

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

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



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Case study 2: Parental responsibility (basic)

Agrita is a Latvian woman who went to London five-and-a-half years ago. Her intention was to stay there for a year or two to earn some money before she settled down in her home country. At the time she was 23, and had just finished her university degree. In her second year, she met Alex, a young British banker. They spent time together, started a relationship and she moved in with him. After two years of cohabiting Agrita gave birth to a daughter, Laura. After the birth of Laura, Agrita started missing her own family and became very lonely. Alex worked long hours and did not do much in terms of caring for the baby. When Laura was one and a half years old, Agrita told Alex that she needed to spend some time with her parents and siblings in Latvia. She was not feeling well and needed some time for herself. Alex reacted sympathetically. She and Laura left for Latvia on a one-way ticket with a cheap airline. Alex accompanied her to the airport.

The couple stayed in touch via phone and skype so that Alex could also see Laura. After three weeks Alex asked when he should buy the return ticket. Agrita replied that she was not ready to return yet and Alex decided to fly over to Latvia for a weekend to see her and Laura. When he was there, he pressed Agrita for information on her plans for return, but she was evasive. Eventually she said that she needed another three months. Alex would visit her and Laura every three weeks.

After three months, Alex started arranging day care for Laura in London and tried to convince Agrita to find a job in London, as that would take her out of her isolation. She said that she needed more time, perhaps another six months. Alex responded that another three months was a reasonable period but that she and Laura should really come back after such additional time. He bought her a flight back to London for three months later.

On the day before the planned flight, Agrita sent a text message to Alex that she will not be returning.

Alex consulted a friend of his brother's, who is a lawyer. The lawyer advised him to contact the Central Authority in England and to request the return of Laura. He explained that if Alex does not act now, he will be deemed to have consented to the move and he might lose contact with his daughter. Alex was devastated. He phoned Agrita every day and tried to persuade her to change her mind. He flew to Latvia to see her several times. She said that she could not raise her child in a country in which she felt depressed and lonely. That would be intolerable for any child.

Alex did not contact the Central Authority, because he realised that Agrita would be unhappy in London and things would not work out. He also knew that he was not able to take the sole care of Laura upon himself should he obtain a return order and Laura returned without her mother. So he did nothing.

Three months after the unused plane ticket, (i.e. ten months after she came to Latvia), Agrita institutes proceedings in the court in Latvia. She claims to have Laura's primary residence be established with her. She also proposes visitation rights for Alex one weekend every third week, to be exercised in Latvia. She does not claim maintenance as her parents support her and she is confident that she will find a job in Latvia and be able to stand on her own feet soon. Alex is not opposed to her claim that the primary residence of Laura be with Agrita. However, he claims a more elaborate contact arrangement, namely that Laura can spend two weeks per year with him in London.

1. Which legal instruments could be relevant in this case? Also examine their scope.
2. Is this to be considered an international child abduction? Explain what you have to take into account and where you will find this information.
3. Does the Latvian court have jurisdiction to hear the cases on residence and visitation?
4. Which law determines whether Alex has parental responsibility for Laura (being an unmarried father)?
5. Which law will the Latvian court apply when considering the dispute between Agrita and Alex concerning the residence and contact arrangement for Laura?

Assuming that two months after the unused plane ticket Alex and Agrita had exchanged emails containing the following:

Alex to Agrita: “I hope that we can sort this out, but if we have to go to court, we can do that in London, right?”

Agrita to Alex: “Yes, London is fine with me.”

6. Does the court in London have jurisdiction on the basis of the choice-of-court agreement?
7. Assume that the court in London does not have jurisdiction on the merits. Can it grant provisional measures?

Assume that the Latvian court orders that parental responsibility is shared. As for visitation, the court orders that Alex can visit Laura every third weekend. From the moment when Laura turns five, she will visit Alex for one week in the winter (the last week of the year) and one week in summer (the last week of July).

Before Laura turns five, Agrita moves to Finland with her, as Agrita has found employment there. Alex is not opposed to the move, but he wants to keep the contact arrangement. Moreover, he is of the view that Laura should attend a British school in Finland, rather than starting to learn to read and write in what will be her third language. He is prepared to pay for the schooling. Agrita does not agree with what she considers an elitist education for Laura.

