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**CIVIL LAW AND PRIVATE INTERNATIONAL LAW ASPECTS OF
THE UNLAWFUL REMOVAL OF THE CHILD**

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IN THE LIGHT OF SENTENCING PRACTICE

Theses of the doctoral dissertation

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CONTENTS

1. SUMMARY OF THE RESEARCH TASK.....	3
2. SHORT DESCRIPTION OF THE EXAMINATIONS AND ANALYSES, METHODS OF PROCESSING.....	7
3. SHORT SUMMARY OF THE FINDING OF THE RESEARCH.....	9
3.1 Conclusions drawn from unlawful removal, as a concept, on the basis of its approach through the legal institution of custody.....	9
3.2. Conclusions drawn from the content and effectiveness of the effective international and private international law sources.....	12
3.3. Analysis of the stipulations of the Hague Abduction Convention¹ and the experience about the effectiveness thereof in the Contracting States.....	14
3.4 Analysis of the stipulations of the articles 10, 11 and 20 of the Brussels II bis² and the effectiveness thereof in practice.....	28
3.5 Findings of the analysis of the issue regarding the enforcement of the decisions regarding the return of the child abroad.....	32
3.6. General statements, usability of the findings of the research, recommendations for the legislators.....	33
4. MY STUDIES REGARDING THE TOPIC OF THE PHD DISSERTATION.....	38

1 Hague Convention on the Civil Aspects of International Child Abduction dated on 25 October 1980 (promulgated by the law decree 14 of 1986) **abbreviated as Hague Abduction Convention**

2 Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, hereinafter abbreviated as **Brussels II bis**.

1. SUMMARY OF THE RESEARCH TASK

The focus of this dissertation is the civil law and private international law aspects of the unlawful removal of the child, since in Hungary, during the previous decades, the legal relationship between parent and child is more and more often affected by the fact or the intention of bringing the child abroad. This trend is visible not only in Hungary, but all over the world as well and more and more countries find it necessary to be a member of the Hague Abduction Convention³ created almost 40 years ago to provide an efficient protection also in the international level for the unlawfully removed children under 16 from a state to another and indirectly for the left behind parents. This was primarily intended to be achieved by a private international law procedure aiming that in case of unlawful removal of the child abroad, the child shall be immediately returned to the state of his/her habitual residence before removal. The further aim of the Hague Abduction Convention is to ensure contact and according to the official Hungarian translation of the regulation, the right of access between the left behind parent and his/her child as soon as possible and with efficient measures. However, among the aims above, the dissertation analyses only the returning mechanism and the concepts and the legal institutions related thereto. It deals with the issue of access only marginally, since it focuses mainly on the analysis of the judicial decisions regarding the Hague Abduction Convention and the legal aid regarding access is out of the scope of authority of the judges in Hungary.

Hungary has been taking part in the Hague Abduction Convention since 1986 and the regulations thereof have been applied since 1 July 1986. This also means that certain cardinal regulations of this convention have been interpreted by the Hungarian courts⁴ for several decades regarding the adjudications of the requests for the return of the children unlawfully brought to or retained in Hungary. The scientific processing of these regulations, the comparison thereof with the interpretation of other Contracting States and with the aspects in literature are of outstanding importance, since due to the increasing number of the Contracting States of the Hague Abduction Convention, these regulations should be applied relatively uniformly contrary to the different judicial cultures and social conditions and at the same time, due to these factors, the possibility of

3 Until December 2018, only in this decade, 18 countries joined (Andorra, Bolivia, Gabon, Guinea, Iraq, Jamaica, Japan, Kazakhstan, Republic of Korea (South-Korea), Lesotho, Morocco, Pakistan, the Philippines, Russia, Singapore, Tunisia, Zambia and in 2018, Cuba) reference: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24>, number of the Contracting States

4 Due to the exclusive competence, the Pest Central District Court as the court of first instance, the Tribunal of Budapest as the court of second instance and the Curia in the review procedure

the different interpretation of the cardinal regulations – especially the articles 3 and 13 – by the certain enforcing authorities was significantly increased. This latter is, however, not desirable, since to achieve the aims included in the Hague Abduction Convention it is necessary to let the Contracting States interpret such aims identically, if possible, and to follow a uniform practice upon the adjudication of the disputes. The same applies for the EU member states applying the Brussels II bis, since certain stipulations thereof amended the effectiveness of the Hague Abduction Convention in case of the unlawful removals between Member States. To reach a relative legal uniformity it is necessary to scientifically analyse the decisions of the Contracting States and the justifications thereof from time to time and to let the courts be able to use the findings of such analyses upon bringing their decisions. All these make the protection of the interests of the children unlawfully removed abroad as well by letting the courts applying the Hague Abduction Convention and the Brussels II bis in the light of these research findings re-evaluate their legal points of view, if necessary. Furthermore, the findings of the analyses may support the legislators to see which amendments of the acts are necessary to make certain civil or administrative procedures or legal institutions affecting cross-border family law relationships really child-centred. This latter is served by the availability of a compilation reviewing the various private law aspects of abduction for the enforcing authorities, which, in addition to the return mechanism based on the foundations of the Hague Abduction Convention, includes the legal institutions inherent to the area of law, such as the enforcement of the decisions on the return of the child, the determination of the place of residence of the child abroad and the resolution of the disputes out of the court. Therefore, my research was dealing not only with the return mechanism of the Hague Abduction Convention and the relating parts of the Brussels II bis regulation amending such convention within the European Union. For the sake of completeness, this research covers the part of the Hungarian legislation dealing with the regulation of the returning procedure and covers the fundamental right and human right aspect of the returning mechanism. Therefore, I also analysed how the Constitutional Court adjudicated the constitutional appeals submitted against the judicial decisions brought in the cases regarding unlawful removal and I reviewed the sentencing practice of the European Court of Human Rights (hereinafter referred to as the ECHR), which affected the adjudication of the violations of human rights referred to by the applicants regarding the Hungarian unlawful removal cases.

Although the prevention of the abduction of a child or the encouragement of the lawful change of the habitual residence could have been inserted into the first part of this dissertation, it was a deliberate decision to put this topic into the last-but-one chapter. In this way, the anomalies in the

Hungarian law regarding the determination of the place of residence abroad are revealed with the help of the earlier chapters, which are specially emphasised in the summary as well.

As this field of law is processed in a relatively low extent, this handbook-like review giving an overall approach may be gap-filling, since in addition to the above, from historical approach, I also deal with that in which cases the protected legal interest, i.e. the exercising of the parental custody right - including the right to determine the place of residence of the child - is violated by the removal of the child abroad and under which circumstances the removal of the child is considered as unlawful. The decision of this latter is often a great challenge even for the law enforcers and not only the laity and based on my experience, in practice, there are interpretation issues as well.

Due to my profession, I have a thorough knowledge in the judicial cases regarding the unlawful removal of the child abroad, as I have been working as a judge in the civil division since 2001; first in the family law group of the Pest Central District Court in the court of first instance and since 2012, in the Tribunal of Budapest, in the court of second instance. As a judge ordered to the Curia in 2014, it became possible for me to take part in the adjudication of the child abduction cases in a judicial review procedure, out of the procedural stages above. Additionally, in 2013 I was the member of the work team of the Curia, which analysed the judicial practice of these cases and since 2008, I have been continuously holding presentations in Hungarian and in foreign language in this topic, and as a tutor, I have been taking part in the specialist Family Law LL.M. training of the Institute for Postgraduate Legal Studies of the Eötvös Loránd University. During these activities, I very often faced the difficulties of these cases and statements of facts, for the solution of which the foreign literature and the international collection of cases were often a great help for me. Therefore, my main motivation as a researcher was to create a material which is useful for the judicial practice as well.

The timeliness of the scientific research on child abduction is indicated also that since the previous decade, multiple monographs have been issued in this topic in Germany, Great Britain and the United States of America. Additionally, the actuality of this topic is supported by the increasing number of countries taking part in the Hague Abduction Convention⁵ together with the statistical data of the Permanent Bureau of the Hague Conference on Private International Law. According to

5 Until the spring of 2019, the number of Contracting States increased to 100. Reference: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24> downloaded on: 2 May 2019

this latter, until 2015, as many as 2652 requests were submitted regarding abduction on the basis of the Hague Abduction Convention from the 93 Contracting States that time, out of which 2270 had focused on the return of the unlawfully removed child and 382 on the settlement of access. The 2270 requests on return affected 2997 children with a mean age of 6.8 years.⁶ Considering the low age of the affected children - especially as it is more and more frequent that infants are unlawfully removed from a country to another - during my research I was searching for an answer whether the presumption of the Hague Abduction Convention, i.e. as a main rule, the best interest of the abducted children is their return, is still correct and based on which interpretation the exceptions making possible the denial of the return of the child serve the best interest of the child affected by abduction. The gravity and the difficulty of the questions arisen during the analysis of the regulations are indicated by the occasional inconsistency between the approach of the decisions of the Court of Justice of the European Union (hereinafter referred to as CJEU) and the ECHR regarding unlawful removal. However, it can be concluded that during the adjudication of the request on the return of the child, the fundamental right and human right protection of the child shall be ensured and it is not sufficient to consider the aims described in the stipulations of the Hague Abduction Convention, and the Brussels II bis of the European legislator. Additionally, the decisions of the court shall be in accordance with the Children's Rights Convention⁷ reinforcing by the way the Hague Abduction Convention and this increases on the number of factors to be considered during the application of the stipulation of law.

