
Todd Heine, Vermont Law School
ABSTRACT:

This article examines two major parts of comparative law in private international law under the Hague Abduction Convention: written laws and judicial opinions. First, this article describes, analyzes, and compares the written laws with which courts in five jurisdictions have gained competence to apply the Convention. By looking to the written laws of the United States, the United Kingdom, France, the European Union, and the European Court of Human Rights, the reader will begin to appreciate how these common law, civil law, and international law jurisdictions impact private international law based on competence provided by written laws.

Second, this article examines court opinions in the United States, the United Kingdom, France, the Court of Justice of the European Union, and the European Court of Human Rights. These cases—all on the same topic in the same Convention—showcase different judicial opinion styles despite their similar substantive focus. After analyzing the laws and court decisions on habitual residence under the Convention, the reader will better appreciate comparative law’s practical application in private international law.

I. Introduction

Comparative law provides interesting and useful analysis of the differences among jurisdictions. A jurisdiction’s history, institutions, education systems, social structures, economic systems, language, religion, and cultural perspective can all affect its legal system. In their most tangible sense, a casual observer will most readily recognize the differences among

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jurisdictions by looking at written laws and cases. In fact even a brief glance at the laws and cases of various jurisdictions reveals different approaches to law.

While these differences are obviously interesting to scholars, some have pointed to comparative law’s lack of practical application in legal practice. However, these differences still have tangible relevance for practicing attorneys. In situations where law crosses jurisdictions, individuals will quickly appreciate the subtle and complex differences that require a comparativist approach to legal issues.

One area of law in which a comparativist mindset drives legal practice is private international law. Ironically, this subject goes by an entirely different name in United States parlance—conflict of laws. This area of law essentially determines which jurisdiction’s laws will govern when two sets of laws could potentially apply to a given situation.

From a strategic point of view, parties in a private international law dispute will seek to apply the law from the jurisdiction that beneficially affects their interest in the situation. To figure out which jurisdiction offers a friendlier expert, lawyers must analyze the legal situation in one or more jurisdictions. In other words, lots of private international law practice involves applied comparative legal analysis.

International family law is a particular area of private international law that offers an accessible viewpoint from which to consider private international law’s working parts. International family law often arises when a custody disputes exists between two parents who have different nationalities. Sometimes, one parent will take the child across international borders to her nation’s courts to decide the child’s custody.

A parent has good reasons to go to the courts in her own nation. The knee-jerk perception is that a parent from one nation might enjoy more favorable treatment in her nation’s court over another non-national parent. While this may be true, other subtler differences provide incentive to seek custody in one’s own nation’s courts.

A parent will likely prefer to attend proceedings in her mother language and a relatively familiar legal system in her own country. A parent may save time and costs involved in legal translating and international travel that are likely necessary when litigating in a foreign

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jurisdiction. She may also enjoy a stronger support network in her home venue and more readily recognize and access resources available in her home nation, such as legal aid.

In modern legal practice however, getting a custody order is not as easy as simply physically taking a child to a court in a nation of choice and showing up on the courtroom steps. To enjoy the benefits that a nation’s court may offer, a parent must establish jurisdiction in her preferred court. The first step towards getting a custody order in a given court is meeting the domestic requirements for jurisdiction in that court. Nowadays, parents must consider a crucial second step in international custody disputes.

In international custody disputes, a parent will have to consider the limits that international law imposes on many nation’s jurisdiction over child custody. Fortunately, private international law in international family law is—relatively—straightforward, thanks to a multilateral treaty called the Hague Convention on the Aspects of International Child Abduction (“Convention”).

The Convention is the result of nations’ multilateral efforts to address cross-border child custody. When parents take their children to a country to get a custody order, this is known as international parental child abduction. Without international rules, parents could more easily abduct their children to friendly venues and secure favorable child custody arrangements.

In the early 1980’s, nations met to address the issue of international child abduction at the Hague Conference on Private International Law (“Hague Conference”). The Hague Conference has met since 1893 as a place for nations to come together and facilitate cross-border civil and commercial matters. Accordingly, the Hague Conference was the most appropriate institution for negotiating the Convention.

The Convention provides a practical solution for wrongful removals—immediate returns. If a parent wrongfully takes a child to a country to secure custody, the Convention allows the left behind parent to petition a court in that country and get the court to order the child’s return the

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4 See, e.g., the Uniform Child Custody Jurisdiction and Enforcement Act (1997).
previous habitual residence. Thus, the Abduction Convention protects a custodial parent by functionally preventing another parent from removing the child from the habitual residence to establish jurisdiction in a new country where that parent may enjoy a friendlier forum.\(^8\)

For the purposes of this paper, we must now consider how this Convention, like any other treaty, comes into law in the various countries that agree to the Convention’s rules.

To implement this Convention, states began by signing it. Signing alone however did not automatically make the Convention law. States then had to ratify the Convention based on their own domestic rules regarding treaty ratification and implementation, normally based on written sources of law under domestic law. In Section II, this article will trace the written laws that brought the Convention to life in the United States, United Kingdom, and France.

In the past, a comparative analysis of private international law might have gotten away with only analyzing the comparative aspects of a Convention in signatory states.\(^9\) Now however, the prominence of international and supranational organization on the in private international law scene requires a more nuanced approach. As a result, Section II of this article also analyzes the textual bases from which the Convention has sprouted in international legal venues, namely the Court of Justice of the European Union and the European Court of Human Rights. Thus, Section II reviews the written sources of law that accompany the Convention in the United States, United Kingdom, France, the European Union, and the European Court of Human Rights.

Of course, after the Convention is born into a nation, its application and development occurs in the courts. As such, the 81 nations that have signed or acceded to the Convention offer a huge cache of case law for comparativists to pore over. Section III analyzes the style and structure of Convention cases in different jurisdictions that grapple with similar issues.

One issue arises repeatedly in Convention cases. Because a child must be removed or retained from his habitual residence for an abduction to occur, courts must always determine the child’s habitual residence. However, this crucial term has no legal definition in the

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\(^8\) Elisa Perez-Vera, *Explanatory Report* at 428 - 429.

This means that while all nations’ courts look at the same two words—“habitual residence”—in Convention cases, many courts have struggled to define habitual residence over the past two decades. Because courts in different nations come from different traditions and systems, courts take markedly different approaches to define these same two words. Section III uses the Convention’s case law to demonstrate the stylistic differences between the courts of the United States, the United Kingdom, France, the European Union, and the European Court of Human Rights.

As to be seen below, the Convention’s application in 81 signatory states turns out to be less than simple. Happily for the reader, this application provides a spectacular lens to examine comparative law at work.

II. Written Laws

The Hague Convention has found its way into many jurisdictions around the world. In each jurisdiction, a written source of law has allowed its application. In this Section, this article describes, analyzes, and compares the written sources of law that have given the Convention life in the United States, the United Kingdom, France, the European Union, and the European Court of Human Rights.

a. United States: The International Child Abduction Remedies Act

In the United States, a hybrid system of monism and dualism exists. When a treaty is clear, it need no further implementing measures. However, when it is not clear, the Senate must ratify the treaty. The Convention is not self-enabling because in Articles 37 – 42 allow for additional measures by signatories after signing but before ratification. Thus, the Convention required further action in the signatory states and the Congress’ advice and consent.

In the United States, this meant that the United States Congress had to pass a law to implement the Convention. In 1988, the Congress passed the International Child Abduction Remedies Act.

