CROSS-BORDER PARENTAL RESPONSIBILITY:

RULES ON JURISDICTION, TRANSFER OF JURISDICTION PROVISIONAL MEASURES 'HABITUAL RESIDENCE'

Zagreb, June 2015

Dr. Kerstin Niethammer-Jürgens

Co-funded by the Justice Programme 2014-2020 of the European Union

Overview

- Parental responsibility and the international protection of the child
- Basic elements of Brussels II a Regulation
- Rules on Jurisdiction
- The Term ‘habitual residence’
- Transfer of Jurisdiction
- Provisional measures

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Parental responsibility and the protection of the child

- International Sources
  - UN: UNCRC
  - Council of Europe: ECHR and the Convention on the exercise of children's rights
  - HCCH: Hague Convention 1980 and 1996
  - International and bilateral treaties
- European Union
  - TEU
  - Charter of Fundamental Rights of the EU
  - European Commission's 'EU Agenda for the rights of the child'
  - Judicial co-operation in cross-border family law cases
- National law of MSs
  - Law regarding parental responsibility

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UN Convention on the Rights of the Child

- Ratified by all EU MSs
- Main articles
  - Protection against all forms of discrimination, Art. 2
  - Primary consideration: best interest of the child, Art. 3.1
  - States and parents/relatives are responsible for the well-being of the child, Art. 3.2
  - States should respect the parents' responsibilities, Art. 5
  - Right of the child to be cared by his/her parents, Art. 7.1
  - Right of the child to preserve the family relations, Art. 8.1
  - Child should not be separated from his/her parents against their will except for the case if it is in the best interest of the child
    - Neglect
    - Parents living separately, Art. 9.1

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UN Convention on the Right of the Child (2)

- Right of the child to maintain personal relations and direct contact with parents living separately from him/her, Art. 9.3
- Even if living in different states, Art. 10.2
- States should combat against illegal transfer of the child and non-return from abroad, Art. 11.1
- Right of the child to express his/her views. Art. 12.1
- Child is provided the opportunity to be heard. Art. 12.2
- Prohibition of unlawful interference with the child's family, Art. 16.1
- The parents in principle have common parental responsibilities, Art. 18.1
- Right of the child for alternative care if it is needed, Art. 20.2

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Council of Europe

- *European Convention of Human Rights of 1950*
  - Article 8.1: right to respect private and family life

    > everyone has the right to respect for his private and family life, his home and his correspondence > Strict exceptions in Art. 8.2.
- *European Convention on the Exercise of Children's Rights of 1996*
  - Grants procedural rights to the child and facilitates the exercise of these rights, Art. 1.2
  - Right of the child to receive all relevant information, Art. 3
  - Right of the child to be consulted and express his/her views
  - Responsibility of judicial authorities (also to act speedily, Art. 6-7

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HCCH

- *Hague Convention of 1980* on the Civil Aspects of International Child Abduction
- *Hague Convention of 1996* on the Protection of Children
  - Close link between the Brussels II a and both conventions
  - Some coherence between their provisions
  - The commentaries of the EU law and HCCH law provide mutual assistance in interpretation
- International and bilateral treaties (MSs are parties)

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Treaty of the European Union (TEU)

- Art. 3.3 commitment: the EU promotes – among others – the rights of the child.
- Art. 19 on effective legal protection

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EU Charter (1)

- binding and in force since December 2009
- establishes the citizenship of the Union
- creates an area of freedom, security and justice
- first EU document declaring the fundamental rights
- strengthens the protection of fundamental rights
- first recognition of children's special status
- move towards the self-standing rights of children
- the CJEU (=ECJ) and national courts have to observe it

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EU Charter (2)

- Art. 24: The rights of the child (based on UN CRC)
- Other Child-focused provisions
  - right to protection and care for their well-being
  - right to express their views freely
  - expressed views have to be taken into attention (age, maturity)
  - child's best interest has priority
  - right to maintain on a regular basis a personal relationship and direct contact with both parents unless that is contrary to the best interest
- Art. 32: Prohibition of child labour and protection of young people at work
- Art. 47: Right to an effective remedy and a fair trial
  - right to fair and public hearing within reasonable time
  - right to have the possibility of being advised and represented
  - right to available legal aid

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Agenda of the EU Commission

- commitment to protect and fulfil the children's rights
- child-friendly system of justice
- promotes the recognition and enforcement of decisions on parental responsibilities
- development of training activities for judges

- European Parliament resolution of 28 April 2016 on safeguarding the best interests of the child across the EU on the basis of petitions addressed to the European Parliament

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Judicial Co-operation in Civil Matters

