Conventions or Regulations (in historical order):

- **Convention of 5 October 1961** concerning the powers of authorities and the law applicable in respect of the protection of infants (= Hague Protection of Minors Convention) -
  emphasized the concept of the "interests of the child" as a basis for authorities of the child's nationality to overrule the authorities of the child's habitual residence for the first time. It built upon prior efforts to create successful multilateral treaties and brought an innovation in terminology by creating a compromise between advocates of "nationality" as the determining factor for jurisdiction and advocates for the modern fact-centric model of "habitual residence." The scope of application of this (old) convention is in actual use only cases that have connection with Turkey.

  covers civil measures of protection concerning children, ranging from orders concerning parental responsibility and contact to public measures of protection or care, and from matters of representation to the protection of children's property. It is therefore much broader in scope than two earlier conventions of the HCCH on the subject. The Convention has uniform rules determining which country's authorities
are competent to take the measures of protection. The Convention determines which country's laws are to be applied, and it provides for the recognition and enforcement of measures taken in one Contracting State in all other Contracting States. The co-operation provisions of the Convention provide the basic framework for the exchange of information and for the necessary degree of collaboration between administrative authorities in the Contracting States. The Convention first came into force 1 January 2002 and currently has 43 Contracting States – finally also Belgium and Italy.

- **Brussels II Regulation (EC) No 2201/2003, also called Brussels IIA or II bis** – is a European Union Regulation on conflict of law issues in family law between member states; in particular those related to divorce, child custody and international child abduction. The Regulation applies as of 1 March 2005 in all Member States of the European Union, with the exception of Denmark. The Regulation is directly applicable in the Member States and prevails over national law. Meanwhile all member states of the European Union (including Denmark!) have also become party to the 1996 Hague Convention, which largely overlaps with this regulation. For cases within the European Union (except Denmark!), the regulation takes precedence over the convention.

Explanations:

- **Parental Responsibility**

The term “parental responsibility” is defined in Article 1(2) of the 1996 Hague Convention and Art. 1 (2) of the Brussels II bis-Regulation. It includes parental authority or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child. The description of the term in the Convention is purposely broad. The term covers at the same time responsibility concerning the person of the child, responsibility concerning his
or her property and, generally, the legal representation of the child, whatever name is given to the legal institution in question.

In contrast to the 1996 Hague Convention, the Regulation does not define a maximum age for the children who are covered by the Regulation, but leaves this question to national law. The 1996 Hague Convention applies to all children from the moment of their birth until they reach the age of 18 years.

Article 1(3) of the Brussels II bis-Regulation and Art. 4 of the 1996 Hague Convention enumerate those matters which are excluded from their scope even though they may be closely linked to matters of parental responsibility (e.g. adoption, emancipation, the name and forenames of the child). The Regulation and the convention don’t apply to maintenance obligations.

However maintenance obligations and parental responsibility are often dealt with in the same court proceeding.

- **Habitual Residence**

The fundamental principle of the 1996 Hague Convention as well as the Brussels II bis-Regulation is that the most appropriate forum for matters of parental responsibility is the relevant court of the Member State of the **habitual residence** of the child. The concept of “habitual residence”, which is increasingly used in international instruments, is not defined by the Convention/Regulation, but has to be determined by the judge in each case on the basis of factual elements. The meaning of the term should be interpreted in accordance with the objectives and purposes of the Convention/Regulation.

The ECJ has taken several decisions on the term of “habitual residence”:

- Case C - 523/07
- Case C - 497/10 PPU
- Case C – 376/14 PPU
The ‘habitual residence’ of a child must be established on the basis of all the circumstances specific to each individual case. In addition to the physical presence of the child in a Member State other factors must be chosen which are capable of showing that that presence is not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in a social and family environment. In particular, the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family’s move to that State, the child’s nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration.

