

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



**Recasting the Brussels Ila
Regulation
WORKSHOP
8 November 2016**

Compilation of briefings for the JURI Committee



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

Recasting the Brussels IIa Regulation

WORKSHOP **8 November 2016**

Compilation of briefings

Abstract ▼

The workshop, organised by the Policy Department upon request by the JURI Committee, takes place while the European Parliament is consulted on the Commission proposal to recast the so-called “Brussels IIa” Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility. The briefings included in this compilation examine the main amendments proposed by the Commission as regards child abduction and return proceedings, mediation, cooperation between national judicial and central authorities, and suggest possible further improvements in these areas as well as in the field of jurisdiction over divorce and annulment of marriage, cooperation with third countries and international organisations, and training of judges.

ABOUT THE PUBLICATION

This research paper was requested by the European Parliament's Committee on Legal Affairs and commissioned, overseen and published by the Policy Department for Citizens' Rights and Constitutional Affairs.

Policy departments provide independent expertise, both in-house and externally, to support European Parliament committees and other parliamentary bodies in shaping legislation and exercising democratic scrutiny over EU external and internal policies.

To contact the Policy Department for Citizens' Rights and Constitutional Affairs, or to subscribe to its newsletter please write to:

poldep-citizens@europarl.europa.eu

Research Administrator Responsible

Rosa RAFFAELLI

Policy Department C: Citizens' Rights and Constitutional Affairs

European Parliament

B-1047 Brussels

E-mail: poldep-citizens@europarl.europa.eu

Editorial Assistant

Monika Laura LAZARUK

LINGUISTIC VERSIONS

Original: EN

Manuscript completed in October, 2016

© European Union, 2016

This document is available on the internet at:

<http://www.europarl.europa.eu/supporting-analyses>

DISCLAIMER

The opinions expressed in this document are the sole responsibility of the author and do not necessarily represent the official position of the European Parliament.

Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged and the publisher is given prior notice and sent a copy.

CONTENTS

CHILD ABDUCTION AND RETURN PROCEDURES	4
Dr Ilaria PRETELLI	
THE ROLE OF FAMILY MEDIATION IN MATTERS OF PARENTAL RESPONSIBILITY	18
Dr Christoph C. PAUL	
THE POINT OF VIEW OF A SPECIALISED LAWYER	29
Dr Nicole GALLUS	
ENHANCING CROSS-BORDER COOPERATION	36
Prof Thalia KRUGER	
THE EXPERIENCE OF A NATIONAL CENTRAL AUTHORITY	45
Lukáš FRIDRICH	
A JUDGE'S PERSPECTIVE ON THE COOPERATION MECHANISMS	55
Judge Annette C. OLLAND	
THE LINK WITH INTERNATIONAL INSTRUMENTS & THIRD COUNTRIES	63
Permanent Bureau of the Hague Conference on Private International Law	
WHAT ABOUT MATRIMONIAL MATTERS?	73
Prof Alegría BORRÁS	
DEVELOPING TRAINING AND MEETING OPPORTUNITIES FOR NATIONAL JUDICIAL AUTHORITIES	81
Judge Wojciech POSTULSKI	

CHILD ABDUCTION AND RETURN PROCEDURES

Dr Ilaria PRETELLI

KEY FINDINGS

- European return proceedings, family proceedings and proceedings involving **minor children** have specific characteristics that justify a considerably different regime from that of other civil law proceedings as well as the adoption of specific connecting factors and rules.
- The creation of specialised courts for return proceedings, family proceedings and/or proceedings interfering with the life of minor children should be enacted in full compliance with the principle of **proximity** of the court to the child, be it the court of the habitual residence or that of the new residence.
- The most extreme of the recurrent patterns of international child abduction experienced are not likely to create conflicts of decisions within the European Union, because of the common foundations of **European legal culture**.
- **Communication between judges, public authorities, central authorities, professionals assisting the parents and the parents themselves** should be promoted by all means, taking into account that a decision that the child should not return may violate the **basic rights of the child** to the same extent as a decision to return it.
- The role of **mediation** should be increased, especially in relation to the **hearing of the child**, with a view to resuming basic forms of communication between the child's caregivers involved in the dispute.

1. INTRODUCTION

This paper will analyse possible improvements in the regime of European return proceedings and custody proceedings brought in cross-border parental child abduction cases, by reference to the Commission's proposal for a recast of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (hereinafter referred to as "the Brussels IIa Regulation" or "the Recast" or "the recast proposal", in the case of the Commission's proposal).¹

The topic is sensitive, complicated² and thoroughly debated in legal literature.³ In addition, international and European case law is abundant and offers many examples of "conflict of solutions" even with reference to a given case. In this panorama, the European Parliament

¹ Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) COM (2016) 411/2 http://ec.europa.eu/justice/civil/files/family-matters/brussels2_regulation_en.pdf (last accessed on 19.10.2016), at 13.

² The Study on the assessment of Regulation (EC) 2201/2003 and the policy options for its amendment (see http://ec.europa.eu/justice/civil/files/bxl_ii_a_final_report_evaluation.pdf (Final Evaluation Report) and http://ec.europa.eu/justice/civil/files/bxl_ii_a_final_report_analytical_annexes.pdf (Analytical Annexes) stresses continuously the difficulties that private persons and even professionals express in understanding legal rules and provisions of European PIL, especially in this field (last accessed on 19.10.2016).

³ For a bibliography until 2015, please refer to the EP Study 510.012, at 395-411. ([http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510012/IPOL_STU\(2015\)510012_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510012/IPOL_STU(2015)510012_EN.pdf)) (last accessed on 19.10.2016).

commissioned the Study “Cross-border parental child abduction in the EU”, which includes a first tentative synthesis of child abduction disputes in light of recurrent patterns and suggests improvements to the supranational legal framework in force.⁴ In particular, the study identified the need to increase data collection, promote judicial cooperation, strengthen the role of Central Authorities and encourage recourse to mediation schemes.⁵

The Commission’s proposal for a recast of the Brussels IIa Regulation takes into account these needs and suggest innovative solutions. The recast was drafted in the aftermath of an extensive work, including a wide public consultation that received a large number of contributions from different EU countries and researches carried out by a Working Group of European experts.

Despite the scale of the preparatory work, the improvements proposed appear cautious and this paper will suggest further improvements with a view to ensuring, on the one hand, that return proceedings are more efficient and timely and, on the other hand, that special focus is put on social justice for European families, a concept that includes broken homes.

Before analysing the proposed changes, attention will be drawn to the substance of the phenomenon, in the light of selected recent cases and findings. These reveal the importance of structuring a framework for fruitful cooperation between the **Member State a quo** – the State of the **former habitual residence** of the child – and the **Member State ad quem** – the State **where the child has been brought** – on a more equal basis, especially in all those cases where the two States appear to be, respectively, the “referential” State of the mother and the “referential” State of the father.⁶

2. A COMPARATIVE SKETCH OF CROSS-BORDER PARENTAL CHILD ABDUCTION CASES

A case not subject to International rules in force: K. Trachsels v. H. Amin

A Swiss-Egyptian couple entered into a marriage in 2008 in Switzerland, had two daughters, split up in July 2013 and obtained a judicial decision in February 2014. The care of the two daughters was given to the mother, with the father obtaining access and the permission to spend two weeks a year of holidays with his children.⁷

To that end, the father decided to take his daughters on holiday to Egypt. Aware of the true intentions of her ex husband, the mother did not authorise the trip, but the father succeeded in obtaining a provisional order to take the children in Egypt from the Regional Court of Thun. The court affirmed that the father had the right to travel to his home country with his children, for whom Egypt was also a “home country” by virtue of their Egyptian nationality (they also had Swiss nationality).

The children are now probably living in Egypt and have not been able to travel back to Switzerland ever since. Despite the mother obtaining custody of her children in Egypt too, she did not obtain a permit to travel out of Egypt with her children. Eventually, the situation worsened and she seems to have lost all contact with her children. The press

⁴ I. Pretelli, Executive Summary and Recommendations, in EP Study 510.012 (note 3), at 17.

⁵ *Ibidem*, at 20.

⁶ The paradigm of the present paper is not solely a “battle” between a father and a mother, although we refer to these figures *brevitatis causa*. The same observations and comments may be transposed to any persons having parental responsibility for the child in question. Similarly, the extensive reference to “judges” or “judicial authorities” in the paper aims at comforting the reader, but is intended to include all authorities referred to in the recast proposal.

⁷ See, in the Swiss Press : <http://www.bernerzeitung.ch/region/oberland/Mutter-von-entfuhrten-Maedchen-Ich-hoere-sie-noch-heute-schreien/story/13185313> ; <http://www.jungfrauzeitung.ch/artikel/144816/> etc. (last accessed on 19.10.2016).

further reports that the two girls, now aged four and six, are not attending school and the Egyptian authorities seem not to be able to identify their whereabouts.

The 1980 Hague Convention is not applicable to the case, since Egypt is not among the 95 Member States that have ratified it. As a consequence, cooperation between the two States cannot benefit by appropriate structures of cooperation.

A case subject to the 1980 Hague Convention: K. Ashworth v. B. Alcock

This Anglo-Australian couple had a long-distance relationship that eventually led to the birth of a child, named D. When D. was about three, the mother decided to join her partner so that the child could grow up with both parents in Australia.⁸

Once in Australia, she discovered that her partner had stable relationships with four other women and immediately decided to pack her things and fly back to Britain with the child.

The child's father filed for return, the re-transfer of the child's residence having been a unilateral decision of Ms Ashworth on which he did not agree. However, return was denied since the child had never "acquired habitual residence in Australia"; he was "not integrated to a sufficient degree in a social and family environment in Australia".⁹

A case subject to the Brussels IIa Regime: B v. B

This case arises from the breakup of a purely Lithuanian family.¹⁰ After the separation, a judicial decision provided for the child, who was 9 years old, to live with her mother and have contact with her father. In December 2013, the mother went to England to seek employment bringing her daughter with her. The father filed for return in England.

In the first place, the mother contested the wrongful character of the transfer of the child's residence. It was not clear whether the father had rights of custody pursuant to the 1980 Convention that rendered his consent necessary for the move; in addition, there was some evidence suggesting that the father had consented to it.

However, an expert report on Lithuanian law stated that the non-residential parent needed to give his permission to the transfer of the child's residence according to Lithuanian law. On the second issue, the mother had argued that the father consented to her moving to England so she could seek employment. In this respect, the father replied that he had understood that their daughter would not leave Lithuania for the time necessary for his ex-wife to find work. The court concluded that consent had not been clear and unequivocal, since it had not been expressed in writing, nor was it corroborated by third-party evidence or by other means.¹¹

The mother further argued that the daughter objected to returning to Lithuania. However, the child's views were not taken into account because "although (the child) expressed a desire not to return to Lithuania, there was a significant lack of substance to her objections".¹²

The additional defence based on the existence of an unacceptable or intolerable risk of physical or psychological harm was also rejected, although it led to **a number of protective measures being ordered**, including that the daughter "would remain in the custody of her mother and there would be no contact with the father until there is a further order for contact by the Lithuanian courts" and an order to the father to avoid approaching

⁸ See in the British Press: <https://www.theguardian.com/law/2016/sep/30/former-bbc-presenter-katy-ashworth-wins-family-court-fight-ex-partner-child> (all last accessed on 19.10.2016).

⁹ High Court of Justice, Family Division, Alcott (1), [2016] EWHC 2413 (Fam), available at <http://www.bailii.org/ew/cases/EWHC/Fam/2016/2413.html> (last accessed 21 October 2016).

¹⁰ B v B [2014] EWHC 1804 (Fam).

¹¹ *Ibidem*.

¹² *Ibidem*.

the mother and to stay 100 metres out of her property. The mother was given three weeks to return to Lithuania, unless she could obtain, through an urgent interim hearing in Lithuania, permission to stay in England during the course of court proceedings in Lithuania aimed at establishing whether the move to England would be in the best interests of the child.

In addition to exemplifying a third pattern, directly linked with the fundamental freedom of movement of workers, the case provides a good example of **mutual trust and judicial willingness to cooperate** to achieve – together – the best interests of the child.

Comparative overview

The Recast aims at improving return proceedings based on the 1980 Hague Convention on the civil aspects of International child abduction and on Brussels IIa with two strategies.

The first is to enhance cooperation in order to diminish conflicts of judicial solutions within the EU. The Recast is a great improvement in this respect, because it favours mediation between the parents and, in parallel, cooperation between the judiciary, central authorities and any other relevant figure capable of protecting the child in the context of judicial litigation between its parents.

If an agreement between the parents is the most respectful solution for the child's psychological welfare, the same needs to be said of **agreed decisions by Member States' judges**. This paper suggests a way to reach agreed solutions through a purposeful and solid cooperation capable of building mutual trust in the European Area of Freedom, Justice and Security (see further and annex I).

As regards the **second strategy**, the recast proposal is based, in common with Brussels IIa, on the prevalence given to the State of the former habitual residence of the child, whenever the move has been carried out illegally. In this respect, the recast would make jurisdiction dependent from the lawfulness or unlawfulness of the move. This choice will have the effect of anticipating the discussion on the wrongful character of the move in the pre-assessment phase of determining jurisdiction. In certain cases, these solutions can have the effect of giving a *de facto* advantage to one of the parents. The circumstance that one of the increasingly recurrent patterns consist of mothers bringing their child "back home"¹³ may be explained by the fact that, in most cases, the woman had previously chosen to move to her partner's country in order to found a family. The CJEU Hispano-German cases provide two examples of this reality.¹⁴

For the purposes of European private international law, this particular figure of child abduction needs to be **distinguished from those abductions that reveal a proprietary concept of parenting**, are carried out with the aim of erasing the relationship with the other referential figure and aim to interrupting it for the rest of the child's life, as seems to be the intention of the father in the first case exemplified.

The judge's conclusion in the second case was that: "any agreement by the mother to move to Australia was based on a fundamentally flawed premise. If the mother had known the true state of affairs I am satisfied that in all likelihood she would not have moved to Australia with [the child] even for a trial period".¹⁵ This statement is interesting because it could be applied to any regretted relocation by a parent having emigrated from a country

¹³ P. Beaumont, L. Walker, J. Holliday, Conflicts of EU Courts on Child Abduction: The reality of Article 11(6)-(8) Brussels IIa proceedings across the EU, available here (last accessed on 19.10.2016): https://www.abdn.ac.uk/law/documents/CPIL_Working_Paper_No_2016_1.pdf at 5.

¹⁴ See CJEU, 22 December 2010, in case C-491/10 PPU, Aguirre Zarraga v. Simone Pelz and CJEU, 15 July 2010 in case C-256/09 and 9 November 2010 in case C-296/10, Bianca Purrucker v Guillermo Vallés Pérez.

¹⁵ Note 8.

with the intimate belief that he or she was going to found a long-lasting family in his or her partner's home country.

Specific attention must be given to this line of cases, since they are becoming more frequent than the ones for which the 1980 Hague Convention was initially negotiated. The 1980 Hague Convention was specifically conceived in order to respond to all those paradigms where **children are viewed as "property" in the mind of one of the parents**. These conceptions often result from interpretations of personal rights that certain legal cultures regard as **attached to gender** and that lead to the grant of custody rights only to mothers or, as happens in the majority of the known cases, only to fathers.¹⁶

The radical contrast between such legal cultures and basic European fundamental rights and principles should, in itself, **prevent similar scenarios from occurring within the European Area** of Freedom, Justice and Security. Bearing in mind that there is unlikely to be any clash of civilisation as between European judges in cases of intra-European return proceedings, the European legislator may and should give increasing attention to the aspects of the phenomenon that are specific to European cases. Intra-European cases are similar only to a certain extent to the core phenomenon that the Hague Convention aims at countering. In addition, these cases are often directly linked to the fundamental freedom of movement of workers, as the third case illustrates. In this respect, due account should be given to whether the person concerned was aware that his or her move was wrongful, to the human and economic situation of the broken home as well as to the whole context of the move.

As revealed by the Commission's consultants in the Impact Assessment study,¹⁷ some of the "abductions" occurring within the European Area are an **unintended illegal behaviour** since they are carried out in the firm belief that the transfer is an exercise of parental responsibility.

3. ANALYSIS OF THE PROPOSED IMPROVEMENTS OF PROCEEDINGS IN RELATION TO THE RETURN OF A CHILD

Of the six areas identified by the Commission for further improving Brussels IIa, four directly have to do with return proceedings: child return procedure, hearing of the child, enforcement of decisions, and cooperation between Central Authorities.¹⁸

Child return procedure

Concentration of jurisdiction

One of the most important innovations of the proposal is the provision in Art. 22, a provision that would seem more suitable for a directive than for a regulation: it provides for **concentration of jurisdiction**. As pointed out by the studies and consultations that preceded the recast,¹⁹ the new rule requests Member States to take appropriate measures in order to concentrate jurisdiction for child abduction cases in specialised courts. These need to be identified and then notified as prescribed by Art. 81. A new recital 26 explains that concentration of jurisdiction facilitates both the correct application of rules and respect of the timeline. The need to appoint expert judges for child abduction cases was pointed

¹⁶ I. Pretelli, Critical Assessment of the Legal Framework Applicable to Parental Child Abduction, in EP Study 510.012 (note 3), at 58.

¹⁷ Impact assessment Study (note 2), at 32, 59, 61.

¹⁸ Note 1, at 3-5.

¹⁹ See I. Pretelli (note 13), at 97; See, for the same needs expressed overseas, Keelikolani Lee Ho, Comment, The Need for Concentrated Jurisdiction in Handling Parental Child Abduction Cases in the United States, 14 Santa Clara J. Int'l L. 596 (2016).

out frequently and the Commission's Impact Assessment Study criticises the sophistication and complexity of legal rules that are objectively difficult for practitioners to work with.²⁰

In addition, the specific characteristics of proceedings involving **minors and families** justify recourse to judges with specific **psychological training and the pedagogic background** required by the particular disputes she or he is asked to resolve, characteristics which are substantially different from those required in other civil and in commercial law disputes.

In civil law proceedings, the role of the judge is ultimately that of determining who is right and who is wrong, applying the rules in a neutral manner. In family proceedings, the judge is asked to organise the logistics of broken homes, so that new social and economic conditions governing the aftermaths of separation, divorce, etc. may be put in place. Judicial intervention in this respect may range from simply supervising an agreement between the parties, to substituting the judge's will for that of the parties, whenever they are unable to agree about the reorganisation of family life and the pursuit of the best interests of common children after the breakup. In these contexts, the judge will make decisions that will **change the daily routine of the days, weeks and years to come of all the family members**.

It is important to stress that **a decision not to return the child may violate his or her fundamental rights to the same extent as a decision on return**, depending on the context in which the transfer of its residence was carried out. Indeed, a unilateral decision which led to the transfer of a child's residence abroad may be illegal, legitimate or even a responsible and courageous exercise of parental responsibility.

Because of the particular role of judges in return proceedings, concentration of jurisdiction in specialised courts is justified and even necessary. However, these arguments do **not justify** concentration of jurisdiction "in one single court for the whole country". The existence of a single court for the whole country for return proceedings would be **excessively detrimental to the proximity of the judge to the dispute**, and, as a result, undermine the *ratio* on which the whole system is based. In addition, concentration of jurisdiction in one single court could also undermine the **timeliness** of return proceedings and of the return itself - these are two of the main already existing shortcomings identified by legal literature.²¹

In addition, the habitual character of the former residence of the child as compared to the new one should not be **a ground for judicial battles**, especially if cooperation between the judges of the two countries involved becomes more efficient. In this respect, the jurisdiction of the judge of the former residence should be prorogated for a fixed period, although the parties may explicitly or *de facto* accept jurisdiction of the judge closer to the new residence of the child (see the proposed amendments to Art. 9 of the recast proposal in the annex).

Time frame and respective role of the two courts involved

As regards return proceedings, proposed improvements with a view to a **timely restoration of the status quo ante** include: limiting appeals to one (Art. 25(4) and recital 27) and setting an eighteen weeks' time frame for the whole process. To this end, Art. 63(1) let. g) and recital 27 require Central Authorities, when they initiate or facilitate the institution of court proceedings for the return of children, "to ensure that ... the file prepared in view of such proceedings ... is complete within six weeks" and Art. 23(1) prescribes a six-weeks time limit for the first instance proceedings and another six-weeks time limit for the appeal, in both cases "except where exceptional circumstances make this impossible".

²⁰ Impact assessment Study (note 2), at 9 and *passim*.

²¹ *E multis* Rhona Schuz, The Hague Child Abduction Convention: A Critical Analysis, Oxford, United Kingdom : Hart Publishing, 2014, at 412.

As already stressed by PE Study 510.012,²² the target of 6 weeks in total for the procedure, prescribed by Art. 11(3) of the Brussels IIa Regulation as currently in force, is often disregarded by judges. This may be explained by the fact that intra-European child abductions are often complicated by the difficulties in ascertaining the family context and need deeper scrutiny (*supra* p. 3). This reality is acknowledged by the Commission, for whom the recast is intended to oblige the Member State *a quo* "to conduct a thorough examination of the best interests of the child" before giving a final decision on custody²³.

Indeed, a thorough examination of the best interests of the child is now necessary for the State of habitual residence to reverse a non-return decision by the State of the new residence. As explained by recitals 17 and 30, coordination between the judge *a quo* and the judge *ad quem* is inspired by the principle that the judge closer to the child addresses its urgent needs by taking provisional measures and deciding on the return - whereas the judge of the habitual residence before removal takes full knowledge of the family situation, since it "shall examine the question of custody of the child, **taking into account the child's best interests as well as the reasons for and evidence underlying the decision refusing to return the child**" (Art. 26(4) amending Art. 11(8)).

The aim is clearly that of preventing decisions obliging the child to face a long-lasting situation of uncertainty and to expose it to sudden resettlement as a consequence of provisional orders of return or non-return.

[The prohibition to refuse return on grounds of Art. 13 b\) of the 1980 Hague Convention](#)

On this note, one critical point is the prohibition of using Art. 13 b) of the 1980 Hague Convention to refuse to return a child, whatever the circumstances of the case, "if adequate arrangements have been made to secure the protection of the child after his or her return" (Art. 25(1), current 11(4)). It is debatable whether this prohibition is, in itself, compatible with the Hague Convention. However, the perspective from which Art. 25 moves seems **adult-centric** since the rule is clearly motivated by a fear of abusive allegations with dilatory intents. Indeed, the practice has shown that abusive allegations are common. However, fear of abusive allegations ought to be countered by appropriate sanctions, not by reducing guarantees established in the best interests of the child.

Anyone who has experienced the failure of a long-lasting family life project knows well the difficulties in re-creating an **environment favourable to the healthy development of children after the failure of such project**. Even in the simplest and peaceful scenarios, new economic resources, new human resources and new logistics need to be found and established in the best interests of the child.

In the European Area of Freedom, Justice and Security, the aforementioned limitation in the use of the defence provided for in Art. 13 b) of the 1980 Hague Convention doesn't seem to be justified, neither does it seem to respect the international treaty in force. If decisions obliging the child to frequent resettlements need to be avoided – for instance, through recourse to provisional and protective measures in the best interests of the child (*supra* p. 4) – then scrutiny of the defences based on Art. 13 b) should be authorised, bearing in mind that emergency situations are ascertainable by the judge, especially with the increased assistance of and intervention by the Central Authorities of both the States involved. As a consequence, Art. 25 should be amended (see annex).

Hearing of the Child

The amendments proposed by the Commission concerning the hearing of the child are two: a new Art. 20 and Art. 24. Member States need to "ensure that a child who is capable of forming his or her own views is given the genuine and effective opportunity to express

²² I. Pretelli, (note 13) at 75.

²³ See note 1.

those views freely" (Art. 20(1)); in addition, Art. 20(2) requires "due weight" to be given to such views and the authority is to document its considerations in relation to the views expressed by the child.

The hearing of the child is a very delicate point. The right stems from Art. 12, 1989 United Nations Convention on the Rights of the Child (UNCRC). It is important to stress that careful attention is needed to avoid making of this basic right of the child – the right to be heard – an excessively onerous responsibility for it, with possible retaliation from and the breakup of the relationship with the "not chosen" parent, as in fact occurs. It is all the more important **to prevent such an eventuality from occurring in cross-border cases** is all the more important since the consequences of the choice expressed by the child can have a far heavier impact on the child's environment compared to cases geographically circumscribed to a small area.

An idea here would be to **increase the role of mediators** by incentivising the use of mediation in the organisation of the hearing of the child. In Art. 23(2), the recast proposal provides for a phase in which the parties are invited to try out mediation as an alternative means of solving their dispute. The idea of introducing compulsory mediation does not appear, although it was discussed during preparatory works. It was rejected on the ground that mediation is based on the willingness of the parties to conclude an agreement under the guidance of experts; thus, it is very unlikely that a party, who is forced to enter into mediation, will cooperate. Despite this idea, the compulsory intervention of a mediator seems feasible, at least in relation to the compulsory hearing of the disputed child.

It is well known that children growing up in broken homes are confronted by **psychological challenges that are too often aggravated by judicial proceedings**. The child is often caught in an irreducible conflict of loyalty that risks to be aggravated by the judicial battle between its caregivers.

Bearing in mind that **a supervised agreement is the best outcome** for family disputes in general and even more for return proceedings, the option of organising the hearing under professional supervision deserves special attention, since it could be a first step for resuming dialogue between the two parents. In any case, even when circumscribed to organising the hearing of the child, mediation could be helpful for the relationship between the child and the parent that may feel "not chosen" or second in the affection of his or her child. In addition, the intervention of a mediator, instead or in support of a psychologist, would **add value to the hearing, ensuring that the child's views are expressed freely and not manipulated** and, moreover, providing **specific assistance to** parents in relation to it. The intervention of a mediator should help parents accept the child's views and give them an additional opportunity to start cooperating in the best interests of their child.

Even if Member States have their own procedural guarantees in respect to the hearing of children, prescribing professional intervention in the form of **minimum European standards** in the proposed Art. 20 would ensure a better harmonisation and equal treatment of children in judicial proceedings, regardless of the State where the hearing is organised.

Enforcement of Decisions

A major problem in the implementation of the current Brussels IIa regulation is the obligation (enshrined in Art. 11(6) to 11(8)) for the judge *ad quem* to enforce a decision of the judge *a quo* requiring the return of the child, if accompanied by the certificate issued under Art. 42. The CJEU had taken a narrow and rigid interpretation of the rule.²⁴ As a

²⁴ See CJEU, 22 December 2010, in case C-491/10 PPU, Aguirre Zarraga; CJEU, 1 July 2010, in case C-211/10 PPU, Doris Povse v. Mauro Alpagó.

consequence, and for the first time, **a conflict of European Supranational Courts** has arisen, with the Strasbourg ECHR Court considering the outcomes of the implementation of the rule potentially contrary to the best interests of the child.²⁵

The proposal makes a welcome step back in this respect and “authorises” the judge *ad quem* to refuse enforcement on grounds of public policy and irreconcilability of judgments. Remarkably, it introduces **specific public policy grounds** restricted to safeguarding **the best interests of the child**. These are the sole public policy grounds which may prevent the enforcement of decisions on return. To this end, new text is added to an Art. 40 (the present Art. 28) in order to allow the party opposing enforcement to demonstrate that: during the time elapsed between the taking of the decision to be enforced and the enforcement procedure there was a **change of circumstances affecting either the child or the environment in which he or she could grow up**. The circumstances that would make enforcement “manifestly contrary to the public policy of the Member State of enforcement” are the following: *i*) the child is objecting to such extent that enforcement cannot be carried out without impairment of his or her rights; *ii*) objective changes need to be taken into account, for instance changes in the foreseen household of the child (such as, for example, the fact that the parent is no longer capable of ensuring a safe environment for the child). The proposed changes in these rules will certainly favour mutual trust between Member States to the same extent as those enhancing cooperation between the State *a quo* and the State *ad quem*.

Cooperation between Member States as a key-factor for Mutual Trust

The recast proposal favours cooperation between Member States at many levels.

Cooperation begins at the stage of *interim relief*. The authorities in the State where the child is present have jurisdiction, in this respect, under Art. 12 (the present Art. 20). Provided that such measures were not issued *inaudita altera parte* (i.e. they are not *ex parte* measures, see Art. 48 and recital 17), they may be enforced abroad. In other words, even if they were issued by a court not having jurisdiction as to the substance, these measures are extraterritorial and have to be enforced by the court having jurisdiction as to the substance. This **exception to the “traditional” EU PIL rule on provisional measures**²⁶ (justified and even necessary in cases covered by Art. 13(1) lett. b) 1980 Hague Convention, see recital 29) is **mitigated** by other rules, encouraging **cooperation** between the authorities involved. The first one is the **duty** of the judge having adopted the measure **to provide detailed information** to his or her colleague in the Member State with jurisdiction as to the substance of the case in conformity with the proposed changes to Art. 12(1) (current Art. 20), last sentence.

A second level of cooperation is involved where a **decision refusing return** is based on Art. 13 of the 1980 Hague Convention. In this event, the decision and all relevant documents must be transmitted to the Member State where the child was habitually resident before the removal (Art. 26(2)). Unfortunately, the proposal identifies Central Authorities and the European Judicial Network as *alternative* “facilitators” in the transmission of the documentation on which the decision is based and the decision itself. In this respect, the role played by the EJN in the transmission of information can be distinguished from the role of Central Authorities. In addition, if the objective is to promote

²⁵ L. Mari, L'interesse superiore del minore nel quadro dello spazio giuridico europeo (a proposito di recenti casi di sottrazione internazionale di minori), Studi in onore di Augusto Sinagra, 2013, 295-314, and L. Walker & P. Beaumont, Shifting the Balance Achieved by the Abduction Convention: The Contrasting Approaches of the European Court of Human Rights and the European Court of Justice, Journal of Private International Law, 2011, 231-249.

