

Conflict of Laws Conventions and their Reception in the Czech Republic

*Monika Pauknerova, Czech Republic**

A. STATISTICAL QUESTIONS

13) Which Hague Conventions have been ratified by Czech Republic?

The Czech Republic has been the Member State of the Hague Conference on Private International Law since 1993, after the dissolution of the former Czechoslovakia. Czechoslovakia has participated in the Hague conventions since 1926 (Czechoslovakia acceded, for example, to the 1905 Civil Procedure Convention in 1926). Regarding the Hague conventions adopted after 1945, the Czech Republic is party to the following conventions:

- a. Convention of 1 March 1954 on civil procedure [02];
- b. Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children [09];
- c. Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents [12];
- d. Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters [14];
- e. Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations [18];

* Professor of Private International Law and International Commercial Law at the Faculty of Law, Charles University in Prague, and at the Faculty of Law, University of West Bohemia, Pilsen; Researcher, Institute of State and Law, v.v.i., Academy of Sciences of the Czech Republic.

- f. Convention of 4 May 1971 on the Law Applicable to Traffic Accidents [19];
- g. Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters [20];
- h. Convention of 2 October 1973 concerning the International Administration of the Estates of Deceased Persons [21];
- i. Convention of 2 October 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations [23];
- j. Convention of 25 October 1980 on the Civil Aspects of International Child Abduction [28];
- k. Convention of 25 October 1980 on International Access to Justice [29];
- l. Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption [33]; and
- m. Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children [34].

14) Which CIDIP Conventions have been ratified by Czech Republic?

The Czech Republic does not participate in CIDIP Conventions.

15) Did the Czech Republic participate and send delegations to the diplomatic conferences where these Conventions were adopted?

The Czech Republic traditionally takes part in sessions, expert meetings and at diplomatic conferences where Hague Conventions are adopted.

16) How many Hague and CIDIP Conventions have been signed but not ratified. Please enumerate them.

The only convention which was signed but not ratified by former Czechoslovakia is Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods. The reasons why the Convention was not ratified are unfortunately unknown.

B. CONFLICTS CONVENTIONS AND DOMESTIC CONFLICTS LAW – A SUBSTANTIVE COMPARISON

17) Is the text of Hague Conventions similar to norms in the domestic legislation of Czech Republic?

18) Please explain similarities and differences.

Czech Private International Law Act

Czech private international law is regulated primarily by the Act concerning Private International Law and the Rules of Procedure Relating thereto of 1963¹ (hereinafter the Czech Private International Law Act or PILA). The essential basis for this Act was the so-called Vienna Draft of Private International Law of 1913, written by the Austrian professor *Walker*. This Draft created the foundations of private international law in several Central European countries.² As Austria, and later Czechoslovakia, independent since 1918, actively participated in the “old” Hague conventions (adopted before 1945), the regulation of private international law corresponds, in principle, to the Hague traditions.

In the mid 1960s when it was passed, the Czech (Czechoslovak) Private International Law Act was considered to be a modern, progressive regulation of private international law worldwide. Moreover, the Czechoslovak PILA, as early as 1963, drew up the rules of conflict of laws and procedural law in one piece of legislation. This new, modern solution, which went beyond the concept of the original Vienna Draft of Private International Law of 1913, proved to be efficient. This means that the Czech Private International Law Act includes not only the conflict of law rules but also rules on international civil procedure.

¹ The Act Concerning Private International Law and the Rules of Procedure Relating Thereto No. 97/1963 Coll. (Collection of Laws), as amended.

² F. Mánhart, *Die Kodifikation des österreichischen Internationalen Privatrechts*, Schriften zum Internationalen Recht, Vol. 10 (Berlin, Duncker & Humblot, 1978), 149.

This interconnection can also be found in some Hague conventions, in particular in the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children.

In general, Czech legislation may be considered as a traditional private international law regulation,³ essentially corresponding to Hague conventions drafted at the time when the Czechoslovak Private International Law Act was adopted.

Therefore, it is obvious that the Czech Private International Law Act cannot contain new progressive solutions as proposed by the Hague Conventions and agreed upon after the Private International Law Act had been passed in 1963, such as the Hague Convention of 14 March 1978 on the Law Applicable to Agency, whose regulation of the conflict of law rules differs from the provisions of Section 10 (2) of the Czech Private International Law Act.