10 Convention, Art. 3.
ICARA spends six pages of text to implement the Convention, which states the law already. So, what is in this implementing legislation?

ICARA is largely a technical law that implements the Convention. Section one establishes ICARA’s short title (i.e., the International Child Abduction Remedies Act). This short title allows users to cite ICARA uniformly.

Section two makes findings and declarations about the harms of child abduction. In essence, this explains the Congress’ reasons for ratifying the Convention. This wording differs from that in the Convention’s preamble, but essentially announces the goal of protecting the best interests of children. This section points to a key difference between the Convention itself and ICARA. While the Convention’s goal is to address international child abduction, ICARA’s goal is to “establish procedures for the implementation of the Convention in the United States” that “are in addition to and not in lieu of the provisions of the Convention.” Thus, section two plays an important role in describing the implementing legislation’s role.

Section three defines internal definitions for terms in ICARA. These definitions help clarify terms used in ICARA. This section does not define terms used in the Convention. In practice, this section helps readers better understand ICARA’s provisions.

Section four handles important procedural measures that align the Convention with legal judicial procedures in the United States’ legal system. First, ICARA answers the all-important question of which courts in the United States have jurisdiction to apply the Convention. Here, ICARA gives jurisdiction to both state and federal courts. In the United States, this is significant because, whereas family law exists primarily in the state courts, ICARA places international family law cases under the Convention into the Federal Courts.

This section also specifies notice requirements. This essentially aligns procedural notice requirements with existing requirements for interstate custody cases.

The next procedural rule in section four has substantive effects. Here, ICARA defines

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13 Id.
14 Id.
15 Id (defining applicant, Convention, Parent Locator Service, petitioner, person, respondent, rights of access, State, and United States Central Authority.).
16 Id.
17 Id.
burdens of proof that apply to various articles in the treaty. Specifically, ICARA requires that a petitioner prove that a wrongful removal occurred or that he had rights of access by a preponderance of the evidence standard. This preponderance of the evidence standard also applies to most of the exceptions to return articulated in Article 13 of the Convention.

However, for the Convention’s Article 13b and Article 20 exceptions to return, the party opposing the return must prove these exceptions apply by clear and convincing evidence standard. This is to limit the availability of exceptions to return. This seemingly procedural rule has substantive effects on parties must in substance meet these evidentiary standards. The Convention does not specifically set these kinds of standards, but ICARA sets these specific requirements to support the Convention’s purpose to limit exceptions’ applicability. Thus, this section modifies the Convention by specifying evidentiary standards.

Section four also modifies the Convention by defining several terms in the Convention. Unlike the terms in ICARA section three, this section provides more specific definitions for courts to follow. This section establishes that courts and government agencies are “authorities” for Convention purposes. It also defines terms like “wrongful removal or retention” and “commencement of proceedings” more precisely than the Convention’s text.

In another notable procedural specification, section four requires full faith and credit between domestic courts. That is, if one court in the United States makes an order under the Convention, other courts may not make a contradictory order, unless it is through an appellate process. This section is necessary in the United States federalist system to avoid conflicting orders between state courts or between federal courts. Finally, this section establishes that the remedies under ICARA are not exclusive if other remedies are available under domestic or international law.

Section five essentially reserves the right for domestic courts to protect the best interests of children. Under this section, courts may make orders to protect a child. However, this section limits court actions in Article 4(b) situations.

Section six establishes that any documents submitted with a Convention petition are not subject to further certification. This section aligns the Convention with admissibility of evidence rules in state and federal courts. This provides a glimpse of the tricky system of

\[18\] *Id.*

\[19\] *Id.*
evidentiary requirements in United States law where parties and lawyers must take careful steps to ensure that evidence they intend to rely on meet admissibility requirements for a judge or jury to consider. Here, ICARA attempts to simplify these procedural requirements by placing Convention case related documents under an existing admissibility rule.

Section seven deals the Convention’s Central Authority in the United States. This section provides that the President will select a Central Authority that will perform functions ascribed by ICARA and the Convention. ICARA allows the Central Authority to issue regulations and access the Parent Locator Service. This administrative delegation is key to the Convention’s functioning in the United States.

Section eight is also administrative; it handles costs and fees associated with the Convention. First, it deals with administrative costs to individuals. It forbids the Central Authority from charging fees for any aspects of administrative processing associated with the Convention. This helps ensure that all individuals can have access to the Convention’s protections. This section provides that in general, petitioners may have to bear costs for legal fees, court costs, and travel costs. However, petitioners may not have to pay these fees if federal, state, local legal assistance, or other programs cover these costs.

Second, section eight deals with cost burdens between parties. This section requires that, in general, if a court orders a return under the Convention, it must also order the respondent to pay for all of the petitioner’s necessary costs including legal fees, court costs, supervisory care for the child during court proceedings, and transportation costs. A court may not make such an order only if the respondent shows that such an order would be clearly inappropriate. In practice, this means that successful petitioners will have a good chance of recovering a successful petition’s costs. These cost allocation rules combine to discourage frivolous petitions while encouraging valid petitions. Not surprisingly, this section has been the subject of litigation.

Moving on, section nine addresses interagency cooperation between the Central Authority and existing agencies to facilitate the Convention’s implementation. This section provides for the collection, maintenance, and dissemination of information by the Central Authority in performing functions under the Convention by giving access to communication

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21 ICARA.
22 E.g., Holder v. Holder, 305 F.3d 854, 859 (9th Cir. 2002).
mechanisms between federal, state, and local authorities, including the Parent Locator Service,\textsuperscript{23} to handle Convention petitions. This section also provides for limits on the dissemination of information that threatens national security or law enforcement interests at the state or federal level. These crucial provisions helped synthesize the Convention into the interstate infrastructure that pre-existed the Convention’s ratification.

Section ten is a forward-looking provision that allows for a system to evaluate the Convention’s implementation after ratification.\textsuperscript{24} Here, ICARA provides for an interagency coordinating group to monitor the Convention’s effective application. ICARA gives power to the Secretary of State, the Secretary of Health and Human Services, and the United States Attorney General to designate—and compensate—federal employees and private citizens to advise and monitor the Convention at work.

Section eleven deals with the Parent Locator Service.\textsuperscript{25} Because the Parent Locator Service predated the Convention, its rules and regulations did not provide access to the Central Authority on Convention-related matters. This section modifies a section of the Social Security Act to permit an agreement between the Secretary and the Central Authority to provide access to the Parent Locator Service. Finally, Section twelve provides for funds to be allocated each year for carrying out the purposes of the Convention and ICARA.\textsuperscript{26}

As we see, the Convention’s implementing legislation in the United States is a specific and important document. Procedurally, it aligns the Convention with standards for evidentiary admissibility and jurisdiction and guidance. Substantively, ICARA sets clearer evidentiary standards and Convention definitions. Administratively, ICARA provides cost burdens, allows interagency collaboration, and makes way for appropriations. In sum, ICARA is a typical way in which the United States implements a Convention.


Like the United States, the United Kingdom used a relatively detailed statute to implement the Convention in England, Northern Ireland, Scotland, and Wales. This statute, the

\textsuperscript{23} The Parent Locator Service is a federal program that supports the location of parents in child support cases in the United States. See, http://www.acf.hhs.gov/programs/cse/newhire/index.htm.
\textsuperscript{24} ICARA.
\textsuperscript{25} Id.
\textsuperscript{26} Id.
Child Abduction and Custody Act of 1985 ("the Act"), implemented the Convention after the U.K. signed the Convention.27 This law has since been reformed, but retains the same title and most of the same provisions. Here, this article will analyze the Act’s current version.