²⁶ I. Pretelli, Provisional and Protective Measures in the European Civil Procedure of the Brussels I System, in V. Lazić and S. Stuij (eds.), Brussels Ibis Regulation, Springer, forthcoming 2017; F. Garcimartín, Provisional and protective measures in the Brussels I regulation recast, in Yearbook of Private International Law XVI, 2014/2015, at 57-83.

cooperation, it seems advisable to open the exchange of information between courts to all refusals of return (not only those based on Art. 13 of the Hague Convention) and to encourage recourse to the **European Judicial Network**, in this respect.

A third level of cooperation concerns exchanges between Central Authorities. Central Authorities of both States involved **need to inform and be up to date about cases treated in courts**. This corresponds to the philosophy of the proposal that sees Central Authorities more involved in the judicial proceedings on return and potentially increases their role in investigating the case, supporting the parties, promoting **mediation**, etc. Art. 61 requires Member States to “ensure that Central Authorities have adequate financial and human resources to enable them to carry out the obligations assigned to them under this Regulation”. EP study 510.012 pointed out that cooperation between Central Authorities was often hindered by the **disparity of resources** available to them, with States such as the UK having a diversified and specialised staff, hierarchically organised, and other Member States having barely one person in a general State office, overwhelmed and unable even promptly to communicate the number of requests received.²⁷

It is also possible to imagine a **fourth level of cooperation**, which would consist in promoting **agreed decisions by Member States’ courts**. In this respect, the investigation of the case prior to the decision on custody should include exchanges of information between the Member States involved, so that, if the Member State *a quo* reverses the non-return order of the State *ad quem*, it becomes possible to trace, in the decision, either the reasons for the divergence on the point of return, or the evolution of the case leading to an agreed decision on return by both States involved.

Whenever there is a clear **unbalance** in the **degree of integration** of one parent as compared with the other in the State from which the child was transferred, it seems important to favour to a maximum extent **joint decisions** by the courts of the **two Member States** involved.²⁸ Whenever one parent has moved, motivated by the desire to found a family and then finds himself or herself deprived of a family, of an appropriate job, with difficulties in speaking the language, without an affective or professional network of contacts, etc., the “assistance” of his or her referential State may be a key factor in order to avoid the feeling of being locked-in to the country of a previous, regretted immigration. This provision would be consistent with the overall philosophy of the recast that aims to a **closer collaboration** between all the operators involved in child abduction cases: in the first place, central authorities and judges; in the second place, professionals, mediators and social workers; and even, in the third place, parents. Actively searching for a coordinated and cooperative solution, decided by the judge of the habitual residence of the child, after taking into account the opinion of the judge of the new residence, may certainly help to build *a posteriori* mutual trust in Europe and to achieve justice for European citizens.

4. CONCLUSION

In synthesis, the following suggestions are brought to the attention of the EP:

1. To continue to take note of the specific reality of return proceedings within family proceedings as opposed to civil law proceedings. On that account, the jurisdiction of the courts of habitual residence of the child may be **prorogated for a fixed period**, unless jurisdiction of the new residence is accepted *de iure* or *de facto* by both parties (see the amendments proposed to the text of Art. 9 of the recast proposal).

²⁷ J. Curran, Global Statistical Assessment, EP Study 510.012, (note 3), at 44-45.

²⁸ See ECHR, 13 January 2015, case of Manic v. Lithuania, Application no. 46600/11, at 117 stating that the fear of a father feeling discriminated by the judiciary of the “referential” Member State of the mother was understandable.

2. To promote the constitution of **specialised courts** for return proceedings, family proceedings and/or proceedings interfering with the life of minor children; such courts should be geographically distributed so as to guarantee **proximity** of the judge to the child is guaranteed.
3. To take into account the specific reality of European cross-border parental abductions in contradistinction to international child abductions and, on that note, **remove the prohibition on the use of Art. 13 b)** of the 1980 Hague Convention to refuse return (see the amendments proposed to the text of Art. 25 of the proposal).
4. To increase the role of **mediation** especially in relation to the hearing of the child – where **minimum standards** need to be set – in order to avoid him or her being too exposed to a conflict of loyalty, with possible negative consequences for the child's relationship with one of the two referential figures.
5. To differentiate **the role of the European Judicial Network** from that of Central Authorities and to ensure that the **Central Authorities** of the two Member States involved in the move are duly informed and may better assist the parties.
To encourage **communication** between the judges involved, by requiring to the court of the habitual residence of the child to express – in the decision on custody related to the transfer of residence of the child – its **considerations on the exchange of documents and of information** occurred with the judge of the new residence of the child (especially when reversing, *de facto*, decisions refusing return through a decision on custody).

ANNEX WITH SUGGESTED AMENDMENTS TO THE PROPOSAL

Note: suggestions for amendments are based on the text as proposed by the Commission in the recast proposal COM(2016) 411 final, with additions in bold and red and deletions in strikethrough. In some articles, suggestions include moving some of the provisions; in that case, the renumbering is in red and the previous number is in strikethrough.

ARTICLE 9 - Jurisdiction in **relation to return proceedings** ~~cases of child abduction~~

In case of the wrongful removal or retention of ~~the~~ **a** child, the authorities of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction **in relation to return proceedings and in matters of parental responsibility** ~~until the child has acquired a habitual residence in another Member State and for (three) years following the move unless, during this timeframe:~~

(a) Each person, institution or other body, **whose having rights of custody right to participate in the decision on the child's residence has been violated by the wrongful transfer of the child's residence,** has acquiesced in the removal or retention, **either explicitly or de facto by:**

~~or~~

~~(b) the child has resided in that other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met:~~

(i) **not lodging any** ~~within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no~~ request for return ~~has been lodged~~ before the competent authorities of the Member State where the child has been removed or is being retained **despite having knowledge of the whereabouts of the child or having been in the conditions to know them for at least one year;**

(ii) **withdrawing** a request for return lodged **before the competent authorities** ~~by the holder of rights of custody has been withdrawn and no~~ **without lodging any** new request ~~has been lodged~~ within the time limit set in point (i);

~~(iv)~~ **(iii) not providing any submission** ~~a case~~ before the court of the Member State where the child was habitually resident immediately before the wrongful removal or retention **in conformity with Art. 26(3), thus determining the closure of the case** ~~has been closed~~ pursuant to the second subparagraph of Article 26(3); or

~~(iii)~~ **(b)** a request for return lodged by the holder of rights of custody was refused on grounds other than Article 13 of the 1980 Hague Convention; or

~~(v)~~ **(c)** a decision on custody that does not entail the return of the child has been given by the authorities of the Member State where the child was habitually resident immediately before the wrongful removal or retention.

ARTICLE 25 - Procedure for the return of a child

1. A court cannot refuse to return a child **wrongfully moved from one Member State to another unless:** ~~on the basis of point (b) of the first paragraph of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return.~~

To this end the court shall:

(a) ~~cooperate with~~ the competent authorities of the **other** Member State ~~where the child was habitually resident immediately before the wrongful removal or retention,~~ **involved in the wrongful move have been informed of the pending return proceedings** ~~either directly, with the assistance of Central Authorities or through the European Judicial Network~~

in civil and commercial matters, and **requested to provide all relevant information available on the case, and**

~~(b) take provisional, including protective, measures in accordance with Article 12 of this Regulation, where appropriate.~~ **the Central Authorities of both Member States have been informed and requested to provide relevant information on the case, and**

~~(2) (c) A court can refuse to return a child only if~~ the person who requested the return of the child has been given an opportunity to be heard.

The court takes the necessary provisional, including protective, measures in accordance with Article 12 of this Regulation, where appropriate. [see former para. (b), adapted]

~~2. A court cannot refuse to return a child only if the person who requested the return of the child has been given an opportunity to be heard [see supra sub c]~~

~~3.~~ The court may declare the decision ordering the return of the child provisionally enforceable notwithstanding any appeal, even if national law does not provide for such provisional enforceability.

~~4.~~ **3.** Only one appeal shall be possible against the decision ordering or refusing the return of the child.

~~5.~~ **4.** Article 32(4) shall apply accordingly to the enforcement of the return decision given under the 1980 Hague Convention.

ARTICLE 26 - Refusal to return the child under the 1980 Hague Convention

1. In a decision refusing to return the child, the court shall specify the article or articles of the 1980 Hague Convention upon which the refusal is based.

~~2. Where a decision refusing to return the child was based on at least one of the grounds referred to in Article 13 of the 1980 Hague Convention, the court shall immediately either directly, or through its Central Authority or the European Judicial Network in civil and commercial matters, transmit a copy of that decision and of the other relevant documents, in particular a transcript of the hearings before the court, to the court having jurisdiction or to the Central Authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention.~~

The decision shall be accompanied by a translation in accordance with Article 69 into the official language, or one of the official languages, of ~~that~~ **the other** Member State **involved in the wrongful move** or into any other language that the Member State expressly accepts.

Through the European Judicial Network in civil and commercial matters, all those documents shall be transmitted to the **other** court **involved in the wrongful move and to the Central Authorities involved** ~~having jurisdiction~~ within one month of the date of the decision refusing to return the child.

3. Unless the courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seised by one of the parties, the court that receives the documents referred to in paragraph 2 shall notify this information to the parties and invite the parties to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child.

Without prejudice to the jurisdiction rules of this Regulation, the court shall close the case if no submissions have been received by the court within the time limit.

4. Where the court referred to in paragraph 3 receives submissions within the set time limit or where custody proceedings are already pending in that Member State, the court shall examine the question of custody of the child, taking into account the child's best interests as well as the reasons for and evidence underlying the decision refusing to return the child

~~pursuant~~ **in particular if the decision is grounded in** ~~to~~ Article 13 of the 1980 Hague Convention.

5. Any subsequent decision on the question of custody, which is given in the proceedings referred to in the first subparagraph ~~which~~ and requiring the return of the child, may be issued by a court having jurisdiction under this Regulation only if:

- i. The other court involved in the wrongful move and having refused the return of the child has been contacted in relation to the pending proceeding on custody in the same form as prescribed by art. 25(1) for return proceedings; and**
- ii. Following the contacts taken in conformity to point a), cooperation between the authorities involved conducted to an agreement on the point of return that is attested in the decision on custody; or**
- iii. The reasons why the court having refused the return of the child does not agree on the point of return despite cooperation between the authorities involved are identified, documented and addressed in the decision on custody;**

A decision pronounced on the basis of the present paragraph shall be enforceable in all other Member States in order to secure the return of the child notwithstanding the earlier decision refusing to return the child pursuant to Article 13 of the 1980 Hague Convention.

THE ROLE OF FAMILY MEDIATION IN MATTERS OF PARENTAL RESPONSIBILITY

Dr Christoph C. PAUL

KEY FINDINGS

- Research suggests that mediation provides sustainable solutions in matters of parental responsibility.
- If mediation is to offer an alternative to court proceedings in international custody disputes, the mediators involved need to have undergone specialised training; the training should incorporate the legal framework of cross-border family disputes, intercultural competence and tools to manage high conflict situations, always having regard to the best interest of the child.
- Training for Judges in EU Member States should also address how to encourage parties to engage in mediation as early as possible and how to incorporate mediation into court proceedings without causing unnecessary delay in Hague child abduction cases.
- Demographic changes across the European Union as a result of the recent migration inflows have led to an increase in cross-border custody disputes where no international legal framework is available. In these cases mediation is often the only means to help the parents reach a sustainable solution on parental responsibility matters.

1. MEDIATION AND CROSS-BORDER FAMILY MEDIATION

In 2008 the European Parliament and European Council adopted Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters, the so called Mediation Directive¹. The Directive aims to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings. Considering the importance of effective and efficient justice systems, the objectives of the Directive are to simplify and improve access to justice and to contribute to the proper functioning of the internal market. Therefore, the European Commission has promoted and continues to promote mediation. Among the different means of amicable dispute resolution, the Mediation Directive primarily addresses "mediation" as one of the most widely promoted methods of alternative dispute resolution in family law. Article 3 of the Mediation Directive gives the following Definition:

'Mediation' means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.

Mediation enables the parties to determine whether they are capable of reaching a mutually acceptable solution for the parents and child. Mediation offers a wide range of options for decision making; the procedure is not limited to the issues under legal dispute. Unlike in

¹ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF>

court proceedings, mediation offers a platform to discuss and determine questions pertaining to the child's future care. Through this process, one can find a solution tailored to each specific case. Under ideal circumstances, this is a permanent, sustainable solution that solves the individual issues and, in parental child abduction cases, may even make further litigation in the child's country of origin about residence - and perhaps contact - unnecessary. This can often avoid stressful and expensive lawsuits in addition to further changes of residence that may harm the child.

As international child abduction cases are usually highly escalated, it makes great sense for parents to consider a mutual resolution of the conflict before resorting to litigation. The international and EU legal instruments that apply in cross-border custody conflicts and child abduction cases support and encourage finding amicable solutions to the disputes at hand.

In line with other Hague family Conventions, the 1980 **Hague Child Abduction Convention** encourages the amicable resolution of underlying family disputes. **Article 7** states that **Central Authorities "shall take all appropriate measures [...] to secure the voluntary return of the child or to bring about an amicable resolution of the issues"**.

The 1996 Hague Child Protection Convention and other international and EU legal instruments, too, explicitly mention the use of mediation, conciliation and similar methods, not only for child abduction cases but also for any kind of cross-border family case concerning parental responsibility, visitation and relocation. In particular, Art. 31 of the 1996 Hague Child Protection Convention states that: **"The Central Authority of a Contracting State, either directly or through public authorities or other bodies, shall take all appropriate steps to**

b) facilitate, by mediation, conciliation or similar means, agreed solutions for the protection of the person or property of the child in situations to which the Convention applies;"

Art. 55 (e) of the Brussels II a Regulation as currently in force explicitly specifies the **Central Authority's task in facilitating an agreement between the parties bearing parental responsibility through mediation or similar methods in addition to fostering cross-border cooperation in this respect**. The European Commission's recent proposal on the revision of the Brussels II a Regulation is even more explicit in encouraging the use of mediation as a means of alternative dispute resolution in all matters of parental responsibility. Art. 23 of the Brussels II a Regulation (recast) states: **"As early as possible during the proceedings, the court shall examine whether the parties are willing to engage in mediation to find, in the best interests of the child, an agreed solution, provided that this does not unduly delay the proceedings."**

2. SPECIFICS OF CROSS-BORDER FAMILY MEDIATION

Mediation in cross-border cases follows the same principles as domestic family cases.

Voluntary nature of mediation

Mediation is a voluntary process, which means that it is possible to return to the court proceedings at any time. The commencement of any court proceedings should not be made contingent upon attendance at mediation or at a mediation information session. Willingness to enter into mediation should not influence court proceedings.

Neutrality, independence, impartiality and fairness

The general principles of neutrality, independence, impartiality and fairness are indispensable for mediation. They need to be safeguarded by the mediator, who must be independent and impartial, as also set out in Article 3 (b) of the EU Mediation Directive.

Confidentiality

This means confidentiality of all parties on the content of the mediation, including in cases that do not lead to a mediation agreement. Confidentiality ensures that the parents are able to propose and consider options without fearing that the other party might use these proposals or any information shared in the mediation in court proceedings in the future. Hence confidentiality is vital in mediation. This is also explicitly required by Article 7 of the EU Mediation Directive.

Self-Empowerment

Mediation empowers the parents because they themselves are in the “driving seat” when it comes to finding solutions. The mediators cannot and do not propose solutions to the parents.

Informed Consent

The parties need to be provided with all the necessary information on the mediation process and its interrelation to the judicial process, the principles of mediation and its costs in advance of the mediation to ensure that they will make an informed decision when entering the mediation process. This also includes informing the parties about involving their legal representatives in the drafting of the mediated agreement.

Cross-Border Family Mediation follows a structured process which ends with a **Memorandum of Understanding** signed by the parents, which in most countries may be turned into a consent order by the court.

Mediating cross-border family conflicts is a challenge

Cross-border child abduction, custody and access cases are often marked by particularly sensitive **conflict dynamics** and the legal instruments available inevitably fail to take the complex network of relationships adequately into account. The law is a “blunt” instrument. Mediation is often the only answer since it considers both the emotional and the legal aspects of the conflict. The parties’ anxieties and insecurities are often particularly exacerbated when the parents are of different nationalities and religions and live in different countries. In an intact bi-cultural relationship, the other culture is generally considered a welcome, attractive addition. When couples start to experience relationship problems and separate, the other culture will often be perceived as a threat. In the separation scenario, with all its inherent conflicts and insecurities, the parties (unconsciously) retreat to what is familiar to them and what feels right, plausible, normal and meaningful.

Litigious custody and access cases often display **special conflict dynamics**. Fear and distrust grow even more when parents have different nationalities and live in different countries, especially if these countries are far apart from each other geographically. This exacerbates the risk of misunderstanding. Differing cultural and social backgrounds lead the couple to interpret the conflict in different ways – which in turn causes increased misunderstanding and escalation. Add to this **language problems** and a lack of knowledge or false perceptions of the cultural, social and legal principles of the other country and the situation becomes even more complex.

The foreign parent is often not familiar with **the legal system in the other parent’s country** or distrusts it as a result of negative experience and is afraid that the other parent will be at an advantage in his/her own country. Understandably, in the course of the legal procedures the foreign parent often has the feeling that his or her interests are not adequately represented or taken into consideration. This parent often ends up feeling yet more misunderstood, helpless and disadvantaged.

The courts and all other professionals involved in these family law procedures are also faced with special difficulties, the least of which are complicated communication channels and language problems. More challenging is the fact that all professionals involved in solving a bi-national, bi-cultural conflict perceive this conflict against the background of their own cultural blueprint and experiences and therefore run the risk of not taking the

view of the party from another culture sufficiently into consideration in the process of developing a solution. In the face of this difficult situation, it is necessary to improve cooperation between the courts in cross-border cases and to search for other promising means of conflict resolution.

Cross-border family mediators can act as a bridge in this complex situation. **Mediators need to have not only excellent general communicative skills but also sound competence in the field of intercultural communication and conflict management.** A mediator with a purely legal background does not normally have such skills. At the same time, mediation in cross-border cases is always conducted **'within the shadow of the law'**. In addition to compliance with the specific features of the Hague family Conventions and the EU Regulation, the relevant national family law of the countries involved must be observed. Hence, **the law represents an important framework in these cases**, the significance of which can easily be underestimated by mediators with a non-legal professional background.

Within international child abduction cases the **6-week timeframe** which is mandated by Article 11 of the 1980 Hague Convention and by Article 11 of the Brussels IIa Regulation puts significant pressure on the process as mediation has to be dealt with expeditiously. Mediation should not lead to undue delay in Hague proceedings.

It is important to note that mediation can take place at any stage of a child abduction case – as a preventive means, i.e. in relocation cases, during proceedings as well as in the enforcement phase.

3. SOME FIGURES AND STATISTICS

There are no available Europe-wide statistics concerning the number of cross-border family cases which go to mediation. MiKK e.V. International Mediation Centre for Family Conflict and Child Abduction, a Berlin-based German NGO with an international scope, publishes annual statistics concerning cross-border family mediation. MiKK provides an advisory service for parents and professionals alike. MiKK also offers the only advanced training for qualified mediators for Europe and worldwide in Cross-border Family Mediation (CBFM). The organisation connects the parties to the mediators and organises mediations. MiKK has been collecting data since 2008 concerning its relevant activities, such as mediation and consultation requests received by the organisation in this field.

Table 1 : Requests for Mediation and Information in Cross-Border Cases received by the MiKK Advisory Service

2008	2009	2010	2011	2012	2013	2014	2015	2016
39	59	79	140	143	159	142	165	150 – Sept.

Source: www.mikk-ev.de

We know from experience and feed-back received from MiKK mediators that these numbers reflect only about half the number of actual mediation requests. All cross-border family mediators trained by MiKK can apply for registration on the MiKK Mediators List which is published on the MiKK website (<http://www.mikk-ev.de/english/list-of-mediators/>). They may also apply for registration on the list of cross-border family mediators of the EU network (www.crossbordermediator.eu) of which MiKK was a founding partner. The MiKK

Mediator List currently lists more than 150 specialised cross-border mediators in Europe and elsewhere. Parents and other interested parties are able to contact the listed mediators directly. From experience we know that at least as much contact and as many mediations take place via this direct link.

MiKK receives enquiries and mediation requests from parents from all over the world, from mothers and fathers, from taking parents and left-behind parents alike, as well as from Courts and Central Authorities. For example, in 2015 MiKK received requests involving 54 different countries; the top 10 countries – seen from the German perspective – were the US, France, Poland, Spain, Belgium, UK, Mexico, Turkey, Italy and Switzerland.

Table 2 : MiKK Statistics 2015 – Enquiries by Country

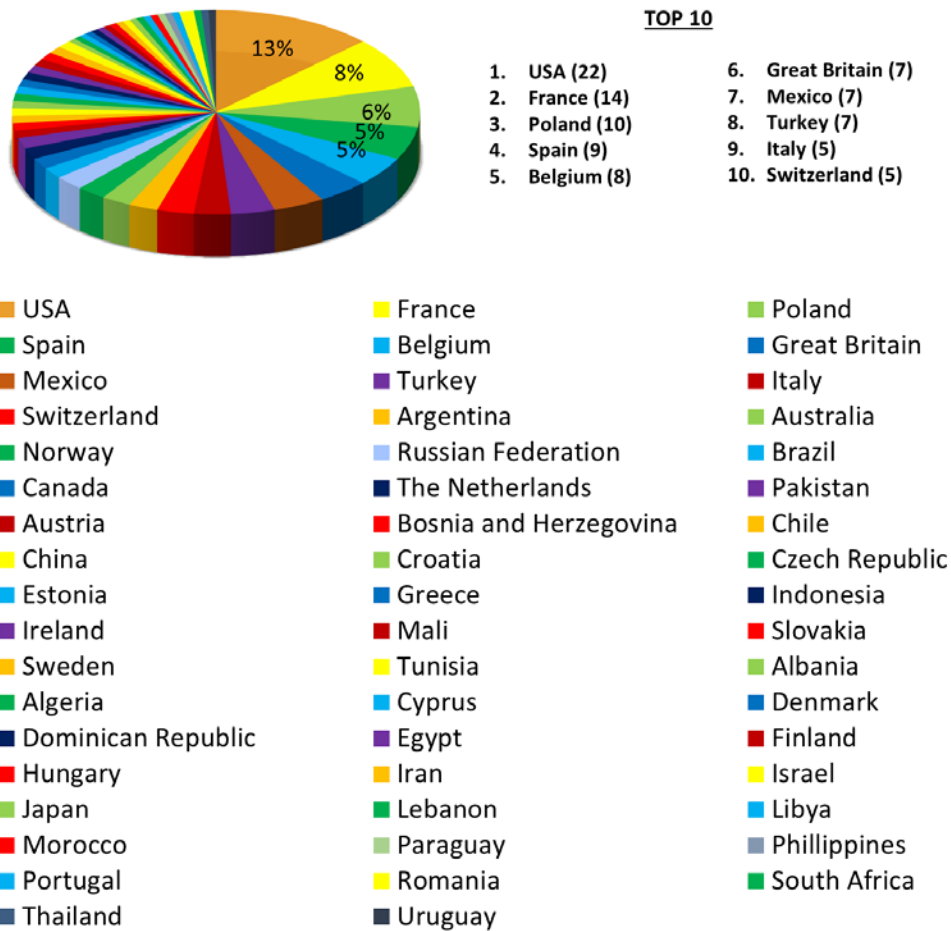


Table 3 : International Mediation Requests (%)

	2008	2009	2010	2011	2012	2013	2014	2015	2016/ August
Custody/ Visitation	49	37	53	42	16	20	23	34	35
Child Abduction	36	49	37	40	48	44	44	39	35
Prevention/ Relocation	8	2	0	7	21	17	20	20	26
Others	7	12	10	11	15	19	13	7	4

Source: www.mikk-ev.de

Statistics show a significant increase in relocation cases, i.e. cases involving a situation where one of the parents decides to move abroad (relocate) following the separation of the couple. This is certainly a result of the preventive function of the 1980 Hague Convention - and of the Advisory Service at MiKK becoming better known and accessed more by parents. Parents tend to inform themselves on the internet and find their way to the relevant websites. Parents are more and more aware that removing their child unilaterally to another jurisdiction represents a violation of the other parent's rights of custody and that it constitutes an offence; thus, they now tend to request advice at an earlier stage.

As outlined above, mediation is bound by the principle of confidentiality. Therefore, the mediators do not provide MiKK with any details regarding the content of the mediation. However, MiKK does ask the mediators to give general feedback on the number of hours mediated and the outcome of the mediation. Taking the year 2015 as an example: nearly 65% of MiKK mediations ended with a final settlement (MoU) or at least a partial agreement.

Even a mediation that does not completely solve but alleviates the conflict can defuse the tension and improve communication between the parents, thus representing a significant step. Although the issue is still decided by the courts in such cases, the parents will have spoken to each other; often the mediation will be the first opportunity for the parents to communicate in a constructive manner in a long time, or indeed the first time they have ever had the opportunity to discuss their conflict at all.

Because the parents have been introduced to the other's viewpoint, their interaction will be different from that moment. We all know that initial discussions between the parents can already be considered a success in a highly escalated conflict. Indeed, parents confirm that, when they have engaged in mediation, the conflict subsequently does not escalate to the utmost degree, but rather remains limited to only one or several specific points of controversy. Even if an agreement was not reached, a characteristic of court proceedings after mediation is the improved interaction of the parents who are better able to focus on the child's interests and to interact more adequately with each other. In 2015, the enquiries received by MiKK affected 242 children.

4. WHO SHOULD BE THE MEDIATORS FOR THESE CASES?

Drawing on the experience and working methods of the German-French mediation project², the members of the German-Polish mediation project published the following recommendations in October 2007 in the **Wroclaw Declaration on Bi-national Disputes over Parents' and Children's Issues**³:

- Wherever possible, mediation in bi-national family conflicts should be conducted as bi-national co-mediation.
- The mediators should be from the same countries of origin as the two parents.
- One of the mediators should be male and the other female.
- One mediator should have a professional background in psychology or education and the other should be from the legal profession.
- In abduction cases, if at all possible, both mediators should be willing and available to conduct the mediation within one to two weeks of receiving the brief.

In addition to the criteria for co-mediation, cross-border family mediators need to have:

- In-depth knowledge of the legal aspects and framework concerning cross-border disputes involving child abduction, custody and visitation;
- Many years' experience in family mediation; and
- Ideally, fluency also in the language of the parent from the other country, so that the mediation can be conducted wholly or partly in the languages of both conflict parties.

The above are considered the ideal composition of a co-mediator team. From my own personal experience I can say that for the success of many of the cross-border cases I have mediated using this model, precisely this model of co-mediation was THE recipe for the successful outcome. Although these standards are high, it has been possible to meet them in most instances of mediations which have been organised by MiKK. This model of bilingual, bi-gender, bi-professional and bi-cultural co-mediation has also been adopted by the EU cross-border family mediators network www.crossbordermediator.eu of which MiKK, as mentioned above, was a founding member and continues to be a Task Force member.

5. FINANCIAL BENEFITS OF CROSS-BORDER FAMILY MEDIATION

In most EU countries, the parties have to finance mediation themselves; however, some countries have state-funded support for mediation in general or for this type of mediation in particular. The European Commission's study for an evaluation and implementation of the 'Mediation Directive' of 2014⁴ suggests a variety of proposals on how to finance and facilitate mediation. National differences exist here. In Germany, for example, the Central Authority finances mediation in Hague Child Abduction Cases for parents on low income if the additional funding criteria of the Central Authority are met.

Mediation is an extrajudicial process and cannot be billed to the court. Even if mediation takes place on the court's advice to resolve a pending legal dispute, it does not automatically fall under legal aid provisions. It is important to explain to those involved that mediation initially results in additional financial expenses, but that it is a sound

² French-German Project of Bi-national Professional Mediation (2003-2006), independent project evaluation: http://www.mikk-ev.de/wp-content/uploads/Arpos_Endbericht1.pdf (in German). For further information see Carl/Walker, Developing professional mediation: The German-French project, in: Cross-Border Family Mediation Paul/Kiesewetter (Eds.). Frankfurt am Main: Wolfgang Metzner Verlag. pp.85-87.

³ Wroclaw Declaration on Bi-national Disputes over Parents' and Children's Issues, 2007. <http://www.mikk-ev.de/english/codex-and-declarations/wroclaw-declaration/>

⁴ Study for an evaluation and implementation of Directive 2008/52/EC – the "Mediation Directive". (2014) EUROPEAN COMMISSION, Directorate-General for Justice Directorate A – Civil Justice.

investment. Mediation offers substantial opportunities for the child and the parents and may also save future expenses. Court proceedings for the return of an abducted child easily lead to substantial costs. The German judges Eberhard Carl and Martina Erb-Klünemann exemplified the costs from a real 1980 Hague Convention case in 2011.⁵ The case involved a father who applied for his child to be returned from Germany to Sweden. Costs of adversarial proceedings in Germany with a return order and adversarial custody proceedings in Sweden after the return to the country of habitual residence led to costs of 33,102.64 euros, whereas the costs of court proceedings in the first instance in Germany together with a mediation would have come to 9,389.40 euros. In other words, **mediation would have resulted in a two-thirds reduction of costs**. The cost-saving possibilities associated with mediation are very important for parties when they are considering mediation. Thus, parents should have a considerable interest in initiating mediation. If they require financial support, they should be able to seek this through national and regional institutions.

