

# Case study: Cross-border parental responsibility, including child abduction (advanced level)

## PROJECT: BETTER APPLYING THE EU REGULATIONS ON FAMILY AND SUCCESSION LAW



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## Case study 5: Parental responsibility (advanced)

Kylie is a Maltese citizen who lived in Malta until she was 22 years old. At that point, she went to Canada to pursue post-graduate studies. While she was in Canada, she met Julien, a French co-student. Julien had gone to Canada for post-graduate studies in the same year as Kylie. Julien and Kylie both turned out to be brilliant students and they stayed on to do PhD research. They started a relationship and lived together.

After three years, they got married at a romantic ceremony in Malta. They returned to Canada after their honeymoon in Spain. A year later their first son, Luis, was born. The next year Elias followed. Both boys have French and Maltese nationality. Kylie speaks Maltese to the children and Julien French; Kylie and Julien speak English to each other. Thus the household used a mix of languages. The couple went through a difficult patch. They were both stressed by their demanding jobs and sleep-deprived by the two young boys. Both took up the care of the boys and household duties.

Kylie's mother realised that the young couple was struggling and went to stay with them for three months to help with the care of the boys. This was a great relief for Kylie, but put more strain on the relationship, as Julien had the feeling that he was constantly being judged by a woman he hardly knew.

After Kylie's mother returned to Malta, matters just got worse. Kylie realised that she had no support network. It turned out that Elias had an autism spectrum disorder (ASD) and he needed extra attention. Both boys were in a nursery school and Kylie reduced her working hours (she was now involved in a post-doc project) to fetch them in time. Julien was of the opinion that Kylie exaggerated Elias's problem and that he should just be treated as any other child and should not be getting medication at such a young age. Shouting matches started between the couple and there was no peace in their household anymore.

When Luis was four and Elias three years old, Kylie decided that she could not handle this anymore and she informed Julien that she wanted to go to Malta to consider what she was going to do with the rest of her life. Julien agreed that she would go to Malta and take the boys with her for a period of six months. He had in the meantime been appointed to a post at the university where he had five years to prove himself in order to get tenured. The agreement was that Julien would come to Malta six months later and then they would discuss things further. On this occasion, Kylie said that Luis was doing well in his nursery school and that Elias was getting special therapy that made him a lot calmer. She thought that it was best for the boys to stay another five months until the end of the school year. In the meantime Kylie was continuing the work on the post-doc project from Malta.

At that point, Julien consulted a lawyer in France about instituting divorce proceedings there.

At the end of the school year, Kylie informed Julien that she wanted to get divorced. As he had already collected information, he quickly instituted divorce proceedings in France even though he was still living in Canada. He requested the French court to grant him sole custody of the children, claiming that Kylie was paranoid and therefore not a trustworthy mother. He wanted to exercise this sole custody in Canada, and thus wanted the boys to return.

He also instituted return proceedings in Malta for the return of Luis and Elias to Canada. Kylie opposed the return request, saying that the boys had become habitually resident in Malta. In the alternative, she

said that Julien was psychologically abusive and that there would be a risk, particularly for Elias, to return to Canada, where Julien refuses to allow him medication and therapy that he needs.

Kylie then also instituted divorce proceedings in Malta, claiming that the French court lacks jurisdiction. She also requested provisional measures, namely that the children could stay with her pending the dispute on the merits. As she claimed that the children had become habitually resident in Malta, she was of the view that the parental responsibility proceedings on the merits should be conducted in Malta.

Consider the following questions:

1. Can the French court to hear the dispute about parental responsibility? If so, which law applies?
2. Can the Maltese court hear the action instituted by Kylie about parental responsibility? If so, which law applies?
3. Can the court in Malta issue the provisional measures that Kylie requests?
4. Where would these provisional measures have effect?
5. Should the Maltese judge order the return of the children to Canada? If so, what should be included in a return judgment?

**Model answer**

Question 1) concerns the French judge; all the other questions concern the Maltese judge.

**Methodology**

*Step 1. Identify the **area of law** concerned.*

*Step 2. Consider which **aspect of private international law** is at issue*

*Step 3. Find EU and international **legal sources**.*

*Step 4. Check the **scope** of the EU and international texts, and where more than one exist, their relation to each other.*

*Step 5. Find the correct **rule**.*

**1) Can the French court hear the dispute about parental responsibility? If so, which law applies?****Step 1. Area of law**

The question of where the children will reside falls under the category of parental responsibility.

Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels IIa, sometimes called Brussels IIbis) states in Article 1(1)(b) that it applies to "the attribution, exercise, delegation, restriction or termination of parental responsibility." Article 1(2)(a) specifies that this includes "rights of custody and rights of access."

**Step 2. Aspect of private international law**

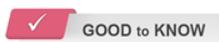
The question concerns the two areas: jurisdiction and applicable law.

**Step 3. Legal sources**

The rules on **jurisdiction** in international disputes about parental responsibility are found in:

- a) Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels IIa);
- b) Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children (Child Protection Convention).

