

THE INTERNATIONAL CHILD ABDUCTION DATABASE (INCADAT) GUIDE FOR CORRESPONDENTS

Prepared by:

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1. INTRODUCTION

Since the Hague Convention on the Civil Aspects of International Child Abduction entered into effect, over 1500 decisions based upon, or referring to, the Convention have been reported. In a significant number of those decisions, the judge or authority applied the Convention with little access to important decisions from other parts of the world. As with any international treaty it is essential that the Convention is subject to consistent interpretation throughout its 73 States Parties. This is a matter of particular importance as the geographical scope of the Convention expands to include States in all parts of the globe.

To facilitate the goal of consistent interpretation, the Hague Conference established in 1999 the International Child Abduction Database (INCADAT), a database of significant decisions concerning the Convention. INCADAT is being used not only by judges and Central Authorities but also by legal practitioners, researchers and others. It is already contributing to the promotion of mutual understanding and good practice, essential elements in the effective operation of the 1980 Convention.

The INCADAT Correspondent Guide is a resource for all individuals and bodies participating in the project. It aims to inform existing correspondents of developments and changes. At the same time new and prospective correspondents will be introduced to the database and informed how they can contribute to its on-going success.

This Guide has been prepared in three language versions: English, French and Spanish. It contains updated and revised versions of papers presented at the 2001 INCADAT Correspondent Meeting.

2. INCADAT ANNUAL REPORT

On the eve of its third anniversary INCADAT now contains summaries of over 450 of the leading child abduction cases. Moreover, many of the summaries now have the full text of the case attached. The States Party within the INCADAT network include: Argentina, Australia, Austria, Canada, China (Hong Kong Special Administrative Region), Denmark, Finland, France, Germany, Hungary, Iceland, Ireland, Israel, Italy, Netherlands, New Zealand, Norway, Poland, Portugal, South Africa, Spain, Sweden, Switzerland, the United Kingdom (England & Wales, Scotland and Northern Ireland), the United States of America and Zimbabwe. It is hoped that INCADAT coverage will continue to grow to incorporate jurisprudence from more of the 73 States Parties. However, to achieve this goal it is essential that more correspondents be recruited. To facilitate the task of the correspondent a Correspondent Guide has been prepared by Peter McEleavy, Aude Fiorini and Marion Ely.

The Correspondent Guide is designed to introduce INCADAT and to give instruction on how to select and prepare summaries. The preparation of a succinct yet accurate summary is far from a simple task and initially is often quite time consuming. A thorough understanding of the Convention is needed so that the most relevant and interesting sections of the case can be highlighted in the summary. Now that a corpus of case law exists and the operation of the provisions is generally understood, one of the key roles of the Correspondent is to try to identify and draw the user's attention to new developments in terms of legal analysis and judicial reasoning and of course the application of the Convention to unusual factual situations. This is what regular users will be particularly interested in. At the same time where a State's Convention jurisprudence is relatively unknown elsewhere, correspondents should be looking to provide a broad sample of the case law on all the major provisions of the Convention.

In addition to the Guide, the last year has seen the first INCADAT Correspondents' Meeting which took place on 25 September 2001 at the Permanent Bureau of the Hague Conference. This event, which was generously financed by the Netherlands government, brought together representatives from 20 States. After presentations by the late Dr Peter Nygh, Marion Ely, Aude Fiorini and Peter McEleavy there was a most productive round table discussion chaired by William Duncan and Peter McEleavy dealing with the operation and development of INCADAT. Many suggestions were made which have led to certain alterations and improvements being made which will increase the accuracy of the summaries and ensure that the database reflects as best as possible the different legal traditions of the Contracting States included.

During the meeting significant attention was paid to the issue of making INCADAT more accessible and useful to civil law legal systems. An analysis of the problems which exist in respect of civil law judgments in the context of a database such as INCADAT, was provided by Aude Fiorini.

It was agreed that correspondents from civil law jurisdictions should endeavour to refer to and gather additional information on secondary literature. It was recognised that civil law case commentaries often provide clarification and contextual information which is absent from the actual judgments. To facilitate this task an additional field has been added to the 'legal basis' section of the database: 'legal doctrine.'

