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Mirela Župan, ed.

Međunarodno privatno pravo u praksi europskih sudova - obitelj u fokusu

Mirela Župan, ur.

Faculty of Law Osijek
Josip Juraj Strossmayer University of Osijek
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CONTENTS

I. EU Private International Family Law ..

II. Hague Conference and International Family Law - Child Abduction at Focus ..

SADRŽAJ

I. Međunarodno privatno obiteljsko pravo EU-a .. 37

II. Haška konferencija i međunarodno obiteljsko pravo - otmica djece u fokusu .. 135

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Foreword

The Faculty of Law at the Josip Juraj Strossmayer University of Osijek and Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), within the framework of the Open Regional Fund for Southeast Europe (ORF) – Legal Reform and South East European Law School Network, organized the 11th Regional Private International Law Conference: "Private International Law in the Jurisprudence of European Courts – Family at Focus" (Osijek, Croatia), 11-12 June 2014)

It was the 11th meeting of academics: professors and assistants working at respective private international law departments of faculties of law in the South East European Region. So far, each meeting was attended by distinguished European experts outside the SEE region. This meeting was special, as for the first time among our participants we had colleagues from Kosovo, Albania and Turkey. Deep appreciation goes to the founder of the idea: Prof. Mirko Živković from the Faculty of Law in Niš as well as to Dr. Christa Jessel Holst of the Max Planck Institute in Hamburg for bonding and bridging us for over a decade. The Osijek regional meeting came in the sequence of previous regional PIL meetings, dating back to 2003 Serbia (Niš), 2004 Slovenia (Maribor), 2005 Serbia (Belgrade), 2006 Croatia (Zagreb), 2007 Bosnia and Herzegovina (Banja Luka), 2008 Montenegro (Podgorica), 2009 Serbia (Novi Sad), 2010 Croatia (Rijeka), 2011 Macedonia (Skopje), 2012 Serbia (Niš).

Academic organizer of conference in Osijek was the Chair of private international law, prof. Vjekoslav Puljko (head of the Chair) and prof. Mirela

Predgovor

Pravni fakultet Sveučilišta Josipa Jurja Strossmayera u Osijeku, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) u okviru Otvorenog regionalnog fonda za jugoistočnu Europu (ORF) – Pravna reforma te Mreža pravnih fakulteta jugoistočne Europe (SEELS) organizirali su 11. regionalnu konferenciju "Private International Law in the Jurisprudence of European Courts – family at focus" (Osijek, Hrvatska), 11. – 12. lipnja 2014.)

Bio je to 11. susret znanstvenika: profesora i asistenata koji rade na katedrama za međunarodno privatno pravo pravnih fakulteta u jugoistočnoj Europi. Dosad su na svakom našem susretu sudjelovali i ugledni europski stručnjaci izvan regije. Na ovom su susretu prvi put s nama bile i kolegice s Kosova, Albanije i Turske. Duboku zahvalnost zaslužuje utemeljitelj ove ideje: prof. Mirko Živković s Pravnog fakulteta u Nišu, kao i dr. Christa Jessel Holst s Max Planck instituta u Hamburgu koja nas povezuje više od desetljeća. Osječka regionalna konferencija dolazi u nizu prethodnih sastanaka koji sežu još u godinu 2003. Srbija (Niš), a slijedili su: 2004. Slovenija (Maribor); 2005. Srbija (Beograd); 2006. Hrvatska (Zagreb); 2007. Bosna i Hercegovina (Banja Luka); 2008. Crna Gora (Podgorica); 2009. Srbija (Novi Sad); 2010. Hrvatska (Rijeka); 2011., Makedonija (Skopje) i 2012. Srbija (Niš).

Akademski je organizator osječke konferencije bila Katedra za međunarodno privatno pravo koju čine izv. prof. dr. sc. Vjekoslav Puljko (predstojnik

Župan. Year after year, participants discuss various interesting topics. The *rationale* of placing the topic of cross-border family relations at the heart of discussion lies, first of all, in the long-term dedication of Faculty of Law Osijek's scholars to family-related topics. Additionally, the intention was to raise the awareness of a legal area that is in regional doctrinal and practical debates neglected, despite the fact that most of the cross-border related practice in front of courts and other authorities relates precisely to family issues! Cross-border family topics –placed in the Western Balkans context – have a common starting position: all of the countries have accepted the same international instruments (particularly the Hague Child Abduction Convention of 1980), and, in the context of national private international law acts, they all have deeply rooted solutions of the common PIL Act of 1982.

Meanwhile, some of the countries have become full EU member states, such as Slovenia and Croatia, some are in the association process, and some have only just opted to follow the European path. Regardless of the EU accession process stage, the EU's efforts in regulation of family private international law affect all of these legal systems. Cross-border family relationships raise broader issues, affecting EU and third country national partners and children alike. Facilitating free movement leads to an ever increasing number of migrating individuals. As the free movement formula serves to aggravate as much as facilitate family life, the EU has been introducing new

Katedre) i izv. prof. dr. sc. Mirela Župan. Iz godine u godinu sudionici su razgovarali o raznim zanimljivim temama, a uvijek je na akademskom organizatoru da postavi okvire te rasprave. *Ratio* odabira prekograničnih obiteljskih odnosa za dnevni red ovog skupa leži u dugogodišnjoj predanosti znanstvenika s osječkog Pravnog fakulteta obiteljskim temama, kao i u nedvojbenoj osviještenosti činjenice da je to područje prava pomalo zanemareno, dok je zapravo glavnina prakse u prekograničnim sporovima, kako sudova i drugih nadležnih tijela, povezana upravo sa statusnim i obiteljskim odnosima. Stavljanje ove teme u kontekst zapadnog Balkana povlači nekoliko zajedničkih nazivnika za sve ove države: one počivaju na istim međunarodnim ugovorima te nacionalnom sustavu međunarodnog privatnog prava; posebice pri tome mislimo na Hašku konvenciju o otmici djece iz 1980. te za sve duboko ukorijenjena rješenja zajedničkog Zakona o rješavanju sukoba zakona s propisima drugih zemalja u određenim odnosima iz 1982. godine.

U međuvremenu su neke od tih zemalja postale punopravne članice EU-a, poput Slovenije i Hrvatske, neke su u procesu pridruživanja, dok su neke tek proglasile svoj europski put. Neovisno o tome u kojem se statusu nalaze, angažman EU-a u reguliranju obiteljskog međunarodnog prava utječe na sve ove pravne sustave. Prekogranični obiteljski odnosi otvaraju širok spektar pitanja koji jednako utječu na građane država članica EU-a kao i na državljane trećih država. Poticanjem slobodnog kretanja EU potiče preseljenje sve većeg broja pojedinaca i obitelji. Tako formula slobodnog kretanja za građane postaje i otegotna i olakšavajuća

rules, as well as upgrading the existent Hague Convention rules. Therefore, an area for discussion has opened with respect to the complex and interrelated normative solutions and the practical issues of interpreting these rules, inherent to any of the legal systems of the Western Balkans states.

The aim of this conference was to discuss and set up a panel for several distinctive topics: general problems of application of personal status and family PIL by courts, particularly national jurisdictions; personal status and family PIL issues raised in cases brought before the European Court of Human Rights; personal status and family PIL issues raised in cases brought before the Court of Justice the European Union. The relevant normative solutions and practices were perceived from several perspectives: EU *acquis*, the Hague Conventions on Private International Law and national systems of private international law in the region. National reports on the application of the Hague Child Abduction Convention were gathered on the basis of a Questionnaire prepared by Mirela Župan and reviewed by Prof. Paul Beaumont as well as Philippe Lortie and Maja Groff from the Permanent Bureau of the HCCH. National reports were presented at a round table discussion, and here the Questionnaire and written reports have been gathered and printed as well. The majority of speakers at the June conference in Osijek have sent their written contributions, which are collected here and presented to the public.

As an editor, I would like to thank all of the private international law friends who presented their academic views at the conference venue and, with special pleasure, to those who reiterated their efforts by submitting outstanding

okolnost. EU uvodi nova pravila kroz svoje uredbe, ali i nadograđuje postojeća pravila Haške konferencije. Dakle, otvoren je panel za raspravu o složenim i međusobno povezanim normativnim rješenjima i praktičnim problemima njihove interpretacije, koji je na različitim razinama svojstven bilo kojem pravnom sustavu država zapadnog Balkana.

U cilju je ove konferencije bilo raspraviti sljedeće skupine tema: opće probleme primjene kolizijskog prava osobnog i obiteljskog statuta, posebice pred sudovima nacionalnih jurisdikcija; pitanja osobnog i obiteljskog statuta svojstvena praksi Europskog suda za ljudska prava te Suda Europske unije. Relevantna normativna rješenja i praksa percipiraju se iz perspektive stečevine Europske unije, Haške konvencije za međunarodno privatno pravo te nacionalnih sustava međunarodnog privatnog prava u regiji. Okupljena su nacionalna izvješća o primjeni Haške konvencije o otmici djece, izrađena prema *Upitniku* koji je pripremila Mirela Župan, uz pomoć i savjete prof. Paula Beaumonta, Philippea Lortieja i Maje Groff iz Stalnog tajništva Haške konferencije. Nacionalna izvješća predstavljena su na okruglom stolu, a *Upitnik* i pisana izvješća okupljena su i tiskana ovdje. Većina govornika poslala je svoje pisane priloge, koji su sada okupljeni i prezentirani zainteresiranoj javnosti.

Kao urednica zahvaljujem svim prijateljima s područja međunarodnog privatnog prava koji su nas na konferenciji upoznali sa svojim akademskim opservacijama. Zadovoljstvo se ponovilo kada sam zaprimila izvrsne pisane priloge

written contributions! I am grateful for the cooperation of the colleagues appointed to the International Editorial Board as well as for all of the reviewers' thoughtful reading, comments and critiques. Finally, I am proud that we can add another written evidence of our academic efforts in the region. On behalf of entire PIL academic community, I express my deep appreciation to the co-organizers of the Osijek 2014 event, GIZ and SEELS. My sincere gratitude also goes to my hometown Faculty of Law in Osijek for hosting and supporting the June 2014 Conference, as well as for encouraging and supporting the entire process of publication of the collection of papers before you. This publication was supported by the Croatian Association for Legal Protection of Family as well.

I sincerely hope these papers will bring our private international law considerations, dilemmas and concerns closer to a wider academic population of Europe and worldwide. Each of these papers cries for improvements of legal solutions and practice. I feel we have carried out our social responsibility as experts in the field, for the benefit of children, individuals and families, who do not need to understand the jungle and esoteric of legal settlement of cross-border relations. I hope this collection of papers will contribute to raising the awareness on the importance of cross-border family regulations and positively influence national and regional policy paths.

Osijek, 1st October 2015.

Mirela Župan

za ovaj zbornik radova. Počašćena sam suradnjom kolegica i kolega imenovanih u međunarodni uredнички odbor, a osobito zahvalna recenzentima na upućenom čitanju rukopisa i kritikama. U konačnici, dodajemo pisani doprinos akademskim nastojanjima u regiji. U ime naše akademske zajednice izražavam iskrenu zahvalnost suorganizatorima osječkog skupa iz 2014., GIZ-u i SEELS-u. Iskreno zahvaljujem i svojoj matičnoj ustanovi, Pravnom fakultetu u Osijeku koji je ugostio i podupro osječku konferenciju u lipnju 2014., kao i poticao i podržao cijeli proces objavljivanja zbornika radova koji se nalazi pred vama. Ovu je publikaciju podržala i Hrvatska udruga za pravnu zaštitu obitelji.

Nadam se da će ovi radovi pridonijeti boljem razumijevanju međunarodno-privatnih promišljanja i dilema, u široj akademskoj populaciji u Europi i svijetu. Svaki od ovih radova poziva na poboljšanje zakonskih rješenja i unaprjeđenje prakse. Osjećam da smo ostvarili svoju društvenu odgovornost kao stručnjaci u ovom području, a sve u korist djece, pojedinaca i obitelji koji se ne smiju postati žrtve džungle i ezoterije pravnog rješavanja prekograničnih odnosa. Nadam se da će ovaj zbornik radova pridonijeti podizanju svijesti o učestalosti, značaju i učincima propisa o prekograničnim obiteljskim odnosima te pozitivno utjecati na razvoj nacionalnih i regionalnih politika.

Osijek, 1. rujna 2015.

Mirela Župan

Introductory lines

This collection of papers consist of four major parts, containing 23 scientific papers, 20 of which are written in English, 2 are translations to the Croatian language and 1 is in German. I would like to take the opportunity and privilege to address each of these valuable contributions with a few sentences.

Part 1 of the Conference Proceedings, titled *EU Private International Family Law*, deals with various topics pertaining to EU *acquis* and case law in the area of cross-border family relations. The first paper, titled *Recent Developments on the Meaning of "Habitual Residence" in Alleged Child Abduction Cases*, is presented by Paul Beaumont and Jayne Holliday. It argues that over the past 30 years the concept of habitual residence of the child in the UK has developed from one which put weight on parental intention to a mixed model, which takes a more child-centric and fact-based approach. By following the jurisprudence of the CJEU, the UK Supreme Court has made a genuine and conscious attempt to provide a uniform interpretation of the 1980 Abduction Convention. The authors argue that this would hopefully have the effect of creating a more uniform approach to the definition of habitual residence amongst all Contracting States to the Hague Abduction Convention. However, the authors are concerned if the CJEU would have the judicial expertise in private international law (especially the family law aspects thereof) to maintain a high quality interpretation of habitual residence based on international best practice.

Uvodno slovo

Ovaj zbornik radova sastoji se od četiri cjeline, sadrži 23 znanstvena rada, od kojih je 20 napisano na engleskom, jedan na njemačkom, a dva su prijevodi na hrvatski jezik. Koristim priliku i povlasticu osvrnuti se na svaki od ovih vrijednih znanstvenih doprinosa.

Glava 1. zbornika radova naslovljena *Međunarodno privatno obiteljsko pravo EU-a* obuhvaća različite teme koje se odnose na EU-ov *acquis* i sudsku praksu u području prekograničnih obiteljskih odnosa. Prvi rad *Recentna tumačenja pojma "uobičajeno boravište" u slučajevima navodnih otmica djece* priredili su Paul Beaumont i Jayne Holliday. Autori tvrde da se u proteklih 30 godina koncept uobičajenog boravišta djeteta u Velikoj Britaniji razvio iz modela koji je stavljao prevagu na namjeru roditelja prema mješovitom modelu koji stavlja u središte dijete i u svojoj je osnovi činjenični koncept. Prateći sudsku praksu Suda EU-a, Vrhovni sud Velike Britanije napravio je prvi i svjesni pokušaj da se osigura jedinstveno tumačenje ovog pojma u kontekstu Konvencije o otmici djece iz 1980. Autori predviđaju da bi ovo tumačenje moglo imati učinak na stvaranje jedinstvenog pristupa definiciji uobičajenog boravišta među svim državama ugovornicama ove Konvencije. Ipak, oni ukazuju na potencijalni rizik da Sud EU-a neće imati potrebnu ekspertizu u području međunarodnog privatnog prava (posebno aspekata obiteljskog prava istih) kako bi održao visoku kvalitetu tumačenja uobičajenog boravišta na temelju najbolje međunarodne prakse.

The discussion on EU issues continues with a topic of high interest to the Western Balkans states. In her contribution on *Dilemmas in application of EU international family law in most recent EU Member States*, Christa Jessel-Holst discusses some issues which are of special relevance for the most recent Member States. She puts special emphasis on the fact that new EU member states feel themselves confronted with a sudden change from the nationality principle to habitual residence as a main connecting factor. The author argues that without providing criteria for the proper interpretation of habitual residence, in particular the demarcation of habitual residence from the legal concept of domicile, the process may appear problematic for new member states. The author emphasises that the candidate countries for accession (Montenegro, Macedonia, Serbia and Albania) have in their (draft) legislations included legal definitions of habitual residence in the process of EU-harmonization of their private international law. These legal definitions provide uniform criteria for determining the habitual residence of a person, but they are, however, formulated in a flexible way so as to allow the countries to take into consideration the development on level of the European Union and the future practice of the Court of Justice of the European Union. The author concludes that dilemmas in application of European private international law are in no way restricted to accession states; this fact is *inter alia* reflected in the decisions of the Court of Justice.

U okviru rasprava s predznakom EU-a slijedi tema od posebnog interesa za države zapadnog Balkana. U svom doprinosu na temu *Dileme u primjeni međunarodnog privatnog obiteljskog prava EU-a u najnovijim državama članicama* Christa Jessel-Holst raspravlja o pitanjima koja su važna za najnovije članice. Autorica stavlja poseban naglasak na činjenicu da su pristupanjem u punopravno članstvo EU-a države suočene s iznenadnim promjenama, prije svega u vezi s odstupanjem od načela državljanstva u korist uobičajenog boravišta kao temeljne poveznice. Autorica upozorava da će u nedostatku jasnih kriterija za pravilno tumačenje uobičajenog boravišta nastati problemi, posebice kad je riječ o razgraničenju od pravnog koncepta prebivališta. Napominje da države kandidatkinje za pristupanje (Crna Gora, Makedonija, Srbija i Albanija) imaju u svojim (nacrtima) zakona ili zakonima pravne definicije uobičajenog boravišta, koje daju jedinstvene kriterije za određivanje boravišta osobe, ali su ipak formulirane na fleksibilan način kako bi se omogućilo uzimanje u obzir razvoja na razini Europske unije i buduće prakse Suda pravde Europske unije. Autorica zaključuje da dileme u primjeni europskog međunarodnog privatnog prava nisu svojstvene samo državama koje tek pristupaju EU-u, a ta se činjenica, među ostalim, ogleda i u odlukama Suda pravde.

The application of European private international law standards in disputed family cases has been in the focus of

Upravo je primjena europskih međunarodno-privatno pravnih standarda u obiteljskim predmetima u

the contribution of Lilla Király. In her paper on *The Hungarian court practice concerning the Brussels II bis Regulation*, the author provides a thorough analysis of the entire legal background: Hungarian substantive and private international law rules, relevant Hague and other conventions, EU rules. Although it is to be applauded for achievements in setting its legal background, there are many problems to be solved regarding the application of the Brussels II bis Regulation. The author extracts several burning legal issues: the definition of the concept of marriage (whether it should be interpreted in EU legal terms, independently from the concepts used in the laws of the Member States, or as a national concept; undefined issues relating to functions of central authority; jurisdictional and enforcement problems). The paper raises the issue of a widespread social phenomenon where parents use the child as a weapon in their relationship. The author therefore argues for a holistic approach to legal settlement of splitting families, as social and psychological considerations have often been neglected in legal proceedings.

The European section proceeds with the Ines Medić paper on *International child relocation*. The author argues that in an era of globalisation it is hard to expect people will not move all over the globe. Hence, international marriages and international child relocation are becoming a prominent question. Compared to interstate relocation, relocation to a foreign country involves added difficulties, such as a clash of culture, distance influencing contact rights, clash of several layers of fundamental human rights (on the one hand, the child has the right not to be

središtu doprinosa Lille Király. U svom radu *Mađarska sudska praksa primjene Brussels II bis uredbe* autorica uz pravo Europske unije predstavlja i cjelokupni pravni sustav: mađarsko materijalno i međunarodno privatno pravo, relevantne haške i druge konvencije. Respektirajući da je samo po sebi nesporno postignuće EU-a u postavljanju pravnog okvira kroz Bruxelles II *bis* uredbu, ostaju mnogi problemi koje treba riješiti. Autorica izdvaja nekoliko gorućih pravnih pitanja: pojam koncepta braka (tumačenje kao euro-autonomni koncept, neovisno o pojmovima koji se koriste u zakonima država članica, ili tumačiti kao nacionalni koncept?); nedefinirani odnosi i funkcije središnjeg tijela; otvorena pitanja nadležnosti i ovrhe. Autorica u središte stavlja raširen socijalni fenomen u kojemu roditelji koriste dijete kao oružje u rješavanju svojih odnosa. Kiray se stoga zalaže za holistički pristup u pravnom razrješenju sporova obitelji koje se cijepaju, a budući da su u sudskim postupcima socijalni i psihološki razlozi često zanemareni.

Poglavlje zbornika s predznakom EU-a nastavlja se radom Ines Medić *Međunarodno preseljenje djeteta*. Autorica elaborira kako je u razdoblju globalizacije teško očekivati da se ljudi neće kretati diljem svijeta, čime međunarodni brakovi i međunarodna preseljenja djece postaju posebno eksponirana pitanja. U usporedbi s tuzemnim preseljenjem, preseljenje u stranu zemlju implicira dodatne teškoće, poput kulturnih razlika, utjecaja udaljenosti na ostvarivanje kontakta s djetetom, sukob nekoliko razina temeljnih ljudskih prava (s jedne strane

separated from his or her parents against his or her will as well as to express his or her view freely and have contact on a regular basis with both parents; on the other hand, the parent has the right to family life entailing the contact with his or her child(ren) and to move and reside throughout the territory of the European Union). The author presents a bundle of cases that confirms that these issues are a handful for a judge to take care of. The author advocates the use of international standards for interstate relocation, a guidance that would enable a judge to correspond to the demands of adjudication in international relocations. In the Croatian context, the author hopes for a new framework for evaluations in increasingly common cross-border relocations.

dijete ima pravo na zajednički život sa svojim roditeljima, kao i pravo slobodno izraziti svoje mišljenje i ostvarivati na redovnoj osnovi kontakt s oba roditelja; s druge strane roditelj ima pravo na obiteljski život, ali i kretati se i boraviti na cjelokupnom teritoriju Europske unije). Medić predstavlja nekoliko slučajeva kojima potvrđuje da su pune ruke posla za sudove. Autorica zagovara usvajanje međunarodnih standarda za međudržavna preseljenja, kako bi te smjernice poslužile davanju adekvatnih odgovara zahtjevima sudovanja u međunarodnim preseljenjima. U hrvatskom kontekstu autorica poziva na usvajanje novog okvira procjene za sve učestalija prekogranična preseljenja.

Part 2 of the Conference Proceedings, under the heading *Hague Conference and International Family Law – Child Abduction at Focus*, covers various themes inherent to the HCCH unification process.

Drugi dio zbornika pod nazivom *Haška konferencija i međunarodno obiteljsko pravo – otmica djece u fokusu* donosi različite teme svojstvene procesu unifikacije u okviru Haške konferencije za međunarodno privatno pravo.

The first paper of Philippe Lortie problematizes *Direct Judicial Communications and The International Hague Network of Judges Under the Hague 1980 Child Abduction Convention.* The author argues that an improved implementation of the Hague Convention of 1980 in the Western Balkans region calls upon the designation of judges to the International Hague Network of Judges (IHNJ) and the use of direct judicial communications. To assist States in this respect, the Permanent Bureau (Secretariat) of the Hague Conference on Private International Law, with the assistance of Members of the IHNJ, developed the "Emerging Guidance regarding the development

Philippe Lortie radom *Neposredna sudska komunikacija i Međunarodna haška sudačka mreža* problematizira uporabu neposredne sudske komunikacije, kako općenito, tako i za regiju zapadnog Balkana. Lortie naglašava da napredak u primjeni Haške konvencije od 25. listopada 1980. o građansko-pravnim aspektima međunarodne otmice djece u regiji iziskuje imenovanje sudaca u Međunarodnu hašku sudačku mrežu (MHSM) te uporabu neposredne sudske komunikacije. Kako bi u tom smislu pomoglo državama ugovornicama, Stalno je tajništvo Haške konferencije za međunarodno privatno pravo uz potporu članova Međunarodne haške sudačke mreže donijelo "Važne smjernice za

of the International Hague Network of Judges and General Principles for Judicial Communications, including commonly accepted safeguards for Direct Judicial Communications in specific cases, within the context of the International Hague Network of Judges". The "Principles" are thoroughly examined through hypothetical cases, and Guidelines in the English and Croatian languages (translated by the publisher) are added as annexes to the paper.

Tena Hoško writes on *Child Abduction in Croatia: Before and After the European Union Legislation.* The author discusses changes to the Croatian legal system due to its accession to the EU, with particular emphasis on the child abduction regime. The author finds that the entry into force of the Brussels II *bis* Regulation has changed the Croatian child abduction disputes' regime in several manners. The first change relates to the fact that now two different regimes are set, dependant on the place of habitual residence of the child. If the place is within the EU, the Regulation applies, whereas towards thirds states the regime remains governed by the Child Abduction Convention. Looking at the Regulation's regime specifically, there are some changes (the author deduces some of them, such as in the obligation to transmit the case after a non-return decision has been issued and in the recognition and enforcement system of judgments coming from the EU) and some nuances (the author particularly mentions the obligation to hear the child and the applicant). Two proposals need to amount to changes in order to enhance the Croatian practice in dealing with child abduction cases. The first is setting time limits that will hopefully influence the

razvoj Međunarodne haške sudačke mreže" i "Opća načela za sudsku komunikaciju", uključujući i zajednički prihvaćena jamstva za neposrednu sudsku komunikaciju u konkretnim predmetima, u okviru Međunarodne haške sudačke mreže". Načela se detaljno obrađuju kroz hipotetske primjere. Tekst načela na engleskom izvorniku, ali i prijevodu na hrvatski jezik (prijevod izdavača) otisnuti su kao prilogu radu.

Tena Hoško piše na temu *Međunarodna otmica djece u Hrvatskoj: prije i poslije zakonodavstva EU*. Autorica govori o promjenama koje za hrvatski pravni sustav nastupaju zbog ulaska u EU, posebno obrađujući režim otmice djece. Sugerira se da je početkom primjene Bruxelles II *bis* uredbe na nekoliko načina promijenjen režim otmice djece pred hrvatskim tijelima. Prva promjena odnosi se na činjenicu da se sada uspostavljaju dva različita režima, ovisno o uobičajenom boravištu djeteta. Ako je ono u EU-u – primjenjuje se Uredba, dok se prema trećim državama nastavlja primjenjivati režim Haške konvencije. Gledajući osobitosti režima Uredbe, nastupaju još neke promjene (Hoško izdvaja situaciju u kojoj je donesena odluka o odbijanju povratka u kojoj država tražiteljica ima mogućnost donijeti konačnu odluku; neka pitanja priznanja i ovrhe presuda koje dolaze iz EU-a) i uvode se neke novine u sam proces (autorica posebno ukazuje na obvezu saslušavanja djeteta kao i podnositelja zahtjeva). Dva su prijedloga za poboljšanje hrvatske prakse u rješavanju otmice djece: a) vremenska ograničenja koja bi trebala utjecati na duljinu postupka; b) promjena tumačenja

length of the procedure. The second is the needed change of interpretation of grave risk of harm. Now it is coupled with the duty to check the security arrangements that have been made in the country of habitual residence. Although it is only applicable to cases governed by the Regulation, this new duty might restrain the tendency of a too wide interpretation of the grave risk of harm defence that is reported in Croatian case law.

”ozbiljne opasnosti“ za dijete. Sada je sud u obvezi provjeriti jesu li u državi podrijetla poduzete dostatne sigurnosne mjere za zaštitu djeteta. Iako su ove odredbe primjenjive samo na slučajeve uređene Uredbom, ova nova dužnost mogla bi ujedno obuzdati tendenciju širokog tumačenja ”ozbiljne opasnosti“ svojstvene hrvatskim predmetima.

Suzana Kraljić and Katja Drnovšek present a paper entitled *Elterliche Internationale Kindesentführung*, which deals with parental child abductions as well. The authors first consider the issues of the basic principle of the Hague Child Abduction Convention: fastest possible return of the kidnapped, wrongfully removed or retained child. The main guiding principle of protection of the child’s best interests, imposes on courts and other authorities and institutions involved in repatriation of children to act promptly, as further elaborated by the authors. In the end, the authors elaborate on the way in which the Hague Child Abduction Convention distinguishes between the unconditional return of the child, which is given before the expiration of one year, and the discretionary right of the court which is given after one year.

Suzana Kraljić i Katja Drnovšek predstavljaju rad *Međunarodne otmice djece od strane roditelja*. Autorice najprije progovaraju o temeljnom načelu Haške konvencije o otmici djece: osiguravanje najbržeg mogućeg povratka otetog, nezakonito odvedenog ili zadržanog djeteta. Vodeća ideja zaštite najboljih interesa djeteta, nameće sudovima i drugim tijelima i institucijama uključenim u povrat djeteta djelovati brzo, što je dodatno razrađeno u radu. Autorice elaboriraju i pitanja razlike bezuvjetnog povratka djeteta prije isteka jedne godine od otmice, te potom diskrecijsko pravo suda kod povrata nakon proteka vremena od jedne godine.

The Conference Proceedings continue with the section *National Reports on Operation of the Hague Child Abduction Convention in the Western Balkans Region.* The Hague Child Abduction Convention was drafted to ensure a prompt return of children to the state of their prior habitual residence. It has proven to be a useful remedy in the international protection of children from the harmful effects of their wrongful removal or retention. However, even

Slijedi odjeljak s nacionalnim izvješćima o funkcioniranju Haške konvencije o otmici djece u regiji zapadnog Balkana. Haška konvencija o otmice djece izrađena je kako bi se osigurao brz povratak djece u državu njihova prethodnog uobičajenog boravišta. Ovo je dokazano učinkovito sredstvo međunarodne zaštite djece od štetnih učinaka njihova nezakonitog odvođenja ili zadržavanja. Međutim, više od trideset godina njezine primjene na svjetskoj razini te više od

after more than thirty years of its application on worldwide level and more than twenty years of its application in the Western Balkans territories, it still raises many open issues and dilemmas. These Conference Proceedings present the first regional survey of the implementation of the Hague Child Abduction Convention where academics are attempting to specify the weak points of each and every system and offer solutions for the improvement of its application and interpretation. As the *Questionnaire on the Operation of the Hague 1980 Child Abduction Convention in the SEE Region* is printed here as well, one may realise that many data are still lacking in the reports. I express my strong gratitude and admiration to the colleagues who have agreed to participate and draft a report, as all of them faced factual hardship in approaching statistical data and case law. All of the academics here cry for the transparency of data (for academic, monitoring and evaluation purposes, with data protection fully guaranteed). The contributing academics suggest a way forward to creating a world that discourages abductors in choosing a forum that is most favourable to them instead of a forum which is best acquainted with the situation – the forum of the child's habitual residence.

dvadeset godina njezina apliciranja na području zapadnog Balkana, ipak ostavlja mnoga otvorena pitanja i dileme. Zbornik radova predstavlja prvu analizu provedbe Haške konvencije otmice djece u regiji. Ovaj akademski pothvat usmjeren je k određivanju slabih točaka unutar pojedinog pravnog sustava, a nudi i rješenja za poboljšanje njezine primjene i tumačenja. Ovdje priloženi obrazac *Upitnika o djelovanju Haške konvencije o otmici djece iz 1980. u jugoistočnoj Europi* ilustrira kako su izvještaji uskraćeni za brojne podatke. Izražavam zahvalnost i divljenje prema kolegama koji su izradili nacionalne izvještaje, jer su svi svjedočili istim teškoćama kad je riječ o dobivanju statističkih podataka i sudskoj praksi. Svi ovi znanstvenici pozivaju na transparentnost podataka (za potrebe znanstvene analize, praćenja i evaluacije, uz potpuno jamstvo zaštite osobnih podataka). Predlažu se i brojna potencijalna poboljšanja sustava usmjerena prema stvaranju svijeta koji obeshrabruje otmičare u odabiru foruma koji je za njih najpovoljniji izbjegavajući time forum koji je najpozvaniji odlučiti o predmetu – forum djetetova uobičajenog boravišta.

The first report on *Operation of the 1980 Hague Child Abduction Convention in Bosnia and Herzegovina* has been prepared by Anita Duraković and Zlatan Meškić. The authors have analysed the available court practice to conclude that the basic problem lies in the fact that resolutions of international child abduction cases are dealt with by judges without any specialization or knowledge in the methodology of resolving cross-

Prvo nacionalno izvješće *Primjena Haške konvencije o otmici djece u Bosni i Hercegovini* pripremili su Anita Duraković i Zlatan Meškić. Autori su analizirali dostupnu sudsku praksu te zaključili da osnovni problem leži u činjenici da odluke o međunarodnim otmicama djece donose suci bez specijalizacije ili bez znanja o metodologiji rješavanja prekograničnih sporova. S obzirom na činjenicu da

border cases. Due to the fact that such cases are rare, judges lack motivation to follow judicial practice or conduct training. As these cases do not come frequently to each judge, no routine can be established or special knowledge gained. In the end, all of these matters affect the length of the proceedings. The lack of knowledge leads to a high proportion of refusals to return the child: any opinion of a child that refuses return to the country of origin is welcomed as a signal to use the Article 13b exception! The correct application and consistent interpretation of the Hague Child Abduction Convention could, according to the authors, be achieved by the adoption of an act on the implementation of the 1980 Convention, providing for concentrated jurisdiction (only the courts in Sarajevo and Banja Luka could adjudicate) and shorter terms for the conduct of particular actions in the procedure. Special training for the application of the 1980 Convention, as well as of international family law in general, is advocated.

In the paper *Operation of the Hague 1980 Child Abduction Convention in Croatia* Mirela Župan and Tena Hoško have analysed a number of court rulings in order to pinpoint several matters of concern regarding the application of the Child Abduction Convention in Croatia. Some of them are included here. The authors detect that the uniform interpretation duty deriving from the Convention is not carried out by judges, and there is no publicly available case law regarding this matter either. Furthermore, mediation and voluntary return of the child are rarely practiced. Social welfare centres do not differentiate between giving an opinion regarding the child's

su takvi slučajevi rijetki, suci nisu motivirani pratiti sudsku praksu ili ići na obuku. U konačnici nedostatak znanja i vještina utječe na duljinu postupka, a dovodi i do visokog udjela odbijanja povrata djeteta. Mišljenje djeteta koje odbija povratak u zemlju porijekla sudovi objeručke prihvaćaju kao signal za uporabu iznimke čl. 13b! Ispravna primjena i dosljedno tumačenje Konvencije mogla bi se, prema mišljenju autora, postići usvajanjem akta o provedbi Konvencije iz 1980.; uvođenjem koncentrirane nadležnosti (samo bi sudovi u Sarajevu i Banjoj Luci bili nadležni) i kraćim uvjetima za obavljanje pojedine radnje u postupku. Zagovara se dodatna obuka za primjenu Konvencije iz 1980. i međunarodnog obiteljskog prava općenito.

Primjena Haške konvencije o otmici djece u Hrvatskoj Mirele Župan i Tene Hoško analiza je brojnih sudskih odluka na temelju kojih su izdvojene goruće točke u primjeni Konvencije u Hrvatskoj. Neke navedimo ovdje. Autorice otkrivaju da se obveza ujednačenog tumačenja koju nameće Konvencija ne reflektira na praksu, tim više što ne postoji objavljena javno dostupna sudska praksa. Mirenje i dobrovoljni povratak djeteta rijetko se prakticira. Centri za socijalnu skrb ne prave razliku između davanja mišljenja u vezi s najboljim interesom djeteta u slučajevima otmice djece u odnosu na slučajeve odluke o skrbništvu, što uzrokuje probleme jer se suci oslanjaju

best interest in child abduction cases and in custody cases, which causes problems as judges rely on those opinions when rendering judgements and the return is often refused. Such practice should be diminished, since the aim of prompt return to the country of origin exists, inter alia, to ensure that custody disputes are settled in that country. The authors detect that the main principles (e.g. grave risk of harm) and connecting factors (e.g. habitual residence) of the Convention are often wrongly interpreted. From the legislative point of view, child abduction procedures are dealt with as any other regular family matter: there is no concentration of jurisdiction, there are no shorter periods for appeals, no legislative founding to enable a court's prompt reaction. Further on, the poor official translation of the Convention impedes its proper application. Several steps may be taken. Legislative action should be set in motion in order to enact proper implementing rules for the Hague Child Abduction Convention; special procedures to enable true promptness in handling cases, concentration of jurisdiction (it should be considered whether the jurisdiction should be concentrated to the four biggest cities or even only to the capital city of Zagreb's municipal court), reducing the number of appeals and time limits for such appeals, or even prescribing that appeal would not affect execution. Training should be provided to judges and the Central Authority's personnel. Having in mind the general lack of knowledge of foreign languages amongst persons applying the Convention, publications in the languages of the SEE region would be quite useful. A Croatian judge should be appointed to the IHNJ.

na ova mišljenja pri donošenju presude i često odbijaju povratak djeteta. Župan i Hoško zaključuju i da se glavna konvencijska načela (npr. ozbiljna opasnost) i poveznice (npr. uobičajeno boravište) često pogrešno tumače. Sa zakonodavne točke gledišta, postupci otmice djece izjednačeni su s ostalim obiteljskim stvarima: nema koncentracije nadležnosti, nema kraćih rokova za žalbu, ne postoji zakonska osnova za brzu reakciju suda. Nadalje, manjkav službeni prijevod Konvencije osujećuje njezinu pravilnu primjenu. Moguće je poduzeti nekoliko koraka. Zakonodavac treba donijeti provedbeni propis za Hašku konvenciju o otmici djece; uvesti posebne postupke kako bi se omogućilo pravu ažurnost u rješavanju predmeta te uvesti koncentraciju nadležnosti (valja promisliti treba li se nadležnost koncentrirati na četiri najveća grada ili čak samo na zagrebački Općinski sud), treba smanjiti broj žalbi i rokova za takve žalbe ili čak propisati da žalba ne odgađa izvršenje. Edukacija se mora osigurati za suce, djelatnike centara i osoblje središnjeg tijela. Imajući u vidu da osobe koje primjenjuju Konvenciju insuficijentno poznaju strane jezike, treba podržati publikacije na jezicima regije jugoistočne Europe. Ohrabruje se vlasti na imenovanje hrvatskog suca u Međunarodnu hašku sudačku mrežu.

Macedonian law and practices related to child abduction cases are presented in

Primjena Haške konvencije o otmici djece u Makedoniji naziv je rada Ilije

Ilija Rumenov's paper *Application of the Hague Child Abduction Convention in Macedonia.* The author points to several challenges that lie ahead in the future. Developing regular training programmes for persons involved in the process (judges, employees of Centres for Social Work and the Central Authority staff) is found indispensable. Not merely national, but regional training on sharing the experiences of the implementation of the 1980 Convention is supported by the author. The author also finds justification for introducing regular screening of the HC 1980 implementation on the national level. This would serve the purpose of having a transparent procedure, which would elevate the implementation of the Convention to higher standards and reduce the possibility of its improper application. The measures that need to be taken in Macedonia are listed as follows: a) adoption of implementing legislation for the application of the 1980 Convention; b) enacting a new, special non-litigious procedure for return of wrongfully removed or retained children, with a proper involvement of Centres for Social Work and the Central Authority (courts are the proper authorities to decide on the issue of return of abducted children, rather than the administrative authorities, as is the present practice); c) developing training programmes (national/regional) that would help involved persons in proper understanding of the return mechanism and thus facilitate more expeditious procedures of return of children and strengthen the mutual trust between authorities.

Rumenova. Autor predstavlja nekoliko izazova koji predstoje u budućnosti. Razvoj programa redovite obuke za osobe koje sudjeluju u postupku (suci, djelatnici centara za socijalni rad i osoblja središnjeg tijela) nalazi nužnim. Autor podržava ne samo nacionalnu nego i regionalnu obuku te razmjenu iskustava provedbe Konvencije iz 1980. I. Rumenov pronalazi opravdanje i za uvođenje redovitog nadzora provedbe Konvencije na nacionalnoj razini, sa svrhom transparentnosti postupaka, a s ciljem podizanja provedbe Konvencije na više standarde i smanjenjem učestalosti nepravilne primjene. Mjere koje treba poduzeti u Makedoniji jesu: donošenje provedbenih propisa za primjenu Konvencije; donošenje novog, posebnog izvanparničnog postupka za odlučivanje o povratu nezakonito odvedenog ili zadržanog djeteta, s pravom sudjelovanja centara za socijalni rad i središnjeg tijela. Sudovi moraju biti ovlašteni odlučivati o pitanju povratka otete djece, a ne kako to sada imaju ovlast upravna tijela. Postoji potreba za razvojem programa obuke (nacionalna / regionalna) koji će podržati pravilno razumijevanje mehanizma kod svih uključenih osoba. Sve to u konačnici bi, ocjenjuje autor, ubrzalo postupke povratka djece i ojačalo međusobno povjerenje između nadležnih institucija.

Maja Kostić Mandić presents the Montenegrin system where child abduction is at stake. *Country Report on*

Maja Kostić Mandić predstavlja crnogorski sustav kod građanske otmice djeteta. Radom *Nacionalni izvještaj*

Application of the Hague Child Abduction Convention – Montenegro reaches a conclusion that the Ministry of Justice as the Central Authority for the Hague Child Abduction Convention does not comply with Article 7 of the Convention. The Ministry has limited its actions only to: forwarding applications for return or rights of access to the Central Authority of the country where the child is situated after the abduction or retention; forwarding applications obtained from a foreign central authority to the competent courts in Montenegro which is seized with respective cases; and providing for information of a general character. The author advocates that the dispersion of competence of the central authorities, courts and judges who can hear return applications under the Convention should be overcome by concentrating jurisdiction. Designation of a judge to the International Network of Judges is found to be an urgent matter as well. The author argues that full conformity with the obligations arising from the Convention requires organizational and capacity-building activities. She places particular emphasis on the indispensable education and training of civil servants and judges regarding the application of the Convention as well as the urgent need to publish a handbook dealing with implementation issues in the local language.

o primjeni Haške konvencije o otmici djece - Crna Gora dolazi do zaključka da Ministarstvo pravosuđa kao središnje tijelo za Hašku konvenciju o otmici djece ne postupa u skladu s člankom 7. Konvencije. Ministarstvo ograničava svoje djelovanje samo na prosljeđivanje zahtjeva za povrat ili pravo pristupa prema središnjem tijelu u zemlji u kojoj se dijete nalazi nakon otmice ili zadržavanja; prosljeđivanje prijave dobivene iz stranog središnjeg tijela nadležnim sudovima u Crnoj Gori i na pružanje informacija općeg karaktera. Autorica se zalaže da se disperzija nadležnosti tijela koja mogu odlučivati o povratu prema Konvenciji prevlada uvođenjem koncentracije nadležnosti. Ocjenjuje nužnim hitno imenovanje suca u Hašku sudačku mrežu. Kostić Mandić također sugerira potpuno usklađivanje s obvezama koje proizlaze iz Konvencije aktivnostima organizacijske naravi i poboljšanjem kapacitiranosti osoblja. Autorica stavlja naglasak na neizbježno obrazovanje i usavršavanje državnih službenika i sudaca u vezi s primjenom Konvencije, kao i potrebu da se na lokalnom jeziku objavi priručnik.

Some open issues in the application of the 1980 Child Abduction Convention in the Republic of Serbia are elaborated by Sanja Marjanović. Considering the shortcomings in the practical application of the 1980 Convention in the Republic of Serbia, the issues concerning the concentration of jurisdiction, the correct application of foreign law in order

Neka otvorena pitanja primjene Haške konvencije o otmici djece u u Republici Srbiji razrađuje Sanja Marjanović. S obzirom na nedostatke u praktičnoj primjeni Konvencije iz 1980. u Srbiji, otvara pitanja moguće koncentracije nadležnosti, ispravne primjene stranog prava kako bi se utvrdilo pravo skrbništva te bolje razumijevanje

to determine the custody right, the differentiation between the exceptions for the return of the child are detected as crucial for improving the national judicial practice. In this context, the author finds no dispute that the adoption of the Draft Implementation Act will significantly contribute to a better application of the 1980 Convention in Serbia. However, as this piece of legislation cannot address all of the practical issues, several additional methods for their improvement are envisaged: a) translation of all the 1980 Convention Good Practice Guides; b) ensuring trainings of judges, the Central Authority officers and the officers of Social Care Centres. In addition to these steps, the author suggests engaging all private international law experts, with the support of the Hague Conference, to compile a joint handbook. This book should include, inter alia, the leading decisions rendered by the national courts of other State Parties, as well as the CJEU and the ECtHR decisions in cases pertaining to the 1980 Convention.

iznimke kojom se odbija povratak djeteta. U tom kontekstu autorica nalazi nespornim usvajanje Zakona o provedbi Konvencije. Sam normativni akt neće riješiti sva praktična pitanja te predlaže dodatne načine za poboljšanje prakse: a) prijevod Dobre prakse i Vodiča za primjenu na lokalni jezik; b) osiguranje izobrazbe sudaca, službenika središnjeg tijela i službenika centara socijalne skrbi. Osim ovih koraka, znanstvenici iz područja otmice djece trebali bi se povezati i uz potporu Haške konferencije izraditi zajednički priručnik s obuhvatom kako Konvencijske dobre prakse tako i vodećih odluka nacionalnih sudova drugih država ugovornica, odluka Suda EU-a i ESLJP-a u vezi s Konvencijom o otmici djece.

An overview of the Slovenian practice has been prepared by Suzana Kraljić. The paper titled *Operation of the Hague 1980 Child Abduction Convention in Slovenia* elaborates on a small number of cases and scarce literature on the application of the Hague Child Abduction (only 6 papers published in Slovenia). In comparison to judges, who are not well-trained, lack foreign language skills and the appropriate knowledge on the issue and therefore fail to obey the time limits given by the 1980 Convention, the author provides an example of the Slovenian Central Authority, where the evidence/ statistics of abduction cases is more up-to-date, consistent, effective and integrated. In addition, the staff is more

Slovensku praksu pripremila je Suzana Kraljić. Rad naziva *Primjena Haške konvencije o otmici djece u Sloveniji* počiva na malom broju dostupnih slučajeva i oskudnoj literaturi o primjeni Haške konvencije o otmice djece (samo šest radova u Sloveniji). U odnosu na suce koji nisu dobro obučeni, nedostaju im vještine u stranim jezicima i stoga se ne mogu držati vremenskih okvira za rokove koje propisuje Konvencija, autorica daje primjer središnjeg tijela gdje su statistike o predmetima otmica ažurirane, rad je dosljedan i učinkovit. Osim toga, osoblje je kvalificiranije i specijalizirano za slučajeve otmica, redovito je uključeno u različite nacionalne, europske i međunarodne

qualified, specialised for abduction cases, and they are regularly involved in various national, European and international activities related to international child abduction actions. If current regulation providing every Slovenian district court with the jurisdiction to adjudicate abduction cases is to be maintained, the author suggests more training of related judges. However, if the possibility to introduce "concentrated jurisdiction" is considered, a smaller number of judges ought to be trained.

The third part of these Conference Proceedings is dedicated to *Human Rights Considerations in Child Abduction Cases*. Paper on *The Interaction between the European Court of Human Rights and the Hague Child Abduction Convention* by Nina Vajić brings a thorough analysis of a much debated ECtHR case in X vs. Latvia. The author starts with the fact that several ECtHR interpretations have raised much debate on the interaction of human rights notions and the child abduction regime set by the 1980 Convention. The author briefly refers to the Neulinger and Shuruk v. Switzerland Grand Chamber judgment of 2010 and proceeds with a detailed analysis of the X. v. Latvia Grand Chamber judgment of November 2013. The author arrives at the following conclusion: when the principle of the immediate return of an abducted child, which is the basis of the Hague Convention, does not materialize within a reasonable time – for whatever reason this may happen – the principle has to be moderated by other considerations, as the one of the best interest of the child. The author brings forward the procedural suggestion that the ECtHR ought to introduce a special speedy procedure for dealing with such type of

aktivnosti vezane za međunarodne otmice djece. Ako se ustraje na propisu kojim nadležnost za donošenje odluka u slučajevima otmice ima svaki općinski sudac, autorica sugerira više obuke svih sudaca. Međutim, ako je moguće uvesti "koncentriranu nadležnost" obim edukacije će biti manji.

Glava 3. ovog zbornika radova *Ljudska prava i međunarodna otmica djece* razmatra utjecaj ljudskih prava na predmete otmice djece. Rad *Interakcija Europskog suda za ljudska prava i Haške konvencije o otmici djece* Nine Vajić donosi obuhvatnu analizu žustro polemiziranog predmeta ESLJP-a *X. protiv Latvije*. Autorica polazi od činjenice da je nekoliko tumačenja ESLJP-a otvorilo mnoge rasprave o interakciji pojmova ljudskih prava i prava djece u kontekstu režima povrata koji je kod građanskopravne otmice djece uspostavila Konvencija iz 1980. Autorica ukratko prenosi presudu Velikog vijeća u predmetu *Neulinger i Shuruk protiv Švicarske* iz 2010., da bi nastavila s detaljnom analizom presude *X. protiv Latvije* Velikog vijeća iz studenog 2013. Vajić dolazi do zaključka: kada se načelo hitnog povrata djeteta koje je u osnovi Konvencije ne materijalizira u razumnom vremenu – bilo to iz bilo kojeg razloga – načelo treba prilagođavati ostalim okolnostima, poput načela najboljeg interesa djeteta. Autorica dolazi s procesnim prijedlogom da ESLJP uvede poseban brz postupak za rješavanje takve vrste hitnih situacija kao što su slučajevi otmice djece.

urgent situations as are child abduction cases. Such goal can be achieved without any further changes of the Rules of the Court. Alongside the critical remarks by the author, who at the time of delivery of the judgement acted as a judge to the analysed case, she calls attention to a large body of the ECtHR case law which has considerably contributed to reinforce the operation of the Child Abduction Convention worldwide. If speedy procedures are introduced, the Court will be in possession of all the elements necessary for a harmonious interpretation of both the European Human Rights Convention and the 1980 Convention in order to achieve the paramount goal – to act in the best interest of the child.

Legal Framework for International Child Abduction in the European Union – the Need for Changes in the Light of Povse v. Austria, by Vesna Lazić, examines the appropriateness of application of the 1980 Child Abduction Convention within the framework of the Brussels IIa Regulation in the light of the Povse v. Austria decision. This factually and legally complex case, submitted to the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR), illustrates the deficiencies of the current procedural framework on international child abduction in the European Union. The author uses the *Povse* case to illustrate the fact that legal framework does not necessarily ensure an adequate protection of the best interest of child. Since the current EU system implies two-fold or parallel applications of the 1980 Hague Convention, one amongst the EU Member States and the other for non-EU members, it is suggested by the author that inconsistencies in

Takav cilj se može postići bez ikakvih daljnjih promjena Poslovnika Suda. Uz kritične primjedbe koje je iznijela autorica, u vrijeme izricanja presude ujedno i sutkinja na ovom predmetu, ona podsjeća i na korpus sudske prakse ESLJP-a koji je znatno pridonio jačanju odrednica Konvencije iz 1980., i to ne samo u Europi već i diljem svijeta. Ako bi uveo brzi postupak, Sud bi osigurao sve preduvjete za skladno tumačenje Europske konvencije o ljudskim pravima i Haške konvencije iz 1980. godine, a sve s ciljem realizacije najboljeg interesa djeteta.

Pravni okvir za međunarodnu otmicu djece u Europskoj uniji – nužne promjene u svjetlu odluke Povse vs. Austrija Vesne Lazić ispituje prikladnost primjene Konvencije o otmici djece iz 1980. u okvirima Uredbe Bruxelles II *bis*, a u svjetlu odluke *Povse v. Austrija*. Taj je činjenično i pravno složeni predmet u postupcima pred Sudom Europske unije i Europskim sudom za ljudska prava ukazao na nedostatke trenutačnog procesnog okvira za međunarodne otmice djece u Europskoj uniji. Lazić koristi slučaj *Povse* za ilustraciju činjenice da pravni okvir nužno ne osigurava adekvatnu zaštitu najboljeg interesa djeteta. Budući da sadašnji sustav EU-a podrazumijeva dva puta ili drugim riječima paralelnu primjenu Haške konvencije iz 1980. među državama članicama Europske unije, a drugu za države izvan EU-a, autorica sugerira kako bi se mogla pojaviti nedosljednost u pravosuđenju. Autorica predlaže prilagodbu

the administration of justice may occur. The author offers suggestions on how to adjust the legislative framework so as to more appropriately accommodate the needs of actors in cross-border child abduction litigation. She advocates that: a) regarding child abductions, the scheme under Articles 11(8) and 42 should be abandoned; and b) regarding possible abolition of exequatur for decision on the custody of the child, certain minimum standards of compliance with the basic notions of morality and justice pertaining to public policy should be able to be examined at the enforcement stage.

zakonodavnog okvira kako bi se primjerenije odgovorilo potrebama svih aktera u prekograničnim otmicama djece. Autorica zagovara: a) napuštanje odredbi čl. 11(8) i 42.; i b) u vezi s mogućim ukidanjem egzekvature za odluke o skrbi nad djecom uvođenje određenih minimalnih standarda kako bi se u fazi ovrhe kroz klauzulu javnog poretka mogle kontrolirati osnove morala i pravde.

Part 4 of the Conference Proceedings entails a number of papers under the general denominator: *Status and Family Matters in Comparative Family Private International Law*.

Glava 4. zbornika radova donosi niz radova s jednim nazivnikom: *Statusni i obiteljski prekogranični odnosi u usporednom međunarodnom privatnom obiteljskom pravu*.

Anatol Dutta's paper *Habitual residence versus nationality – In search of the European personal connecting factor in family matters* comes translated into the Croatian language.

Anatol Dutta donosi rad *Uobičajeno boravište u odnosu na državljanstvo – u potrazi za osobnom poveznicom u europskom obiteljskom pravu*.

This paper is a polemic on the search for the best personal connecting factor in international family law. If the closest connection principle is a starting point, the author argues whether the factual connecting factor of habitual residence, on the one hand, and the more legal connecting factor of nationality, on the other hand, are the most suitable for handling status, personal and family matters. Dutta concludes that the policy of the EU legislator to follow the habitual residence principle is justified. In the long term, the author sees the nationality principle as playing only a secondary role, that of a subsidiary connecting factor. However, for civil status matters (the conflict rules for parentage, marriage, names and adoption), the

Ovaj rad je polemika o potrazi za najboljom poveznicom osobnog i obiteljskog statuta. Naime, izbor između *činjenične* poveznice uobičajenog boravišta s jedne strane i *pravne* poveznice državljanstva s druge strane, postaje važan pri određivanju mjerodavnog prava koje mora biti u najbližoj vezi s određenom osobom ili osobama. Dutta zaključuje da je politika zakonodavca EU-a koja slijedi načelo uobičajenog boravišta opravdana. Dugoročno on vidi načelo državljanstva samo u funkciji sekundarnih poveznica. Međutim, za pitanja građanskog statusa (mjerodavno pravo kod majčinstva i očinstva; brak, osobno ime i posvojenje) državljanstvo je mnogo više ukorijenjeno u zakonima o

nationality principle is much more rooted in Member States' private international laws, and it remains to be seen if the European legislator would depart from it for the benefit of habitual residence.

An article by Csongor István Nagy, entitled *What functions may party autonomy have in international family and succession law? An EU perspective* comes in a Croatian language translation as well. The article examines, from an EU perspective, what functions and considerations may justify party autonomy in the fields of international family and succession law. The author argues that in family and succession law the main function of party autonomy should be to tackle the uncertainties related to the applicable law (predictability), to protect vested rights and to ensure the operation of the country-of-origin principle. It is also submitted that this function is less relevant regarding matters connected to legal systems that contain uniform choice-of-law rules, like the Member States of the EU. Furthermore, the article also argues that in the EU the mutual recognition of the choice-of-law rules of the Member States may also justify party autonomy, especially in family and succession law.

Aida Bushati (Gugu) and Eniana Qarri write on *Albanian Private International Law in Family Matters*. The Albanian Private International Law Act of 2011 has made significant improvements compared to the old law. The law tries to approximate the provisions of Albanian private international law with the best European and international practices. Concerning foreign judgments, they are recognized and enforced according to the provisions of national (the Civil Procedure Code) and international (multilateral and bilateral agreements)

međunarodnom privatnom pravu država članica te je malo izgledno da bi europski zakonodavac od toga načela odstupio.

Članak Csongora Istvána Nagya *Koje su funkcije stranačke autonomije u međunarodnom obiteljskom i nasljednom pravu? Pogled iz EU-ove perspektive*, razmatra koje funkcije i okolnosti opravdavaju stranačku autonomiju u području međunarodnog obiteljskog i nasljednog prava. Članak objašnjava kako glavne funkcije stranačke autonomije u obiteljskom i nasljednom pravu trebaju biti hvatanje u koštac s neizvjesnošću mjerodavnog prava (predvidljivost), zaštita stečenih prava te osiguranje primjene načela zemlje porijekla. Također, objašnjava kako su ove funkcije manje svrsishodne u stvarima vezanima za pravne sustave koji imaju ujednačena kolizijska pravila, kao što su države članice EU-a. Nadalje, argumentira kako međusobno priznavanje kolizijskih pravila među državama članicama EU-a, posebice u obiteljskom i nasljednom pravu, može opravdati stranačku autonomiju.

Zbornik radova nastavlja temom *Albansko međunarodno privatno pravo u obiteljskim stvarima* Aide Bushati Gugu i Eniane Qarri. Albansko međunarodno privatno pravo usvojeno 2011. godine ostvarilo je znatan napredak u odnosu na stari zakon. Uvedeni su novi koncepti te predviđena nova pravila. Zakonom se nastoje uskladiti nacionalne odredbe s najboljim europskim i međunarodnim propisima. Kad su posrijedi priznanja učinaka stranih odluka, primjenjuju se odredbe Zakona o parničnom postupku te međunarodnog

laws applicable in Albania. As regards the regulation of family matters, the new law has brought considerable novelties both from the qualitative aspect, regarding a more detailed regulation of the matrimonial relationship, as well as from the quantitative aspect, regarding the regulation of new relationships which were not covered by the previous law, such as the matrimonial patrimony regime. Along with the traditional connection criteria provided by the previous law, the new law, as regards the determination of the substantive law applicable to marriage with foreign elements, provides for two new connection criteria: "habitual residence" and "closest connection". Despite the improvements, the PIL Act will necessarily continue to be subject to further revision and clarification needed not only to further approximate it with the developing European regulation, but also to correct and improve some of the existing provisions.

Boriana Musseva elaborates on *Application of Family Private International Law in Bulgaria*, with particular emphasis on the application of the Brussels II bis Regulation and of the Hague Child Abduction Convention. The author presents the case law to prove that in seven years after Bulgaria joined the EU these legal sources have been applied more frequently, ending in correct application in most of the cases. Problems may arise due to habits created by the old legislation always providing access to Bulgarian courts for Bulgarian citizens and due to principles contained in "the bible of the judges" – the Bulgarian civil procedural code, often considered by the judiciary as superior to EU regulations.

In the end, Musseva analyses some problems in the application of the

prava (multilateralnih i bilateralnih sporazuma). Autorice ističu kako je novi Zakon iz 2011. kad je riječ o obiteljskim stvarima donio važne novosti, kako s aspekta kvalitete rješenja, tako i činjenicom da je regulirao neke pravne odnose koji su u starom propisu nedostajali (primjerice, režim bračne stečevine). Uz tradicionalne poveznice novi Zakon u vezi s obiteljskim stvarima predviđa i korištenje poveznica "uobičajenog boravišta" i "najbliže veze". Unatoč poboljšanjima, Zakon je nužno i dalje unaprjeđivati, što zbog približavanja europskim uredbama, što zbog poboljšanja samih odredbi.

Boriana Musseva temu *Primjena obiteljskog međunarodnog privatnog prava u Bugarskoj* razrađuje s posebnim naglaskom na primjenu Bruxelles II *bis* uredbe i Haške konvencije o otmici djece. Autorica predstavlja sudsku praksa da bi dokazala da se sedam godina nakon ulaska Bugarske u EU ovi pravni izvori primjenjuju češće te ispravnije u većem broju slučajeva. Problemi mogu nastati zbog navika stvorenih u vrijeme primjene starog zakona koji je uvijek davao bugarskim državljanima pristup pred bugarskim sudovima. Važna je i okolnost da načela sadržana u "Bibliji sudaca" – bugarskom građanskom procesnom zakonu suci smatraju važnijim od EU-ovih propisa.

Posljednje, ali ne i manje važne su određene teškoće koje proizlaze iz

Brussels II *bis* and Hague 1980 Convention rules.

Toni Deskoski and Vangel Dokovski write on *Connecting Factors, Party Autonomy and Renvoi in Family Matters in Macedonian and EU Private International Law*. Positive effect of unification that is under way on universal (Hague Conference on Private International Law) and regional (EU) level are the cornerstone of this contributions. Particularly, the huge impact of EU acquis in this field is analysed as to the developments of national private international law rules. It is argued that the EU's PIL offers a great opportunity to rethink traditional family choice of law approaches. The authors state it is widely accepted that nationality, domicile, habitual residence, party autonomy and *lex fori* are often used as connecting factors in international family law. In different legal systems, these connecting factors have different roles – as a primary or secondary connecting factor. They conclude that the European path of the Western Balkans countries is going to give wind to a wider application of habitual residence and party autonomy in international family matters.

Marija Krvavac and Jelena Belović polemicize on *Family Matters – Jurisdiction of Domestic Courts under the Draft PIL Code of the Republic of Serbia*. If the provisions of the PIL Act in force and those of the Draft PIL Act in Serbia are compared, the subject matter of jurisdiction is the issue that has been amended in the greatest extent. The authors claim there is an entirely new attitude in the Draft, following the examples of the Swiss and Belgian PIL

pravila sadržanih u Bruxelles II *bis* uredbi i Haškoj konvenciji o građanskopravnim aspektima međunarodne otmice djece, koje Musseva prenosi.

Toni Deskoski i Vangel Dokovski pišu na temu *Poveznice, stranačka autonomija, renvoi u obiteljskim stvarima prema međunarodnom privatnom pravu Makedonije i EU-a*. Pozitivni učinci unifikacije koji su u tijeku na univerzalnoj (Haška konferencija za međunarodno privatno pravo) i regionalnoj razini (EU) predstavljaju kamen-temeljac ovog priloga. Posebno se analizira utjecaj pravne stečevine EU-a na razvoj nacionalnih pravila međunarodnog privatnog prava. Autori tvrde da međunarodno privatno pravo EU-a otvara priliku da promislimo o tradicionalnim poveznicama ovog područja. Naime, široko je u međunarodnom obiteljskom pravu prihvaćena primjena poveznica državljanstva, prebivališta, uobičajenog boravišta, stranačke autonomije i *lex fori*. U različitim pravnim sustavima te poveznice imaju različite uloge – kod primarnog ili sekundarnog vezivanja. Autori zaključuju da europski put država zapadnog Balkana daje vjetar u leđa učestalijoj primjeni uobičajenog boravišta i stranačke autonomije u međunarodnim obiteljskim stvarima.

Marija Krvavac i Jelena Belović pišu na temu: *Obiteljske stvari – nadležnost domaćih sudova prema Nacrtu Zakona o međunarodnom privatnom pravu Srbije*. Ako se stave u odnos odredbe važećeg zakona o međunarodnom privatnom pravu i odredbe Nacrta, pitanja nadležnosti doživjela su najveću promjenu. Autorice podržavaju sasvim novi nomotehnički pristup Nacrta, koji slijedi prototip švicarskog i belgijskog zakona. Za svaki je predmet kategorije

Acts. For each matter, the applicable law is regulated in context with international jurisdiction. Authors advocate the approach of the Draft, it being systematic, logical and more apt to practitioners' usage. It is concluded that practitioners would get modern answers that are harmonized with European Community law, not only considering family, but all other regulated matters as well.

vezivanja mjerodavno pravo regulirano u kontekstu s međunarodnom nadležnosti. Autorice Nacrt ocjenjuju sustavnim, logičnim i pogodnim za korištenje praktičarima.Zaključuju da će sustav dobiti moderne odgovore usklađene s europskim pravom, ne samo kad su posrijedi obiteljske stvari nego i šire.

Zeynep Derya Tarman presents on *International Divorce in Turkey: Jurisdiction and Applicable Law*. The rule of special jurisdiction regulating the international jurisdiction of Turkish courts concerning personal status of Turkish nationals (PIL Code Article 41) is discussed. In practice, this rule is currently of interest due to divorce suits filed by Turkish nationals residing abroad and litigated again in Turkey. Since Turkish law does not contain any provisions regarding foreign pendency in case a legal suit that has been litigated in a foreign country is litigated once again in Turkey, the author brings us to a scenario where it will not be possible for judgments rendered in either country to be recognized and enforced in the other country!

Radom Zeynep Derye Tarman: *Međunarodni razvod u Turskoj: nadležnost i mjerodavno pravo*. Tarman raspravlja o pravilima posebne međunarodne nadležnosti turskih sudova u predmetima osobnog statusa turskih državljana (Zakon o međunarodnom privatnom pravu, čl. 41.). U praksi je to pravilo trenutačno interesantno zbog podnesenih tužbi za razvod turskih državljana koji žive u inozemstvu, a koji se ipak parniče u Turskoj. Budući da turski zakon ne sadrži nikakve odredbe o situacijama kada i u stranoj državi teče postupak u istom predmetu spora među istim strankama, autorica nas uvodi u scenarij prema kojemu neće biti moguće priznati i ovršiti presude donesene u jednoj ili drugoj zemlji!

Ceyda Süral discusses the topic of *Children in Turkish International Family Law*. Although the Turkish conflict of law rules on affiliation, custody and maintenance obligations are modern and sufficient, in practice Turkish judges sometimes disregard the conflict of law rules and apply the Turkish Civil Code on the ground that family relations are related to public policy. The most problematic issue is the custody of a child. The author is concerned as the public policy ground is also very widely used in recognition and enforcement of

Ceyda Süral upoznaje nas s temom *Djeca u turskom međunarodnom obiteljskom pravu*. Iako je turski zakon o međunarodnom privatnom pravu moderan, u praksi turski suci katkad zanemaruju njegove odredbe i primjenjuju tursko materijalno pravo smatrajući da su obiteljskopravna pitanja dio javnog poretka. Najproblematičnije je pri tome donošenje odluka o roditeljskoj skrbi. Kad su posrijedi priznanja i ovrhe javni se poredak također široko koristi da bi se opravdalo odbijanje priznanja stranih odluka. Autorica navodi da je

foreign judgments relating to custody. She refers to the fact that Turkey is a party to three international conventions concerning maintenance obligations; however, true analyses of the practice are not possible as the case law on these conventions' application in Turkey is not published.

Turska ugovornica triju međunarodnih konvencija koje se odnose na obveze uzdržavanja, ali o praktičnoj strani istih teško se može polemizirati jer se sudska praksa ne objavljuje.

1

EU Private International Family Law

Međunarodno privatno obiteljsko pravo EU-a

RECENT DEVELOPMENTS ON THE MEANING OF "HABITUAL RESIDENCE" IN ALLEGED CHILD ABDUCTION CASES

Paul Beaumont* and Jayne Holliday**

I. Introduction

At the conference on "Private International Law in the Jurisprudence of European Courts – Family at Focus" held in Osijek, Croatia, June 2014, an overview of the recent developments within European and International Family Law was presented by Professor Beaumont that included analysis of the law of maintenance, surrogacy, same sex relationships, custody issues, child abduction and recognition and enforcement of agreements in family law matters. Drawing from that presentation, this article will focus on the recent developments on the meaning of habitual residence in child abduction cases from the UK Supreme Court and the Court of Justice of the European Union (CJEU), in particular the move by the UK Supreme Court towards a more uniform definition of habitual residence in line with the jurisprudence of the CJEU under the Brussels II*a* Regulation.[1]

1. Background

A popular choice of connecting factor with the Hague Conference since the 1960's, the concept of the habitual residence of the child has clearly changed since it was chosen as the sole connecting factor within the 1980 Hague Convention on the Civil Aspects of International Child Abduction ("the Abduction Convention").[2] The view held at the time of drafting, that a person's habitual residence was simply a question of fact and therefore a

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1 EC Regulation No 2201/2003 of 27th November 2003 concerning jurisdiction and recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels II *a*); Case C-523/07 *A* [2009] ECR I-2805 and Case C-497/10 PPU *Mercredi v Chaffe* [2010] ECR I-14309.

2 P. Beaumont and P. McEleavy, *The Hague Convention on International Child Abduction* (OUP, 1999) p. 88, 90.

formal definition was of no practical use[3] proved not as simple to apply in relation to the habitual residence of the child as first thought, with the issue of where the child is habitually resident often being contentious.[4] The child's habitual residence for the purpose of the Convention looks to the habitual residence immediately prior to the child's wrongful removal or retention.[5] Without the identification of the child's habitual residence at the time of the allegedly wrongful act it is not possible to work out whether the child's removal or retention was lawful or not.[6] Children may acquire a new habitual residence in the country they have been abducted to or retained in due to the passing of time or more speedily if their relocation there was lawful at the time they moved there.[7] In other situations a child may be found to have more than one habitual residence or none at all.[8] Indeed a question that pushes the concept of habitual residence to its limits will be considered within this article; whether a very young child (a newborn child) can be habitually resident in a country that the child has never been to, arguing that it makes sense that the newborn acquires the habitual residence of the custodial parent(s).

The use of the connecting factor of the child's habitual residence within the Abduction Convention was originally designed to protect children from harm in cases of wrongful removal or retention by securing the prompt return of

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3 See the chair of the Special Commission that drafted the Abduction Convention, Sandy Anton, stating that: "Whether the residence is habitual is regarded simply as a question of fact, making a definition otiose." (see Alexander E. Anton, 'The Recognition of Divorces and Legal Separations' in R.H. Graveson, K.M.H. Newman, A.E. Anton and D.M. Edwards, 'The Eleventh Session of the Hague Conference of Private International Law' 18 *International and Comparative Law Quarterly* (1969) p. 618-680, 620 at 629) and the Explanatory Report to the Convention by Elisa Pérez-Vera at para. 66, at http://www.hcch.net/upload/expl28.pdf (25 August 2015), which says that the Hague Conference regards "habitual residence" as "a question of pure fact".

4 "(…) habitual residence is one of the most litigated issues under the Convention" R. Schuz, *The Hague Child Abduction Convention* (Hart, 2013) p. 175.

5 Article 4 of the1980 Convention.

6 T. Kruger, *International Child Abduction; The Inadequacies of the Law* (Hart, 2011) p. 21.

7 Beaumont and McEleavy, *op. cit.* n. 2, p. 106. *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562. Newborn acquired habitual residence after only two days *Re J.S. (Private International Adoption)* [2000] 2 FLR 638.

8 Beaumont and McEleavy, *op. cit*. n. 2, p. 90, 91 and 110. For the purpose of jurisdiction in divorce cases an adult can have more than one habitual residence *Ikimi v. Ikimi* [2001] EWCA Civ 873. Twins born to a surrogate mother were found to have no habitual residence for the purpose of the Abduction Convention *W. and B. v. H. (Child Abduction: Surrogacy)* [2002] 1 FLR 1008. Under Brussels II*a* if a child is found not to have an habitual residence then for the purposes of jurisdiction in parental responsibility cases the court bases its jurisdiction on the presence of the child within the jurisdiction.

children to the State with which they had the strongest connection.[9] The idea being, that the child's habitual residence immediately prior to the abduction would provide the most appropriate forum for a custody hearing.[10] In order to determine the child's habitual residence the courts were to give the concept of habitual residence an autonomous definition. This was wonderfully idealistic, but with the number of contracting States to the Abduction Convention currently standing at a very successful 93, it is not surprising that with the absence of a formal definition, differences in how it should be interpreted have become apparent.[11]

These differences in approach can be attributed to the lack of agreement on the weight to be given to the intentions of the custodial parent(s) in determining the habitual residence of their child. Overall three main approaches have been identified.[12] The first favours the intention of the person or persons exercising parental responsibility to determine the child's habitual residence.[13] The second approach values the child as an "autonomous individual" and uses the child's connection with the country to determine the habitual residence.[14] The third and most recent approach, which is the approach taken by the CJEU, is a combined method, which looks at all the circumstances of the case in order to see where the child's centre of interests are but recognizes as one factor in doing so the relevance of the intention of those holding parental responsibility for the purpose of ascertaining where the child is habitually resident.[15]

When the CJEU came to consider the habitual residence of a child under the Brussels II*a* Regulation, in the context of jurisdiction for parental responsibility cases, in *Re A* they moved away from the more general interpretation of habitual residence that focused on the intention of the party whose habitual residence was in question, as it was felt that this definition was not suitable

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9 Hague Convention on the Civil Aspects of International Child Abduction 1980 (1980 Convention) preamble; There are 93 Contracting States to this Convention. For comprehensive information on the Convention see http://www.hcch.net/index_en.php?act=conventions.text&cid=24 (24 August 2015). The 1980 Convention applies to children that are habitually resident in a contracting State (Article 4).

10 Beaumont and McEleavy, *op. cit.* n. 2, p. 90 and the Pérez-Vera Explanatory Report, *op. cit.* n. 3, para 66.

11 Schuz, *op. cit.* n. 4, Chapter 8; L. Silberman, 'Brigitte M. Bodenheimer Memorial Lecture on the Family. Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence' 38 *University of California Davis Law Review* (2005) p. 1049 at 1064.

12 For an analysis of the development of the concept of habitual residence for the purpose of the Hague Abduction Convention see Schuz, *op. cit.* n. 4, Chapter 8.

13 Schuz, *op. cit.* n. 4, p.186.

14 *Ibid.,* p. 189.

15 *Ibid.,* p. 192.

for determining the habitual residence of the child and they moved towards the combined method.[16] In their view the parental intention to settle with the child in a new State if manifested by some tangible evidence (like purchasing or leasing a residence there or applying for social housing there) should only be seen as a piece of evidence indicative of where the child is habitually resident.[17] That evidence should be weighed by the court alongside all the circumstances of the case to see which residence of the child reflects 'some degree of integration in a social and family environment.'[18]

The current test for the habitual residence of a child that was developed by the CJEU under the Brussels II*a* Regulation in *Re A* and in *Mercredi* is:

> (…) the place which reflects some degree of integration by the child in a social and family environment. In particular, duration, regularity, conditions and reasons for the stay on the territory of the 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 should all be taken into consideration obviously appropriate to the child's age.[19]

With regards to the aspect concerning family and social relationships, the CJEU considered that the relationships to be considered vary according to the child's age.[20] If the child was very young and was dependent on the custodial parent(s) then the court needed to consider the social and family relationships of the parent(s) with the lawful custody in order to determine the habitual residence of the child.[21]

Prior to these cases from the CJEU, the definition that was initially used by the UK Supreme Court for determining habitual residence for the purpose of the Abduction Convention followed the parental intention approach. Drawing from *R v Barnet London Borough Council, Ex p Nilish Shah,* the UK equated the concept of habitual residence with that of ordinary residence, placing emphasis on the residence having a settled purpose.[22]

However the recent developments on the meaning of habitual residence in

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16 The Borràs Report on the Brussels II*a* Regulation refers to habitual residence as being defined by the CJEU for other areas of law as the place where, '(…) the [person] concerned has established, with the intention that it should be of a lasting character, the permanent or habitual centre of his interests'; Case C-523/07, *Re A* [2009] ECR I- 02805 [36].

17 Case C-523/07, *Re A* [2009] ECR I- 02805 [40].

18 *Ibid.,* [38].

19 View of Advocate General Cruz Villalón delivered on 10th December 2010 Case C-497/10 PPU *Barbara Mercredi v Richard Chaffe* [2010] ECR 1-4309 [65].

20 Case C-497/10 PPU *Barbara Mercredi v Richard Chaffe* [2010] ECR 1-4309 [53].

21 *Ibid.,* [55].

22 *R v Barnet London Borough Council, Ex p Nilish Shah* [1983] 2 AC 309.

child abduction cases from the UK Supreme Court demonstrate a move from the parental intention model towards the combined model. Unfortunately, the very recent decision in *C v M* highlights that the CJEU is capable of losing sight of its own jurisprudence when faced with the difficulties of assessing the habitual residence of the child. This paper will consider two recent UK Supreme Court cases before analysing the latest CJEU case.

II. In the matter of A (Children) [2013] UKSC 60

1. Background

In certain extreme situations, the UK courts had previously held the view that a new-born child could take the habitual residence of the parent with parental responsibility with immediate effect, even if the child had never been to that country.[23] In the case of *B v H* it was considered that where there had been coercion of the mother, who was habitually resident in England, and was made to remain in Bangladesh under duress, where she later gave birth to a child, that the child had the same habitual residence as its mother.[24] However, the decision *In the Matter of A* clearly demonstrates how difficult it is to determine the habitual residence of an infant in this situation, to the extent that four out of the five Supreme Court judges avoided doing so.[25]

Following the CJEU cases on habitual residence in child custody cases and demonstrating a willingness to aim for uniform interpretation, the Supreme Court discussed the issue of presence as a necessary factor to habitual residence and whether an infant could be habitually resident in England without the child ever having been there.

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23 *B v H (Habitual Residence; Wardship)* [2002] 1 FLR 388. In this case it was considered that where there had been coercion of the mother, who was habitually resident in England, to remain in Bangladesh where she later gave birth to a child under duress, that the child had the same habitual residence as its mother; A. Fiorini, 'Habitual Residence and the Newborn – A French Perspective' (2012) 61 *International and Comparative Law Quarterly* p. 530-540. It should be noted that the CJEU has not yet faced such an extreme case as that of *B v H* or *In the Matter of A*.

24 *B v H (Habitual Residence; Wardship)* [2002] 1 FLR 388. A. Fiorini, 'Habitual Residence and the Newborn – A French Perspective' 61 *International and Comparative Law Quarterly* (2012) p. 530-540.

25 In *In the matter of A*, Lady Hale, Lords Wilson, Reed and Toulson all questioned the necessary connection for the habitual residence of the newborn child in this situation. They considered an approach which "holds that presence is a necessary pre-cursor to residence and thus to habitual residence or an approach which focuses on the relationship between the child and his primary carer" and erred on the side of the former.

1.1. The facts

The mother, who was considered to be habitually resident in England, had become pregnant and given birth to a child in Pakistan against her will.[26] The child in question was born in 2010 and was the youngest of four children to the mother and father.[27] The father had been born in England and the mother in Pakistan. They had married in Pakistan in 1999 and moved to England in 2000. The father and the eldest three children that were born in 2001, 2002 and 2005 had both British and Pakistani nationality.[28] The mother had indefinite leave to remain in the UK.[29] In 2008 the mother left the family home in England with the three eldest children to move into a refuge claiming domestic abuse.[30] In October 2009 the mother travelled to visit her father for a period of three weeks in Pakistan with the three children.[31] She was unaware that her estranged husband would also be in Pakistan at the same time.[32] Whilst in Pakistan she was coerced by her father and her husband and his family to reconcile the marriage.[33] Her passport and the children's passports were taken from her.[34] She then became pregnant with the fourth child in February 2010 and at that point contacted the refuge in the UK in an attempt to get help to return to England with the children.[35] In May 2011 her father helped her retrieve her passport and she returned to the UK alone.[36] On her return she began proceedings to get the children returned to the UK.[37] The court accepted that all four children were habitually resident in the UK and ordered their return on the basis that the eldest three had not lost their habitual residence and the youngest, following *B v H*, acquired its habitual residence from the mother.[38] The children's father challenged the court's jurisdiction in January 2013.[39] The father's appeal was allowed by the English Court of Appeal in relation to

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26 *In the Matter of A (Children)*[2013] UKSC 60.

27 *Ibid.*, [2].

28 *Ibid.*, [2].

29 *Ibid.*, [2].

30 *Ibid.*, [4].

31 *Ibid.*, [4].

32 *Ibid.*, [4].

33 *Ibid.*, [5].

34 *Ibid.*, [5].

35 *Ibid.*, [6].

36 *Ibid.*, [6].

37 *Ibid.,* [6].

38 *Ibid.,* [7].

39 *Ibid.,* [10].

the youngest child on the basis that habitual residence was a question of fact and that '(…) a rule that a newly born child is presumed on birth to take the habitual residence of his parents "would be a legal construct divorced from actual fact"' and not only that but would also '(…) be inconsistent with the approach of the CJEU'.[40] The mother appealed this decision.

2. Decision

This case did not turn on the issue of habitual residence as the Supreme Court unanimously upheld the mother's appeal on the basis that the court had inherent jurisdiction as the child was a British national.[41] However prior to that decision, the Supreme Court did consider whether the child was habitually resident within the UK for the purpose of Article 8 of the Brussels II*a* Regulation thereby giving the court jurisdiction to order the "return" of the child on the basis of parental responsibility.[42]

Giving the leading judgment, Lady Hale summarised the position of the Supreme Court with regards to habitual residence by stating that in her view;

> The test adopted by the European Court is preferable to that earlier adopted by the English Courts, being focused on the situation of the child, with the purposes and intentions of the parents being merely one of the relevant factors. The test derived from *R v Barnet London Borough Council, ex p Shah* should be abandoned when deciding the habitual residence of a child.[43]

This is a clear statement by the Supreme Court of their intention to follow the jurisprudence of the CJEU. Highlighting the point that habitual residence is '(…) essentially factual' and '(…) should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce.'[44] Lady Hale referred to *Mercredi* for guidance when identifying the habitual residence of the very young child.[45] She pointed out that '(…) in addition to the *physical presence* of the child in a member state' that where the child was an infant then the '(…) social and family environment is shared with those upon whom he is dependent. Hence it is

40 *Ibid.,* [10].

41 *Ibid.*, [68].

42 *Ibid.*, [34].

43 *Ibid.*, [54(v)].

44 *Ibid.*, [54(vii)]

45 *Mercredi v Chaffe* (Case C-497/10 PPU) [2012] Fam 22 [55].

necessary to assess the integration of that person or persons in the social and family environment of that country concerned.'[46] Lady Hale, along with Lords Wilson, Reed and Toulson, agreed that 'presence' was a necessary factor for habitual residence and therefore the majority agreed that the child was not habitually resident within England and Wales as he had not been brought to the UK.[47] However, Lord Hughes took a different view on habitual residence, providing an additional explanation as to why presence was not necessary.[48]

3. Is presence essential to habitual residence?

Although the discussion was obiter, the critical factor in determining whether the child in this case was found to be habitually resident within the UK focused on the issue of presence. The question that was considered by the court was which approach supported the view that habitual residence was a question of fact.[49] Was it an approach that called for '(…) presence [as] a necessary pre-cursor to residence and thus to habitual residence or an approach which focuses on the relationship between the parent and the child?'[50] The Supreme Court supporting the first option, trying to follow the case law of the CJEU, argued that a child that had never been brought to a country by their parent(s) and was not socially integrated in that country could not, based on the facts, be habitually resident there, making presence, at some point in a country, an essential element of habitual residence.[51]

Yet although the UK is in line with the current jurisprudence of the CJEU, the situation is not as simple as this. A child's habitual residence, especially the habitual residence of a newborn, is not best perceived as simply a question of fact but rather as a mixture of fact and law.[52] A very young child has no control

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46 *In the Matter of A (Children)(AP)* [2013] UKSC 60 [54(vi)].

47 *Ibid.*, [58].

48 *Ibid.*, [69]-[94].

49 *Ibid.*, [55].

50 *Ibid*.

51 *Ibid*.

52 Beaumont and McEleavy, *op. cit.* n. 2, p. 46, 91-92 and 112-113; A. Fiorini, 'II. Habitual Residence and the Newborn – A French Perspective' 61 *International and Comparative Law Quarterly* (2012) p. 530, 538 "The preparedness of the *Cour de cassation* to treat a newborn's intended place of residence as his habitual residence should not be taken to apply to other children in other circumstances."; Schuz, *op. cit.* n. 4, p. 202 notes that courts have avoided applying the parental intention approach, preferring to avoid the question of the habitual residence of the newborn when the child is born in a country where the parents are not habitually resident.

over where he or she is living and by his or her very nature is a 'dependent'. If this was a Hague Abduction Convention case the court would be asked to make an assessment of the habitual residence(s) of the legal custodian(s) in order to determine the habitual residence of the child.[53] The question as to who has legal custody is a legal question. For the purpose of the Abduction Convention, the issue of who has legal custody of the child depends upon the law of the habitual residence of the child, creating a 'circularity of logic'.[54] Determining which parent's habitual residence will be used to determine the dependent child's habitual residence, if the habitual residences of the parents differ, can affect the outcome as to who has legal custody of the child and whether a removal or retention will be considered unlawful.[55] The only way this cycle can be broken is by the courts making what amounts to an arbitrary decision as to whose habitual residence they favour. It is an illusion to focus on where the child happens to be living because that simply plays into the hands of the parent or other person who happens to have possession of the child at the relevant time.

Lord Hughes in his dissenting opinion found that the child was habitually resident in England. Agreeing that habitual residence was a question of fact,[56] he put forward the view that the presence of the newborn infant in a country was not a necessary factor for habitual residence when coercion towards the mother had prevented her from returning to her habitual residence. He also put forward the view that if the court were to correctly follow *Mercredi* then the integration into the family unit was an important factor when considering the habitual residence of the child and the natural conclusion would be that

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53 Beaumont and McEleavy, *op. cit.* n. 2, p. 46, '(…) custody rights are determined in accordance with the law of the child's State of habitual residence, but the child's habitual residence will in most instances be derived from his or her custodian(s).'; Case C-397/10 PPU *Mercredi v Chaffe* [2012] Fam. 22 [55] 'An infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent.'

54 Beaumont and McEleavy, *op. cit.* n. 2, p. 46.

55 An example of this would be where an unmarried couple, an English mother and Italian father, leave their two-week-old newborn infant in England with its maternal grandparents while they are temporarily residing in Italy deciding where to live as a family. It can be argued that the child is too young to have gained an habitual residence of its own in England and that the intentions of the parents have yet to determine a habitual residence. The mother then takes the child to Sweden without the father's consent. If the mother's habitual residence of England is applied to the child then under English law the mother would have sole legal custody and the removal would be lawful. If the father's habitual residence is applied then under Italian law he would have joint custody and the removal would be unlawful.

56 *Ibid*., [72]-[73]. But later he had the honesty to admit that 'the concept of habitual residence is necessarily to some extent a legal one' [92].

the habitual residence of the siblings and the mother should be taken into consideration when determining the habitual residence of the infant.[57]

4. Summary

In the matter of A it is clear that the UK Supreme Court has moved away from the parental intention model to the combined model in determining the habitual residence of the child, advocating that the test used by the CJEU should be adopted even outside the scope of EU law.[58] On the question of whether presence is a necessary element it was stated that presence is required for habitual residence in order to support the point that it is a fact-based concept.[59] However there was an element in this case that caused the court concern when it came to the assessment of habitual residence and that was the issue of coercion on the mother. Four of the judges, in obiter comments, could not ultimately decide whether presence was a necessary prerequisite for habitual residence in cases as stark as this one. They noted that the CJEU had not had to deal with such an extreme case as this and had the Supreme Court not been able to dispose of the case on the basis of the child's British nationality, then it should have referred the case to the CJEU to determine whether the child was habitually resident within the UK.[60]

III. Re L (A Child) (Habitual Residence) [2013] UKSC 75

1. Background

'How should the courts react when the child is brought to the UK pursuant to a legal order made abroad in proceedings under the Abduction Convention, which are then overturned on appeal?' [61] This case highlights that the issue of habitual residence is a question of fact and that the initial judge in each country dealing with the case has a wide discretion as how to interpret the facts.

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57 *Ibid.*, [88][90][91]; *Ibid.*, [57] Lady Hale noted that "(…) there is judicial, expert and academic opinion in favour of the child acquiring his mother's habitual residence in circumstances such as these."

58 *Ibid*., [35]-[39], [54] and [81].

59 *Ibid*., [55].

60 *Ibid*., [58] and [93] – [94].

61 *Re L (A Child) (Habitual Residence)* [2013] UKSC 75[1].

1.1. The facts

The father was a US citizen and a Lieutenant Colonel in the US Air Force.[62] The mother, originally from Ghana had indefinite leave to remain within the UK.[63] The parents married in Texas in December 2005.[64] The child was born in August 2006.[65] From May to September 2007 the mother looked after the child in the family home in Texas while the father was in Iraq.[66] On the father's return the mother took a job in England and the father looked after the child in the family home.[67] The marriage broke down in 2008 and the father began divorce proceedings in the Texas State court in March 2008.[68] The parents then agreed to temporary custody orders in the Texas court which stated that the mother could remain in the family home while the father was on duty in Iraq and gave the mother authority to determine residence "without regard to geographic location".[69] The mother subsequently took the child to the UK in July 2008 and stayed in England with the children until February 2010. In the autumn of 2008 the mother applied for indefinite leave to remain for the child and resisted the agreement for the child to have contact with his father during the Spring break in March 2009.[70] The divorce was finalised in July 2009 in the Texas court with the mother being given custody.[71]

In March 2010 at a welfare hearing the Texan court decided that the child should live with his father,[72] and the child remained with the father from March 2010 to August 2011 and had contact with his mother during the holiday periods.[73] In a "bizarre" twist, the mother then applied in the US for the return of the child under the Abduction Convention, on the basis that the child was habitually resident in England in March 2010 and therefore the father in the US was wrongfully retaining the child.[74] This application was

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62 *Ibid.*, [2].

63 *Ibid.*, [2].

64 *Ibid.*, [3].

65 *Ibid.*, [2].

66 *Ibid.*, [3].

67 *Ibid.*, [3].

68 *Ibid.*, [4].

69 *Ibid.*, [4].

70 *Ibid.*, [4].

71 *Ibid.*, [5].

72 *Ibid*., [5].

73 *Ibid*., [6].

74 *Ibid*., [6].

successful before the US Federal District Court and the mother and child returned to the UK in August 2011.[75] The father then appealed against the decision and was successful on 31st July 2012 before the US Court of Appeals for the Fifth Circuit which held that the child was habitually resident in the US in March 2010 and on 29th August 2012 the US Federal District Court ordered that the child should be returned to the US.[76] The mother did not return the child. [77] The father then issued proceedings under the Abduction Convention in England and Wales in September 2012 that were rejected at first instance by Sir Peter Singer (January 2013) and in the Court of Appeal (July 2013).[78] The UK Supreme Court decided the case in December 2013 and therefore the Abduction Convention case in England and Wales took 15 months from start to finish. This is too long.

2. Decision

In *Re L* the child had been brought to the UK from the US after the Texas court of first instance had said it was lawful to do so. The question in the UK Supreme Court turned on whether the child was habitually resident in the US on either 31st July or 29th August 2012 because 'the mother's disobedience of the Texan order became wrongful' only if the child was still habitually resident in Texas at that time.[79] On the facts of the case the UK Supreme Court decided that the child had been resident in the UK for a period of 11 and a half months at the relevant time. The Court applied the test within *Mercredi* to determine where the child was habitually resident.[80] In its view Sir Peter Singer "was entitled to hold" that the child was by the relevant date(s) habitually resident in England and Wales.[81] The child was integrated in England and Wales, and it was not a new environment for the child as the child had lived there for 20 months prior to living in the US and then over 11 months after the lawful return.[82]

Treating habitual residence as a question of fact but acknowledging the relevance of parental intent Lady Hale, giving the unanimous judgment of the Court, stated that:

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75 *Ibid*., [6].

76 *Ibid*., [7]-[8].

77 *Ibid*., [8] and [17].

78 *Ibid*., [16].

79 *Ibid*., [17].

80 *Ibid*., [20].

81 *Ibid*., [27].

82 *Ibid*., [26].

> (…) it is clear that parental intent does play a part in establishing or changing the habitual residence of a child: not parental intent in relation to habitual residence as a legal concept, but parental intent in relation to the reasons for a child's leaving one country and going to stay in another. This will have to be factored in, along with all the other relevant factors, in deciding whether a move from one country to another has a sufficient degree of stability to amount to a change of habitual residence.[83]

However, the Supreme Court made the decision to return the child to his father on the basis of inherent jurisdiction as this was in the best interests of the child.[84]

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83 *Ibid*., [23]. In the later case of *AR v RN* [2015] UKSC 35 the UK Supreme Court decided that two very young children were habitually resident in Scotland four months after they arrived there lawfully with their mother for her maternity leave for 12 months even though the original intention was to return to France at the end of the 12 month period. The family had lived in France and the father agreed to the mother taking the children to Scotland for a 12 month period. After 4 months the mother started legal proceedings in Scotland for custody. The father brought return proceedings under the 1980 Hague Convention but the Inner House of the Court of Session (upheld by the UK Supreme Court) decided that there was no wrongful retention by the mother in Scotland because the two children were already habitually resident there 4 months after they had left France. It seems unnecessarily controversial for the Supreme Court to decide that the children were already habitually resident in Scotland after only four months residence in Scotland (including two trips to France during those 4 months) when they could have arrived at the same result simply by deciding that after 4 months in Scotland the children were no longer habitually resident in France. It is interesting to note that the UK Supreme Court did not even discuss the question of whether it was obliged to refer the case to the CJEU for a preliminary ruling. It was of course dealing with a case on the interpretation of Article 3 of the 1980 Hague Convention after the CJEU had already ruled on the EU's exclusive external competence in relation to that Convention (see Opinion1/13, EU:C:2014:2303. Analysed by P. Beaumont in "A Critical Analysis of the Judicial Activism of the Court of Justice of the European Union in Opinion 1/13", Centre for Private International Law Working Paper No 2015/1, at http://www.abdn.ac.uk/law/documents/Opinion_on_Child_Abduction_-_Judicial_Activism_by_the_CJEU_-_By_Beaumont.pdf) (21 August 2015).

84 *Re L (A Child) (Habitual Residence)* [2013] UKSC 75 [36]. This aspect of the decision is outside the scope of this article but it seems extraordinary that the UK Supreme Court could regard it as being in the best interests of the child to send the child back to the US after he had been with his mother in the UK for such a long time. Surely a Family Court judge in England and Wales should have exercised jurisdiction to determine issues of parental responsibility and access in this case.

IV. C v M (C-376/14 PPU)

1. Background

On 9th October 2014 the Third Chamber of the CJEU gave a ruling clarifying that its case law on habitual residence in the context of parental responsibility decisions under Brussels II*a* is also applicable to child abduction cases. Unfortunately this ruling, at least in part, contradicts the CJEU's own case-law set out in *Mercredi.*

In this case a mother lawfully removed her child from France to Ireland.[85] The French courts at the time of the removal had given her permission to move to Ireland with the child.[86] The French court had refused an injunction by the father to prevent the removal and identified the child's habitual residence as being with the mother.[87] At this point in the proceedings the French courts were clearly upholding the mother's fundamental right to move from one EU Member State to another as the only custodial parent of the child.

Fast forward two years and the French courts have reversed their decision and have ordered the return of the child to France which the Irish High Court rejected on the basis that the child was habitually resident in Ireland at the material time.[88] On appeal the Irish Supreme Court requested a preliminary reference from the CJEU to bring clarity to the matter.[89] However instead of the CJEU looking to *Re A* and *Mercredi*, '(…) that habitual residence is always a question of fact and that the reasons for being in the territory should be accounted for',[90] it incorrectly places weight on the provisional nature of the French court's permission to the mother to remove the child and the effect of this on the child's habitual residence.

1.1. The facts

The mother who was a British national had married the father of the child in France in May 2008.[91] The child was born in July 2008.[92] The relationship between the mother and father deteriorated quickly and the mother filed for

85 Case C-376/14 PPU [22].

86 *Ibid*., [20].

87 *Ibid*.

88 *Ibid*., [26][27].

89 *Ibid*, [32].

90 *Ibid*, [31].

91 Case C-376/14 PPU 9 October 2014 [19].

92 *Ibid*.

divorce in November 2008.[93] The divorce was finalised in the French court in April 2012 and the court gave both parents joint parental responsibility for the child and determined that the responsibility for the habitual residence of the child lay with the mother from 7th July 2012.[94] The father was given access and accommodation rights. The court also stated that the mother had permission to go to Ireland to 'set up residence' and laid out contact arrangements for the father to meet both circumstances as to whether the mother remained in France or moved to Ireland.[95]

The father appealed the decision in April 2012.[96] The French court refused to stay the provisional enforceability of the judgment allowing the mother to move to Ireland.[97] The mother lawfully moved to Ireland with the child in July 2012.[98] In March 2013 the French court, the Bordeaux Court of Appeal, upheld the father's appeal and ordered that the child should reside with the father.[99] As the mother did not return the child, in May 2013 the father sought an order for the return of the child from the Irish High Court under the Hague Abduction Convention and the Brussels II*a* Regulation.[100] The Irish High Court, in August 2013, dismissed the father's application for the return of the child on the basis that the child had been habitually resident in Ireland at the time of the alleged wrongful retention.[101] In its view the child had acquired habitual residence in Ireland probably at the point when the mother had arrived with the settled intention to reside in Ireland.[102] The father appealed this decision in October 2013 citing that a lawful removal neither changed the habitual residence of the child from being France, nor prevented a wrongful retention.[103] In December 2013 the father requested a declaration of enforceability in Ireland of the March 2013 Bordeaux Court of Appeal judgment.[104] This was accepted in the first instance Irish court but in January 2014 the mother appealed to the French

93 *Ibid*.

94 *Ibid.*, [20].

95 *Ibid*.

96 *Ibid.*, [21].

97 *Ibid*.

98 *Ibid.*, [22].

99 *Ibid.*, [23].

100 *Ibid.*, [26].

101 *Ibid*., [27].

102 *Ibid*. See para 54 of the Irish High Court judgment reported at para 48 of the Irish Supreme Court judgment in *G v G* [2015] IESC 12.

103 Case C-376/14 PPU [28].

104 *Ibid.*, [25].

Court of Cassation against the Bordeaux Court of Appeal judgment and in May 2014 successfully asked the Irish High Court to stay the enforcement proceedings, by which time it was almost two years after the mother and child had moved to Ireland.[105] The child was at that point six years old.

In July 2014 the Irish Supreme Court stayed the return proceedings and asked the CJEU for a preliminary ruling on three questions.[106]

2. Decision of the CJEU

The CJEU ruled that the Irish court when determining the child's habitual residence needed to take into account that the 'judgment authorizing the removal could be provisionally enforced and that an appeal had been brought against it' and that they should ascertain 'whether the child was still habitually resident in the Member State of origin immediately before the alleged wrongful retention.'[107] This unfortunate approach taken by the CJEU suggests that a lawful removal can too easily lead to an unlawful retention if the lawfulness of the removal is based on an enforceable judicial order that happens to be the subject of an appeal.

The judges in the Third Chamber appeared to view the move to Ireland as temporary, as the courts had only given the mother a provisional order, which was subject to appeal.[108] The judges therefore believed this was relevant for determining the habitual residence of the child on the basis that as the mother knew that the French court could reverse the decision she could not be sure whether she was able to settle in Ireland and therefore the provisional nature of the judgment was pivotal.

A more accurate viewpoint is presented within Advocate General Szpunar's opinion.[109] He notes that the French court had said the mother could move. The French court clearly stated that the habitual residence of the child was with the mother from 7th July 2012. The French court even made access and accommodation rights for the father depending on whether the mother made the decision to move to Ireland or remain in France. The move by the mother to Ireland was a lawful move. She had the right to move. So why should the fact that the judgment was subject to appeal be relevant? The ability to

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105 *Ibid.*, [25].

106 The actual questions are recorded in *G v G* [2015] IESC 12 [15].

107 Case C-376/14 PPU [57].

108 *Ibid*. The UK Supreme Court had noted in *Re L* above n 61, that the fact the child's residence in England came about as a result of a judicial decision in the US that was subject to appeal made the residence "precarious' and on different facts may have prevented it from acquiring the "necessary quality of stability "to become habitual" [26].

109 View of Advocate General Maciej Szpunar delivered 24th September 2014 *C v M* Case C-376/14.

acquire a new habitual residence after a lawful move occurs quickly. AG Szpunar notes that there is no definition for habitual residence and that it is determined by facts.[110] In the *Mercredi* decision the mother could claim a new habitual residence very quickly and a young child can gain habitual residence very quickly if the move is legitimate.[111]

The ruling by the Third Chamber in *C v M* is clearly focusing on the wrong element. If the CJEU had emphasised the lawful nature of the removal, considered how quickly habitual residence can be gained and taken a child centric approach then it would be clear that the child was habitually resident in Ireland and that the Irish courts should consider the future of this child.

By suggesting that the Irish Court can work out whether the child was habitually resident in the state of origin at the moment when the French court took its decision to overturn its original decision, months after the child had lawfully arrived in Ireland, begs the question as to whether there was wrongful retention at the moment at which that judgment was issued?[112] The CJEU stated that it depended on whether the child was habitually resident in France at that point. This should turn on the facts. But instead of looking to *Mercredi* for guidance, which would have resulted in the child being found to be habitually resident in Ireland, the CJEU attempts to steer the Irish court by giving great weight to the provisional nature of the relocation order.

AG Szpunar is correctly not willing to give weight to the fact that the mother moved to Ireland at the time when the judgment authorizing the move was the subject of an appeal. He is clear in his interpretation that habitual residence is a factual concept.[113] In his view, where a child has been moved from one Member State to another with a parent who, at that time, had rights of custody in relation to the child and was permitted by a court of the Member State of origin to move to the other Member State, the child can in principle acquire habitual residence in the other Member State. The fact that the proceedings relating to the child's custody are still pending in the Member State of origin does not alter this finding, as habitual residence is a factual concept and is not dependent on whether or not there are legal proceedings.[114]

110 View of Advocate General Maciej Szpunar delivered 24th September 2014 *C v M* Case C-376/14 [74][75].

111 *Mercredi v Chaffe [2011] EWCA Civ 272.*

112 Case C-376/14 [57].

113 View of Advocate General Maciej Szpunar delivered 24th September 2014 *C v M* Case C-376/14 [83].

114 View of Advocate General Maciej Szpunar delivered 24th September 2014 *C v M* Case C-376/14 [85].

Unwilling to take this view the CJEU said that in the alternative, whatever was the outcome on the return issue, the French court order which stated that the child should be in the custody of the father, should be recognised and enforced under the Brussels II*a* Regulation as per custody orders and not under the fast track abolition of exequatur route. However, if the child's habitual residence was in fact no longer in France by the time the French appeal court gave its decision on the 5th March 2013 and the child is habitually resident in Ireland at the time when the Irish court is seised of parental responsibility proceedings, then it is for the Irish courts to determine the best interests of the child and they do not need to enforce the French judgment.[115]

The recognition of a parental responsibility order is not and should not be permanent. When children move lawfully, what constitutes their best interests may change and it is not necessarily the right thing to automatically recognise and enforce a judgment from another country once a court in the new habitual residence is seised of a dispute on parental responsibility (see the delicate balance arrived at by Article 23(e) of Brussels II*a*). This case is therefore highly controversial and highlights the difficulty faced by the legislators in how to reform the Brussels II*a* Regulation. Indeed the abolition of exequatur is not necessarily the right outcome in these cases. This is not a commercial judgment where the commercial judgment should not change. This case deals with children where lives change and custody orders given in one country should not necessarily be automatically enforced in another country. This is too simplistic a notion and may not be in the best interests of the child, which is the underlying and indeed the overriding principle. It is therefore suggested that in the review of Brussels II*a* and in the case law of the CJEU the national courts should continue to have the flexibility provided by Article 23 of Brussels II*a* when dealing with the recognition and enforcement of classic custody orders and should not treat them like an Article 11(8) Brussels IIa Regulation order.

3. Summary

The emphasis in this case on the importance of the so called 'provisional nature' of the French judgment is dangerous. It appears to introduce an unhelpful legal element into the determination of habitual residence and

115 The Irish courts would be exercising their jurisdiction under Article 8 of Brussels II*a* to decide on the merits of parental responsibility and give priority to their own ruling, including perhaps an immediate provisional order that the child remains in Ireland with the mother pending a full welfare hearing, on such matters over the earlier French judgment (see Article 23(e) of Brussels II*a*).

allows a defeated party to continue to control the habitual residence of their child simply by appealing a judgment that has taken that control away. The CJEU has also contradicted itself because in *Mercredi* the CJEU emphasized that in relation to young children the parental intent of a sole custodian parent can be determinative of a change in the child's habitual residence very soon after a lawful move by the parent with the child to a new country.

4. Decision of the Irish Supreme Court

On 6 February 2015 the Irish Supreme Court upheld the original decision of the Irish High Court of 13 August 2013 that the child was not habitually resident in France by the time of the French appeal court judgment on 5 March 2013 since the child had moved to Ireland lawfully with her mother in July 2012 and her day to day life was centred in Ireland.[116] The Irish Supreme Court took note (at paras 34 and 51) of the CJEU's caveat in paragraph 55 of the CJEU judgment that the fact that the original French judgment authorizing the mother to take the child to Ireland was subject to an appeal was:

> "not conducive to a finding that the child's habitual residence was transferred, since that judgment was provisional and the parent concerned could not be certain at the time of the removal that the stay in that Member State would not be temporary."

However, in the following brief but undoubtedly correct conclusion the Supreme Court decided that:

> "there was sufficient evidence before the High Court concerning integration, family environment and the nature of the relationship between the child, H and her parents such as to allow the High Court judge to come to the conclusion [on habitual residence] she did."[117]

V. Conclusion

Over the past 30 years the concept of habitual residence of the child in the UK has developed from one which put weight on parental intention to a mixed model, which takes a more child centric and fact based approach. By following the jurisprudence of the CJEU, the UK Supreme Court has made a genuine and conscious attempt to provide a uniform interpretation of the 1980 Abduction Convention. This will hopefully have the effect of creating

116 *G v G* [2015] IESC 12 [43] – [51].

117 *Ibid.*, [50].

a more uniform approach to the definition of habitual residence amongst all Contracting States to the Hague Abduction Convention.[118] However the risk is that the CJEU will not have the judicial expertise in private international law (especially family law aspects thereof) to maintain a high quality interpretation of habitual residence based on international best practice. It does not have a good record of referring to the case law of other national courts on the interpretation of international treaties in order to try to achieve a uniform interpretation of the treaty. In *Mercredi* it reached a careful balance where parental intent of a child's custodial parent(s) is particularly significant in determining the habitual residence of young children. This was perhaps not carefully enough heeded by the majority of the UK Supreme Court *In the Matter of A*.

If enough weight is given to parental intention of the custodial parent(s) of newborns then physical presence is not required to establish habitual residence. This is an easier solution to arrive at if the myth that habitual residence is a pure question of fact is abandoned.

Whilst a mixed question of fact and law is the best way to analyse the 'habitual residence' of the young child, it is not appropriate to introduce into the equation a suggestion that somehow habitual residence cannot change when the custodial parent lawfully removes a child to another country just because that decision was still subject to appeal in that country even though the appeal did not suspend the custodial parent's right to take the child out of the country lawfully.

Such an appeal should not prevent the loss of the child's habitual residence in the country where the appeal is made and should not impact on the "stability" of the child's residence in the new jurisdiction to prevent habitual residence being established there within a few months of the residence beginning.

118 Schuz, *op. cit.* n. 4, p. 186. The parental intention model has been followed by the UK and Commonwealth countries therefore it is possible that Commonwealth courts will follow the UK Supreme Court decision and adopt a more mixed model.

DILEMMAS IN APPLICATION OF EU INTERNATIONAL FAMILY LAW IN MOST RECENT EU MEMBER STATES

Christa Jessel-Holst*

I. Preliminary remarks

"Dilemma" has been defined in the venerable Encyclopedia Britannica as designating a "situation wherein from either two (or more) possible alternatives an unsatisfactory conclusion results".[1] Such negative approach is clearly not intended in this contribution. The most recent EU accessions, of Bulgaria and Romania in 2007 and of Croatia in 2013, have put these countries under the challenge of not only harmonizing their legislation with the *acquis communautaire* but also of preparing their institutions for the heavy task of applying the European law in a proper way. Generally speaking they have certainly risen to this challenge. However, the complexity of the *acquis* inevitably also leads to certain problems, some of which will be discussed in this paper.