Regarding **applicable law**, the relevant instrument is the Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children (Child Protection Convention).



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**Hague Child Abduction Convention**

The Hague Child Abduction Convention does not regulate the questions of jurisdiction or law applicable to the substance of the dispute. It applies to the return procedure (see question 5 below). However, in regulating the return procedure, it can be relevant for jurisdiction.

## Step 4. Scope of the legal texts

### Step 4.a) Brussels IIa

**Geographic scope.** Brussels IIa is applicable in all EU Member States except Denmark (Recitals 30-31).

- Note that the United Kingdom, Ireland and Denmark have a special position with respect to all legal instruments in the area of freedom, security and justice (see Protocols 21 and 22 of the Treaty on the Functioning of the European Union). The United Kingdom and Ireland may opt in or out of any legislation. They have opted into Brussels IIa. Denmark is not bound by legislation in this area. It does not have the possibility to opt in.

The Regulation is thus applicable in France, where this dispute is being heard.



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### Recast of Brussels IIa

Note that this Regulation is currently being reviewed. The European Commission's Proposal for amendment was published on 30 June 2016, and carries number COM (2016) 411.

**Substantive scope.** Brussels IIa applies to divorce and parental responsibility (Article 1). This includes rights of custody and access and measures for the protection of children.

The Regulation is thus applicable on the matters in dispute in this case study.

**Personal scope.** The personal scope refers to the question of which persons fall under the Regulation. For parental responsibility this is determined by the habitual residence of the child. If the child is habitually resident in an EU Member State (except for Denmark), Brussels IIa is applicable (Article 8).

If the child is not habitually resident in the EU, the judge must determine whether he or she is habitually resident in a State that is party to the Hague Child Protection Convention (Article 61(a) Brussels IIa and Article 52 Hague Child Protection Convention). A list of states party to this Convention is available on the website of the Hague Conference on Private International Law ([www.hcch.net](http://www.hcch.net)). If so, that Convention will apply.

If the child is habitually resident in a state that is not part of the EU and not party to the Hague Child Protection Convention, Brussels IIa applies if the parents agreed to the jurisdiction of a Member State Court under the requirements of Article 12 Brussels IIa, or if the child is present in the Member State and his or her habitual residence cannot be established and no forum choice was made (Article 13 Brussels IIa). If none of these circumstances is present, Member States will apply their national law (Article 14 Brussels IIa).



FOOD for THOUGHT

### Scope issues between Brussels IIa and Hague Child Protection Convention

The interplay between Brussels IIa and the Hague Child Protection Convention on issues of jurisdiction is not well regulated. There are situations in which both seem to apply, but this would lead to a contradiction between EU law and international law. This would particularly be the situation if

the child is habitually resident in an EU Member State but the parents agree to have the dispute on parental responsibility be heard together with the divorce proceedings in a State outside the EU but party to the Hague Child Protection Convention (such as Albania, Montenegro, Russia, Serbia, Switzerland, Turkey). Article 10 of the Hague Child Protection Convention permits such prorogation of jurisdiction under certain circumstances. However, according to Article 8 of Brussels IIa the Member State of the child's habitual has jurisdiction and according to Article 61 Brussels IIa the Regulation takes precedence in this situation.

The difficult issue here is that the judge is forced to choose between his or her obligation under EU law and under international law.

This dilemma will hopefully be removed by the recast of Brussels IIa.

**Temporal scope.** Brussels IIa applies to cases instituted after 1 March 2005 (Articles 64(1) and 72). Assuming that the dispute is taking place now, the Regulation is applicable.

#### Step 4.b) Hague Child Protection Convention

**Geographic scope.** The Convention is in force in all EU Member States and in a number of other states. For a full list of the contracting states, see [www.hcch.net](http://www.hcch.net).

The Convention is not in force in Canada.

**Substantive scope.** The Convention covers matters of child protection. This includes parental responsibility (Articles 1 and 3). Thus the Convention and Brussels IIa have to a large extent the same substantive scope.

**Personal scope.** Regarding the personal scope, a distinction must be made between the rules on jurisdiction and those on applicable law. The Convention's provisions on jurisdiction apply to children with their habitual residence in a Contracting State that is not also an EU Member State. With respect to applicable law, the Convention has universal application (Article 20). This means that the Convention will apply irrespective of whether the connecting factors point to the law of a Contracting State or of a non-Contracting State. The nationalities and the habitual residences of the children and their parents are irrelevant.

**Temporal scope.** This Convention entered into force on 1 January 2002. It applies to measures taken after its entry into force (Article 53(1)).

It enters into force at different dates for the different contracting states. This information is also available on the website of the Hague Conference on Private International Law ([www.hcch.net](http://www.hcch.net)).

The Convention entered into force in France on 1 February 2011.

