



PUMP COURT

CHAMBERS

International Care Cases Post Brexit

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International issues

- Where the case should be heard:
 - Jurisdiction
 - Transfer
- Where the child should be placed:
 - Assessment of carers
 - Available orders
 - Recognition and enforcement

Outline

- Focus on cases involving EU countries
- Which rules apply to a particular case
- Summary of rules
- Practical considerations

Which rules apply

- Implementation period until 11pm on 31 December 2020
- EU regulations continued to have effect until then - “IP completion day” (European Union (Withdrawal Agreement) Act (‘EU(W)A’) 2020, s.39)
- Council Regulation (EC) No 2201/2003 (‘Brussels IIR’) was revoked on IP completion day - Reg.3 Jurisdiction and Judgments (Family)(Amendment etc.)(EU Exit) Regulations 2019 (‘the Exit Regulations’)



Which rules apply

- Revocation does not apply in relation to proceedings before a court seised before IP completion day – Reg. 8 Exit Regulations
- Court is ‘seised’ “at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps the applicant was required to take to have service effected on the respondent” – Reg.8(2)(a)



Brussels IIR

Scope

- Art.1 – scope - does not apply to ‘decisions on adoption, measures preparatory to adoption or the annulment or revocation of adoption’ - Art.1(3)(b)
- But does apply to care proceedings even where the final care plan is for adoption - *Re N (Adoption: Jurisdiction)* [2016] UKSC 15, [2016] 1 FLR 1082; *Re J (A Child: Brussels II Revised: Article 5: Practice and Procedure)* [2014] EWFC 41, [2015] Fam Law 129



Jurisdiction

- Art.8 – jurisdiction based on habitual residence
- Art.9 – continuing jurisdiction for 3 months after a change of habitual residence for the purpose of modifying a judgment on access rights
- Art.10 – jurisdiction retained in cases of wrongful removal or retention
- Art.12 – jurisdiction where parents have accepted the jurisdiction of another Member State on an application for divorce, legal separation or marriage annulment
- Art.13 – jurisdiction based on the child's presence where habitual residence cannot be established or where the child is a refugee or internationally displaced



Transfer

- Art.15 – transfer to the court of another Member State with which the child has a particular connection if the court considers the other court would be better placed to hear the case and where this is in the best interests of the child.
- Transferring court must consider the child's best interests (*Re N (Adoption: Jurisdiction)* [2016] UKSC 15)



Stays & declining jurisdiction

- Art.17 – duty of the court to declare of its own motion that it does not have jurisdiction where it is seised of a matter over which it has no jurisdiction under the Regulation and another Member State does
- Art.19 – the second court seised shall stay proceedings until the jurisdiction of the court first seised is established



Urgent cases

- Art.20 – in urgent cases, the provisions of the Regulation shall not prevent the courts of a Member State from taking such provisional, including protective, measures in respect of persons or assets in that State as may be available under the law of that Member State, even if under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter
- Measures cease to apply when the court of the Member State with jurisdiction has taken the measures it considers appropriate



Recognition & enforcement

- Art.21 – judgment given in a Member State recognised in another without any special procedure being required
- Art.23 – grounds of non-recognition
- Art.28 – declaration of enforceability



Co-operation

- Art.53 – designation of a central authority
- Art.54 – European Judicial Network
- Art.55 – co-operation on cases specific to parental responsibility
- Art.56 – placement of a child in another Member State
- Art.57 – working method – languages - each authority bears its own costs

1996 Hague Convention

Introduction

- ‘Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children’
- In June 2008 the European Council authorised ratification or accession by all EU Member States (except Denmark) who had not already done so
- Came into force in the UK on 1 November 2012

1996 Hague Convention Subordinate legislation

- Parental Responsibility and Measures for the Protection of Children (International Obligations)(England and Wales and Northern Ireland) Regulations 2010 (SI 2010/1898) – ‘the 2010 Regulations’
- FPR 2010 Part 12, Chapter 6, Section 2 (applications); Part 31 (registration of orders)

1996 Hague Convention

Scope

- Article 3 – Convention applies to:
- Measures directed at the protection of the person or property of a child at which the Convention is aimed, including:
 - the placement of the child in a foster family or in institutional care, or the provision of care by *kafala* or an analogous institution
 - the supervision by a public authority of the care of a child by any person having care of the child

