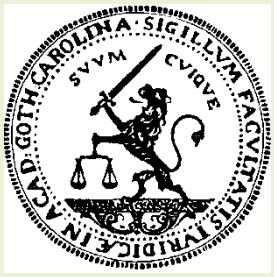

FACULTY OF LAW
Lund University

Jurate Rimkute

International unlawful parental child abduction

Comparative study: Lithuania, Sweden, and Russia

Master thesis
30 credits

Supervisor: Michael Bogdan

Private International Law

Spring Semester 2011

Contents

SUMMARY 1

SAMMANFATTNING 2

PREFACE 3

ABBREVIATIONS 4

1 INTRODUCTION 5

1.1 Background 5
1.2 Purpose 5
1.3 Delimitations 6
1.4 Method and material 6
1.5 Definitions 7
1.6 Outline 8

2 THEORY 9

2.1 International child abduction: history 9
2.2 The best interests of the child 9
2.3 Habitual residence 14

3 THE ABDUCTION CONVENTION 16

3.1 Background 16
3.2 Implementation of the Convention 18

3.2.1 Lithuania ***18***

3.2.1.1 Case law 20

3.2.1.1.1 Gillis case *20*

3.2.2 Sweden ***20***

3.2.2.1 Case law 22

3.2.2.1.1 RÅ 1995 ref. 99 *22*

3.2.2.1.2 NJA 1995s.241 *23*

3.2.2.1.3 RÅ 1996 ref. 52 *23*

3.2.2.1.4 RÅ 2001 ref. 53 *25*

3.2.2.1.5 NJA 2002s.390 *26*

3.2.2.1.6 RÅ 2002 ref. 1 *27*

3.2.2.1.7 RÅ 2002 ref. 69 *28*

3.2.2.1.8 NJA 2008 s. 963 *28*

4 BRUSSELS II BIS REGULATION 31

4.1 Background 31
4.2 ECJ case law 32

4.2.1 Rinau case *32*
4.2.2 Detiček case *34*
4.2.3 McB case *36*
4.2.4 Mercredi case *37*
4.2.5 Purrucker II case *38*
4.2.6 Zarraga case *40*
4.2.7 Povse case *42*
4.3 Implementation of the Regulation by Lithuania respectively Sweden 44
4.3.1 Lithuania *44*
Case law 45
4.3.1.1.1 No. 3K-3-254/2007 (S) *45*
4.3.2 Sweden *46*
4.3.2.1 Case law 46
4.3.2.1.1 RH 2006:60 *46*
4.3.2.1.2 RH 2010:85 *47*

5 NON-HAGUE ABDUCTIONS 48
5.1 Lithuania 48
5.2 Sweden 49
5.2.1.1 Case law 50
5.2.1.1.1 NJA 1997s.196 *50*
5.2.1.1.2 RÅ 1997 ref. 58 *51*

6 NON-HAGUE STATE, RUSSIA. 53
6.1 Legislation on international child abduction 54
6.1.1 Family Code *55*
6.1.2 Other legal and non-legal remedies *56*
6.2 The UNCRC 57
6.3 The ECHR 57
6.3.1 Neulinger and Shuruk v. Switzerland *59*
6.4 Abductions to and from Russia 61

7 EUROPEAN COUNCIL'S CUSTODY CONVENTION 63

8 ANALYSIS AND CONCLUSIONS 64

SUPPLEMENT A 68

SUPPLEMENT B 72

TABLE OF CASES 79

Summary

Globalisation has made its impact not the least on peoples' private relations. The increased migration has made chances of people settling down and starting family outside their home countries rather high. The thesis has shown that parents from international families commit more than half of international parental abductions or retentions to/in their home states. The remaining group of parents simply choose to move for another country and take children along. Irrespective of the cause, the removal or retention of children without consent of the other parent is to be considered unlawful in states that are parties to the Hague Abduction Convention from 1980. The main aim of the instrument is to avoid the harmful effects of the unlawful child removals/ retentions, which means that as a main rule the child shall return to the country of its habitual residence as speedily as possible.

Even though the Hague Abduction Convention is also applicable for the EU Member States (excluding Denmark) it is however inferior in several aspects in relation to the Brussels II bis Regulation. The second version of the instrument introduced new return rules that are more effective in comparison to the Hague Abduction Convention. The key provision in the context is Article 11 (8) which says that the child has to be returned to its habitual residence even though the non-return order under the Article 13 of the Hague Abduction Convention has been issued, if the requesting state has issued a subsequent certified return order in accordance with the Section IV of the Brussels II Regulation.

Convention countries Lithuania and Sweden have expressed their concerns about the future relationship of the above-mentioned provisions. The Article 13 of the Hague Abduction Convention, which inter alia protects best interests of the child, is to give way to the Article 11(8) of the Brussels II Regulation when the latter is of relevance. The ECJ, however, in its case law has established that the interests of the child could be approached in the courts of origin after the child's return to its habitual residence. However, there is another approach inspired by the Hague Abduction Convention, which says that sometimes it is better for the child not to return to its habitual residence.

The Russian Federation is on its path to sign the Abduction Convention. However, even now there exist international instruments that legally bind the country in the matter. The most important is the European Convention on Human Rights, which Article 8, on rights to private and family life, imposes both positive and negative obligations upon its State Parties. Another relevant instrument in the matter is the United Nations Convention on the Rights of the Child, which contains several provisions on protection of the best interests of the child, applicable to unlawful abductions. According to a well-known Russian family law expert Khazova, even if Russia has no domestic rules combating international parental abductions, the state is nevertheless bound by the above-mentioned instruments even though it is not a contracting party to the Hague Abduction Convention.

Sammanfattning

Globaliseringen har haft en stor inverkan på människors privata relationer. Den ökade migrationen har avsevärt ökat chanserna för att människor slår sig ner och startar familj utanför sina hemländer. Detta arbete visar att föräldrar från internationella familjer begår mer än hälften av alla olovliga internationella barnbortföranden eller kvarhållanden till/i sina hemstater. Övriga fall svarar de föräldrar för, som väljer att flytta till ett annat land och tar barnen med sig. Oavsett orsaken, anses bortförande av barn utan samtycke från den andra föräldern olagligt i stater som är parter i Haag-Bortförandekonventionen från 1980. Huvudsyftet med instrumentet ifråga är att undvika skadliga effekter av olagliga barnbortföranden/ kvarhållanden, vilket innebär att som huvudregel ska barnet återlämnas till sin hemviststat så snabbt som möjligt.

Även om Haag Bortförandekonventionen är tillämplig för EU: s medlemsstater (förutom Danmark), är den dock underordnad Bryssel II bis Förordningen i flera avseende. I den andra versionen av instrumentet infördes nya återföringsregler som är mer effektiva än Bortförandekonventionens bestämmelser. Den centrala bestämmelsen i sammanhanget är Artikel 11 (8) som säger att barnet ska återlämnas till sin hemviststat, även då ett beslut om icke-återlämnande av barnet enligt Artikel 13 i Haag-Bortförandekonventionen har utfärdats, om den ansökande staten har utfärdat ett efterföljande certifierat beslut om återlämnande i enlighet med avsnitt IV i Bryssel II bis Förordningen.

Konventionsstaterna Litauen och Sverige har uttryckt sin oro över de framtida konsekvenserna av de ovan nämnda bestämmelserna. Artikel 13 i Bortförandekonventionen, som bland annat värnar om barnets bästa, ger vika för Artikel 11 (8) i Bryssel II-Förordningen när denna är av relevans. EG-domstolen har dock i sin rättspraxis fastställt att barnets intresse kan prövas i domstolar av ursprungslandet efter att barnet har återlämnats till sin hemvistort. Det finns dock ett alternativt synsätt, vilket inspirerats av Haag-Bortförandekonventionen, som säger att det ibland är bättre för barnet att inte återvända till sin hemviststat.

Ryssland är på väg att underteckna Haag-Bortförandekonventionen. Emellertid, finns det redan nu internationella instrument med rättsligt bindande verkan för landet i fråga. Det viktigaste är den Europeiska konventionen om skydd för de mänskliga rättigheterna och de grundläggande friheterna, vars Artikel 8, om rätten till privat-och familjeliv, uppställer både positiva och negativa skyldigheter på konventionsstaterna. Ett annat relevant instrument är FN: s Konvention om barnets rättigheter, som innehåller flera bestämmelser om skydd av barnets bästa i händelse av olovligt barnbortförande av vårdnadshavare. Enligt en erkänd rysk familjerättsexpert, Khazova, är Ryssland bundet av de ovan nämnda instrumenten, trots att inhemska regler om bekämpning av barnbortförande saknas, samt att man ännu inte är konventionsstat i Haag-Bortförandekonventionen.

Preface

Firstly, I want to express my gratefulness to my supervisor, Professor Michael Bogdan for the inspiring start. As the saying goes: a good beginning is half the battle. Thank you for your support and inspiration.

Sincere thanks to you, my dear friends Anna, Julia, Lena, Svetlana and Yvonne for your patronage both as friends and as colleagues.

Thank you, Amjad, for encouraging me to apply for my dream education.

Hearty thanks to my family for their ceaseless faith in me. Myliu.

Most of all I want to thank my four years old daughter Daria for her patience and understanding. Your sacrificed bedtime rituals and weekend joys have been priceless. You are my everything.

Abbreviations

Abduction Convention	Convention on the Civil Aspects of International Child Abduction, Concluded 25 October 1980
AC	Administrative Court
ACA	Administrative Court of Appeal
DC	District Court
CA	Court of Appeal
CS	Contracting State (-s)
ECHR	European Convention on Human Rights
ECHR Court	European Court of Human Rights
ECJ	European Court of Justice
EU	European Union
INCADAT	International Child Abduction Database
MS	Member State(s)
PIL	Private International Law
Regulation	Brussels II a/bis Regulation[1]
SAC	Supreme Administrative Court
SC	Supreme Court
SCC	Supreme Civil Court
SP	State Party (-s)
UNCRC	United Nations Convention on the Rights of the Child

[1] Council Regulation (EC) No 2201/2003 of 27 November 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 2003 L 338/1,(hereinafter: the Regulation).

1 Introduction

1.1 Background

International unlawful child removal or retention appears to be a very complicated issue of PIL due to the individuals involved in the matter. This kind of abduction does not have a victim on one side and a "bad guy" on another like in the conventional kidnapping tragedies. Here everybody is a victim: the parent who abducts the parent who loses her/his child, and most of all, the children, helplessly placed in the middle of the battleground.

At the European Council meeting in Tampere in October 1999[2], it was expressed that international child abductions and retentions are one of the adverse reactions to the free movement of persons within the EU. One could draw the same parallel as to the worldwide abductions that undeniably partially depend on the increased mobility of people with formation of international families in the end. As a result, like also in the other globalised legal areas, the primary aim of the world governments was to develop a sustainable international instrument for resolving international abduction disputes. Accordingly, on 24 October 1980, during the Fourteenth Session, the MS to the Hague Conference on PIL unanimously adopted a *Convention on the Civil Aspects of International Child Abduction*[3].[4] However, some EU MS were eager to introduce even more strict rules regulating the process of return of abducted children and, as a result, on 1 March 2005[5], the *Brussels II a/bis Regulation Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility* became applicable. However, far from all states are parties to the above-mentioned instruments, and one of such is the Russian Federation; though, only two months before finishing this paper, the Russian State Duma was introduced a draft law on accession to the Abduction Convention by the Russia[6].

1.2 Purpose

The purpose of this study is twofold. Primarily, I will discuss the main legal sources dealing with the problem of international unlawful parental abductions. To fulfil the first aim, I will analyse the relevant doctrine as well as case law implementing these instruments. Secondly, in the background of

---

[2] *Tampere European Council 15 AND 16 October 1999, Presidency Conclusions*, paras.1-9; 33-7.

[3] Hereinafter: the Abduction Convention.

[4] For the first time in the Hague Conference's history the MS were able to sign as early as the draft Convention and four states- Canada, France, Greece and Switzerland- did that; *Explanatory Report on the 1980 Hague Child Abduction Convention*, Elisa Pérez-Vera, *Child Abduction Section*,1982, para. 1, (hereinafter: Perez-Vera report).

[5] Article 72 of the Regulation.

[6] See below, Chapter 6.

the above-mentioned, I will compare two convention[7] states that are Lithuania and Sweden, and a non-convention state, that is Russia, regarding their accountability in solving the matters of international parental abductions. The aim, thus, has been to give an overall picture of what legal tools, applicable to international parental abductions, are available in the respective country.

1.3 Delimitations

My paper will only consider legal sources (case law, legislation, treaties, doctrine, and general principles) that directly concern the question of international unlawful child abductions. Thus, I am not covering sources on international custody or access issues where the element of child abduction or retention is absent.

Moreover, I will not discuss criminal aspects of unlawful parental abductions or retentions due to the space shortage.

Concerning the principle of the best interests of the child, I will cover it very shortly in a theoretical part of my work because of the following reasons. Firstly, several theses only at the law faculty in Lund discuss the topic in detail. Secondly, I prefer not going into the topic deeper than the content of my study may require in avoiding non-objectiveness due to the topic's delicate nature. Finally yet importantly, the principle in the context of international parental abductions tends to be of a more limited and specific content due to the procedural nature of abduction matters.

Regarding the implementation of the Abduction Convention, I will restrict my work to two CS: Lithuania and Sweden. Since the Hague Conference, unlike the EU, does not have any adjudicatory body, the implementation of its conventions can be monitored only by rulings in the courts of the SP that, generally, should interpret the convention as uniformly as possible.[8]

Lastly, I am not analysing the relevant abduction provisions in detail because the main purpose of my work is to show how these rules are implemented by the domestic and international courts, which has required the time and space for itself.

1.4 Method and material

Primarily, I will use classic legal methods i.e. literature and empirical studies in order to describe how a problem of international parental abduction is addressed in international and some domestic doctrine and case law. I will also use a comparative method in order to show how three states,

---

[7] The reason to why I am choosing to call it "convention versus non-convention states" is that the Russian Federation might become a state party to the Abduction Convention in a near future. However, the possibility of it joining the EU, and therefore becoming bound by the Regulation is rather low.

[8] Paul R. Beaumont and Peter E. Mceleavy, *The Hague Convention on International Child Abduction*, (Oxford, 1999), (hereinafter: Beaumont & Mceleavy), pp. 226-240.

namely Lithuania, Sweden and Russia handle the matter. The comparative method will be also used in the discussions on similarities and differences between the current two main abduction instruments, i.e., the Abduction Convention and the Regulation.

In order to reveal the major problems related to international parental abductions, I chose to examine all existing ECJ and Lithuanian/Swedish case law.

Erasmus studies at Mykolas Romeris University in Vilnius, Lithuania, and fluency in Russian language helped me to achieve the goal of this work.

1.5 Definitions

Even though the terms "removal"[9] and" retention" are two different legal concepts[10], I am using a common word for it: "abduction/removal" since they are followed by a same legal consequence, i.e. a speedy return of the child. Only when necessary, I use the terms separately.

As to the determination whether a removal or retention is *unlawful*/*wrongful*, the Article 3 of the Abduction Convention and the Article 2(11) of the Regulation equally state:

> The removal or retention of a child is to be considered wrongful where-
> a) it is in breach 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.(…)[11]

Regarding the concept "custody rights" under the named instruments, it has a semi-autonomous and a much broader meaning due to the specific character of the instruments in question.[12] Thus, a parental right to decide over the child's residence can amount to custody rights in abduction matters even though the latter is a part of access or other non-custody rights.[13] In any case, the present question of whether a parent has custody can be challenged only in courts of a CS where the child is habitually resident[14].

As for the concept "parental" abductions, I use it as an opposite to the classical child abductions by strangers. Thus, even though other physical or judicial bodies can exercise custody rights, pursuant the Abduction

---

[9] Other terms are:"removal" or"kidnapping". The former one is used in the very body of the Abduction Convention since the term "abduction" was seen as improper in the context of the parental removals. For more, see the Perez-Vera report, para. 53.

[10] The major difference between the two concepts is the time aspect: the retention takes place when the time for lawful removal has expired, for instance, when one of the custodians does not return the child after a planned vocation, see: Elisa Pérez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention, (hereinafter: Perez-Vera report), 1982, para.11.

[11] Article 6 of the Abduction Convention.

[12] Beaumont & Mceleavy, p.74.

[13] Beaumont & Mceleavy, pp.75-82.

[14] This question is discussed in detail in Chapter 2.3.

Convention[15] and the Regulation[16], I choose to use the named concept because most of the custodians, involved in abduction disputes, are parents.

The term "requesting state/court" will be used to refer to the court of origin, which requires the court of a state, to which the child is removed or retained, i.e., "the requested state/court", for the child's return.

The concept non-convention/non-Hague countries/states refers to states that are not parties to the Abduction Convention and vice versa.

1.6 Outline

The study starts with a theoretical part (Chapter 2) where the history and the main principles of instruments relevant in matters of international parental abductions are discussed.

Chapters 3 and 4 analyse the main features of the Regulation and the Abduction Convention and how it is implemented in general, and by the two selected convention countries, i.e. Lithuania and Sweden, in particular.

Chapters 5 and 6 are about non-Hague abductions. The first one is about Lithuanian and Swedish approach in such matters. The second one is a study of all applicable instruments in case of international parent abductions in relation to a non-Hague country Russia.

Chapter 7 is a brief reminder of another regional instrument in the matter, i.e., the European Council's Custody Convention. However, the latter has become highly irrelevant due to its procedural shortcomings in comparison to the Regulation and the Hague Abduction.

Chapter 8, the analytical and conclusion part of the study, is about comparison of how the relevant instruments are being implemented on both national and international arenas.

Analytical and conclusion parts are also to find in each sub-chapter on case law in which I describe, analyse and draw conclusions about every case.

The description and analysis of the ECHR case, *Neulinger and Shuruk v. Switzerland*, has been placed into Chapter on Russia because the ECHR is today the only international instrument, which a party, involved in parental abduction dispute with Russia, can successfully invoke. It is however important to remind that the named instrument is highly relevant for the Hague countries as well.

[15] Article 13(a).
[16] Article 10(a).

2 Theory

2.1 International child abduction: history

The latest Swedish Parliament survey[17] has shown that international child abductions and retentions continue increasing both in Sweden and abroad. The main reason for this escalation is the growing transnational mobility of people or, as Dr Wibo van Rossum in his article on international abductions[18] quoted one politician, the international love traffic. Many of children involved in such disputes have more than one nationality or at least their parents have different origins.[19] After the divorce, the "foreign" parent usually tends to go back to her/his home country and take the children along.[20] Against any odds, only half of the abductors are fathers, and most of the abducting parents usually have joint or sole custody over the child. It is important to note that the issue of the harmfulness of abductions is different when abducting parents are the only ones who had factual custody that is, resided with the child.[21]

Prior to the adoption of the Abduction Convention, the left behind parent had very limited chances to get her/his child back home. Thus, in the end of the 1970s, under the auspices of the Hague Conference, its MS decided that the need for an instrument protecting the abducted children and their left behind parents was very great.[22] However, the aim of the instrument was about something more than the classical individual approach towards children rights. Thus, the convention should be about protecting a collective interest of all children from being uprooted from their homes by their own parents.[23] This latter interest seems evident even more in the Regulation, which strict return rules, and its interpretation by the ECJ in its case law has shown that it is not worthwhile removing the child within the EU without the consent of the other parent.[24]

2.2 The best interests of the child

It would be a sin, according to me, to write this study without discussing the main principle of all legal instruments dealing with children, which is: the best interests of the child. The study will show that even though the interpretation of this concept is alike under the Abduction Convention and

---

[17] Rapport från Riksdagen, 2008/09: RFR8, Bortförda och kvarhållna barn i internationella förhållanden Riksdagstryckeriet, Stockholm, p. 8. (hereinafter: Riksdagen report).
[18] Wibo van Rossum, *The clash of legal cultures over the 'best interests of the child', principle in cases of international parental child abduction.* Volume 6, Issue 2 (June) 2010.
[19] For a more detailed data see below, Chapter on Abduction Convention.
[20] Riksdagen report, p. 8.
[21] Beaumont & Mceleavy, pp. 7-15.
[22] Beaumont & Mceleavy, pp.2-3.
[23] Beaumont & Mceleavy, p13.
[24] COM (2002) 222 final/2, p.5.

the Regulation, the margin of discretion in the SP's interpretation of the notion is all the more different. Some guidance as to how to interpret the best interests of the child under the instruments in question is to be found in the relevant case law. Nevertheless, the outcome of such assessment usually depends on the individual circumstances of the case. Moreover, in case of abduction matters, the meaning of the principle is narrowed down due to a principle set in the relevant instruments, which is a speedy return of the child to its habitual residence. The criterion tightly interrelates with the aim and purpose of the relevant abduction treaties, which is to deter the parents from removing or retaining their children unlawfully.

The Article 3[25] of the UNCRC[26] is viewed as an umbrella provision for the principle of the best interests of the child in the document. However, even though it is often criticised for its general character, due to its liberal suggestion to every CS to interpret it according to its domestic legal and cultural traditions, it is also seen as the guide to the other articles in the body that include the principle.[27] Thus, the principle also exists in the provisions related to abduction issues, that is, in the Articles 9 to 12. The Article 9 seeks to protect children from unnecessary separation with their parents. The provision gives two examples of when such parting might be essential, e.g., when the child is neglected or abused, and when the parents live in different countries. However, the Article 10(2) says that the child has a right to maintain its relation to a parent living abroad, with exception when it is against the best interests of the child. The Article 11 calls upon the SP to combat illegal child removals and retentions through bilateral or multilateral treaties. The Article 12 says that a child of a mature age and mentality has a right that his expressed opinion- in all the matters that concern him- will be given due weight. However, it is the domestic procedural rules of the SP that regulate how such hearings should take place.

