CROSS-BORDER PARENTAL RESPONSIBILITY:

RULES ON JURISDICTION,
TRANSFER OF JURISDICTION
PROVISIONAL MEASURES
‘HABITUAL RESIDENCE’

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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
  - 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

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.

  - 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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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 IIa 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)
Art. 3.3 commitment: the EU promotes — among others — the rights of the child.

Art. 19 on effective legal protection
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
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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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**
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)
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’
    - 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
- **‘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


- 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)

  - 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
‘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
### 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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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
‘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**

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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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