

Law applicable to parental responsibility matters

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Introduction

- Is there an EU legal instrument?

no (**Brussels IIA Regulation:** jurisdiction, recognition and enforcement of decisions, and co-operation between central authorities).

- Is there an international legal instrument?

the **1996 Hague Convention**

The 1996 Hague Convention

Definitions:

- **parental responsibility** (Art. 1(2))
- **measures of protection** (Arts. 3-4) (excluded: among others, maintenance, succession, social security, public measures of a general nature in matters of education or health)
- **minors**: children until they reach age of 18 years (Art. 2)

Jurisdiction: Arts. 5 to 14 (habitual residence of the child)

Applicable law: Arts. 15 to 22

Recognition and enforcement: Arts. 23 to 28

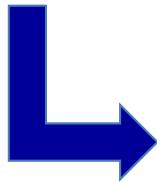
Co-operation: Arts. 29 to 39

General provisions: Arts. 40 to 56

Final clauses: Arts. 57 to 63

The interplay between BIIa Regulation and the 1996 HC

- BIIa Reg and 1996 HC cover similar aspects
 - their interplay
 - and in particular with regard to the applicable law
-
- not regulated in the context of specific provisions on the applicable law, but rather **on a general level:**



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

Art. 61 BIIa

The **Regulation** supersedes the 1996 HC whenever

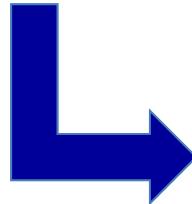
- a) the child concerned has his/her **habitual residence on the territory of a MS**
- b) with regard to the **recognition and enforcement of a judgment** given in a court of a MS on the territory of another MS, even if the child concerned has his/her **habitual residence on the territory of a third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

Art. 62 **BIIa** (residual rule)

The 1996 HC shall continue to have effect in relation to matters not governed by the Regulation (i.e. applicable law)

Art. 52(2) of the 1996 HC

- Contracting States may **conclude further agreements** that contain provisions on **matters regulated by the Convention**



the possibility of an interference between different legal sources regulating parental responsibility matters was also expressly recognised in the 1996 HC

➤ The 1996 HC as an international instrument applies only between Contracting Parties.

- in force in **49 States***
- most recent EIF*: Fiji (1.04.2019), Paraguay (1.07.2019)
- Future EIF*: Nicaragua and Guyana (from 1.12.2019), Barbados (from 1.05.2020)
- Only signatory States: Argentina, USA and Canada
- Brazil is not a contracting party.

'Entry into force – EIF': the relevant date for the application of the given legal instrument at the international level

- Data updated in October 2019
(source: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=70>)

- **All EU Member States** are (now) **Contracting States** of the 1996 HC
 - Denmark, having opted out the Brussels IIa regime, is bound to the Convention in its capacity as member of the HCCH
 - Italy was the last MS to ratify the Convention (EIF: 1.01.2016)

(when the 1996 HC is not applicable, each MS has to refer to its domestic PIL statutes to determine the law applicable to parental responsibility matters)



Putting into practice

- The 1996 HC is an **international legal instrument**, and remains as such also when applied by EU courts to determine the law applicable to parental responsibility matters
- it follows that the **applicability** of the 1996 HC in the given dispute has to be preliminarily verified from an international law perspective

It means that the **preliminary question that all EU counsels and judges have to ask when approaching a parental responsibility claim to which the 1996 HC might apply, is "are the States involved in the dispute Contracting States of the 1996 HC?"**

(‘States involved’: it is necessary that an international element exists, e.g. nationality of the parties, their habitual residence, properties, etc.)