A planned development, and one for which there was support at the Correspondents' Meeting, is the preparation of a paper version of INCADAT. At the meeting it became apparent that many judges, even within Europe, did not have internet access and would not be able to consult the database. A hard copy of INCADAT containing selected summaries from a wide range of States Party with short explanatory sections would therefore be of help in encouraging consistent interpretation - the primary goal of the project. At present the plan is very much in its infancy. A draft chapter has been prepared and discussions will take place with publishers soon.

INCADAT has benefited from several generous donations over the past year including contributions from the governments of Austria, Canada, China (Hong Kong Special Administrative Region), Cyprus, Netherlands, Switzerland, United Kingdom (England and Wales, Northern Ireland and Scotland) and the United States of America. Previous contributions to INCADAT have been received from the governments of Finland, Korea and Norway. Further contributions will be needed if INCADAT is to be maintained and improved as a cost-free service.

On the editorial front significant effort has been put into updating existing summaries over the course of the last year. Cross references are made to more recently entered cases. This will make INCADAT of greater benefit to users. A new addition has been made to the INCADAT homepage to publicise new cases which have been added. A single click on 'New Decisions' takes users to a separate page which lists all the most recent summaries added, together with a two line résumé and with a link to the full summary. The goal for the coming year is to be able to add all leading child abduction case law onto INCADAT within a reasonably short period from its delivery. To be able to achieve this depends however on the help and commitment of all Member States and correspondents.

On a personal note we would like to pay tribute to the late Dr Peter Nygh. Peter was a great friend and supporter of INCADAT. He was working at the Permanent Bureau during the summer of 1999 when we started work on the project and he provided very valuable assistance and comments on how the database and the summaries should be structured and presented. His interest continued thereafter and he inspired all who attended the first Correspondents' Meeting in September 2001 with his opening paper. He will be sadly missed by us and all those involved in the INCADAT project.

Peter McEleavy & Marion Ely

3. THE ROLE OF AN INCADAT CORRESPONDENT

The success of INCADAT ultimately depends on the network of correspondents. The database will only be able to serve as the primary resource for international child abduction case law if there are correspondents in each State Party who are able to submit to the Hague Conference copies of all decisions of interest, along with a case summary in INCADAT form.

It is envisaged that correspondents will be Central Authority officials, or an individual, possibly an academic or graduate student, nominated by the local Central Authority. The Hague Conference is not in a position to pay correspondents. However, all active correspondents will be acknowledged on the introductory page of INCADAT. Correspondent meetings will be convened periodically. The first such meeting took place in The Hague in September 2001. Correspondents will also be invited to submit a six monthly report to update the INCADAT editorial team on the development of case law in the jurisdiction in question.

Detailed guidance to assist correspondents, along with a model report form, is found in the following pages.

Summary of Role:

- 1 To identify and select appropriate judicial / administrative decisions for inclusion on the database as and when they become available.
- 2 To prepare a detailed summary of the selected case law in INCADAT form.
- 3 To inform the editorial team of any developments which are of relevance to cases and summaries previously included on the database.
- 4 To complete and return electronically the six monthly report form.

4. GUIDE TO PREPARING CASE SUMMARIES

A *Selecting Cases*

The first and one of the most important steps in preparing case summaries is deciding which decisions to select for inclusion. It is of great importance that INCADAT include case law from as many Contracting States as possible. Generally if the jurisprudence of a State has not previously featured on INCADAT, summaries / full cases from that jurisdiction will be added.

INCADAT has also been designed to leave open the possibility of including relevant non-convention cases. This would primarily be abduction case law from non-Contracting States, (e.g. *C.W. v. H.R.*, 19/02/1997, transcript, Supreme Court of Western Samoa at Apia; INCADAT cite: HC/E/WS 332), but, could also be extended to include particularly important cases dealing with associated issues which impact upon the Convention (leave to remove cases following a Convention return, e.g. *Payne v. Payne* [2001] EWCA Civ 166; INCADAT cite: HC/E/UK 344).

However, once a body of case law from a particular State has been included on INCADAT our approach is generally to concentrate on and add subsequent **appellate decisions** as quickly as possible. However, if new cases are merely repeating points that have previously been made by courts in the same jurisdiction they will not necessarily be added.

