Child Protection in European Family Law

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Abstract This contribution questions the effectiveness in practice of the plurality of sources applicable to child protection and aims to highlight some essential concepts that guide the application of the relevant instruments, namely the best interest of the child, the right to be heard, parental responsibility, and habitual residence. In general, child protection in European family law mainly relies on procedural rules that benefit from the mutual trust principle in the EU area of justice, but avoid addressing the legal divergence among Member States in these matters. While being apparently neutral, the reality is that these cultural conflicts reappear at the time of their application, as international child abduction cases illustrate.

Keywords parental responsibility, best interest of the child, international child abduction, Brussels II ter Regulation.

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I. Introduction

Child protection in European family law is mainly provided by rules on international jurisdiction, recognition and enforcement of decisions, and cooperation between authorities that take advantage of the mutual trust principle enshrined in the EU treaties. Conflict rules are dealt with by reference to the relevant Hague conventions seeking to avoid duplication and ensuring at the same time the exclusive competence of the EU in private international law matters. This approach is in line with the weight put on procedure on grounds of the best interest of the child principle, and thus on an almost case-by-case approach when it comes to protecting children. It also has the advantage of setting aside the divergence between EU Member States when it comes to family matters.

With respect to said approach, this contribution focuses on EU rules on parental responsibility that are procedural in content with a particular emphasis on the Brussels II ter Regulation of 25 June 2019. The main point is, nevertheless, that this instrument is not exhaustive, firstly, because maintenance matters are excluded from its scope of application, and secondly, because it coexists with other international and national instruments that have an impact on the family life of the child. Coordination of all these sources is not always a given, and even when it is, their fragmentation increases the difficulties in their application, especially for practitioners. This issue needs further attention regarding the extent to which the benefits of well-balanced rules might be lost if wrongly applied.

In order to provide some clarity, section III highlights some concepts that are key in law-making and decision-making in these matters. The UN Child Convention,[1] essential in shifting the legal status of the child from object to subject of rights, enshrines the best interest of the child as the cornerstone of child protection. In doing so, it also provides a voice to the child, elevating its right to be heard to the rank of a fundamental right. EU rules pay due respect to these rights that have a relation to all parental responsibility matters, a concept that was first developed by the HCCH, but now is part of the EU acquis. The same applies for the role of the habitual residence of the child in setting-up its protection. The next sections of this contribution discuss in which manner these key concepts have been embedded in the provisions on jurisdiction, child abduction, and recognition and enforcement of the Brussels II ter Regulation.

1 *Espinosa Calabuig,* Custodia y visita de menores en el espacio judicial europeo, p. 15; *Kilkelly/Lundy,* Child & Fam. L. Quart. 18 (2006), 331–350.

The examination of conflict rules on child protection has not been undertaken to the extent that EU law continues to make reference in these matters to the 1996 Hague Child Protection Convention. In doing so, the EU does not address the legal divergence in family matters among Member States that remains hidden behind the apparent neutrality of procedural rules. However, cultural conflicts reappear at the time of their application, as international child abduction cases illustrate. They will be mentioned during the examination of this issue in section V.

More specifically, it would have been interesting to examine surrogate motherhood, a phenomenon that convenes interests that are not easy to combine: the interest of becoming a father or a mother, the interest of the surrogate mother, and of course, the interest of the child.[2] In view of woman and child protection, the European Parliament condemned this reproductive practice in any of its commercial forms in 2016.[3] However, procreative tourism is a fact and the essential issue is whether the lack of international regulation provides sufficient protection to the child born out of a surrogacy arrangement and the mother that gives birth.[4]

In fact, the EU institutions have not been exempted from discussing the effects of cross-border surrogacy, at least from a child protection perspective. The CJEU issued two judgments in 2014 addressing the social rights of intended parents who have sought maternity leave or adoptive leave by ways of analogy.[5] The main issue was whether their situation was covered by directives dealing with parents and their occupational health and safety.[6]

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2 See *Coester-Waltjen,* in: Muir Watt et al., Global Private International Law – Adjudication without Frontiers, p. 504–509; *Espinosa Calabuig,* Freedom, Security & Justice: European Legal Studies 2019, 36–57.

3 European Parliament, Report on the Annual Report on Human Rights and Democracy in the World 2014 and the European Union's policy on the matter (2015/2229(INI)). In the 2015 report, the European Parliament "[c]ondemns the practice of surrogacy, which undermines the human dignity of the woman since her body and its reproductive functions are used as a commodity; considers that the practice of gestational surrogacy which involves reproductive exploitation and use of the human body for financial or other gain, in particular in the case of vulnerable women in developing countries, shall be prohibited and treated as a matter of urgency in human rights instruments" (note 114).

4 About the different legal solutions see *Trimmings/Beaumont,* International Surrogacy Arrangements, p. 20. See also *Guzmán Zapater,* AEDIPr 10 (2010), p. 731.

5 CJEU, 18.03.2014, C-363/12 (*Z/A Government department, The Board of management of a community school*); CJEU, 18.03.2014, C-167/12 (*C.D./S.T.*).

6 Directive 2006/54/EC of the European Parliament and of the Council of 05.07.2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, or Council Directive 2000/78/EC of 27.11.2000 establishing a general framework for equal treatment in employment and

The CJEU answered in the negative and highlighted that a refusal to provide paid leave in these situations does not constitute either discrimination on grounds of sex or disability, or in general an infringement of the equality principle as they are not within the scope of these directives. Accordingly, it falls within the Member States' competence to decide on social rights of intended parents.

In 2016, the Council of Europe made an attempt to regulate the matter, but the recommendation drafted by the Committee on Social Affairs, Health and Sustainable Development of the Parliamentary Assembly was not approved by the latter.[7] The intention was to provide guidelines to safeguard children's rights regarding surrogacy arrangements and collaborate with the HCCH on the ongoing works on surrogacy.[8] The different approach to the abovementioned conflict of interests, taken by the parties to the Council of Europe, has stopped further regulatory attempts but has not prevented the ECtHR from taking a stance on the effects of a surrogacy arrangement in light of the child's rights to protection of private life enshrined in Art. 8 ECHR.[9] For the time being, the issue seems to have reached an impasse, as a number of destination countries are implementing measures to put an end to procreative tourism,[10] alerted by the abuses inherent to these arrangements.

This contribution does not go into these matters in any depth, as the issues raised in terms of child protection by surrogate motherhood go beyond the narrow framework of the Brussels II ter Regulation. Nevertheless, it points out the need for a holistic approach to child protection which for the time being is spread over several different instruments. While legal divergence among States is a deterrent in this endeavor, international cooperation provides a way forward that nevertheless seems to have important

occupation; Council Directive 92/85/EEC of 19.10.1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC).

7 The draft recommendation is available on the Council of Europe's website: https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23015&lang=en (last consulted 01.10.2020).

8 See https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy (last consulted 01.10.2020).

9 ECtHR, 26.06.2014, no. 65192/11 (*Mennesson/France*). The ECtHR has also condemned France for an infringement of Art. 8 ECHR in ECtHR, 26.06.2014, no. 65941/11 (*Labassee/France*); ECtHR, 19.01.2017, no. 44024/13 (*Laborie/France*); and ECtHR, 21.07.2016, no. 9063/14 and 10410/14 (*Foulon and Bouvet/France*). A similar stance was taken against Italy by ECtHR, 24.01.2017, no. 25358/12 (*Paradiso and Campanelli/Italy*).

10 See *Nishitani,* Recueil des Cours 401 (2019), p. 136 (385).

shortcomings. The Covid-19 pandemic has served to highlight these, as travel restrictions have closed borders, revamped the nationality principle, and put a halt to the exercise of fundamental rights such as family reunification or access rights. The exceptionality of this situation does not minimize the evidence confirming how fragile cross-border situations are.

II. Plurality of legal sources in European family law

Child protection is an area where States find it easy to reach compromises at an international level. At least, this seems to be a reasonable explanation for the many international instruments that govern the rights of the child, and whose co-existence leads to a new set of problems requiring coordination. EU Member States are a case in point.

Child protection is marked by a significant number of international instruments acknowledging their rights, among which are the ECHR, the 1959 UN Declaration of the Rights of the Child, and the UN Child Convention. The latter enumerates the rights of the child, the obligation to prioritize its best interests (Art. 3),[11] the shared responsibility of parents in regards to its development (Art. 18), as well as measures to fight against wrongful removals or retentions in foreign countries (Art. 11). Despite some criticism, all these international instruments represent a significant achievement in child protection and have inspired EU and State legislation.[12]

At the EU level, child protection is primarily ensured by the Brussels II bis Regulation that will be fully replaced on 1 August 2022 by the Brussels II ter Regulation. In addition to the latter, all or some EU Member States have ratified, among others, the 1980 Hague Child Abduction Convention, the 1996 Hague Child Protection Convention, the 2007 Hague Maintenance Convention, or the 2007 Hague Maintenance Protocol. Moreover, each EU Member State has domestic private international law rules in the field that add further layers of difficulty to establishing the applicable set of rules on child protection.

Each of the abovementioned instruments has its own limitations, deficiencies, and interpretative problems that are aggravated by the need for coordination with other instruments.[13] The fragmentation that is a feature of the international legal framework in family matters contrasts with the

11 See *Rodríguez Mateos,* REDI 44 (1992), 465–498.

12 *Moya Escudero,* Aspectos Internacionales del Derecho de Visita de los Menores, p. 4.

13 For the relationship between instruments in the context of the HCCH Judgments Project see *Noodt Taquela/Ruiz Abu-Nigm,* YPIL 19 (2017/2018), p. 449–474

domestic practice of family law, where issues such as marriage, divorce, maintenance, and parental responsibility tend to be intertwined in a single case scenario, meaning that they are all usually dealt with jointly in the same proceedings. At the international level, a different set of sources is applicable to each legal issue (jurisdiction, conflicts of laws, or recognition and enforcement of judgments), and to each matter (marriage, divorce, maintenance, or parental responsibility). Hence, in order to deal with international family litigation, including child protection, several issues should be clarified before addressing the merits of the case, such as: (1) the legal framework, either international, European, or national; (2) the status of the States involved, i.e. whether EU Member States are participating in the relevant regulation, as may be the case for the Rome III Regulation,[14] or whether third States are bound, for instance, by the 2007 Hague Maintenance Protocol; and (3) the scope of application of the relevant instruments, for example, to identify whether there are issues not covered by or excluded from the EU regulations which in turn makes necessary the application of the forum's national private international law rules.

