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Parental Responsibility Cases under the new Council Regulation “Brussels IIA“

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1. Objectives of Brussels IIA

a) Only four years after Council Regulation No 1347/2000 (“Brussels II”) came into force, legal practice faces new challenges when dealing with matrimonial matters and related subjects. The so-called Brussels IIA Regulation (Council Regulation [EC] No 2201/2003) which has come into force on 1 August 2004 and is applicable as to its jurisdictional rules from 1 March 2005 (Article 72), repeals the Brussels II Regulation entirely.

b) As far as matrimonial matters themselves (i.e. divorce, separation or annulment of marriage itself) are concerned, Brussels IIA will bring only minor substantive changes compared to Brussels II, although virtually all article numbers have been changed thereby making it unnecessarily burdensome to discuss existing questions under the new Regulation. The main objective that caused the EC-Commission to file the proposal for the new Regulation quite shortly after Brussels II had come into force was to extend the system of jurisdiction (below 2.) lis pendens (below 4.) and enforcement (below 5.) in matters of parental responsibility, which are not covered by Brussels II unless parental responsibility is to be decided together with a matrimonial matter.

c) When introducing an independent body of jurisdictional rules for parental responsibility cases one has to deal with well established legal instruments that are closely related, i.e. the Hague Convention of 19 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors (CPM), the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children (CPC), which is going to replace the CPM between CPC Contracting States, as well as the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (CCA). From an EC Member State’s perspective, problems do not only arise when a case is related to another EC Member State and at the same time to another non-EC Member State of one of the above-mentioned Hague Conventions. As the substantive scope of application is different compared to the CPM and CPC, conflicts arise even when the Regulation takes precedence over CPM and CPC according to its Articles 60(a) and 61. While both Hague Conventions stipulate jurisdiction as well as the applicable law, Brussels IIA deals only with jurisdiction and enforcement. Therefore, the conflict of laws must be decided under CPM or CPC even if the case is governed by Brussels IIA (below 6.). After some dispute between the Council and the Commission as to whether the signing of the CPC fell within the competence of the EC or each Member State, the Convention has finally been signed by all remaining EC Member States and should be ratified by all remaining EC Members States during 2005. Therefore, this article will not discuss questions arising under CPM which at least by the end of this year will be superseded by CPC for all EC Member States.

d) The other main objective which was difficult to solve by way of compromise is related to child abduction cases. Article 11 is the result of a compromise as proposed by the Council in November 2002. Brussels IIA will not replace Article 12 CCA as the legal ground for child replacement orders but creates a closer system of cooperation between courts in Member States if the court of a Member State to which the child has been displaced finds that the replacement should be denied (below 3.).

2. Jurisdiction in Parental Responsibility Cases

a) Scope of Application – “Parental Responsibility”

aa) Parental Responsibility for Children

By omitting the former restriction to parental responsibility cases related to marital matters, Article 1(1)(b) includes any parental responsibility case, be it related to a marital matter or not, within the scope of Brussels IIA covering the attribution, exercise, delegation, restriction or termination of parental responsibility.

From the context of Article 1 it should be quite clear that the Regulation only applies to measures of parental responsibility (Article 1(1)(b)) directed towards a child (Article 1(2)(c), (d) etc.). Measures of custody or guardianship over adults are not included. However, like Brussels II, Brussels IIA does not provide a definition of who should be considered a child or a minor. Generally, there are two options:Minority could be determined by reference to the applicable law under the

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Footnotes:
1. OJ 2003, L 338 at 1; shortly “Brussels IIA”.
2. All articles cited without express reference to a legal instrument refer to the Brussels IIA-regulation.
7. CPC is already in force for The Netherlands: http://hcch.net/e/status/stat34e.html; last visited 15 Dec 2004.
8. Originally the Commission had proposed 1 January 2005 as the deadline for ratification COM (2003) 348 final.
conflict law of the court or minority could be given an autonomous definition to be applied by the courts in all Member States. The latter option should be given preference in order to assure an efficient and equal application of the Regulation in all Member States and to avoid negative conflicts in competency. Article 2 CPC deliberately eliminated the problems caused under Article 12 CPM by providing an independent definition referring to the age of 18; Brussels IIA should adhere to this model. As soon as the CPC has come into force in all Member States it will govern the applicable law under its Article 1(1)(b) and (c). Thence, applying Brussels IIA and CPC under the same age requirement will also avoid unnecessary contradictions and doubts in practice. However, the application of the Regulation to children under the age of 18 does not extend to rules depending on the applicability of CCA (such as Article 11), as the CCA shall only apply to children under the age of 16 (Article 4 sentence 2 CCA).

bb) Positive and Negative Catalogues Compared to CPC

Obviously the catalogues in Article 1(2) and (3) were partly borrowed from Articles 3 and 4 CPC making it appropriate to describe the scope of application in comparison to the CPC’s scope, although EC institutions involved in the rule making process obviously have a tendency towards reinventing the wheel instead of making a complete reference to pre-existing international legal instruments. In this particular case, changes which took place during the law making process look quite random as the Commission’s and Council’s reasoning is not liberally published. The Commission’s proposal contained no obvious reference to CPC at all. It started with a short clarification excluding maintenance matters, which are covered by Brussels IIA and criminal measures. A negative list of topics to which the Regulation should not apply was added by the Council in a remark of December 2002. Further steps followed including a positive list that made it necessary to add other aspects to the negative list. Although this proposal, which was the blue print for the Regulation, came quite close to how CPC describes its scope, raising the question of whether those changes will be for the better, it is not clear at all to what extent the resulting Article 1 does or does not differ from Articles 1, 3 and 4 CPC.

Instead of making a reference to the well established formula "measures directed to the protection of the person or the property of the child" as established in Article 1 CPM as well as Article 1 CPC and explained in Articles 3 and 4 CPS, Article 1 is designed differently. The scope of application in Article 1(1) is described as “attribution, exercise, delegation, restriction or termination of parental responsibility”, i.e. using one of the particular topics of the positive list in Article 3(a) CPC. Instead the measures directed to the protection etc. which are the starting point in Article 1 CPC are listed in Article 1(2)(e) as one of several matters included within the meaning of “parental responsibility”. Therefore, it becomes questionable whether protective measures should be considered the general or only one of several particular aspects. Moreover, the positive (Article 1(2)) and negative (Article 1(3)) lists differ from the similar lists in Articles 3 and 4 CPC, fuelling the presumption that there should be differences between the scopes of application of Brussels IIA as compared to that of the CPC.