Notwithstanding the focus on appellate level decisions, **first instance decisions of particular importance, or with unusual factual situations**, will be included. Furthermore, in deciding this issue one might ask, where does the court of first instance feature in the judicial hierarchy of the jurisdiction in question? Is it a minor local court, or, as is the case with Finland, Scotland, Australia, or England for example, is it a court of some standing?

A delicate issue, particularly given the aim of INCADAT to serve as a tool for uniform interpretation, is how to deal with judgments which may appear to be at odds with the majority of case law and / or the intentions of the drafters. The approach adopted until now has been to include such judgments where they have emanated from appellate courts, but in the comments section it has been noted that the interpretation given differs to that of other courts in the same jurisdiction or in other Contracting States.

B Constructing the Summary

A common impression is that a case summary can be drafted very easily and quickly. Experience has shown however that this is rarely the case. An accurate case summary will often take several hours to prepare. The aim of the summary is to give the reader an outline of the facts of the case as well as an understanding of the key legal discussion. After reading the summary the user can decide whether to access the full text of the judgment. To facilitate this aim, and to allow accurate and varied searched to be made, the INCADAT summary form has been divided into several different sections, which are listed and explained below.

<i>Name of case</i>	To identify the case the standard form citation of the jurisdiction in question should be used. If the case is only available in transcript form the names of the parties should be replaced by initials.
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Where there is reference to the court seised, the citation should be followed by an approximate translation of the name of the court into English or French as appropriate.

Date of decision This should use the formula: day, month, year.

States The relevant State / jurisdiction should be selected from the list provided. It should be noted that each of the United Kingdom's three component jurisdictions have been included. Also a distinction, for the purposes of incoming cases, has been drawn between the United States federal and state court jurisdictions. The former is USf, the latter USs.

Care should also be exercised since the scroll list of States is very sensitive and it is easy to inadvertently move up or down the list even after a selection has seemingly been made.

Name of court Give the actual name of the court in the original language, a translation in English / French may then be given. The name of the State should be placed in brackets.

Status of case There are 3 choices available here: 'final', 'subject to appeal' and an open field.

Where it is certain that the judgment in question results in the termination of the litigation, 'final' should be used.

Where a judgment has very recently been given and it is possible that there might be an appeal, 'subject to appeal' should be used. This will only ever be a temporary entry and must be updated whenever further information becomes available.

The open field may be used where in the interests of accuracy it is necessary to give specific information. For example if an appeal is successful, but the case is then remitted to the trial court for a decision to be taken on the return application, one might put: 'Case remitted to first instance.' If the summary relates to a first instance decision but an appeal has taken place, one might put: 'Decision upheld / dismissed on appeal.'

Level of Court This field is used to designate whether the court seised of the case is a court of first instance, an appellate court or a superior appellate court.

Some uncertainty may exist as regards this field where there is only one court with jurisdiction to hear appeals in Convention cases and that is the highest court in that State (for example, Ireland, Israel, Finland). Notwithstanding that the 'supreme court' in these instances is acting as a court of 'first' appeal the approach employed is to designate such courts as 'superior appellate courts,' thereby reflecting the status they enjoy in their State of origin.

*Published /
where available*

The original intention here was to indicate where a judgment could be obtained if it had not been officially reported. If the case was reported then this field would not be used.

However, the development of government and court websites and databases means that many decisions can be found on-line within hours of being handed down. For the sake of convenience wherever a case is available on such a web-site, reported or not, the web address should be included here.

Articles considered These provisions are merely for the sake of guidance and should not be considered to be authoritative. In terms of 'articles considered' the approach adopted has been to refer to articles of the Convention that have been considered in a meaningful way. If an article has been mentioned in passing and not discussed it should not be included here.

If national or international law provisions have been referred to these can also be identified in general terms.

Articles relied on This section is used to designate the article(s) that the court has based its decision on. Normally will be Article 3/5, or one of the sections of Article 13.

