France, Germany, England & Wales: perspectives on international movement of children

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This conference set out the fundamental differences and similarities between three of the biggest European jurisdictions when it comes to international children disputes

Last April the Franco-British Lawyers' Society, in partnership with Dawson Cornwell, was delighted to host a conference on the international movement of children between France, England & Wales and Germany. Five speakers gave us insights accumulated over years of experience in this field. They spoke of the procedures and approaches of the courts in relation to two facets of the international movement of children – international relocation and child abduction – and focused mainly on comparing the approaches taken by the French and German courts to those taken by the courts of E&W. From the Parisian firm Chauveau Mulon & Associes, Véronique Chauveau presented on child abduction and Morghân Peltier presented on international relocation. They both spoke about these proceedings in the context of the French legal system. From 4 Paper Buildings, Frankie Shama spoke on international relocation and Mani Basi spoke on child abduction from the E&W perspective. We also had the privilege of hearing a German lawyer and expert in child abduction proceedings, Dr. Kerstin Niethammer-Jürgens.

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This is what to remember from the conference.

The 1980 Hague Convention's six weeks deadline – a problem for France and E&W

Both France and E&W have reported difficulty in abiding by the six-week deadline for summary return applications. In E&W it is mainly due to court delays, the time that Cafcass takes to produce a child objection's report when requested to do so, and other factors such as that documents may need to be translated, or that international disclosure from the police may need to be obtained. In France the reason is more to do with the fact that there are not enough judges specialised in this area of law and not enough budget.

This delay is particularly problematic in France due to the fact that, unlike in E&W, the judge will completely refuse to deal with interim contact whilst the summary return application is ongoing. As a result, in France, the longer the case goes on, the bigger the fracture with the left-behind parent.

On the contrary, in Germany this deadline is taken very seriously. A first hearing will be set within three weeks of the application being made, giving a little bit of time for mediation to take place before the final hearing is set within the six-week deadline. We also heard that a lot of budget was allocated in Germany to training judges.

Germany has also placed a lot of focus on mediation in cases of child abduction. It can take place in two different ways in Germany: at the interim stage through mediation agencies, whilst the parties wait for a final hearing (in the same way that it would take place in E&W);

or directly through the judge at the final hearing, as judges in Germany are being given special training on how to get the parties to reach an agreement during the final hearing.

The 1980 Hague Convention defences: a slight difference between the three jurisdictions

Whilst in all three jurisdictions the threshold for the Art 13(1)(b) defence to be met is high, we saw slight differences in where the threshold was to be placed.

In E&W there is a growing emphasis being placed on mental health in cases of domestic abuse, with greater sensitivity than its European neighbours to the fact that, as a result of domestic abuse, a return could cause the returning parent's mental health to decline drastically, to the point that it may place the child in an intolerable situation and no protective measures can really address that. Meanwhile, Germany is very clear that domestic violence is not a bar to a return when it comes to returning a child. France takes a similar approach and found recently that, even when the abducting parent who has the main care of a young child could no longer board a plane for medical reasons, the child was to return without them, and that would not place that child in an intolerable situation.

In terms of a child's objections, whilst we know that in E&W the judge would rarely hear the child directly, this is common practice in France and in Germany. The principle in France is that the child should be heard directly by the judge if they wish to and have sufficient understanding. As in Germany, they will be given their own lawyer, paid by legal aid, without a guardian in the middle to represent best interests. It was stressed though that this did not mean the views of the child were determinative.

Whilst it used to be the Art 13(1)(b) defence that attracted the most attention in Germany, there now seems to be a lot of issues over the interpretation of the defence of acquiescence as a result of the extensive WhatsApp messages now exchanged between parties.

The role of the public prosecutor in France in summary return applications

In France it is the public prosecutor who is in charge of applying the Convention and, therefore, in charge of deciding when to make an application for summary return. The Central Authority will contact the public prosecutor to make an enquiry. The prosecutor will then ask the abducting parent if they wish to return the child. If the abducting parent declines, the prosecutor will report to the Ministry of Justice and ask for its views. The public prosecutor is independent from the state, which means that, even if the Ministry of Justice advises to proceed with an application, if the public prosecutor does not believe in the case, they won't make an application. As they are independent, their decision (to make an application or not) is very difficult to appeal.