19) Has being a Party to any of the Hague Conventions had an impact on Czech domestic law?

The Hague traditions in Czech law – Czech Private International Law Act of 1963

As previously mentioned, Czech law essentially corresponds to the traditional Hague Conventions having been adopted before the Czech Private International Law Act was passed in 1963. It should be noted, in this context, that the provisions of the Hague Convention of 15 April 1958 on the law governing transfer of title in international sales of goods, which was not ratified by the Czech Republic⁴, were incorporated into the Private International Law Act of 1963 (Section 12 Czech PILA). Section 12 of the Czech PILA relates to the law applicable to movable property regarding the relations between the contract parties.

The Czech Private International Law Act of 1963 was only partially amended after the political changes and the return to democracy by the Czech Republic (“Velvet revolution” in 1989) and after the splitting of Czechoslovakia into two states – Czech Republic and

³ In English see M. Pauknerová, Private International Law, Czech Republic, International Encyclopaedia of Laws, Kluwer Law International 2002.

⁴ The Convention was only ratified by Italy and never entered into force.

Slovakia in 1993.⁵ The only major exceptions worth mentioning are those amendments of the Private International Law Act passed in connection with the entrance of the Czech Republic into the European Union; the amendments implemented EC Directives regulating the conflict of laws rules.

Special provisions of the Private International law Act concerning the recognition and enforcement of certain foreign decisions (see Part II, International procedural law, Division 4, Sections 68a-68c Czech PILA) were also adopted. The provisions of that Division apply to proceedings regarding the recognition and enforcement of foreign decisions, other public documents and judicial settlement (hereinafter referred to as “decisions”), namely in proceedings governed by an EC regulation or by an international treaty officially published in the Collection of International Treaties, to the ratification of which the Parliament has consented and by which the Czech Republic is bound.⁶ These provisions relate not only to EC Regulations but also to the Hague Convention of 1996 on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, see Article 26. The Czech Republic ratified this Convention in 2000, previous to its entrance to the European Union. The Private International Law Act amendment introduced the special procedure on the declaration of enforceability of foreign decisions, hitherto unknown to Czech law (Section 68a Czech PILA).

Recodification of Czech private international law

Recently, a new Private International Law Act has been prepared within the complex recodification (restatement) of Czech private law.⁷ One of crucial questions which are currently under discussion in Czech private international law is the question of establishing fundamental connecting factors in personal, family and succession law. In other words, one

⁵ See in particular the amendments as to the validity of marriage of Czech citizens which took place abroad, and as to the changed structure of Czech judicial organs, comp. Acts No. 234/1992 Coll., No. 264/1992 Coll., and No. 125/2002 Coll.

⁶ For example, the Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses; the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, declared under Ref. No.: 141/2001 Collection of International Treaties.

⁷ The new Czech Private International Law Act draft has only been recently published, see (in Czech)

<<http://obcanskyzakonik.justice.cz/cz/zakon-o-mezinarodnim-pravu-soukromem/obecna-vychodiska-navrhu-obchodniho-zakoniku.html>>.

of the main issues now is that of nationality factor versus habitual residence factor. The new trend concerning the replacement of the traditional connecting factor of nationality with that of habitual residence is a general trend in private international law and with regards to the Czech draft, it affects both conflict rules and rules of jurisdiction. Taking into account the latest negotiations, it seems likely that the idea of habitual residence will appear in future Czech legislation. I think that we can feel here the influence not only of recent European private international law, but also of modern Hague Conventions. In particular, the Hague Convention of 1996 on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, is here reflected to a certain extent in the determination of the applicable law in some family matters, especially those dealing with obligations with respect to a child, as well as for the exercise of parental responsibility. The opinion of *William Duncan* that “the dominance of habitual residence over nationality has been fully realised”⁸ has thus been confirmed. It applies not only to the Hague Conventions on international family law but also to the future Czech private international law where it will probably go even beyond family law issues. I personally consider this new development to be positive. It would provide uniform or similar solutions in various states and jurisdiction rules based on a habitual residence can eliminate, at least partially, the forum shopping in these fields. On the other hand, we may expect that such conflict rules’ solutions will strengthen the application of *lex fori* which may be felt as a positive contribution for the legal practice.

