

DRAFT

FOR DISCUSSION ONLY

IMPLEMENTATION OF HAGUE CONVENTION ON PROTECTION OF CHILDREN

(Revisions to Uniform Child Custody Jurisdiction and Enforcement Act)

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

For September 23-24, 2011 Drafting Committee Meeting

*With Prefatory Note and Comments
Changes Shown in Strike and Score*

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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August 30, 2011

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TABLE OF CONTENTS

Prefatory Note. 1

[ARTICLE] 1

GENERAL PROVISIONS

SECTION 101. SHORT TITLE. 6
SECTION 102. DEFINITIONS. 6
SECTION 103. PROCEEDINGS GOVERNED BY OTHER LAW. 9
SECTION 104. APPLICATION TO INDIAN TRIBES. 9
SECTION 105. INTERNATIONAL APPLICATION OF [ACT] [VERSION ONE]. 10
SECTION 105. INTERNATIONAL APPLICATION OF [ACT] [VERSION TWO]. 10
SECTION 106. EFFECT OF CHILD-CUSTODY DETERMINATION. 11
SECTION 107. PRIORITY. 12
SECTION 108. NOTICE TO PERSONS OUTSIDE STATE. 12
SECTION 109. APPEARANCE AND LIMITED IMMUNITY. 13
SECTION 110. COMMUNICATION BETWEEN COURTS. 13
SECTION 111. TAKING TESTIMONY IN ANOTHER STATE OR FOREIGN
COUNTRY. 14
SECTION 112. COOPERATION BETWEEN COURTS; PRESERVATION OF
RECORDS. 15

[ARTICLE] 2

JURISDICTION

SECTION 201. INITIAL CHILD-CUSTODY JURISDICTION. 16
SECTION 202. EXCLUSIVE, CONTINUING JURISDICTION. 17
SECTION 203. JURISDICTION TO MODIFY DETERMINATION. 18
SECTION 204. TEMPORARY EMERGENCY JURISDICTION [ALTERNATIVE A]. 19
SECTION 204. TEMPORARY EMERGENCY JURISDICTION [ALTERNATIVE B]. 20
SECTION 205. NOTICE; OPPORTUNITY TO BE HEARD; JOINDER. 23
SECTION 206. SIMULTANEOUS PROCEEDINGS. 23
SECTION 207. INCONVENIENT FORUM [ALTERNATIVE A]. 25
SECTION 207. INCONVENIENT FORUM [ALTERNATIVE B]. 26
SECTION 208. JURISDICTION DECLINED BY REASON OF CONDUCT. 29
SECTION 209. INFORMATION TO BE SUBMITTED TO COURT. 30
SECTION 210. APPEARANCE OF PARTIES AND CHILD. 31

[ARTICLE] 3

ENFORCEMENT

SECTION 301. DEFINITIONS. 32

SECTION 302. ENFORCEMENT UNDER HAGUE CONVENTION.	32
SECTION 303. DUTY TO ENFORCE.	33
SECTION 304. TEMPORARY VISITATION.....	33
SECTION 305. REGISTRATION OF CHILD-CUSTODY DETERMINATION [ALTERNATIVE A].....	34
SECTION 305. REGISTRATION OF CHILD-CUSTODY DETERMINATION [ALTERNATIVE B].	36
SECTION 306. ENFORCEMENT OF REGISTERED DETERMINATION [ALTERNATIVE A].....	39
SECTION 306. ENFORCEMENT OF REGISTERED DETERMINATION [ALTERNATIVE B].	40
SECTION 307. SIMULTANEOUS PROCEEDINGS.....	40
SECTION 308. EXPEDITED ENFORCEMENT OF CHILD-CUSTODY DETERMINATION.....	41
SECTION 309. SERVICE OF PETITION AND ORDER.....	43
SECTION 310. HEARING AND ORDER.....	43
SECTION 311. WARRANT TO TAKE PHYSICAL CUSTODY OF CHILD.....	44
SECTION 312. COSTS, FEES, AND EXPENSES.	45
SECTION 313. RECOGNITION AND ENFORCEMENT.....	45
SECTION 314. APPEALS.....	46
SECTION 315. ROLE OF [PROSECUTOR OR PUBLIC OFFICIAL].	46
SECTION 316. ROLE OF [LAW ENFORCEMENT].....	46
SECTION 317. COSTS AND EXPENSES.	47

[ARTICLE] 4

SPECIAL RULES FOR CASES UNDER CONVENTION

SECTION 401. APPLICABILITY.....	48
SECTION 402. JURISDICTION.	48
SECTION 403. JURISDICTION IN CASES OF [WRONGFUL] ABDUCTION.	49
SECTION 404. SIMULTANEOUS PROCEEDINGS.....	51
SECTION 405. TEMPORARY EMERGENCY JURISDICTION [IF ALTERNATIVE A OF SECTION 204 IS SELECTED].....	52
SECTION 406. INCONVENIENT FORUM [IN THE EVENT OPTION A OF SECTION 207 IS CHOSEN].....	54
SECTION 407. PROVISIONAL ORDERS.....	57
SECTION 408. CONTINUATION OF ORDERS.....	58
SECTION 409. GENERAL CHOICE OF LAW RULES.....	58
SECTION 410. SPECIFIC CHOICE OF LAW RULES.	60
SECTION 411. DUTY TO RECOGNIZE.	62
SECTION 412. REGISTRATION OF CONVENTION ORDER. [IF ALTERNATIVE A OF SECTION 305 IS CHOSEN].....	64
SECTION 412. REGISTRATION OF CONVENTION ORDER [ANOTHER ALTERNATIVE].....	67
SECTION 413. EXPEDITED ENFORCEMENT OF CONVENTION COUNTRY ORDERS.	69

SECTION 413. EXPEDITED ENFORCEMENT OF CHILD-CUSTODY DETERMINATION [ANOTHER ALTERNATIVE].	71
SECTION 414. SERVICE OF PETITION AND ORDER.	73
SECTION 415. HEARING AND ORDER.	73
SECTION 415. HEARING AND ORDER [ANOTHER ALTERNATIVE].	75
SECTION 416. COOPERATION WITH CONVENTION COUNTRIES.	76

[ARTICLE] 45

MISCELLANEOUS PROVISIONS

SECTION 4501. APPLICATION AND CONSTRUCTION.	76
SECTION 4502. SEVERABILITY CLAUSE.	76
SECTION 4503. EFFECTIVE DATE.	77
SECTION 4504. REPEALS.	77
SECTION 4505. TRANSITIONAL PROVISION.	77

IMPLEMENTATION OF HAGUE CONVENTION ON PROTECTION OF CHILDREN

(Revisions to Uniform Child Custody Jurisdiction and Enforcement Act)

Prefatory Note

I. FROM THE UCCJA TO THE UCCJEA

In 1997 the Uniform Law Commission revisited the problem of the interstate child when it promulgated the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) as a replacement for the Uniform Child Custody Jurisdiction Act (UCCJA). The UCCJA was adopted as law in all 50 states, the District of Columbia, and the Virgin Islands. A number of adoptions, however, significantly departed from the original text. In addition, almost thirty years of litigation since the promulgation of the UCCJA produced substantial inconsistency in interpretation by state courts. As a result, the goals of the UCCJA were rendered unobtainable in many cases.

In 1980, the federal government enacted the Parental Kidnaping Prevention Act (PKPA) to address the interstate custody jurisdiction and enforcement problems that continued to exist after the adoption of the UCCJA. The PKPA mandates that state authorities give full faith and credit to other states' custody determinations, so long as those determinations were made in conformity with the provisions of the PKPA. The PKPA provisions regarding bases for jurisdiction, restrictions on modifications, preclusion of simultaneous proceedings, and notice requirements were similar to those in the UCCJA. There were, however, some significant differences.

As documented in an extensive study by the American Bar Association's Center on Children and the Law, *Obstacles to the Recovery and Return of Parentally Abducted Children* (1993) (Obstacles Study), inconsistency of interpretation of the UCCJA and the technicalities of applying the PKPA, resulted in a loss of uniformity among the states. The Obstacles Study suggested a number of amendments which would eliminate the inconsistent state interpretations and harmonize the UCCJA with the PKPA.

The UCCJEA revisions of the jurisdictional provisions of the UCCJA eliminated the inconsistent state interpretations and can be summarized as follows:

1. Home state priority. Rather than four concurrent bases of jurisdiction, the UCCJEA prioritized home state jurisdiction over all other bases thereby conforming the UCCJEA to the PKPA.
2. Clarification of emergency jurisdiction. This jurisdictional basis was clarified to make it clear that it provided jurisdiction only on a temporary basis and was specifically made applicable to state domestic violence protective order cases.
3. Exclusive continuing jurisdiction for the state that entered the decree. The UCCJEA made it explicit that the state that made the original custody determination retained exclusive

continuing jurisdiction over the custody determination so long as that state remained the residence of a parent, the child, or a person acting as a parent.

4. Specification of what custody proceedings are covered. These provisions extended the coverage of the UCCJEA to all cases, except adoptions, where a child custody determination was made. This eliminated the substantial ambiguity of the UCCJA concerning which proceeding were covered.

5. Role of “Best Interests.” The UCCJEA eliminated the term “best interests” in order to clearly distinguish between the jurisdictional standards and the substantive standards relating to custody of and visitation with children.

The UCCJEA also enacted specific provisions on the enforcement of custody determinations for interstate cases. First, there is a simple procedure for registering a custody determination in another state. This allows a party to know in advance whether that state will recognize the party's custody determination. This is extremely important in estimating the risk of the child's non-return when the child is sent on visitation to another state.

Second, the Act provides a swift remedy along the lines of habeas corpus. Time is extremely important in visitation and custody cases. If visitation rights cannot be enforced quickly, they often cannot be enforced at all. This is particularly true if there is a limited time within which visitation can be exercised such as may be the case when one parent has been granted visitation during the winter or spring holiday period. Without speedy consideration and resolution of the enforcement of such visitation rights, the ability to visit may be lost entirely. Similarly, a custodial parent must be able to obtain prompt enforcement when the noncustodial parent refuses to return a child at the end of authorized visitation, particularly when a summer visitation extension will infringe on the school year. A swift enforcement mechanism is desirable for violations of both custody and visitation provisions.

Third, the enforcing court will be able to utilize an extraordinary remedy. If the enforcing court is concerned that the parent, who has physical custody of the child, will flee or harm the child, a warrant to take physical possession of the child is available.

Finally, there is a role for public authorities, such as prosecutors, in the enforcement process. Their involvement will encourage the parties to abide by the terms of the custody determination. If the parties know that public authorities and law enforcement officers are available to help in securing compliance with custody determinations, the parties may be deterred from interfering with the exercise of rights established by court order.

II. THE 1996 HAGUE CONVENTION ON JURISDICTION, APPLICABLE LAW, RECOGNITION, ENFORCEMENT AND CO-OPERATION IN RESPECT OF PARENTAL RESPONSIBILITY AND MEASURES FOR THE PROTECTION OF CHILDREN

At the same time that the Uniform Law Commission was revising the UCCJA, the Hague Conference on Private International law was revising the 1961 Convention on the Protection of

Minors. That Convention was adopted by a number of European States and was utilized to recognize custody determinations. However, no common law country ratified the convention. The Hague Conference decided that a revised convention on jurisdiction and judgments with regard to minors might attract more countries as signatories. This resulted in the 1996 Convention which established international standards for jurisdiction, choice of law, and enforcement of judgments in cases regarding measures taken for the protection of minors.

There are significant differences between the UCCJEA and the 1996 Convention. However, the purposes of the two are very similar. They are both designed to allocate judicial competence to decide cases involving child custody and visitation. Both documents provide for enforcement of custody and visitation determinations of other states or countries. The differences are in the details of how this is to be accomplished.

There is a large part of the 1996 Convention that is devoted to country to country cooperation. There is a small role for a national central authority in carrying out the cooperation provisions of the Convention. Most of the cooperation provisions are ultimately directed to the "competent authority" which would be the appropriate entity under local law for carrying out the particular function referred to in the 1996 Convention. This means that the central authority in the United States will delegate these functions to the local authority. These cooperation problems will be addressed in the federal implementing legislation. Therefore it is not necessary to address the particular cooperation aspects contained in Chapter V of the 1996 Convention in this revision to the UCCJEA.

III. THE INTERNATIONAL CUSTODY CASE

The international child custody case, like the international child support case, has always been the marginal case in the multi-state system. However, with increasing globalization, the international case has been assuming more importance. The international case was dealt with in both the UCCJA and the UCCJEA.

A. THE UCCJA

Section 23 of the UCCJA provided that the general policies of that Act applied to foreign country custody determinations. Foreign custody determinations were to be recognized and enforced if they were made consistently with the UCCJA and there was reasonable notice and opportunity to be heard. There were two types of issues that arose under this section. The first was whether a United States court would defer to a foreign tribunal when that tribunal would have jurisdiction under the UCCJA and the case was filed first in that tribunal. The second issue was whether a state of the United States would recognize, under this section, a custody determination made by a foreign tribunal.

On the first issue, the UCCJA was ambiguous and only required application of the "general policies" of the Act. Frequently courts in the United States would apply the same jurisdictional principles to international cases that they would apply in interstate cases. For example, in *Superior Court v. Plas*, 202 Cal.Rptr. 490 (Cal. Ct. App. 1984), the mother filed for

custody when she had only been in California with her child for four months. The child was born in France and was raised and lived there with his family until shortly before the California hearing. The court determined that California lacked jurisdiction to hear the case and, even if it had jurisdiction, it should have deferred to France as the most convenient forum. However, not all states followed the same practice. For example, the Oregon Court of Appeals in *Horiba v. Horiba*, 950 P.2d 340 (Or. Ct. App. 1997), refused to defer to a pending Japanese proceeding since Japan was not a “state” under the definition of "state" in the UCCJA.

With respect to the second issue, most American states enforced foreign custody orders if made consistently with the jurisdictional standards of the UCCJA and reasonable notice and opportunity to be heard were afforded all participants. However, Missouri, New Mexico and Ohio refused to enact §23 of the UCCJA. Indiana formerly had a provision which seemed to affirmatively require the state to not recognize and enforce a foreign custody order. These provisions undermined the UCCJA principles of recognition and enforcement of custody determinations by countries with appropriate jurisdiction under the UCCJA and created obstacles to the return of children that were illegally abducted.

B. THE UCCJEA

Section 105(a) of the UCCJEA provides that a foreign country will be treated as if it is a state of the United States for the purposes of applying Articles I and II of the UCCJEA. This means that the scope and cooperation principles of Article I as well as the jurisdiction provisions of Article II apply to foreign countries in the same way that they apply to states of United States. Thus communication between a tribunal of the United States and a tribunal in a foreign country is mandatory in cases concerning emergency jurisdiction under Section 204 and simultaneous proceedings under Section 206. Otherwise tribunals in the United States may communicate with tribunals in foreign countries whenever it would be appropriate to communicate with tribunals in the United States under Section 110.

Section 105(b) requires tribunals in the United States to recognize foreign custody determinations if the facts and circumstances of the case indicate that the foreign custody determination was made in substantial conformity with the jurisdictional provisions of the UCCJEA. However, as indicated in Section 105(c) a United States court is given the discretion not to apply the UCCJEA if the child custody law of a foreign country violates fundamental principles of human rights. The language of the section was taken from the Hague Convention on the Civil Aspects of International Child Abduction. The drafting committee of the UCCJEA did not attempt to define what aspects of a foreign custody law would violate fundamental principles of human rights. The committee considered a hypothetical case where the foreign custody law awarded custody of children automatically to the father. When asked to decide whether such a provision violated fundamental principles of human rights, the committee, along with the advisors and observers, could not agree. Therefore the application of that provision was left to the courts to determine on a case by case basis.

