

No. 21-797

In the
Supreme Court of the United States

SERGE ALUKER,
Petitioner,
v.

SIMIN YAN,
Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. THE ISSUE BEFORE THE COURT IS THE INTERPRETATION OF A TEXT-BASED TREATY—NOT STATE LAW.

1. The issue before this Court is one of international treaty interpretation—not Virginia state law. Even if Virginia state law were to recognize the parties’ private PSA as an “agreement having legal effect,” which it does not, such a state law could not usurp the meaning of “agreement having legal effect” in an international treaty. The 1980 Convention on the Civil Aspects of International Child Abduction (the “Hague Convention”) is not an enforcement-of-agreements treaty. The Hague Convention functions by operation of law. Convention, art. 3.

2. The United States government does not recognize private agreements between parents as having any “legal effect” through which rights of custody may be acquired, modified, or terminated.¹ The United States government has made its position known to the Hague Conference on Private International Law (the “Hague Conference”) and all other States Parties to the Hague Convention. *Id.* The Hague Conference maintains Country Profiles on States Parties to the Convention, in which the governments of the States Parties submit national responses to questionnaires

¹ See Permanent Bureau, Hague Conference on Private International Law, Country Profile, United States of America (November 2012), available at <https://www.hcch.net/en/publications-andstudies/details4/?pid=6993&dtid=42> (last visited March 3, 2022).

relevant to the Convention. *Id.* The United States government responded as follows to the Hague Conference's questions on how—other than by operation of law—rights of custody are acquired, modified, or terminated:

c) By what other methods can a person or institution acquire rights of custody?	<input checked="" type="checkbox"/> Judicial decision <input type="checkbox"/> Administrative decision <input type="checkbox"/> Agreement having legal effect <input checked="" type="checkbox"/> Other (<i>please specify</i>): Please see our response to question 9.1(b).
d) How, if at all, can the attribution of rights of custody be modified?	<input checked="" type="checkbox"/> By order of a judicial or administrative authority <input type="checkbox"/> By written agreement <input type="checkbox"/> It depends upon how the rights of custody were acquired (<i>please specify</i>): <input checked="" type="checkbox"/> Other (<i>please specify</i>): By judicial order only
e) How, if at all, can rights of custody be terminated?	<input checked="" type="checkbox"/> By order of a judicial or administrative authority <input type="checkbox"/> By written agreement <input type="checkbox"/> It depends upon how the rights of custody were acquired (<i>please specify</i>): <input type="checkbox"/> Other (<i>please specify</i>):

Id. at § 9.2.

3. The United States government has been consistent in its position set forth in Paragraph 2 above through all of its participation in the Hague Conference's various working groups relating to child abduction matters. By way of example, the Hague Conference convened a Working Party on Mediation to discuss issues of voluntary agreements and mediation processes in child abduction matters.² To inform the drafting of the Hague Conference's Guide to Good Practice on Mediation, the Working Party surveyed the States Parties on their respective positions on enforceability of mediated private agreements. *Id.* The United States government's responses are consistent with its responses to the Hague Conference's Country Profile. *Id.* The United States responded in relevant part as follows:

2. Are mediated agreements in a family dispute involving children enforceable in your country without any additional formalities such as notarisations or approval by court?	<input checked="" type="checkbox"/> No – they must be approved by a competent court to be turned into an enforceable order. <input type="checkbox"/> Yes
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² See Permanent Bureau, Hague Conference on Private International Law, Working Party on Mediation in the Context of the Malta Process Questionnaire II, United States Response (August 2009), available at <https://www.hcch.net/en/publications-and-studies/details4/?pid=5311> (last visited March 3, 2022).

<p>3. Can agreements mediated in your country in a family dispute involving children be approved by or registered with a court?</p> <p>(If the answer is “No” please continue with question 4.)</p>	<p>[] No</p> <p>[X] Yes – as long as the court has jurisdiction to hear the case and the court finds the mediated agreement to be in the best interests of the child.</p> <p>[] Other. Please specify:</p>
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<p>3. b) What exact steps are needed to make a mediated agreement into a court order?</p>	<p>Please specify: File a consent motion for a custody hearing in the court that has jurisdiction over the custody case. The judge will ask the parties if they understand the agreement and enter into it knowingly and voluntarily and, if there are no provisions that violate the law or that are contrary to the best interests of the child, the judge will generally approve the agreement and turn it into an enforceable court order.</p>
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3. c) Which court would be competent?	Please specify: the state court that has jurisdiction over the custody case. Generally, where there has been no court case, the court of the state where the child has lived in the last 6 months would have proper jurisdiction. If there was already a US custody order in place, the court that issued that custody order would retain jurisdiction as long as one of the parties or the child still lives in that state
4. Are there any other method(s) by which a mediated agreement can be rendered enforceable in your country (e.g. by being notarised)	Please specify: NO

7. What specific measures are available in your country for enforcing an agreement on child custody or contact?	<p>Please specify: If the agreement is made into a court order, then the same enforcement mechanisms are available for that order as any court order - including findings of contempt of court, fines, jail time, and restrictions on visitation or custodial rights (supervised visits, etc). The UCCJEA (which has been adopted by almost all states in the U.S.) provides for expedited enforcement mechanisms for foreign and domestic custody orders.</p> <p>If the agreement is not merged into a court order, then the parties do not have the remedies listed above. They may have remedies under contract law, but it is frankly unclear how a custody agreement would be enforced under contract law</p>
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Id.

