

Case study 2 : Parental responsibility

What if David wants to file for custody on the children, before and after 31 December 2020?

JURISDICTION

Before 31 December 2020

Applicable text : BIIa. 2 different hypothesis:

1) **There are divorce proceedings in France or both parents agree**

Article 12 (1) : prorogation of jurisdiction of the divorce judge (one at least has parental responsibility + agreement at the time the court is seized + interest of the child)

Article 12 (3): close relation between the child and France (including hab res of one parent – here David) or child citizenship + agreement at the time the court is seized + interest of the child)

Therefore, French courts have jurisdiction in the matter relating to parental responsibility but **only with Samantha's agreement.**

4

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2) **If no agreement between the parents**

Article 8 (1):
jurisdiction of the English courts.

Mitigation – Article 9 (1):
"Where a child moves lawfully from one Member State to another and acquires a new habitual residence there, the courts of the Member State of the child's former habitual residence shall, by way of exception to Article 8, retain jurisdiction during a three-month period following the move for the purpose of modifying a judgment on access rights issued in that Member State before the child moved, where the holder of access rights pursuant to the judgment on access rights continues to have his or her habitual residence in the Member State of the child's former habitual residence".

French courts could have jurisdiction to vary the visitation rights of the father for 3 months after the children's move.

5

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After 31 December 2020

Applicable text?

From a French perspective, we need to look at Article 61 Brussels IIa (2001/2003):

"As concerns the relation with the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, this Regulation shall apply:

- (a) *where the child concerned has his or her habitual residence on the territory of a Member State;*
- (b) *as concerns the recognition and enforcement of a judgment given in a court of a Member State on the territory of another Member State, even if the child concerned has his or her habitual residence on the territory of a third State which is a contracting Party to the said Convention".*

Therefore, the applicable instrument from 31 December 2020 onwards is **the Hague convention of 1996.**

6

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HC1996 : Here again 2 different scenarios :

1) **There are divorce proceedings in France pending**

Article 10:

French courts seized of the divorce proceedings could have jurisdiction (same system of prorogation)

but with one further condition: that, at the time of the commencement of the proceedings one of the parents had his/her habitual residence in France.

OK here given David's hab res in France.

7

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2) **If no divorce proceedings**

Article 5:

As the children have their habitual residence in England, English courts have jurisdiction.

Big differences with B11 Bis :

- **Jurisdiction follows the transfer of residence;**
- **No equivalent to Article 12 (3) B11a (agreement between the parents outside divorce proceedings);**
- **The HC1996 does not provide for the continuing jurisdiction** of the child's former hab res during 3 months (probably because jurisdiction follows the transfer of the child's hab res).

8

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Mitigation ? : Article 8 of the HC 1996 ?

Similar mechanism to Article 15 B11a regulation but with some differences: the former hab res of the child is not mentioned. Addition of the state with which the child has a "substantial connection" (which could include the former hab res of the child).

Here connections between the children and France are tenuous apart from France being the former hab res.

9

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- Quid if proceedings started in a BII bis MS and transfer of hab res to a non EU MS but HC1996 MS?
- The answer depends on when the hab res is appreciated : is it at the beginning of the proceedings? Or at the time of the decision ie after the transfer of hab res.
- French Cass, Civ. 1st, 30 Sept. 2020, n°1914761 (with Switzerland)
- If lawful transfer => change of applicable instrument and HC1996 applies => transfer of jurisdiction
- => **What if proceedings are introduced in the UK before the end of the transition period? Is jurisdiction transferred?**
- The left-over parent loses one degree of jurisdiction.

10

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APPLICABLE LAW

Whether French courts or English courts have jurisdiction and were seized before or after 31 December 2020 => application of the HC 1996

Art 15 : whichever courts have jurisdiction will apply their own law (NB. it is well-known that English courts always apply their own law whatever the matter is).

However, should a decision be taken by French courts which maintains the residence of the children in England, the conditions of application will be governed by English law (law of the new hab res of the children).

