

'Hot Topics in EU Family Law'

CONFERENCE PAPERS

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'Hot Topics in EU Family Law'

A conference for recently admitted IAFL Fellows and lawyers interested in discovering IAFL work

Date: Thursday 10 and Friday 11 November 2016

Venue: Vincci Soho Hotel, Madrid

PROGRAMME

THURSDAY 10 AFTERNOON

Registration Desk open from 1:00pm

Welcome Speech (2:10pm-2:15pm)

Dr Daniela Kreidler-Pleus, IAFL European Chapter President

Session 1 (2.15pm to 3.30pm): Procedure and Soft Skills Topic

1. Introduction to Spanish Civil Justice – jurisdictions within a jurisdiction.

Speaker:

Paula Piquer, Alberto Perez Cedillo Spanish Lawyers and Solicitors, London, Madrid, Marbella

2. Cross Qualifying in Europe – practical points. What you and lawyers on your team can do

Speakers:

Paula Piquer, Alberto Perez Cedillo Spanish Lawyers and Solicitors, London, Madrid, Marbella

Charlotte Kibler, Kingsley Napley LLP, London, England

Chiao Lin Jocelyn Tsao, Withers LLP, Hong Kong

Session 2 (4.00pm to 5.15pm): Matrimonial Property Regimes – The New EU Regulation and International Prenuptial Agreements

Speakers:

Dr Ian Sumner, Voorts Legal Services, Utrecht, Netherlands

Maryla Rytter Wróblewski, NR Law, Copenhagen, Denmark

Martin Haußleiter, SSW, Munchen, Germany

Welcome reception at the at the Hotel Vincci Soho 7.00-8.00pm

Pre-Paid Dinner with wine at LaMucca del Prado 8.00pm onwards

FRIDAY 11

Session 1 (9.45 am to 11am): the Maintenance Regulation at 5 years old

Speakers:

John West, SKO Family Law, Edinburgh, Scotland

Carlo Rimini, Rimini Law Firm, Milan/Professor of Law, University of Milan, Italy

Session 2 (11.30am to 12.45pm): Parental Responsibility and Jurisdiction issues relating to children

Speakers:

Carolina Marín Pedreño, Dawson Cornwell, London, England

Michael Gratton, 4 Paper Buildings, London, England

Lunch

Session 3 (2.15pm to 3.30pm): Child relocation

Speakers:

Dr Alice Meier-Bourdeau, SCP Meier-Bourdeau Lecuyer, Paris, France

Stefanie Sharma, Familienrecht Sharma, Berlin, Germany

Evening closing drinks at the Hotel Vincci Soho 7.00-8.00pm

Pre-Paid Dinner with wine at restaurant Ana La Santa 8.00pm onwards

PAULA PIQUER



Paula is a qualified Spanish lawyer who obtained her law degree from the University of Barcelona. She is registered as a European Lawyer with the SRA. Her work focuses on all aspects of Private Family Law, including divorce, separation and nullity, cohabitation agreements and disputes, civil partnerships, same-sex marriage, pre and post nuptial agreements, all issues regarding private law children matters including child abduction and complex financial claims, all with an international dimension including cross-border litigation cases. Moreover Paula participates in the preparation and drafting of expert reports and certificates of law on family law both in English and Spanish.

www.apcedillo.com

CHARLOTTE KIBLER

Charlotte Kibler is a qualified French lawyer. She joined Kingsley Napley family department in 2016. Her work focuses exclusively on international family law especially with IAFL Fellow William Healing in matters involving French and European aspects. She is currently cross-qualifying as a solicitor of England & Wales. She formerly practised as a French lawyer in Paris where she started practice in 2012 in a niche private client law firm acting for high profile and high net-worth clients in complex matters.



www.kingsleynapley.co.uk

JOCELYN TSAO



Jocelyn advises on all aspects of matrimonial law including divorce, prenuptial agreements, child care and custody and financial disputes. She advises husbands, wives, and unmarried partners. She is an experienced advocate and has also cross examined witnesses in open court.

As well as handling her own case load, Jocelyn has been involved with some of the most high profile cases to come before the courts in Hong Kong as part of a team involving high net worth individuals with diverse and complex issues. This exposure to large cases has given her experience in

dealing with prenuptial agreements, trusts, corporate structures and injunctions, and coordinating with other solicitors overseas and experts, as well as leading counsel in Hong Kong and London.

Jocelyn has considerable experience in divorce cases with trusts involved as well as complex cross-jurisdictional divorces.

Her cases have recently been concerned with issues of jurisdiction, financial discovery and dealing with the preliminary issue of beneficial ownership.

Jocelyn has been involved with a number of child relocation cases and cases dealing with children's custody, care and control.

<http://www.withersworldwide.com/>

IAN SUMNER



From 2005 to 2012 Ian Sumner was employed by the Molengraaff Institute for Private Law, firstly as a junior lecturer (adjunct professor), thereafter as a lecturer and researcher (Assistant professor) and finally up until his departure as senior lecturer and researcher (Associate professor).

In 2008, Ian also received the Young Lecturer of the Year Award from Utrecht University. Ian was nominated by students from the Faculty of Law, and ultimately selected by a university-wide jury to be awarded the prestigious title.

In 2011, Ian Curry-Sumner announced his departure from the academic world and embarked upon a new challenge in the private sector. With the establishment of *Voorts Legal Services*, Ian hopes to best utilise the talents that he developed over the course of his career to assist students and legal professionals with the problems they encounter.

www.voorts.com

MARTIN HAUSSLEITER

Martin specializes in German and international family law (including marriage contracts, representation in divorce and child custody cases), national and international law of wills, estates and trusts; advice in drawing up last wills and contracts of succession, estate distribution among heirs, estate planning agreements, company law.



He is a practicing attorney in Germany since 1992 and a founding member of the firm Schneider Schiffer Weihermüller.

<http://www.ssw-muc.de/en/>

MARYLA RYTTER WROBLEWSKI



Maryla Wróblewska is one of this country's greatest authorities within family and inheritance law. In her daily work she combines her extensive specialist knowledge and her strong counselling competencies with her ability to meet people at eye level and maintain her focus on practical solutions.

Maryla is authorised by the District Court in Lyngby to help spouses with the division of property in case of divorce. Furthermore, she is authorised by the Danish Ministry of Justice as particularly qualified to provide legal counsel in cases on child abduction.

As a particular speciality within family and inheritance law Maryla has insight in the issues which face international families when planning their relationship with separate property and wills, or in case of divorce. Within this area Maryla conducts cases on a continuous basis involving many different countries in both Europe, Africa, USA, Asia and the Middle East.

She is the head of JUC's network on inheritance and matrimonial property law.

<http://nrlaw.dk/?lang=en>

JOHN WEST

John is a Solicitor with SKO. He trained with SKO and was kept on when he qualified. He was the first Student Director of the University of Edinburgh's Free Legal Advice Centre. He has retained his connection with the Centre and is now on the Board and a supervising solicitor for them. John also tutors on the undergraduate Family Law course, again at the University of Edinburgh.



John is diligent, responsive and bright. Clients have regularly commented on how much they have valued his sensitive and professional approach. John is someone with the confidence and ability to work as lead solicitor whilst also being instinctively very much a team player. During his dedicated family law traineeship he worked in multi-disciplinary teams on complex financial cases, child relocation and Hague abduction cases. His practice, since qualifying, has continued to cover the whole range of family law matters including financial and child law issues and is a mixture of working with individuals as lead solicitor and with others in SKO on larger and more complex cases.

John has a particular interest in two technical areas: pensions law as it affects family law matters and he is the main contact in SKO for pension trustee clients; and European Union family law issues- he has written, and lectured, on, amongst things, the Maintenance Regulation and Brussels II revised and their interaction with domestic UK legislation.

<http://www.sko-family.co.uk/>

CARLO RIMINI

He was born in Trieste in 1966. He qualified as a lawyer in 1994 having been admitted to the Milan Bar, and enrolled with the Court of Cassation.

He is a professor of Private Law in the department of International, Legal and Political Studies at the University of Milan and a Professor of Family Law at the University of Pavia.

He is also a Professor of Family Law at Bocconi University. He specializes in family law with a particular focus on international family law and law of succession.

He is also a journalist and is a contributor to newspaper *la Stampa*, for which he writes articles on the area of Family Law. He is the author of over forty publications, including articles, essays and monographs, dedicated to civil and family law.

