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Conflict of Laws' Conventions and their Reception in National Legal Systems

- German National Report -

A. INTRODUCTION

I. German Situation

1. These days, German private international law is becoming more and more a mixture of different legal instruments from different sources. In part, it is governed by certain national legal provisions and case law, but also by European legal instruments and international conventions[1]. Private international law in Germany is still governed mainly by the Introductory Act to the German Civil Code, the EGBGB[2]. In the Introductory Act there is a section exclusively devoted to private international law (Art. 3 – 47). There are also some other statutes dealing with conflict law. Regarding international civil procedure, most rules are to be found in the German Code of Civil Procedure. In addition, many international conventions and some bilateral treaties have to be applied. Of increasing importance are directly applicable European Regulations contained in legislative acts of the European Community and European Directives which have to be implemented into national legislation.

[1] See *Siehr,* Private International Law, in: Reiman/Zekoll (ed.), Introduction to German Law (2nd ed. 2006) 337 et seq.

[2] Einführungsgesetz zum Bürgerlichen Gesetzbuch of 18 Aug. 1896, as amended.

Germany implemented the Hague Child Abduction Convention and other conventions through a special Act on International Family Law Proceedings[3]. For procedural issues in the context of recognition and enforcement of foreign judgments, there is also a special statute[4]. A number of special acts invoke other international conventions and European Regulations.

The application of the conflict rules is primarily the task of the courts, with the Federal Supreme Court (*Bundesgerichtshof*) at the top of the chain. However, decisions of the Federal Constitutional Court (*Bundesverfassungsgericht*), which controls the constitutionality of legal instruments and judgments, are also seen as influential[5].

It is generally recognised that the implementation of many international conventions and effective cooperation between different jurisdictions can only work with the additional help of specialised national authorities[6]. Therefore, in Germany today there is a central authority in the form of the Federal Office for Justice (*Bundesamt für Justiz*)[7]. This Federal Office for Justice plays an important role in several international conventions, particularly in cases of child abduction (see no. 16), but also in child adoptions (see no. 25) and the service of documents (see no. 28). However, Germany is a federal country that consists of sixteen states (*Laender*), each having their own competence in the administration of justice and substantive and procedural law on domestic relations is controlled by federal law. Nevertheless, an important role is played by the local authorities of each German state.

II. The European Dimension

1. European Regulations

[3] International Family Law Proceedings Act (Internationales Familienrechtsverfahrensgesetz; IntFamRVG) of 26 Jan. 2005 (Federal Gazette [Bundesgesetzblatt] 2001 I p. 288) as amended.

[4] Act Implementing Recognition and Enforcement (Anerkennungs- und Vollstreckungsausführungsgesetz; AVAG) of 19 Feb.2001 (Federal Gazette 2001 I p. 288) as amended.

[5] See in more detail Pirrung, The Federal Constitutional Court Confronted with Punitive Damages and Child Abduction, in: Borrás et al. (eds.), E Pluribus Unum – Liber Amicorum Droz (The Hague 1996) 341 (343 et seq.).

[6] Cf. Siehr, The Impact of International Conventions on National Codifications of Private International Law, in: Borrás et al. (eds.) E Pluribus Unum – Liber Amicorum Droz (The Hague 1996) 405 (411 et seq.).

[7] See http://www.bundesjustizamt.de/.- Cf. §§ 7, 8 Int. Fam. L. Proceedings Act.

2. The Treaty of Amsterdam, signed on 2 October 1997, broadened the legal basis for judicial cooperation in civil matters which had, until then, been incorporated in the EC Treaty (Art. 65). The increasing Europeanization of private international law means that nowadays, private international law and the law of international civil procedure are increasingly dominated by European rules which have priority. Therefore, many of the current problems with the relationship with international conventions are, from a practical point of view, increasingly so, a question of the relationship between European rules and international conventions.

The European Community has made use of its competence by adopting a number of instruments under Art. 61 lit. c of the EC Treaty. Thus, European rules already exist in many fields, especially in the field of international civil procedure. The most important Regulations are:

- Council Regulation 1346/2000/EC of 29 May 2000 on insolvency proceedings[8];

- Council Regulation 44/2001/EC of 22 December 2000 on jurisdiction, recognition and enforcement in civil and commercial matters (Brussels I Regulation)[9];

- Council Regulation 1206/2001/EC of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters[10];

- Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes[11];

- Council Regulation 2201/2003/EC of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility (Brussels II bis Regulation)[12];

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[8] Regulation No 1346/2000/EC of 29 May 2000 on insolvency proceedings, OJ EC 2000 L 160/1.

[9] Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ EC 2001 L 12/1.

[10] Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the member states in the taking of evidence in civil or commercial matters, OJ EC 2001 L 174/1.

[11] Directive No 2003/8/EC of 27 Jan. 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ 2003 L 26/41.

[12] Regulation (EC) No 2201/2003 of concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ EC 2003 L 338/1.

- Regulation 805/2004/EC of 21 April 2004 creating a European Enforcement Order for uncontested claims[13];

- Regulation 1393/2007 of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents)[14].

Consequently, central issues of jurisdiction and recognition of foreign judgments in civil and commercial matters, service of documents in civil or commercial matters, taking of evidence in civil and commercial matters, etc. are governed by European rules.

The conflict rules in the field of obligations have been unified. There is a Council Regulation on the law applicable to non-contractual obligations ("Rome II")[15] and another Regulation on the law applicable to contractual obligations ("Rome I")[16]. Such Regulations harmonize the Member States' conflict-of-law rules in more and more fields. In family law, different Regulations on divorce, maintenance, matrimonial property are in preparation [17].with another Regulation dealing with succession law

3. On 5 October 2006 the Council of the European Union (EU) adopted a decision on the accession of the European Community to the Hague Conference on Private International Law[18]. Since 3 April 2007, the European Community has been a participant of the Hague Conference on Private International Law[19]. The European Community accepted formally, and without reservation, the obligations arising from its membership to the Hague Conference. In this context, a declaration of competence by the European Community specified matters in respect of which internal and external competence was transferred to it

[13] Regulation No 805/2004/EC of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ 2004 L 143/15.

[14] Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000, OJ EC 2007 L 324/79.

[15] Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("Rome II"), OJ EU 2007 L 199/40.

[16] Regulation of the European Parliament and the Council on the law applicable to contractual obligations ("Rome I"), OJ EU 2008 L 177/6.

[17] See Martiny, Die Entwicklung des Europäischen Internationalen Familienrechts - ein juristischer Hürdenlauf, FPR 2008, 187 et seq.

[18] Council Decision 2006/719/EC of 5 October 2006 on the accession of the Community to the Hague Conference on Private International Law, OJ 2006 L 297/1.