The unlawful removal of the child abroad has private law and criminal law aspects. However, in this dissertation I deal only with the private law aspect in more details and the criminal law aspect is only marginal herein by dealing with it in certain relations, only in the necessary extent. This is justified by that the legal institution is basically of private international law type, it has multiple connections and organic relationship with civil law and the requests on the return are heard by civil law division judges in Hungary.

6 Statistics analysing the functioning of the Hague Abduction Convention by Nigel Lowe and Victoria Stephens, 2015., Global report reference: <https://assets.hcch.net/docs/d0b285f1-5f59-41a6-ad83-8b5cf7a784ce.pdf> downloaded on 27 February 2018

7 Convention on the Rights of the Child, New York, 20 November 1989 (promulgated by the Act LXIV of 1991)

2. SHORT DESCRIPTION OF THE EXAMINATIONS AND ANALYSES, METHODS OF PROCESSING

This dissertation can be divided into two major parts. In the first part, I analysed the evolution of the private international law concept and legal institution of the child abduction from the approach of history of law, legal dogmatics and case orientation, via the civil law rules on the protected legal interest, i.e. the exercising of the parental custody right. With the methods above I intended to show the separation thereof from the similar legal institution related primarily to the internal law of certain countries, i.e. the release of the child, and I revealed the reasons through the comparison of certain international law and private international law sources, due to which this dissertation focuses on the stipulations of the Hague Abduction Convention. There are highly significant differences between the two legal institutions; according to the effective Hungarian substantive law⁸, due to the legal institution of the release of the child, the parent entitled to exercise custody right or the public guardianship authority may claim for the release of the child from the person unlawfully holding the child in custody. However, the legal institution of the return of the child unlawfully brought abroad is basically a private international law institution, but due to the protected legal interest, i.e. the parental custody right, it is organically bound to civil law. Owing to the detailed analysis of the changes in the Hungarian regulation regarding parental custody right it is also revealed herein, in which cases during the previous century was the removal of the child (especially abroad) from Hungary considered as unlawful on the basis of substantive law. By introducing all these it becomes unambiguous that the decision of this question either in the past or based on the effective law is sometimes a difficult task for the enforcers.

The second part is structured around the analysis of the return mechanism of the child unlawfully brought abroad and that of the other procedures and legal institution related thereto. These issues were approached also from multiple points of view: partly as regards legal dogmatics and concept analysis and partly in a case oriented way by comparing the various legal practices.

The basis of the case oriented approach of this dissertation was the analysis of the legally binding court judgements in the cases of 25 years, between 1991 and 31 December 2015 on the return of the children unlawfully removed to Hungary. The research of these materials was made possible by the

⁸ Paragraph (3) of the section 4:152 of the Civil Code „The parent or the public guardianship authority shall have the right to demand the child be released by any person who unlawfully holds the child in custody.”

permission no. 2016.El.XI.F.8/3 of the head of the Tribunal of Budapest and it affected the documents and registry data of the non-contentious procedures available in the Pest Central District Court and the archives within the set research period, i.e. 22 February 2016 and 30 June 2016. The electronic registry book managed by the court contains data from 1996 regarding the unlawful removal procedures. Therefore, this research covers actually the 119 cases in progress between 1996 and 31 December 2015. In addition to the above and based on the permission no. 2016.El.XI.F.8/7 of the head of the Tribunal of Budapest, in the dissertation there are in anonymised form legally binding decisions – orders and judgements – brought by the Curia within the competence of the Tribunal of Budapest, which directly or indirectly relate to the topic of unlawful removal, but they are not affected due to some reason by the research in the archives.

In addition to the processing of the Hungarian case law, significant amount of data were obtained from the relevant case collection of the Hague Abduction Convention, the so-called INCADAT⁹ to compare the Hungarian legal practice with the practice of other Contracting States and to draw conclusions therefrom, in which database advanced search can be applied for the case decisions brought and published in the Contracting States in the unlawful removal cases on the basis of topics, certain articles, keywords or countries. Their selection based primarily on relevance and it was an additional aspect to give an answer to questions arisen on the basis of identical or similar statement of facts which had already been arisen in the Hungarian judicial decisions learnt during the research.

Furthermore, as regards the topic hereof, I tried to fully process (until the closure of the manuscript hereof at the end of December 2018) the relevant sources of law, such as the regulations, the published judicial decisions and the Hungarian legal literature sources (studies, handbooks, commentaries) and as regards the related foreign legal literature, I used primarily the numerous monographs issued during the previous years in German and in English, which were largely inspired by the related other international publications. The relevant decisions brought by the CJEU regarding unlawful removal, the decision of the ECHR in this topic with Hungarian relations and the orders and decisions of the Constitutional Court of Hungary were also processed.

9 International Child Abduction Database www.incadat.com

3. SHORT SUMMARY OF THE FINDING OF THE RESEARCH

3.1 Conclusions drawn from unlawful removal, as a concept, on the basis of its approach through the legal institution of custody

The Civil Code¹⁰ aimed to eliminate the anomalies arisen due to the stipulations of the Family Act¹¹ previously in force regarding the assessment of the removal of the child abroad and the legal nature thereof. In this regard, the Family Act emphasised several times that the child may reside abroad for a longer time upon the concerning consent of both parents. Due to that the Civil Code stipulates by using the “long term residence” and the “for the purpose of settlement” terms that the parents living separated and apart shall have a joint right as regards the major issues relating to the child’s well-being¹², it is to be decided how to define the removal of the child abroad. About such definition, the Act gives no support and in the light of the increased international mobilisation readiness¹³ experienced within the younger generation bringing up minor children, there is no need or it is not possible to make any distinction between the implicit legal meaning of the two concepts, as the decisions of the parents about moving abroad are often occasional and not for a whole life¹⁴.

If the parents are unable to agree regarding the long-term or permanent removal of the child abroad, according to the effective Hungarian law, such dispute of theirs shall be decided exclusively the public guardianship authority.¹⁵ Contrary to the related stipulations of the Civil Code, it is still unclear for the parents and often also for the enforcers in which cases bringing the child abroad or keeping him/her there is unlawful. Furthermore, it is not evident for the public guardianship authority either that its scope of authority regarding bringing a decision on the long-term removal of the child abroad shall not cover the legalisation of a removal via a later decision, which has been considered as unlawful. It is also a problem and the majority of the enforcers fail to recognise

10 Act V of 2013 on the Civil Code

11 Act IV of 1952 on Marriage, Family and Custody

12 Paragraph (2) of the section 4:175 of the Civil Code: Major issues relating to the child’s well-being shall cover the naming of a minor child and changing the child’s name, relocation of the child’s residence to a place other than one where his/her parent lives, **or to abroad for long term residence or for the purpose of settlement**, changing the child’s citizenship and decisions relating to the schooling or career path of the child.

13 In 2015, approximately 4.7 million immigrants arrived to the 28 Member States of the EU, while based on the official data, at least 2.8 million emigrants left the EU. Reference: http://ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics/hu downloaded on 1 November 2017

14 statement based on the professional experience obtained during 18 years as a family law judge

15 Paragraph (3) of the section 4:175 of the Civil Code: If the parents living separate and apart are unable to reach an agreement in connection with any of the jointly exercised parental rights referred to in paragraph (2), the guardianship authority shall decide on the matters in question.

contrary to the stipulations of the legislation that the public guardianship authority shall have an exclusive scope of authority to decide a dispute on the long-term removal of a child abroad, even if there is an ongoing lawsuit between the parties regarding the judicial settlement or the repeal of the custody rights. In case of a cross-border parent-child relationship it means that a parent having a habitual residence abroad – in case of the intent of lawfulness – shall not resettle the child from Hungary to himself/herself without the consent of the other parent or in the lack of a legally binding administrative decision and shall not keep the child with himself/herself, if the legally binding decision of the court entitled him/her to exercise the right of custody of the child.

As regards the permission of the travel of the child abroad for an extended period, a problem may be triggered by the duration thereof, the wide margin for interpretation of the Hague Abduction Convention and by that due to the various jurisdiction provisions concerning custody, the habitual residence of the child during his/her stay abroad may change, even if there is no parental concurrence of wills in this regard. Namely, the habitual residence of the child is primarily determined by the assessment of facts, therefore, if a child spends an extended period in a state, integrates to the surrounding environment, feels well and his/her parent looking after him/her ensures an appropriate family environment for him/her, it is not excluded that the court of the given state - if any of the parents brings a custody-related dispute to the court - decides that the habitual residence of the child became the state where he/she had been brought with the prior consent of the other parent, since it is considered as an important aspect during the concerning judicial deliberation how much time the child has already spent in the given country and even 6 months are considered as significant in this regard. In this way, the competence regarding the given dispute of custody may transfer to the court of the country where the parent brought the underage child lawfully, but only for a definite period, and contrary to this latter, the child spends more time there than the parent left in Hungary expected based on the prior discussion. All these are significant, as after bringing the child abroad from Hungary, in a dispute on custody right between the parents in a similar case, not a Hungarian authority or court will bring a decision and additionally, considering the 1996 Hague Convention on the Protection of Children¹⁶, not on the basis of the Hungarian substantive law. All these inevitably make the possibility of the exercise of rights harder for the parent stayed in Hungary, since the litigation abroad increase the expected costs of the lawsuit and as I see, it influences accessibility as well. During a similar dispute it is uncertain the foreign court comes to which conclusion upon the deliberation of the

¹⁶ Item 1 of the Article 15 of the Act CXL of 2005: The authorities of the Contracting States shall apply their own laws during their practice of their competence ensured by the stipulations of the Chapter II.

habitual residence of the child in case of a statement of facts above or similar. Upon the adjudication of the request on return will it consider the parental intention as well in addition to the facts and will it attribute any legal significance to that the requesting parent deceived the parent left behind regarding the aim and the duration of the leave to the state of removal?