He is a director of the law journal *Familia*.

He is a member of the Assessment Board for the law journal *Famiglia e Diritto* (literally Family & Law).

He is a member of the International Academy for Family Lawyers (IAFL).

<http://www.carlorimini.com/index.html>



CAROLINA MARÍN PEDREÑO



Carolina is a Spanish Abogado, who cross-qualified as a Solicitor in England and Wales in 2006

She is known as a “provides certainty in the labyrinth of EU Law on relocation and child abduction cases” “absolutely superb: sure footed and authoritative”, Chambers 2017

Carolina is a Fellow and elected Governor of the European Chapter of the [International Academy of Family Lawyers](#), a member of the International Committee of [Resolution](#) and Founder and Vice President of the Academia

Euroamericana de Derecho de Familia.

Carolina graduated from the University of Murcia, Spain with a degree in law having complemented her degree at the Università degli Studi Magna Græcia, Italy on a European Commission "Erasmus" scholarship. She joined Dawson Cornwell in 2003 having won a second European Commission scholarship and qualified as a European Lawyer in this jurisdiction in 2004.

Carolina was featured by The Times as [Lawyer of the Week](#) in September 2014 for her successful representation of a client in the first case with Russia following their ratification of The Hague 1996 Convention.

In 2015 Carolina was awarded a place by the US Department of State to participate in their multi-regional project, "Children in the US Justice System", as part of the 2016 International Visitor Leadership Programme.

Carolina is a frequent lecturer on family law. She has been interviewed by the BBC about international child abduction and is the author of a book about the subject "*Sustracción internacional de menores*" Editorial Ley57. She has written many articles and has recently been invited to speak to the Spanish Judicial Council to contribute with her knowledge on international private law.

Carolina's mother tongue is Spanish. She also speaks fluent English and Italian.

MICHAEL GRATON

Michael specialises in cases involving the international movement of children, appearing regularly in the High Court and the Court of Appeal in cases involving (but not limited to) Hague and non-Hague abduction, jurisdictional disputes, the recognition and enforcement of orders (pursuant to Brussels II revised and the 1996 Hague Convention), relocation (both internal and external) and forced marriage.



Over the past four years Michael has appeared in most of the leading cases in the field of international family law. He has represented parties (including parents, children and non-Governmental organisations) in the Court of Appeal and the UK Supreme Court in cases involving a diverse range of issues from the human rights implications of government immigration policy (R (on the application of Quila and another) and R (on the application of Bibi and another v Secretary of State for the Home Department [2011] UKSC 45) to jurisdictional issues concerning children and the application of the 1980 Hague Convention (In the matter of A (Children) (AP) [2013] UKSC 60, In the Matter of KL (A Child) [2013] UKSC 75, In the matter of LC (Children) [2014] UKSC 1 and Re K (A Child) [2014] UKSC 29).

In addition to his domestic practice, Michael has appeared before the European Court of Human Rights and the Court of Justice of the European Union.

He has also been part of a team representing an intervening party before the United States Supreme Court (*Lozano v Alvarez* – appeal judgment at 697 F.3d 41 (2d Cir. 2012)).

DR ALICE MEIER-BOURDEAU



Born on 21st January 1972 in Dusseldorf, Germany, of German nationality, Alice Meier-Bourdeau has the distinction of being a ministerial officer who is a citizen of another member state of the European Union. She is perfectly trilingual in French, German and English.

Alice Meier-Bourdeau has a Ph. D. in Law (with a thesis on “Nationality as a criteria for incorporation into private French and German international law”), a post-graduate degree in general private law (from the University of Paris X – Nanterre, gaining the highest mark of her year) and a degree in Applied Law Studies in French and German law (from Paris X – Nanterre, with distinction). She was Teaching and Research attaché at the University of Paris X – Nanterre from 1996 to 2000, then became a lawyer at the Paris bar (after coming top of her class in the CAPA law school exams). She qualified as a barrister to the Council of State and the Court of Cassation in 2009.

Before becoming a partner in the firm, Alice Meier-Bourdeau worked as an associate lawyer for about ten years in various *avocat aux Conseils* firms.

She is a member of Trans Europe Experts (TEE), the Association of French and German lawyers (AJFA), the European Law Institute (ELI), the French Community for Private International Law (Comité français de droit international privé) and of the Société de législation comparée.

Her particular interest in private international law and family law has led her to write various papers and contributions (for example, articles on the new Franco-German matrimonial regime published in *La Semaine Juridique* and the *Courrier juridique des finances et de l'industrie*, or her significant contribution to the work on children's rights – “*L'enfant, sujet de droits. Filiation, patrimoine, protection*” published by Editions Lamy in November 2010).

She has also lectured at a number of conferences.

STEFANIE SHARMA LL.M.



Rechtsanwältin (Germany) & Solicitor (England & Wales)

Stefanie was admitted as Rechtsanwältin in 2000. In 2013 she jointly set up the family law firm Delerue Sharma in

Berlin. She lived and worked in London for several years. In 2002 she was admitted as a solicitor.

Membership

- Berlin Law Society (Rechtsanwaltskammer Berlin)
- Law Society of England & Wales
- Family law working group of the German Bar Association (ARGE Familienrecht im Deutschen Anwaltverein)
- Resolution (English Solicitors Family Law Association)
- German-British-Jurists' Association (Deutsch-Britische Juristenvereinigung)
- German Bar Association (Deutscher Anwaltverein)
- Berlin Bar Association (Berliner Anwaltverein)

DELERUE SHARMA RECHTSANWÄLTE

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Email: kontakt@familienrecht-sharma.de

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Introduction to Spanish Civil Justice



ALBERTO PEREZ CEBILLO
AFILIADO A BARCELONA Y BOGOTÁ
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Jurisdictions within jurisdiction

- 17 Autonomous Communities
- The scope of competences varies for each community.
- The consequence of this diversity: different systems of family law operate in Spain. General vs Territorial law.
- Determination of personal law by *Vecindad civil*.
- Areas of family law: cohabitation, matrimonial economic regimes, pre/post nuptial agreements, custody.

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Matrimonial economic regimes

- There is no marriage without a Matrimonial Economic Regime
- *À la carte*
- By default:
 - ❖ Community of assets
 - ❖ Separation of assets
 - ❖ Participation in the gains
- Determination of the MEC

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Foreign pre/post nups in Spain

- Spanish law allows the applicability of foreign law.
- Validity/enforceability:
 - Material requirements:
 - Law that rules the effects of the marriage
 - Law of the nationality or habitual residence of any of the parties.
 - Formalities:
 - Public Deed
 - Registration with the Civil Registry
 - Not contrary to Spanish public policy.

ALBERTO PEREZ CEBILLO
ABOGADO EN ESPAÑA Y REGISTRO
DE LA LEY EN ESPAÑA Y REGISTRO DE LA LEY EN ESPAÑA

Cross-qualifying in Europe

Kingsley
Napley

A practical approach: What you and the lawyers and your team can do



Two options...

...depending on what your firm needs and its positioning

Kingsley
Napley



Pursue your profession on a permanent basis in another EU country under the professional title acquired in their home EU country as a REL (Registered European Lawyer);

Practising under the professional title of the host country.