Application of Section 105 does not seem to have presented much of a problem for courts since the enactment of the UCCJEA. In particular it does not appear that enforcement has been denied on the basis of a violation of fundamental principles of human rights. The effect of

Section 105 is to ensure that all foreign custody determinations that a made in conformity with UCCJEA jurisdictional standards are enforced in the United States. Ratification of 1996 Convention is not necessary for enforcement of foreign custody decrees; ratification it is necessary in order for United States custody determinations to be enforced in other countries.

IV. THIS REVISION

The purpose of this revision to the UCCJEA is to amend the act to incorporate the 1996 Hague Convention on the Protection of Minors. The United States has signed the Convention and the revision of this Act will constitute part of the implementing legislation. The rest of the Convention will be implemented at the federal level.

I have set out the text of the original UCCJEA, regardless as to whether those section are to be amended or not. Future drafts will probably only include those sections that need to be amended. All of the original UCCJEA commentary has been omitted. Comments are (or will be) included for those sections which are amended or are new. Comments at this point are not meant to be official comments but merely reporter's notes concerning the drafting.

1 **IMPLEMENTATION OF HAGUE CONVENTION ON PROTECTION OF CHILDREN**
2
3 **(Revisions to Uniform Child Custody Jurisdiction and Enforcement Act)**
4
5

6 **[ARTICLE] 1**

7 **GENERAL PROVISIONS**

8 **SECTION 101. SHORT TITLE.** This [Act] may be cited as the Uniform Child
9 Custody Jurisdiction and Enforcement Act.

10 **SECTION 102. DEFINITIONS.** In this [Act]:

11 (1) “Abandoned” means left without provision for reasonable and necessary care or
12 supervision.

13 (2) “Child” means an individual who has not attained 18 years of age.

14 (3) “Child-custody determination” means a judgment, decree, or other order of a court
15 providing for the legal custody, physical custody, or visitation with respect to a child. The term
16 includes a permanent, temporary, initial, and modification order as well as the supervision by a
17 public agency of the care of a child by any person having physical custody, legal custody, or
18 visitation with a child and the designation and functions of any person having physical custody,
19 legal custody of, or visitation with, a child. The term does not include an order relating to the
20 property of the child, child support or other monetary obligation of an individual.

21 (4) “Child-custody proceeding” means a proceeding in which legal custody, physical
22 custody, or visitation with respect to a child is an issue. The term includes a proceeding for
23 divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental
24 rights, and protection from domestic violence, in which the issue may appear. The term does not
25 include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement

1 under [articles] 3 and 4.

2 (5) “Commencement” means the filing of the first pleading in a proceeding.

3 (6) “Convention” means the Convention on Jurisdiction, Applicable Law, Recognition,
4 Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the
5 Protection of Minors, concluded at The Hague on 19 October 1996.

6 (7) “Convention country” means a foreign country, including a political subdivision
7 thereof, in which the Convention is in force with respect to the United States.

8 ~~(6)~~ (8) “Court” means an entity authorized under the law of a Sstate or foreign country to
9 establish, enforce, or modify a child-custody determination.

10 (9) “Foreign country” means a country, including a political subdivision thereof, other
11 than the United States, that authorizes the issuance of child-custody determinations, regardless of
12 whether the Convention is in force with respect to the United States.

13 ~~(7)~~ (10) “Home State” means the Sstate or foreign country in which a child lived with a
14 parent or a person acting as a parent for at least six consecutive months immediately before the
15 commencement of a child-custody proceeding. In the case of a child less than six months of age,
16 the term means the Sstate or foreign country in which the child lived from birth with any of the
17 persons mentioned. A period of temporary absence of any of the mentioned persons is part of the
18 period.

19 ~~(8)~~ (11) “Initial determination” means the first child-custody determination concerning a
20 particular child.

21 ~~(9)~~ (12) “Issuing court” means the court that makes a child-custody determination
22 for which enforcement is sought under this [Act].

23 ~~(10)~~ (13) “Issuing Sstate or foreign country” means the State or foreign country in which

1 a child-custody determination is made.

2 ~~(11)~~ (14) “Modification” means a child-custody determination that changes, replaces,
3 supersedes, or is otherwise made after a previous determination concerning the same child,
4 whether or not it is made by the court that made the previous determination.

5 (15) “Non-Convention country” means a foreign country, including a political
6 subdivision thereof, in which the Convention is not in force with respect to the United States.

7 ~~(12)~~ (16) “Person” means an individual, corporation, business trust, estate, trust,
8 partnership, limited liability company, association, joint venture, public corporation, government
9 or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

10 ~~(13)~~ (17) “Person acting as a parent” means a person, other than a parent, who:

11 (A) has physical custody of the child or has had physical custody for a period of
12 six consecutive months, including any temporary absence, within one year immediately before
13 the commencement of a child-custody proceeding; and

14 (B) has been awarded legal custody by a court or claims a right to legal custody
15 under the law of this Sstate.

16 ~~(14)~~ (18) “Physical custody” means the physical care and supervision of a child.

17 ~~(15)~~ (19) “State” means a Sstate of the United States, the District of Columbia, Puerto
18 Rico, the United States Virgin Islands, or any territory or insular possession subject to the
19 jurisdiction of the United States.

20 [~~(16)~~ (20) “Tribe” means an Indian tribe or band, or Alaskan Native village, which is
21 recognized by federal law or formally acknowledged by a Sstate.]

22 ~~(17)~~ (21) “Warrant” means an order issued by a court authorizing law enforcement
23 officers to take physical custody of a child.

1 **Comment**

2
3 Our mandate is to amend the UCCJEA to incorporate the Convention. It seems that
4 where the definitions in the UCCJEA and the Convention are substantively the same, although
5 the language is slightly different, there is no need to amend the UCCJEA to provide Convention
6 language. For example, the Convention states that it applies to children “from the moment of
7 their birth until they reach the age of 18 years.” This is substantively the same as the definition
8 of “child” currently in the UCCJEA and therefore no language change need be made.
9

10 There are places in the UCCJEA where its provisions ought to apply to all countries
11 regardless of whether the United States is in a treaty relationship with that country under the
12 Convention. The term “foreign country” is used under those circumstances. Where a provision
13 of this Act is applicable only to foreign countries with which the United States has a treaty
14 relationship with regard to the Convention the applicable term is “convention country.” Where a
15 provision of this Act is applicable only to foreign countries with which the United States does not
16 have a treaty relationship with regard to the Convention the term used is “non-convention
17 country.”
18

19 Given that this draft uses the terms “foreign country,” “convention country,” or “non-
20 convention country, along with the term “state,” the drafting committee may wish to consider
21 whether Section 105 still retains viability. In other words given that the territorial scope of the
22 UCCJEA is set out in each section, it may not be necessary to retain Section 105.
23

24 The definition of child custody determination has been amended to include some of the
25 measures listed in the Convention in Article 3 that might not be obvious from a reading of the
26 prior definition. It also specifically excludes any determination that relates to the child’s
27 property. This is in line with the fact that the United States will take the reservation mentioned
28 in Article 55 excluding the application of the Convention to property cases.
29

30 **SECTION 103. PROCEEDINGS GOVERNED BY OTHER LAW.** This [Act] does
31 not govern an adoption proceeding or a proceeding pertaining to the authorization of emergency
32 medical care for a child.

33 **SECTION 104. APPLICATION TO INDIAN TRIBES.**

34 (a) A child-custody proceeding that pertains to an Indian child as defined in the Indian
35 Child Welfare Act, 25 U.S.C. § 1901 et seq., is not subject to this [Act] to the extent that it is
36 governed by the Indian Child Welfare Act.

37 [(b) A court of this Sstate shall treat a tribe as if it were a State of the United States for
38 the purpose of applying [articles] 1 and 2.]

1 [(c) A child-custody determination made by a tribe under factual circumstances in
2 substantial conformity with the jurisdictional standards of this [Act] must be recognized and
3 enforced under [article] 3.]

4 **SECTION 105. INTERNATIONAL APPLICATION OF [ACT] [VERSION ONE].**

5 (a) A court of this State shall treat a non-convention country ~~foreign country~~ as if it were
6 a State of the United States for the purpose of applying [articles] 1 and 2.

7 (b) Except as otherwise provided in subsection (c), a child-custody determination made in
8 a non convention country ~~foreign country~~ under factual circumstances in substantial conformity
9 with the jurisdictional standards of ~~this [Act]~~ [article] 2 must be recognized and enforced under
10 [article] 3.

11 (c) A court of this State need not apply this [Act] if the child custody law of a non-
12 convention country ~~foreign country~~ violates fundamental principles of human rights.

13 **SECTION 105. INTERNATIONAL APPLICATION OF [ACT] [VERSION TWO].**

14 (a) A court of this State shall treat a non-convention country ~~foreign country~~ as if it were
15 a State of the United States for the purpose of applying [articles] 1 and 2.

16 (b) Except as otherwise provided in subsection (c), a child-custody determination made
17 in a ~~foreign country~~ non-convention country under factual circumstances in substantial
18 conformity with the jurisdictional standards of ~~this [article] 2 [Act]~~ must be recognized and
19 enforced under [article] 3.

20 (c) A child-custody determination made in a convention country under factual
21 circumstances in substantial conformity with the jurisdictional standards of [article] 4 must be
22 recognized and enforced under that [article]. A child custody determination made in a
23 convention country under factual circumstances in substantial conformity with the jurisdictional

standards of [article] 2 may be recognized and enforced under [article] 3.

(c)(d) A court of this Sstate need not apply this [Act] if the child custody law of foreign country violates fundamental principles of human rights.

Comment

Version One applies the current UCCJEA to non-convention countries. Therefore if this version is adopted there will be no change to how foreign non-convention countries are treated, except insofar as Article 4 implements Convention distinctions between convention and non-convention countries. Convention country jurisdiction, applicable law and recognition will be determined under Article Four. However, some provisions of Articles 1 and 2 are specifically made applicable to convention countries either by expressly so stating or because the reference is made to “foreign countries” which would include both convention and non convention countries.

Version Two raises the option of partially keeping the current UCCJEA for recognition and enforcement purposes for convention countries. There was some sentiment in the telephone conference for retaining the current UCCJEA for foreign cases as much as possible. It is not possible to do so with regard to jurisdiction and applicable law. However, it may be possible to do so with regard to recognition and enforcement of foreign orders. Article 23(2) states that a convention country “may” refuse to recognize a foreign country order if one the categories in that article for non-recognition are established. It does not require non-recognition. Therefore within the confines of the convention a state can set up a recognition scheme that recognizes more orders that the convention would otherwise require. In thinking along that line I have added a new subsection (c). This subsection would require recognition of convention country determinations that are made in accordance with the jurisdictional requirements of Article 4 in an Article 4 proceeding. However, the second sentence gives a United States court the option of recognizing a determination of a convention country that exercised jurisdiction under Article 2 in an Article 3 proceeding.

I have also set this out in Article 4. It does not need to be in both places. The drafting committee should probably decide whether the recognition of judgments for convention countries ought to be in a general article or whether it should only be in the article dealing with convention cases. It is also possible, as mentioned earlier, that Section 105 may not be necessary if the drafting committee believes that setting out the territorial scope of each section though the use of the terms “convention country”, “non-convention country” and “foreign country” is the more appropriate method of handling the problem.

SECTION 106. EFFECT OF CHILD-CUSTODY DETERMINATION. A

child-custody determination made by a court of this Sstate that had jurisdiction under this [Act] binds all persons who have been served in accordance with the laws of this Sstate or notified in accordance with Section 108 or who have submitted to the jurisdiction of the court, and who

1 have been given an opportunity to be heard. As to those persons, the determination is conclusive
2 as to all decided issues of law and fact except to the extent the determination is modified.

3 **SECTION 107. PRIORITY.** If a question of existence or exercise of jurisdiction under
4 this [Act] is raised in a child-custody proceeding, the question, upon request of a party, must be
5 given priority on the calendar and handled expeditiously.

6 **SECTION 108. NOTICE TO PERSONS OUTSIDE STATE.**

7 (a) Notice required for the exercise of jurisdiction when a person is outside this Sstate
8 may be given in a manner prescribed by the law of this Sstate for service of process or by the
9 law of the Sstate or foreign country in which the service is made. Notice must be given in a
10 manner reasonably calculated to give actual notice but may be by publication if other means are
11 not effective.

12 (b) Proof of service may be made in the manner prescribed by the law of this Sstate or by
13 the law of the Sstate or foreign country in which the service is made.

14 (c) Notice is not required for the exercise of jurisdiction with respect to a person who
15 submits to the jurisdiction of the court.

16 **Comment**

17
18 This is an example as to how the territorial scope of the revised UCCJEA can be
19 incorporated into the original UCCJEA. It seems clear that the provisions of this section ought to
20 apply to all people residing in a foreign country regardless as to whether the person lives in a
21 convention country or non-convention country. If version one of Section 105 is adopted there
22 will have to be a duplicate of this section in Article 4 concerning notice in convention cases
23 which would otherwise not be covered under the Act.
24

25 When the original UCCJEA was drafted we did not concern ourselves with service of
26 process internationally, although we probably should have. There was no requirement that
27 international service of process comply, when required, with the Hague Convention on Service of
28 Process Abroad or other treaties concerning the service of process, although most courts have
29 added that requirement. Rather the section merely indicated that service was valid if
30 accomplished according to the law of this state or the law of the state where service took place.
31 In those cases where the Service Convention is applicable it is the law of both this state and the

1 foreign country and therefore must be complied with.

2
3 **SECTION 109. APPEARANCE AND LIMITED IMMUNITY.**

4 (a) A party to a child-custody proceeding, including a modification proceeding, or a
5 petitioner or respondent in a proceeding to enforce or register a child-custody determination, is
6 not subject to personal jurisdiction in this Sstate for another proceeding or purpose solely by
7 reason of having participated, or of having been physically present for the purpose of
8 participating, in the proceeding.

9 (b) A person who is subject to personal jurisdiction in this Sstate on a basis other than
10 physical presence is not immune from service of process in this Sstate . A party present in this
11 Sstate who is subject to the jurisdiction of another Sstate or foreign country is not immune from
12 service of process allowable under the laws of that Sstate or foreign country .

13 (c) The immunity granted by subsection (a) does not extend to civil litigation based on
14 acts unrelated to the participation in a proceeding under this [Act] committed by an individual
15 while present in this Sstate .

16 **Comment**

17 The addition of “foreign country” is made here to allow service of process in this state if
18 the person served is subject to the jurisdiction of the foreign country. If the addition is not made
19 then the reference would only refer to a state of the United States and not to any foreign country.

20
21 **SECTION 110. COMMUNICATION BETWEEN COURTS.**

22 (a) A court of this Sstate may communicate with a court in another Sstate or foreign
23 country concerning a proceeding arising under this [Act].

24 (b) The court may allow the parties to participate in the communication. If the parties are
25 not able to participate in the communication, they must be given the opportunity to present facts
26 and legal arguments before a decision on jurisdiction is made.

1 (c) Communication between courts on schedules, calendars, court records, and similar
2 matters may occur without informing the parties. A record need not be made of the
3 communication.

4 (d) Except as otherwise provided in subsection (c), a record must be made of a
5 communication under this section. The parties must be informed promptly of the communication
6 and granted access to the record.

7 (e) For the purposes of this section, “record” means information that is inscribed on a
8 tangible medium or that is stored in an electronic or other medium and is retrievable in
9 perceivable form.

10 **Comment**

11
12 The amendment to this section authorizes a court of this to communicate with other
13 courts regardless of whether they are located in a convention country or non-convention country.
14 This does not extend the responsibility of state courts since they have that authority under the
15 current version of the UCCJEA which extends to all countries. Like the section on notice, if
16 version one of Section 105 is adopted, there will probably have to be a section like this one in
17 Article 4.

18
19 **SECTION 111. TAKING TESTIMONY IN ANOTHER STATE OR FOREIGN**
20 **COUNTRY.**

21 (a) In addition to other procedures available to a party, a party to a child-custody
22 proceeding may offer testimony of witnesses who are located in another Sstate or foreign
23 country, including testimony of the parties and the child, by deposition or other means allowable
24 in this Sstate for testimony taken in another Sstate or foreign country. The court on its own
25 motion may order that the testimony of a person be taken in another Sstate or foreign country
26 and may prescribe the manner in which and the terms upon which the testimony is taken.