11

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CIRCULATION OF THE DECISIONS

BIIa Regulation:

- Recognition: automatic
- Enforcement:
 - **Parental authority:** non adversarial proceedings for enforcement (petition before the president of the *Tribunal judiciaire* in France), relatively short;
 - **Visitation and return orders:** no need for any proceedings.

The HC 1996 also has provisions on recognition and enforcement, but:

- No certificates: adversarial procedure with longer deadlines
- Article 23 HC 1996: "Recognition may however be refused" = degree of discretion
- Article 28 HC 1996: "Enforcement takes place in accordance with the law of the requested State to the extent provided by such law (in France exequatur)," **taking into consideration the best interests of the child** = enforcement may be challenged

12

Julia Pasche (Germany)





13

Case study 2 : Dave and Samantha have children

Child support – enforcement
Julia PASCHE (Germany)

David has moved to Bavarian countryside
The children are with Samantha in the Cottage in Cornwall.

14

Case study 2 : Dave and Samantha have children

Child support – enforcement
Julia PASCHE (Germany)

Samantha wants to ask for child support

1. Jurisdiction

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

EU Maintenance Regulation is applicable on all international cases, also in relation to non-EU-Member States

15

Case study 2 : Dave and Samantha have children

Child support – enforcement
Julia PASCHE (Germany)

Samantha wants to ask for child support

1. Jurisdiction

Article 3 General provisions
In matters relating to maintenance obligations in Member States, jurisdiction shall lie with:
(a) the court for the place where the defendant is habitually resident, or
(b) the court for the place where the creditor is habitually resident, 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.

16

Case study 2 : Dave and Samantha have children

Child support – enforcement
Julia PASCHE (Germany)

Samantha wants to ask for child support

- 1. Jurisdiction
- 2. Applicable law

PROTOCOL ON THE LAW APPLICABLE TO MAINTENANCE OBLIGATIONS¹
(Concluded 23 November 2007)

The Hague Protocol has replaced German national international private law. It applies universally, even if the applicable law is that of a non-contracting state (Art. 2)

17

Case study 2 : Dave and Samantha have children

Child support – enforcement
Julia PASCHE (Germany)

Samantha wants to ask for child support

- 1. Jurisdiction
- 2. Applicable law

- Art. 8: **Choice of law** – not possible for child support (parr. 3)
- Art. 3: **General rule** on applicable law: **habitual residence of the creditor**
- Art. 4: **Special rules** favouring certain creditors:

Notwithstanding Article 3, if the creditor has seised the competent authority of the State where the debtor has his habitual residence, the law of the forum shall apply. However, if the creditor is unable, by virtue of this law, to obtain maintenance from the debtor, the law of the State of the habitual residence of the creditor shall apply.

18

Case study 2 : Dave and Samantha have children

Child support – enforcement
Julia PASCHE (Germany)

Samantha wants to enforce a court decision on child support, from England in Germany

- Before 31st December 2020:

EU Maintenance Regulation, Chapter IV, Section 2:
Decisions given in a Member State not bound by the 2007 Hague Protocol

Denmark and the UK: **Exequatur**

19

Case study 2 : Dave and Samantha have children

Child support – enforcement
Julia PASCHE (Germany)

Samantha wants to enforce a court decision on child support, from England in Germany

- After 1st January 2021:

CONVENTION ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE
(Concluded 23 November 2007)
Chapter V: Recognition and Enforcement

20

Case study 2 : Dave and Samantha have children

Child support – enforcement
Julia PASCHE (Germany)

Grounds for refusing recognition and enforcement:

Article 22 Hague 2007

- "ordre public"
- fraud in connection with a matter of procedure
- 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;
- the decision is incompatible with a decision rendered between the same parties and having the same purpose in the State addressed
- in a case where the respondent has neither appeared nor was represented in proceedings in the State of origin
- the decision was made in violation of Article 18.