The intention of the person with parental responsibility to settle permanently with the child in another Member State, manifested by certain tangible steps such as the purchase or rental of accommodation in the “new” Member State, may constitute an indicator of the transfer of the habitual residence. In order to distinguish habitual residence from mere temporary presence, the stay must have a certain duration which reflects an adequate degree of permanence. However, the Regulation does not lay down any minimum duration. Before habitual residence can be transferred to another State, it is important that the person concerned has it in mind to establish there the permanent or habitual centre of his interests, with the intention that it should be of a lasting character.

The child’s age can also be of particular importance. The social and family environment of the child, which is fundamental in determining the place where the child is habitually resident, comprises various factors which vary according to the age of the child. The factors to be taken into account in the case of a child of school age are thus not the same as those to be considered in the case of a child who has left school and are again not the same as those relevant to an infant. As a general rule, the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of. That is even more true where the child concerned is an infant. An infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent. So when the infant is in fact looked after by her mother, it is necessary to assess the mother’s integration in her social and family environment. In that regard, the reasons for the move by the child’s mother to another
Member State, the languages known to the mother or again her geographic and family origins may become relevant. When the situation concerned is that of an infant who has been staying with her mother only a few days in the “new” Member State, the factors which must be taken into consideration include, first, the duration, regularity, conditions and reasons for the stay in the territory of that Member State and for the mother’s move to that State and, second, with particular reference to the child’s age, the mother’s geographic and family origins and the family and social connections which the mother and child have with that Member State.

When examining the reasons for a child’s stay in a Member State to which one parent who took the child, it is important to take into account the fact that a *court judgment authorising the removal* could be provisionally enforced and that an appeal had been brought against it. Those factors are not conducive to a finding that the child’s habitual residence was transferred, since that judgment was provisional and the parent concerned could not be certain, at the time of the removal, that the stay in that Member State would not be temporary.

Having regard to the necessity of ensuring the protection of the best interests of the child, those factors are to be weighed against other matters of fact which might demonstrate a degree of integration of the child in a social and family environment since the removal, such as the time which elapsed between that removal and the judgment which set aside the judgment of first instance and fixed the residence of the child at the home of the parent living in the Member State of origin. However, the time which has passed since that judgment should not in any circumstances be taken into consideration.

As the ‘habitual residence’ of a child has to be determined by the judge on the basis of all the circumstances specific to each individual case, I don’t want to discuss several facts of cases on that matter right now. I rather recommend reading the mentioned decisions of the ECJ in full length.
A. 

Jurisdiction in cross-border parental responsibility cases.

I. General jurisdiction

Case #1 a):

Mila and Frederic (“Freddy”) – both German nationals are a married couple. They have one daughter, Carla. The family lives in Brussels (Belgium) for three years. Now the marriage falls apart. Freddy requests divorce in Brussels. Carla lives with Mila. Mila and Freddy quarrel about Freddy’s right of access to Carla.

The Belgian court has jurisdiction according to Art. 8 of the (Brussels II bis-) Regulation. Carla (!) has her habitual residence in Belgium (= EU). The Regulation takes precedence over the (1996 Hague) Convention according to Art. 61 a) of the Regulation and Art. 52 of the Convention.

Case #1 b):

Same Situation – only: Mila and Carla have moved to France six months ago – with Freddy’s permission.

According to Art. 8 of the Regulation a French court would have jurisdiction. Carla now has her habitual residence in France.

Exception: According to Art. 12 (1) of the Regulation the Belgian Court exercising jurisdiction by virtue of Article 3 on an application for divorce can have jurisdiction in any matter relating to parental responsibility connected with that application, when the jurisdiction of that court has been accepted expressly or otherwise in an unequivocal manner by the spouses and the
holder of parental responsibility, at the time the court is seized, and is in the superior interests of the child. The jurisdiction conferred in paragraph 1 ceases, either when the judgment allowing or refusing the application for divorce has become final or - when proceedings in relation to parental responsibility are still pending at that moment – when a judgment in these proceedings has become final.

**Case #1 c):**

Same situation – only: Mila and Carla haven’t moved to France. They live in Turkey for six months already – with Freddy’s permission.

The Regulation and the 1996 Convention are not applicable but the 1961 Hague Convention is.