27 (b) A court of this Sstate may permit an individual residing in another Sstate or foreign
28 country to be deposed or to testify by telephone, audiovisual means, or other electronic means

1 before a designated court or at another location in that Sstate or foreign country. A court of this
2 Sstate shall cooperate with courts of other Sstates or foreign countries in designating an
3 appropriate location for the deposition or testimony.

4 (c) Documentary evidence transmitted from another Sstate or foreign country to a court of
5 this Sstate by technological means that do not produce an original writing may not be excluded
6 from evidence on an objection based on the means of transmission.

7 **Comment**

8
9 This section simply contains amendments making it clear that the cooperation provisions
10 extend to foreign countries. It should be noted that in many cases the cooperation principles with
11 regard to taking evidence in foreign countries will be governed by the Hague Convention on
12 Taking Evidence Abroad.

13 **SECTION 112. COOPERATION BETWEEN COURTS; PRESERVATION OF** 14 **RECORDS.**

15
16 (a) A court of this Sstate may request the appropriate court of another Sstate or foreign
17 country to:

18 (1) hold an evidentiary hearing;

19 (2) order a person to produce or give evidence pursuant to procedures of that
20 Sstate or foreign country ;

21 (3) order that an evaluation be made with respect to the custody of a child
22 involved in a pending proceeding;

23 (4) forward to the court of this Sstate a certified copy of the transcript of the
24 record of the hearing, the evidence otherwise presented, and any evaluation prepared in
25 compliance with the request; and

26 (5) order a party to a child-custody proceeding or any person having physical
27 custody of the child to appear in the proceeding with or without the child.

1 (b) Upon request of a court of another Sstate or foreign country, a court of this Sstate
2 may hold a hearing or enter an order described in subsection (a).

3 (c) Travel and other necessary and reasonable expenses incurred under subsections (a)
4 and (b) may be assessed against the parties according to the law of this Sstate.

5 (d) A court of this Sstate shall preserve the pleadings, orders, decrees, records of
6 hearings, evaluations, and other pertinent records with respect to a child-custody proceeding until
7 the child attains 18 years of age. Upon appropriate request by a court or law enforcement official
8 of another Sstate or foreign country, the court shall forward a certified copy of those records.

9 **[ARTICLE] 2**

10 **JURISDICTION**

11 **SECTION 201. INITIAL CHILD-CUSTODY JURISDICTION.**

12 (a) Except as otherwise provided in Section 204, a court of this Sstate has jurisdiction to
13 make an initial child-custody determination only if:

14 (1) this Sstate is the home Sstate of the child on the date of the commencement of
15 the proceeding, or was the home Sstate of the child within six months before the commencement
16 of the proceeding and the child is absent from this Sstate but a parent or person acting as a
17 parent continues to live in this Sstate;

18 (2) a court of another Sstate or non-convention country does not have jurisdiction
19 under paragraph (1), or a court of the home Sstate or non-convention country of the child has
20 declined to exercise jurisdiction on the ground that this Sstate is the more appropriate forum
21 under Section 207 or 208, and:

22 (A) the child and the child's parents, or the child and at least one parent or
23 a person acting as a parent, have a significant connection with this Sstate other than mere

1 physical presence; and

2 (B) substantial evidence is available in this Sstate concerning the child's
3 care, protection, training, and personal relationships;

4 (3) all courts having jurisdiction under paragraph (1) or (2) have declined to
5 exercise jurisdiction on the ground that a court of this Sstate is the more appropriate forum to
6 determine the custody of the child under Section 207 or 208; or

7 (4) no court of any other Sstate or foreign country would have jurisdiction under
8 the criteria specified in paragraph (1), (2), or (3) or [Section 402].

9 (b) Subsection (a) is the exclusive jurisdictional basis for making a child-custody
10 determination by a court of this Sstate.

11 (c) Physical presence of, or personal jurisdiction over, a party or a child is not necessary
12 or sufficient to make a child-custody determination.

13 **Comment**

14
15 The section is amended to include non-convention countries to indicate the scope of this
16 Section.

17
18 Subsection (a)(4) has been amended to include the term “foreign country.” This is the
19 jurisdiction by necessity principle that provides that a court of this state has jurisdiction to make
20 a child custody determination if no other court anyplace would have jurisdiction. That principle
21 probably ought to apply to convention as well as non-convention countries, although a custody
22 determination made using this basis of jurisdiction does not need to be recognized under the
23 Convention. I have broadened this subsection to include all foreign countries. The point could
24 also be made in a provision in Article 4.

25 **SECTION 202. EXCLUSIVE, CONTINUING JURISDICTION.**

26
27 (a) Except as otherwise provided in Section 204, a court of this Sstate which has made a
28 child-custody determination consistent with Section 201 or 203 has exclusive, continuing
29 jurisdiction over the determination until:

30 (1) a court of this Sstate determines that neither the child, nor the child and one

1 parent, nor the child and a person acting as a parent have a significant connection with this Sstate
2 and that substantial evidence is no longer available in this Sstate concerning the child's care,
3 protection, training, and personal relationships; or

4 (2) a court of this Sstate or a court of another Sstate or non-convention country
5 determines that the child, the child's parents, and any person acting as a parent do not presently
6 reside in this Sstate.

7 (b) A court of this Sstate which has made a child-custody determination and does not
8 have exclusive, continuing jurisdiction under this section may modify that determination only if
9 it has jurisdiction to make an initial determination under Section 201.

10 **Comment**

11 Another amendment extending the scope of the section to non-convention countries.

12 **SECTION 203. JURISDICTION TO MODIFY DETERMINATION.** Except as
13
14 otherwise provided in Section 204, a court of this Sstate may not modify a child-custody
15 determination made by a court of another Sstate or non-convention country unless a court of this
16 Sstate has jurisdiction to make an initial determination under Section 201(a)(1) or (2) and:

17 (1) the court of the other Sstate or non-convention country determines it no longer has
18 exclusive, continuing jurisdiction under Section 202 or that a court of this Sstate would be a
19 more convenient forum under Section 207; or

20 (2) a court of this Sstate or a court of the other Sstate or non-convention country
21 determines that the child, the child's parents, and any person acting as a parent do not presently
22 reside in the other Sstate: or
23

24 [(3) a non-convention country lacks or refuses to exercise its jurisdiction to modify its
25 child custody determination.]

1 **Comment**

2 Subparagraph (3) is a new addition to Section 203. It is in brackets because it is not
3 required by the Convention. Nevertheless, it is an international problem that probably may need
4 to be addressed. The problem arises when a foreign country has different jurisdictional rules
5 from the United States. Assume that there is a child-custody determination in France whereby
6 custody is given to the mother with visitation to the father. The mother and the child move to the
7 United States. Visitation with the father is extensive and there are enough contacts and other
8 evidence to clearly support exclusive continuing jurisdiction under Section 202. Therefore the
9 state of the United States would find that exclusive continuing jurisdiction lies in France. France
10 however would base custody jurisdiction on habitual residence, which is now in the United
11 States and would find it does not have jurisdiction to modify its own determination. In order to
12 avoid the problem whereby nobody has jurisdiction, I thought to include this subsection in
13 Section 203. The same issue was addressed in UIFSA §615.

14
15 **SECTION 204. TEMPORARY EMERGENCY JURISDICTION [ALTERNATIVE**
16 **A].**

17
18 (a) A court of this Sstate has temporary emergency jurisdiction if the child is present in
19 this Sstate and the child has been abandoned or it is necessary in an emergency to protect the
20 child because the child, or a sibling or parent of the child, is subjected to or threatened with
21 mistreatment or abuse.

22 (b) If there is no previous child-custody determination that is entitled to be enforced under
23 this [Act] and a child-custody proceeding has not been commenced in a court of a Sstate having
24 jurisdiction under Sections 201 through 203, a child-custody determination made under this
25 section remains in effect until an order is obtained from a court of a Sstate having jurisdiction
26 under Sections 201 through 203. If a child-custody proceeding has not been or is not
27 commenced in a court of a Sstate having jurisdiction under Sections 201 through 203, a
28 child-custody determination made under this section becomes a final determination, if it so
29 provides and this Sstate becomes the home Sstate of the child.

30 (c) If there is a previous child-custody determination that is entitled to be enforced under
31 this [Act], or a child-custody proceeding has been commenced in a court of a Sstate having

1 jurisdiction under Sections 201 through 203, any order issued by a court of this Sstate under this
2 section must specify in the order a period that the court considers adequate to allow the person
3 seeking an order to obtain an order from the Sstate having jurisdiction under Sections 201
4 through 203. The order issued in this Sstate remains in effect until an order is obtained from the
5 other Sstate within the period specified or the period expires.

6 (d) A court of this Sstate which has been asked to make a child-custody determination
7 under this section, upon being informed that a child-custody proceeding has been commenced in,
8 or a child-custody determination has been made by, a court of a Sstate having jurisdiction under
9 Sections 201 through 203, shall immediately communicate with the other court. A court of this
10 Sstate which is exercising jurisdiction pursuant to Sections 201 through 203, upon being
11 informed that a child-custody proceeding has been commenced in, or a child-custody
12 determination has been made by, a court of another Sstate under a statute similar to this section
13 shall immediately communicate with the court of that Sstate to resolve the emergency, protect the
14 safety of the parties and the child, and determine a period for the duration of the temporary order.

15 **Comment**

16 This version of Section 204 applies only to states of the United States. It cannot be
17 generally extended to non-convention countries since the Convention has specific provisions in
18 Article 11 on recognition of orders from non-convention countries, although it might be possible
19 to extend the definition of emergency under subsection (a) to non-convention countries.

20
21 If this version is adopted then we will need a provision in Article 4 [currently 405] to
22 govern emergency cases with foreign countries.

23 **SECTION 204. TEMPORARY EMERGENCY JURISDICTION**

24
25 **[ALTERNATIVE B].**

26 (a) A court of this Sstate has temporary emergency jurisdiction if the child is present in
27 this Sstate and the child has been abandoned or it is necessary in an emergency to protect the

1 child because the child, or a sibling or parent of the child, is subjected to or threatened with
2 mistreatment or abuse.

3 (b) If there is no previous child-custody determination that is entitled to be enforced under
4 this [Act] and a child-custody proceeding has not been commenced in a court of a Sstate or non-
5 convention country having jurisdiction under Sections 201 through 203, or a convention country
6 having jurisdiction substantially in accord with Section 402, a child-custody determination made
7 under this section remains in effect until an order is obtained from a court of :

8 (1) the Sstate having jurisdiction under Sections 201 through 203, or

9 (2) the convention country having jurisdiction substantially in accordance with
10 Article 402, or

11 (3) the non-convention country where the child is habitually resident and the order
12 is recognized by a court of this state or a court of another convention country.

13 (c) If a child-custody proceeding has not been or is not commenced in a court of a Sstate
14 or non-convention country having jurisdiction under Sections 201 through 203, or a convention
15 country having jurisdiction substantially in accordance with Section 402, a child-custody
16 determination made under this section becomes a final determination, if it so provides and this
17 Sstate becomes the home Sstate of the child, or,

18 (d)(e) If there is a previous child-custody determination that is entitled to be enforced
19 under this [Act], or a child-custody proceeding has been commenced in a court of a Sstate or
20 non-convention country having jurisdiction under Sections 201 through 203, or a convention
21 country having jurisdiction substantially in accordance with 402, any order issued by a court of
22 this Sstate under this section must specify in the order a period that the court considers adequate
23 to allow the person seeking an order to obtain an order from the Sstate or non-convention country

1 having jurisdiction under Sections 201 through 203 or convention country having jurisdiction
2 substantially in accordance with Section 403. The order issued in this Sstate remains in effect
3 until the conditions of subsections (b)(1)(2) or (3) of this Section are satisfied, ~~of until an order is~~
4 ~~obtained from the other Sstate within the period specified or the period expires.~~

5 (e)(d) A court of this Sstate which has been asked to make a child-custody determination
6 under this section, upon being informed that a child-custody proceeding has been commenced in,
7 or a child-custody determination has been made by, a court of a Sstate or non-convention country
8 having jurisdiction under Sections 201 through 203, or convention country having jurisdiction
9 substantially in accordance with Section 402 shall immediately communicate with the other
10 court. A court of this Sstate which is exercising jurisdiction pursuant to Sections 201 through
11 203, or 402 upon being informed that a child-custody proceeding has been commenced in, or a
12 child-custody determination has been made by, a court of another Sstate, or foreign country,
13 under a statute similar to this section shall immediately communicate with the court of that Sstate
14 or foreign country to resolve the emergency, protect the safety of the parties and the child, and
15 determine a period for the duration of the temporary order.

16 **Comment**

17
18 Alternative B is an attempt to integrate the Convention provisions on urgency in Article
19 11 with the UCCJEA section on temporary emergency jurisdiction. It applies both to non-
20 convention and convention countries, with different rules on recognition for convention and non-
21 convention countries. There is also a separate “urgency” provision in Article 4 which could be
22 used if Alternative A is preferred.
23

24 Subsection (b)(3) refers to the term “habitual residence” which is not defined either in the
25 Convention or in this Act. I use it because that is the Convention’s term for the expiration of an
26 emergency order when appropriate jurisdiction is in the non-convention country of the habitual
27 residence of the child. I suspect that its inclusion at this point in the Act may be somewhat
28 confusing and perhaps the drafting committee may wish to keep that in mind in deciding whether
29 this alternative is to be used or whether it would be better to cover emergency provisions with
30 contracting countries in Article 4.
31

1 In subsection (c) I have kept the term “home state” to determine when a temporary
2 emergency order could turn into a permanent order for both convention and non convention
3 countries. The Convention does not have a provision similar to this. It merely provides that an
4 emergency order can stay in place until the issue is determined by a state with appropriate
5 jurisdiction. In theory we could say that the emergency order becomes a final order when this
6 state becomes the habitual residence of the child. However, we would probably have to make
7 that provision subject to the wrongful abduction provisions of Article 4. In addition, a change in
8 habitual residence can occur very quickly and it seemed more appropriate to use the six-month
9 provision at this point to be sure that the left behind parent had sufficient time to start a
10 proceeding and obtain an order.

11
12 **SECTION 205. NOTICE; OPPORTUNITY TO BE HEARD; JOINDER.**

13 (a) Before a child-custody determination is made under this [Act], notice and an
14 opportunity to be heard in accordance with the standards of Section 108 must be given to all
15 persons entitled to notice under the law of this Sstate as in child-custody proceedings between
16 residents of this Sstate, any parent whose parental rights have not been previously terminated,
17 and any person having physical custody of the child.

18 (b) Except as provided in [article] 4, T[t]his [Act] does not govern the enforceability of a
19 child-custody determination made without notice or an opportunity to be heard.

20 (c) The obligation to join a party and the right to intervene as a party in a child-custody
21 proceeding under this [Act] are governed by the law of this Sstate as in child-custody
22 proceedings between residents of this Sstate.

23 **Comment**

24
25 The “except” provision refers to the section on recognition and enforcement proceedings
26 in convention cases. There is a provision in those sections that authorize states not to recognize
27 decisions from convention countries if there has not been appropriate notice. So therefore there
28 is something in the Act that does indeed govern determinations made without notice.

29
30 **SECTION 206. SIMULTANEOUS PROCEEDINGS.**

31 (a) Except as otherwise provided in Section 204, a court of this Sstate may not exercise
32 its jurisdiction under this [article] if, at the time of the commencement of the proceeding, a

1 proceeding concerning the custody of the child has been commenced in a court of another Sstate
2 or non-convention country having jurisdiction substantially in conformity with this [~~Act~~],[~~article~~]
3 unless the proceeding has been terminated or is stayed by the court of the other Sstate or non-
4 convention country because a court of this Sstate is a more convenient forum under Section 207.