#### Step 5. Rule

The children have never lived in France. Therefore the French court does not have **jurisdiction** on the basis of the general rule in Article 8 of Brussels IIa. This means that the French court can only have jurisdiction on the basis of Article 12 or Article 14 Brussels IIa.

i) Article 12 Brussels IIa: *If the French court has jurisdiction over the divorce case under Article 3 Brussels IIa and the parties accept that the French court can also rule on the parental responsibility dispute, this court has jurisdiction.*

Jurisdiction in divorce cases is not the subject of this case study, but briefly:

Article 3 Brussels IIa has a number of alternative bases of jurisdiction. The French courts do not have jurisdiction on the basis of any of these grounds. The French court would then have to consider whether another court in the EU has jurisdiction for the divorce before it can use French domestic bases of jurisdiction (Article 7(1) Brussels IIa and CJEU C-68/07 *Sundelind Lopez*, 29 November 2007, ECLI:EU:C:2007:740). Thus, the court would have to consider whether the Maltese court has jurisdiction. This can only be the case if Kylie is habitually resident there and has been resident there for at least six months (she has Maltese nationality) (Article 3(1)(a), sixth indent). Habitual residence of an adult has a subjective (intentional) and an objective component. Subjectively, it seems that Kylie did not have the intention to stay in Malta (or did she, without telling her husband?). Objectively, she has not really established the centre of her interests there - she has family, but her job and husband and many of her possessions are still in Canada. If Kylie is considered habitually resident in Malta, the Maltese courts have divorce jurisdiction and the French courts cannot take such jurisdiction. If she is not habitually resident in Malta, the French court can turn to its domestic bases of jurisdiction. In that case the French court will have jurisdiction based on Article 14 of the French Civil Code. This provision grants jurisdiction when the applicant, Julien in our case, is a French national, which he is.

Article 12 Brussels IIa allows the parents to agree to have the parental responsibility dispute heard at the divorce court, but only if the divorce court has jurisdiction on the basis of Article 3. Thus, the French courts cannot take jurisdiction on this basis.

ii) Article 14 Brussels IIa: *If the children are considered habitually resident in Canada and no EU Member State has jurisdiction on the parental responsibility, the French court may use its domestic bases of jurisdiction.*

Therefore, the first question is the habitual residence of the children. Is this in the EU (Malta) or outside the EU (Canada)? Habitual residence is an autonomous concept. The Court of Justice of the EU has given some guidance on its interpretation in C-523/07, A, 2 April 2009, ECLI:EU:C:2009:225; C-497/10PPU, *Mercredi*, 22 December 2010, ECLI:EU:C:2010:829; and C-376/14PPU, *C v M*, 9 October 2014, ECLI:EU:C:2014:2268.



In A the court found:

The concept of ‘habitual residence’ under Article 8(1) of Regulation No 2201/2003 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.



### Discussion: Habitual residence

There is room for debate in this question. On the one hand, the children are small and have been living in Malta for a year. The elder child is going to nursery school in Malta and the younger one is receiving treatment there. They have relatives there (at least grandparents). They speak Maltese and they have Maltese nationality. Thus, there is some degree of social and family integration in Malta. On the other hand, it is not clear whether the parents had a common intention and what this was. They have also

gone to nursery school in Canada and they speak English and French. The reason for the move to Malta was to give the mother time out.

When weighing up all the factual elements, it is important to maintain a child-centered approach.

If the French judge concludes that the children are habitually resident in Malta, he or she has no jurisdiction.



### More than one habitual residence?

There is no certainty as yet on the question whether children can simultaneously have more than one habitual residence. The wording of the different instruments seems to suggest that the legislators had a single habitual residence in mind. There is national case law suggesting that two simultaneous habitual residences are possible, but it is unclear whether the Court of Justice would follow this approach.

If the French judge comes to the conclusion that the children's habitual residence is in Canada, he or she would have to consult French domestic law in order to assess jurisdiction. Note that Canada has not ratified the Hague Child Protection Convention of 1996. If it had, the French court would have to consider that Convention before taking jurisdiction according to domestic law.

In order to find the **applicable law** (only if it has jurisdiction), the French court would refer to the Hague Child Protection Convention of 1996. Two distinct rules exist here. First, the question of who has parental responsibility is governed by the law of the habitual residence of the children (Article 16). Second, for making orders concerning the future residence of the children, the court applies its own law (Article 15(1)). However, if the protection of the children so requires, the French court may apply the law of another State with which the children have a substantial connection (Article 15(2) Hague Child Protection Convention).

## 2) Can the Maltese court hear the action instituted by Kylie about parental responsibility? If so, which law applies?

### Step 1. Area of law

The same as in the first question, i.e. parental responsibility

### Step 2. Aspect of private international law

The question concerns the same two areas as question 1 above: jurisdiction and applicable law.

### Step 3. Legal sources

The instruments on jurisdiction and on applicable law have been listed in the answer to question 1 above.



### Hague Child Abduction Convention's reach

The Hague Child Abduction Convention does not regulate the questions of jurisdiction or law applicable to the substance of the dispute. However, it might influence the Maltese court's jurisdiction to deal with the merits of the case.

