

**An Examination of the
Implications for the
Northern Ireland
Judiciary of Brussels II
Revised**

Mr Justice Moylan

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THE BACKGROUND TO COUNCIL REGULATION (EC) NO. 2201/2003, “BRUSSELS II REVISED”: POLITICS AND LAW WITHIN THE EU

1. The *1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* was, from its entry into force in 1973, the cornerstone of the European Community’s private international law policy. Its purpose was to facilitate the recognition and enforcement of judgments throughout the newly established European Community and thereby aid the working of the internal market. The Convention was restricted to ‘civil and commercial matters’ (including maintenance) and specifically excluded matrimonial matters because it was felt that it would be too difficult to unify the jurisdiction rules of the Member States¹. Also, family matters were not then considered directly to affect the course of economic integration; the primary focus of the EEC at this time.

The Political Process – the movement of the EU into Family Matters

2. The principal driving force behind the project which resulted in Brussels II was a jurisdictional problem which was hampering relations between France and Germany. The French Code Civil gave a French national the right to commence matrimonial proceedings in France on the basis of his or her nationality. Where a Franco-German couple lived in Germany and one spouse commenced divorce proceedings there, the French spouse would be at liberty to bring parallel matrimonial proceedings in France. If this happened, often the French court would refuse recognition to the German judgment. The result of this conflict was a proliferation of limping Franco-German marriages. A further driving force was the developing aim of the European Institutions and certain Member States for increased integration.
3. The first proposal that the Brussels Convention (later transposed to become Brussels II Regulation) be extended to cover certain family matters came in July 1992 from the German delegation to the European Community Judicial Co-operation Working Group. In June 1994 agreement was reached at the European Council for a draft convention to be prepared. Its scope was to be restricted to

¹ Jenard Report [1979] OJ C59 at paragraph 10

divorce, legal separation and nullity. Reliance (for a legal base) was placed on the provisions of the Maastricht Treaty (Treaty on European Union: TEU) that had just entered into force; notably what was then Article K.1(6) which identified judicial co-operation in civil matters as a matter of common interest for Member States.

4. A battleground then emerged as to whether custody matters should be included within the scope of the new convention. In 1995 the French and Spanish delegations proposed that the scope of the convention be extended to cover custody and related orders made in the course of the matrimonial proceedings already being dealt with. The UK opposed the extension, stating:
 - ✘ There was no actual evidence of problems experienced in Member States as regards international jurisdiction conflicts over child custody which were confined to the context of divorce proceedings²
 - ✘ The extension of the scope would complicate the negotiation process and delay the eventual instrument
 - ✘ It had no bearing on the problem of Franco-German marriages
 - ✘ Divorce was a finite matter, whereas custody matters would continue for the length of a child's minority.
 - ✘ There was little merit in providing a European approach to a problem already under consideration by the Hague Conference (a process which culminated in the adoption of the *1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*) and which would provide a potentially global solution to private international law issues affecting children.³

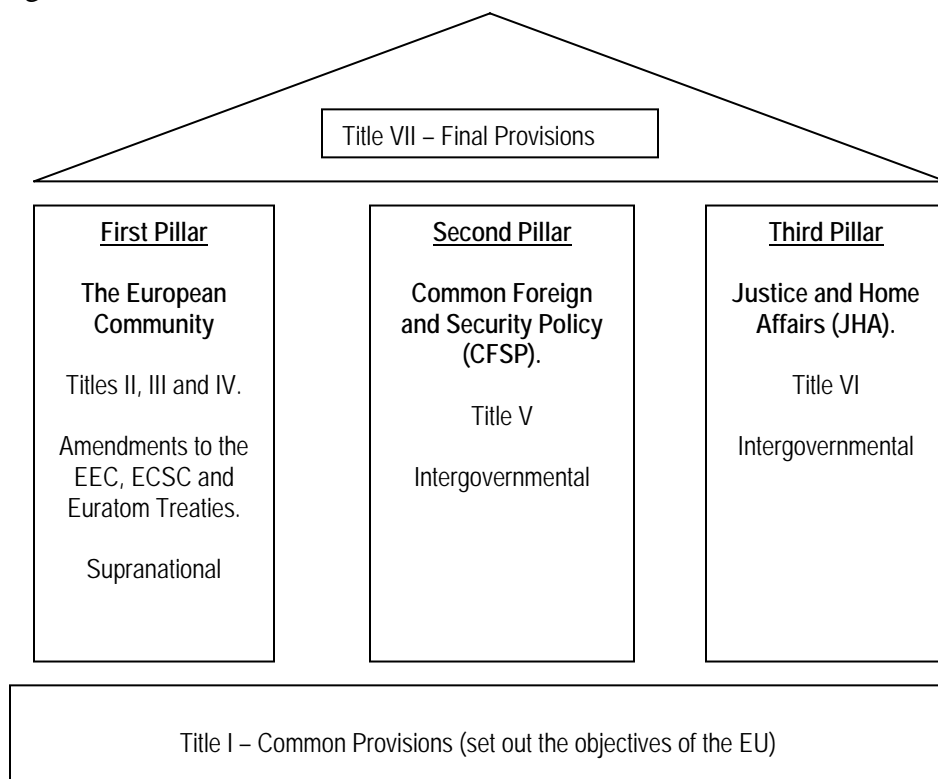
5. Over time, the UK's opposition became muted; government figures became aware of the political capital which could be made from the project. John Major's Conservative Government wanted the Third Pillar of the EU, (which had been chosen as the legal basis of the Convention - see below) to succeed in order to fend off moves to have jurisdiction for private international law measures moved into the First Pillar. (This aim obviously failed spectacularly in the negotiation of the Treaty of Amsterdam.) National political motivations therefore played a part in the UK's acceptance of the Brussels II initiative.