According to Art. 1 of the 1961 Convention the Turkish courts have jurisdiction. Carla’s habitual residence is in Turkey.

Exception: Art. 4 of the 1961 Convention: If the authorities of the State of the infant’s nationality (here: Germany) consider that the interests of the infant so require, they may, after having informed the authorities of the State of his habitual residence (here: Turkey), take measures according to their own law for the protection of the child’s person or property.

**Case #1 d):**

Same situation – only: Mila and Carla live in Denmark for six months already – with Freddy’s permission.

In Denmark the (Brussels II bis-) Regulation is not applicable, but the 1996 Hague convention is.
According to Art. 5 of the Convention the Danish courts have jurisdiction. Carla’s habitual residence is in Denmark.

Exception: According to Art. 10 (1) of the Convention the authorities of a Contracting State exercising jurisdiction to decide upon an application for divorce of the parents of a child habitually resident in another Contracting State may, if the law of their State so provides, take measures directed to the protection of the person or property of such child if the jurisdiction of these authorities has been accepted by the parents, as well as by any other person who has parental responsibility in relation to the child, and is in the best interests of the child. The jurisdiction provided for by paragraph 1 ceases as soon as the decision allowing or refusing the application for divorce or the proceedings have come to an end for another reason.

Case #1 e):

Same situation – only: Mila and Carla live in Switzerland for six months already – with Freddy’s permission.

This case follows the same rules as case # 1 d) (Denmark)!

Case #1 f):

Once again the same situation – only: Mila and Carla live in Egypt for six months already – with Freddy’s permission.

The (Brussels II bis-) Regulation, both Hague conventions (1961 and 1996) are not applicable and – I suppose - neither any other international conventions.

In this case the laws of the State, in which the application is filed, determine jurisdiction.
II. Change of habitual residence

Case #2 a):

Again Mila, Freddy and Carla. The spouses still don’t request divorce. But Freddy filed an application concerning his right of access to Carla at the Belgian court. Carla and Mila move to France with Freddy’s permission. They already live there for six months, Carla speaks French, visits the pre-school and has found several friends there. The proceedings at the Belgian court still haven’t come to an end.

Even if Carla’s habitual residence is in France now, the jurisdiction of the Belgian court remains according to Art. 8 (1) of the (Brussels II bis-) Regulation. The question of jurisdiction is determined at the time the court is seized. Once a competent court is seized, in principle it retains jurisdiction even if the child acquires habitual residence in another Member State during the course of the court proceeding (principle of “perpetuatio fori”). However, if it is in the best interests of the child, Art. 15 of the Regulation provides for the possible transfer of the case, subject to certain conditions, to a court of the Member State to which the child has moved (more later).

Case #2 b):

Same situation – only: Mila and Carla don’t move to France. During the proceedings of the Belgian court they move to Denmark. They already live there for six months, Carla has learned to speak the Danish language, visits the pre-school and has found several friends there. The proceedings at the Belgian court still haven’t come to an end.

In Denmark the (Brussels II bis-) Regulation is not applicable, but the 1996 Hague convention is.

According to Art. 5 (2) of the Convention the authorities of the State of the new habitual residence have jurisdiction in case of a change of the child’s habitual residence – no “perpetuatio fori”!
Case #2 c):

Same situation – only: During the proceedings of the Belgian court Mila and Carla move to Turkey – with Freddy’s permission. They already live there for six months, Carla has learned to speak the Turkish language, visits the pre-school and has found several friends there. The proceedings at the Belgian court still haven’t come to an end.

The Regulation and the 1996 Convention are not applicable but the 1961 Hague Convention is.

According to Art. 5 (1) of the 1961 Convention measures taken by the authorities of the State of the former habitual residence remain in force in so far as the authorities of the new habitual residence have not terminated or replaced them if the habitual residence of an infant is transferred from one Contracting State to another.

