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from ever-increasing protection,[74] a legal and institutional framework is created that allows to take into account, already at the regulatory stage, the countervailing interests of those who need (or wish) to get access to protected achievements under favourable conditions.

This is not the place to speculate about that or other possible scenarios. What remains to be said is that, given the continuous growth of global trade, technical progress and borderless communication, the development of uniform law will remain on the agenda of IP law, be it in the form of international agreements, regional harmonisation measures, or as soft law instruments such as recommendations or concerted practices. Let me therefore join, at the end of this presentation, in the claim forming the underlying rationale of this workshop, namely that it is an urgent and important task to develop and constantly improve the tools that help us to get access to, and to find a better understanding of, the complex body of rules and practice resulting from the creation and implementation of uniform law.

[74] This concerns in particular certain branches of industry, like (e.g.) the pharmaceutical and film industries. Quite frequently (and basically understandably), nation states tend to identify themselves with the interests of such industries, typically representing a strong sector of domestic economy. This sometimes neglects the fact that this may hurt opposing public interests also in their own country.

The state of development of uniform law in the field of European and international family and child law

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I. Introduction

For long it has been said that family law is a field of law that does not lend itself to international unification because it is based on social and cultural norms and values which are too different from one State to another.[1] This may have been true because "unification" does indeed go very far: unified law is the same in all States to which it applies. "Harmonized" rules, on the other hand, are only compatible with each other, but they are still different. Unification can necessarily only be achieved through "hard law", i.e. conventions, or uniform laws and model laws, where they have to be implemented in an identical way. Harmonization, on the other hand, may also be achieved through "soft law": model laws and uniform laws that provide for a certain latitude of implementation, and recommendations on how to apply certain hard law rules.[2]

As a result of the existing differences in substantive national family and child laws, private international law is of considerable importance. First of all, it decides which State has jurisdiction over a subject matter. Secondly, it determines which law is to be applied. Bearing in mind that the choice of the forum and its rules for determining the applicable law can lead to the application of different substantive laws and hence a different outcome of the proceedings, it thirdly has to be ensured that the resulting judgment is nevertheless recognized and enforced in other States concerned. And indeed, while substantive laws have remained different from each other, considerable unification of the rules of private international law has been achieved in Europe so far – both by way of European Community law and of international treaties.

In Europe, for a long time two intergovernmental organizations have been the only fora for elaborating uniform rules in the field of family law: the Hague Conference on Private International Law, which exists since 1893, and the Council of Europe, established 1949. The mandate of the Hague Conference is "to work on the progressive unification of the rules of private international law"[3], the aim of the Council of Europe is "to achieve a greater unity between its members"[4]. Within the framework of the Hague Conference, the following family law conventions were adopted: the Convention of 12 June 1902 relating to the Settlement of the Conflict of the Laws concerning Marriage[5], the Convention of 12 June 1902 relating to the Settlement of the Conflict of Laws as regards Divorce and Separation[6], the Convention of 12 June 1902 relating to the Settlement of Guardianship of Minors[7], the Convention of 17 July 1905 relating to Conflicts of Laws with regard to the Effects of Marriage on the Rights and Duties of the Spouses in their Personal Relationship and with Regard to their Estates[8], the Convention of 5 October 1961 concerning the Powers of Authorities and

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1 *M. Jänterä-Jareborg*, in: *K. Boele-Woelki* (ed.), Perspectives for the Unification and Harmonisation of Family Law in Europe, 2003, p. 195 (195 *et seq.*).

2 See further on unification and harmonisation in the area of private law *A. Schulz*, in: *R. A. Brand* (ed.), Private Law, Private International Law, & Judicial Cooperation in the EU-US Relationship, 2005, p. 237 (241); *M. Jänterä-Jareborg* (*supra* note 1), p. 195 *et seq*.

3 Article 1 of the Statute of the Hague Conference on Private International Law, available at www.hcch.net under "Conventions"– "Statute of the Hague Conference".

4 Article 1 of the Statute of the Council of Europe, available at http://conventions.coe.int/ under "Full list" as No 1.

5 For the Contracting States see www.hcch.net – "Conventions" – "Old Conventions".

6 For the Contracting States see www.hcch.net – "Conventions" – "Old Conventions".

7 For the Contracting States see www.hcch.net – "Conventions" – "Old Conventions".

8 For the Contracting States see www.hcch.net – "Conventions" – "Old Conventions".

the Law Applicable in respect of the Protection of Minors[9], the Convention of 15 October 1965 on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions[10], the Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations[11], the Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages[12], the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction[13], the Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption[14] and the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children[15].

The Council of Europe has so far adopted five Conventions in the field of family law: the European Convention on the Adoption of Children, opened for signature on 24 April 1967[16], the European Convention on the Legal Status of Children born out of Wedlock, opened for signature on 15 October 1975[17], the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, opened for signature on 20 May 1980[18], the European Convention on the Exercise of Children's Rights, opened for signature on 25 January 1996[19] and the Convention on Contact concerning Children, opened for signature on 15 May 2003[20].

Another player in the field that deserves mentioning is the International Commission on Civil Status (Commission Internationale de l'État Civil – CIEC) in Strasbourg/France. It has adopted a number of conventions concerning the civil status of persons that are closely related to the family law issues discussed in this paper.[21]

Since the focus of the Conference held in Florence in October 2007 was primarily to examine the state of play with regard to the EC Member States, or a wider Europe, this paper will focus on European Community law and international treaties applicable in Europe in the areas of family and child law, in particular on custody and contact issues concerning children. Financial aspects such as maintenance – both for former spouses and for children – will not be discussed in detail. The same is true for guardianship, curatorship and adoption.

II. The Major Instruments in a General Perspective

1. The Hague Convention of 5 October 1961 concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Minors (Protection of Minors Convention)

For several decades, the Protection of Minors Convention was the only convention of any practical relevance in this area in Europe. Its 14 Contracting States all follow the Roman and/or Germanic legal tradition; there are no Contracting States with a Common law, Scandinavian or Islamic legal background. The Convention contains rules on jurisdiction, applicable law and recognition with regard to protective measures concerning children, including custody and contact orders. However, the Convention is not without problems. There are two rules attributing jurisdiction to possibly different States.[22] Under Article 1, the State of habitual residence of the child has jurisdiction to take protective measures, and under Article 4, the authorities of the State of which the child is a national equally have jurisdiction to take such measures – but only if they consider that the interests of the child so require and after having informed the authorities of the State of the child's habitual residence. However, the Convention contains no sanctions where the information duties are not complied with,[23] and practice has shown that in most cases such information is not provided.

Moreover, and creating a more serious problem, the relationship between these two rules of jurisdiction is unclear, and there are different views in Contracting States.[24] Some, such as Germany, see the jurisdiction of the State of nationality as subsidiary. In their view, jurisdiction under Article 4 only exists where the interests of the child specifically require an intervention by the authorities of the State of nationality, and not just any protective intervention, *e.g.* because that State is able to take a particular measure that the State of habitual residence would not be able to take. Other States, *e.g.* France,

9 It currently has 14 Contracting States. For the text and status of this Convention (listed as No 10) and all other Hague Conventions discussed in this paper, see www.hcch.net under "Conventions" – "All Conventions" and the respective Convention number.

10 This Convention (No 13) was denounced by its only Contracting States Austria, Switzerland and the United Kingdom in 2003 and 2004, respectively, because now there is a more recent Hague convention on adoption.

11 18 Contracting States. See *supra* note 9 (No 18).

12 3 Contracting States. See *supra* note 9 (No 26).

13 80 Contracting States. See *supra* note 9 (No 28).

14 75 Contracting States. See *supra* note 9 (No 33).

15 15 Contracting States. See *supra* note 9 (No 34).

16 18 Contracting States. For the text and status of this Convention (listed as No 58) and all other Conventions adopted by the Council of Europe and discussed in this paper, see http://conventions.coe.int/ under "Full list" and the respective Convention number.