Order In this section there are several alternatives and also an open field which allows scope for a different order to be included. The most likely orders to select or to put in the open field are:

Application dismissed = no wrongful removal / retention

Return ordered = there has been a wrongful removal / retention, but none of the exceptions has been established.

Return ordered with undertakings given.

Return ordered with conditions imposed.

Return refused = there has been a wrongful removal / retention, but at least one of the exceptions has been established.

Article 15 declaration granted / refused.

Appeal allowed and... (*one of the above*).

Appeal dismissed and... (*one of the above*).

Facts

The aim of the 'facts' section is to tell the story of the case as succinctly as possible, and to provide the reader with all the key information, up until the moment when the trial / appeal is heard. Sometimes the section will be very short, where it deals with a very straightforward removal or retention, on other occasions greater detail will be required.

The 'facts' section should **not** be used to give a summary of the judgment under consideration.

Obviously the information that can be included depends on the original judgment, but a set format has been developed and includes the following details:

How many children involved,

Sex of children,

Age at date of alleged wrongful removal / retention,

States where children have lived for significant periods,

Relationship of parents,

The nationality of parents may be identified if this deemed to be relevant,

Situation in respect of rights of custody,

Date of removal / retention.

Thereafter relevant information should be included in chronological order. This might include steps taken to facilitate the return of the child and, if possible, the date on which return proceedings were initiated. If the

summary is dealing with an appellate decision, the date of the trial should be given, along with details of the ruling of that court.

Below are 2 examples, the first a relatively simple factual situation where little detail is required, the second a very complicated case where significant detail was needed.

EXAMPLE I

Re B. (Abduction: Acquiescence) [1999] 2 FLR 818; [INCADAT cite: HC/E/UKe 264]

The child, a girl, was 5 at the date of the alleged wrongful removal. She had lived in both England and the United States. Her parents were married and had joint rights of custody. On 4/5 October 1997 the mother went to England, her State of origin, with the child.

On 11 February 1998 the father came to England. On 27 February he issued an application for contact. Interim orders for contact were made on 20 March and 9 July.

On 18 July the father visited the United States embassy in London. While there he was informed of the Hague Convention. In late August / early September 1998 the father issued proceedings for the return of his daughter.

In December 1998 the father returned to the United States.

EXAMPLE II

Re L. (Abduction: Pending Criminal Proceedings) [1999] 1 FLR 433; [INCADAT cite: HC/E/UKe 358]

The children, a boy and girl, were twins, aged 9 months at the date of the alleged wrongful removal. They had until then lived all of their lives in the United States. The parents, an American father and Danish mother, were married and had joint rights of custody. In July 1996 the mother took the children to Denmark.

On 13 January 1997 the circuit court in Palm Beach, Florida found that the removal had been wrongful. Around March 1997 the father initiated return proceedings in Denmark.

On 17 September a court of first instance in Esbjerg, Denmark dismissed the father's return application, finding, inter alia, that the father had acquiesced in the removal and that a return would amount to a grave risk of harm to the children.

On 12 November the western division of the High Court allowed the father's appeal and ordered the return of the children.

On 1 December, 4 days before a directions hearing to arrange the modalities of the return of the children, the mother disappeared taking the twins with her.

On 9 June 1998 a grand jury in Florida charged the mother with the criminal offence of international parental kidnapping and a warrant was issued for her arrest.

On 2 July the circuit court in Palm Beach awarded the father full custody of the children.

On 11 August the mother's lawyer petitioned in Denmark for the return proceedings to be re-opened.

In the autumn of 1998 the mother was discovered in England and the US government commenced extradition proceedings.

On 15 October family proceedings were issued in the Family Division of the High Court in London for the return of the children to the United States.

On 4 November a Danish court refused the mother's application for the return proceedings to be re-opened. The mother immediately issued an appeal against this decision.

Ruling

This is in essence an expanded version of the 'order' section. It will explain the basis of the judgment, for example:

Application dismissed; the removal did not breach any rights of custody.

Return ordered; the retention was wrongful and none of the exceptions had been proved to the standard required under the Convention.

Return refused; the removal was wrongful but the standard of harm required under Article 13(1)(b) had been proved.

Judges

This is an optional field. In some States it is accepted practice for judges to be identified, in others it is not.