Against this backdrop, it is not surprising to learn that legal practitioners do often not possess the necessary expertise and professionalism when facing complex cases.[15] It is essential for the best operation of all these instruments to have rules of coordination between private international law rules on matrimonial and parental responsibility issues as well as other family matters regulated by other instruments. Resorting to the expression coined by *Erik Jayme,* a "dialogue of sources" is a matter of necessity in order to increase the efficacy and effectiveness of the existing instruments.

14 The Rome III as well as the Property Regimes Regulations had to be adopted in the enhanced cooperation procedure provided for by Art. 20 TEU and Art. 326–334 TFEU. See in general *Boele-Woelki,* YPIL 12 (2010), p. 17 (21–25); *Espinosa Calabuig,* in: Queirolo/Benedetti/Carpaneto, Le nuove famiglie tra globalizzazione e identità statuali, p. 211; *Pocar,* RDIPP 2011, 297; *Fiorini,* in: Corneloup, Droit européen du divorce, p. 701; *Palao Moreno,* REDI 71 (2019), 89.

15 See *Espinosa Calabuig,* in: Ruiz Abu-Nigm/Noodt Taquela, Diversity and Integration in Private International Law, p. 65–82.

III. Relevant concepts

Child protection in the EU is based on a variety of family models that have been evolving across the world,[16] and pays primary attention to the child's basic rights in a number of situations.[17] In line with the UN Child Convention, both the Brussels II bis as well as the Brussels II ter Regulation take the best interest of the child as the cornerstone of their rules on parental responsibility, including international child abduction.[18] The principle requires some attention because of its trifold function, as a right, a principle, and a rule of procedure, and will be addressed in the following sections. The same applies for the child's right to be heard, closely related to the aforementioned principle. The concepts of parental responsibility and habitual residence are instrumental to both and will be considered due to their inter-sectoral application.

1. The best interest of the child

The Committee of the Rights of the Child highlights that the best interest of the child is a complex concept: first, it is a substantive right by which the child has the right that its best interest is considered primarily over other interests at stake; second, there is a fundamental legal principle that drives any interpretation towards the outcome that best serves the child's interest; and third, there exists a rule of procedure to the extent that the decision-making process has to include an assessment of the possible impact on the child, by explicitly considering the rights of the child, explaining the criteria upon which the decision has been taken, and explaining how its interest has been weighed against any other considerations.[19]

Accordingly, the best interest of the child is an axiological principle that guides both interpretation and application of private international law rules

16 The conservative tendency of the EU legislator in family law has been observed on several occasions. See for example *Ancel/Muir Watt,* Rev. crit. DIP 2001, 403 (408).

17 See *Peleg,* in: Kilkelly/Ton, International Human Rights of Children, p. 135; *Smyth,* in: Kilkelly/Ton, International Human Rights of Children, p. 421.

18 See *Bradley,* in: Boele-Woelki, Perspectives for the Unification and Harmonisation of Family Law in Europe, p. 65 (97); *Nelson,* J. Marriage Fam. 68 (2006), 781; *Sarkisian,* J. Marriage Fam. 68 (2006), 804.

19 *UN Committee on the Rights of the Child* (*CRC*), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para. 1), 29. 05. 2013, CRC/C/GC/14, https://www.refworld.org/docid/51a84b5e4.html (last consulted 13. 10. 2020).

in child-related matters.[20] As indicated by Art. 24 (2) EU Charter, "[i]n all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration". While the mandate already applies to the Brussels II bis Regulation, the update made in the Brussels II ter Regulation has made clear the significance of this principle in parental responsibility matters.[21]

However, the principle itself is far from clear as can be learnt from the use that the judiciary has made of it, with decisions that can sometimes be labelled as arbitrary, in particular in cases of child removal or retention in a country other than the one of its habitual residence.[22] The reason for this contentious approach seems to lie in the fact that the meaning of the principle is dependent upon the legal tradition where it is applied.[23] An overview of academic theories and case law trends in different countries can serve the better understanding of the principle of the best interest of the child in the international and European framework.

a. The best interest of the child from a historical perspective

The best interest of the child has been preceded by other criteria. For example, common law countries have made use of doctrines, such as those of "tender years" or "gender wars", to allocate custody. In fact, they are still used along with the best interest of the child and other doctrines such as the best interest of the family, a welfare test, a harm test of the child, etc.[24]

As to the tender years doctrine, its origin is dependent on the historical context, where the father supported the family and was thus obliged to provide for the child's welfare. English courts – followed by US courts – reacted accordingly by establishing a rule that systematically allocated the child's custody to the father. After the industrial revolution and the democratization of societies, this doctrine raised strong criticism that led to the tender years doctrine, according to which it is the mother who can better represent the child interests in its tender years. This doctrine was nevertheless questioned

20 *Borrás Rodríguez*, El "interés del menor" como factor de progreso y unificación del Derecho internacional privado.

21 See Recital 19 Brussels II ter Regulation.

22 See *Sergio,* Dir. Fam. Pers. 2001, 637 (639–644).

23 *Durán Ayago,* in: Calvo-Caravaca/Castellanos Ruíz, El Derecho de Familia ante el Siglo XXI, p. 295 (307 et seq.).

24 See in general *Guralnick*, Interstate Child Custody Litigation, p. 4; *Bennett Woodhouse,* Fam. L. Quart. 33 (1999), 815 (817); *Boulanger,* Les Rapports juridiques entre parents et enfants, p. 14 et seq.; *Klaff*, Cal. L. Rev. 70 (1982), 335.

in the 1960s and 1970s,[25] especially in some parts of the US where egalitarian criteria are preferred. Others still apply the said doctrine as a default rule when the child is younger than seven years.

The abovementioned doctrines have in common that they focus on parents and not on children, but not as much as the gender wars doctrine. This heavily criticized doctrine gets its name from the fact that it focuses on the essential differences between men and women in relation to their role in the child's life.[26] In general, women are considered better suited than men to raise very young children, while men are preferred when the child grows older due to their social and economic power.[27] These doctrines have not survived as they infringe the equality principle and the prohibition of discrimination on grounds of sex. The next step is the acceptance of the best interest of the child which got traction at the beginning of the 20th century and ended up being considered first and foremost in every custody decision-making process.[28] Internationally promoted by the UN Child Convention, this principle has been considered a factor of progress and harmonization in the field of private international law.[29]

Despite its universal application, the content of the best interest of the child is not universally accepted, meaning that it is determined on a case-by-case basis.[30] The diverse criteria to be considered include: mental health, personality, and behavior of the parents; the child's wishes in relation to school, home, or community where it wants to live; and circumstances as a whole or primarily economic considerations, including those of third parties related to the chosen parent, and of those who may contribute to the child's maintenance.[31] In view of this divergence, some courts have chosen other criteria to support their custody decisions, such as the permanent welfare of the child, i.e. focusing on issues such as health, safety, welfare, or moral education.[32] All these factors are, nevertheless, very similar, confirming that the final

25 With paradigmatic cases such as United States Supreme Court, 22.11.1971 (*Reed/Reed*), 404 U.S. 71 (1971) and United States Supreme Court, 05.03.1979 (*Orr/Orr*), 440 U.S. 268 (1979).

26 *Siegel,* Harvard L. Rev. 115 (2002), 947 (948); *Espinosa Calabuig,* Custodia y visita de menores en el espacio judicial europeo, p. 30–40.

27 *Guralnick,* Interstate Child Custody Litigation, p. 4; *Bennett Woodhouse,* Fam. L. Quart. 33 (1999), 815 (816); *Gordon,* Canadian Fam. L. Quart. 2001, 88 et seq.

28 *Hayes,* Child & Fam. L. Quart. 18 (2006), 351–372; *Worwood,* Family Law 35 (2005), 621–627.

29 Definition proposed by *Borrás Rodríguez,* RJC, p. 17.

30 *Bennett Woodhouse,* Fam. L. Quart. 33 (1999), 815 (825 et seq.).

31 See in general *Espinosa Calabuig,* Custodia y visita de menores en el espacio judicial europeo, p. 20–30.

32 *Guralnick,* Interstate Child Custody Litigation, p. 4 et seq.

decision is usually taken on a case-by-case basis. For example, in cases of international child abduction, the best interest of the child is not being moved to another country but rather staying within its usual living environment.[33]

Criticism of the principle also comes from the fact that it places the interest of the child above the interests of other members of the family, thus not taking into account the collective interest of the family.[34] However, the main point is the legal uncertainty that surrounds it and that might be actually damaging for the child itself.[35] In the end, the child's fate depends on the case and the seized court, including its cultural views on the matter.

The abovementioned criticism lies at the core of the shared custody movement that had started by the end of the 1970s. The movement obviously seeks to put an end to the binary approach to custody and makes both parents responsible for the child's welfare.[36] By requiring cooperation, shared custody puts both parents on an equal footing. However, it is not exempt from criticism,[37] and difficulties in its application present courts with the challenge of deciding on a case-by-case basis. That applies to situations in which the custodian wants to change habitual residence and thus jurisdiction. The trend is for the seized court to assess factors such as the child's opinion and consequences for its private and family life with regard to each parent.[38] Against this backdrop, the court has to highlight the significance of the principle by providing the child with a genuine and effective opportunity to express its views, as foreseen by international and European instruments, including the Brussels II ter Regulation.

b. CJEU and ECtHR: Two different approaches

The discrepancies in relation to the best interest of the child have been reflected in case law of the CJEU and the ECtHR dealing with international child abduction cases that occurred between EU Member States almost

33 See *Álvarez González,* Derecho Privado y Constitución 16 (2002), 41 (45).

34 *Bennett Woodhouse,* Fam L. Quart. 33 (1999), 815 (821 et seq.).

35 *Mnookin,* L. and Contemp. Prob. 39 (1975), 226; *Chambers,* Mich. L. Rev. 83 (1984), 477.

36 *Sephard,* Tex. L. Rev. 64 (1985), 687.

37 Surprisingly, it has been argued that the problem of this shared custody approach is actually ensuring that the child is raised by both parents. See *Bennett Woodhouse,* Fam. L. Quart. 33 (1999), 815 (824 et seq.).