5 (b) Except as otherwise provided in Section 204, a court of this Sstate, before hearing a
6 child-custody proceeding, shall examine the court documents and other information supplied by
7 the parties pursuant to Section 209. If the court determines that a child-custody proceeding has
8 been commenced in a court in another Sstate or non-convention country having jurisdiction
9 substantially in accordance with this [~~Act~~], [~~article~~] the court of this Sstate shall stay its
10 proceeding and communicate with the court of the other Sstate or non-convention country. If the
11 court of the Sstate or non-convention country having jurisdiction substantially in accordance
12 with this [~~Act~~] does not determine that the court of this Sstate is a more appropriate forum, the
13 court of this Sstate shall dismiss the proceeding.

14 (c) In a proceeding to modify a child-custody determination, a court of this Sstate shall
15 determine whether a proceeding to enforce the determination has been commenced in another
16 Sstate or foreign country. If a proceeding to enforce a child-custody determination has been
17 commenced in another Sstate or foreign country , the court may:

18 (1) stay the proceeding for modification pending the entry of an order of a court of
19 the other Sstate or foreign country enforcing, staying, denying, or dismissing the proceeding for
20 enforcement;

21 (2) enjoin the parties from continuing with the proceeding for enforcement; or

22 (3) proceed with the modification under conditions it considers appropriate.

23 **Comment**
24

1 The only article of the Convention that concerns simultaneous proceedings is Article 13.
2 That issue is dealt with under the Article on convention cases.

3
4 However, subsection (c) of this Section discusses the relationship between the
5 modification court and the enforcement court. It is an issue that was discussed extensively in the
6 original UCCJEA drafting committee. The decision there was that the modification court should
7 maintain control over whether the enforcement court should proceed. That policy is maintained
8 here by including both convention and non-convention countries under this section.

9
10 **SECTION 207. INCONVENIENT FORUM [ALTERNATIVE A].**

11 (a) A court of this §state which has jurisdiction under this [Act] to make a child-custody
12 determination may decline to exercise its jurisdiction at any time if it determines that it is an
13 inconvenient forum under the circumstances and that a court of another §state or non-convention
14 country is a more appropriate forum. The issue of inconvenient forum may be raised upon motion
15 of a party, the court's own motion, or request of another court.

16 (b) Before determining whether it is an inconvenient forum, a court of this §state shall
17 consider whether it is appropriate for a court of another §state or non-convention country to
18 exercise jurisdiction. For this purpose, the court and shall allow the parties to submit information
19 and shall consider all relevant factors, including:

20 (1) whether domestic violence has occurred and is likely to continue in the future
21 and which §state could best protect the parties and the child;

22 (2) the length of time the child has resided outside this §state;

23 (3) the distance between the court in this §state and the court in the §state or non-
24 convention country that would assume jurisdiction;

25 (4) the relative financial circumstances of the parties;

26 (5) any agreement of the parties as to which §state or non-convention country
27 should assume jurisdiction;

28 (6) the nature and location of the evidence required to resolve the pending

1 litigation, including testimony of the child;

2 (7) the ability of the court of each Sstate or non-convention country to decide the
3 issue expeditiously and the procedures necessary to present the evidence; and

4 (8) the familiarity of the court of each Sstate or non-convention country with the
5 facts and issues in the pending litigation.

6 (c) If a court of this Sstate determines that it is an inconvenient forum and that a court of
7 another Sstate or non-convention country is a more appropriate forum, it shall stay the
8 proceedings upon condition that a child-custody proceeding be promptly commenced in another
9 designated Sstate or non-convention country and may impose any other condition the court
10 considers just and proper.

11 (d) A court of this Sstate may decline to exercise its jurisdiction under this [Act] if a
12 child-custody determination is incidental to an action for divorce or another proceeding while
13 still retaining jurisdiction over the divorce or other proceeding.

14 **Comment**

15 This alternative is the current section 207. The only amendments are to extend the scope
16 of the section to include non-convention countries.

17 **SECTION 207. INCONVENIENT FORUM [ALTERNATIVE B].**

18
19 (a) A court of this Sstate which has jurisdiction under this [Act] to make a child-custody
20 determination may decline to exercise its jurisdiction at any time if it determines that it is an
21 inconvenient forum under the circumstances and that a court of another Sstate or foreign country
22 is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a
23 party, the court's own motion, or request of another court.

24 (b) Before determining whether it is an inconvenient forum, a court of this Sstate shall
25 consider whether it is appropriate for a court of another Sstate or foreign country to exercise

1 jurisdiction. For this purpose, the court may communicate with the court in another state or
2 foreign country and shall allow the parties to submit information and shall consider all relevant
3 factors, including:

4 (1) whether domestic violence has occurred and is likely to continue in the future
5 and which Sstate or foreign country could best protect the parties and the child;

6 (2) the length of time the child has resided outside this Sstate;

7 (3) the distance between the court in this Sstate and the court in the Sstate or
8 foreign country that would assume jurisdiction;

9 (4) the relative financial circumstances of the parties;

10 (5) any agreement of the parties as to which Sstate or foreign country should
11 assume jurisdiction;

12 (6) the nature and location of the evidence required to resolve the pending
13 litigation, including testimony of the child;

14 (7) the ability of the court of each Sstate or foreign country to decide the issue
15 expeditiously and the procedures necessary to present the evidence; and

16 (8) the familiarity of the court of each Sstate or foreign country with the facts and
17 issues in the pending litigation.

18 (c) A court of this state that has jurisdiction under Section 402 may decline jurisdiction
19 only in favor of the convention country:

20 (1) of the nationality of the child,

21 (2) where the divorce or annulment proceeding concerning the parents of the child
22 is pending,

23 (3) that has significant contacts with the child.

1 convention and non-convention countries. Subsection (f) implements Article 9 of the Convention
2 which allows a court of this state to request that jurisdiction be transferred to it on the ground that
3 this state is a more convenient forum.

4
5 In case alternative A is adopted, there is a provision in Article 4 covering forum non
6 conveniens in convention cases.

7
8 **SECTION 208. JURISDICTION DECLINED BY REASON OF CONDUCT.**

9 (a) Except as otherwise provided in Section 204 [or by other law of this Sstate], if a court
10 of this Sstate has jurisdiction under this [Act] because a person seeking to invoke its jurisdiction
11 has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless:

12 (1) the parents and all persons acting as parents have acquiesced in the exercise of
13 jurisdiction;

14 (2) a court of the Sstate or non-convention country otherwise having jurisdiction
15 under Sections 201 through 203, determines that this Sstate is a more appropriate forum under
16 Section 207; or

17 (3) no court of any other Sstate or non-convention country would have jurisdiction
18 under the criteria specified in Sections 201 through 203.

19 (b) If a court of this Sstate declines to exercise its jurisdiction pursuant to subsection (a),
20 it may fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of
21 the unjustifiable conduct, including staying the proceeding until a child-custody proceeding is
22 commenced in a court having jurisdiction under Sections 201 through 203.

23 (c) If a court dismisses a petition or stays a proceeding because it declines to exercise its
24 jurisdiction pursuant to subsection (a), it shall assess against the party seeking to invoke its
25 jurisdiction necessary and reasonable expenses including costs, communication expenses,
26 attorney's fees, investigative fees, expenses for witnesses, travel expenses, and child care during
27 the course of the proceedings, unless the party from whom fees are sought establishes that the

1 assessment would be clearly inappropriate. The court may not assess fees, costs, or expenses
2 against this §state unless authorized by law other than this [Act].

3 **Comment**
4

5 The article of the Convention that deals with wrongful conduct on the part of the person
6 invoking jurisdiction is Article 7 which concerns wrongful abductions. That problem is dealt
7 with in the Convention article.
8

9 **SECTION 209. INFORMATION TO BE SUBMITTED TO COURT.**

10 (a) [Subject to [local law providing for the confidentiality of procedures, addresses, and
11 other identifying information], in] [In] a child-custody proceeding, each party, in its first pleading
12 or in an attached affidavit, shall give information, if reasonably ascertainable, under oath as to the
13 child's present address or whereabouts, the places where the child has lived during the last five
14 years, and the names and present addresses of the persons with whom the child has lived during
15 that period. The pleading or affidavit must state whether the party:

16 (1) has participated, as a party or witness or in any other capacity, in any other
17 proceeding concerning the custody of or visitation with the child and, if so, identify the court, the
18 case number, and the date of the child-custody determination, if any;

19 (2) knows of any proceeding that could affect the current proceeding, including
20 proceedings for enforcement and proceedings relating to domestic violence, protective orders,
21 termination of parental rights, and adoptions and, if so, identify the court, the case number, and
22 the nature of the proceeding; and

23 (3) knows the names and addresses of any person not a party to the proceeding
24 who has physical custody of the child or claims rights of legal custody or physical custody of, or
25 visitation with, the child and, if so, the names and addresses of those persons.

26 (b) If the information required by subsection (a) is not furnished, the court, upon motion

1 of a party or its own motion, may stay the proceeding until the information is furnished.

2 (c) If the declaration as to any of the items described in subsection (a)(1) through (3) is in
3 the affirmative, the declarant shall give additional information under oath as required by the
4 court. The court may examine the parties under oath as to details of the information furnished
5 and other matters pertinent to the court's jurisdiction and the disposition of the case.

6 (d) Each party has a continuing duty to inform the court of any proceeding in this or any
7 other Sstate or foreign country that could affect the current proceeding.

8 [(e) If a party alleges in an affidavit or a pleading under oath that the health, safety, or
9 liberty of a party or child would be jeopardized by disclosure of identifying information, the
10 information must be sealed and may not be disclosed to the other party or the public unless the
11 court orders the disclosure to be made after a hearing in which the court takes into consideration
12 the health, safety, or liberty of the party or child and determines that the disclosure is in the
13 interest of justice.]

14 **Comment**

15
16 There are no pleading rules in the Convention, therefore the pleading rules of the
17 UCCJEA will carry over to all cases. The additional language makes it clear that this section
18 applies to all cases involving foreign countries.

19
20 The address impoundment provisions of Article 37 of the Convention are inadequate by
21 today's standards. Therefore this section continues to refer to local rules on confidentiality or to
22 the confidentiality rules of the original UCCJEA.

23 **SECTION 210. APPEARANCE OF PARTIES AND CHILD.**

24
25 (a) In a child-custody proceeding in this Sstate, the court may order a party to the
26 proceeding who is in this Sstate to appear before the court in person with or without the child.
27 The court may order any person who is in this Sstate and who has physical custody or control of
28 the child to appear in person with the child.

1 (b) If a party to a child-custody proceeding whose presence is desired by the court is
2 outside this Sstate, the court may order that a notice given pursuant to Section 108 include a
3 statement directing the party to appear in person with or without the child and informing the
4 party that failure to appear may result in a decision adverse to the party.

5 (c) The court may enter any orders necessary to ensure the safety of the child and of any
6 person ordered to appear under this section.

7 (d) If a party to a child-custody proceeding who is outside this Sstate is directed to appear
8 under subsection (b) or desires to appear personally before the court with or without the child, the
9 court may require another party to pay reasonable and necessary travel and other expenses of the
10 party so appearing and of the child.

11 **[ARTICLE] 3**

12 **ENFORCEMENT**

13 **SECTION 301. DEFINITIONS.** In this [article]:

14 (1) “Petitioner” means a person who seeks enforcement of an order for return of a child
15 under the Hague Convention on the Civil Aspects of International Child Abduction or
16 enforcement of a child-custody determination.

17 (2) “Respondent” means a person against whom a proceeding has been commenced for
18 enforcement of an order for return of a child under the Hague Convention on the Civil Aspects of
19 International Child Abduction or enforcement of a child-custody determination.

20 **SECTION 302. ENFORCEMENT UNDER HAGUE CONVENTION.** Under this
21 [article] a court of this Sstate may enforce an order for the return of the child made under the
22 Hague Convention on the Civil Aspects of International Child Abduction as if it were a
23 child-custody determination.

1 non-convention country that does not provide for a specific visitation schedule.

2 (b) If a court of this Sstate makes an order under subsection (a)(2), it shall specify in the
3 order a period that it considers adequate to allow the petitioner to obtain an order from a court
4 having jurisdiction under the criteria specified in [Article] 2. The order remains in effect until an
5 order is obtained from the other court or the period expires.

6 **SECTION 305. REGISTRATION OF CHILD-CUSTODY DETERMINATION**
7 **[ALTERNATIVE A].**

8 (a) A child-custody determination issued by a court of another Sstate or non-convention
9 country may be registered in this Sstate, with or without a simultaneous request for enforcement,
10 by sending to [the appropriate court] in this Sstate :

11 (1) a letter or other document requesting registration;

12 (2) two copies, including one certified copy, of the determination sought to be
13 registered, and a statement under penalty of perjury that to the best of the knowledge and belief
14 of the person seeking registration the order has not been modified; and

15 (3) except as otherwise provided in Section 209, the name and address of the
16 person seeking registration and any parent or person acting as a parent who has been awarded
17 custody or visitation in the child-custody determination sought to be registered.

18 (b) On receipt of the documents required by subsection (a), the registering court shall:

19 (1) cause the determination to be filed as a foreign judgment, together with one
20 copy of any accompanying documents and information, regardless of their form; and

21 (2) serve notice upon the persons named pursuant to subsection (a)(3) and provide
22 them with an opportunity to contest the registration in accordance with this section.

23 (c) The notice required by subsection (b)(2) must state that:

1 (1) a registered determination is enforceable as of the date of the registration in
2 the same manner as a determination issued by a court of this State;

3 (2) a hearing to contest the validity of the registered determination must be
4 requested within 20 days after service of notice; and

5 (3) failure to contest the registration will result in confirmation of the
6 child-custody determination and preclude further contest of that determination with respect to
7 any matter that could have been asserted.

8 (d) A person seeking to contest the validity of a registered order must request a hearing
9 within 20 days after service of the notice. At that hearing, the court shall confirm the registered
10 order unless the person contesting registration establishes that:

11 (1) the issuing court did not have jurisdiction under [Article] 2;

12 (2) the child-custody determination sought to be registered has been vacated,
13 stayed, or modified by a court having jurisdiction to do so under [Article] 2; or

14 (3) the person contesting registration was entitled to notice, but notice was not
15 given in accordance with the standards of Section 108, in the proceedings before the court that
16 issued the order for which registration is sought.

17 (e) If a timely request for a hearing to contest the validity of the registration is not made,
18 the registration is confirmed as a matter of law and the person requesting registration and all
19 persons served must be notified of the confirmation.

20 (f) Confirmation of a registered order, whether by operation of law or after notice and
21 hearing, precludes further contest of the order with respect to any matter that could have been
22 asserted at the time of registration.

23 **Comment**

1 This is the original version of Section 305 now made applicable to non-convention
2 countries. When we drafting the original UCCJEA, we did not address the problem of whether
3 foreign custody determinations that are sought to be registered should be accompanied by a
4 translation. The issue is addressed under the Convention and covered in alternative B as well as
5 an alternate section in Article 4. I have not changed this section to require a translation of the
6 child custody determination. The issue is whether we should (or can) remedy that omission by
7 including such a provision in this section.
8

9 **SECTION 305. REGISTRATION OF CHILD-CUSTODY DETERMINATION**

10 **[ALTERNATIVE B].**

11 (a) A child-custody determination issued by a court of another Sstate or foreign country
12 may be registered in this Sstate, with or without a simultaneous request for enforcement, by
13 sending to [the appropriate court] in this Sstate:

14 (1) a letter or other document requesting registration;

15 (2) two copies, including one certified copy, of the determination sought to be
16 registered, and a statement under penalty of perjury that to the best of the knowledge and belief
17 of the person seeking registration the order has not been modified; and

18 (3) except as otherwise provided in Section 209, the name and address of the
19 person seeking registration and any parent or person acting as a parent who has been awarded
20 custody or visitation in the child-custody determination sought to be registered.

21 (b) In addition to the requirements of subsection (a), if the custody determination sought
22 to be enforced is from a convention country, four copies of the custody determination must be
23 sent to [the appropriate court]. Two copies must be in the original language and two copies must
24 be in English, including one certified copy, of the determination sought to be registered.

