

IAML - FAMILIES ACROSS BORDERS CONFERENCE
16th-17th June 2014, Budapest

Financial aspects of breakdown of marriage and cohabitation

Sandra Verburgt's talk
Mark Harper's talk
Isabelle Rein-Lescastereyres's talk
Dr. Alfred Kriegler's talk

International Child Abduction, Practicalities and Mediation

Alison Shalaby 's talk
Dr. Ildiko Bereczki 's talk
Mert Yalcin's talk

View from Brussels: Current thinking in European Family Law developments

Fernando Rui Paulino Pereira's talk

Enforcement of financial orders within Europe

Mark Harper's talk
Oksana Voynarovska's talk

Relocation of children

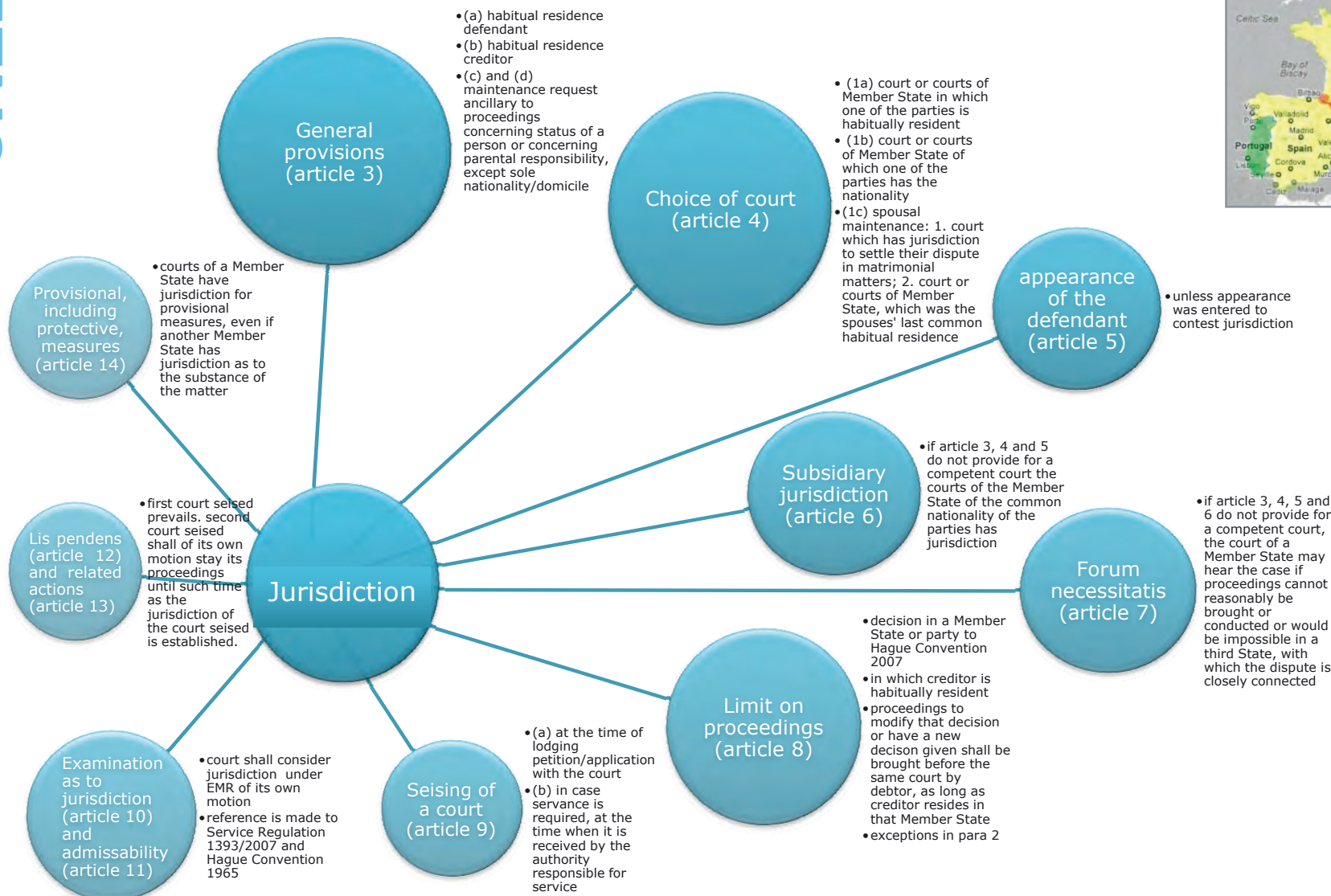
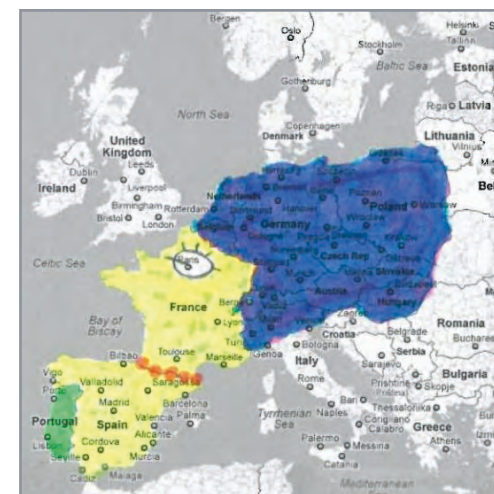
Carolina Marín Pedreño's talk
Hilkka Salmenkylä's talk
Julie Losson's talk
Manuela Tirini's talk

Other Children Issues across borders

Angela Wilson's talk

Family Law in Hungary

Dr. Kolcsenyi Zsolt Soma's talk



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UK/English law financial aspects on breakdown of marriage and cohabitation

Jurisdictional requirements, financial remedies available, forum shopping – problems and solutions

Divorce jurisdiction

1. Brussels II grounds
2. Residual jurisdiction – domicile of either party; unusual English law concept of domicile

Forum shopping

3. First to file wins under Brussels II, if all necessary steps taken to effect service
4. Forum non conveniens in non-Brussels II cases
 - 4.1 Ability to stay or block a divorce
 - 4.2 Anti-suit or *Hemain* injunction to restrain other party from proceeding with foreign divorce

Financial remedies – asset division and maintenance

5. No matrimonial property regime equivalent to civil law countries
6. Asset division and spouse maintenance dealt with together
7. Marital assets usually divided equally, but the sharing principle applies to non-marital assets if the needs of one of the parties requires it
8. In larger asset cases, ongoing spouse maintenance capitalised
9. In lower asset cases, indefinite duration spouse maintenance more common

Cohabitation

10. No rights on cohabitation relationship breakdown
11. Complex property law rights to claim a share in a property owned by the other cohabitant
12. Limited claims by unmarried mother for capital for housing on trust, reverting to the father when the child is 21

Enforcement of financial orders within Europe – practicalities and requirements

UK/English perspective

1. Maintenance Regulation – the disadvantage of the UK not opting into the Hague Protocol on Applicable Law
 - 1.1 Incoming foreign orders automatically enforceable
 - 1.2 Outgoing UK orders still subject to exequatur procedure
2. Orders for payment of capital to satisfy needs may be enforceable under the Maintenance Regulation?
3. Otherwise no automatic recognition and enforcement?
 - 3.1 Need to 'sue' on the debt under common law
 - 3.2 Comity likely to apply
4. Enforcement orders against real property, shares, cash
5. Retention of passport and committal to prison, if in breach of an existing order, in very extreme cases.

13 June 2014

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FINANCIAL ASPECTS OF THE BREAKDOWN OF THE MARRIAGE AND COHABITATION

**MOST COHABITATION AND CIVIL PARTNERSHIPS DO NOT GIVE RISE TO ANY
FINANCIAL OBLIGATION UPON THEIR BREAKDOWN**

Cohabitation

- No financial rights nor obligations

- A few (very rare) exceptions :
 1. Damages
 2. When one grew richer at the expense of the other for no reason
 3. Moral obligation turned into a legal obligation

Civil partnership (PACS)

(articles 515-1 and following of the French civil code)

- Material support during common life
- By default regime of separation of assets. Opposite to marriage.

Breakdown:

- Unilateral
- Non-judicial
- Liquidation of the matrimonial property regime
- No alimony

JURISDICTIONAL REQUIREMENTS



European Maintenance Regulation (n°4/2009)

Article 3 (if no choice of jurisdiction):

(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.

Read together with the Brussels II bis regulation: divorce proceedings

Brussels II bis (article 3) :


Jurisdiction is based on the habitual residence of one party or their common nationality:

In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State

(a) in whose territory:

- the spouses are habitually resident, or*
- the spouses were last habitually resident, insofar as one of them still resides there, or*
- the respondent is habitually resident, or*
- in the event of a joint application, either of the spouses is habitually resident, or*
- the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or*
- the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her "domicile" there;*

(b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the "domicile" of both spouses.

- **If none of these criteria is met in France, subsidiary criteria of jurisdiction: article 14 or 15 of the French civil code.**
-  **However in that case article 3(c) of the Maintenance regulation expressly prohibits that the court having jurisdiction over the divorce rule on maintenance.**

Article 4 of the Maintenance Regulation (choice of court)

a) a court or the courts of a Member State in which one of the parties is habitually resident;

(b) a court or the courts of a Member State of which one of the parties has the nationality;

(c) in the case of maintenance obligations between spouses or former spouses:

(i) the court which has jurisdiction to settle their dispute in matrimonial matters; or

(ii) a court or the courts of the Member State which was the Member State of the spouses' last common habitual residence for a period of at least one year.

➤ Possible to elect a specific court in advance for instance in a pre-nup.

➤  No choice of court possible for the divorce itself under Brussels II bis.

Conflict of law rules

Rules of conflicts of laws for maintenance obligations are to be found :

- in the **Hague protocol of 23 November 2011** *on the law applicable to maintenance obligations*; or
- in international conventions with third party countries to the Hague protocol : for instance the **Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations** towards countries which are parties to this Convention and not to the Protocol, eg. **Switzerland, Turkey, Japan**

Financial remedies available under French law



a) Spousal support

Aimed at maintaining the standard of living

Monthly payments

b) Compensatory allowance

Compensate up to a certain extent, the financial disparity that the breakdown of the marriage creates in the respective living conditions of the couple.