1996 Hague Convention

Scope

- Article 4 – matters to which the Convention does not apply, including:
 - decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption
 - measures taken as a result of penal offences committed by children
- ‘Child’ = from the moment of birth until they reach the age of 18 years

1996 Hague Convention Jurisdiction

- Article 5 – jurisdiction based on habitual residence
- Change in the habitual residence of a child, other than by wrongful removal or retention, changes jurisdiction
- No provision equivalent to Art.9 Brussels IIR, where the original State retains jurisdiction during a 3-month period for the purpose of modifying a judgment on access rights issued in that State before the child moved

1996 Hague Convention Jurisdiction

- Article 6 – jurisdiction based on presence
 - Refugee children
 - Children who, due to disturbances occurring in their country, are internationally displaced
 - Children whose habitual residence cannot be established

1996 Hague Convention Transfer

- Article 8 – the authority of the Contracting State which has jurisdiction under Art.5 or Art.6, if it considers that the authority of another Contracting State would be better placed to assess the best interests of the child, may either
 - Request that other authority directly or with the assistance of the Central Authority of its state, to assume jurisdiction, or
 - Suspend consideration of the case and invite the parties to introduce such a request before the authority of the other state
- No requirement for the transferring court to consider whether a transfer would be in the child’s best interests

1996 Hague Convention Transfer

- Art.8(2) - the Contracting States whose authorities may be asked to assume jurisdiction are:
 - A state of which the child is a national
 - A state in which property of the child is located
 - A state whose authorities are seised of an application for divorce or legal separation of the child's parents, or for annulment of their marriage or
 - A state with which the child has a substantial connection

1996 Hague Convention Transfer

- The authorities may proceed to an exchange of views and the authority to whom the request is addressed may assume jurisdiction if it considers that this is in the child's best interests
- The authorities in both states must agree to the transfer
- Transfer of part of the case or transfer on a non-permanent basis are possible

1996 Hague Convention Transfer

- Article 9 – another state can request transfer – mirrors Art.8
- Transfer only if both states agree
- The procedure for transfer is the same as under Brussels IIR – FPR 2010 rr.12.61-12.68
- In England, an application for transfer of proceedings to another State must be made to the court hearing the care proceedings, using the Part 18 procedure
- An application for the court to request transfer of proceedings from another State must be made to the High Court without notice to any other person

1996 Hague Convention

Cases of urgency

- Article 11
- In a case of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present
- Have jurisdiction to take any necessary measures of protection
- Jurisdiction concurrent with, and subordinate to, the jurisdiction of any Contracting State that has jurisdiction on the basis of habitual residence
- Any measures taken will lapse as soon as the authorities with primary jurisdiction have taken the measures required by the situation

1996 Hague Convention

Provisional measures

- Article 12
- Authorities in a Contracting State in whose territory the child, or property belonging to the child, is present
- Have jurisdiction to
 - Take measures of a provisional character
 - For the protection of the person or property of the child
 - Which have territorial effect limited to the state in question
 - Insofar as such measures are not incompatible with measures already taken by the authorities which have primary jurisdiction
- Any measures taken will lapse as soon as the authorities with primary jurisdiction have taken the measures required by the situation

1996 Hague Convention

Urgent and interim orders

- In cases where Art.11 (measures of protection in cases of urgency) or Art.12 (measures of a provisional character) applies, the local authority may apply for an interim care or supervision order for a limited period – 2010 Regulations, reg.5
- The order will last until the authorities in the Contracting State that has jurisdiction have taken the measures required by the situation or measures taken in another state are recognised in England and Wales
- No requirement for a care plan
- Proceedings are ‘specified’ – a guardian must be appointed

1996 Hague Convention

Two States with jurisdiction

- Article 13
- The authorities of a Contracting State must not exercise jurisdiction if, at the time of the commencement of the proceedings, ‘corresponding measures’ have been requested by another Contracting State with jurisdiction under Art.5-10 at the time of the request and are still under consideration, unless the authority first requested has already declined jurisdiction



1996 Hague Convention Measures remain in force

- Article 14
- Any measures taken by a Contracting State with jurisdiction under Art.5-10 will remain in force, even if a change in circumstances has eliminated the basis on which jurisdiction was founded
- As long as the new authorities which have gained jurisdiction under the Convention have not modified, replaced or terminated them