8. Is the Latvian judgment on the shared parental responsibility and the contact enforceable in Finland? Take into account whether the judgment must be accompanied by a certificate.
9. Alex would like to have the order changed. Does the Latvian or Finnish court have jurisdiction for this matter?

Answers

1) Which legal instruments could be relevant in this case? Also examine their scope.

- i. **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)**

Goal. This Regulation governs the jurisdiction and recognition and enforcement of parental responsibility disputes (along with disputes on divorce) in the EU. It aims to enhance the area of freedom, security and justice, in which the free movement of persons is ensured (Recital 1).

Geographical scope. The Regulation is applicable in all EU Member States except Denmark (Recitals 30-31). 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.

Substantive scope. Brussels IIa applies to divorce and to parental responsibility (Article 1). This includes rights of custody and access and measures for the protection of children. It also includes the wrongful removal and wrongful retention of children (also referred to as child abduction). For this last aspect, the Regulation provides a supplement to the Hague Child Abduction Convention (see personal scope below).

Brussels IIa does not define what a “child” is. The Regulation does not apply to the establishment of the parent-child relationship or emancipation (Article 1(3) Brussels IIa).

Personal scope.

Personal scope in general. If the child is habitually resident in an EU Member State (except for Denmark), the jurisdiction provisions on parental responsibility of Brussels IIa are applicable (Article 8).

If the child is not habitually resident in the EU, the judge must determine whether the child 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 – see below). 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).

Personal scope for abduction. The child abduction provisions of Brussels IIa (Article 11) have a more limited scope. 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).

Personal scope for recognition and enforcement. The provisions on recognition and enforcement in Brussels IIa apply when the recognition or enforcement of a judgment from one EU Member State is sought in another EU Member State. At this stage the habitual residences of the parties and the children are not relevant for the Regulation's application.

Temporal scope. Concerning jurisdiction, Brussels IIa applies to cases instituted after 1 March 2005. Concerning recognition and enforcement, Brussels IIa applies to judgments granted after 1 March 2005 or to earlier judgments under certain conditions (Articles 64 and 72).



Revision of Brussels IIa

The Brussels IIa Regulation is currently subject to revision. The European Commission's Proposal for amendment was published on 30 June 2016, and carries number COM (2016) 411.

ii. **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)**

Goal. The Convention aims to improve the protection of children in international situations, taking into account their best interests (Preamble of the Convention).

Geographic scope. A list of states party to this Convention is available on the website of the Hague Conference on Private International Law (www.hcch.net). All EU Member States are party to it.

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 material scope. The Convention specifies that it is applicable to children from birth to the age of 18 (Article 2).

Personal scope. Regarding the personal scope, a distinction must be made between the rules on jurisdiction, those on applicable law, and those on recognition and enforcement (Article 61(a) Brussels IIa). 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. For children that are habitually resident in the EU, Brussels IIa takes precedence.

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.

The Convention's provisions on recognition and enforcement apply for the recognition and enforcement of judgments of one contracting state in another contracting state. However, if both the state in which the judgment was issued and the state in which recognition is sought are EU Member States (with the exception of Denmark), Brussels IIa takes precedence.

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).

iii. **Hague Convention of 25 October 1980 on the civil aspects of international child abduction (Hague Child Abduction Convention)**

Goal. This Convention aims at protecting children from the harmful effects of international child abduction, recognising that their best interests are paramount (Preamble). It governs the return of children that were wrongfully removed or wrongfully retained in a country other than the country of their habitual residence. The Convention is sometimes referred to as a forum convention: it merely reinforces the general jurisdiction of the state of children's habitual residence to decide on matters of parental responsibility (including the issue of where the children will reside after the separation of their parents and rights of contact). The Convention has created a specific procedure to return abducted children to the place of their habitual residence. The aim is that this procedure must be speedy, before the child can become settled in the new environment. If the Convention works well, it is deterring parents to abduct their children.