The ECHR[28] does not contain the principle as such but it does integrate it under the meaning of the Article 8 that deals with, inter alia, right to private life. In general, the ECHR Court[29] has made many evaluations and comments on the provisions of the Abduction Convention in its case law.[30] As for the principal of the bests interests of the child the ECHR Court has made, according to some PIL lawyers[31], a revolutionising assessment of the principle under the Article 8 of the ECHR on one side and the Article 13 of the Abduction Convention on the other. Thus, in the appealed at the Grand

---

[25] The provision says that both public and private actors shall care for the interests of the child and its parents, pursuant to the standards set by the competent national authorities.

[26] 1989.

[27] Jan CM Willems (ed.), Children's Rights and Human Development: A Multidisciplinary Reader, (2010 Intersentia, Antwerp-Oxford-Portland), pp.583-585.

[28] Hereinafter: the ECHR

[29] Hereinafter: the ECHR Court.

[30] The Hague Conference on PIL, Child Abduction Section, INCADAT, Case law analysis, Inter-Relationship with International / Regional Instruments and National Law, European Convention of Human Rights (ECHR).

[31] Read, for instance, the article by an American international family lawyer Jeremy Morley at<http://www.internationalfamilylawfirm.com/2010/07/momentous-and-disturbing-ruling-in.html>.

Chamber case *Neulinger & Shuruk v. Switzerland*[32], the ECHR Court underlined the overriding importance of the best interests of the child not to be returned in relation to the principle of the prompt return under the Abduction Convention. Just previously, in the case *Maumousseau and Washington v. France*[33] and the first case of *Neulinger & Shuruk v. Switzerland*[34], the Court upheld the importance of the summary returns under the Article 13 of the Abduction Convention even though it might affect the right to a family life of one of the parents under the Article 8 of the ECHR. However, the ruling in the second *Neulinger & Shuruk v. Switzerland* case, established that in that particular situation the return of the child as well as his mother would breach both the Article 13 (1) (b) of the Abduction Convention and the Article 8 of the ECHR.[35]

The Regulation contains in its Recitals 12 and 13 a certain criterion on how one should interpret the principle on the best interests of the child under the regulation. Thus, the criterion of proximity[36] should be a guiding star in determination of the MS's jurisdiction as to the matters of the paternal responsibility. Thus, the main rule is that the jurisdiction should lie with the court of the child's habitual residence since it seems to be most suitable to meet the interests of the child. Exceptions are sometimes possible when a child's habitual residence changes or its parents make an agreement on another jurisdiction. Another exception to the main rule is possible when a court with the jurisdiction transfer the case to another court that appears to be better placed to hear the case. Moreover, as we will be able to see from the below discussed ECJ case law, the proximity criterion is by the ECJ interpreted on a case-by-case level.

The Abduction Convention sets the protection of the best interests of the child as its primary objective. However, the principle adapts to the context of abduction situations, which is reflected in the Article 1 that seeks to protect the child's right to stability/status quo through her/his return to the habitual residence, as well as its contact with both of its parents through the respect of custody and access rights. It is also important to mention that here is no intrinsic hierarchy between the two objectives since they both seek to protect the very same goal.[37] Moreover, the preamble of the instrument in question counterbalances the article, saying that the aim of the document is to prevent the harmful effects of the abductions and not the abductions per se, implying that sometimes removing a child might actually serve its interests.[38] Accordingly, it follows that the primary goal of the convention is the best interests of the child, which might sometimes mean that the abducted child will not return to the state from where she/he was unlawfully removed.[39] Hence, Articles 12, 13 and 20 deliver exceptions from the basic

[32] No 41615/07, 6 July 2010.
[33] No. 39388/05, 6 December 2007.
[34] No. 41615/07, 8 January 2009.
[35] For the analysis of the case see below, Chapter 6.3.1.
[36] For instance, in the *Detiček* or *Purrucker II* cases (see below, Chapters 4.2.2 resp. 4.2.5) the Court talks of a geographical proximity when deciding on certain court's jurisdiction.
[37] Perez-Vera report, paras.16-18, 25.
[38] Beaumont & Mceleavy, pp.28-9.
[39] Perez-Vera report, para.20.

principle of a prompt return, what allow the kidnapped children to stay where they are if it is considered to be in their best interests. Some of it are directly connected to the interests of the child, that is if the child's return might lead to its physical or psychological harm or being placed in an intolerable situation (Article 13 (1b)), and if the child has reached such age[40] and maturity that its own expressed interests might be taken into account (Article 13 (2)).[41]

In the Swedish legislation, the principle of the best interests of the child has been relevant since 1910. However, its definition varied in different law areas. Regarding the abduction matters, such cases did not use the principle of the child's interests as an independent interpretation; rather, the principle was usually interrelated with the interests of the custodians.[42] According to Schiratzki[43], in the light of this vast legal diversion, as well as the court's wide discretion in the interpretation of the best interests of the child, the principle can be divided into an active and a passive part. Thus, the active rights, e.g. care for the child's person or good upbringing, are the rights granted only to children. The passive ones are those also granted to adults, for instance, protection against crime. However, mostly the last ones were covered in the Swedish custody disputes. Moreover, the courts tended to use the principle of the best interests of the child for legitimising their discretionary assessments.[44] A social-legal study on the Swedish DC's estimation of the best interests of the child[45] has shown that the judges in their decisions were using only legal sources that in its turn reflect only the general needs of the child. According to the Swedish Children's Committee, the Swedish courts have failed to handle the cases concerning children from the perspective of the child.[46] Therefore, a number of law amendments as to the child's best interests were made in the Parental Code[47], which is also applicable in the abduction matters. Its chapter 6 § 15 obliges the parent, living with the child, to promote the child's contact with a non-resident parent or any other person close to the child. As a result, a parent who does not respect the child's right to meet its other family members through inter alia its unlawful removal or retention might face difficulties in parental decisions concerning her/him in the future. Already in the preparatory work of the amendments of the Code, it was stated that a parent who tries to

[40] However, according to the Perez-Vera report, no agreement on what that age should be has been reached, para.30.
[41] Perez-Vera report, paras. 29-30.
[42] Johanna Schiratzki, *Vårdnad och vårdnadstvister* (Custody and custody disputes), (Norstedts Juridik AB, Stockholm, 1997), pp.142. (hereinafter: Schiratzki).
[43] Schiratzki, pp.50-5; 61.
[44] Schiratzki, pp.55-6; 69; Perez-Vera report, para. 22.
[45] Annika Rejmer, *Vårdnadstvister, En rättssociologisk studie av tingsrätts funktion vid handläggning av vårdnadskonflikter med utgångspunkt från barnets bästa.* (Custody disputes, A legal-sociological study of the district court's function in the handling of custody disputes on the basis of the child's best interests) (Lund, Studies in Sociology of Law, 2003), pp.125-6, (hereinafter: Rejmer).
[46] Ibid; also: Riksdagen report, p.19.
[47] In Swedish: Föräldrabalken.

sabotage another parent's contact with the child might lose the right to reside with the child.[48]

Some knowledge of how the Lithuanian courts interpret the best interests of the child can be found in a fresh custody case[49] adjudicated by the Lithuanian SC. The main issue in the proceeding was about priorities as to the best interests of the child in a selection of a custodian. The court was to decide on who of the applicants should become a guardian over an infant girl who, only a three months old baby tragically lost her mother and a stepfather in a car accident. The court has referred to all major national and international provisions on protection of the best interests of the child. Firstly, the court invoked the UNCRC's Article 3, on general need of protection of child interests; the Article 12 on the child's right to express its opinion; and the Article 20 guaranteeing the state protection of children without custodians. The court also mentioned the Article 8 of the EHRC in a sense that the SP have positive obligations to take care of children's right to a harmonious family[50] life.[51] The basic national instruments regulating children needs in custody issues are the portal provision in the Article 38 paragraph 2, on the State's obligation to protect family life, of the Lithuanian Constitution[52] and the Act on Protection of the Children Rights[53] as well as the Family Code[54]. For illustration, from the latter's Article 3.249, on the principles of custody determination, follows that the principle of the best interests of the child is absolute and therefore outweighs all other relevant principles. The priority of the child's interests is also enshrined, according to the court, in the Article 3, paragraph 1 of the UNCRC together with the Article 3.3, paragraph 1 of the Family Code and the Article 4, paragraph 1 of the Child Protection Act. Thus, with reference to the inter alia named provisions, the court decided that the most suitable guardian is the one, who, under the equitably assessed factual circumstances, seems to be mostly capable of offering a comprehensive and balanced life to the child in question. The fact that the girl has to separate from the family with whom she lived for the first two years of her life did not overweight the girl's estimated need for a better-adjusted family life.[55]

---

[48] Reply by the Swedish Central Authority to the Hague Conference Questionnaire on preventive measures in the context of the 1980 Hague Convention on the Civil Aspects of International Child Abduction, 030414, pp.1-2.

[49] Ruling of the SC of Lithuania of 13 April 2010, civil case No. 3K-3-169/2010.

[50]However, like also in Sweden and Russia, there is no constitutional definition of family concept.

[51] On the question, the court referred to the cases: Bevacqua and S. v. Bulgaria, no. 71127/01, judgment of 5 June 2008 and Koons v. Italy, no. 68183/01, judgment of 30 September 2008).

[52] Lietuvos Respublikos Konstitucija (Constitution of the Republic of Lithuania), Lietuvos Respublikos piliečių priimta 1992 m. spalio 25 d. referendume (adopted by Lithuanian citizens of the Republic of Lithuanian in a referendum in 25 October 1992).

[53] Vaiko teisių apsaugos pagrindų įstatymas (Framework Law on Protection of Rights of the Child), 1996 m. kovo 14 d. Nr. I-1234, Vilnius.

[54] Trecioji Knyga, Seimos Teise,Civilinis Kodeksas (Book Three, Family Law, Civil Code), 2000 m. liepos 18 d. Nr. VIII-1864, Vilnius.

[55] According to the facts given in the case, the preferred applicants were of a younger age, higher education, better economy and had a son of their own in the same age as the girl.

An interesting thing to mention is the Lithuanian SC's decision establishing that the parent, residing with the child, is legally obliged to facilitate the child's communication with the other parent in order to ensure a harmonious development of the child's personality.[56] In addition, the Article 3.172 of the Lithuanian Civil Code provides that custodians have to enable children to communicate with their relatives and other close to them persons if it is in their best interests. In case of failure to comply with it, the child protection authorities or the court, pursuant to the Article 3.176 of the same code, may order the parents to fulfil the obligation.[57]

As we will see later in the study, the fact that the Russian Federation is not a party to the Abduction Convention, does not mean that it cannot be held responsible for the violation of the rights of children also in the context of international child abductions. There are relevant international instruments legally binding its SP to act in the best interests of the child. The UNCC and, especially, the ECHR are the key instruments that can be applied by both national and international courts in abduction cases involving Russia. Thus, case law from the ECHR Court[58] on the issue of the best interests of the child in abduction disputes is legally binding for the Russian Federation. Furthermore, the priority of the best interests of the child under the UNCC was emphasised on Wednesday 23 March 2011, at the Finnish-Russian Conference of Experts on International Child and Family Law by its attendants. They, inter alia, acknowledged that the child has a right to retain constant relationships with both of its parents, with exception for the times when it would be against its best interests. Russia has also informed of its intentions to join the Abduction Convention.[59]

2.3 Habitual residence

The question of habitual residence is of central importance with regard to international parental abductions. The assessment of whether the abduction is unlawful or not, is made according to the laws of the state where the child was habitually resident immediately before her/his the removal or retention, pursuant to the Article 3, first paragraph, sub-paragraph (a)) of the Abduction Convention and the Article 2 (11)(a) of the Regulation.

Since the Abduction Convention lacks a definition of "habitual residence", the matter of the concept's interpretation seems to fall into the hands of domestic public and judicial authorities. According to the convention's explanatory Vera-Perez report[60], the CS ought to interpret the concept as uniformly as possible and with respect to the aims and purpose of the instrument in question. Accordingly, the main approach in the abduction

---

Moreover, they were rejected the right to meet the girl while she was living with the excluded applicants.

[56] Ruling of the SC of Lithuania of 24 April 2002, civil case No. 3K-3-650/2002.

[57] *Neteisetas Vaiko Isvezimas ir (ar) Laikymas* (Wrongful child removal and (or) retention), State Childs Rights Protection and Adoption Service under the Ministry of Social Security and Labour, at <http://www.ivaikinimas.lt/tarptautinis_bendradarbiavimas>.

[58] See especially the analysis of the case *Neulinger and Shuruk v. Switzerland*.

[59] Finnish-Russian Expert Conference on International Child and Family Law ,23-03-2011, News & Events, Hague Conference on Private International Law.

[60] Para.39.

disputes should be that the child's removal or retention against the will of the other custodian, should generally not lead to a change in habitual residence. On the other hand, another important factor in assessing habitual residence is time, both, with respect to the commencement of the return proceedings, and with the time spent in a new environment. Moreover, in unclear circumstances, a further element has to be introduced, which is the intention[61] of the abducting parent to stay permanently, though not necessary indefinitely, in a "new" country. In cases when the child has no habitual residence at all[62], or has more than one[63], the Abduction Convention is generally not applicable. However, a situation of legal lacuna should be avoided in order to protect the rights of people involved in abduction disputes, especially the children's.

The Regulation, on the other hand, has a more homogenous interpretation of the term. The ECJ in its case law has established that "habitual residence" under the Regulation is an autonomous concept, which also means that the MS have to interpret it in accordance with the principles governing the instrument.[64]

With the reference to the above mentioned it is most important to note that even an unlawful abduction might lead to a non-return decision if any of the exceptions to the main rule of return is applicable[65]. However, the exceptions in the Article 13 of the Abduction Convention are not applicable for the EU MS (excluding Denmark) in situations when certified return decision is delivered to the requested state, pursuant to the Article 11 (8) of the Regulation. The exception under the Article 20, on protection of the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms, of the Abduction Convention is relevant also under the Regulation, but it is invoked very rarely.

In any event, a successful convention case, according to Beaumont and Mceleavy, is the one where the judicial paternalism is avoided and the dispute is resolved with respect to its individual circumstances.[66]

---

[61] See the case *Mercredi* below, Chapter 4.2.4.

[62] In such a case, the Regulation's Article 13 gives the jurisdiction to the courts of the child's presence and therefore we can assume that the law of Lex Fori would be preferred.

[63] In such a case, one could assume that, when the Regulation is applicable, its Article 19, on Lis Pendens rule, would motivate the courts to use the law of Lex Fori.

[64] See below, Chapter 4.2.

[65] See Articles 13 and 20 of the Abduction Convention.

[66] Beaumont & Mceleavy, pp. 88-113.

3 The Abduction Convention[67]

3.1 Background

The Convention is for the time being a primary worldwide instrument on civil aspects of international parental child abductions. The instrument does not regulate CSs' substantial custody law but seek to ensure a prompt and effective return of abducted children to their home state where the question of custody can be resolved. The Convention also deals with access rights of a parent not residing with her/his child.[68] The treaty entered into force the 1st of December 1983, and it now has 85 CS.[69] It is important to note that the instrument is applicable between SP according to a principle of mutuality.

A speedy and effective dealing with return applications is the main objective of the Convention, pursuant to its Article 1(a). However, in contrast to the Regulation, the six weeks rule in the former is not that strictly interpreted.[70] According to a statistical report[71] on return and access applications under the Convention from 2003[72], it took in average 85 days between the return application and the judicial return in consent orders, 98 days in voluntary out of court order cases, 143 days for judicial return orders and 233 days for judicial refusals. However, the access applications took even longer time to handle than the applications on return. For instance, the by the court granted access rights in average took 274 days. The fact that the return applications constituted to 84% of all the applications under the Convention year 2003 reflects the preferences of the CS and the instrument itself, which is to ensure a summary return of abducted children, leaving the question of access rights preferably to Central Authorities[73].[74]

The report shows that the top 10 states[75] to where the children were removed to were USA (23%), UK - England & Wales (11%), Spain (7%), Germany (6%), Canada(4%), Italy (4%), Australia(3%), France (3%),

---

[67] In Section 3: the Convention.

[68] Article 1 of the Abduction Convention.

[69] Last update: 6-IV-2011 regarding the accession by Andorra. At Hague Conference on PIL, INCADAT, Status table, Latest updates.

[70] Riksdagen report, p.31.

[71] There are several statistical reports at the" Hague Conference on PIL", under "Child abduction section", then "INCASTAT: International Child Abduction Statistics".

[72] The report compares the data from 1999 respectively 2003 on incoming return and access applications submitted by the Central Authorities of the Contracting States. However, in the study I only submit the data from 2003 since it has not changed in comparison to1999 considerably. Approximately two thirds of the Contracting States participated in the inquiry that year, *A Statistical Analysis of Applications Made in 2003 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I – Overall Report, drawn up by Professor Nigel Lowe*, Prel. Doc. No 3, Part I (2007 update), September 2008. (Hereinafter: the Hague report).

[73] See Article 21 of the Convention.

[74] The same trend appears in the rulings, from the highest instances of domestic courts, analysed in this study.

[75] The Hague report, p. 45. The CS received return and 27 access rights applications that year.

Switzerland (3%) and Turkey (3%). Sweden received 22 (2%) return applications that year. Lithuania was amongst the countries that did not receive any.[76] Mothers constituted 68 % of those accused of the child removals[77], fathers 29% and the rest where grandparents, other relatives and institutions. The status of the taking parent in relation to the child is to the 68% a primary or joint primary carer. The whole 32% of abducting parents were not primary-carers. Nearly the same percentage of both of the parents has different respectively same nationalities.

In 2003, there were 1784 children involved in the 1259 incoming return applications, which is an average of 1.42 children per case. Most often children are of 1 to 12 years old on the day of their removal. The gender relevance of the removed children is girls to 51% and boys to 49%. The judicial order to return took place in 29% of the return applications that year. The voluntary returns took place in 22% of the cases. Accordingly, the 51% of return cases ended up with the return of the child to its habitual residence. Consequently, in 49 % of cases, the children did not return due to the withdrawals (15%), judicial refusals (13%), pending cases (9%), rejections (6%), and other reasons (4%).

The judicial refusals to return the abducted or retained children were in 23% of the cases taken on grounds of more than one reason. The mostly invoked reasons were: the Article 13(1) (b), regarding risk of the child's exposal to physical or psychological harm, or other intolerable situation back in the place of habitual residence (18%); the child was found not habitually resident in the requesting state (15%); the applicability of Article 12, concerning twelve months rule with regard to the commencement of return proceedings, and the settlement rule (12%); the Article 13 (2) on child's objections (9%); cases when the applicant had no rights of custody (8%); Article 13(1) (a) on custodian's consent (5%) or subsequent acquiescence (5%) in the child's removal or retention.

The return was rejected in 51% of the cases due to the child's relocation to another country (24%) or impossibility to locate the child (27%); another reasons were e.g. that the applicant did not have the custody rights (19%), the convention was not in force at that time (8%) and others. The withdrawal of the return applications might have taken place due to positive (e.g. out-of-court agreement on access rights) or negative (giving up the application, e.g., due to distrust in system) reasons. A different ending in the return applications is agreed or adjudicated access rights that accounts for 3% in the year 2003.[78]

The number of access applications as such was 238 the year 2003, and even one non-convention country, Lebanon, amongst the 39 requesting states had sent such a request. Totally 321 children were involved in the applications. The top five of the receivers of access applications were USA (25%), Australia (8%), Spain (8%), Germany (8%) and UK - England & Wales (7%). Sweden received 2% and Lithuania none of the total. The following states made most applications: UK - England & Wales (15%),

[76] The Hague report, pp. 13-5.
[77] The report is using a neutral form for the abducting parent ("a taking parent") and the parent against whom the access rights are to be enforced ("the respondent"). p.7.
[78] The Hague report, pp.7-44.

Germany (8%), France (6%), Italy (6%) and Australia (5%). Sweden made four (2%) applications that year and Lithuanian none. The access rights were invoked against 79% of the mothers, 18% of the fathers and the rest against the grandparents and other relatives. The nationality of parents were the same in 53% of the cases and, accordingly, different in 47%.

The effects of the applications, submitted in 2003, were that to the 22% it was pending, the 22% were withdrawn. Court granted access in 16% of the cases, out of court access in 13% of applications, and 13% of applications were rejected. Consent access orders took place only in 4% of the cases. Judicially refusals of access rights were of rate to 3%. The most often reason to the rejection (33%) was absence of custody rights by the applicant.[79]

3.2 Implementation of the Convention

3.2.1 Lithuania

A general rule is that an international treaty ratified by Lithuania becomes a part of its national legislation and is applicable directly, like in all states with monistic system.[80] In cases of conflict of norms, the Article 1.13 of the Civil Code of Lithuania acknowledges the superiority of international law before the laws of the Republic of Lithuania.[81] Moreover, the Lithuanian SC has established that in, inter alia, abduction matters the Lithuanian courts have a constitutional duty to interpret domestic law consistently with the EU Law in order to ensure the full effectiveness of the latter.[82]

In March 2002, the Convention[83] was incorporated into the *Law of the Republic of Lithuania on the Implementation of European Union and International Legal Acts Regulating Civil Process*[84]. Relevant provisions are to be found in the Articles 7 to 12 of the law. Its article 7(1) says that a return procedure under the Convention shall be carried out pursuant to the section XXXIX (Articles 579-582) of the Lithuanian Civil Procedure Code[85], regulating a simplified hearing process, and, inter alia, providing the

---

[79] The Hague report, pp.69-81.

[80] Article 138(6) of the Lithuanian Constitution; also Article 11(2) of the *Law on International Agreements of the Republic of Lithuania* (*Lietuvos Respublikos Tarptautiniu Sutarciu Įstatymas*),1999 m. birželio 22 d. Nr. VIII-1248, Vilnius.