But if there aren’t any measures taken so far, the authorities of the State of the new habitual residence have jurisdiction in case of a change of the child’s habitual residence.
III. Change of habitual residence after the proceedings have become final

Case #3:

Again Mila, Freddy and Carla. Freddy achieved a judgment on access rights from the Belgian court: Carla shall visit him monthly for one week. When the judgement has become final Mila and Carla still lived in Brussels (Belgium). Several months later - with Freddy’s permission - they moved to Berlin (Germany), where also Mila’s and Freddy’s parents and their brothers ad sisters live. Carla – now five and a half years old - speaks her parents’ first language (German) and loves to play with her many cousins and their friends. Unexpectedly she was admitted to primary school six weeks after the move. Now Mila doesn’t want her to visit Freddy every month any more. She insists that the child’s access to her father only takes place in school-holidays. She files an application to the German court in order to modify the Belgian judgement on the access right. Freddy doesn’t want to participate in proceedings before the German court and contests its jurisdiction.

According to Art. 9 (1) of the (Brussels II bis-) Regulation the courts of the Member State of the child’s former habitual residence shall, by way of exception to Article 8, retain jurisdiction during a three-month period following the move for the purpose of modifying a judgment on access rights issued in that Member State before the child moved.

Exception: Art. 9 (1) shall not apply if the holder of access rights has accepted the jurisdiction of the courts of the Member State of the child's new habitual residence by participating in proceedings before those courts without contesting their jurisdiction.

In “our” case: Jurisdiction of the Belgian court retains. The judgement was about access rights. Freddy doesn’t want to participate in proceedings before the German court and contests its jurisdiction.

In other cases:

When the child’s habitual residence changes after the proceedings have become final, in general there is jurisdiction of the courts of State of the child’s new habitual residence (compare cases #1 a) – e).
IV. Refugees or child's habitual residence cannot be established

According to Art. 13 of the Regulation as well as to Art. 6 of the 1996 Convention the courts of the Member State where the child is present have jurisdiction, when refugee children are involved or when a child's habitual residence cannot be established.
V. Prorogation of jurisdiction

Generally the court of the member state of the Regulation or the (1996) Convention, in which the child has its habitual residence, has jurisdiction in cases concerning parental responsibility.

As already mentioned the Regulation (as well as the Convention) introduces a limited possibility to seize a court of a Member State in which the child is not habitually resident, either because the matter is connected with a pending divorce proceeding (e.g. case #1 b), or because the child has a substantial connection with that Member State. But these are exceptions (!) so the judge should very carefully examine if the constituent facts can be determined.

1.

When divorce proceedings are pending in a Member State, according to Art. 12 (1) and (2) of the Regulation the courts of that State also have jurisdiction in matters of parental responsibility connected with the divorce even if the child concerned is not habitually resident in that Member State. This applies whether or not the child is the child of both spouses.

The divorce court has jurisdiction provided the following conditions are met:

• At least one of the spouses has parental responsibility in relation to the child.

• The judge should determine whether, at the time the court is seized, all holders of parental responsibility accept the jurisdiction of the divorce court, whether by formal acceptance or unequivocal conduct.

• The jurisdiction of that court is in the superior interests of the child.

➔ Case #1 b
Again: principle of “perpetuatio fori” – Art. 12 (1) b): “at the time the court is seized”

- pending divorce proceedings
- acceptance of jurisdiction by the holders of parental responsibility (jurisdiction doesn’t end when one party doesn’t want to accept it any more)

There is a similar rule in Art. 10 of the 1996 Convention – except: no “perpetuatio fori” – jurisdiction ends when the divorce proceedings come to an end. The proceedings end because they have resulted in a decision, which has become final, granting or refusing the request for divorce, or because of another reason such as a withdrawal or lapsing of the request or the death of a party.

Back to the Regulation: The jurisdiction of the divorce court ends (Art. 12 (2)) as soon as:

• the divorce judgement has become final or

• a final judgement is issued in proceedings on parental responsibility which were still pending when the divorce judgement became final or

• the proceedings on divorce and parental responsibility have come to an end for another reason (e.g. the applications for divorce and parental responsibility are withdrawn).

2.