25 (c) On receipt of the documents required by subsection (a) and (b), the registering court
26 shall cause the determination to be filed as a foreign judgment, together with one copy of any
27 accompanying documents and information, regardless of their form. If the custody determination

1 is from a convention country the registering court shall file one copy in English and one in the
2 original language.

3 ~~(1) cause the determination to be filed as a foreign judgment, together with one copy of any~~
4 ~~accompanying documents and information, regardless of their form, and~~

5 (d)(2) The court shall also serve notice upon the persons named pursuant to subsection
6 (a)(3) and provide them with an opportunity to contest the registration in accordance with this
7 section.

8 (d) The notice required by subsection ~~(b)(2)~~ (d) must state that:

9 (1) a registered determination is enforceable as of the date of the registration in
10 the same manner as a determination issued by a court of this State;

11 (2) a hearing to contest the validity of the registered determination must be
12 requested within 20 days, or 60 days if the contesting party does not reside in the United States,
13 after service of notice; and

14 (3) failure to contest the registration will result in confirmation of the
15 child-custody determination and preclude further contest of that determination with respect to
16 any matter that could have been asserted.

17 (d) A person seeking to contest the validity of a registered order must request a hearing
18 within 20 days after service of the notice, but if the contesting party does not reside in the United
19 States the contesting party must request a hearing within 60 days after service of notice. At that
20 hearing, the court shall confirm the registered order unless the person contesting registration
21 establishes that:

22 (1) the issuing state or non-convention country court did not have jurisdiction
23 under [article] 2;

1 (2) the child-custody determination sought to be registered has been vacated,
2 stayed, or modified by a court having jurisdiction to do so under [article] 2; or

3 (3) the person contesting registration was entitled to notice, but notice was not
4 given in accordance with the standards of Section 108, in the proceedings before the court that
5 issued the order for which registration is sought.

6 (e) If the hearing is to contest the registration of a custody determination from a
7 convention country, the court shall confirm the registered order unless the person contesting
8 registration establishes that:

9 (1) the issuing court did not have jurisdiction substantially in accordance with
10 [article 4];

11 (2) the child-custody determination sought to be registered has been vacated,
12 stayed, or modified by a court having jurisdiction to do so substantially in accordance with under
13 [article 4];

14 (3) the person contesting registration was entitled to notice, but notice was not
15 given in accordance with the standards of Section 108, in the proceedings before the court that
16 issued the order for which registration is sought;

17 (4) the order was made without any opportunity for the child to have input into the
18 determination sought to be enforced in violation of fundamental principles of this state;

19 (5) the order is incompatible with a later order made by a non-convention country
20 of the habitual residence of the child;

21 (6) the order is manifestly contrary to the public policy of this state [taking into
22 account the best interests of the child]; or

23 (7) the procedure provided for in Section 416(a) was not followed.

1 **[ALTERNATIVE B].**

2 (a) A court of this Sstate may grant any relief normally available under the law of this
3 Sstate to enforce a registered child-custody determination made by a court of another Sstate or
4 foreign county.

5 (b) A court of this Sstate shall recognize and enforce, but may not modify, except in
6 accordance with ~~[Article] 2~~ this [Act], a registered child-custody determination of a court of
7 another Sstate or foreign country.

8 **Comment**

9 If the drafting committee prefers to amalgamate the procedure for enforcing convention
10 and non-convention custody determinations then this alternative should be chosen.
11

12 **SECTION 307. SIMULTANEOUS PROCEEDINGS.** If a proceeding for
13 enforcement under this [article] is commenced in a court of this Sstate and the court determines
14 that a proceeding to modify the determination is pending in a court of another Sstate or foreign
15 country having jurisdiction to modify the determination under [articles] 2 or 4, the enforcing
16 court shall immediately communicate with the modifying court. The proceeding for enforcement
17 continues unless the enforcing court, after consultation with the modifying court, stays or
18 dismisses the proceeding.

19 **Comment**

20
21 This section is the mirror of section 206(c) and is addressed to the enforcement court.
22 Communication under this section is required and the policy of allowing the modification court
23 to control the proceeding is maintained. It applies to all countries whether or not they are
24 convention countries.
25

26 **SECTION 308. EXPEDITED ENFORCEMENT OF CHILD-CUSTODY**
27 **DETERMINATION.**

28 (a) A petition under this [article] must be verified. Certified copies of all orders sought to

1 be enforced and of any order confirming registration must be attached to the petition. A copy of a
2 certified copy of an order may be attached instead of the original.

3 (b) A petition for enforcement of a child-custody determination must state:

4 (1) whether the court that issued the determination identified the jurisdictional
5 basis it relied upon in exercising jurisdiction and, if so, what the basis was;

6 (2) whether the determination for which enforcement is sought has been vacated,
7 stayed, or modified by a court whose decision must be enforced under ~~this [Act]~~ [article] 2 and, if
8 so, identify the court, the case number, and the nature of the proceeding;

9 (3) whether any proceeding has been commenced that could affect the current
10 proceeding, including proceedings relating to domestic violence, protective orders, termination of
11 parental rights, and adoptions and, if so, identify the court, the case number, and the nature of the
12 proceeding;

13 (4) the present physical address of the child and the respondent, if known;

14 (5) whether relief in addition to the immediate physical custody of the child and
15 attorney's fees is sought, including a request for assistance from [law enforcement officials] and,
16 if so, the relief sought; and

17 (6) if the child-custody determination has been registered and confirmed under
18 Section 305, the date and place of registration.

19 (c) Upon the filing of a petition, the court shall issue an order directing the respondent to
20 appear in person with or without the child at a hearing and may enter any order necessary to
21 ensure the safety of the parties and the child. The hearing must be held on the next judicial day
22 after service of the order unless that date is impossible. In that event, the court shall hold the
23 hearing on the first judicial day possible. The court may extend the date of hearing at the request

1 of the petitioner.

2 (d) An order issued under subsection (c) must state the time and place of the hearing and
3 advise the respondent that at the hearing the court will order that the petitioner may take
4 immediate physical custody of the child and the payment of fees, costs, and expenses under
5 Section 312, and may schedule a hearing to determine whether further relief is appropriate,
6 unless the respondent appears and establishes that:

7 (1) the child-custody determination has not been registered and confirmed under
8 Section 305 and that:

9 (A) the issuing court did not have jurisdiction under [article] 2;

10 (B) the child-custody determination for which enforcement is sought has
11 been vacated, stayed, or modified by a court having jurisdiction to do so under [article] 2; or

12 (C) the respondent was entitled to notice, but notice was not given in
13 accordance with the standards of Section 108, in the proceedings before the court that issued the
14 order for which enforcement is sought; or

15 (2) the child-custody determination for which enforcement is sought was
16 registered and confirmed under Section 304, but has been vacated, stayed, or modified by a court
17 of a state or non-convention country having jurisdiction to do so under [article] 2.

18 **Comment**

19
20 There is no change to this section other than to add the term non-convention country.
21 Currently the procedure for registration and enforcement of custody determinations under the
22 Convention is placed in Article 4 in two alternatives. The drafting committee might also choose
23 to amend this section and 310 to reflect the process set out in Alternative A to Section 305.

24
25 **SECTION 309. SERVICE OF PETITION AND ORDER.** Except as otherwise
26 provided in Section 311, the petition and order must be served, by any method authorized [by the
27 law of this ~~S~~state], upon respondent and any person who has physical custody of the child.

1 **SECTION 310. HEARING AND ORDER.**

2 (a) Unless the court issues a temporary emergency order pursuant to Section 204, upon a
3 finding that a petitioner is entitled to immediate physical custody of the child, the court shall
4 order that the petitioner may take immediate physical custody of the child unless the respondent
5 establishes that:

6 (1) the child-custody determination has not been registered and confirmed under
7 Section 305 and that:

8 (A) the issuing court did not have jurisdiction under [article] 2;

9 (B) the child-custody determination for which enforcement is sought has
10 been vacated, stayed, or modified by a court of a Sstate or non-convention country having
11 jurisdiction to do so under [article] 2; or

12 (C) the respondent was entitled to notice, but notice was not given in
13 accordance with the standards of Section 108, in the proceedings before the court that issued the
14 order for which enforcement is sought; or

15 (2) the child-custody determination for which enforcement is sought was
16 registered and confirmed under Section 305 but has been vacated, stayed, or modified by a court
17 of a Sstate or non-convention country having jurisdiction to do so under [article] 2.

18 (b) The court shall award the fees, costs, and expenses authorized under Section 312 and
19 may grant additional relief, including a request for the assistance of [law enforcement officials],
20 and set a further hearing to determine whether additional relief is appropriate.

21 (c) If a party called to testify refuses to answer on the ground that the testimony may be
22 self-incriminating, the court may draw an adverse inference from the refusal.

23 (d) A privilege against disclosure of communications between spouses and a defense of

1 immunity based on the relationship of husband and wife or parent and child may not be invoked
2 in a proceeding under this [article].

3 **Comment**

4 The only amendment is to include non-convention countries

5 **SECTION 311. WARRANT TO TAKE PHYSICAL CUSTODY OF CHILD.**

6 (a) Upon the filing of a petition seeking enforcement of a child-custody determination, the
7 petitioner may file a verified application for the issuance of a warrant to take physical custody of
8 the child if the child is immediately likely to suffer serious physical harm or be removed from
9 this Sstate .

10 (b) If the court, upon the testimony of the petitioner or other witness, finds that the child
11 is imminently likely to suffer serious physical harm or be removed from this Sstate, it may issue
12 a warrant to take physical custody of the child. The petition must be heard on the next judicial
13 day after the warrant is executed unless that date is impossible. In that event, the court shall hold
14 the hearing on the first judicial day possible. The application for the warrant must include the
15 statements required by Section 308(b).

16 (c) A warrant to take physical custody of a child must:

17 (1) recite the facts upon which a conclusion of imminent serious physical harm or
18 removal from the jurisdiction is based;

19 (2) direct law enforcement officers to take physical custody of the child
20 immediately; and

21 (3) provide for the placement of the child pending final relief.

22 (d) The respondent must be served with the petition, warrant, and order immediately after
23 the child is taken into physical custody.

1 (e) A warrant to take physical custody of a child is enforceable throughout this Sstate. If
2 the court finds on the basis of the testimony of the petitioner or other witness that a less intrusive
3 remedy is not effective, it may authorize law enforcement officers to enter private property to
4 take physical custody of the child. If required by exigent circumstances of the case, the court may
5 authorize law enforcement officers to make a forcible entry at any hour.

6 (f) The court may impose conditions upon placement of a child to ensure the appearance
7 of the child and the child's custodian.

8 **SECTION 312. COSTS, FEES, AND EXPENSES.**

9 (a) The court shall award the prevailing party, including a Sstate, necessary and
10 reasonable expenses incurred by or on behalf of the party, including costs, communication
11 expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and child
12 care during the course of the proceedings, unless the party from whom fees or expenses are
13 sought establishes that the award would be clearly inappropriate.

14 (b) The court may not assess fees, costs, or expenses against a Sstate unless authorized by
15 law other than this [Act].

16 **SECTION 313. RECOGNITION AND ENFORCEMENT.** A court of this Sstate
17 shall accord full faith and credit to an order issued by another Sstate, or non-convention country
18 and consistent with this [Act] which enforces a child-custody determination by a court of another
19 Sstate or non-convention country unless the order has been vacated, stayed, or modified by a
20 court having jurisdiction to do so under [article] 2.

21 **Comment**

22 Amended only to indicate that this section applies to non-convention countries.

23 **SECTION 314. APPEALS.** An appeal may be taken from a final order in a proceeding

1 under this [article] in accordance with [expedited appellate procedures in other civil cases].

2 Unless the court enters a temporary emergency order under Section 204, the enforcing court may
3 not stay an order enforcing a child-custody determination pending appeal.

4 **SECTION 315. ROLE OF [PROSECUTOR OR PUBLIC OFFICIAL].**

5 (a) In a case arising under this [Act] or involving the Hague Convention on the Civil
6 Aspects of International Child Abduction, the [prosecutor or other appropriate public official]
7 may take any lawful action, including resort to a proceeding under this [article] or any other
8 available civil proceeding to locate a child, obtain the return of a child, or enforce a child-custody
9 determination if there is:

10 (1) an existing child-custody determination;

11 (2) a request to do so from a court in a pending child-custody proceeding;

12 (3) a reasonable belief that a criminal statute has been violated; or

13 (4) a reasonable belief that the child has been wrongfully removed or retained in
14 violation of the Hague Convention on the Civil Aspects of International Child Abduction.

15 (b) A [prosecutor or appropriate public official] acting under this section acts on behalf of
16 the court and may not represent any party.

17 **SECTION 316. ROLE OF [LAW ENFORCEMENT].** At the request of a [prosecutor
18 or other appropriate public official] acting under Section 315, a [law enforcement officer] may
19 take any lawful action reasonably necessary to locate a child or a party and assist [a prosecutor or
20 appropriate public official] with responsibilities under Section 315.

21 **SECTION 317. COSTS AND EXPENSES.** If the respondent is not the prevailing
22 party, the court may assess against the respondent all direct expenses and costs incurred by the
23 [prosecutor or other appropriate public official] and [law enforcement officers] under Section

1 315 or 316.

2 [ARTICLE] 4

3 SPECIAL RULES FOR CASES UNDER CONVENTION

4 Introductory Comment

5
6 This article applies exclusively to cases that fall under the Convention. It has no
7 application to cases between states of the United States. It does apply to cases between states of
8 the United States and non-convention countries to the extent that the Convention requires special
9 treatment for non-convention countries that differs from the original UCCJEA. As noted, some
10 aspects of the Convention could be covered in the earlier articles by specifying whether the
11 section applied to all “foreign countries” including “convention countries”, or, whether the
12 section applied only to states of the United States and “non-convention countries”. This article
13 contains those rules, a lot of them, that could not be covered easily in the earlier sections.
14

15 As noted by the UIFSA reporter, when the Senate has given its advice and consent, the
16 Convention has been ratified by the President, and certain formal procedures have been
17 completed, the Convention will be a multilateral treaty between the United States and the other
18 countries which have ratified or acceded to the Convention. The Convention is not self-
19 executing and therefore its terms are not part of the substantive law of any state of the United
20 States. Implementing legislation will be needed. This will require legislation at the federal level,
21 as well as enactment of this revised UCCJEA by the states. Only at that time will this article of
22 the UCCJEA become enforceable state law.
23

24 Like UIFSA, there has been no attempt here to set forth specifically what cases fall under
25 the Convention. Generally, however, cases will fall under this article if two criteria are met:
26

27 1. The cases involves a state of the United States and a foreign country which has ratified
28 the Convention. Or, the case involves a foreign country that had acceded to the Convention
29 whose accession has not been rejected by the United States.
30

31 2. The subject matter of the case involves those issues covered by the Convention in
32 Article 4. That determination should be made by a court when the issue arises as opposed to
33 attempting to set forth in state statutory language which issues are covered by the Convention.
34 The scope of the Convention is set forth in Articles 3 and 4. Most matters covered by the
35 Convention can be subsumed under the phrase “custody determination.” However matters
36 covered in Articles 3(d) and (f) might not be obvious. I have added those matters to a definition
37 of custody determination in Section 102. There is also a definition of parental responsibility that
38 is found in the choice of law sections. Note that all this is new material and for ease of reading I
39 have not underlined the entire article.
40

41 **SECTION 401. APPLICABILITY.** This [article] applies only to a proceeding under
42 the Convention. In such a proceeding if a provision of this [article] is inconsistent with [articles]

1 through 3, this article controls.

Comment

Related to the Convention: Articles 1, 3 and 4. Adapted from UIFSA Section 702. Like UIFSA §702, the first sentence definitively states that this article applies only to cases involving a convention country as that is defined in section 102. This article does not apply to a non-convention country except as specifically mentioned. The second sentence resolves any situation where there is a conflict between a section in this article and a provision in articles 1-3, in which case this article controls.