17 21 Contracting States. See *supra* note 16 (No 85).

18 35 Contracting States. See *supra* note 16 (No 105).

19 12 Contracting States. See *supra* note 16 (No 160).

20 5 Contracting States. See *supra* note 16 (No 192).

21 See the list of conventions at www.ciec1.org/ListeConventions.htm.

22 According to the Convention, each of the competent authorities applies its own law.

23 In German doctrine it is sometimes suggested that there is no obligation under Article 7 of the Convention to recognize a foreign decision made in violation of the information duties under the Convention because, allegedly, this would best match the purposes of the Convention (*Staudinger/Kropholler*, Vorbem. zu Art. 19 EGBGB, B. Minderjährigenschutzabkommen, 2003, No 384). *K. Siehr* (Münchener Kommentar, BGB, IPR, 3rd ed. 1998, Art. 19 EGBGB Annex. I, No 42, 267) however underlines that recognition could be refused, but one should proceed with some generosity and not let the recognition of an otherwise reasonable measure fail because of this formality.

24 See, for a description of both positions and further references, Münchener Kommentar/*Siehr* (*supra* note 23), Art. 19 EGBGB Annex. I, No 200; *Staudinger/Kropholler* (*supra* note 23), Vorbem. zu Art. 19 EGBGB, No 368 *et seq.*; No 5 of the Explanatory Report by *Paul Lagarde* on the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (Child Protection Convention) (hereinafter Lagarde-Report) in: Hague Conference on Private International Law, Proceedings of the Eighteenth Session, Tome II, 1998, p. 534 (539 *et seq.*), and on the website of the Hague Conference under www.hcch.net under "Conventions" – "All Conventions" – "No 34" – "HCCH Publications".

Italy and others, consider the two bases of jurisdiction to be on an equal footing and are of the view that they may be used cumulatively without any further condition. This is supported by the fact that measures taken by the State of nationality trump those taken by the State of habitual residence (Article 4(4)) but it bears the risk of parallel proceedings, and there is no rule in the Convention to deal with that situation. So in connection with the breakdown of a binational marriage or other relationship it was rather common in the past (when sole custody of one parent after divorce was the most frequent solution) that opposing orders as to the custody of the child were given in the State of habitual residence of the child and in the State of (one) nationality of the child who often had double nationality derived from both parents.

Under Article 7, measures taken by the competent authorities under the Convention are recognized in all other Contracting States. However, if these measures involve acts of enforcement in a State other than that in which they have been taken, their recognition and enforcement is governed either by the domestic law of the country in which enforcement is sought, or by the relevant international conventions. In other words, the scope of the Convention is limited to recognition and excludes enforcement, but where enforcement is required, recognition is also excluded from the Convention.

To sum up: The 1961 Convention was an important first step[25] towards procedural unification but it contains parallel bases of jurisdiction, no explicit rule on their relationship and neither rules on *lis alibi pendens* in different Contracting States nor on irreconcilable judgments. Its silence on enforcement is a further deficit which had a negative impact on its operation.[26]

2. The 1980 European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (European Custody Convention)

For enforcement, the 1961 Protection of Minors Convention refers, *inter alia*, to existing international conventions. The European Custody Convention is one such convention on recognition and enforcement. Unlike the 1961 Hague Convention, it does not contain any direct rules on jurisdiction but only deals with recognition and enforcement. So the two instruments supplement each other.

The initial aim at the beginning of the negotiations had been to prepare a convention on recognition and enforcement of custody and contact orders. Later it was decided to include a special rule on child abductions which can also[27] be revoked by enforcing a custody order.[28] The added value as compared to the 1961 Hague Protection of Minors Convention lies in Article 7 of the European Custody Convention. This Article states that a decision relating to custody given in a Contracting State shall be recognized and, where it is enforceable in the State of origin, made enforceable in every other Contracting State. This rule is, however, not without exceptions. The relevant provisions can be found in Articles 8 to 12 of the Convention, and they are far from easy to apply. Concerning recognition of custody decisions[29], a distinction is made between

- Recognition of decisions relating to custody following an improper removal from a State the nationality of which the child and parents had as their sole nationality and where the child had his or her habitual residence at the time of the institution of proceedings in that State or, if earlier, at the time of the improper removal, if the request for the restoration of custody was made to a Central Authority within six months from the date of the improper removal (Article 8),

- Cases of improper removal where there was no common sole nationality of all participants or the habitual residence of the child had not been in the State from which he or she was removed, and the application was filed within six month following an improper removal (Article 9), and

- Recognition of other decisions relating to custody (i.e. not related to improper removals) (Article 10).

The number of grounds to refuse recognition increases from one group to another. Article 10(1), which provides exceptions to the obligation to recognize the foreign decision and declare it enforceable under Article 7 for cases not related to an improper removal, contains the longest list. It includes a public policy clause specifically relating to family law, the incompatibility with the welfare of the child due to a change of circumstances including the passage of time, the connection of the child with the State addressed by nationality or habitual residence in the absence of such connection with the State of origin of the measure, the habitual residence of the child in the State addressed if it is a national of both States, and the incompatibility of the decision with a decision given in the State addressed or enforceable there after having been made in a third State, pursuant to proceedings begun before the submission of the request for recognition or enforcement, if the refusal is in accordance with the welfare of the child.

Under Article 17, any Contracting State can extend one or more of the grounds listed in Article 10 to cases covered by Articles 8 and 9 – including after an improper removal. This has happened to a large extent.[30] In cases falling under Article 8, refusal of recognition would not be possible at all without such extension. Article 9 only contains two grounds for re-

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[25] In the meantime, the 1961 Protection of Minors Convention and the 1980 European Custody Convention have largely been superseded by the Brussels II a-Regulation as far as relations between EU Member States are concerned (see *infra* under IV.).

[26] For criticism concerning the 1961 Convention, see, *e.g.*, *S. Boelck*, Reformüberlegungen zum Haager Minderjährigenschutzabkommen von 1961, 1994; and the Lagarde-Report (*supra* note 24), No 4 *et seq*.

[27] In addition to the procedure under the 1980 Hague Child Abduction Convention (see *infra* under II. 3.).

[28] See the Explanatory Report on the Custody Convention, available at http://conventions.coe.int/Treaty/en/Reports/Html/105.htm, No 1 *et seq*., in particular No 6.

[29] In addition, there are provisions governing the recognition of contact orders. Under Article 11(1), decisions on rights of access shall be recognized and enforced subject to the same conditions as other decisions relating to custody. For the problems in relation to this provision, see *infra* under II. 6.

[30] See for an introductory overview *Staudinger/Pirrung*, Vorbem. zu Art. 19 EGBGB, E. Europäisches Sorgerechtsübereinkommen, 1994, No 815, 626 as well as the up-to-date presentation on the website of the Council of Europe at http://conventions.coe.int under "Full list" for Convention No 105.

fusal relating to default judgments in cases covered by this Article (violation of the defendant's right to be heard and an indirect control of jurisdiction if jurisdiction of the court of origin was not based on the habitual residence of the child or his or her parents). Finally, recognition can also be refused if the decision is irreconcilable with a decision given in the State addressed.

Here again, we are faced with partial unification. Partial insofar as the unification only extends to recognition and the declaration of enforceability, and even more partial because of the large number of reservations extending the grounds for refusal of recognition or enforcement. Thus, even if the European Custody Convention is seen in conjunction with the 1961 Protection of Minors Convention, unification of private international law including international civil procedure (i.e. the rules on jurisdiction, recognition and enforcement) and conflict of laws remained rather limited in Europe until the end of the 20th century.