[19] See in more detail Schulz, The Accession of the European Community to the Hague Conference on Private International Law, Int. Comp. L. Q. 56 (2007) 939 et seq.

by its Member States. The European Community has internal competence to adopt general and specific measures relating to private international law in various fields in its Member States. In respect of matters within the purview of the HCCH, the European Community notably has the competence under Title IV of the EC Treaty, to adopt measures in the field of judicial cooperation in civil matters having cross-border implications insofar as is necessary for the proper functioning of the internal market (Art. 61 lit. c and 65 EC Treaty).

For existing conventions, the external competence of the Community has to be respected. This competence has been defined by the Court of Justice of the European Communities[20]. The Community may conclude international agreements whenever the internal competence has already been used in order to adopt measures for implementing common policies, or if the international agreement is necessary to attain one of the Community's objectives. The Community's external competence is exclusive to the extent to which an international agreement affects internal Community rules or alters their scope. Where this is the case, it is for the Community to enter into external undertakings with third States or international organisations. An international agreement can fall entirely or only partially within exclusive Community competence.

2. European Regulations and The Hague

4. The European Regulations contain provisions on the relationship with existing international conventions. The respect for international commitments entered into by the Member States proclaims that the Regulations should not affect international conventions to which one or more Member States are parties. In the field of contractual obligations, the Regulations shall not prejudice the application of international conventions to which one or more Member States are parties and which lay down conflict-of-laws rules relating to contractual and non-contractual obligations[21]. However, the Regulations shall, as between

[20] See the EART ("European Agreement on Road Transport") case, ECJ - Case 22/70, ECR 1971, 263 .

[21] Art. 28 para. 1 Rome II Regulation; Art. 25 para. 1 Rome I Regulation.

Member States, take precedence over conventions concluded exclusively between two or more of them, in so far as, such conventions concern matters governed by the Regulation[22].

For the sake of legal security and to make the rules more accessible, a list of conventions has been established. The Member States notify the European Commission of the conventions in the fields of non-contractual and contractual obligations. The Member States are also required to notify the Commission of all denunciations of such conventions[23].

Similar rules apply in the field of international civil procedure. The Service Regulation takes precedence over the international conventions concluded by the Member States (notably the 1965 Hague Convention)[24] and priority is given to the rules on recognition of judgments of the Brussels I Regulation[25]. However, according to Art. 71 para. 1 of the Brussels I Regulation, its provisions shall not affect any conventions to which the Member States are parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments. Therefore specialized Hague Conventions take precedence over the Brussels I Regulation in order to ensure compliance with those conventions[26].

In cases of wrongful removal or retention of a child, the Brussels IIbis Regulation aims to simultaneously combine the application of the Regulation with the application of the Hague Child Abduction Convention[27]. The Hague Convention of 1980 is complemented by provisions of the Brussels IIbis Regulation, in particular Art. 11. The courts of the Member State to or in which the child has been wrongfully removed or retained may oppose his or her return in specific cases. However, such a decision can be replaced by a subsequent decision by the court of the Member State of habitual residence of the child prior to the wrongful removal or retention. Should that judgment require the return of the child, the return is supposed to take place without any special procedure being required for recognition and enforcement of that judgment in the Member State to or in which the child has been removed or retained. According to Art. 11 para. 4 of the Regulation, a court

[22] Art. 28 para. 2 Rome II Regulation; Art. 25 para. 2 Rome I Regulation.

[23] Art. 29 para. 1 Rome II Regulation; Art. 26 para. 1 Rome I Regulation.

[24] Art. 20 of the Service Regulation 2007.

[25] Brussels I Regulation Art. 68 et seq.

[26] See in more detail Mankowski, in: Magnus/Mankowski (ed.), Brussels I Regulation (2007) Art. 71 Brussels I Regulation no. 1 ff.

[27] Cf. Schulz, The New Brussels II Regulation and the Hague Conventions of 1980 and 1996, IFL 2004, 22 et seq.

cannot refuse to return a child on the basis of Art. 13 lit. b of the Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after their return. Therefore, the Regulation places much more emphasis on the return of the child than the Abduction Convention does[28].

In the field of evidence, the Regulation does not preclude two or more Member States from concluding or maintaining agreements aimed at expediting or simplifying the execution of a request for the performance of judicial acts. However, the Regulation does take precedence over the Hague Evidence Convention of 1965[29].

Additionally, the Evidence Regulation deals expressly with the relationship of existing or future agreements or arrangements between Member States. Regarding its application, the Regulation prevails over other provisions contained in bilateral or multilateral agreements or arrangements concluded by the Member States in relations between the Member States party thereto, in particular the Hague Convention of 1954 on Civil Procedure and the Hague Convention of 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters[30].

In the future, the relationship between international conventions and domestic conflict rules will increasingly be a question of European law. Since there are more and more European Regulations, these questions will also address the relationship of the regulations to one another as well to the international conventions. Germany has to follow these European rules.

B. Germany and The Hague

I. Ratifications of Hague Conventions

[28] Cf. Appellate Court Brandenburg 22 Sept. 2006 - 15 UF 189/06 – (juris); Borras, Protection of Minors and Child Abduction under the Hague Conventions and the Brussels-IIbis Regulation, in: Basedow/ Baum/Nishitani (ed.), Japanese and European private international law in comparative perspective (2008) 345 et seq.

[29] See Art. 20 para. 1 Evidence Regulation.

[30] See Art. 21 para. 1 of the Evidence Regulation.

5. Germany actively supports the main purpose of the Hague Conference, that is to say,, the progressive unification of the rules of private international law in the participating countries. The Federal Republic of Germany has ratified the following Hague Conventions:

- Convention on Civil Procedure (adopted 1 March 1954, entered into force 12 April 1957)[31],

- Convention on the Law Applicable to Maintenance Obligations towards Children (adopted 24 October 1956, entered into force 1 January 1962)[32],

- Convention concerning the Recognition and Enforcement of Decisions relating to Maintenance Obligations towards Children (adopted 15 April 1958, entered into force 1 January 1962)[33],

- Convention concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants (adopted 5 October 1961, entered into force 4 February 1969)[34],

- Convention on the Conflicts of Laws relating to the Form of Testamentary Dispositions (adopted 5 October 1961, entered into force 5 January 1964)[35],

- Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (adopted 5 October 1961, entered into force 24 January 1965)[36],

- Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (adopted 15 November 1965, entered into force 10 February 1969)[37],

- Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (adopted 18 March 1970, entered into force 7 October 1972)[38],

- Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations (adopted 2 October 1973, entered into force 1 August 1976)[39],

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[31] Federal Gazette 1958 II p. 576.
[32] Federal Gazette 1961 II p. 1012.
[33] Federal Gazette 1961 II p. 1005.
[34] Federal Gazette 1971 II p. 219.
[35] Federal Gazette 1965 II p. 1144.
[36] Federal Gazette 1965 II p. 875.
[37] Federal Gazette 1977 II p. 1452.
[38] Federal Gazette 1977 II p. 1452, 1472.
[39] Federal Gazette 1986 II p. 826.