SECTION 402. JURISDICTION. Except as otherwise provided in Section 405 and

407, a court of this state has jurisdiction to make or modify a child-custody determination only if:

(1) this state is the habitual residence of the child on the date of the commencement of the proceedings and remains so throughout the proceedings; or

(2) a court of another convention country does not have jurisdiction substantially in accordance with subparagraph (a) and the child is present in this state, or

(3) a court of a convention country with jurisdiction substantially in accordance with subparagraphs (a) or (b) has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under Section 406.

Comment

Related to Convention: Arts. 5,6,8,9. For this draft I have adopted the position that the term “habitual residence” should not be defined. This issue was discussed in the memo. Since then I have talked to a number of European drafters, including the Permanent Bureau, all of whom cautioned against attempting to define a very fact laden term. I think the comments should point out that the term is not necessarily to receive the same construction as currently used by courts construing the Abduction Convention.

Otherwise this section relates primarily to articles 5 and 6 of the Convention. The phrase, “remains so throughout the proceeding” reflects the Convention position that jurisdiction changes when habitual residence changes, even if it is in the middle of a proceeding. A state can also have jurisdiction, apart from habitual residence, if the child has no habitual residence and is present in the jurisdiction, or is a state that has been found by the convention country of the habitual residence of the child to be a more convenient forum.

1 I have used the term “substantially in accordance with” in conjunction with other
2 convention countries because another country cannot have jurisdiction under this act. Therefore I
3 could not draft a phrase like “no convention country would have jurisdiction under subsection
4 (1)” which is how it would otherwise be drafted. Interestingly, this was not considered a problem
5 when we drafted the original UCCJEA even though we applied it internationally and no other
6 country could have jurisdiction under “this Act.”
7

8 **SECTION 403. JURISDICTION IN CASES OF [WRONGFUL] ABDUCTION.**

9 (a) In this section,

10 (1) “[Wrongful] abduction” means that the child has been removed from, or
11 retained from returning to, a convention country which, immediately before the removal or
12 retention, was the habitual residence of the child, and

13 (A) is in violation of a right of custody attributed to a person, an institution
14 or any other body, either jointly or alone, under the law of the convention country where the child
15 was habitually resident immediately before the removal or retention, and

16 (B) the right of custody was exercised or would be exercised but for the
17 removal or retention of the child;

18 (2) “Right of custody” means a right relating to the care of a child under the law
19 of the convention country of the habitual residence of the child and includes the right to
20 determine the place of the residence of the child. The right of custody may be by operation of
21 law, as a result of a judicial or administrative decision, or as the result of an agreement having
22 legal effect under the law of the convention state of the habitual residence of the child.

23 (b) A court of this state which has jurisdiction under section 402 continues to have
24 jurisdiction after a[n] [wrongful] abduction of the child until the child acquires a new habitual
25 residence, and:

26 (1) every person with a right of custody has acquiesced in the [wrongful]
27 abduction; or

1 (2) the child resides in the convention country of the new habitual residence for
2 one year from the time that every person with a right of custody should have known of the
3 whereabouts of the child, no petition for the return of the child is pending in a court of the
4 convention country of the new habitual residence of the child, or in a court of this state, and child
5 is settled in the new environment.

6 (c) Except as provided in section 405, a court of this state does not have jurisdiction over
7 a child whose habitual residence in this state is the result of a[n] [wrongful] abduction unless:

8 (1) every person with a right of custody has acquiesced in the [wrongful]
9 abduction; or

10 (2) the child resides in this state for one year from the time that every person with
11 a right of custody should have known of the whereabouts of the child, no petition for the return
12 of the child is pending in a court of this state, or the convention country of the former habitual
13 residence of the child, and the child is settled in the new environment.

14 **Comment**

15
16 Relation to Convention, Art 7. This section presents both sides of Article 7. It confirms
17 that a court of this state does not lose its jurisdiction after a wrongful abduction unless the
18 requirements of Article 7 are met. It also provides that a court of this state does not obtain
19 jurisdiction if the child's habitual residence in this state is the result of a wrongful abduction
20 unless the requirements of the article are met.
21

22 The reference to a petition for the return of the child pending in the court of this state or
23 the new habitual residence is in line with the interpretation of the Permanent Bureau. See
24 Preliminary Document No. 4, Practical Handbook on the Operation of the 1996 Convention,
25 available at <http://www.hcch.net/upload/wop/abduct2011pd04e.pdf>. It should be noted that a
26 custody determination made by the court of the state from which the child has been abducted
27 while that state still has jurisdiction under this section must be recognized and enforced under the
28 section on recognition and enforcement.
29

30 The definition of wrongful abduction is taken from Article 7 of the Convention as
31 supplemented by the language in the 1980 Convention on the Civil Aspects of International
32 Child Abduction.
33

1 The term “wrongful” is in brackets. The term is used in both the 1980 and 1996
2 Conventions and is in common use to describe a situation where the child must be returned to the
3 state of the child’s habitual residence. There are those that object to the term and therefore for
4 this drafting committee meeting I have place it in brackets.
5

6 **SECTION 404. SIMULTANEOUS PROCEEDINGS.**

7 (a) Except as otherwise provided in Section 405 or 407, a court of this state shall not
8 exercise its jurisdiction under Section 402(a) if at the time of the commencement of the
9 proceeding the court determines that a proceeding had previously been commenced in a court of
10 the convention country having jurisdiction substantially in accordance with Section 402 (a) or (b)
11 concerning the same issues and that proceeding has not concluded.

12 (b) Except as provided in Section 405, if a court of this state determines that a proceeding
13 has been commenced in a court of a convention country having jurisdiction substantially in
14 accordance with Section 402 (a) or (b) concerning the same issues and has not been concluded,
15 the court of this state shall stay its proceeding and communicate with the court of the other
16 convention country. If the court of the convention country having jurisdiction substantially in
17 accordance with Section 402(a) or (b) does not decline jurisdiction in favor of a court of this
18 state, the court of this state shall dismiss the proceeding.

19 **Comment**

20
21 Related to the Convention, Art 13. Article 13 provides a lis pendens for situations where
22 the child has acquired a new habitual residence and there is a pending proceeding in the state of
23 the old habitual residence or in the state where the child is present if there is no habitual
24 residence. I have labeled this simultaneous proceedings and borrowed some of the language
25 from section 206. In particular, this section requires a court of this state to communicate with the
26 court of the former habitual residence.
27

28 **SECTION 405. TEMPORARY EMERGENCY JURISDICTION [IF**
29 **ALTERNATIVE A OF SECTION 204 IS SELECTED].**

30 (a) A court of this state has temporary emergency jurisdiction if the child is present in

1 this state and the child has been abandoned or it is necessary in an emergency to protect the child
2 because the child, or a sibling or parent of the child, is subjected to or threatened with
3 mistreatment or abuse.

4 (b) If there is no previous child-custody determination that is entitled to be enforced under
5 this [Act] and a child-custody proceeding has not been commenced in a court of a foreign
6 country having jurisdiction substantially in accordance with this [Act] a child-custody
7 determination made under this section remains in effect until:

8 (1) an order is obtained from the convention country having jurisdiction
9 substantially in accordance with Section 402, or

10 (2) an order is obtained from the non-convention country where the child is
11 habitually resident and the order is recognized by a court of this state or a court of another
12 convention country.

13 (c) If a child-custody proceeding has not been or is not commenced in a court of a foreign
14 country having jurisdiction substantially in accordance with this [Act] a child-custody
15 determination made under this section becomes a final determination, if it so provides and this
16 state becomes the [habitual residence] [home state] of the child.

17 (d) If there is a previous child-custody determination of a foreign country that is entitled
18 to be enforced under this [Act], or a child-custody proceeding has been commenced in a court of
19 a foreign country having jurisdiction substantially in accordance with this [Act] any order issued
20 by a court of this state under this section must specify in the order a period that the court
21 considers adequate to allow the person seeking an order to obtain an order from the foreign
22 country having jurisdiction substantially in accordance with this [Act]. The order issued in this
23 state remains in effect until the conditions of subsections (b)(1) or (2) of this section are satisfied

1 or the period expires.

2 (e) A court of this state which has been asked to make a child-custody determination
3 under this section, upon being informed that a child-custody proceeding has been commenced in,
4 or a child-custody determination has been made by, a court of a foreign country having
5 jurisdiction substantially in accordance with this [Act] shall immediately communicate with the
6 other court. A court of this state which is exercising jurisdiction pursuant to this [Act] upon
7 being informed that a child-custody proceeding has been commenced in, or a child-custody
8 determination has been made by, a court of a foreign country under a provision similar to this
9 section shall immediately communicate with the court of that country to resolve the emergency,
10 protect the safety of the parties and the child, and determine a period for the duration of the
11 temporary order.

12 **Comment**

13
14 Related to Convention, Article 11

15
16 This is Alternative B of section 204 with substantial modifications. It covers both
17 convention cases and non-convention cases. That is necessary because Article 11 of the
18 Convention covers cases with convention countries and cases with non-convention countries.
19 Therefore I have used the phrase “foreign country” to cover situations common to both
20 convention and non-convention cases. I have distinguished between convention and non-
21 convention countries when required to do so by Article 11. That also means that when
22 jurisdiction is to be exercised by the other country it is necessary in some cases to refer to this
23 act, as opposed to simply this article, since article 2 applies to non-convention countries.
24

25 I have kept the definition of emergency from Section 204. The Convention does not
26 define the term “urgency.” I think this is a situation where the Convention provides the basic
27 rules. However, it should be possible to flesh out the Convention language so long as the draft
28 does not detract from the Convention’s purpose.
29

30 Along the same line I have included the communication provisions from Section 204
31 even though the Convention does not have an communication provisions under the urgency
32 section. However, Article 36 of the Convention requires that:
33

34 In the case where the child is exposed to a serious danger, the competent
35 authorities of the Contracting State where measures for the protection of the child

1 have been taken or are under consideration, if they are informed that the child's
2 habitual residence has changed to, or that the child is present in another State,
3 shall inform the authorities of that other State about the dangers involved and the
4 measures taken or under consideration.
5

6 It would seem that if a country is contemplating taking an emergency measure, it is likely that the
7 child is being exposed to a serious danger. In which case it can be argued that the Convention
8 does require communication between the court entertaining the emergency and the country that
9 would otherwise have jurisdiction or where the child is located.
10

11 The other issue is whether to incorporate all this into section 204 or to have this section in
12 this article for all foreign cases.
13

14 **SECTION 406. INCONVENIENT FORUM [IN THE EVENT OPTION A OF**
15 **SECTION 207 IS CHOSEN].**

16 (a) A court of this state which has jurisdiction under Section 402 to make a child-custody
17 determination may decline to exercise its jurisdiction at any time if it determines that it is an
18 inconvenient forum under the circumstances and that a court of another convention country is a
19 more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party,
20 the court's own motion, or request of another court.

21 (b) Before determining whether it is an inconvenient forum, a court of this state shall
22 consider whether it is appropriate for a court of another convention country to exercise
23 jurisdiction. For this purpose, the court may communicate with the court in another convention
24 country and shall allow the parties to submit information and shall consider all relevant factors,
25 including:

26 (1) whether domestic violence has occurred and is likely to continue in the future
27 and which convention country could best protect the parties and the child;

28 (2) the length of time the child has resided outside this state ;

29 (3) the distance between the court in this state and the court in the convention
30 country that would assume jurisdiction;

1 (4) the relative financial circumstances of the parties;

2 (5) any agreement of the parties as to which convention country should assume
3 jurisdiction;

4 (6) the nature and location of the evidence required to resolve the pending
5 litigation, including testimony of the child;

6 (7) the ability of the court of each convention country to decide the issue
7 expeditiously and the procedures necessary to present the evidence; and

8 (8) the familiarity of the court of each convention country with the facts and issues
9 in the pending litigation.

10 (c) A court of this state may decline jurisdiction only in favor of the convention country:

11 (1) of the nationality of the child,

12 (2) where the divorce or annulment proceeding concerning the parents of the child
13 is pending,

14 (3) that has a substantial connection to the child.

15 (d) If a court of this state determines that it is an inconvenient forum and that a court of
16 another convention country is a more appropriate forum, it shall stay the proceedings upon
17 condition that a child-custody proceeding be promptly commenced in another designated
18 convention country and may impose any other condition the court considers just and proper.

19 (e) A court of this state may decline to exercise its jurisdiction under this [article] if a
20 child-custody determination is incidental to an action for divorce or another proceeding while
21 still retaining jurisdiction over the divorce or other proceeding.

22 (f) A court of this state that is:

23 (1) the nationality of the child,

1 (2) where the divorce or annulment proceeding concerning the parents of the child
2 is pending,

3 (3) that has a substantial connection to the child,
4 may request, or direct the parties to request, a court of the convention country of the habitual
5 residence of the child to decline jurisdiction in favor of a court of this state if the court of this
6 state believes it is a more convenient forum. A court of this state may communicate with the
7 court of the convention country of the habitual residence of the child with regard to the request.
8 A court of this state shall not assume jurisdiction following a request until the court of the
9 convention country of the habitual residence of the child determines that a court of this state is a
10 more convenient forum.

11 **Comment**

12
13 Relation to Convention, Arts 8, 9.

14
15 This section adds in the terms of Article 8 and 9 of the Convention that are not found in
16 Section 207. This includes permissive language on communication, as well as the limits found in
17 Article 8 of the Convention concerning the countries which can be determined to be a more
18 convenient forum. It also includes a provision in subsection (f) which allows the court of this
19 state to request that a court of another convention country determine that a court of this state is a
20 more convenient forum.

21
22 The transfer of the case under this Section does not effect a permanent transfer of
23 jurisdiction. Even if the country of the habitual residence of the child believes it is an
24 inconvenient forum and transfers the case to another country, modification procedures would
25 take place in the country of the child's habitual residence since there is no continuing jurisdiction
26 under the Convention.

27 **SECTION 407. PROVISIONAL ORDERS.**

28
29 (a) A court of this state has jurisdiction to enter provisional orders for the protection of
30 the child if the child is present in this state and has not been wrongfully abducted as defined in
31 section 403. Provisional orders must not be incompatible with orders previously issued by a
32 court of a convention country having jurisdiction substantially in accordance with Section 402

1 and such orders are limited to the territory of this state.

2 (b) A court of this state shall inform the court of the convention country with jurisdiction
3 substantially in accordance with Section 402 of the existence of the provisional order.

4 (c) A provisional order remains in effect until an order is obtained from the:

5 (1) convention country having jurisdiction substantially in accordance with
6 Section 402, or

7 (2) non-convention country where the child is habitually resident and the order is
8 recognized by a court of this state or a court of another convention country.

9 **Comment**

10
11 Related to Convention, Art. 12. The issue with regard to the presence jurisdiction in
12 Article 12 is whether it is possible to avoid this jurisdictional basis altogether. The discussion at
13 the Special and Diplomatic Commissions on this article focused on the problems that occur when
14 the child is habitually resident in country A and owns property in country B. Country B may
15 require certain measures to be taken with regard to the property that are not, strictly speaking,
16 emergencies, but which need to be done fairly quickly. Since the United States will take the
17 reservation allowed by Article 55 with regard to property, this aspect of the presence jurisdiction
18 is not necessary.

19
20 On the other hand, Article 12 is not limited to property and applies to situations where the
21 child is present in the territory and some measure of a provisional nature needs to be taken with
22 regard to the child. It is difficult to conceive of many situations where, absent an emergency,
23 such jurisdiction would be necessary. The fact pattern mentioned by the Reporter, and discussed
24 by the Diplomatic Commission, concerned a child present in a country for a limited period of
25 time as an exchange student. The concern was what should occur when the family receiving the
26 exchange student suddenly could not care for the child. This section would, according to the
27 reporter, facilitate placing the exchange student with another family or shelter, but under the
28 protection of the local social authorities. However, it could very well be argued that this
29 situation constitutes an emergency and could be handled under those provisions.