Brussels IIA applies to parental responsibility in a broad understanding, including not only custody but also rights of access as well as guardianship and similar institutions. Rights of access are also within its scope if persons other than parents claim to be entitled to access to the child. The designation of the respective person in charge of the child (Article 2(c)), particularly a guardian) as well as the placement in a foster family (Article (2)(d)) could easily be understood as measures for the protection of the child (Article 2(c)). When comparing the positive list in Article 1(2) with Article 3 CPC, the most prominent question is whether, by exchanging the terms parental responsibility for measures of protection in the general definition, the Regulation actually was given a broader scope of application than the CPC. Does Brussels IIA in particular solve the problem that CPC does apply to judicial measures restricting parental responsibility but does not apply to the question of who is in charge of the child by operation of law? Not at all! The latter problem is strictly one of (substantive) conflict law; as Brussels IIA deals only with jurisdiction and enforcement rather than private international law, matters to which Article 1(1)(b) refers will always involve judicial measures only.

Minor deviations from Article 3 CPC do not seem to have any meaning either. Different, mostly shorter formulations express the same meaning. Even by omitting the Islamic institution of kafala (Article 3(e) CPC) Article 1(2)(d) will not prevent a judge from applying Brussels IIA to kafala, if Muslim law should be applicable.

Finally, the question arises as to why the supervision of the care of a child by a public authority as listed in Article 3(f) CPC is neither part of the positive (Article 1(2)) nor the negative (Article 1(3)) list. This relates to the general scope of application as described in recitals no (7) and (10) as the Regulation covers civil matters regardless of the type of court involved but does not apply to social security and public measures of a general nature. Nevertheless, Brussels IIA applies to the supervision of the care of a child as far as individual measures are concerned. Whether measures to control a parent or guardian individually are civil matters must be decided autonomously; undoubtedly such measures are civil matters by nature regardless of whether they are performed by a court or a public authority.

As far as the negative list in Article 1(3) is concerned, there is no substantial difference compared to Article 4 CPC, al-
though several topics listed in Article 4 CPC are missing in Article 1(3). Nevertheless, social security (Article 4(g) CPC), public measures of a general nature (Article 4(h)), asylum and immigration (Article 4(j)) are not civil matters and therefore are excluded from Brussels IIA. For similar reasons Brussels IIA does not apply to measures taken as a result of penal offences committed by children (Article 4(i) CPC) either. When removing this exception, which the Commission thought to be important enough to name as one of only two exceptions in the original proposal, the intention was not to make Brussels IIA applicable to criminal proceedings, but rather to leave the decision of whether such measures were of a civil or criminal nature to the discretion of the courts.

b) Territorial Scope of Application

Concerning the territorial scope of application, Brussels IIA as well as Brussels II are not very clear compared to Brussels I with its Articles 3 and 4 clearly describing when and when not the respective Regulation applies. There are no rules under Brussels IIA to generally describe the territorial scope of application depending on where the defendant is domiciled or similar criteria. There is no general prerequisite that the case should have any connection with another Member State. Instead, as a general rule Brussels IIA applies whenever a case within the substantive scope must be decided by a court of a Member State. Whether in such cases the Regulation takes precedence over other instruments including international Conventions and the law of the court (lex fori) depends on Chapter V (Relation with other instruments) and the interpretation of the jurisdictional rules in Chapter II as being exclusive or not. Under Brussels II, this has been a relevant question primarily for matrimonial matters.20 However, under Brussels IIA, the issue of parental responsibility cases, which are not brought in conjunction with matrimonial matters, must be addressed. When assuming the position of a particular court in a Member State, the prominent problem is not, whether or not to positively apply Brussels II, because there can be no doubt that Brussels IIA applies if chapter II (2) grants jurisdiction to the respective court. The crucial aspect is whether or not to apply other instruments if the respective court is not a competent court under chapter II (2). The relation to CPC is quite clear. According to Article 61(a) Brussels IIA takes precedence over CPC if (and only if) the child is habitually resident in a Member State as described in Article 2 definition 3. As far as the lex fori is concerned, Article 14 gives precedence to Brussels IIA as long as a court in any Member State is competent under Articles 8 to 13.21

Notwithstanding Article 14, there is always the CPC in between Brussels IIA and the application of the lex fori. Particularly, if no Member State has jurisdiction under Articles 8 to 13 but the child is habitually resident in a Contracting State of CPC, this Convention shall apply and take precedence over any ground for jurisdiction under the lex fori.

c) General and Continuing Jurisdiction (Article 8)

The general rule of jurisdiction under Brussels IIA is based on the proximity between the court and the child. Article 8 et seq. only rule on inter Member State-jurisdiction, venue is governed by the lex fori. Article 8 gives general jurisdiction to the courts of the Member State where the child is habitually resident at the time a court of this Member State is seised. The seising of the court is determined by Article 16 for all purposes arising under Brussels IIA Regulation. A change of the child’s habitual residence taking place after the court is seised will not affect jurisdiction (perpetuatio jurisdictonis). However, jurisdiction is questionable if a court is seised before the child assumes habitual residence in this Member State. Although in this case the court of the new habitual residence would have had no jurisdiction at the time it was seised this court should not decline jurisdiction under Article 17 unless the case had already been pending in a court of the former State of habitual residence.22 If the court declined jurisdiction the action could easily be brought again in the same court having jurisdiction under Article 8 on the second attempt.

d) Continuing Jurisdiction (Article 9)

A change in habitual residence, even if lawfully effected, shall not deprive the courts of former habitual residence of their jurisdiction under certain circumstances. According to Article 9, the courts of former habitual residence will retain jurisdiction (perpetuatio jurisdictionis) during a three-month period following the move of habitual residence only for the very limited purpose of modifying a judgment on access rights issued in that Member State before the child moved. For all other types of measures concerning parental responsibility, jurisdiction shifts immediately when the child moves. In addition, in order to apply Article 9 the holder of such access right must continue to be a habitual resident of the State where the child formerly resided. Although it is questionable from the wording whether the three-month-period runs until the modifying judgment is rendered, the seising of the court should be sufficient to preserve the time limit. As has already been explained, a change of habitual residence will not affect jurisdiction as soon as a court is seised. Therefore, a court in the Member State of the child’s former habitual residence might render an access order even after the move. However, Article 9 does not apply to this situation. There is no need to retain jurisdiction if the court could already take the move into consideration when rendering the original access order.