Article 24 Maintenance Regulation

- "ordre public"
- where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings
- if it is irreconcilable with a decision given in a dispute between the same parties in the Member State in which recognition is sought;
- if it is irreconcilable with an earlier decision given in another Member State or in a third State in a dispute involving the same cause of action and between the same parties, provided that the earlier decision fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.


21

Magali van Maanen (The Netherlands)
& Karen O’Leary (Ireland)



International Academy of Family Lawyers

22



Wrongful retention / child abduction

Brussels II revised (pre-Brexit)
vs
Hague Convention on child abduction (post-Brexit)

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23



Hague Convention: the Dutch Model

6 + 6 + 6

- 6 weeks for CA to intervene
- 6 weeks for pre-trial hearing, CBM, substantive hearing and Court Order
- 6 weeks for appeal

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24

DE BOORDER
FAMILIE- EN ERFRECHT ADVOCATEN & MEDIATORS

Cross Border Mediation (CBM)

Offered by CA and in pre-trial hearing
 Two mediators: lawyer and behavioural expert
 3 sessions of 3 hours, spread across 2 days
 Outcome: - complete agreement
 - partial agreement
 - no agreement

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25

DE BOORDER
FAMILIE- EN ERFRECHT ADVOCATEN & MEDIATORS

Hague countries vs non-Hague countries

Two signatory states: application of the Hague Convention (NL High Court ECLI:NL:HR:2011:BU2834)

Abduction to NL from a non-signatory State: application of the Hague Convention

Abduction from NL to a non-signatory State: application of the Hague Convention for grounds of refusal etc, not for jurisdiction

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26

DE BOORDER
FAMILIE- EN ERFRECHT ADVOCATEN & MEDIATORS

Voice of the child

Behavioural expert in CBM

Guardian ad Litem

Interview in court (separate from parents)

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27

Karen O'Leary (Ireland)

Child Abduction

After 11pm (GMT) 31st December 2020

1. Article 11 of BIIa enhances provisions of the Hague Convention 1980.
 - a) A 11(3) BIIa – heard and judgement within 6 weeks
 - b) A 11(6)-11(8) BIIa – EU states retains jurisdictions notwithstanding an A13 refusal to return- other state can re-examine
 - c) A 11(4) BII a – court cannot refuse to return a child on the basis of Article
 - d) A 11(2) BIIa – voice of child

28

Gaps Between Hague Convention 1996 and Brussels II

1. Under 1996 Hague Convention, if child's habitual residence changes the court seized of the matters loses jurisdiction(Article 9 of BII R)
2. Brussels II R permits parents to agree jurisdiction (if certain conditions are met) 1996 Convention does NOT.
3. No automatic enforcement of access order under 1996 Hague Convention
4. Current judicial liaison arrangements may be lost.

29

Esther Margarite Susin Carrasco
(Spain)



30

Case study 2 : Dave and Samantha have children
Administration of children’s assets
Esther Margarite SUSIN CARRASCO (Spain)

The sale of real estate of the children under 18 years of age, resident of the United Kingdom, is presented to a Spanish notary.

Although only applicable law and recognition affect this point, let’s review:

- Transitional period
- Competence and recognition of the decision to adopt a protection measure. EC Regulation no. 2201/2003.
 - The art. 61 of EC Regulation number 2201/2003 of November 27 (Brussels II bis) of the Council on the Competence, Recognition and Enforcement of Judicial Resolutions in matrimonial matters and parental responsibility, deals with handling the relationship of this Regulation with the Convention of the 1996 Hague on the protection of minors. The Brussels II Bis Regulation does not deal with issues of applicable law. Article 61 states that in relation to the Hague Convention of October 19, 1996, Regulation 2201/2003 will apply:

31

Administration of children’s assets
Esther Margarite SUSIN CARRASCO (Spain)

- A) when the affected minor has his habitual residence in the territory of a Member State;
- B) With regard to the recognition and enforcement in the territory of a Member State of a decision issued by the competent court of another Member State, even when the affected minor has his habitual residence in a non-Member State that is a contracting party to the cited Convention.
- In matters of jurisdiction of the courts, the Regulation prevails when the minor affected has his habitual residence in the territory of a Member State. Pursuant to the same, the courts of the EU Member State where the minor resides are competent, in general terms, in article 8, jurisdiction rules supplemented by articles 8 to 13.
- The 1996 Hague Convention will apply, in matters of jurisdiction, when the minor child who has not reached 18 years of age habitually resides in a State party to the Convention that is not a member of the EU, because then the Regulation applies.