Where judges are identified they should be given the title they would have in the jurisdiction in question.

If a judge has given a dissenting judgment that can be noted in brackets after their name.

Legal Basis

The legal basis section is without doubt the most important.

The object is to give the reader sufficient indication and flavour of what is said in the judgment so he/she can decide whether to read the full version of the case. Crucial passages should be summarised or may indeed be quoted from selectively. Of course care must be used not to state or quote issues of their context, see for example:

EXAMPLE III

Croll v. Croll, 229 F.3d 133 (2d Cir. September 20, 2000); [INCADAT cite: HC/E/USf 313]

Rights of Custody

Rights of custody refer to a bundle of rights of which a parent must possess a certain portion in order to be protected by the Convention. Possession of only one of those rights, in this case the right to determine the child's place of residence by exercising a veto power over the child's international relocation, was insufficient to confer custody on the party possessing that power.

The majority held that the father's right extended merely to a veto over the child's expatriation. It gave him no say over any other custodial issue, including the child's place of residence within Hong Kong, other than the child's geographical location in the broadest sense. The right of veto therefore fell short of conferring a joint right to determine the child's residence, particularly since the custody order also stated that custody care and control be awarded solely to the mother.

The majority also drew attention to the fact that the right was not one the father actually exercised. It rejected argument that the father would have exercised the right but for the removal because the right concerned nothing but the removal.

The majority further noted that the child risked being returned to a country in which no one had a right to care for it on a daily basis.

Sotomayor CJ dissented. She argued that the Convention's definition of rights of custody contemplated a bundle of rights to be protected regardless of whether a parent held one, several, or all such custody rights, and, whether the right or rights were held singly or jointly with the other parent. She further argued that rights arising under a *ne exeat* clause included the right to determine the child's place of residence since

the clause expressly provided a parent with decision making authority regarding a child's international relocation. Thus the instant ne exeat clause vested both the father and the Hong Kong court with rights of custody for the purposes of the Convention.

To some extent the legal basis section has to be able stand alone. Example III is rather a long passage which reflects the detailed analysis employed in this judgment. In the majority of cases passages will be much shorter, particularly in respect of subsidiary issues, see for example:

EXAMPLE IV

S. v. T., 4 December 2000, transcript, Constitutional Court of South Africa; [INCADAT cite: HC/E/ZA 309]

Undertakings

The Court exacted significant undertakings from the applicant father. These related not only to the dropping of criminal charges against the mother, but also custody, maintenance and other ancillary expenses the mother and child were likely to face upon their return. The father also had to obtain an order from the Supreme Court of British Columbia in the same terms as the undertakings he had given.

This example shows how it is possible to be very succinct and to get the key message across.

Attention must be given to not merely transcribing the text of the judgment. That is not the purpose of INCADAT.

Most of the legal basis sections are self explanatory, but some require clarification:

habitual residence For ease of understanding this section will sometimes require the inclusion of additional factual information that was not included in the 'facts section'. It is also very helpful to work out and indicate the length of time spent in different States.

procedural matters This section deals with a variety of possible issues: costs, was oral evidence allowed, was the application dealt with expeditiously, or were there delays, was contact facilitated pending the final determination of the case...

An issue that sometimes arises is that none of the legal bases corresponds with the issue in question.

In such a situation discretion has to be used to deal with the issue in the most appropriate legal basis.

Comments /

Subsequent History This is a field that will normally be filled out by the INCADAT team.

However, it will be particularly helpful if additional information about a case can be given. Similarly details may be forwarded of any publication where the case has been analysed.

C Updating

Accuracy and attention to detail is obviously essential if as INCADAT matures it is to acquire and maintain a good reputation. One aspect of this is ensuring that the summaries are kept up to date. For example when correspondents become aware that a case has been officially reported after it has been added onto the database, they should forward the citation to the Incadat editorial team. Similarly if the case is the subject of academic analysis, it would be beneficial if a reference of the article / case note could be added to the summary.