From Convention to Regulation: The Amsterdam Effect

² Memorandum by the Lord Chancellor's Department, evidence to the House of Lords' Select Committee

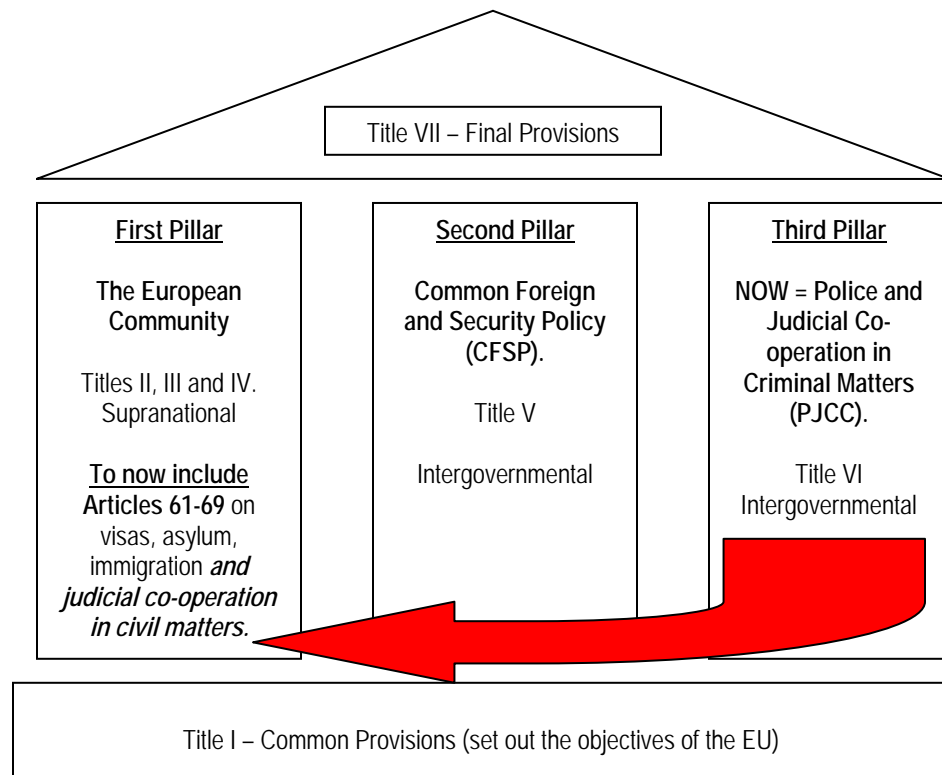
³ House of Lords' Select Committee Report

6. The draft convention was finally agreed in December 1997, by which time the Treaty of Amsterdam (ToA) had been signed (signed 1997, into force 1 May 1999).
7. The Maastricht Treaty of February 1992 had brought about significant institutional and constitutional change in Europe. One of the biggest changes was the ‘three pillar’ structure of the EU, introduced in order to allow for closer political union. The pillar structure was a mechanism by which both supranational and inter-governmental features could be incorporated within the EU. The original pillar structure of the EU can be seen from the following diagram:



8. The second and third pillars of the Union remained largely apart from the Community institutional and legal structure. Whereas EU competences falling within the First Pillar were subject to the EC’s legislative scheme, decisions taken in matters falling within the Second and Third Pillar, were largely carried out by the more conventional consensus-based inter-governmental approach.
9. The Treaty of Amsterdam made a significant change to this pillar structure. A large part of the former Third Pillar on ‘Justice and Home Affairs’ was moved to Title IV of the First Pillar (dealing with the free movement of persons). This Title

is headed “Visas, Asylum, Immigration and Other Policies related to Free Movement of Persons”. Article 65 deals with judicial co-operation in civil matters. The UK and Ireland negotiated an opt-out in respect of this title with certain possibilities for subsequently opting in (Denmark also has a complex partial opt-out). The third pillar was left covering only police and judicial co-operation in criminal matters (PJCC). The new pillar structure can be illustrated as such:



10. Ultimately, as a result of this change, the proposed Brussels II Convention was translated into a directly enforceable Regulation.
11. One, possibly unintended, effect of its becoming a Regulation was to limit the extent to which a reference could be made to the ECJ. It was now restricted to courts from which there is no appeal (Article 68). Previously, as a Convention, all appellate courts would have been able to make a reference (under the Protocol on the ECJ annexed to the Convention).