“Retained jurisdiction” under Article 9 raises the problem of jurisdictional conflicts between the courts of the former and actual habitual residence. Insofar, Article 8(2) gives prece-

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20 This is particularly doubtful for matrimonial matters if jurisdiction is not exclusive under Article 6 (formerly Article 7 Brussels II) although some authors claim the regulation to be basically exclusive against the lex fori, see Rauscher in: Rauscher, EuZPR Article 7 Brussels II-VO n. 5 et seq.

21 Solomon, FamRZ 2004, 1409, 1411; although Article 14 has the same wording as Article 7 the interpretation of Article 14 is much easier as there is no foregone description of exclusiveness like in Article 6 (formerly Article 7 Brussels II). Therefore exclusive application of Brussels IIA in marital matters will be determined by Article 6 rather than by Article 7. Brussels IIA is not exclusive as the marital matters unless Article 6 applies: Rauscher in: Rauscher, EuZPR Article 8 Brussels II-VO n. 6 et seq.

22 Solomon, FamRZ 2004, 1409, 1411; for a similar problem in matrimonial matters see Rauscher in: Rauscher, EuZPR Article 2 Brussels II-VO n. 25.

23 Otherwise see below 3.
dence to the courts retaining jurisdiction under Article 9. However, the holder of the access right, who is the one to be protected by granting retained jurisdiction, may accept jurisdiction of the courts in the Member State of actual habitual residence, particularly when he participates in proceedings before those courts. As under Article 24 Brussels I participation after contesting the jurisdiction does not amount to an acceptance of such jurisdiction. On the other hands, the courts of the child’s new habitual residence shall a fortiori assume jurisdiction if the holder of the access right himself brings the proceeding in one of those courts, thereby, even claiming this court’s jurisdiction.

e) Prorogation of Jurisdiction (Article 12)

Concept of Prorogation not necessary if Article 8 applies

The concept of “prorogation” of jurisdiction was originally used in Article 3(2) and (3) Brussels II to give jurisdiction in parental responsibility cases to the court dealing with the matrimonial matter, if the child was not habitually resident in the State of the court. This concept continues under Article 12(1), (2) and now also applies to isolated parental responsibility cases under Article 12(3). Although consensus of the parties is one of the elements of this concept and Recital 12 refers to the agreement as the crucial criterion which might justify the use of the word “prorogation”, the actual connections between the child, the forum State and the best interest of the child are the more important aspects. There is no preliminary prorogation at all because neither those connections nor the best interest test can be anticipated. Even the element of consent cannot be anticipated as consensus must continue until the court is seised.

Article 12(1), (2) which resembles former Article 3(2), (3) Brussels II concerns annex jurisdiction to decide on parental responsibility in the State where a matrimonial matter is pending. A rule as contained in Article 3(1) Brussels II is no longer necessary as jurisdiction can now be based on the general rule (Article 8) if the child is habitually resident in the forum State. Regardless of its wording, Article 12(1) does not apply to such cases even if a matrimonial matter is pending. Whether the proper venue is the court where the matrimonial matter is pending must be decided according to the lex fori.

bb) Parental Responsibility Jurisdiction Based on Matrimonial Matter

Jurisdiction based on a matrimonial matter only becomes an issue if the child habitually resides outside the State where the matrimonial matter is pending. This situation is now covered by Article 12(1), (2) which only applies to courts exercising jurisdiction under Article 3. It does not take effect for a court exercising residual jurisdiction under Article 7 and its lex fori. The new rule not only applies to children residing in a Member State which is not the forum State (as Article 3 Brussels II did) but also to children residing in Non-Member States. This extension leads to the question whether Article 12(1) or Article 10 CPC applies, if the child resides in a CPC Contracting State which is not a Member State. When considering Article 61, Article 10 CPC should take preference over Article 12(1) in such situations. While it remains necessary under Article 12(1)(a) that at least one of the spouses has parental responsibility in relation to the child, the new rule is no longer restricted to common children of the spouses but extends to all parental responsibility cases connected with the matrimonial matter. For example, an application for access to one spouse’s child by the other spouse after divorce (if the applicable law grants access rights to step-children) is connected with the divorce proceeding between those spouses. An application for access brought by the other legal parent of the child who is not involved in the divorce proceeding is not.

There are also differences as to the consensual element. Although under the new rule the jurisdiction of the courts doesn’t need to be accepted expressly, it must be accepted in an unequivocal manner, making clear that the mere submission to a court having jurisdiction for a matrimonial matter and dealing with the parental responsibility ex officio is not sufficient. Even the active participation in the proceeding, commencing after the parental responsibility case has been brought, could no longer be a sufficient basis for jurisdiction, as, according to the wording of the rule, jurisdiction must be accepted “at the time the court is seised”. If this is to be understood literally, only an acceptance at a time before the relevant steps under Article 16 are taken would be sufficient. In practice such an interpretation would render Article 12(1) almost useless. The parties to a divorce proceeding won’t even think about jurisdiction as to parental responsibility before the court is seised. Therefore, a more liberal interpretation is advisable. The wording should probably be understood in the sense of “at the time the court has been seised” thereby excluding any binding prorogation before the case has been brought to court. As soon as the case is pending, consensus can be achieved by virtue of submission to the parental responsibility case as long as such submission unequivocally shows the consent of each party. Moreover, the consensus of the spouses is not enough. If there are other holders of parental responsibility they must also agree before the court is seised.