3. The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (Hague Child Abduction Convention)

Strictly speaking, the Hague Child Abduction Convention has nothing to do with unification of substantive or procedural law, nor is it a convention on the conflict of laws. It is a sort of legal assistance convention that neither contains rules on jurisdiction nor on recognition and enforcement of custody or contact orders. Its only aim is to restore the factual *status quo ante* after a child has been brought from his or her State of habitual residence to another country without all holders of rights of custody having agreed to this. In such a case, the courts of the State where the child has been wrongfully removed or retained have to order the return of the child to the State of habitual residence forthwith. This is based on the assumption that the courts in the latter State are closest to the factual situation of the child and therefore best placed to take decisions concerning the child (including custody or contact orders and decisions with regard to relocation) which reflect the best interests of the child and are likely to stand for some time.[31] More recent international instruments echo this idea in their rules on direct jurisdiction.[32]

Such return order is not a custody order (Article 19) and neither affects the legal custody situation in the State where the order was made nor in the State of habitual residence of the child. Under the Convention, each Contracting State has to designate a Central Authority (Article 6),[33] and the Convention provides for co-operation of Central and other authorities with a view to immediately returning abducted children to their State of habitual residence. Once the child has been returned, the proceedings are terminated and the return order does not continue to produce effect in any of the States concerned.

The child must have been habitually resident in a Contracting State and must have been wrongfully removed to or retained in another Contracting State (Articles 1, 4). The removal or retention is wrongful where it is in breach of rights of custody attributed to a person or body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention and these rights of custody were actually exercised at that time (Article 3). The rights of custody can arise from a decision of a court or authority as well as by operation of law.[34]

The Convention provides enormous procedural simplifications for the applicant who can turn to the Central Authority in his own State, file a return application, and in many Contracting States the Central Authority will cause the necessary translations to be made.[35] The services of the Central Authority are free of charge (Article 26(1)).

The Central Authority transmits the application to its counterpart in the State where the child is supposed to be. Depending on the implementing legislation enacted in the State concerned, the Central Authority of that State either files a return application on behalf of the foreign applicant with the court or assists the applicant in finding a legal representative. In

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31 See already No 19 of the Explanatory Report on the Convention by *Elisa Pérez-Vera* (hereinafter: Pérez-Vera-Report) in: Hague Conference on Private International Law, Proceedings of the Fourteenth Session, Tome III, 1982, p. 426, and on the website of the Hague Conference under www.hcch.net under "Conventions" – "All Conventions" – "No 28" – "HCCH Publications".

32 This is true for the 1996 Hague Child Protection Convention (see its Article 5 and in further detail *infra* under II. 4.), and also for the Brussels II a-Regulation (*infra* under II. 5., see Article 8 of the Regulation). Likewise, similar to the Child Abduction Convention, the 2003 Council of Europe Convention on Contact concerning Children does not contain any direct rules on jurisdiction but indirectly supports and strengthens the jurisdiction of the State of habitual residence of the child; see No 62 of the Explanatory Report on the Contact Convention. The Convention and its Explanatory Report in English and French can be found at http://conventions.coe.int/ under "Full list" as No 192.

33 See the list at www.hcch.net under "Conventions" – "All Conventions" – "No 28" – "Authorities".

34 A mere right of access is not sufficient under Articles 3 and 5 of the Convention to justify a return application. See, *e.g.*, *Seroka v. Bellah*, Outer House of the Court of Session (Scotland), 26 January 1994 (INCADAT No 72); *Director-General of the Department of Community Services v. M.S.*, Family Court of Australia at Sydney, 15 October 1998 (INCADAT No 217); Re V.-B. (Abduction: Custody Rights), Court of Appeal (England), 17 March 1999 (INCADAT No 261); *W.P.P. v. S.R.W.*, Supreme Court of Ireland, 14 April 2000 (INCADAT No 271). (The decisions were cited from the publicly available database of the Hague Conference on child abduction cases at www.incadat.com. Entering the INCADAT number mentioned here into the "Advanced search" will lead to the decisions cited).

The decision of the European Court of Human Rights of 14 September 1999 in the case of *Balbontin v. the United Kingdom* (Application No 39067/97, available at www.echr.coe.int/echr under "Case law" – "HUDOC") has shown that this distinction made by the 1980 Convention, based on differences resulting from national law, is compatible with the European Convention on Human Rights of 4 November 1950; on this decision, see *A. Schulz*, Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 2001, p. 91. The New Zealand Court of Appeal, on the other hand, decided on 4 December 1994 in *Gross v. Boda* that there was no reason to distinguish this sharply between rights of custody and rights of access when applying the 1980 Hague Convention (INCADAT No 66 – see *supra* note 34). In addition, it has to be recalled that in Common law jurisdictions, often the mere right of contact of one parent is combined with a prohibition upon the other parent to remove the child from the jurisdiction – either by operation of law or following a court order. A removal even by the parent having sole custody would in such a case be wrongful in terms of the Hague Convention. In order to lawfully remove the child, the parent needs to seek the consent of the other parent or its replacement by the competent court through a so-called relocation order.

35 According to Article 24 of the Convention, the application has to be submitted in, or accompanied by, a translation into the official language of the requested State.

France, *e.g.*,[36] the return application of the foreign applicant is presented in court by the public prosecutor who, however, is not a legal representative of the applicant and therefore not bound by the applicant's instructions.

As far as territorial jurisdiction or venue is concerned, several Contracting States have concentrated jurisdiction for Hague return cases on a limited number of courts. In the United Kingdom, the High Court in London has exclusive jurisdiction for England and Wales. Germany has reduced the number of first instance courts from about 620 to 24 in 1999[37] and then further to 22. Austria and France have followed the German example,[38] attributing jurisdiction to one court of first instance in every district of an appellate court. This has increased specialization and expertise of both judges and practicing lawyers and considerably reduced the length of Hague return proceedings.[39]

Article 12 is the key provision for the return of the child. It states that return has to be ordered forthwith where the child has been wrongfully removed or retained in terms of Article 3 and less than one year has elapsed from the date of the wrongful removal or retention until the commencement of proceedings before the judicial or administrative authority designated to decide on the return application in the Contracting State where the child is present. If more than one year has elapsed, return may still be ordered unless it is demonstrated that the child is now settled in its new environment.

Article 13 is the second key provision of the Convention. It contains grounds allowing to exceptionally refuse the return of the child. Acquiescence to the removal or retention, the non-exercise of the rights of custody at the time of the removal or retention, a grave risk of physical or psychological harm or an otherwise intolerable situation for the child caused by the return, and the objection of a child of sufficient age and maturity to the return are among the few grounds admitted.[40] The exceptions have to be construed narrowly.[41] In particular with regard to hearing the child concerned, law and practice of the Contracting States are very different. The Convention leaves this to national law, as do Article 12 of the UN Convention on the Rights of the Child[42] of 20 November 1989 and the European Convention on the Exercise of Children's Rights[43] of 25 January 1996. Practice in Contracting States varies from almost regularly hearing the child via hearing the child in particular cases to regularly deciding on the basis of the files without hearing the child.[44] And even where children are being heard, there are enormous differences in whether the judge in person hears the child, or whether the hearing is indirect, i.e. conducted by a social worker or other expert who then reports to the court.

With regard to the risk of harm for the child it has to be recalled that return does not necessarily imply the separation from the abducting parent. Although the Convention does not contain any legal basis to compel the abducting parent to return to the State of the child's habitual residence, it is possible to impose upon such person the obligation to return the child to that State. Since it is often the primary carer who abducts the child, a legal impediment of that person to return to that State him- or herself can create problems for the return of the child.[45]

4. The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (Child Protection Convention)[46]

The Child Protection Convention has entered into force on

36 This is also the case in Belgium, Italy, Luxembourg and Spain.

37 Federal Law Gazette (Bundesgesetzblatt) 1999 I, p. 702.

38 France: Article 21 of Law No 2002-305 of 4 March 2002 on parental responsibility, Official Journal (Journal Officiel) No 54 of 5 March 2002, p. 4161. In Austria, since 2005 sixteen courts of first instance have jurisdiction (see the Austrian response to the Questionnaire sent out by the Hague Conference in preparation of the Fifth Meeting of the Special Commission on the Operation of the Hague Child Abduction Convention, available at http://www.hcch.net/upload/abd_2006_at.pdf; under Question 6).