- EU promotes *judicial co-operation* in civil matters with cross-border elements
  - Amsterdam Treaty – Community competence in matters of judicial co-operation in order to establish an area of freedom, security and justice, Art. 61(c), 65, 67
    - civil measures with cross-border implications and necessary for proper functioning of the internal market
  - Nice Treaty – amended Art 67 to provide for a co-decision procedure for measures provided in Art. 65 with the exception of aspects relating to family law
  - Lisbon Treaty – TFEU – Art. 81
    - Aim of developing judicial co-operation in civil matters having cross-border implications based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases

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Brussels II a Regulation – Overview

- **Council Regulation No 2201/2003**

  includes matters of parental responsibilities

- **Material scope (Art. 1):**

  cross-border case in parental responsibility matters

- **Definitions (Art. 2)**

- **Territorial and temporal scope –** in force since 03/01/2005; with the exception for Denmark

- **Relation to other international instruments**
  - Conventions of HCCH (Child Abduction Convention 1980 and Child Protection Convention 1996)

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Basic Elements

- Regulation supersedes conventions existing at the time of entry into force of the Regulation, Art. 59.1
- enumerates concrete conventions over which this Regulation has precedence, Art. 60
  - Relation to the 1996 Hague Convention, Art. 61
  - Relation to the 1980 Hague Convention

- The Regulation regulates:
  - **International jurisdiction** in a MS in which the child has his/her habitual residence
  - **Recognition and enforcement** of a judgment given in a court of a MS on the territory of another MS (even on the territory of a third State if this state is a contracting state of the Hague Convention 1996)

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Material Scope

- *civil matters relating to the attribution, exercise, delegation, restriction or termination of parental responsibility', Art. 1.1 b)*
- Art. 1.2: non-exhaustive list of these matters
- Art. 1.3: non covered matters
- Art. 2: Definitions of the child related matters:
- *'civil matters'*
  - *Case C-435/06 [2007] 'C'; Case C-523/07 [2009] 'A'*
  - Decision on the child's taking into care and placement in a foster family adopted in public law context relating to child protection? > CJEU – Yes

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Definitions

- ***'parental responsibility*** *– all rights and duties or the property regarding a child which are given to natural or a legal person per judgement, by operation of law or by agreement having legal effect' (including custody rights and rights of access, Art. 2.7)*
  - independent and autonomous interpretation is needed
  - Case C-435/06 (2007) = "C", Case 523/07 (2009) = "A"
- ***'holder of parental responsibility'****, Art. 2.8*
- ***'rights of custody'****, Art. 2.9,*
- ***'rights of access'****, Art. 2.10*
  - independent and autonomous interpretation is needed
  - equal and uniform application is needed
  - that means: context of the provision, objective pursued by that legislation

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Rules of Jurisdiction

- general ground: habitual residence, Art. 8
- exceptional grounds (no habitual residence), Art. 9,10, 12,13
- no jurisdiction under Art. 8-13 and another MS has jurisdiction under the Regulation, Art. 17
- no court is competent - residual jurisdiction, Art. 14
- transfer to the better placed court, Art. 15
- *lis pendens,* Art. 19.2

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Art. 8 (general ground)

- *MS has international jurisdiction where the child is habitually resident at the time the court is seized*
  - main connecting factor
  - principle of geographical proximity
  - most appropriate forum in best interest of the child
  - factual concept – deliberately no definition
  - circumstances of each case
  - burden on the court – great difficulties
  - *Case C-523/07 [2009] 'A' ; Case C-497/10 PPU '2010] 'Mercredi'*
    - autonomous interpretation
    - attitude of national law has no relevance
    - habitual residence based connecting factors in other areas of European law has no direct relevance, cannot be transposed

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‘Habitual Residence’ of a child

- *Case C-523/07 [2009] ‘A’* and *Case C-497/10 PPU [2010] ‘Mercredi’*
  - actual presence in a MS – physical presence is enough?
  - not in any way temporary or intermittent presence
  - length of stay is not defined > certain duration
  - some degree of integration by the child in a social and family environment
  - ‘actual centre of interest’
  - relevant factors are: duration of stay, conditions and reasons for the move to the country, nationality, place and conditions of attendance at school, linguistic knowledge, family and social relationships of the child
  - intention of the parents to settle with the child in a MS

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‘Habitual residence of a child’ (2)

- *Case C-523/07 [2009] ‘A’ and Case C-497/10 PPU [2010] ‘Mercredi’*
  - age of child determines the factors – those can vary
    - (infants, young children, school age children, who had left school)
    - young child – family environment = circle of people on whom the child is dependent
  - age may have particular importance
  - parental intention, duration, child’s factual connections – may vary – balancing?
    - - depends on age of the child

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‘Habitual residence of a child’ (3)

