

## Conference Papers

### Contents

- Meeting Programme
  
- Audience Questions
  
- Session 1 : Thursday Afternoon
  - Dr Ian Curry Sumner biography
  - Dr Ian Curry Sumner slides
  
- Session 2 : Thursday Afternoon
  - Jacqueline Renton biography
  - Jacqueline Renton slides
  
- Session 3 : Friday Morning
  - Dr Kerstin Niethammer-Jürgens biography
  - Dr Kerstin Niethammer-Jürgens talk summary & slides
  
- Session 4 : Friday Morning
  - Sandra Verburgt biography
  - Alice Meier-Bourdeau biography
  - EU Service regulation flowchart
  - Sandra Verburgt slides
  - Alice Meier-Bourdeau talk summary
  - Frances Goldsmith slides
  
- Session 5 : Friday Afternoon
  - Alexandre Boiché biography
  - Lisette Dupré biography
  - Alexandre Boiché slides
  - Lisette Dupré slides



## Introduction to EU Family Law, Berlin

### Meeting Programme

#### **Thursday 26 November - NH Collection Hotel, Friedrichstraße 96, 10117 Berlin**

- 2.00pm Conference opens NH Collection Hotel, Barcelona Room  
Welcome from IAML President, William Longrigg and European Chapter President, Mark Harper
- 2.00pm - 3.15pm Session 1: Brussels II bis - divorce procedure  
Dr Ian Curry-Sumner, Dordrecht, Netherlands
- 3:15pm – 3:30pm Tea/Coffee Break
- 3.30pm - 4.45pm Session 2: Cross Border parental responsibility issues  
(Brussels II bis)  
Jacqueline Renton, London
- 6.30pm – 7:30pm Welcome Drinks in the Lobby Bar of the Melia Hotel  
(Friedrichstraße 103) hosted by the IAML European Chapter  
Welcome talk, Jutta Wagner, Berlin
- 8:00pm - late Pre-Paid Dinner at 12 Apostel, Berlin-Mitte

#### **Friday 27 November - The Melia Hotel, Friedrichstraße 103, 10117 Berlin**

- 9:30am – 3:30pm Conference Sessions in Melia Hotel, Barcelona II Room
- 9.30am - 10.45am Session 1: Cross Border Child Abduction (Brussels II bis and the Hague Convention 1980)  
Kerstin Niethammer-Jürgens, Potsdam
- 10:45am – 11:15am Coffee Break
- 11.15am - 12.45pm Session 2: Rome III Divorce Regulation & the 2007 Service Regulation  
Alice Meier-Bourdeau, Paris and Sandra Verburgt, The Hague
- 12:45pm – 2:00pm Lunch
- 2.00pm - 3.30pm Session 3: The Maintenance Regulation & Hague Protocol  
Alexandre Boiché, Paris and Lisette Dupré, London
- 6.30pm – 7:30pm Closing Drinks, Melia Hotel, Lobby Bar
- 8:00pm – late Pre-Paid Dinner at the Clärchens Ballhaus

**AUDIENCE QUESTIONS**

**PANEL 1 DIVORCE**

**Bii bis divorce procedure**

Which of the following options does the audience agree with and why ?

- a) The first to issue rule works perfectly well.
- b) Keep the first to issue, but have exceptional right to transfer (like article 15 for parental resp.)
- c) Get rid of first to issue and have wide discretion to transfer – forum conveniens.

**Grounds for divorce**

Are there are any unusual features of grounds for divorce/ areas for reform in your jurisdiction?

**PANEL II BRUSSELS II BIS PARENTAL RESPONSIBILITY ISSUES**

**Cross Border Parental Responsibility**

Enforcement of foreign judgments for parental responsibility

- Are the formalities straightforward - timescales and costs
- (e.g. Does the system of certificates according to Art. 39 and Annex I, II function?)
- Are the orders undermined by variation applications (for example in a leave to remove situation after the 3 month prorogation)
- What are the sanctions for non-compliance

**PANEL III CHILD ABDUCTION**

**Child Abduction**

- What is the timescale and cost (please mention any legal aid issues) of return of a child?
- What are the sanctions for non-compliance – how effective are enforcement proceedings?
- Is mediation used within the proceedings?
- Do the latest rulings of the ECHR have an effect within the proceedings (X vs. Latvia, Neulinger etc.)

## **PANEL IV ROME III AND SERVICE REGULATION**

### **Rome III and the EU Service Regulation 2007**

- Is Rome III on the law applicable to divorce procedure a helpful and useful regulation?  
(e.g. Choice of applicable law in pre-nuptial agreements and marriage contracts? Does that work?)
- Traps you have encountered in the operation of the Service Regulation

## **PANEL V MAINTENANCE REGULATION AND HAGUE PROTOCOL**

### **Maintenance Regulation**

- Are your judges finding this regulation easy to apply? Give examples from higher courts/ or your practice.
- What impact if any has the Maintenance Regulation/ Hague Protocol had on prenuptial agreements/ marriage contracts in your jurisdiction?

**Dr Ian Curry-Sumner, Owner of Voorts Legal Services in the Netherlands.**

Ian Curry-Sumner is an freelance consultant and trainer in the field of private international family law.

He has been involved in this field for more than 15 years and his work has been cited with approval in the landmark United States Supreme Court decision of *United States v Windsor* (2013) that declared the Defense of Marriage Act 1996 unconstitutional.

He has furthermore advised governments in the UK, Sweden, and the Netherlands with regard to legislative amendments, taught together with the Hague Conference on Private International Law, as well as the European Judicial Network.

Alongside his editorship of a number of national and international journals, he is also a part-time judge in the District Court Overijssel in the east of the Netherlands.



# Brussels II-bis Regulation

Divorce jurisdiction

*Dr. Ian Curry-Sumner*  
*26 November 2015, Berlin*



## Structure of presentation

1. History of the regulation
2. Scope of the instrument
3. Grounds of jurisdiction
4. *Lis pendens*
5. Current Developments
6. Discussion



## Scope

### Brussel II-bis Regulation

#### Substantive

Art. 1(1)(a) divorce, judicial separation, marriage annulment

#### Temporal

Art. 72 and 64 1 March 2005  
procedures commenced after this date

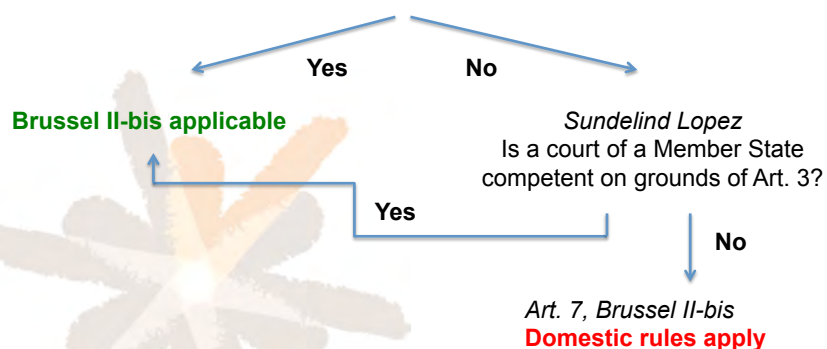
#### Geographical

Art. 6 and 7 respondent has HR / nationality MS  
**ECJ Sundelind Lopez** also is court of MS has jurisdiction on Art. 3

## Geographical scope

### Art. 6, Brussel II-bis

Does the respondent have habitual residence in a Member State or is a national of a Member State?



## Rules of jurisdiction

- ✓ Art. 3 Brussel II-bis
  - ✓ HR of both (sub a, 1 and 2)
  - ✓ HR of respondent (sub a, 3)
  - ✓ HR of claimant (sub a, 5 and 6)
  - ✓ Joint petition (sub a, 4)
  
- ✓ Nationality of parties (sub b)
  - ✓ **ECJ Hadadi**

## Quick example



- Two French nationals
- Husband lived in Belgium since 1978, wife lived in Belgium since marriage in 2001
- Moved to the Netherlands together in 2007
- Now split up and wife has lived for 6 months in England



## *Lis pendens*



Court second seized

Court first seized

Art. 19(3) Brussels II-bis

Art. 19(1) Brussels II-bis

Art. 16 Brussels II-bis



## Issues

- ✓ Universality of rules of jurisdiction
- ✓ Choice of court clauses
- ✓ Hierarchy of jurisdictional grounds
- ✓ Definition of habitual residence



## Contact details

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## About Jacqueline Renton



Jacqueline is a Family Law Practitioner who has a specialist interest and experience in the field of International children law. Jacqueline appears regularly in the High Court and has also appeared in the Court of Appeal and UK Supreme Court.

Jacqueline is ranked in Chambers and Partners Guide 2016 in Band 1 for Family: Children work. The Guide states:

*"Really hard-working, very bright and extremely knowledgeable. She's got an aura of being a lot more senior than she is. She is going to be one of the big names in family law."*

To date, Jacqueline has appeared in 27 reported cases concerning the international movement of children in this jurisdiction. Jacqueline has also filed 2 *amicus curiae* briefs in the Supreme Court of U.S.A.

