ESSAY

French Enforcement of the Hague Convention on International Child Abduction: A Case Study

Ronald P. Sokol*

* LL.M. 1963, University of Virginia; J.D. 1962, Duke University. From 1963-1966, Mr. Sokol served as the Director of Appellate Legal Aid and Lecturer-in-Law at the University of Virginia Law School. Since 1973, he has had his own law practice in Aix-en-Provence, France. He is a member of the Wisconsin bar and of the bar of Aix-en-Provence. Mr. Sokol is admitted to practice in France as an *avocat* and regularly practices before the French courts.

I. INTRODUCTION

On October 30, 2002, Charlotte K., accompanied by her father, boarded an Air France plane in Marseille, headed for Paris and then New York. Later that day the two arrived safely at New York's John F. Kennedy International Airport. Charlotte's father's eight month legal saga of trying to get his ten year old child back from France had finally ended; it had not been easy.

As counsel to the father throughout the French proceedings, the case was a dramatic, but fascinating, exercise in enforcement of a clear multilateral treaty obligation in the face of evident emotional pulls in the opposite direction. Whereas the trial judge yielded to this pull, the three-judge appellate court, much to the surprise of Charlotte's father, the United States Department of State, and myself, upheld the treaty and ordered the child's "immediate" return. In the context of treaty enforcement in France, eight months must be considered "immediate."

It started in 1986 when Glenn K. met Dominique, a French citizen, in New York where they both lived. At that time, both adhered to the tenets of scientology. Glenn and Dominique married and, in 1992, Charlotte was born in New York. Their child was both an American citizen by virtue of her birth, and, under French law, a French citizen by virtue of her mother's nationality.

In 1996, Glenn and Dominique divorced in New York. Their initial custody arrangement placed Charlotte principally with her mother and granted Glenn liberal visitation rights, however they modified the agreement in 1999 to provide for equal shared parenting. In addition, the custody agreement contained a two sentence clause, which eventually made my task as Glenn's French counsel considerably more difficult. The clause provided "[t]he child shall be permitted to study and attend Scientology classes and events." Because the French government categorizes Scientology as a cult, or what the French call a "sect," opposing counsel continually paraded this clause before the French judges.

Sometime in 2000, Dominique decided she wanted to return to France to live. She and Glenn agreed to change their custody arrangements and proceeded, with the assistance of counsel of their own choosing, to negotiate a new arrangement. The parties agreed that Charlotte would stay in the United States with her father, who would have sole custody, and Dominique would have liberal visitation rights. Charlotte would spend five weeks in France with her mother during her summer holiday, Easter and Christmas holidays would be alternated, and

Charlotte would go to France every winter for the February school recess. Although Glenn had stopped attending Scientology sessions and had stopped all contact with the group since his remarriage in 1997, the Scientology clause remained in the new agreement, which the parties formalized and had adopted by the Supreme Court of New York for Suffolk County. That court entered its order on April 21, 2001.

Early in 2001, Dominique moved back to France; Charlotte remained in New York with her father. That spring, at nine years of age, Charlotte made her first trip to France. She went alone, spent ten days with her mother, and then returned. That summer she again went to France, spending just over a month with her mother and returning to New York on August 31, 2001.

On February 14, 2002, Charlotte left New York for France with a roundtrip plane ticket for her winter visit. Her return flight was scheduled for February 24, 2002. On the morning of February 24, Glenn received a message from Dominique saying Charlotte was not on the plane and that Dominique needed to talk about the situation. Glenn phoned back and Dominique told him that Charlotte did not want to return; Charlotte wanted to spend more time with her mother and, therefore, they had not gone to the airport that day. Glenn told Dominique to put Charlotte on the next flight back to New York. It did not happen. Although the French judicial system thereafter operated at its ultimate speed, eight months would pass before Charlotte returned to New York.

In late October, Dominique finally relinquished her control. At that point, she faced an appellate court decision ordering Charlotte's immediate return to New York, coupled with an assurance from the prosecutor's office that she would be pursued in the criminal court if she did not hand over Charlotte. Moreover, we confronted Dominique with the presence of an American consular officer who accompanied Glenn and the knowledge that the penalty for failure to turn Charlotte over was a year in prison and a $15,000 fine. Only then, after nearly three hours of refusal and after having brought in the French press, did Dominique tearfully allow Charlotte to leave.

II. THE LEGAL PROCEEDINGS

A. Initial Maneuvering

When Dominique failed to return Charlotte on February 24, 2002, Glenn immediately notified the New York police. This led to the filing of a New York "Domestic Incident Report." Glenn then contacted the

U.S. State Department and proceeded to file an "Application for Assistance" under the Hague Convention on International Child Abduction (the Hague Convention).[1] By March 5, 2002, he had completed the application and assembled the required supporting documents. Meanwhile, in France, on February 28, 2002, Dominique's counsel filed a petition in the Family Law Division of the *Tribunal de grande instance*[2] in Nîmes requesting a change of custody. The petition stated:

> Charlotte returned to France for the winter holidays in February, 2002. At the end of the holidays she displayed her deep distress at having to leave for the United States. It is manifest that this young child who just turned ten is suffering from not being able to see her mother save for two or three times a year. Mme. has found it impossible to convince Charlotte to return to her paternal domicile. In such circumstances it appears appropriate in light of the child's profound desire to live with her mother, to modify the place of residence and to fix the residence at the maternal domicile.[3]

The hearings on this petition and on the Hague Convention Application were initially set for the same day, April 30, 2002, before the same judge. As counsel to Glenn K., I responded to this change of custody petition by requesting that the court refrain from ruling on the custody petition until the Hague Convention proceeding was resolved. At the April 30 hearing, the court agreed to defer its hearing on Dominique's change of custody petition until the date it had fixed for its ruling on the Hague Convention application.

B. Substantive Provisions of the Hague Convention

1. Objectives

The multilateral Hague Convention has been ratified by both France and the United States.[4] It has been in force in France since 1983, and in the United States since 1989.[5] The treaty requires the immediate return

---

1. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 98, *reprinted in* 51 Fed. Reg. 10,493 (Mar. 26, 1986), *available at* http://travel.state.gov/hague_childabduction.html (last visited Mar. 25, 2003) [hereinafter Hague Convention].

2. This is the basic trial court of general jurisdiction. There are 175 such courts in metropolitan France. L'organisation de la justice en France, *at* http://www.justice.gouv.fr/justorg/tgi.htm (last visited Apr. 15, 2003).

3. Petition for Dominique D. [author's translation] (on file with author).

4. *See* Hague Convention, *supra* note 1.