[81] Valentinas Mikelenas, *Seimos Teise* (Family Law), (Vilnius: Justitia, 2009), pp.83-4.

[82] Janina Stripeikienė, *Europeizuotos ir internacionalizuotos privatinės teisės aiškinimas ir taikymas Lietuvos Aukščiausiojo Teismo Civilinių bylų skyriaus praktikoje: lyginamojo metodo vaidmuo (Internationalized and Europeanized private law interpretation and application of the Lithuanian Supreme Court of the Civil Division in Practice: the role of the comparative method.*), p.2.

[83] The Convention applies between the Republic of Lithuania and the countries acknowledging its membership; the treaty between Lithuania and Sweden entered into force in 2004 08 01, *State Childs Rights Protection and Adoption Service under the Ministry of Social Security and Labour.*

[84]Lietuvos Respublikos Civilini Procesa Reglamentuojanciu Europos Sajungos ir Tarptautines Teises Aktu Įgyvendinimo Įstatymas, 2008, Vilnius, (Hereinafter: the Implementation Act.

[85] Lietuvos Respublikos Civilinio Proceso Kodeksas Nr. IX-743 (Civil Procedure Code of the Republic of Lithuania No. IX-743).

court with ex officio rights, though without prejudice to the rules under the Convention itself.[86]

According to the latest *Questionnaire* under the Convention,[87] the Lithuanian Republic has entirely received three return applications. In two of them, the Lithuanian courts refused to return the child on grounds of the left behind parents' unsuitability as a caretaker and their weak relationship with the child before the abduction, which, consequently, would harm the children physically or psychologically if they returned. The survey also reveals Lithuania's concerns about its obligations under the Article 11(4) and (8) of the Regulation that the return of the child would not be followed by the adequate assurance of the child's physical and psychological safety. However, Lithuania expressed its eagerness in acquiring all adequate information on where and under what conditions the child will be living after the return. Nonetheless, once the child is back in its habitual residence, the welfare of the child is more or less in the hands of local authorities.[88]

Lithuanian law gives equal custody rights to both parents, irrespective of whether they are married or not. It means that even though the child resides with only one of the parents the other still has an equal parental authority upon her/his child, pursuant to the Article 3.156 of the Civil Code of the Republic of Lithuania[89].[90]

As to the child's right to be heard, the child, of an adequate age and maturity, may always express its opinion, but the courts may set such a right aside if it would contravene the child's best interests, pursuant to the Lithuanian Civil Procedure Code's Article 380 (1)[91]. The court shall objectively consider the opinion and objections of the child together with all other evidences placed before it, according to the Article 185[92] of the named Code.[93]

The Questionnaire also reveals the Lithuanian authorities' concern about the recent growth in international abductions due to the amendment of the *Resolution of the Government of the Republic of Lithuania on the Procedure of Child's Temporary Departure to a Foreign Country*[94], which abolished the requirement of consent from the other parent in case of temporary departure abroad. Apparently, the parents who remove their children tend to think that even 2 years of period abroad still falls within the temporary departure criteria.

According to the latest figures from the Lithuanian Department of Statistics, in 2007 from Lithuania to foreign countries to live permanently or

---

[86] For more on relevant Lithuanian rules see below, Chapter 4.3.1.

[87] *Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980, drawn up by the Permanent Bureau, November 2010*, Child abduction section, Hague Conference on PIL, (hereinafter: Questionnaire).

[88] Questionnaire,pp.16-7.

[89] Lietuvos Respublikos Civilinis Kodeksas, 2000 m. liepos 18 d. Nr. VIII-1864, Vilnius.

[90] Questionnaire, p.6.

[91] See supra n.89.

[92] Ibid.

[93] Questionnaire, pp.18-9.

[94] No. 41.

for longer than six months left 26.5 thousand people and 2.9 thousand of them (11%)were children.[95]

3.2.1.1 Case law

3.2.1.1.1 Gillis[96] case

The case is relevant as an example of how the Convention can be relevant as a preventive legal tool in order to avoid unlawful removals or retentions. The matter started when a Lithuanian mother moved to her new husband's home in USA together with her 6 years old daughter, from a former marriage, and, therefore, sought a local Lithuanian district court so that it would determine the child's permanent place of residence in USA, in order to avoid unlawful retention when the girl would visit her father in Lithuania. The lower courts dismissed the application on grounds of lack of jurisdiction. However, the Lithuanian SC established that those courts misinterpreted the conflict of law rules in the Lithuanian Civil Code's Article 132, which says that personal relationships of children and parents are governed by the law of the child's habitual residence. These provisions simply indicate what national substantive law applies in border disputes, but does not provide jurisdiction, which was also confirmed in the Lithuanian SC's previous case law. The SC held that since no bilateral treaty on legal assistance was applicable between Lithuania and USA, the jurisdiction of the court dealing with family issues was to be decided according to the provisions of the Lithuanian Civil Procedure Code, which Article 784(1) says that Lithuanian courts have jurisdiction if, inter alia, one of the parents is a citizen of Lithuania. Moreover, the test on the supplementary criteria in determining the international jurisdiction, i.e., 1) whether a determined place of residence could be recognised and enforced in a foreign country and 2) whether proceeding exclusively belongs to the jurisdiction of that foreign state,- did not rebut the Lithuanian courts' jurisdiction in the matter either. Quite on the contrary, both the mother and the girl are Lithuanian citizens and the father enjoys joint custody rights. Moreover, both Lithuania and USA were bound by the Convention, which seeks to prevent child abductions and calls upon the CS to mutual respect of custody and access rights decisions.

Thus, after the SC's observation of the procedural failures, the case went back to the DC.

3.2.2 Sweden

The *Law (1989:14) on Recognition and Enforcement of Foreign Decisions Concerning Custody of Children etc. and on the Return of Children*[97] is the central Swedish Act implementing instruments on international child

[95] *Contemporary Migration Research*, Lithuanian Emigration Institute.
[96] Ruling of the Supreme Court of Lithuania of 22 October 2003, civil case No. 3K-3-1003/2003.
[97] Lagen (1989:14) om erkännande och verkställighet av utländska vårdnadsavgöranden osv. och om återförande av barn. (Hereinafter: the Enforcement Act).

abduction. The central points of the Convention are thus to be found there. The Enforcement Act contains detailed enforcement rules regarding the return and access orders. It inter alia says that in cases where the abducting parent objects the return, the child could stay under the custody of the authorities. The latter usually have two weeks to try to reach a peaceful agreement with the abducting parent. If a child is of a mature age, he/she can express its opinion on the issue. An abducting parent, who refuses to hand over the child to the enforcement authorities, risks a penalty fine or an involvement of the police in the return procedure, pursuant to the Article 18 of the Act. The Swedish Parental Code, in its chapter 21, sections 9 and 11-16 provides guidelines on how the child should be treated during the similar procedures. Thus, the child should be approached with due tenderness and respect. When it comes to the 6 weeks rule, besides the Enforcement Act, the *Law (1996:242) regarding Court Procedures*[98], regulating speedy trials, is applicable. One of the relevant provisions is about restriction of oral testimony, as it usually requires too much time to complete.[99]

The Article 17 of the Enforcement Act and Chapter 6 section 20 of the Parental Code regulate the question of hearing the child. The main rule is that the social workers, who later report the results to the court, should hear a child of appropriate age and maturity. The child interviewers have to be of a proper competence and be able to perform the interrogation without the influence of the parents.[100]

The definition of the rights of custody under the Article 5(a) of the Convention are implemented in the chapter 6, sections 11-14 of the Parental Code. However, when it comes to the question of whether the custody was actually exercised on the time of abduction, the Article 13 (1) (a) of the Convention is not implemented into Swedish legislation. The rights of access are implemented in the same Code in the Chapter 15-15(a) and (b) and it is more exhaustive than the one in the named Convention.

The provision in the Article 20 of the Convention, which is another ground for refusal to return the child, can be found in the section 12(4) of the Parental Code, but, in reality, it has not been used in the Swedish return or access cases due to its restrictive interpretation. [101]

With regard to the latest figures, in January 2009 there were 100 open cases registered at the Swedish State Department. About 60% of them were about children who have been abducted or retained away from Sweden.[102] The Riksdagen report[103] on the subject indicates that the majority of the resolved child abduction cases were Convention matters.[104]

---

[98] *Lagen (1996:242) om Domstolsärenden.*

[99] Questionnaire concerning the practical operation of the Hague Convention of 25October 1980 on the Civil Aspects of International Child Abduction, Sweden, pp.7-10 (hereinafter: Questionnaire 2).

[100] Questionnaire 2, p.11.

[101] Questionnaire 2, pp.13-5.

[102] However, during the period 2001-2008 the percentage was “only” 20% of all cases registered.

[103] Riksdagen report, p.7.

[104] It is also confirmed by this study with reference to the amount of Convention cases, solely on the supreme courts level, analysed in the study.

3.2.2.1 Case law

3.2.2.1.1 RÅ 1995 ref. 99

The case is about a Swedish woman who decided to divorce her American husband and move permanently to Sweden with their infant daughter. The father did not consent to the daughter's removal and tried to solve the matter peacefully. The mother, on the other hand, applied both for divorce and for sole custody in Swedish courts. Soon she got interim sole custody and the father obtained access rights. During one of such visitations, the father took the daughter back to USA. The mother went there. The American interim court order gave the daughter to the mother but with condition not to leave the country. Nonetheless, she and her daughter flew back to Sweden. Then the father applied for the return of the child in Sweden. The Swedish AC dismissed the father's application on the ground of absence of the father's custody rights under the Swedish law. The ACA amended the ruling on the ground that the habitual residence of the girl has not changed since she left her home in USA without the consent of the other custodian, the father, with the result that the removal was unlawful, pursuant to the Abduction Convention. The court did not find any circumstances contravening this main rule in the case, contrary to the SC, which found that the abducted girl has acquired a new habitual residence in Sweden during the period of almost two years before the father took the daughter back to USA. During that period, the father did not apply for the return of the child at any Swedish authority. Moreover, the child has adjusted to the new environment and therefore has acquired a new place of habitual residence, all in accordance with the Article 12 of the Abduction Convention. Thus, the court dismissed the father's return application since the last removal of the child by the mother was lawful.

It is of most interest to read the discussion on the concept of habitual residence under the Convention by the SC in its ruling. The court established that even though the Swedish national legislation[105] and case law has developed its own approach towards the definition of the concept[106] in the context of the international family law, the interpretation of the term in the light of the aim and objectives of the Convention is important as well. Thus, in the spirit of the other conventions of the Hague Conference and the international doctrine, the habitual residence has been interpreted as mostly meaning factual circumstances regarding whether the child belongs to one or another place. Thus, a general picture of the child's social connections with the place has to be made, for instance, for how long the child has been living in that place, what are its family ties or whether the child is undergoing some kind of education or other connecting factors that make the place an effective centre of the child's life. Moreover, in some cases the intention of a parent regarding the permanency of their life in a new place

[105] The court has established that the *Law (1904:26 p. 1) on certain international legal relationships relating to marriage and guardianship* (Lagen (1904:26 s. 1) om vissa internationella rättsförhållanden rörande äktenskap och förmyndarskap) can be used by analogy when applying the enforcment law in the international abduction cases.

[106] The discussions on the definition can also be found in inter alia: prop. 1982/83:38 s. 12 ff.; prop. 1984/85:124 s. 40; NJA 1977 s. 706; NJA 1983 s. 359;NJA 1987 s. 600.

may also be relevant, though to a limited extent. However, the SC has emphasized that a general perspective is that the term habitual residence, both nationally and internationally, has primarily to be used in the light of the instrument in which it is used.

As we can see, the focal point in the case was the procedural technicality in the return mechanism; the father simply did not officially apply for the return of the daughter at the Swedish authorities within a time limit set in the Convention. During that time, the girl has settled in the new environment and thus acquired a new habitual residence.

3.2.2.1.2 NJA 1995s.241

The case is about a cohabitant couple consisting of a Norwegian mother and a Swedish father whose long-time relationship produced a son. According to the story of the parties, the long lasting debts of the mother influenced their decision to fake a move to Norway where a restructuring of the debts was possible to arrange. However, the mother decided that, due to the worsened relationship with her partner, she would separate from him and stay with their daughter in Norway permanently. Then the father went to the Swedish DC and applied for the custody over the child. Firstly, the court had to decide whether it had the jurisdiction on the matter since the whole family registered themselves as newcomers in Norway. The main question was where the habitual residence of the child was since the jurisdiction of the court depended on that. The DC found that the child's habitual residence has changed into being Norway since the father did not succeed to prove that the change of the living place was fictive or that the mother moved driven by the forum of convenience motive. The CA, on the contrary, decided that the child's habitual residence was still in Sweden since the child was removed without the consent of the other custodian, the father. Furthermore, the court added that- irrespective of the habitual residence question- the child has not lived in Norway that long that it should mean the total loss of the jurisdiction for Swedish courts. The SC upheld the decision of the DC on the ground that the child has lost its factual connection to the old home. In addition, the Norwegian court had have already delivered a custody judgement of a joint legal custody over the child, with a factual custody to the mother.

In this case, the SC, quite contrary to the ruling of the CA, decided that irrespective of the fact that the removal was unlawful the child has been living in Norway for almost two years and thus adjusted to its new environment. The SC did not pay attention to the fact that the father applied for the custody and return of the girl as soon as he understood that the mother decided to stay in Norway for good.

3.2.2.1.3 RÅ 1996 ref. 52

This case is about a diplomat couple of a Swedish mother and an American father who produced a daughter during their life in Switzerland. The girl, of both American and Swedish citizenship, was three years old when the parents moved to USA and, after their divorce, the girl was dually resident at both parents homes in different states every third week. When the mother

decided to move back to Sweden an agreement between the parents was made and confirmed by the American court, which said that the parents would share their daughter every third year. However, when the father's turn had come the mother refused to give the daughter on the ground that the child´s habitual residence was now Sweden and that the girl was psychologically unhealthy because of all worries about leaving the country. The mother also applied for the sole custody and the Swedish CA established that the girl has acquired habitual residence in Sweden and therefore the courts had jurisdiction in the custody matter. The father had also sought the Swedish courts when the mother was not respecting his access rights according to their agreement. Then the Swedish ACA decided that the Convention was not applicable in the matter on the ground that at that time the father had only access rights. This time the father sought at the Swedish AC the return of the child to USA since it was his turn to exercise the "physical custody" according to their agreement. The main question in the proceeding was where the girl had her habitual residence, since no return of the child under the Convention could take place if the unlawfully retained girl has acquired habitual residence in Sweden. Thus, the AC ordered the immediate return of the girl to USA, arguing that the term habitual residence has to be interpreted with some difference from the internal understanding since the aim and objectives of the relevant Abduction Convention are to prevent such actions to the most possible extent. Therefore, since the daughter was kept by the mother unlawfully and contrary to the agreement[107], the child's habitual residence is still in USA. The girl's psychological condition was not to be seen more serious than other children's in similar situation and therefore not constituting a ground for return refusal. The ACA upheld the ruling on the very same grounds. However, in both courts the dissenting opinions were present. A very short and very opposite ruling was delivered by the SAC. Firstly, the court referred to the case RÅ 1995 ref. 99[108] and repeated the prerequisites for the unlawful removal that thoroughly were discussed in the case. In short, the referred court has established that the definition of habitual residence in another Swedish law can be used by analogy, since neither the enforcement law nor in it incorporated Convention have any definition of the concept. That other law states that a person has acquired a habitual residence if the duration and other circumstances of his/her residence is of a permanent character. The court has also acknowledged that the concept has to be

[107] An excerpt of it found in the case: "It is adjudged, ordered and decreed that this Court hereby expressly finds that it has continuing and exclusive jurisdiction to decide all matters relating to the care and custody of the minor child, A., and the Petitioner's residence in the Commonwealth of Virginia, United States of America, and not Sweden, shall constitute the place of residence for the purpose of all adjudications of custody and visitation of the said minor child; and, that the Courts of Sweden as well as all other courts anyplace in the world, shall not acquire jurisdiction over the custody of said child by reason of the respondent's residence in the Country of Sweden, or either parties' residence anywhere else. - It is the intent of the parties that the Commonwealth of Virginia shall be the only forum for the adjunction of custody or visitation involving the child A., now or in the future (...) - It is further ordered that neither party shall seek modification of this Order without prior leave of this Court and notice to the other party."

[108] See in the analysis of the case above.

interpreted in the light of the aims and objectives of the Abduction Convention itself. However, the court decided that the girl has acquired a habitual residence in Sweden given the time spent with the mother. Moreover, the retention was not seen as unlawful under the Abduction Convention by the court, and, consequently, the girl did not have to be returned to USA.

Thus, we can conclude, that the SAC chose to use the Swedish internal interpretation of the concept before the international one in its ruling, contrary to the lower courts.

3.2.2.1.4 RÅ 2001 ref. 53

This case is about an English woman who had been living in Sweden for seven years when she met a Swedish man with whom she one year later got a child. The boy, of British citizenship, was living with his mother during the first year of his life and together with both of the parents during the following two years. Then the father moved to another place and the mother, within couple of months, decided to move back to England. The parents were having joint custody. Within short time, the mother and the boy acquired English habitual residence and, soon after, the boy followed the father to Sweden where he was staying for four months. Next time the father took the boy over the summertime and in the end of the summer decided not to return the boy to the mother. In England, the High Court of Justice, Family Division, stated that the detention is unlawful in accordance with what is stipulated in the Convention, Article 3. Subsequently, the mother applied to the Swedish AD for the return of the son to England. The court granted the application reasoning that, in line with the argumentation in the case RÅ 1995 ref. 99, the interpretation of the permanent residence has to be made in the light of the aim and objectives of the Abduction Convention. Thus, the court ruled that in an overall assessment of the factual circumstances[109] it finds that the boy at the time before the retention had more permanent ties with England than Sweden and therefore must be deemed to have his habitual residence in England. The Swedish ACA, on the contrary, dismissed the mother's return application in its very short ruling. The main ground was the short time spent by the boy with his mother in England, a total of only 8 months, and the fact that the boy had strong family and social connections[110] in Sweden. The Swedish SAC upheld the decision. It referred to the above-mentioned case RÅ 1995 ref. 99, and made a similar analysis as in the case thereof. However, the court was also relying on the Swedish Parental Code, Chapter 6, Articles § 11 and § 13 first paragraph, what inter alia say that both custodians have equal authority to decide upon the child's personal affairs and only in extreme situations it may be circumvented. The fact that the father did not consent to the boy's removal to England was found to be a very serious breach of his rights as a

[109] The court placed great emphasis on the fact that the mother's intentions to remain in England were great, i.e. the boy was to begin a preparatory school full time after the summer, the family of the mother was living in the same town;

[110] The boy was attending a day care; and had constant relations with the whole family on the father's side;

custodian. However, such removal might lead to a subsequent acquisition of a new permanent residence, but not in this case since the boy cannot be understood as settled in England during his 9 months there, according to the court. Therefore, the boy was still to be considered habitually residing in Sweden and therefore its retention in the country by the father cannot be seen as unlawful. However, one justice had a dissenting opinion founding that the habitual residence of the child was with his mother due to his low age and the fact that the boy was living with his mother from his birth and the father mostly of the time had visiting rights.

As we can see in the case, the courts emphasised different facts in their rulings. While the county administrative court stressed the importance of the mother's intention to remain in England as well as her agreement with the father on a shared physical custody, the upper courts cared more for the fact that the child has been living in England for too short period for considering the change of his habitual residence.

3.2.2.1.5 NJA 2002s.390

The case is about a couple of Austrian nationality who decided to divorce when their two boys were eight respectively ten years old. The father, who also was a citizen of Lebanon, moved with the boys against the mother's will to Lebanon and later to Sweden where he, like also in the former state, applied for sole custody over his sons. The mother, who lost the return case[111] at the Swedish ACA, responded to the Swedish district court that the children's habitual residence was still in Austria, since the boys left the home with their father against her will, and therefore the jurisdiction was still with the Austrian courts. Irrespective of that, the court found that the boys have settled in Sweden to the extent that their acquisition of a habitual residence in Sweden is out of every doubt. Therefore, the most suitable forum for consideration of the father's claim for sole custody is the courts in Sweden. The Swedish ACA simply rejected the mother's appeal. The SAC, however, had further argumentations in its decision on this jurisdiction matter. The court held that the boys have acquired a Swedish habitual residence due to two main reasons. Firstly, the children, who were now 11 and 13 years old, opposed their return to Austria and, secondly, they had been away from Austria for four years now, two of which they had now spent in Sweden. Consequently, the main principle that the unlawful removal may not lead to an acquisition of a new habitual residence has been, according to the court, set aside in the case due to the boys' settlement in Sweden. Thus, the Swedish courts had the jurisdiction in the custody matter.

In this case, we can see that the focal point in the rulings was the age of the boys. Their expressed opposition to their return to Austria overweight all the other principles applicable under both, the abduction and the European Council's custody conventions. According to The Article 5 of the latter one, the Austrian custody decision could have been, in general, enforceable in Sweden if the latter was to be found having no jurisdiction in the matter.

---

[111] Firstly, the AC granted the mother the return order, but the ACA, on basis of the refusal by the children themselves, rejected the mother's claim.