#### Step 4. Scope of the legal texts

This has been discussed in question 1 above. As explained, the date of entry into force of the Hague Child Protection Convention is different for the different states. It entered into force in Malta on 1 January 2012.

#### Step 5. Rule

When assessing whether it can hear the case, the Maltese court must consider three issues:

- i) *lis pendens* (parallel proceedings);
- ii) the alleged child abduction;
- iii) its own jurisdiction.

i) Concerning *lis pendens*, it is important that the French court was seised first. The result is that the Maltese court must stay its proceedings until the French court has decided on its jurisdiction (Article 19(2) Brussels IIa). This is because the actions in the two courts concern the same children and involve the same cause of action.

If the French court decides that it has jurisdiction, the Maltese court has to decline its jurisdiction in favour of the French court (Article 19(3) Brussels IIa). The Maltese court may not second-guess the decision by the French court. If the French court declines the case for lack of jurisdiction, the Maltese court can continue with the case which had been stayed and assess its own jurisdiction.

ii) Even if the French court declines its jurisdiction, the Maltese court must take into account the **alleged child abduction** and the return proceedings that Julien has instituted.



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#### Internal division of jurisdiction

Whether the return procedure will come before the same court as the court where the abducting parent instituted proceedings on the merits, depends on national law. Some States have concentrated jurisdiction for child abduction disputes. This means that only one or several courts in the State can hear return proceedings.



#### Discussion: concentration of jurisdiction

Participants can discuss whether there is concentrated jurisdiction in their states and how it works.

The Hague Child Abduction Convention does not allow the court of the State to which the child was wrongfully removed or in which he or she was wrongfully retained to decide on the merits before it has decided that the child must not be returned (Article 16).



#### Discussion: knowledge of return proceedings

In states that have implemented concentrated jurisdiction, there should be a mechanism for other courts to know that return proceedings have been introduced. These other courts are not allowed to decide on the merits while the return proceedings are being considered. Participants can discuss ways of knowing about return proceedings.

iii) Only after the competent Maltese court has considered the return proceedings (for more information, see question 5 below) the Maltese court can consider its **jurisdiction** to rule on the merits. For this purpose, the Maltese court must assess the habitual residence of the children. See the

discussion in question 1 above. The same elements have to be considered. If the children have their habitual residence in Malta, the Maltese court has jurisdiction.

If the Maltese court finds that the children do not have their habitual residence in Malta, other provisions have to be considered.

First, if one of the parties institutes divorce proceedings in Malta and the Maltese court has jurisdiction under Article 3 Brussels IIa, the parties may agree that the Maltese court can also take jurisdiction over the dispute concerning the parental responsibility (Article 12 Brussels IIa). Such jurisdiction must be in the best interests of the child.

Second, if no court in the EU has jurisdiction on the basis of the Regulation, the Maltese courts may consider its domestic bases of jurisdiction (Article 14 Brussels IIa). Before doing so, the court has to consider whether the child is not habitually resident in a State outside the EU that is party to the Hague Child Protection Convention. Canada, the only other place where the children can be considered to be resident, is not party to this Convention and it thus does not apply in this case.

A third possibility if the children are not habitually resident in Malta is to take jurisdiction for provisional measures only (Article 20 Brussels IIa). As this is the subject of a separate question (see question 3 below), it will not be discussed here.

If the court concludes that it is not possible to establish the children's residence, it may take jurisdiction based on the presence of the children in Malta (Article 13 Brussels IIa). Before using this provision, a court must attempt to find the habitual residence.



The Court of Justice of the EU noted (CJEU C-523/07, A, 2 April 2009, ECLI:EU:C:2009:225, para 33):

Thus, the physical presence alone of the child in a Member State, as a jurisdictional rule alternative to that laid down in Article 8 of the Regulation, is not sufficient to establish the habitual residence of the child.

Advocate General Kokott said in the same case (CJEU C-523/07, A, Opinion of 29 January 2009, ECLI:EU:C:2009:39 at para 20):

Habitual residence must be distinguished from mere presence. The presence of a child in a Member State also establishes proximity to the courts there, but that relationship does not have the same quality as habitual residence. Article 13 of Regulation No 2201/2003 therefore confers on the courts of the Member State in which the child is present only a residual jurisdiction which gives way if habitual residence in another State can be established.

The provision is more often used in the case of refugee children or children internationally displaced (Article 13(2)), where the habitual residence is really unclear, as opposed to situations where there are two distinct possibilities.



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### Mentioning basis of jurisdiction

It is advisable for judges to explicitly mention the basis of jurisdiction in the judgment. This will enable enforcing courts to identify provisional measures, which cannot be enforced across borders under Brussels IIa (CJEU C-256/09, *Purrucker*, 15 July 2010, ECLI:EU:C:2010:437).

If the Maltese court hears the case, it must find the **applicable law** on the basis of the Hague Child Protection Convention. Again, as in question Question 1 above, there are two aspects to this assessment. The question of who has parental responsibility is determined by the law of the habitual residence of the children (Article 16). For making an order, the court would apply its own law (forum law) (Article 15(1)). If the protection of the children so requires, the Maltese court may apply the law of another State with which the children have a substantial connection (Article 15(2)).