- Case C-376/14 of 9 October 2014 = C v. M

- Duration of stay
- Regularity of stay
- Conditions and reasons for the stay in the territory of a Member State
- Conditions and reasons for the family’s move to that State
- Child’s nationality
- Place and conditions of attendance at school
- Linguistic knowledge
- Family and social relationships of the child in that State
- Intention of the parents or one of them to settle permanently with the child in another Member State, manifested by certain tangible steps such as the purchase or lease of a residence in that Member State, may constitute an indicator of the transfer of the child’s habitual residence

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‘Habitual residence of a child’ (4)

- Case C-376/14 of 9 October 2014 = C v. M
- This CJEU decision and the bench mark judgement delivered on 2 April 2009 (Case A, C-523/07) set up a **fact-based test** regarding the **criteria for the determination of the habitual residence** of a child as referred to in the Brussels IIa Regulation

  and
- Independent, autonomous and uniform interpretation throughout the EU, having regard to the context of the provision and objective of that legislation - settled case-law of the CJEU

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Arts. 9, 10

- **Art. 9: *Continuing jurisdiction of the child's former habitual residence***
  - Conjunctive requirements:
    - child moves lawfully from one MS to another MS
    - acquires a new habitual residence there
    - there is a judgment on access rights
    - they are within three months from the move
    - the holder of access rights has his/her habitual residence in the former MS (MS of the child's former habitual residence)
    - the holder of access rights does not accept the change of jurisdiction

- **Art. 10: *Wrongful removal***
- *Exceptions to the general rule*
  - jurisdiction of a MS where the child is not habitually resident
  - strict interpretation is demanded

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Art. 12

- ***Prorogation of jurisdiction***
  - Two different situations:
    - court of a MS exercising jurisdiction by virtue of Art. 3 and
      - at least one of the spouses has parental responsibility
      - agreement of the parties and
      - this is in the best interest of the child
    - court of a MS to which the child has substantial connection
      - in particular because one parent is or was habitual resident there /child's nationality (other grounds possible)
      - agreement of the parties and
      - this is in the best interest of the child
    - (best interest = superior interest)

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Art. 13, 14

- **Art. 13: *Jurisdiction based on the child's presence***
  - Court of the MS where the child is present
  - Requirements:
    - it is impossible to determine the habitual residence
    - Art 12 cannot be applied
  - 'habitual residence' is not equal to 'presence'
- **Art. 14: *Residual jurisdiction***
  - No court has jurisdiction upon Art. 8-13 – jurisdiction has to be determined by the MSs's own rules = national PIL rules on procedures

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Art. 15

- ***Transfer to a court of a MS which is better placed to hear the case***
  - in exceptional circumstances
  - no transfer to a third country's court
  - child must have particular connection to another court
    - Five cumulative requirements

      - seized court can invite the parties to introduce a request at another court
      - directly requests the another court to take over the case
        - ☐ European Judicial Atlas in Civil matters on competent courts
        - ☐ co-operation directly or through the central authorities

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‘Lis pendens’, Art. 19.2

- ***the same proceedings are brought to the courts of two MSs***
- same child and same cause of action
- parallel actions – irreconcilable judgments – occurs
- court first seized has to examine its jurisdiction
- court second seized has to stay the proceeding
- if court first seized considers itself competent – the court second seized declines jurisdiction
- if court first seized does not have jurisdiction – the court second seized can continue proceeding

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‘Lis pendens’ (2)

- *Case 296/10 [2010] ‘Purrucker’*
  - the court second seized has to examine whether the judgment of the court first seized was a preliminary step or a provisional measure
  - co-operation is emphasized: the court second seized has to seek information, communicate with the court first seized (upon the judicial cooperation and mutual trust)
  - ‘Ultima ratio’ is the approachment of the central authority

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Provisional measures, Art. 20

- MS can take **provisional, including protective measures** in respect of persons or assets in that State in accordance with the national law even if court of another MS has international jurisdiction as to the substance of the case.
- strict interpretation:
  - Three cumulative conditions:
  - Urgency: regarding the situation of the child, no possibility to involve the court having international jurisdiction
  - in respect of persons or assets in the MS where those courts are situated
  - provisional
    - *Case C-523/07 [2009] 'A'; Case C-403/09 PPU [2010] 'Detiček'*

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Provisional measures (2)

- *Case C-403/09 PPU 'Detiček' [2010]*
  - Provisional measure cannot be in contrast to the fundamental right, e.g. right to direct personal contact with the other parent
  - Art. 20 cannot be interpreted in such a way that it is used as an instrument for prolonging the factual situation caused by the wrongful conduct
- *Case C-523/07 'A' [2009]*
  - provisional measure: only if the situation endangers the child's welfare, health, development
  - immediate adoption
  - effectiveness of these measures have to be examined
  - best interest of the child demands that this court should inform the court having jurisdiction about these provisional measures

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Thank you for your attention

..... **Let‘s discuss** .....

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