

# INTERACTION BETWEEN HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION AND DOMESTIC LITIGATIONS CONCERNING DOMICILE OF THE CHILD AND PARENTAL AUTHORITY

Anca Magda VOICULESCU\*

## Abstract

*In the vast majority of cases, international abduction of a child determines almost per se litigations both at international and national level, namely an international litigation based on provisions of Hague Convention on the civil aspects of international child abduction and a domestic litigation aiming at establishing the domicile of the child in the state of destination and other different measures concerning the child which fall within the area of parental authority (joint or exclusive).*

*The purpose of the article is to analyze the interaction between the international and the national case and how they influence each other from a double perspective (procedural and substantial), taking into account that the two litigations are generally pending at the same time. Even the mere coexistence of the two litigations gives rise to the question which one should have priority in solving.*

*Therefore, the objectives of this study are, on the one hand, to examine the implications in the domestic litigation of the decision pronounced in the Hague litigation (international competence, suspension of the national case, elements which are covered by the res judicata principle), and on the other hand to identify how a national decision on domicile and parental authority may influence the solution in the Hague case.*

**Keywords:** *international abduction of a child, international litigation, domestic litigation, procedural implications, substantial implications.*

## 1. Introduction

The present study aims to analyze the interaction between two types of litigations (one national and the other international), which generally appear at the same time in case of international child abductions.

The subject presents significant importance, from both practical and theoretical point of view.

International child abductions give birth in practice, almost automatically, to an international case based on provisions of the 1980 Hague Convention on the civil aspects of international child abduction that pursues to return the child to the state of origin, as well as to a domestic litigation, where the goal is to establish the domicile of the child in the state of destination (and eventually other different measures concerning the child that fall within the area of parental authority – joint or exclusive).

The parties involved in these disputes have opposite interests on the same major aspect that is at stake in both cases, namely to establish the domicile of the child<sup>1</sup> in the state of origin (the parent left-behind) or in the state of destination (the abductor parent).

Depending on the solution on this point, other procedural and substantial aspects are to be determined. Moreover, the mere coexistence of the two litigations

gives rise to the question which one should have priority in solving.

In this context, it comes natural that there is an interaction between the two cases, which expresses both in procedure and substance, and not only during court proceedings, but also after settlement by judicial judgement.

The great number of cases in the particular area of international child abductions where national and international litigations coexist, doubled by the fact that this aspect has not yet been discussed in Romanian juridical literature, fully illustrates the importance of identifying the interdependence aspects of and providing an answer to questions raised by this interdependence.

To reach this purpose, we intend to make a short presentation of the 1980 Hague Convention (nature, objectives, mechanism provided to assure the prompt return of abducted children to the state of origin), in connection to Council Regulation (EC) no. 2201/2003 (applicable for Member States of European Union).

As in practice 1980 Hague Convention and the Regulation apply in compliance with national law, we will also identify relevant provisions in Romanian domestic law and present case law (both national and international).

Specialized opinions (where they have been expressed) will also be identified and discussed.

---

\* PhD, Judge at Bucharest Tribunal, trainer in family law at Romanian National Institute of Magistracy, Romanian designated judge in International Network of Hague Judges for 1980 Hague Convention on the Civil Aspects of International Child Abduction (e-mail: [ancamagda.voiculescu@gmail.com](mailto:ancamagda.voiculescu@gmail.com))

<sup>1</sup> „Habitual residence” in the words of the 1980 Hague Convention (notion specific to 1980 Hague Convention, distinct from the notion of domicile in national legislations).

Interconnecting all these different perspectives (legislative, judicial and doctrinal), we will finally conclude over the main interaction points in procedure and substance and solutions proposed from our national domestic perspective.

## 2. Content

### 2.1. The 1980 Hague Convention on the Civil Aspects of International Child Abduction

The Hague Convention on the Civil Aspects of International Child Abduction is an intergovernmental agreement concluded at The Hague on October 25, 1980, during the 14th Session of the Hague Conference on Private International Law, which entered into force on December 1, 1983<sup>2</sup>.

Similar to other Hague Conventions, an Explanatory Report was drafted by Eliza Pérez-Vera<sup>3</sup> and is a useful working tool for professionals who deal with international child abductions in their practice.

The 1980 Hague Convention governs issues related to parental kidnapping of children under the age of 16<sup>4</sup> across international borders and involving the jurisdiction of different countries<sup>5</sup>.

It's objectives are „to secure the prompt return of children wrongfully removed to or retained in any Contracting State and ensure that the rights of custody and of access under the law of one Contracting State

are effectively respected in the other Contracting States” (Article 1 of 1980 Hague Convention).

The very first article of 1980 Hague Convention expresses therefore the idea that this international agreement does not address the question who should have domicile of the child<sup>6</sup>, but only aims to achieve the objectives presented above<sup>7</sup>, of which the most important is considered to be the prompt return of the child to the state of origin<sup>8</sup>.

Once the child has been returned to the state of habitual residence, the dispute concerning domicile and parental authority can then be solved in the courts of that jurisdiction under the applicable national law<sup>9</sup>.

The mechanism provided by 1980 Hague Convention to achieve the immediate return of the child is simple and efficient and should be applied complemented by domestic law of each Contracting State<sup>10</sup>.

Each country party to 1980 Hague Convention designates a Central Authority to carry out specialized Convention duties. Central Authorities cooperate in order to achieve the objects of the convention (Articles 6 and 7 of 1980 Hague Convention).