1996 Hague Convention

Applicable law

- Article 15
- In exercising jurisdiction, the authorities of the Contracting State must apply their own law
- BUT
- Parental responsibility is an exception
 - Law of state of habitual residence applies
 - PR gained under the law of a state of previous habitual residence persists
 - PR can be gained under the law of the new state of habitual residence
- PR can still be modified or terminated by protective measures

1996 Hague Convention

Recognition & enforcement

- Article 23
- Measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States
- No need for any formal application for simple recognition
- Application only needed to enforce
- ‘Measures’ interpreted broadly, includes undertakings (*Re Y (Abduction: Undertakings Given for Return of Child)* [2013] EWCA Civ 129, [2013] 2 FLR 649)
- BUT
- Recognition may be refused on 6 grounds – Art.23(2)

1996 Hague Convention

Grounds for refusing recognition

1. Measures taken by an authority whose jurisdiction was not based on one of the grounds provided for in Chapter II of the Convention
2. Measure taken, except in the case of an emergency, in the context of a judicial or administrative proceeding without the child having been provided with the opportunity to be heard
3. On the request of any person claiming that the measure infringes his or her PR, if such a measure was taken, except in an emergency, without the person having been given an opportunity to be heard

1996 Hague Convention

Grounds for refusing recognition

4. If recognition is manifestly contrary to public policy of the requested State, taking into account the best interests of the child
5. If the measure is incompatible with later measures taken in the non-Contracting State of habitual residence of the child, where this later measure has been recognised by the requested State
6. If the procedure provided for in Art.33 (placement in another Contracting State) has not been complied with

1996 Hague Convention Enforcement

- Article 26
- If measures taken in one Contracting State and enforceable there, require enforcement in another Contracting State, they shall, upon request by an interested party, be declared enforceable or registered for the purpose of enforcement in that other State according to the procedure there provided in the law of the latter State
- A declaration of enforceability or registration may only be refused for one of the 6 reasons set out in Art.23(2) – refusal is discretionary, not compulsory

1996 Hague Convention Co-operation

- Article 29
- Each Contracting State must designate a ‘Central Authority’
- In England – The Lord Chancellor
- Who delegates his day-to-day duties to the International Child Abduction and Contact Unit (‘ICACU’)

1996 Hague Convention Co-operation

- Article 30
- Central Authorities are required to co-operate with each other and promote co-operation among competent authorities in their states to achieve the purposes of the Convention
- They shall in connection with the application of the Convention, take appropriate steps to provide information as to the laws of, and services available in, their States relating to the protection of children

1996 Hague Convention Co-operation

- Article 31
- Central Authorities shall take appropriate steps to
 - Facilitate communications and offer the assistance provided for Art.8 and 9 in Chapter V
 - Facilitate by mediation, conciliation or similar means, agreed solutions for the protection of the person or property of the child in situations in which the Convention applies
 - Provide, on the request of a competent authority of another Contracting State, assistance in discovering the whereabouts of a child where it appears that the child may be present and in need of protection within the territory of the requested State

1996 Hague Convention

Placement in another Contracting State

- Article 33
- An authority seeking to place a child in care in another Contracting State must first consult the Central Authority or other competent authority in the other Contracting State and submit a report on the child, together with reasons for the proposed placement
- Decision to place may only be made if the Requested State has consented to the placement, taking into account the child's best interests



1996 Hague Convention

Co-operation – child exposed to danger

- Where the competent authorities of a Contracting State, in which measures for the protection of a child have been taken or are contemplated, consider that the child is exposed to serious danger and they are informed of that child's presence or change of residence to another state (Contracting or not), those authorities are obliged to inform the authorities in the other state about the danger involved and the measures that have been taken or are being contemplated – Art.36
- Except...



1996 Hague Convention

Co-operation – child exposed to danger

- Except where to request or transmit information would, in the opinion of the competent authority, be likely to place the child's person or property in danger or constitute a serious threat to the liberty or life of a member of the child's family – Art.37

1996 Hague Convention

Non-mandatory forms of co-operation

- Co-operation is contemplated but not a mandatory requirement in the following situations:
 - The Central Authority of a Contracting State with which the child has a substantial connection may request the Central Authority of the state of habitual residence and which the child is present to provide a report on the situation of the child and consider the need to take measures for the child's protection – Art.32
 - A competent authority may, if the situation of the child requires it, request any authority in another Contracting State to communicate any information which it has which is relevant to the protection of the child – Art.34
 - Assistance in implementation of measures of protection – Art.35(1)
 - Assistance for a parent seeking contact – Art.35(2)