Geographical scope. The Convention is in force in over 90 states (for a full list see the website of the Hague Conference on Private International Law: www.hcch.net). All EU Member States are included in the contracting states. The Convention does not automatically create bilateral obligations between all contracting states. States that have acceded, but 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. (This information is also available at the website of the Hague Conference on Private International Law.)

Substantive scope. The Convention governs the return procedure for children that have been wrongfully removed or wrongfully retained. The Convention only applies to children under the age of 16 (Article 4).

Personal scope. The Convention applies when a child has been abducted from one contracting state to another, provided that there is a bilateral obligation between these states (accessions have been accepted). If a child is abducted from a Hague Convention contracting state to a non-contracting state or from a non-contracting state to a contracting state, the Convention does not apply.

Temporal scope. The Convention entered into force on 1 December 1983. It enters into force for new contracting states three months after ratification or accession or three months after the acceptance by a state of another state's accession (Article 38).

iv. **The UN Convention on the Rights of the Child of 1989**

Goal. This Convention aims at protecting the Rights of the child in all cases in which the child is involved. It emphasises the importance of taking the child's best interests into consideration (Article 3) and of giving the child the opportunity to be heard (Article 12).

Geographical scope. This Convention is in force in 196 states, including all EU Member States.

Substantive scope. The Convention has a very broad scope, applying to all children under the age of 18 in all possible contexts where their rights are relevant.

Personal scope. The Convention binds contracting states and their courts in all decisions they take. It is not relevant where the children concerned are resident, nor what their nationality is.

Temporal scope. The Convention entered into force on 2 September 1990. For states ratifying later than that date, it enters into force one month after ratification (Article 49).

v. **European Convention on Human Rights (1950)**

Goal. This Convention is aimed at the maintenance and further realisation of Human Rights and Fundamental Freedoms in the states of the Council of Europe.

Geographic scope. This Convention is in force in 47 states. This includes all EU Member States.

Substantive scope. The Convention guarantees a number of human rights and fundamental freedoms. Of particular relevance in the area of parental responsibility is the right to respect of private and family life (Article 8) and the right to a fair trial (Article 6).

Personal scope. All contracting states are bound by the Convention, irrespective of the habitual residences of the persons involved. It has for instance been applied in child abduction cases where the children had lived in the US (*B v Belgium*, no. 4320/11) or in Australia (*X v Latvia*, Grand Chamber, 27853/09) prior to their abduction.

Temporal scope. The Convention entered into force on 3 September 1953. For states ratifying later than that date, it entered into force at the time of the deposit of the instrument of ratification (Article 59(4)).

vi. **EU Charter of Fundamental Rights (2000)**

Goal. The Charter entrenches the human rights and fundamental freedoms of individuals in the EU.

Geographic scope. The Charter is in force in all EU Member States.

Substantive scope. The Charter applies where EU law is applicable. Article 51(1) provides: "The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law..." Article 51(2) adds: "The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties." As the field of parental responsibility is regulated by the EU, the Charter applies (see recital 33 of

Brussels IIa and CJEU C-400/10PPUMcB v LE, 5 October 2010, ECLI:EU:C:2010:582). Particularly Article 24 of the Charter, which guarantees the rights of the child, is relevant for this case.

Personal scope. In line with the above, the Charter applies to all persons subjected to EU law.

Temporal scope. The Charter entered into force on 1 December 2009, along with the Treaty of Lisbon.



Methodology for questions 2) to 9)

*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.*

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

2) Is this to be considered an international child abduction? Explain what you have to take into account and where you will find this information.

Step 1. Area of law

This issue falls in the category of parental responsibility. As explained above, this is a broad concept. It also encompasses the civil law aspects of international child abduction.

Step 2. Aspect of private international law

This question is pertinent for jurisdiction.

Step 3. Legal sources

In order to answer this question, the Child Abduction Convention and Brussels IIa are relevant. In a situation where a child is abducted from one EU Member State to another, the starting point is that the Child Abduction Convention still applies. However, Brussels IIa supplements this Convention (Recitals 17 and 18 and Articles 11 and 60e) Brussels IIa).