The present contribution has been prepared for a scientific conference in the beautiful city of Osijek, which has been held with the participation of a large number of scholars mainly from West Balkan countries, but also from all over Europe. The Osijek conference stands in a tradition of regional conferences on private international law which have been organized on an annual basis since the First Regional Meeting held in Niš in the year of 2003, on the occasion of 20 years since the entry into force of the Yugoslav Act concerning the resolution of conflict of laws with provisions of other states in certain matters.[2] Follow-up meetings were held in Maribor, Belgrade, Zagreb, Bečići, Banja Luka, Novi Sad, Rijeka, Skopje, again Niš and most recently in Osijek. These annual meetings, which go back to an initiative of Professor Mirko Živković from the University of Niš, have developed into a well-established international forum which constitutes an excellent tool for the overcoming of dilemmas in the application of private international law by joint efforts, be it in the field of EU international family law or in other areas of private international law.

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1 *The Encyclopedia Britannica* vol. 8 (13th ed., London and New York 1926) p. 271.

2 English translation in: M. Stanivuković, M. Živković, *International Encyclopedia of Laws. Private International Law. Supplement 21: Serbia* (Kluwer Law International, Alphen aan den Rijn 2008) pp. 249 *et sequ*.

West Balkan countries have in the last decade considerably intensified collaboration with the Hague Conference on Private International Law and ratified many Hague Conventions. In 2013, a Centre for the study of Hague Conventions has been established at the Law Faculty in Niš. Regional cooperation in the field of private international law has triggered fundamental legislative reforms in almost every country of the West Balkans. The new codifications and legislative proposals demonstrate an impressive knowledge on the side of the domestic experts of the European private international law. Similar observations can be made with regard to the overall development in Bulgaria and Romania. When in this paper the focus is on certain dilemmas, remaining inconsistencies should not obscure the fact that actually, South Eastern Europe constitutes an excellent place for private international law.

II. EU international family law

1. Sources of EU international family law

For the scope of the present analysis it can be referred to the following legal acts from the *acquis communautaire*:

> Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation ("Rome III-Regulation"),[3]
>
> 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 ("Maintenance Regulation"),[4]
>
> Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matter of parental responsibility, repealing Regulation (EC) No 1347/2000 ("Brussels II bis-Regulation").[5]

In addition, the following instruments have been proposed but not yet adopted:

> Proposal for a Council Regulation of 16.3.2011 on jurisdiction, applicable and the recognition and enforcement of decisions in matters of matrimonial property regimes,[6]

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3 OJ L 343, 29.12.2010, p.10.

4 OJ L 7, 10.1.2009, p. 1.

5 OJ L 338, 23.12.2003, p.1.

6 COM(2011) 126 final.

Proposal for a Council Regulation of 16.3.2011 on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships.[7]

The instrument used by the European legislator is insofar that of a regulation, which is directly applicable in all Member States (Article 288(2) of the Treaty on the Functioning of the European Union (TFEU)). [8]

From the three EU-Regulations mentioned above, none has become automatically applicable in all the EU Member States. The Maintenance Regulation has entered into force in all Member States[9] with the exception of Denmark. However, Denmark has agreed to implement the contents of that regulation, with the exception of the provisions of Chapters III and VII,[10] so that it is at least in part applicable in relations between the Community and Denmark. Denmark and the United Kingdom have not participated in the conclusion of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations by the European Community, to which the Maintenance Regulation refers in Article 15.

The Brussels II bis-Regulation is binding for all Member States, with the exception of Denmark (see Recital 31). It goes without saying that the Maintenance Regulation and the Brussels II bis-Regulation have entered into force in all new Member States at the respective day of EU-accession.

2. The Rome III –Regulation and the principle of enhanced cooperation

Different from all others, the Rome III-Regulation was adopted in a procedure of enhanced cooperation as provided for in Article 20 of the Treaty on European Union[11] and Articles 326-334 TFEU. This means that only those States

7 COM(2011) 127 final.

8 Consolidated version, OJ C 326, 26.10.2012, p. 47.

9 For applicability in the United Kingdom see Commission decision of 8 June 2009 on the intention of the United Kingdom to accept Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (OJ L 149, 12.6.2009, p. 73).

10 Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 149, 12.6.2009, p. 80).

11 Consolidated version, OJ C 326, 26.10.2012, p. 13.

who have expressly notified their intention of participation to the Council and to the Commission are bound by it.

Bulgaria and Romania belong to those Member States which have chosen to participate in the Rome III-Regulation from the beginning, so that for them, Rome III is applicable from 21.6.2012. In addition to the initial 14 participants, the Rome III-Regulation has entered into force for Lithuania on 22.5.2014 and for Greece on 29.7.2015.

For our third new Member State, Croatia, the Rome III-Regulation is not applicable. It remains unclear whether Croatia has deliberately decided that it has no intention to join, or whether so far no opinion has been formed on the issue. In recent years, in Croatia the reform of the substantive family law has been in the center of attention. A new Croatian Family Code has been adopted in June 2014[12] but seems to be highly controversial, since the application of the Code has been suspended for the time being by decision of the Constitutional Court.[13] Therefore, it is conceivable that the issue of Croatia´s joining the Rome III-Regulation or not has simply been deferred to a more suitable moment.

III. Temporal application of EU-Regulations in new Member States

The transitional provisions concerning civil proceedings, such as Article 64 of the Brussels II bis-Regulation, have not been conceived for new EU accession states and therefore raise questions when it comes to the applicability in relation to them. According to the general rule of Article 64(1), the Brussels II bis-Regulation is only applicable to legal proceedings which have been instituted after the date of application of the regulation. "Date of application of the regulation" in a new EU accession state is the date when the accession comes into effect. The Brussels II bis-Regulation is therefore not applicable to proceedings brought before the courts of a State before the latter became a Member State of the European Union.[14] Similarly, the paragraphs (2) and (3) of Article 64 have no retroactive effect as far as the quality as an EU Member State is concerned.[15]

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12 NN 75/2014.

13 NN 5/2015.

14 See also Case C-312/09 *Michalias v Ioannou-Michalia,* CJEU.

15 Th. Rauscher (ed.), *Europäisches Zivilprozess- und Kollisionsrecht, vol. IV* (4th ed. Köln 2015), Article 64 Brüssel IIa-VO Recital 3, p. 395 *et sequ*.

The same considerations are valid with regard to Article 66 of the Brussels I-Regulation.[16] For new Member States, also this regulation applies only for proceedings which have been instituted after their respective EU accession.[17] The applicability of the Brussels I-Regulation shall in certain situations make a major difference in comparison to the national law. For example, in the case of a traffic accident, Article 9 of the Brussels I-Regulation (de lege lata: Article 11 of Brussels I (Recast)[18]) gives the injured party the right to sue the liability insurer at the domicile of the injured party. This means a considerable advantage for the accident victim who at his choice may bring the matter before a domestic court. A large number of cases are these days brought before the German courts on the basis of the Brussels I-Regulation which involve traffic accidents in popular holiday destinations such as Bulgaria, Croatia or Romania, with German citizens suing a foreign insurance company. The applicable law will then be the *lex loci delicti,* and the German courts find it difficult to determine the amount for compensation of immaterial damages or to reach a decision on matters like compensation for decrease in market value under the substantive law of Bulgaria, Croatia or Romania. Applying the above-mentioned criteria, it can be concluded that the effective date for temporal application is not the date when the traffic accident occurred, but the date of application of the Brussels I-Regulation in the new Member State concerned.[19]

Whether the new Member States have already developed a court practice on the issue of temporal application of the regulations mentioned above could not be ascertained. In Germany, this is still not a problem-free matter. Thus, in a well-known German commentary on traffic law[20] (which is in great practical

16 Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12, 16.1.2001, p. 1).

17 OLG Dresden, *judgment of* 11. 4. 2007, NJW-RR 2007, p. 1145 = Die deutsche Rechtsprechung auf dem Gebiet des Internationalen Privatrechts im Jahre 2007 (Tübingen 2009) No.135, p. 384.

18 Regulation (EU) No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (OJ L 351, 20.12.2012, p. 1).

19 See also J. Kropholler, J. von Hein, *Europäisches Zivilprozessrecht* (9th ed., Frankfurt am Main 2011) pp. 710 et sequ. In the case of a consumer contract the German Federal Court of Justice (BGH) has therefore decided that the applicability of Article 66 of the Brussels I-Regulation does not depend on the date of the conclusion of the contract, but solely on the date of institution of proceedings (BGH 17.9.2008, NJW 2009 p.298).

20 K.-L. Haus, C. Krumm, M. Quarch (eds.), *Gesamtes Verkehrsrecht* (Baden-Baden 2014) p. 2623.

demand in view of the increasing number of court cases) in the country report for Croatia the (misleading) information is provided that solely the Croatian courts shall have jurisdiction for actions on compensation claims from traffic accidents in Croatia which have occurred before 1.7.2013, and that only if the accident has occurred after Croatia´s EU accession proceedings may be brought at the domicile of the injured party. Dilemmas in application of the EU private international law are clearly not restricted to new Member States!

IV. Relationship between EU law and national private international law

As far as private international law matters have been addressed in an EU regulation, there is no more space left for the national legislator to deal with the same matter. This can well be illustrated at the example of the German Introductory Act to the Civil Code (EGBGB).[21] With the entry into force of Rome I, Rome II, Rome III, the Maintenance Regulation and the Succession Regulation,[22] respectively, the provisions of the EGBGB which have been superseded by EU law have formally been repealed. Instead, Article 3 EGBGB refers to the pertinent EU regulations. As a result, in matters covered by a regulation, the EGBGB today contains only supplementary and implementing provisions, if any.

A similar concept has e.g. been chosen by Hungary. The Hungarian Act 13/1979[23] on private international law is still in force but has been regularly updated and has thus been amended many times.[24] Each time an EU-Regulation enters into force, the provisions of the Act 13/1979, which are superseded by the regulation, are repealed and in their place, the Act refers to the respective regulation in a precise manner. This is done promptly; for example, on the occasion of the entry into force of the Succession Regulation the Hungarian

21 An English translation of the EGBGB is accessible free of charge at http://www.gesetze-im-internet.de/englisch_bgbeg/index.html (27 August 2015).

22 Regulation (EU) No. 650/2012 of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201 of 27.7.2012, p. 107.

23 English translation at the level of 1 November 2011 in: Cs. I. Nagy, *International Encyclopedia of Laws*. *Private International Law. Supplement 34: Hungary* (Kluwer Law International, Alphen aan den Rijn 2008) pp. 151 *et sequ.*

24 For the version of 25.8.2015 see Hatályos Jogszabályok Gyűjteménye, at http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=97900013.TVR#lbj23param (27 August 2015).

legislator has amended Section 36 ("Inheritance Law") of the 13/1979 Act so that this provision applies now only to matters which are not covered in the Regulation.[25] Accordingly, the chapters on contractual obligations (Sections 24-30) and on non-contractual obligations (Sections 32-34) basically refer to Rome I and II and have retained only provisions on issues which are not regulated on the level of the EU law. There is only one gap, namely, the 13/1979 Act does not expressly refer to the Hague Maintenance Protocol or to Article 15 of the Maintenance Regulation, because it initially followed the same approach as the 1982 Yugoslav Act and contained no special provision on the law applicable to maintenance.[26]

Let us now see how the issue of provisions of the national law which have been superseded by EU regulations is seen in the most recent EU Member States.

1. Bulgaria

In 2005, that is: two years before EU accession, Bulgaria adopted its private international law code,[27] as the first systematic and comprehensive piece of legislation in this field, covering both the conflict of laws and the law of international legal proceedings.[28] Since then, no amendments have been made as to substance; only very few minor technical adaptations have been performed.

The Bulgarian code takes into account the European private international law as much as was possible at the time of creation of the code.[29] This means in particular that the provisions on the law applicable to contractual and to non-contractual obligations in Articles 93-116 were shaped after the draft versions for the later Rome I and II-Regulations.

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25 See Law No. LXXI/2015.

26 At the entry into force of the Hague Protocol, in Section 39 of the Hungarian Act 13/1979 ("The personal and property relations between the spouses") the words "including maintenance" were simply deleted and Section 47 on maintenance of kin was repealed. It is not obvious from the Act that an EU-Regulation applies instead.

27 Official Gazette 2005 No 42, with amendments 2007 No. 59, 2009 No 47 and 2010 No. 100. For a German translation see: 'Bulgarien. Gesetzbuch über das Internationale Privatrecht vom 4. Mai 2005' 71 *RabelsZ* (2007) pp. 457-493.

28 See J. Zidarova, V. Stančeva-Minčeva, 'Gesetz über das Internationale Privatrecht der Republik Bulgarien' 71 *RabelsZ* (2007) pp. 398-456; V. Stancheva-Mincheva, *Komentar na kodeksa na mezhdunarodnoto chastno pravo* (Sibi, Sofia 2010).

29 See in this connection P. Maesch, *Kodifikation und Anpassung des bulgarischen IPR an das europäische Recht* (Tübingen 2010).

Family relations are regulated in Articles 75-88 of the Bulgarian code. From the point of view of this paper, the most interesting provisions are Article 82 on divorce and Articles 87 *et sequ.* on maintenance. It is obvious at first sight that they have not been harmonized with the EU law.

As far as maintenance is concerned, Article 15 of the Maintenance Regulation refers to the Hague Protocol of 23.11.2007 on the law applicable to maintenance obligations which is binding also on the Member State Bulgaria. The provisions of the Bulgarian code bear a certain similarity to the Hague Protocol, but in some respects differs substantially from it, for the simple reason that at the time the Code was drafted, the Hague Protocol had not yet been finalized. For example, the Bulgarian code does not allow for party autonomy, which is a basic principle of the Hague Protocol (Article 8).

As regards divorce, Article 82 of the Bulgarian code also does not provide for party autonomy (in contrast to Article 5 of the Rome III-Regulation). Besides, in the Bulgarian code, the applicable law is still determined on the basis of common nationality of the spouses, whereas in the cascade system of Article 8 of the Rome III-Regulation the main connecting factor is the habitual residence of the spouses.

The conclusion can only be that important parts of the Bulgarian private international law code of 2005 are no longer applicable and remain dead letter. This is also true for the provisions on the law applicable to succession which have been superseded by the Succession Regulation but have remained unchanged in the national codification.

For the legal practice this may seem confusing. On the other hand it is comparatively easy for the Bulgarian legal community to access the European private international law. A comprehensive text collection in three volumes has been published in Bulgarian language, with regular updates, which covers all aspects of private international law (European law, international agreements, national law) and can be bought at a very cheap price.[30]

2. Croatia

The former Yugoslav Act concerning the resolution of conflict of laws with provisions of other states in certain matters of 1982 has been taken over as

30 B. Museva, *Mezhdunarodno chastno pravo*, vol. I (7th ed. 2014), devoted to civil and commercial matters; vol. II (5th ed. 2014) covering matrimony, family and succession, vol. III (4th ed. 2015) dealing with service of documents, taking of evidence, legal aid.

Croatian law and has been amended only very slightly so far.[31] As of 1 July 2013, the European private international law regulations within their scope of application have superseded the Croatian national law, but this fact is nowhere recorded in the Croatian Act.

Therefore, a substantial part of that Act now leads into a wrong direction. However, a new codification seems to be under way. The draft private international law act has not been made public yet. Once adopted, the new law will provide the correct information.

3. Romania

Like Bulgaria, Romania has acceded to the EU on 1 January 2007. At that time, the main source of Romanian private international law was contained in the Act No. 105/1992 on private international law relationships.[32] At the date of accession Romania thus had already fifteen years of experience with a comprehensive, fairly modern and well prepared private international law codification. However, after the EU accession the Romanian private international law was in no way harmonized with the acquis. De facto it was at the time superseded by the EU-Regulations Rome I and II, but this circumstance was not apparent from the Act No. 105/1992.

The 1992 Act was repealed and private international law was totally reformed in the context of the adoption of a new Romanian Civil Code. The Act 287/2009 on New Civil Code[33] (applicable from 1.10.2011) regulates the conflict of laws in Book Seven. At the time of adoption of the final version of the Civil Code in 2011, the Rome I and II-Regulations were already in force so that insofar the Civil Code simply states that the law applicable to contractual and to non-contractual obligations is determined by the "Regulations of

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31 OG No. 53/91 and 88/01. For an English translation see D. Babić, Ch. Jessel-Holst, *Međunarodno privatno pravo. Zbirka unutarnjih, europskih i međunarodnih propisa* (Narodne Novine, Zagreb 2011) p. 4.

32 See also O. Căpăţînă, 'Das neue rumänische International Privatrecht' *RabelsZ* (1994) pp. 465-520. For a German translation see: 'Rumänien: Gesetz Nr.105 über die Regelung der internationalen Privatrechtsverhältnisse vom 22. 9. 1992' *RabelsZ* (1994) pp. 534-572.

33 *Official Gazette* No. 505/2011, with amendments by Acts No. 60/2012 and 138/2014, at: http://legeaz.net/noul-cod-civil/ (27.8.2015). For a French translation see the following bilingual edition: M-E. Laporte-Legeais, M. Moreau (eds.), *Noul cod civil/ Nouveau code civil romain. Traduction commentée ; traduction de la loi roumaine n. 287 du 17 juillet 2009 portant Code civil, telle que modifiée par la loi no. 71 du 3 juin 2011 de mise en application* (Juriscope, Paris 2013).

the European Union", without further specification. The Civil Code regulates only some additional issues which are not dealt with in Rome I and II.

Similarly, with regard to the law applicable to maintenance the Romanian Civil Code limits itself to referring to the "Regulations of the European Union".

The Rome III-Regulation has been adopted on 20.12.2010 and is applicable in Romania from 21.6.2012. Article 4 of the Rome III-Regulation contains the principle of universal application. It might therefore have suggested itself to refer to this regulation in some appropriate way and not establish in the Civil Code an own national regime for the law applicable to divorce, with application only for the interval between 1.10.2011 and 21.6.2012, that is: less than one year, but this is exactly what happened. The Romanian Civil Code until today contains provisions on the law applicable to the dissolution of marriage in Articles 2597-2602. Although similarities exist, these provisions are not a copy of the Rome III-Regulation. What catches the eye is namely that in contrast to the Regulation, the Civil Code does not exclude renvoi.

Articles 2633-2634 of the Civil Code determine the law applicable to matters of succession, without any reference to the EU Succession Regulation which applies in Romania since 17.8.2015.

The adoption of new EU-Regulations is therefore not reflected in the Romanian national law.

V. Concept of habitual residence

Continental European countries, including the South East European new EU Member States, have traditionally based their autonomous international family law mainly on the *lex nationalis*. In contrast, the primary connecting factor in the European international family law is the habitual residence of the person or persons concerned. Habitual residence plays an important role also in other regulations such as the EU Succession Regulation. Still others use habitual residence as a subsidiary connecting factor. Generally speaking, the concept of habitual residence is much more flexible than that of nationality. As pointed out in Recitals 23 and 24 of the EU Succession Regulation, habitual residence shall be determined "taking into account the specific aims of this Regulation", meaning that the interpretation of habitual residence may vary, depending on the context and on the applicable regulation.

The European private international law does not contain a general legal definition of habitual residence. The EU Court of Justice has emphasized that

habitual residence has an autonomous meaning under EU law. Decisions of the Court of Justice of the European Union have so far only dealt with specific aspects of habitual residence, with the focus on Articles 5 and 8 of the Brussels II bis-Regulation. A fully developed European concept is not yet visible.

Member States mostly abstain from introducing a legal definition of habitual residence into their national law and leave the matter to court practice and legal science. Apparently, the first country to include a provision on legal definition of habitual residence in the national private international law codification was Belgium.[34]

New EU accession States feel themselves confronted with a sudden change, from nationality principle to habitual residence as a main connecting factor. Without providing criteria for the proper interpretation of habitual residence, in particular the demarcation of habitual residence from the legal concept of domicile may appear problematic for them. The example of Belgium has therefore been followed in Bulgaria and Romania, who have more or less copied from the Belgian code. Candidate countries for accession such as Montenegro, Macedonia, Serbia and Albania have in their legislation, or draft legislation, seen a need to include similar legal definitions of habitual residence in the process of EU-harmonization of their private international law. These legal definitions provide uniform criteria for determining the habitual residence of a person which are formulated in a flexible way so as to allow the countries to take into consideration the development on level of the European Union and the future practice of the Court of Justice of the European Union.

VI. Closing remarks

In this paper the author discusses some issues which are of special relevance for the most recent Member States. Dilemmas in application of European private international law are in no way restricted to accession States; this fact is inter alia reflected in the decisions of the Court of Justice.

34 Article 4 of the Belgian Law of 16. July 2004 holding the Code of Private international Law, English translation *RabelsZ* (2006) p. 358.

THE HUNGARIAN COURT PRACTICE CONCERNING THE BRUSSELS II *BIS* REGULATION

Lilla Király*

> "Children are suffering from this sort of thing… More, than their environment would ever think. The pain, the rejection, the lack of belonging to somewhere…This is something that could never be possible to compensate merely with good living conditions…"
>
> Agatha Christie

I. Introduction

The significant expansion of the European Union (hereafter: EU) has, due to the free movement of workers, substantially increased the number of cross-border disputes and therefore amplified the need for international legal instruments aimed at solving such disputes. Due to intensifying international mobility, family law has to be considered as a cross-border matter. According to estimated data, approximately 7,000,000 EU citizens live in a Member State other than their home country, and the number of international divorces within the European Union provides 16% of the total number of divorces.[1] Academic studies of international migration have been slow to explore the relationship between family and mobility and rarely, if ever, consider the involvement of children in migration processes or the impact of migration on children (e.g. rights of refugee children, international abduction and adoption policies).[2]

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1 A jogellenesen Magyarországra hozott gyermekek visszavitelével kapcsolatos eljárások vizsgálatára létrehozott joggyakorlat elemző csoport összefoglaló véleménye, (The Curia's jurisprudence analysing working group on the procedures established by case law on abduction of children) Curia/Supreme Court of Hungary, 2013. El.II.G.1/14. (hereinafter: Curia's jurisprudence analysing working group, 2013), at http://kuria-birosag.hu/sites/default/files/joggyak/osszefoglalo_velemeny_2013_el_ii_g_1_14.pdf (5 January 2015).

2 L. Ackers and H. Stalford, *A Community for Children? Children, Citizenship and Internal Migration in the EU* Research in Migration and Ethnic Relations Series (Ashgate Publishing, Hampshire, England and Burlington, USA, 2003) p. 42.

The concepts of "spouse", "family", "child" and "status of same-sex couples" have a legal background under EU law[3] and relevant CJEU rulings since 1968 to take into consideration, but in response to family-related legal and judicial demands created by the increasingly common cycle of cross-border migration, relationship and family formation, divorce and then re-migration, the 1992 Treaty of Maastricht provided the necessary legal and institutional basis for enhanced intergovernmental and inter judicial co-operation between Member States in civil matters, including family-related ones. This has first of all yielded the Brussels II Convention of 28 May 1998, the aim of which was essentially to introduce uniform rules for determining jurisdiction and ensuring enforcement between Member States in relation to annulment, divorce, separation and decisions concerning parental responsibility. After the Treaty of Amsterdam (1997) entered into force, the Brussels II Convention was translated into an enforceable, uniformly applicable law through the EC Regulation 1347/2000 of 29 May 2000, entered into force on 1 March 2001, by now applicable as EC Regulation 2201/2003 (hereinafter: Brussels II *bis* Regulation or the Regulation) regulating matters concerning jurisdiction, recognition and enforcement of judgements both in matrimonial matters and in matters of parental responsibility.[4] One of the most important rules of the Brussels II *bis* Regulation with regard to the liability of the parents is not only applicable concerning the common child, but all children, and irrespective of the fact whether there is a matrimonial case in process or not. It is beyond the scope of the EC Regulation 1347/2000, which only concerned civil procedures applying to parental responsibility that were initiated during matrimonial proceedings and were in relation with the common child of the spouses.[5]

The Brussels II *bis* Regulation does not deal with the questions of, for example, the legal base of separation or the property effects of marriage or other issues.

The Regulation has annulled the exequatur proceedings in relation to cases dealing with the contact and return of children (every Member State has the obligation to automatically and indirectly recognise the latter Resolutions), that are helping prevent child abductions, and introduced legal acts concerning the return of children to provide a faster and more effective procedure. It

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3 EEC Regulations 1612/68 and 1408/71 (the "free movement of persons" Regulations); ECHR (the right to respect for private and family life).

4 See more in O. Szeibert, 'A családjog jövője Európában - Családi Jog' [The Future of the Family Law in Europe] 4 *Family Law Journal* (2011) pp. 1-14.

5 I. Nagy Csongor, *Az Európai Unió nemzetközi magánjoga, Határon átnyúló polgári jogviták az EU-ban* [The Private International Law of the European Union, Cross-Border Civil Disputes in the EU] Hvgorac, Budapest, 2006, p. 333.

reduced the time limit of judicial proceedings concerning the return of children: the court has to give its order within six weeks after receiving the petition for the return of the child. The court must hear the applicant – if there are no circumstances preventing the court from it (for example, age) – and has the obligation to hear the child as well during the proceedings.

Moreover, in 2010 the Council of Europe adopted Guidelines on child friendly justice, which were taken into account by the *EU's agenda for the Rights of the Child* adopted by the European Commission in February 2011. The latter document contains elements that could have a particular impact on procedurally defaulted child custody cases (for example, the participation of the child in the proceedings, taking into account the child's opinion, giving enough information to the parents about their rights, about the procedure, the procedure's fast and effective conduct, the importance of mediation in family disputes, the training of professionals responsible for children, Member States' obligations for regulation of the media).[6]

The main provisions, as they currently stand, apply to two types of civil proceedings: (1) divorce, marital separation and marriage annulment; (2) the attribution, exercise, delegation, restriction or termination of parental responsibility (e.g. the residence and contact rights of parents over children).[7] Thus, the topic of this paper focuses – on the one hand – on the spouse who wants to get a divorce and – on the other hand – the specific situation of children in families in which at least one of the parents has moved from one Member State to another. It has a socio-legal approach concerning both the legal framework shaping the formal rights of this group of migrants and the experiences of children concerned. This study has been conducted with respect to the Hungarian legislation concerning the Regulation, including (1) jurisdiction, (2) recognition and enforcement, and (3) cooperation between central authorities in solving problems related to parental responsibility and experienced by some migrant families in court proceedings and following divorce.

II. Hungarian rules concerning matrimonial matters

The provisions for *jurisdiction* may trigger a race between spouses to seize the jurisdiction of the Member States that offers a divorce law best suited to their needs, especially with respect to financial and child custody orders. They also affect the speed with which a divorce will be processed and could potentially

6 Curia's jurisprudence analysing working group, 2013, *loc. cit.* n. 1.

7 Ackers, Stalford, *op. cit.* n. 1, pp. 178-179.

be used as a method of delaying proceedings.[8] According to the Hungarian legislation – including both the previous and the one in force – there are no preconditions (e.g. any length of separation) in terms of the length of the proceeding that can be considered as a fair procedure.[9] The problem of "forum shopping" can be avoided by a domicile/habitual residence test – the spouses have to demonstrate more than a mere commercial link with the country in which they sought to obtain their divorce – and by having a minimum time limit in which the individual is required to live in a country before attaining the status of habitual residence.[10]

The provisions of Article 19(1) relating to *lis pendens and dependent actions* become important provisions of the Regulation when spouses turn to the courts of different states, as a result of which parallel proceedings are conducted, which can give rise to contradicting decisions. Proceedings in matrimonial cases raise a lot of practical questions, for example, what is to be done if a legal system concerned does not provide for legal separation (this is the case in Hungary as well) or annulment, or what to do if one lawsuit is filed for annulment and the other petition is submitted for divorce. In cases like these, practically the only requirement should be that the proceeding concerns a dispute "between the same parties" and then the court second seised should of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.[11]

On 15 March 2014 the new Civil Code (Act V. of 2013) came into effect in Hungary, which is to be applied to legal cases arising following this date. Family law is now regulated by Book Four of the Code instead of the previous separate Act on Family Law (Act IV. of 1952). Based on the statutory regulations in force (Act III. of 1952 on Hungarian Civil Procedural Law), the following procedures can be applied for in family law cases: (1) actions for the annulment of a marriage; (2) actions for establishing the existence of a

8 E.g. if the only ground for a divorce is a given period of separation, respectively.

9 Within four months after the application, the first trial (this is for a conciliatory hearing in the case of a common minor child) is held, followed by the continuation of the proceedings at the request of either party. In the case of an agreement of the spouse and the absence of a common minor child, a judgment may take place at the first trial.

10 According to Hungarian law, the place of residence is the address of the apartment, where – without any intention of leaving permanent residence – a citizen has lived for three months or longer. Section 3, Article 5 of the Act LXVI. of 1992 on the Registration of Citizens' Personal Data and Addresses.

11 C-168/08, Hadadi László v. Mesko Csilla Márta; if the spouses have dual citizenship, it means dual jurisdiction as well. In case of parallel civil processes, the first court decision will be the final one. See more in: Zs. Wopera, *Az Európai családjog kézikönyve* [The Handbook of the European Family Law] (HVG-ORAC Publishing House, Budapest, 2012) pp. 66-73.

marriage; (3) actions for the dissolution of a marriage.[12] The Hungarian family law does not recognise the institution of legal separation[13] (*separatio a mensa et toro*).[14]

Before filing for a divorce, or during the divorce action, the spouses shall have access to mediation – of their own accord or by recommendation of the court – attempting to reconcile their differences or to settle any disputes they may have in connection with the divorce by way of an agreement. The agreement reached in conclusion of the mediation process may be laid down in a court settlement.[15]

In Hungary it is not possible for same-sex couples to contract a marriage. They can only enter into a registered (or non-registered) civil partnership. Under Hungarian law, we can differentiate between *contracting a registered partnership* and the *recorded partnership*. In EU law there is no regulation of the dissolution, separation or annulment of registered partnerships, which makes it necessary to review the Regulation in force.

The institution of *contracting a registered partnership*[16] can be established by two persons of the same sex who have attained the age of 18. A registered partnership has the same legal effects on property issues and succession as a marriage. With regard to jurisdiction, no problem arises, since in matters of divorce or annulment of same-sex marriages – similarly to proceedings relating to heterosexual couples – the rules of jurisdiction contained in the Brussels II *bis* Regulation are applicable. The recognition of judgments granting divorce or annulment of marriage raises no particular problem either. At the same time, the recognition and enforcement of a judgment relating to the division

12 Such an action may take place when the marriage has completely and irretrievably broken down. Under Hungarian law, there is no requirement to prove fault or unreasonable behaviour on the part of one of the parties. The court dissolves the marriage in a judgment.

13 2201/2003 EC Regulation, Article 1(1) (a).

14 Legal separation is not equal to divorce; it only results in separate life and division of matrimonial property. Separation is commonly the final step before getting divorced. See in Csongor, *op. cit.* n. 4, p. 338.

15 The Council Directive 2008/52/EC also covers mediation in family law disputes. The member states must guarantee to enforce the written agreement, except if by the law of the Member State this agreement cannot be enforced. See more in: Zs. Wopera, *Európai családjog, házassággal, gyermekelhelyezésselés tartással kapcsolatos ügyek az európai közösségi jogban és más jogforrásokban* [The European Family Law, Marriage, Maintenance, Child Placement in the European Community Law and other Legal Sources] (HVG-ORAC Publishing House, Budapest 2009) pp. 144-145.

16 Regulated in Hungary by the Act XXIX of 2009 on registered partnership, and on the amendment of legal acts relating thereto and needed for the facilitation of the justification of the partnership.

of joint matrimonial property may conflict with public policy, since in Hungary same-sex marriages are not permitted by law. If a registered partnership has been established abroad, following 1 July 2009, the procedure does not have to be repeated in Hungary. It is sufficient to apply to the registrar having competence based on the partners' domicile or to the consulate for domestic registration. However, even in this case, Hungarian regulations should be applied to registered civil partnership, as additional rights applicable abroad (e.g. bearing the partner's name, having children) are not enforceable in Hungary.

The Act on *Recorded Life Partnerships*[17] contains an additional possibility for same-sex and heterosexual couples: life partners can apply to the notary public to have their relationship recorded. While registered partnership only for same-sex couples is a similar institution to marriage (thus the partners can acquire rights and obligations based on this relationship), in comparison, recorded life partnership does not provide such additional rights compared to unrecorded life partnership. The aim of recording is simply to facilitate the verification of the existence of life partnership. Recording a life partnership is possible for both same-sex and heterosexual couples.

Article 21 of the Regulation provide that any orders made in respect of divorce, legal separation and annulment will receive automatic recognition and will thus be enforceable in any Member State to which either party moves. The registration of divorce is carried out by a registrar having competence according to the place of contracting of the marriage. The registrar establishes that a marriage has been dissolved or annulled on the basis of a final court judgment and a marriage certificate containing that judgment.

III. Hungarian family law on parental responsibility proceedings

1. The parental rights of custody

The content of the notion of "parental responsibility" contained in the Brussels II *bis* Regulation is described by the term "right of custody" in Hungarian law, although the Hungarian term has a narrower meaning. Book Four of the Civil Code lays down the content of the right of custody and the rules relating to the exercise of this right. In Hungary, the minor child[18] is under parental custody or guardianship. In the legal frame of the latter, the rights and obligations are

17 Regulated by the Act XLV of 2008 on the Non-litigious Notarial Procedures.

18 Hungary is a party to the UN(O) Convention of 20 November 1989 on the Rights of the Child, pursuant to which a child means every human being below the age of eighteen years, unless, under the law applicable to the child, majority is attained earlier. Thus, in Hungary a child means a person below the age of eighteen.

primarily practiced and accomplished by the parents or guardians (a foster parent with a legal guardianship, director at a children's home). There is a broader category of persons known that are listed among those with parental responsibility, but not belonging to the area of parental custody and who are entitled to exercise rights and in certain cases have obligations (a foster parent who does not assume legal guardianship, caregiver, trustee). We can mention in the same context legal persons who are exercising the child's rights concerning parental responsibility, such as his/her personality, property rights and obligations. This type of a legal person could be a children's home.[19]

The right of custody contains the right to determine the child's name, to provide care for and bring up the child, to determine the child's residence, to administer the property of the child, it contains the obligation and right to represent the child legally, the right to name a guardian or exclude somebody from the guardianship of the child. The court or another competent authority may restrict or withdraw the parent's rights of custody in exceptional and justified cases specified by law, where this is deemed necessary for the protection of the child's best interest.[20]

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19 B. Somfai, 'Kapcsolattartás az új Brüsszel II. rendelet tükrében' [Access to the Child by the New Brussels II Regulation], at www.gyermek.joghaz.hu/dokumentumok/Kapcsolattartas_az_uj_Brusszel_II_rendelet_tukreben.pdf (22 January 2015).

20 Jurisdiction of the child's habitual residence: according to the CJEU, besides the physical presence of the child in a Member State, some other factors must be taken into account as well, which leads to the conclusion that this presence is by no means a temporary or ad hoc basis, and that the child's stay means a certain degree of integration in the social and family environment. Consideration should be given particularly to the duration of residence of the family in the territory of a Member State, regularity, reasons and the conditions of moving from one state to the other, the child's nationality, place and conditions of schooling, language skills, as well as the child's family and social relations with the given Member State. The fact that the child stays in one Member State for a short time may indicate that the child's habitual residence is not located in that State. See more in A. Osztovits, 'Az Európai Közösségek bíróságának joggyakorlata a szülői felelősséggel kapcsolatos perek joghatósági kérdéseiben' [CJEU Case Law in Disputes Relating to Jurisdiction in Matters of Parental Responsibility] 3 *Családi Jog* (2009) pp. 25-30.

2. The Hungarian system of procedures in matters relating to parental rights of custody

2.1. Court proceeding

2.1.1.1. Court decisions on the establishment, exercise, restriction, termination and restoration of parental rights of custody (first, second instance proceedings and review as an extraordinary legal remedy)

2.1.1.2. Proceedings for the return of the child, over which the Central District Court of Pest has exclusive jurisdiction in Hungary (first, second instance proceedings and review as an extraordinary legal remedy)

2.1.1.3. Judicial approval of decisions made in (obligatory) court mediation procedures

2.2. Administrative proceeding

2.21. Proceedings of the guardianship authority

2.21.1. First and second instance proceedings of the guardianship authority

2.21.2. Judicial review of administrative decisions taken by the guardianship authority ("third instance proceedings")

2.21.3. Legality supervision procedure by the prosecution service as the organ having a supervisory function over the guardianship authority's measures taken for the child's protection

2.21.4. The supervisory power of the Ministry of Human Resources over the administrative procedure of the guardianship authority

2.21.5. Mediation procedure for the child's protection

2.22. Contact keeping between central authorities

2.22.1. The Ministry of Public Administration and Justice as a central authority (cases falling within the scope of the Hague Convention of 1980 – third states)

2.22.2. The Ministry of Human Resources (according to Council Regulation (EC) 2201/2003 in cases within the EU)

2.23. Enforcement proceedings

2.23.1. Judicial enforcement proceedings (handing over the child)

2.23.1.1. Recognition and ordering enforcement of a foreign judgment (exclusive jurisdiction lies with district courts which operate at the seat of courts of justice, and in Budapest with the Central District Court of Buda)

2.23.1.2. Procedures by independent court bailiffs (enforcement proceedings involve Hungarian court bailiffs, the police, the guardianship authorities)

2.23.1.3. Administrative enforcement proceedings (measures in the interests of the child's protection, enforcement of rights of access to the child removed to Hungary)

- Proceedings by the guardianship authority
- Child protection mediation
- (Supervisory) proceeding by the prosecution

3. The agreement of the parents relating to the exercise of the right of custody or the court decision on the exercise of parental rights of custody

"In case of a divorce or an end of a domestic partnership where the parents or partners had a common child, it is of critical importance for all the affected members how the question of parental custody of the minor child will be solved, which parent would the child live with, and how will the child keep the contact with the other parent. Formerly, following a divorce the child generally stayed with one parent, usually and typically with the mother, meanwhile the father as a non-custodian could maintain the contact with his child. More recently, such practice is no longer acceptable in terms of fathers' needs, as they are nowadays willing to spend more time with their child, and, more specifically, they have a keen interest in taking a more significant part in their child's life as a parent. In the meantime, it has become increasingly recognised that both parents are equal, and they possess the same rights and the same obligations, and the fact that they are living separately does not change it. As a legal solution for the problem, the idea of joint custody arrived, but it did not guarantee that both parents will have an important role in their child's life. In the interest of improving the situation, several countries introduced as a possibility – and this has become an optional practice – for the non-custodial parent to obtain extensive contact rights, so that as part of a joint custody the child will spend sixty or seventy percent of the time with its mother and thirty or forty percent with its father as per his contact rights.

To obtain a physical meaning for joint custody, several European legal systems have introduced the institution of joint physical custody,[21] which allows both parents to exercise full parental custody, with the child spending half of its time with the mother and the other half with the father."[22]

The new Hungarian Civil Code's part - relating to family law - contains fundamental changes in the regulation of parental custodial rights. To observe the changes, we should review the past regulations. Earlier (before the implementation of the new Hungarian Civil Code on 15 March 2014), if the parents decided to divorce or legally separate, they had to decide primarily about the residence of their common child. Residence meant that the custodial parent exercised legal rights, whereas the non-custodial parent's legal rights were ignored, except in some of the most important questions, for example: the chosen career or education of the child, its name, and change in place of residency.

In the past, the non-custodial parent's co-decision power remained. The right of co-decision in practice meant that the child's admission to a kindergarten or school had to be confirmed with the signatures of both parents. Educational institutions did not always adhere to it, curtailing the right of the non-custodial parent.

The co-decision power could be exercised, obviously, in case of a change of name, since the petition could only be filed jointly. Misinterpretations were common in cases of the change of the child's residency. Some thought that the non-custodial spouse could decide where the custodial parent would live with the child, which part of the city or country they could live in. This was never said. The Supreme Court's (presently the Curia) precedent system developed

21 After the divorce procedure, the parents having a joint custodial right may enter into an agreement or the court can make a decision that the child lives in the same or approximately the same amount of time with the mother and the father. It is not about the access to the child, but rather that both parents spend substantially the same amount of time with the child. Both will take care of the child if the child lives with them. In terms of length of such periods, totally different solutions are possible: a day, two days, two months or a six-month shift.
Joint custody basically creates full equality between the parents, but it does not necessarily guarantee effectively the same parental responsibility. This has led to an equality among parents, not only in legal approach, but in a physical sense as well, which is changing the child's location by an agreement. By assuming joint custody, the parents must agree on the place of residence of the child, i.e. the home of one of the parents. The change in location has changed it to the way that both parents' homes – in turn – are the child's place of residence. In O. Szeibert, 'Együtt a házasság felbontása után is? A közös szülői felügyelet és a váltott elhelyezés európai tendenciái' [Together after Divorce? The European Tendencies of Joint Custody and Frequent Changes in Location of the Child], 4 *Családi Jog* (2012) p. 3.

22 *Ibid*., pp. 1-11.

the interpretation that the change of residency meant that the child would no longer be in the foster parent's household, for example because the grandparents would take care of it, or the child would move into a dormitory. In such cases, both parents' consent was needed. Other than this, the custodial parent of the child could move – inside the country – anywhere. A permanent change of residence to another country required agreement between the parents.

The practice of the Curia and other courts was implemented into the family law book of the new Civil Code, therefore on 15 March 2014 it acquired a legal scope. The non-custodial parent has no right to intervene in the decision of the previous partner about the residence of the child within the country. Until 15 March 2014, it was a frequent problem that the non-custodial parent could only take the child to a short vacation abroad, for a holiday or a ski trip, if the other parent agreed. The new Civil Code has changed this issue as well – the non-custodial parent can take his/her child on a holiday without the agreement of the other parent. In addition to the placement of the child, the parents can decide about joint custody and that in the future they will make their decisions together concerning every question related to the child.

The most important change in the new Civil Code's family law book – in effect as of 15 March 2014 – is that courts and agreements before courts do not have to regulate custodial rights. The Code is not declaring anymore that the non-custodial father's or mother's rights are suspended, it merely states that they cannot exercise them. The Code's aim with the new regulation is to decrease confrontations between parents which could lead to violations and to avoid the negative consequence of vanity issues arising when deciding on custodial rights.

If a court awards custodial rights to one parent, the right to co-decide will remain in the choice or change of the minor child's name, in case of a change in the parent's permanent residence to reside abroad, change of nationality, and in the question of the child's career and education choices.

Separated parents can agree on joint custodial rights, but they do not have to declare in which parent's custody the child will be; instead they have to declare the residence of their child, which can be both parents' residential address. In case of joint custody, the parents have to clarify how and using which method they will cooperate, but they do not have to regulate the rules of contact.

If parents fail to agree on joint custody, a court can order shared custody by application.[23] With two previous amendments, Hungarian law introduced joint custody, which can be achieved not only by mutual agreement but by a court order as well. The non-custodial mother or father should provide information to the other party in every question when they exercise their custodial right without the other. If parents cannot agree on joint custody, they can turn to the guardianship authority, not to the court (as earlier). It brings a faster solution, because the guardianship's procedural deadline is 30 days, and they do not have to wait for months until the court announces it would hold a hearing. According to the new Civil Code, if the parents are not giving sufficient care to their child's property (as if it was theirs), the guardianship will exercise the rights of property and can request accounts or oblige the parents to give assurance or to provide certain property to the guardianship.

This can be ordered in the form of sanctions. The former regulation prescribed that the child's goods and property had to be provided to the guardianship, which is no longer required. Generally, this only had importance when the parents sold the real estate of the child, and they did not buy a new property to their successor's name. After 15 March 2014, the obligation for the purchase price or cash to be transferred to the guardianship's bank account or to provide values was discontinued. Moreover, after the said date, a rule is in force that the provided goods and values should be given to the trustee parents.[24]

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23 Shall the judge listen to the child in court proceedings relating to parental responsibility cases? To answer this question many – mainly psychological – aspects must be taken into account, and the advantages and disadvantages of the hearing must be taken into account. In the Hungarian judicial practice, direct hearing of children (the child is directly heard by the court) is not a general practice in the majority of family law cases. This comes from the legislation, the lack of infrastructural conditions and the judges' lack of psychological competence to listen to the child. More in H. Kozák, *A gyermekek bíróság által történő meghallgatásának gyakorlata* [The Court Practice of Hearing Children] 1 *Családi Jog* (2011) pp. 23-30.

24 http://www.ugyvedvilag.hu/rovatok/publikaciok/valtoznak-a-szuloi-felugyeleti-jogok-az-uj-ptk-csaladjogi-konyveben (10 January 2015).

IV. Hungarian law on enforcement of decisions relating to surrender (return) of the child and the enforcement of the right of access

According to Article 46 of the Regulation:

> "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."

It can be concluded from submitted applications that the definitions of "recognition", "enforceability" and "enforcement" are not unequivocal; claimants almost always mix up these terms. Submissions are usually aimed at the enforcement of a foreign judgment. In judicial practice, recognition is automatic, while the declaration of enforceability and enforcement are procedures commenced upon request. In Hungary, the enforceability of decisions relating to the exercise of the right of custody is governed by the general rules relating to the ordering of enforcement. The condition for ordering enforcement is that the decision should contain an order to perform some obligation, it should be legally binding or subject to preliminary enforcement, and that the deadline for performance should already have passed. The child cannot be heard either in the proceedings for the ordering of enforcement, or during the effectuation of enforcement. In order to apply for the ordering of enforcement, the legally binding decision has to be attached to the application, and the application has to be submitted on a printed form.[25]

Refusing the recognition of a judgment can be mentioned for by the obligor only in his/her appeal against the decision declaring the enforceability of the judgment. Generally, during the enforcement of the decision relating to the placement of the child (return of the child), reference is made to conflict with public policy. Refusing the recognition of the foreign judgment with reference to conflict with public policy is permitted only where the judgment would lead to legal consequences intolerably offending national legal sense, according to Decision Pfv.II.21.068/2013 of the Curia). The Curia also stated that divergence from the cogent rules of the procedural law of the state of recognition itself cannot serve as a ground for the non-recognition of the foreign decision.

25 More in V. Harsági, 'A házassági ügyekben, valamint a szülői felelősségre vonatkozó eljárásokban hozott határozatok elismerése az Európai Unióban' [Recognition of Decisions in Proceedings on Matrimonial Matters and Parental Responsibility in the European Union] 3 *Magyar Jog* (2006) pp. 169-176.

Reference is also often made to Article 23(b) of the Brussels II *bis* Regulation. Concerning this, the practice of the Curia accords with Article 24 of the Charter of Fundamental Rights of the European Union and the judgment of the European Court of Justice in the Zarraga case.[26] The Curia has pointed out several times that the lack of hearing of the child itself does not entail non-recognition of the judgment. Article 23 (b) of the Brussels II *bis* Regulation only lays down the requirement of ensuring the legal and procedural conditions for the child to enable him/her to express his/her opinion freely, and that the court should take this opinion into consideration. Thus, in order to provide a real and genuine possibility for the child to express his/her opinion, the court has to take every measure to provide an opportunity for the child to be heard.[27]

The guardianship authority is in charge of the enforcement of the decision relating to the exercise of rights of access (Government Decree 149/1997. (IX. 10.), and the surrender of the child falls within the competence of an independent court bailiff (Act LIII of 1994 on Judicial Enforcement). The enforcement rules render it possible to enforce the decision at the place of the child's de facto habitual residence and to remove the obligor and other persons from the scene of the handing over of the child in case their conduct could prevent the enforcement. In the event of the obligor's failure to voluntarily comply with the decision, the court orders the enforcement of the surrender of the child with the assistance of the police. At the same time, the court ensures the protection of the interests of the child through the involvement of the guardianship authority in the procedure, and the child and his/her personal belongings are delivered to the said authority.

1. Surrender of the child

Enforcement is ordered by the court on the basis of a legally binding decision or a decision subject to preliminary enforcement. Enforcement is carried into effect by an independent court bailiff. During the judicial enforcement proceedings, the following persons or bodies may become involved in the effectuation of enforcement if required: the notary of the local government of the municipality, the guardianship authority, an expert qualified in psychology and appointed by the guardianship authority, and the police.

Special enforcement rules are applicable to the proceedings for the surrender of the child. These rules are contained in Act LIII of 1994 on Judicial Enforcement: in the enforcement order, the court shall request the respondent to

26 C-491/10, PPU Joseba Andoni Aguirre Zarraga v Simone Pelz.

27 Curia's jurisprudence analysing working group, 2013, *loc. cit.* n. 1.

comply voluntarily within the prescribed time limit and shall order to obtain surrender of the custody of the child with police assistance in the event of non-compliance. The court shall send to the bailiff a copy of the court decision serving as grounds for enforcement, together with the enforcement order. The bailiff shall make available the enforcement order and the copy of the court decision serving as grounds for enforcement to the guardian authority as well, including a notification for such authority to conduct on-site proceedings, to inform the respondent as to the consequences of failure to comply voluntarily, stressing the importance of protecting the child from having to go through said police action regarding custody, and to advise the bailiff on the ensuing results within fifteen days of receipt of the enforcement order.

In the event of non-compliance, the bailiff shall schedule the on-site procedure and shall notify the party requesting the enforcement, the representative referred to in Subsection (1) of Section 180/A, the guardian authority and the police. If the proceedings fail, the bailiff shall directly notify the aforementioned parties concerning the date set for the new proceedings. The bailiff shall carry out the procedure for having the child surrendered at the residence of the obligor – or if the child is not there, at the residence of the child – under assistance by the police and the guardianship authority.

The child has to be returned to the person applying for enforcement or, if not available, to his/her representative appointed and approved by the guardianship authority, or to the guardianship authority. The representative and the guardianship authority shall take prompt action to have the child returned to the person applying for enforcement. When returning the child, the obligor shall inform the person to whom the child is delivered about the child's health and any other information that, if not conveyed, may put the child's life or health in danger. The obligor shall, without undue delay, deliver the child's documents, personal articles, the necessary clothing items, the instruments essential for regular studies, any medication the child is taking due to sickness or handicap, medical and technical aid, to the person to whom the child is delivered. The delivery of any other articles shall take place separately, if it is likely to delay the return of the child.

If requested by the bailiff, the police shall remove the obligor and other persons from the place where the child is returned if they are engaged in any conduct to obstruct the proceedings. The bailiff shall inform the person affected concerning any police assistance, and shall record it in a report, including – where justified – a warning for penalty for contempt.

If the obligor or the child to be returned cannot be found at their registered domicile or habitual residence, or at any other address known to the authorities, the

bailiff shall issue a warrant to locate them, or an international warrant where it is deemed necessary. If after having issued a warrant the police apprehends the child, the bailiff shall be forthwith notified, also at short notice and shall place the child in the nearest children's home designated for providing temporary care, of which the bailiff shall be notified simultaneously. Before placement, the relative accompanying the child at the time of apprehension shall be given the opportunity to remain with, and to care for, the child, except if this may put the child in danger or jeopardize the outcome of the proceedings.

The enforcement of a decision ordering the return of the child is a sensitive area from the aspect of the child and the parent living with him/her; on the other hand, the failure of enforcement injures or may injure the interests of the absent parent (and, in the long run, also the interests of the child) and affects the basic human right to family life. The cases analysed by the Curia's jurisprudence analysing working group have raised doubts as to the suitability of the applied means of enforcement and the adequate level of effectiveness of proceedings conducted by the authorities (police, guardianship authority, bailiff). In this, it may play a role – in the examined cases almost without exception – that e.g. the authorities have refrained from using coercive measures against the child; the bailiff has been allowed to issue a warrant to locate the child, and – if it is necessary – an international warrant as well, but the bailiff has no right to detain or apprehend any person; the police have the instruments to search for children in the case of the disappearance of a minor. However, if the child is found, the police cannot take the necessary child protection measures in order to sort out the situation of the minor; it is no use starting criminal proceedings for a change in the placement of the child against the person hiding the child, since, if the parent has taken the child to another country, it is not possible to issue a European arrest warrant against him/her, because a European arrest warrant can be issued only in the case of such acts where the upper limit of punishment provided for by the Criminal Code is at least one year of imprisonment or a measure involving loss of liberty. However, the crime in question is punished under the Criminal Code by maximum one year imprisonment and this has not been changed by the new Criminal Code either.

In the case of Shaw vs Hungary[28] the European Court of Human Rights condemned Hungary for the protraction of the proceedings for the return of the child and, in connection with this, for the violation of the right to family life of the applicant living abroad. The Court established that there had been a violation of rights also because an unjustifiably long period of time had passed between the making of the enforceable final decision ordering the return of

28 Shaw vs Hungary, Application No. 6457/09, ECHR.

the child and the first enforcement act carried out with the participation of the police.

2. Enforcement of the right of access

Enforcement of the right of access is carried out by the guardianship authority and child welfare services on the basis of the decision of the court or the guardianship authority. Enforcement is regulated by special rules laid down in Government Decree 149/1997. (IX. 10.) on Guardianship Authorities, Child Protection and Guardianship Procedures. There are several types of access to the child:

2.1. Reasonable access

The non-custodial parent has the right of constant access, which means accordingly with the usual practice that the child can be taken for one weekend every two weeks. The frequency of access is not in the code, so there is nothing that prevents the non-custodial parent to organise a more frequent meeting schedule, e.g. one or two afternoons in between the weekends. Only the distance of the residence of the child or other school duties could prevent it. The right of access can be restricted if the child is an infant, or in case of health-related problems, whereby the non-custodial parent can only visit, spend a few hours with the child, or meet the child through the child welfare office.

2.2. Specified access

Within the frame of specified access, the non-custodial parent can take the child e.g. on specified days, such as national public holidays (Easter, Pentecost, Christmas) or for a half of kindergarten or school holidays.

2.3. Supervised access

Supervised access can be carried out through a child welfare office or at another child support office in the following cases:

- If the relationship of the parents has deteriorated and the contact between them should be minimized or completely avoided;
- If the relationship between the child and the non-custodial parent has deteriorated and they need support to rebuild their relationship;
- If the non-custodial parent is not capable to supervise the child for a

longer period of time or his or her living circumstances are not appropriate for hosting.

Arrangements of the right of access, whether a court or the guardianship authority has given its order, should be very detailed and concrete. Consequently, the starting and ending dates and times for reasonable access and specified access as well as the locations of access and return should be defined, otherwise no regulation will be possible because the guardianship authority will not be able to establish whether an omission has occurred by comparing the specified times to the actual ones.

When parents are arranging the exercise of the right of access at the half-point of a holiday period, they should write down the starting and ending dates, and in which part – the first or the second – of the holidays such access will occur. Another issue is what will happen in case of an odd number of days of a holiday period? Which day will be considered as the half-point?

It is a very common problem that the child has other activities colliding with the non-custodial parent's scheduled access time, such as a birthday celebration, school trip, camp or a party. If there is no regulation in such cases, this could lead to an endless fight between the parents, and even the guardianship authority would not be able to solve such a problem. At the most, it can send the parties to mediation or, if there is a petition, it can reregulate the right of access.

Enforcement of arrangements on access rights is the duty of the guardianship. Child welfare offices are related to this duty in many ways. If an arrangement is sufficiently precise and concrete, and despite this the custodial parent does not adhere to it, meaning that the custodial parent does not provide access to the child on time, after 30 days from the omission one can apply to the guardianship authority. If the custodial parent cancels the access over the phone or in letter in advance, one can only expect enforcement measures where, despite such cancellation, the non-custodial parent will visit the child's place of residence at the specified date. Otherwise, the guardianship authority cannot determine the omission of the custodial parent. It is also important to validate before the guardianship authority that one was truly there at the specified time. So, in this case, one needs to ask someone to accompany him/her to prove that the access failed. During the process started with a statement, the guardianship authority will focus on determining if the custodial parent failed to accomplish his/her obligations under the arrangement due to his/her own fault. This is not a complicated process, because the guardianship authority considers the custodial parent's fault as an axiom. There are methods to prove the opposite, but this usually only works with a medical certificate. If the guardianship

authority determines the fault of the custodial parent, it will order the enforcement within 30 days after the arrival date of the petition.[29]

Proceedings for the enforcement of judgments relating to the granting of the right of access to the child can be instituted within 30 days following the expiration of the time limit laid down in the judgment for rescheduling cancelled visits or, in the lack of such, for arranging visits, or following the date when the parent learnt about the other parent's conduct endangering the child. It endangers the development of the child if the person entitled to have access to the child or the person obligated to ensure access to the child – because of his/her wrongful conduct – does not comply with the decision made concerning access to the child. If the guardianship authority establishes the fact of wrongful conduct, it orders the enforcement within 30 days following the receipt of the request for enforcement.

In its order providing for enforcement, the guardianship authority:

- asks the defaulting party to meet his/her due obligations related to ensuring access to the child at the first scheduled visit following the receipt of the order – at the time and in the way defined in the decision relating to the granting of access – and cease to influence the child against the other party;
- warns the defaulting party about the legal consequences of non-performance;
- upon request, obligates the defaulting party to bear the certified costs generated by the prevention of access, even if the obligee has not initiated enforcement proceedings;
- if the person entitled to the right of access to the child or the person obligated to ensure access to the child does not meet his/her obligations laid down in the decision ordering enforcement, other enforcement measures will take place;
- orders participation in obligatory mediation proceedings (Article 30/A (1) of Act LV of 2002).

If the person who is obligated to ensure the exercise of the right of access to the child influences the child demonstrably against the person entitled to access to the child and, in spite of the enforcement measures, does not comply with his/her obligations contained in the decision relating to the granting of

29 J. Náday, 'Külön a gyermektől – problémás kapcsolattartás' [Being separated from children – troubled relations of parents] at http://www.ugyvedvilag.hu/rovatok/publikaciok/kulon-a-gyermektol-problemas-kapcsolattartas (10 January 2015).

access to the child, the guardianship authority:

- can bring an action for changing the placement of the child provided that the change is in the interests of the child;
- can report the defaulting party for endangering a minor on the basis of Section 208 of the Criminal Code (Act C of 2012).[30]

If the exercise of the right of access is prevented due to the uninfluenced, independent declaration of will of the child who has attained 14 years, the guardianship authority suspends the enforcement – upon request – provided that the parties submit to child protection mediation or if either of the parties has applied for the re-regulation or withdrawal of rights of access. If the mediation or re-regulation is unsuccessful and the child is not willing to meet or live with the separately living parent, the above mentioned consequences are applicable and the contact is still infeasible.

The child's transfer could be done with the help of police officers (carrying out a specific act), but which parent would scare his/her child to death in this way? Unfortunately, the single sanction is to take away the parental rights from the parent liable for the wrongful conduct, and delegate them to the other parent (using the old expression: change the child's placement). If the person entitled to ensure access to the child imputably prevents the child's right to keep the contact with the person entitled to the right of access or influences the child against the person entitled to ensure access to the child beyond reasonable doubt, demonstrably, and does not fulfil its obligation according to the execution measures, the guardianship authority can bring legal action to clarify the parental rights or bring action to place the child at a third person, if that is in the interest of the child and a parent or a third person demands it. In practice, parents who are against contact resolutions or implemented measures generally influence children against parents who live separately from the child. This is a psychological process where the child will ultimately be distant from or

30 Abuse of a Minor**,** *Section 208* of the Criminal Code (Act C of 2012) (1) A person who is given custody of a minor to maintain and care for the person in his charge – including the domestic partner of the parent or guardian exercising parental custody, as well as any parent who has been deprived of the right of parental custody, if living in the same household or in the same home with the minor – and who seriously violates the obligations arising from such duty and thereby endangers the physical, intellectual, moral or mental development of the minor, is guilty of a felony punishable by imprisonment between one to five years. (2) Any person over the age of eighteen years who:

a) persuades or makes any attempt to persuade a person under the age of eighteen years to commit a criminal or misdemeanour offense, or to engage in immoral conduct,

b) offers a person under the age of eighteen years for the commission of a crime is punishable in accordance with Subsection (1), insofar as the act did not result in a more serious criminal offense.

hostile towards the other parent, so that the child's placement cannot be done as it psychologically would not be in the interest of the child.[31]

V. Practice in child protection

Rights of access are dealt with by Article 21 of the Hague Convention of 1980, which provides that Central Authorities are bound to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. Either directly or through intermediaries, central authorities 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. Tasks relating to this fall within the competence of the Ministry of Justice (cases falling under the scope of the Hague Convention of 1980) and the Ministry of Human Resources (cases falling under the scope of the Regulation), regardless of the direction of the submitted request.

Although from many aspects the Brussels II *bis* Regulation means a further development of the Hague Convention with respect to child abduction relating to the EU, this concerns only cases where a third state is not affected, in other words, where the case involves exclusively EU Member States. In cases falling within the scope of the Hague Convention of 1996 the central authority is the Ministry of Human Resources, while in cases falling under the scope of the Luxemburg Convention of 1980 (decisions concerning custody of children and restoration of custody of children) the Ministry of Justice acts as the central authority. There is no division of powers between the two ministries with respect to the individual conventions.

1. Rules on child abduction (unlawful removal)[32]

The passage of time can cause irreversible damage and consequences because of the lack of access between the child and the non-custodial parent. One of the most important tasks of family law is to protect the interest of children. The first international treaty to protect their interest was the New York Convention

31 Náday, *loc. cit.* n. 27.

32 According to the Ministerial Decree No. 7/1988. (VIII.1.) § 3, in cases of return of children illegally brought to Hungary the responsible body is the Pest Central District Court as the first instance court. Consequently, appeals against related decisions are judged by the Metropolitan Tribunal Court in Budapest, and the revision is decided by the Supreme Court, which is called the Curia.

on the Rights of the Child, signed on 20 November 1989. The Convention was implemented in the framework of the United Nations by its Article 11:

> "The Member States shall take measures to combat the illicit transfer and non-return of children abroad. To this end, State Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements."

Hungary joined the Hague Convention in 1986 and integrated it into Hungarian law by a ministerial decree (Decree 7/1988.[VIII.1.]IM) that determines the procedural acts of non-litigious procedures concerning children brought to and kept unlawfully in Hungary, and since Hungary is an EU Member State from 1 May 2004, it has the obligation to apply the Brussels II *bis* Regulation in relations with other Member States. Child abduction cases, according to the Amsterdam Treaty, are under the EU's exclusive competence, which excludes the creation of bilateral agreements among Member States.[33]

The Private International Law Department of the Ministry of Justice (MJ) is the central authority in cases regarding the wrongful removal or return of the child according to the Brussels II *bis* Regulation and the Convention on Child Abduction. It acts as central authority in matters relating to maintenance both within the EU and in cases involving third countries. Furthermore, the Department acts as a central authority in international private law cases relating to legal assistance on the basis of EU laws or bilateral and multilateral conventions. A further task of the Department is to inform courts and authorities about foreign laws. In addition, the Department assists in the work of courts and other authorities with professional opinions on questions of international private law.

In Hungary, the Ministry of Justice has a permanent, and therefore adequately qualified and experienced legal representative for representing foreign parties in Hungarian proceedings, which essentially simplifies and accelerates the proceedings in cases relating to child abduction. At the time of its accession to the Hague Convention, Hungary did not make reservations to Articles 26 and 42, therefore the country agreed to ensure totally cost-free proceedings in Hungary in terms of procedural costs. Besides, the central authority transmits requests for legal aid abroad, helping to overcome administrative difficulties. However, in the case of Member States that made reservations to Articles 26 or 42, Hungarian applicants must specially apply for exemption from costs and legal aid. Moreover, they are also exposed to the risk that, if their application fails, they will have to bear the costs of the whole proceedings. Consequently, due to the differences between Member States' rules relating to legal aid and

33 Curia's jurisprudence analysing working group, 2013, *loc. cit.* n. 1.

exemption from costs, there are significant inequalities with regard to access to justice in individual Member States, which should be avoided in the EU.

In Hungary there are two possibilities to institute court proceedings for the return of the child removed to Hungary:

A. It is possible to request the court directly to order the return of the child. (In Hungary the Central District Court of Pest has exclusive jurisdiction). In judicial proceedings, the tasks of the Ministry of Justice (MJ), as a central authority, include: it shall ask the foreign central authority for information about the foreign law at the request of the Hungarian court (e.g.: foreign regulations relating to child abduction); at the request of the Hungarian court it may ask the foreign central authority for information on the basis of Article 11(4) of the Brussels II *bis* Regulation (e.g.: about foreign arrangements to be made to secure the protection of the child); in this case the MJ does not participate in providing legal representation.

B. The applicant has recourse to the Hungarian central authority (MJ) directly or it applies to the Ministry of Justice through the foreign central authority. In these cases the MJ has the following tasks: in order to provide legal representation for the applicant, it participates in the commencement of proceedings before the Central District Court of Pest through a legal representative; it performs other tasks laid down in the Convention and the Regulation for the Central Authority (e.g.: obtaining information relating to foreign law or possible foreign measures of protection, initiation of search for the child by involving the police or through the address registry).

The court and the central authorities that provide assistance (counselling, legal representation in court proceedings) act according to the Hague Convention of 1980 on Child Abduction and the Brussels II *bis* Regulation, the procedural rules of which are applicable both to the Member States of the EU and to the countries falling under the scope of the Hague Convention. The Regulation differs from the Convention, since it contains further conditions which should be taken into consideration during its application. However, since the Hague Convention was raised by the Brussels II *bis* Regulation to the level of secondary sources of EU law, it is indispensable to consult both of them during the resolution of individual legal disputes. The Brussels II *bis* Regulation – according to Article 60 thereof – prevails over the Hague Convention. However, the Convention is still applicable with regard to questions raised between the Member States that do not fall under the scope of the Brussels II *bis* Regulation.

The court or the administrative authority of the state which was requested is obligated to order the immediate return of the child if it has established on the basis of Article 3 of the Hague Convention that the child has been removed or is being retained wrongfully, and at the time of the commencement of the action before that authority less than one year has passed from the date of the wrongful removal or retention of the child. The competent authority is not obligated to order the return of the child if the party opposing the return – the one who has removed the child wrongfully – proves the existence of one of the grounds enumerated in Articles 12 or 13 of the Hague Convention of 1980. Therefore, according to the Convention, the court proceedings for the return of the child are aimed not at deciding about the right of custody or deciding in which state the child should reside, but at ensuring that these questions are decided by the competent organ of the state in which the child used to have his/her habitual residence. However, since the parent retaining the child unlawfully almost always refers to Article 13 of the Convention during the proceedings, the court has to take evidence concerning the case. And the demonstration of evidence and the decision based on it constitutes a delicate borderline issue between the establishment of wrongful removal and the determination of custody (the abducting parent may retain the child further on).

During the evidentiary procedure relating to the removal of the child, the court can order a home study report to be made in the following two types of situations:

- The child has been removed to Hungary: at the request of the court, action is taken by the Hungarian guardianship authority. If the child has been staying for more than 1 year in Hungary, the home study has special importance with regard to examining if the child has become settled in his/her new environment.
- The child has been removed abroad: the foreign court requests a home study report to be made about the child's home environment, and through the KIM it requests the competent Hungarian guardianship authority to prepare the report.

The preparation of the home study report is not obligatory, so the court has discretion to decide whether to order it. Such a request is not common, since in these cases – as a main rule – there is no taking of evidence, except where the court has to weigh, according to Article 11 of the Regulation, how to ensure protection for the child following his/her return.

In general, it can be concluded that in order to prevent the ordering of the return, the parent who has brought the child to Hungary arbitrarily, in the vast majority of cases, usually refers to Article 13(b) of the Convention in his/her

defence, namely that the child's return would expose the child to physical or psychological harm (e.g. violence against the other parent,[34] lack of the required living conditions). However, Hungarian judicial practice considers the refusal of the request for the return of the child as an exceptional decision and interprets it rather restrictively. Denial of the return of the child on the basis of Article 13(b) happens relatively rarely, only in well-founded cases.[35] There are cases where the Hungarian court did not sufficiently consider the information supplied by the foreign central authority under Article 11(4) of the Hague Convention[36] in order to refuse the request. In matters of child abduction from Hungary, there have been several cases where the courts rejected the application for the return of the child only on the basis of the child's opinion.[37] There has not been any case in which the return of a child wrongfully removed to Hungary would have been refused on the basis of the child's opinion.[38] .....

The court practice has clearly clarified its position on the question, that a Hungarian court does not have jurisdiction in child custody cases concerning abducted children if the court ordered the child's return to another Member State of the European Union, where he/she had residency at the date of the abduction.[39]

Attila is one of the lucky ones who could manage to bring back his child from abroad. The man from Pecs divorced after 15 years, and when his wife announced that she would travel with the minor children abroad, he wrote a letter to the Airport Police Authorities not to let his minor children travel abroad because he had not given his permission to it. The Airport Police replied that they did not have right to stop people with valid travel documents.

34 See more in A. Grád, 'Az Emberi Jogok Európai Bíróságának családon belüli erőszakkal összefüggő joggyakorlata' [Case Law of the European Court of Human Rights Relating to Domestic Violence] 2 *Családi Jog* (2010) pp. 32-35.

35 Case law of the Central District Court of Pest Pk. 500.062/2010, Municipal Court of Budapest No. Pkfv. 637.192/2010; BH 1998/86., Curia Pfv.II.20.018/2012.

36 Case law of the Central District Court of Pest 24.Pk.5000040/2013/18., Municipal Court of Budapest 50.Pkfv.634.214/20013/2., Curia Pfv. II.21.029/2013/4.

37 In Case No. XX-NMFO/GYELV1/3762/2013., when the English court established that the 15-and-a-half-year-old boy was being retained wrongfully, it rejected the request of the mother (living in Hungary) for the return of the child only with reference to the child's opinion. In Case No. XX-NMFO/GYELV1/3704/2013, the 12-year-old girl, who had been taken wrongfully to Austria, opposed her return to Hungary to such an extent that the court considered this sufficient to reject the request for the return of the child.

38 See more in H. Kozák, 'Gyermek jogellenes elvitele miatti eljárás a határok nélküli Európában' [Procedures for Child Abduction in a Borderless Europe] 1 *Családi Jog* (2009) pp. 25-29.

39 Case law: Municipal Court of Budapest No. 2.P.20.016/2012; Curia No. Pfv.II.20.769/2013/5. Supreme Court/Curia BH 1991.273., 1995, 283.

Attila's ex-wife took the children to England, despite his protest. Attila immediately turned to the competent department of the Ministry of Justice, and right after his documents arrived to London, the foreign court provided him with an attorney. The police of Bristol took the documents of the mother and the children and notified the airports that they could not leave the country. The mother defended herself in front of the court by stating that they had to escape from Hungary because of the violent behaviour of the father and denied that she intended to stay in England permanently. The Hungarian Supreme Court's Resolution stated that it was not unlawful to stay abroad if they would return within a year. Of course, many will abuse this: it is very complicated to prove that someone intends to reside permanently in another country in the future if they return to their home country at least once a year. There were practices by the mother in which she showed recordings (such as the father teaching the child to cut wood with an axe or sitting with the child on a motorbike in static position without a helmet) which she believed were the grounds to prove the child's endangering. After several hearings (according to the man, the English authorities were fair with both parents during the proceedings), the judge ordered that the mother had to bring the children back home. The reason was that the ex-wife lied, she enclosed her work-permit, which was for longer period than a year, and she got confused during the hearings several times. The judge has also noticed that the ten-year-old daughter would say exactly the same words as the mother, to the effect of how great their stay in England was, as if she had been taught to say them, and the younger aged boy would say the opposite: "I want to go home, I miss my father!" The father brought an action for custody, because the mother had clearly stated that she had just come home temporarily after four and a half months, and she would return anyhow to England where she had a new partner. Attila has said that he did not want to be only an ATM machine in his children's life, from where they could cash out child support, he indeed wanted to be a part of their life.

2. Parental responsibility – e.g. rights of custody, provisional/ protecting measures, right of access of the child in Hungary

The Regulation's Article 20 contains particularly important provisions in terms of access to the child. 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.[40] In practice it means that while a Member State, for example Germany, may determine parental responsibility, the child's residence and the rights of access, another Member State – for example Hungary – can take provisional measures in case of the right of access between a parent and a child if the child resides in Hungary. The parties can apply to a court to give its order with provisional measures on the question of parental access (156§ of the Code of Civil Procedure).[41]

The measures referred to in urgent cases 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.

The Ministry of Human Resources acts as the central authority in matters concerning rights of access to the child, protection measures and contacts between central authorities. It is the supervisory organ of the Hungarian guardianship system as well. The central authorities have established a so-called "child protection notification system" between each other for situations where there is a need for child protection measures (e.g. the central authority of a foreign Member State informs the EMMI if a family intends to settle down in Hungary). As a result of this, the Hungarian child protection system comes into action. Consulates are also involved in the signalling system. Thus, for example, this signalling system can be used if the Hungarian child-welfare service indicates the need for a search for the foreign relatives of a child, since in this case the consulates will also provide assistance with the detection. However, Hungarian experiences show that the operation of the signalling system is not always based on the principle of reciprocity. With regard to provisional child protection measures, there has been great progress in the past two years in the cooperation between central authorities. However, it is a problem that foreign authorities rarely inform the consulates or Hungarian authorities if children of Hungarian citizenship have been left abroad without parental custody. A further problem is that every Member State operates a different (country-specific) child protection system.

Instead of a court, the guardianship authority orders the custody of the state (temporary or permanent state custody), according to the Administrative Procedural Rules, giving an administrative decision which is no longer under the objective scope of the Regulation.[42]

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40 See more in A. Osztovits, 'Ideiglenes intézkedések a határokon átnyúló szülői felelősséggel kapcsolatos perekben - az Európai Unió Bíróságának legújabb joggyakorlata tükrében' [Interim measures related to cross-border parental responsibility – in the light of the recent case law of the European Court of Justice] 4 *Családi Jog* (2010) pp. 18-24.

41 Somfai, *loc. cit.* n. 19.

42 More in Osztovits, *loc.cit* n. 38.

While talking with divorced parents, we came across some shocking stories: in one case the mother the mother suffered from a mental disorder and considered herself a "light eater". The ex-husband felt that their common child's situation was endangered and filed a petition with the authorities to change the placement of the child or, in other words, applied for custody. His petition was even supported by his former parents-in-law, but despite that the authorities were reluctant to give an order until the media reported about the spiritual guide of the "light eater's" partner who died because of avoiding food, and the two-year-old daughter's life was barely saved. After the latter case, the court gave its judgment and the father could obtain the custodial rights over his child after three years. In another shocking case, the father was not that fortunate. The divorced mother pushed the child into a cesspit, from where the father helped the child escape and saved its life. The child was institutionalized, but after a few months the court found the mother capable of practicing the custodial rights, so, rather than the father, she could bring the child back home.[43]

43 Cs. Lukács, 'Apa ma nem jön, Miért hisznek a trükköknek a magyar gyámhivatalok?' [Dad did not come today, Why do the Hungarian guardianship agencies believe parents' "tricks"?] *Magyar Nemzet Magazin* 17 November 2012 at http://hu.scribd.com/doc/135731039/Apa-Ma-Nem-Jon-Magyar-Nemzet-20121117 (10 January 2015).

VI. The system of courts, the types of proceedings in the matrimonial matters and parental responsibility, the cooperation between central authorities (summary)

1. The system of courts, the types of proceedings in the matrimonial matters and parental responsibility

Authorities involved:

1. System of courts:
   - Pest Central District Court (Budapest) – child abduction in Hungary
   - Buda Central District Court (Budapest) / Town (Local) Courts – recognition and enforcement of foreign court decisions
   - Budapest Metropolitan Court / County Courts of Judicature
   - Supreme Court of Hungary (review)

Central authorities:

- Ministry of Justice (Budapest) – child abduction in and from Hungary
- Ministry of Human Resources (Budapest) – right of access to the child

2. Other authorities:
   - Bailiff and Police – surrender of the child
   - National Child Care Authority – parental responsibility (rights of custody, right of access to the child)
   - Mediation services – e. g. in the right of access of the child

Types of proceedings:

A. Court proceedings in
- Matrimonial matters
- Matters of wrongful removal or retention of the child
- Recognition of the foreign court decisions
- Mandatory mediation proceeding at court

B. Public administration proceedings in
- E.g. rights of custody, right of access to the child, provisional proactive measures inside Hungary
- Contacts among the courts by central authorities

C. Enforcement procedure of the Bailiff, Police / Child Care Authority
- Matters of wrongful removal or retention of the child
- Access to the child, provisional protective measures

2. The cooperation between central authorities

The central authorities appointed by the Member States cooperate in individual cases, directly or through the authorities, and take necessary measures (data collection, information, administrative support, contact, mediation). The entitled applicant has to hold the copy of the foreign judgement and the validation form and has to submit an application for administrative support (free of charges) to the local authorities of the Member States where the applicant has residency.[44]

2.1. Ministry of Justice (MJ)

Legal assistance (cooperation) in practice is based on Article 55 of the Brussels II *bis* Regulation and the Hague Convention. In this respect, the problem is that, because of the overly general formulation of Article 55 of the Regulation, a significant part of the central authorities of the Member States interpret it in such a way that they provide practically less assistance for parents involved in EU cross-border cases than they do for third-country applicants under the Hague Convention (on child abduction). In addition, concerning the relation between the Luxembourg Convention (1980) and the Regulation, we can see that under the Convention the central authorities must provide more help to the applicant than what is provided under the Regulation, which cannot be maintained in the EU.

Cross-border cases within the EU relating to rights of access to the child fall within the competence of the Ministry of Human Resources, while in cases involving states outside the EU, the responsible authority is the Ministry of Public Administration and Justice.

In the field of contacts between courts (under Article 11(6)-(7) and Article 15(6)) and concerning information and assistance provided to courts, cooperation between the Hungarian KIM and Hungarian courts is rather flexible – courts may be informed about the applicable law even immediately (by phone, e-mail).

Reaching agreement between holders of the right to custody through mediation or other means of alternative dispute resolution (Article 55) is currently at an early stage. Mediation is not applied by the MJ in proceedings relating to child abduction, the party concerned can only be informed by the MJ.

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44 Somfai, *loc. cit.* n. 19.

2.2. Ministry of Human Resources

Within the EU, concerning measures relating to rights of access to the child and the protection of the child, the Ministry of Human Resources is the responsible central authority. In practice, legal assistance (cooperation) is based on Article 55 of the Brussels II *bis* Regulation.

The relationship between central authorities is problematic. Despite their duty of cooperation, as required under Article 55, many states simply do not respond to requests.

Mediation process can help mainly if parents or holders of rights of access to the child (grandparents, adult brothers or sisters, uncles, aunts, the parent's spouse) cannot agree on the details or the timing of visitation. For the involvement of a mediator, the parties' joint will is required. Mediation can also be initiated by the submission of an application to the guardianship authority by any party. In this case, the guardianship authority shall initiate the proceedings with the consent of the parties concerned. With the start of the mediation process, the guardianship authority stays its proceedings for four months. During this period of time, the mediator must work out an agreement that is acceptable for both parties. The mediator must hear both parties and children above 12 years of age – at the request of parents. Furthermore, a child who is capable of forming his or her own views must be heard by the mediator based on the proposal of the parties or the guardianship authority concerned. In case an agreement is concluded between the parties, the mediator has a duty to reduce it to writing. Then the agreement is signed by both the mediator and the parties. Within eight days of the conclusion of the agreement, the mediator shall send the document containing the agreement to the guardianship authority regulating rights of access. The authority – at the request of the parties – approves the agreement.

VII. Conclusion

Migrant family relationships raise broader issues, however, affecting partners and children from the EU and third countries alike. The very success of the free movement provisions has led to greater prosperity for a growing number of migrating individuals – workers, tourists, students, retired persons, carers and the cared for. This has undoubtedly generated an increase in international relationship and family formation, necessitating the negotiation of more complex family arrangements. The institutions of the EU now have to address the paradox whereby its free movement formula serves to aggravate, as much as facilitate, family life. This is particularly apparent where such relationships

break down and where difficulties associated with ensuring recognition and enforcement of divorce and parental responsibilities across Member States become increasingly important. The developments brought about since the Treaty of Maastricht and the Treaty of Amsterdam clearly articulate a new extension in European competence in the private domain of family disharmony, divorce, child residence, contact and maintenance.[45] This EU activity – by its directly enforceable, uniform European measures – represents not so much an attempt at harmonised regulation of domestic family law systems, but rather an endeavour to achieve much needed co-ordination between Member States with the view to simplifying procedures and guaranteeing security and certainty to migrant families in the post-divorce period.[46]

Besides respecting the achievements in the legal background, there are many problems to be solved, regarding either cases related to matrimonial matters or those to the right of access to the child:[47] the Brussels II *bis* Regulation does not define the concept of marriage, however, the interpretation of this concept is essential. The basic question to which the Brussels II *bis* Regulation does not provide a response is the following: should the concept of marriage be interpreted in EU legal terms, independently from the concepts used in the laws of the Member States or should it be interpreted as a national concept? The current problem raised by the definition of marriage results from differences in content and regulation relating to marriage and other forms of relationships between persons of the same sex.[48]

Habitual residence is the fairest connecting principle concerning jurisdiction, but the notion has to be put on a clear footing not only in the guiding decisions of the European Court of Justice, but also at the level of norms.

According to the 1996 Hague Convention – which is aimed at reinforcing the 1980 Hague Convention – the Ministry of Human Resources functions as the central authority in cases relating to rights of access to the child. Accord-

45 Ackers, Stalford, *op. cit.* n. 1, p.199.

46 See more in Zs. Wopera, 'Az európai családjog időszerű kérdései' [The up-to-date questions of European family law] 2 *Európai Jog* (2010) pp.10-18.

47 See more at: europa.eu/civiljustice/publications/docs/family_rights/hungary_en.pdf (8 January 2015).

48 In 2013 nine European states, including seven EU Member States, recognized same-sex marriages, ensuring equal rights for same-sex couples as those of heterosexual couples. Another ten Member States, excluding the possibility of same-sex marriage, but ensuring similar rights to those of married heterosexual couples, established a special form of partnership for same-sex couples. Finally, eleven Member States within the EU do not recognize any form of relationship between same-sex couples.

ing to the 1980 Hague Convention on Child Abduction, in the states that are parties to the Convention, the central authorities – i.e. the Ministry of Justice in Hungary – provide assistance to ensure the exercise of parental rights of access to children living abroad (Article 21). Therefore, if a child resides in a Contracting State and the parent (or guardian) with whom the child is placed obstructs access to the child, an application can be submitted to the MJ as the central authority to make arrangements for and ensure the exercise of access rights. This division of competences is difficult to follow from the citizens' point of view, and it may result in a delay in the proceedings (e.g. due to the transfer of the case);

Based on the Luxemburg Convention of 1980, the central authorities have to manage cases. This means providing as much assistance as possible for the claimants during the proceedings. The Convention goes beyond the provisions contained in the Regulation to a great extent. The Brussels II *bis* Regulation provides far less assistance for the claimant with respect to the exercise of rights of access to the child and allows more space to domestic law, which renders the administration of affairs more difficult and expensive for the parties.

Rules could become unified within the EU: there should not be a procedure relating to the removal of the child; instead, the possibility should be granted to regulate these cases through provisional measures. The Regulation and the procedure laid down in the Hague Convention (1980) on International Child Abduction should be harmonised so that the interests of the child would prevail to a greater extent in the proceedings.

After the child's return, the child's interests are not taken into consideration in most countries because the previous situation is criminalized (even if the child has been handed over voluntarily), it is sanctioned by the state. This causes a problem concerning the further exercise of access rights. The abducting parent staying in Hungary, from whom the child has been taken, applies to the Ministry of Human Resources for help, which officially requests the foreign central authority to help with the arrangement of visitation. However, in this case the foreign state either does not even grant rights of access to the child (e.g. Ireland), or even if it does, the Hungarian applicant cannot exercise his or her right under the circumstances (e.g. Germany) because visitation is rendered unreasonably difficult by the authority. For example, the appointed day is a weekday, the time interval is strictly specified (e.g. from 9:00 to 12:00), and in addition to all this, the Hungarian parent applying to the authority is notified only one week prior to the appointed date. Thus, the applicant has one week to organize the foreign trip, to ask for a day off at his or her workplace, which is in most cases impossible.

It is important to maintain the exequatur procedure concerning the recognition and enforcement of decisions on parental responsibility, since only this procedure can act as a suitable filter to detect judgments based on the violation of procedural rules, and such judgments should not be allowed to be enforced. It is necessary, however, to render the exequatur procedure smoother and faster than it is under the current system. This must be achieved, on the one hand, by prescribing tight deadlines, and, on the other hand, by precise procedural rules. Limiting the number of remedy applications (only one level of remedy) should also be considered, with the provison that first instance proceedings should also be of bilateral, adversarial character, and the proceedings should be referred to the exclusive competence of courts.

Next to the above mentioned exemplary legislative problems solutions, it is important to observe from a practical view, mostly psychological,[49] the jurisdictional issues. The following case could be a great illustration.[50] If a divorced woman does not want it, the father can never meet its child – this is the first sentence of a shocking letter written by a recently divorced father. The man got married after a three-year-long relationship in early 2008, and at the end of the same year the couple's baby was born. One year later, they were arguing about the details of the divorce, and during the procedure the wife disappeared several times with the child. She prosecuted the man for assault, and asked for restraint unsuccessfully. She was provoking police cases but still continued to live in the house which was considered the man's separate property. Soon afterwards, the court declared the divorce, but she was regularly preventing the ex-husband's access to his son, so the guardianship authority of the district gave her a warning. The ex-husband placed twelve and a half million forints in the custody of an attorney, for the housing of the child. In the beginning of 2011, the woman left the house. The child started to go the kindergarten, but the mother was hiding it from the father. Meanwhile, according to law, they have a joint decision-making right in questions concerning the most important decisions (such as the choice of a kindergarten or education) in the child's life, regardless of the fact that they had divorced. The court defined the rules of the correspondence, and the father repeatedly went in vain to take the child. He filed a complaint to the guardianship authority, but the authority denied all his petitions, stating that the judgement did not define precisely the location where the father can have access to the child. The authority was not interested in the existing circumstance that the mother did

49 See more In Á. Hajnal, 'Pszichológiai vizsgálati módszerek és azok hatékony alkalmazása a gyermekelhelyezési perek során' [Psychological testing methods and their effective use in child custody litigation] 4 *Családi Jog* (2005) pp. 30-33.

50 Lukács, *loc. cit.* n. 41.

not wait for the father (if ever) at the previously agreed time. The father asked for a resolution in relation to summer holidays, because, according to the court judgement he was to have access to the child at the mid-point of holidays, but the court did not want to give its order. The mother sent the police against the father for returning the child late. The guardianship authority immediately brought an action against the man. On the 20th of August, the father separated from the child in the hope of meeting him again after five days, however, instead of the child he received a letter from the woman's lawyer stating that she went to work abroad and that he could not see his child until the beginning of October, and later on he could only visit him in London. To take the child abroad, the mother should have asked the agreement of the father, but without doing so, the ex-wife basically stole their four-year-old child from the country. Since then they have lived in England, so the father has not seen his son approximately for three months. Meanwhile, he has the court's order in hand giving him access to his child every week. Additionally, time works against him: if his ex-spouse can keep the child abroad for a year, the court will decide to let him stay there because he would have adapted to the new environment, and it would not be advisable to take him back home. Sandor believes that a prepared lawyer and a well-established plan can circumvent the law and international treaties, and mothers are giving related advice to each other on online forums. If a divorced partner is facing this kind of hardship, he/she can turn to the Ministry of Justice's department of private international law, where a complaint can be filed, or he/she can turn to a court of the country where the child was taken.

The Ministry's media department has confirmed that in the recent years the number of similar cases has increased. In 2004 they were taking measures in only 28 child abduction cases, but last year this number rose to 67 minor cases. The Hungarian Central Authority is currently participating in 91 child abduction cases, 25 of them concerning the return of the abducted child to Hungary and 66 concerning children abducted from Hungary. According to the Ministry of Justice, parents usually take children to other EU Member States, and in recent years the numbers of children taken to the United Kingdom has significantly increased. The existence of the internal market allows parents to decide to take their child abroad without the agreement of the other parent or the court. It is also a common example that a parent who resides in another country, and his/her relationship with the spouse has deteriorated, tries to bring the child back to Hungary without the agreement of the other parent or the court of the other country. The good news is that in the majority of cases parents are inclined to make an agreement. According to the court, in 2011 foreign courts ordered the return of the child in eight cases and rejected

it in four cases; however, they brought back sixteen children voluntarily, and they closed fourteen children's cases because of the annulment of the petition or the agreement of the parents.

The time required to return the unlawfully taken child to Hungary depends on necessary measures, for example, if the foreign authorities are aware of the child's residence or they have to find it.

The proceedings could be delayed if the mother does not comply with the regulations ordering the child's return and they can be only enforced. Sandor has experienced the difference between the Hungarian guardianship authority and the English authorities: the English authorities ordered for the mother and child's identification cards to be collected within 12 days after receiving the translated documents, preventing her from travelling abroad somewhere else until the proceedings are carried out, and obligated the mother to give daily fifteen-minute access to the child via phone or Skype. Sandor has received seven orders of rejection from the guardianship authority after claiming that he could not have access to his child because of the mother's fault, and he asked for the replacement of the correspondence and visitation. Sandor sadly noticed: there is no Hungarian authority that can validate the right of the father. This should be the duty of the guardianship authority, but the practice is opposite to the law – the authorities take no measures against the mother to enforce the father's right of access to the child. In the described case, the legal representative of the wife has clearly stated that the father would not have the right of access to his child for more than a month and, additionally, the child was taken abroad unlawfully, but this did not provide a sufficient cause for the authority to order enforcement against the mother. However, according to the present rules, repeated prevention of the right of access is a felony. In Sandor's opinion, the passivity of the guardianship authority can be explained by the protection of the mother, because until the authorities fine the mother because of preventing the correspondence between the father and the son, they cannot prosecute her for endangering the welfare of the minor. The situation is usually harsh for the father. Sandor talked to another man who was immediately detained and his right of access was annulled. Indeed, we informed the guardianship authority about the issue as well. According to the data of the National Office for Rehabilitation and Social Affairs, in the period between the 1st and the 30th of September 2012, sixty percent of the judgements on second appeal, i.e. almost eight hundred judgement were given in relation to the right of correspondence. In thirty-four percent, i.e. in 272 cases the court declared that the custodial parent did not comply with the judgment of the court regarding parental responsibility. Repeated and validly established prevention of correspondence was followed by charging a fine against the custodial parent. The

legislation is very complex, and it is clear from the courts' replies that they can only charge someone with a fine if the meeting is cancelled without any doubt due to the failure of the other parent.

Moreover, these are second-appeal proceedings, and most fathers get tired by the time the first-appeal court judgement is given. Petitions for enforcement are mostly denied by the guardianship authority because contact is not precisely regulated (for example, it is not indicated in a court judgment or in an agreement of the parties where the non-custodial parent will get access to his/her child), and in this kind of cases the guardianship authority does not have the power to order enforcement because the obligation is not specifically defined, and the parties are giving different statements on when and where they met or waited for the non-custodial parent, so the fault of the other party cannot be identified. This gives a reason for abuse, and ex-wives are very creative at this area. Additionally, they are in the state of mind to believe without a doubt that the authorities will give the right to them. I have talked to a father who had arrived with two witnesses at the time when he was supposed to get access to his child, but he waited in vain in front of the house, and, despite ringing the bell, no one opened the door to him. However, the mother, who did not let him into the building, brought two witnesses to support her claim that they should have met in front of the door on the fifth floor rather than in front of the building, and, according to the judgement, he was supposed to take the child at the door 31 on the fifth floor. The right to correspondence is not only the non-custodial parent's right but the right of the child as well. Experts believe that the most important problem is that the custodial parent cannot see that only the parents are separated, but the child is not. In 2011 the authorities' passivity led two fathers to bring their cases before the European Court of Human Rights in Strasbourg and they both won their respective cases. Hungary was charged with a fine of twenty thousand euros for not enforcing correspondence. The reasoning of the Court:

> "The Court is not convinced about the fact that the authorities – despite of the ministry's order for measures – used efficiently the legal instruments provided to them … From the above stated, the Court can only infer with the interest of the parties that the competent authorities were not acting in a reasonable time, and did not take the logical steps to facilitate the meeting."[51]

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51 Németh Zoltán vs. Hungary (Application No. 29.436/05.), Show vs. Hungary (Application No. 6457/09.) at http://www.origo.hu/itthon/20120305-magyar-ugyek-a-strasbourgi-emberi-jogok-europai-birosagan-2011ben.html, http://kuria-birosag.hu/hu/ejeb/nemeth-zoltan-magyarorszag-elleni-ugye-2943605 (11 December 2014).

> "On the contrary: the authorities' passivity was a burden for the petitioner, who had to constantly, with time-consuming hard work, turn to ineffective appeals to enforce his rights. They tolerated the unlawful actions of the mother for years, which they were obligated to prevent. The multiplication of the above-mentioned cases could be caused by the passivity of the guardianship authority as well. Divorced wives are so sure of their situation that Sandor's ex-wife also attempted to convince Sandor as follows: 'I was informed, and my lawyer also told me the same, that no authority will take any measure against a mother who is raising her child alone.' "

For this reason, some divorced mothers think that children are their property and they can use them as a weapon against the father. This is a very effective weapon, but mothers do not see that the due to their actions children will suffer the most.

In America, there is a wide range of literature concerning the issue when one parent influences the child against the other. They even gave a name to the phenomenon: it is called Divorce-Related Malicious Mother Syndrome (DRMMS). In Hungary, Laszlo Tomasovszki, a psychiatrist and forensics expert, has published an article[52] in which he explains: "The purpose of brainwashing by the mother is to denigrate the father with every possible instrument, and, as a consequence, the child can indeed hate his father". The purpose is to inflict more and more pain and bitterness on the father.

The expert says that this social phenomenon is increasing, and in the future we have to be aware of its further expansion. In this case, the mother is lying to the child; for example, she tells the child that she cannot afford to buy something for the child because the father is not giving her financial support. She links every wrong to the father so the child becomes careless towards the feelings of the father. There can be a lack of feeling of gratitude for received presents, or for the child support or for anything that comes from the father and proves his love and care. It often occurs that the child finds out in early adulthood or adolescent age that the father is not that malicious, but at this time it is already too late, as they cannot overcome the distance. In exchange, the child gets disappointed by the mother and becomes distant with her, which leaves the child without either parent of full value in the end. There are cases in Hungary where the child moved to the father's place after realising that mother's statements about the father were wrong, but the mother still receives

52 The Parental Alienation Syndrome; The Divorce Related Malicious Mother Syndrome (DRMMS), at http://www.jogiforum.hu/forum/23/4556.2.0 (21 December 2014).

child support. Maria Regasz, a psychologist, explains[53] that in most cases one does not have to be a psychologist in order to be clear that the mother is trying to keep the child away from the father. In many cases, the mother refer to the fact that when the child meets the father, there is always an anxiety before meeting him and crying when he wants to take the child. The authority believes them because, in most cases, this is the truth. However, if they observe the situation, they can see that the child is only crying while the mother sees it, trying in this way to satisfy the mother's expectation that the child cannot love the father because in that case she will be sad. The mother can also use different psychological methods to make the child feel guilty. When the child is out of the mother's horizon, the anxiety and the crying disappears, and when they return the child the same circus starts over again: "It was not that good at your place". The parent cannot see that by referring to the interest of the child, she harms the child, who is anxious because of her. The minor who is raised in similar circumstances is always afraid of questions which can make it obvious that he/she had a good time at his/her father's place, due to being afraid of losing the mother's love, and feels that the mother hates the father.

In Hungary, the number of psychiatric patients is very high unfortunately, and it would be worth observing what percentage of them are divorced parents' children, and how many of that percentage did not have a relation with the non-custodial parent. I believe that we would obtain some very interesting statistics.[54]

53 http://www.kapcsolattartas.hu/; http://www.kapcsolattartas.hu/#!fcikk-4/c17nv (10 December 2014).

54 Lukács, *loc. cit.* n. 41.

INTERNATIONAL CHILD RELOCATION

Ines Medić*

I. Introduction

We live in times in which long-distance travel has become increasingly common. A myriad of reasons make it easier for people to relocate to other countries in order to take different advantages. These may include better educational, employment, health or other opportunities. In such circumstances it is not uncommon that people relatively often relocate in order to take such opportunities.

Besides those already mentioned, one of the most common reasons for parental relocation is the dissolution of an international marriage or breakup of internationally characterized cohabitation. It is very difficult to give a universal conclusion on incentives for relocation, but it is possible to enumerate the most common ones. These are: return to the homeland where it is easier to get assistance from relatives and friends,[1] escape from family violence, relocation due to a new marriage,[2] relocation due to cultural or ethnical reasons, etc.[3]

A problem arises when a person considering relocation is a custodian parent. As stated in Tropea v. Tropea, "relocation cases ... present some of the knottiest and most disturbing problems that our courts are called upon to resolve ... the court must weigh the paramount interests of the child, which may or may not be in irreconcilable conflict with those of one or both of the parents".[4] Why is it so? For a child, being the pawn between two parents is highly traumatic. If relocation includes a significant distance from the other parent, the child's

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1 See more in: N.J. Taylor and M. Freeman, 'International Research Evidence on Relocation: Past, Present and Future' 44 *Fam L. Q*. (2010) pp. 226-227.

2 M. Freeman, 'The Reunite Research (Research Unit of the Reunite International Child Abduction Centre' (July 2009) at www.reunite.org/edit/files/library%20-%20reunite%20 PublicationsRelocation%20Report.pdf (12th June 2015).

3 Considering that, as a rule, parental responsibility is given to mothers, the right to relocation is sometimes viewed as a gender question. See more in: R. Zafran, 'Children's Rights as Relational Rights: The Case of Relocation' 18 *American Journal of Gender*, *Social Policy and the Law* (2010) pp. 163, 212-216. See also: K. Herma Hill, 'No-Fault Divorce and Child Custody: Chilling out the Gender Wars' 36 *Fam. L.Q.* (2007) p. 27.

4 Tropea v. Tropea, 665 N.E.2d 145, 148 (N.Y. 1996) (allowing the mother to relocate two hours from the father).

relationship with that other parent is most likely endangered. In any case it will change, not only in quantity, but also in quality.[5] Additionally, the child must move and leave all his or her social contacts, he or she loses stability and continuity, must overcome the language barrier, etc. Even though (especially younger) children are very adaptable, expectations like the one that relocation will not make a great disturbance in their life are not realistic.

On the other hand, for a left behind parent, the news of the custodial parent's intention to relocate can also be devastating, especially if he or she has been closely involved in parenting. The left behind parent is suddenly faced with the reality of not being a significant part of the child's life, not being able to see his or her child so often as before, and the question of financing the child's life and particularly the travel expenses connected with maintaining contact with the left behind parent often comes to the fore. So, generally speaking, most often the left behind parent views the move as an infringement of his or her visitation rights and a threat to the parent-child relationship.[6]

It is obvious that these kind of situations create enormous tensions for parents and their children and burden the legal system and the judges who have to decide them. A potential relocation can generate conflict in cases where there had been none before, reopen the old wounds in others, or exacerbate an already highly-conflicted situation.[7] Therefore, it is very important to develop certain standards in relation with parental relocation to encourage settlement and dissuade litigation.

II. Relocation law

Relocation law is part of national law and is applied with the aim of ascertaining, on the merits of a particular case, whether to allow a parent to change the

5 However, it does not have to be the case. Some social science studies show that in cases of domestic violence or other similar problems distance might be beneficial for saving the relationship between the child and that parent. Some other studies show that although fathers' participation has been correlated to children's academic performance and participation in extracurricular activities, *the amount* of visitation with the noncustodial parent is not consistently related to the child's adjustment post-divorce. In contrast, *the quality* of the relationship with the noncustodial parent is very important. See: J.S. Wallerstein and T.J.Tanke, 'To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce' 30 *Fam. L.Q*. (1996) p. 312., F.F. Furstenberg Jr., et al., 'Parental Participation and Children's Well-being After Marital Dissolution' 52 *Am. Soc. Rev.* (1987) pp. 659-701.

6 J.L. Richards, 'Children's Rights v. Parent's Rights: A Proposed Solution to the Custodial Relocation Conundrum' 29 *N. M. L. Rev.* (1999) p. 246.

7 L.D. Elrod, 'National and International Momentum Builds for More Child Focus in Relocation Disputes' 44 *Fam. L.Q.* (2010-2011) p. 342.

child's place or country of residence. Relocation law is only relevant where the relocating parent needs the consent of the other parent to change the child's country of residence.[8] Since joint legal custody is quite common nowadays, custodial parent has no right to independently remove the child from the jurisdiction. So, the legal regulation of parental relocation must accommodate contradicting ideals or legal principles, such as the free movement of persons and more equal parenting.[9]

Until today, only some states in Europe have enacted special legislative provisions governing relocation disputes.[10] It is so because in most of the countries relocation is still treated as an aspect of child custody determinations (or modification) and is decided in accordance with the law governing custody disputes.

Regardless of the *situs* of the relocation provisions, closer inspection of the provisions of different legislatures shows that France and Spain could be described as "pro-relocation", Germany could be described as "neutral" and Sweden could be described as "anti-relocation".[11] Also, in connection with parameters considered important for adjudication there seems to be only a partial consensus. More precisely, there is a consensus with respect to the main factors which are relevant to a relocation determination, but there is no consensus on the precise content of these factors.[12] The main factors are: the best interests of the child, the autonomous interest of the relocating parent to choose where to live and the interests of the left behind parent to maintain an active and meaningful relationship with children. As has already been said, the abovementioned factors are weighted differently in different jurisdictions.

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8 R. Schuz, *The Hague Child Abduction Convention, A Critical Analysis* (Hart Publishing, Oxford and Portland, Oregon, 2013) p. 72.

9 C.G. Jeppesen de Boer, 'Parental relocation, Free movement rights and joint parenting' 4 *Utrecht L. Rev.* (2008) p. 82.

10 In Europe, these are: Switzerland (Article 301 § 3 of Swiss Civil Code, entered into force 1 January 1978), United Kingdom (Section 13(2) of the Children Act 1989, enacted 14 October 1991), Norway (Sections 37 and 40 of the Norwegian Children Act, implemented on 1 January 1998), France (Article 373-2 of the French Civil Code, in the Act of 4 March 2002 on Parental Authority), Spain (Article 158 of the Spanish Civil Code) and Denmark (Article 3(1) and Article 17(1) of the Act of Parental Responsibility, entered into force on 1 October 2007).

11 See more in: A Report to the Attorney-General prepared by the Family Law Council, May 2006, at www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Relocation_report.pdf pp. 57-58. (12 June 2015)

12 See more in: Schuz, *op. cit.* n. 8, p. 73.

On the contrary, the US relocation law[13] is quite developed, as well as the Canadian,[14] New Zealand and Australian relocation laws.[15] It implies not only detailed statutory provisions, but also a rich and publicly available case law. An insight into this material shows some similarities, but also many differences.

To begin with, the understanding of the contents of the term "relocation" may vary from state to state, with respect to time and geographic limitations. *A propos* time limitations, they refer to situations where a change of residence that falls within given time period does not fall within the scope of relocation law. For example, the custodial parent is free to move with the child if the relocation does not exceed a certain number of days.[16] For relocations exceeding the referred number of days, relocation statute applies. Geographic limitations refer to situations where a change of residence happens within a certain geographic limit, in which case the relocation does not fall within the scope of relocation provisions.[17] Some of the relocation law explicitly stipulates that it applies to movements out of the state, within the state or both within and out of state.[18]

There are also some other approaches, e.g. in Australian law. According to the Subdivision 4 of the Family Law Act 1975, "changes to the child's living arrangements that make it significantly more difficult for the child to spend time with a parent" can be labelled as child relocation.

There are also differences with respect to notice. Most state laws include specific time spans in which the relocating party must give notice of the planned relocation to the other person with custodial responsibilities or visitation rights,[19] but also the time spans for the left behind person to oppose the proposed relocation.

With regard to notification, the legislative solutions vary, prescribing a reasonable time to give notice or only that the notice must be given in advance

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13 See more in: Y.M. Bérénos, 'Time to Move On? The International State of Affairs with Respect to Child Relocation Law' 8 *Utrecht L. Rev.* (2012) pp. 3-5.

14 *Ibid*, p. 5.

15 *Ibid*, pp. 6-7.

16 As already mentioned, time limitations vary from state to state, e.g. from 30 days in California to 90 days in Kansas and Missouri or even 150 days in New Hampshire.

17 Geographic limitations also vary from state to state, e.g. from 50 miles within the old home in Florida to 150 miles within the old home in Iowa and Louisiana.

18 See: Bérénos, *op. cit.* n. 13, p. 4.

19 Bérénos, *op. cit.* n. 13, p. 4.

to fixing the time limit.[20] The form, contents and manner of notice vary, too.[21] There are also some states whose law does not address notification.

With regard to objection, most of the states do not have objection periods, i.e. the period within which the left behind parent must object to a proposed relocation. Only a minority of the states have this period fixed.[22]

In any case, the party which opposes the proposed relocation has to raise an objection. If the left behind party does not object, relocation is permitted. However, some states require the relocating parent to first obtain permission of either the left behind party or the court before carrying out the plan to relocate.[23]

Since the US relocation law is much more developed, including a very rich case law, it provides a good platform for drawing some conclusions with respect to possible legislative approaches. All the states start with the general rule that the best interests of the child are paramount, but it is possible to speak of four different legal approaches to the relocation issue:

1. Presumption in favour of relocation – where relocation is generally permitted except in case where the left behind parent rebuts the presumption by showing that relocation will be harmful to the child. Such an approach has adopted an attitude that the right of the parent to relocate must always be respected, unless a competent court concludes that relocation is in collision with the best interests of the child. It is based on the belief that the custodial parent's (prospective) mental and emotional stability guarantees the welfare of his or her dependent child.[24]
2. Presumption against relocation – which requires from the relocating parent to prove to the court that the reason for relocation is legitimate and that relocation is in the best interests of the child. Specifically, it means that the relocating parent has to prove to the court "an assess-

20 These time limits may vary from 30 to 90 days depending on the country.

21 Many states require that the notice be sent by certified mail and include:
1) the intended date of relocation,
2) the address of the intended new residence, if known,
3) the specific reasons for the intended relocation, and
4) a proposal of how custodial responsibility should be modified, if necessary, in light of the intended move.
See: Elrod, *op. cit.* n. 7, p. 352.

22 E.g. Wisconsin - 15 days; Alabama, Arizona, Florida, etc. - 30 days; Indiana - 60 days and New Jersey - 90 days.

23 E.g. Nevada; New Jersey, North Dakota. More about it see in: Richards, op. cit. n. 6, p. 246.

24 This approach is taken by the courts of England and Wales, Israel, US State of Wyoming, etc.

ment as to the likely influence on the child of the proposed move and of the ways in which the child will maintain contact with other parent".[25] Some laws may even be more demanding, in the sense that the relocating parent has to prove that relocation will bring positive benefits to the child.[26]

3. Intermediate approach – which comprises two types, the first less frequent and the second more common.

The first type is one in which the burden of proof shifts from one to another party, meaning that the relocating parent first has to prove that his or her motives are *bona fide* and that the wish for relocation is not inspired by seeking to cut off the child from the other parent. If he or she manages to prove this, relocation will be approved, unless the other parent successfully shows that it will be harmful to the child.

The second type is one which does not include the burden of proof. The basis for adjudication is the best interests of the child, meaning that each party has to try to persuade the court that his or her position supports the best interests of the child. Even though there are some factors that are always taken into account,[27] this approach is quite inadequate because of its subjectivity. Namely, the outcome of the proceedings depends in great measure on the judge's perceptions of the importance of some factors.

Despite the existing legislature, predicting the results of relocation disputes still remains difficult because they are so intensely fact-driven.[28] Apart from the statutory requirements, the court is obliged to take into account the type of parenting agreement that currently exists (joint and shared custody), rights of parents, rights of the child, reasons for relocation, best interests of the child, etc.

The 1996 New York breakthrough pushes this uncertainty yet a step further. In Tropea v. Tropea, the court paved the way toward abolishing presumptions for or against a parent's relocation, saying: "It serves neither the interests of

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25 Schuz, *op. cit.* n. 8, p. 75.