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance

<sup>2</sup> For an online text, see for example [www.hcch.net](http://www.hcch.net). In 1999, the Hague Conference established INCADAT, a database of significant decisions in the area of international child abductions, available in general in summary and full text, in English, French, Spanish and sometimes the original language at [www.incadat.com](http://www.incadat.com).

<sup>3</sup> Explanatory Report on the 1980 Hague Child Abduction Convention drafted by Eliza Pérez-Vera, Madrid, April 1981, published in 1982 and available online at the following link: <https://www.hcch.net/en/publications-and-studies/publications2/explanatory-reports>, last accession on 28.02.2018; 17,57.

<sup>4</sup> The 1980 Hague Convention does not apply to unborn children (cases involving pregnant mothers). Also, it considers age 16 of the child, specific to this international instrument and different from the age of emancipation in different domestic legislations.

<sup>5</sup> M. Welstead & S. Edwards, *Family Law*, Oxford University Press, 2<sup>nd</sup> Edition, 2008, p. 352-353: „Where abduction occurs in countries which are signatories to the Convention, the Convention applies. (...) Where countries are not signatories to the Hague Convention, inter-country cooperation is difficult and outcomes for parents are haphazard and unpredictable, with the result that the courts have adopted divergent rules with regard to non-Convention cases.”

<sup>6</sup> K. Standley, *Family Law*, 6<sup>th</sup> Edition, Palgrave Macmillan Publishing House, New York, 2008, p. 352: „The scheme of the Convention is to provide a speedy extradition-type remedy whereby Contracting States agree to return abducted children to their country of habitual residence so that the matter can be dealt with there. In this sense it is a provisional remedy, for Hague Convention proceedings are not concerned with the merits of a custody issue – that is a matter for the court in the child's country of habitual residence.”

<sup>7</sup> For the same conclusion, see D.F. Barbur, *Autoritatea părintească*, Hamangiu Publishing House, 2016, p. 215. ECtHR held that failure of national authorities to secure return of abducted children may lead to a breach of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and therefore national authorities must take positive measures to enable parents to be reunited with their children, unless contrary to children's best interests (ECHR, Decision adopted on 29 April 2003, Application no. 56673/00, case *Gil and Aui v. Spain*; ECHR, Decision adopted on 26 June 2003, Application no. 48206/99, case *Maire v. Portugal*).

<sup>8</sup> C. Mol LL.B., *Non-traditional Family Forms & the International Dimension of Family Life: A Report on the ERA Seminar, 'Recent Case Law of the European Court of Human Rights in Family Law Matters'*, p. 1, available online at the following link: <http://www.familyandlaw.eu/tijdschrift/fenr/2016/06/FENR-D-16-00006/fullscreen>, last accession on 28.02.2018; 19,14: „ (...) at the time of the adoption of the Hague Convention the opinion was that it is in the best interests of the child to be returned immediately to the country of habitual residence. Primarily because most abductors were believed to be fathers who no longer had custody rights and abducted the children out of frustration or spite, but also because the Hague Convention aimed to dissuade parents from abducting their children as it is in children's best interests not to be abducted. However, research has shown that nowadays most abductors are mothers with the role of primary caretakers.” Starting from case *Neulinger and Shuruk v. Switzerland* (ECHR, Decision adopted on 6 July 2010, Application no. 41615/07), the author expresses doubts that, at present, automatic and prompt return is still considered to be in the best interests of the child (ECtHR developed the opinion that a swift return is not always in the best interests of the particular abducted child, and the best interests of the child must be assessed in each individual case).

<sup>9</sup> There are countries where abducting a child is a criminal offence (e.g., United Kingdom of Great Britain and Northern Ireland, under the Child Abduction Act 1984 - see K. Standley, *op. cit.*, p. 350).

<sup>10</sup> K. Standley, *op. cit.*, p. 352: „Instead of making a return order, the English courts have sometimes adopted the practice of accepting an undertaking from a party to the proceedings. An undertaking is a promise to the court (for example, to return the child, to provide accommodation, travel costs or maintenance) and breach of the undertaking can be contempt of court. (...) The problem with undertakings, however, is that, compared to court orders, they are not easily understood by foreign courts and enforcement abroad may be difficult.”

in securing the return of the child (Article 8 of 1980 Hague Convention).

The judicial and administrative authorities of the Contracting States under the Convention are required to use the most expeditious procedures for the return of children according to their national law (Article 2 of the Hague Convention).

To this respect, a period of six weeks from the date of commencement of the proceedings is recommended in order to take a decision (Article 11 of 1980 Hague Convention).

Participation of Romania to 1980 Hague Convention was assured by Law no. 100/1992 for Romania's accession to 1980 Hague Convention on the Civil Aspects of International Child Abduction<sup>11</sup>.

Subsequently, Law no. 369/2004 on the application of 1980 Hague Convention on the Civil Aspects of International Child Abduction<sup>12</sup> provided procedural and substantial domestic rules under which international child abductions are dealt with<sup>13</sup>.

In Romania, the designated Central Authority is the Romanian Ministry of Justice.

Since 2004, Romania has unified national territorial competence for international child abductions in Bucharest (Bucharest Tribunal is the first instance and Bucharest Court of Appeal is the instance of appeal).