12. The new Brussels II *Regulation* was approved by the Council on 29 May 2000 and entered into force on 1 March 2001. Brussels II has been modelled on Brussels I as far as possible. The Borrás report⁴ explains that, where the terms in Brussels I and II are identical, they must be given the same meaning with case law from the European Court of Justice being used as a tool for interpretation.

The Revision of Brussels II Regulation: Brussels II Revised

13. Following a French initiative, the Commission submitted a proposal for a Regulation to replace Brussels II in 2001. The negotiating process for the new Brussels II turned out to be lengthy and difficult, in particular because of the possible interference of the new instrument with the *1980 Hague Convention on Child Abduction* and the *1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*.

Decision-Making in Judicial Co-operation in Family Matters within the EU

14. Under the current scheme of the EU, all legislative proposals in the family law arena continue to be dealt with on a ‘unanimous’ basis i.e. legislation cannot be passed without the approval of each member of the Council.
15. There is provision, however, in Article 67(2) EC, for the Council, acting unanimously and after consulting the European Parliament, to take a decision to provide that all or parts of the areas covered by Title IV shall be governed by the co-decision procedure. If this route were ever adopted, this would have the effect of partially or wholly extinguishing the exception for certain family law matters.⁵

⁴ The Borrás Report (1998) O J C 221/27, the Explanatory Report on Brussels II

⁵ Interestingly, the Commission issued a Communication in 2005 (COM(05)648) which set out the case for a decision under Article 67(2) EC to bring measures relating to maintenance obligations within the voting regime (i.e. within the co-decision procedure) for other civil judicial co-operation measures (presumably ahead of the adoption of a new Maintenance Regulation). The justification for such an approach was that whilst it is clear that matrimonial matters and parental responsibility are “aspects relating to family law” within the meaning of Article 67(5) TEC, the recovery of a maintenance obligation is a “claim and is subject to legal rules that differ little from the general rules governing asset-related claims”. It was stated that it does not concern the “core aspect of family relationships”. The English government has decided not to opt-in to the Maintenance Regulation in any event. However, they have stated that they would oppose any use of Article 67(2) EC to bring maintenance matters within the co-decision procedure. It appears that other Member States are of the same opinion; the Communication was debated in the EU Civil Law Committee in February 2006 and it was clear that the majority of Member States did not support such an approach.

B. BRUSSELS II REVISED (2201/2003)

21. The aims of Brussels II Revised:

- 21.1 to extend the rules on mutual recognition and enforcement of Brussels II to all decisions on parental responsibility;
- 21.2 to reinforce the obligation of the courts to order the return of children abducted within the Community.
- 21.3 to establish/reinforce, as a fundamental principle, that the most appropriate forum for matters of parental responsibility is the state of the child's habitual residence.

22 **In Force: 1 March 2005**

I. THE SCOPE OF BRUSSELS II REVISED

23 **Matrimonial Matters** - *divorce, legal separation, annulment*: Art. 1(a).

But Not "*issues such as the grounds for divorce, property consequences of marriage or any other ancillary measures.*" (Recital 8).

24 **Parental Responsibility** - all aspects⁶ ("*attribution, exercise, delegation, restriction, or termination*") of parental responsibility -Art. 1(1)(b), 1(2) - i.e. private and public law,
but **NOT**: Art. 1(3):

- establishing/contesting a parent/child relationship;
- adoption;
- names;
- maintenance;
- trusts or succession.

24. **Article 2: Definitions:**

- Article 2(7) → '**parental responsibility**' - all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal

⁶ NB: even under Brussels II PR construed widely: Re : G (Foreign Contact Order : Enforcement) [2004] 1 FLR 378: Thorpe LJ explained that the term "parental responsibility" must be construed widely because a narrow construction of the term would frustrate an important objective of Brussels II.

effect. The term shall include rights of custody and rights of access. (Note: this is a much wider definition than that under the English Children Act 1989.)

- Article 2(9) → **‘rights of custody’** - shall include rights and duties relating to the care of the person of a child and in particular the right to determine the child’s place of residence.
- Article 2(10) → **‘rights of access’** - shall include in particular the right to take a child to a place other than his or her habitual residence for a limited period of time.
- Article 2(11) → **‘wrongful removal or retention’** - shall mean a child’s removal or retention where it is in breach of rights of custody provided they were being exercised.

II. JURISDICTION

25. A: Divorce, legal separation and annulment (Article 3)

Same as under Brussels II.

26. The grounds are **‘exclusive’** - jurisdictional list is exhaustive and closed. There is a residual jurisdiction (Art. 7) only where no court of a Member State has jurisdiction under the Regulation. In that case, jurisdiction shall be determined by the internal law of the Member State.

27. The grounds are **‘alternative’** - there is no hierarchy in terms of the grounds set out in Article 3(1).

28. The grounds are **‘objective’** - the court must examine whether it has jurisdiction under the Regulation (Art. 17). If it does not, it must, *of its own motion*, dismiss the proceedings:

- **Rogers-Headicar v. Headicar [2004] EWCA Civ 1867, [2005] 2 FCR 1**
- **R v. R (Divorce: Jurisdiction: Domicile) [2006] 1 FLR 389.**

29. B: Parental Responsibility (Articles 8 to 14)

The jurisdictional DNA of Brussels II Revised is that of ‘habitual residence’. Article 8 states that:

“The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.”