Practical example Kingsley Napley

Venez les avocats...
SURTOUT en guacamole...
From French avocat(e)... ... to English solicitor

Key facts and figures in England & Wales in 2015 Kingsley Napley

- No of EU lawyers practising as RELs: 437
Most represented jurisdictions:
 - Italy (95)
 - France (84)
 - Germany (61)
 - Spain (59)
- No of EU lawyers who have gained admission in England & Wales under Art. 10 of Directive 98/5/EC: 442
 - Italy (88)
 - Germany (85)
 - France (53)
 - Spain (52)


Amongst a total of 168.303 solicitors in E&W in 2015 i.e. 0.5% of solicitors
(Source: CCBE lawyers' statistics 2015 as at 24.03.2015)

Becoming an English solicitor Kingsley Napley

- Two routes:
- Quick route: QLTS exam... but back to studies !
(Basis: SRA Qualified Lawyers Transfer Scheme Regulations 2011)
- Long route: 3 years as a REL practising in English law (including European law) on an effective and regular basis
(Basis: Art. 10 of Directive 98/5/EC)
 - How do you justify "effective basis"?
 - International commercial lawyer
 - Insurance
 - In practice: QLTS route

Preparing the QLTS exam Kingsley
Napley

- Pre-requisite: being a qualified lawyer from a recognised jurisdiction (more than 100); or a barrister
- Compatible with a part-time job such as paralegal
- Number of candidates per year – between 700 and 1,000 with an average pass mark of 56% (source: QLTS School)



What about Brexit? Kingsley
Napley

- Short answer: right now, nothing has changed!
...at least until Article 50 of the Lisbon Treaty is triggered & the withdrawal agreement is negotiated with the EU (two-year period)
- Opportunities for EU Bars and Law Societies?
 - Legal services in England & Wales: £25.7 billion in 2015
 - Cross-border practising rights and mutual accreditation of qualifications: a competitive advantage for law firms and practitioners



3 years as a REL

- Requirements:
 - “Lawyer”: *Avocat, Advokat, Rechtsanwalt, Δικηγόρος, Abogado, Barrister/Solicitor, Avvocato, Advocaat, Rechtsanwalt, Advogado, Asianajaja/Advokat, Advokat.*
 - EU national
 - Established EU lawyer practising in the law of England and Wales “on a permanent basis” in E&W for 3 years or more.
 - You are registered with the SRA as a REL.

ALBERTO PEREZ CEBALLO
OFICINA PEREZ CEBALLO & ASOCIADOS
C/ San Juan, 1, 28014 Madrid, T. 91 531 11 22

Becoming a Spanish Abogado

- **Nationals of Spain:**
 - Until November 2011
 - From November 2011

- **Nationals of MS of EU: 2 options:**
 - a) Practice under the home-country professional title:**
 - ✓ Same requirements – EU Directive
 - ✓ Apply to the local BAR where registered
 - ✓ Personal insurance
 - ✓ 6 months

 - b) Recognition of the professional qualification as lawyer:**
 - ✓ Aptitude test:
 - ✓ Requirements: EU national and EU lawyer
 - ✓ Resolve a practical case.

ALBERTO PEREZ CEBILLO
OFICINA DE ABOGADOS
EN ESPAÑA, INCLUIDO EN LA LISTA DE

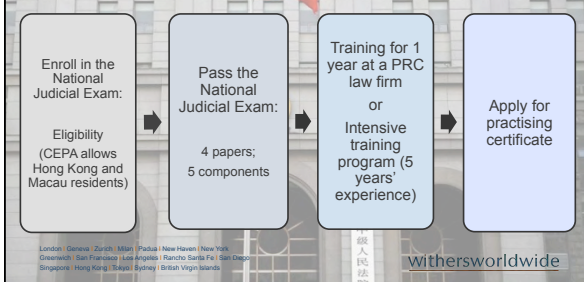
Foreign lawyers qualifying in the PRC and Hong Kong



London | Geneva | Zurich | Milan | Padua | New Haven | New York
Geneva | San Francisco | Los Angeles | Rancho Santa Fe | San Diego
Singapore | Hong Kong | Tokyo | Sydney | British Virgin Islands

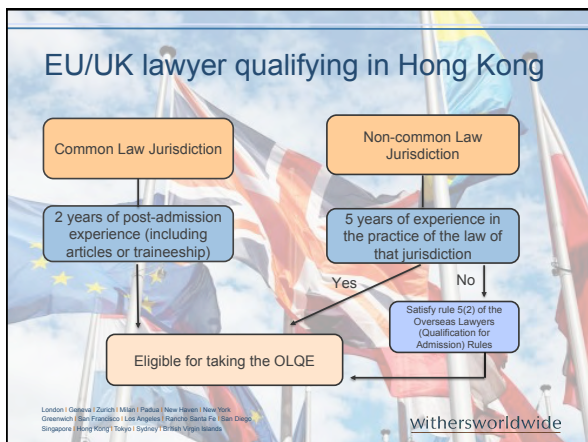
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HK lawyer qualifying in the PRC



London | Geneva | Zurich | Milan | Padua | New Haven | New York
Geneva | San Francisco | Los Angeles | Rancho Santa Fe | San Diego
Singapore | Hong Kong | Tokyo | Sydney | British Virgin Islands

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Overseas Lawyers Qualification Examination (OLQE)

- Head I – Conveyancing
- Head II – Civil and Criminal Procedure
- Head III – Commercial and Company Law
- Head IV – Accounts and Professional Conduct
- Head VI – Hong Kong Constitutional Law
- Head V* – Principles of Common Law (oral)

Exemptions possible if applicants have 5 or more years of experience in law practice

London | Geneva | Zurich | Milan | Padua | New Haven | New York
 Canton | San Francisco | Los Angeles | Phoenix | Santa Fe | San Diego
 Singapore | Hong Kong | Tokyo | Sydney | British Virgin Islands

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“Lawyers” Practice and Code of Conduct

	China	England and Wales	France	Germany	Spain
1. Do lawyers owe a duty as officers of the court?					
2. How many professionals intervene in the litigation?					
3. Is correspondence between lawyers “privileged”?					
4. Is there a duty of financial disclosure in divorce cases?					
5. Can you coach the witnesses/be economical with the truth before the Court?					
6. Does the concept of “undertakings” exist?					
7. Do most foreign lawyers practice as RELs or another status in your jurisdiction?					

'Hot Topics in EU Family Law'

QUESTIONS

Thursday 10th November, Session 1
Procedure and Soft Skills Topic

1. Do lawyers owe a duty as officers of the court?
2. How many professionals intervene in the litigation?
3. Is correspondence between professionals "privileged"?
4. Is there a duty of financial disclosure in divorce cases?
5. Can you coach the witnesses/ be economical with the truth before the Court?
6. Does the concept of "undertakings" exist?
7. Do most foreign lawyers practice as RELs or another status in your jurisdiction?



EU Matrimonial Property Regulation


Viewpoint from the Netherlands

Dr. Ian Sumner
10 November 2016, IAFL Madrid




Structure of presentation

1. Scope of Regulation
2. Jurisdiction
3. Applicable Law
4. Recognition and Enforcement
5. Conclusions




SECTION I

Scope




Scope

- ✓ Temporal scope
 - ✓ Marriages concluded after entry into force
 - ✓ Choice of law clause is concluded after entry into force
- ✓ Geographical or territorial scope
 - ✓ Will only apply in 18 MS
 - ✓ Different per section
- ✓ Material or substantive scope
 - ✓ What is "matrimonial property"?
 - ✓ Validity of marriages?




SECTION II

Jurisdiction




Jurisdiction

- ✓ Three different situations
 - ✓ Death (art. 4)
 - ✓ Divorce (art. 5)
 - ✓ Other situations (art. 6)
- ✓ Connected jurisdiction
 - ✓ Death – court seized under Succession Regulation
 - ✓ Divorce – court seized under Brussels II-bis Regulation
- ✓ Other cases
 - ✓ Hierarchy of grounds: common HR, last common HR, defendant's HR, common nationality
 - ✓ Courts of country whose law has been chosen




Jurisdiction

- ✓ Other grounds (art. 8 and 9)
- ✓ Subsidiary jurisdiction (art. 10)
 - ✓ No court has jurisdiction according to 4, 5, 6, 7 or 8
 - ✓ Courts of country where property is located, but only for that property
- ✓ *Forum necessitatis* (art. 11)
 - ✓ If no court has jurisdiction according to 4, 5, 6, 7, 8 or 10
 - ✓ Exceptional ground
 - ✓ Sufficient connection to the case
 - ✓ Proceedings are impossible or unreasonable to bring




SECTION III

Applicable Law



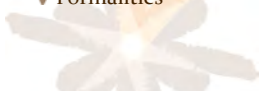
Applicable Law

- ✓ Basic principles
 - ✓ One court, one law for divorce matters!
 - ✓ Unity, same law applies to all property – art. 21
 - ✓ Choice of law permitted – art. 22
- ✓ Hierarchy
 - ✓ Choice of law – art. 22
 - ✓ First common HR – art. 26(1)(a), but exception possible (26(3))
 - ✓ Common nationality – art. 26(1)(b)
 - ✓ Closest connection – art. 26(1)(c)



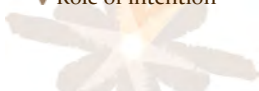
Complexities – Number 1!

- ✓ Choice of law
 - ✓ System to be chosen
 - ✓ Moment of choice
 - ✓ Retroactive effect
 - ✓ Formalities



Complexities – Number 2!