The case may be brought to court either by the Ministry of Justice as Central Authority or by any person, institution or other interested body and no costs are attached.

By exception to the general rule, no defence procedural act is mandatory; free legal aid and advice by an attorney are assured.

The period between court sessions cannot be longer than two weeks and participation of the prosecutor is imperative.

Adoption of judgement may be postponed 24 hours and motivation of decision should be made within 7 days from date of pronouncement.

## 2.2. Connection to Council Regulation (EC) no. 2201/2003

Abduction of children is a growing problem in European Union, where citizens increasingly move freely across borders. It is a frequent situation that abductions occur among EU citizens, who decide either to wrongfully remove, or illegally retain a child in the territory of another EU Member State<sup>14</sup>.

Relation between 1980 Hague Convention and the Council Regulation no. 2201/2003<sup>15</sup> is very important, as there are EU State Members which at the same time are contracting parties to 1980 Hague Convention<sup>16</sup>.

The connection between them is legitimated by Article 60 of the Regulation, according to which, in relations between Member States, the Regulation shall take precedence over the Hague Convention in so far as they concern matters governed by the Regulation<sup>17</sup>.

Nevertheless, 1980 Hague Convention will continue to govern issues not dealt by the Regulation, as well as abduction cases involving EU State Members and third countries that are parties to 1980 Hague Convention<sup>18</sup>.

Recital 17 of the Preamble of the Regulation clarifies that in case of wrongful removal or retention of a child, provisions of 1980 Hague Convention will continue to apply, as complemented by article 11 of the Regulation<sup>19</sup>.

In this context, we consider important to underline the progress made by the Regulation in comparison to 1980 Hague Convention, related to some particular matters concerning international child abductions<sup>20</sup>.

First, when applying Articles 12 and 13 of 1980 Hague Convention<sup>21</sup>, it shall be ensured that *the child*

<sup>11</sup> Published in the Official Gazette of Romania no. 243/30.09.1992.

<sup>12</sup> Published in the Official Gazette of Romania no. 888/29.09.2004 and republished in the Official Gazette of Romania no. 468/25.06.2014.

<sup>13</sup> For short references to 1980 Hague Convention (without further comments), see M. Avram, *Drept civil. Familia*, 2<sup>nd</sup> Edition revised and completed, Hamangiu Publishing House, 2016, p. 492.

<sup>14</sup> Most of international abduction cases in which Romania is involved concern Italy, Spain, France, United Kingdom of Great Britain and Northern Ireland and Germany. Also, there have been cases with Hungary, Austria, Ireland, Greece, Cyprus, Portugal, Mexico, USA.

<sup>15</sup> Council Regulation (EC) no. 2201/2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) no. 1347/2000, OJ L338/1 (12/23/2003).

<sup>16</sup> This „double participation” arises the problem of priority/armonisation between 1980 Hague Convention and Regulation no. 2201/2003.

<sup>17</sup> The Regulation is not limited to issues related to child abduction. It intends to solve, in general, conflicting issues related to jurisdiction, recognition and enforcement of judgments in family relations and questions of parental responsibility, in order to create a common judicial area in civil matters, based on trust and mutual confidence in judicial systems of EU Member States.

<sup>18</sup> K. Standley, *op. cit.*, p. 377: „If a child is abducted (...) to a country which is not party to the Hague or European Conventions, the wronged parent is in a precarious position because (...) there are no international mechanisms in place. A parent will therefore have to try to reach an amicable settlement with the abducting parent, or commence legal proceedings in the country to which the child has been taken. (...) Bringing proceedings in countries with Islamic legal systems can be particularly difficult.”

<sup>19</sup> To this respect, see T. Papademetriou, Implications of European Union Regulation Hague Convention on International Child Abduction, in Hague Convention On International Child Abduction. An analysis of the applicable law and institutional framework of fifty-one jurisdictions and the European Union, Report for Congress, June 2004, p. 11, James Madison Memorial Building; 101 Independence Avenue, S.E.; Washington, DC, available on-line at the following link: <https://www.loc.gov/law/help/archived-reports/hague-convention-on-international-child-abduction.pdf>, last accession on 27.01.2018, 15:38.

<sup>20</sup> For some references to this aspect, see A.-G. Gavrilescu, *Drepturile și obligațiile părintești. Drept român și comparat*, Universul Juridic Publishing House, 2011, p. 293.

<sup>21</sup> Exceptions to the general rule of prompt return, in case the child integrated to the new environment (Article 12) or lack of interest/consent of the holder of rights concerning the child/grave risk for the child in case of return (Article 13).

is given the opportunity to be heard during the proceedings, unless this appears inappropriate having regard to his or her age or degree of maturity (Article 11 Para 2 of the Regulation)<sup>22</sup>. The importance attached to the voice of the child is thus enhanced, as in the context of 1980 Hague Convention the child is to be heard only in case of Article 13 Para 2 (when the child opposes to return)<sup>23</sup>.

Secondly, according to Article 11 Para 4 of the Regulation, a court cannot refuse return of a child on the basis of Article 13b of 1980 Hague Convention *if it is established that adequate arrangements have been made to secure the protection of the child after his or her return* (this exception is not prescribed by 1980 Hague Convention)<sup>24</sup>.

Thirdly, pursuant to Article 11 Para of the Regulation, a court cannot refuse to return a child *unless the person who requested the return of the child has been given an opportunity to be heard* (another exception not to be found in the Hague Convention).

