



Planning the Future of Cross-Border Families: a
Path Through Coordination
EUFam's - JUST/2014/JCOO/AG/CIVI/7729



With financial support of the Civil Justice
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Brussels IIa calling... the 1996 Hague Convention answering

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EUFam's Final Conference – Milan, 1 December 2017



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GIURIDICI E STORICO-POLITICI

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- The international status of the 1996 Hague Convention
- A brief historical background
- The applicable law under the 1996 Hague Convention regime
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The supplementary role of the 1996 Hague Convention

- Brussels IIa Regulation provides only the rules concerning jurisdiction, recognition and enforcement of decisions, and co-operation between central authorities
- **no EU PIL instrument regulates the applicable law to parental responsibility matters**
- **the legislative gap is filled by another international legal instrument: the 1996 Hague Convention**



The international status of the 1996 Hague Convention

- The Convention governs **jurisdiction, applicable law, recognition, enforcement and co-operation** in respect of **parental responsibility and measures of protection of children**
- as of today, it is **in force in 46 States**
 - most recently: Turkey (since 1 February 2017),
Cuba (since today, 1 December 2017)
- only signatory States: Argentina, USA and Canada



The international status of the 1996 Hague Convention

- **All EU Member States** are (now) **Contracting States** of the Convention
 - Denmark, having opted out the Brussels IIa regime, is still bound to the Convention being a member of the HCCH
 - Italy was the last MS to ratify the Convention (EIF: 1 January 2016)
- **prior** to that, each MS had to refer to its **domestic PIL acts** to determine the law applicable to parental responsibility matters



A brief historical background

- The 1996 Convention was drafted within the **framework of the HCCH**, whose aim is to promote cross-border co-operation in the field of civil and commercial matters
- considering this statutory purpose and the direct impact on the civil judicial cooperation policy, the **EU** could become a **member of the HCCH in 2007**
 - June 2005: the HCCH Statute was amended in order to allow a REIO to accede to it
 - Decision 2006/719/EC: declaration to accept the HCCH Statute from the date of the admission



A brief historical background

Peculiarities of the EU competences

- whenever the EU has enacted measures included in a competence conferred by the Treaties, it can also conclude those international agreements that are necessary to fulfil their objectives (*ERTA* doctrine, and now Arts. 3(2) and 216(1) TFEU)
- indeed, in Annex II of the Decision 2006/719/EC the matters pertaining to both exclusive and shared competences of the EU are specifically listed, also with regard to its external field of action



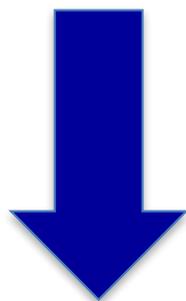
A brief historical background

With specific regard to the 1996 Convention

- Indeed the **EU** had **exercised its competence** on **jurisdiction**, and **recognition and enforcement** of decisions in parental responsibility matters through **Brussels IIa Reg.**, but **NOT** regarding applicable law
- **MS** maintained **their competence** as regards the **applicable law**
- Hence the **interest** of the EU for the 1996 Conv., **BUT:**



- The **EU** may not sign, ratify or accede to the Conv., only sovereign States can be part thereto

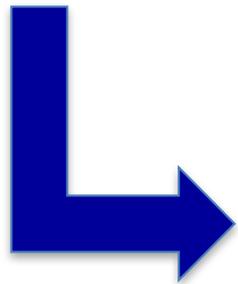


- a **specific authorisation** to sign (and then to ratify) the Convention in the interest of the European Community was required (Decisions 2003/93/EC and 2008/431/EC)



The interplay between BIIa Regulation and the 1996 Hague Convention

- not regulated in the context of specific provisions on the applicable law, but rather **on a general level:**



Arts. 61-62 BIIa, contained in Chapter V 'Relations with other instruments

The interplay between BIIa Regulation and the 1996 Hague Convention

Art. 61 BIIa

The **Regulation supersedes** the Convention whenever

- a) the **child** concerned has his/her **habitual residence on the territory of a MS**
- b) with regard to the **recognition and enforcement of a judgment** given in a court of a MS on the territory of another MS, even if the child concerned has his/her **habitual residence on the territory of a third State** which is a **contracting Party** to the Convention



The interplay between BIIa Regulation and the 1996 Hague Convention

Art. 62 BIIa (residual rule)

The **Convention** shall continue to have **effect** in relation to **matters not governed by the Regulation** (i.e. applicable law)