It is also the result of an analysis regarding the content of the custody rights to state that there are new questions arisen as regards the shared parenting which appeared in more and more states in the previous decade concerning the unlawful removal of children abroad. During the application of law, it is a problem that there is no unified position either in Hungary or within the European Union whether the court decisions ordering shared parenting or approving an agreement thereabout qualify as decisions on contact or the exercise of custody rights in case of the execution of such decision. Additionally, in case of the settlements in the neighbouring member states, which are geographically close to each other it may occur that the parents within the framework of shared parenting take care of the child separately, but in the two sides of the border, which makes the adjudication of the habitual residence of the child and the keeping of the child in a state without the consent of the other parent significantly more difficult and it inhibits the effective protection of the child in case of unlawful removal abroad or keeping him/her there.

Based on the research I could conclude that the attention of the parents and the enforcers shall be called also to that in case of the settlement of disputes between them, the wording of the consent to bring the child abroad shall be unambiguous and unequivocal for others. Considering the theoretical possibilities of the transfer of competence and for the prevention thereof the content and the wording of the agreement is of outstanding importance, in which the left behind parent consents to the removal of the child abroad for a definite and foreseeable period, however, he/she tries to create guarantees to require the child to be returned to Hungary by all means after the expiry of such period. There have already been attempts in other states to solve this issue. Out of the possible variations the best could be to state in writing, in a private document providing full evidence that the parent who brings the child abroad explicitly accepts the other parent to return the child to Hungary after the expiry of the definite period, with his/her unilateral decision, if the parent who brings the child abroad fails to return the child in time. If the child is returned to Hungary in this way and the parent in the other state initiated the procedure on the return of the child on the basis of the Hague Abduction Convention, the documentary proof with the content above – as a prior consent to the return – would lead to the high possibility application of a successful reason of denial

according to the phrase 2 of the item a) of the article 13 of the Abduction Convention. However, to prevent the negative emotional effect of such cross-border removal, which is actually a return, on the child, the child must be made aware of the condition above - and the temporary nature thereof - even upon bringing him/her abroad to let the child not get too attached to and to prevent the other parent to make the child feel that the stay abroad is without a deadline or even permanent. Such prior notification makes integration to the given environment slower by all means, since even from the beginning, the child will be aware of that he/she will return to his/her former social environment within a foreseeable period.

During the research serving as the basis hereof it became clear that as an enforcer, it is important to know the difference between the two legal institutions: the release of the child and the return of the child unlawfully removed abroad. It shall be emphasised that the former term is included in civil law and basically it serves as a legal aid for the removal within the borders of a country, while the other belongs to the legal aid in international (private) law. Contrary to this, it is worth noting that within the European Union, under certain circumstances, the return of the child unlawfully removed abroad may be reached via the release of the child as well to the left behind parent, as for this, the stipulations of the Brussels II bis relating to and facilitating the acknowledgement and enforceability of the decision brought in a Member State on parental responsibility in another member state do provide help. However, the process until the enforcement of the decision of the competent court on the ordering of the release of the child in the Member State of the unlawful removal or retention may last for a long time, even for years due to the possibilities for legal remedy, therefore, in case of the unlawful removal or retention of the child abroad, still the immediate initiation of the procedure on the return of the child on the basis of the Hague Abduction Convention is considered as the most efficient way for the remedy of the violated custody rights.

3.2. Conclusions drawn from the content and effectiveness of the effective international and private international law sources

As a result of the comparison of the stipulations of the Hague Abduction Convention, the Brussels II bis regulation, the Luxembourg Convention¹⁷ and the 1996 Hague Convention on the Protection of

¹⁷ European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children dated in Luxembourg on 20 May 1980 (promulgated by the Act LXVIII of 2004).

Children¹⁸ it was stated that both the Hague Abduction Convention and the Luxembourg Convention create a new child return procedure, however, the Brussels II bis regulation and the 1996 Hague Convention on the Protection of Children failed to do so. The Brussels II bis regulation only amends and partly modifies the stipulations of the Hague Abduction Convention for the removal of the child within the EU Member States and it restricts the possibilities via the application of which the ordering of the return of the child may be refused. The 1996 Hague Convention on the Protection of Children does not contain any stipulations either via which the court having competence at the place of removal may order the return of the child removed or retained unlawfully there and in this way, it does not even deal with the return mechanism created by the Hague Abduction Convention and the complementary stipulations of the Brussels II bis regulation for the removal within the European Union. At the same time, it is very important that it contains rules on jurisdiction practically identifying with and reinforcing the aim of the Hague Abduction Convention.

By comparing the Hague Abduction Convention and the Luxembourg Convention it can be unambiguously concluded that due to its content and the number of its Contracting States, the Hague Abduction Convention operates much more efficient than the Luxembourg Convention which is rather formal due to its enforcement nature. The applicability of the Luxembourg Convention is inhibited also by that it does not have priority over the Hague Abduction Convention, however, the Brussels II bis regulation is expressly of higher priority than the Luxembourg Convention.¹⁹

Considering the above, in case of the unlawful removal of the child abroad, it is the Hague Abduction Convention both in the Hungarian and the private international law practice, the application and in this way the necessity of the interpretation of which arises most frequently. This is followed by the Brussels II bis regulation, as it modifies and in practice it tightens certain stipulations of the Hague Abduction Convention regarding return within the European Union. The significance and at the same time the order of these two regulations compared to each other are shown that the requests on return based on the Hague Abduction Convention, if out of the two countries affected by the unlawful removal case only one is an EU Member State and the other is not an EU Member State, but the signatory of the Hague Abduction Convention, shall be subject to

18 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, dated in the Hague on 19 October 1996 (promulgated by the Act CXL of 2005)

19 Christina Holzmann: Brüssel Ila VO: Elterliche Verantwortung und internationale Kindesentführung. Jenaer Wissenschaftliche Verlagsgesellschaft 2008. i.m. page 63

the stipulations of the Hague Abduction Convention. In case of the unlawful removal case between two EU Member States, i.e. within the EU, the requests on the return shall be adjudicated by the joint application of the Hague Abduction Convention and the Article 11 of the Brussels II bis regulation amending the Abduction Convention and being of priority over it. However, if the child is removed from an EU Member State to a state being not a signatory of the Abduction Convention, the application of incidental bilateral conventions, if any, might arise with the help of the ministry of foreign affairs between the two countries or the institution of the national law regarding the release of the child may be applied²⁰, however, its acknowledgement and enforceability abroad is highly ambiguous.

Considering all these, the analysis of the stipulations of the Hague Abduction Convention and the Brussels II bis regulation regarding unlawful removal became the focus of the research serving as the basis of this dissertation.

3.3. Analysis of the stipulations of the Hague Abduction Convention and the experience about the effectiveness thereof in the Contracting States

The first phrase of the Abduction Convention unambiguously determines that to adjudicate the request on return, the court(s) or authority/authorities of the state where the child actually is shall have the jurisdiction, i.e. where the child was unlawfully removed to or was lawfully removed to, however, unlawfully retained. **The Article 11 of the Abduction Convention** not only requires a procedure without delay in the cases regarding the return of the child, but it sets a limit of 6 weeks to complete the procedure. This latter period for the children removed to Hungary is lower than the mean duration of 164 days, i.e. 23 weeks of the procedure, as stated on the basis of the statistical data of the Contracting States of the Abduction Convention. The Hungarian courts of first instance needed an average of 38 days, i.e. less than 6 weeks from the receipt of the request by the court to bring the order. However, in case of an appeal, further 72 days lapsed from the date of the order of first instance until bringing a legally binding order of second instance, therefore, in case of a legal remedy procedure, a legally binding and enforceable order was brought within an average of 110 days, i.e. within more than 15 weeks. Overall, it was also found that the 55% of the cases in

20 Constanza Honorati, Agné Limanté in: edited by Constanza Honorati; Jurisdiction in Matrimonial Matters. Parental responsibility and International Abduction, A Handbook on the Application of Brussels IIa Regulation in National Courts/Jurisdiction in Child Abduction Proceedings (Articles 10,11). G. Giappichelle Editore, Torino - Peter Lang, Frankfurt am Main, 2017. pages 95-96

Hungary were finished within 6 weeks in the first instance and the Hungarian courts pay distinguished attention to rapidly settle the requests on return.