- Convention on the Law Applicable to Maintenance Obligations (adopted 2 October 1973, entered into force 1 October 1977)[40],

- Convention on the Civil Aspects of International Child Abduction (adopted 25 October 1980, entered into force 17 December 1983)[41],

- Convention on Protection of Children and Co-operation in respect of Intercountry Adoption (adopted 29 May 1993, entered into force 1 May 1995)[42],

- Convention on the International Protection of Adults (entered into force 1 January 2009)[43].

Germany frequently takes part in the work of The Hague conferences, having delegations present at the diplomatic conferences where these conventions were adopted. The German Council for Private International Law (Deutscher Rat für Internationales Privatrecht) regularly gives advice to the German Federal Ministry of Justice. The development of legislation for implementing the conventions is seen as an important task.

II. Signing without Ratification

6. The signing of a convention generally signals the intention of the German government to accept the final solutions of the convention, to proceed with efforts to ratify the convention and to implement it in the near future. Therefore, ratification normally follows the signing. Only in very few cases has a treaty been signed but not later ratified. Germany has signed but not ratified the following Hague Conventions:

- Convention on the jurisdiction of the selected forum in the case of international sales of goods (concluded 15 April 1958),

- Convention on International Access to Justice (adopted 25 October 1980, entered into force 1 May 1988*),*

[40] Federal Gazette 1986 II p. 837.

[41] Federal Gazette 1190 II p. 206.

[42] Federal Gazette 2001 II p. 1034.

[43] Federal Gazette 2007 II p. 323.

- Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (adopted 19 October 1996, entered into force 1 Jan. 2002).

The reasons for non ratification are varied. In a few cases the result of the convention was, in the end, seemingly unconvincing. On other occasions however, like the Conventions on Traffic Accidents of 1971 or Products Liability of 1973, Germany did not sign the Convention in the first instance. Today, due to changes in European law, there is an external competence of the EC (see no. 3); Germany needs authorisation from the EC where there is such an external competence of the EC. Hence there has not even been a signing of the most recent conventions:

- Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary (adopted 5 July 2006, no ratifications up til now),

- Convention on Choice of Court Agreements (adopted 30 June 2005),

- Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (adopted 23 November 2007, no ratifications up til now),

- Protocol on the Law Applicable to Maintenance Obligations (adopted 23 November 2007, no ratifications up til now).

The reason for the non ratification of the Children Protection Convention of 1996 is that this treaty covers issues which are also dealt with in Regulation No 1347/2000 (Brussels II) and the Brussels IIbis Regulation. Thus it falls within the external competence of the Community. The convention, however, does not allow for accession by the Community. By way of exception, therefore, the Council has authorised those Member States that are bound by Community provisions in the field to sign the convention in the interest of the Community[44]. The Member States signed the convention on 1 April 2003, with the exception of the Netherlands which had already signed on 1 September 1997. At the same time they made a declaration aimed at ensuring that the Community rules on recognition

[44] Council Decision 2003/93/EC of 19 Dec. 2002 authorising the Member States, in the interest of the Community, to sign the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, OJ EU 2003 L 48.

and enforcement would be applied consistently. The Decision authorising the signature was followed by a decision on ratification[45] (see no. 3).

C. Conflicts Conventions and Domestic Conflicts Law – A Substantive Comparison

7. Originally, in status matters and family law, the German codification followed the nationality principle. With the change of The Hague approach and reform efforts within the German system, there is now a move towards the principle of habitual residence. Today, the main personal connecting factors employed by the German system on conflict of laws are nationality and habitual residence, while domicile is only relevant in the rules on international jurisdiction. This shift from a connection in accordance with the principle of nationality to a system based more and more on a connection in accordance with the principle of habitual residence has occurred in family law, mainly for mixed marriages, where there is no common nationality of the spouses (see Art. 14 para. 1 Introductory Act).

With respect to nationality as a connecting factor, the situation of dual nationality is covered by Art. 5 Introductory Act (positive conflicts of nationality), stating a preference for the law of the nationality with the closest connection. However, if one of the individuals is German, then the German nationality will prevail as the connecting factor.

German conflict of laws rules also deal with States with a multiple legal system. Here, the approach is similar to the one of the Hague Conventions. One first looks to the foreign legal system in determining which law is applicable and only subsequently, as necessary, inquires as to the closest connection (Art. 4 para. 3 Introductory Act). In the public policy clause of Art. 6 German Introductory Act, the word "manifestly", incompatible with German public policy, is used as in the Hague Conventions. German courts tend to refrain from invoking this clause.

8. During the reform of German private international law in 1986, the legislator decided that unnecessary contradictions between the national codification and the existing

[45] See also the Proposal for a Council Decision authorising certain Member States to ratify, or accede to, in the interest of the European Community the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (the 1996 Hague Convention) of 6 May 2008.

conventions should be avoided. Moreover, the legislator also wanted to create a comprehensive national statute and incorporate existing German conflicts law. Therefore, some treaties were incorporated into the German codification[46]. The Convention on the Law Applicable to Maintenance Obligations of 1973 was transformed into Art. 18 of the German Introductory Act. Thus, as a general rule, the obligation to furnish maintenance is governed by the substantive rules of the law of that country in which the claimant has his habitual residence. The exemptions to this rule, particularly the so-called "cascade" allowing the application of the most favourable law to the maintenance claim, were also introduced into Art. 18 of the German Introductory Act which is of universal application. Consequently, the German legislation is completely in line with the Hague Convention of 1973.

The Convention on the Conflicts of Laws relating to the Form of Testamentary Dispositions of 1961 was incorporated as Art. 26 into the German Introductory Act. The form of testamentary dispositions, even if made by two or more persons in one document, shall be valid if it complies with one of a list of alternatives, e.g., the *lex loci actus, lex rei sitae*, but also the law of the country of which the testator was a citizen. Therefore, the German legislation in this field is also completely consistent with the Hague Convention of 1961.

Another example is the incorporation of the Rome Convention on the Law Applicable to Contractual Obligations of 1980 into Art. 27 ff. of the German Introductory Act. For these types of cases the legislator has ordered that only the German version of the convention should be used. However, since this could contravene the duty of uniform interpretation of the convention, the legislator at the same time introduced an article into the German Introductory Act stating that there should be a uniform interpretation of these provisions (Art. 36). It seems tempting, however, for the courts to only take the German version into account.

One has to admit that the incorporation of the conventions has been accomplished without neither translation mistakes nor errors in legal technique. However, the fact that these provisions form a part of the national statute creates a continual temptation to look for

[46] See Siehr, Codification of private international law in the Federal Republic of Germany, Neth. Int. L. Rev. 31 (1984) 92 et seq.

solutions to general private international law questions in the national codification rather than in the convention. This has happened, for example, in cases of dual nationality[47]. German private international law states that where one of the dual nationalities is German then it should prevail (Art. 5 para. 1 sent. 2 Introductory Act). The correct solution is, however, that under the Hague Conventions the closest connection should be determinative and that German nationality is not to assume priority under the convention[48].