1996 Hague Convention Co-operation

- International Hague Network of Judge not mentioned explicitly
- Office of the Head of International Family Justice may be able to assist

<https://www.judiciary.uk/about-the-judiciary/international/international-family-justice/>

Brussels IIR vs. 1996 Hague Convention

	Brussels IIR	1996 Hague Convention
Scope	Art.1 – where it applies Art.1(3) – where it does not apply	Art.3 – where it applies Art.4 – where it does not apply
Jurisdiction	Art.8 – jurisdiction based on habitual residence	Art.5(1) – jurisdiction based on habitual residence
	Art.9 – lawful change of habitual residence	Art.5(2) – lawful change of habitual residence
	Art.10 – in case of wrongful removal or retention	Art.7 – in case of wrongful removal or retention
	Art.12 – proceedings for divorce, legal separation or marriage annulment in another Member State	Art.10 – proceedings for divorce, legal separation or annulment of marriage in another Contracting State
	Art.13 – jurisdiction based on presence where habitual residence cannot be established or the child is a refugee or internationally displaced	Art.6 – jurisdiction based on presence for refugee children or those who internationally displaced and children whose habitual residence cannot be established
Transfer	Art.15	Art.8 & 9
Urgent cases & provisional measures	Art.20	Art.11 – cases of urgency Art.12 – provisional measures
Proceedings in two courts	Art.19	Art.13
Recognition	Art.21 Art.23 – grounds of non-recognition	Art.23 Art.23(2) – when recognition may be refused
Enforcement	Art.28 Art.31(1) & (2)	Art.26
Co-operation	Art.53, 54, 55	Art.29, 30, 31, 33, 34, 35, 36 & 37
Costs of co-operation	Art.57(4)	Art.38
Placement in another State	Art.56	Art.33
Languages	Art.45(2), Art.57(2)	Art.54

Practical considerations

- For local authorities:
 - Early identification of international issues, particularly potential carers outside the jurisdiction
 - Getting contact details pre-proceedings if possible
 - Get details of where in the other country the family lived
 - Making contact with ICACU and embassies
 - Consider making an early initial enquiry of ICACU by email
 - If appropriate, seek advice from Protecting Children and Uniting Families Across Borders ('CFAB')
 - Check nationality & immigration status pre-proceedings
 - Ascertaining the existence, validity and whereabouts of travel documents and obtaining passport or ID document numbers
 - Get documents translated immediately

Practical considerations

- For parents:
 - Early identification of potential alternative carers and providing contact details
 - Providing information on nationality, immigration status, validity and whereabouts of travel documents

Practical considerations

- For those representing the child(ren):
 - Early identification of international issues, particularly potential alternative carers outside the jurisdiction
 - Encourage parents to provide names and contact details early
 - Encourage the local authority to make contact with ICACU and embassies
 - Ask parents and local authority about children's nationality and immigration status and the whereabouts & validity of any travel documents

References & Resources

- Family Procedure Rules 2010 – Part 12, Section 2 (Applications relating to the Brussels IIR and the 1996 Hague Convention); Part 31 (Registration of Orders)
- President’s Guidance of 10 November 2014: The International Child Abduction and Contact Unit (ICACU)
- ICACU Guide to Completing the Request for Information Form & ICACU Request for Information Form
- Explanatory Report on the 1996 Hague Convention (<https://www.hcch.net/en/publications-and-studies/details4/?pid=2943>)
- Cross-border child protection cases: the 1996 Hague Convention guidance
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/280834/The_1996_Hague_Convention.pdf

References & Resources

- President's guidance for the judiciary: Transfer of proceedings under Article 15 of Brussels IIa and Articles 8 and/or 9 of the 1996 Hague Convention, April 2016
- Working with foreign authorities: child protection cases and care orders (Departmental advice for local authorities, social workers, service managers and children's services lawyers, July 2014)
- European Commission notice to stakeholders: Withdrawal of the United Kingdom and EU rules in the field of civil justice and private international law (27 August 2020) - https://ec.europa.eu/info/sites/default/files/brexit_files/info_site/civil_justice_en.pdf



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References & Resources

- Family law disputes involving the EU: guidance for legal professionals (published 31 December 2020) - <https://www.gov.uk/government/publications/family-law-disputes-involving-the-eu-guidance-for-legal-professionals/family-law-disputes-involving-the-eu-guidance-for-legal-professionals>