5. In 1989, the United States passed the legislation necessary for implementation of the Hague Convention. *See* International Child Abduction Remedies Act (ICARA), 42 U.S.C. §§ 11601-11610 (1995). Currently, over fifty countries are party to the Hague Convention.

of a child who has been unlawfully abducted and obliges each party to the treaty to use all appropriate measures to achieve this goal and to utilize its expedited procedures.[6]

The term "abduction" in the title of the Hague Convention is misleading because a treaty violation can actually occur either through an abduction or through a retention, which is a failure to return a child.[7] In Charlotte's case, the violation at issue was a retention, rather than an abduction, because Glenn had voluntarily sent Charlotte to France.

2. Illicit Behavior

The concept of unlawfulness under the Convention is quite simple. Article 3 defines an abduction or a retention as "wrongful" if it violates a right to custody in the jurisdiction of the child's principal residence just prior to the abduction or retention.[8] If the abduction or retention meets that definition, however, this does not end the inquiry, as the Convention may not even apply in certain instances. For example, article 4 provides that it does not apply to a child who has attained the age of sixteen.[9] Moreover, article 12 states that a court which is asked to return a child need not do so unless less than one year has passed between the wrongful removal or retention and the date of filing the petition requesting the child's return.[10]

3. Escape Clauses

Article 13 provides some escape clauses.[11] A court need not order the child's return if the person who opposes the return can show that the

---

6. *See* Hague Convention, *supra* note 1, arts. 1-2. *See generally* Peter Pfund, *The Hague Convention on International Child Abduction, The International Child Abduction Remedies Act, and the Need for Availability of Counsel for All Petitioners*, 24 FAM. L.Q. 35 (1990). As the author of the article was the Assistant Legal Adviser for Private International Law at the U.S. Department of State, his comments are of particular interest.

7. *See* Hague Convention, *supra* note 1, pmbl., arts. 1-3.

8. *Id.* art. 3(a).

9. *Id.* art. 4.

10. *See id.* art. 12.

11. *See id.* art. 13. Article 13 is curiously drafted. It states in pertinent part:

> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that—
>
> a. the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
>
> b. there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

person who had custody was not effectively exercising it,[12] or if the custodian has after the abduction or failure to return the child either consented to or acquiesced in the change of status,[13] or if there exists a serious risk that returning the child will expose it to either physical or psychic harm,[14] or that the return of the child will in any other way put it in an intolerable situation.[15] Finally, the court can refuse to return a child if it finds the child opposes its return and the child has reached an age and a maturity that makes it appropriate to take its opinion into account.[16]

4. Analytic Framework

Setting aside the instances in which the treaty does not apply (articles 4 and 12), one must make a two-pronged analysis. The first prong requires a determination of whether there has been a wrongful abduction or retention under article 3.[17] The second prong determines whether any of the seven escape clauses in article 13 apply.[18] In

---

> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.
>
> In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Id. Only two of the four exceptions paragraphs are numbered. The first two exceptions paragraphs are identified as a and b. *Id.* art. 13(a)-(b). The two subsequent paragraphs are not identified at all. Article 13(a) contains the following three exceptions: (1) the true custodian was not in fact exercising custody prior to the abduction or retention; (2) the true custodian consented to the abduction or retention after it occurred; and (3) the true custodian acquiesced in the abduction or retention after it occurred. *Id.* art. 13(a)

Article 13(b) lists three more exceptions: (1) a serious risk of exposing the child to physical danger upon return exists; (2) a serious risk of exposing the child to psychological harm upon return exists; and (3) the requested return will in any other way place the child in an intolerable situation. *Id.* art. 13(b).

The fourth paragraph, which one would expect to be labeled c is not labeled at all. It contains another exception: the court need not order the return if the child opposes the return and has attained an age and a maturity whereby it is appropriate to take into account the child's opinion. *Id.* art. 13. The last paragraph simply states that, in evaluating the above exceptions, the court should consider information furnished by the Central Authority of the country of the child's habitual residence. *Id.* There are thus seven actual exceptions to the immediate return requirement. *See id.*

12. *Id.* art. 13(a).
13. *Id.*
14. *Id.* art. 13(b).
15. *Id.*
16. *Id.* art. 13.
17. *See id.* art. 3.
18. *See id.* art. 13.

Charlotte's case, as is typical of Hague Convention proceedings, article 13 proved to be the critical article.

The first question involved which exceptions Dominique intended to invoke. During the course of the proceedings Dominique's counsel shifted her ground. In her initial petition to the French family law judge, she had invoked only the seventh exception—Charlotte's desire to remain in France.[19] However, by the end of the proceedings before the Court of Appeals of Nîmes, Dominique's counsel had invoked all of the exceptions save the first three.[20] As opposing counsel, I initially directed most of my argument towards refuting the applicability of the escape clause.[21]

C. Procedure Under the Hague Convention

Article 6 of the Hague Convention requires that each adhering country designate a "Central Authority."[22] The State Department represents the Central Authority in the United States. More specifically, the Central Authority consists of the Office of Children's Issues, which falls under Overseas Citizens Services within the Bureau of Consular Affairs. In France, the Ministry of Justice serves that purpose. Article 7 imposes a duty of cooperation between the Central Authorities so as to ensure the immediate return of the illicitly abducted or retained child.[23] The Convention grants the Central Authority extensive power to locate the child, attempt to achieve the child's voluntary return, and, if possible, to facilitate a settlement.[24]

As a practical matter, under article 8, the parent who lost custody must request the assistance of its Central Authority.[25] That authority provides the parent with a form which supplies all of the relevant information and supporting documents.[26] In Charlotte's case, therefore, Glenn sought the assistance of the United States State Department which provided him the form and guided him in its completion. The State Department then transmitted Glenn's application to the French Central Authority which turned it over to the nearest *Parquet*, which is the French equivalent of the U.S. Attorney's Office. In this case, as Dominique lived in the city of Nîmes, the case was sent to the *Parquet* in Nîmes.

---

19. Petition for Dominique D. (on file with author).
20. Appellate Brief for Dominique D. (on file with author).
21. Trial Brief for Glenn K. (on file with author).
22. Hague Convention, *supra* note 1, art. 6.
23. *Id.* art. 7.
24. *Id.* arts. 7-10.
25. *See id.* art. 8.
26. *See id.*

The moving party for the return of the child is the government of the Central Authority;[27] in Charlotte's case, France was the moving party. The individual parties also have the right to counsel of their own choosing[28] and to legal aid if they are unable to afford counsel.[29] Dominique availed herself of this right and benefited from French counsel paid for by the French government. Counsel was also appointed to represent Charlotte as a minor child, and this counsel too was paid for by virtue of French legal aid.[30] I was retained by Glenn to represent him.[31] The initial Hague Convention application pleadings thus showed as the moving parties the French Prosecutor and Glenn, with Dominique as defendant, and the minor child as being represented.