A quick note here about the ratification procedure in the United Kingdom exposes a difference between the United States and United Kingdom. At the time of the Convention’s ratification, treaty-ratification powers vested solely in the Queen as a Prerogative power.28 However, from 1924 – 2010, the Ponsonby Rule included the Parliament in the ratification process. Under that rule, the Crown would present all treaties to the Parliament 21 days before ratification. During this time, Parliament would consider the treaty and often pass an Act related to the treaty, as it did with the Convention.

The Act straddles two sources of international family law: the Convention and European-specific law on international family law. Unlike the United States, the United Kingdom—a European Union Member State—must always consider how its international agreements outside the European Union will affect its responsibilities within the European Union. Today, two Conventions and a European Union Regulation address international child abduction. As seen below, these two sources have come together in many aspects of Convention application. For now, we will only consider the sections of the Act that relate to the Convention.

In its preamble, the Act’s purpose is to ratify two international conventions.29 Here the United Kingdom does not present its motivations for ratifying except for the procedural requirement towards ratification. As per United Kingdom’s Ponsonby Rule, the Queen enacted treaties with the advice and consent of the Parliament.30 Thus the Act was necessary to ratify the Convention.

Part I of the Act encompasses the sections that relate to the Convention.31 The first section provides an internal definition for the Convention and declares that the Convention will have the force of law in the U.K. This formal declaration gives force to the Convention.

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29 Act.
30 Id.
31 Id.
The second section addresses when the United Kingdom will recognize that the Convention applies reciprocally between the United Kingdom and other states that ratify the convention. For such recognition, the Act requires an Order in Council. This is another procedural step that gives the Convention life between the United Kingdom and other states.

The third section names the Central Authorities in England, Scotland, Northern Ireland, and Wales. Here we see a unique aspect of the U.K. system where ratification happens at the U.K. level while separate entities handle implementation in the U.K. countries. Unlike ICARA, which left the naming of the Central Authority to the President of the United States, the Act names the Central Authority. This section also has an interagency communication aspect as it requires coordination between the Lord Chancellor and the Secretary of State.

Section four handles the important question of establishing jurisdiction in domestic courts for Convention matters. Essentially, this aligns Convention cases with other family law jurisdiction in the United Kingdom courts. In England, Wales, and Northern Ireland, the High Court may handle Convention petitions. In Scotland, the Court of Session may handle Convention Petitions. This alignment is a procedural yet practical function.

Section five specifies the court’s role in urgent matters. The Act preserves these courts’ ability to make interim orders to protect a child’s welfare. This procedural provision has an important function in protecting children.

Section six gives administrative leeway by addressing communication requirements between the Lord Chancellor or Secretary of State and other signatory nations. This section allows the U.K. Central Authority to request information from local authorities, state health services, and courts. These entities are then bound to provide this information. In turn, the Central Authority can then communicate this information to other Central Authorities. This important provision allows for a chain of information from local agencies to the Central Authorities then to the Lord Chancellor or Secretary of State and onto foreign Central Authorities. This harmonizes Convention procedures with pre-existing infrastructure.

32 Id.
33 Id.
34 Id.
35 Id.
36 Id.
Section seven describes admissibility requirements for Convention petitions. As in the United States, this section helps parties know how to authenticate documents that the petitioned court will then use as evidence. Here again, the Act aligns the Convention with existing admissibility requirements in United Kingdom courts.

Section eight provides a court the power to declare that a removal from the U.K. was wrongful. This jurisdiction allows a parent whose child was removed or retained from the U.K. to obtain a U.K. decision that the child was wrongfully removed. Then, this parent can presumably present this decision along with a petition to the court in the country to where the child has been removed or retained. While this decision will not likely bind another country’s court, it may help persuade a foreign judge. Also, as seen below in a decision by the Court of Justice of the European Union, this kind of procedure can allow a court to refer an international family law issue to the Court of Justice.

Section nine specifies domestic court’s limits under the Convention. As per the Convention’s Article 16, courts may not make decisions on the merits of a child custody arrangement after the child has been wrongfully removed. Here, the Act aligns this section with domestic law by specifying which domestic laws that courts shall not apply regarding the child’s custody arrangement after the child has been wrongfully removed.

Section ten addresses rules of court that may apply to Convention cases. In general, rules of court by appropriate authorities may make provisions for Convention cases that are necessary or expedient. More specifically, this section allows for rules of court that address procedural and judicial cooperation provisions.

Section eleven addresses the all-important issue of legal costs. The U.K. made the specific reservation that no costs in the Convention’s Article 26 will fall on the U.K. government. The only costs that the government will bear are those set out in the various legal aid laws in the U.K. countries. Unlike ICARA, the Act does not address the allocation of costs between parties.

In sum, the Act resembles ICARA in many ways. The Act provides for procedural and

37 Id.
38 Id.
39 Id.
40 Id.
administrative measures to align the Convention with the family law framework and infrastructure that pre-existed the Convention. The Act did not affect the Convention in the same substantive manner that ICARA did. It provided more specific attention to court procedures and coordination with other countries. In the ends, the Act was a necessary step for the Convention’s practical application in the United Kingdom’s dualist system.

c. France: Loi and Decrets

France too is a dualist system, but its legislation surrounding the Convention is quite different than the common law approach taken across the Atlantic and the Channel. The Convention’s ratification relied on a loi and two decrets. These written laws are considerably more concise that those in the United States and United Kingdom, but they nonetheless met France’s ratification requirements.

Articles 52 – 55 of the French Constitution set forth the requirements for ratifying a treaty. Article 52 provides that the President of the Republic has the power to negotiate and ratify treaties. However, Article 53 requires the Parliament’s approval to ratify a treaty that modifies existing law. Once ratified, Article 55 provides that a treaty supersedes acts of Parliament.

Following these constitutional requirements, the French Parliament issued a loi that led to ratification. On June 10, 1982, the Sénat and the Assemblé Nationale passed Loi No. 82-486,

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41 French Constitution, Art. 52 (“Le Président de la République négocie et ratifie les traités.”).
42 Article 53 states:

Les traités de paix, les traités de commerce, les traités ou accords relatifs à l'organisation internationale, ceux qui engagent les finances de l'Etat, ceux qui modifient des dispositions de nature législative, ceux qui sont relatifs à l'état des personnes, ceux qui comportent cession, échange ou adjonction de territoire, ne peuvent être ratifiés ou approuvés qu'en vertu d'une loi.

Ils ne prennent effet qu'après avoir été ratifiés ou approuvés.

Nulle cession, nul échange, nulle adjonction de territoire n'est valable sans le consentement des populations intéressées.

43 French Constitution, Art. 55 (“Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l'autre partie.”).
44 Loi No 82-486 du 10 Juin 1982 autorisant l’approbation d’une convention sur les aspects civils d’enlèvement international d’enfants (“loi”).
approving the Convention’s ratification. In a very short act published in the Official Journal, the French Parliament simply gave its assent for the approbation to Convention and provided that this Convention would have the force of law in France.\footnote{Id.} Here we see very different approach from the legislative action in the United States and United Kingdom. Rather than using pages worth of specific provisions, the French Parliament gave the Convention the force of law with well under 100 words. This \textit{loi} allowed the French government to bring the Convention into effect in France.