- **Principle**-lump sum capital
- When impossible several instalments within eight years;
- **Exception**-life maintenance
- **Otherwise agreed.**
- When monthly payments, spousal maintenance may be revised-downwards

Forum shopping



- French courts are seized *as soon as the petition for divorce is filed*
- In disputes involving France and **another EU Member State** (but for Denmark): imperative lis pendens (article 19 of the B II bis regulation and article 12 of the Maintenance Regulation).
- In disputes involving France and a **non EU Member State**: more flexibility in the situations of lis pendens
 - If French courts are first seized: they retain jurisdiction over the case.
 - If French courts are second seized: they may or may not retain jurisdiction over the case due to considerations of opportunity (links with France: location of assets, evidence, enforceability...)

Problems and solutions



1) Analysis of “Anglo saxon” laws as regimes of separation of assets

2) Timing

a) The judge rules on the divorce and its financial consequences at the same time.

- Slower proceedings
- What happens when decision rendered abroad on the divorce without a ruling on maintenance?
- Need for new French rules of civil procedure

b) In France, in contentious divorces, the judge rules on the amount of the “*prestation compensatoire*” before the liquidation of the matrimonial property regime occurs.

⇒ Problematic since the rights of each spouse in the liquidation impacts on the disparity and therefore should impact on the amount of the “*prestation compensatoire*”



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SOME THOUGHTS ABOUT MAINTENANCE CHALLENGES AND QUESTIONS

GLOBALISATION = MORE INTERNATIONAL CASES

- DIFFERENT NATIONALITIES
- DIFFERENT HABITUAL RESIDENCES (DOMICILES)
- NATIONAL LEGISLATIONS
- MORE AND MORE "INTERNATIONAL AGREEMENTS"

PROBLEMS - WHERE?

- WHAT LAW TO BE APPLIED?
- CAN A DECISION BE ENFORCED?
- **WHAT IS THE BEST CHOICE FOR MY CLIENT?**
(MY INCOME - MY LIABILITY)

QUESTIONS

- NATIONALITIES: - HOW MANY NATIONALITIES?
 - WHICH ONES RELEVANT?
 - WHEN?
- HABITUAL RESIDENCE: - OR DOMICILE?
 - WHERE?
 - ONE OR MORE?
- NATIONAL LEGISLATIONS: - CHANGES?
 - ONE IN THE COUNTRY?
 - ONE FOR EVERYBODY?
- "INTERNATIONAL AGREEMENTS": - WHICH ONE?
 - APPLICABLE *in casu*?

DIFFERENT NATIONAL APPROACHES

- MAINTENANCE WITH/WITHOUT DIVORCE
- *INTERIM* MAINTENANCE
- "URGENT" MAINTENANCE
- CODE OF LAW - CASE LAW - BOTH
- ONE FORMULA - MANY CRITERIA
- NO MAINTENANCE - MONTHLY PAYMENTS - LUMP SUM
- AS SUCH - ONLY WITH DIVISION OF ASSETS
- ONLY FOR SPOUSES - COHABITATION TOO

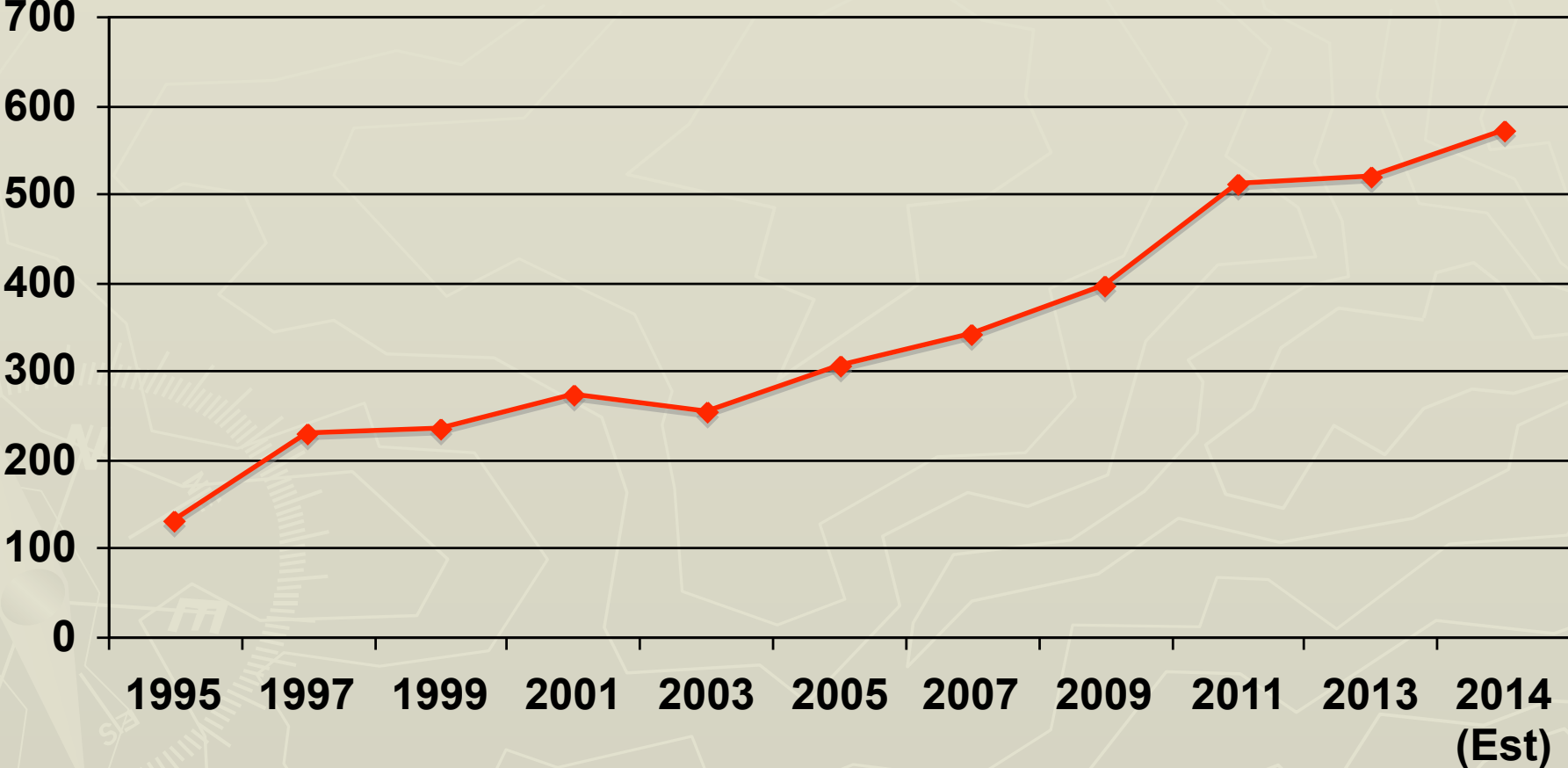
CHALLENGE

- MORE RISKS & OPTIONS
- NEW MARKETS
- RELIABLE INTERNATIONAL NETWORK NEEDED



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New Abduction Cases Reported to the Advice Line



Advice Line Statistics - 2013

	Cases	Children	2013 vs 2012
Abduction	520	708	+3%
<i>Hague</i>	334	438	
<i>Non-Hague</i>	186	270	
Prevention	428	587	+4%
<i>Hague</i>	177	244	
<i>Non-Hague</i>	251	343	
Permission to Remove	149	213	+15%
<i>Hague</i>	100	143	
<i>Non-Hague</i>	49	70	
Total New Cases	1,446	2,009	+5%
Advice Line Calls	11,551		+42%

2012 Abduction Cases

- A total of 506 Cases - 82% of all cases resolved
- 329 Abduction Cases to Hague States - 91.5% resolved
- 177 Abduction Cases to Non-Hague States - 65.5% resolved

Current Status of 2012 Cases

	Hague Cases	Non-Hague Cases
Return - Hague, Voluntary, Domestic	47%	45%
Amicable solution - no third party intervention	20%	11%
Full proceedings - non-return	8%	2%
Parents Reconciled	5%	5%
Mediated	5%	-
Ongoing	5%	23%

reunite Mediation Pilot Scheme

“In some of these cases the central issue for the “left behind” parent is, in fact, contact or visitation and not necessarily a wish for a permanent return. The ‘left behind’ parent justifiably sees the removal or retention of the children as an attempt to “cut them out” of the children’s lives.

An application under the Hague Convention for the pre-emptory return of the child appears to be the only option open to them and the only way to secure adequate contact rights. Both parents are often reluctant to commence any form of negotiation, for fear of being seen as abandoning their respective positions.”

Mediation

- Mediation takes place over a 2-day period - in person/telephone/Skype
- Matters considered may include:
 - Country of habitual residence
 - Parental responsibility
 - Contact between the child and non-resident parent
 - Travel arrangements for contact
 - Exchange of information regarding the child's education and well-being
- Mediation does not delay the court process
- **reunite** has mediated in more than 150 abduction cases - in 75% of these cases the parents are able to reach an agreement
- Unstructured mediation through the advice line

A role for mediation in cases of international parental child abduction?

- Mediation may be a way forward but is not the way forward
- Mediation is only appropriate in around 10% of abduction cases
- For mediation/amicable agreements to flourish, there has to be an effective legal framework
- The success of mediation is dependent upon the professionalism and expertise of the mediators
- The mediation service has to be able to demonstrate its independency from the court process

A role for mediation in cases of international parental child abduction?

- Governments need to demonstrate that they value the use of mediation and make funds available
- The mediated agreement needs to be legally binding and enforceable in both States



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Thank you

**The role of the Central Authorities (CA) and the mediation
in the context of child abduction with Europe**

- I. The present legal framework
- II. The tasks of the CA
- III. Mediation in HU, with special regard to the role of CA
- IV. Conclusions

I. The present legal framework

Hague Abduction Convention (HC):

- establishes a well-functioning mechanism for return proceedings
- active cooperation of the CA
- aim: prompt return
- restricted scope: *does not address all relevant issues* (custody, access) → procedural limits (Art. 16)

Brussels IIA Regulation:

- complements and reinforces the HC
- strict jurisdictional rules: *custody issues may be decided by the court of the MS of the child's habitual residence* – unless the child acquired new habitual residence there (rational: real link, prevents legalization of the unlawful situation)

Mediation

- difficulties: more debated questions need to be tackled → need for a *package agreement*: getting more – more more willingness to concessions
- mediation may cover all issues, but in order to gain legal force need to be approved by the court → jurisdiction: *procedural impediments* (Art. 10)
- without an approved mediation agreement the party making bigger concessions has no guarantees in his hands (transitional period)

Mediation Directive:

- lays down the basis of mediation in the EU – covers also family matters
- Conclusions of EU CONS (2010): called MS to pay special attention to child abduction matters → these matters *need special treatment* in respect of mediation

Guide to Good Practice (HCCH):

- useful tool for specialists, including CA as well

II. What are the tasks of the CA in relation to mediation?

HC, Brussels IIA Regulation:

- CA shall cooperate with each other – acting directly or through other bodies – and shall make efforts to facilitate amicable resolutions in these matters → the tasks of CA is to *actively promote* the use of mediation

Guide to Good Practice (HCCH):

- to *provide information* on the possibility of mediation, respectively on mediation services available in that MS
- to *try to convince* the abducting parent to bring back voluntarily the child

Within the international legal framework, the activity of the CA, its room of manoeuvre depends to a large extent on the national regulations.