26 E.g. law of US State of Louisiana.

27 Such as:
1. the suitability of the child's living conditions in the foreign country,
2. the ease with which the child is likely to integrate into the new country,
3. the adequacy of the arrangements made for reserving contact with the remaining parent, and
4. the views of a sufficiently mature child.
See: Schuz, *op. cit.* n. 8, p. 75.

28 Elrod, *op. cit.* n. 7, p. 342.

the children nor the ends of justice to view relocation cases through prisms of presumptions and threshold tests that artificially skew the analysis in favour of one outcome or another. Courts should be free to consider and give appropriate weight to all of the factors that may be relevant..."[29]

This started the trend all over the United States of abandoning presumptions in favour of the "best interests of the child" test. Even though this test, with its flexibility and adaptability to each child's particular circumstances, puts the child and his or her welfare in the focus of the relocation analysis, some are of the opinion that decades of its use have not helped in making it less vague and less vulnerable to judges using their own values to make the decisions.[30] Ultimately, it means that the (relocation) decision may well depend on personal experience and beliefs of the judge, especially if lacking support from different kinds of specialists.[31]

III. International harmonisation initiatives

1. Attempts on regional level

The growing number of national and international relocation cases, as well as the myriad of different legislative arrangements, has led to a heightened awareness of problems with the existing lack of uniformity and to an interest in developing appropriate relocation standards.[32] Even more so having in mind that relocation to a foreign country involves added difficulties.[33]

It is possible to distinguish several attempts from different organisations on developing standards for assessing relocation issues. In Europe, it is the CEFL;[34] in the United States, it is the American Academy of Matrimonial Lawyers, but also the American Law Institute and the Uniform Law Commission; in Australia, it is the Australian Family Law Council, and on a global level, it is the Hague Conference on Private International Law.

29 See: L.R. Greenberg, D.J. Gould-Saltman, R. Hon. Schnider, 'The Problem with Presumptions – A Review and Commentary', 3 *J. Child Custody* (2006) p.146.

30 See: J.B. Kelly, 'The Best Interests of the Child: A Concept in Search of Meaning' 35 *Fam. & Concil. Cts. Rev.* (1997) p. 384.

31 E.g. an attorney for the child, mental health specialists, social workers, etc.

32 Elrod, *op. cit.* n. 7, p. 345.

33 Meaning that courts have to take into account custodial parents' right to travel, possible jurisdictional conflicts, added difficulties with realization of left behind parents' visitation rights, the child's right not to be compelled to leave the homeland, etc. See more in: J. Grayson, 'International Relocation, the Right to Travel, and the Hague Convention: Additional Requirements for Custodial Parents' 28 *Fam. L.Q.* (1994-1995) p. 531.

34 European Commission on Family Law.

The initiative started within North America. In 1997, the American Academy of Matrimonial Lawyers[35] promulgated the Model Act on Relocation,[36] designed to serve as a template for jurisdictions desiring a statutory solution.[37] The Act addresses: the content of the term "relocation", duty to give written notice, the objection to relocation, factors for the court to consider and the issue of assigning the burden of proof.

According to this Act, "relocation is a change in the principal residence of a child for a period of 60 days or more, but does not include a temporary absence from the principal residence".[38] *A propos* geographical limitations, residence changes within a state or a relatively short distance can also be classified as relocation. With regard to notice, the Act requires all parties entitled to residential custody or visitation to give written notice 60 days prior to relocation, except in cases of domestic violence.[39] If the left behind person does not object, i.e. does not file a proceedings to prevent relocation within 30 days after receiving the notice, relocation is permitted by default.[40] As far as the factors for the court to consider are concerned, in making its determination the court must take into account the following factors:

1. The nature, quality, extent of involvement and duration of relationship of the child with each parent;
2. The age, developmental stage, needs of the child, and the likely impact the relocation will have on the child's physical, educational and emotional development;
3. The feasibility of preserving the child's relationship with the non-custodial parent;
4. The child's preference, considering age and maturity level;
5. Whether there is an established pattern of the person seeking relocation either to promote or thwart the child's relation with the other parent;

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35 Established in 1962, with the goal "to provide leadership that promotes the highest degree of professionalism and excellence in the practice of family law", at http://www.aaml.org/about-aaml (12 June 2015).

36 See: Richards, *op. cit.* n. 6, pp. 277-278.; Bérénos, *op. cit.* n. 13, pp. 13-14.; Elrod, *op. cit.* n. 7, pp. 357-359.

37 American Academy of Matrimonial Lawyers: Proposed Model Relocation Act: An Act relating to the relocation of the principal residence of a child, 1998 Journal of the American Academy of Matrimonial Lawyers 15, No. 1, Introductory Comment.

38 Article 1(101(5)) of the Model Relocation Act.

39 Article 2(205) of the Model Relocation Act.

40 Article 3(301) of the Model Relocation Act.

6. Whether the relocation of the child will enhance the general quality of life for both the party seeking the relocation and the child, including but not limited to financial or emotional benefit or educational opportunity;
7. The reasons each person seeks or opposes the relocation; and
8. Any other factor affecting the best interests of the child.

Since there was no consensus in respect of the burden of proof, the Act proposes three alternatives: the relocating person has the burden of proof, the left behind person has the burden of proof and the burden of proof shifts from the relocating person (if the burden is met) to the left behind person. The Act applies to cases when either a left behind person or the child relocates.[41] It does not contain express stipulation on whether it applies to national and/or international relocation cases.

In 2000 the American Law Institute[42] promulgated the Principles of the Law of Family Dissolution.[43] The ALI Principles differ greatly from the AAML Act. First and foremost they adopt a presumption in favour of relocation, subject to some limitations. Those are: it has to be the parent who exercises a significant majority of the custodial responsibility, relocation decision has to be made in good faith and for legitimate purpose and to a location that is reasonable[44] in light of the purpose.[45] So, the burden of proof is on the relocating party. According to the Principles, the following reasons should be considered as valid reasons for relocation:

1. To be close to significant family or other sources of support;
2. To address significant health problems;
3. To protect the safety of the child or another member of the child's household from a significant risk of harm;
4. To pursue a significant employment or educational opportunity;
5. To be with one's spouse or domestic partner who lives in, or is pursuing a significant opportunity in the new location; and

41 Comment on Article 1(101) of the Model Relocation Act.

42 Established in 1923, after a study conducted by the committee on the establishment of a permanent organisation for the improvement of the law, which consisted of American judges, lawyers and teachers; at http://www.ali.org (12 June 2015).

43 See: Richards, *op. cit.* n. 6, pp. 278-285; Bérénos, *op. cit.* n. 13, 2012, pp. 14-15.; Elrod, *op. cit.* n. 7, pp. 359-360.

44 Generally speaking, relocation will be considered reasonable if there is no way to achieve the legitimate purpose without moving.

45 ALI Principles, Section 2 § 2.20(4)(a).

6. To significantly improve the family's quality of life.[46]

If the relocation does not significantly impair either parent's ability to exercise his or her responsibility, it does not constitute a substantial change of circumstances, meaning that the court will not interfere. In case where neither of the persons is currently exercising a significant majority of custodial responsibility or the relocating party fails to demonstrate that the relocation is valid, the court shall apply a best interests test without a presumption favouring relocation. This test is based on factors set out in Principles,[47] some of which are:

1. The prospective advantage of the move for directly or indirectly improving the general quality of life for the child;
2. The extent to which parental rights and responsibilities have been allowed and exercised by the non-relocating parent;
3. Whether the relocation will allow a realistic opportunity for intervals of time with each parent;
4. The extent to which allowing or prohibiting relocation will affect the emotional, physical or developmental needs of the child;
5. Whether the primary custodial parent, once out of the jurisdiction, is likely to comply with any revised parenting plan;
6. The love, affection and emotional ties between the parents and child;
7. The capacity and disposition of the parents to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent has been the primary caregiver;
8. The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment;
9. The stability of the family unit of the parents;
10. The mental and physical health of the parents;
11. The home, school and community record of the child;
12. The reasonable preference of the child if twelve years of age or older. The court may hear the preference of a younger child at request; etc.[48]

With regard to notice, the relocating parent has to give notice at least 60 days before the planned relocation.[49] There are also some issues that the Principles

46 ALI Principles, Section 2 § 2.17(4)(a)(ii).

47 ALI Principles, Section 2 § 2.09-2.10.

48 See more in: Richards, *op. cit.* n. 6, pp. 283-284.

49 ALI Principles, Section 2 § 2.17.

do not address, like: the effect of domestic violence, a situation in which the primary psychological parent is not the primary custodial parent, international relocations, etc.[50]

In 2005 the Joint Editorial Board on Uniform Family Laws of the Uniform Law Commission[51] started to draft a Uniform Relocation Act. Due to budgetary reasons this project ended in February 2009, after one draft. Fortunately, in 2010 the American Bar Association Family Law Section appointed a committee to continue the work. The latest version of the Draft defines relocation as "a change of residence", where the change of residence will be: out of the state, outside the geographic restriction set forth in the existing court order, more than 50 driving miles from the residence of the other parent or will substantially affect the nature and quality of the parent-child relationship.[52] The relocating parent has to give notice to other persons with parental responsibility towards the child at least 60 days prior to planned relocation. The contents of the notice are also specified. The non-relocating party has 30 days after receipt of the notice to either start the court proceeding to prevent relocation or to initiate some alternative dispute resolution. The draft also proposes the factors for the competent court to consider when adjudicating. So, when making any determination the court must consider the best interests of the child and:

1. The quality of relationship and frequency of contact between the child and each parent;
2. The likelihood of improving or diminishing the quality of life for the child, including the impact on the child's educational, physical and emotional development;
3. The views of the child, having regard to the child's age and maturity;
4. The child's ties to the current and proposed community and to extended family members;
5. The parent's reasons for seeking or opposing the relocation or whether either parent is acting in bad faith;
6. A history or threat of domestic violence, child abuse or child neglect;
7. The willingness and the ability of each parent to respect and

50 For a much more detailed overview of the ALI Principles see: J.L. Richards, 'ALI Family Dissolution Principles: Are Children Better Protected?' 2001 *BYU L. Rev.* (2001) p. 1105.

51 The Uniform Law Commission was founded in 1892 with the objective to study and review the law of the states, to determine which areas of law should be uniform and draft and propose specific statutes in areas of the law where uniformity between states is desirable; at http://www.nccusl.org (12 June 2015).

52 ABA Draft, Section 2 § 2.10.

appreciate the bond between the child and the other parent and to allow for a continuing relationship between the child and the other parent, unless the court finds that the other parent sexually assaulted or engaged in domestic violence against the parent or a child, and that a continuing relationship with the other parent will endanger the health or safety of either the parent or the child;

8. The degree to which one or both parents have relied on a prior agreement or order of the court regarding relocation;

9. The degree to which the parties' proposals for contact after relocation are feasible, having particular regard to the cost to the family and the burden to the child; and

10. Any other relevant factor affecting the best interests of the child.[53]

In 2006 the Australian Family Law Council published a report regarding relocation to advise the Attorney-General. The Report emphasises that the Family Law Act is not very helpful when it comes to relocation and suggests appropriate amendments. The Report brings four recommendations. The first one is in relation to whether or not the existing Family Law Act needs changes and if the answer is positive, how extensive. The Council suggested only inserting some amendments in relation to relocation. The second recommendation was to consider relocation cases as a special category of cases with special reference to indigenous children and to insert the amendments into the Family Law Act. The third recommendation suggested against any presumptions with respect to relocation, because "a presumption is not an appropriate way for the law to deal with relocation cases. A presumption would be a very blunt legal instrument for dealing with the complexities involved in such cases."[54] The fourth recommendation concerned the best interests of the child and factors for the court to consider when adjudicating on relocation. The Report suggested insertion of a new detailed provision into the Family Law Act with respect to the relevant factors to consider. The intention of this provision is to ensure that the court gets the extra information it needs.[55] Some of the factors are:

1. The relationship of the child with both parents;

2. The impact on the child;

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53 ABA Draft, Section 9.

54 A Report to the Attorney-General prepared by the Family Law Council, May, 2006, p. 64, at www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Relocation_report.pdf (12 June 2015).

55 A.-G. Report, pp. 67-73.

3. Reasons for relocation, but also
4. What are the alternatives to the proposed relocation;
5. Whether it is reasonable and practicable for the person opposing the application to move to be closer to the child if the relocation is to be permitted; and
6. Whether the person who is opposing the relocation is willing and able to assume primary caring responsibility for the child if the person proposing to relocate chooses to do so without taking the child;
7. Whether, given the age and the developmental level of the child, the child's relocation would interfere with the child's ability to form strong attachments to both parents, etc.

Besides the abovementioned, when making the relocation decision the court should consider the freedom of movement of persons between the states of Australia. However, parents' rights are subordinate to the best interests of the child.[56] .....The Report did not include: a definition of child relocation, notice requirements nor a burden of proof.

In 2007 the CEFL[57] published the Principles of European Family Law regarding Parental Responsibilities. The Principle relevant to relocation does not comprise any definition of relocation. There is an obligation to give notice, but the time frame is not specified.[58] The Principle does not distinguish between the relocation within or outside the jurisdiction, so it addresses national as well as international relocation cases.[59] The Principle also provides a set of non-exhaustive consideration factors:

1. The age and opinion of the child;
2. The right of the child to maintain personal relationships with the other holders of parental responsibilities;
3. The ability and willingness of the holders of parental responsibilities to co-operate with each other;
4. The personal situation of the holders of parental responsibilities;

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56 A.-G. Report, p. 2.

57 Established in Utrecht in September 2001, with the main objective to develop the non-binding principles which may serve as an inspiration for the harmonisation of family law in Europe.

58 Principle 3.21(1) says: "in advance".

59 See: K. Boele-Woelki, *Principles of European Family Law Regarding Parental Responsibilities* (Intersentia, Antwerpen-Oxford, 2007) p. 141.

5. Geographical distance and accessibility; and

6. The free movement of persons.[60]

2. Attempts on global level

The Hague Conference on Private International Law[61] is a permanent inter-governmental organisation with the aim "to work for the progressive unification of private international law rules".[62] To achieve that, the Conference develops international legal instruments to serve worldwide needs.[63] When it comes to relocation, the Hague Conference on Private International Law has long seen the need to develop more satisfactory ways to decide relocation cases because of the interrelationship between relocation and child abduction.[64] Namely, both of them are concerned with the removal of the child from his or her habitual residence, but while relocation is the lawful removal of the child after having obtained the consent of the other parent or the court, abduction is the unlawful removal of the child from his or her habitual residence. The other similarity is the same basic concern – whether or not to allow the custodial parent to move with the child to another country, i.e. "which option is the lesser of two evils for a child where the custodial or joint custodial parent wishes to move to another country and the other parent does not".[65] Generally speaking, a liberal approach to relocation means less child abductions. *Vice versa*, the harder it is to obtain permission to relocate, the greater is the incentive to abduct.

On the other hand, relocation law comes into play only where the relocating parent needs the consent of the other parent to change the child's country of residence. If the left behind parent does not have joint legal custody or the

60 For guidance on how this question can be solved see: P. Parkinson, 'Freedom of movement in an era of shared parenting: the differences in judicial approaches to relocation' 36 *Fed. L. Rev.* (2008) p. 145.

61 The Conference had its first meeting in 1893. It became a permanent inter-governmental organisation in 1955. At this moment there are 72 members of the Conference, representing all the continents.

62 See pages of the Hague Conference www.hcch.net (12 June 2015).

63 Bérénos, *op. cit.* n. 13, p.12.

64 Elrod, *op. cit.* n. 7, p. 346.

65 Schuz, *op. cit.* n. 8, p. 71.

right to *ne exeat*,[66] the custodial parent is free to move with the child as he or she wants. However, the majority of legislators today accept the trend towards granting joint legal custody, and even joint physical custody. Combined with the increased number of international marriages, this approach makes some parents desperate enough to attempt child abduction. In that sense, as early as in 2001, the Fourth Special Commission Meeting identified the existing need for harmonisation of laws with respect to parental responsibility and relocation, especially because the frequency of international child abductions is growing by the day and different courts are taking different approaches. The Commission expressly pointed out the adverse effects of restrictive approach to relocation. In 2006 the Fifth Special Commission Meeting went a step further and expressly "encouraged all attempts to seek to resolve differences among legal systems so as to arrive as far as possible at a common approach and common standards as regards relocation".[67]

Some years later, in 2010, the Hague Conference on Private International Law, together with the International Centre for Missing and Exploited Children, took part in a conference in Washington, which ended with the adoption of a document called the "Washington Declaration on International Family Relocation". The Declaration gives 13 recommendations and a list of 13 Principles as a guide to the courts when deciding on relocation issues. The Declaration is clearly against any presumptions and in favour of the best interests of the child as the paramount consideration. It also requires a reasonable notice and gives 13 factors as relevant for the judges to consider:

1. The right of the child separated from one parent to maintain personal relations and direct contact with both parents on a regular basis in a manner consistent with the child's development, except if the contact is contrary to the child's best interests;
2. The views of the child having regard to the child's age and maturity;
3. The parties' proposals for the practical arrangements for relocation, including accommodation, schooling and employment;

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66 The right to veto removal from jurisdiction. It can be allocated to the party by court decision or *ex lege*. "A *ne exeat* order is a custody device used by international courts that requires either both parents' consent or permission from the court before a custodial parent may change a child's country of residence." *Black's Law Dictionary* (9th ed. 2009) p. 1131. A *ne exeat* clause is defined as "an equitable writ restraining a person from leaving, or removing a child or property from the jurisdiction".

67 Conclusions and Recommendations of the Fifth Special Commission Meeting, at www.hcch.net/index_en.php?act=publications.details&pid=3905&dtid=2 para. 1.7.5. (12 June 2015).

4. Where relevant to the determination of the outcome, the reasons for seeking or opposing the relocation;
5. Any history of family violence or abuse, whether physical or psychological;
6. The history of the family and particularly the continuity and quality of past and current care and contact arrangements;
7. Pre-existing custody and access determinations;
8. The impact of grant or refusal on the child, in the context of his or her extended family, education and social life, and on the parties;
9. The nature of the inter-parental relationship and the commitment of the applicant to support and facilitate the relationship between the child and the respondent after the relocation;
10. Whether the parties' proposals for contact after relocation are realistic, having particular regard to the cost of the family and the burden to the child;
11. The enforceability of contact provisions ordered as a condition of relocation in the State of destination;
12. Issues of mobility for family members; and
13. Any other circumstances deemed to be relevant by the judge.

Unfortunately, already two years later, in 2012, at the next Special Commission Meeting most of the members believed that relocation is a question of national law and not directly within the auspices of the Hague Conference. So, at the end, this great initiative remained limited to Conclusions and Recommendations in the sense of recognition of the Washington Declaration as a platform for further investigation, support to further investigation of the relocation problem and support to the ratification of the 1996 Hague Convention, as an instrument of value for international relocation.

Namely, the 1996 Hague Convention deals, amongst other things, with "rights of custody, including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, as well as rights of access including the right to take a child for a limited period of time to a place other than the child's habitual residence".[68] But, with regard to applicable law, the 1996 Convention also points to the law of habitual residence of the child.

68 Article 3(b) of the 1996 Hague Convention.

So, up until today the question of international relocation remains unsolved, meaning that there are no international instruments that deal with the relocation issue. It is still a question which has to be solved in front of the domestic court, either the national or the court of habitual residence of the child, depending on whether it is a national or international case. This has for many years created great problems in abduction cases where the 1980 Hague Convention[69] applies, because of the lack of clear definition of "custody" in the Convention's language.[70] Namely, Article 5 of the Convention includes an autonomous definition of the "rights of custody", as rights relating to the care of the person of the child, in particular the right to determine the child's place of residence. However, the removal or retention of a child will be considered wrongful if "it is in breach of the 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", under the condition that "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".[71]

So, whether the removal or retention of the child will be considered wrongful depends on the law of the state of habitual residence of the child. A problem appears if the law of the respective state does not expressly regulate relocation or does not explain the meaning of a *ne exeat* clause given to the parent with visitation rights.[72]

The case law of the United States clearly shows the importance of a better formulation of relocation law. The first published case, which marked the next eleven years (1999 – 2010) of American adjudication was Croll v. Croll.[73] The mother got "custody, care and control" and the father got "reasonable access". The judgment also included a *ne exeat* clause which expressly stated

69 Convention on the Civil Aspects of International Child Abduction, at http://www.hcch.net/index_en.php?act=conventions.text&cid=24 (12 June 2015).

70 See: M. Sattler, 'The Problem of Parental Relocation: Closing the Loophole in the Law of International Child Abduction' 67 *Wash. & Lee. L. Rev.* (2010) p. 1709, at http://scholarlycommons.law.wlu.edu/wlulr/vol67/iss4/12 (12 June 2015).

71 Article 3 of the 1980 Hague Convention.

72 The question of what is to be considered the "law of the State" for the purposes of application of the 1980 Hague Convention's provisions is also a very delicate one because part of the national law are also private international law rules, but we are not going to deal with it here. For more see: E. Peres-Vera, *Explanatory Report, III Hague Conference on Private International Law* (Acts and Documents of the 14th Session 429, 1982) para. 68. p. 446.

73 C.B. Whitman, 'Croll v. Croll: The Second Circuit Limits 'Custody Rights' Under The Hague Convention on the Civil Aspects of International Child Abduction' 9 *Tulane J. of Int'l & Comp. L.* (2001) pp. 605-627.

that the child is not to leave the country without a court permission or written permission from the father. The mother took the child from Hong Kong to the United States in breach of the *ne exeat* clause. The father then started proceedings pursuant to the 1980 Hague Convention and the first instance court decided in his favour. The mother complained and the Second Circuit Court of Appeals reversed the first instance judgment in favour of the mother, holding that, even when paired with a *ne exeat* clause, the rights of access do not become the rights of custody within the realm of the Hague Convention and thus do not invoke the return of the child.[74] The Second Circuit Court of Appeals consulted dictionary definitions on "custody" and concluded that all the dictionaries with regard to the term "custodial parent" refer to the person with whom the child lives, so it can never be a parent who holds only visitation rights.[75] Additionally, the court held that the *ne exeat* right refers exclusively to the right to determine the child's residence within that state.

A second case, Gonzalez v. Gutierrez,[76] which was brought before the Ninth Circuit Court of Appeals, also ended with the conclusion that the *ne exeat* right means no more than protection of visitation rights.[77] To support its interpretation, the Court referred to the history of the 1980 Hague Convention, i.e. the fact that in 1996 while the discussion of possible amendments of the 1980 Hague Convention was in progress the *ne exeat* clause was not even discussed. The Court concluded that it shows the intention of the authors of the Convention to keep the clear division between the custody and visitation rights.

A third case, Fawcett v. McRoberts,[78] followed the same road as the previous two. The Fourth Circuit Court of Appeals adjudicated against *ne exeat* as part of custody rights.

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74 Judge Sotomayor gave a separate view, in which she pointed out that, in her opinion, the purpose and aims of the 1980 Hague Convention call for such interpretation according to which the right given by the *ne exeat* clause constitutes a custody right. See: D.L. Brewer, 'The Last Rights: Controversial Ne Exeat Clause Grants Custodial Power under Abbott v. Abbott' 62 *Mercer L. Rev.* (2011) p. 674.

75 Whitman, *op. cit.* n. 73, pp. 618-619

76 S.J. Bass, 'Ne Exeat Clauses Proven Ineffective: How the Hague Convention Renders Access Rights Illusory' 29 *N. C. J. Int'l L. & Com. Reg.* (2004) pp. 573-594.

77 According to the Court's explanation, only the party which violates someone's custody right can be submitted to the 1980 Hague Convention's provisions. On the contrary, a violation of someone's visitation rights stays outside the scope of the Convention ("not all parental disputes warrant direct intervention by the courts of the State to which children are taken", "the Convention allows remedy of return only for the parent with superior rights"). See: Bass, *op. cit.* n. 76, p. 577.

78 T. Jones, 'A Ne Exeat Clause is a "Right of Custody" for the Purposes of the Hague Convention: Abott v. Abott' 49 *Duq. L. Rev.* (2011) pp. 537-538.

New winds started to blow in 2004. In Furness v. Reeves,[79] the decision of the Eleventh Circuit shows a paradigm shift in adjudications of American courts. After repealing the first instance judgment, the Eleventh Circuit Court of Appeals adjudicated that the *ne exeat* clause constituted a custody right under the 1980 Hague Convention, thus making removal without consent "wrongful" under the Convention. Ms. Reeves appealed against the decision of the Eleventh Circuit Court of Appeals to the Supreme Court of the United States, but the Supreme Court denied her petition for certiorari.[80] By doing that, the Supreme Court of the USA missed a great opportunity to set the precedent in such an important question, leading to a uniform interpretation of the Convention.

Finally, in 2010, with Abott v. Abott,[81] the American saga on the interpretation of the *ne exeat* right ended. The district court "held that the father's *ne exeat* right did not constitute a right of custody under the 1980 Hague Convention and, as a result, that the return remedy was not authorised". On an appeal, the United States Court of Appeals for the Fifth Circuit affirmed the district court's decision, following the precedent of the United States Courts of Appeals for the Second, Fourth and Ninth Circuits. So, the Fifth Circuit Court of Appeals also determined that a parent's *ne exeat* right is merely a "veto right" over the child's departure from a country. Having in mind the dissenting views of the Eleventh Circuit Court of Appeals and the dissenting opinion of Judge Sotomayor in Croll v. Croll, the Supreme Court of the United States decided it was time to resolve the conflict between the circuits and the granted certiorari. The Supreme Court of the United States held that a parent's *ne exeat* right granted in a foreign court is to be considered by the United States to constitute a "right of custody", as defined in the 1980 Hague Convention, rather than a "right of access". Namely, having in mind Article 5 of the Convention and its autonomous definition of the custody rights, which includes the right to determine the place of residence of the child, the Supreme Court adjourned that the

79 K.A. O'Connor, 'What Gives You The Right? – Ne Exeat Rights Should Constitute Rights of Custody after Furnes v. Reeves' 24 *Penn St. Int'l L. Rev.* (2005-2006) pp. 451-452, 461-465.

80 In the United States, it is a writ seeking judicial review. It is issued by a superior court, directing an inferior court, tribunal, or other public authority to send the record of a proceeding for review; at http://en.wikipedia.org/wiki/Certiorari (12 June 2015).

81 Brewer, op. cit. n. 74, p. 663-683.; A. Gupte, 'Rights of Access with Ne Exeat Clause Do Not Create Rights of Custody Under Hague Convention – Abbot v. Abbot' 33 *Suffolk Transnat'l L. Rev.* (2010) p. 187.

term "place of residence" can also be understood as "country of residence",[82] especially having in mind that the child's life, mother tongue and all the other circumstances are closely connected with the country of the child's habitual residence.[83] The consequences of this ruling can be observed on different levels. On the domestic level, the Supreme Court resolved a federal circuit split and dictated the standard for domestic courts to follow in cases involving the 1980 Hague Convention. On the international level, this decision signals to the international community that the United States' judicial system is willing to utilise foreign laws and policies to interpret treaties to which the United States is a party.[84]

The definition enclosed in BU II bis[85] mainly copies the one for child abduction found in Article 3 of the 1980 Hague Convention. However, compared to the definition incorporated in the 1980 Hague Convention, in our view, it has an important addition which clears the problems with the interpretation of the *ne exeat* clause. According to Article 2(11)(b), "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".[86]

Namely, since the EU law has priority with respect to national law, it means that, even when the applicable law attributes the exclusive legal and physical custody to one parent and visitation rights and *ne exeat* to the other parent, for the purpose of the application of the BU II bis provisions, custody shall

82 Judge Stevens dissented from the majority opinion and argued that such interpretation was wrong because the authors of the Convention in certain provisions used the term "place of residence" and in some other provisions the term "state of residence", so it is to conclude that their intention was to keep the distinction between these two terms. The dissent also criticised the weight afforded to the contrary opinions of international courts (of Australia, United Kingdom, Israel, Austria, South Africa and Germany) and noted that the Department of State's opinion on the issue has changed a great deal throughout the years since the implementation and ratification of the Hague 1980 Convention. See: Brewer, op. cit. n. 74, p. 681.

83 For more details see: J.D. Hon Garbolino, 'The United States Supreme Court Settles the Ne Exeat Controversy in America: Abbot v Abbot' 59 *Int'l & Comp. L.Q.* (2010) p. 1158.

84 See: Brewer, op. cit. n. 74, p. 665.

85 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 L 338, 23. 12. 2003., pp.1-29.

86 On other important issues see: N. Lowe, 'The Impact of the Revised Brussels II Regulation on Cross-Border Relocation' *The Judges' Newsletter, Special Edition No 1* [International Judicial Conference On Cross-Border Family Relocation, 23-25 March 2010, Washington D.C., United States of America] (2010) pp. 69-72.

be considered to be exercised jointly (i.e. the removal or retention will be considered wrongful).

Of course, there are divided opinions with regard to such solution. Supporters refer to Article 5 of the 1980 Hague Convention, which defines custody rights as "... in particular, the right to determine the child's place of residence". They point out that such formulation indicates that exercise of the *ne exeat* right gives its holder a much bigger influence on the child's life than obvious at first sight. By exercising this right, he or she influences the child's identity, culture, language, etc. On the other hand, opponents believe that the only role of the *ne exeat* right is to protect the visitation rights and, as such, it is a part of visitation rights and not a part of custody rights.[87] They argue that such perception of the *ne exeat* clause blurs the distinction between visitation and custody rights.[88]

IV. State of play in Croatia

As already said, until today only some states in Europe have enacted special legislative provisions governing relocation disputes. The Republic of Croatia is not one of them. In Croatia, the question of relocation is considered to be an aspect of child custody determination (or modification) and is decided in accordance with the law governing custody disputes. According to Article 99 (1) of the Croatian Family Law Act,[89] "parents, whether they live together or are separated, equally, jointly and by agreement take care of the child, unless prescribed differently by this Act". According to Article 101 of the FLA, if parents are unable to reach an agreement with regard to the realisation of parental responsibilities or child's rights, the dispute can be settled through non-contentious court proceedings, at the request of the parents, social welfare officer or the child. If necessary, because of a substantial change of circumstances, the

87 Custody of a child entails the primary duty and ability to choose and give sustenance, shelter, clothing, moral and spiritual guidance, medical attention, education, etc. See: J.A. Jackson, 'Interpreting Ne Exeat Rights as Rights of Custody: The United States Supreme Court's Chance to Advance the Purposes of the Hague Convention on International Child Abduction' 84 *Tul. L. Rev.* (2009-2010) p. 200.

88 The Court considered the *ne exeat* right as purely a right to veto, which enables the other parent to forbid the child's removal to another country. Considering that such right does not obtrude the obligation to actively care for the child, it cannot be considered as a custody right and its holder cannot be considered as a custody rights holder. See: Jackson, op. cit. n. 87, p. 202.

89 Obiteljski zakon Republike Hrvatske, NN RH 116/03, 17/04,136/04, 107/07, 57711, 61/11.

court shall issue a new decision on custody and visitation, and, if required, on other aspects of parental responsibilities.[90]

It is obvious that the Croatian FLA provides for joint legal custody and that neither parent has the right to independently change the child's place of residence. So, for the relocation to be lawful there has to be an agreement or that question has to be settled by a court decision. Even though this is not expressly stated, the provisions of this Act are also applicable in cases where the custodial parent wants to relocate abroad with the child.

In our opinion, absence of specific relocation provisions, especially with regard to international relocation, is in no one's interest. Because each case is fact-sensitive, and there are currently no uniform standards, the potential for conflict is great.[91] Polarised parents, often contemptuous to each other, may easily lose focus of their child. On the other hand, the well intentioned, child-centred and "neutral" legal standard to consider "the best interests of the child" is vague enough to allow subjectivity and other sorts of influences to dictate the outcome of the proceedings.[92]

In that sense, it would be recommendable to the legislator to set some standards with regard to the notice, objection, burden of proof and factors for the court to consider when adjudicating relocation cases. It should improve legal certainty and, at the same time, allow a court to focus on the child's needs and customise the decision to best serve primarily the child's interests.

The current state of play in Croatia shows great differences amongst the decisions of different courts and as such only confirms the need for some guidance. Some judges emphasise the importance of stability, past caretaking and emotional bonds while others consider a variety of factors. Some judgments are highly restrictive while others are not. It makes the outcome utterly unpredictable for the parent who wishes to relocate with the child, which is a strong incentive for child abduction. Even more so with regard to international relocations.

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90 Article 102 of the FLA.

91 L.D. Elrod, M.D. Dale, 'Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance' 42 *Family L. Q.* (2008) p. 389.

92 G. Skoler, 'A Psychological Critique of International Child Custody and Abduction Law' 32 *Fam. L. Q.* (1998-1999) p. 558. For some other arguments see: L. Elrod, 'A Move in the Right Direction? Best Interests of the Child Emerging as the Standard for Relocation Cases', at http://jcc.haworthpress.com (12 June 2015).

V. Conclusion

Family law issues are no longer just local or national. In an era of international marriages and globalisation, it is hard to expect people will not move all over the globe. In such context, international child relocation is becoming a prominent question. Undoubtedly, compared to interstate relocation, relocation to a foreign country involves added difficulties.[93] For example, the country to which the relocation is planned may have different cultural conditions, the greater distance may lead to additional costs of visitation if not even make it practically impossible, there may also be some concerns with respect to enforcement of custody and visitation order in that country, etc. Then there are the internationally protected rights, which also have to be respected. For example, the child has the right not to be separated from his or her parents against his or her will[94] and to express his or her view freely and have contact on a regular basis with both parents.[95] The parent has the right to have contact with his or her child(ren)[96] and to move and reside throughout the territory of the European Union,[97] etc.

As case law shows, it is a handful for a judge to take care of. Without any guidance, it is not a surprise that some of them are reluctant to take any other but a restrictive approach. If at least there were some standards for interstate relocation, it would be easier to upgrade them to correspond to the demands of adjudication in international relocations. But there are none, at least in Croatia, so in our view the time has come for a new framework for relocation evaluations. It is an issue which requires close attention since it has a great impact on the lives of all the parties involved, especially on the life of the child.

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93 J. Grayson, 'International Relocation, the Right to Travel, and the Hague Convention: Additional Requirements for Custodial Parents' 28 *Fam. L. Q.* (1994-1995) p. 531.

94 Article 9(1) of the UN Convention on the Rights of the Child (1989), at http://www.ohchr.org/en/professionalinterest/pages/crc.aspx (12 June 2015).

95 Article 24 of the Charter of Fundamental Rights of the European Union, OJ EC C 364/1, 18 December 2000.

96 Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), at http://www.echr.coe.int/Documents/Convention_ENG.pdf (12 June 2015).

97 Article 21 of the Treaty on the Functioning of the European Union, OJ EU C 326/47, 26 October 2012. See also: P. Parkinson, 'Freedom of Movement in an Era of Shared Parenting: The Differences in Judicial Approaches to Relocation' 36 *Fed. L. Rev.* (2008) p. 145.

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Hague Conference and International Family Law - Child Abduction at Focus

Haška konferencija i međunarodno obiteljsko pravo - otmica djece u fokusu

DIRECT JUDICIAL COMMUNICATIONS AND THE INTERNATIONAL HAGUE NETWORK OF JUDGES UNDER THE HAGUE 1980 CHILD ABDUCTION CONVENTION

Philippe Lortie*

I. Introduction

An improved implementation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (hereinafter: the Hague 1980 Child Abduction Convention) in the region[1] calls upon the designation of judges[2] to the International Hague Network of Judges (IHNJ) and the use of direct judicial communications. Once 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* (hereinafter the Hague 1996 Child Protection Convention) is in force in the region these mechanisms could also be useful in this context.

To assist States in this respect, the Permanent Bureau (Secretariat) of the Hague Conference on Private International Law with the assistance of Members of the IHNJ developed the "Emerging Guidance regarding the development of the International Hague Network of Judges and General Principles for Judicial Communications, including commonly accepted safeguards for Direct Judicial Communications in specific cases, within the context of the International Hague Network of Judges"[3] (hereinafter: the "Principles" or "Emerging Guidance and General Principles for Judicial Communications").

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1 Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Hungary, Kosovo, Montenegro, Romania, Serbia, Slovenia, the former Yugoslav Republic of Macedonia,

2 As of 1 November 2014, Bulgaria, Hungary, Romania, Serbia and Slovenia have designated judges to the International Hague Network of Judges (IHNJ).

3 The Emerging Guidance and General Principles for Judicial Communications are available in English, French and Spanish on the website of the Hague Conference at www.hcch.net under the "Child Abduction Section" then "Judicial Communications".

1. Background of the principles

The drawing up of the Emerging Guidance and General Principles for Judicial Communications began following the Fifth Meeting of the Special Commission to review the operation of the Hague 1980 Child Abduction Convention and the practical implementation of the Hague 1996 Child Protection Convention (30 October – 9 November 2006).[4] Among the Conclusions and Recommendations of this meeting, the section relating to judicial communications contains the recommendation that the future work of the Permanent Bureau would include exploring the value of drawing up principles concerning direct judicial communications, which could serve as a model for the development of good practice, with the advice of a consultative group of experts drawn primarily from the judiciary.[5]

With this in mind, the Permanent Bureau gathered together a group of experts in July 2008 to discuss a preliminary draft.[6] The draft was improved in the

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4 "Conclusions and Recommendations of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the practical implementation of 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* (30 October-9 November 2006)", adopted by the Special Commission (hereinafter, "Conclusions and Recommendations of the Fifth Meeting of the Special Commission"). Available on the website of the Hague Conference at www.hcch.net under "Child Abduction Section" then "Special Commission meetings on the practical operation of the Convention".

5 Conclusion and Recommendation No 1.6.7 *e)*. This follows a suggestion for a recommendation contained in P. Lortie, "Report on Judicial Communications in relation to international child protection", Prel. Doc. No 8 of October 2006 drawn up for the attention of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (The Hague, 30 October – 9 November 2006) (hereinafter, "Prel. Doc. No 8/2006 on Judicial Communications"), at para. 73 under 7 *w)*. Available on the website of the Hague Conference at www.hcch.net under "Child Abduction Section" then "Special Commission meetings on the practical operation of the Convention" and "Preliminary Documents".

6 The following experts met at the Permanent Bureau: The Honourable Justice Victoria Bennett (Australia), Judge Eberhard Carl (Germany), Senior Judge Francisco Javier Forcada Miranda (Spain), Judge Myriam de Hemptinne (Belgium), Judge Jónas Johannsson (Iceland), The Honourable Justice Judith Kreeger (United States of America), Judge Robine de Lange-Tegelaar (Netherlands), Judge Jorge Antonio Maurique (Brazil), The Honourable Justice Dionisio Núñez Verdín (Mexico), Judge Annette C. Olland (Netherlands), The Honourable Judge Ricardo C. Pérez Manrique (Uruguay), Judge Lubomir Ptáček (Czech Republic), Kathy Ruckman (United States of America), Andrea Schulz (Germany), Judge Mônica Jacqueline Sifuentes Pacheco de Medeiros (Brazil), Judge Graciela Tagle (Argentina), François Thomas (European Union), The Right Honourable Lord Justice Mathew Thorpe (United Kingdom, England and Wales) and Markus Zalewski (European Union).

light of comments made by the experts to provide a basis for further discussion and consultation at the Joint Conference of the European Commission-Hague Conference on Direct Judicial Communications on Family Law Matters and the Development of Judicial Networks (hereinafter "the Joint EC-HCCH Conference"), which took place in Brussels, Belgium, in January 2009.[7] The Joint EC-HCCH Conference underlined the continued development and refinement of the Draft General Principles for Judicial Communications in consultation with judges from all regions of the world and different legal traditions.[8] The draft was the subject of discussion at a number of judicial conferences which took place thereafter.[9]

In June 2010, the Permanent Bureau gathered together a group of experts drawn from the judiciary[10] to develop further the Emerging Guidance and General Principles for Judicial Communications. These Principles were submitted formally in March 2011 to Contracting States to the Hague 1980 Child Abduction Convention and the Hague 1996 Child Protection Convention for their comments and suggestions prior to the meeting of the Special Commission to review the operation of those two Conventions, which took place from 1 to 10 June 2011. The Special Commission gave its general endorsement to

7 The Conclusions and Recommendations of the Joint EC-HCCH Judicial Conference are available on the website of the Hague Conference at www.hcch.net under "Child Abduction Section" then "Judicial Communications". These Conclusions and Recommendations were adopted by consensus by more than 140 judges from more than 55 jurisdictions representing all continents.

8 See, *ibid*., Conclusion and Recommendation No 16.

9 The Third Judicial Conference on Cross-Frontier Family Law Issues, St. Julian's, Malta, 24-26 March 2009; the International Family Justice Judicial Conference for Common Law and Commonwealth Jurisdictions, Cumberland Lodge, Windsor, United Kingdom, 4-8 August 2009; the International Hague Network of Judges Latin American Judges' Meeting, Montevideo, Uruguay, 4 December 2009; the International Judicial Conference on Cross-border Family Relocation, Washington, D.C., United States of America, 23-25 March 2010; and, the Inter-American Meeting of International Hague Network Judges and Central Authorities on International Child Abduction, Mexico, 23-25 February 2011.

10 The following experts met at the Permanent Bureau: The Honourable Judge Peter Boshier (New Zealand), The Honourable Justice Jacques Chamberland (Canada, Civil Law), Judge Martina Erb-Klunemann (Germany), Senior Judge Francisco Javier Forcada Miranda (Spain), Judge Myriam de Hemptinne (Belgium), Judge Jacques M.J. Keltjens (Netherlands), The Honourable Justice Judith Kreeger (United States of America), The Honourable Justice Dionisio Núñez Verdín (Mexico), The Honourable Judge Ricardo C. Pérez Manrique (Uruguay), Judge Lubomir Ptáček (Czech Republic), Judge Mônica Jacqueline Sifuentes Pacheco de Medeiros (Brazil) and The Right Honourable Lord Justice Mathew Thorpe (United Kingdom, England and Wales). Jenny Clift (United Nations Commission on International Trade Law (UNCITRAL)) joined the group as the officer responsible at the UNCITRAL Secretariat for judicial communications in insolvency matters.

the Emerging Guidance and General Principles for Judicial Communications. The current version of the Principles has been revised taking into account the discussions within the Special Commission and were endorsed in April 2012 by the Council on General and Policy (the governing body) of the Hague Conference on Private International Law.

II. The International Hague Network of Judges

1. The birth of the IHNJ

The IHNJ specialising in family matters was created at the 1998 De Ruwenberg Seminar for Judges on the international protection of children. It was recommended that the relevant authorities (*e.g.*, court presidents or other officials as is appropriate within the different legal cultures) in the different jurisdictions designate one or more members of the judiciary to act as a channel of communication and liaison with their national Central Authorities, with other judges within their jurisdictions and with judges in other Contracting States, in respect, at least initially, of issues relevant to the Hague 1980 Child Abduction Convention. It was felt that the development of such a network would facilitate communications and co-operation between judges at the international level and would assist in ensuring the effective operation of the Hague 1980 Child Abduction Convention. More than 15 years later, it is now recognised that there is a broad range of international instruments, both regional and multilateral, in relation to which direct judicial communications can play a role beyond the Hague 1980 Child Abduction Convention. The IHNJ currently includes more than 95 judges from more than 70 States in all continents.[11]

2. Designation of Judges to the IHNJ

States that have not designated a Network Judge are strongly encouraged to do so.[12] Judges designated to the Network with responsibility for international child protection matters should be sitting judges[13] with authority and present experience in that area.[14] It is important to note that competent authorities responsible for making such designations vary from State to State. Examples

11 A complete list of Members of the International Hague Network of Judges is available on the website of the Hague Conference at www.hcch.net under "Child Abduction Section" then "International Hague Network of Judges".

12 Principle 1.1, *op. cit.* n. 3.

13 These are judges that are currently carrying out judicial functions.

14 Principle 1.2, *op. cit.* n. 3.

of these competent authorities include judicial councils, supreme courts, chief justices, assemblies of judges or, sometimes, the Ministry of Justice or other relevant government department. 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.[15] It is established practice that judges who are no longer active should resign from the Network to be replaced by sitting judges with authority and present experience in that area. Designations should be made by way of a signed letter or the transmission of any official document from the competent authority responsible for the designation.[16]

3. The role of members of the IHNJ

The role of a member of the IHNJ is to be primarily a link between his or her colleagues at the domestic level and other members of the Network at the international level. There are two main communication functions exercised by members of the Network. The first communication function is of a general nature (*i.e.*, not case specific). It includes the sharing of general information from the IHNJ or the Permanent Bureau of the Hague Conference on Private International Law with his or her colleagues in the jurisdiction and vice versa. It may also encompass the sharing of general information with regard to the interpretation and operation of international instruments. The second communication function consists of direct judicial communications between two sitting judges with regard to specific cases. The objective of such communications is to address any lack of information of the competent judge, who, for example, may be seized of a return application under the Hague 1980 Child Abduction Convention and may have questions about the situation and legal implications in the State of the habitual residence of the child.

III. Direct judicial communications concerning specific cases

Current practice shows that these communications mostly take place in child abduction cases under the Hague 1980 Child Abduction Convention. These cases show that these communications can be very useful for resolving some of the practical issues, for example, surrounding the safe return of a child (and accompanying parent, as necessary), including the establishment of urgent and / or provisional measures of protection and the provision of information

15 *Ibid*., Principle 1.6.

16 *Ibid.*, Principle 1.7.

about custody or access issues or possible measures for addressing domestic violence or abuse allegations, and they may result in immediate decisions or settlements between the parents before the court in the requested State. These communications will often result in considerable time savings and better use of available resources, all in the best interests of the child.

The role of the Hague Network Judge is to receive and, where necessary, channel incoming judicial communications and initiate or facilitate outgoing communications. The Hague Network Judge may be the judge involved in the communication itself, or he or she may facilitate the communication between the judges seized with the specific case. Such communications are different from Letters of Request used in the context of the cross-border taking of evidence. Such taking of evidence should follow the channels prescribed by law. When a judge is not in a position to provide assistance he or she may invite the other judge to contact the relevant authority.

1. Direct judicial communications subject matters

Matters that may be the subject of direct judicial communications include, for example:

1.1. Scheduling the case in the foreign jurisdiction:

- to make interim orders, *e.g.*, support, measure of protection;

- to ensure the availability of expedited hearings.

Example: Justice Singer from the United Kingdom (England and Wales) was considering ordering the return of two children to the United States of America (California) in the context of an application under the Hague 1980 Child Abduction Convention.[17] Justice Singer engaged in direct judicial communications with the relevant California family law judge, who agreed to make efforts to ensure that child custody proceedings instituted in California would be given priority appropriate to the case if the child was returned. The California judge also agreed to make himself available at short notice, if needed, in order to make any immediate and necessary interim arrangements for the children prior to their arrival in his jurisdiction. As there was also an outstanding arrest warrant in California for the mother's breach of probation, Justice Singer also liaised with the appropriate Californian criminal judge, arranging for a recall of the warrant until the issues relating to the children were resolved.

17 *Re M and J* (Abduction: International Judicial Collaboration) 1 *FLR* (2000) 803.

1.2. 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

Example: Justice Moylan from the United Kingdom (England and Wales) was considering an application for the return of children to Malta under the Hague 1980 Child Abduction Convention.[18] Justice Moylan reported that the taking mother "raised very significant issues about domestic violence both in respect of her and in respect of the children."[19] Justice Moylan, with agreement of the parties, initiated and carried out direct judicial communications to assist in establishing "what arrangements could be made in the other State to secure the protection of the children in the event that [the judge] ordered their return".[20] A prompt response was received from the judge in Malta, which: a) identified the relevant agency concerned with child protection in Malta; b) "made clear that child protection measures could be initiated expeditiously when and if required";[21] and c) made clear that other orders (of protection) could also be made expeditiously. Justice Moylan noted that the communication had provided him with the "necessary degree of what might best be described as comfort not only to me but also, perhaps more importantly, to the mother, that a proper protective structure was available so that she felt able to agree to return with the children."[22]

1.3. Ascertaining whether the foreign court can accept and enforce undertakings offered by the parties in the initiating jurisdiction

Example: A mother had travelled with her 2½ year old child to the United States of America without the consent of the father, who remained in Greece. The parents were married and had joint rights of custody. A judge in the United States of America (Connecticut) ordered, under the Hague

18 This case was reported by Judge Andrew Moylan in *The Judges' Newsletter on International Child Protection* Vol. XV, Autumn 2009, at p. 17 (available on the website of the Hague Conference, www.hcch.net, under "Specialised sections" then "Child Abduction Section"). Note that this case was subject to the "Brussels II a Regulation" (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) and was therefore also subject to Article 11(4) of that Regulation, which supplements Article 13(1) *b)* of the Hague 1980 Child Abduction Convention among Member States of the European Union where the Regulation is applicable.

19 *bid.*, p. 19.

20 *Ibid.*

21 *Ibid.*

22 *Ibid.*

1980 Child Abduction Convention, the return of the child to Greece, subject to undertakings.[23] The court received undertakings from each party as well as from counsel for the child. The court in the United States of America affirmed that attempts would be made to arrange a conference call with the judge in Greece to ensure that the undertakings would be honoured there. The court noted that such an arrangement between judges could obviate the need of a bond to insure the fulfilment of any undertaking set by the court in Connecticut.

1.4. Ascertaining whether the foreign court can issue a mirror order (i.e., same order in both jurisdictions)

Example: The Constitutional Court of South Africa was deciding upon an appeal of an order made under the Hague 1980 Child Abduction Convention for the return of a child to Canada (British Columbia).[24] The mother, appealing the return order, raised substantiated concerns about domestic violence. The South African court required that the applicant act on a number of undertakings (including refraining from criminal or other legal charges towards the abducting parent, providing financial and other material support, co-operating with child services authorities, etc.) by obtaining an order from the appropriate court in British Columbia mirroring, "insofar that it is possible" the order by the requested court in South Africa. Such a "mirror order" then had to be communicated to the requested court. The South African court, by way of communications made by a Family Advocate, also ensured that enquiries were made to the foreign court, via the Central Authority in British Columbia, regarding a specific time-line as to when a custody determination in the State of habitual residence would be made. The court noted that it was "clearly in the interests of [the child] that certainty as to her custody and guardianship be settled at the earliest possible time."[25]

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23 *Panazatou v. Pantazatos*, No. FA 960713571S (Conn. Super. Ct. Sept. 24, 1997). The decision and a summary can be found at http://www.incadat.com Ref. HC/E/USs 97 [24/09/1997; Superior Court of Connecticut, Judicial District of Hartford (United States of America); First Instance].

24 *Sonderup v. Tondelli*, 2001 (1) SA 1171 (CC). The decision and a summary can be found at http://www.incadat.com Ref. HC/E/ZA 309 [12/04/2000; Constitutional Court of South Africa; Superior Appellate Court].

25 Although it is unclear if judicial communications were made directly between judges in this case, it is a clear instance of court-to-court communications, where direct judicial communications could be employed.

1.5. Confirming whether orders were made by the foreign court

Example: Judge Kay of the Appeal Division of the Family Law Court of Australia (then member of the IHNJ) was a seized judge in the State of habitual residence of a child who had been returned from New Zealand under the Hague 1980 Child Abduction Convention.[26] Judge Kay established direct communications with Judge Mahony (then member of the IHNJ and Principal Judge of the Family Law Court of New Zealand). Judge Kay had cause to rule upon some conditions that had been imposed by a Judge of New Zealand for the return of a child to Australia. After having made the orders the New Zealand Judge had thought appropriate, Judge Kay wrote to Judge Mahony to draw his attention to some issues of jurisdiction he had identified in his reasons. These were indicative of the New Zealand Judge having possibly infringed upon aspects of the Australian court's jurisdiction.

1.6. Verifying whether findings about domestic violence were made by the foreign court

Example: A mother removed two children from Ireland to the United States of America (Massachusetts), and her husband, possessing joint rights of custody, filed a return application under the Hague 1980 Child Abduction Convention.[27] A return order for the children to Ireland was issued by the court of first instance, and the mother appealed the decision, arguing a 13(1) *b)* grave risk of harm exception to return due to domestic violence. The appellate court overruled the first instance return order, indicating that the concern was not only whether the Irish authorities would issue protective orders upon return but rather whether the alleged abuser would violate them, as he had a history of fleeing criminal charges and had violated previous court orders in Ireland and in the United States of America. Protection orders in the context of domestic violence had previously been issued

26 Reported by Judge Joseph Kay, in 'Memoirs of a Liaison Judge' III *The Judges' Newsletter (*Autumn 2001) *op. cit.* n. 8, at pp. 20-24.

27 *Walsh v. Walsh*, 221 F.3d 204; Fed: 1st Cir. (2000). The decision and a summary can be found at http://www.incadat.com Ref. HC/E/USf 326 [25/07/2000; United States Court of Appeals for the First Circuit; Appellate Court].

in Ireland, following repeated instances of physical abuse.[28]

1.7. Verifying whether a transfer of jurisdiction is appropriate

Example: Articles 8 and 9 the Hague 1996 Child Protection Convention contain procedures whereby jurisdiction may be transferred from one Contracting State to another in circumstances where the judge normally exercises jurisdiction (*i.e.* in the country of the child's habitual residence). For example, under Article 8 of the 1996 Convention, by way of exception, an authority having jurisdiction under Article 5 or 6, if it considers that the authority of another Contracting State would be better placed in a particular case to assess the best interests of the child, may either: (i) request that other authority, directly or with the assistance of the Central Authority of its State, to assume jurisdiction to take such measures of protection as it considers to be necessary, or (ii) suspend consideration of the case and invite the parties to introduce such a request before the authority of that other State. Article 9 of the 1996 Convention sets out a parallel scheme for the foreign counterpart authorities to also request a transfer of jurisdiction if they think that they are better placed in a particular case to assess the child's best interests. The judicial co-operation system necessary to support these communications is laid-out in Articles 31 and following of the 1996 Convention.[29]

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28 Although it was not reported that direct judicial communications were used in this case, it is a clear that the documented domestic violence and the existence of a protection order in the foreign jurisdiction were important in determining this case. Ascertaining the existence or nature of such an order in a foreign jurisdiction might form the object of direct judicial communications. Article 13(3) of the Hague 1980 Child Abduction Convention stipulates that "[i]n considering the circumstances referred to in this Article [Art. 13], 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."

29 As the operation of the 1996 Hague Convention is still very young there is not yet any known case law on this matter under the Convention. However, see Re Y (a child) [2013] EWCA Civ 129 (United Kingdom, England and Wales) for an instance of judicial communications on the issue of enforceability of orders under Article 23 of the 1996 Convention. See also LM (A Child) [2013] EWHC 646 (Fam) (United Kingdom, England and Wales) for a case under the Brussels II a Regulation of the European Union concerning a transfer of jurisdiction and the desirability of direct judicial communications (subsequently endorsed in HJ (A Child) [2013] EWHC 1867 (Fam) and in LA v ML & Ors [2013] 2063 (Fam)), as Article 15 of Brussels II a is very similar to Arts 8 and 9 of the 1996 Hague Convention.

1.8. Ascertaining the application / interpretation of foreign law in order to assist in establishing whether removal or retention has been wrongful

Example: A child of two Polish nationals, previously residing in Poland, had been removed by the mother to the United Kingdom (England and Wales).[30] A Polish court had ordered that the child live with the mother, while the father was granted contact. The father filed an application under the Hague 1980 Child Abduction Convention for the return of the child to Poland. Proceedings in the United Kingdom were delayed due to confusion around the issue of whether the father possessed custody rights in Poland, in order to meet the Article 3 requirements of the Convention. The United Kingdom (England and Wales) appeal court offered commentary that the case was an occasion where direct judicial communications might be employed to most quickly and effectively assist in resolving this issue, noting that an opinion from the Polish liaison judge "would not be binding, but […] would perhaps help the parties and the court of trial to see the weight or want of weight, in the challenge to the plaintiff's ability to cross the Article 3 threshold."[31]

1.9. Ascertaining that the abducting parent would have due access to justice in the State where the child would be returned (*e.g.*, where necessary, access to free legal representation, etc.)

Example: Two children for which the married parents had joint rights of custody were taken by their mother from the United States of America (California) to Canada (Quebec), the mother's State of origin.[32] An escalation of legal proceedings followed and the mother initiated custody proceedings in Quebec. A court in California then ordered the mother to return the children to California. The Quebec Court subsequently awarded the mother provisional custody, and the father contested the jurisdiction of the court. The California court awarded interim custody to the father. Finally,

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30 F (A Child) [2009] EWCA Civ 416; [2009] 2 FLR 1023.

31 *Ibid*, at para. 12. Thorpe J also clarified that "[e]ven the formal determination by a court in the requesting state of the status of the father's rights according to the domestic law is not determinative, because in the end a question has to be decided according to the autonomous law of the Convention and not the domestic law of the requesting state. But in practice, in the majority of cases, a definitive ruling from the court of the requesting state under Art 15 will be determinative of the issue."

32 *D. v. B.*, 17 May 1996, transcript, affirmed by a majority decision by the Quebec Court of Appeal, 27 September 1996. 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); First Instance].

the father applied to the Superior Court of Quebec for the return of the children under the Hague 1980 Child Abduction Convention. Further to direct judicial communications, the return to California was ordered. The trial judge in Quebec made contact with the responsible judge in California to ascertain whether the mother would be at a disadvantage upon return for having refused to comply with the California order to return with the children. A judge of the California Supreme Court stated this would not be the case and offered to sign an additional order clarifying that his previous custody order was interim only (the latter was subsequently set out in full in the Canadian judgment).

1.10. Whether a parent will be subject to civil / criminal sanctions when returning with a child to the State of habitual residence

Example: A Hague 1980 Child Abduction Convention return application came before Judge Gillen in Northern Ireland regarding three children who had allegedly been abducted from the United States of America and taken to Northern Ireland by their mother.[33] The application was on behalf of the father, residing in the United States of America. The mother raised concerns as to what would happen if she returned to the United States of America with the children. After discussing the case with counsel for each party, Judge Gillen contacted, by telephone, Assistant Superior Judge McElyea in Georgia, United States of America. Judge Gillen received assurances from Judge McElyea that the mother would not be subject to any further civil sanction provided that the children were returned subject to a return order. Judge McElyea also shared her view (whilst not inviting reliance) that it was unlikely that the returning parent would be prosecuted by the Law Enforcement Agency without the initiation of the applicant-father, and provided the court with the name and contact details of the local sheriff. Judge McElyea also affirmed that she would try to afford a measure of urgency to the custody hearings upon return of the mother and children. The communications between the judges were conducted in the presence of counsel to the parties and the communications were summarized in written documents also circulated to counsel.

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33 Case reported in "Practical Mechanisms for Facilitating Direct International Judicial Communications in the Context of the Hague *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*: A Preliminary Report," drawn up by Philippe Lortie, First Secretary, Preliminary Document No 6 (and Appendices A and B) of August 2002 for the attention of the Special Commission of September / October 2002 (available on the Hague Conference website at www.hcch.net under "Specialised Sections" then "Child Abduction Section" and "Special Commission meetings on the practical operation of the Convention" then "Preliminary Documents").

1.11. Resolving issues of parallel proceedings and the taking of jurisdiction

Example: In April 2007 the Canadian Judicial Council approved the concept of judicial networking and collaboration in cases where another jurisdiction is involved. The protocol encourages direct judicial communication with the foreign jurisdiction. The judicial communication is not for the purpose of considering the merits of the case. Rather it is simply to make the other court aware of the dual proceedings. The purpose was best expressed by Martinson J. in *Hoole v. Hoole*, 2008 B.C.S.C. 1248 (British Columbia Supreme Court (Canada)) as follows:

> "There is a recognition that judicial communication should not be for the purpose of considering the merits of the case. Instead, it can provide judges with the relevant information needed to make necessary decisions, such as making informed decisions on jurisdiction, including the location of the place of habitual residence. It can also assist judges in obtaining information about the custody laws of the other jurisdiction, which is needed to determine whether a removal or retention was wrongful."

2. Establishing an outgoing direct judicial communication in a specific case

Upon request from one of the parties or on its own motion, a judge seized of an international child protection case may decide to make use of direct judicial communications. Doing so, the following steps should be followed with a view to establish a line of communications:

1) The judge seized of an international chid protection case who wants to make use of direct judicial communications will first verify whether a Judge from his / her State has been designated to the IHNJ by consulting the list of Members available on the website of the Hague Conference at < www.hcch.net > under "Child Abduction Section" then "International Hague Network of Judges".
2) The judge seized of an international child protection case will then send a request for direct judicial communications to the member of the IHNJ of his / her State using the most rapid and appropriate means of communication.
3) The International Hague Network Judge of his / her State will then forward the request to the International Hague Network Judge of the State where the other party to the dispute is located.

4) The International Hague Network Judge of the other State will locate the Court and the Judge already seized by the other party and will forward to him / her the request for direct judicial communications.

5) If there is no Judge seized, the International Hague Network Judge of the other State will determine who should respond to the request or will respond himself / herself to the request.

6) A Judge from the other State will then contact the Judge in the State of origin of the request.

When making direct judicial communications, one should follow Principles 6 to 9 (reproduced below) as set out in the Emerging Guidance and General Principles for Judicial Communications.[34] The Principles for Judicial Communications will provide transparency, certainty and predictability to such communications for both judges involved as well as for the parties and their representatives. Such Principles are meant to ensure that direct judicial communications are carried out in a way which respects the legal requirements in the respective jurisdictions and the fundamental principle of judicial independence in carrying out Network functions. The Principles are drafted in a flexible way to meet the various procedural requirements found in different legal systems and legal traditions.

V. Conclusion

It is hoped that the region will follow the example of other regions by designating judges to the IHNJ and by embracing direct judicial communications. In Latin America all the States Parties to the Hague 1980 Child Abduction Convention where within the European Union only Croatia, Greece and Lithuania, out of the 28 Member States, have not yet designated a judge to the IHNJ.

34 *Op. cit.* n. 3.

Principles for Direct Judicial Communications in specific cases including commonly accepted safeguards (Principles 6-9)

6. Communication safeguards

Overarching principles

6.1. Every judge engaging in direct judicial communications must respect the law of his or her own jurisdiction.

6.2. When communicating, each judge seized should maintain his or her independence in reaching his or her own decision on the matter at issue.

6.3. Communications 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

6.4. In Contracting States in which direct judicial communications are practised, the following are commonly accepted procedural safeguards:

– except in special circumstances, parties are to be notified of the nature of the proposed communication;

– a record is to be kept of communications and it is to be made available to the parties;[35]

– any conclusions reached should be in writing;

– parties or their representatives should have the opportunity to be present in certain cases, for example via conference call facilities.

6.5. Nothing in these commonly accepted procedural safeguards prevents a judge from following rules of domestic law or practices which allow greater latitude.

7. Initiating the communication

Necessity

7.1. In considering whether the use of direct judicial communications is appropriate, the judge should have regard to speed, efficiency and cost-effectiveness.

Timing – before or after the decision is taken

7.2. Judges should consider the benefit of direct judicial communications and when in the procedure it should occur.

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35 It is to be noted that records can be kept in different forms such as, for example, a transcription, an exchange of correspondence, a note to file.

7.3. The timing of the communication is a matter for the judge initiating the communication.

Making contact with a judge in the other jurisdiction

7.4. 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.

7.5. When making contact with a judge in another jurisdiction, the initial communication should normally be in writing (see Principle No 8 below) and should in particular identify:

a) the name and contact details of the initiating judge;

b) the nature of the case (with due regard to confidentiality concerns);

c) the issue on which communication is sought;

d) whether the parties before the judge initiating the communication have consented to this communication taking place;

e) when the communication may occur (with due regard to time differences);

f) any specific questions which the judge initiating the communication would like answered;

g) any other pertinent matters.

7.6. The time and place for communications between the courts should be to the satisfaction of both courts. Personnel other than judges in each court may communicate fully with each other to establish appropriate arrangements for the communication without the necessity for participation of counsel unless otherwise ordered by either of the courts.

8. The form of communications and language difficulties

8.1. Judges should use the most appropriate technological facilities in order to communicate as efficiently and as swiftly as possible.

8.2. The initial method and language of communication should, as far as possible, respect the preferences, if any, indicated by the intended recipient in the list of members of the Hague Network. Further communications should be carried out using the initial method and language of communication unless otherwise agreed by the judges concerned.

8.3. Where two judges do not understand a common language, and translation or interpretation services are required, such services could be

provided either by the court or the Central Authority in the country from which the communication is initiated.

8.4. Hague Network Judges are encouraged to improve their foreign language skills.

Written communications

8.5. Written communications, particularly in initiating the contact, are valuable as they provide for a record of the communication and help alleviate language and time zone barriers.

8.6. Where the written communication is provided through translation, it is good practice also to provide the message in its original language.

8.7. Communications should always include the name, title and contact details of the sender.

8.8. Communications should be written in simple terms, taking into account the language skills of the recipient.

8.9. As far as possible, appropriate measures should be taken for the personal information of the parties to be kept confidential.

8.10. Written communications should be transmitted using the most rapid and efficient means of communication and, in those cases where it is necessary for confidential data to be transmitted, secured means of communication should be employed.

8.11. Written communications should always be acknowledged as soon as possible with an indication as to when a response will be provided.

8.12. All communications should be typewritten.

8.13. Ordinarily, communications should be in writing, save where the judges concerned are from jurisdictions with proceedings conducted in the same language.

Oral communications

8.14. Oral communications are encouraged where judges involved come from jurisdictions which share the same language.

8.15. Where the judges do not speak the same language, one or both of them, subject to an agreement between the two judges concerned, should have at their disposal a competent and neutral interpreter who can interpret to and from their language.

8.16. Where necessary, personal information concerning the parties should be anonymised for the purposes of oral communication.

8.17. Oral communications can take place either by telephone or videoconference and, in those cases where it is necessary that they deal with confidential information, such communications should be carried out using secured means of communication.

9. Keeping the Central Authority informed of judicial communications

9.1. Where appropriate, the judge engaged in direct judicial communications may consider informing his or her Central Authority that a judicial communication will take place.

Načela neposredne sudske komunikacije u konkretnim predmetima, uključujući zajednički prihvaćena jamstva (Načela 6-9)

6. Komunikacijska jamstva

Temeljna načela

6.1. Svaki sudac uključen u neposrednu sudsku komunikaciju mora poštivati zakone svoje države;

6.2. Tijekom komunikacije svaki sudac mora zadržati svoju neovisnost u donošenju odluke u pravnoj stvari;

6.3. Komunikacija ne smije ugroziti sudačku neovisnost u donošenju odluke u pravnoj stvari.

Zajednički prihvaćena procesna jamstva

6.4. U državama ugovornicama uključenima u neposrednu sudsku komunikaciju, primjenjuju se sljedeća zajednički prihvaćena procesna jamstva:

– osim u iznimnim okolnostima, stranke se obavještavaju o naravi predložene komunikacije;

– komunikacija se bilježi u službenu evidenciju koja je na raspolaganju strankama;[36]

– svi postignuti zaključci trebaju biti pisano zabilježeni;

– u određenim slučajevima stranke i njihovi zastupnici imati pravo biti prisutni, npr. tijekom konferencijskog poziva.

6.5. Ništa od navedenih zajednički prihvaćenih procesnih jamstva ne sprječava suca da primjeni nacionalno pravo ili sudsku praksu, koja dopušta šire djelovanje.

7. Pokretanje komunikacije

Nužnost

7.1. Tijekom razmatranja prikladnosti neposredne sudske komunikacije sudac u obzir treba uzeti brzinu, učinkovitost i ekonomičnost.

Vrijeme pokretanja komunikacije - prije ili nakon donošenja odluke

7.2. Suci trebaju razmotriti korist neposredne sudske komunikacije u onoj fazi postupka u kojoj se za njom pojavi potreba.

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36 Valja napomenuti kako evidencija može biti različitim oblicima, npr. prijepis, razmijenjeni dopisi, bilješke u predmetu.

7.3. Vrijeme pokretanja komunikacije stvar je suca koji ju pokreće.

Uspostava kontakta sa sucem u drugoj državi

7.4. Početna komunikacija obično se odvija između dva suca Međunarodne haške sudačke mreže s ciljem utvrđivanja identiteta suca koji postupa u slučaju u drugoj državi.

7.5. Nakon uspostavljanja kontakta sa sucem u drugoj državi, uobičajeno je da se početka komunikacija odvija pisanim putem (Vidi niže: Načelo 8) i njom je posebno potrebno utvrditi:

a) ime i kontakt podatke suca koji je pokrenuo komunikaciju;

b) narav predmeta (uz poštivanje pravila o povjerljivosti informacija);

c) problematiku zbog koje je pokrenuta komunikacija;

d) jesu li stranke pred sucem koji je pokrenuo komunikaciju pristale na ovu vrstu komunikacije;

e) kada komunikacija može biti provedena (uz poštivanje vremenske razlike);

f) specifična pitanja na koja bi sudac koji pokreće komunikaciju želio znati odgovore;

g) sva ostala relevantna pitanja.

7.6. Vrijeme i mjesto održavanja komunikacije trebaju biti usuglašeni među sudovima. Sudski službenici mogu međusobno komunicirati, s ciljem uspostavljanja primjerenog dogovora za održavanje komunikacije. Pri tome nije potrebno sudjelovanje zastupnika stranaka, osim ako sud nije drugačije odredio.

8. Oblici komunikacije i poteškoće s jezikom

8.1. Suci trebaju koristiti najprikladnija tehnološka sredstva za što učinkovitiju i bržu komunikaciju.

8.2. Početna metoda i jezik komunikacije mora biti, koliko je to moguće, u skladu sa smjernicama, ako takve postoje, postavljenima od strane suca Međunarodne haške sudačke mreže prema kojem je komunikacija upućena. Daljnja komunikacija treba se nastaviti primjenom započete metode i jezika, osim ako suci nisu drugačije dogovorili.

8.3. Kada suci ne koriste zajednički jezik, potreban je prijevod ili tumačenje. Prijevod može izvršiti sud ili središnje tijelo države koja je pokrenula komunikaciju.

8.4. Haška sudačka mreža potiče suce na usavršavanje znanja stranih jezika.

Pisana komunikacija

8.5. Pisana komunikacija, posebice ona početna, značajna je zbog evidencije komunikacije te isto tako pomaže u ublažavanju jezične i vremenske barijere.

8.6. Kada se komunikacija odvija putem prijevoda, dobro je priložiti dopis i na izvornom jeziku.

8.7. Dopis uvijek treba sadržavati ime, titulu i kontakt podatke pošiljatelja.

8.8. Dopisi trebaju biti pisani jednostavnim jezikom, uzimajući u obzir pri tome jezične vještine primatelja.

8.9. Potrebno je poduzeti odgovarajuće mjere sa svrhom zaštite osobnih podataka stranaka, koliko god je to moguće.

8.10. Pisana komunikacija treba se odvijati koristeći najbrža i najučinkovitija sredstva komunikacije, dok se u slučaju prijenosa povjerljivih informacija trebaju osigurati odgovarajuće sigurnosne mjere.

8.11. Primitak pisanog dopisa potrebno je što prije potvrditi, s naznakom vremenskog roka u kojem se može očekivati odgovor.

8.12. Sva komunikacija treba biti tipkana strojno.

8.13. Uobičajeno se komunikacija odvija pisanim putem, osim ako se radi o sucima kod kojih se predmeti vode na istom jeziku.

Usmena komunikacija

8.14. Na usmenu se komunikaciju potiču suci koji koriste isti jezik.

8.15. Kada se suci ne koriste istim jezikom, jedan od njih ili obojica, ovisno o sporazumu među njima, trebaju imati na raspolaganju sposobnog i neovisnog tumača koji će prevoditi na njihov i s njihovog jezika.

8.16. Tijekom usmene komunikacije, kada je to nužno, osobni podaci stranaka trebaju ostati anonimni.

8.17. Usmena se komunikacija može odvijati telefonski ili videovezom, dok se u predmetima koji sadrže povjerljive informacije komunikacija treba odvijati uz korištenje odgovarajućih sigurnosnih mjera.

9. Informiranje središnjeg tijela o sudskoj komunikaciji

9.1. Sudac uključen u neposrednu sudsku komunikaciju, kada je to potrebno, može obavijestiti središnje tijelo svoje države o provedenoj komunikaciji.

CHILD ABDUCTION IN CROATIA: BEFORE AND AFTER THE EUROPEAN UNION LEGISLATION

Tena Hoško*

I. Introduction

The Republic of Croatia became a European Union (hereinafter: the EU) Member State on 1 July 2013. The accession to the EU led to many changes in the Croatian legal order, one of them dealing with international child abduction cases. From 1991, Croatia has been a signatory to the Hague Convention on the Civil Aspects of International Child Abduction of 1980[1] (hereinafter: the Convention, the Child Abduction Convention).[2] From the date of the country's accession to the EU, the Brussels II *bis* Regulation[3] (hereinafter: the Regulation), which also regulates child abduction cases, has been in force in Croatia.[4] However, the Regulation only deals with intra-EU child abduction[5], whereas the Convention remains applicable to all cases between Croatia and the Convention signatory states that are not EU Member States.

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1 Hague Conference on Private International Law, Convention on the Civil Aspects of International Child Abduction (concluded 25 October 1980, entered into force 1 December 1983), at www.hcch.net/index_en.php?act=conventions.text&cid=24 (7 July 2014) (Child Abduction Convention).

2 The Republic of Croatia became a party to the Convention via notification of succession after the Socialist Federal Republic of Yugoslavia ceased to exist. Therefore, Croatia is the party to the Convention from 8 October 1991, *Official Gazette (OG)* Int'l Agreements No 4/94.

3 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 [2003] OJ L338/1.

4 There is one implementing act - Act on the Implementation 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 (OG 127/2013) – which designates the Ministry of Social Policy and Youth as central authority, the same one as for the Convention.

5 According to Article 10 of the Regulation, it applies to children habitually resident in one Member State that have been removed to or retained in another Member State. The term Member State does not include Denmark, according to Article 2(3) of the Regulation.

The Regulation builds on the Convention's system,[6] and this paper is going to demonstrate only the differences between the two systems and estimate how they fit within the Croatian legal order. This is especially interesting due to the entry into force of the new Family Act[7] (hereinafter: Family Act 2014) on 1 September 2014. Firstly, the Regulation regulates both the shift of jurisdiction in child abduction cases and the recognition and enforcement of judgments, whereas those provisions are not present in the Convention.[8] Also, the court of the state of removal or retention needs to assess whether adequate security arrangements have been made in the state of habitual residence of the child before issuing a non-return order.[9] The main controversy lies in the obligation to transmit the case once the court of state of removal has decided that the child should not be returned to the state of his/her habitual residence immediately prior to the unlawful removal or retention.[10] After the transmission, the court of the child's habitual residence may review the case according to Article 11(8) of the Regulation. If the return is ordered subsequently, such judgments circulate without an *exequatur* needed in the state of recognition and enforcement.[11] It is clear that the principle of restoration of *status quo* embedded into the Convention[12] is even more emphasized in the Regulation's system.

The Regulation nuanced the system of dealing with child abduction cases within the EU in several more ways. It has introduced the obligation to hear the child[13] as well as the obligation to hear the applicant when the non-return decision is to be issued.[14] Same as in the Convention, the courts are given 6 weeks to deal with the case, but unlike the Hague Conference, the EU has mechanisms to sanction the violations of the set deadlines through state liability.

The paper will follow the logic of the procedure and will therefore firstly present the jurisdictional issue, then the obligation to hear the child, to hear the

6 According to Articles 60 and 63, the Convention is still applicable to the intra-EU cases, but the specificities of the Regulation system need to be respected.

7 OG Nos. 75/14 and 83/14. The Family Act 2014 has been suspended by the Constitutional Court of the Republic of Croatia, and the old Family Act of 2003 currently applies.

8 Article 10 and Chapter III of the Brussels II *bis* Regulation.

9 Article 11(4) of the Brussels II *bis* Regulation.

10 Article 11(6) of the Brussels II *bis* Regulation.

11 Articles 40 and 42 of the Brussels II *bis* Regulation.

12 See also E. Pérez-Vera, *Explanatory Report of the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (The Hague, Hague Conference on Private International Law 1982) (Pérez-Vera Report) at: www.hcch.net/upload/expl28.pdf (21 July 2014).

13 Article 11(2) of the Brussels II *bis* Regulation.

14 Article 11(5) of the Brussels II *bis* Regulation.

applicant and to assess the security arrangements. After that, the possibility of state liability due to overstepping time limits will be assessed. Lastly, the biggest changes to the system will be elaborated – the obligation to transmit the case and the recognition and enforcement procedure.

II. Relevant changes in the child abduction system introduced by the Brussels II *bis* Regulation

1. Jurisdiction in child abduction cases

In order to estimate whether the abduction took place at all and whether it has jurisdiction to hear the issue, the court has to establish whether the removal or retention of the child was wrongful. If it is not wrongful, the Convention will not apply and other sections of the Brussels II *bis* Regulation might apply (e.g. Article 9 of the Regulation will apply to jurisdiction in case of a lawful removal of the child). The removal or retention of the child will be wrongful if it is in breach of actually exercised rights of custody acquired by judgment, *ex lege* or by an agreement under the law of the state where the child was habitually resident immediately before the removal or retention.[15] The Regulation managed to clarify the definition of child abduction by stating that there is a joint exercise of rights of custody "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".[16] But this novelty should not amount to major changes[17] since such a stance was already taken in the case law regarding the Convention.[18]

The Child Abduction Convention did not contain any jurisdictional rules; they were left out of the Convention due to lack of consensus. However, the mechanism of swift return warrants the custody proceedings being heard in

15 Article 2(11) of the Brussels II *bis* Regulation and Article 3 of the Child Abduction Convention.

16 Article 2(11)b of the Brussels II *bis* Regulation.

17 But see C. Dekar, '*JMCB. v. L.E.:* the intersection of European Union law and private international law in intra-European Union child abduction' 34 *Fordham International Law Journal* (2010-2011) p. 1430, stating on p. 1467 that the possible problems might arise from the fact that the definition of custody rights contains both "rights and duties" under the Regulation and only "rights" under the Convention.

18 E.g. *Marriage of Resina* [1991] FamCA 33; *2 Ob 596/91*, OGH, 5 February 1992, Oberster Gerichtshof; *C. v. C. (Minor: Abduction: Rights of Custody Abroad)* [1989] 1 WLR 654; *Abbott v Abbott*, 130 S. Ct. 1983 (2010).

the state of habitual residence prior to removal and retention.[19] The jurisdiction can shift to the state of removal if a non-return order is issued or the return proceedings are not commenced in due course.[20] However, Croatia is also a signatory to 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,[21] which regulates jurisdiction in case of wrongful removal in its Article 7 in a very similar manner as the Regulation does.[22]

The Regulation deals with the shift of jurisdiction in child abduction cases by providing two situations in its Article 10 when the jurisdiction can shift to the state of removal if the prescribed requirements are fulfilled. The first situation requires that the child has acquired habitual residence in the state of removal and everybody having rights of custody had acquiesced to the removal or retention. The other possibility also demands that the child has acquired new habitual residence, but has also settled in the new territory and more than a year has passed before the relevant person has had knowledge about the whereabouts of the child. In addition, one of the following conditions has to be met: no request for return has been lodged before the competent authorities of the state of removal, a request for return has been withdrawn and no new request has been lodged, 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),[23] a judgment on custody

19 See Pérez-Vera Report, *loc. cit.* n. 12, para 16.

20 See P. McEleavy, 'The New Child Abduction Regime in the European Union: Symbiotic Relationship or Forced Partnership?' 1 *Journal of Private International Law* (2005) p. 5, pp. 18-19.

21 Hague Conference on Private International Law, 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 (concluded 19 October 1996, entered into force 1 January 2002), at: http://www.hcch.net/index_en.php?act=conventions.text&cid=70 (7 July 2014).

22 For comparison, see also C. Holzmann, *Brüssel IIa VO: Elterliche Verantwortung und internationale Kindesentführungen* (Sipplingen, JWV 2008) pp. 221-224.

23 Under Article 11(7) of the Regulation, the case will be closed if, following the transmission of the case after a non-return decision has been issued, the parties fail to make submissions before the court in the state of habitual residence of the child.

that does not entail the return of the child[24] has been issued by the courts of the state where the child was habitually resident immediately before the wrongful removal or retention. The Court of Justice of the EU (hereinafter: the CJEU, the Court) has had the opportunity to deal with Article 10 in only one aspect and it decided in *Povse v Alapago* that a decision dealing only with provisional measures cannot be considered a decision that does not entail return for the purposes of Article 10 of the Regulation.[25]

The jurisdiction rules contained in Article 10 of the Regulation rely on the exceptions of return contained in Articles 12 and 13 of the Convention, but the shift of jurisdiction does not presuppose issuance of the non-return order, unlike in the Convention's system. This means that acquiescence, settlement of the child in the new territory and inactivity of the left behind parent will both be relevant for the issue of return and for jurisdiction for custody disputes.[26] This is especially important due to the difference in calculating the time of the left behind parent's inactivity – the Convention counts a period of one year from the date of removal or retention[27], whereas the Regulation[28] takes the knowledge about the whereabouts of the child as the starting point.[29] Additionally, the shift of habitual residence is the requirement for both situations in which the shift of jurisdiction may occur. This might cause some concerns in Croatia because habitual residence is not extensively employed in the Croatian private international law.[30] Moreover, habitual residence of the child may

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24 The expression "the decision does not entail return" should be interpreted extensively, i.e. even if there is no express order, the judgment might entail return. In between the English, Italian, Spanish, French, German and Croatian versions, only the German translation reads "angeordnet", which means "order", rather than "entail" return. This is important in the context of the Croatian legal order, which allows in Article 341(2) of the Family Act (OG Nos. 116/03, 17/04, 136/04, 107/07, 57/11, 61/11 and 25/13) as well as Article 515(1) of the Family Act 2014 the judge of enforcement to order return even if it was not expressly ordered in the judgment on custody.

25 ECJ, Case C-211/10 PPU *Doris Povse* v. *Mauro Alpago* [2010] *ECR* I-6673.

26 See É. Pataut, 'Article 10 Jurisdiction in cases of child abduction' in U. Magnus and P. Mankowski, eds., *Brussels II bis Regulation* (Munich, Sellier 2012) p. 123.

27 Article 12 of the Convention.

28 Article 10(1)b of the Regulation.

29 This might lead to discrepancies within a single case in practice. See: Pataut, *op. cit.* n. 26 at p. 125.

30 The Croatian PIL Act does not contain habitual residence as a connecting factor for any of the matters, but Croatia is a signatory to some Hague Conventions so it is bound to apply connecting factors contained therein. For conventions ratified by the Republic of Croatia see at http://www.hcch.net/upload/statmtrx_e.pdf. (2 September 2014).

be quite difficult to establish in child abduction cases,[31] and the CJEU has not been given the opportunity to present guidelines for habitual residence of the child in child abduction specifically.[32]

2. The obligation to hear the child

The Brussels II *bis* Regulation states in its Article 11(2) that the abducted child shall be heard during the proceedings and thereby introduces "a 'softer' and more child-centred approach in child abduction cases."[33] When compared to the Convention, this is a novelty, since the Convention only allowed return based on the objections of the child, but did not have a general obligation to hear the child during the proceedings.[34] Now, the child's opinion may be evaluated not only with respect to return, but whenever Articles 12 and 13 of the Convention are to be applied, i.e. whenever the decision on return has to be made.[35] The child's opinion may thus also be used in the estimation of e.g. the child's habitual residence and grave risk of harm.[36]

Still, the scope of the duty to hear the child is questionable. It is unclear whether the child has to be heard *ex officio*, as the court's duty or just the possibility has to be given to the parties to request that the child is heard.[37] This has to be evaluated especially having in mind that the court has discretion to refuse the application to hear the child depending on "his or her age or degree of maturity".[38] The issue may be resolved by national law since the Regulation "is not intended to modify national procedures applicable".[39] Within the

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31 See e.g.: R. Lamont, 'Habitual Residence and Brussels II bis: Developing Concepts for European Private International Family Law' 3 *Journal of Private International Law* (2007) pp. 276-280, Holzmann, *op. cit.* n. 22, pp. 181-185.

32 The Court has only had an opportunity to give answers to preliminary questions related to habitual residence of children in two cases under Brussels II bis: ECJ, Case C-523/07 *Proceedings brought by A* [2009] *ECR* I-02805 and ECJ, Case C-497/10 PPU *Barbara Mercredi* v. *Richard Chaffe* [2010] *ECR* I-14309.

33 K. Trimmings, *Child Abduction within the European Union (Studies in Private International Law)* (Oxford, Hart Publishing 2013) p. 211.

34 Baroness Hale in *Re D. (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 A.C. 619, at para 25 advocates for a wider use of this obligation so that the children are heard in all Convention proceedings, not only those to which the Regulation applies.

35 Article 11(2) of the Brussels II *bis* Regulation.

36 McEleavy, *loc. cit.* n. 20, pp. 28-29.

37 Pataut, *loc. cit.* n. 26, pp. 132-133.

38 Article 11(2) of the Brussels II *bis* Regulation.

39 Recital 19 of the Preamble to the Brussels II *bis* Regulation.

Croatian legal order, this would mean both that the child has the right to be heard[40] and the court has the duty to hear the child when his or her age and maturity allow[41].

Although this is a novelty within the international child abduction system, it should not change the Croatian practice drastically. Based on Article 12 of the United Nations Convention on the Rights of the Child,[42] the obligation to hear the child has been implemented into the national legal order in all proceedings in which the child's rights and interests are disputed.[43] Already now judges need to evaluate the child's maturity when assessing the child's ability to express his/her opinion and the court practice shows that usually children above seven years of age are heard during the proceedings involving their rights or interests, including child abduction cases.[44] According to the Family Act 2014, a child older than 14 years will always be heard, whereas younger children will be heard if there is a need to assess their affection to a person, conditions in which the child lives and for other very important reasons.[45] The manner in which the hearing is conducted is left for the national legislation.[46] In Croatia, children will remain to be heard either before the court or, more often, before the social welfare centre that will draft a report and submit it to the court.[47]

3. Obligation to hear the applicant

The Brussels II *bis* Regulation demands that the applicant is heard before a non-return order should be issued. According to the Regulation, the obligation to give the applicant the opportunity to be heard exists only when a non-return order is to be issued since "[a] court cannot refuse to return a child unless the person who requested the return of the child has been given an opportunity to

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40 Article 89(5) of the Family Act (as well as Article 360 of the Family Act 2014).

41 Article 269(2) of the Family Act (and Article 86 of the Family Act 2014).

42 Convention on the Rights of the Child (concluded 20 November 1989, entered into force 2 September 1990) UNTS 1577, 3.

43 Articles 89 and 269 of the Family Act (Articles 86 and 360 of the Family Act 2014).

44 Z. Bulka, 'Primjena Konvencije o građanskopravnim aspektima međunarodne otmice djece na prava roditelja' [Application of the Convention on Civil Aspects of Child Abduction to Parental Rights] 5947 *Informator* (2011) p. 5, 6.

45 Article 360(2) of the Family Act 2014.

46 European Commission, *Practice Guide for the Application of the New Brussels II Regulation,* at: http://ec.europa.eu/civiljustice/divorce/parental_resp_ec_vdm_en.pdf (8 July 2014).

47 Article 269(2), 295(1) and 335 of the Family Act (Article 357 of the Family Act 2014).

be heard".[48] Although the Convention did not contain a similar provision, its added value is questionable due to the existence of Article 6 of the European Convention on Human Rights[49] that guarantees the right to a fair trial which encompasses the right to be heard[50] as well.[51]

In the Republic of Croatia, child abduction cases are usually held in the form of non-contentious proceedings, unless there is a dispute over facts when a hearing needs to be held.[52] In non-contentious proceedings, the judge can decide that the evidence and statements may be given only in written form, but this should not be considered to be a violation of a right to be heard as long as the applicant is given the opportunity to present his/her case.[53] According to the Family Act, in non-contentious proceedings the statements of parties and other participants in a procedure may also be given when other parties and participants are absent. The court does not necessarily have to give a party an opportunity to respond to these statements.[54] There is thus a danger of violating the Regulation whilst applying these rules. The courts need to be careful when exercising the discretion given to them by the Family Act when dealing with intra-EU child abduction cases. According to the *Simmenthal* doctrine, the judges need to avoid application of national rules running counter the EU law.[55] Croatian judges will therefore have to give the opportunity to the applicant to present his/her case when a non-return order should be issued notwithstanding the mentioned provision of the Family Act. However, the Family Act 2014 does not contain the mentioned provision.

The two procedural novelties – obligation to hear the child and the applicant – are tightly connected with the obligation to deliver the judgment expeditiously, seeing that they might prolong the process. The Regulation[56] itself

48 Article 11(5) of the Brussels II *bis* Regulation.

49 Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (concluded 4 November 1950, entered into force 3 September 1953) ETS 5.

50 See e.g.: *Ankerl v Switzerland* (2001) 32 EHRR 1, *Helle v Finland* [1998] 26 EHRR 159.

51 See Pataut, *loc. cit.* n. 26, pp. 138-139.

52 Article 309(5) of the Family Act. The County Court in Zagreb quashed a decision 148 R10-519/11-37 of the Municipal Court in Zagreb because it was brought in non-contentious proceedings and there was a dispute over facts.

53 See Pataut, *loc. cit.* n. 26, p. 139.

54 Article 309(4) of the Family Act.

55 ECJ, C-106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] *ECR* 629.

56 Recital 20 of the Preamble to the Brussels II *bis* Regulation.

suggests the use of the Evidence Regulation[57] in order to facilitate the hearing of the child. The Commission in its Practice Guide mentions the Evidence Regulation in the context of hearing the applicant as well.[58]

4. Time limits and using the most expeditious procedures

The Brussels II *bis* Regulation puts forward an obligation to use the most expeditious procedures available in national law in order to act expeditiously and to deliver the judgment in six weeks' time.[59] The change from the Convention is twofold – the Convention only stated that the judgment should be issued in six weeks whenever possible and there was no sanction if the swiftness was not respected.[60] Now, the judgment needs to be issued within six weeks unless there are some exceptional circumstances. What is to be considered as exceptional circumstance is not given, and this is most probably going to be resolved through CJEU's case law. If this obligation is violated, there is a possibility to sanction this through state responsibility for breach of EU law established in *Francovich*[61] since the Court has stated that national courts can also breach EU law.[62] The question that arises is whether the six-week time limit concerns only the first instance procedure or encompasses all the procedural steps. The Regulation is silent on that issue, but the Commission took stance that the decision should be enforceable in the given time since "this is the only interpretation which would effectively guarantee the objective of ensuring the prompt return of the child within the strict time limit."[63] It is questionable whether the Member States will be able to respect this obligation since already under the Convention some states had difficulties respecting the set time limits.[64] McEleavy rightly concludes that this novelty should be

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57 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 [2001] OJ L 174/1.

58 Practice Guide, *loc. cit.* n. 46, p. 33.

59 Article 11(3) of the Brussels II *bis* Regulation.

60 See Pataut, *loc. cit.* n. 26, pp.134-135.

61 ECJ, Joined cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991] ECR I-05357.

62 ECJ, Case C 224/01 *Gerhard Köbler* v *Republik Österreich* [2003] ECR I 10239, para 33.

63 Practice Guide, *loc. cit.* n. 46, p. 33.

64 For UK and France see: P. R. Beaumont and P. E. McEleavy, *The Hague Convention on International Child Abduction* (Oxford, OUP 1999) pp. 250, 251 and 256, and for Germany see: Holzmann, *op. cit.* n. 22, pp. 191-192.

welcomed due to the delicate nature of child abduction, but at the same time its full application in all the Member States seems a bit optimistic.[65]

Respecting the time limits might be problematic in the Republic of Croatia as well. According to Article 263(2) of the Family Act, all family law cases should be dealt with urgently. Article 265 prescribes that the first hearing shall be held within fifteen days from when the application has been received by the court. Article 266 states that the appellate decision shall be issued within sixty days. However, these rules are the so-called *lex imperfecta* since they do not provide for a sanction if the time limits are not respected. A limited insight into the child abduction case law shows that the first instance procedure may respect the six-week time limit. As soon as the parties appeal, delays occur.[66] Now, the question arises whether there are mechanisms in the national law that might shorten the proceedings. Firstly, the Family Act 2014 states that all disputes involving children are urgent, rather than all family law disputes as before.[67] There is no special priority given to child abduction cases, but looking at the whole body of family law, such priority might not be justified since all cases involving children are of a delicate nature.[68] Secondly, the new Act states that the decision shall be issued within fifteen days if no hearings are held and the appellate decision is to be issued within thirty days.[69] The Convention contains a rule that if the decision is not reached within six weeks, an explanation for that might be asked from the judge.[70] Such a possibility is not contained in the Regulation, which is unfortunate since such a request may put additional pressure on the judge.[71] However, under the new Croatian Family Act, the first instance judges have an obligation to report to the court's president that they have exceeded the time limit.[72]

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65 McEleavy, *loc. cit.* n. 20, pp. 25-26. Trimmings concludes, based on an empirical survey, that compliance with the six-weeks rule is "at best difficult and at worst hardly attainable". See Trimmings, *op. cit.* n. 33, p. 109.

66 The case law looked into consists of eight judgments of the Municipal Court in Zagreb from 2004 until 2014. Four of eight first instance judgments have been issued within six weeks, whereas the average for the rest of the first instance proceedings was four months. None of the procedures that have led to an appeal respected the six weeks period. Average amount of time necessary for the second instance judgment is six months.

67 Article 347(1) of the Family Act 2014.

68 McEleavy, *loc. cit.* n. 20, p. 26.

69 Article 347(2) and 6 of the Family Act 2014.

70 Article 11(2) of the Convention.

71 I. Medić Musa, *Komentar Uredbe Bruxelles II bis u području roditeljske skrbi* [Commentary of the Brussels II bis Regulation in the area of parental responsibility] (Osijek, Pravni fakultet u Osijeku, 2012) p. 75.

72 Article 347(5) of the Family Act 2014.

Additionally, the Commission in its Practice Guide puts forward several suggestions as to how the time limit might be respected.[73] The most suitable approach would be allowing the appeal that does not suspend enforcement, which is one of the Commission's suggestions. According to the Croatian Family Act, an appeal lodged in due time suspends the enforcement unless the court decision itself stipulates differently. Moreover, the court may decide that an appeal does not suspend enforcement if measures of protection of rights and welfare of children are being taken.[74] Since discretion regarding suspension of enforceability already exists in the relevant provisions of the Croatian Family Act, the approach in case law could easily change. The judges should thus, having in mind the obligation to use most convenient national procedures stemming from the Regulation, develop their practice in the direction that precludes suspension of enforceability in child abduction cases. In some cases, this would still not provide an appropriate outcome since the decision might be quashed at the appellate instance. Unfortunately, only a systematic reform of judiciary would resolve the problem of lack of swiftness due to a huge case load that has slowed judicial proceedings, leading to many cases having been brought before the European Court of Human Rights against the Republic of Croatia.[75]

5. Grave risk of harm and security arrangements

The Child Abduction Convention has as its primary goal the swift return of children to their place of habitual residence prior to removal or retention. Still, some exceptions to return do exist, one of them being "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".[76] The exception of grave risk of harm is to be interpreted strictly in order to ensure the wanted functioning

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73 "(a) National law may preclude the possibility of an appeal against a decision entailing the return of the child, or (b) National law may allow for the possibility for appeal, but provided that a decision entailing the return of the child is enforceable pending any appeal. (c) In the event that national law allows for the possibility of appeal, and suspends the enforceability of the decision, the Member States should put in place procedures to ensure an accelerated hearing of the appeal so as to ensure the respect of the six-week deadline.", Practice Guide, *op. cit.* n. 46, p. 33.

74 Article 316(3) and 4 of the Family Act and Article 445(3) and 4 of the Family Act 2014.

75 See e.g.: *Mikulić* v *Croatia* (53176/99); *Počuča* v *Croatia* (38550/02); *Smoje* v *Croatia* (28074/03); *Štokalo* v *Croatia* (15233/05) at: http://hudoc.echr.coe.int. (11 July 2014).

76 Article 13(1)b of the Child Abduction Convention. The other exceptions concern objections of the child (Article 13(2)), child's settlement in the new territory (Article 12/2) and violation of human rights under Article 20 of the Convention.

of the Convention,[77] but it is unfortunately the most often cited reason for not returning the child.[78] The Regulation makes the interpretation of that exception even more restrictive[79] by prescribing that "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."[80] Some states, especially those belonging to the common law circle, already interpreted the grave risk of harm exception in the Regulation's manner. So even when there was a grave risk of harm, the courts would order the return if security arrangements have been made in the country of habitual residence and the child could safely return there.[81] This provision is considered to be an improvement of the existing regime,[82] and its application leads to a diminished number of refusals of return based on the exception of existence of grave risk of harm.[83]

The new provision is far from being flawless. As Trimmings notes, there are still some open concerns – whose is the burden of proving that the arrangements have been made; what are the responsibilities of central authorities under the new provision; there is an issue of proper application due to a different level of protection in different Member States; the extent of investigations which the court has to undertake and the questionable safety of the returning parent are still left open.[84] Nonetheless, the provision "has the potential to bring a most welcome benefit for it does not make the assumption that children will be protected upon return, rather it has to be shown that adequate arrangements have been made."[85] According to the Practice Guide on the

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77 Pérez-Vera Report, *loc. cit.* n. 12, para. 34.

78 N. Lowe, *A Statistical Analysis of Applications Made in 2008 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Part I – Global Report*, Prel Doc No 8A 2 update November 2011, 17 as referred in J. Paton, 'The Correct Approach to the Examination of the Best Interests of the Child in Abduction Convention Proceedings Following the Decision of the Supreme Court in Re E (Children) (Abduction: Custody Appeal)' 8 *Journal of Private International Law* (2012) p. 547, at p. 553.

79 Holzmann, *op. cit.* n. 22, at p. 197. It is to be noted that Article 11(4) of the Regulation concerns only the grave risk of harm exception provided in Article 13(1)b of the Convention. See Holzmann, *op. cit.* n. 22, pp. 196-197 and Pataut, *loc. cit.* n. 26, p. 138.

80 Article 11(4) of the Brussels II *bis* Regulation.

81 Beaumont and McEleavy, *op. cit.* n. 64, pp. 156 *et seq*.

82 R. Lamont, 'Free movement of persons, child abduction and relocation within the European Union' 34 *Journal of Social Welfare & Family Law* (2012) p. 231, p. 237.

83 The smaller number of returns is not only an outcome of this provision, but the whole system of child abduction within the EU. See also Trimmings, *op. cit.* n. 33, pp. 107-108.

84 Trimmings, *op. cit.* n. 33, pp. 138-161.

85 McEleavy, *loc. cit.* n. 20, p.26.

Brussels II *bis* Regulation, concrete measures to protect the child need to be taken in the state of origin.[86] For the judge, this means that after establishing the existence of grave risk of harm, there must be an evaluation of the security arrangements made in each case. Only if after that the grave risk of harm still exists, the child will not be returned.[87] The return should not in any case compromise the child's safety.[88]

The way to achieve the proper functioning of the Brussels II *bis* return mechanism is to support the creative approach of competent authorities and strengthen the co-operation between central authorities.[89] A more creative approach could be seen in introducing into the continental law circle undertakings and mirror orders (safe harbours) developed in the common law systems.[90] In order to support and strengthen the judicial and administrative co-operation, the European Judicial Network in civil and commercial matters was created by the Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters.[91]

Looking at the Croatian legal order, a limited insight into the case law of the Municipal Court in Zagreb shows that the exception of grave risk of harm is most often used to support the decision on non-return.[92] Looking at the interpretation of the exception, it is sometimes interpreted too broadly.[93] Reasons such as separation from the parent who is the abductor cannot be used to support the grave risk of harm unless the grave risk actually exists.[94] The usual harm which will unfortunately take place due to separation cannot be enough to constitute the exception.[95] Otherwise, the abductor would benefit from his/her own illegal actions.[96] The Croatian judges put too much emphasis on the

86 Practice Guide, *loc. cit.* n. 46, p. 32.

87 Holzmann, *op. cit.* n. 22, p. 208

88 Trimmings, *op. cit.* n. 33, p. 136.

89 Pataut, *loc. cit.* n. 26, p. 137.

90 For more on undertakings and safe harbours see Beaumont and McEleavy, *op. cit.* n. 64, pp. 156-168 and specifically regarding the Brussels II *bis* Regulation Holzmann, *op. cit.* n. 22, pp. 198-207.

91 OJ L 174/25 (2001).

92 In two of eight judgments, the return was ordered. In four of six non-return judgments, the grave risk of harm exception was used. In one judgment, it was in combination with the Convention's Article 13(2) exception – objections of the child.

93 In all four non return judgments, separation from the abducting parent was mentioned as the reason for the grave risk of psychological harm.

94 Beaumont and McEleavy, *op. cit.* n. 64, p. 145.

95 Holzmann, *op. cit.* n 22, pp. 210-212.

96 Beaumont and McEleavy, *op. cit.* n. 64, p. 149.

harm inflicted by separation from the mother.[97] The decision is often based on the opinion issued by a welfare centre, and it is questionable whether its staff is educated for the special purpose and operation of the Convention and subsequently the Regulation.[98] New rules will hopefully influence the interpretation of the grave risk of harm exception in Croatia.[99]

6. Obligation to transmit the case file

One of the biggest novelties introduced by the Brussels II *bis* Regulation is contained in its Article 11(6) and 11(7). Those provisions relate to the obligation to transmit the case file to the court of the habitual residence of the child in case of issuance of a non-return order. The obligation to transmit the case file follows the general Brussels II *bis* scheme of prioritising return.[100] The obligation is limited only to non-return orders issued based on exceptions from Article 13[101] of the Convention.[102] The case file needs to be transferred to the

97 Other reasons that support the existence of grave risk of harm are: the fact that the child and the abductor do not have citizenship of the state of origin (judgment R1o-27/11-12 of 6 April 2011, not published), the fact that the child would have to stay in kindergarten until 17.45 in the state of origin (judgment R1o-27/11-12 of 6 April 2011, not published), the fact that the mother was abused in the state of origin (although there was never a formal application to the authorities) (judgment R10-519/11-37 of 15 March 2012, not published), the fact that the child had eight cavities and neurodermatitis prior to removal (Judgment V-R1-1696/06-9 of 17 November 2006, not published).

98 According to Articles 275-279 of the Family Act (Article 353-357 of the Act 2014), the social welfare centre shall take part in the proceedings involving children's rights and interests. Also, it will submit an opinion and proposal in custody disputes and disputes concerning protection of the child according to Articles 295 and 335 of the Family Act, which are usually used in child abduction proceedings. It seems, however, that in child abduction cases, the centre submits the same type of analysis as when participating in custody proceedings. The same is provided in the Family Act 2014, Articles 357 and 416.

99 For example, even when there was a risk of domestic violence, the exception of grave risk of harm was not found due to Article 11(4) in other member States. See CA Paris, 15 février 2007, No de RG 06/17206, INCADAT cite HC/E/FR 979.

100 McEleavy, *loc. cit.* n 20, p. 25.

101 The reasons contained therein are: the applicant 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; the grave risk of harm exception and the child's objections to return.

102 See also Pataut, *loc. cit.* n. 26, p. 140.

competent court[103] or the central authority in the state of origin[104] immediately, and the court in the state of origin shall receive the file within one month. The transfer should include "the relevant documents, in particular a transcript of the hearings before the court".[105] The procedural specificities of the transfer have not been dealt with within the Regulation. The Practice Guide gives only limited guidelines, which is why judges and central authorities' staff will have to be quite creative in order to deal with the time requirements. The main issue is the translation of the documents, and the Guide invites judges to use direct communications and informal translations whenever possible.[106]

After the court in the state of origin has received the case file, it has two options depending whether it has already been seized by the parties[107] or not. If the court has not already been seized, it or the central authority will notify and invite the parties to make submissions within three months. If they fail to do so, the case will be closed.[108] The applicant's proactive approach will thus be crucial for the continuance of the proceedings.[109] If the court has already been seized on the custody issue, the proceedings will continue according to rules of national law.[110] The court in the state of origin will decide custody issues as well as the issue of return.[111] In the proceedings in the state of origin, the court should rather give due regard to the reasons for refusing the return of the child than doing the overall assessment of the abduction issue.[112] If that court decides that the child should be returned, such decision will be subject to fast

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103 The competent court will be the one that has already issued a judgment regarding the child or the one competent according to national rules of the state of origin. Practice Guide, *loc. cit.* n. 46, p. 36.

104 The choice of the institution for the transmission will depend on the role of the central authority in the state of origin. If its role is greater, the transmission should go through it. Pataut, *loc. cit*. n. 26, p. 141.

105 Article 11(6) of the Brussels II *bis* Regulation.

106 Practice Guide, *loc. cit.* n. 46, p. 37; Pataut, *loc. cit.* n. 26, p. 142 states that such practical and informal arrangements should be generally supported in child abduction cases.

107 The parties to the proceedings may be the person, institution or other body having the care of the person of the child. Pataut, *loc. cit.* n. 26, p. 143.

108 Article 11(7) of the Brussels II *bis* Regulation.

109 McEleavy, *loc. cit.* n. 20, p. 30.

110 Pataut, *loc. cit.* n. 26, pp. 143-144. But see McEleavy, op.cit. n. 20, p. 31 who states that the exact way of proceeding with the case is not clearly stated.

111 Pataut, *loc. cit*. n. 26, p. 144.

112 See McEleavy, *loc. cit.* n. 20, p. 32.

track recognition and enforcement,[113] notwithstanding the previous non-return decision.[114]

There are some problems that might arise from the obligation to transmit the case file in the Croatian legal system. If a Croatian court acts as the court of habitual residence, there is an issue with using uncertified translations. The Croatian Civil Procedure Act [115] states in its Article 232/2 that all submitted documents in a foreign language need to be accompanied by certified translations to Croatian language. The Practice Guide does suggest that "[i]f it is not possible to carry out the translation within the one month time limit, it should be carried out in the Member State of origin".[116] This may solve the problem of observing the one month time limit for transmission, but may still be problematic due to the general need for urgent conduct in child abduction cases.[117]

The other problem that might arise is the question of how custody proceedings will be initiated.[118] The Regulation leaves the issue to national law.[119] According to the Croatian Family Act, the court has no competence to initiate custody proceedings *ex officio*[120] but has the duty to decide the issue in a decision establishing that marriage does not exist or is annulled or divorced or in a decision establishing maternity or paternity.[121] If no such proceedings are pending, the initiation of the procedure needs to be dealt with according to the rules of the Croatian civil procedure. If the first submission made by the notified party

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113 See infra, section 7.2.

114 Article 11(8) of the Brussels II *bis* Regulation.

115 Civil Procedure Act OG Nos 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 123/08, 57/11, 148/11, 25/13.

116 Practice Guide, *loc. cit.* n. 46, p. 37.

117 As McEleavy, *loc. cit.* n. 20, p. 31 rightly concludes: 'The Practice Guide expresses the woolly aspiration that "judges should try to find a pragmatic solution which corresponds to the needs and circumstances of each case" before naively suggesting that central authorities might be able to provide "informal" translations. The lack of appreciation of civil procedure and the realities of legal practice continues in the optimistic expectation that the documentation will be able to find its way to an appropriate court in the child's State of habitual residence.'

118 See also McEleavy, *loc. cit.* n. 20, p. 31.

119 Article 11(7) of the Brussels II *bis* Regulation.

120 The Family Act allows the child, the parents and the social welfare centre to initiate court proceedings by analogous application of Article 101 of the old Family Act (See M. Alinčić et al., *Obiteljsko pravo* [Family Law] 3rd ed. (Zagreb, Narodne novine 2007) at p. 270). The new Act 2014 gives that procedural right expressly to the parents, the child, the social welfare centre and other custodians (Article 479(1)).

