



Ministry of Justice of the Republic of Latvia

DEUTSCHE STIFTUNG FÜR  
INTERNATIONALE RECHTLICHE  
ZUSAMMENARBEIT E.V.



MINISTERUL JUSTIȚIEI



MINISTRY OF JUSTICE  
OF HUNGARY



Bundesamt  
für Justiz



CURTEA DE APEL  
CONSTANȚA

# *European seminar*

*Cooperation between the EU member states  
for the purposes of solving the civil cases regarding  
the wrongful removal or retention of a child*

*- Manual -*

*JUST/2015/JTRA/AG/EJTR/8681- “European Seminar - Cooperation  
between the EU Member States for the purposes of solving the civil cases  
regarding the wrongful removal or retention of a child”*

SITECH Publishing House  
Craiova, 2018

## Authors:

Botond CZELLE CZ, Petre MATEI  
Anca GHIDEANU  
Juliane HIRSCH  
Inka HOTTGENROTH, Elena-Alina OPREA  
Anastasija JUMAKOVA, Carmen-Gina ACHIMESCU  
Tijana KOKIC, Andrei IACUBA  
Irēna KUCINA, Emilian-Constantin MEIU  
Mária KURUCZ  
Ionica NINU  
Michael NISCHT  
Dan-Andrei POPESCU, Marius FLOARE  
Anca - Magda VOICULESCU

© 2018 Ministry of Justice

All rights reserved. This book is protected by copyright. No part of this book may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, photocopying, recording or otherwise, without written permission from the copyright owner.

Editura SITECH face parte din lista editurilor românești acreditate de CNCSIS și de asemenea face parte din lista editurilor cu prestigiu recunoscut de CNCS, prin CNATDCU, pentru Panelul 4.

Editura SITECH Craiova, România  
Aleea Teatrului, nr. 2, Bloc T1, parter  
Tel/fax: 0251/414003  
E-mail: editurasitech@yahoo.com; office@sitech.ro

### **Descrierea CIP a Bibliotecii Naționale a României**

**European seminar - cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child : manual / Botond Czellecz, Anca Ghideanu, Juliane Hirsch, .... - Craiova : Sitech, 2018**  
ISBN 978-606-11-6637-4

- I. Czellecz, Botond
- II. Ghideanu, Anca
- III. Hirsch, Juliane

34

ISBN 978-606-11-6637-4

### **European seminar**

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child

2

## Content of the manual

1. <b>Introduction</b> – presentation of the project and the content of the manual- lect. Phd Marieta Safta, Secretary of State, Ministry of Justice, Romania	5
2. Bios, photos of experts and rapporteurs	8
3. <b>Cooperation between Central Authorities</b> – <i>Michael Nischt, Executive Officer, Federal Office of Justice, Bonn, Germany</i>	17
4. <b>Habitual residence – national court practice and international case law on matters concerning parental responsibility and international child abduction</b> - <i>Dr Inka Hottgenroth, expert, Judge and Head of the Department of Family Law in the District Court of Cologne, Germany, and Alina Elena Oprea, rapporteur, Lecturer PhD, Faculty of Law Babes-Bolyai University, Cluj-Napoca, Romania</i>	25
5. <b>(Un)lawful change of the country of habitual residence of the child</b> – <i>Tijana Kokic, expert, Judge, Zagreb Court, Croatia, and Andrei Iacuba, rapporteur, Judge, Tribunal for minors and family Braşov, Romania</i>	42
6. <b>Issues within proceedings</b>	49
6.1. <b>The relation between the proceedings concerning parental responsibility and those of international child abduction. Discussion on international jurisdiction, cooperation between courts etc.</b> - <i>Botond Czellecz, expert, Legal Adviser, Ministry of Justice of Hungary, and Petre Matei, rapporteur, lawyer, Bucharest Bar Association, Romania</i>	49
6.2. <b>Domestic violence - the role of social services and the issuance of protective measures in favour of a child</b> - <i>Ionica Ninu, expert, Judge at the Bucharest District Court, Romania</i>	58
6.3. <b>Criminal proceedings</b> – <i>Anca Ghiddeanu, expert, judge, Iaşi Court of Appeal, Romania</i>	75
6.4. <b>Maintaining contact with the left-behind parent</b> – <i>Tijana Kokic, expert, Judge, Zagreb Court, Croatia, and Andrei Iacuba, rapporteur, Judge, Tribunal for minors and family Braşov, Romania</i>	83
7. <b>The importance of the child’s hearing in establishing his/her best interests during the return proceedings</b> – <i>Anastasija Jumakova, expert, Central Authority, director, Department of International Cooperation, Latvia, and Assistant Professor Carmen-Gina Achimescu, rapporteur, Faculty of Law University of Bucharest, România</i>	87
8. <b>Enforcement of decision</b>	99
8.1. <b>Enforcement of return decisions (a national perspective, some aspects of international cooperation)</b> – <i>Irena Kucina, expert, Secretary of</i>	

<i>State, Ministry of Justice, Latvia, and Emilian-Constantin Meiu, rapporteur, judge, Tribunal Ilfov, trainer, National Institute of Magistracy, România</i>	99
<b>8.2. Enforcement of access right decisions</b> – <i>Tijana Kokic, expert, Judge, Zagreb Court, Croatia, and Andrei Iacuba, rapporteur, Judge, Tribunal for minors and family Braşov, Romania</i>	107
<b>9. Direct judicial communication within international Hague network of judges</b> - <i>Anca Magda Voiculescu, expert, judge, Bucharest Tribunal, Romania</i>	111
<b>10. Practical aspects related to mediation in matters concerning parental responsibility and international child abduction. The Malta process. Recognition and enforcement of agreements concluded during return proceedings</b> – <i>Dan Popescu, expert, PhD Associate Professor, Faculty of Law “Babeş-Bolyai” University Cluj-Napoca, public notary, Romania, and Assistant Professor Marius Floare, rapporteur, Faculty of Law “Babeş-Bolyai” University Cluj-Napoca, Lawyer, Cluj Bar Association, România</i>	124
<b>11. International Child Abduction in the jurisprudence of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU)</b> - <i>Juliane Hirsch, expert, LL.M. Trinity College Dublin</i>	143
<b>12. The Revision of the Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000</b> – <i>Maria Kurucz, expert, Legal Adviser, Ministry of Justice of Hungary</i>	163
<b>13. Legislation</b>	167
13.1. The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction	167
13.2. The Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000	176
13.3. German legislation - Act to Implement Certain Legal Instruments in the Field of International Family Law (International Family Law Procedure Act – IFLPA)	210
13.4. Latvian Legislation – the Regulation No. 322 adopted on the 15 May 2007 and Extracts from Civil Procedure Law of the Republic of Latvia	227
13.5 Romanian legislation – Act no. 369 of 15 September 2004 Republished Implementing the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, to which Romania acceded through the Act No. 100/1992	241

#### European seminar

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child

## 1. Introduction

The first instrument adopted at European Union level in the field of legal cooperation on family law was the Council Regulation (EC) no. 1347/2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of both Spouses. This Regulation was repealed by the Council Regulation (EC) no. 2201 /2003 of 27 November 2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility. The latter is the cornerstone of the legal cooperation in the Union in matrimonial matters and in matters of parental responsibility and is enforceable since 1 March 2005 in all Member States, except Denmark.

Council Regulation (EC) no. 2201/2003 provides for uniform regulations to solving conflicts of jurisdiction between Member States and facilitates the free movement of court decisions, authentic instruments and agreements in the Union, establishing provisions regarding the recognition and enforcement in another Member State. The Regulation complements the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and has specific provisions regarding the relationship with the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

The Regulation also includes rules regarding the determination of the competent jurisdiction but it does not grant the parties the possibility of concluding agreements to choose the forum. Moreover, it does not include any provisions regarding the enforceable law in trans-border litigations in the fields concerned (implicitly, it does not allow the parties to choose the enforceable law).

Taking into consideration the ascending trend of international couples and trans-border mobility, the number of cases which involve international cooperation in cases regarding minors shall increase constantly. The fact that the participants in the civil proceedings are not fully informed regarding their rights and obligations in the light of the Council Regulation (EC) no. 2201/2003 only increases the complexity of the cases dealt with by the judges.

In this context, it is worth mentioning that ten years after the entry into force of the Regulation, the European Commission assessed its practical performance and deemed necessary in its report regarding the application adopted in April 2014, to amend this instrument. The objective of this recast is to further develop the field of European justice and fundamental rights,

based on mutual trust, by eliminating the barriers which still obstruct the free movement of the court decisions, according to the principle of mutual recognition, and to better protect the best interests of the child, by simplifying the procedures and increasing their efficiency.

When this proposal was presented, the European Commission noted that the recast exercise shall focus on parental responsibility aspects, because these generated the most issues in the application and practical operation of the Regulation. The matrimonial aspects posed fewer practical difficulties. Although forum shopping is a problem regarding matrimonial aspects, the European Commission chooses to avoid the recast because this would have led to debates with a pronounced sensitive, political character which is linked to family law in the Member States (e.g. the regulations on matrimonial regimes and the matrimonial effects of the registered partnerships, which, following the impossibility of reaching unanimity in the European Union Council, were adopted in the framework of the consolidated cooperation procedure).

In the light of the negotiation manner, the talks on the recast proposal are taking place in the JUSTCIV Working Group established at the level of the Council of the European Union. Until now, the proposal was debated under the half year Presidency of the Council of the European Union constituted by Slovakia, Malta, Estonia, Bulgaria and Austria. The Bulgarian Presidency (January-June 2018) was the first which set this priority to reach a political consensus until the end of its mandate. This goal was not achieved and at the moment when this text was drafted (September 2018) the Austrian Presidency has declared the priority of achieving the political agreement on the operative part and considerations pertaining to the main elements of the compromise. Negotiations are carried out according to the principle "nothing is agreed until everything is agreed".

This book is based on the European Seminar entitled "Cooperation between European Union Member States with the purpose of solving civil cases regarding the wrongful removal or retention of a child", carried out by the Romanian Ministry of Justice in the framework of the European Commission Programme "Justice 2015". Together with the partners from Latvia and Hungary - through the Ministries of Justice of the two States, Germany - through the German Foundation for International Legal Cooperation and Croatia - through the Judicial Academy, the seminar had the undertaken purpose of contributing both to a better legal cooperation practice in family law matters and to the improvement of the specialists involved in cases pertaining to the application of the Council Regulation (EC) no. 2201/2003.

The target audience of the project was formed by judges, central authorities, attorneys as well as other specialists such as bailiffs or mediators, with responsibilities in the application of the Regulation (EC) no. 2201/2003, from all the European Union Member States.

#### European seminar

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child

The project was born from a mutual reality in the Community area: given the increased mobility of the citizens in the European Union, the situations in which the members of a family do not have the same nationality or do not live in the same Member State are not exceptional anymore. This social reality also determined the adoption, at Community level, of uniform rules on jurisdiction, recognition and enforcement of court decisions in these highly sensitive matters of divorce and parental responsibility.

Solving an international civil case is always a challenge. In the European area this challenge doubled due to the high standards and guarantees given to the parties, both in international civil proceedings, and most of all in the Community civil proceedings.

The observance of the private international law jurisdiction of the European courts in the matters of family law was from the beginning a necessary requirement to ensure the movement of the court decisions and the simplification of the enforcement procedure.

During the seminar a pragmatic approach was aimed by supporting the participants to identify the main issues they are facing in cases including cross-border elements, as well as to find the best solutions to eliminate the barriers encountered in practice in matters of abduction or retaining of children. Other aspects were also considered, which are in close relationship with this subject, namely returning the minors, the exercise of parental responsibility, moving the child's residence in another State, enforcing the foreign court decisions issued in this matter etc.

The seminar was structured in lecturing sessions and workshops. These created the basis for a number of talks between various practitioners from various legal systems, aiming for a better understanding of the role and responsibilities of each of them, starting from the same mutual regulatory basis. Thus, the materials included in this book reflect these discussions. The chosen structure starts from the hypothetical situation of an abduction or illegal removal of a child; by illustrating the main issues that may arise in solving such cases (e.g. change of habitual residence, setting visitation rights, hearing the minor, enforcement of decisions). The end of the book refers to the relevant case-law of the European Court of Human Rights and the European Court of Justice in this matter, as well as the most important Recast proposals regarding the Council Regulation (EC) no. 2201/2003.

Lect. Phd. Marieta SAFTA  
Secretary of State, Ministry of Justice  
Romania

## 2. Bios and photos of experts and rapporteurs

### Experts

#### **Botond CZELLE CZ**

Being employed by the Ministry of Justice of Hungary in the Department of Private International Law wide diversity of family law areas are experienced while conducting daily duties. Since the Department is functioning as the Central Authority under various international instruments, including Brussels II bis, all colleagues have close overview on actual cases while the Department participates in the national and international policy making and legislation in the relevant areas as well. As member of the Hungarian delegation in the Working Party of the Civil Law Committee he participated in the revision of the Brussels II bis Regulation. Over the past 10 years he managed his own caseload and took part in the national legislation procedures within the competence of the Department of Private International Law.



#### **Anca GHIDEANU**

She was born in Vaslui (Romania) on March 12th, 1968. She studied law in Iași (Romania), at the University „Alexandru Ioan Cuza” and graduated in 1991 (Bachelor’s Degree). From May 1993 to December 1994 she was a trainee judge at the „Ecole Nationale de la Magistrature” in Bordeaux (France). She has been judge, first in the Local Court („Judecătoria”) Iași (1991 - 1995), then in the County Court („Tribunal”) Iași (1995 - 1999) and since 1999 she was a judge at the Iași Court of Appeal. As a judge, she has been dealing with Commercial, Civil and Family Law cases.

Since 2001, she is a trainer in the National Institute of Magistracy, Bucharest (Romania) in EU Law,

Judicial Cooperation in Civil Matters, The European Convention of Human Rights and Justice for Minors.

She was a lecturer in EU Law at the University „Alexandru Ioan Cuza” Iași - Faculty of Law (2001 - 2007, 2011 - 2013).

#### **European seminar**

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child





### **Juliane HIRSCH**

*Consultant on Private International Law and International Family Law, Mediator & Trainer*

Juliane HIRSCH holds a law degree from the Humboldt University of Berlin, Germany (1999) and a LL.M. Degree from Trinity College Dublin, Ireland (2006) as well as a French State Diploma for Family Mediation (2015). She obtained both German State Examinations in Law (1999 & 2002).

Juliane HIRSCH is specialised in private international law and international family law. She has been working for the Hague Conference on

Private International Law for many years; first as Legal Officer, later as Senior Legal Officer (2007-2012) and since 2012 repeatedly as external consultant. The past years, she has been working as independent expert on a number of international family law and mediation projects. Her main fields of work comprise: international child abduction, cross-border family relocation, international family mediation and cross-border recovery of maintenance.

### **Inka HOTTGENROTH**

The Honourable Justice Dr Inka HOTTGENROTH was appointed Head of the Department of Family Law in the District Court of Cologne since 2013.

Following the completion of her legal clerkship, she entered the judiciary in 1991 appointed to the District Court of Aachen and later the District Court of Cologne and received further judicial qualifications working for a period at the High Court of Appeal of Cologne.

Since 2004, she has worked exclusively on family law matters and has a special responsibility for cases of international child abduction and cross-border parental responsibility, and has presided over a large number of such matters at the District

Court of Cologne, where the national local jurisdiction for such cases is concentrated for the Federal State of Nordrhein-Westfalen.

Dr Hottgenroth lectures in international family law and international child abduction at the German Judicial Academy, the Judicial Academy of Nordrhein-Westfalen and for German attorneys. She has appeared regularly as an expert speaker on these topics including cross-border divorce and maintenance.

Dr Hottgenroth holds a Master of Law (Staatsexamen) and a Degree in *Doctor of Laws* (Dr. iur.) from the University of Cologne. Her Doctoral



thesis on a comparative legal investigation on certain issues in German and Italian company law was published by the University of Cologne in 1999. She studied in Italian language and culture at University for Foreigners in Perugia, Italy, and speaks English, Italian, French and Spanish.



### **Anastasija JUMAKOVA**

Acting Director of International Cooperation Department of the Ministry of Justice of the Republic of Latvia. She has started her professional career as the family law specialist, focusing on the children rights protection, thus she had been working for the former Ministry of Family and Children Affairs, the Ministry of Welfare and the State Inspectorate for the Protection of Children's Rights of the Republic of Latvia.

Having increased her area of expertise and completing Phd studies (Dr. iur. cand.), she is now one of the leading experts on children cross-border matters in Latvia and she is therefore a frequent guest lecturer at the Latvian Judicial Training Centre, the Law Faculty of the University of Latvia, the Local Governments Training centre of Latvia, the Law Faculty of Riga Stradiņš University etc. Ms Jumakova also has a number of relevant articles and she is participant of various both national and international conferences related to the children protection and the theory of law.

### **Tijana KOKIĆ**

She studied at the University of Zagreb, Faculty of Law. In 2016 she finished the Interdisciplinary training programme in the field of the child's rights within the judiciary and communication with the child, University of Osijek, Faculty of Law.

From 1998, she was appointed Judge at the Municipal civil court in Zagreb.

From January 2010 she is judge in Family Law panel at the Municipal civil court in Zagreb.

In 2017 she became EJM contact Judge for Croatia in Family matters.

As a national expert in Family law, she was involved in many national and international projects.



### **European seminar**

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child



### **Irēna KUCINA**

Assoc. Prof. Dr. iur. Irēna KUCINA is the Deputy State Secretary on Court Matters at the Ministry of Justice of the Republic of Latvia and Agent of the Republic of Latvia before the Court of Justice of the European Union. She leads the elaboration of the policy related to the judicial matters, ensures the administration and strengthening the capacity of the judiciary and the national level. In the framework of her extensive professional experience in the Ministry of Justice since 2006, Ms Kucina was Director of the Department for Cooperation with the European Court of Justice (ECJ), led the work of the Civil Law Department and, before the Private International Law Unit.

Beside the broad professional experience, she has strong academic background, specializing in private international law and being elected as Associated Professor of the Faculty of Law in the University of Latvia. She is as well lecturer of the Latvian Judicial Training Center. On the regular basis Ms KUCINA provides trainings for the judiciary and lectures for students in area of cross – border cooperation in civil law matters. She is author of numerous publications in the area of private international law, has conducted several researches and is actively involved in the *Twining* projects as the project leader and expert on the different aspects related to the strengthening of the judiciary.

### **Mária KURUCZ**

She has been working in the Hungarian Ministry of Justice since 22 years, in the department responsible for private international law. As member of the Hungarian Central Authority for the 1980 Hague Child Abduction Convention and the 2201/2003/EC Regulation, she has been dealing with cases of child abduction. Now as an expert of the Hungarian delegation she takes part in the EU-negotiations for the recast of the Brussels II bis Regulation.

Mária KURUCZ has been also dealing with other aspects of private international law. She was especially involved in the elaboration of the 2007 Hague Maintenance Convention (as chair of the Special Commission at the 2007 Diplomatic Conference) and the 4/2009/EC Maintenance Regulation. Recently she was took part in the preparation of the new Hungarian Code on Private International Law.





### **Ionica NINU**

Born in 1970; graduate of the Faculty of Law - Alexandru Ioan Cuza University of Iasi (1993); Master "European Public Spatio" with Dissertation "Relationship between National Law and Community Law"; Postgraduate Courses in the Law of Business and International Cooperation, the French - Romanian Institute of Business Law and International Cooperation "Nicolae Titulescu - Henri Capitant (1997-1998);

Judge since 1993, currently at the Bucharest Tribunal.

Trainer in the field of European Union law at the National Institute of Magistracy (since 2009 at present), a member of the EuRoQuod - network of judges coordinating the application of the law of the European Union and a member of the scientific college of the journal published by it.

Collaborator trainer at the National School of Clerks - Department of Initial Vocational Training - Civil Process and Family and Child Protection (2012-2014); member of ARDAE - European Law and European Affairs Association and member of the scientific college of the journal published by this association Expert/trainer in the field of family law within the framework of the Program Norwegian Financial Mechanism 2009-2014, as well as within the Swiss-Romanian Cooperation Program for reducing the economic and social disparities within the enlarged European Union.

Author of various books in the field of civil law.

### **Michael NISCHT**

Judge at the Local Court in Aschaffenburg, most recently as a family judge (national family matters) for nearly six years. Since October 2017 he is temporary seconded as official in the higher service to the Federal Office of Justice, Division of International Custody Conflicts.



#### **European seminar**

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child

### **Dan - Andrei POPESCU**

Associate Professor at “Babeş-Bolyai” University, Cluj-Napoca (Romania), teaching private international law and comparative private law. PhD (1996) “Babeş-Bolyai” University.

He is the chair of Private Law Department, Faculty of Law, “Babeş-Bolyai” University, Cluj-Napoca; member of the European Law Institute (ELI), Viena; member of the Executive Council – Chamber of Public Notaries Cluj; honorary member of the Faculty Council of Bălţi Law Faculty, Republic of Moldova.

Mr POPESCU also has a number of relevant articles related to the international succession law in the European Union, authentic acts in matters of succession and the creation of a European Certificate of Succession, published in specialized Romanian legal journals.



### **Anca – Magda VOICULESCU**

Born in 1975; graduated Faculty of Law - Bucharest University (1997); judge since 1997, at the present time at Bucharest Tribunal; postgraduate courses in private law and Community Law, Faculty of Law - Bucharest University (1999, 2006); postgraduate courses in human resources management, Faculty of Management - Bucharest Academy of Economic Sciences (2007); LLM in European Union Law, Faculty of Law, Bucharest University Titu Maiorescu (2007); Phd in Laws in European Union Law,

Nicolae Titulescu University in Bucharest, theme of thesis „Direct application of primary and secondary EU law in the domestic law of Member States” (2012); contact judge designated by Romania in International Hague Network of Judges since 2007; member of Romanian Network in civil and commercial matters since 2014; trainer at National School of Court Clerks in international judicial cooperation, European Union Law and civil procedural law (2007 - 2010); trainer at Romanian National Institute of Magistracy in family law (since 2017); mediation courses organised by ADR Professional Trading SRL – Board of Mediation, Romania in 2016; member in numerous commissions for exams organised by Romanian Superior Council of Magistracy, Romanian National Institute of Magistracy and Romanian National School of Clerks; author of publications in the fields of EU law, family law and 1980 Hague Convention on the civil aspects of international child abduction; national expert at international seminars and projects.

## Rapporteurs

### Carmen - Gina ACHIMESCU

Assistant Professor at the Faculty of Law, University of Bucharest. She teaches International Public Law, International Organizations and Relations, Law of Treaties and European Law of Human Rights. She was the Romanian Rapporteur in several European research projects, including the comparative study *Children's involvement in civil judicial proceedings in the 29 EU countries*.



### Marius FLOARE

Marius FLOARE is a Romanian barrister in Cluj County Bar Association (since 2005) and tenure assistant professor at Babes-Bolyai University Law School in Cluj-Napoca (since 2004) Romania. He graduated from Babes-Bolyai University Law School in 2002 and gained a Master's degree (LL.M.) in Private Law in 2004 at the same university. He obtained a PhD (*Summa cum laude*) in 2014 at Babes-Bolyai University with the dissertation entitled "Good and Bad Faith in Negotiating and Performing Common Contracts". His published doctoral dissertation was awarded the 2015 "Simion Barnutiu" Prize for Law Science of the Romanian National Academy.

Marius Floare's areas of legal practice and teaching focus mainly on Family Law and Civil Law (contracts and torts). He also teaches undergraduate courses on Legal Writing and Health Law.



### European seminar

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child



### **Andrei IACUBA**

Judge (since 2003), president of the Tribunal for minors and family, Romania (since January 1<sup>st</sup> 2017)

Ten years of experience in solving family and parental responsibility cases, eight of them within the only Romanian specialized court on such matters.

Member of the Romanian Judicial Network in civil and commercial matters, EUROQUOD Network and International Association of Family Judges (UK).

Trainer of the National School of Clerks (since 2008).

Co-author of “Judicial cooperation on civil and commercial matters – Annotated EU Regulations” (Ed.CH Beck, Bucharest, 2014), “The book on civil procedure exceptions” (Ed.CH Beck, Bucharest, 1<sup>st</sup> edition-2016, 2<sup>nd</sup> edition-2018), author of several articles on EU and domestic law and European jurisprudence in Romanian law journals.

### **Petre MATEI**

Lawyer, member of the Bucharest Bar Association since 2003, author of several scientific works and articles, such as: Practical guide to co-operation in cross-border cases with minors, Bucharest – 2016, in co-author, ACTIONES Handbook on the Techniques of Judicial Interaction in the Application of the EU Charter, the European University Institute, Department of Law, Firenze, Italy, 2016, in co-author;



The right to choose and to be elected in the context of the guarantees given by the European Charter of Human Rights, Institute of Legal Research of the Romanian Academy, Bucharest, 2014; Handbook - Regional Legal Best Practices in Assistance to Victims of Trafficking in Human Beings, Center for Prevention of Trafficking in Women, Chisinau, 2007, in co-author; Child Protection Legislation, SAVE CHILDREN, Bucharest, 2006, co-authored.

### **Emilian-Constantin MEIU**

Judge at Ilfov Tribunal and a trainer at the National Institute of Magistracy. As a trainer for the National Institute of Magistracy Mr. MEIU teaches Civil law and Civil procedure law. He is also a PhD student and teaching assistant at the Faculty of law, in the University "Nicolae Titulescu" of Bucharest.



### **Elena-Alina OPREA**

Senior lecturer at Babeş-Bolyai University, Cluj-Napoca (Faculty of Law), where she teaches International Business Law, Internal and International Business Contracts, Private International Law. She graduated UBB Faculty of Law in 2003 and pursued her studies at Panthéon Assas University, obtaining a Master's degree in Private International Law and International Commercial Law (2004). She prepared her doctoral thesis – “Le droit de L'Union européenne et les lois internationales imperatives” (European Union Law and Internationally Mandatory Rules) - under the supervision of emeritus professor Bernard Audit and since March 2011 she holds a PhD from Panthéon Assas University. She has authored a series of studies in the field of International Business Law and Private International Law, different manuals on Business Law and International Business Law and the monograph *Droit de l'Union européenne et lois de police* (L'Harmattan, 2015).

#### **European seminar**

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child



## 3. Cooperation between Central Authorities in Return Cases

Michael Nischt, Executive Officer  
Federal Office of Justice  
Bonn, Germany

### 3.1. Introduction

The following presentation deals with the role of Central Authorities in solving cases of international child abduction according to the Hague Child Abduction Convention of 1980. The establishment of Central Authorities is based on Article 6 of the 1980 Hague Convention. Article 6 states that every Contracting State shall designate a Central Authority to perform the duties which are imposed by the Convention upon such authorities. The tasks of Central Authorities are defined in detail by Article 7 of the 1980 Hague Convention. The first part of Article 7 contains a “blanket clause” stating that Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objectives of the Convention. The remainder of Article 7 is concerned with a catalogue of rule examples describing the tasks of Central Authorities with particular reference to return cases. Furthermore, Article 21 of the 1980 Hague Convention obliges the Central Authorities to support applicants by promoting the effective exercise of rights of access in cross-border cases.

On the other hand, the way tasks are allocated does not mean that the functioning of the Central Authorities is uniform across Contracting States. Rather, the instruments and legal competences of such Authorities to pursue the aims of the Convention are left to the national legal system of the individual State. For this reason, a uniform description of the operation by Central Authorities is not possible. Due to this fact, this presentation is based on the example of the German Central Authority.

In Germany, the Federal Office of Justice, located in Bonn, is the Central Authority which undertakes tasks under the 1980 Hague Convention.

Broadly speaking, the support provided by the German Central Authority takes one of the following three forms:

- The main task is that of handling incoming and outgoing cases.
- The German Central Authority provides information about return proceedings and application forms on its website.
- The German Central Authority replies to general requests, especially those coming from applicants or foreign Central Authorities regarding

return procedure. Thus, this activity is mainly concerned with providing information about the requirements of an application as well as about further proceedings on the part of the Federal Office of Justice.

- The main task of handling of incoming and outgoing individual cases is described in more detail below.

### 3.2. Incoming Cases

If a child is unlawfully abducted from another Contracting State of the 1980 Hague Convention to Germany, the left-behind parent may ask for assistance from the German Central Authority directly or via the Central Authority of her or his country of residence (see Article 8 of the 1980 Hague Convention). For this purpose s/he can use the information and application forms which are provided on the website of the Federal Office of Justice. The application must contain a German translation of the required statements and documents which are specified in Article 8 of the 1980 Hague Convention.

Upon receipt, the Federal Office of Justice will check the application and, in the event that it is incomplete, request additional information or documents. Before proceeding with the application, the fact that the child has been wrongfully removed or retained must be credibly demonstrated. The following criteria must be fulfilled:

- The child is under 16 years old (Article 4, second sentence of the 1980 Hague Convention).
- The removal or retention is in breach of at least the joint custody rights attributed to the applicant under the law of the State in which the child was habitually resident immediately before the removal or retention (Article 3 para. 1 subparagraph (a) of the 1980 Hague Convention).
- At the time of removal or retention, (joint) custody rights were actually being exercised by the applicant or would have been so exercised but for the removal or retention (Article 3 para. 1 subparagraph (b) of the 1980 Hague Convention), e.g. by having regular, but not necessarily personal contact.
- The Convention was in force between Germany and the relevant Contracting State at the time of wrongful removal or retention (Article 35 para. 1 of the 1980 Hague Convention).

The application should be submitted as soon as possible. However, this may take place no later than so as to be filed with the competent court within one year after the wrongful removal or retention, as per Article 12 para. 1 of the 1980 Hague Convention. If the application is received later than this deadline by the competent court (filing with the Central Authority is NOT sufficient), and if the abducting person is able to demonstrate that the child has now settled in her or his new environment, this situation may be sufficient so as to prevent the return of the child (Article 12 para. 2 of the 1980 Hague Convention).

In the incoming cases, the German family courts have to decide on the potential return of the child. The German Central Authority performs only a limited preliminary examination. In any given case, it is not within the competence of the Central Authority to determine the justification of an application in cases where doubt exists. Only if an application is obviously unfounded will the German Central Authority refuse to provide support as per Article 27 of the 1980 Hague Convention. In the event of such a refusal, the applicant can appeal to the Cologne Higher Regional Court. However, applicants are not required to go via the Central Authority. The applicant always has the option of filing an application with the competent court in her/his own right or with the help of a lawyer every time (Article 29 of the 1980 Hague Convention).

Examples of cases where the requirements of Article 27 are met include:

- The abduction of a child from a non-contracting State
- The applicant did not have (joint) custody rights at the time of the abduction as defined in the law of the requesting State.
- The child is 16 years of age or older.

If Article 27 does not apply, the German Central Authority will take further action. This could consist from locating the child if her/his whereabouts are unknown or unclear. To this end, the Federal Office of Justice may, for example, request data from the residents' registration offices or other German authorities. It is also possible to issue a search notice via the German Federal Criminal Police Office.

The Federal Office of Justice informs the Local Family Court at the place of the child's current residence of the existence of a return application under Article 16 of the 1980 Hague Convention. While such return proceedings are ongoing, the Family Court is not able to issue a decision on parental custody.

Since the Central Authority should aim to facilitate an amicable solution, the German Central Authority sends a letter to the respondent asking for the voluntary return of the child, when this is required and deemed appropriate. Moreover, the Federal Office of Justice offers the option of mediation conducted by an external organization. Of course, mediation is voluntary and requires the willingness of both of the parents. The parents will also have to bear the costs of mediation. If the parties are unable to pay due to their financial circumstances, the Federal Office of Justice may, in exceptional circumstances, bear the costs of mediation. This is decided on a case-by-case basis.

In appropriate cases, the German Central Authority requests a social welfare report from the competent Youth Welfare Office. This could be the case, for example, if there are specific reasons to presume that the child's welfare is endangered while in the care of the abducting parent.

If a voluntary return does not occur, the German Central Authority initiates court proceedings. The competent court is the local Family Court at the seat of the Higher Regional Court which has jurisdiction for the place of the child's whereabouts.

The German Central Authority files the application on behalf of the applicant and lodges any subsequent appeal which is necessary. However, the German Central Authority is not able to attend court hearings. For further representation, especially for the purpose of attending the court hearings, the Federal Office of Justice, thus, appoints a lawyer provided that funding is available. Therefore, the applicant has to ensure payment is made in advance. If s/he is unable to pay due to her/his financial circumstances, s/he can apply for legal aid. The application for legal aid is prepared and filed by the Federal Office of Justice. The applicant can also choose to represent herself/himself at court as there is no requirement to be represented by a lawyer. For legal aid to be granted, there is a requirement that the legal action has sufficient prospects of success and is not an abuse of process.

In the case of non-return decisions, the Federal Office of Justice may appeal to the competent Higher Regional Court on behalf of the applicant. The procedure, including representation by a lawyer and legal aid, follows comparable rules to the first instance proceedings.

The enforcement of a return decision under the 1980 Hague Convention must be performed ex-officio by the competent court. The court may enforce the decision by applying penalties or detention or by direct enforcement. One of the main ways the Central Authority assists the enforcement process is by exchanging information on returns and informing the courts about the necessity of enforcement. Furthermore, the Federal Office of Justice helps by setting dates for enforcement. This is necessary as the applicant usually has to appear in person to take the child into her/his custody. To ensure the rights of the applicant are guaranteed as far as is possible, a lawyer can be appointed and the applicant can be granted legal aid by the court for the enforcement proceedings if s/he is not in a financial position to pay.

If needed, the German Central Authority encourages the court to take measures to secure the return proceedings and to prevent a risk of absconding, for example by prohibiting the departure with the child and alerting the border authorities so that the persons involved are stopped at the border if they try to leave the country or the Schengen area with the child.

### **3.3. Outgoing Cases**

If a child is unlawfully abducted from Germany to another Contracting State, the German Central Authority facilitates the correspondence between the applicant and the Central Authority of the requested State.

As with the incoming cases, following receipt of an application, the Federal Office of Justice checks the documents and, where necessary, makes sure that the application is followed up. To maximise expertise, individual countries are assigned to individual case workers. The application and the required documents have to be submitted by the applicant in German with a translation into the language of the requested State. The applicant may apply to the competent Local Court in Germany for an exemption from translation costs if the conditions for granting legal aid are fulfilled. If the applicant submits such a court decision related to the exemption from translation costs, the Federal Office of Justice will undertake the translations free of charge.

Only in cases of obvious unfoundedness can the support be refused by the Central Authority, as allowed by Article 27 of the 1980 Hague Convention.

Otherwise, the Federal Office of Justice forwards the application and the necessary documents to the requested Central Authority.

In outgoing cases, as well as with the incoming cases, a constant exchange of information takes place between the Central Authorities until the file can be closed. In order to enable swift communication, electronic communication (e-mail) is used whenever possible and communication takes place in English to minimise delays caused by the need for translation.

In relevant cases, the Federal Office of Justice asks the requested Central Authority for the transmission of a social welfare report and may also assist in providing a social welfare report from German authorities if so requested during the judicial return proceedings in the requested State. The Federal Office of Justice may also answer questions on matters of law and can assist in obtaining other relevant information or documents from the applicant as required in the Hague Convention proceedings in the requested State, such as in obtaining certification under Article 15 of the 1980 Hague Convention.

### **3.4. Further Support and Activities**

On a case-by-case basis, there may emerge a need for further support.

In some instances, applicants or other Central Authorities or courts contact the German Central Authority because the child urgently needs a passport or a visa for an entry or departure. Although passport and visa matters are not within the jurisdiction of the Federal Office of Justice, it can nonetheless establish contact with the competent German authorities in cases when this is possible.

In other cases, safety measures may become necessary to ensure the safe return of the child. A problem might arise, for example, if the abducting parent is confronted with criminal proceedings, other sanctions or even arrest in Germany upon her/his return as a result of having abducted the child. This can result in the child losing a parent, potentially her/his primary carer, which may

cause difficulties during the Hague return proceedings. In cases where this is appropriate, the Federal Office of Justice may help to work out a solution ensuring safe conduct by getting in touch with the competent German law enforcement authorities. For example, it may also be possible to reach an agreement between the parents, and this involves the withdrawal of any complaint already filed. This being said, however, the German Central Authority cannot influence criminal proceedings.

The Federal Office of Justice can also support negotiations between the parents regarding other methods for the child to be returned.

In all of the cases mentioned above, a close coordination is needed between the Central Authorities in order to achieve an information exchange over a short period of time.

A further example of support measures and co-operation between Central Authorities refers to the follow-up of an expeditious execution of the return proceedings. Thus, according to Article 11 para. 2 of the 1980 Hague Convention, the Central Authority of the requested State, on its own motion or, if prompted by the Central Authority of the requesting state, may request a statement on the delay, if the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Also, regardless of individual cases, there are forms of interaction between Central Authorities to maintain and promote co-operation among each other. Thus, the German Central Authority attends international meetings, for example, to discuss matters related to the 1980 Hague Convention with other Central Authorities.

### 3.5. Examples

#### Issues:

##### Case 1:

Applicant “A” and respondent “R” are parents of the child “C”. They have joint custody rights. The family lived in the State “S” (Contracting State of the 1980 Hague Convention) until the wrongful removal of “C” by “R” to Germany at 1 January 2017. “A” wants to apply for the return of “C” and wonders to which authority the application has to be addressed.

##### Solution 1

According to Article 8 of the 1980 Hague Convention “A” may address the application to the Central Authority either of “S” (SCA) or Germany (GCA). In

#### European seminar

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child

case that the application is addressed to the SCA it will be forwarded to the GCA. The GCA is entitled to claim the voluntary return of the child out of court as well as by judicial proceedings before the competent German court on behalf of the applicant. But the method via the Central Authorities is not mandatory. According to Article 29 of the 1980 Hague Convention, the applicant has also the possibility of applying directly to the judicial or administrative authorities which are competent to decide about the return of the child.

#### Case 2:

The return application of “A” is received by the German Central Authority (GCA) coming from the Central Authority of “S” (SCA). “A” has stated specific indications regarding an endangerment of the child’s welfare. The SCA asks the GCA for safety measures. How should the GCA proceed?

#### Solution 2

According to Article 7 para. 2 subparagraph (b) of the 1980 Hague Convention, Central Authorities, either directly or through any intermediary, shall take all appropriate measures to prevent further harm to the child or prejudice to interested parties by taking or causing provisional measures to be taken. The GCA may encourage provisional safety measures by the competent court, for example. Another possibility may be the request for a social welfare report. In this way, the applicant can be informed about the situation of the child via the Central Authorities. It should only be briefly mentioned the fact that Article 55 of the Brussels II bis Regulation also includes, *inter alia*, a legal basis for the exchange of social welfare reports between Central Authorities. However, in the given context of the 1980 Hague Convention, this matter will not be discussed any further.

#### Case 3:

After receipt of the return application of “A”, the GCA finds out that the child is not in Germany but in the Contracting State “X”. How to proceed?

#### Solution 3

According to Article 9 of the 1980 Hague Convention the GCA has to submit the application directly and without delay to the Central Authority of “X” and to inform the SCA or the applicant.

#### Case 4:

Let us presume that the 1980 Hague Convention is valid in “S” since 1 March 2017. “A” applies for the return at 1 April 2018. How are the prospects of a return application?

#### Solution 4

Article 35 para. 1 of the 1980 Hague Convention requires that the Convention entered into force before the wrongful removal or retention occurred. So return proceedings according to the 1980 Hague Convention are not admissible in the given case.

#### Case 5:

“A” does not want to apply for the return of “C” but wants to have access rights. What are the possibilities?

#### Solution 5

“A” may address his/her access application to the SCA or directly to the GCA in the same way as a return application, as per Article 21 of the 1980 Hague Convention. The GCA may assist in reaching an amicable solution between the parents, normally by involving the competent Youth Welfare Office. If an agreement does not take place or appears hopeless, the GCA may initiate court proceedings on behalf of the applicant.

#### Contact details

**Federal Office of Justice - Central Authority  
(International Custody Conflicts)**

**Adenauerallee 99 – 103, 53113 Bonn Germany**

**Telephone:**

*From within Germany: 0228 99 410-5212 (direct) or 0228 99 410-40 (telephone exchange)*

*International: + 49 228 99 410-5212*

**Fax:**

*From within Germany: 0228 99 410-5401*

*International: +49 228 99 410-5401*

**E-mail: [int.sorgerecht@bfj.bund.de](mailto:int.sorgerecht@bfj.bund.de)**

The contact details of the Central Authorities of the other Contracting States to the Hague Child Abduction Convention can be found on the website of the [Hague Conference on Private International Law](#).

The contact details of the Central Authorities of the other Contracting States to the Hague Child Protection Convention can be found on the website of the [Hague Conference on Private International Law](#).

Some contact details of the Central Authorities of the other Contracting States to the European Custody Convention can be found on the website of the [Council of Europe](#).

The contact details of the Central Authorities of the other EU Member States (except Denmark) under the Brussels II bis-Regulation can be found on the website of the [European Commission](#).

#### European seminar

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child



## **4. Habitual residence – national court practice and international case law on matters concerning parental responsibility and international child abduction**

Dr Inka Hottgenroth, expert  
Judge and Head of the Department of Family Law in the District  
Court of Cologne, Germany  
Alina Elena Oprea, rapporteur  
Lecturer PhD, Faculty of Law, Babes-Bolyai University  
Cluj-Napoca, Romania

### **4. A. Introduction**

Habitual residence has an essential role to play in international disputes relating to children. It is widely considered that the legal term habitual residence is used in context where one wishes to reflect the child's best interests and in the European Member States it is the main criterion used to determine the jurisdiction and the applicable law in parental responsibility cases. In child abduction cases, the former habitual residence of the child determines the law applicable to the custody rights of the parents and the unlawful change of the child's habitual residence determines, whether there is an abduction case at all. Despite this importance, the concept has not been yet legally defined in any pertinent legal instruments.

In order to gain a deeper understanding of the essential role of the child's habitual residence in international conflicts concerning parental responsibility and child abduction, it is important to be aware of the legal sources that must be used to pacify these conflicts and to understand their relationship to each other and to other legal instruments.

#### **I. The legal sources of jurisdiction**

To determine which court has jurisdiction and which law is applicable, reference should be made to the Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338/1 of 23 December 2003 (Brussels II bis or Brussels II bis Regulation) and the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children (1996 Hague Convention).

## 1. Brussels II bis Regulation

### a) Relationship with other instruments

The courts of the Member States of the EU (except Denmark) always determine their international jurisdiction under the Brussels II bis Regulation, regardless of where the child is, at the time the court is seised and or the child's nationality. All Member States are now subject to Article 59 of the Brussels II bis Regulation, which supersedes all bilateral and multilateral conventions of the Member States and which also contain provisions on international jurisdiction.

In relation to the Contracting States of the 1996 Hague Convention, the Brussels II bis Regulation also takes precedence, if the child is habitually resident in a Member State of the EU, Article 61 lit. a) Brussels II bis Regulation. The courts of the Member States are required to determine their international jurisdiction under the 1996 Hague Convention, if the child is habitually resident in a Contracting State of the 1996 Hague Convention which is not a Member State of the EU.

As regards the relationship between the Member States, the Regulation, pursuant to Article 60 lit. a) Brussels II bis Regulation, also takes precedence over the 1961 Hague Convention concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Minors.

On the other hand, for EU Member States and non - EU countries not bound by the 1996 Hague Convention, Article 14 Brussels II bis Regulation leaves the question of residual jurisdiction to be determined by national law, where no court of a Member State has jurisdiction pursuant to the Brussels II bis Regulation.

### b) Material scope

Pursuant to Article 1 (1) lit b), the Regulation applies to civil matters relating to parental responsibility for a child. Civil matters within the meaning of the Regulation are also those which, under national law, are regarded as public law measures, e.g. the placement of a child in a home or foster home.

The term parental responsibility is legally defined in Article 2 no 7 and shall mean all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgement, by operation of law or by an agreement having legal effect, including rights of custody and rights of access.

Unlike the 1996 Hague Convention, the Regulation does not specify a maximum age for the child. The question of who is child and who is under parental responsibility is therefore determined by national law.

The Brussels II bis Regulation shall not apply to:

- the establishment or contesting of the parent-child relationship
- decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption
- the name and forenames of a child
- maintenance obligations. International jurisdiction in matters relating to maintenance is governed by Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, which came into force on 18 June 2011
- emancipation
- trusts or succession
- measures taken as a result of penal offences committed by children.

### **c) Temporal scope**

The regulation has been in force since 1 March 2005. Although the Regulation came into force on 1 August 2004 pursuant to Article 72, initially only Articles 67-70 governing preparatory measures of the Member States were applicable from that date.

### **d) Rules of jurisdiction**

#### **aa) Habitual residence**

In the absence of any relevant contrary case authority under Articles 9, 10 or 12 the courts of the Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised, Article 8 (1) in conjunction with (2). The legal term of habitual residence is not to be interpreted in accordance with national law, but autonomously (see ECJ C - 523/07 and C - 497/10).

A later change of habitual residence is irrelevant (*perpetuatio fori*), thus the court that had jurisdiction of the child's former habitual residence, will continue to have jurisdiction - Article 9 (1) Brussels II bis Regulation.

Where a child moves lawfully, the courts of the Member State of the child's former habitual residence shall even retain jurisdiction during a three-month period for the purpose of modifying a judgment on access rights issued in that Member State before the child moved, where the holder of access rights continues to have his or her habitual residence in the Member State of the child's former habitual residence, unless the holder of access rights has accepted the jurisdiction of the new court, Article 9 (2) Brussels II bis Regulation.

#### **bb) Child abduction**

In cases of child abduction the refuge state shall only have jurisdiction

- when the child has acquired a new habitual residence there and all holders of parental responsibility have acquiesced in the removal or retention of the child

- the child has resided in that Member State for a period of at least one year after the holder of parental responsibility has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and
  - within one year no request for return has been lodged or
  - a request for return has been withdrawn or
  - a case pursuant to Article 11 (7) Brussels II bis Regulation has been determined or
  - the country of origin has issued a judgment on custody that does not entail the return of the child.

cc) Prorogation of Jurisdiction, Article 12 Brussels II bis Regulation

Paragraphs 1 and 2 regulate the conditions of an effective jurisdictional agreement for decisions relating to parental responsibility, if these decisions are annexed to the divorce.

Paragraph 3 sets out the requirements of an effective prorogation based on the child's substantial connection to that state and in line with the best interests of the child. All parties involved must accept this jurisdiction at the time the court is seised. Earlier jurisdiction agreements do not create international jurisdiction if the agreement no longer exists at the time the court is seised.

dd) Jurisdiction based on the child's presence, Article 13 Brussels II bis Regulation

Where a child's habitual residence cannot be established or the child is a refugee, the courts of the Member State where the child is present shall have jurisdiction.

ee) Jurisdiction by transfer, Article 15 Brussels II bis Regulation.

Article 15 Brussels II bis Regulation allows a court of a Member State which has international jurisdiction to transfer a procedure relating to parental responsibility or parts of it to a court of another Member State, if

- the child has a particular connection with that other Member State
- the transfer is in the best interest of the child
- at least one party must accept the transfer
- the court of origin considers that the court of another Member State would be better placed to hear the case
- the court of that other Member State may accept jurisdiction within six weeks of its seisure. The application can come from the court of origin as well as from the court of the other Member State or from a party.

### **e) Lis pendens, Article 19 (2) Brussels II bis Regulation**

Proceedings relating to parental responsibility and involving the same cause of action are needed, but the action must only have the same content as its core (wide procedural concept), for example the application for return of a child and contrary custody application (in dispute) or the application for access to a child and later filed contrary custody application.

The applications must relate to the same child, so there is no jurisdiction based on fraternal connection, and the application may not be limited to provisional measures under Article 20 Brussels II bis Regulation. The court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

If the second seised court in violation of the Regulation continues its proceedings, the Regulation does not provide for any further regulation. The court first seised is probably not bound by the decision made there and is not obliged to recognize and enforce it (see ECJ C 497/10). If the court first seised is invoked only for provisional measures under Article 20 and there are no indications of a main jurisdiction of that court based on Brussels II bis Regulation, the second seised court may continue its proceedings (see ECJ C 296/10).

### **f) Provisional measures**

The court having international jurisdiction under Article 8 et seq. of Brussels II bis Regulation can also take provisional measures. The court not having international jurisdiction under Article 8 et seq. of Brussels II bis Regulation can nevertheless take provisional, including protective, measures in urgent cases under Article 20 Brussels II bis Regulation, for example if the child is in his district. An urgent case can only be presumed if, owing to the situation in which the child is present and because of the practical impossibility of submitting the application to the court having jurisdiction in the main proceedings, the omission would be equal to a refusal of legal protection. According to the ECJ (C-403/09), not only the child must be present, but all those involved must be in the forum state so that a measure pursuant to Article 20 may even be allowed. However, it does not have cross-border effects under the Regulation.

## **2. The 1996 Hague Convention**

### **a) Material and temporal scope**

The material scope is governed by Article 2, 3 and 4 of the 1996 Hague Convention which is similar to Article 1 of the Brussels II bis Regulation. However, pursuant to Article 2 of the 1996 Hague Convention

and in contrast to the Brussels II bis Regulation, it only applies to children up to the age of 18, even if the children are still deemed minors under their national law. The 1996 Hague Convention came into force in Romania on 1 January 2011.

## **b) Rules of jurisdiction**

Pursuant to Article 5 (1) 1996 Hague Convention jurisdiction is determined after the child's habitual residence determination. Exceptions:

- Child abduction, Article 7 1996 Hague Convention, but Article 7 (3) 1996 Hague Convention
- Contracting State exercising jurisdiction to decide upon divorce or legal separation or annulment of the marriage, Article 10 1996 Hague Convention
- Cases of urgency and provisional protective measures, Article 11, 12 1996 Hague Convention.

## **3. Change of habitual residence during the procedure**

If the child changes its habitual residence from one Member State to another Member State, the Brussels II bis Regulation remains applicable, *perpetuatio fori*, but there is a reform proposal currently under consideration by the European Commission.

If the child changes its habitual residence from a Member State to a Contracting State of the 1996 Hague Convention, which is not a Member State, according to Article. 5 (2) 1996 Hague Convention the authorities of the new state now have jurisdiction, no *perpetuatio fori*.

A conflict with Article 8 Brussels II bis Regulation can only be avoided, if Article 8 Brussels II bis Regulation does not apply because there is no (longer) habitual residence in a Member State (Article 60 lit a) Brussels II bis Regulation), in dispute. If the child changes its habitual residence from a Member State to a State which is not a Member State and not bound by any convention, the Brussels II bis Regulation remains (universally) applicable, *perpetuatio fori*.

## **II. Applicable Law**

### **1. The 1996 Hague Convention**

#### **a) The legal source**

As a result of the Convention referred to below, It is now no longer possible for any Member State of the EU and the state signatories there to

to rely on their national state courts to determine the question of which law applies to international issues and cases relating to parental responsibility.

Instead, the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children (1996 Hague Convention) applies.

The 1996 Hague Convention is an international contract which was signed on October 19, 1996 after a special diplomatic conference of the Hague Conference on Private International Law. The 1996 Hague Convention is a revision of the 1961 Hague Convention.

## **b) Contracting Parties of the Convention**

In contrast to the 1961 Hague Convention, the 1996 Hague Convention has achieved much greater international acceptance which up until March 2018 has now got 47 Contracting Parties namely: Albania, Armenia, Australia, Austria, Belgium, Bulgaria, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, Estonia, Finland, France, Georgia, Germany, Greece, Honduras, Hungary, Ireland, Italy, Latvia, Lesotho, Lithuania, Luxembourg, Malta, Monaco, Montenegro, Morocco, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland and Uruguay (current status see under [www.hcch.net](http://www.hcch.net) – welcome – other languages – English – Conventions – No 34 – Status Table).

## **c) Substantive scope of the choice of law rules**

Article 1 (2) now determines which law takes precedence concerning all rights and obligations particularly of parents but also of guardians or other legal representatives in relation to the person or property of the child. Article 18 of the United Nations Convention on the Rights of the Child which came into force on 20 November 1989, the 1996 Hague Convention as well as the Brussels II bis Regulation in this respect all provide authority on parental responsibility. In determining which law has precedence, Article 15 provides a synchronism for authorities that base their jurisdiction on the Convention: In exercising their jurisdiction under the Convention, the authorities of the Contracting States should apply their own law. The aforementioned legal provisions that determine which law has precedence also determine the substantive law applicable to the attribution or extinction of parental responsibility by operation of law and they replace all former national law provision that determined which law took priority within the scope of the Convention.

The Convention does not apply to:

- the establishment or contesting of a parent-child relationship
- decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption (cross-border adoptions are governed by the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Adoption Convention))
- Name and forenames of the child (The name rights are governed by the national choice of law rules)
- Maintenance obligations (The applicable law on maintenance obligations is governed by the Hague Protocol on the Law Applicable to Maintenance Obligations of 23 November 2007)
- emancipation
- trusts and succession
- social security (excluded because the service providers relate to special features of the insured person, not of the child)
- public measures of a general nature in matters of education or health (this refers to compulsory education or compulsory vaccinations. In contrast, the placement of a child in a particular school or the decision to undergo surgery are measures covered by the 1996 Hague Convention)
- measures taken as a result of penal offences committed by children (cross-border educational measures like boot camps, which are arranged by youth welfare offices as an alternative to juvenile justice)
- decisions on the right of asylum and on immigration.

#### **d) Temporal scope of the choice of law rules**

According to Article 53 the decision to which law takes precedence and /or applies is determined from the date that the Convention came into force. Therefore Article 15 applies to all proceedings retrospectively where courts had already been seised before the inception of the Convention but which had still not completed the determination of the matter before it, and Article 16 applies to all facts of attribution or extinction of parental responsibility by operation of law, that occur from that date.

#### **e) Personal scope of the choice of law rules**

The 1996 Hague Convention applies to children from the moment of their birth until they reach the age of 18 years. The Convention does not apply to foster care, for unborn children and the applicability ends, even for already initiated legal proceedings, on the day that the child turns 18 years of age after



which either the national law of the relevant Member State or the Hague Convention of 13 January 2000 on the International Protection of Adults applies.

### **f) Territorial scope of the choice of law rules**

The territorial scope varies depending on the regulatory area. Article 15 (1) provides that the authority of a Contracting State shall always apply its own law (*lex fori*) in the exercise of its jurisdiction under the 1996 Hague Convention. The determination of which law takes precedence therefore always intervenes if the authority or the court of a Contracting State has international jurisdiction under the 1996 Hague Convention.

Article 16 contains general provisions establishing such determination of the applicable law governing the attribution and the extinction of parental responsibility by operation of law, without the intervention of a court or an administrative authority. According to Article 20 this choice of law process is referred to as a “*loi uniforme*”, which means it is always applicable when in a Contracting State the question of which law is applicable to parental responsibility arises, even if the child does not have his habitual residence in a Contracting State, unless there is a contractual relationship with the State of residence governing the same conflict.

### **g) The choice of law rules in detail**

Courts and administrative authorities can apply their own national law, under Article 15. The parental responsibility by operation of law relating to the habitual residence of a child is determined by state national law under Article 16 (1). However, by way of distinction, the notion of habitual residence itself is not to be interpreted in accordance with national law, but autonomously (see ECJ C - 523/07 and C - 497/10).

Parental responsibility by agreement or unilateral act relating to child’s habitual residence is governed by state law at the time when the agreement or unilateral act takes effect under Article 16 (2).

The exercise of parental responsibility relating to child’s habitual residence is governed by State law under Article 17.

### **h) Designation rules**

Article 21 (1) contains a substantive law designation, which means, the designated foreign law is applicable even if its own choice of law rules designate the law of another State. Exception: Article 21 (2) which contains a designation of the entire law for non-Contracting States.

If the law applicable under Article 16 is the law appertaining to a non-Contracting State and the State law relating to precedence designates to the

law of another non-Contracting State, which applies its own law, the law of the latter State applies.

## 2. Change of the child's habitual residence

The measures taken before the change of residence remain in force, as long as the authorities of the new habitual residence have not modified, replaced or terminated such measures, Article 14, but the conditions of their application are governed by the law of the new habitual residence, Article 15 (3). A guardianship arranged in the old state remains, whether and in which cycle a report of the guardianship needs to be presented, is governed by the law of the new state.

Parental Responsibility that is justified by operation of law or agreement subsists after a change of the child's habitual residence, Article 16 (3).

The attribution of parental responsibility by operation of law to a person, who does not already have such responsibility, is governed by State law that relates to the new habitual residence, Article 16 (4). Parental responsibility cannot be lost by a change of the child's habitual residence but can be obtained by such a change without further action.

### 4.B. Workshop

In order to begin to analyse the meaning of the legal term "habitual residence" and to clarify the difficulties in its determination, it is worth looking at four cases which were decided in the practice of the Family Court of Cologne.

#### Case 1:

German Eva gets to know and love Spanish Nico on a vacation trip to Spain in 2010. They marry in Seville in 2012 and move into an apartment there. In 2013, daughter Lena is born. In 2016, Eva and Nico divorce. Eva is assigned the "guardia y custodia" over Lena in the divorce order-

Eva moves into a flat of her own with Lena, but after working for years a housewife she does not succeed in gaining a rights of residence foothold in Spain. When she receives a job offer from her hometown of Cologne, she decides to return to Germany.

She discusses her plans with Nico, who does not agree that Lena should live in Cologne in the future. Nevertheless, Eva moves to Cologne in March 2017 and makes an urgent petition for sole custody in the local family court, because she wants to register Lena at a kindergarten.

Does the Family Court of Cologne have jurisdiction?

## Approach to case 1:

An international jurisdiction of the Family Court of Cologne can only be justified if either Eva was allowed to decide on the change of residence of Lena alone, or if the requirements of Art. 10 or 12 Brussels II bis are met.

In contrast to the German legal rights of sole custody, most other legal systems do not grant the custodial parent sole decision rights to change the residence of the child abroad even if sole custody has been assigned to him by a court.

If Nico (for example via the Central Authorities) files a petition for the return of Lena to the Family Court of Cologne, the Family Court is also prevented from taking a decision in substance under Art. 16 of the 1980 Hague Convention until the return procedure is completed.

## Case 2:

Aradom and Selam are the parents of Martha but have separated and are living apart.

Aradom's family moved from Eritrea to Italy in the middle of the last century. He was born in Italy and lives there. Selam is from Eritrea. On the occasion of a vacation in Eritrea, Aradom got to know Selam and they married on 27.12.2011. On 09.06.2012 the daughter Marya was born.

Aradom spent the following years in Italy, where he is currently the managing director of a logistics company. Selam and Marya remained in Eritrea. Aradom regularly visited them and has made provision for them throughout.

Although the couple had been planning to reunite the family in Italy since the wedding, Selam was initially unable to leave because she had not yet completed her civil service in Eritrea. In April 2016, she managed to obtain a tourist visa for Italy. On 12.04.2016 Selam and Marya travelled to Italy. There they lived with Aradom in an apartment that had been provided for them temporarily by a relative of the family until such time as the relative required it back. The spouses intended to find another permanent home and live there together.

