TRANSNATIONAL MOVEMENT OF CHILDREN:

BRUSSELS II REVISITED – WHAT YOU NEED TO KNOW

[about a significant change in the law relating to child abduction within Europe - in force from the 1st March 2005]

1 A distinction is generally made between two types of abduction, **so-called north-south abductions**, or classic abductions: the father takes the children to his country of origin or does not send them back following a right of access. These abductions are often coupled with a conflict of civilisation.

East-west abductions, the unlawful removal of the child by the custodial parent, most often the mother, who, after living abroad with the father, returns to her own country with the child. When it cites against neighbouring countries, misrepresentation is even more significant as only the nationalist reactions of the countries involved often justify the solutions presented being so different, or indeed radically opposed, in a Europe where it has become so easy to move. The parent has no choice but to place herself under the protection of its judges.

2 These east-west or **trans-European** abductions of children are precisely those covered by Council Regulation (EC) No *2201/2003 on jurisdiction, recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.*

3 Two types of measures are distinguished at international level, which can solve the problem of international abduction, as well as the existence, at national level, of preventive measures[1]:

- dissuasive measures: that is, in particular, the recognition of judgments and the protection of rights of access,
- measures to ensure that the child is returned.

The precise specification of the rules of jurisdiction[2] prevents "forum shopping" and therefore indirectly restrains either parent from evading, together with his or her child, the justice of one of the Member States.

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[1] Measures prohibiting departure from the territory (Civ.I, 3 February 1982, appeal No 80-16.027 stating the absence of a judicial convention linking France and the host country; Article 373-2-6, paragraph 3, of the Civil Code resulting from the Law of March 2002), or recognition of the broader rights of parents and, in particular, the joint exercise of parental authority and of an alternative residence (Articles 373-2 and 373-2-9 of the Civil Code).

[2] The principle is that the court of the habitual residence of the child on the day of the seisin has jurisdiction and remains competent to rule for three months after his or her legal movement for matters of rights of access. There are two exceptions to this jurisdiction:

1 The child has acquired residence in another Member State and his or her movement or non-return has been agreed;

2 The child has acquired habitual residence in another Member State, has resided there for at least a year, while the legal guardian knew or should have known of the location of the child and the child has integrated into his or her new environment.

Pursuant to Article 20, the court of the place of the presence of the child may take interim measures, the effects of which cease once the competent courts have taken the appropriate measures.

4 The Regulation relates in particular to the cooperation of the central authorities (section IV) and contains specific rules on the abduction of children and on access rights, providing in particular for the recognition and automatic enforcement of these judgments.

The new Regulation partakes of a determination to group the different international and European rules governing the jurisdiction, the recognition and the enforcement of judgments in matters of parental responsibility [3].

5 Here, we will confine ourselves to the measures relating to the recognition of judgments and access rights and those aimed at guaranteeing the return of the child.

I. THE DISSUASION OF ABDUCTIONS BY COUNCIL REGULATION (EC) NO 2201/2003

I.A The recognition of judgments

1 Recourse to the rules of common law to gain recognition in another country for judgments relating to custody is often particularly complex in practice.
- This recognition is necessary in cases where a judgment includes enforcement measures in the other Member States.
- Compliance with a judgment lies in its recognition, which conditions its enforcement.
- This is, in particular, the purpose of the Hague Convention of October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children.

2 Council Regulation (EC) No 1347/2000 was particularly effective[4], but was limited in scope, as it only concerned judgments relating to the dissolution of matrimonial ties and parental responsibility towards common children, i.e. those born out of the marriage (B.Sturlese, H. Gaudemet-Tallon).

4 The new Brussels II Regulation, which is based on the principle of the equal treatment of children[5] applies to all judgments given on matters of parental responsibility and, in particular, to custody.

5 The notion of "judgments"
What is meant by "agreements between the parties that are enforceable in the Member State in which they were concluded", which are mentioned in Article 46?

