Brussels II *bis* Regulation
Five Years On and Proposals for Reform

'I do not mean to say that a woman may not be settled too near her family. The far and the near must be relative, and depend on many varying circumstances. Where there is fortune to make the expense of travelling unimportant distance becomes no evil. But that is not the case here. So says Elisabeth Bennett to Mr Darcy in Pride and Prejudice.

She may have changed her mind had she said that in the 1990s. Personal relationships between nationals of different Member States have become less rare thanks to '*Easytravelling*' and '*Quickiefly*'. Offers of 50 Euro return flights from Bergamo to Malmo or from Alicante to Tallin together with an increase in economic migration, encouraged by educational European programmes such as Erasmus and European internships programmes, have resulted in intercontinental and cross-cultural relationships increasing exponentially. The inevitable breakdown of many of these new relationships (which may be subjected to increased pressure due to the inherent international dimension) required legal security.

In 1999 the Tampere European Council[1] expressed the wish of the Member States to reinforce mutual recognition of court judgments, particularly in civil matters.

Trying to grant such an ambitious wish the European Council adopted Council Regulation (EC) No 1347/2000 of 29th May 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial matters and in matters of Parental Responsibility for Children of both spouses. This Regulation was a significant evolution in European Family Law, entering into force on 1st March 2001. As a Regulation it has the full force of law in every Member State[2] automatically.

[1] The European Council held a special meeting on 15th and 16th October 1999 in Tampere on the creation of an area of freedom, security and justice in the European Union.

[2] Throughout this paper, where reference is made to Members States within the Council Regulation (EC) No 1347/2000 of 29th May 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial matters and in matters of Parental Responsibility for Children of both spouses and Council Regulation (EC) 2201/2003 of 27th November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, it is referred to all States members of the European Union, except for Denmark.

But even before the Regulation came into force, reform was called for. France submitted an initiative regarding cross-border rights of access in July 2000, and on 20th September 2000 the European Commission submitted a proposal regarding parental responsibility[3].

The proposals for reform were, however, withdrawn prior to the finalisation of (EC) 2201/2003 of 27th November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, known as Brussels II *bis*. This Regulation repealed Council Regulation (EC) No 1347/2000 of 29th May 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial matters and in matters of Parental Responsibility for Children of both spouses.

Brussels II *bis* entered into forced on 1st August 2004, and became applicable on 1st March 2005.

Five years on we could agree that the aim of standardising the rules and creating a genuine European judicial area, where freedom of movement is assured and mutual trust of the judicial community and their decisions is the basis, has been furthered greatly by this Regulation. I would submit that part of the success is the extension of Parental Responsibility matters in general to the Regulation.

The Regulation provided for a committee of representatives of the Member States to assist the Commission in giving effect to the Regulation. By 1st January 2012 at the latest and every five years thereafter, the Commission should submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of the Regulation, based on information supplied by the Member States, accompanied by any proposed amendments. As seems to be becoming common in the legal European community, earlier than expected voices seeking reform increased in volume leading to the Commission presenting a Green Paper on

[3] The provisions were included in the proposal for Council Regulation (EC) 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility. They were formally withdrwan on 6 June 2002.

applicable law and jurisdiction in divorce matters on 14th March 2005. The proposal for a Council Regulation amending the Regulation as regards to jurisdiction and introducing rules concerning applicable law in matrimonial matters was made on 17th July 2006. The proposal has not been adopted[4]. The question of applicable law was not invoked during the negotiations of Brussels II *bis*, which took over virtually unchanged the provisions on matrimonial matters from Council Regulation (EC) 1347/2000.

Although this paper will consider proposals for reform, I propose to consider the question from the perspective of the subjects of the regulation arguably at greatest need of certainty: children. Although it is of course vital that jurisdiction in respect of divorce and matrimonial matters is clear to all involved in such cases, it is the vulnerable parties at the heart of matrimonial breakdown who are in greatest need of certainty as regards in which jurisdiction decisions concerning them will be taken.

There is no circumstance in which a child is more deserving of jurisdictional certainty and, as part of that, swift determination of their future, than following a case of international child abduction. As such I propose to consider the practicalities and principles behind Articles 11 (6), (7) and (8) of the Regulation.

The Hague Convention of 25th October 1980 on the Civil Aspects of International Child Abduction ("the 1980 Hague Convention"), which has been ratified by all Member States, continues to apply in full in relevant applications between Member States, supplemented by certain provisions of the Regulation. The rules of the Regulation prevail over the rules of the Convention in relations between Member States, articles 10, 11, 40, 42 and 55 of the Regulation are the articles which deal with this matter.

By Articles 11 (6), (7), and (8) of *Brussels II Revised* the regulation intends to provide for a mechanism by which, in certain limited circumstances (namely the

[4] Commission of the European Communities, Brussels, 17th July 2006, COM(2006), 399 final, 2006/0135 (CNS), Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters.

establishment of an Article 13 defence) the Courts of the requesting state may nonetheless, and supposedly by way of a relatively summary procedure, determine the future state of residence of the child. Any judgment reached by the Court in accordance with that mechanism is then automatically enforceable in the receiving state by the special procedure available under Section 4 of Chapter III of the regulation.