Finally, the Regulation introduced *new obligations for the court settling 1980 Hague case by a non-return order based on Article 13 of the Hague Convention* (Article 11 Para 6-8 of the Regulation). The central idea is that a non-return decisions in 1980 Hague cases must be followed by a clarification of legal situation of the child in the courts of the jurisdiction where the child was habitually resident immediately before the wrongful removal or retention<sup>25</sup>.

### 2.3. Procedural interconnections

Procedural interconnections between the national and the international case appear while they are both pending, but also if 1980 Hague dispute is settled first<sup>26</sup>.

It is of great importance to establish how these interconnection points are to be solved, as the two disputes generally take place at the same time under jurisdictions of different Contracting States.

Thus, the Hague case is always settled by courts in the state of destination and the domestic litigation falls within the competence of jurisdiction of the state of habitual residence<sup>27</sup>.

#### a) Suspension of national litigation

The 1980 Hague Convention has specific provisions for the situation that the two disputes mentioned above are pending at the same time.

According to Article 16 of 1980 Hague Convention: „After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under the Convention is not lodged within a reasonable time following receipt of the notice.” (our underline)

As clearly explained in Pérez-Vera Explanatory Report (Para 121), „ (...) so as to promote the realization of the Convention's objects regarding the return of the child, (this article – our note) seeks to prevent a decision on the merits of the right to custody being taken in the State of refuge. To this end, the competent authorities in this State are *forbidden* to adjudicate on the matter when they have been informed that the child in question has been, in terms of the Convention, wrongfully removed or retained.” (our underline)

Nevertheless, 1980 Hague Convention gives no clue to application in practice of the principle prescribed by Article 16 presented above. The response is thus to be looked for in national law of each Contracting State (in general, procedural law<sup>28</sup>).

There are still courts considering that no provision of domestic law is necessary and apply directly (and only) Article 16 of 1980 Hague Convention when deciding suspension of the domestic case<sup>29</sup>.

Our opinion is that the above-mentioned Article 16 prescribes a mere principle and therefore its application in practice must be individualized by provisions of domestic law (as already precised, procedural provisions left at the discretion of each Contracting State).

In Romanian case-law there was no debate on the procedural solution of suspension of national litigation; nonetheless, an intensely debated question concerns the legal nature of suspension: mandatory or facultative?

In our opinion, the answer resides in application of Article 412 pt. 8 of Romanian Procedural Civil Code, under which: „(1) Suspension of cases operates by law:

<sup>22</sup> See ECJ, Decision adopted on 22 December 2010, C-491/10, case *Aguirre Zarraga v. Pelz*, where a question concerning whether the child has had the opportunity to be heard under Regulation (the case was based on Article 42 of the Regulation, but in essence the reasoning should also apply to Article 11). ECJ's approach was to emphasize the mutual trust between EU courts (if Spanish courts certified that the child had the opportunity to be heard, then they should be trusted). ECtHR's approach was very different and examined (not trusted) whether the Spanish courts had adequately protected the child's human right to be heard.

<sup>23</sup> K. Standley, *op. cit.*, p. 356: „It has been increasingly recognised in Hague Convention cases that children may not be being heard enough.”

<sup>24</sup> For example, in case of a violent parent left-behind in the state of origin, the authorities of this state assure for returning parent and child protection in houses and state-sponsored shelters.

<sup>25</sup> This provision exemplifies an application of the well-known principle of *best interests of the child* and represents at the same time a type of cooperation among different national courts.

<sup>26</sup> The 1980 Hague Convention promotes the idea that domestic litigation should be settled after the Hague case, as it will be argued in the foregoing considerations.

<sup>27</sup> Habitual residence of the child prior to removal to the state of destination is to be established in 1980 Hague case.

<sup>28</sup> In case of Romania, Romanian Procedural Civil Code adopted by Law no. 134/2010, published in the Official Gazette of Romania no. 606/ 23.08. 2012.

<sup>29</sup> E.g., case no. 36836/301/2015 (judgement pronounced on 30.03.2016), where Judecătoria Sector 3 București decided suspension of the domestic case concerning parental authority, based only on Article 16 of 1980 Hague Convention.

... 8. in other cases provided by law” (in case of international child abductions, the „law” to which Article 412 pt. 8 makes reference is to be individualized in Article 16 of the Hague Convention).

We consider application of Article 412 pt. 8 of Romanian Procedural Civil Code to be the right solution because it is a case of mandatory suspension (by force of law) that fully accomplishes the idea expressed by Article 16 of 1980 Hague Convention.

Romanian case-law is not unified on this aspect, and there are courts considering that Article 413 pt. 3 or Article 413 Para 1 pt. 1 of Romanian Procedural Civil Code should be applied (facultative suspension)<sup>30</sup>.

We have strong doubts concerning this procedural solution.

Article 16 of 1980 Hague Convention is formulated in binding terms: „the judicial (...) authorities of the Contracting State to which the child has been removed or in which it has been retained *shall not decide*” – our underline. Likewise, the Explanatory Report Eliza Pérez-Vera states that „the competent authorities in this State are *forbidden* to adjudicate on the matter” (our underline).

Moreover, Article 413 of Romanian Procedural Civil Code allows national judge to appreciate upon suspension of the domestic litigation (suspension does not imperatively operate by law but falls within the margin of appreciation of the domestic judge).