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[3] These rules were divided up between the 1961 Hague Convention on the Powers of Authorities and the Law Applicable in respect of the Protection of Minors, the 1996 Hague Convention on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, the Luxembourg Convention of 20 May 1980 on Recognition and Enforcement of Judgments concerning Custody of Children and on Restoration of Custody of Children and Council Regulation (EC) No 1347/2000 on jurisdiction, the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

[4] It established the principle that judgements served in a Member State were recognised in the other Member States without the need for recourse to another procedure; they were declared enforceable according to a simplified procedure.

[5] Access rights may be those of the stepparents, or indeed those of the grandparents; this same spirit is at the heart of the Convention of the Council of Europe of 15 May 2003 on the personal relations of children.

- The practical guide of the European judicial network indicates that it is enough that they are enforceable, irrespective of whether it concerns a private agreement between the parties or an agreement concluded before an authority.
- **Pursuant to Article 373-2-7 of the Civil Code,** agreements under which the parents organise the ways in which they exercise parental authority may be submitted to the judge in family matters for approval, in which case the Judge has to ensure that the interest of the child is protected.
- **Does the new European Regulation cover parental agreements that have not been approved?**
  - These agreements are, in principle, valid when they relate solely to the methods and not to the attribution of parental authority. They are also obligatory between the parties. Once they have been submitted to the judge, however, they become an element that could confer greater effectiveness on the judge's decision. In practice and for increased security, practitioners seek approval.
- **Is it necessary to give a European definition to the notion of parental agreement or to refer to the national law of each Member State?**

6 This text greatly facilitates the circulation of judgments relating to parental authority.
- **The principle** is that judgments served by another Member State are automatically recognised if they are accompanied by the certificate provided for by Article 39[6]. Judgments are enforced after they have been declared enforceable by the Member State on the application of any interested party (Article 28)[7].
- The Member States wished to maintain **certain grounds of non-recognition**[8], in particular:
  - the public policy of the Member State, which still bears witness to the presence of a national ideology of the strong family within the countries of the EU.
  - the child not being given an opportunity to be heard recalls the importance of the rights of the child. In practice, this condition may be difficult to implement, as we shall see in respect of access rights.

I.B The protection of access rights

1 One of the main objectives of the Regulation is to guarantee that, following a legal separation, a child may maintain relations with all those who have parental responsibility, even in cases where they live in other Member States.
- Failure to preserve the link created by access rights constitutes an abduction; the guarantee that the effectiveness of the link with the child is preserved prevents the risk of abduction.

[6] The central authorities provide assistance to persons seeking recognition and enforcement (Article 55 b).
[7] Judgments relating to access rights and ordering the return of the child no longer have to be the subject of a simplified procedure in declaration of enforceability.
[8] The grounds of non-recognition are listed in Articles 22 and 23 and are, in particular, if such recognition is contrary to the public policy of the Member State in which recognition is sought, or the child has not been given an opportunity to be heard; except in an emergency, if such recognition is given in default of appearance, if the respondent was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable the respondent to arrange for his or her defence unless it is determined that the respondent has accepted the judgment unequivocally: a person asserts that the judgment hinders his or her parental responsibility and he or she has not been given the opportunity to be heard; the judgment is irreconcilable with other judgments; the case concerns the placement of a child in another Member State and the procedure set out in Article 56 has not been respected.

- [Access rights are] traditionally protected by the Luxembourg Convention of 20 May 1980 on the Recognition and Enforcement of Judgments concerning Custody of Children and on Restoration of Custody of Children, which extends the protection given to custody to access rights.

- Council Regulation (EC) No 2201/2003 facilitates the exercise of transnational access rights by guaranteeing that a judgment on access rights[9] is directly recognised and enforceable in another Member State if it is accompanied by a certificate[10].
  - There is therefore no need for a simplified procedure in declaration of enforceability.
  - On this point of recognition and enforcement, the new Regulation goes further towards harmonisation than do Regulation (EC) No 1347/2000 and Regulation (EC) No 44/2001.