The next procedural step was to provide for the Convention’s application via \textit{décret}. On November 29, 1983, the Prime Minister and Foreign Minister published \textit{Décret 83-1102} in the Official Journal.\footnote{\textit{Decret No 83-1021 du novembre 1983 portant publication de la convention sur les aspects civils de l’enlvement international d’enfants faite a La Haye le 25 octobre 1980, Journal official du 1er decembre 1983, p. 3466 (“decret 83-1021”).} This \textit{décret} simply stated that, based Articles 52 - 55 of the French Constitution, \textit{Loi No. 82-486}, and \textit{décret no. 53-192}, the Convention would be published in the Official Journal and that the Prime Minister and Foreign Minister would be in charge of executing its application.\footnote{Id.} This \textit{décret} included the Convention’s full text. The Convention went into effect on December 1, 1983. Here again, we see no details on the Convention’s application except the government agencies that would execute the Convention’s application.

After over twenty years of the Convention’s entry into force, the French Government issued a second \textit{décret} regarding the Convention. On October 29, 2004, the Prime Minister published \textit{Décret no. 2004-1158} in the Official Journal.\footnote{Ministere de la Justice, \textit{Decret No 2004 -1158 du 29 octobre 2004 portant reforme de la procedure en matiere familiale, Journal official du 31 octobre 2004, Texte 6 sur 41.} This \textit{décret’s} purpose was to reform civil procedure in family matters to conform with European Union Regulation 2201/2003 and the Convention. Like the United Kingdom, France’s European Union membership required it to line up its international responsibilities with its European Union obligations. The government did this by \textit{décret}.

This \textit{décret} was an entirely procedural order that aligned Convention cases with procedural requirements in France. It fined-tuned the French code of civil procedure (\textit{“code de procédure civile”}) to better handle the international family matters. Section I of the \textit{décret} stated

\footnotetext[45]{Id.}
\footnotetext[47]{Id.}
that the code of civil procedure would be modified by this décret, which occurred by renumbering and adding substantive passages.\textsuperscript{49}

For the purposes of this article, the décret's Section V is most important as it dealt with international child abduction. This part of the décret injected three subsections specific to international child abduction cases into the French code of civil procedure, two of which affected Convention cases. These two subsections were Articles 1210-4 and 1210-5 of the code of civil procedure.

First, Article 1210-4 aligned Convention cases with jurisdictional requirements for domestic custody disputes in France.\textsuperscript{50} Article 1210-4 stated that cases under the Convention would go to the family judge in the Tribunal de Grande Instance that would have jurisdiction based on Articles L. 312-1-1 of the judicial code. This alignment clarified jurisdiction for Convention petitions.

Second, Article 1210-5 stated that any petition for return would be judged by a juge de referée.\textsuperscript{51} This important provision means that petition cases will be handled in the fastest manner possible.\textsuperscript{52} This specific procedure does not exist under the implementing legislation in the United States and United Kingdom.

As we see, the written laws that led to the Convention’s ratification in France are a technical step towards ratification. When compared to United States and United Kingdom written laws, the French system is much clearer and relies more heavily on government and judicial application after ratification. As seen below, this judicial application is also quite different among these traditional actors on the comparative law stage.

d. European Union

A relatively new star on the comparative screen is the European Union. While the European Union is not a signatory of the Convention, the Court of Justice of the European Union has considered the Convention in its case law. Though not traditionally recognized in classic comparative legal scholarship, a comparative analysis of European Union law helps the reader

\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} See, J. Bell, Principles of French Law, 97 (Oxford University Press, 2008).
frame the role of the E.U. in private international law. Thus, the question begs attention—how did the E.U. get in the business of interpreting an international treaty between nations?

The history behind the answer falls outside the scope of this article. Suffice it to say however that the E.U. Treaties, conventions, and regulations have brought international family law well within the jurisdiction of the Court of Justice. Through this jurisdiction, the Court of Justice has interpreted concepts that straddle E.U. law and the Convention. Now, the relevant legislation that has brought the Convention into the Court of Justice is Brussels IIbis ("BIIbis").

Before taking a look at BIIbis, the reader must know that the Convention is not the focus of the Court of Justice. Instead, concepts in E.U. law appear in both the Convention and BIIbis that affect each other’s application in the Member States’ courts. Parallel terms in the Convention and BIIbis have not officially led to a synthesis of these two legal instruments. Nonetheless, while the Convention is not at first glance a subject of European Union competence, Brussels BIIbis has ushered the Convention into the Court of Justice in Strasbourg.

BIIbis is a typical E.U. Regulation that has direct effect in the Member State courts. Its structure includes a lengthy preamble of thirty-three paragraphs, stating the goals and competences under which the Commission, Council, and European Parliament passed the law. These preambles have valuable information that courts may later refer to in decisions. Then the Regulation goes into the heart of the matter with its articles. BIIbis deals with many more situations than the Convention. This article will only review the three articles that deal with the Convention—two that show BIIbis and the Convention’s indirect interconnectedness and one that expressly governs their co-application.

Several aspects of BIIbis deal with international child abduction in manner that similar to the Convention. This similarity exists because BIIbis’ predecessors—Brussels II Regulation and Brussels II Convention—were modeled on the Convention’s successor, 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. Thus, several concepts closely align between BIIbis and the Convention.

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55 Id.
In particular, Articles two and ten show how closely BII\textit{bis} resembles the Convention. In the definition section in Article two, “rights of custody” and “rights of access” have identical definitions. The definition of “wrongful removal” is almost identical, but it contains a modification to include \textit{ne exeat} provisions as rights of custody. In Article ten, BII\textit{bis} sets habitual residence as the most important jurisdictional factor in international child abductions, as does the Convention. Like in the Convention, BII\textit{bis} does not define habitual residence. With these similarities, interpretations from the Court of Justice of the European Union regarding BII\textit{bis} will indirectly influence how Member State courts define identical terms in these two sources of written law.

Article eleven contains the provisions that explicitly intertwine BII\textit{bis} and the Convention’s application. Article eleven’s provisions apply to all Convention petitions lodged in Member States when the child was habitually resident in another Member State. Otherwise stated, Article eleven of BII\textit{bis} will impact any Convention petition in the European Union that involves two Member States.

With this provision, BII\textit{bis} substantially changes the Convention’s application in the European Union. In Convention petitions, Member State courts must presumptively allow the child to be heard, unless it would be inappropriate based on the child’s age or maturity. Courts must act swiftly in considering Convention petitions—BII\textit{bis} sets a six-week time limit for issuing judgments on a Convention petition. Courts may not refuse a return under Article 13b unless if the petitioning party proves that arrangements can be made to protect the child on return. Courts may not refuse a return unless they give an opportunity for the petitioning party to be heard in court. If a court refuses a return under any of Article 13’s provisions, it must then communicate with courts in the

\textit{Id.}

\textit{Id.}

\textit{Id.}

\textit{Id.}

\textit{Id.}

\textit{Id.}

\textit{Id.}

\textit{Id.}

\textit{Id.}
Member State to which the return was requested within a month.\textsuperscript{64} After that, the court in the previous habitual residence can still consider the custody of the child.\textsuperscript{65} These provisions noticeably modify the Convention’s application in the European Union.

BII\textit{bis} shows us the unique, interesting, and unprecedented role that the European Union plays in private international law. Compared to the United States, United Kingdom, and France, the European Union is indeed a strange beast. As an international actor, the European Union never negotiated, ratified, or implemented the Convention. Nonetheless, it has used BII\textit{bis} to drastically alter the Convention’s application.