During the analysis of the adjudication of the **unlawfulness described in the Article 3 of the Abduction Convention**, from the case decisions found in the INCADAT database regarding the adjudication on unlawfulness, the literature resources and the Hague global statistical data it can be concluded that this is the issue to raise the most forceful interpretation problems regarding the Hague Abduction Convention. The courts often face difficulties to decide whether the fact of the removal of the child abroad or the retention of the child violated the custody right. During this, the courts no longer cling to the word for word interpretation of the Hague Abduction Convention, however, during deliberation, they consider the aim of this Convention. During the years, the concept and the underlying content of custody right was transformed over the years compared to the original ones and the right to determine the residence of the child means now basically a right of veto regarding bringing abroad. From the analysis of the judicial decisions in Hungary it was found that the adjudication of unlawfulness - similarly to the other Contracting States - means a serious professional challenge for the Hungarian courts and they interpret sometimes also the Articles 3 and 5 of the Abduction Convention differently from the approach of the courts of the Contracting States of the Abduction Convention. It also occurred that decisions based on conflicting points of view were brought. As a result of the analysis of the Hungarian decisions it can be concluded that the significant difference regarding the lack of unlawfulness according to the Article 3 and regarding the presence of the reason of refusal according to the item a) of the phrase 1 of the Article 13 of the Abduction Convention, i.e. the difference in the burden of proof did not become clear in the justification of any Hungarian decisions. There was no professional accordance either whether it is unlawful to bring the child abroad contrary to the decision of the court having competence at the habitual residence of the child, which prohibits the bringing of the child abroad (as defined by the international literature as “ne exeat order”) or which allows stay abroad only for a definite time, and the child is brought or retained abroad without the permission of the court or the consent of the other parent. The competence regarding the issue of a **decision or other determination defined in the Article 15 of the Abduction Convention** is not regulated by the Hungarian internal law. In Hungary there is no non-contentious procedure where the parents whose custody right was violated by the removal abroad may request the court to bring a decision to make a single commitment whether the removal or the retention of the given child abroad in the given specific statement of facts was unlawful pursuant to the Article 3 of the Abduction Convention or not. However, it is

emphasised that this does not mean that the Hungarian court having jurisdiction for the custody dispute cannot make a stand in the lawsuit in progress about the unlawfulness of the removal abroad. In a custody dispute it has a legal significance how one of the parents removed the common child abroad to settle. Therefore, in this case it is within the scope of authority of the proceeding Hungarian courts to reveal the statement of facts and to deliberate the data of the lawsuit, whether one of the parties removed or retained abroad the child concerned with or without the consent of the other and considering also the paragraph (2) of the section 4:175 of the Civil Code whether this act violates or violated the custody right of the other party. If the two procedures are in progress simultaneously and in the custody right dispute there is a decision from the justification of which the legal point of view of the Hungarian court about the removal abroad is seen, naturally, the left behind parent is not forbidden to use such decision as a documentary evidence in the return procedure launched on the basis of the Hague Abduction in the state of the removal of the child.

As regards whether **the habitual residence** shall be determined on the basis of the facts or other points of view, there are different approaches in the jurisdiction of the Contracting States of the Abduction Convention, which can be classified into three main groups. According to one of the dominant points of view, it shall be analysed from the aspect of the child where his/her habitual residence was, while there are courts which consider also the parental intent regarding the stay in addition to the facts about the child. This latter is naturally influenced by the age of the child; in case of infants, this has a specific significance, while in case of adolescents, it has much lower importance.²¹ For the third trend, the parental intention is the decisive and according to this perception, the habitual residence of the child remains in the country of origin upon travelling abroad, even if the child spends longer time in another state, however, there is no parental concurrence of wills about resettlement. This rigid enforcer's point of view has been refined in that the state the child was removed to may become the habitual residence of the child even in the lack of parental concurrence of wills, if the child spent there a longer time, he/she found it as a good experience and he/she integrated to his/her new environment.²² By analysing the case decisions applying the Hague Abduction Convention, the outstanding researcher of the topic, Schuz had a similar conclusion as regards content. According to her finding, the legal practice of the court can be divided into two main categories: the first attributes specific relevance to the parental intention

21 dr. Kozák Henriette: A gyermek szokásos tartózkodási helyének értelmezése a joggyakorlatban (Interpretation of the habitual residence of the child in legal practice). Családi jog, 2013. 2., page 9

22 dr. Kozák Henriette: A gyermek szokásos tartózkodási helyének értelmezése a joggyakorlatban (Interpretation of the habitual residence of the child in legal practice) Családi jog, 2013. 2., page 9

during deliberation, while in the second there is an independent or child-centred approach. However, she pointed out that there are states, the legislation of which mixes the two aspects, by applying a so-called combined/hybrid model.²³

As a Member State of the European Union, by analysing the concept of the habitual residence through the decisions of the CJEU, conclusions in addition to the above may also be drawn. Accordingly, completely different factors shall be considered upon the determination of the place of residence of a person who decides himself/herself by his/her free will about his/her place of residence than in case of a child whose habitual residence is determined mostly by his/her parents or the people taking care of him/her. Similarly to the Hague Abduction Convention, no general habitual residence concept may be created from the case decisions brought regarding the application of the Brussels II bis regulation. Based on the justifications of the decisions of the CJEU, upon the determination of the habitual residence of the child, in case of separated parents – if the family relationships are cross-border, as in the majority of the unlawful removal cases – it has a determining significance where the child generally and factually lived from his/her birth until the separation of his/her parents together with where the parent actually exercising the custody right regarding the child after separation stays with the child on a daily basis. During deliberation it also matters where the parent taking care of the child performs his/her professional activity within the framework of an employment relationship of indefinite duration. It is also important whether the child has a regular contact with his/her other parent and if yes, where and whether the contacting parent is still at the same place. Contrary to all these facts, it cannot be considered as a determining condition whether the parent actually exercising the custody right resided or resides in the territory of his/her Member State of origin during his/her holidays or the public holidays. The family and social roots of the parent do not have significance either, similarly to the links and the cultural links of the child to the Member State of origin of the parent and the relationship of the child with the family staying in the mentioned Member State. Furthermore, the incidental intention of the parent to settle with the child in the same Member State in the future is irrelevant as well. According to the related literature, the decisions of the CJEU interpreting the habitual residence are considered practically an approach with a mixed or combined/hybrid model contrary to that the majority of the deliberation factors considered relevant by the CJEU are objective. The reason of this is that the CJEU usually factually analyses the depth and the quality of the social and family integration of the

²³ Rhona Schuz: *The Hague Child Abduction Convention A Critical Analysis*, Hart Publishing, Oxford and Portland, Oregon, 2013. pages 186-190

child during its decision-making, however, it does not exclude the consideration of the parental intention regarding settlement, if it is manifested in tangible things, such as the purchase or a long-term hire of a flat. Additionally, as concluded from their decisions, it allowed the possibility for children at very low age to get a habitual residence under certain circumstances in the given country after their arrival with their mother.²⁴

In the majority of the cases, the Hungarian judicial approach is close to the mixed, based on the categories of Schulz, the combined/hybrid model as observed in case of the CJEU; in addition to that it deals primarily with the facts regarding the child, it also analyses the intent of the parents jointly responsible for the child, regarding the underage. There are only few decisions from the statement of facts it can be concluded that the court attributed an excessive significance to the latter compared to the facts. In a case, according to the justification of the decision, the court compensated this excessive significance with that contrary to the determination of unlawfulness, it applied the reason of denial based on the paragraph (2) of the section 12 of the Abduction Convention due to that upon the adjudication, the child had been residing in the given state for years.

Overall, from the significantly different sentencing practice of the Contracting States of the Abduction Convention, the different system of aspects and the statistical data it can be concluded that the habitual residence as a concept is rather diffuse, the judicial deliberation thereof is rather uncertain and it is hard to forecast the related decisions of the courts of the states. The global statistical data show that the uncertainty in this field increased in the previous one and a half decades. In this it may play a role that the application of the habitual residence as a connecting factor is more and more widespread, which brought multiple different judicial interpretations, including the practice of the CJEU. These are claimed by the enforcers as their own in different extent, depending on their own personality, professional perception and experience, by accepting and rejecting certain aspects, which inevitably leads to different outcomes.

However, this trend is a bad news for the parents willing to “secure themselves” against not to change the habitual residence of the child contrary to the stay abroad in case of the removal of the child for a longer, but defined and foreseeable period. To have a good chance to request the return of the child in the country of origin, it would be necessary to prevent the other state where the child was lawfully brought to become the habitual residence of the child, even if after the lapse of the

24 Schulz i.m. pages 194-195

agreed time, the child is retained there by the other parent without the consent of the left behind parent and is failed to be returned to the state of his/her original home. With this statement of facts, from the legal practice according to the model based on parental intention it is seen that in case of a removal for a definite period, the habitual residence of the child shall remain unchanged, until there is no intention from both parents entitled to determine the place of residence to terminate the place of residence in the original state. Contrary to this, in case of a mixed approach it is seen from the case decisions that the habitual residence is changed, if more than two years have lapsed since the move. In case of an independent or child-centred model it is also rather hard to forecast the legal consequence of moving abroad for a definite period, however, in case of the integration of the child and a prolonged time spent there, there is a good chance for the state where the child is unlawfully retained contrary to the consent of the other parent after the lapse of the pre-agreed time to become the habitual residence of the child.