38 See *Hayes,* Child & Fam. L. Quart. 18 (2006), 351 (371); *Worwood,* Family Law 35 (2005), 621–627. About the works of the International Law Association (ILA) see *Bennett Woodhouse,* Fam. L. Quart. 33 (1999), 815 (829); *Schneider,* Mich. L. Rev. 89 (1991), 2215; *Ross,* Fordham L. Rev. 64 (1996), 1571.

simultaneously. While the ECtHR pays attention to the substance of the case in interpreting the best interest of the child, the CJEU has chosen a formal interpretation based on the mutual recognition principle. In fact, these different approaches show the tension between systems that favored the quasi-automatic return of the child and those that pay careful attention to the best interest of the child concerned.

This tension has been increased by the rules laid down in the Brussels II bis Regulation that allocate the ultimate jurisdiction to decide on the child's return to the country from where the child has been removed, even in those cases in which the State where the child is present has decided not to return it in accordance with the 1980 Hague Child Abduction Convention. Moreover, this jurisdiction rule is reinforced by making the return decision immediately enforceable in any EU Member State, without leaving any room for refusal of recognition and enforcement. However, the mutual recognition principle has not been welcomed by national courts who have refused to comply with this *modus operandi.*[39]

In contrast, the ECtHR examines whether return decisions have infringed the right to a personal and family life enshrined in Art. 8 ECHR,[40] i.e. whether the non-return of the child amounts to its best interest, regardless of compliance with the 1980 Hague Child Abduction Convention. *Neulinger and Shuruk/Switzerland*[41] is a landmark case in which the ECtHR highlighted that the seized court has to examine whether in this particular case the return can indeed be ordered because it is in the best interest of the child; otherwise, the decision constitutes an infringement of Art. 8 ECHR as later indicated in *Raban/Romania.*[42] The ECtHR thus chooses a substantive approach that prioritizes the interest of the child *in concreto* over the procedural approach taken by the 1980 Hague Child Abduction Convention and that attends to the interest of the child *in abstracto.*[43] The problem is, of course, that this case law pits the Convention against Art. 8 ECHR leading to difficult interpretation issues.[44] In view of the fact that the regulations seek to play a complementary role to the 1980 Hague Child Abduction Convention, the conflict seems to be inevitable.

39 *Beaumont/Walker/Holliday,* Int. Fam. L.J. 4 (2016), 307–318.

40 *Herranz Ballesteros,* REDE 44 (2012), 41 (42).

41 ECtHR, 06.07.2010, no. 41615/07 (*Neulinger and Shuruk/Suiza*).

42 ECtHR, 09.09.2010, no. 25437/08 (*Raban/Romania*).

43 See *López Guerra,* Teoría y Realidad Constitucional 39 (2017), 163 (185).

44 *González Marimón,* in: García Garnica/Marchal Escalona, Aproximación interdisciplinar a los retos actuales de protección de la infancia dentro y fuera de la familia, p. 637–658.

In *M.R and M.L/Estonia,*[45] the ECtHR aligned, however, its case law with the 1980 Hague Child Abduction Convention by not upholding the claim brought by the mother that removed the child, highlighting that the national authorities have simply complied with the said convention. Therefore, the return decision did not infringe Art. 8 ECHR. Remarkably, the ECtHR does not even consider that the mother and caregiver of the child cannot herself return to the country of the child's habitual residence. In the case *X/Latvia,*[46] the Grand Chamber of the ECtHR addressed the relationship between the ECHR and the 1980 Hague Child Abduction Convention by asserting that the doctrine in *Neulinger and Shuruk/Switzerland* is not an obligation directed towards national courts on how to apply the 1980 Hague Convention, but a reminder of their obligation to hear all admissible grounds for refusal of the child's return, in particular in cases of serious risk for its wellbeing.[47]

More specifically, the ECtHR indicates that the courts in the country of enforcement have to take into consideration all factors that may lead to an exception to a return and, once assessed, take a sufficiently motivated decision.[48] Such a decision cannot only be based on the general objection of a grave risk of psychological or physical harm to the child. In other words, an infringement of Art. 8 ECHR in these cases will arise not only out of disregarding grounds for refusal, but also from the lack of sufficient motivation.[49] If the return is found to be in the best interest of the child, there must be assurances that the country of the child's habitual residence will take appropriate protection measures.[50]

All in all, the ECtHR provides guidelines for the 1980 Hague Child Abduction Convention, which some authors perceive as an attempt to minimize its formalistic application.[51] In line with this approach, the Brussels II ter Regulation has also moved from an automatic application of the mutual recognition principle to a more nuanced approach.

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45 ECtHR, 15. 05. 2012, no. 13420/12 (*M.R. and M.L./Estonia*).

46 ECtHR, 26. 11. 2013, no. 27853/09 (*X/Latvia*).

47 See *López Guerra,* Teoría y Realidad Constitucional 39 (2017), 163 (186).

48 See ECtHR, 26. 11. 2013, no. 27853/09 (*X/Latvia*), note 106.

49 See Practice Guide for the application of the Brussels IIa Regulation, p. 73 et seq., https://op.europa.eu/en/publication-detail/-/publication/f7d39509-3f10-4ae2-b993-53ac6b9f93ed (last consulted 05. 10. 2020).

50 See *González Marimón,* in: Martín Rodríguez/García Alvarez, El mercado único en la Unión europea, p. 81 (86–90); *González Marimón,* in: García Garnica/Marchal Escalona, Aproximación interdisciplinar a los retos actuales de protección de la infancia dentro y fuera de la familia, p. 637 (642–648).

51 See *Forcada Miranda,* Bitácora Millennium DIPr 2016, 33.

2. The hearing of the child

By perceiving the child as a subject of rights, the UN Child Convention also provides the child with a voice. The child's right to be heard is enshrined in Art. 12 thereof and is also featured prominently in Art. 24 (1) EU Charter. The 1980 European Custody Convention refers to the practical impossibility of hearing the child depending on its age and incapacity of discernment,[52] and the 1980 Hague Child Abduction Convention gives a fundamental role to this right in children abduction cases, in particular by granting the child the possibility to object to a return to the country of origin (Art. 13).

The operation of the right is, nevertheless, a matter of procedure that is addressed in a divergent manner by domestic laws. Issues such as the minimum age for the child to be heard, whether the hearing should be conducted by a judge or another professional, the methods and means to hear the child in court, the form of representation of the child in court, whether to designate a guardian *ad litem,* and the role and powers of the latter are left open in the international instruments. Such legal divergence leads to conflicts regarding the understanding of the situations in which the child's right has been violated, including cases in which it has been clearly disregarded, as happened in the *Aguirre Zagarra* case.[53] While the child voiced her refusal to be returned to Spain (the country where she had had her habitual residence before being retained by the mother in Germany) before the German court competent for the 1980 Hague Child Abduction Convention proceedings, the Spanish court with competence to decide on the merits of the case in accordance with the Brussels II bis Regulation decided on her return despite not having granted her the opportunity to express her views in a genuine and effective manner. Remarkably, the Spanish court ordered the hearing of the child, but it did not permit it to be undertaken via video conference once the mother refused to bring the child to Spain. Finally, the conflict was settled by a formalistic approach to the rules on recognition and enforcement of return decisions provided by the Brussels II bis Regulation, which do not allow for any grounds of refusal on the side of the Member State of enforcement, including the breach of the child's fundamental rights.[54]

52 See Art. 15 (1) 1980 European Custody Convention.

53 CJEU, 22. 12. 2010, C-491/10 PPU (*Aguirre Zarraga/Pelz*), note 75.

54 According to the CJEU in CJEU, 22. 12. 2010, C-491/10 PPU (*Aguirre Zarraga/Pelz*), note 75, "the Court with jurisdiction in the Member State of enforcement cannot oppose the enforcement of a certified judgment ordering the return of a child who has been wrongfully removed on the ground that the Court of the Member State of origin which handed down that judgment may have infringed art. 42 of the Regulation, interpreted in accordance to

Nevertheless, the CJEU in the *Aguirre Zagarra* judgment did remind that "it is a requirement of Art. 24 (1) of the Charter that children should be able to express their views freely and that the views expressed should be taken into consideration on matters which concern the children, solely 'in accordance with their age and maturity', and of Art. 24 (2) of the Charter that, in all actions relating to children, account be taken of the best interests of the child, since those interests may then justify a decision not to hear the child".[55] In fact, the Brussels II bis Regulation has the merit of specifically requiring the hearing of the child in a number of situations (Art. 11 (2), 23 (b), 42 (2) (a) Brussels II bis Regulation), but it specifically indicates that "it is not intended to modify national procedures applicable".[56] Hence, it applies the mutual trust principle to accommodate legal divergence in these matters within the EU area of justice, leading to a scenario in which the child's rights are not sufficiently taken into account, eroding the legitimacy of the system and thus mutual trust.[57]

In order to adequately address the impact of legal divergence in this field, several comparative studies have been carried out.[58] These have found significant differences among countries when it comes to the issues indicated above. For example, while the main criteria for deciding whether a child should be heard are the child's age and maturity, as highlighted by the international framework, in practice, countries approach this issue in a different manner. Some, such as Croatia and Poland, do not establish a minimum

art. 24 of the Charter of fundamental Rights of the EU, since the assessment of whether there is such an infringement falls exclusively within the jurisdiction of the courts of the Member State of origin".

55 CJEU, 22. 12. 2010, C-491/10 PPU (*Aguirre Zarraga/Pelz*), note 63.

56 Recital 19 Brussels II bis Regulation.

57 See in particular the empirical study by *Beaumont/Walker/Holliday,* JPIL 12 (2016), 211–260. Building upon these findings, see *Ubertazzi,* JPIL 13 (2017), 568–601.