Indirectly, the similar terms in BII\textit{bis} and the Convention allow the Court of Justice of the European Union to interpret concepts under BII\textit{bis} that will likely sway Member State courts that apply the Convention alone.

Directly, BII\textit{bis} changes how the Convention applies among Member States. None of these requirements exist in United States, United Kingdom, or French implementing legislation. Now however, all Member States must apply BII\textit{bis’} relevant provisions to Convention cases. Thus, we see that comparative differences and influence exists among traditional states and the European Union alike.

e. European Court of Human Rights

Another non-traditional actor in comparative law is the European Court of Human Rights. Here again, even though this institution has not received much attention in comparative analysis, its massive influence among its contracting parties requires scholars and practitioners alike to understand it from a comparative perspective. Like the above actors, international family law via the Convention allows comparative analysis of private international law at work within the European Court of Human Rights’ jurisdiction. Unlike the other actors, the European Court of Human Rights has a unique source of law and influential interpretations of the Convention.

Like the Court of Justice of the European Union, the European Court of Human Rights has influenced the Convention’s application despite the fact that the Council of Europe did not sign the Convention. Ironically, the Council of Europe passed a parallel convention on

\textsuperscript{64} \textit{Id.}
\textsuperscript{65} \textit{Id.}
international child abduction that provided little impact in practice.\textsuperscript{66} However, the Council of Europe’s golden child—the Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention on Human Rights”) has provided the base for the Strasbourg court’s influence in this field.\textsuperscript{67}

Without any kind of implementing legislation, the European Court of Human Rights has taken on the Convention under the European Convention on Human Rights. Several articles in the European Convention on Human Rights have provided the basis for European Court of Human Rights claims related to the Convention.

First and foremost, Article 8 of the European Convention on Human Rights protects the right to family life.\textsuperscript{68} It provides that “[e]veryone has the right to respect for his private and family life, his home and his correspondence.”\textsuperscript{69} A contracting state may only interfere with this right unless done so “in accordance with the law” in a manner that is:

necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.\textsuperscript{70}

Thus, while the European Convention on Human Rights restricts a contracting state from interfering with an individual’s family life, it may in some cases cause such interference.

Considering a Convention petition, a court that orders or refuses to order a child’s return based on the Convention will interfere with a parent or a child’s right to family life. After all, a Convention petition will almost always affect parent-child contact. Though while this interference exists, it is indeed in accordance with law. As seen in Section III, the question that the European Court of Human Rights most often addresses is whether such interference is necessary in a democratic society.

Another Article of the European Convention on Human Rights that has related to


\textsuperscript{68} Id.

\textsuperscript{69} Id.

\textsuperscript{70} Id.
Convention claims protection of the right to a fair trial. Article 6 protects everyone’s right to “a fair and public hearing within a reasonable time by an independent and impartial tribunal[]”71 In some situations, a parent may argue that the nature of a Convention proceeding has violated their right to a fair trial.

Some cases may also involve an element of discrimination. Article 14 prohibits any discrimination that interferes with an individual’s enjoyment of the European Convention on Human Rights’ rights and freedoms.72 Careful reading of this Article reveals that the European Convention on Human Rights does not prohibit all forms of discrimination in these categories.

Rather, discrimination on these grounds only violates the European Convention on Human Rights if it interferes with the other rights in the European Convention on Human Rights. Standing alone, Article 14 wields no power against discrimination. That said, Article 14 might one day provide significant protection as a source of written law. If a party can show that some discrimination was involved in a court’s decision, it need not show a violation of another right, it must only show that the discrimination fell within the ambit of another right.73 Thus, Article’s 6, 8, and 14 offer substantive jurisdiction for the European Court of Human Rights to consider cases involving the Convention.

Perhaps more importantly, the European Convention on Human Rights provides procedural requirements for a Convention case that falls under those substantive articles to meet the procedural requirements to get into the Luxembourg court. An obvious but nonetheless important step towards the European Court of Human Rights is jurisdiction. Article 32 provides that “[t]he jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention.”74 This creates broad jurisdiction in the European Court of Human Rights for cases that fall under Articles 6, 8, and 14 mentioned above. Thus, international family law can come within European Court of Human Rights jurisdiction.

Article 33 requires that a party exhaust all remedies under domestic law.75 This means that to reach the European Court of Human Rights on a Convention case, the party must take the case as far as it can go in a Member State’s courts.

71 Id.
72 Id.
73 See, e.g., Palau-Martinez v. France, 64927/01 (European Court of Human Rights, 16 December 2003).
74 European Convention on Human Rights.
75 Id.
Not just a dry procedural provision, Article 34 provides individuals with access to the European Court of Human Rights. It states that:

the Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.  

This important provision has provided access for individuals seeking remedies in Convention cases. These articles combined have led to important European Court of Human Rights decisions on the Convention.

The European Convention on Human Rights stands out as a unique source of written law that implements the Convention. Without mentioning or even foreseeing the Convention’s existence, the European Convention on Human Rights has opened the door for its application and interpretation in the European Court of Human Rights. As mentioned below, this has led to landmark changes in the Convention’s application through European Court of Human Rights case law.

f. Conclusions

These five jurisdictions have all applied the same Convention. However, each has implemented this Convention in different ways. In the United States and the United Kingdom, detailed legislation has ushered the Convention into the domestic courts. In France, specific legislation through loi and decrets have impacted the Convention’s implementation. These three jurisdictions have similarly used legislation to establish domestic court jurisdiction, provide limited definitions of certain terms, align Convention cases with existing domestic procedures, and allow for interim measures. Though these purposes have all existed, analysis reveals the different ways that these three jurisdictions have pursued these aims.

The European Union and the European Court of Human Rights have also applied the Convention but in an altogether different manner. Because both of these international legal actors could not join as signatories, they have instead used other means to apply the Convention.

76 Id.
In the European Union, the Convention has arrived in the Court of Justice of the European Union eventually through BIIbis. Thereby, the European Union has taken a large step into international family law. Under BIIbis, key concepts in the Convention are now a matter of European Union law.

In the European Court of Human Rights, the Convention has arrived through the European Convention on Human Rights. Through broad jurisdiction to address matters relating to the rights to family life, fair trial, and non-discrimination, many Convention cases fall under the European Court of Human Right’s subject matter jurisdiction. When contracting states violate these rights and provide no form of redress under domestic law, individual applications allow people to take their cases to the European Court of Human Rights. By analyzing these five jurisdictions’ sources of written law that have allowed the Convention’s application, this article has revealed private international law’s comparative aspects.

III. Convention case law

Once written laws provide jurisdiction for courts to apply the Convention, the Convention can incubate in the courts of various jurisdictions. Through judicial application, the Convention comes to life, giving rights and legal protections to individuals. While all courts will consider the same Convention in Convention cases, the decisions, judgments, and opinions that result may have different forms and outcomes. In this section, this article compares Convention cases from the United States, the United Kingdom, France, the Court of Justice of the European Union, and the European Court of Human Rights, revealing stark differences between these jurisdiction’s approach to judicial opinion writing.

a. The United States: *Mozes v. Mozes*

In the United States common law system, a unique brand of judicial opinions fleshes out the Convention’s application. An early case that has set one standard for determining habitual residence in the United States was *Mozes v. Mozes.*77 Here, this article will describe the format through which the Ninth Circuit Court of Appeals handled the issue.