Where there are no pending divorce proceedings, according to Art. 12 (3) of the Regulation the courts of an EU Member State (except Denmark) may have jurisdiction in matters of parental responsibility even if the child is not habitually resident in that Member State provided the following conditions are met:

• The child has a substantial connection with the Member State in question, in particular because one of the holders of parental responsibility is habitually resident there or the child
is a national of that State. These conditions are not exclusive, and it is possible to base the connection on other criteria.

- All parties to the proceedings accept the jurisdiction of that court explicitly or otherwise unequivocally at the time the court is seized.

- The jurisdiction is in the best interests of the child (as above in Article 12(1)).

Article 12(4) specifies in which circumstances jurisdiction under this Article shall be deemed to be in the “child’s best interest” when the child in question is habitually resident in a third State that is not a contracting State to the 1996 Hague Convention on Child Protection: namely, if it is found impossible to hold proceedings in the third State in question.

There is no similar rule to this in the 1996 Hague Convention!

Lately the ECJ has taken two decisions on the prorogation of jurisdiction:

Case C - 436/13

Case C – 656/13

- for the purposes of proceedings in matters of parental responsibility, the jurisdiction of a court of a Member State which is not that of the child’s habitual residence can have jurisdiction even where no other proceedings are pending before the court chosen

- it cannot be considered that the jurisdiction of the court seized by one party of proceedings in matters of parental responsibility has been ‘accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings’ within the meaning of that provision where the
  - defendant in those first proceedings
• subsequently brings a second set of proceedings before the same court and,
• on taking the first step required of him in the first proceedings, pleads the lack of jurisdiction of that court.

In other words shown by an example:

Mila, Freddy and Carla again:

Carla lives with Mila in Vienna (Austria). She visits Freddy in Brussels (Belgium) in her summer holidays for three weeks. She tells him that she doesn’t like Mila’s new boyfriend and that she would rather live with Freddy and go to school in Belgium. One week before Carla ought to return to Mila Freddy files an application to the Belgian court to get the sole right of custody for Carla.

⇒ no jurisdiction of the Belgian Court according to Art. 8 of the Regulation – Carla’s habitual residence is still in Vienna (Austria)

⇒ no jurisdiction according to Art. 12 (1) and (2) – no pending divorce proceedings

⇒ possible: jurisdiction according to Art. 12 (3)

The proceedings extend. Mila pleads the lack of jurisdiction of the Belgian court. Carla still hasn’t returned to her. Mila wants to have access to her daughter. After two months she also files an application to the Belgian court for access right.

Can it be considered that the jurisdiction of the Belgian court has been ‘accepted expressly or otherwise in an unequivocal manner’ by Mila just because she also filed an application to the Belgian court subsequently?

**ECJ:** No! If and because she pleaded the lack of jurisdiction in the first proceedings!
- Jurisdiction in matters of parental responsibility, which has been prorogued under Article 12(3) in favour of a court of a Member State before which proceedings have been brought by mutual agreement by the holders of parental responsibility ends after a final judgment in those proceedings. The prorogation doesn’t extend over following proceedings.

3.
The Regulation contains in Art. 15 an innovative rule which allows, by way of exception, that a court which is seized of a case transfers it to a court of another Member State if the latter is better placed to hear the case. The court may transfer the entire case or a specific part thereof. According to the general rule, jurisdiction lies with the courts of the Member State of the child’s habitual residence at the time the court was seized (Article 8). Therefore, jurisdiction does not shift automatically in a case where the child acquires habitual residence in another Member State during the court proceedings. However there may be circumstances where, exceptionally, the court that has been seized (“the court of origin”) is not the best place to hear the case. Art. 15 allows in such circumstances that the court of origin may transfer the case to a court of another Member State provided this is in the best interests of the child. Once a case has been transferred to the court of another Member State, it cannot be further transferred to a third court.

The transfer is subject to the following conditions:

The child must have a “particular connection” with the other Member State. Article 15(3) enumerates the five situations where such connection exists according to the Regulation:
• the child has acquired habitual residence there after the court of origin was seized; or
• the other Member State is the former habitual residence of the child; or
• it is the place of the child’s nationality; or
• it is the habitual residence of a holder of parental responsibility; or
• the child owns property in the other Member State and the case concerns measures for the protection of the child relating to the administration, conservation or disposal of this property.