Or, a facultative suspension is contrary to the text of 1980 Hague Convention quoted above.

Also, it is contrary to the spirit of 1980 Hague Convention. Let us remind that the primary scope of 1980 Hague Convention is to ensure prompt return of the child to the state of origin. This goal would become much more difficult to be attained if, prior to settling the 1980 Hague case, the national court establishes that the domicile of the child is in the state of destination<sup>31</sup>.

Another question appeared in Romanian jurisprudence, namely suspension should be considered only in case of national litigations concerning the merits, or also in case of litigations concerning provisional measures asked to be taken by the urgent procedure in Romanian Procedural Civil Code called „ordonanță președințială”<sup>32?</sup>

In disagreement to the case-law<sup>33</sup>, we consider that suspension must be decided independently of nature of

the measures asked for in the domestic case (on the merits or provisional).

We argue by the same teleological interpretation of 1980 Hague Convention presented before and also paying attention to the fact that Article 16 of 1980 Hague Convention makes no difference between provisional measures/merits of the case.

In addition, according to Article 13 of Law no. 369/2004, measures of protection concerning the child under Romanian domestic legislation (provisional by their own nature) may be taken only by the court seized with 1980 Hague case<sup>34</sup>.

Or, there is no good reason to consider that, contrary to the spirit of these provisions, *other* provisional measures might be taken by domestic courts, while the Hague case is still pending.

We conclude that suspension of national litigation is mandatory if a 1980 Hague Convention case is pending at the same time, albeit the domestic litigation concerns the merits of the case or simply provisional measures.

In Romanian law, the correct procedural solution is to apply Article 412 pt. 8 of Romanian Procedural Civil Code, which prescribes a case of imperative suspension.

#### b) International competence

If 1980 Hague dispute is settled first, the judgement pronounced in this case establishes indirectly (but undeniably) the international competence of domestic court invested with the dispute concerning measures for the child under national legislation which fall within the area of parental authority (domicile, exercise of parental authority, etc.).

Article 8 of Regulation (EC) no. 2201/2003 stipulates as a rule on the matter of international competence<sup>35</sup>: „*The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised*”. (our underline)

As already pointed out, the state of habitual residence of the child prior to his/her removal to the state of refuge is always established in the international abduction case.

This aspect, once decided in 1980 Hague dispute, will be covered by the *res judicata* principle and therefore the national court must take it into account when deciding on its own competence.

<sup>30</sup> For example, in case no. 14153/193/2017 registered at Botoșani Tribunal (judgement pronounced on 01.11.2017), the court decided suspension of domestic case based on Article 413 pt. 3 of Romanian Procedural Civil Code in connection to Article 16 of 1980 Hague Convention (facultative suspension). In a similar reasoning of facultative suspension, Judecătoria Sector 1 București decided in case no. 16819/299/2017 (judgement pronounced on 17.01.2018), suspension based on Article 413 Para 1 pt. 1 of Romanian Procedural Civil Code (it is to be noted that, in this case, a different basis for facultative suspension was considered).

<sup>31</sup> For example, one may consider that, in this situation, the child is lawfully retained in the state of destination and Hague application for return should be dismissed, as conditions prescribed by Article 3 of 1980 Hague Convention are not fulfilled.

<sup>32</sup> Articles 997 and subsequent of Romanian Procedural Civil Code.

<sup>33</sup> E.g., in case no. 37303/301/2015 (judgement pronounced on 15.01.2016), Judecătoria Sector 3 București denied suspension of national litigation („ordonanță președințială” concerning domicile of the child and exclusive parental authority) arguing that the measures making the object of the case were provisional and did not concern the merits of the case. Further on, the court decided to establish the domicile of the child to the abductor, to whom also granted exclusive parental authority.

<sup>34</sup> Article 13 Para 1 of Law no. 369/2004.

<sup>35</sup> There are also other situations apart from the general rule, where competence is attained by other means (prorogation of competence, presence of the child, etc.), according to Articles 9-14 of the Regulation.

In Romanian law, under Article 131 of Romanian Civil Procedural Code, the national judge is obliged to verify the general (international), material and territorial competence of the court at the first hearing<sup>36</sup>.

If 1980 Hague dispute is settled and habitual residence of the child has been established in the state of origin, the national court in the state of refuge should deny its general competence.

According to Article 17 of the Regulation: „Where a court of a Member State is seised of a case over which it has no jurisdiction under this Regulation and over which a court of another Member State has jurisdiction by virtue of this Regulation, it shall declare of its own motion that it has no jurisdiction”.

A similar solution is provided by Romanian Civil Procedural Code: „ If the court decides it has no jurisdiction (...) it shall reject the request (...) as not falling under the jurisdiction of Romanian courts” (Article 132 Para 4).

If 1980 Hague dispute is settled and habitual residence of the child has been established in the state of refuge, the courts in this state will gain international competence.

Finally, if the 1980 Hague dispute has not yet been settled (and international competence has not yet been established), we consider the national court should apply Article 16 of 1980 Hague Convention complied to domestic legislation and dispose suspension of the domestic case until the Hague case is pronounced by definitive judgement.

#### 2.4. Substantial interconnections

As soon as one of the two disputes in discussion is settled, important substantial interconnections appear.

If the international dispute is solved first, juridical elements and even facts discussed and settled fall afterwards within the area of application of the principle of *res judicata*.