2 This concern responds to the initiative of the French Republic submitted on 15 August 2000 relating to the mutual enforcement of judgments relating to the cross-border exercise of access and accommodation rights with a view to adopting Council Regulation (EC) on the mutual enforcement of judgments concerning child access rights[11].

It was also highlighted that one of the significant shortcomings of the 1980 Hague Convention was the lack of effective protection of access rights.

3 Articles 40 and 41 set out the conditions for the issue of the certificate: the parties and the child were given an opportunity to be heard, except the latter if his or her hearing was considered inappropriate having regard to his or her age or degree of maturity.

4 The opportunity for the child to be heard

- Article 373-2-11 of the Civil Code provides that when the judge rules on the ways in which parental authority is exercised, he or she takes account of the feelings expressed by the child who is a minor.
- This action is only taken when the judge makes a ruling and not when the judge examines the agreement of the parents. It would also seem that the agreement of the parents is a limit to the measure of investigation by the welfare authorities, which could not be ordered in the case of divorce by mutual consent.
- Quid therefore of the hearing of the child in this context, especially since, in practice, thanks to the jurisprudence, the judges delegate the hearing of the child and only have to note that the child was heard as part of an investigation by the welfare authorities or a medico-psychological examination or by any other person of his or her choice (Civ.II, 5 June 1991, B No 173)[12]. Moreover, where the minor requests to be heard under Article 388-1 of the Civil Code, the judges have got into the habit of allocating a children's advocate to him or her[13].

[9] Access rights – right to take the child to a place other than that of his or her habitual residence for a limited period (apply only to judgments that grant access rights and not to those that refuse them)

[10] The Regulation also introduces an innovative rule (Article 9) in that it allows the former habitual residence to maintain jurisdiction for three months following the wrongful abduction (for example, if the holder of parental authority was lawfully able to change the child's residence) to rule on the measures of access rights.

[11] JOCE C 234/7(BII , 29 May 2000, entry into force 1 March 2001).

[12] This position was particularly criticised by French doctrine (J.Massip, J.Castaignede).

[13] But as the latter is not party, he or she does not obtain the documents and cannot appeal the judgment.

These procedural considerations lead one to suppose that it will be particularly difficult to implement the necessity for the child to have had the opportunity to have been heard in the context of decisions approving a parental agreement or a divorce by mutual consent under French law.

4 One of the most important problems concerns the effective enforcement, which is not regulated by the Regulation. One solution could be to seek the assistance of the central authorities of the State concerned provided they have the time and the necessary resources.

II THE IMMEDIATE RETURN OF THE CHILD UNDER REGULATION 2201/2003

1 France played an essential role in the adoption of rules relating to the immediate return of unlawfully removed children. Extremely concerned by the issue of the international abduction of children, it also concluded numerous bilateral agreements[14].

In 1978, there were 130 cases of unlawful removal; in 2002 there were 350. A significant increase occurred between 1997 and 2002 in particular in Great Britain, where there were 42 cases, which is the largest number of cases after the EU (56) and ahead of Morocco.

During the preparation of Regulation (EC) No 2201/2003, France also wanted it to include all the rules of the 1980 Hague Convention on the civil aspects of international child abduction, which was not possible due to a lack of consensus.

2 International child abduction covers the wrongful removal and the wrongful retention of the child (Article 2(11). The judge of the habitual residence must determine whether the removal or the retention is wrongful on the basis of the criteria set by Article 11. The Member State concerned must ensure that the child is returned quickly. A court that decides not to return a child sends a copy of its judgment and the case documents to the court of origin and the two courts cooperate. If the judgment of the State of origin orders the return of the child, the e*xequatur* is removed and this judgment is immediately enforceable in the State in question with the certificate required under Article 39.

3 Several innovations and corrigenda were made by Regulation (EC) No 2201/2003, which must be understood as supplementing the 1980 Hague Convention[15].

3.1 The special rule of jurisdiction for the international abduction of children of Article 10: It is up to the judge of the habitual residence to determine *in fine* whether the removal is wrongful. In reality, even though this is not the objective of the text, the court of origin seeks to act as appeal court.