Role of CA in general:

- assist parties in asserting their rights in another MS: legal advice, preparation of applications, transmission and processing of the requests - appoints an attorney for the applicant, keep informed the applicants on the outcomes
- help parties to reach an amicable resolutions
- location of the child, abducting parent
- provide legal advice to the courts, other authorities
- cooperate with each other and promote cooperation amongst the competent authorities of the MS
- seek solutions to the problems arisen in individual cases
- act free of charge: bear their own costs, translation of documents etc.

III. Mediation in HU, with special regard to the role of CA

- in general terms, the HU legal environment offers an appropriate ground for mediation: Act no LV of 2002 on mediation
- possibility: before the court procedure/parallel with the court procedure
- list of mediators specialized to family law matters

- difficulties, questions in relation to child abduction matters: lack of physical presence (videoconference, effectiveness?), language barriers (interpreter, costs?), financing of mediation (could be covered by the legal aid program?)

Role of HU CA:

- in the context of the Hague proceedings and at request the CA attempts to settle the dispute by way of reconciliation: enters into contact with the requested party and tries to convince him/her to bring back the child voluntarily – mainly by bringing up legal arguments
- in case the parties are willing to take part in mediation: prepared and organizes the mediation, provides legal advice to parties/mediators, if necessary can ensure the scene, technical equipment etc.
- takes part in projects aiming the promotion of mediation: EU Project: Budapest Conference on mediation in child abduction matters – June 23-24, 2014
- training programs, drafting of information materials concerning mediation
- looking for further solutions: integration of a mediation service within the CA etc.
- prevention: raising public awareness, publish information material on internet (how to take abroad the child lawfully?), trainings etc.

IV. Conclusions

The existing legal instruments ensure the possibility of mediation; *the basis for mediation in general is given.*

However, the present legal framework leave many questions open. In my opinion, at present the possibilities lying in the mediation are not explored sufficiently: *the legal framework need to be strengthened so as to encourage more strongly the conclusion of mediation agreements in these cases.* This could be realized by special tools of procedural nature, guarantees, inclusion of mediation in the legal aid program, further training, information materials for parents etc. *The revision of Brussels IIA Regulation will provide a good opportunity to consider the possibility of introducing specific provisions on mediation as well.*

The mediation procedures itself need to be developed as well so as to meet the requirement of child abduction matters.

In general: *need for change of attitude* in respect of family conflicts, more openness towards mediation among the general public and legal experts as well.

CA: are faced with abduction cases mainly after the event has happened and Hague proceedings cannot suffer delay, thus their possibilities are limited. *The role of CA within the context of mediation could also be reinforced if a clear, accessible and legally well-defined structure are at disposal.*

CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION AND TURKISH PERSPECTIVE

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Definition of Child Abduction

Child abduction is when a person takes or sends a child out of the country, they usually live in without the permission of those with parental responsibility or the permission of a court.

If a person has a residence order for a child they will not be acting unlawfully if the child is taken for a short period.



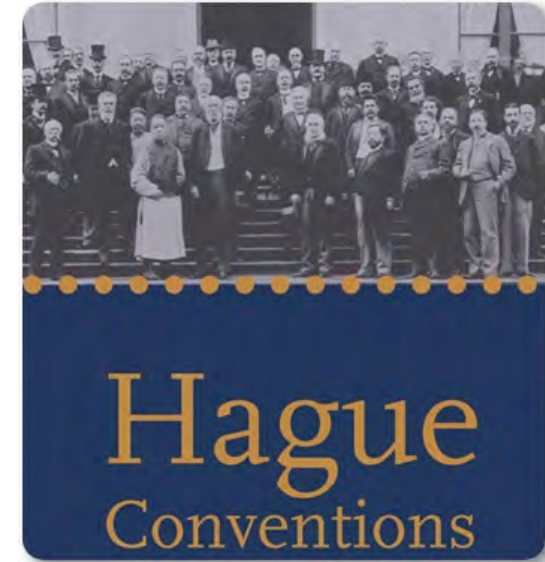
The Hague Convention & States

Integrity The Hague Convention on the Civil Aspects of International Child Abduction, 25 October 1980

Turkey is signed the Convention on 21.01.1998, the Convention entered into force as of 01.08.2000.

Key points are...

- ✓ Habitual Residence of the child,
- ✓ Timeframe,
- ✓ Preserving the status quo of custody,
- ✓ Consent,
- ✓ Applies only to children under 16,
- ✓ Not a vehicle for international child custody battles.

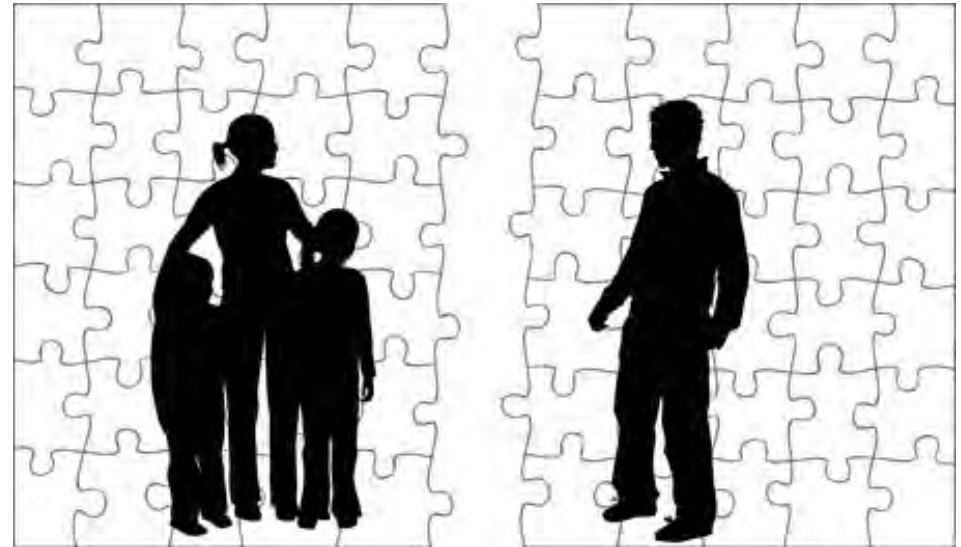


The Hague Convention Court Action

A court action brought under the Hague convention will only decide where the child will go.

The Convention does not give substantial rights to the court:

- The court cannot decide on the merits of the custody case.
- The court simply decided which country's court has jurisdiction to decide custody.



The Objects of the Hague Convention

- To secure the prompt return of children wrongfully removed to or retained in any Contracting State
- To ensure that rights of custody and of access effectively respected in other Contracting States.



Habitually Resident

- The Convention mandates the return of the child to the country where he was habitually resident
- Not defined in the convention as a technical term
- Should be broadly interpreted considering the particular cases.



Exceptions to Returning

The child may not be returned under the Hague Convention Article 13 if:

- The person caring for the child was not actually exercising custody rights at the time of removal or retention, or had consented
- There is a grave risk that the return of the child would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.



GUIDE TO TURKISH APPLICATION- STAGES

STAGE 1

- Preparation of the Parent.
- Preparation of the Local Public Prosecutor and Family Court Judge.
- Coordination of the Turkish Ministry of Justice Officers (Judges) and Applicant Country's Foreign Delegation in Turkey.

STAGE 2

- **International Case Law.**
- **Turkish Supreme Court Decisions.**
- **Regulations.**
- **Hague Convention Articles:**

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

*If the judicial or administrative authority concerned has not reached a decision within **six weeks** from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.*

Article 16

*After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained **shall not decide on the merits of rights of custody** until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.*

STAGE 3

- Turkish Code of Execution.
- Turkish Criminal Code.
- Turkish Procedural Law Principles.
- Family Court Procedural Principles.

Consent

There is a grave risk that the return of the child would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. Consent is required from all custodial guardians for long term residence.

- If Consent cannot be gained a court order will suffice.
- Consent for removing the child for a short time or holiday does not mean consent for removal

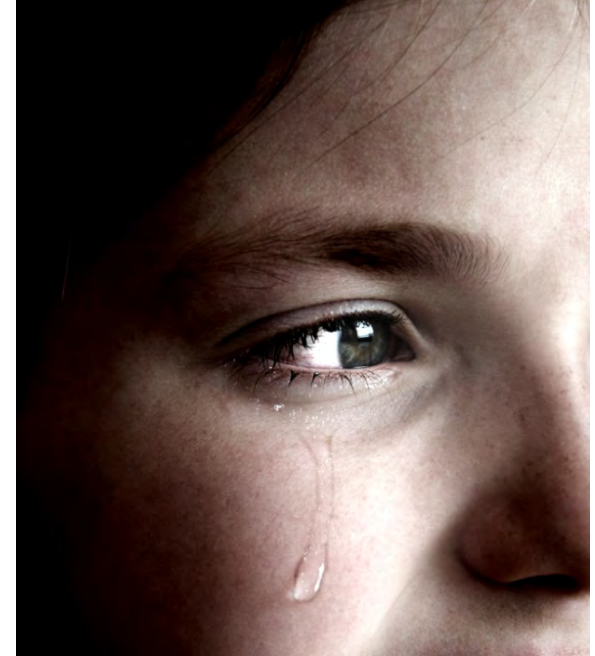


Physical or Physiological Danger

Danger under the Convention means danger of violence, harassment, war, epidemic diseases. The minority age of the child does not constitute danger under the Convention

The objection to returning the child to Israel because the danger of war is rejected since daily life is secure in Israel.