- ✓ Common habitual residence
 - ✓ Concept of habitual residence
 - ✓ Moment of fixation
 - ✓ Duration of stay
 - ✓ Role of intention



Complexities – Number 3!

- ✓ Common nationality
 - ✓ Interaction with common habitual residence
 - ✓ Double nationality
 - ✓ Forced acquisition of nationality




Complexities – Number 4!

- ✓ Automatic change of applicable law
 - ✓ Improvement upon Convention!
 - ✓ Automatic change in 3 situations under Convention
 - ✓ But no retroactive effect!
 - ✓ No automatic change under Regulation




SECTION IV

Recognition and enforcement



SECTION V

Conclusions



Conclusion

- ✓ EU Matrimonial Property Regulation
 - ✓ Improvement on HMPC 1978
 - ✓ Still areas that will lead to different results
 - ✓ Lessons from NL, FR and LUX can be learnt!



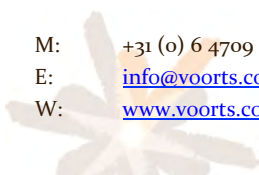
Contact details

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3311 BZ Dordrecht
The Netherlands

M: +31 (0) 6 4709 4427

E: info@voorts.com

W: www.voorts.com



I. Area of application

- 1. territorial scope of application
- 2. temporal scope of application examples
- 3. factual scope of application
 - a) demarcation to the general effects of marriage and to the law of obligation
 - b) demarcation to the law of succession
 - c) demarcation to the statute of matter
- 4. preliminary questions

1

II. Applicable law concerning the marital property regime

- 1. objective tie
 - a) first joint residence
 - b) joint citizenship
 - c) closest connection
- 2. convertibility of the property status and variability clause
- 3. fortune unity

2

- 4. choice of law concerning the property regime
 - a) selectable laws
 - b) choice of law, form
 - c) implied choice of law
- 5. retroactive change of the property status by choice of law
- 6. No Renvoi
- 7. Ordre Public

3

III. Marriage contracts and divorce agreements

- 1. Form
- 2. Minimum content
- 3. Excursus: pension rights adjustment
 - a) prenuptial agreements
 - b) divorce settlement agreements

4

IV. International competence for matrimonial property matters

- 1. competence in case of the death of the spouse
- 2. competence in case of divorce with divorce petition in front of a court of the member states
- 3. competence in other cases
- 4. jurisdiction agreements

5

V. Characteristics of the EuPartVO

- 1. scope of application
- 2. objective connecting arrangement
- 3. choice of law

6

Danish perspective – Property regimes

Advokat Maryla Rytter Wróblewski
IAFL Madrid meeting, November 2016

1

International Private Law

- What is considered asset division guided by a property regime?
- International Jurisdiction
- Choice of law
- Recognition and enforcement

2

Division of assets - property regimes

- Property Regimes vs. Maintenance
- Lump sum compensations
- Pension rights

3

Jurisdiction

- Residence of the applicant or the defendant
- Residence: A person can have more than one residence in different countries.

4

Choice of law

- The husband's domicile at the time of marriage
- The first common domicile if established in connection with the marriage
- Domicile: The place where a person lives with the intent to stay permanently or at least not only temporarily

5

Enforcement

- Direct enforcement only if there is basis for that in a convention or regulation, i.e. the convention between the Nordic Countries,
- If no convention/regulation an exequatur is needed

6

Recognition

- No recognition of foreign judgements unless
- 1) they are constitutive, i.e. divorce, parenting rights, adoption, custody
- 2) the jurisdiction of the foreign court was based on an agreement between the parties (the validity of the agreement is looked at under Danish law)

7

Recognition

Further conditions:

- The judgement can not be against Ordre Public, recent examples are decisions on custody from Malaysia and Algeria
- The judgement shall be enforceable in it's own jurisdiction
- The judgement may not be contrary to a Danish judgement between the same parties on the same subejct

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'Hot Topics in EU Family Law'

QUESTIONS

Thursday 10th November, Session 2 Matrimonial Property Regimes

1. Do you foresee any problems occurring in your jurisdiction due to the regulation will be applying only for pre-nuptial or post-nuptial agreements entered into after January 29th 2019 and the coexistence of different matrimonial property regimes (i.e. the difference between spouses married before and after January 29th)?
2. Have pre or post-nuptial agreements in your jurisdiction already started taking into account this regulation even though it will not come into effect until 2019?
3. What law is applicable to pension rights? Is it determined by the law of the matrimonial property regime or the law of the pension right?
4. If a country ordered the division of a pension as part of the liquidation of the matrimonial property regime, would this be recognized in your country? Could this hinder the foreign decision from receiving a declaration of enforceability?

**The Maintenance
Regulation at 5 Years Old**

Hot Topics in EU Family Law
International Academy of Family Lawyers (European Chapter)
10-11 November 2016

John West
Solicitor
SKO Family Law Specialists



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The Maintenance Regulation: Purpose (i)

“Claims without frontiers”

- 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

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The Maintenance Regulation: Purpose (ii)

- Recital 9
- A maintenance creditor should be able to obtain easily, in a Member State, a decision which will be automatically enforceable in another Member State without further procedure

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The Maintenance Regulation: Scope (i)

Applies to, and binds, all 28 EU Member States, apart from Denmark



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The Maintenance Regulation: Scope (ii)

- Denmark agreed to be bound to MR to the extent that it amended Brussels I:
 - MR has effect, apart from Chapters III (applicable law) and VII (cooperation between central authorities)
- Also note, Denmark and UK did not ratify Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations

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The Maintenance Regulation: "Maintenance" (i)

- Article 1
- This Regulation shall apply to maintenance obligations arising from a family relationship, parentage, marriage or affinity

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The Maintenance Regulation: "Maintenance" (ii)

- "Maintenance" is not defined. However, authoritatively defined by European Court of Justice in *Van den Boogaard v Laumen* (Case C-220/95, reported [1997] QB 759):
- *"If...provision awarded is designed to enable one spouse to provide for himself or herself or if the needs and resources of each of the spouses are taken into consideration in the determination of its amount, the decision will be concerned with maintenance."*
[Paragraph 22]

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The Maintenance Regulation: "Maintenance" (iii)

- If the provision is concerned solely with dividing property, then the decision will not be concerned with maintenance
- A decision which does both can be enforced in part, if the judgment clearly shows the aims to which different parts of the provision correspond. See as an example the Scottish case of *AB v CD* 2007 Fam. L.R. 53

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The Maintenance Regulation: Jurisdiction (i)

- Article 9:
 1. A court is seised at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the claimant has not subsequently failed to take the steps he was required to take to have service effected on the defendant

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The Maintenance Regulation: Jurisdiction (ii)

- OR

2. If the document has to be served before being lodged with the court, **at the time when it is received by the authority responsible for service**, provided that the claimant has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

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The Maintenance Regulation: Jurisdiction (iii)

- Article 12:

1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

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The Maintenance Regulation: Jurisdiction (iv)

- *lis pendens*

- Race to raise? Encouraging clients to be litigious?

- See CJEU decision re Brussels II *bis* case, *A v B* (C-489/14)

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The Maintenance Regulation: Applicable law (i)

- Article 15:

- The law applicable to maintenance obligations shall be determined in accordance with the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations (hereinafter referred to as the 2007 Hague Protocol) in the Member States bound by that instrument.