### 3) Can the court in Malta issue the provisional measures that Kylie requests?

#### Step 1. Area of law

This question of where the children will reside falls within the category of parental responsibility.

#### Step 2. Aspect of private international law

The question concerns the jurisdiction of the courts.

#### Step 3. Legal sources

For jurisdiction, the sources are the same as those discussed in questions 1 and 2 above.

 **Hague Child Abduction Convention's reach**  
The Hague Child Abduction Convention does not apply to the question of provisional measures. It applies only to the return procedure (see question 5 below).

#### Step 4. Scope of the legal texts

See the discussion in question 1 above.

#### Step 5. Rule: jurisdiction

**Option 1:** If the court in Malta has jurisdiction over the merits of the dispute relating to parental responsibility for them (this issue has been discussed in question 2 above), this court will also be able to issue provisional measures.

**Option 2:** The Brussels IIa Regulation furthermore contains the possibility for a court in a Member State to issue provisional measures in urgent cases "in respect of persons or assets in that State" (Article 20). In order to use this provision, the court need not have jurisdiction on the substance.

Moreover, it can use this provision even if proceedings are pending in another court in the EU (such as the French court in our case). The Court of Justice of the EU has ruled that the *lis pendens* provision does not apply to situations where one court has jurisdiction on the merits and the other court is only granting provisional measures (CJEU C-296/10, *Purrucker*, 9 November 2010, ECLI:EU:C:2010:665: in this case the court first seised was granting provisional measures, but the same reasoning applies when the court second seised wishes to grant provisional measures for urgent situations.) These measures will automatically cease to have effect when the court with jurisdiction on the merits grants measures on the same issue (Article 20 Brussels IIa).

Consider the requirements of Article 20:

1) Is this a situation of urgency? There does not seem to be an immediate threat that Julien will abduct the children or that they are in danger. Moreover, the Court of Justice of the EU ruled in C-403/09, *Detiček* (23 December 2009) that provisional measures may not be used to strengthen the position of an abducting parent. Therefore, the judge would have to consider whether this is a case of international

child abduction. The definition of child abduction is the wrongful removal or retention of the child (Article 3 Hague Child Abduction Convention and Article 2(1) Brussels IIa Regulation). A removal or retention is wrongful when it is in breach of the rights of custody obtained in a judgment, by an agreement with legal effect or operation of law if these rights are exercised. This has to be determined in accordance with the law of the habitual residence of the child before the wrongful removal or retention.

2) Are these measures aimed at persons in Malta? Article 20 refers to "provisional, including protective, measures in respect of persons or assets in that State". On first sight, the measures are aimed at the children in Malta, but judges should also consider the judgment by the Court of Justice of the EU in *Detiček*.



The Court stated in para 51 that

"[a]provisional measure in matters of parental responsibility ordering a change of custody of a child is taken not only in respect of the child but also in respect of the parent to whom custody of the child is now granted and of the other parent who, following the adoption of the measure, is deprived of that custody."

This paragraph causes confusion. Article 20 is worded as it is because it applies not only to child protection, but also to provisional measures within the scope of divorce proceedings. The provision's origin lies in Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses and in the Convention of 28 May 1998 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters. This Convention was replaced before its entry into force by Regulation 1347/2000. In the Explanatory Report to the Convention Professor Borrás states that this provision touches on matters not covered by the Convention (at para 59). It therefore seems that the broad wording was intentional and was not meant to be limiting.



### The *Detiček* confusion

The judgment in *Detiček* seems to suggest that *all* the parties have to be in the State in which the provisional measures are requested, but that would severely limit the ambit and usefulness of Article 20. In the *Detiček* case the court had another reason to disallow the use of provisional measures. One wonders whether this extra paragraph about the presence of all was really necessary. The recast of Brussels IIa will probably address this issue so that provisional measures can be taken if the child is present on the Member State of the court.

## 4) Where would these provisional measures have effect?

### Step 1. Area of law

Still the same as in question 1, i.e. parental responsibility

### Step 2. Aspect of private international law

The question concerns the recognition and enforcement of judgments.

### Step 3. Legal sources

The rules on recognition and enforcement of judgments about parental responsibility are found in:

- a) Brussels IIa;
- b) Hague Child Protection Convention;



### Luxembourg Convention

Besides the Brussels IIa Regulation and the Hague Child Protection Convention, the Council of Europe has also enacted a Convention in this field: the European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (Luxembourg Convention). This Convention is in force in 37 European states (see the treaty service of the Council of Europe).

This Convention is not often used for two reasons. First, in the EU Brussels IIa takes precedence over it (Article 60d Brussels IIa). Second, all states party to this Convention are also party to the Hague Child Abduction Convention except for Liechtenstein. The Hague Convention with its particular return mechanism is more versatile as it can be used in situations where there is no prior court judgment, while the Luxembourg Convention applies to the recognition and enforcement of custody decisions.