Step 4. Scope of the legal texts

The Hague Child Abduction Convention applies when a child is wrongfully removed or wrongfully retained from one contracting state to another.

Brussels IIa applies when the wrongful removal or retention took place from one EU Member State to another.

Thus, both instruments apply.

Step 5. Rule

Alex has not instituted proceedings for the return of the child. He has not contacted the Central Authority to have such proceedings instituted. If he had, the Latvian courts would not be permitted to decide on the merits of Agrita's claim (Article 16 Child Abduction Convention).

Brussels IIa reiterates this rule by providing that the courts of the state of the child's habitual residence retain jurisdiction until:

- all bearers of custody rights have acquiesced in the removal or retention, or
- the child has resided in the new Member State for more than a year after the person whose custody rights were infringed obtained knowledge or should have obtained knowledge of the whereabouts of the child and the child is settled in his or her new environment (plus other conditions, which are not discussed here, because this is not the situation that is applicable in our case) (Article 10 Brussels IIa).

Thus the court must make sure that Alex has acquiesced in the move. If Alex has not accepted the move and it is still being contested at the time of the proceedings, the court must refrain from deciding on the merits of the case.

Discussion: The father's consent

It can be tricky to know whether the father has consented to the move or subsequently acquiesced. Discuss how this can be verified: through submissions, or to what extent can the court ask questions at the hearing?

In any event, a court can still in urgent matters grant provisional measures under Article 20 Brussels IIa. However, these measures may not endorse the child abduction (see CJEU C-403/09, *Detiček*, 23 December 2009, ECLI:EU:C:2009:810).



GOOD TO KNOW

Being alert to international child abduction

Even if a judge is not required to rule on international child abduction (and may not be working at the court which deals with these matters under domestic procedural law), he or she must still be sensitive to the problem and the possibility that a parent instituted proceedings in order to try to endorse the new factual situation after a child abduction.

The **definition of international child abduction** is the wrongful removal or retention of a child outside the country of the child's habitual residence (Article 3 Hague Child Abduction Convention and Article 2(11) Brussels IIa). In this case the issue is a wrongful retention and not wrongful removal. The father had consented to a temporary stay in Latvia, but not to the child never returning. This distinction is important in order to determine the date of the abduction.

Wrongful means in breach of custody rights, which could have come into existence by a judgment, by an agreement with legal effect or by operation of law. The act can only be considered a wrongful if the custody rights were in effect being exercised.

Custody rights include rights (and duties) relating to the care of the person of the child and, in particular, the right to determine the child's place of residence (Article 5(a) Hague Child Abduction Convention; Article 2(9) Brussels IIa Regulation). The Regulation refers to rights and duties while the Convention refers to rights. This difference is however not relevant for the present case.

In C-400/10 PPU, *McB v LE*, 5 October 2010, ECLI:EU:C:2010:582 the Court of Justice of the EU found that custody rights has an autonomous meaning in the EU (i.e. in the entire EU the definition in

Brussels IIa must be followed, irrespective of the meaning that the words have in national law), but that the question who has such rights is a question for national law. This complies with the reference in Article 3 Hague Child Abduction Convention and Article 2(11) Brussels IIa to the state of the habitual residence of the child. Note that when assessing child abduction, the moment at which the habitual residence must be assessed is the moment just before the wrongful retention.

Habitual residence is an autonomous concept. The Court of Justice of the EU has ruled:

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. (C-523/07, A, 2 April 2009, ECLI:EU:C:2009:225; confirmed in C-497/10PPU, *Mercredi*, 22 December 2010, ECLI:EU:C:2010:829 and C-376/14, PPU, *C v M*, 9 October 2014, ECLI:EU:C:2014:2268.)

Discussion:

Take into account the elements relevant for determining Laura’s habitual residence at the time just before her mother took her to Latvia. Consider the languages she speaks, her nationality/ies, her integration in family and social life in England, day care if relevant (Laura was not in day care yet), the reasons for the move to Latvia. The parents’ intentions are also relevant in this regard.

Just before Agrita and Laura moved to Latvia, most of the elements seem to point to England.