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The Maintenance Regulation: Applicable law (ii)

- Generally, the law to be applied is:-

- That of the habitual residence of the maintenance creditor

- If the habitual residence of the maintenance creditor changes, the law of the state of the new habitual residence from the moment when the change occurs (Article 3 of the Hague Protocol)

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The Maintenance Regulation: Applicable law (iii)

- The UK and Denmark are not bound by the 2007 Hague Protocol and so will apply domestic law

- What about prenuptial and postnuptial agreements?
 - The requirements for making a designation of the applicable law are more rigid (see Article 8 of the Hague Protocol) than those for a choice of court agreement (see Article 4 of the MR)

 - Neither can be made in respect of maintenance obligations for a child under the age of 18 years

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The Maintenance Regulation: Enforcement (i)

- Article 41:
- A decision given in a Member State which is enforceable in the Member State of enforcement shall be enforced there under the same conditions as a decision given in that Member State of enforcement

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The Maintenance Regulation: Enforcement (ii)

- Direct enforcement
- Decisions from Hague Protocol MS shall be automatically enforceable in other MS and no declaration of enforceability required (Article 17)
 - Very limited right of review for defendant who did not enter appearance (Article 19 – review to original MS of origin)
 - Enforcement may be refused in enforcing MS if obligation has prescribed or if irreconcilable with decision in other MS or third state (Article 22)

S K O

The Maintenance Regulation: Enforcement (iii)

- Direct enforcement (continued)
- Decisions from Denmark or UK shall be enforceable in other MS only when it has been declared enforceable (Article 26)
 - Provision for obtaining declaration of enforceability (Articles 28-38)
 - Declaration can be revoked or refused only on following grounds (Articles 24 and 34):
 - Manifestly contrary to public policy
 - In default of appearance
 - Irreconcilable with decision given in dispute between the same parties in MS where recognition is sought
 - Irreconcilable with decision in another state that falls to be recognised in place of enforcement

S K O

The Maintenance Regulation: Enforcement (iv)

- Enforcement through Central Authorities

- Articles 49-63: applications to enforce, or limit/suspend enforcement of, decisions can be made via Central Authorities:
 - Provision of legal aid
 - Assistance to obtain relevant information
 - Encourage settlement through, for example, mediation
 - Locate debtor or creditor
 - However, potentially very slow compared to direct enforcement

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The Maintenance Regulation: Enforcement (v)

- **Question:** are there in fact two distinct routes for enforcement? Can a maintenance creditor apply for direct enforcement based on Article 41?

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The Maintenance Regulation: Enforcement (vi)

- Recently explored in England & Wales:-

- Mostyn J said yes to direct enforcement (*EDG v RR* [2014] EWHC 816 (Fam))

- Sir Peter Singer said no; applications must be made to Central Authority (*AB v JJB* [2015] EWHC 192 (Fam))

- What's next? An authoritative CJEU decision is awaited: *MS v PS* (Case C-283/16; [2016] EWHC 88 (Fam))

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The Maintenance Regulation: Modification (i)

- Article 8:
- Where a decision is given in a Member State or a 2007 Hague Convention Contracting State where the creditor is habitually resident, proceedings to modify the decision or to have a new decision given cannot be brought by the debtor in any other Member State as long as the creditor remains habitually resident in the State in which the decision was given.

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The Maintenance Regulation: Modification (ii)

- Is the only one route to modify a maintenance decision through the Central Authorities (see Article 56 and *AB v JJB*)?
- But what about Article 8, which clearly envisages proceedings to modify?

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The Maintenance Regulation: Modification (iii)

- Article 55:
- An application under this Chapter [which includes application for modification of a decision] shall be made through the Central Authority of the Member State in which the applicant resides to the Central Authority of the requested Member State

S K O

The Maintenance Regulation: Modification (iv)

Example:

- Maintenance creditor resides in Country A
- Maintenance debtor resides in Country B
- Maintenance creditor wishes Country A to modify decision given in Country B
- Should modification application be sent from Country A to Country A??

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The Maintenance Regulation: Next 5 Years (i)

- Further CJEU guidance?
 - Watch this space: Enforcement/Modification
- Interplay with other EU Regulations?
 - Brussels II *bis*/recast (Council Regulation (EC) 2201/2003)
 - Applicable law to divorce and legal separation (Council Regulation (EU) No 1259/2010)
 - Matrimonial Property Regimes (Council Regulation (EU) 2016/1103)

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The Maintenance Regulation: Next 5 Years (ii)

- How do you solve a problem like the UK:
- Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance?
- Increase in forum selection and bifurcated proceedings as a result of application of MR being applied intra-UK (see *Re V: "European Maintenance Regulation"* [2016] EWHC 668 (Fam))
- Transitional provisions

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The Maintenance Regulation: Next 5 Years (iii)

- Feedback from colleagues across EU:
- Generally MR has been positive for clients: it has made enforcement of decisions easier
- Improvements to cooperation between CAs would be helpful
- Streamlining of modification procedure is essential
- Retain MR

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**The Maintenance Regulation
at 5 Years Old**

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How pending proceedings concerning the status affect jurisdiction in matters relating to maintenance obligations

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1

Which is the problem?

- ⦿ How jurisdiction rules in matters relating to maintenance obligations in EU Member States are influenced by pending proceedings concerning the status of a person?
- ⦿ And, in particular, how jurisdiction rules concerning maintenance obligations towards children are influenced by pending proceedings concerning legal separation or divorce between the parents?

2

Ancillary issues rule

The answer is contained in Art. 3(c) and (d) of Reg. (EU) n. 4/2009: "In matters relating to maintenance obligations in Member States, jurisdiction shall lie with:

- ⦿ (a) [defendant residence criterium], or
- ⦿ (b) [creditor residence criterium], or
- ⦿ (c) the court which, according to its own law, has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties, or
- ⦿ (d) the court which, according to its own law, has jurisdiction to entertain proceedings concerning parental responsibility if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties".

3

I am going to describe a problem of interpretation of Regulation (EU) n. 4/2009. I focus on the solution provided by the European Court of Justice together with the description of the case brought to the attention of the Court. Starting from the case, we can analyse not only the theoretical aspects but also the practical implication of the problem.

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A problem of interpretation arising from Art. 3(c) and (d)

Dealing about maintenance obligations arising from legal separation or divorce, we have to consider:

spousal support, and

child support paid by the parent who does not have primary custody of his child to the parent who has it

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A problem of interpretation arising from Art. 3(c) and (d)

- It is clear that Art. 3(c) does apply to spousal support arising from legal separation/divorce: the court where legal separation or divorce is pending has jurisdiction also to settle any disputes in matters relating to maintenance obligations between the splitting spouses, and
- It is clear that Art. 3(d) does apply to child support arising from legal separation/divorce: if a court is seised of proceedings in matters of parental responsibility involving the child of the splitting couple, the same court has jurisdiction also to settle any disputes in matters relating to maintenance obligations towards the child, but

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A problem of interpretation arising from Art. 3(c) and (d)

- ⦿ It is unclear if Art. 3(c) does apply to child support: if the court where legal separation/divorce (status proceedings) is pending has not jurisdiction to entertain proceedings concerning parental responsibility involving the child of the splitting couple, has the same court jurisdiction to settle any disputes in matters relating to maintenance concerning that child?

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The European Court of Justice answered to this question with the Judgment, 16 July 2015, in case C-184/14, A v. B (Request for a preliminary ruling under Art. 267 TFEU from the Italian Corte di Cassazione [Italian Supreme Court], made by decision of 25 February 2014)

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The case

- ⦿ Mr. A and Mrs. B are Italian citizens living in London
- ⦿ They got married in Italy
- ⦿ At the time of the marriage they signed a separation of assets agreement following Italian law
- ⦿ They have two children
- ⦿ Mr. A is a businessman. He has relevant assets and good income. Mrs. B works for a public relation company. Her earnings are not relevant.

Legal strategy from Mr. A point of view

- Mr. A obtains an advice from an English lawyer. If English jurisdiction is seised of proceedings involving divorce and ancillary relief:
 - The Italian separation of assets agreement is probably considered not binding in England because it does not fulfil the so called Radmacher criteria
 - Mrs B obtains child support and something around the half of the husband's assets
 - The husband is asked from the English Court to make a full disclosure of all his assets and incomes
- Mr. A is horrified and his English lawyer suggests him to obtain an advice from an Italian lawyer

Legal strategy from Mr. A point of view

- Mr. A obtains an advice from an Italian lawyer. If Italian jurisdiction is seised of proceedings involving divorce and ancillary relief:
 - Italian separation of assets agreement is of course fully effective; this means that the wife cannot obtain a share of husband's assets;
 - Mrs. B obtains child support and she is only entitled to receive spousal support in term of periodical alimony monthly paid;
 - Mr. A is not asked to make a full disclosure
- Mr. A seems comforted and decides to make all steps necessary in order to avoid English jurisdiction

Legal strategy from Mr. A point of view

English and Italian lawyers of Mr. A decide that, in order to reach the goal, it is necessary to file immediately a petition for legal separation in Italy (Italian Law requires a period - six months or 12 months depending on some circumstances - of legal separation before asking divorce)