The latest amendment of the Czech Civil Procedure Code

Recently, the amendment of the Czech Civil Procedure Code (Czech CCP)⁹ entered into force, which, *inter alia*, introduces new, special provisions for proceedings on the return of a child having been subjected to international child abduction. It is a reaction to some problems connected with the application of the Hague Convention of 1980 on the Civil Aspects of International Child Abduction (sections 193a – 193e Czech CCP).¹⁰ At the

⁸ See W. Duncan, Nationality and the protection of children across frontiers, and the example of intercountry adoption, *Yearbook of Private International Law*, Vol. 8 (2006), 79.

⁹ Act No. 99/1963 Coll., Civil Procedure Code, as amended (hereinafter Czech CCP).

¹⁰ Act No. 295/2008 Coll., amending the Act No. 99/1963 Coll., Civil Procedure Code.

same time, the amendment implements the requirements of EC Regulation No. 2201/2003 concerning jurisdiction and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Regulation Brussels II bis) into Czech law. This amendment to the Code of Civil Procedure implemented a specific child-return procedure in international cases. For example, exclusive jurisdiction of one court in the Czech Republic has been established in order to eliminate jurisdiction problems and entrust the cases – which are rare but complicated - to specialised judges; new regulation stipulates possibility of a preliminary enforcement of judgments, or a review of an appeal is excluded, etc. The main purpose of this amendment is to provide Czech courts with a special child-return regulation in order to use swift proceedings and to make the proceedings as efficient as possible.

The Czech Office for International Legal Protection of Children

The Czech Office for International Legal Protection of Children (hereinafter “the Office“) was established by the Act on Socio-Legal Protection of Children.¹¹ The Office is an authority in charge of the socio-legal protection of children and, since 1st April 2000, it has officially been one of public authorities providing socio-legal protection. The Office is the only Competent Authority in the Czech Republic authorized to ensure and provide legal protection (mainly in matters concerning the recovery of maintenance) to minors and, in exceptional cases, to adult persons in cross-border relations. It ensures direct implementation of several international conventions, which include, among others, the following Hague Conventions:

- Hague Convention concerning the recognition and enforcement of decisions relating to maintenance obligations towards children,
- Hague Convention on the civil aspects of international child abduction,
- Hague Convention on the protection of children and co-operation in respect of intercountry adoption.

¹¹ Act No. 359/1999 Coll., on Socio-Legal Protection of Children.

- Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children.

The Hague Conventions specify priorities and essential tasks of the Office in three basic areas, namely; recovery of maintenance from abroad, international child abductions and international child adoptions. The Office has been designated the Central Authority of the Czech Republic under Article 6 of the Hague Convention on international child abduction, the Central Authority of the Czech Republic under Article 6 of the Convention on protection of children and co-operation in respect of intercountry adoption. The Office also provides legal aid and counselling in the field of recovery of maintenance from abroad, international child abductions and international child adoptions.

C. CONFLICTS BETWEEN CONFLICTS CONVENTIONS AND CZECH DOMESTIC LAW

20) Precedence of domestic law or international Conventions according to the Constitution of the Czech Republic

Section 2, Czech Private International Law Act, and Article 10, Czech Constitution

Pursuant to Section 2, Czech Private International Law Act, provisions of international treaties which are binding to the Czech Republic shall take precedence over the Act, or, more precisely, provisions of the PILA shall be applied only if such a treaty does not provide otherwise. The wording of this rather outdated clause concerning the preferential application of international treaties does not explicitly require the publication of such a treaty in the Collection of Laws (since the year 2000 the publication in the Collection of International Treaties). However, the publication of such a treaty in the Collection of Laws was considered, at least in Czech legal literature, to be a prerequisite for its application as a necessary requirement of legality, despite the fact that this condition was not formally required by the law.¹² This situation, rather unclear, particularly with respect to the practice of Czech courts, was changed with the Constitutional Act No. 395/2001

¹² Cf. Z. Kučera, L. Tichý, 'Zákon o mezinárodním právu soukromém a procesním. Komentář' (Act on Private International Law and Rules of Procedure Relating Thereto, Commentary, in Czech), Panorama Prague 1989, 31.