If the habitual residence just before the retention is considered to be England, one would have to consult **English law** in order to consider whether the father had custody rights over the child.



GOOD to KNOW

Unmarried fathers

In some Member States unmarried fathers obtain parental responsibility automatically, while in others, some form of registration or even court order is required.

The United Kingdom has three distinct legal systems:

- i. England and Wales,
- ii. Scotland,
- iii. Northern Ireland.

It is important to keep this distinction in mind when seeking to determine the content of the law.

In order to find English law, a judge has several possible routes:

- Consult comparative law books;
- Consult the European Commission's E-Justice portal, available at e-justice.europa.eu;
- Direct communication using the European Judicial network, i.e. contact the judge in your country who is a member of the network to contact a judge in England who can provide this information or contact the English judge directly;

In order to find judges in other EU Member States, judges can use the contact point, also available on the E-Justice portal.

- Direct communication through the Hague network of judges, i.e. contact the network judge in your country to help to establish contact with the judge in England;
- Contact the Central Authority of his or her own country in order to ask it for information or, if it does not have this information, to contact the Central Authority in the country whose law is sought;

Addresses of all the Central Authorities are available on the website of the Hague Conference on Private International Law: www.hcch.net.

- Use the mechanism of Article 15 of the Hague Child Abduction Convention.

Article 15 allows the judge to request the applicant to obtain from the State of the habitual residence of the child a declaration that the removal or retention was wrongful. The judge can stay proceedings to allow the applicant to obtain such declaratory order.

Many problems exist with the certificates that are issued pursuant to this provision: they are difficult to obtain, getting them causes delays, and their effect (i.e. the extent to which they are binding) is unclear.



GOOD to KNOW

Judicial notice of foreign law

The Hague Child Abduction Convention provides that the judge may take judicial notice of foreign law. It is not necessary, when applying this Convention, to follow particular procedures for the proof of foreign law.

Thus, in order to assess whether this is to be considered an international child abduction, the judge must consider whether there had been a wrongful retention, i.e. whether the retention by Agrita in Latvia was in breach of Alex's custody rights. In order to know whether he had custody rights, the judge has to consider English law.

In this case the parents are not married. On this situation, the following information is available on the E-Justice Portal:

Mothers always have parental responsibility and unmarried fathers or a second female parent who is not married to or in a civil partnership with the child's mother can acquire it by agreement with the mother, by court order or by registering the birth jointly with the child's mother.

Another issue that the court should consider, is whether Alex acquiesced to the move to Latvia.

Discussion:

Consider Alex's actions. Did he acquiesce in the retention by Agrita of Laura in Latvia? He did not institute return proceedings. Consider also his counter-claim: he is not requesting return.





Discussion:

How can a judge become aware that return proceedings have been instituted? These will not necessarily be held in the same court as a dispute on parental responsibility, custody or contact. Do Central Authorities inform the courts of return proceedings that might be pending in other courts? Are the proceedings registered centrally? Otherwise, judges can contact the Central Authorities to ask them.

Participants can discuss the various options in their countries.

3) Does the Latvian court have jurisdiction to hear the case?

Step 1. Area of law

This issue falls in the category of parental responsibility. Note that this is a broad concept, which includes the attribution, exercise, delegation, restriction or termination of parental responsibility and rights of custody and access (Article 1 Brussels IIa and Article 3 Hague Child Protection Convention).

Step 2. Aspect of private international law

This question concerns only jurisdiction.

Step 3. Legal sources

In order to answer this question, Brussels IIa is relevant.

Step 4. Scope of the legal texts

Brussels IIa applies because Latvia is bound by the Regulation (see the discussion of the scope in question a) above). As the child is habitually resident in an EU Member State and there is no prorogation of jurisdiction, the Regulation takes precedence over the Hague Child Protection Convention (Article 61(a) Brussels IIa).

Step 5. Rule

Brussels IIa provides that the court of the Member State where the child is habitually resident has jurisdiction for parental responsibility disputes (Article 8).