The effects of the strategy

- Following Art. 19 of Reg. (EU) n. 2201/2003 (so called Bruxelles II bis), where proceedings relating to divorce or legal separation are brought before courts of different Member States, the court second seised shall of its own motion STAY its proceedings until the jurisdiction of the court first seised is established
- Italian legal separation/divorce proceedings can be described like a box: within the same box (the same proceedings) the court deal about the status and ancillary relief:
 - Parental responsibility;
 - Child support;
 - Spousal support

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The effects of the strategy

Therefore within the same petition for legal separation Mr. A asks the Italian court to affirm Italian jurisdiction about:

- Spousal maintenance, on the basis of art. 3 (c), Reg. (EU) n. 4/2009
 - Mr. A obtains that if later Mrs. B files a petition in England claiming any kind of spousal support English Court shall STAY its proceedings until Italian jurisdiction is established (Art. 12 of Reg. (EU) n. 4/2009)

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The effects of the strategy

- Child support, arguing on the basis of art. 3(c), Reg. (EU) n. 4/2009 (following Italian Law child support claims are ancillary to legal separation proceedings)
 - Mr. A is trying to obtain the effect that if later Mrs. B files a petition in England claiming any kind of child support English Court shall STAY its proceedings until Italian jurisdiction is established
- Italian Court cannot be seised in matter of parental responsibility because the children are resident in England and English court has the exclusive jurisdiction on the basis of Art. 8 of Reg. (EU) 2201/2003: therefore the father cannot ground Italian jurisdiction relating to child support on Art. 3(d),¹² (EU) Reg. n. 4/2009

What happened?

- The Italian Court of first instance states that Art. 3(c) cannot be applied to child support and declined jurisdiction about this issue
- Mr. A appeals the Italian Supreme Court
- In the meantime Mrs. B files a petition in England asking for child support and asks a full disclosure of Mr. A's assets. The English Court stay the English proceedings (on the basis of Art. 12 of Reg. (EU) n. 4/2009)
- Italian Supreme Court suggests that, following Italian law, child support claim is ancillary to legal separation proceedings and Italian court has jurisdiction in matters relating to child maintenance on the basis of Art. 3(c) even if Italian court has not jurisdiction about parental responsibility, but
- Italian Supreme Court questions the Court of Justice on the interpretation of Art. 3(c)

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The European Court of Justice judgement

- The Court analyses how the problem is described by the Italian Supreme Court
 - the referring court seeks to ascertain whether Article 3(c) and (d) of Reg. (EU) n. 4/2009 must be interpreted as meaning that, where a court of a Member State is seized of proceedings involving the separation or dissolution of a marital link between the parents of a minor child and a court of another Member State is seized of proceedings in matters of parental responsibility involving that child, a maintenance request pertaining to that same child may be ruled on both by the court that has jurisdiction to entertain the proceedings involving the separation or dissolution of the marital link, as a matter ancillary to the proceedings concerning the status of a person, within the meaning of Article 3(c) of that regulation, and by the court that has jurisdiction to entertain the proceedings concerning parental responsibility, as a matter ancillary to those proceedings, within the meaning of Article 3(d) of that regulation, or whether a decision on such a matter must necessarily be taken by the latter court
 - the referring court seeks to ascertain whether the criteria for attributing jurisdiction set out in Article 3(c) and (d) of Reg. (EU) n. 4/2009, taking into account the inclusion of the conjunction 'or', are mutually exclusive or whether that conjunction signifies that the respective courts that have jurisdiction to entertain the proceedings for legal separation and the proceedings concerning parental responsibility may be both validly seized of an application relating to maintenance in respect of minor children.

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The European Court of Justice judgement

- The Court says that the question moves from an incorrect assumption:

Such a matter arises only if an application relating to maintenance in respect of a minor child is deemed ancillary both to 'proceedings concerning the status of a person' and to 'proceedings concerning parental responsibility' and not only to one of those sets of proceedings.

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The European Court of Justice judgement

- ⦿ The Court states that, even if Italian Law considers maintenance request pertaining to a child as an ancillary matter of the proceedings involving the separation or divorce between the parents,
- The "scope of the concept of 'ancillary matter', referred to in those provisions, cannot, however, be left to the discretion of the courts of each Member State according to their national law"

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The European Court of Justice judgement

- ⦿ While the criteria for attributing jurisdiction set out therein are alternative in so far as they are linked by the conjunction 'or', it cannot however be unequivocally established from that wording whether the alternative nature of those criteria means that the applications relating to child maintenance are ancillary only to one set of proceedings concerning parental responsibility, or whether those applications may be deemed ancillary also to proceedings concerning the status of a person

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The European Court of Justice judgement

- ⦿ The provisions of Article 3(c) and (d) of Reg. (EU) n. 4/2009 distinguish, as regards the criteria for attributing jurisdiction set out therein, between legal proceedings depending on whether they concern the rights and obligations of the spouses or the rights and obligations of the parents towards one or more of their children.
- ⦿ An application relating to maintenance obligations in respect of minor children concerns the latter type of proceedings, since it entails the imposition on one or other of the parents of the obligation to pay maintenance in respect of their children in order to cover the children's maintenance and education costs.
- ⦿ By its nature, an application relating to maintenance in respect of minor children is thus intrinsically linked to proceedings concerning matters of parental responsibility.

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The European Court of Justice judgement

- It follows, therefore, from the wording, the objectives pursued and the context of Article 3(c) and (d) of Regulation No 4/2009, that, where two courts are seised of proceedings, one involving proceedings concerning the separation or dissolution of the marital link between married parents of minor children and the other involving proceedings involving parental responsibility for those children, an application for maintenance in respect those children cannot be regarded as ancillary both to the proceedings concerning parental responsibility, within the meaning of Article 3(d) of that regulation, and to the proceedings concerning the status of a person, within the meaning of Article 3(c) of that regulation. They may be regarded as ancillary only to the proceedings in matters of parental responsibility.

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Conclusion

- Article 3(c) and (d) of Reg. (EU) n. 4/2009 must be understood as meaning that, in the event that a court of a Member State is seised of proceedings involving the separation or dissolution of a marital link between the parents of a minor child and a court of another Member State is seised of proceedings in matters of parental responsibility involving that same child, an application relating to maintenance concerning that child is ancillary only to the proceedings concerning parental responsibility, within the meaning of Article 3(d) of that regulation.

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My personal view of the problem

- On the basis of the wording of Art. 3(c) and (d) Reg. (EU) n. 4/2009, in the context of Reg. (EU) n. 2201/2003, it seems reasonable to state that child support claims are ancillary only to the proceedings concerning parental responsibility
- On the other hand, I think that EU rules should have the aim to concentrate the proceedings arising from the matrimonial crisis under the jurisdiction of one sole State.
- The prism built up by the European Regulations relating to family law has the effect to refract the family conflict in several different aspects that are supposed to be dealt before different courts and with different laws. As a matter of facts, the rules concerning jurisdiction do not have the aim to concentrate (or to try to concentrate) the whole conflict arising from the family's crisis in the hands of a single judge who applies a single law. This choice has large costs both for the parties who needs to have lawyers in each jurisdiction involved, and for the efficiency of the legal system. Moreover, it often leads to an irrational and unfair solution of the family conflict.

'Hot Topics in EU Family Law'

QUESTIONS



Friday 11th November, Session 1
The Maintenance Regulation at 5 Years Old

1. Are the maintenance regulation rules on jurisdiction easily applied and welcomed by practitioners?
2. Is the maintenance regulation properly applied by the courts?
3. Are you aware much evidence of splitting of cases across jurisdictions between child maintenance and other financial claims (as occurred in Carlo's case)?
4. Are clients finding the enforcement mechanisms cost effective?

Issues in International Family Law



The 1996 and 1980 Hague Conventions

Carolina Marin Pedreno
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4 PB



First considerations

- What are the first questions that arise when considering the application of a Convention?
- What is the scope of the Convention?
- The scope determines whether or not the Convention applies in a particular case
- It involves consideration of the material, temporal and geographical scope.

Does any other instrument affect the operation of the particular Convention?

