The 1996 Hague Children Convention: The Legal Framework

Prof. Gian Paolo Romano

University of Geneva

21 October 2015
Outline

• Overview of the 1996 Hague Convention
• Jurisdictional Scheme
• Law Applicable
• Recognition and Enforcement
Overview

• **Objective: prevent « conflict of legal systems »**
  – i.e avoid having Country A and Country B being in conflict with each other over how to allocate parental responsibility (Preamble)

• **Common rules on:**
  – jurisdiction to take «protective measures»
  – law applicable to such measures
  – recognition and enforcement
  – cooperation among judicial and administrative authorities

• **Measures**
  – parental responsibility, custody rights, access rights
  – withdrawal of parental responsibility
  – placement in foster families and institutional care, etc.
  – measure to protect assets belonging to the child
Jurisdictional Scheme

• General Jurisdiction
  – Habitual residence of the child (Art. 5 and 6)
    ▪ no definition
    ▶ factors articulated by CJEU in a range of decisions
    ▪ relevant time: no clear answer
    ▶ P. Lagarde Report: prevailing opinion in favour of time of decision
    ▶ Brussels IIa: at the time of filing
    ▪ for internationally displaced children: presence (Art. 6)
  – Divorce (Art. 10): three strict requirements
    ▪ a parent is a holder of parental responsibility
    ▪ two parents agree on competence of divorce judge
    ▪ judge considers it is in the interests of the child (normally case if conditions under a) and b) are fulfilled

– Urgent measures (Art. 11)
– Territorial measures (Art. 12)
Jurisdictional Scheme

• Coordinating jurisdiction
  – Transfer of jurisdiction (Art. 8 and 9)
    ▪ substantion connection required
      ➢ nationality, property, other substantial connection, etc.
    ▪ procedure
      ➢ authorities of A of competent jurisdiction asks authorities of B to exercise jurisdiction on their behalf
      ➢ authorities of B ask authorities of A to allow them to exercise jurisdiction on behalf of authorities of A
    ▪ transfer effected only in case of agreement between the two authorities
  – Coordination based on prior-in-time rule (Art. 13)
    ▪ if authorities of B are seised after authorities of A
      ➢ they should abstain from exercising jurisdiction
      ➢ as long as authorities of A have not decided
Law Applicable

• **Principle**
  – each authority applies its own law (art. 15(1))

• **Four exceptions**
  – possibility of « applying or taking into consideration » law of another State with which *substantial connection*
    ▪ if person or property of the child *so requires* (art. 15(2))
  – parental responsibility arising out of (art. 16)
    ▪ *operation of law* governed by law of habitual residence at the *time of event* triggering parental responsibility
    ▪ *agreement or unilateral act* by law of habitual residence at the *time of the agreement or act*
  – exercise of parental responsibility (art. 17)
    ▪ governed by law of the *current habitual residence*
  – validity of transaction between a third party and a person which would be the legal representative under the law of place of transaction (art. 19)
Recognition and Enforcement

• Recognition of decision of State A sought in State B
  – Recognition takes place by operation of law
    ▪ unless grounds for refusal exist (see next slide)
  – Possibility of prompting a decision on recognition
    ▪ any interested person may seek such decision (art. 24)
    ▪ procedure governed by the law of State B
      ➢ no common rules on recognition procedure
  – Exequatur
    ▪ necessary in case decision requires enforcement
    ▪ takes the form or declaration of enforceability or registration
    ▪ « simple and rapid procedure » (art. 26(2))
  – Enforcement: according to rules of State B
    ▪ as if decision made by State B
    ▪ taking into account the interests of the child
Recognition and Enforcement

• Grounds for non-recognition (art. 23(2))
  – Breach by State A of the rules on jurisdiction
    ▪ BUT: facts as established by the authority of A are binding on the authority of State B (art. 25)
  – Violation of right to be heard
    ▪ of the child: if fundamental principle of State B
    ▪ of any person adversely affected by the decision
  – Violation of public policy of the requested B
    ▪ taking into account the best interests of the child
  – Measure incompatible with a later measure
    ▪ taken in the non-contracting State C of the habitual residence
    ▪ recognizable in State B