Therefore, one has to determine the **habitual residence** of the child; please see question b). However, for determining jurisdiction if there has not been a child abduction, the judge should consider the current time, i.e. the time of the proceedings.



Discussion on habitual residence:

Consider the elements of this case: Laura's age, the contact she has with her grandparents and aunts and uncles, the language(s) she speaks, her nationality/ies, the reason why Agrita brought her to Latvia, the parents' intention concerning their family, day care (if any).

Several elements point to Latvia.

If Laura's habitual residence is in Latvia, the Latvian court has jurisdiction to hear the claim brought by Agrita.

If the Latvian court comes to the conclusion that Laura is not habitually resident in Latvia, it can in urgent cases still order provisional measures (Article 20 Brussels IIa) to ensure the protection of the child. These can concern measures to protect the child or to ensure contact with a parent in a provisional manner (i.e. until there has been a judgment on the substance). See question g) below for a discussion on the conditions for using this provision.

If the court finds it impossible to determine Laura's habitual residence, it can base its jurisdiction on the presence of the child on Latvian territory (Article 13 Brussels IIa). Before reverting to 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.

Mentioning the 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).

4) Which law determines whether Alex has parental responsibility for Laura (being an unmarried father)?

Step 1. Area of law

This issue falls in the category of parental responsibility (same as b) above).

Step 2. Aspect of private international law

This question concerns applicable law.

Step 3. Legal sources

In order to answer this question, the Hague Child Protection Convention is relevant. Brussels IIa does not govern the determination of the applicable law.

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

The Hague Child Protection Convention applies in all EU Member States, including Latvia (see a) above for more information).

Step 5. **Rule**

According to the Hague Child Protection Convention, the law of the child's habitual residence determines who has parental responsibility by operation of law upon birth (Article 16(1)). The issue of Laura's habitual residence was discussed in question b) above.

If the court has found that Laura is habitually resident in Latvia, it would apply its **own law**.

However, parental responsibility cannot be lost automatically when a child moves to a different state. Article 16(3) provides that parental responsibility will subsist.

In this scenario, the court would have to find and apply **English law**.

For information on **how to find English law** see b) above.

Note that the Child Protection Convention also obliges Member States to appoint Central Authorities (Article 29(1)). They may be the same as the Central Authorities appointed under the Hague Child Abduction Convention, but this is not necessarily so. It depends on national law and the structures of the administration. The details of the Central Authorities are available at the website of the Hague Conference on Private International Law.

Discussion:

Participants can discuss where the Central Authorities in their countries are located and how many staff members they have. They can also consider the accessibility of the Central Authorities for information.

5) Which law will the Latvian court apply when considering the dispute between Agrita and Alex concerning the residence and contact arrangement for Laura?

Step 1. **Area of law**

This issue falls in the category of parental responsibility (same as b) above).

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

This question concerns applicable law.

Step 3. **Legal sources**

In order to answer this question, the Hague Child Protection Convention is relevant.

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

The Hague Child Protection Convention applies in all EU Member States, including Latvia (see a) above for more information).

Step 5. **Rule**

When exercising jurisdiction, the Hague Child Protection Convention provides that courts shall apply their **own law** (Article 15(1)). Thus, the Latvian court would apply Latvian law.

The Convention provides an **escape clause**: if the protection of the child so requires, a court may exceptionally apply or take into consideration the law of another state with which the situation has a substantial connection (Article 15(2)). As the wording makes clear, this provision will not be applied often. It might be relevant when the contact will be exercised in another state and certain elements of the law of that state is relevant. Note the flexibility that the Convention allows: a judge can apply his or her own law and **take into consideration** foreign law.

6) Does the court in London have jurisdiction on the basis of the choice-of-court agreement?

Step 1. **Area of law**

This issue falls in the category of parental responsibility.

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

This question concerns jurisdiction.

Step 3. **Legal sources**

The Brussels IIa Regulation is applicable.

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

The UK is an EU Member State and it has opted into the Brussels IIa Regulation. The child is habitually resident in an EU Member State. Therefore Brussels IIa applies.