58 *Reich Sjögren,* Protection of Children in Proceedings. Other studies are: Academy of European Law on behalf of the European Commission, DG Justice, p. 51 et seq.; *European Commission,* Study on the assessment of Regulation (EC) No 2201/2003 and the policy options for its amendment, https://op.europa.eu/en/publication-detail/-/publication/924728ec-9148-11e8-8bc1-01aa75ed71a1 (last consulted 15. 10. 2020); *Council of Baltic Sea States* (*CBSS*) *Children's Unit,* Protect Children on the Move, 4th Expert Meeting, Transnational child protection: The role of judges, social services and central authorities, 2014, p. 10 et seq., http://childcentre.info/public/PROTECT/4th_Expert_Meeting_Riga_November_2014_Full_Meeting_Report.pdf (last consulted 15. 10. 2020); *European Union Agency for Fundamental Rights,* Child-friendly justice. Perspectives and experiences of professionals on children's participation in civil and criminal judicial proceedings in 10 EU Member States, http://fra.europa.eu/sites/default/files/fra-2015-child-friendly-justice-professionals_en.pdf (last consulted: 15. 10. 2020); and *Heckendorn Urscheler/Pretelli,* Cross-border parental child abduction in the EU.

age while others do, but differ as regards minimum age, which is 10 years in Bulgaria and Romania, but 14 years in Spain and 15 years in Finland. Nevertheless, the court's discretion plays a role in the decision to hear the child in all States,[59] the main problem being the assessment of the child's maturity as it is not addressed in most national laws and will also have an impact on the consideration of the views provided by the child in the decision. In view of these difficulties, most legislations provide for the child to be accompanied by professionals other than the judge when being heard. However, the methods and means used to hear the child vary from one country to another, including whether they deliver their views to the judge or other professional, and whether training of these professionals is required or not.

The abovementioned case law triggered an alarm on the impact that the said divergence might have on the rights of the child within the EU area of justice. The recast of the Brussels II bis Regulation was intended to address this issue, among others, and Art. 21 Brussels II ter Regulation deals specifically with the right of the child to express its views in an effective and genuine manner, either directly or through a representative or an appropriate body, with the obligation of the court to give due weight to those views in accordance with the child's age and maturity.

However, the new Regulation does not seek to harmonize national substantive and procedural rules on this matter and only indicates in the recitals that the different national approaches are all acceptable, although "while remaining a right of the child, hearing the child cannot constitute an absolute obligation, but must be assessed taking into account the best interests of the child, for example, in cases involving agreements between the parties".[60] Recital 39 Brussels II ter Regulation also indicates that international cooperation should be put in motion to ensure the child's right to be heard through, in particular, the Taking of Evidence Regulation. In general, this implies that Member States cannot resort to public policy grounds when there is a divergence between laws of procedure, provided that the standards for the hearing of the child laid down in Art. 21 Brussels II ter Regulation have been respected.[61]

59 See the case law cited by *Espinosa Calabuig,* Custodia y visita de menores en el espacio judicial europeo, p. 120.

60 Recital 39 Brussels II ter Regulation.

61 As a result of the contrast between German law and others with a more lenient approach to the child's right to be heard. See *Espinosa Calabuig,* in: Ruiz Abou-Nigm/Noodt Taquela, Diversity and Integration in Private International Law, p. 65 (70); *González Beilfuss,* in: Álvarez González et al., Relaciones transfronterizas, globalización y derecho, p. 383 et seq. and p. 391 et seq.; *Völker,* in: Fulchiron/Nourissat, Le nouveau droit communautaire du divorce et de la responsabilité parentale, p. 293–302.

3. Parental responsibility

Parental responsibility only entered into EU law with the Brussels II Regulation, although it was already enshrined in other international instruments, in particular the 1996 Hague Child Protection Convention and national legislation, such as the English Children Act of 1989. A 1986 Resolution of the European Parliament on co-parental responsibility already mentioned the concept of shared parental responsibility. This concept would encompass a number of rights and obligations related to the care, education, legal representation, asset administration, and habitual residence determination of the child.[62] Parental responsibility in EU law encompasses "all rights and duties relating to the person or the property of a child which are given to a natural or legal person by a decision, by operation of law or by an agreement having legal effect, including rights of custody and rights of access" (Art. 2 (7) Brussels II bis Regulation and Art. 2 (2) no. 7 Brussels II ter Regulation).

As to the relevant authorities in these matters, EU law lays down a broad concept of court that refers to "any authority in any Member State with jurisdiction in the matters falling within the scope of this Regulation" (Art. 2 Brussels II bis Regulation and Art. 2 (2) no. 1 Brussels II ter Regulation.), i.e. with power either to adopt measures or to enforce them. The only requirement is that the domestic legislation allocates the jurisdiction to that court.[63]

All these provisions apply to children born out of the same or different marriages, of non-married couples, or raised by only one parent. Against this backdrop, the question is whether there is a concept of child, an issue that is not uniformly addressed by the international framework. While the Brussels II bis Regulation is silent on this issue, Art. 2 (2) no. 6 Brussels II ter Regulation lays down that a child is any person below the age of 18 years "even in cases where they have acquired capacity before that age under the law governing their personal status, for example through emancipation by reason of marriage".[64] In the case of children below the age of 16 years, the 1980 Hague Child Abduction Convention remains applicable along with Chapter III of the Brussels II ter Regulation specifically dealing with international

62 See Select Committee on The European Communities, Brussels II: The Draft Convention on Jurisdiction, Recognition and Enforcement of Judgments in Matrimonial Matters, Session 1997–1998, 5th Report, London, House of Lords, 22.06.1997, p. 6 (note 3). See also *Boulanger,* Les Rapports juridiques entre parents et enfants, p. 3 et seq.

63 Recital 14 Brussels II ter Regulation.

64 Recital 17 Brussels II ter Regulation.

child abduction. Hence, EU law supplements the 1980 Hague Convention in its application within EU Member States.[65]

Maintenance obligations are, however, excluded from the parental responsibility concept.[66] The patrimonial and diverse nature of child maintenance obligations as well as the notion of debtors and creditors seem to have justified a specific instrument, i.e. the Maintenance Regulation and their exclusion from the Brussels II ter Regulation,[67] as is already the case in the Brussels II bis Regulation. However, the Maintenance Regulation does not define the concept of maintenance obligations resulting in inconsistencies between the instruments, which are to the detriment of child protection.[68]

The possibility of reaching agreements between the parties on maintenance obligations has generally been regulated as a means of increasing legal certainty, predictability, and autonomy of the parties, as explained in the Preamble of the Maintenance Regulation. However, party autonomy has been excluded with respect to children under the age of 18 years "to protect the weaker party". Nevertheless, it has not been made apparent in which way party autonomy may jeopardize child protection and payment by the debtor. Furthermore, the Brussels II ter Regulation – like the Brussels II bis Regulation – already takes into consideration party autonomy in cases in which maintenance of a child below 16 years is related to parental responsibility litigation, to the extent that this regulation specifically included a head of jurisdiction for these cases. In particular, this would happen when the judge who decides custody and access rights according to the choice of court rule now embedded in Art. 10 Brussels II ter Regulation also resolves the child maintenance dispute in accordance with Art. 3 (d) Maintenance Regulation.

4. Habitual residence

The establishment of the child's habitual residence as the main connecting-factor in private international law can be traced back to the HCCH,[69] starting with the 1956 Hague Maintenance Convention. It has now been firmly

65 Recital 17 Brussels II ter Regulation.

66 Recital 13 Brussels II ter Regulation.

67 See Recital 13 Brussels II ter Regulation.

68 See in general *Espinosa Calabuig*, in: Baruffi/Caffari Panico, Le nuove competenze comunitarie, p. 51.

69 See *Espinosa Calabuig*, Custodia y visita de menores en el espacio judicial europeo, p. 125 et seq.; *Thorpe*, Int. Fam. L.J. (2018), 39 (40–44); *Azcárraga Monzonís/Quinzá Redondo,*

consolidated in all Hague conventions, including the 1996 Hague Child Protection Convention, where it is mainly used in jurisdiction rules. Both the Brussels II bis as well as the Brussels II ter Regulation also based their provisions on the child's habitual residence. The first and most important reason to support this choice is the proximity principle, in that this factor indicates the closest and most immediate jurisdiction to the child, also in terms of assessing the child's circumstances, gathering evidence and ensuring the child's right to be heard. The second reason relies on the fact that it provides the parents with a legal system that is neutral to their interests, but it is selected as catering to the child's best interests.[70]

Despite the significance of habitual residence, neither the Hague conventions nor the EU regulations attempt to define this factual concept. The opportunity of this definition was discussed during the 1996 Hague Child Protection Convention's negotiations, following a suggestion made by the International Union of Latin Notaries. However, it was against the Conference's tradition and rejected for fear that it could influence the interpretation of other conventions that use the same factor, as well as for problems in its construction. An alternative proposal put forward by the US seeking to define situations that do not imply a change of habitual residence was also rejected, but some elements found agreement. In particular, it was accepted that "the temporary absence of the child from the place of his or her habitual residence for reasons of vacation, of school attendance or of the exercise of access rights, for example, did not modify in principle the child's habitual residence".[71] Accordingly, this section does not seek to provide a definition of habitual residence, but to gather elements with which habitual residence of the child can be established.[72]

The child's habitual residence is meant to reveal a close and stable connection with the relevant State. In determining that country, all relevant factual elements should be considered, in particular duration and regularity of the child's presence, as well as the conditions and reasons for that presence

CDT 10 (2018), 795–801; *Pérez Martín,* CDT 12 (2020), 1119–1127; *Palao Moreno,* REDI 71 (2019), 89 (101–104). From a socio-historical perspective, see *Bucher,* Recueil des Cours 283 (2000), p. 9 (24–49).

70 See Recital 20 Brussels II ter Regulation, and *Pérez Martín,* in: Guzmán Zapater/Herranz Ballesteros, Crisis matrimoniales internacionales y sus efectos, p. 927 (930–940); *Palao Moreno,* REEI 2018, 9 (12–13).