Contrary to the different aspects it can be set that every model approaching the concept of the habitual residence pays particular attention to the time factor, i.e. for how long time the given child stays in the given place, i.e. whether the child stays there steadily or systematically. Within this, it considers integration and thus the environmental factors, such as age, important, as it differentially analyses also the integration in the function thereof. If an order of preference is to be set among the models, I think that the mixed, hybrid model should be preferred with a restriction that it should be aimed during deliberation to focus rather on the objective, child-related facts and to give significance to the parental intention only as much as it is concluded by anyone from the acts and manifestations of the given person. Indeed, the emphasised consideration of parental intention gives rise to subjective elements during deliberation, which – especially in case of contradictory statements – makes the determination of the statement of facts and the former habitual residence of the child significantly more difficult. In this way, this approach entails the risk of false conclusions even against the interest of the child.

Nevertheless, instead of the selection among the significantly different approaches it would be more optimal in terms of predictability and legal certainty to approach the concept of habitual residence by every court of the Contracting States with identical points of view. This would facilitate for everyone to take steps against unlawful removal in the form of agreements on the exercising of custody right between the parents, even as prevention. Furthermore, this would probably decrease the number of requests for return, which do not reach the desired outcome before the court, as in

case of the identical approach of the concept, the legal representatives and the central authorities would be able to screen out the requests in advance with a high level of confidence, which would be adjudicated also by the courts as unfounded. In this way, significant procedural costs, time, energy and conflicts would be saved for the affected parties.

With the analysis of the judicial decisions related to the stipulations of the Article 3 of the Abduction Convention it was also stated that the courts of the Contracting States evaluate it as a “ground for rejection”, if the requester is unable to prove that right before the removal, the habitual residence of the child was in a state other than the place of removal. Additionally, it is also a “ground for rejection”, if on the basis of the substantive law of the given state, the requester was not entitled to exercise custody right covering also the determination of the place of residence of the child upon the time of the removal, i.e. he/she did not have a right to decide whether the child can move abroad or not. These “grounds for rejection” are different than the “grounds for refusal” detailed below, as in case of the presence of the former one, the removal of the child abroad is not considered as unlawful, therefore, it shall not accompany with either private law or criminal law consequences.

Based on the Article 12 of the Hague Abduction Convention, the court having competence at the place of the child shall immediately order the return of the child, if the unlawful removal or retention of the child can be stated on the basis of the Article 3 therein. The Hungarian translation appropriately forwards with the wording that the underage child cannot travel alone and at the same time, it implies the important difference between this legal institution and the procedures on the release of the child present also in the Hungarian family law. According to the item a) of the Article 1, the aim of the Abduction Convention shall be to secure the prompt return of children unlawfully removed to or retained in any Contracting State to the state of his/her habitual residence and not to release the child to the other parent. The operative parts of the decisions of the Hungarian courts approving the request in this matter reflect also this perception, in which they oblige the claimee to return the child to his/her habitual residence, to the specifically determined country, until a given deadline and it is only secondary to oblige the claimee, upon his/her default, to release the child to the claimant or the representative thereof in the territory of the state of removal, i.e. Hungary. Anyway, the wording of the Abduction Convention does not make it clear whether the return of the child shall be to the claimant, i.e. whether an obligation linked to a person shall be issued or the return shall be to a given place, i.e. whether a given settlement shall be determined within the

habitual residence. During the execution, it is not necessary by all means for the child to get to the same settlement within the state of his/her habitual residence as he/she was removed from. Therefore, in the judicial decision it is sufficient to determine a country. If in the meantime the claimant moved from the country of the child's habitual residence, the enforcement of the return is more troublesome. In a case decision of the Hungarian court in this regard, the court took the view that if the claimant does not live in the country anymore where the habitual residence of the child was before removal, there is no objection to order the return directly to the claimant.²⁵ As a result of the research it was stated that there is a relative legal uniformity between the Contracting States regarding that in the special case above, the return shall go to the left behind parent and not to a given place.²⁶

As a result of the analyses performed as the basis of this dissertation it can be clearly stated that four – but actually **seven** – different **grounds for refusal** were inserted during the composition of the Hague Abduction Convention, and if the conditions therein are met, discretion for the courts adjudicating the request on return is ensured. Contrary to the “grounds for rejection” detailed above, the application of the grounds for refusal may arise in cases where the removal of the child from one Contracting State to another is unlawful, however, considering some legally significant fact(s), the necessity arises to reject the request on return. Among these grounds for refusal there is the phrase 2 of the Article 12 of the Abduction Convention, i.e. the ground for refusal based on the lapse of the deadline of a year and the integration of the child, the three different grounds for refusal – lack of the actual exercising of the custody rights, and the previous or subsequent consent (acquiesce) according to the item a) of the phrase 1 of the Article 13, the ground for refusal due to a grave risk that the return of the child would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation according to the item b) of the phrase 1 of the Article 13, the ground for refusal according to the phrase 2 of the Article 13 making the views and objections of the child regarding his/her return to be considered and finally the ground for refusal in the Article 20 inserted therein for the protection of public order. Within this framework, the courts may refuse the return of the child contrary to the unlawfulness of the removal or the retention, if they consider the return of the child to be contrary to the interests of the child. The sentencing practice of the

25 Dr. BENCZE Lászlóné: A Hágai Gyermekelviteli Egyezmény hazai gyakorlata (Hungarian Practice of the Hague Abduction Convention). *Családi jog*, 2003, Vol. 3-4., page 32-40

26 Isabel Pape: *Internationale Kindesentführung*. Peter Lang Internationaler Verlag der Wissenschaften, Frankfurt am Main. 2010. Page 89

Contracting State shows that in case of the refusal of the request on return, the decisions are based often on multiple grounds.

Although in the dissertation, with the research results, I discussed in details as regards the grounds of refusal that during the application thereof what questions arise, the decision of which shall be the task of the courts adjudicating the given request on return, it was a deliberate action of mine to avoid the answers thereto to leave it for the proceeding courts.

As regards the application of the **phrase 2 of the Article 12 of the Hague Abduction Convention, i.e. the ground for refusal based on the lapse of the deadline and the integration of the child**, it can be concluded that similarly to the grounds for rejection – unlawfulness and the habitual residence – the interpretation thereof has several uncertainties: starting with from which date until which date the legally relevant deadline shall be counted regarding the lapse of a year, up to that whether the applicability of the grounds for refusal shall be assessed by the court by virtue of office or only upon the proposal of the claimee. It is also not uniform which factors are considered as significant by the courts of the Contracting States upon the assessment of the settling, and what influence the actual conceal of the child has during the integration of the presence of the conditions: whether the fact of concealing shall be considered during the assessment of the integration or after the calculation of the lapse of the deadline. Both from the global statistics and the disclosed case decisions it is well seen that all courts having applied the Abduction Convention faced with similar legal issues in this regard and sometimes there were contradictory decisions as well. However, it can be stated that the Hungarian legal practice as regards the calculation of the deadline was in compliance with the aspect applied by the majority of the courts in the majority of the decisions, i.e. the lapse of the deadline of one year shall be counted from the date of the unlawful removal until the receipt of the request on return by the court and the arrival of the request to the central authority shall be irrelevant regarding the calculation of the lapse of the deadline. From the analysed cases it was also stated that the Hungarian judicial practice analyses the possibility of the application of the ground for refusal according to the phrase 2 of the Article 12 of the Abduction Convention even without the expressed reference thereto, practically by virtue of office to protect the interest of the underage affected and after the lapse of the given deadline, it proceeds right in the same way to assess whether the child integrated into the given environment. This approach corresponds to the German application of the law and the related literature as well, which has been typically

representing the point of view that the proving shall be performed by virtue of office, whether this ground for refusal applies.

Owing to the analyses performed it can also be stated that considering the accelerated flow of information during the 40 years lapsed from the enactment of the Abduction Convention, it would be realistic and would serve the interests of the affected child to decrease the deadline of one year according to the Article 12 of the Abduction Convention down to 9 or even 6 months, however, in this case it shall be harmonised with the stipulations of the Article 10 of the Brussels II bis regulation. The decrease of the deadline is justified by the statement deriving from the data of the research that the age of the children affected by the removal has been getting lower and lower and the time perception of the kindergarten-age or even younger children or even infants is subjectively highly different from that of the older children. Of course, it has a dramatic influence on the emotional relationship and the trust between the child and the left behind parent from the aspect of the child and increases the extent of the potential risk and emotional injury the child may be subject to upon the ordering of the return.