Step 5. **Rule**

Besides the general rule of jurisdiction for the court of the habitual residence of the child (Article 8 Brussels IIa), parties have a limited possibility to choose the court which will hear their dispute (Article 12(3) Brussels IIa).

Several limitations apply to their choice:

- The child must have a substantial connection with the state of the chosen court. This can be the case for instance if one of the holders of parental responsibility is habitually resident in that state. Alex is habitually resident in England, but Laura has little connection with that court.
- The jurisdiction must be unequivocally accepted by all the parties to the proceedings. It appears from the emails that the parties accepted the jurisdiction.
- Taking jurisdiction must be in the best interests of the child. This is a difficult issue. Would the English court really be in a good position to determine this case on parental responsibility (custody and/or contact), taking into account in the best interests of the child? It seems that it might not be able to really assess the child's situation well, as the child is in Latvia and the contact would take place in Latvia. When the child should be heard, this is also a relevant element to consider. In the light of Laura's age, a court would not necessarily hear her.

7) Assuming that the court in London does not have jurisdiction on the merits, can it grant provisional measures?

Step 1. Area of law

This issue falls in the category of parental responsibility.

Step 2. Aspect of private international law

This question concerns jurisdiction.

Step 3. Legal sources

The Brussels IIa Regulation is applicable.

Step 4. Scope of the legal texts

The UK is an EU Member State and it has opted into the Brussels IIa Regulation. The child is habitually resident in an EU Member State. Therefore Brussels IIa applies.

Step 5. Rule

In urgent cases a court other than the court that has jurisdiction on the merits of the case may issue provisional measures concerning persons and goods on the territory of its state (Article 20 Brussels IIa). In this case, the child is not present in England.

Moreover, provisional measures are not enforceable across borders (CJEU C-256/09, *Purrucker*, 15 July 2010, ECLI:EU:C:2010:437). It would not make sense for the court in England to grant measures that it would not be able to enforce.



GOOD TO KNOW

Language versions of the Regulation

The different language versions of the Regulations are not always identical. When applying a provision (such as Article 20), it is advisable to read various language versions.

8) Is the Latvian judgment on the shared parental responsibility and the contact enforceable in Finland? Take into account whether the judgment must be accompanied by a certificate.

Step 1. Area of law

This issue still falls in the category of parental responsibility, just as the questions above.

Step 2. Aspect of private international law

This question concerns recognition and enforcement.

Step 3. Legal sources

In order to answer this question, the Brussels IIa Regulation is the relevant instrument.

Step 4. Scope of the legal texts

The Brussels IIa Regulation applies for the recognition and enforcement of judgments in parental responsibility cases if both the state from which the judgment emanates and the state in which

recognition or enforcement is sought, are EU Member States. This is the case: both Latvia and Finland are EU Member States.

Step 5. Rule

Judgments from other EU countries on parental responsibility are recognised without any procedure being required (Article 21(1) Brussels IIa). There are several grounds for refusal (Article 23 Brussels IIa). Note that when considering public policy, the best interests of the child should be the guiding principle (Article 23a) Brussels IIa).



Conflicting judgments

When there are two or more conflicting judgments on parental responsibility, the latest judgment should be given prevalence. This is different from the rule in divorce cases, where the earliest judgment prevails.

Compare Article 22c) and d) with 23e) and f) Brussels IIa.

For enforcement, there are two regimes that are relevant to this question.

First, one for parental responsibility. This would apply if Alex wants to force Agrita in some way to take his views on the choice for Laura's school into account. The regime is that exequatur proceedings (proceedings for a declaration of enforceability) are required. Any interested party can apply for such a declaration of enforceability (Article 28(1) Brussels IIa). The Regulation does not specify the nature of these proceedings. This depends on national procedural law (Article 30(1)).

The judge considering the declaration of enforceability may take into account the grounds for refusal of recognition (Article 23 Brussels IIa) but may under no circumstances test the jurisdiction of the foreign court or the substance of the judgment. As mentioned above, all Member States are party to the UN Convention on the Rights of the Child. They may take the best interests of the child into account as a public-policy concern which might lead to the refusal of recognition and enforcement. However, they may not reconsider the foreign judgment in its entirety and reassess the best interests of the child in full.