Exceptions to the General Rule

30. ***Article 9 – Continuing Jurisdiction of the child’s former habitual residence***

Where a child moves lawfully to another MS and acquires a new habitual residence, the original MS keeps jurisdiction to vary any contact order for 3 months if the parent with contact remains habitually resident there unless that parent has accepted the jurisdiction of the courts of the country to which the child has moved by participating in proceedings before those courts without contesting their jurisdiction (**Article 9**).

31. Relationship between Articles 8 and 9? Practice Guide - once a competent court is seised, it retains jurisdiction even if the child acquires habitual residence in another Member State during the course of the court proceeding.

32. NB: It does not prevent the courts of the new Member State from deciding on matters other than access rights.

33. ***Article 12 – Prorogation of Jurisdiction***

Either (i) to the country exercising divorce etc. jurisdiction or;
(ii) to a country with which the child has a substantial connection (e.g. one holder of PR habitually resident there or child a national) provided in each case – (a) jurisdiction expressly accepted and
(b) in the best interests of the child.

34. **C v C and others, [2006] EWHC 3247 (Fam) (December 2006).**

Spain/England.

Held that if a party succeeded in establishing all three limbs of art 12(1) or (3), the court was to accept jurisdiction, otherwise art 8 prevailed and the court had to decline jurisdiction. In the instant case the father had established that the English court properly had jurisdiction by virtue of art 12(1) and art 12(3) of Council Regulation (EC) 2201/2003. What was required was essentially not

a discretionary exercise (save in relation to best interests) but a fact finding exercise as to whether, on the facts of the instant case the mother by her conduct had accepted the jurisdiction of the English court in an unequivocal manner. Objective approach.

35. **Other Articles**

- Where a child's habitual residence cannot be established and Art. 12 does not apply, the country where the child is present will have jurisdiction (Art. 13).
- Where no MS has jurisdiction under the Regulation, state laws apply (Art. 14).

36. ***Transfer to a court better placed to hear (Article 15):***

Court may transfer if considers that court of another MS, with which the child has a particular connection, would be better placed to hear the case or a part of the case and that this in the best interests of the child. Once a case has been transferred to the court of another Member State, it cannot be further transferred to a third court (Recital 13).

Particular connections include:

- new or old habitual residence;
- habitual residence of a holder of pr;
- the place of the child's nationality.

37. In the case of **Eva Clark (a child) [2006] EWCA Civ 1115**, Thorpe LJ stated that Article 15 is “*an import into the regulation of the forum conveniens concept...It is a provision negotiated for the comfort of those jurisdictions who have reservations about the introduction of a strict lis alibi pendens rule into family litigation...I suspect that as far as the Civil Law jurisdictions are concerned, it will indeed be a truly exceptional case before they invoke Article 15.*”⁷

⁷ On the facts of the case, Thorpe LJ held that the judge at first instance had been wrong to give directions for a welfare investigation to be carried out in England pending the primary jurisdiction (Hungary) hearing the case on the basis that the judge thought Hungary may well transfer the matter back to England in accordance with Article 15. Thorpe LJ stated that there should be no orders made in England which would (even inferentially) challenge the primary jurisdiction of another Member State.

III. THE RULES ON CHILD ABDUCTION

38. Brussels II Revised **takes precedence** over the 1980 Hague Convention between MS (**Art. 60**) - the Hague Convention continues to apply as supplemented by this Regulation.

39. **Jurisdiction (Article 10):**

MS where child was habitually resident before wrongful removal or retention will retain jurisdiction until:

- (a) the child has acquired a habitual residence in another MS and:
- (b) every person (institution or other body) having rights of custody have acquiesced or child resided there at least one year after person etc. had or should have had knowledge of whereabouts and the child is settled⁸ in his or her new environment.⁹

40. **Rules to Ensure the Prompt Return of the Child: Article 11**

- The mechanism by which the return of the child is effected is dealt with in **Art. 11** - application made for a judgment "*on the basis of*" the Hague Convention: Art. 11 (1) .
- Article 11 deals with the return of the child and the interrelationship between the Hague Convention and the Regulation.
- Court cannot refuse to return under Article 13(b) (physical or psychological harm or intolerable situation) Hague Convention if adequate arrangements made to secure protection of child: Art. 11(4).
- Judgment to be given no later than 6 weeks after the application is lodged: Art. 11(3) unless exceptional circumstances.
 - **Re M (A Child) (Abduction: Brussels II Revised), [2006] EWCA Civ 630**

⁸ Cannon v Cannon [2005] 1 WLR 32

⁹ A case dealing with the interplay between Brussels II Revised and the Hague Convention: **Re T&J (Children)(Abduction: Recognition of Foreign Judgment) [2006] EWHC 1472** - an unusual case where proceedings under the Hague Convention only commenced after the children proceedings had been resolved in favour of the abducting parent in the court of the Member State where the children were habitually resident (Spain). The English court affirmed that the Regulation recognised the primacy of the Spanish court (the court of the children's habitual residence) in determining questions surrounding the children's future and as the Spanish court had already made a decision regarding the children's welfare in accordance with the Regulation, that decision had to be recognised automatically in all other Member States and could not be substantially reviewed.