At first glance, the reader notices that the name of the case reveals the parties who are

77 *Mozes v. Mozes*, 239 F.3d 1067, (9th Cir. 2001).
involved in the proceeding. The case lists their full names and the attorneys who represent them. Then, the case lists each judge who heard the case at the Court of Appeal. Before the opinion begins, the case identifies which judge actually writes the opinion of the court.

The opinion in *Mozes* started with a succinct statement of the issue at hand. He wrote that in this case, the court would “interpret the term ‘habitual residence’ in the Hague Convention on the Civil Aspects of International Child Abduction.” This early brevity gives way to a detailed decision.

In Section I, the court lays out the facts of the case in detail. The opinion described how the parties met, married, and had a child. The opinion then describes several moves and the parents’ motivation behind these moves. Section I concludes with a brief retelling of the court proceedings below.

In Section II, the court provides detailed information about the Convention. The opinion meticulously explains the Convention’s purpose, citing the Convention’s Official Report and an academic treatise on the Convention. The court also cites the Convention’s text to give the reader a broad understanding of the Convention. The court’s analysis then narrows by setting out four questions that a court must address to order a return under the Convention.

This passage provides a poignant example of dicta. In the first line of the opinion, the court opinion narrowly framed the issue in the case as defining habitual residence. Here however, the opinion uses this opportunity to lay down four questions for all returns. While this does not have any binding precedence, lower courts have considered it in subsequent cases.

After laying down those four questions, the opinion cuts to the issue. Here, he announces that the opinion will, based on the second question he posed, examine the concept of habitual residence under the Convention.

Section III uses a lot of ink to determine the court’s role in addressing this case. In general, trial courts in the United States decide questions of fact while appellate courts generally decide on issues of law. Habitual residence is a largely fact-based decision. If it was merely a

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78 *Id*.
79 *Id*.
81 *Mozes*.
82 *Id*. 
question of fact, then the court could only reverse the trial court based on clear error. If habitual residence’s definition is a matter of law, then the court could take on the issue *de novo*. As a result, the court had to determine whether habitual residence’s definition was a matter of fact or law.

The court grappled with its role in evaluating an appeal on habitual residence in a Convention case. The court considered its role in defining habitual residence, citing ICARA, the Convention’s Official Report, and a 1980 treatise on conflict of laws. It also cited an English case on the same issue. Essentially, these sources provided the court with a mandate to strive towards a legal definition for a uniform and autonomous method of defining habitual residence.

However, the court spent a long paragraph describing the academic debate over habitual residence’s factual definition and whether courts should be constrained by any legal definition. Here, the court cites a treatise, academic law journal articles, United Kingdom case law, United States case law, and even a poem by Lewis Carroll. Eventually, the court holds that habitual residence is a mixed issue of fact and law and thus reviewable *de novo*.

The court then moved on to define habitual residence in Section IV. Section IV broke into three sections considering (a) parental intent in general, (b) how to deal with conflicting parental intent, and (c) the circumstances of the child. In each section, the opinion considers multiple elements in a habitual residence definition and their rationales. The court cites cases from the U.K., Canada, New Zealand, and Australia. The court cites treatises, academic law journal articles, and numbers from the Rotary Club and youth exchange organizations.

With all of these hypothetical solutions, a reader might expect a resolution on which definition the court will embrace. By the end of this lengthy section, the reader is however left only with the court’s struggle for a definition.

In Section V, the court announced that definition. In essence, the court compared its definition with the trial court’s definition and found irreconcilable differences between these the two. The court held that habitual residence under the Convention required an:

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83 *Id.*
84 *Id.*
85 *Id.*
86 *Id.*
87 *Id.*
the court to infer a shared intent to abandon the previous habitual residence, such as when there is effective agreement on a stay of indefinite duration.\textsuperscript{88} The trial court however did not include the requirement of an indefinite stay, and thus the court reversed the lower court’s decision.

In Section VI, the court provided instructions for the trial court on remand.\textsuperscript{89} Here again, we see dicta. The court provided its views on certain aspects of the Convention that could arise depending on the trial court’s decision on remand. This guidance presumably helped give the trial court some guidance. However, as it was not immediately relevant to the issues in the present case, this part of the opinion only carried persuasive weight.

In sum, the decision in \textit{Mozes} offers a glimpse of the United States judicial writing style. The judge who writes the opinion will insert his personality throughout the opinion. The opinion will analyze many arguments relative to the issue. The opinion will express positions that are not necessary to the essential issue in the case. Many sources will find their way into the opinion, from written laws to poems. In the end, the essential holding can be buried in all of this prose.

b. The United Kingdom: \textit{S(A Child)}

We now turn our focus across the pond the United States’ former colonial master to compare an English decision. The case \textit{S(A Child)} also dealt with the issue of habitual residence.\textsuperscript{90} However, this case shows that the two common law jurisdictions have different styles in their judicial opinions. This case also shows how E.U. law and the Convention come together in today’s complex private international legal environment.

From the title itself, we see a difference between this case and \textit{Mozes}. In the United Kingdom, the title of the case is the name of the child who is the subject of the case, not the name of the parties who are pitted as adversaries in the United States cases.

Another contrast is that each judge in an English case will write his own opinion. The opinion began by announcing the name of the judge who delivered the first opinion.\textsuperscript{91} He in turn

\textsuperscript{88} Id.
\textsuperscript{89} Id.
\textsuperscript{91} v
announced the attorneys, the general description of the case, the decisions below, and a bit of procedural history. Then he described the grounds for appeal in the case at bar. With a bit of flourish, the judge framed his decision by quoting a passage written by the judge below who contemplated that she “may be found wrong” in her decision below.\textsuperscript{92}

Lord Justice Thorpe then went into a thorough retelling of the facts of the case. In five lengthy paragraphs, the judge chronicled the family’s history.\textsuperscript{93} The Lord Justice revealed a fondness for storytelling, as he provided colorful commentary with mild value judgments of the family’s experiences over the years.

Then, the opinion took note of the mother’s attorney’s argument that based on the nature of the evidence in the case regarding the standard by which the court should determine the child’s habitual residence.\textsuperscript{94} In handling that argument, the Lord Justice noted the varying sources of case law, which he could consider in his decision. In the end however, the Lord Justice indicated that he would rely primarily on a decision by the Court of Justice of the European Union.

It is also worth noting here the style in which the judge cites his and other judges opinions. He regularly refers to himself in the first person. He also cites other judges referring to themselves in the first person. This gives a sense that each judge shares their opinions and agrees or disagrees with the other judges who have decided these cases.

In addition, the opinion repeated cites the attorneys. Each attorneys opinion goes back in forth in a legal game of ping pong. Ultimately, the judge agrees or disagrees with one attorney. This also gives the case a personal feel and a true-to-life account of what has happened in the case.

Moving on, the opinion cites long passages from the lower court opinion.\textsuperscript{95} The judge for all purposes relies on these quotes to assert his case.

These stylistic choices reveal more differences between English and United States decisions. In the United States case, judges will rarely use the first person, rarely name other judges, and sparingly give long quotes from other decisions. Further, judges will always refer to

\textsuperscript{92} Id.
\textsuperscript{93} Id.
\textsuperscript{94} Id.
\textsuperscript{95} Id.
the arguments of the parties, never labeling them as the arguments of the lawyers.