In addition, both courts must be convinced that a transfer is in the best interests of the child. The judges should co-operate to assess this on the basis of the “specific circumstances of the case”.

The transfer may take place:
• on application from a party, or
• of the court’s own motion, if at least one of the parties agrees, or • on application of a court of another Member State, if at least one of the parties agrees.

What procedure applies?
A court which is faced with a request for a transfer or which wants to transfer the case of its own motion has two options:
■ It may stay the case and invite the parties to introduce a request before the court of the other Member State, or
■ It may directly request the court of the other Member State to take over the case.

Once again: These cases are exceptions! The conditions shouldn’t be widely interpreted.
VI. Cases of urgency and measures of a provisional character

In all cases of urgency, the authorities of any Contracting State of the 1996 Convention or the Brussels II bis-Regulation in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection. Independently of cases of urgency the Convention and the Regulation provide a specific ground of jurisdiction, which allows the authorities of a Contracting State in whose territory the child or property belonging to the child is present to take measures of a provisional character for the protection of the person or property of the child.

Art. 11, 12 of the 1996 Hague Convention
Art. 20 of the Brussels II bis-Regulation
Art. 9 of the 1961 Hague Convention
VII. **Same proceedings in two Member States – “lis pendens” mechanism**

It may happen that parties initiate court proceedings on parental responsibility concerning the same child and the same cause of action in different EU Member States. This may result in parallel actions and consequently the possibility of irreconcilable judgements on the same issue.

Art. 19(2) regulates the situation where proceedings relating to parental responsibility are brought in different Member States concerning:

- the same child and
- the same cause of action (but also: application and cross-application)

In that situation, Art. 19(2) stipulates that the court first seized is, in principle, competent. The court second seized has to stay its proceedings and wait for the other court to decide whether it has jurisdiction. If the first court considers itself competent, the other court must decline jurisdiction. The second court may only continue its proceedings if the first court comes to the conclusion that it does not have jurisdiction or if the first court decides to transfer the case pursuant to Article 15.

It is expected that the lis pendens mechanism will be rarely used in proceedings relating to parental responsibility since the child is usually habitually resident in only one Member State in which the courts have jurisdiction according to the general rule of jurisdiction (Art. 8).

ECJ Case C – 296/10:

Art. 19(2) is **not applicable** where a court of a Member State first seized for the purpose of obtaining measures in matters of parental responsibility is **seized only for** the purpose of its granting **provisional measures** (Art. 20) and where a **court of another Member State** which **has jurisdiction as to the substance of the matter** is **seized second** of an action directed at obtaining the same measures, whether on a provisional basis or as final measures.

In other words:
When the **court** seized **first** has only (!) rendered a decision on provisional measures, the **court** seized **second** has **jurisdiction** and doesn’t have to obtain the conditions of Art. 19 (2).

**But what, if** it isn’t evident

- if **court one** also has jurisdiction on the substance of the matter and
- if there is already an action as to the substance of the matter which might have been linked to the action to obtain interim measures pending at **court one**?

**ECJ:**

Where, in spite of **efforts** made by the court second seized to **obtain information** by enquiry of the party claiming lis pendens, the court first seized and the central authority,

- the **court second** seized **lacks any evidence which enables it to determine the cause of action of proceedings brought before another court and to determine the jurisdiction** of that court and
- where the **interest of the child requires the handing down of a judgment,**
- it is the **duty of that court, after the expiry of a reasonable period** in which answers to the enquiries made are awaited, **to proceed** with consideration of the action brought before it.
- The **duration of that reasonable period** must take into account the best interests of the child in the specific circumstances of the proceedings concerned.

In other words:

The **court** seized **second** has **jurisdiction** and doesn’t have to obtain the conditions of Art. 19 (2), when it – despite all appropriate efforts - isn’t able to clear up, if a court of another Member State already works on the main issue of the same cause of action.