Jacqueline writes and lectures regularly on international children law issues, and founded 'International Family Law Focus Online' in collaboration with Jordans Family Law Publishing.

Jacqueline was short listed as "Young Barrister of the Year" at Jordans Family Law Awards 2012 and as "Legal Commentator of the Year" at Jordans Family Law Awards 2013.

Further details can be found at: [www.4pb.com](http://www.4pb.com)



**CROSS-BORDER PARENTAL  
RESPONSIBILITY ISSUES  
(BRUSSELS II BIS)**

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**BIIR(BIS) JURISDICTIONAL  
SCHEMA**

## JURISDICTION

**Article 8 – habitual residence**

**Article 9 – residual, 3 month jurisdiction**

**Article 12 – prorogation of jurisdiction**

**Article 13 – presence jurisdiction**

**Article 15 – transfer of jurisdiction**

## ARTICLE 8

**Defining habitual residence**

- 3 important UKSC cases:-
  - Re A (Jurisdiction: Return of Child) [2013] UKSC 60
  - Re KL (Abduction: Habitual Residence: Inherent Jurisdiction) [2013] UKSC 75
  - Re LC (Reunite: International Child Abduction Centre Intervening) [2014] UKSC 1

- Question of fact, degree of integration
- No appreciable period of time needed
- Parental intention is not the only hallmark

## ARTICLE 9

- Article 9 gives the state from which relocation has taken place a residual jurisdiction for the sole purpose of modifying an access order
- Article 9 only applies for the 1<sup>st</sup> 3 months after relocation has taken place
- Article 9 - optional not obligatory derogation (CF: article 12)
- Article 9 does not have to be utilised - can ask state to which relocation has taken place to examine access issues in the round despite the 3 months period not having elapsed
- Article 9 cannot apply if the parent with access rights has accepted the jurisdiction of the state to which relocation has taken place

## ARTICLE 12

- Article 12(1) - prorogation re PR issues where there are already proceedings for divorce / legal separation / marriage annulment
- Article 12(3) - prorogation re PR issues where there are no other proceedings already afoot

## SCOPE OF ARTICLE 12(3) OF BIIR

- **Re I (A Child) (Contact Application: Jurisdiction) [2010] 1 FLR 361** - extends the scope of article 12(3)
- In this case, the 2 states involved were Pakistan and England. Pakistan is not a signatory to BIIR. The children were habitually resident in Pakistan, but the court allowed for a prorogation under article 12(3) of BIIR of the English jurisdiction
- **NOTE:** cannot be the other way round - ie: if the children habitually resident in England, parents cannot prorogue a jurisdiction that is not a signatory to BIIR under article 12(3), BUT they can decide to accept such a state's jurisdiction (this would then fall to be considered under the *forum conveniens* matrix; no automatic, prorogation 'trump card' as there is under article 12(3) of BIIR

It used to be the case that article 12(3) allowed parents to prorogue the jurisdiction of the state from which relocation has been granted for a defined or indefinite period of time. This was a useful tool in some cases.

CJEU recent decision - an article 12(3) prorogation breaks with a final order - **E v B Case C-436/13 [2015] 1 FLR 64**

- This has a significant impact on cases
- Renders it very difficult to ensure that a prorogation can be lasting
- Ways around it? How to show it is not a 'final order'?

A final order includes a temporary relocation order - **Re G (Jurisdiction: Brussels II Revised) [2014] 2 FLR 746**

### **L v M and others (Case no: C-656/13) [2014]**

- Article 12(3) prorogation can apply even if the prorogued court is not seised of other proceedings
- Article 12(3) is different to article 12(1) – can only prorogue if here are existing divorce / separation / annulment proceedings before the court
- Wide recourse to the court under article 12(3) – conscious of recital 12 that jurisdiction is shaped in light of the child's best interests
- If a party is a defendant to 1<sup>st</sup> set of proceedings, and then issues a 2<sup>nd</sup> set of proceedings and pleads the lack of jurisdiction in the court at the first opportunity within those proceedings, that will undermine any suggestion that party has expressly accepted the court's jurisdiction under article 12(3)

### **ARTICLE 13**

#### ***Article 13***

#### ***Jurisdiction based on the child's presence***

1. *Where a child's habitual residence cannot be established and jurisdiction cannot be determined on the basis of Article 12, the courts of the Member State where the child is present shall have jurisdiction.*
2. *Paragraph 1 shall also apply to refugee children or children internationally displaced because of disturbances occurring in their country.*

- article 13 can be used when article 8 or article 12 cannot be established – presence jurisdiction – 'relocation' by virtue of war or other humanitarian disaster



### **ARTICLE 15 TRANSFER**

- Transfer to a court better placed to hear the case
- Child has a particularly connection with another state
- Another state would be best placed to hear the case
- Transfer must be in child's best interests
- Transfer can taken place:
  - upon application from a party; or  
of the court's own motion; or  
upon application from a court of another Member State with which the child has a particular connection.
- A transfer made of the court's own motion or by application of a court of another Member State must be accepted by at least one of the parties.

### **ENFORCEMENT OF FOREIGN ORDERS UNDER BIIR(BIS)**

## ANNEX III CERTIFICATE

- **Articles 40 - 41 BIIR provide for the circumspection of the exequatur process (recognition + enforcement) as long as contact order has a valid Annex III certificate**
- **Article 41(2) BIIR sets out the conditions for obtaining an Annex III certificate:**
  - Where judgment was given in default, person defaulting was served with proceedings in sufficient time to make representations to the court, or person not served in sufficient time but can establish that they have accepted the **decision unequivocally**
  - All parties concerned were given an opportunity to be heard
  - Child given an opportunity to be heard, unless inappropriate given child's age and degree of maturity

- Enforcement procedure is governed by law of member state (article 47(1) BIIR)
- Any judgement made in state A shall be enforced in state B in the same conditions as if had been delivered in state B (article 47(2) BIIR)
- A judgment cannot be enforced if it is irreconcilable with a subsequent enforceable judgment (article 47(2) BIIR)
- The issuing of an Annex II certificate cannot be appeal in the courts of the state that issued the certificate (article 43(2) BIIR)
- The certificate can be rectified- apply to courts of the state that issued the certificate for rectification (article 43(1) BIIR)

**NOTE:** enforcement under articles 21 - 39 of BIIR is possible without a valid Annex I or Annex II certificate - this flexibility does not apply to enforcement with Annex III or Annex IV certificates under articles 40 - 41 of BIIR.

## IMPORTANT ISSUES

- **Scope of non-recognition grounds with judgment on PR (recognition and enforcement process?)**
- **Interface with enforcement process and fresh welfare evaluation?**

### MD v AA & Another [2014] EWHC 2756 (Fam) (Jackson J)

- The court considered a free standing enforcement application by a father who sought to enforce a Custody Order in his favour in respect of the parties' child. The order was made on 27 November 2013 by the Romanian Supreme Court.
- The parties were both Romanian and had been involved in litigation in Romania since November 2007, albeit the child had lived in England with the mother for his entire life, save for the first 2 months.
- At the time of the hearing before Jackson J, the child was nearly 8.
- M challenged enforcement of the order on various grounds – (1) procedural challenge to the way in which the order was registered by the Central Family Court; (2) article 23(a) – public policy; (3) article 23(b) – the child was not given an opportunity to be heard; (4) articles 23(c) and (d) – service issues.

**In his judgment, Jackson J determined as follows:-**

- **Procedural challenge** – did not stand in the way of enforcement. Only fundamental shortcomings in the registration process should lead to an order not being enforceable; other matters of non-compliance will not necessarily be fatal. Be pragmatic where possible.
- **Article 23(a)** – not a ground on which enforcement was refused. Child had substantial relationship with F. M did not raise any parenting issues.

**Article 23(b)**

- Jackson J refused to enforce the order on this ground.
- Jackson J determined that an English court faced with such an application (peremptory change of lifelong carer, country and language) would as a minimum seek a report from a court social worker that would consider, amongst other things, the child's perspective on a such a monumental change of circumstances. Such a report would be fundamental.
- As a consequence, the child (aged 5 at the relevant time) not being heard in this case amounted to the establishment of article 23(b).
- Growing importance in domestic and international law of the need for the child to be heard;

**Articles 23(c) and (d)**

- Jackson J refused to enforce the order on both of these grounds.
- M did not know about the documents that had been served, despite service having taken place in accordance with Romanian domestic law.
- Reliance placed on the meaning of article 23(c) considered by Mostyn J in **MD v CT [2014] EWHC 871 (Fam)**.

**NOTE:** Hearing in Court of appeal took place in May 2015 – judgment still awaited.

**ISSUES TO CONSIDER.....**

**Article 23(b)**

- what is a violation? Child heard in some cases? Child would definitely have been heard?
- Wide Margin of appreciation should be taken into account
- Domestic test should be applied – take into account how other EC states address this issue (what would the local foreign court do?)
- Fundamental principles – article 6 ECHR, or due process principles? Serious breach of fundamental rights (article 8 and 6)
- Impact of decision of Jackson J – no order can be enforced if child as young as 6 not heard by foreign court?