6. SUSTAINABILITY OF MEDIATED AGREEMENTS

Research shows that mediation agreements provide sustainable solutions. A UK Ministry of Justice research project in 2011⁶ which was based on legal aid records of 1.4 million clients showed that:

- Parents are less likely to return to court following mediation;
- This suggests that mediated solutions are more sustainable than court imposed solutions. In particular, mediated agreements relating to children's issues are more sustainable.

7. MODELS OF CROSS-BORDER FAMILY MEDIATION IN EUROPE

It is encouraging to see the development of various mediation projects across the EU for cross-border custody disputes and parental child abduction and the growth in interest in the welfare of the children affected. The German-French mediation project which was initiated by the French and German justice ministries and launched in 1999 is one such project, which gave impetus for the founding of MiKK as a project. Another important impulse came from England and Wales. Here cooperation between the High Court in London and the NGO **reunite** was established with the aim of integrating mediation into court proceedings involving cross-border child abduction.

Since 2002 the Berlin-based NGO **MiKK e.V. International Mediation Centre for Family Conflict and Child Abduction** has been specialising in cross-border family mediation. MiKK delivers comprehensive information and advice on mediation to parents and all professionals involved in any particular case. If both parents consent to mediation, they are referred to MiKK-trained, qualified and experienced mediators worldwide from the MiKK mediators network. Since the legal framework and the implications arising in each case differ greatly from domestic family mediation, mediators working in this field require additional qualifications. The more than 250 mediators from the EU and other countries worldwide who have to date been trained by MiKK alone have gathered a vast amount of experience in this field. Together they are able to mediate in more than 30 languages.

Enquiries from all over the world to professional mediation bodies such as MiKK, the British NGO **reunite** and the Dutch **Center IKO (International Child Abduction Center)** have multiplied over the past few years. Other mediation centres such as the **Irish Centre for**

⁵ 5. Carl/Erb-Klünemann (2014), Integrating Mediation into Court Proceedings in Cross-border Family Cases, in: Cross-Border Family Mediation Paul/Kiesewetter (Eds.). Frankfurt am Main: Wolfgang Metzner Verlag.

⁶ "Sustainability of mediation and legal representation in private family law cases" https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217369/sustainability-mediation-private-family-law.pdf

International Family Mediation and the **Greek Family Mediation Centre** are increasingly being set up to deal with this special field of mediation. One of our goals is to see the establishment of mediation services like MiKK in every country throughout the world to provide a pre-mediation service and facilitate networking, training and supervision for the mediators handling these complex international cases.

8. TRAINING AND QUALITY MANAGEMENT

Article 4 of the Mediation Directive refers to the quality of mediation:

1. Member States shall encourage, by any means which they consider appropriate, the development of, and adherence to, voluntary codes of conduct by mediators and organisations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services.

2. Member States shall encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties.

If Art. 23 of the Commission's Proposal for the Recasting of the Brussels II a Regulation will be adopted untouched, the courts will be required to examine whether the parties are willing to engage in mediation: in this scenario, the judges have to be sure that mediation is a valid alternative to court proceedings and that the parties in mediation are "in good hands". MiKK has been providing specific training for mediation in cross-border family cases since 2008. Experience shows that only experienced family mediators who have undergone specific training for mediation in these highly escalated and complex cases should conduct mediations in such cases. Mediators working in this field need ongoing training to maintain their professional competence.

An important step towards the training of qualified mediators and building effective networks was the TIM project "Training in International Family Mediation" which was co-financed by the EU. As part of this project, MiKK in conjunction with the Belgian NGO Child Focus had the opportunity to train 54 mediation trainers from 27 EU Member States in this special field of mediation employing the MiKK mediation model. Other initiatives followed, such as the co-financed EU MED-ENF project involving Child Focus and MiKK as project partners as well as Spanish and Greek partners. The MED-ENF project focused on mediation in the enforcement phase of 1980 Hague Convention return court orders.

Currently, the European Commission is co-financing the LEPCA II project (Lawyers in Europe on Parental Child Abduction – www.lepca.eu). Centre IKO of the Netherlands and MiKK are the main partners in this project, whose aim is to provide advanced training to European lawyers specialising in child abduction cases. The project comprises a series of webinars on legal issues as well as on mediation in child abduction cases. It will culminate in a Blended Training Conference in Berlin in January 2017 on MiKK's home ground.

MiKK continues to offer its 50-hour advanced training course in both English and German twice per year to qualify family mediators from Europe and elsewhere to mediate cross-border family disputes, including international child abduction, access and custody cases. The course covers the relevant legal aspects of international family conflicts, specific aspects of mediating Hague Convention and cross-border cases, as well as aspects concerning the best interest and the voice of the child among other topics. Participants are introduced to the relevant tools and methodologies for mediating high-conflict cases. After this specialised training, participants are eligible to become part of the MiKK mediators network and also join the EU network.

Just four weeks ago in October 2016, some further 25 mediators from 14 different countries, namely from Australia, Belgium, Cyprus, Denmark, Germany, Greece, Hong Kong, Ireland, Japan, Latvia, Sweden, Switzerland, UK and USA, completed the English Cross-border Family Mediation Training in Berlin. MiKK training courses have also been held abroad, not only in Europe but as far afield as Australia, Japan and the USA. MiKK has also

provided training and workshops to foreign Central Authorities, e.g. in the Czech Republic and Switzerland. Furthermore, MiKK continues to focus on bi-national projects to establish close co-operation between mediators, courts and Central Authorities in different countries, e.g. with Poland, Spain and Japan.

As an important step, quality standards were introduced by MiKK in 2016 requiring mediators to participate in continuing training on various relevant aspects of mediation and family law in order to remain members of the MiKK Mediators network. Regular advanced training enables qualified cross-border family mediators to keep abreast of changes in legislation, update and deepen their knowledge of mediation tools and discuss their cases within professional supervision.

MiKK has also devised a training concept for mediating cross-border custody dispute cases and child abduction cases relating to countries in which no international legal framework exists, such as countries in the Islamic world. According to MiKK's statistics the majority of Non-Hague mediation requests received by MiKK concern cases which involve non-EU States whose legal systems are based on Islamic law and/or which involve parents who have a cultural connection with these countries. Here, in the absence of an international legal mechanism, such as the Hague Convention, mediation often remains the only option to enable the parents to reach an agreement in the best interest of their children. Yet the MiKK statistics also show that in these cases very few of the mediation requests made by one parent actually result in mediation. The lack of cross-border mediators with relevant cultural knowledge and linguistic skills is in all likelihood one of the reasons for the low uptake in mediations despite a growing number of cases – a gap that MiKK is seeking to plug. Demographic changes across the European Union as a result of the recent waves of migration will in all likelihood lead to a further increase in such cross-border custody disputes involving non-EU States whose legal systems are based on Islamic law that have not acceded to the Hague Convention. MiKK has already noted an increase in such requests and – funding permitting - is hoping to start training mediators as well as refugees with relevant language skills and professional backgrounds to meet this growing demand.

9. RECOMMENDATIONS

- The training of judges across the EU should be facilitated. As a potential key referrer to mediation, judges should be assisted in familiarising themselves with methods to encourage conflict parties in family cases to go to mediation. Judges should also be familiar with a model focussed on integrating mediation into the tight timeframe of Hague Convention Child Abduction proceedings. MiKK has devised a model, based on the Dutch model, for integrating mediation into the 6-week timeframe of Hague convention proceedings. This system is now operating in an increasing number of the 22 German courts competent to hear Hague cases.
- Courts and Central Authorities should be encouraged to refer parties to mediation by providing them with information on mediation. MiKK provides such information letters in 11 different languages that can be sent out by the Courts.⁷
- The Hague Conference has launched a Working Group on cross-border recognition and enforcement of mediated agreements. In our view, these very laudable efforts should definitely be continued and extended beyond the borders of the EU and Hague Convention Contracting States.⁸
- Based on the aforementioned UK research study which found that mediation provides sustainable solutions in parental responsibility matters, EU Member States

⁷ These template letters can be accessed using the following link on the MiKK website:

<http://www.mikk-ev.de/deutsch/informationen-fur-richter/infoschreiben-gerichte/>

⁸ Report of the Experts' Group Meeting on cross-border recognition and enforcement of agreements in family matters involving children (The Hague, 2-4 November 2015), <https://assets.hcch.net/docs/e4ee1bfd-27ab-4e0a-9ab2-9b784db5534a.pdf>

should be encouraged to provide state-financed mediation aid in cases of cross-border family conflicts.

- Training programmes for mediation in cross-border custody disputes with non-EU States that have not acceded to the Hague Convention should be facilitated because of increasing demand.

THE POINT OF VIEW OF A SPECIALISED LAWYER

Dr Nicole GALLUS

1. APPLICABLE LAW

The fight against international child abductions¹ is the subject of various bi- or multilateral conventions.

When the wrongful removal implicates two European Union Member States – with the exception of Denmark - the laws applicable are the Hague Convention of 25 October 1980 on the civil aspects of international child abduction, together with Regulation (EC) no. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (the so-called Brussels IIa Regulation).

2. OBJECTIVES OF THE INTERNATIONAL CONVENTIONS

The objective of the abovementioned legal instruments² is to set up procedures that will ensure the prompt return of the child to the Member State where the child was habitually resident immediately before the wrongful removal, *i.e.* the urgent recovery of the situation *ante raptum*. The judges of the State of refuge may not examine the arrangements on custody, accommodation or parental responsibility: such matters must be decided by the judges of the State of habitual residence.

This prompt return is presumed to be in compliance with the child's interest, in that it prevents an unlawful act from consecrating, through the passage of time, the separation between the child and one of his/her two parents.

Nevertheless, this presumption of conformity to the child's interest is not irrefutable, since in some exceptional situations the prompt return of the child could be clearly against his/her interest.

¹ Wrongful removal or, after an initially authorized removal, wrongful retention of the child outside the habitual residence, when the right to determine the place of residence requires the consent of both holders of parental responsibility: 1980 Hague Convention, article 3; Brussels II bis Regulation, article 2(11). The question of who holds rights of custody is determined by the State of residence of the child before the abduction; its effective exercise does not necessarily involve cohabiting with the child (Hague Convention of 19 October 1996, article 16, C.D.I.P. (Belgian code of international private law), article 35).

² The Hague Convention of 1980 doesn't apply to children under 16, while the Brussels II bis Regulation applies to all minors. In addition to existing bilateral conventions, two more conventions deserve a mention: the Luxembourg European Convention of 20 May 1980 on recognition and enforcement of decisions concerning custody of children and the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (this text refers to children under 18). On these matters, see for instance: COLLIENNE F., PFEIFF S., « Les enlèvements internationaux d'enfants, Convention de La Haye et Règlement Bruxelles II bis, pratique et questions de procédures », R.T.D.F., 2009, p. 351 ; COLLIENNE F. et WAUTELET P., « L'enlèvement parental d'enfant – La pratique des juridictions belges », in Actualités du contentieux familial international, WAUTELET P., (dir.), Larcier, CUP, p. 240 ; DEMARET M., « L'enlèvement international d'enfants », R.G.D.C., 2006, p. 505 ; FALLON M., « Enlèvement illicite d'enfant et « droit de garde » au sens du Règlement Bruxelles II bis », R.T.D.F., 2010, p. 1235 ; FULCHIRON H., « La lutte contre les enlèvements d'enfants » in Le nouveau droit communautaire du divorce et de la responsabilité parentale, FULCHIRON H. et NOURISSAT C., (dir.), Paris, Dalloz, 2005, p. 223 ; KRUGER T., « L'enlèvement parental : l'interaction entre la Convention de La Haye et le Règlement Bruxelles II bis », Rev. dr. étr., 2009, p. 742 ; FISCHER Q., « L'enlèvement international d'un enfant par un de ses parents », Rev. dr. ULB, 2005, p. 68 ; SAROLEA S., « Le retour immédiat de l'enfant déplacé illicitement face à l'écoulement du temps : principe ou option ? », R.T.D.F., 2010, p. 1191 ; PFEIFF S., « L'enlèvement international d'enfants dans l'Union européenne : la fin du retour immédiat ? » in Le droit aux relations familiales internationales à la croisée des chemins, Actes du XIVème Colloque de l'Association « Famille et Droit », Bruxelles, 20 mai 2016, Larcier, 2016, p. 149.

3. EXCEPTIONS TO THE PROMPT RETURN IN THE 1980 HAGUE CONVENTION

The 1980 Hague Convention enables the requested judge to refuse to order the return, in the cases referred to in articles 12, 13 and 20.

- Article 12: commencement of judicial or administrative proceedings more than one year after the date of the wrongful removal, when it is demonstrated that the child is settled in its new environment³.
- Article 13: this provision lists four cases, to be interpreted restrictively⁴, allowing a refusal to order a prompt return, *i.e.* four situations in which return might not correspond to the best interest of the child. These exceptions to the principle of prompt return cannot be grounded solely on the passage of time or on the settlement of the child in his/her new residence.
 - The person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention;
 - The person, institution or other body having the care of the person of the child had consented to or, after the removal, acquiesced in the removal or retention;
 - there is a grave risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation;
 - The child, when he/she has attained a degree of maturity at which it is appropriate to take account of its views, objects to being returned.
- Article 20: return is not permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

4. ADDITIONAL MECHANISMS IN THE BRUSSELS II BIS REGULATION

The mechanism of the 1980 Hague Convention is supplemented by article 11 of the Brussels IIa Regulation, which also embraces the same fundamental conception according to which the State of the child's habitual residence before the removal is the best suited to decide in his/her best interest. Furthermore, the principle of mutual trust between member States is opposed to the appropriation of this decision-making power by the requested State.

Therefore, the Brussels II bis Regulation introduces in the prompt return mechanism established by the Hague Convention two additional rules that reinforce the power of the courts of the State of the child's habitual residence, organise the return procedure and establish deadlines for the decision-making process⁵.

- 1) The court of the requested State cannot refuse to return a child based on a grave risk of harm or intolerable situation if it is established that adequate arrangements have been made in the State of origin to secure the protection of the child after his/her return (article 11(4)).

³ This applies to cases of late filing, *i.e.* the return refusal follows from a delay in the introduction of the procedure, not from the duration of the latter.

⁴ ECtHR, X / Latvia, 26 November 2013; ECtHR, MAUMOUSSEAU et WASHINGTON / France, 6 December 2007.

⁵ Article 11(3) of the Brussels II bis Regulation imposes a quick ruling, since the court must issue its judgment, unless exceptional circumstances prevail, no later than six weeks after the application is lodged.

The court seized will have to stay the proceedings and await the decision of the courts of the State of origin adjudicating on the protective measures⁶.

- 2) If the return of the child has been refused on the basis of one of the exceptional grounds listed in article 13 of the Hague Convention, the court of the State to which the child has been abducted must - within one month - transmit its decision and the file to the courts of the State of origin, which will be allowed to rule on custody, and therefore confirm or deny the non-return⁷.

If the custody decision implies the return of the child, it has an immediate effect in all the member States without the need for a declaration of enforceability (*exequatur*) and without the possibility for the executing State to oppose it (articles 42 ff., Brussels II a Regulation).

5. DIFFICULTIES IN THE IMPLEMENTATION OF THE APPLICABLE INTERNATIONAL CONVENTIONS AND REGULATIONS

The fundamental principle of the child's prompt return, prior to any debate on the substance, which is perceived as always being in the interest of the child, contradicts the exceptions to prompt return, which are also based on the child's best interest.

Indeed, the general principle of prompt return is based upon an abstract presumption that return is in compliance with the interest of the child, on the grounds, among others, that the habitual residence *ante raptum* is the actual centre of the child's life, *i.e.* the place of his/her family, affective, social, educational,... integration, as well as the place where the substantial matters – parental authority and responsibility, housing...-, will best be decided.

However, the exceptions and mitigations to the prompt return inevitably imply a concrete appreciation of the child's interest in the specific circumstances of the case.

In this regard, various difficulties in the implementation of the rules against international child abductions have emerged:

- 1) The passage of time leads to *de facto* situations where the child's integration in the State of refuge becomes hardly reversible; in that case, return to the State of origin would be seriously disturbing.

The rules of the Brussels IIa Regulation supplementing the 1980 Hague Convention are surely essential, since they reinforce the final decision-making power of the State of origin – which is meant to deter abductions; yet, they have the effect of prolonging the length of the procedures⁸.

- 2) The application of the exception based upon the risk of serious harm or intolerable situation for the child requires the application of subjective concepts that will depend on numerous factors – age of the child, environment, behaviour of the parents, etc. Furthermore, it implies an analysis of the specific circumstances of the case and of the interest of the child, assessed *in concreto*, not in an abstract manner.

⁶ In Belgian law, see article 1322i of the Judicial Code, law dated May 10, 2007 ensuring the implementation of Regulation n° 2201/2003, of the 1980 Luxembourg Convention, as well as the 1980 Hague Convention, M.B., June 21, 2007.

⁷ Brussels II bis Regulation, article 11(6); articles 1322i of the Judicial Code.

⁸ This is even truer since the current text is unrealistic and hardly precise. Article 11 imposes, save in exceptional circumstances, a decision within 6 weeks following the lodging of an application, without specifying if the deadline is precisely fixed by the authority or if it includes appeals – whose number is unlimited -, while at the same time, it also imposes the hearing of the child and of the parties, which cannot be done in a hurry. Furthermore, the 6-week deadline applies to the decision of the court seized; no deadline is provided for the file processing by the Central Authorities.

It is with regard to this specific point that the contradiction between the general abstract rule of return, which is perceived as complying with the interest of the child, and the concrete application of the exceptions turns out to be the most complex problem.

Indeed, this contradiction reveals the difficulties arising from the application of the concept of the child's best interest vis-a-vis the procedural principle of prompt return. The difficulty becomes even bigger since we must take into account not only the rules of the 1980 Hague Convention and of the Brussels II bis Regulation, but also of the European Convention of Human Rights and of the UN Convention on the Rights of the Child.

6. EFFECT OF THE PASSAGE OF TIME ON THE CHILD'S PROMPT RETURN

The 1980 Hague Convention is based on the idea of not removing the child from the "natural" jurisdiction of the courts of the State of his/her habitual residence through a parent's unlawful action.

The procedure must consequently guarantee the prompt return of the child, so that the substantive decision on parental responsibility can be taken in the State of origin, and that attempts to abduct the child by one of the parents are discouraged.

Therefore, States are under an obligation to create urgent procedures for that return, and to ensure the effective enforcement of the decisions, at risk of failing to uphold their international obligations and being sanctioned by the European Court of Human Rights⁹.

The idea is to avoid the consolidation of a factual wrongful situation, as the passage of time would lead to a breach of the relationship between the child and the "left behind" parent and to the child's settling in his/her new State, which in turn would make return too disturbing.

However, the application of those principles cannot ignore that the first victim of the abduction is the child: thus, exceptions to the prompt return must be provided for, in order to avoid a violation of the child's interest.

Those exceptions, which admittedly must be interpreted restrictively, cannot be implemented without an examination of the substance of the case, essentially when the application of the exception requires the analysis of the serious harm for the child and the assessment whether this harm has been created by the passage of time after the abduction.

The risk here is to empty the mechanism of prompt return by integrating the temporal component of the child's interest into the concept of harm.

An illustration of this dysfunction can be found in a judgement adopted on 11 February 2010 by the Court of Appeal in Brussels; the Court considers that prompt return is appropriate, provided that it will be handled within a short deadline and will be in compliance with the child's interest¹⁰.

The same question arises in the jurisprudence of the European Court of Human Rights.

⁹ ECtHR, BIANCHI / Switzerland, 22 June 2006 ; CARLSEN / Switzerland, 6 November 2008 ; IGNACCOLO ZENIDE / Romania, 25 January 2000, KARRER / Romania, 21 February 2012, MAIRE / Portugal, 26 June 2003 ; HROMADKA et HROMADOVA / Russia, 11 December 2014 ; S. SAROLEA, « Le retour immédiat de l'enfant déplacé illicitement face à l'écoulement du temps : principe ou option ? », R.T.D.F., 2010, p. 1191 ; A. GOUTTENOIRE, « Les enlèvements internationaux d'enfants devant la Cour européenne des droits de l'homme : entre obligation positive et ingérence », R.T.D.H., 2015, p. 65.

¹⁰ Bruxelles, 11 February 2010, R.T.D.F., 2010, p. 1178, note S. SAROLEA.

Initially, the Court found that the passing of time is not sufficient to ground a refusal to return the child, since the child's interest is essentially not to be taken away from one of the parents¹¹.

Subsequently, the Court has specified that the judge MUST assess whether return is in the interest of the child and that the judge can, in doing so, take into account the passing of time¹².

The child's interest – which is a primary consideration -, is to maintain the relationship with his/her family as well as to grow up in a healthy environment. Consequently, this interest depends on various individual circumstances and must be assessed case by case.

As a result, the return of the child cannot be ordered automatically or mechanically. The European Court must verify whether the national courts have carried out an in-depth examination of the family's situation as a whole, including factual, affective, psychological, material, medical,... elements, as well as whether they have carried out a balanced and reasonable appreciation of everyone's interests, while taking a decision that complies with the concern of determining the best solution for the child.

In this *in concreto* examination, the passing of time can be one factor to be taken into account¹³.

Finally, afterwards, the European Court of Human Rights¹⁴ has specified that the child's interest must be taken into account, not in a global perspective, in the framework of the exercise of parental responsibility, but in the framework of the examination of the exceptions to prompt return. This imposes a particular procedural obligation upon national authorities:

- An effective examination of the allegations of a grave risk for the child;
- A decision motivated specifically with regard to the circumstances of the case, not in an automatic and stereotyped manner¹⁵.

We can conclude from these few elements that in the mechanism of the Hague Convention, the passage of time plays an important role in the application of articles 11 and 13(b), so that fast procedures are essential to avoid the consolidation of wrongful situations that would prevent the re-establishment of the situation *ante raptum*.

However, within the European Union, the implementation of the additional mechanisms provided for by the Brussels IIa Regulation has the inevitable effect of extending the length of the procedures and, consequently, of making the return of the child more difficult, since such return would impose on the child a new uprooting. This is because the regulation sets an imprecise deadline, hardly compatible with judicial practice, especially as the hearing of the child and of the requesting parent is mandatory.

The reinforcement of the return procedure through the specific rules of article 11(6) of the Brussels II bis Regulation is also delicate, since "the last word" belongs to the judge of the State of origin, in which the child is, by definition, not present. Clearly, this implies difficulties in what concerns the hearing of the child and the enforcement of the decision,

¹¹ ECtHR, MAUMOUSSEAU et WASHINGTON / France, 6 December 2007 ; GETTLIFFE et GRANT / France, 24 October 2006; ESKINAZI et CHELOUCHE / Turkey, 13 December 2005 ; at the same time, the European Court estimates that there has been a violation of the right of the "left-behind" parent when the procedures have been too long and the breach of the parental relationships is settled. (ECtHR, BIANCHI / Switzerland, 22 June 2006).

¹² ECtHR, NEULINGER et SHURUK / Switzerland, Gde Ch., 6 July 2010.

¹³ See also ECtHR, B. / Belgium, 10 July 2012.

¹⁴ ECtHR, X / Latvia, 26 November 2013 ; PHOSTIRA, EFTHYMIYOU et RIBEIRO / Portugal, 5 February 2015.

¹⁵ G. WILLEMS, Chronique de jurisprudence de la Cour européenne des droits de l'homme en matière de droit de la personne et de la famille, 2012-2014, R.T.D.F., 2015, p. 703.

regardless of the rule of automatic enforceability on the basis of the certification of the decision in accordance with articles 40(1) and 42 of the Regulation¹⁶.

Finally, many difficulties arise from the national laws of each State as regards the possibility of appeals, their unlimited number, the enforcement of the decisions, or the specialisation of the judges who are competent for international child abductions¹⁷.

7. THE CHILD'S INTEREST IN THE RETURN PROCEDURE

Article 3 of the UN Convention on the Rights of the Child of 20 November 1989 requires that the best interest of the child must be a primary consideration in all actions concerning him/her.

The presumption that a prompt return of the child after an international abduction is in line with the best interest of the child cannot be enough; it must be possible to rebut such presumption on the basis of an *in concreto* analysis of the child's interest.

In order to reconcile the general rule of prompt return with the actual assessment of the child's concrete interest, while preventing the passage of time from consolidating a wrongful factual situation, we must examine the function of the concept of the "best interest of the child" in the area of international child abductions.

Interesting lessons can be drawn from General Comment no.14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, adopted by the United Nations committee on the Rights of the Child¹⁸. According to this text, the concept of "best interest" of the child fulfils three distinct functions.

Firstly, it refers to a substantive right: the child has the right to a case-by-case appreciation of his/her interest, and the latter must be a primary consideration when balanced with the interests of the other parties. The child's interest is not, therefore, on the same level as other considerations; on the contrary, it must be given more weight.

One of the elements that must be taken into consideration in this case-by-case analysis is the actual relationship between the child and each of his/her parents, in accordance with articles 9, 10, 11 and 18 of the UN Convention on the Rights of the Child¹⁹.

Secondly, the child's interest is also an interpretative legal principle: when a measure can be interpreted in various ways, the interpretation which most effectively serves the child's best interests should be chosen.

Thirdly, the child's interest is a rule of procedure: any decision regarding a child must be made in compliance with a procedure that allows the effective evaluation of the child's interest, and must be specifically motivated.

In other words, the child's interest is not abstract; it represents the interest of each child in his/her singularity.

When the European Court of Human Rights imposes a procedural obligation on the requested judge to motivate his/her decision and to take into account the possible grounds

¹⁶ The decision of the State of origin based on article 11(6) of the Regulation, implicating the return of the child, is enforceable in all the member States without exequatur if it is certified by the judge of the State of origin. The decision itself can trigger an appeal, but not the certification. However, the release of the certificate implies conditions and, among others, the hearing of the child and the parties and the inclusion of these grounds of return within the decision of the requested State.

¹⁷ In Belgian law, see articles 633 sexies et 1322 bis et seq of the Judicial Code from the law of May 10, 2007 that aims at setting up in the procedural scheme, the new European mechanisms that supplements the Hague Convention of 1980.

¹⁸ Available at http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf.

for non-return, it refers to the procedural function of the concept of the best interest of the child. Such a concept cannot be discarded merely because the situation urgently requires that a decision is taken.

Nonetheless, when a judge rules on the basis of article 11(6) of the Brussels II bis Regulation – giving the “last word” to the judge of habitual residence *ante raptum* -, he/she decides on the substance of the custodial right, and therefore his/her decision may, or may not, trigger the return. At this stage, the child’s interest intervenes in all its components and in all its functions: this is not anymore about stopping an unlawful act, but about examining all the elements of the child’s interest.

Furthermore, when in the application of article 11(6) of the Brussels II bis Regulation the judge of the State of origin issues a certified decision that requires the child’s return, it might be possible to file an appeal in the State of origin against the decision, while an appeal against the certificate is not possible²⁰.

This enforceability without exequatur or appeal may therefore not be contested, even if some new elements regarding the interest of the child arise.

The jurisprudence of the Court of Justice of the European Union²¹ and the European Court of Human Rights²² are set in that sense.

It is essential to underline the different functions of the interest of the child when assessed by the judge of the State of refuge, who decides upon the return, by the judge of the State of origin, who rules on the substance pursuant to article 11(6) of the Brussels IIa Regulation, as well as the absence of any such assessment in the enforcement of the certified decision of return. Indeed, this functional analysis allows reconciling the principle of prompt return with respect for the child’s best interest.

¹⁹ Articles 9 and 10 oblige the States to make sure the child is not separated from his/her parents; article 11 obliges the States to take measures in order to fight against illicit displacements; article 18 reminds of the fact that the child must be, as a matter of priority, raised by his/her two parents.

²⁰ Except in case of a material mistake; article 43, Regulation Brussels II bis.

²¹ CJEU, RINAU, 11 July 2008, c-195/08 PPU; POVSE, 1 July 2010, c-211/10 PPU; ZARRAGA, 22 December 2010, c-491/10 PPU; the C.J.E.U. validates the prohibition for the courts of the requested State to oppose to the enforcement of a certified decision of return.

²² ECtHR, POVSE / Austria, 18 June 2013.

ENHANCING CROSS-BORDER COOPERATION

Prof Thalia KRUGER¹

KEY FINDINGS

- The **Commission's Proposal enhances** cross-border cooperation.
- Cooperation is not limited to that between Central Authorities, but **includes cooperation with other administrative and judicial authorities.**
- The **cross-border enforceability of provisional measures and return orders** until such time as the court with jurisdiction has taken a final decision **requires an efficient system of information sharing.**
- In order to effectively deal with parallel proceedings, **direct judicial communication should be used to obtain information about the time at which the court was seised.**
- Central Authorities should **assist in collecting and dispersing information about the content of the national substantive and procedural laws** of the member States.
- The **assistance** that Central Authorities provide in **locating the whereabouts of children should extend to the time of enforcement and should be made available to holders of parental responsibility directly.**
- Cooperation between administrative (central) and judicial authorities can assist in further **safeguarding children's rights** such as ensuring that their best interests play a paramount role and that the right to have the opportunity to be heard is respected.
- Central Authorities can and **should assist to enhance the use of mediation** in cases on parental responsibility.
- Administrative and judicial cooperation should **not infringe citizens' and particularly children's right to privacy.** Therefore, authorities should not share more information than necessary. Where personal information is not required to answer a particular question, the **focus should be on providing abstract or theoretical information** (such as the content of the law) **and connecting authorities or institutions.**

1. INTRODUCTION

The Brussels IIa Regulation has an important function to facilitate the free movement of citizens while protecting vulnerable citizens, particularly children. In order to fully reach this goal, the Regulation contains not only rules on jurisdiction and the recognition and enforcement/enforceability of judgments, but also on cross-border cooperation. Such cooperation can take many forms and involves both administrative and judicial authorities.