3.2.2.1.6 RÅ 2002 ref. 1

Another case where the age of the child was the key issue was about a 12 years old boy whose Swedish mother, the sole custodian, left Sweden for England together with the son The father have always had access rights. However, during one of such meetings, when the boy was visiting the father in Sweden for Easter holidays, the latter refused to return the boy and only after the court order, the boy came back to England. Since that incident, the father had not met the boy for two and a half years. The next time in Sweden, due to a visit with the mother's parents, the father again refused to return the boy to England on a very same ground, i.e., that his son himself wants to stay in Sweden. The boy was now of age 12 and the Swedish courts had to consider this when deciding whether the unlawful retention of the boy should lead to the return of him to his habitual residence, England, pursuant to the Convention. The Swedish AC rejected the mother's return application on the ground that the boy has expressed his well-founded will to stay in Sweden, and the child has reached such age and maturity that his opinion should be the decisive factor in the matter. The court has based its ruling on the report made by a specially appointed rapporteur who had a one-hour long conversation with the boy.[112] However, the ACA granted the return claim to the mother on the ground that the overall circumstances[113] in the case did not convinced the court that the boy's intention to stay in Sweden was unaffected and well thought. The SAC upheld the decision of the ACA in its entirety.

In this case, we can see that the higher courts made a thorough evaluation of all the circumstances that have or could have influenced the boy's expression of his will to stay in Sweden. That will was founded to be of a very spontaneous and influenced nature connected to the boy's desire to spend more time with his biological father. Furthermore, the boy wanted to leave England for Sweden only together with his mother and stepfather.

---

[112] The report had the following content: "A. (*the boy*) has made his mind and he wants to stay here. He wants to become a Swedish man. He was born in Sweden and his family lives here. He feels he does not want to live in England. A's wish is to live with his father. At the meeting with A. A. gave a clear impression of maturity, and his answers came after reflection. A. was seemed very sharp boy with a sparkle in his eye. They (*the boy and the rapporteur*) sat at a snack bar together and A. talked and answered questions with security. A. was very clear that he wanted to be a "Swedish man". He did not understand why he could not meet his father and other relatives in Sweden. –One could see from the A's eyes and body language that with his father he appeared happy. He quickly jumped up in his father's lap when his father came into the room. - A. who had reached the age of 12 years had clearly stated what he wants. It is appropriate to challenge the existing access order with respect to A's age, wishes and needs. - It was not his belief that the father could have affected A. for wanting to stay with him." .

[113] The father was found to have been given contradictive information to English and Swedish courts; in general, the father was not trying to visit his son to the extent he could have done, especially bearing in mind the boy's great desire to spend more time with his biological father; on the same time, the boy had no complains about his social life in England where he, together with his mother and the stepfather, lived since he was three years old;

3.2.2.1.7 RÅ 2002 ref. 69

This case is about interaction between the Swedish procedural provisions and the Convention in return proceedings. The dispute started when the mother, against the court order, left the family's habitual residence in Cyprus for Sweden together with her four years old son. The father was the sole custodian of the child. After the mother deceased in Sweden, her parents got provisional custody by the decision of the Swedish social welfare authorities. When the Swedish AC rejected the father's return application the latter appealed to the ACA that, on the contrary, annulled the lower court's decision on the merits and upheld the father's return application. Thus, regarding the costs, the court ordered the losing party to pay the counter-party costs jointly. Consequently, the authorities and the grandparents appealed to the SAC on the ground that neither of them could be understood as counterparties in the proceedings under the Convention. The first ones argued that they were simply doing their obligations under the public law, and the second ones asserted that they became counterparties because the administrative court of appeal appointed them as such. Firstly, the court established that both the social welfare authorities and the grandparents are to be considered as counterparties under the Convention, pursuant to the Article 13 of the convention, and the Articles 11[114] and 12 of the Enforcement Act, implementing the former. Both of them were taking care of the child at that time and both of them were refusing to return it to the father who was the only legal custodian of the boy. Secondly, the court found that there were no reasons to depart from the main rule[115] that the losing party should pay the costs of the winning one. However, the grandparents were exempted from obligation to pay their part of the court costs since they were following the orders of the authorities that had the ultimate responsibility and decision-making power as to the care of the boy.

3.2.2.1.8 NJA 2008 s. 963

The most recent case decided by Sweden is about a man and a woman, of Croatian origin, who got an asylum in Sweden, and four years later had a child in their marriage. When the child was six years, the parents decided to divorce, and soon after the mother took the boy and left Sweden for Croatia. The father applied in the Croatian courts for the return of his son back to Sweden but the application was rejected and, subsequently, the mother was granted sole custody in Croatia. After that, the mother agreed that the boy should spend Christmas holidays with the father in Sweden. However, after the holidays, the boy did not return to Croatia. In Sweden, the father was sole custodian over the boy. Both the mother and the father invoked several

[114] According to the preparatory work (Prop. 1988/89: 8 p. 40), the § 11 of the Enforcement Act means that the person who has care of the child may be natural or a legal person, and a child care institution entrusted with the care of the child also may be considered when applying the provision.

[115] The provision is enshrined in the Chapter 18, 1 § of the Procedure Code, which is referred to in the Chapter 21, 13 § of the Parental code that is directly applicable under the abduction convention, pursuant to the 21§ of the enforcement act.

witnesses in the return proceedings at the Swedish DC. However, none of them could say for sure that the boy would suffer mentally or physically when he was back in Croatia. The only thing that was clearly established was the general fact that children usually experience anxiety due to environmental change. Moreover, a field specialist has observed that a child usually is loyal to the parent he/she lives with which means that his/her opinion has little value regarding to his/her relationship with the left behind parent, especially in cases of children of age under 12-13 years old when their logical thinking is not yet developed. Hence, the court had to answer three questions: whether the boy had his habitual residence in Croatia before his retention in Sweden; whether this retention was unlawful; and if yes, whether there was any ground for refusing the return, all this pursuant to the Abduction Convention. The court, while referring to the argumentation in the above-discussed case RÅ 2001 ref. 53, held that the boy had his habitual residence in Croatia, and therefore also the law of Croatia was applicable in determining whether the retention was unlawful, which was answered in the affirmative. The third question, whether the refusal of the boy's return could be based on the grounds under the Article 12 §2 of the Enforcement Act, in accordance with the above discussed testimonies, was responded negatively. It is important to note that the court had also paid attention to the child's right to see both of his parents, which, according to the court, was more respected when the boy was living with his mother than the other way around. Thus, the court held that no obstacles not to order the return of the child to Croatia were at hand. For the child's right to express its opinion the court referred to the abovementioned case RÅ 2002 ref. 1,which established that even a 12 years old child's opinion can be overlooked if it does not reflect its genuine and independent will; in this case the child was only 10 years old. The Swedish CA upheld the ruling and dismissed the father's appeal[116]. The father appealed to the SC on, primarily, procedural error, and, in the alternative, on a point of law. On the first point, the court held that the father's request for an oral hearing in the court of appeal was already satisfied in the district court, which, according to the Swedish case law, is sufficient to meet the goals set in the Article 6(1) of the ECHR. This is especially the case when the applicant has not alleged that he had been denied to an adequate development of his position in the matter, or that the district court's statement of facts or the witnesses' claims were incorrect or unclear in some regard. On the second point, the court agreed with the ruling of the district court that the boy has to return to Croatia where the custody matters could be resolved by the Croatian courts. Even though the boy had strong relations with Sweden, his habitual residence, at the time of the retention is Croatia. Accordingly, the SC rejected the appeal in its entirety.

[116] The father was claiming: firstly, that the court would eliminate the district court's decision and refer the case to the district court; secondly, that the court would reject the mother's return application. In the event the case is not to be referred back to the district court, it should seek an additional inquiry from the social welfare administration. He also requested that the court would decide on the transfer after an oral hearing.

Thus, we can see from the reasoning of the SC that the overall assessment of the time spent by the boy in Croatia before the detention compared with the subsequent time spent in Sweden was of a great importance for the court's decision. Generally, also from the other cases above, we can conclude that the Swedish courts usually carry a proportional assessment out of time spent by the child in respective country before and after the unlawful removals or retentions. However, an even more specialised and uniform assessment of abduction disputes might be expected after the concentration of abduction cases to one court, which is Stockholm's DC, since July 2006.[117]

[117] Riksdagen report, p.9.

4 Brussels II bis Regulation

4.1 Background

The Regulation is applicable to all EU MS (except Denmark) in its entirety and the Abduction Convention is for the very same states relevant to the extent it does not contravene the regulation.[118]

A first version of the Regulation, adopted in 2000, was the very first instrument within a family law area at EU level.[119] However, according to Mcglynn[120], it was a total failure regarding the rights of children. The instrument was applicable only for children of marriage since the question of custody could be resolved only in connection with the divorce proceedings. Consequently, with the EU Commission's and some MS' initiation, a new version of the Regulation soon came out. It regulates jurisdiction, recognition, and enforcement of marital and parental matters that might be resolved independently of each other. The preamble (Recital 5) acknowledges the equality of all children dragged into parental disputes. The only requirement for the MS to get a jurisdiction in matter under the Regulation is that the child in question is habitually resident in that MS. Moreover, the Recital 33 refers to the Charter of Fundamental Rights of the European Union in general, and the Article 24, on the principle of the best interests of the child, including the right of the child to be heard and the right to maintain contact with both of its parents, in particular. On the other hand, these provisions are not enshrined in the very body of this new version, which, according to Mcglynn[121], indicates the MS's unwillingness to change their national laws in the matter.

A rushed reform of the Regulation's first version was also about introducing operative provisions on return of the abducted children to their habitual residence and respect for the rights of access of parents not residing with their offspring.[122] Prompt and effective return of the abducted child to its habitual residence also means that the courts of jurisdiction under the Regulation could resolve prospective custody dispute. An important thing to note is that this new rule, starting in the portal Article 11, means that the child is to go back to the country of its usual place of living even though the child could be left in the country where it was abducted, according to the Article 13 of the Abduction Convention.[123] Pursuant to the Article 11(8) of the Regulation, the rule overtakes the Abduction Convention, meaning that the unlawfully removed child has to return if a certified[124] return order has

---

[118] Article 60.
[119] COM(2002) 222 final/2, p.2.
[120] Clare Mcglynn, *Families and the European Union, Law, Politics and Pluralism*, (Cambridge, 2006), p.58, (hereinafter: Mcglynn).
[121] Mcglynn, pp.169-170.
[122] The provisions on family divorce, legal separation or marriage annulment remained the same. See the COM(2002) 222 final/2, p.4.
[123] Riksdagen report, p.31.
[124] Article 42 (2) says: the judge delivering the judgement shall issue the certificate only if: the child, of appropriate age and maturity, had an opportunity to express its opinion; the

been delivered to the requested state's authorities[125]; no exequatur procedure is required for the enforcement of such order.[126] Moreover, even when no certified decision is at hand, the requested state cannot refuse to return the child with reference to the Article 13 of the Abduction Convention if the requesting state has arranged for the protection of the child after its return, according to the Article 11 (4) of the Regulation. Moreover, the requested court cannot refuse returning the child if the left behind parent has not been given opportunity to be heard, pursuant to the Article 11 (5).

Other important provisions regarding abduction matters under the Regulation are the Articles 55 and 56 that contain rules on cross-border cooperation between social and judicial authorities on a case-by-case level. For instance, the authorities should be helpful to each other to collect and exchange information on a child's social situation. They should also facilitate peaceful agreements between holders of parental responsibility through cross-border mediation or other means. Moreover, the authorities ought to cooperate in matters concerning placement of children in institutions or in foster homes where such settlement has to take place in a MS other than where the child is located.

4.2 ECJ[127] case law

4.2.1 Rinau[128] case

Initially, it is important to note that this case is the first one adjudicated under a speedy procedure[129] in accordance with the Article 104b of the Court's Rules of Procedure. [130]

The return dispute in the case started when a mother of Lithuanian nationality went for holidays to her home country with one and a half years old daughter. In Germany, after the parents' separation, the girl was residing with the mother. The latter decided to stay in Lithuania for good and the German father, after he was granted a provisional custody over his daughter in Germany, issued return proceedings in the Lithuanian district court under the Article 13 of the Abduction Convention. The court within a reasonable time of 7 weeks reached a non-return decision and informed the German authorities, according to the rules in the Article 11 of the Regulation thereof. The Lithuanian CA overrode the decision twice but the DC continued suspending it. The mother was also trying to reopen the proceedings under the Article 13(1) of the Abduction Convention but both DC and AC

---

parties have been given chance to be heard; and the court has taken into account the circumstances from the non-return decision under the Art. 13 of the Hague Convention.

[125] Article 45.

[126] COM (2002) 222 final, p.5.

[127] In Chapter **4.2**: the Court.

[128] Case C-195/08PPU (hereinafter: Rinau); also: Biuletenis "Teismų praktika", Europos Bendriju Teisingumo Teismo Sprendimu Santraukos II d.(Bulletin "jurisprudence ", Summary of decisions by the ECJ, Part II), EBTT-2 2009-07-29.

[129] Hereinafter : PPU.

[130] Rinau, para.1.

dismissed the case, while the SC[131] sent the matter back for the review. The very same appeal procedure took place once more and within several months, the SC had the same case at its table. The third and the last set of proceedings, commenced by the mother in Lithuania, was the application for non-recognition of the German court's decision[132] on custody and the return of the child to Germany. The appeal ended up at the SC's bench when the CA found it inadmissible. In the context of all those proceedings, the SC decided to ask the ECJ for a preliminary ruling in the matter.

Accordingly, the main question in the proceedings was, whether the abducting parent has a right to apply for non-recognition of a child return decision, handed down in accordance with the Article 11(8) of the Regulation. Accordingly, the named provision says that, even though the court of a state, to which the child was unlawfully removed or where it is retained[133], decides not to return the child, according to the Article 13 of the Abduction Convention, any following ruling, requiring the return of the child, issued by a court having jurisdiction[134] under the Regulation, shall be directly enforceable, pursuant to the Section 4 of Chapter III, in order to guarantee the speedy return of the child to its habitual residence. Thus, the decisive point in the procedure is a certificate[135], which has to complement the judicial return decision. The certificate shall meet the requirements in the Article 42 (2), and when it is done, the judgment on the return of the child has to be recognised and enforced with no exequatur involved, pursuant to the Art.42 (1) of the Regulation.[136] Consequently, this means that no interested party may appeal on such decision in the requested state, which is also said in the Article 21 (3)[137] of the Regulation. In other words, according to the ECJ, the court having jurisdiction under the Regulation acquires a procedural autonomy[138] in this child return matter. All this is for the sake of a speedy return of the child to its habitual residence. Even the causes of the requested state's non-return decision might be considered by the courts of the requesting state after the child is back home.[139] Moreover, the fact that a higher court of the requested state eventually amends the non-return decision awarded by the lower one does not eliminate the obligation to return the abducted child under the Art.11 (8) as long as the child is remaining in the requested country.[140] Thus, from the foregoing, we can conclude that the return decision under the Article 11(8) is not negotiable when a certificate pursuant to the Section 4 has been issued. On the other

[131] In this chapter: SC.
[132] It was issued only 6 months following the Lithuanian non-return decision. My note.
[133] Hereinafter: the requested state.
[134] The relevant provisions on jurisdiction are in the Articles 8 and 10.
[135] It is important to note that in this case the certificate under the Article 42, on return of the child, is of relevance. Issuance of certificate on rights of access proceeds pursuant the Art 41.
[136] Rinau, paras. 66, 68.
[137] It says: "Without prejudice to section 4 of this Chapter, any interested party may <…>apply for decision that the judgement be or not be recognised."
[138] Which is manifested in the Articles 43 and 44 of the Regulation, Rinau, para. 64.
[139] Rinau, para.78.
[140] Rinau, paras. 63, 80-3, 89.

hand, when no such certificate exists, any party can apply for non-recognition of the decision pursuant to the Article 21(3).[141]

An interesting thing to mention, even though it does not change the ECJ's final ruling, is that, according to the Lithuanian SC, neither the German judge nor the left behind father delivered the certificate- while requiring the return of the child- to the Lithuanian authorities as it is required under the Article 45 of the Regulation. The certificate for the first time reached the Lithuanian judicial authorities only when the mother issued the third set of proceedings.[142] Thus, according to me, only at that point the Lithuanian authorities were obliged to return the child under the no-exequatur procedure, pursuant to the Article 24 of the Regulation. However, even with no certificate at hand the Lithuanian courts had the right to refuse the return only if the requesting state, Germany, could not show that the child would be safe after its return, pursuant to the Article 11(4).

4.2.2 Detiček[143] case

The second, also PPU abduction case, is about the interpretation of the Article 20 (1) of the Regulation. The provision says that courts of a MS can undertake provisional or protective measures in matters under the Regulation even though those courts do not have the jurisdiction as to the substance of the matter. Hence, the Court had to answer whether a preliminary decision, by the court not having substantive jurisdiction, awarding the custody to the abducting parent, when another court with the jurisdiction as to the substance of the matter had earlier awarded the custody to the other parent, falls within the scope of the named provision.

The dispute started when a Slovenian mother moved together with the almost 10 years old daughter back to her home country Slovenia, after she had lived with her Italian husband/the daughter's father in Italy for 25 years. They left the same day as the Italian court, which dealt with the couple's divorce proceedings, issued a preliminary decision awarding the sole custody rights to the father and, temporarily, placing the girl in a children's home. The Slovenian SC eventually declared the Italian custody order enforceable in its territory. However, soon after, the very same court suspended the enforcement of the return procedure due to the appeals against the main proceedings, issued by the mother, where she, in due course, was awarded provisional sole custody, with reference to the Article 20 of the Regulation in conjunction with the Article 13 of the Abduction Convention. Eventually the Slovenian CA stopped the main proceedings and turned to the Court for a preliminary ruling in the matter.[144]

Accordingly, the referring court asked the Court whether the Slovenian court had the jurisdiction to award preliminary custody to the mother under the Article 20 after the Italian court, having the jurisdiction as to the

---

[141] Rinau, paras. 92, 96-7; Michael Bogdan, *Svensk Jurist Tidning* (Swedish Lawyer Gazette), (Särtryck årgång 95, 2010), p.48.

[142] Ruling of the Supreme Court of Lithuania of 25 August 2008, civil case No. 3K-3-126/2008, pp.5-6.

[143] Case C‑403/09 PPU.

[144] Detiček, paras. 18-28.

substance of the matter, had earlier granted custody to the father, which was also recognised enforceable in Slovenia. Thus, the Court answered that in the above-described situation, where the preliminary measure was about awarding custody to the abducting parent by courts without substantive jurisdiction, the Article 20 cannot be applicable due to several reasons.[145] Primarily, according to the settled case law, the MS are obliged to interpret the EU secondary legislation in accordance with the fundamental principles of the Community law. Such a principle, in the context of the dispute in question, is the best interests of the child, which is enshrined in the recital 12 of the Regulation. The named principle says that the criterion of proximity is the guiding star in determination of the jurisdiction regarding the parental responsibility disputes. A principle of geographical proximity is reflected in the inter alia Article 8 that says that the courts of the child's habitual residence should rule in custody and access matters.[146] Accordingly, in view of this, the Article 20, which is one of the few exceptions to this main rule of habitual residence, should be interpreted strictly. Furthermore, the provision takes effect only if all three criteria- set in the provision- are met. That is, the jurisdiction could go to another court, than that of the child's habitual residence, firstly, if that court has to undertake a provisional or a protective measure because of an urgent situation[147], secondly, if that measure concerns persons within the same territory as that court and, thirdly, if that measure is of a provisional character. Consequently, in the given case, the Court pointed out that the two conditions, namely, the urgency and the territory, were not fulfilled because of the following. Primarily, the fact that the girl may have settled in the new environment could not alone support the interpretation of the situation as *urgent*. On the contrary, such an interpretation would go against the main aim of the Regulation, which is to deter the child abductions. Moreover, to set aside an earlier custody decision by the court of origin, which was also the declared enforceable by the requested state, would contradict the principle of mutual recognition of court decisions, pursuant to the Recital 21 of the Regulation.[148] Secondarily, the provisional measure in question affected also the left behind father, who was deprived his custody rights, even though he did not live in the territory of the requested state.

The Court also found that a less strict interpretation of the Article 20 would contradict one of the basic rights of the child, enshrined in the Article 24 of the EU Charter on Fundamental Rights and the Recital 33 of the Regulation, i.e., the right, on the regular basis, to have contact with both of the parents. However, other interests of the child might outbalance this interest, but this assessment might be made only by courts having jurisdiction as to the substance of the matter.[149]

---

[145] Paras. 28; 32.
[146] Paras. 33-8.
[147] The measure is urgent when the interests of the child are under the imminent danger and the court with substantive jurisdiction cannot be sought in the matter in due time.
[148] Paras. 39-49; *Rinau*, para. 52.
[149] Paras. 50-60.

4.2.3 McB[150] case

This, a PPU case, relating to abductions, as well, is about the interpretation of the definition of "rights of custody" under the Article 2 (9) of the Regulation in cases of not married parents. Other instruments that the ECJ applied in its ruling were the Abduction Convention, the EU Charter on Fundamental Rights[151] and the ECHR.

