

THE HEARING OF THE CHILD IN THE CONTEXT OF A CROSS-BORDER FAMILY CASE

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UN Convention on the Rights of the Child (UNCRC)

▶ Art.12 :

- ▶ *1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
- ▶ *2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*

Charter of Fundamental Rights of the EU

▶ Art. 24.1:

- ▶ *“Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.”*

Well-established right in the international and European setting

Differences in national laws and standards of the Member States

Margin of appreciation with regard to whether it is appropriate to grant the child a hearing,

Hearing the child is not an absolute obligation: case by case approach

- ▶ The right to be heard: not absolute

Regulation 2201/2003 Brussels IIbis

- ▶ **Recital 19:** hearing of the child plays an important role, « *although it is not intended to modify the national procedures applicable* »
- ▶ **Art. 11,2:** Return proceeding under Hague Convention 1980:
 - ▶ give the opportunity to be heard ... « *unless this appears inappropriate having regard to his or her age or degree of maturity* »
- ▶ **Art. 23:** Recognition and enforcement: refusal ground
 - ▶ « *except in case of urgency* », « *if the decision is given without the child being given the opportunity to be heard* », in violation of the principles of the requested state
- ▶ **Art. 41,2,c and Art.42,2,a:** issuance of the certificates
 - ▶ Only if the child was given the opportunity to be heard, unless... « *inappropriate having regard to his or her age or degree of maturity* »
 - ▶ *C-491/10 PPU (Aguirre Zarraga): the delivery of the certificate can not be challenged by the requested State on the possible infringement of the art.42 on the rights of the child to be heard* : NO DEROGATION on MUTUAL TRUST

Comparative scheme

Brussels II *bis*

- ▶ Obligation not positively stated nor framed:
>>>> *Lex fori*
- ▶ Sanctioned at the moment of recognition or enforcement:
 - ▶ **General regime: mandatory ground for refusal of recognition and declaration of enforceability :** **art. 23 and 31:** if the hearing did not take place according to the standards of the requested state,
 - ▶ Only exception: urgency
 - ▶ **Privileged regime: mandatory ground for non-issuance** of the certificate of **art. 41 and 42:** if the hearing did not take place according to the standards of the State of delivery
- ▶ Particular case: Hague return proceedings: **art. 11,2:** Ensure that the child is given the opportunity to be heard unless...inappropriate ...age and maturity...

Brussels II *a Recast*

- Obligation positively stated for all decisions: **art. 21:**
 - Child capable of forming his/her views
 - Directly or through representative
 - >>>> *substantial and procedural lex fori*
 - Give due weight to the views in accordance with age/maturity (no « secret » hearing)
 - Same standard for the particular case of the Hague return proceedings (art. 26)
- Sanctioned at the moment of recognition or enforcement:
 - **General regime : optional ground for refusal :** **art. 39,2 and art. 41 :** if the child was not given the opportunity according to the standards of art. 21
 - Exceptions:
 - Proceedings concern only the property
 - Serious ground taking into account in particular, the urgency
 - **Privileged regime: mandatory ground for non-issuance** of the certificate: **art. 47,3,b:** if the child was not given the opportunity according to the standards of art. 21

Hague Convention 1996

- ▶ Art. 23,2,b: recognition and enforcement: refusal ground
 - ▶ « *except in case of urgency* », « *if the decision is given without the child being given the opportunity to be heard* », in violation of the *principles of the requested state*

Hague Convention 1980

- ▶ Art. 13,a12: return can be refused
 - ▶ « *if the child objects to being returned and has attained an age and a degree of maturity at which it is appropriate to take account of its views* »
 - ▶ Is this an obligation to hear the child ?
 - ▶ What is the purpose of this hearing?
 - ▶ Assessment of the objections of the child and his/her degree of maturity?
 - ▶ Assessment of the grave risk on psychological or physical harm? Or the intolerable situation?
 - ▶ Assessment of the final custody matter?

Why- Hearing the opinion of a child

- ▶ is in the superior interest of the child
- ▶ is an essential tool to enable better assessment of the factual situation

Practical Questions

- ▶ can pose a major challenge in order not to cause more harm than good to the child in these sensitive cross-border family cases
- ▶ are important to reach the aim of minimising the risk of parental influences and of putting pressure in the child

How -Hearing the opinion of a child

► Safeguards in international instruments:

Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (17 November 2010)

see IV.D.3.-6

- Respect of right to be heard when sufficient understanding
- Means adapted to level of understanding and wishes
- Information about the right to be heard
- Child-friendly organisation, environment and language
- Trained professionals

How -Hearing the opinion of a child

Different national systems with varying requirements and methods

And in your State:

How? What? Who? Why? Where? When?

- ▶ *Starting at what age is the opinion of a child heard? What is the reason for this? Exceptions?*
- ▶ *How does a hearing take place? (persons present, premises, judge or other professional, standard protocol ...)*
- ▶ *Is there a reporting of the hearing? Does the child know that the parties will be informed?*
- ▶ *How do you try to avoid influence by the adults?*
- ▶ *Share personal experiences?*

Helpful tips

- ❑ NEVER ignore the matter
- ❑ ALWAYS comply - *a minima* - with own national law and standards on this matter
- ❑ ALWAYS:
 - ✓ Give the opportunity to the child to be heard
 - OR
 - ✓ Write a short motivation why you decided not to hear the child (age, maturity)
- ❑ ALWAYS fill in the certificate very carefully

If the child is abroad:

Regulation n° [1206/2001](#) (Council) on the cooperation between courts of the Member States in the taking of evidence in civil and commercial matters

[Practice guide for the application of the Regulation on the Taking of Evidence](#)

Two options:

- ✓ Request to the foreign court
- ✓ Direct taking of evidence by the requesting court:
 - Video-conference : Art. 17,4 al, 3

[Practical guide on using videoconferencing to obtain evidence in civil and commercial matters](#)