The purpose of this briefing note is to assess the amendments that the Commission has proposed to Brussels IIa² as well as possible improvements to the cross-border cooperation

¹ The author was a member of the Expert Group advising the European Commission on the amendment of Brussels IIa. The views in this paper are however my own and do not reflect the discussions of the Expert Group.

framework. The main focus is Chapter V “Cooperation between Central Authorities in matters of Parental Responsibility” of the Commission’s Proposal. However, I will also refer to other provisions where greater cooperation is necessary to my mind.

I will first discuss the different levels of cooperation (administrative, judicial and others) and thereafter turn to specific fields in which cooperation is provided for or should be provided for.

2. LEVELS OF COOPERATION

Under various conventions and regulations Member States are obliged to institute Central Authorities. Such authorities have the duty to assist in cross-border communication, the providing of information and several practical tasks (e.g. current Art. 54-58 Brussels IIa). However, cross-border cooperation is incomplete if restricted to the administrative level. The European Union has also pursued the goal of judicial cooperation and continues to do so.

Administrative cooperation

The most obvious and the most regulated form of cooperation is that between Central Authorities. While the Commission’s proposal makes some useful amendments, more can be done.

A very good step forward that the Commission’s proposal has taken is the obligation on Member States to properly resource Central Authorities (Art. 61 of the Commission’s Proposal). These authorities have been gaining competences by the entry into force of various EU and international instruments. This has led to an expansion of their workload. The authorities must have sufficient funding and human resources to do their work. Therefore, this proposal should be supported.

Another good step is the introduction of a time limit for the through-flow of files at Central Authorities. Unless there are exceptional circumstances, the Central Authorities must submit requested information within two months (Art. 64(6) of the Commission’s Proposal). In child abduction cases, Central Authorities must deal with the case within six weeks (Art. 63(1)(g) of the Commission’s Proposal). Such time limits are useful, even if they are hard to enforce: they pronounce not only an obligation but also an expectation for citizens. If an authority repeatedly transgresses these deadlines, warnings or even infringement proceedings can be envisaged.

However, in urgent cases, two months can be too long to serve the rights of citizens, and particularly of children. Therefore, I would suggest adding a provision for urgent cases. If the requesting authority indicates that the case is urgent, it should be able to ask the requested authority to respect a shorter period. Although it does not seem possible to set criteria for when a case is urgent and to set a timeline for such cases, the possibility to request a shorter period should be available. In other words, the two-month period should serve as a safety net for the requesting authority only and not as a justification for requested authorities to use more time than is necessary in a particular case.

The six-week period for the processing of child abduction files should encompass the entire administrative preparation up until the submission to the court.

Brussels IIa regulates the division of costs in a summary way: each Central Authority shall bear its own costs (Art. 57(4) current Brussels IIa). There might however be situations in which some flexibility is needed, as well as a possibility to agree differently. Carpaneto argues that Central Authorities should be able to impose to the requesting States

² Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), 30 June 2016, COM(2016) 411.

reasonable charges for services such as locating the child or delivering information or certificates.³ This is something that I would advise the European Parliament to consider very carefully. We have seen under the Evidence Regulation (1206/2001) that the division of costs can lead to unnecessary disputes, even for a small amount.⁴ If the Parliament wishes to open the possibility of dividing costs between Central Authorities, which certainly has its merits, my suggestion would be to provide that Central Authorities may agree to divide costs differently. In the absence of agreement, the default rule should be clear.

Judicial cooperation

Judges can contact each other through the European Judicial Network. The judges who take up responsibilities in this network are not always compensated. A higher salary would be difficult to regulate from an EU level, but the Regulation can require that sufficient capacity is foreseen for the functioning of the network. This can entail freeing up time in the agendas of network judges.

Mixed cooperation

Cooperating authorities are instituted as an aid, not as an extra administrative burden. The Assessment Study has found that there is often confusion among citizens as to which authority they should address.⁵ Under the Regulation, such confusion should not cause delays. Citizens should not be forced to contact specific authorities in a specific country. If they are able or prefer to contact a Central Authority in another country, it should be clear that this is permitted.

Moreover, citizens living through a family crisis should not be bothered by the precise division of tasks between Central Authorities and other authorities or (welfare) organisations. Such authorities should send requests directly to the appropriate authority, after obtaining the citizens' permission (in order to guarantee their right to privacy).

Central Authorities are also required to cooperate with the European Judicial Network in order to "communicate information on national laws and procedures and take measures to improve the application of this Regulation" (current Art. 54 Brussels IIa). Thus, cooperation crosses the frontiers between administrative and judicial bodies. In some instances Central Authorities are explicitly required to directly communicate with courts (e.g. current Art. 11(6) Brussels IIa). Currently this mixed cooperation is phrased as a duty for the Central Authorities and they should use the European Judicial Network (current Art. 54, renumbered 62 in the Commission's Proposal). However, it would be useful to make clear in Brussels IIa (possibly in a recital) that judges also have a duty to cooperate with Central Authorities in order to exchange information on national law and to enhance the good application of the Regulation.

3. FIELDS OF COOPERATION

Provisional measures

The Commission provides in its proposal for the recognition and enforcement of provisional measures (Art. 48 et seq. and Recital 17 of the Commission's Proposal). This is a deliberate reversal of the Court of Justice of the EU's (CJEU) *Purrucker I* judgment.⁶ The amendment

³ See L Carpaneto, "Cross-border placement of children in the European Union", Study for the Committee on Legal Affairs of the European Parliament, 2016 (available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556945/IPOL_STU\(2016\)556945_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556945/IPOL_STU(2016)556945_EN.pdf)) p 28-29.

⁴ See for instance CJEU C-283/09, *Weryński v Mediatel 4B spółka z o.o.*, ECLI:EU:C:2011:85.

⁵ European Commission, Study on the assessment of Regulation (EC) No 2201/2003 and the policy options for its amendment (Assessment Study), May 2015, at p 31 and 49-50.

⁶ CJEU C-265/09, *Purrucker v Vallés Pérez*, ECLI:EU:C:2010:437.

seeks to provide for the situation in which a court in a Member State takes urgent measures to protect a child and such measures should keep their force in other Member States, pending a final decision. This approach reaches further than that taken in the Brussels Ia Regulation (1215/2012). Art. 2a of Regulation 1215/2012 provides that the regime of enforcement without declaration of enforceability (the so-called abolishment of exequatur) only applies to provisional measures if these were granted by a court in a Member State with jurisdiction as to the substance of the case.

The different approach in Brussels IIa can be justified by the particular position of vulnerable children. However, this approach does raise a practical difficulty: the provisional measure is automatically enforceable in all Member States but it automatically expires as soon as the authority of competent jurisdiction has ruled on the matter (Art. 12 of the Commission's Proposal). This rule was taken over from the current version of the Regulation (current Art. 20 Brussels IIa) and establishes a delicate balance between urgency and preventing forum shopping.

In order to retain both these provisions and to make them function without confusing enforcing authorities, there must be an information duty. The Central Authority of the Member State in which the provisional measures were issued should be informed of the judgment on the substance and therefore be able to inform enforcement agencies that the provisional measure has expired and can no longer be enforced.

Child abduction

The Commission's Proposal also explicitly provides for the cross-border enforcement of return orders (Art. 49 of the Commission's Proposal). This is useful, as it is all too easy in an area of free movement to take the child across another border to avoid return.

A problem of contradictory judgments arises also here. If the court that has jurisdiction as to the substance has in the meantime made a different ruling, the return order should no longer be enforced. There is no judicial check at this point, as exequatur has been abolished. It is therefore necessary to spread the information of the new judgment through Central Authorities, especially the Central Authority of the Member State where the return order was issued. Enforcement authorities in other States should be able to address this Central Authority in order to get the latest information on the status of the return order.

Regarding the location of children (abducted children in most instances), the services of Central Authorities should also be available to parents or other holder of parental responsibility directly. The Commission's Proposal does not make this explicitly possible. Art. 63(2) of the Commission's Proposal should therefore also refer to Art. 63(1)(a) and not only to (c) and (f).⁷

Parallel proceedings

Brussels IIa contains a provision on *lis pendens* and dependent actions (current Art. 19). This provision gives preference to the court first seised where the same case is brought before courts in different Member States. The first court has the first opportunity to decide whether it has jurisdiction. If it does, this court may hear the case. The Commission does not suggest any substantial changes to this provision. In research that we have done in the EUPILLAR project (JUST/2013/JCIV/AG/4635), we have found that judges have difficulties in finding the details of foreign procedural law. National laws differ on the moment of seising the court. In some countries the first step in seising a court is lodging the documents with the court. In other countries the first step is serving the documents on the other party. Both systems are provided for under Brussels IIa (current Art. 16).

⁷ This suggestion is made by the European Group for Private International Law (GEDIP) in their Resolution on the Commission Proposal for a Recast of the Brussels II a Regulation, adopted at their 26th meeting, held in Milan on 16-18 September 2016 (will be made available at http://www.gedip-egpil.eu/gedip_reunions.html).

In this regard, co-operation can help judges. The Brussels Ia Regulation (1215/2012) has introduced a mechanism for judges to directly contact each other in order to find out on what date a court was seised: Art. 29(2) provides that "[...] upon request by a court seised of the dispute, any other court seised shall without delay inform the former court of the date when it was seised". Such provision would be helpful in Brussels IIa as well. If this cannot be introduced as an obligation like in Brussels Ia (a judge must respond without delay), the possibility to ask a colleague judge could be mentioned in a recital. Alternatively, providing such information can be taken up in the list of tasks of the Central Authorities (current Art. 54 Brussels IIa).

Information of foreign law

Getting correct and up-to-date information on the content and correct application of foreign law is a persistent problem. Examples of information on foreign law (both substantive and procedural) that judges need in the application of the regulation include:

- parental responsibility *ex lege* (especially when parents are not married);
- how the residence of children is determined after the separation of their parents;
- when and how civil proceedings are introduced;
- until which moment choice-of-court agreements are possible;
- which provisional measures exist;
- which child welfare institutions exist and what their tasks are;
- what the procedure is for placing children in alternative care;
- how enforcement takes place and which authorities are responsible for this;
- at what moment decisions on parental responsibility become final;
- what the terms for appeals are;
- whether a judgment is enforceable pending appeal.

The Hague Child Abduction Convention of 1980 provides for a mechanism for judges or administrative authorities to suspend proceedings in order to allow the applicant to obtain a decision indicating that the removal or retention of a child was wrongful according to the law of the State of habitual residence of the child immediately before the removal or retention (Art. 15). However, Art. 15 of the Hague Child Abduction Convention does not set out a detailed procedure, which has prevented some lawyers and judges from using it. This provision also applies between Member States, as the entire Convention does. It seems to me that within the EU, it should be easier to obtain this information through cooperation between judicial authorities and Central Authorities.

This can only be solved by continuing with consistent efforts to elaborate networks among judges and to gather information centrally. To my mind, Brussels IIa can address this concretely in three ways:

1. explicitly task the Commission with keeping its information on national law updated, including national case law;
2. explicitly task Central Authorities with sending regular updates of the evolution of their law (legislation and case law of the highest courts) to the European Commission;
3. oblige States to provide funding for the training of judges in other countries or in international settings and for court libraries and access to international databases.

Recognition and Enforcement

The Commission is suggesting to abolish exequatur. The current version of Brussels IIa has already abolished exequatur for two situations (Art. 40-45 current Brussels IIa). The

operation of these provisions has not been flawless. If this goal is to be further pursued, there will be room and need for intensified cooperation.

The current text of the Commission recast proposal does not seem completely adapted to the proposed generalised abolition of exequatur. For instance, Art. 63(1)(a) of the Proposal provides that Central Authorities must take appropriate steps to provide assistance in discovering the whereabouts of a child, where it appears that the child may be present within their Member State, and where the determination of the whereabouts of the child "is necessary for carrying out a request under this Regulation." However, Central Authorities might be required to assist in determining the whereabouts of the child even at the stage of enforcement. It could be debatable whether automatic enforcement can be considered as a "request". It therefore seems to me that the words "... and the determination of the whereabouts of the child is necessary for carrying out a request under this Regulation" in Art. 63(1)(a) is too limiting and should be deleted, since it could give rise to unnecessary confusion.

If it is considered too bold to delete the phrase entirely, it could be replaced by "...and the determination of the whereabouts of the child is necessary for ~~carrying out a request under~~ [the application of] this Regulation".

Protecting children's rights

The Commission's proposal already made a commendable step in safeguarding the rights of children, including their right to be heard and consideration of their best interests.

Through efficient cross-border cooperation this safeguarding can be further enhanced. Central Authorities could be requested to provide the necessary logistical help where a child has to be heard by a court outside the State of his or her habitual residence. In some instances the Evidence Regulation (Regulation 1206/2001) could be used for such cross-border hearing of the child. That Regulation has also enacted functions for central bodies and competent authorities (Art. 3 Evidence Regulation). Depending on the structures of the various public authorities and ministries in the Member States, the central bodies or competent authorities under the Evidence Regulation could be located close to or far from the Central Authorities under Brussels IIa. Brussels IIa could explicitly mention that these bodies and authorities should co-operate with each other in order to provide practical assistance in the safeguarding of children's rights.

Similarly, the best interests of the child can best be assessed by authorities (institutions, local authorities etc.) close to the child. There should be a network to provide contact details in order to make sure that those persons who can assess the interests of the child are solicited for their views and help. The network of contacts should entail Central Authorities and local institutions and authorities. The purpose is not for these contacts to lead to the sharing of details about a specific case or child (see paragraph 4 below on the concern of data protection and privacy). Rather, the idea would be to share contact details across borders so that the right persons can be called as experts in pending cases (whether as witness in court or to write a report for the judge).

Mediation

The Assessment Study reiterates that mediated solutions have a better chance of lasting.⁸ Moreover, mediation saves state resources.⁹ These resources could then be redeployed for ensuring speedier proceedings where these are inevitable and for funding Central Authorities to perform their increasing tasks. Mediation also saves time, which is in the

⁸ Assessment Study at p 39.

⁹ G De Palo, M D'Urso, M Trevor, B Branon, B Cawyer and L Reagan Florence, " 'Rebooting' the Mediation Directive; Assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU ", Study for the Committee on Legal Affairs of the European Parliament, 2014 (available at [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET\(2014\)493042_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf)) p 126-128.

interests of children who might have been separated from their relatives or core family members.¹⁰

The Assessment Study further states that the current Regulation does not sufficiently promote mediation.¹¹ The Commission's Proposal has taken this at heart and introduced an explicit obligation for courts to actively seek to promote Mediation (Art. 23(2) of the Commission's Proposal).¹² This is a good starting point. The provision could also impose a further duty to contact courts in another country in order to consider the mediation options in that country.

Furthermore, in order to really promote mediation, various authorities have to cooperate: courts should refer the parties to mediation, but Central Authorities should be able to assist in promoting mediation and in providing information about how the mediation system works, where to find qualified mediators that work in various languages, and existing networks of mediators.¹³ They should also provide information on the legal recognition of mediated agreements in their States, i.e. the implementation in their States of the Mediation Directive (2008/52/EC).

It can be beneficial to mention mediation more in the text of the Regulation. The reason for the limited use of mediation has been found to be the weak pro-mediation stance taken also in legislation.¹⁴

4. CONCERN: DATA PROTECTION AND PRIVACY

The Commission's Proposal refers to the Data Protection Regulation (2016/679) (in Recital 43).

There is a need for information across borders, just as there is a need for cooperation across borders. Sometimes the sharing of information about children is in their best interests. Fenton-Glynn in her study on adoption without consent for instance suggests that it should be mandatory to inform foreign authorities of child protection proceedings before the court, unless the safety or welfare of the child demands otherwise.¹⁵ The purpose of the recommendation is to ensure that the best option for the child is found and that placement with relatives in another country is considered.

On the other hand, care should be taken not to infringe the right to privacy of the very children we are aiming to protect. More information than necessary should not be shared. Besides that, the legislator should ensure that authorities respect the legal frameworks that have been created to protect the data of persons.

¹⁰ G De Palo, M D'Urso, M Trevor, B Branon, B Cawyer and L Reagan Florence, " 'Rebooting' the Mediation Directive; Assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU ", Study for the Committee on Legal Affairs of the European Parliament, 2014 p 124-125. On the benefits of Mediation, see also the extensive work done by the Hague Conference on Private International Law, available at <https://www.hcch.net/en/instruments/conventions/publications1/?dtid=52&cid=24>.

¹¹ Assessment Study at p 38-40 and 51-52.

¹² Hague Conference on Private International Law "Mediation: Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction", 2012 (available at https://assets.hcch.net/upload/guide28mediation_en.pdf), p 44-46 also explains that judges have to take up a role to promote mediation.

¹³ See the Hague Conference on Private International Law "Mediation: Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction", 2012, p 42-43 on the role that Central Authorities can take up. See also Swiss Institute of Comparative Law, "Cross-border parental child abduction in the European Union", Study for the Committee on Legal Affairs, 2015 (available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510012/IPOL_STU\(2015\)510012_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510012/IPOL_STU(2015)510012_EN.pdf)) p 100.

¹⁴ See G De Palo, M D'Urso, M Trevor, B Branon, B Cawyer and L Reagan Florence, " 'Rebooting' the Mediation Directive; Assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU ", Study for the Committee on Legal Affairs of the European Parliament, 2014.

¹⁵ C Fenton-Glynn, "Adoption without Consent", Study for the Committee on Petitions of the European Parliament, 2015 (available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519236/IPOL_STU\(2015\)519236_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519236/IPOL_STU(2015)519236_EN.pdf)) p 46.

I am not specialised in this area, but I would advise the Parliament to consult experts on finding the right balance between guaranteeing the best interest of children while respecting their right to privacy.

5. PROPOSED AMENDMENTS

This paragraph contains the amendments to the Commission's Proposal that I would advise the European Parliament to consider. Suggestions for amendments are based on the text as proposed by the Commission in the recast proposal COM(2016) 411 final, with additions in bold and deletions in strikethrough.

New Recital 48bis:

Where the interests of the child so require, judges should communicate directly to Central Authorities or judges in other Member States.

New Art. 12(3):

When the authority of the Member State having jurisdiction under this Regulation as to the substance of the matter has taken measures in a case where an authority in another Member State has taken provisional measures, the authority of the Member State having jurisdiction as to the substance of the matter shall inform the Central Authority of the Member State in which the provisional measures were taken of the measures taken and of the date upon which they take effect.

Art. 19(2bis):

In cases referred to in paragraphs 1 and 2, upon request by a court seised of the dispute, any other court seised shall without delay inform the former court of the date when it was seised in accordance with Article 15.

New Art. 20bis:

In all proceedings falling under the scope of this Regulation, authorities shall examine whether mediation would be a viable option for the parties involved.

Art. 23(2):

As early as possible during the proceedings, the court shall examine whether the parties are willing to engage in mediation to find, in the best interests of the child, an agreed solution, provided that this does not unduly delay the proceedings. **If necessary, the court shall contact Central Authorities in its own or other Member States in order to assist in arranging the mediation.**

New Art. 25(6):

When a judicial authority has ordered the return of a child, it shall notify the Central Authority of the Member State of the habitual residence of the child prior to the abduction of such decision and the date upon which it takes effect.

Art. 63(1)(g):

ensure that where they initiate or facilitate the institution of court proceedings for the return of children under the 1980 Hague Convention, the file prepared in view of such proceedings, save where exceptional circumstances make this impossible, is complete **and submitted to the court** within six weeks.

Art. 66(4):

Save any agreement to the contrary between authorities, Each Central Authority shall bear its own costs.

Art. 63(1)(a):

provide, on the request of the Central Authority of another Member State, assistance in discovering the whereabouts of a child where it appears that the child may be present within the territory of the requested Member State and the determination of the whereabouts of the child is necessary for ~~carrying out a request under~~ **the application of this Regulation.**

Art. 63(1)(d):

facilitate communications between authorities, in particular for the application of Article 14, **Article 19**, Article 25(1)(a), Article 26(2) and the second subparagraph of Article 26(4);

Art. 63(1)(fbis):

provide assistance, either through Regulation 1206/2001 or through other means, to ensure that the child has a real opportunity to be heard when the child resides in a Member State other than the Member State in which the proceedings are conducted.

New Art. 63(1)(h):

gather information on child protection authorities in its Member State and make such information available.

New Art. 63(1)(i):

provide assistance in arranging mediation.

Art. 63(2):

Requests pursuant to points **(a)**, (c) and (f) of paragraph 1 may also be made by holders of parental responsibility.

New Art. 64(5bis):

Central Authorities shall, upon request by an authority of another Member State, provide information on the law in their own Member State regarding issues that fall within the scope of this Regulation or are relevant for determining a case under this Regulation.

Art. 64(6):

Except where exceptional circumstances make this impossible, the requested information shall be transmitted to the Central Authority or competent authority of the requesting Member State no later than two months following the receipt of the request. **If the Central Authority or competent authority of the requesting State intimates that the case is urgent and that a shorter deadline is necessary, the requested authority shall respect such request.**

THE EXPERIENCE OF A NATIONAL CENTRAL AUTHORITY

Lukáš FRIDRICH

KEY FINDINGS

- **The Commission proposal for a recast of the Brussels IIa Regulation can be evaluated positively from the point of view of a Central Authority.** The proposal addresses issues encountered in the application of the Regulation and reflects good practices introduced by some Member States beyond the requirements of the existing legislation. The proposed changes are a good basis for improving the quality of the work of courts and Central Authorities and for the harmonization of procedures and standards within the European Union.
- **A risk factor remains the degree of actual fulfilment of the obligations stipulated by the Brussels IIa Regulation by the Member States and the possible enforcement of these obligations against their will.** Some Member States do not fulfil their obligations under the current wording of the Regulation, and the adoption of new rules without any further steps will probably not change this practice.
- **Other changes may be recommended for a more effective functioning of the Brussels IIa Regulation.** A more accurate wording of some provisions related to cooperation between Central Authorities and to court proceedings in cases of child abduction and the revision of other provisions which remain without changes in the recast proposal would be desirable. The actual impact of some changes and, as appropriate, the deepening of safety mechanisms should also be considered.
- **The proposal reflects the social changes and current trends in family law.** It puts greater emphasis on amicable solution of disputes by means of mediation and on participation rights of the child.

1. ROLE OF THE OFFICE FOR INTERNATIONAL LEGAL PROTECTION OF CHILDREN

The Office for International Legal Protection of Children (“Office”) is an administrative body with the competence of a Central Authority in the Czech Republic and it is subordinate to the Ministry of Labour and Social Affairs.

It has a fairly long history. Founded already in 1930, it was initially only the Central Authority for cross-border recovery of maintenance, but over time the scope of its tasks and activities has extended significantly.

In 2000, the position of the Office was transformed by Czech domestic law¹ into the current form, where it fulfils the tasks of the Central Authority under international treaties and European Union regulations; also, it has other obligations associated with the position of an authority of social and legal protection of children.

Today, the Office has 35 employees, of which 13 lawyers in the Legal Aid Department, 4 lawyers in the Intercountry Adoption Department, 3 psychologists and one social worker. 22 employees of the Office have undergone mediation training.

¹ Sections 3 and 35 of Act No. 359/1999 Sb., on Social and Legal Protection of Children

The table below shows detailed statistics of the Office's activities. The amount of work on its agenda has been increasing year-on-year, it is a long-term trend. In addition to written communication, the Office provides a large number of phone consultations. The statistics do not include personal meetings with clients (mostly parents and their attorneys).

Table 1 : Statistics of the Office's activities between 2010 and 2015

Item	2010	2011	2012	2013	2014	2015
Delivered mail	18,072	18,092	22,222	25,723	28,778	33,657
Sent mail	18,234	15,802	21,770	26,284	28,655	31,274
Phone calls	6,535	7,005	7,709	8,183	8,298	9,321
New cases - outgoing	427	482	568	634	823	1,067
New cases - incoming	400	490	549	558	489	322
New cases - general advice	662	449	556	501	472	423
New cases - children for intercountry adoption	77	44	62	61	54	59
New cases - applicants for adoption from abroad	40	68	94	57	54	66
New cases – applicants for adoption from the CZ	5	5	10	4	5	6
Pending cases - outgoing	1,435	1,767	1,807	2,021	2,508	2,922
Pending cases - incoming	1,195	1,541	1,638	1,751	1,885	1,672
Pending cases - general advice	2,008	2,322	2,760	2,022	1,438	1,429
Pending cases - children for intercountry adoption	327	371	402	446	421	424
Pending cases - applicants for adoption from abroad	79	116	168	175	158	170
Pending cases - applicants for adoption from the CZ	8	9	12	16	17	13
Pending cases total	4,638	6,126	6,787	6,431	6,427	6,630
Maintenance enforced from abroad (rounded to thousands) CZK	11,958	16,057	20,791	19,046	23,005	23,709
Maintenance enforced to abroad (rounded to thousands) CZK	7,198	9,730	10,452	9,308	13,144	15,311

Source: Office for International Legal Protection of Children, 9th October 2016

The Office as the Central Authority of the Czech Republic

Most of the activities of the Office result from its position as the Central, or receiving and sending, Authority of the Czech Republic. The Office plays this role mainly in the area of wrongful removal or retention of a child (parental child abductions), securing the parental right of access to a child, cross-border enforcement of maintenance, cooperation in cross-border exchange of information regarding the social circumstances of parents and children, and intercountry adoption of children. An indispensable part of the Office's activities is providing advice on international family law to parents, their legal representatives, courts, local social services and other authorities. Below is a list of the most important instruments under which the Office proceeds:

- Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility
- Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations

- Convention of 25 October 1980 on the Civil Aspects of International Child Abduction
- Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children
- Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance
- Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption

The Office as an authority of social and legal protection of children

Under Czech domestic law, the Office is an authority of social and legal protection of children. Because of this, it has, in addition to the tasks of the Central Authority, fairly broad powers in the area of work with vulnerable children and their families, similarly to local social services. The activities of the Office in this area are limited to cases with an international or cross-border element. However, due to the nationwide competence of the Office, its cooperation with local social services is necessary.

The Office may require information about children from state authorities and parents, take measures to protect vulnerable children, organize case conferences², provide mediation, etc. In its position as an authority of social and legal protection of children, the Office is often appointed as children's guardian *ad litem*, i.e. their representative in court proceedings with a cross-border element. In such cases, representatives of the Office attend court hearings, may hear children to find out their opinions and make other steps associated with this role.

Conceptual activities of the Office in the development of international legal protection of children

One of the missions of the Office is the long-term monitoring of trends in the area of international legal protection of children, their implementation in the everyday activities of the Office and the dissemination of good practices among all the authorities involved. These are conceptual and long-term activities with an emphasis on the sustainability of the results achieved. To coordinate these activities, the Office has set up a Department of EU Projects in order to effectively and purposefully draw and expend financial resources from European Union funds.

In order to exchange good practices among the professionals and authorities involved in international legal protection of children both in the Czech Republic and abroad, the Office organizes conferences with international participation. Its representatives also actively attend conferences and workshops abroad.

So far the Office has implemented or is implementing the following projects:

- Strengthening the Effectiveness of Human Resources Management in the Office for International Legal Protection of Children³ (implemented in 2011-2012; aimed mainly at the development of soft skills of the Office employees, for example in the area of communication, telephonic emergency intervention, mediation, etc.);

² Case conferences are one of the methods of social work with threatened children and their families. Usually the facilitator, the parents and their attorneys, and under certain circumstances the children, the case managers, the psychologist, the social workers and other persons (for instance teachers, general practitioners, etc.) attend the case conference.

³ Registration number CZ.1.04/4.1.00/58.00030

- Development of Partnerships for International Cooperation at the Office for International Legal Protection of Children⁴ (implemented from 2012-2015; the project aimed at the transfer and implementation of good practices between Central Authorities, the improvement of mutual cooperation, and developing the area of international mediation and intercountry adoption);
- The Rights and Participation of Child at the Office for International Legal Protection of Children⁵ (implementation period 2016-2020; the project aims to improve the quality of performance of the Office's statutory responsibilities by strengthening the rights and participation of children in its activities).

2. PRACTICE OF THE OFFICE AS THE CENTRAL AUTHORITY UNDER THE BRUSSELS IIA REGULATION AND THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

The Brussels Iia Regulation⁶ defines the fundamental obligations, competences and tasks of Central Authorities in Chapter IV. In its activities, the Office also deals with areas regulated in other parts of the Brussels Iia Regulation, whether associated with the tasks of the Central Authority directly (e.g. in cases of parental abductions of children) or indirectly (counselling in the area of international family law). The Office also has experience with the application of the Brussels Iia Regulation as a party to court proceedings in cases of parental responsibility, specifically in the role of children's guardian *ad litem* (the Office, as a party to the proceedings, may give its opinions on issues of jurisdiction or applicable law). In both roles, the Office provides mediation and works on the strengthening of participation rights of children.