Despite the acceptance by the spouses, the exercise of such jurisdiction must be in the superior interest of the child. “Superior” interest should be interpreted the same way as “best” interest in Article 12(3)(b) or even “interest” in Article 12(4). Jurisdiction based on Article 12(1) shall cease according to Article 12(2) under the same prerequisites as laid out in the former rule Article 3(3) Brussels II.

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26 In this sense Schulz, FPR 2004, 299, 300.
27 Which means that one parent actually has the full parental responsibility, while a mere right to access the child will not be sufficient: Rauscher in: Rauscher, EuZPR Article 3 Brussels II-VO n. 15.
28 As finally proposed by the Council 2002/0110 (CNS).
30 Solomon, FamRZ 2004, 1409, 1413 who points out that the use of the word “prorogation” is misleading.
31 The German version does not make any differences as to the Kindeswohl.
cc) Prorogation in Isolated Parental Responsibility Cases

Article 12(3) develops a different concept of prorogation which applies to parental responsibility cases only if no matrimonial matter is pending and, again, the child is not habitually resident in the State of the court. The idea was already part of the original Commission proposal31 where it was designed to allow for an agreement among all holders of parental responsibility to bring a case before the courts of a Member State with which the child has a substantial connection. Again the consensus of all parties to the proceeding at the time the court is (even better “has been”) seized, in this case not necessarily including all holders of parental responsibility, is only one aspect. Even more important is a substantial connection between the child and that Member State. Such connection exists in particular if one of the holders of parental responsibility is habitually resident there or the child is a national of that State, which should be understood as a legal example rather than a mere presumption. Again, exercising this jurisdiction must be in the (best) interest of the child. By wisely applying the best-interest criterion, courts should achieve reasonable results32 although Article 12(3) gives quite long-armed jurisdiction if it is based on the child’s nationality only.33 When the presumption in Article 12(4) (below dd) does not apply, i.e., if the child is habitually resident within a Member State or a contracting party of CPC the best interest must be carefully examined in order to avoid conflicting jurisdiction within the systems of Brussels IIA and the CPC. Even if the child is habitually resident in a Member State this Member State’s jurisdiction under Article 8 does not prevent the parties from consensually bringing the case in another State under Article 12(3). Nevertheless, such cases won’t happen too often as usually one parent is living with the child and this parent will be hesitant to agree to a burdensome jurisdiction elsewhere. Most cases under Article 12(3) will probably feature strange situations of habitual residence particularly with children being nationals of a Member State but residing farther abroad in countries with unreliable judicial structures.

dd) Presumption for Children Residing Outside CPC Contracting Parties

Referring to such cases Article 12(4) states that exercising jurisdiction under Article 12 should be presumed to be in the interest of the child (including the superior (Article 12(1)(b)) or best (Article 12(3)(b)) interest34) if the child is habitually resident in a State which is not a contracting party to the CPC. This presumption makes clear that Article 12 is advantageous over Article 10 CPC. Generally CPC is not applicable to children outside its area and therefore even in divorce cases jurisdiction cannot be established or if the child has been internationally displaced as a refugee because of disturbances occurring in the country of origin, the courts of the Member State where the child is actually present have jurisdiction unless jurisdiction can be determined on the basis of Article 12.

f) Jurisdiction Based on Presence (Article 13)

Article 13 has been tailored according to Article 6 CPC thereby exchanging paragraphs (1) and (2). If a child’s habitual residence cannot be established or if the child has been internationally placed as a refugee because of disturbances occurring in the country of origin, the courts of the Member State where the child is actually present have jurisdiction.

g) Jurisdiction Based on Urgency

The concept of jurisdiction based on urgency as adopted by Article 11 CPC is hidden under the veil of “Provisional, including protective, measures” in Article 20. As recital 16 expressly says, the Regulation should not prevent the courts of any Member State from taking such measures in urgent cases. The only reason why the legal basis for such measures cannot be found in Chapter II Section 2 is the systematical order of Brussels IIA which follows Brussels II and Brussels I rather than CPM and CPC.

Article 20, unlike Article 11 CPC, does not grant jurisdiction in situations of urgency itself. It only allows a court which lacks jurisdiction under Brussels IIA, to exercise jurisdiction under the lex fori if provisional matters are appropriate with regard to the person of the child or the assets situated in this State. Insofar, the solution provided by Article 11 CPC would be advantageous over the reference to national law made by Article 20. Provisional measures, in particular urgency measures in parental responsibility cases should be possible in any Member States regardless of whether the lex fori provides for them or not. A solution for this problem may be found by referring to Article 11 CPC as part of the respective national law of the court. Although Article 61 gives precedence to Brussels IIA over the CPC, if the child is habitually resident in a Member State, such precedence cannot exist, if Brussels IIA refers to a lex fori which itself must give preference to CPC. Therefore, as soon as CPC has come into force in all Member States, Article 11 CPC will indirectly apply to urgency measures even if the child resides in a Brussels IIA Member State.

Any measures taken under Article 20(1) shall cease to apply when the court of a Member State having jurisdiction under Article 8 et seq. has taken measures as to the substance of the matter. Insofar, Article 11(2) CPC is not applicable.

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32 With similar arguments Solomon, FamRZ 2004, 1429, 1412.
33 Critical to this point: de Boer, NILR 2002, 329.
34 The German version does not make any difference of that kind taking “das Wohl des Kindes” as the relevant criterion in Article 12 (1)(b), (3)(b) and (4).
b) Transfer of Jurisdiction (Article 15)

aa) Exceptional Concept of Forum non Conveniens

A court which has jurisdiction under Article 8 et seq. may transfer its jurisdiction to a court better placed to hear the case (Article 15) in exceptional circumstances. Although this rule can be considered the first attempt to implement the concept of forum non conveniens into an instrument of EC law of civil procedure, Article 15 should be understood as a concept of limited power to transfer a case to another jurisdiction rather than a model to be implemented in other instruments. Article 15 has been proposed as a less open-ended method compared with Article 8 CPC using a system of cooperation between both the courts and the parties to ensure that even in very exceptional cases jurisdiction shall lie in a court which is better placed to hear the case in the best interest of the child.