**Article 23(c)**

- Default of appearance (if this cannot be established – then no issue re article 23(c))
- Annex II certificate – filled in by foreign court
- In this case – certificate says not default of appearance
- Can you go behind certificate? (**Rinau v Rinau [2008] ECR I-5271; [2008] 2 FLR 1495** – only go behind Annex IV certificate if issue as to authenticity of certificate)
- **OR:**
- Default of appearance, but then service arguments....
- If valid service under domestic foreign law, do you need to establish anything else?

- **MD v CT [2014] Parental Responsibility Order: Recognition and Enforcement) [2014] EWHC 871 (Fam); [2015] 1 FLR 213** (Mostyn J - only English authority to date)
- 'in such a way as to enable that person to arrange for his or her defence' - examine if there was actual service on the ground or service in sufficient time to enable defendant to arrange defence
- Expansive interpretation.
- Does there need to be more than technical service? How do you evidence more than technical service, ie: show defendant actually got the documents?
- Was such an enquiry envisaged by drafters of BIIR

### **Article 23(d)**

- 'opportunity to be heard'
- This just means service?
- Nothing about 'in such a way as to enable that person to arrange his or her defence'

**NOTE:** arguable that interpretation of article 23(b), (c) and (d) - could be subject to CJEU reference, and potentially also article 23(a) (less the focus of the appeal).

**INTERFACE WITH ENFORCEMENT  
PROCESS AND FRESH WELFARE  
EVALUATION?**

**Faced with enforcement – either access order, or  
judgment on PR, is there scope for ‘starting again’?**

- Variation application – enforcing court has substantive welfare jurisdiction (article 8 of BIIR)
- Enforce then vary?
- Combine applications?
- Depends on passage of time that has elapsed since foreign order was made.....
- Cannot prevent there ever being variation
- Enforcement is not a ‘straight jacket’ for life



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In practice since November 1990 – Partner of Jürgens Rechtsanwaltsgesellschaft mbH, Potsdam, Germany ([www.juergens-law.de](http://www.juergens-law.de))

- Specialized in German and International Family Law and Inheritance Law
- Certified Family Law Attorney (“Fachanwältin für Familienrecht”) since 2001
- Member of:
  - Commission on Family and Succession of the German Federal Bar (BRAK)
  - Commission on European Law of the German Federal Bar (BRAK)
  - Member of the Working Group Family & Succession Law of the Council of Bars and Law Societies of Europe – European lawyers promoting law & justice (CCBE) representing Germany
  - Family Law Committee of the “German Association of Female Lawyers” (DJB)
  - Member of the Board of the International Social Service (ISD), Germany
  - Member of the publishing team of a Family Law Journal in Germany
  - Fellow of the IAML
- gives annual lectures to educate future certified family law attorneys on International and European Law
- several lectures at the ERA – European Academy of European Law (Trier)
- from 2011 till the end of 2013 (in part time) Team Leader of an EU funded project in partnership with the Presidential Administration of the Russian Federation on the Application and Implementation of the Hague Child Abduction Convention, the Hague Child Protection Convention and on Russia’s possible accession to the Hague Convention on Child Support
- from July 2014 (in part time) Senior Legal Key Expert advising Kosovo on implementing the national Family Law and Inheritance Law in a new Civil Code of Kosovo

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## **Cross Border Child Abduction: Brussels II bis and the Hague Convention 1980**

### **I. THE HAGUE CONVENTION 1980 ON INTERNATIONAL CHILD ABDUCTION**

- **History**
- **Aim and basic principles**
- **Helpful Tools**
- **Application of the Convention, Art. 4 and Art. 3**
- **Rights of Custody**
- **Exercise of Custody**
- **Habitual Residence**
- **Return of the Child to the State of Habitual Residence**
- **Exceptions according to Art. 13**
- **Exceptions according to Art. 12 and 20**

### **II. THE MODIFICATIONS WITHIN THE BRUSSELS IIBIS REGULATION**

- **Aim and basic principles**
- **Artts. 9 and 10**
- **Art. 11**
  - **Art. 11 (3)**
  - **Artts. 11 (2) and (5)**
  - **Art. 11 (4)**
  - **Art. 11 (6) and (7)**
  - **Art. 11 (8)**




**CROSS BORDER CHILD ABDUCTION**  
**(BRUSSELS II BIS AND THE HAGUE CONVENTION 1980)**

IAML Berlin November 2015

**Dr. Kerstin Niethammer-Jürgens**  
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**I. THE HAGUE CONVENTION 1980 ON INTERNATIONAL CHILD ABDUCTION**

- **1. History**
  - concluded 25.10.1980, entered into force on 1.12.1983
  - as for November 2012: 88 Contracting States
  - see status table on the Website of the Hague Conference on Private International Law: <http://www.hcch.net>
  - all EU Member States are Contracting States



## I. THE HAGUE CONVENTION 1980 ON INTERNATIONAL CHILD ABDUCTION

### ○ 2. Aim and basic principles

- it is in the interest of a child not to be wrongfully retained or removed from the country of its habitual residence, Art. 1
- status quo ante shall be secured
- prompt return of the child is the best way to secure the status ante
- protection of the custody rights of the left behind parent
- fast proceedings, Art. 2



## I. THE HAGUE CONVENTION 1980 ON INTERNATIONAL CHILD ABDUCTION

### ○ 3. Helpful Tools

- specialized child abduction section of the HCCH website
- explanatory documents, good practice guides
- case law databases (INCADAT)
- statistics (INCASTAT)
- European Hotline Number: 116000 reserved by the European Commission for missing children



## I. THE HAGUE CONVENTION 1980 ON INTERNATIONAL CHILD ABDUCTION

### ○ 4. Application of the Convention, Art. 4 and Art. 3

- child under the age of 16 at the time of the breach of custody
- wrongful removal or retention according, Art. 3 lit. a)
- breach of rights of custody, Art. 3, Art. 3 lit. a)
- habitual residence, Art. 3 lit. a)
- exercise of rights of custody, Art. 3 lit. b)

## I. THE HAGUE CONVENTION 1980 ON INTERNATIONAL CHILD ABDUCTION

### ○ 5. Rights of Custody

- autonomous meaning of Rights of Custody according to the law of the state of habitual residence of the child
- but in accordance with Art. 5 > right to determine residence
- under the law of the state of habitual residence or
- granted by a court of the state of habitual residence or
- granted by agreement having legal binding effect
- to find out which is the applicable law on custody in the country of habitual residence of the child:
  - Art. 15 Declaration and/or communication via the International Hague Network of Judges

## I. THE HAGUE CONVENTION ON 1980 INTERNATIONAL CHILD ABDUCTION

### o 6. Exercise of Custody

- o Actual exercise of custody, Art. 3 lit b)
- o can be held by public authorities or by courts
- o can be held by foster families based on a placement order
- o only complete abandonment of custody rights indicates that rights of custody have not been exercised at the time of removal or retention of the child



## I. THE HAGUE CONVENTION 1980 ON INTERNATIONAL CHILD ABDUCTION


### o 7. Habitual Residence

- o no definition in the Hague Convention 1980, definition has been avoided
- o factual concept: individual's actual connection to a place
- o not only a question of time to become habitual resident in a Contracting State
- o time, housing, schooling, health care, social and cultural activities, language skills
- o centre of gravity
- o intention of parent/s to move? vs. intention of child to move?
- o more than one centre of gravity?
- o does the interpretation of the ECJ in "Mercredi" and "A" also apply to habitual residence in Art. 3 of the convention?




## I. THE HAGUE CONVENTION 1980 ON INTERNATIONAL CHILD ABDUCTION

### ○ 8. Return of the Child to the state of Habitual Residence

- if there is an unlawful removal or retention of the child the child is going to be returned to the State of Habitual Residence, Art. 12 lit. a)
  - if there is no agreement on return the court MUST order the return
  - unless an exception applies
- 

## I. THE HAGUE CONVENTION 1980 ON INTERNATIONAL CHILD ABDUCTION

### ○ 9. Exceptions according to Art. 13

- no actual exercise of the custody rights at the time of removal or retention, Art. 13 (1) lit a)
  - consent to or subsequently acquisition in the removal or retention, Art. 13 (1) lit a)
  - grave risk that would expose the child to physical or psychological harm, Art. 13 (1) lit b)
  - grave risk that would otherwise place the child in an intolerable situation, Art. 13 (1) lit b)
  - Child's objection to being returned, if it has attained an age and degree of maturity at which it is appropriate to take account of its views, Art. 13 (2)
- 

## I. THE HAGUE CONVENTION 1980 ON INTERNATIONAL CHILD ABDUCTION

- **10. Exceptions according to Art. 12 and 20**
  - expiration of a period of one year after the commencement of return proceedings, Art. 12
  - Return order would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms, Art. 20



## II. THE MODIFICATIONS WITHIN THE BRUSSELS IIBIS REGULATION

- **1. Aim and basic principles**
  - cases involving only Member States
  - new and modified system as a complement to the Hague Convention 1980
  - EU country in which the child was habitually resident (“Member State of origin) immediately before the abduction continues to have jurisdiction until the child is habitually resident in another EU country (“requested Member State”)
  - even more expeditious proceedings
  - the child is given the opportunity to be heard during the proceedings, unless this appears inappropriate due to his or her age and degree of maturity.