There is a **similar rule** in **Art. 13** of the 1996 Convention.
B.

Applicable law:

There are no rules on this question in the Brussels II bis-Regulation. It is regulated in the 1996 Hague Convention – as well as in the 1961 Hague Convention before. According to Art. 62 of the Brussels II bis-Regulation the rules of the 1996 Hague Convention on the applicable law are valid.

I.

When exercising their jurisdiction to take measures directed to the protection of the person or property of the child, the authorities of Contracting States will apply their “own law” (Art. 15(1)), that is, their domestic, internal, law. The rule has the advantage that the authorities of Contracting States are applying the law that they know best.

However, Art. 15(2) provides an exception to this general rule. Art. 15(2) states that, in so far as the protection of the person or the property of the child requires, the authorities may, exceptionally, (1) apply, or (2) take into consideration, the law of another State with which the situation has a substantial connection. As an exception to the general rule, this provision should not be utilised too easily. The authorities should be sure that it is in the child’s best interests to apply or take into consideration foreign law.

II.

The attribution or extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority, is governed by the law of the State of the habitual residence of the child (Art. 16 (1)). So in the case of

- the child’s birth,
- the marriage of the child’s parents,
- the separation or divorce of the child’s parents...

In some cases, the attribution or extinction of parental responsibility may occur as a result of an agreement or unilateral act which, again, does not require the intervention of the judicial or administrative authorities. The law applicable to this attribution or extinction of parental
responsibility is the law of the State of the child’s habitual residence at the time when the agreement or the unilateral act takes effect (Art. 16 (2)). An example of a unilateral act attributing parental responsibility might be a will or an expression of last intentions by the last parent of the child designating a guardian for the child.

Parental responsibility, which exists under the law of the State of the child’s habitual residence remains after a change of the child’s habitual residence to another State (Art. 16 (3)). This is the case even if the State of the child’s new habitual residence would not provide for parental responsibility in the same circumstances.

The attribution of parental responsibility by operation of law to a person who does not already have such responsibility, is governed by the law of the State of the child’s new habitual residence (Art. 16 (4)). The purpose of these rules is to secure continuity in parent-child relationships.

The result of the rules is that a change in a child’s habitual residence, in and of itself, cannot result in a person losing parental responsibility for a child, but it can result in another person gaining parental responsibility for a child.

The co-existence of several holders of parental responsibility, which may result from an application of these provisions, can only work if the holders of parental responsibility generally agree. If there is disagreement between them, this can be resolved by a measure requested by one or more of them from the competent authority with jurisdiction.

III.

The preceding rules in Art. 16 refer to the attribution or extinction of parental responsibility.

According to Art. 17 the exercise of parental responsibility, however, is always governed by the law of the child’s current habitual residence. So on matters like

- legal representation of a child,
- access rights,
- extinction and exercise of guardianship (kafala)
- administration of a child’s property,
- religious education...

IV. Public policy exception

There is a public policy exception provided for in Art. 22. This means that if the application of the law designated under the rules described above is manifestly contrary to the public policy of the Contracting State, taking into account the best interests of the child, the authorities of that State can refuse to apply it.

This rule can only refer to very few cases, because the general rule is, that the authorities of Contracting States apply their “own law”.
V. Modifying a judgment

Art. 14 of the Convention ensures the continuation in force of measures taken by an authority having jurisdiction on the basis of Articles 5 to 10 of the Convention, even when the ground of jurisdiction upon which the measures were taken has subsequently disappeared as a result of a change of circumstances. In all instances, the measures of protection previously taken will remain in force despite a “change of circumstances”. The measures taken by the authority on the basis of Articles 5 to 10 will remain in force for so long as they have not been modified, replaced or terminated by measures taken by any authorities that have jurisdiction under the Convention as a result of the new circumstances.

Art. 14 is aimed at providing a degree of security and continuity for children and their families. Families need not fear that a move to another jurisdiction will, in and of itself, alter the arrangements that have been made concerning the care of the child.

For further information, you may refer to the following websites: