Keys To A 9-0 High Court Win: Look For Common Ground

By **Karen King** (October 7, 2022)

With a new U.S. Supreme Court term underway — and amid a recent downturn in 9-0 opinions — in this Expert Analysis series, advocates who've won unanimous rulings from the justices discuss their argument strategies, the tactics they think may help unify the court, and what other practitioners can learn from their experience.

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The Supreme Court's October 2021 term will undoubtedly be remembered for a number of high-profile and highly politicized decisions.

By contrast, Golan v. Saada presented a legal issue that fell outside popular news coverage, and outside traditional party lines, but which has important implications for many families and young children.

In preparing for oral argument, we focused on appealing to multiple judicial philosophies on the academic points, while conveying the intense personal trauma at the core of this case and others like it involving domestic violence. Ultimately, it was one of a limited number of cases in the October 2021 term to articulate a legal framework through a unanimous decision and opinion.

Golan v. Saada involved a dispute about the application of the Hague Convention on the Civil Aspects of International Child Abduction.

The Hague Convention is an international treaty that generally requires return of a child removed from the country in which he or she is "habitually resident" unless certain exceptions apply, including that there is a "grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

A parent seeking to invoke the grave risk exception must establish that this exception applies by clear and convincing evidence.

In Golan v. Saada, following a two-week trial in 2019, the U.S. District Court for the Eastern District of New York found that Narkis Aliza Golan was a victim of severe and persistent physical, psychological, emotional and verbal abuse at the hands of her Italian husband and the child's father, often in front of the child.

The district court further determined that Golan had satisfied her heavy burden of demonstrating, by clear and convincing evidence, that returning the then-two-year-old child to Italy would expose him to a grave risk of harm.

Indeed, the husband's own expert testified that the husband could not control his anger or take responsibility for his behavior.[1] However, under Second Circuit precedent at the

time, the district court was required to consider whether any possible ameliorative measures would mitigate the grave risk and permit return of the child.

The district court therefore fashioned a suite of purported ameliorative measures to facilitate return and ordered the child returned to Italy. What followed was three years of litigation, including multiple appeals to the U.S. Court of Appeals for the Second Circuit and engagement with the Italian courts.

Golan was ultimately directed (under protest) to obtain a protective order in Italy, even though she believed it would be ineffective, and the district court ordered the return of the child to Italy based on the existence of that Italian order.

The case reached the U.S. Supreme Court on the question of whether, upon finding that there is a grave risk in returning a child to the country of habitual residence, district courts are nonetheless required to consider all potential ameliorative measures that might reduce the risk of return, and to favor return if at all possible.

A conflict among the federal courts of appeals had developed on this question.

In contrast to the Second Circuit, other circuit courts explicitly did not require consideration of ameliorative measures following a finding of grave risk. Indeed, the U.S. Courts of Appeals for the Sixth and Seventh Circuits went so far as to caution against the use of ameliorative measures in cases involving domestic abuse.

The Supreme Court granted certiorari on Dec. 10, 2021, and following briefing, held oral argument on March 22, 2022.

In both the briefing and at argument, our team tried to attract broad support among the justices by focusing on the narrow legal question viewed through the text of the Hague Convention and its implementing legislation, the International Child Abduction Remedies Act,[2] as well as contemporaneous legislative history.

This case presented a ripe opportunity to appeal to textualism, the starting place for most of the court's decisions interpreting any statute or treaty, and a judicial philosophy that would likely appeal to the more conservative justices on the court.

We argued that the Second Circuit's mandatory requirement to consider ameliorative measures and to favor return is a judicial construct not grounded in the text or structure of the Hague Convention or the International Child Abduction Remedies Act. That alone should end the matter.

Because the content of the court's opinion is often equally or more important than the specific result, the opportunity to shape the court's thinking on the broader subject was, in our view, the most important part of oral argument. The justices often ask advocates: "What do you think the rule should be?" or "What do you propose we say?"

Indeed, Justice Stephen Breyer asked both parties during oral argument: "What words do you suggest that we write in this opinion … What words would you like, if we can, to deal with the problem?"[3]

We urged the court to reinforce the core principles set forth in the convention — i.e., that "the interests of children are of paramount importance" and that safety and expeditious resolution are critical components of the Hague process.

We also urged the court to provide clear guidance on the exercise of discretion — that any consideration of ameliorative measures must be expeditious and must not entangle the court in custody matters, and any measures imposed must be limited, enforceable and effective in protecting the child. The court's unanimous opinion ultimately incorporated these suggestions.

Of course, we also anticipated a discussion about the concept of grave risk in the context of the Hague Convention and how grave risk should be addressed depending on its source.

Justice Breyer is well known for offering creative hypotheticals to analyze specific propositions. In preparation for oral argument, our team constructed and tested in mock argument multiple examples of grave risk — some more straightforward and easy to solve, and others more inherently complex and difficult to solve in an expedited proceeding.

Pandemics and war zones were natural examples given that oral argument was scheduled in the middle of the COVID-19 pandemic, and a month after the invasion of Ukraine by Russia. We also discussed scenarios from case precedents, like special medical needs or squalid, cramped living conditions.

In the end, Chief Justice John Roberts suggested an example of his own — grave risk arising from the location of a home next to a nuclear power plant, which could be resolved by moving to a different location within the country of habitual residence.

And Justice Amy Coney Barrett highlighted in her questioning the critical point we sought to make — that the vast majority of grave risk cases, like this one, involve severe domestic violence and complex family issues, and that courts should proceed with great caution in those cases because effective ameliorative measures are difficult, if not impossible, to fashion, particularly in an expedited Hague proceeding.

By using examples that test an argument against different factual scenarios, advocates can aim to persuade a broader set of justices that their position is correct.

On June 15, the Supreme Court issued a unanimous decision in our client's favor. Writing for the court, Justice Sonia Sotomayor's opinion observed:

> The Second Circuit's rule, "in practice, rewrite[s] the treaty," by imposing an atextual, categorical requirement that courts consider all possible ameliorative measures in exercising this discretion, regardless of whether such consideration is consistent with the Convention's objectives.[4]

In providing guidance to district courts, the court stated that any discretionary consideration of ameliorative measures by the district court must prioritize the child's physical and psychological safety, must not "draw the court into determinations properly resolved in custodial proceedings," and must not cause undue delay.

The court also stated that the grave risk in some cases may be "so unequivocal, or the potential harm so severe, that ameliorative measures would be inappropriate."

The most challenging part in preparing for oral argument — and the topic that consumed much of the moot arguments — pertained to the remedy requested. Both sides in the case favored final resolution at the Supreme Court, instead of remand back to the district court for further proceedings. The Office of the Solicitor General, which filed an amicus brief,

favored remand.

On behalf of Golan, we hoped to convince the court to reverse and end the case by allowing the child to remain in the United States while custody proceedings move forward. However, reversal is rare in this context; remand is by far the more common outcome after a legal standard is clarified.

Additionally, given the detailed factual record, the lack of any record on present circumstances, and the fact that some additional time would have relatively little impact on a case that has already been proceeding for four years, it was not surprising that the court opted to remand the case back to the district court to apply the newly articulated legal standard. It nevertheless left a disappointing mark on the victory.

The case is thus still ongoing.[5] As a result, the full story, our reflections on the litigation, and what ultimately happens to this child, are still to be determined. But the journey to the Supreme Court stands as its own chapter in this story.

As a first-time advocate before the Supreme Court, it was an experience like no other. My 30 minutes at the podium, in the most sacred room for a litigator, represented the culmination of months of preparation.

Steps I took that I believe could benefit future advocates include:

- Reading and re-reading the record, the case law, and relevant policies, regulations and treaties;
- Scrutinizing the court's prior relevant decisions and the justices' questions during oral arguments in those cases;
- Drafting and editing countless potential questions and answers;
- Mooting arguments in front of a diverse array of lawyers and academics; and
- Working with the support of numerous colleagues in my own firm, and elsewhere.[6]

All who worked on the case with me engaged in intense preparation in the hopes of garnering each and every vote — an effort not just to prevail, but to achieve clear guidance from the court that would benefit all domestic violence survivors facing return petitions under the Hague Convention.

In a time, and a term, that was increasingly fractured and mired in partisan disputes, it was a welcome break to focus on the basic principles of textual construction and judicial discretion. Due to COVID-19 restrictions, the courtroom was closed to the public; oral argument was intimate, constructive and a true debate to distill conflict down to common ground.

On multiple levels, the argument and the unanimous decision were relief from the cacophony of our present times.

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[1] Saada v. Golan, No. 18-CV-5292, 2019 WL 1317868, at *18 (E.D.N.Y. Mar. 22, 2019).

[2] Title 22 of the U.S. Code, Sections 9001–9011.

[3] Oral Arg. Tr. ("Tr.") at 25; see also Tr. at 64.

[4] See Golan v. Saada, 142 S. Ct. 1880, 1893 (2022) (citations omitted).
Quoting Lozano v. Montoya Alvarez, 572 U.S. 1, 17 (2014).

[5] On remand, on August 31, 2022, the district court again ordered that the child (now six years old) be returned to Italy based on its prior findings. The August 31 decision is currently on appeal before the Second Circuit.

[6] In this case, Paul Weiss Rifkind Wharton & Garrison LLP (my former firm and co-counsel on the case), Sanctuary for Families, and all the organizations and amici curiae that supported my client provided invaluable contributions.