39 Often courts of first instance having jurisdiction for Hague return cases have further concentrated this jurisdiction internally on one or a limited number of judges. For Germany see, *e.g.*, the interview with *Wolfgang Weitzel* of the German Central Authority in Forum Familien- und Erbrecht 2001, p. 73 (74).

40 Article 20 further allows to refuse return if the return would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

41 See, *e.g.*, Federal Constitutional Court (BVerfG – Germany), 15 February 1996, Zeitschrift für das gesamte Familienrecht (FamRZ) 1996, p. 405; 29 October 1998, FamRZ 1999, p. 85; Re M (Children) [2007] England & Wales Court of Appeal (Civil Division), 9 December 2007 (INCADAT No 936); *Richards & Director-General*, Department of Child Safety, Full Court of the Family Court of Australia (Appellate Court), 15 February 2007 (INCADAT No 904); Cour de cassation (première chambre civile) (France), 12 December 2006 (INCADAT No 891) and the interesting overview in the annotation *ibid*. towards an ever more restrictive interpretation of Article 13 in French case law; *Staudinger/Pirrung* (*supra* note 30), Vorbem. zu Art. 19 EGBGB, No 680. For INCADAT, see *supra* note 34.

42 Available at www.unhchr.ch/html/menu3/b/k2crc.htm.

43 *Supra* note 19.

44 See, *inter alia*, the practice reports on Germany and the United Kingdom in the proceedings of the second Anglo-German Judicial Conference, organized 1998 in Wustrau by the German Federal Ministry of Justice and the British Lord Chancellor's Department (jointly with other partners) (available from the organizers). The issue was rediscussed at the fourth conference, held in Trier/Germany in September 2002, and at the fifth conference, held in Cardiff/Wales in September 2004. See further the country reports in *N. Lowe/S. Armstrong/A. Mathias*, ICMEC Guide to Good Practice under the Hague Convention on the Civil Aspects of International Child Abduction, 2002, under 3.5, respectively, and in detail *K. Schweppe*, Kindesentführungen und Kindesinteressen, 2001. For a human rights perspective on hearing the child in Hague return proceedings, see the decision of the European Commission of Human Rights of 4 September 1996 in *Laylle v. Germany*, Application No 26376/95 (available at www.echr.coe.int/echr under "Case law" – "HUDOC") and in general *A. Schulz*, Transnational Law & Contemporary Problems 12 (2000), p. 355 *et seq*.

45 *E.g.* in Germany, the Higher Regional Court (OLG) Rostock (Germany), in its decision of 4 July 2001, IPRax (*supra* note 34) 2002, p. 218, refused the return of the child to Canada because the mother had been the primary carer of the nearly 3-year old child, and the efforts of the German court seized with the return proceedings to have the Canadian arrest warrant set aside remained to no avail. See also the critical remarks by *K. Siehr*, IPRax 2002, p. 199 *et seq.*, and the response by *P. Winkler von Mohrenfels*, IPRax 2002, p. 372, who was involved as a judge in the decision of the OLG Rostock.

46 The text of the Convention and the Explanatory Report by Lagarde (*supra* note 24) in the authentic English and French versions can be found in: Hague Conference on Private International Law, Proceedings of the Eighteenth Session, Tome II, 1998, p. 533 and on the website of the Hague Conference under www.hcch.net under "Conventions" – "All Conventions" as No 34. Unofficial translations of the Convention into other languages (currently Arabic, Bulgarian, Dutch, Finnish, German, Latvian and Spanish) are also available there.

1 January 2002 following ratification by the Czech Republic, Monaco and Slovakia. It can be considered a breakthrough in relations with Islamic States that Morocco has in the meantime also ratified it. To date, the Convention has 15 Contracting States[47] – one more than the 1961 Protection of Minors Convention. This is a remarkable achievement because the EC Member States could not yet participate to the full extent: Due to external Community competence for the 1996 Hague Convention, EC Member States can only act jointly, and unanimity is required for the decision to ratify.[48] Several disputes between the Member States of the European Community have so far prevented them from jointly ratifying the Convention. First, following the revision and extension of the so-called Brussels II-Regulation[49] between 2000 and 2003, some EC Member States (led by France and Belgium, in particular) wanted to include rules on child abduction into the new regulation and fully replace the 1980 Hague Child Abduction Convention in relations between EC Member States while others, led by Germany and the United Kingdom, objected to this.[50] A compromise was reached under the Danish presidency in November 2002,[51] and the mandate to sign the 1996 Child Protection Convention was adopted unanimously by the EC Member States. The Netherlands had already signed in 1997, and the 14 remaining EC Members signed on 1 April 2003. The mandate for signature also said that the Commission was to submit a draft mandate for ratification, which the Commission did in due time on 17 June 2003. In substance, the mandate also aimed at bringing the revised Brussels II-Regulation[52] and the 1996 Child Protection Convention in force for the EC Member States at the same time. However, a dispute between Spain and the United Kingdom concerning the position of Gibraltar under the Convention arose after the signature by the Community Member States in April 2003.[53] This dispute had existed before and had been dormant for several years. Following the signing of the 1996 Child Protection Convention, however, the Gibraltar dispute returned and remained for several years until it was finally resolved in December 2007. Now the – currently 27 – EC Member States will hopefully adopt the mandate for ratification unanimously, and within a timeframe to be defined, the EC Member States will have to go through their respective domestic ratification procedures before jointly depositing their instruments of ratification in The Hague. Ironically, the 1996 Child Protection Convention already applies in a number of EC Member States[54] because eight of the twelve States that joined the EC in 2004 and 2007 signed and ratified before[55] joining the Community. For the remaining EC Member States to join the Convention, it will still take some time, probably at least until 2009, because some domestic ratification procedures are expected to be lengthy, and domestic elections may interfere with the planning. Some States moreover feel that a new domestic consultation is required because the one carried out before signature, i.e. in 2002/2003, is too dated. Others need to consult in any case because they have not even signed yet.[56]

The 1996 Convention is a comprehensive instrument covering all possible protective measures (see the non-exhaustive list of examples in Article 3) and all children.[57] It contains rules on jurisdiction, applicable law and the recognition and enforcement of measures for the protection of children. Unlike the 1961 Protection of Minors Convention, the 1996 Convention does not only govern the law applicable to certain particular measures but also to a parent-child relationship existing by operation of law. Also under the Child Protection Convention, the competent authority shall apply its own law (Article 15). The attribution or extinction of parental responsibility by operation of law is governed by the law of the State of habitual residence of the child (Article 16(1)).

The Convention's jurisdiction rules are child-centred. Jurisdiction for protective measures (including custody and contact orders) lies with the courts and authorities of the State of habitual residence or, in urgent and special cases, of simple residence, of the child (Articles 5, 6, 11). In case of a lawful change of habitual residence, jurisdiction changes accordingly without delay (Article 5(2)). Measures taken remain in force until they are replaced or amended by the authorities of the new habitual residence (Article 14).

One of the most difficult issues was to achieve a compromise in case of unlawful change of residence. Article 16 of the 1980 Hague Child Abduction Convention contains a substantive-law prohibition addressed to the judicial or administrative authorities of the State to which the child has been abducted, to make a custody order while return proceedings are pending or could still be brought. It neither creates nor prohibits any bases of jurisdiction. These are left to national law. The 1996 Convention, on the other hand, which focuses, *inter alia*, on jurisdiction, had to take a position on the impact of an abduction on habitual residence and jurisdiction. Article 7 represents an attempt to build on the idea of Article 16 of the 1980 Child Abduction Convention.[58] Conditions for the establishment of jurisdiction of the State to which the child had been abducted are (i) the establishment of a new habitual residence plus (ii) either acquiescence of all holders of custody rights or residence of the child in that State for at least one year since

47 Status as of 5 February 2008, see *supra* note 15.

48 Denmark is not affected by this, due to Protocol No 5 to the EC Treaty as revised by the Treaty of Amsterdam, which has since been carried forward with every revision of the Treaty.