As regards the ground for refusal described in the **item a) of the phrase 1 of the Article 13**, i.e. the lack of the actual exercising of the custody rights, and the previous or subsequent consent (acquiesce) from the related literature and the case judicial decisions found in the INCADAT database it can be clearly concluded that this part of the Hague Abduction Convention includes practically three different grounds for refusal. All of them aim to prevent the parent left in the other country to apply the mechanism of the Abduction Convention cynically by misuse against the other parent and to let a parent claim for the immediate return of the child, who failed to exercise his/her rights, contributed to the removal of the child abroad or acquiesced to it.²⁷ As regards the actual contribution of the custody rights it shall be analysed whether it is in the interest of the child that the requesting parent is later practically obstructed by the retention of the child abroad to actually have a voice in the determination of the place of the centre of vital interest of the child. It is important that even in case of the proving of the presence of the condition included in the ground for refusal, the application of such grounds shall not be automatic. This concludes also from the wording itself, as the text of the Convention leaves it to the deliberation of the court to deviate from the main rule described in the Article 12 of the Abduction Convention; in this case, the court is “not obliged” to order the return of the child, but it may do so. However, during the analyses of the Hungarian

²⁷ Schuz i.m. Page 245

jurisdiction it became clear that the courts failed to describe the differences above during their decisions and they did not attribute importance to them either. During the adjudication on the request on return, in addition to the above it may also be relevant that in case of the reference to the lack described in the Article 3 of the Abduction Convention, based on the related literature and the dominant legal practice, the burden of proof that the removal or the retention is unlawful shall lie on the claimant, while as regards the applicability of the ground for refusal according to the item a) of the Article 13, the parent having performed the removal shall prove that contrary to the legal presumption, the claimant failed to exercise the custody right he/she was entitled to²⁸, and the removal abroad does not violate the custody right, as he/she gave his/her consent to the removal. From the Hungarian case decisions analysed it can be concluded that this difference triggers a problem for the Hungarian courts in practice, however, in Hungary it shall be by all means the task of the claimant to prove that the claimant previously or subsequently contributed to the removal or retention of the child abroad, and this contribution shall be clearly detectable and unambiguous.²⁹ It can also be stated that the acceptance of these grounds of refusal – similarly to the majority of the Contracting States – shall be subject to strict criteria.

As regards the item b) of the phrase 1 of the Article 13, the grave risk that the return of the child would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation, as a ground for refusal it can be stated that it focuses completely at the child and the protection of the interest of the child. According to the Hague global statistical data, this is the ground of refusal referring to which the requests on return are most frequently rejected, however, from the statistical data obtained on the basis of the research hereunder this statement cannot be drawn, as out of the cases analysed, it was only six times that the Hungarian court rejected the request on return in its legally binding order based on the ground of refusal according to the item b) of the phrase 1 of the section 13 of the Abduction Convention, however, in one of these cases, the Supreme Court deleted the reference to the item b) of the phrase 1 of the section 13 of the Abduction Convention from the justification. One can only conclude as to the causes of the apparent difference between the statistics of the global data and the statistics I made on the basis of the Hungarian court cases, however, from the other data of my research it was found that the claimants (their legal representatives) often failed to request the application of this ground for refusal, as in the cases analysed by me, the claimants in their substantive statements of defence referred primarily to

28 Pape i.m. Page 84

29 Bencze: A Hágai Gyermekelviteli Egyezmény (The Hague Abduction Convention) ...i.m. pages 32-40

that the removal or the retention of the children here is not unlawful. Mostly they argued only secondarily or later during the procedure, in the form of a modified statement of defence – often only as regards content – that the ordering of the return of the child would be contrary to the well-being of the child. Even if they referred to the item b) of the phrase 1 of the section 13 of the Abduction Convention, mostly they refused to present the facts founding the application of this ground for refusal in their opinion and their statement of defence often did not contain even a basic level of legal arguments about the relationship between their statement of facts and the ground for refusal intended to be enforced by them. It also occurred that the applicability of this ground for refusal was mentioned only in their appeal. Presumably, these deficiencies significantly decreased the success of their defence. At the same time, it can also be observed from the analysed cases that the Hungarian judicial practice has applied stricter requirements against the claimees since the previous decade than it had done before and only in case of the compliance therewith could result in the enforcement of the ground for refusal above. The above resulted in also that the thorough analysis of this ground for refusal was performed with the help of the case decision of other Contracting States and it was only completed by the few Hungarian decisions, as based on the numbers above, the Hungarian courts – contrary to the other Contracting States – did not have to thoroughly analyse the item b) of the phrase 1 of the section 13 of the Abduction Convention.

From the legal dogmatic analysis of the ground for refusal according to the item b) of the phrase 1 of the section 13 of the Abduction Convention it can be stated that the legislator included two separate conditions into this item as well. One of these conditions is that if the return of the child exposed the child to physical or psychological harm and the other is that such return otherwise placed the child in an intolerable situation. Due to the lack of definition by the regulation, it can be concluded only from the cases adjudicated so far what the causes, facts and circumstances are according to the affected parties, their legal representatives and the courts to constitute the definition of the physical or physiological harm of the child or the otherwise intolerable situation for the child. It can also be stated that this scope is much broader according to the interpretation of the claimees and their legal representatives than according to the courts, as the courts rejected the requests on return of the child far less frequently than the parties referred to the presence of the ground for refusal according to the item b) of the phrase 1 of the section 13 of the Abduction Convention. On the basis of the statement of facts of the decisions uploaded to the INCADAT database, the circumstances and facts, which were referred to by the claimees' side as regards this ground for refusal, can be listed into five larger categories:

- a.) the separation of a low-age child from his/her mother or brother/sister
- b.) hazard due to the claimant parent - suspicion of assault or abuse
- c.) hazard due to the habitual residence - famine, epidemics, economic problems
- d.) disease or mental problems of the child
- e.) economic and parenting reason and others

From the analysed cases it is also seen that the request on return was mostly rejected in unique and special cases with a reference to this ground for refusal and it was also analysed whether the threat to the child can be eliminated. Even though, there was a relatively large uncertainty for the courts of the various Contracting States as regards the application of this ground for refusal and the preconditions thereof, and the judicial deliberation played a major role therein. All this may accompany with the possibility that a reference to the same reason has a positive outcome and the refusal of the return before a court, while another court, contrary to a highly similar statement of facts, approves the request on return and omits the application of the ground for refusal.

From the analysis of the wording of the **phrase 2 of the Article 13 – the child objects to being returned and it is appropriate to take account of his/her views, as a ground for refusal** – it can be concluded that for the application of such ground, the presence of two simultaneous conditions shall be proven: on the one hand that the child objects to being returned to the country requested by the claimant to order and if yes, on the other that on the basis of the age and the maturity of the child, his/her statements can be considered with a gravity to lead finally to the refusal of the request. With the inclusion of this ground for refusal, the Abduction Convention made it possible for the main affected person, i.e. the child, in the procedure to express his/her own opinion about his/her return. Both from the Hague global statistical data and the Hungarian case decisions analysed during the research hereunder it can be concluded that as an effect of the Article 12 of the Children's Rights Convention, it was more and more often to ensure the asking of the opinion of the child affected during the adjudication of the requests of return and this trend is seen both in Hungary and in the European Union. There was no uniformity in the practice of the courts of the Contracting States from the aspect whether the opinion of the child about that the claimant requests his/her return to the state he/she had been removed from shall be discovered by virtue of office or it shall only discover the statement of facts in this regard in case of the related defence of the claimee. There is a point of view to assess the applicability of this ground for refusal by virtue of office by the court, however, from the data of the research hereunder it can be concluded that according the point of

view of the Hungarian court, it shall perform a proving procedure only in case of the reference thereto by the claimant and at this time it shall deliberate whether the involvement of the child is necessary into the procedure at all. As regards the application and the interpretation of the ground for refusal according to the phrase 2 of the Article 13 of the Abduction Convention it can be stated from the analysed cases overall that the procedure of the Hungarian courts whether to involve the child into the procedure, complies with the general and especially the Western European trends. This means that in the unlawful removal cases, the Hungarian courts in the majority of cases make the interrogation of the affected children possible from a relatively low age, from about school-age. This latter is typically realised in the form of direct interrogation in the court, for which there have been more and more examples since the last decade not only in Germany, but in Europe as well. In the assessment of the judgement of the children there are no great differences between the countries. Such assessment is typically left for the individual deliberation of the court together with the extent of the consideration of the opinion of the child during the adjudication of the request on return. However, statistics show that the Hungarian judicial practice accepts much less frequently the opinion of the child as the basis of the rejection of the request on return than the courts of other countries. At the same time, the questions to be decided regarding this ground for refusal are often not found by both the Hungarian and the foreign courts to be of a type requiring a special expertise not available for the court. Therefore, the maturity of the child is mostly assessed by the judges.

As a result of the analysis of the ground for refusal included in the Article 20 of the Abduction Convention, such ground can be considered as a clause aiming the protection of public order, which maintains the possibility – although in a very narrow scope – for the court adjudicating the request on return to express the basic legal value system of its own country in its decision. Its point is that protection shall cover only the values to be protected unconditionally and above all and only if it is actually necessary. This may involve the human rights or fundamental freedoms declared in the European Convention on Human Rights³⁰, the Children's Rights Convention or the Fundamental law/Constitution of the given country. In none of the Hungarian cases analysed hereunder the application of such ground for refusal arose, even not as a proposal and there are only few case decisions in other Contracting States where the reference on this ground for refusal was accepted. Therefore, this ground for refusal can be mostly analysed based on what the claimees having requested the rejection of the request on return of the child based on such ground referred to. On the

30 Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 and the announcement of the eight supplementary protocols thereto (promulgated by the Act XXXI of 1993).

basis of all these, three larger groups were set with the help of the cases in the INCADAT database and the related literature: the first was practically to argue that the return is inconsistent with the best interest of the child, the second was to refer to the lack of an appropriate procedure in the state of the habitual residence of the claimant and the third was the reference to the violation of the right to freedom of movement. However, from the analysed decisions it can be concluded that in almost every case the courts found that the facts and circumstances due to which the application of this ground for refusal was requested could basically be treated on the basis of other grounds for refusal detailed above, such as the one based on the item b) of the phrase 1 of the Article 13, and it was not necessary to apply the Article 20 of the Abduction Convention.