9. The legal relationship between parent and child is governed by the law of the country in which the child has their habitual residence (Art. 21 German Introductory Act). This solution for parent-child relationships was strongly influenced by the tendency of the Hague Conventions to use the concept of habitual residence in family law and also in status matters[49]. For parentage, habitual residence is alternatively used as a connecting factor, along with others, in order to favour a certain result by giving a choice between more than one single governing law (Art. 20 Introductory Act).

Divergent solutions are mainly being found in areas where the respective Hague Conventions have not been signed and ratified. The law of matrimonial property is governed by the law which governs the effects of marriage in general (Art. 15 para. 1 in conjuncture with Art. 14 Introductory Act). Contrary to the Hague Convention of 1978, which was not signed by Germany, it is not the habitual residence of the spouses but their common nationality which is the starting point. To a certain extent, party autonomy is recognised not only by the Hague Convention of 1978 but also by the Introductory Act. Spouses may choose the law for their matrimonial regime, e.g., for immovables, the law of the country in which they are located (Art. 15 para. 2 no. 3 Introductory Act).

In the field of legal representation, one finds only case law which follows the principle of the place of use of authorisation. The concept of a link between the underlying relationship and authority to represent is not followed in German private international law.

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[47] See e.g., Court of Appeal (Kammergericht) Berlin 7 Sept. 2001, FamRZ 2002, 1057.

[48] See Andrae, Internationales Familienrecht (2nd ed. 2006) § 8 No. 50.

[49] See Siehr (supra note 6) 406 et seq.

However, the consistency of a solution with one of the Hague Conventions is often a strong argument for reform. On the other hand, one has to admit that European Regulations and Directives which currently exist or are in preparation, are more influential.

D. Conflicts between Private International Law Conventions and Domestic Law

10. The German constitution (Basic Law, "*Grundgesetz*") deals with the force of international conventions[50]. Ratification is necessary[51]. Under German constitutional law, an international convention takes no precedence over German federal law; in principle, the treaty simply has the force of a federal statute[52]. The Basic Law always remains paramount. However, there is a special provision in the Introductory Act according to which rules in public international treaties, insofar as they have become directly applicable to intra-state law, and prevail over the Introductory Act (Art. 3 No. 2). Regulations in legislative acts of the European Community remain unaffected (cf. Art. 3 No. 1).

11. The danger of inconsistencies between domestic law and the conventions arises mainly in the context of constitutional law issues. In several cases the Federal Constitutional Court had to deal with the constitutionality of Hague Conventions. Under the Basic Law there is the question whether the convention as such is constitutional. In most cases, however, the only question to arise is whether the application contradicts constitutional requirements. In Germany, a constitutional complaint may be filed against a final, last-instance decision for an alleged violation of fundamental rights as protected by the Constitution. Consequently, the proceedings are generally brought as individual complaints against German court decisions or decisions of German judicial authorities applying the respective conventions[53]. It is generally not the convention as such which is being challenged, but the application of a

[50] Basic Law for the Federal Republic of Germany (Promulgated by the Parliamentary Council on 23 May 1949) (as amended by the Unification Treaty of 31 Aug. 1990 and Federal Statute of 23 Sept. 1990) as amended.

[51] See Art. 59 Basic Law.

[52] Cf. Wolfe, A Tale of Two States: Success and Failures of the 1980 Hague Convention on the Civil Aspects of International Child Abduction in the United States and Germany, N.Y.U. J. Int. L. & Pol. 33 (2000) 285 (368).

[53] See § 93b in conjunction with § 93a of the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz; BVerfGG)

foreign law which allegedly contradicts principles of German law. This happens mainly in respect of the rules of common law jurisdictions. The application and enforcement of the law of the United States of America in particular caused difficulties[54]. In child abduction, cases procedural defects are often claimed without support. Generally there are some decisions of the Federal Constitutional Court on the principal issues. Later complaints are no longer admitted because of a lack of fundamental significance.

12. Under German constitutional law, a whole range of fundamental rights stemming from the German Basic Law may be involved[55]. One issue is the "general freedom of action", i.e. the right to the free development of personality (Art. 2 para. 1 of the Basic Law) in conjunction with the rule of law[56]. Additionally, the child's right to dignity (Art. 1 para. 1 Basic Law) can play a role[57]. On occasion it has also been argued that there is a violation of the essential principles of a free state governed by the rule of law (Art. 20 of the Basic Law).

In cases of service of a statement of claim, a violation of Art. 12 para. 1 of the Basic Law was denied because the provision does not regulate the practice of an occupation or a profession[58]. Furthermore, a violation of Art. 14 para. 1 of the Basic Law (protection of property) did not occur since the act of serving the statement of claim does not presently and directly affect legal values protected by Art. 14 para. 1 of the Basic Law[59].

Protection of marriage and the family under Art. 6 para. 1 Basic Law is an important issue. The protection of the rights of children under Art. 6 para. 2 Basic Law is another question in abduction cases[60]. From a procedural perspective, the right to be heard (Art. 103 Basic Law) has to be respected[61]. It is a demanding task to interpret the constitutional guarantees,

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[54] von Hein, Recent German jurisprudence on cooperation with the United States in civil and commercial matters : a defense of sovereignty or judicial protectionism?, in: Gottschalk et al. (ed.), Conflict of laws in a globalized world (Cambridge 2007) 101 et seq.

[55] In more detail, see Pirrung (supra note 5) 341 et seq.

[56] Fed. Const. Court 10 Oct. 1995, IPRax 1997, 123 Annot. E. Klein (106). Commented by Dyer ILM 35 (1996) 529; 14 June 2007, NJW 2007, 3709.

[57] Fed. Const. Court 10 Oct. 1995, IPRax 1997, 123. Commented by Dyer ILM 35 (1996) 529.

[58] Fed. Const. Ct. 14 June 2007, NJW 2007, 3709.

[59] Fed. Const. Ct. 14 June 2007, NJW 2007, 3709.

[60] Fed. Const. Ct. 3 May 1999, NJW 1999, 3622 = IPRax 2000, 224 Annot. Staudinger (194); 18 July 2006, FamRZ 2006, 1261.

[61] See Fed. Const. Court 18 July 2006, FamRZ 2006, 1261.

especially in the context of cross-border proceedings[62]. The peculiarities of international cases have to be recognised. It is also necessary that courts and German authorities define their role as just one of many players in an increasingly globalized world[63].

13. One possibility for defending one's own legal system against the solutions of the convention is a public policy clause or a similar clause found in the convention itself, cf. for the Hague Abduction Convention (no. 19) and the Hague Service Convention (no. 28).

14. However, often it is not so much a reluctance to apply the convention correctly but the purposes and mechanisms of the convention or of the applicable foreign law that do not exactly align with domestic law. Domestic judges feel uncomfortable and do not want to deviate from general rules or infringe the established legal positions of domestic citizens. Therefore, particularly in the law of procedure, specific statutes which implement the conventions fully and clarify contradictions are necessary. Especially in the context of protection of children, special authorities play an even greater role. Within the European Union, national courts become more and more accustomed at establishing direct contact with their counterparts in other Member States.