Thorpe LJ: no choice but to comply and practical arrangements must be in place to ensure compliance.

- **In the Matter of H (a child) [2006] EWCA Civ 1247**, at paragraphs 17-18:
“If the target of six weeks from issue to determination is to be achieved, these cases may have to be conducted more summarily than has been the convention in our jurisdiction...we have to consider ways of paring down the litigation process...”¹⁰

41. **SUBJECT TO Procedural Requirements:**

- **The child shall be given the opportunity to be heard** (when applying Arts. 12 and 13 of the Hague Convention) unless inappropriate having regard to age or maturity: Art. 11(2).
- **Court cannot refuse to return unless person who requested return given opportunity to be heard:** Art. 11(5) - video/tele conference

42. **NB: Article 11(8):**

Even if the court of the MS to which the child has been abducted does not order the return of a child under Article 13 of the Hague Convention, the court of the child's original habitual residence can still order the child to be returned: Art. 11(8) - and see Art. 40/42. Judges in the two MS encouraged to speak to each other.

IV **SEISING (Article 16)**

43. Same as for Brussels II.

44. Court shall be deemed to be seised :

- (a) when the document instituting the proceedings is lodged with the court, provided that the applicant/petitioner does not subsequently fail to take the steps required to effect service on the respondent; or
- (b) if the document has to be served prior to lodging with the court, at the time when it is received by the authority responsible for service, subject to the same requirement as to failure to take steps to serve the respondent.

¹⁰ But see the dicta of Baroness Hale in *Re D (a child) (abduction: foreign custody rights)* [2006] UKHL 51

V **LIS PENDENS (Article 19)**

45. Applies where proceedings "*relating*" to divorce etc.
46. Applies where proceedings "*relating*" to parental responsibility and same child and involving the "*same cause of action*".
47. Court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the first court is established. Once that has happened, it must then decline jurisdiction in favour of that court: Article 19(3)¹¹.
48. Note - for divorce - that there is no scope for declining jurisdiction in favour of a more appropriate forum, nor is there an equivalent of Article 17 of Brussels I permitting prorogation by agreement. See Article 15 (above) for parental responsibility.
49. The term "same cause of action" must be given an independent, and broad, European law meaning.
50. There is sometimes an issue about whether the relevant sort of proceedings have been initiated in deciding which Member State has been first seised.
 - **Chorley v. Chorley [2005] 2 FLR 38.** The competing jurisdictions in that case were France and England. In France, in order to get divorced, it is necessary first to issue a 'requete' which triggers an automatic conciliation process. Subsequently an 'assignation' must be filed. Mr Chorley filed those two documents but in between them, Mrs Chorley filed a divorce petition in England. Wood J felt that he had to determine whether the issue of the requete was in reality the initiation of the sort of proceedings sufficient to seise the French court. He decided they conciliation proceedings, separate from proceedings to terminate a marriage. This ruling, if correct, would always give a heard start in such a case to the party who wished to have a divorce in England rather than France. The Court of Appeal held that the question of whether or not the requete was sufficient to seise the French court was a matter for the French court. By the time of the Court of Appeal judgment, the French court of Appeal had ruled that the requete did indeed serve to initiate the

¹¹ **Chorley v Chorley** EWCA 12.01.05: FPR 2.27A(2) - Judge should have waited for French decision on characterisation of French process.

relevant form of proceedings, within the meaning of the Regulation. The French Court was therefore the first seised.

VI PROVISIONAL, INCLUDING PROTECTIVE MEASURES (Article 20)

51. If a Member State has stayed its proceedings in accordance with Article 19, it can still grant some relief provided that **Article 20** of Brussels II Revised is satisfied; namely that the relief is a provisional, including protective, measures. In **Wermuth v. Wermuth (No. 2) [2003] 1 FLR 1029**, the Court of Appeal held that maintenance pending suit is neither protective nor provisional. See also in this regard, **L-K v K (Brussels II Revised: Maintenance Pending Suit), [2006] EWHC 153, [2006] Fam. Law 635**.

VII RECOGNITION AND ENFORCEMENT OF JUDGMENTS

52. **Article 21** provides that a judgment given in a MS shall be recognised in the other Member States without any special procedure being required.
53. Party seeking to enforce order relating to PR MUST register judgment: **Article 28**. Other party can apply for a decision that judgment should not be recognized.
54. **Grounds for Non-Recognition of Judgments relating to PR:**

Article 23: The court shall only refuse to recognise and declare the judgment enforceable if:

- Manifestly contrary to public policy in the Member State addressed¹²;
- The child has not been given the opportunity to be heard except in the case of urgency;
- The judgment was given in the absence of a person who was not served with the documents instituting the proceedings in sufficient time and in such a way as to enable him or her to arrange for his or her defence, unless it is determined that he or she has accepted the judgment unequivocally;

¹² See the case of **W v. W (Foreign Custody Order: Enforcement) [2005] EWHC 1811** – a father argued that enforcement of an Irish order in England giving a mother primary care of the children where she had bi-polar disorder was contrary to public policy. Singer J held that had Brussels II Revised applied (it did not on the facts due to the fact that the Irish order failed the transitional provision test) there was no basis upon which recognition of the order, which had been made after consideration of detailed evidence, on express welfare principles, and after a lengthy hearing, could be considered to be contrary to public policy. It was quite the opposite: its non-recognition would be contrary to public policy.