5. THE IMPORTANCE OF PREPARING SUMMARIES UNDERSTANDABLE TO LAWYERS FROM ALL LEGAL TRADITIONS:

Mlle AUDE FIORINI

INCADAT has been seen as an important way in which to contribute to greater consistency in the interpretation of the 1980 Convention and to the improvement of practices under this instrument. To achieve this end, it is important that the summaries of judicial decisions be uniform in style, form and substance to facilitate their use and comprehension by all users.

a. Linguistic aspects

- General construction of the summaries

It is important to bear in mind that the INCADAT summaries will be read and used by lawyers from all legal traditions and by people whose mother tongue will not necessarily be one of the two official languages of the database. In order for the summaries to be understandable for all potential users of INCADAT, the summaries should be constructed in the same manner. The same framework should always be followed for the presentation of the fields (especially the fields 'facts', 'order' and 'ruling'). This will not only facilitate the linguistic understanding of the summaries,

but will also enable the quick identification of the substantial differences of each case.

- Wording

The terminology utilised in the summaries is an important issue. The summaries should be written so as to enable a total appreciation by jurists from the requested country as well as foreign lawyers.

Precise terms should be used. However it does not follow, for example, that the summaries should mention the exact names of all administrative or social bodies taking measures for the child. These will, if necessary, be found in the full text of the case or added in brackets in the summary.

The use of generic terms should always prevail. The summaries should not be the mere transcription of the text of the judgment, but rather should have an *explanatory component*. For instance, one should refrain from naming the Central Authority involved in the case.

For example, instead of referring to the "Lord Chancellor's Department", it would be more readily comprehensible if one merely mentioned "the Central Authority for England and Wales".

This is particularly important as regards the procedural aspects of a case. As comparative jurists have indicated, the general assumption that, in all legal systems similar needs are met in ways that are equivalent, is hard to maintain when one turns to procedural law. Common law and civil law traditions have developed quite differently: the preparation and progress of a claim, the way witnesses and experts are selected and examined, the manner in which the different tasks and functions are allocated to the court, the parties and the lawyers in different phases vary greatly from a system to another. These differences are certainly more accurate if we compare the Continental and the Anglo-American systems, but can be found at a different level of the scale even in procedural orders of the same tradition.

These differences cannot be overlooked in the construction of the summaries. The peculiarities of a given system should not be emphasised in the summaries; the procedure should be formulated so as to be accessible to all users of INCADAT. Here again the use of generic concepts should prevail. The characteristics can then, if necessary, be mentioned in brackets.

For example, when courts are referred to in the summaries, it should be specified if they are a court of first instance or a court of appeal. An extreme illustration of this need is given by the 'Supreme Court of New York' which is indeed a court of first instance. The name may be confusing for foreign readers, and this confusion may be magnified through the translation.

If more precision or information is needed to explain the case, it is suggested to give more details in the 'Comments' or 'Procedural matters' fields.

An example for this is the summary of Ø.L.K. 1. februar 1999, 1. afd., B-0149-99 (INCADAT cite: HC/E/DK 407) where the Danish Act concerning returns to another Nordic country with reference to certain decisions about care and treatment has been not merely cited. Its operation has been succinctly but clearly explained in the comments section of the case.

The same explanation should be given when the case reveals that some substantial concepts have been used that have no equivalent in other systems. Here again, clarification should be given in the text of the summary.

Example: In Re S., Auto de 21 abril de 1997 [INCADAT cite: HC/E/ES 244], reference was made to the rabbinical concept of "Moredet". Such a concept obviously requires some clarification. 'Moredet' is a status under Jewish religious law indicating that someone is a 'rebellious wife', which results in the absolute negation of her rights, not only in relation to the child, but also within the Israeli community. This description has been rightly inserted in the summary of the decision.

In constructing the summaries, attention should be given to the languages in which the summaries will be made available. Whichever language the summary will be formulated in, it will have to be translated into the second official language of the database. To date, the large majority of summaries have been written in English and subsequently translated into French.

When a foreign judgment has not been translated from its original language before the construction of the summary in English or French, it is particularly important and useful to keep the original terms, in brackets, together with a non-literal translation. This will avoid mistakes or inaccuracies in the later translation of the summary and contribute to a perfect understanding of all aspects of the case by those INCADAT users who will have some knowledge of the relevant legal system.