71 See *Lagarde* report, note 40.

72 See with this approach *Carballo Piñeiro,* Rev. Mex. Der. int. pr. 30 (2012), 131–154. In this sense, there are interesting proposals for a concept of habitual residence. See *Pérez Martín,* AEDIPr 18 (2018), p. 469–494.

in the country.[73] Nevertheless, an exact duration is not required, meaning that a new habitual residence might be immediately acquired by the child, without the need for a certain lapse of time, provided that the change is not wrongful.[74] The relevant interpretative element is that the habitual residence indicates the child's effective vital center,[75] which is not only different from its domicile as a legal concept, but also from the mere physical presence. While regularity is important, as it seems necessary to highlight the child's integration within a social and familiar environment, the physical presence in a country for an important period of time does not suffice, however, to qualify it as the child's habitual residence if integration is missing.[76] In this vein, the conditions and reasons for the child's presence in the country are thus relevant, i.e. whether the child is on holiday,[77] or whether it is the country chosen by the mother following its birth.[78] By the same token, the process of establishing a habitual residence cannot occur in violation of fundamental rights.[79]

All in all, it is important to acknowledge that the social and family environment of the child depends on different elements that vary according to the age of the child, i.e. the elements to consider in the case of a child of school age differ from those of a child who has left school, but also differ from those relevant to an infant.[80] Be that as it may, the determination of the child's habitual residence is, in any instance, to be geared by its best interests.[81]

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73 See the enumeration in Recital 23 Succession Regulation. The CJEU has also recorded these elements. In its judgment CJEU, 02. 04. 2009, C-523/07 (*A*), note 44, it concludes that "the concept of 'habitual residence' under Article 8 (1) of the Regulation must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case". Also CJEU, 15. 02. 2017, C-499/15 (*W and V/X*).

74 See *Lagarde* report, note 41. The same can be learnt from Art. 8 Brussels II ter Regulation.

75 See *de Steiger* Report, p. 14.

76 See *Franchi,* Protezione dei minori e diritto internazionale privato, p. 23–27.

77 As it happened in Case C-523/07 (*A*).

78 CJEU, 22. 12. 2010, C-497/10 PPU (*Mercredi/Chaffe*).

79 See CJEU, 17. 10. 2018, C-393/18 PPU (*UD/XB*) and critical comments by *Pérez Martín,* La Ley UE 66 (2019), 1.

80 CJEU, 22. 12. 2010, C-497/10 PPU (*Mercredi/Chaffe*), note 53.

81 For example, the Spanish Constitutional Court has indicated the relevance of the integration of the child into its new environment. It has thus been understood that this is an essential factor in light of the 1980 Hague Child Abduction Convention. See Spanish Con-

IV. Rules on jurisdiction in parental responsibility matters

Cases involving children are problematic per se and reluctance to relinquish jurisdiction can be identified, e.g. in the *Purrucker* case[82], but also in cases involving third country jurisdictions, such as in the infamous *Carrascosa* case[83] and in other case law[84]. This reluctance may lead to a race to court, which in situations that should consider the best interest of the child should actually be avoided.

The EU regulations address this issue in line with the 1996 Hague Child Protection Convention and take the habitual residence of the child as the general rule of international jurisdiction in parental responsibility matters, provided that it is located in an EU Member State at the time the court is seized

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stitutional Court (Tribunal Constitucional), 01.02.2016, STC 16/2016. Against this backdrop, the judgment of the Spanish Supreme Court (Tribunal Supremo) 20.10.2014, STS 536/2014 has to be highlighted, establishing the criteria to be considered by the judiciary in deciding whether to authorize the transfer of the child's habitual residence in case of one parent's opposition. In the case at hand, the Spanish father did not authorize the transfer of the child to Brazil along with his Brazilian mother and the court of appeal did not authorize it, mainly on grounds of the Spanish nationality of both father and child. However, the Supreme Court did not uphold this judgment highlighting that it did not take into account the best interests of the child, it was against the best interests of the child, and failed to acknowledge a reality more and more common in Spain, i.e. that of mixed marriages.

82 CJEU, 15.07.2010, C-256/09 (*Purrucker/Vallés Pérez*); CJEU, 09.11.2010, C-296/10 (*Purrucker/Vallés Pérez*).

83 Superior Court of New Jersey, 03.04.2007, 391 N.J. Super. 453, 918 A.2d 686 (*Innes/Carrascosa*). After illegally relocating the child to Spain, the Spanish mother obtained full custody from a court in Valencia. Later on, she was held in contempt of court in the United States and spent several years in prison while the American father never got to see the child again. The Brussels II bis Regulation and 1996 Hague Child Protection Convention might have changed this approach.

84 See in general, case law in EUFams II, Comparative Report on third country nationals, 18.09.2019, http://www2.ipr.uni-heidelberg.de/eufams/index.php?site=entscheidungsdatenbank. For example, in Spain as to parental responsibility issues, the Audiencia Provincial of Girona was deemed not competent since the minor was residing in Peru (Audiencia Provincial Girona, 28.03.2019, 57/2019, ESS20190328). Also regarding a divorce of a Spanish couple with children, the judgment of the Audiencia Provincial de Barcelona 400/2018 of 31.05.2018, ESS20180531 can be mentioned. The mother went to India with the minors. In the divorce claim, the court did not resolve the rest of the measures requested in the application, namely custody of the two minor children. The plaintiff appealed. The Spanish courts had jurisdiction, but not according to Art. 8 Brussels II bis Regulation since the minors did not have their habitual residence in Spain but in India. Art. 12 was accordingly inapplicable. See the comments by *Pérez Martín,* CDT 12 (2020), 657–672. See also *Herranz Ballesteros,* RGDE 52 (2020), 1 (4–9).

(Art. 7 Brussels II ter Regulation).[85] Along with the best interest of child, the principle of proximity plays a significant role in this choice that, nevertheless, is subject to exceptions in specific circumstances. Cases that allow for departure from the habitual residence rule are: modification of access rights by the court of the previous habitual residence during a three-month period (Art. 8 Brussels II ter Regulation); jurisdiction in cases of wrongful removal or retention of the child (Art. 9 Brussels II ter Regulation); prorogation of jurisdiction (Art. 10 Brussels II ter Regulation); and transfer of jurisdiction (Art. 12 Brussels II ter Regulation).

The Brussels II ter Regulation has laid down the aforementioned rule and exceptions, although there are some adjustments, especially to better accommodate party autonomy. In this vein, it has reformulated the rule in Art. 12 Brussels II bis Regulation that established the possibility of a joinder in a parental responsibility claim and claims pertaining to marriage annulment, legal separation, and divorce. However, this prorogation of jurisdiction was only feasible under certain circumstances, namely that one of the spouses has parental responsibility over the child, or the child has a close connection to the Member State where the proceedings are started. In any case, jurisdiction has to have been accepted, expressly or otherwise, in an unequivocal manner by all the parties to the proceedings at that time and has to be in the best interest of the child. Framed in this vein, there are party autonomy elements in the rule, but with limitations that require the interpretation by the CJEU.[86]

According to the CJEU, the appearance in court of all the parties to the proceedings is enough to sustain jurisdiction on parental responsibility, provided that it is in the best interest of the child and there are no proceedings pending elsewhere. In the *Saponaro* case, the parents brought a request for court authorization to repudiate a succession in favor of the child before the courts where the main asset in the estate was located; the latter has jurisdiction on the basis that, "in the absence of such opposition, the agreement of that party may be regarded as implicit and the condition of the unequivocal acceptance of prorogation of jurisdiction by all the parties to the proceedings at the date on which that court was seized may be held to be satisfied".[87] By the same token, the condition of acceptance is not met in those cases in

85 In lack of a habitual residence, the criterion of the presence of the child will be applied. See Art. 11 Brussels II ter Regulation. In view of the increase of migrant and unaccompanied minors, the latter is becoming a relevant head of jurisdiction.

86 See *Quinzá Redondo,* in: Forner Delaygua/Santos, Coherence of the scope of application. EU Private International Legal instruments, p. 253 (254–259).

87 CJEU, 19. 04. 2018, C-565/16 (*Saponaro and Xylina*).

which the court is seized only by one of the parties to the proceedings and the defendant intervenes to plead the lack of jurisdiction of this court, even if he had instituted another set of proceedings before the same court.[88] In short, the CJEU's case law allows for an establishment of jurisdiction on the basis of tacit acceptance, i.e. in cases of appearance of all parties without challenging the jurisdiction.[89]

While the former Regulation did not expressly mention choice of court as an option to establish jurisdiction in parental responsibility matters, Art. 10 Brussels II ter Regulation allows for both express as well as tacit choices of court, provided that the child has a substantial connection with the chosen court, either because it is the habitual residence of one of the holders of parental responsibility or the country of the child's former habitual residence or that of its nationality. In any event, the exercise of jurisdiction has to be in the best interest of the child. In this vein, the provision manages to overcome the uncertain wording of Art. 12 Brussels II bis Regulation, where it was not clear in which cases the parties to the proceedings have accepted jurisdiction. This issue is now solved by requiring express acceptance during the proceedings according to the formalities indicated in the provision, and only after the court informs all the parties of the right not to accept jurisdiction. Tacit acceptance is also admitted as a basis for establishing jurisdiction if occurring "at the latest at the time the court is seised" (Art. 10 (1) (b) (i) Brussels II ter Regulation), being the abovementioned case law applicable to its understanding.

The *forum non conveniens* rule can now be found in Art. 12 Brussels II ter Regulation in similar terms as in the Brussels II bis Regulation. The transfer of the case from the court originally competent to another court will be done only exceptionally when the child has a "particular connection" to another Member State.[90] Under these exceptional circumstances, this new court will be considered as "better placed to assess the best interests of the child in the particular case". This rule corresponds to those included in the 1996 Hague Child Protection Convention dealing with *forum non conveniens* on the one hand, and with *forum conveniens* on the other. While with the first rule, a transfer of jurisdiction will take place from the court first seized to another court better placed, the second rule entails the situation where a claim is brought to the latter and leave is asked from the court that was originally

88 CJEU, 12. 11. 2014, C-656/13 (*L/M*).

89 See *Espinosa Calabuig/Quinzá Redondo,* Report on the Spanish Exchange Seminar, p. 12.

90 This connection guarantees that the court which will resolve the case actually is competent, avoiding the risk of fraudulent forum shopping.

competent.[91] Art. 12 (1) Brussels II ter Regulation seems to combine both concepts in just one provision.[92]

V. Rules on international child abduction

A brief perusal of the International Child Abduction Database (INCADAT)[93] is sufficient to confirm that child abduction[94] is a problem that is far from diminishing but rather increases worldwide. This factor, aggravated by the length of the proceedings and an outdated legal framework, especially in some Member States, along with sociological factors that have changed the background against which the international instruments operate,[95] has signaled the interest of the EU in amending the Brussels II bis Regulation on this matter. In this vein, the Brussels II ter Regulation includes a mechanism apparently better suited to protect the best interests of the child than its predecessor.[96] It also seeks to better align itself with the 1996 Hague Child

91 *Picone,* RDIPP (1996), 705 (715–718). The *forum non conveniens* doctrine would be reflected in Art. 8 of the 1996 Hague Child Protection Convention and the *forum conveniens* in its Art. 9, working only as an exception to the general rule based on the habitual residence of the child.