This procedure has been named by judiciary and practitioners 'the trumping provision' and/or 'second bite'.

Before the entering into force of the Regulation, the position was that if a Defendant succeeded in a Hague Convention case, the subsequent proceedings would almost certainly take place in that jurisdiction (arguably in line with the approach encapsulated within Articles 8, 9 and 10). This is no longer the case. The provisions of this article place families litigating in these particular circumstances within the European Community in a position where they have to engage in sophisticated international litigation.

Revising the objectives of the Treaty of Amsterdam and what the Community has archived in security and justice, article 11 (6), (7) and (8) of Brussels II *bis* may be said to have a distinctly '*un-European flavour'*.

The Regulation ensures that the courts of the Member State where a child was habitually resident before the abduction remain competent to decide on the question of custody after the abduction, and, by way of Article 11(4), reinforces the principle that the court shall order the immediate return of the child by restricting the exceptions of Article 13(b)[5] of the 1980 Hague Convention. The Regulation also reinforced the need for speed in these cases ruling that the courts must apply the most expeditious procedures available under national law and issue a decision within six weeks from being seized with the request with the aim of ensuring the prompt return of the child within the strict time limit.

[5] Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that - *b)* there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

It can be argued that all of these provisions have empowered the Convention making non return orders the exception.

But in these exceptional cases where a court decides that a child shall not return pursuant to Article 13 of the 1980 Hague Convention, the Regulation foresees this special procedure allowing the left behind parent to be asked by the Member State of origin whether they wish the court of origin to examine the question of the location and custody of the child, with the possibility of the Court of the Member State of origin issuing a return order which can be enforced in the Requested Member State. Where a non-return order is made on the basis of Article 13, this allows the authorities in the State of the child's habitual residence to rule on whether the child should be returned notwithstanding the non-return order.

If a subsequent return order is made under the article 11 (6), (7) and (8) of the Regulation, and is certified by the issuing judge, then it will be automatically enforceable in the State where the child has been removed to and all other EU-Member States.

If a contact or residence order is made under the article 11 (6), (7) and (8), that order needs to be enforced in the Member State where the Minor has now become habitually resident since the non return order within The Hague Convention proceedings was made. Any further variations of such order would be made by the Member State where the Minor is not resident.

Legal Security

The preceding articles concerning jurisdiction within Brussels II *bis* have the effect of instituting comprehensive arrangements for determining which court has jurisdiction for a particular child, based upon that child's habitual residence. The habitual residence criteria serves to facilitate the stated aims of the revised regulation, and particularly that "the grounds of jurisdiction in matters of parental responsibility

established in the present Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity'[6].

It is submitted, however, that jurisdiction based on proximity can only serve to further the interests of the child to a certain extent, particularly where to maintain such a jurisdiction is to cause unnecessary delay.

In practice the special procedure under Articles 11(6) – (8) has shown the potential to cause protracted, parallel litigation in two different Member States. It raises uncertainty and I would submit that it damages the legal security that the Regulation aims to offer the European Community, in the circumstances were, from the perspective of the child, that certainty and security is most needed.

Taking into account that the whole international community's aim was for non return orders to be the exception in Child Abduction cases, the special procedure seems to provide for the same cause to be litigated in a different procedural context in the Member State of origin. This results in a situation where the children's State of residence, not only their relationship with the left behind parent and family, is left in limbo for a considerable amount of time whilst it is disputed certainly in the State in which the child was formerly habitually resident (on the assumption that in accordance with the law of the State, as in English law, habitual residence may shift following an abduction should that situation be regularised by a decision of a court) or alternatively in two different Member States, who may engage in a lengthy (and potentially unnecessary) legal examination of jurisdiction.

This legal uncertainty may be connected to the lack of contact between the child and the left behind parent because the procedure brings with it the sense of non trust on resolutions of another Member State, and the significant risk that until such jurisdictional questions are finally determined, one or other parent may refuse to travel internationally with the child.

[6] Preamble 12

Although practising in this area, I have not been involved in a single case of this nature where contact takes place in the interim; potentially a number of years, as contact in the Member State of origin, which may be seen as an untrusting land, could be seen to involve the risk that if the children enters the courts of that State might not let them return. One example is Re: H (A Child)[2009] EWHC 2280 (Fam) following 18 months of litigation in Spain when a non return order to England was made pursuant to The Hague Convention 1980, the left behind parent's application under article 11 in England concluded, almost 2 years later with an order for direct and indirect contact as a matter of principle, order that was never complied with.

When dealing with Parental Responsibility cases, timing is all important. Delay is prejudicial, and the welfare of the child should be paramount. This special procedure provides more time for litigation of technicalities, when what may be more child-centric would be the swift initiation of proceedings, on a welfare basis, in the jurisdiction with the greatest connection to the child at the time that the determination is required.