## II. THE MODIFICATIONS WITHIN THE BRUSSELS IIBIS REGULATION

### ○ 2. Aim and basic principles II

- the judge must order the child's return if it is established that adequate arrangements have been made to ensure the protection of the child after his or her return, Art. 11 (4)
- If a court rules that a child is not to be returned, it must transfer the case file to the competent court of the EU country in which the child was habitually resident prior to removal. This court takes the final decision as to whether or not the child is to be returned, Art. 11 (4)-(8)



## II. THE MODIFICATIONS WITHIN THE BRUSSELS IIBIS REGULATION

### ○ 3. Aim and basic principles III

- Regulation as international agreement on jurisdiction
- National law applying for procedures and to identify courts
- Concentration of courts in some Member States



## II. THE MODIFICATIONS WITHIN THE BRUSSELS IIBIS REGULATION

- **4. Definitions, Art. 2 Regulation Brussels Iibis**
  - definitions of custody and access rights, Art 2 (9) and (10)
  - wrongful removal or retention, Art. 2 (11) – according Art. 3 and 5 of the Hague Convention 1980




## II. THE MODIFICATIONS WITHIN THE BRUSSELS IIBIS REGULATION


- **5. Art. 9 and 10 Regulation Brussels Iibis**
  - Concept of Art. 9 and 10 of the Regulation: to avoid “forum shopping” and to secure that only under strict conditions of Art. 10 the requested MS has jurisdiction after an unlawful removal or retention of the child
  - Art. 9 applies, if a child is lawfully removed from a Member State: MS of the child’s former residence retains jurisdiction for a period of three months referring to access rights of the left behind parent



## II. THE MODIFICATION WITHIN THE BRUSSELS IIBIS REGULATION

- **6. Art. 10 Regulation Brussels IIBis**
    - Art. 10 applies, if a child is unlawfully removed from a Member State: despite the abduction the Member State of origin retains jurisdiction to decide on the question of custody.
    - Jurisdiction only changes, if
      - acquiescing in the removal or retention
      - child is residing in the new MS for more than one year, is settled and the whereabouts of the child are known
      - no request for return is lodged
- 

## II. THE MODIFICATIONS WITHIN THE BRUSSELS IIBIS REGULATION

- **7. Art. 11 Regulation Brussels IIBis**
    - Interrelation of Art. 11 of the Regulation and Art. 12 and 13 of the Hague Convention 1980
    - Judgment of return will be based on the rules of Art. 12 and Art. 3 Hague Convention 1980 complemented by Art. 11 Regulation Brussels IIBis
    - Model Application Form  
<http://www.hcch.net/upload/recomm28e.pdf>
- 

## II. THE MODIFICATIONS WITHIN THE BRUSSELS IIBIS REGULATION

**Request for return**

Major Criminal Authority of \_\_\_\_\_ in the Child Aspect of \_\_\_\_\_ and Child Abduction \_\_\_\_\_

REQUIRING COUNCIL AUTHORITY OR APPROVAL

REQUISITED AUTHORITY

Child: (a) Surname, child \_\_\_\_\_ who was \_\_\_\_\_ when the age of 16 was \_\_\_\_\_

NOTE: The following particulars should be completed insofar as possible.

1 - IDENTITY OF THE CHILD AND HIS FAMILY

1.1 Child \_\_\_\_\_

name and first names \_\_\_\_\_  
 date and place of birth \_\_\_\_\_  
 nationality \_\_\_\_\_  
 passport or identity card No. if any \_\_\_\_\_

1.2 Parents \_\_\_\_\_

1.2.1 Mother: name and first names \_\_\_\_\_  
 date and place of birth \_\_\_\_\_  
 nationality \_\_\_\_\_  
 passport or identity card No. if any \_\_\_\_\_

1.2.2 Father: name and first names \_\_\_\_\_  
 date and place of birth \_\_\_\_\_  
 nationality \_\_\_\_\_  
 passport or identity card No. if any \_\_\_\_\_

1.3 Date and place of marriage \_\_\_\_\_

2 - REQUESTING JURISDICTION, THE INSTITUTION (WHICH ACTUALLY EXERCISED CUSTODY BEFORE THE REMOVAL OR RETENTION)

2.1 Name and first names \_\_\_\_\_  
 nationality of individual applicant \_\_\_\_\_  
 occupation \_\_\_\_\_  
 passport or identity card No. if any \_\_\_\_\_  
 address of the child \_\_\_\_\_  
 name and address of legal adviser, if any \_\_\_\_\_

3 - PLACE WHERE THE CHILD IS TAKEN TO BE

3.1 Information concerning the person alleged to have removed or retained the child \_\_\_\_\_

name and first names \_\_\_\_\_  
 date and place of birth, if known \_\_\_\_\_  
 nationality, if known \_\_\_\_\_  
 occupation \_\_\_\_\_  
 passport or identity card No. if any \_\_\_\_\_  
 residence and place of domicile (see annex) \_\_\_\_\_

3.2 Address of the child \_\_\_\_\_

3.3 Other persons who might be able to supply additional information leading to the whereabouts of the child \_\_\_\_\_



## II. THE MODIFICATIONS WITHIN THE BRUSSELS IIBIS REGULATION

IV - TIME, PLACE, DATE AND CIRCUMSTANCES OF THE UNLAWFUL REMOVAL OR RETENTION

V - FACTUAL, LEGAL GROUNDS SUPPORTING THE REQUEST

VI - CIVIL PROCEEDINGS IN PROGRESS

VII - CHILD IS TO BE RETURNED TO

7.1 Name and first names \_\_\_\_\_  
 date and place of birth \_\_\_\_\_  
 address \_\_\_\_\_  
 residence (see annex) \_\_\_\_\_

7.2 Proposed arrangements for return of the child \_\_\_\_\_

VIII - OTHER REMARKS

IX - LIST OF DOCUMENTS ATTACHED

One \_\_\_\_\_  
 Two \_\_\_\_\_

Signature and/or stamp of the requesting Criminal Authority or applicant \_\_\_\_\_

\* 1.6 Certified copy of relevant decision or agreement concerning custody or access conditions or otherwise in the appropriate language, indicating the legal background of the child, submitted empowering the Central Authority to act in that capacity.



## II. THE MODIFICATIONS WITHIN THE BRUSSELS IIBIS REGULATION

- **8. Art. 11 (3) Regulation Brussels Ibis**
  - courts must use most expeditious procedures under national law, Art. 11 (3), the judgment has to be issued not later than six weeks after the application is lodged
    - to guarantee this is a question of national procedural law
    - does this timeframe include appeal proceedings according to national law? How to make sure that national procedural laws do not undermine the aim of Art. 11 (3)?



## II. THE MODIFICATIONS WITHIN THE BRUSSELS IIBIS REGULATION

- **9. Art. 11 (2) and (5) Regulation Brussels Ibis**
  - child has the opportunity to be heard unless this appears inappropriate in regard to his age or degree of maturity, Art. 11 (2)
    - the way how the child is heard is a question of national procedural law
  - a court can not refuse a return unless the requesting party did not have the opportunity to be heard, Art. 11 (5)



## II. THE MODIFICATIONS WITHIN THE BRUSSELS IIBIS REGULATION

- **10. Art. 11 (4) Regulation Brussels Iibis**
  - Art. 11 (4) of the Regulation and Art. 13 lit. b) of the Hague Convention – grave risk
  - the court of the “requested MS” can not refuse the return of the child on the basis of Art. 13 b) Hague Convention 1980 if precautions were taken to protect the child in the “state of origin”
  - This involves
    - Direct juridical communication via The International Hague Network of Judges > [www.hcch.net](http://www.hcch.net) and the European Network of Judges (EJN)

## II. THE MODIFICATIONS WITHIN THE BRUSSELS IIBIS REGULATION

- **11. Art. 11 (6) and (7) Regulation Brussels Iibis**
  - new procedure foreseen in the exceptional case that the court of the requested Member States decides that the child is not returned
  - procedure allows the court of the MS of the habitual residence of the child prior to the abduction to have the final say
  - procedure regulates in detail what has to happen when a court decides that a child is not returned

## II. THE MODIFICATIONS WITHIN THE BRUSSELS IIBIS REGULATION

### o 12. Art. 11 (6) Regulation Brussels IIBis

- o court must transmit a copy of the order, all documents, esp. the protocol of the hearing to the Central Authority (CA) or the court of the MS where the child was habitually resident before the abduction (“state of origin”)
- o the court of the state of origin shall receive all documents within **one month** of the date the non-return order was entered
  - o European Judicial Atlas in Civil Matters  
[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/index\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/index_en.htm)
  - o Central Authorities in every MS  
[http://www.hcch.net/index\\_en.php?act=conventions.authorities&cid=24](http://www.hcch.net/index_en.php?act=conventions.authorities&cid=24)
  - o European Network of Judges (EJN): <http://www.hcch.net>