Article 29 of the Convention allows the parent to apply directly for a summary return but, in practice, making a direct application using Article 29 has negative consequences for a client's case in France. Having the public prosecutor making the application undeniably adds weight to it. The flip side of it is that a direct application will raise suspicion over its merits. There is also the fact that, even if your client has chosen to apply directly, the public prosecutor will have to be involved in the case. They are likely to be hostile if they have previously found that no application should be made in this case. The client will then have to defend the application against both the abductor and the public prosecutor.

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In France it is, therefore, better to try to convince the public prosecutor to apply than to jump into an application using Article 29.

Summary returns and the use of foreign experts

In E&W, foreign lawyers are sometimes instructed as experts to advise on protective measures in the returning country. The report usually does not take too long, but the funding of those experts by the Legal Aid Agency is a real problem. Finding an appropriate expert can also be a challenge.

In France, foreign experts are used as a tool to convince the public prosecutor to bring a case. If you are for the left-behind parent, before the case goes in front of the public prosecutor, it is best to ascertain the law on protection of minors in the returning country.

European issues with enforcement in Hague cases

In France, it is also the public prosecutor who is in charge of enforcement. They are the one giving the order to the police. Very often, if the abducting parent decides to appeal, the public prosecutor will not take steps to enforce the order. Again, as for the decision to make an application, there is very little the left-behind parent can do about it.

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In Germany, it used to be the lawyers themselves who had to seek enforcement by calling the police. This had the advantage of being quite swift as the lawyers were representing their client's best interest. It has changed, however, and now only the Court of Appeal oversees enforcement in Germany. The result is that there is less efficacy in enforcement.

Inherent jurisdiction – a useful E&W tool

The inherent jurisdiction gives wide-ranging powers to the High Court, including the ability to make a return order in respect of a child who is habitually resident in E&W and has been removed to a non-Hague signatory state or in respect of a child who is physically present in E&W but habitually resident in another jurisdiction that is not a signatory to the Hague convention. There is no such fall-back mechanism in France or Germany.

Unlike Hague cases, cases under the inherent jurisdiction are determined based on the child's welfare and best interests.

Relocation application – a common approach between France and E&W

The principle of parental responsibility as well as how it is acquired is the same in France and in E&W. In both jurisdictions an application to court is required for permission to relocate when there is a lack of agreement between the parents.

Those requests are dealt with by professional judges in both jurisdictions. In France, judges are always professional and in E&W those requests cannot be dealt with by magistrates. In the latter, you would typically have a Cafcass report with a recommendation and then oral evidence at final hearing, whereas the parties rarely give oral evidence in France.

The principle for deciding these applications is the same in both countries: welfare. At our conference the speakers made clear that welfare is the overriding principle for E&W applications, and in France these applications will be based exclusively on the best interests of the child.

In terms of how to apply the welfare principle, both jurisdictions have a very similar approach. On the E&W side, we heard that we should no longer categorise cases between primary care cases and shared care cases and that we should now take a holistic approach to all aspects of the welfare checklist. This means balancing the pros and cons in a side-by-side analysis, but with all features not necessarily carrying the same weight. The relocating parent needs to really show how the relocation is going to work in practical terms. In France, the holistic approach is also favoured and the relocating parent will be asked details about local accommodation, school for the child, a job to provide financial stability, how any language barrier is going to be addressed, etc.

Our E&W speaker explained how the proportionality test is applied in relocation cases. There is a need to balance the left-behind parent's Article 8 rights with the advantages of relocation. The relocating parent will need to show they are going to maintain a meaningful relationship with the left-behind parent. In France, the rights of the left-behind parent are also a crucial factor. France also considers the domestic law of the new country to make sure those rights will be respected there.

The principle in France is not to relocate a child unless it is necessary. The relocating parent must indicate whether the reason for the move is personal or professional. The move is more likely to be accepted if the reason is professional, but the threshold remains very high. There must be a real risk that the relocating parent will lose their job unless they relocate. Personal reasons can still be accepted but the threshold is extremely high. There the French court will assess the relocating parents' ties in each country. The UK also considers the ties in each country when it comes to the assistance that the parent will have in meeting the child's needs (the support network).

In France, a child should not be separated from their siblings, and that includes half brothers and sisters.

We would like to thank all the speakers for a very informative and thought-provoking conference.

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