92 The CJEU has traditionally rejected the efficacy of the *forum non conveniens* doctrine, notwithstanding its defense by the English doctrine. See *Font i Segura,* REDI 56 (2004), 273. The debate was opened for example in the case CJEU, 13.07.2000, C-412/98 (*Group Josi Reinsurance Company SA/Universal General Insurance Company* (*UGIC*)).

93 International Child Abduction Database, available at: www.incadat.com (last consulted 13.10.2020).

94 The terminology used in this field differs depending on the countries. For example, in Latin America, the term *secuestro* is used, whereas in Spain, *sustracción* is preferred (*enlévement* and *abduction,* according to the official translations of the 1980 Hague Child Abduction Convention). This shows the habitual problems derived from the translation of the Conventions. See *Fernández Arroyo,* R. Inf. legisl. Brasília 1991, 139 (155, fn. 58). Art. 2 (10) Brussels II ter Regulation refers in particular to the appropriate concept of wrongful removal or retention.

95 In particular, there has been an increase in cases of wrongful removal of the child carried out by the holder of the custody rights, as well as for reasons of gender-based violence by the abused parent in order to distance the child from the abuser. See *Kaye,* Int. J.L. Pol. Fam. 13 (1999), 191.

96 See *van Loon,* in: Cross-border Activities in the EU, p. 178. See also the interesting proposals by *Beaumont/Walker/Holliday,* JPIL 12 (2016), 211–260. Some of these proposals for the future regulation focus on: (1) concentration of jurisdiction for child abduction cases; (2) limiting appeals and making the whole process timely; (3) reversal of CJEU, 01.07.2010, C-211/10 PPU (*Povse/Alpago*); (4) hearing the child; (5) protective measures and links to the 1996 Hague Child Protection Convention; and (6) Central Authorities. Very interesting are also the reflections made by *Rodríguez Pineau,* REDI 69 (2017), 139–166.

Protection Convention, with the aim of harmonizing child protection within the EU and in relation with third States that are parties to the Convention.

In line with the 1980 Hague Child Abduction Convention and the objective of ensuring the immediate return of the child after a wrongful removal or retention committed by one of the "holders of parental responsibility",[97] the Brussels II bis Regulation contains provisions on international child abduction that have been criticized for their formalistic approach to this complex topic.[98] These provisions do not aim at substituting the 1980 Hague Child Abduction Convention, but at supplementing it and thus enhancing its performance. One key feature that is retained by the Brussels II ter Regulation is that the country of the child's habitual residence prior to its removal or retention maintains jurisdiction to decide on parental responsibility matters and on the child's habitual residence. This jurisdiction rule is reinforced by a special recognition and enforcement regime for return decisions issued by the court where the child's habitual residence is located, that prevail over a non-return decision issued by the court in charge of the 1980 Hague Child Abduction Convention proceedings. This approach has received the unrestrained support of the CJEU, but it has put in jeopardy the best interests of the child as illustrated by the CJEU in *Povse/Alpago*[99] and in *Aguirre Zagarra*[100]. As mentioned above, the immediate return of the child does not always coincide with its best interests. Thus, the Brussels II ter Regulation seeks for a better balance between the interests at stake by amending Art. 11 (8) Brussels II bis Regulation.

The said case law has also served to highlight that the relationship between the 1980 Hague Child Abduction Convention and the Brussels II bis Regulation is far from clear. Art. 22 and 96 Brussels II ter Regulation clarify this issue by indicating that Chapters III and IV thereof are complementary to the 1980 Hague Child Abduction Convention. While the latter prevails,[101] return decisions pursuant to this Convention issued by an EU Member State that must be recognized and enforced in another EU Member State will be

97 Using the terminology of the Brussels II bis as well as of the Brussels II ter Regulation, the Hague Convention has focused on cases of wrongful removal by the holder of the access rights.

98 For a critical analysis of the Brussels II bis Regulation in this regard, in particular Art. 11 (8), see *Espinosa Calabuig,* in: Carbone/Queirolo, Diritto di familia e Unione Europea, p. 283; *Beaumont/Walker/Holliday,* JPIL 12 (2016), 211–260.

99 CJEU, 01.07.2010, C-211/10 PPU (*Povse/Alpago*). For detail see *Lazić,* in: Paulussen et al., Fundamental Rights in International and European Law, p. 161–183.

100 CJEU, 22.12.2010, C-491/10 PPU (*Aguirre Zarraga/Pelz*), note 75.

101 According to Art. 22 *in fine,* Art. 23 to 29, and Chapter VI Brussels II ter Regulation, the Regulation "shall apply and complement the 1980 Hague Convention".

covered by Chapter IV Brussels II ter Regulation. It is nevertheless worth noting that some participants in the EUFams II Spanish Exchange Seminar hosted in Valencia in May 2019 stated that this provision entails a step back, because Art. 11 and 42 Brussels II bis Regulation seemed to have preference over those in the Convention instead of merely having a complementary role as in the Brussels II ter Regulation.[102]

In general, the Brussels II ter Regulation seeks to strike a better balance than its predecessor between the protection of the best interest of the child and the mutual recognition and mutual trust principles used to strengthen the EU area of justice. Key features of the new Regulation are: return proceedings are better streamlined; the clarified possibility of resorting to mediation during the whole proceedings; the encouragement of judicial and administrative cooperation; and room for weighing the best interests of the child when it comes to recognizing and enforcing decisions.[103]

In line with the 1980 Hague Child Abduction Convention, Art. 11 (3) Brussels II bis Regulation requires courts seized to act expeditiously and solve the return proceedings no later than six weeks after the application is lodged. Being more realistic, the new provisions allocate six weeks to each stage of the proceedings, i.e. six weeks to decide on the return in the first instance, six weeks to decide appeals,[104] and presumably six weeks to enforce the decision. As to the duration of the pre-proceedings, the regulation is silent, although it also requires the expeditiousness of the central authorities involved.[105] Nevertheless, it has been suggested that the farewell to the maximum six-week period mentioned in the Convention should have been carefully considered to the extent that, although not realistic, in practice this period puts pressure on courts to finalize the proceeding as soon as possible,

102 See *Espinosa Calabuig/Quinzá Redondo,* Report on the Spanish Exchange Seminar, 19. 05. 2019, p. 12.

103 See in general *Baruffi,* Freedom, Security & Justice: European Legal Studies 2017, 2–25; *Honorati,* RDIPP 53 (2017), 247; *González Marimón,* in: Martín Rodríguez/García Alvarez, El mercado único en la Unión europea, p. 81 (86–90); *Kruger,* Nederlands internationaal privaatrecht 35 (2017), 462; *Kruger/Samyn,* JPIL 12 (2016), 132.

104 See Art. 24 Brussels II ter Regulation. According to COM (2016) 411 final, p. 13, the average duration of a 1980 Hague Child Abduction Convention proceeding was 165 days, i.e. around 23 weeks.

105 See Art. 23 Brussels II ter Regulation. Art. 63 of the Proposal for a Brussels IIa Recast did establish a six-week period for the Central Authorities to receive and process the return application. About the benefits of this time limitation, see *González Beilfuss,* in: Álvarez González et al., Relaciones transfronterizas, globalización y derecho, p. 383 (393); *de Sousa Gonçalves,* AEDIPr 18 (2018), p. 351 (364); *Herranz Ballesteros,* in: Cebrián Salvat/Lorente Martínez, Protección de menores y Derecho Internacional Privado, p. 171 (185–189).

and the new time limits risk putting an end to that pressure.[106] Be that as it may, the adherence to deadlines for the return of the child seems to depend heavily on a strong inter-State cooperation framework, including direct communications among authorities and courts of different countries.[107]

More specifically, the speeding up of such proceedings requires the assistance of the Central Authorities to the court seized,[108] reliance on existing networks of judicial cooperation, and possibly involvement of members of the International Hague Network of Judges and liaison judges. This would probably be enhanced by the concentration of jurisdiction upon a few judges, as suggested in Recital 41 Brussels II ter Regulation. This cooperation is the only way to reduce the manipulation inherent in time limits in cases of child abduction, as happened with the 1980 Hague Child Abduction Convention and the interpretation of its Art. 12.[109] Nevertheless, the enhancement of cooperation among authorities is very challenging, even within the EU area of justice. In this vein, court concentration and time limits may help to achieve the objectives of return proceedings. By the same token, it would have been desirable to also set up a time limit for the proceedings deciding on the child's custody, as this decision might imply its return and be taken extemporarily in respect of the 1980 Hague Child Abduction Convention proceedings.[110]

Invited by the court and, where appropriate, with the assistance of Central Authorities, the parties are encouraged to resort to mediation or other alternative dispute resolution (ADR) methods as soon as possible and at any stage of the proceedings, "unless this is contrary to the best interests of the child, it is not appropriate in the particular case or would unduly delay the proceedings" (Art. 25 Brussels II ter Regulation). This provision takes into consideration the role that mediation already has in the 1980 Hague Child Abduction Convention, that has been enhanced by the issuance of a Guide to

106 These opinions were manifested by some judges and lawyers during the EuFams Spanish Exchange Seminar in Valencia in October 2016. See these comments in *Espinosa Calabuig/Carballo Piñeiro,* Report on the Spanish Good Practices, p. 13

107 On the importance of direct communications and the role of judges see *Goicoechea/van Loon,* in: Ruiz Abou-Nigm/Noodt Taquela, Diversity and Integration in Private International Law, p. 295.

108 The essential function of the Central Authorities has been highlighted for a long time in relation to The Hague Conventions. See *Bonomi,* RDIPP 1995, 607 (654) and *Franchi,* Protezione dei minori e Diritto internazionale privato, p. 19, who refer to the role of the Central Authorities in the framework of the 1996 Hague Child Protection Convention as a way of promoting cooperation between Member States. In the same way *Picone,* RDIPP 1996, 705; *Borrás Rodríguez,* REDI 45 (1993), 63.

109 *Espinosa Calabuig,* REDI 68 (2018), 347.

110 See *González Beilfuss,* in: Álvarez González et al., Relaciones transfronterizas, globalización y derecho, p. 383 (395).