- There are now a number of international instruments, some of which cover the same (or similar) matters
- In Europe, the first port of call in most cases will be Council Regulation (EC) No. 2201/2003 ("BIIa")
- As such, once it has been determined that a case falls within the material and geographical scope of a Convention, it is necessary to consider whether BIIa impacts the operation of the Convention

The 1980 Hague Convention

- Material scope is set by the preambles and by Article I, which provides that:
 - "The objects of the present Convention are -*
 - a) *to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and*
 - b) *to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."*
- The Geographical (and temporal) scope is set by Article 4:
 - "The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years."*

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The 1980 Hague Convention and BIIa

- The 1980 Hague Convention is affected by BIIa, in the following way:
 - "Article 60**
Relations with certain multilateral conventions
In relations between Member States, this Regulation shall take precedence over the following Conventions in so far as they concern matters governed by this Regulation:
 - e) *the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction"*
- In practical terms, that means that in European cases, Article 11 of BIIa applies.

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The 1996 Hague Convention

- Chapter I of the Convention defines its scope. Particularly:
 - Article 3 sets out the material scope of the Convention, it is, however, a non-exhaustive list.
 - Article 4 is equally important, as it sets out what the Convention does not apply to
 - Article 2 sets the temporal scope. Importantly, it differs to the 1980 Hague Convention in that it applies to children up to the age of 18, whereas the 1980 Hague Convention applies only to the age of 16
 - The geographical scope of the 1996 Hague Convention is determined by the jurisdictional provisions that appear in Chapter II

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The 1996 Hague Convention and BIIa

- The 1996 Hague Convention has a complicated relationship with BIIa. Priority is established by Articles 61 and 62 of BIIa, which provide that:
 - Article 61**
Relation with the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children
 As concerns the relation with the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, this Regulation shall apply:
 - (a) where the child concerned has his or her habitual residence on the territory of a Member State;
 - (b) as concerns the recognition and enforcement of a judgment given in a court of a Member State on the territory of another Member State, even if the child concerned has or her habitual residence on the territory of a third State which is a contracting Party to the said Convention.
 - Article 62**
Scope of effects
 1. The agreements and conventions referred to in Articles 59(1), 60 and 61 shall continue to have effect in relation to matters not governed by this Regulation.
 2. The conventions mentioned in Article 60, in particular the 1980 Hague Convention, continue to produce effects between the Member States which are party thereto, in compliance with Article 60.



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The 1996 Hague Convention - jurisdiction

- The usual rule is set by Article 5, which provides that the judicial or administrative authorities of the Contracting State of the child's habitual residence have jurisdiction
- There are, however, exceptions to Article 5 as contained in Articles 6 – 13
- It is necessary to consider the jurisdictional scheme as a whole, and whether or not there are competing proceedings in another Contracting State, when deciding whether to commence proceedings




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The 1996 Hague Convention – recognition and enforcement

- Chapter IV of the 1996 Hague Convention provides for the recognition and enforcement of orders
- Recognition and subsequent enforcement may, however, be opposed and, potentially, refused on the grounds set out in Article 23
- Whilst the court considering enforcement can review the procedure followed in making the original order in accordance with Article 23, it is prohibited from reviewing:
 - The findings of fact on which the court based its jurisdiction when making the original order; and
 - The merits of the measure taken



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The 1996 Hague Convention – cooperation

- Chapter V of the Convention requires that each Contracting State establish a Central Authority which is then used to share information and to cooperate with other Contracting States
- The said Central Authorities are then required to cooperate generally, in order to achieve the aims of the Convention (Art. 30) and specifically in relation to other Articles of the Convention (e.g. Art. 31 – 33)
- Art. 36 makes specific provision for cases of urgency where a child is exposed to “serious danger”

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The 1980 Hague Convention – the return mechanism

- The 1980 Hague Convention allows the summary return of a child where that child has been wrongfully removed to or retained in a Contracting State.
- Upon an applicant establishing that he or she has rights of custody, and that the child concerned was habitually resident in a Contracting State immediately before the removal or retention, the court must order the child's return unless one of the exceptions to return under Articles 12 or 13 are established.
- If the respondent is able to establish one (or more) of the exceptions to return, the court may nonetheless order the child's return in the exercise of its discretion.

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'Hot Topics in EU Family Law'

QUESTIONS

Friday 11th November, Session 2

Parental Responsibility and Jurisdiction issues relating to children

1. A 5-year old Australian national, Sam, lives with his mother in Australia. He has lived there continuously for the last 4 years. Sam's father is a Moroccan national who lives and works in London as a painter. He is married to Sam's mother but they are now separated. He wishes to apply for access as Sam's mother is refusing to let him see Sam.
2. Sam's mother agrees that Sam can spend one week with his father in London. Two months have passed and Sam's mother has not heard from either Sam or his father. She makes an application for return under the 1980 Hague Child Abduction Convention. 10 months have now passed since the wrongful retention and the proceedings have still not concluded.
3. The 1980 Convention proceedings have concluded, 11 months after the wrongful retention. The father successfully makes out a grave risk defence and a non-return Order under Art 13(1)(b) of the 1980 Convention is made. The mother then applies for custody in Australia.
4. 3 years have passed since the non-return Order and Sam and his father are now settled and habitually resident in England. Sam's father now wishes to divorce Sam's mother and initiates divorce proceedings in Morocco (where he is a national). He also wishes to relocate with Sam there, which Sam's mother fiercely opposes.
5. Sam's mother is furious and takes Sam away from his father in England, wrongfully removing him to Australia. Sam's father is concerned that she has not changed and will cause Sam irreparable harm by abusing him.
6. Sam is swiftly returned to his father in England. As Morocco does not have jurisdiction under Art 10 to deal with the relocation issue alongside the divorce, Sam's father issues an application for permanent relocation in the English courts.
7. Sam's father's relocation application is successful and they move to Morocco. The divorce proceedings have concluded and, two years later, Sam's father moves in with his new boyfriend, John, in Argentina, taking Sam with him. They all live there for a year before Sam's father and John enter into a same-sex marriage. They then all move to Morocco to live permanently.
8. As part of the relocation proceedings that took place in England, Sam's mother was granted direct contact over the Summer holidays in Australia. Sam's father refuses to hand over their child. He adds that Sam is also against the idea and that the courts in England would never have allowed such contact if they had actually listened to Sam's views.
9. Sam is now 17. Unfortunately, John has since joined a dangerous cult. He tries to get Sam to join. Sam's father informs the Moroccan police but before they can do anything, John snatches Sam and disappears. Sam's father suspects John has taken Sam to Uruguay.

**International relocation of children
(within the EU / outside the EU)**

Alice Meier-Bourdeau
Barrister to the Council of State (Conseil
d'Etat) and the Court of Cassation (Cour de
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Notion of rights of custody

Article 3 of the Hague Convention 25 October 1980 :

- The removal or the retention of a child is to be considered wrongful where
- a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
- b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
- The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State

Notion of rights of custody

Article 11 Council Regulation (EC) n° 2201/2003 27 november 2003 (Bruxelles II bis)

Where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter 'the 1980 Hague Convention'), in order to obtain the return of a child that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, paragraphs 2 to 8 shall apply.

Notion of rights of custody

- Only a parent who has rights of custody can refuse a relocation or claim for abduction
- Rights of custody: who has it? Both parents, only the mother, only the father?
- Is there a difference if the parents are married?

Notion of rights of custody

- French Law (before 5 March 2002)
- Article 372
- Parental authority is exercised jointly by both parents if they are married.
- It is also exercised jointly if the parents were not married but both legally acknowledged the child before he/she was one year old, were living together at the time they acknowledged the child. The provisions of the previous paragraph hold no obstacle to the third and fourth paragraphs of article 374.
- Article 374
- When the filiation of a child born out of wedlock is only established with regard to one of the two parents, this parent is the only one with parental authority.
- When the child's filiation is established with regard to both parents according to different terms to those set out in article 372, the mother has sole parental authority. However, this is exercised jointly by both parents if they make a joint declaration before the chief clerk of the Tribunal de Grande Instance.
- In all cases, the family judge can, at the request of the father, mother or public prosecutor, modify the conditions of exercise of parental authority with regard to a child born out of wedlock. He can decide that it can be exercised either by one of the parents or jointly by the mother and father; in this case, he designates the parent whose home will be the child's habitual residence.