One example is parental authority and its exercise prior and after removal of the child from one Contracting State to another.

Upon Article 3 of 1980 Hague Convention<sup>37</sup>, parental authority (common or exclusive according to the law of the state of origin or judgements already pronounced in this state) and its practical exercise represent conditions to be necessarily analyzed in order to determine if removal or retention of a child was wrongful (or not) and and decide on admission or denial of 1980 Hague application.

Once these juridical or factual elements have been established in 1980 Hague case, they must be considered by the national court and, according to appreciation of the national judge, may influence the solution to be pronounced.

Depending on the aspects established in the international litigation, the outcome in the national dispute may result in exclusive authority, change of domicile of the child to the left-behind parent and/or restricted rights of access for the abductor parent.

For example, in a 1980 Hague case, Romanian court decided return of the children to USA, stating that their habitual residence was in USA<sup>38</sup>.

In the state of the habitual residence (even prior to the decision in the Hague case<sup>39</sup>), the court decided to change the custody agreed by parents at divorce (joint common legal and sole physical custody in favour of the abductor parent) into sole physical and legal custody in favour of the left-behind parent.

At the same time, the domestic court in USA decided to restrict the time to be spent by the abductor parent with children to “supervised visitation at a commercial parental supervision facility due to (...) risk of flight and abduction of the minor children<sup>40</sup>”.

Another example consists in factual elements in the corpus of a decision of non-return based on Article 12 Para 2 or Article 13 Para 1 b of 1980 Hague Convention (integration of the child in the new environment in the state of refuge/grave risk to physical or psychological harm to the child in case of return to the state of origin)<sup>41</sup>.

<sup>36</sup> Article 131 of Romanian Civil Procedural Code: „ (1) At the first hearing when the parties are legally summoned before the court, the judge must, ex officio, examine and determine whether the court seised has general, material and territorial jurisdiction ... (2) In exceptional cases, if clarifications or additional evidence are necessary for establishing jurisdiction, the judge will take the conclusions the parties and provide a single postponement for this purpose”.

<sup>37</sup> Article 3 of 1980 Hague Convention: „The removal or the retention of a child is to be considered wrongful where: a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. The rights of custody mentioned in subparagraph a above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.”

<sup>38</sup> Bucharest Tribunal, case no. 24670/3/2017, judgement no. 1522 pronounced on 27.10.2017.

<sup>39</sup> We are of the opinion that Article 16 of 1980 Hague Convention should have been applied.

<sup>40</sup> The Fourth Circuit Tribunal for Knox County, Tennessee, USA, case no. 131115, judgement pronounced on 17.07.2017, where the court reasoned as follows: „There has been no valid reason presented to this Court or to any Court to explain ... (the abductor parent 's – our note) actions in failing to obey Orders of this Court, for denying the plaintiff coparenting time, and for removing the minor children to Romania and refusing to return them. (...) the Plaintiff has been forced to seek legal relief under the Hague Convention on the Civil Aspects of Child Abduction and there is an upcoming trial set in Romania (...) (The abductor parent – our note) has unilaterally and without cause completely denied the Plaintiff his coparenting time and as such, does not have the ability to facilitate a relationship between the Father and the minor children (...) did abduct the minor children, has refused to follow a child-custody determination of this Court (...) has engaged in conduct that Court considers relevant to risk of abduction, specifically seeking Romanian citizenship for the children (...)”

<sup>41</sup> Article 12 Para 2 of 1980 Hague Convention: „The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.”

Integration of the child in the state of destination with the abducting parent may very well lead to establishment of domicile of the child to this parent.

Similarly, great risk to physical or psychological harm to the child based on mental illness of the left-behind parent may justify granting to the abductor parent domicile of the child and even exclusive parental authority<sup>42</sup>.

On the other hand, the situation where the national case is pronounced first is a bit different and is expressly dealt with in 1980 Hague Convention.

Articles 17 and 18 of Hague Convention<sup>43</sup> invest the court solving the international case with a large margin of appreciation concerning reasons of national decision which may be taken into account in applying Hague Convention; practice has proved that, in general, courts are reluctant to refuse a return order<sup>44</sup>.

This difference in treatment (as there is no provision in 1980 Hague Convention to leave to the appreciation of national judge the effects of the judgement pronounced in the international litigation) may well be explained by the aim to discourage national courts to solve their cases in breach of Article 16 of 1980 Hague Convention discussed above<sup>45</sup>.

Considering limitation by law itself of influence of decision pronounced in the national litigation (Articles 17 and 18 of 1980 Hague Convention), we conclude that it is the judgement pronounced in the abduction case that has a more pregnant influence, as presented above.

### 3. Conclusions

In case of coexistence of national and international disputes based on situations of international child abduction, the international litigation should be settled first, according to Article 16 of 1980 Hague Convention.

This first procedural interaction between the two disputes while they are both pending should be solved according to domestic legislation, whereas 1980 Hague Convention does not prescribe a specific procedural

means in order to ensure practical application of Article 16 referred to above.

Under Romanian law, we consider that the solution consists in application of Article 412 pt. 8 of Romanian Procedural Civil Code (mandatory suspension by law of the national case).

Nevertheless, taking into consideration that Romanian case – law on this point is not unified (a considerable number of courts decide facultative suspension under Article 413 of Romanian Procedural Civil Code), we appreciate that a clear legislative solution would be very useful.