Good Practice whose Part V is devoted to mediation.[111] Yet, and linked to the fact that the pre-proceedings stage before the Central Authorities does not have a time limit, ADR methods might be used to delay a quick solution.[112] For that reason, emphasis should be put on authorities' adequate training, including the ability to detect delaying tactics. If an agreement is reached via ADR methods, the parties should also be able to agree on submitting their approval to the court seized under the Convention by removing the jurisdiction from the natural judge of the child, that of its habitual residence.[113]

The abovementioned Guide to Good Practice to the 1980 Hague Child Abduction Convention provides in Part VI guidelines for applying Art. 13 (1) (b) of the Convention, which allows for refusal of the child's return in the event that this would expose the child to a grave risk of physical or psychological harm, or otherwise place the child in an intolerable situation. Framed in these terms, this exception (or any other in the Convention, including the provision on infringement of fundamental rights in Art. 20) does not specifically account for domestic violence that the abducting parent might be suffering, because the focus is on the child. However, socio-legal studies illustrate that the child is also a victim in these cases, which account for a significant number of the totality of international child abduction cases.[114] The main issue is how to address these cases in the framework of a Convention that does not provide any mechanism for accommodating the interests at stake, including those of the abused parent. The Brussels II ter Regulation does not address this conflict either, but it does mention that mediation might not be appropriate in these situations.[115]

Regarding the return proceedings, Art. 27 Brussels II ter Regulation follows the lines of Art. 11 Brussels II bis Regulation, including the limitation to refuse return based on Art. 13 (1) (b) of the 1980 Hague Child Abduction Convention, provided that sufficient evidence or adequate arrangements have been made to secure the protection of the child after its return. There

111 The Guide to Good Practice Child Abduction Convention: Part V – Mediation.

112 See *Gandía Sellens,* AEDIPr 17 (2017), p. 799 (812); *Azcárraga Monzonís,* in: Azcárraga Monzonís/Quinzá Redondo, Tratado de mediación, Vol. 3, p. 17 (20–38).

113 See Recital 43 Brussels II ter Regulation.

114 See *Lowe/Stephens,* A statistical analysis of applications made in 2015 under the Hague Convention 1980 on the civil aspects of international child abduction – Global report. See also the analysis made by *Bruch,* Fam. L. Quart. 38 (2004), 529–545; *Hale,* Current Legal Problems 70 (2017), 3–16; *Kaye,* Int. J.L. Pol. Fam. 13 (1999), 191–212; *Requejo Isidro,* AEDIPr 6 (2006), p. 179–194; *Rodríguez Pineau,* REEI 35 (2018), 1–31; *Weiner,* Fordham L. Rev. 69 (2000), 593–706; *Pérez Martín,* in: Bastante Granell/López San Luis, La protección del menor. Situación y cuestiones actuales, p. 73–88.

115 See Recital 43 Brussels II ter Regulation.

are, nevertheless, significant developments in terms of: first, prominently placing the child's right to be heard;[116] second, encouraging contact between the child and the person seeking its return, provided that it is in its best interests; and third, entitling the seized court in the 1980 Hague Convention proceedings to adopt protective measures that can be recognized and enforced in the country of the child's habitual residence. This was already advanced by a judgment of the CJEU in 2018,[117] changing former case law that territorially restricted provisional measures adopted by a court other than the one with jurisdiction on the merits. This entitlement may also serve to tackle domestic violence situations by, for example, requiring the abducting parent and the child to be placed in a secured home in the country from where it was removed. To this end, direct communications between courts as well as the resort to Central Authorities are encouraged. The extent to which these measures may help to adequately consider the grave risk that domestic violence situations imply for the child is, nevertheless, subject to great controversy if the child's best interest is to be given proper weight.[118]

In general, the measures laid down in the Brussels II ter Regulation could improve the effectiveness of the return mechanism. Several features could contribute to that effectiveness, namely: the establishment of additional deadlines; the clarification of the subject of each deadline; the extension of the deadline; the limitation of appeals, and the unification of this issue in all Member States. Together with these items, the requirement of cooperation between authorities of EU Member States and the specialization of jurisdiction will probably advance the rules on the return of child.[119]

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116 See Art. 26 Brussels II ter Regulation.

117 CJEU, 19.09.2018, C-325/18 PPU and C-375/18 PPU (*Hampshire County Council/C.E. and N.E.*), that concludes that the Regulation must be "interpreted as not precluding a court of one Member State from adopting protective measures in the form of an injunction directed at a public body of another Member State, preventing that body from commencing or continuing, before the courts of that other Member State, proceedings for the adoption of children who are residing there".

118 See an overview of criticism regarding the Guide to Good Practice Child Abduction Convention: Part VI – Article 13(1)(b) in this respect, that also applies to the Brussels II ter Regulation in *Rodríguez Pineau,* REEI 35 (2018), 1 (23–31).

119 *Baruffi,* JPIL 14 (2018), 385–420. The author makes a reference to the works of the HCCH Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Child Protection Convention. In this regard, see Int. Fam. Law (2018), 39–44. Also interesting are the proposals of the HCCH Experts Group on cross-border recognition and enforcement of agreements in family matters involving children. See also *de Sousa Gonçalves,* AEDIPr 18 (2018), p. 351.

VI. Rules of recognition and enforcement

In line with the Brussels II bis Regulation, the Brussels II ter Regulation provides two different regimes in order to enforce a decision on parental responsibility matters, namely, a generally applicable recognition and enforcement regime and a regime only suitable for certain privileged decisions that benefit from a further limitation on the grounds for refusal of enforceability. In addition to a better procedural alignment of both regimes, with some concessions on the application of the country of origin principle, the main development in the new Regulation is the recognition and enforcement of authentic instruments and agreements, now with a dedicated Section in Chapter IV.

Art. 2 (1) Brussels II ter Regulation provides a definition of "decision" for the purposes of Chapter IV. This definition specifically includes a return decision pursuant to the 1980 Hague Convention and provisional measures as long as the defendant had been summoned in the proceeding adopting them. Remarkably, provisional measures issued by a court other than the one with jurisdiction on the merits can be also recognized, provided that the measure is taken to protect the child from a grave risk as defined by Art. 13 (1) of the 1980 Hague Convention.[120] The latter marks a sharp contrast with its predecessor where there was no room for recognition of provisional, including protective, measures taken by courts other than the competent court for the substance of the matter, which is a principle that was asserted by the CJEU.[121] The same provision lays down the definitions of "authentic instrument" and "agreement", both requiring the intervention of a public authority for the applicability of the recognition and enforcement rules in Chapter IV.

The new Regulation provides for three types of recognition and enforcement proceedings, namely: recognition without a formal proceeding; via incidental question; and a formal proceeding to apply for a decision that there are no grounds for refusal of recognition. However, the major development is the abolition of exequatur by granting immediate effects, including enforceability, to the decision taken in the Member State of origin in the Member

120 The principle is kept that these protective measures adopted by a court other than the one with jurisdiction on the substance of the matter remain in force only until the latter takes the measures it considers appropriate. The reminder that the court adopting the measure should inform the court of the child's habitual residence, directly or through the Central Authorities, laid down in Recital 30, is in line with the gap identified by CJEU, 27. 11. 2007, C-435/06 (*C*).

121 See Recital 59 Brussels II ter Regulation.

State of destination, whose recognition and enforcement might nevertheless be challenged before the courts of the latter following a proceeding laid down in Art. 59–62, Section 5 of Chapter IV and Chapter VI thereof.

As to the grounds for refusal of recognition and enforcement, Art. 39 Brussels II ter Regulation is in line with Art. 23 Brussels II bis Regulation, although the child's right to be heard in parental responsibility proceedings is protected better in the new instrument, in accordance with the principle set up in its Art. 21.[122] While the former was formulated in such terms that the examination requires focus on whether there had been a violation of fundamental principles of procedure in the Member State in which recognition is sought due to the failure to provide for a hearing of the child, the latter rightly examines whether there has been a violation of the child's right to be heard.[123] However, two exceptions for compliance with this right are established. The first is parallel to the previous Regulation and considers concurrent serious grounds that prevented the hearing, including the urgency of the case. The second is restricted to proceedings concerning the property of the child, where the opportunity to be heard is not given in view of the subject-matter of the proceeding. These specifications are welcome and in line with the CJEU's case law.[124] The use of open concepts in both exceptions will nevertheless call for the CJEU's interpretation, although some clarifications are made in Recital 57, at least as to the meaning of "serious grounds" preventing the hearing in case of "imminent danger for the child's physical and psychological integrity or life and any further delay might bear the risk that this risk materialises".

Decisions granting access to a child and its return benefit from a special regime, as they do in the Brussels II bis Regulation. While they can be recognized and enforced following the abovementioned general regime, the special regime simplifies the proceeding in situations where the rights of the child as stated in Art. 9 of the 1959 UN Declaration of the Rights of the Child, are, or might be, compromised. Art. 42 Brussels II ter Regulation refers to decisions that ensure the right of the child who is separated from one or both parents to maintain personal relations and direct contact with them

122 The same applies to the ECtHR that has already provided some guidance on the application of the child's right to be heard in ECtHR, 08. 07. 2003, no. 30943/96 (*Sahin/Germany*), note 73 et seq.; ECtHR, 22. 06. 2004, no. 78028/01 and 78030/01 (*Pini et al./Romania*), note 164; ECtHR, 13. 07. 2000, no. 25735/94 (*Elsholz/Germany*); ECtHR, 02. 02. 2016, no. 71776/12 (*N.TS. et al./Georgia*), note 73 et seq. and ECtHR, 11. 10. 2016 no. 23298/12 (*Iglesias Casarrubios and Cantalapiedra Iglesias/Spain*), note 42. See *Ubertazzi,* JPIL 13 (2017), 568–601.