The return dispute started when a father wanted to get back his three children home to Ireland from England to where the children were removed by their mother. The English court requested the father to acquire a home court decision that the removal of children was unlawful, pursuant to Article15 of the Abduction Convention. The Irish appellate court, however, dismissed the fathers claim for rendering such a decision on the ground of the lack of custody rights over the children at the time of their removal to another country. At that point, the father appealed the decision to the Irish SC, which, in its turn, referred the matter to the ECJ. The essence of the question was whether the Regulation does not hinder the MS to issue domestic laws that require the unmarried fathers to obtain custody over their children before they can apply for a determination of the child's removal or retention as unlawful. The referring court interpreted the concept of "rights of custody" in the context of the Regulation and in the Article 7 of the European Charter as not necessarily meaning that the natural father has to obtain the legal custody for being able to declare his children wrongfully removed, as contrary to the Abduction Convention. Nevertheless, according to the treaty rules, the final interpretation of the Regulation is within the ECJ jurisdiction, which the Irish SC also acknowledged in its reference for the preliminary ruling.[152] In addition, the Court pointed out, when responding to the admissibility question raised by the European Commission and the German Government, that the Regulation, pursuant to its Article 60, supersedes the Abduction Convention in relation to the EU MS.[153] The Court also reminded of the autonomy of the EU law in the light of the equality principle.[154] Accordingly, the Court explained that the concept "rights of custody" under the Regulation means nothing more than what kind of rights and duties should be included into custody rights, e.g. the right to decide on the place of the child's residence. The Regulation, thus, does not regulate the question of who should obtain such rights but, instead, leaves the matter to the MS, pursuant to the Article 2 (11) of the Regulation. Consequently, the Court concluded that the father had to apply for custody in national courts before he might invoke the Articles 2(9) and (11) of the Regulation.[155] However, the Court had also to answer whether the Article 7, on respect for private and family life, of the EU Charter or the Article 24, of the UNCRC somehow could change the previous interpretation. On this, the left behind father did argue that his life with his

[150] Case C-400/10PPU.
[151] In this section: the EU Charter.
[152] Paras. 23-4.
[153] For more, paras. 30-9.
[154] Para. 41.
[155] Paras. 42-4.

children and their mother, even though without marriage, as a family should be set equal to a marital family life, for the purposes of the Regulation.[156] The Court, in its turn, argued that as long the right to apply for award of custody is protected under domestic laws the earlier discussed interpretation of the Article 2 (9) of the Regulation is not contrary to the aims of the Article 7 in the EU Charter. A support for this interpretation was found in the EHRC Court's case law where it was established that only a reverse situation, where a parent is not granted the possibility to seek custody, even where the other parent's consent is absent, would mean that the former's right to family life under the Article 8 of the ECHR has been breached.[157] The Court also established that the right to apply for custody is an absolute one, which means that, even though the father in the case lost his chances to apply for return of his children due to his passivity, his right to apply for custody remains eternal.

From the above, we see that the Court was trying to balance the interests of the left behind father on one hand, of the mother, and the children on the other.[158] Therefore, the best interests of the child, enshrined in the Article 24 of the EU Charter, influenced the Court's assessment of the matter as well. However, the Court found that not even the latter provision changed its above-discussed interpretation, which stated that the assessment of whether child's removal or retention is unlawful under the Regulation could be made only after the parent's acquisition of custody award in the national court. Moreover, such an interpretation was by the Court seen as not violating but, on the contrary, protecting the interests of children in question as it enabled the domestic courts to evaluate the potential custodian's relations with the children and the other parent.[159]

4.2.4 Mercredi[160] case

In this, also a PPU case concerning abductions, the main question was the interpretation of the term "habitual residence" of an infant child who was lawfully removed to another MS.

The central facts leading to the dispute were the following. An unmarried couple of a French mother and an English father separated one week after their daughter's birth and, soon after, the mother took the baby girl back to the home country of Island of Reunion[161]. The removal was lawful as the mother was the sole custodian. Already within five days, the father turned to

---

[156] Para. 47.
[157] For further reading on the relationship between Art.7 of the Charter and Art.8 of the ECHR see paras. 53-6.
[158] Para. 58.
[159] Paras. 60-3.
[160] Case C-497/10 PPU.
[161] Réunion (French: La Réunion; previously Île Bourbon) is a French island with a population of about 800,000 located in the Indian Ocean, east of Madagascar, about 200 kilometres (120 mi) south west of Mauritius, the nearest island. Administratively, Réunion is one of the overseas departments of France. Like the other overseas departments, Réunion is also one of the 27 regions of France (being an overseas region) and an integral part of the Republic with the same status as those situated on the European mainland, at < http://en.wikipedia.org/wiki/R%C3%A9union>.

the Duty High Court for award of parental rights and a request for returning the child to its habitual residence. Two weeks after that, the mother applied at home courts for exclusive parental responsibility and for establishing the daughter's domicile in Island of Reunion. Later on, the court in Island of Reunion dismissed the return application on the ground of the lack of custody rights by the father. Two months later, the home court awarded the mother with sole custody and established the child's habitual residence being in Island of Reunion. The English court, in its turn, denied the French court's jurisdiction pursuant to the Article 19 (2) of the Regulation, which says that the court second seized has to stay its proceedings until the jurisdiction of the court first seized is established. The mother appealed on that to the British CA, which decided to stay the proceedings and ask the ECJ for a preliminary ruling on the matter. Accordingly, the Court should clarify what the interpretation of the term "habitual residence" under the Regulation should be in a borderline case like the one, where the child in question is only several months old.[162]

Initially, the Court established that the concept *habitual residence* under the Regulation has an autonomous meaning since it does not entail any express reference to the laws of the MS. Furthermore, the term should be interpreted in the light of the principle of the best interests of the child, pursuant to the Recital 12 of the Regulation. Moreover, the concept should mean "some degree of integration by the child in a social and family environment".[163] However, in a situation like the present one, where an infant child is involved, the courts should also pay attention to such factors as the purpose of the mother's removal, the family and social connections of both the mother and the baby, as well as the strong dependency of the child upon its mother. Therefore, the Court asked the court of origin to arm itself with objectivity when determining habitual residence of a child in question.[164]

Accordingly, the Court ruled that, since the English court was the court first seized[165] it should determine the habitual residence of the removed child. If the English court fails in that, the Article 13 (1) gives the jurisdiction to the courts of the MS of the child's current place of living.

4.2.5 Purrucker II[166] case

In the main, the Court had to answer whether the Lis pendens rule in the Article 19(2) of the Regulation is applicable in relation to the provisional and protective measures undertaken within the scope of the Article 20. The referring court drew parallels with the conclusion made in the Purrucker I case[167] where the Court established that the Article 21, on recognition of

[162] Mercredi, paras. 20-36.
[163] Ibid, para.56.
[164] Ibid, paras 41-56.
[165] Ibid, para. 69.
[166] Case C‑296/10.
[167] Case C‑256/09.

judgements, is not applicable in relation to the Article 20 of the Regulation.[168]

The return dispute originally started when a Spanish, though born in Germany[169], father suddenly decided that he does not any longer agree, contrary to a previously notarised but not yet court-approved agreement, to that his ex-cohabitant and mother to their infant twins (a boy and a girl) would move to her home country Germany. Under the Spanish law, the cohabitants enjoy joint custody. The babies, born in Spain, had dual nationality. Because of the baby girl's illness, the mother left Spain only with the boy.

Three sets of proceedings commenced in this dispute. The first one was about the father's application for provisional measures as to the custody over the children. According to the Spanish law, such temporary decision might convert into substantive proceedings if the latter starts within the timeframe of thirty days. With response to that, the Court held that it did not receive any evidences of that the above-mentioned time limit was kept by the father. Nevertheless, the Spanish courts claimed itself the court first seized under the Article 19(2) of the Regulation and its domestic rules.[170] The second set of proceedings, also initiated by the father, was the one under scrutiny in the *Purrucker I* case. There, the father applied for an enforcement of the provisional custody in Germany. After the reference of the matter by the German SC, the Court ruled that the preliminary measures, adopted under the Article 20, could not rely on the recognition procedure enshrined in the Article 21 et seq. However, the Court added that another outcome is possible if the court, which adopted provisional measures, can provide clear evidences from its interim judgement that it has jurisdiction as to the substance of the matter in accordance with one of the grounds of jurisdiction in the Articles 8 to 14 of the Regulation. Otherwise, that interim decision stays within the scope of the Article 20.[171] The third set of proceedings started in Germany where the mother was asking for the sole custody over the twins in the substantive proceedings. According to German law, a mother has exclusive custody if she is not married to the children's father and there is no mutual agreement made by the parents stating the opposite. However, regarding the custody over the daughter, who was remaining in Spain, the German lower courts dismissed the case on grounds of lack of jurisdiction. As to the custody over the boy, the German DC stayed its proceedings, pursuant to the Article 16 of the Abduction Convention, which says that the state, where the child was unlawfully removed, has to wait, within a reasonable period, for a return application. Thus, two weeks past and no application delivered, the German judges proceeded with the custody case. The mother also initiated provisional measures under the Article 20 asking for an exclusive custody over the boy but the court dismissed the case on the ground of lack of urgent situation.[172] As a result, in the background of all those proceedings, the German DC , the

[168] Para. 51.
[169] Para.13.
[170] Paras. 18-24.
[171] Paras. 25-7; *Purrucker I*, para.76.
[172] Paras. 28-33.

one in which the enforcement of the Spanish interim custody judgement was sought by the father, during the period of three months, was trying to find out whether any substantive proceedings were taking place in Spain. [173] Accordingly, without any response from the Spanish authorities, the German DC issued a decision requesting the parties to provide all the documentation on the interim and substantive proceedings initiated by the father in Spain. Hence, the very same day the German DC received the judgement from the Spanish court, which inter alia considered itself as a court first seised.[174] The German DC, in its turn, thought that the Lis Pendens question under the Article 19(2) has to be resolved by the court, which was the first to declare that it had the jurisdiction, which, in the case, would be the Spanish court. [175]However, the Court in its ruling held that either party involved in the dispute has a right to determine whether Lis pendens under the Article 19 is at hand. Accordingly, the Court answered as follows. Firstly, according to its case law, the interpretation of Lis pendens under the Regulation is autonomous. The term "the same cause of action" means that the parties' claims as to the facts and the rule of law are the same.[176] Secondly, already in the *Purrucker I* the Court established that the Article 20, as proved by its position in the body of the Regulation and its wording, does not determine the question of substantive jurisdiction. The provision is applicable only to the measures adopted by courts that cannot base their jurisdiction as to the substance of the matter under any of the Articles 8 to 14 of the Regulation. Consequently the provisional or protective measures, taken by the court without substantive jurisdiction, are inferior to any decisions (may it be provisional or substantive) taken by the courts having jurisdiction as to the substance of the matter. Consequently, the measures, undertaken under the Article 20, lose its effect as soon as the court, having substantive jurisdiction, is seized. As a result, a Lis pendens situation cannot arise where the court first seized is having only a provisional jurisdiction under the Article 20 and the court second seised is having the jurisdiction as to the substance of the matter. However, the fact that the court was initially seised only for the purposes of provisional measures does not preclude the possibility that such proceedings can convert into substantive ones if there is evidence that such court has jurisdiction as to the substance of the matter under the Regulation. In the lack of such evidences, the court second seised, after the reasonable waiting, should proceed with the substantive proceedings.[177]

4.2.6 Zarraga[178] case

This, also a PPU abduction case is unique, in my opinion, in a way that it contains unusually many references to the rulings in the previously

[173] In the ruling of the Court it is, as I already mentioned, referred as the first set of proceedings.
[174] Paras. 34-6.
[175] Para. 37.
[176] Paras. 64-9.
[177] Paras. 70-86.
[178] Case C- 491/10 PPU.

discussed cases and the most often referred decision here is *Rinau*. The main question in the case is the interpretation of the Article 42, in particular its second paragraph, of the Regulation.

The dispute started when both the Spanish father and the German mother sought the sole custody with respect to their 7 years old daughter after the parents separated and commenced their divorce proceedings after nine years of their marital life in Spain. The mother was planning to move with the daughter and a new boyfriend to her homeland, Germany. The temporary custody was granted to the father, the mother had access rights. After the summer holidays spent in Germany the girl never came back home to Spain.[179] Initially, the Spanish courts called the girl and her mother to attend the custody proceedings in Spain so that the court could hear the daughter's opinion and make an expert report on the matter. However, the mother and the daughter did not attend the proceedings since the Spanish court's would not grand the mother and her daughter the right to leave the country after the proceedings. The Spanish court did also decline the mother's request for hearing the child via video conference.[180] Consequently, the father started two sets of return proceedings. The second one was due to a certified return order issued by the Spanish court in divorce proceedings, where also the father was granted sole custody.[181] However, the German CA refused to uphold the DC's decision to return the child to Spain holding that the prerequisites of the Article 42 (2) were not fulfilled since the child had not been heard in accordance thereof. Thus, the German court stayed the proceedings and turned to the Court for a preliminary ruling on the interpretation of the Article 42(2). The Court was asked to answer whether a certified return decision could be denied to the enforcement for the reason that the certificate includes falsehoods[182] about the hearing of the child, which, if answered in negative, according to the referring court, would be contrary to the best interests of the child under the Article 24 of the EU Charter.[183] The Court responded that interpretation of the provision in question cannot be other than meaning that all the inadequacies about the certificate has to be dealt with by the court issuing such certificate due to the following reasoning in the Court's case law and the Regulation itself. Firstly, the main objective of the Regulation in general and through the Section 4 in particular is to ensure speedy and effective return of the child to its habitual residence where all the custody questions may be resolved.[184] Secondly, a support to this interpretation can be found in the *Rinau* case, where it was established that the return procedure under the section 4 is excluded from the exequatur process, and therefore from the inter alia grounds for non-recognition in the Article 23, pursuant to the Article 21(3) of the Regulation.[185] Thirdly, as it was established in *Rinau*, the procedural autonomy as to all the questions relating to the section 4 is enshrined in the

[179] Paras.19-20.
[180] Para.22.
[181] Para. 29.
[182] The Spanish courts wrote that the hearing of the girl has actually taken place.
[183] Para. 42.
[184] Paras. 44-47.
[185] Paras. 48-49;56- 57; *Rinau*, paras 84;91; 97; 99;

Article 43, which states that only national laws of the courts of origin regulate the rectification of the certificate. Consequently, it means that the state of enforcement, in this case Germany, has to turn to the domestic courts of the requesting state, here Italy, with complains about the content of the certificate, though only after the child is returned to its habitual residence. Moreover, the issuance of such certificate cannot be appealed against even in the country of origin[186].[187]

Thus, the above-mentioned principles were encountered by the Court in order to support its interpretation of the relevant provision. Moreover, the Court underlined that the wording of the Article 42(2) has only an informative function as to notify on the content of the certificate and in any situation gives the powers to the state of enforcement to review the certified judgement, so that the principles of the judicial autonomy of the court of origin and the speedy return of the child would be upheld.[188] Lastly, the court of origin also decides whether the hearing of the child is to take place. Moreover, even though the general binding nature of the EU Charter encourages the court of origin to give the opportunity to the child to express its opinion[189], it, however, does not oblige to do so in cases when the court finds that this would be against the child's best interests. Accordingly, the court of origin is in its full powers to determine whether the hearing of the child on the return issue would cause more damage than use in the particular case. On the other hand, the country of enforcement has to obtain the opportunity to challenge the lawfulness of the certificate under the laws of the court of origin. Thus, only the courts of the latter state have the jurisdiction to decide whether the rights of the child under the Article 42(2) of the Regulation and the Article 24 (1) of the EU Charter were violated.[190]

Once again, we see that the Regulation's return rules are much stricter in comparison to the same rules in the Abduction Convention. The Court established that the principle of the speedy return would be in danger if the requested state would be allowed to refuse to return the child due to the complains about the certificate's content. Thus, the Article 42(2) should mean that the child's right to express its opinion is not absolute under the Regulation.

4.2.7 Povse[191] case

This most recent abduction case is also a PPU matter.[192] It is about a one-year-old baby girl who was taken to the mother's home country, Austria, after her parent's cohabitant life in Italy deteriorated. Under the Italian law, also unmarried couples enjoy joint custody. After the unlawful removal, the Italian court, in a preliminary ruling, retained the parents' joint custody rights, where the abducting mother was allowed to reside with the child in

[186] The second paragraph of the named article.
[187] Zarraga, para. 50; Rinau, Para 85.
[188] Zarraga, paras. 52-55.
[189] McB, para. 60.
[190] Parraga, Paras 59-73.
[191] Case C-211/10 PPU.
[192] Paras 35-36.

Austria, with condition that she would respect the father's access rights.[193] However, due the mother's breach of the settlement, the Italian court issued a certified return decision ordering the mother to go back to Italy where the child could be with both of its parents. In the meantime, the mother sought preliminary sole custody in her home court, which also granted the request.[194] The Austrian lower courts interpreted the Italian court's preliminary ruling on joint custody as a reassigning of the jurisdiction to the courts of Austria, pursuant to the Articles 10(b) (iv) or 15(5) of the Regulation.[195] However, the Austrian SC was not certain whether it was the case and, therefore, turned to the Court for a preliminary ruling on interpretation of the named provisions in relation to the certified return decision under the Article 11(8) in conjunction with Articles 40 to 45 and 47(2). Thus, four questions were placed before the Court.

The answer to the first, regarding the interpretation of the Article 10(b) (iv) in relation to the named preliminary custody ruling by the Italian court, was that preliminary decisions do not fall within the scope of the named provision and certainly cannot mean the transfer of the jurisdiction to the MS where the child was unlawfully removed. A different interpretation would undermine the objectives of the Regulation in general and of the Article 10 in particular, which, inter alia, means that in case of unlawful removals the court of origin shall be able to retain its jurisdiction as long as it has an intention to do that. Accordingly, the Article 10(b) (iv) has to be interpreted strictly, meaning that only the final custody decisions by the courts of the state from where the child was abducted, fall within the scope of the provision. Moreover, this approach is also in the best interests of the child in a sense that it gives the courts of origin the opportunity to revise the custody matter before it reaches a final decision without losing the jurisdiction.[196]

The second question on whether the certified return decision under the Article 11(8) does take effect even though no final custody decision had been issued, was answered in affirmative. The Court established that already the wording of the provision indicates no such requirement. On the contrary, the purpose of introducing the Article 11(8) accompanied by the section 4 into the Regulation, as well as the Court's case law, proves that the above-mentioned interpretation is the only possible. Already in the *Rinau* ruling, the Court established the procedural autonomy of the court of origin.[197] Further, the objective of the Article 11(8), i.e., a speedy return of the child to its habitual residence, would be highly jeopardised if the final decision on custody matters should have to be awaited first.[198]

The third question was about the interpretation of the second subparagraph of the Article 47(2) in the following situation. The Court was asked whether the Australian preliminary custody decision, awarding sole custody to the mother, falls within the scope of the named article.

---

[193] Paras 21-24; 47.
[194] Paras 28-32.
[195] Paras 28; 30.
[196] Paras 39-50.
[197] *Rinau*, Paras 63-64.
[198] Paras.51-67

Accordingly, it was held that the relevant provision means that only courts of origin can deliver a "subsequently enforceable judgement"[199]. Another interpretation would contravene the aim of the rules enshrined in the section 4, on certified decisions, whichk give the procedural autonomy to the courts of origin. All procedural and substantive questions within the scope of the section 4 are within the jurisdiction of the court of origin, with exception for the procedure of enforcement as such, pursuant to the Article 47 (1) and the Recital 23 of the Regulation.[200]

The fourth and the last question was whether substantive changes as to the return matter could preclude the enforcement of the certified decision under the article 11(08). The answer was similar to those above, namely the importance of keeping the division of jurisdictional powers between the court of origin and the requested court under the Article 11(8) strict. Consequently, the changed circumstances should be brought up in the court of origin. However, such substantial proceedings should not postpone the enforcement of the return judgement.[201]

4.3 Implementation of the Regulation by Lithuania respectively Sweden

As we could see from the previously discussed case law, the ECJ does not give the MS broad discretionary margin in interpreting the abduction provisions under the Regulation. This seems to be the case not only because of the Regulation's direct applicability but also because the instrument is dealing with extremely sensitive questions to all the parties involved, above of all the children. Accordingly, the Court appears striving for uniform interpretation of the Regulation in order to safeguard legal certainty among the MS in their handling of international custody disputes.

4.3.1 Lithuania

The aforementioned Lithuanian Implementation Act is the one incorporating the Regulation. Its Chapter 6 establishes the implementation of both the Regulation and the Abduction Convention. The Article 7 is on enforcement procedure after the return order by the requested court had been made. The Article 7 (1) says that the procedure is regulated by the section XXXIX of the Lithuanian Civil Procedure Code[202], though without prejudice to the Regulation and the Implementation Act. The Article 7(5) says that the authorities conducting the return have to follow the 6 weeks rule set in the Article 11 of the Regulation. According to the Article 12, the requested court, while deciding on the question of whether to order the return of the child or after such an order has been issued, may undertake provisional

[199] Article 47(2) second subparagraph.
[200] Paras 69-79.
[201] Paras.80-3.
[202] See supra n.85.

protective measures, e.g., forbidding the abducting parent and the child to leave the country.[203]

The earlier in the study mentioned questionnaire reveals Lithuania's concerns about its obligations under the Article 11(4) and (8) of the Regulation in a sense that the return of the child would not be followed by the adequate assurance of the child's physical and psychological safety. However, Lithuania expressed its eagerness in acquiring all adequate information on where and under what conditions the child will be living after the return. Nonetheless, once the child is back in its habitual residence, the welfare of the child is more or less left in the hands of the local authorities.[204]

Case law

4.3.1.1.1 No. 3K-3-254/2007 (S) [205]

A very interesting case arose when a Lithuanian mother, after 6 months of working in Holland, came back to her son, also a Lithuanian citizen, in Poland where they for the last three years lived together with the boy's Polish father at his mother's place. The mother found her son alone with the grandmother as the father was away without informing about his whereabouts. After the grandmother refused to let the boy's mother stay at her place, and would not give the boy back to the mother, the latter went to the Polish police office where she was told to determine the child's place of residence first. The mother turned to the Lithuanian DC with application for the determination of the child's residence and the return of the boy to Lithuania. The court dismissed the case on grounds of the lack of jurisdiction pursuant to the in the matter applicable Regulation. The main argument was that the boy's habitual residence was in Poland since he lived there with both of his parents for the most part of his life. The Lithuanian CA upheld the ruling of the district court. However, the Lithuanian SC pointed out many substantial mistakes in the lower court's rulings even though the procedural outcome stayed unchanged. The court simply established that the relevant situation did not fall under the definition of international unlawful child abduction or retention under the relevant instruments, since the child was not removed from one state to another and the mother was living with him in Poland where his grandmother now keeps him. Moreover, the SC concluded that the child's habitual residence had been in Poland for the last three years and therefore the jurisdiction as to the matter belonged only there.