The fact the child is having physiological treatment cannot be an excuse not to return the child since the treatment can continue in the Country returned



Time Frame

CASE	TURKISH MINISTRY OF JUSTICE REGISTRATION DATE	DECISION DATE	SUPREME COURT DECISION DATE	2ND SUPREME COURT EXAMINATION DECISION DATE (CORRECTION OF A DECISION)	TOTAL DAYS
YILMAZ VS KAYA (SWEDEN) 13/41	25.05.2012	17.06.2013	26.09.2013	03.02.2014	613
DEAN VS KIZIL (CANADA) 12/163	16.09.2011	05.06.2013	05.11.2013	05.03.2014	899
CATALOGLU VS TUTUMAN (CANADA) 08/267	05.06.2007	28.07.2008	20.02.2009	03.07.2009	615
				AVERAGE	709

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Current thinking in European Family Law developments

Budapest, 16 June 2014

F.R. PAULINO PEREIRA

Aspects to be presented

- I. Divorce, legal separation and annulment (Brussels IIa and Rome III)
- II. Parental responsibility
- III. Maintenance obligation
- IV. Matrimonial property regimes and registered partnerships
- v. e-Justice
- VI. e-Book

I. Divorce, legal separation and annulment

1. Scope
2. Jurisdiction
3. Recognition
4. Applicable law

1. Scope

- a) territorial scope
- b) material scope

2. Jurisdiction

- a) general jurisdiction
- b) specific rules on jurisdiction
- c) exclusive nature of jurisdiction

3. Recognition

- a) general rule
- b) grounds of non recognition

4. Applicable law (Rome III)

- a) scope
- b) universal application
- c) uniform rules
 - choice of law
 - absence of a choice of law
- d) exceptions

II. Parental responsibility (Brussels IIa, the 1996 Hague Convention and 1980 Hague Convention)

1. Scope
2. Jurisdiction
3. Recognition
4. Applicable law

1. Scope

- a) territorial scope
- b) material scope

2. Jurisdiction

- a) general jurisdiction
- b) specific rules on jurisdiction
- c) child abduction (1980 Hague Convention)
- d) return of the child (1980 Hague Convention)
- e) exclusive nature of jurisdiction

3. Recognition and enforcement

- a) general rule
- b) grounds of non recognition
- c) differences in applicable law

4. Applicable law (1996 Hague Convention)

III. Maintenance obligation (Regulation 4/2009 and 2007 Hague Convention)

1. Scope
2. Jurisdiction
3. Recognition and enforcement
4. Applicable law
5. 2007 Hague Convention

1. Scope

- a) territorial scope
- b) material scope

2. Jurisdiction

- a) general jurisdiction
- b) choice of Court
- c) specific rules on jurisdiction
- d) exclusive nature of jurisdiction

3. Recognition and enforcement

- (a) Member State not bound by the 2007 Hague Protocol
- (b) Member State bound by the 2007 Hague Protocol

3 (a). Member State not bound by the 2007 Hague Protocol

- a) general rule
- b) grounds of non recognition

3 (b). Member State bound by the 2007 Hague Protocol

- a) abolition of exequatur
- b) review

4. Applicable law (2007 Hague Protocol)

5. The 2007 Hague Convention

IV. Matrimonial property regimes and registered partnerships

V. e-Justice

- a) the Portal
- b) the Strategy and Action plan

a) The e-Justice Portal



- bg** Европейски портал за електронно правосъдие
- cs** Portál evropské e-Justice
- da** Europæisk e-Justice Portal
- de** Europäisches Justizportal
- et** Euroopa e-õiguskeskkonna portaal
- el** Δικτυακή πύλη της ευρωπαϊκής ηλεκτρονικής δικαιοσύνης
- en** European e-Justice Portal
- es** Portal Europeo de e-Justicia
- fr** Portail e-Justice européen
- it** Portale europeo della giustizia elettronica
- lv** Eiropas e-tiesiskuma portāls
- lt** Europos e. teisingumo portalas
- hu** Európai igazságügyi portál
- mt** Portal Ewropew e-Justice
- nl** Europees e-justitieportaal
- pl** Europejski portal e-sprawiedliwość
- pt** Portal da justiça electrónica europeia
- ro** Portalul european e-justiție
- sk** Portál európskej elektronickej justície
- sl** Evropski portal e-pravosodje
- fi** Euroopan e-Justice-portaali
- sv** Europeisk e-juridikportal




- Law
- Case law
- Judicial systems
- Legal professions and justice networks
- Going to court
- Legal aid
- Mediation
- Successions
- Wills
- Victims of crime
- Rights of defendants in criminal proceedings
- Tools for courts and practitioners
- Registers
- Find a...
- Glossaries and terminology
- Judicial Training
- Funding
- Dynamic forms

The European e-Justice Portal is conceived as a future electronic one-stop-shop in the area of justice.

As a first step it strives to make your life easier by providing information on justice systems and improving access to justice throughout the EU, in 22 languages.

Log in to the portal to personalise your content



Login

[First registration](#) | [Login information](#)



Citizens

- ▶ Going to court
- ▶ Rights of victims of...
- ▶ Family matters
- ▶ Legal aid
- ▶ Legal aid forms
- ▶ Costs of proceedings
- ▶ Find a...



Businesses

- ▶ Business registers
- ▶ Insolvency registers
- ▶ European Payment Ord...
- ▶ Land registers
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Legal professions and justice networks



Through this section, you can access information on the various legal professions and their networks dealing with justice matters.

Please consult relevant subpages to find more information on:



- [legal professions](#),
- the [European Judicial Network in civil and commercial matters](#),
- the [European Judicial Network in criminal matters](#),
- [Eurojust](#),
- [European Law Institute \(ELI\)](#)
- the [Justice Forum](#).

In addition to this information, you may be interested in the following websites on European networks and expert organisations:

- the [European Network of Councils for the Judiciary \(ENCJ\)](#),
- the [European Legal Interpreters and Translators Association \(EULITA\)](#) represents court interpreters and legal translators in EU Member States.

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Find a lawyer

If you are confronted with a legal dispute or require legal advice, you may need to turn to a lawyer. This section provides information on how to find a lawyer within the European Union, the European Economic Area, and countries that are candidates for accession to the European Union.

A **lawyer** is a legal practitioner who provides:

- support in legal proceedings;
- representation in legal proceedings;
- advice as to prosecution or defence of lawsuits,
- advice as to legal rights and obligations in other matters.

The role of the lawyer varies significantly across legal jurisdictions and Member States. To read more about lawyers, please see the section on [legal professions](#).

If you are looking for a lawyer in a European country, the [Council of Bars and Law Societies of Europe](#) (CCBE) offers via its website, a European lawyers' database. The CCBE, through its members, represents around 1 million European lawyers.

The CCBE [search tool](#) for a European lawyer will help you to find a lawyer in one of the Member States of the CCBE, including the Member States of the European Union, and other countries: a total of 42 States in all. As the results of the search you will be provided with the following information:

- the full contact details of the Bar Association(s) at national level, including their website,
- a link to the page of their website containing their lawyers' directory.

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Mediation

Disputes can be solved without going to court. If you are in dispute with a firm, a tradesperson, your employer, even a member of your family, in your own country or abroad and are unable to settle the dispute by yourself, you can go to court, of course, but you can also consider alternative dispute resolution ("ADR") techniques such as mediation.



Mediation can be defined as a structured process whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a neutral and qualified third party ("mediator"). This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.

The mediator helps the parties to come to an agreement without actually formally expressing an opinion on one or other possible solution to the dispute.

During mediation, the parties are invited to open or resume a dialogue and avoid confrontation. They themselves choose the technique for settling the dispute and play a particularly active role in endeavouring to find the solution that suits them best. In other cases, especially in consumer disputes, it is the mediator who finds the solution and puts it to the parties. Resolution of the dispute depends on the parties reaching agreement; if the parties fail to reach agreement, the mediator does not impose a solution.

Mediation is considered faster and, most often, cheaper than ordinary court proceedings. It avoids the confrontation between the parties which is inherent in judicial proceedings and allows the parties to maintain their professional or personal relationship beyond the dispute. Mediation also enables the parties to find creative solutions to their dispute which they could not obtain in court.

More detailed information is to be found in [EU overview](#) and [Member States'](#) pages.

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Going to court

Not surprisingly, going to court may give rise to many questions. This section aims to fill the information gap which might be experienced when confronted with judicial proceedings.



You can find here answers to the following questions:

- Which court in which Member State shall I turn to?
- How do I bring a case to court?
- Which law will be applied?
- What are the costs?
- Can I apply for legal aid?

This section also provides detailed information on [monetary claims](#), [family matters](#) and [enforcement of judgements](#).

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In which Member State?

Imagine a situation in which you are in dispute with a company, a professional person, your employer, a member of your family or somebody else in your own country or abroad. Once the efforts at settling the dispute amicably have failed, you may want to bring a court action against the other party. But how do you know which court in which Member State to turn to?

If your case has a **national dimension**, you just have to define the competent court or, in other words, a court that has jurisdiction. If you use the wrong court or if there is a dispute over the question of jurisdiction you run the risk of a considerable delay in the proceedings or even of a dismissal of your case because of a lack of jurisdiction.

All the Member States have different rules of jurisdiction that determine the distribution of competence among the courts on their territory.

If your court case has an **international or crossborder dimension**, you have to define both: which Member State and which court are competent (has jurisdiction). The answer to these questions might have significant consequences. If you have to litigate abroad you may have to face additional inconveniences and costs, for example because of the necessity to translate your statements, to hire a lawyer in the Member State where proceedings take place or to travel to court hearings.

To help you identify the competent court for a specific case, visit the search tool at the [European Judicial Atlas in civil matters](#). It contains the names and addresses of all courts in the Member States competent in civil and commercial matters (courts of first instance, court of appeals, etc.) and geographical areas in which they have jurisdiction.

See also other sections on:

- [jurisdiction in civil and commercial matters](#);
- [jurisdiction in criminal matters](#);

Having defined the competent Member State and court you can bring a case to court – to this end see the [How to proceed?](#) section.

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Jurisdiction



It may happen that both parties to a dispute initiate court proceedings on the same matter in different Member States.



For example, after a traffic accident between two persons living in Germany and France, respectively, it could be that they sue one another for damages in the Member State of their own domicile.

European Union (EU) law determines which courts of which Member States should hear the case, to avoid conflicting decisions. The general rule is that a person should be sued in the State where s/he is domiciled. Special rules exist to protect groups such as consumers, workers and insured persons.