In the end, the Lord Justice adds a bit of dicta about how Europe is changing and votes to dismiss the appeal.\footnote{Id.} This approach differs from the United States approach, which will either uphold, reverse, or remand the case to the court below.

Another unique aspect of the English system is that each judge will write a bit of their own. After Lord Justice Ward has finished, Lord Justice Wall chimes in. He adds little to the opinion and agrees with Lord Justice Ward. Finally, Lord Justice Moore-Black chimes in, but only to state that she agrees with Lord Justice Ward.

In sum, the English decision resembles the United States opinion. However, several differences stick out. Generally speaking, the English opinion offers a more personal style in its application of the law to the case at hand.

c. France: \textit{M. X. v. Mme. Y}

In France, courts use an altogether different method in the civil law tradition’s style of judicial opinion writing. The French \textit{Cour de Cassation} heard the case \textit{Mme H.Y. v. M. B.X.}, which provides an example of a French-style judicial opinion on a Convention case.\footnote{Cass Civ 1ere 16/12/1992 (No de pourvoi: 91-13119) (France, 1992).} Because the French Constitution, civil code, and judicial codes prevent judges from making law, we will see a totally different approach to judicial opinion writing. Furthermore, we see a different court structure in France.

Unlike in the common law countries, the French legal system—like most in the civil law tradition—has separate courts of last resort. The \textit{Cour de Cassation} is the supreme appellate court for private and civil law matters. For administrative matters, the \textit{Conseil d’Etat} is the court of last resort. The third supreme appellate body is the \textit{Conseil Constitutionel}, a council with limited jurisdiction that meets to address matters of constitutionality. The \textit{Cour de Cassation} is divided into six chambers, the first being for family law related matters. Thus, the \textit{Mme. H.X.} case reached the \textit{Cour de cassation}.

At first glance, one notices that, like the United Kingdom practice, the French legal system keeps the parties’ identities anonymous by only using initials to name the parties and officially only listing the court, case, date, and case number in the title. In the opinion however,
the case pits the parties against each other as adversaries, like the United States. Unlike its common law sister signatories though, the judges and the opinion writer are anonymous in the French decision.

A brief look at the decision also reveals a characteristic feature of French court opinions—brevity. This opinion filled less than two pages, longer than many Cour de Cassation opinions. In fact, the opinion is so brief that this article has enough space to paraphrase the entire opinion.

The opinion begins with a brief restatement of the key facts.98 Here, the Cour recounted that the parties were married and had a child in 1988 in Canada. In 1989, they went for a vacation in France. The mother then returned alone to Canada and filed a petition to return the child to Canada.

In the same paragraph, the Cour explained the decision below by the Tribunal de Grande Instance and the Cour d’Appel. The Tribunal de Grande Instance had decided that the child was illegally retained in France. However, it refused to return the child due to an exception in the Convention. Both parties made an appeal to the Cour d’Appel. Mme. X argued that the Tribunal de Grande Instance erred in applying the exception. M. Y. argued that the Tribunal de Grande Instance wrongfully held that the child’s habitual residence was Canada and that thus he had not wrongfully retained the child. The Cour d’Appel accepted Mme. X’s argument and rejected M. Y’s, thus ordering the child’s return to Canada. So, in one paragraph—with only one sentence separated by semicolons—, the Cour summed up the facts and decisions below.

The Cour then divided the grounds for appeal into three parts.99 First, it dealt with a procedural issue that the father brought up in the first paragraph of the section dealing with the first ground. It explained his argument and the article in the code of civil procedure that the father cited. In the second paragraph, the court rejected his argument with one sentence.

On the second ground, subdivided into two parts, the Cour explained the father’s argument regarding the child’s wrongful removal.100 In the first part, he argued that the Cour d’Appel violated the Convention by not ascertaining whether the mother had custody in Quebec. In the second part, he argued that the Cour d’Appel violated Article 455 of the code of civil

98 Id.
99 Id.
100 Id.
procedure by not finding the mother’s return to Canada temporary.

The Cour rejected both parts.\textsuperscript{101} First, it found that the civil code of Quebec attributed parental authority to both parents. Second, it found that the father did not sufficiently prove a new family arrangement and thus the Cour d’Appel did not violate the code of civil procedure. Thus with these two paragraphs, the Cour characterized and rejected the father’s second ground of appeal.

On the third ground, the father argued that the Cour d’Appel did not sufficiently ascertain whether, based on the mother’s lifestyle, the child’s return would pose a grave risk to the child’s physical and psychological well-being.\textsuperscript{102} The Cour rejected this ground because, based on its sovereign authority as a trier of fact, the Cour d’Appel had determined that the return would not pose a grave risk to the child. Unlike in the United States, the appellate court is always a trier of fact and the Cour de Cassation can only rule on questions of law. Thus, the Cour de Cassation rejected all three of the father’s grounds for appeal.

This case provides a textbook example of the Cour’s style in handing down an arret d’especes. With a mechanical precision, the Cour lays out minimal facts and procedure below. In handling the grounds for appeal, it deals with each ground. Each ground may include separate parts, which the Cour will address. Then it either dismisses or remands the case.

The Cour embraces a mechanical style in its sentence structure and grammar. This rigid uniformity is largely a product of the specific judicial training that happens in France. Unlike in the United States where judges are appointed from the ranks of lawyers or even open elections, judges in France train right out of law school and go straight to the bench. Only rarely will a judge come from the civil service in France.

The sources used in French opinions also differ from the common law countries. The Cour relies only on the facts and the written law in its opinion. Here, the Cour cited only the Convention and the code of civil procedure. This is not merely a stylistic choice—judges are prohibited from making law in cases and in citing any sources other than written law. The court only addresses the issues at bar. Thus, in the French system, we see a mechanical, terse, formulaic, to the point, anonymous style.

\textsuperscript{101} Id.
\textsuperscript{102} Id.
d. The Court of Justice of the European Union

The Court of Justice of the European Union uses a style that falls somewhere between the traditional civil law and common law approaches. In the case called A, the Court of Justice considered the issue of habitual residence under Brussels IIbis, a decision that will affect all international child abduction cases at the very least in E.U. Member States.

That case begins with a title, and here we see that the parties’ identities are concealed by using only an initial for the party’s name. Significantly, only one party’s initial exists in the case name. This signifies that the case issued to the Court of Justice is not really a dispute between two parties. Rather, as with most cases that reach the Court of Justice, this case came from a request for a preliminary ruling from a Member State court on an issue under E.U. law. Thus, the case is merely a method for the Court of Justice to clarify E.U. law for all Member State courts.

The judgment then lists the judges who heard the case and the name of the Advocate General. The Advocate General plays an interesting role in the Court of Justice. Based on the treaty, the Advocate General will submit an opinion to the Court of Justice before the Court of Justice considers the case. These opinions are persuasive and informative. The case also lists which countries and E.U. institutions have submitted observations to the Court of Justice regarding the case.

The body of the case begins by stating a brief two-sentence description of the law and proceedings related to the case. Then, the Court of Justice quotes the relevant E.U. and national legislation that relate to the case—here, BIIbis and two Finnish laws.

Next, the judgment provides a detailed description of the factual and procedural history that brought the case to the Court of Justice. Here, a parent challenged a decision in which a Finnish social services agency took her children from her. This case went to the Finnish supreme administrative court, which referred four questions to the Court of Justice.