121 Article 294 of the Family Act (and Article 413 of the Family Act 2014).

is a statement of claim, there will be no problem.[122] However, it may happen that the first submission does not represent a statement of claim and thus cannot present the document by which the proceedings are commenced. The Civil Procedure Act in its Article 109 deals with such situations – submission of incomprehensive documents and documents that do not adhere to the necessary formal requirements (including statement of claims). If such document is submitted, the court has to invite the party to correct it within eight days. If the party does that, the date of first submission will be the date of the valid submission of the document, i.e. the initiation of the proceedings. If it is not corrected, it will be found inadmissible. Within the specific procedure following the transmission of the file, this will mean that the parties should be notified by the court or the central authority to make submissions in three months. The date of the first submission, even if it is incomprehensible and does not adhere to formal requirements for statement of claims, will be the date of lodging the statement of claim if it is corrected after the invitation from the court to do so. So the party may in fact "violate" the three-month time limit by submitting an "invalid" statement of claim within those three months, although the correction came a few days outside the set time limit.

7. Recognition and enforcement

Due to the entry into force of the Brussels II *bis* Regulation, there are several systems of recognition and enforcement of child abduction judgments in Croatia. The old regime still remains towards non-EU Member States that is based on the Croatian Private International Law Act,[123] its Articles 86 to 96. The Brussels II *bis* Regulation introduced two new systems – the "standard track" recognition and enforcement under Chapter III of the Regulation and the "fast track" recognition and enforcement of return judgments issued in the state of habitual residence of the child after the non-return order has been issued in the state of removal based on Articles 11(8), 40 and 42 of the Regulation. In order to use the Brussels II *bis* Regulation recognition and enforcement systems, the judgement has to be issued when both the state of origin and state of

122 The litigation is commenced by the statement of claim and the litigation is pending once the statement of claims is delivered to the defendant (Articles 185 and 194 of the Civil Procedure Act).

123 Act on Resolving Conflict of Laws with Rules of other Countries in Certain Areas (PIL Act) (OG 53/91, 88/01). The Act is currently in the process of being revised.

recognition and enforcement are EU Member States.[124] Each of the systems will be discussed in a separate section.

7.1. "Standard track" recognition and enforcement

The standard track recognition and enforcement of child abduction judgments is based on mutual trust between EU Member States.[125] Article 21 of the Regulation provides for automatic recognition of judgments without any special procedure required. The judgment can either be recognised incidentally or an application for recognition or non-recognition can be decided as the main issue.[126] The application that the judgment is to be or not be recognised in Croatia has to be submitted to municipal courts competent to decide on declaration of enforceability[127] as notified in accordance with Article 68 of the Regulation.[128] In child abduction cases, that will usually be the court that has jurisdiction to enforce the return decision – the court of domicile of the party against whom enforcement is sought or the party who seeks enforcement or the court in whose territory the child is present.[129] There are limited grounds that can be invoked for non-recognition of a judgment,[130] and they can be raised as soon as the judgment is claimed to be valid.[131] The court of recognition is not allowed to review the substance or the jurisdiction of the court of origin of the judgment, nor can it refuse recognition based on differences in

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124 This means that the system will apply to judgments issued after 1 July 2013, when Croatia became a Member State. See, in the context of Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 1968 ECJ, Case C-514/10 *Wolf Naturprodukte GmbH* v *SEWAR spol. s r.o.* [2012] ECR I-0000.

125 Recital 21 of the Preamble to the Brussels II *bis* Regulation.

126 Article 21(3) and 21(4) of the Brussels II *bis* Regulation. See also: ECJ, **Case** C-195/08 PPU Inga Rinau [2008] ECR I-5271.

127 The Croatian PIL Act in its Article 101 states that the competent court is the one in whose territory the recognition and enforcement has to be conducted. The party who seeks recognition and enforcement has to show that the decision will be "used" (e.g. enforced there, used in a procedure, entered into public registry etc.) within the territory of that court. See M Dika *et al.*, *Komentar Zakona o međunarodnom privatnom i procesnom pravu* [Commentary of the Act on International Private and Procedural Law] (Belgrade, Nomos 1991) p. 338.

128 https://e-justice.europa.eu/content_croatia__cooperation_in_civil_matters-276-en.do. (27 July 2014).

129 Article 340 of the Family Act (and Article 512 of the Family Act 2014).

130 See Article 23 of the Brussels II *bis* Regulation.

131 K. Siehr 'Chapter III Recognition and Enforcement' in U. Magnus and P. Mankowski, eds., *Brussels II bis Regulation* (Munich, Selp 2012) p. 277.

applicable law.[132] That court may, however, stay proceedings on recognition if ordinary appeal[133] is pending in the state of origin according to Article 27 of the Regulation.

Any interested party may apply for enforcement of a foreign judgment that has been declared enforceable in the country of origin. The competent court is to be established based on the habitual residence of the person against whom the enforcement is sought or of the relevant child. If neither of the places can be found in the state of enforcement, the competent court shall be the court of the place of enforcement.[134] In Croatia, enforcement should be sought before the municipal courts.[135] In order to obtain the declaration of enforceability, the party shall submit an authentic copy of the judgment and the certificate of enforceability issued in the country of origin of the judgment in accordance with Annex II of the Regulation, as well as some other documents in case of a judgment given in default.[136] All of them need to be translated by a certified translator.[137] The applicant has to give an address for service in the country of enforcement or appoint an applicant *ad litem*, depending on national law.[138] In Croatia, a representative *ad litem* needs to be appointed if the applicant is not present in the Croatian territory and has no legal representative in Croatia.

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132 Articles 24-26 of the Brussels II *bis* Regulation.

133 A definition of ordinary appeal given by the Court of Justice of the EU for the purposes of Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 1968 may be transposed to the Brussels II *bis* Regulation and it reads: "Within the meaning of Articles 30 and 38 of the Convention, any appeal which is such that it may result in the annulment or the amendment of the judgment which is the subject matter of the procedure for recognition or enforcement under the Convention and the lodging of which is bound, in the state in which the judgment was given, to a period which is laid down by the law and starts to run by virtue of that same judgment constitutes an 'ordinary appeal' which has been lodged or may be lodged against a foreign judgment." ECJ, Case 43-77 *Industrial Diamond Supplies* **v** *Luigi Riva* [1977] ECR 02175, OP 2.

134 Articles 28 and 29 of the Brussels II *bis* Regulation.

135 https://e-justice.europa.eu/content_croatia__cooperation_in_civil_matters-276-en.do (27 July .2014).

136 Article 37 of the Brussels II *bis* Regulation. Also, Article 30 of the Regulation states that the procedure shall be governed by national law. D. McClean 'Chapter III Recognition and Enforcement Section 2 Application for a declaration on enforceability' in U. Magnus and P. Mankowski, eds., *Brussels II bis Regulation* (Munich, Selp 2012), p. 299, states that this mainly relates to method of delivery, form and time for the application and office for submission. Croatian law does not contain any specific rules on those issues.

137 Article 38(2) of the Regulation in combination with Article 232 of the Croatian Civil Procedure Act.

138 Article 30(2) of the Brussels II *bis* Regulation.

If the party fails to do so, the application will be dismissed[139] since the consequences of failure to obey Article 30/2 are to be governed by national law.[140]

The court will issue a decision on enforceability without the party against whom enforcement is sought being notified, and the decision itself needs not to be notified to that party. After the notification, the parties have the right to appeal the decision within one month if the party against whom the enforcement is sought has his/her habitual residence in the country of the enforcement or two months if not.[141] In Croatia, the appeal is to be lodged to the county court via the municipal court that has issued the judgment.[142] After the appellate decision is issued, a motion for retrial may be submitted in accordance with Articles 421 to 428 of the Civil Procedure Act to the court which issued the first instance judgment.[143] The application for retrial has to contain the legal basis for the application, evidence supporting the claims from the application as well as evidence that the application has been submitted within the deadline of thirty days.[144],[145] The reasons on which the application may be based are the following: the judge who issued the judgment was or should have been removed from the proceedings; breach of the right to be heard; lack of procedural capacity of a party or misrepresentation; the judgement was based on a false witness or expert witness statement, on a forged document, on a criminal action of a judge, legal representative, the opposing party or a third person; the party gained opportunity to use the final judgment between the same parties; *res iudicata* and new evidence favourable to that party. Both during the first and second appeal, the court has the discretion to stay proceedings if ordinary appeal has been lodged in the country of origin or the deadline for it has not yet expired according to Article 35 of the Regulation.

The recognition and declaration of enforceability of a judgment related to child abduction may only be refused:

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139 Article 146(1) of the Civil Procedure Act.

140 Siehr, *loc. cit.* n. 131, p. 300.

141 Article 33 of the Brussels II *bis* Regulation.

142 https://e-justice.europa.eu/content_croatia__cooperation_in_civil_matters-276-en.do. (27 July 2014).

143 See https://e-justice.europa.eu/content_croatia__cooperation_in_civil_matters-276-en.do. (27 July 2014) and Article 34 of the Brussels II *bis* Regulation.

144 The deadline for the application counts from the date of service of the judgment or from the date when the party has had knowledge of the relevant fact or the date from which the party was able to invoke the reason on which the application is based. The commencement of the deadline depends on the reason on which the application is based (Article 423 of the Civil Procedure Act).

145 Article 424 of the Civil Procedure Act.

(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.[146]

The mere execution of the judgment is still governed by national law.[147] The national procedures may not in any case undermine the purpose of the intra-EU child abduction regime, which is primarily the swift return of abducted children.[148] This is especially so when the principle of effectiveness is considered. It has been well established by the CJEU that national procedures should not make it "impossible in practice to exercise the rights which the national courts are obliged to protect".[149] The Family Act provides for enforcement by taking the child, monetary penalties and imprisonment as means of

146 Article 23 of the Brussels II *bis* Regulation. For a detailed elaboration of the reasons, see: Siehr, *loc. cit.* n. 131, pp. 275-286 and Medić Musa, op.cit. n. 71, pp. 103-106.

147 Article 47(1) of the Brussels II *bis* Regulation.

148 See also U. Magnus 'Chapter III Recognition and Enforcement Section 4 Enforceability of certain judgments concerning rights of access' in U. Magnus and P. Mankowski, eds., *Brussels II bis Regulation* (Munich, Selp 2012) p. 317, p. 364.

149 ECJ, Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* [1976] *ECR* 1989, para 5.

enforcement. [150] These did not always lead to the most favourable results.[151] The Family Act 2014 introduces a bit more detailed provisions on enforcement by coercive measures towards the child.[152] It compels the judge, the police and the social welfare centre to co-operate in order to protect the child's interest.[153] It also gives the court a possibility to direct the child to a conversation with a professional and therefore stay the enforcement proceedings.[154] This could lead to more successful enforcement procedures in some cases, although coercive measures are not generally desirable. Therefore, the Croatian authorities will have to apply them carefully; only "in the event of unlawful behaviour by the parent with whom the children live"[155] in order to comply with the European Convention on Human Rights, namely its Article 8 that protects the right to family life. In some situations, on the other hand, it may be justifiable not to enforce the return judgment. These are limited to most exceptional cases when the child strongly objects to return and when there is a new fact that may result in severe harm for the child upon return.[156]

7.2. "Fast track" recognition and enforcement

One of the main controversies in the new intra-EU child abduction regime lies in new Articles 11(8) and 42. According to them, the return judgment issued in the state of habitual residence that has been preceded by a non-return judgment issued in the state of removal will be automatically recognised without a need for *exequatur*. What this actually means is that the court in the state of habitual residence has the right to overturn the judgment of the court of the state of removal after the latter has transmitted the case to the first under Article 11/6 of the Regulation. This is "easy to understand and perfectly consistent with the general policy underlying Articles 10 and 11".[157] However, it is difficult to understand having in mind the often invoked principle of mutual

150 Article 345(1) of the Family Act.

151 As an example, see *Karađić* v *Croatia* (2005) 44 ECHR 896.

152 Article 514(1) of the Family Act 2014.

153 Article 516(1) of the Family Act 2014.

154 Article 517(2) and 519/1 of the Family Act 2014.

155 *Ignaccolo-Zenide* v *Romania* (2001) 31 EHRR 7, at para 106; Karadžić v Croatia, n. 151, at para 61.

156 See P. McEleavy 'Chapter III Recognition and Enforcement Section 6 Other provisions' in U. Magnus and P. Mankowski, eds., *Brussels II bis Regulation* (Munich, Selp 2012) p. 387, p. 395.

157 Pataut, *loc. cit.* n. 26, p. 144.

trust between national courts of EU Member States.[158] The system thus, controversially enough, promotes mistrust between the two courts.[159]

This system only applies to judgments issued after a non-return judgment based on reasons from Article 13 of the Convention has been issued.[160] After such subsequent return judgment has been issued, if certified, it will be susceptible to automatic recognition and enforcement without any need for *exequatur*.[161] The purpose of Article 42 and the system found within is to prevent lengthy proceedings following the return judgment.[162] Certification of the judgment will take place if the judge issuing the judgment establishes that the following requirements are fulfilled:

"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 parties were given an opportunity to be heard; and 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."[163]

The judgment itself may be declared enforceable notwithstanding any appeal in the country of origin.[164] The Croatian judges may therefore avail themselves of the provisions of the Family Act which allow them to declare that the appeal does not suspend the enforceability of the judgment.[165] The certificate issued may only be rectified in accordance with national law, which means, under the Croatian Civil Procedure Act, that the parties may seek correction of evident typographical and numerical errors, formal mistakes and differences between the original and the copy of the certificate at any time.[166]

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158 The principle is endorsed within the Brussels II *bis* Regulation as well as in Recital 21 of the Preamble to the Regulation.

159 See Holzmann, *op. cit.* n. 22, p. 221; McEleavy, *loc. cit.* n. 20, p. 32.

160 Article 11(8) of the Brussels II *bis* Regulation. According to Trimmings, *op. cit.* n. 33, p. 107, the result of the new system is some degree of avoidance of Article 13(1)b.

161 Article 42(1) of the Brussels II *bis* Regulation.

162 Magnus, *loc. cit.* n. 148, at p. 362. Undue delay may in some cases constitute the grave risk of harm exception. See: *S. v. S. & S.* [2009] EWHC 1494 (Fam), INCADAT cite HC/E/UKe 1016.

163 Article 42(2) of the Brussels II *bis* Regulation.

164 Article 42(1) of the Brussels II *bis* Regulation.

165 See n. 74 and accompanying text.

166 Article 342 of the Civil Procedure Act.

In the country of recognition, the recognition may not be refused and the parties may not apply for a declaration of non-recognition.[167] Accordingly, the provision of the Croatian Private International Law Act that allows to appeal on a decision on recognition and/or enforceability[168] should not be applied, in accordance with the *Simmental* doctrine mentioned above. The judgment shall be enforceable as if it were a domestic judgment.[169] Non-enforcement might thus take place in case of changed circumstances,[170] but non-enforcement should not take place due to a different standpoint on the merits of the judge in the country of enforcement.[171] The Regulation provides for one explicit reason for non-enforcement – if there is a subsequent irreconcilable[172] and enforceable judgment, the judgment on return certified in the country of origin of the judgment shall not be enforced.[173] Objection of a subsequent irreconcilable judgment should thus be found admissible at any time in order to ensure the correct functioning of the Regulation.[174]

7.3. The old recognition and enforcement regime

Both regimes of recognition and enforcement under the Brussels II *bis* Regulation are based on the principle of mutual recognition of judicial decisions that is crucial for the creation of a genuine judicial area.[175] Such judicial area does not exist towards non-EU Member States, so no mutual trust between courts is presumed.[176] Therefore, recognition and enforcement of child abduction judgments coming from non-EU Member States remains to be governed by the Croatian Private International Law Act, namely its Articles 86 to 96. The main difference is that the decision from a non-EU state needs to be recognised and

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167 Article 42(1) of the Brussels II *bis* Regulation. See also: *Rinau*, n. 126, at OP 1 and 2.

168 Article 101(2) of the PIL Act allows appeal to be lodged within fifteen days.

169 Article 47(2) of the Brussels II *bis* Regulation.

170 Medić Musa*, op. cit*. n. 71, p. 114.

171 McEleavy, *loc. cit.* n. 156, p. 395.

172 According to case law under the Brussels Convention of 1968, the judgments are irreconcilable if "they entail legal consequences that are mutually exclusive". ECJ, Case 145/86 *Horst Ludwig Martin Hoffmann* v *Adelheid Krieg* [1988] ECR 645, para 22.

173 Article 47(2) of the Brussels II *bis* Regulation. The notion "subsequent irreconcilable enforceable decision" does not encompass decisions that award only provisional rights of custody. *Povse*, n. 25, at OP 2.

174 See Magnus, *loc. cit.* n. 148, p. 362.

175 Recital 2 of the Preamble to the Brussels II *bis* Regulation.

176 Holzmann, *op. cit.* n. 22, p. 218.

declared enforceable; there is no automatic recognition.[177] Other differences can be found in the documents that need to be submitted, procedure and the reasons for refusing recognition and enforcement of a foreign judgment.

In order to secure recognition of a foreign judgment, the applicant should submit the judgment itself as well as the certificate of finality issued by the authority and in accordance with the law of the state of origin.[178] Reasons that may lead to a non-recognition and refusal of enforceability are the following: breach of the right to be heard of the person against whom the judgment was issued (especially lack of notice of the proceedings if the party has not entered into appearance); exclusive jurisdiction of Croatian courts in the matter; domestic or enforceable foreign previous judgment between the same parties and in the same matter;[179] public policy;[180] lack of reciprocity with the state of origin of the judgment.[181],[182] The objection of exclusive jurisdiction of domestic courts may come into consideration when both the defendant and the child are Croatian and have their domicile in Croatia.[183] The hypothetical is the following: the child and the mother are Croatian and have their domicile and habitual residence in Croatia. The child is then wrongfully removed to a foreign country, e.g. the United States of America, and the USA court issues a decision regarding the child's return or non-return. Although this would completely contravene the purpose of the Child Abduction Convention, the Croatian court may not recognise and enforce the USA court's judgment due to existence of exclusive jurisdiction. When compared with the standard track recognition and enforcement, the differences in reasons for non-recognition are significant. Only the public policy and the violation of the right to be heard exceptions overlap, but do not necessarily have identical interpretation.

The procedure is not regulated in details. Article 101 of the PIL Act provides that the decision may be recognised incidentally and as the main issue in the proceedings. However, unlike in the Regulation's system, the party against whom recognition and enforcement is sought needs to be notified of the ap-

177 Article 86(1) of the PIL Act.

178 Article 87 of the PIL Act.

179 The criterion of both objective and subjective identity of the subject matter is accepted by analogy with the rule on *lis pendens* from Article 90(2) of the PIL Act. Dika, *op. cit*. n. 127, p. 296.

180 The Act uses the phrase "contrariety to basis of the state system as set in the Constitution", but this is perceived as public policy objection. Dika, *op. cit.* n. 127, p. 300.

181 The reciprocity is presumed until proven otherwise. If there is doubt, the Ministry of Justice shall issue a clarification. (Article 92(3) of the PIL Act).

182 Articles 88-91 of the PIL Act.

183 Article 66(2) of the PIL Act.

plication in order to secure the requirement of fair trial.[184] The proceedings for recognition and enforcement may be stayed, but only if the proceedings in the same matter and between the same parties are pending before domestic courts.[185]

III. Conclusion

Entry into force of the Brussels II *bis* Regulation has changed the Croatian child abduction disputes' regime in several manners. Primarily, it has set two different regimes depending on the place of habitual residence of the child. If the place is within the EU, the Regulation applies. Towards non-EU states, the regime remained the same, governed by the Child Abduction Convention. Looking at the Regulation's regime specifically, there are some changes and some nuances. The changes are seen in the obligation to transmit the case after a non-return decision has been issued and in the recognition and enforcement system of judgments coming from the EU. Nuances are to be seen with respect to obligations to hear the child and the applicant. Two novelties need to amount to changes in order to enhance the Croatian practice in dealing with the child abduction cases. First are the set time limits that will hopefully influence the length of the procedure. Second is the needed change of interpretation of grave risk of harm. Now it is coupled with the duty to check the security arrangements that have been made in the country of habitual residence. Although it is only applicable to cases governed by the Regulation, this new duty might restrain the tendency of a too wide interpretation of the grave risk of harm defence that appears in some Croatian cases.

184 Dika, *op. cit.* n. 127, pp. 340-341.

185 Article 90(2) 0f the PIL Act.

ELTERLICHE INTERNATIONALE KINDESENTFÜHRUNG

Suzana Kraljić* & KatjaDrnovšek**

I. Einleitung

Wir leben in einer Zeit der großen Mobilität der Menschen. Die Menschen siedeln innerhalb ihrer Staaten, von Staat zu Staat und von Kontinent zu Kontinent um. Die Mobilität zieht natürlich auch familienrechtliche Beziehungen mit internationalem Element nach sich. 2011 sollen von 122 Millionen Ehen in der Europäischen Union rund 13% der Ehen eine grenzübergreifende Dimension gehabt haben.[1] Wenn man bereits von einer »einheimischen Ehe« ausgeht, sehen sich die Ehegatten zahlreichen Fragen, die zu lösen sind (z.B. die Wohnungsmiete, die Teilung des gemeinsamen Vermögens,…), gegenüber. Ein besonders hohes Maß an Bereitschaft zur einvernehmlichen Lösung verlangen die Angelegenheiten hinsichtlich der gemeinsamen Kinder. Ausgehend vom slowenischen Ehe- und Familiengesetz (*Zakona o zakonski zvezi in družinskih razmerjih*) (weiter: EheFamG)[2] müssen die Eltern das Einvernehmen über die Obhut, Erziehung, den Unterhalt und den Umgang mit den gemeinsamen Kindern, über welche sie das Elternrecht haben, erzielen. Alles Genannte verlangt den Eltern eine große Bereitschaft ab, miteinander zu sprechen und schließlich Lösungen, welche zum Vorteil aller Beteiligten, aber in erster Linie müssen sie jedenfalls zum Wohl des Kindes, sind, zu beschließen. Können die Eltern allein kein Einvernehmen erreichen, kann ihnen das Zentrum für Sozialarbeit (weiter: ZSA) helfen. Erreichen die Eltern auch unter Mithilfe des ZSA kein Einvernehmen, entscheidet das Gericht über die Obhut, Erziehung, den Unterhalt und den Umgang, jedoch nur im Fall der Ehescheidungsklage. Zusätzlich können sich diese Angelegenheiten noch verschärfen, wenn die Eltern Staatsangehörige verschiedener Staaten sind beziehungsweise ihr gewöhnlicher Aufenthalt in verschiedenen Staaten liegt. In Ehen mit internationalem Element kann es nämlich zu Konfrontationen verschiedener Kulturen, Religionen, Sitten, Rechtsordnungen, usw. kommen. Unter bereits erschwerten Umständen hinsichtlich der Scheidung kommen

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1 Eprsauthor, International parental child abduction. Online in Internet: http://epthinktank.eu/2014/05/28/international-parental-child-abduction/ (22.10.2014).

2 Ehe- und Familiengesetz (*Zakon o zakonski zvezi in družinskih razmerjih*): Uradni list (Gesetzblatt) RS, Nr. 69/2004 – ABW1 mit späteren Änderungen

noch die genannten Umstände, die eventuelle einvernehmliche Lösungen noch erschweren, hinzu. Unstimmigkeiten, die dabei auftreten, können zur Extremsituation führen, dass einer der Eltern sich entscheidet und das Kind widerrechtlich in sein Heimatland, einen anderen Staat oder gar anderswohin verbringt. Verbringt ein Elternteil das Kind in sein Heimatland, hofft er, dass die Lösung, die von der Behörde dieses Landes beschlossen wird, für ihn oder sie günstiger sein wird, als die Lösung, die im Staat, aus dem das Kind verbracht wird, beschlossen worden ist oder werden wird. Um die genannten Handlungen zumindest teilweise zu verhindern beziehungsweise um die Gedanken an eine Entführung abzuwenden, wurde am 25.10.1980 das Haager Übereinkommen über die zivilrechtlichen Aspekte internationaler Kindesentführung (weiter: HK 1980) geschlossen.[3]

II. Rolle der zentralen Behörde

Die HK 1980, die 1980 verabschiedet wurde und die heute von bereits 93 Staaten (davon allen Mitgliedstaaten der Europäischen Union) ratifiziert wurde,[4] hat die Rechtsregelungen in den Fällen der zivilrechtlichen internationalen Kindesentführung vereinheitlicht, weshalb wir sie zum einheitlichen materiellen Recht zählen. Jedoch beinhaltet die HK 1980 auch viele organisatorische Bestimmungen, weshalb wir sie auch zu den Quellen, welche die internationale Rechtshilfe in Zivilangelegenheiten regeln, einordnen.[5]

Die HK 1980 schafft nämlich ein System der engen Zusammenarbeit zwischen den zentralen Behörden der Vertragsstaaten. Die HK 1980 erlegt zu Eigenzwecken die Gründung einer zentralen Behörde in jedem Mitgliedstaat auf (Art. 6). Auch Slowenien legte bei der Ratifizierung (25.3.1993) fest, wer die Rolle der zentralen Behörde übernimmt. Nach Art. 6 des Gesetzes über die Ratifizierung des Abkommens über die zivilrechtlichen Aspekte der internationalen Kindesentführung (Zakon o ratifikaciji konvencije o civilnopravnih vidikih mednarodne ugrabitve otrok)[6] wurde festgelegt, dass diese Rolle vom Ministerium für Inneres übernommen wird. Dann kam es zu Komplikationen, da die Regierung bei ihrer 43. Sitzung am 16.9.1993 den Beschluss gefasst hat, dass das für die Familie zuständige Ministerium als zentrale Behörde bestimmt werde. Jedoch sind seitdem neun Jahre vergangen, bevor es tatsächlich

3 Uradni list RS-MP, Nr. 6/1993; 14/2012.

4 Der Stand in 93 Staaten ist vom 22.11.2014. Er ist Online im Internet verfügbar: http://www.hcch.net/index_en.php?act=states.listing (22.10.2014).

5 G. Kegel, K. Schurig, *Internationales Privatrecht,* 8th Edition (München, Beck 2000) S. 810.

6 Uradni list RS-MP, Nr. 6/1993.

zur Änderung gekommen ist. Erst am 29.11.2012 wurde das Gesetz über die Änderungen des Gesetzes über die Ratifizierung des Abkommens über die zivilrechtlichen Gesichtspunkte der internationalen Kindesentführung, welches die Zuständigkeit der zentralen Behörde vom Ministerium für Inneres auf das für die Familie zuständige Ministerium übertrug, verabschiedet (Art. 4).

Wegen der Übertragung der Zuständigkeit der zentralen Behörde auf das für die Familie zuständige Ministerium begann man erst nach der Übertragung mit der Führung einer entsprechenden Statistik und Dokumentation in Angelegenheiten der internationalen Kindesentführung. Ausgehend von den Daten, die uns seitens der zentralen Behörde übermittelt wurden, wurden zwischen 2008 und 2013 21 Anträge auf Rückführung des Kindes eingereicht. Erst in Zukunft wird man auch in Slowenien auf qualitätsvollere und vollständigere Daten zurückgreifen können werden.

III. Geografische Komponente des HKÜ

Ausgehend vom globalen Bericht für 2008, für den 60 Mitgliedstaaten (also 94%) statistische Daten beigetragen haben,[7] kann folgendes festgestellt werden, dass im Zeitraum, der vom Generalbericht umfasst wird:

- 2705 Kinder in 1961 Rückführungsanträgen umfasst wurden;
- das Durchschnittsalter der Kinder 6,4 Jahre betrug;
- 46% zurückgeführt wurden, davon 19% freiwillige Rückführungen und 27% aufgrund einer Gerichtsentscheidung;
- über 44% Anträge vor Gericht entschieden wurde;
- in 269 Fällen die Rückführung des Kindes abgelehnt wurde;
- die Durchschnittszeit für die Fällung der Entscheidung über die Rückführung des Kindes 166 Tage betrug;
- die Durchschnittszeit für die Ablehnung der Rückführung des Kindes 286 Tage betrug;
- die Durchschnittszeit für die freiwillige Rückführung des Kindes 121 Tage betrug.[8]

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7 N. Lowe, *A Statistical Analysis of Applications made in 2008 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction Part I – Global Report* (La Haye, 2008) S. 4.

8 Lowe, *op. cit.* n. 7 auf S. 2, 5, 6.

Das Ziel der HK 1980 ist die Verringerung der Anzahl der internationalen Entführungen. Dadurch, dass das HKÜ bereits in 93 Staaten in Kraft ist, ist das Ziel der HK 1980, dass die möglichst baldige Rückführung der Kinder gewährleistet wird, sicherlich erreicht, da mit jeder Erweiterung der Vertragsstaaten die Anzahl der potenziellen Staaten, wohin der Entführer sorglos flüchten kann, geringer wird.

Eine der Grundvoraussetzungen für die Anwendung der HK 1980 ist, dass beide Staaten Vertragsstaaten sind. Somit ist die HK 1980 nur dann anzuwenden, wenn das Kind, das den gewöhnlichen Aufenthalt in einem Vertragsstaat hat (Art. 4), widerrechtlich in einen anderen Vertragsstaat verbracht oder dort festgehalten wird (Art. 1(a) HK 1980). Daraus kann geschlossen werden, dass die HK 1980 nicht anzuwenden ist, wenn es sich um eine innerstaatliche Entführung handelt oder das Kind in einen Nichtvertragsstaat entführt oder dort festgehalten wird. Das bedeutet konkret, dass die HK 1980 in Betracht kommt, wenn das Kind, das den gewöhnlichen Aufenthalt in Slowenien hat, widerrechtlich in einen anderen Vertragsstaat verbracht oder dort festgehalten wird, wie auch wenn das Kind, das seinen gewöhnlichen Aufenthalt in einem anderen Vertragsstaat hat, widerrechtlich nach Slowenien verbracht oder hier festgehalten wird. Es handelt sich also um eine Bedingung in beiden Richtungen – es wird verlangt, dass beide Staaten Vertragsstaaten der HK 1980 sind.

Die HK 1980 legt den gewöhnlichen Aufenthalt des Kindes als grundlegenden Anknüpfungspunkt für die Entscheidung über die Rückführung des Kindes fest, gibt dabei aber keine Definition des gewöhnlichen Aufenthalts. Obwohl der gewöhnliche Aufenthalt heute den Standardanknüpfungspunkt im internationalen Privatrecht darstellt, ist seine Definition nicht leicht. Insbesondere kommt das bei einem Kind, bei dem es kein Willenselement gibt, da es gewöhnlich mit dem Elternteil, der das Elternrecht besitzt, lebt, zum Ausdruck.[9]

IV. Personelle Komponente der HK 1980

Die Rückführung aufgrund der HK 1980 kann nur abgelehnt werden, wenn das gesetzliche Sorgerecht für das Kind verletzt wurde (Art. 5). Das Sorgerecht für das Kind kann eine Person allein oder mehrere Personen gemeinsam haben. Der Inhaber des Sorgerechts für das Kind, das vor allem das Recht auf die Fürsorge für die Persönlichkeit des Kindes und im Rahmen dessen das Aufenthaltsbestimmungsrecht umfasst, entscheidet gewöhnlich auch über den Aufenthalt des Kindes. Wer das Sorgerecht für das Kind hat, entscheidet über den gewöhnlichen Aufenthalt des Kindes vor der Entführung oder

9 N. Lowe, G. Douglas, *Bromley's Family Law,* 10. Ausgabe (Oxford, Oxford University Press 2007) S. 633-4.

seiner widerrechtlichen Festhaltung (Artikel 3 Abs. 2). Das Gericht, vor dem der Antrag auf Rückführung des Kindes gestellt wurde, stellt nicht fest, bei welchem der Eltern langfristig besser für das Kind gesorgt ist, da über diese Frage in Verfahren entschieden wird, wo inhaltlich über die an das Elternrecht gebundene Fragen entschieden wird. In diesem Fragen ist nämlich der primäre Anknüpfungspunkt die Staatsangehörigkeit und nicht der gewöhnliche Aufenthalt, wie nach der HK 1980.[10]

Das Sorgerecht für das Kind kann somit individuell oder kollektiv ausgeübt werden. Das Kind ist also widerrechtlich verbracht oder festgehalten, wenn dem Elternteil, der das Sorgerecht ausübt, durch die Verbringung dessen Ausübung unmöglich gemacht wird. Auch wenn das Kind gesetzesgemäß verbracht wird (z.B. mit der Zustimmung des Elternteils), kann sich dieser Zustand später in ein widerrechtliches Festhalten ändern. Im Fall *Re S (Minors) (Abduction: Wrongful Retention) (1994)* wurde erachtet, dass das Kind widerrechtlich festgehalten wurde, obwohl die Zeit, für welche die Zustimmung zur gesetzesgemäß erteilt wurde, noch nicht abgelaufen war, da bereits vor dem Ablauf dieser Zeit bekannt war, dass das Kind nicht zurückgebracht werden würde.[11]

Das Wesen der Inhaberschaft des Sorgerechts für das Kind ist, dass dieses tatsächlich ausgeübt werden muss. Es reicht nämlich nicht aus, dass es nur besteht. Üben die Eltern das Sorgerecht für das Kind aus[12] (gemeinsame Elternschaft auch nach dem EheFamG) und lebt ein Kleinkind nur bei einem der Eltern, wird das Sorgerecht für das Kind auch dann verletzt, wenn es weniger umfangreich ist als das überwiegende Recht des Elternteils, der für das Kind sorgt.[13] Ebenso gilt, dass das Sorgerecht ausgeübt wird, obwohl das Kind sich nicht wirklich bei der Person, die dieses Recht hat, befindet, jedoch nur, wenn die Trennung aus berechtigten Gründen (z.B. Krankheit, Schulbesuch) besteht.[14]

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10 Vgl. Art. 42 des Gesetzes über das Internationale Privatrecht und Verfahren (*Zakona o mednarodnem zasebnem pravu in postopku*: Uradni lis RS, Nr. 56/1999): »(1) *Razmerja med starši in otroci se presojajo po pravu države, katere državljani so...(3) Če so starši in otroci državljani različnih držav in tudi nimajo stalnega prebivališča v isti državi, se uporabi pravo države, katere državljan je otrok.«*

11 S. Cretneym, J.M. Masson, R. Bailey-Harris, *Principles of Family Law* (London, Thomson Sweet&Maxwell 2002) S. 680.

12 Siehe der Fall *Cooper v Casey (1995) FLC 92-575*, wo die Rückführung des Kindes beschlossen wurde, da die Mutter die Kinder, über die beide Eltern das Sorgerecht hatten, einseitig verbracht hat.

13 B. Hoffmann, *Internationales Privatrecht,* 7. Auflage (München, Verlag C. H. Beck 2002) S. 345.

14 E. Perez-Vera, *Explanatory Report*. Online im Internet: http://www.hcch.net/upload/expl28.pdf (25.10.2014) S. 49.

Eine Besonderheit der HK 1980 stellt die Senkung der Altersgrenze der Anwendung dar, da sie sich nur auf Kinder bis zum vollendeten 16. Lebensjahr bezieht (Art. 4). Vergleicht man *ratione personae* die HK 1980 und das Übereinkommen über die Rechte des Kindes (weiter: UN-KRK),[15] sieht man, dass die Altersgrenze des UN-KRK bei 18 Jahren liegt – also zwei Jahre höher als bei der HK 1980. Der Grund dafür liegt darin, dass in den meisten Rechtsordnungen die Volljährigkeit mit dem 18. Lebensjahr erreicht wird. Die HK 1980 setzt deshalb eine niedrigere Grenze fest, dass das Kind, älter als 16 Jahre, bereits seine Meinung, die von den Eltern, als auch von den Gerichten und anderen Behörden berücksichtigt werden sollte, ausreichend klar bilden und ausdrücken kann.

V. Stellung des Kindes im Lichte der Hauptziele der HK 1980

HKÜ 1980, als multilaterales Abkommen, verfolgt, ausgehend aus Art. 1, zwei grundlegende Ziele. Das erste Ziel bezieht sich auf die *Gewährleistung der möglichst baldigen Rückführung der Kinder, die widerrechtlich in einen Vertragsstaat verbracht oder dort festgehalten werden*. Mit dem zweiten Ziel strebt die HK 1980 die *Gewährleistung, dass das Sorgerecht für das Kind und der Umgang mit ihm nach dem Gesetz eines der Vertragsstaaten im anderen Vertragsstaat tatsächlich respektiert werden* (Art. 1 HK 1980). Mit der Formulierung solcher Ziele soll die Ausübung der Selbsthilfe in Angelegenheiten des Kindesschutzes verhindert und die Hoffnung des Entführers, dass er mit der widerrechtlichen Verbringung oder dem festhalten des Kindes praktische oder rechtliche Vorteile erwirbt, zunichte gemacht werden.[16]

Art. 3 HK 1980 definiert, dass das Verbringen oder Zurückhalten eines Kindes im Folgenden widerrechtlich ist:

a) Verletzung des Sorgerechts, das einer Person, Behörde oder sonstigen Stelle allein oder gemeinsam nach dem Recht des Staates zusteht, in dem das Kind unmittelbar vor dem Verbringen oder Zurückhalten seinen gewöhnlichen Aufenthalt hatte;

b) dieses Recht im Zeitpunkt des Verbringens oder Zurückhaltens allein oder gemeinsam tatsächlich ausgeübt wurde oder ausgeübt worden wäre, falls das Verbringen oder Zurückhalten nicht stattgefunden hätte.

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15 Übereinkommen über die Rechte des Kindes, kurz UN-Kinderrechtskonvention (*Konvencija Združenih narodov o otrokovih pravicah*): Uradni list RS, Nr. 9/1992.

16 C. S. Bruch, 'The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases' 38 *Fam. L. Q.* 529, 2004-2005, S. 529.

Die Gewährleistung des ersten Ziels, also die möglichst baldige Rückkehr des Kindes, das widerrechtlich verbracht oder zurückgehalten wurde, soll das Eintreten oder die Vergrößerung der negativen Folgen, denen sich das Kind im Fall der widerrechtlichen Verbringung oder Zurückhaltung gegenübersieht, verhindern. Man muss wissen, dass die Ablehnung der Rückführung des Kindes in der Regel stärker in die Interessen des Kindes eingreift, als die erneute Errichtung des vorigen Zustands vor seiner Entführung. Dem Kind droht nämlich häufig die vollkommene Unterbrechung der Verbindungen mit dem Elternteil, dem es entzogen wurde, wie auch mit den Verwandten und Freunden. Im Fall der Entführung wird das Kind in der Regel ohne vorherige Nachfrage nach seiner Meinung oder seinen Wünschen in ein fremdes Umfeld, ein fremdes Schulsystem verbracht und das Kind begegnet einer Fremdsprache, einer fremden Kultur oder Religion.[17] Den einzigen Anknüpfungspunkt für das Kind in dieser Zeit gibt ihm der Elternteil, der das Kind entführt hat, und es kommt nicht selten vor, dass das Kind den Verwandten, die für es Unbekannte sind, zur Obhut und Erziehung überlassen wird.

Um dieses Ziel am Leichtesten, Schnellsten und Effektivsten zu erreichen, ist ein schnelles Handeln erforderlich. Deswegen wird das Gerichts- oder Ordnungsverfahren für die Rückführung des Kinds sofort durchgeführt und die Entscheidung über die Rückführung sollte innerhalb von sechs Wochen gefällt werden (Art. 11 HK 1980). Die slowenische zentrale Behörde versucht, dieser Frist zu folgen, obwohl gesagt wird, dass das manchmal sehr schwierig beziehungsweise unmöglich ist. Das Ziel, die möglichst baldige Rückkehr des Kindes zu gewährleisten, gründet also auf der Vermutung, dass das Wohl des Kindes am besten gewährleistet wird, wenn die Wirkungen der Entführung möglichst bald beseitigt werden, und zwar aus drei Gründen:

- dass der Schaden, der den Kindern, die unerwartet aus ihrer Umwelt umgesiedelt werden, neutralisiert wird;
- das Wissen, dass die Rückführung des Kindes verlangt wird, kann für den potentiellen Entführer sehr störend sein;
- die Interessen des Kindes können im Konflikt *forum conveniens,* das gewöhnlich der Ort des gewöhnlichen Aufenthalts ist, am besten gewahrt werden.[18]

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17 S. Motzer, R. Kugler, *Kindschaftsrecht mit Auslandsbezug* (Bielefeld, Gieseking Verlag 2003) S. 242.

18 R. Schuz, *The Hague Abduction Convention: A Critical Analysis* (Hart Publishing, London) S. 723.

Mit der HK 1980 wird der Schutz des Kindeswohls vorsorglich verwirklicht, da die HK 1980 die Eltern so beeinflussen soll, dass sie diese von der Entführung abhält, da sie ihnen mit ihrer Regelung aufzeigt, dass der Entführung die Errichtung des vorigen Zustands folgen wird. Jedoch kann diese Vorsorgefunktion nur gewährleistet werden, wenn alle Vertragsstaaten diesem Ziel der Konvention folgen und sich bemühen werden, das Kind zurückzuführen und die Fälle, in denen die Rückführung abgelehnt wird, die Ausnahme sein werden.

Der Zweck der HK 1980 ist nicht die inhaltliche Lösung von Konflikten über die Frage des Elternrechts, sondern die Errichtung des vorigen Zustands, indem die Rückführung des Kinds an den Ort seines gewöhnlichen Aufenthalts gewährleistet wird (es soll also der *status quo ante* errichtet werden. Der gewöhnliche Aufenthalt des Kindes folgt üblicherweise dem gewöhnlichen Aufenthalt seiner Eltern beziehungsweise des Elternteils, der für das Kind sorgt.[19] Mit der Rückführung des Kindes an den Ort seines gewöhnlichen Aufenthalts wird nämlich den zuständigen Behörden des Staats ermöglicht, gemäß ihrem Recht über das Sorgerecht für das Kind zu entscheiden. Dieser Standpunkt geht aus der HK 1980 hervor, da es ihr Grundziel ist, die möglichst baldige Rückkehr des Kindes zu gewährleisten. Ebenso gilt die Vermutung, dass für das Kindeswohl am besten in dem Staat gesorgt ist, wo es seinen gewöhnlichen Aufenthalt hat. Und deshalb wird über den Inhalt des Elternrechts nur nach dem Recht des Staats des gewöhnlichen Aufenthalts des Kindes entschieden und nicht in dem Staat, in das es widerrechtlich verbracht oder in dem es zurückgehalten wird. In diesem Staat kann nämlich nur festgestellt werden, ob das Kind widerrechtlich verbracht oder zurückgehalten wird. Das Gericht kann sich dabei so behelfen, dass es verlangt, der Antragsteller auf Rückführung des Kindes, solle die Entscheidung oder andere Beweise vorlegen, dass das Kind widerrechtlich verbracht oder zurückgehalten wird. In diesem Fall handelt es sich um Entscheidungen, die gewöhnlich erlassen wurden, nachdem das Kind bereits in ein anderes Land verbracht oder dort zurückgehalten worden ist. Und deshalb ist keine Verletzung der Gleichberechtigung des Entführers, noch die des Rechts auf den gleichen Rechtsschutz gegeben.[20] Mit der Rückführung des Kindes wird versucht, die Vollstreckung solcher Entscheidungen zu gewährleisten.

Wir sind jedoch der Meinung, dass der genannten Vermutung über die möglichst baldige Rückkehr des Kindes nicht absolut gefolgt werden kann, sondern in jedem Fall gesondert das Kindeswohl hinsichtlich der möglichst bal-

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19 *Dickson v Dickson 1990 SCLR 692*.

20 Entscheidung des Verfassungsgerichts der RS Nr. Up-377/01.

digen Rückkehr zu beurteilen ist. Es ist die Grundregel, dass das Kind zurückzuführen ist, wenn der Antrag vor dem Ablauf von 12 Monaten seit der widerrechtlichen Verbringung oder Zurückhaltung gestellt wurde (Art. 12 HK 1980). Jedoch sind hinsichtlich des Art. 12 HK 1980 in Art. 13 Ausnahmen gegeben, in denen die Rückführung des Kindes ungeachtet des Art. 12 abgelehnt werden kann. Das Gericht kann so die Rückführung des Kindes ablehnen, wenn nachgewiesen wird:

a) dass die Person, Behörde oder sonstige Stelle, der die Sorge für die Person des Kindes zustand, das Sorgerecht zur Zeit des Verbringens oder Zurückhaltens tatsächlich nicht ausgeübt, dem Verbringen oder Zurückhalten zugestimmt oder dieses nachträglich genehmigt hat oder

b) dass die Rückgabe mit der schwerwiegenden Gefahr eines körperlichen oder seelischen Schadens für das Kind verbunden ist oder das Kind auf andere Weise in eine unzumutbare Lage bringt;

c) dass sich das Kind der Rückgabe widersetzt und dass es ein Alter und eine Reife erreicht hat, angesichts deren es angebracht erscheint, seine Meinung zu berücksichtigen (Art. 13 HK 1980).

Bei Würdigung der in diesem Artikel genannten Umstände hat das Gericht oder die Verwaltungsbehörde die Auskünfte über die soziale Lage des Kindes zu berücksichtigen, die von der zentralen Behörde oder einer anderen zuständigen Behörde des Staates des gewöhnlichen Aufenthalts des Kindes erteilt worden sind.

Nach dem Ablauf der Jahresfrist, welche davor vom Gericht die unbedingte Rückführung des Kindes verlangt, hat das Gericht hinsichtlich der Rückführung des Kinds das Ermessensrecht. Stellt das Gericht also fest, dass vor dem Ablauf der Jahresfrist die oben genannten Gründe vorhanden waren, kann es die Rückführung des Kinds bereits vor dem Ablauf dieser Frist ablehnen. Läuft die Frist aber ab, kann die Rückführung abgelehnt werden, wenn nachgewiesen wird, dass sich das Kind in die neue Umwelt eingelebt hat.

Die Ausnahmen, wegen denen die Rückführung des Kindes seitens der Behörden vor dem Ablauf der Jahresfrist abgelehnt werden kann, sind restriktiv auszulegen.[21] Das kommt insbesondere in den Fällen der Geltendmachung des Grundes der schwerwiegenden Gefahr (*ang. grave risk of harm*), die trotz der restriktiven Auslegung häufig angewandt wird (im Vergleich zum Grund nach Art. 13(1)(a), der selten angewandt wird), in Betracht. Dieser Grund wurde

21 S. Kraljić, 'Mednarodna ugrabitev otrok : kdaj vrnitev, kdaj zavrnitev', in: G. Knežević und V. Pavić (eds.), *Državljanstvo i međunarodno privatno pravo. Haške konvencije (zbornik radova)*, (Biblioteka Zbornici, 5). (Beograd: Pravni fakultet: Službeni glasnik 2007) S. 193.

zwischen 1999-2003 global gesehen in einem Fünftel aller Fälle als Grundlage für die Ablehnung der Rückführung des Kindes verwendet.[22]

Macht ein Elternteil die Rückführung des Kindes wegen einer schwerwiegenden Gefahr geltend, muss das Gericht die Umstände des Falls untersuchen und feststellen, ob die Rückführung des Kindes tatsächlich eine schwerwiegende Gefahr für das Kind bedeutet. Die schwerwiegende Gefahr gibt dem Gericht nämlich die Möglichkeit, die Rückführung des Kinds abzulehnen, wenn berechtigte Gründe beziehungsweise Umstände vorhanden sind. Keinesfalls darf die Ausnahme der schwerwiegenden Gefahr eine Möglichkeit darstellen, dem Elternteil, der das Kind widerrechtlich verbracht oder zurückgehalten hat, einen Zeitgewinn, der die Möglichkeit der Vermeidung der Rückführung des Kindes erhöht, zu ermöglichen.[23] Es wird ausdrücklich hervorgehoben, dass es nötig ist, dass Umstände vorhanden sind, die zeigen, dass die Rückführung eine schwerwiegende Gefahr für das Kind bedeutet. Es reicht nämlich nicht aus, dass es sich nur um eine Gefahr, die keine ausreichende Stufe der Ernsthaftigkeit erreicht, handelt.[24]

Wie bereits erwähnt, befielt die Abwesenheit von mehr als einem Jahr nicht mehr die unbedingte Rückführung des Kindes. Nach dem Ablauf eines Jahres erlegt die HK 1980 zwar die Rückführung des Kindes auf, jedoch kann das Gericht die Rückführung des widerrechtlich verbrachten oder zurückgehaltenen Kindes ablehnen, wenn sich dieses in die neue Umwelt eingelebt hat (Art. 12). Der Zweck dieser Regelung der Konvention ist der Wunsch, weiteren Schaden des Kindes bei einer erneuten Umsiedlung zu verhindern. Die HK 1980 erlegt die schnelle Reaktion auf, da ansonsten nach dem Ablauf eines Jahres gilt, dass der Elternteil seine stillschweigende Zustimmung erteilt hat.[25] Die Rückführung des Kindes kann ebenso abgelehnt werden, wenn das Kind mit der Rückführung einen geistigen oder körperlichen Schaden erleiden würde. Es handelt sich um eine Generalklausel, deren Inhalt in jedem Einzelfall für sich gegeben wird. Da die HK 1980 die Vermutung schafft, dass die Rückführung eines widerrechtlich verbrachten oder zurückgehaltenen Kindes zum Vorteil des Kindes ist, muss die Partei, welche der Rückführung des Kindes aufgrund von Artikel 13(1)(b) HK 1980 entgegensteht, klare und

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22 Lowe, Douglas, *op. cit.* n. 9, S. 654.

23 Schuz, *op. cit.* n 18, S. 271.

24 So *Aguilera v. De Lara*, Not Reported in F. Supp. 2d, 2014 WL 3427548 (D. Ariz.)[Mexico] [Grave Risk of Harm]. Online in Internet: http://www.brandeslaw.com/hague_Cases/defenses_cases/aguilera_v.htm (24.10.2014).

25 T. M. De Boer, 'Jurisdiction and Enforcement in International Family Law: a Labyrinth of European and International Legislation', *Netherlands International Law Review, XLIX:* 307-351 (2002) S. 332.

überzeugende Beweise vorlegen, dass die Ablehnung zum größeren Vorteil des Kindes ist, als die Rückführung.[26] Die schwerwiegende Gefahr des Art. 13(1)(b) HK 1980 muss sich als besonders erheblich, konkret und aktuell darstellen.[27] Die Beweislast des Bestehens solcher Umstände liegt auf dem Elternteil, das der Rückführung des Kindes entgegensteht. Dabei reicht nicht aus, dass die Anführungen pauschal und nicht mit Beweisen gestützt sind. Es reicht nicht aus, dass nur die für das Kind ungünstigen Umstände behauptet werden. Wäre jede Behauptung der ungünstigen Stellung des Kindes ein ausreichender Grund für die Ablehnung der Rückführung des Kindes, würde das zum Ausspielen der HK 1980 führen.[28]

Das Gericht, wo der Antrag auf Rückführung des Kindes nach dem Ablauf von mehr als einem Jahr seit der widerrechtlichen Verbringung oder Zurückhaltung des Kindes gestellt wurde, kann die Rückführung des Kinds ablehnen, wenn es der Meinung ist, dass das Kind bei einer Rückführung einer körperlichen Gewalt oder einem geistigen Trauma oder einer anderen unangenehmen Situation ausgesetzt sein wird (Art. 13 HK 1980). Die genannte Bestimmung des Art. 13 muss restriktiv ausgelegt werden und es kann nicht jede für das Kind unangenehme Situation geltend gemacht werden. Gegen die Entscheidung über die Rückführung sprechen nur ungewöhnlich schwere Umstände, die das Wohl des Kindes gefährden könnten und die dem Gericht als besonders wesentlich, konkret und aktuell darzustellen sind.[29] Diese Umstände sind gewöhnlich schwer nachzuweisen. Werden sie aber schon behauptet, ist ihr Bestehen als ausreichend wahrscheinlich auszuweisen. Das Gericht, das über die Rückführung beziehungsweise die Ablehnung der Rückführung des Kinds entscheidet, muss dem Kindeswohl, welches das Grundprinzip ist, das ausdrücklich aus der UN-KRK hervorgeht, folgen, während dieses in der HK 1980 nicht ausdrücklich erwähnt wird. So legt Art. 3(1) UN-KRK fest, dass bei allen Maßnahmen, die Kinder betreffen, gleichviel ob sie von öffentlichen oder privaten Einrichtungen der sozialen Fürsorge, Gerichten, Verwaltungsbehörden oder Gesetzgebungsorganen getroffen werden, das Wohl des Kindes ein Gesichtspunkt ist, der vorrangig zu berücksichtigen ist. Aus dem Genannten schließen wir, dass auch nach der HK 1980 dem Kindeswohl zu folgen ist. Das wird noch zusätzlich durch die Bestimmungen des Art. 9 (die Vertragsstaaten der HK 1980 gewährleisten, dass das Kind nicht gegen den

26 L. W. Morgan, '"Grave Risk of Harm" Under Article 13(b) of the Hague Convention on International Child Abduction: What Constitutes a War?' *Family Law Reader July 2002*. Online im Internet: http://www.famlawconsult.com/archive/reader200207.html (24.10.2014).

27 So in *OLG-Hamm – Beschluss*, *II-11 UF 85/12* vom 28.6.2012.

28 *Op. cit.* n. 20.

29 *Ibid.*

Willen der Eltern von ihnen getrennt wird)[30] und Art. 11 (die Vertragsstaaten verpflichten sich, Maßnahmen für den Kampf gegen die widerrechtliche Verbringung und Nichtrückführung des Kindes aus dem Ausland zu ergreifen)[31] UN-KRK gestützt.

Wie die Umstände, die zeigen, dass für das Kind eine schwerwiegende Gefahr (*grave risk of harm)* besteht*,* es wäre bei der Rückführung einer körperlichen Gewalt oder einem geistigen Trauma oder anders in eine unangenehme Stellung gebracht, wurden seitens der Eltern Umstände der familiären Gewalt, des sexuellen Missbrauchs, regionale Konflikte definiert.[32] Es ist insbesondere hervorzuheben, dass in den letzten Jahren, seitdem sich die Ansicht und die Toleranz gegenüber familiärer Gewalt in der Gesellschaft und damit folglich auch in der Gesetzgebung und in der Rechtsprechung bei den Gerichten geändert hat,[33] hat sich die Anzahl der Fälle, wo man sich in Fällen der widerrechtlichen

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30 Art. 9 UN-KRK: »*(1) Die Vertragsstaaten stellen sicher, dass ein Kind nicht gegen den Willen seiner Eltern von diesen getrennt wird, es sei denn, dass die zuständigen Behörden in einer gerichtlich nachprüfbaren Entscheidung nach den anzuwendenden Rechtsvorschriften und Verfahren bestimmen dass diese Trennung zum Wohl des Kindes notwendig ist. Eine solche Entscheidung kann im Einzelfall notwendig werden, wie etwa wenn das Kind durch die Eltern. misshandelt oder vernachlässigt wird oder wenn bei getrennt lebenden Eltern eine Entscheidung über den Aufenthaltsort des Kindes zu treffen ist. (2) In Verfahren nach Absatz 1 ist allen Beteiligten Gelegenheit zu geben, am Verfahren teilzunehmen und ihre Meinung zu äußern. (3) Die Vertragsstaaten achten das Recht des Kindes, das von einem oder beiden Elternteilen getrennt ist, regelmäßige persönliche Beziehungen und unmittelbare Kontakte zu beiden Elternteilen zu pflegen, soweit dies nicht dem Wohl des Kindes widerspricht. (4) Ist die Trennung Folge einer von einem Vertragsstaat eingeleiteten Maßnahme, wie etwa einer Freiheitsentziehung, Freiheitsstrafe, Landesverweisung oder Abschiebung oder des Todes eines oder beider Elternteile oder des Kindes (auch eines Todes, der aus irgendeinem Grund eintritt, während der Betreffende sich in staatlichem Gewahrsam befindet), so erteilt der Vertragsstaat auf Antrag den Eltern, dem Kind oder gegebenenfalls einem anderen Familienangehörigen die wesentlichen Auskünfte über den Verbleib des oder der abwesenden Familienangehörigen, sofern dies nicht dem Wohl des Kindes abträglich wäre. Die Vertragsstaaten stellen ferner sicher, dass allein die Stellung eines solchen Antrags keine nachteiligen Folgen für den oder die Betroffenen hat.“*

31 Art. 11 UN-KRK*: »(1) Die Vertragsstaaten treffen Maßnahmen, um das rechtswidrige Verbringen von Kindern ins Ausland und ihre rechtswidrige Nichtrückgabe zu bekämpfen. (2) Zu diesem Zweck fördern die Vertragsstaaten den Abschluss zwei- oder mehrseitiger Übereinkünfte oder den Beitritt zu bestehenden Übereinkünften.“*

32 So Online im Internet: http://www.kentlaw.edu/honorsscholars/2004students/liseminar.htm (26.10.2014).

33 Als grundlegender Wendepunkt in Slowenien im Bereich der familiären Gewalt wird 2008 bezeichnet, als das Gesetz zum Schutz vor Gewalt in der Familie (*Zakon o preprečevanju nasilja v družini*): Uradni list RS, Nr. 16/2008, das dem Prinzip der Nulltoleranz für Gewalt in der Familie folgt, verabschiedet wurde. Ebenso wurde ebenfalls 2008 im Strafgesetzbuch (Kazenski zakonik) (Uradni list RS, Nr. 55/2008) die Straftat der ‘familiären Gewalt” aufgenommen.

internationalen Verbringung oder Zurückhaltung von Kindern auf familiäre Gewalt als Grund der Ablehnung der Rückführung berufen hat, vergrößert.[34] In der Fortsetzung werden kurze Darstellungen von Fällen gegeben, in denen die Gerichte die Rückführung des Kindes wegen einer schwerwiegenden Gefahr oder einer unzumutbaren Lage für das Kind abgelehnt haben*:*

a) Die Rückführung des Kinds wurde abgelehnt, da eine schwerwiegende Gefahr für die Kindesmutter bestand, wenn sie nach Israel zurückgekehrt wäre. Die Mutter wies eine ernsthafte und begründete Angst vor dem Kindesvater aus. Die Mutter wurde nämlich unter einem Vorwand nach Israel gelockt, wo sie zunächst an die russische Mafia verkauft wurde, dann an den Vater, der sie vergewaltigt und zur Prostitution gezwungen hat. Da die Angst der Mutter ernsthaft und begründet ist, kann nicht erwartet werden, dass sie nach Israel zurückkehrt. Es wäre aber auch unangemessen, das Kind ohne die Mutter zurück zum Vater, der Frauen gekauft und verkauft hat und sich mit der Organisation und Durchführung der Prostitution beschäftigte, nach Israel zu schicken.[35]

b) Im Fall *N v. N (Abduction: Article 13 Defence)* war die Geisteskrankheit des Vaters, einige Beweise über den sexuellen Mussbrauch und die Störungen des Kindes ein unzureichender Grund für die Abweisung der Rückführung. Jedoch wurde die Rückführung im Fall *Re F (Child Abduction: Risk of Return)* abgelehnt, da ein 4-jähriger Junge, der missbraucht wurde und Zeuge der Gewalt des Vaters über die Mutter und Großmutter war, Angst und Störungen zeigt (Bettnässen und Aggression) – der Antrag auf Rückführung des Kindes an den Ort, wo die Gewalt ausgeübt wurde, wurde abgelehnt.[36]

c) Das slowenische Gericht führte an, dass das Kind seine Meinung vollkommen klar ausdrückt und bei der Mutter bleiben will und dass sich das Kind gut an die Umwelt in Slowenien gewöhnt hat und in der Schule und in der Umwelt, in der es lebt, enge freundschaftliche Verbindungen geknüpft hat, sowie im sozialen Sinne gut angepasst ist und in der neuen Umwelt akzeptiert wird und dies für seine Entwicklung nicht problematisch ist, es wäre aber vollkommen unangemessen und

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34 So J. D. Morley, *The Future of the Grave Risk Of Harm Defense in Hague Cases.* Online im Internet*:* http://www.international-divorce.com/grave_risk_harm_defense.htm (26.10.2014).

35 So *N.P. v A.B.P.*, (1999) R.D.F. 38 (Que. C. A.), (INCADAT cite: HC/E/CA: 764). Online im Internet: http://www.incadat.com/index.cfm?act=search.detail&cid=1116&lng=1&sl=2 (26.10.2014).

36 Kraljić, *op. cit.* n. 21, S. 198.

gegen seinen Willen, es aus dieser Umwelt zu reißen und nur deshalb in eine Anstalt zu bringen, um für den Vater zugänglicher zu sein und es ohne Indikationen (wo das Kind keine Psychopathologien, die eine psychotherapeutische Hilfe erforderlich machen würde, zeigt) in eine Psychotherapie zu geben. Unverständlich und fachlich und ethisch strittig wäre die Unterbringung des Kindes in einer fremden Umwelt, bei beiden lebenden Eltern und auch Verwandten, mit einem ausdrücklichen Vorteil des Elternteils, der dieser Lösung zustimmt, sie ist auch vom Gesichtspunkt der Berücksichtigung der Kinderrechte inakzeptabel und eine solche gewaltsame Unterbringung des Kindes, wie sie vom Gericht bei diesem Mädchen angeordnet wurde, würde sicher ein traumatisches Erlebnis, das im heftigen pubertären Lebensabschnitt zu einer Persönlichkeits- oder dissozialen Störung ausarten könnte, verursachen.[37]

d) Ebenso hat sich das slowenische Gericht mit der Ablehnung der Rückführung im Fall *VSL sklep IV Cp 1297/2012* beschäftigt. Die Rückführung eines Kinds, das die Mutter widerrechtlich aus Norwegen nach Slowenien verbracht hat, wurde vom slowenischen Gericht abgelehnt. Die Mutter führte an, dass der Kindesvater ihr die gesamte Zeit ihres Aufenthalts in Norwegen nicht bei der Regelung der Aufenthaltsgenehmigung geholfen hat, dass er nach der Geburt des Kindes ins Gefängnis musste, das er an ihr psychische und physische Gewalt ausgeübt hat, dass er einen ungeregelten finanziellen Zustand hatte, dass er oft unter Alkoholeinfluss war, dass in der Zeit der gemeinsamen Familienlebens in Norwegen die gesamte Sorge (inhaltlich und finanziell) für das minderjährige Kind auf ihr lag. In Slowenien lebt das 19 Monate alte Kind bei der Mutter und ihren Eltern. Des Weiteren hat die Mutter angeführt, dass das Kind an ihre Verwandten gebunden ist und dass sie eine regelmäßige Beschäftigung erworben hat. Das Gericht bewertete, dass die Rückführung des Kindes nach Norwegen beziehungsweise sein Ausreißen aus der sozialen Umwelt, in dem es lebt, bei ihm einen geistigen Schaden beziehungsweise ein Trauma verursachen würde.[38]

e) Im Fall *Silverman v. Silverman* hat das Gericht in den USA die Rückführung zweier Kinder nach Israel abgelehnt. Der Zustand in Israel wurde vom Gericht nämlich als ungünstige Situation gemäß Art. 13(b) HK 1980 definiert. Die Intifada in Israel wurde als Kriegszustand

37 So die Gerichtsentscheidung *VSM sklep I Ip 623/2010* vom 20.7.2010.

38 Gerichtsentscheidung *VSL sklep IV Cp 1297/2012* vom 9.5.2012.

bezeichnet, weswegen das Kind im Fall der Rückführung mehr als nur einer allgemeinen Gefahr ausgesetzt wäre.[39]

f) Die Rückführung des Kindes wurde auch im Fall abgelehnt, wo die Rückführung eine aktuelle Gefahr des Selbstmordes des Kindes bedeutet hätte.[40]

Hingegen sind aber der Wechsel des Kulturkreises, die kurzfristig erfolgte Einschulung, das Finden neuer Freunde, das Eingewöhnen des Kindes in Zufluchtsstaat hier nicht von ausreichendem Gewicht.[41] Ebenso kann die Rückführung des Kindes nicht abgelehnt werden, wenn festgestellt wird, dass alle nötigen Maßnahmen für die Gewährleistung des Schutzes des Kindes nach seiner Rückkehr ergriffen wurden.[42] Deshalb ist der Grund der schwerwiegenden Gefahr vor allem in Fällen, wo die innere Ordnung des Staats, in den das Kind zurückkehren soll, keinen entsprechenden und angemessenen Schutz des Kindes nach seiner Rückkehr gewährleisten kann, anzuwenden. Ein entsprechender Schutz muss gewährleistet werden, wenn es nötig ist, auch seiner engeren Familie und anderen Familienmitgliedern.

Es ist noch einmal hervorzuheben, dass auch in der HK 1980 das Grundprinzip des Schutzes des Kindeswohls enthalten ist, obwohl dieses Prinzip in der Konvention selbst nirgendwo ausdrücklich erwähnt wird (vgl. UN-KRK). Das Kind ist das zentrale Subjekt der internationalen Entführungen, das wegen seines Alters nicht fähig ist, vollständig für den Schutz seiner Rechte und Vorteile zu sorgen. Deshalb sind alle Gerichte und andere Behörden, die in

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39 *Silverman v. Silverman,* 2002 WL 971808 (D. Minn. May 9, 2002). Interessant ist, dass das amerikanische Gericht im Fall *Freier v. Freier,* 969 F. Supp. 436, 443 (E.D. Mich.1996) 1996 den Zustand in Israel als unzureichenden Grund bezeichnet hat, die Rückführung des Kindes abzulehnen. Allerdings hat das Gericht im Fall *Silverman v. Silverman* seine Entscheidung mit den Tatsachen begründet, dass die Umstände seit dem Fall Frier bis zum Fall Silverman in Israel wesentlich schlechter wurden, da sich die Stufe der Gewalt erhöht hätte, auch die Art der Gewalt, die mit Selbstmordattentaten nun eine ernsthafte Gefahr für die Zivilbevölkerung, einschließlich der Kinder, darstelle, habe sich geändert. So Morgan, Anm. zit. Nr. 26.

40 OLG-Hamm, *op. cit.* n. Nr. 27.

41 C. Rama, 'Die internationale Kindesentführung durch die Kindesmutter - HKÜ, Kindeswohl, Mediation und Rückführung ?!' *gender…politik…online April 2014* S. 19. Online in Internet: http://www.fu-berlin.de/sites/gpo/int_bez/globalisierung/Rama_kindesentfuehrung/Rama_Text.pdf?1397571156 (25.10.2014).

42 A. Galič, 'Pristojnost za odločanje v postopkih glede mednarodne ugrabitve otrok – med uredbo Bruselj II in Haaško konvencijo' V. Žnidaršič Skubic et al., eds., *Zbornik v čast Karla Zupančiča : družinsko in dedno pravo pred izzivi prihodnosti : zbornik znanstvenih razprav v čast 80. rojstnega dne zaslužnega profesorja dr. Karla Zupančiča* (Ljubljana, Pravna fakulteta 2014) S. 234.

Kindesangelegenheiten entscheiden, verpflichtet, das zu tun und dabei dem Grundprinzip des Schutzes des Kindeswohls zu folgen.

Eines der Grundrechte des Kindes nach der UN-KRK ist *das Recht auf die Bildung der eigenen Meinung* (Art. 12(1) sowie das *Recht auf den Ausdruck (*Art. 13(1)). Das Kind hat das Recht, eine eigene Meinung zu bilden und das damit verbundene Recht, diese in allen Angelegenheiten, die mit ihm verbunden sind, auszudrücken – dazu gehört sicherlich auch die Entführung. Die vom Kind ausgedrückte Meinung wird hinsichtlich seines Alters und seiner Reife berücksichtigt. Die Rückführung kann nämlich auch auf Wunsch des Kindes abgelehnt werden, wenn dieses fähig ist, seine Meinung klar zu bilden. Dabei spielt das Alte rund die Reife des Kindes eine wichtige Rolle, was aber nach dem Prozessrecht des Vertragsstaats beurteilt wird. Und gerade hier sind große Unterschiede in der Gesetzgebung und Praxis gegeben. Die HK 1980 überlässt deshalb die Anhörung des Kindes dem nationalen Recht.

Das Gericht wird das aber nicht allein beurteilen, sondern muss, ausgehend von HK 1980, der Elternteil, der das Kind widerrechtlich verbracht beziehungsweise zurückgehalten hat, selbst darauf hinweisen, dass das Kind die Rückführung ablehnt. Das Gericht wird das nämlich nicht allein tun, da es dem Ziel der Konvention folgt, und zwar wird die möglichst baldige Rückführung des Kindes versucht. Aus der wörtlichen Auslegung des Art. 13 HK 1980 geht nämlich hervor, dass dem Gericht keine Pflicht der Gewährleistung der Ansichten des Kindes in der Sache auferlegt wird, da der genannte Artikel bestimmt, dass die Rückführung abgelehnt werden kann, »wenn festgestellt wird«, dass das Kind der Rückführung entgegensteht und dass es das Alter vollendet hat und sich auf einer solchen Reifestufe befindet, wo seine Meinung zu berücksichtigen ist. Der Elternteil, der sich auf die Meinung des Kindes beruft, muss dem Gericht ausreichende Beweise vorlegen, dass das Kind der Rückführung entgegensteht. Das Gericht hat das Ermessensrecht, zu entscheiden, ob das besonders untersucht werden muss.[43]

Die Rückführung des Kindes wird ebenfalls nicht vollzogen, wenn dadurch im Staat, in den der Antrag auf Rückführung des Kindes geschickt wurde, Grundrechte und Freiheiten verletzt würden (Art. 20 HK 1980). In diesem Fall handelt es sich um einen besonderen Vorbehalt der öffentlichen Ordnung.[44]

Das grundlegende Dokument im Bereich des Schutzes der Menschenrechte und Grundfreiheiten in Europa ist die Konvention zum Schutz der Menschenrechte und Grundfreiheiten (*Evropska konvencija o varstvu človekovih*

43 Lowe/Douglas, *op. cit.* n. 9, S. 660.

44 Perez-Vera, *op. cit.* n. 14, S. 22-23.

pravic in temeljnih svoboščin),[45] die nicht so auszulegen ist, dass die Ziele der HK 1980 untergraben würden. Die Verletzung der Grundprinzipien der Menschenrechte und Grundfreiheiten ist der am wenigsten angewandte Grund für die Ablehnung der Rückführung, jedoch ist auch der Europäische Gerichtshof für Menschenrechte Fällen begegnet, deren Inhalt in den Bereich der internationalen Kindesentführungen reichte.

VI. Schluss

Trotzdem, dass die HK 1980 nur in 93 Staaten in Kraft ist, sind ihre Bedeutung und die Ziele, die sie verfolgt, von außerordentlicher Bedeutung. Ihr grundlegendes Ziel, unter Berücksichtigung des Kindeswohls, ist die Gewährleistung der möglichst baldigen Rückführung des Kindes. Diesem Ziel wird aber nicht strikt Folge geleistet, da die HK 1980 ermöglicht, dass die Rückführung des Kindes aus bestimmten Gründen, die restriktiv auszulegen sind, abgelehnt wird. Dabei stellt die schwerwiegende Gefahr einen Grund dar, wo die meisten Fragen offen sind und mehrere Interpretationen zulässig sind, was eine schwerwiegende Gefahr bedeutet. Dabei ist auch die Tatsache, dass es sich um einen Grund handelt, der in den letzten Jahren einer außerordentlichen Dynamik und der unterschiedlichen Beurteilung der konkreten Umstände, auf die man sich berufen hat, unterworfen war, nicht zu übersehen. Die Unterschiedlichkeit steht noch zusätzlich unter der Patenschaft der Vielfalt der Rechtsordnungen, der historischen, politischen und anderen Aspekte, welche die Stellung der Frau und der Kinder in der Familie definieren, der Beziehung gegenüber der familiären Gewalt, der Religion, usw. Da es sich bei internationalen Kindesentführungen um eine ganz besonders empfindliche Thematik handelt, wird es auch in Zukunft nötig sein, sich dem sowohl auf internationaler, als auch nationaler Ebene zu widmen, insbesondere in Slowenien, wo die neue zentrale Behörde erst gebildet wird.

45 Die Konvention zum Schutz der Menschenrechte und Grundfreiheiten *(Evropska konvencija o varstvu človekovih pravic in temeljnih svoboščin):* Uradni list RS-MP, Nr. 7/1994.

National reports on operation of the Hague Child Abduction Convention in the Western Balkans Region

Nacionalni izvještaji o funkcioniranju Haške konvencije o otmici djece u regiji zapadnog Balkana

Questionnaire on the Operation of the Hague 1980 Child Abduction Convention in the SEE Region

Part. I. General Issues, Central Authority and Court System

1. When did your State become a party to the Hague 1980 Child Abduction Convention (hereinafter, "HC 1980")?
2. Was implementing legislation necessary in your State to give effect to HC 1980? If yes, please provide a hyperlink or reference to the legislation.
3. Did your State complete a Country Profile to be made available on the website of the Hague Conference on Private International Law (hereinafter, the "HCCH")?
    a. If yes, has it been regularly updated? What were the reasons for the update(s)? (*e.g.*, new implementing legislation)
    b. If no, what are the obstacles to regular updating?
4. Has your State become a party to the Hague Convention of 1996 on the International Protection of Children (hereinafter, "HC 1996")? If yes, is the Central Authority the same for both the HC 1980 and the HC 1996 or are the Central Authorities different?
5. Central Authority contact details:
    a. Are Central Authority contact details publically available in order to ensure responsiveness and speed in return proceedings? (if so, please provide a web link for these contact details)
    b. Are standardised forms and other useful information accessible to the public?
6. Is your State party to any other convention / instrument (*e.g.*, EU regulations, bilateral agreements) that would fall within the material scope of application of either HC 1980 or HC 1996?
    a. If yes, please provide a hyperlink or reference.
    b. Has doctrine in your State addressed the relationship of HC 1980 and the HC 1996 to other relevant instruments in this field (*e.g.*, European Custody Convention, European Convention on Human Rights, UN Convention on the Rights of the Child)?
    c. Has case law in your State addressed the relationship of HC 1980 and the HC 1996 to other relevant instruments in this field?

7. Would you say that the Central Authority in your State is staffed with adequate personnel? Do the persons working at the Central Authority have the required language skills and possess relevant legal qualifications? Do they benefit from regular training? If yes, please explain (*e.g.*, how many times a year, type of training, etc.).
8. Is your State Central Authority and / or competent authority equipped with a software programme to process, document and / or archive applications and relevant documentation, or do they use a paper archive system? Please explain.
9. Does your State Central Authority and / or relevant competent authority follow the strict timeframes set out under HC 1980?
10. Is the Central Authority of your State operating well with other governmental agencies? Are communications taking place by mail or electronically? Is the Central Authority in your State co-operating effectively with judges?

Part. II. Procedures in Relation to the Hague Child Abduction Convention

Please explain and provide details and examples on relevant stages of HC 1980 procedures.

Application

11. Does your State Central Authority keep statistics on Hague applications?
    a. If yes, please specify for the period of 2008 to 2013:
        i. The total number of applications,
        ii. The number of access applications,
        iii. The number of return applications,
        iv. The number of applications withdrawn.
    b. If no, please provide an approximate number of applications for at least three calendar years?
12. Do relevant competent authorities keep statistics on Hague procedures?
    a. If yes, please specify for the period of 2008 to 2013:
        i. The total number of procedures per court per year,
        ii. The number of access applications,
        iii. The number of return applications.

b. If no, please provide an approximate number of Hague cases for at least three calendar years.

13. Has your Central Authority been in a position to review applications and reject them under Article 27?

Locating the abducted child

14. Which tools are used by Central Authorities to locate abducted children and to prevent their removal?

a. What mechanisms or sources of information are available in your State to identify the whereabouts of the child? For example: private location services; population register; employment register; information maintained by other government agencies (*e.g., immigration, social welfare*); police; INTERPOL; court orders to compel the production of information on the whereabouts of the child; or, other (please specify).

Protection Measures

15. What measures can be taken in your State to deter the removal or re-abduction of the child? (*E.g.*, child's passport(s) to be deposited with authorities; alleged abductor's passport to be deposited with authorities; obtain orders to prevent the removal of the child)

a. Does the Central Authority of your State use the Guide to Good Practice under the HC 1980 — Part III Preventive Measures? Is it translated into the official language(s) of your State?

b. Is co-operation with other relevant bodies and public authorities satisfactory?

Domestic Violence and Safe Return

16. Is there concern concerning safe return of a child and protection from domestic violence or other forms of abuse?

17. Have the courts often used Article 13(1) *b)* to reject the return of a child? Please provide examples.

18. How is the "grave risk of harm" exception interpreted by competent authorities in your State? Please explain.

Hearing, Participation and Objections of the Child

19. Does the child have an opportunity to be heard in return proceedings in your State?

    a. If yes, is it in every case or does it depend on the particular case and the discretion of the judge / authority hearing the case?

    b. How is the child heard in return proceedings in your State? (*e.g.*, direct interview with judge, report prepared by independent expert, child's own legal representative, or other (please specify)).

    c. Has the issue of the voice of the child been the subject of case law in your State?

    d. Have you encountered cases where the child's objection under Article 13(2) has been raised?

Enforcement of return orders

20. What procedure may be used to enforce a return order?

    a. Please specify (*e.g.*, directions by a judicial or administrative authority to make arrangements for return, measures for the immediate execution of final orders, issuance of a warrant for the apprehension or detention of the child, authority for coercive detention or use of force, or other) and explain.

    b. Have problems been encountered with enforcement procedures?

Concentration of jurisdiction

21. Does your State limit the number of judicial or administrative authorities who can hear return applications under HC 1980?

    a. I.e., has your State "concentrated jurisdiction" in respect of applications under the HC 1980?

    b. If possible, please state exactly how many courts or administrative authorities and how many judges or relevant decision-makers can hear return applications under HC 1980?

    c. Do you think such "concentrated jurisdiction" would be useful and desirable?

Procedures

22. Please list some measures that have been taken in your State to ensure that the judicial and administrative authorities in your State act expeditiously in return proceedings? (*e.g.*, in implementing legislation, in procedural rules, other).

23. What is in general the expected time from the commencement of the proceedings for return to a final order (excluding appeals)? *Up to 6 weeks / 6 to 12 weeks / more than 12 weeks* Please provide details.

24. Do you have concerns that a longer period is needed to process applications? Would implementing legislation and procedural rules for HC 1980 cases make a difference?

25. Is the applicant generally required to participate in the return proceedings?

    a. Are facilities available to enable the applicant to participate in return proceedings from outside of your State? If yes, please specify (*e.g.*, via video-conference, telephone, through a legal representative, other).

26. Rejecting the application.

    a. If a judge in your State rejects an application, what are usually the reasons?

27. Can a return decision be subject to an appeal?

    a. Is there an expedited procedure or special process to appeal HC 1980 return decisions?

    b. What is the expected time within which appeals are filed and decided? *Up to 3 months / 3 to 6 months / Longer than 6 months*

    c. In cases under appeal, what are the main reasons for objection, and are these objections accepted by the appellate courts?

Mediation

28. Is mediation and conciliation used in the HC 1980 procedures in your State? Are they recognised as effective tools to settle cross border child abduction?

29. Please describe how Central Authorities in your State go about promoting agreements (*e.g.*, contacting the taking parent, referring parties to mediation) that ended in voluntary return of a child.

30. Do mediation and conciliation mechanisms have a positive impact on the length of proceedings?

Consideration of basic human rights in relation to HC 1980

31. Have basic human rights been considered in the case law under HC 1980? Please explain, giving examples.

    a. Is there case law in which the best interests of a child have been considered, in particular in relation to Art. 3 and Art. 12 of the UN Convention on the Rights of the Child?

    b. Have you noticed case law dealing with issues of conflicting individual interests of the child and a parent (in particular, in relation to right to family life, Art. 8. ECHR)?

    c. Do you think that the model of the HC 1980 that preserves the best interests of a child in general is in conformity with overall human rights norms that address the best interests of a child in a particular case? (See, for example, the *Neulinger* and *X. v. Latvia* cases.)

Designation of a Judge to the International Hague Network of Judges (IHNJ) and Direct Judicial Communications

32. Has a member of the IHNJ been designated for your State?

    a. If yes, please specify the position and court.

    b. If no, is there a legislative basis upon which judges in your State can engage in direct judicial communications? In the absence of legislation, can judges in your State engage in direct judicial communications?

33. Is there a general understanding of the role of the IHNJ and its importance and benefits among judges and relevant authorities responsible for the nomination of a judge to the IHNJ (*e.g.*, Ministry of Justice)?

34. If there is a judge designated to the IHNJ, please provide an example of making use of direct judicial communications in specific cases.

35. Are the judges dealing with HC 1980 cases specialised in family law or international family law? Do they have sufficient training? Do they have the necessary language skills to read foreign case law? Do the judges dealing with HC 1980 cases have the required IT infrastructures such as regular access to the Internet? In your view should training be organised?

36. When you analyse relevant case law, does it appear that judges understand the methodology of cross border cases, apply correct choice of law methods, and find and prove foreign law if relevant?

Other

37. Can you identify other obstacles in the proper operation of HC 1980 (*e.g.*, interpretation of the term "habitual residence", etc.)?

Part III. A Way Forward

38. From a general perspective, do you feel that proper application of HC 1980 would be achieved by any particular training? Who should take part in such training?

39. Would the proper application of HC 1980 be achieved with more research and publication in the region? Would you find it useful to publish a handbook dealing with implementation issues? Have handbooks already published by HCCH been translated and used by judicial and administrative authorities handling child abduction cases?

40. After collecting and analysing judicial and administrative case law, could you make a statement on what the best practices in handling HC 1980 applications in your State would be? Can you identify barriers to achieving such best practices?

41. Could you identify points of possible improvements of judicial / administrative practice?

42. Could you suggest methods for ensuring consistent interpretation of HC 1980 in your State / the SEE region?

OPERATION OF THE 1980 HAGUE CHILD ABDUCTION CONVENTION IN BOSNIA AND HERZEGOVINA

Anita Duraković* and Zlatan Meškić**

I. General issues, central authority and court system

The Hague Convention on the Civil Aspects of International Child Abduction (hereinafter: HC 1980) entered into force in Bosnia and Herzegovina on 6 March 1992 and has been applicable on its territory as a successor state from 23 August 1993 (after the notification on succession, acceptance and accession – Official Journal of the Republic of Bosnia and Herzegovina 25/1993). In order for the HC 1980 to enter into force in Bosnia and Herzegovina, it was necessary to adopt the Act on the Ratification of the Convention on the Civil Aspects of International Child Abduction of 25 October 1980.

On the official website of the Hague Conference is a profile of the state with the information on the Central Authority and the contact persons. The Central Authority is the Ministry of Justice of Bosnia and Herzegovina. The information has been updated regularly, and the last update was on 24 April 2014. The change was made with regard to the contact person. The following documents concerning the HC 1980 and translated to one of the official languages in Bosnia and Herzegovina are available on the website: HC 1980 – Croatian language, Guide to Good Practice – Part II - Implementing Measures – Bosnian and Croatian language.

Bosnia and Herzegovina is not a member state to the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children of 1996. Among all of the Hague Conventions which regulate family law, Bosnia and Herzegovina is only a member state to the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance, which was signed by Bosnia and Herzegovina on 5 July 2011, ratified on 25 October 2012, and which entered into force on 1 February 2013. The Central Authority for the purpose of the application of this Convention is the Ministry of Justice of Bosnia and Herzegovina, the same authority as determined for the fulfillment of the obligations under the HC 1980.

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Within the Ministry of Justice, as the Central Authority, a Sector for interstate and inter-entity legal aid and cooperation has been established as the competent body for "the action under the Convention on the Civil Aspects of International Child Abduction – the return of wrongfully removed or retained children". On the official website of the Ministry of Justice of Bosnia and Herzegovina is a document named "International Child Abduction",[1] which contains the following documents: Proceeding in case of child abduction, Application, Decision, Contact, Form of application for visiting the child and the Form of application for the return of the child, as well as the text of the HC 1980. These documents explain the procedure in case of a child abduction and list the competent decision-making authorities and the documents which need to be filed together with the application for a visit or return of a minor child. Further on, the contact for additional information is listed – phone numbers and fax numbers of the Sector for interstate and inter-entity legal aid and cooperation. Thereby, the procedure in cases of wrongfully removed and retained children by one parent in a foreign state is rounded up and publicly available.

The personnel of the Central Authority consists of graduate lawyers who speak one foreign language, English or German. Special trainings are not foreseen. When the application is received, the chief of the Sector for interstate and inter-entity legal aid and cooperation together with the chief of the Department for international legal aid and cooperation in civil matters and the person competent for these cases consider the application together and take the necessary steps.

The Central Authority has all the equipment needed for processing and archiving applications and relevant documents. The cases are classified by sectors and within the sectors by cases that are being processed. Within the Sector for interstate and inter-entity legal aid and cooperation there is a classification named "Cases related to international child abduction". There are all the cases that have been processed by the Central Authority.

The HC 1980 demands the most expeditious procedures available to ensure the objects of the Convention (Article 2), or to secure the prompt return of children wrongfully removed to or retained in any Contracting State (Article 1(1)). The Central Authority respects the timeframe set out by the HC 1980. Following receipt of the application of a person from Bosnia and Herzegovina who requests the return (or visiting) of a child residing in one of the contracting states of the HC 1980, the Central Authority, within the shortest term possible (one or two days), sends all the necessary documents under HC 1980 together with the application to the foreign Central Authority. In case where

1 http://mpr.gov.ba/organizacija_nadleznost/medj_pravna_pomoć/medj_otmica_djece/default.aspx?id=1053&langTag=bs-BA (15 April 2015).

a person is residing outside of Bosnia and Herzegovina, and the child is currently in Bosnia and Herzegovina, following receipt of a proper application, the Central Authority, within the shortest term possible (one or two days), refers the application to further procedure. If the application received is not complete, the Central Authority does not dismiss it, but requests its completion through the foreign Central Authority pursuant to the HC 1980.

The Central Authority cooperates with other agencies (centers for social matters, competent ministries for internal affairs, Interpol etc.) regularly by post. Nevertheless, with the aim of the most efficient action, the writings are sent by fax or electronically and afterwards also by post. In addition, the Central Authority cooperates with the courts and delivers them all the information necessary to secure expedited action.

Bosnia and Herzegovina is not a party to any other convention that regulates the matters of the HC 1980 or HC 1996. The conventions which are in force in Bosnia and Herzegovina, and which regulate the field of parental law and custody issues are the Convention on the Rights of the Child and the ECHR. The doctrine and the judicial practice in Bosnia and Herzegovina has not dealt too much with the abovementioned conventions and their interrelation. We can point to some papers of professors of private international law[2] as well as some single decisions where the judges have argued in their decision using the "best interest of the child" as the basic criterion when deciding on matters related to children. This criterion is listed by the Convention on the Rights of the Child in its Article 3. As a particular example we may mention the professional opinion of a professor of family law on questions relevant for decision-making in one case of international child abduction, requested by an American court, and the Scientific Conference "The Best Interest of the Child in Legislation and Practice" held at the Faculty of Law of the "Džemal Bijedić" University of Mostar in December 2013, where certain questions from the domain of the HC 1980 and the Convention on the Rights of the Child were analyzed.[3]

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2 V. Šaula, 'Dostignuća Haške konferencije za međunarodno privatno pravo u zaštiti djece – savremene tendencije' XXV *Godišnjak Pravnog fakulteta u Banjoj Luci* (2001) p. 255-265; V. Šaula, 'Primjena normi međunarodnog privatnog prava u praksi sudova u Bosni i Hercegovini – jedan pozitivan primjer', paper presented at the 8th International Scientific Conference on Private International Law *Uloga autonomije volje stranaka u suvremenom međunarodnom privatnom pravu: izučavanje međunarodnih propisa,* Opatija, 16-17 September 2010.

3 Z. Ponjavić, V. Vlašković, 'Koncept najboljeg interesa deteta unutar Haške konvencije o građanskopravnim aspektima međunarodne otmice dece'; S. Bubić, 'Standard najbolji interes djeteta i njegova primjena u kontekstu ostvarivanja roditeljskog staranja u Mostaru'; A. Duraković, 'Uredba Brussels IIa u svjetlu prakse Suda EU' in: *Zbornik radova sa Naučnog skupa Najbolji interes djeteta u zakonodavstvu i praksi* (Mostar, 2013).

II. Procedures in relation to the Hague Child Abduction Convention

1. Central Authority procedures in relation to the Hague Child Abduction Convention

The Central Authority possesses a database where all the cases of international child abduction are archived. However, no further classification of accepted, withdrawn or returned applications has been made. In the last three years there have been overall 46 requests, 15 in the year 2011, 19 in the year 2012 and 12 in the year 2013. The Ministry of Justice of Bosnia and Herzegovina as the Central Authority acts in all cases of international child abduction and therefore the abovementioned data applies.

1.1. Review of applications under Article 27

The Central Authority, after it receives an application from the competent foreign institution, determines if the application has been made in accordance with the HC 1980, and, if the answer is affirmative, refers it to the competent ministry of justice of one of the two entities, which further refers it to the competent court. If the application is not complete, the Central Authority does not dismiss it, but requests its completion through the foreign central authority. In cases where a person from Bosnia and Herzegovina requests the return (or visiting) of a child residing in one of the contracting states of the HC 1980, the Central Authority sends all the necessary documents under the HC 1980 together with the application to the foreign Central Authority. Therefore, the Central Authority examines if the application has been filed properly, if it contains all the documentation necessary and refers it to further procedure. To date, the Central Authority has not been in the position to use the authority given by Article 27 of the Convention and to reject the application based on the manifest lack of fulfillment of the requirements.

1.2. Locating an abducted child

Pursuing the aim to locate an abducted child and to prevent its further relocation, the Central Authority cooperates closely with the competent courts, the centers for social matters, the competent ministries for internal affairs and the Interpol. In cases which we had the opportunity to analyze, the parent and the child that was taken (abducted) in foreign contracting states had regularly registered their residence before the competent institutions in Bosnia and Herzegovina and established communication with the centers for social matters. In all of these cases, the child was residing at the address that was given in the application for the return of the child. In addition, the Ministry of Internal Affairs has the authority to, pursuant to the Act on the travel documents of

Bosnia and Herzegovina,[4] reject the application for issuing a travel document in the administrative procedure if one parent gives the statement that he or she does not consent for the travel document to be issued to his or her minor child.

1.3. Protection measures

In order to prevent the removal or re-abduction of a child, the court may order to revoke the passport of the child or the abductor and issue an order to prevent the removal of the child. The Central Authority uses the Guide to Good Practice under the HC 1980 – Part III – Preventive Measures, although it has not been translated to the official languages of Bosnia and Herzegovina. The cooperation with other relevant bodies and institutions is at a satisfying level.

1.4. Domestic violence and safe return

The centers for social matters have an important role in the procedure initiated by the application for the return of the child. As the organ of custody, the center for social matters conducts the social anamnesis, gives the opinion of the psychologist on the condition of the child, and, if necessary, adopts the official notification on the determination of preliminary child custody for the minor child. The report that the organ of custody sends to the court contains the data on the living and material conditions of the child and the family where the child lives, its general health condition, psychological and physical development, on the relationship between the child and the parent the child lives with and on the level of integration of the child into the environment where the child is currently living. These are the relevant reports that have been the essential basis for the decision of the court to reject the application to return the child in a large number of proceedings on international child abduction in B&H. Further on, the center for social matters cooperated, when necessary and possible, with the centers for social matters of the state from which the child was abducted, in order to gain a whole picture of the situation the child is currently in, which is necessary for the court to make a decision.

1.5. "Grave risk of harm" under Article 13(1) *b)*

The courts in Bosnia and Herzegovina have in all of the analyzed cases, with the exception of one, rejected the return of the child by referring to Article 13 (1b). Article 13 (1b) of the HC 1980 provides that the court is not bound to order the return of the child if it establishes that there is a grave risk that the child's return would expose it to physical or psychological harm or otherwise place the child in an intolerable situation. In its explanation of the decision, the Basic Court in Trebinje[5] stated that it "considers it to be established that

4 OJ B&H, Nos. 4/97, 1/99, 9/99, 27/00, 32/00, 19/01, 47/04, 53/07, 15/08, 33/08, 39/08 and 12/24.

5 Decision No. 095-0-I-08-000-618 of 23 February 2009, Basic Court in Trebinje.

the child is against the return", "taking into account the elapsed time and the full adaptation of the child to the current surroundings and the way of living, the creation of the new environment, and especially its irrepressible and clearly manifested will to stay with its father", "considering foremost the best interest of the child, the consequences that the child could have if it would be separated from its father against its will". The Municipal Court in Sarajevo rejected the return of a child in its decision of 2013,[6] arguing in the explanation that by "the abrupt separation of the child from its mother (two years and five months), the psychological development of the child would be negatively affected and have unmanageable consequences for the child". In other decisions where the application for return has been rejected by referring to Article 13(1b), the courts have based their decision on the facts that the child has expressed its will to live in the new environment, that the child has integrated in the new surroundings and that its return would negatively affect its psychophysical development.

1.6. Hearing, participation and objections of the child

In all of the analyzed cases of international child abduction, when this was possible considering the maturity and the age of the child, the court heard the child. Hearings are mostly conducted by centers for social matters, concretely by the psychologists included in the team. If the case concerns older children, the court will hear the child directly. On that occasion, the parent is not present, so that he or she cannot influence the child. The presence of psychologists depends on the maturity and the age of the child. In all of the analyzed cases, the child expressed its will to stay with the parent in the new environment. This wish of the child was strongly followed by the courts and it is mentioned in the explanation as an important fact on which the decision rejecting the return of the child was grounded. The Municipal Court in Doboj rejected in its decision of 5 October 2006 the application for the return of a child with the argumentation "that the child's return would as a consequence lead to a great psychological trauma considering that the child has objected to its return and that the court has assessed that the child is at the age and level of maturity that its opinion and wish to stay with the father can be taken into account, thereby pursuing primarily the best interest of the child". In this case, the court has primarily relied on Article 13(1)b of the HC 1980, although it would have made more sense to ground such decision on Article 13(2) of the HC 1980 providing that the court 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.

6 Decision No. 065-0-SUN-012.000432 of 18 June 2013, Municipal Court in Sarajevo.

In the explanation of its decision of 29 May 2012 by which the Municipal Court in Sanski most refused the application for the return,[7] it referred to Article 13(2), stating that "the minor A has objected to its return to England without his mother, and, based on that, the court has followed the findings in the socio-anamnestic data of the center for social matters and the findings and opinions of the center for mental health and rejected the application of the father to return the child".

1.7. Enforcement of a return order

Only in one case in Bosnia and Herzegovina[8] was an order to promptly return the child adopted in non-contentious proceedings. A further procedure needs to be carried out pursuant to the Acts on Enforcement Proceedings of the Federation of B&H, Republic of Srpska and the District Brčko as well as the Family Acts of the Federation of B&H (FB&H), Republic of Srpska and the District Brčko. According to the before mentioned acts, a prompt return of the child needs to be conducted, in certain situations within a term of 24 hours (Article 362 (2) of the FA in FB&H). The court can order a fine against a person who opposes the order (Article 366 (1) of the FA in FB&H). During the enforcement procedure, the court is obliged to protect the child to the greatest extent possible (Article 365 of the FA in FB&H). The courts in Bosnia and Herzegovina until now have not had the opportunity to conduct the procedure of the return of the child according to the HC 1980. In domestic cases, the conduct of the enforcement with the purpose to transfer the child to the parent with whom the child is going to live was often connected with great problems and traumatic experiences for the child.

2. Judicial procedures and ADR in relation to the Hague Child Abduction Convention

2.1. Concentration of jurisdiction

In the procedure initiated by the application for the return of the child in Bosnia and Herzegovina, the municipal courts have jurisdiction, whereas only in the Posavina Canton does the Cantonal Court have jurisdiction. In the second instance in Bosnia and Herzegovina, the cantonal courts have jurisdiction, whereas in the Posavina Canton the Supreme Court has jurisdiction. In the Republic of Srpska, the basic courts have jurisdiction in the first instance and the higher courts in the second instance. Consequently, there is a large number of courts deciding on the application for the return of the child in non-contentious procedures.

7 Decision No. 22 O P 018096 11 Mpom, Municipal Court in Sanski most.

8 Decision No. 51 0 V 048694 11 Pom of 22 September 2011, Municipal Court in Travnik.

In Bosnia and Herzegovina, no concentrated jurisdiction for the return of the child is foreseen pursuant to the HC 1980, although it would be very desirable. The representatives of the Ministry of Justice of Bosnia and Herzegovina as the Central Authority insist on the introduction of the concentrated jurisdiction, aware of all of the problems the courts are facing in cases of international child abduction. The concentration of jurisdiction, comprising the jurisdiction of a few concretely listed courts in these proceedings, would be of multiple uses. A fewer number of courts would be involved, only one or two per entity, i.e. only two or four courts overall. The courts would have a department for family law or a judge dealing with family law cases. Anyhow, only certain judges would be assigned to these cases. They would be trained and ready to answer the application for the return of the child according to HC 1980. It is expected that this would lead to shorter proceedings and more prompt action in cases of international child abduction.

2.2. Procedures and prompt return of a child

The HC 1980 obliges the courts to act expeditiously in proceedings for the return of the child (Article 11 HC 1980). Furthermore, the Family Acts of FB&H, Republic of Srpska and District Brčko provide that in cases considering relationships between parents and their children, matrimonial and other issues, and particularly when determining the terms and hearings, the court will always pay particular attention to the need of expeditious resolving of the dispute in order to protect the interests of the child (Article 268 (1) Family Act FB&H).

The proceedings initiated by the application for the return of the child in most of the analyzed cases lasted much longer than six weeks, as provided by Article 11(2) of the HC 1980. The procedure in the first instance lasts from five to eight weeks, with the exception of three cases of a newer date where the proceedings lasted six weeks (two cases) or three months (one case). The proceedings in the second instance last from five to twelve months. The reasons why the proceedings last longer than provided are not mentioned in the explanations of their decisions, but it is evident that the service of documents usually takes too much time.

The HC 1980 rightly provides for expeditious action in cases of international child abduction, because any delay of the proceedings negatively affects the fulfillment of the Convention itself, and that is to secure a prompt return of wrongfully removed or retained children. Consequently, six weeks is a realistic term for the proceedings for the return of the child. However, the procedure itself is not always simple, considering that every single action taken in the proceedings – the notification of the parties involved about the proceedings,

the taking of their statements, the invitation to the organ of custody, oral hearings, etc. – is necessary but makes the procedure longer. Therefore, it would be important to adopt an act for the implementation of the HC 1980, as also suggested by the Central Authority, which would provide for a concentrated jurisdiction and terms for the conduct of every single action in the proceedings for the return of the child.

2.3. Participation of the applicant generally required in the return proceedings

The HC 1980 was adopted with the aim to make the proceedings for the return of wrongfully removed or retained children faster and easier. However, that does not mean that the parent applying for the return of his child needs to use this procedure. It is possible to initiate the proceedings independently, without the involvement of the Central Authority, but there have been no such cases in Bosnia and Herzegovina. A foreign applicant for the return of his child has all the same rights in the proceedings before the courts of Bosnia and Herzegovina as a domestic citizen. His national procedural law will be applicable to the question of his legal capacity. Considering his rights to sue and be sued, usually related to the requirement of a certain age, a foreign citizen will have the right to sue either according to his national law or to the law of Bosnia and Herzegovina, and he can take over the proceedings at any time, if they are conducted by his legal representative, with a statement. The foreign applicant may also request for legal aid and consulting services in the same way as domestic citizens (Article 25 HC 1980).

2.4. Rejection of the application by a judge

The courts in Bosnia and Herzegovina, in most of the analyzed cases, have refused the return of the child by relying on Article 13(1b) and (2) of the HC 1980. This Article represents an exemption from the HC 1980 because it provides for reasons when the court is not obliged to order the return of the child. In all of the procedures, when possible, the child was heard and it expressed its will to continue living in the new environment. Its will, as well as the report of the center for social matters establishing that the child had adapted to the new environment, were the facts based on which the courts concluded that its return would affect the child negatively and create a psychological trauma. In a case that concerned a two and a half years old child that could not be heard, the court held that the separation from its mother would create a psychological trauma for the child and rejected the application for the return of the child. Therefore, in most of the cases the courts refused to order the return of the child because of the psychological trauma that would be caused by the separation and the resistance of the child that has reached the level of maturity and an age when its opinion needs to be taken into account.

2.5. Appeal on a return decision

The decision to reject the application can be subject to an appeal. The appeal is decided in a non-contentious procedure and the provisions of the Acts on Non-Contentious Procedure of the FB&H, Republic of Srpska and BDB&H apply, but also the provisions of the Acts on the Civil Procedure of FB&H, Republic of Srpska and BDB&H, and the Family Acts of FB&H[9] RS and BDB&H. While in the first instance the decision is made by a single judge, in the second instance a chamber made of three judges decides. They examine the order brought in the first instance with regards to the reasons listed in the appeal and *ex officio*, according to Article 221 of the Civil Procedure Act of FB&H in relation to Article 2(2) of the Act on Non-Contentious procedure, and adopt an order. The appeal procedure, in most of the analyzed cases, lasted longer than 6 months, in some cases even nine months. Only in one case the procedure lasted shorter than three months, more precisely, five weeks. The most common reasons for appeals are infringements of the procedural rules and the wrong application of the substantive law (Article 208 of the Civil Procedure Act of FB&H). In one case the appellant stated that she "did not have a just hearing at the lower court". However, the court of appeal stated that the procedure was non-contentious within the meaning of Part Eight of the Family Act of FB&H, and therefore the procedure could be conducted without an oral hearing if the court finds it unnecessary. In this, as in other analyzed cases, the courts of appeal have rejected the appeals and confirmed the decisions of the first instance. In one case, the revision has been filed as an extraordinary legal remedy to the decision of the appeal court, but it was rejected because the procedure in the first and the second instance was conducted in the form of an enforcement procedure,[10] while according to the Act on the enforcement procedure of the Republic of Srpska[11] against an absolute order adopted in an enforcement procedure it is not permitted to file extraordinary legal remedies.[12]

2.6. Mediation

Mediation and conciliation has not been used in Bosnia and Herzegovina until today, which leads us to the conclusion that they have not been recognized as effective means for the resolution of cases of international child abduction. The Central Authority services the application for the return of the child with the instructions to conduct in accordance with the HC 1980. Until today, the

9 OJ FB&H No. 35/05.

10 Decision No. 095-0-I-08-000-618 of 23.2.2009, Municipal Court of Trebinje; Decision no. 015-0-GŽ-09-000-127 of 10. 7. 2009, District Court of Trebinje.

11 OJ RS Nos. 59/03 and 85/03.

12 Decision No. 118-0-Rev-09-000 898 of 6 October 2009, Supreme Court of RS.

Central Authority has not used its authority from Article 7 (c) that obliges it to undertake all appropriate measures to secure the voluntary return of the child or to bring about an amicable resolution of the issues. The mediation and conciliation mechanisms have not been used yet.

3. Consideration of basic human rights in relation to the HC 1980

When deciding on the application for the return of the child, the courts in Bosnia and Herzegovina rejected the application because the child expressed its wish to stay to live in the new environment and because the return would cause psychological trauma for the child. A fewer number of judges have in their explanations relied on the provisions of the Convention on the Rights of the Child and considered the rights provided by this instrument. Those judges who have chosen this way of argumentation mention the best interest of the child as the "interest which has priority over all other interests" and refer to Article 3(1) of the Convention on the Rights of the Child providing that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies shall take the best interests of the child as the primary consideration. In one case, the court argued that "considering all that has been adopted, the court has primarily been guided by the best interest of the child, as it is obliged not only by the Family Act of the FB&H, but also the valid Convention on the Rights of the Child, and that means that the court needs to permanently take into consideration the protection of the child, which has led this court to the rejection of the application for the return of the child".[13] Other courts have, aside from Article 3(2) of the Convention on the Rights of the Child, also referred to Article 2(2) of the Convention on the Rights of the Child providing that the State Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members and Article 7(2) of the Convention on the Rights of the Child stating that the States Parties shall ensure the implementation of these rights in accordance with their national law.[14]

4. The International Hague Network of Judges (IHNJ) and direct judicial communications

Bosnia and Herzegovina does not have its representative as a member of the IHNJ. There is no legal framework that allows judges to participate in direct judicial communications. All of the communication within the procedure

13 Decision No. 065-0-SUM-012-000432 of 18 June 2013, Municipal Court in Sarajevo.

14 Decision No. 095-I-08-000-618 of 23 February 2009, Municipal Court in Trebinje.

for the return of the child is conducted through the Central Authority. In that way, the courts notify the applicant through the Central Authority, e.g. that the procedure is ongoing, that the decision has been adopted etc. Consequently, judges do not participate in direct judicial communication.

The Ministry of Justice as the Central Authority considers the role of the IHNJ to be important and tries to undertake all measures necessary in order for Bosnia and Herzegovina to have a member in the IHNJ. B&H does not have a representative in the IHNJ. Judges that work on cases of international child abduction are generally not specialized in family law. Judges that work in family law departments of bigger courts constitute an exception (e.g. Municipal Court in Sarajevo). Smaller courts do not have special family law departments, but in some courts family law disputes are solved by specific judges. However, that does not mean that these judges are the ones dealing with cases of international child abduction. Sometimes these cases are solved by judges working in departments for non-contentious procedure. A special detriment is the fact that judges are not deeply acquainted with the field of international family law.. Especially in this field, it would be of great importance to carry out training for judges. Generally, the training of judges is conducted by the Center for Education of Judges and Prosecutors and the High Judicial and Prosecutorial Council. However, there has been no special training related to the application of the HC 1980 to date. Judges rarely use foreign judicial practice, probably because of the lack of knowledge of foreign languages. A large number of judges does not recognize cross-border cases as such, and does not differentiate between cross-border cases and purely domestic cases. Even if they do recognize the foreign element in a civil law dispute, they rarely apply the provisions of private international law – neither the ones contained in the Act on Private International Law or other internal provisions nor the ones contained in the Hague Conventions or other international legal sources. Thus the applicable foreign law is rarely applied in order to solve a case with a foreign element.

5. Other obstacles in the proper operation of the HC 1980

Habitual residence does not represent a connecting factor in the internal legal sources of Bosnia and Herzegovina. Judges, in general, rarely use internal or external sources of private international law when solving cases with a foreign element. Consequently, the problem related to the interpretation of "habitual residence" is still not present in our court practice. However, a lot has been written in the research activity of Bosnia and Herzegovina and the region concerning "habitual residence" as a connecting factor. The journals are available for everyone who has an interest in the problem.

III. A way forward

The application of the HC 1980 would be of a much higher quality if there were special trainings for judges in the field of international family law, or even more specifically, in the field of international parental and custody law. This is how a much more complete insight into the problem of cross-border disputes involving children would be achieved. Besides judges, the trainings should also be attended by other participants of these disputes, foremost the representatives of the centers for social matters, considering the important role they have in the disputes in this field of law.

There is only a small number of research studies conducted in Bosnia and Herzegovina and the region related to international child abduction. The application of the HC 1980 would surely be of a greater quality if judges, but also other organs who participate in the proceedings, were more familiar with foreign and domestic court practice, if they had the opportunity to talk about it and exchange their opinions. Therefore, it would be of great use to print handbooks that contain court practice and to translate the Guide to Good Practice under the HC 1980 –Part III – Provisional Measures, but also other documents that are on the official website of the Hague Conference into one of the official languages in Bosnia and Herzegovina. The Guide to Good Practice under the HC 1980 – Part II – Implementing Measures has been translated into the Bosnian and Croatian languages, but is not used very much by judges working on cases of international child abduction.