In family law, EU rules exist to determine where a dispute relating to divorce, parental responsibility or maintenance should be heard.

To obtain detailed information please select one of the flags listed on the right hand side.

When you have determined the right Member State on the basis of the jurisdiction rules, then you need to find the competent court in practice.

The [European Judicial Atlas in civil matters](#) contains the names and addresses of all courts in the Member States competent in civil and commercial matters (courts of first instance, court of appeals, etc.) and geographical areas in which they have jurisdiction.

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Finding competent courts



1 FINDING COMPETENT COURTS



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Municipality:



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UK/English law financial aspects on breakdown of marriage and cohabitation

Jurisdictional requirements, financial remedies available, forum shopping – problems and solutions

Divorce jurisdiction

1. Brussels II grounds
2. Residual jurisdiction – domicile of either party; unusual English law concept of domicile

Forum shopping

3. First to file wins under Brussels II, if all necessary steps taken to effect service
4. Forum non conveniens in non-Brussels II cases
 - 4.1 Ability to stay or block a divorce
 - 4.2 Anti-suit or *Hemain* injunction to restrain other party from proceeding with foreign divorce

Financial remedies – asset division and maintenance

5. No matrimonial property regime equivalent to civil law countries
6. Asset division and spouse maintenance dealt with together
7. Marital assets usually divided equally, but the sharing principle applies to non-marital assets if the needs of one of the parties requires it
8. In larger asset cases, ongoing spouse maintenance capitalised
9. In lower asset cases, indefinite duration spouse maintenance more common

Cohabitation

10. No rights on cohabitation relationship breakdown
11. Complex property law rights to claim a share in a property owned by the other cohabitant
12. Limited claims by unmarried mother for capital for housing on trust, reverting to the father when the child is 21

Enforcement of financial orders within Europe – practicalities and requirements

UK/English perspective

1. Maintenance Regulation – the disadvantage of the UK not opting into the Hague Protocol on Applicable Law
 - 1.1 Incoming foreign orders automatically enforceable
 - 1.2 Outgoing UK orders still subject to exequatur procedure
2. Orders for payment of capital to satisfy needs may be enforceable under the Maintenance Regulation?
3. Otherwise no automatic recognition and enforcement?
 - 3.1 Need to 'sue' on the debt under common law
 - 3.2 Comity likely to apply
4. Enforcement orders against real property, shares, cash
5. Retention of passport and committal to prison, if in breach of an existing order, in very extreme cases.

13 June 2014

Mark Harper

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VASIL KISIL & PARTNERS

ATTORNEYS & COUNSELLORS AT LAW

Enforcement of financial
orders in Europe /
Ukrainian perspective

June 16, 2014



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Financial orders in Ukraine

Types of financial orders in Ukraine:

- child support
- (ex-)spouse and (ex-)civil partner support
- parents support
- division of property.

Child Support

- Who should pay? A parent living separately
- Who should be paid? A parent living with a child
- How much should be paid? $\frac{1}{4}$ of income for one child, $\frac{1}{3}$ of income for two children, and $\frac{1}{2}$ of income for three and more children periodically or a Fixed payment periodically or a Lump Sum or Transfer of real estate ownership title
- How long should be paid? Until 18 years of age or 23 years of age, if a child continues studying
- Financial instruments? Contract or Court decision

(Ex-)spouse and (Ex-)civil partner Support

- Who should pay? Spouse, Ex-spouse, Civil Partner or Ex-Civil Partner (not depending on a divorce or separation)
- Who should be paid? Spouse, Ex-spouse, Civil Partner or Ex-Civil Partner. Namely, pensioners, disabled persons, pregnant women, a spouse living with a under 3 years old child or with a disabled child
- How much should be paid? A part of income or a Fixed payment periodically or a Lump sum
- Financial instruments? Contract or Court decision

Parents support

Parents support

- Who should pay? Adult children
- Who should be paid? Old or Disabled parents
- How much should be paid? A part of income or a Fixed payment periodically
- Financial instruments? Contract or Court decision
- When should not be paid? Parents were deprived of custody rights and neglected their parental duties

Division of property

- Who should be eligible? Spouse, Ex-spouse, Civil Partner or Ex-Civil Partner (not depending on a divorce, but may be depending on a separation)
- Any time limitations? No time limitations until the spouses are divorced, once divorced – three years
- Amount of Shares? Shares are equal
- Financial instruments? Contract or Court decision
- Types? To divide in kind, if divisible property or To transfer indivisible property to one of the spouses and award a compensation instead to the other one or To divide business income or business investment only (business is not divisible, except for shares in opened joint stock companies)

Enforcement of foreign court financial orders

Foreign court financial orders may be enforced in Ukraine:

- if there is an international agreement
- according to the reciprocity principle. The reciprocity principle is presumed until and unless the contrary is proved (the USA, Germany, Portugal and Great Britain).

Maintenance Conventions in Ukraine

- Ukraine ratified the 1956 New York Convention and the 1973 Hague Convention in 2006
- Over 300 Ukrainians benefited from the New York Convention (Germany, Italy, Portugal, Israel, Spain, Ireland, Poland, France, Switzerland, Check Republic were receiving and sending financial orders under this Convention. Poland, Spain, Portugal and Check Republic recognized and enforced the Ukrainian financial orders under the Convention.
- Ukraine ratified the 2007 Hague Convention in 2013 (no implementation cases so far)

Enforcement of financial orders in Europe Ukrainian perspective

- Financial orders in Ukraine, enforcement of local court financial orders
- Enforcement of foreign court financial orders

Types of financial orders in Ukraine:

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Relocation in England and Wales

**IAML- Budapest
15th to 17th June 2014**

Carolina Marín Pedreño

Solicitor and Spanish *Abogada*

Dawson Cornwell Solicitors, London

Dawson Cornwell the family law firm

Leave to Remove: What is it?

Relocation disputes arise when parents have separated and one of them proposes to take their child/children to live in a new geographic location, and the other parent objects

Can either be domestic or international

Either by consent or by application to the Court



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Leave to Remove: Who does it?

- No constant statistics on the amount of applications for leave to remove.
- In 2012: **384** children were the subject of orders allowing them to be removed from the UK
- **93%** of all applicants are mothers
 - 80% providing majority of the child's day-to-day care
 - 15% of cases have a 65:35 split
 - 5% have a shared care

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Leave to Remove: Who does it?

- Europe – 40% of cases
- North America – 25% of cases
- Australasia – 20% of cases



- In Europe:
 - 3rd – Poland
 - 2nd – France
 - 1st – Spain



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Leave to Remove: Types of Cases

Example 1

"I want to go home!"

Example 2

"I've got a new job!"

- or -

"My new man's got a new job!"

Example 3

"The weather's just so much better there!"

Example 4

(all other reasons)

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Leave to Remove: Procedure

Before Court

Mediation

At Court

Issue C100 Application or C2 if already in the context of proceedings

Comes before a County Court judge – unless a non-Hague 1980 country, which must go to a High Court judge



At Court

First Appointment/FHDRA

Directions

Final Hearing

Judgment

Implementation

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Leave to Remove: Principles

- (a) The welfare of the child is always paramount.
- (b) There is no presumption created...in favour of the applicant parent.
- (c) The reasonable proposals of the parent with a residence order wishing to live abroad carry great weight.
- (d) Consequently the proposals have to be scrutinised ...the court needs to be satisfied that there is a genuine motivation for the move and not the intention to bring contact between the child and the other parent to an end.



- (e) The opportunity for continuing contact between the child and the parent left behind is very significant.
- (f) The effect upon the child of the denial of contact with the other parent and in some cases his family is very important.
- (g) The effect upon the applicant parent and the new family of the child of a refusal of leave is very important.

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Leave to Remove: Principles

In reaching a decision:

(a) Pose the question: is the mother's application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life. Then ask is the mother's application realistic, by which I mean founded on practical proposals both well researched and investigated? If the application fails either of these tests refusal will inevitably follow.



- (b) If however the application passes these tests then there must be a careful appraisal of the father's opposition: is it motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive? What would be the extent of the detriment to him and his future relationship with the child were the application granted? To what extent would that be offset by extension of the child's relationships with the maternal family and homeland?
- (c) What would be the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic proposal?
- (d) The outcome of the second and third appraisals must then be brought into an overriding review of the child's welfare as the paramount consideration, directed by the statutory checklist insofar as appropriate.

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Leave to Remove:

What helps?

- Strong connection with proposed destination
- Language/culture/family ties
- Proximity and ease of contact
- Strong and secure proposals
- Child's familiarity with the proposed destination
- Less/no direct contact with left-behind parent



What hurts?

- Child has overnight contact with the left-behind parent
- Move to Australia or New Zealand
- Ill-thought out plans or impracticalities
- Child's objections/negative Cafcass assessment
- History of abduction – **BIG NO!**



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Leave to Remove: a word on shared care

Pre-1989:

Custody vs Access

1989-2014:

Residence vs Contact

Now:

Child Arrangement Orders



Children and Families
Act 2014

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Leave to Remove: a word on shared care

Child Arrangement Orders

s 12: "contact" and "residence" are gone. Instead, there will be a single order, a "child arrangements order", which deals with the arrangements as to "with whom a child is to live, spend time or otherwise have contact" and "when a child is to live, spend time or otherwise have contact with any person".

Change in terminology – but reflecting an emphasis on not categorising care

Within Leave to Remove proceedings: should be seen within context of day-to-day care matters, rather than from any Court order



Children and Families
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Leave to Remove: Case Study

Sophia

- 4 years old. Lived in London all her life
- Joint Spanish-British national. Mother is Spanish; Father is British. Never married
- Shared care; couple are cohabiting
- Mother has comfortable job here – more of a “going home” case
- Regular trips to Spain throughout S’s life
- Speaks Spanish and English
- Both accept each other as capable parents; no abduction risk; healthy contact.
- Mother exhibiting emotional fragility



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Applying the law:

Is the mother’s application genuine?

Is the mother’s application realistic?

Careful appraisal of the father’s opposition, and whether this is going to be of detriment to the future relationship with the father.

Impact on the refusal on the mother.

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- Mother exhibiting emotional fragility

Applying the law:

The ascertainable wishes and feelings of the child.

Sophia’s needs.

The likely effect on Sophia.

Harm/risk of harm.

Capability of her needs being met.

The Article 8 of the mother, the father, of Sophia, and as well as the rights of both extended families.