- **YES:** the 1996 HC is applicable
- **NO:** national law of the *forum* is applicable (residual role), in particular the relevant national PIL statutes to determine the LA to PR matters

...with a little help from the EU

- As a result of the **EIF of the 1996 HC in all EU MS**, the **preliminary question** regarding the applicability of the Convention from an international law perspective **always finds an answer in the positive**
- therefore, the **1996 HC** is the **only legal instrument** to determine the law applicable to parental responsibility matters **whenever the States involved in the dispute are EU MS**
- **BUT the question should not be forgotten in case a third State is (also) involved**

The 1996 HC provisions on the applicable law

The competent authority

Art. 15

Attribution/extinction/
exercise/modification/
termination of parental
responsibility

(also under Art. 18)

Art. 15(1): general rule

principle of **coincidence between forum and ius**

- the authorities of Contracting States (having jurisdiction under this Conv.) shall **apply their domestic law** (i.e. the law they are most familiar with)
- this law shall govern all the **measures** covered by the Convention (see **Art. 3**)

Art. 15(2): exception to the general rule

(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** (even if the child is not physically there)
- 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

Art. 15(3): law applicable to the conditions of application of the measures in case of change of habitual residence

- a change in the child's habitual residence (to another Contracting State B) 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 A of the former habitual residence.**

Art. 15(3):

examples of conditions of application of the measure taken in the former State of habitual residence (A) and then governed by the law of the new State of habitual residence (B):

- exercise of the supervision by the public authority on the parents' care,
 - request for authorization submitted by the guardian of the child to sell a child's property.
- In case of differences in the conditions of application between State A and State B: State B (of new HR) can take a new measure

After having determined the applicable law...

The substantive law regulates the case in practice.
Before taking the decision, judges may entrust the
social service workers with tasks on

- hearing
- report on family situation
- report on family relationship
- How does it work in your jurisdiction?
 - In **Italy** there are **good practices** on cooperation among judges/lawyers/social service workers.
 - BUT what about in transnational cases? With other countries?

The 1996 HC provisions on the applicable law

The parties

Art. 16

Attribution/extinction

Art. 17

exercise

Art. 18

modification/termination

Example (1)

An **unmarried couple** living in Contracting State A separate before the birth of their child. The father moves to Contracting State B for his work. Under the law of Contracting State B, an unmarried father **does not automatically** acquire parental responsibility for a child upon the birth of the child. In contrast, under the law of Contracting State A, an unmarried father **does acquire** parental responsibility **automatically** upon the birth of the child.

Example (1)

Question

Does the father have the parental responsibility over the child?

- Yes
- No

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

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

Example (1)

Answer

- When the child is born, the question as to whether the father has parental responsibility for the child is **governed by the law of the State of the habitual residence of the child**, in this case, the law of Contracting State A. The father therefore **automatically acquires** parental responsibility for the child in accordance with this law (**Art. 16(1)**).

Art. 16: on the existence of parental responsibility (without the intervention of a judicial or administrative authority)

- 1) attribution/extinction of parental responsibility **by operation of law**
- 2) attribution/extinction of parental responsibility **by agreement/unilateral act**

Example (2)

A child is born in Contracting State A where **both unmarried parents** have parental responsibility for the child **by operation of law**.

The mother moves with the child to **Contracting State B** where the law provides that an unmarried father can only acquire parental responsibility **by court order**.

Question: has the unmarried father the parental responsibility after moving in State B?

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

Example (2)

Answer

The parental responsibility of the father acquired in Contracting State A by operation of law **will subsist** after the move (> principle of continuity).

Example (3)

A child is born in Contracting State A. The child's parents divorce shortly after her birth. Under the law of Contracting State A, both parents retain parental responsibility for the child after the divorce. Two years later the mother re-marries and the new couple and the child move to Contracting State B. **Contracting State B** has a rule whereby a **step-parent has parental responsibility** for his or her step-children by operation of law.

Question: who has parental responsibility rights over the child?

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 in the new State

Example (3)

Answer

In this case, after the child acquires his or her habitual residence in Contracting State B, there will be **three persons** who have parental responsibility for her: her mother, father and step-father.

Example (4)

In Contracting State A a holder of parental responsibility needs the consent of all other holders of parental responsibility before he or she can arrange a ***non urgent surgical procedure*** for the child.

The child lived with the parents in State B, where no **consent** is needed in similar situations, before moving to State A where they are living since one year and half.