3.4 Analysis of the stipulations of the articles 10, 11 and 20 of the Brussels II bis and the effectiveness thereof in practice

The Brussels II bis regulation with its Article 11 restricts the application of the grounds for refusal stipulated in the Article 13 of the Abduction Convention by applying the possibility included in the Article 36 of the Abduction Convention explicitly emphasising that nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction. Additionally, in the Article 10 together with the Article 20 – even if the child was unlawfully removed to another Member State or was removed lawfully, but retained unlawfully – it intends to strengthen the jurisdiction of the court of the given Member State in the cases regarding parental responsibility where the child had a habitual residence. From the point of view of a judge in any Member States of the European Union except Denmark, these rules on jurisdiction result overall in that the court of the State of the habitual residence of the child may bring a substantial decision on the exercising of the custody, independently of the country the child was unlawfully removed to. At the same time, the Brussels II bis regulation does not affect the stipulation in the Article 12 of the Hague Abduction Convention, which stipulates that the courts of the State where the child was unlawfully removed to or retained shall have jurisdiction to adjudicate the request on return.

The conditions of the merits of the request on return shall be the same in case of the procedure within the European Union as well, as in case of the cases based exclusively on the Hague Abduction Convention: the unlawfulness of the removal or the retention of the child abroad.

However, in the item 11 of the Article 2 of the Brussels II bis regulation created a new definition for the “unlawful removal or retention” compared to the Article 3 of the Abduction Convention. It means at the same time that the legal aid of return is maintained only for the event where the claimant actually exercised his/her custody right. As a result of all these, it aims only the restoration of the actual life conditions and not of the rights the applicant is incidentally formally entitled to, to which rights even the claimant himself/herself had not attributed significance until the removal. In this regard, from the decisions of the CJEU it can also be stated that the person who failed to acquire custody right on the basis of international law before the removal of the child abroad, shall not successfully request with a reference to the Brussels III bis regulation to order the return of the child as a remedy for the unlawful removal of the child abroad.

As a result of the research it was stated that the **paragraph (2) of the Article 11 of the Brussels II bis regulation** makes it mandatory to interrogate the child with the exception described therein, however, it does not link any legal consequences for the omission of this interrogation. This can be explained with that it intends to leave space for the related judicial deliberation and it leaves it to the courts to decide on the basis of the available proofs what the best interest of the child in the specific case is: the provision of the fundamental right of the freedom of expression or the omission of the interrogation of the child. However, in the procedures on return, these questions remain in the level of internal procedural law and the interrogation of the child or the lack thereof basically does not influence the enforceability of the decision on the return based on the Abduction Convention, as the question of the enforceability thereof in another member state, based on the main rule – in case of merely the order of return – does not arise. Nevertheless, the stipulation included in the paragraph (2) of the Article 11 had an impact on the judicial practice in Hungary and in other Member States as well and the child is directly interrogated by the court in more and more procedures and the statement of the child also influences the substantive adjudication of the requests on return.

As regards the compliance with the deadline of six weeks according to the paragraph (3) of the Article 11 of the Brussels II bis regulation, from the Hague statistical data focusing on the EU in 2015 and the operation of the Brussels II bis regulation it can be concluded that the requests on return between the Member States are adjudicated by the courts faster than the requests where only the Abduction Convention is to be applied and Brussels II bis regulation not. However, no such difference was detected in case of the Hungarian cases. Overall in the Hungarian courts, contrary to

the requirements of the procedures as a matter of urgency and the compliance therewith, just over half of the cases were completed within 6 weeks in a legally binding way in first instance.

As regards the **application of the paragraph (4) of the Article 11**, the dogmatic analysis of the law number and the analysis of the related legal practice exhibited numerous serious problems and the content thereof raised multiple questions from the point of view of enforcers. On the one hand, this law number does not unambiguously determine whose task it is to prove that appropriate measures were taken to ensure the protection of the child after his/her return. Furthermore, it does not precisely define the liability of the central authorities to reach the safe return of the child according to the Brussels II bis regulation and the Abduction Convention. Additionally, it starts from the unrealistic presumption that all Member States are able to provide the same level of protection for the child returned after the unlawful removal. Additionally, it does not determine either in which depth it shall be analysed whether the available protective tools are sufficient in case of a direct and severe threat to the child and if they are sufficient, in which extent. Finally, it completely disregards certain realistic life situations, such as domestic violence, in case of which the direct and severe threat regarding the return of the child has a close relationship with the risk of harm of the parent/person having performed the removal of the child. It is also a great deficiency of this law number that it does not ensure the safety of the parent incidentally returning with the child and having performed the removal at all.³¹ From the data of the research it can be concluded that only the performance of the actual protective measures tailored to the child himself/herself can be accepted only as a factor founding the omission of the ground for refusal of the return and within this only the measures suitable to protect the child from the realistic danger which would be an objection of the ordering of the return. Therefore, a distinction shall be made between the measures whether they were taken before the removal and whether they were taken to prevent another unlawful removal or to serve the safe return of the child. According to the analysed case decisions, the Hungarian courts did not necessarily cling to the performance of a protective measure tailored to the affected child and to the given situation, but the theoretical possibilities were also suitable for them, therefore, the need for the correction of this approach is arisen.

As regards the stipulation on the requirement of the interrogation of the claimant according to the **paragraph (5) of the section 11** the research pointed it out that by ensuring an actual possibility,

³¹ Katarina Trimmings: Child Abduction within the European Union. Hart Publishing, Oxford and Portland, Oregon, 2013. Page 138

the court adjudicating the request on return complies with the requirements of this law number, however, if the applicant fails to make use of such possibility, it is not an objection to bring a decision any more.

From the analysis of the **paragraphs (6)-(8) of the Article 12**, the related literature and the decisions of the CJEU it is seen that the procedural order made possible with these stipulations and “giving a second chance” to the return may only be applied, if in the procedure on return based on the Hague Abduction Convention, the court in the place of removal has already refused to order the return of the child on the basis of the Article 13 of the Abduction Convention. The court of the country of the habitual residence before removal may order the return of the child only after this history on the basis of the paragraph (8) of the Article 11.

Although the Article 42 of the Brussels II bis regulation is out of the scope of the stipulations of the Article 11, it does directly connect to the stipulations of the paragraphs (6)-(8) of the Article 11. However, as regards this latter, it is to be emphasised as a result of the research that the stipulations therein on the recognition in another Member State and on the direct enforceability shall affect exclusively the decisions brought in the procedure of “giving a second chance” according to the paragraphs (6)-(8) of the Article 11 and ordering the return of the child and they shall not be applicable at all for the decisions brought by the courts in the Member State of the place of the unlawful removal of the child and ordered the return of the child. The data of the research unambiguously pointed it out that the paragraphs (6)-(8) of the Article 11 of the Brussels II bis regulation relativise the Article 16 of the Abduction Convention. Indeed, there is a decision in vain about that in the procedure according to the Hague Abduction Convention it is not necessary to return the child to the state of his/her habitual residence, and on the basis of the paragraphs (6)-(8) of the Article 11 of the Brussels II bis regulation, the court of the state of the removal cannot bring a decision on the substance of the custody right due to the lack of its related jurisdiction. In this way, it indirectly reinforces the rules of the Brussels II bis regulation on legislation regarding the custody. Moreover, the compliance with the sequence of events determined in the paragraphs (6)-(8) of the Article 11 shall receive particular attention. The decision ordering the return of the child may be executed on the basis of the Article 42 of the Brussels II bis regulation, only if it is brought after the decision in the procedure described in the Hague Abduction Convention and within the framework of the procedure regulated in the paragraphs (6)-(8) of the Article 11.³²

32 Pape i.m. Page 136

The court of the Member States not having jurisdiction to substantially adjudicate the dispute regarding parental responsibility may bring a temporary measure on the basis of the **Article 20 of the Brussels II bis regulation**, only if the urgency thereof is justified. However, the temporary measure brought in this way shall not serve as a tool for the parent having performed the unlawful removal to prolong or even legitimise the life situation formed by his/her wrongful conduct. The court above shall not bring a temporary measure with a content contradicting the legally binding or preliminarily enforceable decision having been already temporarily brought by the court in the habitual residence of the child, i.e. the court having jurisdiction, in the dispute on parental responsibility in progress before it.