32

Administration of children’s assets
Esther Margarite SUSIN CARRASCO (Spain)

- If it is a minor according to their national law (art.9.1CC) but over 18 years of age, and does not have the habitual residence in a Member State, article 22 LOPJ applies; however, as the explanatory report indicates, a child does not have to be a habitual resident of a Contracting State to be covered by the 1996 Convention; they may have their habitual residence in a non-Contracting State but still fall within the scope of article 6 (refugee children, internationally displaced children, or those whose habitual residence cannot be determined), article 11 (emergency measures) or the Article 12 (provisional measures) of the 1996 Convention.
- The United Kingdom is party to Regulation No. 2201/2003 Brussels II BIS and the 1996 Hague Convention signed it as a State in the interest of the EC.
- **Applicable Law.**- 1996 Hague Convention; When a rule of the Convention introduces a rule of conflict of laws relating to parental responsibility, it introduces a rule of universal conflict, applicable to all children, whatever their nationality and whatever their residence; therefore, this Convention is universal in nature, it displaces articles 9, 4 and 9.6 of our Civil Code in the personal and material sphere regulated by it. **To the protection measures, the INTERNAL Law of the Authority is applied, which is competent and applies whatever the basis of competence of this Authority is, says the explanatory report.**

33

Administration of children's assets
Esther Margarite SUSIN CARRASCO (Spain)

- The Convention is universal in nature and given the approval of the jurisdiction, in favor of the Authorities of the State of the child's habitual residence and takes into account that the criteria of international jurisdiction contained in the Convention are very similar to those of Regulation 2201/2003. Application of the law rules that the Convention will, in most cases, result in the application of the law of the State of the child's habitual residence.
- **Recognition.**- European Regulation 2201/2003. Regarding the issue of the recognition of decisions, the 1996 Hague Convention is replaced by European Regulation 2201/2003 **with regards to the recognition and enforcement in the territory of a Member State of a decision issued by the competent court of another Member State, even when the affected minor has his habitual residence in a non-Member State that is a contracting party to said Convention.**

34

Administration of children's assets
Esther Margarite SUSIN CARRASCO (Spain)

Once the transitional period has ended, the answer will depend on whether it is understood that after said period, the Hague Convention of October 19, 1996, continues to apply to the United Kingdom (it was signed as a State). Interpretation, in our opinion, is questionable and is an issue that has been raised by some Spanish academics who recall that at first the European Community (EC) chose to establish that the Member States were to conclude in the interest of the Community. The international agreements resulting from interest for the EC was the case of the 1996 Hague Convention, on the protection of minors, see Council Decision of December 19, 2002, and it is suggested that although it seems to be the safest thing, that it is not ratified by international conventions by Member States. In the interest of the EU, it would continue to bind the UK, which would imply exclusion by the UK from the 1996 Hague Convention on the Protection of Minors, and recognizes that this result may be excessive.

Jurisdiction after the transitional period: From the point of view of Spanish law, the 1996 Hague Convention [3] will be applicable to a minor residing in a non-member State [4] if the United Kingdom becomes a State participant in the Convention for the protection of minors and, in any case, the Convention applies in the aforementioned cases (art. 6, 11 and 12 of the Convention) and, failing that, article 22 of the LOPJ.