Question: does the mother need the consent of the holders of parental responsibility?

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

Example (4)

Answer

➤ If the child is now habitually resident in Contracting State A, such **consent is necessary** even if the child was previously habitually resident in Contracting State B where the parental responsibility in respect of the child was originally attributed and where there was no such requirement (Art. 17).

- **Art. 16: attribution/extinction of parental responsibility**
(without the intervention of a judicial or administrative authority)
Change of habitual residence: continuity/mutability
- **Art. 17: exercise of parental responsibility**
(without the intervention of a judicial or administrative authority)
Change of habitual residence: mutability
= the law of the new State applies to the exercise of parental responsibility (e.g. consent of the other parent; conditions (periods) of the exercise of access rights)

Art. 18: termination of PR and modification of condition of the exercise of PR

- This Art. refers to the PR rights conferred by operation of law or by agreement/unilateral act without authority (Art. 16)
- The PR rights may be terminated or modified by measures taken under this Convention, that means under Art. 15 = in application of the *lex fori* by the judicial (or administrative) authority (which has jurisdiction under the Convention/i.e. Regulation).

Other provisions and issues

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

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

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

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**’

Summarising conclusions

- Legal instrument governing the law applicable in intra-EU cross-border family disputes: 1996 Hague Convention
- Applicability of the Convention between Contracting States (all EU MS)
- Art. 15 of the 1996 HC (intervention of judicial/administrative authority)
- Arts. 16-18 of the 1996 HC (parties, i.e. without intervention of judicial/administrative authority)
- Art. 19-22 of the 1996 HC: other provisions on the law applicable

Law applicable to parental responsibility matters

Case study 1

FACTS

Annika (Austrian national) and Alberto (Italian national) got married in Italy in 2010, and since then, have been habitually residing in Milan (Italy).

They had a son, Alexander (Austrian and Italian national), born in Italy in 2011 and habitually resident with them. According to the Italian law, both parents hold parental responsibility over the child from his/her birth and they exercise it jointly taking into account his/her capabilities, attitudes and desires (cp. Article 316 of the Italian Civil Code).

Their marriage started to break down.

On 15 September 2016, Annika filed for separation and custody of the child before the Tribunal of Milan. She further pleaded for the award of the family home in her favour.

Alberto wants to enter an appearance before the court and seeks legal counsel especially on how to address the custody issue.

Related questions

- 1) Has the Tribunal of Milan jurisdiction over the parental responsibility claims?
- 2) Which legal instrument regulates the law applicable to these claims?
- 3) Which Article is applicable? Which is the substantive law applicable to the claims?

VARIATION No. 1

On 15 June 2017, the Tribunal of Milan issued its decision, declaring the separation and granting to both parents the joint custody of the child (which, under Italian law, is the ordinary custody regime following the parents' separation or divorce, while the sole custody should be granted only upon certain conditions). Alexander should be placed with the mother Annika, who was also awarded the Milan family home where she was supposed to live with the child. Further, the father Alberto was granted the rights of access to the child to be exercised according to a specific schedule (on Saturdays and Sundays, Alexander would be staying with him).

After some months, Annika was planning to relocate to Austria with Alexander, and spent several holidays in Austria in her family home (together with Alexander) in order to arrange the practicalities (e.g. the home, the child's enrolment in school, healthcare). The relocation was supposed to take place as of September 2018, so Alexander could have started school in Austria.

Alberto objected to the relocation.

On 3 September 2018, Annika lodged an application before the Tribunal of Milan, seeking permission to relocate.

Alberto seeks legal counsel to appear before the court, contest Annika's application and claim a modification of his rights of access (an additional weekday, besides Saturdays and Sundays).

Related questions

- 4) Has the Tribunal of Milan jurisdiction over the application for the permission to relocate and the modification of the rights of access?
- 5) Which legal instrument regulates the law applicable to these claims?
- 6) Which Article is applicable to the application for the permission to relocate? Which is the substantive law applicable to this claim?
- 7) Which Article is applicable to the modification of the rights of access? Which is the substantive law applicable to this claim?