Coll., amending the Constitution of the Czech Republic, effective as of June 1, 2002, which brought in a general solution to the preferential application of international treaties, so far limited only to treaties on human rights. Under Article 10 of the amended Constitution, officially promulgated international treaties, whose ratification was consented to by the Parliament and which are binding to the Czech Republic, form part of the Czech legal system; if an international treaty provides different from a relevant act, the international treaty shall be applied.

This means that an international convention complying with the prerequisites of Article 10 of the Czech Constitution, that is, consent of the Parliament, ratification and official promulgation of the convention in the Collection of international treaties, takes precedence over the respective provisions of the Czech domestic law. The requirement of the publication of conventions in the Collection of international treaties now applies in general.

21) How are inconsistencies between domestic law and the Conventions resolved?

If any provision of the Czech domestic law is in conflict with an international treaty or convention, such provision may not be applied. Its application would constitute grounds for lodging an appeal against the judicial decision which is applying that provision, because such a decision would be reached that violated the legal order of the Czech Republic, as the Czech Constitution would be breached. Thus, the inconsistencies between domestic law and international conventions should be resolved in favour of the conventions.

D. IMPLEMENTATION OF CONFLICTS CONVENTIONS

22) How has the implementation of the Conventions ratified by Czech Republic taken place.

Czech law is essentially based on the monistic theory. Published international treaties, whose ratification were consented to by the Parliament and which are binding to the Czech Republic, form part of the Czech legal order; if an international treaty provides different from a relevant act, the international treaty shall be applied (Article 10 of the Czech Constitution). International conventions are published in the Collection of International

Treaties (for details see item 8 above); the publication is sufficient to prove their primacy over Czech laws. If it appears to be necessary to adopt special provisions within the Czech domestic law providing, for example, a specific court procedure, the relevant provisions of international treaties are implemented into a particular Czech law. In some cases, the Czech law in question even refers to a particular international treaty, which was implemented through the relevant amended provision.¹³

23) Cite jurisprudence applying the Hague Convention of 1980 on the Civil Aspects of International Child Abduction.

11.1. Recent cases of international child abduction

In the Czech Republic, there have been many cases of international abduction of children heavily covered by media; these cases have been solved recently, however, sometimes in rather differing ways. Some decisions have been criticized by legal specialists particularly with respect to the application and interpretation of Article 13 (b) of the Hague Convention on International Child Abduction, under which the judicial or administrative authority of the requested state is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

Recently, the most discussed cases publicized in the Czech media were cases of children *Sarah Barao* (7 years), *Adrian Santana* (4), and siblings *Sofie* (8) and *Lucas* (11) *Krajnik*.¹⁴

Sarah Barao

Czech female *Natalie* married Portuguese *Jorge Barao*; they have a daughter, *Sarah*, and the family lived in Portugal. *Natalie* arrived in the Czech Republic with her daughter and refused to return back; instead, she initiated a divorce proceeding. In January 2007 a Czech court decided that mother of *Sarah* carried out an abduction of her child and was ordered to

¹³ See above - Sections 68a-68c Czech PILA concerning the procedure on declaration on enforceability of foreign judgments.

¹⁴ Full names of children are provided because all cases have been heavily covered by media which revealed the names. Published judicial decisions contain only the initials of names.

return the child back to her father to Portugal. One month later a Portuguese court changed the decision and decided that the daughter may live with and be brought up by her mother in the Czech Republic.

Adrian Santana

Czech female *Veronika Horvathova* lived with her husband and son *Adrian* in the United States. She left the US and arrived with her son in the Czech Republic. The reason for her departure from the US was alleged cruelty committed by her husband towards her and their son. In October 2006, a Czech court decided that *Adrian* be returned to his father in the US, as *Adrian* had been allegedly abducted by his mother. The mother instituted a divorce proceeding. The decision was changed as late as in July 2007. The Supreme Court of the Czech Republic quashed the judgment and returned the case back to a Prague district court. In February 2008 the district court decided that *Adrian* should not be returned in his father to the US as it was not in the best interests of *Adrian* to be returned to the US.