35

Administration of children's assets
Esther Margarite SUSIN CARRASCO (Spain)

- **Applicable law:** The aforementioned 1996 Hague Convention will be applied (universal character) and regarding the recognition in Spain, in the decision on the protection measure (a judicial authorization) of a minor resident in the UK, we will apply Law 29/2015 of International Legal Cooperation in Civil Matters, unless otherwise agreed.
- However, it is likely that the UK adheres to Conventions that have been a source of inspiration for the regulation of EU Regulations, in this case, the 1996 Hague Convention for the protection of minors that inspired the drafting of the Brussels II Regulation Bis. It can also adhere to other instruments to which the EU has acceded, such as the Council Decision of November 30, 2009 on the accession of the European Community to the Hague Protocol, of November 23, 2007, on the law applicable to maintenance obligations, although the UK at the time did not participate in the adoption of this decision and therefore is not bound by the aforementioned Protocol.

36

Karen O’Leary (Ireland)



37

A bit of perspective - Brussels II Bis Re-Cast
Lost Opportunity

1. On the 1st August 2020 all the EU member states except Denmark will adopt a revision to Regulation (EC) 2201/2003 the “Brussels II Bis Regulation”.
2. This is aimed at improving the protection of children in cases of cross-border parental responsibility disputes.

38

Brussels II Bis Re-Cast- Lost Opportunity

Key points:

1. Introduction of duty to allow the children subject of application opportunity to express their view of proceedings.
2. The abolition of exequatur
3. The introduction of clearer deadlines for the determination of intra-EU child abduction cases.
4. Clarity regarding the placement of children in other EU states.
5. Rules on instruments and extra judicial agreements.

39

Nina Hanssen (England)



40

Sam wants to apply for custody

Jurisdiction and Lis Pendens – Hague 96

Jurisdiction

- Based on Habitual residence (Art 5)
Habitual Residence has the same meaning B11bis and Hague 1980
- Duration of Jurisdiction (art 5 (2)) *no perpetuatio fori*
- Article 6 'refugee children, displaced children, and those without HR

41

Hague 96

- No prorogation but see Article 10 - divorce
- Lis Pendens rule- Article 13

• the authorities in a contracting state "must abstain from exercising this jurisdiction if, at the time of the commencement of proceedings before those authorities, corresponding measures have been requested from the authorities of another contracting state having jurisdiction under Articles 5 to 10 which are still under consideration.

• The provision is silent as to service.

42

Lis Pendens and transfer of Jurisdiction

- Transfers of Jurisdiction – Articles 8 and 9

a *forum conveniens* provision

Criterion for transfer :
 Would the Court "be better placed in the particular case to assess the best interests of the child".
 (Article 8(1))

43

Protective measures

- Articles 11, 12 and 14 deal with protective measures for children
- Articles 23 to 25 provide for Recognition and Enforcement of orders made in other contracting States in relation to children
- Protection for Adults
- The 1996 Hague provides protection for children but there is no corresponding provision for adults.
- The UK have amended regulations to include the "Mutual Recognition of Protection Measures in Civil Matters (Amendment) (EU Exit) Regulations 2019"

44

Maintenance – Hague convention 2007

- The current EU Maintenance Regulation 2009 will be revoked at the end of the transition period.
- However those cases already up and running will remain under that regulation but Maintenance orders made in the UK after that date (31.12.2020) will need to be registered in EU member States to be enforceable. (unlike Hague 96.)
-
- Following 31 December the UK becomes a signatory in its own right to the 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance
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45

Service... Hague 1965 (really?)

- Under Brussels II bis service is essential otherwise the lis pendens rules don't apply - t
- there are no corresponding rules in Hague 96 so lis pendens is not ~~dependent~~ on service but still..
- UK revert to the HAGUE CONVENTION ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS 1965
- the Central Authority is the conduit for service — although in this digital and fast moving age ...
- ... we do have Mr Justice Mostyn and the UKSC... reminding us all of a simple truth namely that the "whole (and sole) purpose of service is to inform the defendant of the contents of the claim form and the nature of the claimant's case".

46

Conclusion - Arnaud GILLARD

Wider impact

- Relocation + immigration issues due to Brexit job transfers
- Less certainty regarding jurisdiction for divorce + extra costs => impacts children too
- No CJUE
- British law practitioners abroad

47

Thank you all !



48