D. Settlement Attempts

Although I have been handling family law cases in France for almost thirty years and exclusively international cases, I have not yet ceased to be surprised by the decisions people make. Nothing seemed more foolish than Dominique's choice to disregard her prior commitments and a New York court order. If Dominique persisted in refusing to return Charlotte, the courts would no doubt order her return, leaving Glenn forever fearful of allowing Charlotte to return to France. As a result, a child with two cultural heritages would be denied one of them. In my naïve optimism, I thought if I could convey this message to Dominique she would see, despite her intense desire to be with her child, the only sensible option was to send Charlotte back. Thereafter, Dominique could try to persuade Glenn to change the custody arrangement.

The Hague Convention itself imposes a duty on the Central Authority to take all appropriate measures to insure the voluntary return of the child and to facilitate a settlement.[32] I thus inquired of the Prosecutor whether he had taken any steps to fulfill this duty. The

---

27. *See id.* art. 10.
28. *See id.* art. 7(g).
29. *See id.* art. 25.
30. Under French law, the role of a minor's counsel is extremely limited. While not explicit from the text, in practice counsel does not have a duty to present what is in the best interests of the child or to take a position on the arguments raised by the other parties, but must simply meet with the child, listen to what she says, and transmit it to the court. *See* C. CIV. art. 388-1 (Fr.).
31. At the end of the trial proceedings, which resulted in a judgment refusing to order the return of the child, Glenn had exhausted his financial resources and was prepared to abandon his efforts from lack of means to pursue them. At that point, I offered to continue the case on a *pro bono publico* basis, foregoing a fee and only being reimbursed for expenses incurred.
32. Hague Convention, *supra* note 1, art. 7(c).

Prosecutor informed me that he had spoken with Dominique and had tried to resolve the matter, but that she adamantly refused to return the child. I then contacted Dominique's counsel to explain, as diplomatically as possible, the likely consequences of her client's actions and to request a meeting with Dominique in counsel's presence. Dominique's counsel did not agree with my assessment of the situation. In fact, she said the child had become too fat in the United States, and reiterated that Charlotte wanted to be with her mother.

Dominique's counsel did arrange a meeting with Dominique, but not until April 30, shortly before the scheduled hearing. Charlotte's counsel also joined us at that meeting, but said she would simply listen and did not even want copies of the brief I was submitting to the court, as her mandate limited her to conveying the child's views. The meeting lasted no more than fifteen minutes. I explained to Dominique that Charlotte would suffer the most from this exercise and that after, what seemed to me, Charlotte's inevitable return to New York, the likelihood that her father would again send her back to France seemed slight. Unfortunately, Dominique's counsel did not share my view that a return to New York was inevitable, and aggressively defended her client's actions. My efforts were in vain; we proceeded to court.

E. The April 30 Hearing and May 14 Decision

We presented the case before a single family court judge, a woman of about forty-five years of age and the mother of four children. She had a reputation among the local members of the bar of being a good, conscientious judge, strict on the law but inordinately slow.[33] Present at the hearing, which was held in chambers, were myself, Dominique's counsel, Dominique, counsel to Charlotte, and a representative of the Prosecutor's office. I spoke first, arguing that the failure to return Charlotte was clearly wrongful under article 3 of the Convention. I argued that it violated an existing right of custody, which had been granted by the judgment of a New York court, the jurisdiction of Charlotte's habitual residence immediately prior to her failure to return,[34] and that her father had effectively exercised this custody right.[35] Support for Charlotte's habitual residence was bolstered by the fact that Charlotte had been born in New York and had lived there for the ten years of her life. I submitted school documents Glenn obtained for me showing that

33. In some cases, she had taken over a year to render a decision. In fact, she was so slow that the local bar had filed a formal complaint.

34. *See* Hague Convention, *supra* note 1, art. 3(a).

35. *See id.* art. 3(b).

she was enrolled and well adapted at school, winning various prizes; that she was a member of a judo club; and regularly attended a Protestant church. I also submitted an affidavit I had prepared for Glenn in which he swore under oath that he had not had any contact with Scientology since he had remarried.

I noted Dominique had invoked the escape clause dealing with the child's opinion.[36] To refute this, I argued this escape clause was not mandatory on the court. The court *may* refuse to order the return based on the child's wishes, but it is not obliged to.[37] I used the original Hague Convention working papers to show this particular escape clause was aimed at the "mature adolescent."[38] The drafters of the Convention had originally unanimously agreed on a cut-off age of twelve years; below that age they concluded a child's opinion should not be considered.[39] For reasons that do not appear in the working papers, this cut-off age was not included in the final draft.[40] To support my assertion I also cited a French law providing a minor child cannot be heard in court until it reaches the age of thirteen.[41] I also cited a similar law in Scotland that introduced the presumption that a child of twelve has the necessary maturity to express its opinion.[42]

The case law seemed to support my argument, as well. In Denmark, a judge had ruled that a child of twelve was too young to permit the use of this escape clause, even though the child had refused to get on a plane.[43] An Irish court had declined to follow the wishes of a girl of fourteen.[44] While some cases did take the child's wishes into account, none did so when the child was less than twelve years old.[45]

In analyzing the French case law, I found it solidly supportive of the Convention. The French case law revolved around two clauses of the Convention, the meaning of the phrase "rights of custody,"[46] a prerequisite to a determination of whether the abduction or failure to return is illicit and around the meaning of the term "grave risk."[47] There

---

36. *See id.* art. 13.
37. *See id.*
38. *See* PAUL R. BEAUMONT & PETER E. MCELEAVY, THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION 191 (Oxford Univ. Press 1999).
39. *Id.* at 180.
40. *Id.*
41. *See id.* (referring to France's *loi Malhuret* of July 22, 1987).
42. *See id.* at 180 n.25 (referring to Scotland's Children Act of 1995).
43. *See id.* at 185-86.
44. *See id.* at 199.
45. *See generally id.*
46. *See* Hague Convention, *supra* note 1, arts. 1, 3.
47. *See id.* art. 13(b).

did not appear to be any significant case law on the issue of the age or maturity of a child being taken into account when evaluating a child's express wishes to justify a refusal to order the child's return. There was one case from the *Tribunal de grande instance* of Paris declining to follow the wishes of an eight-year-old child.[48] In 1997 a leading French professor noted that the French courts had refused to order the return of a child only three times since France had adopted the Hague Convention in 1983.[49] Additionally, the leading work in English endorsed the principle that "the child must not merely be voicing a preference to remain with the abductor. Such pleas have been accorded little credence by courts in England, France, the United States, and Australia."[50]

My next argument dealt with a more sensitive issue. Glenn had previously informed me that Dominique was a lesbian and was currently living in Nîmes with another woman. I asked myself two questions: was this relevant; and how should I deal with it? French jurisprudence on *des conditions de vie inhabituelles* (nontraditional lifestyles) stated that the homosexuality of one of the parents was a relevant and adverse factor in awarding custody.[51] The two are not truly parallel, for this was not a custody case, but Charlotte was presently residing in that nontraditional household. France had, however, recently adopted a law providing a legal framework for same sex unions, illustrating the French trend toward accepting such unions.[52]

I decided to devote seven lines of my brief to this issue. Three lines explained that the child was living in a nontraditional home, and three lines dealt with the above referenced French case law. I cited a case that denied the right of a same sex couple to adopt a child, and a case that treated the "sexual inclinations" of the parties as a neutral factor.[53] I concluded by asking the Court to use its own discretion in evaluating this factor. I thus felt that I had done my duty in bringing what the Court might consider as a relevant fact to its attention, but not taking a position on it, fearing that whatever position I took could end up working against the interests of my client. The trial court's opinion on this issue, along with the Prosecutor mocking my "Puritan reticence," led me to decide that in the appellate court I would give more weight to this consideration.