In this respect, we suggest a solution similar to the one legislated in Article 412 Para 1 pt. 7 of Romanian Procedural Civil Code<sup>46</sup> in case of preliminary questions pursuant to Article 267 TFEU (ex. Article 234 EC) addressed to ECJ by domestic courts, which expressly states mandatory suspension of the national dispute.

This clear legislative procedural solution would eliminate all possible interpretations of national courts that are against the text and spirit of 1980 Hague Convention and ensure at the same time a correct application of Article 16 of the same Hague Convention.

Once the 1980 Hague litigation is (priority) settled, the implications of this decision in the national case concern both procedural and substantial aspects.

First, it is obvious that return/non-return of the child (admission or denial of Hague application) imply establishment in 1980 Hague case of the habitual residence of the child in the state of origin or the state of destination.

Once this problem is settled, a very important procedural consequence arises in the national case, respectively international competence of the domestic court to decide on the merits in the national case.

Depending on the state of habitual residence as established in 1980 Hague case, international competence to take measures concerning the child belongs either to the court in the state of origin, or to the court in the state of destination.

---

Article 13 Para 1 b of 1980 Hague Convention: „Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that (...) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.”

<sup>42</sup> Article 398 of Romanian Civil Code (Law no. 287/2009 concerning Romanian Civil Code, published in the Official Gazette of Romania no. 511/24.07.2009 and republished per Article 218 from Law no. 711/2011, published in the Official Gazette of Romania no. 409/10.06.2011, in force from 01.10.2011) and Article 36 Para 7 of Law no. 272/2004 concerning protection and promotion of children's rights, published in the Official Gazette of Romania no. 557/23.06.2004, successively modified and lastly republished in the Official Gazette of Romania no. 159/05.03.2014.

<sup>43</sup> Article 17 of 1980 Hague Convention: „The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but *the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.*” (our underline)

Article 18 of 1980 Hague Convention: „The provisions of this Chapter *do not limit the power of a judicial or administrative authority to order the return of the child at any time.*” (our underline)

<sup>44</sup> K. Standley, *op. cit.*, p. 366: „Thus, the alleged abductor has a heavy burden to establish a defence. Even if a defence is proved, the court retains an overriding discretion under art. 18 to order the child's return.”

<sup>45</sup> The Explanatory Report drafted by Eliza Pérez-Vera states on this point that: „The solution contained in this article (article 17 – our note) accords perfectly with the object of the Convention, which is to discourage potential abductors, who will not be able to defend their action by means (...) of a decision obtained subsequently, which will, in the majority of cases, be vitiated by fraud.”

<sup>46</sup> Article 412 Para 1 pt. 7 of the Romanian Procedural Civil Code: „(1) Suspension of cases operates by law: (...) 7. in case that the national court addresses a preliminary question to the ECJ according to the Treaties on which the Union is founded.”

Secondly, there are certain substantial aspects comprised in the merits of the decision pronounced in 1980 Hague case that are covered by the *res judicata* principle and therefore become mandatory for the national court and influence/may influence the solution in domestic case.

Such aspects are always those concerning parental authority and its exercise prior and after removal of the child from one state to another (conditions imposed to be analyzed by Article 3 of the 1980 Hague Convention in order to determine if a wrongful cross-border removal or retention of a child has taken place).

In addition, in case of non-return based on Articles 12 Para 2 or 13 Para 1 b of 1980 Hague Convention, integration of the child in the new environment of the state of destination or grave risk to expose the child to physical or psychological harm in the state of origin are also substantial aspects discussed and settled in the international litigation.

All these substantial aspects may influence the national decision on parental authority (joint or exclusive), domicile of the child or rights of access to the child.

In case the national dispute is pronounced before 1980 Hague (contrary to Article 16), the influence of the national judgement on the solution to be adopted in the international dispute is much weaker. It may appear only in substance and is to be decided always by the judge invested with 1980 Hague dispute, depending on the particularities of the case.

Article 17 and 18 of 1980 Hague Convention are relevant to this aspect and give to the court solving the international case a large margin of appreciation concerning reasons of the national decision which may be considered in applying Hague Convention.

We consider that all aspects taken in discussion above could help to ensure a unified case – law on procedure and substance of courts settling both national and international case, a goal necessary to be reached in general and moreover in a realm as sensible as international abduction of children.

Also, corresponding to the foremost importance that the European Court of Human Rights has attached to settling international abduction cases in a reasonable time within the sense of Article 6<sup>47</sup> of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>48</sup>, we consider that some specific legislative solutions may be taken into consideration.

To this end, express prohibition of regularization and preable procedure prescribed by Articles 200 and 201 of Romanian Procedural Civil Code as a rule would be clear means to ensure faster settlement of international abduction cases<sup>49</sup>.

The judge invested to solve such a dispute will thus establish automatically the date of first court session from the very moment of receiving the file case and not consider waiting for the preable procedure to be exhausted.

Also, shorter express legal periods of time for receiving citation by parties in cases of international child abductions might offer a solution.

On the one hand, given the fact that Romania has unified territorial competence in Bucharest, it is a usual situation that parties have domiciles all over Romania and shorter periods as proposed above would be useful, in connection to the recommended period of 6 weeks to solve the 1980 Hague case<sup>50</sup>.