Sofie and Lucas Krajnik

Czech female *Marcela Krajnikova* married Argentine *Roque Fiordalis* and they lived in Argentina. After five years, their relationship broke down and in 2002 *Marcela* fled with her children *Sofie* and *Lucas* to the Czech Republic. She alleged that her husband had subjected her and their children to physical and psychological cruelty. The husband insisted that she had committed abduction as the children travelled without his consent. In 2006 a Czech court decided that both parents had equal rights and that children would be removed from their mother and returned to their father in Argentina. The children were subjected to a dramatic mode of enforcement of judgment by an executor. *Lucas* was taken by the executor from an outdoor school training and younger *Sofie* from her kindergarten. Their mother did not have a chance to say good bye to them. The children have been in Argentina since. In the opinion of the Ministry of Labour and Social Affairs, which is immediately superior to the Czech Office for International Legal Protection of Children, the forcible transport of children to Argentina constituted a breach of the children's rights as the children had been exposed to psychological harm.

As can be seen, individual cases are quite specific and each of them warrants separate attention.

11.2. Recent jurisprudence in international child abduction

Judgment No. 440/2000 of the Constitutional Court of 7th December 2000¹⁵

The judgment No. 440/2000 of the Constitutional Court of 7th December 2000 has been most significant for the decision-making of Czech courts and usually referred to by the Supreme Court in its decisions. The judgment deals with the following issue:

Complainant *D.D.*, a Czech female citizen, challenged in her constitutional complaint the final judgments of a regional and district courts alleging, briefly speaking, that those courts violated her constitutionally protected rights contained in the Czech Charter of Fundamental Rights and Freedoms. The violation exists in the fact that both courts compelled the complainant “to leave the country against her will in order to preserve her right to raise her daughter”. *D.D.* had lived with her Israeli husband and daughter *Karolina* in Haifa for 8 years and her daughter attended school there. Then the mother left Israel for the Czech Republic with her daughter and without consent of the father. The Czech courts ordered that the daughter *Karolina* should be returned to the place of her father’s residence in accordance with the Hague Convention on Child Abduction. In her complaint to the Constitutional Court *D.D.* claimed that the decisions of both Czech courts could not rely on the Convention as the change of residence of her daughter (from Israel to the Czech Republic) had been done as a result of her agreement with the father; as far as the procedural issues were concerned, the mother claimed insufficient fact-finding by the courts, in particular with respect to the personal situation of her daughter for whom the return to her father’s residence in Israel would be a traumatizing experience. The mother believed that the courts acted erroneously when they failed to hear her minor daughter, primarily with respect to her return to Israel. The complainant asked the Constitutional Court to quash the judgments of general courts due to the fact that their enforcement could have caused significant harm to the interests of her daughter and the complainant applied

¹⁵ Collection of judgments and resolutions of the Constitutional Court No. N 185/20 SbNU 285, published in Czech on <<http://nalus.usoud.cz/Search/Search.aspx>>.

for the suspension of the enforcement of the judgments. The courts stated that because the complainant and her daughter had arrived in the Czech Republic without the father's consent and resided there permanently, the only possibility they had was to conclude that the complainant, through her conduct, had accomplished all elements of unlawful retention of a child in the sense of the Convention (Article 1) for the application of which other conditions also existed.

Considering the criteria for the application of the Hague Convention, the Constitutional Court regards as significant and relevant whether;

- a) the change of residence of the minor was done by a unilateral act of the complainant or whether the father of the minor acquiesced to it [Article 13 (a) *in fine* of the Convention];
- b) the return of the minor to the residence of her father does or does not mean any danger of mental harm to be caused to the minor, or may or may not expose her to any other intolerable situation [Article 13 (b) of the Convention], or whether the minor expresses her dissent with her return to her father's residence (under the conditions stipulated by the Convention).