30
31 If this concept is retained, the Convention provides a number of protections against its
32 misuse. First, it is subject to Section 403, which deals with wrongful abductions. It cannot be
33 used to subvert the provisions of that section. Second, the measures cannot be contrary to
34 measures taken previously by the country of the child's habitual residence. Third, measures
35 taken under this Article lapse using the same procedure as with measures taken in an emergency,
36 with the same difficulties.

37
38 **SECTION 408. CONTINUATION OF ORDERS.** Except as provided in sections 405

1 and 407, orders issued by a court with jurisdiction substantially in accordance with this [article]
2 continue in effect until modified by a convention country with jurisdiction substantially in
3 accordance with Section 402.

4 **Comment**

5 Related to Convention, Art 14. This is a familiar principle and is found in both UIFSA
6 and the UCCJEA. An order made with appropriate jurisdiction continues to be enforceable even
7 after the jurisdictional basis of the order disappears. The order is enforceable until modified by a
8 court with appropriate jurisdiction under this article, or until a situation arises whereby another
9 order can be recognized under the recognition sections. This would occur when the original
10 order is modified by either a court with jurisdiction under this article or by the court of the non-
11 contracting state of the child's habitual residence. Article 23(b) specifically sets out a rule
12 allowing for non-recognition of an order from a contracting state if it is incompatible with a later
13 order from the non-contracting state of the child's habitual residence.
14

15 **SECTION 409. GENERAL CHOICE OF LAW RULES.**

16 (a) In this section the law referred to means the law in force in the state or foreign
17 country other than its conflict of law rules.

18 (b) In a proceeding under this [article] a court of this state shall apply the following
19 general choice of law rules:

20 (1) The law of this state applies unless the court determines that a foreign country
21 has a more substantial connection with the child.

22 (2) If the child becomes habitually resident in this state, the law of this state
23 governs the application of decisions taken in the country of the previous habitual residence of
24 child.

25 (3) The law of the habitual residence of the child governs the exercise of parental
26 responsibility.

27 (c) A court of this state may refuse to apply the law designated by this section if it is
28 manifestly contrary to the public policy of this state [after considering the best interests of the

1 child].

2 **Comment**

3
4 Related to Convention, Arts 15, 17, 20, 21(1), 22. These articles introduce into United
5 States cases arising under the Convention a new element: the question of the applicable law. In
6 the United States, as well as most other common law countries, allocation of competency
7 between jurisdictions in child custody and visitation cases is handled by rules of jurisdiction and
8 recognition of judgments. Choice of law is not used. A court that has jurisdiction over a custody
9 determination applies its own substantive law of custody, visitation, dependency, neglect, etc.
10 Given that choice of law is a new element for the United States, I thought the best way to
11 approach this problem may be simply to set out the choice of law rules using the Convention
12 language as much as possible.

13
14 The normal rule, contained in subparagraph (b)(1), is that a court that has jurisdiction
15 under the Convention will apply its own law, which, given that the jurisdiction is likely to be the
16 place of the child's habitual residence, will result in the application of the law of the child's
17 habitual residence. However, the court may apply the law of another state which has a more
18 substantial connection to the fact pattern.

19
20 The provision providing for the application of the law of another jurisdiction is likely to
21 be little used in the United States. Since there will be no jurisdiction for the divorce court in the
22 United States, the only concurrent jurisdiction will be urgency jurisdiction, or, possibly, presence
23 jurisdiction. It is extremely unlikely that a court asked to decide a case concerning an emergency
24 will have time to consider the law of another jurisdiction. Thus, practically all cases will be
25 heard by the court of the child's habitual residence which will apply its own law. However, it is
26 possible that there may be a case, albeit rare, where even though a court has jurisdiction as the
27 place of the child's new habitual residence, the child, over the course of time, has had more
28 connection with another country and therefore, although unlikely, the court of the child's new
29 habitual residence may wish to apply the law of the child's previous habitual residence.

30
31 Subsection (b)(2) draws a distinction between the existence of the measures and the
32 method of application of the measure in a particular state when the child's habitual residence
33 changes as required by Article 15(3). In other words, the distinction is the equivalent of the
34 distinction between the law governing the validity of a contract and the performance of a
35 contract. The substantive law governing, for example, visitation, is that of the forum. However,
36 the conditions for carrying out the visitation arrangements are that of the child's habitual
37 residence. This is particularly apt, according to the reporter, in those situations where the
38 original determination was made by the child's habitual residence and then child's habitual
39 residence changes. The Explanatory Report acknowledges that there is not a clear line between
40 the establishment of a measure and the means of carrying out the measure and suggests that the
41 line will have to be drawn on a case-by-case basis.

42
43 Subsection (b)(3) distinguishes between the existence of custodial rights and the exercise
44 of those rights. The applicable law is that of the habitual residence of the child.

1 I am unsure whether to include the bracketed phrase in subsection (e). It is in the
2 Convention and is meant to restrict the public policy defense. However, it could be used to
3 actually broaden the public policy defense, especially since the phrase comes up again in the
4 recognition section.
5

6 The term “foreign country” is used in this section because, except as provided in section
7 410, article 20 of the convention provides that the law chosen by this section is to be applied
8 even if the law is that of a non-convention country.
9

10 **SECTION 410. SPECIFIC CHOICE OF LAW RULES.**

11 (a) In this section the term “parental responsibility” means parental authority or any
12 analogous relationship of authority determining the rights, powers and responsibilities of parents,
13 guardians or other legal representatives in relation to the person of the child. [The term does not
14 include a lawyer representing a child, a guardian ad litem, or a CASA worker.]

15 (b) In a proceeding under this [article] a court of this state shall apply the following
16 specific choice of law rules:

17 (1) The attribution or extinction of parental responsibility by operation of law is
18 governed by the law of the habitual residence of the child.

19 (2) The attribution or extinction of parental responsibility by agreement or a
20 unilateral act is governed by the law of the place where the agreement or unilateral act takes
21 effect.

22 (3) The attribution of parental responsibility under the law of the habitual
23 residence of the child continues even if the child acquires a new habitual residence.

24 (4) When a child acquires a new habitual residence the law of the new habitual
25 residence determines the attribution of parental responsibility by operation of law to a person
26 who at the time of the acquisition of the new habitual residence did not have parental
27 responsibility.

28 (c) The law referred to in this section means the law in force in the chosen state or foreign

1 country other than its conflict of law rules. However, if the law referred to in this section is the
2 law of non-convention country and if the choice of law rules of the non-convention country
3 would apply the law of another non-convention country, the law of the other non-convention
4 country is applicable. If that non-convention country would not apply its own law then the law
5 applicable is as stated in this section.

6 (d) A court of this state may refuse to apply the law designated by this section if it is
7 manifestly contrary to the public policy of this state [after considering the best interests of the
8 child].

9 **Comment**

10
11 Related to Convention, Arts 16, 21(2), 22. The specific rules referred to in this section
12 are for situations where a state may have rules which provide for rights of custody, or parental
13 responsibility, by operation of law, unilateral act, or agreement. Unlike anything else in the
14 Convention, the rules do not concern decisions, but rather relationships created by local rules of
15 law. The Convention provides that these issues be determined by the habitual residence of the
16 child or the place where the unilateral act or agreement occurred,
17

18 Subsection (b)(1-3) provides that the parental responsibility that comes about by
19 operation of law, agreement or unilateral act continues even if the habitual residence of the child
20 changes.
21

22 Subsection (b)(4) deals with the reverse situation. It provides that if parents who do not
23 have parental responsibility under the law of the child's original habitual residence move to a
24 state where parental responsibility by operation of law is applicable, the law of the new habitual
25 residence applies.
26

27 Subsection (c) deals with the renvoi problem, i.e. whether the reference to the law of a
28 particular State is to that State's local law or whether the reference includes the conflict of law
29 rules of the referred to State. Article 21 (2) contains an exception to the normal rule of referring
30 only to local law for fact patterns that fall under Article 16. If the application of that article
31 designates the law of a non-convention country and if the choice-of-law rules of that state would
32 dictate applying the law of another non-convention country then the law of the second non-
33 convention country applies. If the second non-convention country would not apply its own law
34 then the Convention requires that the applicable law be that set forth in the section.
35

36 **SECTION 411. DUTY TO RECOGNIZE.**

37 (a) A child custody determination made by a court of a convention country in substantial

1 conformity with the jurisdictional provisions of this [article], or was made under factual
2 circumstances meeting the jurisdictional provisions of this [article], and has not been modified in
3 accordance with the jurisdiction standards of this [article], shall be recognized in this state [as a
4 matter of law].

5 (b) The recognition required by subsection (a) shall also apply to a custody determination
6 made by a convention country that had jurisdiction over the divorce or annulment of the parents
7 of the child if:

8 (1) one of the parents was habitually resident in the convention country;

9 (2) one of the parents of the child had custody of the child at the time the
10 proceeding for divorce or annulment was commenced; and

11 (3) the jurisdiction of the court of the convention country that decided the divorce
12 or annulment of the parents of the child was agreed to by the parents and any other person with
13 custody.

14 (c) A court of this state may recognize a child custody determination of a court of a
15 convention country under [article 3 of this Act] if that court exercised jurisdiction in substantial
16 conformity with [article 2 of this Act] or the determination was made under factual
17 circumstances meeting the jurisdictional standards of [article 2 of this Act] and the determination
18 has not been modified in accordance with [article 2 of this Act].

19 **Comment**

20
21 Related to the Convention, Art. 10, 23(1). This section sets out in subsection (a) the basic
22 rule of recognition. It requires recognition of child custody determinations made in another
23 contracting country if the child custody determination were made in accordance with the
24 jurisdictional provisions of this article.

25
26 Subsection (b) is a special case. The Convention allows a court having jurisdiction of the
27 parent's divorce or annulment to also exercise jurisdiction over child custody so long as one of
28 the parents is habitually resident in the country, one parent has parental responsibility and the

1 parties, as well as anyone else with parental responsibility, agree. This jurisdictional basis is not
2 required under the Convention. However, the Convention does require recognition of custody
3 determinations made in accordance with its jurisdictional standard be recognized. Therefore
4 even though the United States does not have this jurisdictional basis to determine custody, the
5 Convention does require recognition of custody determinations made by the divorce court under
6 the circumstances set out in Article 10 of the Convention.

7
8 The jurisdiction authorized under Article 10 for the court of the divorce or annulment
9 ceases when the divorce or annulment proceedings end. There is no continuing jurisdiction
10 under the Convention. Therefore proceeding to modify the determination made by the divorce
11 court are governed by Section 402.

12
13 The convention requires recognition as a matter of law without the intervention of a court
14 or other tribunal. Recognition “by operation of law” means that it is not necessary to commence
15 proceedings for the measure to be recognized in the requested Contracting State and for it to
16 produce its effects there. An example set out by the Permanent Bureau in the Practical
17 Handbook, and slightly modified, is as follows:

18
19 A family are habitually resident in Contracting State A. Following the breakdown
20 of the parents’ relationship, the court in Contracting State A, with the agreement
21 of the father, grants the mother sole custody of the child. A year later, the mother
22 lawfully moves with the child to Contracting State B. She wishes to enroll the
23 children in school. Her sole custody of the child which will allow enrollment in
24 school will be recognized by operation of law in Contracting State B without her
25 taking any further action. She will not have to apply to the judicial or
26 administrative authorities in Contracting State B for recognition of the custody
27 order.

28
29 I have placed this language in brackets. It raises the issue of to whom this act should be
30 addressed. The example seems to assume that this Convention will be known to the appropriate
31 school administrator. However, this act is addressed to judges who will decide cases. The
32 drafting committee should discuss whether to limit this act to judges or whether the act has
33 broader applicability to all decisions whether or not made by judges, and should also be applied
34 by other administrators before whom these issue may appear.

35
36 Subsection (c) sets forth one of the ideas expressed in the alternative version of section
37 105. It arises out of the fact that the grounds for non-recognition which are set out in Article
38 23(2) of the convention are not phrased in mandatory standards. In other words there is nothing
39 in the Convention which prohibits a court from recognizing a custody determination made by a
40 convention country that did not comply with the jurisdictional standards of the Convention. This
41 section would expand the United States recognition of foreign convention country custody
42 determinations to those made in conformity with the jurisdictional standards of article 2 even if
43 they did not comply with the jurisdictional standards of this article. Recognition is not
44 mandatory under this alternative standard, but it permissive.

45
46 **SECTION 412. REGISTRATION OF CONVENTION ORDER. [IF**

1 **ALTERNATIVE A OF SECTION 305 IS CHOSEN]**

2 (a) An order issued by a court of a convention country may be registered in this state ,
3 with or without a simultaneous request for enforcement, by sending to [the appropriate court] in
4 this state:

5 (1) a letter or other document requesting registration;

6 (2) two copies in the original language and two copies in English, including one
7 certified copy, of the determination sought to be registered, and a statement under penalty of
8 perjury that to the best of the knowledge and belief of the person seeking registration the order
9 has not been modified; and

10 (3) except as otherwise provided in Section 209, the name and address of the
11 person seeking registration and any parent or person acting as a parent who has been awarded
12 custody or visitation in the order sought to be registered.

13 (b) On receipt of the documents required by subsection (a), the registering court shall:

14 (1) cause the determination to be filed as a foreign judgment, together with one
15 copy of any accompanying documents in the original language and one copy in English, and
16 information, regardless of their form; and

17 (2) serve notice upon the persons named pursuant to subsection (a)(3) and provide
18 them with an opportunity to contest the registration in accordance with this section.

19 (c) The notice required by subsection (b)(2) must state that:

20 (1) a registered order is enforceable as of the date of the registration in the same
21 manner as an order issued by a court of this state ;

22 (2) a hearing to contest the validity of the registered order must be requested
23 within 20 days after service of notice, or 60 days if the party does not live in the United States;

1 and

2 (3) failure to contest the registration will result in confirmation of the order and
3 preclude further contest of that order with respect to any matter that could have been asserted.

4 (d) A person seeking to contest the validity of a registered order must request a hearing
5 within 20 days after service of the notice, or 60 days if the person does not live in the United
6 States. At that hearing, the court shall confirm the registered order unless the person contesting
7 registration establishes that:

8 (1) the issuing court did not have jurisdiction under this [article] ;

9 (2) the child-custody determination sought to be registered has been vacated,
10 stayed, or modified by a court having jurisdiction to do so under this [article] ;

11 (3) the person contesting registration was entitled to notice, but notice was not
12 given in accordance with the standards of Section 108, in the proceedings before the court that
13 issued the order for which registration is sought;

14 (4) except in the case of an emergency, the order was made without any
15 opportunity for the child to have input into the order sought to be enforced in violation of
16 fundamental principles of this state;

17 (5) the order is incompatible with a later order made by a non-convention country
18 of the habitual residence of the child;

19 (6) the order is manifestly contrary to the public policy of this state [taking into
20 account the best interests of the child]; or

21 (7) the procedure provided for in Section 416(a) has not been followed.

22 (e) A court of this state shall be bound by the findings of fact of the issuing court and
23 shall not review the merits of the order.

1 (f) If a timely request for a hearing to contest the validity of the registration is not made,
2 the registration is confirmed as a matter of law and the person requesting registration and all
3 persons served must be notified of the confirmation.

4 (g) Confirmation of a registered order, whether by operation of law or after notice and
5 hearing, precludes further contest of the order with respect to any matter that could have been
6 asserted at the time of registration.