1. Best practices in handling HC 1980 application in Bosnia and Herzegovina

By analyzing the court practice available, we may conclude that the basic problem lies in the fact that resolutions of cases of international child abduction are not conducted by courts with concentrated jurisdiction, and are therefore decided by judges who are not specialized in family or international family law and do not know the methodology of resolving cross-border cases. Considering that these cases do not occur often, judges who are solving these cases among many others are not particularly interested in training – they are of the opinion that they will face a case of international child abduction maybe once or never, and consequently they lack motivation to follow judicial practice, to attend trainings or to further educate themselves in that particular field. The lack of knowledge of this field, as well as the terms set for the conduction of a particular action in the proceedings, affect the length of the proceedings. In most of the cases, the application for the return of the child lasted much longer than set by the HC 1980. We cannot speak about a prompt procedure

in any case, although it should be an imperative in order to fulfill the main goal of the HC 1980, and that is to secure the prompt return of wrongfully removed or retained children. Considering that the procedure lasts very long, the child removed from a foreign state to Bosnia and Herzegovina adapts to the new environment and regularly gives the statement that it is feeling well, that it has new friends and that it wants to stay. Such a wish expressed by the child, to stay in the new environment, is taken, among other circumstances, as one of the important facts, in some cases even as a deciding fact, based on which the court grounds its decision to reject the application for the return. Consequently, this provision, meant to be an exception from the HC 1980, is used regularly by courts in Bosnia and Herzegovina.

2. Weak points of judicial/administrative practice in the application of the HC 1980

The abovementioned problems that make a correct and successful application of the HC 1980 impossible could be avoided by the adoption of an act on the implementation of the HC 1980, providing for concentrated jurisdiction and shorter terms for the conduct of particular actions in the procedure. The jurisdiction for cases of international child abduction should be given to one court in FB&H and another in the RS. The best solution would be to determine the jurisdiction of the courts in Sarajevo and Banja Luka, because these courts have special family law departments, and therefore specialized judges would solve these cases. A special training for the application of the HC 1980, but also of international family law in general, would in the case of concentrated jurisdiction make more sense because judges who are dealing with these cases and have some knowledge and experience in international family law would attend the trainings. The judges would be aware of the importance of prompt action, and with shorter terms the procedure would be more efficient, as also requested by the HC 1980. The Ministry of Justice as the Central Authority also insists on the adoption of an act on the implementation of the HC 1980. Until such an act is adopted, the training institutions should be suggested to deliver education in this field because of the existing problems in the application of the HC 1980.

A consistent interpretation of the HC 1980 could be ensured by the adoption of an act on the implementation of the HC 1980 that would provide for concentrated jurisdiction and shorter terms for the conduct of certain procedural actions. Until then, there is a need for special trainings for judges that would be focused on good practices in the application of the HC 1980.

OPERATION OF THE HAGUE 1980 CHILD ABDUCTION CONVENTION IN CROATIA

Mirela Župan* and Tena Hoško**

I. General issues, Central Authority and court system

The Republic of Croatia became a party to the Child Abduction Convention[1] via notification of succession after the Socialist Federal Republic of Yugoslavia ceased to exist. Therefore, Croatia has been a party to the Convention since 8 October 1991.[2] No further implementing legislation was necessary for the entry into force of the Convention. According to the Croatian Constitution,[3] "[i]nternational treaties which have been concluded and ratified in accordance with the Constitution, published and which have entered into force shall be a part of the domestic legal order of the Republic of Croatia and shall have primacy over domestic law."

Besides the Child Abduction Convention, Croatia is a party to 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,[4] which has entered into force on 1 January 2010

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1 Hague Conference on Private International Law, Convention on the Civil Aspects of International Child Abduction (concluded on 25 October 1980, entered into force on 1 December 1983), at: www.hcch.net/index_en.php?act=conventions.text&cid=24 (13 August 2014).

2 Official Gazette (hereinafter: OG) Int'l Agreements No. 4/94, at: http://narodne-novine.nn.hr/clanci/medunarodni/1994_04_4_22.html (13 August 2014).

3 OG Nos 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14, Article 141.

4 Hague Conference on Private International Law, 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), at http://www.hcch.net/index_en.php?act=conventions.text&cid=70 (13 August 2014).

in Croatia[5]. Also, since 1 July 2013, when Croatia acceded to the European Union, the Brussels II *bis* Regulation[6] has been applicable in Croatia as well.

The Central Authority is the same for all three instruments and it is the Ministry of Social Policy and Youth of the Republic of Croatia.[7] The national authority designated as the Central Authority is seated within the Ministry of Social Policy and Youth, Zagreb, Croatia (hereinafter referred to as: Ministry). Within a particular internal structure, there is a Service for International Cooperation in the Field of Protection of Children and Coordination of Social Security that actually performs the function of the central authority. According to the official letter of the Croatian Central Authority,[8] its staff is sufficient with regard to the number of applications and, in terms of their legal qualifications, the employees are graduate lawyers possessing appropriate language skills. The staff is involved in meetings of the European Judicial Network and in the work of the Hague Conference. At least once a year, the Central Authority organizes education of other actors in return procedures: be it social welfare staff, judges or police officials.

If one is searching for information on the web, regrettably the Ministry's website is not very informative on the instruments and has no English version of the pages. It does not clearly state that it acts as the Central Authority for any of the instruments. The only relevant document that can be found on the Ministry's web pages is the standard application form for the Child Abduction Convention.[9] However, the Hague Conference website provides relevant contact details for the Croatian Central Authority.[10] Regrettably, the Croatia Country Profile for the website of the Hague Conference on Private International Law is not fully completed.

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5 For decision on ratification, see OG Int'l Agreements 5/2009, at: http://narodne-novine.nn.hr/clanci/medunarodni/2009_07_5_50.html (13 August 2014). For decision on entry into force, see OG Int'l Agreements 8/2009, at: http://narodne-novine.nn.hr/clanci/medunarodni/2009_10_8_105.html (13 August 2014).

6 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* Regulation, OJ [2003] L338/1.

7 For the Brussels II *bis* Regulation, see Act on Implementation 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, OG 127/2013, at http://narodnenovine.nn.hr/clanci/sluzbeni/2013_10_127_2754.html (13 August 2014).

8 Official letter by Deputy Minister: KLASA: 910-08/14-01/35; URBROJ: 519-03-3-3/1-15-6.

9 http://www.mspm.hr/djelokrug_aktivnosti/socijalna_skrb/konvencije (13 August 2014).

10 http://www.hcch.net/index_en.php?act=authorities.details&aid=837 (13 August 2014).

The relationship of the HC 1980 and the HC 1996 to the Brussels II bis regulation has been a subject of interest of Croatian doctrine.[11] The relationship of HC 1980 and the HC 1996 to other relevant instruments in this field, for example, the European Convention on Human Rights or UN Convention on the Rights of the Child, has been elaborated in some doctrinal findings.[12] However, the available case law does not deal with it.

II. Procedures in relation to the Hague Child Abduction Convention

1. Relevant statistics on operation of the Hague Child Abduction Convention

There is no available statistical record on the number of child abduction cases, neither before Central Authority nor before the courts. However, the Municipal Court in Zagreb has established a separate registry number for child abduction cases, so there is a possibility to do a statistical survey. This practice should be further enhanced and introduced to all courts.

11 I. Medić-Musa, *Komentar Uredbe Bruxelles II bis* [Commentary of the Brussels II bis regulation in relation to parental responsibility] (Pravni fakultet Osijek, Osijek 2012).

12 M. Župan, I. Medić, P. Poretti, *Najbolji interes djeteta u prekograničnim stvarima* [Best interest of a child in cross-border situations] (Pravni fakultet Osijek, Osijek 2015).

Table 1. Zagreb Municipal Court statistics on HCA

Year	Number of cases	State of abduction	Parent-kidnapper
2002	1	Austria	mother
2005	1	Austria	father
2006	1	Bosnia and Herzegovina	father
2007	2	France	father
2009	1	New Zealand	mother
2010	2	Bosnia and Herzegovina	mother
		Netherlands	mother
2011	1	France	mother
	1	USA	mother
2012	1	Switzerland	father
2013	2	Poland	father
		Canada	mother
2014	1	Bosnia and Herzegovina	mother
Total	14 cases		

Source: Judge Marina Parać Garma, "Praksa općinskih sudova u prekograničnim stvarima koje se tiču djece" [The practice of municipal courts in cross-border child-related matters], presentation given at the round table: Best interest of a child in cross-border situations, Osijek, 4 April 2014. (updated data)

According to a study conducted by Župan concerning the case law originated from each municipal and county court in Croatia over a period of one year, (June 2013 – June 2014), there were only four child abduction cases dealt with by Croatian courts in that period. None of these cases related to EU member states, but to Bosnia and Herzegovina (two of them), and to Serbia and the USA.[13]

2. Protection measures

Courts seldom issue the protection measure that the passport has to be handed over and deposited with the authorities of the relevant Ministry. The legal basis for protective measures is given by the Family Act, whereas there is currently a constitutional issue regarding the Family Act 2003 and Family Act 2014, as the application of the former was suspended. However, the difference between the 2003 Family Act and 2014 Family Act is that the 2014 Act

13 M. Župan, *Study on the Application of Brussels II bis in Croatia*, not available publicly.

established a regular information service, and at the moment the judge issues a protective measure stipulating that the relocation of the child is not permitted, such order is electronically sent to all border crossings. This measure of the Family Act of 2014 is the most useful protection measure as the parent is truly not able to leave the country. Due to the suspension of the 2014 Act, the courts can still issue the same protective measure based on the 2003 Act, but there is no useful control of movement. Namely, as the 2003 Act has no provision for an IT system that registers protection measures, if the parent is given 14 days to deposit the passport, in that period he/she has sufficient time to leave the country and abduct the child.

3. Grave risk of harm, domestic violence and safe return

Despite the lack of statistics for the entire country, the statistics run by the Municipal Court in Zagreb is rather indicative to the Croatian practice of interpretation of conventional standards. A study conducted by Parać Garma reveals that in a total of 13 cases of the Municipal Court of Zagreb (from 2002 until mid-2014), one case was withdrawn, in one case the child was voluntarily returned, in three cases the return was ordered, whereas in seven cases the return was rejected (grounds for refusal were in six cases of Article 13(1)b and in one case of Article 13(1)a.[14]

A study conducted by Župan and Ledić presents the most detailed analysis of the Croatian HCA case law, relevant parts being copied here. It proves that Article 13(1)b was often used to reject the return of a child.[15]

When it comes to non-return decisions, the grave risk of harm exception contained in Article 13(1)b of the Convention is mostly used. That exception has been interpreted quite broadly in some decisions of the Municipal Court in Zagreb, and such interpretation was confirmed by the appellate court – the Zagreb County Court. Examples are the following: in one case the court rejected the return of a child since she was well adapted to the new environment and was very closely connected to the abducting father. Also, her medical records showed that her teeth had not been adequately cared for and that she had had neurodermatitis while residing with her mother.[16] In another case the court

14 M. Parać Garma, "Praksa općinskih sudova u prekograničnim stvarima koje se tiču djece" [Practice of municipal courts in cross-border child-related matters], presentation given at the round table: Best interest of a child in cross-border situations, Osijek, 4 April 2014.

15 M. Župan, S. Ledić, 'Cross-border family matters - Croatian experience prior to EU accession and future expectations' 3-4 *Pravni vjesnik* (2014) p. 49-77.

16 Judgment V-R1-1969/06-9 of the Municipal Court in Zagreb of 17 November 2006.

decided that there was a grave risk of harm for the children since the separation from the abducting mother would be stressful as they did not know their father well.[17] Further case law is similar – the court rejected the return of the child since the child would have to be separated from the mother, which would cause it harm. Also, the child had no citizenship of the place of habitual residence prior to the removal, and at the place of habitual residence, where the left behind father lives, the child would have to be in kindergarten until 5:45 p.m. due to father's working hours.[18]

In one of the cases,[19] the plaintiff (father) was a citizen of Canada currently residing in France. The respondent (mother) was a citizen of Croatia residing in Croatia. The parties with a common minor child often changed residence because of their business; the last common residence was in Lyon, France. After the termination of an employment contract by the mother's employer, the mother brought the minor child to Croatia, where they resided. The request to return the minor child back to Lyon was rejected. The court argued that the return did not represent the child's return to its homeland, nor guaranteed its permanent stay in that environment. The minor child had stability with his mother, and the return to Lyon could have led to an unfavourable position and cause psychological trauma.

In the next case,[20] the facts are as follows: the marriage of the plaintiff and the respondent ended by a divorce with a final 2008 decision of a court in Bosnia and Herzegovina. The court ruled that the minor children (born in 2006 and 2008) would live with their mother. The spouses ceased to live together prior to the birth of their younger child. In 2009, the mother moved with the children from their Bosnian permanent residence to Croatia. The children have Croatian citizenship. The court made use of the excuse of Article 13 of the Child Abduction Convention as to the request to return the minor children since it was found out that the separation of the minor children from their mother and the environment in which they felt safe and well cared for would have had adverse effects on their development, especially because the mother did not dispute the father's right to meetings and get-togethers with his children.

In the next child abduction case,[21] the facts of the case indicate that the marriage of the plaintiff and the respondent was divorced by a final court decision

17 Judgment 97-R10-143/10 of the Municipal Court in Zagreb of 14 October 2010 confirmed by judgment 11 Gz2-21/11-2 of the County Court in Zagreb of 31 May 2011.

18 Judgment R10-27/11-12 of the Municipal Court in Zagreb of 6 April 2011 confirmed by judgment Gz2-234/11-3 of the County Court in Zagreb of 9 September 2011.

19 Municipal Civil Court in Zagreb, No R1o-27/11 of 6 April 2011.

20 Municipal Civil Court in Zagreb, No R1o-143/10 of 14 October 2010.

21 Municipal Civil Court in Zagreb, No R1-1744/04 of 27 October 2004.

in Austria in 1995. The court made a final decision to entrust the two minors, born in 1991 and in 1994, to their mother, and allowed visitation rights to the father. In 1997, the mother took her minor children, both Croatian citizens, to Croatia and looked after them so the children were taken care of (both financially and socially), while the father actually and legally did not execute the right to care and custody of the two minor children at the time of their removal. The court refused the request to return the minor children because it was determined that the father actually and legally did not execute the right to care and custody of the two minor children at the time of their removal, and that there was an obstacle for their return justified by Article 13 of the Convention.

In the following case,[22] a minor child lived with his mother in Bosnia and Herzegovina. The father, a Croatian national and of Croatian residence, felt the mother was not providing the child with sufficient health care and hence refused to return the child to the mother on one of the visitation occasions. The court refused the request to return the minor child. The court undertook an overall assessment of the merits, found out that the father was taking good care of the child and that the child was emotionally satisfied and successfully adapted to the new environment. The court emphasised that the return to the mother would not be in the child's best interest, as it would bring him in an unfavourable position. The court's decision does not explain the particular circumstances of the removal of the minor child.

There are examples of proper application of the "grave risk of harm" excuse. In one of the cases,[23] the minor child born in 2009 was a dual citizen of Croatia and Italy and also had residence in Italy at the address of his parents – the father being a citizen of Italy and the mother a Croatian citizen. By its decision of 2011, the Court in Torino entrusted the care of the child to both parents. The mother illegally moved the child to Croatia, where she declared his residence. Upon a return claim, the Croatian court accepted the request for the return of the minor child to Italy. The mother objected and asked the court to refuse the return on the grounds of Article 13. The court undertook an assessment of the fact and concluded that the mother wrongfully took and kept the minor, that the return of the child to Italy would not pose any serious threat to the child, nor would it expose the child to abuse, neglect, or extraordinary emotional dependence, in the sense of Article 13 of the HCA.

These examples suggest that in the vast majority of cases the courts conduct a thorough analysis of the child's situation in order to evaluate the child's best interest and the notion "grave risk of harm" is given quite a wide scope.

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22 Municipal Civil Court in Zagreb, No R1-1696/06 of 17 November 2006.

23 Municipal Civil Court in Split, No Rob-72/11 of 27 July 2012.

It is held by Beaumont & McElevey that the fact of separation from the abducting parent should not by itself constitute a grave risk of harm.[24] It is disturbing to see that in most cases there was actually no consideration of risk in the country of origin, but rather of the fact that a parent (in all cases the abducting parents were Croatian citizens) would be better suited to a child, in the court's view. It seems that judges mainly base their decisions on the opinions and proposals of social welfare centres. Such an opinion is obtained during the procedure according to Articles 335 and 295 of the Family Act,[25] and the same procedure is maintained in the new Family Act (hereinafter: Family Act 2014) that came into force on 1 September 2014.[26] If the opinion issued by the centre states that the grave risk of harm exists, the judge will most often reject the return of the child. Therefore, the first step is to educate social welfare workers that the exception should be interpreted very strictly. Therefore, we may conclude that the Croatian practice is not fully aware of the function of HCA and the prompt return rationale, but it seldom gives a conclusion on the merits of the parental responsibility issue. There are cases where the rationale of HCA is fully supported by the court. For example, a case relating to the USA ended with a return order.[27] The mother (a Croatian citizen) and the minor born in 1996 (a Croatian citizen), lived with the child's father in Florida until 2002. The mother illegally moved the minor to Croatia. Upon the father's request, the court found no justified ground to refuse the return, as the mother acted contrary to the orders of the court in the United States and violated the father's right to care that he had at the time of removal of the minor child. The court also ordered the return of the child wrongfully taken by its mother in the case that related to the Netherlands.[28]

In addition, judges generally do not evaluate whether the applicant has sought protection from abuse in the country of habitual residence of the child, even when they base their decision on the grave risk of harm exception. Such practice runs against the established foreign case law on the same question,[29] and the Brussels II *bis* regime in particular emphasises the need to seek protection from abuse in the country of habitual residence.[30]

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24 P. R. Beaumont, P. E. McEleavy, *The Hague Convention on International Child Abduction* (Oxford, OUP 1999) p. 145.

25 OG Nos 116/03, 17/04, 136/04, 107/07, 57/11, 61/11, 25/13.

26 OG Nos 75/14 and 84/14, Articles 357 and 416.

27 Municipal Civil Court in Zadar, No R1-159/03 of 27 October 2004.

28 Municipal Civil Court in Zagreb, No R1o-225/10 of 3 January 2011.

29 Beaumont, McEleavy, op. cit. n. 24, pp. 156 *et seq*.

30 Article 11(4) of the Brussels II *bis* Regulation.

In the available case law, domestic violence was actually directed towards the mother, not the child. The court was, however, keen to use that argument to refuse the return of the child.[31] Some other case law proves that judges are reluctant to send the child back to the country of habitual residence when there is a risk of abuse or neglect.[32]

4. Hearing, participation and objections of the child

Due to the implementation of Article 12 of the United Nations Convention on the Rights of the Child,[33] the obligation to hear the child is observed in all proceedings in Croatia regarding the child's rights and interests.[34] The discretion given to the judge is mainly as to whether the child is mature enough and capable of expressing its thoughts, and the case law shows that children above 7 years of age are generally heard during the proceedings.[35] The Family Act 2014 compels judges to hear children above fourteen years of age. Younger children will be heard "according to his/her age and maturity"[36] and if there is a need to assess his/her affection to a person, conditions in which the child lives and for other very important reasons.[37] The children may be heard by the judge, or by assistance of a special representative or another qualified person (usually by persons at the social welfare centre – a social worker and/or psychologist).[38]

Regarding the child's objections to return, the case law shows that judges take account of it. In one case, the objections of siblings aged two and four years were enumerated as a supporting reason for the existence of a grave risk of harm, so the return was rejected based on Article 13(1)b of the Convention.[39]

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31 Case 148-R1O-519/11-37, of 15 March 2012.

32 Case 145-R1o-598/13-22 of 22 December 2014.

33 Convention on the Rights of the Child (concluded 20 November 1989, entered into force 2 September 1990) UNTS 1577, 3.

34 Articles 89 and 269 of the Family Act and Articles 86 and 360 of the Family Act 2014.

35 Z. Bulka, 'Primjena Konvencije o građanskopravnim aspektima međunarodne otmice djece na prava roditelja' [Application of the Convention on civil aspects of child abduction to parental rights] 5947 *Informator* (2011) 5, 6.

36 Article 86(2) of the Family Act 2014.

37 Article 360(2) of the Family Act 2014.

38 Article 360(1) and 2 of the Family Act 2014.

39 Judgment 97-R10-143/10 of the Municipal Court in Zagreb of 14 October 2010 confirmed by judgment 11 Gz2-21/11-2 of the County Court in Zagreb of 31 May 2011.

In another case, the Court explicitly referred to the wish of children to live with their father (abductor) and rejected the return of the children. [40]

5. Enforcement of return orders

The enforcement procedure is regulated by the Family Act 2014 in more detail than by previous legislation, but the same postulates remain.[41] The parties to the enforcement procedure are the person seeking and the person against whom enforcement is sought, the child and the social welfare centre. The means that the enforcement court may employ are monetary penalties up to 30,000 HRK (approx. 3,900 EUR), imprisonment up to six months and coercive measures for taking the child. The measures may be directed towards the person against whom the enforcement decision has been issued, the person upon whose will it depends whether the child will be taken, and against every person with whom the child is at the moment. When it comes to the coercive measures towards the child, the court, police and the social welfare centre need to co-operate to protect the child's interests. Also, during the enforcement the court may hear the party opposing the enforcement and may direct the child to a conversation with a professional. Although an appeal against the enforcement decision does not postpone the enforcement, the court has discretion to stay the proceedings if the appeal against the first instance judgment is pending, if the child has been directed to professional conversation and if the proceedings to change the decision (due to changed circumstances) are pending.

The length and ineffectiveness of return orders enforcement has been marked as truly problematic in the Croatian legal system, as confirmed by the judgment of the European Court of Human Rights in *Karadžić v Croatia*.[42] An example of problematic enforcement was evidenced in a recent abduction case

40 The divorce proceeding of parents was conducted in Switzerland, where a court decision assigned the mother with custody over the minor children and decided they should live in Switzerland. The court also determined that the father, who lives in Croatia, would have adequate contacts with the children. After summer holidays, the father did not return the children to Switzerland but retained them in Croatia and enrolled them in school in Croatia. The court had to decide on a return request; it held a hearing of both children who expressed their wish to live with their father, and complained about an inappropriate lifestyle with their mother. The court refused the request to return these minor children to Switzerland because it determined that it was not in the interest of the children. Municipal Civil Court in Zagreb, No R1o-599/12 of 11 October 2012.

41 Articles 106, 336 to 342 and 344 to 348 of the Family Act and Articles 510-520 of the Family Act 2014.

42 The case of *Karadžić* v *Croatia*, Application No. 35030/04, 15 December 2005 (final 15 March 2006).

relating to Poland. Mere enforcement was delayed as the left behind parent was not keen to coercive measures towards a child, so the enforcement claim was withdrawn several times, the court ordered the father to pay a monetary penalty, but none of the means were effective. The enforcement was finally accomplished in the few months of application of the Family Act of 2014, which contains a special protocol on mere enforcement.

6. Judicial system

Until 2015, the judicial system of the Republic of Croatia consisted of 67 municipal courts that had the jurisdiction to hear child abduction cases in the first instance and 15 county courts to which the case might have been appealed to.[43] A reform of court system entered into force on 1st July 2015. Now there are only 24 municipal courts and 15 county courts, but in relation to county courts only three courts would serve as the appellate courts for family matters.

When it comes to internal organization within a municipal court, only in Zagreb, Split and Rijeka there is a specialised group of family law judges who can hear cases of family law, including child abduction. Concentrated jurisdiction may be very purposeful for Croatian circumstances. For instance, having only four courts (in the four biggest cities – Zagreb, Split, Rijeka, Osijek – as endorsed by Hoško) or even only one (as endorsed by Župan), that would have jurisdiction in child abduction cases would make the case law more unified and education of the judges easier. On the other hand, concentration of jurisdiction would not impair access to courts, having in mind that Croatia is a relatively small country and approaching those four courts would not be considered too burdensome. Concentration of jurisdiction is obviously a useful tool towards efficiency in child abduction cases and is not problematic in the context of the EU judicial system either.[44]

7. Procedures

The Family Act 2014 in its Article 347 lays down the procedural rules governing all procedures in family law disputes involving child's rights and interests, including child abduction. It emphasises that cases involving children's rights and interest are urgent. If there is a need for a hearing, it should be held within

43 Act on the Territory and Jurisdiction of the Courts, OG 144/10, 84/11.

44 M. Župan, P. Poretti, 'Concentration of jurisdiction in crossborder family matters', in: M. Vinković (ed.), *New developments in EU Labour, Equality and Human Rights Law* (to be published).

fifteen days from the commencement of the proceedings. If there is no need to hold a hearing, the decision needs to be reached within fifteen days. If those deadlines are overstepped, the court's president needs to be informed about the reasons causing the delay. The appellate decision is to be reached within thirty days from the date of lodging the appeal. The old Act had similar restrictions regarding time limits.[45] This did not always yield most favourable results.

The applicant is invited to take part in the proceedings. Not giving the applicant an opportunity to be heard may lead to the decision being quashed at a higher instance,[46] and violations of the right to be heard and the principle of equality of arms are often invoked as reasons for the appeal. The applicant usually takes part either personally or through a legal representative. Having in mind the Evidence Regulation, evidence taking and hearing of the applicant may be enhanced in intra-EU child abduction cases.[47]

Having in mind a very recent ECHR judgement Adžić v. Croatia, a prompt reaction of competent authorities is needed.[48] The length of the judicial procedure before reaching a final judgement lasted 151 weeks longer than the envisaged 6 weeks! In the available case law, the period is obviously longer than 12 weeks.

8. Mediation

During child abduction proceedings, voluntary return is usually attempted by the Central Authority and/or a social welfare centre. The Central Authority usually communicates with the competent social welfare centre to contact the abducting parent and consider voluntary return. Sometimes, court proceedings are commenced even before there has been a try of such consideration. Mediation and conciliation have not been extensively used otherwise so far. However, the Family Act 2014 provides in Article 322 for obligatory consulting in cases relating to parental responsibility and personal relationships with the child. At the same time, the Act provides for voluntary mediation that

45 See Articles 263-266 of the Family Act.

46 E.g. Judgment Gž2-238/12-2 of the County Court in Zagreb of 2 July 2012 quashing the judgment 148 R1O-519)11-37 of the Municipal Court in Zagreb of 15 March 2012.

47 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 [2001] OJ L 174/1.

48 After the ECHR judgement in the Karadžić case, an initiative to enact implementing legislation occurred. However, it was never actually adopted.

may result, if confirmed by the judge, in an enforceable decision.[49] The court is allowed to stay the proceedings if mediation is taking place.[50] It is worth mentioning that mediation taking place before a social welfare centre is free of charge for the parties.[51] Hopefully, this new system will lead to mediation being used in the context of international child abduction.

9. Consideration of basic human rights in relation to HC 1980

The case law shows that evaluation of the child's interest is at focus when deciding the issue of the child's return. This often leads to an implied comparison of the safeguards of the child's interest in the place of habitual residence and the place where the child has been living after the abduction (e.g. living conditions, adaptation of the child, child's attachment to either parent, etc.). Consequently, judges take a more general approach to the question of the best interest of the child. The approach is similar to taking an "in-depth examination of the entire family situation",[52] as underlined by the European Court of Human Rights. At the same time, it seems that due regard is not given to the left behind parent's right to family life, especially the right of access and contact with the child. Also, one of the main factors cited in favour of non-return in the case law is the possible trauma that could affect the child if separated from the abducting parent. Giving such an important role to the effects of separation only benefits the abducting parent (and encourages future possible abductors as well). Such case law is not in line with the main goal of the 1980 Convention, which only seeks to restore the *status quo* without going into a detailed analysis of the question where should the child live, i.e. which place is in the best interest of the child.

10. Designation of a judge to the International Hague Network of Judges (IHNJ) and direct judicial communications

The Republic of Croatia has not designated a judge to the International Hague Network of Judges (hereinafter: IHNJ). Regarding other possibilities of direct

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49 Article 336(3) of the Family Act 2014.

50 Article 338 of the Family Act 2014.

51 Article 343of the Family Act 2014.

52 Case of *Neulinger and Shuruk* v *Switzerland,* Application no. 41615/07, 6.7.2010 (final 8 January 2009), at para 139; case of *Raban* v *Romania,* Application no. 25437/08 (final 26 September 2010), at para. 28; case of *Šneersone and Kampanella* v *Italy,* Application no. 14737/09 (final 12 July 2011), para. 85; case of *M.R. and L.R.* v *Estonia,* Application no. 13429/12 (final 15 May 2012) para. 37.

communications, the relevant legislation, specifically the Law on Courts,[53] expressly mentions international judicial co-operation as a responsibility of the court's administration, namely the court's president. There is thus no provision allowing direct communications, but at the same time, nothing prohibits it. A possible problem regarding direct communications within the Croatian judiciary lies in the fact that judges are bound by the information written in the case file, so in case of such direct communications, a judge would have to leave a paper evidence of the communication in the case file.[54]

Most municipal courts do not have a specialised family law group of judges, i.e. most judges deal with, more or less, all civil law cases. There might be a subdivision to informal groups in larger courts, but such a subdivision is often not strict and still does not mean that judges will be able to specialise in a certain branch of law. Judges do have the needed infrastructure, but they frequently do not have necessary language and IT skills. Due to the lack of knowledge of foreign languages, training would be very purposeful because judges should get acquainted with foreign case law in order to reach international uniformity envisaged by the Convention. Learning how to use the INCADAT database would also be purposeful for those judges who speak English.

Regarding private international law cases in general, the main problem in that field is Croatia's recent accession to the EU that resulted in many private international law regulations coming into force. It is questionable to what extent are judges familiar with these regulations, which are directly applicable and have not been transposed into national legislation. Therefore, there must be a degree of confusion regarding legal sources in this field at the moment. This is even more so if one has in mind that judges usually do not have much experience in applying the conflict of laws rules since such cases come before Croatian courts much more seldom than "regular" domestic cases.

11. Other considerations

It may be inferred from the case law that habitual residence is not given enough consideration and that it is equated with the child's residence, the current address at the place from where it was abducted. A case law example shows that even where the facts are unclear, the court does not go into a detailed analysis as long as the child was living for a while in the state from which it was abducted. In that particular case, the family moved from Australia to Nether-

53 OG No 28/13, Article 29.

54 Article 57 of the Judicial Rules of Procedure, OG Nos 37/14 and 49/14.

lands where they lived for a few months before coming to Croatia where the child was retained. There was even a disagreement over the issue of the child's habitual residence, and the court's standpoint was that it is obvious that they were last resident in the Netherlands.[55]

III. A way forward

Conclusively, several points of concern regarding the application of the Child Abduction Convention in Croatia may be pinpointed. First, nothing suggests that judges take account of foreign case law on the 1980 Convention. This could be improved in order to reach the goal of uniform interpretation. Second, more emphasis should be placed on mediation and voluntary return of the child, since such arrangement is usually the most favourable for the child. Third, social welfare centres should differentiate between giving an opinion regarding the child's best interest in child abduction cases and custody cases. Judges rely on those opinions, and it seems that centres apply the same standards in both cases. Such practice should be diminished, since the aim of prompt return to the country of origin exists, inter alia, to ensure that custody disputes are settled in that country. Fourth, some of the main categories of the Convention are not considered with due regard or are sometimes wrongly interpreted (e.g. habitual residence, grave risk of harm). Fifth, child abduction procedures are dealt with as any other regular family matter, occurring not as problem of judiciary but legislative deficiencies. There is no concentration of jurisdiction, there are no shorter periods for appeal, there are no any legislative foundations that would enable a court's prompt reaction, although such cases are marked as "urgent". In the 2014 Family Act, more ex parte prompt procedures were enacted, though there is no special procedure only for child abduction cases. Sixth, organization of courts and judges' tasks is not proper, as there is no specialization. As suggested also by Judge Parać Garma, there is no sufficient informal communication between the Central Authority, social welfare centres and the police. As far as organization of court registry is concerned, there is a need to run separate case file numbers for child abduction cases. Seventh, the official translation to the Croatian language is poor, and it deprives of a proper application of the instrument. The concept of habitual residence can be taken as an example, being widely introduced to the Croatian legal system through the Hague Conventions and European PIL Acts. Even in previous translations of the Hague Convention, the term "habitual residence" was translated into Croatian in different (false) ways; the most significant departure has been

55 Judgment 34 R1O-225/10-9 of the Municipal Court in Zagreb of 3 January 2011 confirmed by the judgment 10. Gž2-75/11-4 of the County Court in Zagreb of 11 November 2011.

made with the translation of the Hague Child Abduction Convention, as it says "the place where child regularly stays".[56] Eight, there is no publicly available case law regarding this matter. Ensuring the uniformity of law application could be problematic as case law is not being published on a regular basis.

In order to resolve those problems, there are several steps that may be taken. Legislative action should be taken in order to enact proper implementing rules on Hague child abduction cases. Special procedures to enable true promptness in handling the case, concentration of jurisdiction (it should be considered whether the jurisdiction should be concentrated to the four biggest cities or even only to the capital city Zagreb's municipal court), reducing the number of appeals and time limits for such appeals, or even prescribing that appeal would not affect execution. In the enforcement stage, the entry into force of the 2014 Family Act brought improvements, as the handing over of the child was regulated adequately. At the moment, due to the suspension of the 2014 FA, enforcement of a return order is carried out as enforcement of any other movable property, which is considered contrary to the wellbeing of the child and to basic human rights. Training on the general aim and the main notions of the Convention should be provided to judges and Central Authority's personnel. Providing some technical knowledge on using the HCCH website and the information there available could also constitute a part of the training. Workshops and colloquia could be organised on the regional level or even beyond. It should be ensured that the lessons learned are communicated to all relevant judges. Having in mind the general lack of knowledge of foreign languages amongst persons applying the Convention, publications in the languages of the SEE region would be quite useful. Only the Guide to Good Practice – Part II – Implementing Measures has been translated into the Croatian and Bosnian languages.[57] Perhaps more detailed implementing rules based on the Guides to Good Practice would be useful, if the same goal cannot be reached by translating the Guides. In order to ease the communication between judges from different states involved in cases, a Croatian judge should be appointed to IHNJ.

56 Župan, Ledić, *op. cit.* n. 15.

57 http://www.hcch.net/index_en.php?act=publications.details&pid=2781> (13 August 2014).

APPLICATION OF THE HAGUE CHILD ABDUCTION CONVENTION IN MACEDONIA

Ilija Rumenov*

I. General information

The Republic of Macedonia is a member to the HC 1980 Convention as a Successor State to the Socialist Federal Republic of Yugoslavia which became a Party to the Convention on 1 December 1991.[1] The Republic of Macedonia declared itself to be bound by the HC 1980 on 20 September 1993 (every member to the Convention accepted this except Greece, which informed the Ministry of Foreign Affairs of the Kingdom of the Netherlands that the Government does not recognize the Republic of Macedonia and consequently does not consider itself to be bound by the Conventions to which the latter is a Party). In the Republic of Macedonia, the implementation of the HC 1980 is conducted directly, without any implementing legislation. The basis for this is Article 118 of the Constitution of the Republic of Macedonia. General information about the Republic of Macedonia is posted on the Hague Conference website; however, the Republic of Macedonia does not have a Country Profile submitted and placed on the HCCH website.

1. Central Authority

The Central Authority is seated within the Ministry of Labour and Social Policy of the Republic of Macedonia.[2] The Central Authority consists of three people with legal background and sufficient language skills. They have completed different trainings and education workshops in their line of work, but they have not had any specialised training about the implementation of the

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1 *Službeni list SFRJ - Međunarodni ugovori*, br. 7/91.

2 Ministry of Labour and Social Policy of Republic of Macedonia (Министерство за труд и социјална политика на Република Македонија)
Dame Gruev No. 14, 1000 Skopje, Republic of Macedonia
Telephone number: +389 (2) 3106-212
Telefax numbers: +389 (2) 3220-408
Contact persons: Ms Elena Lazovska (Head of Unit for Social and Legal Protection of Children and Family); Ms Elka Todorova (Counsellor)
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HC 1980.

There is basic information about the HC 1980 available on the internet site www.uslugi.gov.mk.[3] This information includes details about contact persons, providing contactability with the Central Authority, e-mail addresses, telephone number, etc. There are no standardised application forms available online, however, under the link "Description of Services", there is general information available about the documents required for application. The Central Authority does not possess any software programme for processing, documenting and/or archiving application files (relevant documentation) and cases are processed in hard copy.

The administrative authority is seated within the Centre for Social Work.[4] The Centre for Social Work is using a general programme for all cases (LIRICUS). There are 29 Community Centres for Social Work and 16 Intercommunity Centres for Social Work.[5]

2. Other related instruments

Table 1.

Convention	Signed	Ratified	Entry into force
European Convention on Human Rights[6]	9 November 1995	10 April 1997	10 April 1997
Convention on the Rights of the Child[7]	26 January 1990	3 January 1991	2 December 1993[8]
European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children[9]	3 April 2001	29 November 2002	1 March 2003
Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children[10]	/	/	/

3 http://uslugi.gov.mk/UslugaDetali.aspx?UslugaID=5087364F200441ABA047D78F07DB43BA (21 August 2015).

4 Centre for Social Work - Центар за социјална работа. Ul. Nikola Karev bb, 1000 Skopje, Republic of Macedonia.

5 List of Community and Intercommunity Centres for Social Work is given on the following address: http://www.mtsp.gov.mk/WBStorage/Files/podracni.pdf (21 August 2015).

3. Communication with other authorities[6][7][8][9][10]

There is a good cooperation between the Central Authority and the Centre for Social Work which decide about the return of abducted children (in the Republic of Macedonia there is an administrative procedure applied to this Convention). The communication between the relevant authorities in the Republic of Macedonia is conducted promptly, however, they have not been able to observe the timeframes of the HC 1980. The main obstacles for this are fact crosschecking, finding abducted children and communication with other Central Authorities.

II. Process of Hague Child Abduction Convention

1. Statistics

Table 2. Total number of applications[11]

Year	Applications	Return	Right of access
2005 – 2008	28	/	/
2008 – 2014	32	28	5

Table 3. Number of applications in the last two years[12]

Year	Applications	Decided	Pending
2013	12	8	4
2014	3	-	-

There is no record of a rejected application according to Article 27 of the HC 1980. In cases where the application requirements were not fulfilled or where the application was not grounded properly, the Central Authority contacted the interested parties to properly fulfil the application and the requirements set by the Convention.

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6 *Official Gazette of the Republic of Macedonia* Nos. 11/1997; 30/2004; 30/2005.

7 *Official Gazette of the Republic of Macedonia* No. 12/2002.

8 Successor State to the Socialist Federal Republic of Yugoslavia.

9 *Official Gazette of the Republic of Macedonia* No. 12/2002.

10 The Republic of Macedonia is not a member to the 1996 Hague Convention. However, the ratification of this Convention is part of the 2014 – 2015 programme of activities of the Ministry of Justice.

11 Source: Central Authority.

12 Source: Centre for Social Work of the Republic of Macedonia.

2. Locating the abducted child and protective measures

For determining the location of the abducted child, the involved authorities contact the Ministry of Internal Affairs (Министерство за внатрешни работи), which uses its assets to locate the child if it is presumed to be situated in its territory. The commonly used measure to deter the removal or re-abduction of the child is the order that forbids the person from leaving the country. However, there are omissions arising from uncoordinated actions of the involved authorities that in some cases allow re-abduction. The Centre for Social Work does not use the Guide to Good Practice under 1980 Convention – Part III Preventive Measures and it has not been translated to Macedonian.

3. Domestic violence and safe return

There is a general concern among the relevant authorities that the abducted child will in some form suffer physical or psychological abuse. In most cases, Article 13(1)(b) was used as the ground for the non-return of the abducted child. This ground was also used in combination with other grounds. Generally, it was used on a highly regular basis. There is a direct and indirect interpretation of "grave risk of harm", whether physical or psychological. It is not only interpreted in the manner of direct abuse, but the relevant authorities are also concerned that taking the child from the parent, mainly the mother, will cause great psychological harm. In most cases, the children were infants and dependent on their mothers.

4. Hearing, participation and objections of the child

When the child is mature enough for the relevant authorities to take into account his/her view, they will hear the child. This is performed by the Centre for Social Work, and it is conducted by a team of employees consisting social workers and a child psychologist. There are different methods for hearing the child, including: observation, tests, play, drawings, behaviour and direct contact.

Article 13(2) is used, however, not as a sole ground for refusal of return, but often in combination with other grounds (especially Article 13(1)(b)). The reason for this is that generally, most abducted children are not mature enough.

5. Procedures

In the Republic of Macedonia there is no implementing legislation for the HC 1980. In addition, there is no concentrated jurisdiction. All of the 29 Community Centres for Social Work can decide on a return order. They are coordinated by 16 Intercommunity Centres for Social Work. The procedure is administrative,[13] and the administrative authorities directly apply the HC 1980. The length of the procedure is between six and twelve weeks, although in some cases it can be longer than that. All of the authorities agree that a longer period for processing the application is needed and that having some kind of implementing legislation would make a significant difference. Regarding the active participation of the applicant in the return proceedings, it depends on the case, but the Central Authority are flexible about the modalities of participation. Video-links, telephone, e-mail as well as legal representation have been used.

The usual reasons for the rejection of an application are grave risk of physical or psychological harm (Article 13(1)(b)), the child opposing the return (Article13(2)) and the child having settled in the new environment (Article 12(2)). Usually these conditions are not met individually but are combined. The relevant authorities have five or six cases which have been appealed. According to the Law on the General Administrative Procedure, appeal is allowed. There are no special procedures for the HC 1980. The appeal must be filed 15 days as of the day of receiving the decision (Article 230). The administrative authority should decide upon the appeal no later than two months as of the day the appeal has been filed (Article 247). In some HC 1980 cases, the appeal process took six months. The main reason for an objection leading to an appeal is that the factual situation was not properly determined by the authority that decided in the first instance.

In some situations, when the outcome was predictable, the parents would often come to an agreement about the return. In these situations, the Central Authority and administrative authority did not receive information whether the child was returned or not, so these cases are unaccounted. Another concerning circumstance is when, in the finishing stages of a return procedure, rather than issuing a (non-)return order, the relevant authorities and the Central Authority would simply inform the other central authority via e-mail that the child would not be returned to the place of his/her habitual residence.

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13 Law on the General Administrative Procedure, *Official Gazette of the Republic of Macedonia* No. 38/2005, 110/2008 and 51/2011. Decision of the Constitutional Court of the Republic of Macedonia, U.no. 102/2008 dated 10 September 2008, published in the *Official Gazette of the Republic of Macedonia* No. 118/2008.

6. Mediation

The Republic of Macedonia has adopted a Law on Mediation.[14] It applies in civil, commercial, labour, consumer and other relationships between physical and legal persons.[15] The Law on Mediation also applies in family and criminal matters, if appropriate given the nature of the dispute and if it is not excluded by law.[16] However, mediation is not applicable regarding child abduction cases in the Republic of Macedonia.

7. Other considerations

There is no track of basic human rights consideration in the HC 1980 cases in the Republic of Macedonia. The relevant authorities rely only on the HC 1980, although there are frequent considerations about the best interest of the child.

No judge from the Republic of Macedonia has been designated to the IHNJ. The Ministry of Justice is acquainted with this possibility; however, nothing has been specifically done. In the Republic of Macedonia, as stated above, the procedure is not conducted in front of a court, but rather by an administrative authority (Centre for Social Work).

There are some terminological problems in the interpretation of the terms used by the HC 1980. The most common problem of the varying interpretation of the terms used in the Convention is that of "custody rights". Although there has been no cases in which the child was returned to the place of his/her habitual residence, the term "habitual residence" also appeared to be problematic. On the other hand, there are serious problems with regard to expenses arising out of the operation of the HC 1980 on the side of the applicant. The applicant is often discouraged in going further in the return of the wrongfully removed or retained child because of the expenses that he/she cannot bear.

14 Law on Mediation, *Official Gazette of the Republic of Macedonia* No. 60/2006, 22/2007 and 114/2009. Decision of the Constitutional Court of the Republic of Macedonia, U.no. 34/2007, 6 June 2007.

15 Article 1(2) of Law on Mediation.

16 Article 1(3) of Law on Mediation.

III. A way forward

Future challenges lie ahead. The HC 1980 now is turning 34, an age that shows what the structure is made of. As a convention drafted to ensure a prompt return of children to the state of their habitual residence, it has proven to be a useful remedy in the international protection of children from the harmful effects of their wrongful removal or retention. The Republic of Macedonia has been a member to the Convention for about 21 years now, but there is still room for future activities aimed toward a more effective implementation of the HC 1980.

In perspective, there is a need for developing regular training programs for persons involved in the process; this especially refers to judges, employees of Centres for Social Work and persons working at the Central Authority. This can be achieved on the national level, but also, in our opinion, some kind of regional training would be more helpful in sharing the experiences of the implementation of the HC 1980. Secondly, there is an evident need of having regular screening of the implementation of the HC 1980 on the national level. This would serve the purpose of having a transparent procedure, which would elevate the implementation of the HC 1980 to higher standards and reduce the possibility of its improper application. In this manner, all materials that can help this goal would be useful.

This survey of the implementation of the HC 1980 in the Republic of Macedonia has revealed room for further improvement. The measures that need to be taken are:

- The Republic of Macedonia should adopt implementing legislation for the application of the HC 1980;
- The relevant authorities should enact a new, special non-litigious procedure for return of wrongfully removed or retained children, with a proper involvement of Centres for Social Work and the Central Authority. Courts are the proper authority to decide on the issue of return of abducted children, rather than the administrative authorities, as it the present practice;
- There is a need for developing training programs (national/regional) that would help the involved persons in proper understanding of the return mechanism, which would facilitate more expeditious procedures of return of children and strengthen the mutual trust between authorities;
- Regular screening should be provided for.

This is the first regional survey of the implementation of the HC 1980 showing that only through a transparent, expeditious procedure can the goals of the

Convention be achieved. Regional activities are always helpful in achieving the ultimate goal of this Convention, creating a world that discourages abductors in choosing a forum that is most favourable to them instead of a forum which is best acquainted with the situation, that being the forum of the child's habitual residence.

COUNTRY REPORT ON APPLICATION OF THE HAGUE CHILD ABDUCTION CONVENTION – MONTENEGRO

Maja Kostić-Mandić*

I. Introduction

Application of international treaties in general and the Hague Child Abduction Convention in particular has to be reviewed in a specific historical context which will shed more light on developments in legal framework and practice of judicial and administrative bodies following the referendum on Montenegrin independence.

In terms of the hierarchy of the sources of law, the 2007 Constitution of Montenegro[1] prescribes that the ratified and promulgated international agreements shall have supremacy over the national legislation and shall be directly applicable when regulating relations differently from the internal legislation (Article 9). The predominant interpretation of the said provision by scholars and jurisprudence is that the Constitution remains the highest ranking source of law in Montenegro. The Constitution explicitly stipulates supremacy and direct applicability of ratified and promulgated international agreements in cases of conflicts of norms with the national legislation. Another possibility of implementation of international law includes generally accepted rules of international law (Article 9 of the Constitution). The phrase presumably refers primarily to customary international rules and general principles of law accepted by civilized nations.[2] Due to a comprehensive codification of private international law in 1982[3] and in 2014[4] as well as the adoption of concrete solutions from certain multilateral conventions, the cases in which international treaties are directly applicable are relatively rare in practice.

Montenegro became a Member State of the Hague Conference on Private International Law retroactively on 1 March 2007. The Decision on Proclamation

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1 Constitution of Montenegro, *Official Gazette of Montenegro* No. 1/2007.

2 M. Kostić-Mandić, M. Stanivuković and M. Živković, 'Private International Law of Montenegro' in: B. Verschraegen, *IEL Private International Law* (Kluwer Law International BV, The Netherlands, 2013) p. 13 et.seq.

3 SFR Yugoslav Act Concerning the Resolution of Conflicts of Laws with Provisions of Other States of 1982 as amended 1996 (not in force in Montenegro since 9 July 2014).

4 Private International Law Act, *Official Gazette of Montenegro* No. 1/2014.

of Independence of 3 June 2006 explicitly states that Montenegro will be bound by international conventions and agreements concluded and succeeded by the State Union of Serbia and Montenegro, when they relate to Montenegro and do not contravene with its legal order. Thus, Montenegro succeeded to the following Hague conventions as of 3 June 2006: Hague Civil Procedure Convention; Hague Legalization Convention 1961; Hague Testamentary Dispositions Convention 1961; Hague Traffic Accident Convention 1971; Hague Product Liability Convention 1973; Hague Child Abduction Convention 1980 and Hague Access to Justice Convention 1980. The new accessions to the Hague Conventions by Montenegro include: Hague Service Convention 1965; Hague Evidence Convention 1970; Hague Adoption Convention 1993 and Hague Child Protection Convention 1996.

II. Application of the Hague Child Abduction Convention

This short overview of the application of Hague Child Abduction Convention in Montenegro will consist of two parts: a brief introduction to the general framework (vaguely based on the Questionnaire provided to the national reporters by the Hague Conference) and an overview of the most recent practice in this field (from January 2010 to June 2014) accompanied with an analysis of two cases from the late 1990s. The Hague Child Abduction Convention has been in force in Montenegro since 1 December 1991, when former Yugoslavia became a party to the Convention and implementing legislation was not necessary in Montenegro to give effect to this convention. In addition, neither the 1982 Yugoslav Private International Law Act nor the new, 2014 Montenegrin one contain provisions on international child abduction.

Some information regarding application of the Hague Child Abduction Convention can be found in the Country Profile which is available on the website of the Hague Conference on Private International Law, under the Child Abduction section.[5]

One of the features of the organizational scheme of bodies applying the Convention in Montenegro is a lack of centralization of competences. Thus, the Central Authorities for Hague Conventions differ, so for this convention it is the Ministry of Justice, and e.g. for the Hague Child Protection Convention it is the Ministry of Labor and Social Welfare. Montenegro is not a party to any other convention/instrument that would fall within the material scope of application of those two conventions.

5 See http://www.hcch.net/index_en.php?act=publications.details&pid=6072&dtid=42 (3 July 2015).

In practice, the role of the Ministry of Justice of the Government of Montenegro as the central authority for the Convention is limited to forwarding applications for return or rights of access to a Central Authority of a country were the child is situated after the abduction or retention and forwarding applications obtained from a foreign central authority to the competent courts in Montenegro which are seized with the respective cases. As in case of other international treaties, it is obvious that proper training of the staff working with applications is lacking. The work of the Central Authority in Montenegro at the Ministry of Justice is performed by one civil servant[6] possessing relevant legal qualifications and not having the required language skills. The whole procedure relating to applications as well as archiving is traditional (paper archive system). Cooperation with other relevant bodies and public authorities is satisfactory and the whole communication is traditional, not including electronic means.

1. Return application proceedings

In practice, when Montenegro is the requested state the, the main task of the Central Authority is only to forward the application to the court and all basic courts in Montenegro (15 courts) may comply with applications under the Convention. In addition, the judges are not specialized in the field so any judge of the civil law division of any basic court in Montenegro may be seized. Once an application is forwarded to the competent court, the police is in charge of accessing the information on the whereabouts of the child. In order to deter the removal or re-abduction of the child, the court may order e.g., child's passport(s) to be deposited with authorities; the alleged abductor's passport to be deposited with authorities; obtain orders to prevent the removal of the child, etc. In general, the expected time from the commencement of the return proceedings to a final order (excluding appeals) is up to six weeks. The applicant is generally not required to participate in the return proceedings, but it is the common case in practice (via telephone, through a legal representative). Free legal assistance is available to an applicant in return proceedings in Montenegro. The child has an opportunity to be heard in return proceedings in Montenegro in every case through a Center for Social Welfare.

A return decision can be subject to an appeal and the expected time within which appeals are filed and decided is up to 3 months. However, in practice, timeframes from the Convention are usually not met since it takes time to

6 According to the official data of the Ministry of Justice of Montenegro, as of 24 March 2014 there are 47 employees in the Ministry and other institutions under its competence.

locate a child, timeframes from the Enforcement Procedure Act[7] have to be complied with, appeal procedure takes up to 3 months, and forced enforcement can sometimes take up to several years.

Mediation and conciliation may be used in the procedures under the Hague Child Abduction Convention in Montenegro. There is a general legislation relating to mediation which also applies to mediation in family matters – the mediation procedure in family disputes is provided for by the 2004 Law on Mediation[8] (Section IV) and 2007 Law on Family.[9] Mediated agreements in family disputes involving children are immediately enforceable without any additional formalities being required.

Mediation and conciliation mechanisms have a positive impact on the length of proceedings since the forced execution procedure may take years (e.g. the case Mijušković v Montenegro before the European Court of Human Rights, addressing a child abduction case in a national context).[10]

The Central Authority has been keeping statistics on Hague Child Abduction Convention applications only since 2010.[11] In the course of the last 4.5 years (2010 – June 2014) there were 10 applications (4 outgoing and 6 incoming applications), half of them relating to two countries (Serbia – 3, Germany 2) and Kosovo, Denmark, Luxembourg, the USA and the Russian Federation – 1.

Outgoing applications, where Montenegro was a requesting state, were sent to:

- Germany – the case was archived since the father did not comply with the court orders and in the meantime left for Germany to be reunited with the ex-wife and abducted child;
- Serbia – the court stayed the proceedings since the applicant was not accessible;

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7 Enforcement Procedure Act, *Official Gazette of Montenegro* No. 36/2011.

8 Law on Mediation, *Official Gazette of Montenegro* No. 1/2014.

9 Law on Family, *Official Gazette of Montenegro* No. 1/2007.

10 Application no. 49337/07 - The case concerned the lengthy non-enforcement of a final judgment awarding the applicant custody of her twins, born in 1998, following her ex-husband's refusal to return the children to her since January 2005. The applicant also complained that a prior interim custody order had not been enforced either. The children were finally surrendered to the applicant in November 2009. The applicant relied on Article 8 (right to respect for private and family life). The ECHR found a violation of Article 8 of the European Convention on Human Rights; at: http://sim.law.uu.nl/sim/caselaw/Hof.nsf/2422ec00f1ace923c1256681002b47f1/827ab6f2b120f53dc12577a5002f6f53?OpenDocument (3 July 2015).

11 Information provided courtesy of Ms. Dara Tomić from the Ministry of Justice.

- Luxembourg - final judgment of a foreign court, but the children are still displaced,
- Kosovo – the application has been sent recently.

Incoming applications, where Montenegro is a requested state, originated from:

- Serbia – the mother revoked the application and the father was granted custody rights;
- Serbia – the application was transferred to Croatia;
- Germany – the court rejected the claim of the Center for Social Welfare, the child remained with its mother in Montenegro;
- USA – the court rejected the claim, the appeal procedure is pending;
- Denmark – the child returned to mother in Denmark;
- Russia – the mother and children have not been found yet.

Out of ten cases, two cases were terminated in judicial proceedings providing for the return of the child and reuniting it with the parent who has custody rights; in one case, in spite of the final judgment of the foreign court, the children are still displaced; in one case, the application was revoked; one case has been archived, one case has been transferred to Croatia and the other cases are still pending.

2. Case law

An overview of two cases[12] of international child abduction which were adjudicated by the courts of Montenegro will show different approaches in obtaining the final goal. In both cases, which took place shortly one after another, the father, a citizen of Montenegro, unlawfully took a minor child, Swiss citizen in Montenegro, without the consent of the mother, a Swiss national. However, the second case benefited from mediation.

In the case no. 1, the father of the child started divorce proceedings before the Basic Court in Podgorica, and the proceedings were stayed due to the *lis pendens* (a Swiss court issued a ruling in the proceedings for divorce 5 May 1999). The wife initiated proceedings for recognition of foreign judgments (two final court orders of the Civil Division of the Court in Solothurn –

12 Courtesy of Attorney-at-Law Vanja Mugoša, from the Law Office "Jovović & Partners", who provided the complete file to the author of this report; the facts of the two cases where the Convention was applied are now accessible to the public.

Lebern, entrusting the custody of the minor daughter to her mother and ordering the father to return the daughter to the mother, as well as the judgment of the Municipal Court Solothurn – Lebern of 5 May 1999 laying divorce and awarding child custody to the mother and regulating the obligation of maintenance. The appeal proceedings against the decision on the recognition of the above decision included a revision before the Supreme Court of Montenegro. The procedure for execution ended by a decision which ordered the father of the child to return it to the mother. The attempt of an alternative dispute resolution (handing the child to the mother without carrying out mandatory execution, with a proposal for the conclusion of agreements on access with the child's father) failed. Meanwhile, in the criminal proceedings before the Basic Court in Podgorica, the husband was convicted of the criminal offense of revocation of a minor under the Criminal Code of Montenegro and sentenced to a suspended sentence. Finally, after 13 attempts of mandatory execution, two and a half years later the child was returned to her mother.

In the case no. 2, the marriage between a Swiss national and a Montenegrin citizen with a permanent residence in Switzerland was divorced by the judgment of the District Court Fafikon, Switzerland, of 12 March 1996, and the custody of a minor child was awarded to the mother. The same judgment provided for the manner of exercising the rights of access. The father acted in compliance with the court's decision for the following three years. During one of the arranged visits, the father removed the child to Montenegro without the consent of the mother, with the intention to permanently retain him there. The Swiss decision granting the custody to the mother was then recognized as an enforceable judgment in the FRY by the District Court in Pančevo. The wife applied for the child's return under the Hague Child Abduction Convention. The Swiss Federal Departments of Justice and Police ordered the Swiss Embassy in Belgrade to forward the request to the Ministry of Justice of the Montenegrin Government. The Basic Court in Herceg Novi delivered a judgment that the father was guilty of a criminal offense – revocation of a minor child under the Criminal Code of Montenegro – and sentenced him to a suspended sentence. A procedure for arranging contacts for the duration of the execution procedure between the mother, who came to Montenegro, and the son was started at the Center for Social Welfare of the Municipality of Herceg Novi. The Basic Court in Herceg Novi decided on requests for provisional measures on several occasions (the requests were submitted either by the mother or the father). One of the rulings complied with the proposal for the seizure of the child's passport (and not the father's passport) while another temporary relief was issued regarding protection and placement of the minor child, which prohibits the child's mother to leave Montenegro with her son

before the termination of the litigation, initiated by the father before the same court, demanding for the decision on custody to be modified. However, the procedure regarding custody never came to an end because the father willingly returned the child and the parents amicably arranged their relations for the sake of their son who suffered from severe psychological problems during the described situation.

III. Conclusion

The Ministry of Justice as the Central Authority for the Hague Child Abduction Convention basically does not comply with Article 7 of the Convention in its work, limiting its actions only to: forwarding applications for return or rights of access to the Central Authority of the country where a child is situated after abduction or retention; forwarding applications obtained from a foreign central authority to the competent courts in Montenegro which are seized with the respective cases; and providing for information of a general character. In order to be able to fully comply with the obligations arising from the Convention, some organizational and capacity-building activities should be effectuated in the near future. Having in mind its poor implementation capacity, Montenegro should benefit from a regional project aimed at the education and training of civil servants and judges regarding the application of the Convention and publication of a handbook dealing with implementation issues in the local language.

Dispersion of competence of the central authorities, courts and judges who can hear return applications under the Convention should be overcome by "concentrating jurisdiction" (the Ministry of Justice should be the only central authority for all Hague Conventions, the Basic court in Podgorica should be the only court hearing those cases and two judges should be involved in a regional training). Montenegro should also designate a judge to the International Network of Judges.

SOME OPEN ISSUES IN THE APPLICATION OF THE 1980 CHILD ABDUCTION CONVENTION IN THE REPUBLIC OF SERBIA

Sanja Marjanović*

I. Introduction

The 1980 Hague Convention on the Civil Aspects of International Child Abduction (hereafter: the 1980 Convention) was ratified by the former SFRY in 1991.[1] After the dissolution of the SFRY, all ex-Yugoslav republics became successors to seven Hague conventions on Private International Law, including the 1980 Convention.[2] Nevertheless, given the refusal of the Hague Conference to automatically accept Serbia's status as a successor state, the

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1 *Official Gazette of SFRY*, International Agreements Supplement, No. 7/91

2 Besides the 1980 Child Abduction Convention, the former Yugoslav republics became successors to the 1905 Convention relating to civil procedure (*Official Gazette of the Kingdom of Yugoslavia,* No. 100/1930), the 1954 Convention on Civil Procedure (*Official Gazette of the FPRY*, International Agreements Supplement, No. 6/1962), the 1961 Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions (*Official Gazette of the FPRY*, International Agreements Supplement, No. 11/1962), the 1961 Convention Abolishing the Requirement of Legalization for Foreign Public Documents (*Official Gazette of the FPRY*, International Agreements Supplement, No. 10/1962), the 1971 Convention on the Law Applicable to Traffic Accidents (*Official Gazette of the SFRY*, International Agreements Supplement, No. 26/1976), the 1973 Convention on the Law Applicable to Products Liability (*Official Gazette of the SFRY*, International Agreements Supplement, No. 8/1977) and the 1980 Convention on International Access to Justice (*Official Gazette of the SFRY*, International Agreements Supplement, No. 8/1977). So far, the Republic of Serbia has joined four more Hague conventions: the 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (*Official Gazette of RS,* International Agreements Supplement, No. 1/2010 and 13/2013), the 1970 Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (*Official Gazette of RS,* International Agreements Supplement, Nos. 1/2010 and 13/2013), the 2007 Protocol on the Law Applicable to Maintenance Obligations (*Official Gazette of RS,* International Agreements Supplement, No. 1/2013) and the 1993 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (*Official Gazette of RS,* International Agreements Supplement, No. 12/2013). The Serbian Government's Council on Private International Law has also proposed the ratification of the 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (the ratification process is pending) and the 2007 Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (the ratification process has not been initiated yet).

Republic of Serbia was required to apply for membership with the Hague Conference on Private International Law in 2001. In spite of this unusual solution, the Republic of Serbia has officially had the status of a State Party to the 1980 Convention ever since the 1980 Convention became effective for the former SFRY. After the Belgrade Treaty in 2006 and the dissolution of the State Union of Serbia and Montenegro, Serbia once again became a successor of all international obligations pertaining to this former State Union.

As it has been more than 30 years since the 1980 Convention became effective for all former Yugoslav republics, it may imply that the crucial problems concerning its practical application were resolved long ago. Yet, the judicial practice of Serbian courts suggests otherwise. Although there have been notable and significant improvements in the application of the 1980 Convention, the most recent court cases decided in the period from 2008 until 2013[3] show that some international child abduction issues should be given special attention due to their importance for the proper adjudication on the return of the child (II). Those issues concern: the type of court proceeding for deciding the 1980 Convention cases (II.1); the determination of the child's habitual residence (II.2) and the interpretation of the grave risk of harm in cases involving domestic violence against the abductor (II.3).

However, it should be noted that none of these problems are new. Actually, they have successfully outlived the dissolution of the SFRY and the State Union of Serbia and Montenegro given the fact that their main cause remained the same: the absence of concentration of jurisdiction. This means that all basic (formerly municipal) courts in Serbia have the subject-matter jurisdiction to adjudicate the 1980 Convention cases in the first instance. Thus, the issue of implementing legislation was first raised in 2009 when the Ministry of Justice of the Republic of Serbia established a Working Group for drafting the Implementation Act on Civil Protection of Children from Wrongful Cross-Border

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3 In the analysed period, the numbers of submitted applications under the 1980 Convention are as follows:
Number of all applications: 13 in 2008; 18 in 2009; 10 in 2010; 10 in 2011; 17 in 2012; and 18 in 2013;
Number of access applications: 1 in 2008; 2 in 2009; 1 in 2010; 1 in 2011; 5 in 2012; and 0 in 2013;
Number of return applications: 12 in 2008; 16 in 2009; 9 in 2010; 9 in 2011; 12 in 2012; and 18 in 2013;
Number of withdrawn applications: 2 in 2008; 3 in 2009; 3 in 2010; 1 in 2011; 1 in 2012; 1 in 2012; and 1 in 2013; *Number of rejections under Article 27*: in 2008 and as well as in 2013 only one application. The statistical data were provided by the Ministry of Justice of the Republic of Serbia, the Sector for Normative Affairs and International Cooperation – Department for International Legal Assistance in Civil Matters.

Removal and Retention (hereafter: the Draft Implementation Act).[4] Although this type of a legislative act is highly unusual for the Serbian legal system, based on the monistic theory,[5] it seems to be the only solution for overcoming the current problems in the application of the 1980 Convention. Thus, the prospective Implementation Act should be considered as a legal instrument which could facilitate the application of the 1980 Convention. However, despite the fact that the proposed solutions in the Draft Implementation Act are more than welcome, there are some significant provisions which need to be improved (III).

II. The most important shortcomings in the application of the 1980 Convention

1. The type of court proceeding

The first crucial problem in the judicial practice of Serbian courts concerns the type of the court proceedings for deciding on the 1980 Convention cases. According to the analyzed cases, the Serbian courts seem to be resolving this issue *ad hoc,* by applying different civil law proceedings. In general, judges reach out for the rules of contentious, non-contentious and enforcement proceedings, which are occasionally combined without reservation.

In some cases, where the custody right was based on an enforceable decision or on interim measures, the courts applied the procedural rules governing the recognition and enforcement of foreign judgments. In other words, the provisions on the recognition of foreign judgments regulated in the 1982 Act on Resolution of Conflict of Laws with Regulations of Other Countries were applied (hereafter: the 1982 PIL Act),[6] which were subsequently followed by the provisions of the Enforcement and Security Act[7] (in the compulsory enforcement proceeding). In six cases, the requests for the return of the abducted child were treated as international legal assistance requests, whereas in two cases the decision was brought in non-contentious proceeding as the only cases of proper application of the 1980 Convention (in terms of the type of court proceedings). Furthermore, in two cases, the requests for the return of the abducted child were arranged as parental responsibility action, subject

4 The Draft Implementation Act is available at http://arhiva.mpravde.gov.rs/lt/news/vesti/radna-verzija-zakona-o-gradjanskopravnoj-zastiti-dece-od-nezakonitog-prekogranicnog-odvodjenja-i-zadrzavanja.html (12 January 2015).

5 According to the monistic theory, the international sources of law are directly applicable.

6 *Official Gazette of SFRY*, No. 43/82, 72/82 of the RS, No. 46/2006.

7 *Official Gazette of RS,* Nos. 31/2011, 99/2011, 109/2013 and 55/2014.

to the contentious proceeding (according to Articles 201 and 202 of the 2005 Family Act).[8] These cases are also the examples of breaching the 1980 Convention, which prohibits deciding on the merits of custody rights (Article 16 of the 1980 Convention).[9]

Meanwhile, in 2010, responding to the concerns expressed by the first instance courts, the Supreme Court of the Republic of Serbia explained that the proceedings for the return of the wrongfully removed or retained child have to be arranged under the rules of the non-contentious proceedings,[10] making the Non-Contentious Proceeding Act applicable.[11] After this decision, the first instance courts have largely pursued the application of the non-contentious proceedings, but the problem is still prominent, most likely given the fact that some of the first instance courts are not aware of the cited Serbian Supreme Court decision.[12] In one of the recent cases, the judge of the Basic Court in Jagodina explained in his letter to the Serbian Ministry of Justice (as the Central Authority) that he had combined several legislative acts in order to accomplish the most effective procedure envisaged in Article 2 of the 1980 Convention.[13] Thus, the first instance judge applied the acts regulating the non-contentious proceeding, the contentious proceeding and the enforcement proceeding (provision concerning the time limits for the legal remedy). Although the Non-Contentious Proceeding Act refers to the application of the Contentious Proceeding Act[14] as a gap-filling method (Article 30(2) of the Non-Contentious Proceeding Act), there is no legal ground for the analogous application of a shorter time limit for legal remedy which applies only in the enforcement proceedings and is not applicable in the non-contentious

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8 *Official Gazette of RS,* No. 18/2005 and 72/2011.

9 All of the cited court cases were decided in period from 2007 until 2009. They are quoted from the Explanatory Report for the Draft Implementation Act, at http://arhiva.mpravde.gov.rs/lt/news/vesti/radna-verzija-zakona-o-gradjanskopravnoj-zastiti-dece-od-nezakonitog-prekogranicnog-odvodjenja-i-zadrzavanja.html (12 January 2015) p. 23.

10 Supreme Court of Serbia, Rev. 2239/2010(1) of 24.02. 2010.

11 *Official Gazette* of RS, Nos. 25/82, 48/88...6/2015.

12 For example, the Basic Court in Zaječar in the beginning of proceedings on the return of the child applied the rules of contentious proceeding, but later on the judge continued the proceedings according to the rules of the non-contentious proceeding. Decision of the Basic Court in Zaječar, 16 Pom. Ig-23/11 of 20.12.2012, *unpublished.* However, it cannot be purported that this aberration is specific only to the courts covering considerably smaller administrative (geographical) areas. One year later, the Basic Court in Novi Sad decided on the return of the child according to the rules of the contentious proceeding. Decision of the Basic Court in Novi Sad, Posl.br. P2. 2982/12 of 30.05.2013, *unpublished*.

13 Basic Court in Jagodina, 2.P3. No. 31/11 of 14.02.2011, *unpublished*.

14 *Official Gazette* of RS, Nos. 72/2011, 49/2013, 74/2013 and 55/2014.

proceedings at all. In fact, it can at least be considered a serious breach of the right to seek legal protection and the right to appeal.

2. Child's habitual residence

The second crucial issue in the judicial practice of Serbian courts refers to the determination of the child's habitual residence as the only connecting factor used in the 1980 Convention. Actually, it is essential for the autonomous qualification of the child's removal or retention as wrongful (Article 3). Yet, the experienced shortcomings of Serbian courts are not specific only to child abduction cases. On the contrary, they are related to determination of habitual residence in general.

The concept of habitual residence was introduced in the domestic system of Private International Law through the relevant Hague conventions on PIL which are legally binding for Serbia,[15] even though none of them provides the definition of this concept.[16] As for the internal sources, the legal system of the Republic of Serbia still does not recognize habitual residence as a connecting factor because it follows the traditional tripartite concept of nationality, domicile and simple residence. Hence, habitual residence remains beyond the provisions of the Citizens' Domicile and Residence Act,[17] the Aliens Act,[18] and the 1982 PIL Act. Furthermore, the Citizens' Domicile and Residence Act makes the differentiation between domicile and habitual residence completely vague, given the fact that it defines domicile as "the place where a citizen is settled with the intention to live there permanently, or *the place which*

15 The 1961 Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, the 1971 Convention on the Law Applicable to Traffic Accidents, the 1973 Convention on the Law Applicable to Products Liability, the 1980 Convention on International Access to Justice, the 1980 Convention, the 2007 Protocol on the Law Applicable to Maintenance Obligations and the 1993 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. Apart from the Hague conventions, habitual residence as a connecting factor is also provided in the United Nations Convention on Contracts for the International Sale of Goods (*Official Gazette of the SFRY*, International Agreements Supplement, No. 10/1984) and the Convention on the Limitation Period in the International Sale of Goods (*Official Gazette of the SFRY*, International Agreement Supplement, No. 5/1978).

16 The Hague Conference offered some explanations concerning the child's habitual residence in the 2014 Practical Handbook on the Operation of the 1996 Child Protection Convention, relying on the leading comparative jurisprudence of State Parties to the 1980 Convention and on decisions of the Court of Justice of the EU, p. 173, at http://www.hcch.net/upload/handbook34en.pdf (12 December 2014).

17 *Official Gazette of RS,* No. 87/2011.

18 *Official Gazette of RS,* No. 97/2008.

represents the centre of his vital interests, professional, economic, social or other relationships that prove his permanent connection to the place where he has settled"[19] (*highlighted by S.M.)*. Thus, within the meaning of the aforementioned Act, the concept of habitual residence actually has been confused with the concept of domicile.

A specific problem arises with regard to foreigners, given that the Aliens Act regulates only their stay of up to 90 days, including temporary and permanent residence of foreigners. Some national PIL authors suggest that a temporary stay of foreigners may be equated with their habitual residence and that their permanent residence corresponds to their domicile in Serbia.[20] However, it is still only a doctrinal opinion and not unambiguously accepted legal definition. Moreover, bearing in mind that the establishment of habitual residence (due to its factual character) requires neither registration nor approval, the problem proves to be even more complicated.

As opposed to the current legislation, the general notion of habitual residence will become a widely accepted connecting factor once Serbia enacts a new PIL Act, whose final draft version was submitted to the Ministry of Justice in early July 2014 (hereafter the Draft PIL Act)[21]. This prospective legislative act will make profound changes in the national PIL system, which will thus be modernised in line with the achievements in comparative PIL, in the EU PIL and in certain conventions adopted within the framework of the Hague Conference. One of these changes implies the suppression of nationality and domicile as the leading connecting factors in the 1982 PIL Act. In the new PIL Act, these two concepts will be substituted by the notion of habitual residence of natural and legal persons. Besides, the new Draft PIL Act introduces the general concept of habitual residence of a natural person, which is defined as follows:

> "1. The habitual residence of a natural person shall be deemed to be in the place where the person has the centre of his/her vital interests and where the person habitually resides, even in the absence of registration by the competent authority and independent of a residence or establishment permit.

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19 Article 3 (1) (2) of the Citizens' Domicile and Residence Act.

20 M. Stanivuković, M. Živković, *Međunarodno privatno pravo: opšti deo* [Private International Law: General Part] (Belgrade, 2013) p. 106.

21 The final version of the new Draft PIL Act is available at http://www.drzavnauprava.gov.rs/obavestenje/6274/konacna-verzija-nacrta-zakona-o-medjunarodnom-privatnom-pravu-.php (12 January 2015).

> 2. In order to determine the habitual residence within the meaning of paragraph 1 of this Article, the competent authority shall take into account all the circumstances of personal or professional nature that show durable connections with the specific State or indicate an intention to create such connections."[22]

Specifically, whereas the general concept of habitual residence will be regulated in the Draft PIL Act, the concept of child's habitual residence remains out of its reach. Similarly, the 2005 Family Act does not recognize this concept. However, it should be borne in mind that the national problems in the application of the 1980 Convention are partly encouraged by the very lack of criteria for determining the habitual residence of the child. Hence, in those rare cases where Serbian courts were involved in the determination of the child's habitual residence, it was stated that

> "…the concept of habitual residence generally corresponds to the concept of domicile. Given the fact that these cases involve children who cannot willingly have a domicile, their habitual residence is either in the country of habitual residence of the parents or the guardian, or in the country of residence of the parent who has been entrusted to take care of the child and his/her upbringing."[23]

In other analysed cases, Serbian courts just stated that the child had his/her habitual residence in the State of his domicile. Thereby, one cannot help noticing that Serbian courts are mostly unaware of the fact that the equivalence between a domicile and a habitual residence is not a rule.

On the one hand, the reason for misinterpretation of the concept of habitual residence of the child is the poor translation of the 1980 Hague Convention in the Ratification Act.[24] On the other hand, it is a consequence of the lack of criteria for determination of the habitual residence of the child not only in the national legislation, but also in the judicial practice of Serbian courts. It seems that Serbian judges are not familiar with the comparative jurisprudence which has developed different approaches to establishing this

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22 Article 6 of the Draft PIL Act.

23 In this case, the child was born on 4 February 2012. In the appeal proceedings, the Higher Court in Novi Sad reached its decision on 9 September 2013. Decision of the Higher Court in Novi Sad, Posl.br. Gž.2-38/2013 of 11.09.2013, *unpublished.*

24 The term *habitual residence* was translated into Serbian as "the place of permanent residence" (Article 5, paragraph 1b) – in Serbian "*mesto stalnog boravka*"*)* and also as "the place of permanent settlement" (Article 3, paragraph 1a) – in Serbian "*mesto stalnog nastanjenja*").

connecting factor, such as the parental rights test (or parental intention test) and the child-centred approach.[25]

3. Domestic violence cases – a grave risk of harm vs. the best interest of the child

The legal standard of a grave risk of harm is the most controversial exception for the return of a child in comparative jurisprudence (Article 13(b) of the 1980 Convention). In cases of alleged domestic violence it turns to be even more complex, especially if the victim is not a child but an abducting parent. Concerning the experience of Serbian courts, in the period from 2008 to 2013, there were no cases of domestic violence directly against a child. However, three cases of wrongful removal of the child include alleged domestic violence against the mother as the abducting parent. In two of them, the return of the child was refused also on the basis of an in-depth investigation of the best interest of the child, while in the third case, the judge actually ordered the return of the child.

In the first case involving the refusal of the child's return,[26] the mother was an illegal immigrant in the USA, dependant on the social services, living as a cohabitant with the child's father. The police repeatedly intervened because of domestic violence towards the mother of the child. At the time of commencing of the return proceeding in Serbia, the child was 3 years old. In deciding on the child's return to the USA, the Serbian court took into account a number of facts, such as: the mother's status of an illegal immigrant in the USA; the fact that the mother and the child depended on the social services in the USA; the mother's indisposition to accompany the child due to her status in the USA; the young age of the child and his emotional bonds with the mother; the fact that the mother participated in the programme for domestic violence victims in the USA and, finally, the fact that "in comparison with the situation in the USA, where the social services have to provide care for the child in terms of accommodation and food, it is in the best interest of the child to stay in Serbia". Deciding on the return, the judge seems to have reached for an in-depth

25 See especially N. Lowe, M. Everall, M. Nicholls, *International Movement of Children* (Family Law, Bristol, 2004) pp. 59-66. See more on the child's habitual residence especially R. Schuz, 'Habitual residence of children under the Hague Child Abduction Convention – theory and practice' 13 *Child and Family Law Quarterly* 1(2001); R. Schuz, 'Policy Considerations in Determining the Habitual Residence of a Child and the Relevance of Context', 11 *Journal of Transnational Law and Policy* (2001) pp. 2-61; P. Nygh, 'The Hague Convention of the Protection of Children', *NILR* (1998) p. 13.

26 Decision of the First Basic Court in Belgrade R4 – 1/2011 of 07.04.2011, *unpublished*.

test of the best interest of the child, including even an assessment of both parents' financial standing and the living conditions of the mother and the child (which are mostly relevant in parental responsibility cases).

In the second case,[27] the mother stated, *inter alia*, that the father was violent towards her, that these incidents were reported to the police because of the injuries she had sustained, that the child's father did not care about her and the child, that she did not have a permanent job and thus did not have financial resources in France, that the child developed the symptoms of selective mutism due to anxiety and experienced difficulties in his psychological development because of their lifestyle in France with the child's father; for all these reasons, the mother had to return to Serbia where she and the child would be living with her mother. At the time of adjudication, the child was 5 years old; the father took a paternity test (DNA analysis) two years after the child's birth and he was finally registered as the child's father. In deciding on the return of the child, the judge took similar approach as his colleague in the previously mentioned case.

In the third case (where the return of the child was actually ordered), the court concluded that

> "…since the mother does not claim that the child was in any way a victim of domestic violence, the child cannot be put in an intolerable situation or be under a serious risk of harm having in mind that the court of the child's habitual residence has taken the provisional measure providing that the child will be living with the mother and that the father will have access rights."[28]

However, this decision was challenged several times (before second and third instance courts), and the actual compulsory enforcement never took place due to the unprecedented media attention, public resentment and the mother's refusal to cooperate with the competent authorities in the enforcement proceeding.

It is difficult to appraise how the "grave risk of harm" exception is interpreted by Serbian courts in general because, as previously mentioned, there is no concentration of jurisdiction, which further implies that every basic (former municipal) court can decide in cases concerning the 1980 Convention issues. Consequently, the interpretation varies. On the other hand, there is a significant and recurrent characteristic underlying the interrelation between the legal standards of the grave risk of harm and the best interest of the child. Generally

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27 16 Pom. Ig-23/11 of 20.12. 2012, Basic Court in Zaječar, *unpublished*.

28 Basic Court in Valjevo, Court Unit in Ljig, I – 10 Pom. Ig 32/11 of 23.09.2011, *unpublished*.

speaking, Serbian courts are too often inclined to conduct an in-depth investigation of the best interest of the child, taking into account the facts relevant only in deciding on merits (in parental responsibility proceedings). This approach is based on comprehensive expertise provided by Social Care Centres, acting upon the request of a court. Generally, in the Serbian family law system, the court has to *ex officio* request the expertise of a Social Care Centre, family counselling or other specialized institutions for mediation in family relations before deciding on the protection of the child's rights or the exercise or deprivation of parental responsibility (Article 270 of the Family Act). However, the procedure for the return of the child does not (and cannot) prejudice the decision on the merits; hence, this type of expertise may be disputed. Moreover, it even implies a change in the burden of proof, which now rests with the court rather than the abductor.[29] This shift calls for establishing a broader set of circumstances, including those not stated by the parties. As illustrated, this approach enables the judge to assess the parents' role in child's life and the degree of child's integration in the State of refuge, even in cases where the request for return was timely submitted. In the most extreme case, in order to evaluate the fulfilment of the grave risk of harm exception, the judge had to assess the psychological expertise regarding the parents' childhood, their early psychological development, the current living conditions, parents' incomes and their individual affection towards the child, including the parents' psychological profiles.[30]

The approach taken by the Serbian courts significantly corresponds with the European Court of Human Rights' (hereafter: the *ECtHR*) leading decisions concerning the return of the child mechanism. According to the *ECtHR*, the in-depth examination of the best interest of the child has become crucial in determining whether to reject the request for the return of the child, which

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29 E. Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention* (Acts and Documents of the Fourteenth Session, Tome III, HCCH, 1980) p. 460 *ad* 114; also, judges *Bratza, Vajić, Hajiyev, Šikuta, Hirvelä, Nicolau, Raimondi* and *Nussberger* of the *ECtHR* in *Joint dissenting opinion* in the case *X. v. Latvia (Application No. 27853/09)*, Grand Chamber, p. 52 *ad* 10.

30 The decision of the Basic Court in Novi Sad had been repealed by the High Court in Novi Sad. Afterwards, the Basic Court had to determine the whole family situation (e.g. that the parents and the child lived in a three-room apartment in Sweden; the total income of the parents and their employment status). *Inter alia,* the court pointed out that the applicant (father) "is a person of a tidy appearance, decent and appropriate behaviour ... direct and communicative ... respectful of institutional authorities ... whose current emotional state ... may be defined as traumatic because he is deprived of his property – child (sic!)", whereas the respondent (mother) "places a claim on the child in terms of equalizing her child with her personal self (ego*, clarification by S.M)*". Basic Court in Novi Sad, Posl. br. P2.2982/12 of 30.05.2013, *unpublished.*

started with the judgments in *Neulinger and Shuruk v. Switzerland,*[31] *Raban v. Romania*[32] and *X. v. Latvia.*[33] However, these *ECtHR* decisions have not drawn the attention of the Serbian judicature.[34]

Moreover, starting with *Neulinger* case and especially in *X. v. Latvia*, the *ECtHR'*s decisions turned the burden of proof upside down. Under the 1980 Convention, the burden of proof rests with the abductor but, according to the *ECtHR,* the national courts must have a proactive role; once the defense has been raised, the court has to activate its *ex officio* powers to conduct this in-depth examination. Similarly, the *ECtHR* has pointed out to the child's integration in the new environment (in the State of refuge) as an important factor for in-depth examination, disregarding that the issue of the child's integration is only relevant in terms of Article 12 of the 1980 Convention, when the proceedings have been commenced after the expiry of a one-year period from the date of the wrongful removal or retention.[35] This approach, actually, can be found in recent Serbian court decisions.[36]

The response to the recent trend underlying the *ECtHR* decisions is not quite straightforward. The states who are Contracting Parties to the 1980 Convention and to the European Convention on Human Rights seem to be in dire straits. In other words, this situation can be described as a choice between *Scylla and Charybdis*. On the one hand, if national courts abide by the opinions of the

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31 *Neulinger and Shuruk v. Switzerland*, Application No. 41615/07, Grand Chamber, INCADAT HC/E/ 1323.

32 *Raban v. Romania (Application No. 25437/08)*, INCADAT HC/E/ 1330.

33 *X. v. Latvia (Application No. 27853/09)*, Grand Chamber, INCADAT HC/E/ 1234.

34 The Department for International Legal Assistance in Civil Matters of the Serbian Ministry of Justice is acquainted with the opinion of the *ECtHR* concerning this matter since it cooperates very closely with Serbian Private International Law scholars (especially the academic members of the Council for Private International Law, as the Government-appointed authority). Moreover, the American Central Authority has contacted the Serbian Central Authority regarding recent *ECtHR* decisions in cases involving the 1980 Convention.

35 On the influence of the *ECtHR* in these cases see P. Beaumont, L. Walker, 'Post Neulinger Case Law of the European Court of Human Rights on the Hague Child Abduction Convention', in The Permanent Bureau of the Hague Conference on Private International Law (ed.), *A Commitment to Private International Law – Essays in honour of Hans van Loon* (Intersentia, Cambridge 2013) pp. 17-31.

36 The Decision of the Higher Court in Belgrade Gž. 1926/ 12 of 2.03.2012 where, in the context of determining the child's integration in the new environment, the court found that the refusal of the child's return is in compliance with the principle of the best interest of the child, regulated in Article 3 of the Convention on the Rights of the Child (notwithstanding the fact that the request for the return was submitted within the period of one year).

ECtHR on "in-depth investigation on the whole family situation",[37] then they are most likely to breach the 1980 Convention. On the other hand, if a State Party does not apply this in-depth investigation, then the State is in breach of the European Convention (especially in terms of its Article 8), risking to lose cases before the *ECtHR*. In this sense, the human rights issues could have a chilling effect on the 1980 Convention because in-depth examination is time-consuming and it obviously contradicts its mechanism and the urgent nature of re-establishing *status quo ante*. Besides, the exceptions for the return of a child are focused on the assessment whether there is a significant likelihood that the return to the State of the child's habitual residence would put the child into danger (the so-called test of the immediate interest of the child).[38] On the other hand, when it comes to parental responsibility disputes, the judge has to establish the interests of the child for it to be entrusted to a particular person as a caretaker (in-depth test of the best interests of the child).

Actually, if this in-depth examination is to be applied, leading to the rejection of the return of the child, the outcome of the custody proceeding can be considerably predictable because the State of refuge will use the same method of assessing the best interest of the child in the custody proceeding as it was done in the proceeding on the child's return. We can conclude that this type of investigation even contradicts Articles 16 and 19 of the 1980 Convention because, to some extent, the decision on non-return of the child can be understood as a "covert" decision on custody right; it would be quite unlikely to expect that the prospective decision on custody right will be in favour of the left-behind parent if the return of the child has been refused.

III. Draft Implementation Act – a way forward

Responding to the shortcomings in the application of the 1980 Convention in the Republic of Serbia, the Draft Implementation Act regulates in details the judicial proceeding for deciding on the return of the child. Although regulation of this issue is more than welcome, there are some important provisions which should be specifically focused on: the inquisitorial powers of the court, the child's habitual residence and the joint custody right. As for the type of proceeding, the Draft Implementation Act explicitly regulates it as a non-contentious proceeding which does not provide for awarding extraordinary legal remedies (Articles 20 and 25). Besides, the proceeding is regulated as

37 *Maumousseau and Washington v. France* (Application No. 39388/05), INCADAT HC/E/942.

38 R. Schuz, 'The Hague Abduction Convention and Children's Rights Revisited' *March IFL* (2012) p. 37.

particularly urgent, which implies that the general time-limits determined by the court cannot exceed 3 days (Article 21(2)). However, under the Draft Implementation Act, the courts are vested with inquisitorial powers. This means that they can independently investigate facts not indicated by the parties (Article 22). Although the inquisitorial principle (in status cases) is characteristic for the non-contentious proceeding in the Serbian civil law procedure system (Article 8(2) of the Non-contentious Proceeding Act), its applicability in child return proceedings can be disputable due to the specific burden of proof and the need to avoid in-depth investigation of the best interest of the child.

Concerning the concentration of jurisdiction, the Draft Implementation Act prescribes that only four basic (formerly municipal) courts shall have the jurisdiction to decide in first instance upon a request for the return of a child, whereas the decisions on appeals will be rendered only by the Appellate Court in Belgrade.[39] This solution should significantly contribute to the unification of the judicial practice in the application and interpretation of the 1980 Convention provisions.

The Draft Implementation Act also prescribes the criteria for determining the child's habitual residence (Article 4). The provided "semi-definition" of the child's habitual residence is inspired by the Court of Justice of the EU (hereafter: the *CJEU*) decisions in cases C-523/07[40] and *Mercredi v. Chaffe*.[41] Although the list of the child's habitual residence criteria in the Draft Implementation Act is not exhaustive,[42] it could raise some reservations that the judges would probably confine the criteria to those referred to in the Draft Implementation Act. Bearing in mind that the method of determining habitual residence actually depends on the age of the child, it should be noted that the *Mercredi* case concerned the habitual residence of a baby. Thus, in cases

39 According to Article 27 of the Draft Implementation Act, the Basic Court in Belgrade is competent in cases within the administrative area of the Court of Appeal in Belgrade; the Basic Court in Kragujevac is competent in cases within the administrative area of the Court of Appeal in Kragujevac; the Basic Court in Niš is competent in cases within the administrative area of the Court of Appeal in Niš; the Basic Court in Novi Sad is competent in cases within the administrative area of the Court of Appeal in Novi Sad.

40 *C-523/07*of 2 April 2009, INCADAT HC/E/1000.

41 *C497/10 PPU Mercredi v Chaffe* of 22 December 2010, INCADAT HC/E/1044.

42 According to Article 4 of the Draft Implementation Act, "the habitual residence of a child, in the sense of this Act, shall assume the place where the child is integrated into social and family environment. During the establishing of the habitual residence of a child in each individual case the following circumstances shall be considered:duration, regularity, conditions and reasons of the child's residence;moving of the family to another place of residence;citizenship of the child; age of the child; place and conditions of his/her schooling; knowledge of the language; family and social relations of the child. A child can have only one habitual residence."

involving very young children, their habitual residence logically depends on the parents' intention; in cases involving older children, their own intention may prevail.[43] Likewise, there are other approaches that are more focused on assessing the nature and quality of the habitual residence of the child independently from the parents' intention.[44] Hence, one can conclude that the concept of the habitual residence of the child branches into specific categories: the habitual residence of newborns and babies, the habitual residence of pre-school children and the habitual residence of schoolchildren. Furthermore, the abovementioned Article 4 of the Draft Implementation Act provides also that the child can acquire a new habitual residence in the country of refuge, taking into account the circumstances relevant to defining the child's habitual residence. Given the fact that Serbia commenced the ratification process of the 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (hereafter: the 1996 Convention), it would be necessary to explain in details the relation between these two conventions to the Serbian judges. This is very important especially because the 1996 Convention introduces *perpetuatio jurisdictionis* in cases concerning the wrongful removal or retention of the child (Article 7 of the 1996 Convention). This may require enacting a legislative act on the implementation of both Hague conventions.

Finally, the last issue concerns the qualification of the custody right in the Draft Implementation Act. According to Article 2(3), "it shall be deemed that the parents exercise parental responsibility jointly when, pursuant to the decision of the competent authority or *ex lege*, one parent cannot decide about the child's place of domicile without the consent of the other parent." This provision regulates cases involving the *ne exeat* order[45], which, in terms of the 1980

43 In particular, see the decision of the UK Supreme Court rendered on 14 January 2014, *In the matter of LC (Children) and In the matter of LC (Children) (No 2);* at http://supremecourt.uk/-decided cases/docs/ UKSC_2013_0221_Judgment.pdf (28 January 2014).

44 See *supra* under *2.Child's habitual residence*.

45 For the UK: *C v C (Minor: Abduction: Rights of Custody Abroad)* [1989] 1 WLR 654, INCADAT HC/E/UKe 34. P. R. Beaumont and P. E. McEleavy, The Hague Convention on International Child Abduction (Oxford, OUP 1999) p. 77. However, the most famous case is the USA Supreme Court decision in *Abbott v. Abbott*, 130 S. Ct. 1983 (2010). See also *Croll v. Croll*, 229 F.3d 133 (2nd Cir. September 20, 2000 cert. den. Oct. 9, 2001), INCADAT HC/E/USf 313 and *Gonzales v. Gutierrez*, 311 F.3d 942 (9th Cir 2002), INCADAT HC/E/USf 493. The standpoint that a *ne exeat order* gives rise to a custody right in terms of the 1980 Convention was subsequently confirmed in the aforementioned *ECtHR* case *Neulinger and Shuruk v. Switzerland*.

Convention, gives rise to a custody right[46] if any institution or individual having the right to give or withhold the consent for the removal or retention of the child has not been asked to give the consent.[47] However, referral to the child's domicile instead of the habitual residence in the Draft Implementation Act is the consequence of the 2005 Family Act, which provides that the parent who is not deprived of his parental responsibility has the right to decide on issues significantly influencing the child's life, including the change of the child's domicile (Article 78 (3) and (4)). Regardless of this provision, the reference to the child's domicile in the Draft Implementation Act is misleading and not in compliance with the 1980 Convention. In this sense, the autonomous qualification of custody rights has to be consistent with Article 5 of the 1980 Convention,[48] and not with the national legislation. Besides, unlike Article 3 (2) of the 1980 Convention, the quoted provision of the Draft Implementation Act does not include an agreement having legal effect under the law of the State of the child's habitual residence as the legal ground for custody right. In fact, the 1980 Convention does not provide an exhaustive list of legal grounds for establishing custody rights.[49] Consequently, the national provision on joint parental responsibility cannot be introduced as the universal magic formula.

IV. Conclusion

Considering the shortcomings in the practical application of the 1980 Convention in the Republic of Serbia, the issues concerning the concentration of jurisdiction, the correct application of foreign law in order to determine the custody right, the differentiation between the exceptions for the return of the child (in Articles 12 and 13) are crucial for improving the national judicial

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46 As also confirmed by the 2011 Special Commission. See *Conclusions and Recommendations of the Sixth Meeting (Part I) of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and 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*, 2011, p. 6 *ad* 44-46, at http://www.hcch.net/upload/wop/abduct2012pd14e.pdf (12 January 2015).

47 As stated in *C v C (Minor: Abduction: Rights of Custody Abroad)* [1989] 1 WLR 654, INCADAT HC/E/UKe 34.

48 According to Article 5(2) of the 1980 Convention, 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.

49 The most illustrative example of an additional legal source of the custody right is a unilateral act. This legal source is envisaged in the 1996 Convention (Article 16(2), and its ratification by the Republic of Serbia is currently pending.

practice. In this context, there is no dispute that the adoption of the Draft Implementation Act will significantly contribute to a better application of the 1980 Convention in the Republic of Serbia. However, this will not address all the practical issues. In this regard, there are several additional methods for their improvement.

First of all, a translation of all the 1980 Convention Good Practice Guides is necessary, primarily given the fact that Serbian judges are generally unaware of this set of manuals and that it appears to be unreasonable to expect them to use the English version of these manuals. In other words, the translation is pertinent for the improvement of good practice under the 1980 Convention in the Republic of Serbia. Concurrently, it is highly important to entrust the translation of these manuals to PIL experts because the Republic of Serbia had an unsatisfactory experience with the translation of the 1980 Convention (as previously mentioned).

Secondly, it is necessary to ensure the training of judges, the Central Authority officers and the officers of Social Care Centres. These trainings and the translation of the Guides to Good Practice should be organized under the supervision of the Hague Conference. The initiative could be given by the Council on Private International Law, a body officially appointed by the Serbian Government for the purpose of, *inter alia*, monitoring and analyzing the development of Private International Law and the compliance of the national legislation with the international conventions on PIL, adopted under the auspices of the Hague Conference and other international organizations, as well as for the purpose of providing assistance in the training of the judiciary and public administration on the implementation of international conventions on PIL which are binding for the Republic of Serbia.[50]

In addition to these steps, which have to be officially approved by the Serbian state authorities, PIL scholars should also be engaged. Bearing in mind that most of the ex-Yugoslav republics probably encounter similar difficulties in the application of the 1980 Convention, the PIL scholars in the region could compile a joint handbook with the support of the Hague Conference, which should include, *inter alia*, the leading decisions rendered by the national courts of other State Parties, as well as the *CJEU* and the *ECtHR* decisions in cases pertaining to the 1980 Convention. It is essential that the courts in the region are aware of the leading jurisprudence of other State Parties because self-centered national legal systems are no more sustainable in terms of contemporary Private International Law.

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50 The Decision on establishing the Council on Private International Law [Odluka o obrazovanju Saveta za međunarodno privatno pravo], *Official Gazette of RS,* No. 5/2011.

OPERATION OF THE HAGUE 1980 CHILD ABDUCTION CONVENTION IN SLOVENIA

Suzana Kraljić*

I. General issues, central authority and court system

Slovenia became a party to the Hague 1980 Child Abduction Convention (hereinafter: HC 1980) in 1993 (22 March). The Act Ratifying the Convention on the Civil Aspects of International Child Abduction[1] has been in force in Slovenia since 9 March 1993. Regarding Article 8 of the Constitution of the Republic of Slovenia, ratified and published treaties (in our case the HC 1980) shall be applied directly. Slovenia just adopted the Act Ratifying the Convention on the Civil Aspects of International Child Abduction.[2]

The last time Slovenia updated its Country Profile was on 5 December 2012, but it is not up to date because the Ministry of the Interior is still named as the Central Authority. However, on 21 November 2012 the Act Amending the Act Ratifying the Convention on the Civil Aspects of International Child Abduction was adopted. The aforementioned Act was published on 6 December 2012[3] and in its Article 4 defines the Ministry of Labour, Family, Social Affairs and Equal Opportunities as the new Central Authority. The Central Authority is working on updating the Country Profile. The Central Authority contact details are publicly available[4] in order to ensure responsiveness and speed in return proceedings.

Slovenia is also a member 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 (hereinafter: the HC 1996).[5] The HC 1996 entered into force on 1 February 2005. The Central Authority for the HC 1980 and HC 1996 has been the same since December 2012. It is the Ministry of Labour, Family, Social Affairs and Equal

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1 *Uradni list RS – Mednarodne pogodbe*, št. 6/1993.

2 *Uradni list RS – Mednarodne pogodbe*, št. 6/1993 http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO721 (25 August 2015).

3 *Uradni list RS – Mednarodne pogodbe*, št. 14/2012.

4 http://www.mddsz.gov.si/si/delovna_podrocja/druzina/mednarodni_protipravni_odvzem_otrok/ (25 August 2015).

5 *Uradni list RS*, št. 85/2004.

Opportunities. Slovenia is an EU member state and is also obliged by the EU regulations.

Doctrine has addressed the relationship of the HC 1980 to the UN Convention on the Rights of the Child, and also to the European Convention on Human Rights. However, Slovenia is not a member of the European Custody Convention. The case law in Slovenia has not addressed the relationship of the HC 1980 and HC 1996 to other relevant instruments in this field.

The Slovenian Central Authority is staffed with adequate personnel. They have legal education and qualifications. One person is fluent in four foreign languages and others also have a very good knowledge of the English language. They regularly attend various trainings (especially organized by the European Judicial Network or domestic contractors).

The Central Authority is well equipped with a software program to process, document and/or archive applications and relevant documentation. The software enables easier work, archiving of documents, searching modes etc. However, they are also using manual work and a paper archiving system. The Slovenian Central Authority is using a double system for maintaining documentation.

The Central Authority is always trying, as far as possible, to follow the given strict timeframes under the HC 1980. However, it is not always possible to obey them, depending on the circumstances. The Central Authority has a good cooperation with other governmental agencies, especially with the Ministry of Justice, Ministry of the Interior and the Centre for Social Work. Communications are verbal, by mail and electronic. The Slovenian Central Authority also has a very good and effective cooperation with judges.

II. Procedures in relation to the Hague Child Abduction Convention

1. Relevant statistics on the operation of the Hague Child Abduction Convention

On the basic level, relevant statistics have been kept solely by the Central Authority since 2012. However, it needs to be stressed that the change of the Central Authority has resulted in a reorganisation, especially regarding the keeping of statistics. Since 2012, when the competence of the Central Authority was transferred to the Ministry of Labour, Family, Social Affairs and Equal Opportunities, they have not been in the position to reject an application under Article 27 of the HC 1980.

The statistics had not been previously kept by the courts. Slovenia has complete statistics only for two years. In 2012 there were 3 court cases and in 2013 just two court cases.

In relevant procedures, the Central Authority uses the Guide to Good Practice. But the Guide has not been translated to the Slovenian language. It is used in the English version. The Central Authority has a satisfactory cooperation with the Centre for Social Work, Police and Courts.

2. Grave risk of harm

Concern has been expressed regarding the safe return of the child and protection from domestic violence or other forms of abuse. Therefore, the courts have used Article 13(1) *b)* to reject the return of the child. An example follows. The Slovenian High Court rejected the return of a 19-month-old child to the father in Norway. When the mother was living in Norway, the father did not take financial care of the child and mother, he was often drunk, he was physically and emotionally violent to the mother and after the child's birth he went to jail. The mother was taking care (financial and custodial) of the child. Those are the facts which were confirmed by the court. During an argument, the mother said to the father that she would take the child to Slovenia and the father answered that she should go. However, the court stressed that this was only the mother's testimony. On the other hand, the court emphasised that the child was currently living in regulated circumstances: the mother was working, the child and mother were living with her parents (her living situation was well regulated), who helped her, and the child was attached to the grandparents and other close relatives. The child had a regular contact via Skype with the father, who also visited the child for a period of 12 days. The court came to the conclusion that the return of the child to the father in Norway was not in the child's best interest. The change of the child's social surroundings would cause the child mental harm and trauma.[6]

3. Hearing, participation and objections of the child

The child has the right to be heard in return proceedings in Slovenia, but not in every case. That is the discretion of the judge who makes the decision whether to hear the child, taking into account the child's capability of understanding the meaning and consequences of his/her opinion. The main principle is, of course, the best interest of the child.

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6 See more in: High Court of Ljubljana no. IV Cp 1297/2012 (9 May 2012) at http://www.sodisce.si/vislj/odlocitve/2012032113048081/ (12 September 2014).

The child's opinion is always obtained without the presence of the parents. The child may express its opinion in a direct interview or by talking to a person it trusts and which has been chosen by the child. However, the court has the task to establish whether the opinion of the child is its actual will. The Slovenian Marriage and Family Relations Act (MFRA) gives the child the right to express its own opinion in several places. The court can get the opinion of a capable child in the following cases:

- before the court grants a divorce, it has to establish whether the agreement of the spouses takes care of the custody, upbringing and subsistence of joint children and contacts between the children and the parents is in line to the benefit of the children and has to obtain the expertise of the Centre for Social Work (Article 64(2) MFRA);
- before the court grants a divorce – when the divorce is based on a claim, the court has to establish that the child's interest is guaranteed in the best way (Article 78(2) MFRA);
- when deciding on the custody and upbringing of the children (Article 105(3) MFRA);
- when deciding on the contact between the child and the parent at whose place the child does not live (Article 106(7) MFRA);
- when deciding on the contact of the child with other persons (Article 106a(5) MFRA);
- when parents who do not live together decide on questions that do not essentially influence the development of the child (Article 113(4) MFRA).

The child's objection under Article 13(2) of the HC 1980 was raised in the case VSM I Ip 623/2010, but at the end this issue was not deemed important as between the time when the child was wrongfully removed and the date of the commencement of the proceedings more than one year has expired and the child demonstrated that it had settled in its new environment.

4. Enforcement of return orders

In every case, the court or Central Authority should encourage the parents to return the child voluntarily. If this is not possible, the measures for the immediate enforcement of final orders may be used. The provision that the measure will be enforceable must be exactly specified in the operative part of the judgment, including how the return of the child will be carried out, where the child must be brought and by whom. Enforcement should be carried out as in cases

where a district court in family law matters issued a temporary injunction, but in these cases an immediate direct delivery of the child is required under Article 238.e of the Enforcement and Securing of Civil Claims Act.[7] In general, no problems have been encountered with enforcement procedures.

5. Judicial system

Slovenia does not have "concentrated jurisdiction". In Slovenia, the jurisdiction to make decisions of the return of the child under the HC 1980 is given to the district courts, located in Maribor, Ljubljana, Novo mesto, Ptuj, Murska Sobota, Slovenj Gradec, Koper, Celje, Nova Gorica, Krško, Kranj (11 district courts). Some district courts have judges who are specialised for family matters, but none have judges who are specialised just for abduction cases.

"Concentrated jurisdiction" would be useful and desirable in Slovenia because Slovenia is a small country (24,000 km^2) and every aforementioned court could be reached from the capital of Ljubljana (starting from the fact that the District Court of Ljubljana would have jurisdiction and specialised judges) inside of two hours.

To ensure that the judicial and administrative authorities act expeditiously in return proceedings, measures have been implemented in the following legislation: the Civil Procedure Act, Courts Act, Enforcement and Securing of Civil Claims Act. The expected time from the commencement of the return proceedings to the final order is up to 6 weeks, but in some cases this is not strictly followed. In Slovenia there is no need for a longer period to process applications. We are not faced with a huge number of cases, and since the Central Authority has been transferred to the Ministry of Labour, Family, Social Matters and Equal Opportunities, the current Central Authority is working towards improving the situation regarding abductions, returns, etc.

The applicant is generally not required to participate in return proceedings, but it is advisable to do so. The reasons for rejecting the application are: grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation (case VSL IV Cp 1297/2012; VSM I Ip 623/2010); settlement in a new environment (VSM I Ip 623/2010). The expected time within which appeals are filed and decided is up to 3 months.

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7 *Uradni list RS,* št. 3/07 – official consolidated version; 93/07, 28/09, 51/10, 26/11, 17/13; 53/14 in 58/14 - odl. US.

6. Mediation

Mediation is used in the HC 1980 procedures in Slovenia, but we do not have concrete information about the effectiveness of mediation in cross-border child abduction cases. The Central Authority provides the parties with the information about mediation and may refer them to accredited professionals to undertake mediation. The Central Authority may refer parties to mediation which may be performed by private mediation services, mediation services within the judicial system or mediation services provided by NGOs.

Mediation is available at all stages, but court-annexed mediation is available only during court proceedings. In court-annexed mediation the judge must consider whether the case is suitable for mediation. Mediation may have a positive impact on the length of proceedings.

7. Human rights

Consideration of basic human rights in relation to the HC 1980 has been detected in the case VSM 623/2010, where the court decided that Article 56[8] of the Constitution of the Republic of Slovenia was violated. However, no case law dealing with issues of conflicting individual interests of the child and a parent (in particular, in relation to the right to family life, Article 8 of the ECHR) has been detected.

Problems arise relating to the purpose of the HC 1980, which is to secure the immediate return of the child (with a few exceptions). This principle of immediate return derives from the idea that the court of the jurisdiction from which the child was abducted is best suited to assess what is in the best interest of the child (return or non-return of the child). However, the ECHR (in the cases *X v. Latvia*; *Neulinger and Shuruk v. Switzerland, Sneersone and Campanella v. Italia)* gave priority to the issue whether the return of the child violates the mother's and child's right to respect for family life and found in each of the mentioned cases that this violation was present. Thus, we can see that the HC 1980 and ECHR (in relation to the mentioned cases) do not always follow the same goal.

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8 Article 56 (Rights of Children) of the Constitution of the Republic of Slovenia defines: "(1) Children shall enjoy special protection and care. Children shall enjoy human rights and fundamental freedoms consistent with their age and maturity. (2) Children shall be guaranteed special protection from economic, social, physical, mental, or other exploitation and abuse. Such protection shall be regulated by law. (3) Children and minors who are not cared for by their parents, who have no parents or who are without proper family care shall enjoy the special protection of the state. Their position shall be regulated by law."

III. A way forward

For the future it will be necessary for the staff working at the Central Authority, judges making decisions in abduction cases as well the staff at the Centre for Social Work and lawyers to take part in particular trainings.

A small number of articles dealing with the issues of international abduction have been published so far, and no books have been published on this topic in Slovenia. Only 6 articles have been tracked through the Cobiss system.[9]

Finally, a few words on the best practices in handling HC 1980 applications in Slovenia and barriers to achieving such practices. Since the Ministry of Labour, Family, Social Matters and Equal Opportunities has been serving as the Central Authority, the evidence/statistics of abduction cases are more up-to-date, consistent, effective and integrated. In addition, the staff is more qualified, specialised for abduction cases, and they are regularly involved in various national, European and international activities related to international child abduction actions.

A best practice has also been attained in relation to some judges, specialised for family matters. If we maintain the present regulation that the jurisdiction to make decisions in abduction cases is given to every Slovenian district court, we should consider training more judges in the issued of international child abduction. However, if we consider the possibility to introduce "concentrated jurisdiction", we will need a smaller number of judges.