On the other hand, it is not always the case that judges use the possibility to shorten themselves these periods per Article 159 of the Romanian Civil Procedural Code<sup>51</sup>.

## References

- Avram Marieta, *Drept civil. Familia*, 2<sup>nd</sup> Edition revised and completed, Hamangiu Publishing House, 2016
- Barbur Diana Flavia, *Autoritatea părintească*, Hamangiu Publishing House, 2016
- Gavrilesu Alin-Gheorghe, *Drepturile și obligațiile părințești. Drept român și comparat*, Universul Juridic Publishing House, 2011
- Mol Charlotte LL.B., *Non-traditional Family Forms & the International Dimension of Family Life: A Report on the ERA Seminar, 'Recent Case Law of the European Court of Human Rights in Family Law Matters'*
- Papademetriou Theresa, *Implications of European Union Regulation Hague Convention on International Child Abduction*, in *Hague Convention On International Child Abduction. An analysis of the applicable*

<sup>47</sup> The notion of „reasonable time” should be interpreted in the specific area of international child abduction in connection to Article 11 Para 2 of 1980 Hague Convention: „If the judicial or administrative authority concerned has not reached a decision within *six weeks from the date of commencement of the proceedings*, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay.” (our underline)

<sup>48</sup> Concluded in Rome, 04.11.1950, ratified by Romania through Law no. 30/18.05.1994, published in the Official Gazette of Romania no. 135/31.05.1994.

<sup>49</sup> E.g., in adoption cases the legislator expressly excepted this type of litigations from application of Article 200 of the Romanian Procedural Civil Code (Article 87 of Law. no. 273/2004 concerning adoption procedure, lastly republished in the Official Gazette of Romania no. 283/14.04.2016).

<sup>50</sup> Should the period for receiving citation not be respected, the case must be postponed for a regular citation, which takes generally one month if the domicile of parties is not in Bucharest.

<sup>51</sup> According to Article 159 of the Romanian Civil Procedural Code, the first date of session in court is established as to ensure respect of a period of 5 days before the date of the hearing.

- law and institutional framework of fifty-one jurisdictions and the European Union, Report for Congress, June 2004, James Madison Memorial Building; 101 Independence Avenue, S.E.; Washington, DC
- Standley Kate, *Family Law*, 6<sup>th</sup> Edition, Palgrave Macmillan Publishing House, New York, 2008
  - Welstead Mary & Edwards Susan, *Family Law*, Oxford University Press, 2<sup>nd</sup> Edition, 2008
  - ECtHR, Decision adopted on 29 April 2003, Application no. 56673/00, case *Gil and Aui v. Spain*
  - ECtHR, Decision adopted on 26 June 2003, Application no. 48206/99, case *Maire v. Portugal*
  - ECtHR, Decision adopted on 6 July 2010, Application no. 41615/07, case *Neulinger and Shuruk v. Switzerland*
  - ECJ, Decision adopted on 22 December 2010, C-491/10, case *Aguirre Zarraga v. Pelz*
  - Judecătoria Sector 3 București, case no. 36836/301/2015, judgement pronounced on 30.03.2016
  - Judecătoria Sector 3 București, case no. 37303/301/2015, judgement pronounced on 15.01.2016
  - The Fourth Circuit Tribunal for Knox County, Tennessee, USA, case no. 131115, judgement pronounced on 17.07.2017
  - Bucharest Tribunal, case no. 24670/3/2017, judgement pronounced on 27.10.2017
  - Botoșani Tribunal, case no. 14153/193/2017, judgement pronounced on 01.11.2017
  - Judecătoria Sector 1 București, case no. 16819/299/2017, judgement pronounced on 17.01.2018
  - European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 04.11.1950, ratified by Romania through Law no. 30/18.05.1994, published in the Official Gazette of Romania no. 135/31.05.1994
  - Hague Convention on the Civil Aspects of International Child Abduction concluded at The Hague on October 25, 1980
  - Explanatory Report on the 1980 Hague Child Abduction Convention drafted by Eliza Pérez-Vera, Madrid, April 1981, published in 1982
  - Law no. 100/1992 for Romania's accession to 1980 Hague Convention on the Civil Aspects of International Child Abduction, published in the Official Gazette of Romania no. 243/30.09.1992
  - Council Regulation (EC) no. 2201/2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) no. 1347/2000, OJ L338/1 (12/23/2003)
  - Treaty on the Functioning of the European Union, Official Journal C 326, 26/10/2012
  - Law no. 369/2004 on the application of 1980 Hague Convention on the Civil Aspects of International Child Abduction, published in the Official Gazette of Romania no. 888/29.09.2004 and republished in the Official Gazette of Romania no. 468/25.06.2014
  - Law no. 272/2004 concerning protection and promotion of children's rights, published in the Official Gazette of Romania no. 557/23.06.2004, successively modified and lastly republished in the Official Gazette of Romania no. 159/05.03.2014
  - Law. no. 273/2004 concerning adoption procedure, lastly republished in the Official Gazette of Romania no. 283/14.04.2016
  - Romanian Civile Code, Law no. 287/2009 concerning Romanian Civil Code, published in the Official Gazette of Romania no. 511/24.07.2009 and republished per Article 218 from Law no. 711/2011, published in the Official Gazette of Romania no. 409/10.06.2011
  - Romanian Procedural Civil Code, Law no. 134/2010, published in the Official Gazette of Romania no. 606/23.08.2012