49 Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ EC L 160/2000, p. 19.

50 See in further detail *A. Schulz*, International Family Law 2004, p. 22.

51 See further *A. Schulz*, International FamilyLaw 2004, p. 22 (23) and, for details of the compromise, *F. R. Paulino Pereira*, ERA Forum 2003, p. 134 (136-141); *M. Tenreiro/M. Ekström*, ERA Forum 2003, p. 126 (131-133); *A. Fuchs*, ERA Forum 2003, p. 4 (7 *et seq.*).

52 See *infra* under II. 5.

53 For further details see *A. Schulz*, FamRZ (*supra* note 41) 2006, p. 1309.

54 Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Slovakia and Slovenia.

55 In fact, Hungary and Slovenia signed and ratified after joining the EC, which is not permitted under Community law. The Commission did however not bring a case before the European Court of Justice because joint signature and ratification of the 1996 Convention by all EC Member States was on the EC agenda anyway.

56 This only applies to Malta.

57 This is also the aim of the Brussels II a-Regulation; see its Article 1(1) b). For the narrower scope of Brussels II, see *infra* under II. 5. a).

58 Lagarde-Report (*supra* note 24), No 46 *et seq*.

the person or body having rights of custody had or should have known about the whereabouts of the child, (iii) that no request for return of the child lodged within that period is still pending and that (iv) the child is settled in the new environment (Article 7, see also Article 10 Brussels II a-Regulation).

A point of particular importance: the general jurisdiction of the State of nationality which according to some States existed under the 1961 Protection of Minors Convention has disappeared. The courts of the State of nationality may only act instead of the courts of the State of habitual residence if the conditions set out in Articles 8 and 9 of the 1996 Child Protection Convention are complied with. Those Articles provide for a transfer of competence upon request of one or the other of the courts concerned. Courts or authorities that can acquire jurisdiction instead of the courts of the State of habitual residence of the child are the courts or authorities of:

- the State of which the child is a national,

- a State in which property of the child is located,

- a State whose authorities are seized with an application for divorce or legal separation of the child's parents or for annulment of their marriage, and

- a State with which the child has a substantial connection.

As compared to the obligation established by the 1961 Protection of Minors Convention (without sanction in case of a breach) to inform the State of habitual residence or the State of nationality, respectively, of measures taken by the other State, these provisions are a substantial progress. Without agreement of both States, jurisdiction outside of the State of habitual residence of the child cannot be established.

The only exception to this child-centred approach is Article 10. It states that the court seized with a divorce under the Convention may also decide on child protection measures concerning children not having their habitual residence in the forum State where,

- at the time of the commencement of the proceedings, one of the parents has his or her habitual residence in that State and one of the parents (not necessarily the same) has parental responsibility in relation to the child,

- jurisdiction of these authorities to take such measures has been accepted by the parents, as well as by any other person having parental responsibility in relation to the child, and

- such jurisdiction is in the best interests of the child.

This exception to the jurisdiction of the State of habitual residence of the child is due to the negotiations pending in Brussels at that time which led to the Brussels II-Convention and later to the Brussels II and II a-Regulations.[59]

Measures taken by the authorities of a Contracting State in accordance with the 1996 Child Protection Convention are recognized by operation of law in all other Contracting States (Article 23). In addition, Article 24 provides for a declaratory procedure on the recognition or non-recognition of such measure. Article 23 contains an exhaustive list of grounds for refusal of recognition including the lack of jurisdiction of the court or authority to take the measure in question under the Convention. A violation of the right to be heard of the child or any person claiming that the measure infringes his or her parental responsibility, a violation of public policy, or the incompatibility with a later measure taken in the non-Contracting State of habitual residence of the child entitled to recognition in the requested State are further grounds for refusal. Here again, the position of the State of habitual residence is strengthened, even if it is a non-Contracting State.

Before proceeding to enforcement, a declaration of enforceability is required. The grounds for refusal are the same as for recognition and are contained in an exhaustive list in the Convention (Articles 26, 23).

Moreover, due to bad experiences with the (too limited) rules on co-operation contained in the 1961 Protection of Minors Convention, detailed rules on cross-border co-operation of authorities were included (Articles 29–39), the violation of which sometimes even leads to refusal of recognition (Articles 23(2) f), 33).

5. Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters concerning parental responsibility, repealing Regulation (EC) No 1347/2000l (so-called Brussels II a-Regulation)[60]

a) Overview

Upon a proposal made by Germany in 1994, the EC Member States embarked on the elaboration of a new convention.[61] The primary focus of the negotiations on "Brussels II", as it was named in honour of its predecessor, the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters[62] (now known as "Brussels I") was on the spouses and their divorce, separation or annulment of marriage. During the negotiations in Brussels, some delegations insisted that the Brussels II-Convention, which was primarily parent-centred and related to divorces and separations, should also cover custody decisions.

At the same time, however, the Hague Conference on Private International Law, upon request of its Member States, had begun work on the revision of the 1961 Protection of Minors Convention, which later resulted in the 1996 Hague Child Protection Convention. Therefore some EC Member States preferred to limit the Brussels II-Convention to the parents and the 1996 Hague Convention to children's issues. The compromise consisted in limiting the Brussels II-

[59] See further *infra* under II. 5. a).

[60] OJ EU L 338/2003, p. 1. The Regulation has been applicable since 1 March 2005.

[61] For further details concerning the history of the negotiations, see the Explanatory Report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (approved by the Council on 28 May 1998) by *Alegría Borrás*, OJ EC C 221/1998, p. 27, No 8 *et seq*.

[62] OJ EC L 12/2001, p. 1.

Convention to common children of both spouses and only those decisions relating to parental responsibility that were made "on the occasion of matrimonial proceedings" while including an almost identical jurisdiction rule for the divorce court in the 1996 Hague Child Protection Convention even in cases where the children do not have their habitual residence in the State of that court.

The Brussels II-Convention was adopted on 28 May 1998 but it never entered into force. Following the entry into force of the Amsterdam Treaty revising the EC Treaty on 1 May 1999, the Convention was first converted into a Regulation[63] and, shortly thereafter, already revised, due to the practical problems arising from its limitation to decisions concerning parental responsibility with regard to common children of both spouses, taken on the occasion of matrimonial proceedings.

Brussels II a now extends this scope to cover all children of the family irrespective of whether their parents are married; and protective measures taken for them at any time, regardless of any matrimonial proceedings. Many of these provisions mirror the provisions of the 1996 Child Protection Convention. The approach is child-centred and attributes jurisdiction first and foremost to the State of the habitual residence of the child (Article 5 of the 1996 Convention; Article 8(1) of Brussels II a). A transfer to a court better placed to hear the case may occur upon request of either the court having jurisdiction under the rules just mentioned; upon request of a court wishing to take the case; or upon request by one of the parties (Articles 8 and 9 of the 1996 Convention; Article 15 of Brussels II a). The latter rule introduces, for the first time, a certain amount of discretion along the lines of the doctrine of *forum (non) conveniens* into a Community instrument on jurisdiction. Eligible for transfer under the 1996 Child Protection Convention are the courts of the State of which the child is a national; a State in which property of the child is located; a State with which the child has a substantial connection; and a State whose authorities are seized of an application for divorce or legal separation of the child's parents. Brussels II a uses slightly different wording in Article 15, listing any Member State with which the child has a particular connection, in particular a new habitual residence; the former habitual residence; the State of which the child is a national; the habitual residence of a holder of parental responsibility; and the State in which property of the child is located (for measures concerning such property). Under both instruments, the divorce court has original jurisdiction for protective measures concerning even a child not habitually resident in that State, provided that certain conditions are fulfilled[64] (Article 10 of the 1996 Convention; Article 12 of Brussels II a). However, one may assume that this will not lead to parallel proceedings being brought in both the court of the State of the habitual residence of the child and the State where matrimonial proceedings are pending, because consent of both spouses to the exercise of jurisdiction by the divorce court in a State other than the State of the child's habitual residence, also over the custody issue, is one of the preconditions for such jurisdiction.