The interplay in the BIIa Recast Proposal

- The choice of **not regulating the applicable law** to parental responsibility has been **confirmed** also in the Recast Proposal
- the **interplay** between the two instruments remains **regulated on a general basis**, and the main coordination clauses provided by the current Art. 61(1) are reproduced in Art. 75(1) of the Recast
- **two further levels of coordination** are provided in paras. 2 and 3 of Art. 75



The interplay in the BIIa Recast Proposal

Art. 75(3) BIIa Recast (to reiterate the primacy of the jurisdictional regime laid down in the Regulation over that envisaged in the Convention)

- **when applying Chapter III – Applicable Law** of the 1996 Convention in proceedings before an authority of a MS, the reference in Art. 15(1) of the Convention to ‘the provisions of [its] Chapter II’ (jurisdiction) shall be read as ‘the provisions of Section 2 of Chapter II of the Regulation’ (rules on jurisdiction in matters of parental responsibility)



The applicable law under the 1996 Hague Convention regime

Art. 15(1): general rule

- principle of **coincidence between *forum* and *ius***
- this makes it possible for the authorities of Contracting States to apply their **domestic law** (i.e. the law they are most familiar with)



The applicable law under the 1996 Hague Convention regime

Art. 15(2): exception (narrow interpretation)

- as the **protection** of the **person** or the **property** of the child requires, authorities may apply or take into consideration the **law of another State** (even a **non-Contracting State**) with which the situation has a **substantial connection**
- no clarification of ‘substantial connection’
(nationality? place where the properties are located?)
- the **child’s best interests** is paramount in the application of this provision



The applicable law under the 1996 Hague Convention regime

Art. 15(3): change of habitual residence

- a change in the child's habitual residence (to another Contracting State) will result in a change of the authorities having jurisdiction (Art. 5(2))
- this involves a **change in the law governing the conditions of application of the measures taken in the State of the former habitual residence**



The applicable law under the 1996 Hague Convention regime

**Art. 16(1): attribution/extinction of
parental responsibility by operation of
law**

- **governed by the law of the State of
the child's habitual residence**
- **requirement: no intervention of a
judicial or administrative authority**



The applicable law under the 1996 Hague Convention regime

Art. 16(2): attribution/extinction of parental responsibility by agreement/unilateral act

- governed by the **law of the State of the child's habitual residence** at the time when the agreement or unilateral act takes effect, even if it is the law of a non-Contracting State
- requirement: **no intervention** of a judicial or administrative authority



The applicable law under the 1996 Hague Convention regime

Art. 16(3): change of habitual residence ?

- **parental responsibility** that exists under the law of the State of the child's habitual residence **subsists after a change** of that habitual residence
- underlying principle: **continuity** in the parent-child relationship

The applicable law under the 1996 Hague Convention regime

Art. 16(4): change of habitual residence

- the **attribution** of parental responsibility by **operation of law** to a person who **does not** already have such responsibility is governed by the **law of the State of the new habitual residence**
- underlying principle: **mutability**, in order to ensure the exercise of parental responsibility over a child



The applicable law under the 1996 Hague Convention regime

Art. 17: exercise of parental responsibility

- governed by the **law of the State of the child's habitual residence, even in case of its change**
- underlying principle: **mutability**, with the consequence that the holder of parental responsibility under the law of the State of former habitual residence retains such right, but he/she shall exercise it under the conditions provided by the law of the State of the new habitual residence

The applicable law under the 1996 Hague Convention regime

Art. 18: termination of parental responsibility

- referred to those rights conferred by operation of law or by agreement/unilateral act (Art. 16)
- terminated or modified by measures taken in application of the *lex fori* of the authority having jurisdiction under the Regulation

The applicable law under the 1996 Hague Convention regime

Art. 19: protection of third parties

- the validity of a **transaction** entered into **between a third party and another person** who would be entitled to act as the **child's legal representative** under the law of the State where the transaction was concluded **cannot be contested**, and the third party cannot be held liable, on the **sole ground** that the other person was **not entitled to act** as the child's legal representative under the law designated by the provisions of the Convention



The applicable law under the 1996 Hague Convention regime

Art. 20: universal character

- the rules concerning applicable law are of **universal** application, meaning that the designated law may even be the law of a **non-Contracting State**
- **only** when parental responsibility is attributed or extinguished **without a judicial or administrative authority being involved** (i.e. Art. 16), as the principle of coincidence between *forum* and *ius* would otherwise be compromised



The applicable law under the 1996 Hague Convention regime

Art. 21: *renvoi*

- **general rule:** *renvoi* is excluded
- **exception:** if the applicable law according to Art. 16 is that of a non-Contracting State, which designates the law of another non-Contracting State that would apply its own law, the law of the latter State applies