- The person claiming that the judgment infringes his or her parental responsibility has not been given an opportunity to be heard;
 - The judgment is irreconcilable with another judgment, in the conditions set out in Article 23(e)(f);
 - The case concerns the placement of a child in another Member State and the procedure prescribed in Article 56 has not been complied with.
55. There are **2 exceptions** where the Regulation dispenses with this procedure and where a decision is to be recognised and enforceable without any procedure:
- i. Decisions concerning access rights (**Article 41**) and
 - ii. The return of a child following abduction (**Article 42**).
56. **CERTIFICATES:**
NEED A CERTIFICATE:
- Divorce etc. - Annex I;
 - Parental Responsibility - Annex II
 - Contact - Annex III
 - Return under 11(8) - Annex IV
- Can give Certificate III **ONLY** if judgment in default sufficient notice given, all parties given opportunity to be heard and child given opportunity to be heard: Art. 41(2).
- Can give Certificate IV **ONLY** if child given opportunity to be heard, parties given opportunity to be heard and court taken into account the reasons and evidence in order under Art. 13 of 1980 Convention: Art. 42(2).
57. **Re : S (Brussels II : Recognition : Best Interests of Child) [2004] 1 FLR 571 and (No 2) [2004] 1 FLR 582,**
Belgian Order. None of the exceptions applied. No power to vary the order. However, the Order was enforced by means of a controlled phasing in. The target had to be to make the foreign order happen as soon as that could be effectively achieved.
- Had the welfare of the child been the paramount consideration, the court would have inclined to a much more gradual build up of contact. However the terms of the Belgian order required contact to progress at a faster pace. It could not be said that, although contrary to the English court's evaluation of the child's best interests, the order for enforcement was contrary to public policy.)
58. Practical Enforcement - governed by national law (Article 47).

59. It has been stated that the provision regarding a judgment being “manifestly contrary to public policy” will only have a limited reach because neither the jurisdiction of the court of origin, nor the substance of a judgment may be reviewed and recognition may not be refused on the ground that the recognising Member State would not allow the divorce on the same facts. Commentators have stated that it may be that the basis for refusing recognition on this ground will be limited to situations where the corresponding provision of the Brussels I regime has been applied, namely where the foreign decree has been obtained by fraud or where the respondent’s human rights (as protected by the ECHR) have been infringed (see *Interdesco SA v. Nullifire Ltd.* [1992] 1 Lloyd’s Rep 180 and *Krombach v. Bamberski* [2000] ECR I-1935).

VIII PRELIMINARY REFERENCES TO THE ECJ REGARDING THE APPLICATION OF BRUSSELS II REVISED¹³

The ECJ’s Preliminary Reference Procedure

60. The decision to seek a preliminary ruling is made by the national court itself, paying only such regard as it thinks fit to the views of the parties to the case. Once a preliminary ruling has been received, the national court is under an obligation to apply the preliminary ruling.
61. Reference can only be made by a court/tribunal:
“against whose decisions there is no judicial remedy under national law.”
62. Such a court is under an obligation to make a reference if it considers that a decision on a question of EC law is necessary to enable it to give judgment. A “court of last instance” has been held to be a court against whose decision there is no judicial remedy in the case at issue (*Costa v. ENEL* [1964] ECR 585). A subordinate court may therefore bring itself within the Article if it has the conclusive power to deny leave to appeal. The decisive question is whether the unsuccessful party has the opportunity to take the case any further.
63. Accordingly, in the United Kingdom, the House of Lords will generally be the court of last resort because, in the majority of cases, a petition for leave to appeal may be presented to the House of Lords. (*Chiron Corporation v Murex Diagnostics* [1995] All ER (EC) 88).

¹³ Taken largely from the article ‘The European Court of Justice and Brussels II Revised’, [2006] IFL 188

The Problem of Delay

64. There already exists a clear awareness within the ECJ of the need to devise strategies to deal with existing delays. In 2003 the delay was on average 25.5 months; in 2004 the delay was 23.5 months (2004 Annual Report of ECJ). In 2005 the delay had been reduced further, to 20.4 months (2005 Annual Report). EU Heads of State and Governments have specifically asked the Court to develop new procedures to remedy this problem (as to which, see below).
65. There are, therefore, two hurdles which could cause, not just the 6 week deadline to be missed, but also generally unacceptable delays where the proceedings in issue involve children:
 1. Since only a “court of last instance” can make a reference to the ECJ, the domestic delay and expense in arriving at that court;
 2. The delay in the ECJ following a reference.