[203] Ibidem.
[204] Questionnaire, pp.16-7.
[205] Ruling of the Supreme Court of Lithuania, of 19 June 2007, civil case No. 3K-3-254/2007 (S).

4.3.2 Sweden

The main Swedish domestic law, ensuring the compliance with rules in the Regulation is the aforementioned Enforcement Act from 1989. Its Article 1(4) establishes the instrument's direct applicability in Sweden. Consequently, the Swedish government decided that there is no need for substantial changes in the named Act regarding the complementing provisions[206] of speedy return under the Section IV of the Regulation with motivation that the main principles[207] of those additional provisions do not substantially differ from the ones in the Abduction Convention, implemented in the very same Act.[208]

In line with the Lithuanian authorities[209], the Swedish ones are deeply concerned about the consequences of the relationship between the Article 13 of the Abduction Convention and the Article 11 of the Regulation. It is a common ground that very same abduction situations can face totally opposite legal outcomes depending on what countries are involved in the matter.[210]

4.3.2.1 Case law

4.3.2.1.1 RH 2006:60

The case is about a Swedish mother who took her nine years old son from Finland to Sweden without the Finnish father's consent. The latter applied for the immediate return of the child. The Swedish court had to decide whether the boy's removal was unlawful under the Article 11 of the Enforcement Act and whether there were obstacles to impose the return order according to the Article 12 (2) of the same act. The DC found that the removal was unlawful since the father shared joint custody with the mother under the Finnish law, which meant equal rights to take care of the child. The court, after looking through the displayed evidence, did not find any sufficient ground to hinder the return of the child to the father. The alleged physical and psychological threats towards the mother were not found being sufficient enough in order to apply the Article 12 (2) on exception to return the child due to serious risk to its physical or psychological wellbeing. However, one of the lay judges had a dissenting opinion on that point. Nevertheless, the Swedish CA upheld the decision.

In addition, it is of the utmost importance to remember that, even though the Swedish DC had found that the exception under the Article 12(2) of the Swedish Enforcement Act, which implements the Article 13 of the Abduction Convention, was applicable, it would have been legally bound to

---

[206] As we could read in Chapter 4.1, the Regulation in relation to the Hague Convention has much more far reaching provisions regarding the return procedure, which is obligatory for its MS (not Denmark).

[207] For instance, the child's right to the possibility of being heard; speedy handling of return procedure.

[208] Regeringen's proposition (*The Government's Proposition*), 2007/08:98, pp.33-4.

[209] See above, Chapter 4.3.1.

[210] Questionnaire 2, p.27.

return the child if the Finnish authorities had made adequate arrangements to secure the protection of the child after its return, pursuant to the Article 11(4) of the Regulation, which is superior to its MS. As previously stated, the exceptions under the Article 13 of the Abduction Convention are not applicable for the EU MS if the condition under the Article 11 (4) is met.

4.3.2.1.2 RH 2010:85

This quite fresh case is from 2009. In 2008, the Swedish mother decided to move to her native country with her son leaving the husband and their common home in Greece behind. Even though the father knew about the boy's whereabouts, he did not react upon the removal until he had to appear before the Swedish court regarding the divorce and custody proceedings commenced by the mother. The father contested the Swedish court's jurisdiction on the ground of unlawful removal of their son by the mother under the Regulation and claimed that the boy's habitual residence was still in Greece. The DC, however, established that the boy has acquired a new habitual residence in Sweden, pursuant to the Article 10(b) (i) of the Regulation, which says that the courts of the state, from where the child was abducted, retain its jurisdiction until the abducted child has acquired a new habitual residence, on condition that the left behind custodian knew or should have known about the child's removal and still did not lodge a return request within twelve months after the child's abduction. Consequently, since the father did not apply for the return within the period set in the relevant provision, was the boy's acquisition of a new habitual residence, in Sweden, considered to be a fact. Accordingly, the jurisdiction for the custody issues went to the Swedish courts. The Swedish CA upheld the DC's decision.

5 Non-Hague abductions

With the knowledge that a number of 81 of the world states are parties to the Abduction Convention, we realise there are still many countries that do not share the common approach towards the abduction problem. When a child is removed from or to a country, which has no agreement with a convention state, the solution to the problem generally depends on the political and legal relationships of the countries that are dragged into the dispute. Besides international and regional treaties, another way to go is bilateral agreements. However, if none of these are available the last step to take is asking for help at the local administrative or judicial authorities in the state where the child is residing after the abduction. The left behind parent ought also seek local lawyers or turn to non-governmental organisations there.[211]

The section on *Non-Convention Child Abduction Cases under National Law* at the Hague Conference's website holds as follows:

> When a parent seeks the return of a child outside the scope of the Hague Convention, or another international or regional instrument, the court seised will have to decide how to balance the interests of the child with the general international policy of combating the illicit transfer and non-return of children abroad (Art. 11(1) UNCRC 1990).[212]

5.1 Lithuania

The designated central authority for abduction matters in Lithuania is the *State Childs Rights Protection and Adoption Service under the Ministry of Social Security and Labour*[213].[214] However, when the Abduction Convention is not applicable[215], the parents cannot seek help at the named institution, but need to contact other institutions, namely: a Lithuanian Criminal Police Bureau of Crime Investigation for coordination of a missing person's search; territorial police units for local investigation on a disappeared child; a Lithuanian Criminal Police Bureau of Interpol's International Liaison Office, Lithuanian National Division, for carrying out searches for internationally missing people; State Border Guard Service at the Ministry of Home Affairs, which controls persons and vehicles crossing the border and cooperates in the prevention of child abduction into and from the country.[216]

---

[211] Publication, Non-Hague Convention Child Abductions, Child Abduction Section, Hague Conference on P I L.
[212] Case law analysis, Non-Hague Convention Child Abductions, Child Abduction Section, Hague Conference on PIL.
[213] At <http://www.ivaikinimas.lt/tarpt_apsauga>.
[214] Lithuania, Country Profiles, Child Abduction Section, Hague Conference on PIL, last updated 2011-04-28, (hereinafter: Lithuanian country profile).
[215] As aforementioned, the convention is neither applicable between CS that has not recognised each other's accession.
[216] Ministry of Social Security and Labour, Republic of Lithuania, Other institutions.

According to the latest Lithuanian country profile[217], the country has no bilateral agreements relating to international child abductions. However, there is a bilateral agreement[218] between Lithuanian and the Russian Federation regarding judicial cooperation on inter alia family matters. The Articles 29 to 32 deal with the question of applicable law and jurisdiction in relation to parent and children matters. The main rule is that the law of the SP where the child with both of its parents reside is applicable. In case one of the parents' lives in the other state, the law of the child's nationality is applicable.[219] The latter connecting factor is also relevant when the child's parents are not married.[220] As to the jurisdiction, it goes to the court of a SP which law is applicable. However, if the parents live in the same SP the jurisdiction might be determined in accordance with the Articles 29 to 31.[221]

According to the Lithuanian authorities, the UNCRC is a legal instrument that appears to be of great importance in cases when a child is removed to a non-convention country. Use of the Convention in such matters is said to be facilitating in negotiations on return of wrongfully removed children.[222]

5.2 Sweden

Around 20% of all the abduction cases, registered at the Swedish State Department[223], during the period 2001-2008, were relating removals to or from non-convention country, though most of it were outgoing ,i.e., from Sweden, unlawful removals. Another fact about the none-Hague abductions is that here mostly the fathers were the abductors.[224]

A poor access to both international and national legal remedies for dealing with non-convention abductions has been complained about in the aforementioned Riksdagen report.[225] The survey has thus shown that the chance is much less that a child can return to Sweden in comparison with convention matters.[226] If disputing parents cannot achieve an amicable agreement, it can take exceedingly long time to reach an adequate solution. The report also indicates that the great need for cooperation with non-convention states by Sweden persists.[227] Nevertheless, there are some Swedish regulations that Swedish judicial and social authorities in dealing with non-convention abductions can apply. One of such laws is the

---

[217] See supra n.214, p.11.
[218] *A Treaty between the Republic of Lithuania and the Russian Federation on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters* (Lietuvos Respublikos ir Rusijos Federacijos Sutartis dėl Teisinės Pagalbos ir Teisinių Santykių Civilinėse, Šeimos ir Baudžiamosiose Bylose), Entered into force on 1995-01-21.
[219] Article 30.
[220] Article 31.
[221] Article 32.
[222] Questionnaire , p.24.
[223] The Swedish equivalent to central authority for abduction matters.
[224] Riksdagen report, pp.8, 76.
[225] Riksdagen report, p. 13.
[226] Riksdagen report, pp.13, 76.
[227] Riksdagen report, p.39.

aforementioned Enforcement Act that might also be applicable in non-convention matters, though, subject to reciprocity.[228] Another Swedish rule that might be relevant is the earlier mentioned Act from 1904. It allows to consider matrimonial matters and to it ancillary custody issues, though under certain conditions. Thus, the Act does not regulate independent custody matters. The latter also contains rules on the recognition of foreign divorce decisions. Furthermore, it looks at issues of guardianship of minors.[229] Moreover, the Articles 21:7 and 8, on return of children, of the Parental Code can sometimes be applied by analogy.[230]

According to a renowned Swedish case *NJA 1974s.629*[231], foreign custody rulings are not to be recognized nor enforced in Sweden without support in the national law. According to Bogdan[232], in such cases Sweden is obliged to recognise and enforce convention decisions automatically. The professor also points out that generally the non-convention custody decisions have merely probative value.[233]

Sweden has bilateral agreements with Tunisia[234], Egypt[235] and Morocco regarding cooperation in civil matters.[236]

5.2.1.1 Case law

5.2.1.1.1 NJA 1997s.196

This case involves a non-convention state, Singapore, where a Swedish mother and an English/Australian father lived together with their six and eight years old children since three years back. They moved there because of the father's work. Then the mother took the children without the father's consent and moved to her homeland Sweden. She had not lived in Sweden for fifteen years. The children were born in Australia and have all the three citizenships. The mother applied for divorce and sole custody over the children at the DC in Sweden. The court found itself competent to the divorce proceedings pursuant to the Chapter 3, Article 2 § 2[237] of the 1904 Act. The Article 6 of the same Chapter also allows custody proceedings as an ancillary matter. If children are also residing in Sweden the law of the state shall be applicable. The DC established that according to the chapter 7 Article 2, the children's habitual residence was still in Singapore since the

---

[228] See the Article 3 (1) of the act in question.
[229] Riksdagen report, p.35.
[230] Lennart Pålsson, *Vårdnad och umgängesrätt i svensk internationell privaträtt*, SOU 2005:111, Google Book, p.92.
[231] The analysed case *RÅ 1995 ref. 99* refers to this case. See above, Chapter 3.2.2.1.1.
[232] Bogdan, Michael, *Något om gränsöverskridande barnkidnappningar* (Slightly about cross-border child abductions). Festskrift tillägnad Ulla Jacobsson. Stockholm 1991, p.25.
[233] Ibidem.
[234] At: http://www.hcch.net/upload/2se-tu.pdf.
[235] At: http://www.hcch.net/upload/2se-eg.pdf.
[236] The Riksdagen report, p.77; Non-Hague Convention child abductions - bilateral agreements, Publication, Non-Hague Convention Child Abductions, Child Abduction Section, Hague Conference on PIL.
[237] It says that a claimant of a Swedish nationality and who once - after he/she turned into the age of eighteen - had its habitual residence here has a right to divorce proceedings in Sweden.

parents had a joint custody, the father applied for the return of the children who were replaced without his consent. However, the DC found the case admissible on grounds of a principle of "praktiskt behov"/practical necessity since none of the parties or their children were citizens there and the mother's intention was to stay in Sweden with the children permanently. Moreover, the custody decision of Singapore courts could not have legal effects in Sweden. The ruling was upheld by the ACA in its totality. The SC established that the courts are not obliged under the named provision to include the custody issue into the divorce proceedings but have to decide on the case-by-case level. Thus, the court reaffirmed the importance of the principle "praktiskt behov"/practical necessity. The court however placed another issue, than the district court, in the context of the principle,- the matter of the removal of children without the consent of the father. Sweden has ratified inter alia abduction convention in desire to cooperate with another states in the battle against the child abduction by one of the parents. However, Singapore was not a party to that treaty, nor had it a bilateral agreement with Sweden. Moreover, the 1904 law, applicable in the matter, had not been changed when Sweden ratified the named abduction convention. Accordingly, the court found that the jurisdiction as to the mater of custody also lies with the jurisdiction of Swedish courts.

As we can see in the ruling, the SC did not agree to apply the provisions of the Abduction Convention by analogy in this non-convention dispute.

5.2.1.1.2 RÅ 1997 ref. 58

A Tunisian/Swedish couple, whose Islamic marriage was not valid under the Swedish law, had two children of three respectively six years old when the father unlawfully took the children to Tunisia and never came back to Sweden. The mother was a sole custodian over the children under the Swedish law. The mother claimed in the Swedish AC that it should oblige the father to return the children under the default fine order of ten thousand Swedish crowns per month, pursuant to the Chapter 21, Articles 3 and 7 of the Parental Code. The claim was rejected on the ground of the general principle established in *RÅ 1968 ref. 74*, where it was held that Swedish courts cannot order an enforcement that has to take place in Tunisia. The ACA upheld the decision in its entirety. However, the deputy judge was of a dissenting opinion saying that the court cannot decline the jurisdiction on the bare ground that the children and father reside in Tunisia. The fact that the father has attachable assets (his disability pension) in Sweden is a sufficient ground for the court to consider whether a default fine order could be made against the father. Thus, the SAC established that the main question was whether the bare fact that the children and the father were now residing in Tunisia made the Swedish courts inadmissible for the enforcement case. The court said that, contrary to the general principle, (established in previous case law), referred to in the lower courts' decisions[238], the international law does not forbid in situations like this to impose default fine orders in order to make the defaulting part to fulfil

[238] The SC referred to the general principle enshrined in the case RÅ 1968 ref. 74, which was invoked by the lower courts in the matter.

his/her obligations[239]. Thus, since the mother and the children were Swedish citizens and had their habitual residence here, the Swedish courts had jurisdiction in the matter.

[239] The court referred to the following doctrine: Walin, Föräldrabalken och internationell föräldrarätt, 1996, s. 518 (Parental Code and international parental rights, 1996, p. 518); Bogdan, *Om svensk exekutionsbehörighet* (About Swedish enforcement competency), SJT (Swedish Lawyer- Magazine) in 1981, p. 409; International Child Abduction from the Swedish legal standpoint (Internationella barnarov ur svensk rätts synvinkel), Journal published by the Law Students' Association in Finland, issue 2 / 1982, p. 130.

6 Non-Hague state, Russia.

At the time of writing this paper, the Russian government had presented a draft to the Russian State Duma on law of ratification of the Abduction Convention.[240] The draft has been initiated by the Russian president in November 2006. [241]

An American lawyer and expert in the field Jeremy D. Morley[242] has called Russia as one of havens for international parent abductions. On the other hand, he fact that Russia has not ratified the Abduction Convention influences not only the Russian Courts to refuse to return the abducted children but, also, in reverse. In other words, the countries to what the children have been abducted from Russia tend to act in a similar manner. If, for instance, a Lithuanian child was also a Russian citizen,[243] the Lithuanian court would not be willing to send the child back to Russia just as the Russians colleagues would be in the same situation, since no bilateral agreement between the two countries is at hand.

> In such cases, an agreed mechanism for addressing the issue of returning the child to the Russian Federation does not exist, and the results made by the Russian side to recovering a child depends primarily on legislation and law enforcement of a foreign state.[244]

Khazova[245], an assistant professor and PhD in Family Law at the Russian Institute of State and Law in Moscow, states that the problem of international child abduction has several legal aspects and notwithstanding their mutual autonomy, they are nonetheless interrelated. The first aspect is the Russian participation in international treaties that provide for mutual recognition and enforcement of judgments in cases involving disputes about children. The second, is Russia's compliance with its obligations under the international instruments, in particular the UNCRC and the ECHR. The last but certainly most important - the need to protect the rights and interests of children involved in conflicts of their parents.[246]

---

[240] The draft was presented on 29 of March 2011. Тамара Шкель, *Обратный билет домой; Детей, увезенных из страны родителями-иностранцами, станет легче вернуть на родину* (A return ticket home; Children taken away by foreign parents will be easier to return home.) "Российская газета".

[241] Пояснительная записка к проекту федерального закона "О присоединении Российской Федерации к Конвенции о гражданско-правовых аспектах международного похищения детей", (Explanatory note to the draft federal law "On accession of the Russian Federation to the Convention on the Civil Aspects of International Child Abduction.)

[242] Enjoining Potential International Child Abduction, New York Family Law Monthly, May 2009.

[243] Both Russia and Lithuania do not recognise double citinseship, but even if they did, the fact that Russia is a non-convention state would give the Lithuanian courts discretion to decide the faith of the abducted child pursuant to its national legislation.

[244] See supra n. 241.

[245] Хазова Ольга Александровна, *Международное похищение детей: правовые аспекты* (International Child Abduction: Legal Aspects), Zakon (Law), No. 1, January 2010, page(s): 65-70, Moskva, Russia, (hereinafter: Khazova).

[246] Khazova, et.seq.

6.1 Legislation on international child abduction

Regarding the first aspect, referred to in the previous chapter, it should be noted that, under the Russian civil procedural law, the foreign judgments (including the decisions on approval of settlement agreements) are recognized and enforced in Russia only if there is a relevant international treaty signed by the Russian Federation, pursuant to the Russian Civil Procedure Code, Chapter 45, Article 409[247]. In contrast to most of the Western countries, Russia does not have any clear mechanism preventing international child abductions or organising the return of abducted children. The reason to that is that it does not participate in any of the international instruments dealing with the problem. However, Russia has concluded many bilateral treaties for legal assistance in civil (and family) matters with a number of countries, many of which were concluded during the Soviet era. However, the existence of such a treaty per se does not guarantee that a foreign decision on custody over the child will be recognized and enforced in Russia. A lot depends on how the issues of family law are laid in a specific bilateral agreement, whether it does specify the legal relationships of parents and children or not. If, for instance, the agreement is about the recognition and enforcement of judgments in family matters, such broad language is likely to cover all matters of family law, including parental disputes, like, for instance, the treaty between the USSR and the Kingdom of Spain on Legal Aid in Civil Cases, 1990, which also includes family matters. However, many other bilateral treaties are formulated in a way that the absence of an explicit mentioning of the custody (residence, etc.) matters may mean non-applicability of the agreement in question. A good example is the case, which arose in a custody dispute between a citizen of Russia (the child's mother) and a Finnish citizen (the child's father) who have proceeded up to the SC (1999). The legal dispute in Russia started when the Finnish father turned to the Russian DC in Sankt-Petersburg for enforcement of the custody decision by the Finnish courts after the Russian mother illegally removed the child to Russia. The application was denied on the ground that the invoked bilateral agreement on legal protection and assistance in inter alia family cases between Russia and Finland does not include (the list is exhaustive) rules on recognition and enforcement of decisions regarding disputes about the upbringing and residence of the child. Likewise, the Russian SC upheld the decision by the DC. Besides, the Minsk Convention[248] was used within the field by its SP.[249]

---

[247] Статья 409, Признание и исполнение решений иностранных судов, Гражданский процессуальный кодекс (ГПК РФ) (Article 409, Recognition and enforcement of foreign judgments, Civil Procedure Code).

[248] The Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, 22 January 1993, Minsk, as amended on 28 March 1997).

[249] Khazova, et.seq.

With regard to the second aspect, i.e., Russia's obligations under the UNCRC and the ECHR in the matter, see below, Chapters 6.2 and 6.3. As to the third and the most important aspect, i.e., the best interests of the child, it is discussed in the following Chapter.

6.1.1 Family Code

There is no such term as" parental child abduction" in normative acts of the Russian Federation. The Russian Family and the Civil Procedure Codes provide several options for deciding the fate of children after divorce. Former spouses can conclude an amicable agreement, determining whom the child will be living with and who will have the rights of access. The former spouses may conclude such an agreement in a written form and then notarise it. When spouses cannot agree on the residence of the child, it will be determined by the court on the recommendation of the social services/guardianship agencies (органы опеки).[250] Child abduction is not considered kidnapping if the child was taken by one of the parents without resorting to violence and the participation of outsiders.[251] Nobody brings criminal charges in such situations. However, if such abduction takes place after a court decision, the left-behind parent has the right to sue the parent abductor for limitation or even deprivation of parental rights of the latter.[252]

The rights and interests of children in the post-divorce phase are or should be of the greatest importance. However, as Khazova[253] complains adults most often forget or just ignore an individual child perspective. The equation of divorce and family breakdown may be relevant for the spouses but not for the children. For them each of the parents remains being the family since children do not divorce from their parents. Therefore, a constructive dialogue between the former spouses is a precondition for their children's wellbeing. Protection of child's interests in the family disputes can inter alia be found in the Russian Family Code. Section 2, Article 24[254]means, according to the author, that the court in the divorce proceedings shall consider the issues regarding residence and maintenance of children even if none of the parents raised the relevant issue. Access rights of the left behind parent should be ancillary under the provision as well, says Khazova.[255]

Regulation of the Russian SC from 1998, on the applicability of the Russian Family code is, according to a Russian family lawyer, obsolete in a

---

[250] Article 24, Family Code of the Russian Federation of December 29, 1995 N 223-FZ(Article 24, Семейный кодекс Российской Федерации от 29 декабря 1995 года N 223-ФЗ).

[251] Article 126, Criminal Code of the Russian Federation of 13 June 1996 N 63-FZ (Уголовный Кодекс Российской Федерации от 13 июня 1996 г. N 63-ФЗ).