#### Step 4. Scope of the legal texts

##### Step 4a) Brussels IIa

**Geographic scope.** Same as above.

**Substantive scope.** Same as above.

**Personal scope.** The Brussels IIa Regulation applies for the recognition and enforcement of Member State judgments in other Member States. For this aspect of private international law the nationalities and habitual residences of the parties are not relevant.

**Temporal scope.** Brussels IIa applies to judgments granted after 1 March 2005 or to earlier judgments under certain conditions (Articles 64 and 72).

##### Step 4b) Hague Child Protection Convention

**Geographic scope.** Same as above.

**Substantive scope.** Same as above.

**Personal scope.** The Hague Child Protection Convention regulates the recognition and enforcement of judgments of one Contracting State in another Contracting State (Article 23(1)).

**Temporal scope.** The Convention applies to the recognition and enforcement of measures taken after its entry into force between the relevant contracting states (Article 53(2)). For the entry into force in the different states, see the website of the Hague Conference on Private International Law.

#### Step 5. Rule: recognition and enforceability

First we will consider the recognition and enforcement in other EU Member States.

The answer to this question depends on whether the Maltese court has jurisdiction on the merits (see question 2 above).

If the Maltese court has jurisdiction on the merits (i.e. on the basis of Article 8, 12, 13 or 14) the measures can be recognised and enforced in other EU Member States after they have been declared enforceable (Article 21 and following of Brussels IIa).

If the Maltese court does not have jurisdiction on the merits but only on the basis of Article 20 for provisional measures (as explained in question 3 above), the judgment cannot benefit from cross-border recognition and enforcement. See in this regard C-256/09, *Purrucker* (15 July 2010), in which the Court of Justice of the EU stated that the Regulation's provisions on recognition and enforcement do not apply to provisional measures.



### No cross-border enforceability for provisional measures

This limitation imposed by the Court of Justice raises two concerns. First, in cases where children are in danger and a court issues protective measures, their effect is limited to the territory of the State in which they were issued. This means that if the children cross another border (perhaps taken by a parent), new measures would have to be requested if necessary. Second, the recognising and enforcing judge must make an assessment of the basis of the issuing court's jurisdiction. Normally it is prohibited to consider the basis of jurisdiction of other Member State courts at the moment of recognition or enforcement (Article 24 Brussels IIa). This assessment of jurisdiction now has to be made. Third, and related to the second concern, is the fact that the assessment of the other court's jurisdiction is not always clear. Often courts do not clearly state the ground for jurisdiction in the judgment. Moreover, in an urgent case, a court might take jurisdiction on the basis of Article 20 without going through the cumbersome process of assessing whether it has jurisdiction on the merits, as this might entail the difficult issue of habitual residence as discussed in question 1 and 2 above.

For recognition and enforcement in Canada, other rules apply. As neither the Hague Child Protection Convention nor the Luxembourg Convention is not in force in Canada, bilateral conventions would be considered where they exist. If not, the domestic law of Canada will apply to the recognition and enforcement of the measures there.

### 5) Should the Maltese judge order the return of the children to Canada? If so, what should be included in a return judgment?

#### Step 1. Area of law

Child abduction, which is a specific sub-section of parental responsibility.

#### Step 2. Aspect of private international law

The question concerns the jurisdiction for the return, the return mechanism itself and the cooperation between authorities.

#### Step 3. Legal sources

The rules on the return of wrongfully removed or wrongfully retained children are found in:

- a) Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (Child Abduction Convention);
- b) Brussels IIa;



### Hague Child Protection Convention's reach

The Hague Child Protection Convention does not regulate the return, but other questions of parental responsibility such as permanent residence.

## Step 4. Scope of the legal texts

### Step 4.a) Hague Child Abduction Convention

**Geographic scope.** The Convention is in force in all EU Member States and in a large number of other states (approx. 100). For a full list of the contracting states, see the website of the Hague Conference on Private International law: [www.hcch.net](http://www.hcch.net).

The Convention is also in force in Canada.



### Application of the Child Abduction Convention

The Convention does not automatically apply between all contracting states. The accessions by states that were not Members of the Hague Conference on Private International Law at the time of the Convention's conclusion must be accepted by the other states (Article 38). Therefore, before applying the Convention, the judge must verify whether both states in question are bound in relation to each other.

**Substantive scope.** The Child Abduction Convention has a very limited substantive scope: it applies only to the wrongful removal and wrongful retention of children. In this case the issue is whether the mother wrongfully retained the children in Malta.

The Convention covers only the return of the child. It does not regulate other matters of parental responsibility, nor the permanent residence arrangements after return.

**Personal scope.** The Convention applies if both the state of the child's habitual residence and that to where he or she has been removed or where he or she is retained are contracting states.

**Temporal scope.** The Convention entered into force on 1 December 1983.

It entered into force in Canada on 1 December 1983 and in Malta on 1 January 2000. Canada accepted Malta's accession on 29 August 2003 and the Convention entered into force between these two states on 1 November 2003.