Recast of the Brussels Iia Regulation and cooperation between Central Authorities

In the current Brussels Iia Regulation, cooperation between Central Authorities is regulated in Chapter IV, in Articles 53 to 58. Besides a general definition of the role and activities of Central Authorities in Articles 53 and 54, a crucial article is Article 55 stipulating the specific obligations and competences of Central Authorities — to collect and exchange information on the situation of the child, on court proceedings or on court orders concerning the child; to provide assistance to holders of parental responsibility seeking the recognition and enforcement of decisions in the Member States; to facilitate communication and provide assistance as needed by courts to apply the provisions of the Brussels Iia Regulation; and to facilitate agreement between holders of parental responsibility through mediation or other means. Article 56 regulates the cooperation of courts and Central Authorities in cases of cross-border placement of a child in institutional care or with a foster family, and the seeking of the consent of the competent national authority to the placement of the child. Other articles stipulate how and which persons may contact the Central Authorities, and a system of meetings of Central Authorities is introduced.

With regard to the Office's experience, two problematic areas of cooperation between Central Authorities under the Brussels Iia Regulation may be identified:

1. the speed in handling sent requests and flexibility of communication with the Central Authority in the requested state;

⁴ Registration number CZ.1.04/5.1.00/81.00002

⁵ Registration number CZ.03.2.63/0.0/0.0/15_017/0003544

⁶ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, and sections 3 and 35 of Act No. 359/1999 Sb., on Social and Legal Protection of Children

2. different standards of services provided by Central Authorities in relation to other Central Authorities, other institutions and parents.

As regards the **speed and flexibility of cooperation**, the bad practice in some Member States is shown by long delays in processing requests for return of abducted children (up to several months) and by subsequent delays in the provision of information about the return proceedings. Moreover, even outside the area of parental abductions, for example in cases of applications for social investigations, the handling of a case may take several months or even years. This phenomenon is most often caused by the inefficient organisation and insufficient financial resources and personnel affecting some Central Authorities. This statement is based on the long-term experience of the Office in cooperating with other Central Authorities and on the outcome of bilateral meetings with representatives of Central Authorities organized by the European Judicial Network in Civil and Commercial Matters.

The inefficient organisation and insufficient financial resources and personnel affecting some Central Authorities is also reflected in the **quality and scope of services provided**. An agenda overload may cause a Central Authority not to have sufficient capacity to meet some obligations (for example, guiding the holders of paternal responsibility into agreements and amicable settlement of conflicts, which requires quite a lot of time and patient negotiations).

Another important factor in this area is the generic and in some points ambiguous formulation of Central Authorities' obligations. Individual Central Authorities interpret differently who may approach them with requests for cooperation, and under what circumstances, which leads, for example, to the refusal of some kinds of requests for social investigation by one Central Authority, whereas another Central Authority grants such requests. This is connected with the so far unclear relationship between the Brussels IIa Regulation and Regulation (EC) No 1206/2001 of 28 May 2001 on the taking of evidence⁷. Some Central Authorities refuse courts' requests for social investigations for the purposes of pending proceedings with the reasoning that the court should be referred to a procedure under Regulation 1206/2001.

The vague and unclear wording of the rules may lead Central Authorities not to apply some provisions. An example may be Article 56, on the possibility of placing a child in foster or institutional care in another Member State. Ambiguities in giving consent to the placement of a child⁸ and the follow-up procedure lead to situations where some Central Authorities do not use this option, which has the potential to be a very flexible mechanism. Instead, the institution of transfer to a court better placed to hear the case under Article 15 is inappropriately used (for details see below). Where the procedure under Article 56 is used, it involves great difficulties whose solution requires relatively complex negotiations between two Central Authorities. The Czech Office has managed to set up an effective system with the Slovak Central Authority; however, it took several years to fix the practice. In relation to Slovakia, dozens of children⁹ are now placed annually in foster or institutional care under Article 56.

In the **Commission proposal to recast the Brussels IIa Regulation**, cooperation between Central Authorities is regulated in Chapter V, in Articles 60 to 68. In principle, the proposal includes a more detailed definition of some already existing obligations, and a clarification of some areas that have been unclear so far.

⁷ Council 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

⁸ It is not clear who may give consent to the placement of the child, in what form and what is the procedure to give the consent.

⁹ In most cases, very young children of parents who are nationals of one country and travelled to the other country are preliminarily placed in institutional or foster care due to the parents' incapacity to provide due care. When it is reasonable and in the best interest of the children, they are placed in institutional or foster care in their home country (where they have family or where there are other persons who are able to provide due care).

The recast should help **accelerate cooperation and make it more efficient** thanks to a new Article 61, which obliges Member States to provide Central Authorities with **adequate financial and human resources** to enable them to carry out their obligations. Interpretation of what the term “adequate financial and human resources” means may be difficult in practice. However, one should add that a different wording is hard to imagine in such a provision. Another question is the practical enforcement of this obligation by the Member States. Whether the provision will really lead to acceleration and streamlining of cooperation between Central Authorities will depend mainly on the will of individual Member States. Despite this, the proposed amendment can be evaluated positively from the point of view of the Central Authority.

The recast proposal stipulates **time limits for some steps**. Central Authorities are to collect the documents necessary for the institution of court proceedings for the return of children under the 1980 Hague Convention within six weeks (Article 63 (1) (g)), provide the requesting Central Authority with information within two months following the receipt of the request (Article 64 (6)), and in cases of placement of a child in institutional or foster care in another Member State, transmit the decision granting or refusing consent to the placement of the child no later than two months following the receipt of the request (Article 65 (4)). The introduction of time limits for some procedures may be an effective instrument to accelerate cooperation between Central Authorities, as shown by our experience with procedures under other instruments, e.g. Council Regulation (EC) No 4/2009 of 18 December 2008, regulating, among other things, cooperation between Central Authorities in cross-border enforcement of maintenance.¹⁰ Although the setting up of cooperation under the Regulation took a relatively long time in some Member States, a gradual improvement and acceleration of cooperation can be observed even in poorly cooperating partners in the long run (after several years).

To improve and unify the standards of **quality and the scope of services provided** by the Central Authorities, specification and clarification of the competences of the Central Authorities and the strengthening of some of their powers may help. The recast proposal clarifies previously disputable and inconsistently interpreted issues such as who may apply for what help or information, from whom and under what conditions.¹¹

The obligation of Central Authorities to provide cooperation at the request of another Central Authority is the general rule. In specifically defined areas, Central Authorities may provide cooperation at the request of holders of parental responsibility, an authority other than the central one, and there is a new possibility of direct cooperation between authorities other than central ones (Article 64 (2) and (3) and recital 46). This wording will result in an unambiguous possibility to file requests for cooperation by local social services and courts, which—in contrast to the current practice—will enable to use reports from social investigations also for the purposes of court proceedings. Moreover, the recast proposal, in its recital 44, clearly defines the relation between Regulation Brussels IIa and Regulation (EC) No 1206/2001 of 28 May 2001 on the taking of evidence, allowing courts to choose under which channel to request the necessary information. While the above may be considered a step forward, direct cooperation between authorities other than central ones may potentially involve **risks**. Other authorities may not have the knowledge of the structure and competences of authorities in a foreign country and of regulations of that state on the protection of personal data. A solution that could be envisaged in the course of the negotiations on the recast proposal could be to delete the possibility of direct cooperation and replace it with an obligation to send requests at least through the Central

¹⁰ For example the time limit to acknowledge the receipt of a request under Article 58 (3) of Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations

¹¹ For details see p. 16 of the Explanatory Memorandum to the Brussels IIa Regulation, available at: <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-411-EN-F1-1.PDF>

Authority in the requested Member State.¹² In the event that direct cooperation is maintained, an alternative safeguard could be an obligation to inform the Central Authority in the requested Member State about a request made.

The recast proposal specifically defines under which circumstances information may be required from the Central Authority of the State where the child is habitually resident and present (Article 64 (1)) and in what situations it is possible to request information from the Central Authority of any Member State (Article 64 (2)) or of another State where the person seeking access to the child is resident (Article 64 (5)). The current Regulation does not include any similar distinction, which causes some Central Authorities to refuse to carry out social investigations with parents or other family members living in a State other than the State of the child's habitual residence.¹³ This information is often necessary for ongoing custody proceedings. The revised Regulation would clarify this area, and thus prevent an inconsistent practice of Central Authorities in obtaining information about children.

The procedure for **placing a child in institutional or foster care in another Member State** (Article 65) has been changed in the recast proposal: if adopted untouched, it would require the consent of the State where the child is to be placed. The procedure involves Central Authorities, and the new proposed rules define the conditions of the procedure, the documents to be attached to the request and the time limits for handling it. The question is whether such a specification of the rules will be sufficient for a better functioning of this provision. In any case, it is a step forward and the recast proposal corresponds to practice established between the Office and some Central Authorities.

In the area of cooperation between Central Authorities, one can imagine **other minor changes**. In **Article 64 (1)**, the word **"may"** should be replaced with **"shall"**. Otherwise, there may be refusals of requests for cooperation under the impression that provision of information is at the discretion of the requested authority. The scope of information about the child which may be requested under Article 64 should also be extended.

Recast of the Brussels IIa Regulation in cases of child abduction and the role of Central Authorities

The Brussels IIa Regulation deals with parental child abductions in Article 11¹⁴, which sets a higher standard of cooperation between Member States. The 1980 Hague Convention on child abduction still applies, but the Brussels IIa Regulation takes precedence to the extent that it regulates parental abductions.¹⁵

Article 11 was adopted with a view to streamlining and accelerating child return proceedings between contracting states by tightening the rules of the 1980 Hague Convention. This includes in particular the explicit stipulation of a six-week time limit for the court to issue a decision on return, and the limitation of the conditions for not returning the child. Specific to the Brussels IIa regulation (Article 11 (6) - (8)) is the so-called **overriding mechanism**, which is not contained in the Hague Convention. Where a court decides on non-return of the child for reasons listed in Article 13 of the Hague Convention, the court of the State of habitual residence of the child (i.e. the state from which the child was abducted), which still has jurisdiction to decide on parental responsibility, may

¹² The word "authority" in the text of Article 64 (2),(3) and recital 46 should be replaced by "Central Authority".

¹³ Such an interpretation of the current Article 55 of the Brussels IIa Regulation may be explained for example by the fact that the possibility to request a report on the situation of the child under Article 32 of the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children is based on the child's habitual residence or presence in the requested state

¹⁴ Provisions regarding parental child abductions can also be found in other parts of the Regulation, for example in Article 10, which stipulates special rules of jurisdiction in the case of wrongful removal or retention of a child.

¹⁵ The relation between the two instruments is regulated by Article 60 (e) of the Brussels IIa Regulation

“override” any decision of the return court by issuing a decision ordering the return of the child. The “left-behind” parent may then request enforcement of such a decision in the State where the child has been abducted.

In practice, **a number of problematic issues** may be encountered **in cases of international child abductions**. Below I will try to summarize the most crucial factors from the point of view of the Central Authority.

Again, it is true that the practice in various states differs significantly in terms of **speed of handling a case** and **quality of functioning of the mechanism**, i.e. observance of the rules and standards introduced by the 1980 Hague Convention and the Brussels IIa Regulation. Problematic issues are also described in the Explanatory Memorandum to the recast proposal.¹⁶

In the case of parental abduction of a child, the aim is to ensure his/her **immediate return** to the country of habitual residence. Speed is an important factor in all stages, i.e. in the stage of cooperation between Central Authorities, in the court proceedings on return and, where applicable, also in the enforcement of the decision. Although no specific time limits are set for the stage of cooperation between Central Authorities, they should honour the principle of speedy proceedings and deal with requests for return as speedily as possible. This rule is not always respected by all Central Authorities and there are even several-month delays between the various steps. As regards the causes, we may refer to the previous chapter, which dealt in detail with the need for adequate financial resources and personnel to secure the activities of the Central Authority. The Hague Convention in connection with the Brussels IIa Regulation stipulate a six-week period for the issuance of a decision in the case. Even this period is often not respected (with exceptions). Even in States where the return mechanism works very well, the courts mostly only approach this time limit.

A factor that has a major **impact on the speed and quality** of the return procedure **is the national organisation of the judiciary**—whether return proceedings are conducted before specialised courts with specialised and trained judges, whether there is special domestic legal regulation of return proceedings, etc. In countries where return proceedings are brought before courts of general jurisdiction, judges often have very little or no experience with specific abduction cases. This is due to their relatively low number compared with the total amount of other child-related proceedings. The result is that judges proceed similarly in return proceedings as in common child-related proceedings. For example, instead of deciding on the return or non-return, they decide on custody, although this issue is to be addressed by the courts in the state of the child's habitual residence. This often prolongs the proceedings due to the obtaining of evidence which is not related to the subject-matter of the proceedings. Moreover, judges may not be aware of the possibility to use special instruments such as protective measures (undertakings) or the assistance of liaison judges. Moreover, the actual return of a child may be prevented for example by the large number of means of remedy against the court order or by the impossibility of a preliminary enforcement of the order. In some Member States, it is difficult to enforce a return order against the will of the “abducting” parent.

It seems that the **overriding mechanism does not work**. In practice, courts often fail to send the necessary documents, and often it is necessary to remind the court or the Central Authority. Moreover, there are confusions as to what documents the court is to send. The time limits set are not met either. The Office has not yet seen a case which would lead to issuing a decision ordering the return of a child and its enforcement in the state where the child has been abducted.

In the proposal to recast the Brussels IIa Regulation, provisions on child abductions are detailed in Chapter III. Articles 21 to 26 deal with parental abductions instead of the

¹⁶ For details see p. 3 and pp. 12 and 13 of the Explanatory Memorandum to the Brussels IIa Regulation

original Article 11. The time limits for Central Authorities are systematically included in the already described Chapter V on cooperation between Central Authorities.

The recast proposal details **the time limits for procedures of Central Authorities and courts**. Central Authorities are to collect the documents necessary to institute proceedings for the return of children within six weeks (Article 63 (1) (g)). The six-week time limit for a decision is now stipulated for each court instance. **The recast proposal amends the procedural part of the return proceedings**—it establishes an obligation for Member States to concentrate jurisdiction for parental abductions in a limited number of specialised courts (Article 22), and provides that the court may order the preliminary enforcement of its decision on return, and only one appeal may be filed against such a decision. Moreover, the Regulation expressly mentions the possibility for the return court to take provisional, including protective, measures (Article 25), and an obligation to examine whether the parties are willing to take part in mediation (Article 23). As regards the overriding mechanism, courts are to expressly specify the article of the 1980 Hague Convention on which the refusal of the request for return is based. There is a new obligation to translate the documents into the official language of the state to which it is sent (Article 26). The court is also required to review the issue of child custody taking into account the child's interest, reasons and evidence for the decision on non-return of the child.

In general, the changes may be evaluated positively, as they address problematic issues of return proceedings and at the same time reflect rules which are already being applied in some Member States and whose effectiveness has already been proven in practice. In the wording proposed by the Commission, the recast Regulation could help accelerate cooperation between Central Authorities, streamline return proceedings and extend the scope of specialized instruments aimed at improving the practice. The potential of unification or at least approximation of the quality of the functioning of the return mechanism among European Union Member States is also important. **A risk factor** could be the willingness of Member States, specifically Central Authorities and courts, to comply with these obligations, because even the existing time limits are not met in practice. Moreover, some revised provisions are still unclear: for example, when the time limit begins to run for completion of activities by a Central Authority not representing the left-behind parent and not filing an application for return with the court; which moment marks completion of the obligation; and what is understood by “file prepared” (Article 63(1)(g)). As regards the overriding mechanism, it is doubtful whether the proposal for the recast (Article 26) is sufficiently detailed and specific, so that this procedure is used efficiently in practice.

Comments on the revision of the Brussels IIa Regulation in other matters

In this chapter, I will briefly comment on some changes which do not directly affect the activities of the Central Authorities but relate to them. Due to its specific position as the Central Authority and at the same time as an authority for social and legal protection of children, the Office deals with the issues regulated by the Brussels IIa Regulation, including jurisdiction rules and the recognition and enforcement of decisions. With regard to the extent and focus of this note, only a few provisions will be mentioned below.

The recast proposal introduces a new conception of the essence of the **preliminary protective measures** established in the renumbered Article 12. The court in the state where the child is present may, in urgent cases, take measures in respect of that child, although the court in the State of habitual residence of the child would have jurisdiction otherwise. Under Article 48 and recital 17 of the recast proposal, such a measure is to be enforceable not only in the State where the child is currently present, but newly in all Member States. This could have a negative impact for example in cases of international abductions of children where the “abducting” parent often files, after removing the child, a request for a preliminary measure before the “left behind” parent in the State of the child's

habitual residence does. With regard to the new regulation, it will be necessary to clarify the relationship between proceedings initiated earlier in the State where the child has been abducted (although these are mere proceedings for a preliminary measure) and proceedings instituted later in the State of the child's habitual residence.¹⁷ With regard to the duration of court proceedings, a preliminary measure of the court in the State where the child has been abducted could actually regulate the child's situation for a long time, which may be considered undesirable.¹⁸

The recast proposal leaves virtually unchanged the regulation of transfer to a court, or Member State, better placed to hear the case (Article 15, now Article 14), although the application of this article in practice is problematic. It follows from the text of the article that this should be an extraordinary measure—however, it is used fairly often in practice, and often in unfounded cases. Cases may be found where courts wanted to transfer a case concerning custody instituted after a motion by a parent who subsequently moved to another state with the child. In this case, transfer is a circumvention of the *perpetuatio fori* principle, on which the Brussels IIa Regulation has been based so far. However, the revision of the Brussels IIa Regulation in Article 7 (1) waives this principle. The argument used would therefore become meaningless if the Regulation were to be adopted in the text proposed by the Commission. Another example of incorrect procedure is the transfer of a case to the court in the State where the child has been abducted after dismissal of a request for return of a child under Article 13 of the 1980 Hague Convention. The court would thus make it impossible for the “left-behind” parent to obtain the application of the overriding mechanism. Problems are often caused by unclear rules for the actual transfer process, which differs in various cases. For example, the nature of the time limits and the consequences of a failure to comply with them have been interpreted inconsistently.¹⁹ Although a number of answers may be found in the literature²⁰, it would be appropriate to use the process of recast of the Brussels IIa Regulation also for the complex, but necessary, amendment of Article 15.

The strengthening of the role of mediation, which is mentioned in recital 28 of the recast proposal and whose use is recommended both on the side of the court in cases of child abduction (Article 23) and on the side of Central Authorities (Article 63), may be considered a largely positive change. One can also agree with the greater emphasis on participation rights of children, which are mentioned in recital 23, regulated generally in Article 20, and particularly in matters of child abduction in Article 24, and are defined as grounds for refusal of enforcement in Article 40. These changes follow the current societal development and tendencies in family law and, last but not least, follow up on the good practice introduced in some Member States.

¹⁷ I.e. whether the *lis pendens* rule would apply. Under the current regulation, it will not apply in these cases as decided by the Court of Justice of the European Union in case Purucker II (C-296/10); the relation between preliminary measures issued in two states is also the subject of other decisions, e.g. Jasna Detiček v. Maurizio Sgueglia (C-403/09 PPU)

¹⁸ In this paragraph, the author also works with documents of the Ministry of Justice of the Czech Republic related to the recast proposal of the Brussels IIa Regulation provided in the consultations over the proposal to recast the regulation, and also with the Practice Guide for the application of the Brussels IIa Regulation (2014), pp. 39 to 40, available at: http://ec.europa.eu/justice/civil/files/brussels_ii_practice_guide_en.pdf.

¹⁹ With regard to the time limits, the wording in the recast proposal is “six weeks following receipt of the request” instead of “six weeks of their seizure” in current Regulation, which actually could help with interpretation of this provision.

²⁰ Specifically on the issue of time limits, for example in Mankowski P., Magnus M., *European Commentaries on Private International Law: Brussels IIbis Regulation* (2012), pp. 174–176

A JUDGE'S PERSPECTIVE ON THE COOPERATION MECHANISMS

Judge Annette C. OLLAND

PRACTICE AND IMPORTANCE OF JUDICIAL COOPERATION AND COMMUNICATION IN MATTERS OF CROSS-BORDER FAMILY LAW UNDER THE BRUSSELS II A REGULATION: 'OIL IN THE MACHINE'

KEY FINDINGS

- **International judicial cooperation and direct judicial communication** act as '**oil in the machine**' of the application of the Regulation, especially when it comes to the mechanisms of the present Articles 11 (6)-(8), 15, 19 and 56.
- When it comes to judicial cooperation and communication, **knowledge, experience, and personal contacts** count. It is therefore highly recommendable that these communications are initiated and/or facilitated by **specially designated Network- or liaison judges** in each Member State who are **practising, experienced and internationally oriented family judges**.
- These Network- or Liaison judges should be **facilitated and equipped** by governments of the Member States to do the job.
- **Awareness and knowledge of the mechanisms under the Regulation** and of the most effective ways of executing these mechanisms in practice should be raised among family judges in Member States by giving them **training and education**.

1. INTRODUCTION

International judicial cooperation and communication act as 'oil in the machine' of the application of the Brussels IIa Regulation¹, especially when it comes to putting into practice the mechanisms under the present articles 11 (6) – (8), 15, 19 and 56 of the Regulation.

In this Briefing note I will give an insight in judicial cooperation between family judges in the Member States within the framework of the Brussels IIa Regulation.

The observations, comments and remarks in this Briefing note are based on my own professional experience as liaison judge for the Netherlands in matters of international child protection. I will restrict my observations and comments to the judicial communications as *such* and will not go into the depth of other questions, problems and challenges encountered when dealing with cross-border family cases within the framework of the Brussels IIa Regulation.

2. DESCRIPTION OF MECHANISMS UNDER THE PRESENT BRUSSELS IIa REGULATION THAT REQUIRE JUDICIAL COOPERATION

The present Brussels IIa Regulation includes (at least) four mechanisms/principles that prescribe and/or presuppose and/or would be facilitated by judicial cooperation. I will first

¹ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000

describe these four mechanisms and give an example from my daily practice as a family judge.

Article 11 (6) - (8): the so-called “overriding mechanism” in child return procedures under the 1980 Hague Child Abduction Convention

The ‘overriding mechanism’ of article 11 (6), (7) and (8) of the Regulation prescribes, in short, that the court of a Member State that has issued an order on non-return pursuant to article 13 of the 1980 Hague Convention² must transmit a copy of the court order on non-return and of the relevant documents, in particular a transcript of the hearings before the court, to the court with jurisdiction or central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention. These documents should be received by the latter court within one month of the date of the non-return order. This court must notify the parties and invite them to make submissions within three months of the date of notification so that the court can examine the question of custody of the child.

Example: the child has been wrongfully removed from Lille, France to Madrid, Spain by one of the parents. The courts in Madrid, Spain have issued an order on non-return of this child, stating that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views (article 13 (2) of the 1980 Hague Convention). The court of Madrid should ensure that the competent court in Lille, France receives all the documents within one month of the date of the non-return order.

How should the judges of the court in Madrid go about, ensuring that all prescriptions of article 11 (6), (7) and (8) of the Regulation are met? How do they know which court is the competent court in Lille? How to make sure that the documents are not just dropped at the official postal address of this court but that they are received and handled by (a) family judge(s) in Lille that know(s) how to handle them according to the prescriptions of article 11(7) and (8) of the Regulation?

Article 15: Transfer to a court better placed to hear the case

According to article 15 of the Regulation, the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State - with which the child has a particular connection - would be better placed to hear the case, request that court to assume jurisdiction.

Example: a family judge in the Netherlands is handling a case of a child living with his mother in Utrecht, the Netherlands. The father, living in Munich, Germany, has filed a request to the court in the Netherlands for the establishment of contact arrangements with the child. During the proceedings in front of the court in the Netherlands, the mother and the child move to Munich, Germany.

Now, article 8 of the current Regulation does not provide for a change of jurisdiction in case of international relocation; to the contrary, Article 7 of the recast proposal would, if adopted, provide for such a change.

The judge in the Netherlands might estimate that an in-depth-investigation is necessary in order to decide upon the question whether contact between the child and the father is in the best interest of the child. Such an investigation can only be done by the local experts and institutions who have access to the family home, school etc. who, in this case, are all based in Germany. Thus, the judge in the Netherlands finds him/herself having jurisdiction but no (direct) access to information on the family situation.

This might lead the Dutch judge to the conclusion that the German courts, having direct access to and contact with the German institutions and experts, are better placed to hear the case. But how to go about transferring jurisdiction to his/her colleague(s) in Munich?

² Convention on the civil aspects of international child abduction concluded 25 October 1980, hereinafter referred to as: the 1980 Hague Convention

How to establish which authority in Germany to address? Which court and/or judge is competent, able and willing to discuss the matter of transfer of jurisdiction? How to ensure that the transfer is being decided upon, and, if yes, exercised in a swift and smooth way, ensuring that the best interests of the child involved are met?

Article 19: *Lis pendens* and dependent actions

Article 19 (2) of the Regulation prescribes that, where proceedings relating to parental responsibility relating to the same child and involving the same cause of action are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

Example: the child lives with her mother in Florence, Italy, since January 2016. Before that, the child, mother and father lived in Vienna, Austria. In February 2016 the mother files a request to the competent judge in Italy asking for sole custody. The father states that he already filed a request asking for sole custody at the court in Vienna, Austria in December 2015 and, with reference to article 19 of the Regulation and making reference to some copies of his request to the Austrian courts, argues that the Italian court should stay its proceedings until the jurisdiction of the Austrian courts has been established. The mother contests, stating that no such proceedings are pending in Austria. The proceedings that are still pending before the Austrian courts only relate to child support, according to the mother.

The judge in Italy is obliged to investigate the question whether the court in another Member State has been seised '*involving the same cause of action*'. The parties do not give sufficient information in order to answer this question properly.

How to find out? Make a call or send an e-mail to the court in Vienna? How to find out the right number and/or address? In what language?

Article 56: Placement of a child in another Member State

According to article 56 of the Brussels IIa Regulation, a court or authority envisaging the placement of a child in a foster family or an institution in another Member State has to *consult* the authorities of that State *before* ordering the placement.

Example: an orphan child in Antwerp, Belgium lives in an institution for the placement of orphans. She has an aunt and uncle living in Poland who are very much willing to act as a foster family for the child. The juvenile judge in Antwerp is handling the request for placing the child with the aunt and uncle. Article 56 prescribes that the Judge in Antwerp consults the Polish authorities before ordering the placement. Which authorities to consult? How to establish contact?

3. EXPERIENCES IN PRACTICE: CHALLENGES AND PROBLEMS ENCOUNTERED

Time is of the essence in all custody and child protection cases. Family and juvenile judges are dealing with children who are growing up and whose best interest is, in any case, with no exception, not to live in (legal) uncertainty about where to live, to see or not to see one of the parents etc. When operating in a cross-border context, deciding and acting expeditiously is the greatest challenge. Swift communication and cooperation between judges in different Member States is indispensable when it comes to expeditious court decisions, as prescribed in the proposed Article 23 (1) of the Regulation.

In all the examples mentioned under 2, in practice it first comes down to finding out which judge(s) in the other Member State is a) competent b) able and c) willing to discuss and, if necessary, decide upon the matter. And furthermore, there is always the question how to ensure that the transfer, placement or overrule-decision is decided upon and/or exercised in a swift and smooth way, ensuring that the best interests of the child involved are met.

General problems encountered in judicial cooperation and communication

In general, most problems encountered when initiating judicial cooperation and communication are of a practical nature.

Unfortunately it sometimes happens that e-mails sent to authorities in other member States remain unanswered, or that an answer is received only after a few weeks. My impression is that this has all to do with the accessibility and availability in practice of the individual judges handling the case. Obstacles are sometimes simply caused by the lack of a secured and working e-mail address. But the problem can also be of a more structural nature: the workload of the individual (network) judges and the lack of funding for them to be able to do the job.³ As far as I know the majority of acting network judges in Member States do this job on top of their 'normal' workload as a judge.

Another problem can arise when it comes to the translation of documents. There can be a discussion about the costs of the translation: should they be paid by the requesting court or by the requested court? Or should they be paid by (one of) the parties? And: into which language? Is a certified translation needed and/or demanded by the requested court in the other Member State?

Specific problems encountered in judicial communication related to the "overriding mechanism" of article 11 (6)-(8) of the Regulation

When it comes to judicial communication related to this "overriding mechanism" the main problem is non-compliance. In practice, in very few cases the decision of non-return of a child on the basis of Article 13 of the 1980 Hague Convention and the relevant documents are communicated to the court of the habitual residence of the child immediately before the wrongful removal. And thus, very few "overriding proceedings" are effectuated.

For a more extended description of this problem, I refer to the findings in the research project of professor Beaumont and others in the article "Conflicts of EU courts on child abduction: the reality of Article 11(6)-(8) Brussels IIa proceedings across the EU"⁴. In this article, the authors reveal how infrequently used and largely ineffective the Article 11(6)-(8) system is. They also make proposals for law reform in the current revision of the Brussels IIa Regulation.

I am afraid that this reality has a lot to do with the lack of awareness of this mechanism among professionals within the Member States. If a child was abducted from a small village in the Netherlands to Warsaw, Poland, the local court in that region in the Netherlands might one day receive a non-return court order from the Polish court. The local family judge in the Netherlands should be aware of what article 11 (6)-(8) Brussels IIa expects him or her to do, in order to make sure that the documents are not only sent and received but recognized as such and treated according to the prescriptions of article 11(7) and (8) of the Regulation. This is not an easy job since the text of the Regulation is not very clear on this point. Training, education and exchange between professionals about their experience with this mechanism in practice would be of great help.

4. BEST PRACTICES: DIRECT JUDICIAL COMMUNICATION

According to my own professional experience the fastest, securest and most tailor-fit solutions to problems encountered when dealing with cross-border family cases are found through direct judicial cooperation and communication. I will now describe the – in my eyes – best practices when it comes to direct judicial communication.

³ Please note that in many cases, as described later in Chapter 4 of this Briefing note, we do get swift answers and actions from our colleague Liaison Judges in other Member States.

⁴ Beaumont, P., Walker, L. & Holliday, J. (2016). 'Conflicts of EU courts on child abduction: the reality of Article 11(6)-(8) Brussels IIa proceedings across the EU'. *Journal of Private International Law*, vol 12, no. 2, pp. 211-260.

Liaison- or Network Judges

Since a number of years, each Member State has designated one or more family judges who are, in person, members of the worldwide International Hague Network of Judges (hereinafter: IHNJ) established under the auspices of the Hague Conference on Private International Law (hereinafter: HCCH).⁵

All members of the IHNJ are designated as such by their State and act as a channel of communication and liaison with their national Central Authorities, with other judges within their jurisdictions and with judges in other Contracting States. They are all actual practitioners and specialists in (international) family law, fluent in English (both written and oral) and very much aware of the importance and urgency of direct judicial communication. The vast majority of the EU Member States have designated at least one judge as IHNJ member.

The Netherlands has designated two so-called 'Liaison Judges International Child Protection'. At present, the author of this Briefing acts as one of these two liaison judges.

My personal experience is that most colleague IHNJ-judges in other EU Member States are very communicative, cooperative and always 'on-line' when I contact them. We know each other personally since we meet on a regular basis at international conferences, seminars and other professional meetings. These personal contacts very much facilitate the professional contacts when it comes to direct judicial communication in individual cross-border family cases. There is a solid basis of mutual trust and understanding among the liaison judges of the Member States. We know and trust that we all do the same job from the same perspective, with the same intention: serving the best interest of the child, and, last but not least, at least for IHNJ judges from EU Member States, according to the rules and principles of the Brussels IIa Regulation.

In my view it is a best practice that, when it comes to judicial communication and cooperation in matters of cross-border family law under the Brussels IIa Regulation, the IHNJ judges 'do the job'. The proposed Recast of the Regulation now refers to the European Judicial Network in civil and commercial matters (hereinafter: EJM). I must remark that EJM is a network for judges in the broad field of civil and commercial matters, whereas the IHNJ judges are all specialised and practising family judges. In some Member States the EJM judge may be very well specialised in cross-border family law. But this is not the case in every Member State. It is therefore preferable that reference is made to this already existing and very well-functioning specialised Network of family judges, and that EU Member States are encouraged to designate at least one judge as member of the IHNJ. Alternatively, a similar list for specialised family judges designated by each of the Member States could be created and referred to in the Regulation. I will suggest in Chapter 5 of this Briefing note that the EU creates such a list, based on the IHNJ Network, and that the Regulation refers to this specialised Network.

Example of establishment of direct judicial communication in a specific cross border family case

Let's suppose, in the example under 2 relating to the transfer of jurisdiction according to article 15 of the Regulation, the case is being handled by the local family judge of the District court of Midden-Nederland, the Netherlands. This judge wants to transfer jurisdiction to the competent court in Germany.

The judge of Midden-Nederland does not know how to go about and needs assistance in order to establish contact with the competent judge(s) in Germany. He or she will therefore contact the Liaison Judge International Child Protection for the Netherlands either by phone or by e-mail. In this first contact with the Liaison Judge, the local judge will briefly describe the case and ask the Liaison Judge to assist in getting in contact with the competent judge,

⁵ For more information on the IHNH : <https://www.hcch.net/en/news-archive/details/?varevent=426>

in the example, in Munich. If this is done by phone, the request will later be confirmed by e-mail so the communication is recorded and can be reported to the parties involved.

The Liaison Judge for the Netherlands will then directly write an e-mail to the IHNJ judge(s) of, in this case, Germany. This will be done by e-mail, in 99% of the cases in English. In the example, the Dutch Liaison Judge will ask the colleague Liaison Judge(s) of Germany, firstly, to point out which judge(s) in Germany would be competent, in the case of transfer of jurisdiction, to assume jurisdiction according to article 15 of the Regulation. Second, we would ask the German Liaison Judge to contact the competent German court and to find a judge who is able and ready to decide whether or not to accept jurisdiction in accordance with article 15 (5) of the Regulation. The latter judge might need some more information before deciding. He or she can e-mail these questions in German to the German Liaison Judge. The German Liaison Judge will translate them into English and send them by e-mail to the Dutch Liaison Judge. The Dutch Liaison Judge will, if necessary, translate these questions into Dutch and pass them on to the (still) competent local judge of the court of Midden-Nederland. The latter will answer the questions in Dutch, which will be translated by the Liaison Judge and sent to the German Liaison Judge, and so forth.

Thus, the Liaison Judges not only act as a 'letter box' but also as an active intermediate, communicator, advisor and translator. They facilitate the cross-border judicial communication in every possible way.

My experience is that we mostly get very swift answers and reactions from our colleague Liaison Judges of most of the Member States (some exceptions do occur, unfortunately). The kind of judicial communication described will mostly be set up within a matter of days.

Facilitating the functioning of the Liaison Judges

As for the two liaison judges for the Netherlands, the Council for the Judiciary provides for resources so that they have their own, secured e-mail address, and a staff of five legal assistants who are (each of them part time) available for executing the 'Liaison-tasks'. This team is called the Dutch Office Liaison Judge International Child Protection (also referred to as "BLIK"). The legal staff checks our special 'BLIK' e-mail inbox permanently and answers phone-calls immediately. This form of assistance by legal staff is of primary interest since the judges are not always immediately available, for example when we are in a court hearing. BLIK is thus capable of answering questions and requests from colleague-judges in the Netherlands as well as from colleague-judges in other Member States within one, maybe two days.

The resources available also provide judges and legal staff of BLIK the effective opportunity to visit conferences and other professional meetings with our colleague Liaison- and family judges in other Member States. These meetings very much contribute to mutual understanding and trust. This, in my view, is absolutely necessary in order to handle cross-border family cases swiftly and effectively. As mentioned before, time is of the essence when it comes to cross-border family cases involving children. Delay in proceedings means uncertainty and instability for the children involved.

5. APPRAISAL OF THE RECAST PROPOSAL

The problems encountered and described above can – in my view – only to a limited extent be addressed and solved by amending the Brussels IIa Regulation. As mentioned before, most of the problems arise from a lack of awareness and/or time and/or support for the professionals in the Member States dealing with cross-border cases.

Now a few of the changes proposed in the Commission recast proposal do imply an improvement and enhance judicial cooperation and communication, and will be examined in this Chapter.

The proposed Article 14 (6) of the Regulation

“The authorities shall cooperate for the purposes of this Article, (...) or through the European Judicial Network in civil and commercial matters.”

The addition of the possibility of direct judicial communication is, in my opinion, an improvement. However, instead of referring to the EJM (European Judicial Network in civil and commercial matters), I would suggest that reference is made to the IHNJ: *“or through the International Hague Network Judges designated by the Member States involved”*.

As explained before, EJM is a network for judges in the broad field of civil and commercial matters whereas the IHNJ judges are all specialised and practising family judges. It is therefore preferable that reference is made to these specialised family network judges. Alternatively, a similar list of specialised family judges designated by each of the Member States could be created and referred to in Article 14 (and Articles 25 (1)(a) and 26 (2)) of the Regulation as “the Brussels IIa Network of Judges” (or some other name). I suggest that the present IHNJ judges are also appointed as network judge for their own Member State under the “Brussels IIA Network of Judges” since they are the ones who have the indispensable knowledge and experience for this function. Those (very few) EU Member States who did not yet appoint a judge to the IHNJ Network should be encouraged to do so. In any case, if such a new EU-Network would be created, every EU Member State should be obliged to designate a specialised and experienced judge to the “Brussels IIA Network of Judges”.

The proposed Article 25 (1) (a) of the Regulation

“(1) A court cannot refuse to return a child on the basis of point (b) of the first paragraph of Article 13 of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return.

To this end the court shall:

(a) cooperate with the competent authorities of the Member State where the child was habitually resident immediately before the wrongful removal or retention, either directly, with the assistance of the Central Authorities, or through the European Judicial Network in civil and commercial matters, (...)”

The principle that a court that envisages to refuse the return on the basis of Article 13 (1) (b) of the 1980 Hague Convention shall first investigate whether adequate arrangements have been made to secure the protection of the child after his or her return to the Member State where the child was habitually resident immediately before the wrongful removal or retention, is, in my opinion, a very good one. All Member States have good provisions for the protection of children, and judges should not too easily conclude that the child will face a grave risk in the Member State where the child was habitually resident immediately before the wrongful removal or retention.

However, the general obligation to “cooperate” is, in my opinion, not clear enough. What does ‘cooperate’ in this context mean? Does it only mean that the court should communicate/inform in general about the possibilities of protection for the child in the Member State of habitual residence? Or does it mean that the court should actively investigate these possibilities in the context of the circumstances of the case? And what about the role and obligation of the authorities in the Member State where the child was habitually resident immediately before the wrongful removal or retention?

As described before, unfortunately, it sometimes happens that questions to colleagues in other Member States remain unanswered. What to do in such a case? And if no cooperation is possible, can the court still refuse the return of the child on the basis of Article 13 (1) (b) of the 1980 Hague Convention?

There is another objection to the proposed text. According to the proposed Article 23 of the Regulation, in incoming cases of international child abduction, each instance shall give its

decision no later than six weeks after the application. An investigation on the possibilities of protection for the child in the Member State where the child was habitually resident immediately before the wrongful removal will surely cause a delay. It is therefore necessary that such investigations are set to a strict time limit.

I would suggest the following text for Article 25(1), second subparagraph:

To this end the court shall:

- (a) *investigate the possibilities for protecting the child against the grave risk of harm in the specific case in the Member State where the child was habitually resident immediately before the wrongful removal or retention. It shall do so in cooperation with the competent authorities of the Member State where the child was habitually resident immediately before the wrongful removal or retention, either directly, with the assistance of the Central Authorities, or through the Brussels IIa Network of Judges⁶. This investigation shall be conducted expeditiously and shall take no longer than two weeks. If no contact has been established with the Authorities of the other Member State within two weeks, the court referred to under (1) will give its decision with no further delay, and (...)*"

The proposed Article 26 (2) of the Regulation

"Where a decision refusing to return the child was based on at least one of the grounds referred to in Article 13 of the 1980 Hague Convention, the court shall immediately either directly through its Central Authority or the European Judicial Network in civil and commercial matters transmit a copy of that decision (...)

The decision shall be accompanied by a translation in accordance with article 69 into the official language, or one of the official languages, of that Member State or into any other language that the Member State expressly accepts."

As to the reference to the EJN, I refer to my earlier remark. Furthermore, this provision makes it clear that the court that has taken the decision refusing to return the child has the obligation to provide (and therefor pay the costs of) the translation. This is a considerable improvement.

6. TO CONCLUDE: OIL IN THE MACHINE

Despite some critical remarks and observations from my daily practice as a Liaison Judge, I would say that direct international judicial cooperation and communication in most cases acts as 'oil in the machine' of the application of the Regulation, especially when it comes to the practical application of the mechanisms under the present articles 11 (6) – (8), 15, 19 and 56 of the Regulation.

International judicial cooperation and communication should be initiated and/or facilitated by specially designated Network- or Liaison judges in each Member State. The designated judges should be practicing, experienced and internationally oriented family judges. Furthermore, these Network- or Liaison judges should be facilitated and equipped by the governments of the Member States to do the job.

Awareness and knowledge of the mechanisms under the Regulation, and of the most effective ways of executing these mechanisms in practice, should be raised among family judges in Member States by giving them training and education.

⁶ Alternatively, reference could be made to the IHNJ Network or, in the case of absence of an IHNJ judge, to the EJN.

THE LINK WITH INTERNATIONAL INSTRUMENTS AND THIRD COUNTRIES

Permanent Bureau of the Hague Conference on Private International Law

KEY FINDINGS

- The 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention seek to establish a coherent international legal order to effectively protect children in cross-border situations. It is important that a coherent international legal order is maintained and that co-ordination is achieved between the global and regional instruments.
- Most amendments brought about by the Proposal for a recast of the Brussels II a Regulation¹ take due account of the spirit and terms of the two Hague Conventions as well as the Conclusions and Recommendations of meetings of the Special Commission that periodically reviews their practical operation.
- Although some provisions of the Proposal would lead to differences between the Regulation and the two aforementioned Conventions (*e.g.*, revision of the grounds of non-recognition, abolishment of *exequatur*), there would not be a negative impact on the international legal order.
- Various amendments seek to address certain challenges that EU Member States face in relation to the practical operation of the Brussels IIa Regulation, some of which are comparable to those experienced by Contracting States to the two aforementioned Conventions, such as undue delays in the administrative and judicial procedures in relation to the return of a wrongfully removed or retained child. These amendments are to be supported in that they have the potential to improve the practical operation of the two relevant Hague Conventions and may encourage other Contracting States outside the EU to replicate these improvements in their implementation of these Conventions.
- The suggested amendment concerning the ability for courts to take provisional, including protective, measures allows a more effective and continuous protection of the child, including in a situation where a court intends to order the return of a wrongfully removed or retained child to the child's State of habitual residence. It also aligns the Brussels IIa Regulation and the 1996 Hague Child Protection Convention in urgent cases.
- The Proposal clarifies the interrelationship between the Brussels IIa Regulation and the two Conventions. Clear indications on the articulation of these three instruments contribute to legal certainty by making it easier for government officials, judges, lawyers and other actors to understand the interplay between the international legal instruments in individual cases.

¹ Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), Brussels, 30.6.2016
COM(2016) 411 final, 2016/0190 (CNS).

1. INTRODUCTION

About the Hague Conference on Private International Law and the Permanent Bureau

The Hague Conference on Private International Law (hereinafter referred to as the “Hague Conference”) is an intergovernmental organisation whose origin dates back to 1893. As at 20 October 2016, the organisation is comprised of 82 Members: 81 Member States representing all continents and different legal traditions and, since 2007, one Member Organisation, namely the European Union (EU).² In addition to the EU, all EU Member States are Members of the Hague Conference.

The mandate of the Hague Conference is the “progressive unification of the rules of private international law” (Art. 1 of its Statute),³ which it pursues principally through the conclusion of multilateral Conventions and the provision of support to their sound implementation and practical operation. Since 1951, the Hague Conference has concluded 38 Conventions, to which any State, and in the case of more recent Conventions also Regional Economic Integration Organisations (such as the EU⁴), may become a party. The Hague Conventions cover the following areas:

- international protection of children, family and property relations;
- international legal co-operation and litigation; and
- international commercial and finance law.

The Permanent Bureau is the Secretariat of the Hague Conference and is charged with coordinating its activities in these areas (Arts 5-7 of the Statute).

Relevant legal instruments of the Hague Conference

In relation to the Proposal for a recast of the Brussels IIa Regulation (hereinafter referred to as the “Recast Proposal”), two Hague Conventions are particularly relevant, namely

- the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (hereinafter referred to as the “1980 Convention”) and
- the *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (hereinafter referred to as the “1996 Convention”).

The 1980 Convention seeks to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access. With 95 Contracting States (as of 20 October 2016), the 1980 Convention can be considered a universally accepted standard to combat international child abduction.⁵

The 1996 Convention, with currently 45 Contracting States (as of 20 October 2016)⁶ provides rules for determining international jurisdiction, the applicable law and the cross-border recognition and enforcement of measures to protect children and their property in a

² The latest State to become a Member of the Hague Conference is the Kingdom of Saudi Arabia. A list of all the Members of the Hague Conference is available at < www.hcch.net >, under “HCCH Members” (incl. map).

³ The Statute of the Hague Conference is accessible at < www.hcch.net > under “Statute, Rules, and Regulations”.

⁴ The EU approved the *Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations* and the *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* respectively in 2010 and 2014. The *Convention of 30 June 2005 on Choice of Court Agreements* was approved by the EU in 2015.

⁵ More information on the 1980 Convention is available at < www.hcch.net > in the Section “Child Abduction”.

⁶ Two of the 45 States have, so far, only signed the 1996 Hague Child Protection Convention, Argentina and the United States of America.

cross-border context. The Convention also provides a scheme for effective cross-border co-operation among relevant authorities.⁷

All EU Member States are Contracting States to the 1980 and the 1996 Conventions.

In general, it can be noted that the 1980 and 1996 Conventions seek to establish a coherent international legal order to effectively protect children in cross-border situations. It is important that the Brussels IIa Regulation remains interwoven and consistent with international rules and standards that apply at the global level and that co-ordination is achieved between the global and regional instruments.

Limitations to the scope of this briefing note

The content of this note represents the views of the Permanent Bureau; it does not necessarily represent the views of the Members of the Hague Conference (the Permanent Bureau has not consulted any Member of the Hague Conference in this matter).

This contribution only refers to the Recast Proposal in relation to the 1980 and 1996 Conventions.

2. THE RECAST PROPOSAL IN RELATION TO THE 1980 AND 1996 CONVENTIONS

Relationship of the Brussels IIa Regulation with the 1980 and 1996 Conventions

The relationship of the Brussels IIa Regulation and the 1980 and 1996 Conventions is currently ensured by Articles 60(e) and 61 of the Brussels IIa Regulation. In Articles 72, 74, 75 and 76 of the Recast Proposal, this complementarity is maintained with a few additions that clarify the relationship between the Regulation and the two Conventions.

The provisions in the Recast Proposal on the articulation of the 1980 and 1996 Conventions and the Brussels IIa Regulation are welcomed in that they provide clarity on how the applicable instruments interact. In particular, Article 75(3) of the Recast Proposal confirms that the law applicable to parental responsibility matters is determined by the 1996 Convention (also in EU cases to which the Brussels IIa Regulation applies). It is suggested that a separate Chapter on applicable law to parental responsibility could be inserted after the provisions on jurisdiction (Chapter II) and before the provisions on Child Abduction (Chapter III), using the same drafting technique as applied in the Regulation on Maintenance Obligations.⁸

Return proceedings in cases of international child abduction

1. Refusal of the return of a child under Article 13(1)(b) of the 1980 Convention

The Recast Proposal includes two additional requirements concerning the procedure for the return of the child in a case in which the "grave risk exception" is raised (Art. 13(1)(b) of the 1980 Convention). Article 25(1) requires the court to "(a) co-operate with the competent authorities of the Member State where the child was habitually resident immediately before the wrongful removal or retention, either directly, with the assistance of Central Authorities or through the European Judicial Network in civil and commercial matters, and (b) take provisional, including protective, measures [...], where appropriate".

⁷ More information on the 1996 Hague Convention is available at < www.hcch.net > in the Section "Child Abduction".

⁸ In Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, a specific Chapter, Chapter III, deals with applicable law. In this Chapter, Art. 15 ("Determination of the applicable law") provides that the law applicable to maintenance obligations is determined in accordance with the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations.

Both provisions are useful additions and will produce positive effects in the consideration of the return of children in international child abduction cases.

Co-operation with Central Authorities and / or (network) judges is important for the court seized with the return proceedings to obtain necessary information about adequate and effective measures of protection for the child without causing undue delay in the consideration of the case. In particular, direct judicial communications (communications between sitting judges concerning a specific case) can be used to establish, *i.a.*, whether protective measures are available for the child in the State to which the child would be returned and to ensure that the available protective measures are in place in that State before a return is ordered.⁹

The ability of the court to take, where appropriate, provisional, including protective, measures in relation to the child may be of particular importance in cases where Article 13(1)(b) of the 1980 Convention is raised. The ability of the court to order protective measures that, as modified in the Recast Proposal, can also "travel with the child" to the State of habitual residence, if necessary, to enable a safe return of the child,¹⁰ is a welcomed step in that it contributes to a more effective protection of the child and aligns the Brussels IIa Regulation with the 1996 Convention. (Further information on this aspect is included below.)

Both requirements contribute to a more effective practical operation of the 1980 Convention and it is hoped that courts located in EU Member States consider applying them also in cases where the 1980 Convention is applicable, but not the Brussels IIa Regulation.

2. Specific timeframes in relation to the return of children under the 1980 Convention

The fundamental principle of the 1980 Convention, that return will protect the child from the harmful effects of the abduction, can only be upheld where the child is returned quickly.

The 1980 Convention does, however, not stipulate a specific timeframe within which an application for return should be processed by the receiving Central Authority, or by which a decision is to be rendered by the competent court at both first instance and the appeals level.¹¹

At several Special Commission meetings on the practical operation of the 1980 Convention, Contracting States have been encouraged to undertake all possible efforts to expedite proceedings,¹² including by organising their administrative¹³ and judicial procedures¹⁴ and

⁹ See the publication "Direct Judicial Communications - Emerging Guidance regarding the development of the International Hague Network of Judges and General Principles for Judicial Communications, including commonly accepted safeguards for Direct Judicial Communications in specific cases, within the context of the International Hague Network of Judges", available at < www.hcch.net > in the Section "Child Abduction".

¹⁰ Recast Proposal, Explanatory Memorandum, p. 10.

¹¹ Art. 11(2) of the 1980 Convention merely states that where a decision has not been reached within six weeks from the commencement of the proceedings, the applicant or the Central Authority of the requested State (on its own initiative or if asked by the Central Authority of the requesting State) have the right to request a statement of the reason for the delay.

¹² *E.g.*, it was noted at the Second Special Commission meeting in 1993 that "[d]elay in legal proceedings is a major cause of difficulties in the operation of the Convention. All possible efforts should be made to expedite such proceedings"; see the Report of the Second Special Commission meeting of January 1993, Conclusion No 7. Conclusions and Recommendations as well as Reports of Special Commission meetings are available at < www.hcch.net > in the Section "Child Abduction".

¹³ In relation to Central Authorities, it was recommended that they acknowledge receipt of an application immediately, endeavour to provide follow-up information rapidly, reply promptly to communications from other Central Authorities and, as far as possible, use modern rapid means of communication in order to expedite proceedings; see, *e.g.*, the Conclusions of the Fourth Special Commission meeting of March 2001. See also the "Guide to Good Practice on Central Authority Practice", Chapter 1, in particular in 1.5. All Guides to Good Practices are available at < www.hcch.net > in the Section "Publications".

¹⁴ In relation to the judicial process, it was noted that Contracting States have an obligation to process return applications expeditiously which also extends to appeal procedures. In particular, Contracting States have been urged to set and adhere to timetables that ensure the speedy determination of return applications; see, *e.g.*, the

setting strict timeframes in such a way as to ensure the effective operation of the Convention.¹⁵ The requirement to act expeditiously in all stages of the return process is also emphasised, and practical recommendations provided, in several “Guides to Good Practice”, published by the Hague Conference.¹⁶

Articles 23(1) and 63(1)(g) of the Recast Proposal envisages a maximum period of 18 weeks for all stages of the return application until a decision on return or non-return is reached, including the Central Authority stage (6 weeks), the proceedings before the first instance court (6 weeks), and the appeal stage (6 weeks).

The new timeframe, which now includes all stages of the process, is more suitable to achieve speedy, prompt and expeditious actions which are vital for the successful operation of the 1980 Convention. As noted in the Recast Proposal, the projected timeframe is realistic to also allow courts to protect the right of the defendant to a fair trial.¹⁷

It is hoped that the competent authorities in the EU Member States will consider applying these timeframes also in cases where the 1980 Convention is applicable, but not the Brussels IIa Regulation and that other Contracting States outside the EU will improve their implementation of the Convention in the same fashion.

3. Limitation of the number of appeals against a return order

The aforementioned Convention requirement of expeditious proceedings applies equally to the appeal process.¹⁸ However, experience has shown that the appeal process in return cases can cause long delays before a final determination of the matter. This may be so even where a first instance decision has been made promptly.

It should also be noted that the enforcement of a return order can be delayed because several levels of legal challenge exist and it is often not possible to enforce a return order until these have all been exhausted.

Article 25(4) of the Recast Proposal, stipulating that only one appeal should be possible against the decision ordering or refusing return, addresses these concerns. A similar suggestion is included in the “Guide to Good Practice on Implementing Measures”, stating that “[p]rovisions to encourage speed within the appeals process may include limiting the time for appeal from an adverse decision, requiring permission for appeal and specifying the court *or limiting the number of courts to which appeal can be made.*”¹⁹

Conclusions and Recommendations from the Fourth and the Fifth Special Commission meetings in 2001 and, respectively, 2006. In the “Guide to Good Practice on Enforcement”, it is stated in Chapter 2, para. 52 that “[i]n view of the requirement of promptness underlying the Convention, it is important to establish a timeframe for the courts”.

¹⁵ The First Special Commission meeting in 1989 “encourage[d] States, whether contemplating becoming Parties to the Convention or already Parties, to organize their legal and procedural structures in such a way as to ensure the effective operation of the Convention and to give their Central Authorities adequate powers to play a dynamic role, as well as the qualified personnel and resources, including modern means of communication, needed in order expeditiously to handle requests for return of children or for access”; see the Conclusions of this meeting. The Sixth Special Commission meeting in 2011/2012, noted delays, *i.a.*, caused in relation to the operation of Article 15 of the 1980 Convention.

¹⁶ *E.g.*, in the “Guide to Good Practice on Central Authority Practice”, on “Implementing Measures”, on “Enforcement” and on “Mediation”, available at < www.hcch.net > in the Section “Publications”.

¹⁷ See the Recast Proposal, Explanatory Memorandum, p. 13.

¹⁸ At the Fourth and the Fifth Special Commission meetings in 2001 and, respectively, 2006 it was concluded: “The Special Commission underscores the obligation (Art. 11) of Contracting States to process return applications expeditiously, and that this obligation extends also to appeal procedures.”

¹⁹ Emphasis added. See the “Guide to Good Practice on Implementing Measures”, Chapter 6, para. 6.6.; see also the “Guide to Good Practice on Enforcement”, Chapter 2.

4. "Overriding return mechanism"

The Permanent Bureau has noted the proposed changes to the overriding return mechanism and looks forward to following the discussions on the proposed amendments.

5. Concentration of jurisdiction

Article 22 of the Recast Proposal obliges EU Member States to concentrate jurisdiction in international child abduction cases in a limited number of courts in a manner coherent with the structure of their legal system.²⁰

As shown by the experience of more than 40 Contracting States to the 1980 Convention, concentration of jurisdiction produces an accumulation of a high level of understanding of and experience with the 1980 Convention among the judges concerned, contributes to the development of mutual confidence between judges, mitigates delay in the processing of cases, and leads to greater consistency in practice by judges.²¹ Against the background that a lack of specialised courts may lead to inconsistent, incorrect and / or delayed return or non-return decisions, these advantages have been promoted and recognised at various Special Commission meetings.²² Taking these precedents into account, the Permanent Bureau welcomes the proposed requirement in Article 22 of the Recast Proposal.

6. Mediation in cases of wrongful removal or retention of a child

Article 23(2) of the Recast Proposal requires the court, "as early as possible during the proceedings", to "examine whether the parties are willing to engage in mediation to find, in the best interests of the child, an agreed solution, provided that this does not unduly delay the proceedings".

The inclusion of this explicit provision on mediation in return proceedings reflects the trend that Central Authorities and courts play an increasingly important role in initiating an amicable resolution of international child abduction cases,²³ including through mediation. It has, however, been recognised that measures employed to assist in securing the voluntary return of the child or to bring about an amicable resolution of the issues should not result in any undue delay in return proceedings.²⁴

Article 23(2) of the Recast Proposal responds adequately to this concern in that the court is not only required to consider the possibility of mediation with a view to finding, in the best interest of the child, an agreed solution, but to do so *as early as possible during the proceedings*, and to only agree to a mediation process on the condition that it does *not unduly delay* the proceedings.

7. Provisional enforcement of a return order

Article 25(3) of the Recast Proposal explicitly invites the court to consider whether a decision ordering return should be provisionally enforceable, notwithstanding any appeal, even if national law does not provide for such provisional enforceability.

²⁰ See the Recast Proposal, Explanatory Memorandum, p. 11.

²¹ This has been confirmed in reports submitted by judges in the Judges' Newsletter, Volume XX (Summer – Autumn 2013), available at < www.hcch.net > in the Section "Child Abduction".

²² See, e.g., the Conclusions and Recommendations of the Fourth Special Commission of 2001, para. 3.1. The "Guide to Good Practice on Implementing Measures" notes, in Chapter 5, para. 5.1, that "[w]here possible, and practical, under domestic law, implementing legislation may provide for the concentration of Hague return cases in a limited number of courts".

²³ See also Art. 7(2)(c) of the 1980 Convention.

²⁴ See the Conclusions and Recommendation of the Fourth and the Fifth Special Commission meetings in 2001 and 2006, respectively. See also the "Guide to Good Practice on Mediation", *i.a.* in Chapter 2.1.

In this context, it should be noted that the child's best interests will be most effectively served if coercive measures are only applied once it is clear that the return order will not be changed or annulled. This is only true, however, if the proceedings are quick enough that they do not contribute to the settling of the child in the new environment, with the ensuing risk of harm in case of a subsequent return.²⁵

Against this background, the "Guide to Good Practice on Enforcement" highlights the obligation of Contracting States to create conditions which enable their courts to reach a final decision, *i.e.*, one which is no longer subject to ordinary legal challenge, expeditiously.²⁶ While coercive measures should preferably only be used to enforce a return order that is final, it is, however, noted in the Guide that the possibility of immediate or provisional enforceability of a return order which is not yet final should nevertheless exist in order to respond appropriately to the circumstances of each case.²⁷

The wording in Article 25(3) adequately reflects these considerations in that the provision encourages the court, without imposing an obligation, to consider provisional enforceability by taking into account the circumstances of the case.