E. Implementation of Conflicts Conventions

I. Implementation in General

15. The implementation of international conventions raises different issues. At first, ratification requires that the convention enters into force according to national constitutional law. In Germany one will also find implementing legislation which is generally drafted with a certain degree of detail. It is also important that the texts of the conventions are accessible and that the rules are known by parties, judges and legal professionals. This requires training and specialisation. In all these respects there are ongoing efforts in Germany.

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[62] Cf. Coester-Waltjen, Die Wirkungskraft der Grundrechte bei Fällen mit Auslandsberührung, BerDtGesVR 38 (1998) 9 et seq.

[63] Cf. von Hein (supra note 54) 123 et seq.

Some problems are predictable where there are reservations within the conventions. The existence of reservations shows that there may be conflicts and the scope of these reservations may be disputed. The interpretation of the conventions – especially insofar as they contain general clauses and exceptions – is also of crucial importance.

II. Hague Convention of 1980 on the Civil Aspects of International Child Abduction

16. Germany ratified the Hague Convention of 1980 on the Civil Aspects of International Child Abduction in 1990 and it entered into effect in Germany later that year. The Abduction Convention requires the effective "return" of a child who has been wrongfully removed from their habitual place of residence or retained in another Contracting State and provides an effective mechanism for the swift return home of a child. It aims to establish a consistent approach in handling international civil child abduction cases. In Germany, proceedings under the Hague Convention follow §§ 37 et seq. of the Int. Fam. L. Proceedings Act; "non-contentious" questions are also dealt with in the Act on Non-Contentious Proceedings[64]. The Federal Office of Justice fulfils its functions as a Central authority. However, if Germany is the State to where the child has been abducted, problems may result. The return proceedings may conflict with the usual approach of German courts which in effect tend to grant protection to domestic parties[65].

17. In the past Germany has been the recipient of extensive international criticism, alleging that German courts were violating their treaty obligations by failing to return children who had been abducted to Germany by German nationals. The United States and other countries have been critical of Germany's handling of international parental child abduction cases filed by foreign parents for not fully and consistently following the criteria and procedures established under the 1980 Hague Convention[66]. With regards to France, a special

[64] Gesetz über die freiwillige Gerichtsbarkeit (FGG) of May 20, 1898 (as amended) – Cf. Wolfe (supra note 52) 315 et seq.

[65] Siehr, The 1980 Hague Convention on the Civil Aspects of International Child Abduction: Failures and Successes in German Practice, N.Y.U. J. Int. L. & Pol. 33 (2000) 207 et seq.- Cf. also Dutta/Scherpe, Die Durchsetzung von Rückführungsansprüchen nach dem Haager Kindesentführungsübereinkommen durch deutsche Gerichte, FamRZ 2006, 901 et seq.

[66] See Lowe, Die Wirksamkeit des Haager und des Europäischen Übereinkommens zur internationalen Kindesentführung zwischen England und Deutschland, FamRZ 1998, 1073 et seq.; Id., In the Best Interests of the Child? Handling The Problem of International Parental Child Abduction, in: Maurauhn (ed.), Internationaler Kinderschutz (2005) 73 (83 et seq.); Wolfe (supra note 52) 285 et seq.

mediation by a French-German team took place[67]. The primary criticisms have included the inappropriate use by German courts of certain provisions of the Hague Convention to justify retaining an abducted child in Germany, the length of time it has taken to adjudicate cases, and the failure to enforce return orders and the access rights of left-behind parents. As a result, Germany enacted procedural reforms in 1999 and 2005 which have solved at least parts of the problem[68].

18. A series of cases dealt with the relationship between the Constitution and The Hague Convention and clarified some issues[69]. Art. 6 para. 1 of the Basic Law states that marriage and family shall enjoy the special protection of the State. "Family" includes the relationship between parents and their children, whether legitimate or illegitimate. According to Art. 6 para. 2 Basic Law, the care and rearing of children is the parents' natural right and foremost obligation. This is considered to be not only the constitutional basis for the principle that the best interest of the child is paramount, but also a barrier to State intervention. In the past there was concern that constitutional arguments could block the proper application of the Hague Convention. A decade ago in one case, the Hague Conference itself participated in the litigation by filing an amicus brief on an issue that arose in a case in the German constitutional court[70]. However, the Federal Constitutional Court has subsequently held that the convention does not conflict with the German Constitution[71].

19. Of crucial importance is the interpretation of Art. 13 of The Hague Abduction Convention. According to this provision, the judicial or administrative authority of the requested State is not bound to order the return of the child if certain criteria can be

[67] Cf. Carl/Copin/Ripke, Das deutsch-französische Modellprojekt professioneller Mediation, Kind-Prax Spezial 2004, 25 et seq.

[68] See in more detail Wolfe (supra note 52) 318 et seq.

[69] Cf. Pirrung (supra note 5) 349 et seq.; Wolfe (supra note 52) 324 et seq.

[70] See Dyer and The Permanent Bureau of the Hague Conference on Private International Law, Germany: Constitutional Court Decision in Case Concerning the Hague Convention on the Civil Aspects of International Child Abduction, Including Memorandum Prepared by the Permanent Bureau of the Hague Conference on Private International Law for Submission to the Constitutional Court, ILM 35 (1996) 529 et seq.; Groves v. Groves, BvR 982/95 and 2 BvR 983/95 (F.R.G. Oct. 10, 1995).

[71] Fed. Const. Court 29 Oct. 1998, BVerfGE 99, 145 (158 et seq.); 18 July 2006, FamRZ 2006, 1261.

established. Under Art. 13 para. 1 lit. a, an obstacle is encountered during the return process when the other parent was not actually exercising custody rights at the time of removal or retention, or had consented to the removal or retention. According to German case law, the removal or retention is nonetheless unlawful where joint custody in the first state was not being respected. The second justification for a non-return is that there is a grave risk that their return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation (lit. b). What constitutes harm for the child has to be interpreted by the courts. A narrow interpretation which accepts that returning the child does not involve a grave risk of harm, but is generally in the child's best interests, ensures that the functioning of the convention cannot be blocked by invoking this ground[72].

According to Art. 13 para. 2 Hague Abduction Convention, the judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has reached an age and degree of maturity at which their views should be taken into account.. According to German case law, the age of maturity is approximately seven to nine years[73]. Also, in this respect, the dominant interpretation is in line with the general approach taken in other jurisdictions.

20. However, despite this interpretation, several actions taken by Germany in order to reform its handling of international parental child abduction cases were necessary. In the past one reason for difficulties was that judges were not adequately trained or specialized. Today there is a special rule on jurisdiction *ratione loci*. Initial jurisdiction is given to the family court (*Familien-/Amtsgericht*) where a Court of Appeal (*Oberlandesgericht*) is situated (§§ 10, 11 Int. Fam. L. Proceedings Act). Unless there are special needs, the child's or the respondent's residence determines jurisdiction. In practice, this means that jurisdiction in Hague Convention cases is restricted to twenty-four first-instance and twenty-four appellate courts.

[72] Cf. Wolfe (supra note 52) 331 et seq.

[73] See Wolfe (supra note 52) 335 et seq.

21. The convention requires that cases be heard expeditiously and there is a special German provision for an expedited procedure (§ 38 Int. Fam. L. Proceedings Act). Many cases in Germany take a few months to resolve and, at least in the past, there were also serious delays[74]. The length of time required depends on the circumstances of each individual case (known or unknown location of the child and the abducting parent; consent or objections to return the child voluntarily, etc.). Children need not as a rule be heard in Hague proceedings; however, special circumstances such as re-abduction of the children may create an exception. Then, the court is under an obligation to ascertain the wishes of the child and has to hear the child in person[75]. It can also be necessary to appoint a special custodian ad litem (Ergänzungspfleger) in the sense of § 50 Act on Non-Contentious Proceedings to represent the interest of the child in the German return proceedings.[76] Under German law the parties and the child will, as far as possible, be heard in person and their attorney or the court officer representing the child in the proceedings will be heard as a minimum.

22. The German Federal Supreme Court clarified that Art. 16 of the 1980 Convention also prevents the courts in the State where the return proceedings are taking place from giving an order on the merits of custody where the return proceedings have already been concluded, with an order of return, but the order has not yet been enforced[77]. The Court discussed an interpretation of Art. 16 of the Hague Abduction Convention under which the courts would be allowed to make a decision on the merits of custody in cases where enforcement is delayed. However, the court rejected such an interpretation, at least in cases where the delay is caused by the abducting parent or by delayed treatment by the enforcement agencies.

[74] See in more detail Wolfe (supra note 52) 337 ff.; Lowe (supra note 66) 83 et seq.

[75] Fed. Const. Court 29 Oct. 1998, BVerfGE 99, 145.

[76] Fed. Const. Court 18 July 2006, FamRZ 2006, 1261.

[77] Fed. Supreme Court 16 Aug. 2000, BGHZ 145, 97 = NJW 2000, 3349 = IPRax 2002, 215 Annot. Pirrung (197).

23. Decisions on applications for return under the Hague Convention may be appealed by either party. The request for an appeal must be filed within two weeks of the initial decision[78]. The two-week period begins immediately after the local family court has served its decision on the legal representatives of each party. After an appeal is filed with the competent Court of Appeal, proceedings start with the transfer of the files from the local court to the Court of Appeal. After receiving the records and the pleading of the appellant and deliberating upon the case, the Court of Appeal decides on the measures to be taken to reach a final decision. The court can make a decision solely based on the submitted documents, or it can schedule a hearing. A decision by the Court of Appeal is usually final.

24. German courts do issue return or access orders based upon Hague applications. However, the actual enforcement of those orders can be difficult if the parent with the child refuses to comply with the court's decision. In 2005 Germany changed its legislation governing the enforcement of Hague return orders with a view to making enforcement more effective. The general provisions on the enforcement of decisions in non-contentious matters[79] are no longer applicable; rather, some special rules governing the enforcement of Hague return orders in § 44 of the Int. Fam. L. Proceedings Act were introduced. However, the Act on Non-Contentious Proceedings still governs the regime of legal challenges where the Act does not make specific provision.

A first instance return order has to be final in order to be enforceable; the court cannot order an earlier enforcement. If an appeal is filed, however, the Court of Appeal has to examine *ex officio* whether to order immediate enforceability. According to the relevant provisions, this should be done where the legal challenge is obviously ill-founded or where the return of the child before a decision on appeal is in line with the child's best interests, taking into account the justified interests of the parties.

The return is ordered under a penalty of fine or imprisonment in the case of non-compliance[80]. This penalty shall be included in the original order[81]. Moreover, physical

[78] See § 40 para. 2 Int. Fam. L. Proceedings Act in conjunction with § 22 para. 1 Act on Non-Contentious Proceedings.

[79] See § 33 of the Act on Non-Contentious Proceedings.

[80] See § 44 para. 1 of the Int. Fam. L. Proceedings Act.

[81] See § 44 para. 2 of the Int. Fam. L. Proceedings Act.

force can now be used to enforce court orders in convention cases[82]. If the return order is not complied with, the actual sanction then has to be ordered. The penalty can only be challenged together with the return order, which speeds up enforcement[83].

In Germany, under the general legislation applicable to non-contentious matters, a judgment debtor has to be notified first that non-compliance with an order is under penalty of a particular coercive measure (fine or imprisonment, physical force). Then the particular measure has to be subsequently ordered. Now, where the first instance order granting return is challenged by an appeal and the Court of Appeal confirms the return order, the appellate court is responsible for the institution *ex officio* as well as the supervision of and coercive enforcement of the return order[84]. In the past, enforcement was always under the responsibility of the court of first instance, and a request by the applicant was necessary.

It is expected that the new legislation will speed up enforcement because the Court of Appeal is closest to the most current state of facts and thus best placed to order the appropriate enforcement measures[85]. The German Federal Ministry of Justice and other institutions have organized seminars for enforcement officers (bailiffs) on the enforcement of Hague return orders. At those seminars, the bailiffs have been trained and a checklist was developed for each type of order; the checklist is supposed to assist the bailiffs in making the necessary arrangements[86].

Despite all these efforts, the U.S. Department of State still found that Germany demonstrated patterns of non-compliance in fiscal years 2006 and 2007[87]. Specifically, Germany's non-compliance related to the unwillingness of some courts to enforce orders for the return of children or access to children under the convention. Left-behind parents were unable to secure prompt enforcement of a final return or access order. Taking parents could, and did, thwart court-ordered returns and access.

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[82] See § 44 para. 3 of the Int. Fam. L. Proceedings Act.

[83] Cf. § 44 para. 2, 4 of the Int. Fam. L. Proceedings Act.

[84] See § 44 para. 6 of the Int. Fam. L. Proceedings Act.

[85] Schulz, Enforcement of orders made under the 1980 Convention – A comparative legal study (Provisional version) (2006) no. 61. - http://hcch.e-vision.nl/upload/wop/abd_pd06e2006.pdf.

[86] See with more details Schulz (supra note 85) no. 56.

[87] See U.S. Dept. of State 2007 Compliance Report for the 1980 Hague Convention on the Civil Aspects of International Child Abduction; 2008 Compliance Report, http://travel.state.gov/pdf/2008HagueAbductionConventionComplianceReport.pdf.

III. Hague Convention of 1993 on the Protection of Children and Co-operation in Respect of Intercountry Adoption

25. The Hague Convention of 1993 on the Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Adoption Convention) tries to protect children and their families against the risks of illegal, irregular, premature or ill-prepared adoptions abroad. This convention, which also operates through a system of national central authorities, seeks to ensure that intercountry adoptions are done in the best interests of the child and with respect for his or her fundamental rights and to prevent the abduction, sale, or trafficking of children.

In Germany, which is mainly a "receiving state" for children from foreign countries, several statutes implement the convention. One of them specifically deals with the implementation of the convention[88]. The procedure of adoption placement is governed by a special Law on Adoption Placement[89]. There is also a specialised authority for foreign adoptions which is the central authority in the sense of the Hague Convention[90]. Its function, however, is mainly restricted to coordination. There is also a Central Authority of the Youth Welfare Office (*Landesjugendamt*) in each German state (*Bundesland*)[91]. These are responsible for adoption placements within their jurisdiction. There is a Youth Welfare Office (*Jugendamt*) in each district/major city.

26. The ratification led to a reform of the adoption placement procedure under German law. It generally secures that there are decisions taken in accordance with the best interests of the child. For both domestic and intercountry adoption, the prospective adoptive parents must first approach either one of the German youth offices, the German Central Authority

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[88] Act Implementing the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (Gesetz zur Ausführung des Haager Übereinkommens vom 29. Mai 1993 über den Schutz von Kindern und die Zusammenarbeit auf dem Gebiet der internationalen Adoption; AdÜbAG) of 5 Nov. 2001, Federal Gazette 2001 I p. 2950, as amended.

[89] Act on Adoption Placement (Adoptionsvermittlungsgesetz; AdVermiG) of 2 July 1976, as amended 22 Dec. 2001, Federal Gazette 2002 I p. 354.

[90] Bundeszentralstelle für Auslandsadoption. – Cf. Weitzel, Das Haager Adoptionsübereinkommen vom 29.5.1993: zur Interaktion der zentralen Behörden, NJW 2008, 186 et seq.; Weitzel/Marx/Reinhardt/Radke Rechtslage und Verfahrensgang bei Auslandsadoptionen,.in: Harald Paulitz (ed.), Adoption (2nd ed. 2006) 271 (306 et seq.).

[91] Zentrale Adoptionsstellen der Landesjugendämter. - Cf. Weitzel/Marx/Reinhardt/Radke (supra note 90) 293 et seq.

for intercountry adoption, the Central Authority in the country of the child's habitual abode or an international adoption agency for an initial consultation[92]. After a favourable evaluation, the parents will be subject to a home study by their local youth welfare office. A translation of their home study is sent to the adoption authority office. When a child has been identified, the adopting parents and the child's legal guardian sign an agreement before a German court or notary public. Before the family court decides if the adoption may take place and issues the final decree, the adopting parents have to prove that the child will be lawfully admitted into their home country. The option of confirming a foreign adoption order under Art. 23 of the convention has hardly ever been used in Germany[93]. Only in a few cases has there been a non-recognition pursuant to German national law because the adoption took place in the first country without any examination of the welfare of the child and the aptitude of the adoptive parents[94].

27. One problem which existed prior to the convention has subsequently been solved. A special statute deals with the effects of so-called "simple" foreign adoption decrees. These adoptions can acquire the stronger effect of a "full adoption" under German law which completely terminates the legal relationship between the child and its natural parents[95].

There is a supervision of accredited private agencies and there have been prohibitions against single adoption placement agencies which have been affirmed by the courts[96]. However, the convention is not exclusive which means that German adoption agencies can additionally interact with countries which are not members of the convention[97]. Adoptions are occasionally effected in foreign countries outside the regular procedure and such an

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[92] Cf. Weitzel/Marx/Reinhardt/Radke (supra note 90) 284 et seq.

[93] Weitzel/Marx/Reinhardt/Radke (supra note 90) 319.

[94] See Court of Appeal Celle 5 Dec. 2007, FamRZ 2008, 1109; Court of First Instance (Amtsgericht) Karlsruhe 29 Nov. 2007, JAmt 2008, 106 Annot. Weitzel. - A decision of the Court of First Instance Hamm 17 April 2006, JAmt 2006, 363 = IPRspr. 2006 Nr. 228, recognising a Turkish adoption decree has been criticized by Weitzel (supra note 90) 188 et seq. - Cf. also Weitzel/Marx/Reinhardt/Radke (supra note 90) 321 et seq.

[95] Act on Effects of Adoption (Adoptionswirkungsgesetz; AdWirkG) of 5 Nov. 2001, Federal Gazette 2001 I p. 2950 as amended. – See Winkelsträter, Anerkennung und Durchführung internationaler Adoptionen in Deutschland (2007) 218 ff.

[96] See e.g. Higher Regional Administrative Court (Oberverwaltungsgericht) Hamburg 18 Oct. 2006, NJW 2007, 1709.

[97] Wacker/Bach/Holz/Braun, Interstaatliche Adoptionsvermittlungsstellen in Deutschland, Vermittlungspraxis, Kinderhandel, in: Paulitz (ed.), Adoption (2nd ed. 2006) 327 (334 et seq.)

adoption is also recognised in Germany under national law[98]. Sometimes prospective adoptive parents travel abroad to adopt children. Thus, in many cases adoption has already been effected in the child's country of origin and Germany is only the "receiving country" but without the safeguards of the convention[99].

IV. Hague Evidence and Service Convention

28. Pursuant to the Hague Service Convention, personal service may be obtained by sending a completed "Request and Summary", with the documents to be served directly to the appropriate central authority. There are several German reservations against some methods of service. Service of process in Germany can be obtained through the methods prescribed by the convention. Any other methods of service, including attempts at service by mail, are considered illegal in Germany and an affront to its judicial sovereignty. The responsible state body may also, for constitutional reasons, refuse service of a statement of claim.

According to the Federal Constitutional Court, there is no doubt as to the constitutionality of the Hague Service Convention. As was stated in the context of a claim for compensatory and punitive damages in the United States, the convention serves important general interests which are suitable for justifying an encroachment on the general freedom of action[100]. The German state does not protect its citizens who engage in international legal transactions, from their responsibilities in a foreign legal system. On the contrary, Germany supports the enforcement of foreign claims to jurisdiction. A defendant in a U.S. class-action lawsuit is subject to added burdens since such class actions under U.S. law can have far reaching effects. However, service in Germany does not violate the essential principles of a free state governed by the rule of law in the sense of German constitutional law. If, from the German perspective, a plaintiff exploits the weaker position of a defendant to

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[98] See § 16a Act on Non-Contentious Proceedings. This has been criticized as a circumvention of the Convention by Weitzel (supra note 90) 188. - Cf. also Weitzel/Marx/Reinhardt/Radke (supra note 90) 313 et seq.; Winkelsträter (supra note 95) 178 et seq., 209 et seq.

[99] Cf. Albrecht, Grenzgänger: internationale Adoption und Kinderhandel, in: Marauhn (ed.), Internationaler Kinderschutz : politische Rhetorik oder effektives Recht? (2005) 97 et seq.; Weitzel/Marx/Reinhardt/Radke (supra note 90) 296 et seq.