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9 Articles on child abduction: (1) J. Roblek, 'Uporaba Uredbe sveta (ES) št. 2201/2003 o pristojnosti in priznanju ter izvrševanju sodnih odločb v zakonskih sporih in sporih v zvezi s starševsko odgovornostjo (Uredba Bruselj II bis) s praktičnimi primeri in morebitnimi težavami, povezanimi z e-izvršbo, v povezavi z uporabo Konvencije o civilnopravnih vidikih mednarodne ugrabitve otrok' 3 *Pravosodni bilten* (2013) p. 25-34; (2) M. Končina Peternel, 'Mednarodna ugrabitev otrok. Pravosodni bilten 3/2013, str. 47-58, (3) S. Kraljić, Mednarodna ugrabitev otrok: kdaj vrnitev, kdaj zavrnitev', in: G.V. Knežević, V. Pavić, (ur.), *Državljanstvo i međunarodno privatno pravo. Haške konvencije. (zbornik radova)* (*Biblioteka Zbornici, 5)*. (Beograd: Pravni fakultet: Službeni glasnik, 2007), p. 189-204; (4) M. Strašek Dodig, 'Starševska odgovornost v čezmejnem kontekstu in mednarodna ugrabitev otrok' 19 *Pravna praksa: časopis za pravna vprašanja* 32 (2013) p. 29; (5) B. Felc, 'Mednarodna ugrabitev otroka : Carlson proti Švici št. 49492/06' 27 *Pravna praksa : časopis za pravna vprašanja* 46 (2008) p. 23-24; (6) A. Galič, 'Pristojnost za odločanje v postopkih glede mednarodne ugrabitve otrok - med Uredbo Bruselj II in Haaško konvencijo' in: V. Žnidaršič Skubic, A. Vlahek, K. Podobnik (ur.), *V: Zbornik v čast Karla Zupančiča : družinsko in dedno pravo pred izzivi prihodnosti : zbornik znanstvenih razprav v čast 80. rojstnega dne zaslužnega profesorja dr. Karla Zupančiča* (Ljubljana: Pravna fakulteta, 2014) p. 229-246.

Possible improvements:

a) Specialisation/trainings of judges;
b) "Concentrated jurisdiction" could also be an advantage in Slovenia;
c) Better language skills of judges;
d) Making efforts to respect the deadlines given in the HC 1980.

3

Human Rights Considerations in Child Abduction Cases

Ljudska prava i međunarodna otmica djece

THE INTERACTION BETWEEN THE EUROPEAN COURT OF HUMAN RIGHTS AND THE HAGUE CHILD ABDUCTION CONVENTION

Nina Vajić*

I. Introduction

The Council of Europe and the Hague Conference on Private International Law (Hague Conference) have a record of a long-standing fruitful working relationship. Possible differences in views have usually been resolved by agreement underlining the complementarity between the two organisations. The interaction between the European Court of Human Rights (hereinafter: the ECtHR) and the Hague Conference has for some time now been on the agenda of both institutions regarding the Court's most recent interpretation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ("the Child Abduction Convention"/ "the Hague Convention").

The Child Abduction Convention addresses the important problem of the unilateral removal of children across international borders, usually by one of the child's parents. The wrongful removal and retention of children across state borders is one negative aspect of the globalisation of our lives due to increased travelling, tourism, studying abroad, etc. that is, the fact that the world is "shrinking" as distances have become smaller.

This Convention was designed to protect children from the harmful effects of their wrongful abduction or retention. It establishes machinery and procedures to ensure their prompt return to the place/State of their habitual residence and to secure protection for rights of access. Even if the Hague Conference has established a wide range of tools to achieve effective implementation and consistency of operation of the Convention,[1] the Hague Convention does not have a procedure for individual or inter-State complaints before an international judicial body. Thus, in Europe the individual applications mechanism under Article 34 of the European Human Rights Convention is frequently used for

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1 Cf. Hans van Loon, 'Interaction between Recent Case-law of the European Court of Human Rights and the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*', statement at the 41st Meeting of the Committee of Legal Advisers on Public International Law, Strasbourg, 17 March 2011, p. 3.

complaints about alleged violations of its Articles 6 and 8 as a result of the application of the Hague Child Abduction Convention.

II. Jurisprudence of the ECtHR

1. Relevant case law

In a series of cases, the European Court of Human Rights has through many years expressed its strong support for the 1980 Hague Convention. Thus the Court considered in *Ignaccolo-Zenide v. Romania* (2000) that "the positive obligations that Article 8 of the Convention lays on the Contracting Parties 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. This is all the more so when the respondent State is also a party to that instrument, Article 7 of which contains a list of measures to be taken by States to secure the prompt return of children."[2] In *Eskinazi and Chelouche v. Turkey* (2005) the Court also held that the obligations imposed under Article 8 of the Convention must be interpreted in the light of the requirements of the Hague Convention of 25 October 1980[3] and the Convention on the Rights of the Child of 20 November 1989 (*Maire v. Portugal*, 2003).[4]

Building further on the *Eskinazi and Chelouche v. Turkey* decision, the Court held in the *Maumousseau and Washington v. France* (2007) judgment the following:

> 69. "The Court is entirely in agreement with the philosophy underlying the Hague Convention. Inspired by a desire to protect children, regarded as the first victims of the trauma caused by their removal or retention, that instrument seeks to deter the proliferation of international child abductions. It is therefore a matter, once the conditions for the application of the Hague Convention have been met, of restoring as soon as possible the status quo ante in order to avoid the legal consolidation of de facto situations that were brought about wrongfully, and of leaving the issues of custody and parental authority to be determined by the courts that have jurisdiction in the place of the child's habitual residence, in accordance with Article 19 of the Hague Convention."[5]

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2 *Ignaccolo-Zenide v. Romania*, 31679/96, judgment of 25 January 2000, § 95.

3 *Eskinazi and Chelouche v. Turkey*, 14600/05, decision of 6 December 2005. See, also: *Iglesias Gil et A.U.I. c. Espagne*, 56673/00, judgment of 29 April 2003, § 51.

4 See *Maire v. Portugal*, 48206/99, judgment of 26 June 2003, § 72.

5 *Maumousseau and Washington v. France,* 39388/05, judgment of 6 December 2007, §69.

However, the *Neulinger and Shuruk v. Switzerland* Grand Chamber judgment of 2010[6] was perceived by many practitioners as "a sign for alert". In particular, the judgment was criticised for having given too much weight to the Convention on the Rights of the Child of 1989 and, accordingly, too much importance to the notion of the child's best interest. In this respect, it should be reminded that the Court has since long held that the Convention cannot be interpreted in a vacuum but in harmony with any relevant rules of international law applicable in the relations between the parties, in particular the rules concerning the international protection of human rights. In recent years, the Court has been further developing this approach (which is explained in paragraphs 131and 132 of the judgment).

The *Neulinger* judgment was seen as a turning point in the Court's approach, although the statement that "the obligations imposed under Article 8 of the ECHR must be interpreted in the light of the requirements of the Hague Convention" re-appeared in the Court's reasoning[7] as it did in the previous judgments on the matter. Thus it confirmed that the Court intended to continue being strongly inspired by the Hague Convention.

However, the Court added that it was competent to review the procedure followed by the domestic courts, in particular to ascertain whether the domestic courts, in applying and interpreting the provisions of the Hague Convention, have secured the guarantees of the European Convention and especially those of Article 8.[8] This statement imposes on the national judge dealing with child abduction cases the obligation to take into account the pertinent provisions of the ECHR when applying the Hague Convention. It clearly reiterates that the Court is competent to review whether the Convention has been observed in the national proceedings.

Moreover, in paragraph 139 of the judgment, the Court went much further. It said that when examining the national decision-making process leading to the

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6 *Neulinger and Shuruk v. Switzerland,* 41615/07, GC judgment of 6 July 2010.

7 *Ibid*., § 132.

8 *Ibid*., § 133: "However, the Court must also bear in mind the special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings and its own mission, as set out in Article 19, 'to ensure the observance of the engagements undertaken by the High Contracting Parties' to the Convention (see, among other authorities, *Loizidou v. Turkey* (preliminary objections), 23 March 1995, § 93, Series A no. 310). For that reason the Court is competent to review the procedure followed by domestic courts, in particular to ascertain whether the domestic courts, in applying and interpreting the provisions of the Hague Convention, have secured the guarantees of the Convention and especially those of Article 8 (see, to that effect, *Bianchi,* cited above, § 92, and *Carlson*, cited above, § 73)".

adoption of the impugned measures by the domestic court it "must ascertain whether the domestic courts conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin."[9] This passage provoked many negative comments. Among other reactions, this also led to comments by the Special Commission on the Practical Operation of the 1980 Convention (and the 1996 Hague Child Protection Convention) and not least by the then Secretary General of the Hague Conference on Private International Law, Mr Hans van Loon. They expressed their serious concern in relation to the language used by the Court in some of its judgments, in particular *Neulinger and Shuruk* and *Raban v. Romani*a[10].

The main concerns related to the issue whether the "new" language was to be read as a (drastic) change of jurisprudence, requiring "…national courts to abandon the swift, summary procedure approach for a free-standing assessment of the overall merits of the situation".[11] Some months later the then President of the ECtHR, Jean-Paul Costa, in a speech held in Dublin emphasized, however, that the Court in *Neulinger and Shuruk* had had no intent to detract from the Hague Child Abduction Convention (the same message was also taken over by the UK Supreme Court in the *Eliassen* case). In such a situation, in particular in view of the *Raban v. Romania* chamber case, the Hague Conference, the national courts in the States Parties and also the Court itself, were all waiting for an appropriate Grand Chamber case to clarify the issue of the relationship between the ECHR and the Hague Child Abduction Convention.

2. X. v. Latvia

Therefore, when the Panel of five judges accepted the referral of *X. v. Latvia* to the Grand Chamber, that was seen as the occasion to settle the matter. As to the final outcome of the case, the judgment in *X. v. Latvia*[12] pointed to a clearly visible division among the 17 Judges of the Grand Chamber. However, in spite of that division, the Court was unanimous in operating an important

9 See in this respect, *Maumousseau and Washington, op. cit*., § 74.

10 *Raban v. Romania*, 25437/08, judgment of 26 October 2010

11 Cf. Hans van Loon, mail of 13 January 2012 to the Court, p. 2.

12 *X. v. Latvia,* 27853/09, GC judgment of 26 November 2013.

reassessment of the general principles.[13] It clearly stated that Article 8 of the Convention does not call for an in-depth examination by the judicial or other authorities of the requested State of the entire family situation of the child in question. This was not a pure clarification but a clear correction which set aside paragraph 139 of the *Neulinger and Shuruk* judgment.

The Court admitted that paragraph 139 "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". Then it continued to explain that against this background it "considered it opportune to clarify that its finding in paragraph 139 of the *Neulinger and Shuruk* judgment does not in itself set out any principle for the application of the Hague Convention by the domestic courts".[14]

As to the general principles, the judgment made a *renvoi* to *Maumousseau*. It thus set the *Maumousseau and Washington v. France* judgment as the leading case in child abduction matters, referring to its paragraph 99, which defined the obligations incumbent on States in this connection. By doing so, the Court in fact confirmed that the *Neulinger and Shuruk* solution was an exceptional one, due to the very specific circumstances of that case and that it was not to be seen as the leading case in all child abduction situations.

To avoid possible misinterpretations of the general principles, the *X. v. Latvia* judgment clearly spelled out the basic principles regulating the proceedings for return made under the Hague Convention. Thus, it reaffirmed that such proceedings are distinct from custody proceedings (paragraph 100), that the Court does not propose to substitute its own assessment for that of the domestic courts (paragraph 102), and that the Court's task is not to take the place of the national courts (paragraph 107).

At the same time the Court reiterated, however, the obligations under the ECHR, i.e., that Article 8 of the Convention imposed on domestic authorities a particular procedural obligation. 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. The Court considered that

> "[b]oth a refusal to take account of objections to the return capable of falling within the scope of Articles 12, 13 and 20 of the Hague Convention and insufficient reasoning in the ruling dismissing such objections would be contrary to the requirements of Article 8 of the Convention and also

13 *Ibid.,* §§ 104-105.

14 *Ibid.,* §105.

> to the aim and purpose of the Hague Convention. Due consideration of such allegations, demonstrated by reasoning Convention, of the domestic courts that is not automatic and stereotyped, but sufficiently detailed in the light of the exceptions set out in the Hague which must be interpreted strictly is necessary. This will also enable the Court, whose task is not to take the place of the national courts, to carry out the European supervision entrusted to it."

Thus, the Grand Chamber was, as previously mentioned, unanimous as to the necessity to delete the need for "an in-depth examination" of the entire family situation (and of a whole series of factors) from the general principles and also as to the confirmation of the other general principles to be applied in cases of child abduction covered by the Hague Convention. Still, the division among the Judges when it came to the interpretation of the very facts of the case (as to the application of the just mentioned procedural obligations) led to a 9:8 final vote in favour of the finding of a violation in that case.

The majority based the judgment on the lack of reasoning given by the Latvian courts and other alleged procedural flaws of the national proceedings to which the eight dissenting Judges could not agree, as explained in the joint dissenting opinion.

What is then the importance of the *X. v. Latvia* judgment? Will it bring more consistency to the relevant jurisprudence of the Court? Will it have an impact on certain tendencies that have surfaced in the Court (contrary to those in the Luxembourg Court of Justice) towards a broader assessment of the overall (merits of the) situation of the child which are today visible also among family law specialists in different countries? In this respect, is the violation found only a "small procedural violation" – to use the *jargon* of the Court – or is it in reality trying to circumvent the proclaimed general principles of interpretation in child abduction matters?

Before trying to give an answer to some of these questions, I would like to underline that there is definitely a genuine concern among the Judges of the ECtHR that accepting the summary, expeditious procedure, i.e. the speediness requirement of the Hague Convention without calling for the observance of the ECHR safeguards, may leave too much freedom to the national courts in that it might allow for flaws which, normally, would not pass the control of the Convention's procedural requirements either under the procedural aspect of Article 8 or indeed Article 6. The fear is that because of the short time limits the national authorities might tend to minimize their own task in the return proceedings by automatically or mechanically returning children without any meaningful examination of procedure and the claims or without giving

reasoned decisions when the Hague Convention is applicable. The proper balance of these elements would definitely be of utmost importance for achieving what the Court called a harmonious interpretation of both Conventions.

Most importantly, however, this judgment did what was really urgent to be done, that is, it corrected the general principles by deleting a passage that had inadvertently found its way into the *Neulinger* judgment. The confirmation of the fact that the domestic courts are NOT required to conduct an in-depth examination of the entire family situation (and of a whole series of factors) is of primordial importance. It is the main result of this judgment and will unavoidably have important effects on the future case law of the Court.

The judgment definitely does not give a green light to the Court to shift towards an independent assessment of the overall merits of the situation of the child, i.e. the merits of abduction cases. In my opinion, however, a finding of a non-violation in *X. v. Latvia* would have strengthened the general principles and added to the consistency of the case law. On the other hand, the result as it stands sends a clearer message to national authorities in general not to get "lost in automaticity". The message is that they should not forget the basic principles of the ECHR when interpreting them together with the Child Abduction Convention.

Therefore, and having in mind also the very strict case law of the European Court of Justice in similar situations – as well as their special procedure – which definitely is looked at in Strasbourg, one might expect that this judgment should stabilize the Strasbourg case law on the matter.

Along these lines, in the recent *Lopez Guio v. Slovakia*[15] judgment the Court did not proceed with the examination of the substantive issues of the Slovakian Constitutional Court's judgment. Remaining at the procedural level, it found that Slovakia had failed to provide the applicant with an effective procedural framework for the return of the child under the Hague Convention in compliance with Article 8 of the Human Rights Convention. Moreover, the Court basically accepted a lower court's opinion holding that in Slovakia existed a systemic problem in relation to return proceedings under the Hague Abduction Convention, which destroyed the object and purpose of that treaty.

15 No. 10280/12, Judgment of 3 June 2014.

III. Conclusion

To sum up, the Court's position seems to be that, in principle, the 1980 Hague Convention is important and applicable in abduction cases where proceedings on return of children are speedy and could thus avoid harmful effects of their wrongful abduction or retention as much as possible. However, if the enforcement comes some time after the child's abduction, this may undermine the pertinence of the 1980 Hague Convention in such a situation, it being essentially an instrument of a procedural nature (and not a human rights treaty protecting individuals on an objective basis). In other words, when the principle of the immediate return of an abducted child, which is the basis of the Hague Convention, does not materialize within a reasonable time – for whatever reason this may happen – the principle has to be moderated by other considerations, as the one of the best interest of the child.[16]

Therefore, and in view of the Court's holding that it must place itself at the time of the enforcement of the impugned measure (*Neulinger,* paragraph 145), it is all the more important to accelerate this type of proceedings in Strasbourg as well.

In this respect, and drawing on my own experience within the Court, in particular on what had happened in the *Neulinger and Shuruk* case while it was pending before the First Section, my subsequent experience with the *M.R. and L.R. v. Estonia* case, with which the First Section of the Court dealt within less than three months, the last week's *Lopez Guio v. Slovakia* judgment which took two years before the ECtHR, but also having in mind the practice of the Luxembourg Court, I would make the following procedural suggestion:

- In my opinion, it is of utmost importance that the ECtHR introduces a special speedy procedure for dealing with such type of urgent situations as are child abduction cases.

Nowadays, since in 2009 the Court introduced a new prioritization policy concerning the order in which it deals with cases, this is clearly possible without any further changes of the Rules of the Court. According to this policy, the Court takes into consideration the importance and urgency of the issues raised when deciding the order in which cases are to be dealt with. Child abduction cases fall into the so-called category I., referring to the most important applications. They are thus to be dealt with more rapidly.

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16 *Koons v. Italy,* 68183/01, 30 September 2008. Cf. D. Rietiker, 'Un enlèvement d'enfant devant la grande chambre de la Cour européenne des droits de l'homme : « L'affaire *Neulinger et Shuruk c : Suisse* analysée à la lumière des méthodes d'interprétation des traités internationaux »' 90 *Rev. trim.dr.h.* (2012) p. 394.

In practice, this is to be done first and foremost at the Section level. The task falls to the case lawyers who receive and filter the applications. It is for them to put the application on a faster track, to alert the national judge and the Section Registrar and through them also the Section President of any such case (what *de facto* happened in *M.R. and L.R. v. Estonia*) so as to accord it priority. All of them together bear responsibility for speedy dealing with urgent cases. Also, putting such cases on a faster track would definitely avoid the application of long lasting interim measures as was, unfortunately, the case in *Neulinger and Shuruk*. It is clear that a prolonged application of interim measures "freezes" the situation and may thus lead to a "fundamental change of the situation" – as happened in the *Neulinger* case.

Alongside my critical remarks (which, in part, are also self-critical!) it should not be forgotten that the Court has by a large body of its case law considerably helped reinforce the operation of the Child Abduction Convention, not only in Europe. In this respect, the *X. v. Latvia* judgment has an important role to play as it reiterated the general principles of the Court's case law at stake. If, in addition, some speedy procedures are consequently applied and observed, the Court will be in possession of all the elements necessary for a harmonious interpretation of both the European Human Rights Convention and the 1980 Hague Convention in order to achieve the paramount goal – to act in the best interest of the child.

LEGAL FRAMEWORK FOR INTERNATIONAL CHILD ABDUCTION IN THE EUROPEAN UNION – THE NEED FOR CHANGES IN THE LIGHT OF *POVSE V. AUSTRIA*[*]

Vesna Lazić[**]

I. Introduction

This article examines the appropriateness of application of the 1980 Child Abduction Convention within the framework of the Regulation Brussels IIa[1] in the light of the decision *Povse v. Austria*. This factually and legally complex case, submitted to the Court of Justice of the European Union (CJEU)[2] and the European Court of Human Rights (ECtHR),[3] illustrates deficiencies of the current procedural framework on international child abduction in the European Union. Both judgments of the CJEU and of the ECtHR Court have been subject of a heated debate amongst family lawyers and private international law specialists alike.[4]

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* This article has been based on an earlier publication. It is adjusted and shortened version of the article entitled 'Family Private International Law Issues before the European Court of Human Rights – Lessons to be Learned from Povse v. Austria in Revising the Brussels IIa Regulation and its Relevance for Future Abolition of Exequatur in the European Union', originally published in: Paulussen, Ch., Takacs, T., Lazic, V., Rompuy, B. (eds.), *Fundamental Rights in International and European Law - Public and Private Law Perspectives* (T.M.C. Asser Press, 2015)

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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 (hereinafter: Regulation Brussels IIa or Regulation).

2 Case C-211/10 PPU *Povse v Alpago* [2010] ECR I-6673

3 European Court of Human Rights Judgment of 18 June 2013, decision on admissibility, Application no. 3890/11 (*Sofia and Doris Povse v. Austria*).

4 See e.g., D. Van Iterson, 'The ECJ and ECHR Judgments of Povse and Human Rights – a Legislative Perspective'at http://conflictoflaws.net/2013/the-ecj-and-echr-judgmentson-povse-and-human-rights-alegislative-perspective/ (28 May 2015); H. Van Loon, 'Kinderontvoering en mensenrechten', in: K. Boele-Woelki (ed.) *Actuele ontwikkelingen in het familierecht', - Achtste UCERF symposium, UCERF REEKS 8,* (Ars Aequi Libri, Nijmegen, 2014) pp 9-29; H. Muir Wat, 'Muir Wat on Abolition of Exequatur and Human Rights', Online symposium, at http://conflictoflaws.net/2013/muir-watt-on-povse/ (9 September 2013);

After the facts of the case and series of legal proceedings in Italy and Austria are briefly presented, the decisions of the CJEU and the ECtHR are analysed. Finally, some suggestions are offered on how to adjust the legislative framework so as to more appropriately accommodate the needs of actors in cross-border child abduction litigation. They may prove useful within the context of current discussion on the revision of the Brussels IIa Regulation.

II. *Povse v. Austria* – facts

After the relationship of unmarried couple Ms. Povse and Mr. Alpago had deteriorated they separated in January 2008. Their daughter Sofia was born in December 2006 in Italy where the couple lived until the separation. Both parents had joint custody of the child in accordance with Article 317a of the Italian Civil Code. Ms. Povse travelled to Austria with her daughter on 8 February 2008 – on the same day that the Venice Youth Court awarded Mr. Alpago sole custody of the child and issued a travel ban prohibiting Ms. Povse from leaving Italy without father's consent. This decision was revoked on 23 May 2008 whereby the Court authorised the residence of the child with the mother in Austria. In the same judgment, it granted preliminary joint custody to both parents. Until June 2009 meetings between the father and the child were held regularly. Thereafter Mr. Alpago declared that he did not intend to continue with meetings and requested the return of the child to Italy. On 19 June 1990 the Leoben District Court dismissed the request for the return of the child under the 1980 Hague Child Abduction Convention. It referred to the decision of the Venice Youth Court of 23 May 2008 authorising the residence of the child in Austria. In addition to that, the Court issued an interim injunction against Mr. Alpago prohibiting him to contact his daughter for 3 months, because of threatening messages sent to the mother.

4 M. Requejo, 'Requejo on Povse', Online symposium, at http://conflictoflaws.net/2013/requejo-on-povse/> (9 September 2013); R.A. García, 'Povse v. Austria: Taking Direct Effect Seriously?', 2013, Online symposium, at http://conflictoflaws.net/2013/povse-v-austria-taking-direct-effect-seriously/> (9 September 2013). On the analysis of earlier case law of the ECtHR, see P. Vlaardingerbroek, 'Internationale kinderontvoering en het EVRM', 32 *Nederlands Internationaal Privaatrecht* (2014) pp. 12-20.

In another proceeding in Austria the Judenburg District Court granted the request of Ms. Povse for preliminary sole custody. The Court based its jurisdiction with respect to matters of custody, access and alimony on Article 15(5) of the Regulation Brussels IIa.

In Italy, the Venice Youth Court issued the return order under Article 11(8) of the Regulation Brussels IIa on 10 July 2009. Holding that the Judenburg District Court had erroneously determined to have jurisdiction on the basis of Article 15(5) of the Brussels IIa Regulation, the Venice Youth Court decided that it retained its competence in the case at hand. On 21 July 2009, it issued a certificate of enforceability under Article 42 of the Regulation Brussels IIa.

The enforcement of the return order issued in Italy was requested on 22 September 2009 in Austria. The Leoben District Court dismissed the request on 12 November 2009. It held that the child's return without her mother would constitute a grave risk within the meaning of Article 13(b) of the 1980 Child Abduction Convention.[5] After this decision had been reversed by Leoben Regional Court an appeal on points of law was filed with the Supreme Court (*Oberster Gerichtshof*). The latter submitted a request for a preliminary ruling to the CJEU on a number of questions relating to the interpretation of the Regulation Brussels IIa. In particular, the questions concerned the relevant provisions on jurisdiction (Arts. 10 and 11 para 8) and the provisions of Article 47(2) in connection with Article 42 of the Regulation relating to the enforcement of return orders. This decision has been analysed in greater detail *infra*, under 3.

After the CJEU had rendered its decision in 2010, legal proceedings in two jurisdictions continued. Most importantly, in its judgment of 23 November 2011 the Venice Youth Court withdrew the decision of 23 May 2008 which had granted preliminary joint custody to both parents and had authorised the residence of the child with the mother in Austria. In addition to that, in the same decision the Court awarded a sole custody to Mr Alpago and ordered the return of the child to the father in Italy. It should be noted that Ms Povse submitted no appeal against this judgment. This decision replaced the judgment of 10 July 2009 in which the return order initially had been issued.[6] Soon thereafter on 19 March 2012 Mr. Alpago notified the Leoben District Court of the 23 November 2011 judgment and submitted a certificate of enforceability

5 Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter: 1980 Hague Convention). The text and related materials are available on the website of the Hague Conference on Private International Law (www.hcch.net).

6 On the basis of the decision rendered in May 2008, the child lawfully stayed in Austria for more than a year.

under Article 42 of the Brussels IIa Regulation.

The Leoben Court dismissed the request. On appeal, the Regional Court ordered the enforcement, holding that the custody decision of the Judenburg District Court of 8 March 2010 was not to prevent the enforcement of the judgment of 23 November 2011. When deciding upon a request in cassation, the Austrian Supreme Court rejected the appeal holding that the allegation of violating Article 8 was not relevant in the proceedings before the Austrian courts, but that it had to be raised before competent Italian courts.

Enforcement proceedings were initiated on 4 October 2012 before the Wiener Neustadt District Court. On 20 May 2013 the Wiener Neustadt District Court ordered Ms Povse to hand over the child to her father by 7 July 2013, otherwise coercive measures would apply. It referred to the Supreme Court judgment and reiterated that it was for the Italian courts to examine any question relating to the child's well-being.

In Italy, criminal proceedings were instigated against Ms. Povse for removal of a minor and failure to comply with court orders. It is not entirely clear whether or not the legal aid would be available to Ms. Povse in the proceedings in Italy.

1. CJEU Judgment

In its judgment of 1 July 2010,[7] the CJEU provides for the interpretation of a number of provisions of the Regulation Brussels IIa, in particular Articles 10, 11(8), 40, 42 and 47(2). The first two relate to issues of jurisdiction in matters of child abduction or rather the exceptions from the general jurisdictional rule on parental responsibility contained in Article 8. Namely, under the Regulation the habitual residence of a child as the basis for jurisdiction under Article 8 has been deviated from in certain circumstances. The exceptions from the main rule on jurisdiction are contained in Articles 9,[8] 10 and 11. The inter-

7 CJEU *Povse*-judgment, *op. cit.* n. 2.

8 Article 9 provides under which conditions the courts of the child's former habitual residence retain jurisdiction in cases when the child lawfully moves to another Member State (*perpetuatio fori*). Accordingly, the courts in the country of the child's former habitual residence remain competent during a three-month period for the purpose of modifying a judgment on access right issued in that EU Member State, provided that the person entitled to exercise access right has habitual residence in that jurisdiction. The only exception is in the case of tacit prorogation, i.e., if the holder of the access rights participated in the proceedings before the courts in the Member State of child's new habitual residence without raising the objection of lack of jurisdiction. This provision is not further discussed as it was not the subject of ruling in the CJEU *Povse*-judgment.

pretation of the provisions on jurisdiction by the CJEU will be addressed *infra*, under 3.1 and 3.2. The relationship between the Regulation and the 1980 Hague Convention is explained in greater detail *infra*, under 3.2.

The provisions of Articles 40, 41,[9] 42 and 47 relate to the enforcement of judgments concerning rights of access and of certain judgments that require the return of the child. In particular, any judgment on the access rights and return orders declared enforceable in an EU Member State in accordance with Articles 41(1) and 42(1) respectively shall be enforceable in another EU Member State under the same conditions as a judgment rendered in the state of enforcement. The interpretation of the relevant provisions on the enforcement in the CJEU *Povse*-judgment will be analysed *infra*, under 3.3.

1.1 Jurisdiction over child custody in cases of child abduction - Interpretation of Article 10 of the Regulation Brussels IIa

The relevant provisions of the Regulation aim at discouraging parental child abduction amongst Member States and ensuring the prompt return of the child to the Member State in which it had his or her habitual residence immediately before the abduction.[10] Both wrongful removal and wrongful retention is to be understood under the term 'child abduction'. The definition of the 'wrongful removal or retention' is provided in Article 2(11) of the Regulation. It is drafted along the lines of Article 3 of the 1980 Hague Convention, even though it is somewhat broader than the definition in Article 3. Thus, the removal or retention is wrongful when it is carried out in breach of the rights of custody provided that such rights were actually exercised at the moment of abduction, or would have been exercised if it had not been hindered by the removal or retention.[11] Yet in the Regulation, it is added that the custody is considered to be exercised jointly when one of the holders of parental responsibility is not

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9 In the present case, Article 41 is of no relevance as it concerns judgments on access rights, which were not at stake in the case at hand. Yet, the reasoning of the CJEU on the return orders in the case at hand may analogously be applied to judgments which concern rights of access. This is so because in judgments rendered both in cases of access rights, as well as return orders fall under the same favourable regime for enforcement provided in Article 47 of the Regulation.

10 Practice Guide for the application of the new Brussels II Regulation (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, up-dated version 1 June 2005, p. 28, at http://ec.europa.eu/civiljustice/divorce/parental_resp_ec_vdm_en.pdf (hereinafter: Practice Guide).

11 Article 2(11) of the Regulation.

allowed to decide on the residence of the child without the consent of the other holder of the parental responsibility.

The first question submitted to the CJEU for a preliminary ruling is whether in the circumstances of the case at hand the Austrian courts, as courts of the child's new habitual residence, can establish jurisdiction on the basis of Article 10(b)(iv) of the Regulation Brussels IIa. The idea incorporated in Article 10 is that the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention, in principle retain jurisdiction to decide the custody of a child. That jurisdiction is transferred to the courts in the Member State to which the child was wrongly removed or retained only if the child has acquired a habitual residence in that Member State and provided that one of the alternative conditions under Article 10 is met. Thereby the Regulation ensures that the jurisdiction is retained by the courts of the 'Member State of origin' regardless of wrongful removal or retention of the child in another EU Member State (the requested 'Member State).[12]

Accordingly, the new habitual residence of the child in itself is not sufficient to deprive the courts of the Member State of child's habitual residence immediately before the wrongful removal or retention of their jurisdiction. Instead it must be accompanied by one of the conditions provided in Article 10 in order to vest jurisdiction upon the courts of the Member State where the child has been removed or retained. Firstly, the courts in a Member State prior to removal or retention, will have no competence if the child has acquired habitual residence in a Member State in which the child was removed or retained, and all those having the rights of custody have acquiesced in the removal or retention (Article 10(a)). Additionally, Article 10(b) provide the courts in a Member State where the child has acquired habitual resident will be vested with jurisdiction if the child has resided in that Member State for a period of at least one year after the person that holds the 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 provided that at least one of the following conditions is fulfilled:

(i) No request for return has been filed before the competent authorities of the Member State where the child has been removed or is being retained within one year after the holder of the rights of custody has had or should have had knowledge of the whereabouts of the child.

(ii) A request for return has been withdrawn and no new request has been filed within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child.

12 Practice Guide, *op. cit.* n. 10, p. 28.

(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, due to inactivity of the interested party to obtain the return of a child as provided in Article 11(7).

(iv) The courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention has issued a judgment on custody that does not entail the return of the child.

Accordingly, under Article 10(b) a cumulative application of the following conditions is required: (1) A child has acquired habitual residence in the EU Member State where it has been removed or retained; (2) the residence has lasted at least one year after the person that holds the rights of custody has had or should have had knowledge of the whereabouts of the child; and (3) the child is settled in his or her new environment. When these conditions are complied with, one of the requirements under (i)-(iv) of Article 10(b) must be met in order to vest jurisdiction to the courts in a Member State where the child has been removed or retained.

In the case at hand, the Venice Youth Court is the court having jurisdiction over the place where the child was habitually resident before her wrongful removal to Austria. As already explained *supra*, under 2, the Venice Youth Court revoked its ruling prohibiting the mother from leaving Italy in its decision of 23 May 2008. Thereby it awarded provisional custody to both parents. With the view of rendering its final judgment on the rights of custody, the Court granted access rights to Mr. Alpago and ordered an expert report on the relationship of the child with the parents. The Court also granted the right to decide on the practical aspects of the child's daily life to the mother. The father was ordered to share the costs of the child support. In addition to that, the conditions and times for the father's access right were determined. Finally, an expert report was to be submitted by a social worker concerning the nature of the relationship between the child and both parents.

The question submitted to the CJEU was whether the decision of the Venice Youth Court of 23 May 2008 presented 'a judgment on custody that does not entail the return of child' within the meaning of Article 10(b)(iv). If a positive answer was to be given, jurisdiction could have been transferred to the courts in Austria on the basis of Article 10(b)(iv) of the Regulation Brussels IIa.

It is not surprising that the CJEU held that the decision of 23 May 2008, as a provisional measure, did not constitute a 'judgment on custody that does not entail the return of the child' within the meaning of Article 10(b)(iv). Consequently, it cannot be relied upon to transfer jurisdiction to the courts of the Member State to which the child has been unlawfully removed. Regarding

the transfer of jurisdiction under Article 10(b)(iv) the Court held, *inter alia,* that it:

> '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.'

Thereby the Court has emphasised that the condition in Article 10(b)(iv) of the Regulation has to be interpreted strictly. Thus, a 'judgment on custody that does not entail the return of child' must be a final judgment, which no longer can be subjected to other administrative or court decisions. The final nature of the decision is not affected by the fact that the decision on the custody of the child may be subjected to a review or reconsideration at regular intervals.[13] The Court rightly observes that if a decision of a provisional nature would be considered as a decision within the meaning of Article 10(b)(iv) of the Regulation, and accordingly entail a loss of jurisdiction over the custody of the child, the court of the Member State of the child's previous habitual residence may be reluctant to render such provisional judgments even though they may be needed in the best interest of the child.[14]

In conclusion, the decision of the Venice Youth Court of 23 May 2008 concerns measures that are provisionally granted pending a final decision on the parental responsibility. As such it does not qualify as 'a judgment on custody that does not entail the return of the child' within the meaning of Article 10(b)(iv) of the Regulation. Consequently, in the case at hand this provision could not have been relied upon to transferred jurisdiction to the Austrian court.

1.2 Jurisdiction over return orders in child abduction cases - Article 11(8)

Whereas the provision of Article 10 relates to jurisdiction over the right to custody in cases of child abduction, Article 11 governs jurisdiction to order return of the child. Judgments rendered under Article 10 are recognised and enforced in other Member States in accordance with Sections 1 and 2 of the Regulation, Articles 23 and 28 respectively. A declaration of enforceability (exequatur) is required if a decision on the child custody given in one Member State is to be enforced in another Member State (Article 28).

In contrast to that, orders on the return of child rendered in one Member State under Article 11(8) are directly enforceable in other Member States under

13 CJEU *Povse*-judgment, *op. cit.* n. 2, para. 46.

14 *Ibid.,* para. 47.

the special, more favourable enforcement regime provided for in Section 4. Thereby no declaration of enforceability is required, as will be explained in greater detail *infra*, under 3.3.

In regulating certain aspects of return of the child, Article 11 of the Regulation modifies provisions of the 1980 Hague Convention. The latter remains applicable, but is supplemented by the provisions of the Regulation. Thereby, the Regulation prevails over the provisions of the Convention in matters governed by it.[15] When a competent authority in an EU Member State has to proceed on the basis of the 1980 Hague Convention, it will do so by applying provisions of Article 11(2)-11(8) of the Regulation.[16] Consequently, the application of the 1980 Hague Convention in EU Member States to a certain extent differs from the manner in which the Convention applies in non-EU contracting states.[17] The Regulation adjusts the applicability of the 1980 Hague Convention in the European Union Member States in order to enhance its effectiveness. For example, paragraph 2 of Article 11 supplements Article 12 and 13 of the 1980 Hague Convention so as to require that the child is given the opportunity to be heard 'unless this appears inappropriate having regard to his or her age or degree of maturity'.[18]

In addition to that, the courts at the Member State of wrongful removal or retention are under the obligation to act expeditiously and to decide upon an application for a return of the child within six weeks. There is no such a requirement under the 1980 Hague Convention. Also the Regulation poses a restriction regarding the reason for which a return of the child may be refused provided in Article 13b) of the 1980 Hague Convention. Thus, a grave risk that the return would expose the child to physical or psychological harm or would place the child in an intolerable position under Article 13b) of the Convention, cannot be relied upon if adequate arrangements have been made to ensure that the child is sufficiently protected in the country of origin after the

15 Article 60(e) of the Regulation Brussels IIa.

16 Article 11(1) of the Regulation Brussels IIa.

17 There are 93 contracting states to the 1980 Hague Convention (statues per 10 April 2014, http://www.hcch.net/index_en.php?act=conventions.status&cid=24). Recently, the Council of the European Union adopted decisions on 15 June 2015 authorising certain Member States to accept, in the interest of the European Union, the accession of Andorra and Singapore to the Convention. When interpreting certain provisions of the Brussels IIa Regulation, the CJEU in its Opinion 1/13 of 14 October 2014 asserted that the declarations of acceptance under the 1980 Hague Convention were within the exclusive external competence of the EU. Since a number of the EU Member States had accepted the ratifications of Singapore and Andorra before the Opinion 1/13, the relevant decisions of the Council are addressed only to the EU Member States that have not already accepted the ratifications of the two states.

18 Article 11(2) of the Regulation Brussels IIa.

return.[19] The provisions of the Regulation in Article 11(2)-(5) prevail over the relevant rules of the 1980 Hague Convention contained in Articles 11-13.[20]

Finally, in Article 11(6)-(8), the Regulation goes further than the 1980 Hague Convention and determines how to proceed if the courts of the EU Member State where the child has been removed or retained decide that the chid shall not return. Thus, it determines how the courts in a requested Member State will proceed if an order on non-return is issued.[21] It also defines the rules of procedure to be followed by the courts in the EU Member State where the child had habitual residence immediately before the wrongful removal or retention.[22]

The most substantial departure from the 1980 Hague Convention, is the rule provided for in Article 11(8) of the Regulation. Under the Convention, the jurisdiction to render a decision on the return of the child is vested with the courts of the country where the child has been removed or retained. Considering the strict conditions outlined in Article 13 of the Convention it is likely that those courts would order a return of the child in the vast majority of cases. The 1980 Hague Convention does not regulate how to proceed when the court of the country where the child has been wrongly removed or retained, renders a decision on non-return of the child. In contrast, Article 11(8) the Regulation provides that '[n]otwithstanding 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'. Thus, the Regulation shifts the jurisdiction to finally decide on a request for return from the courts of the 'requested Member State'[23] to the 'Member State of origin'.

Enforceability of such orders, so as not to delay the return of a child, is ensured by provisions in Section 4, Articles 42, 41, and. 47. Thereby the exequatur is abolished regarding decisions on return of the child and rights of access. The underlying purpose of those provisions and Article 11(8) is to deter child abduction and to protect the child's right to maintain a personal relationship and direct contact on a regular basis with both parents. The need to protect this

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19 Article 11(4) of the Regulation Brussels IIa.

20 For a detailed overview of the modifications and alterations in the application of the relevant provisions, see the sheet in Practice Guide, *op. cit.* n. 11, p. 35.

21 Article 11(6) of the Regulation Brussels IIa.

22 Article 11(7) of the Regulation Brussels IIa.

23 According to the 1980 Hague Convention they are competent to decide upon requests for a return of the child.

right as one of the fundamental rights set out in Article 24(3) of the Charter of Fundamental Rights of the EU[24] and to deter child abduction has repeatedly been emphasised in the ECJ jurisprudence.[25]

In a similar vein, the 'procedural autonomy' of the provisions of Article 11(8), 40 and 42, and the priority given to the jurisdiction of the court of origin is confirmed in the ECJ case law.[26] Thus, there is no need for a return order issued under Article 11(8) to be preceded or accompanied by a final judgment on the custody rights, as it was confirmed in the *Povse*-judgment.[27]

1.3 Enforcement of return orders issued under Article 11(8) of the Regulation

The Regulation provides for an enforcement regime of the return orders issued in Section 4 of Chapter III (Articles 42 and 41 – Article 47). Thereby the exequatur regarding decisions on return of the child and rights of access is abolished. The judgment of the court of the Member State of habitual residence of the child immediately before wrongful removal or retention shall be enforceable in accordance with Sect. 4 of Chapter III. A return of a child given in a judgment according to Article 11(8) and certified in the Member State where it is rendered, is to be recognised and enforced in another EU Member State without the need to obtain a declaration of enforceability and with no possibility to oppose the recognition and enforcement.[28]

Besides, there is no possibility of opposing the enforcement. The only condition is that the judgment is certified in the Member State of origin by using form Annex III. Article 42 paragraph 2 lies down a number of conditions for issuing the certificate: the child and the parties were given the opportunity to be heard and the court has taken into consideration the reasons under Article 13 of the 1980 Hague Convention. Judgments

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24 Charter of Fundamental Rights of the European Union, 7 December 2000, Nice, OJ 2000 C 364, p. 1.

25 See e.g., *Povse*-judgment, para 64 and ECJ judgment of 23 December 2009, Case C-403/09 PPU *Detiček* [2009] ECR I-12193, para 54.

26 See e.g., CJEU judgment of 11 July 2008, Case C-195/08 PPU (*Rinau)* [2008] ECR I-5271., paras. 63 and 64.

27 Regarding to the second question the CJEU in the *Povse*-judgment held that 'judgment of the court with jurisdiction ordering the return of the child falls within the scope of that provision**,** even if it is not preceded by a final judgment of that court relating to rights of custody of the child.'

28 Article 42(1) of the Regulation Brussels IIa.

certified in the country of origin are not examined in the country of the enforcement. The certificate will be completed in the language of the judgment, and will include details of any measure for the protection of the child if such a measure has been ordered. Return orders so certified in the country of origin, are enforced as a judgment rendered in the Member State of the enforcement.

The only reason to refuse the enforcement is if the judgment is irreconcilable with a subsequent enforceable decision.[29] The ruling in the *Povse*-judgment is clear that 'a subsequent decision' may only be a judgment rendered in the country of origin. Since the *Bezirksgericht* Judenburg issued an interim order on 25 August 2009, which became final and enforceable in under Austrian law, the question arose as to whether such a decision prevented the enforcement of the return order made in the State of origin (Italy) issued on the basis of Article 11(8) on 10 July 2009. The Austrian *Oberster Gerichtshof* submitted the question to the CJEU of whether the interim order of 25 August 2009 presents such a 'subsequent enforceable judgment' preventing the enforcement of the return order issued by an Italian court on 10 July 2009.

The Court concludes that the second subparagraph of Article 47(2) BIIa must be 'interpreted as meaning that a judgment delivered subsequently by a court in the Member State of enforcement which awards provisional rights of custody and is deemed to be enforceable under the law of that State cannot preclude enforcement of a certified judgment delivered previously by the court which has jurisdiction in the Member State of origin and ordering the return of the child'.[30] In answering the question, the CJEU emphasised the importance of the allocation of jurisdiction established in Article 11(8) solely to the courts in the Member State of origin. Thereby the question of irreconcilability within the meaning of Article 47(2) can be raised only in relation to any judgment subsequently rendered by the courts in the Member State of origin. Consequently, jurisdiction over return orders under Article 11(8) is vested with the court of a Member State where the child had habitual residence immediately before the abduction. The CJEU holds that any other interpretation would circumvent the system set up by Section 4 of

29 Article 47(2)

30 *Ibid*., ruling 3.

Chapter III and would deprive Article 11(8) of practical effect.[31]

Accordingly, a final ruling on the return of a child lies within the jurisdiction of the court in the EU Member State where the child has his or her habitual residence immediately before the wrongful removal or retention. In contrast to that, under the 1980 Hague Convention the jurisdiction for the return of a child lies with the courts in a Member State where the child has been removed or retained.

Moreover, no objections may be raised in a Member State of enforcement against return orders certified in a 'country of origin' as provided under Article 42 paragraph 2. As just discussed, 'a subsequent enforceable judgment' under Article 47 paragraph 2 is the only possibility to oppose the enforcement, but again it is a judgment to be rendered in the country of origin and not in the Member State of enforcement. The same holds true for any objection such as a violation of fundamental rights or best interest of the child. The ruling in the CJEU *Povse*-judgment is explicit in that respect:

> 'Enforcement of a certified judgment cannot be refused in the Member State of enforcement because, as a result of a subsequent change of circumstances, it might be seriously detrimental to the best interests of the child. Such a change must be pleaded before the court which has jurisdiction in the Member State of origin, which should also hear any application to suspend enforcement of its judgment.'

Hence, the court in the Member State of enforcement is left with no discretion. It may not examine or control whether the court in the Member State of origin has complied with the conditions to issue the certificate provided in Article 42 paragraph 2. In other words, it must recognise and enforce the return order even if the court in a Member State of origin failed to apply or incorrectly applied the requirements in Article 42.[32] The reasoning in the *Povse*-judgment merely confirms an earlier ruling of the CJEU.[33] Considering that a party is

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31 CJEU *Povse*-judgment, *op. cit.* n. 2, para 78.

32 See also, P. R. Beaumont, 'The Jurisprudence of the European Court of Human Rights and the European Court of Justice on the Hague Convention on International Child Abduction ' 335 *Recueil des cours* (2008) pp 9-103, at. p. 93.

33 CJEU judgment of 22 December 2010, C-491/10 PPU (*Joseba Andoni Aguirre Zarraga v. Simone Pelz*), holding, *inter alia*, that the allegation of violation of fundamental rights were not to prevent the free circulation of judgments under the Brussels IIa Regulation.

left with virtually no remedy at the state of the recognition and enforcement of return orders, and that such orders are unconditionally enforced, it is not surprising that the enforcement regime under the Brussels IIa Regulation is referred to as 'nuclear missile'.[34] The Regulation and its provision on the enforcement reflect the principle of mutual trust amongst EU Member States.[35]

III. Proceedings before the European Court of Human Rights

Vast majority of cases submitted before the European Court of Human Rights (ECtHR) in the area of private international law concern family matters. Especially in cases involving cross-border child abduction violations of procedural standards under Article 6, as well as of substantive law issues under Article 8 of the European Convention on Human Rights[36] are likely to be invoked. Return orders and the decisions banning the removal of a child from particular jurisdiction have bearing on the right to respect family life incorporated in Article 8 of the Convention. In the case at hand, the legal battle in two jurisdictions continued after the CJEU had rendered its decision. Finally, the claim was brought before the European Court of Human Rights (ECHR).

1. Complaint submitted to the European Court of Human Rights

The applicants – the mother and the child – submitted complaint to the European Court of Human Rights that the Austrian courts had violated their right to respect for private and family life under Article 8 of the ECHR by ordering the enforcement of the Italian courts' return order. Article 8 of the Convention reads as follows:

'1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of

34 Muir Watt, *op. cit.* n. 4, p. 6.

35 CJEU *Povse*-judgment, *op. cit.* n. 2. para 40.

36 Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950 (hereafter: Convention). See the overview of the case law of the ECtHR concerning Article 8 of the Convention in A. R. Mowbray, *et. Al.,* Cases, *Material and Commentary on the European Convention on Human Rights*, 3rd edition. (Oxford University Press, Oxford, 2012) pp. 488-597.

disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

They maintained that the Austrian courts limited themselves to ordering the enforcement of Italian return order and thus failed to examine their argument that the return would constitute a serious danger for child's well-being. In particular, the child could not communicate with the father, had not seen him for 4 years and she would not be able to accompany the child due to criminal proceedings against her in Italy. The applicants acknowledged that the decisions were in line with the position of the CJEU, yet violated Article 8 for not examining the arguments against the enforcement. Thus, the application to the ECHR invokes the questions of whether a EU Member State granting the enforcement under the Regulation Brussels IIa, can be held accountable for any violation of fundamental rights granted under the European Convention of Human Rights, and, if so, whether the Austrian court's decision on the enforcement of the return order violates the applicant's right to respect for their family life.

2. The judgment of the European Court of Human Rights

When deciding upon the application on the alleged violation of the Convention by Austria, the ECtHR posed the following questions:

- Was there an interference with the right to respect for family life?
- Was the interference in accordance with the law?
- Did the interference have a legitimate aim?
- Was the interference necessary?[37]

The Court decided that there was an interference with the right to respect for family life, i.e. the decisions of Austrian courts ordering the enforcement interfered with the applicant's right to respect for their family life. Such interference violates Article 8 of the Convention, unless it is 'in accordance with the law, pursues legitimate aims and is 'necessary in a democratic society' to achieve that aim.[38] The interference was in accordance with the law. The enforcement of the return orders was based on Article 42 of the Regulation Brussels IIa which is directly applicable in Austria[39] The interference did have a legitimate aim which is reuniting the child with the father. Compliance with

37 ECtHR *Povse*-judgment, *op. cit.* n. 2, p. 20 and 21.

38 ECtHR *Povse*-judgment, *op. cit.* n. 2, paras. 70-71.

39 *Ibid*., para 72.

EU law by a Contracting Party constitutes a legitimate general-interest objective.[40]

In addressing the last question whether the interference is necessary, the Court applied the *Bosphorus*-test.[41] It held that '…the presumption of Convention compliance will apply provided that the Austrian courts did no more than implement the legal obligations flowing from' membership of the EU. In other words, the presumption of compliance would apply if Austrian courts merely complied with their obligation to apply the relevant provision of the Regulation Brussels IIa as interpreted by the CJEU in the preliminary ruling.[42] In such a case the 'protection of fundamental rights afforded by the EU is in principle equivalent to that of the Convention system'[43] The Court examined further whether international organisation in question must protect fundamental rights to a degree equivalent to the Convention. If so, a Member State is presumed to have acted in accordance with the Convention. In the case at hand, the court of the Member State had no discretion than to order the enforcement of the return order. Otherwise the presumption does not apply. Additionally, there are no circumstances justifying that the presumption is rebutted, which would be if it is proven that the protection of Convention right was 'manifestly deficient'.

Whilst applying the *Bosphorus*-test in applied the case at hand the reasoning of the ECtHR can be summarised as follows:

1) European Union protects fundamental rights to an equivalent degree and accordingly the presumption of compliance applies.[44]
2) The EU legislative act in question - Regulation Brussels IIa - protects fundamental rights, considering the standards to be complied with by the court ordering the return of child and the fact that Austrian Supreme Court made use of most important control mechanism provided for in the European Union by requesting a preliminary ruling of the CJEU.[45]

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40 *Ibid*., para 73.

41 ECtHR 30 June 2005, appl. no. 45036/98, *Bosphorus Airways v. Ireland*

42 Already in ECtHR 6 March 2013, appl. No. 12323/11 *Michaud v. France*, where a state had transferred a part of their sovereignty to an international organisation, that state would be in compliance with obligations under the Convention where the relevant organisation protects fundamental rights in manner 'that it to say not identical but 'comparable' to that for which is protected by the Convention. *Michaud*-judgment, para 102.

43 *Ibid.*, para 77.

44 *Ibid.*, as determined in ECtHR *Michaud v. France-judgement, op. cit.* n. 42.

45 *Ibid.*, paras 80-81.

3) The Austrian courts had no discretion in ordering the enforcement, as the Regulation Brussels IIa introduces strict division of authority between the court of origin and the court of enforcement. Referring to its judgment in *Sneersone and Kampanella v. Italy,*[46] the Court concludes that any objection to the judgment should have been raised before the Italian courts as the court of the country of origin. It is open to the applicants to rely on their Convention rights before the Italian courts.

The applications failed to appeal against the return order. The question of any changed circumstances for a review of that order can still be raised before the Italian courts. Therefore, by enforcing the return order without any scrutiny of its merits the Austrian courts did not deprive the applicants of the protection of their rights under the Convention.

3. Criticism to the ECtHR judgment

The *Povse*-saga is the result of the existing complicated system of legal regulation on international child abduction in the European Union. It is not surprising that the judgments in the case at hand have attracted much attention and have been heavily criticised.

In particular, the appropriateness of applying the *Bosphorus*-presumption by the ECtHR may be questioned. It is true that both European legal orders – the EU Charter of Fundamental Rights and the ECHR - do incorporate and reflect comparable standards as far as the rights of the child are concerned. Yet, as rightly objected in the literature 'they may not share a methodology in the assessment of the existence of a violation, nor give exactly the same weight to the various factors which weigh into the process'.[47] The accession of the European Union to the ECHR would diminish the relevance of the *Bosphorus*-presumption. However, in the light of the Opinion 2/3 delivered on 18 December 2014,[48] the CJEU 'blocked the path of the EU to the European Convention on Human Rights'.[49]

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46 ECtHR of 12 July 2011, Appl. No., 14737/09 *(Sneersone and Kampanella v. Italy*).

47 Muir Watt, *op. cit.* n. 4, p. 5. For a more extensive criticism on the application of *Bosphorus*-test, see Requejo, *op. cit.* n. 4, p. 6-8.

48 Opinion 2/3 delivered on 18 December 2014, ECHR, EU: C:2014:2454.

49 'Editorial Comments: The EU's Accession to the ECHR – A 'NO' from the ECJ' 52 *Common Market Law Review* 1(2015),pp. 1-16. For the comments on the Opinion, see also, S. Peers, 'The EU's Accession to the ECHR: The Dream Becomes a Nightmare' 16 *German Law Journal* (2015) pp. 213-222, http://www.germanlawjournal.com/index.php?pageID=11&artID=1673. (28 August 2015).

On the first appearance the ruling in *Povse* might seem as if the Court applied standards that somewhat deviate from principles in child abduction cases established in its earlier judgments outside the context of the Regulation Brussels IIa. These principles are summarised in *Sneersone and Kampanella v. Italy*[50]as follows:

1) In this area the decisive issue is whether there is a fair balance between the competing interests at stake – those of the child, of the two parents, and of public order.[51] Thereby the child's best interests must be the primary consideration.[52]

2) 'The child's interests' are primarily considered to be in having his or her ties with his or her family maintained.[53] When assessing what is the best interests of the child a variety of individual circumstances will be considered, in particular his age and level of maturity, the presence or absence of his parents and his environment and experiences.

3) Return of the child cannot be ordered automatically or mechanically when the Hague Convention is applicable.

Especially the part of the decision in the *Povse*-judgment ruling that no control on the merit of the return order by Austrian courts did not violate the applicants' fundamental rights under the Convention, might appear as deviating from the above-mentioned standards. That is particularly true for the holding that a child's return cannot be ordered automatically or mechanically when the Hague Convention is applicable. Those unfamiliar with the complex system of international child abduction in the European Union, may perceive it as inconsistency in the rulings of the ECtHR when this part of the decision in the *Povse*-case is compared to the rulings in earlier relevant case law[54] and upheld in post-*Povse* rulings.[55] Especially by those whose rights are meant to be protected, this may be viewed as an inconsistency in applying the relevant

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50 ECtHR *Sneersone and Kampanella v. Italy*-judgement, *op. cit.* n. 46.

51 See ECtHR of 6 December 2007, Appl. No. 39388/05 (*Maumousseau and Washington v. France*), para 62.

52 ECtHR of 19 September 2000, Application no. 40031/98 (*Case of Gnahoré v France*)

53 ECtHR no. 25735/94, §50, ECHR 2000-VIII (*Elsholz v. Germany [GC*]); ECtHR of 4 April 2006, no. 8153/04, para (*Maršálek v. the Czech Republic)*.

54 ECtHR Sneersone and Kampanella v. Italy-judgement, *op. cit.* n. 46.

55 See e.g., ECtHR judgment of 26 November 2013, Application no. 27853/09 (*X v Latvia*), where the ECtHR in circumstances comparable to the *Povse*-case reasoned that the return orders were not to be issue when the best interest of the child is at stake.

standards. Yet, it should be emphasised that there is no departure from the earlierestablished criteria. The ECtHR did not alter the position that the return orders should not be issued automatically. It merely confirmed that the examination of the relevant criteria must be done before the court in the country or origin and not before the enforcement court. A different ruling is hardly conceivable in the context of the legal framework under the Regulation Brussels IIa.

It may be concluded that in the case at hand the major criticism in both the ECJ and ECrHR judgments does not lie with the legal reasoning or application and interpretation of relevant legal sources. Instead the existing legal framework under the Brussels IIa Regulation provided under Articles 11(8) and 42 is a real source of problem. It unnecessarily complicates the application of the 1980 Hague Convention and substantially deviates from the procedure provided therein. Most importantly, it is indeed doubtful that the system of automatic and unconditional enforcement of return orders under Article 42 adequately protects the best interest of the child.

IV. Abolition of exequatur in EU Private International Law

The judgments in *Povse*-case not only illustrates how inappropriate and counterproductive the setting under Articles 11(8) and 42 within the legal framework of the Brussels IIa Regulation, but also raise questions relevant for the discussion on the regime of the enforcement of judgments within the European Union.[56]

56 See e.g., the debate on abolishing the exequatur when the Regulation Brussels I was discussed: A. Dickinson, 'The Revision of the Brussels I Regulation. Surveying the Proposed Brussels I BIs Regulation – solid foundations but renovation needed', *Yearbook of Private International Law* 2010, pp. 247-309; G. Cuniberti, and G. Rueda, 'Abolition of Exequatur: Addressing the Commission's Concerns' *RabelsZ* (2011) pp. 286-316; P. A. Nielsen, 'The New Brussels I Regulation' *Common Market Law Review* (2013) pp. 503-528.

No uniform approach in regulating free circulation of decisions is maintained in EU PIL instruments. Thus, there are those which require the exequatur[57] and those where no declaration of enforceability in the country of the enforcement is needed. Whereas the enforcement regime under the Regulations where the exequatur has been retained is rather comparable, there is no uniform system of enforcement under the regulations where the exequatur has been abolished. Thus, under the recently revised Regulation Brussels Ibis,[58] no exequatur is required, but a party against whom the enforcement is sought still has the right to oppose the enforcement on certain grounds. Under the Insolvency Regulation,[59] no special procedure is required, but public policy exception may be invoked in the Member State of the enforcement. In a number of Regulations, no exequatur is required, but the enforcement may be refused if there is an earlier irreconcilable judgment.[60] Finally, virtually unconditional enforcement of the return orders under the Regulation Brussels IIa has already been addressed.

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57 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L 12 (all Member States, including Denmark), Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 2003 338 of 23.12.2003 (divorce and parental responsibility, except decisions concerning return of child orders and decisions in the right of access/contacts) and Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ 2012 L 201 of 27.7.2012 (Denmark and the United Kingdom are not bound by it).

58 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) , OJ L 351 of 20.12.2012, p. 1–32 , as amended by Regulation No 542/2014 applicable as of 10 January 2015.

59 Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L 160 of 30.6.2000, pp. 1-18.

60 Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims O J L 143 of 30.04.2004, pp. 15 – 39; Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007establishing a European Small Claims Procedure; Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, O J L 399 of 30.12.2006, p. 1–32; 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 for judgments rendered in those Member States that have ratified the 2007 Hague Protocol.

In general, such diversity of approaches in regulating circulation of judgment within the EU can result in differences in the level of protection of 'procedural position' granted to certain 'weak parties.'[61] The line of reasoning in maintaining various approaches in that respect on the EU level is not always easily discernible. In any case, a more consistent and coherent approach in carrying out underlying policies and aims in the EU PIL legal instruments should be achieved when drafting new and revising the existing legislation. A certain degree of control is retained in all private international legal instruments on the EU level, the framework set out in the provisions of Articles 11(8) and 42 of the Regulation Brussels IIa being the only exception. The Report from the Commission of 15 April 2014[62] illustrates that the possibility to revise the Regulation Brussels IIa has been considered. Within that context, the questions submitted for public consultation include issues such as should all judgments concerning parental responsibility circulate freely without exequatur including judgments on placement of a child in institutional care or a foster family and should there some means of control in the enforcement state be maintained.[63] If a proposal for revising the Regulation Brussels IIa would be offered, it is to be hoped that the EU legislator will use that opportunity to remedy the unsatisfactory existing framework on unconditional enforcement of return orders. In addition to that any decision on abolishing exequatur for some or all decisions concerning parental responsibility should be preceded by careful examination of its possible effects. And if an approach to abolish exequatur would be followed, a certain degree of control at the enforcement stage should be provided.

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61 On the diversity of regimes of enforcement, as well as unclear line of reasoning in protecting interests of 'weak' parties and inconsistency among various PIL EU instruments, see V. Lazić, 'Procedural Justice for Weaker Parties in Cross-border Litigation under the EU Regulatory Scheme' 10 *Utrecht Law Review* 4 (2014) pp. 100-117, at p. 115-116.

62 The Report from the Commission to the European Parliament, The Council and the European Economic and Social Committee on the Application 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, (Brussels, 15.4.2014 COM(2014) 225 final).

63 See also, the questionnaire thereto attached for the purposes of public consultations in questions no. 20 (relating to abolishing exequatur in the enforcement of judgments on placement of a child in institutional care or a foster family) and 21 (concerning maintaining certain main safeguards such as public policy, proper service of documents, right of parties (the child) to be heard, irreconcilable judgments.

V. Conclusions

Circumstances surrounding the *Povse*-judgments illustrate how the system of justice sometimes can work against those whose rights are intended to be protected. The EU legislators attach great importance to the access to justice, credibility and trustworthiness of the system of justice. It is often emphasised that one of the core values in the European Union and the rule of law, is a system where justice is not only done, but also is seen to be done. Factual and legal circumstances surrounding *Povse*-judgments certainly do not meet the standard. This especially holds true for the legislative framework concerning orders for return of the child under the Regulation Brussels IIa.

The framework on the direct enforcement of return orders within the Regulation is obviously well intended. The underlying purpose is enhancing the effectiveness of the 1980 Hague Child Abduction Convention and the issuance of the return orders so as to adequately protect the right of the child to have the ties with the family maintained. Yet it has failed to meet that aim. Moreover, it does not necessarily ensure an adequate protection of the best interest of child, as the *Povse*-case clearly illustrates. In addition to that, it implies twofold or parallel applications of the 1980 Hague Convention, one amongst the EU Member States and the other for non-EU members. Such a system of legal regulation may create an appearance of inconsistency in administration of justice. Therefore, it is hoped that at the occasion of possible future revision of the Regulation the European legislator will no longer maintain the regulatory scheme under Article 11(8) and 42.

Within the discussion on further abolition of exequatur in the legal EU PIL instruments, the approach of 'direct enforcement' with no control in a Member State of the enforcement should generally be avoided. Regarding possible abolition of exequatur for decision on the custody of the child certain minimum standards of compliance with basic notions of morality and justice pertaining to public policy should be able to be examined at the enforcement stage.

4

Status and Family Cross Border Issues in Comparative Family Private International Law

Statusni i obiteljski prekogranični odnosi u usporednom međunarodnom privatnom obiteljskom pravu

UOBIČAJENO BORAVIŠTE U ODNOSU NA DRŽAVLJANSTVO – U POTRAZI ZA OSOBNOM POVEZNICOM U EUROPSKOM OBITELJSKOM PRAVU*

Anatol Dutta**

I. Uvod

Pitanje kojim se u svom kratkom izlaganju bavim jedno je od vrlo važnih u međunarodnom privatnom pravu – potraga za najboljom osobnom poveznicom u međunarodnom obiteljskom pravu. Naime, izbor između *činjenične* poveznice uobičajenog boravišta s jedne strane i *pravne* poveznice državljanstva s druge strane, postaje važan pri određivanju mjerodavnog prava koje mora biti usko povezano s određenom osobom ili osobama. U obiteljskim stvarima to su dijete, roditelji, supružnici, registrirani partneri, vjerovnik ili dužnik uzdržavanja itd.

Zašto je izbor između uobičajenog boravišta i državljanstva toliko važan? S jedne strane, izbor između ove dvije klasične poveznice, kao što vidimo, nije slučajan nego je riječ o političkoj odluci između *dva modela lokaliziranja osobe* situiranjem osobe u određeno društvo čiji će zakoni uređivati njezine obiteljske odnose. S druge strane, izbor između uobičajenog boravišta i državljanstva posebice se odnosi na utvrđivanje relevantne objektivne poveznice u slučajevima kada stranke nisu izabrale mjerodavno pravo – poveznice koja je mnogo važnija u obiteljskom pravu nego u drugim granama prava. Stranačka autonomija ograničene je primjene u obiteljskom pravu i članovi obitelji rijetko je primjenjuju. Osobe povezane obiteljskim vezama, bez ikakvog razloga, rijetko razmišljaju o primjenjivom pravnom režimu, za razliku od trgovačkog i ugovornog prava gdje stranke, barem teoretski, pregovaraju i ponukane su na promišljanje o pravnom sustavu koji će uređivati njihov odnos i odraziti se na izbor mjerodavnog prava.

Kratka napomena o terminologiji: grubo ću razlikovati poveznicu *uobičajenog boravišta* i poveznicu *državljanstva* te pri tome ostaviti po strani druge moguće poveznice kao što su *prebivalište* (npr. "Wohnsitz" koncept u germanskom pravu) ili još važnije – *domicil* (u zemljama običajnog prava), budući da obje poveznice trenutačno nisu od važnosti u europskom međunarodnom

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obiteljskom pravu. Za ove osobne poveznice, barem na prvi pogled, ionako vjerojatno postoje argumenti slični onima za i protiv poveznice uobičajenog boravišta. Kada se pogleda pobliže, naravno postoje i određena funkcionalna preklapanja među poveznicama državljanstva i domicila, posebice zbog činjenice pravne neprirodnosti koncepta domicila iz običajnog prava te činjenice isticanja mjesta rođenja.

II. Pobjeda uobičajenog boravišta nad državljanstvom

1. Uobičajeno boravište kao primarna poveznica

Ako uzmemo u obzir vrlo mladu povijest europskog međunarodnog privatnog prava, europski zakonodavac stekao je istinsku stručnost na tom području u razdoblju od posljednjih 15 godina, možemo posvjedočiti pobjedi primarne poveznice uobičajenog boravišta nad poveznicom državljanstva.

Uporaba poveznice uobičajenog boravišta više je od jednostavnog praćenja međunarodnog trenda, koji su posebice postavile haške konvencije u kojima poveznica uobičajenog boravišta sve češće zamjenjuje poveznicu državljanstva. Još važnije, s obzirom na izbor prava i nadležnost, uobičajeno boravište postalo je istaknuta poveznica u europskom međunarodnom privatnom pravu u cjelini, ne samo u obiteljskim stvarima. Upućivanje na uobičajeno boravište, kao što znate, može se naći u Uredbi Brisel I,[1] Uredbi Brisel II *bis*,[2] Uredbi o uzdržavanju,[3] Uredbi Rim I,[4] Uredbi Rim II,[5] Uredbi Rim III[6] i naravno u

1 Čl. 5.(2), čl. 13.(3) i čl. 17.(3) Uredbe Vijeća (EZ) br. 44/2001 od 22. prosinca 2000. o nadležnosti, priznavanju i izvršenju sudskih odluka u građanskim i trgovačkim stvarima, SL 2001 L 12/1.

2 Čl. 3.(1)(a), čl. 8.(1), čl. 9., čl. 10. i čl. 12.(3)(a) Uredbe Vijeća (EZ) br. 2001/2003 od 27. studenoga 2003. o nadležnosti, priznavanju i izvršenju sudskih odluka u bračnim sporovima i u stvarima povezanim s roditeljskom odgovornošću, kojom se stavlja izvan snage Uredba (EZ) br. 1347/2000, SL 2003 L 338/1.

3 Čl. 3.(a) i (b) i čl. 4.(1)(a) i (c)(ii) Uredbe Vijeća (EZ) br. 4/2009 o području nadležnosti, mjerodavnog prava, priznanja i izvršenja odluka te suradnji u stvarima koje se odnose na obveze uzdržavanja, SL 2009 L 7/1.

4 Čl. 4(1)(a), (b), (d), (e) i (f), čl. 5(1) i (2), čl. 6(1), čl. 7(2) podstavak 2 i čl. 11(2), (3) i (4) Uredbe (EZ) br. 593/2008 Europskog parlamenta i Vijeća od 17. lipnja 2008. o pravu koje se primjenjuje na ugovorne obveze (Rim I), SL 2008 L 177/6.

5 Čl. 4.(2), čl. 5.(1)(a) i (1) podstavak 2., čl. 10.(2), čl. 11.(2), čl. 12.(2)(b) Uredba (EZ) br. 864/2007 Europskog parlamenta i Vijeća od 11. srpnja 2007. o pravu koje se primjenjuje na izvanugovorne obveze (Rim II), SL 2007 L 199/40.

6 Čl. 5(1)(a) i (b), čl. 6(2), čl. 7(2)–(4), čl. 8(a) i (b) Uredbe Vijeća (EU) br. 1259/2010 od 20. prosinca 2010. o provedbi pojačane suradnje u području prava primjenjivog na razvod braka i zakonsku rastavu, SL 2010 L 343/10.

Uredbi o nasljeđivanju.[7] Isto vrijedi i za Hašku konvenciju o mjerama za zaštitu djece iz 1996. godine[8] i Haški protokol o uzdržavanju iz 2007. godine,[9] budući da je europski zakonodavac prihvatio oba dokumenta. Isto tako, Prijedlog Komisije o Uredbi o bračnoj stečevini za supružnike,[10] i u određenoj mjeri, za registrirane partnere[11] također široko slijedi načelo uobičajenog boravišta. Stoga ne čudi što je Europska komisija u Zelenoj knjizi o Uredbi o nasljeđivanju okarakterizirala uobičajeno boravište kao poveznicu "koja je u trendu".[12]

2. Sekundarna funkcija državljanstva

Uspješnost poveznice uobičajenog boravišta, doduše, ne zamjenjuje državljanstvo u potpunosti. Poveznica državljanstva i dalje ima sekundarnu ulogu u određivanju mjerodavnog prava u sukobima zakona u europskom pravu koja se očituje u sljedećem:

Prvo, državljanstvo je često korišteno u europskom međunarodnom privatnom pravu kao *supsidijarna* poveznica. Primjerice, ako se određuje pravo koje je usko povezano s više od jedne osobe, npr. supružnici, a osobe kojih se tiče nemaju zajedničko uobičajeno boravište.[13] Drugo, europski zakonodavac redovito dopušta strankama djelovanje u okviru *stranačke autonomije* i na taj način zamjenu poveznice uobičajenog boravišta odabirom prava države čiji su državljani.[14] Treće, ironično je kako državljanstvo osobe može biti važno pri određivanju *njezina uobičajenog boravišta*. U skladu sa sudskom praksom

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7 Čl.4, čl.6(a), čl. 10(1)(b), čl. 13, čl. 21(1), čl. 27(1)(d), čl. 28(b) Uredbe (EU) br. 650/2012 Europskog parlamenta i Vijeća od 4. srpnja 2012. o nadležnosti, mjerodavnom pravu, priznavanju i izvršavanju odluka i prihvaćanju i izvršavanju javnih isprava u nasljednim stvarima i o uspostavi Europske potvrde o nasljeđivanju, SL 2012 L 201/107.

8 Čl. 5., čl. 6.(2), čl. 7.(1) i (2)(a), čl. 9.(1) i (3), čl. 10.(1)(a), čl. 11.(2) i (3), čl. 12.(2) i (3), čl. 15.(3), čl. 16., čl. 17. Haške konvencije od 19. listopada 1996. o nadležnosti, mjerodavnom pravu, priznanju, izvršenju i suradnji u vezi s roditeljskom skrbi i mjerama za zaštitu djece.

9 Čl. 3. Haškog protokola od 23. studenoga 2007. o mjerodavnom pravu za obveze uzdržavanja.

10 Prijedlog Uredbe Vijeća o nadležnosti, mjerodavnom pravu, priznavanju i izvršavanju odluka u stvarima o režimima bračne stečevine, COM(2011) 126 od 16. ožujka 2011. godine.

11 Prijedlog Uredbe Vijeća o nadležnosti, mjerodavnom pravu, priznavanju i ovrsi odluka o imovinskim posljedicama registriranog partnerstva, COM (2011) 127 od 16. ožujka 2011. godine.

12 Zelena knjiga o nasljeđivanju i oporukama, COM(2005) 65 od 1. ožujka 2005. godine., t. 3.

13 Vidi za supružnike čl. 8.(c) Uredbe Rim III; čl. 17.(b) Komisijina Prijedloga Uredbe o bračnoj stečevini.

14 Vidi čl. 5.(1) Uredbe Rim III; čl. 22.(1) Uredbe o nasljeđivanju; čl. 16.(c) i čl. 18. podčlanak 1.(b) Komisijina Prijedloga Uredbe o bračnoj stečevini.

Europskog suda pravde, u odnosu na Uredbu Brisel II *bis*, državljanstvo je jedan od kriterija pri određivanju uobičajenog boravišta.[15]

III. Prednosti i nedostaci: Zašto koristiti poveznicu uobičajenog boravišta?

Kako je uopće došlo do toga da je načelo boravišta tijekom posljednjeg desetljeća zamijenilo načelo državljanstva koje je igralo, i još i dalje djelomično igra, važnu ulogu u međunarodnom privatnom pravu država članica?

1. Integracija u odnosu na interes za stabilnošću

Ponajprije, nužno je naznačiti da ako država čiji je osoba državljanin i država u kojoj ima uobičajeno boravište nisu iste, nije lako odgovoriti na pitanje s kojom je državom osoba uže povezana, s državom čiji je državljanin ili u kojoj ima boravište. Zelena knjiga o Uredbi o nasljeđivanju s pravom tvrdi kako "ni jedan od kriterija nije bez nedostataka".[16]

Važno je kako se odluka ne može temeljiti na *interesima* osoba kojih se tiče. Je li osoba uže povezana sa svojom domovinom ili s državom u kojoj ima boravište ili pak s nekom trećom državom, ovisi o unutarnjoj orijentaciji te osobe te posebice o činjenici prevladava li kod nje interes za *stabilnošću* vezan uz državu čija je osoba državljanin ili pak prevladava interes za *integracijom* vezan uz državu u kojoj ima boravište. Na *općoj* razini, nemoguće je utvrditi dominira li interes za stabilnošću ili za integracijom.[17] Opća odluka zahtijevat će empirijsko prikupljanje podataka, što je zasad, čini se, nedostatak na području cijele Europske unije.[18] Ni pravilo o izboru prava ne može u svakom *pojedinom* slučaju razlikovati prevladava li osobni interes za stabilnošću ili za integracijom. Pojedinačne sklonosti naspram stabilnosti ili integraciji mogu se uočiti u objektivnim činjenicama. Moguće rješenje može biti samo korištenje izbjegavajuće klauzule s ciljem donošenja odluke u kojoj su uravnoteženi integracijski interesi (načelo boravišta) i interesi za stabilnošću (načelo državljanstva), kao u čl. 21.(2) Uredbe o nasljeđivanju, gdje europski zakonodavac izbjegavajućom klauzulom oslabljuje načelo boravišta. Nedostaci takve

15 Vidi ECJ, Case C-435/06 (C) [2007] ECR I-10141, [39] *et seq.*

16 Zelena knjiga o nasljeđivanju i oporukama, COM(2005) 65 od 1. ožujka 2005. godine, t. 3.

17 Vidi Mansel, *Personalstatut, Staatsangehörigkeit und Effektivität* (1988), str. 73. *et seq.*

18 Vidi za Njemačku statističke podatke u Basedow/Diehl-Leistner, *Das Staatsangehörigkeitsprinzip im Einwanderungsland, u: Nation und Staat im Internationalen Privatrecht*, ur. Jayme/Mansel (1990), str. 13.

izbjegavajuće klauzule, koja daje znatnu diskreciju sudovima, očituju se u tome što strankama uzrokuje pravnu nesigurnost. Jasna individualna sklonost k integracijskom interesu ili interesu za stabilnošću, može isključivo biti utemeljena na izboru prava od strane te osobe a ne na objektivnoj poveznici.

Međutim, rastući europski trend u korist načela boravišta podudara se s *integrativnom politikom* Europske unije koja teži integraciji osoba s boravištem izvan svoje matične zemlje. Jedan od primjera u kojem je vidljiva ta politika jest čl. 18. Ugovora o funkcioniranju Europske unije koji zabranjuje diskriminaciju na temelju državljanstva. Čl. 18. ne propisuje korištenje državljanstva kao poveznice u međunarodnim privatnom pravu, što je potvrdio i Europski sud pravde:[19] Načelo državljanstva razlikuje osobe različitih državljanstava, ali ne pravi daljnju razliku nauštrb građana Europske unije. Međutim, sprječavanje bilo kakvog razlikovanja građana na temelju državljanstva i nacionalnosti u državi u kojoj borave štiti integracijski interes građana. Gdje god oni u Europskoj uniji boravili, uživaju slobodu kretanja i boravka zajamčenu čl. 21. Ugovora o funkcioniranju Europske unije.[20] Slično nastojanje može se uočiti i u europskoj zajedničkoj migracijskoj politici unutar jednog područja slobode, sigurnosti i pravde. Uvodne odredbe (recitali) dosad usvojenih europskih instrumenata, koji se odnose na spajanje obitelji i pravo dugoročnog boravka, jasan su dokaz kako je cilj europskog zakonodavstva integracija građana u društvo u kojem žive.[21] Primjena prava u mjestu uobičajenog boravišta može se smatrati daljnjim korakom prema pravnoj integraciji osoba koje žive izvan svoje matične zemlje, pogotovo kad se ističe kulturalna uvjetovanost prava, posebice na području obiteljskog i nasljednog prava.

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19 ECJ, Case C-353/06 (Grunkin-Paul) [2008] ECR2008, I-7639, [19] *et seq*.

20 Vidi također Direktivu 2004/38/EZ Europskog parlamenta i Vijeća od 29. travnja 2004. o pravu građana Unije i članova njihovih obitelji na slobodno kretanje i boravište na području države članice, SL 2004 L 158/77, Recital 18: "Kako bi se stvorio istinski instrument za integraciju u društvo države članice domaćina u kojoj građanin Unije boravi, jednom stečeno pravo na stalno boravište ne bi smjelo biti podložno nikakvim uvjetima." Vidi također Recital 23 *et seq*. i čl. 28.

21 Direktiva Vijeća 2003/86/EZ od 22. rujna 2003. o pravu na spajanje obitelji, SL 2003 L 251/12, Recital 3:"[…] Europska unija bi trebala osigurati pravično postupanje s državljanima trećih zemalja koji zakonito borave na državnom području država članica […] i snažnija politika integracije trebala usmjeriti kako bi im se odobrila prava i obveze usporedive s onima državljana Europske unije." i Recital 4: "Spajanje obitelji […] pomaže stvaranju sociokulturne stabilnosti koja omogućava integraciju državljana trećih zemalja u državama članicama, što također služi promicanju ekonomske i socijalne kohezije, temeljnom cilju Zajednice navedenom u Ugovoru."; Direktiva Vijeća 2003/109/EZ od 25. studenoga 2003. o statusu državljana trećih zemalja s dugotrajnim boravištem, SL 2004 L 16/44, Recital 4: "Integracija državljana trećih zemalja koji imaju dugotrajno boravištеu državama članicama ključni je element promicanja ekonomske i socijalne kohezije,

2. Zaštita autonomije europskog zakonodavca

Nadalje, *autonomna* odluka europskog zakonodavca o mjerodavnoj poveznici u skladu je sa zaštitnim jamstvima načela boravišta. Nasuprot tome, uporaba državljanstva delegirat će određivanje definicije poveznice, korištene u europskom izboru pravu, na nacionalnog zakonodavca.[22] U slučaju sukoba zakona, pravo države čije se državljanstvo propituje određuje je li osoba njezin državljanin. Državljanstvo je politički instrument u rukama zakonodavca države članice.[23] Europski zakonodavac nije nadležan za usklađivanje nacionalnih zakona država članica.[24] Državljanstvo bi kao poveznica moglo biti manje problematično u nacionalnim kolizijskim zakonima gdje zakonodavac može, barem što se tiče primjene *vlastitog* materijalnog prava, definirati poveznicu kroz svoje nacionalno pravo. Situacija je ipak drukčija na europskoj razini gdje zakonodavac stvara prijelazna kolizijska pravila koja, u isto vrijeme, ne definiraju međunarodni opseg *vlastitog* materijalnog prava, nego radije ocrtavaju *ostala* nacionalna materijalna prava.[25]

Razgraničenje nacionalnih prava treba biti autonomno uređeno europskim pravom. U suprotnom će europske političke odluke biti predmet nacionalne politike. Ako, naprimjer, europski zakonodavac, pri izradi kolizijskih pravila za pitanja bračne stečevine, dođe do zaključka kako interes za stabilnošću supružnika vezan uz zemlju podrijetla treba biti zaštićeniji u odnosu na integracijski interes, ta će politička odluka čak i u okviru Europe moći biti samo djelomično provedena na temelju načela državljanstva. Ovisno o nacionalnoj politici u odnosu na integraciju, lakoća s kojom stranci mogu steći državljanstvo razlikuje se u svakoj od država članica. S obzirom na migracijsku politiku, neke zemlje nesebično dodjeljuju državljanstvo osobama s migracijskom prošlošću. Takve će države članice, što se tiče državljanstva, radije podržati integracijsku politiku nego zaštititi interes za stabilnošću tradicionalno predviđen kolizijskim pravilima vezanima uz nacionalna načela.

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temeljnog cilja Zajednice koji je naveden u Ugovoru.“ i Recital 12: “Radi uspostave stvarnog instrumenta za integraciju osoba koje imaju dugotrajno boravište u društvo u kojem žive, osobe koje imaju dugotrajno boravište trebale bi uživati jednaki tretman kao i državljani države članice u širokom opsegu ekonomskih i socijalnih pitanja, pod odgovarajućim uvjetima definiranim u ovoj Direktivi.“

22 Važnost državljanstva u nacionalnom pravu država članica u europskom međunarodnom privatnom pravu također je istaknuo Defhloff, *ZEuP* (2007), str. 992. i 996.

23 Basedow, *IPRax* (2011), str. 109. i 111.

24 Vidi čl. 61.(a) i (b), čl. 62. i 63. Ugovora o osnivanju Europske zajednice, koji su ograničeni na mjere iz područja azila, imigracije i zaštite prava državljana trećih zemalja.

25 Vidi Basedov, *Conflict of Laws and the Harmonization of Substantive Private Law in the European Union*, u: *Liber amicorum Guido Alpa, Private Law Beyond the National Systems*, ur. Andenas *et al*. (2007) str. 168., 172 *et seq*.

Potrebno je dodati kratko objašnjenje vezano uz razvoj zakona koji uređuju državljanstvo u državama članicama. Riječ je o *porastu višestrukog državljanstva* koji će dodatno oslabiti načelo državljanstva. U slučaju dvostrukog i višestrukog državljanstva, načelo kao što je ovo naravno ne uspijeva kao poveznica. Europski sud pravde u predmetu *Garcia Avello*[26] *postavio je određene granice, dajući automatski prioritet domaćem državljanstvu kao jedinom održivom rješenju u odnosu na efektivno državljanstvo (koje će, u većini slučajeva, biti pravo države uobičajenog boravišta) ili dajući strankama, kao u predmetu Hadidi,*[27] *pravo izbora između svojih državljanstava.*

3. Obitelji s dva državljanstva, jedno obiteljsko pravo i usklađivanje foruma i *iusa*

Dvije su prednosti uporabe uobičajenog boravišta kao primarne poveznice u obiteljskim stvarima koje svakako kratko treba spomenuti. U obiteljima s dva državljanstva, ako članovi obitelji imaju zajedničko uobičajeno boravište, zakonodavcu načelo boravišta omogućuje da dva različita obiteljska odnosa podnese pod jedno pravo. Također, s obzirom na to da će sudovi uglavnom postupati u obiteljskim predmetima vezanima uz osobe koje borave na njihovom teritoriju, u skladu s načelom boravišta, sudovi će primijeniti pravo vlastite države i tako uskladiti forum i *ius*, odnosno nadležnost i mjerodavno pravo.

4. Rastuća uporaba uobičajenog boravišta kao poveznice

Tko je mogao i pomisliti kako će rastuća uporaba načela boravišta u europskom međunarodnom privatnom pravu biti takav argument u korist uobičajenog boravišta. Uporaba uobičajenog boravišta u preostalim obiteljskim stvarima, koje dosad nisu usklađene, pod okriljem će Europe manje ili više uskladiti nadležnost i mjerodavno pravo u tim područjima.

Ovo unutarnje usklađivanje, međutim, ne bi trebalo skrivati činjenicu kako će u odnosu na državljane trećih država koji borave u EU-u prihvaćanje načela boravišta voditi k međunarodnoj disharmoniji. Mnogi državljani trećih zemalja trenutačno borave u Europskoj uniji, većinom iz Turske (2,3 milijuna), Maroka (1,7 milijuna), Albanije (0,8 milijuna) i Alžira (0,6 milijuna).[28] Oni i dalje, barem u određenoj mjeri, naginju načelu državljanstva u obiteljskim i

26 ECJ, Case C-148/02 (Garcia Avello) [2003] ECR I-11613.

27 ECJ, Case C-168/08 (Hadadi) [2009] ECR I-6871.

28 Komunikacija Komisije Vijeću, Europskom parlamentu, Europskom gospodarskom i socijalnom odboru i Odboru regija – Treće godišnje izvješće o migracijama i integraciji, COM(2007) 512 od 11. rujna 2007, t. 3.

nasljednim stvarima. Dakle, njihov sud će u obiteljskim stvarima primijeniti drukčije pravo od europskog suda. Ipak, ako Europska unije prihvati načelo boravišta za sve države članice, stavit će se pritisak na treće države da promisle o svojem stajalištu.[29]

5. Zaštita interesa za stabilnošću

Međutim, ne može se previdjeti da uporaba uobičajenog boravišta ignorira interes za *stabilnošću* osoba kojih se tiče. Već je spomenuto kako se načelo boravišta temelji na pretpostavci ili političkom cilju da je osoba najuže povezana s državom u kojoj ima boravište i da prevladava njezin interes za integracijom nad interesom za stabilnošću. Ova je pretpostavka posebice manjkava u slučaju da kod osobe prevlada interes za stabilnošću vezan uz matičnu državu ili drugu državu, primjerice, državu prošlog boravišta.

Valja napomenuti da u ovom kontekstu pravo EU-a ne štiti samo interes za integracijom. Europska unija se također posebice zalaže za zaštitu *interesa za stabilnošću* u slučajevima sukoba prava. Zaštita interesa za stabilnošću posebice je važna za ostvarivanje unutarnjeg tržišta. Osnovne slobode mogu biti osigurane samo ako ispunjenje tih sloboda nije povezano s gubitkom već stečenog pravnog stanja. Mnogo je primjera u kojima je taj problem postao vidljiv, primjerice, načelo zemlje porijekla te sudska praksa Europskog suda pravde koja se tiče priznanja stranih tvrtki (*Centros*, *Überseering* i *Inspire Ar*) i priznanja naziva stečenih u inozemstvu (*Grunkin-Paul* i *Sayn-Wittgenstein*).

Međutim, interes za stabilnošću bit će obnovljen, čak i dok načelo boravišta prevladava, ako osoba na koju se odnosi ima mogućnost izabrati, primjerice, pravo države čiji je državljanin te ima pravo utvrđivanja mjerodavnog prava bez obzira na moguće promjene uobičajenog boravišta u budućnosti.

IV. Definiranje uobičajenog boravišta

Često se kao kritika načela boravišta navodi kako je državljanstvo osobe u većini slučajeva lako utvrditi s pomoću službenih dokumenata, dok koncept uobičajenog boravišta podrazumijeva *neizvjesnosti* i čak ostavlja prostor za manipulacije. S obzirom na to, načelo boravišta do neke se mjere zanemaruje u odnosu na nadležnost i mjerodavno pravo upravo zbog *predvidljivosti* i *pravne izvjesnosti*, veoma važne u europskom međunarodnom privatnom pravu. Međutim, treba naznačiti kako je u međuvremenu Europski sud pravde u

29 Vidi Henrich, *Abschied vom Staatsangehörigkeitsprinzip*, u: FS Hans Stoll (2001) str. 437, 445.

svojoj sudskoj praksi[30] dao prve smjernice nacionalnim sudovima za slučajeve neovisne primjene načela boravišta, s tim da na umu treba imati da se koncept uobičajenog boravišta razlikuje u europskim državama. Nadalje, europskom zakonodavcu dana je mogućnost da ubuduće definira koncept uobičajenog boravišta kao što je to učinjeno, primjerice, u Uredbi o nasljeđivanju – barem u recitalu.

V. Zaključak

Molim vas dopustite mi da zaključim veoma kratko: politika europskog zakonodavca kojom prati načelo boravišta – opravdana je. Načelo državljanstva vjerojatno će igrati sporednu ulogu, kao podredna poveznica, kao subjektivna poveznica ili kao element u definiciji uobičajenog boravišta. Međutim, veoma sam znatiželjan hoće li se europski zakonodavac imati hrabrosti držati svoje odluke u korist uobičajenog boravišta pri okretanju prema međunarodnom obiteljskom pravu kao što je građanski status (dakle, sukob prava u slučajevima roditeljstva, braka, osobnog imena, posvojenja) gdje je načelo državljanstva mnogo više ukorijenjeno u međunarodno privatno pravo država članica nego što je u područjima pokrivenim europskim zakonodavstvom.

30 Vidi u odnosu na Brisel II *bis* Uredbu, ECJ, Case C-435/06 (*C*) [2007] ECR I-10141 i ECJ, Case C-497/10 PPU (*Mercredi*) [2010] ECR I-14309.

KOJE SU FUNKCIJE STRANAČKE AUTONOMIJE U MEĐUNARODNOM OBITELJSKOM I NASLJEDNOM PRAVU? POGLED IZ EU-ove PERSPEKTIVE*

Csongor István Nagy**

I. Uvod

Članak, iz kritičke perspektive i usredotočen na pravo EU-a, razmatra teorijske i političke okolnosti koje mogu opravdati stranačku autonomiju u području međunarodnog obiteljskog i nasljednog prava, analizira moguće razloge za primjenu kolizijskopravne stranačke autonomije uopće te istražuje njihovu primjenjivost u kontekstu međunarodnog obiteljskog i nasljednog prava.

Iako se, ironično, stranačka autonomija prvi put pojavljuje u obiteljskom pravu (vidi Dumoulinov *Consilium* 53. od 1525)[1] dokazano je kako ona u međunarodnom obiteljskom i nasljednom pravu, za razliku od ugovornog, ima prilično ograničenu funkciju. Članak ukazuje kako je mogućnost da stranke izbjegnu prisilne propise primjenjive u slučaju izostanka stranačke autonomije, manje prihvaćena u obiteljskom i nasljednom pravu zbog jačeg utjecaja javnog poretka.

Članak objašnjava kako je glavna funkcija stranačke autonomije u obiteljskom i nasljednom pravu otklanjanje neizvjesnosti mjerodavnog prava (osiguravanje predvidljivost), zaštita stečenih prava te osiguranje primjene načela zemlje porijekla. U brojnim slučajevima nacionalna prava koriste različite poveznice (koje dovode do primjene različitih prava), kada se stranke suočavaju s rizikom da će obiteljski ili nasljedno-pravni odnosi valjani u jednoj državi (npr. zakonito sklopljen brak) biti nevažeći ili nepostojeći u drugoj državi.

* Prijevod publiciranog rada: Cs. I. Nagy, "What function should and should not party autonomy have in family law? An EU perspective" 4 *Nederlands Internationaal Privaatrecht, Special Issue on Party Autonomy in International Family Law* (2012) pp. 576–586. Prijevod Martina Drventić.

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1 Ch. Dumoulin, *Caroli Molinaei franciae et germaniae celeberrimi juris consulti et in supremo parisiorum senatu antiqui advocati, Omnia Quae Extant Opera* (Paris, 1681, II) str. 963.

Stranačka autonomija (izričit ili prešutan stranački izbor) može služiti kao alat za zaštitu tih stečenih prava. Svi ostali razlozi koji govore u prilog načela autonomije stranaka u području ugovornog prava (autonomija kao temeljno pravo, snažne praktične prednosti stranačkog izbora i dr.) nisu odgovarajuće primjenjivi u odnosu na realnost i politiku obiteljskog i nasljednog prava. Također se iznosi stav da je gore navedena uloga stranačke autonomije manje svrsishodna u stvarima vezanima za pravne sustave koji imaju ujednačeno kolizijsko pravo. Stranačka autonomija manje je opravdana u predmetima u kojima uključene države imaju ujednačena kolizijska pravila, kao što to imaju države članice EU-a.

U članku se također razmatra kako se stranačka autonomija u EU-u, posebice u obiteljskom i nasljednom pravu, može opravdati međusobnim priznavanjem nacionalnih kolizijskih pravila među državama članicama. Stranačka autonomija u međunarodnom privatnom pravu EU-a također je i zakonodavna metoda koja teži unifikaciji nacionalnih kolizijskih zakona na temelju načela sporazuma i uzajamnog priznanja, koja se pobrinula da kolizijska pravila EU-a zamijene sve ili većinu nacionalnih kolizijskih modela. Dok samo jedno od primjenjivanih nacionalnih kolizijskih načela može pobijediti u "borbi ideala", dodvoriti se europskom zakonodavcu i tako postati pravilo o mjerodavnom pravu u slučajevima izostanka stranačke autonomije, neuspješni se kandidati (*op. urednice:* ostale poveznice i kolizijska načela) obično pojavljuju u okviru pravila (*op. urednice:* ograničenoj) o stranačkoj autonomiji kojima se određuje raspon prava između kojih stranke mogu izabrati mjerodavno pravo.

II. Status stranačke autonomije u europskom međunarodnom privatnom pravu

Stranačka autonomija je na jednak način uvrštena u različite kolizijske instrumente EU-a. Izvedena je (barem djelomično) iz temeljnih sloboda zajamčenih europskim pravom (zabrana diskriminacije na temelju državljanstva, pravo slobode kretanja i dr.) i "postupno postaje osnovno načelo [u europskom međunarodnom privatnom obiteljskom pravu], a to joj uspijeva i na ustavnoj razini".[2] Nije iznenađujuće kako je ona u središtu kolizijskih pravila ugovornog prava (Uredba Rim I).[3] Stranačka je autonomija u isto vrijeme stekla i

2 T. M. Yetano, "The Constitutionalisation of Party Autonomy in European Family Law" 6 *Journal of Private International Law* (2010) str. 155.–156.

3 Uredba (EZ) br. 593/2008 Europskog parlamenta i Vijeća od 17. lipnja 2008. o pravu koje se primjenjuje na ugovorne obveze (Rim I) Sl.l. EU 2008 L 177, str. 6.–16.

važnu ulogu u području izvanugovornih obaveza (Uredba Rim II),[4] razvoda (Uredba Rim III),[5] uzdržavanja (Uredba o uzdržavanju),[6] nasljeđivanja (Uredba o nasljeđivanju)[7] te će vrlo vjerojatno postići sličan status i u pitanjima bračne imovine (Prijedlog Uredbe o bračnoj stečevini).[8]

U Uredbi Rim I pravo stranaka na izbor mjerodavnog prava prilično je neograničeno: mogu izabrati pravo bilo koje države te se mogu sporazumjeti o mjerodavnom pravu i prije i nakon nastanka spora. Uredba Rim II također strankama jamči pravo izbora mjerodavnog prava, međutim, ta je sloboda ograničena. U slučajevima kada stranke obavljaju poslovnu djelatnost izbor mjerodavnog prava nije vremenski ograničen, dok je u svim drugim slučajevima izbor prava moguć samo nakon događaja koji je prouzročio nastalu štetu. Sukladno tome, sporazumi o izboru prava općenito su dopušteni u odnosu stranaka u kojem obje obavljaju poslovnu djelatnost, dok je u odnosu *obavljač poslovne djelatnosti – potrošač* i odnosu *potrošač – potrošač* izbor prava moguć tek nakon događaja koji je prouzročio nastalu štetu.[9]

Uredba Rim III pitanje stranačke autonomije uređuje u čl. 5. određujući kako se bračni drugovi mogu usuglasiti oko određivanja mjerodavnog prava za razvod braka i zakonsku rastavu pod uvjetom da je to jedno od sljedećih prava: pravo države u kojoj bračni drugovi imaju uobičajeno boravište u trenutku sklapanja sporazuma; pravo države u kojoj su bračni drugovi imali zadnje

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4 Uredba (EZ) br. 864/2007 Europskog parlamenta i Vijeća od 11. srpnja 2007. o pravu koje se primjenjuje na izvanugovorne obveze (Rim II), Sl.l. EU 2008 L 199, str. 40.–49.

5 Uredba Vijeća (EU) br. 1259/2010 od 20. prosinca 2010. o provedbi pojačane suradnje u području prava primjenljivog na razvod braka i zakonsku rastavu, Sl.l. EU 2010 L 343, str. 10.–16.

6 Uredbe Vijeća (EZ) br. 4/2009 od 18. prosinca 2008. o nadležnosti, mjerodavnom pravu, priznanju i izvršenju odluka te suradnji u stvarima koje se odnose na obveze uzdržavanja, Sl.l. EU 2009 L 7, str. 1.–79.

7 Uredba (EU) br. 650/2012 Europskog parlamenta i Vijeća od 4. srpnja 2012. o nadležnosti, mjerodavnom pravu, priznavanju i izvršavanju odluka i prihvaćanju i izvršavanju javnih isprava u nasljednim stvarima i o uspostavi Europske potvrde o nasljeđivanju, Sl.l. EU 2012 L 201, str. 107.–134.

8 Prijedlog Uredbe Vijeća o nadležnosti, mjerodavnom pravu, priznavanju i izvršavanju odluka u stvarima o režimima bračne stečevine, COM(2011) 126 final; Prijedlog Uredbe Vijeća o nadležnosti, mjerodavnom pravu, priznavanju i ovrsi odluka o imovinskim posljedicama registriranog partnerstva, COM (2011), 127 final.

9 Čl. 14.(1) Uredbe Rim II. Za stranački autonomiju u Uredbi Rim II vidi: npr. Mo Zhang, "Party Autonomy in Non-contractual Obligations: Rome II and Its Impacts on Choice of Law" 39 *Seton Hall Law Review* (2009) str. 861.–917.; T. Kadner Graziano, "Freedom to Choose the Applicable Law in Tort – Articles 14 and 4(3) of the Rome II Regulation", u: J. Ahernand, W. Binchy (eds.), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations* (Leiden, Martinus Nijhoff Publishers 2009) str. 113.–132.

uobičajeno boravište, ako jedan od njih i dalje u toj državi ima uobičajeno boravište u trenutku sklapanja sporazuma; pravo državljanstva bilo kojeg bračnog druga ili *lex fori*.

Uredba o uzdržavanju u čl. 15. propisuje određivanje mjerodavnog prava u skladu s Haškim protokolom o pravu mjerodavnom za obveze uzdržavanja od 23. studenog 2007. godine, koji pak strankama pruža mogućnost odabira mjerodavnog prava. Stranke mogu odrediti *lex fori* kao mjerodavno pravo za određeni postupak (čl. 7. Haškog protokola iz 2007. godine)[10] ili mogu sklopiti sporazum o izboru prava (čl. 8. Haškog protokola iz 2007. godine). Izabrati mogu pravo države čiji je bilo koja stranka državljanin, pravo države u kojoj bilo koja stranka ima uobičajeno boravište ili pravo države koje je mjerodavno za njihov imovinski režim ili njihov razvod braka ili rastavu.

U skladu s čl. 21. Uredbe o nasljeđivanju, *lex successionis* pravo je države u kojoj je umrli imao svoje uobičajeno boravište, međutim prema čl. 22. "Osoba može za pravo koje će urediti u cijelost njezino nasljeđivanje izabrati pravo države čiji je državljanin u trenutku izbora ili u trenutku smrti."

Stranačka će autonomija vrlo vjerojatno biti dijelom europskog kolizijskog prava i u pitanjima bračne imovine. Čl. 16. Prijedloga Uredbe o bračnoj stečevini omogućuje supružnicima (ili budućim supružnicima) mogućnost birati između sljedećih prava: pravo države zajedničkog uobičajenog boravišta supružnika ili budućih supružnika, pravo države uobičajenog boravišta jednog od supružnika, pravo države čiji je državljanin jedan od supružnika ili budućih supružnika.

Gore prikazan sustav europskih kolizijskih instrumenata pokazatelj je kako stranačka autonomija predstavlja važan dio kolizijskih pravila, uključujući i područje obiteljskog i nasljednog prava. U isto vrijeme, on otkriva kako su prava između kojih stranke mogu birati odabrana na temelju poveznica koje zakonodavac koristi u slučaju izostanka stranačkog sporazuma o izboru prava (*op. urednice*: objektivne poveznice); riječ je o zakonskim rješenjima koja se pojavljuju u odredbama međunarodnog privatnog prava jedne ili više država.[11]

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10 "Vjerovnik uzdržavanja i dužnik uzdržavanja za potrebe isključivo određenog postupka u dotičnoj državi mogu izričito odrediti pravo te države kao mjerodavno pravo za obvezu uzdržavanja".

11 Naravno, ovdje nije sporno kako bi za tu svrhu prikladnije bile poveznice kojima se ograničava obujam stranačke autonomije.

III. Koje su funkcije stranačke autonomije u kolizijskom pravu?

Stranačka je autonomija (barem što se tiče ugovornog prava)[12] bila univerzalno načelo kolizijskog prava i u biti, globalno priznata.[13] Nažalost, učenje o stranačkoj autonomiji više je usmjereno na zamršenost stranačkog izbora prava i većinom ignorira pitanja kao što su teorijski i politički temelji, kao i funkcije koje ta sloboda može imati.[14] Pri razmatranju primjerenosti stranačke autonomije u međunarodnom obiteljskom i nasljednom pravu, nužno je obratiti pozornost na ontološko pitanje o tome zašto je stranačka autonomija opravdana. U nastavku se istražuju i primjenjuju potencijalni argumenti u korist stranačke autonomije u međunarodnom obiteljskom i nasljednom pravu. U prvom koraku analizirana je tradicionalna uloga stranačke autonomije. Dokazano je kako teoretski i praktični argumenti koji podupiru stranke na neograničenu autonomiju u ugovornom pravu, gube svoju uvjerljivost kada ih se stavi u

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12 Valja napomenuti kako stranačka autonomije nije uvijek pobjeđivala. Na početku 20. stoljeća, u nekim državama čak i poslije, pravo stranaka na izbor mjerodavnog prava bilo je snažno osporavano. Vidi: G. Rühl, "Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency", u: E. Gottschalk *et al*. (eds.), *Conflict of Laws in a Globalized World* (Cambridge, Cambridge University Press 2011), str. 155.–157., str. 153.; H. Muir Watt, "'Party Autonomy' in International Contracts: From the Makings of a Myth to the Requirements of Global Governance" 6 *European Review of Contract Law* (2010) str. 250.–254.

13 Vidi: Resolution of 1991/2 of the Institut de Droit international, usvojena u Basleu ("L'autonomie de la volonté des parties dans les contrats internationaux entre personnes privées"), dostupna na francuskom jeziku na www.idi-iil.org/idiF/resolutionsF/1991_bal_02_fr.PDF; P. Nygh, *Autonomy in International Contracts*, (Oxford, Clarendon Press 1999), str. 13. ("Danas je općepriznato da stranke međunarodnog ugovora imaju slobodu izabrati mjerodavno pravo i kao posljedicu toga mogu izabrati forum, sudski i arbitražni, za rješavanje sporova koji mogu proizaći iz takvog ugovora."); R. J. Weintraub, "Functional Developments in Choice of Law for Contracts" 187 *Recueil des cours* (1984) str. 239.–271. ("[M]ožda je najšire prihvaćeno pravilo međunarodnog prava našeg vremena to da su ugovorne stranke slobodne ugovoriti koje će pravo urediti njihov odnos."); P. J. Borchers, "Choice of Law in the American Courts in 1992: Observation and Reflections" 42 *American Journal of Comparative Law* (1994), str. 125.–135.; Letter from Friedrich K. Juenger to Harry C. Sigman, Esq. (June 23, 1994), reprinted in 28 *Vanderbilt Journal of Transnational Law* (1995), str. 445.–447. ("Diljem svijeta, na dohvat ruke, postoji univerzalni sporazum prema kojem stranke s otprilike jednakom pregovaračkom snagom trebaju biti slobodne pregovarati o tome koji će zakon urediti njihov ugovor.").

14 Vidi: M. Lehmann, "Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws" 41 *Vanderbilt Journal of Transnationa lLaw* (2008) str. 381.–383. ("Autori konfliktnog prava previdjeli su ovu činjenicu te nisu uspjeli osigurati teorijsko objašnjenje zašto je strankama dopušteno izabrati mjerodavno pravo. Mogućnost klauzule o izboru prava uglavnom se smatra sporednim problemom ili onim koje je problematično. Iako je verbalno priznato kako je stranačka autonomija ostala prekršitelj unutar utvrde konfliktne teorije.").

kontekst obiteljskog i nasljednog prava. U drugom su koraku te potencijalne funkcije stranačke autonomije ispitane s obzirom na pravo slobode kretanja pod okriljem unutarnjeg tržišta EU-a. Ističe se kako se te funkcije mogu poprilično pripisati stranačkoj autonomiji u području obiteljskog i nasljednog prava. Međutim, one opravdavaju samo ograničenu stranačku autonomiju (tj. kada zakon određuje popis prava između kojih stranke mogu birati) te ponešto gube na jačini u odnosima između država članica ako su pravila koja određuju mjerodavno pravo, u nedostatku stranačkog izbora (objektivne poveznice), ujednačene na razini EU-a.[15]

3.1. Tradicionalne funkcije stranačke autonomije: stranački izbor u ugovornom pravu

3.1.1. Kolizijskopravna stranačka autonomija kao kvazitemeljno pravo i zaštita autonomije koju daje materijalno pravo

Stranačka se autonomija u međunarodnom privatnom pravu može smatrati dijelom individualne opće autonomije. U ovom članku, stranačka autonomija (općenito, i posebno u međunarodnom privatnom pravu) samoj je sebi svrha. Pravo izbora mjerodavnog prava može biti viđenje materijalnopravne stranačke autonomije,[16] ili ambicioznije, može biti izvedeno iz više općenitijih temeljnih prava individualne autonomije.[17]"Dok je izvorno [ugovor] viđen

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15 Usp. Lehman, *op. cit*. bilj. 14., str. 392.–393. (["P]redvidljivost može biti osigurana i na druge načine osim stranačkom autonomijom. Primjerice, ako sudovi diljem svijeta prihvate ista kolizijska pravila, stranke će također moći predvidjeti koji pravo će se primijeniti na njihov spor... Teorija koja ipak favorizira stranačku autonomiju, kao sredstvo koje osigurava predvidljivost, temelji se naravno na iskustvu.")