Possible Solutions to the Question of Delay

66. Several possible solutions to the question of delay at a national level have been mooted in the UK and Europe. For example, in the UK, the ‘leapfrog procedure’ permitted by ss.12-15 of the Administration of Justice Act 1969 could be used to allow cases to reach the House of Lords more quickly. An alternative approach to the problem would be for the requirement of Article 68(1) to be relaxed and for the more liberal regime of Article 234 to be applied to Brussels II Revised references. Another approach currently being addressed by the European Commission is whether Article 68 should be modified to enable all national courts which sit in an appellate capacity to make references.
67. The challenges facing the ECJ are also being actively considered at a European level. In particular, the ECJ’s Procedural Committee is in the process of discussing the issue of acceleration and how best to deal with the problems that might be caused by the need for expeditious decision-making. There is a recognised inevitable tension between the need to accelerate the ECJ’s procedure and the need to ensure that decisions are taken with due care and, importantly for a European Court, with safeguards in place to ensure sufficient involvement of all Member States so that judgments have authority across the whole Community.

68. Another possible solution which has been suggested involves the use of procedures already set out in the ECJ's Rules of Procedure at Article 104. Firstly, Article 104(3) allows for a 'Simplified Procedure'. This procedure is used where a question referred to the court is identical to a question on which the court has already ruled, where the answer to such a question may be clearly deduced from existing case law or where the answer to the question admits of no reasonable doubt.
69. Another procedure available under the Rules of Procedure is the 'Accelerated Procedure' (Article 104a). Acceleration will only be ordered where the circumstances establish that a ruling on the question put to the Court is a matter of exceptional urgency. This procedure is very rarely used because of an understandable reluctance by the ECJ to advance some cases to the consequent detriment of others. In fact, since its inception, the accelerated procedure has only been permitted on three or four occasions. In the first such case, **Jippes [2001] ECR I-5689**, a conclusion was reached in eleven weeks demonstrating the potential for expedition that this procedure can provide. However, the duration of the later cases has not matched this outcome.¹⁴

X Potential Issues for Reference?

70. **The Meaning of 'Habitual Residence'**
'Habitual residence' is not defined in the Regulation. The Practice Guide for Brussels II Revised refers to the fact that the concept is increasingly used in international instruments and that it has to be determined by the judge in each case on the basis of factual elements. It also states that Article 8 "does not refer to any concept of habitual residence under national law, but an 'autonomous' notion of Community law." Further, "the meaning of the term should be interpreted in accordance with the objectives and purposes of the Regulation."
71. To date, there is no decision of the ECJ specifically addressing the meaning of habitual residence for the purposes of Brussels II. However, the Borrás Report, at paragraph 31 states:
"... it was decided not to insert any specific provision on the matter. However, although not applicable under the 1968 Brussels Convention, particular account was taken of the definition given on numerous occasions by the Court of Justice, i.e. 'the place

¹⁴ See *Commission v. Artogodan and Others* [2003] ECR I-7857 and *Commission v. Council* [2004] ECR I-06649, where conclusions were reached in twenty-three and twenty-two weeks respectively.

where the person had established, on a fixed basis, his permanent or habitual centre of interests, with all the relevant facts being taken into account for the purpose of determining such residence’.”

e.g. *Sivana Di Paulo v. National Employment Office* (Case 76/76 [1977] 2 CMLR 59), *Robin Swaddling v. Adjudication Officer* (Case C-90/97, [1999] ECR I-01075 [1999] 2 FLR 184), amongst others. This is a qualitative rather than a purely quantitative evaluation.

72. There is some debate as to whether there are differences between English domestic law and the above definition, focusing on the ability to have two habitual residences at the same time:
- **Ikimi v. Ikimi [2001] 2 FLR 1288** (an individual may have two habitual residences);
 - **M v. H (a child) (shared residence order: habitual residence) [2005] EWHC 1186 (Fam)** – where Charles J states that for the purposes of Brussels II Revised, it is possible for a child to have more than one habitual residence at any one time, in accordance with the domestic interpretation of ‘habitual residence’.
 - **Mark v. Mark [2005] 2 FLR 1193** (residence need not be lawful).
73. The Practice Guide (p. 22) contemplates a child being habitually resident in more than one MS: “It is expected that the *lis pendens* mechanism will be rarely used in proceedings relating to parental responsibility since the child is usually habitually resident in only one” MS. It also states (p. 12) that “it should not be excluded that a child might acquire habitual residence in a Member State the very day of the arrival, depending on the factual elements of the concrete case.”
74. The ECJ interpretation set out above has been applied to the interpretation of the habitual residence of a respondent in the context of Brussels II by the French Courts. (see the case of *M* by the Cour d’Appel D’Aix en Provence on 18 November 2004 and the confirmation by the Cour de Cassation in the same case (Pourvoi No H 05-10951) on 14 December 2005).
75. **Child’s Right to be Heard**
An important element of the Regulation – the importance of giving children the opportunity to express their views:
Features in Articles 11 (Return of the Child), Article 23 (Ground for Non-Recognition), Articles 41 and 42.