The Constitutional Court identified procedural errors and incomplete fact findings in the case at issue. The Court has concluded as follows:

“If children have their statutory protection (Section 32 and subsequent of the Family Act No. 94/1963 Coll.) as well as their constitutional protection (Article 32 (1) and (2) of the Charter of Fundamental Rights and Freedoms) guaranteed, both the statutory and constitutional guarantees, when applied, should be based not only on very precise fact-finding in the case at issue, but also on a precise legal opinion inferred therein. Considering the application of the Convention (Article 13), this means that reasons prohibiting the return of the child to the father's place of residence (Article 3 of the Convention) must be ascertained and explained sufficiently to such an extent that the threat of serious danger of physical or psychological harm, or any other intolerable situation, resulting from the compelled return may be excluded with the highest degree of probability. Accordingly, all

circumstances which may indicate a real position of the minor's father with respect to the minor's recent residence in the Czech Republic should be identified and revealed.”

This judgment of the Constitutional Court has often been quoted by the Supreme Court of the Czech Republic. However, it should be noted that the judgment was issued several years ago and that the context has slightly changed. On the one hand, there are newer international treaties and conventions adopted primarily by the Council of Europe, and the Czech Republic acceded to the European Union, i.e. EC Regulation No. 2201/2003 concerning jurisdiction and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels II bis) is applicable today. On the other hand, a certain shift can also be traced in the judgments of the European Court of Human Rights. The possibility of proper fact-finding is significantly limited as there is only the maximum of six weeks when the return of a child to his habitual place of residence must be decided, under Article 11 (3) of the Brussels II Regulation. But the Hague Convention also invokes the welfare of the child, i.e. the issue of the protection of a child rights complements the procedural requirement of speedy proceedings. As stated by Czech Ombudsman, every judge should himself gauge the balance of the two principles during proceedings, and he or she should do it in such a way that a fair trial may be secured.¹⁶

Judgment of the Supreme Court of the Czech Republic No. 30 Cdo 474/2007 of 20th June 2007¹⁷

One of the recent judgments of the Supreme Court of the Czech Republic, which followed the above-mentioned decision of the Constitutional Court, is judgment No. 30 Cdo 474/2007 of 20th June 2007 (*Santana*; the facts were described *supra*).

The Supreme Court quashed the decisions of the District and Regional Courts which had ordered that the child be returned to the United States (in 2005 a Californian court ordered the conditions for joint custody of the minor; one condition was that the child could not be removed from the US without a prior written consent from the other parent or a Californian

¹⁶ Public Defender of Rights – Ombudsman, Final Opinion – Measures proposed for the rectification of issues of abduction of children from abroad No. 2840/2006/VOP/ON, 8.8.2006, see (in Czech) <<http://www.ochrance.cz>>.

¹⁷ Published in *Pravni rozhledy* 1/2008, 30, see also (in Czech) <<http://www.nsoud.cz/rozhod.php>>.

court order). The Supreme Court has concluded that when interpreting Article 13 of the Convention the following issues should be noted: despite the fact that the circumstances are restrictive, under which an administrative or judicial body of the requested state is not obliged to order that a child be returned to the requesting state, the restrictive regulation of reasons for the refusal to return a child (apart from the duty to return the child immediately) does not prevent a court from considering whether the person, institution or any other body disagreeing with the return have been able to prove the existence of circumstances under Article 13 (a) or (b) of the Convention. Consideration whether there is a serious danger that the return may expose the child to physical or mental harm or any other intolerable situation under Article 13 (b) of the Convention should always apply to a particular case individually, this means that the circumstances of every case, which are always unique, should be considered on a strictly individual basis. Thus the Article may not be applied by courts, only in exceptional situations such as, when a child becomes a victim of a crime committed by his or her parent (cruelty, sexual abuse), as was inferred by the general courts in the *Santana* case. Apparently, many other situations may occur, as a result of which, the return of a child becomes undesirable or in conflict with the child's interests, for example; where a parent requesting the return will not be able to provide sufficient care (whether the insufficiency is caused on the part of the parent or the child) or where the child may be exposed to domestic violence. There are other relevant factors to be considered such as, among others, the mental or physical conditions of the child and the requesting parent, or when the child does not agree with his or her return, and should be taken into account depending on the age and degree of maturity of the child.