3.5 Findings of the analysis of the issue regarding the enforcement of the decisions regarding the return of the child abroad

During the research it became unambiguous that attention shall be drawn to that there are significant differences between the enforcement of the decisions regarding the return abroad and the legal regulations to be applied thereabout depending on the procedure the given decision was brought in. There are different enforcement rules between the orders on return brought in the procedure on return on the basis of the Hague Abduction Convention and the orders brought after the closure of such procedure and the refusal of the return on the basis of the Article 13 of the Abduction Convention, within the framework of the paragraphs (6)-(8) of the Article 11 of the Brussels II bis regulation giving a second chance for return. Furthermore, there are different regulations on the enforcement from the above also, if the court having jurisdiction on the parental responsibility brought a decision on the release of the child out of this latter procedure, even in a procedure simultaneously in progress with the procedure on return based on the Hague Abduction Convention, which results - in case of the enforcement thereof - in the return of the child to the Member State from where he/she was removed. As a result of the analysis and the comparison of the regulations on enforcement it can also be stated that in case of the unlawful removal of the child abroad it is the decision ordering the return of the child in the procedure based on the Abduction Convention, the enforcement of which can take the shortest time. Compared to this, in the state of removal, the enforcement of the decision of the court having jurisdiction on the basis of the Brussels II bis regulation or the Hague Convention on the Protection of Children requires much longer time, which orders actually the return of the child. Although the enforcement on the decision on return brought in the procedure according to the paragraphs (6)-(8) of the Article 11 of the Brussels II bis

regulation, “giving a second chance” is simpler than the enforcement of the decisions above in another member state, it may require actually months or even years from the removal of the child abroad to be brought. Therefore, in case of the unlawful removal of the child abroad, still the legal aid offered by the Abduction Convention seems to be the most efficient.

3.6. General statements, usability of the findings of the research, recommendations for the legislators

With the help of the analysis of the regulations regarding the custody right, a catalogue was made in which cases the removal of the child abroad from Hungary is unlawful based on the effective Hungarian substantive law. Accordingly, the removal of the child from or his/her retention in Hungary shall be unlawful, if:

- one of the cohabiting parents or separated parents exercising jointly the custody on the basis of the paragraph (1) of the section 4:164 of the Civil Code brings the child for a prolonged time abroad - exceeding the length of a usual vacation - without the consent of the other parent or he/she brings the child abroad with the consent of the other parent, but retains the child there for a longer time than approved by the other parent, unless this retention was made possible by the public guardianship authority having jurisdiction on the basis of the paragraph (3) of the section 4:175 of the Civil Code for his/her request.
- after the legally binding settlement of the exercising of custody right by the court, any of the separated parents – either the one entitled by the court to practice custody right or the one living separately from the child – brings the child for a prolonged time abroad – exceeding the length of a usual vacation – without the consent of the other parent or he/she brings the child abroad with the consent of the other parent, but retains the child there for a longer time than approved by the other parent, unless this retention was made possible by the public guardianship authority having jurisdiction on the basis of the paragraph (3) of the section 4:175 of the Civil Code for his/her request.
- if the parent having habitual residence abroad, after prevailing in the lawsuit on the settlement or modification of the exercising of the custody right resettles the child abroad without the consent of the other parent, unless it was made possible by the public guardianship authority having jurisdiction on the basis of the paragraph (3) of the section 4:175 of the Civil Code for his/her request.

- the parent whose custody right was terminated by the court or is suspended based on law brings the child abroad.
- without the joint consent of the parents exercising their custody rights jointly or exercising their rights jointly having regard to major issues relating to the child's well-being based on the paragraphs (1) and (2) of the section 4:175 of the Civil Code, a third person brings the child abroad or retains him/her for a longer period than jointly approved by the parents.
- in case of the family placement of the child, the guardian brings the child abroad for a prolonged period – exceeding the length of a usual vacation – without the joint consent of the parents whose custody right is suspended.
- in case of the family placement of the child, a third person brings the child abroad for a prolonged period – exceeding the length of a usual vacation – without the joint consent of the guardian and the parents whose custody right is suspended.

From the findings of the research on the judicial decisions regarding the Abduction Convention I came to a conclusion that in case of the unlawful removal of the child abroad, still the legal aid mechanism set by the Hague Abduction Convention is the most effective to remedy the injury of the child and the left behind parent. Contrary to the social changes of the previous four decades it is still justified to provide protection due to unlawful removal to the children under 16 who are brought abroad by one of their parent without the knowledge and the consent of the other. According to the main rule, their interest is still served by their immediate return to the environment they originally lived. At the same time, it is a retention for the people intending to get to a more beneficial position through unlawful means in a dispute regarding the exercising of custody right and furthermore, the practical experience uniformly, independently of the country shows that lapse of time has a determining significance in these cases, since after a certain time, return is rather against the well-being of the child. However, the grounds for refusal included in the Abduction Convention and potentially covering multiple life situations give sufficient possibility for the enforcers to individually deliberate the best interest of the affected child in the given case: the ordering of the return of the child or the rejection of the request on return.

As a result of the research hereunder it can be stated that the interpretation of certain stipulation of the Hague Abduction Convention is by no way unified and it is much more typical that there are different, even contradictory points of view many of which can be corresponded to each other as

regards content and therefore, they can be classified. The justifications of the Hungarian decisions can be mostly classified into one of the main, so-called majority trends.

Additionally, it is expressly against the interest of the child that contrary to the dispute on custody in progress before a court, the court does not have jurisdiction to allow the prevailing parent to move the child abroad or to retain the child there. This is also highly disadvantageous for the party of the lawsuit, having a habitual residence abroad and it deteriorates the enforceability of the legally binding court decision as well with that the foreigner prevailing party of the lawsuit – to whom the child is ordered to be released by the judgement – cannot bring the child to his/her habitual residence. All of these could be solved with a procedural law stipulation in a way that if there is a lawsuit on the exercising of custody right in progress regarding the child affected by the removal abroad, the procedure on the removal of the same child abroad for a prolonged time or with the aim of settlement should be launched only in the same court and this lawsuit should be connected with the lawsuit on the exercising of custody right. This would at the same time serve as a preventive tool against the unlawful removal and it would be made unambiguous for the parents and also for the enforcers that in addition to the judicial settlement of the exercising of the custody right, the authorisation to bring the child abroad shall also be requested and additionally, this could be adjudicated within a single procedure by all means.

To prevent unlawful removal abroad it would be important to call the attention of the parents by the courts and child protective services in their decisions brought during the disputes on custody to that none of the parents may unilaterally decide without the express consent of the other party on the removal of the children abroad for a prolonged period or with the aim of settlement and if there is no agreement thereabout between the parents, which authority shall have the jurisdiction to adjudicate this dispute of the parents.

It should also be emphasised that the removal of the child abroad for a prolonged time or with the aim of settlement shall be unlawful, if one of the parents removes or retains the child abroad without the consent of the other party or without the preliminary and legally binding decision of the child protection service, which approves the request on the determination of the place of residence abroad for a prolonged time or with the aim of settlement.

In case of the arising of the statement of facts element regarding the unlawful removal or the retention of the child abroad, the left behind parent should be notified by the authorities about the available legal institutions to restore the custody right violated by such removal, especially about that on the basis of the Abduction Convention, he/she may apply to the Central Authority of the child's habitual residence for assistance in securing the return of the child. There, via the completion of the appropriate form, he/she may request the immediate return of the child to the child's habitual residence according to the Article 12 of the Abduction Convention, if the state the child was removed to is also a Contracting State of the Hague Abduction Convention.

It would be also desirable for the Hungarian courts proceeding in family law cases to have a wider knowledge about the unlawful removal of the child abroad, about the gravity thereof and about the possible measures in case of such removal. In many cases it can be still observed that in the family law lawsuits, such as lawsuits on the dissolution of marriage and the related issues and the settlement of the exercising of custody right, the fact of the removal of the child involved is treated as a "foreign body" and in certain situations, the justification of the judgement includes also that it is not the task of the court adjudicating the dispute on custody to decide whether the parent being one of the parties brought the child abroad unlawfully. This attitude, however, shall not be tolerated and it is inconsistent with the stipulations of the Brussels II bis regulation, as detailed hereunder. As in case of the unlawful removal of the child abroad, the time factor has a distinguished significance, it is unavoidable for the court proceeding in the dispute on the exercising of custody right – even by virtue of office – to take appropriate protective measures without delay to protect the child from the unlawful removal and retention abroad with a view also to the Article 11 of the Abduction Convention.

During the creation of the Hungarian enforcement decree of the Hague Convention on the Protection of Children, by giving a legislative status to the 25 years of judicial practice it should be necessary to declare that the court adjudicating the requests on return may order the proving considered by it necessary even by virtue of office. The analysed foreign decisions showed that as regards the application of the Abduction Convention, there are conditions in other Contracting States as well, the presence of which is typically analysed by the courts by virtue of office, for the interest of the child.

To prevent the unlawful removal, the paragraph (2) of the section 24 of the Government Decree 149/1997 (10 October) on the Public Guardianship Authorities, the Child Protection and Guardianship Procedure should also be modified in a way that the parent requesting the designation of the place of residence abroad should attach proofs supporting that he/she is able to ensure the conditions of the everyday care and education – including the accommodation and the teaching – for the child at the foreign place of residence. During this, instead of a school attendance certificate, a declaration of acceptance from the education institution should be sufficient and instead of the home inspection, the parent should be able to prove that with the rented flat or the flat to be rented, it is still able to provide the objective conditions of the care of the child.

4. MY STUDIES REGARDING THE TOPIC OF THE PHD DISSERTATION

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A gyermekek bíróság által történő meghallgatásának gyakorlata (Practice of the interrogation of children by the court). Családi jog, 2011. (Family Law Journal) (year 9) Vol. 1, pages 23-30

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