---

48. T.G.I. Paris, Feb. 8, 1993, 82 R.C.D.I.P. 653, 653-56 (1993) (Fr.).
49. Cass. 1e civ., Apr. 22, 1997, 82 R.C.D.I.P. 746, 746-51 (1997) (Fr.).
50. BEAUMONT & MCELEAVY, *supra* note 38, at 189 (citation omitted).
51. Cass. 1e civ., June 15 and July 12, 1994, 82 R.C.D.I.P. 96, 96-103 (1995) (Fr.).
52. Law of 15 Nov. 1999 incorporated in the French Civil Code as art. 515-1 *et seq.*
53. Cass. 1e civ., July 12, 1994, 82 R.C.D.I.P. 96, 96-103 (1995) (Fr.).

By the end of the hearing I felt that, both in my brief and in my oral argument, I had completely demolished the "opinion of the child" argument. I felt that there was no option left for the judge other than to find for my client. My confidence unfortunately proved unfounded.

In her brief, Dominique's counsel argued that Dominique discovered in February 2002 that Charlotte had gotten much fatter, and that she could not bear the thought of leaving her mother.[54] Faced with this situation Dominique phoned Glenn on February 24 and explained the situation to him. He would not listen. She thus concluded:

> in her soul and in her conscience that there was no other solution than to make an official report to the French Police on February 24, 2002 so that Charlotte's stay on French Territory be officially registered and then she immediately began a judicial proceeding so that the legal structure of the family relations [would] be reviewed.[55]

Dominique's counsel submitted a letter from a physician stating that Charlotte's weight problem was related to her "anxiety" and that a return to the United States would have a negative effect on her psyche.[56]

The brief stated that Charlotte had settled into a French school, was learning the language very rapidly, and generally was doing better.[57] It concluded by claiming that the father was a practicing Scientologist and that, as such, he managed both family problems and his daughter's education "with rigidity."[58]

The Prosecutor, as representative of the French Central Authority, did not file a brief but presented his argument orally. He spoke briefly, saying that the retention was clearly illicit and that no justification existed for not returning Charlotte to New York. He relied on a case, decided earlier that month by the Family Court Division of the Nîmes court, ordering the return to London of two children, aged eight and six, who had been brought to Nîmes by their French father.[59] In that case, the father made several arguments to justify retaining the children in France: the children opposed their return to England, their English mother had not effectively exercised custody as required by the Convention and the children were unable to adapt to the English educational system.[60] When I obtained a copy of this decision from the Prosecutor, I discovered that

---

54. Petition for Dominique D. (on file with author).
55. *Id.* [author's translation].
56. *Id.* [author's translation].
57. *Id.*
58. *Id.* [author's translation].
59. T.G.I. Nîmes, 2e ch., Apr. 9, 2002 (unreported) (Fr.) (on file with author).
60. *Id.*

Dominique's counsel had also been counsel to the French child in that case,[61] but had not seen fit to bring the case to the attention of the court. While in the United States this could constitute an ethical breach, it was not unethical under French rules.

Because this judicial decision, which supported my argument, was rendered by the court before which I was arguing,[62] I would have preferred to know about it prior to the hearing. That it came upon me as a surprise was a result (a) of the Prosecutor not filing a written brief, (b) the decision being unreported, and (c) the absence in France of a doctrine of *stare decisis*. As there is no national reporter system in France, most French judicial decisions are not reported. The principal exceptions to this rule are the decisions of the two highest French courts, the *Cour de cassation* and the *Conseil d'État*.[63] Although the doctrine of *stare decisis* does not apply in France, lawyers do cite cases both in their briefs and in their oral arguments. The cases are cited to illustrate what the law is, however, rather than as binding precedent on the court. There is rarely a distinguishing of facts between cases as there would be in the United States, due to the French technique of writing judicial decisions.

A French judicial opinion contains three parts. First, it lays out the contentions of each party at considerable length, demonstrating the court's awareness of them. Next, it sets forth a very short statement of the Court's reasoning. Finally, the opinion concludes with the provisions of the Court's order. There is no explicit statement or findings of fact. Consequently, it is not always easy to determine what the facts are when reading a French judicial opinion. The opinions do not cite the decisions of other courts, or of the court rendering the opinion.

Counsel for Charlotte, who had been chosen because she was the only member of the Nîmes bar who spoke some English, stated that Charlotte wanted to stay with her mother, that she loved her father, and that she missed her baby half-sister. Charlotte's counsel also commented that Charlotte was too fat, but that she was on a diet and was learning French at an astonishing rate.

During the hearing, the French Family Court judge asked no questions, as is customary, yet she was very polite and listened attentively to my argument. In the opinion given May 14, she ruled the retention was wrongful under article 3 of the Hague Convention and that

---

61. *See id.*

62. *See id.*

63. The *Cour de cassation* deals with both civil and criminal cases, while the *Conseil d'État* hears cases from the administrative tribunals which decide cases involving the government.

Dominique had not contested this point.[64] The judge then went on to say Dominique had alleged "Charlotte had arrived in France at the beginning of the February, 2002 school holidays very fat, her counsel described her as obese," and this allegation had not been contested.[65] Her next reference was to the two documents Dominique had submitted as evidence: a medical certificate from a psychiatrist who had seen Charlotte once on March 29, 2002, and from an acupuncturist who had also seen her once.[66] The psychiatrist stated that Charlotte's return to the United States would be "completely unsuitable and prejudicial to the psychological development of this child."[67] The acupuncturist claimed that Charlotte's excess weight was due to anxiety.[68] The court also cited Dominique's affirmation that Charlotte's father was "rigid" and that Charlotte felt free in France.[69]

The court concluded its opinion by stating: "Thus, in light of these factors, especially medical, which characterize a psychological danger for the child to be separated again from its mother, it is evident, taking into account Charlotte's expressed wishes, that a return to the United States would place her in an intolerable situation."[70]

The court's opinion amalgamated the fifth, sixth, and seventh escape clauses as outlined above.[71] I have often witnessed the tendency of French courts to favor their own nationals regardless of the merits of a case, yet this decision still surprised and aggravated me. It is common knowledge in France that physicians will provide any kind of certificate their patient requests. If the court had doubts about the child's psychological welfare, it should have designated its own physician to examine the child. French courts have done this in other instances. Considering the delay it would have caused, and the presumed clarity of the case, I had specifically refrained from asking for a court-appointed medical expert. If the court did not share this view, it could have appointed an expert *sua sponte*.