## II. THE MODIFICATIONS WITHIN THE BRUSSELS IIBIS REGULATION

### o 13. Art. 11 (7) Regulation Brussels IIBis

- o unless there are not already custody proceedings pending in the “state of origin” the court of the “state of origin” must invite the parties to make submissions to the court according to national law **within three months** of notification so that question of custody of the child can be examined before the court of the “state of origin”
- o if this timeframe elapses and no submission is lodged the court can close the file

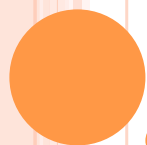
## II. THE MODIFICATIONS WITHIN THE BRUSSELS IIBIS REGULATION

- **14. Art. 11 (8) Regulation Brussels Iibis**
  - even if there is a judgment of non-return issued by the court of the “requested MS” pursuant to Art.13 Hague Convention 1980 any subsequent judgment which requires the return of the child issued by a court of the “MS state of origin” is enforceable;
  - Section 4 of Chapter III (Art. 21ff. – recognition and enforcement) Brussels Ibis applies to secure the safe return of the child
  - underlines the “last say” of the courts of the state of habitual residence of the child



(BRUSSELS II BIS AND THE HAGUE CONVENTION 1980)

**THANK YOU – let’s discuss !**





## **S.L.A. (SANDRA) VERBURGT**

**senior lawyer**



**Called to the bar** : 2000  
**Fields of Expertise** : (International) Family Law  
**Specialist Associations** : Dutch Association of Family Law Lawyers and Divorce Mediators (vFAS)  
International Academy of Matrimonial Lawyers (IAML)

### **Practice**

With more than 15 years experience in all kind of family law matters Sandra is a senior lawyer in the Family and Mediation Team of Delissen Martens. She is also a member of the International Desk, which provides specialised advice and advocacy on various practice areas to both international clients and professionals working for international clients. Her practice includes divorces and financial relief (maintenance, divisions and prenuptial agreements), both contentious and non-contentious. Many of these disputes involve complex and financial aspects, often with an international element. Sandra deals also with other complex international family disputes related to custody and parentage. Since 2007 Sandra also deals with cross border disputes. She works closely with accredited family law specialists in Europe and the United States of America.

### **Publications**

Sandra is co-author of the chapter on Private International law and Maintenance law in the explanatory commentary "*SDU Commentaar Relatierecht*" (*SDU, February, 2014*) and the online equivalent of Dutch Legal Publisher SDU.

Furthermore she has written several publications in Dutch and English law journals:

- *Dossier Divorce dans le monde (1re partie), Pays-Bas*, in the French Family Law Magazine *AJ Famille* (Dalloz, November 2015, p. 596-597)
- "*Bevoegdheid, erkenning en tenuitvoerlegging onder Alimentatieverordening 4/2009*" in the Dutch Family Law Magazine "*Relatierecht en Praktijk*" (*SDU, November 2012*).
- "*Marital Agreements: International lawyers neglect jurisdictional developments at their peril*" in *International Family Law* (Jordans, September 2011)
- "*Double Dutch? – The relevance of Hague Conventions to Marital Contracts and Maintenance*" in *International Family Law* (Jordans, June 2010)

Sandra is also a member of the editorial board of the IAML Online News, in which E-journal she publishes frequently.

### **Events**

Sandra is serving on the Co-ordination Team of DM Academy, dealing with the operational control of DM Academy, the Training Establishment of Delissen Martens, certified by the Dutch Bar Organisation with effect of 1 January 2014. Sandra is also a trainer of DM Academy.

Furthermore Sandra has been asked several times as a speaker on international family law topics:

- IAML Surrogacy Symposium (17-19 May 2015) London, where she presented the latest legal information and developments with regard *surrogacy in The Netherlands*;

- IAML Annual Meeting 2014 in (10-14 September 2014) in Budapest, where she has been participating in a panel on *same sex marriage around the world*.
- IAML European Family Law Conference "*Families around borders*" (16 and 17 June 2014) in Budapest, where she lectured on the "*Financial aspects of breakdown of marriage and cohabitation*".
- IAML European Chapter Conference meeting 2013 in Salzburg where she has been participating in a panel of Family Lawyers from around Europe as they take part in a comparative discussion *about their respective matrimonial property regimes, how they treat foreign regimes, and what this means for international couples*.
- IAML European Chapter Conference meeting 2012 (15 April 2012 - 22 April 2012) in Elounda, Crete (Greece) where she held lectures "*EU Maintenance Regulation: Minotaur or Magnifique?*" and "*Marge and the Maintenance Regulation*" with English Family Law barrister Tim Amos QC.
- Experts4Expats Family law 27 January 2012, "*Experiences with the EU Maintenance Regulation 4/2009*" with English Family Law barrister Tim Amos QC
- Experts4Expats Family law 4 February 2011, "*The Effectiveness of pre-nuptial agreements in England & Wales and The Netherlands*" with English solicitor Simon Bruce
- Lecture on 18 November 2009 to the Family Team at Farrer & Co, London (*on the aspects of Dutch Private International Law, Hague Convention on the Law Applicable to Matrimonial Property Regimes 1978 and Dutch Law regarding prenuptial agreements*)

## **Memberships**

Sandra is an accredited family lawyer/mediator and member of the Dutch Association of Family Lawyers and Divorce Mediators (vFAS) and a fellow of the International Academy of Matrimonial Lawyers (IAML), for which body she is serving as a Vice President of the European Chapter and further as a Co-ordinating Chair of the Hague Committees, member of the Editorial Board of the IAML Online News, the IAML Forced Marriage Committee and European Chapter Instruments Committee. Sandra will also chair the CLE of the IAML European Chapter Meeting in Amsterdam and The Hague in May 2015. Until recently she was also Chair of the UNICEF Regional Committee for The Hague and surrounding municipalities.

[www.delissenmartens.nl](http://www.delissenmartens.nl)

## Alice Meier-Bourdeau Biography

Born on 21st January 1972 in Dusseldorf, Germany, of German nationality, Alice Meier-Bourdeau has the distinction of being the only ministerial officer who is a citizen of another member state of the European Union. She is perfectly trilingual in French, German and English.

Alice Meier-Bourdeau has a Ph. D. in Law (with a thesis on “National Law as a conflict rule in private French and German international law”), a post-graduate degree in general private law (from the University of Paris X – Nanterre, gaining the highest mark of her year) and a degree in Applied Law Studies in French and German law (from Paris X – Nanterre, with distinction).

She was Teaching and Research attaché at the University of Paris X – Nanterre from 1996 to 2000, then became a lawyer at the Paris bar (after coming top of her class in the CAPA law school exams). She qualified as a barrister to the Council of State and the Court of Cassation in 2009.

Before becoming a partner in the firm, Alice Meier-Bourdeau worked as an associate lawyer for about ten years in various avocat aux Conseils firms.

She specialises in private and employment litigation, litigation for provisional remand compensation, as well as certain branches of public law litigation (civil service, interim procedures).

Her particular interest in private international law and family law (especially relating to personal status, family status and estates, whether inheritance laws or matrimonial regimes) has led her to write various papers and contributions (for example, articles on the new Franco-German matrimonial regime published in *La Semaine Juridique* and the *Courrier juridique des finances et de l'industrie*, or her significant contribution to the work on children's rights – “*L'enfant, sujet de droits. Filiation, patrimoine, protection*” published by Editions Lamy in November 2010).

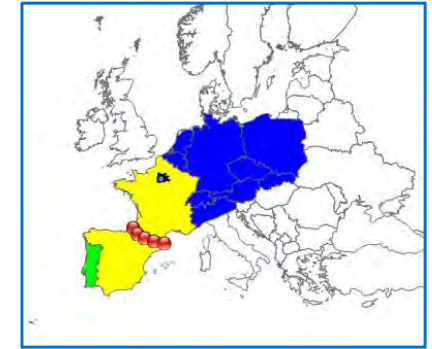
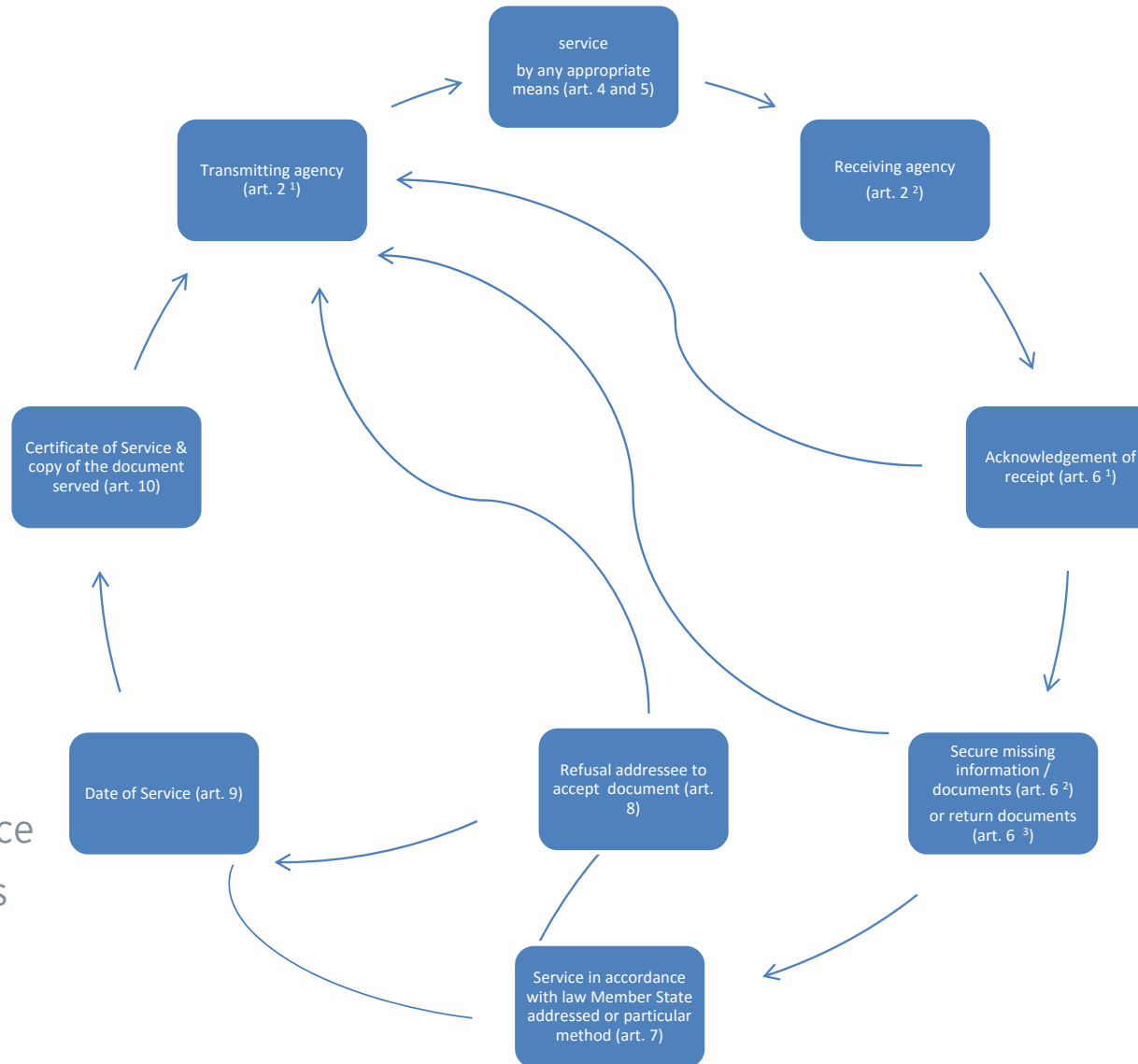
She is a member of Trans Europe Experts (TEE), the Association of French and German lawyers (AJFA), the European Law Institute (ELI),

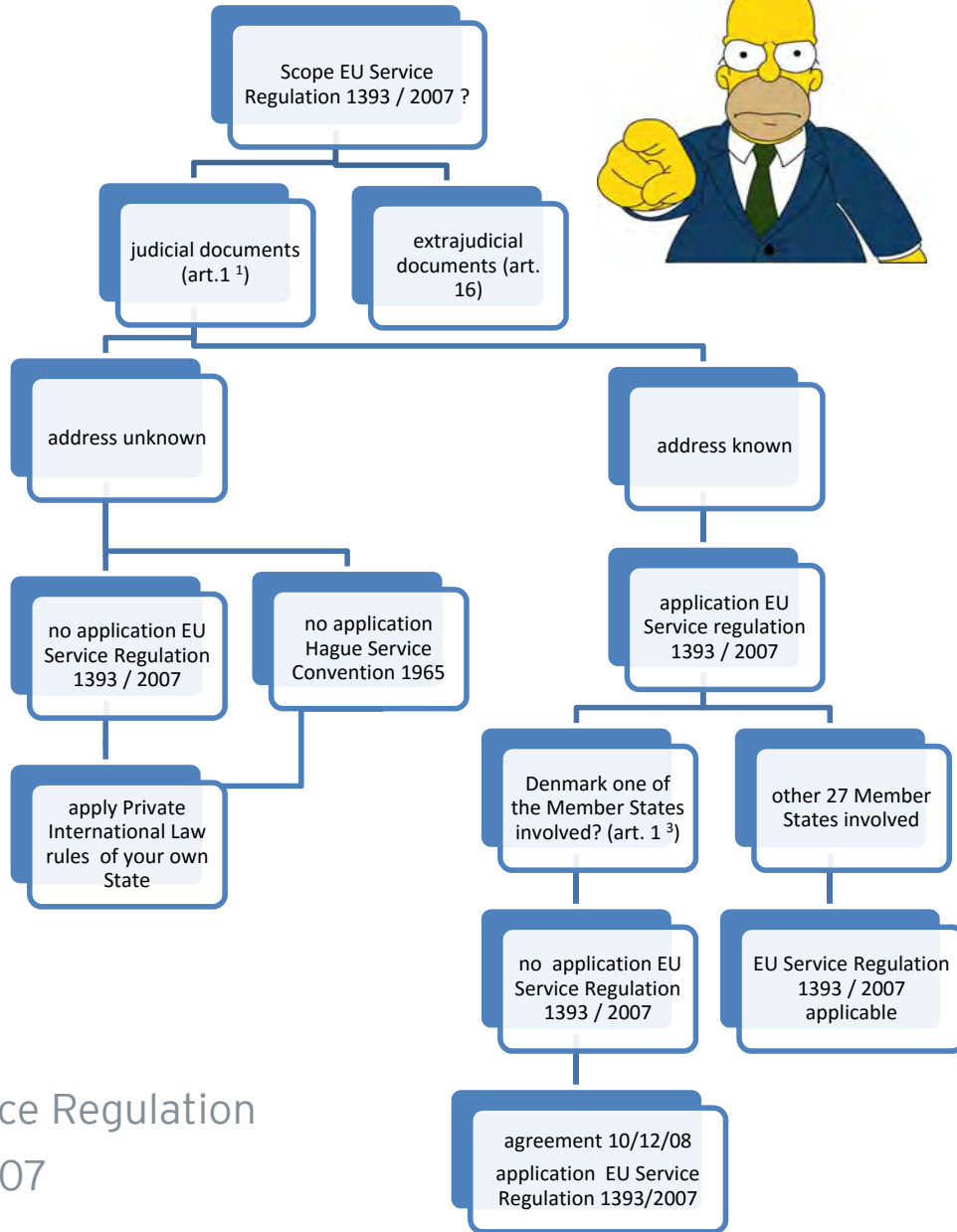
## Alice Meier-Bourdeau Biography

the French Community for Private International Law (Comité français de droit international privé) and of the Société de législation comparée.

She has also lectured at a number of conferences, such as that on European family law on 21 and 22 November 2013 (Vers un statut Européen de la famille?, Family law centre, (University of Lyon 3), CREDIP and GDR ELSJ (CNRS) or on class action on 26 April 2013 (Sur la voie de l'action de groupe, Institut de Recherche Juridique de la Sorbonne (University of Paris 1 Panthéon-Sorbonne), the Institute of Ethical Law and Estate of the University of Paris-Sud, the Centre of Criminal Law, litigation justice section of the University of Paris Ouest-Nanterre, participation in the round table discussion "Modalités de mise en oeuvre").

Section 1  
Transmission & service  
of judicial documents





## Section 2

Other means of transmission & service of judicial documents

Article 12: Transmission by consular or diplomatic channels (consular or diplomatic channel -> receiving agency)

Article 13: Service by diplomatic or consular agents (diplomatic/consular agent -> diplomatic/consular agent)

Article 14: Service by postal services (registered letter with acknowledgement of receipt or equivalent)

Article 15: Direct Service (through judicial officer, officials or other competent persons)

Scope  
EU Service Regulation  
1393/ 2007



**“Are you  
being  
served?”**

**EU Service Regulation  
1393/2007**

**Sandra Verburgt**

**MARTENS  
MESSIENS  
DELISEN**



ADVOCATEN BELASTINGADVISEURS MEDIATION

**MARTENS  
MESSIENS  
DELISEN**

**“Are you being served?”**

**Experiences from the practitioner**

- Service Regulation is not working very well
- Only in countries using official officers (gerechtsdeurwaarder, bailiff, huissier) instructions can be completed within the required term
- Service from NL to SE and DE works well (but not Berlin)
- Language requirements may result in difficulties
- When using standard forms, translation will be arranged
- Some countries accept surnames with initials, other countries require both surname and first names written in full.
- Communication with foreign officers can be very slow.

ADVOCATEN BELASTINGADVISEURS MEDIATION

## Experiences from the practitioner

**Erik van Hal, gerechtsdeurwaarder in The Hague)**

*"(...)This summer we had a divorce petition that had to be served in southern France . We found a bailiff locally through the EU site. We heard nothing from him and the defense term was about to expire. When the summer was over, we just got an acknowledgment from him. At that time we did not need him anymore, because we had arranged for service at the chosen domicile.(...)"*

**“Are you being served?”**

ADVOCATEN BELASTINGADVISEURS MEDIATION

## Experiences from the practitioner

**Erik van Hal, gerechtsdeurwaarder in The Hague)**

*"(...) We have received documents in return because in the official notice of service only initials and surname of the addressee were listed. Under Dutch law this is sufficient but apparently that was not accepted abroad (...)"*

**“Are you being served?”**

ADVOCATEN BELASTINGADVISEURS MEDIATION



## Experiences from the practitioner

Erik van Hal, gerechtsdeurwaarder in The Hague)

*"(...) Courts in Berlin can be difficult to find. On the site of European Union you can find all receiving agencies. If you enter the postal code you will find the related Amtsgericht. However, often they will still forward the documents in Berlin..(...)"*

**"Are you being served?"**

ADVOCATEN BELASTINGADVISEURS MEDIATION

## **"Are you being served?"**

**Flow Chart The Simpsons and the Service Regulation 1393 /2007**

**Scope**

**Section 1: transmission and service through agencies**

**Section 2: other means of transmission and service**

ADVOCATEN BELASTINGADVISEURS MEDIATION

## **ROME III : LAW APPLICABLE TO DIVORCE IN EUROPE (EUROPEAN DIVORCE)**

The Council of 20th December 2010's (EU) Regulation n°1259/2010 which implements enhanced cooperation in the domain of law applicable to divorce and to legal separation came into effect on 21st June 2012.

This regulation, known as « Rome III », has just added an extra piece to the puzzle of international European family law.

The aim of this presentation is not to enter into the details of the Regulation, but to provide some useful markers for the practitioner who is faced with a divorce or a legal separation in a context which involves an international element.

### **I. Who ?**

The Rome III regulation shall apply to all spouses who are nationals from two different States, or who reside in two different States, and to all spouses of the same nationality but residing in a State that is different to that of their nationality. The criteria can be filled inside or outside the European Union.

The new text also concerns same-sex couples once they are married. However, article 13 allows participating member states, where there is no same-sex marriage, not to grant divorce for same-sex couples.

### **II. What ?**

The Rome III Regulation only concerns the law applicable to divorce and to legal separation. Different legal bases are dealt with, in particular :

- - property consequences of the marriage : the matrimonial regime will be liquidated in principal, in line with normally applicable law;
- - maintenance obligations : the European Regulation n°4/2009 of 18th December 2008 which refers to the The Hague Protocole of 23rd November 2007, and which came into effect in France on 18th June 2011;
- - parental responsibility

### **III. Where ?**

•

The Rome III Regulation will be applied by the 15 member states which have implemented it for the moment: Germany, Austria, Belgium, Bulgaria, Spain, France, Hungary, Italy, Latvia Luxembourg, Malta, Portugal, Romania, Slovenia and since July 2015, Lithuania and Greece.

The other members of the European Union will continue to apply their common law.

### **IV. By whom ?**

The Rome III regulation only deals with the issue of applicable law (conflict of laws) and reserves the application of the (EU) Regulation n°2201/2003, called « Bruxelles II bis », to settle the issue of the competent judge (conflicts of jurisdiction). In most cases, in the European Union (apart from Denmark) the choice of the competent judge is made based on Regulation Bruxelles II bis.

If the judge of a State which participates in the Rome III Regulation, is competent under the Bruxelles II bis Regulation or even under another Regulation, the decision on applicable law is made under the new Rome III Regulation.

## **V. Which law ?**

The Regulation has universal scope: the law that has been designated by its provisions or chosen by the spouses applies even if it is the law of a member State which does not participate in the enhanced cooperation or that of a third State.

The Regulation states two main situations :

- The spouses have no choice in the law;
- The spouses choose the law.

And there are two main criteria: either the usual place of residence or nationality.

### **1) If the spouses have not chosen the applicable law for their divorce**

The Regulation states a series of special provisions:

- If the spouses usually reside in the same country, the law of this country is applicable; this is the common country of residence at the time the case is brought before the court, or the last common residence if one of the spouses had kept it while the other has left it less than a year before the case is brought before the courts.
- In the case that there is no common usual place of residence for the spouses (or if the period of one year has elapsed), the law of the country of their common nationality shall be applied.
- In the case that there is no usual place of residence and common nationality, the law of the court where the action is brought shall be applied (lex fori).

### **2) If the spouses have chosen the applicable law for their divorce**

The choice that the spouses can make is limited: they can choose the law of their usual residence, the national law for one of them, or lex fori.

The criteria of residence and of nationality must be determined at the time of agreement on applicable law is concluded.

## **VI. How should one choose ?**

It has to be done by way of a written document, signed by the spouses or future spouses. It is even stated that communicating the document electronically will create a durable record and

this shall be equivalent to a written document.

The choice can therefore be made as soon as the marriage settlement is signed. But this choice can be made and modified at any time, until the case is brought to court.

The legal professional must advise his or her clients to make their choice at the « right » time and the “right” choice.

In any case, a Legal professional’s advice will only be relied upon if he or she has knowledge of the foreign law chosen by the spouses. He/she should not hesitate to consult the network’s website to make the clients aware that their divorce will be filed under enhanced cooperation in the domain of the law applicable to divorce and legal separation.



## Rome III

The Law applicable to Divorce  
And to what else?



## Context

- Proposal Regulation in 2006 abandoned after two years of negotiations « *lack of unanimity on the proposal and that there were insurmountable difficulties that made unanimity impossible both then and in the near future* »
- Only 15 Member States have implemented it for the moment: Germany, Austria, Belgium, Bulgaria, Spain, France, Hungary, Italy, Latvia Luxembourg, Malta, Portugal, Romania, Slovenia and since July 2015, Lithuania and Greece.
- Adopted by the Commission upon the initiative of these States



## Scope

- Universal Application
- Article 1 – Does not include:
  - the legal capacity of natural persons
  - the existence, validity or recognition of a marriage
  - the annulment of a marriage
  - The name of the spouses
  - the property consequences of the marriage
  - parental responsibility
  - maintenance obligations
  - trusts or successions
- Preambule 10 – ultimately leaves the scope of the law applicable to the divorce to the international private law rules of the law designated.



## In the Absence of an Applicable Law Clause

### **Article 8:**

- where the spouses are habitually resident at the time the court is seized; or, **failing that**
- where the spouses were last habitually resident, provided that the period of residence did not end more than 1 year before the court was seized, in so far as one of the spouses still resides in that State at the time the court is seized; or, **failing that**
- of which both spouses are nationals at the time the court is seized; or, **failing that**
- where the court is seized (*lexi fori*)



## Choice of Law Clause

### Article 5:

- the law of the State where the spouses are habitually resident at the time the agreement is concluded; or
- the law of the State where the spouses were last habitually resident, in so far as one of them still resides there at the time the agreement is concluded; or
- the law of the State of nationality of either spouse at the time the agreement is concluded; or
- the law of the *forum*.



## How/When to Choose

- In pre-nuptial or post-nuptial agreement: best for a late or second marriage
- Determine exactly what is encompassed by the law applicable to the divorce
- Possibility of conflict between applicable law and the court seized

## Bio Alexandre BOICHÉ

Alexandre BOICHÉ has a Phd in private international law, he is avocat at the paris bar since 2003. He is an accredited specialist in Family and International and European law.

He is a specialist in international family litigation and notably conflicts of jurisdictions or conflicts of laws, recognition of foreign judgments. As such, he conducts numerous judicial training programs for colleagues in this domain both in France and abroad. Seeking to promote sustainable solutions, he also specializes in the drafting of international marriage contracts, divorce and parental authority agreements. He is also trained in collaborative law.

Since 2006, he has been an editor for the “Actualité Juridique Famille” law review edited by Dalloz .



**Lisette Dupré**



Lisette qualified as a solicitor in 2008. She joined Dawson Cornwell, a renowned family law firm in London specialising in international cases, in 2010.

Lisette advises on all areas of private family law from cohabitation and pre-nuptial agreements through to divorce, financial disputes on separation, contact with children and enforcement. She also has experience securing financial remedies following a foreign divorce and maintenance for "abandoned spouses". More recently she has advised on a number of cases involving complex jurisdictional issues. Lisette acted for Mrs Mittal in *Mittal v. Mittal [2013] EWCA Civ 1255* which established that where a state has jurisdiction under Brussels IIA, there remains the power to grant a stay on the grounds of *forum non conveniens*.

Lisette completed a dissertation on the EU Maintenance Regulation 4/2009 for her Masters' degree at the University of Bristol, in May 2014.