VARIATION No. 2

After a year since the decision of the Tribunal of Milan (issued on 15 June 2017), Annika relocated to Austria with Alexander. They started to build their new life there.

After some months, for business reasons Alberto could no longer travel each week to and from Austria, and thus was not able to effectively exercise his rights of access.

He seeks legal counsel to seize the local court in Austria, asking for a modification of his rights of access as regulated in the decision issued by the Tribunal of Milan (three days every other week, instead of Saturdays and Sundays).

Related questions

- 8) Has the Austrian court jurisdiction over the application for the modification of the rights of access?
- 9) Which legal instrument regulates the law applicable to this claim?
- 10) Which Article is applicable? Which is the substantive law applicable to the claim?

LEGAL INSTRUMENT(S) TO BE APPLIED

Regulation No. 2201/2003

1996 Hague Convention

Questions with guidelines

1) Has the Tribunal of Milan jurisdiction over the parental responsibility claims?

The Italian jurisdiction over the child's custody claim is grounded on Article 8 of Brussels IIA Regulation (the child, Alexander, has been habitually residing in Italy since his birth).

Likewise, the award of the family home should be considered as a measure of protection towards children, therefore subject to the same private international law regime. The Tribunal of Milan can ground its jurisdiction over this further claim pursuant to Article 8 of Brussels IIA Regulation.

Possible issues to be discussed:

- Could the award of the family home be further considered for the purposes of the determination of a maintenance allowance in favour of the child? In this case, would it be qualified as a maintenance obligation from a private international law perspective?

In the Italian practice, the child's custody or the parent's cohabitation with the child are a necessary pre-requisite for the award of the family home, which is consequently a measure of protection towards children: see, e.g., Cassazione civile, sez. I, judgment of 12 October 2018, no 25604.

Are there any examples from other Member States' practice?

2) Which legal instrument regulates the law applicable to these claims?

The law applicable to parental responsibility claims shall be determined on the basis of the 1996 Hague Convention. In this regard, whenever the States involved are EU Member States (in this case, Italy and Austria), the preliminary question as to whether the States involved are Contracting States to the Convention always finds an answer in the positive (all EU Member States are Contracting States thereto).

3) Which Article is applicable? Which is the substantive law applicable to the claims?

Article 15(1) of the 1996 Hague Convention is the relevant provision, because the measures of protection are taken by a judicial authority. According to this provision, the judicial authority shall apply its own law, which is the Italian law in this case.

As a result, the Tribunal of Milan shall rule on both the child's custody and the award of the family home applying the Italian substantive law.

4) Has the Tribunal of Milan jurisdiction over the application for the permission to relocate and the modification of the rights of access?

The Italian jurisdiction over both parental responsibility claims is grounded on Article 8 of Brussels Ila Regulation (the child Alexander is still habitually resident in Italy at the time the court is seised).

5) Which legal instrument regulates the law applicable to these claims?

The law applicable to both parental responsibility claims shall be determined on the basis of the 1996 Hague Convention. In this regard, whenever the States involved are EU Member States (in this case, Italy and Austria), the preliminary question as to whether the States involved are Contracting States to the Convention always finds an answer in the positive (all EU Member States are Contracting States thereto).

6) Which Article is applicable to the application for the permission to relocate? Which is the substantive law applicable to this claim?

As to the permission to relocate sought by the mother Annika, Article 15(1) of the 1996 Hague Convention is the relevant provision, because the measure of protection is taken by a judicial authority. According to this provision, the Tribunal of Milan shall apply its own law, which is the Italian law in this case.

7) Which Article is applicable to the modification of the rights of access? Which is the substantive law applicable to this claim?

Regarding the modification of the rights of access, a different reasoning could be made, given that the decision to be issued will modify the regulation of the rights of access following the relocation of Annika and Alexander to Austria.