In the following four subsections, the Court of Justice concisely handles each question

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104 Id.
105 Id.
106 Id.
107 Id.
that the Finnish court submitted. For each question, the Court of Justice cites relevant provisions in BIIbis. The court also cites previous Court of Justice cases and the Advocate General’s opinion. It answers each question and then leaves the substantive decisions in the case to the Member State court that referred the question.

All in all, the Court of Justice’s opinion resembles aspects from both the common law and civil law judicial opinion writing style. Like the common law jurisdictions, the Court of Justice provides detailed facts and cites relevant case law. Like the civil law jurisdictions, the Court of Justice cites a limited number of sources, uses a terse and formulaic approach, issues an anonymous decision, and keeps a strict focus on the issues presented.

e. The European Court of Human Rights

The European Court of Human Rights has also decided several cases involving the Hague Convention. A unique aspect of the European Court of Human Rights is that it delivers both judgments and decisions. A judgment is a decision on the merits after the court has admitted the application. A decision however only decides whether a the European Court of Human Rights will admit the application. Judgments hold more persuasive authority and consider the arguments of the applicant and the contracting state in the case. Decisions however only consider the applicant’s complaint, which can in itself indicate points of law in the European Court of Human Rights. Both judgments and decisions follow similar styles and this article will give attention to a decision to provide the reader with a feel for this unique aspect in the European Court of Human Rights.

The court made one such decision involving the Convention in *Levadna v. Ukraine*.

The title of the case reveals a key difference in European Court of Human Rights case law. In the European Court of Human Rights, the case is between individuals and a state, based on the state’s alleged failure to follow the European Convention on Human Rights. Here, the individual was Ganna Levadna and she brought a case against the Ukraine.

The decision will list the chamber and the judges’ who decided on the case. Then, the decision goes directly into describing the facts of the case. The decision provides a detailed

\[108 \text{Id.}\]

\[109 \text{Levadna v. Ukraine, Application no. 7354/10 (European Court of Human Rights, 27 April 2010).}\]
history of the events in the family’s life that led up to the legal dispute.\textsuperscript{110} Then, the chamber reviews the procedural history in the case. The court provides a detailed account of what has happened at each step during the litigation.

After providing the factual and procedural history, the chamber cites the relevant law in the case. Here, the chamber listed Articles 1, 3 – 5, 11 – 13 of the Convention.\textsuperscript{111}

Next, the court considers the applicant’s complaints. In this case, the applicant sought to rely on Articles 6 and 8 of the Convention.\textsuperscript{112} Regarding Article 6, the applicant claimed that a Ukrainian Court of Appeal violated her right to fair trial when it “applied the law incorrectly and that it declared the child’s retention in Ukraine unlawful without a claim having been made in that respect.” Regarding Article 8, the applicant claimed that her child’s return to Italy would amount to an unlawful interference of her right to family life.\textsuperscript{113}

After considering these complaints, the chamber examined the law and rejected the mother’s application. As it is apt to do, the chamber looked past the Article 6 complaint because it considered that “the applicant's complaints fall to be examined solely under Article 8 of the Convention, as they are essentially directed against the merits of the domestic court's decision ordering the return of her son to Italy.”\textsuperscript{114} Thus, the court examined Article 8’s constituent parts.

Essentially, the chamber will break down Article 8 into three steps, as it did here.\textsuperscript{115} First, the chamber considers whether the state has interfered with the applicant’s right to family life. Here, as in most Convention cases, the chamber found that the decision to return the child did interfere with the applicant’s family life.

Second, the chamber considers whether the interference was in accordance with national law and pursued a legitimate aim. If not, then the state has violated the law. Here, as in most Convention cases, the interference was in accordance with the Convention and pursued the legitimate aim of protecting the father’s and child’s right to family life.\textsuperscript{116}

Third, after finding a legal basis, the chamber will consider whether the interference was
necessary in a democratic society. Here, the chamber framed the issue as “whether a fair balance between the competing interests at stake – those of the child, of the two parents, and of public order – was struck, with the particular importance being attached to the best interests of the child.” In considering all of the factors that the Ukrainian court examined, the chamber decided that the Ukrainian court struck a fair balance in the best interests of the child. Because “the applicant’s complaints [did] not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols,” the chamber rejected the application as manifestly ill-founded and inadmissible.

In this decision of the European Court of Human Rights, we see again a middle ground between the traditional common law and civil law judicial opinion writing styles. This decision laid thoroughly laid out the facts and law. However, the chamber avoided unnecessary details or holdings. The chamber used an anonymous, objective tone. It cited law and European Court of Human Rights case law, but avoided other sources. This decision was clearly labeled and followed a clear logical progression. All in all, the decision in Levadna presented a clear and readable opinion.

f. Conclusions

In all, we see varying approaches to judicial opinion writing among these five jurisdictions. On one end of the spectrum, we have the style of judges in the United States and United Kingdom, whose lengthy opinions can bury the law beneath the style. These judges are free to cite all kinds of sources and inject their own personality into each opinion. Their opinions wander from topic to topic, often repeating passages or making hypothetical declarations that have no bearing on the case at hand. Confusing as this may be, it produces an opinion style that can offer a wide range of information and background and, at times, be fun to read.

At the other end of the spectrum, we have the French style of judicial opinion. This opinion style cuts all of the fat from the legal writing, producing a relatively clear and concise application of the law to the case at hand. This promotes a coherent and easily manageable format. However, this style leaves the reader with little in the way of concrete indicators of how the judges reached their opinion and which specific facts contributed to the outcome. Although

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117 Id.
118 Id.
the case has no precedent in theory, this style can make the task of understanding how the judges may decide a case with different facts.

Somewhere in the middle of these extremes lies the style of opinions handed down by the Court of Justice of the European Union and the European Court of Human Rights. These courts provide more in the way of facts, reasoning, and sources of law. They also provide more in the way of structure, logical progression, and impartial opinions. These jurisdictions likely benefit from their position as courts that speak to a variety of legal traditions.

IV. Conclusion

The Convention provides a valuable reference point for comparativists to analyze the different written laws and judicial opinions that give life to private international law in varying jurisdictions. The written laws the United States, the United Kingdom, France, the European Union, and the European Court of Human Rights readily demonstrate the comparative differences between these jurisdictions. The laws of the United States and United Kingdom deal with specific aspects of the Convention and aim to align the Convention’s interpretation, procedure, and administration. In contrast, the French laws implement the Convention with minimal procedural alignment, not affecting the Convention’s text and leaving the government and courts to apply its provisions. These states take different approaches to the Convention’s implementation.

Non-states have effected the Convention’s implementation with their own written laws. The European Union has affected the Convention by passing a Regulation that controls its substantive and procedural application in Member States. The European Court of Human Rights has relied on the provisions of the European Convention on Human Rights to sweep the Convention within its jurisdiction. Thus, we see a myriad of ways in which the Convention is affected by written sources of law.

The courts that then apply those laws also affect the Convention. In the United States and United Kingdom, a long-winded and relatively free wheeling approach to judicial opinion writing stands in stark contrast to the concise and formulaic approach that the French courts take. The Court of Justice of the European Union and the European Court of Human Rights have seemingly married these two styles to come up with a unique form of judicial opinion.

These differences are certainly interesting from a scholarly point of view. Academics can pore over these differences and explain how and why these differences exist. In practice,
practitioners must likewise appreciate many differences between jurisdictions when handling private international law issues. Judges, lawyers, and legislators will benefit from looking to other jurisdictions to identify best practices that exist among the jurisdictions.