The fact that both instruments will thereby prevent parallel proceedings and contradictory custody decisions in different Contracting States to the 1996 Convention, as well as in Member States of the EU, constitutes a significant improvement. Subject to the exception for the divorce court just described, at any given moment only the courts of one single State have jurisdiction. A transfer of a case is possible only if the courts of the different States concerned have come to an agreement. Otherwise, jurisdiction lies only with the State of the child's habitual residence or, if both parents agree, with the State of the divorce court.

b) Changes in the application of the 1980 Convention under Brussels II a

First, Brussels II a ensures that, when applying the 1980 Convention in relations between EU Member States, the child will be heard in return proceedings (Article 11(2)), unless this is inappropriate regarding the child's age or maturity. In some States,[65] this will cause no change at all because the same obligation is understood to flow from the case law of the European Court of Human Rights in Strasbourg and its interpretation of, in particular, Articles 6 and 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[66], as well as from Article 12 of the 1989 UN Convention on the Rights of the Child[67]. Article 13(2) of the Child Abduction Convention permits a court to refuse to return a child if the child objects to being returned and has attained an age and a degree of maturity at which it is appropriate to take account of these views. This presupposes that the child's views are explored.

Article 11(2) of Brussels II a prohibits to refuse to return a child if the applicant has not been given an opportunity to be heard, which is in line with Article 6 ECHR. The latter has influenced the application of the Child Abduction Convention to the same effect in many European Contracting States already.

Another change with regard to the application of the Child Abduction Convention by courts of EU Member States concerns the ground for refusal of return in Article 13(1) b) of the 1980 Convention – the grave risk of physical or psychological harm for the child or an otherwise intolerable situation caused by the return. In future, it will no longer be possible to refuse the return of the child to another EU Member State if it is established that adequate arrangements have been made to secure the protection of the child after return (Article 11(4) Brussels II a). This is in line with Article 36 of the Child Abduction Convention, which allows State Parties to restrict the grounds for refusal by way of bilateral or multilateral agreements, and it is already the way in which the 1980 Convention has been interpreted in particular in Common law jurisdictions.

63 The so-called Brussels II-Regulation, *supra* note 49.

64 *Supra* under II. 4.

65 For a description of different practices in this regard see *supra* note 44 and the adjoining text.

66 Available at www.coe.int – "Human Rights" – "The Convention".

67 *Supra* note 42.

Assuming that, for example, a judge seized with a return application expects custody proceedings to take place following the return of the child in the State of the child's habitual residence. The judge further expects such proceedings to result in the attribution of custody to the abducting parent who, in the return proceedings under the 1980 Convention, alleged domestic violence in order to avoid return, and the judge seized with the return proceedings considers this defence well-founded. A judge in a Civil-law country – who is normally used to making a choice between 'yes' and 'no' only as to whether or not to return the child in such a case – would probably refuse to grant a return order because it is likely that, following return, the child would again be exposed to domestic violence, at least until the custody proceedings have led to the attribution of custody to the other (i.e. the abducting) parent. Article 11(4) now requires also a Civil-law judge to think about a 'Yes, if ...' concerning the return application, and, perhaps, to contact his fellow judge in the State of the child's habitual residence or a liaison judge there and explore how to prepare the ground for the child's return. He could also be prompted to try to achieve agreement between the parties to proceedings or a mirror order in the State of habitual residence about arrangements following return. This could include a prohibition for the applicant to contact the abducting parent and/or the child during custody proceedings and to provide separate accommodation and/or maintenance pending custody proceedings. The exceptional nature of a refusal to return a child as a last resort is thus strengthened by Article 11(4) of Brussels II a.

c) Other changes brought about by Brussels II a

In child abduction cases between EU Member States, Brussels II a has also strengthened the position of the State of the habitual residence of the child by introducing a co-operation mechanism. Where the court of an EU Member State refuses to return a child pursuant to Article 13 of the 1980 Child Abduction Convention, the court – directly or through Central Authorities – has to transmit, within one month following the issue of such decision, a copy of it as well as any other relevant documents, to the competent court of the former habitual residence. Unless such court has already been seized by one of the parties, the parties have to be notified of the refusal to return the child and must be invited to make submissions to the court within three month following notification, so as to enable the court to examine the question of custody. This preserves the jurisdiction of the State of the former habitual residence for custody proceedings even where the child is no longer there, and the protection of that jurisdiction – deemed to be in the best interest of the child – is one of the main purposes of the 1980 Convention. If neither of the parents makes any submissions within the three months time limit, the file will be closed and the child remains in the State to which he or she has been abducted (with the legal custody situation unchanged) (Article 11(6)-(8) of Brussels II a).

If there are custody proceedings in the State of the (former) habitual residence following a refusal to return the child, and custody is granted to the abducting parent, the child also remains in the State to which it had been abducted – this time in accordance with a new custody situation. If, on the other hand, the court in the State of the former habitual residence of the child grants custody (or at least the right to determine the child's residence) to the left-behind parent and orders the return of the child, under Article 11(8) of Brussels II a, this decision on the merits of custody prevails over a decision not to return a child under the 1980 Child Abduction Convention that was made following the abduction or retention of the child and which does not deal with the merits of custody (Article 19 of the 1980 Convention). Provided that it is accompanied by a certificate, such order is enforceable without any further formalities in the requested State (i.e. no registration for enforcement, *exequatur* or other formality may be required; see Articles 11 (8), 42 of Brussels II a). For the issuance of the certificate, Article 42(2) c) of Brussels II a requires that, when making its custody decision, the court has taken into account the reasons for, and evidence underlying, the refusal to return the child pursuant to Article 13 of the 1980 Child Abduction Convention.

The privileged position of the custody order, which can trump the non-return order, is justified by the fact that Hague return proceedings are normally summary proceedings, where no expert opinion is obtained, because the proceedings are not aiming at a determination of the long-term attribution of custody rights. Their only objective is the return of the child to his State of former habitual residence. If, subsequently, custody proceedings take place in that latter State, they normally take longer than Hague return proceedings, and extensive evidence may be taken. Therefore, it seems appropriate that a custody decision made on such a basis in favour of the left-behind parent ultimately prevails over a refusal to return a child under the 1980 Hague Convention.

6. The Council of Europe Convention on Contact concerning Children (Contact Convention)[68]

On 15 May 2003, the Convention on Contact concerning Children, which had been approved by the Committee of Ministers of the Council of Europe on 3 May 2002, was opened for signature.[69] It is a valuable complement to existing instruments – and it is the first Convention that actually aims at unifying an important aspect of substantive family law, namely the right of parents and children to have contact with each other even if there are State frontiers between them.[70] As

[68] *Supra* note 32.

[69] The opening for signature was delayed by a dispute between the EC and its Member States about possible external Community competence. Eventually, the Convention was opened for signature on 15 May 2003, the issue of Community competence still remaining unresolved. This is reflected by the fact that some EC Member States (Austria, Belgium, Italy and Portugal) signed the Convention on the day it was opened for signature (together with the then non-EC States Bulgaria, Croatia, Cyprus, the Czech Republic, Malta, Moldova, San Marino and Ukraine) while others are still waiting for a mandate unanimously adopted by the 26 EC Member States without Denmark. In the meantime, Albania, Greece, Poland, Romania and Turkey have also signed, and the Convention has been ratified by Albania, the Czech Republic, Romania, San Marino and Ukraine. Both the Czech Republic and Romania ratified after having joined the EU. The Convention has entered into force on 1 September 2005 with its third ratification.