### Step 4.b) Brussels IIa

**Geographic scope.** Same as above.

**Substantive scope.** Brussels IIa applies to divorce and parental responsibility (Article 1). This includes the civil aspects of international child abduction (see the provisions in Articles 10 and 11).

**Personal scope.** The child abduction rules of Brussels IIa applies when the child is abducted from one EU Member State to another (Article 11). They supplement the Child Abduction Convention for situations in which the child has been abducted from one EU Member State to another EU Member State. Reading Recitals 17 and 18, Article 11 and Article 60e) together, a complex picture emerges. The Regulation leaves the Convention in place, but takes precedence over it. The Regulation does not contain its own full set of rules to regulate child abduction. Rather, it uses the Child Abduction Convention and builds on it. Thus, when a child is abducted from one EU Member State to another (except Denmark), the Convention provides the basics, but the Regulation adds extra rules, for instance

on the time frame, the obligation to hear the child, the grave risk exception, and an extra mechanism to request the return in certain circumstances in the Member State of the former habitual residence of the child if the State to where the child was taken refuses the return (called the second chance procedure).

In this case the court should consider only the Hague Child Abduction Convention and not the supplements by Brussels IIa. This is because the children have been taken from Canada (outside the EU) to Malta. The supplements of Brussels IIa apply only when both the country of former habitual residence and of destination of the removal or retention are in the EU. The fact that the children have EU nationalities does not change this finding.

**Temporal scope.** Brussels IIa applies to cases instituted after 1 March 2005 (Articles 64(1) and 72).

### Step 5. Rule

It should be noted first of all that return proceedings should be dealt with expeditiously. The court must decide within six weeks. The Hague Child Abduction Convention provides that if the court has not reached a decision in six weeks, the applicant or the Central Authority can ask for reasons for the delay (Article 11).



#### Six weeks' time frame

Brussels IIa imposes an obligation to use the most expeditious proceedings available in national law and to issue a judgment within six weeks except where exceptional circumstances make this impossible (Article 11(3)). The Regulation is not applicable in this case, as explained. However, it is not fundamentally different from the Child Abduction Convention, but has merely underlined the importance of speedy proceedings in the interests of the children involved.

The first step that the court should take, is to consider whether there has been a wrongful removal or retention (Article 3 Hague Child Abduction Convention). The parents were married. The judge should check whether under Canadian law both parents have custody rights.

The second question that the court faces is the habitual residence of the children. Were they habitually resident in Canada at the time of the wrongful retention, i.e. at the time when Kylie made clear that she would not be returning and Julien's consent to the stay in Malta ceased to exist? In order to establish the habitual residence, the court should take account of the case law of the CJEU (see question 1 above). The interpretations given by other courts when applying the Convention are also relevant and should be taken note of. Note that the relevant time of habitual residence is different here than in questions 1 and 2). In those questions, the assessment is made at the moment of the proceedings, while for child abduction the relevant moment is that immediately before the wrongful removal or retention.

The third issue is the timing of the introduction of the proceedings. If Julien's return proceedings were introduced more than a year after the retention, the court can refuse the return if the children had become settled in their new environment. The difficult question here is when to start counting: it should be at the time when Julien's consent ceased. His consent has never been to a move, but to a temporary stay. Thus the time starts when his consent to the stay (which he regarded as temporary) ceased.

Fourth, the court should consider the grounds for refusal under Article 13 and 20 of the Hague Child Abduction Convention.

- If Julien had agreed to or acquiesced to the retention in Malta or if he had not been exercising his custody rights (Article 13 a) of the first paragraph of the Hague Child Abduction Convention), the children should not be returned.
- If there is a risk that the children will face psychological or physical harm upon return or that they will be placed in an intolerable situation (Article 13 b) of the first paragraph of the Hague Child Abduction Convention). Kylie tries to aver this. Take into account the specific character of his problem. However, according to good practice under the Convention, the court should consider whether Elias could receive the necessary treatment in Canada. The court can consider information provided by the Central Authority.
- If the children object to the return and they are of a sufficient age and degree of maturity that the judge has to take account of their views (Article 13, second paragraph Hague Child Abduction Convention). These children are small, but arguably Luis is not too small to be heard. Here the participants should be pointed to Article 12 of the Children's Rights Convention which contains a two pronged test: if the child can express his or her views, he or she must get the opportunity to do so. The extent to which the judge will take those views into consideration depends on the child's age and degree of maturity. Participants can exchange experiences on when and how they hear children. They can also discuss whether hearing children in cases under the Hague Child Abduction Convention differ from hearing children in other cases.
- If the return would be contrary to the fundamental principles of the protection of fundamental rights and freedoms of Malta (Article 20 Hague Child Abduction Convention). This ground for refusal is reserved for extreme situations and does not apply here.