[252] Ирина Тимофеева, *Дети разных народов. Как защитить детей, которые оказываются предметом дележа со стороны матери и отца, а потом уже и двух государств, гражданами которых они являются?* (Children of different nations. How to protect children who are subject to division by the mother and father, and then also by the two states, which they are citizens?), Novaya Gazeta, № 55 от 27 Мая 2009 г.

[253] Khazova, et.seq.

[254] See supra n.250.

[255] Khazova, et.seq.

sense of child and parents' rights when the latter live apart. The lawyer says that even though the relevant provisions advocate the equality of parents after the divorce, in the reality most often the mothers are those favoured as custodians. Both courts and the guardianship agencies hold such approach. However, the situation is changing regarding older children. There the chance of fair and equitable process is greater.[256]

The chairman of the Russian State Duma Committee for Family, Women and Children Elena Mizulina states that interests of children of international marriages involving Russian citizens is one of the main areas where improvement of Russian Family Code is required. The Russian citizens meet enormous difficulties since the Russian Federation does not have any bilateral agreements with any of its Western neighbours where Russian people travel frequently. Due to lack of relevant international legal instruments, Russian citizens lack opportunities to seek protection in the international courts and courts of those countries where they reside with their children.[257]

6.1.2 Other legal and non-legal remedies

In order to encourage parents to peaceful extrajudicial settlement of disputes arising between them, it is crucial to have mechanisms for alternative dispute resolution of family affairs. Family mediation might be one of the ways to resolve family disputes on a low conflict level as possible and to achieve sustainable relations between the parents and the children. Khazova writes that an analogous international family mediation should be available for resolving transnational disputes about children.[258]

Another problem in the matter is, according to Khazova, the Russian parent's unawareness of the scope of their rights and obligations regarding the after divorce stage. The current Russian family related legislation includes a general provision on equality of rights and responsibilities of parents irrespective of whether they actually participate in the life of their children or not, which, according to the author, leads to a great insecurity for the factual custodian, especially if the custodians are not on good terms with each other. Moreover, it can be contrary to the interests of children.

The fact that a notion of custody is lacking in the Russian family law makes the possibility to resolve both national and international parental disputes even more difficult. Another example of ambiguously worded legislation on the matter is the Federal law of 15.08.1996 N 114-FZ "On the Procedure for Exit from the Russian Federation and Entry into the Russian Federation" with regard to the departure from the Russian Federation by children. Its article 20 says that a child may leave the country with at least

---

[256] Владислав Куликов, Правила хорошего развода, Верховный суд разъяснит, с кем должны жить дети после развода родителей. (The Supreme Court will explain, with whom the children should live after the divorce.), "Российская газета" - Федеральный выпуск №5418 (42), 01.03.2011, 00:27.

[257] Похищения детей в интернациональных семьях (Abduction of children in international families).

[258] Khazova, et.seq.

one of its parents, and it does not contain any requirement for the other parent's notarised consent, contrary to the analogous foreign law[259].[260]

6.2 The UNCRC

Even though the Russian Federation is not a party to the Abduction Convention the problem of international parental kidnappings can hypothetically be approached through invoking the relevant provisions in the UNCRC to which Russia is a SP.

As stated in the introductory part of this chapter, Russia's obligation under the UNCRC is one of the aspects of the international child abduction matters involving the country.[261] Primarily, the main international instrument regarding children's rights regulates the child's, whose parents live in different countries, rights to have contact with both of them (Article 10), and the SP' responsibilities to combat unlawful child removals and non-returns (Art. 11). Moreover, the UN Committee on the Rights of the Child urges the sister states to join the Abduction Convention as its Article 11 invites to do. It does equally concern Russia.[262] The third periodic report on implementation of the UNCRC by the Russian Federation says the following:

> E. Illicit transfer and non-return (Article 11)
> 138. In the current Russian law, illegal transfer and non-return of children is a crime of a criminal nature.
>
> 139. Cases of removal of children abroad by one parent without the consent of the other have in Russia a discrete character. Each such case usually becomes the subject of litigation. Controversial issues of this matter are dealt with a number of countries by the Russian Federation on a bilateral basis within the framework of existing intergovernmental agreements.[263]

6.3 The ECHR

The ECHR is relevant also in cases of international abductions as we could see from the above-mentioned doctrine and the recent developments in the ECHR Court's case law. More than once the ECHR Court has reminded the SP to meet their positive obligations under the Article 8 of the ECHR. The obligation to protect the right to the private and family life under the

---

[259] However, as aforementioned, an analogous rule has been issued in Lithuania.
[260] Khazova, et.seq.
[261] Khazova, et.seq.
[262] Khazova, et.seq.
[263] Третий периодический доклад о реализации Российской Федерацией Конвенции ООН о правах ребенка, (1998–2002 гг.) (The third periodic report on implementation of the United Nations Convention on the Rights of the Child by the Russian Federation).

instrument is applicable also in child abduction or retention situations, and it is not dependent on the participation in the Abduction Convention, according to the ECHR Court. According to the latter, the ECHR is an instrument of international standard, which also is applicable in international parental abduction matters, even when a SP, like, for instance, Russia is not bound by the Abduction Convention.[264]

Khazova writes that Russia violates the Article 8 of the ECHR in several aspects regarding international parental abductions. Primarily, it does not deal with the problem through either ratifying the Abduction Convention or concluding bilateral treaties and, at the same time, does not recognise foreign custody or access decisions. Consequently, both the children's and the parents' rights enshrined in the named provision are breached by the Russian Federation, according to the author. The approach is, according to Khazova, confirmed by the ECHR Court's case law, which, for instance, in the *Hokkanen v. Finland*[265] established that non-compliance with the court decision on access rights was a violation of Article 8 of the ECHR. However, according to Khazova, most relevant to the issue in the present context is the case *Bajrami v. Albania*[266] where the left behind father complained against his country not having any effective legal measures to ensure that to him adjudicated custody rights could be respected abroad. Moreover, Albania was not providing any operative legal instruments preventing or forbidding child abductions, thus contrary to the UNCRC; nor had it ratified the Abduction Convention. The ECHR Court concluded that even though such ratification is voluntary the fact that there is no other alternative legislation protecting right to family life in accordance with the Article 8 is in conflict with the SP' positive obligations under the provision.[267]

Another case confirming the CS' positive obligations under the Article 8 of the ECHR, though not the Abduction Convention, was established in the matter regarding access rights of the left behind parent in the case *Hansen v. Turkey*[268]. In the case, the Turkish/Icelandic father went for holidays to Turkey and never came back home to Iceland. The Icelandic mother travelled 100 times and issued 18 sets of proceedings in order to get her two girls back or at least obtain access rights with them. She claimed to the ECHR Court that the Turkish authorities did not fulfil its obligations under the Article 8 since it did not ensure her rights to visit the daughters. The only sanction imposed against the father was fines of small amount. The statement that the girls might have opposed seeing their mother is not sufficient when no professional and neutral environment for the determination of their opinion was ever provided. The ECHR Court also decided that in case of unlawful removal or retention the possibility of the return of abducted children to the left behind parent, after a considerably long time spent in a new country, might not be ruled out even though it would not be the most desirable scenario under the ECHR. Consequently,

[264] European Court of Human Rights Judgements.
[265] Hokkanen v. Finland.
[266] Bajrami v. Albania.
[267] Khazova, et.seq.
[268] *Hansen v. Turkey*.

the Court ruled that the Turkish authorities failed to take effective measures in order to meet the mother's requirement to visit her daughters during the six years of proceedings and therefore breached the Article 8 of the ECHR.[269]

6.3.1 Neulinger and Shuruk v. Switzerland[270]

As aforementioned, the very case has raised many passionate reactions as to the future effectiveness of the Abduction Convention in cases when also the ECHR is applicable.

As for the structure of the analysis of the case, I will firstly discuss the background of the return dispute, referred to in the very ruling of the ECHR Court, and then analyse its argumentation in the matter placed before it.

The return dispute in the case started when a Swiss/Jewish mother decided to leave Israel together with her two years old son after she divorced her Jewish husband. The latter shared a joint guardianship[271] over the boy with the former, and his access rights were, due to his violent behaviour towards her, limited to supervised visitation rights to two hours twice a week. Upon the application by the mother, the Jewish Family court made a ne exeat order forbidding the boy's removal from the country, since the mother was afraid of the father's plans to join the extremist religious group, which he was attending, abroad. However, the mother herself did breach the order when her application for annulling it- so that she could visit her family in Switzerland- was dismissed. Thus, the mother and the boy secretly left Israel. Soon after, the father applied for the boy's return at the home authorities, which only almost one year later succeeded in locating the boy and his mother. The Israeli Ministry of Justice applied directly to the Swiss Federal Office of Justice for the return of the child, pursuant to the Abduction Convention. However, the Lausanne District Justice of the Peace rejected the father's application on return on grounds that the child would be exposed to harmful physical or psychological treatment, or otherwise placed in an intolerable situation, pursuant to the Article 13 (b) of the Abduction Convention. The upper court, the Guardianship Division of the Vaud Cantonal Court, upheld the decision, referring to the report by a paediatrician and child psychiatrist who stated that if the boy was to be returned to Israel alone, or even with his mother, he would suffer great psychological harm in the long term.[272] However, the Federal Court accepted the father's appeal and ordered the return of the child to Israel on the ground that the lower court was wrongfully applying the Article 13(b), for the reason that no clear evidences of a grave risk of harm were presented.[273]

---

[269] Ibidem.

[270] This is an appeal case on the Chamber's ruling where the return order was not seen as infringing the applicants' rights under the provision. Application no. 41615/07, JUDGMENT STRASBOURG 6 July 2010.

[271] Under the Israeli law, it means something similar to legal custody, thus meaning non-factual custody, i.e., to reside with the child; on this, see the paragraph 80 in the case.

[272] Paras. 1-37.

[273] Paras. 42; 142.

Both the mother and her son sought the ECHR Court as applicants and invoked inter alia Article 8[274], stating that the Federal Court through ordering the return of the boy back to Israel infringed their rights enacted in the provision. Accordingly, the ECHR Court, firstly, agreed on the provision's applicability in the matter and, consequently, proceeded to the question of whether the applicants' rights protected thereof were violated. In other words, whether the Swiss authorities' actions, enforcing[275] the return of the child, were legitimate, necessary and proportional in relation to the consequences it would or could lead to[276]. Thus, the ECHR Court's position was the following. Firstly, the order to enforce the return of the child was legitimate since the removal of the boy was unlawful under the Jewish law and therefore also under the Abduction Convention.[277] Regarding the criterion of necessity, the Article 8 has to be interpreted in the light of the instrument, which is applicable, in this case the Abduction Convention and the UNCRC, which was also confirmed by numerous case law of the Court itself.[278] Nevertheless, the ECHR Court reminded that the special character of the ECHR authorises the ECHR Court to review its SP' court decisions in order to establish whether human rights protected under the instrument are not violated. Accordingly, the protection of such rights can be achieved through weighing[279] the interests of all involved in the abduction dispute: the mother, the father and, most of all, the child.[280] Concerning the interests of the child, it consists of two parts: the first is about the importance for the boy of being with both of his parents, and, the second, - the significance of the child growing up in a sound environment. The latter interest is in danger if the risk of psychological or physical harm is grave, pursuant to many national court rulings under the Abduction Convention.[281] Thus, after the overall assessment of all the circumstances[282] in the matter, and after the announcement that the consideration of all the interests involved has to be made at the time of the enforcement of the return order, the ECHR Court ruled that the interests under the Article 8 of the ECHR of the applicants overweight those, under the same provision, of the respondent. Thus, the

[274] Other articles that were claimed were found either inadmissible or not necessary to examine.
[275] One of the fourteen judges, in his dissenting opinion, argued that the breach of the Article 8 of the ECHR was already completed when the Federal Court decided that the boy should return to Israel. See the *Dissenting Opinion of Judge Zupancic*.
[276] Under inter alia Article 8, the ECHR usually performs a test consisting of three criteria, that is legitimacy, necessity and, lastly, proportionality of the authorities' interference with the rights protected under the provision.
[277] Paras. 92-106.
[278] For a detailed account of the relevant cases, see in paragraphs 131-2.
[279] Such balancing test, which is possible only on a case-by-case level, can be, however, in accordance with the margin of appreciation rule, reviewed by the Court.
[280] Paras. 133- 5.
[281] Para.137.
[282] The decisive factor seems have been the fact that the father was mismanaging his life; he remarried and divorced within three months leaving the wife pregnant, paying no maintenance; the father was also absent from the return proceedings; Moreover, the Court referred to the lower courts' divert opinion on the return matter, what also included expert reports strongly recommending against the boy´s return;

mother's and her son's right to family life would be infringed if the boy returned to Israel.[283]

With regard to the concept of the best interests of the child, the ECHR Court held that neither the preparatory works of the UNCRC nor its Committee expressed a comprehensive meaning of the principle, but left the work to those working with individual cases relating to children's rights. Moreover, instruments on protection of rights of children, including the UNCRC, should be interpreted in the light of their objectives, e.g., the aim to respect children's individual civil and political rights. For instance, in the context of Articles 5 and 16 of the *Convention on the Elimination of All Forms of Discrimination against Women* the principle means a child´s right to a harmonious life, which can be ensured only by parents' mutual respect. In Article 24 of the EU's Charter, the principle is interpreted similarly like in all other analogous provisions in instruments relating to children.[284] As to the interpretation of the principle in the context of the Article 13(b) of the Abduction Convention, the ECHR Court said that the provision is the most frequently used exception- out of the four existing- to the main rule of prompt return. In addition, the ECHR Court referred to several domestic case law decisions, which interpreted the relevant provision very strictly.[285]

6.4 Abductions to and from Russia

There are two recent renowned "Russian" abduction [286] cases[287] of minor children who were abducted and re-abducted by both of parents; or, if to be more precise, the children were abducted and re-abducted with help of strangers.

A first story started in 2007 and was about a girl of 3 years old, born in Russia, who had both Russian (from mother) and French (from father) nationalities. After the divorce, each parent received sole custody in his or her home countries. After unsuccessful arrangements, parents began to abduct the child from each other. Firstly, the mother abducted her daughter to Russia, Moscow region. However, later, two stranger men took the girl, when she was in the park with her nanny, back to the father. The same did repeat in France when the girl was taking a walk with her father. The French security forces and the Interpol itself were involved in the seeking of the kidnapped girl. The mother (and the child) was detained in Hungary while trying to pass for Ukraine. The Hungarian authorities extradited them due to kidnapping allegations issued in France. The situation was that both were

[283] Paras.139-151
[284] Paras. 49-56.
[285] Paras. 58-68.
[286] I chose to call these actions as "abductions" even though the involved states do not have any agreements with the Russian Federation, and the reason to that is that the involved countries call these removals as "abductions" themselves.
[287] The two cases involved Russian citizens from Moscow and the Region of Nizhny Novgorod; unfortunately, I did not succeed to receive the needed court decisions from the relevant courts; an employee from the archive department of the Moscow DC has, via a telephone conversation, instructed me that the case concerning their court is not published on the Internet and that in general "such" cases are not accessible online.

facing the named charges in each other's home state. However, the father offered an amicable agreement on equal rights to the daughter, who would spend half a year with the mother and the same time with the father by turns. Nonetheless, only the mother signed the document. Soon after, the French court gave the sole custody to the father. The mother appealed. In the meantime, the French human rights activists filled a claim against France and Hungary to the ECHR Court on breaches of the ECHR and the UNCHR.[288]

A second well-known story began in 2008 in Finland when a Russian woman, after the divorce from her Finnish husband, decided to move back home, to the region of Nizhny Novgorod, and take their son with her. Kidnapping charges were opened in Finland. Later, the father abducted the boy back to Finland, not without the help of others. For instance, a Finnish consulate worker transferred the child through the Russian border. The Finnish court sentenced the mother to one and a half years' probation and ordered to pay 20,000 € to compensate for moral damage, about 5,000 € in compensation costs for transporting a child into Finland and about 5,000 € for legal costs. The mother contested all the charges against her; she asserted she was not planning to retain their son when she went with him to Russia on vacation, and only because of the threats from her former husband, she decided to stay in the homeland. The Finnish court allowed the mother to see the child twice a month, accompanied by representatives of the police and social workers. The mother is not allowed to talk with her son in Russian even though neither she nor her son can speak Finnish.[289]

The third story is less famous and with a positive ending since the child was returned to its habitual residence. An ex-husband to a Russian citizen took their six years old boy for an alleged visit to a park and ran away to his homeland Israel. The boy left Russia illegally which meant that the mother had some time before the father could obtain all relevant papers in Israel since he tried to mislead the mother while saying that he needed the boy's birth certificate because of the latter's sudden illness. The mother appealed to an Israeli court with a lawsuit and soon the boy was returned to his mother.[290]

---

[288] Похищения детей в интернациональных семьях (Abduction of children in international families). Социальный проект, Проблема похищений несовершеннолетних (Social project, the problem of abduction of minors),
[289] Ibidem.
[290] See supra n. 257.

7 European Council's Custody Convention[291]

The Convention, similarly to the Abduction Convention, is inferior to the Regulation in relation to the latter's MS[292], according to the Article 60 (d) of the Regulation. Every MS of the Council of Europe may become party to the Convention; also other countries upon invitation. In 2010, only Liechtenstein out of 36 contracting states to the Convention has not ratified the Abduction Convention.[293] Compared with the latter[294], the Convention has a precondition for its applicability: there has to be custody or access order from a court of the requesting state party in order to being able to apply for the child's return. There is also a time limit of 6 months for issuing such return proceedings. However, the advantage of this rule, in comparison with the Abduction Convention, is its mandatory enforcement. Nevertheless, the states that are parties to both instruments tend to prefer the Abduction Convention due to its less complicated procedural rules. Therefore, the Convention has ceased to be applicable amongst both the EU MS and the CS to the Abduction Convention.[295]

[291] *European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children Luxemburg, 20.V.1980,* (in the chapter: the Convention).
[292] With exception for Denmark.
[293] *International parental child abduction,* Chapter 5, International Child Law, Second edition, Trevor Buck, Alisdair A. Gillespie and others, Routlege, London and New York, 2011, pp.217-219.
[294] Also the ECJ in its case law (see the case …) has established that no such condition is required in the Regulation.
[295] See supra n. 293, p.218.

8 Analysis and Conclusions

In the background of the studied doctrine and case law, my general conclusion is that the main debate in the matter of international parental abductions is about a balance between two major principles or, in other words, interests to be protected. The first one is specific for the abduction matters collective interest to defer parents from unlawful removals or retentions of their children through adoption of the rule of a prompt return of the child to its habitual residence. The other is the classic one, typical for all children rights' instruments, i.e., the best interests of an individual child. As we could see in the study, in some abduction cases these two principles/interests can coincide, which means that it can be in the best interests of a particular child to return to its habitual residence. However, other times, the child can be returned even though it is not in the best of its interests. The latter situation, according to me, is a routine outcome under the Regulation since this instrument very strictly regulates the return procedure. The exceptions when such return might not happen are very few and, as we have learned in the discussion part, can be invoked mostly due to procedural shortcomings. On the other hand, it is very important to remember that the assessment of the child's individual interests can always be made by the courts of origin after the child is returned. Thus, the requested state and the ex-abductor parent can submit their claims to those courts. However, neither this legal possibility nor the official interpretation that the child is to be returned to the country of jurisdiction and not the left behind parent, coincides with the picture in the study, which reveals that 32% of children were returned to a custodian who has never been a primary carer, or has shared a joint custody with the other parent, in the convention matters in the year 2003.

The differences between the return rules under the Regulation versus the Convention are best reflected in provisions on legal outcomes of the return proceedings. According to the former instrument, the child has to be returned to its habitual place of residence even though the exceptions under the Article 13 of the latter instrument are at hand. The understanding that the child is to be returned to the country with jurisdiction and not to the left behind parent is the only hope that the child will not be returned to the latter and that the subsequent proceedings in the courts of origin will award the custody to the most suitable parent. However, the precondition for that to happen is that the abducting parent goes back to the child's habitual residence if he/she wants to have a chance of custody rights adjudicated to her/him, solely or jointly. Unfortunately, I am afraid that even then this might not be the case in all the times due to the courts' of origin political temptations to give custody to the citizens by origin so that the child would stay within the state borders. An ideal situation in the return proceedings would be that a requesting court would evaluate the factual circumstances without any political agenda and refuse to issue a return order if it finds that the return would make more harm than use for the child in question. The Court under the ECHR where it has recently ruled on the relationship between the Abduction Convention and the Article 8 of the ECHR in the

Neulinger and Shuruk v. Switzerland case also gave a similar approach. In short, the Court held that the circumstances of an individual child's situation have to be evaluated at the time of the proceedings and the child should not be returned if it would violate its best interests at that time. Thus, the Court amended the domestic decision ruled under the Abduction Convention, which is even softer than the Regulation, which makes one to wonder how the Court would rule in the matter under the latter instrument, considering the fact that only the exception under the Article 20 of the Abduction Convention is applicable.

The studied reports and case law also revealed another problem with the return rules, this time with regard to the principle of a speedy return, which proves to be not particularly followed in reality. It appears that in many cases the child is being returned only after several years of living in another country with the abducting parent. Such a return, to my opinion, maintains only a legal status quo though not the factual one. Furthermore, such a coming back would only rebut the child's new factual status quo that has been acquired during the time in the new after- abduction home. Moreover, the principle of immediate return, as we have learned from the study, is interrelated to the main objective of the abduction instruments, that is, to deter future abductions. However, one can clearly see that it has not yet functioned in that way. The in the study submitted data shows that the international abductions keep increasing every year.