The court's decision aggravated me and I reflected on the possible influence of the all female cast in which the Prosecutor and I were the sole males. Mother, child, counsel for the mother, counsel for the child, and judge were all female. I wondered what role, if any, gender played in

---

64. T.G.I. Nîmes, 2e ch., May 14, 2002 (unreported) (Fr.) (on file with author).
65. *Id.* [author's translation].
66. *Id.*
67. *Id.* [author's translation].
68. *Id.*
69. *Id.*
70. *Id.* [author's translation].
71. *See* discussion *infra* Part II.B.3.

these proceedings, and whether it was just a coincidence that I finally prevailed in front of an all male three-judge court. While there is no answer to these questions, it is an intriguing factor of the case and subsequent appeal.

I advised Glenn to appeal and the United States State Department said it would ask the French Central Authority to appeal. Shortly thereafter, both moving parties filed an appeal to the Court of Appeals of Nîmes.[72] Since the normal delay for a hearing before the Nîmes Court of Appeals exceeds a year, and could possibly be two years, I knew that as an individual litigant the appellate court would not grant my request for an expedited hearing. Therefore, I asked the State Department to request the French Central Authority to request that the appellate court set the case on an accelerated calendar. It did so, and the case was scheduled for argument on September 25, 2002.

F. The May 14 Custody Hearing and May 28 Decision

The Family Court judge had ruled on the Hague Convention Application, and therefore Dominique's counsel invited her to rule on Dominique's February 28th petition for a change of custody. Article 16 of the Hague Convention specifically states a court in the jurisdiction to which a child has been abducted or is retained shall not rule on the issue of custody until such time as it has been determined that the conditions set forth in the Convention for the return of the child have not been met.[73] Despite that provision, the court heard arguments on the custody petition on May 14, 2002. Because of financial considerations, Glenn decided not to defend. Thus, I did not attend the hearing, but did file a one-page brief citing article 16 of the Convention. The Prosecutor did attend the hearing and, I was told, also argued the applicability of article 16. Counsel for Dominique argued because the May 14 decision declining to order Charlotte's return to New York was immediately effective, article 16 did not apply.

In her May 28, 2002, decision, the same Family Court judge first ruled the intervention of the Prosecutor in what was now purely a custody procedure raised no issues of *ordre public* (public policy) and was therefore without basis.[74] The judge thus ruled the Prosecutor lacked standing to intervene and dismissed his intervention.[75] She stated that

---

72. There are twenty-eight appellate courts in France, and it was just by coincidence that the case happened to be heard in a jurisdiction where there is also an appellate court.

73. Hague Convention, *supra* note 1, art. 16.

74. T.G.I. Nîmes, 2e ch., May 28, 2002 (unreported) (Fr.) (on file with author).

75. *Id.*

only a defendant could raise a request to suspend judgment on the petition pursuant to article 16 of the Convention.[76] In any event, the judge concluded article 16 was inapplicable because she had already ruled the conditions requiring a return of the child under the Convention had not been met and article 16 did not require that the judicial decision be a final and definitive one.[77]

The judge further noted, although Glenn had appealed her May 14 judgment declining to return Charlotte to New York, he had not requested an expedited appeal.[78] She noted that Charlotte's legal status while on French territory could not remain in limbo until such time as the appellate court ruled on the issue.[79] At this stage, the judge did not know I had asked the State Department to request the French Central Authority to seek an expedited hearing before the appeals court. Finally, she said even if the appellate court did reverse her decision, a new custody decree granting custody of Charlotte to her mother would not, under article 17 of the Convention, preclude execution of an eventual order by the appellate court that Charlotte return to New York.[80]

The judge awarded Dominique exclusive custody of Charlotte and allowed four weeks of visitation in France for Glenn during the summer holidays and during the February winter holiday.[81] The judge ordered Dominique to take Charlotte to New York but to retain possession of Charlotte's passport during her visit.[82] The judge also ordered Glenn to pay the transportation, and other, costs related to the February visit and to pay Dominique monthly child support of 460 euros.[83] Neither Glenn nor the Prosecutor appealed the decision.

G. End of Round One

Round One was over. Dominique had won. Charlotte remained in France. The Family Court had refused to order her return to the United States despite the clear violation of the New York custody decree.[84] Moreover, Charlotte remained in France pursuant to a new French

76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*; *see* art. 17. Article 17 states that the mere fact that a custody decree has been rendered by the jurisdiction where the child is being illicitly retained cannot justify a refusal to return the child pursuant to the terms of the Convention, although the courts of that jurisdiction can take into account the grounds of the custody decree when applying the Convention. *Id.*
81. T.G.I. Nîmes, 2e ch., May 28, 2002 (unreported) (Fr.) (on file with author).
82. *Id.*
83. *Id.*
84. *See id.*

custody decree, issued by the Family Court, which gave Dominique exclusive custody. The rout was total. In New York, Glenn was discouraged, angry, and depressed. He had exhausted his financial resources, and could not see how there could be a second round. The State Department was also discouraged and angry. France, it lamented, had failed to uphold the clear terms of the Hague Convention.

H. The September 25 Appeal

1. The Nature of French Review

The clerk of court advised me that the case had been set for argument on September 25, 2002. By August 5, I had completed my brief and submitted it to the court together with a few additional documents. Under French procedure new evidence can be submitted on appeal, and the review is not limited to the trial record, as it is in common law proceedings. The appellate court hearing is, in effect, a *de novo* review.