Provisional, including protective, measures in respect of a child or property of that child

Article 12 of the Recast Proposal ensures that protective measures, which the court of the Member State where the child is present takes in urgent cases in respect of that child, can be recognised by operation of law in the Member State where the child is habitually resident. These measures would lapse as soon as the courts of that State have taken the measures required by the situation.

This amendment is welcomed in that it renders the protection of the child across borders more effective and aligns the Brussels IIa Regulation with Article 11 of the 1996 Convention. According to Article 11 of the 1996 Convention, the authorities of any Contracting State in whose territory the child or property belonging to the child is present, have jurisdiction, in all cases of urgency, to take any necessary measures of protection in relation to that child or the child's property. These measures can have extra-territorial effect and, therefore, guarantee the continued protection of the child.²⁸

The extra-territorial effect of Article 11 of the 1996 Convention ensures, for example, that measures of protection taken to ensure the safe return of an abducted child, will be recognised and, if necessary, enforced, in the State to which the child will be returned, and, thus, that the effective and adequate protection of the child is guaranteed upon the child's return to that State. The fact that the Brussels IIa Regulation would follow the example of the 1996 Convention as suggested in Articles 25(1)(b) and 12 of the Recast Proposal is also welcomed in this context. It is hoped that these provisions will be used increasingly by courts seized with return proceedings to secure the safe return of the child to the State of habitual residence and ensure the child's continued protection until the authorities in that State have taken adequate protective measures.

The explicit invitation in Article 12(1) of the Recast Proposal to the authority that has taken the protective measures to inform the authority of the other Member State having jurisdiction as to the substance of the matter (either directly or through the Central

²⁵ "Guide to Good Practice on Enforcement", Chapter 3, para. 72.

²⁶ "Guide to Good Practice on Enforcement", Chapter 2, Principle 2.3 and Chapter 3, Principle 3.1.

²⁷ "Guide to Good Practice on Enforcement", Chapter 3, Principle 3.2.

²⁸ Measures of protection under Art. 11 of the 1996 Convention are entitled to recognition (by operation of law) and enforcement in accordance with the terms of Chapter IV (Arts 23 *et seq.*) of that Convention. They will lapse "as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken the measures required by the situation" (Art. 11(2) of the 1996 Convention), or, in the case of measures taken with regard to a child who is habitually resident in a non-Contracting State to the 1996 Convention, "in each Contracting State as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question" (Art. 11(3) of the 1996 Convention).

Authority) is a useful addition in that it ensures effective communication between the authorities in the two concerned States in cases where a child is in need of protection. Such communication is, in particular, useful to enable the State of the child's habitual residence to ensure that, where necessary, the situation of the child is investigated fully and any measures of protection required are taken for the long-term protection of the child.²⁹

Placement of the child in another State

The Recast Proposal includes a modification of the procedure to be followed in relation to cross-border placements in Article 65. One effect of this modification is that the procedure in the Brussels IIa Regulation would explicitly require the submission of a report on the child (Art. 65(1)) which would align this provision further with Article 33 of the 1996 Convention requiring the requesting authority to "transmit a report on the child together with the reasons for the proposed placement or provision of care" to the requested authority.

The proposed time limit of two months for the requested Member State to respond to the request for placement as suggested in Article 65(4) of the Recast Proposal, is to be welcomed since it will effectively reduce delays related to obtaining consent for placement decisions. This way, a long period of uncertainty which may be detrimental to the well-being of the child that is to be placed in institutional care or with a foster family, can be avoided.

The Recast Proposal addresses a concern that also exists in relation to the practical operation of Article 33 of the 1996 Convention, where an explicit timeframe is not included. It is hoped that EU Member States would apply the timeframe set in Article 65(4) of the Recast Proposal also in cross-border placements where the 1996 Convention is applicable, but not the Brussels IIa Regulation.

Hearing the child

Neither the 1996 Convention nor the 1980 Convention stipulate a general requirement to give the child who is capable of forming his or her own views a genuine and effective opportunity to express those views freely in the context of a judicial or administrative proceeding under these Conventions. Such general requirement is now included in Article 20 of the Recast Proposal, and reiterated in Article 24 of the Recast Proposal requiring the court, when applying Articles 12 and 13 of the 1980 Convention, to ensure that the child is given the opportunity to express his or her views.

The Recast Proposal rightly reflects the trend of giving children "a voice" in proceedings affecting them, in line with Article 12 of the UN Convention on the Rights of the Child and Article 24(1) of the Charter of Fundamental Rights of the European Union. The two relevant Hague Conventions do not prevent Contracting States from hearing children in proceedings affecting them in accordance with their national procedural rules regarding the hearing of the child. This is also confirmed in Article 23(2)(b) of the 1996 Convention that operates so as to allow a requested Contracting State to ensure that its fundamental principles in this regard will not be compromised when recognising a decision from another Contracting State.³⁰

²⁹ In the Practical Handbook on the 1996 Convention, Chapter 6., para. 6.10, it is stated: "In cases where necessary measures of protection have been taken in accordance with Art. 11, the judicial or administrative authority which has taken these measures may wish to communicate and co-operate with any other State it considers necessary in order to ensure the continued protection of the child. Such communication and co-operation may take place directly between competent authorities or, where appropriate, with the assistance of the relevant Central Authorities". The Practical Handbook on the 1996 Convention is available at < www.hcch.net > in the Section "Publications".

³⁰ The ground of refusal in Art. 23(2)(b) is directly inspired by Art. 12 of the Convention on the Rights of the Child. See P. Lagarde, "Explanatory Report on the 1996 Hague Child Protection Convention", *Proceedings of the Eighteenth Session (1996)*, Tome II, The Hague, SDU, 1998, para. 123 and the Practical Handbook on the 1996 Convention, Chapter 10, para. 10.6.

Grounds of non-recognition for decisions in matters of parental responsibility

The Permanent Bureau has noted the suggestion to delete the ground of non-recognition of a decision under Article 23 (b) of the Brussels IIa Regulation which provides for non-recognition “except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought” and for which a similar provision exists in the 1996 Convention (see Art. 23(2)b)). It is our understanding that if a decision were to be rendered without giving the child an opportunity to express his or her own views, the recognition of this decision shall be refused “if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child” (see Art. 38(1)(a) of the Recast Proposal).

Procedure for declaring a decision given in another Member State enforceable (“*exequatur*”)

As to the enforcement of measures taken in one Contracting State to the 1996 Convention, Article 26(1) of that Convention foresees that these measures should, upon request by an interested party, be declared enforceable or registered for the purpose of enforcement in another State according to the procedure provided in the law of that State. In Article 26(2), the 1996 Convention requires each Contracting State to apply to the declaration of enforceability or registration a simple and rapid procedure, leaving, however, this State entirely free as to the means for achieving this, without fixing a time period.³¹ By requesting a “simple and rapid procedure”, the drafters sought to avoid long delays that may occur until a decision can be enforced.

The Recast Proposal addresses this concern in that it abolishes the requirement of *exequatur* in States where such procedure is present, usually States of the Civil Law tradition, thus constituting a step towards further integration and harmonisation at the regional level. This amendment does not contradict the 1996 Convention, considering that it renders the enforcement of decisions in matters of parental responsibility more effective.

Resources of Central Authorities

The Central Authorities designated by the Contracting States under the 1980 and 1996 Conventions play a vital role in the effective operation of the Conventions. The Recast Proposal states in Article 61 that “Member States shall ensure that Central Authorities have adequate financial and human resources to enable them to carry out the obligations assigned to them under this Regulation”.

This requirement is consistent with recommendations made at several Special Commission meetings at which Contracting States were encouraged, *i.a.*, to give their Central Authorities adequate powers to play a dynamic role, and qualified personnel and resources needed in order to handle requests for return of children expeditiously.³²

Since Central Authorities designated under the Brussels IIa Regulation often coincide with those designated under the 1980 Convention³³ and the 1996 Convention, it can be assumed that the implementation of this requirement will have a positive effect on all cases processed by the Central Authorities falling within the scope of the two Conventions, in particular return applications under the 1980 Convention, regardless of whether the Brussels IIa Regulation is applicable to the specific case.

³¹ See the Explanatory Report on the 1996 Convention, (*ibid.*) at para. 132.

³² See, *e.g.*, the Conclusions and Recommendations of the First Special Commission meeting of 1989.

³³ According to the Brussels IIa Regulation Practice Guide, “[t]he ideal situation is that the authorities designated coincide with the authorities designated under the 1980 Convention. This could create synergies and allow the authorities to benefit from experience acquired by the authorities in managing other cases under the Convention”.

3. CONCLUSION

The Permanent Bureau has taken note of these important developments, which are to be seen in the context of a higher degree of regional integration within the EU. It is suggested that these important developments as they relate to the 1980 and 1996 Conventions in their global operation be shared with other Contracting States at the next meeting of the Special Commission to review the operation of these Conventions. As some of these developments contribute to the Brussels and Hague regimes to come closer together, their respective case law could influence each other's interpretation and operation.

WHAT ABOUT MATRIMONIAL MATTERS?

Prof Alegría BORRÁS

KEY FINDINGS

- The 2016 Commission proposal to recast the Brussels II a Regulation includes only minor modifications to the rules applicable in matrimonial matters. The Commission has preferred the policy option of retaining the *status quo*. In this briefing note, some doubts and proposals shall be raised in relation to different points.
- As to the scope of the regulation, this note will consider whether or not matrimonial matters should be maintained in the same instrument regulating the protection of children, as well as looking at the still open question of the inclusion of same sex marriage, private divorces and annulment.
- As to the objective grounds of jurisdiction, it could be discussed if their number has to be reduced and if a hierarchy has to be introduced among them.
- The paper suggests the introduction of party autonomy as a ground of jurisdiction, as it is in relation to applicable law.
- One important point to be considered is that any amendment to the Brussels IIa Regulation will require unanimity in Council according to Article 81(3) TFEU. The history of Brussels IIa and of the Rome III Regulation, which was adopted as a tool of enhanced cooperation, shows that unanimity is very difficult to reach in family law matters.

1. INTRODUCTION

It is not without good reason that the title of this briefing note is formulated as a question. In the Memorandum that accompanies the 2016 Proposal of the Commission for a recast of the Brussels IIa Regulation, it is stated that “for matrimonial matters the preferred policy option is retaining the *status quo*”.¹ Consequently, the greatest part of this Workshop is devoted to questions related to children, parental responsibility and child abduction.

In my view, some considerations have to be made also with regard to the rules on marriage and some modifications of these rules would also be needed. However, pursuant to Article 81(3) TFEU, this requires the unanimous will of the Member States and this is no easy task when dealing with such a sensitive matter. From a scientific point of view, the European Group on Private International Law (usually known as the GEDIP, by the French name)² has prepared a draft on divorce at its meeting in Luxembourg in 2015.³ In the meeting held in Milan in September 2016, the Group did not continue studying the draft on divorce and

¹ Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), document COM(2016)411/2, of 30 June 2016.

² Its function is to study points of convergence between private international Law and European Union law. For proceedings since 1991, see notes by J.D. González Campos, A. Borrás and F.J. Garcimartín in *Revista Española de Derecho internacional*. The Group's website may also be consulted (<http://www.drt.icl.ac.be/gedip>) and the volume *Building European private international law. Twenty years' work by GEDIP* (M. Fallon, P. Kinsch and Ch. Kohler, eds), Intersentia, Mortsel, 2011.

³ Borrás, A. Garcimartín, F.J., “25.^a Reunión del Grupo Europeo de Derecho Internacional Privado (Luxemburgo, 18 A 20 De Septiembre De 2015)”, *Revista Española de Derecho Internacional*, Vol. 68/1, 2016, pp. 249-253.

concentrated efforts on studying and proposing some modifications to the Commission proposal on questions related to children.

I shall examine the current situation on matrimonial matters, in order to draw some critical considerations and propose some possible changes⁴.

2. THE SCOPE OF THE REGULATION

The first group of considerations relates to the inclusion of matrimonial matters in Brussels IIa, together with parental responsibility, and to the need to clarify issues related to different points.

Matrimonial matters and parental responsibility in the same instrument?

The rules on jurisdiction in matrimonial matters have been maintained without change since 1998, when the Convention on jurisdiction and the recognition and enforcement of judgments in matrimonial matters was adopted (the 'Brussels II Convention') and the same rules were maintained without almost any changes in Regulation 1347/2000 (the 'Brussels II Regulation') and in Regulation 2201/2003 (the 'Brussels IIa Regulation'). But, in parallel, Regulation 2201/2003 profoundly amended the rules on child protection. And now, the situation is repeating itself with the 2016 Proposal of the Commission. In this context, it is noteworthy that the 2016 proposal follows the withdrawal of the previous Commission proposal to recast the Brussels IIa Regulation, which was put forward in 2006⁵ and which suggested some amendments to the rules on matrimonial matters: at the time, the Commission was faced with the impossibility of reaching the required unanimity in Council.

The fact that the rules on jurisdiction have been maintained without any change means that the comments made on them in 1998 continue to be relevant.⁶ The internal rules on matrimonial matters existing in the different member States, which are very jealous of their sovereignty on family law matters, have not been modified, nor has a unification of the conflict-of-laws rules taken place, with the consequence that forum shopping remains possible as a consequence of the alternative grounds of jurisdiction in the Brussels IIa Regulation. The Commission proposal aiming to solve this problem did not reach unanimity and Regulation 1259/2010 (the 'Rome III Regulation') has only partially given a solution, as it is only implementing enhanced cooperation among some member States in the area of the law applicable to divorce and legal separation, following, in part, the 2006 proposal of the Commission.⁷ It is, without any doubt, the need for a free circulation of decisions expressed by the European citizens that has been at the basis of these achievements. But, as it has been said in the previous paragraph, the 2016 proposal is less ambitious, as it is not easy to reach unanimity.

If the regulation of matrimonial matters and protection of children do not advance in parallel, and the protection of children is not limited to children of the couple that divorces, then why maintain both matters in the same text? Moreover, while the Brussels IIa Regulation is limited to jurisdiction, recognition and enforcement, and does not address

⁴ Really, these considerations have their origin in Borrás, A., "Grounds of jurisdiction in matrimonial matters: recasting the Brussels IIa Regulation", *Nederlands Internationaal Privaatrecht (NIPR)*, 2015, 1, pp. 3-9.

⁵ Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, document COM (2006) 399 final, of 17 July 2006.

⁶ The point must be made that the Explanatory Report was approved by the Working Group which had prepared the 1998 Convention, and for this reason the ideas, differences and discussions of the Member States are synthesised. It is not necessary the personal opinion of the Rapporteur.

⁷ Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, document COM (2006) 399 final, of 17 July 2006.

issues of applicable law, the most recent texts in the Union (such as successions,⁸ maintenance obligations⁹ or matrimonial property regimes¹⁰) follow the same line as the Hague Conventions and refer to jurisdiction, applicable law, recognition and enforcement of decisions and cooperation between authorities. This would also be good for matrimonial matters.

It could be argued that not all Member States are able or prepared to advance at the same speed in the field of matrimonial matters, as clearly shown by the adoption of the Rome III Regulation establishing enhanced cooperation. However, it would be really good to have a complete and separate text, including, as it happens in other fields, rules to facilitate the relationship with the Regulation on parental responsibility.

The material scope of the Regulation

Art. 1 determines the scope of the Regulation. In the 2016 Commission Proposal, no modification is suggested and thus the Regulation continues to apply to “divorce, legal separation or marriage annulment”. The only modification proposed in this article, and in all of the text of the Regulation, is the substitution of the term “court” by the term “authority” to include any judicial or administrative authority with jurisdiction on matrimonial matters (for ex., a Notary), taking into account the evolution of that matter in the different Member States. But other questions have arisen over the 20 years since the original Brussels II Convention and, even though they are questions which already existed 20 years ago, an answer was not agreed upon or provided.

One first question is: should the Regulation include the divorce of same sex couples? The 1998 Convention and its Explanatory Report, the so-called Borrás Report,¹¹ do not say anything on this point. Nowadays, the question is if they have to be expressly included, as unanimity is very difficult on this issue. Another issue is related to registered partnerships, for which the solution would be outside of the Regulation.

Another question is related to private divorces, that is, those divorces that are agreed without the intervention of any public authority. As we said before, if an authority in a Member State intervenes, be that judicial or administrative, then the divorce would be included in the scope of application of the recast Brussels IIa Regulation. Otherwise, it would appear correct to exclude the private divorce from the scope of the Regulation, and thus its cross-border recognition and enforcement would only be possible if it is regulated by national law. Another different question has arisen with regard to the recognition of a private divorce pronounced by a religious court in a third country, where the Court of Justice, by an Order of 12 May 2016,¹² decided that it manifestly lacked jurisdiction to decide on that matter, given that the Brussels IIa Regulation does not apply to the recognition of divorce decisions adopted in third countries. Yet, the Court left the door open to a new request for a preliminary ruling from the *Oberlandesgericht München*, which is now pending.¹³

⁸ Regulation 650/2012 of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, O J L 201, 27 July 2012.

⁹ Council Regulation 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, O J L 7, 10 January 2009.

¹⁰ Council Regulation 2016/1103, of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, O J L 183, 8 July 2016.

¹¹ Explanatory Report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters, drawn up by Prof Alegría Borrás.

¹² Order of the Court (First Chamber) of 12 May 2016, case C-281/15, Soha Sahyouni c. Raja Mamisch. ECLI:EU:C:2016:343.

¹³ Case C-372/16 (Sahyouni).

One last question on the scope of the Regulation relates to the annulment of marriage. This problem arises for different reasons: the distinction between nullity and annulment, the absence of nullity in some states that only know divorce, and the questions related to counterclaim (art. 4 of Brussels IIa Regulation) or *lis pendens* (art. 19 of the same text). The inclusion of annulment in the Regulation, just as it stands now, appears to be a good solution and it does solve a lot of situations. Obviously, the solution is different as to the applicable law since Regulation 1259/2010 does not address that matter, but only the law applicable to divorce and separation. However, new problems always arise: in the Judgment of the Court of 13 October 2016 the problem is whether cases relating to the annulment of a marriage by a third person following the death of one of the spouses fall within Regulation 2201/2003.¹⁴

3. THE INTRODUCTION OF PARTY AUTONOMY

The only limited choice which is permitted in matters of jurisdiction in Regulation 2201/2003 is in the case of a joint application, where it is possible to choose the courts of the Member State of the habitual residence of either of the spouses. In the 2006 recast proposal that forms the basis of the Rome III Regulation, a modification of the Brussels IIa Regulation was envisaged to include a rule on the possibility of choice of court. The objective of the proposal was explained as follows: “the possibility to choose the competent court in proceedings relating to divorce and legal separation (‘prorogation’) will enhance access to court for spouses who are of different nationalities. The rule on prorogation applies regardless of whether the couple lives in a Member State or in a third State”.¹⁵ The possibility of accepting the choice of courts does not increase forum shopping, but reduces this possibility taking into account that both spouses agree on the jurisdiction of the courts of a certain member State. A rule introducing party autonomy for the determination of the competent court would be welcome and it would be an important improvement for the Brussels IIa Regulation, especially taking into account that the choice of law has been accepted in Rome III.¹⁶ The problem lies in whether or not the Member States would accept this change by unanimity. It is clear that if unanimity is not reached for this or any other modification of Brussels IIa, then it is better to stick to the current text than use enhanced cooperation in this field: indeed, the current situation, however imperfect, ensures that the same rules apply in all EU Member States, thus providing for greater harmonization than any improved solution which, if adopted as a form of enhanced cooperation, would only apply between a limited number of States.

If the possibility of including party autonomy in Brussels IIa arises during the discussion of the 2016 Commission proposal, the discussion on this point would refer essentially to two questions: the choice of court *stricto sensu* and the validity of the agreement.

Given that this would be the first time that party autonomy would be accepted for determining the competent courts in matrimonial matters, it is clear that it must be a limited choice of court, which means only autonomy of choice between some given options. The question which remains open is what the acceptable options could be. The best possibility seems to choose one of the grounds of jurisdiction listed in Article 3. Any other

¹⁴ Judgment of 13 October 2016 rules that the action falls within the scope of Regulation 2201/2003, but that a person other than one of the spouses may not rely on the grounds of jurisdiction set out in the fifth and sixth intends of art. 3 (1)(a). Request for a preliminary ruling from the Sąd Apelacyjny w Warszawie (Poland) lodged on 17 June 2015 — Edyta Mikołajczyk v Marie Louise Czarnecka, Stefan Czarnecki, (Case C-294/15) Opinion of the General Advocate Mr. Wathelet of 26 May 2016, with large reference to the Borrás Report .

¹⁵ As stated in the Explanatory Memorandum accompanying the Commission recast proposal: COM/2006/0399 final.

¹⁶ Although with problems, see I. Queirolo-L Carpaneto, ‘Party autonomy under the Rome III Regulation: an unsatisfactory compromise. Which possible way out?’, *The European Legal Forum*, 2014, 2, pp. 29 ff. See also, B. Añoveros, ‘La autonomía de la voluntad como principio rector de las normas de Derecho internacional privado comunitario de la familia’, *Entre Bruselas y La Haya. Liber Amicorum Alegría Borrás* (J. Forner, C. González Beilfuss, R. Viñas, coords), Madrid, 2013, pp.119 ff.

ground seems difficult to be accepted on the part of the Member States and also for the spouses, in the specific case. The problem is, in this case, whether all of the grounds of art. 3 should remain or whether some of them should be modified, as we shall see afterwards. In any case, it is always a good solution to choose the court and thus to avoid *forum shopping* and/or problems of *lis pendens*.

The second question refers to the requirements for the validity of the agreement. The question which ought to be discussed is if the terms of articles 6 and 7 of the Rome III Regulation are adequate or whether some modifications ought to be introduced. This, however, is a question that arises in a different context.

4. THE OBJECTIVE GROUNDS OF JURISDICTION

In the Brussels IIa Regulation there is no possibility of choice of court, but only objective grounds of jurisdiction. This prompts us to ask whether or not all the grounds should be maintained and if they have to continue to be alternative grounds of jurisdiction or whether it would be better to introduce a hierarchy among them.

The existing grounds of jurisdiction

Art. 3 of Regulation 2201/2003 contains seven alternative jurisdiction criteria, without any hierarchical order among them and divided into two categories, the first being based on habitual residence and the second being based on nationality or 'domicile'.¹⁷ Some scholars argue that the range of options contained in this article is excessive, and that they should be unified to avoid *forum shopping*. The risk of *forum shopping* arises as a result of the non-unification of conflict-of-law rules and the diversity of solutions which the laws of the Member States have in matrimonial matters.¹⁸ Indeed, the fact that a different law applies depending on the court that parties choose to seize increases the risk of *forum shopping*, as each party has an incentive to bring the case in front of the court that would apply the law that is most favorable to him or herself. As pointed out in the *Borrás Report*,¹⁹ the adopted jurisdiction criteria 'are designed to meet objective requirements, are in line with the interests of the parties, involve flexible rules to deal with mobility and are intended to meet individual's needs without sacrificing legal certainty'. The result, with seven alternative criteria, gives rise to a clear *favor divortii*, but this was not the object of the discussion at that time, whereas the need to reach unanimity for the adoption of the text was one of the main concerns. It is not surprising, therefore, that the majority of debates on the preparation of this text focused upon which jurisdiction criteria ought to be included in it.²⁰

The first group of jurisdiction rules is based on habitual residence (Article 3(1)(a)). In this case, it is worth noting that not all criteria were greeted with the same level of acceptance during the negotiations, given that, whilst four of them were accepted without any difficulty, the last two criteria were only accepted in order to bring about the possibility of an agreement on the text as a whole at the very last minute. In fact, the negotiations were marked by a concern for the spouse who, as a result of the marriage breakdown, moves to another Member State. The acceptance of jurisdiction grounds for these types of cases was

¹⁷ On the connections used, see, M. Bogdan, 'The EC Treaty and the use of nationality and habitual residence as connection factors in international family law', *International family law for the European Union* (J. Meeusen – M. Pertegás – G. Straetmans – F. Swennen, Eds.), Amberes, 2007, pp.303 ss; C. González Beilfuss, 'Jurisdiction rules in matrimonial matters under Regulation «Brussels II bis»', *Le nouveau Droit communautaire du divorce et de la responsabilité parentale* (C. Fulchiron, Nourissat, dir.), Paris, 2005, pp. 53 ff..

¹⁸ Among others, see R. Baratta, 'Separazione e divorzio nel Diritto internazionale privato italiano', Chapter XXII, vol. I in *Trattato di Diritto di famiglia*, Milano, 2002, p. 1587.

¹⁹ Paragraph 27.

²⁰ In the words of J. Pirrung, 'Unification du droit en matière familiale : la Convention de l'Union européenne sur la reconnaissance des divorces et la question de nouveaux travaux d'UNIDROIT », *Rev. dr.unif.*, 1998, p. 633, art. 3 (formerly art. 2) manifests the obvious characteristics of its history, which one might refer to as « d'un compromis à l'autre ».

difficult, given that they constitute *forum actoris*, and, for that reason, they were subject to specific conditions, and specifically to the elapsing of a certain period of time. These last two jurisdiction criteria have an undisputed drawback for the spouse who moves away or changes his/her residence when the marriage breaks down. In essence, the spouse who remains in the last common place of habitual residence prior to the marriage breakdown can start proceedings immediately, whereas the other spouse has to wait six months or one year, depending on the case. If, by this, a connection with the State in question is intended to be shown, then one cannot overlook the advantages of going to court in one's own State and the consequences that this carries in relation to the existence of two possible proceedings, and in particular of *lis pendens* cases and dependent actions (article 19) and matters linked to the enforcement of decisions. These consequences are not satisfactory and a modification of these criteria should be envisaged.

Another criterion that was conceived as an alternative criterion in relation to the jurisdiction of the courts of the place of habitual residence, in the different cases, is sub-paragraph (b) of article 3(1), which sets out the possibility that the courts of the joint nationality of the spouses or, in the case of the United Kingdom and Ireland, their 'domicile', may also have jurisdiction. This possibility was subject to lengthy debate given that nationality is a widely rejected criterion of jurisdiction in the European Union. However, there was not, in fact, any real drawback to using this criterion, provided that it was not applied on discriminatory grounds. This matter has been debated by the doctrine given that, for example, if a German woman wishes to get a divorce from her German husband with whom she has always resided in Italy, she can always approach the German courts, whereas she cannot do so if she married an Austrian, given that she would need to establish a minimum length of residence in Germany of six months.²¹ One matter which is not dealt with in this provision is what occurs when both spouses have dual nationality. This scenario was brought up in the *Hadadi* case.²²

The problem lies in whether member States would accept eliminating these grounds. If this is not the case, then a different modification could be envisaged. In relation to the six months of habitual residence if the applicant has the nationality (or domicile) of that country, as provided for by the last indent of Article 3(1)(a), it would be possible to introduce the addition of 'or, if it is not the case, if he has had at any moment habitual residence during more than one year'. In the case of the habitual residence during one year without nationality, as provided for in the penultimate indent of Article 3(1)(a), it would be possible to add 'or, if it is not the case, if he has had at any moment habitual residence during more than five years'. This would ensure increased equality in the position of both spouses in a lot of cases and also takes into account the previous links of a person with a certain country, to which he or she comes back.

²¹ R. Hausmann, 'New international procedure in matrimonial matters in the European Union (Part II)', *The EuLF*, Issue 5-2000/01, p. 352; A. Bonomi, 'Il Regolamento comunitario sulla competenza e sul riconoscimento in materia matrimoniale e di potestà dei genitori', *Riv.dir.int.*, 2001, p. 318; W. Hau, 'Das System der internationalen Entscheidungszuständigkeit im europäischen Ehe verfahrensrecht', *FamRZ* 2000, pp. 1355 ff.

²² Judgment of 16 July 2009, Case C-168/08, *Laszlo Hadadi (Hadady) c. Csilla Marta Mesko, wife of Hadadi (Hadady)*. In this case, Mr. Hadadi and Mrs Mesko, both of Hungarian nationality, married in Hungary and afterwards moved to France, where they acquired French nationality and where they are habitually resident. The husband filed for divorce before Hungarian Courts, which pronounced the divorce. The issue arose when recognition of the Hungarian decision was required in France and Mrs Mesko opposed. Just as A-G Kokott explained in her conclusions, Mrs Mesko's opposition was not so much to the jurisdiction, but to the material rules which were applied, given that it would have been far more beneficial to petition for fault-based divorce in France. The ECJ ruled that both nationalities are at the same level without a closest connection, as habitual residence or most effective nationality, would be required. Obviously, this question would not arise today, as both the Hungarian courts and the French courts would apply the same law, according to the Rome III Regulation, as both countries take part in the enhanced cooperation. Comments of S. Alvarez, *La Ley*, n° 7312, 20 December 2009, pp. 1 ff and in *Noticias UE*, 2011, n° 321, pp. 89 ff.; comments of C. Brière, *Revue critique de Droit international privé*, 2010, 1, pp. 184 ff. See, in particular, J. Basedow, 'Le rattachement à la nationalité et les conflits de nationalités en droit de l'Union Européenne', *Revue critique de Droit international privé*, 2010, pp. 427 ff; H. Gaudemet-Tallon – P. Lagarde, 'Histoires de famille du citoyen européen', *Liber Amicorum Alegria Borrás*, cit. pp. 482 ff.