123 See *Ubertazzi,* JPIL 13 (2017), 568 (585).

124 CJEU, 22. 12. 2010, C-491/10 PPU (*Aguirre Zarraga/Pelz*).

on a regular basis. That is the case for judgments granting rights of access, but in particular for those decisions that order the return of the child within the framework of the proceeding set up in the 1980 Hague Child Abduction Convention as supplemented by Chapter III of the Brussels II ter Regulation. The latter follows the path already initiated by the Brussels II bis Regulation and rules the case where the country of the child's physical presence denies the return on grounds of Art. 13 (1) and (2) of the Hague Convention, i.e. because whoever was exercising the custody of the child at the time of removal was not effectively doing it or have consented or acquiesced in the removal, or because of grave risk for the child in physical or psychological terms if returned, respectively. While the country of the child's habitual residence needs to adequately ponder this non-return decision in addressing custody matters, Art. 29 (6) Brussels II ter Regulation lays down that its judgment finally ordering the return prevails over that of the non-return judgment. In this vein, these decisions become enforceable in another Member State once they are certified in accordance with the requirements laid down in Art. 47 of the Regulation.

Unlike in the Brussels II bis Regulation, the certificate is only issued upon request of a party by the court that has rendered the judgment granting access rights to the child or its return, provided that all parties, including the child, where appropriate, were given an opportunity to be heard and service of notice was provided or parties in default have otherwise unequivocally accepted the decision. Based on the principle of mutual trust, the abolition of exequatur relies on the Member State of origin attesting that these basic rights have been respected during the proceeding and denying jurisdiction to undertake this examination to the courts of the Member State of destination. However, the *Aguirre Zagarra* case has signaled the difficulties of this approach, since the courts of the Member State of origin certify compliance with the child's right to be heard even when that hearing has not taken place.[125] This has prompted close attention to the circumstances upon which the hearing of the child should take place, and it has been found that there are significant divergences across the Member States. In view of this situation, the development of an autonomous approach to this right during the recast of Brussels II bis Regulation has been strongly suggested to avoid the erosion of the mutual trust principle, but in particular to ensure the child's rights.[126] As already indicated, the new Regulation has acknowledged in Art. 21 the substance of the right, but has refused to harmonize the

125 CJEU, 22. 12. 2010, C-491/10 PPU (*Aguirre Zarraga/Pelz*), note 72.
126 *Ubertazzi,* JPIL 13 (2017), 586–601.

substantive and procedural aspects, such as the minimum age to hear the child or who should be conducting the hearing, either the judge or another professional.

Nevertheless, and with respect to the *Aguirre Zagarra* case and similar, on the one hand, all relevant forms of certificates contained in the Annexes to the Brussels II ter Regulation require the authority issuing it to attest whether the child has been given a "genuine and effective" opportunity to express his or her views in accordance with Art. 21 of the Regulation. The latter is intended to raise the already low figure of cases in which the child has been effectively heard.[127] On the other hand, Art. 21 (1) indicates that the hearing can take place either before the court seized or through a representative or an appropriate body. More specifically, Recital 53 presents a reminder that a hearing through video conference or by means of any other communication technology might be considered unless it would infringe the fair conduct of the proceedings on account of the particular circumstances of the case, if it is not possible to hear a child in person.[128]

In addition to the abovementioned requirements and in the case of a return decision, the court seized will only issue the certificate if "in giving its decision, the court has taken into account the reasons for and the facts underlying the prior decision given in another Member State pursuant to point (b) of Art. 13 (1), or Art. 13 (2), of the 1980 Hague Convention" (Art. 47 (4) Brussels II ter Regulation). In line with the amendments made to Art. 11 (8) Brussels II bis Regulation, the new Regulation partially overturns the *Povse/Alpago* case where the CJEU held that interim return orders could be enforced via the special regime for privileged decisions.[129] Hence, only final return decisions made in the best interests of the child can now benefit from this regime. In this vein, the Regulation would be in alignment with the ECtHR case law, in particular *Neulinger*[130] and *Kampanella.*[131]

127 *Beaumont/Walker/Holliday,* Int. Fam. L.J. 4 (2016) 310 (318), found that only 20% of children involved in Art. 11 (8) Brussels II bis Regulation have been heard.

128 These methods and means available to judges to hear the child were already indicated in the EU Commission's Practice Guide for the Application of the Brussels IIa Regulation (2014), 76–80, https://op.europa.eu/en/publication-detail/-/publication/f7d39509-3f10-4ae2-b993-53ac6b9f93ed (last consulted 02. 10. 2020). This guidance in the regulation is still an advancement compared to the previous situation as indicated by *Carpaneto,* RDIPP 2018, 944 (969).

129 CJEU, 01. 07. 2010, C-211/10 PPU (*Povse/Alpago*).

130 ECtHR, 06. 07. 2010, no. 41615/07 (*Neulinger and Shuruk/Switzerland*). See with this remark *Carpaneto,* RDIPP 2018, 944 (973 et seq.); *Honorati,* RDIPP 53 (2017), 247 (264 et seq.).

131 ECtHR, 12. 07. 2011, no. 14737/09 (*Šneersone and Kampanella/Italy*).

The abovementioned requirements differentiate between the certificates pursuant to Art. 47 and 36 Brussels II ter Regulation. The reason for this divergence lies in the fact that the former cannot be challenged on the grounds laid down in Art. 39, but only by those set out in Art. 50, along with the situation described in Art. 56 (6), because it applies to all instances of enforcement. In other words, in addition to the abolition of exequatur, the special regime for privileged decisions shifts the examination of grounds for refusal of recognition and enforcement from the country of destination to the country of origin. The exceptions are: (1) those cases where the certified decision is irreconcilable with a later decision in the Member State of recognition, or in another Member State or the non-Member State of the child's habitual residence provided that they comply with the requirements for recognition and enforcement in the latter State (Art. 50); and (2) the certificate pursuant to Art. 47 is rectified because there is a material discrepancy between the decision and the certificate (Art. 48 and 49). The *Aguirre Zagarra* case also accounts for the latter ground for refusal of enforcement to the extent that it permits to correct assertions, such as the one that the child has been heard, if necessary.

Regardless of the chosen regime to recognize and enforce a decision, the new Regulation also sets up grounds for suspension and refusal of enforcement. Art. 56 lists the cases in which the court seized can stay the enforcement of a decision, either on its own motion or upon application of the person against whom enforcement is sought or the child concerned. Those situations include the case in which the "enforcement would expose the child to a grave risk of physical or psychological harm due to temporary impediments which have arisen after the decision was given, or by virtue of any other significant change of circumstances" (Art 56 (4) Brussels II ter Regulation), that can lead to a refusal of enforcement if those impediments or circumstances are of a lasting nature (Art. 56 (6) Brussels II ter Regulation). Recital 69 sheds light on this ground which was addressed in the *Povse and Povse/Austria* case,[132] where the father visited the child in the country of abduction but stopped doing so shortly afterwards. By the time of enforcement, four years had already passed and the child had forgotten the common language with the father and become a stranger. Nonetheless, the return was insisted upon by the Italian side without undertaking any previous measure to re-establish the contact between the child and the father. Nevertheless, the *Deticek* case sends a different message by reminding us that this type of assessment corresponds to the court of the child's habitual residence, for which

132 ECtHR, 18. 06. 2013, no. 3890/11 (*Povse and Povse/Austria*).

reason the child's integration in the country of destination might lead to stay of enforcement, but not to refusal.[133]

Recital 69 of the Brussels II ter Regulation presents as an example of an impediment of the abovementioned sort, the "manifest objection of the child voiced only after the decision was given which is so strong that, if disregarded, it would amount to a grave risk of physical or psychological harm for the child". Although the same Recital insists on the resumption of enforcement as soon as the said grave risk ceases to exist, adopting measures in accordance with national law and procedure, such as seeking the assistance of professionals, such as social workers or child psychologists, to try to overcome those objections, the concern has also been raised that this provision will only serve to prolong the dispute.[134] Other examples might be circumstances that concern one of the parents, such as a new child, a serious illness that renders the custodian unable to take care, detention, or expulsion to another country.[135]

In general, and as stated in Recital 67, a relevant change of circumstances, such as challenges against the decision in the country of origin or its loss of enforceability, as well as obstacles or emergency situations, including the ones mentioned in Art. 56 (4) and (6) Brussels II ter Regulation that have arisen out at the enforcement stage, should be immediately addressed by the authorities competent for enforcement. Hence, Art. 56 and 57 deal with suspension and refusal of enforcement, including on the grounds laid down in national legislation that are not incompatible with Art. 41, 50 and 56. In this vein, Recital 63 provides for clarification on these grounds that "could include, for example, challenges based on formal errors under national law in an act of enforcement or on the assertion that the action required by the decision has already been performed or has become impossible, for instance, in case of force majeure, serious illness of the person to whom the child is to be handed over, the imprisonment or death of that person, the fact that the Member State to which the child is to be returned has turned into a war zone after the decision was given, or the refusal of enforcement of a decision which under the law of the Member State where enforcement is sought does not have any enforceable content and cannot be adjusted to this effect".

Section 4 of Chapter IV is devoted to recognition and enforcement of authentic documents and includes a more exhaustive regulation than the

133 CJEU, 23. 12. 2009, C-403/09 PPU (*Deticek/Sgueglia*).

134 See *González Beilfuss,* in: Álvarez González et al., Relaciones transfronterizas, globalización y derecho, p. 383 (397 et seq.); *Rodríguez Pineau,* REEI 35 (2018), 1 (30).

135 See *Honorati,* RDIPP 53 (2017), 247 (267 et seq.).

one in the succinct Art. 46 Brussels II bis Regulation. Like its predecessor, the Brussels II ter Regulation provides for the circulation of authentic instruments and agreements in matters of parental responsibility which have binding legal effect and are enforceable in the Member State of origin. To this end, not only the general provisions provided for in the previous sections of Chapter IV apply, but a specific certificate is issued in order to facilitate such circulation, that it is also subject to the abolition of exequatur. In this vein, the certificate can only be issued if: (1) the authentic instrument has been formally drawn up or registered, and the agreement has been registered, in a Member State assuming jurisdiction under Chapter II; (2) either of them has binding legal effect in that State; and (3) their content is not contrary to the best interest of the child (Art. 66 Brussels II ter Regulation.).

Although the proceedings are laid down in Art. 59 to 62, Section 5 of Chapter IV and Chapter VI, this Section provides for the grounds for refusal of recognition and enforcement that follow the path of Art. 39. However, these grounds have been adjusted to the elaboration of authentic instruments and agreements in this matter. In a similar vein, and in a manner highlighting its significance, the mandatory hearing of the child's views, where appropriate, has been laid down in a separate paragraph (3), from the other grounds established in Art. 68 (2).

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