2. Briefs of Counsel

In my brief, I first discussed the lower court's decision pointing out it was based essentially on two medical certificates submitted by the child's mother.[85] I noted the French doctors' observations were made over an extremely limited time (two visits) and without the benefit of the opinion of the child's American doctor.[86] I attacked the impartiality of the physicians who the mother retained in a situation of family conflict and urged they be evaluated with considerable caution.[87] I noted that neither doctor had stated the child was in bad health nor had stated that she was "obese."[88] It was the minor's counsel alone who had used that term.[89] The medical certificate simply referred to a weight problem linked to a certain anxiety.[90]

Obesity was not, I argued, a ground one could find in the Hague Convention to justify a wrongful retention, and treatment for obesity existed in the United States as well as in France.[91] Previous French case law made it clear the danger referred to in the Hague Convention had to

85. Appellate Brief for Glenn K. (on file with author).
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*

be a present danger rather than a future or a potential danger.[92] I pointed out Charlotte was born in the United States, had lived there her entire life, had arrived in France in good health, had good reports from her school in New York, and was active in neighborhood activities and clubs.[93] I also observed Dominique had not shown any proof of a *danger* that awaited Charlotte in New York, or that Charlotte's return there would put her in an "intolerable situation."[94]

On the other hand, I acknowledged the natural desire of the child not to want to leave her mother.[95] I then argued, however, that the behavior of the mother over the prior two years had largely contributed to the anxiety of which Charlotte now complained, and the mother had in fact destabilized the child's life three times in the prior six years by her moves.[96] I went on to discuss the case law interpreting the Convention concerning the weight to be given to a child's expressed desires.[97]

Opposing counsel submitted her brief to the appellate court on September 11, 2002,[98] as the court had set September 13 as the final date for submitting briefs and documents. This left me two days to file a reply brief had I wished to do so.[99] Fortunately, I saw nothing in the brief to necessitate a reply.

In her appellate brief, Dominique's counsel abandoned the argument that Charlotte's opinion was the basis for declining to return her to New York.[100] "The mother does not base her argument on the opinion of the child but on the serious psychological situation concerning her."[101] The mother's argument was now based on the allegation that Charlotte's return to the United States would have "a negative psychic effect on Charlotte."[102] Again counsel relied on a medical certificate of a

92. Cass. 1e ch., Oct. 23, 1990, 80 R.C.D.I.P. 407, 410 (1991) (Fr.).
93. Appellate Brief for Glenn K. (on file with author).
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. Appellate Brief for Dominique D. (on file with author).
99. In this type of procedure, the clerk of court sets the date for the argument and an earlier date, called the "closing date," at which all exchanges of briefs and evidence must be completed. There are no specific dates, other than the closing date, by which briefs must be filed. The procedure is thus chaotic and unorganized, and most French lawyers will try to submit their brief at the last moment so as to afford their opponent no time in which to prepare a reply. It is possible to ask the court to extend the closing date, but as the court will not necessarily agree to do so, there is a risk involved if one submits nothing at all. The procedure is thus largely unsatisfactory.
100. Appellate Brief for Dominique D. (on file with author).
101. *Id.* [author's translation].
102. *Id.* [author's translation].

local child psychiatrist.[103] In what can only be considered a major tactical mistake by Dominique's counsel, she admitted in her appellate brief that Glenn's statement that Charlotte's life in New York with her father was a happy one was true.[104] Counsel sought to weaken this admission by emphasizing Charlotte's weight problem and what she referred to as Glenn's "rigidity" and his adherence to the cult of Scientology.[105] Dominique did not contest her homosexuality, but simply declared it was irrelevant.[106] Finally, she submitted a mass of witness statements testifying to how well Charlotte was doing in her new environment.[107]

3. Oral Argument

In discussions of this case with friends and colleagues, the response to opposing counsel's reasoning that Charlotte was too fat was incredulous. The argument seemed ridiculous. Two weeks before the date set for arguments I benefited from a stroke of good luck. In reading the French newspaper *Le Monde*, I ran across an article on the growing problem of obesity among French children.[108] The article stated fifteen percent of French children between the ages of five and twelve were obese.[109] This would surely help refute the claim Charlotte's obesity was a purely American phenomenon.

French appellate courts set no time limits on counsel's presentations, but like judges everywhere tend to be impatient. For a French judge, fifteen minutes is long. Moreover, you never know whether or not the judge will be familiar with the case. He may know nothing about it, or he may be fully apprised of all the facts and arguments. This makes preparing for argument even more difficult. If one begins by stating the facts, one may be wasting time and aggravating the judge, whereas if one leaves them out, the judge may never understand what the case is about during the entire argument.

In interacting with the French judicial system counsel must thus have a flexible plan. He must be ready to give the facts if necessary and to move on if it is apparent the judge is already familiar with them. It is the custom in France for an out-of-town lawyer to present himself to the

---

103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *L'alarmante augmentation du nombre d'enfants obèses*, LE MONDE, Sept. 14, 2002, *available at* http://www.lemondefr/imprimer_article_ref/0,9750,3226-290391,00.html (last visited Sept. 15, 2002) [hereinafter LE MONDE].
109. *Id.*

judge in chambers just before argument to introduce himself or to be presented by his local counsel if he has one. Sometimes at that brief meeting, one can discreetly discover if the judge is aware of what the case is about, but more often than not the meeting is just a brief handshake and a welcome to the court.

My basic plan was to focus on the concept of danger, to show there was no danger, and to make certain the court did not get into the subject of where Charlotte would be better off. My opponent's plan would stress Charlotte's miraculous adaptation to French life, her new svelte shape, and her increasingly fluent French.

Thus, I began my argument by stating the facts of the case were extremely simple. Dominique, the mother of a child now ten years old, admitted she kept her daughter Charlotte in France in violation of a New York custody judgment, and the lower court had confirmed the failure to return was unlawful under article 3 of the Hague Convention.[110] There was thus only one question to resolve which I designated Question Number One. The question arose out of article 13(b) of the Hague Convention and out of the case law of the French Supreme Court. The question was whether in this case there existed a *grave risk* of a psychological *harm*, to which Charlotte would be exposed if returned to the country of her habitual residence.[111] The case law required this danger to be present; a potential danger would not suffice. I noted that there had been no allegations of a physical danger. I also noted Dominique had in her latest brief abandoned the argument that Charlotte's opinion was sufficient grounds for not returning her to the United States.[112]

Although this was the only question for the court to decide, hidden behind this first question lay a second which I designated as Question Number Two. This second question was whether the residence of the child with her mother in France was in the child's best interest in the medium and long term. I pointed out that article 16 of the Convention made it absolutely clear that the court was not to address this question.[113] I criticized the lower court's decision for ignoring the explicit language of article 16 and proceeding to render a custody judgment without waiting for the decision of the appellate court on the Hague Convention proceeding.

---

110. T.G.I. Nîmes, 2e ch., May 14, 2002 (unreported) (Fr.) (on file with author).
111. *See* Hague Convention, *supra* note 1, art. 13(b).
112. *See* Appellate Brief for Dominique D. (on file with author).
113. *See* Hague Convention, *supra* note 1, art. 16.

I next argued if the two questions were kept clearly distinct, as they should be, it would be apparent that almost all of the evidence the child's mother submitted to the court concerned the second question and, hence, was inadmissible. All of the evidence submitted concerned Charlotte's adaptation to French life, but the quality of her adaptation related uniquely to Question Number Two and not to Question Number One. In fact, I noted, Dominique's counsel had tried to push the second question to the forefront and merge the two questions throughout the case, thereby diluting the crucial question of "harm" to the child by emphasizing the "best interest of the child."