The applicable law under the 1996 Hague Convention regime

Art. 22: public policy

- the application of the law designated by the Convention can be **refused only** if it is **manifestly contrary to public policy**, ‘taking into account the **best interests of the child**’

General trends in national case law

- Cases involving the **application of the 1996 Hague Convention in the context of Brussels Ia proceedings**
- Preliminary note: only decisions collected and filed in the [EUFam's public database](#) will be referred to



General trends in national case law

- **Good work**
- the Convention is applied even if the **other State involved is not a Contracting party** thereto (i.e. whether the Convention has been ratified and entered into force in this other State)
- result: **possible misapplication** of the Convention which might be due to the confusion created by the reference to the Conv. in the Reg.
- eg Audiencia Provincial Barcelona 9 April 2014 num. 262/2014 (India); Audiencia Provincial Barcelona 17 April 2015 num. 256/2015 (Peru); Cour d'appel de Caen 3 November 2016 n. 15/03741 (Algeria)



General trends in national case law

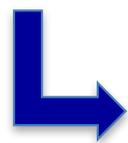
- In other cases **reference** is made only to **Art. 15** and not to the specific conflict-of-laws rules (mostly Art. 16-17)
- Sometimes no relevance is given to which specific aspect of parental responsibility is dealt with in the judicial proceedings (attribution, exercise or termination)
- eg Tribunale Padova 25 July 2016 (Art. 16); Tribunale Belluno 27 October 2016 no. 5217 (Art. 16-17); Tribunale Aosta 10 July 2017 (Art. 17); Tribunale Roma 3 November 2017 (Arts. 15-17); Tribunale di Lecco 28 November 2017 (Arts. 16-17)



General trends in national case law

The temporal application

- **Art. 53(1)**: application of the Convention to measures taken in a State after its EIF for that State
- **no rule concerning proceedings that were pending and in which no measure had yet been taken at the date of EIF**



the laws of each Contracting State govern these situations



General trends in national case law

The temporal application of the Convention: an “Italian” issue?

Two opposite approaches in pending proceedings

- a) in most cases, it was held that the situation fell outside the temporal scope of the Convention on the ground that the proceedings were already initiated before its EIF, and the **domestic PIL Act** was **applied**, which refers ‘in any case’ to the prior 1961 Hague Convention (eg Tribunale Roma 8 March 2016 no 4804; Tribunale Roma 12 April 2016; Tribunale Roma 28 September 2016 no 17955; Tribunale Roma 14 October 2016)

General trends in national case law

The temporal application of the Convention: an “Italian” issue?

Two opposite approaches in pending proceedings

b) more rarely, the **Convention** is **applied** if the **final decision** was issued **after** the date of EIF

(eg Tribunale Roma 19 May 2017; Tribunale Belluno 27 October 2016 no. 5217)

– element that appears to have been properly considered in these instances: lack of provisional measures taken during the proceedings, before its EIF



General trends in national case law

Inter-territorial conflicts

- **Arts. 47-48:** in those States comprising several territorial units, the general rule establishes that the law of the relevant territorial unit should apply
- however, in a number of decisions these provisions have been **overlooked when designating the law of a specific territorial unit as applicable** to the case at issue

(in particular, the Catalan law: eg Audiencia Provincial Barcelona 27 June 2013 num. 496/2013; Audiencia Provincial Barcelona 30 October 2014 num. 665/2014)



General trends in national case law

Sometimes domestic law provisions are qualified as **overriding mandatory rules** and therefore always applied by Italian courts even if the applicable law is another one:

- **Art. 36-bis of the Italian PIL Act: substantial provisions concerning the attribution of parental responsibility to both parents, the parents' duty to provide for child maintenance and the powers conferred to the judicial authority to restrict or terminate the exercise of parental responsibility in order to protect the child are to be **applied 'in any case'****



General trends in national case law

- This case law can be considered a **breach of international law (and EU law)** performed by the State insofar as the domestic mandatory rule overrides the Convention provisions governing the applicable law?
- safer approach: to apply the **Convention provisions, unless the foreign law results to be manifestly contrary to public policy** in light of the principles underlying the (inapplicable) domestic overriding mandatory rule



(Provisional) conclusions

Positive factor: EIF of the Convention now in all EU MS

- **consistent recourse** to the Convention in the context of BIIa proceedings
- **building of a more established case law** that is able to provide sound guidance for the resolution of cross-border cases



(Provisional) conclusions

- a **Recital** should be introduced in the Recast Proposal with regard to the **determination of the applicable law** to parental responsibility matters
- **useful to interpret the Convention** from a practical perspective

Thank you



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