[70] See the Preamble of the Convention.

uniform law, the Convention also applies to purely internal cases. Should a State decide to sign and ratify the Convention, this would imply the adaptation of domestic family law provisions to the Convention requirements for all contact cases. The Convention is based on common principles distilled from the case law of the European Court of Human Rights and some more recent family law codifications of the Member States of the Council of Europe. Recently the Court has handed down a number of decisions on Articles 6 and 8 of the European Convention on Human Rights which define the substantive and procedural rights in the area of international family law in further detail.[71]

The Convention is based upon a right of the child and his or her parents to have contact with each other (Article 9 of the UN Convention on the Rights of the Child[72]), and on the presumption that such contact is in line with the child's best interests (Article 4). In addition, for some States, the Convention is likely to[73] bring about an enlargement of the group of persons entitled to contact.

The Convention does not contain any rules on the law applicable, recognition and enforcement of foreign decisions or on the return of children because the drafters were aware of already existing instruments.[74] It provides for Central Authorities and imposes obligations on Central and other authorities to co-operate across frontiers (Articles 11-13).[75] The Convention focuses very much on amicable agreement between the parents. Moreover, certain provisions were included in order to remedy practical difficulties that have arisen in particular in applying the 1980 European Custody Convention. *E.g.*, Article 15 tries to clarify the difference between ordering mere conditions for the recognition of a foreign contact order which shall foster its implementation, and a modification of its substance. For the latter, the court addressed must have proper jurisdiction to make a contact order. Article 14(1) b) tries to remedy the fact that the European Custody Convention does not explicitly oblige States to provide for a basis of jurisdiction to recognize a foreign decision – normally a custody order – and declare it enforceable *before* the child actually enters the country.[76]

The Convention moreover contains an exemplary catalogue of safeguards and guarantees that can be ordered with or following a cross-border contact order – with a view to ensuring that contact takes place (Article 10(2) a)) and that the child, after having travelled abroad for contact, returns swiftly and smoothly (Article 10(2) b)). States are obliged to provide for at least three of them in their domestic law. The following safeguards for ensuring that contact takes place are listed:

- supervision of contact,

- the obligation of a person to provide for the travel and accommodation expenses of the child and, as may be appropriate, of any other person accompanying the child,

- a security to be deposited by the person with whom the child is usually living to ensure that the person seeking contact with the child is not prevented from having such contact,[77]

- a fine to be imposed upon the person with whom the child is usually living, should this person refuse to comply with the contact order.

The Convention mentions the following safeguards for ensuring the proper return of a child or preventing an improper removal:

- the surrender of passports or identity documents and, where appropriate, a document indicating that the person seeking contact has notified the competent consular authority about such a surrender during the period of contact,[78]

- financial guarantees,

- charges on property,

- undertakings or stipulations to the court,[79]

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71 See, *inter alia*, the decisions of the ECtHR of 13 July 2000 (*Elsholz v. Germany*, Application No 25735/94), 11 October 2001 (*Sahin v. Germany*, Application No 30943/96), 11 October 2001 (*Sommerfeld v. Germany*, Application No 31871/96), all available at www.echr.coe.int/echr under "Case law" – "HUDOC".

72 *Supra* note 42.

73 The careful wording was chosen deliberately because many of the States concerned are already Parties to the European Convention on Human Rights. This means that the case law of the European Court of Human Rights that interprets the relatively general Article 8 ECHR (protection of family life) is already binding today. The Contact Convention only codifies this case law, *e.g.* as concerns the persons potentially entitled to contact, without adding anything new. It is apparent, however, that the ECHR plays a very different role in the legal culture of different States Parties.

For persons other than parents, Article 5 of the Contact Convention also refers to the child's best interests as the decisive factor, provided these persons have "family ties" with the child. No 47 of the Explanatory Report lists three categories of persons that might be covered: (1) persons having a close family relationship with the child by law (in many States this applies, *e.g.*, to grandparents and/or siblings); (2) persons having a *de facto* family relationship with the child (*e.g.* former foster parents, a spouse or former spouse of a parent, a person with whom the child has been living in the same household for a considerable period of time, a person who has cohabited with a parent and the child, a relative of the child such as an aunt or uncle; (3) persons other than those having family ties with the child, as freely determined by each State Party; for instance, persons having close personal links with the child.

74 The second indent of the Preamble refers to the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, the third indent to the Brussels II-Regulation.

75 In the political discussions in Brussels, there is disagreement on whether this overlap already leads to the establishment of external Community competence for (part of the topics covered by) this Convention.

76 When the Contact Convention was negotiated, under Belgian domestic law, including the Belgian implementation of the European Custody Convention, jurisdiction for recognizing a foreign custody or contact order only existed where the child was physically present in Belgium. Other States, *e.g.* Germany, interpret Article 7 of the Custody Convention as also covering preventive recognition and declaration of enforceability (see, *e.g.*, *Staudinger/Pirrung* (*supra* note 30), Vorbem. zu Art. 19 EGBGB, No 768 with references for other Contracting States). In this context it is worth mentioning that also Article 14 of the Contact Convention is referred to as creating Community external competence because this Article is a provision on recognition and enforcement of decisions, and the latter has been "communitarized" at least in part by the Brussels II-Regulation and its successor Brussels II a.

77 This provision is likely to gain considerable practical importance. Even in domestic cases this is an issue which often enough demonstrates how powerless the legislator is in this area (see, *e.g.*, the dissenting opinion of three judges of the ECtHR in the case of *Nuutinen v. Finland* (Application No 32842/96, judgment of 27 June 2000, available at www.echr.coe.int/echr under "Case law" – "HUDOC"), which concerned the non-enforcement of a right of contact in a domestic case. See, on this case, *A. Schulz*, FamRZ (*supra* note 41) 2001, p. 1420 (1427).

78 This information duty shall prevent the parent from declaring his or her passport or that of the child as stolen and successfully applying for a new identity document.

79 "Undertakings" or "stipulations" are promises that the applicant gives

- the obligation of the person having contact with the child to present himself or herself regularly before a competent body such as a youth welfare authority or a police station in the place where contact is to be exercised,

- the obligation of the person seeking contact to present a document issued by the State where contact is to take place, certifying the recognition and declaration of enforceability of a custody or contact order or both, either before a contact order is made or before contact takes place,

- the imposition of conditions as to the place where contact is to be exercised, and, where appropriate, the registration, in any national or cross-border information system, of a prohibition preventing the child from leaving the State where contact is to take place.[80]

III. Soft law

1. Resolutions and Recommendations adopted by the Council of Europe

So far, this paper has focused on "hard law", i.e. international treaties and EC regulations, and it has become clear that – with the exception of the Contact Convention – unification has not yet occurred as far as substantive family law is concerned. However, there have been, and there are, efforts towards such unification of substantive family law, albeit in the form of "soft law". The Council of Europe has adopted a number of resolutions and recommendations in this respect which, for the sake of completeness, are worth mentioning here.[81] They cover issues such as the placement of children, their protection against ill-treatment, parental responsibilities, violence in the family, foster families, emergency measures in family matters, the application of the European Custody Convention, family mediation, children's participation in family and social life, the rights of children living in residential institutions, the international abduction of children by one of the parents and the rights of children in general.