- The notion of habitual residence is not defined more precisely, though it is worth noting that, as the Hague Convention was Communitarised, it may be interpreted by the CJEC, in the same way as the provisions of Regulation (EC) No 2201/2003.
- The court of the habitual residence loses its jurisdiction in particular in cases where the holders of parent responsibility acquiesce to the removal.[16].

[14] Bilateral agreements: Algeria, Benin, Congo, Niger, Senegal, Slovakia, Chad, Togo, the Czech Republic, then those inspired by multilateral agreements, Brazil, Djibouti, Egypt; Hungary, Morocco, Portugal, Tunisia, and the Franco-Algerian Agreement of 21 June 1988;within the European Union, the contention with Germany led to the implementation in 1999 of a Franco-German parliamentary mediation committee.

[15] The Hague Convention, which was ratified by all the Member States, will continue to apply.

- In application of the Hague Convention, French case law has had the opportunity to state that both **consent** (Tribunal de Grande Instance of Lyons, 9 July 1993, the Prosecutor's office of Lyons/Gourio Dubos) and **assent** (Civ.I, 16 July 1992, D 1993.570), must be unequivocal:
    - Assent may under no circumstances be implicit, in particular assent may not be given with a view to reaching an amicable solution and while there is no legal instrument stating unequivocally and with certainty the intention of the parent who had the care of the child to renounce the right to its return (Civ.I, 16 July 1992, D 1993.570). This solution must be approved otherwise it would be such as to dissuade parents from seeking amicable solutions as French domestic law encourages them to do (252-2 of the Civil Code) and the Convention (7c and 10).
    - Similarly, an agreement given by one parent for the children to go on holiday does not constitute consent to their abduction (CA Paris 28 March 2002, Juris-data 173201).

3.2° Article 11-3, paragraph 2 the court of refuge gives its decision within six weeks of referral to the court, unless exceptional circumstances make respect for this time impossible.

- What is to be understood by referral, to the Court or to the central authority. In the spirit of the Hague Convention 1980, it must mean the second.
- In France, two central authorities have been appointed, DACS (Civil Affairs Directorate) and the DPJJ (Legal protection of the young Directorate).
- Consideration is currently being given to adopting our domestic law to this requirement, and could be a procedure in the form of urgent applications (S.DJEMNI-WAGNER, assistant head of the bureau of negotiations on private law and economics of the Ministry of Justice GP.Friday 3, Saturday 4 September 2004.18), which was often used in practice.
    - The doctrine had in fact assimilated the system thought up by the Hague Convention of 25 October 1980 as a kind of international urgent application, an action for immediate return as soon as possible[17].
    - The action was often undertaken by the French central authority by fixed-date proceedings through the State Prosecutor's Office[18].
    - The competent court may be the urgent applications court at the Tribunal de Grande Instance or the Family Affairs Court, since it concerns an action related to the exercise of parental authority.

3-3° In the definition of the right to care and control[19].

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[16] Similarly if the child has become habitually resident in a member state at least one year after those having care and control knew or should have known the place where he was, and the child has been integrated in its new environment and the person having care and control has not asked for the child to be returned within one year of knowing or when he should have known where the child was, this person has withdrawn his demand or the jurisdiction of refuge has refused to order the return and the parties have not referred the matter to the original jurisdiction, or the original jurisdiction has rules on the care and control of the child and its decision did not involve its return.

[17] In France some persons have compared it to action to recover possession (Y Lequette note under CA Aix en Provence, 23 March 1989, Rev. Crit. DIP1990.535 and B Ancel note under Civ.I, 16 July 1993, Rev. Crit. DIP1993.658).

[18] With effectiveness and without costs (article 423 of the New Code of Civil Procedure). The Court of Cassation had stated that this procedure did not prevent the parent from referring the matter directly to the judicial authority (Civ.I, 7 June 1995, B n°234).

[19] The Hague Convention provides for the return of the child when a right of care and control is established whatever its source, court decision, legal provision, agreement entered into by the parties concerned.

- First of all the question of defining an enforceable agreement is posed. Previously French doctrine considered that approval of the agreement was necessary for the right to care and control to be protected (CA Versailles, 12 November 1992;Civ.I, 16 July 1993, H.Gaudemet-Tallon, JDI1994.145).
- Next Regulation CE 2201/2003 added that care and control is considered as exercised jointly when one of those with parental responsibility cannot decide on the place of residence of the child without the consent of the other person with parental responsibility.
  - Application of the Hague Convention raised difficulties when the right to care and control was not truly joint, i.e., the judicial decision handed down did not mention it as such, while the other parent was not for all that deprived of any right over the child and had in particular the right to object to its change of residence.
  - French case law had recognised that in this situation the other parent had in fact a right of care and control over the child within the meaning of the Convention (Tribunal de Grande Instance Grasse 7 April 1988, confirmed CA Aix en Provence, 23 March 1989, Rev. Crit. DIP 1990.529 confirmed Civ.I, 23 October 1990, D.1991.233;Civ., 16 July 1993 Rev. Crit. DIP 1993.650;Civ.I, 22 April 1997, Rev. Crit. DIP 1997.746, but some decisions had taken the opposite view, for example, Tribunal de Grande Instance of Périgueux, 17 March 1992, GP.1992.2.678, by considering that it involved arrangements incidental to the right of care and control).

3-4° <u>In default of a habitual residence, the place where the child is present</u>:
- A confirmation of dominant case law: in the case of alternate or migratory residence, the country where the child is (article 13)[20].
- On the other hand what about the possibility of return provided by article 15[21]?

3-5° <u>The hearing of the child is reinforced and established in principle by article 11-2 unless this is inappropriate, similarly in the case of non-return, the hearing of the claimant parent:</u>
- On the hearing of the child and its objection: in application of the Hague Convention some practitioners had recommended distinguishing between the wish of the child to remain in the territory and its objection to returning, only the second having to be considered (V.Chauveau, A.Boiche, Critical point of view of a practitioner, AJ family, 10/2002.323).
- These hearings may be ordered in application of CE 1206/2001 on obtaining proof (1st January 2004), and therefore may be in accordance with national laws.
- In French law the validity of delegating the hearing of the child to social workers and experts must be recognised.
- Some courts, in the context of hearing and assessing the objection and/or danger, conduct real investigative proceedings intended to establish the substance of the child's interests (Civ.I, 12 July 1994 B n°248).

3-6° <u>The return cannot be refused under 13 b[22] if adequate measures have been taken to ensure the protection of the child</u>.
- The principle is reinforced in the sense of an immediate return[23]. The return can only be refused in serious cases strictly defined by the convention and in particular article 13 b[24].

[20] Civ.I, 16 December 1992, CA Versailles 12 November 1992, D.1993.353.
[21] Special link, new residence, former residence, leaving the country, habitual residence of either of the parents, child has property in this territory.
[22] The physical or psychological danger incurred by the child, which puts it in an unbearable situation.

- It involves specific measures and not simply procedural ones, and here the aid of the central authorities will therefore be important.
- French case law has interpreted the terms of the convention in a rather restrictive manner[25]. After low utilisation, article 13b of the convention is now the most utilised.
  - The Court of Cassation considered that the notion of danger was a basic matter. The trial and appeal courts have a sovereign power of assessment in the matter (Civ.I, 12 December 1992, B n°313).
  - It refused to define what could be regarded as danger (Civ.I, 12 July 1994 Rec.Crit.DIP 1995;Civ.I, 21 November 1995, B n°415) but the interpretation given by the trial and appeal courts and their statements of reasons is strictly controlled.
  - The Court of Cassation recalled that a strict and stringent interpretation must be given to this notion, (Civ.I, 23 October 1990, « *we must not rely on past evidence to find a serious current risk for children* » Rev. Crit. DIP1991.407).
  - The danger must also be specific stating the circumstances and not general (CA Paris, 28 March 2002, Juris-data 173201).
  - Case law which is highly criticised, but well established has however considered that the danger could result from the new change in the current living conditions of the child, but also new conditions or conditions found in the condition of its habitual residence (Civ.I, 12 April 1994, B n°248;Civ.I, 21 November 1995, D.1996.468;Civ.I, 22 June 1999, JCP.1999.IV.2540).
  - The danger should not only consist of the separation from the parent who proceeded on the facts (Civ.I, 15 June 1994, Rev.Crit.DIP 1995;CA Paris, 6 June 2002, AJ Fam.10/2002.344) on the other hand the state of health, or relationship of the child with the parent applying for return must be taken into account.

Strict definition but supple application must however be maintained having regard to the reality of the complaints put forward.

3-7° <u>The decision of return recognised and legally enforceable</u>.

- This constitutes a major innovation since in France it was apparent that the enforcement of decisions given in matters under the Hague convention was one of the weaknesses of this instrument[26].
- A decree on procedure will be necessary in France to define precisely the method of referral to the French courts after the transfer of documents by the foreign courts[27].
  - In general the central authority in France which acts through the Public Prosecutor's Office will await the result of the basic appeal before enforcement.
  - In France it was considered that the ruling of the Family Court which orders the return is given in the form of urgent interim rulings (CA Paris, 11 February 2004

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[23] The practical guide of the European legal network in civil and commercial matters considers that an additional step is taken from the moment that once the danger is established, the return must be ordered if adequate provisions have been made by the original state to ensure the protection of the child on its return.

[24] Also article 12: return impossible due to the integration of the child in its new surroundings and article 20: return not allowed under fundamental principles.

[25] The international conference of the Hague provided for follow-up work of the (creation of an Incadat base grouping all the decisions given by the different authorities of the member states).

[26] Investigation carried out by the family law centre of the university of Lyons III, under the direction of Hugues Fulchiron, « family conflict, removal of children, and international legal co-operation in Europe », Dec. 2002.

[27] Specialisation of jurisdictions as in Great Britain is under way since within large jurisdictions a judge specialises in these matters, and also there is greater specialisation at the level of Appeal Courts, since in application of the law of 4 March 2002 a tribunal de grande instance specialises in the jurisdiction of each of the courts of appeal, i.e., only 36 Tribunal de Grande Instance – their lists are fixed by the decree of 9 March 2004.

Codur/Rubin) and that its enforcement may therefore be deferred by an urgent ruling of the President of the Court.

- In France it is particularly rare for judges to contact their opposite numbers directly, the transfer of information and documents will rest mainly on the central authorities.

In the spirit of the Regulations, some people have suggested that the decision is enforceable within six weeks.

- Enforcement in practice is difficult while both the CJCE and the CEDH recalled that states had a positive obligation in this respect. Therefore the absence of uniformity of rules of procedure and enforcement constitutes a real obstacle.
- An extremely rapid procedure must no longer restrict the possibilities of mediation[28].
- What about the power of judges in France to take tracing measures, demand that passports are handed over[29], order mediation[30], but also and more generally accompany the decision of return with conditions or undertakings of the applicant.

Conclusion, the well-known swiftness of English courts (sometimes only 4 weeks), highly specialised, allows them to organise flexible measures in this time and to take the full measure of the situation.

In France, there is a real problem of method and specialisation, even if training takes place within the context of the ENM sometimes leading in order to respect this essential of swiftness to an interpretation not strict but restrictive of article 13 b but also the impossibility of organising the accompaniment of the parties in mediation or in the case of return of the parent in spite of the particularly big efforts of the central authorities.

[28] In France the Mission of Aid for International Mediation for Families (MAMIF), in particular in application of recommendation R98 of the Council of Europe of 1st January 1998.

[29] In the context of exercising visiting rights, it may be required that identity documents are sent to the jurisdiction, CA paris, 6 July 1987 and 9 May 1988, cited by N Voidey and L-A Devillairs, exercise of comparative law, AJ family 10/2002.333

[30] Mediation may not be ordered without the agreement of the parties (131-1 of the New Code of Civil Procedure).