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Thank for your attention

Carolina

RELOCATION OF CHILDREN

Budapest 15.-17.6.2014

Hilkka Salmenkylä

Finland

hilkka.salmenkyla@salmenkyla.fi

In Finland we do not have any law especially about relocation. We mainly deal with the normal custody etc. rules. I think it is very seldom a question of returning home. More often a Finnish parent wants to move abroad for some reason.

The main law is the Child Custody and Right of Access Act. All matters should be decided on the best interests of the child. The act is not very specific, so it is often a question of court practice. Most parents, even after divorce, have joint custody. That is what the courts order even when none of the parents wants it, when both parents are suitable or, as it may be, both unsuitable. A court can issue instructions on the duties, rights and obligations of custodians, when necessary, and decide on the distribution of responsibilities.

The objectives of custody are to ensure the well-being and the balanced development of a child according to his individual needs and wishes, and to ensure close and affectionate relationships for a child in particular with his parents.

If the parents are not living together, the child shall reside with one of them, the so called "near parent". If disputed, the court orders the child to live with that parent who can better guarantee the child's relations to the other parent.

The other parent then is the "far parent". He has right of access to ensure the child the right to maintain contact and meet with the parent with whom it no longer resides.

Even if the time is split 50-50, which happens often, the child resides with one parent and meets the other. According to our law everything should be decided and done keeping the best interest of the child foremost in mind and actually according to our law the child has all the rights, the parents none or very few.

Then, relocation. The custodian of a child has a right to make decisions on major matters, like the place of residence of a child. If the near parent wants to relocate and the other parent says no, then you have to go to court (or have mediation). There are two ways: you ask for either sole custody or the right to decide on the place of residence alone without the consent of the other parent. Custody stays joint in other respects. We usually ask the right to decide on residence, passport and other such documents.

The practical problem is, of course, very often money. And the real problem for the child is losing contact to the other parent as the parents do not have the money to travel very often.

But the far parent then, to succeed in objecting the relocation, should actually ask for a change in residence, so the child would reside with him. We do not have any published cases from the Supreme Court, so all of this tells only my thoughts in this matter. Lower court decisions are hard to find as relocation is not a term to list the cases. All cases are listed as custody cases.

Only to object to relocating, if there is a good and sensible reason to relocate, should not be enough, depending perhaps on how actively the far parent has used his visitation rights. Then actually he should concentrate on changing the visitation order to be more practical for the time to come.

A question of money... In a domestic situation the far parent normally pays for visitation travelling. But in an international situation the costs are often split between the parents.

During trial, the court can appoint somebody else to act as custodian till the trial decision is made, so to keep the child in Finland and guarantee the trial.

If the near parent has sole custody, she can of course relocate, even if the other parent has visitation rights. The far parent, if he has heard of the intention to relocate, can go to court and try to change the custody order.

What kind of criteria to consider in these cases? The child's best interest is the most important factor and who knows what it is...in every case different? There is often a new partner, new child, sort of a new family. If the other parent has met with the child a lot, like every other week – the time is split 50-50 - it is more difficult. If the far parent and the child have not met very often, the similar system is perhaps easy in the future too.

Some things to consider:

- Is the plan to move realistic?
- What is the reason? – I had a client to be who wanted to move to New Zealand to keep the father from seeing the child. I didn't take her.
- A new job – why?
- A new partner, just met.

To sum these up:

Relation between the child and the far parent / non-custodian: has the latter exercised his right of access and to what extent?

Relation between the child and the near parent: has the child spent most of his life mostly with the near parent?

What is the reason for moving: if the near parent has a new family, possibly with "new" kids, is it easier to get permission to relocate the child compared with the situation there is just a new partner met abroad without any history of living together?

Is there a new job: why is it necessary to change jobs, has the parent applied for jobs only on the other side of the globe, or is it a question of career opportunity in a big global firm like Nokia or similar?

The affects to the right of access: to how near or far abroad is the near parent moving. Is it possible to maintain relations between the child and the far parent so that the child can keep on the contact with that parent?

Child Custody and Right of Access Act (361/1983)

NB: Unofficial translation
© Ministry of Justice, Finland

Extract

Section 1 *Child custody*

- (1) The objectives of custody are to ensure the well-being and the balanced development of a child according to his individual needs and wishes, and to ensure for a child close and affectionate relationships in particular with his parents.
- (2) A child shall be ensured good care and upbringing as well as the supervision and protection appropriate for his age and stage of development. A child should be brought up in a secure and stimulating environment and receive an education that corresponds to his inclinations and wishes.
- (3) A child shall be brought up with understanding, security and gentleness. He shall not be subdued, corporally punished or otherwise humiliated. The growth of a child towards independence, responsibility and adulthood shall be supported and encouraged.

Section 2 *Right of access*

- (1) The objective of the right of access is to ensure a child the right to maintain contact and meet with the parent with whom he no longer resides.
- (2) The parents of a child shall, in mutual understanding and keeping the best interests of the child foremost in mind, strive to the fulfillment of the purpose of the right of access in accordance with the principles provided in section 1.

Section 4 *Duties of a custodian*

- (1) The custodian of a child shall ensure his well-being and development, as provided for in section 1. For this purpose the custodian shall have the authority to make decisions on the care, upbringing and place of residence of a child and on other matters relating to the person of the child.
- (2) Before making a decision on a matter relating to the person of a child, a custodian shall discuss the matter with him, if this is possible in view of the age and stage of development of the child and the nature of the matter. When making the decision the custodian shall give due consideration to the opinion and wishes of the child.
- (3) The custodian shall represent a child in matters relating to his person, unless otherwise provided by law.

Section 5 *Joint exercise of custody*

- (1) The custodians of a child shall be jointly responsible for the duties inherent to custody and make joint decisions relating to the child, unless otherwise provided or ordered.
- (2) If one of the custodians cannot take part in the making of a decision relating to a child due to absence, illness or another reason and if a delay in the decision would be detrimental, the consent of the custodian shall not be necessary. However, in a matter that is of great significance for the future of the child, the custodians may only make a joint decision, unless it is clear that the best interests of the child do not require the same.

Section 7 *Agreement on custody and right of access*

The parents may agree

- (1) that they have joint custody of the child;
- (2) that the child is to reside with one of them, if they are not living together;
- (3) that one of them has sole custody of the child;
- (4) that the child has the right to maintain contact and meet with the parent with whom he no longer resides, in the manner agreed upon by the parents.

Section 8 *Confirmation of the agreement*

- (1) An agreement on child custody and right of access shall be made in writing and submitted for confirmation to the social welfare board in the municipality where the child has the place of his residence. When considering whether to approve the agreement, the social welfare board shall take the best interests and the wishes of the child into account, as provided for in sections 10 and 11. If neither of the parents has custody of the child, the agreement shall not be confirmed.
- (2) An agreement confirmed by the social welfare board shall be valid and enforceable similarly to a final court decision.

Section 9 *Court decision on child custody and right of access*

- (1) A court may order
 - (1) that the parents shall have joint custody of a child;
 - (2) that a child shall reside with one of the parents, if they are not living together;
 - (3) that one parent shall have sole custody of a child;
 - (4) that one or more persons who have consented thereto shall have custody of a child jointly with or instead of the parents;

- (5) that a child shall have the right to maintain contact and meet with the parent with whom he no longer resides.
- (2) If the parents, or one of them, are custodians of a child, a court may give the custody of the child to one or more persons instead of the parents in accordance with paragraph (1)(4), only if there are substantial reasons for the same for the sake of the child.
- (3) Where necessary, a court may issue instructions on the duties, rights and obligations of custodians and, if the child has several custodians, decide on the distribution of responsibilities between them. When making an order on the right of access, the court shall issue more detailed instructions on the conditions of visiting.
- (4) When making a decision in a case relating to child custody and right of access, the court shall take the best interests and the wishes of the child into account, as provided for in sections 10 and 11.

Section 10 *Decision in a matter relating to custody and right of access*

- (1) A matter relating to child custody and right of access shall be decided keeping the interests of the child foremost in mind. For this purpose, special attention shall be paid to the manner in which custody and right of access may best be realised in the future.
- (2) A matter relating to the giving of custody to both parents or one of them, or relating to the right of access, shall be decided in the manner agreed upon by the parents, if the parents or one of them have custody of the child and there is no reason to believe that this would be contrary to the best interests of the child.

Section 11 *Ascertainment of the wishes and views of the child*

- (1) In a matter relating to child custody and right of access the wishes and views of the child himself shall be ascertained in so far as this is possible in view of the age and stage of development of the child, if the parents cannot reach an agreement on the matter, if the child is in the care of someone else than the custodian or if this is otherwise to be deemed appropriate with regard to the best interests of the child.
- (2) The views of the child shall be ascertained tactfully, taking his stage of development into account, and in a manner not detrimental to the relationships between the child and his parents.

STUDIO LEGALE TIRINI GRASSI

AVV. MANUELA TIRINI PATROCINANTE IN CASSAZIONE

AVV. CLAUDIA GRASSI

AVV. FRANCESCO BRANDOLI

DOTT. IDA GURZILLO

RELOCATION OF THE CHILD

First of all, the meaning of the word should be clarified. "Child relocation" is the expression that indicates the transfer of a minor from one place to another (and potentially from one country to another), under the custody of the custodial parent. In this respect, it is a topic that concerns parental responsibility. Since this is a condition that due to its nature alters, sometimes also drastically, the life style of the minor and structure of surrounding relations, it requires a judicial step, in the form of amendments to the terms set forth for visitation rights, etc...

Therefore, let's analyse the relocation of the child, keeping in consideration the verdicts of Italian trial judges on the matter.

First of all, it must be underscored that Italian courts began dealing with international and community laws only recently, also in view of the growing number of mixed couples. As you are all aware of, Italy is unfortunately renowned for trial times (fairly long) and numerous cases that are brought to the attention of the Legal Authority. This

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is also due to the fact that in Italy, arbitration is not successful. The same applies to collaborative law, in which however I still have lots of faith.

Italy, and I state this with profound sadness since it is my beloved country, provides unfortunately limited information to those who decide to give birth to children with parents of different nationality (even if relocation cases may take place also in couples with the same citizenship but with one of the parties having to move abroad, for example for work reasons).

This means that it often occurs that a minor is illicitly taken and brought somewhere else, rather than requesting his relocation to the legal Authority.

We can state that in general, Italian judges, also regardless of the rights exercised by parents as free individuals and as such, boasting the freedom to travel as they please, make decisions always and anyhow based on the child's wellbeing.