Transfer is only an option for a court having jurisdiction under Article 8 et seq. Otherwise, the proper decision would be to declare, on its own motion, that it has no jurisdiction. Consequently, Article 15 is not a basis for a binding transfer from a court not having jurisdiction to another court supposedly having jurisdiction like the German law concept of Verweisung.

bb) Particular Connection

A case may only be transferred to the courts of a Member State with which the child has a particular connection (Article 15(1)). Such connection is to be considered in five situations as expressly stated in paragraph (3) and, although other kinds of particular connections are not entirely excluded, they rarely exist. One type of particular connection is induced by a change in the child’s habitual residence either after the court was seised (Article 15(3)(a) or shortly before (Article 15(3)(b)). Another particular connection depends on the child’s nationality (Article 15(3)(c)). It is particularly remarkable that again nationality is acknowledged to be a relevant factor when determining a close relationship of a person with respect to a Member State. Hopefully, the CJEU, when deciding on the question of whether Article 2(a) alternative 6 Brussels II (the 6-month habitual residence criterion for nationals of the forum State) is or is not in conflict with Article 12 EC Treaty, will accept the position that nationality may serve as a connecting factor when determining jurisdiction. Habitual residence of a holder of parental responsibility is another ground (Article 15(3)(d)) whereas a parent’s nationality is not.

A weak connection to the person of the child is established, if only property of the child is located within the Member State to which the child’s cases, to which the cases should be transferred (Article 15(3)(e)). Originally proposed as a connecting factor for all parental responsibility cases, it is now restricted to cases concerning the administration etc. of this property and therefore does not apply to questions concerning the person of the child.

However, the existence of such a connecting factor is only the starting point. On the application of either a party or a court of the other Member State to which the child is closer connected or even of the (original) court’s own motion this court will make a deliberate decision whether an exception is appropriate, the court of the other Member State was actually better placed and a transfer of jurisdiction was in the best interest of the child. As Article 15(1) expressly describes this decision as exceptional the court will only decide to transfer the case if the aspects in favour of such transfer do significantly outweigh the aspects against it.

cc) Cooperation between the Courts and the Parties

The court cannot decide on a transfer on its own. If there was no application by a party, a transfer requires acceptance by at least one party (Article 15(2) sentence 2).

After deciding that a transfer of jurisdiction was appropriate, the court has two procedural options. It may either stay the case and invite the parties to introduce a request before a court of the other Member State (Article 15(1)(a)), in which case it often will be appropriate to set a time limit according to Article 15(4), or to directly address such court and request it to assume jurisdiction (Article 15(1)(b); court to court transfer). In both situations the other court is free to decide within six weeks whether or not to accept jurisdiction, again weighing all relevant factors as to the best interest of the child (Article 15(5)). It only has the options to either accept or decline jurisdiction. It may not transfer the case to the courts of another Member State. Such transfer may only be affected by the original court after the second court declines jurisdiction and it may be initiated by the second court under the Regulation’s system of cooperation (Article 15(6), Article 33). While a time limit under Article 15(4) or the six week term under Article 15(5) is running the original court should stay the case.

If the court to which the case has been transferred, accepts jurisdiction, the original court shall decline jurisdiction. Otherwise, the court first seised shall continue to exercise jurisdiction. If the court to which the case has been transferred, accepts jurisdiction, the original court shall declie jurisdiction. Otherwise, the court first seised shall continue to exercise jurisdiction (Article 15(5) sentence 2). As neither time limit should be considered an absolute deadline, the second court may assume jurisdiction or be seised even after the time limit has run out, as long as the first court did not continue the case.

3. Child Abduction: The Brussels IIA Solution Compared to the Hague CCA

a) Background

The most controversial question during the law making process was whether to implement an inter-Member-State mechanism for child abduction cases. While some Member States where afraid that particular EC-rules concerning child abduction might weaken the effect of the quite successful CCA, the Commission’s opinion partly prevailed. Article 4 Brussels II Regulation gave general precedence to the CAA system of child return whatever this rule meant for particular cases, whereas Brussels II A claims its own precedence over.
the CCA (Article 60(e)) implementing own child return rules. According to a compromise Brussels II A, instead of implementing a full system including an independent legal ground for child return orders,\(^{43}\) is based on Articles 12 and 13 CCA (Article 11(1)). Therefore, when deciding on child abduction cases, a court of a Member State, must apply Article 12 and 13 CCA notwithstanding Article 60(e). Brussels II A features a rule of it’s own to prevent a change of jurisdiction in child abduction cases (Article 10) similar to Article 7 CPC, as well as a system of cooperation in order to remove impediments preventing child return and to find final solutions when a child return order has been refused by a court of the Member State where the child is retained (Article 11), in order to avoid the problems of the unilateral concept of Article 13 CCA.

\(^{b)}\) Jurisdiction (Article 10)

Whether jurisdiction under the habitual-residence rule (Article 8, compare Article 11 CPM and Article 5 CPC) shifts when a child is wrongfully removed, has already been a problem under Article 1 CPM even before legal kidnapping became an issue in a different Hague Convention. Originally, the CPM was based on a concept of habitual residence that finally lead to the presumption that integration of the child in the State, into which the child was displaced, took place after a six month period of undisturbed presence. The CCA only provided legal remedies in order to “disturb” such presence and thereby hinder the acquisition of a new habitual residence, whereas Article 7 CPC introduced restrictions to the concept of habitual residence in order to prevent a change in habitual residence during a one year period.