Last, but important, the judge has to take into account the human and children's rights framework: the Children's Rights Convention of 1989 (especially Article 3 that the best interests of the child must be paramount) and the European Convention on Human Rights (Articles 6 and 8). The European Court of Human Rights has ruled in several cases that the best interests of the child must be considered in every case: see for instance the Grand Chamber Judgment of *X v Latvia*, 27853/09 (26 November 2013). The court has to seriously consider psychological or other reports submitted to it and must consider the grounds for refusal in light of the best interests of the child. In the balance between the general obligation of return and the exceptions for well-defined cases, the Hague Child Abduction Convention is in compliance with the Children's rights Convention and the European Convention of Human Rights. Every judge must take great care when doing this balancing act, in order to respect firstly the several international and European obligations and secondly the rights of children, who can be very vulnerable in this situation.



### **Discussion: return**

Consider whether a judge should order the return of Luis and Elias, given the law and the circumstances of the case. Is there really a grave risk for them if they return? A judge should be careful not to favour his or her own country as the best place for the children.

Remember that a return order is not a decision on the merits. It is only a decision that the children must return unless the abducting parent can prove that there are exceptional circumstances which warrant the use of one of the grounds of refusal. The merits of the case must be dealt with in the court of the habitual residence of the children.

Judges should consider safeguards that they can insert in return judgments. The possibilities differ largely in national law. Judges should be encouraged to be as detailed as possible.

Elements that they should take into account, include:

- when will the children return: a specific date in the judgment can be helpful;

- how will the children return: by train, airplane; who will accompany them or will they travel on their own;
- who will pay for the tickets;
- can the Central Authority play a role in assisting with the return (whether the judge orders them to take steps or requests them for assistance, is a matter of national law);
- what safeguards must be in place in the country to which the children are returning, eg support for the child with ASD;
- how can the abducting parent (most often the mother) be helped to find accommodation if she wishes to travel with the children;
- can anything be done concerning the abducting parent's residence permit in the country from which he or she took the children;
- how can the abducting parent's safety be guaranteed.



GOOD to KNOW

### Networks

Judges can request assistance through different networks. The Hague network of judges has been set up by the Hague Conference on Private International Law. The European Union has set up the European Judicial Network. Judges can use the network judges in their countries to contact their colleagues in other countries. Such contact can concern generic information (for instance what is the law of a particular province of Canada on parental responsibility of unmarried fathers), or specific assistance in a particular case (for instance possibilities of supervised visitation in a particular city).



Note to the instructor: Participants should also consider the value of mediation under this question. Mediation could enable the parties to solve all the issues in one go, instead of at several courts. They could address the issue of the return and the future residence and contact arrangement for the children in one step. Judges should consider referring parties to mediation as this could reduce conflict. At the same time, mediation should not be a free ticket to extend proceedings and allow the children to become settled in the new environment so that return is no longer possible or advisable. Thus, mediation should be quick. The best option is for the parties to institute return proceedings and then allow them to mediate before the hearing. This is the model used in Germany and The Netherlands.

## **Annex: further reading**

### Reports and guides:

Borrás A, "Explanatory Report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters" (1998)

European Court of Human Rights, "Factsheet – International child abductions" (2016) available at the website of the Council of Europe: [www.echr.coe.int](http://www.echr.coe.int).

European Judicial Network in civil and commercial matters, "Practice Guide for the application of the Brussels Iia Regulation" (2014) available at the website of the Hague Conference on Private International law: [www.hcch.net](http://www.hcch.net).

Hague Conference on Private International Law, Guides to Good Practice (five volumes 2003-2012) available at their website: [www.hcch.net](http://www.hcch.net).

Hague Conference on Private International Law, Judges' Newsletter on International Child Protection (1999-current) available at their website: [www.hcch.net](http://www.hcch.net).

Hague Conference on Private International Law, "Practical Guide on the Operation of the 1996 Hague Child Protection Convention" (2014) available at their website: [www.hcch.net](http://www.hcch.net).

House of Commons Library, "Briefing Paper Number 7726, 3 October 2016. International child abduction" (2016) available at the Parliament's website

Lagarde P, "Explanatory Report on the 1996 Hague Child Protection Convention"(1998) available at the website of the Hague Conference on Private International law: [www.hcch.net](http://www.hcch.net).

Pérez-Vera E, "Explanatory Report on the 1980 Hague Child Abduction" (1982) available at the website of the Hague Conference on Private International law: [www.hcch.net](http://www.hcch.net).

Swiss Institute of Comparative Law, "Cross-border parental child abduction in the European Union. Study for the LIBE Committee" (2015) available at the website of the European Parliament.

### Databases containing case law:

[www.incadat.com](http://www.incadat.com) (case law on the Hague Child Abduction Convention)

[w3.abdn.ac.uk/clsm/eupillar](http://w3.abdn.ac.uk/clsm/eupillar) (case law on Brussels Iia)

[www.unalex.eu](http://www.unalex.eu) (case law on Brussels Iia)

[www.curia.eu](http://www.curia.eu) (case law of Court of Justice of the EU)

[hudoc.echr.coe.int](http://hudoc.echr.coe.int) (case law of the European Court of Human Rights)