The crucial point consists therefore in establishing the parameters on which to base the decisions, so that the latter are in line with the interests of the minor.

First of all, the moment in which a parent brings forward the motion to the Legal Authority to move abroad, is certainly within a petition for separation (by fact or law). Therefore, this petition is related to the custody terms of the minor (and consequent visitation right), and also to child support paid by the parent who does not live with the child.

In Italy, Law no. 54/2006 came in effect in 2006, better known as law on shared custody. Therefore, since 2006, custody shared by both parents is the rule, and sole

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custody forms are not admitted neither ratified by law (unless shared custody is at the child's detriment). Shared custody is not impeded by distance in geographical terms, therefore, if paradoxically, one of the parents requests to be transferred to Australia and the court grants said request, custody would be definitely shared.

It is easy to understand how the law on shared custody has actually changed the current juridical system, especially with regards to the relocation of the child.

It is not possible to state with accuracy if Italian courts are inclined or not to grant the relocation of the minor abroad. This depends first of all on the Court who issues the decree (unfortunately in Italy, the issued decrees are often different according to the Court who enacts them and it often occurs that if a petition is for example rejected in Northern Italy, is instead granted in the South or vice versa) and, obviously, on the reasons for which relocation is requested.

First of all, the age of the minor is considered, as well as the relation with the parent who would suffer the relocation and the terms according to which said parent could exercise the visitation right towards the minor.

I dealt with a case in Milan, that was closed recently. Croatian mother, Italian father. Separation.

The mother, an architect, was requesting to be able to return to Split to her family and where her wealthy parents would have been able to offer her a job in an extremely important project concerning the construction of different shopping centres. Moreover, she would have owned her own house, worked in a professional office and she would

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have been closer to her parents and sister who would have helped her to take care of the minor.

The father, my client, objected. The couple was married for over 15 years and had always lived in Italy, first in Rome and then in Milan. Any life plan together was discussed to take place here. The child was only two years old and the relation between father and son was not yet consolidated. Not only, but trips from and to Split and from and to Milan could have not been frequent due to the scarce connections. Therefore the relation between father-son could have been prejudiced.

The Judge immediately issued an order for shared custody of the minor, with the child living with the mother in Milan, and also prohibited the expatriation of the minor without the previous authorisation of the father, but at the same time, he planned a series of options for the mother to go to Split with the child to see her parents.

Afterwards, the Judge appointed an expert (psychiatrist) in order to evaluate the situation from a technical point of view, the parental ability of both parents and best location for the child.

The expert concluded by asserting that it would have not been appropriate for the child to leave Italy, at least for a few years. The relation with the father was being consolidated and it would have been compromised in case the minor had left. In addition to the fact that the mother had already began a new relationship with a Croatian citizen (interviewed by the expert).

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If the mother will present the petition for relocation in a few years, it will be certainly granted. Meanwhile, the father-son relation will be consolidated and excellent (also in view of the fact that the father would see the son almost everyday) and I assume that there will be no reasons for the Court to deny the consent to the transfer.

Vice versa, I followed the case in which the mother, a client of mine, Belgian citizen, brought forward a petition to the Juvenile Court (back then the competent Juvenile Court for de facto couple, now the ordinary Court) to return to Belgium. Her daughters were also very young, 3 and 4 years old. The investigations were not carried out by a court-appointed expert, but by the Social Services that, differently from the previous case, did not take in consideration the father-daughters relation that still had to be consolidated, but only the mother-daughters relationship. And the lady left.

The Juvenile Court issued a decree according to which custody was granted to both parents, and specifying the detailed visitation rights of the father as well as child support.

It must be specified that the Italian judges do not worry if the decree is acknowledged by the Country where relocation is requested. The Italian judges base their considerations on the fact that they shall protect the minor until he is on the Italian territory, as they boast jurisdiction on it. And they issue decrees that aim at protecting the minor in this respect. What happens after the relocation in terms of safeguarding the child's best interest will be the task of the legal authority that will boast jurisdiction on

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the child. The above takes place based on the reciprocal trust of Member States, especially in Europe.

Last consideration: listening to the minor. In Italy, despite the New York Convention of 1989 and Strasbourg Convention of 1996 (ratified by Italy in 2006), there has always been a certain hostility in listening to the minor in first person. The Juvenile judge usually hears children over 12 years of age. Younger children are often heard through mediators, like for example with the assistance of childhood psychologists or neuropsychiatrists. In these cases of very young children, instead of hearing them, the relation with the parents is observed, while in children between 7 and 12 years old, dialogues are held and drawings executed in order to understand the child's psychological state.

In recent months, the Italian Civil Code was amended and the duty to hear the minor was introduced. In reality, I believe that as in the past, the minor will not be asked directly where and with whom he would like to live. This would attribute a responsibility of remarkable entity to the minor, and would force him to face the so called "loyalty conflict". We cannot force the child TO CHOOSE. Choosing means to be fully aware of the choice to be made and above all, taking responsibility for it.

Therefore, I can state beyond any doubts, that the child's will to stay with one parent rather than the other, in a place or another, must be taken in consideration in children of 12/14 years of age and over, and the child's opinion should be more focused on the actual relation with both parents, rather than a possible relocation in itself. This also avoids the risk of brainwashing done by parents lacking sensitivity, towards the child

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they want to relocate or not. I believe that the minor, despite being the key person in proceedings that concern himself in first person, shall be protected as much as possible, therefore he should be left out from choices that would be complex to make even for an adult. Italian Judges currently share the same opinion. It is also true that Italy is adapting its domestic laws to European ones (including listening to the minor), but it is also true that regardless, we are still very far from said amendments.

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Social work perspectives on international family dispute

**Children and Families Across Borders
(CFAB)**

16 June, 2014

Angela Wilson, Social Worker & Research Assistant

Formerly known as International Social Service of the UK (ISS UK)

Aims of Presentation

- Overview of CFAB's work

Focus on:

- Placing Children Overseas
- Cross Border child protection
- Potential Joint Court Pilot in UK

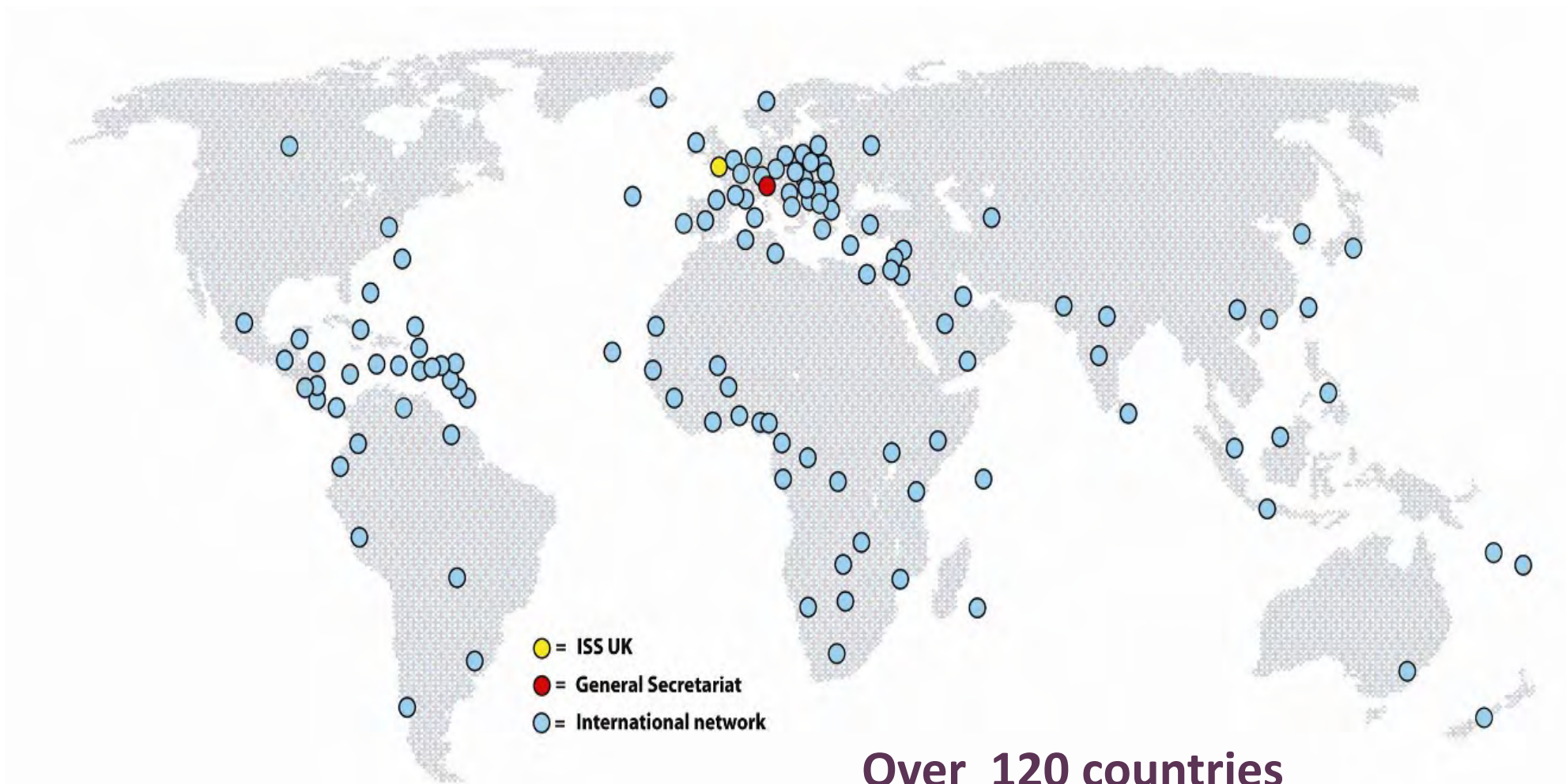
What is International Social Work?

There are debates over the scope and definition of the term 'international social work'.