Under the Hague Convention analysis, once it has been determined the child's retention is unlawful, the only remaining issue is to determine whether the child would be exposed to a "harm" if the court orders the child's return to her habitual residence.[114] The burden of proof to show such a danger falls on the parent who has unlawfully taken or retained the child.[115]

I examined in detail the four letters Dominique had submitted that could be construed as dealing with Question Number One. I noted that none of the letters mentioned the word "danger," and the strongest statement simply provided "the separation of the mother would be completely inappropriate and prejudicial to the psychological development of this child."[116] This opinion, which came from a psychiatrist retained by Dominique, was explicit in directing itself to "psychological development" and not to a current psychological danger.[117] Consequently, the psychiatrist's opinion was actually directed to Question Number Two and therefore irrelevant.

There were numerous indicia of a lack of danger beginning with the behavior of Dominique herself. Just over a year prior to the current case, she had given exclusive custody to Glenn. Presumably Dominique would not have agreed to do so if she had felt it would put her daughter at risk of a physical or psychological danger. When she left New York to return to live in France, she likewise left Charlotte with Glenn. In the summer of 2001, Charlotte had come to France for a five week holiday, and at the end of the holiday, Dominique sent her back to New York;

---

114. *See id.* art. 13(b).

115. *See* C. CIV. art. 1315 (Fr.) (stating the burden of proof rests on the party making the assertion); Claude Giverdon, *The Problem of Proof in French Civil Law*, 31 TUL. L. REV. 29, 38 (1956).

116. Appellate Brief for Glenn K. [author's translation] (on file with author).

117. *Id.*

again, she would not have done so if she thought Charlotte faced any danger.

Finally, I dealt with the issue of the purported obesity and its underlying, unstated corollary that one is well nourished in France and badly nourished in the United States. I argued this was an ethnocentric and outmoded conception of the two countries, that in fact fifteen percent of French children between the ages of five and twelve were obese,[118] and the diverse problems arising out of a sedentary society existed in France just as they do in the United States. To categorize a child's weight problem as a "harm" as used in article 13 of the Convention would push the limits of the term far beyond the meaning given to it by both French and foreign case law.

I concluded by noting, if the court declined to order the child's return, the inevitable consequence would be the child's banishment from its native country until the child came of age. On the other hand, if the court ordered Charlotte's return, then Glenn could have confidence the French courts would protect his rights and Charlotte could benefit throughout her childhood from her dual Franco-American heritage.

I. The Decision of October 23

The case was heard on September 25, 2002, before a three-judge, all male court. Although the French Central Authority had formally appealed the lower court's decision at the request of the Office of Children's Issues of the United States State Department, the French prosecutor did not attend the hearing. The appellate court opinion did not list the French government as an appellant, but stated in the body of its opinion the Prosecutor had not filed a brief.[119] Instead, the Prosecutor had noted on the file that it submitted the issues to the appreciation of the court.

The court first observed that the lower court's May 28 decision on the merits of custody would have no effect on the appeal of the lower court's earlier decision on the Hague Convention application.[120] The court stated the lower court had correctly determined the retention of Charlotte was unlawful in light of the earlier New York custody decree, and it thus affirmed that portion of the lower court's decision.[121] It then noted that the failure to return a child was subject to limited exceptions, namely a physical or psychic danger or an intolerable situation, and the

118. LE MONDE, *supra* note 108.
119. Cass. 2e civ., Oct. 23, 2002 (unreported) (Fr.) (on file with author).
120. *Id.*
121. *Id.*

opinion of the child was irrelevant unless the child had attained an age and a maturity making it appropriate to take the child's opinion into account.[122]

Further, the court stated, according to minor's counsel, Charlotte had sufficient maturity to determine her true interests and she had expressed deep attachment to both parents.[123] The court went on to consider many factors in making its decision to reverse the lower court. The most important of these factors were: Charlotte had been born in the United States and had always lived there, first with her mother and then with her father; the New York custody decree had been awarded with the consent of both parents in the presence of their respective counsel and after negotiations, and at that time the parents were convinced their agreement was in the best interests of the child; the child was enrolled in school in New York and her educational, athletic and family environment in New York was favorable; and Dominique had previously obeyed the New York custody decree.[124] The court thus ordered the immediate return of the child to Glenn's domicile in New York noting Glenn's intention to come to France to collect Charlotte and take her back to New York.[125]

The court declined to award Glenn costs, however.[126] This was perhaps not surprising in light of the fact that Dominique, because of her limited financial resources, benefited from French legal aid throughout the proceedings.

J. End of Round Two

At the end of Round Two, the legal situation had been reversed for the most part. The French appellate court had reversed the lower court's judgment and ordered Dominique to turn Charlotte over to Glenn so that Charlotte could immediately return to New York.[127] The main unresolved issue in the background was the outstanding French custody decree granting exclusive custody of Charlotte to Dominique, and counsel's intention to file a Hague Convention application based on that decree; however, this seemed rather far-fetched.

As a practical matter, Charlotte was still in France with her mother. If Glenn was exultant, the Office of Children's Issues at the State Department was apprehensive, fearing Dominique would flee with

---

122. *Id.*
123. *Id.*
124. *See id.*
125. *Id.*
126. *Id.*
127. *Id.*

Charlotte. I did not think she would flee because she lacked the financial resources to do so, but I was uncertain as to how easy it would be to collect the child. Although I advised Glenn to come to France immediately, I was apprehensive that he might come and not be able to collect Charlotte in a reasonable amount of time. I knew his financial resources were limited and he would not be able to afford a delay. Still, I felt I had no alternative but to advise him to come. I also requested the State Department to provide for a consular officer from the United States Consulate General in Marseille to accompany Glenn as a witness. I then contacted the public prosecutor in Nîmes to advise him of what had transpired and to assist, if necessary, with the handing over of the child.

III. THE RETURN

The decision was handed down on Wednesday, October 23, 2002,[128] and by what can only be considered a minor miracle, I actually received the written opinion that afternoon. The normal waiting period to receive a court's opinion in France is a minimum of several weeks and can be as long as several months. Glenn was ready to come to France immediately to collect his daughter, but I counseled caution. Thursday morning I phoned Dominique's counsel who said she was seeing her client later that day. At Glenn's request, I told counsel Glenn would come to collect Charlotte on Saturday, October 26.