[100] Fed. Constitutional Ct. – First Senate - 7 Dec. 1994, BVerfGE 91, 335 (339 et seq.) = IPRax 1996, 112 Annotation Tomuschat (83).- Cf. Pirrung (supra note 5) 346 et seq.; von Hein (supra note 54) 109 et seq. ; Hopt/Kulms/von Hein, Rechtshilfe und Rechtsstaat - Die Zustellung einer US-amerikanischen class action in Deutschland (2006).

enforce his or her own rights, this alone will not be sufficient to substantiate an allegation that the plaintiff has committed an abuse of law; instead the objective and the specific circumstances of the legal action must indicate that there has been an obvious abuse of law[101]. Thus, service was allowed for a class-action suit in a competition law case[102].

For a limitation, the reservation clause in Article 13 para. 1 of the Hague Service Convention can be used. According to the case-law of the Federal Constitutional Court, a limit might be reached where the objective pursued by the action "obviously violates essential principles of a free state governed by the rule of law"[103]. The mere possibility of imposing punitive damages does not amount to a violation of essential rule of law principles[104]. If, however, damages claims appear from the outset to violate the abuse of law principle, one cannot exclude the possibility that the service of a statement of claim may be incompatible with the essential principles of a free state governed by the rule of law. In such a case, a German state body could, through its application and interpretation of the reservation clause in Article 13 para. 1 of the Hague Service Convention, fundamentally misjudge and disproportionately limit the rights of a German defendant. In the controversial and highly discussed Napster case, the Second Senate of the Constitutional Court issued an interim injunction which temporarily blocked a copyright violations class action filed by several American recording companies and artists against the German company Bertelsmann[105]. The Constitutional Court decided that the German court which was, according to the Hague Convention, required to serve the writ could not do so until the Constitutional Court had checked that the suit did not violate Bertelsmann's rights as granted by the German constitution. The Court was concerned by the extraordinary sum of 17 billion Dollars in the suit and argued that "proceedings before state courts are obviously abused to discipline competitors through public media pressure and the risk of a

[101] Fed. Constitutional Ct. – First Chamber of the Second Senate - 14 June 2007, NJW 2007, 3709.

[102] Fed. Constitutional Ct. 14 June 2007, NJW 2007, 3709.

[103] Fed. Constitutional Ct. 7 Dec. 1994, BVerfGE 91, 335 (343); 25 July 2003, BVerfGE 108, 238 (247) = IPRax 2004, 61 Annot. Oberhammer (40).

[104] Fed. Constitutional Ct. 7 Dec. 1994, BVerfGE 91, 335 (343-344) = NJW 1995, 2977; Fed. Constitutional Ct. – First Chamber of the Second Senate - 24 Jan. 2007, RIW 2007, 211. Cf. von Hein, Jan, BVerfG gestattet Zustellung einer US-amerikanischen Klage auf Punitive Damages : Entspannung im transatlantischen Justizkonflikt?, RIW 2007, 249 et seq.

[105] Fed. Constitutional Ct. 25 July 2003, BVerfGE 108, 238. - Cf. von Hein (supra note 54) 113 et seq.; Rasmussen-Bonne, Zum Stand der Rechtshilfepraxis bei Zustellungsersuchen von US-Schadensersatzklagen nach dem Beschluss des Bundesverfassungsgerichts vom 25. Juli 2003, in: Balancing of interests: liber amicorum Peter Hay (2005) 323 et seq.

conviction". However, the Constitutional Court stated it was a constitutional issue and because of the ongoing U.S. proceedings, things were later resolved by party settlement.

One explanation for these constitutional proceedings is that there are several structural differences between U.S. and German substantive law and procedural rules concerning punitive and treble damages, class-actions, discovery, etc. But seemingly, mainly the economic interests of German corporations were the motive for their attempts to block service in Germany or at least to create barriers against recognition of U.S. American judgments. Thus, the courts are constantly confronted with attempts to broaden the interpretation of Art. 13 para. 1 of the Hague Service Convention in the sense of a very general clause on public policy[106].

29. Other difficulties for German-American Judicial Co-operation have arisen in obtaining evidence in the Federal Republic of Germany in the context of the Hague Evidence Convention[107]. According to Article 23 of the Evidence Convention, a Contracting State may declare that it will not execute letters of request issued for the purpose of obtaining pre-trial discovery of documents, as practiced in Common Law countries. Germany has declared such a reservation[108].

F. Conclusion

30. In conclusion, Germany has a mixed record. The Federal Republic of Germany regularly sends delegates to the Hague Conferences and participates in the negotiations in The Hague. A considerable number of conventions have been ratified. Additional implementing legislation facilitates access to the rules of the conventions and their application. Generally, according to German private international law, the conventions take precedence. However, the Europeanization of private international law with an increasing

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[106] von Hein (supra note 54) 111. - For a more restrictive approach see Otto, Tücken der Zustellung im internationalen Rechtshilfeverkehr : rechtsstaatlicher Schutz vor Schikane und Rechtsmissbrauch, Festschrift für Rolf Birk (2008) 575 (584 et seq.)

[107] See Gerber, Extraterritorial discovery and the conflict of procedural systems: Germany and the United States, Am. J. Comp. L. 34 (1986) 745 et seq.; Shemanski, Obtaining Evidence in the Federal Republic of Germany: The Impact of the Hague Evidence Convention on German-American Judicial Co-operation, Int. Lawyer 17 (1983) 465 et seq.

[108] German Act Implementing the Convention of 22 Dec. 1977, Federal Gazette 1977 I p. 3105.

number of European rules means that conflicts in the future will have to be solved mainly on an European level. The European development has the effect that, among the Member States of the European Union, Regulations take precedence or supplement Hague Conventions. This, plus the new competences of the EU, will, in the long run, alter the influence of international treaties.

In the past The Hague's approaches and solutions considerably influenced German national conflict rules, predominantly in the partial introduction of habitual residence as a connecting factor. However, this development will, in many respects, be reduced since European Regulations will increasingly replace national conflict rules.

A closer look at the application of some of the Hague Conventions in judicial practice shows that deference to national fundamental rights and values of the German Constitution sometimes causes difficulties and can endanger the functioning of the conventions. In the context of child abduction, German courts have generally resisted the temptation to broadly interpret potential obstacles in the return of children. However, due to the fact that German national procedural provisions were not sufficiently adapted to the requirements of international cooperation in this field in the past, there have been serious flaws in the implementation of the convention. Despite all efforts to amend the procedural rules, deficits still exist in practice.

The Hague Adoption Convention is, as such, respected and has been accompanied by extensively detailed legislation. However, the mechanism of the convention is not exclusive and some of the former situation's deficiencies still persist.

In the field of service of complaints, there has been a constant struggle for or against restrictions, mainly in respect of protecting German corporations from U.S. American law suits. There is in fact a danger that judicial protectionism could prevail under the guise of defending the constitutional guarantees of German parties and protecting German sovereignty. The overall impression is, therefore, that the signing and ratification of a convention only signals the beginning of a new chapter in the never ending work of international cooperation.