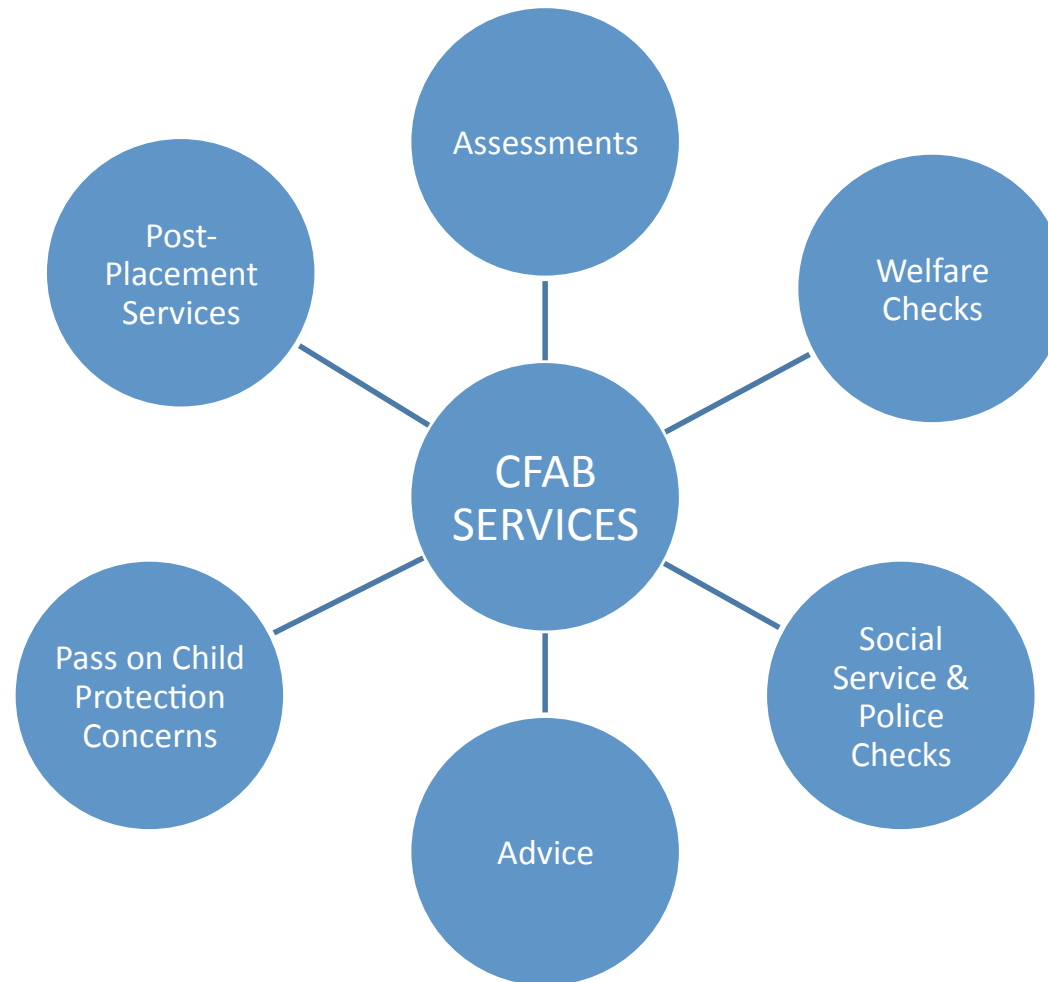
In general, International Social Work can be defined as any aspect of the social profession that involves more than one country. It may include:

- Any case that crosses international borders
- Acknowledging the impact of globalisation on children and families
- Practice informed by international knowledge
- Examples include, placing a child overseas, raising child protection alerts overseas or international child trafficking.

Where we work



What We Can Do?



CFAB and International Social Work: Client Groups and Areas of Work

- Child Trafficking
- Unaccompanied Minors
- Children in Care
- Informal care arrangements of children from abroad
- Children at risk of harm
- Children of Foreign Prisoners
- Asylum seekers, Adoption and Vulnerable Adults
- Child Abduction
- International private law

Section One: Placing Children Overseas

- In 2011, three out of every five children born in London had at least one parent from overseas.
- Children are affected by international marriage disputes
- An increasing number of children looked after ('children in care') have relatives overseas.
- All children have ***right to family life***, including relatives overseas.
- Vital that social workers gather information about family overseas (including contact details) early on in involvement with family
- The longer that a child is away from family members in other countries, the weaker their ties will be
- Vital that a best interest assessment is completed at the earliest point
- Legal context : Brussels II and Hague 1996 Convention on on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children

Issues in Placing overseas

- How to make best interest determination?
- Evidence gathering
- Differing social work assessment practice worldwide.
- Travelling social workers
- Increased use of video link/Skype for witnesses.
- Immigration and travel documentation
- Contact
- Transition planning
- Being honest with child
- Follow-up visits
- Solicitors and representation

Practical Placement Issues

- Visa issues – US v. Australian model.
- Availability of UK entry visas to relatives in some cases.
- Mirroring orders and gaining orders once child placed.
- Follow up visits.
- CFAB works with LA and overseas agency to ensure all areas required are covered.
- Vital to refer to CFAB early in care proceedings especially with 26 week rule.

CFAB and International kinship care

Inter-country collaboration for:

- Home study and assessment;
- Transition plan,
- Post-placement support

Other services needed:

- Transferring residence/custody orders,
- Immigration

Section Two: Child Protection

- Duty to pass on information to competent body overseas if family flee or move in a planned way.
- Vital to gather information from overseas.
- CFAB can obtain information from overseas and pass on child protection concerns to overseas authorities.

Examples of Cross Border Child Protection Issues:

- Child abuse linked to a belief in spirit possession
- Staged fake births or miracle babies
- Trafficking
- FGM
- UASC

Child Protection (2)

- The number referral to CFAB of families fleeing social services has increased 600% in 2013 (20 cases 2012 119 cases 2013)
- Most common destinations are Poland, Lithuania & Spain

Good Practice

- Ensure you have contact details of family overseas
- If child on plan of protection agree that child's passport held by LA
- Remember child may have UK and/or other passport
- Discuss issue with family so they are aware you are monitoring

Section Three: Joint Court Proposal

- Issue is what is most effective Best Interests Determination process?
- Joint Court will bring together family and immigration court
- Child will be subject to this once identified
- Within 6 months BID made and child will return to family/alternate care or stay in UK with Indefinite Leave to Remain

Joint Court Proposal 2

Issues are:

- Governments nervous of effect on immigration numbers
- Availability of robust assessments in some countries
- Cannot be used if ongoing conflict in country of origin

Opportunities

- Will resolve immigration issue early so child's future can be planned with confidence
- Will resolve issues of legal parental responsibility early

Good Practice Guidance: International Social Work Practice

- Engage families early and obtain information about previous addresses, background, family members in other countries
- Assessments overseas: work in cooperation with countries
 - Health and Safety Issues
 - Understanding of cultural and societal values and norms
- Transition and placement plans
 - Involve overseas organisations
 - Work realistically, not theoretically
- Legal advice about validity of orders in other countries
- Immigration advice for the young person

CFAB's FREE Advice Line



Call 020 7735 8941
Monday to Friday
10.00 a.m. - 4.00 p.m.

www.cfab.org.uk



 **iaml** International Academy of Matrimonial Lawyers

Family Law in Hungary

IAML mini-conference 16-17.06.2014
Budapest



Károlyi és Némethi Ügyvédi Iroda

Ways of settling a marital dispute in Hungary

- Judicial competencies
 - The marital bond $\hat{=}$
 - Custody matters (settlement of exercising parental custody) $\hat{=}$
 - Marital assets issues €\$£
- Public administration forums competencies
 - Essential matters regarding the child $\alpha + \Omega$
 - Enforcing judicial decisions §
 - Child protection competencies \oplus

Family law courts in Hungary

- Court system consists of three levels:
 - Local/district courts (in total 111 of them in Hungary) as courts of first instance
 - County courts (20 in total) as courts of second instance (appeal forum)
 - Supreme Court (only one of its kind)①
- Court system aligns with public administration territorial areas
 - 111 micro-regions (or walks), and 20 counties in total
 - 5-6 local courts per county are available for lawseekers

Administrative districts (111 walks, 20 counties)



Guardianship offices as forums of the public administration

- 111 local offices deal with child protection, enforcement and as forum of first instance in competencies delegated by law
- Aligns with the local and county courts network (111 local territorial jurisdictions, 20 county level jurisdictions)
- Part of the governmental executive power branch
- Just like courts, county-level (2nd instance) decisions are effective immediately

Challenging public administrative decisions

- Even if second instance public administration forums (County Guardianship office) decisions are effective immediately, those can be overruled by the
- Courts of administration (20 in total in Hungary) as extraordinary courts
- Only question is the lawfulness of the decision, no factual evidence is examined during these proceedings 📄🔗☑
- No reversal of Guardianship Office decisions, only upholding or expunging 👍/👎

New Civil Code and within that: Family Law Book

- Entered into effect 15th of March this year
- Consists of six Books one of which is the Family Law Book
- Integrating marital law into the civil code (unlike the former, separate regulation)
- Narrowing judicial and widening public administration competencies (removing over encumbrance from the courts)
- Elements of judicial practise has been brought into the actual text of law

The most common judicial competencies

- Dissolution of the marital bond
- Parental custody and its related matters
- Marital asset issues
- The court has no right to rule on joint-custody (co-parenting) unless the parties want it so
- The parent living separately shall not exercise parental rights apart from the most essential ones

Lawmaking of the Supreme Court

- Not even the new family law book can regulate all possible matters
- Supreme Court through its case-law making activity, issues decisions, statements.
- E.g. a decision according to which the bilingual – dual-citizen – children and the foreign parent can not be infringed in exercising parental rights and that includes traveling with the child outside Hungary (BH2004.184.)
- Also issues resolutions on „unification of law application” the Hungarian courts shall always align with

Public administration (Guardianship office) competency branches

- All essential matters regarding the child:
 - name or name change, New location for the child, Nationality and citizenship, schooling $\alpha + \Omega$
 - The guardianship office has sole jurisdiction over these matters; growing amount of cases
- As the enforcement forum:
 - Most common issues are: child allowance has not been paid 😊
 - Enforcing visitation rights obstructed by the primary guardian parent 🙅
- Child protection matters

Wrongful removal from Hungary →

- The „recipe” remained similar: removal is not permanent, return within a year is „guaranteed” by a properly drafted invitation letter or labour agreement 📄
- Hungarian Supreme Court statement No.284 (states that in cases containing a removal duration shorter than 1 yr the court will not rule) → caused uncertainties ✂
- 1/2014 Supreme Court resolution: among many others, statement No.284 has been deemed no longer applicable as the matter is regulated by the new family law book ✌
- Removal according to the new regulation is available by mutual parental consent 😊

Thank you for your patience



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