On Friday, Dominique's counsel phoned me and began to negotiate as to when Charlotte would be handed over. Saturday, October 26, was too early for Dominique. Her earliest offer was November 1, to which we objected. Dominique then proposed to take the child to New York in the next few days. We agreed and said the handover would take place at the airport in New York. Dominique then changed her mind; she no longer wanted to go to New York. She said the cost was too great. Glenn offered to cover the cost, but still she refused. She wanted to hand Charlotte over in Nîmes at the end of the following week. We wanted the hand-over to occur at a neutral place; to this Dominique would not agree. Finally we reached an agreement on Tuesday, October 29, at ten in the morning at Dominique's house where Charlotte was living. I asked for confirmation in writing from her counsel which I received by fax on October 24, 2002.

The State Department continued to express apprehension Dominique would take Charlotte and flee. On Monday, October 28, I decided to inform the public prosecutor in writing of what had transpired.

---

128. *Id.*

I faxed him, saying that I might well be contacting him the next day for his assistance if the hand-over did not go smoothly.

It did not go smoothly. In fact, that same day, I received a call from a journalist in Nîmes seeking information about the case. Journalists do not normally call me, and I did not know what he knew. Many questions sprang to mind: did he know that the child was to be handed over the next day; did he know where; would the press be there; who had informed the press. I explained the situation to him as best I could, emphasizing the importance of the Hague Convention for French parents, as well as for American parents, and of the significant French population in the United States and American population in France. I knew his article would play on the sympathy Dominique would undoubtedly try to engender and to which, in some respects, she was entitled.

The next day when Glenn showed up at the designated time and location, accompanied by a United States Foreign Service Officer from the Marseille consulate, Dominique refused to turn over Charlotte. She claimed Charlotte refused to go. Just in case there was any doubt, she had taken the precaution to have a *huissier* present. A *huissier* is a quasi-governmental official whose principal function is to act as a process server, but whose important secondary function is to make an official report at someone's request to establish a fact.[129] According to French civil procedure, there is no oral testimony with direct and cross-examination; instead, evidence is submitted in the form of written statements of witnesses.[130] The evidence of a *huissier* is considered more reliable by the courts than that of an ordinary witness because he is deemed to be neutral and holds a public office. His evidence carries even more weight if both parties have advance notice of his intervention. That was not done in this case. The fact Dominique wanted to establish via the *huissier*'s report was Charlotte's statement that she did not want to return to the United States.

As discussions in front of Dominique's house dragged on, I phoned the prosecutor who said he had told Dominique's lawyer the day before that, if Dominique did not turn Charlotte over, he would prosecute Dominique in criminal court. He said the potential penalty was one year in jail and a fine of 100,000 francs (approximately 15,245 euros). He suggested I call Dominique's lawyer to see if she would help. He said if

---

129. *See Chambre des Huissiers de justice de Paris*, *Activités*, *at* http://www.huissiersdeparis.org/htmlbleu/metiers.html.

130. *See generally* James Beardsley, *Proof of Fact in French Civil Procedure*, 34 AM. J. COMP. L. 459 (1986).

the mother failed to turn over the child, then Glenn should go the Police Station and file a formal complaint. I suggested he phone Dominique, but he expressed doubt as to his authority to do so. He said if the Ministry of Justice in Paris told him to phone her, he would; otherwise, he left me with the conclusion that he was not going to take any action.

I then phoned Dominique's lawyer who said she had explained the risks of refusing to obey the court order. She told me that when Dominique had left her office last Thursday, she had intended to obey the order. She said Dominique was clearly getting advice from someone else, and that she, too, had been contacted by the press. I took this to mean that it had been Dominique herself, and not her lawyer, who had brought the case to the attention of the press. She also acknowledged the prosecutor had told her the day before that he would pursue charges against Dominique in the criminal court. I next asked her if she would phone Dominique, and she agreed to do so. It was now about 11:15 a.m. At about 11:30, Glenn called again to tell me Dominique had not yet turned Charlotte over. I advised him to go to the Nîmes Central Police Station and file his complaint before the station closed for the lunch hour. Meanwhile, I had been studying the Hague Convention once again so as to put together a letter to convince the prosecutor that he had the authority under the Convention to intervene to obtain the voluntary handover. I prepared the relevant sections for him and wrote a covering letter which I faxed to him marked "Urgent."

While Glenn talked to Dominique and Charlotte and the consular officer observed, Glenn phoned me for an explanation of what was happening, as he no more knew what a *huissier* was than he did a *bœuf à la daube*.[131]

It was now just after 11:30 a.m., and I felt as if I were in a command center issuing cryptic instructions to various parties scattered about the region in the hope of securing the release of a kidnap victim. At about 11:45, I received another call from Glenn. He was in his car leaving Nîmes, and Charlotte was with him. I asked him to stop and buy the local newspaper so we could see the article.

That afternoon I was at the consulate for a meeting with the Consul General on other matters. When my meeting ended, I met with the consular officer who had accompanied Glenn and obtained a copy of her report. To my surprise, she said they never made it to the police station. She and Glenn had just turned away and were walking towards their cars around 11:45, having said they were going to the police station to file the

131. A Provençal beef stew.

complaint. She looked back and thought she sensed hesitation from Charlotte. She told Glenn to go back. He went and, after some further discussion, Charlotte came with him. It was all over.

After hearing this story, I found it quite extraordinary that, at a critical instant of this saga, the consular officer showed a flash of psychological insight or intuition, and sensed the turning point.

At the consulate I also was finally able to meet Charlotte for the first time. As her mother had conveniently forgotten to return her passport, the consular officer issued her a temporary passport to enable her to fly back to New York. Charlotte was smiling and seemed happy to be with her father. She left the next day with Glenn for New York; they arrived safely early in the afternoon on October 30, 2002. She had been unlawfully retained in France for 248 days. Her original return ticket to New York had been for February 24, 2002. It took seventy-nine days to get to the first hearing in a French court. It took ninety-three days before the first unfavorable court decision was handed down. By the time the appellate court handed down its decision ordering Charlotte's return, 241 days had passed.

IV. FINAL OBSERVATIONS

What can one conclude from this heartbreaking tale of human folly? The French judicial system eventually ground out a result consistent with the objectives of the Hague Convention. It was slow and uncertain, but it did eventually achieve the right result. Yet, if Dominique had in fact refused to turn Charlotte over to her father, Glenn's position would have been impossible. The French police would not come out to a person's home to take away a ten year old child from its French mother, even with the support of a court order. As a practical matter, it just would never happen.

Although the public prosecutor had said that he would prosecute Dominique if she failed to respect the court order, it is far from certain that he would have. And even if he had, the case would not have come before the criminal court for at least another six months to a year. When it did come before the criminal court, the judge would have difficulty working up enthusiasm for imprisoning a mother for refusing to turn over her child. A fine would have provided no deterrence. Meanwhile Charlotte would have remained with Dominique.

So, if I had been Dominique's counsel, what would I have advised? To obey the court order, of course. That would have been my duty. The question remains whether my duty would have extended to explain to her

the potentially favorable practical consequences of failing to obey the court order.