2. The efforts of the Commission on European Family Law (CEFL) towards harmonisation or unification of European family law

Another completely different initiative is also of interest here although it is not driven by intergovernmental organizations or individual governments but by academics. In September 2001, six European academics in the area of family law[82] set up the "Commission on European Family Law" (CEFL).[83] The Organizing Committee established an Expert Group which by now encompasses 25 (primarily academic) experts on family law, private international law and comparative law from more than 20 European States.[84] The CEFL's aim is to further the harmonization and unification of family law, in particular within the European Union.[85] Prompted, *inter alia*, by the entry into force of the Brussels II Regulation[86], different areas of family law have been researched. For each topic, a Questionnaire was developed, and responded to by national experts for their respective legal system. From the results of the comparative law research, principles were distilled that could form the basis for unification by national and international legislators. These principles are based, in the first place, on a common core distilled from national laws and, at a subsidiary level, on a "better law" approach.[87] "Grounds for divorce" and "maintenance between former spouses" were the first two topics addressed, followed by "Parental Responsibilities". By now, the CEFL has formulated 59 "Principles" – ten on divorce and ten on maintenance between former spouses, which were published in 2004,[88] and 39 on parental responsibilities, published in 2007.[89] Currently, work is carried out on matrimonial property law, and the respective principles are expected to be published in 2009/2010.[90]

Public debate on these principles has by far not been comparable yet with that on the Principles of European Contract Law (PECL) or the Common Frame of Reference, but this can be explained by the fact that in commercial law, a considerable unification of substantive law has already been achieved by binding international instruments while this is not the case

to the court – of a Common law-State – with a view to obtaining a particular decision of that court. In international family law, they have been of relevance in particular in return proceedings under the 1980 Hague Child Abduction Convention. A breach of undertakings can cause sanctions for contempt of court. In order to have some effect, however, this requires the applicant to be subject to the effective exercise of jurisdiction to enforce of the court ordering the sanctions. This is why recently such undertakings, which within a State can be quite effective, have proved to be of limited effect even in relations between Common law States which all know them in their own legal system. On undertakings in Civil law systems (here: Germany) see *G. Mäsch*, FamRZ (*supra* note 41) 2002, p. 1069; *P. Schlosser*, Recht der internationalen Wirtschaft (RIW) 2001, p. 81.

80 Examples are the Schengen Information System (SIS) and Interpol. Both systems are not only available for the pursuit of criminal offences but also for locating a missing child (for Interpol, see, *e.g.*, No 5 of the Report on the Third meeting of the Special Commission of the Hague Conference on Private International Law to review the Operation of the Child Abduction Convention, held from 17 to 21 March 1997, at http://hcch.e-vision.nl/upload/abduc97e.pdf, and the Report on the Fifth meeting of the Special Commission of the Hague Conference on Private International Law to review the Operation of the Child Abduction Convention, held from 30 October to 9 November 2006, at http://www.hcch.net/upload/wop/abd_2006_rpt-e.pdf, Nos 36, 235.

81 See the list of Resolutions and Recommendations adopted at http://www.coe.int/t/e/legal_affairs/legal_co-operation/Family_law_and_children's_rights/.

82 *K. Boele-Woelki* (Utrecht/Netherlands, Chair), *F. Ferrand* (Lyon/France), *N. Lowe* (Cardiff/United Kingdom), *D. Martiny* (Frankfurt an der Oder/Germany), *W. Pintens* (Leuven/Belgium) and *D. Schwab* (Regensburg/Germany) who quit in November 2002. The others have since been joined by *C. González Beilfuss* (Barcelona/Spain) and *M. Jänterä-Jareborg* (Uppsala/Sweden).

83 See on CEFL in more detail *K. Boele-Woelki*, Tijdschrift voor Familie- en Jeugdrecht (FJR) 2004, p. 249; http://www2.law.uu.nl/priv/cefl , and *A. Schulz*, FamRZ (*supra* note 41) 2003, p. 426.

84 See http://www2.law.uu.nl/priv/cefl/ for the names.

85 The CEFL has so far organized three conferences: Utrecht 2002 (proceedings: *K. Boele-Woelki* (ed.), Perspectives for the Unification and Harmonisation of Family Law in Europe, 2003), Utrecht 2004 (proceedings: *K. Boele-Woelki* (ed.), Common Core and Better Law in European Family Law, 2005) and Oslo 2007.

86 *Supra* note 49.

87 See further *M. Antokolskaia*, in: *K. Boele-Woelki* (ed.), Perspectives (*supra* note 85), p. 159.

88 *K. Boele-Woelki et al.*, Principles of European Family Law Regarding Divorce and Maintenance between Former Spouses, 2004.

89 *K. Boele-Woelki et al.*, Principles of European Family Law Regarding Parental Responsibilities, 2007.

90 *K. Boele-Woelki & D. Martiny*, ERA Forum 8 (2007) p. 125 (126).

for family law. Here, the movement is only just beginning.[91]

IV. Conclusion

So far, in international family and child law as discussed in this paper, unification achieved in Europe during the last 100 years has been limited almost completely to private international law rules. During the second half of the twentieth century, the 1961 Hague Protection of Minors Convention and the European Custody Convention represented first steps towards unification. After a long phase without any further progress, this is now about to change. The EC has entered the scene of private international law, and the Hague Conference has elaborated a modern instrument for child protection matters. With the Brussels II a Regulation and soon also the 1996 Hague Child Protection Convention, there will be a set of almost identical rules for cases within the EC and in relation to third States, offering unified rules on jurisdiction, applicable law, recognition, enforcement and co-operation across frontiers. For child abduction cases, the 1980 Hague Convention with its 80 Contracting States provides a solid and successful legal basis. The co-operation mechanisms established by the Child Protection Convention and the Brussels II a Regulation supplement and strengthen the Child Abduction Convention, and the fact that in the future, there will normally only be one State at a time having jurisdiction over a particular child will also contribute to reducing cross-border complications created by irreconcilable judgments. Even in the area of substantive law, there is now a modern instrument – the European Contact Convention – aiming at the unification of an important aspect of international child law, namely contact between parents and children. The work of the Commission on European Family law might pave the way towards further unification of substantive law. Last but not least, cross-border co-operation of courts, central and other authorities has now been provided with a structured legal basis by Brussels II a and the 1996 Convention and waits to be filled with life.

[91] For a fundamental discussion whether or not family law in Europe could and should be unified or harmonised, see the proceedings of the 2002 Utrecht Conference (*supra* note 85).

How uniform is uniform law?

The Development of the Public Policy Barrier to Judgment Recognition Within the European Community*

*Peter Hay***

Introduction

"National public policy" can be a convenient label for the reluctance, for whatever reason, to give up a national solution in favor of Community law and policy. It cuts across all areas of Community endeavor, as such landmark decisions as *Cassis de Dijon*,[1] *Centros*,[2] and *Van Duyn*[3] illustrate. National public policy concerns also present a barrier to attempts to harmonize areas of substantive law. Depending on the subject, national and Community interests of different strengths may be involved, and attempts to generalize seem therefore futile. The following remarks thus have a more modest, more limited focus: the current role of public policy in trans-border litigation, particularly in judgment recognition. In the future, public policy concerns may play an increasingly important role in choice of law, beginning now with the Rome II-Regulation.[4]

Traditional Defenses to Judgment Recognition And Integrated Legal Systems

In traditional international practice, states condition foreign judgment recognition on a number of considerations, among them: the positive evaluation of the rendering court's jurisdic-

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[1] ECJ 20 February 1979 – Case 120/78 – *Rewe-Zentral v. Bundesmonopolverwaltung für Branntwein ("Cassis de Dijon")*, [1979] ECR 649.

[2] ECJ 9 March 1999 – Case C-212/97 – *Centros Ltd. v. Erhvervs-og Salskabsstyrelson*, [1999] ECR I-1459.

[3] ECJ 4 December 1974 – Case 41/74 – *Van Duyn v. Home Office*, [1974] ECR 1337.

[4] Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II"), OJ 2007, L 199/40. This Regulation, as well as the current Rome Convention (soon-to-be "Rome-I" Regulation) on the law applicable to contractual obligations, provides rules of "universal", not only intra-EU applicability. As a result, the law of a non-EU state may well become applicable in a given case. In such a setting, the public policy exception retains more of its traditional importance than it does in the case of intra-EU judgment recognition under discussion here. For brief comment on the Rome-II Regulation, see *Hay*, Contemporary Approaches to Non-Contractual Obligations in Private International Law (Conflict of Laws) and the European Community's "Rome II" Regulation = [2007] EuLF I-137, at I-149 – I-150.