TOWARDS A BETTER PROTECTION OF CHILDREN WORLDWIDE: THE 1996 HAGUE CHILD PROTECTION CONVENTION IN PRACTICE

GENEVA, 21-23 OCTOBER 2015
THE RIGHTS OF ACCESS IN BRUSSELS IIA AND IN THE 1996 HAGUE CONVENTION

Geneva, 22 October 2015
Right of access

- It denotes the level of contact a parent or other significant person in a child’s life can have with a child (not only personally, but also by phone, e-mails, skype)

- It shall include in particular the right to take a child to a place other than his or her habitual residence for a limited period of time: Arts. 2, n. 10 Regulation; 3.b) 1996 Hague Convention.
Legal Sources

- Regulation 2201/2003: jurisdiction and recognition and enforcement of judgments;
- 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

Other legal instruments:
- Hague Convention of 25 October 1980 on the civil aspect of international child abduction
Italian Law 31 May 1995, No 218:

- the protection of minors is «in all cases» (even beyond the personal and material scope of application of the Convention) governed by the Hague Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants, made effective by Law No 742 of 24 October 1980.

- The Law No 218 has now a residual scope of application because Art. 2 thereof states that its provisions are without prejudice to the application of international conventions (and EU Regulation too) effective in Italy.
Hague Convention of 5 October 1961 concerning the power of authorities and the law applicable in respect of the protection of infants.

- It makes no reference to access, but according to most Courts the term “measures directed to the protection of [the child’s] person” includes bearing on access as well as measures bearing on custody.

- Its Art. 35 is dedicated to the role of Central Authorities in contact cases.
Luxembourg Convention of 20 May 1980 concerning Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children

- It can operate only where an order already exists and so it had a frequent application for access orders
- It works on the principle of mutual recognition and enforcement of orders made in Contracting States
- After the entry into force of the Regulation 2201/2003, it mostly only operates with respect to countries which are not EU Members (Andorra, Iceland, Liechtenstein, Moldova, Montenegro, Norway, Serbia, Switzerland, The Former Yugoslav Rep. Macedonia, Turkey, Ukraine)
- It gives a central role to the nationality of the child.
Regulation 2201/2003 of 27 November 2003

It applies since 1 March 2005 to all Member States, except for Denmark
Objectives

- Central role of the child’s best interests, which entails an actual interest prevailing on the rights and interests of the subjects who maintain relationships with him/her.

- The Regulation lays down specific rules to guarantee the right of the child to maintain contacts with both parents (see also Art. 24 of the Charter of Fundamental Rights).

- It provides for uniform rules on recognition and enforcement, facilitating the free circulation of judgments.
Relations with other instruments: Arts. 59, 60, 61

- **General rule:** the Regulation supersedes conventions existing at the time of its entry into force which have been concluded between two or more Member States, as the 1961 Hague and 1980 Luxembourg Conventions.

- It complements the **1980 Hague Convention on the civil aspect of international child abduction**.
It lays down specific rules with regard to the **1996 Hague Convention**:

- the Regulation prevails over the **Convention** if the child has his/her habitual residence in a Member State (except for Denmark);
- the Regulation prevails as regards recognition and enforcement of judgments given by a judge of a Member State on the territory of another Member State, even if the child habitually resides in a third State which is a Contracting Party to the Convention.
Scope of application

All the measures of protection of the child:

- ECJ 27 November 2007, C-435/06, C case (even measures that under national law pertain to the public area: taking into care and placement of the child outside their original home in a foster family);

- ECJ 26 April 2012, C-92/12 PPU, Health Service Executive (placement of child in a secure institution providing therapeutic and educational care situated in another Member State and which entails that, for their own protection, the child is deprived of her liberty)
- even children born out of wedlock;
- even children of only one of the partners
- even though the parental responsibility proceeding is not linked to a proceeding on matrimonial matters;
- no *exequatur* for the decisions on the right of access
Exclusions

- The Regulation does not apply to purely internal situations and not even in plurilegislative States (England and Wales High Court 31 July 2013, England and Scotland) being this an internal aspect of civil procedure.
- See however the Scottish case of 2006 (*Surowiak v Dennehy*) where it was accepted that the Regulation applied to a jurisdictional dispute between Scotland and England.
Recognition and Enforcement of the rights of access (Art. 41)

- **General rule**: automatic recognition, without delay (mutual recognition of judgments).

- **Aims**: make the protection of the right of access easier.

- No possibility of opposing the recognition of a certified judgment

- A judgment can not be reviewed as to its substance, but it is possible to issue a new decision if a new situation arises.
- Abolition of the *exequatur* substituted by the *certificate* (Annex III; see following slides)

- The decision of the the State of origin are equated to those of the requested State.