16 Vidi: E. G. Lorenzen, "Validity and Effects of Contracts in the Conflict of Laws"30 *Yale Law Journal* (1921) str. 572.–575, str. 565.; Letter from Friedrich K. Juenger to Harry C. Sigman, *op. cit*. bilj. 13., str. 447. i 449. "[S]tranačka autonomija se na razini sukoba zakona ogleda u materijalnom načelu ugovorne slobode."); Lehmann, *op. cit*. bilj. 14., str. 415. ("Na neki način, stranačka autonomija nalikuje na ulogu koju ima volja u nacionalnom ugovornom pravu."); Muir Watt, *op. cit*. bilj. 12., str. 257. ("[U] skladu s tradicionalnim učenjem, osnaživanje privatnih sudionika na odabir prava koje će urediti njihov odnos prirodna je posljedica, i svakako se ogleda na slobodu ugovora u obiteljskom okruženju."). Za opću stranačku autonomiju u Europi vidi: A. Colombi Ciacchi, "Party Autonomy As a Fundamental Right in the European Union" 6 *European Review of Contract Law* (2010) str. 303.–318. usp. čl. 1134.(1) Građanskog zakonika, propisuje kako ("[Z]akonito sklopljeni sporazumi pravno reguliraju odnos osoba koje su ih sklopile") ("Les conventions légalement formées tiennent lieu de loi à ceuxqui les ont faites.") (Prijevod dostupan na www.legifrance.gouv.fr /content /download /1950 /13681 /version/3/file/Code_22.pdf).

17 Vidi: Lehmann, *op. cit*. bilj. 14., str. 417.–418. (Za dogmatsku vrijednost pristanka vidi: Yetano, *op. cit*. bilj. 12., str. 191.–192.)

kao obveza nametnuta strankama općim pravom koji proizlazi iz njihova poslovnog odnosa, on može biti viđen i kao obveza stvorena od strane samih stranaka.“[18] Kolizijskopravna stranačka autonomija može se također poduprijeti argumentom kako ugovori s međunarodnim elementom “istupaju“ iz nacionalnog prava i ulaze u stanje bez zakona.[19] Nadalje, u ugovornom pravu, utjecaj treće strane obično je manje važan: ugovor se tiče stranaka i obično daje prava i obveze isključivo strankama. Izuzev nekih ugovora koji se vežu uz slabiju ugovornu stranu[20] i ponekih pravila koja u obzir uzimaju javni poredak, ne postoji uvjerljiv razlog za ograničavanje stranačke slobode u određivanju sadržaja ugovora. Premda se odstupanje od prisilnih pravila prava koje će biti mjerodavno u slučaju izostanka stranačkog izbora ne može uvjerljivo uklopiti u konceptualizaciju kolizijskog prava, ti se nacionalni problemi mogu prevladati zahvaljujući praktičkim zaslugama neograničene stranačke autonomije. Jednostavnije rečeno, stranačka autonomija priznata je u ugovornom

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18 Nygh, *op. cit*. bilj. 13., str. 7.

19 Vidi: F. Johns, “Performing Party Autonomy“ 71 *Lawand Contemporary Problems* (2008) str. 243.–249. Za francuski koncept *contrat san sloi* vidi: P. Mayerand, V. Heuzé, 8th edn., *Droit international privé* (Paris, Montchrestien 2004) str. 514.; Lehmann, *op. cit*. bilj. 14., str. 414. (“[D]anašnji je problem što postoji niz prava koja sama zahtijevaju svoju primjenu. Iz pravne perspektive, previše proturječnih pravila s jednakom pravnom snagom stvaraju pravnu prazninu. Dakle, ponovno smo u prirodnom stanju, ili preciznije u 'modernom prirodnom stanju', gdje objektivno ne postoji mjerodavno pravo – paradoksalno, zbog obilja zakona. U tom kontekstu, stranke dohvaćaju svoju preostalu snagu kako bi regulirale svoje odnose. Stranačka autonomija nije ništa drugo nego osobe koje se brinu za prirodno stanje vlastitih poslova.“); R. A. Brand, “Balancing Sovereignty and Party Autonomy in Private International Law: Regression at the European Court of Justice“, u: V. Tomljenovic, J. A. Erauw i P. Volken (eds.), Liber Memorialis Petar Šarčević: Universalism, Traditionand the Individual (Munich, Sellier 2006) str. 35.–44. (“Međunarodnopravno pravo demokratskih vlada može se nositi s važnom supsidijarizacijom autoriteta pojedinca, uključujući i izbor pravila mjerodavnih za privatne transakcije. To bi, naravno, trebao biti pojedinac, a ne država, koji će ostvariti pravo na demokratski oblik vlasti.“). Usp. Muir Watt, *op. cit*. bilj. 12., str. 257.–258. (“Razlog zbog kojeg svaka suverena država dopušta strankama, subjektima tog ograničenja, ugovaranje svojih vlastitih pravila i zamjenu pravila susjedne zajednice, nalazi se u podrazumijevanoj posebnoj potrebi prekograničnih transakcija i slabljenju potraživanja bilo koje od država da ih isključivo regulira. Tada nema *contat sans loi*, nego regulirane slobode biti subjektom suverenog pravnog poretka koji je izabrala jedna od stranaka.“).

20 Potrošački ugovori, ugovori o radu i o osiguranju, vidi: čl. 6.–8. Uredbe Rim I. Također vidi: ECJ 9 November 2000, Case C-381/98, ECR 2000, str. I-9305, 29 *NIPR* (2001) (*Ingmar*). Za napetost između stranačke autonomije u odnosu na presudu Europskog suda pravde u predmetu *Ingmar* vidi: H. L. E. Verhagen, “The Tension between Party Autonomy and European Union Law: Some Observationson Ingmar GB Ltd v Eaton Leonard Technologies Inc“ 51 *International & Comparative Law Quarterly* (2002) str. 135.–154.

pravu jer djeluje kao učinkovit alat u međunarodnoj trgovini,[21] a ne zato što je to dogmatski razumno i dobro utemeljeno. Konceptualni nedostaci neograničene stranačke autonomije nadjačani su njezinim praktičnim prednostima.[22]

Teorijom o "temeljnom ljudskom pravu" nije moguće valjano opravdavati stranačku autonomiju u međunarodnom obiteljskom i nasljednom pravu. Ovdje, za razliku od ugovornog prava, stranke imaju jače ograničenu materijalnopravnu autonomiju te se suočavaju sa strožim pravilima javnog poretka, stoga argument kako je kolizijskopravna stranačka autonomija projekcija autonomije u materijalnom pravu, nije valjana u odnosu na obiteljsko i nasljedno pravo. Iako možemo argumentirati kako ni u ugovornom pravu ne možemo zanemariti prisilna pravila, većina tih pravila manje su vezana za javni poredak. Zapravo je "relativno obvezni"[23] karakter taj koji omogućuje strankama ostvarivanje neograničene autonomije u ugovornom pravu. U međunarodnom obiteljskom i nasljednom pravu važan je utjecaj "treće strane" (vanjskih utjecaja). Dok, "nema ograničenja na pravo pojedinca u izboru mjerodavnog prava sve dok se relevantno pitanje odnosi samo na pojedinca i ne dotiče treće",[24] u obiteljskom i nasljednom pravu moralna očekivanja društva i potreba za zaštitom određenih temeljnih društvenih institucija podrazumijevaju da javni poredak prodire u "privatnost" stranaka. Napokon, ne postoji nesavladiv praktični argument koji bi bio teži od nedostataka stranačke autonomije.[25]

3.1.2. Pravna sigurnost i predvidljivost

Stranačka autonomija može biti opravdana svrhom pravne sigurnosti i predvidljivosti.[26] S gledišta učinkovitosti, stranački izbor (vjerojatno) može biti korisniji od objektivnih poveznica (pravila primjenjiva u slučaju izostanka stranačkog izbora), budući da je vjerojatnije da će stranke biti sposobne

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21 Vidi: Muir Watt, *op. cit*. bilj. 12., str. 255.–256.

22 Vidi niže poglavlje 3.1.3.

23 Za izraz "relativno obavezan" vidi: Lehmann, *op. cit*. bilj. 14., str. 420.

24 *Ibid*., str. 423.

25 Vidi niže poglavlje 3.1.3.

26 Vidi: M. J. Levin, "Party Autonomy: Choice-of-Law Clauses in Commercial Contracts" 46 *Georgetown Law Journal* (1958) str. 260.–269. ("u trgovačkom pravu, predvidljivost može najbolje biti ostvarena kroz stranačku autonomiju"); A. Shapira, "Territorialism, National Parochialism, Universalism and Party Autonomy: How Does One Square the Choice-of-Law Circle?" 26 *Brooklyn Journal of International Law* (2000) str. 202.–203., str. 199.; Mo Zhang, "Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law" 20 *Emory International Law Review* (2006) str. 511.–553.; Lehmann, *op. cit*. bilj. 14., str. 392.–393.; Yetano, *op. cit.* bilj. 12., str. 184.–186.

donijeti adekvatniju odluku o izboru prava (primjerenost). Prvo, stranke mogu napraviti bolji izbor i pronaći pravo koje najbolje odgovara njihovu slučaju i situaciji.[27] Drugo, stranački sporazum čini primjenu mjerodavnog prava bržom i jasnijom (predvidljivost).[28] Jedna je od prednosti stranačke autonomije u tome što pitanje mjerodavnog prava nije prepušteno zamršenosti kolizijskog prava. Nacionalna kolizijska pravila upotrebljavaju različite poveznice. Nadalje, koliko god bila jasna kolizijska pravila kod izostanka stranačke autonomije, ona zasigurno sadržavaju određenu količinu nesigurnosti. Takva se nedoumica može otkloniti ugovaranjem mjerodavnog prava.

Zahtjev za predvidljivošću podržava prijedlog prema kojem stranke mogu izabrati jedno od prava koje je s ugovorom u određenoj vezi,[29] međutim, zahtjev za predvidljivošću najbolje je ostvaren ako stranačka mogućnost biranja mjerodavnog prava nije ograničena te one imaju pravo izabrati također i pravo s kojim ne postoji veza.

Svrha pravne sigurnosti i predvidljivosti opravdana je i u područjima međunarodnog obiteljskog i nasljednog prava, iako na različitoj razini. Od najveće je važnosti u pravu vezanom uz bračnu imovinu, s obzirom na to da se stranke oslanjaju na navodno mjerodavno pravo primjenom kojeg će nastupiti određene pravne posljedice za koje se očekuje da će biti globalno važeće. S druge strane, čini se da su pravna sigurnost i predvidljivost manje relevantne u pitanjima razvoda.

3.1.3. Praktične prednosti stranačke autonomije – toleriranje izbora prava s kojim ne postoji veza

Možda je najuvjerljiviji argument u korist stranačke autonomije u međunarodnom poslovanju upravo praktične naravi. "Unatoč kantovskom podrijetlu (...) dominantno opravdanje (stranačke autonomije) bitno je utilitarno, povezano s potrebama međunarodne trgovine."[30] Neograničena stranačka autonomija ima znatne prednosti u međunarodnoj trgovini; one su jasno prevagnule nad nedostacima koje povlači mogućnosti odabira prava s kojim ne postoji veza.[31]

27 Vidi: Rühl, *op. cit*. bilj. 2., str. 176.–177., posebice napomene u podrubnoj bilješci 100.

28 Vidi: Verhagen, *op. cit*. bilj. 20., str. 143.

29 Vidi Prijedlog za Uredbu Vijeća (EU) o provedbi pojačane suradnje u području prava primjenljivog na razvod braka i zakonsku rastavu, COM(2010) 104 final, COM(2010) 105 final, komentari na čl. 3.

30 Muir Watt, *op. cit*. bilj. 12., str. 255.–256.

31 Lehmann, *op. cit*. bilj. 14., str. 394. "Moglo bi se tvrditi kako će države dopuštati slobodno ugovaranje klauzula o mjerodavnom pravu s ciljem osiguravanja uvjeta nužnih za funkcioniranje međunarodne trgovine."

Prikladnost izabranog prava u pravilu nije načelo koje stranke uzimaju u obzir tijekom pregovora o mjerodavnom pravu. Često im je važnije kako sporazum o mjerodavnom pravu utječe na troškove saznatljivosti tog prava. Stranke katkad izaberu određeno pravo zato (ili dijelom zato) što su obje upoznati s njime, npr. podrazumijeva se da je određeno pravo *lingua franca* određene industriji. Primjerice, englesko pravo u pomorskim pitanjima te englesko i newyorško pravo u pravu financijskih transakcija, smatraju se međusobno poznatima, što je i u skladu s tržišnom praksom. U drugim slučajevima, stranke mogu izabrati neutralno pravo (pravo treće zemlje), želeći izbjeći asimetriju među strankama u pogledu troškova informiranja. Izbor prava treće države stavlja stranke u isti položaj. Stranke često nisu u potpunosti svjesne sadržaja odabranog zakona, ali znaju kako izbor prava koje je objema strano osigurava jednakost oružja.

Štoviše, bez pretjeranog pojednostavnjenja komparativnog prava, treba napomenuti kako je razilaženje između nacionalnih obiteljskih i nasljednih prava važnije od onog na razini nacionalnih ugovornih prava. Postoji određeni stupanj približavanja na razini načela ugovornog prava civiliziranih naroda. Određena temeljna načela obično dijeli većina civiliziranih pravnih sustava. Primjerice, *pacta sunt servanda*, *clausula rebus sic stantibus*, nemogućnost ispunjena, Božji zakon, *force majeur*, *vis major* itd. U drugu ruku, mnogo je više razlika u obiteljskom i nasljednom pravu. U nekim zemljama supružnici se mogu razvesti jednostavnim sporazum, u nekim zemljama razvod je postupak koji traje više godina, dok je u potpunosti suprotno filipinsko pravo koje ne poznaje koncept razvoda. Isto tako, neka se prava temelje na načelu potpune oporučne slobode, dok su druga ograničila tu slobodu nužnim nasljedstvom, a neka su u potpunosti odbila pojam oporučne slobode.

Načelo prema kojemu je u kolizijskom pravu nužno pronaći pravo s kojim postoji najuža veza (ili manje ambiciozno, uska veza) s pravnim odnosom, jer to pravo predstavlja primjereni odgovor, teško se može smjestiti uz pravo stranaka na izbor prava s kojim ne postoji veza. Pravo na izbor prava s kojim postoji veza može se ispraviti tim tradicionalnim poimanjem kolizijskog prava: postoje podudarne poveznice koje se na jednak način koriste s ciljem ishođenja mjerodavnog prava ("sjedište" pravog odnosa); stoga kolizijsko pravo države foruma mora donijeti zakonodavnu odluku i izdvojiti jednu od tih poveznica. Međutim, odobravanjem ograničene stranačke autonomije također se prihvaća da su te poveznice uzajamno priznatljive. S druge strane, čini se da je neuvjerljivo da pravo s kojim ne postoji veza može s predmetom stvari imati najbližu vezu jednostavno zato što su ga stranke izabrale! Iz te se perspektive

neograničena stranačka autonomija čini konceptualno manjkavom.[32] Ipak, čini se kako je legislativa međunarodnog privatnog prava mnogo više zaokupljena praktičnom primjenom nego teoretskom dosljednošću. Neograničena stranačka autonomija (mogućnost izbora prava s kojim ne postoji uska veza) ne uklapa se u načelo najuže veze, ali međunarodno privatno pravo, pod utjecajem stranačke autonomije kao općeg načela privatnog prava, drži da su nedostaci izbora prava s kojim ne postoji veza mnogo manji nego što su to prednosti u slučajevima jasnih pravila o stranačkoj autonomiji. Uključenost trećih osoba znatno utječe na ovu ravnotežu. Postavlja se pitanje može li izbor prava negativno utjecati na interese treće strane (uključujući i javni poredak), što ujedno povećava nedostatke stranačke autonomije.

Čini se kako je stranačka autonomija u međunarodnom obiteljskom i nasljednom pravu manje praktično utemeljena nego što je to kod ugovornog prava te nema ulogu usporedivu s funkcijom stranačke autonomije u području ugovornog prava. Čini se kako praktični argumenti u korist stranačke autonomije u obiteljskom i nasljednom pravu nisu nadjačali konceptualnu nedosljednost i utjecaj treće stane, uključujući i javni interes.

3.2. Doprinos unutarnjeg tržišta funkcijama autonomije u privatnom pravu

Doprinos koji stranačkoj autonomiji daje pravo slobode kretanja u okviru unutarnjeg tržišta EU-a[33] može se opisati s pomoću četiri načela: načelo uzajamnog priznavanja nacionalnih kolizijskih pravila, načelo stečenih prava, načelo države podrijetla i "postupanje po pogrešnom pravu" (*Handeln unter falschen Recht*).[34] U središtu gore navedenih kolizijskih načela jest činjenica

32 Usp. J. H. Beale, "What Law Governs the Validity of a Contract" 23 *Harvard Law Review* (1910) str. 260. ("(...) zaključivanje kako je stranački izbor konceptualno manjkav u teoriji (...) to uključuje dopuštenje strankama poduzimati pravne radnje"); J. H. Beale, *A Treatise on the Conflict of Laws*, Vol. 2. (New York: Baker, Voorhis & Co 1935) str. 1080. ("(...) stranačka će autonomija u okviru kolizijskog prava napraviti zakonodavca od osoba koje su sklopile ugovor); Lehmann, *op. cit.* bilj. 14., str. 383. ("Doista, sloboda stranaka za izborom mjerodavnog prava mora prouzročiti teorijsku glavobolju svakom ozbiljnom pozitivistu.")

33 Vidi: P. von Wilmowsky, "EG-Vertrag und kollisionsrechtliche Rechtswahlfreiheit" 62 *Rabels Zeitschrift* (1998) str. 2.–37.; cf. J.-J. Kuipers, "Party Autonomy in the Brussels I Regulation and Rome I Regulation and the European Court of Justice" 11 *German Law Journal* (2009) str. 1506.–1522. ("Čini se kako je Europski sud pravde usvojio funkcionalni pristup u odnosu na autonomiju u privatnom pravu. Ona je zaštićena kada doprinosi ostvarivanju unutarnjeg tržišta, a potisnuta kada vodi k neprimjeni prava Zajednice.")

34 Vidi: R. Michaels, "The New European Choice-of-Law Revolution" 82 *Tulane Law Review* (2008) str. 1624.–1635., str. 1607. (Kolizijska pravila u EU-u su, među ostalim, konstitucionalizirana kroz načelo uzajamnog priznavanja i načelo zemlje podrijetla.)

da će prava stečena na temelju prava koje je različito od *lex causae* (pravo određeno kolizijskim pravilima države foruma) biti priznata.

Stranačka autonomija može biti alat koji će osigurati uzajamno priznavanje nacionalnih kolizijskih pravila.[35] Iako, kolizijska pravila mjerodavna u slučajevima izostanka stranačkog izbora uključuju određenu zakonsku odluku o najprikladnijoj poveznici (ili poveznicama), pravo stranaka da izaberu pravo koje je, s pomoću neke druge poveznice povezano s predmetnom stvari, podrazumijeva kako kolizijsko pravo priznaje legitimnost alternativnih poveznica. Primjerice, prema čl. 21. Uredbe o nasljeđivanju, *lex successionis* pravo je države u kojoj je preminuli imao svoje uobičajeno boravište, međutim prema čl. 22. "Osoba može za pravo koje će urediti u cijelost njezino nasljeđivanje izabrati pravo države čiji je državljanin u trenutku izbora ili u trenutku smrti." Na taj se način zakonodavac EU-a odlučio za *lex domicilii*, ali Uredba priznaje i načelo *lex patriae*. Suprotno teoriji stečenih prava i načelu države podrijetla, ovdje nije relevantno priznavanje strane materijalnopravne norme nego stranog kolizijskog pravila. Čini se da je uzajamno priznavanje nacionalnih kolizijskih pravila dio političkog kompromisa uključenog u unificiranje međunarodnog privatnog prava u Europi. Premda kolizijski instrumenti EU-a ne mogu izbjeći davanje prednosti jednom kolizijskom rješenju nad drugim, odbačene poveznice vraćaju se na mala vrata zahvaljujući stranačkoj autonomiji. Zanimljivo, u raspravi o Uredbi Rim III, ideja da supružnici mogu izabrati mjerodavno pravo nije naišla na znatnije probleme. Obratno, kolizijska pravila primjenjiva u slučajevima izostanka stranačkog izbora prava "prouzrokovala su lom".[36] Situacija sa stranačkom autonomijom slična je i u slučajevima imovine bračnih drugova.[37]

Uzajamno priznavanje nacionalnih kolizijskih pravila može biti važno u svim područjima međunarodnog obiteljskog prava, uključujući i razvod, uzdržavanje i bračnu imovinu te nasljedno pravo. U skladu s vrlo kritiziranom teorijom stečenih prava, status i prava stečena na temelju stranog prava bit će (ili mogu

35 Usp.: Kuipers, *op. cit*. bilj. 33., str. 1522. (Europski sud pravde "nagradio je pojedinca mogućnošću biranja između mjerodavnih PIL sustava").

36 K. Boele-Woelki, "To Be, or Not to Be: Enhanced Cooperation in International Divorce Law within the European Union" 39 *Victoria University of Wellington Law Review* (2009) str. 779.–784.

37 Nacrt Uredbe o bračnoj stečevini, daje komentar na čl. 16. ("Tijekom konzultacija, međunarodni konsenzus ide u korist strankama dajući ima stupanj slobode odabira mjerodavnog prava za režim bračne imovine.").

biti) priznata u državi foruma.[38] Prema načelu zemlje podrijetla, prava zakonito stvorena ili izazvana prema pravu jedne od država članica bit će priznata u svim drugim državama članicama, tj. ako je pravo nastalo (ili priznato) prema zakonu jedne države članice, ono će na temelju ovog načela biti priznato u svim drugim državama članicama. Zbog načela zemlje podrijetla, kolizijska pravila države foruma stavljaju se na stranu kad god ometaju kontinuitet učinka prekograničnog odnosa.[39] Europski sud pravde u velikom je broju predmeta koji se tiču prava slobode kretanja (vidi niže), imao stajalište kako je, općenito govoreći, kolizijskopravna stranačka autonomija pravo koje se odnosi na temeljne slobode koje jamči slobodno tržište EU-a. "Pravo izbora" u nekim je slučajevima prepoznato posredno (osobni statut trgovačkih društava), a u drugima neposredno (slučajevi vezani uz izbor prezimena).

Pojam "postupanje po pogrešnom pravu" odnosi se na slučajeve u kojima netko u dobroj vjeri postupa misleći da je mjerodavno pravo države "A", a mjerodavno je pravo države "B". Naravno, "pogrešivost" u pravu pitanje je odredišne točke: navodno mjerodavno pravo nije mjerodavno u skladu s kolizijskim pravilima države foruma, ali je vrlo vjerojatno mjerodavno u skladu s kolizijskim pravilima države s kojom postoji uska veza s predmetnom stvari (npr. države u kojoj je sastavljena oporuka ili zaključen brak).

Iako bi bilo mnogo jednostavnije staviti znak jednakosti između njih, gore navedena četiri pojma međusobno su usko povezana. Primjerice, načelo zemlje podrijetla podrazumijeva da će status i prava stečena prema pravu jedne od država članica (država podrijetla) biti priznata u svim drugim državama članicama. To znači da se ta prava tretiraju i priznaju kao stečena prava koja zadiru u primjenu kolizijskih pravila države foruma (država domaćin).[40]

Ipak, ova definicija načela države podrijetla ignorira mehanizme kolizijskog prava. U kolizijskopravnoj terminologiji to znači kako načelo države podrijetla također može biti shvaćeno ne samo kao dužnost primjene *prava države podrijetla*, nego kao i dužnost primjene *prava na koje su ukazala kolizijska pravila države podrijetla*. Naravno, ta kolizijska pravila mogu dovesti do primjene prava te države. Štoviše, u okviru koncepta "postupanja po pogrešnom pravu", stranke djeluju u okviru navodno mjerodavnog stranog prava, a država foruma suočava se s dilemom hoće li priznati prava stečena na temelju

38 Za teoriju stečenih prava vidi: R. Michaels, "EU Law As Private International Law? Reconceptualising the Country-of-Origin Principle As Vested-Rights Theory" 2 *Journal of Private International Law* (2006) str. 214.–221., str. 190.

39 H. Muir Watt, "European Federalism and the "New Unilateralism" 82 *Tulane Law Review* (2008) str. 1983.–1983.

40 Za rekapitalizaciju načela zemlje podrijetla, kao i za teoriju stečenih prava vidi: Michaels, *op. cit*. bilj. 38., str. 190.–242.

nemjerodavnog stranog prava (koncept stečenih prava) ili će ih pokušati dovesti pod pravo koji je zapravo mjerodavno (ispraviti "postupanje po pogrešnom pravu"). Oba, i "teško" i "meko" priznanje prava stečenih na temelju stranog prava imaju logiku ""stečenog prava" logički usmjerenu prema zaštiti legitimnih očekivanja stranaka.

U nastavku se ispituje načelo zemlje podrijetla u sudskoj praksi Europskog suda pravde (osobni statut trgovačkog društva, prekogranična povreda osobnih prava, pravila o odabiru prezimena). Teorija stečenih prava i načelo zemlje podrijetla, u jednu ruku, i koncept "postupanja po pogrešnom pravu", u drugu ruku, zaslužuju posebnu analizu. Stoga će koncept "postupanja po pogrešnom pravu" biti odvojeno obrađen u nastavku.

3.2.1. Sankcioniranje prava na neposredan izbor mjerodavnog prava: osobni statut trgovačkih društva

Europski sud pravde u nekoliko se navrata bavio osobnim statutom trgovačkih društava (*Daily Mail*,[41] *Centros*,[42] *Überseering*,[43] *Inspire Art*,[44] *Cartesio*[45] *i nedavno VALE*).[46] Vezano uz ograničenja koja postavlja država domaćin (tj. u slučajevima u kojima država članica u potpunosti odbije priznati osobni status trgovačkog društva osnovanog u drugoj državi članici, na temelju toga što pravo države osnivanja nije pravo osobnog statuta trgovačkog društva te što ne postoji prava veza između trgovačkog društva i zemlje osnivanja), Europski sud pravde smatra kako osobni statut stečen pod okriljem prava države osnivanja treba biti u potpunosti priznat. Pravna pravila države sjedišta mogu biti primjenjiva u onoj mjeri u kojoj su povoljnija za trgovačko društvo ili njegove članove. Ova praksa ne uspostavlja na odgovarajući način pravo izbora mjerodavnog prava. Međutim, strankama se pruža pravo osnovati trgovačko društvo u bilo kojoj državi članici, čak i kad su jasno motivirane namjerom zaobilaženja prava države stvarnog sjedišta te čak i ako između države osnivanja i trgovačkog društva ne postoji druga veza (kao što su dioničari, područje rada i sl.) osim činjenice osnivanja.

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41 ECJ 27 September 1988, Case 81/87, *ECR* 1988, str. 5483 (*Daily Mail*).

42 ECJ 9 March 1999, Case C-212/97, *ECR* 1999, str. I-1459, *NIPR* 1999, 242 (*Centros*). Vidi: ECJ 10 July 1986, Case 79/85, *ECR* 1986, str. 2375 (*Segers*).

43 ECJ 5 November 2002, Case C-208/00, *ECR* 2002, str. I-9919, *NIPR* 2003, 19 (*Überseering*).

44 ECJ 30 September 2003, Case C-167/01, *ECR* 2003, str. I-10155, *NIPR* 2003, 255 (*Inspire Art*).

45 ECJ 16 December 2008, Case C-210/06, *ECR* 2008, p. I-9641, *NIPR* 2009, 16 (*Cartesio*).

46 ECJ 12 July 2012, Case 378/10, *NIPR* 2012, 325 (*VALE*). Ovaj se predmet odnosi na prekograničnu pretvorbu. Za prekogranično spajanje vidi: ECJ 13 December 2005, Case C-411/03, *ECR* 2005, str. I-10805, *NIPR* 2006, 116 (*Sevic*).

Gore navedena tvrdnja iznesena je u predmetu *Centros*, prvom predmetu koji je uključivao ograničenja postavljena od strane države domaćina. U ovom slučaju, danski je par (oboje danski državljani s prebivalištem u Danskoj), osnovao društvo s ograničenom odgovornošću u Engleskoj, s ciljem izbjegavanja složenih danskih pravila o osnivanju trgovačkog društva, a posebice onoga o minimalnom temeljnom kapitalu. Bilo je to jedinstveno rješenje za ovo trgovačko društvo "poštanski sandučić" osnovano u Engleskoj, koje je imalo namjeru djelovati isključivo na području Danske, bez ikakvih aktivnosti na području Velike Britanije. Do komplikacija je došlo kada je trgovačko društvo pokušalo registrirati svoju podružnicu u Danskoj. Njihov je zahtjev odbijen "među ostalim, na temelju toga što je *Centros*, koji nije obavljao svoju djelatnost u Ujedinjenoj Kraljevini, zapravo zahtijevao svoje temeljno osnivanje u Danskoj, a ne osnivanje podružnice, i to zaobilaženjem nacionalnih propisa koji se posebice tiču plaćanja minimalnog temeljnog kapitala".[47] Drugim riječima, stranke nisu bile zadovoljne propisima danskog prava, stoga su odlučile svoje trgovačko društvo osnovati pod okriljem engleskog prava, a svoju djelatnost obavljati u Danskoj.

U svom je prethodnom mišljenju Europski sud pravde smatrao kako su osnivači slobodni osnovati trgovačko društvo (i nakon toga obavljati svoju djelatnost) gdje god žele i država članica nema moć ispitivanja odluke druge države članice kojom je nekom društvu dana pravna osobnost (načelo zemlje podrijetla i uzajamnog priznavanja). Argumenti danskih nadležnih tijela podrazumijevali su kako osnivači nisi mogli osnovati društvo s ograničenom odgovornošću u Engleskoj i Walesu i stoga je potonji nisu ni trebali upisati u sudski registar: ovo je odluka, koju na temelju uzajamnog povjerenja i priznanja, druga država članica ne može ispitivati.[48]

Premda je sud priznao kako država članica u određenim slučajevima može ograničiti priznavanje trgovačkih društava osnovanih u drugoj državi članici (ako postoji opasnost od zlouporabe), jasna i nesporna činjenica da je osnivanje trgovačkog društva u Engleskoj i Walesu bilo isključivo vođeno željom da se izbjegnu danska pravila te činjenica kako je društvo imalo namjeru djelovati samo u Danskoj, nisu bile dovoljne da se Danskoj omogući posezanje za ovom iznimkom. Prema tome, stranke imaju slobodu izabrati bilo koje nacionalno pravo i formirati trgovačko društvo u skladu s tim pravom (pod uvjetom da osnuju društvo u toj državi članici i da ta država slijedi načelo inkorporacije kad je posrijedi osobni statut društava).

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47 *Centros*, *op. cit*. bilj. 42., [7].

48 *Ibid*., [39].

U predmetu *Überseering*[49] riječ je o nizozemskom trgovačkom društvu osnovanom u Nizozemskoj, čije su udjele imali njemački državljani i čije se sjedište upravljanja preselilo u Njemačku. U tužbi u kojoj je Überseering tužio zbog neispravne izvedbe radova, tuženi su iznijeli argument kako Überseering ne postoji jer ne ispunjava uvjete postavljene vlastitim osobnim statutom po pitanju pravne osobnosti; stoga, nema poslovnu sposobnost (tj. nije pravni subjekt) i kao takvo ne može biti stranka u pravnom postupku. Argument je strukturiran na sljedeći način. Država foruma treba primijeniti vlastita kolizijska pravila na pitanja osobnog statuta pravne osobe. U skladu s njemačkim kolizijskim pravilima, osobni statut, uključujući i pitanje poslovne sposobnosti, reguliran je pravom države u kojoj se nalazi stvarno sjedište navodne pravne osobe. Budući da se stvarno sjedište društva, nakon prodaje udjela trgovačkog društva njemačkim državljanima, preselilo u Njemačku, mjerodavno je bilo njemačko, a ne nizozemsko pravo. Prema tome, od Überseeringa se očekivao kako će udovoljiti zahtjevima njemačkog prava društava, uključujući i zahtjev za upisom u registar u Njemačkoj, koji su kao društvo s nizozemskim "identitetom" zanemarili. Budući da Überseering nije ispunio preduvjet pravne osobnosti propisane njemačkim pravom (zahtjev za upisom u registar u Njemačkoj), nije imao pravnu osobnost te kao takav nije imao poslovnu sposobnost.

Bio je to u svojoj biti problem međunarodnog privatnog prava koji je prouzrokovao napetost između prava EU-a i legislative o mjerodavnom pravu. Pravila o slobodi poslovnog nastana i prava EU-a općenito, nisu ispunila očekivanja u odnosu na kolizijska pravila osobnog statuta trgovačkih društva te ovo pitanje očito potpada u djelokrug države članice. U drugu ruku, bez obzira na to što kolizijsko pravo podupire ovakav zaključak, pravo EU-a ne može tolerirati položaj prema kojem jedno društvo, zakonski osnovano u jednoj državi članici ne može "ući" u drugu državu članicu. Europski sud pravde presudio je kako:

> "1. U slučaju kada je trgovačko društvo osnovano sukladno pravu jedne države članice ('A') u kojoj ima i svoje registrirano sjedište te se po pravu druge države članice ('B') smatra da je to društvo prenijelo svoje stvarno središte upravljanja (stvarno sjedište) u državu članicu B, članci 43. i 48. Ugovora o Europskoj zajednici [sada čl. 49. i 54. Ugovora o funkcioniranju Europske unije] zabranjuju drugoj državi članici da osporava pravnu sposobnost trgovačkom društvu, kao i sposobnost društva da bude strankom u sudskim postupcima koji se vode u drugoj državi članici u svrhu ispunjenja obveza iz ugovora koje je trgovačko društvo sklopilo s trgovačkim društvom osnovanim u državi članici B.

49 *Überseering, op. cit*. bilj. 43.

> 2. U slučaju ako je trgovačko društvo valjano osnovano u jednoj državi članici ('A') u kojoj ima i svoje registrirano sjedište te ostvaruje slobodu poslovnog nastana u drugoj državi članici ('B'), članci 43. i 48. Ugovora o Europskoj zajednici [sada čl. 49. i 54. Ugovora o funkcioniranju Europske unije] nameću obvezu državi članici B da prizna pravnu sposobnost, kao i sposobnost društva da bude strankom u sudskim postupcima koji se vode u drugoj državi članici, a koje trgovačko društvo ima po pravu države članice u kojoj je osnovano ('A').“

Sud nije dao savjet ili prijedlog kako nacionalna kolizijska pravila trebaju biti oblikovana. Bio je jednostavno previše kategoričan u odnosu na stanje koje se ne može tolerirati. U isto vrijeme, posljedice ovakvog rješenja vrlo su jasne za područje kolizijskog prava. Ako je društvo zakonito osnovano u jednoj državi članici, odnosno ako postoji prema zakonu o osnivanju, ono je nositelj slobode poslovnog nastana,[50] njegovo je postojanje zajamčeno pravom države osnivanja i to nijedna država članica ne može dovoditi u pitanje. Drugim riječima, pravo EU-a ne zahtijeva od država članica primjenu zakona države osnivanja, ipak, ako prema mjerodavnom pravu država nema poslovnu sposobnost, dok ima takvu karakteristiku prema pravu države osnivanja, ovo drugo prevladava. Stavljajući ovu sudsku praksu u kontekst stranačke autonomije: država foruma primjenjuje vlastita kolizijska pravila, ali ako društvo ima poslovnu sposobnost na temelju prava države koje su osnivači (dioničari) *kvazi* izabrali, potonje prevladava.

Presuda Europskog suda pravde u predmetu *Inspire Art* ukazuje na to da je pravo države članice koju su izabrali osnivači kao mjesto osnutka (pod uvjetom da slijedi načelo inkorporacije) mjerodavno za osobni statut društva u potpunosti. U ovom je slučaju Nizozemska usvojila posebne propise za pseudostrana trgovačka društva. Dok je za društva osnovana u drugoj državi članici bilo mjerodavno pravo države osnivanja, ako su ih sve relevantne veze vezale za Nizozemsku, bila su podvrgnuta posebnim propisima. Primjerice, primjenjivao se zahtjev za minimalnim temeljnim kapitalom na temelju nizozemskog prava te su direktori imali solidarnu i pojedinačnu odgovornost u slučaju da društvo nije djelovalo u skladu s gore navedenim nizozemskim pravilima. Ovaj se pristup može kolizijskopravno koncipirati s pojmovima kako slijedi: mjerodavno pravo za osobni statut društava bilo je pravo države osnivanja, dok su prisilni propisi države foruma dominirali nad nekim pravilima *lex causae*. Ipak, sud je smatrao da posebna pravila nizozemskog suda mjerodavna za "formalno strana trgovačka društva" ometaju slobodu poslovnog nastana

50 *Ibid*., [81-82].

jer mogu obeshrabriti društva zakonski osnovana u jednoj državi članici od osnivanja podružnice ili obavljanja drugih aktivnosti u drugoj državi članici.[51]

> "U protivnosti je s člancima 43. i 48. Ugovora o Europskoj zajednici [sada čl. 49. i 54. Ugovora o funkcioniranju Europske unije] u nacionalnim propisima (…) nametnuti primjenu određenih uvjeta ako pravo na sekundarno osnivanje u toj državi ostvaruje trgovačko društvo koje je osnovano sukladno pravu druge države članice. Razlozi zašto je trgovačko društvo osnovano u toj drugoj državi članici, kao i činjenica da društvo obavlja svoju gospodarsku djelatnost isključivo ili pretežito u državi članici u kojoj ostvaruje pravo na sekundarno osnivanje, nisu od utjecaja na ostvarivanje slobode poslovnog nastana koju društvu jamči Ugovor o Europskoj zajednici, osim u slučaju postojanja zloporabe koja se utvrđuje od slučaja do slučaja."[52]

Najnoviji slučaj vezan za ograničenja postavljena od države domaćina jest *VALE Építési kft*,[53] u kojem je došlo do kontroverzije zbog prijenosa sjedišta talijanskog društva iz Italije u Mađarsku te zahtjeva za upisom u registar u Mađarskoj. Zemlja podrijetla (Italija) priznala je univerzalnu sukcesiju, dok država članica domaćin (Mađarska) nije. U talijanskom je registru naznačeno kako se "društvo preselilo u Mađarsku". Društvo je dalo informaciju o novoj adresi u Budimpešti koja je naznačena kao adresa novog sjedišta.[54] Ipak, mađarski je trgovački sud odbio u registru navesti kako je mađarsko društvo pravni sljednik talijanskog društva. Naravno, dioničari nisu bili lišeni mogućnosti osnivanja društva u Mađarskoj koja je preuzela djelatnost ukinutog talijanskog društva. Međutim, to bi bilo novo društvo, a ne pravni sljednik talijanskog društva.

Sud je smatrao kako u slučaju prekograničnog preoblikovanja društva "država domaćin ima pravo odrediti nacionalno pravo mjerodavno za takve aktivnosti te tako primjenjivati odredbe svog nacionalnog prava na preoblikovanje nacionalnih društava, uređujući na taj način osnivanje i djelovanje društava". Načelo ekvivalencije onemogućuje državu članicu domaćina da u prekograničnom preoblikovanju odbije upis u registar novog društva, "pravnog prednika" osnovanog u državi članici podrijetla, pod uvjetom da je to moguće u slučajevima domaćih preoblikovanja. Nadalje, načelo učinkovitosti onemogućuje državi članici domaćinu da "kad obrađuje zahtjev društva za upisom

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51 *Inspire Art*, *op. cit*. bilj. 44., [99101].

52 *Ibid*., [143] i odgovor na pitanje 2.

53 *VALE, op. cit*. bilj. 46.

54 *Ibid*., [11].

u registar, u obzir odbije uzeti dokumentaciju dobivenu od nadležnih tijela države članice podrijetla".[55]

Iako to u presudi nije izričito naglašeno čini se da je, iz perspektive međunarodnog privatnog prava, bilo odlučno što je u ovom slučaju država podrijetla (talijanski registar), u svojoj "gracioznoj poruci o razrješenju"[56] naznačila kako je do preoblikovanja društva (ili je bilo u postupku preoblikovanja) u mađarsko društvo, preko pravne sukcesije, došlo u skladu s njihovim pravom (početno *lex personae*). To jest, kada je odbio upisati u registar mađarsko društvo kao pravnog sljednika talijanskog poduzeća, mađarski je trgovački sud zapravo odbio priznati status stečen u zemlji podrijetla (Italija).

3.2.2. Načelo zemlje podrijetla i prekogranična elektronička (*on-line*) povreda prava osobnosti

Iako nije povezano s pitanjem osobnog statuta, treba naznačiti kako je Europski sud pravde u predmetu *eDate/Martinez*,[57] također potvrdio načelo države podrijetla u prekograničnoj elektroničkoj (tj. *on-line*) povredi privatnosti i prava osobnosti. U presudi je interpretiran čl. 3. Direktive o elektroničkoj trgovini,[58] i ako pojednostavnimo, u istoj je utvrđeno da će u načelu pravo države članice u kojoj je pružatelj usluga osnovan (pod uvjetom da je osnovan u EU-u) biti primjenjivo ako je povoljnije za pružatelja usluga. Iako čl. 1.(4) Direktive propisuje kako "Ova Direktiva ne utvrđuje dodatna pravila o privatnom međunarodnom pravu niti se bavi nadležnošću sudova",[59] također određuje kako "odredbe mjerodavnog prava određene pravilima međunarodnog privatnog prava ne smiju ograničiti slobodu pružanja usluga informacijskog društva kako su utvrđene u ovoj Direktivi."[60] Čl. 3.(2) Direktive propisuje da "Države članice ne mogu, zbog razloga koji spadaju u okvir područja koordinacije, ograničiti slobodu pružanja usluga informacijskog društva iz neke

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55 *Ibid*., [62].

56 Posuđeno iz naslova jedne od pjesama Endrea Adyja, poznatog mađarskog pjesnika, na mađarskom: *Elbocsátó, szép üzenet*.

57 ECJ 25 October 2011, Joined Cases C-509/09 and C-161/10, *NIPR* 2011, 475 (*eDate/Martinez*). Vidi: C. I. Nagy, "The Word is a Dangerous Weapon: Jurisdiction, Applicable Law and Personality Rights in EU Law – Missed and New Opportunities" 8 *Journal of Private International Law* (2012) str. 287.–293., str. 251.

58 Direktiva 2000/31/EZ Europskog parlamenta i Vijeća od 8. lipnja 2000. o određenim pravnim aspektima usluga informacijskog društva na unutarnjem tržištu, posebno elektroničke trgovine (Direktiva o elektroničkoj trgovini), SL 2000 L 178/1.

59 Vidi: *eDate/Martinez*, *op. cit*. bilj. 57., [60].

60 Direktiva o elektroničkoj trgovini, Recital 23.

druge države članice.“ Europski sud pravde drži kako koordinirana područja obuhvaćaju privatno pravo, uključujući i odgovornost davatelja usluga informacijskog društva[61] te sve mjere kvalificirane kao ograničenja koja obeshrabruju prekogranično pružanje usluga informacijskog društva. Riječ je o obeshrabrenju ako davatelj usluga mora udovoljiti strožim pravilima od onih u državi osnivanja. Europski sud pravde smatra kako na taj način pravo na slobodno kretanje usluga nije u potpunosti zajamčeno.

> “Ako se davatelji usluga moraju u konačnici uskladiti u državi članici domaćinu sa strožim zahtjevima od onih u za njih mjerodavnom pravu države članice u kojoj su osnovani (...) Čl. 3. Direktive zabranjuje, uz odstupanja u skladu s uvjetima iz čl. 3.(4), da pružatelj usluga elektroničke trgovine bude podvrgnut strožim zahtjevima od onih propisanim materijalnim pravom koje je na snazi u državi članici u kojoj je davatelj usluga osnovan.“[62]

Status stečen u državi podrijetla mora biti priznat.

3.2.3. Pravo EU-a i pravo na izbor prezimena: zajamčeno pravo na neposredni izbor mjerodavnog prava

Za razliku od gore navedene sudske prakse koja utvrđuje samo pravo na neposredni izbor mjerodavnog prava, Europski sud pravde, kad je riječ o izboru prezimena, smatra kako je stranačka autonomija normativno pravo. Pojednostavnjeno, u prekograničnim stvarima građani Europske unije imaju, pod određenim uvjetima, pravo birati između nekoliko prava na temelju kojih će njihova imena biti upisana, pod uvjetom da je izabrano pravo vezano uz njihov predmet stvari.

U predmetu *Carlos Garcia Avello*,[63] spor je nastao nakon što su belgijska nadležna tijela odbila upisati promjenu u skladu sa španjolskim običajima, vezanu uz dvoje djece dvojnog državljanstva, oca Španjolca i majke Belgijanke. Prema belgijskom pravu, dijete uzima prezime oca, dok prema španjolskom pravu dijete uzima prvo prezime od oba roditelja. U svojoj je odluci sud u biti utvrdio kako dvojno državljanstvo, tj. bivanje državljaninom dviju država članica daje osobi pravo izabrati ime koje je u skladu s pravom bilo koje od tih država članica. Čl. 18. (zabrana diskriminacije na temelju državljanstva) i čl. 20. (građanstvo EU-a)

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61 *eDate/Martinez*, *op. cit*. bilj. 57., [58].

62 *Ibid*., [66-67].

63 ECJ 2 October 2003, Case C-148/02, *ECR* 2003, str. I-11613, *NIPR* 2004, 2 (*Carlos Garcia Avello*).

Ugovora o funkcioniranju Europske unije zabranjuje državama članicama:

> "Odbijanje odobrenja zahtjeva za promjenom prezimena podnesenog u ime maloljetne djece koja borave u toj državi i imaju dvostruko državljanstvo te države i druge države članice, u slučaju gdje je svrha takvog zahtjeva omogućiti djeci da nose prezime na koje imaju pravo u skladu s pravom i tradicijom druge države članice."[64]

Načelo prava izbora pripada pod pravila unutarnjeg tržišta, što je potvrđeno i u predmetu *Grunkin i Paul*,[65] u kojem je došlo do kolizije načela državljanstva i boravišta (u smislu uobičajenog boravišta).[66] Predmet se tiče djeteta njemačkog državljanstva rođenog u Danskoj. U skladu s danskim kolizijskim pravilima, zbog njegova uobičajenog boravišta u Danskoj, pravo mjerodavno za određivanje njegova prezimena dansko je pravo[67] te je u skladu s tim njegovo prezime zabilježeno u Danskoj. U slučaju kada roditelji nemaju ista prezimena, dansko pravo dopušta "administrativnu promjenu prezimena u jedno prezime sastavljeno od prezimena obaju roditelja podijeljenih crticom."[68] U skladu s navedenim pravilima, prezime koje je upisano u danski registar jest *Grunkin-Paul*. Nakon toga, priznavanje tog prezimena odbijeno je u Njemačkoj, koja prati načelo državljanstva (građanstva) kod određivanja imena fizičkih osoba.[69] Budući da je dijete imalo samo njemačko državljanstvo, mjerodavno je njemačko pravo, koje određuje da u slučaju kad "roditelji ne dijele zajedničko prezime, ali imaju zajedničko skrbništvo nad djecom, moraju u izjavi pred matičarom izabrati hoće li dijete nositi majčino ili očevo prezime."[70] Europski sud pravde smatra da dijete (zastupano po zakonskim zastupnicima), u gore navedenoj situaciji, ima pravo birati hoće li mjerodavno biti *lex domicilii* ili *lex patriae*. Naravno, presuda ne ističe kako će fizičke osobe nužno imati opće pravo birati između ovih dvaju prava; u ovom je slučaju bila riječ o dvije države članice koje su bile povezane s predmetnom stvari, jedna je slijedila pristup *lex domicilii*, a druga *lex patriae*.

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64 *Ibid*., [45].

65 ECJ 14 October 2008, Case C-353/06, *ECR* 2008, str. I-07639, *NIPR* (2008) 253 (*Grunkin-Paul*).

66 Valja napomenuti da unatoč kontroverzijama nastalih iz tenzija između *lex domicilii* i *lex patriae*, čini se činjenica da "Danska nije bila slučajna država, nego država uobičajenog djetetova boravišta, bila je nevažna u obrazloženju Europskog suda pravde".Yetano, *op. cit*. bilj. 2., str. 161.

67 *Grunkin-Paul*, *op. cit*. bilj. 65., [11-14].

68 *Ibid*., [13].

69 Odjeljak 10. Uvodnog akta njemačkog građanskog zakonika.

70 Odjeljak 1616. Njemačkog građanskog zakonika.

> "Nakon svega navedenoga, na prethodno pitanje treba odgovoriti da je u okolnostima poput onih u glavnom postupku suprotno čl. 18. Ugovora o europskoj zajednici [čl. 21. Ugovora o funkcioniranju Europske unije] da tijela vlasti jedne države članice primjenjujući nacionalno pravo odbiju priznati prezime djeteta koje je određeno i upisano u drugoj državu članici u kojoj to dijete – koje kao i njegovi roditelji ima isključivo državljanstvo prvospomenute države članice – rođeno i otada boravi."[71]

3.2.4. Primjena pogrešnog prava

Problem "primjene pogrešnog prava" (*Handeln unter falschem Recht*) prouzrokovao je zanimljive probleme vezane uz tumačenje situacija u kojima stranke (ili stranka) postupaju u skladu sa zakonima navodno mjerodavnog prava, dok njihovi postupci (ili postupak) moraju biti u skladu s tehničkim pojedinostima drugog prava.[72] Kolizijsko pravo može riješiti ovaj problem s različitim stupnjevima empatije. Prvo, može zanemariti pogrešnu pretpostavku stranaka i primijeniti *lex causae* bez daljnjih teškoća (ignorancijski pristup). Drugo, može jednostavno primijeniti *lex causae* te uzeti u obzir postupanje u dobroj vjeri pri primjeni određenog materijalnog prava (materijalnopravni pristup). Treće, kolizijsko pravo može poštovati stečena prava i pravne posljedice izazvane postupanjem prema "pogrešnom" pravu i smatrati ih "stečenim pravima" (kolizijski pristup). Ovaj pristup vodi nas natrag k teoriji stečenih prava i načelu države podrijetla. U ovom je slučaju važno pitanje može li se poveznica koja je dovela do pogrešnog *lex causae*, priznati (prihvatiti) u državi foruma. Stranačka autonomija može biti alat za rješavanje problema "primjene pogrešnog prava". Ako stranke imaju pravo izabrati mjerodavno pravo, njihovo djelovanje prema navodno mjerodavnom pravu može značiti (barem) bezuvjetan izbor stranaka.

Neograničena stranačka autonomija čini se, ne samo da rješava, nego isključuje probleme koje za sobom povlači "primjena pogrešnog prava", budući da postupanje pod određenim pravom podrazumijeva, u najmanju ruke, bezuvjetni izbor stranaka. Ograničena stranačka autonomija, tj. situacija u kojoj stranke mogu birati između nekoliko prava određenih popisom poveznica – ima istu svrhu samo s ograničenjem da se "problem postupanja po pogrešnom pravu" i dalje pojavljuje ako stranke primjenjuju pravo koje nije na popisu.

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71 *Grunkin-Paul*, *op. cit*. bilj. 65., [39].

72 Vidi, npr.: C. Münzer, *Handeln unter falschem Recht* (Frankfurt am Main, Peter Lang 1992); C. von Bar and P. Mankowski, *Internationales Privatrecht*, Vol. I. (Munich, C.H. Beck 2003) str. 705.–706.

Sudska praksa mađarskih[73] i njemačkih sudova može ilustrirati zamršenost "postupanja po pogrešnog pravu". Do "postupanja po pogrešnom pravu" došlo je u predmetu 1-H-PJ-2009-732 koji se vodio na Žalbenom sudu u Budimpešti (Mađarska).[74] Sud je rješavao o pravnim učincima bračnog ugovora sklopljenog u Švicarskoj i znatno ignorirao činjenicu "postupanja po pogrešnom pravu". Stranke, oboje mađarski državljani, vjenčali su se u Švicarskoj i potom sklopili bračni ugovor. Ugovor je propisivao kako su supružnici izabrali režim razdvajanja imovine (*Gütertrennung*) na temelju Poglavlja 27. (i pripadajućih dijelova) Švicarskog građanskog zakonika (ZGB).

U skladu sa švicarskim bračnim pravom, opći režim je zajednica u kojoj se zajednički stječe bračna stečevina (*Errungenschaftsbeteiligung*). Ukratko, zarada stečena tijekom braka zajednička je imovina, dok je imovina koja je pripadala supružnicima prije sklapanja braka, njihova pojedinačna imovina. Grubo rečeno, takav je sustav prihvaćen i u Mađarskoj.[75] Ipak, supružnici se mogu odlučiti za druge imovinske režime: zajedničku imovinu ili diobu imovine. Pod okriljem režima zajedničke imovine (*Gütergemeinschaft*) u braku se, u načelu, ujedinjuje imovina supružnika.[76] Dok je prema režimu podijeljene imovine (*Gütertrennung*) imovina supružnika u potpunosti podijeljena.[77]

Mađarski je sud morao donijeti odluku o pravnim posljedicama gore spomenutog bračnog ugovora sklopljenog u Švicarskoj. Žalbeni je sud smatrao da je on formalno nevažeći budući da je sklopljen kod javnog bilježnika i kao takav se u Mađarskoj može priznati samo kao javna isprava na temelju Apostile konvencije.[78] Sud je također utvrdio kako je u predmetu, na temelju zajedničkog državljanstva supružnika, mjerodavno mađarsko pravo. Pri ispitivanju bračnog ugovora sud je utvrdio kako:

> "Ti se sporazumi susreću s bitnim zahtjevima ugovora o imovini bračnih drugova (na mađarskom: *házassági vagyonjogi szerződés*) koji osim što se odnose na opća načela, uređuju imovinski režim koji su odabrali supružnici kako bi potpunom razradom riješili svoje imovinske odnose... Sporazum između umrle osobe i tuženika (...) ne zadovoljava taj

73 O mađarskoj sudskoj praksi ispitivanoj gore vidi: C. I. Nagy, "Private International Law: Hungary", u: B. Verschraegen (ed.), *International Encyclopaedia of Laws: Private International Law* (Alphen aan den Rijn: Kluwer Law International 2012) str. 103.–104. i 110.–111.

74 Presuda je dostupna na mađarskom jeziku na <www.birosag.hu/engine.aspx?page=anonim>.

75 Poglavlje 196.–220. Švicarskog građanskog zakonika.

76 Poglavlje 221.–246. Švicarskog građanskog zakonika.

77 Poglavlje 247.–251. Švicarskog građanskog zakonika.

78 Haška konvencija o ukidanju potrebe legalizacije stranih javnih isprava od 5. listopada 1961.

> zahtjev budući da je on općenito primjenjiv i načelno samo supružnici mogu upravljati, koristiti i raspolagati svojom imovinom, on ne sadrži konkretne odredbe o imovinskim odnosima koje odstupaju od Obiteljskog zakona. Prema tome, ugovor se ne odnosi na ugovor o bračnoj imovini u skladu s Poglavljem 27.(2) Obiteljskog zakona. Stoga nije moguće urediti bračne imovinske odnose supružnika drukčije od odredbi Obiteljskog zakona."

Dakle, sud je primijenio odredbe mađarskog Obiteljskog zakona[79] kada je odlučivao o imovinskim posljedicama braka, koje određuju kako bračna imovinska zajednica, u načelu, obuhvaća sve što su supružnici stekli tijekom braka. Imovina stečena prije braka ostaje pojedinačno vlasništvo. Sud je ignorirao činjenicu kako su stranke u dobroj vjeri postupale prema pogrešnom zakonu (vidi "ignorancijski pristup" gore) te odbio slijediti neku vrstu pristupa "izbora u materijalnom smislu" i uzeti u obzir švicarsko bračno pravo pri primjeni *lex causae* (koje je bilo mađarsko pravo), odnosno, primijeniti odredbe stranog prava kao da su ugovorne odredbe te ih na taj način uključiti u sporazum. Prema tome, Žalbeni je sud u Budimpešti usvojio restriktivni pristup i ignorirao okolnost da su stranke djelovale pod pogrešnim zakonom.

Isto tako, problem "postupanja po pogrešnom pravu" pojavio se i u nasljednom pravu u praksi haških sudova. Tipičan slučaj koji uključuje materiju vezanu za ostavinu dobiva međunarodni element kada preminuli, rođen kao mađarski državljanin, emigrira u drugu državu gdje živi desetljećima i stječe državljanstvo.

U ovakvim predmetima, na pitanje mjerodavnog prava može lako biti odgovoreno na temelju Poglavlja 36. mađarskog Zakona o međunarodnom privatnom pravu:[80] ako je preminuli imao više državljanstava i jedno od njih je bilo mađarsko, prema Poglavlju 11. Zakona o međunarodnom privatnom pravu, mjerodavno pravo bit će mađarsko pravo. Ovo pravilo vrijedi bez obzira na činjenicu da je pokojni u svojim ranim godinama uspostavio svoj život u stranoj državi i što je većinu svog života proveo u njoj. Tenzija je posebice vidljiva kada preminuli načini oporuku u stranoj zemlji te je ona u skladu sa zakonom države u kojoj ima prebivalište; isto tako i na temelju kolizijskih pravila te države mjerodavno je pravo države prebivališta (ili kolizijska pravila te države osnažuju preminuloga na izbor mjerodavnog prava i on odabire to pravo). Naime, takve oporuke podliježu pod mađarsko pravo (čak i ako preminuli

79 Zakon IV. iz 1952. o braku, obitelji i skrbništvu nad maloljetnicima (na mađarskom: *1952. évi IV. törvény a házasságról, a családról és a gyámságról*).

80 Zakon 13. iz 1979. o međunarodnom privatnom pravu (na mađarskom: *1979. évi 13. törvényerejű rendelet a nemzetközi magánjogról*).

nije razmotrio mogućnost primjene mađarskog prava dok je pisao oporuku), prema kojem se neće smatrati valjanom.

U predmetu FIT-H-PJ-2009-852 Žalbeni sud u Budimpešti morao je odlučiti o valjanosti oporuke koja je sadržavala uvjet, što je bio presedan: suprugova oporuka sadržavala je odredbu kako će njegovu imovinu naslijediti njegova supruga, pod uvjetom da ga nadživi za 28 dana. Preminuli je imao dvostruko državljanstvo, britansko i mađarsko. Stoga je prema Zakonu o međunarodnom privatnom pravu mjerodavno pravo za njegov osobni status bilo mađarsko pravo. Mađarski zakon o nasljeđivanju zabranjuje određene uvjete; ovakve su klauzule nezakonite i time ništetne. Iako je oporuka sastavljena u Engleskoj gdje je ostavitelj živio desetljećima, budući da je mjerodavno mađarsko pravo, sud u Budimpešti smatrao je kako je ovakvo određivanje supruge za nasljednika nevažeće.

Dilemu koja se pojavljuje u gore navedenim pitanjima pravilno bi riješila ograničena stranačka autonomija. U predmetu 1-H-PJ-2009-732 bračni se ugovor izričito pozivao na odredbe švicarskog zakona i jasno sugerirao kako stranke postupaju u dobroj vjeri i dobro osnovanoj pretpostavki da je njihov pravni odnos reguliran švicarskim pravom (napomena: u skladu sa švicarskim kolizijskim pravom mjerodavno je bilo švicarsko pravo). Isto tako, u predmetu FIT-H-PJ-2009-852 sud je vrlo vjerojatno iz uvjeta oporuke mogao zaključiti da je oporučitelj odabrao englesko pravo.

Njemački su sudovi slijedili materijalnopravni pristup u odnosu na predmete koji sadrže "postupanje po pogrešnom pravu". U odluci 16 T 3295/97 od 2. lipnja 1997. godine,[81] *Landgericht München I* ispitivao je valjanost oporuke "inspirirane" francuskim pravom, za koju je u skladu s njemačkim kolizijskim zakonom mjerodavno bilo njemačko pravo. Valja napomenuti da bi prema francuskom kolizijskom pravu mjerodavno pravo bilo francusko pravo i kako je oporučitelj djelovao pod pretpostavkom da je mjerodavno francusko pravo. On je sastavio oporuku na francuskom jeziku, pred francuskim javnim bilježnikom, oporuka je sadržavala francuske pravne pojmove i oporučiteljevo prebivalište je u odgovarajuće vrijeme bilo u Francuskoj. Oporuka je sadržavala sljedeću odredbu: "Ja ostavljam slobodno raspoloživi dio svoje pokretne i nepokretne imovine svojoj kćeri." *Landgericht München I* je smatrao da, iako je trebalo biti primijenjeno objektivno mjerodavno pravo, čak i u slučajevima kada je oporučitelj sačinio svoju oporuku sukladno pravu koje nije mjerodavno, ovo navodno mjerodavno pravo može dobiti na važnosti pri tumačenju oporuke. U takvim se slučajevima sadržaj takvog zakona treba uzeti u obzir pri tumačenju sadržaja oporuke. Pojam "raspoloživi dio imovine" nepoznat je

81 Vidi: Jayme's Case-Note u *IPRax* (1998) str. 117.

u njemačkom pravu, on proistječe iz francuskog koncepta zakona. U skladu s njemačkim pravom oporučitelj može raspolagati cijelom imovinom, dok dijete isključeno iz ostavštine ima pravo na ograničeni zahtjev koji se temelji na nužnom pravu nasljedstva u vrijednosti do polovice onoga što bi naslijedilo na temelju zakonskog nasljeđivanja (da nema oporuke). U ovom je slučaju oporučitelj imao dvoje djece, u tom slučaju prema francuskom pravu svako dijete ima *ex lege* pravo na 1/3 nasljedstva, a oporučitelj može raspolagati s ostalom 1/3 (raspoloživi dio), *Landgericht München I* tumačio je oporuku na način da se njome raspolaže s 1/3 ostavštine, dok je na preostali dio imovine primijenio pravila o zakonskom nasljeđivanju.[82]

IV. Zaključak

U članku je utvrđeno kako stranačka autonomija može imati samo ograničenu ulogu u međunarodnom europskom i nasljednom pravu. Suprotno ugovornom pravu, u međunarodnom obiteljskom i nasljednom pravu stranačka autonomija može služiti samo u svrhu zaštite stečenih prava (u zemlji podrijetla), u svrhu uzajamnog priznavanja kolizijskih pravila i za rješavanje problematike "postupanja po pogrešnom pravu". Različiti kolizijski režimi ukazuju na različita mjerodavna prava, na taj način frustriraju stranke s legitimnim očekivanjima i narušavaju njihova zakonom stečena prava. Jedna od funkcija stranačke autonomije u međunarodnom obiteljskom i nasljednom pravu jest ostvarivanje prava stečenih prema kolizijskim pravilima države stranog foruma u slučajevima kada je to pravo različito od *lex causae,* određenog kolizijskim pravilima države foruma. Stranke se mogu, bilo posredno ili neposredno, sporazumjeti oko primjene prava na temelju kojeg su stekle svoja prava. Stranačka autonomija temelji se na priznavanju stranih kolizijskih pravila. Prema tome, za razliku od ugovornog prava, ovdje stranke mogu izabrati pravo države koje s predmetnom stvari ima razumnu vezu; ne priznaju se sve pravne posljedice, samo one koje su, poveznicama koje se smatraju važećima prema kolizijskim pravilima države foruma, povezane s predmetnom stvari. Kolizijsko pravo utvrđuje mjerodavno pravo, ali stranke imaju pravo izabrati pravo koje je povezano s predmetnom stvari poveznicom koja se smatra valjanom prema kolizijskom pravu.

Neobično je kako gore navedene funkcije gube svoju težinu u odnosima između država koje su usvojile ista kolizijska pravila, kao što su to npr. države

82 Materijalnopravni pristup primijenio je i *Bundesgerichtshof* u presudi IV ZR 93/05 od 22. ožujka 2006. Za više njemačkih predmeta koji sadrže "postupanje po pogrešnom zakonu" vidi: E. Jayme, "Party Autonomy in International Family and Succession Law: New Tendencies" 11 *Yearbook of Private International Law* (2009) str. 5.–7., str. 1.

članice EU-a. U tom slučaju kolizijska pravila svake od država podrazumijevaju primjenu istog zakona i svrha zaštite prava stečenih na temelju zakona na koje su ukazala kolizijska pravila druge države (države podrijetla) manje su važna. Isto tako, problem "postupanja po pogrešnom pravu" manje je važan budući da stranke postupaju prema istom pravu u svim državama članicama, s iznimkom u slučajevima kada je tumačenje kolizijskih pravila (pravo mjerodavno u slučaju izostanka stranačkog izbora) vrlo neizvjesno. Stranačka autonomija u međunarodnom europskom privatnom pravu može poslužiti sa svrhom proširenja zaštite slobode kretanja i prava koja proizlaze iz građanstva EU-a. Nadalje, ona je zakonodavna metoda koja teži unifikaciji nacionalnih kolizijskih pravila na temelju načela uzajamnog priznanja i kompromisa. Uzajamno priznanje nacionalnih kolizijskih pravila dio je političkog kompromisa o unifikaciji europskog kolizijskog prava. Razmatranje uzajamnog priznanja kolizijske baštine država članica podrazumijeva da kolizijski instrumenti EU-a, uobičajeno, čine spoj poveznica koje se općenito koriste u državama članicama. Premda kolizijski instrumenti EU-a ne mogu izbjeći davanje jednom kolizijskom rješenju prednost pred drugim, odbačene se poveznice vraćaju na mala vrata preko stranačke autonomije. Stoga nijedan nacionalni pristup nije u potpunosti odbačen, iako je jedan od njih uvijek u prednosti u odnosu na ostale.

ALBANIAN PRIVATE INTERNATIONAL LAW IN FAMILY MATTERS

Aida Bushati (Gugu)* and Eniana Qarri**

I. Introduction

Nowadays it is almost impossible to study a legal institute without regard to its international and European dimensions due to global movement of the world population and its economic and cultural exchanges.[1] In the last two decades, after the fall of communism Albania has experienced a vast migration of its population and at the same time it has also been influenced by global developments.[2] This has led to a considerable increase of economic and family relations between Albanians and people of other nationalities. Cross-border marriages have become a phenomenon of our society as well.

In Albania, civil and family issues with foreign elements are regulated by the Act on Private International Law No. 10428, dated 2 June 2011 (hereinafter: PIL Act) and a number of international and bilateral agreements ratified by the Albanian Assembly. The PIL Act of 2011 has replaced the old rules of private international law adopted in 1964 and introduced new detailed rules on conflict of laws issues. The new law has deeply reformed Albanian rules on private international law, providing new criteria for the determination of the

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1 D. Masmejan, *La localisation des pesonnes physiques en droit international privé, Etude comparée de notions de domicile, de résidence habituelle et d'établissement, en droit suisse, français, allemand, anglais, américain et dans les Conventions de La Haye* [Localization of physical persons in private international law. A comparative study of the concepts of domicile, habitual residence and establishment, under Swiss, French, German, English, American laws and the Hague Conventions] (Genève, Librairie Droz, 1994) p. 13.

2 Two British political researchers give this definition for the phenomenon of globalization as "the process of increasing interconnections between societies, so that events in one part of the world increasingly have an impact on people and societies of the rest of the world. A globalized world is a world in which political events, economic, cultural and social ones are increasingly connected between them." J. Baylis and S. Smith, *The globalization of world politics*, (Oxford 1999) p. 7; Apud. J. Basedow, 'The effects of globalization on private international law', in J. Basedow et al., eds., *Legal aspects of Globalization, Conflicts of Laws, Internet Capital Markets and Insolvency in a Global Economy* (The Hague, Kluwer Law International, 2000) p. 2.

applicable law and for determining jurisdiction of Albanian courts on civil and family matters with foreign elements.

This paper will focus on the provisions of private international law related to family issues. It will elaborate the criteria used for the determination of applicable law on family matters and determination of jurisdiction of Albanian courts on these issues. The analysis will underline the differences between the old and the new regime of private international rules applicable in family matters. The analysis will be also completed by a comparative view of the solutions offered by PIL Act provisions and the solutions contained in the EU regulations Brussels II bis and Roma III. The paper will be concluded by some findings and recommendations.

II. History and development of PIL rules in Albania

During the years of the communist regime, civil and family relations with foreign elements were regulated by the Law No. 3.920 of 21 November 1964 on the Enjoyment of Civil Rights by Foreigners and on the Application of Foreign Law (the old PIL Act). The application of Albanian private international law rules at that time was very limited. Due to the country's severe isolation from the rest of the world, especially after the 1970s, it was almost impossible to have marriage or family relations with foreign nationals. Economic relations with the rest of the world were very limited too. Nevertheless, the old PIL Act contained a few provisions on civil and family relations with foreign elements. Under the old PIL Act, the main connecting factor with regard to persons, family relations and succession was the *lex nationalis*. Rights in movables and immovables were governed by the *lex rei sitae*. For contractual relations, the parties were free to choose the applicable law; in the absence of a choice, the focus was on characteristic performance. For torts, the *lex loci delicti* applied.

The old PIL Act also contained a provision on international jurisdiction. Under this provision, the domicile of defendant was considered as a connecting criterion for the determination of court jurisdiction. The old PIL Act contained no rules on the recognition and enforcement of foreign judgments. This issue was later regulated by Chapter V of the Civil Procedure Code of 1981, (Law No. 6343, dated 27 June 1981, on the Civil Procedure Code of the People's Socialist Republic of Albania). At that time, foreign judgments related to property and other rights over immovable properties located in Albania were not recognized and enforced by Albanian courts. Other conditions of refusal of recognition of foreign judgments were similar to the ones applied in the current legal system.

After 1990, with the fall of the communist regime the political and socio-economic situation of the country changed drastically. Many Albanians emigrated abroad and economic and social relations were established with the rest of the world. The rapid development of the country and in particular its engagement in the Stabilization and Association Process with the European Union determined the need of revising the entire legislation, including the existing rules on private international law as well. The main concern of the Albanian authorities was to reform the old private international law with the primary goal of modernizing it and approximating it with EU regulations and other private international law agreements that Albania adhered to. Albania has been a member of the Hague Conference on Private International Law since 2002, and it has ratified a number of Hague Conventions on PIL. On the other hand, the approximation of Albanian legislation with the EU *acquis* is one of the key conditions for EU accession and one of the obligations deriving from the Stabilization and Association Agreement (SAA).[3]

After several years of intensive work by national and international experts, the Albanian Parliament finally approved a new law in 2011, Law No. 10 428, dated 2 June 2011, on Private International Law (PIL Act).[4] In drawing up this law, the experience of other European states (for example, the Italian, German and Belgian laws) and those that have recently joined the European Union (for example, the Romanian and Slovenian law) were utilized, as well as a series of European and international legal instruments in the field of private international law. As made clear in the footnote inserted at the beginning of the text of the law, this law has been approximated with the Rome I (on applicable law on contractual obligations) and Rome II (on applicable law on non-contractual obligations) Regulations.[5]

The scope of the PIL Act is the regulation of legal civil relationships with foreign elements as well as the determination of Albanian courts' jurisdiction on legal civil relationships with foreign elements.[6] The PIL Act defines the

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3 Articles 6 and 70 of the SAA. *Official Journal of the Republic of Albania* No. 87 ratified by Law No. 9590, dated 27 July 2006, on the ratification of the Stabilization and Association Agreement between the European Communities and their member states on the one part and the Republic of Albania on the other part".

4 *Official Journal of the Republic of Albania* No. 82 dated 17 June 2011, page 3319.

5 Regulation (EC) No.593/2008 of the European Parliament and of the Council of 17 June 2008 'On the Law Applicable to Contractual Obligations (Rome I). *Official Journal of the European Union* 2008 L 177, 4 July 2008. Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 'On the Law Applicable to Non-Contractual Obligations' (Rome II). *Official Journal of the European Union* L 199, 31 July 2007.

6 Article 1(1) of the Act No. 10428, dated 2 June 2011, on International Private Law.

foreign element as "any legal circumstance related to the subject, content or object of a legal civil relationship (specifically of the marriage relationship) that causes the connection of this relationship with a certain legal system".[7]

In our opinion, the choice of the legislator to provide for the definition of "foreign element" is not approriate. Other countries' experiences regarding PIL rules show that foreign element is not defined by law, but they rather leave it to be defined by the legal doctrine or jurisprudence of the court, case by case. Foreign element remains a matter of fact and not a matter of law. The PIL Act offers a number of novelties and detailed regulation compared to the old PIL, but in some places its provisions are not well drafted and leave room for misinterpretation and inconsistencies.

III. Family matters in private international law (the applicable law)

1. Connecting criteria for family matters

The provisions related to marital and family relations with foreign elements include provisions on the form and conditions of marriage, personal and property relations, divorce, maintenance obligations, child adoption, custody of children and parental relations. In the field of family matters, the new PIL Act has brought evident novelties, both from the quantitative[8] (the number of legal provisions) and qualitative points of view.

The new PIL Act, compared to the old one, provides for two new connection criteria to be used for the determination of applicable law in family matters: *habitual residence* (different from dwelling place as provided by the old PIL) and *closest connection* to a certain place. The old PIL did not use habitual residence as a connecting factor for conflict of law rules. In the old PIL Act the only connection criteria for determining the applicable law for the regulation of marriage with a foreign element was the *lex nationalis* of the spouses. Although *lex nationalis* is still predominantly used as connecting factor for family issues, there are also cases where referral to habitual residence is used, for example in maintenance provisions. When it comes to the determination of the *lex nationalis* of natural persons, the PIL Act provides the following rules:

a) Albanian law prevails in cases where Albanian citizens have dual citizenship.

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7 Article 1(2) of the Act Mo. 10428, dated 2 June 2011, on International Private Law.

8 The new Act has brought the improvement of the existing legal institutes and has expanded their contents in line with the most up-to-date developments of international private law.

b) If a person has two or more foreign nationalities, the law of the country is applied where the person has his or her habitual residence.

c) In case the person's habitual residence is not located in any of the states whose national he/she is, the person is considered a national of the state with which the closest connection exists (Article 8, PIL Act).

d) If a person is stateless or if his/her nationality cannot be identified, the applicable law is that of the state in which the person has his/her habitual residence, or in the absence thereof, the law of that state with which the person has the closest connection (Article 9, PIL Act).

Regarding the habitual residence of natural persons, Article 12(1) of the PIL Act has introduced a legal definition similar to the one used in other modern PIL Acts such as the ones of Belgium, Bulgaria, Macedonia and Romania. The "habitual residence" of a natural person means the country where a natural person has decided to stay predominantly, even in the absence of registration and independent of a permit or authorization to stay. In order to determine this country, the circumstances of personal or professional nature that show durable connections with that country or indicate the will to create such connections are taken into account.

2. Marriage as a "legal action" (substantive requirements)

The conditions for the conclusion of marriage (*substantive requirements*) are exceptionally complex. In principle, they are subject to the *lex nationalis* of each future spouse at the time of the conclusion of marriage. However, in cases where one of the spouses is an Albanian national or has his/her habitual residence in Albania and the conclusion of marriage is subject to a foreign law which is missing one of the conditions for the conclusion of marriage, the marriage may be entered into according to Albanian law (Article 21(1) to (3) PIL Act).

For conclusion of marriage in the territory of the Republic of Albania, foreign or stateless persons shall in addition (cumulatively) fulfill the fundamental preconditions provided for in the Albanian Family Code. According to Article 21(4) of the PIL Act, a marriage which has been concluded in compliance with the conditions of the *lex nationalis* of each spouse (Article 21(1) PIL Act) may still not be recognized in Albania unless the conditions for the conclusion of the marriage under Albanian law are fulfilled.

The form of conclusion of marriage is governed by the *lex loci actus*. If two foreign citizens or stateless persons decide to marry in the Republic of

Albania, then the marriage must necessarily be concluded before a state employee of a civil status office. The marriage should be concluded according to all legal regulations provided by the Family Code, otherwise it will be considered invalid. A marriage between two persons, neither of whom is an Albanian national, may be celebrated before a diplomatic or consular representative of a foreign state, in accordance with the law of that state (Article 22 (1) and (2) of the PIL Act). The form of marriage that is considered valid under *lex loci actus* may be also recognized under Albanian law. The question that arises here is: will a marriage concluded in a foreign state among two Albanian citizens be valid in our domestic legal order if the form followed is not the civil form but another, e.g. a religious one?

If we literally interpret Article 22(3) of the PIL Act, the answer to this question will be "yes", the marriage is valid. However, according to the Albanian Family Code, the only valid form of marriage is the civil one. In this case, the provision of public policy will apply. So, the problem seemingly finds its solution in the public order clause, providing that if a foreign law conflicts the Albanian public order, it will not be enforced.[9]

A better phrasing of the provision is necessary. We propose the following formulation: if the form of marriage is valid by *lex locu actus*, it is also considered valid in Albania (Article 22 (3) of the PIL Act) or – following the same legal logic as the law of 1964[10] – "if, in the case of a marriage concluded among Albanian citizens living in Albania, it has been concluded in the form of civil marriage".

Another problem identified in the PIL Act is the lack of regulation concerning the invalidity (annulment) of marriage. For an overall regulation of the marriage institute, the law must contain provisions concerning the conflict factors for determination of the law applicable to invalidity (annulment) of marriage.

3. Effects of marriage and its dissolution

3.1. Personal effects of marriage

The general effects of marriage are governed by the law of the country of shared nationality of the spouses. There are two subsidiary connecting criteria

9 According to Article 7 of the PIL Act, "the foreign law does not apply when the effects of its implementation are clearly contrary with the public order or may have consequences which are apparently not compatible with the fundamental principles set in the Albanian Constitution and legal system. In case of non-compatibility, another provision of the foreign law is applied, and when this is absent Albanian law is applied."

10 Article 6 of the Act no. 3920, date 21.11.1964 "On the enjoyment of the civil rights by the foreigners and on the enforcement of the foreign law".

that apply as alternatives. Firstly, failing the shared nationality criterion, the laws of the country in which both spouses have their joint (habitual) residence will apply. Secondly, failing the joint residence criterion as well, the law of the country with which the spouses are most closely connected will apply (Article 23 of the PIL Act). Article 8 of the old law of 1964 provided the nationality of the spouses as the main connecting criterion, and in cases of different nationalities, the *lex fori* was applicable.

3.2. Matrimonial property regime

The patrimonial relationships among spouses are regulated by the so-called matrimonial property regime of goods. This regime represents the set of legal rules that regulate relationships among spouses regarding patrimony gained by them in the course of marriage, as well as relationships established among them and third parties through undertaking obligations related to patrimony gained in the course of marriage.[11] In the absence of a contract between the spouses, the marital property regime shall be regulated by the law of the state that regulates the personal relations of spouses.

Unlike the old PIL Act, the new PIL Act introduces for the first time the principle of party autonomy in the marital property regime. It provides for the right of spouses to determine through agreement the applicable law of the marital property regime. However, the choice is restricted to the law of the state: a) of which one of the spouses is a national; b) in which one of the spouses has habitual residence, or c) in which the real property is located. The agreement shall be made in a notarial form or in an equivalent act certified by a public organ. If on the strength of an agreement the marital regime is governed by the law of another country, third persons acting in good faith enjoy protection in accordance with Article 24(3) of the PIL Act.

Traditionally, the party autonomy principle in private international law has been applied exclusively in the area of contractual relations, while today, in contemporary private international law, this principle is also applied in the field of marital property regimes.[12] One of the main concerns arising from applying the party autonomy principle in the choice of the applicable law in the field of marital property regime is the issue of fragmentation (depeçage) of the legislation that governs the

11 S. Omari, *E drejta familjare* [Family Law] (Tiranë, Morava 2008) p. 105.

12 M. Diago, *Pactos o Capitulaciones Matrimoniales en derecho Internacional Privado* [Marriage Contracts in Private International Law] (Zaragoza, El Justicia de Aragon Colecction, 1999) p. 113.

personal and patrimonial relationship between spouses. Such fragmentation might lead to the problem of classification of certain relations between spouses, such as the family dwelling and the material contribution for the family, which is called the primary regime of the family. Another question that arises in this case is whether these connection criterions will be applied to all types of spouses' properties (movable and immovable properties). From a careful reading of Article 24 of the PIL Act we may conclude that the law guarantees the principle of the unity of applicable law to be applied for all properties of spouses.

The PIL Act provisions on the patrimonial regime of marriage also reflects the solutions offered in the proposed EU Regulation on jurisdiction, applicable law and the recognition and enforcement of judicial decisions in matters of matrimonial property regimes of 16 March 2011. According to Articles 16, 17 and 18 of this proposed Regulation, the spouses have the right to freely choose the applicable law between the law of the common habitual residence, the law of habitual residence of one of the spouses in the moment of the conclusion of the agreement and the law of the citizenship of one of them at the time of conclusion of the agreement. In the absence of an agreement among the spouses, their property relationships will be regulated by the law of the first habitual residence after the marriage, the law of the common citizenship at the time of the marriage, or the law of the state the spouses have closest connections to. The proposed regulation also recognizes the principle of unity of applicable law for all the patrimony of the spouse despite its character.[13]

4. Dissolution of marriage

Dissolution of marriage is governed by the shared *lex nationalis* of the spouses at the time of the submission of the lawsuit (Article 25). The same criterion was also provided by Article 7 of the old law of 1964. In cases where spouses have different nationalities, dissolution of marriage is regulated by the law of the state in the territory of which the spouses have their habitual residence at the moment of filing of the lawsuit. There is an exception to this rule provided in paragraph 3 of Article 25 which stipulates that when the foreign law does not permit the dissolution of the marriage, Albanian law will apply if the one who seeks it is an Albanian citizen or was an Albanian citizen at the moment the marriage was entered into (Article 25 PIL Act). The law that regulates dissolution of marriage is also applicable to consequences arising from divorce, except for alimony.

13 Article 15 of the Draft Regulation.

IV. Other family law issues

1. Maintenance obligations

Article 26 of the PIL Act provides for the connecting criteria in determining the law applicable to maintenance obligations. Maintenance obligations are in principle governed by the law of the state of the habitual residence of the creditor. If the person entitled and the debtor have the same nationality and the debtor has his habitual residence in the state in question, the maintenance is subject to the common *lex nationalis*. If the person entitled cannot obtain maintenance under the conditions mentioned above, Albanian law is applied. In case the marriage was dissolved or declared invalid in the Republic of Albania, or when the decision for its dissolution or declaration of invalidity has been recognized in the Republic of Albania, maintenance obligations are regulated by the law of the state where its dissolution was sought or where it was declared invalid (para. 4).[14]

2. Parentage

The descent, as well as the challenge of the descent of a child is governed by the *lex nationalis* of the child at the time of birth. The PIL recognizes the principle of the child's best interest, and in order to protect that provides for two alternative connecting factors: a) the habitual residence of the child at the time of submission of the request, or b) the law applicable to the personal relations between the parents at the time of the child's birth (Article 28 of the PIL Act).

With regard to relationships between parents and children, the law provides the habitual residence of the child as the connecting criterion. However, priority has been given to the nationality if this might be more favorable, taking into consideration the fact that the best interest of the child prevails (Article 29 PIL Act). The determination of the "habitual residence" of the child is of special importance because this implies a complex operation. The habitual residence of a child is neither specified in the PIL Act nor has it been developed by the jurisprudence of Albanian courts. It would be good if the definition provided by the European Court of justice in case C-523/07 could be used as a reference when Albanian courts apply this provision. According to the ECJ decision:

> "...the concept of the habitual residence under Article 8(1) of the Regulation No. 2201/2003 must be interpreted as meaning it corresponds to the place which reflects some degree of integration in a social and

14 This Article was drafted after the international standards of the Hague Protocol of 2007, and reference was also made to the Belgian Code on Private International Law (note 8) Chapter V.

family environment. A child is habitually resident under Article 8/1 of the Regulation Brussels II bis, in the place in which the child – making an overall assessment of all the relevant factual circumstances, in particular the duration and stability of residence and familial and social integration – has his or her center of interests."[15]

3. Adoption

Adoption is regulated by a combination of the Family Code and the Act on Private International Law. Article 257(1) of the Family Code foresees the conditions and effects of adoptions which occur in Albania; this is to be interpreted as a referral to Albanian substantive provisions. The scope of application of Article 30 of the PIL Act is therefore reduced to adoptions performed abroad (see para. (3) under Article 30 of the PIL Act). In the latter case, the conditions for adoption and the very performance of adoption (as well as the consequences of adoption) are governed by the *lex nationalis* of the adopters at the time of adoption. In case the adopters have different nationalities, the law of their common habitual residence applies (Article 30 (1) and (2), Article 31 PIL Act). Independent of the provisions cited above, the law applicable to adoption is also dealt with in Article 16 of the Law on the Adoption Procedure and the Albanian Committee for Adoption, which distinguishes as follows: a) foreign children in a de facto state of neglect are subject to Albanian law; b) Albanian nationals intending to adopt a child which has a foreign nationality shall fulfill the conditions of the Albanian Family Code, of the Law on the Adoption Procedure as well as of the law of the child's domicile; c) Albanian nationals with double nationality and permanent domicile abroad shall for the adoption of an Albanian child fulfill the legal conditions for adoption of their state of domicile.

4. Guardianship

Guardianship over a person or his/her property is governed by the *lex nationalis* of the person under whom the guardianship is established. A foreign citizen or a stateless person who has his/her habitual residence in the Republic of Albania is placed in guardianship, according to Albanian law, until his/her state takes all the necessary measures. The property located in the territory of the Republic of Albania, owned by a foreign citizen or a stateless person is placed in guardianship, according to Albanian law, while another state decides and takes necessary measures (Article 32 PIL Act).

15 Case C-523/07 of 2 April 2009, proceedings brought by A (2009) ECR I 2805.

V. Jurisdiction of Albanian courts in family matter disputes

International jurisdiction is regulated in the context of private international law, whereas for the recognition and enforcement of foreign judgments the Civil Procedure Code applies. This concept stands in a striking contrast not only to the European law on international civil procedure, which always regulates international jurisdiction and recognition in context, but also to the concept used by other national legislators in Europe. Similarly, stipulation of the jurisdiction of the Albanian courts is regulated in a liberal way in the PIL Act, whereas the choice of a foreign forum is regulated in a highly restricted manner in the Civil Procedure Code.

1. Jurisdiction and procedural provisions

The PIL Act addresses the question of applicable law in civil and commercial matters as well as the question of jurisdiction and the procedures before Albanian courts in disputes with foreign elements (Article 1 of the PIL Act)[16]. As a general rule, Albanian courts have jurisdiction over resolution of civil legal disputes with foreign elements if the defendant has habitual residence[17] in the Republic of Albania. The PIL Act has kept habitual residence as the basic connecting factor for determining the jurisdiction of the Albanian courts (Article 71 of the PIL Act).

Special jurisdiction of Albanian courts has been provided for family and civil matters, such as the announcement of the disappearance or death of a person; marriage; relationships between spouses, parents and children; maternity; adoption; waiver or limitation of the capacity to act; and custody (Articles 74-79 of the PIL Act).

According to Article 75 of the PIL Act,[18] Albanian courts have jurisdiction in cases related to marriage and consequences of divorce, annulment and matrimonial property regimes, when:

a) One of the spouses was or is an Albanian citizen at the time of their marriage;

b) The spouse against whom the lawsuit has been filed or the plaintiff in the case of divorce has his/her habitual residence in the Republic of Albania;

16 Jurisdiction in regulated by Articles 71-81 of the PIL Act.

17 The definition of habitual residence is given in Articles 12 and 17 of the PIL Act.

18 According to the meaning that Article 75(2) of the law gives, lawsuits related to marriage mean lawsuits for divorce and invalidity (annulment) of marriage, lawsuits for the verification of marriage and lawsuits related to matrimonial property regimes.

c) One of the spouses is a stateless person and has his/her habitual residence in Albania.

Also, the law regulates the jurisdiction of Albanian courts in lawsuits related to the rights and obligations among parents and children arising from marriage. Albanian courts have jurisdiction to decide on such cases where one of the parties has Albanian nationality or residence in the Republic of Albania.

As a general principle, adjudication of judicial cases with foreign elements before Albanian courts is done according to the Albanian procedural law (Article 82 para. 1, PIL Act). Adjudication of matrimonial disputes before Albanian courts is done based on Albanian procedural law, which means based on the Civil Procedure Code and those procedural provisions provided by the Family Code. In civil adjudications that are held before Albanian courts, foreign subjects as well as stateless persons enjoy the same rights and procedural guarantees as Albanian subjects (para. 2).

Provisions about judicial expenses are contained in Article 83 of the PIL Act. According to this article, if the plaintiff is a natural person, or a foreign legal person or a stateless person and does not have a domicile or headquarters in the Republic of Albania, then, at the request of the defendant party, the court decides that the plaintiff party, shall, within an appropriate/reasonable time period set by it, deposit a guaranty for covering judicial expenses in a specified sum or an object.

2. Recognition of foreign court judgments

Foreign judgments are recognized and enforced in the Republic of Albania according to the provisions of national law and international law applicable in Albania. The Civil Procedure Code (CivPC) in its Article 393-399 stipulates the rules and procedures for the recognition and enforcement of foreign judgments in civil and commercial matters in Albania. As a general rule, the recognition of foreign decisions is based on the CivPC provisions (Article 393). However, in cases where an international agreement has been entered into on that matter, the provisions of the agreement will be applied (Article 393(2)).

According to the CivPC, the recognition of foreign decisions is subject to conditions specified in the CivPC and in separate laws (Article 393(1)). The term "separate laws" implies the multilateral and bilateral agreements as well as domestic laws that lay down the conditions and procedures for the recognition and enforcement of foreign decisions. The CivPC does not contain any specific provision which indicates the conditions under which a foreign judgment can be recognized and enforced. Nevertheless, by simple interpretation

of the provisions covering that matter, we can conclude that the authenticity of the decision the recognition of which is required for the purpose of creating the belief that the decision has become final and has the effects of *res judicata* in the state of origin as well as that the legitimacy of the litigant claiming the recognition should be taken into consideration.

The CivPC provides that the refusal of recognition and enforcement of a foreign judgment is based on the principles of public order and due process of law. A decision of an Albanian court of appeal is needed in order to give effect to and enforce a foreign judgment within the territory of the Republic of Albania (*exequatur*). The role of the court of appeal as to the recognition and enforcement of the foreign court decision is limited only to the verification of the fact that the decision does not fall under one of the situations provided in Article 394 of the CivPC (conditions for refusal of recognition and enforcement). The court does not enter into the merits of the case, and it issues the decision based on the request submitted (Article 397, CivPC).

The decision of the court of appeal on a request for the recognition of a foreign court decision gives effect to the foreign decision for being enforced in Albania. The enforcement of foreign judgments is subject to the general enforcement rules foreseen in the Civil Procedure Code (Article 510 et seq.).

Albania is one of the countries that have ratified the Hague Conventions on the recognition and enforcement of court decisions. The provisions of these agreements will be applied alongside the provisions of the CivPC.

The Code gives room for the recognition of judgments of foreign courts to also be established in separate laws. Those provisions are applicable, except for the case of the existence of an agreement on the recognition of foreign judgments on the dissolution and annulment of a marriage, divorce, parental responsibility, maintenance obligation, custody, adoption and similar matters.[19]

Part of the Albanian legislation covering the rules and procedures for the recognition and enforcement of foreign judgments in civil and commercial

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19 Albania has ratified the following multilateral conventions, among others:
Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, enforced by Law No. 10 194, of 10 December 2009;
Hague Convention on Recognition and Enforcement of Decisions relating to Maintenance Obligations, enforced by Law of 17 March 2011;
Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, enforced by Law No. 9443 of 16 November 2005;
Hague Convention on Civil Aspects of International Child Abduction, enforced by Law No. 9446 of 24 November 2005;
Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, enforced by Law No. 8624 of 15 June 2000.

matters includes bilateral agreements that Albania has signed with countries of the region such as Greece, Macedonia, Turkey and so forth.[20]

V. Final remarks

The Albanian Private International Law Act of 2011 has made significant improvements compared to the old law. New concepts have been introduced and complete provisions have been provided for civil and commercial issues. The law tries to approximate the provisions of Albanian private international law with the best European and international provisions on these matters. Concerning foreign judgments, they are recognized and enforced according to the provisions of national law (the Civil Procedure Code) and international law (multilateral and bilateral agreements) applicable in Albania.

As regards the regulation of family matters, the new law has brought considerable novelties both from the qualitative aspect regarding a more detailed regulation of the matrimonial relationship and from the quantitative aspect regarding the regulation of new relationships which were not covered by the previous law, such as the matrimonial patrimony regime.

Along with the traditional connection criterions provided in the previous law, the new law, as regards the determination of the material law applicable to the marriage with foreign elements, provides for two new connection criteria: "*habitual residence*" and "*closest connection*".

Despite the improvements, the PIL Law will necessarily continue to be subject to further revision and clarification needed not only to further approximate it with developing European regulation, but also to correct and improve some of the existing provisions.

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20 Bilateral Agreement between the Republic of Albania and Greece, Law No. 7760 of 14 October 1993 on the ratification of the Convention between the Republic of Albania and Greece for legal assistance in civil and criminal Matters;
International Agreement between the Republic of Albania and the Republic of Macedonia on mutual legal assistance in criminal and civil matters, Law No. 8304 of 12 March 1998;
Bilateral Agreement between the Republic of Albania and Turkey on mutual legal assistance in civil, criminal and commercial matters, Law No. 8036 of 22 November 1995.

APPLICATION OF FAMILY PRIVATE INTERNATIONAL LAW IN BULGARIA

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I. Introduction

Bulgaria became a Member State to the EU on 1 January 2007. In the pre-accession process the country was faced with the challenge to adapt its legislation to the stage of the existing aquis communautaire. The main efforts were directed to the implementation of the EU directives into the domestic law. The Bulgarian legislator correctly did not provide for rules repeating the EU regulations as it was of the opinion that these instruments will apply directly after the full EU membership. As nothing was to be done, almost nobody in Bulgaria was aware of the regulations' existence. Since the instruments in the field of the judicial cooperation in civil matters are predominately regulations, the existence of EU rules in this sphere was rater surprising for the Bulgarian practice.

Up to 1 January 2007 private relationships with a cross-border element were regulated by the newly adopted Code on Private International Law (PIL Act), as well as by some multilateral and bilateral treaties. The new PIL Act was the first in Bulgaria's history to combine the questions of international jurisdiction, applicable law, recognition and enforcement of foreign judgments. After its entry into force on 21 May 2005, it has led to an enlargement of the subject of private international law in Bulgaria. The PIL Act added the international jurisdiction questions and the theme of recognition and enforcement to the classical issue of conflict of laws and the regulation of private relationships with a foreign element by special substantive rules. The application of the PIL Act has just started and some of its parts have been suspended due to the direct application of the EU's private international law regulations. The Bulgarian theory and some Bulgarian judges are aware of the existence and the supremacy of the EU regulations to the Bulgarian PIL Act. Unfortunately, other judges and attorneys are not.

This paper will show some cases brought before Bulgarian courts. It will focus on international jurisdiction in connection with: 1) matrimonial matters – divorce and legal separation, 2) parental responsibility claims attached to divorce and 3) child abduction.

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Some open issues will be discussed based on the Bulgarian case law applying to these issues the Brussels II bis Regulation, the Hague Convention on the Civil Aspects of International Child Abduction and domestic Bulgarian law – the PIL Act and the Civil Procedural Code. The paper is using typical stylized cases visualizing the core of the problems found.

II. Matrimonial matters

1. General jurisdiction

A short remark at the beginning: Bulgaria is a country with a very high emigration rate due to economic and political situation after the changes in 1989. The presented case and the following cases result from this.

In this first case, there is a Bulgarian woman – Maria – who studied and started to work in Germany. Maria met and subsequently married Andreas – a German national. The couple had a baby. The marriage collapsed and Maria returned to Bulgaria with the baby. Immediately after Maria came home, she lodged a claim with the Bulgarian court for divorce and parental responsibility. If the case had happened before 2007, the Bulgarian court would have had international jurisdiction in the divorce matter pursuant to Article 7 and Article 9 of the PIL Act. According to these rules, if each of the spouses, respectively each of the parents or the child, is a Bulgarian national or has a habitual residence in Bulgaria, Bulgarian courts shall have the international jurisdiction to solve the case. After 2007, the court seized has to apply the Brussels II bis Regulation. Under Article 3 therein, the international jurisdiction lies with German courts unless Maria is habitually resident in Bulgaria, has resided in Bulgaria for at least 6 months immediately before the application and is a Bulgarian national. What happens in those cases in Bulgaria? Some courts apply Article 3 of the Brussels II bis Regulation correctly.[1] Judges refer to the ECJ case law and look for the place where the person has settled permanently with the intention to establish his/her center of interest. On these grounds, in the given case the courts logically deny jurisdiction and dismiss such a claim.

Some courts apply Article 3 with the intention to provide Bulgarian justice to the Bulgarian applicant. This happens in two ways. Some judges equate the factor of habitual residence to permanent address. Pursuant to Article 93(4) of the Civil Registration Act, all Bulgarian citizens, irrespectively of their habitual residence, should have a permanent address in Bulgaria. Thus, as the

1 Ruling No. 554 of 29 October 2012 in Case No. 314/2012 of the Supreme Court and Ruling No. 7559 of 4 May 2012 in Case No. 2512/2012 of Sofia City Court.

permanent address would be established a long time ago, normally at the time of birth, a person like Maria will be deemed as having habitual residence in Bulgaria.[2] Some judges study only the period of time, not the quality of residence. If it exceeds six months, it is sufficient to consider the person habitually resident in Bulgaria.[3] Finally, some courts simply apply Article 7 of the PIL Act and neglect the Brussels II bis Regulation.[4]

The presented first case may lead to at least two open questions. Is a legal definition of habitual residence needed? The majority of academics believe it is not needed, as habitual residence is self-evident in most cases and very complex to define. That view is rational, but it works much better with pointers given by the ECJ in the Case C-523/2007:

> "… 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 (para. 39)."

These pointers provide more confidence to judges, lawyers and parties when deciding on that crucial question. In order to avoid grave mistakes, in addition to the positive list a negative one may be created. It could state that it is not sufficient to decide about habitual residence only on the bases of citizenship, address or mere period of time.

Is international jurisdiction in divorce cases based on the procedural capacity of a spouse really needed? Article 3 of the Brussels II bis Regulation considers simultaneously the habitual residence and the procedural capacity of the spouse. The spouse staying in the last common habitual residence may seize the court with a divorce claim at any time. The moving spouse has to establish habitual residence and wait six or even twelve months for lodging the same claim. At the end of the day, there is no equal access to the court of the habitual residence in a Member State. If habitual residence is considered as a sufficient factor, it is not needed for the moving claimant to be restricted by an added period of time. The easiest solution would be to restructure Article 3 of the Brussels II bis Regulation by excluding the procedural capacity of the spouses.

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2 Judgment No. 394 of 1 December 2008 in Case No. 397/2008 of Sofia City Court and Ruling No. 649 of 30 June 2009 in Case No. 605/2009 of the Supreme Court.

3 Ruling of 16 September 2010 in Case No. 423/2010 of County Court Sliven. Ruling No. 605 of 19 February 2013 in Case No. 47/2013 of County Court Blagoevgrad.

4 Judgment No. 303 of 9 July 2013 in Case No. 341/2013 of County Court Vratsa, Judgment of 10 April 2008 in Case No. 83/2008 of County Court Veliko Tarnovo.

2. Conversion of legal separation into divorce

The second case brought before a Bulgarian court is as follows: a lady (Neli), Bulgarian citizen, moved to Italy, where she married Carlo, an Italian citizen. Neli return to Bulgaria in 2008. In 2009 the couple received a decision on legal separation in Italy. Later, in 2012 Neli lodged a divorce claim with the Bulgarian court. The institute of legal separation in not known in Bulgaria. The Brussels II bis Regulation has a special rule, Article 5, for conversion of legal separation into divorce. Pursuant to it, 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 5 is an alternative to Article 3. That kind of proceeding may raise *lis pendence* and recognition issues.

What happened in Bulgaria with that case? The first[5] and second instance[6] courts in Varna declined jurisdiction. They found that there was only one competent court – the Italian – as the court of the last common habitual residence of the spouses where one of them still lives. They construed Article 5 as giving the power to convert the legal separation into divorce only to the Italian court. The Supreme Court of Cassation decided differently.[7] The judges rightly considered Article 5 as an alternative to Article 3. Hence, according to the Supreme Court, Bulgarian courts may divorce the couple as the court of the habitual residence of the applicant constituted more than 12 months prior to the claim. The judges in the Supreme Court completely ignored the *lis pendence* and foreign judgment recognition issues.

Based on the presented case, one important question may arise. Is it really needed to consider *lis pendence* and foreign legal separation judgment when deciding on divorce in another Member State?

The Supreme Court rightly did not acknowledge the Italian judgment on legal separation, as pursuant to it the legal bound between the spouses was not terminated. This termination will occur as a result of a Bulgarian divorce judgment. Hence, the claim for legal separation and the claim for divorce have different subjects and lead to different results. The Bulgarian divorce judgment will not be irreconcilable with the previous Italian judgment on legal separation. As there is no competition between legal separation and divorce judgments, then there is no need for considering at an earlier stage the *lis pendence* of divorce and legal separating claims as stated in Article 19(1) of the Brussels

5 Ruling No. 5229 of 5 April 2012 in Case No. 3188/2012 of Varna District Court.

6 Ruling No. 1556 of 4 June 2012 in Case No. 1365/2012 of County Court Varna.

7 Ruling No. 716 of 28 December 2012 in Case No. 356/2012 of the Civil Chamber, I, Supreme Court.

II bis Regulation. The last conclusion contradicts with the wording of Article 19(1) of the Brussels II bis Regulation but contains much more pragmatism.

III. Parental responsibility claim attached to divorce claim

The third case is linked to the first one. A Bulgarian couple with two children was living in Spain. The mother and the children remained in Spain, whereas the father returned to Bulgaria and lodged claims with the Bulgarian court for divorce, parental responsibility, maintenance of the children, the name of the wife and the family home. According to Article 322(2) of the Bulgarian Civil Procedural Code, all these claims have to be lodged and decided jointly. This is a very fundamental principle that has to be adapted to the application of the Brussels II bis Regulation.

According to the Brussels II bis Regulation, the international jurisdiction has to be determined separately for each claim, i.e. divorce and parental responsibility. There is only one escape from this rule: Article 12. The given case may be decided in two ways in Bulgaria. Some judges will apply Article 3 and Article 8 and drift away from the principle of joint claims.[8] Another group of judges will most probably try to apply Article 3 in connection with Article 12 in order to keep all claims together. One subclass of judges will study all the prerequisites of Article 12 and in the given case will come to the conclusion of the lack of jurisdiction.[9] Another subclass will follow the so called "gravitation principle" or "the principle of attraction" established by the Supreme Court of Cassation. In a series of rulings on this issue, the Supreme Court of Cassation ruled that in the given case the habitual residence of the child is irrelevant.[10] If the court seized has jurisdiction to decide on the divorce, the same court is automatically competent to solve the parental responsibility issue in order to keep all compulsory claims together. This way of construction is obviously in contradiction with the wording and the sense of Article 12 of the Brussels II bis Regulation.

Looking at the practical consequences of the application of Article 12, the following question may arise: if the Brussels II bis Regulation seeks to protect the child, is Article 12 really needed at all or required in this version? The Article discussed may work only if the jurisdiction at stake is established in the

8 Judgment No. 164 of 15 May 2013 in Case No. 42/2013 of the Civil Chamber, IV, Supreme Court.

9 Ruling No. 40 of 25 April 2012 in Case No. 298/2012 of County Court Dobrich.

10 Ruling No. 715 of 29 December 2010 in Case No. 645/2010, Ruling No. 38 of 25 January 2011 in Case No. 647/2010, Ruling No. 409 of 9 August 2011 in Case No. 194/2011.

superior interests of the child (para. 1 and 3) and if there is a substantial connection of the child with a Member State different than the Member State of its habitual residence (para. 3).[11] These two lines of reasoning deserve respect. At the same time, they could serve the phenomenon of "Heimwärtsstreben" (Homewardboundness) and allow the court to hear the case, as shown by the presented case. In order to limit this consequence, the assessment of the superior interests of the child and the substantial connection to a particular Member State could be made by way of comparison.[12] The superior interests of the child and the substantial connection could be evaluated from the perspective of the country of the court seized and of the country of the habitual residence of the child. If the superior interest of the child is more visible in the country of his/her habitual residence, respectively the child is substantially more connected with the same country, Article 12 should not lead to escape from Article 8 – the international jurisdiction of the Member State of the habitual residence of the child. Thereby the Regulation will protect in much more effective way the interests of the child.

IV. Child abduction

The last topic is in the sphere of child abduction, more specifically abduction of babies and children at a younger age. The case is as follows: Milena – a Bulgarian citizen – moved to Slovenia. She married Ivan, a Slovenian national, and found a job in Slovenia. Milena got pregnant and left the job. Shortly after that, Ivan was fired. The baby was born on 25 April 2011 in Slovenia. Milena went to Bulgaria to visit her parents and retained the baby starting from 29 September 2011 in Bulgaria. Ivan immediately applied for the return of the baby pursuant to the Hague Convention on the Civil Aspects of International Child Abduction. In the given case, the first[13] and second instance courts[14] delivered very well grounded judgments. They studied the Convention correctly, the prerequisites for its application and the facts. They requested expert opinions and heard witnesses. When reading 95% of the judgment, one could predict that the court would order the return of the child. In the last page, the first and the second instance court discovered that the return would

11 See in addition some factors connected with the parents considered in Article 12: the holding of parental responsibility (para. 1), their choice of court (paras. 1 and 3) or their habitual residence (para. 3). In para. 3 the nationality of the child may be used for determining the substantial connection.

12 A. Nussbaum, *Grundzüge des Internationalen Privatrechts* (München/Berlin, Beck, 1952) p. 43.

13 Judgment of 13 July 2012 in Case No. 5065/2012 of Sofia City Court.

14 Judgment of 8 February 2013 in Case No. 4529/2013 of Sofia Appellate Court.

lead to a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation and applied Article 13(1)b of the Convention. The main argument was that the return would lead to the separation between the mother and the child, which would be harmful to the normal physical and mental development of the child. In addition, it was ascertained that the baby did not have any real connection to the country of his birth because it was at a very young age.

There are many cases similar to Milena's case. If the child is a baby or at a very young age, the court is prone to refuse a return under Article 13(1)b of the Hague Convention on the Civil Aspects of the International Child Abduction using the above stated grounds. Judgments ordering return in this type of cases are in fact very rare in Bulgaria.[15] Nobody may say with absolute certainty whether the majority of Bulgarian courts act according to or against the Hague Convention on the Civil aspects of International Child Abduction. If the child concerned is at a very young age or even a baby, it is really very hard to disregard the close mother-child relation and to prefer the child's slight contact to the country of its habitual residence. On the other hand, the mother is supposed to return together with the child. But this presumption is not regulated and not obvious for the judges and even for the mother herself. The understanding of habitual residence has to be specified with respect to babies and children at a very young age. Here at the end comes the open issue: is a special rule or guide on good practice needed for abductions of babies and children of a very young age?

V. Conclusion

Bulgarian courts are aware of the Brussels II bis Regulation and of the Hague Convention on the Civil Aspects of International Child Abduction. In the seven years after Bulgaria joined the EU, they have been applied more frequently. In most cases, the application is correct. Problems may arise due to habits created by the old legislation, always providing access to Bulgarian courts for Bulgarian citizens and due to principles contained in the "bible" of Bulgarian judges – the Bulgarian civil procedural code is considered to be more important than the EU regulations. Last but not least, some problems result from the rules contained in the Brussels II bis Regulation and the Hague Convention on the Civil Aspects of International Child Abduction. It would be beneficial if in time all these factors causing troubles would disappear.

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15 Judgment of 9 January 2012 in Case No. 14566/2011 of Sofia City Court.