Notion of rights of custody

- Conseil d'Etat 30 June 1999 req. 191232
- The article 371-2 of the Code Civil states, in its second paragraph, that parental authority comprises, with regard to the child " custody rights and duties, supervision and education"; that in the terms of the first paragraph of article 374 of the same Code, in its drafting from the law of 22 July 1987 already mentioned, applicable at the date of 13 May 1992: "Parental authority is exercised on the child born out of wedlock by the parent who voluntarily acknowledged him, if the child was only acknowledged by one of the parents. If both parents acknowledged the child, the parental authority is exercised by the mother", that under the terms of the second and third paragraphs of the same article, in the same draft: "Parental authority can be exercised jointly by both parents if they make a joint declaration before the wardship judge. At the request of the father or the mother or the public prosecutor, the marital affairs judge may modify the conditions of the exercise of parental authority and decide that it will be exercised, either by one of the two parents, or jointly by the mother and the father; in this case, he indicates with which parent the child has his or her main residence"; that these terms which - as is the case here, where the child has been acknowledged by both parents - stipulate that parental authority is exercised by the mother, but give the father the possibility, upon decision by the marital affairs judge, of exercising this authority himself, either alone or jointly with the mother, and obtaining, if applicable, that the child's residence be with him.
- Considering that it is clearly shown in the elements of the file that the father did not have parental authority for his son Godefroy, when he was taken to Canada by his mother on May 13th 1992; that therefore he did not have, at this date and for the purposes of article 5 of the Hague Convention, custody of this child, and, in particular, did not have the right to decide upon his main place of residence; that, consequently, the decision on 7th June 1993 of the garde des sceaux, French minister of justice, was in no way legally flawed in considering that the moving of the young Godefroy could not be qualified as "illicit" for the purposes of the same convention.

Notion of rights of custody

- French Law (today)
- Article 371-1 Code Civil
 - Parental authority is a set of rights and duties whose purpose is the interest of the child.
 - It is the father and mother's responsibility, until the coming of age or emancipation of the child, to protect him in his security, health and morality, to ensure his education and allow his development, with all due respect owed to his person.
 - Both parents automatically have custody rights.
 -
 - Cass. Civ. 29 February 2012 appeal no 11-15.613
 - Given that, in order to note the illicit nature of the move, the judgment maintains, first of all, that the mother left her job in November 2009, then, that she terminated the lease on her apartment in December 2009, finally, that she had all her mail forwarded to Germany as from 20th October 2009, so that, having the intention, since Autumn 2009, of making her residence in Germany, at her husband's home, this is where the child's main residence was;
 - In deciding this, without investigating whether Mr Y. was, in the eyes of German law, the holder of custody rights for the purpose of the Convention, the appeal court did not give a legal basis to its decision.
 - = the judge must investigate whether the parent who is citing child abduction had custody rights.

Notion of rights of custody

- CJUE 5 october 2010, aff. C-400/10
- A parent cannot have a child's relocation deemed illicit unless he has custody of the child. That the father's custody, in the case of a child born out of wedlock, depends upon a court decision is not contrary to article 7, read in liaison with article 24 of the charter of fundamental rights. In other words, the regulation, interpreted in accordance with the European Union Charter of Fundamental Rights, does not bar a member state from not recognising as of right the custody rights of an unmarried father who is bringing up his children. Thus, there is no illicit abduction if the mother decides unilaterally to leave the member state in which she habitually resides.

Notion of rights of custody

- In Germany : see Stefanie
- In the other countries : how does it work ?

Compatibility Interdiction to leave the country and / or relocate and freedom of circulation

The conflict
 Reduction of contact to the other parent / fear of child abduction

Versus

Freedom of circulation with in the EU

Compatibility Interdiction to leave the country and freedom of circulation

Question to the French Court of cassation :
 the decision to issue a prohibition to leave the territory for minors without the consent of both parents simply because the agreement of both parents should be obtained, before the children leave the French territory, is simply a performance guarantee, for both parents, as to the duties attached to the joint exercise of the parental authority, is contrary to the principle of freedom of movement since such a prohibition is not subject to any time limitation or to the possibility of a periodic review of the factual circumstances or law that underlie it and that, legal standards exist in the European Union such as the Regulation (EC) No. 2201/2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility as to protect the rights of parents without necessarily limiting the freedom of one of them

Compatibility Interdiction to leave the country and freedom of circulation

Request to the Cour de Cassation to ask the CJUE for a preliminary hearing:

- If a doubt should remain as to the compatibility of Article 373-6-2 of the Civil Code with the law of the European Union, the Supreme Court (*Cour de Cassation*), a domestic court whose decisions are not likely to be appealed pursuant to the provisions of national law, shall, in accordance with Article 267 of the Treaty on the functioning of the European Union, ask the Court of Justice of the European Union the following interlocutory question:
- "Should Article 21 of the TFEU and Article 27 of Directive 2004/38 be interpreted as meaning they preclude
- national legislation which provides, as does Article 373-6-3 of the Civil Code, the possibility for the judge to order a prohibition to leave the country for the child without both parents' consent to ensure the continuity and effectiveness of maintaining the child's relationship with both parents where such a measure is not subject to any time limitation or periodic review and that same legal standards exist in EU law such as the Regulation (EC) No. 2201/2003 which are likely to protect the rights of both parents without necessarily limiting the freedom of one of them?"

**International Relocation
of Children**

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The conflict

the reasonable desire of one parent to relocate

↔

reduction of contact to the other parent

Legal Background in Germany

Parental Responsibility (Sorgerecht)

- What is it? The right to make important decisions concerning the child.
For example: which Kindergarten/school?; to determine where the child should live
- Who has it? (the unmarried father only has it if he signs an agreement with the mother or if it is transferred by the court)
- If both parents have parental responsibility, the parent who wants to move needs agreement of the other parent or a court order that allows her to move abroad.

Relocation Proceedings

- no special law / no special proceedings
- general proceedings concerning parental responsibility (Sorgerechtsverfahren)
- application for part of parental responsibility to be transferred to one parent (the right to determine where the child should live - Aufenthaltsbestimmungsrecht) or the right to decide over this one specific move

Leading German case

- BGH 28.04.2010 – XII ZB 81/09
- The constitutional right of general freedom of action allows the parent who wishes to relocate to do so. The court cannot consider it as an option that this parent remains in Germany even if this would be in the best interest of the child. Essentially, the question is therefore, whether it is better for the child to move with parent A to country X or to remain with parent B in Germany. Consequently, it is very difficult to oppose the relocation application of the primary carer.

The law in England

Payne v Payne [2001] EWCA 166
 the Court posed the following test:
 Is the application genuine (not motivated by some selfish desire to exclude the father from the child's life?)
 Is the mother's application realistic (founded on practical proposals)
 What is the effect on the mother (either as a single parent or a new wife) if her application is refused?
 overriding review of the child's welfare as paramount
 following this case: priority given to the wishes of the parent with whom the child was primarily living

K (Children) [2011] EWCA Civ 793
 Emphasis shifted back to the welfare principle

WASHINGTON DECLARATION ON INTERNATIONAL FAMILY RELOCATION

On 23-25 March 2010, more than 50 judges and other experts from Argentina, Australia, Brazil, Canada, France, Egypt, Germany, India, Mexico, New Zealand, Pakistan, Spain, United Kingdom and the United States of America, including experts from the Hague Conference on Private International Law and the International Centre for Missing and Exploited Children, met in Washington, D.C. to discuss cross-border family relocation. They agreed on the following:

WASHINGTON DECLARATION ON INTERNATIONAL FAMILY RELOCATION

- Availability of Legal Procedures Concerning International Relocation
- Reasonable Notice of International Relocation
- Promoting Agreement
- Enforcement of Relocation Orders
- Modification of Contact Provisions
- Direct Judicial Communications

Washington Declaration

Factors Relevant to Decisions on International Relocation:

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 interest;
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;
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 to 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.

Enforcement

practicality of enforcement of international contact orders is of utmost importance

'Hot Topics in EU Family Law'

QUESTIONS

Friday 11th November, Session 3 Child Relocation

1. What measures have been taken by your State to secure the prompt return of a child or to ensure that rights of custody and of access are effectively respected?
2. « Rights of custody » or rights of access: how does your legislation define these notions? It is necessary to have a decision of a judge or is it automatic? Is a right of access comparable to right of custody?
3. Did your State (or jurisdiction), if you belong to an EU country, examine the compatibility between an interdiction to leave the country without the agreement of both parents and the freedom of circulation?
4. Does your country make any difference between the countries regarding the move of a child to another country?
5. Is there a special law on child relocation in your country? Are there special proceedings?
6. What are the criteria in your country for one parent to be allowed to move with the child to another country?
7. What are your experiences with the enforcement of relocation orders / contact orders that have been made in another country?
8. Should there be international rules on child relocation?