While Aradom continued to work, Selam spent most of her days with Aradom's parents, where she went shopping, visited the local playground with Marya or met Aradom's brother.

After disagreements between the spouses, Selam took the child and travelled to Switzerland on 08.06.2016. She spent some time with her uncle, then continued to Germany. There she first lived in a refugee shelter, since December 2016 in a shared flat in Cologne. Marya has been attending a kindergarten there since 01.03.2017, she speaks good German and has found friends.

By way of a written statement dated 08.06.2017, Aradom lodged an application in the Family Court of Cologne for the return of his daughter to Italy.

How will the court decide?

### **Approach to case 2:**

The central question is whether Marya had already established habitual residence in Italy, when Selam took her to Germany.

### **Case 3:**

A German, Annika and a French man, Alain had lived as an unmarried couple in his house in Perpignan, France, for a few years. Since Annika works as a guide book writer, her residence in France had regularly been interrupted by longer work periods.

During her pregnancy, Annika moved back to her mother's house in Cologne in October 2013, where the common daughter Alba was born on 03.03.2014.

Shortly after the daughter's birth Alain told Annika, that he had a new girlfriend. Annika was shocked but returned with Alba to France in September 2014 in order to finish her work on a guide book about the Pyrenees.

For following two years Annika lived at times in Perpignan in her caravan and Alba lived with Alain in their old house. At times she would rent holiday houses for her and Alba in the area of Perpignan region where Alba would attend a kindergarten on a temporary basis. At other times she travelled with Annika in her caravan through France, Spain and Andorra.

In September 2016 Annika and Alba went back to Germany to live there on a permanent basis. Alain does not agree to Alba living in Germany and desires the return of the child to France.

Will his claim be successful?

### **Approach to case 3:**

Alain can only claim for the return of the child successfully, if Annika had removed Alba to Germany unlawfully and that can only be the case, if Alain had had any custody rights over Alba.

Under German law, Annika, as an unmarried mother has sole parental responsibility over Alba by operation of law and can decide alone, where to live with Alba. Under French law there is joint parental responsibility including unmarried parents and one parent is not allowed to decide alone, whether a child should be removed and taken to another country.

So Alain's claim can only be successful, if Alba could be said to have had habitual residence in France at some time or other, but it could be strongly argued that Alba until, has never had habitual residence anywhere.

#### Case 4:

Maria and Hans lived together in Cologne as an unmarried couple. At the beginning of 2008, her son, Tim is born.

In the middle of 2008, all three move to France. At the end of 2016 they return to Cologne and shortly thereafter Maria and Hans break up. Maria moves to Berlin in early 2017 without the consent of Hans.

In March 2017 Hans applied to the Cologne Family Court for the transfer of parental responsibility. Maria denies the local jurisdiction of the Family Court Cologne.

Is she right?

#### Approach to case 4:

If the normal residence of the child changes, the assignment of parental responsibility by law to a person who does not already have that responsibility is governed by the State law of the new habitual residence, according to Art. 16 (4) 1996 Hague Convention. In France, parental responsibility applies automatically, which is why Hans now has joint parental responsibility.

After changing the habitual residence back to Germany, this joint parental responsibility continues to apply according to Art. 16 (3) 1996 Hague Convention, so the Cologne Family Court has jurisdiction if Tim still has a habitual residence in Cologne.

#### 4.C. Factors permitting the determination of the habitual residence

Because there is no legal definition of the habitual residence this notion must be considered as a question of fact for determination by the judge in each particular case autonomously and independently from his national state law. Even if the habitual residence may appear as a simple and flexible criterion, adapted to the needs of mobility characterizing modern life, it also raises important challenges. Nevertheless, even for reasons of continuity as a conception which has its origin in child protection, it is generally considered that, in regulating the whole notion habitual residence it should not differ materially from that of the 1980 and 1996 Hague Conventions. In several decisions the European Court of Justice opted for a uniform and autonomous definition of this concept, to be used both in parental responsibility and child abduction cases.

In the case *A* (ECJ C-523/07), the Court considered that the habitual residence should correspond “*to the place which reflects some degree of*

*integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration".*

In the case *Mercredi* (ECJ C-497/10) the Court refined and renewed this definition clarifying that judges must verify if the presence of the child in a certain state was not just temporary or intermittent, taking eventually into consideration the parental intent; it finally stated that *"the concept of "habitual residence", for the purposes of Articles 8 and 10 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, must be interpreted as meaning that such residence corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, where the situation concerned is that of an infant who has been staying with her mother only a few days in a Member State - other than that of her habitual residence - to which she has been removed, the factors which must be taken into consideration include, first, the duration, regularity, conditions and reasons for the stay in the territory of that Member State and for the mother's move to that State and, second, with particular reference to the child's age, the mother's geographic and family origins and the family and social connections which the mother and child have with that Member State. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances of fact specific to each individual case"*.

In the case *C v M* (ECJ C-376/14) the Court gave more clarifications, stating that, in the context of a displacement of a child into the territory of a new state, *"the duration of a stay can serve only as an indicator, as part of the assessment of all the circumstances of fact specific to each individual case"* and also that the presence of a court judgement which authorises this displacement, but which is only provisionally enforceable and subject to an appeal, should not allow the removing parent to believe that the stay in the Member State of destination would be permanent.

In the case *HR* (ECJ C-512/17) the Court was once again asked to decide on the interpretation of the habitual residence concept by interpreting article 8 of the Brussels II bis Regulation. In the determination of the habitual residence of a child of low age, three factors were held to be decisive, and three not :

*„...a child's place of habitual residence for the purpose of that regulation is the place which, in practice, is the centre of that child's life. It is for the national court to determine, on the basis of a consistent body of evidence, where that centre was located at the time the application concerning parental responsibility over the child was submitted.*

*In that regard, in a case such as that in the main proceedings, having regard to the facts established by that court, the following, taken together, are decisive factors:*

- the fact that, from its birth until its parents' separation, the child generally lived with those parents in a specific place;*
- the fact that the parent who, in practice, has had custody of the child since the couple's separation continues to stay in that place with the child on a daily basis and is employed there under an employment contract of indefinite duration; and*
- the fact that the child has regular contact there with its other parent, who is still resident in that place.*

*By contrast, in a case such as that in the main proceedings, the following cannot be regarded as decisive:*

- the stays which the parent who, in practice, has custody of the child has spent in the past with that child in the territory of that parent's Member State of origin in the context of leave periods or holidays;*
- the origins of the parent in question, the cultural ties which the child has with that Member State as a result, and the parent's relationships with family residing in that Member State; and*
- any intention the parent has of settling in that Member State with the child in the future”.*

Despite the efforts of the European Court of Justice, in absence of more precision, the implementation of these decisions is not easy in practice. The factors permitting the determination of the habitual residence can be divided into two broad categories: subjective factors (related to the intent of those concerned) and objective factors (related to the integration of the child into a social and family environment). To summarize the criteria for habitual residence, the judge has to take into consideration:

- the duration of the residence
- the regularity of the residence
- the circumstances of the move to that state as well as the reasons for the residence there
- the citizenship
- the child's age
- location and circumstances of school enrolment
- the knowledge of the language
- the social and family ties of the child in that state
- the outward intention to settle permanently in that state
- In the case of infants, peculiarities apply in so far as habitual residence can be justified after just a few days, taking into account, in particular, the geographical and family origin of the mother and the

family and social ties of mother and child in the state, in particular because of the age of the child.

- Also the will of the caregiver, who may decisively determine the residence to be permanently, can be an important indicators well as the lack of will to timely return to the previous residence.
- Relevant may also be the purchase or rental of an apartment or a request for housing allocation.
- In addition, taking up gainful employment can also be an indication.
- In general, the question of whether the age of the child or children essentially, has to be taken into consideration. From the point of view of the child, the longer the residence lasts, the more likely it becomes habitual. In any case, if the residence lasts six months, it is often determined that it is habitual, unless the stay was limited in advance (semester abroad).

Yet, this list is not exhaustive and the characterisation of the habitual residence of a child cannot be done by taking into consideration in general only one factor or element or just some of them; on the contrary, all the circumstances of the case should be analysed and balanced before taking a decision (as the ECJ indicated in each of its judgments on the matter).

In the child abduction cases, where the existence of an unlawful retention or removal is in issue, the law of the state where the child was habitually resident before the retention or removal should be considered in order to determine the rights of custody over the child and in particular, the right of a parent to eventually change the habitual residence of the child against the will or without the consent of the other parent.

Disputes about habitual residence, as the London Court of Appeal in the Matter of L (a child) (2012] EWCA Civ 1157, note 72 proclaims, “*can arise in many different factual contexts. Sometimes the issue may arise, as in Mercredi, in the context of a re-location from one Member State to another. Sometimes, as in Marinos, the issue may arise because someone has a house in more than one Member State. It is not difficult to imagine other cases which if more extreme are not altogether fanciful. What of the mega-rich 'citizen of the world' ceaselessly on the move between the houses he owns in a number of different countries, the houses of his friends in various countries and the most luxurious hotels in various fashionable resorts around the globe. And what of the perpetual nomad who, having cut his previous ties, has spent the last ten years pedalling his bicycle around the world or sailing his yacht across the oceans.*”

Thus, a situation may well arise that after weighing up all the circumstances of any particular case, a habitual residence cannot be determined or the child has an alternating residence. This situation will



impede the operation of the rules from the Brussels II bis Regulation or from the Hague Conventions.

The rules on child abduction are inoperative in cases, in which no habitual residence of the child can be determined, as they presuppose the displacement of the child from the state where it had its habitual residence to a state where it has no habitual residence (yet).

Regarding the international jurisdiction of Member States' courts for custody disputes, Article 8 of the Brussels II bis Regulation should be interpreted, in case of alternating residence, as allowing the courts from both states to retain jurisdiction (the eventual parallel proceedings being limited through the *lis pendens* rule). In case of no habitual residence, the competence of the Members States' courts could be assessed on the basis of Article 12 (prorogation of jurisdiction), Article 13 (presence of the child) or Article 14 (residual application of the national law) of the Regulation.

The habitual residence has a large success as a criterion for determining the jurisdiction and the applicable law in cross-border cases related with children. It is flexible and may properly reflect the changes in time of the circumstances of the child and of its family. At the same time, it raises a lot of uncertainties; it turns to be somehow vague and reserves to the courts a relatively broad discretion that may endanger the European and supranational efforts to harmonize the rules and the solution in this field through firm standards. This is why in practice it would be recommended: (1) a peculiar attention to the indications provided by the European Court of Justice in its case law; (2) a cautious and balanced approach in each situation; this might ensure a bigger level of uniformity and might limit the positive and negative conflicts of characterization.

## 5. (Un)lawful change of the country of habitual residence of the child

Tijana Kokic, expert  
Judge, Zagreb Court, Croatia  
Andrei Iacuba, rapporteur  
Judge, Tribunal for minors and family Braşov, Romania

None of the Regulations or Conventions include a definition on what is a lawful or unlawful change of the country of habitual residence.

In practice these are the so called “child abduction cases“, which translate into an application request for returning a wrongful removed or retained child. The law practitioners (judges, Central Authorities, lawyers etc.), when they are dealing with such a case, they always try to find out whether the child’s change of habitual residence was unlawful. Therefore, finding out if a change was lawful represents a reversed logic.

In specific cases, there are some elements related to the applicable law in such a manner that could demonstrate that the child was wrongfully removed or retained.

If such elements do not exist or if they exist but they change throughout the proceedings, then this is a case of lawful change of habitual residence of the child.

The applicable law depends on the status of the requested country and that of the requesting country, as the situation is different depending whether it involves two EU Member States or an EU Member State and a Third State.

If the case involves two Member States, than the Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility repealing Regulation (EC) No 1347/2000 (Brussels II bis or Brussels II a) should apply in the first place and the Hague Convention on the Civil Aspects of International Child Abduction of 25.10.1980, as the applicable law in accordance with Art.60 para. 1(e) and Art. 62 para. 2. Brussels II bis.

If the case arises between an EU Member State and a Third State than the 1980 Hague Convention shall become applicable if the respective Third State is bound by this Convention.

This information are available on the website of the Hague Conference (HCCH).

In all such instances, some other legal sources also apply, such as:

1. European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.
2. European Convention on the Exercise of Children's Rights, 1996.

3. European Convention on Contact concerning Children, 15.05.2003.
4. Practice Guide for the application of the Brussels II bis Regulation, EU Commission, 2014
5. United Nations Convention on the Rights of the Child, 1989.
6. Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children, 1996.
7. Domestic law
8. Case law

Trying to find the applicable law in a specific case represents another question which should be answered, that revolves around the "habitual residence of the child" issue.

There is no definition of the "habitual residence of the child" included in Regulations and Conventions.

This autonomous concept of habitual residence resulted from various case law.

Habitual residence represents a key element for the court in its attempt to establish its jurisdiction. And it is also a key element in applying the 1980 Hague Convention, as it is based on the previous habitual residence of the child (Art.4).

The next important element in establishing the un/lawfulness of the change in the habitual residence of the child is a breach of the rights of custody (Art.3.a) and the exercise of these rights (Art.3.b) of the 1980 Hague Convention.

If the left-behind parent does not have any rights of custody, then the change of the habitual residence would be lawful.

In these cases, it is important to be aware that, in some countries, parents do not have the same status in terms of their parental responsibility rights if they are not married.

In some countries (Germany, Scandinavian countries, Belgium etc.), an unmarried father, could acquire parental responsibility rights only by a decision issued by a court or some other administrative body.

In some other countries (Croatia, Portugal, Romania, Slovenia, etc.), both parents acquire these rights at the moment when the child is born, by law. Case law: ECHR, No. 00006833/74, 13.06.1979. *Marckx v. Belgium* (an unmarried couple)

The next step is to find out whether the left-behind parent who has custody rights has actually exercised them.

The fact that the parent and the child permanently communicated by Skype or in some other similar way should be enough to establish that.

If the left-behind parent did not exercise any custody rights, the change of the habitual residence will be lawful, as the key element of the 1980 Hague Convention is not achieved.

Taking into consideration all the previously mentioned elements, the change of the habitual residence will be lawful:

1. If the parents have reached an agreement on custody rights which stipulates that one parent could move with the child to another country.

2. Or, when a court decision on custody rights (or, in some countries, a decision of an administrative body) was issued in favour of one parent, allowing him/her to change a habitual residence of the child without the other parent's permission.

Thus, it all depends on how the domestic law prescribes parental responsibility rights and custody rights.

Some countries do not retain the address where the child lives, instead they just mention the parent with whom the child resides. Some countries record the address and the parent who shall receive custody rights, and even take note of what these rights include. For that reason, it is important to investigate the applicable domestic law when the court must determine whether the change of the habitual residence falls within the scope of those custody rights (Central Authorities could make available the provisions of the national law from the other country).

An informal "duty" for the courts to mention the specific address where the child shall live together with the resident parent (instead of merely including a general provision that the child shall live "with the mother/father") in their decisions (regarding the residence of the child or the access rights) could help protect the rights of the non-resident parent, as a safeguard that his/her right of access would be effective. It could also make easier to determine whether there has been any change in the child's habitual residence and if that change is lawful or not.

For example: In Croatia there is such an obligation for the courts, while in Romania this is a matter left for each court to decide, according to the circumstances of the case. In Portugal, the court has to establish if the child will live with the mother or the father and also, which parent (or maybe both) acquires the parental responsibility, however there is no obligation to indicate a specific place of residence for the child.

3. If the left-behind parent does not submit an application for the return of the child up to the end of a one year period following the change in the child's country of habitual residence.

4. If the left-behind parent had submitted an application until the end of the one year period following the change in the child's country of habitual residence, but the same parent withdrew it and did not issue a new one.

5. If the left-behind parent submitted an application in due time, however the court decides not to return the child in accordance with Art. 13 from the 1980 Hague Convention.

In that case, if the child was removed from one Member State to another Member State or was retained in a Member State, the court of the country of the child's previous habitual residence, in accordance with Art. 11 para. 7, must get a submission from the parents within three months; if this does not happen, then the habitual residence of the child will become lawful.

If the child was wrongfully removed from one Member State to a Third State or was wrongfully retained in a Third State or the other way around, then Art. 11 para. 7 from the Regulation Bruxelles II bis is not applicable.

6. If the child is 16 years old or more, the 1980 Hague Convention will not apply (Art. 4) and the change of the habitual residence will be lawful.

7. If the child did not have his/her previous habitual residence in the requesting state, the 1980 Hague Convention will not apply (Art. 4) and the change of the habitual residence will be lawful.

There are two new decisions – Hungarian courts decided to return the child to the country where the left-behind parent moved from the country of the child's previous habitual residence.

This underlines the importance for the exchange of good practice between the legal professionals from the different European Union Member States, in order to assure a common interpretation of the legal provisions applicable in such matters.

To summarize – when the elements of the Regulation Brussels II bis and the 1980 Hague Convention which determine the nature of a child abduction case are not fulfilled, the change of the habitual residence is deemed or will become lawful.

Since neither the 1980 Hague Convention or Brussels II bis Regulation provide a definition of the “habitual residence” of a child, the expert and the participants first focused on finding the elements to outline this notion, since it should be analyzed as an autonomous one, not being necessarily related to the definition provided by the domestic law of one or another Member State.

The EU Court of Justice provided the criteria to identify the habitual residence of a child, as they were synthesized in case C-497/10 – Mercredi, in which the Court stated that the concept of habitual residence must correspond to the place which reflects some degree of integration by the child in a social and family environment. This place should be determined using several criteria, such as the duration, regularity, conditions and reasons for the stay of the child on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge, the family and social relationships established by the child in that state.

In a case, brought before the Dutch courts by a Romanian national, under the 1980 Hague Convention, the first instance court ordered for a child to be returned to Romania, considering that he is wrongfully retained in Netherlands by one of his parents. This decision was quashed by the appeal court, on the grounds that the child actually has two habitual residences, one in Romania and the other one in the Netherlands and, therefore, the plaintiff's claim cannot be granted.

In another case, a child of a young multinational couple was disputed, the mother being Slovenian and the father a German national. The couple first lived together in Krakow, Poland; they never got married, but they had a child who was born there. Soon after, the couple and their child moved to Berlin, Germany, but, due to economic reasons, the parents convened for the mother to move with their son to her hometown in Slovenia, Kranji, where the father was supposed to follow them in a while. This agreement wasn't enforced by a court, it was just made between the two parents. The father never moved to Slovenia, but, after some time, he asked the mother to return with the child to Germany, but she refused and father was advised by a lawyer to file a complaint, under the 1980 Hague Convention, for the return of the child.

Several questions regarding the lawfulness of the change in child's habitual residence could be discussed when identifying the legal grounds applicable in the provisions of article 10 of Regulation Brussels II bis and art.3, art.5, art.12 and art.15 of the 1980 Hague Convention. The change in the habitual residence of the child may be considered lawful or would become lawful if:

- the father agreed for the child to stay in Slovenia with his mother (art.10 para.1 a) Regulation Brussels II bis);
- the father did not issued a request for the return of the child in the term set by art.10 para.1 b) and i) from Regulation Brussels II bis;
- the father issued such a request in the period of time established by the Regulation Brussels II bis, but he then withdrew it and didn't issue a new one (art.10 para.1 b) and ii) Regulation Brussels II bis);
- if the father issued such a request, in the term provided by the Regulation, but Slovenian courts decided not to return the child, in accordance with article 13 of the 1980 Hague Convention, and there was no pending case brought before the German courts on parental responsibility prior to the relocation of the child with his mother to Slovenia and if the German courts, in accordance with art.11 para.7 got no submission from the parents within three months of the date of notification sent by the central authority or the court (art.10 b) and iii) Regulation Brussels II bis);
- if either parent issued a claim before a German court, prior to the mother moving with the child to Slovenia, and the German court ruled on the custody of the child in favour of the mother, so the father had only access rights and he is not entitled to ask for the return of the child (art.10 para.1 b) and iv), Regulation Brussels II bis, art.3,5,12 and 15 of the 1980 Hague Convention);
- the father issued a request for the return of the child, but the Slovenian courts ruled against returning the child, in accordance with art.3 of the

1980 Hague Convention, because there was not a judicial decision on the father's parental responsibility rights before the child was moved to Slovenia (since the father is a German national, the parties lived prior in Germany and the parents are not married).

The logical steps that should be followed by the Slovenian judge to determine if there has been a "child abduction" or, on the contrary, the change of the child's habitual residence should be considered lawful could be as follows.

First, the judge should check if the child is 16 years old or younger to see if the case falls within the scope of the 1980 Hague Convention.

Secondly, the judge should verify if the parent who issued the return request has parental responsibility rights/custody rights regarding that child. The participants discussed the different national legal systems, which may provide by law equal custodian rights to both parents, regardless if they are married, or, on the contrary, may require a court order for such rights to be granted for the father, if the parents are not married. Apparently, this could be the situation in Germany, while in Croatia, Romania and Portugal such rights of the father are recognized automatically, since child's birth, by effect of the law, regardless of the marital status of the parents.

Thirdly, the court should examine if the parent who filed a request for the return of the child actually makes use of his parental rights, in other words, if these parental responsibility rights are effective and, as such, there is an actual connection of that parent with his child.

Fourthly, and last, before deciding on the change in habitual residence being lawful or not, the judge should determine where the habitual residence of the child actually was before he/she was moved to a different state.

The participants presented a case brought before the Croatian courts, in which the parents lived together with the child in an European country and then the mother had left the country without the father's consent, bringing the child to Croatia. The father also moved from that country to United States and he issued a request for the child to be "returned" to United States and not the former country of residence of the parties. The Croatian court denied that request, arguing that the child had no connection with US, as he never lived in that country.

One of the participants, from the Hungarian Ministry of Justice, presented two other cases, perfectly similar, in which the Hungarian courts chose a totally different approach, ruling for the return of the child to his father. On the basis of the explanatory report on the 1980 Hague Convention, the Hungarian courts argued that what matters most, when a return request

is filed, it's not the actual place where the child lived before the "abduction", but his/her family ties, so the child could be returned to the new country of residence of his father.

The debate on this matter remains open, but regardless of one's personal opinion on this, it fully underlines the importance for the exchange of good practice between the legal professionals from different states of the European Union, in order to assure a common interpretation of legal provisions applicable in such matters.

Various hypothesis could be analyzed based on the data provided through the case study, in which the child's father was not a national of a EU member state, but an European state from outside of the Union (like Russia), or the parents lived with the child in such a state before the child moved with his mother to Slovenia, or the mother moved with the child to a state which is not a member of the EU, but it is a contracting state to the Hague Convention, or, finally, if the child is taken to a state which is not a contracting state to the 1980 Convention either. For each situation, one can identify the legal provisions applicable – Regulation Brussels II bis and the 1980 Hague Convention, the Convention alone (for non-EU states which are bound by it) or, finally, the domestic law and/or, other international instruments, determined on a case by case basis, like the 1996 Hague Convention on jurisdiction and applicable law in matters of parental responsibility. The nationality of the parents and of their child is important only in regard to their parental responsibility rights, everything else will be regulated by courts of the two states involved in such a case - the courts of the state of the former habitual residence and the courts of the state to which the child was moved.



## 6. Issues within proceedings

### 6.1. The relation between the proceedings concerning parental responsibility and those of international child abduction. Discussion on international jurisdiction, cooperation between courts etc.

Botond Czellecz, expert  
Legal Adviser, Ministry of Justice of Hungary  
Petre Matei, rapporteur  
Lawyer, Bucharest Bar Association, Romania

The topic addresses some of the provisions of Regulation Brussels II bis and the 1980 Hague Child Abduction Convention which, among other aims, are meant to prevent decisions which are incompatible.

In this regard, five main areas can be separated in respect of possible parallel proceedings in cross border parental responsibility matters by application of Regulation Brussels II bis and the 1980 Hague Child Abduction Convention. These five main areas identified are:

- Granting custody
- Regulating access rights
- Provisional measures
- Enforcement procedures (including overriding mechanism)
- Child abduction procedures (supplementing 1980 Hague Child Abduction Convention)

The first two areas (granting custody and regulating access right) could be grouped together, as they usually appear complementing each other in parental responsibility proceedings and court decisions. As far as the relevant case law of the CJEU relating to the first area of the topic is concerned, preliminary rulings C-436/13 and C-296/10 are good examples to be examined.

The facts of the case C-436/13 were that a Spanish-British couple who lived in Spain, after the breakdown of their relationship, agreed upon the terms of parental responsibility. At the time of the agreement, the mother had already left for the UK with the child and settled there. According to the agreement, the mother was granted custody, while the father was entitled to access. Subsequently, they submitted their agreement to the Spanish court, which approved it, exercising the jurisdiction conferred on it by the parties (prorogued jurisdiction, according to Article 12(3)). A few months later, the mother turned to the UK court

seeking the modification of the terms of access previously agreed. In parallel to this application, the father requested enforcement of the Spanish court settlement, also before a UK court. The mother raised no objections against the enforcement proceeding, as she admitted that she prorogued jurisdiction in favour of the Spanish court. Therefore, the court settlement was enforced, rather than the access rights modified. The mother subsequently applied to the Spanish court for the transfer of the prorogued jurisdiction to the UK court (Article 15). The Spanish court stated that it had no jurisdiction, as the previous proceeding for which it had prorogued jurisdiction ended with a final decision. The mother once again brought the proceedings before the UK court, requesting the modification of the terms of access and, before all, to establish the jurisdiction of the court. The UK court declared that it had jurisdiction, but the father appealed against this judgement. *This was the stage when the UK court referred the question to the CJEU concerning the effect of the prorogued jurisdiction.*

The conclusion of the CJEU in this case was that '*Jurisdiction in matters of parental responsibility which has been prorogued, under Article 12(3) of the Brussel IIA Regulation in favour of a court of a Member State before which proceedings have been brought by mutual agreement by the holders of parental responsibility ceases following a final judgment in those proceedings*'.

In preliminary ruling C-436/13, it was also underlined that a prorogation of jurisdiction, on the basis of Article 12(3) of the Regulation, is valid only in relation to the specific proceedings for which the court whose jurisdiction is prorogued is seised and that jurisdiction comes to an end, in favour of the court benefiting from a general jurisdiction under Article 8(1) of that regulation, following the final conclusion of the proceedings from which the prorogation of jurisdiction derives.

The second case examined in this sub-topic is the 2<sup>nd</sup> Purrucker Judgment of the CJEU, (Case No. C-296/10). The relevant facts of the case were the following. The parties (the mother, Ms Purrucker of German nationality and the father, Mr. Vallés Perez, of Spanish nationality) lived in Spain and from their relationship twins, a boy and a girl, were born. The children have dual, German and Spanish, nationality. After the parents' relationship deteriorated, the mother moved to Germany with her son and the daughter remained with the father in Spain. (The case will only refer to the boy, as the girl did not move with her mother, being under medical treatment in Spain. Therefore, the legal issue did not concern the girl, but the boy only.) We must also mention that the parents were cohabiting, so they had, under Spanish law, joint rights of custody. Although initially the parties made an agreement before a notary in terms of custody over the children, this had to be approved by the court, in order to be enforceable,

as far as the Spanish procedural law is concerned. According to this agreement, Ms. Purucker was allowed to move to Germany with the child, but subsequently the father changed his mind and did not agree with the removal. Instead, after Ms. Purucker left for Germany with their son, he applied before the Spanish court for custody as provisional measure, and, allegedly, subsequently, also for being granted custody, in substantial proceedings. The mother, in Germany, initiated proceedings for being granted custody or the right to determine the place of residence of the child in Germany. By then, there were three sets of proceedings under way involving Ms Purucker and Mr Vallés Pérez: the first, brought in Spain by Mr Vallés, concerns the granting of custody by provisional measure; the second, brought in Germany by Mr Vallés Pérez, concerns the enforcement of the order of granting custody as provisional measure to him (this was the subject of the judgment of the CJEU in *Purucker I* Case No. C-256/09), and the third, brought by Ms Purucker in Germany, was concerned with the award of rights of custody of the abovementioned children.

The complexity of the situation and the importance of the legal issues that the courts from both countries were confronted with cannot be debated. The difficulties generated by the legal actions of the parties in interpretation of Regulation Brussels II bis made the courts of Germany to refer the subject for preliminary ruling two times.

The legal issues with respect to the above situation, which the Court in Germany faced and which determined it to make a reference for a preliminary ruling are: *jurisdiction, lis pendens*, the notion of “*first seized court*”, *provisional measures versus substantive proceedings and exequatur proceedings*. Another aspect worth mentioning is the importance of communication between courts, in order to reduce time and to avoid parallel proceedings.

According to the outcome, the CJEU held in this case that ‘*whether a situation of lis pendens arises must be regarded as autonomous*’ and ‘*the term ‘the same cause of action’ must be defined by taking into account the objective of Art 19(2) of Regulation, which is to prevent decisions which are incompatible.*’ In this respect ‘*lis pendens within the meaning of Article 19(2) of the Regulation can therefore exist only where two or more sets of proceedings with the same cause of action are pending before different courts, and where the claims of the applicants, in those different sets of proceedings, are directed to obtaining a judgment capable of recognition in a Member State other than that of a court seized as the court with jurisdiction as to the substance of the matter*’. In that regard, no distinction can be drawn on the basis of the nature of the proceedings brought before those courts, that is, according to whether they are proceedings for interim relief or substantive proceedings. Neither the concept of ‘judgment’, defined in Article 2(4) of Regulation No 2201/2003, nor Articles 16 and 19 of the regulation

relating, respectively, to the seizing of a court and *lis pendens*, indicate that the Regulation makes such a distinction. The same is true of the provisions of Regulation relating to recognition and enforcement of judgments, such as Articles 21 and 23 thereof.

The conclusion of 'The Purucker Judgment' relating to the nature of provisional measures and whether it can be subject to *lis pendens* provisions was that such procedures can be regarded as a case in the substance of parental responsibility, and therefore can be subject to *the lis pendens* rule. (It is worth noting that the provisional measure in question was ordered in a proceeding where the jurisdiction of a court was based on different grounds than the grounds of competence laid down in Article 20 of the Regulation.)

Another important point is, also concerning parallel proceedings, that a court shall proceed even if there are ongoing procedures in the same matter between the same parties, if no information can be obtained as to the parallel proceeding and, therefore, the *lis pendens* rule cannot be applied due to lack of necessary information, and taking into account all the circumstances and, above all, the best interest of the child.

The next area of possible parallel proceedings is *parallel proceedings in respect of provisional measures under Article 20 of the Regulation*, which was reflected by case No C-403/09 (Deticek Case) within the case law of CJEU.

The parties to the case were an Italian-Slovenian couple who lived in Italy with their child. After the breakdown of relationship, within the divorce proceedings, the Italian court provisionally granted custody of the child to the father. Despite the court order, Ms Deticek, the mother, left Italy with the child. The Italian order was declared enforceable in Slovenia and, on this basis, enforcement was sought before the competent Slovenian court, for the child to be returned. Enforcement was, subsequently, suspended until the final outcome of the main proceedings. The mother then requested provisional and protective measure under Article 20 of the Regulation, namely the granting of custody of the child to her. The Slovenian court granted, in first instance, custody to the mother. It held that the child was settled in her new social environment, return to Italy would be contrary to her welfare, and the child also expressed her wish to stay with her mother.

Taking into account these facts, it is clear that in the given situation there were theoretically two decisions of two different national courts which had opposite contents concerning provisional measures and custody. One by the Italian court, which awarded custody to the father, and another one by the Slovenian court, which awarded custody to the mother. The Slovenian court, upon the appeal of the father against the custody-granting order, stayed its proceedings and referred the following question to the CJEU: '*Does a court of a Member State of the European Union have jurisdiction under Article 20 of Regulation to take protective measures in a situation in*

*which a court of another Member State, having by virtue of that regulation jurisdiction as to the substance, has already taken a protective measure declared enforceable in the same state?’*

The CJEU held that this situation did not allow Article 20 to be interpreted to such effect that the court last seised had jurisdiction. Since Article 20 is an exception, it has to be interpreted strictly. According to the ruling, when a court applies Article 20 and exercises jurisdiction under this article, three requirements must be met cumulatively: 1. the measure must be urgent; 2. it has to be in respect of persons and assets in the Member State where the court is situated; 3. it must be provisional.

The conclusion of the case is that, in the given circumstances, the referring court cannot pronounce a decision to granting custody (there is a court of jurisdiction has already granted custody by provisional order to the other parent).

The third sub-topic is parallel proceedings for the enforcement of orders pronounced in the matter of parental responsibility and child abduction.

First, it should be pointed out that the situation in question is likely to arise and it is necessary to find the legal solution or the best of those available. It often occurs that, when enforcement of a parental responsibility decision is requested in another Member State, in the meantime, a parent wrongfully removes the child, this resulting in child abduction. In this legal situation there are pros and cons in respect to the legal ways to be followed. In some instances, the enforcement of a custody order seems more favourable for the applicant, while in others the application for the return of the child (child abduction procedure) is more effective.

The following practical case, where a child was removed from Hungary to Romania, serves as an example to illustrate such a situation.

A couple lived in Hungary with their child and, after the breakdown of their relationship, proceedings were initiated before the Hungarian court in the matter of parental responsibility. In the meantime, the father took the child to Romania for a holiday and did not return on time. The mother initiated the child abduction procedure involving the Central Authorities in Hungary and Romania. The mother also requested a provisional measure of sole custody of the child before the Hungarian court, which was granted with immediate effect, regardless appeal. In the meantime, the father filed an application for custody before the Romanian court. The Romanian court refused to proceed due to lack of jurisdiction over the subject matter, recognizing that the child's former habitual was in Hungary and that child abduction proceedings were ongoing. The mother participated and appeared before the Romanian court in the child abduction proceedings. The first instance court ordered the return of the child. The order was challenged by the father and the case was referred to the court of second instance, hence no legal force was yet gained.

The mother, in the interim, wanted visitation rights, as she could not see her daughter nor was she able to keep contact with her in any way.

In the circumstances, the court of jurisdiction did not grant her visitation rights (since custody was granted) and therefore no enforceable order existed as far as the mother's visitation request is concerned. The Romanian child protection authority made an attempt to maintain visitation, but without success. As stated, no legal tool was available for effective measures. Under child protection laws, the only measure available was to check whether the child was secure.

In the meantime, the mother requested the competent Romanian court to enforce the Hungarian court order (which was in fact a provisional measure, with immediate legal effect regardless of appeal) granting her custody. This procedure was, however, subject to exequatur. The father referred to a refusal ground and, after the order was declared enforceable at first instance, upon appeal, the case was referred to a court of second instance. Although the first instance court in Romania declared the order issued by the Hungarian court enforceable, the court of second instance refused the request of the mother on the ground that the order was not final (it only had provisional enforceability in Hungary).

More than a year elapsed until the court of second instance delivered an order in the child abduction case, parallel to the enforcement proceedings, and by the time the mother obtained the return order in her favour, the child was alienated so much as no enforcement was possible, due to her opposition to being returned to her mother's care. *At that time, proceedings were still ongoing in Romania:*

1. *The father initiated proceedings against the enforcement of the return order*

2. *The mother tried to obtain an order for regulation of visitation in Romania*

3. *Criminal proceedings were brought against the father for not complying with the directions given by the enforcement officer (during the attempted enforcement of the order to hand over the child)*

*In Hungary: a judgement was delivered granting sole custody to the mother. This judgement had been appealed by the father and appeal was still pending.*

There are many issues open for discussion and to reflect on: the options open for the parent left behind; the decisions of the Romanian courts of enforcement in the specific case; the next steps that should be taken by the mother; the nature of the enforcement proceedings mentioned above.

The problem of parallel proceedings in relation to the 'overriding mechanism' can also be added to this topic. The term overriding mechanism is used for the process of enforcement of certain custody decisions ordering return of the child overriding the non-return decision delivered in the preceding child abduction case falling under the regime of Article 42 of the Regulation Brussels

II bis. These decisions have to be enforced without the possibility of non-recognition and refusal of enforcement (save irreconcilability).

The most relevant case study from CJEU in this respect is the preliminary ruling C-211/10 ('Povse case'). In this case a couple lived in Italy and had joint custody over their child. Following the couple's separation, Ms Povse, the mother, left to Austria with the child, despite the order of the Italian court prohibiting her to do so. The father brought a return application before the competent Austrian court. Meanwhile, the Italian court granted common custody for the parents, while stating that the child could stay with her mother pending final judgment (the court also granted the mother authority to make decisions on the day to day organization of the child's life). In the child abduction proceedings, the 1<sup>st</sup> instance court dismissed the application for return on a ground of refusal (Article 13(b), grave risk). Then, upon the father's appeal, the 2<sup>nd</sup> instance court referred the case back to the 1<sup>st</sup> instance court which this time, dismissed the return application, because custody had subsequently been granted to the mother by the Italian court. Following the refusal of the father's return application, Ms. Povse brought an action before the Austrian court, applying for custody. The Austrian court declared that it had jurisdiction on the basis of Article 15(5) and asked the Italian court to transfer jurisdiction. The Italian court held that Article 10 was not satisfied, in order to transfer the jurisdiction. Moreover, the Italian court ordered the immediate return of the child, on the basis of several grounds. This was the legal situation when the provisions of the 'overriding mechanism' were applied, as the father requested the enforcement of the Italian court order before the Austrian court.

In this context, the Austrian court referred several questions to the CJEU, requiring the clarification of the legal situation and asking under what circumstances the enforcement has to or has not to be carried out under the special enforcement rules.

The recitals of preliminary ruling C-211/10 are very important because they contain fundamental principles applicable in such matters:

- The recognition and enforcement of judgments given in a Member State should be based on the principle of mutual trust, and grounds for non-recognition should be kept to the minimum required (recital 40).
- The jurisdiction based on the habitual residence of the child is retained and is transferred only if the child has acquired a habitual residence in another Member State (recital 41).
- The regulation seeks to deter child abductions from one Member State to another and, in cases of abduction, to obtain the child's return without delay (recital 43).

- Regulation must be interpreted as meaning that a provisional measure does not constitute a ‘judgment on custody that does not entail the return of the child’ within the meaning of that provision, and cannot be the basis of a transfer of jurisdiction to the courts of the Member State to which the child has been unlawfully removed (recital 50); only final judgments can qualify as such judgments, if adopted on the basis of full consideration of all the relevant factors, in which the court with jurisdiction rules on arrangements for the custody of a child who is no longer subject to other administrative or judicial decisions.
- Judgement of the court with jurisdiction ordering the return of the child falls within the scope of that provision, even it is not preceded by a final judgement of that court relating to rights of custody of the child.

The last sub-topic addresses the direct link between substantial proceedings in the matters of parental responsibility and of child abduction. It, in particular, reflects how these two procedures relate to each other and whether they can result in incompatible decisions. The Hague Child Abduction Convention includes a ‘stay of procedure’ rule (Article 16), which can be considered as a special *lis pendens* rule. Although it does not expressly require stay of procedure, but only prohibits the delivery of a judgement on the substance while child abduction procedure is ongoing, it is common practice followed by courts of many countries to stay proceedings. Nevertheless, since under Regulation Brussels II bis the courts of EU Member States apply the same jurisdiction rules and the *lis pendens* rule for cross border cases, there is no such need to apply Article 16 of the Convention. However, in certain situations, there can be good reasons for its application, which will be highlighted in the following case study.

In another practical case, a Romanian-Hungarian couple lived in Cluj (Romania) with their child. They decided to move to Sweden for conducting further studies. They planned to stop in Hungary for a couple of weeks, before moving to Sweden. During their stay in Budapest, the couple quarrelled, and the relationship broke up.

A child abduction case was filed by the Romanian father who, by then, had moved back to Romania. The mother filed a custody case before the competent Hungarian court. The Hungarian court examined its jurisdiction in the custody case and found that it had jurisdiction under the general rule. However, it stayed its proceedings in line with Article 16 of the Convention. The first instance court in the child abduction case in Hungary ordered the return of the child. It stated that her habitual residence was still in Romania, before her retention in Hungary became wrongful. At this stage, the rulings from the child abduction proceedings were different from those delivered on



the substance of the matter (parental responsibility), the latter establishing jurisdiction on the ground of already acquired habitual residence.

Following the appeal, the court of second instance, in the child abduction case, overruled the first instance court's decision, stating that the child, by way of her parents agreeing to leave Romania, lost her habitual residence in Romania, although the new habitual residence was not yet acquired anywhere (including Hungary). The Hungarian court proceedings in the custody matter continued and ended with a custody decision.

In such a situation, the finding of another court examining the same circumstances can never be predicted. The finding of the court judging the child abduction case can easily be overruled or approached differently by the court judging the substance case of parental responsibility. It may establish or decline jurisdiction over the case. It could be well defended that the Hungarian court did not acquire jurisdiction over the subject matter, considering that the child had his habitual residence in Romania, and the parents' decision was to move to Sweden and the period of time they spent in Hungary as well as the circumstances have not established a change of habitual residence.

As an interesting development, a recent CJEU case 'Liberato' (Case C-386/17) must be noted in relation to the topic at hand. In the case, an Italian court referred a question to the CJEU relating to the infringement of the *lis pendens* rule, asking whether such infringement should be regarded as a *procedural public policy* matter and if infringement of such could serve as a ground of refusal. It is likely that, in light of what was discussed and seen in earlier cases, the CJEU will only allow very strict interpretation of grounds of refusal and will not allow the infringement of *lis pendens* rule to be referred to as a ground for refusal.

There are also other aspects of parallel proceedings that have to be reflected on. Mediation, for example, is one of those. It is commonplace for it to be promoted and made available in the proceedings in question to the wildest extent possible. As possible parallel proceedings, criminal proceedings also come into the picture, which in some instances, facilitate the effective settlement of the cases at hand, while, in others, produce the opposite effect. Relocation proceedings may also run simultaneously and could also impact on the outcome of other proceedings, for example, in the matter of parental responsibility, when, after the wrongful removal of the child, the situation becomes lawful, because the competent authority determines that the habitual residence of a child is abroad.

## 6.2. Domestic violence - the role of social services and the issuance of protective measures in favour of a child

Ionica Ninu, expert  
Judge at the Bucharest Tribunal, Romania

*“... interpretation of a child’s best interests must be consistent with the whole Convention, including the obligation to protect children from all forms of violence and the requirement to give due weight to the child’s views; it cannot be used to justify practices, including corporal punishment and other forms of cruel or degrading punishment, which conflict with the child’s human dignity and right to physical integrity.”*

*(Committee on the Rights of the Child (2006). General Comment No. 8. The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (articles 19, 28(2) and 37, inter alia), CRC/C/GC/8, para 26.)*

The problem of domestic violence has existed in the social context as a subject of human rights since 1948, with the Universal Declaration of Human Rights stipulating the right of all people to live without violence.

In Article 1 of the Convention on the Rights of the Child, a child is defined as: “every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier”.

The definition of violence is found in Article 19 of the Convention: “all forms of physical or mental violence, injury and abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse”.

Art. 3 (b) The Council of Europe Convention of 11 May 2011 on the Prevention of and Fight against Violence Against Women and Domestic Violence (also known as the Istanbul Convention), which went into effect on 1 August 2014 and was ratified by Romania by Law no. 30/2016, provides that “Domestic violence” means all acts of physical, sexual, psychological or economic violence occurring in the family or domestic environment or between former or current spouses or partners “whether the aggressor divides or shares the same residence with the victim.”

The Convention recognizes that many of these women have children. In some cases, the violence is directed at both the women and the children. There are several provisions that address both children as direct victims of physical, sexual or psychological violence, and children who witness such violence between their parents.

It is the first international treaty that establishes a comprehensive set of legally binding obligations to ensure a holistic response to all forms of violence against women, including domestic violence. It combines detailed provisions

concerning preventing violence, protecting and supporting victims and prosecuting perpetrators with the obligation to develop a set of comprehensive policies that are to be implemented in a coordinated manner.

Three quarters of children aged 2 to 4 worldwide – close to 300 million – are regularly subjected to violent discipline (physical punishment and/or psychological aggression) by their parents or other caregivers at home, and around 6 in 10 (250 million) are subjected to physical punishment. Many children are also indirectly affected by violence in the home: worldwide, 1 in 4 children (176 million) under the age of 5 live with a mother who has been a recent victim of intimate partner violence.

Violence also occurs in places where children are meant to learn and socialize. In 2016 alone, close to 500 attacks, or threats of attacks, on schools were documented or verified in 18 conflict-affected countries or areas. Children attending schools in countries that are not affected by conflict can also be at risk. Between November 1991 and December 2016, 59 school shootings that resulted in at least one reported fatality occurred in 14 countries across the world. Nearly 3 in 4 of these happened in the United States. (United Nations Children's Fund, *A Familiar Face: Violence in the lives of children and adolescents*, UNICEF, New York, 2017)

Scientists have long understood that the vital neural pathways formed during the first 1,000 days of life, from conception to age 2, shape the rapidly developing brain. It is well established that these connections require adequate nutrition and stimulation. But recent research reveals that a third element – protection from violence – is essential as well. Exposure to traumatic experiences can produce toxic stress – defined as prolonged, strong or frequent adversity in which the body's stress-response system remains activated. This can alter the structure and functioning of the brain during the formative early years (Shonkoff, Jack P., et al., 'The Lifelong Effects of Early Childhood Adversity and Toxic Stress', *Paediatrics*, vol. 129, no. 1, January 2012, pp. 232–246, available at <http://pediatrics.aappublications.org/content/129/1/e232> in United Nations Children's Fund study, *A Familiar Face: Violence in the lives of children and adolescents*, UNICEF, New York, 2017).

In society, extreme violence is rejected, but there is a high tolerance for other forms of violence, such as neglect, slapping, screaming, humiliation, etc.

### **The role of social services**

In Romania, social services were regulated by Ordinance no. 68/2003 in effect since January 1, 2004 and in Article 3<sup>4</sup> (1) specialized social services are defined as social services aimed at maintaining, restoring or developing individual capacities to overcome a situation of social need.

(2) The social services defined in para. (1) are as follows:

a) recovery and rehabilitation;

- b) support and assistance for families and children in difficulty;
- c) extracurricular informal education for children and adults, depending on the needs of each category;
- d) assistance and support for the elderly, including the elderly dependent;
- e) assistance and support for all categories defined in Art. 25;
- f) support and orientation for integration, rehabilitation and re-education;
- g) social-medical care for people in difficulty, including palliative care for people in the terminal stages of diseases;
- h) social mediation;
- i) counselling in an institutionalized framework, in information and counselling centres;
- j) any other measures and actions aimed at maintaining, restoring or developing individual capacities to overcome a situation of social need.

In Romania there are 61 residential services for victims of domestic violence, of which: Emergency reception centres, Recovery Centres for Victims of Domestic Violence (non-governmental organizations public-private partnership), Daily Care Services for Victims - 33 of which: Centres for the Prevention of and Combating Domestic Violence - 24 and Centres for Information and Raising Population Awareness – 9 and Day-care Centres for Aggressors – 2.

Emergency reception centres, hereinafter referred to as shelters, are social assistance units, with or without legal personality, of a residential type, providing protection, hosting, care and counselling to victims of domestic violence.

Shelters provide, for a limited period of time, family assistance to both the victim and minors under her care, protection against the aggressor, health care and personal care, food, accommodation, psychological counselling and legal counselling, according to the organizational and operational instructions developed by the authority in charge.

Persons convicted of domestic violence offenses are required to participate in special social counselling and reintegration programs organized by the institutions responsible for the enforcement of punishment they are aware of.

The Government of Romania approved the National Strategy for Prevention and Control of the phenomenon of domestic violence for the period 2013-2017 by Government Decision no. 1156/2012, which includes the Operational Plan for its implementation.

The strategy promotes good practice in the field and useful tools in practice to all who come in direct contact with family victims and aggressors, specialists in different areas, such as social protection, local government, justice, health, education, with a goal of providing a common plan of measures to pursue

the reintegration into society of people affected by domestic violence and the rehabilitation of family aggressors.

The Istanbul Convention stipulates a series of measures on the protection of victims through information, general assistance services, assistance in individual / collective complaints by insuring specialized services, the establishment of appropriate shelters, the organization of 24-hour emergency call centres, the setting up of rape crisis call centres and support, the implementation of protection and assistance services for child witnesses, as well as the setting up of a framework in which a person witness to the commission of acts of violence to be encouraged to report this to the competent authorities.

At the level of international cooperation, the signatories of the Convention undertake to cooperate in preventing, combating and prosecuting all forms of violence and develop reception procedures and support services for asylum - seekers sensitive to HIV / AIDS genes, including the determination of refugee status and the request for international protection.

Romania has signed and ratified the Istanbul Convention and has committed itself to adopt, promote and respect a number of firm measures to ensure the prevention and adequate combating of the phenomenon of violence.

In May of 2016, the instrument of ratification was deposited with the Council of Europe, and as a result, the Convention went into effect in Romania on 1 September 2016.

### **The protection order**

In Romania, Law no. 217/2003 on the prevention and combating of domestic violence regulates the order of protection.

The order of protection is issued by the courts for a maximum of 6 months.

The measures which can be ordered are:

- evacuating the aggressor from the family home,
- reintegration of the victim and, where appropriate, of the minors into the family home;
- requiring the aggressor to maintain a minimum distance from the victim, his / her children or other relatives, or the place of work or educational establishment of the protected person;
- prohibiting any contact, including by telephone, by mail or any other way with the victim, etc.
- requiring the aggressor to perform counselling, treatment, etc.

According to Art. 27 (1) of the above Law no. 217/2003 on the prevention and combating of domestic violence, "requests for the issue of the order of protection are judged urgently and, in any case, their resolution cannot exceed 72 hours from the of filing the application."

The court may also order the aggressor to bear the rent and / or maintenance for the temporary home where the victim, minor children or other family members live or will live because of the impossibility of staying in the family home.

In addition to any other measures ordered, the court may also order *the aggressor* to follow psychological counselling, psychotherapy, or may recommend taking control measures, treatment or forms of care, especially for detoxification purposes.

The order for protection ordering any of the measures shall be enforced immediately by or, as the case may be, under the supervision of the police.

In order to enforce the protection order, the police officer may enter the family home and any annexes thereof, with the consent of the protected person or, failing that, of another family member.

Police officers have the duty to supervise the manner in which the judgment is complied with and to notify the criminal investigating authority in case of absconding.

Violation of any of the measures ordered by the protection order constitutes the offense of non-compliance with the court decision and is punished by imprisonment from one month to one year. Reconciliation removes criminal liability.

If, with the settlement of the application, the court finds that one of the situations requiring a special child protection measure - emergency placement, placement or/and psychological counselling, as required – is in place, it will immediately notify the local public authority responsible for the protection of the child.

In *E. and Others v. the United Kingdom* (no. 33218/96), 26 November 2002, **ECHR**, the Court found that social services had failed to protect the children, in **violation of Article 3** (prohibition of inhuman or degrading treatment) of the Convention, and that there had been no effective remedy, in **violation of Article 13** (right to an effective remedy) of the Convention.

In this case, three sisters and their brother were for many years abused physically (all four children) and sexually (the girls) by their mother's boyfriend, including after his conviction for assaulting two of the girls, when he came back to live with the family, in breach of his probation conditions. The man forced the children, among other things, to hit each other with chains and whips in front of and sometimes with him. The girls all suffered severe post-traumatic stress disorder and the boy had personality problems as a result.

### **Protective order- mutual recognition**

Victims who were traveling to another Member State previously had to obtain a new protection order in the new country of residence. After the Directive 2011/99/EU (the European Protection Order) and Regulation (EU) No 606/2013

#### **European seminar**

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child

of the European Parliament and of the Council of 12 June 2013 (on the mutual recognition of protection measures in civil matters mutual recognition of protection measures in civil matters) went into effect, this is no longer necessary. These tools allow for EU Member States to recognize a protection order that was granted in another Member State.

In the case of the Directive 2011/99/EU, the EU Member State of residence has to replace the original protection order with a measure under its own law that corresponds 'to the highest degree possible' with the original measure.

The scope of Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 is within the field of judicial cooperation in civil matters within the meaning of Article 81 TFEU. This Regulation (EU) No 606/2013 applies only to protection measures ordered in civil matters. Protection measures adopted in criminal matters are covered by Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European Protection Order.

In paragraph 11 of the preamble to Regulation (EU) No 606/2013, it states that the Regulation should not interfere with the functioning of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (2) ('Brussels II bis Regulation'). Decisions taken under the Brussels II bis Regulation should continue to be recognised and enforced under that Regulation.

The purpose of Regulation (EU) No 606/2013: mutual recognition in a Member State if the person decides to leave the country for various reasons; the rapid and simple recognition and enforcement of the civil protection measures ordered in a Member State, and the introduction of a uniform model certificate and the setting up of a multilingual standard form for this purpose (the issuing authority should issue the certificate upon request).

The Regulation applies to cross-border cases and does not apply to protection measures covered by Regulation (EC) No. 2201/2003, and falls within the scope of judicial cooperation in civil matters within the meaning of Article 81 TFEU.

The protection measures adopted in criminal matters are covered by Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European Protection Order and it went into effect on January 11, 2015.

It applies to all Member State excluding Denmark, with protection orders issued from January 11, 2015, irrespective of the date of initiation of the proceedings.

The state of Origin is the Issuing State of the Order.

The state of Destination is where recognition and / or enforcement is sought - Recognition / enforcement - through the Certificate referred to in Article 5 of the Regulation.

Romania adopted Law no. 206/2016 for completing the Government Emergency Ordinance no. 119/2006 on certain measures necessary for the application of certain Community regulations as of the date of Romania's accession to the European Union, as well as for the modification and completion of the Law on Notaries Public and of Notarial Activity no. 36/1995.

This Law regulates that recognition and enforcement of the protection measure established in another Member State will be pronounced by the court, in closed session, without the parties being summoned. In the situation where the request was admitted, there is no recourse - if it was rejected, the conclusion is subject only to the appeal, within 5 days of its communication.

The Certificate is issued to the protected person, and a copy shall be communicated to the person representing the threat, who shall be notified that the certified protection measure is recognized and enforceable in all Member States of the European Union.

### **Domestic violence - ground of refusal of return**

According to Article 13 of the 1980 Hague Convention, notwithstanding the provisions of the previous article, the judicial or administrative authority of the requested state is not required to order the return of the child if the person, the institution or body opposing its return establishes:

a) that the person, institution or body that cared for the child was not effectively exercising the right of custody on the date of removal or retention, or had accepted, consigned or assisted afterward, to such removal or retention; or  
b) *that there is a serious risk that the return of the child will expose it to a physical or psychological danger or otherwise place the child in an intolerable situation.*

ECHR, in case *X v. Latvia*, considered the decisive issue being whether the fair balance that must exist between the competing interests at stake – those of the child, of the two parents, and of public order – had been struck, within the margin of appreciation afforded to States in such matters..., taking into account, however, that the best interests of the child must be of primary consideration and that the objectives of prevention and immediate return correspond to a specific conception of ‘the best interests of the child’ ...

The child's best interests do not coincide with those of the father or the mother ... [and,] in the context of an application for return made under the Hague Convention, which is accordingly distinct from custody proceedings, the concept of the best interests of the child must be evaluated in the light of the exceptions provided for by the Hague Convention, [particularly those] concerning the passage of time and the existence of a ‘grave risk’. This task falls in the first instance to the national authorities of the requested State, which have, *inter alia*, the benefit of direct contact with the interested parties. In fulfilling their task under Article 8 [of the European Convention], the domestic courts enjoy a margin of appreciation, which, however, remains subject to a European supervision



whereby the Court reviews under the Convention the decisions that those authorities have taken in the exercise of that power ...

[A] harmonious interpretation of the European Convention and the Hague Convention... can be achieved provided that the following two conditions are observed. Firstly, the factors capable of constituting an exception to the child's immediate return in application of [the Hague] Convention... must genuinely be taken into account by the requested court. That court must then make a decision that is sufficiently reasoned on this point, in order to enable the Court to verify that those questions have been effectively examined. Secondly, these factors must be evaluated in the light of Article 8 of the [European] Convention...

Consequently, Article 8 of the Convention imposes on the domestic authorities a particular procedural obligation in this respect: when assessing an application for a child's return, the courts must not only consider arguable allegations of a 'grave risk' for the child in the event of return, but must also make a ruling giving specific reasons in the light of the circumstances of the case. ...

Furthermore, as ... the Hague Convention provides for children's return 'to the State of their habitual residence', the courts must satisfy themselves that adequate safeguards are convincingly provided in that country, and, in the event of a known risk, that tangible protection measures are put in place." (*X v. Latvia* (application no. 27853/09), Grand Chamber judgment of 26 November 2013, §§ 93-108).

In another case, **Rouiller v. Switzerland**, 22 July 2014, ECHR affirmed there had been **no violation of Article 8** of the European Convention. Like the Cantonal and Federal Courts which had ruled on appeal, it found that the removal of the children to Switzerland by their mother was a "wrongful removal" and that the Hague Convention did not grant a child the freedom to choose where he or she wished to live. *The reasons given by one of the children for wanting to remain in Switzerland did therefore not suffice to justify the application of one of the exceptions to a child's return provided for in Article 13 of the Hague Convention, bearing in mind that those exceptions had to be interpreted strictly.*

This case concerned the removal of two children from France to Switzerland by their mother, who had been granted residence after her divorce. The applicant complained that the return of her children to France, as ordered by the Swiss courts, had constituted a violation of Article 8 of the European Convention on Human Rights. Her children had lived with her in Switzerland for almost two years and she claimed that the Swiss courts had been wrong to apply the 1980 Hague Convention in ordering their return to France. She added that the children's opinion had not been sufficiently taken into account.

### *Other jurisprudence*

#### **In the present case - Ref. No. 821/2012 on 28 November 2012 of the Luxembourg Tribunal -**

At the time of the birth of E1. (...), his mother B.) was a minor. At first, the young family lived in the household of the paternal grandfather, and then moved to a rented house.

Following domestic violence, B.), who had become an adult, took refuge with the child in (...), Bristol. Before going to Luxembourg, she lived together with the child at the Charles England House in Patchway, Bristol. On November 25, 2011 B.) joined, together with the child, the home of her mother C.) where she lived before she went to Great Britain without the permission of her mother.

According to the reports of the British social services, following a report by the father and mother of B.), they put in place a "child protection plan" for child E1.) as of December 2010. If it appears from the documents that both the child and his parents have been regularly monitored in the context of this plan, however, it must be noted that the living conditions of the child E1.) did not provide him with the stability necessary for his good development, since her situation changed several times and she was living last with her mother in a home. The mother was separated from the father, and no court decision had been taken, neither with regard to the residence of the child nor with regard to the right of custody and/or visit.

The judge found that under those circumstances, the child did not have the stability necessary for his proper development during his residency in Great Britain and that there is a serious risk that the child is in an intolerable situation, which poses a serious risk to his mental health when he returns to Great Britain – and it must be remembered that it is not in the interest of the child to return in Great Britain.

It follows that the State Attorney's request to have the return of E1.), born on (...) in (...) (GB) is to be rejected.

**In the Callicutt v. Callicutt case**, cited as: 2014 MBQB 144, the father seeks an order pursuant to the Hague Convention so that the children be returned to Guam. The mother denies that the removal or retention of the children was wrongful on the basis that the children were not habitually resident in Guam and that the father was not exercising his custody rights at the time of removal. The father has physically and emotionally abused the mother and children, and manipulated the mother in relinquishing her protection order.

If the removal was wrongful, the mother relies on the exceptions set out under Article 13 which gives the court a margin to decline a return order. She submits that the father implicitly or explicitly consented to the removal of the children, and that a return order would expose them to a serious risk of physical or psychological harm or place them in an intolerable situation.

The mother has no funds and no place to live in Guam. In the past, the military supplied her housing on the naval base at no charge because she was the spouse of a member.

#### **European seminar**

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child

The mother has no family support in Guam, or friends who could act as caregivers or provide general support to her. In addition to being isolated from her support network, the mother is afraid to return to Guam, for fear of the father's violent behaviour towards her and the children.

The mother has been unable to obtain counsel in Guam to represent her. The lawyer from the Public Defender's office who represented her for the Protection Order Application cannot represent her on a divorce and custody application. The lawyer she paid a retainer to has left Guam. She has been unable to find a new attorney in Guam to represent her as the two attorneys she tried to retain have refused to take her case.

She has no financial resources to allow her to return to Guam. She could not afford to visit the children should they be returned to Guam. The mother has part-time employment as a cook and server and receives an income subsidy from social assistance. Her previous work in Guam would not supply her with adequate income to support her and the children, notwithstanding support from the father.

The issues are:

- i. Were the children wrongfully removed from Guam by the mother?
- ii. Were the children habitually resident in Guam at the time of their removal?
- iii. Was the father exercising his custody rights pursuant to Guam law at the time of removal?
- iv. Did the father consent to or subsequently acquiesce in the mother's removal or retention of the children?
- v. Is there a serious risk that the return of the children to Guam would expose them to physical or psychological harm or cause them to be placed in an intolerable situation?

COURT OF QUEEN'S BENCH OF MANITOBA (FAMILY DIVISION) considers the interpretation of the Hague Convention on Civil Aspects of International Child Abduction, Can. T.S. 1983, No. 35, ("the Hague Convention") in respect to its purposes, its procedures, the exceptions to the return of children, and whether evidence of domestic and family violence is sufficient to trigger the serious risk exception.

The judge stated "I also find on the evidence, that there is a grave risk that a return order would place the children and the mother in an intolerable situation.

That a return order would place the mother and the children in a financially and psychologically vulnerable position without support.

Factors such as: lack of financial means; lack of emotional support; and isolation have been found to satisfy the "intolerable situation" test (See *Harris v. Harris*, 2010 Fam CAFC 221).

I am not satisfied that any undertakings I may make, would protect the mother and the children from the father, given the longstanding pattern of domestic violence in this case, nor lessen the grave risk to the children I have found.

In making my decision, I have determined that this is an exceptional case, and I have not approached it as a custody case, where the children's best interests are paramount. I have considered the purposes articulated in the Hague Convention to prevent international child abduction and ensure that children are returned to their place of "habitual residence", the exceptions provided for in the Hague Convention, and the serious corroborated evidence of a well-established pattern of domestic violence before me. Having balanced same, I find that returning the children to Guam, even subject to undertakings would expose the children to a grave risk of physical or psychological harm and place the children in an intolerable situation."

**In another case** – that of the child L.E., born on 02.03.2005, as a result of a marriage concluded between the applicant L. U. and defendant L. F.M : the child in question was born in H.. The L. U. and L. F. M. family lived in H. prior to the moment when they arrived to Romania, on the date of 18.04.2008, as this results from the certificates of residence, sheets 61 and 74 file, issued by the Department for Population Records and Marital Status of the City Hall.

The child's father claimed that the minor was raised in H. and not lived elsewhere than on the territory of this state, a factual situation that has not been challenged by the applicant. The two parents had parental custody rights over the child, thus exercising together parental authority. According to the H. law applicable in this case, both parents were entrusted with the exercise of parental rights, thus that none of them had precedence in terms of the parental rights exercised over the child. Also, pursuant to art. 97 of the Romanian Family Code "both parents have the same rights and obligations towards their minor children, no matter whether they result from marriage, out of marriage, or they are adopted. The parents exercise parental rights only in the interests of the children."

The minor was brought to Romania by his mother, L. F. M., who stated in her submission in court that she had done so because of the physical and verbal violence she had been subjected to by the claimant and his family. Later, the mother refused to return to H. and asked for the child to be entrusted to her by a the court injunction order, accepted through the civil court judgment of 15.10.2008, issued by the Court of C, which ordered that the minor L.E. to be brought up and educated by the mother, L.F.M., as a provisional measure, until a decision is rendered in the divorce proceedings. As regards the application for divorce, this has not been determined yet, and the minor is still living with his mother.

On the other hand, the First Instance Court E, the family court division, based on the request of the claimant, decided the transfer the right to take decisions on the child's residence to the father, in order for the child to be brought back to the his social environment. Also, a Criminal court Order was

issued against the mother by the Court of First Instance E, dated 11.08.2008, according to which she was ordered to pay a fine of 30 Euro for a period of 100 days for having committed an offense against the minor, namely the deprivation of freedom against the claimant's son, whom she had transported abroad.

In its Civil court decision no.887, during the public hearing of 21 May 2009, the Bucharest Court of Appeal - 3<sup>rd</sup> Division for civil and family law cases involving minors maintained that the first instance court had rightly held that the case fulfilled the conditions of art. 3 of the Hague Convention, taking into consideration that, before moving to Romania on April 18, 2008, the minor L. E. had his habitual residence in H. - there was no proof that the minor's father had expressed his consent for the domicile or residence of the child to be established in Romania, and, as stipulated by the provisions of art. 1626 and 1627 of the Civil Code of H., the parents share custody over the child; moreover, this right was actually exercised by both parents at the time of the minor's travelling to Romania.

As the Ministry of Justice and Citizens' Freedoms also claimed, the appellant may not rely on the civil court sentence no. 14741 of 15 October 2008 issued by the Court of C., as, according to art. 16 of the Hague Convention, it is necessary to establish in advance whether the minor had been displaced or not at the date of the above-mentioned sentence, when the proceedings covered by the Convention were already under way.

(...) Referring to the ground of appeal in this case that made a reference to the provisions of art. 13 b) of the Convention in the sense that "there is a serious risk that the return of the minor would expose him to physical or psychological danger or it could place him in an intolerable situation in any other way", the Court notes that this claim is also ungrounded.

The appellant did not prove that in the minor could have been exposed to a danger. As the first instance held, the violent behaviour that represented the subject of the complaint was manifested by the respondent exclusively in his relationship with the wife, not with his child.

In fact, the statement of the appellant – given on 24 October 2008, led to the conclusion that immediately after the alleged episode of aggression on December 20, 2007 which resulted in the temporary removal of the respondent from their home, the appellant consented to leaving the minor in the latter's care, which proves that the appellant did not consider at that moment that the respondent represented a danger for minor.

The Court took note of the fact that the respondent had not been proven as behaving aggressively against the minor. As regards the possible state of danger resulting from the circumstance that the minor would have been present repeatedly while violent actions were against the appellant, the Court held that, although there are some indications of a tense relationship between the spouses, the actions of the appellant were not been finalised through court proceedings, that could lead to the conclusion that a state of

danger and *mens rea* of the respondent existed, or the consequences of such behaviour for the minor.

## **Appendix 1**

### **Statistics:**

Monitoring report of the current status of the Operational Plan for the implementation of the National Strategy preventing and fighting the domestic violence phenomenon for the period 2013-2017, Year 2016, in Romania:

-The statistics on the total number of cases of domestic violence, where applications were made for social support, centralised for 2009 - 2016 at the level of the National Agency for Equal Opportunities between Women and Men (ANES) of the Ministry of Labour and Social Justice, has highlighted the following figures:

- In 2009 - 12,461 cases of domestic violence;
- In 2010 - 11,592 cases of domestic violence;
- In 2011 - 12,205 cases of domestic violence;
- In 2012 - 14,376 cases of domestic violence;
- In 2013 - 15,358 cases of domestic violence;
- In 2014 - 11,598 cases of domestic violence;
- In 2015 - 12,273 cases of domestic violence;
- In 2016 - 13,019 cases of domestic violence.

As regards the development in the phenomenon of domestic violence over the last years, the following data have been identified:

□ In 2010, compared to 2009, the number of cases of domestic violence decreased by 6.98%

□ In 2011, compared to 2010, the number of cases of domestic violence increased by 5.28%

□ In 2012, compared to 2011, the number of cases of domestic violence increased by 17.78%

□ In 2013, compared to 2012, the number of cases of domestic violence increased by 6.83%

□ In 2014, compared to 2013, the number of cases of domestic violence decreased by 24.29%

□ In 2015, compared to 2014, the number of cases of domestic violence increased by 5.81%.

Data collected by ANES revealed the following:

- In 2009 - 12,461 cases of domestic violence;
- In 2010 - 11,592 cases of domestic violence;

□ In 2011 - 12,205 cases of domestic violence, of which the number of female adult victims is 1,723 and out of which the number of child victims is 10,787 between <1 and 17 years old;

□ In 2012 - 14,376 cases of domestic violence, of which the number of female adult victims is 1,296 and out of which the number of child victims is 12,512 between <1 and 17 years old;

□ In 2013 - 15,358 cases of domestic violence

The number of female victims is 1,993 and the number of child victims is 13,136 between <1 and 17 years old;

□ In 2014 - 11,598 cases of domestic violence. The number of female victims is 1,623, and the number of child victims is 9,698, between <1 and 17 years old.

□ In 2015 - 12,216 cases of domestic violence. The number of female victims is 1,910 and the number of male victims is 105, while the number of child victims is 10,258, between <1 to 17 years old.

□ In 2016 - 13,019 cases of domestic violence. The number of female victims is 2,056 and the number of male victims is 165, while the number of child victims is 10,798, between <1 to 17 years old.

At national level, after 2013, there was a significant decrease in the number of applications for social services, followed, in the last three years, by a slight increase in the phenomenon of domestic violence on a year to year basis.

In 2016, there were 1467 defendants brought in court, out of whom 191 for murder, 487 for battery or other forms of violence, 33 for bodily injury, 13 for murder-causing injuries, 20 for ill-treatments applied to juveniles, 1 for infanticide, 13 for illicit deprivation of liberty, 80 for rape, 8 for sexual assault, 47 for sexual relations with a minor, 3 for sexual abuse against minors, 566 for family abandonment, and 5 for non-compliance with custody rules for the minor, as well as 1,822 victims of domestic violence, of whom 932 are underage persons.

## **Appendix 2**

### **References, resources**

1. Convention on the Rights of the Child, GA Res. 44/25, annex, 44 UN GAOR Supp. (No. 49) at 167, UN Doc. A/44/49 (1989), entered into force 2 September 1990

2. Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5, 1950/1953)

3. The European Convention on Human Rights

4. European Convention on the Exercise of Children's Rights (ETS No. 160, 1996/2000)

5. The Hague Convention on the Civil Aspects of International Child Abduction (concluded on 25 October 1980, entered into force on 1 December 1983)

6. The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (concluded on 19 October 1996, entered into force on 1 January 2002)

7. Regulation (EU) No. 606/2013 of the European Parliament and others Council on mutual recognition of protection measures in civil matters, adopted in Strasbourg on 12 June 2013;

8. Directive 2004/38 / EC of the European Parliament and of the Council of 29 April 2004 on the right to move and reside freely within the territory Member States for Union citizens and their family members, amending Regulation (EEC) No. 1612/68 and abrogation of Directives 64/221 / EEC, 68/360 / EEC, 72/194 / EEC, 73/148 /75/34 / EEC, 75/35 / EEC, 90/364 / EEC, 90/365 / EEC and 93/96 / EEC;

9. Charter of Fundamental Rights of the European Union.

10. Council Regulation (EC) Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction, recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility ("Regulation Brussels II bis ")

11. Law no. 217/2003 of the Romanian Parliament on the prevention and combating of domestic violence in effect since 27 August 2003

12. Ordinance of the Romanian Government no. 68/2003 in effect since January 1, 2004

13. <https://hudoc.echr.coe.int>

14. <https://www.hcch.net/en/instruments/conventions/full-text/?cid=24>

15. [eur-lex.europa.eu/legal-content](http://eur-lex.europa.eu/legal-content)

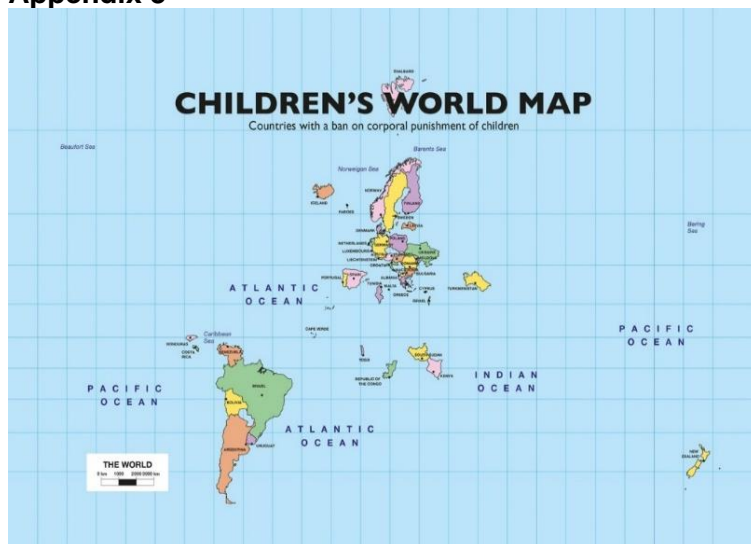
16. <https://www.incadat.com/en>

17. <http://srsg.violenceagainstchildren.org>

18. <http://anes.gov.ro/wp-content/uploads/2017/09/RAPORT-DE-MONITORIZARE-STRATEGIE-Violenta-in-familie-2016.pdf>

**Suzan van der Aa, Johanna Niemi, Lorena Sosa, Ana Ferreira, Anna Baldry**, *Mapping the legislation and assessing the impact of protection orders in the European Member States*, Wolf Legal Publishers, 2015; the study, conducted with the support of the EU Daphne Program, is available in its entirety at <http://poems-project.com/wp-content/uploads/2015/04/Intervict-Poems-digi-1.pdf> .

### Appendix 3



SOURCE: [Save the Children](http://www.savethechildren.org) on:

[http://srsg.violenceagainstchildren.org /page/children\\_world\\_map](http://srsg.violenceagainstchildren.org/page/children_world_map)

#### European seminar

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child



## **Appendix 4**

### **Agenda 2030 for Children:**

#### **End Violence Solutions Summit**

14-15 February 2018 | Stockholm, Sweden

#### **PROCLAMATION**

**“No violence against children is justifiable; all violence against children is preventable.”**

– *2006 UN Secretary General’s Study on Violence Against Children*

As partners from all sectors of society and all parts of the world, we have gathered here in Stockholm to share and advance our work to end violence against children. At the heart of this work are rights enshrined in the Convention on the Rights of the Child and renewed global commitments of Agenda 2030 and the Sustainable Development Goals. In target 16.2 and associated targets of Agenda 2030 all countries commit to end all forms of violence against children by the year 2030. The right to grow up free from violence has been placed at the centre of our political agenda.

We have listened to the voices of the children as equal members of our society. We have been moved by their power, vision and demands of us, the adult world, to act and do more. They and we know there are solutions. These solutions are achievable, evidence-based and highly cost-effective. There is no excuse not to act.

Violence affects hundreds of millions of children, girls and boys, every year, but its impacts are largely ignored. Every five minutes a child dies from violence, while many more suffer physical and psychological harm. The damage is long lasting.

The Summit aimed to inspire a global, national and local movement to protect children from violence. We have focused on finding and promoting ways to increase collaboration across sectors. We have recognized the complex and interdependent causes of violence against both women and children. We have cast a light on the role of boys and men in shaping a non-violent future for all children.

We recognize that it is never too late to help a child who has been hurt by violence – and that responding to the needs of survivors of violence is central to any prevention strategy. We must redouble efforts to protect children online, address violence in their every-day lives, and prevent violence against those and escaping facing conflict and crisis.

This Summit underscores the importance of shifting our focus towards prevention. The more we prevent violence, the less we must respond to. Solutions presented at this Summit point to an emerging consensus that we need a systematic holistic approach well defined in INSPIRE, the seven strategies that together provide a framework for ending violence against children. Implementation and enforcement of laws, Norms

and values, Safe environments, Parent and caregiver support, Income and economic strengthening, Response and support services, Education and life skills. INSPIRE and the Model National Response, developed by the We PROTECT Global Alliance, work hand in hand – they are part of a larger vision to end all forms of violence against children. The Summit has celebrated the commitment of pathfinder countries whose leadership is at the core of the Global Partnership to End Violence Against Children. It is important that they continue to demonstrate significant, sustained and measurable reductions in violence. We call on more countries to become pathfinders, learn from each other's successes and hold each other accountable for delivering results that change children's lives.

We now return to our home countries with five overarching conclusions. Building on children's rightful demands, the global community needs to:

1. Demonstrate leadership at the most senior levels of governments, international organizations, civil society, faith groups, and the private sector to take action, engage more countries to join the Global Partnership to End Violence Against Children as pathfinders and improve cooperation and coordination between different actors and policy areas

2. Increase knowledge on how to prevent, detect and treat violence against children, girls and boys, and accelerate implementation of evidence-based strategies to end violence against children. INSPIRE strategies is a guide.

3. Develop and share solutions and best practices to defend the safety, integrity and dignity of every child, in every setting, including in the cyberspace.

4. Invest more resources to prevent and respond to violence, from all relevant sources (national budgets, development cooperation, etc.) including through the Fund to End Violence Against Children as a vehicle to support solutions and innovation.

5. Place all children – and especially those most vulnerable at the centre of Agenda 2030 and its progress review at the High-level Political Forum in 2019. There Heads of State and Government will meet for the first time to review progress on the 2030 Agenda for Sustainable Development. Let them make the children of the world a priority.

We express our heartfelt thanks to the government of Sweden the municipality of Stockholm for warmly and efficiently hosting this historic Summit. This event will be remembered as the first bi-annual gathering of children, leaders and experts who together will put an end to a global epidemic of violence; a massive undertaking but a very achievable one – an undertaking of the kind rewarded and celebrated in this city.

### **Contact**

Email: [summit@end-violence.org](mailto:summit@end-violence.org)

Website: [www.end-violence.org/summit](http://www.end-violence.org/summit)

#### **European seminar**

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child

## 6.3. Criminal proceedings

Anca Ghideanu, expert  
judge, Iași Court of Appeal, Romania

### 6.3.1 Introductory remarks: the framework of the judicial cooperation between EU Member States

Article 3 of the Treaty on European Union (TEU) stipulates: “(2) The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime”.

#### **a. The judicial cooperation in civil matters**

The free movement of goods, services, capital and people across-borders is constantly on the increase. Consequently, the European Union is developing judicial cooperation in cross-border civil matters, “building bridges” between the different legal systems.

Its main objectives are legal certainty and easy and effective access to justice, implying the identification of the competent jurisdiction, clear designation of the applicable law and speedy and effective recognition and enforcement procedures.

The **legal basis** of the judicial cooperation in civil matters is the Article 81(1) of the Treaty on the Functioning of the European Union (TFEU) and the Protocols Nos 21 on the position of the United Kingdom and Ireland of the area of freedom, security and justice and 22 on the position of Denmark to the Treaty of Lisbon.

The **main tools** for facilitating access to cross-border justice are **the principle of mutual recognition**, based on mutual trust between Member States and **direct judicial cooperation** between national courts.

The Treaty of Lisbon made the measures in the field of judicial cooperation in civil matters subject to the ordinary legislative procedure.

However, **measures relating to family law** with cross-border implications have to be adopted by the Council **unanimously**. According to Article 81(3) TFEU, family law remains subject to a special legislative procedure: the Council acts unanimously after consulting the Parliament.

The **main legal instrument** in this field is **the regulation**.

As laid down in Article 288 TFEU: „A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States”.

Regulations are somehow equivalent to „Acts of Parliament”, in the sense that what they say is law and they do not need to be mediated into national law by means of implementing measures.

As such, regulations constitute **one of the most powerful forms of European Union law**.

When a regulation comes into force, it overrides all national laws dealing with the same subject matter and subsequent national legislation must be consistent with and made in the light of the regulation. The member states are prohibited from obscuring **the direct effect of regulations**.

**b. The judicial cooperation in criminal matters** is based on **the principle of mutual recognition of judgments and judicial decisions** and **includes measures to approximate the laws of the Member States in several areas**. The Treaty of Lisbon has provided a stronger basis for the development of a criminal justice area.

The **legal basis** of the judicial cooperation in criminal matters are the Articles 82 to 86 of the Treaty on the Functioning of the European Union (TFEU).

The progressive elimination of border controls within the EU has facilitated considerably the free movement of European citizens, but has also made it easier for criminals to operate transnationally.

In order to tackle the challenge of cross-border crime, the area of freedom, security and justice includes measures to promote judicial cooperation in criminal matters. The starting point is the principle of mutual recognition.

Under **the former „third pillar”** (police and judicial cooperation in criminal matters), **the legal instrument was the framework decision**.

A framework decision was a kind of legislative act of the European Union used exclusively within the EU's competences in police and judicial co-operation in criminal justice matters.

Framework decisions were similar to **directives** in that they required member states to achieve particular results without dictating the means of achieving that result.

However - unlike directives - framework decisions were **not capable of direct effect**, they were only subject to the optional jurisdiction of the European Court of Justice and enforcement proceedings could not have been taken by the European Commission for any failure to transpose a framework decision into domestic law.

Under the Treaty of Lisbon, the old pillar structure has disappeared.

The abolition of the former „third pillar” led to the harmonisation of legislative instruments: instead of framework decisions, decisions and conventions, even **in the criminal law field the EU adopts the ordinary EU instruments** (regulations, directives and decisions).

The role of the Court of Justice has also been strengthened under the Treaty of Lisbon: the ordinary procedures for preliminary references and infringement proceedings initiated by the Commission now apply even in this area.

According to Article 9 of the Protocol (No 36) to the Treaty of Lisbon on transitional provisions: „The legal effects of the acts of the institutions, bodies,

offices and agencies of the Union adopted on the basis of the Treaty on European Union prior to the entry into force of the Treaty of Lisbon shall be preserved until those acts are repealed, annulled or amended in implementation of the Treaties". Consequently, some framework decisions still apply.

The **European Court of Justice (Grand Chamber)**, in **Case C-42/11**, in the proceedings concerning the execution of a European arrest warrant issued against João Pedro Lopes Da Silva Jorge, stated that:

„(53) ... although framework decisions may not, as laid down in Article 34(2)(b) EU, entail direct effect, their binding character nevertheless places on national authorities, and particularly national courts, an obligation to interpret national law in conformity.

(54) When national courts apply domestic law they are therefore bound to interpret it, so far as possible, in the light of the wording and the purpose of the framework decision concerned in order to achieve the result sought by it. This obligation to interpret national law in conformity with European Union law is inherent in the system of the Treaty on the Functioning of the European Union, since it permits national courts, for matters within their jurisdiction, to ensure the full effectiveness of European Union law when they determine the disputes before them”.

In this case, the **ECJ ruled** that: „The national court is required, taking into consideration the whole body of domestic law and applying the interpretative methods recognised by it, to interpret that law, so far as possible, in the light of the wording and the purpose of Framework Decision 2002/584, with a view to ensuring that that framework decision is fully effective and to achieving an outcome consistent with the objective pursued by it”.

### 6.3.2 The judicial cooperation between EU Member States in cases of international child abduction

„**The child abduction**” within the meaning of the judicial cooperation between the EU Member States is a **civil autonomous concept**.

**The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction** (the Convention) uses the term „child abduction” (French: “enlèvement d’enfants”, German: “Kindesentführung”, Spanish: “sustracción de menores”).

This legal instrument aims at protecting children from the harmful effects of international child abduction, recognising that their best interests are paramount.

It governs the return of children that were wrongfully removed or wrongfully retained in a country other than the country of their habitual residence.

The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction has created a specific procedure to return

abducted children to the place of their habitual residence. The aim is that this procedure must be speedy, before the child can become settled in the new environment.

Article 3 of the Convention defines the wrongful removal or retention of a child:

„a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State”.

The **Regulation Brussels II bis** (the Regulation) also applies to the wrongful removal or wrongful retention of children (also referred to as child abduction), and for this aspect the Regulation provides a supplement to the Hague Convention.

The child abduction provisions of the Regulation have a limited scope: they supplement the Convention for situations in which the child has been abducted from one EU Member State to another Member State.

Reading Recitals 17 and 18, Article 11 and Article 60 e) together, it emerges that the regulation leaves the Convention in place, taking precedence over it.

The Regulation does not contain its own full set of rules to regulate child abduction, it uses the Child Abduction Convention and builds on it.

Thus, when a child is abducted from one EU Member State to another (except Denmark), the Convention provides the basic, and the Regulation adds the extra rules: on the time frame, obligation to hear the child, grave risk exception and an extra mechanism to request the return, in certain circumstances, to the Member State of the former habitual residence of the child to which the child refuses to return.

The **interaction between civil law and criminal law** in cases of international child abduction is limited, due to the differences between and characteristics of each form of judicial cooperation.

#### **a. Interaction in a civil law procedure:**

Article 13 b) of the Hague Child Abduction Convention states that the “judicial authority of the requested State is not bound to order the return of the child if the person which opposes its return establishes 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”.

According to Article 11 (4) of the Regulation Brussels II bis, a court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention, if it is established that adequate arrangements have been made to secure the protection of the child after his or her return.

One can ask whether the situation of the parent facing criminal proceedings in the requesting State (for the wrongful removal of the child) falls within the concept of “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”.

To answer this question, we should point out that this exception must be read narrowly and recall that the best interest of the child is the core of the international legal instruments in this area.

The **European Court of Human Rights**, in the **Case G.N. v. Poland** (no 2171/14, Judgment from 19 July 2016) stated:

„§ 61. In addition to restating consistently that the exceptions to return under the Hague Convention must be interpreted strictly (see X v. Latvia, cited above, § 116), this Court has also specifically held that the harm referred to in Article 13 (b) of the Hague Convention cannot arise solely from separation from the parent who was responsible for the wrongful removal or retention. This separation, however difficult for the child, would not automatically meet the grave risk test (see, mutatis mutandis, K.J. v. Poland, cited above, § 67, and G.S. v. Georgia, no. 2361/13, § 56, 21 July 2015)”.

**b. Interaction in a criminal law procedure:**

A (an international) child abduction is a **criminal offence**, but **each Member State has its own policy** in criminal matters.

**Each Member State defines the criminal offences and the penalties.** These **can vary substantially** from a Member State to another, and the differences between national judicial systems have consequences on the judicial cooperation.

In international child abduction cases, the **relevant legal instrument for judicial cooperation in criminal matters** is the **Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States** (2002/584/JHA).

The Council Framework Decision on the EAW has revolutionized the traditional extradition system, by adopting innovative rules:

- limited grounds for refusal of execution;
- decision-making shifting from political to judicial authorities;
- the possibility of surrendering nationals of the executing state;
- the abolition of the dual criminality requirement for 32 listed offences;
- clear time-limits for the execution of each EAW.

The Framework Decision is **not directly applicable**. It has been implemented in the Member States and each national court shall apply its national law.

In Romania, Law No 302 of 28 June 2004 on international judicial cooperation in criminal matters implemented the EAW Framework Decision. The Romanian courts act as executing judicial authority in cases of international child abduction.

**Article 96(1)** of Law No 302 “**Acts that allow surrender**” (implementing Article 2 of the Framework Decision), contains an exhaustive list of offences that, regardless of the name given to the same in the laws of the issuing Member State, if sanctioned under the laws of the issuing Member State by imprisonment or a custodial preventive measure of at least 3 years, shall not be subject to the verification of the double criminality of the act. Among such offences are “kidnapping, illegal restraint and hostage-taking”.

The **interpretation of a Romanian court** was that **the international child abduction was not „kidnapping” within the meaning of Article 96 of the Law** (Article 2 of the EAW Framework Decision) - Bucharest Court of Appeal, Judgment no 24x/2014, Case-file no 445y/2/2014.

For offences other than those listed in Art. 96(1), surrender may be conditional on the acts motivating the issuing of the European Arrest Warrant be offences under the Romanian law, regardless of their constituent elements or of their legal classification.

In the **Romanian Criminal Code**, Chapter „**Offences against family**” comprises **Article 379 - Failure to comply with measures taken for a juvenile’s custody**:

“(1) If a parent withholds their juvenile child without the approval of the other parent or of the individual to whom the juvenile was entrusted under the law, they shall be punishable by no less than 1 month and no more than 3 months of imprisonment or by a fine. ...

(3) Criminal action shall be initiated based on a prior complaint filed by the victim”.

Article 4 of the Framework Decision sets a list of grounds for optional non-execution of the EAW.

The **Article 98** of Romanian Law 302 (“**Grounds for refusing execution**”, implementing Article 4) has been applied by Romanian courts, after assessing that the condition of the double criminalisation is fulfilled.

**Romanian courts refused execution of EAW in international child abduction cases on grounds of:**

(i) - „**the sentenced person did not personally attend trial**” (Bucharest Court of Appeal, Judgment no 24x/2014, File no 445y/2/2014, confirmed by the High Court of Cassation and Justice of Romania - Decision no 291z/2014);

(ii) - „**the European Arrest Warrant refers to offences that were committed, according to the Romanian law, on Romanian territory**” (Oradea Court of Appeal - Judgment no 5x/2016, Case file no 18y/35/2016,



confirmed by the High Court of Cassation and Justice of Romania - Decision no 91z/2016).

**A Romanian court was requested, in a EAW procedure, to surrender a parent and the child, together with the parent.**

The court stated that **the law refers only to the “handing over of property”**: „The Romanian executing judicial authority may order, upon the request of the issuing judicial authority or ex officio, the freezing and handing over, in accordance with the Romanian law, of articles constituting material means of evidence or which have been acquired by the requested person as a result of having committed the offence having formed the basis for the European Arrest Warrant” (Article 98 of the Law, implementing Article 29 of the Framework Decision) - (Iași Court of Appeal - Judgment no 1x/2009).

In an **extradition case**, related to international child abduction, **the High Court of Cassation and Justice of Romania (Decision no 84x/2016) refused extradition** on the grounds of Article 26 “Seriousness of the penalty” (of the same Law No 302): “Extradition shall be granted by Romania, in view of criminal prosecution or trial, for acts the commission of which entails, according to the legislation of the Requesting State and to Romanian law, a custodial penalty of at least one year, and in view of serving a penalty, provided it is at least 4 months long”.

The High Court of Cassation and Justice of Romania noted that the corresponding offence in Romanian Criminal Code is in Article 379 – “Failure to comply with measures taken for a juvenile’s custody” that is punishable by no more than 3 months of imprisonment.

**We suppose that the decision would have been different in an EAW case**, taking into consideration that the European Court of Justice, in Case C-463/15 PPU *Openbaar Ministerie v. A* stated:

“(29) As is clear from the first two paragraphs of Article 2, this Framework Decision focuses, with regard to offences in respect of which a European arrest warrant may be issued, on the level of punishment applicable in the issuing Member State (see, to that effect, the judgment in *Advocaten voor de Wereld*, C-303/05, EU:C:2007:261, paragraph 52). The reason for this is that criminal prosecutions or the execution of a custodial sentence or detention order for which such a warrant is issued are conducted in accordance with the rules of that Member State.

(30) In contrast to the extradition regime which it removed and replaced by a system of surrender between judicial authorities, Framework Decision 2002/584 no longer takes account of the levels of punishments applicable in the executing Member States. This corresponds to the primary objective of this Framework Decision, referred to in recital 5 in its preamble, of ensuring free movement of judicial decisions in criminal matters, within an area of freedom, security and justice”.

In this case, the ECJ ruled: “Article 2(4) and Article 4.1 of Council Framework Decision 2002/584/JHA ... must be interpreted as precluding a situation in which surrender pursuant to a European arrest warrant is subject, in the executing Member State, not only to the condition that the act for which the arrest warrant was issued constitutes an offence under the law of that Member State, but also to the condition that it is, under that same law, punishable by a custodial sentence of a maximum of at least twelve months”.

As shown, there is a limited **interaction between civil law and criminal law** in cases of international child abduction. The judicial cooperation in civil matters and in criminal matters have different legal bases.

**The principle of mutual recognition**, based on mutual trust between Member States is common to these two forms of cooperation, but **in civil matters** there is **direct judicial cooperation between national courts** while the **judicial cooperation in criminal matters includes only measures to approximate the laws of the Member States in several areas.**

## 6.4. Maintaining contact with the left-behind parent

Tijana Kokic, expert  
Judge, Zagreb Court, Croatia  
Andrei Iacuba, rapporteur  
Judge, Tribunal for minors and family Braşov, Romania

In case of the change of the habitual residence of the child, in the best interests of the child is saving connection with the left behind parent.

This contact could be provided through rights of access granted in person or through an Internet-based or phone-based connection. However, it should be permanent and regular.

In case the change of the child's habitual residence was lawful, the rights of access could be maintained by the decision of the court or of some other body or by parental agreement. The decision should exist at the time of the change of the habitual residence and it should be enforced in the country of the child's new habitual residence in accordance with the Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the parental responsibility, repealing regulation (EC) No. 1347/2000 (Brussels II bis or Brussels II bis), if the country involved is a EU Member State or pursuant to other international or domestic law, if the latter is not the case.

The application could be submitted in the EU Member State of the child's former habitual residence during a three-month period following the move, for the purpose of modifying a judgment on access rights issued in that Member State before the child moved (Art. 9 Regulation Bruxelles II bis).

If there is no prior decision on the access rights, then the left-behind parent or the other parent or the child (depending on the applicable domestic law) could submit an application or a claim (also depending on the applicable domestic law) to establish access rights in the country of the child's new habitual residence of the child.

In the case when the child was wrongfully removed or retained in another Member State or a Third State bound by the Hague Convention on the Civil Aspects of International Child Abduction of 25.10.1980 (hereinafter "the 1980 Hague Convention"), Art. 21 of the Convention shall become applicable. Thus, an application could be made to the Central Authorities in the same way as an application for return of the child or directly to the judicial or administrative authorities of the Contracting State (Art. 29, from the 1980 Hague Convention).

Central Authorities are bound by the duty to cooperate which is set forth in Art.7 from the 1980 Hague Convention.

Also, parents, grandparents or the child (depending on the applicable domestic law) could submit an application or claim (also depending on the applicable domestic law) to establish access rights in the country of the child's previous habitual residence. In the case that country is a Member State, Art. 10 from Regulation Bruxelles II bis shall become applicable, while in the case of the Third States, Art. 7 of the Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children, 1996, shall become applicable, if these Third States are bound by the Hague Convention of 1996.

According to Art.20 from Regulation Bruxelles II bis, in urgent cases, a court of a Member State which has no jurisdiction based on the Regulation Brussels II bis, may decide over the issue of access rights through provisional measures. However, such provisional measures shall be enforced only in that Member State and they shall remain valid until the moment when the Member State which has jurisdiction in accordance with the Regulation Brussels II bis reaches a decision in that case.

Third States may apply Art.12 Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the Protection of children, 1996, if bound by that Convention.

In such cases, provisional measures on access rights may be upheld by the court in the country where the child was wrongfully removed or retained even when the respective court has no jurisdiction.

Case law: ECHR No. 36983/97, 13.01.2007., Hass v. Holland  
ECHR No. 25735/94, 13.07.2000., Elsholz v. Germany  
ECHR No. 30943/96, 08.07.2003., Sahin v. Germany  
ECHR No. 3187/96, 08.07.2003., Sommerfeld v. Germany  
EHCR No. 45582/99, 01.06.2004., Lebbink v. Holland

As for the resolution of all disputes in family law matters, more and more recommendations are issued to deal with such conflicts in family mediation proceedings – Art. 7 para. 2 f) from the 1980 Hague Convention; Art.13. European Convention on the Exercise of Children's Rights, 1996.

The support for the left-behind parent in exercising his/her right of access or his/her visiting rights is represented by access to mediation, in order to prevent parents from litigating in court.

### **Mediation within the member states**

Each national system provides different solutions for encouraging mediation in child abduction cases. Here are some examples:

- in Germany, this issue is handled by the central authority, which provides the parties with access to mediation proceedings,

- in Croatia, these tasks are split between the central authority and the courts themselves,
- in Romania, any agreement reached through mediation should be enforced by the courts,
- in Bulgaria, there is a possibility for mediation in such cases, however there is no structured mechanism for convincing the parents to reach a settlement through negotiations.

### **Mediation in relation with third states**

Mediation could prove a very good method for solving the problems between parents in child abduction cases and EU Member States try to provide mediation as a solution not only in cases involving the Member States but also encourage it in all other child abduction cases, as long as the Third State accepts the agreement reached during the mediation process.

The party may receive information on this issue from the Central Authorities of the Third State.

### **Other solutions**

There are also cases where both parents understand the need for preserving the rights of access for the non-resident parent as being in the best interest of the child and they reach an agreement without using the mediation process.

For example: a Romanian court enforced an agreement between the parents, through which the father waived his right to sue over the return of the child to Romania (the mother wanted to move together with the child to the United States), while the mother agreed to contribute financially for the father to be able to visit the child in the U.S. on a regular basis.

Based on all of the above, the conclusion is that preserving the child's contact with the left-behind parent is able to secure the basic right of the child: the right to have both parents.

An interesting debated is the right of access of the left behind parent, the specific elements in different countries' domestic law and practical difficulties met regarding transnational enforcement of such rights. The main vulnerability that could be identified was the opposition of the resident parent.

For example, the resident parent can deny the access rights of the left-behind parent by hiding with the child in an unknown location for several years, using the media to put pressure on the courts for obtaining a non-return decision or refusing to accept the enforcement of such rights despite having to pay huge fines.

Practical means to offer support for the left behind parent, in exercising his right of access or his visiting rights could be the cooperation

of the resident parent. The means to offer to the parties is the access to mediation, in order to prevent them to litigate in court. Different national systems offer different solutions for encouraging mediation in child abduction cases - in Germany, this is handled by the central authority, that offers the parties access to mediation, in Croatia, the tasks are split between the central authority and the courts themselves, in Romania, any agreement reached through mediation should be enforced by the courts, while in Bulgaria there is also the possibility of mediation in such cases, but there is not an entirely structured mechanism to convince the parents to reach a solution through negotiation.

There are also cases in which both parents understand the need for preserving the rights of access of the non-resident parent for the best interest of the child. An interesting case in which a Romanian court enforced an agreement between the parents was when the father waived his right to sue for the return of the child to Romania. The mother wanted to move together with the child to United States. The mother agreed to contribute financially for the father to be able to visit his child periodically in the U.S.

The court has an informal “obligation” to mention in their rulings (regarding the residence of the child or the right of access) the specific address where the child will live together with the resident parent. In some countries such an obligation derives from the law, in others the law only requires for the ruling to contain a general provision that the child will live “with the mother/father”. Using a specific address may help protect the rights of the non-resident parent, being a guarantee that his right of access would be effective. It would also make easier to determine whether there has been a change in the child’s habitual residence and if that change is lawful or not. In Croatia there is such an obligation for the courts, while in Romania this is a matter left to each court to decide for itself, according with the circumstances of the case. In Portugal, the court has to establish if the child will live with his/her mother or father and, also, which parent (or maybe both) has the parental responsibility, but there is no obligation to indicate the specific place of residence of the child. However, if the resident parent would decide to move to a different country, the other parent may agree or refuse to agree to such a change. The Romanian Law offers the same guarantee for the change in the habitual residence of the child and any disagreement among parents on such a matter will be solved by an order of the court.

## 7. The importance of the child's hearing in establishing his/her best interests during the return proceedings

Anastasija Jumakova, expert, Central Authority  
director, Department of International Cooperation  
Ministry of Justice, Latvia  
Assistant Professor Carmen-Gina Achimescu, rapporteur  
Faculty of Law, University of Bucharest, Romania

The right of the child to be heard has been established in a number of international and European legal instruments and the United Nations Convention on the Rights of the Child (1989) usually has been named as a first and most widely ratified international instrument covering the issue with its Article 3 stating *that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*; and Article 12 noting that *States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. And for this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*<sup>1</sup>

Yet the one might argue that the same arise also from more fundamental international instruments such as the Convention for the Protection of Human Rights and Fundamental Freedoms with its Article 8 on the Right to respect for private and family life and the Charter of fundamental rights of the European Union with its Article 7 on respect for private and family life and Article 24 on the rights of the child.

The importance of the hearing of the child in civil abduction cases has been particularly stressed in both The Hague Convention of 25 October, 1980 on the Civil Aspects of International Child Abduction and in particularly in the Article 13 providing that the judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views, and the Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition

---

<sup>1</sup> UN. Convention on the Rights of the Child, art.12, G.A. Res. 44/25, UN. GAOR, 44th Sess., UN. Doc.A/Res/44/25 (1989).

and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, and in particular in the Article 11 stating when applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.

The interesting fact is that the concept of best interests of the child unlike the United Nations Convention on the Rights of the Child, when the same has been strengthened in particular article, both the Hague 1980 Convention and Regulation Brussels II bis do not provide a certain article for that. In fact, the idea has been stressed in preambles of both legal international instruments, when in first case it has been noted: “*firmly convinced that the interests of children are of paramount importance in matters relating to their custody*” and in second case: “*The hearing of the child plays an important role in the application of this Regulation, although this instrument is not intended to modify national procedures applicable*”. Wherewith, it should be concluded that the necessity to evaluate the observation of best interests applies to all cases relating to child protection matters. Best interests go through each particular issue of the child protection and the family proceedings; especially concerning the civil abduction matters.

Domestic law does not always provide for a detailed regulation in respect of the coordination of various professionals, which might in practice hinder the comprehensive understanding of the child. The assessment of the child’s legal, psychological, social, emotional, physical and cognitive situation and the respect for the child's right to private and family life are nevertheless mandatory within any child-related procedures in all EU countries.

During the return procedures, the possibility arises for than more than one type of child-related procedure to be run at the same time: some child-related cases that are dealt with under civil proceedings cannot be determined by the courts without some investigations and reports done by public authorities. This is typically the case where the exercise of parental authority appears to be abusive/ insufficient<sup>2</sup>.

- **Safeguarding the best interests of children**

The **child’s best interest** should represent the governing principle of all (judicial and non-judicial) proceedings that involve children. Despite the existence of this obligation, the term is not always defined in the national legislation. Some indications pointing out to the meaning of the term ‘best

---

<sup>2</sup> These ideas were also published as part of the Romanian Report (author Carmen-Gina ACHIMESCU) within the EU study *Children’s involvement in civil judicial proceedings in the 29 EU countries*, Publications Office of the European Union, Luxembourg, 2015, ISBN 978-92-79-47556-6



interest of the child' exist in manuals, guidelines and handbooks drafted by public authorities in cooperation with NGOs in charge with children protection (while these are not legally binding instruments).

Based on the European case-law, it seems that the child's personal best interest often coincides with the family interests. As an example, custody over a child is often given to the parent who is the most cooperative (the one who agrees to share custody and to encourage maintaining the relationship between the child and the other parent), in order to give a chance to the child to have a normal relationship with both parents; this aim is assessed as being in the best interest of the child. Moreover, when more children are involved in a custody or in a return procedure, the best interest of each child is assessed separately with a view to preserve the relationship between brothers/sisters

The international jurisprudence generally provides that the child's opinions and preferences must be taken into account as long as these can be reasonably assessed. Although this is not always spelled out in domestic legislation (i.e. there are cases where interviewing the child is mandatory), in practice, officials and judges may decide to involve the child while defining his/her best interest. The child's view on his/her interests can be gathered via his/her direct hearing.

As to methodological approach it must be noted that the right of the child to be heard shall be conceived as a legal right and not as a possibility for adults to take advantage of children's immature opinions or perceptions. Therefore, the interviewing of the child in a friendly environment is of particular importance, as it can encourage children to express themselves freely.

According to the relevant guidelines<sup>3</sup>, in order to exclude the possibility of manipulating the child, a person (specialist or a family member close to the child) should be selected by the court for the support of the child, in close cooperation with the child himself. The support person should not be chosen from amongst those who exercise authority above the child (i.e. parents, tutors, teacher) and his/her interests cannot be contrary to those of the child, nor opposite to the interests of any other person who is being interviewed.

Moreover, if a conflict between the child's interests and the interests of his/her legal representative is identified; a temporary guardian/curator or support person must be appointed by the judge, upon request of any interested party or *ex officio*<sup>4</sup>. According to general rules, children older than 14 years old can ask for the appointment of an *ad litem* or other support person, in their own name and right. With regard to younger children, the judge has the power to decide whether such a request is well founded (especially after the age of 10, when children are supposed to be able to

---

<sup>3</sup> *Interviewing children throughout legal proceedings*

<sup>4</sup> New Civil Code, Art. 150

express their opinions). If it finds that a request is well-founded, the court may intervene and appoint a guardian *ad litem* for the child.

The main public body responsible for the evaluation of the child's best interests is the domestic court, which in accordance with the principles of multisectorial approach and of cooperation/partnership, may cooperate with specialised bodies while determining the child's best interests.

The judge has the power to assess the value attached to the information/evidence provided by the child (i.e. with regard to the child's age) if there are no specific provisions concerning the way the special needs of the child and their age should be taken into account while gathering information.

In case a child refuses to be interviewed, the judge must evaluate the reasons for the child's refusal<sup>5</sup>.

While adapting the interview technique to the children's needs, judges should closely cooperate with the child's parents, guardians, professionals and/or local authorities in charge of the protection of children<sup>6</sup>. Although applicable legislation does not require for the assurance of the minimum standard of child's psychological comfort during judicial interviews (i.e. specific measures in order to ensure that the number of interviews is as limited as possible or that their length is adapted to the child's age and attention span), some good practices in this field tend to become general.

As an established practice, children must always be accompanied and supported by an adult person when attending proceedings such as interviews, court sessions etc. The presence of an adult support-person (legal representative, guardian, guardian *ad litem*, adult relative, or a lawyer) is basically mandatory regardless the role and the age of the child. Parents can accompany the children during the judicial proceedings, even when the parent's participation to the interview is not recommended. The conditions under which the adults can accompany the child are determined by the court, which is free to interview the child without the presence of an adult person or to appoint a specialised support-person if needed.

In terms of cooperation with professionals, judges cooperate with public authorities providing specialised and family support services to children. Although cooperation between courts and other public authorities is necessary for avoiding excessive intervention into the child's life and to limit the negative impacts of judicial procedures on the child<sup>7</sup>, there are no specific legal measures or public policies in this respect.

In order to limit the negative impacts of proceedings, children regardless of their age might be interviewed with the presence of

---

<sup>5</sup> Law no 272/2004 on the protection and promotion of the rights of the child

<sup>6</sup> New Civil Procedure Code, Art. 22 (principle of the judge's active role in establishing the truth, interpreted in compliance with Law no 272/2004 on the protection and promotion of the rights of the child, Art. 6).

<sup>7</sup> Law no 272/2004 on the protection and promotion of the rights of the child, Art 24; see *Manual for implementing the Law no .272/2004*, issued by the Direction for Child's protection, available on [www.copii.ro](http://www.copii.ro)

psychologists. In case of very young children (i.e. children under 10 years old), the presence of a psychologist is strongly recommended along the proceedings<sup>8</sup>.

**In accordance with the child's protection principles, particularly the principle enshrining the dignity of the child**, a special attention must be paid to the appropriateness of premises and locations where the children involved in civil proceedings are heard (i.e. a non-intimidating and child-friendly environment, an appropriate language and visual contact). Currently, Romanian legislation stipulates only basic standards in this respect (e.g. as expressly provided by the NCPC, children irrespective of their age must be heard in a separate hearing room).

Although this is specifically not required by applicable legislation, the interview techniques and methods used by the judge and other professionals should also be adapted to the children's special needs<sup>9</sup>. Measures to be taken by the authorities in order to ensure the hearing and other actions during the return procedure must be adapted to the child's pace and attention span (e.g. regular breaks, provisions on avoiding lengthy hearings, etc.) and any communication difficulties the child might have. As a child's sensitivity and needs change with his/her age, different arrangements for different age groups are recommended. Children under 10 years old should be approached with particular care. Trained professionals should be involved in this process. In Romania, no specific national legislation or public policy reflects these guideline's recommendations.

Although the hearing of a child in a child-friendly environment should be compulsory<sup>10</sup>, very few public bodies have hearing rooms which are appropriate for children. The requirement of having child-friendly rooms also applies to child-friendly waiting areas<sup>11</sup>. In the absence of specific child-friendly rooms, courts or other public bodies dealing with children often use smaller rooms for the hearing of the child, i.e. a room which is big enough so people can sit around a table<sup>12</sup>. The location for the interview should at least be adapted to the children's needs, but the legislation provides no details on how such places should be arranged.

In order to avoid the need for the child to be present against his/her wish or to protect the child's privacy, the judge could decide *ex officio* or upon any interested person's request (children included, under the general conditions of procedural capacity) to hold the hearing of the child outside

---

<sup>8</sup> Specialised training for **all** the authorities in contact with children is considered to be the best solution (ns) ; see *Manual for implementing Law no 272/2004*, supra.

<sup>9</sup> *Interviewing children...., supra*

<sup>10</sup> According to the interpretation of L.272/2004 in relation to the civil procedure provisions, provided by the guidelines *Interviewing children...., supra*

<sup>11</sup> *Ibidem*

<sup>12</sup> *Manual for implementing L. 272/2004, supra*

court premises”<sup>13</sup>. A hearing outside court premises could theoretically take place at the children’s own residence.

Romanian legislation expressly provides two kinds of measures for the protection of children’s privacy that can be ordered by the judge: interviewing the children in a separate place and prohibiting the presence of any members of the public and/or of the parties. The judge can order such measures *ex officio* or upon request. In practice, children younger than 10 years old are never heard in a public court session.

The importance of the issue with the hearing of the child can be also studied through the case law not only of domestic level but even in the number of cases in the European Court of Human Rights (ECHR) such as:

- *Raw and Others v. France* (7 March 2013)
- *Rouiller v. Switzerland* (22 July 2014)
- *Gajtani v. Switzerland* (9 September 2014)
- *M.K. v. Greece* (1 February 2018)

As a result some key findings of the ECHR concerning the hearing of the child in return proceedings were established:

- Although the children’s opinion had to be taken into consideration, their opposition did not necessarily prevent their return.
- The reasons given by one of the children for wanting to remain did therefore not suffice to justify the application of one of the exceptions to a child’s return provided for in Article 13 of the 1980 Hague Convention, bearing in mind that those exceptions had to be interpreted strictly.
- The wishes expressed by a child who had sufficient understanding are a key factor to be taken into consideration in any judicial or administrative proceedings affecting him or her. The right of children to be heard and to be involved in the decision-making in any family proceedings primarily affecting them was also guaranteed by several international legal instruments. In particular, Article 13 of the 1980 Hague Convention provided that the authorities could refuse to order the return of a child if the child objected to being returned and had attained an age and degree of maturity at which it was appropriate to take account of his or her views.

#### Practical cases:

The competent Court of EU member state “A” is reviewing the application of the children’s father Mr Singh for the return of his children siblings Tanya (5 years old) and Karash (7 years old) to EU member state “B”, which are allegedly removed from the state “B” to state “A” by their mother, national of state “A”, Ms Berzina.

<sup>13</sup> Romanian Civil Procedure Code, Art. 345 ss

Ms Berzina has explained to the Court, that she was forced to come to state “A” with the children, as they were living in inappropriate conditions.

Both children were born in state “A” and Ms Berzina was visiting Mr Singh occasionally and state “B”. Mr Singh was not providing enough maintenance support for the children, noting that he runs a small cafe-business in state “B”, which is not that profitable as it was anticipated. The children spoke with their father on the phone and via Skype in English.

Soon after their youngest child was born, Ms Berzina decided to give their relationship a try, so she believed when Mr Singh promised that if they would come to state “B” everything would become easier. Little did she know at that time that in reality, she and children would have to sleep on mattresses in the kitchen of restaurant owned by Mr Singh. Moreover, later Ms Berzina has found out that Mr Singh has been having an affair with one of the waitresses all this time. Wherewith, having spent only 6 months in state “B”, Ms Berzina decided to return to state “A” with the children.

Mr Singh, on the other hand, had explained that his business has only recently been expecting problems due to changes in tax systems and soon enough his business will recover and he will be able to rent a new apartment for the family. Up until now, he did not have such a necessity as he was sleeping in empty room of his restaurant.

Having clarified the opinion of the children, it was established that they do not wish to return to state “B” and they do not like their father because he does not smell nice (Mr Singh runs traditional Indian restaurant) and he does not look cute (Mr Singh is Indian national).

The question for this scenario and all upcoming scenarios were as follows:

*If you were judge, how would you assess the provided view of the children – would you consider that in this particular case the children have attained an age and degree of maturity at which it is appropriate to take account of its views?*

*Would you find it as essential objection within the meaning of the Article 13 of the Hague Convention?*

Namely, the scenario concerned some questions related to the legal value attached to **young children’s opinions** in return procedures. In the used example, we had two siblings, aged 5 and 7, refusing to return living with their father in a place they perceive as appropriate for a normal family life. The question was what the judge should do, taking into account that the child’s opinion, especially when he is very young, is not sufficient to assess his best interest. Will he decide to return the children, despite their objection,

or he will decide that their best interest is to stay with the abducting parent, who has a closer relationship with them and who can offer them better life conditions? Each decision - to ignore children's objection or to take it into account – should anyway be motivated in relation to other objective facts that are determinant for their best interest.

The differences between the national systems are mainly related to the age when the child's opinion must be taken into account (generally 10 years-old, 12 years old in Italy, as soon as the child can express himself in Portugal, Latvia). Apparently, European judges generally have a large manoeuvre space when they decide to interview young children in order to assess their best interest within a return procedure. However, it is possible to take into account the objection of a very young child, but only in relation to other objective elements.

It would not always be an obligation to give legal effects to children's objections, especially when they are very young. Although the possibility to interview very young children is not always spelled out in domestic legislation, the judges often interview young children in order to assess their best interests. The value attached to the information provided by the child would nevertheless be assessed not only with regard to the child's age, but also with regard to the child maturity.

In all national legal systems a multisectorial approach is necessary while interviewing young children and while assessing their opinion. First of all, children must be handled with particular care, in a child-friendly environment, by judges who have a special training or expertise in the field (child psychology, child's interview techniques, etc.). As an alternative, judges can be assisted by psychologists and/or social workers.

Most of the national legal systems know the obligation of creating a child-friendly environment and using child-adapted interview techniques, but the implementation of this obligation is very different from country to country and even from court to court. In Romania very few courts have special waiting areas and hearing rooms for children, so the judges have to make big efforts in order to adapt the available rooms to children's special needs. Although it would be better not to bring the child in court, one cannot reasonably expect from judges to interview each child in his normal environment (only special cases would justify this measure).

For example, in Romania, mediation law does not provide in which way children could be involved in the mediation phase in order to take into account their best interest while drafting the agreements between their parents. Nevertheless, children can be involved in mediation procedures, which does not exclude an additional assessment of their best interested operated by the judge in relation with the possibilities to give effect to an eventual return decision. Taking into account that Romanian legislation does

not provide the steps to be taken in order to enforce a court decision against the child's wish, the abducting parent can easily compromise the enforcement of such court decisions. The enforcement depends therefore on the capacity of bailiffs to reduce the influence of the abducting parent on the child and to help the child to become aware of his best interest.

The presented scenario has also drawn the attention to the issue of the legal nature and value of the hearing of the child as such, and in particular, whether the opinion and views provided by the child shall and can be considered as evidence. It was then agreed that the hearing of the child in any case primarily shall be viewed as the independent right of the child requiring proper legal protection.

The solution in the real case that inspired the first scenario.

It has been chosen not to return the children. The determinant argument was not the children's objection, as they were not mature enough to fully understand the consequences of their choices. Nevertheless, the judge assessed the material conditions in which the children would have lived at their return and decided that these conditions were *totally unappropriated* for a normal family life. Although material life conditions are not necessarily determinant for assessing the best interest of the child, they can become determinant if totally insufficient for children's basic needs. In conclusion, a return decision not only would have been against children's wish, but it would also have put them in a situation of risk.

The second scenario:

*Peter (born in 2006) is the common son of Ms Carly (national of state „A“) and Mr Frank (national of state „C“). Both parents have been living in state „B“ since 2000. Ms Carly has been employed in international corporation ABC as head deputy of state „B“ branch. In January 2017 the Court of state B, made a judgement ordering the shared parental responsibility in respect of Peter. Mr Frank has appealed the same and the Court of Appeal in March 2017 ruled that Mr Frank shall have sole parental responsibility, whereas Ms Carly – access rights arrangements.*

*With the permission of Mr Frank, both Peter and his mother came to state „A“ in June 2017 to spent holidays with the maternal grandparents. At the same time Ms Carly was appointed as head of state „A“ branch office of the international corporation ABC. Moreover, during their stay in state „A“, Ms Carly met her high-school sweetheart Mr Rolf, who asked her to stay with him in state „B“. Ms Carly agreed, failing to return Peter to state „B“.*

*Having clarified the view of Peter, it was clarified that he does not want to return to state „B“ neither, as despite the fact that he was born in state „B“, he has never felt that he belongs there. He knows well official*

*languages of both states, as he was visiting his grandparents very often and he has a lot of friends here (state "A").*

Namely, the scenario concerned the situation of a teenager child, born in a foreign state, who kept strong relations with her mother's native countries. After his parents' divorce, the child custody was given to the father. Taken in his mother's native country, the child refuses to return, motivating that his emotional relation with her mother's country was stronger than the one with his own native country.

The discussions on the second scenario were more structured, as some general remarks had already been pointed out previously. While the majority expressed the opinion that the child must be returned, some participants pointed out the fact that the child was mature enough to understand his best interest, so his refuse to return should have been respected.

The return procedure is based on the idea that the **child's best interest** is to live in his habitual residence, with the parent who legally exercises parental authority, and the judge should only check if the child's objection is related to the existing of a risk according to the 1980 Hague Convention. One can consider that the child's objection is an independent argument for non-return and must be taken into account if it can be sustained with objective elements, such as the strong relationships he has developed with people from his mother's country. All other related issues, like child's habitual residence, the legal exercise of parental authority or the enforcement of a court's decision establishing the custody on the child.

The speaker gave the solution in the real case that inspired the first scenario:

The child was returned, because the return would not have prevent him to keep developing his relations with his mother, with his mother's family and with his own friends from that country.

The third scenario:

7 years old Anna was born in state „A“, nationals of which are also her parents Ms Amy and Mr Mark. When Anna was still a toddler her parents decided to move to state "B", looking for better job opportunities. Soon enough Mr Mark found a good job and was promoted every two years. Meanwhile, Ms Amy was not able to find a job there she would work longer than 3 months, so she was getting depressed and she could not fit in the state "B". Anna was enrolled into local kindergarten and eventually she was speaking the language of state "B" better the mother tongue of her parents. Ms Amy would spend a whole summer in state "A" by herself, having only small phone conversations with her daughter.



During the last summer Ms Amy took Anna to state “A”, without the consent of Mr Mark, as she wanted to see if a girl would fit in her native country. It was very hard for Anna to start school and make friends as she did not speak the language of the state “A” that well anymore. Nonetheless, although she was very close to her father, she thought that the father will understand, but now her mother needs her more and if she goes back to the father, it will very upset her mother. Wherewith, when she was speaking with relevant specialists, she told them, that she does not want to return to state “B” and she would rather see the father occasionally.

Namely, the scenario was based on the situation of a 7 years old girl, taken by her mother in her native country, although the family had been living in a foreign country since the girl was a still a toddler. The difficulties raised by this scenario concerned the legal value of a young child’s opinion when **the influence of the abducting parent** is obvious.

The real-life solution to this scenario was that although the court decided to return the child, parents could find a friendly solution by allowing the child to stay in state A.

## **Conclusions**

The child’s best interest is the governing principle of all proceedings that involve children - the return procedures are not an exception. The child’s best interest is not always defined in domestic legislation. However, some indications to the meaning of this term exist in manuals, guidelines, handbooks (these are not legally binding instruments), but also in international jurisprudence (e.g. ECHR and EUCJ case-law).

Child’s opinion is important in defining his best interest. International conventions and jurisprudence provide that the child’s opinion and wishes must be taken into account, but only after a reasonable assessment, in relation to series of objective elements. In most of the European national legal systems, judges must interview children when defining their best interest, especially after a certain age (10-12 years old). Younger children can also be interviewed for this purpose if the judge appreciates they are able to express themselves in a comprehensive way.

In order to collect useful information, children’s interviews must take place in a child-friendly environment, with the participation of specialists who can correctly assess the information received. These requirements concern both institutional and substantial capacity of domestic authorities to find the balance between child’s opinion and his best interest.

**The institutional capacity is based on 3 main elements:**

1. Specialized training for judges (for example in child's psychology, child-friendly interview techniques, etc.)
2. Child-friendly rooms and waiting areas for children
3. Interaction between judges and other specialists (psychologist, social services, etc.) in order to guarantee a multisectorial approach

Concentrated jurisdiction can be a solution for return procedures where institutional capacity cannot be built in a systematic manner.

**The substantial capacity is based on 4 main elements:**

1. Child's age (there are different national approaches, as described above)
2. Child's maturity:
  - older children are more likely to know their best interest, but biological age is not an absolute guarantee for the child's maturity
  - child's capacity to understand his family relations in a more complex timeline is an evidence of his maturity
  - the influence of the abducting parent over an immature child is easily recognizable
3. The relation of the child with his siblings
  - where more than one child is concerned by a return procedure, the best interests of each child is assessed separately, with a view to preserve the relationship between brothers/sisters
4. The respect of international provisions:
  - Child's objection to the return does not automatically reverse the presumption with regard to his best interest
  - Child opinion must always be assessed in relation to other objective elements
  - Child shall be considered and seen as wholesome subject with his/ her legal rights protected by both international and domestic legal acts. Wherewith, the purpose and aim of the hearing of the child is rather to complement and promote the child's right to express a view and not to use the child as useful source of information.

## 8. Enforcement of decision

### 8.1. Enforcement of return decisions (a national perspective, some aspects of international cooperation)

Irena Kucina, expert,  
Secretary of State, Ministry of Justice, Latvia  
Emilian-Constantin Meiu, rapporteur,  
judge, Tribunal Ilfov  
trainer, National Institute of Magistracy, Romania

Some theoretical aspects as regards enforcement of return decisions were discussed during the workshop.

Neither the Hague Convention nor the Regulation Brussels II bis provide rules that should govern the enforcement of judgments in the civil law matters of international child abduction, leaving this issue for the national regulatory framework to deal with. The national provisions on enforcement of family law are relatively different, and in some Member States there are no specific provisions in this respect, thus the objective of the Hague Convention and of the Regulation Brussels II bis, namely to ensure the prompt return of the child, is difficult to be achieved.

The only one provided for in the Hague Convention on this issue is that one of the purposes of the Convention is to ensure the prompt return of children illegally taken to or detained by one of the contracting parties and that the courts or administrative authorities of the Contracting Parties, in the context of the child return procedure, must act quickly.<sup>14</sup> Consequently, the Hague Convention provides only that the Contracting States of the Hague Convention must ensure the prompt return of children, but the means and measures to achieve this are left to national rules. The Regulation Brussels II bis also provides that the enforcement procedure is governed by the law of the Member State of enforcement.<sup>15</sup>

If you look at the national framework for enforcement in the area of family law, it should be noted that this is quite different, or even in individual countries, there is no specific provision for it. In many countries, there is no specific enforcement rule in the field of the civil aspects of cross-border child abduction. However, in some countries, such as Denmark<sup>16</sup>, Slovakia<sup>17</sup>, the enforcement of judgments in that field applies to general rules applicable to

---

<sup>14</sup> Article 1 of the Hague Convention

<sup>15</sup> Article 47 of the Regulation Brussels IIbis

<sup>16</sup> P. Gjørtler P., Kronborg A., Comparative study on enforcement procedures of family rights, Annex 9 National Report Denmark: [http://ec.europa.eu/civiljustice/publications/docs/family\\_rights/denmark\\_en.pdf](http://ec.europa.eu/civiljustice/publications/docs/family_rights/denmark_en.pdf)

<sup>17</sup> Pavelková B., Comparative study on enforcement procedures of family rights, Annex 26 National Report Slovak Republic: [http://ec.europa.eu/civiljustice/publications/docs/family\\_rights/slovakia\\_en.pdf](http://ec.europa.eu/civiljustice/publications/docs/family_rights/slovakia_en.pdf)

the enforcement of family law decisions, such as custody, access rights. However, there are also countries which, along with the general arrangements for enforcing family law, have also identified some of the specifics of the enforcement of judgments in the area of the civil aspects of cross-border child abduction, such as Hungary<sup>18</sup>, the Netherlands<sup>19</sup>. For example in some countries:

- the court may decide on the voluntary enforcement of return decisions by setting a deadline for it (for example, Hungary<sup>20</sup>, Sweden<sup>21</sup>, Latvia<sup>22</sup>);

- the court may impose a fine (for example Denmark - 25 EUR per day<sup>23</sup>, Hungary - up to 1930 EUR<sup>24</sup>; Latvia – 750 EUR<sup>25</sup>; Sweden - the amount of the fine depends on the debtor's financial position<sup>26</sup>);

- the court can decide on the taking of a child by power (for example, Sweden<sup>27</sup>, Denmark<sup>28</sup>);

- the court can decide on the question of criminal liability (eg Belgium - deprivation of liberty from 8 days to a year and / or fines from 26 to 1000 EUR<sup>29</sup>, Poland - deprivation of liberty up to 3 years<sup>30</sup>, Slovakia - deprivation of liberty from 1 to 5 years<sup>31</sup>);

- the child's opinion may also be taken into account in the enforcement proceedings if the child objects to enforcement (for example, Sweden<sup>32</sup>, Slovakia<sup>33</sup>).

---

<sup>18</sup> Szeibert-Erdős O., Comparative study on enforcement procedures of family rights, Annex 15 National Report Hungary: [http://ec.europa.eu/civiljustice/publications/docs/family\\_rights/hungary\\_en.pdf](http://ec.europa.eu/civiljustice/publications/docs/family_rights/hungary_en.pdf)

<sup>19</sup> Baarsma N.A., B.-J. van het Kaar., M.J. de Rooij., Nijssen A.J., Schmidt G.E., Vlaardingerbroek P., Comparative study on enforcement procedures of family rights, Annex 22 National Report The Netherlands: [http://ec.europa.eu/civiljustice/publications/docs/family\\_rights/hungary\\_en.pdf](http://ec.europa.eu/civiljustice/publications/docs/family_rights/hungary_en.pdf)

<sup>20</sup> Szeibert-Erdős O., Comparative study on enforcement procedures of family rights, Annex 15 National Report Hungary: [http://ec.europa.eu/civiljustice/publications/docs/family\\_rights/hungary\\_en.pdf](http://ec.europa.eu/civiljustice/publications/docs/family_rights/hungary_en.pdf)

<sup>21</sup> Örténhed K., Comparative study on enforcement procedures of family rights, Annex 28 National Report Sweden: [http://ec.europa.eu/civiljustice/publications/docs/family\\_rights/sweden\\_en.pdf](http://ec.europa.eu/civiljustice/publications/docs/family_rights/sweden_en.pdf)

<sup>22</sup> The Civil Procedure Law of Latvia (Civilprocesa likums). [http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Civil\\_Procedure\\_Law.pdf](http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Civil_Procedure_Law.pdf)

<sup>23</sup> P. Gjørtler P., Kronborg A., Comparative study on enforcement procedures of family rights, Annex 9 National Report Denmark: [http://ec.europa.eu/civiljustice/publications/docs/family\\_rights/denmark\\_en.pdf](http://ec.europa.eu/civiljustice/publications/docs/family_rights/denmark_en.pdf)

<sup>24</sup> Szeibert-Erdős O., Comparative study on enforcement procedures of family rights, Annex 15 National Report Hungary: [http://ec.europa.eu/civiljustice/publications/docs/family\\_rights/hungary\\_en.pdf](http://ec.europa.eu/civiljustice/publications/docs/family_rights/hungary_en.pdf)

<sup>25</sup> The Civil Procedure Law of Latvia (Civilprocesa likums). [http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Civil\\_Procedure\\_Law.pdf](http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Civil_Procedure_Law.pdf)

<sup>26</sup> Örténhed K., Comparative study on enforcement procedures of family rights, Annex 28 National Report Sweden: [http://ec.europa.eu/civiljustice/publications/docs/family\\_rights/sweden\\_en.pdf](http://ec.europa.eu/civiljustice/publications/docs/family_rights/sweden_en.pdf)

<sup>27</sup> Ibid

<sup>28</sup> P. Gjørtler P., Kronborg A., Comparative study on enforcement procedures of family rights, Annex 9 National Report Denmark: [http://ec.europa.eu/civiljustice/publications/docs/family\\_rights/denmark\\_en.pdf](http://ec.europa.eu/civiljustice/publications/docs/family_rights/denmark_en.pdf)

<sup>29</sup> Pertegas M., Swennen F., Comparative study on enforcement procedures of family rights, Annex 6 National Report Belgium: [http://ec.europa.eu/civiljustice/publications/docs/family\\_rights/belgium\\_en.pdf](http://ec.europa.eu/civiljustice/publications/docs/family_rights/belgium_en.pdf)

<sup>30</sup> Bagan-Kurluta K., Comparative study on enforcement procedures of family rights, Annex 23 National Report Poland: [http://ec.europa.eu/civiljustice/publications/docs/family\\_rights/poland\\_en.pdf](http://ec.europa.eu/civiljustice/publications/docs/family_rights/poland_en.pdf)

<sup>31</sup> Pavelková B., Comparative study on enforcement procedures of family rights, Annex 26 National Report Slovak Republic: [http://ec.europa.eu/civiljustice/publications/docs/family\\_rights/slovakia\\_en.pdf](http://ec.europa.eu/civiljustice/publications/docs/family_rights/slovakia_en.pdf)

<sup>32</sup> Örténhed K., Comparative study on enforcement procedures of family rights, Annex 28 National Report Sweden: [http://ec.europa.eu/civiljustice/publications/docs/family\\_rights/sweden\\_en.pdf](http://ec.europa.eu/civiljustice/publications/docs/family_rights/sweden_en.pdf)

<sup>33</sup> Pavelková B., Comparative study on enforcement procedures of family rights, Annex 26 National Report Slovak Republic: [http://ec.europa.eu/civiljustice/publications/docs/family\\_rights/slovakia\\_en.pdf](http://ec.europa.eu/civiljustice/publications/docs/family_rights/slovakia_en.pdf)

## European seminar

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child

As a result, each country, when executing its decisions on the civil aspects of cross-border abduction of children, is guided by a national regulation that significantly undermines the objective of the Hague Convention and the Brussels II bis Regulation, namely to ensure the prompt return of the child.

The fact that there is no uniform guideline on enforcement in the field of the civilian aspects of cross-border child abduction, as each country is guided by its national regulations, is also illustrated by the number of cases in the European Court of Human Rights (ECHR) on these issues. Several cases have already entered the ECHR, where a child abduction decision has been taken in the country of abduction in the country of their habitual residence, but the complainant complains that the national authorities are not taking adequate and effective measures to comply with this ruling. And if the ECtHR finds that such measures are not being taken, it considers that the State violates Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter - the Convention), which concerns the right to respect for private and family life. Some of that judgments were discussed during the meeting:

1. Ignaccolo-Zenide v. Romania (2000), the actual enforcement process lasted more than 2 years<sup>34</sup>;

2. Maire v. Portugal (2003), the child was found after 4 years and 6 months since the application for the return of the child was sent to the Portuguese Central Authority<sup>35</sup>;

3. H.N. v. Poland (2005), the return of children took place after 3 years and 7 months since the application for the return of the child was submitted to the Polish Central Authority<sup>36</sup>;

4. P.P. v. Poland (2008), children have spent 6 years since abduction in Poland<sup>37</sup>;

5. Sylvester v. Austria (2003), children have spent more than a year since abduction in Austria<sup>38</sup>.

As a result some key findings of the ECHR concerning enforcement of return decisions were established:

■ The ECHR points out that litigation relating to parental responsibility decisions, which also includes the enforcement of a final decision, requires urgent action, as the timing may have irreparable consequences for the relationship between the child and the non-living parent. Consequently, the measure's relevance should be judged by the speed of its implementation.

---

<sup>34</sup> [http://www.echr.coe.int/echr/Homepage\\_EN](http://www.echr.coe.int/echr/Homepage_EN)

<sup>35</sup> [http://www.echr.coe.int/echr/Homepage\\_EN](http://www.echr.coe.int/echr/Homepage_EN)

<sup>36</sup> [http://www.echr.coe.int/echr/Homepage\\_EN](http://www.echr.coe.int/echr/Homepage_EN)

<sup>37</sup> [http://www.echr.coe.int/echr/Homepage\\_EN](http://www.echr.coe.int/echr/Homepage_EN)

<sup>38</sup> [http://www.echr.coe.int/echr/Homepage\\_EN](http://www.echr.coe.int/echr/Homepage_EN)

■ Article 11 of the Hague Convention requires the court or administrative authority to act promptly in proceedings for the return of children, and any omission that lasts more than 6 weeks may be a cause for delay. This means that Article 11 of the Hague Convention applies not only to issues at the stage of the proceedings, but also to the stage of the enforcement process.

■ The ECHR points out that each Contracting State must provide itself with adequate and effective means to comply with the positive obligations they bring under Article 8 of the Convention. This means that states have a duty to provide a strong and rapid mechanism to ensure that the decision to return a child is enforced.

■ The ECHR notes that, although coercive measures against children in this sensitive area are not desirable, the use of sanctions against unlawful behavior from the parent with which the child lives is not to be ruled out;

■ The ECHR notes on a number of occasions that Article 8 of the Convention includes parental rights regarding measures to re-establish a link with its child and the obligation of national authorities to take such measures.

■ The ECHR notes that the positive obligations imposed by Article 8 of the Convention on the renewal of the relationship between the parent and the child should be interpreted by the Contracting States in the light of the Hague Convention.

■ The ECHR agrees that the change of essential circumstances in exceptional cases may justify a final decision on the return of a child. Although, in the light of the positive national commitments they bring under Article 8 of the Convention, and the general principle of respecting the letter of the law, the court is satisfied that the change of circumstances is not caused by the failure of the state to take all measures that are reasonably expected to facilitate the enforcement of the decision on the return of children.

■ In cases related to family law enforcement, the ECHR reiterates that it is essential that national authorities take all necessary steps to promote compliance as expected in the light of the specific circumstances of each case.

■ The ECHR emphasizes the importance of a social worker, psychologist or psychiatrist for preparing children and for appointment.

A first practical case discussed during the workshop was that the *child's father Rodrigo, which is national of State Y, in January 2017, submitted an application to the Central Authority of State X for the return of his son (Lucas, 2 years old, citizen of both State X and Y) from the State X to the State Y. While submitting the application, Rodrigo at first asked not to initiate Court's proceeding, but to communicate with the mother instead, asking her to return to the State Y voluntary, considering the age*

*of the child and the fact that he did not wish to complicate his relationship with the child's mother.*

*Mediation which has lasted for two months did not promote the relationship between the child's parents, in fact, it gave an opposite result, the child's mother Liga has stated that she does not wish to return to the State Y and the child shall remain in the State X. Rodrigo has asked to proceed with the mater at the Court. All Court instances have ruled that the child shall return to the State Y, because it is his habitual place of residence, the custody rights of the father has been breached. Furthermore, there are no obstacles for the child's mother to return to the State Y, because the father was willing to leave the family's apartment until all proceedings are concluded in the State Y.*

*Once the Order came into legal force and voluntary return conditions have passed, Rodrigo asked to initiate the enforcement of the Order. During the enforcement procedure it was clarified that the whereabouts of both mother and the child are unknown. The child's mother does not have official work, the child is not enrolled into any preschool education institution or health institution, they do not reside at their registered addresses.*

The question for this practical case was: ***what actions shall be performed under your national procedures/law, to ensure the enforcement of the decision?***

A problem that can be discussed concerns a question closely connected with the main issue, namely the difficulty for a bailiff to enforce a decision which determined that a child should be returned by the father to the mother in the country of habitual residence. The mother refuses to come to the state of refuge and take the child, so the bailiff has to overcome this difficulty, for he could not fly with the child to the state of habitual residence himself. To solve this problem, one may suggest that mediation should be a solution, in order to convince the parents to cooperate. On the other hand, article 14 of the Romanian Law no. 369/2004 implementing the 1980 Hague Convention on the Civil Aspects of International Child Abduction provides that, in the return decision, the court may authorize the applicant to take over the child personally or by a representative, in case the defendant does not willingly comply with the decision within the deadline determined by the court. A practical solution might be provided by the Latvian law: this type of situation can be solved using the aid of a child protection agent. This person can accompany the child to the country where the return must be made, as determined by the court.

The debates may extend to the situation where, when required and pursuant to the same article 14, in the return decision, the court orders the

defendant to hand over the child's passport to the applicant; the court may also order the defendant to offer his/her support in obtaining a travel document for the child, otherwise his/her consent can be replaced.

Another practical case was the following: *On 15 December 2017, the Court of State X ruled that David (citizen of both States X and Y, 8 years old) must return to State Y, which is his habitual residence, as well as the place of residence for his parents, Ms. Inga (a citizen of State X) and Mindaugas (citizen of State Y) since 2015. Taking into account that the child's mother failed to obey the court order, Mindaugas asked the competent institution of State X to enforce the court order. The enforcement of the order was set to take place on 30 January and on that day the child's parents have (verbally) asked the competent institution to dismiss any enforcement procedures because they had been undergoing mediation procedures and they had almost reached an agreement concerning the child's place of residence and access rights.*

This practical situation might raise the following questions: ***Is it possible to conclude a settlement/mediation agreement or equivalent during the enforcement procedure? Is the form of such settlement of the essence (is it possible to submit a verbal settlement)? What impact may the settlement have on further enforcement procedures? What actions might be taken if shortly after the cancellation of the enforcement procedure, one of the parties fails to comply with the arrangements made during the settlement?***

As regards the possibility to use mediation in matters concerning a return decision, one may agree that mediation is the best solution for the interest of the child, and that not only the court but also the bailiff should try advising the parents to reconcile or to refer to mediation. However, there is a problem if the parties submit a private mediation agreement to the bailiff, during the phase of enforcement of a return decision. The mediation agreement is not enforceable in most European countries, so it does not produce any effect from this point of view.

The enforcement procedure for the return decision can be suspended or terminated as a result of the request from the creditor, but not as a direct consequence of the mediation agreement. In any case, if the enforcement procedure of the return decision is stopped, the bailiff does not have any duty to follow the implementation of the mediation agreement by the parents. If the parents conclude a mediation agreement during the enforcement of a return decision, the best solution for the bailiff would be to not stop the enforcement until the mediation agreement is executed. Then, if the mediation agreement is not executed, the bailiff may continue the enforcement of the decision. Another suggestion is that mediation should be



allowed during the enforcement of the decision, before the bailiff, but for the moment this is not possible.

As far as concerns the mediation, for example, in the Czech Republic, only 25% of the return decisions are enforced, and the mediation is a process coordinated by the central authority. Also, in Latvia, the mediation is recommended by the court and it usually takes ten meetings of approximately one and a half hour to conclude a mediation agreement.

Another question that may emerge is what can be done if the child is missing in the process of the enforcement of a return decision. In Romania, the Ministry of Justice concluded a cooperation protocol with the Ministry of Interior in order to deal with this kind of situations, but this protocol applies only if the case is handled by the Ministry of Justice as a Central Authority. In any other case, the police would not start an investigation unless the child is declared as missing. There are situations when the bailiff could find it very useful to have access to the aid of the criminal investigation police in order to identify a child that is missing.

In Romania, although article 911 para. (3) of the Civil Procedure Code entitles the bailiff to use the services of the police for the enforcement of a return decision, this provision cannot be used for identifying the precise location where the child should be found. In Portugal and Finland, the prosecutor is the one enforcing the return decision with the aid of the police. In the Netherlands, the prosecutor and the police take over the enforcement of the return decision if the bailiff encounters difficulties, for example, in finding the child.

There are times where the lawyer or the psychologist may have information regarding the whereabouts of the child, but they cannot divulge such information due to the professional secrecy duty. This, together with the bad faith of the debtor parent, may lead to a lengthy period of enforcement for the return decision. If the child is not in contact with the creditor parent for a long period of time, the bond between them is weakened. It is more likely, then, that the child would not want to leave with the creditor parent at the moment of the actual enforcement of the return decision.

Another problem results from the previous one and is concerned with the refusal of the child to go with the parent creditor. If this happens in Romania, the bailiff must contact the representatives of the child protection authority and a psychological counselling program must be established for the child over a maximum period of 3 months. Then, the enforcement procedure will be restarted. In Germany, the child cannot be forced to attend therapy sessions.

Another hypothesis that can be briefly discussed is derived from one of the practical cases concerning the effects of an application submitted before the European Court of Human Rights during the enforcement of a

return decision. The enforcement must continue, and the application before the ECtHR does not have any direct and immediate effects in the enforcement procedure.

### **Conclusions**

It is strongly recommended for the parties to use mediation during the enforcement phase; there are situations in Romania when the bailiff could use the aid of the police in order to identify the location of the child, otherwise it is difficult to enforce a return decision (these cases are rare, nevertheless they exist); in case of a mediation agreement, it is better for the bailiff to only suspend enforcement procedure, and to cancel it only as a result of the request from the creditor, not as a direct consequence of the mediation agreement (in case of cancellation, the debtor parent might fail to execute the mediation agreement, and the bailiff would not be liable).

## 8.2. Enforcement of access right decisions

Tijana Kokic, expert  
Judge, Zagreb Court, Croatia,  
Andrei Iacuba, rapporteur  
Judge, Tribunal for minors and family Braşov, Romania

When the parent left behind or the child can't exercise their access rights freely, then they have to ask for the enforcement of the decision awarding these rights.

The Hague Convention on the Civil Aspects of International Child Abduction, 25.10.1980 does not include provisions on enforcement.

The Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children, 1996, does include such provisions in Chapter IV, Article Articles 26 - 28.

EU Member States are first required to apply Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and parental responsibility, repealing Regulation (EC) No 1347/2000 (Regulation Brussels II bis).

Chapter III of Regulation Bruxelles II bis includes provisions on recognition and enforcement.

Article 21(1) is very clear: a judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

It means that the party is not obliged to ask for the judgement to be recognised in special court proceedings in the other Member States.

Article 23 provides exceptions to the grounds for non-recognition of judgments in the matter of parental responsibility, and judgments relating to access rights are among them.

There are seven grounds for non-recognition:

a) if such recognition is manifestly contrary to public policy of the Member State in which recognition is sought, taking into account the best interests of the child;

b) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought;

c) where it was given in default of appearance, if the person in default was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence unless it is determined that such person has accepted the judgement unequivocally;

d) on the request of any person claiming that the judgment infringes his or her parental responsibility, if it was given without such person having been given an opportunity to be heard;

e) if it is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought;

f) if it is irreconcilable with a later judgment relating to parental responsibility given in another Member State or in the non- Member State of the habitual residence of the child provided that the later judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

or

g) if the procedure laid down in Article 56 has not been complied with. All these reasons should be exceptions only.

In any case, the jurisdiction of the court of the Member State of origin may not be reviewed (Article 24, Regulation Bruxelles II bis).

Furthermore, under no circumstances may a judgment be reviewed as to its substance (Article 25, Regulation Bruxelles II bis).

The provisions of Section 2 of Chapter III relate to application for a declaration of enforceability of a judgment, with the basic standard that a judgment on the exercise of parental responsibility given in a Member State which is enforceable in that Member State and has been served shall be enforced in another Member State when it has been declared enforceable there.

The provisions of Section 3 of Chapter III relate to common provisions to Sections 1 and 2, such as documents, absence of documents, and certificates concerning judgments.

The provisions of Section 4 of Chapter III relate to enforceability of certain judgments concerning rights of access (Article 40 (1) (a) ) and of certain judgments which require the return of the child (Article 40 (1) (b) ).

Article 41 relates to the rights of access.

The rights of access granted in an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition, if the judgment has been certified in the Member State of origin in accordance with Paragraph 2.

Even if the national law does not provide for enforceability by operation of law of a judgment granting access rights, the court of origin may declare that the judgment shall be enforceable, notwithstanding any appeal.

In practise, it means that the party (usually the parent left behind) who has an enforceable judgment on access rights issued in one Member State could easily, without any special recognition proceedings, without any special declaration of enforceability and without any possibility of opposing its recognition, enforce that judgment in another Member State.

The only condition that should be fulfilled is for such judgment to have been certified, which means that the judge of origin should issue the certificate using the standard form in Annex III (certificate concerning rights of access), but three other conditions should also be fulfilled (Article 41(2):

“a) where the judgment was given in default, the person defaulting was served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence, or, the person has been served with the document but not in compliance with these conditions, it is nevertheless established that he or she accepted the decision unequivocally;

b) all parties concerned were given an opportunity to be heard;

c) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity.”

The certificate shall be completed in the language of the judgement. So issuing it in the language of the requested Member State because some Internet applications allow this is not in accordance with the provisions of the Regulation.

If the certificate regards a pending cross-border case, the judge of origin should issue the certificate ex officio.

If no cross-border case is pending, the judge shall deliver the certificate on request of one of the parties.

Article 43 clearly states that the law of the Member State of origin shall be applicable to any rectification of the certificate and no appeal shall lie against issuing of that certificate.

Articles 44 and 45 contain provisions on the effects of the certificate and documents which the party seeking for enforcement of the judgment shall produce; such party shall be required to produce a copy of the judgment, which meets the requirements for establishing its authenticity and the certificate mentioned in Article 41.

Thus, when the party (probably the parent left behind) has a judgment granting him/her access rights and also the certificate provided for in Article 41 then, if he/she cannot exercise these rights, must initiate the enforcement procedure.

Article 47 includes provisions on the enforcement procedure. The procedure is governed by the law of the Member State of enforcement. The same conditions for enforceability of the judgement from another Member State are applicable as for the judgement of the Member State of enforcement, if that judgement has a declaration of enforceability from the Member State of origin or is certified in accordance with Article 41(1) or Article 42(1)

There are some exception regarding subsequent enforceability of the judgement.

Different Member States have different material laws. Thus, if an enforceable judgment from one Member State is to be enforced in another Member State, some practical arrangements for the exercise of rights of access could be made by the court of the Member State of enforcement (Article 48). See the Case law: CJEU, 9 November 2010, case Purrucker v. Valles Perez

Lots of issues regarding lawful or wrongful changes of the country of habitual residence of the child and rights of child and his parents are in close connection with these cross-border elements.

As every case is special in some way and depends on different circumstances, solving the problems between parents in any case, and especially in cross-border cases, is not just about applying the provisions of Regulations and Conventions.

For these reasons, case law could give us an answer.

Family mediation on the other hand is a very good way to solve these problems in the best interests of the child.

As far enforcement of the right of access of the parent left behind is concerned, it depends on the specific provisions of different countries' domestic law and on the practical difficulties. The main vulnerability is the opposition of the resident parent who can deny the access rights of the left-behind parent, by hiding with the child in an unknown location for several years, using the media to put pressure on the courts to obtain a non-return decision or refusing to accept the enforcement of such rights, despite having to pay huge fines.

However, if the resident parent decides to move to a different country, the other parent may agree or refuse to agree to such a change.

For example: The Romanian Family Law and the Croatian Family Law provide the same guarantees for the change of the habitual residence of the child, and any disagreement among parents on such a matter is to be settled by order of the courts.

## 9. Direct judicial communication within international Hague network of judges

Anca-Magda Voiculescu, expert  
Judge, Bucharest Tribunal

### 9.1. The framework-European judicial network in civil and commercial matters (EJNCCM)

Whereas the European Union has the objective of maintaining and developing an area of freedom, security and justice, according to provisions within the Treaty of Amsterdam,<sup>39</sup> the gradual establishment of this area entails the need to improve, simplify and expedite effective judicial cooperation between Member States in civil and commercial matters.

The conclusions of the special European Council held in Tampere (Finland) on 15 and 16 October 1999 recommended the establishment of an easily accessible information system, to be maintained and updated by a Network of competent national authorities<sup>40</sup>, which afterwards was conceived as a cooperation structure established at Community level (European Judicial Network in civil and commercial matters) and regulated by a mandatory instrument of Community law.

By Council Decision no. 2001/1470/EC from 28 May 2001<sup>41</sup> there was established a European Judicial Network in civil and commercial matters (EJN), which began operating on 1 December 2002<sup>42</sup>.

In May 2006, according to Article 19 of the Decision, the European Commission presented a report on the application of this decision, which recommended that the EJN should gradually be opened to other legal practitioners (for example, representatives of various legal professions concerned in each Member State should be able to join the Network).

A new Decision came into force on 01 January 2011, respectively Decision no. 568/2009/EC of the European Parliament and of the Council from 18 June 2009, amending the decision mentioned above<sup>43</sup>.

The Creation of the EJN therefore arose from the idea that *gradual* establishment of a genuine area of freedom, security and justice in Europe

<sup>39</sup> Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and Related Acts, signed on the 2nd October 1997, Official Journal C 340, 10 November 1997.

<sup>40</sup> Conclusion no. 29, Presidency Conclusions of the Tampere European Council.

<sup>41</sup> Published in the Official Journal of the European Union, L 174, 27 June 2001, pages 25 to 31.

<sup>42</sup> Denmark, in accordance to Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, did not participate in the adoption of this decision, and is therefore not bound by it, nor subject to its application.

<sup>43</sup> Similarly, this decision is not bound on Denmark.

must be achieved by means of simplified and efficient judicial cooperation in civil and commercial matters, given the fact that the European Union's extremely large variety of national legal systems, together with EU legislation, has imposed the need to provide support and information through a specific network to authorities dealing with cross-border cases.

The EJN is composed of<sup>44</sup>:

- contact points designated by the Member States<sup>45</sup>;
- liaison magistrates with responsibilities for cooperation in civil and commercial matters;
- bodies and central authorities specified in European Union law or in international instruments whereby Member States are party or in domestic law relating to judicial cooperation in civil and commercial matters;
- other judicial or administrative authorities responsible for judicial cooperation in civil and commercial matters whose membership is deemed to be useful by the Member State (e.g., judges of the local courts);
- professional associations representing legal practitioners directly involved in application of European Union law and international instruments in civil and commercial matters at national level in Member States<sup>46</sup>.

The EJN facilitates and supports relations between contact points (who are at the disposal of all the other authorities referred to in the Decision), but at the same time it does not prevent direct communication between national judicial authorities and all the other members in the network of each Member State, and thereby helps to facilitate cross-border cases.

Also, the EJN maintains relations and shares experience and best practice with other European networks, such as the European Judicial Network in criminal matters<sup>47</sup> and the European Judicial Training Network, and also other judicial cooperation networks established between third

---

<sup>44</sup> According to information available at [https://e-justice.europa.eu/content\\_about\\_the\\_network-431-en.do?clang=en](https://e-justice.europa.eu/content_about_the_network-431-en.do?clang=en) (last accessed 14.02.2018; 13,10) there are more than 500 members of the Network who fall under the five categories mentioned.

<sup>45</sup> Each Member State has at least one contact point; if there are several contact points, an appropriate coordination mechanism must be ensured among them. In Romania, there are two contact points from the Romanian Ministry of Justice, designated by Order no. 1929/C/22.05.2014 of the Minister of Justice, updated by the Order no. 4314/C/05.12.201. Annex 1 of the same Order identifies the members of the Romanian Network in civil and commercial matters (judges from High Court, Courts of Appeal, Bucharest District Court and Braşov Family District Court, representatives of notaries, lawyers and bailiffs).

<sup>46</sup> As already presented, this is an improvement by Decision no. 568/2009/EC.

<sup>47</sup> EJN in civil and commercial matters was partially inspired from EJN in criminal matters, created by Joint Action of 29 June 1998 and adopted by the Council on the basis of Article K.3 of the Treaty on European Union. Nevertheless, there is a fundamental difference, emerging from the fact that the Treaty of Amsterdam brought a radical change of perspective in the area of civil and commercial matters by virtue of Title IV, because the matter was brought under the so-called first pillar, and consequently from intergovernmental sphere to Community level.

#### European seminar

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child



countries and international organisations that promote international judicial cooperation<sup>48</sup>.

Inside the EJM, an important role was acknowledged for judges specialised in family issues, as follows: „Legal disputes in the area of family law are very specific and sensitive matters that can greatly benefit from direct communication between judges in order to arrive at the most appropriate solution. (...) The participation of judges specialised in family matters in the EJM network meetings and activities will be proactively encouraged and the Commission will take all steps necessary to ensure that judges specialised in family matters are involved in EJM activities.”<sup>49</sup>

## 9.2. The international Hague network of judges (IHNJ)

In contrast with the large area of civil and commercial matters, within the smaller (but very specific) area of family law represented by international child abductions and legislated by the 1980 Hague Convention on the Civil Aspects of International Child Abduction<sup>50</sup>, there is no legal basis for judicial cooperation (other than cooperation among the Central Authorities designated according to the 1980 Hague Convention<sup>51</sup>).

Article 7 of the 1980 Hague Convention legislates a form of cooperation among Central Authorities, which shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention”<sup>52</sup>.

---

<sup>48</sup> For an example of such a network, see João Simoes de Almeida, *Background to the European Judicial Network in Civil and Commercial Matters*, The Judges' Newsletter, vol. XV, Autumn 2009, Ed. LexisNexis, HccH Hague Conference on Private International Law, p. 52: „An example of such a network will be the Latin American international judicial co-operation network IberRed, in which Spain and Portugal participate.” For details concerning IberRed Network, see Ricardo Pérez Manrique, *The Hague Network and IberRed in Latin America*, The Judges' Newsletter, vol. XV, Autumn 2009, Ed. LexisNexis, HccH Hague Conference on Private International Law, p. 54 – 57.

<sup>49</sup> João Simoes de Almeida, *op. cit.*, p. 53.

<sup>50</sup> Hague Convention on the Civil Aspects of International Child Abduction is an intergovernmental agreement reached at The Hague on October 25, 1980, during the 14th Session of the Hague Conference on Private International Law (HCPIL) and entered into force on December 1, 1983. Participation of Romania to the 1980 Hague Convention was assured by Law no. 100/1992 for Romania's accession to the Convention (published in Official Gazette no. 243/30.09.1992). Subsequently, Law no. 369/2004 on the application of the Hague Convention on the Civil Aspects of International Child Abduction (published in Official Gazette no. 888/29.09.2004 and republished in Official Gazette no. 468/25.06.2014) provided procedural domestic rules under which international child abductions are dealt with.

<sup>51</sup> Under Article 6 of the 1980 Hague Convention: „A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities”.

<sup>52</sup> Detailing *in concreto* the possible forms of cooperation, the 1980 Hague Convention contains a non-exhaustive list, as follows:

„In particular, either directly or through any intermediary, they shall take all appropriate measures:

- a) to discover the whereabouts of a child who has been wrongfully removed or retained;
- b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

On the other hand, for Contracting States of the 1980 Hague Convention that are also Member States of the European Union, practical examples referring to cooperation are to be found in Regulation no. 2201/2003<sup>53</sup>.

There is a sensible difference between cooperation under the 1980 Hague Convention and Regulation no. 2201/2003, as the forms of cooperation according to the Regulation are more diverse than those provided by the 1980 Hague Convention, respectively either through Central Authorities or directly between courts (e.g., Article 11 Para 6, Article 15 Para 6, Article 19 and Article 55 of the Regulation).

In spite of no legal basis<sup>54</sup>, since *D. v. B.* decision issued by the Superior Court (Family Division) of the District of Terrebonne, Quebec in 1996<sup>55</sup>, direct communication between judges dealing with cases of international child abduction has developed into a solid informal network „as a natural extension of the equivalent measures detailed in the Convention with regard to Central Authorities”<sup>56</sup>.

In this context and taking into consideration that there are states parties to the 1980 Hague Convention that are not Member States of the European Union (therefore, the forms of cooperation under Regulation 2201/2003 are not available), the Permanent Bureau of the Hague Conventions has published a document actually known as „Emerging Guidance regarding development of IHNJ and General Principles for Judicial Communications”<sup>57</sup>, a document still under construction, to be refined in the future.

- 
- c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;
  - d) to exchange, where desirable, information relating to the social background of the child;
  - e) to provide information of a general character as to the law of their State in connection with the application of the Convention;
  - f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access;
  - g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;
  - h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;
  - i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application”.

<sup>53</sup>Council Regulation (EC) No. 2201/2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) no.1347/2000, OJ L338/1 (12/23/2003).

<sup>54</sup> By contrast to the situation of EJN, and although the Sixth Special Commission at the Hague recommended that consideration should be given to the inclusion of a legal basis in any relevant future Hague Convention („Conclusions and Recommendations on the Sixth Special Commission”).

<sup>55</sup> A summary of the decision can be found at <http://www.incadat.com>, Ref. HC/E/CA 369 (17/05/1996; Superior Court of Quebec, Terrebonne, Family Division, Canada).

<sup>56</sup> Jónas Jóhannsson, *The International Hague Network of Judges – Role and Functions of a Hague Network Judge*, The Judges’ Newsletter, vol. XV, Autumn 2009, Ed. LexisNexis, Hcch Hague Conference on Private International Law, p. 61.

<sup>57</sup> Available online at <https://www.hcch.net/en/publications-and-studies/details4/?pid=6024&dtid=3>, last accessed on 21.02.2018; 18,12.

This document deals with two important aspects: I. The development of the International Hague Network of Judges (IHNJ) and II. The general principles in relation to judicial communication (both *general* judicial communication and direct judicial communication in *specific cases*, including commonly accepted safeguards).

### 9.2.1 Creation of the International Hague Network of Judges

Creation of a network of judges specialized in family matters was first proposed<sup>58</sup> in 1998, at the DeRuwenberg (Netherlands) Seminar for Judges on the international protection of children, hosted by the Permanent Bureau. This was the first international opportunity for judges to discuss issues which were common to hearing cases involving the return of children who were wrongfully abducted or retained.

It was recommended at the same seminar that an informal network of judges should be initiated, where the relevant authorities (e.g., court presidents or other officials, as considered appropriate within different legal cultures) should designate one or more members of the judiciary to act as a channel of communication and liaison with their national Central Authorities, other judges within their jurisdictions and judges in other Contracting States<sup>59</sup>.

Later on, specific recommendations regarding both the establishment of a judicial network and the adoption of minimal safeguards to assure transparency in judicial communications were adopted at the Fourth and Fifth Special Commissions held at the Hague in 2001 and 2005, after which a draft of the document was conceived.

Important improvements of the draft were made in 2009 at Joint Conference EC-HCCH, the European Commission- Hague Conference on Direct Judicial Communications on Family Law Matters and the Development of Judicial Networks, Brussels, and the current form is included in Preliminary Document No 3 A (Special Commission, the Hague, June 2011).

It was felt that the development of such a network would facilitate communications and co-operation between judges at an international level and would assist in ensuring the effective operation of the 1980 Hague Convention, given the specificity of this international judicial instrument.

The necessity of such a network of judges is even more apparent, as judges throughout the world which deal with cases involving children face precisely the same issues regardless of the country where the case appears,

---

<sup>58</sup> The suggestion was made by Lord Justice Matthew Thorpe (United Kingdom), judge at the Court of Appeal, England and Wales.

<sup>59</sup> The recommendation was made that judges attending the seminar should raise with the relevant authorities in their jurisdictions the potential usefulness of designating one or more members of the judiciary in this informal network.

and the increasingly mobile society of present time has given rise to an abundance of cases which have international implications.

Common judicial interest to pronounce reasoned and well-considered judgements in which the same judicial problem should be dealt with in the same manner fully justifies direct communication between judges in the very sensible area of international child abductions<sup>60</sup>.

Since creation, the International Hague Network of Judges has constantly developed, and at the present time includes 125 judges from 81 jurisdictions all over the world<sup>61</sup>.

In stark contrast to EJNI, this is a network of judges, where no other participants are allowed. Central Authorities (approximately equivalent to contact points in EJNI), although not part of the IHNH, play a key role and cooperate among themselves (Article 7 of the 1980 Hague Convention).

#### **A. Conditions for nomination in the International Hague Network of Judges according to Emerging Guidance regarding development of IHNJ.**

Judges designated to the IHNJ with responsibility for international child protection matters should be sitting judges with present experience in that area. It is established practice that judges who are no longer active should resign from the Network and be replaced by sitting judges.

Where possible, designations should be for as long a period as possible in order to provide stability to the Network, while recognising the need to have new members join the Network on a regular basis.

Where two or more members are designated for a State, it is established practice that one should identify the territorial units or systems of law for which each judge has responsibility and it should also indicate the judge who is the primary contact and the judge who is the alternate contact<sup>62</sup>.

#### **B. Competent authorities and form of nomination according to Emerging Guidance regarding development of IHNJ.**

Authorities responsible for making such designations vary from State to State. Examples of these competent authorities include judicial councils,

---

<sup>60</sup> "If courts are able to strengthen the concept that there is an international judicial community which works to achieve common solutions which strengthen family relations and the welfare of children, then the operation of the 1980 Convention will be made more efficient and effective by this communal effort." (Justice James Garbolino, *The Experience of Judges from the United States of America with Direct Judicial Communication*, *The Judges' Newsletter*, vol. XV, Autumn 2009, Ed. LexisNexis, HcCH Hague Conference on Private International Law, p. 26).

<sup>61</sup> A list of members of the International Hague Network of Judges is available on the website of the Hague Conference at < [www.hcch.net](http://www.hcch.net) > under "Child Abduction Section" then "The International Hague Network of Judges" (English and French).

<sup>62</sup> Judges designated by Romania are Mateescu Florina Andreea (primary contact) and Voiculescu Anca Magda (alternate contact), both sitting judges at Bucharest District Court. By Law no. 369/2004, Romania has unified territorial jurisdiction concerning international child abductions in Bucharest, respectively Bucharest District Court – as a first instance court and Bucharest Court of Appeal – as a second instance court. Unified jurisdiction and distinct expeditious procedural rules lead to certain advantages in time and quality, and also to the creation of a data base available to other judges.

#### **European seminar**

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child

supreme courts, assemblies of judges or, sometimes, the Ministry of Justice<sup>63</sup> or other relevant government departments.

Designations should respect the independence of the judiciary and should be made by way of a signed letter or the transmission of any official document from the competent authority responsible for the designation.

### **C. Information about the members of the Network according to Emerging Guidance regarding development of IHNJ.**

Details of the individual members of the Network are forwarded to the Permanent Bureau for inclusion in a list of members, available in both English and French, which is updated as necessary.

The information to be provided for inclusion in the list of members of the Network should consist of the name of the judge and the name of the court where the judge sits, the position and the name in the original language(s); the official contact details of the judge, including postal and e-mail addresses, telephone and fax numbers, as well as the judge's preferred method of communication including the languages in which they are able to communicate in writing and orally.

Later on, a copy of the list of judges, including their contact details, will be made available for distribution only to members of the Network. However, names and positions of the members are available to the public through the Hague Conference website and The Judges' Newsletter on International Child Protection.

## **9.2.2. Principles for Judicial Communications**

The Principles for Judicial Communications represent important tools, as they provide transparency, certainty and predictability to such communication. At the same time, they are meant to ensure that direct judicial communication are carried out in a way which respects the legal domestic requirements and the fundamental principle of judicial independence in carrying out Network functions. On the other hand, the Principles are drafted in a flexible way to meet the various procedural requirements found in different legal systems and legal traditions.

The role of a member of the International Hague Network of Judges is to be a link between his or her colleagues at the domestic level and other members of the Network at international level.

There are two main communication functions exercised by members of the Network, respectively general judicial communication and direct judicial communication in specific cases, including commonly accepted safeguards.

### **A. General Judicial Communications**

This function is of a general nature (not case specific) and entails both internal and external aspects. It includes the collecting and sharing of general

---

<sup>63</sup> This is the case for Romania, where judges were nominated by Order no. 1075/C/27.04.2007 of the Minister of Justice.

information from the International Hague Network or the Permanent Bureau with his or her colleagues in the jurisdiction and also internationally among members of the Network.

### ***Internal communication within domestic court system***

The Hague Network judges should make colleagues in the jurisdiction aware of the legislation and Conventions on child protection in general and inform them as to their application in practice.

Also, they should make certain that other colleagues dealing with international child protection cases receive *The Judges' Newsletter on International Child Protection*<sup>64</sup>, published by the Permanent Bureau of the Hague Conference, and are aware of the International Child Abduction Database (INCADAT) of the Hague Conference<sup>65</sup>.

Initiation of and participation in internal training seminars for judges and legal professionals, as well as writing articles for publication is also part of this role.

This role is particularly important in Contracting States which do not have concentrated jurisdiction and specialised family law judges who deal with the 1980 Hague abduction cases.

### ***Internal communication – relationship with Central Authorities***

Successful working relationships depend on development of mutual trust and confidence between judges and Central Authorities. Central Authorities may play an important role in giving support to judicial networks and facilitating direct judicial communication.

Meetings involving judges and Central Authorities at a national, bilateral, regional or multilateral level are a necessary part of building this trust and confidence and can assist in the exchange of information, ideas and good practice.

### ***International communication with foreign Judges and Permanent Bureau***

The Hague Network judges should encourage national judges to engage in direct judicial communication<sup>66</sup> and may provide or facilitate the provision of responses to focused enquiries from foreign judges concerning legislation and Conventions on international child protection and their operation in their jurisdiction<sup>67</sup>.

---

<sup>64</sup> This is a bi-annual publication of the Permanent Bureau of the Hague Conference on Private International Law, first published in 1999 and arising from the Conclusions and Recommendations of the 1998 De Ruwenberg judicial seminar on child protection. It is available also online on the website of the Hague Conference (English, French, Spanish).

<sup>65</sup> Accessible at <[www.incadat.com](http://www.incadat.com)>. It was established in order to make available the most important decisions rendered by national courts in respect of the 1980 Hague Convention (summaries available in a standard form in English and French).

<sup>66</sup> „There is a consensus among Hague Network judges that they will encourage members of their judiciaries to participate in direct judicial communications, i.e. intercommunication between sitting judges.” (Jónas Jóhannsson, *op. cit.*, p. 60).

<sup>67</sup> Under Article 7 e) of the 1980 Hague Child Abduction Convention, Central Authorities shall, in particular, either directly or through any intermediary, take all appropriate measures “to provide information of a general character as to the law of their State in connection with the application of the Convention”.

#### **European seminar**

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child

Also, the network is responsible for ensuring that important judgments dealing with direct judicial communication, among other matters, are sent to the editors of the International Child Abduction Database (INCADAT), it may be invited to contribute to the Permanent Bureau's *Judges' Newsletter* and should participate in international seminars covering international child protection.

### **B. Direct Judicial Communications in specific cases**

This function consists of direct judicial communication with regard to specific cases and cross-border assistance in linking together two sitting judges in a particular case (current practice shows that this communication mostly takes place in child abduction cases under the 1980 Hague Child Abduction Convention). The aim of such communication is to address any lack of information that the competent judge has about the situation and legal implications in the State of the habitual residence of the child.

In this context, members of the Network may be involved in facilitating arrangements for the prompt and safe return of the child, including the establishment of urgent and/or provisional measures of protection and the provision of information about custody or access issues or possible measures for addressing domestic violence or abuse allegations.

This communication will often result in considerable time savings and better use of available resources, all in the best interests of the child (traditionally, communication was through the slow and inefficient method of letters rogatory, which took a lot of time and was costly).

When a judge is not in a position to provide assistance, he or she may invite the other judge to contact the relevant authority (for example, taking of evidence should follow the channels prescribed by law).

The Principles for Direct Judicial Communications offer examples of matters that may be subject to direct judicial communication, as follows:

- a) Scheduling the case in the foreign jurisdiction:
  - i) to make interim orders, e.g., support, measure of protection;
  - ii) to ensure the availability of expedited hearings;
- b) establishing whether protective measures are available for the child or other parent in the State to which the child would be returned and, in an appropriate case, ensuring the available protective measures are in place in that State before a return is ordered<sup>68</sup>;
- c) ascertaining whether the foreign court can accept and enforce undertakings offered by the parties in the initiating jurisdiction;

---

<sup>68</sup> For example, some courts may tend to the idea of refusing return based on Article 13 b) of the 1980 Hague Convention because the mother is not allowed to enter the country to which the child is to be returned or risks imprisonment. In such cases, by using direct communications between judges in the state of destination, respectively state of origin, judges in the state of origin may offer information about the legal system.

- d) ascertaining whether the foreign court can issue a mirror order (i.e., same order in both jurisdictions);
- e) confirming whether orders were made by the foreign court;
- f) verifying whether findings about domestic violence were made by the foreign court;
- g) verifying whether a transfer of jurisdiction is appropriate.

Direct judicial communication should be accompanied by communication safeguards<sup>69</sup>, organised as overarching principles and commonly accepted safeguards.

**Overarching principles**

- a) the judge engaging in direct judicial communication must respect the law of his or her own jurisdiction;
- b) while communicating, each judge seized should maintain his or her independence in reaching his or her own decision on the matter under discussion;
- c) communication must not compromise the independence of the judge seized in reaching his or her own decision on the matter at issue.

**Commonly accepted procedural safeguards**

- a) except in special circumstances, parties are to be notified of the nature of the proposed communication;
- b) a record of communication is to be kept and made available to the parties;
- c) any conclusions reached should be in writing;
- d) parties and their representatives should have the opportunity to be present in certain cases, for example via conference call facilities;
- e) a judge may follow rules of domestic law or practices which allow greater latitude.

**C. Initiating the communication<sup>70</sup>**

The initial communication should ordinarily take place between two Hague Network judges, in order to ascertain the identity of the judge seized in the other jurisdiction and should normally be in writing.

Necessity (benefit of direct judicial communication) and timing of the communication (before or after the decision is taken) are matters for the judge initiating the communication.

---

<sup>69</sup> For a detailed comment on principles of direct judicial communication and safeguards, Mary Finlay Geoghegan, *Overarching Principle for Direct Judicial Communications and Commonly Accepted Safeguards (Draft Principle No 6)*, The Judges' Newsletter, vol. XV, Autumn 2009, Ed. LexisNexis, HccH Hague Conference on Private International Law, p. 72 – 78.

<sup>70</sup> For comments on this principle: Justice Ben Stephens, *Initiating the contact (Draft Principal No 7)*, The Judges' Newsletter, vol. XV, Autumn 2009, Ed. LexisNexis, HccH Hague Conference on Private International Law, p. 79 - 83.



#### **D. The form of communication and language difficulties<sup>71</sup>**

It is recommended that judges should use the most appropriate technological facilities in order to communicate as efficiently as possible (in general, communication takes place via e-mail).

The initial method and language should respect the preferences, if any, indicated in the list of members of the Hague Network; further communication should be carried out using the initial method and language, unless otherwise agreed by the judges concerned.

Where two judges do not understand a common language, one or both of them, subject to an agreement between the two judges concerned, they should make provision to have at their disposal a competent and neutral interpreter who can interpret to and from their language.

In general, communication should be in writing, save where the judges concerned are from jurisdictions with proceedings conducted in the same language. Written communication should be transmitted using the most rapid and efficient means of communications, whereas oral communication can take place either by telephone or videoconference; when communications concern confidential information, it should be carried out using a secure means of communication.

#### **E. Keeping the Central Authority informed of judicial communication**

The judge engaged in direct judicial communication may consider informing his or her Central Authority that a judicial communication will take place.

### **9.3. Experience of Romanian liaison judges**

In the Romanian case, the two judges designated as primary and alternate points of contact for IHNJ since 2007 are also members of Romanian Network in civil and commercial matters since 2014, and this double appointment offers a better perspective.

Order no. 1075/C/27.04.2007 of Romanian Minister of Justice stipulates the key tasks of Romanian Hague Network judges, namely:

- facilitating cooperation between Romanian judicial authorities and Central authorities/judicial authorities in other Contracting States in order to solve practical issues concerning the application of the 1980 Hague Convention;
- cooperating closely to Romanian Central Authority;
- drafting an annual report concerning activity in the framework of the Hague Network.

---

<sup>71</sup> For comments on this principle: Francisco Javier Forcada Miranda, *Using best means of communications available in a multilingual context (Draft principles Nos 8 and 9)*, The Judges' Newsletter, vol. XV, Autumn 2009, Ed. LexisNexis, Hcch Hague Conference on Private International Law, p. 84 – 91.

As already pointed out, these functions in the area of the 1980 Hague Convention and IHNJ are doubled by tasks inside the EJNI, and therefore Romanian liaison judges receive requests on a large area of subjects (mainly from liaison judges in IHNJ, not sitting judges or other national judges, part of EJNI).

Making a synthetic presentation, Romanian experience presents the following characteristics:

→ **Requests on general judicial communication**

- **Spain:** requests concerning the legislative basis on which judges and courts can develop and use «direct judicial communication»;
- **UK:** requests concerning empirical research on the improvement of direct communication;
- **UK:** requests on the extent of proceedings in Romania concerning children as well as general information on Romanian law;
- **Germany:** requests concerning Romanian procedural law (difference, in the case of divorce, between the date of petition filing / and the court service date on the defendant).

→ **Requests on direct judicial communication in specific cases (the 1980 Hague Convention and Regulation no. 2201/2003)**

- **Germany:** requests concerning the date of proceedings pending in relation to the sense of Art. 16 Brussels II bis in Romania, so that German seized judges may deliberate properly on Article 19 of the Regulation;
- **UK:** requests initiated by International Family Justice Office in England and Wales (the 1980 Hague Convention case in England, case of parental authority in Romania, request for the stages of the trial and the outcome in Romania);
- **UK:** multiple requests concerning applications under Article 15 of the Regulation;
- **Belgium:** application of Article 15 of the Regulation;
- **Other Member States:** application of Article 11 Para 6 of the Regulation.

Practical experience demonstrated that Romanian liaison judges were always contacted via e-mail and all further contact took place in the same manner (due to potential distances, finding an appropriate time to make telephonic contact might be difficult).

The language barrier has never existed, as Romanian judges nominated in IHNJ speak English and French, and where the request came in another language (e.g., requests in German), the German Embassy in Bucharest offered support and help.

Statistics show that over the years the number of requests increased constantly, as in 2016 there were 5 requests (UK, Belgium), in 2017 – 8 requests (Germany, UK, Spain) and in 2018 (up to March) – 3 requests (all of them from the UK).

Also, statistics presented above show that judicial communication, either general or in specific cases, was commonly used in Member States of the European Union (there were no requests from Contracting States outside the European Union).

As a final point, it should be mentioned that Romanian liaison judges encountered difficulties recently in responding to different requests concerning cases possibly falling under Article 19 of the Regulation, as the data concerning divorce cases are no longer available on portal, (just national on-line data base available to the public).

Therefore, a request for access to the EMAP (data base available to judges specifically to help them solve cases allocated to them) was made in February 2018, which was sent to the Romanian Superior Council of Magistracy and is currently being worked on and refined. Until such time that the request is (favourably) dealt with prompt answers to different requests from abroad is expected to be difficult, as no rapid check on-line is available any longer, and information will be available only by fax, phone, etc. to the court where the case is registered (if known).

#### **9.4. Conclusions**

Cooperation in civil and commercial matters (including family matters), especially in the very sensible area of international child abductions, makes it easier for judges in various Contracting States of the 1980 Hague Convention/Member States of European Union to obtain information about judicial procedures and family law practice in other states.

In this context, a mutual understanding and trust can be developed and cases can be solved in a unified manner, by adopting the same solution to the same judicial problem, which serves to build trust and confidence between the judicial systems involved and signals to the litigants that the courts are unified in order to serve the best interests of the child.

## 10. Practical aspects related to mediation in matters concerning parental responsibility and international child abduction. The Malta process. Recognition and enforcement of agreements concluded during return proceedings.

Dan-Andrei Popescu, expert, PhD Associate Professor, Faculty of Law  
“Babeş-Bolyai” University Cluj-Napoca, public notary, Romania  
Assistant Professor Marius Floare, rapporteur  
Faculty of Law “Babeş-Bolyai” University Cluj-Napoca,  
Lawyer, Cluj Bar Association, Romania

*“Overlooked through lenses that accent utility and orderliness, beauty and natural metaphors introduce a range of sensual, embodied ways that our human thirst for belonging and for feeling moved is implicated in mediation. When these ideas are introduced to the corpus of work on mediation, mediation becomes more vivid and compelling. Possibilities appear that were unavailable via more analytic ways of imagining mediation processes; opportunities to move beyond fragmentation and towards congruence emerge.”*

(Alexander, Nadja Marie, *Mediating Beautifully: The Alchemy of Aesthetics in a Fragmented Age* (September 12, 2016) – Singapore Management University School of Law Research Paper No. 12/2017.

### 10.1. Introduction

Although its roots are indisputably ancient<sup>72</sup>, the institution of mediation is quite a recent alternative form of dispute settlement. It was adopted and made its way into Romanian legislation under Law no. 192/2006 on mediation and mediator profession (*Romanian Mediation Act – RMA*), as amended and further supplemented.

---

<sup>72</sup> From a historical point of view, mediation can be traced back to ancient civilizations. In Roman times, mediators belong to diverse social groups, and were known under different names, such as *internuncio*, *medium*, *intercessor*, *conciliator*, *interlocutor*, *interpolator* (N. Alexander, *International and Comparative Mediation. Legal Perspectives*, Kluwer Law International, 2009, p. 51). Also, numerous ancient communities in Africa, America, Asia, Australia, Pacific, New Zealand, united by strong kinship ties throughout community, experienced mediation as a form of conflict mitigation, based on a *communitarian approach*, having as its benchmark for the settlement of disputes, the superior interest of the community. In many archaic communities mediation was exercised in close connection with religious elements, seeking to promote religious values and ideals. For Muslims, the terminology and concept of mediation (*wasata*), conciliation (*tawfik*, *solh*), reconciliation (*tahkim*) or arbitration (*tahkim*) has always been prevalent, such terms being used interchangeably, dependent upon the type of dispute or its circumstances. (v. N. Antaki, *Cultural diversity and ADR Practices in the World*, in J. Goldsmith, A. Ingen-Housz and G. Pointon (eds.), *ADR in Business*, Kluwer Law International, 2006, p. 1; M. Alberstein, *Forms of Mediation and Law: Cultures of Dispute Resolution*, (2007) 22 *Ohio State Journal on Dispute Resolution*, p. 321.

#### European seminar

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child

Mediation is not an institution by itself, but rather an entity that “provides assistance”, aimed at performing the functions and finality of judicial institutions that it seeks to serve

The somewhat unheralded success of mediation and its techniques are that they provide an enhanced opportunity for disputing parties to avoid the more formal rigours of judicial settings whilst frequently, at the same time uniquely touching the kernel and particularity of the dispute that they try to solve.

Placed in the semi-darkness of international judicial competence rules, international mediation treads a fine line between judicial and non-judicial, national and international concepts.

## 10.2. About mediation in general

Mediation is defined as being “*a structured process whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of the mediator, who is the third person asked to conduct the mediation in an effective, impartial and competent way.*”<sup>73</sup>

For those involved in a dispute, whatever its nature, mediation appears as an alternative means of settling a dispute and the very call to mediation evokes an openness to dialogue as well as, the idea of a readiness and willingness by the parties to negotiate, their positions from a less clear cut and less polarized standpoint.

Seen through the eyes of a mediator (mediators), however, mediation can be qualified as a provision of service, aimed at successfully facilitating agreement in order to settle a dispute.

Article 3 (a) of DIRECTIVE 2008/52/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 May 2008 on certain aspects of mediation in civil and commercial matters – defines **mediation** as “*a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.*”

The **mediator** is defined as being “*any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation*” (Article 3 (b) of DIRECTIVE 2008/52/EC).

---

<sup>73</sup> P. O. Prieto de los Mozos, “*The Law Applicable to International Mediation Contracts*”, in InDret No. 1/2011, p. 3.

Put it in simple terms, mediation can be defined as “an assisted decision-making process, which typically – but not invariably – takes the form of a facilitated negotiation or dialogue. The mediator assists parties to make decisions about the issues in dispute between them and about the appropriate norms for the regulation of future relationships. Generally mediation is based on principles such as party autonomy, client-centeredness and choice, confidentiality and a focus on interests and needs rather than rights and positions”<sup>74</sup> (emphasis added, DAP).

### 10.3. Romanian Mediation Act, No. 192 of 22.5.2006 – about mediation and organising the mediation profession.

In Romania mediation :

- (1) is a form of alternative dispute resolution (ADR); It is a way of amicably settling conflicts, with the support of a third party specialised as a mediator;
- (2) relies on the trust which the parties invest in the mediator and his or her capabilities: “*Mediation relies on the trust which the parties invest in the mediator, as a person capable of facilitating negotiations between them and providing support for the settlement of the conflict, by reaching a mutually convenient, efficient and durable solution*” (Art. 1, par. (2) of Romanian Mediation Act – RMA);
- (3) is of public interest. Public interest requires some alternative forms of dispute resolution, contributing, the reduction of court backlogs as well as speeding up decision making, in addition “mediation does in fact reduce time and costs involved in dispute resolution” (N. Alexander, *op. cit.*, p. 55, note 139);
- (4) imposes an obligation to advise parties, without making decisions: the mediator does not have any decision making powers regarding the contents of the understanding reached by the parties, but he may advise them to examine the lawfulness thereof (Art. 4, par. (2));
- (5) has no mandatory mediation procedure. Whereas previously, the law required the same unless otherwise provided. Therefore, currently mediation procedure is, in principle, voluntary / optional. However, the parties have to provide evidence setting out the advantages of mediation enable such participation, in the following areas:
  - consumer protection;

---

<sup>74</sup> N. Alexander, *International and Comparative Mediation. Legal Perspectives*, Kluwer Law International, 2009, p. 15.

- family law (the instances provided under art. 64);
  - disputes with regard to land possession, delimitation, repositioning of land signs and other disputes resulting from neighbourhood relations;
  - professional liability (medical error);
  - labour relations, on conclusion, performance and termination of individual employment agreements;
  - civil litigation where claims are capped at 50,000 lei, except those where a binding decision has been delivered on opening up insolvency proceedings, claims referring to the Trade Register and low value claims.
- (6) enjoys an absence of competence rules in terms of mediation. Mediators can participate in any dispute related to rights that the parties can enjoy by agreement, regardless of the territorial jurisdiction of the competent court and regardless of the domicile or habitual place of residence of the parties;
- (7) also has an absence of strict rules for mediation procedure. We speak, therefore, of a very flexible procedure that is meant to take into account the particular matter and the specificity and circumstances of each concrete case. Such a procedural approach allows the mediator to highlight his or her experience or expertise. According to article 27(1) of Romanian Law on Mediation, "each mediator is entitled to apply his or her organizational model to the mediation procedure, consistent with the statutory provisions and principles stipulate under that law". In addition, „methods and techniques that are being used by the mediator must exclusively serve the legitimate interests and objectives contemplated by the parties in dispute (Article 50 (2)).
- (8) In case of judicial proceedings, if the matter has been settled by means of mediation, the court shall deliver, at the request of the parties and in compliance with the requirements of law, an expedient decision, which shall be an enforceable order (*titlu executoriu* in Romanian).

#### 10.4. Mediation in family matters

According to Art. 64 of the Romanian Mediation Act, marital disputes that can be resolved by *mediation* cover issues such as:

- a) continuation of marital relations;
- b) liquidation of marital property;
- c) exercise of parental responsibility;

- d) determining the residence (domicile) of children;
- e) child support;
- f) any dispute that occurs during marital relations with regard to rights that they could be granted under the *law*.

Agreements reached by *mediation* by the parties, in the matters (conflicts) that relate to the exercise of parental responsibility, child support and determining child residence, come under the form of a court settlement certifying consent award resulting from the mediation procedure. The agreement of spouses in relation to a dissolution of marriage and settlement of issues accessory to the divorce will be filed by the parties with the competent court to issue a divorce ruling.

According to Art. 65 of the Romanian Mediation Act, the mediator will monitor the effects and the result of the mediation procedure making sure that *mediation* will not infringe the superior rights of a child. He will encourage the parents to focus primarily on the needs of the child and that parental responsibility, legal separation and divorce will not adversely affect the education and development of the child.

### 10.5. Terminology. Mediation – Conciliation – Arbitration

Often, terms such as “*mediation*”, “*conciliation*” and “*arbitration*” are used interchangeably, having the same meaning. Confusion stems from the different way in understanding the concepts, due, mainly, to the different cultural environment that often ascribes different meanings to such concepts.<sup>75</sup>

*Conciliation* presupposes a procedure in which the third party involved has a much more active role, an interventionist role. As it has already been noted “a conciliator may move beyond the process-focused role of a mediator and provide advice to the parties regarding the underlying issues in dispute, the legal merits of the situation and an appropriate outcome for the dispute, even going so far as to suggest terms of settlement” (N. Alexander, p. 16). In other words, *conciliation* is a more directive procedure, whereas *mediation* is a facilitative process which promotes party autonomy and confidentiality.

GUIDE TO GOOD PRACTICE UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, *Mediation* (2012)<sup>76</sup>:

*“conciliation is generally characterised as a more directive process than that of mediation. Conciliation will therefore be understood for the*

---

<sup>75</sup> v. H. Astor and C. Chinkin, *Dispute Resolution in Australia*, Sydney, Butterworths, 2002, p. 93, *apud* N. Alexander in *op. cit.* p. 15, note 32.

<sup>76</sup> Available at [http://www.hcch.net/upload/guide28mediation\\_en.pdf](http://www.hcch.net/upload/guide28mediation_en.pdf)



*purposes of this Guide as a dispute resolution mechanism in which an impartial third party takes an active and directive role in helping the parties and an agreed solution to their dispute. Mediation can be proactive, but cannot be directive. For mediation, emphasis has to be placed on the fact that the mediator him- or herself is not in a position to make a decision for the parties, but only assists the parties in finding their own solution. Conversely, the conciliator can direct the parties towards a concrete solution.”* (emphasis added, DAP).

Sometimes, the term conciliation is understood in a broader sense, including all non-determinative dispute resolution (mediation and conciliation). For that purpose, see UNCITRAL’s Model Law on International Commercial Conciliation (MLICC) adopted in 2002.<sup>77</sup>

Unlike mediation, *arbitration* represents a determinative procedure where the arbiter (arbiters) has/have full decision-making powers over the material issues of the dispute that has been referred to them, decision that is issued in the form of an arbitral award. As mentioned, “arbitration is a rights-based determinative process in which the parties agree to be bound by the decision of an arbitrator or arbitral panel.”<sup>78</sup>

In spite of having common principles such as neutrality and confidentiality, the two procedures are fundamentally different.

## 10.6. Advantages of mediation

Mediation, especially in matters of parental responsibility and international child abduction cases, presents, undoubtedly, distinct advantages:

- an accessible and flexible procedure, stimulating understanding between holders of parental responsibility;
- can be used before the start of disputes or while they are ongoing;
- allows for a broad understanding and choice of competent jurisdiction in matters dealing with parental responsibility (article 12, (3) of the Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 –Regulation Brussels II bis);
- determines the habitual place of residence of the child; stimulate agreement on the details of custodial rights – except for child abduction cases;
- avoid the sanctions (of civil or criminal nature) inherent to judicial procedures in international child abduction cases;

---

<sup>77</sup> A. W. Rovine (Ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2011*, Martinus Nijhoff, Leiden – Boston, 2012, p. 392.

<sup>78</sup> N. Alexander, *op. cit.*, p. 27.

- entails reduced costs;
- psychologically, it has a lower emotional impact on the child.

It is true that sometimes it is used contrary to its purpose, as a tactical delay and prevarication of ongoing judicial procedures.

## 10.7. Rebooting the EU Mediation Directive and national legislation as well

In 2014, the JURI Committee of the European Parliament published a research study on their concern for the lack of interest in mediation.<sup>79</sup> The reported difficulties are the following:

- judges don't refer to mediation;
- lawyers refuse to refer to mediation for financial reasons;
- parents don't want to mediate, because they want to be proven right, they want to win, they want revenge;
- international child abduction cases are very specific and demand specific skills and knowledge from the mediator;
- the speedy return procedure obliges mediators to work within a very strict time-frame. The Hague Child Abduction Convention obliges the courts to take a decision within 6 weeks;
- the inherent difficulties of the mediation process involving international elements: different languages; different cultures and legal traditions.

## 10.8. Mediation in Romanian legal practice

*In Romanian legal practice we could not identify relevant judicial practice in cross-border mediation.*

*By application registered in Galați City Court on 12.02.2013, the plaintiff G. D. R. made an application against the defendant, T. Ș. in order to establish the domicile of the minors T. S. G. and T. A. V. at the plaintiff's domicile.*

*In her statement of reasons, the plaintiff stated that the dissolution of the parties' marriage was ordered in 2002 and that the minors were*

<sup>79</sup> <http://www.europarl.europa.eu/cmsdata/122603/juri-committee-mediation-directive.pdf> - Main Conclusions (2): "Deplores the fact that only three Member States have chosen to transpose the directive with respect to cross-border cases only, and notes that certain difficulties exist in relation to the functioning of the national mediation systems in practice, mainly related to the adversarial tradition and the lack of a mediation culture in the Member States, the low level of awareness of mediation in the majority of Member States, insufficient knowledge of how to deal with cross-border cases, and the functioning of the quality control mechanisms for mediators". See also the Commission report to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters (COM(2016)0542), p. 4.

### European seminar

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child

*entrusted to the defendant. As the plaintiff could not find work in Romania, she went to France and took the minors to live with her. As the plaintiff wished to settle definitively in France and for the minors to live with her in France, the applicant stated that she has reached a settlement with the defendant and had entered into a mediation agreement.*

*The parties asked the court to take note of the mediation agreement between them.*

*“Under Art. 400 paragraph one of the Romanian Civil Code, the court acknowledged the consent of the parties expressed through the mediation agreement and that the needs of the children were paramount. The court therefore granted the application for the domicile of the minors T. A. V. and T. S. G. to be the applicant's domicile in France.*

*Consequently, the court determined the action under the terms of the mediation agreement.”<sup>80</sup>*

However, there are a significant number of judgments in national mediation, where no foreign element is involved and more often than not, the courts have only limited powers to take into account out the parties' mediation agreements when making decisions.<sup>81</sup>

*For example, in one case “By way of a mediation agreement dated March 1, 2011, the parties reached an agreement regarding the amount of the maintenance pension. This was approved by the court in accordance with Art. 2 para. 1 and 4 of Law no. 192/2006 which permits a competent court to order the mediation and organization by the media profession of certain disputes in order that parties can resort to mediation on a voluntary basis, (including after a hearing has been concluded). The Article permits mediation of civil, commercial, family, criminal matters, as well as other matters, except those situations that cannot be mediated on, such as those regarding the status of the person, as well as any other rights which the parties, according to the law, cannot by convention or by any other means be permitted by law.*

*If one considers the above legal provisions, together with the provisions of art. 64 courts can be confident that the outcome of mediation must not be contrary to the best interests of the child. Thus in those matters normally solved by mediation, including: disagreements between spouses concerning the continuation of marriage, the exercise of parental rights, the establishment of children's homes, the parents 'contribution to*

<sup>80</sup> Galați City Court, Civil Sentence No. 2630 of 19.03.2013.

<sup>81</sup> Brăila City Court, Civil Court Sentence No. 2988 of 16.04.2015; Bacău District Court, Civil Court Sentence No. 562 of 26.09.2016; Pitești City Court, Civil Court Sentence No. 3345 of 15.04.2015; for more court decisions, see **Culegere de hotărâri judecătorești pronunțate în materia medierii, cu note și comentarii**, 2nd edition, Ed. Universitară, Bucharest, 2012.

*child care, and any other misunderstandings concerning -spouses' rights parents are likely to be encourage to focus primarily on the needs of the child, and parental responsibility on divorce. Further, pursuant to Art. 63 of Law no. 192/2006 the court shall pronounce, at the request of the parties, a decision, according to the provisions of art. 271 of the Code of Civil Procedure. (...)*

*By way of illustration, this allows an application registered under no. 19864/231/2010, filed, by say, applicant X., residing at V., in conflict with Y., resident in V., to agree a maintenance pension. Such an application under the provisions of this article could enhances the understanding of the parties under the mediation agreement”<sup>82</sup>.*

From this it can be seen that courts do check that the content of mediation agreements prioritize the best interests of the child.

The authorities referred to below are good illustrations of the above:

*“The plaintiff, X, residing in Ramnicu Sarat, Buzau County, and in dispute with the defendant Y, domiciled in A city, Buzau County, applied to the court for an order requesting custody of his child, Z, in order to bring him up and educate him as a minor and further for an order stopping maintenance payments granted by Ramnicu Sarat Court under order no. 34 of January 11, 2007.*

*In the substantive reasoning of the action, the plaintiff gave evidence that the custody order no. 34 of 11.01.2007 granted to the defendant was no longer in the best interests of the minors Z and W on grounds that it was no longer possible for the respondent to provide the necessary conditions for the minors upbringing and education.*

*Both minors were pupils and the expenses for raising and caring for them have increased substantially. It was therefore contended that the decision was out of date and now had potentially harmful consequences for the minors’ physical, mental and educational development.*

*As a matter of law, the plaintiff based his action on the provisions of Art. 44 of the Family Code. As part of the evidence of the action, the plaintiff filed the civil divorce order no. 34/2007 granted by Rm. Sarat court, the birth certificate of minor Z and the plaintiff’s identity card.*

*On March 18, 2011, the plaintiff also gave evidence that a mediation agreement had been concluded between the parties requesting that the mediation agreement be taken into account and that an expedited decision be taken.*

<sup>82</sup> Focsani City Court, Civil Court Sentence No. 2937 of 05.05.2011.

*Verifying the content of the mediation agreement under Art. 271 pr. civil, and Art. 67 of Law 192/2006 the court ordered that the agreement be taken into account and that its contents should form the basis of the order granted.”<sup>83</sup>*

*The other case was a civil action brought by the applicant C. V. M. domiciled in T, no 15, county G. against the defendant B. N. domiciled in T, No. 15, county G. The case was pending, awaiting the conclusion of a mediation agreement – in respect of the minors.*

*On the facts, the plaintiff stated that the parties’ minor B. G. D., was born out of wedlock on 24.12.2004. They originally all lived together in the plaintiff’s home, No. 15, county G. The defendant subsequently left to go abroad and this separation had lasted two years and it was contended that he was no longer involved in the family’s life. To avoid the necessity for joint consent to be given by various institutions they agreed that it would be in the minor’s best interests that the parental authority be exercised exclusively by the mother.*

*Under Art.438 C.C. and Art. 63 of Law 192/2006, the Court concluded that the agreement mediated between the parties maintained the same domicile and address for the minor in accordance with the plaintiff’s wishes and thus the agreement concluded on 06.10.2015 at the Bureau of Mediators B. A. L. was adopted and approved by order of the court ”<sup>84</sup>.*

## **10.9. Law to be applied to mediation settlements**

From a legal perspective, mediation settlements are contracts that primarily serve to assist the performance and clarity of orders made by the courts and generally enhance the prestation of other service connected thereto. They have the advantage of involving a plurality of parties and, have an onerous and synallagmatic character. As previously mentioned in the doctrine, the mediator’s performance one which characterizes the contract, and it is a services’ provision. Also, the mediator has a duty to undertakes to use her/his best efforts to channel all communications between the disputants, thus assisting them to try and conclude their own arrangements for resolving a conflict. For their part, the disputants are obliged to pay for the services rendered, even if the fees may be assumed by third parties,

---

<sup>83</sup> Râmnicul Sărat City Court, Civil Court Sentence no. 662 of 18.03.2011.

<sup>84</sup> Tecuci City Court, Civil Court Sentence No. 2656 of 29.10.2015.

namely the State or charities, notwithstanding the fact that mediation expenses may also be considered a part of legal aid.”<sup>85</sup>

Of course, parties involved in mediation contracts have the legal option to choose any applicable law under Art. 3 of the Rome I Regulation.

Their choice “shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By choice the parties can select the law to apply to the whole or to part only of the contract” (Art. 3, 1 Rome I Regulation).

However, it is difficult to imagine, in our opinion, a partial choice of law exercised by the parties in mediation contracts. This is because the relevant law containing options or having precedent are obligatory by nature on the parties involved. All aspects related to the exercise of parental rights and custody of the child are subject to the law of protection (*lex protectionis* – usually the law of the habitual residence of the child), regardless of the law chosen by the parties to mediation contracts.

The law chosen by the parties will govern the formation of the mediation contract (e.g. consents, or the formal requirements), and also the nature of the agreement entered into by the parties, should be answered by the law applicable to contractual obligations.<sup>86</sup>

Mediation is often international in its nature. Internationality of mediation contracts involves one or more foreign elements. For example, if: the parties to the contract are foreign nationals or they have their habitual residence; or the contract is signed abroad<sup>87</sup>; or if in child abduction cases, the child has his/her habitual residence abroad; or when the obligations of the parties need to be performed in a foreign country. In complicated family matters, two or more mediators having their professional seat in different countries are often used.

What law should be applied if mediation is carried out by two mediators, having their headquarters in different countries? Of course, we consider the hypothesis where the parties to the mediation contract did not choose the law applicable, according to art. 3 of the Rome I Regulation. In principle, the contract shall be governed “by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence” (Art. 4, 2 *fin*, Rome I Regulation). It is obvious that the characteristic performance in the case of a mediation contract is that of the mediator's.<sup>88</sup>

---

<sup>85</sup> P. O. Prieto de los Mozos, “*The Law Applicable to International Mediation Contracts*”, in *InDret*, Review on the Analysis of Law, No. 1/2011, pp.3-4.

<sup>86</sup> C. Esplugues; J. L. Iglesias, “*Mediation and private international law: improving free circulation of mediation agreements across the EU*”, p. 10.

<sup>87</sup> P. O. Prieto de los Mozos, *op. cit.*, p. 6.

<sup>88</sup> “The determination of the performance which is characteristic of the contract could fundamental for the determination of the law applicable to the mediation contract in the absence of choice. Such performance is said to be the performance that reveals the legal and economic function of the contract, i.e., the one that “gives a name” to the contract” (P. O. Prieto de los Mozos, *op. cit.*, p. 3, note 4).

In the absence of laws taking precedence, in cases of international mediation with several mediators, from different countries, we believe that the principle that should be applied is that the state law with the closest links should be applied: *where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected*" (Art. 4, 4 Rome Regulation). We are talking here about a rule of residual conflict norm, which takes over the mechanism of the escape clause. If the escape clause acts severely, leading to the replacement of the rule of conflict, thus fulfilling a corrective role, the residual clause is part of the conflict rule, allowing flexibility by applying it differently according to the concrete circumstances of the legal relationship. In both cases the role of the judge is a major one, he being the one who assesses the circumstances and, on this basis, establishes proximity according to the intensity of the links with the respective legal systems. The mechanism of the two instruments is very similar as, in both situations the issue of assessing the factual circumstances which lead to the closest links is posed. In terms of predictability, the residual clause is "milder", with a considerably lower surprise effect, being part of the rule of conflict known to those legally bound. Instead, the exception clause often surprises, the parties being taught to relate to the norm of conflict (choice of law norm), ignoring the escape clause almost completely.<sup>89</sup>

---

<sup>89</sup> The purpose of the escape clauses is to induce certain flexibility when the abstract rule of the norm of conflict would lead to unjust results related to the location of the considered legal case. In other words, it represents an exceptional correction to the norm applicable to the conflict, considering the variability of the daily reality. Its finality is to contribute to the conflict justice, as part of it ("*conflict justice*" or "*kollisionsrechtliche Gerechtigkeit*" / "*internationalprivatrechtliche Gerechtlichkeit*" – Kegel/Schurig, *Internationales Privatrecht*, 8<sup>th</sup> Auflage, 2000, p. 114), aimed at assuring equity in the determination of legal proximity. This *internationalprivatrechtliche Gerechtlichkeit* also has its own soul and specific method, seeking all the time the legal system which is the most "closest" to the parties of the legal relationship (generally speaking), and not necessarily geographically, but from the point of view of the elements of legal integration. The conflict justice aims at identifying the centre of life (interest) of the person, the "premise of the legal relation" establishing the applicable jurisdiction, depending on the circumstances and on the nature of the envisaged institutions. It operates with the concept of legal proximity, setting up the determination criteria and methods, being a *rechtsanwendungsrecht* which should act "without peeping" to the substantial content of the laws to which the respective relation shows connections and which could potentially become applicable to the case. It is only this way that we can discover the truth, giving voice to that *internationalprivatrechtliche Geist* anchored in the reasonable expectation of the parties, in the spirit of predictability and, in any case, wishing safety for establishing the competent authority and the applicable law to the case. In addition, reasonableness and predictability mean using "almost no" escape clauses... **Escape clauses** scan the state of affairs, qualitatively assessing each circumstance and then, considering the whole particularities (specificities) of the relation, find out and impose the applicable jurisdiction. Metaphorically speaking, it aspires to becoming a kind of equity of conflict justice. Still, there is also a risk. The excessive use of escape clauses, and mainly, in unjustified situations, can lead to the risk of unpredictability about the applicable law, averting in this way the purpose of the conflicts norm. That is why, the Courts (or Notaries) should resort to these "adjustment" clauses with great precaution, only in very exceptional cases, that is only when obvious and beyond any doubt relevant connections of the legal relations impose that, refusing to give satisfaction to any request made in this sense speculatively by the parties. Hence, their name: escape clauses! *However, in international succession matters, we think it would have been wiser to give up this "technique" in the matter of international successions, as, on one hand, in this field the localization should start from a single*

In conclusion, despite the fact that EU national legal systems on mediation are silent regarding the law applicable to mediation contracts (with the exception of Greece), the law applicable to party settlements is determined in accordance with the existing rules of private international law.<sup>90</sup> Contractual by nature, mediation agreements are regulated, by the Rome I Regulation. When the parties have chosen the applicable law, the law chosen will apply (Art. 3 Rome I Regulation). However, there are certain limits of autonomy, stemming, on the one hand, from the exclusions of the

---

*“key” – the person of the deceased, the “exception” elements being more rare and, in any case, less relevant* (placement in another location of the goods or of the great majority of the goods in the succession estate, the habitual residence of the heirs), *while, on the other hand, the risk of abusive use of the escape clauses cannot be underestimated, especially in countries which are not used to live under an exception condition...* (For a philosophical work dedicated to the exception condition, we recommend G. Agamben, **State of exception** (*Homo sacer* II, 1), Ed. Idea Design & Print, Cluj, 2008). *Therefore, the escape clause was tailored for a very narrow corridor; it should not invade the practice of the Courts, bringing the exceptional into our daily life.* On the other hand, even if the deceased has recently changed (recently before his/her death) the habitual residence, this should not have been a reason to apply the escape clause in favour of the country of the previous habitual residence, as the change of habitual residence could also be a sign of the intent to integrate into the legal system of the new country. Moreover, if the deceased was also a citizen of that country, the failure to explicitly choose the succession jurisdiction of the latter – to eliminate any doubt and, thus, also the possible application of the escape clause stipulated by art. 21 (2) EU Succ. Reg. – can derive from his/her belief that such a choice would have been redundant, as this jurisdiction (of the new habitual residence) would have anyway benefited of the enforcement, based on art. 21 (1), as the jurisdiction of the last habitual residence. In other words, the application of the escape clause could distort the last will and belief of the deceased, “surprising” him/her *post mortem*... Regarding the escape clause in private international law, see A. Bucher, *“La clause d’exception dans le contexte de la partie générale de la LDIP”* in 21<sup>e</sup> Journée de droit international privé – 20 mars 2009; T. Hirse, *Die Ausweichklausel im Internationalen Privatrecht*, Tübingen 2006; P. Rémy-Corlay, *Mise en oeuvre et régime procédural de la clause d’exception dans les conflits de lois*, *Rev. crit.* 2003, p. 37-76; H. Gaudemet-Tallon, *“Le pluralisme en droit international privé : richesses et faiblesses (Le funambule et l’arc-en-ciel)”*, *RCADI* 312 (2005), p. 9-488 (327-338); J. D. González Campos, *“Diversification, spécialisation, flexibilisation et matérialisation des règles de droit international privé”*, *RCADI* 287 (2000), p. 9- 426 (253-262, 297-303); P. Lagarde, *“Le principe de proximité dans le droit international privé contemporain”*, *RCADI* 196 (1986-I), p. 9-237 (97-126); U. Blaurock, *Vermutungen und Ausweichklausel in Art. 4 EVÜ*, in *Festschrift für Hans Stoll*, Tübingen 2001, p. 463-480. **The escape clause cannot lead to dépeçage, allocating different laws to succession**, depending on the nature and location of the goods. The same is also true in **international family matters and mediation** as well. In other words, it cannot defeat the principle of inheritance unity, its action remaining subordinated to this principle. Besides, the regulation itself speaks of the possibility to apply the escape clause (art. 21, paragraph 2) when, “according to art. 21 (2), *“(w)here*, by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State whose law would be applicable under paragraph 1”. At the same time, the recital (25) specifies that, under exceptional situations, when the “the deceased had moved to the State of his habitual residence fairly recently before his death and all the circumstances of the case indicate that he was manifestly more closely connected with another State”, the escape clause can be activated. At the same time, the escape clause does not represent a localization method subsidiary to the conflict norm, being no alternative to it any time the identification of its connecting point turns into a difficult operation due to the case circumstances: “the closest connection should not be resorted to as a subsidiary connecting factor whenever the determination of the habitual residence of the deceased at the time of death proves complex” (recital 25 EU Succession Regulation). In other words, **the escape clause is not subsidiary to the conflict norm, but exceptional to this** (D. A. Popescu, *Guide on international private law in succession matters*, Bucharest, 2014, p. 43-44, note 96).

<sup>90</sup> C. Esplugues; J. L. Iglesias, *Mediation and private international law: improving free circulation of mediation agreements across the EU*, p. 10; C. Esplugues, in **Encyclopaedia of Private International Law** (J. Basedow, G. Rühl, F. Ferrari, P. de Miguel Assensio – Eds.), Edward Elgar Publishing, Vol. 2, 2017, p. 1252-1253.

#### European seminar

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child



Rome I Regulation, and, on the other hand, from the mandatory application of EU Standards in matters of mediation. Matters excluded by the Rome I Regulation will be governed by national private international rules:

- *the capacity to enter into a mediation clause or an mediation agreement* falling outside the scope of the Regulation – *lex patriae* principle<sup>91</sup>;
- *the law applicable to the content of the agreement* is directly dependent on the nature of the dispute or of the settlement reached by the parties. “Depending on the specific obligations agreed upon, and their nature and legal enforceability, the applicable law will vary” (P. O. Prieto Mozos, *op. cit.*, p. 8). If mediation agreement is related to the custody of the child, the best interests of the child principle have to be respected, taking into account all the circumstances of the case;
- *the role played by the mediator* will be, in principle governed by the national rules of the country where the mediation procedure is taking place. This national law will also determine the legal status of mediators, be they national or foreign as well as their duties on confidentiality. It is important to emphasize that, “as a matter of principle no discrimination by reason of nationality is envisaged in the Member States, even to non-EU citizens residing in EU countries. The application of the national general legal framework regarding foreign mediators also relates to countries which distinguish registered and non-registered mediators”<sup>92</sup>;
- *the mediators liability in cross-border mediation* should be established, in principle, according to the rules of the applicable law appertaining to the content of the mediation settlement. The contractual nature of the liability will prevail whenever the mediator's conduct does not embrace a form of tort. In the latter case, the law applicable to the mediator's liability shall be determined in accordance with the Rome II EU Regulation concerning the law applicable to non-contractual obligations. The national law where mediation process takes place and the national law of the mediator will also play an important role regarding the mediation standards (confidentiality, mediator independence, appreciation of mediator professional conduct etc);

---

<sup>91</sup> Art. 1, p. 2 Rome I Regulation: “The following shall be excluded from the scope of this Regulation: (a) questions involving the status or legal capacity of natural persons, without prejudice to Article 13”. For more details, M. McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations*, Oxford, 2015, p. ; Magnus/Mankowski, *European Commentaries on Private International Law: Rome I Regulation – Commentary*, Otto Schmidt Verlag, 2016, p.

<sup>92</sup> C. Esplugues, in *Encyclopaedia...*, p. 1252.

- *the mediation procedure* will be regulated, in principle, by the law where the mediation process takes place. The role of the agreement of the parties to the mediation agreement should not be neglected. So, “it would be for them to fix the rules of the proceeding, venue, language or seating arrangements in accordance with the law where the mediation takes place. The only limits stressed are those relating to the preservation of basic principles like the maintenance of confidentiality, impartiality, equal treatment of the parties and so on, in accordance with the law of mediation. Because of the monistic position maintained in many EU Member State, these principles are applicable both to internal and cross-border mediations in that country.”<sup>93</sup>

### **10.10 Efficient mediation of child abduction cases. The Malta process. Recognition and enforcement of agreements concluded during return proceedings**

According *The Hague Mediation Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, adopted in 2012, mediation agreements “should not be seen as a complete substitute for judicial procedures, but as a complement” (45). In other words, the possibility of appealing to the court cannot be ruled out even if the parties have entered into a mediation agreement.

An efficient mediation of child abduction cases without a proper understanding of the Hague Convention of 1980 is not possible. In child abduction cases, mediation needs to be conducted in short time. There are drastic mediation time limits, often as little as a few days. That means the pressure is on the parties (and on mediators) to get results in a relatively short period of time and the initial attention is usually focused on the return or retention of a child.<sup>94</sup>

In many cases there is an imbalance of power given to one of the parties, such as, for instance, the left-behind parent’s assumption that he or she will most probably win the case. This, it could be surmised, has an impact on the momentum of the mediation process and mediators need to be aware of that and be able to move swiftly from strict legal considerations aspects of the case to the more interpersonal ones. The left-behind parent does not, in reality, always wish that the child is returned.<sup>95</sup> There are several reasons why parents submit applications based on the Hague Convention, such as: the left-behind

<sup>93</sup> C. Esplugues, *Ibidem*, p. 1253.

<sup>94</sup> Z. D. Şuşţac, J. Walker, C. Ignat, A. E. Ciucă, S. E. Lungu, *Best Practice Guide on the use of Mediation in Cross-border Cases*, Bucharest, 2013, p. 19-23.

<sup>95</sup> *Ibidem*.

parent wants his/her spouse to return; the left-behind parent does not trust the legal system of the country where the abducted child was brought to and is afraid of losing contact with the child; the father is angry with his wife because she took the child away without his consent and wants to try and bring her to account for her behaviour or take revenge thus initiating the process.<sup>96</sup>

One of the essential factors when mediating such cases is to determine whether the child or children was/were abducted from a functional marriage or relationship or whether the parents were already separated or even divorced and each lived separately. If the relationship was still intact – at least from the point of view of the left-behind parent – the mediation is more than likely going to deal with issues concerning the relationship.

According to the Hague Mediation Guide, experience has shown that the return proceedings need to be followed, where possible, by a stay of proceedings for mediation. This has many advantages:

*“a) It may positively affect the taking parent’s motivation to engage in finding an amicable solution when otherwise faced with the concrete option of court proceedings.*

*b) The court may be able to set a clear timeframe within which the mediation sessions must be held. Thus the misuse of mediation as a delaying tactic is avoided and the taking parent is not able to gain any advantages from the use of Article 12(2) of the 1980 Hague Child Abduction Convention.*

*c) The court may take necessary protective measures to prevent the taking parent from taking the child to a third country or going into hiding.*

*d) The left-behind parent’s possible presence in the country to which the child was abducted to attend the Hague court hearing can be used to arrange for a short sequence of in-person mediation sessions without creating additional travel costs for the left-behind parent.*

*e) The court seized could, depending on its competency in this matter, decide on provisional contact arrangements between the left-behind parent and the child, which prevents alienation and may have a positive effect on the mediation process itself.*

*f) Funding for court-referred mediation may be available.*

*g) Furthermore, the fact that the parties will most likely have specialist legal representation at this stage already helps to ensure that the parties have access to the relevant legal information in the course of mediation.*

*h) Finally, the court can follow up the result of mediation and ensure that the agreement will have legal effect in the legal system to which the child was abducted.”*

– Hague Mediation Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (61).

---

<sup>96</sup> *Ibidem.*

One of the most stringent aspects of mediating cross-border family disputes is in the intercultural dimension. When bi-national couples meet and fall in love, they are often fascinated that their new partner comes from a different cultural and national background – differences are interesting and contribute to new experiences. When the relationship breaks down, however, the same differences can get to be perceived as threatening, and the parties can return to familiar thinking and behavioural patterns. Therefore, mediators need to take into account the cultural and religious considerations that could affect the situation (according to the Hague Conference on the Permanent Bureau for Private International Law 2012: 62).

On 24 March 2014 The Permanent Bureau of the Hague Conference on Private International Law announced the 10th Anniversary of the **Malta Process**, a dialogue involving both Contracting States to the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and of the *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*, and non-Contracting States whose legal systems are based on or influenced by Islamic law (“Shariah”).

The *Malta process*<sup>97</sup> was launched at a Judicial Conference on Cross-Frontier Family Law Issues in St. Julian’s, Malta, in March 2004. The success of the first judicial conference led to a subsequent conference in 2006 and a third conference in 2009, each of the conferences concluding with a “Malta Declaration”. In response to a recommendation made at the Third Malta Conference in 2009, the Council on General Affairs and Policy of the Hague Conference approved the establishment of a Working Party on Mediation in the context of the Malta Process. The objective of the Working Party is to promote the development of mediation structures to help resolve cross-border family disputes concerning custody of, or contact with, abducted children, where the 1980 Hague Child Abduction Convention does not apply.

The Malta IV Conference on Cross-Frontier Child Protection and Family Law took place from 2-5 May 2016. “The experts recognised that the 1980 Child Abduction Convention, the 1996 Child Protection Convention and the 2007 Child Support Convention support a number of key principles expressed in the 1989 *United Nations Convention on the Rights of the Child*, all in the best interests of children. The experts noted that these Hague Children’s Conventions are designed to be global in reach and to be compatible with diverse legal traditions. Experts underlined the important benefits of the Hague Children’s Conventions for States Parties.”<sup>98</sup>

---

<sup>97</sup> W. Duncan, “Towards the Malta Process”, in Hague Conference on Private International Law, The Judges’ Newsletter, Vol. VIII, autumn 2004, Special Focus, Malta judicial conference on cross-frontier family law issues involving certain Hague and non-Hague States, National Reports by 14 States and the Conclusions of the Judicial Conference, pp. 4-8, at p. 6.

<sup>98</sup> <https://www.hcch.net/en/news-archive/details/?varevent=486>

There is *no automatic enforceability* of settlement reached by parties to mediation proceeding. Enforceability depends on its homologation by the relevant public authority.

Recently, following a legislative changes, Romanian legislation has been granted the right of entitlement to enforce parental agreements.

**Act of Parliament no. 17/2017 on the endorsement of Special Government Ordinance no. 1/2016 for the amendment of Law of Parliament no. 134/2010 on the Code of civil procedure and related normative acts.**

**Art. IV<sup>1</sup>.** -

*Notaries Public and Notarial Activities Law no. 36/1995, republished in the Official Gazette of Romania, Part I, no. 444 from 18 June 2014, as amended and supplemented from time to time, shall be supplemented as follows:*

**1.** *At article 100, after paragraph (1) a new paragraph shall be added, paragraph (2), stating that: «*

**(2)** *A parental consent made before a notary public on the occasion of the divorce or thereafter, where, in exercising jointly parental authority, parents agree on aspects such as determining the child's residence, ways to keep personal links with the child by the parent who doesn't live with the child, as well as other measures on which parents can determine in the conditions set forth under art. 375 (2) Civil Code, re-enacted, as amended from time to time.»*

**2.** After article 100 a new articles shall be introduced, article100<sup>1</sup>, with the following wording:

**Art. 100<sup>1</sup>**

*« For validity purposes, when authenticating the parental consent made on the occasion of a divorce or in any other situations, the notary public shall obtain the psycho-social inquiry report and proceed with hearing the child in the conditions set forth under art. 264 Civil Code, re-enacted, as amended from time to time».*

**3.** At article 136, after paragraph (4) a new paragraph is being added, paragraph (5), with the following wording:

**(5)** *the instrument authenticated by the notary public shall verify that the parental consent constitutes writ of execution in the conditions set forth under art. 100 (2)»."*

During the workshop of the seminar, a mediator from Romania shared her experience that the base for any mediation process is the simple idea that all the parties are merely human beings, that their true needs must be identified, the child frequently being a mere instrument for hurting the other (former) spouse. The parents must realize their responsibility for the well-being of the child, in most cases the parties having deep communication issues. Not all mediators are lawyers and thus the lawfulness of the mediation agreement must

be checked by the notary public or the judge that certifies it. She also expressed the idea that legal studied might limit a mediator's perspective by subconsciously guiding them towards a certain solution prescribed by law. The solutions can be much more diverse, the mediator's task being to focus on reaching consensus, asking questions and modifying the parties' perceptions. The mediation agreement must be enforceable in both jurisdictions and thus it must be thoroughly checked by certified lawyers.

The mediators from Bulgaria asserted that the enforceable nature of a mediation agreement is necessary for broadening the appeal of this procedure. There is little reliable statistical data on the success of mediation in child abduction cases because the judicial requests are frequently dropped without mentioning the reason and no follow-up data is collected. In Bulgaria, there are “embedded” mediators at the trial courts for the purpose of informing the parties about the procedure and also the social services inform about this specific procedure. There are no mediators specialized in international child abduction cases, but in order to perform such mediations they must be familiar with international law and fluent in foreign languages.

A mediator from a U.K. non-governmental organization shared the relevant British experience about mediation in international child abduction cases. All mediators must have a basic course in mediation and broad practical experience. The common language is always English and all mediators at this particular N.G.O. are women. They frequently use mediation by Skype or other long-distance communication methods. A typical mediation procedure lasts for two days, with a three-hour session in the first day and two three-hour sessions on the second day. Any mediation agreement is written down by the two mediators and the draft is subsequently checked by lawyers. The objective of the mediation process is to reach an enforceable agreement before the final judicial hearing in a child abduction case.

The participant from the Czech Central Authority shared her experience on the matter. There are no special mediators for international child abduction cases. All staff at the have mediation training and all mediation procedures involve two mediators, always one woman and one man, one with legal training and the other with psychological training. Of the approximately 30 international child abduction cases that reach the Czech Central Authority every year, about 10 cases go to mediation but they are rarely successful.

In Romania, the National Mediation Council does not have special mediators for international child abduction cases, but each county has its own register of all certified mediators, each one listing his or her areas of expertise.

A participant from Germany shared the more positive German experience in this area. The country has a specialized mediation centre for international mediations, with adequate resources for child abduction cases.

## 11. International Child Abduction in the jurisprudence of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU)

Juliane Hirsch, expert  
LL.M. Trinity College Dublin

The number of families whose everyday lives have a connection with more than one legal system is increasing in today's globalised world. Due to the fact that, unfortunately, divorces and separations are part of life as are marriages and births, the number of child related family disputes having an international element is equally raising, as is the number of "international child abductions" which constitute a small yet not negligible proportion of these international family disputes.

The term "international child abduction", as used in this contribution, refers to situations in which a parent (or sometimes other family member) removes a minor child from his/her country of habitual residence to another country or retains the child there in breach of the actually exercised rights of custody of the other parent (or other holder(s) of parental responsibility).

The individual circumstances of cases falling within this category may differ considerably. It may be that a parent in the situation of a very conflictual separation moves to a far-away place with the child with the clear intention to deprive the other parent of any contact with the child. It may as well be, that following the breakdown of his/her marriage a parent stemming from another State simply wants to move back to his/her country of origin taking the child with him or her not awaiting the other parent's approval.

All these cases have in common that the unilateral decision of the "abducting" parent threatens the child's right to maintain personal relations with the other parent and threatens the left-behind parent's right to custody and contact. The abducting parent is often not aware of the legal consequences of his/her action and ignores what trauma the sudden separation of the child from the other parent and the habitual environment, oftentimes without a chance to say goodbye, may cause to the child. The harm caused to the left behind parent is either disregarded or indented.

Several thousand children are victims of cross-border child abduction each year. The latest Hague Conference statistics<sup>99</sup> on international child

---

<sup>99</sup> Nigel Lowe and Victoria Stephens, *A statistical analysis of applications made in 2015 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction — Global report*, Preliminary Document No 11 A of February 2018 (revised) for the attention of the Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the

abduction cases falling within the scope of the **Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction** (hereinafter “1980 Hague Child Abduction Convention”)<sup>100</sup> show that around 3000 children were involved in applications handled by Central Authorities under the Convention in the year 2015. Since the statistics were based on data provided by 76 of the then 93 Contracting States and since non-Convention abduction are not included in the statistics, the “real” figure of international child abductions occurring each year worldwide must be considerably higher.

Much work has been done on the international and European level to combat the illicit international removal or retention of children and to protect children from the harmful effects of child abduction. The 1980 Hague Child Abduction Convention, currently in force in 98 States (status: 1 May 2018)<sup>101</sup> including all EU Member States, is the key international instrument in this field of law providing a powerful mechanism to bring about the immediate return of wrongfully removed or retained children to their State of habitual residence. This Convention together with the **Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children**<sup>102</sup> forms an effective toolkit to settle cross-border disputes on parental responsibility.

The **United Nations Convention of 20 November 1989 on the Rights of the Child**<sup>103</sup> (hereinafter “UNCRC”) obliges State Parties to “take measures to combat the illicit transfer and non-return of children abroad” and, to this end, to promote “the conclusion of bilateral or multilateral agreements or accession to existing agreements” (Article 11 UNCRC). As highlighted by the *Implementation Handbook for the Convention on the Rights of the Child*<sup>104</sup>, the 1980 Hague Child Abduction Convention is the principal instrument which States are encouraged to join in fulfilment of their UNCRC obligation.

In the greater European region, a further instrument adopted in 1980 is to be mentioned: The **European Convention of 20 May 1980 on**

---

1996 Hague Child Protection Convention – October 2017, available at the website of the Hague Conference on Private International Law at < <https://www.hcch.net/en/publications-and-studies/details4/?pid=6545&dtid=57> > (last consulted on 1 June 2018).

<sup>100</sup> See for the Convention text and further information on the Convention the Hague Conference website at < <https://www.hcch.net/en/instruments/conventions/full-text/?cid=24> > (last consulted on 1 June 2018).

<sup>101</sup> See for further details the status table of the Convention at the Hague Conference website under < <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24> > (last consulted on 1 June 2018).

<sup>102</sup> See for the Convention text and further information on the Convention the Hague Conference website at < <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70> > (last consulted on 1 June 2018).

<sup>103</sup> See for the Convention text and further information the United Nations website at < <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx> > (last consulted on 1 June 2018). Nearly all States of the world including all European Union Member States have signed and ratified this Convention.

<sup>104</sup> See pp. 143 *et seq.* of the *Implementation Handbook for the Convention on the Rights of the Child*, Fully Revised Third Edition, commissioned by the United Nations Children’s Fund, UNICEF, Geneva, 2007, available online at < [https://www.unicef.org/publications/index\\_43110.html](https://www.unicef.org/publications/index_43110.html) > (last consulted on 1 June 2018).

#### European seminar

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child



**Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children.**<sup>105</sup> This Convention, prepared by the international organisation “Council of Europe” and currently in force in 37 of its Member States (status: 1 May 2018), contributes to the protection of children in international child abduction situations by providing an effective system for the cross-border enforcement of custody decisions rendered in a Contracting State. The Convention is applicable without prejudice to the applicability of the 1980 Hague Child Abduction Convention and *vice versa*. This means, that a parent whose child has been wrongfully removed to another State can choose which remedy to use, provided the two States concerned are Contracting States to both the Council of Europe 1980 Custody Convention and the 1980 Hague Child Abduction Convention. A requirement for the effective use of the Council of Europe Convention in an abduction situation is, however, the existence of a “decision relating to custody” whereas the 1980 Hague Convention solely requires that this removal should have occurred in the breach of an actually exercised right of custody whereby custody rights by operation of law suffice.

Last but not least, the **Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility**<sup>106</sup> (hereinafter “Regulation Brussels II bis”) applicable in all EU Member States (except Denmark) is to be referred to. The Regulation provides additional rules for international child abduction cases and takes precedence over the Council of Europe 1980 Custody Convention and the 1980 Hague Child Abduction Conventions in so far as they concern matters governed by the Regulation, see Article 60 of the Regulation Brussels II bis.

This contribution aims to give an overview of the relevant case law of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) in international child abduction cases. The contribution focuses on cases falling within the scope of the 1980 Hague Child Abduction Convention and, when it comes to CJEU cases, falling within the scope of the Regulation Brussels II bis, respectively. As a first step, the role of the two Courts and how international child abduction cases find their way in front of these two important bodies shall be summarised. In the main part of the contribution the jurisprudence of the ECtHR<sup>107</sup> and CJEU<sup>108</sup> will be analysed.

---

<sup>105</sup> See for the text of the Council of Europe 1980 Custody Convention see < <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/105> > (last consulted on 1 June 2018). 37 States have currently (status 1 May 2018) ratified the Convention, including all EU Member States except Slovenia.

<sup>106</sup> See for the text of the Brussels II bis Regulation < <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:338:0001:0029:EN:PDF> > (last retrieved on 1 June 2018).

<sup>107</sup> ECtHR jurisprudence can be retrieved online at < <https://hudoc.echr.coe.int/> > (last retrieved on 1 June 2018).

<sup>108</sup> CJEU jurisprudence can be retrieved online at < <http://curia.europa.eu/> > (last retrieved on 1 June 2018).

## 11.1. Role and jurisdiction of the ECtHR & the CJEU

### a) ECtHR

The European Court of Human Rights, set up in 1959 and based in Strasbourg, has jurisdiction on matters relating to the interpretation and application of the **European Convention on Human Rights**<sup>109</sup> (hereinafter “ECHR”) and its Protocols.

All 47 Member States of the Council of Europe, including all EU Member States, are Parties to the ECHR and can thus be held accountable for a breach of human rights under the Convention in front of the ECtHR. Any violation of the ECHR independent of whether it relates to the application of domestic or international law in force in the relevant Council of Europe Member State can be brought in front of the ECtHR.<sup>110</sup> This means that the jurisprudence of the ECtHR has an important influence on a “human rights”-based consistent application and interpretation of international instruments in force in all State Parties to the ECHR. This is exactly how questions relating to the application and interpretation of the 1980 Hague Child Abduction Convention can find their way in front of the ECtHR.

It is important to highlight that not only States but also individuals can seize the ECtHR. The individual applicant must file a complaint depicting that a State Party to the ECHR violated the Convention or the Protocols, that this violation directly and significantly affected the applicant and that domestic remedies have been exhausted (see Articles 34, 35 ECHR).

In the event the ECtHR finds that a State Party is in violation of its obligations under the ECHR, the State concerned is bound to ensure that such violation will not occur again and must, where necessary, amend its national legislation. The individual concerned can be awarded compensation for damages (see Articles 41 ECHR *et seq.*)

There is a rich body of ECtHR jurisprudence dealing with international child abduction falling within the scope of the 1980 Hague Child Abduction Convention. Regularly applicants claim in those cases that their rights under Article 8 ECHR (right to respect for family life) and/or Article 6 ECHR (right to fair trial) have been breached by State authorities’ actions or omissions.

### b) CJEU

The Court of Justice of the European Union has a jurisdiction that severely differs from that of the ECtHR. The Court of Justice is an institution

---

<sup>109</sup> The text of the **Convention for the Protection of Human Rights and Fundamental Freedoms** (*better known as European Convention of Human Rights*) and the text of the Protocols are available online at < [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf) > (last retrieved on 1 June 2018).

<sup>110</sup> See the reference to established case law in this regards in ECtHR, **Nada v. Switzerland** (Grand Chamber), No. 10593/08, paragraph 167.

of the European Union charged with ensuring that the European Union law is interpreted and applied consistently across the European Union; it is equally tasked with ensuring that countries and EU institutions abide by EU law, see Article 267 of the Consolidated version of the Treaty on the Functioning of the European Union.

Due to the Court's focus of jurisdiction, the CJEU has in the past had much less opportunity to deal with family law matters. Only the extensive legislative activity of the EU in recent years in this field of law has brought international family law cases in front of the CJEU. Cases of international child abduction falling within the scope of the 1980 Hague Child Abduction Convention have come before the CJEU in a number of instances where the CJEU was asked to decide on a question of interpretation and application of the European Regulation Brussels II bis.

The angle from which the CJEU explores these cases is very different from that under which the ECtHR examines the cases before it. The latter, concentrating on human rights breaches, can take a much more holistic approach. However, with binding force given as of 2009 to the **Charter of Fundamental Rights of the European Union**,<sup>111</sup> which implements central human and children's rights as part of European Union law,<sup>112</sup> the CJEU also watches over a Charter-compliant and thus, to some extent, "human-rights" compliant interpretation of EU-law.<sup>113</sup>

## 11.2. ECtHR jurisprudence in international child abduction cases

In this section, leading European Court of Human Rights (ECtHR) case law in the field of international child abduction falling within the scope of the 1980 Hague Child Abduction Convention will be examined and important principles summarised.

However, before commencing the analysis of ECtHR jurisprudence in international child abduction cases, an important particularity of the Court's focus in the examination of human rights breaches must be pointed out. Although it is the ECtHR's primary focus to analyse whether a State is in breach of the ECHR or its Protocols, the ECtHR consistently recognises that "*the [European] Convention [on Human Rights] cannot be interpreted in a*

---

<sup>111</sup> Charter of Fundamental Rights of the European Union ((2000/C 364/01), available online at < [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf) > (last retrieved on 1 June 2018).

<sup>112</sup> In particular Article 24 of the Charter.

<sup>113</sup> As the CJEU noted "*according to Article 51(1) of the Charter, its provisions are addressed to the Member States only when they are implementing European Union law. Under Article 51(2), the Charter does not extend the field of application of European Union law beyond the powers of the Union, and it does not 'establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties'. Accordingly, the Court is called upon to interpret, in the light of the Charter, the law of the European Union within the limits of the powers conferred on it*", see CJEU, C-400/10 PPU, **McB v. LE**, Judgment of 5 October 2010, paragraph 51.

*vacuum but must be interpreted in harmony with the general principles of international law [...] in particular the rules concerning the international protection of human rights”.*<sup>114</sup>

This is why the ECtHR regularly includes a consideration of important international human rights norms, such as children’s rights enshrined in the UNCRC, when analysing whether a State Party is in breach of the ECHR in family law related matters.

### **a) Importance of UNCRC in ECtHR’s assessment**

The UNCRC, which in past decades has assisted in bringing about a major shift in the perception of the child’s role in national and international family law, is given particular consideration in the ECtHR’s family law jurisprudence. The ECtHR has in various instances underpinned the central UNCRC principle that the best interests of the child must be a primary consideration in all actions concerning the child (Article 3 UNCRC).<sup>115</sup> In many family law cases, where individual complaints alleged a breach of Article 8 ECHR (right to respect for family life) as a result of how State authorities dealt with matters of parental responsibility, custody and contact rights, the ECtHR ultimately considered whether the best interests of the child concerned have been adequately assessed as required by international law.

The ECtHR thereby has always pointed out very clearly that it is not for the ECtHR to make a conclusive assessment of the best interests of the child but that the Court is solely to examine whether the national authorities concerned were in their actions led by an adequate assessment of the child’s best interest.<sup>116</sup> In this context, the ECtHR sometimes also deals with the question of whether the child concerned was given opportunity to be heard and whether the child’s views have been given due weight in accordance with the age and maturity of the child (Article 12 UNCRC).

As detailed below, compliance with the “Article 3 UNCRC best interests of the child principle” also plays a prominent role in the Court’s jurisprudence in international child abduction cases.

---

<sup>114</sup> See ECtHR, *Nada v. Switzerland* (Grand Chamber), No. 10593/08, paragraph 169 with further references.

<sup>115</sup> See for example the ECtHR’s statement in ECtHR, *Maumousseau and Washington v. France*, No. 39388/05, 6 December 2007, paragraph 66: “*The Court notes that since the adoption of the New York Convention on the Rights of the Child of 20 November 1989, ‘the best interests of the child’ in all matters concerning it, within the meaning of the New York Convention, have been paramount in child protection issues, with a view to the child’s development in its family environment [...]*”.

<sup>116</sup> As clarified in various judgments “*the Court’s task is not to substitute itself for the domestic authorities in the exercise of their responsibilities regarding custody and access issues, but rather to review, in the light of the Convention, the decisions taken by those authorities in the exercise of their power of appreciation*” see inter alia ECtHR, *Sahin v. Germany* [Grand Chamber], No. 30943/96, 2003, paragraph 64; ECtHR, *Sommerfeld v. Germany* [GC], No. 31871/96, 8 July 2003, paragraph 62; ECtHR, *Z.J. v. Lithuania*, No. 60092/12, 29 April 2014, paragraph 96.

## **b) International child abduction cases falling within the scope of the 1980 Hague Child Abduction Convention**

When analysing the ECtHR case law in the field of international child abduction that falls within the scope of the 1980 Hague Child Abduction Convention, it is important to take note of the Court's general support for this Convention.

### **(1) ECtHR's general support for the 1980 Hague Child Abduction Convention**

The ECtHR acknowledges to be “*entirely in agreement with the philosophy underlying the Hague Convention*”<sup>117</sup> and, over the past decades, has developed an important body of case law that has assisted in a better implementation and more considerate application of the 1980 Hague Child Abduction Convention in many Council of Europe Member States and beyond.

The Court's support for the 1980 Hague Child Abduction Convention is best exemplified by the ECtHR jurisprudence holding States responsible for ineffective mechanism to bring about the return of a child under the Convention.

### **(2) State's obligation to provide mechanisms to effectuate a swift return**

The ECtHR has repeatedly been seised by individuals claiming that the failure of a Contracting State to the 1980 Hague Abduction Convention to enforce the ordered return of the wrongfully removed or retained child, violated their right to respect for family life under Article 8 ECHR. The ECtHR found on several occasions that there had indeed been a breach of Article 8 ECHR because the authorities had “*failed to make adequate and effective efforts to enforce the applicant's right to the return of [the] children*”,<sup>118</sup> see for example *Ignaccolo-Zenide v. Romania*,<sup>119</sup> *Sylvester v. Austria*,<sup>120</sup> *Karadžić v. Croatia*<sup>121</sup> and *Cavani v. Hungary*.<sup>122</sup> The ECtHR consistently underlined that in international abduction cases “*the adequacy of measures taken by the authorities [to enforce the return order] is to be judged by the swiftness of their implementation*” and that they “*require urgent handling as*

---

<sup>117</sup> ECtHR, *Maumousseau and Washington v. France*, No. 39388/05, 6 December 2007, paragraph 96.

<sup>118</sup> See ECtHR, *Ignaccolo-Zenide v. Romania*, No. 31679/96, 25 January 2000, paragraph 113. See also ECtHR, *Sylvester v Austria*, No. 40104/98, paragraph 72; ECtHR, *Karadžić v. Croatia*, No. 35030/04, 15 December 2005, paragraph 63.; ECtHR, *H.N. v. Poland*, No. 77710/01, 13 September 2005, paragraph 83.

<sup>119</sup> ECtHR, *Ignaccolo-Zenide v. Romania*, No. 31679/96, 25 January 2000.

<sup>120</sup> ECtHR, *Sylvester v Austria*, No. 40104/98, paragraph 72.

<sup>121</sup> ECtHR, *Karadžić v. Croatia*, No. 35030/04, 15 December 2005, paragraph 63.

<sup>122</sup> ECtHR, *Cavani v. Hungary*, No. 5493/13, 28 October 2014.

*the passage of time can have irremediable consequences for relations between the children and the parent who does not live with them*".<sup>123</sup>

At the same time, the ECtHR has dismissed on a number of occasions complaints of parents, who had wrongfully removed or retained a child, that measures taken to enforce a Hague return order, including coercive measures, violated their rights under Article 8 ECHR. In the admissibility decision **Paradis and Others v. Germany**,<sup>124</sup> the ECtHR noted "*that although coercive measures against children are not desirable in such sensitive situations, the use of sanctions must not be ruled out in the event of unlawful behaviour by the parent with whom the children live*". Similarly, in **Maumousseau and Washington v. France**<sup>125</sup>, where the mother had gone into hiding with the child following the return order issued by the French court of appeal, the ECtHR noted that the use of coercive measures was a result of the mother's total lack of cooperation with the French authorities and that "*coercive measures cannot by itself entail a violation of Article 8 of the Convention*".<sup>126</sup>

### **(3) Particularities of safeguarding the best interests of the child in international child abduction cases**

Clarifying the relationship between the ECHR obligations and obligations from other international instruments in the field of international child abduction, the ECtHR consistently holds that "*the positive obligations that Article 8 of the Convention lays on the Contracting States in the matter of reuniting a parent with his or her children must be interpreted in the light of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction [...] and the Convention on the Rights of the Child of 20 November 1989 [UNCRC]*".<sup>127</sup>

The ECtHR recognises that "*the idea that in all decisions concerning children, their best interests must be paramount [...] is inherent in the 1980 Hague Child Abduction Convention*"<sup>128</sup> and recognises that the Hague Convention, if applied correctly, provides the necessary tools to take a decision in line with the best interests of the child. As the ECtHR pointed out, the 1980 Hague Child Abduction Convention "*associates this interest with restoration of the status quo by means of a decision ordering the child's*

<sup>123</sup> See, for example, ECtHR, **Ignaccolo-Zenide v. Romania**, No. 31679/96, 25 January 2000, paragraph 102; ECtHR, **Karadžić v. Croatia**, No. 35030/04, 15 December 2005, paragraph 62.

<sup>124</sup> ECtHR, **Paradis and Others v. Germany**, Decision as to the admissibility of the Application no. 4783/03.

<sup>125</sup> ECtHR, **Maumousseau and Washington v. France**, No. 39388/05, 6 December 2007.

<sup>126</sup> ECtHR, **Maumousseau and Washington v. France**, No. 39388/05, 6 December 2007, paragraph 85.

<sup>127</sup> See, for example, ECtHR, **X v. Latvia** [Grand Chamber], No. 27853/09, 26 November 2013, paragraph 93; ECtHR, **Neulinger and Shuruk v. Switzerland** [Grand Chamber], No. 41615/07, 2010, paragraph 132 and **Maire v. Portugal**, No. 48206/99, 26 June 2003, paragraph 72 with further references.

<sup>128</sup> ECtHR, **X v. Latvia** [Grand Chamber], No. 27853/09, 26 November 2013, paragraph 96.

*immediate return to his or her country of habitual residence in the event of unlawful abduction, while taking account of the fact that non-return may sometimes prove justified for objective reasons that correspond to the child's interests, thus explaining the existence of exceptions, specifically in the event of 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 (Article 13, first paragraph, (b)).*<sup>129</sup>

The ECtHR repeatedly emphasised that a return under the 1980 Hague Convention “cannot be ordered automatically or mechanically”;<sup>130</sup> this “follows directly not only from Article 8 [ECHR] but also from the Hague Convention itself, given the exceptions expressly enshrined therein to the principle of the child's prompt return to his or her country of habitual residence”.<sup>131</sup>

Hence, the ECtHR recognises that the exceptions to return as set forth by the 1980 Hague Convention allow for an analysis of the interests of the child in the circumstance of an individual case.

However, it is crucial to underline that the assessment of the best interests of the child undertaken in the context of Hague return proceedings should not be mistaken with the “best interest of the child”-assessment in the context of a custody decision. This very important principle has been spelt out in recent ECtHR jurisprudence: In ***X v. Latvia***,<sup>132</sup> the ECtHR, highlighted that “***in the context of an application for return made under the Hague Convention, which is [...] distinct from custody proceedings, the concept of the best interests of the child must be evaluated in the light of the exceptions provided for by the Hague Convention, which concern the passage of time (Article 12), the conditions of application of the Convention (Article 13 (a)) and the existence of a “grave risk” (Article 13 (b)), and compliance with the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms (Article 20)***”.<sup>133</sup>

The judgment of ***X v. Latvia*** contains a much-awaited clarification from the ECtHR following the confusion caused by the judgment of ***Neulinger and Shuruk v. Switzerland***,<sup>134</sup> which had given rise to ambiguity concerning the requirements for an assessment of the best interests of the child in the context of the Hague return proceedings. There was a fear that the ***Neulinger and Shuruk v. Switzerland*** judgment could undermine the effectiveness of the Hague Convention applicability, since it seemed to imply

<sup>129</sup> ECtHR, ***X v. Latvia*** [Grand Chamber], No. 27853/09, 26 November 2013, paragraph 97.

<sup>130</sup> See ECtHR, ***X v. Latvia*** [Grand Chamber], No. 27853/09, 26 November 2013, paragraph 98; see also ECtHR, ***Maumousseau and Washington v. France***, No. 39388/05, 6 December 2007, paragraph 72; ECtHR, ***Neulinger and Shuruk v. Switzerland*** [Grand Chamber], No. 41615/07, 2010, paragraph 138.

<sup>131</sup> See ECtHR, ***X v. Latvia*** [Grand Chamber], No. 27853/09, 26 November 2013, paragraph 98.

<sup>132</sup> ECtHR, ***X v. Latvia*** [Grand Chamber], No. 27853/09, 26 November 2013.

<sup>133</sup> *Ibid.*, paragraph 101.

<sup>134</sup> ECtHR, ***Neulinger and Shuruk v. Switzerland*** [Grand Chamber], No. 41615/07, 2010.

the necessity of assessing the best interests of the child in a way that threatened to compromise the workability of swift return proceedings.

In the Grand Chamber judgment of **X v. Latvia**, third-party interveners “considered that the requirement of an ‘in-depth examination of the entire family situation’ [as referred to in *Neulinger*] conflicted with the Hague Convention [...] asked the Court to clarify this question [...] and to set limits on the examination of the family situation by the court deciding on an application for a child’s return”.<sup>135</sup> In response, the ECtHR observed, “that the Grand Chamber judgment in **Neulinger and Shuruk** [...] to which a number of subsequent judgments refer [...] may and has indeed been read as suggesting that the domestic courts were required to conduct an in-depth examination of the entire family situation and of a whole series of factors. [...]”.<sup>136</sup> However, the ECtHR then added that “[a]gainst this background the **Court considers it is opportune to clarify that its finding in paragraph 139 of *Neulinger and Shuruk* does not in itself set out any principle for the application of the Hague Convention by the domestic courts**”<sup>137</sup> [emphasis added] and that the “Court considers that a harmonious interpretation of the European Convention and the Hague Convention [...] can be achieved provided that the following two conditions are observed. Firstly, the factors capable of constituting an exception to the child’s immediate return in application of Articles 12, 13 and 20 of the Hague Convention, particularly where they are raised by one of the parties to the proceedings, must genuinely be taken into account by the requested court. That court must then make a decision that is sufficiently reasoned on this point, in order to enable the Court to verify that those questions have been effectively examined. Secondly, these factors must be evaluated in the light of Article 8 of the Convention [...]”.<sup>138</sup>

### 11.3. CJEU jurisprudence in international child abduction cases

This part of the paper will examine leading case law from the Court of Justice of the European Union (CJEU) in the field of international child abduction and will summarise key principles. As noted above, the CJEU examines these cases from a very different angle due to its area of jurisdiction. Cases of international child abduction falling within the scope of the 1980 Hague Child Abduction Convention have only come in front of the CJEU because questions relating to the interpretation of the European Regulation Brussels II *bis* have been raised. Even though the CJEU has no

---

<sup>135</sup> *Ibid.*, paragraph 103.

<sup>136</sup> *Ibid.*, paragraph 104.

<sup>137</sup> *Ibid.*, paragraph 105.

<sup>138</sup> *Ibid.*, paragraph 106.



authority to decide upon matters of interpretation of the 1980 Hague Convention itself, the CJEU's jurisprudence, whenever dealing with the interpretation of wording equally contained in the Regulation Brussels II *bis* and in the 1980 Hague Convention, is clearly influential for the interpretation of the latter.

### **a) Urgent preliminary ruling procedure**

Most of the cases analysed in this part have come in front of the CJEU when making use of the urgent preliminary ruling procedure (PPU). This procedure, regulated in Articles 107 *et seq.* of the Rules of the CJEU,<sup>139</sup> only exists since March 2008 and is meant to guarantee a swift handling of particularly urgent cases. PPU cases are regularly dealt within two to three months by an especially designated Chamber of five judges and all communications of the written procedure take place, as far as possible, electronically.<sup>140</sup>

### **b) International child abduction cases in front of the CJEU**

#### **(1) Use of the mechanism of Articles 11(8) and 42 of the Regulation Brussels II *bis* upon a first instance non-return decision**

*Rinau v. Rinau*<sup>141</sup> was the first case dealt with under the new urgent preliminary ruling procedure. This case concerned a German-Lithuanian married couple, who, having resided in Germany for two years, separated shortly after the birth of their daughter. The Lithuanian mother took the child to Lithuania for a short stay with the agreement of the father, but then unilaterally decided not to return. The father brought return proceedings under the 1980 Hague Child Abduction Convention and the Lithuanian first instance court issued a non-return order. Later, the first instance court's decision was overturned on appeal and a return was ordered. Shortly afterwards a German court granted the divorce and permanent custody to the child's father. The German court asked the mother to return the child to Germany and issued a certificate in accordance with Article 42 of the Regulation Brussels II *bis*. The mother tried to oppose the enforcement in

---

<sup>139</sup>Consolidated version of the Rules of Procedure of the Court of Justice of 25 September 2012 available online at < [https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp\\_en.pdf](https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf) > (last consulted 1 June 2018).

<sup>140</sup> See "The Court of Justice - Composition, jurisdiction and procedures", published by the CJEU, 2010 edition, available online at < [https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-05/cjue\\_en.pdf](https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-05/cjue_en.pdf) > (last consulted 1 June 2018); for further details see also Vassilios SKOURIS, Report on the use of the urgent preliminary ruling procedure by the Court of Justice, Luxembourg, 31 January 2012, < [https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-07/en\\_rapport.pdf](https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-07/en_rapport.pdf) > last consulted 1 June 2018).

<sup>141</sup> CJEU, C-195/08 PPU, *Rinau v. Rinau*, Judgement of 11 July 2008.

Lithuania and the question arose whether the “overriding mechanism” in Articles 11(8) and 42 of the Regulation Brussels II *bis* could be used even though the non-return decision had later been overruled by the higher instance. The CJEU decided that “[o]nce a non-return decision has been taken and brought to the attention of the court of origin, it is irrelevant, for the purposes of issuing the certificate provided for in Article 42 [...] that that decision has been suspended, overturned, set aside or, in any event, has not become *res judicata* or has been replaced by a decision ordering return, in so far as the return of the child has not actually taken place.”

## (2) Article 2(9) Regulation Brussels II *bis* - autonomous meaning of the term “rights of custody”

In cases of an alleged wrongful removal or retention of a child a crucial question to decide is whether the child’s removal or retention occurred in breach of actually exercised rights of custody (Article 2(11) of the Regulation Brussels II *bis* and Article 3 of the 1980 Hague Convention).

In *McB v. LE*,<sup>142</sup> the CJEU had to deal with a case where the Irish unmarried father of three children, who had cohabited with the British mother the children for many years in different countries, last in Ireland, claimed that the mother had abducted the children to England. The unmarried father, who under Irish law had no automatic rights of custody, tried to obtain a declaration in accordance with Article 15 of the 1980 Hague Child Abduction Convention from the Irish courts stating the “wrongfulness” of the children’s removal in the sense of the Convention. The Irish High Court dismissed his claim; the Irish Supreme Court referred the following question to the CJEU for preliminary ruling: “Does [the Regulation Brussels II *bis*], whether interpreted pursuant to Article 7 of [the Charter of Fundamental Rights of the EU] or otherwise, preclude a Member State from requiring by its law that the father of a child who is not married to the mother shall have obtained an order of a court of competent jurisdiction granting him custody in order to qualify as having ‘custody rights’ which render the removal of that child from its country of habitual residence wrongful for the purposes of Article 2(11) of that Regulation?’ 2(9)”.<sup>143</sup>

The CJEU underlined that the Regulation Brussels II *bis* in its Article 2(9) defined the term “**rights of custody**” to include “*rights and duties relating to the care of the person of a child, and in particular the right to determine the child’s place of residence*”. The CJEU noted that since the Regulation contained a definition of the term “rights of custody” it is “**an**

---

<sup>142</sup> CJEU, C-400/10 PPU, *McB v. LE*, Judgment of 5 October 2010, paragraph 25.

<sup>143</sup> *Ibid.*, paragraph 25.

**autonomous concept which is independent of the law of Member States**” and that “*for the purposes of applying Regulation No 2201/2003, rights of custody include, in any event, the right of the person with such rights to determine the child’s place of residence*”.<sup>144</sup> The CJEU, however, pointed out that “*the identity of the person who has rights of custody*” was an “*entirely separate matter*” and that this question would, according to Article 2(11) a) Regulation Brussels II *bis*, be decided in compliance with the law of the State of habitual residence of the child prior to the wrongful removal or retention.<sup>145</sup>

### (3) Habitual residence

In cases of alleged wrongful removal or retention, it is often disputed where did the child concerned have his/her place of habitual residence. Neither the European Regulation Brussels II *bis* nor the 1980 Hague Child Abduction Convention include a definition of this term.

Given that several EU Regulations use the term “habitual residence”, it is not surprising that a considerable number of cases relating to the interpretation of the term “habitual residence” have come before the CJEU. However, as a first principle, **it is crucial to note that the “[t]he case-law of the Court relating to the concept of habitual residence in the [different] areas of European Union law [...] cannot be directly transposed [into other areas]”**.<sup>146</sup>

The following summary of case law focuses on the interpretation of habitual residence in the Regulation Brussel II *bis* in the context of international child abduction.

To start with, the non-abduction case **A**<sup>147</sup> shall be quoted. This judgment lays down general principles for the interpretation of a child’s habitual residence in the sense of Article 8 of the Regulation Brussels II *bis* and is quoted as a reference in CJEU case law relating to international child abduction. In **A**, the CJEU highlighted that, in the context of Article 8 of the Regulation Brussels II *bis*, the “habitual residence” of a child “*corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family’s move to that State, the child’s nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the*

<sup>144</sup> *Ibid.*, paragraph 41.

<sup>145</sup> *Ibid.*, paragraph 42.

<sup>146</sup> See, inter alia CJEU, C-523/07, **A**, Judgment of 2 April 2009, paragraph 36.

<sup>147</sup> CJEU, C-523/07, **A**, Judgment of 2. April 2009.

**circumstances specific to each individual case**".<sup>148</sup> The Court detailed that "[i]n addition to the physical presence of the child in a Member State other factors must be chosen which are capable of **showing that that presence is not in any way temporary or intermittent** [...]"<sup>149</sup> and that "**the parents' intention to settle permanently with the child in another Member State, manifested by certain tangible steps such as the purchase or lease of a residence in the host Member State, may constitute an indicator of the transfer of the habitual residence**".<sup>150</sup>

In **Mercredi v. Chaffe**,<sup>151</sup> a case where the French mother had left England with her two-month-old daughter for the Island of Réunion, the CJEU reiterated the criteria given in **A** (C-523/07) and added that "**in order to distinguish habitual residence from mere temporary presence, the former must as a general rule have a certain duration which reflects an adequate degree of permanence. However, the Regulation does not lay down any minimum duration. Before habitual residence can be transferred to the host State, it is of paramount importance that the person concerned has it in mind to establish there the permanent or habitual centre of his interests, with the intention that it should be of a lasting character. Accordingly, the duration of a stay can serve only as an indicator** [...]"<sup>152</sup> The Court further highlighted the importance of considering the factors comprising the social and family environment in the light of the child's age<sup>153</sup> and stated that "[a]n infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent. Consequently, where, as in the main proceedings, the infant is in fact looked after by her mother, it is necessary to assess the mother's integration in her social and family environment. In that regard, the tests stated in the Court's case-law, such as the reasons for the move by the child's mother to another Member State, the languages known to the mother or again her geographic and family origins may become relevant."<sup>154</sup>

A judgment of further importance when it comes to interpreting the term "habitual residence" is **C v. M**.<sup>155</sup> In July 2012, following a French divorce decision, the British mother left France with the four-year-old child to live in Ireland. The decision expressly allowed the mother to "set up residence in Ireland" but it was subsequently overturned by the French judgment of 3 March 2013 upon application of the French father, who wanted

---

<sup>148</sup> *Ibid.*, paragraph 44.

<sup>149</sup> *Ibid.*, paragraph 38.

<sup>150</sup> *Ibid.*, paragraph 40.

<sup>151</sup> CJEU, C-497/10 PPU, **Mercredi v. Chaffe**, Judgment of 22 December 2010.

<sup>152</sup> *Ibid.*, paragraph 51.

<sup>153</sup> *Ibid.*, paragraph 53.

<sup>154</sup> *Ibid.*, paragraph 55.

<sup>155</sup> CJEU, C-376/14 PPU, **C v. M**, Judgment of 9 October 2014.

the child to return to France. The question which arose was whether the child could have established habitual residence in Ireland despite the fact that the decision allowing the mother to move had been provisional. The CJEU decided that, when assessing all circumstances of fact specific to the individual case in order to determine the child's habitual residence at the time of the alleged wrongful retention, *"it is important that account be taken of the fact that the judgment authorising the removal"* was only provisionally enforceable *"and that an appeal had been brought against it."*

In **OL v. PQ**,<sup>156</sup> a Greek woman, eight months pregnant, had travelled to Greece in agreement with her husband to give birth there and to be supported by her family for the first months following the birth. Later she refused to return to the marital home in Italy. The husband claimed that the mother wrongfully retained their child in Greece and applied for a return. The father claimed that the child, although never having physically been in Italy, had become "habitually resident" there due to the fact that the parents had intended for the child to live in Italy. The Greek court requested to return the child, referred a question concerning the interpretation of habitual residence to the CJEU for a preliminary ruling. The CJEU highlighted that *"the concept of 'habitual residence', within the meaning of Regulation No 2201/2003, reflects essentially a question of fact. Consequently, to take the position that the initial intention of the parents that a child should reside in one given place should take precedence over the fact that the child has continuously resided since birth in another State would be difficult to reconcile with that concept."*<sup>157</sup> Therefore, the CJEU decided *"that in a situation, such as that in the main proceedings, where a child has been born and has lived continuously with her mother for several months, in accordance with the joint wishes of her parents, in a Member State other than that where those parents were habitually resident before her birth, the initial intention of the parents with respect to the return of the mother, together with the child, to the latter Member State cannot allow the conclusion that that child was 'habitually resident' there, within the meaning of that regulation."*

#### (4) Enforcement of a certified judgment

In **Zarraga v. Pelz**<sup>158</sup> the CJEU had to decide whether the enforcement of a judgment in accordance with Article 42 of the Regulation Brussels II *bis* could exceptionally be opposed on the ground that the court of origin, despite stating in the accompanying certificate that it had fulfilled its obligation to give the child an opportunity to be heard, had in fact not done so.

---

<sup>156</sup> CJEU, C-111/17 PPU, **OL v. PQ**, Judgment of 8 June 2017.

<sup>157</sup> *Ibid.*, paragraph 51.

<sup>158</sup> CJEU, C-491/10 PPU, **Zarraga v. Pelz**, Judgment of 22 December 2010.

The case concerned the enforcement of a Spanish decision ordering the return of a child, who had been wrongfully retained in Germany by the mother.

Following the parents' divorce in Spain in 2008, the Spanish courts had awarded the rights of custody of the then 8-year-old child to the Spanish father and granted rights of access to the German mother. This had been based, *inter alia*, on an expert opinion identifying the father as “*best placed to ensure that the family, school and social environment of the child was maintained*” since the mother had repeatedly expressed her wish to relocate to Germany to live there with her new partner. Subsequently, the mother had indeed settled in Germany.

Following the first summer holidays the daughter spent with her mother in Germany, the mother did not return the child to Spain. The Hague return proceedings initiated by the father ended with a final non-return decision in January 2009 based on Article 13(2) of the Hague Convention, since the child resolutely opposed the return. The Spanish court, relying on Article 11(8) of the Regulation Brussels II *bis*, ordered the return of the child to Spain and issued an Article 42 certificate.

As Article 42(2) of the Regulation Brussels II *bis* clearly states, “*the judge of origin who delivered the judgment referred to in Article 40(1)(b) shall issue the certificate referred to in paragraph 1 only if: (a) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity*”. The Spanish court had issued the certificate, although the child had not been given an opportunity to be heard.

Answering the questions brought before it by the court in the Member State of enforcement, the CJEU noted that it was “*solely for the national courts of the Member State of origin [ i.e., the Spanish courts] to examine the lawfulness of that judgment with reference to the requirements imposed, in particular, by Article 24 of the Charter of Fundamental Rights and Article 42 of Regulation*” and held that the courts in the State of enforcement could not oppose the enforcement.

In the case ***Povse v. Alpago***,<sup>159</sup> an unmarried couple holding joint rights of custody of their daughter and residing in Italy had split up. Despite the fact that the father had obtained an order from the Italian courts forbidding the mother to leave the country, the mother left to Austria with the then two-year-old child. Different sets of proceedings followed in Italy and Austria.

The Oberster Gerichtshof of Austria referred several questions to the CJEU for preliminary ruling, one of which was whether the enforcement of a judgment certified under Article 42 of the Regulation Brussels II *bis* could be refused in the Member State of enforcement under certain circumstances,

---

<sup>159</sup> CJEU, C-211/10 PPU, ***Povse v. Alpago***, Judgment of 1 July 2010.

namely “because, as a result of a change of circumstances arising after its adoption, it might be seriously detrimental to the best interests of the child”. The CJEU made it very clear that the Member State of origin of the decision and certificate was the right forum to hear any application to suspend enforcement of its judgment.

### **(5) Shift of jurisdiction under Article 10 Regulation Brussels II bis**

In *Povse v. Alpago*,<sup>160</sup> the CJEU furthermore had to decide on a question relating to the interpretation of Article 10 b), iv of the Regulation Brussels II bis. Article 10 of the Regulation Brussels II bis aims, in cases of wrongful removal or retention, to uphold jurisdiction in matters of custody in the State of habitual residence of the child immediately before the removal or retention in order to avoid conflicting custody decisions and, at the same time, to prevent the abducting parent from obtaining procedural advantages through the abduction. However, in certain, clearly defined circumstances, Article 10 allows for a shift of jurisdiction. The question that arose in *Povse v. Alpago*, was whether an Italian decision, allowing the child to reside with the mother pending final judgment could be understood as “a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention” in the sense of Article 10 b), iv of the Regulation Brussels II bis.

The CJEU held “that a ‘judgment on custody that does not entail the return of the child’ [in the sense of Article 10 b) iv] is a final judgment, adopted on the basis of full consideration of all the relevant factors, in which the court with jurisdiction rules on arrangements for the custody of a child who is no longer subject to other administrative or judicial decisions.”<sup>161</sup> Consequently, the CJEU considered that the provisional decision of the Italian court did not represent such a judgment in the sense of Article 10 b) iv of the Regulation Brussels II bis.

### **(6) Interpretation of Article 11(8) Regulation Brussels II bis**

A further matter to be decided in *Povse v. Alpago* was related to the interpretation of Article 11(8) of the Regulation Brussels II bis. The Austrian court wanted to ascertain whether “Article 11(8) of the regulation must be interpreted as meaning that a judgment of the court with jurisdiction ordering the return of the child falls within the scope of that provision only when the

---

<sup>160</sup> *Ibid.*

<sup>161</sup> *Ibid.*, paragraph 46.

*basis of that order is a final judgment of the same court relating to rights of custody of the child.*<sup>162</sup>

The CJEU observed that “*such an interpretation, which makes the enforcement of a judgment of the court with jurisdiction ordering the return of the child dependent on whether a final judgment on rights of custody has been delivered by that court, has no basis in the wording of Article 11 of the regulation and, specifically, of Article 11(8). On the contrary, Article 11(8) of the regulation extends to ‘any subsequent judgment which requires the return of the child’.*”<sup>163</sup> The CJEU further highlighted: “*The objective of the provisions of Articles 11(8), 40 and 42 of the regulation, namely, that proceedings be expeditious, and the priority given to the jurisdiction of the court of origin are scarcely compatible with an interpretation according to which a judgment ordering return must be preceded by a final judgment on rights of custody. Such an interpretation would constitute a constraint which might compel the court with jurisdiction to take a decision on rights of custody when it had neither all the information and all the material needed for that purpose, nor the time required to make an objective and dispassionate assessment.*”<sup>164</sup>

## **(7) Provisional measure under Article 20 of the Regulation Brussels II bis**

The case *Detiček v. Sgueglia*<sup>165</sup> related to a married couple who had lived in Italy for 25 years. During the divorce proceedings in 2007, custody of their ten-year-old daughter was provisionally granted to the father and the child was placed provisionally in a foster home. The day the decision was rendered, the Slovenian mother left to Slovenia together with the child. The Italian decision was declared enforceable in Slovenia. Meanwhile the mother applied in Slovenia for a provisional and protective measure giving her custody of the child on the basis of Article 20 of the Regulation Brussels II bis. The provisional measure was granted blocking the enforcement of the Italian order in Slovenia. The CJEU held that “*Article 20 [of the Regulation Brussels II bis ], must be interpreted as not allowing, in circumstances such as those of the main proceedings, a court of a Member State to take a provisional measure in matters of parental responsibility granting custody of a child who is in the territory of that Member State to one parent, where a court of another Member State, which has jurisdiction under that regulation as to the substance of the dispute relating to custody of the child, has already delivered a judgment provisionally giving custody of the child to the other*

---

<sup>162</sup> *Ibid.*, paragraph 51.

<sup>163</sup> *Ibid.*, paragraph 52.

<sup>164</sup> *Ibid.*, paragraph 62.

<sup>165</sup> CJEU, C-403/09 PPU, *Detiček v. Sgueglia*, Judgment of 23 December 2009.



parent, and that judgment has been declared enforceable in the territory of the former Member State.”

**(8) Question of applicability of provisions laid down in Article 21 of the Regulation Brussels II bis to provisional measures under Article 20 and question relating to the interpretation of Article 19(2) of the Regulation (*lis pendens*)**

The case *Purrucker v. Vallés Pérez* came twice before the CJEU: (1) C-256/09<sup>166</sup> (also referred to as “**Purrucker I**”) and (2) C-296/10<sup>167</sup> (also referred to as “**Purrucker II**”).

The relationship of a German-Spanish couple living in Spain deteriorated after the premature birth of a twin boy and girl, who due to health problems had to stay in hospital long weeks after the birth. The mother, who also has another child from a former relationship wanted to move to Germany with the twins. The Spanish father, first opposed this idea, finally entered into an agreement before a notary, allowing the mother to leave Spain and settle in Germany with the twins. The agreement noted that the twins were subject to the parental responsibility of mother and father both of whom were supposed to have custody of the children. The father was to have rights of access. Due to further health problems, the twin girl requiring surgery needed to remain in the care of the Spanish hospital and the mother could, when leaving to Germany in February 2007, only take the twin boy with her. The twin girl remained in Spain and never joined the mother in Germany. The father did not feel bound by the agreement which was not judicially ratified and requested the twin boy to be returned to Spain.

Three different sets of proceedings in Spain and Germany involving the two parties can be distinguished. First, the father brought proceedings in Spain asking to grant provisional measures relating to rights of custody. The second set of proceedings are the ones brought by the mother in Germany in order to be awarded custody of the twins. Third, the father brought proceedings in Germany to enforce the Spanish judgment granting provisional measures for which the Spanish court had issued a certificate under Article 39 of the Regulation Brussels II bis.

The question referred to the CJEU for preliminary ruling in *Purrucker I* related to the enforcement of the Spanish decision in Germany ordering the return of the twin boy to Spain. The German Federal Court of Justice (Bundesgerichtshof), the court to which the mother had appealed to oppose the enforcement of the Spanish decision, sought a preliminary ruling from the CJEU as to whether the provisions of the Regulation Brussels II bis

---

<sup>166</sup> CJEU, C-256/09 (Purrucker I), *Purrucker v. Vallés Pérez*, Judgment of 15 July 2010.

<sup>167</sup> CJEU, C-296/10 (Purrucker II), *Purrucker v. Vallés Pérez*, Judgment of 9 November 2010.

containing the rules on enforcement and recognition applied to provisional measures within the meaning of Article 20, relating to rights of custody. The CJEU held that the “**provisions laid down in Article 21 et seq. [...] do not apply to provisional measures, relating to rights of custody, falling within the scope of Article 20 of that regulation.**” The CJEU pointed out that “[t]he fact that measures falling within the scope of Article 20 [of the Regulation Brussels II bis ] do not qualify for the system of recognition and enforcement provided for under that regulation does not, however, prevent all recognition or all enforcement of those measures in another Member State, as was stated by the Advocate General in point 176 of her Opinion. Other international instruments or other national legislation may be used, in a way that is compatible with the regulation”.<sup>168</sup>

In *Purrucker II* the CJEU was, *inter alia*, asked to decide on a matter of interpretation of Article 19(2) of the Regulation Brussels II bis. In accordance with that provision, “[w]here proceedings relating to parental responsibility relating to the same child and involving the same cause of action are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.” The German court seised by the mother for a decision on the merits of custody wanted to know whether Article 19(2) of the Regulation would be applicable even though the court of another Member first seised by one party to resolve matters of parental responsibility was only called upon to grant provisional measures. The CJEU held that “[t]he **provisions of Article 19(2) [of the Brussels II bis Regulation], are not applicable where a court of a Member State first seised for the purpose of obtaining measures in matters of parental responsibility is seised only for the purpose of its granting provisional measures within the meaning of Article 20 of that regulation and where a court of another Member State which has jurisdiction as to the substance of the matter within the meaning of the same regulation is seised second of an action directed at obtaining the same measures, whether on a provisional basis or as final measures.**”

---

<sup>168</sup> *Ibid.*, paragraph 92.

## **12. The Revision of the Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000**

Maria Kurucz, expert  
Legal Adviser, Ministry of Justice of Hungary

### **Introduction**

The European Seminar provided an opportunity to take a look at the present stage of the negotiations on the revision of the present system of the Regulation Brussels II bis.

Just like all EU Regulations, Regulation Brussels II bis includes a review clause (Article 65) which obliged the Commission to make a report on the application of the Regulation. The Report was published in 2014. The Commission found that there were several problems in practice which could be remedied by the modification of the provisions. As the proposed modifications were widespread and related also to the structure of the regulation, the Commission submitted a proposal for a new regulation in June 2016. This article introduces only those aspects of the proposal which relate to international child abduction. All the issues explained are still open for further discussion.

The phenomenon of international child abduction appears as a separate issue in the title of the proposal and in a separate chapter. The reason for this is that child abduction is not a matter of parental responsibility: in return proceedings, the court does not issue a ruling on parental custody, only on the factual question whether the child should return to the state of his habitual residence or not. This must be made clear also in the structure of the new regulation.

### **Proposals transposing good practice into legal obligation**

The Commission proposal transposed an old Hague recommendation into an obligation, namely that Member States shall ensure that competence for return proceedings is concentrated on a limited number of courts. Concentration of competence undoubtedly assists the professional and speedy conduct of proceedings. These procedures require a special competence to apply international and EU legislation, to proceed in an international context (foreign parties, documents received from abroad, need for interpretation). If competence is concentrated, the limited number of judges gain experience in abduction cases after some time, and this might not happen

if every family law judge would get such cases – maybe once in a lifetime. Notwithstanding its clear advantages, this provision has not received the support of all Member States; the opposing states believe the rules on internal competence should be left to the domestic law of the Member States.

On the proposal of certain Member States, an explicit provision would empower the courts to order contact between the child and the left-behind parent for the period while the return procedure is pending. This has been possible already but an explicit provision would dissolve any doubts whether such a provisional order on access is possible or not.

### **Promoting agreements**

The Commission proposes an explicit obligation to the court determining an abduction case to examine whether the parties are willing to engage in mediation unless this would unduly delay the proceedings. So far only Central Authorities have had an obligation to try to achieve an amicable resolution.

At present, even if parties agree, and the scope of their agreement is wider than return or non-return, this cannot be approved. Article 16 of the 1980 Hague Child Abduction Convention (hereinafter “the Hague Convention”) does not allow the court proceedings in a return case to decide on custody including the approval of an agreement on custody, access and related issues. To encourage amicable resolution of child abduction matters, the Commission proposal would eliminate this legal obstacle and enable the court deciding on return to approve the parties’ agreement.

### **Proposals aiming to ensure a speedy procedure**

The greatest problem of the present system of the Brussels II bis Regulation is that return procedures last much longer than desirable, thus allowing the child to integrate into his new circumstances and to be more subject to parental alienation. Therefore it is of utmost importance to guarantee that the return procedure is in fact a speedy remedy of the wrongful act. The Commission proposal contains several provisions to this end.

The proposal would introduce strict deadlines for each stage of the procedure. The requested central authority would have 6 weeks from the receipt of the application until its submission to the court. Within these 6 weeks, it shall take several measures if necessary: locating the child and the abducting parent, attempting an amicable resolution, helping with the mediation, forwarding legal aid applications.

The Commission proposal makes it clear that both courts should have a 6-week deadline each; from the Hague Convention it is not clear whether a final court order should be achieved in 6 weeks, or only the first instance court should issue the ruling by that time.

The enforcement of return orders should also take place in 6 weeks, otherwise a report should be made about the reasons of delay.

#### **European seminar**

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child

Surprisingly, Member States did not oppose the introduction of strict deadlines though statistics show hardly any cases are completed at present within those time limits. Member States seem to admit that a great improvement needs to be achieved in this field. They however emphasized that a time period shall be allowed for the service of the order, submittal of appeal and comments on the appeal after the first decision; the deadline for the appellate court should run only afterwards.

The Commission also proposes that the court may declare the decision ordering the return of the child provisionally enforceable notwithstanding any appeal, even if domestic law does not provide for such provisional enforceability. This proposal is not generally supported. One may argue that, if return is enforced, the appellate procedure has no purpose: even if return is denied on appeal, the child's return to his habitual residence cannot be reversed. With the introduction of strict deadlines also for the appellate court, it is even more disputed why provisional enforceability is promoted.

The limitation of appeal only to one also serves the purpose of speed. The Commission proposal does not specify whether the remaining appeal should be "ordinary" or "extraordinary"; it is up to the Member States to decide. Several Member States do not agree with this proposal as the system of appeals within a Member State is a matter for the domestic law. From the latest proposal, it seems that the proposed limitation would not relate to certain special kinds of remedies: constitutional challenge or reopening the case due to changed circumstances, which would still be available.

### **Facilitating the ordering of return**

A novelty in the proposal is that the return court may order provisional measures for the protection of the child after return. These measures will have effect in the other Member State until the court of the other Member State having jurisdiction as to the substance of parental responsibility has taken the measures it considers appropriate. With these provisional measures in place, courts will be able to issue other than the present black or white (return or non-return) orders. In the typical child abduction case, removal is clearly wrongful but the judge feels the child and the abducting parent would be in a very difficult situation after return. With the proposed possibility, the court could order, e.g., that the child cannot be taken from the abducting parent's custody except for the visitation periods or the left-behind parent shall pay the expenses of accommodation of the child and the abducting parent upon return.

Another novelty of the proposal is ensuring the enforceability of Hague return orders in other Member States. At this moment, this is not possible, as the rules on recognition and enforcement apply only to orders on parental responsibility. This way, if the abducting parent takes the child to

a third state after a return order to avoid enforcement, the whole return procedure shall be re-started in that third state. To prevent such frustrating situations, the Hague return orders would be enforced in all Member States. Some Member States would go even further and would provide privileged status to Hague return orders without any grounds of refusal.

### **Refusal of return**

The so-called overriding mechanism is the subject of the most intense discussions. Many Member States questioned the need for privileged decisions including return orders under para. (8) of Article 11 which shall be enforced without any examination of grounds for refusal. In the context of the new Brussels II bis, *exequatur* would be abolished for all orders of parental responsibility; as immediate enforcement may be applied for all decisions of parental responsibility, the same procedure should apply for all decisions that would be easier for practitioners as well. However, another group of Member States insisted on keeping privileged decisions as a policy matter. Even if privileged decisions stay, some restrictions are still expected to the present system. First, the Commission proposes to keep privileged status only to orders deciding on custody. Mere return orders by the court having jurisdiction on custody would not suffice (like the one by the Italian court in the Povse-case, C-211/10 PPU). Secondly, a further possible restriction was raised, namely that the overriding mechanism would be restricted to Article 13.b refusals. This way, a refusal based on the child's objection would not trigger the overriding mechanism and as such it would cause the shift of jurisdiction to the Member State of removal. One may question whether a change of jurisdiction could be justified by the child's objection to return in an abduction case.

The Commission proposed that the court shall specify on which article of the Hague Convention should the refusal of return rely on. It is an important question as different grounds for refusal have different consequences. Though the reason for this proposal can hardly be questioned, there were Member States which did not support this idea, claiming this obligation interferes with the judges' independence. In the latest proposal this obligation does not appear any more in the text, but there will probably be a form the judge should fill in when refusing return, and the appropriate box on the ground for refusal should be ticked in that form.

## 13. Legislation

### 13.1. Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions

Chapter I - Scope of the convention

Article 1

The objects of the present Convention are -

a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where -

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention -

- a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;
- b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

## Chapter II - Central authorities

### Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organisations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

### Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures -

- a) to discover the whereabouts of a child who has been wrongfully removed or retained;
- b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;
- c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;
- d) to exchange, where desirable, information relating to the social background of the child;
- e) to provide information of a general character as to the law of their State in connection with the application of the Convention;
- f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access;
- g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;
- h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;
- i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

## Chapter III - Return of children

### Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

#### European seminar

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child



The application shall contain -

- a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;
- b) where available, the date of birth of the child;
- c) the grounds on which the applicant's claim for return of the child is based;
- d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by -

- e) an authenticated copy of any relevant decision or agreement;
- f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;
- g) any other relevant document.

#### Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

#### Article 10

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

#### Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

#### Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

#### Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

#### Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

#### Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

#### Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

#### Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

#### Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

#### Article 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

## Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

## Chapter IV - Rights of access

### Article 21

An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

## Chapter V - general provisions

### Article 22

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

### Article 23

No legalisation or similar formality may be required in the context of this Convention.

### Article 24

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.

However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

### Article 25

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

### Article 26

Each Central Authority shall bear its own costs in applying this Convention.

Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In

particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.

However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

#### Article 27

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

#### Article 28

A Central Authority may require that the application be accompanied by a written authorisation empowering it to act on behalf of the applicant, or to designate a representative so to act.

#### Article 29

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

#### Article 30

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

#### Article 31

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units -

a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;

b) any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

#### Article 32

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law

of that State shall be construed as referring to the legal system specified by the law of that State.

#### Article 33

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

#### Article 34

This Convention shall take priority in matters within its scope over the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors, as between Parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organising access rights.

#### Article 35

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.

Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

#### Article 36

Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

### Chapter VI - Final clauses

#### Article 37

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

#### Article 38

Any other State may accede to the Convention.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

#### Article 39

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

#### Article 40

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

#### Article 41

Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

#### Article 42

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted.

Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

#### Article 43

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.

Thereafter the Convention shall enter into force -

(1) for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;

(2) for any territory or territorial unit to which the Convention has been extended in conformity with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article.

#### Article 44

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

#### Article 45

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following -

(1) the signatures and ratifications, acceptances and approvals referred to in Article 37;

(2) the accessions referred to in Article 38;

(3) the date on which the Convention enters into force in accordance with Article 43;

(4) the extensions referred to in Article 39;

(5) the declarations referred to in Articles 38 and 40;

(6) the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;

(7) the denunciations referred to in Article 44.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 25th day of October, 1980, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.

## **13.2. Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and Article 67(1) thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the European Parliament(2),

Having regard to the opinion of the European Economic and Social Committee(3),

Whereas:

(1) The European Community has set the objective of creating an area of freedom, security and justice, in which the free movement of persons is ensured. To this end, the Community is to adopt, among others, measures in the field of judicial cooperation in civil matters that are necessary for the proper functioning of the internal market.

(2) The Tampere European Council endorsed the principle of mutual recognition of judicial decisions as the cornerstone for the creation of a genuine judicial area, and identified visiting rights as a priority.

(3) Council Regulation (EC) No 1347/2000(4) sets out rules on jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility for the children of both spouses rendered on the occasion of the matrimonial proceedings. The content of this Regulation was substantially taken over from the Convention of 28 May 1998 on the same subject matter(5).

(4) On 3 July 2000 France presented an initiative for a Council Regulation on the mutual enforcement of judgments on rights of access to children(6).

(5) In order to ensure equality for all children, this Regulation covers all decisions on parental responsibility, including measures for the protection of the child, independently of any link with a matrimonial proceeding.

(6) Since the application of the rules on parental responsibility often arises in the context of matrimonial proceedings, it is more appropriate to have a single instrument for matters of divorce and parental responsibility.

(7) The scope of this Regulation covers civil matters, whatever the nature of the court or tribunal.

(8) As regards judgments on divorce, legal separation or marriage annulment, this Regulation should apply only to the dissolution of matrimonial ties and should not deal with issues such as the grounds for divorce, property consequences of the marriage or any other ancillary measures.

(9) As regards the property of the child, this Regulation should apply only to measures for the protection of the child, i.e. (i) the designation and functions of a person or body having charge of the child's property, representing or assisting the child, and (ii) the administration, conservation or disposal of the child's property. In this context, this Regulation should, for instance, apply in cases where the parents



are in dispute as regards the administration of the child's property. Measures relating to the child's property which do not concern the protection of the child should continue to be governed by Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters(7).

(10) This Regulation is not intended to apply to matters relating to social security, public measures of a general nature in matters of education or health or to decisions on the right of asylum and on immigration. In addition it does not apply to the establishment of parenthood, since this is a different matter from the attribution of parental responsibility, nor to other questions linked to the status of persons. Moreover, it does not apply to measures taken as a result of criminal offences committed by children.

(11) Maintenance obligations are excluded from the scope of this Regulation as these are already covered by Council Regulation No 44/2001. The courts having jurisdiction under this Regulation will generally have jurisdiction to rule on maintenance obligations by application of Article 5(2) of Council Regulation No 44/2001.

(12) The grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity. This means that jurisdiction should lie in the first place with the Member State of the child's habitual residence, except for certain cases of a change in the child's residence or pursuant to an agreement between the holders of parental responsibility.

(13) In the interest of the child, this Regulation allows, by way of exception and under certain conditions, that the court having jurisdiction may transfer a case to a court of another Member State if this court is better placed to hear the case. However, in this case the second court should not be allowed to transfer the case to a third court.

(14) This Regulation should have effect without prejudice to the application of public international law concerning diplomatic immunities. Where jurisdiction under this Regulation cannot be exercised by reason of the existence of diplomatic immunity in accordance with international law, jurisdiction should be exercised in accordance with national law in a Member State in which the person concerned does not enjoy such immunity.

(15) Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters(8) should apply to the service of documents in proceedings instituted pursuant to this Regulation.

(16) This Regulation should not prevent the courts of a Member State from taking provisional, including protective measures, in urgent cases, with regard to persons or property situated in that State.

(17) In cases of wrongful removal or retention of a child, the return of the child should be obtained without delay, and to this end the Hague Convention of 25 October 1980 would continue to apply as complemented by the provisions of this Regulation, in particular Article 11. The courts of the Member State to or in which the child has been wrongfully removed or retained should be able to oppose his or her return in specific, duly justified cases. However, such a decision could be replaced by a

subsequent decision by the court of the Member State of habitual residence of the child prior to the wrongful removal or retention. Should that judgment entail the return of the child, the return should take place without any special procedure being required for recognition and enforcement of that judgment in the Member State to or in which the child has been removed or retained.

(18) Where a court has decided not to return a child on the basis of Article 13 of the 1980 Hague Convention, it should inform the court having jurisdiction or central authority in the Member State where the child was habitually resident prior to the wrongful removal or retention. Unless the court in the latter Member State has been seised, this court or the central authority should notify the parties. This obligation should not prevent the central authority from also notifying the relevant public authorities in accordance with national law.

(19) The hearing of the child plays an important role in the application of this Regulation, although this instrument is not intended to modify national procedures applicable.

(20) The hearing of a child in another Member State may take place under the arrangements laid down in Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters(9).

(21) The recognition and enforcement of judgments given in a Member State should be based on the principle of mutual trust and the grounds for non-recognition should be kept to the minimum required.

(22) Authentic instruments and agreements between parties that are enforceable in one Member State should be treated as equivalent to "judgments" for the purpose of the application of the rules on recognition and enforcement.

(23) The Tampere European Council considered in its conclusions (point 34) that judgments in the field of family litigation should be "automatically recognised throughout the Union without any intermediate proceedings or grounds for refusal of enforcement". This is why judgments on rights of access and judgments on return that have been certified in the Member State of origin in accordance with the provisions of this Regulation should be recognised and enforceable in all other Member States without any further procedure being required. Arrangements for the enforcement of such judgments continue to be governed by national law.

(24) The certificate issued to facilitate enforcement of the judgment should not be subject to appeal. It should be rectified only where there is a material error, i.e. where it does not correctly reflect the judgment.

(25) Central authorities should cooperate both in general matter and in specific cases, including for purposes of promoting the amicable resolution of family disputes, in matters of parental responsibility. To this end central authorities shall participate in the European Judicial Network in civil and commercial matters created by Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters(10).

(26) The Commission should make publicly available and update the lists of courts and redress procedures communicated by the Member States.

(27) The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission(11).

(28) This Regulation replaces Regulation (EC) No 1347/2000 which is consequently repealed.

#### European seminar

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child

(29) For the proper functioning of this Regulation, the Commission should review its application and propose such amendments as may appear necessary.

(30) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation.

(31) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, is not participating in the adoption of this Regulation and is therefore not bound by it nor subject to its application.

(32) Since the objectives of this Regulation cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

(33) This Regulation recognises the fundamental rights and observes the principles of the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure respect for the fundamental rights of the child as set out in Article 24 of the Charter of Fundamental Rights of the European Union,

HAS ADOPTED THE PRESENT REGULATION:

## **CHAPTER I SCOPE AND DEFINITIONS**

### *Article 1* **Scope**

1. This Regulation shall apply, whatever the nature of the court or tribunal, in civil matters relating to:

- (a) divorce, legal separation or marriage annulment;
- (b) the attribution, exercise, delegation, restriction or termination of parental responsibility.

2. The matters referred to in paragraph 1(b) may, in particular, deal with:

- (a) rights of custody and rights of access;
- (b) guardianship, curatorship and similar institutions;
- (c) the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child;
- (d) the placement of the child in a foster family or in institutional care;
- (e) measures for the protection of the child relating to the administration, conservation or disposal of the child's property.

3. This Regulation shall not apply to:

- (a) the establishment or contesting of a parent-child relationship;
- (b) decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption;
- (c) the name and forenames of the child;
- (d) emancipation;
- (e) maintenance obligations;
- (f) trusts or succession;
- (g) measures taken as a result of criminal offences committed by children.

*Article 2*  
**Definitions**

For the purposes of this Regulation:

1. the term "court" shall cover all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to Article 1;
2. the term "judge" shall mean the judge or an official having powers equivalent to those of a judge in the matters falling within the scope of the Regulation;
3. the term "Member State" shall mean all Member States with the exception of Denmark;
4. the term "judgment" shall mean a divorce, legal separation or marriage annulment, as well as a judgment relating to parental responsibility, pronounced by a court of a Member State, whatever the judgment may be called, including a decree, order or decision;
5. the term "Member State of origin" shall mean the Member State where the judgment to be enforced was issued;
6. the term "Member State of enforcement" shall mean the Member State where enforcement of the judgment is sought;
7. the term "parental responsibility" shall mean all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access;
8. the term "holder of parental responsibility" shall mean any person having parental responsibility over a child;
9. the term "rights of custody" shall include rights and duties relating to the care of the person of a child, and in particular the right to determine the child's place of residence;
10. the term "rights of access" shall include in particular the right to take a child to a place other than his or her habitual residence for a limited period of time;
11. the term "wrongful removal or retention" shall mean a child's removal or retention where:
  - (a) it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention; and
  - (b) provided that, at the time of removal or retention, the rights of custody were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Custody shall be considered to be exercised jointly when, pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility.

**CHAPTER II**  
**JURISDICTION**

**SECTION 1**  
**Divorce, legal separation and marriage annulment**

*Article 3*  
**General jurisdiction**

1. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State

**European seminar**

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child

(a) in whose territory:

- the spouses are habitually resident, or
- the spouses were last habitually resident, insofar as one of them still resides there, or
- the respondent is habitually resident, or
- in the event of a joint application, either of the spouses is habitually resident, or
- the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or
- the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her "domicile" there;

(b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the "domicile" of both spouses.

2. For the purpose of this Regulation, "domicile" shall have the same meaning as it has under the legal systems of the United Kingdom and Ireland.

#### *Article 4* **Counterclaim**

The court in which proceedings are pending on the basis of Article 3 shall also have jurisdiction to examine a counterclaim, insofar as the latter comes within the scope of this Regulation.

#### *Article 5* **Conversion of legal separation into divorce**

Without prejudice to Article 3, a court of a Member State that has given a judgment on a legal separation shall also have jurisdiction for converting that judgment into a divorce, if the law of that Member State so provides.

#### *Article 6* **Exclusive nature of jurisdiction under Articles 3, 4 and 5**

A spouse who:

- (a) is habitually resident in the territory of a Member State; or
- (b) is a national of a Member State, or, in the case of the United Kingdom and Ireland, has his or her "domicile" in the territory of one of the latter Member States, may be sued in another Member State only in accordance with Articles 3, 4 and 5.

#### *Article 7* **Residual jurisdiction**

1. Where no court of a Member State has jurisdiction pursuant to Articles 3, 4 and 5, jurisdiction shall be determined, in each Member State, by the laws of that State.

2. As against a respondent who is not habitually resident and is not either a national of a Member State or, in the case of the United Kingdom and Ireland, does not have his "domicile" within the territory of one of the latter Member States, any national of a Member State who is habitually resident within the territory of another Member State may, like the nationals of that State, avail himself of the rules of jurisdiction applicable in that State.

## **SECTION 2**

### **Parental responsibility**

#### *Article 8*

#### **General jurisdiction**

1. The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.
2. Paragraph 1 shall be subject to the provisions of Articles 9, 10 and 12.

#### *Article 9*

#### **Continuing jurisdiction of the child's former habitual residence**

1. Where a child moves lawfully from one Member State to another and acquires a new habitual residence there, the courts of the Member State of the child's former habitual residence shall, by way of exception to Article 8, retain jurisdiction during a three-month period following the move for the purpose of modifying a judgment on access rights issued in that Member State before the child moved, where the holder of access rights pursuant to the judgment on access rights continues to have his or her habitual residence in the Member State of the child's former habitual residence.
2. Paragraph 1 shall not apply if the holder of access rights referred to in paragraph 1 has accepted the jurisdiction of the courts of the Member State of the child's new habitual residence by participating in proceedings before those courts without contesting their jurisdiction.

#### *Article 10*

#### **Jurisdiction in cases of child abduction**

In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State and:

- (a) each person, institution or other body having rights of custody has acquiesced in the removal or retention; or
- (b) the child has resided in that other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met:
  - (i) within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained;
  - (ii) a request for return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the time limit set in paragraph (i);
  - (iii) a case before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed pursuant to Article 11(7);

#### **European seminar**

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child

(iv) a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention.

### *Article 11* **Return of the child**

1. Where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter "the 1980 Hague Convention"), in order to obtain the return of a child that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, paragraphs 2 to 8 shall apply.

2. When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.

3. A court to which an application for return of a child is made as mentioned in paragraph 1 shall act expeditiously in proceedings on the application, using the most expeditious procedures available in national law.

Without prejudice to the first subparagraph, the court shall, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged.

4. A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return.

5. A court cannot refuse to return a child unless the person who requested the return of the child has been given an opportunity to be heard.

6. If a court has issued an order on non-return pursuant to Article 13 of the 1980 Hague Convention, the court must immediately either directly or through its central authority, transmit a copy of the court order on non-return and of the relevant documents, in particular a transcript of the hearings before the court, to the court with jurisdiction or central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law. The court shall receive all the mentioned documents within one month of the date of the non-return order.

7. Unless the courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seised by one of the parties, the court or central authority that receives the information mentioned in paragraph 6 must notify it to the parties and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child. Without prejudice to the rules on jurisdiction contained in this Regulation, the court shall close the case if no submissions have been received by the court within the time limit.

8. Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child.

*Article 12*  
**Prorogation of jurisdiction**

1. The courts of a Member State exercising jurisdiction by virtue of Article 3 on an application for divorce, legal separation or marriage annulment shall have jurisdiction in any matter relating to parental responsibility connected with that application where:

(a) at least one of the spouses has parental responsibility in relation to the child; and  
(b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility, at the time the court is seised, and is in the superior interests of the child.

2. The jurisdiction conferred in paragraph 1 shall cease as soon as:

(a) the judgment allowing or refusing the application for divorce, legal separation or marriage annulment has become final;

(b) in those cases where proceedings in relation to parental responsibility are still pending on the date referred to in (a), a judgment in these proceedings has become final;

(c) the proceedings referred to in (a) and (b) have come to an end for another reason.

3. The courts of a Member State shall also have jurisdiction in relation to parental responsibility in proceedings other than those referred to in paragraph 1 where:

(a) the child has a substantial connection with that Member State, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State; and

(b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised and is in the best interests of the child.

4. Where the child has his or her habitual residence in the territory of a third State which is not a contracting party to the Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, jurisdiction under this Article shall be deemed to be in the child's interest, in particular if it is found impossible to hold proceedings in the third State in question.

*Article 13*  
**Jurisdiction based on the child's presence**

1. Where a child's habitual residence cannot be established and jurisdiction cannot be determined on the basis of Article 12, the courts of the Member State where the child is present shall have jurisdiction.

2. Paragraph 1 shall also apply to refugee children or children internationally displaced because of disturbances occurring in their country.

*Article 14*  
**Residual jurisdiction**

Where no court of a Member State has jurisdiction pursuant to Articles 8 to 13, jurisdiction shall be determined, in each Member State, by the laws of that State.

**European seminar**

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child



## Article 15

### Transfer to a court better placed to hear the case

1. By way of exception, the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State, with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child:

(a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with paragraph 4; or  
(b) request a court of another Member State to assume jurisdiction in accordance with paragraph 5.

2. Paragraph 1 shall apply:

(a) upon application from a party; or

(b) of the court's own motion; or

(c) upon application from a court of another Member State with which the child has a particular connection, in accordance with paragraph 3.

A transfer made of the court's own motion or by application of a court of another Member State must be accepted by at least one of the parties.

3. The child shall be considered to have a particular connection to a Member State as mentioned in paragraph 1, if that Member State:

(a) has become the habitual residence of the child after the court referred to in paragraph 1 was seised; or

(b) is the former habitual residence of the child; or

(c) is the place of the child's nationality; or

(d) is the habitual residence of a holder of parental responsibility; or

(e) is the place where property of the child is located and the case concerns measures for the protection of the child relating to the administration, conservation or disposal of this property.

4. The court of the Member State having jurisdiction as to the substance of the matter shall set a time limit by which the courts of that other Member State shall be seised in accordance with paragraph 1.

If the courts are not seised by that time, the court which has been seised shall continue to exercise jurisdiction in accordance with Articles 8 to 14.

5. The courts of that other Member State may, where due to the specific circumstances of the case, this is in the best interests of the child, accept jurisdiction within six weeks of their seisure in accordance with paragraph 1(a) or 1(b). In this case, the court first seised shall decline jurisdiction. Otherwise, the court first seised shall continue to exercise jurisdiction in accordance with Articles 8 to 14.

6. The courts shall cooperate for the purposes of this Article, either directly or through the central authorities designated pursuant to Article 53.

## SECTION 3

### Common provisions

## Article 16

### Seising of a Court

1. A court shall be deemed to be seised:

(a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently

failed to take the steps he was required to take to have service effected on the respondent; or

(b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the applicant has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

#### *Article 17*

### **Examination as to jurisdiction**

Where a court of a Member State is seised of a case over which it has no jurisdiction under this Regulation and over which a court of another Member State has jurisdiction by virtue of this Regulation, it shall declare of its own motion that it has no jurisdiction.

#### *Article 18*

### **Examination as to admissibility**

1. Where a respondent habitually resident in a State other than the Member State where the action was brought does not enter an appearance, the court with jurisdiction shall stay the proceedings so long as it is not shown that the respondent has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.

2. Article 19 of Regulation (EC) No 1348/2000 shall apply instead of the provisions of paragraph 1 of this Article if the document instituting the proceedings or an equivalent document had to be transmitted from one Member State to another pursuant to that Regulation.

3. Where the provisions of Regulation (EC) No 1348/2000 are not applicable, Article 15 of the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters shall apply if the document instituting the proceedings or an equivalent document had to be transmitted abroad pursuant to that Convention.

#### *Article 19*

### **Lis pendens and dependent actions**

1. Where proceedings relating to divorce, legal separation or marriage annulment between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where proceedings relating to parental responsibility relating to the same child and involving the same cause of action are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

3. Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court.

In that case, the party who brought the relevant action before the court second seised may bring that action before the court first seised.

*Article 20*  
**Provisional, including protective, measures**

1. In urgent cases, the provisions of this Regulation shall not prevent the courts of a Member State from taking such provisional, including protective, measures in respect of persons or assets in that State as may be available under the law of that Member State, even if, under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter.
2. The measures referred to in paragraph 1 shall cease to apply when the court of the Member State having jurisdiction under this Regulation as to the substance of the matter has taken the measures it considers appropriate.

**CHAPTER III**  
**RECOGNITION AND ENFORCEMENT**

**SECTION 1**  
**Recognition**

*Article 21*  
**Recognition of a judgment**

1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.
2. In particular, and without prejudice to paragraph 3, no special procedure shall be required for updating the civil-status records of a Member State on the basis of a judgment relating to divorce, legal separation or marriage annulment given in another Member State, and against which no further appeal lies under the law of that Member State.
3. Without prejudice to Section 4 of this Chapter, any interested party may, in accordance with the procedures provided for in Section 2 of this Chapter, apply for a decision that the judgment be or not be recognised.  
The local jurisdiction of the court appearing in the list notified by each Member State to the Commission pursuant to Article 68 shall be determined by the internal law of the Member State in which proceedings for recognition or non-recognition are brought.
4. Where the recognition of a judgment is raised as an incidental question in a court of a Member State, that court may determine that issue.

*Article 22*  
**Grounds of non-recognition for judgments relating to divorce,  
legal separation or marriage annulment**

A judgment relating to a divorce, legal separation or marriage annulment shall not be recognised:

- (a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought;
- (b) where it was given in default of appearance, if the respondent was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable the respondent to arrange for his or

her defence unless it is determined that the respondent has accepted the judgment unequivocally;

(c) if it is irreconcilable with a judgment given in proceedings between the same parties in the Member State in which recognition is sought; or

(d) if it is irreconcilable with an earlier judgment given in another Member State or in a non-Member State between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

#### *Article 23*

### **Grounds of non-recognition for judgments relating to parental responsibility**

A judgment relating to parental responsibility shall not be recognised:

(a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child;

(b) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought;

(c) where it was given in default of appearance if the person in default was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence unless it is determined that such person has accepted the judgment unequivocally;

(d) on the request of any person claiming that the judgment infringes his or her parental responsibility, if it was given without such person having been given an opportunity to be heard;

(e) if it is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought;

(f) if it is irreconcilable with a later judgment relating to parental responsibility given in another Member State or in the non-Member State of the habitual residence of the child provided that the later judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought. or

(g) if the procedure laid down in Article 56 has not been complied with.

#### *Article 24*

### **Prohibition of review of jurisdiction of the court of origin**

The jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in Articles 22(a) and 23(a) may not be applied to the rules relating to jurisdiction set out in Articles 3 to 14.

#### *Article 25*

### **Differences in applicable law**

The recognition of a judgment may not be refused because the law of the Member State in which such recognition is sought would not allow divorce, legal separation or marriage annulment on the same facts.

#### **European seminar**

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child

*Article 26*  
**Non-review as to substance**

Under no circumstances may a judgment be reviewed as to its substance.

*Article 27*  
**Stay of proceedings**

1. A court of a Member State in which recognition is sought of a judgment given in another Member State may stay the proceedings if an ordinary appeal against the judgment has been lodged.

2. A court of a Member State in which recognition is sought of a judgment given in Ireland or the United Kingdom may stay the proceedings if enforcement is suspended in the Member State of origin by reason of an appeal.

**SECTION 2**  
**Application for a declaration of enforceability**

*Article 28*  
**Enforceable judgments**

1. A judgment on the exercise of parental responsibility in respect of a child given in a Member State which is enforceable in that Member State and has been served shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.

2. However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland or in Northern Ireland only when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom.

*Article 29*  
**Jurisdiction of local courts**

1. An application for a declaration of enforceability shall be submitted to the court appearing in the list notified by each Member State to the Commission pursuant to Article 68.

2. The local jurisdiction shall be determined by reference to the place of habitual residence of the person against whom enforcement is sought or by reference to the habitual residence of any child to whom the application relates.

Where neither of the places referred to in the first subparagraph can be found in the Member State of enforcement, the local jurisdiction shall be determined by reference to the place of enforcement.

*Article 30*  
**Procedure**

1. The procedure for making the application shall be governed by the law of the Member State of enforcement.

2. The applicant must give an address for service within the area of jurisdiction of the court applied to. However, if the law of the Member State of enforcement does not provide for the furnishing of such an address, the applicant shall appoint a representative ad litem.

3. The documents referred to in Articles 37 and 39 shall be attached to the application.

*Article 31*  
**Decision of the court**

1. The court applied to shall give its decision without delay. Neither the person against whom enforcement is sought, nor the child shall, at this stage of the proceedings, be entitled to make any submissions on the application.
2. The application may be refused only for one of the reasons specified in Articles 22, 23 and 24.
3. Under no circumstances may a judgment be reviewed as to its substance.

*Article 32*  
**Notice of the decision**

The appropriate officer of the court shall without delay bring to the notice of the applicant the decision given on the application in accordance with the procedure laid down by the law of the Member State of enforcement.

*Article 33*  
**Appeal against the decision**

1. The decision on the application for a declaration of enforceability may be appealed against by either party.
2. The appeal shall be lodged with the court appearing in the list notified by each Member State to the Commission pursuant to Article 68.
3. The appeal shall be dealt with in accordance with the rules governing procedure in contradictory matters.
4. If the appeal is brought by the applicant for a declaration of enforceability, the party against whom enforcement is sought shall be summoned to appear before the appellate court. If such person fails to appear, the provisions of Article 18 shall apply.
5. An appeal against a declaration of enforceability must be lodged within one month of service thereof. If the party against whom enforcement is sought is habitually resident in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be two months and shall run from the date of service, either on him or at his residence. No extension of time may be granted on account of distance.

*Article 34*  
**Courts of appeal and means of contest**

The judgment given on appeal may be contested only by the proceedings referred to in the list notified by each Member State to the Commission pursuant to Article 68.

*Article 35*  
**Stay of proceedings**

1. The court with which the appeal is lodged under Articles 33 or 34 may, on the application of the party against whom enforcement is sought, stay the proceedings if an ordinary appeal has been lodged in the Member State of origin, or if the time for such appeal has not yet expired. In the latter case, the court may specify the time within which an appeal is to be lodged.

2. Where the judgment was given in Ireland or the United Kingdom, any form of appeal available in the Member State of origin shall be treated as an ordinary appeal for the purposes of paragraph 1.

*Article 36*  
**Partial enforcement**

1. Where a judgment has been given in respect of several matters and enforcement cannot be authorised for all of them, the court shall authorise enforcement for one or more of them.
2. An applicant may request partial enforcement of a judgment.

**SECTION 3**  
**Provisions common to Sections 1 and 2**

*Article 37*  
**Documents**

1. A party seeking or contesting recognition or applying for a declaration of enforceability shall produce:
  - (a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and
  - (b) the certificate referred to in Article 39.
2. In addition, in the case of a judgment given in default, the party seeking recognition or applying for a declaration of enforceability shall produce:
  - (a) the original or certified true copy of the document which establishes that the defaulting party was served with the document instituting the proceedings or with an equivalent document; or
  - (b) any document indicating that the defendant has accepted the judgment unequivocally.

*Article 38*  
**Absence of documents**

1. If the documents specified in Article 37(1)(b) or (2) are not produced, the court may specify a time for their production, accept equivalent documents or, if it considers that it has sufficient information before it, dispense with their production.
2. If the court so requires, a translation of such documents shall be furnished. The translation shall be certified by a person qualified to do so in one of the Member States.

*Article 39*  
**Certificate concerning judgments in matrimonial matters and certificate concerning judgments on parental responsibility**

The competent court or authority of a Member State of origin shall, at the request of any interested party, issue a certificate using the standard form set out in Annex I (judgments in matrimonial matters) or in Annex II (judgments on parental responsibility).

**SECTION 4**  
**Enforceability of certain judgments concerning rights of access and of  
certain judgments which require the return of the child**

*Article 40*  
**Scope**

1. This Section shall apply to:
  - (a) rights of access; and
  - (b) the return of a child entailed by a judgment given pursuant to Article 11(8).
2. The provisions of this Section shall not prevent a holder of parental responsibility from seeking recognition and enforcement of a judgment in accordance with the provisions in Sections 1 and 2 of this Chapter.

*Article 41*  
**Rights of access**

1. The rights of access referred to in Article 40(1)(a) granted in an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2.

Even if national law does not provide for enforceability by operation of law of a judgment granting access rights, the court of origin may declare that the judgment shall be enforceable, notwithstanding any appeal.

2. The judge of origin shall issue the certificate referred to in paragraph 1 using the standard form in Annex III (certificate concerning rights of access) only if:

(a) where the judgment was given in default, the person defaulting was served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defense, or, the person has been served with the document but not in compliance with these conditions, it is nevertheless established that he or she accepted the decision unequivocally;

(b) all parties concerned were given an opportunity to be heard; and

(c) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity.

The certificate shall be completed in the language of the judgment.

3. Where the rights of access involve a cross-border situation at the time of the delivery of the judgment, the certificate shall be issued ex officio when the judgment becomes enforceable, even if only provisionally. If the situation subsequently acquires a cross-border character, the certificate shall be issued at the request of one of the parties.

*Article 42*  
**Return of the child**

1. The return of a child referred to in Article 40(1)(b) entailed by an enforceable judgment given in a Member State shall be recognised and enforceable in another

**European seminar**

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child



Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2.

Even if national law does not provide for enforceability by operation of law, notwithstanding any appeal, of a judgment requiring the return of the child mentioned in Article 11(b)(8), the court of origin may declare the judgment enforceable.

2. The judge of origin who delivered the judgment referred to in Article 40(1)(b) shall issue the certificate referred to in paragraph 1 only if:

(a) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity;

(b) the parties were given an opportunity to be heard; and

(c) the court has taken into account in issuing its judgment the reasons for and evidence underlying the order issued pursuant to Article 13 of the 1980 Hague Convention.

In the event that the court or any other authority takes measures to ensure the protection of the child after its return to the State of habitual residence, the certificate shall contain details of such measures.

The judge of origin shall of his or her own motion issue that certificate using the standard form in Annex IV (certificate concerning return of the child(ren)).

The certificate shall be completed in the language of the judgment.

#### *Article 43*

### **Rectification of the certificate**

1. The law of the Member State of origin shall be applicable to any rectification of the certificate.

2. No appeal shall lie against the issuing of a certificate pursuant to Articles 41(1) or 42(1).

#### *Article 44*

### **Effects of the certificate**

The certificate shall take effect only within the limits of the enforceability of the judgment.

#### *Article 45*

### **Documents**

1. A party seeking enforcement of a judgment shall produce:

(a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and

(b) the certificate referred to in Article 41(1) or Article 42(1).

2. For the purposes of this Article,

- the certificate referred to in Article 41(1) shall be accompanied by a translation of point 12 relating to the arrangements for exercising right of access,

- the certificate referred to in Article 42(1) shall be accompanied by a translation of its point 14 relating to the arrangements for implementing the measures taken to ensure the child's return.

The translation shall be into the official language or one of the official languages of the Member State of enforcement or any other language that the Member State of

enforcement expressly accepts. The translation shall be certified by a person qualified to do so in one of the Member States.

## **SECTION 5**

### **Authentic instruments and agreements**

#### *Article 46*

**Documents which have been formally drawn up or registered as authentic instruments and are enforceable in one Member State and also agreements between the parties that are enforceable in the Member State in which they were concluded shall be recognised and declared enforceable under the same conditions as judgments.**

## **SECTION 6**

### **Other provisions**

#### *Article 47*

#### **Enforcement procedure**

1. The enforcement procedure is governed by the law of the Member State of enforcement.
2. Any judgment delivered by a court of another Member State and declared to be enforceable in accordance with Section 2 or certified in accordance with Article 41(1) or Article 42(1) shall be enforced in the Member State of enforcement in the same conditions as if it had been delivered in that Member State.

In particular, a judgment which has been certified according to Article 41(1) or Article 42(1) cannot be enforced if it is irreconcilable with a subsequent enforceable judgment.

#### *Article 48*

#### **Practical arrangements for the exercise of rights of access**

1. The courts of the Member State of enforcement may make practical arrangements for organising the exercise of rights of access, if the necessary arrangements have not or have not sufficiently been made in the judgment delivered by the courts of the Member State having jurisdiction as to the substance of the matter and provided the essential elements of this judgment are respected.
2. The practical arrangements made pursuant to paragraph 1 shall cease to apply pursuant to a later judgment by the courts of the Member State having jurisdiction as to the substance of the matter.

#### *Article 49*

#### **Costs**

The provisions of this Chapter, with the exception of Section 4, shall also apply to the determination of the amount of costs and expenses of proceedings under this Regulation and to the enforcement of any order concerning such costs and expenses.

#### **European seminar**

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child

*Article 50*  
**Legal aid**

An applicant who, in the Member State of origin, has benefited from complete or partial legal aid or exemption from costs or expenses shall be entitled, in the procedures provided for in Articles 21, 28, 41, 42 and 48 to benefit from the most favourable legal aid or the most extensive exemption from costs and expenses provided for by the law of the Member State of enforcement.

*Article 51*  
**Security, bond or deposit**

No security, bond or deposit, however described, shall be required of a party who in one Member State applies for enforcement of a judgment given in another Member State on the following grounds:

- (a) that he or she is not habitually resident in the Member State in which enforcement is sought; or
- (b) that he or she is either a foreign national or, where enforcement is sought in either the United Kingdom or Ireland, does not have his or her "domicile" in either of those Member States.

*Article 52*  
**Legalisation or other similar formality**

No legalisation or other similar formality shall be required in respect of the documents referred to in Articles 37, 38 and 45 or in respect of a document appointing a representative ad litem.

**CHAPTER IV**  
**COOPERATION BETWEEN CENTRAL AUTHORITIES**  
**IN MATTERS OF PARENTAL RESPONSIBILITY**

*Article 53*  
**Designation**

Each Member State shall designate one or more central authorities to assist with the application of this Regulation and shall specify the geographical or functional jurisdiction of each. Where a Member State has designated more than one central authority, communications shall normally be sent direct to the relevant central authority with jurisdiction. Where a communication is sent to a central authority without jurisdiction, the latter shall be responsible for forwarding it to the central authority with jurisdiction and informing the sender accordingly.

*Article 54*  
**General functions**

The central authorities shall communicate information on national laws and procedures and take measures to improve the application of this Regulation and

strengthening their cooperation. For this purpose the European Judicial Network in civil and commercial matters created by Decision No 2001/470/EC shall be used.

#### *Article 55*

### **Cooperation on cases specific to parental responsibility**

The central authorities shall, upon request from a central authority of another Member State or from a holder of parental responsibility, cooperate on specific cases to achieve the purposes of this Regulation. To this end, they shall, acting directly or through public authorities or other bodies, take all appropriate steps in accordance with the law of that Member State in matters of personal data protection to:

(a) collect and exchange information:

(i) on the situation of the child;

(ii) on any procedures under way; or

(iii) on decisions taken concerning the child;

(b) provide information and assistance to holders of parental responsibility seeking the recognition and enforcement of decisions on their territory, in particular concerning rights of access and the return of the child;

(c) facilitate communications between courts, in particular for the application of Article 11(6) and (7) and Article 15;

(d) provide such information and assistance as is needed by courts to apply Article 56; and

(e) facilitate agreement between holders of parental responsibility through mediation or other means, and facilitate cross-border cooperation to this end.

#### *Article 56*

### **Placement of a child in another Member State**

1. Where a court having jurisdiction under Articles 8 to 15 contemplates the placement of a child in institutional care or with a foster family and where such placement is to take place in another Member State, it shall first consult the central authority or other authority having jurisdiction in the latter State where public authority intervention in that Member State is required for domestic cases of child placement.

2. The judgment on placement referred to in paragraph 1 may be made in the requesting State only if the competent authority of the requested State has consented to the placement.

3. The procedures for consultation or consent referred to in paragraphs 1 and 2 shall be governed by the national law of the requested State.

4. Where the authority having jurisdiction under Articles 8 to 15 decides to place the child in a foster family, and where such placement is to take place in another Member State and where no public authority intervention is required in the latter Member State for domestic cases of child placement, it shall so inform the central authority or other authority having jurisdiction in the latter State.

#### **European seminar**

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child

*Article 57*  
**Working method**

1. Any holder of parental responsibility may submit, to the central authority of the Member State of his or her habitual residence or to the central authority of the Member State where the child is habitually resident or present, a request for assistance as mentioned in Article 55. In general, the request shall include all available information of relevance to its enforcement. Where the request for assistance concerns the recognition or enforcement of a judgment on parental responsibility that falls within the scope of this Regulation, the holder of parental responsibility shall attach the relevant certificates provided for in Articles 39, 41(1) or 42(1).
2. Member States shall communicate to the Commission the official language or languages of the Community institutions other than their own in which communications to the central authorities can be accepted.
3. The assistance provided by the central authorities pursuant to Article 55 shall be free of charge.
4. Each central authority shall bear its own costs.

*Article 58*  
**Meetings**

1. In order to facilitate the application of this Regulation, central authorities shall meet regularly.
2. These meetings shall be convened in compliance with Decision No 2001/470/EC establishing a European Judicial Network in civil and commercial matters.

**CHAPTER V**  
**RELATIONS WITH OTHER INSTRUMENTS**

*Article 59*  
**Relation with other instruments**

1. Subject to the provisions of Articles 60, 63, 64 and paragraph 2 of this Article, this Regulation shall, for the Member States, supersede conventions existing at the time of entry into force of this Regulation which have been concluded between two or more Member States and relate to matters governed by this Regulation.
2. (a) Finland and Sweden shall have the option of declaring that the Convention of 6 February 1931 between Denmark, Finland, Iceland, Norway and Sweden comprising international private law provisions on marriage, adoption and guardianship, together with the Final Protocol thereto, will apply, in whole or in part, in their mutual relations, in place of the rules of this Regulation. Such declarations shall be annexed to this Regulation and published in the Official Journal of the European Union. They may be withdrawn, in whole or in part, at any moment by the said Member States.  
(b) The principle of non-discrimination on the grounds of nationality between citizens of the Union shall be respected.

(c) The rules of jurisdiction in any future agreement to be concluded between the Member States referred to in subparagraph (a) which relate to matters governed by this Regulation shall be in line with those laid down in this Regulation.

(d) Judgments handed down in any of the Nordic States which have made the declaration provided for in subparagraph (a) under a forum of jurisdiction corresponding to one of those laid down in Chapter II of this Regulation, shall be recognised and enforced in the other Member States under the rules laid down in Chapter III of this Regulation.

3. Member States shall send to the Commission:

(a) a copy of the agreements and uniform laws implementing these agreements referred to in paragraph 2(a) and (c);

(b) any denunciations of, or amendments to, those agreements or uniform laws.

#### *Article 60*

### **Relations with certain multilateral conventions**

In relations between Member States, this Regulation shall take precedence over the following Conventions in so far as they concern matters governed by this Regulation:

(a) the Hague Convention of 5 October 1961 concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Minors;

(b) the Luxembourg Convention of 8 September 1967 on the Recognition of Decisions Relating to the Validity of Marriages;

(c) the Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations;

(d) the European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children; and

(e) the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

#### *Article 61*

### **Relation with the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children**

As concerns the relation with the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, this Regulation shall apply:

(a) where the child concerned has his or her habitual residence on the territory of a Member State;

(b) as concerns the recognition and enforcement of a judgment given in a court of a Member State on the territory of another Member State, even if the child concerned has his or her habitual residence on the territory of a third State which is a contracting Party to the said Convention.

*Article 62*  
**Scope of effects**

1. The agreements and conventions referred to in Articles 59(1), 60 and 61 shall continue to have effect in relation to matters not governed by this Regulation.
2. The conventions mentioned in Article 60, in particular the 1980 Hague Convention, continue to produce effects between the Member States which are party thereto, in compliance with Article 60.

*Article 63*  
**Treaties with the Holy See**

1. This Regulation shall apply without prejudice to the International Treaty (Concordat) between the Holy See and Portugal, signed at the Vatican City on 7 May 1940.
2. Any decision as to the invalidity of a marriage taken under the Treaty referred to in paragraph 1 shall be recognised in the Member States on the conditions laid down in Chapter III, Section 1.
3. The provisions laid down in paragraphs 1 and 2 shall also apply to the following international treaties (Concordats) with the Holy See:
  - (a) "Concordato lateranense" of 11 February 1929 between Italy and the Holy See, modified by the agreement, with additional Protocol signed in Rome on 18 February 1984;
  - (b) Agreement between the Holy See and Spain on legal affairs of 3 January 1979.
4. Recognition of the decisions provided for in paragraph 2 may, in Italy or in Spain, be subject to the same procedures and the same checks as are applicable to decisions of the ecclesiastical courts handed down in accordance with the international treaties concluded with the Holy See referred to in paragraph 3.
5. Member States shall send to the Commission:
  - (a) a copy of the Treaties referred to in paragraphs 1 and 3;
  - (b) any denunciations of or amendments to those Treaties.

**CHAPTER VI**  
**TRANSITIONAL PROVISIONS**

*Article 64*

1. The provisions of this Regulation shall apply only to legal proceedings instituted, to documents formally drawn up or registered as authentic instruments and to agreements concluded between the parties after its date of application in accordance with Article 72.
2. Judgments given after the date of application of this Regulation in proceedings instituted before that date but after the date of entry into force of Regulation (EC) No 1347/2000 shall be recognised and enforced in accordance with the provisions of Chapter III of this Regulation if jurisdiction was founded on rules which accorded with those provided for either in Chapter II or in Regulation (EC) No 1347/2000 or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

3. Judgments given before the date of application of this Regulation in proceedings instituted after the entry into force of Regulation (EC) No 1347/2000 shall be recognised and enforced in accordance with the provisions of Chapter III of this Regulation provided they relate to divorce, legal separation or marriage annulment or parental responsibility for the children of both spouses on the occasion of these matrimonial proceedings.

4. Judgments given before the date of application of this Regulation but after the date of entry into force of Regulation (EC) No 1347/2000 in proceedings instituted before the date of entry into force of Regulation (EC) No 1347/2000 shall be recognised and enforced in accordance with the provisions of Chapter III of this Regulation provided they relate to divorce, legal separation or marriage annulment or parental responsibility for the children of both spouses on the occasion of these matrimonial proceedings and that jurisdiction was founded on rules which accorded with those provided for either in Chapter II of this Regulation or in Regulation (EC) No 1347/2000 or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

## **CHAPTER VII FINAL PROVISIONS**

### *Article 65* **Review**

No later than 1 January 2012, and every five years thereafter, the Commission shall present to the European Parliament, to the Council and to the European Economic and Social Committee a report on the application of this Regulation on the basis of information supplied by the Member States. The report shall be accompanied if need be by proposals for adaptations.

### *Article 66* **Member States with two or more legal systems**

With regard to a Member State in which two or more systems of law or sets of rules concerning matters governed by this Regulation apply in different territorial units:

- (a) any reference to habitual residence in that Member State shall refer to habitual residence in a territorial unit;
- (b) any reference to nationality, or in the case of the United Kingdom "domicile", shall refer to the territorial unit designated by the law of that State;
- (c) any reference to the authority of a Member State shall refer to the authority of a territorial unit within that State which is concerned;
- (d) any reference to the rules of the requested Member State shall refer to the rules of the territorial unit in which jurisdiction, recognition or enforcement is invoked.

### *Article 67* **Information on central authorities and languages accepted**

The Member States shall communicate to the Commission within three months following the entry into force of this Regulation:

- (a) the names, addresses and means of communication for the central authorities designated pursuant to Article 53;

#### **European seminar**

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child



(b) the languages accepted for communications to central authorities pursuant to Article 57(2); and

(c) the languages accepted for the certificate concerning rights of access pursuant to Article 45(2).

The Member States shall communicate to the Commission any changes to this information.

The Commission shall make this information publicly available.

#### *Article 68*

### **Information relating to courts and redress procedures**

The Member States shall notify to the Commission the lists of courts and redress procedures referred to in Articles 21, 29, 33 and 34 and any amendments thereto.

The Commission shall update this information and make it publicly available through the publication in the Official Journal of the European Union and any other appropriate means.

#### *Article 69*

### **Amendments to the Annexes**

Any amendments to the standard forms in Annexes I to IV shall be adopted in accordance with the consultative procedure set out in Article 70(2).

#### *Article 70*

### **Committee**

1. The Commission shall be assisted by a committee (committee).
2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply.
3. The committee shall adopt its rules of procedure.

#### *Article 71*

### **Repeal of Regulation (EC) No 1347/2000**

1. Regulation (EC) No 1347/2000 shall be repealed as from the date of application of this Regulation.
2. Any reference to Regulation (EC) No 1347/2000 shall be construed as a reference to this Regulation according to the comparative table in Annex V.

#### *Article 72*

### **Entry into force**

This Regulation shall enter into force on 1 August 2004.

The Regulation shall apply from 1 March 2005, with the exception of Articles 67, 68, 69 and 70, which shall apply from 1 August 2004.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, 27 November 2003.

*For the Council  
The President  
R. Castelli*

- (1) OJ C 203 E, 27.8.2002, p. 155.
- (2) Opinion delivered on 20 September 2002 (not yet published in the Official Journal).
- (3) OJ C 61, 14.3.2003, p. 76.
- (4) OJ L 160, 30.6.2000, p. 19.
- (5) At the time of the adoption of Regulation (EC) No 1347/2000 the Council took note of the explanatory report concerning that Convention prepared by Professor Alegria Borrás (OJ C 221, 16.7.1998, p. 27).
- (6) OJ C 234, 15.8.2000, p. 7.
- (7) OJ L 12, 16.1.2001, p. 1. Regulation as last amended by Commission Regulation (EC) No 1496/2002 (OJ L 225, 22.8.2002, p. 13).
- (8) OJ L 160, 30.6.2000, p. 37.
- (9) OJ L 174, 27.6.2001, p. 1.
- (10) OJ L 174, 27.6.2001, p. 25.
- (11) OJ L 184, 17.7.1999, p. 23.

---

**ANNEX I**  
**CERTIFICATE REFERRED TO IN ARTICLE 39 CONCERNING JUDGMENTS**  
**IN MATRIMONIAL MATTERS(1)**

1. Member State of origin
2. Court or authority issuing the certificate
  - 2.1. Name
  - 2.2. Address
  - 2.3. Tel./fax/e-mail
3. Marriage
  - 3.1. Wife
    - 3.1.1. Full name
    - 3.1.2. Address
    - 3.1.3. Country and place of birth
    - 3.1.4. Date of birth
  - 3.2. Husband
    - 3.2.1. Full name
    - 3.2.2. Address
    - 3.2.3. Country and place of birth
    - 3.2.4. Date of birth
  - 3.3. Country, place (where available) and date of marriage
    - 3.3.1. Country of marriage
    - 3.3.2. Place of marriage (where available)
    - 3.3.3. Date of marriage

**European seminar**

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child

4. Court which delivered the judgment
  - 4.1. Name of Court
  - 4.2. Place of Court
5. Judgment
  - 5.1. Date
  - 5.2. Reference number
  - 5.3. Type of judgment
    - 5.3.1. Divorce
    - 5.3.2. Marriage annulment
    - 5.3.3. Legal separation
  - 5.4. Was the judgment given in default of appearance?
    - 5.4.1. No
    - 5.4.2. Yes(2)
6. Names of parties to whom legal aid has been granted
7. Is the judgment subject to further appeal under the law of the Member State of origin?
  - 7.1. No
  - 7.2. Yes
8. Date of legal effect in the Member State where the judgment was given
  - 8.1. Divorce
  - 8.2. Legal separation
 Done at ..., date ...  
 Signature and/or stamp

- (1) Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.
- (2) Documents referred to in Article 37(2) must be attached.

**ANNEX II**  
**CERTIFICATE REFERRED TO IN ARTICLE 39 CONCERNING JUDGMENTS**  
**ON PARENTAL RESPONSIBILITY(1)**

1. Member State of origin
2. Court or authority issuing the certificate
  - 2.1. Name
  - 2.2. Address
  - 2.3. Tel./Fax/e-mail
3. Person(s) with rights of access
  - 3.1. Full name
  - 3.2. Address
  - 3.3. Date and place of birth (where available)
4. Holders of parental responsibility other than those mentioned under 3(2)
  - 4.1. 4.1.1. Full name
  - 4.1.2. Address
  - 4.1.3. Date and place of birth (where available)

- 4.2. 4.2.1. Full Name
- 4.2.2. Address
- 4.2.3. Date and place of birth (where available)
- 4.3. 4.3.1. Full name
- 4.3.2. Address
- 4.3.3. Date and place of birth (where available)
- 5. Court which delivered the judgment
  - 5.1. Name of Court
  - 5.2. Place of Court
- 6. Judgment
  - 6.1. Date
  - 6.2. Reference number
  - 6.3. Was the judgment given in default of appearance?
    - 6.3.1. No
    - 6.3.2. Yes(3)
- 7. Children who are covered by the judgment(4)
  - 7.1. Full name and date of birth
  - 7.2. Full name and date of birth
  - 7.3. Full name and date of birth
  - 7.4. Full name and date of birth
- 8. Names of parties to whom legal aid has been granted
- 9. Attestation of enforceability and service
  - 9.1. Is the judgment enforceable according to the law of the Member State of origin?
    - 9.1.1. Yes
    - 9.1.2. No
  - 9.2. Has the judgment been served on the party against whom enforcement is sought?
    - 9.2.1. Yes
      - 9.2.1.1. Full name of the party
      - 9.2.1.2. Address
      - 9.2.1.3. Date of service
    - 9.2.2. No
- 10. Specific information on judgments on rights of access where "exequatur" is requested under Article 28. This possibility is foreseen in Article 40(2).
  - 10.1. Practical arrangements for exercise of rights of access (to the extent stated in the judgment)
    - 10.1.1. Date and time
      - 10.1.1.1. Start
      - 10.1.1.2. End
    - 10.1.2. Place
    - 10.1.3. Specific obligations on holders of parental responsibility
    - 10.1.4. Specific obligations on the person with right of access
    - 10.1.5. Any restrictions attached to the exercise of rights of access
- 11. Specific information for judgments on the return of the child in cases where the "exequatur" procedure is requested under Article 28. This possibility is foreseen under Article 40(2).

- 11.1. The judgment entails the return of the child
- 11.2. Person to whom the child is to be returned (to the extent stated in the judgment)
  - 11.2.1. Full name
  - 11.2.2 Address
- Done at ..., date ....
- Signature and/or stamp

- (1) Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.
- (2) In cases of joint custody, a person already mentioned under item 3 may also be mentioned under item 4.
- (3) Documents referred to in Article 37(2) must be attached.
- (4) If more than four children are covered, use a second form.

**ANNEX III**  
**CERTIFICATE REFERRED TO IN ARTICLE 41(1) CONCERNING JUDGMENTS**  
**ON RIGHTS OF ACCESS(1)**

- 1. Member State of origin
- 2. Court or authority issuing the certificate
  - 2.1. Name
  - 2.2. Address
  - 2.3. Tel./fax/e-mail
- 3. Person(s) with rights of access
  - 3.1. Full name
  - 3.2. Address
  - 3.3. Date and place of birth (where available)
- 4. Holders of parental responsibility other than those mentioned under 3(2)(3)
  - 4.1. 4.1.1. Full name
  - 4.1.2. Address
  - 4.1.3. Date and place of birth (where available)
  - 4.2. 4.2.1. Full name
  - 4.2.2. Address
  - 4.2.3. Date and place of birth (where available)
- 4.3. Other
  - 4.3.1. Full name
  - 4.3.2. Address
  - 4.3.3. Date and place of birth (where available)
- 5. Court which delivered the judgment
  - 5.1. Name of Court
  - 5.2. Place of Court
- 6. Judgment
  - 6.1. Date
  - 6.2. Reference number
- 7. Children who are covered by the judgment(4)

- 7.1. Full name and date of birth
  - 7.2. Full name and date of birth
  - 7.3. Full name and date of birth
  - 7.4. Full name and date of birth
  8. Is the judgment enforceable in the Member State of origin?
    - 8.1. Yes
    - 8.2. No
  9. Where the judgment was given in default of appearance, the person defaulting was served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence, or the person has been served with the document but not in compliance with these conditions, it is nevertheless established that he or she accepted the decision unequivocally
  10. All parties concerned were given an opportunity to be heard
  11. The children were given an opportunity to be heard, unless a hearing was considered inappropriate having regard to their age or degree of maturity
  12. Practical arrangements for exercise of rights of access (to the extent stated in the judgment)
    - 12.1. Date and time
      - 12.1.1. Start
      - 12.1.2. End
    - 12.2. Place
    - 12.3. Specific obligations on holders of parental responsibility
    - 12.4. Specific obligations on the person with right of access
    - 12.5. Any restrictions attached to the exercise of rights of access
  13. Names of parties to whom legal aid has been granted
- Done at ..., date ...  
Signature and/or stamp

- (1) Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.
- (2) In cases of joint custody, a person already mentioned under item 3 may also be mentioned in item 4.
- (3) Please put a cross in the box corresponding to the person against whom the judgment should be enforced.
- (4) If more than four children are concerned, use a second form.

**ANNEX IV**  
**CERTIFICATE REFERRED TO IN ARTICLE 42(1) CONCERNING**  
**THE RETURN OF THE CHILD(1)**

1. Member State of origin
2. Court or authority issuing the certificate
  - 2.1. Name
  - 2.2. Address

**European seminar**

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child

- 2.3. Tel./fax/e-mail
3. Person to whom the child has to be returned (to the extent stated in the judgment)
  - 3.1. Full name
  - 3.2. Address
  - 3.3. Date and place of birth (where available)
4. Holders of parental responsibility(2)
  - 4.1. Mother
    - 4.1.1. Full name
    - 4.1.2. Address (where available)
    - 4.1.3. Date and place of birth (where available)
  - 4.2. Father
    - 4.2.1. Full name
    - 4.2.2. Address (where available)
    - 4.2.3. Date and place of birth (where available)
  - 4.3. Other
    - 4.3.1. Full name
    - 4.3.2. Address (where available)
    - 4.3.3. Date and place of birth (where available)
5. Respondent (where available)
  - 5.1. Full name
  - 5.2. Address (where available)
6. Court which delivered the judgment
  - 6.1. Name of Court
  - 6.2. Place of Court
7. Judgment
  - 7.1. Date
  - 7.2. Reference number
8. Children who are covered by the judgment(3)
  - 8.1. Full name and date of birth
  - 8.2. Full name and date of birth
  - 8.3. Full name and date of birth
  - 8.4. Full name and date of birth
9. The judgment entails the return of the child
10. Is the judgment enforceable in the Member State of origin?
  - 10.1. Yes
  - 10.2. No
11. The children were given an opportunity to be heard, unless a hearing was considered inappropriate having regard to their age or degree of maturity
12. The parties were given an opportunity to be heard
13. The judgment entails the return of the children and the court has taken into account in issuing its judgment the reasons for and evidence underlying the decision issued pursuant to Article 13 of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction
14. Where applicable, details of measures taken by courts or authorities to ensure the protection of the child after its return to the Member State of habitual residence
15. Names of parties to whom legal aid has been granted

Done at ..., date ...  
Signature and/or stamp

(1) Council Regulation (EC) No 2201 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

(2) This item is optional.

(3) If more than four children are covered, use a second form.

**ANNEX V**  
**COMPARATIVE TABLE WITH REGULATION (EC) No. 137/2000**  
**(Brussels II Regulation old)**

Articles repealed	Corresponding Articles of new text	Articles repealed	Corresponding Articles of new text
1	1, 2	31	51
2	3	32	37
3	12	33	39
4		34	38
5	4	35	52
6	5	36	59
7	6	37	60, 61
8	7	38	62
9	17	39	
10	18	40	63
11	16, 19	41	66
12	20	42	64
13	2, 49, 46	43	65
14	21	44	68, 69
15	22, 23	45	70
16		46	72
17	24	Annex I	68
18	25	Annex II	68
19	26	Annex III	68
20	27	Annex IV	Annex I
21	28	Annex IV	Annex II
22	21, 29		

**European seminar**

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child



23	30			
24	31			
25	32			
26	33			
27	34			
28	35			
29	36			
30	50			

**ANNEX VI**  
**Declarations by Sweden and Finland pursuant to Article 59(2)(a)**  
**of the Council Regulation concerning jurisdiction and the recognition**  
**and enforcement of judgments in matrimonial matters and matters**  
**of parental responsibility, repealing Regulation (EC) No 1347/2000.**

**Declaration by Sweden:**

Pursuant to Article 59(2)(a) of the Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000, Sweden hereby declares that the Convention of 6 February 1931 between Denmark, Finland, Iceland, Norway and Sweden comprising international private law provisions on marriage, adoption and guardianship, together with the Final Protocol thereto, will apply in full in relations between Sweden and Finland, in place of the rules of the Regulation.

**Declaration by Finland:**

Pursuant to Article 59(2)(a) of the Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000, Finland hereby declares that the Convention of 6 February 1931 between Finland, Denmark, Iceland, Norway and Sweden comprising international private law provisions on marriage, adoption and guardianship, together with the Final Protocol thereto, will apply in full in relations between Finland and Sweden, in place of the rules of the Regulation.

### **13.3. German legislation - Act to Implement Certain Legal Instruments in the Field of International Family Law (International Family Law Procedure Act – IFLPA / 218**

#### Division 1

Scope of application; definitions

#### Section 1

Scope of application

This Act shall serve:

1. to execute Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000 (OJ EU No. L 338 p. 1);
2. to implement the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (Federal Law Gazette [Bundesgesetzblatt] 2009 part II p. 602) - hereinafter referred to as the Hague Child Protection Convention;
3. to implement the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (Federal Law Gazette [Bundesgesetzblatt] 1990 part II p. 207) - hereinafter referred to as the Hague Child Abduction Convention;
4. to implement the Luxembourg European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (Federal Law Gazette [Bundesgesetzblatt] 1990 part II p. 220) - hereinafter referred to as the European Custody Convention.

#### Section 2

Definitions of terms

For the purposes of this Act the term “title” shall mean decisions, agreements and public documents in respect of which there is application of the EC Regulation needing execution or the respective Convention needing implementation.

#### Division 2

Central Authority; Youth Welfare Office

#### Section 3

Designation of the Central Authority

(1) The Central Authority under

1. Article 53 of Regulation (EC) No. 2201/2003,
2. Article 29 of the Hague Child Protection Convention,
3. Article 6 of the Hague Child Abduction Convention,
4. Article 2 of the European Custody Convention shall be the Federal Office of Justice.

(2) The proceedings before the Central Authority shall be deemed to be a judicial administrative proceeding.

(3)

#### Section 4

Translations in the case of incoming applications

(1) The Central Authority receiving an application from another State, pursuant to

#### **European seminar**

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child

the Regulation (EC) No. 2201/2003 or to the European Custody Convention, may refuse to take action so long as communications or documents that have to be enclosed are not drawn up in German or accompanied by a translation into German.

(2) Where by way of exception a document is not accompanied by a German translation pursuant to Article 54 of the Hague Child Protection Convention or to Article 24, first paragraph, of the Hague Child Abduction Convention, the Central Authority shall arrange for a translation.

(3)

#### Section 5

Translations in the case of outgoing applications

(1) Where the applicant does not himself procure translations required for applications that are to be dealt with in another State, the Central Authority shall arrange for the translations at the applicant's expense.

(2) The Local Court shall, upon application being made, exempt an applicant who is a natural person having his or her habitual residence or, in the absence of such residence, actually residing within the district of the Court, from the duty of reimbursement pursuant to subsection (1) if the applicant fulfils the personal and financial requirements for the grant of legal aid, without his or her having to make a contribution towards the costs pursuant to the provisions of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction.

#### Section 6

Performance of tasks by the Central Authority

(1) For the purpose of fulfilment of the tasks incumbent on it the Central Authority shall take all necessary measures with the assistance of the competent agencies. It shall correspond directly with all competent agencies in Germany and abroad. Communications shall be forwarded without delay to the competent agencies.

(2) For the purpose of implementing the Hague Child Abduction Convention and the European Custody Convention the Central Authority shall commence court proceedings if necessary. Within the framework of these Conventions the Central Authority shall, for the purpose of returning a child, be deemed to be authorised, on behalf of the applicant, to take action in or out of court, either on its own or by power of attorney delegated to persons representing it. Its authority to take relevant action, on its own behalf, in order to secure compliance with the Conventions shall remain unaffected.

#### Section 7

Ascertainment of whereabouts

(1) The Central Authority shall take all necessary measures including bringing in the police enforcement authorities to ascertain the child's whereabouts in cases where the child's place of abode is unknown and there are indications to the effect that the child is in Germany.

(2) So far as is necessary for ascertainment of the child's whereabouts, the Central Authority shall be authorised to collect vehicle keeper data required, pursuant to section 33 subsection first sentence number 2, of the Road Traffic Act, at the Federal Motor Transport Authority, and to request the providers of benefits, within the meaning of sections 18 to 29 of the First Book of the Social Code, for notification of a person's current whereabouts.

(3) Under the conditions stated in subsection (1) the Central Authority can cause issuance, by the Federal Criminal Police Office, of a notice for ascertainment of a person's whereabouts. It can also initiate the storage of a search notice in the Central Register.

(4) So far as other agencies are brought in, the Central Authority shall transmit such personal data to these agencies as are necessary for carrying out the measures; such data may only be used for the purpose for which they were transmitted.

## Section 8

### Recourse to the Higher Regional Court

(1) Where the Central Authority does not accept an application or where it refuses to take action, an application for a decision can be made to the Higher Regional Court.

(2) The Higher Regional Court in whose district the Central Authority has its seat shall have jurisdiction.

(3) The Higher Regional Court shall give a decision in proceedings for non-contentious matters. Section 14 subsections (2) and (3) as well as divisions 4 and 5 of the First Book of the Act on proceedings in family matters and in matters of non-contentious jurisdiction shall apply *mutatis mutandis*.

## Section 9

### Youth Welfare Office participation in proceedings

(1) Without prejudice to the responsibilities of the Youth Welfare Office in relation to crossborder co-operation, the Youth Welfare Office shall assist the courts and the Central Authority in respect of all measures taken under this Act. In particular it shall

1. give information, upon request, regarding the social background of the child and his or her environment,

2. support an amicable resolution in every situation,

3. give assistance, in appropriate cases, in the conduct of proceedings, also in relation to securing the child's residence,

4. give assistance, in appropriate cases, in the exercise of the right of personal access, in the delivery or return of the child as well as in the enforcement of court decisions.

(2) Competence shall lie with the Youth Welfare Office in whose area the child habitually resides. Where the Central Authority or a court is seized of an application for delivery or return or the enforcement thereof, or where the child does not habitually reside in Germany, or where the competent Youth Welfare Office does not take action, competence shall lie with the Youth Welfare Office in whose district the child is actually residing. In the cases of Article 35 paragraph 2, first sentence, of the Hague Child Protection Convention, local jurisdiction shall lie with the Youth Welfare Office in whose area of jurisdiction the applicant parent habitually resides.

(3) The court shall inform the competent Youth Welfare Office about decisions pursuant to this Act also in those cases where the Youth Welfare Office was not involved in the proceedings.

## Division 3

### Court jurisdiction and concentration of jurisdiction

## Section 10

### Local jurisdiction over recognition and enforcement

Exclusive local jurisdiction shall lie in respect of proceedings

#### European seminar

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child

- pursuant to Article 21 paragraph 3 and Article 48 paragraph 1 of Regulation (EC) No. 2201/2003 as well as for compulsory enforcement pursuant to Articles 41 and 42 of Regulation (EC) No. 2201/2003,
  - pursuant to Articles 24 and 26 of the Hague Child Protection Convention,
  - pursuant to the European Custody Convention
- with the Family Court in whose area of jurisdiction at the time the application is made
1. the person against whom the application is directed, or the child to which the decision relates, habitually resides, or
  2. in the absence of jurisdiction pursuant to number 1, the interest arises in respect of the finding or the need for care exists,
  3. otherwise, in the district of Berlin Higher Regional Court, with the court that has been appointed to decide.

#### Section 11

##### Local jurisdiction pursuant to the Hague Child Abduction Convention

In respect of proceedings pursuant to the Hague Child Abduction Convention, local jurisdiction shall lie with the Family Court in whose area of jurisdiction

1. the child was residing upon receipt of the application at the Central Authority, or
2. in the absence of jurisdiction pursuant to number 1, the need for care exists.

#### Section 12

##### Concentration of jurisdiction

(1) In proceedings on a matter referred to in sections 10 and 11 as well as in proceedings on the declaration of enforceability pursuant to Article 28 of Regulation (EC) No. 2201/2003, the decision shall lie with the Family Court in whose district a Higher Regional Court has its seat for the district of such Higher Regional Court.

(2) In the district of Berlin Higher Regional Court the decision shall lie with Pankow/WeiGensee Family Court.

(3) The state governments shall be authorised to assign this jurisdiction, by ordinance, to another Family Court in the Higher Regional Court district or, where there is more than one Higher Regional Court established in a state, to a Family Court for the districts of all Higher Regional Courts or of more than one Higher Regional Court. The state governments can transfer this power of authorisation to the state administrations of justice.

#### Section 13

##### Concentration of jurisdiction over other family matters

(1) The Family Court where a matter referred to in sections 10 to 12 becomes pending shall, from that moment onwards and notwithstanding section 137 subsections (1) and (3) of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction, have jurisdiction over all family matters, concerning the same child, pursuant to section 151, number 1 to 3, of the Act on Proceedings in Family Matters and in Matters of Noncontentious Jurisdiction, including directions pursuant to section 44 and to sections 35 and 89 to 94 of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction. Jurisdiction pursuant to subsection (1), first sentence, shall not arise in cases where the application is manifestly inadmissible. Jurisdiction shall cease as soon as the court addressed is

not competent by virtue of an incontestable decision; proceedings over which such court thus loses its jurisdiction shall, in accordance with section 281 subsections (2) and (3), first sentence, of the Civil Procedure Code, be transferred proprio motu to the court with jurisdiction.

(1) Another family matter pursuant to section 151, number 1 to 3, of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction can also be brought before the Family Court with jurisdiction over applications of the kind referred to in subsection (1), first sentence, in the Higher Regional Court district where the child habitually resides, provided that a parent habitually resides in another Member State of the European Union or in another contracting State of the Hague Child Protection Convention, of the Hague Child Abduction Convention or of the European Custody Convention.

(2) In the case of subsection (1), first sentence, another Family Court where a family matter, concerning the same child, pursuant to section 151, number 1 to 3, of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction is, or becomes, pending at first instance, shall transfer such proceedings proprio motu to the court having jurisdiction pursuant to subsection (1), first sentence. Upon concurrent application by both parents, other family matters in which they are participants shall be transferred to the court having jurisdiction pursuant to subsection (1) or subsection (2). Section 281 subsection (2), first to third sentence, and subsection (3), first sentence, of the Civil Procedure Code shall apply mutatis mutandis.

(3) On important grounds the Family Court having jurisdiction pursuant to subsection (1) or subsection (2) or the Family Court to which the matter has been transferred pursuant to subsection (3) can transfer, or refer back, such matter to the Family Court that has jurisdiction pursuant to general provisions, provided that this does not lead to a substantial delay in the proceedings. As a rule, an important ground shall be deemed to exist where the particular expertise of the first court referred to above is not, or no longer, required for the proceedings. Section 281 subsections (2) and (3), first sentence, of the Civil Procedure Code shall apply mutatis mutandis. Refusal to effect a transfer pursuant to the first sentence shall be incontestable.

(4) Section 4 and section 5 subsection (1), number 5, subsections (2) and (3) of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction shall remain unaffected.

### Section 13a

#### Proceedings on cross-border transfer

(1) Where pursuant to Article 8 of the Hague Child Protection Convention the Family Court requests the court of another contracting State to assume jurisdiction, it shall set a time limit within which the foreign court can notify its assumption of jurisdiction. Where pursuant to Article 8 of the Hague Child Protection Convention the Family Court suspends proceedings, it shall set the parties a time limit within which the foreign court is to be addressed. If the time limit pursuant to the first sentence has expired without the foreign court having notified its assumption of jurisdiction, it shall as a rule be assumed that the requested court has refused to assume jurisdiction. If the time limit pursuant to the second sentence has expired without

a party having addressed the foreign court, jurisdiction shall remain with the Family Court. The court of the requested State and the parties shall be notified of these legal consequences.

(2) Where pursuant to Article 8 of the Hague Child Protection Convention a court of another contracting State requests the Family Court to assume jurisdiction, or where a party addresses the Family Court in pursuance of that provision, the Family Court can assume jurisdiction within six weeks.

(3) Subsections (1) and (2) shall be applied mutatis mutandis to applications, requests and decisions pursuant to Article 9 of the Hague Child Protection Convention.

(4) The Family Court decision

1. to request the foreign court, pursuant to subsection (1), first sentence, or pursuant to Article 15 paragraph 1 letter (b) of Regulation (EC) No. 2201/2003, to assume jurisdiction;

2. to suspend proceedings, pursuant to subsection (1), second sentence, or pursuant to Article 15 paragraph 1 letter (a) of Regulation (EC) No. 2201/2003;

3. to request the foreign court with jurisdiction, in pursuance of Article 9 of the Child Protection Convention or pursuant to Article 15 paragraph 2 letter (c) of Regulation (EC) No. 2201/2003, to transfer jurisdiction;

4. to invite the parties to introduce a request to the foreign court with jurisdiction, pursuant to Article 9 of the Hague Child Protection Convention, for the transfer of jurisdiction to the Family Court; or

5. to transfer jurisdiction to the foreign court, upon request by a foreign court or application by the parties pursuant to Article 9 of the Hague Child Protection Convention,

shall be contestable by immediate complaint, upon application mutatis mutandis of sections 567 to 572 of the Civil Procedure Code. A complaint on a point of law shall be precluded.

The decisions referred to in the first sentence shall come into effect only when they become binding with final legal force. This shall be indicated in the order.

(5) Otherwise the decisions pursuant to Articles 8 and 9 of the Hague Child Protection Convention and pursuant to Article 15 of Regulation (EC) No. 2201/2003 shall be incontestable.

(6) Parties within the meaning of this provision, of Articles 8 and 9 of the Hague Child Protection Convention and of Article 15 of Regulation (EC) No. 2201/2003 shall be the participants referred to in section 7 subsections (1) and (2), number 1, of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction. The provisions on the involvement of further participants shall remain unaffected.

Division 4

General rules of court

Section 14

Family Court proceedings

Unless otherwise provided, the Family Court shall give a decision

1. on a matrimonial matter referred to in sections 10 and 12 pursuant to the provisions of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction applying thereto,

2. on the remaining matters referred to in sections 10, 11, 12 and 47 as family matters in proceedings of non-contentious jurisdiction.

## Section 15

### Provisional orders

Upon application or proprio motu, the court can make provisional orders in order to avert risks from the child or to avoid detriment to the interests of the participants, and especially to secure the child's abode during the proceedings, or to prevent the child's return from being obstructed or made difficult; division 4 of the First Book of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction shall apply mutatis mutandis.

## Division 5

Admission of compulsory enforcement, recognition finding and restoration of custody of children

### Subdivision 1

Admission of compulsory enforcement at first instance

## Section 16

### Application

(1) With the exception of the titles referred to in Articles 41 and 42 of Regulation (EC) No. 2201/2003 the title enforceable in another State shall become admissible for compulsory enforcement when, upon application, it is furnished with the endorsement for enforcement.

(2) The application for grant of endorsement for enforcement can be submitted to the Family Court with jurisdiction, in writing or orally to be recorded by the registry.

(3) Where contrary to section 184 of the Courts Constitution Act the application is not drawn up in German, the court can enjoin the applicant to procure a translation of the application, the accuracy of which has been confirmed by a person having the authority to provide such confirmation

1. in a Member State of the European Union or
2. in another contracting State of a Convention needing implementation.

## Section 17

### Person authorised to accept service

(1) Where in his or her application the applicant has not designated a person authorised to accept service, within the meaning of section 184 subsection (1), first sentence, of the Civil Procedure Code, every service on the applicant can, until subsequent designation, be effected by postage (section 184 subsection [1], second sentence, subsection [2] of the Civil Procedure Code).

(2) Subsection (1) shall not apply where the applicant has appointed a representative for the proceedings, upon whom service can be effected in Germany.

## Section 18

### Ex parte proceedings

(1) Within the scope of application of Regulation (EC) No. 2201/2003 and of the Hague Child Protection Convention it shall be the applicant alone, in proceedings at first instance for admission of compulsory enforcement, who receives the opportunity to make statements. The decision shall be given without holding an oral hearing. However, there can be an oral discussion with the applicant or a person authorised by the applicant, provided the applicant or the person so authorised agrees thereto

### European seminar

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child



and the discussion serves the purpose of expedition.

(2) Notwithstanding section 130 subsection (1) of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction, representation by a lawyer shall not be required in matrimonial matters at first instance.

## Section 19

### Special provisions regarding the European Custody Convention

A declaration of enforceability of a title from another contracting State of the European Custody Convention shall also be precluded in the cases of Articles 8 and 9 if the conditions referred to in Article 10 paragraph 1 letter a or b of the Convention subsist, in particular where the effects of the title would be incompatible with the basic rights of the child or of a person having custody.

## Section 20

### Decision

(1) Where compulsory enforcement based on the title is to be admitted, the court shall order that the title be furnished with the endorsement for enforcement. In the order, the obligation to be enforced is to be described in German. It shall as a rule suffice, in giving the reasons for the order, for reference to be made to Regulation (EC) No. 2201/2003 or to the treaty on recognition and enforcement, which is to be implemented, as well as to the documents submitted by the applicant.

(2) Section 81 of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction shall be applied *mutatis mutandis* to the costs of the proceedings; in matrimonial matters section 788 of the Civil Procedure Code shall apply *mutatis mutandis*.

(3) Where the application is not admissible or not well-founded, the court shall refuse the application in an order setting out the reasons. Subsection (2) shall apply to the costs; in matrimonial matters the costs shall be imposed on the applicant.

## Section 21

### Notification of the decision

(1) In the case of section 20 subsection (1) service shall be effected *proprio motu* on the obligor of a certified copy of the order, of a certified copy of the title that does not yet bear the endorsement for enforcement and, if necessary, the translation thereof, as well as of the documents to which reference is made in pursuance of section 20 subsection (1), third sentence. An order made pursuant to section 20 subsection (3) shall be communicated informally to the obligor.

(2) A certified copy of the order made pursuant to section 20 and, in the case of section 20 subsection (1), also an attestation of the effected service shall be sent to the applicant. The authentic issue of the title, bearing the endorsement for enforcement shall be sent to the applicant only when the order made pursuant to section 20 subsection (1) has come into effect and the endorsement for enforcement has been granted.

(3) In proceedings on the declaration of enforceability of a decision concerning parental responsibility, service shall be effected also on the child's statutory representative, on the child's representative in the proceedings, on the child him- or

herself, so far as he or she has reached the age of 14 years, on a parent who was not a participant in the proceedings, as well as on the Youth Welfare Office.

(4) Where the measure declared to be enforceable concerns a placement, the order shall also be notified to the head of the institution or the foster family in which the child is to be placed.

## Section 22

### Decision coming into effect

An order made pursuant to section 20 shall come into effect only when it becomes binding with final legal force. This shall be indicated in the order.

## Section 23

### Endorsement for enforcement

(1) On the basis of an effective order made pursuant to section 20 subsection (1) the registry clerk shall grant the endorsement for enforcement in the following form: "Endorsement for enforcement pursuant to section 23 of the International Family Law Procedure Act of 26 January 2005 (Federal Law Gazette [Bundesgesetzblatt] part I p. 162). In pursuance of the order of ... (designation of the court and of the order) compulsory enforcement based on ... (designation of the title) shall be admissible for the benefit of ... (designation of the obligee) against ... (designation of the obligor).

The obligation to be enforced reads as follows:

...(indication in German of the obligation, based on the foreign title, incumbent on the obligor; to be taken from the order made pursuant to section 20 subsection [1])."

(2) Where compulsory enforcement is admitted only in respect of one, or more than one, claim granted by the foreign title or set down in another foreign title, or only in respect of part of the subject matter of the obligation, the endorsement for enforcement shall be designated as "part endorsement for enforcement pursuant to section 23 of the International Family Law Procedure Act of 26 January 2005 (Federal Law Gazette [Bundesgesetzblatt] part I p. 162)".

(3) The endorsement for enforcement shall be signed by the registry clerk and shall be stamped with the court stamp. Such endorsement shall be made either on the authentic issue of the title or on a page to be joined thereto. If there is a translation of the title, it shall be joined to the authentic issue thereof.

## Subdivision 2

### Complaint

## Section 24

### Filing a complaint; time limit for a complaint

(1) A complaint can be filed against a decision given at first instance with the Higher Regional Court. The complaint shall be filed with the Higher Regional Court by submission of a notice of complaint or by declaration to be recorded by the registry.

(2) The admissibility of the complaint shall not be affected by the fact that it has been filed with the court of first instance instead of with the Higher Regional Court; without delay the complaint shall be transferred proprio motu to the Higher Regional Court.

(3) A complaint against the admission of compulsory enforcement shall be filed  
1. within one month after service in a case where the person entitled to file a complaint habitually resides in Germany;

## European seminar

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child

2. within two months after service in a case where the person entitled to file a complaint habitually resides abroad. The time limit shall begin to run on the day on which the declaration of enforceability is served on the person entitled to file a complaint, either in person or at his or her dwelling. An extension of this time limit on the ground of long distance shall be precluded.

(4) The time limit for a complaint shall be a mandatory time limit.

(5) The complaint shall be served on the respondent proprio motu.

#### Section 25

Objections to the claim to be enforced

Through a complaint against the admission of compulsory enforcement based on a title concerning reimbursement of the costs of proceedings, the obligor can also make objections to the claim itself in a case where the grounds on which the objections are based originated only after the title was issued.

#### Section 26

Proceedings and decision on the complaint

(1) The Higher Regional Court Panel shall pronounce its decision in an order for which reasons shall be stated and which can be given without holding an oral hearing.

(2) So long as no order has been made for an oral hearing, applications can be made, and statements given, to be recorded by the registry. Where an order is made for an oral hearing in a matrimonial matter, section 215 of the Civil Procedure Code shall apply to the summons.

(3) A complete authentic issue of the order shall then also be served on the participants proprio motu when the order has been pronounced.

(4) Section 20 subsection (1), second sentence, subsections (2) and (3), section 21 subsections (1), (2) and (4) as well as section 23 shall apply mutatis mutandis.

#### Section 27

Order for immediate effect

(1) A Higher Regional Court order made pursuant to section 26 shall come into effect only when it becomes binding with final legal force. This shall be indicated in the order.

(2) In conjunction with the decision on the complaint the Higher Regional Court can make an order imposing the immediate effect of an order.

#### Subdivision 3

Complaint on a point of law

#### Section 28

Complaint on a point of law permitted

Pursuant to section 574 subsection (1), number 1, subsection (2) of the Civil Procedure Code, a complaint may lie to the Federal Court of Justice on a point of law in respect of such Higher Regional Court order.

#### Section 29

Filing, and grounds for, a complaint on a point of law

Section 575 subsections (1) to (4) of the Civil Procedure Code shall be applied mutatis mutandis. So far as a complaint on a point of law is based on the argument that the Higher Regional Court has diverged from a decision of the Court of Justice

of the European Communities, the decision from which the contested order diverges must be designated.

### Section 30

Proceedings and decision on a complaint on a point of law

(1) The Federal Court of Justice can only examine whether the order concerned is based on a violation of the law of the European Community, of a recognition and enforcement treaty, of other federal law or of another provision in force for an area extending beyond the district of a Higher Regional Court. The Federal Court of Justice shall not be allowed to examine whether the court wrongly assumed that it had local jurisdiction.

(2) The Federal Court of Justice can give a decision on a complaint on a point of law without holding an oral hearing. Section 574 subsection (4), section 576 subsection (3) and section 577 of the Civil Procedure Code shall be applied *mutatis mutandis*; in matters of noncontentious jurisdiction section 574 subsection (4) and section 577 subsection (2), first to third sentence, of the Civil Procedure Code as well as the reference made to section 556 in section 576 subsection (3) of the Civil Procedure Code shall be disregarded.

(3) Section 20 subsection (1), second sentence, subsections (2) and (3), section 21 subsections (1), (2) and (4) as well as section 23 shall apply *mutatis mutandis*.

### Section 31

Order for immediate effect

Upon application being made by the obligor, the Federal Court of Justice can revoke an order made pursuant to section 27 subsection (2), or it can make an initial order pursuant to section 27 subsection (2) upon application being made by the obligee.

### Subdivision 4

Establishment of recognition

### Section 32

Recognition finding

Subdivisions 1 to 3 shall be applied *mutatis mutandis* to proceedings on a separate application for a finding pursuant to Article 21 paragraph 3 of Regulation (EC) No. 2201/2003, pursuant to Article 24 of the Hague Child Protection Convention or pursuant to the European Custody Convention, to recognise or not to recognise, a title from another State. In this case Section 18 subsection (1), third sentence, shall be applied subject to the condition that the oral discussion can also take place with further participants.

### Subdivision 5

Restoration of custody of children

### Section 33

Order to deliver the child

(1) Where, pursuant to the law of the State in which it was established, an enforceable title, in the scope of application of Regulation (EC) No. 2201/2003, of the Hague Child Protection Convention or of the European Custody Convention,

#### European seminar

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child

embraces the right to delivery of the child, the Family Court can, for clarification, include the order for delivery of the child in the endorsement for enforcement or in an order made pursuant to Section 44.

(2) Where there is no enforceable title, in the scope of application of the European Custody Convention, to delivery of the child, the court shall make a finding, pursuant to section 32, that there shall be recognition of the custody decision or the custody agreement from the other contracting State approved by the competent authority, and the court shall, upon application being made, order the obligor to deliver the child for the purpose of restoring custody of the child.

#### Subdivision 6

#### Revocation or amendment of orders

#### Section 34

#### Proceedings for revocation or amendment

(1) Where the title is revoked or amended in the State in which it was established and the obligor can no longer plead this fact in the proceedings for admission of compulsory enforcement, the obligor can apply for revocation or amendment of admission in separate proceedings. The same shall apply in the event of revocation or amendment of decisions, agreements or public documents the recognition of which has been established.

(2) In respect of the decision on such application, exclusive jurisdiction shall lie with the Family Court that decided at first instance on the application for grant of endorsement for enforcement or that made the first-instance finding of recognition.

(3) The application can be made to the court in writing or by declaration to be recorded by the registry. The decision shall be given in an order.

(4) Subdivisions 2 and 3 shall be applied to a complaint *mutatis mutandis*.

(5) In the case of a title concerning reimbursement of the costs of the proceedings sections 769 and 770 of the Civil Procedure Code shall be applied *mutatis mutandis* to termination of compulsory enforcement and to revocation of enforcement measures already taken. Revocation of an enforcement measure shall be permissible also in the absence of provision of security.

#### Section 35

#### Compensation for unjustified enforcement

(1) Where admission of compulsory enforcement based on a title concerning reimbursement of the costs of the proceedings has been revoked or amended upon a complaint made on a point of law, the obligee shall be bound to make compensation for the damage caused to the obligor by enforcement of the title or by a cost incurred to avert enforcement. The same shall apply where the admission of compulsory enforcement is revoked or amended pursuant to section 34, so far as the title admitted for compulsory enforcement could still be contested, at the time of its admission, by ordinary appellate remedy under the law of the State in which it was issued.

(2) In respect of claims brought, exclusive jurisdiction shall lie with the court that decided at first instance on the application for the title to be furnished with the endorsement for enforcement.

## Subdivision 7

### Court action to oppose enforcement

#### Section 36

Court action to oppose enforcement in respect of titles concerning the costs of the proceedings

(1) Where there is admission of compulsory enforcement based on a title concerning the costs of the proceedings, the obligor can make objections to the claim itself in proceedings pursuant to section 767 of the Civil Procedure Code only in a case where the grounds on which his or her objections are based originated

1. after expiry of the time limit within which the obligor could have filed a complaint, or
2. if a complaint has been filed, after conclusion of these proceedings.

(2) A court action pursuant to section 767 of the Civil Procedure Code shall be brought in the court that decided on the application for grant of endorsement for enforcement.

## Division 6

### Proceedings pursuant to the Hague Child Abduction Convention

#### Section 37

##### Applicability

Where in an individual case the return of the child can be considered pursuant to the Hague Child Abduction Convention and to the European Custody Convention, the provisions of the Hague Child Abduction Convention shall initially be applied, so far as the applicant does not make express application for the European Custody Convention to apply.

#### Section 38

##### Expedited proceedings

(1) The court shall deal with proceedings for the return of a child with priority at all instances. Except in the case of Article 12 paragraph 3 of the Hague Child Abduction Convention there shall be no stay of the proceedings. The court shall apply all measures needed to expedite the proceedings, also to enable, in particular, the decision on the merits to be given within the time limit set in Article 11 paragraph 3 of Regulation (EC) No. 2201/2003.

(2) At every stage of the proceedings the court shall examine whether the right of personal access to the child can be ensured.

(3) The participants shall assist in establishing the facts, in conformity with a procedure that is intent on advancing and expediting the proceedings.

#### Section 39

##### Transmission of decisions

Where, pursuant to Article 11 paragraph 6 of Regulation (EC) No. 2201/2003, a domestic decision is transmitted directly to the court with jurisdiction or the Central Authority abroad, a copy shall be sent to the Central Authority for the discharge of its functions pursuant to Article 7 of the Hague Child Abduction Convention.

#### Section 40

##### Effect of the decision; appellate remedy

(1) A decision requiring the return of a child to another contracting State shall come into effect only when it becomes binding with final legal force.

### European seminar

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child

(2) A complaint can be filed in respect of a decision given at first instance to the Higher Regional Court, pursuant to subdivision 1 of division 5 of the First Book of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction; section 65 subsection (2), section 68 subsection (4) as well as section 69 subsection (1), second to fourth sentence, of that Act shall not be applied. The complaint shall be filed, and grounds shall be stated therefor, within two weeks. The right of complaint against a decision requiring the return of a child shall vest in the person opposing the application, in the child, so far as he or she has reached the age of 14 years, and in the Youth Welfare Office concerned. A complaint on a point of law shall not be admissible.

(3) Upon receipt of the notice of complaint, the court hearing the complaint shall examine, without delay, whether there is to be an order for the immediate effect of the contested decision on returning the child. Immediate effect should be ordered where the complaint is manifestly ill-founded or where returning the child before the decision on the complaint is compatible with the best interests of the child while taking into account the legitimate interests of the participants. The decision on immediate effect can be amended during the proceedings on the complaint.

#### Section 41

##### Determination of wrongfulness

The decision on an application for a finding to the effect that the removal or retention of the child was wrongful pursuant to Article 15, first sentence, of the Hague Child Abduction Convention shall lie with the Family Court

1. where the child custody matter or matrimonial matter is, or was, pending at first instance, otherwise with the Family Court
2. in whose district the child had his or her last habitual residence in the area for which this Act is in force, alternatively with the Family Court
3. in whose district the need for care arises.

Reasons shall be stated for the decision.

#### Section 42

##### Submission of applications to the Local Court

(1) An application that is to be dealt with in another contracting State can also be submitted to the Local Court, as the authority for the administration of justice, in whose district the applicant has his or her habitual residence, or where, in the absence of such residence in the area for which this Act is in force, the applicant is actually residing. After examining the requirements as to form, the court shall transmit the application, without delay, to the Central Authority, who will forward it to the other contracting State.

(2) Except in cases pursuant to section 5 subsection (1), costs shall not be imposed for the tasks performed by the Local Court and the Central Authority in receiving and forwarding applications.

#### Section 43

##### Legal aid and advice

Notwithstanding Article 26 paragraph 2 of the Hague Child Abduction Convention, there shall be exemption from court costs and extra-judicial costs in proceedings

pursuant to this Convention only in accordance with the provisions on legal advice and on legal aid.

## Division 7

### Enforcement

#### Section 44

Coercive measures; enforcement proprio motu

(1) On infringement of a title to be enforced in Germany pursuant to Chapter III of Regulation (EC) No. 2201/2003, to the Hague Child Protection Convention, to the Hague Child Abduction Convention or to the European Custody Convention, such title being aimed at the delivery of persons or the regulation of access, the court should impose a coercive fine, and in the event of such fine not being recoverable, the court should order coercive detention. Where the imposition of a coercive fine offers no prospect of success, the court should order coercive detention.

(2) In respect of titles referred to in subsection (1), jurisdiction shall lie with the Higher Regional Court, so far as the order has been declared enforceable, made or confirmed by that court.

(3) Where a child is to be delivered or returned, the court shall carry out enforcement proprio motu, unless the order is aimed at delivery of the child for the purpose of having access. Upon application by the obligee, the court should dispense with this.

## Division 8

### Cross-border placement

#### Section 45

Competence for consent to placement

For the grant of consent to placement of a child pursuant to Article 56 of Regulation (EC) No. 2201/2003 or to Article 33 of the Hague Child Protection Convention in Germany, competence shall lie with the supra-local agency responsible for the public youth welfare service in the area where, as proposed by the requesting agency, the child is to be placed, or otherwise with the supra-local agency with whose area the Central Authority has found the closest link. Alternatively, competence shall lie with the Land of Berlin.

#### Section 46

Consultation procedure

(1) Consent to the request should as a rule be granted where

1. carrying out the intended placement in Germany is in the best interests of the child, in particular because he or she has a particular connection with the country,
2. the foreign agency has submitted a report and, to the extent necessary, medical certificates or reports setting out the reasons for the intended placement,
3. the child has been heard in the proceedings abroad, unless this appeared inappropriate on the ground of the child's age or degree of maturity,
4. the consent of the appropriate institution or foster family has been given and there are no reasons telling against such placement,
5. any approval required by the law governing aliens has been given or promised,
6. the issue of assumption of costs has been dealt with.

(2) In the case of a placement linked with deprivation of liberty the request shall be refused notwithstanding the conditions set out in subsection (1) where

#### European seminar

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child



1. in the requesting State, no court decides on the placement, or
2. on the basis of the notified facts of the case, a placement linked with deprivation of liberty would not be admissible under national law.
- (3) The foreign agency can be requested to provide supplementary information.
- (4) Where there is a request for placement of a foreign child, the opinion of the aliens authority shall be obtained.
- (5) The decision, for which reasons shall be stated, shall also be notified to the Central Authority and to the institution or foster family where the child is to be placed. The decision shall be incontestable.

#### Section 47

##### Approval of the Family Court

(1) The consent of the supra-local agency responsible for the public youth welfare service, pursuant to sections 45 and 46, shall be admissible only with the approval of the Family Court. The court should as a rule give its approval where

1. the conditions referred to in section 46 subsection (1), number 1 to 3, are met, and
2. there is no apparent impediment to recognition of the intended placement.

Section 46 subsections (2) and (3) shall apply mutatis mutandis.

(2) Local jurisdiction shall lie with the Family Court at the seat of the Higher Regional Court in whose area of jurisdiction the child is to be placed for the district of that Higher Regional Court. Section 12 subsections (2) and (3) shall apply mutatis mutandis.

(3) The order, for which reasons shall be stated, shall be incontestable.

#### Division 9

Certificates concerning national decisions pursuant to Regulation (EC) No. 2201/2003

#### Section 48

##### Issuance of certificates

(1) The certificate pursuant to Article 39 of Regulation (EC) No. 2201/2003 shall be issued by the registry clerk at the registry of the court of first instance and, where the proceedings are pending before a higher court, by the registry clerk at the registry of such court.

(2) The certificate pursuant to Articles 41 and 42 of Regulation (EC) No. 2201/2003 shall be issued by the Family Court judge at the court of first instance, in proceedings before the Higher Regional Court or the Federal Court of Justice by the President of the Panel for Family Matters.

#### Section 49

##### Rectification of certificates

Section 319 of the Civil Procedure Code shall apply mutatis mutandis to the rectification of a certificate pursuant to Article 43 paragraph 1 of Regulation (EC) No. 2201/2003.

#### Division 10

##### Costs

Sections 50 to 53

(repealed)

## Section 54

### Translations

The amount of remuneration for the translations arranged by the Central Authority shall be governed by the Judicial Remuneration and Compensation Act.

## Division 11

### Transitional provisions

#### Section 55

##### Transitional provisions for Regulation (EC) No. 2201/2003

This Act shall also apply mutatis mutandis to proceedings pursuant to Council Regulation (EC) No. 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses (OJ EU No. L 160 p. 19), subject to the following condition:

Where an order is to be served on the obligor pursuant to section 21 in a State that is neither a Member State of the European Union nor a contracting party to the Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters (Federal Law Gazette [Bundesgesetzblatt] 1994 part II p. 2658) and where the Family Court has set a time limit for a complaint, pursuant to section 10 subsection (2) and section 50 subsection (2), fourth and fifth sentence, of the Recognition and Implementation of Enforcement Act, the complaint by the obligor against the admission of compulsory enforcement shall be filed within the time limit set by the court.

#### Section 56

##### Transitional provisions for the Custody Conventions Implementation Act

The provisions of the Custody Conventions Implementation Act of 5 April 1990 (Federal Law Gazette [Bundesgesetzblatt] part I p. 701), as last amended by Article 2 paragraph 6 of the Act of 19 February 2001 (Federal Law Gazette [Bundesgesetzblatt] part I p. 288, 436), shall continue to apply to proceedings, pursuant to the Hague Child Abduction Convention and to the European Custody Convention, that were commenced before this Act entered into force. In respect of compulsory enforcement, however, the provisions of this Act shall be applied. Where a court has already commenced compulsory enforcement, its functional jurisdiction shall remain unaffected.

### European seminar

Cooperation between the EU member states for the purposes of solving the civil cases regarding the wrongful removal or retention of a child

## 13.4. Latvian legislation

**Republic of Latvia - Cabinet  
Regulation No. 322  
Adopted 15 May 2007**

**Procedures by which the Latvian Central Authority in Conformity with the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction Shall Perform the Activities Referred to Therein and Co-operate with the Other State and Local Government Authorities Issued pursuant to Section 61, Clause 6 of the Protection of the Rights of the Child Law**

### I. General Provisions

1. This Regulation prescribes the procedures by which the Latvian central authority that has been determined in accordance with the Hague Convention on the Civil Aspects of International Child Abduction (hereinafter – central authority), in conformity with the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter – the Convention) shall perform the activities referred to therein and co-operate with other State and local government authorities.

2. A natural person, institution, authority or foreign central authority (hereinafter – applicant) may submit the following application to the central authority:

2.1. regarding the return of a child who has been illegally moved to another state or detained in another state to Latvia in accordance with Article 8 of the Convention (hereinafter – Application A);

2.2. regarding the return of a child who has been illegally moved to Latvia or detained in Latvia to another state in accordance with Article 8 of the Convention (hereinafter – Application B);

2.3. regarding the exercise of access rights in relation to a child whose place of residence is in another state in accordance with Article 21 of the Convention (hereinafter – Application C);

2.4. regarding the exercise of access rights in relation to a child whose place of residence is in Latvia in accordance with Article 21 of the Convention (hereinafter – Application D).

3. After receipt of an application corresponding to Paragraph 2 of this Regulation, the central authority shall take a decision within three working days:

3.1. to accept the application;

3.2. to take no further action on application, if the application does not conform to the requirements laid down in the Convention.

4. If the central authority takes a decision to take no further action on application, it shall send the decision to the applicant and determine a time

period for rectification of deficiencies – 10 working days from the day the decision was sent.

5. If the applicant does not rectify the deficiencies within the specified time period, the application shall be deemed not submitted and shall be returned to the applicant. The application that has been returned to the applicant may be re-submitted.

## **II. Action of the Central Authority after Receipt of the Application A or after Receipt of a Court Decision (True Copy) Regarding Submission of the Application A to a Foreign State**

6. After receipt of an Application A and taking of a decision the central authority shall, not later than within 10 working days, submit the Application A to the court or foreign central authority accordingly, informing the applicant thereof (in determining where the Application A should be submitted afterwards, the central authority shall conform to the request of the applicant).

7. The central authority shall submit the following documents to the court in accordance with Paragraph 6 of this Regulation:

7.1. Application A;

7.2. in respective cases – translation of the Application A in the official language, certified according to specific procedures.

8. The central authority shall submit the following documents to the foreign central authority in accordance with Paragraph 6 of this Regulation:

8.1. Application A;

8.2. in respective cases – translation of the application in a language, which has been determined as the communication language in the application of the Convention, or in the official language of the state receiving the documents, or in a language that has been notified by the respective state as acceptable for communication;

8.3. information regarding provisions of the laws and regulations of Latvia in accordance with Article 14 of the Convention.

9. After receipt of a court decision (true copy) regarding submission of an Application A to the foreign state in accordance with Section 644.<sup>11</sup> of the Civil Procedure Law the central authority shall submit the Application A to the foreign central authority within 10 working days, informing the applicant thereof.

10. The central authority shall submit the following to the foreign central authority in accordance with Paragraph 9 of this Regulation:

10.1. Application A;

10.2. in respective cases – translation of the application in a language, which has been determined as the communication language in the application of the Convention, or in the official language of the state receiving the documents, or in a language that has been notified by the respective state as acceptable for communication;

10.3.the court decision (true copy) regarding submission of the Application A to the foreign state;

10.4.translation of the court decision (true copy) regarding submission of the Application A to the foreign state in a language, which has been determined as the communication language in the application of the Convention, or in the official language of the state receiving the documents, or in a language that has been notified by the respective state as acceptable for communication;

10.5. information regarding provisions of the laws and regulations of Latvia in accordance with Article 14 of the Convention.

11. In submitting Application A or a court decision (true copy) regarding submission of the Application A to the foreign state to the foreign central authority, the central authority may concurrently request that the foreign central authority takes the measures specified in Article 7 of the Convention.

### **III. Action of the Central Authority after Receipt of the Application C**

12. After the receipt of an Application C and taking of a decision the central authority shall submit the following to the foreign central authority within 10 working days:

12.1. an application regarding exercise of access rights in relation to a child whose place of residence is in another state;

12.2. in respective cases – translation of the application in a language, which has been determined as the communication language in the application of the Convention, or in the official language of the state receiving the documents, or in a language that has been notified by the respective state as acceptable for communication;

12.3. information regarding provisions of the laws and regulations of Latvia in accordance with Article 14 of the Convention.

13. In submitting Application C to the foreign central authority, the central authority may request the foreign central authority to take the measures specified in Article 7 of the Convention.

### **IV. Action of the Central Authority after Receipt of the Application B**

14. After the receipt of an Application B and taking of a decision the central authority shall, within three working days, inform the applicant regarding receipt of the Application B.

15. The central authority shall appoint a legal representative for the applicant – a natural person – in accordance with Articles 7 and 26 of the

Convention. The legal representation shall, if necessary, provide consultations and represent the applicant in the court.

16. The central authority shall, within 10 working days after receipt of the Application B and taking of a decision, submit the Application B and – in respective cases – translation of the Application B in the official language, certified according to specific procedures:

16.1. to the court in accordance with the requirements of Section 644.14 of the Civil Procedure Law, if possible, appending information regarding the provisions of the foreign laws and regulations in accordance with Article 14 of the Convention;

16.2. to the Orphan's court according to the location of the child or the place of residence or location of the person, who has illegally moved or detained the child, informing the court thereof, to which the Application B has been submitted in accordance with Sub-paragraph 16.1 of this Regulation.

17. The Orphan's court referred to in Sub-paragraph 16.2 of this Regulation shall inform the central authority and the court, to which the Application B has been submitted in accordance with Sub-paragraph 16.1 of this Regulation, regarding:

17.1. the living conditions of the child;

17.2. the measures taken for the protection of personal and financial interests and rights of the child;

17.3. if possible, the opinion of such person regarding voluntary return of the child or the possibilities of finding a peaceful solution, who has moved or detained the child.

## **V. Action of the Central Authority after Receipt of the Application D**

18. After the receipt of an Application D the central authority shall, within three working days, inform the applicant regarding receipt of the Application D.

19. The central authority shall appoint a legal representative for the applicant – a natural person – in accordance with Articles 7 and 26 of the Convention. The legal representation shall, if necessary, provide consultations and represent the applicant in the court.

20. The central authority shall, within 10 working days after receipt of the Application D, submit the Application D and – in respective cases – translation of the Application B in the official language, certified according to specific procedures, to the Orphan's court according to the location of the child or the place of residence or location of the persons indicated in Section 181 of the Civil Law.

## **VI. Power of the Central Authority**

21. If the central authority receives an Application A of a person and the place of residence of the child is unknown, the central authority may request the institution, whose competence includes the search for the child or which performs the search of the child, to announce the international search for the child, as well as provide information that may help to ascertain the location of the child.

22. If the institution, whose competence includes the search for the child or which performs the search of the child, receives the request referred to in Paragraph 21 of this Regulation, it shall notify the date of announcing the international search for the child to the central authority or the reasons, which preclude announcing of international search. After ascertaining the location of the child, the institution, which performs search of the child, shall inform the central authority regarding the place of residence of the child.

23. State and local government institutions, which according to their competence have received a request for information from the central authority, shall examine it without delay (as possible), take all the possible measures in order to ensure carrying out of the Convention, and provide the obtained information to the central authority.

24. In order to ensure information regarding the operation of the Convention and to eliminate obstacles, which hinder the application of the Convention, the Court Administration shall, with methodological assistance of the central authority, organise training of judges and public prosecutors regarding application of the Convention and topical issues not less than once in two years.

### ***Extract from Civil Procedure Law of the Republic of Latvia***

#### **Chapter 74.<sup>3</sup>**

#### **Return of a Child to the State, which is his or her Place of Residence**

*[4 August 2011]*

#### **Section 620.<sup>10</sup> Ruling Enforcement Expenses and Procedures for Payment Thereof**

(1) A creditor shall, by submitting an enforcement document for enforcement, pay the State fee and cover the ruling enforcement expenses in accordance with Section 567, Paragraph one of this Law.

(2) A creditor who does not participate in enforcement of the ruling shall, upon a request of a bailiff, in addition to the ruling enforcement expenses referred to Paragraph one of this Section, pay in the sum for covering of the expenses related to the conveyance of the child to a state,

which is his or her place of residence (also for covering of the expenses related to the stay of the child in a crises centre or other safe conditions, travel expenses, expenses for the services of an interpreter and psychologist and other expenses). The amount of such expenses and procedures for the payment thereof shall be determined by the Cabinet.

(3) After transfer of the child to a representative of the Orphan's Court a bailiff shall immediately transmit the expenses referred to in Paragraph two of this Section to the account specified by the Orphan's Court.

(4) When issuing an enforcement document to the creditor (Section 565, Paragraph one, Clauses 7 and 8, and Section 620.<sup>13</sup>, Paragraph three), a bailiff or the Orphan's Court shall repay the expenses referred to in Paragraph two of this Section, which have not been spent for enforcement of the ruling, to the creditor.

(5) A bailiff shall recover the ruling enforcement expenses from the debtor.  
*[29 October 2015]*

#### **Section 620.<sup>11</sup> Notification of an Obligation to Enforce the Ruling**

(1) A bailiff, when about to commence enforcement, shall notify the debtor in accordance with the procedures laid down in Section 555 of this Section regarding an obligation to enforce the ruling within 10 days. If the creditor submits an enforcement document for enforcement repeatedly after the bailiff has issued it to him or her in accordance with Section 620.<sup>13</sup>, Paragraph three of this Law, a notification shall not be sent.

(2) Upon receipt of the enforcement document indicated in Section 540, Clause 8 of this Law in which the time period for voluntary enforcement of ruling has not been determined for enforcement, a bailiff shall, in accordance with the procedures laid down in Section 555 of this Law, send a notification to the debtor regarding obligation to enforce the ruling within 30 days. In the notification the bailiff shall warn the debtor regarding consequences provided for in this Section that will set in if the ruling is not enforced.

*[29 October 2015]*

#### **Section 620.<sup>12</sup> Consequences that Arise if Debtor Fails to Voluntarily Enforce a Ruling**

(1) A bailiff shall send the information that a debtor has failed to voluntarily enforce a ruling to:

1) the district (city) court that has taken the decision on return of the child to the state, which is his or her place of residence - upon receipt of the abovementioned decision for enforcement; or

2) the district (city) court, in the territory of which the enforcement document referred to in Section 540, Clause 8 of this Law is to be enforced - after the time period for voluntary enforcement of the ruling specified in the enforcement document or in accordance with Section 620.<sup>11</sup> of this Law has expired.



(2) The court shall, after receipt of the information referred to in Paragraph one of this Section, shall impose a fine on the debtor in the amount of EUR 750.

(3) The issue regarding imposition of a fine shall be examined in the written procedure.

(4) A true copy of the court decision on imposition of a fine shall be sent to the debtor.

(5) An ancillary complaint may be submitted regarding a court decision on imposition of fine.

(6) The fine shall be recovered from the debtor into income of the State.

(7) Payment of the fine shall not release the debtor from the obligation to enforce the ruling.

*[12 September 2013; 9 June 2016]*

### **Section 620.<sup>13</sup> Ascertaining of Daily Regimen of a Child**

(1) Concurrently with sending of the information referred to in Section 620.<sup>12</sup>, Paragraph one of this Law, a bailiff shall, where it is necessary for the enforcement of the ruling, issue an order to the Orphan's Court based on the location of the child to ascertain the daily regimen of the child and inform the bailiff thereof immediately.

(2) The Orphan's Court shall immediately inform the bailiff regarding the information which applies to the child and the location of the child and which it has obtained by executing the order specified in Paragraph one of this Section. If it is not possible to obtain the abovementioned information, the Orphan's Court shall inform the bailiff thereof. The bailiff shall, upon receipt of the information that the location of the child is not known, in accordance with Section 569 of this Law, ask a judge to take a decision on search for the child or the child and debtor with the assistance of the police and stay enforcement proceedings.

(3) The bailiff shall, upon receipt of the information regarding the location of the child from the Orphan's Court or police, which is in the operational territory of the regional court to which the bailiff is not attached, make a notation thereon in the enforcement document, by providing information regarding the location of the child, and shall, without delay, issue the enforcement document to the creditor explaining his right to submit the enforcement document for the enforcement in conformity with the provisions of Section 549 of this Law.

(4) *[29 October 2015].*

*[29 October 2015]*

### **Section 620.<sup>14</sup> Transfer of a Child to a Creditor or Representative of the Orphan's Court**

(1) Upon receipt of the information referred to in Section 620.<sup>13</sup>, Paragraph one of this Law, a bailiff shall determine the times and places

when and where a child will be transferred to a creditor or representative of the Orphan's Court, if the creditor does not participate in the enforcement, and notify thereof:

1) the creditor by issuing a notification to him or her against a signature or by sending a notification by registered mail or forwarding it through the Ministry of Justice and informing him or her regarding the rights of the creditor to be present at the enforcement activities;

2) the Orphan's Court and the police based on the location of the child by issuing an order for their representatives to participate in enforcement. The Orphan's Court may, at its own discretion, invite a psychologist to participate in the enforcement of the ruling.

(2) The bailiff shall not inform the debtor regarding the times and places when and where the child will be transferred to a creditor or representative of the Orphan's Court, if the creditor does not participate in the enforcement.

(3) Transfer of the child to the creditor or representative of the Orphan's Court shall be performed as soon as possible.

(4) The bailiff, representatives of the Orphan's Court, as well as a psychologist, if the Orphan's Court has invited him or her, shall participate in the transfer of the child. In the time and at the place specified in the order by the bailiff the representative of the Orphan's Court shall, in co-operation with a psychologist if any has been invited, carry out negotiations with a creditor or other persons with whom the child is located in order to convince to return the child to the creditor or representative of the Orphan's Court, if the creditor does not participate in the enforcement, as well as to prepare the child for conveyance back to the state, which is his or her place of residence. The representatives of the police shall ensure public order and compliance with the order by the bailiff.

(5) If the bailiff is not allowed to enter the premises regarding which there is the information that a child is therein, they shall be opened by forced enforcement in the presence of the representative of the police. If no person aged over seven years is met at the premises, after forced opening of the premises the bailiff shall, without inventorying the property present in the premises, take care regarding safe closing and sealing of such premises. A bailiff shall leave a notification near the relevant the immovable property or premises inviting to appear at the bailiff's office in order to collect the keys from the premises. The bailiff shall make a notation in the statement regarding activities related to forced opening of the premises.

(6) If a child is transferred to a creditor, the bailiff shall make a notation in the statement regarding transfer of the child, indicating that the ruling has been enforced.

(7) If the child is transferred to a representative of the Orphan's Court for the performance of further activities in order to convey the child back to

the state, which is his or her place of residence, the bailiff shall make a notation in the statement regarding transfer of the child. A copy of the statement shall be issued to the representative of the Orphan's Court. After receipt of the notification from the Orphan's Court that the child has been conveyed back to the state, which is his or her place of residence, the bailiff shall draw up a statement on enforcement of the ruling.

*[29 October 2015]*

**Section 620.<sup>15</sup> Action of a Bailiff if it is not Possible to Transfer a Child to a Creditor or Representative of the Orphan's Court**

If the Orphan's Court cannot acquire the information referred to in Section 620.<sup>13</sup> of this Law or the conveyance of the child back to the state, which is his or her place of residence, is not possible because the child had not been met in the times and at the places specified by the bailiff, the bailiff shall draw up a statement thereon and send such statement to the Office of the Prosecutor in order for it to decide an issue regarding commencement of criminal proceedings against a debtor in relation to his or her malicious evasion from enforcement of the ruling, and stay the enforcement proceedings.

**Section 620.<sup>16</sup> Refusal or Suspension of Enforcement of a Ruling**

(1) A debtor may submit to the district (city) court, which has taken a decision on the return of a child to the state, which is his or her place of residence, or in the territory of which the certificate referred to in Section 540, Clause 8 of this Law is to be enforced, a proposal regarding suspension of enforcement of a ruling or refusal to enforce a ruling if a change of important circumstances has occurred.

(2) The following shall be considered as a change of important conditions within the meaning of this Section:

1) the fact that the conveyance of the child back to the state, which is his or her place of residence, is not possible due to the condition of health or psychological condition of the child which is certified by a statement from the hospital or psychiatrist;

2) objections of the child against his or her conveyance back to the state, which is his or her place of residence, that is certified by an opinion of the psychologist appointed by the Orphan's Court; or

3) the fact that a creditor does not demonstrate any interest regarding renewal of the connection with the child.

(3) The proposal referred to in Paragraph one of this Section may be submitted, if more than a year has passed since the decision on return of the child to the state, which is his or her place of residence (Section 644.<sup>20</sup>), except in the case referred to in Paragraph two, Clause 1 of this Section.

(4) Such application shall be examined in a court hearing, previously notifying the parties and the Orphan's Court thereof. Failure of such persons to attend shall not constitute a bar for the examination of the application.

(5) In a decision to stay enforcement of a ruling the court shall indicate the obligations of the debtor and creditor during the time period while enforcement of the ruling is stayed, and, if necessary - also procedures by which a connection between the child and creditor is to be renewed.

(6) The decision shall be enforced without delay. An ancillary complaint may be submitted regarding the decision of the court. Submission of an ancillary complaint shall not stay the enforcement of the decision.

*[29 October 2015]*

### ***Extract from Civil Procedure Law of the Republic of Latvia***

#### **Chapter 77.<sup>2</sup>**

#### **Cases Regarding the Wrongful Removal of Children across Borders to Latvia or Detention in Latvia**

*[7 September 2006]*

#### **Section 644.<sup>13</sup> Procedures for Examining Cases**

Cases regarding wrongful removal of a child across borders to Latvia or detention in Latvia if the place of residence of the child is in another state shall be examined in accordance with the provisions of this Chapter, taking into account the general provisions of this Law.

#### **Section 644.<sup>14</sup> Jurisdiction of Cases**

Cases regarding wrongful removal of a child across borders to Latvia or detention in Latvia if the place of residence of the child is in another state shall be examined in the Riga City Vidzeme Suburb Court.

(2) *[30 October 2014].*

*[29 November 2012; 30 October 2014]*

#### **Section 644.<sup>15</sup> Application for the Return of a Child to the State, which is his or her Place of Residence**

(1) In order to ensure the return to the state, which is his or her place of residence, of such a child who has been wrongfully removed to Latvia or detained in Latvia, the person whose right to implement custody or guardianship has been breached may submit an application to a court regarding the return of the child to the state, which is his or her place of residence, if the relevant state is a contracting state to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction or the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

(2) The application referred to in Paragraph one of this Section may be submitted to a court also by competent authorities in order to apply the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, the Hague Convention of 19 October 1996 on Jurisdiction,

Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children or Council Regulation No 2201/2003.

(3) The following shall be indicated in an application:

1) the name of the court to which the application has been submitted;  
2) the given name, surname, personal identity number (if there is none, then other identification data), declared place of residence and the additional address indicated in the declaration, but if none, the place of residence of the applicant or information regarding his or her location, as well as a correspondence address in Latvia for the receipt of judicial documents. If the applicant agrees to electronic correspondence with the court, an electronic mail address shall also be indicated and, if he or she has been registered in the online system for correspondence with the court, an indication of registration shall be included as well;

3) the given name, surname, personal identity number (if such does not exist, then other identification data) of the wrongfully removed or detained child and other information regarding the child, as well as information regarding the possible location of the child and the identity of the person with whom the child may be found;

4) the given name, surname, personal identity number (if there is none, then other identification data), declared place of residence and the additional address indicated in the declaration, as well as the place of residence of the defendant, if it differs from the declared place of residence and the additional address indicated in the declaration, or information regarding his or her location;

5) the circumstances, which certify the custody or guardianship rights of the applicant to the child;

6) the circumstances which certify the fact of the wrongful removal or detention of the child and civil law aspects;

7) the request of the applicant;

7<sup>1</sup>) whether the applicant or his or her representative will participate in the voluntary enforcement of the decision on return of the child to the state, which is his or her place of residence, in the territory of Latvia;

8) the list of attached documents;

9) the date when the application was drawn up.

(4) The following shall be attached to an application:

1) the documents upon which it is based;

2) certified information from the relevant competent authority regarding legal regulations in the state, which is the place of residence of the child;

3) a translation into the official language of the application and the documents certified according to specified procedures referred to in Clauses 1 and 2 of this Paragraph.

(5) The application shall be signed by the applicant or the representative thereof. If the application has been submitted by the

representative of the applicant, an authorisation or other document certifying authorisation to submit the application shall be attached to the application. If the representative of the applicant is a sworn advocate, an electronic mail address of the sworn advocate shall be indicated additionally.

(6) An application which is not signed shall be regarded as not submitted and shall be sent back to the submitter.

(7) A judge shall take a decision to refuse to accept an application, if a power of attorney or other document certifying authorisation of the representative to apply to the court with such application is not attached thereto. A decision shall not be subject to appeal.

[4 August 2011; 29 November 2012; 23 April 2015; 23 November 2016]

#### **Section 644.<sup>16</sup> Leaving an Application Not Proceeded With**

If an application fails to comply with the requirements of Section 644.<sup>15</sup>, Paragraphs one, two, three and four of this Law or if an authorisation does not arise from the power of attorney or other document attached to the application for a representative to apply to the court with such application, the court shall leave the application not proceeded with only in such case when the lack of the documents or necessary information significantly influences the possibility of examination of the application.

(2) If a court in conformity with Paragraph one of this Section leaves the application not proceeded, the consequences provided for in Section 133 of this Law shall come into effect.

[23 April 2015]

#### **Section 644.<sup>17</sup> Search for the Defendant and Child**

(1) If the place of residence or whereabouts of the defendant or the child wrongfully removed to Latvia or detained in Latvia is not known, but there is a basis for believing that the child is located in Latvia, a judge on the basis of receipt of the application referred to in Section 644.<sup>15</sup> of this Law shall take a decision on search for the child or defendant with the assistance of the police.

(2) The court shall stay legal proceedings if a decision on the search for the defendant or the child with the assistance of the police has been taken.

(3) Legal proceedings shall be stayed until the defendant or the child is found.

[4 August 2011]

#### **Section 644.<sup>18</sup> Court Action after Initiation of a Case**

(1) A court shall notify the Ministry of Justice regarding initiation of a case. The Ministry of Justice shall inform the competent authorities, which are in the place of residence of the child of this in order to apply the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of

Parental Responsibility and Measures for the Protection of Children or Council Regulation No 2201/2003.

(2) If the application is based upon a decision taken by the relevant competent authority of the foreign state regarding the return of the child, the court may in addition directly inform also the relevant foreign competent authority, which has taken the decision on the return of the child to the relevant state.

(3) Court documents and summons shall be delivered to the defendant based on the address of his or her declared place of residence, but in cases when additional address has been indicated in the declaration - based on additional address, as well as based on the address of the place of residence or location, if it differs from the declared place of residence and additional address indicated in the declaration.

*[12 June 2009; 29 November 2012]*

### **Section 644.<sup>19</sup> Examination of an Application**

(1) An application shall be examined in a court hearing within 15 days after initiation of the case with participation of the parties. A representative of the Orphan's Court shall be invited to the court hearing, as well as the point of view of the child shall be ascertained if he or she can formulate it by taking into account his or her age and degree of maturity. The Orphan's Court shall have the rights of a participant in the case specified in Section 88, Paragraph two of this Law.

(2) If the defendant, without a justified cause, fails to attend pursuant to a court summons, he or she may be brought to court by forced conveyance.

(3) If one of the parties lives far away or due to other reasons cannot attend pursuant to a court summons, the court may admit a written explanation by this party or the participation of a representative thereof as sufficient for examination of the case.

(4) In examining the application, the court shall, upon its own initiative, request evidence by using the most appropriate procedural possibilities, as well as the quickest way of acquiring evidence.

(5) If the court finds that the child is located in a foreign state, it shall take a decision on leaving the application without examination.

(6) If the court finds that the child has been wrongfully removed to Latvia or detained in Latvia, it shall take a decision to return the child to the state, which is his or her place of residence.

(7) The court shall take a decision on return or non-return of the child to the state, which is his or her place of residence, by applying the provisions of Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction or Council Regulation No 2201/2003.

(8) During examination of the case the court shall ascertain the opinion of the participants in the case regarding measures of voluntary enforcement of the possible decision on return of the child to the state, which is his or her place of residence.

(9) In taking a decision on return of the child to the state, which is his or her place of residence, the court shall indicate the time period for voluntary enforcement of the decision and, if possible, the procedures for voluntary enforcement of the decision. The time period for voluntary enforcement of the decision shall be determined not longer than 30 days from the day of coming into effect of the decision. In the decision the court shall warn the defendant - if the decision is not enforced voluntarily, a fine will be applied and enforcement will be performed in accordance with the procedures laid down in this Law, as well as an issue regarding commencement of criminal proceedings may be decided.

(10) In the ruling the court shall impose an obligation on the defendant to notify the Ministry of Justice immediately, if until enforcement of the ruling he or she changes his or her place of residence or location, or the location of the child is changed.

*[4 August 2011]*

#### **Section 644.<sup>20</sup> Entering into Effect of Decision and Appeal Thereof**

(1) An ancillary complaint may be submitted regarding a decision of a court. If the decision has been taken without the presence of a participant in the case, the time period for submitting a complaint shall be counted from the day of issue of a true copy of the decision.

(2) A decision of the court of first instance shall enter into lawful effect when the time period for its appeal has expired.

*[4 August 2011]*

#### **Section 644.<sup>21</sup> Competence of the Regional Court**

(1) The regional court shall examine an ancillary complaint within 15 days after initiation of the appeal proceedings. The regional court, when examining an ancillary complaint, has the right to:

- 1) leave the decision unamended, but to reject the complaint;
- 2) withdraw the decision and decide the issue according on the merits.

(2) The decision shall enter into effect and shall be enforced without delay.

*[4 August 2011]*

#### **Section 644.<sup>22</sup> Actions after Taking of a Decision**

A true copy of the decision taken by a court regarding the non-return of the child to the state, which is his or her place of residence, and other materials of the case shall be submitted to the Ministry of Justice.

*[12 June 2009]*



**13.5. Romanian legislation - ACT No. 369 of 15 September 2004  
\*\*\*Republished. Implementing the Hague Convention of 25 October  
1980 on the Civil Aspects of International Child Abduction, to which  
Romania acceded through the Act No. 100/1992.**

**ART. 1**

(1) The Ministry of Justice is the Central Authority of Romania for the implementation of the obligations set forth in the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, to which Romania acceded through the Act No. 100/1992, published in the Official Journal of Romania, Part I, No. 243 of 30 September 1992, hereinafter referred to as the "Convention".

(2) As the Romanian Central Authority, the Ministry of Justice cooperates with the Central Authorities of the other States-Parties to the Convention and collaborates with the Romanian institutions and authorities that have competences in the implementation of the Convention.

(3) The competent Romanian institutions and authorities must provide immediate support to the Romanian Central Authority by transmitting the information that is available to them according to their competences, following requests made in the implementation of this Act.

**ART. 2**

(1) The processing of applications submitted by natural persons, institutions or agencies concerned from any State-Party to the Convention, in view of the return of a child who is in Romanian territory following a wrongful removal or retention under Art. 3 of the Convention, is of the competence of the law court.

(2) The court that has competence to process the applications in para. (1) is the Bucharest Tribunal for Minors and Families.

**ART. 3**

If the natural person, institution or agency concerned or the Central Authority of the State-Party to the Convention submits a standard application to the Romanian Central Authority, it shall check whether the conditions in Art. 8 para. 2 of the Convention are met and, as appropriate, within 10 days of receipt of the application, request supplements or supporting documents. If the application does not meet the conditions in Art. 4 of the Convention, the Romanian Central Authority returns the application.

**ART. 4**

The natural person, institution or agency concerned whose application meets the conditions in Art. 8 para. 2 of the Convention receives legal aid for the processing of the return application, regardless of their financial situation. Art. 6 and 81 of the Government Emergency Ordinance No. 51/2008 on Legal Aid in Civil Matters, as approved with amendments

and supplements by the Act No. 193/2008 as subsequently amended and supplemented, as well as the provisions of the Act No. 51/1995 on the Organisation and Exercise of the Lawyer's Profession, as republished, as subsequently amended and supplemented, shall apply mutatis mutandis.

#### ART. 5

(1) At the request of the natural person, institution or agency concerned or of the Central Authority of the Requesting State, the Romanian Central Authority facilitates the provision of legal aid by a lawyer. To this end, the Romanian Central Authority immediately forwards the entire documentation transmitted according to Art. 3 to the dean of the bar association in the jurisdiction of the court that has competence to deal with the return application.

(2) On grounds of Art. 81 of the Government Emergency Ordinance No. 51/2008, as approved with amendments and supplements by the Act No. 193/2008 as subsequently amended and supplemented, the dean of the bar association must within 3 days issue a decision designating, mandatorily, ex officio, for the person whose habitual residence is abroad and who has submitted the return application, a lawyer to initiate court proceedings, to represent and to assist in first instance, in the ordinary and extraordinary means of judicial review and to initiate coercive enforcement.

(3) The lawyer designated according to para. (2) submits the return application to the competent court within 7 days of the date of receipt of the notice of his designation.

(4) The designated lawyer receives, for each procedural stage, the fee provided in the Protocol between the Ministry of Justice and the National Union of Bar Associations of Romania Establishing the Fees for Lawyers in the Public Legal Aid System.

(5) Within 48 hours of the date when the mandate of a lawyer designated under para. (2) ceases, he must return to the Romanian Central Authority the entire documentation forwarded according to para. (1) and any court documents served during the processing of the return application.

#### ART. 6

If the Romanian Central Authority has reason to believe that the child whose return is being requested is in the territory of another State-Party to the Convention, it will forward the application directly and without delay to the Central Authority of that State, informing the requesting central authority or, as appropriate, the plaintiff, about this.

#### ART. 7

Articles 4 and 5 do not preclude the possibility for the natural person, institution or agency concerned to apply with the competent court, either personally or through a chosen lawyer. If representation is provided by a chosen lawyer and the Romanian Central Authority was initially applied with

under Art. 3, it makes available to the lawyer the filled-out standard application form and all the supporting documents sent by the competent authorities of the Requesting State. The Romanian Central Authority will continue to exercise its functions under Art. 7 of the Convention.

#### ART. 8

The refusal by the Romanian Central Authority to accept the processing of the return application, according to Art. 27 of the Convention, does not prevent the natural person, institution or agency concerned from applying directly with the competent law court.

#### ART. 9

(1) Cases concerning the processing of applications for the return of a child who is in Romanian territory under Art. 3 of the Convention must be dealt with urgently and with priority, and the parties must be summoned within a short time.

(2) The participation of a public prosecutor is mandatory.

(3) The application is dealt with in opposition with the person who is claimed to have removed or retained the child in Romania.

(4) It is not mandatory to make a written submission in defence.

(5) The court hearings must not be more than two weeks apart.

(6) If the presence of an interpreter is needed, the law court takes all steps required before the court hearing date, according to the Act No. 304/2004 on Judicial Organisation, as republished and subsequently amended and supplemented.

#### ART. 10

A plaintiff from abroad must specify an address for service in Romania. In the absence of an address for service, process shall be served through the Romanian Central Authority and the Central Authority of the State in which the plaintiff resides.

#### ART. 11

(1) In court, the parties may present any documents and information relevant to the case. Documents issued by the competent public authorities of the Requesting State are valid in court without any further legalisation or similar formality, according to Art. 23 of the Convention.

(2) The law court shall deal speedily with the case. To this end, the court must accept documents and, if this is not sufficient or the circumstances of the case so demand, other evidence may be obtained also.

(3) The court may consider also the relevant foreign law and foreign judicial or administrative decisions, without having recourse to the specific procedures for the recognition of foreign judgements. Also, the court may ask the plaintiff to provide a judgement or another document issued by the authorities of the State in which the child habitually resides, certifying, if the law of that State permits it, the fact that the removal of the child from that

State or the retention of the child is a violation of a right of custody awarded according to the law of that foreign State.

(4) It is mandatory to hear a child who has reached the age of 10. A child who has not reached the age of 10 may be heard if the court believes it to be necessary.

(5) In all cases, when the child is heard a psychologist from the general directorates of social assistance and child protection of Bucharest sectors must participate and prepare, at the request of the court, a psychological report.

#### ART. 12

The court may cooperate with the authorities of the State in which the child habitually resided, either directly or through the Romanian Central Authority.

#### ART. 13

(1) Throughout the proceedings, the court may take, by means of an order which is not subject to any means of legal review, any of the measures of protection of the child provided in the current legislation.

(2) If there are grounds to fear that the minor could be removed outside the borders of Romania in order to abscond from the return proceedings initiated according to the Convention and to this Act, the court that is dealing with the return application must, by means of an order which is not subject to any means of legal review, retain the passport of the child or another travel document, as appropriate. The measure of retaining the passport or another travel document is ordered for a determinate period or until the cessation of the grounds that justified it. A copy of the order must be served on the Romanian authority that issued the passport or the travel document, as appropriate, to the General Directorate of Passports or to the General Inspectorate for Immigration, subordinated to the Ministry of the Interior.

#### ART. 14

(1) If the court finds that the removal or retention of the child in Romanian territory is wrongful under Art. 3 of the Convention, it orders the return of the child to the country of its habitual residence.

(2) The court appoints, in the judgement, a time limit for complying with the obligation to return the child, which may not exceed two weeks from service of the judgement. The time limit is appointed subject to a civil fine payable to the Romanian State and ranging from RON 2500 to RON 12500.

(3) When the return judgement is pronounced, the court may order one of the following measures:

a) that the defendant hand over to the plaintiff the minor's passport or travel document, as appropriate;

b) that the defendant parent contribute to the issuing of a travel document to the minor or that his consent be substituted in this respect.

Also, in the same judgement, the court may authorise the plaintiff to take over the minor personally or, as appropriate, through a representative, in the event of a refusal to voluntarily comply with the obligation to return the child within the appointed time limit.

(4) The bearing of the costs for the return of the child is established according to the last paragraph of Art. 26 of the Convention.

(5) By means of exception to para. (1), the court may order any other measure provided in Art. 12 and 13 of the Convention.

#### ART. 15

(1) The judgement by the initial court that ordered the return of the minor is enforceable.

(2) The pronouncement of the judgement by the initial court may be postponed by up to 24 hours, and the judgement must be drawn up within 7 days of pronouncement.

(3) The judgement must be served on the parties and the Central Authority, within 48 hours after it is drawn up.

(4) The judgement is subject to appeal on points of law with the Court of Appeal of Bucharest, Section for Minors and Families, within 10 days from service. The appeal suspends the enforcement of the judgement pronounced in first instance. The case record must be forwarded to the Court of Appeal of Bucharest within 5 days from the expiry of the time limit for submitting an appeal.

(5) The pronouncement by the appellate court may be postponed by up to 24 hours, and the decision by the appellate court must be drawn up within 7 days of pronouncement. A copy thereof must be served, ex officio, on the Romanian Central Authority, within 48 hours after it is drawn up.

#### ART. 16

(1) The Romanian Central Authority must, throughout the time limit appointed by the court, according to Art. 14 para. (2), monitor whether the obliged person complies with the obligation to return the child. To this end, the court is entitled to request information from the institutions and authorities involved.

(2) If the obligation to return the child is not executed voluntarily within the time limit appointed by the court, the Romanian Central Authority informs the court about the non-execution. The court must immediately serve a copy of the writ of execution to the fiscal authorities in view of enforcing the fine.

#### ART. 17

(1) If the court judgement ordering the return of the child to the State of its habitual residence is not voluntarily executed within the time limit appointed by the court, coercive enforcement is carried out according to the Civil Procedure Code. Art. 888 of the Civil Procedure Code shall apply *mutatis mutandis*.

(2) The lawyer designated according to Art. 5 requests the granting of legal aid in the form of the payment of the fee for the judicial enforcer. Art.

26 of the Government Emergency Ordinance No. 51/2008, as approved with amendments and supplements by the Act No. 193/2008, as subsequently amended and supplemented, shall apply mutatis mutandis.

(3) The court grants the legal aid according to Art. 81 of the Government Emergency Ordinance No. 51/2008, as approved with amendments and supplements by the Act No. 193/2008, as subsequently amended and supplemented.

(4) The lawyer submits the application for coercive enforcement together with the writ of execution, with the judicial enforcer designated according to Art. 26 of the Government Emergency Ordinance No. 51/2008, as approved with amendments and supplements by the Act No. 193/2008, as subsequently amended and supplemented, within 7 days from receipt of the notice of designation by the president of the territorial chamber of judicial enforcers.

(5) Enforcement takes place in the presence of a representative of the general directorate of social assistance and child protection that has jurisdiction. The judicial enforcer may request the participation of the police, which must provide support as a priority.

(6) Following the coercive enforcement, the child is taken over by the creditor from abroad or by a person duly authorised to do so.

#### ART. 18

The Romanian Central Authority informs the Central Authority of the Requesting State that it shall interpret as a renouncement of the return application if the natural person, the institution or the agency concerned from abroad, who filed the application:

a) does not reply, within 60 days, to the requests sent by the Romanian Central Authority;

b) does not contribute in view of taking over the child within the coercive enforcement procedure.

#### ART. 19

(1) In the implementation of Art. 15 of the Convention, at the request of a judicial or administrative authority of a State-Party to the Convention, the Romanian court may pronounce a judgement to confirm whether, according to Romanian legislation, the removal or retention of a child whose habitual residence is in Romania to the territory of that State took place in violation of any custody rights.

(2) In processing the request, the court may certify, as appropriate:

a) the identity of the holder of the rights concerning the child;

b) the content and the limits of the rights concerning the child, under Romanian law;

c) whether, in relation to the elements mentioned, under Romanian law, the removal of the child from Romanian territory or its retention outside that territory was compliant with the custody rights over the child or whether

the holder of custody was entitled to consent to or oppose the removal of the child from Romanian territory or its retention outside that territory;

d) any other aspect that is relevant in establishing whether the removal or retention of the child outside Romanian territory is wrongful under Art. 3 of the Convention.

(3) The request is received by the Romanian Central Authority, which forwards it to the court that has competence according to Art. 2 para. (2).

(4) The judgement is handed down without summoning the parties, in camera, based on the court judgements pronounced with regard to the child, as well as on any other documents transmitted by the competent authority of the Requesting State according to Art. 30 of the Convention. The provisions of the Civil Procedure Code regarding non-disputed proceedings apply *mutatis mutandis*.

(5) The judgement is not subject to any means of judicial review and it must be served to the requesting judicial or administrative authority, through the Romanian Central Authority. Art. 15 para. (2) is applicable.

#### ART. 20

(1) According to Art. 11 para. (6) of the Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, hereinafter referred to as the Regulation, a judgement of non-return pronounced by a Romanian court under the Convention and the Regulation is served to the Romanian Central Authority within 48 hours after it is drawn up, together with a copy of the relevant documents based on which the judgement was pronounced.

(2) The transmission of documents by the requesting central authority, in the implementation of Art. 11 para. (6) of the Regulation, takes place through the Romanian Central Authority.

#### ART. 21

(1) After receiving under Art. 11 para. (6) of the Regulation a judgement by a foreign court dismissing a return application made under the Convention and the Regulation, and the relevant documents, the Romanian Central Authority obtains a Romanian translation thereof and forwards them as soon as possible to the local court that has jurisdiction over the habitual residence that the child had immediately before the wrongful removal or retention.

(2) After receiving the documents from the Romanian Central Authority, unless the Romanian court has already been seised, the local court notifies the parents of the child, mentioning the following:

1. The phrase "According to Art. 11 para. (7) of the Regulation" and
2. Information to the parents regarding the possibility to seise the Romanian court, within 3 months of the date of the notification, by submitting

an application concerning the exercise of parental authority regarding the child concerned.

(3) The court shall consider itself seized as of the date of transmission of the application instituting court proceedings.

(4) Upon the expiry of the time limit, the court informs the Romanian Central Authority and serves to the Romanian Central Authority the outcome of the notification sent according to para. (2).

#### ART. 22

In the implementation of Art. 1 b) and Art. 21 of the Convention, the natural person, the institution or the agency concerned from any State-Party to the Convention may ask the Romanian Central Authority for assistance with organizing or securing the effective exercise of access rights to a child who resides in Romanian territory.

#### ART. 23

(1) The Romanian Central Authority must contact the person who is exercising parental authority over the child and with whom the child is living and attempt, either directly or through specialists, an amicable resolution of the application for exercise of access rights. It shall warn the person who is exercising parental authority over the child and with whom the child is living about the sanctions that may be imposed under this Act, in the event of a refusal to voluntarily allow the exercise of access rights.

(2) The Romanian Central Authority may request the participation of the tutelary authority or of other authorities or institutions whose cooperation it considers necessary to organise the exercise of access rights.

#### ART. 24

(1) If the child concerned by the application for the organisation or protection of exercise of access rights constantly refuses contact with one of the parents or shows an aversion towards that parent, the court may order, depending on the age of the child, that it should undergo a psychological counselling programme for up to 3 months.

(2) The application instituting court proceedings may be submitted at any time after applying with the Romanian Central Authority for the organisation or protection of exercise of access rights. Articles 4, 5 and 7 apply *mutatis mutandis*.

(3) The application instituting court proceedings is dealt with by an order issued in camera, after summoning the parties, the person with whom the child is living, as appropriate, and the general directorate of social assistance and child protection in whose jurisdiction the child is. Art. 11 para.

(4) applies *mutatis mutandis*.

(4) The above order is served by the court to the authorities that have the competence to enforce it and to the Romanian Central Authority, within 5 days after it is drawn up.



(5) Within 10 days from service, the psychologist appointed by the court shall establish the duration and the content of the psychological counselling programme, after an initial psychological evaluation of the child. The psychologist must immediately inform the court about the duration of the psychological counselling programme and about any modifications thereof, as appropriate.

(6) After completing the programme, the psychologist must prepare a report of final psychological evaluation and serve it to the court.

(7) The court shall forward that report to the Romanian Central Authority within 5 days from service.

#### ART. 25

(1) If it is requested that the exercise of access rights should take place by removing the child from Romanian territory, the provisions of Articles 4, 5, 7, 9, 10 and 17 apply *mutatis mutandis*.

(2) The court may approve the exercise of access rights by removal of the child from Romanian territory only if the evidence available provides guarantees for the voluntary return of the child to Romania. The court may order the natural person, the institution or the agency concerned holding the access rights to deposit a bail.

(3) If the exercise of access rights is conditioned upon the depositing of bail, the court may, in the same judgement, appoint the time limit for depositing the bail, as well as the date when it will be returned. The provisions of Art. 1056 – 1063 of the Civil Procedure Code apply *mutatis mutandis*.

(4) The judgement must order the bearing of the cost of exercising access rights, according to the final paragraph of Art. 26 of the Convention.

#### ART. 26

Depending on circumstances, the Romanian Central Authority may ask either the central authority of the State where the child will stay during the visit, or the embassy or consulate of Romania in that State, to provide assistance and cooperation in view of checking the conditions of the visit and making sure that the child is brought back to Romania at the end of the visitation period.

#### ART. 27

In the fulfilment of its duties, the Romanian Central Authority may, as appropriate:

a) apply with or request the cooperation of the Police, the Gendarmerie, the local council or any other competent authorities in order to locate a child about whom it believes that it was wrongfully removed to or is being wrongfully retained in, Romanian territory;

b) apply with competent child protection authorities in view of taking, if necessary, the measures for the protection of a child who has been wrongfully removed to or is being wrongfully retained in, Romanian territory;

c) attempt an amicable resolution of the dispute or suggest that the parties use mediation;

d) initiate and establish forms of collaboration with lawyers who specialise in the matter of the Convention and of this Act, as well as with psychologists who specialise in child psychology;

e) cooperate, within the limits of its competences, with the law court, in view of making sure that applications submitted to Romanian authorities under the Convention are dealt with as quickly as possible;

f) take any other steps for the implementation of the Convention. In order to monitor the implementation of the Convention, the Romanian Central Authority may request explanatory reports from all persons and authorities involved in the implementation of the Convention.

#### ART. 28

(1) All applications made under the Convention and under this Act are free of charge.

(2) The cost of fulfilment by the Romanian Central Authority of its obligations under the Convention and this Act shall be borne from the budget of the Ministry of Justice.

#### ART. 29

The provisions of this Act are supplemented by those of the Civil Procedure Code.

#### ART. 30

(1) The manner in which the Ministry of Justice exercises its functions as Central Authority under Art. 7 of the Convention shall be established by regulation approved by order of the minister of justice, within 3 months\*) of the entry into force of this Act.

(2) Before the Bucharest Tribunal for Minors and Families is set up, the applications in Art. 2 para. (1) will be dealt with by the specialised sections of the District Court of Bucharest.

#### ART. 31

This Act shall enter into force 3 months after its publication into the Official Journal of Romania, Part I. \*\*)

-----

\*\*) The Act No. 369/2004 was published in the Official Journal of Romania, Part I, No. 888 of 29 September 2004.

#### N.B.:

Below are reproduced the provisions of Art. II of the Act No. 63/2014 which have not been incorporated into the republished form of the Act No. 369/2004 and which are still applicable as its own provisions:

#### “ART. II

Trials that are ongoing, as well as coercive enforcements that began under the former Act shall remain governed by that Act.”

-----