The reduction of the number of objective grounds of jurisdiction and its hierarchization

Although a limited possibility of choice of court does exist, the introduction of autonomy in this field means that we must immediately refer to the question of the hierarchy of the grounds of jurisdiction. It is evident that the choice of court must have priority over the objective grounds of jurisdiction. The question is then whether or not a hierarchy must also be established among the objective grounds, in the same way that it has been established for the determination of the applicable law in art. 8 of the Rome III Regulation. The answer to this question seems rather difficult. In fact, the principle of mutual trust and the fact that the alternative grounds of jurisdiction have been accepted gives rise to the question as to whether such a hierarchization should be recommended or, on the contrary, whether it would be better to maintain the rule in art. 3 as it is now, with alternative grounds of jurisdiction, in the absence of a choice-of-court agreement. The current drafting of art. 3 has been criticized as prioritising the plaintiff,²³ owing to the possibility of acceding to the courts of different countries, but this is a criticism which could easily be made in relation to all of the cases where there are alternative grounds of jurisdiction. It is difficult to predict what the result would be, but it seems difficult to envisage that the alternativity of grounds of jurisdiction may be reversed as it facilitates the access to the court by the parties, while for applicable law hierarchy seems more acceptable. In fact, in the Memorandum that accompanies the 2016 Proposal, it is stated that “the flexibility for the spouses to apply for a divorce in one of the fora indicated in the Regulation will be maintained. The benefits of reducing or abolishing this flexibility (favoured by some Member States) would be outweighed by the disadvantages of the options considered to respond to the “rush to court” problem (transfer of jurisdiction or hierarchy of grounds) signalled by other Member States.”

5. THE RESIDUAL JURISDICTION

The 2016 Commission proposal includes two important modifications on jurisdiction, not on the contents, but on the interpretation of the rules. In fact, the provisions which have given rise to the greatest number of comments are those contained in articles 6 and 7 of the Brussels IIa Regulation. In this case, we are dealing with the exclusive nature of jurisdiction under articles 3, 4 and 5. However, this term does not have the same meaning as that given to the term ‘exclusivity’ in the Brussels Convention of 1968 or in Regulations 44/2001 and 1215/2012.²⁴ In the current text of Regulation 2201/2003, the meaning of the term ‘exclusive forum’ refers to a limited or restricted list of forums. This provision has not been subject to any modifications since the 1998 Convention.

Art. 6 would have disappeared according to the 2006 Commission proposal. In the Explanatory Memorandum which accompanied the proposal, it was stated that the provision of art. 6 may cause confusion and that it is also superfluous since articles 3, 4 and 5 describe in which circumstances the courts of a Member State have jurisdiction according to the Regulation. At the time of the proposal, I agreed with the removal of the article. All that is said in this article is that arts. 3, 4 and 5 ought to be examined in order to ascertain if a court of a Member State has jurisdiction as derived from the Regulation. If there is no jurisdiction, then one should be referred straight to article 7 regarding residual jurisdiction. On this point, the judgment of the Court of Justice of 29 November 2007²⁵ in the *Sundelind*

²³ M.A. Sánchez, *El Divorcio Internacional en la Unión Europea (Jurisdicción y Ley aplicable)*, Cizur Menor, 2013, in particular, pp. 41 and 173; M.A. Sánchez, ‘Reglamentación comunitaria relativa a las crisis matrimoniales y la particular «crisis» entre los Reglamentos que la integran’, *Liber Amicorum Alegría Borrás*, cit. pp. 799 ff.

²⁴ Arts. 16, 22 and 24, respectively.

²⁵ Judgment of the ECJ 29th November 2007, case C-68, *Sundelind*. Comments by A. Borrás, ‘‘Exclusive’ and ‘Residual’ Grounds of Jurisdiction on Divorce in the Brussels II bis Regulation’, *IPRax*, 2008, 3, pp. 233-235; Borrás, A., ‘Competencias « exclusivas » y competencias « residuales » : De « Bruselas II » a « Roma III »’, *Essays in honour of*

Case is relevant. Where the grounds under Article 3 are either the spouse's habitual residence or his or her nationality or 'domicile', an application may be made to a court only in accordance with the rules laid down in this article. This limitation on the rules of jurisdiction opens the door to the residual jurisdiction provided for in Article 7.

Art. 7 is now the object of a proposed revision in the 2016 recast Proposal, taking into account the criticism to the previous proposals and the real problem arising in its application:²⁶ when one of the spouses has the nationality (or the 'domicile') of a Member State and both spouses have the habitual residence in a third country, it is unclear which Courts have jurisdiction. The current text of art. 7 establishes for these cases that jurisdiction shall be determined, in each Member State, by the internal laws on jurisdiction but only in some Member States are there internal rules to determine the jurisdiction of its courts. The 2016 proposal of the Commission is to introduce a rule to this end, as a *forum necessitatis* for the cases where the respondent is habitually resident in the territory of a Member State or is a national (or, if it is the case, has his domicile) in a Member State. Only if it is not the case, the internal laws of the Member States would apply to determine jurisdiction. It seems a rather acceptable solution.²⁷

6. FINAL CONSIDERATION

As I stated at the beginning, the need to ensure free circulation of decisions on divorce, legal separation and marriage annulment as expressed by the European citizens has formed the basis of achievements in family law in Europe. The practice of family law during the years now enables us to think about the revision of the text. But one thing has to be made clear: modifications should only be introduced if they result in a clear improvement and if all the member States agree on the modification, as unanimity is required according to the Treaties. If unanimity is not reached on a text or if the solution does not improve the current text, then it is better to leave it as it is.

The unanimity required to adopt texts on family law does not make it easy to reach an agreement. Rome III was only possible by way of enhanced cooperation - which results in a partial harmonization only. It would be a good result if all member States could accept amended rules on matrimonial matters, as well as on jurisdiction and on applicable law. But it still seems an impossible task. The ultimate goal would be the harmonisation of both texts, Brussels IIa and Rome III, but the main goal has to be to improve the rules on matrimonial matters included in Brussels IIa Regulation as much as possible.

Konstantinos D. Kerameus, Atenas (Ant. N. Sakkoulas Publishers/Etablissements Emile Bruylant), 2009, tomo I, pp. 165- 181.

²⁶ On this problem, A. Nuyts, *Study on residual jurisdiction (Review of the Member States' Rules concerning the 'Residual Jurisdiction' of their Courts in Civil and Commercial matters pursuant to the Brussels I and II Regulations)*, General Report (final version dated 3 September 2007), in particular pp. 92 *et seq.*

²⁷ It could be added that the position of GEDIP on this point is not yet fixed and 3 options are maintained.

DEVELOPING TRAINING AND MEETING OPPORTUNITIES FOR NATIONAL JUDICIAL AUTHORITIES

Judge Wojciech POSTULSKI

KEY FINDINGS

Any significant amendment to the law requires the judiciary to be involved: aware of the changes, well prepared for its application and committed to its goals. The tool to achieve this is judicial training. This is also the case for the recast of the Brussels IIa Regulation, one of the cornerstones of cross border judicial cooperation in the EU.

The training offer of EJTN, including training on cross border family law, is characterised by addressing a high number of judges from all EU Member States and offering diversified training topics in a variety of formats. Seminars aim at developing judges' knowledge, skills and attitudes. Exchanges focus on building mutual trust between judges of all EU MS as well as on developing their knowledge of national legal systems. Activities are addressed to sitting judges, trainees as well as judicial trainers. They comprise in-class courses, blended seminars and e-learning tools.

Training actions following the recast of Brussels IIa will be required at both European and national level. They should aim at raising awareness of the recast, its content and consequences for practitioners. Additionally, building trust in each other's national judicial systems is required. Linguistic training and development of judicial skills will remain a must. Further knowledge-based training will have to be developed.

1. IMPORTANCE OF JUDICIAL TRAINING

General remarks

Judges and prosecutors, as well as other legal practitioners, play a fundamental role in guaranteeing respect for the law of the European Union; Justice, including judicial cooperation, has become a mature EU policy with the entry into force of the Lisbon Treaty; training is a key tool in order to ensure that rights granted by EU legislation become a reality, that the effectiveness of the justice systems in the Member States increases and that legal practitioners trust each other's justice systems. This in turn should help to ensure smooth cross-border proceedings and recognition of judgments¹.

At a time when we are witnessing an increasing attention being paid to the role and significance of the judiciary, the question of the training of judiciary is of particular importance. Judges have a duty to perform judicial work professionally and diligently, which implies that they should have great professional ability, acquired, maintained and enhanced by the training².

¹ Council Conclusions 'Training of legal practitioners: an essential tool to consolidate the EU acquis' (2014/C 443/04)

² Opinion no 4 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on appropriate initial and in-service training for judges at national and European levels

Training is a prerequisite if the judiciary is to be respected and worthy of respect. Regardless of the diversity of national institutional systems and the problems arising in certain countries, training should be seen as essential in view of the need to improve not only the skills of those in the judicial public service but also the very functioning of that service³.

Any significant amendment to the law requires the judiciary to be involved: aware of the changes, well prepared to its application and committed to its goals. The tool to achieve this is judicial training. This is also the case for the recast of the Brussels IIa Regulation, one of the cornerstones of cross border judicial cooperation in the EU.

The European Judicial Training Network (EJTN) and its Members, 35 national judicial training institutions from all 28 Member States and the Academy of European Law, are at a heart of the processes of answering the challenges mentioned.

EU framework for judicial training

At its Justice and Home affairs meeting on December 4, 2014, the Council of the European Union issued key conclusions – “Training of legal practitioners: an essential tool to consolidate the EU acquis”.⁴ We entered 2015 with the acknowledgement of the Council that at the EU level, the EJTN is best placed to coordinate, through its members, national training activities and to develop a cross-border training offer for judges and prosecutors.

The European Commission has recently published the 2015 report on European judicial training⁵. The report shows that, in 2014, more than 132 000 legal practitioners were trained in EU law or in the national law of another Member State, including 25 000 participants in EU-funded or co-funded national and European projects (compared to 94.000 participants and 22.000 in EU co-funded projects as reported in 2014⁶). This increase can be attributed to a greater offering of training activities. All these efforts aim at meeting the goals set on 13 September 2011 by the European Commission in the Communication “Building trust in EU-wide Justice, a new dimension to European judicial training”.⁷ Even more importantly, all these efforts are undertaken as the answer to the training needs of the European judiciary.

It's worth highlighting that the focus is not only on quantity but on quality of judicial training as well. Firstly, based on a pilot project on European judicial training, which was proposed by the European Parliament in 2012 and executed by the European Commission during the 2013-2014 period, EJTN conducted a thorough study to locate and document good judicial training practices from across Europe⁸, which since then have been disseminated and implemented. Secondly, attention is being given to the exhaustive evaluation of training activities to secure their highest quality and responsiveness to the training needs of participants. Finally, an important tool of assistance in the process of judicial training, the Handbook on judicial training methodology in Europe, has been published by EJTN in January 2016⁹.

³ ibidem

⁴ http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOC_2014_443_R_0004&from=FR

⁵ http://ec.europa.eu/justice/criminal/files/final_report_2015_en.pdf ISBN 978-92-79-51007-6

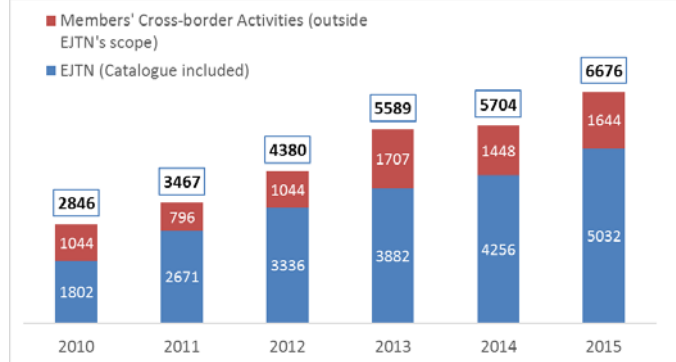
⁶ European judicial training, European Commission – Directorate-General for Justice, 2014, ISBN 978-92-79-44336-7

⁷ http://ec.europa.eu/justice/criminal/files/2011-551-judicial-training_en.pdf

⁸ <http://www.ejtn.eu/Resources/Good-judicial-training-practices/>

⁹ http://www.ejtn.eu/Documents/EJTN_JTM_Handbook_2016.pdf

Table – Cross-border Training Activities for judges and prosecutors organised in the EU



Importance of judicial training in cross-border family law

Training in cross-border family law means delivering in-depth insights on highly specialised topics pertaining to diversified aspects of family law (e.g. cross-border divorce and parental responsibility). Trainings aim at expanding upon such aspects as jurisdiction, applicable law, EU instruments, recognition and enforcement of decisions and judicial cooperation. It is crucial to combine the theoretical approach with a more concrete one providing a widened knowledge of EU legislation and case-law and facilitating the exchange of best practices. Training events enhance mutual trust between legal practitioners - in particular, judges involved in cross border family matters. Finally, judicial skills including necessary linguistic skills are developed.

2. INITIATIVES TAKEN BY EJTN TO TRAIN JUDGES ON THE SCOPE OF APPLICATION AND CONTENT OF THE BRUSSELS IIA REGULATION AND ON CROSS-BORDER FAMILY LAW

European Judicial Training Network

As the sole association comprising the national judicial training institutions of all EU MS, EJTN, in respecting the independence of the judiciary, is the principal platform and promoter for the development, training and exchange of knowledge and competence of the judiciary of the European Union, thus contributing significantly to the reinforcement of a European legal area, by developing and sharing a common European judicial culture.

EU Regulation 1382/2013 of 17 December 2013 of the European Parliament and the Council of the European Union, establishing a Justice Programme for the period 2014/2020, has granted EJTN an operating grant to finance its functioning and its annual portfolio of training activities for the full length of that working programme.¹⁰

In 2015, EJTN trained 5,032 judges, prosecutors, trainers and trainees, representing all EU Member States, through 1,815 exchanges, 84 seminars and 216 Catalogue activities (activities organised by EJTN Members opened for participation of foreign judges and prosecutors).

The EJTN training offer, including training on cross border family law, is characterised by addressing a high number of judges from all EU Member States and offering diversified training topics and a variety of formats. Seminars aim at developing judges' knowledge, skills and attitudes. Exchanges focus on building mutual trust between judges of all EU Member States as well as on developing their knowledge of foreign national legal systems. All activities are addressed to sitting judges, trainees as well as judicial trainers. They comprise in-class courses, blended seminars as well as e-learning.

¹⁰ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R1382&from=EN>

Being aware of the limited impact of European level training activities (5,032 participants in 2015 out of 120.000 judges and prosecutors in EU MS), EJTN aims at addressing multiplayers, sets the frames for the national training activities that are to follow EJTN ones, and focuses on dissemination of best practices and development of judicial training methodology.

EJTN seminars on Brussels IIA

Annual seminars on European Family Law Matters are organised. Seminars offer day-and-a-half and two-day long training activities, each aimed at 48 judges from across the 28 EU Member States, run by a panel of carefully selected international experts. Seminars open setting the scene with an analysis of the rules of the Brussels IIA Regulation. This is followed by exhaustive case studies and practical examples. Participants analyse best practices in cross-border communication between courts and cooperation between courts and a central authority. Finally, this year we have focused on identifying the child's opinion and on the hearing of a child, with a session offering a psychological overview.

Such an approach enables participants to deepen their knowledge, strengthen their practical ability to apply the regulation, and exchange with a panel of the best European experts as well as colleagues from other Member States. EJTN seminars create a great opportunity to build personal networks and practice English when debating legal issues.

On top of its own training offer, EJTN upgrades the national training activities of its member institutions by financing the participation of 10 foreign judges and interpretation. Annually some out of 28 upgraded seminars focus on Brussels IIA. One of the events upgraded this year was the seminar on "International family law-some international instruments and their judicial application (case studies)" which focused on raising a greater awareness of the implementation of instruments in the field of Family and Children Law.

EJTN Exchange Programme

The Exchange Programme for Judicial Authorities is the EJTN's flagship activity. Launched at the initiative of the European Parliament, the Exchange Programme was first implemented in 2005, with the financial support of the European Union.

Its main purpose is to enhance the European judiciary's practical knowledge of other judicial systems as well as European and human rights law through direct contacts, exchange of views and experiences between judges, prosecutors and trainers from different EU Member States. The EJTN Exchange Programme also aims at developing a European judicial culture based on mutual trust between judicial authorities in the common European judicial area.

The EJTN Exchange Programme comprises short-term exchanges in the courts/prosecution offices and judicial training institutions of the EU Member States as well as study visits and long-term training periods in European courts, EU institutions and agencies.

Linguistic training

A linguistics seminar on the vocabulary of Family Law is in the EJTN offer since 2016. This is a three day, face-to-face course designed for EU judges and prosecutors dealing with family law cases, preferably of cross border nature. It aims at developing both legal and linguistics skills of the participants by combining legal information and language exercises in a practical and dynamic way. The course combines theoretical and practical sessions of the four basic language skills: reading, writing, speaking, listening, within legal terminology.

This course is a part of the EJTN linguistic offer intended to familiarise participants with the various legal instruments in the different fields addressed (judicial cooperation in criminal matters, civil matters, human rights, family law, competition law, cybercrime) and provide them with training on specific terminology in English and French.

An exceptional training experience is ensured by combining an interactive, small-group methodology with the simultaneous participation of tutors, a linguistic expert and a legal expert. Linguistic e-learnings and handbooks are being developed as well.

E-learning programmes

EJTN has developed an offer of e-learning courses which include a course on the application of the Brussels IIa Regulation. This course begins by providing a thorough overview of the scope and definitions of the current Regulation, considers the rules of jurisdiction in matters of parental responsibility and Article 15 and the transfer to a court better placed to hear the case. Moving forward, the principle of mutual trust and minimising the grounds for non-recognition are discussed.

When developing its e-tools, EJTN is aware of some limitations of this format in the area of judicial training; however, investments are done in e-learnings, podcasts and webinars.

Initial training

Special attention is paid to the immersion of future judges and prosecutors in the European judicial culture from the very beginning of their careers. EJTN developed two projects addressed to the future and newly appointed judges and prosecutors: Themis competition and AIAKOS exchange programme.

The main aim of the Themis Competition is to bring together future magistrates from different European countries at a time when they are undergoing entry level training to enable them to share common values and to exchange new experiences/discuss new perspectives in areas of European law.

The Project aims to:

- Promote a forum of discussion on European and International Law subjects.
- Promote exchanges of experiences between the participants.
- Obtain and spread interesting and useful theses on the chosen subjects.
- Encourage the development of critical thinking and communication skills.
- Promote and foster relationships among participants from across the European judiciaries represented in the competition.

The project consists of 4 semi-finals and a grand finale, devoted to different legal topics, one of them being "International Judicial Cooperation in Civil Matters - European Family Law". Within this topic, participants debate a variety of issues related to cross border family law. The current recast of Brussels IIa regulation is one of numerous topics that are currently at the centre of the training¹¹.

In 2013, EJTN launched a specific exchange programme - the AIAKOS programme - dedicated to future and early-career judiciary to give them the opportunity to learn about other judicial systems and training curricula, to enhance their knowledge of EU law and

¹¹ Recently elaborated topics include: Placement of a child in another Member State; Custody and visiting rights in cross-border separation; Matrimonial property regimes and property consequences of registered partnerships; Behind the Curtains of International Child Abduction Proceedings; Hearing the Voice of the Child, an overview on visitation rights of parents in international, European and Austrian law; Establishing jurisdiction on parental responsibility; The right of the child to be heard; Legal and Practical Issues Concerning Civil Aspects of International Child Abduction; In the name of mutual trust. A pleading for the abolition of the exequatur procedure in regulation (ec) no. 2201/2003 for judgments regarding parental responsibility;

judicial cooperation instruments as well as meet with their counterparts and develop useful contacts for their future professional life.

The AIAKOS Programme offers 2-week exchanges (1 week abroad and 1 week at home with foreign trainees) for judicial trainees or newly appointed judges and prosecutors to other European initial training schools and courts with the aim to raise their awareness of the European dimension of their (future) work and to foster mutual understanding of different European judicial cultures and systems. In 2016 46,2% of all judicial trainees trained by EU Member States took part in AIAKOS.

"This programme made me realise that in spite of our differences, a close contact with foreign counterparts is still possible. A real interface with European colleagues was created and it will certainly help simplify dialogue between young European judges". (French future judge on exchange in Portugal).

The way the courses are organised¹²

Any training programme should use a variety of training formats. The approach should be "tailor-made". EJTN and its Members, aiming at being modern judicial training institutions, employ a range of training formats because of the diversity of needs. These include: mixed approach between residential and distance learning; a format specific to induction training for professional newcomers; a format providing a mix of knowledge-based, multi- or interdisciplinary and skills oriented training sessions; a format that accommodates specific training events dealing with practice-oriented and hands-on methods within European law as an integral part of domestic law.

Based on a decentralised planning and execution of its activities, EJTN relies on its Members¹³, Observers¹⁴ and Partners¹⁵ to facilitate and enhance training offering. The decentralised planning concept means that every activity to be carried out within the EJTN annual training programme should firstly be identified as corresponding to an actual training need of the European judiciary by EJTN Members of the appropriate Working Group or Sub-Working Group. In addition, it also signifies that the activity in question will be soundly designed and structured, relying on the expertise provided by several EJTN Members. The decentralised execution concept envisages ensuring that every EJTN Member is entitled to present its candidacy to host any of the training activities or any other EJTN event, if it so wishes. This concept encourages a favourable, widespread distribution of training.

In the light of the Brussels IIa recast proposal, which suggests to substitute the term "court" with that "authority", including not only judicial but also administrative authorities having jurisdiction in these matters, it's worth mentioning that EJTN gathers and addresses institutions of the Member States of the European Union specifically responsible for the training of the professional judiciary and for the training of prosecutors where they form part of the "Corps Judiciaire". It is up to EJTN Members to decide who will be appointed to participate in the activities offered by EJTN within the above-mentioned remit of the Network.

Challenges in judicial training

Presenting all the successes as above we have to be aware of challenges ahead. The workload of judges in many EU Member States increases continuously, austerity measures limit financial and human resources in the area of judicial training, members of national judiciaries have limited linguistic capacities. All these factors jeopardise the effectiveness of

¹² See more on training methodology in EJTN Handbook on Judicial Training Methodology in Europe http://www.ejtn.eu/Documents/EJTN_JTM_Handbook_2016.pdf

the judicial training offered and limit its development. Stakeholders in the European and national justice sector, as well as judges themselves, should be more aware of the need to develop European judicial training, participate in it and support it financially.

3. THE TRAINING NEEDS AND OPPORTUNITIES THAT WILL ARISE FROM THE RECAST

Post recast training needs

As already stated, any significant amendment to the law requires the judiciary to be involved: aware of the changes, well trained in its application and committed to its goals. This is also a case for the recast of the Brussels IIa Regulation.

Training actions will be required at both European and national level. They should aim at raising awareness of the recast, its content and consequences for practitioners. Further building trust in other Member States' judicial systems is required. Linguistic training and development of judicial skills will remain a must. Recent surveys have shown that judges and prosecutors are still relatively reluctant to properly apply European law. In view of this phenomenon and in view of the inseparable entwinement of domestic law and European law, the latter should form part of virtually any knowledge-based training for judges and prosecutors.

Some of the proposed amendments to the Brussels IIa Regulation will require a specific focus of the training activities.

Concentration of jurisdiction and training of judges

According to the European Commission, concentration of jurisdiction can contribute to the swift handling of the cases by a pool of specialised and experienced judges. As mentioned in the impact assessment accompanying the Commission Recast proposal of the Brussels IIa Regulation,¹⁶ it would maximise the effectiveness of networking with judges in other jurisdictions dealing with such cases and of training opportunities.

From the perspective of a judicial training provider, it is an ideal solution. One of the obstacles in addressing judges with training on EU law at European level is lack of specialisation. The number of judges that are potentially set to solve EU-law based, specialised cases is enormous, whereas the number of cases of cross-border nature is still limited in the majority of Member States, limiting judges' awareness of training needs in these areas.

The appropriate targeting of participants with appropriate training offers is a challenge at present. EJTN believes that the identification of target groups for which EU-level training has a particular added value (such as trainers, trainees, EJTN national Members and "court coordinators" as called for in the European Parliament resolution of 7 February 2013 on judicial training - court coordinators¹⁷) will be increasingly important. In line with this, it is essential to be aware that each of these divergent groups may require specific training strategies and methodologies.

¹³ EJTN has 35 members representing EU states as well as EU transnational bodies. Members are key stakeholders in EJTN's endeavours and enjoy full voting rights. For the full listing see <http://www.ejtn.eu/About-us/Members/>

¹⁴ EJTN also has Observers representing EU accession states, other EU states and EU institutions. Observers may partake in EJTN's projects and help to shape its endeavours. For the full listing see <http://www.ejtn.eu/About-us/Observers1/>

¹⁵ [EJTN](http://www.ejtn.eu/About-us/Partners/) Partners are European judicial networks and associations, EU agencies; see listing at <http://www.ejtn.eu/About-us/Partners/>

¹⁶ Commission Staff Working Document SWD(2016) 207, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016SC0207>.

The creation of a pool of specialised judges as the outcome of concentration of jurisdiction is a right step from a training perspective. As the Proposal to recast the Brussels IIa Regulation foresees a concentration of jurisdiction, fewer judges, easily identifiable and with specific training needs, will be easy to address with tailor-made activities in a cost efficient manner.

The specific training of judges sitting in such specialised courts shall include, as to a large extent rightly identified by the European Commission:

- Development of capacity to deal expeditiously with child abduction cases and with cases of illegal transfers of a child's residence;
- meeting opportunities for judges from all EU Member States, via specialised exchange programmes, building a network of specialised judges in Europe who will be mutually understanding and trusting each other;
- development of appropriate language skills favouring communication between judges specialised in child cases in different EU Member States;
- development of intercultural competence, ability to cooperate with each other without national and gender prejudices;
- development of specific communication skills to deal appropriately with children, being part of judgecraft;
- ability to cooperate with recognised mediation centres.

Training needs as an outcome of the abolition of exequatur

As recognised in the explanatory memorandum accompanying the Commission's recast proposal, the objective of the recast is to further develop the European area of Justice and Fundamental Rights based on Mutual Trust by removing the remaining obstacles to the free movement of judicial decisions in line with the principle of mutual recognition and to better protect the best interests of the child by simplifying the procedures and enhancing their efficiency by abolishing exequatur.

It is rightly mentioned that to achieve that, enacting a new Regulation is not sufficient. It should just constitute the beginning of processes creating mutual trust. This can be achieved by extensive training and meeting opportunities offered to members of national judiciaries. A common European judicial culture built on trust is created not only by judicial dialogue but equally importantly by opportunities of meeting peers and being trained together.

Particularly, any kind of well-designed exchanges opportunities create perfect occasion of getting to know other legal systems and understanding their functioning, building personal networks, creating mutual trust.

Other training needs

Judges must have a depth and diversity of knowledge which extends beyond the technical field of law to the following areas:

- important social concerns,
- courtroom and personal skills,
- understanding how to manage cases,
- dealing with all persons involved appropriately and sensitively.

This is especially important for judges dealing with cases of a high level of sensitivity, as in particular cases in the area of family law.

The proposed recast clearly strengthens the right of the child to be heard. The question left to national authorities is **how** the child should be heard, rather than whether the child

¹⁷ P7_TA(2013)0056, available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0056&language=EN&ring=B7-2013-0053>.

should be heard. No matter what the national solutions will be, there is also a need for judicial training. Besides their legal and non-legal knowledge, practising judges need a wide range of psychological, social and communication skills summarised by the recently coined word judgecraft. Skills-oriented training should be organised for small groups of participants in line with their specialisation.

The number of recitals and articles in the proposed recast has significantly increased, many of them have increased in length, many will be substantially amended and renumbered. That will require the creation of a simple training tool: a kind of systematic guide following all the amendments and novelties, showing how they are all connected and what was intended by them. This will help trainers and trained judges to better understand, follow, apply and be trained in the changes to the Brussels IIa Regulation. For judges working with the legal text such assistance is a must. It should accompany every training activity in the field.

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C** **CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS**

Role

Policy departments are research units that provide specialised advice to committees, inter-parliamentary delegations and other parliamentary bodies.

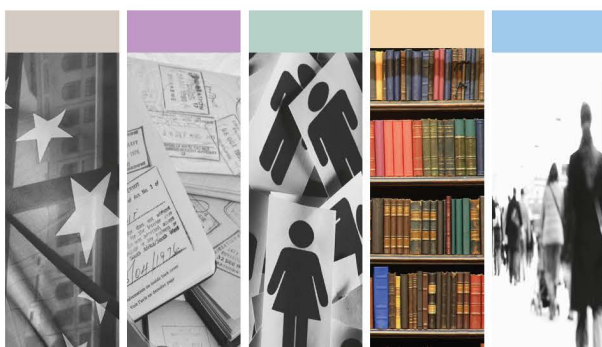
Policy Areas

- Constitutional Affairs
- Justice, Freedom and Security
- Gender Equality
- Legal and Parliamentary Affairs
- Petitions

Documents

Visit the European Parliament website:
<http://www.europarl.europa.eu/supporting-analyses>

PHOTO CREDIT: iStock International Inc.



ISBN 978-92-846-0236-0 (paper)
ISBN 978-92-846-0237-7 (pdf)

doi: 10.2861/417161 (paper)
doi: 10.2861/475126 (pdf)