Article 10 resembles the concept of Article 7 CPC with some additional restrictions: Generally the courts of the child’s former habitual residence retain jurisdiction although the child is no longer physically present in this jurisdiction, if the child is wrongfully removed or retained, particularly after visiting a person having a right of access. Wrongful removal or retention is defined in Article 2(11) which literally resembles Article 7(2) CPC. The courts of the Member State where the child is actually present after the wrongful displacement do not acquire jurisdiction, unless the child is habitually resident in this State and one of the following two scenarios of acquiescence are given: Either each person etc having rights of custody must have acquiesced in the removal or retention (Article 10(a)), or the child has resided there for at least one year after anybody in charge of the child’s custody had actual or constructive knowledge of the whereabouts of the child and the child is settled in the new environment.\(^{44}\) In the latter situation Article 10(b) states additional requirements concerning a request to return a child, which, although not expressly mentioned in Article 7 CPC, do not entirely change the concept of that rule and are to be understood as mere clarifications. In particular, it should be considered a mere question of definition whether to say that a child cannot acquire habitual residence before the passing of one year without disturbance by an application for a return order, or, as Article 10 does, to state that habitual residence (as defined by one year residence together with social integration, (b)) must be accompanied by non-disturbance before jurisdiction shifts. Be that as it may, the courts of new residence do not acquire jurisdiction unless the passing of one year after the holder of rights of custody, although having the possibility to do so, did not lodge a request for return ((b)(ii)), or such request has been withdrawn and no new request has been lodged within the one year limit ((b)(iii)), or a custody case in a court of the child’s former habitual residence has been closed under Article 11(7) ((b)(iii)) or lead to a decision that does not entail the return of the child ((b)(iv)).

Obviously Article 10 does not prevent a court in the Member State of the child’s actual presence from issuing an order under Article 13 CCA.\(^{45}\) Instead Article 10(b)(i) and (ii) clarify that by applying for such an order, the holder of custody rights can prevent the court from acquiring jurisdiction to issue any decision as to the substance of parental responsibility including custody and access rights.

\(^{c)}\) Cooperation to Assure Return Orders under Exceptional Circumstances (Article 11)

\(^{aa)}\) Cooperation instead of Unilateral Refusal

Originally the CCA system was designed to provide for an almost immediate return of the child without regard to parental responsibility issues. Whether a parent should be given custody or access should not be decided by the courts of a State where the “kidnapper” had brought or retained the child. Decisions based on Article 13(1)(b) CCA developed into a severe problem, particularly when German courts started to treat Article 13(1)(b) CCA more as a rule than an exception after the constitutionality of immediate return without regard to parental responsibility had become an issue.\(^{46}\)

The modifications to this unilateral system introduced by Article 11 shall apply to child abduction cases between two Member States only. The system is based on the cooperation between and trust in the jurisdictional system of other Member States and therefore cannot apply when non-Member States are involved either as the State of habitual residence before or after the replacement happened. Therefore, according to Article 11(1), paragraphs (2) to (8) shall apply where a person or institution from one Member State applies to the courts in another Member State under the CCA. Those rules basically have three objectives: a) to introduce additional measures to protect the child and expedite the procedure; b) to reduce the court’s discretion when deciding on an application; c) to solve situations if a court decides not to issue a return order.

\(^{bb)}\) Procedural Measures

Articles 12 and 13 CCA do not provide any measures to ensure that the child can participate in the proceeding leaving this aspect to the respective lex fori.\(^{47}\) Article 11(2) now im-

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\(^{43}\) Schulz, FamRZ 2003, 1351.

\(^{44}\) Which is an essential prerequisite to acquire an habitual residence: Coester-Waltjen, Festschrift für Geimer (2002) 148.

\(^{45}\) Solomon, FamRZ 2004, 1409, 1417.

\(^{46}\) See BVerfG (D) (Federal Constitutional Court) NJW 1999, 2173, 3621, 3622.

\(^{47}\) In a proper understanding of Article 8 ECHR, as adopted by the European Court of Human Rights, a child should be given the opportunity to be heard before a decision affecting his or her family life is
plemented the prerequisite that the child is given the opportunity to be heard during the proceedings, which does not necessarily mean that the child must be heard in court. Therefore, all Member States are free to provide for any procedural method giving the child such a possibility including audience by a youth welfare agency as long as such hearing takes place independently, giving the child a chance to freely express his or her preferences and is brought to knowledge of the court. The opportunity to be heard needs to be given unless it appears inappropriate due to his or her age or degree of maturity. However, urgency of the case is not a proper ground for not hearing the child. Article 13(2) CCA permitting the court to refuse to render a return order, if the child resists and is old and mature enough, remains untouched by this rule.

Article 11(3) is made to expedite the proceeding. Generally, a court to which an application for return of a child into another Member State is made, should act expeditiously using the most expeditious procedure available in national law. The necessity to expressly mention what should have been good practice even under CCA alone and even towards non EC-Member States gives proof that this rule can’t be more than an appeal to the courts. In addition Article 11(3) states a six weeks time limit after the application is lodged. As there are no consequences if the judgment is not rendered in time the rule will give the court a mere idea of how fast it should decide.

c) Reduced Discretion

In order to reduce cases where return of the child is refused, Article 13(4) does not allow the court to refuse the return under Article 13(1)(b) CCA if it is established that adequate arrangements have been made to secure the protection of the child after the return. Such measures can be arranged with the help of a court in the State of the former habitual residence or even by undertakings given by the applicant. However, the court has discretion to decide whether it is established that such arrangements are adequate to prevent what the court who otherwise would apply Article 13(1)(b) CCA expects to be against the best interest of the child. Other grounds to refuse the return are not mentioned in Article 11(4) which leads to the question of whether the court may refuse the return based on its public policy or particularly on Article 20 CCA. This seems to be quite a constructive problem. Even if an intense danger for the child’s best interest as described by Article 13(1)(b) CCA could easily fall under public policy and human rights, public policy, it will no longer be an issue if the court is convinced that the protection of the child is secured. If not, other grounds to refuse the return should not be used to avoid the restriction in Article 11(4) as long as the problem is related to the welfare of the child. There is no prejudice as to other grounds, particularly Article 13(1)(a) or public policy for different reasons.