For example, in the summary of the Swedish case RÅ 1995 ref 99 [INCADAT cite: HC/E/SE 448], the exact name of the court involved (Regeringsrätten) has been mentioned despite the fact that a translation intelligible for jurists from all legal background (Supreme Administrative Court of Sweden) had been found.

The same shall apply when it comes to the "cases and authorities referred to" in the original decision: if the person responsible for the construction of the summary thinks it might be useful to translate some of the references for the sake of clarity, this should be by the way of a mere addition to the references also reproduced in their original language and form.

b. Analytical aspects

Given the extensive amount of case law on the database, INCADAT currently seems more adapted to decisions emanating from the common law systems. This results from the type and the form of the decisions as well as the role played by courts and the impact of judge-made law in these jurisdictions.

The need for consistent interpretation of the 1980 Convention is certainly general. Foreign case law can appear as an aid to interpretation. The consultation of foreign case law remains easier and better accepted in systems allowing the courts a power to create the law. INCADAT can greatly contribute to this welcomed tendency. Even if some jurisdictions, in the common law world, have been reluctant to engage in an analysis of foreign decisions, it is remarkable that other jurisdictions of common law systems such as Australia, New Zealand, the United States and Ireland have from the outset made extensive use of foreign case law. This situation is in marked contrast to the position of continental systems.

In many civil law countries, an extreme doctrine of the separation of powers has been followed. This separation has restricted to a minimum the judges' scope for creativity and allowed for the resolution of disputes by mere acts of subsumption. The binding force of precedent is not recognised and civil law judges will not necessarily refer to previous decisions.¹ In these States, the influence of national case law is purely indirect. The influence of foreign case law will be even less explicit, even when used as an interpretative tool. In that regard, the role of the database on consistent interpretation can only be indirect in continental countries.

Conversely, it might be difficult for common law jurisdictions to refer to civil law decisions because of the form and the traditional content of the latter.

The fields of the summaries are certainly well adapted to the type of decisions rendered in jurisdictions of the common law world. At the moment, civil law decisions have to be forced into a scheme which is rather inadequate for them. In this regard, French, Italian or Danish summaries can appear disappointingly brief.

An extreme example can be found in the French supreme court decisions. These judgments are traditionally formulated in a very succinct way and their motivation is almost entirely formal. The understanding of the decisions is very difficult because of their concision: generally the decisions are not more than one or two (long) sentences. The lack of details in the case leads the reader who wants to understand the substantial part of the case to make use of the conclusions and reports written during the preparation of the judgments, or to try and read the text of the decisions of the previous instances which yet are not always available or published.

¹ Such prohibition can be explicit. See art 5 of the French civil code.

As a result, the legal basis for the many civil law decisions is often very short. The corresponding field in the summaries is regularly at best rather vague. The 'Comments' field appears to be the more useful section for the reader and the user of the database, which in turn should oblige the person responsible for the construction of the summary not to concentrate as much on the decision itself as on the conclusions and reports or the decisions of the lower courts having dealt with the case. The INCADAT correspondent can also, when necessary, refer to the explanations or justifications given by leading authors in notes, commentaries or articles dealing with the relevant case. To enable this task an additional field has recently been added to the 'legal basis' section of the database: 'legal doctrine.'

The lack of information in the text of the decision can also be reinforced by the fact that some courts – like the Italian or Belgian or French supreme courts and, to a smaller extent, the German supreme court – are mere judges of the law and as such are not allowed to deal with the factual aspects of the case. Consequently, these courts never give a definite solution to the case, which is always remitted to a lower court if the appeal is allowed. Under these circumstances, the contribution of these courts to the interpretation and the understanding of the dispositions of the Convention can sometimes hardly be revealed by the decision itself:

For example, a French decision of the Cour de cassation has often to be read in connection with the subsequent judgment of the court of appeal (to which the case is remitted following the allowance of the appeal) or of the judgment of the appellate jurisdiction which was challenged (in case of dismissal of the appeal).

In those cases, some information has, once again, to be added to the 'Comments' section. Alternatively, the INCADAT correspondent can also take the responsibility of preparing a separate summary of the relevant decision of the lower court.

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