Another problem that I discovered in the studied case law was a pattern of the courts' of origin behaviour after they had been notified about a particular abduction. Quite often, such courts transform the custody, giving it solely to the left behind parent, before they request the return of the child. This technique, according to me, makes the return negotiations poorer. The requested state is from the beginning convinced that if the child is returned, the former abducting parent risks to get very limited access rights with the child, who has spent the latest years with the latter parent alone. Consequently, it is hard to escape the thoughts that after the return the child is forced to live through the very same abduction situation once more only with the other parent. My suggestion to the solution of this problem would be to let the child stay in the country to where it was abducted for a longer time and reside with both of the parents by turns, until the child has adjusted to be with both of them. Only then should the child be returned to the habitual residence where the custody matter could be resolved. Considering the fact that the authorities of both countries usually share the same information on the circumstances of a particular case, there should be no problems in assessing whether such gradual adjustment in the requested country should be appropriate or not. Such a settlement should protect both collective and individual interests of abducted children since the courts of origin would still keep the jurisdiction and the abducting parent would not lose the contact with the child to the detriment of the child itself. I think that the chance that the former abductor parent would acquire her/his share of custody would be thus greater as well, as long as it is for the child's best interests. Without doubt, such a balanced solution is possible only when the courts with jurisdiction are being objective enough to realise that the child should be able to see its both parents on casual basis even though the

parents live in different states. Otherwise, it is only the question of time when parents and children will start frequently go to the Human Rights Court and complain about restrictions on their right to family life under the Convention and the UNCRC.

From the discussed Swedish and Lithuanian relevant legal acts we can conclude that both systems have issued laws referring to the domestic procedural rules on speedy procedures underlining the need of such when the Regulation or the Convention are not itself regulating on the matter. The study has also shown that Lithuania has received or sent very few return applications and one can only speculate why this is the case due to the fact that many thousands of Lithuanians leave the country for permanent living abroad every year. My humble guess is that the Lithuanian people still are very restrained in relying on their home authorities. The assumption cannot be totally unfounded due to the fact that the studied public and private, legal and social authorities and institutions, which directly work with abduction matters, include very little information comprehensible for a layman. Moreover, the scarce amount of case law seems to be disproportionate in relation to the submitted data on numbers of the Lithuanian people leaving their homes every year.

A Swedish case that attracted my greatest attention is *RÅ 1995 ref. 99,* which shows that a technical failure in the return procedure can decide the fate of the left behind parent even though he (it was a father) was an active custodian and did not agree on the child's removal in the first place. The only mistake the father had made was to try to negotiate with the mother without involving judicial authorities. My response to the case decision is that the court should have paid a greater attention to the fact that the left behind father was trying to get the child back even though without going to court, especially when there are strong evidences of the activity of the kind as in this case. I think the judges should treat active oppositions against unlawful removal as equivalent to the court applications when the only difference between them is that the left behind parent did not apply for the return in court. Thus, the fact that the left behind parent chooses to settle the dispute peacefully should not place such a parent in an inferior situation. Therefore, the 12 months rule should be applicable in cases when left behind parents are passive in all other ways besides not going to court. However, to my satisfaction, the Swedish SC in the case *RÅ 2001 ref. 53* made a different decision and even said expressly in its judgement that the fact that the father did not legally react to the mother's flight does not affect the court's assessment.

Regarding the Russian approach towards international abductions, we can see that the relevant case law under the Article 8 of the ECHR is applicable for all the CP, thus also the Russian Federation. For instance, the *Hokkanen v. Finland* case revealed that non-compliance with the court decision on access rights was a violation of Art. 8 of the ECHR, which means that if a parent had her/his child living in Russia with the other parent and the Russian authorities would refuse to respect the former parent's access rights, the Russian Federation might be kept liable for breaching the Article 8; or the other way around, for that matter. In fact, even the circumstance that a SP to the ECHR has not fulfilled its positive obligations

under the Article 8, in conjunction with relevant provisions in the UNCRC, to adopt effective rules on preventing and dealing with international abductions can lead to an established breach of the provisions in question, as established in the cases *Bajrami v. Albania* and *Hansen v. Turkey*. Furthermore, we know now that Russia is considering joining the Abduction Convention, but, for the time being, the named instruments are the only ones that are relevant in the matter.

Regarding Lithuanian and Swedish relations with non-convention states, the study has shown that a general uncertainty and inconsistency remains in the authorities' approach towards the handling of such matters.

In light of the above, we can conclude that international parental abduction is a very complicated and delicate matter, where many different interests interact, which makes it difficult to choose the most suitable approach. I personally prefer that in the study said, and in some case law established case-by-case methodology where the decision makers thoroughly review individual circumstances of the case before they determine whether an abducted child should be returned or not. The study has shown that such approach is a common ground in proceedings under the Abduction Convention. The matters under the Regulation, on the contrary, involve little consideration of factual circumstances due to the- by now famous for being excessively strict- return rules. However, the Article 42, which requests states with jurisdiction to fulfil certain criteria in order to get the child back, balances this stringent approach a little. The provision requires, inter alia, to take into consideration the requested state's position on the child's situation, or to give a child an opportunity to be heard, if it is appropriate. On the other hand, as we have seen in the case *Zarraga*, the appeals as to non-fulfilment of such criteria can be made only in the courts of origin and only after the child is returned back.

In this final stage of the study, I strongly believe that the interests of an individual child should prevail over the collective principle of deterrence. After all, a decision not to return the child to where it had its habitual residence immediately before the unlawful removal or retention means only that the custody issue has to be resolved in the country where the child is residing at the moment. The fact that such legal outcome would place the left behind parent in an inferior procedural position is undeniable. However, given the general statement that instruments on rights of children should protect the interests of those, it is a sacrifice we should make. An objective evaluation of the child's interests, regardless of their parents', can be achieved only through an overall assessment of the individual circumstances of each case. The involved state authorities, according to me, should put their energy in mediation and cooperation so that children could enjoy their right to meet with both of their parents to the highest possible extent. Unfortunately, at the time being, the political or other interests seem having a greater value than those that should have most: those of children. Only when states will remain outside the barricades of disputing parents and stand in the middle with the children, the latters' interests, both individual and collective, will be addressed for real.

Supplement A

Excerpts from the Abduction Convention

The States signatory to the present Convention,
Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,
Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,
Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions

CHAPTER I – SCOPE OF THE CONVENTION
Article 1
The objects of the present Convention are –
a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2
Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3
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 sub-paragraph 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.

Article 4
The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5
For the purposes of this Convention –
a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;
b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.
CHAPTER II – CENTRAL AUTHORITIES

Article 6
A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.
Federal States, States with more than one system of law or States having autonomous territorial organisations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7
Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.
In particular, either directly or through any intermediary, they shall take all appropriate measures –

a) to discover the whereabouts of a child who has been wrongfully removed or retained;
b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;
c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;
d) to exchange, where desirable, information relating to the social background of the child;
e) to provide information of a general character as to the law of their State in connection with the application of the Convention;
f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access;
g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;
h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;
i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

CHAPTER III – RETURN OF CHILDREN

Article 8

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 in securing the return of the child.
The application shall contain –
a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;
b) where available, the date of birth of the child;
c) the grounds on which the applicant's claim for return of the child is based;
d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.
The application may be accompanied or supplemented by –
e) an authenticated copy of any relevant decision or agreement;
f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;
g) any other relevant document.

Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.
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. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.
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.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13
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 –
a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
b) 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.
The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.
In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 14
In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15
The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16
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 this Convention is not lodged within a reasonable time following receipt of the notice.

Article 17
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.

Article 18
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.

Article 19
A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20
The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

CHAPTER IV – RIGHTS OF ACCESS
Article 21
An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

Supplement B

Excerpts from the Brussels II Regulation
Article 11
Return of the child
1. Where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter 'the 1980 Hague Convention'), in order to obtain the return of a child that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention,
paragraphs 2 to 8 shall apply.
2. When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child 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.
3. A court to which an application for return of a child is made as mentioned in paragraph 1 shall act expeditiously in proceedings on the application, using the most expeditious procedures available in national law. Without prejudice to the first subparagraph, the court shall, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged.
4. A court cannot refuse to return a child on the basis of Article 13b of the 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.
5. 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.
6. If a court has issued an order on non-return pursuant to Article 13 of the 1980 Hague Convention, the court must immediately either directly or through its central authority, transmit a copy of the court order on non-return and of the L 338/6 EN Official Journal of the European Union 23.12.2003 relevant documents, in particular a transcript of the hearings
before the court, to the court with jurisdiction or central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law. The court shall receive all the mentioned documents within one month of the date of the non-return order.
7. Unless the courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seised by one of the parties, the court or central authority that receives the information mentioned in paragraph 6 must notify it to the parties and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child. Without prejudice to the rules on jurisdiction contained in this Regulation, the court shall close the case if no submissions have been received by the court within the time limit.
8. Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child.

Bibliography

Books

Beaumont Paul R. and Mceleavy Peter E., *The Hague Convention on International Child Abduction*, (Oxford, 1999)

International parental child abduction, Chapter 5, International Child Law, Second edition, Trevor Buck, Alisdair A. Gillespie and others, Routlege, London and New York, 2011

Mcglynn Clare, *Families and the European Union, Law, Politics and Pluralism*, (Cambridge, 2006)

Mikelėnas Valentinas, *Šeimos teisė* (Family Law), (Vilnius: Justitia, 2009)

Rejmer Annika, *Vårdnadstvister, En rättssociologisk studie av tingsrätts funktion vid handläggning av vårdnadskonflikter med utgångspunkt från barnets bästa.* (Custody disputes, A legal-sociological study of the district court's function in the handling of custody disputes on the basis of the child's best interests) (Lund, Studies in Sociology of Law, 2003)

Schiratzki Johanna, *Vårdnad och vårdnadstvister* (Custody and custody disputes), Norstedts Juridik AB, Stockholm, 1997

Willems Jan C.M (ed.), *Children's Rights and Human Development: A Multidisciplinary Reader*, (2010 Intersentia, Antwerp-Oxford-Portland)

Lithuanian legislation

Lietuvos Respublikos Civilinis Kodeksas (Civil Code of the Republic of Lithuania), 2000 m. liepos 18 d. Nr. VIII-1864, Vilnius. http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=390714&p_query=&p_tr2=

Lietuvos Respublikos Civilinio Proceso Kodeksas (Civil Procedure Code of the Republic of Lithuania), No. IX-743
http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=284330&p_query=&p_tr2=>

Lietuvos Respublikos Civilinį Procesą Reglamentuojančių Europos Sąjungos ir Tarptautinės Teisės Aktų Įgyvendinimo Įstatymas (Law of the Republic of Lithuania on the implementation of the European Union and International Law on regulation of civil process.)
http://www3.lrs.lt/pls/inter2/dokpaieska.showdoc_l?p_id=329726

Lietuvos Respublikos Konstitucija, Lietuvos Respublikos piliečių priimta 1992 m. spalio 25 d. referendum (Constitution of the Republic of Lithuania adopted by Lithuanian citizens of the Republic of Lithuanian in a referendum in 25 October 1992)
http://www3.lrs.lt/pls/inter2/dokpaieska.showdoc_l?p_id=237975

Lietuvos Respublikos Tarptautinių Sutarčių Įstatymas (Law on International Agreements of the Republic of Lithuania), 1999 m. birželio 22 d. Nr. VIII-1248, Vilnius
http://skelbimas.lt/istatymai/tarptautiniu_sutarciu_istatymas.htm

Del Lietuvos Respublikos Vyriausybes 2002 M. VASARIO 28 D. Nutarimo Nr. 302 „Del Vaiko Laikino Isvykimo i Uzsienio Valstybes Tvarkos Parvirtinimo“, Pakeitimo, 2007 m. balandžio 25 d. Nr. 414 (Procedure for Approval of Amendment of Resolution of the Government of the Republic of Lithuania of 2002 28 February No. 302 "Children's temporary departure to a foreign country “, April 25, 2007)
http://www.lrvk.lt/lt/teises-aktai/priimti-teises-aktai/?a=Nutarimas&an=&df=&dt=2009-12-20&ot=0&q=&p=414

Vaiko teisių apsaugos pagrindų įstatymas (Framework Law on Protection of Rights of the Child), 1996 m. kovo 14 d. Nr. I-1234, Vilnius
http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=26397

Russian Legislation

Гражданский процессуальный кодекс (ГПК РФ) (Civil Procedure Code of the Russian Federation)
http://www.zakonrf.info/gpk/409/

Семейный кодекс Российской Федерации от 29 декабря 1995 года N 223-ФЗ (Family Code of the Russian Federation of December 29, 1995 N 223-FZ
http://www.rg.ru/2007/10/22/semejny-kodeks-dok.html

Уголовный Кодекс Российской Федерации от 13 июня 1996 г. N 63-ФЗ (Criminal Code of the Russian Federation of 13 June 1996 N 63-FZ)
http://www.rg.ru/2007/11/12/ukrf-dok.html

The Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, 22 January 1993, Minsk, as amended on 28 March 1997).
http://www.hcch.net/upload/wop/jdgm_info01e.pdf

Swedish Legislation

Lagen (1904:26 s. 1) om vissa internationella rättsförhållanden rörande äktenskap och förmyndarskap (Law (1904:26 p. 1) on Certain International Legal Relationships Relating to Marriage and Guardianship)

Lagen (1989:14) om erkännande och verkställighet av utländska vårdnadsavgöranden osv. och om återförande av barn. (The Law (1989:14) on Recognition and Enforcement of Foreign Decisions Concerning Custody of Children etc. and on the Return of Children)

Lagen (1996:242) om Domstolsärenden (Law (1996:242) Regarding Court Procedures)

Other Internet Sources

Official websites

A Treaty between the Republic of Lithuania and the Russian Federation on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (Lietuvos Respublikos ir Rusijos Federacijos Sutartis dėl Teisinės Pagalbos ir Teisinių Santykių Civilinėse, Šeimos ir Baudžiamosiose Bylose), Entered into force on 1995-01-21 http://www3.lrs.lt/pls/inter2/dokpaieska.showdoc_l?p_id=19827

Contemporary Migration Research, Lithuanian Emigration Institute. http://www.iseivijosinstitutas.lt/index.php?cid=14>

Finnish-Russian Expert Conference on International Child and Family Law, News & Events, Hague Conference on Private International Law,23-03-2011 http://www.hcch.net/index_en.php?act=events.details&year=2011&varevent=214, 2011-04-07

Hague Conference on Private International Law, The Child Abduction Section http://www.hcch.net/index_en.php?act=text.display&tid=21

Ministry of Social Security and labour, Republic of Lithuania http://www.socmin.lt/index.php?-1000530127

State Childs Rights Protection and Adoption Service under the Ministry of Social Security and Labour http://www.ivaikinimas.lt/tarpt_apsauga

Articles

Bogdan, Michael, Något om gränsöverskridande barnkidnappningar (Slightly about cross-border child abductions). *Festskrift tillägnad Ulla Jacobsson*. Stockholm 1991, p.25

European Court of Human Rights Judgements http://www.incadat.com/index.cfm?act=search.detail&cid=868&lng=1&sl=2

Куликов Владислав, Правила хорошего развода, Верховный суд разъяснит, с кем должны жить дети после развода родителей. (The Supreme Court will explain, with whom the children should live after the divorce.), "Российская газета" - Федеральный выпуск №5418 (42) (”Rossiyskaya Gazeta" - federal issue № 5418 (42), 01.03.2011, 00:27
http://www.rg.ru/2011/03/01/razvod.html

Morley Jeremy D., Enjoying Potential International Child Abduction, *New York Family Law Monthly*, May 2009
http://www.international-divorce.com/Enjoining-Potential-International-Child-Abduction, 2011-02-21-15:02

Neteisetas Vaiko Isvezimas ir (ar) Laikymas (Wrongful child removal and (or) retention), State Childs Rights Protection and Adoption Service under the Ministry of Social Security and Labour.) http://www.ivaikinimas.lt/tarptautinis_bendradarbiavimas

Похищения детей в интернациональных семьях (Abduction of children in international families). Социальный проект, Проблема похищений несовершеннолетних (Social project, the problem of abduction of minors). http://www.detivrunete.ru/nedopusti/pohishenija/index.php?ELEMENT_ID=777

Stripeikienė Janina, Europeizuotos ir internacionalizuotos privatinės teisės aiškinimas ir taikymas Lietuvos Aukščiausiojo Teismo Civilinių bylų skyriaus praktikoje: lyginamojo metodo vaidmuo (Internationalized and Europeanized private law interpretation and application of the Lithuanian Supreme Court of the Civil Division in Practice: the role of the comparative method)
http://www.lat.lt/4_tpbiuleteniai/senos/nutartis.aspx?id=34063

Тамара Шкель, Обратный билет домой; Детей, увезенных из страны родителями-иностранцами, станет легче вернуть на родину (A return ticket home; Children taken away by foreign parents will be easier to return home.) "Российская газета".
http://www.rg.ru/2011/03/30/detiduma-site.html, 30.03.2011

Тимофеева Ирина, Дети разных народов. Как защитить детей, которые оказываются предметом дележа со стороны матери и отца, а потом уже и двух государств, гражданами которых они являются? (Children of different nations. How to protect children who are subject to division by the mother and father, and then also by the two states, which they are citizens?), Novaya Gazeta, № 55 от 27 Мая 2009 г
http://www.novayagazeta.ru/data/2009/055/32.html

Хазова Ольга Александровна, Международное похищение детей: правовые аспекты (International Child Abduction: Legal Aspects), Zakon (Law), No. 1, January 2010, page(s): 65-70, Moskva, Russia
https://dlib.eastview.com/browse/doc/21453089

Van Rossum Wibo, The clash of legal cultures over the 'best interests of the child', principle in cases of international parental child abduction. Volume 6, Issue 2 (June) 2010
http://www.utrechtlawreview.org/

Books

Pålsson Lennart, Vårdnad och umgängesrätt i svensk internationell privaträtt, SOU 2005:111, Google Book, p.92.

Official reports and documents

A Statistical Analysis of Applications Made in 2003 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I – Overall Report, drawn up by Professor Nigel Lowe, Prel. Doc. No 3, Part I (2007 update), September 2008
http://www.hcch.net/upload/wop/abd_pd03e1_2007.pdf , 2011-04-11

Biuletenis "Teismų praktika", Europos Bendriju Teisingumo Teismo Sprendimu Santraukos, II d.(Bulletin "jurisprudence ", European Court of Justice, Summary of Decisions, Part II). EBTT-2 2009-07-29
http://www.lat.lt/4_tpbiuleteniai/senos/nutartis.aspx?id=34799

COM (2002) 222 final. Proposal for a Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility repealing Regulation (EC) No 1347/2000 and amending Regulation (EC) No 44/2001 in matters relating to maintenance (presented by the Commission), Brussels, 17.5.2002

Explanatory Report on the 1980 Hague Child Abduction Convention, Elisa Pérez-Vera, Child Abduction Section, 1982
http://www.hcch.net/index_en.php

Пояснительная записка к проекту федерального закона "О присоединении Российской Федерации к Конвенции о гражданско-правовых аспектах международного похищения детей", (Explanatory note to the draft federal law "On accession of the Russian Federation to the Convention on the Civil Aspects of International Child Abduction.)
http://mon.gov.ru/dok/proj/7758,print/

Proposition 2007/08:98 Kompletterande bestämmelser till den nya Bryssel II-Förordningen
http://www.riksdagen.se/Webbnav/index.aspx?nid=37&dok_id=GV0398

Третий периодический доклад о реализации Российской Федерацией Конвенции ООН о правах ребенка, (1998–2002 гг.) (The third periodic report on implementation of the United Nations Convention on the Rights of the Child by the Russian Federation)
http://www.rfdeti.ru/news/rubric-11.15/

Questionnaire concerning the practical operation of the Hague Convention of 25 October 1980, drawn up by the Permanent Bureau, November 2010, Lithuania
http://www.hcch.net/upload/abduct2011lt1.pdf, 2011-04-12

Questionnaire (2) concerning the practical operation of the Hague Convention of 25October, Sweden
http://www.hcch.net/upload/abd_2006_se.pdf

Rapport från Riksdagen, 2008/09: RFR8, Bortförda och kvarhållna barn i internationella förhållanden Riksdagstryckeriet, Stockholm
http://www.riksdagen.se/webbnav/?nid=3777&doktyp=rfr&rm=2008/09&bet=RFR8&dok_id=GW0WRFR8

Reply by the Swedish Central Authority to the Hague Conference Questionnaire on preventive measures in the context of the 1980 Hague Convention on the Civil Aspects of International Child Abduction
http://www.hcch.net/upload/wop/prevmeas_se.pdf

Tampere European Council 15 AND 16 October 1999, Presidency Conclusions
http://www.europarl.europa.eu/summits/tam_en.htm

Table of Cases

ECHR Court

Bajrami v. Albania

Hansen v. Turkey

Hokkanen v. Finland

Maumousseau and Washington v. France

Neulinger & Shuruk v. Switzerland

ECJ

Case C-195/08PPU (Rinau)

C-403/09 PPU (Detiček)

C- 400/10 PPU (McB)

C- 497/10 PPU (Mercredi)

C- 256/09 (Purrucker I)

C- 296/10 (Purrucker II)

C- 491/10 PPU (Zarraga)

C- 211/10 PPU (Povse)

Lithuania

Ruling of the Supreme Court of Lithuania of 24 April 2002, civil case No. 3K-3-650/2002.

Ruling of the Supreme Court of Lithuania of 22 October 2003, civil case No. 3K-3-1003/2003.

Ruling of the Supreme Court of Lithuania, of 19 June 2007, civil case No. 3K-3-254/2007 (S).

	Ruling of the Supreme Court of Lithuania of 13 April 2010, civil case No. 3K-3-169/2010
Sweden	RÅ 1995 ref. 99
	1996 ref. 52
	1997 ref. 58
	2001 ref. 53
	2002 ref. 1
	2002 ref. 69
	RH 2006: 60
	2010: 85
	NJA 1995 s. 241
	1997 s. 196
	2002 s. 390
	2008 s. 963