In addition under Article 11(5) the person who requested the return must be given an opportunity to be heard before return is refused by the court. This again should be considered a mere clarification of what is already necessary under Article 8 ECHR.

d) Cooperation after the Refusal of a Return Order

Probably the most important measures in this context are laid out in Articles 11(6) to (8) transforming the unilateral decision not to return the child under CCA into a structure of cooperation with the courts in the Member State of former habitual residence. Although those rules literally apply only to cases under Article 13 CCA, they should also apply if a court refuses to issue a return order for other reasons. Article 13, the most important ground for refusal, should be understood to be a synonym for all kinds of non-return orders. If a court has issued an order of non-return under Article 13 CCA it must immediately (at least so that the documents are received within one month of the date of the order) transmit a copy of the court order and the relevant documents including transcripts of the hearings either directly or through its central authority under Article 6 CCA to the court with jurisdiction or to the central authority in the Member State of the child’s habitual residence immediately before the wrongful removal or retention (Article 11(6)). If there is not yet a proceeding concerning custody pending in the addressee court, this court must notify the parties of the information it received under Article 11(7). After notification there is a three months term for the parties to seize this court so that the court can examine the question of custody. As the mere order of non-return is not mentioned in Article 10(b) as a condition by which the court loses jurisdiction and Article 11(7) as referred to in Article 10(b)(iii) grants an additional three months term of continuing jurisdiction to make a custody order, the courts in the former State of habitual residence will not lack jurisdiction until the three months term has passed even if the order of non-return was rendered later than one year after the person who applied for an order had knowledge under Article 10(b). If the court issues an order giving custody to the former “kidnapper”, the child will definitely remain with this parent. If the court orders the child to be brought back into the State of former habitual residence, such order will immediately prevail over the order of non-return and shall be enforceable under Article 21 et seq. (Article 11(8)). Moreover, the courts in the State where the child is actually present do not have the option to refuse enforcement under public policy (Article 23(a)) as the enforcement of judgments requiring the return of the child falls within the concept of immediate enforcement (Article 40(1)(b), below 5(b)).

If no submission is received within three months, the court shall close the case without prejudice to the rules of jurisdiction. Although in this situation Article 10(b)(iii) is provided, the court is not necessarily deprived of its jurisdiction. If the child has not resided in the Member State it had been wrongfully taken to for a period of a year from the time the applicant receives actual knowledge, jurisdiction of the Member State of former habitual residence is not affected. Even after the lapse of that period somebody else might be able to seize the court if custody is shared.

48 Schulz, FamRZ 2003, 1351, 1353.
49 Solomon, FamRZ 2004, 1409, 1417.
50 Solomon, FamRZ 2004, 1409, 1417.
4. Examination of Jurisdiction – Dependent Actions (Articles 16, 17 to 19)

There are no changes, compared with Brussels II, concerning the examination of jurisdiction. Article 17 and 18 Brussels IIA are literally identical to Articles 9 and 10 Brussels II. The same is true for the rules concerning dependent actions. Article 19 Brussels IIA equals Article 11(1) to (3) Brussels II, while Article 11(4) Brussels II has found its place as Article 16 Brussels IIA without any change to the wording.

5. Enforcement in Parental Responsibility Cases

a) General Rules

Changes concerning recognition and enforcement of parental responsibility orders are in general very limited. Article 21 Brussels IIA equals Article 14 Brussels II with only one clarification in paragraph (3) concerning venue (local jurisdiction).

Article 23, which resembles Article 15(2) Brussels II, adds only one ground for non-recognition with reference to new Article 56. If the procedure for placement of a child in institutional care or a foster family described in Article 56 has not been followed, recognition of this decision may be refused under Article 23(g). Other grounds for refusal remain unchanged including public policy. Lack of jurisdiction, as under Article 17 Brussels II, is no ground for non-recognition, neither directly nor under the concept of public policy (Article 24). This is particularly true if a court having jurisdiction by virtue of Article 15 rendered the judgment. Although it has been discussed whether other Member States are bound by a jurisdiction based on forum non conveniens, there is no room for any doubt. Article 24 applies, even if a court has no jurisdiction at all, as the courts in the State where recognition is sought a fortiori do not have the power to control a deliberate shift in jurisdiction under Article 15 for which reasonable grounds have been given by both the court of regular jurisdiction as the court of exceptional jurisdiction.

b) Judgments Concerning Rights of Access or the Return of the Child

Certain types of orders concerning rights of access or the return of a child are given special rules of enforcement (Articles 40 to 45) in order to improve and expedite enforcement. Those rules remotely resemble the idea of enforcement of uncontested claims (Council Regulation No 805/2004) by using the method of certification of the judgment in the Member State of origin instead of a declaration of enforceability according to Article 28 et seq. in the State where enforcement is sought. However, a holder of parental authority is still free to seek recognition and enforcement under the usual rules (Article 40(2)).

This concept applies to rights of access (Article 40(1)(a)) and to the return of a child entailed by a judgment given pursuant to Article 11(8) i.e. a judgment rendered in the State of (former) habitual residence disagreeing with an order of non-return, which has been issued in the State of actual presence (Article 40(1)(b)). All the other decisions concerning parental responsibility, including child return orders which have not been rendered in the particular situation of Article 11(8) and judgments denying or restricting a right of access, need to be enforced under Article 21 et seq. as far as they are enforceable at all.

In both cases rights of access granted (Article 41(1)) or a return of a child entailed (Article 42(1)) by a judgment enforceable in the State of origin will become enforceable in any Member State by virtue of a certificate issued under Article 41(2) or Article 42(2) on a standard form according to Annex III or IV respectively. Even if national law does not provide for enforceability by operation of law for judgments of the particular type the court of origin may declare the judgment enforceable (Article 41(1) sentence 2, Article 42(1) sentence 2). As the certificate is issued by the judge of origin (Article 41(2), Article 42(2) – not merely a court in the State of origin) self control is very limited. Prerequisites for the issuing of the certificate focus on legal audience (Article 41(2), Article 42(2)) including service in child access cases when the judgment was given in default (Article 41(2)). Measures to be taken in order to ensure the protection of the child after its return under a return order, particularly arrangements as mentioned in Article 11(4) shall be contained in the certificate. No appeal shall lie against the issuing of the certificate in the State of origin (Article 43(2)).