There is a certificate for this enforcement: see Annex II. A party seeking a declaration of enforceability must produce this certificate (Article 37(1)b)). The court that issued a judgment must issue this certificate at the request of any interested party (Article 39). Note that the certificate aims at protecting the rights of defaulting parties. Judges should ensure that their rights have been respected.



It might be good practice for a judge presiding over an international case to ask the parties whether they would need the certificate. If the parties or their lawyers do not think about this, they might have to return to court at a later stage to obtain the certificate.

Second, one for contact (or access rights). Brussels IIa has abolished exequatur for two situations, the first of which concerns rights of access (Article 41 Brussels IIa). This is applicable with respect to Alex's rights. Thus, if Agrita refuses his contact rights, he can have the Latvian judgment enforced in Finland without having to return to court for a declaration of enforceability.

The enforcing court may make practical arrangements for organising the exercise of the rights of access (Article 48 Brussels IIa). This could be useful if for instance the Latvian decision contained the address of Agrita where the contact rights could be exercised, the enforcing Finnish court can change this.

There is a specific certificate for this situation: see Annex III. Where the rights of access involve a cross-border situation, the judge must issue the certificate *ex officio* (Article 41(3)).

A court can only issue this certificate if specific conditions are met:

- In the case of a default judgment, the defendant was served or has accepted the decision;
- All parties concerned were given the opportunity to be heard;
- The child was given the opportunity to be heard, unless a hearing was considered inappropriate in the light of the child's age or degree of maturity (Article 41(2) Brussels IIa).



Hearing the child

This wording concerning the hearing of the child is not entirely compatible with the UN Convention on the Rights of the Child (Article 12).

That provision introduced a two-tiered test:

- 1) The court must give the opportunity to be heard to a child that is capable of forming his or her own views.
- 2) These views will be given due weight in accordance with the age and maturity of the child.

The way in which the parties have to be heard, is subject to domestic procedural law. Courts can use technology such as video conferencing, or they can revert to Regulation on the taking of evidence.



Abolition of exequatur in certain situations of child abduction

The other situation for which exequatur was abolished (but which is not relevant for this case study), is when there is a return order by a court in the country of the former habitual residence after a court in the country to which the child was abducted refused the return (Article 42 Brussels IIa; Annex IV Brussels IIa). This concerns a peculiar situation where two contradictory judgments exist and where the later judgment must be enforced in the state where the first was issued.

The issue of **actual enforcement** (e.g. the police going to fetch the child) is entirely governed by national law.

Discussion:

Participants can give information on the exequatur proceedings in their states. There are vast differences with respect to where these proceedings must be introduced and how they are conducted. Moreover, there are vast difference about how enforcement actually takes place. Some courts only introduce fines; in others the police can become involved to get the child, etc.



9) Alex would like to have the order changed. Does the Latvian or Finnish court have jurisdiction for this matter?**Step 1. Area of law**

This issue falls in the category of parental responsibility.

Step 2. Aspect of private international law

This question concerns jurisdiction, but recognition is also of importance.

Step 3. Legal sources

The Brussels IIa Regulation is applicable.

Step 4. Scope of the legal texts

Finland and Latvia are EU Member States; the child is habitually resident in an EU Member State. Therefore Brussels IIa applies.

Step 5. Rule

For the **Latvian court**: The court of the former habitual residence has no jurisdiction to modify the contact order (Article 9(1) Brussels IIa), because the father has no habitual residence in Latvia.

For the **Finnish court**: The general rule on jurisdiction, as discussed above, is that the court of the habitual residence of the child has jurisdiction (Article 8). If Laura has become habitually resident in Finland, the Finnish court has jurisdiction. Concerning the changing of the contact order within the first three months, the Finnish courts can only take jurisdiction if Alex has accepted its jurisdiction (Article 9(2)).

The Finnish court would, when considering the case, take the Latvian judgment into account. This is an example of incidental recognition. As explained in question f) above, this recognition requires no specific procedure. The grounds for refusal remain valid (Article 23 Brussels IIa).