- **Documents:**
  1) a **copy of the judgment** which satisfies the conditions necessary to establish its authenticity;
  2) a **certificate** completed in the language of the judgment and partially (with regard of practical arrangements for the exercise of rights of access) translated into the language of the State of the enforcement or any other that the Member State of enforcement expressly accepts.
The judge of the State of the enforcement can only establish how the right of access shall be exercised if this is not provided in the decision that has been recognised, in the respect of the main elements contained in this one.

- **Enforcement procedure**: law of the State of enforcement.

- **Coercive enforcement in Italy**: obligations to do/not to do something (Art. 612 Civil Procedural Code).
Sound refusal of the child to follow the parent creates obstacles to the enforcement if he/she is considered mature enough to decide what his/her best interests are. If not the judge can take the necessary measures.
Certificate (Art. 41)

- It is issued in the form of Annex III by the judge who made the original “access” (contact) order.
- It is issued *ex officio* when the judgment becomes enforceable, even if only provisionally. If the situation subsequently acquires a cross-border character, the certificate shall be issued at the request of one of the parties.
- No-review as to substance, only rectification; the only way to challenge the substance is to appeal the decision in the State of origin.
Conditions for issuing a certificate

- In case of default judgments: no service or no timely service of document instituting the proceedings was effected, unless there is unequivocal acceptance of the judgment by the party not properly served;
- all parties concerned were given an opportunity to be heard;
- the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his/her age or degree of maturity.
The child’s hearing

- Decision of hearing/not hearing the child has to be adequately motivated;
- In the draft Conclusion of **18 November 2014** the Council invites the Member States and the Commission to: «**implement the right of the child to be heard, consulted and to participate in all the matters which concern them, notably by giving all children the opportunity to express themselves and by ensuring that those views are given due weight in accordance with their age and maturity**». 
The state of mind of the child

- United Kingdom, England and Wales Court of Appeal, 19 March 2009: judicial discretion, the return of the child wrongfully removed has not been ordered on the sole basis of the refusal of the child considered mature enough to give an aware and conscious opinion.

- UK Supreme Court, 15 January 2014: in order to establish the habitual residence of an adolescent who temporarily lives in a given country the judge has not to evaluate his social integration, but his state of mind.
In a procedure for the return under the Hague Convention the Supreme Court strays from the previous decisions of 27 July 2007, n. 16753 and 11 August 2011, n. 17201 according to which the hearing of a mature and sound child has only a "cognitive relevance".

The Supreme Court gives importance of the hearing itself both under national (see Art. 315 bis c.c. e Law 219/12) and international law (NY Convention 1989, Strasbourg Convention 1996).
The hearing of children - considered mature enough to express their thoughts, emotions, and needs - justifies, under the discretionary power of the judge, the respect of their opinion. A negative opinion of the minor on the return can on its own provide justification for the withdrawal of the request.
No appeal shall lie against the issuing of a certificate; an evaluation can be carried out only as regards the opposition to the execution (Art. 615 Civil Procedural Code);

It shall certify the respect of the rights of defence (all parties had the opportunity to be heard, the child had the same opportunity in consideration of age and degree of maturity, and that any default judgment gave by defaulting party either notice and opportunity to prepare a defence or he has accepted the judgment), contains practical information.
When a certificate has been issued, the order concerned enjoys the same status as a domestic decision; recognition may not be refused; the *exequatur* is not required; if the contact order as such is challenged in the State of origin and the next instance makes a new contact order, the certificate issued by the first instance Court has to be withdrawn and, if appropriate, replaced by a new one.
The Courts of the Member State where the enforcement of access order is occurring may make only practical arrangements to organise the exercise of right of access (if the necessary arrangements have not, or not sufficiently, been made in the judgment delivered originally by the Court of the Member States having jurisdiction as to the substance of the matter and provided the essential elements of the judgment are respected).
In other words, the Courts where the enforcement of contact is taking place may make any practical arrangements for contact if not set out sufficiently or at all in the original contact order. These arrangements cease where there is a later order of the Courts of the Member States having jurisdiction as to substance matter.
Problematic issue

Last August the Committee on Petitions of the European Parliament had to deal with the problems connected with the fact that enforcement is governed by national law:

- a German father complaints about difficulties in maintaining contacts with his son who lives in the UK with the mother;

- he asks for an effective exercise of his access rights by enforcement in the UK of the decision on rights of access given by the Family Court in Malta and certified under Art. 41 Reg.;
according to the father, the enforcement measures taken by the UK authorities are inefficient;

the Commission’s conclusion is that “the Regulation only facilitates enforcement insofar as it renders judgments issued in one Member State capable of execution in another, in lines with the national modalities. In this context, the use of any specific procedure for enforcement (...) has also to be assessed in view of national legal framework”. And so no infringements of the EU Law in that case.
In conclusion, the judgment, when certified, becomes automatically recognised and enforceable in all Member States.

The order is treated as if made locally and enforceable directly as a local order by local law and procedure.
ANNEX III
CERTIFICATE REFERRED TO IN ARTICLE 41(1) CONCERNING JUDGMENTS ON RIGHTS OF ACCESS(1)

1. Member State of origin
2. Court or authority issuing the certificate
   2.1. Name
   2.2. Address
   2.3. Tel./fax/e-mail
3. Person(s) with rights of access
   3.1. Full name
   3.2. Address
   3.3. Date and place of birth (where available)
4. Holders of parental responsibility other than those mentioned under 3(2)(3)
Annex III (2)

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<th>Section</th>
<th>Description</th>
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| 4.1. Mother | 4.1.1. Full name  
 4.1.2. Address  
 4.1.3. Date and place of birth (where available) |
| 4.2. Father | 4.2.1. Full name  
 4.2.2. Address  
 4.2.3. Date and place of birth (where available) |
| 4.3. Other | 4.3.1. Full name  
 4.3.2. Address  
 4.3.3. Date and place of birth (where available) |
| 5. Court which delivered the judgment | 5.1. Name of Court  
 5.2. Place of Court |
6. Judgment
   6.1. Date
   6.2. Reference number

7. Children who are covered by the judgment(4)
   7.1. Full name and date of birth
   7.2. Full name and date of birth
   7.3. Full name and date of birth
   7.4. Full name and date of birth

8. Is the judgment enforceable in the Member State of origin?
   8.1. Yes
   8.2. No

9. Where the judgment was given in default of appearance, the person defaulting was
   served with the document which instituted the proceedings or with an equivalent
   document in sufficient time and in such a way as to enable that person to arrange for his
   or her defence, or the person has been served with the document but not in compliance
   with these conditions, it is nevertheless established that he or she accepted the decision
   unequivocally
10. All parties concerned were given an opportunity to be heard.

11. The children were given an opportunity to be heard, unless a hearing was considered inappropriate having regard to their age or degree of maturity.

12. Practical arrangements for exercise of rights of access (to the extent stated in the judgment):
   12.1. Date and time
       12.1.1. Start
       12.1.2. End
   12.2. Place
   12.3. Specific obligations on holders of parental responsibility
   12.4. Specific obligations on the person with right of access
   12.5. Any restrictions attached to the exercise of rights of access

13. Names of parties to whom legal aid has been granted.

Done at ..., date ....
Signature and/or stamp
Recognition and Enforcement under the 1996 Hague Convention

Concluded on 19 October 1996
It is in force since 1 January 2002
The Contracting States are 42 States.

Between the EU Member States since 25 November 2012, except for:

- Sweden (on 1 January 2013)
- Belgium (on 1 November 2014)
- Italy (on 1 January 2016)
Aims

- To improve the protection of children in international situations, also providing a basis for recognition and enforcement of foreign decisions concerning contact. It applies to children until the age of 18 (the same in the Regulation; differently in the Hague Convention 1980)

- To establish co-operation between the authorities of the contracting States in order to avoid conflicts between legal systems in relation to measures taken to protect children
For the first time, the Convention deals not only with parental responsibility, but also with jurisdiction, applicable law, recognition and enforcement and co-operation in respect of measures for the protection of children (differently from the Regulation);

In this way the Convention covers both private and public law measures because it addresses a very wide range of international child protection issues (see CJ under Reg. system).
It provides that «The measures taken by the Authorities of a Contracting State shall be recognised by operation of law in all other Contracting States»;

it means that a parent will not be required to initiate any proceedings to obtain recognition of the order. It is the party against whom the measure is invoked who must allege a ground of non-recognition.

Para. 2 sets out a limited list of grounds where recognition may be refused.
The requisite proof of the necessary measures taken by a Contracting State normally results «from the written document emanating from the authority of origin and incorporating the decision taken by it».

However, in order to avoid any bureaucratic diversion, the Convention does not actually require the production of a written document from the authority of origin. In cases of urgency, a telefax is, in fact, sufficient to prove recognition of the measure.
Advance recognition: Art. 24

It is a preventive procedure, limited to recognition or non-recognition of the order. It could be particularly useful where a person may have a legitimate interest in dispelling a doubt as to the existence of a ground of non-recognition.
Measures taken in one State and there enforceable shall be declared **enforceable** (or registered for the purposes of enforcement) in another State according to the procedure provided in the law of that State, as if those measure had been taken by the authorities of that State and to the extent provided by its law.

The procedure by which the contact order is declared enforceable (or registered for enforcement) must be simple and rapid (para. 2), but the Convention does not impose a specific procedure or time limits.
The declaration of enforceability may be refused only for one of the reasons set out in Art. 23, para. 2.

In the same way as Regulation No 2201/2003, Art. 27 of the Convention does not allow any review on the merits.
Co-operation between authorities: Art. 35

The competent authority of one Contracting State «may request the authorities of another Contracting State to assist in the implementation of measures of protection taken under this Convention, especially in securing the effective exercise of rights of access as well as of the right to maintain direct contacts on a regular basis»
Art. 35, supplementing the general duties of States (some of them can be useful in ensuring the exercise of the right of access, such as to provide assistance in locating the child and in facilitating agreed solutions), sets forth a general basis for co-operation in cross-border access cases;

it provides for mutual assistance between the competent authorities with respect to the implementation of measures of protection.
Art. 35 underlines the primary role played by the authorities of the child’s habitual residence in deciding upon any measures which may be needed to protect the child (similar to the Regulation).

Art. 35, para. 2 of the Convention applies to the assistance to be provided by States in connection with the exercise of access rights.
A parent residing in a Contracting State, who is seeking to obtain or maintain access to a child habitually resident in another Contracting State, may request the authorities in the place of residence to gather information or evidence and make a finding on his/her suitability to exercise access and, if applicable, delineate the conditions under which it is to be exercised.

The authority which has jurisdiction must admit and consider the information, evidence and findings before reaching its decision.
However, it is not obliged to adjourn the proceedings pending the outcome of such a request, in particular when it is considering an application to restrict or terminate access rights granted in the child’s former habitual residence.

In any case, the authority having jurisdiction can take provisional measures, pursuant to Art. 35, para. 4, pending the outcome of the request.
Relationship between 1980 and 1996 Hague Conventions

- The 1996 Convention does not affect the application of 1980 Convention, but it can be used to securing access rights.
- It may be used in preference where there is a pre-existing custody order.
- The 1996 Convention is fully applicable to the five 1996 Contracting States which are not also Contracting States to the 1980 Convention (Albania, Armenia, Dominican Republic, Morocco and Russia).
Conclusions

- Access orders are fundamental for the benefit of the life of the child post parental separation.
- Enforcement methods are necessary, but they present problems because ultimately they may work against the wishes and best interests of the child.
- Cross-border laws for recognitions and enforcement of national access order are fundamental.
Compared to the 1980 Hague Convention, the 1996 Hague Convention is more specifically directed to co-working between governments for children orders including access, but too many countries are still not signatories.
A contact order made in the context of international relocation by the authorities in the Contracting State where the child is habitually resident is entitled to be recognised by operation of law in the Contracting State to which relocation is to occur (Art. 23).

The order is also entitled to be enforced in the originating Contracting State since it was made in that State (Arts. 26, 28).
As a further safeguard, the advance recognition of the access order gives the opportunity to the authorities of the Contracting State of relocation to regard the order as having the same status as an order made by the authorities of that State.
Additional value of the 1996 Hague Convention

The 1996 Hague Convention makes it possible to enforce contact orders between Contracting States in a way which previously was only possible between EU Member States.
The Regulation 2201/2003 is a well-functioning instrument that has brought important benefits to citizens, in particular regarding to parental responsibility matters.

Report from the Commission of 15 April 2014: the Regulation is the first EU instruments to have abolished *exequatur* in respect of certified judgments on access rights to children.

However, some of existing rules could be improved.
The **reasons** depend on the fact that:

1. the **enforcement procedure is governed by the law of the Member States** of enforcement and

2. national **laws are different** and so difficulties arise with regard to the enforcement of parental responsibility decisions.
Regarding recognition of judgments significant differences have arisen in practice with regards to the hearing of the child because of diverging national rules governing it.
Regarding the enforcement of judgments, Member States do not interpret the term in a uniform manner.

Some national systems do not contain special rules for the enforcement of family law decisions and parties must resort to procedures available for ordinary civil or commercial decisions (the problem of the length of procedure: the application of different Member States procedures may not guarantee an effective and expeditious enforcement of judgments).
Regarding co-operation between Central Authorities – essential in particular in concerning access rights because for the assistance of the holders of parental responsibility to have their judgments recognised and enforced – the relevant provisions are not sufficiently specific.
That’s why the Commission is studying a recast of Brussels IIA Regulation, in particular regarding to the enforcement.

In this respect, the European Parliament calls for a better coordination between the Regulation and the 1996 Hague Convention, including in the Reg. an express reference to the Chapter on applicable law of the Conv. (Van Loon Study for the European Parliament, February 2015).