As a result of the new concept no declaration of enforceability by any authority of other Member States will be necessary and there is no possibility of opposing the recognition on any ground as mentioned in Article 25 et seq. including any control under public policy. Although it is very questionable if the protection of the debtor as well as the public policy of the State of enforcement is preserved sufficiently under the similar concept of Council Regulation No 805/2004, the concept should be considered to be acceptable with regard to the very limited scope of application in Article 40. As far as child return orders under Article 11(8) are concerned, immediate enforcement is the only way to avoid unlimited fighting in the courts of two Member States. Although Article 13 CCA leads to the outcome that the court rendering an order of non-return as a mere fact has final power, giving this power to the court of habitual residence having proper jurisdiction is the better solution.

Access to a child on the other hand is quite sensitive in nature. The passing of time rapidly works against the best interest of the child as estrangement between the child and the person having access rights takes place. At the same time access orders do not share the same level of irreversibility as other final orders do. In the event that a child is wrongfully retained after the time of access has lapsed, a child return order will also fall within the scope of Article 40 thereby giving both parents the same level of defence. Nevertheless, public policy is not definitely excluded when it comes to an enforcement of a child access order. Only enforceability is granted by virtue of the certificate issued by the court of origin. Enforcement itself is effected under the laws of the Member State where enforcement takes place. Obviously any method of enforcement

51 Wagner, FPR 2004, 286, 289 s.
52 Solomon, FamRZ 2004, 1409, 1418.
contrary to this State’s public policy will not take place. Moreover, there is a chance to implement public policy if a court in the second State considers any kind of enforcement inappropriate in the particular case.  

6. Applicable Law in Brussels IIA/Hague-CPC Cases

The preference given to Brussels IIA over the Hague Conventions on jurisdiction and enforcement i.e. CPM (Article 60(a)) and CPC (Article 61) does extend only to matters covered by the new Regulation. Taking into consideration that CPC will come into force in the near future, discussion of the problems may be restricted to this instrument. As far as jurisdiction is concerned, Article 61(a) referring to the child’s habitual residence gives a quite manageable criterion to separate the Regulation’s scope of application from that of CPC. There is just one other instrument to deal with in the field of parental responsibility: Brussels II A applies where the child habitually resides in a Member State within the definition given by Article 2 no. 3; CPC applies where the child habitually resides in a non-Member Contracting State, national law i.e. the lex fori applies when the child resides out of the area of both aforementioned instruments. Things are even easier when it comes to recognition of enforcement as like any EC-instrument on recognition and enforcement Brussels II A applies if (even when the child resides abroad) and only if the judgment is given by a court of a Member State (Article 61(b)).

The situation becomes more complicated when determining the applicable law, as Brussels II A does not deal with conflicts of laws and therefore has no precedence over CPC even if the child resides within a Member State. Problems arise because the general principle to apply the law of the court having jurisdiction (Article 15(1) CPC) is based on the idea that jurisdiction is governed by the same instrument, i.e. the Hague CPC rather than Brussels II A. The application of the law of the court is not at all an independent rule of conflict law contained in the CPC. This problem becomes even more important as Brussels II A not only introduces some modifications to the jurisdictional rules under CPC but has a significantly different concept of forum non conveniens under Article 15. Therefore at least in theory Article 15(1) CPC cannot be applied directly when jurisdiction is based on Brussels II A. Instead the conflict law of the lex fori will apply. However, as a part of the conflict law of the lex fori the habitual residence rule of Article 15(1) CPC should apply if (but only if) the court had jurisdiction even if CPC applied to jurisdiction. This won’t make the determination of the applicable law easier but will lead to the application of the lex fori in most cases. Unlike Hague CPM the CPC features most of the jurisdictional ideas of Brussels II A or, with the necessary respect to the re-invention of the wheel by EC law making authorities, Brussels II A closely resembles the general principles of jurisdiction under CPC. Even a court assuming jurisdiction under the forum non conveniens concept would have been competent under Article 8 as well.


\[54\] Helms, FamRZ 2002, 1602.

\[55\] Rauscher in: Rauscher, EuZPR Article 3 Brüssel II-VO n. 3, including references to the opposite opinion. For other opinions see Solomon, FamRZ 2004, 1409, 1416 n. 67 et seq.

ECJ 20 January 2005 – C-27/02 – Petra Engler v Janus Versand GmbH

Brussels Convention (3) Article 5(1) and (3), and Article 13, first paragraph, point 3 – Entitlement of a consumer to whom misleading advertising has been sent to seek payment, in judicial proceedings, of the prize which he has ostensibly won – Classification – Action of a contractual nature covered by Article 13, first paragraph, point 3, or by Article 5(1) or in matters of tort, delict or quasi-delict by Article 5(3) – Conditions

The rules of jurisdiction of the Brussels Convention must be interpreted in the following way:

– legal proceedings by which a consumer seeks an order, under the law of the Contracting State in which he is domiciled, that a mail order company established in another Contracting State award a prize ostensibly won by him is contractual in nature for the purpose of Article 5(1) of that convention, provided that, first, that company, with the intention of inducing the consumer to enter a contract, addresses to him in person a letter of such a kind as to give the impression that a prize will be awarded to him if he returns the ‘payment notice’ attached to the letter and, second, he accepts the conditions laid down by the vendor and does in fact claim payment of the prize announced;

– on the other hand, even though the letter also contains a catalogue advertising goods for that company and a request for a ‘trial without obligation’, the fact that the award of the prize does not depend on an order for goods and that the consumer has not, in fact, placed such an order has no bearing on that interpretation.

Facts: At the beginning of 2001 Ms Engler, an Austrian national domiciled in Lustenau (A), received a letter personally addressed to her at her domicile from Janus Versand GmbH, a mail order company incorporated under German law established in Langenfeld (D) (‘Janus Versand’), which carries on business as a mail order company. That letter contained a ‘payment notice’, whose form and content led her to believe that she had won a prize of ATS 453,000 in a ‘cash prize draw’ organised by Janus Versand, and a catalogue of goods marketed by the latter (which apparently also called itself, in its relations with its customers, ‘Handelskontor Janus GmbH’) with a ‘request for a trial without obligation’. In the advertising brochure sent to Ms Engler Janus Versand stated that it could also be contacted on the Internet at the following address: www.janus-versand.com.

On the ‘payment notice’ the word ‘confirmation’ appears in the