The Supreme Court does not agree with the appellate court (Regional Court) which concluded that Article 13 of the Convention should be interpreted in the following way: "the decision not to return the child to his or her habitual place of residence may be issued only if a serious danger of mental or physical harm has been proved even if the mother intends to follow her child". Thus the Regional Court inferred that in that particular case "the child would not suffer the alleged mental or physical harm as a result of the return to his habitual place of residence but in the causal link to the decision of his mother not to return with him to the habitual place of residence". As is clear even in the title of the Convention, its subject-matter lies in the civil aspects of the international abduction of

children; this means that reasons for a court or any other competent body to decide to return or not to return a child to his or her habitual place of residence under Article 13 (b) of the Convention may be considered exclusively with respect to the child and his or her interests regardless of whether the parent, having unlawfully removed the child, will return back to the habitual residence with the child (compare also the Supreme Court decision No. 30 Cdo 34/2003 of 29th January 2004¹⁸).

The decision of the Supreme Court of 20th June 2007 may be considered as decision-breaking through recent practice.

Judgment of the Supreme Court of the Czech Republic No. 30 Cdo 5473/2007 of 5th March 2008¹⁹

In the judgment, the Supreme Court stressed the necessity to restrictively evaluate the possible exceptions to the obligation to return the child to his or her habitual residence under the Hague Convention on the Civil Aspects of International Child Abduction. The Court defined a “grave risk” which prevented the return of the child to the habitual residence and it also dealt with the refusal of the mother to return to the original habitual residence of her children and the refusal to return her children. The Supreme Court quashed the decisions of the District and Regional Courts, which had rejected the request of the Israeli father to order that the children, removed by the Czech mother to Czech Republic, be returned to Israel.

A Czech female citizen married an Israeli citizen in Israel, and their two children were born in Israel. They lived there until the mother brought them to Czech Republic just to visit her country; but they remained there and did not return. The Israeli father requested the return of his children to Israel and the issue was whether, under the present situation, there was a “grave risk” involved in the children’s return to Israel and it was safe for them to live there. The Court came to the conclusion that there was a “grave risk” only if the return would expose the child to an immediately threatening danger before the enactment of the decision on the right to child care, such as the return of the child to a war zone, a famine area, or

¹⁸ See (in Czech) <<http://www.nsoud.cz/rozhod.php>>.

¹⁹ Published in Právni rozhledy No. 14/2008, 532, see also (in Czech) <<http://www.nsoud.cz/rozhod.php>>.

there was a serious threat of abuse to the child. The Ministry of Justice in Israel as a central authority in this respect provided the information that both children would have conditions for a safe return and therefore it was not possible to deduce that their return to Israel would plunge them into serious danger. While assessing the conditions of the child-return, the argument that the children were emotionally tied to their mother and had, in the meantime, adapted to their new home environment in the Czech Republic cannot be accepted either. On the contrary, it is in the best interests of both children, following the Hague Child Abduction Convention, as well as by Article 3 (1) of the United Nations Convention on the Rights of the Child, that the decision on the merits of the case on the right to custody of the children be issued by the court located in the place of their habitual residence, that is, in Israel, which has the best knowledge of their relationships and their situation.

This rather restrictive concept of the “grave risk” which prevents the return of the child to the habitual residence, can break the existing practice of Czech courts and contribute to the international harmony in these very delicate decisions.

11.3. Conference “When a parent abducts his own child”, Ministry of Justice of the Czech Republic, Prague 2007 – Conclusions

Let me quote some parts from the Conclusions of the Conference entitled “When a parent abducts his own child” held in Prague on 15th and 16th October 2007 under the auspices of the Ministry of Justice of the Czech Republic.

Part 3 of the Conference was dedicated to “Child-return proceedings – role of courts”. The conference came to conclusion that it was necessary to take into consideration two main objects of the Convention on the Civil Aspects of International Child Abduction : 1. to protect children against abduction and

2. to prevent parents from abduction.

The following aspects need to be implemented:

- Use of swift proceeding;
- Principle of autonomous interpretation of the Convention;

- Distinction between a child-return proceedings and a decision on the merits;
- Hearing of the child;
- Cooperation and communication with judges in the state of origin – obtaining of undertakings and mirror orders in the state of origin when appropriate;
- Application of Article 13 (b) of the Hague Convention on International Child Abduction only as an exceptional rule, necessity of its restrictive interpretation; and
- Swift and considerate execution of decision using assistance of specialists.

Prague, Czech Republic, December 2008