CONNECTING FACTORS, PARTY AUTONOMY AND RENVOI IN FAMILY MATTERS IN MACEDONIAN AND EU PRIVATE INTERNATIONAL LAW

Toni Deskoski* and Vangel Dokovski**

I. Introduction

The most remarkable evolution of private international law in the past two decades appears to have been its swift and intense Europeanization. Today, private international law is to a large degree European private international law. The impact of the rule of non-discrimination, of fundamental rights and, especially, mutual recognition even mark a kind of European conflict revolution.[1]

Family matters with an international element are very often in the area of conflict of law, since questions related to family are part of everyday living. Family law has five functions – *protective, facilitative, dispute resolution, expressive and channeling*.[2] Many family law matters require reference to the law of another country. Hence, if we analyze family law from a private international law perspective, international family law has two functions – *choosing applicable law* and *dispute resolution*.

Lawyers and judges working in family law face complex procedural and conflict-of-laws issues, and these issues are even more pronounced in cases that reach across national borders.[3]

Family law presents unique problems in the field of conflicts. Although family legal problems sometimes are treated in the same fashion as any other

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1 J. Meeuen 'Instrumentalisation of Private International Law in the European Union: Towards a European Conflict Revolution' 9 *European Journal of Migration and Law* (2007) p. 287.

2 These functions are determined by C. Schneider, 'The Channelling Function in Family Law, *20 Hofstra Law* Review (1992)' pp. 495-532. See also J. Wriggins, 'Marriage Law and Family Law, Autonomy, Interdependence, and Couples of the Same Gender' 41 *Boston College Law* Review (2000) p. 265.

3 A.L. Estin, 'International Family Law Desk Book' *American Bar Association* (2003) p. 1.

personal legal problem encountered in tort or contract law, the law also treats the relationship among family members as creating a status. The law recognizes that the state has a substantial interest in the existence and possible dissolution of this status.[4]

In this paper, authors will give an overview of the connecting factors (nationality, domicile, habitual residence, party autonomy and *lex fori*) regarding family issues in private international law with the main focus on marriage, matrimonial and patrimonial issues and divorce.

II. Nationality, domicile, habitual residence, party autonomy and *lex fori* – in search of an "appropriate" connecting factor in family matters

When a given PIL rule leads to the conclusion that a court in a given State (X) is competent to adjudicate a private law dispute with an international element, that decision can usually be traced to the existence of a certain connection – the existence of one or more connecting factors – which serves to provide a legally sufficient link between the forum State (and its courts) on the one hand and the parties and circumstances of the particular case on the other. Similar connecting factors are also at work when a competent court in a given State (X) decides to choose and apply the substantive law of that State or of a different State (Y).[5] Each country has its own conflict of laws rules dealing with these issues, and their rules can differ considerably.[6] Nationality, domicile, habitual residence, party autonomy and lex fori are often used as connecting factors in international family law.

"Nationality" means the legal bond between a person and a State and does not indicate the person's ethnic origin.[7] Nationality also represents a person's political status, whereby he or she owes allegiance to some particular country. Apart from cases of naturalization, it depends essentially on the place of birth

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4 M.M. Wills, 'Conflict of Laws in Divorce Litigation: A Looking – Glass World?' 10 *Campbell Law Review* 1 (1987) p. 149.

5 J. Lookofsky, K. Hertz*, EU-PIL European Union Private International Law in Contract and Tort* (JurisNet, Copenhagen 2009) p. 15.

6 M. James, *Litigation with a Foreign Aspect. A Practical Guide* (Oxford University Press, 2010) p. 5.

7 Article 2 (a) of the European Convention on Nationality; also Article 2 of the Law on Nationality of Republic of Macedonia from 2004.

of that person or on his or her parentage.[8] In Continental Europe, most civil laws define nationality as a personal quality, providing that the national law of a person governs his family relations and all matters linked – directly or indirectly – to personal status. It also holds that the national law best corresponds to the expectations of a person who relies on the law in planning his or her family, even if the conduct takes place wholly within another state's jurisdiction. The concept of nationality as a person-bound quality was first introduced with the Napoleonic Civil Code.[9]

We can point to several factors that have made nationality an important connecting factor in matters relating to personal status such as personal identity or marital status. This concerns first of all the stability of nationality as compared to habitual residence (it is habitual residence, rather than domicile, that is the counterpart of nationality as a connecting factor). The element of stability, in turn, is closely linked to legal certainty and predictability. Use of nationality instead of habitual residence is also considered to be more appropriate as it takes into account a person's cultural identity, thereby paying due respect to fundamental human rights.[10] International harmony may be ensured at the outset when the PIL rules of the countries in question employ the same connecting factor. Nationality, seen from the point of view of Mancini and his followers, may be regarded as naturally contributing to this goal, since it represents, at least in the field of personal and family law, a connecting factor based on rational grounds.[11]

On the other side, the ECJ's complex jurisprudence demonstrates that Article 12 of the EU Treaty prohibits any disparate treatment mandated by a Member State's national law if it arises from subjective connecting factors that cannot be justified objectively; however, it does not prohibit any differentiation arising from subjective connecting factors that are objectively justified. In this framework, the doctrine has raised the question of whether the adoption

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8 http://www.lawreform.ie/_fileupload/consultation%20papers/wpHabitualResidence.htm, para. 15. (4 July 2015).

9 M.-C. Foblets, 'Conflict of Laws in Cross-Cultural Family Disputes. Choice-of-Law in a time of unprecedented mobility' (1997) *Retfærd,* p. 50.

10 W. O. Vonk, *Dual Nationality in the European Union, A Study on Changing Norms in Public and Private International Law and in the Municipal Laws of Four EU Member States* (Leiden/Boston, Martinus Nijhoff Publishers, 2012) p. 117.

11 P. Franzina, 'The Changing Role of Nationality in International Law' in: A. Annoni, S. Forlati, ed., *The evolving role of nationality* (New York, Routledge, 2013) p. 198.

of the nationality connecting factor as part of the neutral rules of conflict is compatible with the Community principle of non-discrimination.[12]

Since the 1950s, however, domicile became more popular as the connecting factor for personal and family matters. In Belgian conflict of laws, domicile also became a substitute for nationality in family affairs when both spouses are of different nationality and the newly discovered equality between man and woman made it no longer possible to choose the national law of the husband.[13] Domicile is a "connecting factor" or link between a person and the legal system or rules that will apply to him or her in specific contexts, such as the validity of a marriage, matrimonial causes (including jurisdiction in, and recognition of, foreign divorces, legal separations and nullity decrees), legitimacy, succession and taxation. Thus, for example, the law of the country of the domicile of a person will determine whether, as regards such requirements as age and capacity, he or she may validly be married elsewhere and whether he or she may obtain a divorce that will be recognized elsewhere.

Habitual residence has for some time been used as a connecting factor. It has played a most important role in the Conventions of the Hague Conference on Private International Law, since it is perceived as providing an alternative to nationality and as being free of the difficulties associated with domicile, such as those in regard to intention, origin, dependency and prolepsis.[14] The term "habitual residence" was used for the first time in a number of bilateral treaties on Legal Aid in which the authority of the habitual residence of the applicant was designated as the proper authority competent to issue a certificate of indigence. A similar provision is to be found in the first Hague Convention on Civil Procedure of 14 November 1896. Why preference was then given to this term rather than the usual reference to domicile has not become apparent. Van Hoogstraten presumes that the term, apparently to be found for the first time

12 B. Ubertazzi, 'The Inapplicability of the Connecting Factor of Nationality to the Negotiating Party in International Commerce' 10 *Yearbook of Private International Law* (2008), p. 716. According to Ubertazzi, p. 719: "I believe that the application of the nationality connecting factor is compatible with Community law when neutrally used to determine the law applicable to capacity, like in the Italian private international law's provision on personal status".

13 H. Van Houtte 'Updating Private International Law, The Belgian Experiment', in: V. Tomljenović, J. Erauw, P. Volken (eds.), *Liber Memorials Petar Sarcevic, Universalism, Tradition and the Individual* (Sellier, 2006) p. 72.

14 http://www.lawreform.ie/_fileupload/consultation%20papers/wpHabitualResidence.htm, para. 18. (4 July 2015).

in a treaty between France and Prussia of 1898 is a translation of the German expression "gewohnlicher Aufenthalt".[15]

Various authors have attempted to define further what factual situation "habitual residence" is supposed to denote. F.A. Mann does not see any difference of principle between "habitual residence" and domicile.[16] In fact, the only difference is that in order for one person to obtain "habitual residence", no formal condition is required regarding administrative registration or obtaining a residence permit. For example, in the new Romanian Private International Law, habitual residence, represents, for natural persons, the synonym for domicile.[17] In Cruse v. Chittum, an early case which concerned the recognition of an overseas divorce, habitual residence was said to denote "regular physical presence which must endure for some time". In several cases, the courts have said that is a question of fact; this has turned out to be over-optimistic and, unavoidably, legal rules have developed.[18]

The traditional function of party autonomy as part of private international law is selecting rules that govern private relationships with international elements. Party autonomy made its entrance into the area of international family law in the second half of the 1970s. Notwithstanding the substantive advantage of party autonomy, until today in many European countries, courts remain relatively reluctant to apply the solution of the parties' will in the field of international family law. In practice, only a restricted freedom of choice is permitted: the choice is generally confined to a choice from among a limited number of relevantly connected legal systems: either the common national or the common domiciliary law. In matrimonial property regulation, for example, only a limited choice is accepted. The spouses may, prior or during the marriage, choose the law of either party's present nationality or domicile, as well as the *lex rei sitae* in respect of immovable property.[19]

In European private international family law party autonomy has traditionally been more limited but has nevertheless served as the starting point for the determination of the law which is applicable to various family relationships. For example, the Maintenance Regulation in conjunction with the corresponding

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15 L. I. de Winter, 'Nationality or Domicile? The Present State of Affairs' 128 *Recuiel des Cours* III (1969) p. 423.

16 *Ibid.*, p. 428.

17 C. Darisecu, 'New Romanian Choice-of Law Rules on Marriage Effects', at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1537200, p. 92. (2 July 2015).

18 J. G. Collier, *Conflict of Laws* (Third Ed., Cambridge University Press 2001) p. 55.

19 Fobles, *op. cit.* n. 9 p. 54.

Hague 2007 Protocol enables limited party autonomy for choosing the applicable law for the international maintenance obligations.[20]

Finally, lex fori is used as a connecting factor for the formal validity of a marriage. This rule is widely accepted in the countries of the world. It is a well-established principle that the formal validity of a marriage depends entirely on the law of the place where the ceremony is performed *(lex loci celebrationis)* and, therefore, non-compliance with the requirements of that law will invalidate the marriage. Also, there are legal systems that apply lex fori generally for divorce since they have a liberal approach to divorce.

III. Issues of family matters in private international law

There are many issues of family matters in the private international law sense. Marriage and other adult relationships (the meaning of marriage, formalities of marriage, capacity to marry, civil partnership), matrimonial and related causes (divorce, nullity and judicial separation, also dissolution, nullity and separation of civil partnership), highly complex law relating to children, legitimacy, legitimation, adoption, matrimonial and patrimonial relations, are all issues of family matters. All of these issues are very complex, and therefore authors of this paper will only address the questions of marriage, divorce, matrimonial and patrimonial relations between spouses from a comparative perspective.

Since proclaiming its independence, the Republic of Macedonia has kept the Federal Conflict of Laws Act in force, as well as a certain number of other federal acts from 1982. On 4 July 2007, the Macedonian Parliament adopted the Private International Law Act (PIL Act), which entered into force on 19 July 2007.[21] The Republic of Macedonia entered into the Stabilisation and Association to the EU, by entering into Stabilisation and Association Agreement of 26 March 2001. This agreement, among other things, provided an obligation for approximation of laws of the country with EU law.[22] Article 68 of the Agreement provided that:

> "1. The Parties recognise the importance of the approximation of the existing and future laws of the former Yugoslav Republic of Macedonia to those of the Community. The former Yugoslav Republic of Macedonia shall

20 M. Torga, 'Party autonomy of spouses under the Rome III Regulation in Estonia – can private international law change substantive law?' 4 *NiPR* (2012) p. 547.

21 *Official Gazette of Republic of Macedonia* No. 87/2007, 156/2010.

22 See T. Deskoski V. Dokovski, 'Latest developments of Macedonian Private International Law' in: *Collection of papers, IX Private International Conference* (Skopje, 2011) pp. 1-23.

endeavour to ensure that its laws will be gradually made compatible with those of the Community.

2. This gradual approximation of law will take place in two stages.

3. Starting on the date of signing of the Agreement and lasting as explained in Article 5, the approximation of laws shall extend to certain fundamental elements of the Internal Market acquis as well as to other trade-related areas, along a programme to be defined in coordination with the Commission of the European Communities. The former Yugoslav Republic of Macedonia will also define, in coordination with the Commission of the European Communities, the modalities for the monitoring of the implementation of approximation of legislation and law enforcement actions to be taken, including reform of the judiciary. Deadlines will be set for competition law, intellectual property law, standards and certification law, public procurement law and data protection law. Legal approximation in other sectors of the internal market will be an obligation to be met at the end of the transition period.

4. During the second stage of the transitional period laid down in Article 5 the . approximation of laws shall extend to the elements of the acquis that are not covered by the previous paragraph."

1. Marriage

It has often been observed that, while marriage may be based on agreement, it is an agreement sui generis, in that it confers on the parties a particular status. Marriage provides an excellent counter example to the notion that classifications can be made on the basis of analytical jurisprudence and comparative law. While it is a universal institution, in that all societies have a concept of marriage, very different cultural traditions have influenced the development of the concept in the various countries of the world. So that, while the institution can be recognised easily enough, its attendant incidents vary considerably. Even within the Western Christian cultural tradition, different rules on capacity and form and different attitudes to the termination of marriage produce important variations from the core of monogamy.[23]

1. Capacity to marry – essential validity

Assessment of the validity or invalidity of marriage requires a preliminary distinction to be drawn between formal validity, capacity to marry, and other

23 J. O'Brien, *Conflict of Law*, Cavendish Publishing Limited, London, 1999, p. 409.

impediments to marriage.[24] Thus, a major issue relating to choice of law in the context of marriage is the question of which law governs capacity, otherwise known as essential validity. This question covers a wide range of issues, such as: consanguinity (blood relationships); affinity (relationships created by virtue of marriage); remarriage; lack of age; and parental consent (unless it is classified as an issue of formalities).[25]

Each party is required to have capacity to marry the other according to their *lex personalis*. Article 38 of the Macedonian PIL Act deals with the substantive conditions for conclusion of a marriage. Under this article, the substantive requirements of marriage are governed by the national law of each spouse at the time of marriage (Article 38(1)). Hence, *lex nationalis* is used as a connecting factor for determining the applicable law for the substantive conditions for conclusion of a marriage. This means that each spouse should satisfy the substantive requirements under his *lex nationalis*. *Lex nationalis* is also accepted in the Bulgarian PIL Act (Article 71(1)) and in the Polish PIL Act (Article 48).

However, if the marriage is to be concluded in Macedonia, it is expressly provided that certain impediments provided by Macedonian substantive family law must be applied. These are: (1) the existence of an earlier marriage, (2) consanguinity, and (3) mental incapacity. This leads to the conclusion that the characterization category of the capacity to conclude marriage includes the question of polygamy, prohibited degrees of relationship and marital capacity.

It shall be pointed out that there are authors in the theory that strongly object the use of *lex nationalis* as a connecting factor. They support the use of *lex domicilii*. The reason is said to be that whether and when someone is ready to marriage is determined by the society in which he or she has grown up. Some authorities suggest that the law of the intended matrimonial home might be a more appropriate test, but none has so decided, and the inherent uncertainty of such a test makes it difficult to support, at least when the question arises prospectively.[26] If we compare civil law and common law countries, we may conclude that while civil law countries are using *lex nationalis* or habitual residence as connecting factor for the capacity to marry, common law countries are using *lex domicilii*. There are two main views as to the law which should govern the capacity to marry – the dual domicile doctrine, and the intended matrimonial home doctrine.[27]

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24 A. Brigs, *The Conflict of Laws* (Oxford University Press, 2013) p. 329.

25 A. Mayss, Principles of Conflict of Laws (Great Britain, 1999) p. 215.

26 A. Brigs, *The Conflict of Laws* (Oxford University Press, 2008) p. 244.

27 Cheshire, North & Fawcett, *Private International Law* (Oxford University Press, 2008) p. 895.

The Renvoi-question implies that there is a difference between the rules of I.P.L. adopted by two States with regards to the same matter. In the early days of the science, however, the rules of I.P.L. were in theory at any rate, uniform; they were conceived of as constituting universal law adopted by all individual systems *ex comitate*: in such circumstances there could be no Renvoi-question. In the 19th century it became finally apparent that this uniformity was impossible even as an ideal. Fundamental conceptions began to diverge; this was especially so in matters of the personal statute (Status, Capacity, Family Law; Movable Succession); in these matters domicile ceased to be the universal criterion, nationality begin, by many systems, adopted in its place. This made the Renvoi-question possible.[28]

Therefore, in the area of marriage (capacity to marry) there is a space for application of renvoi. In the PIL Act, Article 6 covers renvoi. However, renvoi is excluded where the parties have the rights to choose the applicable law (Article 6(3)). Since parties do not have the right to choose the applicable law for the essential and formal validity of the marriage, Article 6(3) cannot be applied. Thus, if the rules of the PIL Act provide that the law of a foreign State applies, the rules thereof determining the applicable law shall be taken into consideration (Article 6(1)). If the rules of a foreign State determining the applicable law refer back to the law of the Republic of Macedonia, the law of the Republic of Macedonia shall apply, without taking into consideration the rules on reference to the applicable law (Article 6(2)). This will always be a situation where foreign applicable law will use *lex domicilii* as the connecting factor for the essential validity of a marriage. It may create a situation where the Macedonian Family Law Act is to be applied for the essential validity of a marriage if a foreign law contained *lex domicilii* as the connecting factor for the condition for concluding a marriage and if the future spouses have their domicile in Macedonia.

Let us consider an even more interesting situation, where both spouses are foreign nationals with a domicile in Macedonia – under Article 38(1) *lex nationalis* will designate the applicable law for the essential validity of the marriage. If they have different nationalities, different foreign laws will apply. And if in the private international law rules, *lex domicilii* is used as a connecting factor for essential validity of marriage, under Article 6(2) of the PIL Act the Macedonian Family Law Act will apply to that spouse. As for the other spouse, if under his or her *lex nationalis* there is the same connecting factor (*lex nationalis*), that foreign substantive law will apply. In the end, even without

28 J. Bate Pawley, *Renvoi in Private International Law* (Forgotten Books) 2012, [Originally Published in 1924] p. 4.

lex domicilii as a connecting factor for foreign nationalities, the Macedonian Family Law Act can be applicable simply because of the doctrine of renvoi.

1.2. Formal validity

Multiple communities may claim an interest in regulating certain behaviors, such as marriage. Thus, families, church communities, and state officials may all claim some jurisdiction over the creation of marriage via family traditions, religious rites, and state laws. The rules of different communities sometimes create diverse, inconsistent, even conflicting, obligations for individuals who belong to multiple communities. For example, when the rules of one community require certain behavior (such as religious celebration), but the rules of another community prohibit that behavior (such as state law requiring state formation first or exclusively), there is potential for conflict between those communities.[29]

There is no rule more firmly established in private international law than that which applies the maxim *locus regit actum* to the formalities of a marriage, i.e. that an act is governed by the law of the place where it is done.[30]

There are many questions that need to be characterized. In some countries for example, the question of the form of marriage is treated as an issue of formal validity (in England), and in others it is treated as issue of essential validity.

Thus, in England, the question whether there is a need for a public, civil, or religious ceremony, whether particular words need to be spoken in the course of the ceremony, whether the ceremony must be held in temple, registry, or out in the fresh air, whether a religious practitioner need be in attendance, whether it is necessary for either spouse to be present in person or by proxy, or whether it is necessary for the parents or other parties to give their consent, are all characterized as issues of formal validity. They are all answered by recourse to the *lex loci celebrationis*, and the consequences in terms of nullity or otherwise are determined by it as well. If the marriage would be invalid by the domestic law of the place of celebration, but would be valid by reference to the law to which a judge at the locus celebrationis would look if he were trying the issue, the marriage will be formally validated via the principle of renvoi.[31]

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29 D. L. Wardle, 'Marriage and Religious Liberty: A Comparative Law Problems and Conflict of Laws Solutions' 2 *Journal of Law & Family Studies* (2010) p. 317.

30 *Ibid.*, p. 879.

31 Brigs, *op. cit.* n. 26, p. 331.

Case law: Ogden v. Ogden (English Courts, 1908) – the problem was whether parental consent was one of formality or capacity. Parental consent in this case was classified as an issue of formality and since the marriage had been celebrated in England, English law was applied as opposed to French law, which was the law of the parties' country of domicile. Had it been an issue of capacity, under French law the parties would have required parental consent, which had not been given, meaning that the marriage would have been declared null and void.

If we look in the Polish PIL Act, we can find a provision under which *lex nationalis* and habitual residence are also used as connecting factors regarding the form of marriage. Where a marriage is celebrated outside the territory of the Republic of Poland, it shall be sufficient to comply with the form required by laws of the nationality, of the permanent or habitual residence of both spouses (Article 49(2)).

As for party autonomy, it is widely accepted that it cannot be used as a choice of law rule. Marriage is a contract in the sense that there can be no valid marriage unless each party consents to marry the other. But it is a contract of a very special kind. It can be concluded (at least as a general rule) by a formal, public act, and not, e.g. by an exchange of letters or over the telephone; no actions for damages will lie for breach of the fundamental obligation to love, honor and obey; the contract cannot be rescinded by the mutual consent of the parties: it can only be dissolved (if at all) by a formal, public act, usually the decree of a divorce court.[32]Although marriage is a form of contract between woman and man, public interest is always present and, therefore, party autonomy cannot be used as a connecting factor for determining applicable law for essential and formal validity of marriage.

2. Divorce

Divorce cases with international issues appear with increasing frequency. This is consistent with anecdotal evidence and logic. The world is shrinking, globalization marches on, and the mobility of people is growing. The issues in divorce that can have international aspects are myriad. Some, such as international child abduction, are addressed by treaties. Some, such the immigration consequences of divorce on an alien spouse, are more the product of national law. Others, such as the couple divorcing in a country different from their

32 M. McClean, *The Conflict of Laws* (Sweet&Maxwell, 1993) p. 143.

nationalities or former residence, may implicate the courts and national laws of more than one country. [33]

The choice of law rules for divorce have been slightly reformed in the Macedonian PIL Act. The common *lex nationalis* of the spouses at the time of filing is still the primary connecting factor (Article 41(1)). However, a major change has been introduced in the choice of law rule for divorce when the spouses have different nationalities at the time the divorce petition is filed. The 1982 Act provided for the cumulative applicability of the *lex nationalis* of the spouses in such situations, unlike the new choice of law rule that has been enacted in paragraph 2 of Article 42. Thus, if at the time when the application is made the spouses are nationals of different States, the divorce shall be subject by the law of the State in which the spouses had their last common domicile, and if they never had a common domicile, the law of the state where the application is submitted shall be applicable.

The provision of the Federal Conflict of Laws Act of 1982 that required applying Macedonian law when divorce could not be obtained by cumulative application of the national law of the spouses has been abrogated.[34]

The question of renvoi once again may arise if the applicable foreign law contains different choice of law rules that refer back or transmit to law of a third state. If the rules of a foreign State refer back to the law of the Republic of Macedonia, the law of the Republic of Macedonia will apply, without taking into consideration the rules on reference to the applicable law (in line with Article 6(2) of PIL Act).

Party autonomy is still an unknown connecting factor for divorce under the Macedonian PIL Act, unlike the situation in the EU. Reference must be made to the Regulation No. 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation. This Regulation is part of the European Private International Law and the enhanced cooperation is used as a new method for unification of the conflict of laws. The enhanced cooperation was originally introduced by the Treaty of Amsterdam in 1995. In 2009 the Treaty of Lisbon improved the mechanism for enhanced cooperation by amending questionable rules and grouping all provisions in one chapter. Only after these improvements the mechanism has been used for the first time in order to partially unify the conflict of laws rules.[35]

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33 H.H. Hatfield, 'Private International Law Concepts in Divorce' *19 American Journal of Family Law* 2 (2005) p. 1.

34 Deskoski, Dokovski, *op. cit.* n. 22, p. 17.

35 A. Sapota, 'The Enhanced Cooperation – is it an instrument efficient enough to avoid the divergence between national regulations of private international law in the EU?' at: http://www.tf.vu.lt/dokumentai/Admin/Doktorant%C5%B3_konferencija/Sapota.pdf p. 28. (2 July 2015).

The Regulation employs habitual residence as its main connecting factor in situations of absence of choice of law made by the parties. Hence, parties are free to choose applicable law for their divorce (Article 5) -

> "1. The spouses may agree to designate the law applicable to divorce and legal separation provided that it is one of the following laws: (a) the law of the State where the spouses are habitually resident at the time the agreement is concluded; or (b) the law of the State where the spouses were last habitually resident, in so far as one of them still resides there at the time the agreement is concluded; or (c) the law of the State of nationality of either spouse at the time the agreement is concluded; or (d) the law of the forum."

It is clear that the chosen law must have some connection with the parties or with the forum.

An agreement designating the applicable law may be concluded and modified at any time, but at the latest at the time the court is seized (Article 5(2)). If the law of the forum so provides, the spouses may also designate the law applicable before the court during the course of the proceeding. In that event, such designation shall be recorded in court in accordance with the law of the forum.

The application of renvoi is excluded under Article 11 of the Regulation. Where Regulation provides for the application of the law of a State, it refers to the rules of law in force in that State other than its rules of private international law. It is notable to be pointed out that the Macedonian PIL Act differs from the Rome III Regulation in the sense of law applicable to divorce. Having in mind Article 68(4) of the Stabilisation Agreement between Macedonia and the EU, it is expected that Macedonian authorities will undertake activities in order to harmonize the conflict rules for divorce with the Rome III Regulation (for example, such harmonization has been already done with the conflict of law rules for non-contractual obligations – they are harmonized with the Rome II Regulation). A new conflict rule for divorce shall be enacted by the end of 2015.

It is common trend nowadays for abrogating nationality as a connecting factor for divorce within Europe. However, if we read carefully Article 5 of the Rome III Regulation, nationality still plays an important role. Under Article 5 the spouses are allowed to choose, *inter alia*, the law of the State of either of the spouses at the time the agreement is made.[36]

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36 Vido de Sara, 'The relevance of Double Nationality to Conflict of Laws Issues relating to Divorce and legal Separation in Europe' 4 *Cuadernos de Derecho Transnacional* 1 (2012) p. 226.

In the absence of choice, Article 8 lays down the Kegel's ladder. Thus, in absence of a choice of law pursuant to Article 5 of the Rome III, divorce and legal separation shall be subject to the law of the State:

> "(a) where the spouses are habitually resident at the time the court is seized; or, failing that (b) where the spouses were last habitually resident, provided that the period of residence did not end more than 1 year before the court was seized, in so far as one of the spouses still resides in that State at the time the court is seized; or, failing that (c) of which both spouses are nationals at the time the court is seized; or, failing that (d) where the court is seized."

It is clear that the concept of domicile that has been used for a long time in common law countries as a connecting factor for divorce has been replaced with habitual residence and that the common nationality of the spouses has been demoted from the status of the main connecting factor in the countries with the continental system of law to the position of a subsidiary one.

At common law, the sole basis of the jurisdiction of the English courts in divorce was domicile, and no choice of law problem arose. English law was applied and this could be justified either as the application of the law of the domicile to issues affecting status or as the application of the law of the forum on the basis that dissolution of a marriage is a matter which touches fundamental English conceptions of morality, religion, and public policy, and one which is governed exclusively by rules and conditions imposed by the English legislature.[37] Today, this has changed as a result of the Rome III. Determination of applicable law for divorce within the EU is resolved by party autonomy and habitual residence. Nationality as a connecting factor has acquired a subordinate position compared to habitual residence. Still, one potential problem regarding nationality in Rome III is the problem with dual nationality.

Common dual nationality may cause some problems when the first two connecting factors fail. At first glance, common habitual residence and the last common habitual residence seem to be the connecting factors applicable in the majority of cases. Nevertheless, a hypothetical situation may be envisaged: it may be that two spouses have a common residence in an EU Member State, where they moved from their Member State of origin soon after the marriage. Let us imagine that they hold the nationality of the State where they were born and that they also have the nationality of the State of residence. Let us further imagine that, after some years, one of the spouses moves abroad, leaving the marital house, whereas the other one returns to his/her State of origin. Subsequently, the spouses agree to start divorce proceedings before the court of

37 Cheshire, North & Fawcett, *op. cit.* n. 28, p. 966.

the State (bound by the Rome III Regulation) where one of them is habitually resident. The seized court must determine the applicable law in accordance with Regulation No 1259/2010. The first two connecting factors cannot be resorted to. The third connecting factor operates, but the common nationality is dual. Considering the evolution of European society and the fact that people move frequently from one State to another, this situation does not seem so uncommon. Which law will the judge apply, since nationalities are considered equivalent as said by the ECJ regarding grounds of jurisdiction?[38]

Mancini's theory of nationality shall still be analyzed and used for answering such question. Should the judge use the effective nationality, or should *lex fori* be applied? Therefore, nationality has not completely lost its role in private international law and if it is used properly it may give very good results in the area of conflict of laws.

Party autonomy has also been introduced in the new PIL Act of Montenegro, as a connecting factor for divorce. Spouses are free to choose applicable law for their divorce. The spouses may at any event choose the law applicable to a divorce, and, in addition to one of the provisions from Article 85 of the present Act, may also choose the law of nationality of either spouse at the time the divorce application is made. The agreement designating the applicable law must be made in writing and certified in accordance with law, no later than at the time the divorce application is made (Article 86 of the PIL Act of Montenegro). Hence, we need to look into Article 85 of the PIL Act in order to see which law the parties may choose (Article 85 is applicable in absence of choice of law made by the parties). If the parties fail to choose the applicable law, divorce shall be governed by the law of the state of which the spouses are nationals at the time the divorce application is introduced. Where the spouses do not have the same nationality, divorce shall be governed by the law of the state where they have their common habitual residence at the time the divorce application is introduced. Where the spouses do not have the same nationality or common habitual residence at the time the divorce application is introduced, the law of the state where the spouses had their last common habitual residence shall apply. Where the applicable law cannot be designated under paragraphs 1, 2 and 3 of this Article, the law of Montenegro shall apply. Where either of the spouses is a Montenegrin national who does not habitually reside in Montenegro, and the marriage could not be divorced under the law designated under paragraphs 1, 2 and 3 of this Article, the divorce shall be governed by the law of Montenegro (Article 85).

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38 De Vito, *op. cit.* n. 36, p. 228.

In Switzerland, divorce and separation are governed by Swiss law or by the law of the State of a common foreign citizenship, if only one of the spouses has his habitual residence in Switzerland and if this law does not impose extraordinarily severe conditions on divorce (Article 61).

3. Choice-of-law rules on the matrimonial and patrimonial regime

In Macedonia, the personal and property effects of marriage are primarily governed by the common national law of the spouses. However, where spouses are nationals of different States, the law of the State in which they have domicile shall apply. If the spouses have neither the same nationality nor domicile in the same State, the law of the State in which they both had the last common domicile shall apply. In the end, if the applicable law cannot be determined under these connecting factors, the law of the Republic of Macedonia shall apply (Article 42). It is evident that nationality is still used as a primary connecting factor for the personal and property effects of marriage. The concept of domicile is used only if spouses do not have common nationality.

Spouses may choose the law applicable to their contractual relations (marital contracts and other contracts concluded between spouses). By a written agreement, spouses may choose one of the following laws: the law of the state of which at least one of the spouses is a national; the law of the state in which at least one of the spouses is domiciled; for immovable estate, the law of the place where such immovable estate is situated (Article 43(2)). If the parties did not choose applicable law, then contractual matrimonial property relations shall be governed by the law which at the time of conclusion of the agreement was applicable to personal and statutory patrimonial relations (Article 43(1)). From the wording of Article 43 of the PIL Act, conclusion can be drawn that the Macedonian PIL Act has made a difference between statutory and contractual matrimonial property relations. This is very important regarding the question of renvoi.

Since 2001, under the Law on Ownership and Other Related Rights,[39] spouses may conclude an agreement concerning their common and individual property and by doing that they are converting the statutory character of their patrimonial property relations into a contractual one (argument from Article 71 of the Law on Ownership and Other Related Rights). Most patrimonial property relations are statutory, unless spouses have agreed otherwise. From the wording of Article 43 of the PIL Act, if spouses have concluded a contract for their patrimonial relations, then the judge will determine the applicable law in

39 *Official Gazette of Republic of Macedonia* No. 18/2001, 92/2008, 129/2009, 35/2010.

accordance with party autonomy. If spouses fail to agree on the applicable law in writing, the judge will apply the choice of law rules contained in Article 42 without the application of the doctrine of renvoi. This is a direct result of Article 6(3) of the PIL Act, where it is stated that the provisions for renvoi shall not apply in cases where the parties have the right to choose the applicable law. Even without choosing the applicable law, spouses, by converting their statutory patrimonial relation into a contractual one through a substantive marriage agreement, are excluding the future application of renvoi. If spouses have not agreed on their statutory patrimonial relations, then the judge will apply Article 42, but this time he will also apply the rules for renvoi, since for statutory patrimonial relations spouses cannot choose applicable law, and the application of renvoi cannot be excluded under Article 6(3).

It may be concluded that the application of renvoi will depend on whether the parties have used their party autonomy, not for the purpose of choosing the applicable law, but rather to convert their statutory patrimonial relation into a contractual one in the sense of the Law on Ownership and Other Related Rights of Macedonia.

Lex nationalis is often used in many PIL acts in Europe as a choice of law rule for the matrimonial regime. For example, under Article 51 of the Polish PIL Act, personal and patrimonial relationships between spouses shall be subject to the law of their current common nationality. In the absence of common nationality, the law of the country in which both spouses have their place of permanent residence – or, in the absence of the latter, of their common habitual residence – shall apply. Where spouses are not habitually resident in the same country, the law of the country with which both are otherwise most strictly connected shall apply. Also, under Article 52, spouses may make their patrimonial relationships governed by the law of the nationality of either spouse or by the law of the country in which one of them is permanently or habitually resident. The choice of law may also be made before the conclusion of marriage. The marriage agreement shall be subject to the law chosen by the parties according to paragraph 1 of Article 52. In the absence of the law choice, the marriage agreement shall be governed by the law applicable to the personal and patrimonial relationships between spouses at the time of entering into the agreement. When choosing the law applicable to patrimonial relationships between spouses or for the marriage agreement, it shall be sufficient to comply with the form prescribed for marriage agreements either by the law chosen or by the law of the country in which the law choice was made.

Under Article 14 of the Turkish PIL for the matrimonial properties, spouses may choose either the law of domicile or one of their national laws at the time

of marriage; in the cases that such a choice has not been made for the matrimonial properties, the joint national law at the time of marriage shall apply; in cases where no joint national law exists, the law of the joint domicile at the time of marriage shall apply; if this does not exist either, the law of the place where matrimonial properties are located shall be applicable. Souses who have a new joint law after entering into marriage, are subject to this new law, under the reservation of third parties' rights.

Kegel's ladder is also used in Germany, Romania, Montenegro, Serbia and many other countries in order to designate the applicable law for matrimonial and patrimonial property relations. Party autonomy is frequently used, but with certain restrictions in the sense of conditioning the choice of law made by parties with certain relations provided by law (parties are not generally free to choose a law that has no connection with them or with the property – such connection can be in the form of nationality, domicile or habitual residence of at least one of the spouses and is always a condition for validity of the agreement on the choice of law).

Within the EU, still there is no regulation on applicable law for matrimonial property regime. In the absence of an effective choice of law or valid pre- or postnuptial agreement, a forum state must determine the law or laws that determine and define matrimonial property. However, there is a proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (COM(2011)0126 – C7-0093/2011 – 2011/0059(CNS)). Under this proposed regulation, together with the amendments from 2013, the spouses or future spouses may agree to designate or to change the law applicable to their matrimonial property regime, as long as it is one of the following laws: (a) the law of the State where the spouses or future spouses, or one of them, is/are habitually resident at the time when the agreement is concluded, or (b) the law of a State of which one of the spouses or future spouses is a national at the time when the agreement is concluded. 1a. Unless the spouses agree otherwise, a change of the law applicable to the matrimonial property regime made during the marriage shall have prospective effect only. 1b. If the spouses choose to make that change of applicable law retroactive, its retroactive effect shall not affect the validity of previous transactions entered into under the law hitherto applicable or the rights of third parties deriving from the law previously applicable. If no choice-of-law agreement is made pursuant to Article 16, the law applicable to the matrimonial property regime shall be: (a) the law of the State of the spouses' common habitual residence at the time of marriage or of their first common habitual residence after their marriage or, failing that, the law of the State with which the spouses jointly have the

closest links at the time of the marriage, taking into account all the circumstances, regardless of the place where the marriage was celebrated.

If we analyze these proposed provisions, we may conclude that conditional party autonomy is also welcomed into the new draft Regulation and it is in line with the PIL acts of the most countries. However, there is a difference from the national provisions regarding the applicable law in absence of choice of law made by spouses in the sense that nationality and domicile are substituted by spouses' common habitual residence. The closest connection will also be used as a connecting factor for determining applicable law for matrimonial property regime – *the law of the State with which the spouses jointly have the closest links at the time of the marriage, taking into account all the circumstances, regardless of the place where the marriage was celebrated.*

IV. Conclusion

The unification of conflict of law rules is positive for international relations because it makes the applicable law more predictable, favors the international harmony of solutions and avoids *forum shopping*. The Hague Conference on Private International Law is the organization that has been traditionally more involved in the unification of these rules.[40] The developments that took place in the European Union in the field of private international law over the past years had a large impact on national private international law in all candidate countries. In all of the Stabilisation and Association Agreements concluded between candidate countries and the EU there is an obligation for approximation of laws of the country with EU law as part of the *acquis communautaire*. The EU's PIL offers a great opportunity to rethink traditional family choice of law approaches. Most notable are the benefits that derive from an inclusion of party autonomy in family law within a structured choice of law regime.

It is widely accepted that nationality, domicile, habitual residence, party autonomy and *lex fori* are often used as connecting factors in international family law. In different legal systems, these connecting factors have different roles – as a primary or secondary connecting factor. Also, for different questions that are part of international family law, different connecting factors are appropriate.

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40 D. B. Campuzano, 'Uniform Conflict of Law Rules on Divorce and Legal Separation vie Enhanced Cooperation' at http://centro.us.es/cde/justicia_civil_2011/mod_003.html (4 July 2015).

In the Republic of Macedonia, nationality is part of the tradition as a conflict of law rule used in the area of family matters. Also, in most countries in Europe, nationality is the primary conflict of law rule regarding the capacity to marry. However, in common law systems, domicile is used instead of nationality, having in mind the significant role of domicile in those legal systems.

However, party autonomy nowadays star an increasing impact in this area of conflict of laws. Not so many years ago, party autonomy was reserved solely for conflicts of laws in the area of contract law. Today, under the Rome III Regulation, party autonomy becomes a primary conflict of law rule within the EU for divorces with international elements.

Therefore, it is expected that all countries that are on their way to become Member States (such as Macedonia, Serbia and Montenegro), will harmonize their PILs with European private international law.

FAMILY MATTERS – JURISDICTION OF DOMESTIC COURTS UNDER THE DRAFT PIL CODE OF THE REPUBLIC OF SERBIA

Jelena Belović* and Marija Krvavac**

I. International jurisdiction in family matters

International jurisdiction implies the right and duty of a respective court or other authorities to act and make decisions in private law disputes with a foreign element. Jurisdiction of domestic courts is primary a subject of national judicial system organization. National rules govern national court jurisdiction, saying nothing about jurisdiction of a foreign court. However, problems of international family law related to migration of modern families cannot be solved only within national legal frameworks. Disputes arising as a result of the increased volume of movement of people and capital, as well as the development of national economy, require adequate protection of participants interests and an efficient resolving mechanism. International judicial cooperation in family matters has resulted in the creation and conclusion of both multilateral and bilateral agreements.

On the other hand, regulation of family relations is directly connected with the legal framework of human rights protection. In this context, of particular importance are results of international efforts in the protection and promotion of certain family rights. On the way to achieve greater uniformity and unification of legislation in this very sensitive area of international human rights, organizations, particularly the European Union, are trying to find a solution that would avoid a conflict of jurisdiction and a conflict of law.

Due to the particularity of European private international law, certain family relations cannot be regulated directly by application of internationally unified rules. In this sense, one of the main objectives sated by Member States in the integration process is maintaining the European Union as an area of freedom, security and justice. The area of private international law is part of Title IV of the Reform Treaty of Lisbon.[1] It is one of the areas with a split jurisdiction,

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although Articles 81 and 114 of the Treaty on the Functioning of the EU[2] undoubtedly point to the jurisdiction of the EU to regulate private law relations with an inter-European international element. However, the EU's engagement contributes to a great extent in creating an intense judicial cooperation in civil matters having cross-border implications. Taking into consideration that the Republic of Serbia has embarked on the path of the European integration process, the efforts being made within the EU in this field have not gone unnoticed in the Republic of Serbia's private international law. However, the final draft of the national PIL code from 2014 goes in line with European solutions.[3]

II. Respective EU legal instruments

The model of European Community law is undoubtedly one of the best examples of standardizing jurisdiction rules. Starting the process of action in this area, Member States have initiated cross-border harmonization of procedural law rules by adopting the Brussels Convention on jurisdiction, recognition and enforcement of judgments in civil and commercial matters in 1968.[4] By revising the Treaty on European Union in 1997 by the Treaty of Amsterdam,[5] the conditions for converting conventional law into regulation were fulfilled.

The first step towards the harmonization of family law was the creation of common standards regarding the protection of human rights through the implementation of the European Convention on Human Rights and Fundamental Freedoms of 1950.[6]

The basic idea on the creation and promotion of European Community law was grounded on provisions of the EU founding treaties that are promoting conflict of rules and procedural rules harmonization in the area of the European Union. As of entering into force of the Amsterdam Treaty, judicial cooperation was transferred from the third pillar to the first, creating a new harmonization

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2 Consolidated version of the Treaty of the Functioning of European Union, 26 October 2012, C 326/49.

3 www.mpravde.gov.rs (15 July 2014).

4 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters OJ L 299, 31 December 1972, p.0032-0042 – consolidated version, OJ C 27, 26 January 1998.

5 Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts was signed on 2 October 1997, and entered into force on 1 May 1999.

6 There were also other Council of Europe conventions worth mentioning: European Convention on the Adoption of Children of 1967, European Convention on the Legal Status

ground concerning family matters. The Treaty of Nice expressively predicted that measures related to family law have "*to be adopted using the unanimity procedure*". It was the very first time that the term of "*family law*" had to be mentioned in the founding treaties.[7] The Treaty of Lisbon of 13 December 2007[8] confirmed the concerns of Member States related to decision-making in this matter, considering family law issues as particularly sensitive.[9] A very interesting innovation in family law addresses the law-making process. In fact, despite the unanimity that family issues still require (Article 81(3)), the Council may decide (on the Commission proposal after obtaining the unanimous opinion of the European Parliament) that certain acts in relation to matters of family law could follow the ordinary legislative procedure. Subsequently, national parliaments shall be informed, and if some of them within a six-month period oppose, the Council cannot adopt a positive decision.

Member States exercise judicial cooperation concerning family matters within the EU seeking to overcome the strong influence of the local socio-political organization, traditions, customs and culture. Simultaneously, Member States act through several international organizations.[10] The European Union became a member of the Hague Conference on 3 April 2007. Having a new role in the field of civil judicial cooperation, the Statute of the HCCH regulates accession of the EU as a Regional Economic Integration Organization to the HCCH.

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of Children Born out of Wedlock of 1975 reducing differences in legal status between children born in and out of wedlock, European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children of 1980. However, numerous Recommendations of the Committee of Ministers and of the Council of Europe were related to family law. The process of Europeanization of family law is developing within the Council of Europe, through legal regulation of certain issues and through action taken by specialized organizations aimed at harmonization of law….. M. Alinčić *et al., Obiteljsko pravo* [Family law] (Zagreb, 2006) pp. 533-535.

7 Treaty of Nice, Amending the Treaty on European Union, OJ C 80/11, 10 March 2001, pp. 1-86.

8 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Lisbon, 13 December 2007, OJ C 306/10.

9 M. Župan, 'Europska pravosudna suradnja u prekograničnim obiteljskim predmetima' [European judicial cooperation in cross-border family matters] in: M. Župan (ed.) *Pravni aspekti prekogranične suradnje i EU integracija* (Osijek - Pečuh, Pravni fakultet Sveučilišta u Osijeku i Pravni fakultet Sveučilišta Pečuh, 2011) p. 593.

10 The most important is their activity in the work of the Hague Conference on Private International Law unifying the procedural rules and harmonizing criteria of international jurisdiction. The Hague Conference has reached a high level of agreement on the need for unified solutions, its main purpose and objectives that have to be achieved. In a series of conventions which regulate the issues of cross-border family disputes a special place and importance are given to children as a subject of such contracts... D. Hrabar, 'Dijete u obitelji' [Child in the family], in: *Naša obitelj danas* (Zagreb, 1994) p. 127.

Regulation No 664/2009[11] has established a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations and the law applicable to maintenance obligations.

It should be noted that in the international context the term "*parental responsibility*" is used rather than the term "*parental rights*", pointing to legally prescribed powers belonging both to the father and the mother, founding the basis for taking care of the person and the property of the child.[12] General principles underlying the regulation of parental rights are prescribed by the UN Convention on the Rights of the Child of 20 November 1989.[13]

EU action in the field of international family law is directed at the matters related to maintenance, divorce, parental care, and property relations between spouses. Adoptions of common procedural rules were aimed at rules simplification, retaining the issue of mutual recognition as a priority. In this sense, the European Community Law instruments are regulating questions of procedure, conflicts of jurisdiction and the recognition of decisions, stressing the need for cooperation in the protection of children and achieving legal certainty through free movement of judgments and free exercising of parental rights within the Union.

As of 1 March 2002, the Brussels Convention was replaced by the Brussels I Regulation No 44/2001 on jurisdiction, recognition and enforcement of judgments in civil and commercial matters,[14] covering almost the entire territory of the European Union. The first step towards a recognition of decisions in the area of family law was made by adopting Regulation No 1347/2000, which

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11 Regulation EC No. 664/2009 of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations OJ L 200/46, 31 July 2009, pp. 25-31.

12 M. Krvavac, O. Jović, 'Vršenje roditeljskog prava – sukob zakona' [Parental responsibility – choice of law] in: *Oktobarski pravnički dani* (Banja Luka, 2011).

13 The Convention confirms the prohibition of discrimination, committing member states to respect and ensure the rights protected in the Convention to each child without discrimination and without regard to race, color, sex, language, religion, political or other opinion. The Convention deals with the child's specific needs and rights. It requires that states act in the best interests of the child.

14 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 012, 16 January 2001.

included harmonizing rules on jurisdiction, recognition and enforcement of decisions in matrimonial matters and matters of parental responsibility for children of both spouses (Brussels II)[15] and was later replaced by Regulation No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters parental responsibility (Brussels II *bis*).[16]

1. Parental responsibility

The subject of Brussels II *bis* is civil proceedings related to divorce, marriage annulment and legal separation, as well as certain aspects of parental responsibility. The Regulation defines all relevant terms used in it: court of a Member State, right to custody, etc. The term "*parental responsibility*" encompasses not only the right to custody and access, but also matters such as guardianship and placement of child in a foster family or institutional care. The list of matters qualified as "*parental responsibility*" pursuant to the Regulation in Article 1(2) is not exhaustive, but merely illustrative. The Regulation applies to court judgments, whatever a given judgment may be called (decree, order, decision, etc.). However, it is not limited to decisions issued by courts, but applies to any decision pronounced by an authority having jurisdiction in matters falling under the Regulation (e.g. social authorities). The rules on jurisdiction laid down in Chapter II. Jurisdiction of a Member State concerning matters of parental responsibility over a child are based on the habitual residence of the child at the time the court is seized (Article 8). As an exception, the court of the Member State of the child's former habitual residence shall retain jurisdiction when a child moves lawfully from one Member State to another. This possibility is limited by a three-month period following the move (Article 9). The Regulation allows prorogation of jurisdiction to the court of a Member State exercising jurisdiction by virtue of Article 3 on an application for divorce, legal separation or marriage annulment in any matter relating to parental responsibility if the child has substantial connection with that Member State (Article 12). If the child's habitual residence cannot be determined, the court of the child's residence is competent. In cases where no court of a Member State has jurisdiction (Article 8 to 13), jurisdiction shall be determined residually, in each Member State, by the laws of that State. There is a

15 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, OJL 160/19, 30 July 2000.

16 Council Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters parental responsibility, OJ L 338/1, 23 December 2003.

possibility to transfer the case to a court better placed to hear the case, with which the child has a particular connection and when this is in a best interest of the child. The general rule on jurisdiction pursuant to Regulation is based on the child's habitual residence, but there is a possibility of "*softening"* this rule if the conditions from Article 15 are fulfilled. Article 15 is related to transfer of jurisdiction, and it has some elements of *forum non conviniens,* but it is not equivalent to this institute of private international law. All Member States pay attention to legal certainty and predictability, asking for clear and predictable procedural rules. In that sense, there is no place for *forum non conviniens.* Exclusively, there is the possibility for rule correction when this is in the best interest of the child. As an exception, the best interest of the child is a strong argument for flexibility and correction of *perpetuation fori.* In relations between Member States, Brussels II *bis* has precedence over the Conventions as concerns matters governed by this Regulation. The Regulation sets a complete jurisdiction framework appointing a Member State's jurisdiction, but no concrete court in the respective Member State. This question has to be answered by national procedural rules.

III. Some indications of the final Serbian Draft PIL Code

As mentioned before, the final Draft of the new Serbian PIL Code was presented in June 2014. The Draft is intended to replace the existing codification of private international law and international civil procedure from 1982.[17] Now, its adopting procedure is in progress.

The Draft is obviously based on intensive legal comparison and has been prepared taking into account the developments in other recent European codifications, and especially the Regulations of the European Union in this field of law.[18] However, the provisions of the Draft show an intensive influence of EU law. Concerning family matters, the Draft also takes into account a number of Hague Conventions.

The principle of national rules coordination is the Draft's cornerstone. Concerning jurisdiction issues, it serves to disable *lis pendens* and to facilitate legal relations with other countries through making the proceedings of the recognition and enforcement of foreign judgments more flexible and user-friendly.

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17 Zakon o rešavanju sukoba zakona sa propisima drugih zemalja, *Official Gazette* No. 43 of 23 July 1982, No. 72 of 3 December 1982, *Official Gazette CPJ* No. 46 of 4 October 1996.

18 Council of Europe, Opinion on the Draft Private International Law Code of Republic of Serbia of 22 December 2012, p. 3, www.mpravde.gov.rs (15 July 2014).

The coordination principle is facilitated since the Republic of Serbia is oriented towards the EU integration process.

One of the main questions during the preparation of the Draft was whether or not to adopt the EU law (EU Regulations related to PIL issues) into the new PIL Code? The Working Group's opinion on this question was divided. Some members were against implementation. Their arguments were as follows: a) the implementation is not a direct condition for EU integration; b) there is the question of whether and when we would become an EU member; c) We should create the most suitable solutions for our circumstances (different than or modified EU solutions). Conversely, the opinion of the majority in the Working Group was positive toward the implementation of EU solutions. Their arguments were as follows: a) the principle of universality clearly demands the implementation; b) the vast majority of PIL issues would be unified; c) concerning practitioners, it would be better for them to get used to EU solutions earlier, since from the moment of becoming an EU member we would be obliged to apply EU law. We are sharing the second opinion.

Concerning the jurisdiction issue in family matters, during the preparation of the new Serbian Draft, the following EU instruments have been used:

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) 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,
3) Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation,
4) Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes {COM(2011) 125} {COM(2011) 127} {SEC(2011) 327} {SEC(2011) 328},
5) Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of property consequences of registered partnership {COM(2011) 125} {COM(2011) 126} {SEC(2011) 327} {SEC(2011) 328}.

1. Jurisdiction in the PIL Draft

Compared to the law in force, the jurisdiction issue in the Draft is regulated in a more detailed and systematic way. There is a big difference in relation to the 1982 PIL Code. The Draft structure is organized as follows: for each matter the applicable law is regulated in context with international jurisdiction. Thus, international jurisdiction in family matters is placed under Chapter II, subheading *Family law,* and goes in line with determining the applicable law in family matters.

Besides these special jurisdiction rules, there are general rules on jurisdiction worth mentioning. A general rule on exclusive jurisdiction can be found in Article 21. Jurisdiction is exclusive only when it is expressly provided for. Contrary to the PIL Code in force, exclusive jurisdiction is not prescribed for status relations, family matters and succession. The number of case-groups of exclusive jurisdiction in the Draft is reduced considerably, which is in line with modern developments.[19] The Draft does not provide exclusive jurisdiction of domestic courts in family matters if the defendant has Serbian nationality and if he/she resides in the Republic of Serbia.

The provision for the general jurisdiction rule is placed in Article 12. Traditionally, the domicile of the defendant is a criterion for the general jurisdiction rule in civil proceedings. The domicile is also a criterion for general jurisdiction in non-litigious proceedings. The position of the defendant is placed to the person against whom the petition was filed. Alternatively, if the defendant is not domiciled in the Republic of Serbia or in another state, a court of the Republic of Serbia shall have jurisdiction if the defendant has his/her habitual residence in the Republic of Serbia.

A brand new provision in the Draft is related to *exceptional jurisdiction* (Article 20). The rationale of this institute is the protection of human rights through guaranteeing the right to court access and forbidding *denial of justice.* In a comparative view, the exceptional jurisdiction rule is known both in national and international sources of private international law. Provisions of this type constitute the basis for exceptional jurisdiction in specific types of disputes, especially those concerning family disputes or those involving relations between parents and children. The ratio of this institute is to complement jurisdiction rules when they are not appropriate to the circumstances of the case. The correct conclusion is that exceptional jurisdiction rule is an exception clause in the field of international jurisdiction rules. This is the very first time that a Serbian national PIL code offers a solution for negative conflict of law

19 CoE Opinion, *op. cit.* n. 20, p. 5.

in international civil procedure, by prescribing a rule on *emergency jurisdiction* or *forum necessitates.*

The 1982 PIL Code showed a restrictive attitude towards prorogation of jurisdiction, be it of domestic or of foreign courts. Articles 22 to 24 follow a liberal approach and should facilitate legal relations with other countries. The provisions are obviously influenced by Article 23 of the Brussels I Regulation, which is of practical importance to, for example, cross-border commerce.[20]

2. Family matters

Intensive harmonization of private international law rules as well as of procedural rules in family matters could significantly contribute to the harmonization of national family laws. The differences between national laws are the main reason for establishing judicial cooperation. Following modern trends in comparative law, the jurisdiction of courts and other authorities of the Republic of Serbia in family matters is regulated in a way that mitigates the current overemphasis on Serbian citizenship as a criterion for jurisdiction of domestic courts and accepting habitual residence as a basic criterion. The special jurisdiction provisions in family matters take into account consideration of international cooperation. In order to establish jurisdiction, they ask for the existence of distinct connections with the domestic legal system. This chapter concerns the jurisdiction of domestic authorities in family matters, with the exception of maintenance obligations. Jurisdiction in family matters in the final Draft of the Serbian PIL Code, as in other fields, is regulated in detail with respect to the separate issues that follow.[21]

2.1. Marriage

The capacity to enter into marriage is based on nationality or habitual residence (Article 60). This means that persons who wish to marry in Serbia and who have no such links with the country are impeded from doing so. It should simply be pointed out that marriage tourism – where a couple chooses to marry in a country for reasons of pure choice in relation to the venue, the culture, history or any personal ties – is therefore excluded here.[22]

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20 *Ibid.,* p. 7.

21 References to the articles in the text below concern the final Draft PIL Code of the Republic of Serbia.

22 CoE Opinion, *op. cit.* n. 20, pp. 8-9.

Matrimonial disputes include disputes on existence or non-existence of marriage, annulment of marriage and divorce procedure. Special provisions considering jurisdiction in these disputes are in line with Article 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. The main criterion for jurisdiction of the domestic court prescribed in Article 78 of the Draft is habitual residence (alternatively: present common residence, last common residence or, in the event of joint application, either spouse's habitual residence in Serbia at the time the court is seized; the plaintiff has had his/her habitual residence in Serbia for at least a year immediately before the application was made, or the plaintiff, who is a national of the Republic of Serbia, has had his/her habitual residence in the Republic of Serbia for at least a year immediately before the application was made). The last listed alternative criterion is common spouses' Serbian nationality.

2.2. Matrimonial property regime

Jurisdiction in matrimonial property regime disputes is separately regulated in three possible situations: a) jurisdiction in the event of death of one of the spouses, b) jurisdiction in cases of divorce or marriage annulment and c) jurisdiction in other events.[23] There is an open possibility for prorogation of jurisdiction settled by paragraphs 2 and 3 of Article 69.

Special jurisdiction provisions considering these disputes are in line with the Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.

On the other hand, the jurisdiction provisions for property consequences of registered and unregistered partnership seem to be in keeping with the Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships. [24]

2.3. Parentage disputes

Proceedings in parentage disputes are regulated by civil law procedural framework, mandatory family law rules, and principles on special child protection.

23 Articles 67, 68, and 69.

24 Article 86.

The Serbian law in force prescribes exclusive judicial jurisdiction in maternity and paternity disputes in cases where the child (defendant) has Serbian nationality and resides in Serbia.[25]Also, a domestic court is competent if both the claimant and defendant have Serbian nationality, regardless of where they reside, or if the claimant has Serbian nationality and resides in Serbia.[26] There is room for competence of the domestic court if the claimant(s) of foreign nationality reside(s) in Serbia, but only if the defendant accepts the jurisdiction, according to his/her domestic law. One of the characteristics of the Serbian PIL Code in force is that nationality figures as a criterion for domestic court jurisdiction in family matters. This is contrary to modern private international law trends that recognize habitual residence as a basic criterion for jurisdiction. European Community law, as well as Hague PIL instruments, goes toward accepting habitual residence instead of residence as a main connecting factor in the area of international jurisdiction. At the same time, there is criticism aimed at defining the term of habitual residence. Opinions on this issue are divided, some writers advocate a common unique definition and some allow different definitions stressing the fact that there are different concepts of habitual residence, both nationally and internationally, and there is need for flexibility in this sense.[27] The compromise opinion is that the concept of habitual residence has to be treated as a factual issue, but not a legal one. Beside this, habitual residence points to the center of a person's interests, indicating its connection over a longer period of time.

Starting from the assumption that habitual residence is the place indicating the center of the personal, economic and social life of a person, the writers of new the Serbian Draft Code have proposed a solution for jurisdiction in parentage disputes under Article 84 as follows:

> "1. A court of the Republic of Serbia shall be competent for the proceedings in the disputes concerned with parentage even when the requirement referred to in Article 12 hereof are not met, to the extent that, at the time of instigation of the proceedings:
>
> a) The child has his habitual residence in the Republic of Serbia, or
>
> b) The person whose parentage is being established or contested has his/her habitual residence in the Republic of Serbia, or

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25 Serbian PIL Code Article 64, *Official Gazette* No. 43 of 23 July 1982, No. 72 of 3 December 1982, *Official Gazette CPJ* No. 46 of 4 October 1996.

26 *Ibid.*

27 M. Petrović, 'Predlog Uredbe EU o nasleđivanju '[Proposal for the Succession Regulation] 12 *Pravni život* (2010) p. 546.

c) The child has the nationality of the Republic of Serbia.

2. Paragraph 1 of this Article shall apply to the determination of paternity in common law marriage by recognition.

3. The time giving the statement on recognition shall be relevant for the application referred to in paragraph 2 of this Article."

2.4. Adoption

There are very important international legal documents of universal application setting basic principles and recommendations to national laws concerning adoption: the 1989 UN Convention on the Rights of the Child, the 1986 UN Declaration on Social and Welfare Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally and the 1993 Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoption,[28]adopted as an international agreement to safeguard inter-country adoptions. All these documents contain rules regulating procedures on inter-country adoptions aimed to assure the best interests of a child, to obtain children protection and legal certainty in adoption procedure. Before the adoption of the 1989 UN Convention, inter-country adoption was regulated regionally by the European Convention on Adoption of 1967, created to overcome the differences between legal procedures and consequences of adoption in different countries. The European Convention was modified in 2008, due to the anachronism of its previous text and conflict with the practice of the European Court of Human rights.

However, the first document of crucial importance is the 1993 Hague Convention. The Convention shall apply where a child habitually resident in one Contracting State ("the State of origin") has been, is being, or is to be moved to another Contracting State ("the receiving State") either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin.[29]

By its nature, adoption belongs to public law institutions, but not to private law institutions, which means that respective state authorities are always involved in the establishing of adoption. From a comparative perspective, it

28 The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. Conference de La Haye de droit international prive, Actes et documents de la 17eme session, Tome II, La Haye 1994.

29 Article 2 of the Convention.

could be a court or an administrative body in charge.[30] The provisions of the Convention oblige competent authorities of State Countries to act in the best interests of a child. From a comparative view of the jurisdiction issue, it is very interesting to find that the exception from *perpetuation fori* is often connected with adoption and custody cases. There has been such a practice in Germany and the Netherlands.

The Serbian PIL Code stipulates the exclusive jurisdiction of domestic authorities on adoption if the adoptee is of Serbian nationality residing in Serbia.[31] For other cases, that involve adoptees of non-Serbian nationality, the competitive jurisdiction is prescribed. Countries may assure adoptees' protection by rules on direct and indirect competence, respecting general principles on international jurisdiction.

Exclusive jurisdiction of domestic courts is regulated in a different way in the Draft of the new Serbian PIL Code. The Draft writers propose in Article 87:

> "1. The authority of the Republic of Serbia shall be competent to establish adoption where one of the adopters, the adopter, or the child, has the nationality of the Republic of Serbia, or has his habitual residence in the Republic of Serbia.
>
> 2. Where the requirements referred to in paragraph 1 of this Article or Article 12 are met, a court of the Republic of Serbia shall be competent to determine in disputes concerned with the annulment of adoption."

As in parentage disputes, where competence could be based on the child's Serbian nationality or habitual residence, in cases related to adoption it is sufficient for one of the subjects to be of Serbian nationality or have his or her habitual residence in Serbia. The Draft writers intended to lower the emphasis on Serbian nationality as a connecting factor taking into consideration the need for international judicial cooperation in family matters.

2.5. Parental responsibility and the rights of the child

Clarifications of the term "*parental responsibility*" in European Community law, were taken into consideration in creating the Draft. Concerning the jurisdiction issue, the grounds of parental responsibility are shaped in the light of the best interests of the child. This means that jurisdiction should lie in the

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30 M. Krvavac, O. Jović, 'Međudržavno usvojenje – priznanje i izvršenje stranih odluka' [Cross-border adoption – recognition and enforcement of foreign decisions] 3-4 *Pravni život* (2008) p. 98.

31 Article 74(1) of the PIL Code.

first place with the country of the child's habitual residence (Article 94). There would be jurisdiction of a domestic court if the proceedings on parental responsibility are ancillary to matrimonial disputes at a competent court in the Republic of Serbia. A provision on *emergency jurisdiction* or *forum necessitates* is also part of this article if the child's habitual residence could not be determined, or a child is a refugee children and children who, due to disturbances occurring in their country, are internationally displaced but present in the territory of the Republic of Serbia at the time the court is seized.

IV. Conclusion

If we compare the provisions of the PIL Code in force and provision of the Draft PIL Code in Serbia, the subject matter of jurisdiction is the issue that has been amended in the greatest extent. Actually, there is an entirely new attitude in the Draft, following the examples of the Swiss and Belgian PIL Codes. For each matter, the applicable law is regulated in context with international jurisdiction.

It would certainly be easier for practitioners to follow provisions of the Draft, since they are ordered in a systematic and logical way. The very first question that has to be answered in a PIL case is: *to whom, or to authorities of whose country the request should be addressed?* The second question is: *which law should be applied?* Following the Draft agenda, practitioners would get modern answers that are harmonized with European Community law, not only considering family, but all other regulated matters as well.

Concerning family matters, Chapter II of the Draft covers all important issues of this subject matter: contracting a marriage, effects of marriage, matrimonial property regime, property consequences of registered and unregistered partnership, termination of marriage, parentage, adoption, parental responsibility and the rights of the child and maintenance obligations.

INTERNATIONAL DIVORCE IN TURKEY: JURISDICTION AND APPLICABLE LAW

Zeynep Derya Tarman*

I. Introduction

In Turkish law, the international jurisdiction of Turkish courts is based on the internal jurisdiction rules. In the Private International Law and International Civil Procedure Code (hereafter: PIL Code) dated 21 November 2007 and numbered 5718,[1] Article 40 reads: *"The international jurisdiction of Turkish courts shall be determined by the rules of domestic law on internal jurisdiction"* and thus the general principle designating the international jurisdiction of Turkish courts is established. Therefore, in case of a conflict involving a foreign element, whether Turkish courts have international jurisdiction or not shall be determined based on the rule of internal jurisdiction in accordance with domestic law. Also, in addition to the general rule designating the international jurisdiction of Turkish courts based on the rule of internal jurisdiction in accordance with the domestic law, there are special international jurisdiction rules determining the international jurisdiction of Turkish courts in terms of certain legal conflicts (PIL Code Article 41-47). In such cases where the international jurisdiction of Turkish courts is regulated in particular ways, such particular jurisdiction rules shall apply instead of the general rule based on internal jurisdiction in accordance with the domestic law.[2] There are also certain international jurisdiction rules that are in effect as a result of international conventions that have been entered into, concerning the conflicts that are the subject matter of such conventions to which the Republic of Turkey is

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1 The law has been carried into effect as of the date of its publication in the *Official Gazette* (OG) on 12 December 2007, No. 2678.

2 B. Tiryakioğlu, Türklerin Kişi Hallerine İlişkin Davalarda Türk Mahkemelerinin Milletlerarası Yetkisi, *Prof. Dr. Tuğrul Arat'a Armağan* (Ankara, 2012) p. 1141. For counter view see E. Nomer, *Devletler Hususi Hukuku* (Istanbul, 2011) p. 456. The author does not evaluate the international jurisdiction rules as an exception to the general international jurisdiction rule stated in Article 40 and qualifies the special jurisdiction rules as complementary rules.

a contracting party.[3] Regarding the conflicts that can thus be considered to be within the scope of such conventions, the respective provisions and rules shall apply (PIL Code Article 1(2)).

In this paper, the rule of special jurisdiction regulating the international jurisdiction of Turkish courts concerning personal status of Turkish nationals (PIL Code Article 41) shall be discussed. In practice, this rule is currently of interest due to divorce suits filed by Turkish nationals residing abroad, and which are litigated again in Turkey. First, the rule of international jurisdiction stated in Article 41 of the PIL Code and the conditions concerning the application of this article shall be studied. This shall be followed by a discussion of the applicable law regarding divorce cases litigated at Turkish courts.

II. The rule of international jurisdiction (PIL Code Article 41)

1. The rule

The Turkish PIL Code regulates the international jurisdiction of Turkish courts regarding legal actions concerning the personal status of Turkish nationals. In conjunction with this subject matter, the Code has chosen to constantly keep a Turkish court with international jurisdiction at hand, notwithstanding the jurisdiction rules presented by internal law (Article 41). In the aforementioned article, it is stated:

> "Suits relating to the personal status of Turkish nationals shall be heard before the court having internal jurisdiction in Turkey, provided that these suits have not been or may not be brought before the courts of a foreign country, if there is no court having internal jurisdiction in Turkey, the legal suit shall be heard before the court where the person concerned is resident, if he/she is not resident in Turkey, before the court of last domicile in Turkey and if there is no court of last domicile, before one of the courts in Ankara, Istanbul or Izmir."

In accordance with Article 41, Turkish nationals may bring their suits pertaining personal status to the courts of a foreign country or a Turkish court. The intention behind the article is certainly not to prevent Turkish citizens from filing lawsuits concerning their civil status in countries where they live.

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3 Convention on the Contracts for the International Carriage of Goods by Road (CMR), Article 31 (OG 14 December 1993 No. 21788); Convention concerning International Carriage by Rail (COTIF), Appendix A Article 52 (OG 1 June 1985 No. 18771); Convention for the Unification of Certain Rules for International Carriage by Air-Montreal, Article 33 (OG 1 October 2010 No. 27716).

The purpose of Article 41 is to provide a competent court which has international jurisdiction over Turkish citizens in case that Turkish nationals can not bring their suits pertaining personal status to a court of a foreign country or if they do not wish to do so, and in case there are no competent courts based on internal jurisdiction in Turkey.[4] According to Article 41, two conditions must be met in order for Turkish courts to have jurisdiction: (i) the legal suit must concern the personal status of Turkish nationals and (ii) this legal suit concerning the personal status of Turkish nationals must not or could not have been brought before the courts of a foreign country. Article 41 does not require a genuine connection between the foreign country where the legal case was first brought before the courts and the legal suit or the parties of such.

2. Conditions for the application of the rule

2.1. Legal conflict concerning the personal status of Turkish nationals

The first condition that is sought to be met in order for courts in Turkey to have international jurisdiction is that the legal suit must concern the personal status of Turkish nationals. The qualification as to whether the legal suit concerns the personal status or not shall be performed in accordance with Turkish law.[5] Within this framework, legal suits concerning personal status are those involving the laws designating the civil status and capacity of a person as well as family law. These contain legal suits concerning subject matters such as divorce and separation, nullity of marriage, guardianship, descent and capacity[6]. Therefore, legal suits, the subject matter of which is regulated by law of persons and family law but which do not concern the personal status (civil status) of the person, such as legal suits concerning matrimonial property and maintenance claims, are not among legal suits that relate to personal status. In the same way, suits concerning material and immaterial damages, even if they are litigated for a conflict concerning personal status, are not considered as legal suits concerning personal status.[7] Therefore, it shall be the case that legal suits concerning legal capacity, matrimonial cases and cases concerning descent and guardianship are particularly going to be subject to Article 41 within the framework of the concept of "personal status." In case a legal suit litigated in a foreign country does not concern personal status but nonetheless has been brought before Turkish courts, Article 41 shall not apply and the

4 A. Çelikel, B. Erdem, *Milletlerarası Özel Hukuk* (Istanbul, 2012) p. 544.

5 Tiryakioğlu, *op. cit.* n. 2, p. 1145.

6 Nomer *op. cit*. n. 2, p. 449-450; Çelikel, Erdem, *op. cit*. n. 4, p 541.

7 Tiryakioğlu, *op. cit*. n. 2, p. 1145.

courts indicated in this article shall have no jurisdiction. In order for Turkish courts to have jurisdiction in accordance with Article 41, it is not mandatory for both parties to be Turkish nationals and it is sufficient for one of the parties to be a Turkish national either as a defendant or a plaintiff.[8] Turkish nationality is regulated in accordance with Turkish law. Legal suits concerning the personal status of persons who are nationals of Turkey according to the provisions of the Turkish Nationality Act dated 29 May 2009 and numbered 5901[9] are subject to Article 41 of the PIL Code.[10] Whether the person in question resides in Turkey, or in a foreign country or has a domicile in one or the other is of no concern. Whether the person in question has a nationality of a different country, besides his/her Turkish nationality, or whether his/her Turkish nationality is acknowledged by another country is of no significance either. What is of importance in terms of Turkish courts' having international jurisdiction is for one of the parties to be a national of Turkey at the time the legal suit is litigated. The person in question losing his/her Turkish nationality as the legal suit continues to be heard does not have any influence on the established international jurisdiction. According to the legal system, the jurisdiction of a court is not impacted by any changes that may occur concerning the circumstances that establish such jurisdiction. This conclusion can be derived based on the general provision (PIL Code Article 3) which takes the circumstances as of the date of the claim is filed as the basis of the applicable law.[11]

2.2. No litigation in a foreign country

A legal suit concerning personal status must not or could not have been litigated in a court of a foreign country. This is the second requirement parties have to meet in order to benefit from the jurisdiction rule of PIL Code Article 41. In this case, the competent courts listed in Article 41 will gain jurisdiction.

The PIL Code contains neither a provision regulating the impact on the international jurisdiction of Turkish courts on a circumstance such as a case that has been litigated in a foreign country being also litigated before a Turkish court nor any rules concerning foreign pendency in general. In case a legal suit that has been litigated in a foreign country is litigated once again in Turkey,

8 Nomer *op. cit*. n. 2, p. 450.

9 OG 12.6.2009, Nr. 27256.

10 Çelikel, Erdem, *op. cit*. n. 4, p. 545.

11 Nomer, *op. cit*. n. 2, p. 450.

there are solely Articles 41 and 47[12] dealing with the jurisdiction of Turkish courts regarding such a case. In these two situations where Turkish courts are the subsequent courts, consequences of two pending cases will be very similar and Turkish courts will not have jurisdiction with regard to both situations. Therefore, the party concerned has to object to the international jurisdiction of a Turkish court in order to have the Turkish court dismiss the second case.

Apart from legal suits concerning the personal status of Turkish nationals and Article 47 concerning jurisdiction agreements, the PIL Code does not contain any regulations to allow for raising objections concerning *"the international jurisdiction of Turkish courts"* or *"foreign pendency"* as acknowledged in the doctrine, propounding a case that was litigated in a foreign country. Therefore, any objections made against jurisdiction or pendency shall be void of any legal basis apart from the regulations put forth in the international conventions which Turkey is a contracting party to.[13]

3. Competent courts in accordance with Article 41

PIL Code Article 41 states explicitly that in case the requirements sought for in the article are met, Turkish courts shall have international jurisdiction. This can be easily understood from the mandatory wording of the article.[14] For this reason, if a legal suit concerning the personal status of Turkish nationals has not been litigated in a foreign country, it is indisputable that Turkish courts shall have international jurisdiction. If it is concluded that Turkish courts shall have international jurisdiction in accordance with Article 41 because the conditions specified in the article have been met, the second issue that the judge shall examine on its own motion is to determine whether the courts have been applied to in the appropriate hierarchical manner as described. For instance, if a competent court based on internal jurisdiction rules exists in Turkey, but a

12 PIL Code Article 47 regulates the terms and consequences of the court of a foreign country being assigned as the competent court as a result of a jurisdiction agreement. If the jurisdiction agreement meets the conditions set forth in Article 47, Turkish courts shall have no international jurisdiction. In case a legal suit has been litigated in the competent court of the foreign country in accordance with the jurisdiction agreement, and the same legal suit is litigated once again in Turkey while the first legal suit is in the process of being heard, foreign pendency shall be taken into consideration. Nomer, *op. cit*. n. 2, p. 468. However, in the doctrine it is also argued that the Turkish court shall dismiss the case based on lack of international jurisdiction instead of foreign pendency, see F. Sargın, *Milletlerarası Usul Hukukunda Yetki Anlaşmaları*, (Ankara 1996) p. 189; Tiryakioğlu, *op. cit*. n. 2, p. 1148, fn.19.

13 Tiryakioğlu *op. cit*. n. 2, p. 1152.

14 N. Ekşi, *Türk Mahkemelerinin Milletlerarası Yetkisi*, 2. (Bası, İstanbul 2000) p. 175.

court at the last domicile, which is described as the third possible option in the article, has been applied to instead of the former, the judge must observe this matter on its own motion and dismiss the case based on jurisdiction.[15]

In Turkish law, internal jurisdiction rules exist not only in the Code of Civil Procedure, but also in the Civil Code. For instance, there are courts with special jurisdictions for legal suits concerning the annulment of marriage (Civil Code Article 160), divorce and separation (Civil Code Article 168), descent (Civil Code Article 283) and the personal relationships of the child (Civil Code Article 326) and for taking the necessary precautions for protection of the matrimony (Civil Code Article 195-198) as well as rules concerning adoption decisions (Civil Code Article 315).[16] For procedures concerning guardianship, the jurisdiction resides with the guardianship chambers at the domicile of the minor or the person with legal disability (Civil Code Article 411).[17]

In divorce cases, besides the court at the place of domicile of one of the spouses, the court at the spouses' common habitual residence for the last 6 months before the trial also has jurisdiction (TCC Article 168). If there is no competent court based on internal jurisdiction rules concerning a divorce case of Turkish nationals, for example, if the habitual residence of the Turkish national in question is not in Turkey (Code of Civil Procedure Article 9), the courts indicated in Article 41 shall have jurisdiction. According to this, the legal suit shall be held at the court where the Turkish national in question resides in Turkey or, if the person in question is not residing in Turkey, the court located at his/her last domicile in Turkey and if such is not applicable either, at the courts in Ankara, Istanbul or Izmir. According to the provision regulating the choice of court agreements (PIL Code Article 47), an agreement granting jurisdiction to a foreign court can not be entered into regarding matrimony matters.[18] However, Article 41 provides the parties, for instance, with the opportunity to obtain a divorce decree by applying to a court in a foreign country provided that the parties are in mutual agreement to do so. In case the recognition and enforcement of such a court judgement at a Turkish court is requested, the parties having applied to the court in a foreign country in mutual agreement do not provide grounds for the dismissal of the recognition and enforcement of this divorce judgement. In such a case, it is possible to qualify this agreement as an agreement granting jurisdiction to a foreign court regarding a matrimony

15 Ekşi, *op. cit*. n. 14, p. 155.

16 Nomer, *op. cit*. n. 2, p. 451, fn. 188.

17 Court of Cassation (*Yargıtay*), 2. Civil Chamber, E. 2008/20095, K. 2009/8384, T. 30 April 2009.

18 Nomer, *op. cit*. n. 2, p. 453.

matter.[19] The conditions that Turkish law requests to be met for recognition and enforcement (PIL Code Article 54) are not sufficient to dismiss the recognition and enforcement of such a divorce judgement. The invalidity of such a jurisdiction agreement is outside the matters to be reviewed by the Turkish judge, unless an exclusive jurisdiction of Turkish courts is concerned.[20]

III. Applicable law

Since Article 41 of the PIL Code relates to only one of the spouses being a Turkish national, particularly regarding matrimonial conflicts, it subjects persons who are not Turkish nationals to the international jurisdiction of Turkish courts as well. For this reason, the international jurisdiction of Turkish courts has been extended to cover conflicts concerning the personal status of foreign nationals as well. In such cases, the substantive law to be applied in accordance with the rules concerning the conflict of laws may also be a foreign law. The application of Turkish law to a conflict may not provide Turkish courts with international jurisdiction and Turkish courts having international jurisdiction in accordance with Article 41 does not result in the application of Turkish substantive law. For example, in a divorce case of spouses whose mutual residence is in a foreign country, a Turkish court may have international jurisdiction in accordance with Article 41 in case one of the spouses is a Turkish national. However, the substantive law to be applied is the law of the foreign country where the mutual habitual residence of the parties is located (PIL Code Article 14 (1)). Under Turkish law, choice of law is not permitted in divorce cases.[21] The grounds for and the effects of divorce and separation shall be governed by the common national law of the parties. Where the parties have different nationalities, the law of common habitual residence shall apply, and if this does not exist, Turkish law shall apply (PIL Code Article 14). Thus, even though Article 41 secures that a Turkish court is constantly present for legal suits concerning the personal status of Turkish nationals, the determination of the applicable substantive law is subject to the conflict of law rules. According to the conflict of laws rules, foreign law may be applied in a legal suit concerning the personal status of a Turkish national.

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19 Nomer, *op. cit*. n. 2, p. 453.

20 Nomer, *op. cit*. n. 2, p. 454.

21 Court of Cassation, 2nd Civil Chamber (OG 20 September 1995 – 22410); this decision regarding a divorce case serves as a model: "The parties have foreign nationalities. According to the rule in PIL Code, the divorce is not subject to Turkish law…It is not allowed to decide only according to the parties' will which says that Turkish law is to be applied.".

However, where a provision of foreign applicable law, applied to a specific case, is clearly contrary to Turkish public policy, this provision shall not apply (PIL Code Article 5). Moreover, according to the rules of conflict of laws, in case the foreign substantive law that needs to be applied assigns a duty to the Turkish judge that can not be legitimized by the judge in question, the possibility for the foreign law to be applied can also be endangered and such a situation may result in a problematic issue.[22] This final possibility must be thought of as a matter concerning the application of foreign law. However, in case certain reasons rendering the application of the foreign substantive law impossible arise, it can be argued that the only way to resolve such an issue would be the application of the related provisions of Turkish law.

IV. Conclusion

According to Article 41, two conditions must be met in order for Turkish courts to have jurisdiction: (i) The legal suit must concern the personal status of Turkish nationals and (ii) this legal suit concerning the personal status of Turkish nationals must not or could not have been brought before the courts of a foreign country. In case a legal suit that has been litigated in a foreign country is litigated once again in Turkey, according to Article 41 Turkish courts will not have jurisdiction. Therefore, the party concerned has to object to the international jurisdiction of a Turkish court in order to have the Turkish court dismiss the second case.

Turkish law does not contain any provisions regarding *foreign pendency* in case a legal suit that has been litigated in a foreign country is litigated once again in Turkey. Fundamentally, if a legal suit has been brought before a court in a foreign country and this court has found itself competent to hear the case and the country in question has a genuine connection to the legal suit and the parties of such, the same legal suit being brought before a court in Turkey again is of no particular legal interest. Aside from Articles 41 and 47, PIL Code does not contain any provisions that shall obstruct a second case to be litigated in Turkey even though a legal suit brought before a court of a foreign country is also present. This situation is liable to create problems in terms of recognition and enforcement since the court of the foreign country where the legal suit was first litigated shall refuse to recognize and enforce the judgement rendered by the Turkish court as a result of considering itself competent. On the other hand, if the judgement in the first legal suit is finalized, it is also highly probable for a request to be made for this judgement to be recognized

22 Nomer, *op. cit*. n. 2, p. 453.

and enforced in Turkey. Upon recognition by the Turkish court, the foreign judgement will constitute res judicata in Turkey. However, in case the legal suit litigated in a Turkish court has been concluded before the first legal suit and the judgement is finalized, the recognition and enforcement of the judgement by the foreign court shall be dismissed because of the final judgment in Turkey. As a result, it will not be possible for the judgements rendered in either country to be recognized and enforced in the other country.

Under Turkish law, choice of law is not permitted in divorce cases. The grounds for and the effects of divorce and separation shall be governed by the common national law of the parties. Where the parties have different nationalities, the law of common habitual residence shall apply, and if this does not exist, Turkish law shall apply (PIL Code Article 14).

CHILDREN IN TURKISH INTERNATIONAL FAMILY LAW

Ceyda Süral*

I. Introduction

As a result of improvement of communication and transportation, economic, social and cultural intercourse between different nations has developed. Due to this, international personal relations and marriages between couples of different nationalities have increased. This has also led to a growth of disputes between such couples and usually children are also made part of disputes between couples. The problems related to children may involve questions arising out of affiliation, custody and maintenance obligations.

The applicable law to affiliation and custody is provided in Articles 14(3), 16 and 17 of the Turkish Private International Law Act (PIL Act) and Turkey is a party to the 1956 Hague Convention on the Law Applicable to Maintenance Obligations Towards Children and 1973 Hague Convention on the Law Applicable to Maintenance Obligations.

The recognition and enforcement of judgments concerning custody of and maintenance obligations towards children is also a significant problem. The recognition and enforcement of foreign judgments is provided in Articles 50-59 of the PIL Act and Turkey is a party to the 1973 Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations and European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children.

According to the Turkish Constitution Article 41(III), every child has the right to benefit from protection and maintenance and to establish and sustain a direct and personal relationship with his or her mother and father unless it is contrary to his or her best interest. Turkey is a party to the United Nations Convention on the Rights of the Child as of 1995 and to the European Convention on the Exercise of Children's Rights as of 2001. Turkey is a party to the Hague Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants as of 1983 along with Germany and Latvia (but no other South European countries).

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II. Choice of law rules

1. Affiliation

There are two different provisions concerning affiliation in the PIL Act. These are Article 16 on the establishment and abolition of affiliation and Article 17 on the consequences of affiliation. Article 16(1) brings more than one connecting factor; entitles more than one law. The aim is to find a law that binds the child to one of his parents so that the child is not left without affiliation.[1] The affiliation may not be established pursuant to different foreign laws for reasons such as the expiry of a certain prescription period; non-establishment of affiliation for children born outside a marriage or for children who are born through new technologies such as sperm banks or surrogate mothers.[2]

According to Article 16(1), the establishment of affiliation is subject to the national law of the child at the time of his birth. If affiliation cannot be established according to his or her national law, it shall be subject to the law of his or her habitual residence. The priority is given to the law of the child, as the focus of interest in affiliation cases shall be the child.[3] However, preference of the law of the child is criticized in the doctrine. According to this view, the nationality of the child shall be determined according to the nationality of the mother or father. If the child is not affiliated with a parent, then it may not be possible to determine his nationality at the time of his or her birth. Furthermore, a child may not have a habitual residence at the time of his or her birth.[4] However, it should be noted that the conflict of law rule does not refer to the habitual residence of the child at the time of his or her birth but only to his or her habitual residence. Therefore, such habitual residence shall be understood as the child's habitual residence at the time of the initiation of the lawsuit (Article 3 PIL Act). If affiliation cannot be established according to the law of the child, then it shall be subject to the national law of the mother or father at the time of birth of the child. If affiliation cannot be established according to these laws, it shall be established according to the law of the common habitual

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1 C. Şanlı, E., Esen, İ. Ataman Figanmeşe, *Milletlerarası Özel Hukuk* [Private International Law] (Vedat Kitapçılık 2014) p. 136; G. Gelgel, *Devletler Özel Hukukunda Çocuk Hukukundan Doğan Problemler* [The Problems Arising out of Child Law in Private International Law] (Beta 2012) p. 9; V. Doğan, *Milletlerarası Özel Hukuk* [Private International Law] (Seçkin 2013) p. 298.

2 Z. Akıncı, C. Demir Gökyayla, *Milletlerarası Aile Hukuku* [International Family Law] (Vedat Kitapçılık 2010) p. 124.

3 G. Tekinalp, A. Uyanık Çavuşoğlu, *Milletlerarası Özel Hukuk Bağlama Kuralları* [Private International Law Conflict of Laws] (Vedat Kitapçılık 2011) p. 221.

4 E. Nomer, *Devletler Hususi Hukuku* [Private International Law] (Beta 2013) p. 264.

residence of the mother and father at the time of birth of the child. If it still cannot be established, affiliation shall be established according to the law of the place of birth of the child. The law of the place of birth of the child is considered as the last option because it is highly likely that the place of birth is a fortuitous place.[5]

It should be noted that according to Article 2(3) of the PIL Act, *renvoi* is taken into consideration in disputes concerning family law. For example, German law is applicable to the establishment of affiliation between a German child and his or her father. But, according to German law, the habitual residence of the child shall be applicable to the establishment of affiliation. So, if the child is habitually resident in Turkey, Turkish law shall be applied.[6] However, according to an opposing view, if the purpose of a conflict of law rule is to secure a certain result, i.e. the establishment of affiliation between the child and one of his parents for Article 16(1), then *renvoi* shall not be taken into consideration.[7] The problem of *renvoi* has never been dealt with by the Court of Cassation.

Two procedural rules should be mentioned for lawsuits brought before Turkish courts. According to Turkish Civil Code Article 284(3), parties and third persons are obliged to give consent to examinations that are necessary to determine the affiliation unless such examination is risky for their health. Otherwise, the judge may consider the result of the relevant examination to be against the favor of the relevant person. According to Turkish Civil Code Article 301, lawsuits that are initiated against the alleged father in order to determine him as the father of the child by a court decision shall be informed to the Turkish public prosecutor and the Treasury. As these rules are procedural rules, they shall be applied in all cases before Turkish courts even though one of the parties is a foreigner. This has also been confirmed by the Court of Cassation.[8]

Article 16(2) stipulates that the abolition of affiliation is subject to the law according to which affiliation has been established. The reasoning of this rule is to maintain the uniformity by applying the same law to the establishment and abolition of affiliation.[9] Furthermore, the abolition of affiliation according to a law other than that which has established the affiliation is prohibited;

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5 Gelgel, *op. cit.* n. 1, p. 10; Akıncı/Demir Gökyayla, *op. cit.* n. 2, p. 123.

6 Tekinalp, Uyanık Çavuşoğlu, *op. cit.* n. 3, p. 45.

7 Nomer, *op. cit.* n. 4, s. 153; Şanlı, Esen, Ataman Figanmeşe, *op. cit.* n. 1, pp. 57-58.

8 2nd Civil Chamber, 24 January 2006; 20724/254.

9 Gelgel, *op. cit.* n. 1, p. 11.

otherwise, it would have been possible to establish affiliation according to one law and then abolish it according to another law.[10]

The law applicable to the consequences of affiliation is also subject to the law according to which affiliation has been established (PIL Act Article 17). However, if the child and his mother and father have a common nationality, then their common national law applies. If they do not have a common nationality but common habitual residence, then the law of their common habitual residence applies. The idea of preferring a common law is that if there is an ongoing family relationship between the parents and the child, their common law would be more closely connected with their family relations.[11]

The consequences of affiliation are regulated in Articles 321-334 of the Turkish Civil Code. Accordingly, the surname of the child, mutual duties arising out of being a family, personal relationship with the child and duty of maintenance and education of the child are consequences of affiliation. Therefore, the applicable law determined pursuant to Article 17 will govern all these matters.

2. Custody

The law applicable to the custody of the child[12] is not regulated separately under Turkish private international law. It is considered as one of the consequences of affiliation. Therefore, the law applicable to custody is subject to Article 17.

However, according to Article 14(3), the law applicable to custody related with divorce is the same law that applies to divorce.[13] This law is the common national law of the spouses. If the spouses are of different nationalities, then the law of their common habitual residence applies. If the spouses do not have a common habitual residence, Turkish law applies. Therefore, the law applicable to custody may be a law different than the law of the child; it could even be Turkish law.

As *renvoi* is applicable in family law matters, it may be possible that the Turkish judge is in a position to apply Council Regulation No 1259/2010

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10 Tekinalp, Uyanık Çavuşoğlu, *op. cit.* n. 3, p. 222.

11 Gelgel, *op. cit.* n. 1, p. 12; Akıncı, Demir Gökyayla, *op. cit.* n. 2, p. 125.

12 For further information on applicable law to the custody of the child under the former Turkish Private International Law Act, see, B. Huysal, *Devletler Özel Hukukunda Velayet* [Custody in Private International Law] (Legal, 2005).

13 For further information on applicable law to divorce under the former Turkish Private International Law Act, see, A. Uyanık Çavuşoğlu, *Türk Milletlerarası Özel Hukukunda Boşanma* [Divorce in Turkish Private International Law] (Beta, 2006).

implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III Regulation) if the common national law or the common habitual residence of the spouses is in a participating member state.

Unfortunately, the Court of Cassation frequently disregards the conflict of law rules in custody cases and directly applies Turkish law. According to Article 182 of the Civil Code, Turkish judges have the discretion to decide on the custody of children as a result of divorce. With the intention of "raising the child according to Turkish culture and values", judges usually give custody to the Turkish parent without taking into consideration the interests of the child.[14]

Another issue relating with custody cases is whether the judge is obliged to hear the child before making his decision. There is no clear provision that brings such an obligation on Turkish judges. However, the Court of Cassation, relying on Articles 3 and 6 of the European Convention (the right to be informed and to express his or her views in the proceedings and in the decision-making process) and Article 12 of the UN Convention, gives the opinion that the children who have a sufficient understanding capability shall be heard in custody cases.[15] Therefore, in practice, Turkish courts decide on custody cases upon hearing a child.[16]

3. Maintenance

Turkey is a party to the 1973 Hague Convention on the Law Applicable to Maintenance Obligations. The law designated by this Convention shall apply irrespective of any requirement of reciprocity and whether or not it is the law of a Contracting State (Article 3). This Convention shall apply to maintenance obligations arising from a family relationship, parentage, marriage or affinity, including a maintenance obligation in respect of a child who is not legitimate (Article 1). Turkey reserves the right not to apply the Convention to maintenance obligations between persons related collaterally and between persons related by affinity. Turkey also reserves the right to apply Turkish law if the creditor and the debtor are both Turkish nationals and if the debtor has his habitual residence in Turkey.

The law applicable is determined as the internal law[17] of the habitual residence of the maintenance creditor. If the creditor is unable to obtain maintenance

14 Gelgel, *op. cit.* n. 1, p. 18.

15 General Assembly of Civil Chambers, 01.10.2003, 2-513/521.

16 Gelgel, *op. cit.* n. 1, p. 34; Akıncı, Demir Gökyayla, *op. cit.* n. 2, p. 153.

17 The Convention excludes *renvoi.* Akıncı, Demir Gökyayla, p. 86.

according to this law, then the internal law of the common nationality of the creditor and debtor applies. If the creditor is still unable to obtain maintenance according to his or her national law, *lex fori* (the law of the authority seized) applies (Articles 4-6). However, the law applied to a divorce shall, in a Contracting State in which the divorce is granted or recognized, govern maintenance obligations between divorced spouses and the revision of decisions relating to these obligations (Article 8).

It should be noted that maintenance obligations, which are decided as precautionary measures during the continuance of a lawsuit, are subject to Turkish law as they are part of the Turkish civil procedural law.[18] According to Article 332 of the Civil Code, the judge is entitled to take any necessary precautionary measures in maintenance cases. According to Article 333, if the possibility of the alleged father to be the father is high, the judge may decide on payment of maintenance before making his final decision.

III. Recognition and enforcement

The recognition and enforcement of foreign judgments is provided in Articles 50-59 of the PIL Act. According to Article 50, execution of final and binding judgments rendered by foreign courts in civil matters is subject to enforcement by Turkish courts.

The grounds for recognition and enforcement are provided in Article 54 of the PIL Act. According to Article 54(a), a multilateral or bilateral agreement between Turkey and the State by whose courts the foreign judgment was given provides for the mutual enforcement of foreign judgments. If no such agreement is in place, a statutory provision must be in place in the relevant foreign State enabling the enforcement of Turkish court decisions in the relevant foreign state; or at least Turkish court decisions shall *de facto* be enforced in that state.[19] According to Article 54(b) of the PIL Act, foreign judgments given on issues that Turkish courts have exclusive jurisdiction to resolve may not be enforced. According to Article 54(b) of the PIL Act, if the foreign court's jurisdiction is based on an exorbitant jurisdiction rule,[20] and the party against

18 Nomer, *op. cit.* n. 4, p. 281.

19 Reciprocity is not one of the grounds for refusal of recognition (Article 58(1) PIL Act).

20 For further information on exorbitant jurisdiction rules see N. Ekşi, *Devletler Özel Hukukunda Aşırı Yetki Kuralları* [Exorbitant Jurisdiction rules in Private International Law], Selahattin Sulhi Tekinay'ın Hatırasına Armağan (To the Honor of Selahattin Sulhi Tekinay) (İstanbul 1999); N. Ekşi, *Türk Mahkemelerinin Milletlerarası Yetkisi* [International Jurisdiction of Turkish Courts] (Istanbul 2000) p. 50 *et seq*.

whom enforcement is sought objects to the enforcement, the foreign judgment may not be enforced in Turkey. Article 54(c) of the PIL Act allows for the refusal of recognition and enforcement of a foreign judgment based on the ground that it is manifestly contrary to Turkish public policy. In Article 54(ç) of the PIL Act some procedural requirements pertaining to the defence rights of the person against whom enforcement is sought are formulated as conditions to enforcement. The procedural requirements pertaining to the defence rights of the person against whom the enforcement is sought should be duly fulfilled.

Turkey has enacted bilateral agreements with many states concerning judicial cooperation in civil and commercial matters. Bosnia and Herzegovina, Slovakia, Macedonia, Croatia and Albania are some of these states.[21] These bilateral agreements govern recognition and enforcement of judgments rendered by the courts of state parties. These agreements will prevail over the provisions of the PIL Act and will be applicable in matters within their scope.

1. Recognition and enforcement of judgments concerning custody

The relevant provisions of the PIL Act concerning recognition and enforcement of judgments apply to the recognition and enforcement of judgments concerning custody.[22] As the PIL Act only concerns the recognition and enforcement of foreign "judgments", decisions given by administrative authorities relating to custody (for example, according to Danish or Japanese law, administrative authorities may decide on custody along with divorce) may not be enforced in Turkey unless it is possible under an international convention.[23]

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21 www.resmigazete.gov.tr (22 August 2015).

22 For further information see, A. Çelikel, *Yabancı Mahkemelerden Verilen Velayete İlişkin Kararların Tanınması ve Tenfizi* [Recognition and Enforcement of Judgments Concerning Custody Rendered by the Foreign Courts], Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni, Prof. Dr. Yılmaz Altuğ'a Armağan (Review of International Law and Private International Law, to the Honor of Prof. Dr. Yılmaz Altuğ), V. 17, No. 1-2, 1997-1998, p. 107 *et seq*; C. Şanlı, *Türk Hukukunda Çocukların Velayetine ve Korunmasına İlişkin Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi* [Recognition and Enforcement of Court Judgments Concerning Custody and Protection of Children under Turkish Law], Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni [Review of International Law and Private International Law], V. 16, No. 1-2, 1996, p. 71 *et seq*; R. Partalcı, Yabancı Devletlerden Alınan Velayet Kararlarının Tenfizi [Enforcement of Custody Decisions Rendered in Foreign Countries], İstanbul Üniversitesi Sosyal Bilimler Enstitüsü Özel Hukuk Anabilim Dalı Yüksek Lisans Tezi, 2014.

23 N. Ekşi, *Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi* [Recognition and Enforcement of Foreign Court Judgments] (Beta 2013) pp. 542-543.

One of the main problems concerning the case law of Turkish courts is that the notion of "public policy" is very widely applied in custody cases. The mere fact that applicable foreign law brings different rules than Turkish law for custody matters is considered as contrary to public policy within the meaning of Article 54(c) of the PIL Act.

There are many decisions[24] of the Court of Cassation where "sharing the custody of the child by both parents" is considered as contrary to Turkish public policy. Such decisions are criticized in the doctrine as not being in compliance with the idea of public policy restrictions in the enforcement of foreign judgments. Public policy restriction should be narrowly applied and mere differences of applicable foreign law with Turkish law cannot be considered as contrary to Turkish public policy.[25]

According to Article 335 of the Turkish Civil Code, children shall be under the custody of their mother or father and the custody rights of the parents cannot be abolished unless there is a statutory reason. Relying on this provision, the Court of Cassation found it contrary to Turkish public policy that the custody of children was given to a relative having the same surname as the children because their mother was alive.[26]

Notwithstanding the above, according to United Nations Convention on the Rights of the Child Article 3, in all actions concerning children, undertaken by courts of law, the best interests of the child shall be a primary consideration. According to Article 9, in deciding matters such as the custody and personal relations of the child, the best interests of the child shall be primarily taken into consideration. Therefore, in all cases above, the judge reviewing enforcement should have taken into account the best interest of the child and not the provisions of the Turkish Civil Code.

Another example of contrast with public policy is where a foreign court decides on the custody of the child only according to the written agreement of the parents without making any further examination.[27]

On the other hand, the Court of Cassation, in a case where the custody of the child was given to the father by the foreign court, did not find it contrary to Turkish public policy that the foreign court denied personal relationship with

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24 2nd Civil Chamber, 20 March 2003, 2818/3889; 02.04.2003, 3784/4670; 22 November 2004, 12286/13680; 27 December 2004, 13947/15854; 10 October 2006, 6824/13638.

25 Nomer, *op. cit.* n. 4, p. 509; Gelgel*, op. cit.* n. 1, p. 27; Ekşi, *op. cit.* n. 23, p. 548.

26 2nd Civil Chamber, 21 September 2004, 9168/10346.

27 Gelgel, *op. cit.* n. 1, p. 68.

the mother.[28] In another case, the foreign court grants custody to the mother and does not decide on personal relationship with the father or the maintenance obligation of the father. The Court of Cassation decided that such foreign decision was to be enforced because it was always possible for the father to apply for establishment of personal relationship with the child and it was always possible for the mother to require maintenance from the father with subsequent proceedings.[29]

According to Turkish Civil Code Article 348, the custody of the child may be abolished if the parent having the custody right cannot exercise the custody right in an appropriate manner due to his naivety, illness or because he resides at a different place than the child; or if that parent does not provide sufficient attention to the child or severely ignores his or her obligations towards the child. This Article will be applicable in cases where the custody of the child was provided based on an enforcement of a foreign judgment. In other words, even if a foreign judgment granting custody to one of the parents is enforced in Turkey, if the conditions under Article 348 occur, the Turkish judge may decide to the contrary of the foreign decision and may abolish the custody right of the relevant parent.[30]

The enforcement of a foreign judgment may be sought years after it was originally rendered and the enforcement proceedings will also take some time. During this time, the conditions pertaining to the original foreign judgment may even change. For example, the custody of the child may be given to the father by a foreign court decision ten years ago. But the mother may claim and prove that the child stayed with her. In such case, it might be contrary to the best interest of the child to enforce the foreign court decision and leave the child's custody to the father, so the Turkish court may deny enforcement.[31]

In case that a Turkish court denies a foreign court decision pertaining to the custody of a child, the question arises as to who has the custody of the child under Turkish law? Can the Turkish court denying enforcement decide on the custody of the child? According to Article 351 of the Civil Code, the Turkish judge is entitled to re-arrange the measures to be taken in order to protect the child in line with new conditions. It is opined by Turkish scholars that Turkish judges denying enforcement may use this Article 351 to make a new decision on the custody of the child, because leaving him or her without any custody would in any case be contrary to the best interest of the child.[32]

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28 2nd Civil Chamber, 17 February 1997, 675/1633.

29 2nd Civil Chamber, 7 April 2004, 3609/4423.

30 Ekşi, *op. cit*. n. 23, p. 546.

31 Akıncı, Demir Gökyayla, *op. cit*. n. 2, p. 167.

32 Gelgel, *op. cit.* n. 1, p. 77.

Turkey is a party to the European Convention on the Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children as of 2000.[33] Some other parties to this Convention are Bulgaria, Germany, Hungary, Latvia, Montenegro, Netherlands, Serbia, Slovakia, Macedonia and United Kingdom. According to Article 7 of this Convention, a decision relating to custody given in a Contracting State shall be recognized and, where it is enforceable in the State of origin, made enforceable in every other Contracting State. Therefore, this Convention prevails for the recognition and enforcement of decisions relating to custody given by the courts of Contracting States and it requires that the Contracting States respect the judgments rendered in other Contracting States. According to the Convention, each state determines a central authority responsible for cooperating with other central authorities and relevant parties in order to execute judgments relating to custody. The central authority in the State addressed shall take or cause to be taken without delay all steps which it considers to be appropriate, if necessary by instituting proceedings before its competent authorities, in order: to discover the whereabouts of the child; to secure the recognition or enforcement of the decision; to secure the delivery of the child to the applicant where enforcement is granted (Article 5).

2. Recognition and enforcement of judgments concerning maintenance obligations

The relevant provisions of the PIL Act concerning recognition and enforcement of judgments apply to the recognition and enforcement of judgments concerning maintenance obligations. However, there are two international conventions that Turkey is a party to and these Conventions prevail for cases within their scope and they are important for practice.[34] Turkey is a party to the 1973 Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations. Albania, Germany, Slovakia, United Kingdom are also parties to this Convention along with 19 other countries.

In practice, however, it is unfortunately seen that the application of international conventions is sometimes omitted. For example, in a case where the

33 See, Y. Sayman, 'Çocukların Velayetine İlişkin Kararların Tanınması ve Tenfizi ile Çocukların Velayetinin Yeniden Tesisine İlişkin Avrupa Sözleşmesi Hakkında Rapor [Report on the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of custody of Children]', V. 16 *Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni* [Review of International Law and Private International Law] 1-2 (1996) p. 129 *et seq.*

34 Turkey is not a party to the 2007 Convention on the International Recovery of Child Support and other Forms of Family Maintanence.

child applied to a Turkish court for the enforcement of a German court decision pertaining to maintenance, the Court of Cassation based its decision on the 1961 Hague Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants, although such enforcement is subject to the 1973 Convention.[35] Therefore, the Court of Cassation had wrongly construed the scope of application of both Conventions in this case.

This Convention shall apply to a decision rendered by a judicial or administrative authority in a Contracting State in respect of a maintenance obligation arising from a family relationship, parentage, marriage or affinity, including a maintenance obligation towards an infant who is not legitimate, between a maintenance creditor and a maintenance debtor; or a maintenance debtor and a public body which claims reimbursement of benefits given to a maintenance creditor (Article 1). A decision rendered in a Contracting State shall be recognized or enforced in another Contracting State if it was rendered by an authority considered to have jurisdiction under the Convention and (2) if it is no longer subject to ordinary forms of review in the State of origin (Article 4). Recognition or enforcement of a decision may, however, be refused (1) if recognition or enforcement of the decision is manifestly incompatible with the public policy of the State addressed; or (2) if the decision was obtained by fraud in connection with a matter of procedure; or (3) if proceedings between the same parties and having the same purpose are pending before an authority of the State addressed and those proceedings were the first to be instituted; or (4) if the decision is incompatible with a decision rendered between the same parties and having the same purpose, either in the State addressed or in another State, provided that this latter decision fulfils the conditions necessary for its recognition and enforcement in the State addressed (Article 5). No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the proceedings to which the Convention refers (Article 16).

Turkey is also a party to the 1956 United Nations Convention on the Recovery Abroad of Maintenance. This Convention brings a facilitated system for the recovery of maintenance debts. Bosnia and Herzegovina, Croatia, Germany, Hungary, Montenegro, Netherlands, Serbia, Slovakia, Slovenia, Macedonia and the United Kingdom are also some of the parties to this Convention.

Where a claimant is in the territory of one Contracting Party and the respondent is subject to the jurisdiction of another Contracting Party, the claimant may make application to a Transmitting Agency in the State of the claimant for the

35 2nd Civil Chamber, 15 July 1998, 7478/9013.

recovery of maintenance from the respondent (Article 3(1)). The Transmitting Agency shall transmit the documents to the Receiving Agency of the State of the respondent (Article 4(1)). The Receiving Agency shall, subject always to the authority given by the claimant, take, on behalf of the claimant, all appropriate steps for the recovery of maintenance, including the settlement of the claim and, where necessary, the institution and prosecution of an action for maintenance and the execution of any order or other judicial act for the payment of maintenance (Article 6(1)). Therefore, the Convention still requires enforcement of a judgment pertaining to maintenance obligations. Such enforcement shall be subject to the national law of the state of the respondent. However, all proceedings will be conducted by the Transmitting and Receiving Agencies. This is the Directorate General for International Law and Foreign Relations in Turkey. The general directorate mandates the public prosecutors for proceedings arising out of this Convention.[36]

Can the parties, instead of resorting to the Transmitting Agency, require the enforcement of judgment pertaining to a maintenance obligation themselves directly from a Turkish court? Although it is opined in the doctrine that there is no impediment to require enforcement from Turkish courts,[37] the Court of Cassation decided that the party requiring enforcement, instead of resorting to the Transmitting Agency according to the UN Convention, had no legal interest in initiating a lawsuit for enforcement and denied such enforcement requests.[38]

IV. Conclusion

Although the Turkish conflict of law rules on affiliation, custody and maintenance obligations are modern and sufficient, in practice Turkish judges sometimes disregard the conflict of law rules and apply the Turkish Civil Code on the ground that family relations are related to public policy. The most problematic issue is the custody of a child. The public policy ground is also very widely used in recognition and enforcement of foreign judgments relating to custody.

On the other hand, Turkey is a party to three international conventions concerning maintenance obligations and there are not many published cases concerning the implementation of these conventions.

36 See the Communique numbered 64/1 issued by the Directorate General for International Law and Foreign Relations.

37 Şanlı, Esen, Ataman Figanmeşe, *op. cit.* n. 1, p. 523.

38 2nd Civil Chamber, 20 July 1996, 4304/6944; 6 February 1997, 593/1466.