The enforcement of foreign maintenance orders is an area in which Lisette has specific expertise. She chaired a conference on the EU Maintenance Regulation on 1<sup>st</sup> April 2015 with a panel including senior barristers, foreign lawyers and REMO and spoke at the Hague Conference in Hong Kong in November 2015. She has written on this topic for International Family Law journal and has recently set up a working group comprising senior lawyers and members of the judiciary to discuss the issues that arise from the implementation of the EU Maintenance Regulation and other Conventions.

Lisette is a member of [Resolution](#), [the Family Law Bar Association](#) and the [Franco British Lawyers Society](#). She volunteers for the [Rights of Women](#) advice line and sits on the Young Resolution Committee. In 2015 she was shortlisted for the Jordan's Family Law Associate of the Year award.

# THE HAGUE PROTOCOL ON MAINTENANCE OBLIGATIONS

## AN OVERVIEW

### KEY POINTS

- The Hague Protocol *“shall determine the law applicable to maintenance obligations arising from a family relationship, parentage, marriage or affinity, including a maintenance obligation in respect of a child regardless of the marital status of the parents “ (article 1)*
- The applicable law is the law of the State of the habitual residence of the creditor. In case of a change of State, the law of the new State of the new habitual residence is immediately applicable.

## Choice of the applicable law to maintenance obligations *General Choice (article 6)*

- Not applicable to maintenance obligations in respect of *“a person under the age of 18 years or of an adult who, by reason of an impairment or insufficiency of his or her personal faculties, is not in a position to protect his or her interest.”*
- The choice of law is limited to:
  - “ a) the law of any State of which either party is a national at the time of the designation;*
  - b) the law of the State of the habitual residence of either party at the time of designation;*
  - c) the law designated by the parties as applicable, or the law in fact applied, to their property regime;*
  - d) the law designated by the parties as applicable, or the law in fact applied, to their divorce or legal separation.”*
- *“Agreement shall be in writing or recorded in any medium, the information contained in which is accessible so as to be usable for subsequent reference, and shall be signed by both parties.”*

## PRECAUTIONS TO BE TAKEN IN THE CHOICE OF LAW

- Notwithstanding the law designated by the parties in accordance with paragraph 1, the question of whether **the creditor can renounce his or her right to maintenance** shall be determined by the law of the State of the habitual residence of the creditor at the time of the designation.
- **Unless at the time of the designation the parties were fully informed and aware of the consequences of their designation**, the law designated by the parties shall not apply where the application of that law would lead to manifestly unfair or unreasonable consequences for any of the parties.
- **Public Policy:** the application of the law determined under the Protocol may be refused only to the extent that its effects would be manifestly contrary to the public policy of the forum.

## A wrong first application of the Hague Protocol made by the French *Cour de cassation*

- Civ I, 8 July 2015 n°14-17880 :
- *“Whereas, to reject the wife claim for compensatory allowance, the order retains, for reasons adopted, that under the terms of their marriage contract before a notary in Germany, 31 March 2000 , the couple having excluded ” any compensatory benefit under German law or any other law, ” Ms. Y ... gave up , in advance, any compensatory allowance;*
- *That decision, then it was up to it to seek, concretely, if the effects of the German law was not manifestly contrary to French international public policy, the Court of Appeal violated the above texts”*

## Applicable law to maintenance obligations between spouses (article 5)

- *“In the case of a maintenance obligation between spouses, ex-spouses or parties to a marriage which has been annulled, Article 3 shall not apply if one of the parties objects and the law of another State, in particular the State of their last common habitual residence, has a closer connection with the marriage. In such a case the law of that other State shall apply.”*

## Forum shopping = Forum law shopping (article 4)

- *“(1) The following provisions shall apply in the case of maintenance obligations of-*
- *a) parents towards their children;*
- *b) persons, other than parents, towards persons who have not attained the age of 21 years, except for obligations arising out of the relationships referred to in Article 5; and*
- *c) children towards their parents.*
  
- *(3) Notwithstanding Article 3, if the creditor has seised the competent authority of the State where the debtor has his habitual residence, the law of the forum shall apply. However, if the creditor is unable, by virtue of this law, to obtain maintenance from the debtor, the law of the State of the habitual residence of the creditor shall apply. “*

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## Guide to the EU Maintenance Regulation 4/2009

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## The EU Maintenance Regulation

Council Regulation (EC) 4/2009 on jurisdiction, applicable law, recognition and enforcement and cooperation in matters relating to maintenance obligations ("The Regulation")

- Background
- The Regulation – the basics
- Some key issues:-
  - Jurisdiction
  - Enforcement

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## Background

- 1957 - European Economic Community created
- 1993 – Maastricht Treaty
- 2002 – Brussels I came into force
- 2004 - Brussels II bis came into force
- 2009 – Treaty of Lisbon
- 2011 (18 June) – The Regulation came into force\*
- 2013 – Hague Protocol 2007 came into force in the EU\*\*
- 2014 – Hague Convention 2007 came into force in the EU\*\*\*
- 2015 – Brussels I Recast came into force

\*Denmark is not a party to the Regulation, but has agreed to implement it to the extent it amends BRI.

\*\* UK, Ireland and Denmark opted out

\*\*\*Denmark opted out

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## Structure of the Regulation

- Recitals (1 – 48)
- Chapters:
  - I Scope and Definitions (Articles 1-2)
  - II Jurisdiction (Articles 3 – 14)
  - III Applicable Law (Article 15)
  - IV Recognition, Enforceability and Enforcement of Decisions (Articles 16-43)
    - Section 1 – Hague Protocol States
    - Section 2 – Non Hague Protocol States (UK and Denmark)
    - Section 3 – Common provisions
  - V Access to Justice (Articles 44 – 47)
  - VI Court Settlements and Authentic Instruments (Article 48)
  - VII Cooperation between CA (Articles 49- 63)
  - VIII Public Bodies (Article 64)
  - IX General and Final Provisions (Articles 65-76)
- Annexes

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## The Regulation

28 Member states as at 2015

Non Hague Protocol States

- UK
- Denmark



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## The Regulation

Definition of Maintenance?

- Not defined in the Regulation
- Case law for guidance:

C-220/95 *Van den Boogaard v Laumen* (1997) ECR I-1147

“[27]...a decision...ordering payment of a lump sum and transfer of ownership in certain property by one party to his or her former spouse must be regarded as relating to maintenance and therefore as falling within the scope of the Brussels Convention if its purpose is to ensure the former spouse's maintenance.”

From an English perspective see *Moore v Moore* [2007] EWCA Civ 361

From a Scottish perspective see *AB v CD* 2007 Fam LR 53 and *C v C* [2007] CSOH 191

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# Jurisdiction

## Chapter II

- Article 3
  - (a) HR of defendant or (b) HR of creditor; or
  - (c) Ancillary to status or (d) children proceedings unless jurisdiction based solely on single nationality/domicile
- Article 4
  - parties agree the court in writing; and
  - The court chosen is in a MS of either parties' HR/nationality/domicile, or last common HR of parties or the matrimonial court; and
  - The dispute does not concern a child under 18 years.
- Article 5 – defendant agrees
- Article 6 – (if Art 3-5 don't apply) common nationality of the parties
- Article 7 – *forum necessitatis*



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# Article 3 (c) and (d)

## CJEU - A v B (Case -184/14) 16 July 2015

Question referred:

'May the decision on a request for child maintenance raised in the context of proceedings concerning the legal separation of spouses, being ancillary to those proceedings, be taken both by the court before which those separation proceedings are pending and by the court before which proceedings concerning parental responsibility are pending, on the basis of the prevention criterion, or must that decision of necessity be taken only by the latter court, as the two distinct criteria set out in points (c) and (d) of [Article 3 of Regulation No 4/2009] are alternatives (in the sense that they are mutually exclusive)?'

Ruling:

Article 3(c) and (d) must be understood as meaning that, in the event that a court of a MS is seised of proceedings involving the separation or dissolution of a marital link between the parents of a minor child and a court of another Member State is seised of proceedings in matters of parental responsibility involving that same child, an application relating to maintenance concerning that child is ancillary only to the proceedings concerning parental responsibility, within the meaning of Article 3(d) of that regulation.

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# Enforcement and Modification

## Enforcement

EDG v RR [2014] EWHC 816 (Fam)

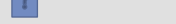
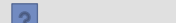
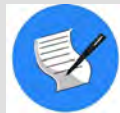
"[17] It seems to me to be inconceivable that the Secretary of State could have intended to have imposed more restrictive measures of enforcement by virtue of the 2011 Regulations\*, in circumstances where Articles 17 and 41 [of the Regulation] expressly forbid that. Therefore, I have no hesitation in concluding that...the mother here is entitled to issue her application for general enforcement in the Principal Registry"

\*The Civil Jurisdiction and Judgments (Maintenance) Regulations 2011 (2011 No. 1484)

## Modification

AB v JJB [2015] EWHC 192 (Fam)

"[64]...it is only via submission through the Central Authority for England and Wales in London of an Annex VII application that an application for modification under article 56 of the Maintenance Regulation can be directed to the designated Family Court.



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Thank you for listening

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