Even though the applicable law is the Italian law pursuant to the general rule of Article 15(1) of the 1996 Hague Convention, the Tribunal of Milan may be entitled under Article 15(2) of the same Convention to take into consideration the Austrian law with a view to framing the decision according to the regime in which it will have effect. This appears to be in the child's best interests, as he will indeed relocate to Austria with the mother.

8) Has the Austrian court jurisdiction over the application for the modification of the rights of access?

The Austrian jurisdiction over the parental responsibility claim is grounded on Article 8 of Brussels Ila Regulation (Alexander had acquired his habitual residence in Austria at the time the court is seised).

9) Which legal instrument regulates the law applicable to this claim?

The law applicable to the parental responsibility claim shall be determined on the basis of the 1996 Hague Convention. In this regard, whenever the States involved are EU

Member States (in this case, Italy and Austria), the preliminary question as to whether the States involved are Contracting States to the Convention always finds an answer in the positive (all EU Member States are Contracting States thereto).

10) Which Article is applicable? Which is the substantive law applicable to the claim?

Under Article 15(3) of the 1996 Hague Convention, the change of habitual residence will leave subsisting the measure of protection (in this case, rights of access) already taken in respect of the child. Its conditions of application are, however, governed by the law of the State of the new habitual residence, that is the Austrian law.

As a result, the Austrian court will rule on the modification of the rights of access granted to Alberto by applying its own law pursuant to Article 15(1) of the Convention.

Law applicable to parental responsibility matters

Case study 2

FACTS

Annika (Austrian national) and Alberto (Italian national) got married in Italy in 2010, and since then, have been habitually residing in Milan (Italy).

They had a son, Alexander (Austrian and Italian national), born in Italy in 2011 and habitually resident with them. According to the Italian law, both parents hold parental responsibility over the child from his/her birth and they exercise it jointly taking into account his/her capabilities, attitudes and desires (cp. Article 316 of the Italian Civil Code).

Since January 2017, Alberto has been regularly travelling to China for business reasons, spending also several consecutive weeks abroad. The relationship between him and Alexander progressively loosened, and as of September 2017 Alberto left the family home and had no more contacts with his family in Italy.

On 3 September 2018 Annika lodged an application before the Tribunal of Milan, seeking revocation of the father's parental responsibility.

Alberto failed to enter an appearance before the court.

Related questions

- 1) Has the Tribunal of Milan jurisdiction over the application for the revocation of the parental responsibility?
- 2) Which legal instrument regulates the law applicable to the claim?
- 3) Can the judicial authority terminate the father's parental responsibility attributed by operation of law?
- 4) Which Article is applicable? Which is the substantive law applicable to the claim?

LEGAL INSTRUMENT(S) TO BE APPLIED

Regulation No. 2201/2003

1996 Hague Convention

Questions with guidelines

1) Has the Tribunal of Milan jurisdiction over the application for the revocation of the parental responsibility?

The Italian jurisdiction over the parental responsibility claim is grounded on Article 8 of Brussels Ila Regulation (the child, Alexander, has been habitually residing in Italy since his birth).

2) Which legal instrument regulates the law applicable to the claim?

The law applicable to the parental responsibility claim shall be determined on the basis of the 1996 Hague Convention. In this regard, whenever the States involved are EU Member States (in this case, Italy and Austria), the preliminary question as to whether the States involved are Contracting States to the Convention always finds an answer in the positive (all EU Member States are Contracting States thereto).

3) Can the judicial authority terminate the parental responsibility of the father attributed by operation of law?

Under Article 18 of the 1996 Hague Convention, the parental responsibility attributed by operation of law may be terminated by measures taken under the Convention. Therefore, the fact that the parental responsibility was attributed by operation of law does not prevent a judicial (or administrative) authority (in this case, the Tribunal of Milan) from taking the necessary measures of protection to terminate parental responsibility.

4) Which Article is applicable? Which is the substantive law applicable to the claim?

As a result of Article 18 of the 1996 Hague Convention, the Tribunal of Milan will rule on the revocation of the father's parental responsibility by applying its own law (i.e. the Italian law) pursuant to Article 15(1) of the Convention.