7 **Comment**

8
9 Related to the Convention, Arts 23(2), 24, 25, 26, 28, 54. This article is an adaptation of
10 the registration procedure under Section 305 to convention cases. The Convention provides that
11 any interested person may request a determination by the court of another convention country on
12 whether a decision taken in a contracting country can be recognized. The example discussed in
13 the report is a situation where a mother in Country A has been granted custody with a proviso
14 that she may not change the child's habitual residence without the permission of the father. The
15 father is willing to allow the mother to change the child's habitual residence to Country B, but
16 not to Country C. He might wish a pre-determination in Country B that it would continue to
17 recognize the father's ability to restrict the mother's efforts to change the child's habitual
18 residence from Country B. The report also suggests that this principle would work to allow an
19 interested person to obtain a pre-declaration on non-recognition. This section provides the
20 procedure to request such a determination through a registration procedure very similar to that
21 already in place. Indeed its use for this purpose was contemplated by the original UCCJEA
22 drafting committee.
23

24 Of necessity some changes had to be made from the original version of Section 305. The
25 first of these is in (a)(2) which deals with the translation problem. In accordance with Article 54
26 of the Convention this subsection requires that the documents be sent in the original language as
27 well as a translation into English. This issue was not addressed in the original UCCJEA even
28 though that Act is applicable internationally.
29

30 The amount of time necessary to contest a registered order has been extended to 60 days
31 for persons not living in the United States. See UIFSA §707.
32

33 There is an important issue that needs to be considered at this point. The Convention
34 does not require that the establishment of any of the defenses listed in Article 23(2) result in non-
35 recognition. It only provides that a country may refuse to recognize a decision from another
36 convention country if any of the defenses are established. The issue for the drafting committee is
37 whether any of these defenses should be mandatory. For purposes of discussion I have drafted
38 the defenses in this and other articles as mandatory, i.e. once the respondent proves one of the
39 defenses the order cannot be recognized. For purposes of non-convention countries the defenses
40 set out in (d)(1), (2), and (3) are mandatory since that was the way the UCCJEA was drafted,

1 although in the Convention these are permissive only. The drafting committee needs to consider
2 whether all the defenses should be mandatory, permissive, or whether some should be mandatory
3 and others permissive.
4

5 Otherwise, subsection (d) adds to the defenses to registering an order, those defenses
6 listed in Article 23(b) that were not contained in the UCCJEA. These include subsection (4) for
7 those cases where the child did not have any input into the proceedings and the failure to solicit
8 the child's views violates the fundamental procedural policy of this state. I suspect this would
9 rarely occur in the United States, however, outgoing cases will have to be carefully documented
10 to insure United States orders are enforced abroad. Added also are sections that the order is
11 incompatible with a later order issued by the non-convention state of the child's habitual
12 residence as well as a public policy defense which replicates that found under the applicable law
13 sections.
14

15 The defense found in subsection (7) is one we may well want to consider. That refers to
16 section 416(a) , Article 33 under the convention, which requires that if a court of another country
17 is considering placing a child in this state it must first consult with the appropriate authority in
18 this state and obtain this state's consent. While we must comply with article 33 for outgoing
19 cases, we are not obliged to have this defense to incoming cases.
20

21 Subsection (e) implements Article 25 and 27 which require that the enforcing court is
22 bound by the findings of fact of the issuing court and cannot review the merits of the original
23 order.
24

25 **SECTION 412. REGISTRATION OF CONVENTION ORDER [ANOTHER**

26 **ALTERNATIVE].** Registration of a child-custody determination issued by a convention
27 country is governed by Section 305 with the following exceptions:

28 (1) Four copies of the custody determination sought to be enforced must be sent to the
29 [appropriate court]. Two copies must be in the original language and two copies must be in
30 English, including one certified copy of the determination sought to be registered.

31 (2) The court shall file two copies as a foreign judgment. One copy shall be in English
32 and one shall be in the original language.

33 (3) The notice shall provide that a hearing to contest the validity of the registered
34 determination must be requested within 60 days if the contesting party does not reside in the
35 United States.

1 (4) The person seeking to contest of a registered order must request a hearing within 60
2 days if that person does not live in the United States.

3 (5) The following defenses to the registered order may be raised:

4 (A) the issuing court did not have jurisdiction substantially in accordance with
5 [this Article];

6 (B) the child-custody determination sought to be registered has been vacated,
7 stayed, or modified by a court having jurisdiction to do so substantially in accordance with under
8 [this Article];

9 (C) the person contesting registration was entitled to notice, but notice was not
10 given in accordance with the standards of Section 108, in the proceedings before the court that
11 issued the order for which registration is sought;

12 (D) the order was made without any opportunity for the child to have input into
13 the determination sought to be enforced in violation of fundamental principles of this state;

14 (E) the order is incompatible with a later order made by a non-convention country
15 of the habitual residence of the child;

16 (F) the order is manifestly contrary to the public policy of this state [taking into
17 account the best interests of the child]; or

18 (G) the procedure provided for in Section 416(a) was not followed.

19 (5) A court of this state shall be bound by the findings of fact of the issuing court and
20 shall not review the merits of the order.

21 **Comment**

22 The approach leaves 305 as the governing law and specifies how it is different for
23 convention cases. The same approach is taken with alternatives to section 413 and 415.

24 **SECTION 413. EXPEDITED ENFORCEMENT OF CONVENTION COUNTRY**

1 **ORDERS.**

2 (a) The remedies to enforce an order from a convention country are governed by the law
3 of this state, including Sections 311, 312, 313, 315, 316 and 317 of this [Act].

4 (b) A petition under this [article] must be verified. Certified copies of all orders sought to
5 be enforced and of any order confirming registration must be attached to the petition. One copy
6 must be in the original language and one copy must be in English. A copy of a certified copy of
7 an order may be attached instead of the original.

8 (c) A petition for enforcement of a child-custody determination must state :

9 (1) whether the court that issued the determination identified the jurisdictional
10 basis it relied upon in exercising jurisdiction and, if so, what the basis was;

11 (2) whether the determination for which enforcement is sought has been vacated,
12 stayed, or modified by a court whose decision must be enforced under this [article] and, if so,
13 identify the court, the case number, and the nature of the proceeding;

14 (3) whether any proceeding has been commenced that could affect the current
15 proceeding, including proceedings relating to domestic violence, protective orders, termination of
16 parental rights, and adoptions and, if so, identify the court, the case number, and the nature of the
17 proceeding;

18 (4) the present physical address of the child and the respondent, if known;

19 (5) whether relief in addition to the immediate physical custody of the child and
20 attorney's fees is sought, including a request for assistance from [law enforcement officials] and,
21 if so, the relief sought; and

22 (6) if the child-custody determination has been registered and confirmed under
23 Section 412, the date and place of registration.

1 (d) A court of this state shall be bound by the findings of fact of the issuing court and
2 shall not review the merits of the order.

3 (e) Upon the filing of a petition, the court shall issue an order directing the respondent to
4 appear in person with or without the child at a hearing and may enter any order necessary to
5 ensure the safety of the parties and the child. The hearing must be held on the next judicial day
6 after service of the order unless that date is impossible. In that event, the court shall hold the
7 hearing on the first judicial day possible. The court may extend the date of hearing at the request
8 of the petitioner.

9 (f) An order issued under subsection (c) must state the time and place of the hearing and
10 advise the respondent that at the hearing the court will order that the petitioner may take
11 immediate physical custody of the child and the payment of fees, costs, and expenses under
12 Section 312, and may schedule a hearing to determine whether further relief is appropriate,
13 unless the respondent appears and establishes that:

14 (1) the child-custody determination has not been registered and confirmed under
15 Section 412 and that:

16 (A) the issuing court did not have jurisdiction under this [article] ;

17 (B) the child-custody determination for which enforcement is sought has
18 been vacated, stayed, or modified by a court having jurisdiction to do so under this [article] ; or

19 (C) the respondent was entitled to notice, but notice was not given in
20 accordance with the standards of Section 108, in the proceedings before the court that issued the
21 order for which enforcement is sought;

22 (D) the order was made without any opportunity for the child to have input
23 into the order sought to be enforced in violation of fundamental principles of this state;

1 (E) the order is incompatible with a later order made by a non-convention
2 country of the habitual residence of the child;

3 (F) the order is manifestly contrary to the public policy of this state [taking
4 into account the best interests of the child]; or

5 (G) the procedure provided for in Section 417 has not be followed, or

6 (2) the order for which enforcement is sought was registered and confirmed under
7 Section 412, but has been vacated, stayed, or modified by a court of a state having jurisdiction to
8 do so under this [article] .

9 **Comment**

10 Related to Convention, Arts 23(b), 26. This is section 308 modified slightly to fit
11 convention cases. The modification adds grounds for non-recognition and enforcement under
12 article 23(b).
13

14 The other modification of section 308 is subsection (a) which makes it clear that the
15 remedies available for enforcement are governed by the law of this state. There is then a
16 reference to sections of article 3 to make it clear that those sections are applicable to enforcement
17 proceeding under this article.
18

19
20 **SECTION 413. EXPEDITED ENFORCEMENT OF CHILD-CUSTODY**
21 **DETERMINATION [ANOTHER ALTERNATIVE].**

22 (a) The expedited procedure for enforcement of convention country orders is governed by
23 Section 308 with the following exceptions:

24 (1) One copy of the order sought to be enforced must be in the original language
25 and one copy must be in English.

26 (2) The order issued under Section 312(c) must state the time and place of the
27 hearing and advise the respondent that at the hearing the court will order that the petitioner may
28 take immediate physical custody of the child and the payment of fees, costs, and expenses under
29 Section 312, and may schedule a hearing to determine whether further relief is appropriate,

1 unless the respondent appears and establishes that:

2 (A) the child-custody determination has not been registered and confirmed
3 under Section 412 and that:

4 (aa) the issuing court did not have jurisdiction under this [article];

5 (bb) the child-custody determination for which enforcement is
6 sought has been vacated, stayed, or modified by a court having jurisdiction to do so substantially
7 in accord under this [article]; or

8 (cc) the respondent was entitled to notice, but notice was not given
9 in accordance with the standards of Section 108, in the proceedings before the court that issued
10 the order for which enforcement is sought;

11 (dd) the order was made without any opportunity for the child to
12 have input into the order sought to be enforced in violation of fundamental principles of this
13 state;

14 (ee) the order is incompatible with a later order made by a non-
15 convention country of the habitual residence of the child;

16 (ff) the order is manifestly contrary to the public policy of this state
17 [taking into account the best interests of the child]; or

18 (gg) the procedure provided for in Section 416(a) has not be
19 followed, or

20 (B) the order for which enforcement is sought was registered and confirmed under
21 Section 412, but has been vacated, stayed, or modified by a court of a state having jurisdiction to
22 do so substantially in accordance with this [article] .

23 (b) A court of this state shall be bound by the findings of fact of the issuing court and

1 shall not review the merits of the order.

2 (c) Additional remedies to enforce an order from a convention country are governed by
3 the law of this state, including Sections 311, 312, 313, 315, 316 and 317 of this [Act].

4 **SECTION 414. SERVICE OF PETITION AND ORDER.** Except as otherwise
5 provided in Section 311, the petition and order must be served, by any method authorized [by the
6 law of this state], upon the respondent and any person who has physical custody of the child.

7 **SECTION 415. HEARING AND ORDER.**

8 (a) Unless the court issues a temporary emergency order pursuant to Section 405, upon a
9 finding that a petitioner is entitled to immediate physical custody of the child, the court shall
10 order that the petitioner may take immediate physical custody of the child unless the respondent
11 establishes that:

12 (1) the order has not been registered and confirmed under Section 412 and that:

13 (A) the issuing court did not have jurisdiction substantially in accordance
14 with this [article];

15 (B) the child-custody determination for which enforcement is sought has
16 been vacated, stayed, or modified by a court of a convention country having jurisdiction
17 substantially in accordance with this [article] ;

18 (C) the respondent was entitled to notice, but notice was not given in
19 accordance with the standards of Section 108, in the proceedings before the court that issued the
20 order for which enforcement is sought;

21 (D) the order was made without any opportunity for the child to have input
22 into the order sought to be enforced in violation of fundamental principles of this state;

23 (E) the order is incompatible with a later order made by a non-convention

1 country of the habitual residence of the child;

2 (F) the order is manifestly contrary to the public policy of this state [taking
3 into account the best interests of the child]; or

4 (G) the procedure provided for in Section 416 (a) has not be followed, or
5 (2) the child-custody determination for which enforcement is sought was
6 registered and confirmed under Section 412 but has been vacated, stayed, or modified by a court
7 of a having jurisdiction to do so under this [article].

8 (b) A court of this state shall be bound by the findings of fact of the issuing court and
9 shall not review the merits of the order.

10 (c) The court shall award the fees, costs, and expenses authorized under Section 312 and
11 may grant additional relief, including a request for the assistance of [law enforcement officials],
12 and set a further hearing to determine whether additional relief is appropriate.

13 (d) If a party called to testify refuses to answer on the ground that the testimony may be
14 self-incriminating, the court may draw an adverse inference from the refusal.

15 (e) A privilege against disclosure of communications between spouses and a defense of
16 immunity based on the relationship of husband and and wife or parent and child may not be
17 invoked in a proceeding under this [article].

18 **Comment**

19
20 This is section 310 of article 3, modified to take account of the additional defenses to
21 enforcement set out in Article 23(b) of the Convention.

22
23 **SECTION 415. HEARING AND ORDER [ANOTHER ALTERNATIVE].** The
24 hearing and order are governed by Section 310, with the following exception:
25 Unless the court issues a temporary emergency order pursuant to Section 405, upon a finding that
26 a petitioner is entitled to immediate physical custody of the child, the court shall order that the

1 petitioner may take immediate physical custody of the child unless the respondent establishes
2 that:

3 (1) the order has not been registered and confirmed under Section 412 and that:

4 (A) the issuing court did not have jurisdiction substantially in accordance with this
5 [article];

6 (B) the child-custody determination for which enforcement is sought has been
7 vacated, stayed, or modified by a court of a convention country having jurisdiction substantially
8 in accordance with this [article] ;

9 (C) the respondent was entitled to notice, but notice was not given in accordance
10 with the standards of Section 108, in the proceedings before the court that issued the order for
11 which enforcement is sought;

12 (D) the order was made without any opportunity for the child to have input into
13 the order sought to be enforced in violation of fundamental principles of this state;

14 (E) the order is incompatible with a later order made by a non-convention country
15 of the habitual residence of the child;

16 (F) the order is manifestly contrary to the public policy of this state [taking into
17 account the best interests of the child]; or

18 (G) the procedure provided for in Section 416 (a) has not be followed, or

19 (2) the child-custody determination for which enforcement is sought was registered and
20 confirmed under Section 412 but has been vacated, stayed, or modified by a court of a having
21 jurisdiction substantially in accordance with this [article].

22 **SECTION 416. COOPERATION WITH CONVENTION COUNTRIES.**

23 (a) A court of this state contemplating placing a child in foster care, institutional care, or

1 an analogous situation in a convention country must:

2 (1) consult with the appropriate authority in the other convention country; and

3 (2) obtain the consent of that country prior to making the placement.

4 (b) A court of this state, at the request of a parent who is seeking to obtain or maintain
5 visitation and has asked the authorities of the convention country of the residence of the parent to
6 make a finding on the suitability of that parent to exercise visitation, may stay the proceeding
7 pending receipt of the information from the convention country. A court of this state shall admit
8 such information and consider it before making a decision on visitation.

9 **Comment**

10 Related to the Convention, Arts 33, 35.

11 **[ARTICLE] 45**

12 **MISCELLANEOUS PROVISIONS**

13 **SECTION 4501. APPLICATION AND CONSTRUCTION.** In applying and
14 construing this Uniform Act, consideration must be given to the need to promote uniformity of
15 the law with respect to its subject matter among States that enact it.

16 **SECTION 4502. SEVERABILITY CLAUSE.** If any provision of this [Act] or its
17 application to any person or circumstance is held invalid, the invalidity does not affect other
18 provisions or applications of this [Act] which can be given effect without the invalid provision or
19 application, and to this end the provisions of this [Act] are severable.

20 **SECTION 4503. EFFECTIVE DATE.** This [Act] takes effect

21 **SECTION 4504. REPEALS.** The following acts and parts of acts are hereby repealed:

22 **SECTION 4505. TRANSITIONAL PROVISION.** A motion or other request for relief
23 made in a child-custody proceeding or to enforce a child-custody determination which was

1 commenced before the effective date of this [Act] is governed by the law in effect at the time the
2 motion or other request was made.