In *Iosub Caras v Romani,* Application No 7198/04, [2007] 1 FLR 661 there was a delay of 18 months from the date of the application under the *Hague Convention* 1980 to the date of determination. That was found by the European Court of Human Rights to constitute a breach of the positive obligation on a state by Article 8 of the European Convention. As stated at paragraphs [38] – [40]: *In matters pertaining to the reunification of children with their parents, the adequacy of a measure is also to be judged by the swiftness of its implementation, such cases requiring urgent handling, as the passage of time can have irremediable consequences for the relations between the children and the parent who does not live with them.*

One of the latest problems that needed the involvement of the European Court was the case of Povse v. Alpago. On 3rd May 2010, the Oberster Gerichsthof (Austrian Supreme Court of Justice) asked five questions of the European Court of Justice for a

preliminary ruling[7] in this matter. This matter originated from a Child Abduction from Italy to Austria and the issues to resolve were the jurisdiction of the Italian Courts to order the return of the child to that State in circumstances where the child has resided for more than one year in Austria and where the courts of Italy, after the abduction, provisionally awarded custody of the child to the parent who abducted the child. It questions whether it is possible to refuse, in the interests of the child, the enforcement of the Italian decision ordering the child's return to that jurisdiction.

Examples of the applicability of this procedure are not too numerous[8] but significant. *Re A (custody decision after Maltese non-return order)* [2007] 1 FLR 1923 Mr Justice Singer ordered the return of a child from Malta to England and Wales, after the Maltese court had upheld an article 13(b) defence. *Re A, HA v MB (Brussels II Revised: Article 11(7) Application)* [2007] EWHC 2016 (Fam) the application was under Article 11(8) but gave rise to issues under articles 10 and 11(7). Mr Justice Singer's judgment gives practical guidance on what the court can do and how, upon an Article 11 application for return to State of origin. The learned Judge decided that it was wrong to treat a contact order made in the State of origin as an order requiring a return to the State of origin if any order is made under Article 11. *"To elevate an order for contact into an order requiring return of the child to state A (in this case England) would render the Regulation scheme unworkable."*

Judicial cooperation is available and much needed in this type of cases; however it is not the panacea. These European families need legal certainty and legal security following a non return order made at the conclusion of complex, technical yet swift litigation in most of the cases in a Member State where one of the parties is not familiar with the legal system or even the language.

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[7] Case C-211/10 PPU (Judicial cooperation in civil matters — Matrimonial matters and matters of parental responsibility — Regulation (EC) No 2201/2003 — Unlawful removal of a child — Provisional measures relating to 'right to take parental decisions' — Rights of custody — Judgment ordering the return of the child — Enforcement — Jurisdiction — Urgent preliminary ruling procedure)

[8] In the jurisdiction of England and Wales:- Re A (Custody Decision after Maltese Non-Return Order) [2006] EWHC 3397 (Fam), [2007] 1 FLR 1923; Re ML and AL (children) (contact order: Brussels II Regulation) [2006] EWHC 3631 (Fam), [2007] 1 FCR 496, a decision of Mr Nicholas Mostyn QC sitting as a Deputy High Court Judge; Re A; HA v MB (Brussels II Revised: Article 11 (7) Application) [2007] EWHC 2016 (Fam), [2008] 1 FLR 289; Re RC and BC (Child Abduction) (Brussels II Revised: Article 11(7)) [2009] 1 FLR 574; and Re RD (Child Abduction) (Brussels II Revised: Arts 11 (7) and 19), [2009] 1 FLR 586.

In these exceptional cases when a non return order is made, shall the jurisdiction of the Member State of origin be transferred automatically to the Member State that makes a non return order?

Shall Article 15 of the Regulation include a non return order pursuant to Hague proceedings as an exception justifying the transfer of jurisdiction to an alternative Court?

Shall we include provisions that following the non return order made, the jurisdiction of the Member of State of origin is transferred and no further decisions could be made concerning the minor in the Member State of origin?

Would this offer legal security and legal certainty to these parents in cases where parallel proceedings would bring lack of trust between them, lack of legal trust in their respective jurisdictions, and no contact between the child and the left behind parent?

Conclusion

In 1998 the European Council in Vienna emphasized that the aim of a common judicial area is to make life simpler for citizens, in particular in cases affecting their everyday life.

The impact of article 11 (6), (7) and (8) of the Regulation on children and in families of the European Community, in my humble submission, does not reach that aim in its current form.

In short, in considering how legal security should best be offered to the European Community, the procedure that offers the Regulation in articles 11 (6), (7) and (8) in Child Abduction, should be reconsidered and amended. This article does not offer

legal security, but could be said, in what is already a remarkably technical jurisdiction, to achieve the opposite.

The question may be asked whether the Articles concerning jurisdiction based upon habitual residence would provide certainty enough to establish in which jurisdiction determination following a non-return order should be conducted, or whether even that might be trumped by the issue of proceedings in the requesting State prior to determination of the Hague proceedings[9], which may lead perfectly properly founded proceedings without conclusion due to an intervening non-return order.

Security in the future will undoubtedly be much shaped by the past.

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[9] As is a relatively common ploy

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