4. The Hague Conference recognizes the legal landscape set out above in the resulting Guide to Good Practice on Mediation.³ The Guide explains as follows with respect to the legal effect of agreements:

... there may be a risk that the agreed solution will not have legal effect and thus may not safeguard the parties' rights in case of further dispute. There are various possible reasons for this. The mediated agreement or part of it may be in conflict with the applicable law or not legally binding and enforceable due to the fact that the agreement has not been registered, court approved and/or included in a court order where this is required . . . For example, in some systems agreements on parental responsibility may have no legal effect unless approved by a court.

* * *

Giving legal effect to a mediated agreement will often require the involvement of a court, be it for registration purposes or for turning the agreement into a court order. Hence, considering which court(s) may have jurisdiction on the issues that are to be included in the mediated agreement is important, as is the question of

³ Permanent Bureau, Hague Conference on Private International Law, Guide to Good Practice (Mediation) under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (2012), available at <https://www.hcch.net/en/publications-and-studies/details4/?pid=6561> (last visited March 3, 2022).

applicable law. Where a mediated agreement covers a wide range of subjects, it may be that the involvement of more than one judicial or administrative authority in the process of giving legal effect to the content of that agreement becomes necessary.

* * *

In many States, parental agreements relating to parental responsibility will need to be approved by the court ensuring that the agreement is compatible with the best interests of the child concerned.

Id. at ¶¶ 41, 190, 214.

5. Recognizing that very few, if any, private agreements between parents will have the required “legal effect” to be meaningful in any way in the context of the Hague Convention, the Hague Conference commenced a project in 2013 to study family agreements involving children.⁴ To begin the project, the Hague Conference convened an Experts’ Group to study and make recommendations on whether the negotiation and drafting of a separate treaty on the cross-border recognition of agreements in family matters involving children should be undertaken. *Id.* The Experts’ Group has held several meetings over the course of the last decade and has recommended that a new treaty be drafted to address recognition and

⁴ See <https://www.hcch.net/en/projects/legislative-projects/recognition-and-enforcement-of-agreements> (last visited March 3, 2022).

enforcement of private agreements between parents. *Id.* No such treaty negotiation or drafting has yet been convened or undertaken. *Id.*

6. Therefore in order for the parties' PSA here to have any "legal effect" on their respective rights of custody, it must be entered as an order by a court with jurisdiction over determining custody of the children. *See ¶ 3, Response Nos. 3(c), 7 supra.* That has never happened. At the time the parties entered into the PSA, the children had lived in Portugal for more than six months. Under the Uniform Child Jurisdiction and Enforcement Act ("UCCJEA"), the children's home state was therefore Portugal, and Portugal therefore had jurisdiction to determine custody of the children. *See ¶ 3 supra; see also, e.g., Va. Code Ann. §§ 20-146.1, 20-146.12.* Even if one of the parties had requested a Virginia court to enter the PSA as a custody order before the children were removed from Portugal, a Virginia court would not have had jurisdiction to do so under the UCCJEA because Portugal, not Virginia, was the children's home state under the UCCJEA. Va. Code Ann. §§ 20-146.1, 20-146.12.

7. Virginia law is a shadow part of the analysis here only because neither of the parties had any court anywhere in the world enter the PSA as a court order to give it "legal effect." Portugal's choice-of-law rules, specifically Portugal's *renvoi* analysis, required that the parties' respective rights, under the law of the parties' common nationality, be considered under Portuguese law as one aspect of the bundle of rights of custody held by the parties. *See* Petition for Cert. at 28. The Fourth Circuit's opinion writing the article 3 "legal

effect” requirement out of a text-based international treaty therefore requires this Court’s review to ensure the interpretation of the Hague Convention is not diluted by state law.

CONCLUSION

The Court should grant review to restore and ensure consistent, text-based interpretation and application of the Convention’s article 3. The requirement that a parental agreement have “legal effect” under the substantive law of the country of the child’s habitual residence is the very touchstone of the treaty. Otherwise there is no lynchpin in the treaty to interpret a parent’s “rights of custody” under the treaty. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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