76. Mirrors the equivalent provision in the 1996 Hague Convention. Domestic procedure in each Member State will set out how the child is to be heard – Recital 19 expressly states that the Regulation does not modify the applicable national procedures.
77. However, Article 23(b) permits non-recognition where the child was not given the opportunity to be heard “in violation of fundamental principles of procedure in the Member State in which recognition is sought”.
- **Re D (a child) (abduction: foreign custody rights) [2006] UKHL 51** At paragraphs 58-61, Baroness Hale states that, as a result of Article 11(2), “children should be heard far more frequently in Hague Convention cases than has been the practice hitherto.” She examines how this should be done and states that usually ensuring the child has spoken to a CAFCASS officer will be enough. However, other methods available to the court are to allow the child to speak to the judge or to allow the child to have separate legal representation. She confirms that Brussels II Revised requires the court to consider the issue of how the child’s views should be ascertained at the *outset* of proceedings rather than having the child’s views only considered late in the day as part of a ‘last ditch stand’ to support the abducting parent’s case.¹⁵

C. RECENT PROPOSALS AND THE FUTURE FOR FAMILY LAW IN EUROPE

78. In order to promote and fulfill its aim of establishing an “area of freedom, justice and security”, the EU has not stopped its progression into family law with the advent of Brussels II Revised. The following initiatives have recently been published and are gaining momentum. One of the challenging areas for the UK in the next few years will be how far it decides to ‘jump on the bandwagon’ of this further harmonisation of family conflicts of law rules, and how far it retreats to maintain the status quo of the rules we have today.

Proposal for a Council Regulation on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Co-operation in Matters Relating to Maintenance Obligations COM(2005) 649

¹⁵ See also: *Shields v Shields* 2002 SCLR 334 – a Scottish decision focussing on Article 12 of UNCRC 1989.

79. In 15 December 2005 the Commission adopted a proposal for a Regulation aimed at solving the difficulties met by EU maintenance creditors, particularly children, in obtaining a judgment and having it enforced (cross-border). The UK opted out and therefore is not currently taking part in legislative negotiations.

The Commission's Legislative Proposal for Amendments to Brussels II Revised dealing with Jurisdiction and Applicable Law in Divorce (COM (2006) 399, published July 2006), also known as "ROME III"

80. The legislative proposal by the Commission suggests a number of amendments to Brussels II Revised which can be summarised as follows:
- a. The introduction (by amendment to Chapter II on jurisdiction) of a limited possibility for the spouses to designate by common agreement the competent court ("prorogation"). Further, the ability for spouses to choose the applicable law (confined to laws with which the spouses have a close connection by virtue of their last common habitual residence if one of them still resides there, the nationality of one of the spouses, the law of the state of their previous habitual residence or the law of the forum).
 - b. Introduction of a 'Chapter IIa' on applicable law in matters of divorce and legal separation harmonising choice of law rules, based in the first instance on the choice of the spouses. In the absence of choice, the applicable law is determined on the basis of a scale of connecting factors, based first on the habitual residence of the spouses. It is stated that this uniform rule will ensure "legal predictability and certainty" and "reduce the risk of 'rush to court'". In an important passage (p.10), it is stated that the fact that the rule is based in the first place on the habitual residence of the spouses and, failing that, on their last habitual residence if one of them still resides there will result in the application of the law of the forum in the vast majority of cases. "The problems relating to the application of foreign law will therefore be scarce."
 - c. A public policy exception is introduced to the new Chapter, allowing a foreign law to be disregarded in a given case if the application of the rules would be contrary to the public policy of the forum. It is expressly stated in the proposal that the use of this provision is intended to be "exceptional".
 - d. Lastly, abolition of the current Article 7 of Brussels II Revised is suggested with the introduction of a uniform and exhaustive rule on residual jurisdiction which replaces the national rules on residual

jurisdiction and ensures access to court for spouses who live in a third state but retain strong links with a certain Member State of which they are nationals or in which they have resided for a certain period.

The proposed Regulation, if adopted, is to apply from 1 March 2008.

81. The Government has recently announced (27 October 2006) that it will not opt-in to the proposed amendments to Brussels II Revised. Following this announcement, the 'House of Lords European Union Committee' has published its report on the proposals. Whilst the Committee has concluded that the matter is one for international rather than national action, it has expressed doubts as to whether the Commission has proved that action is necessary, raising questions of both legal base and subsidiarity. The Committee also has concerns about whether the proposal is proportionate, and questions whether the objective might be achieved by simpler and less prescriptive means.

The full report can be accessed at

<http://www.publications.parliament.uk/pa/ld200506/ldselect/ldeucom/272/27203.htm>

The Green Paper on Conflict of Laws in Matters Concerning Matrimonial Property Regimes (COM(2006) 400, published 17 July 2006)

82. The issue of applicable law is again central to the discussion in this Green Paper. Most of the EU civil jurisdictions argue that the applicable law should be in accordance with the legitimate expectations of the parties.
83. The Family Law Bar Association responded with particular concern at the underlying assumption that all Member States have a separate matrimonial property regime, and, as under Rome III, that decisions taken relating to matrimonial property are separate from divorce proceedings.