

## Annex 3.1. – Workshop exercise I

### Case Study: Parental Responsibility and Child Abduction<sup>3</sup>

#### Case

Heidi (a German national) and Paul (a French national) have since 2003 been living together as a couple in Brussels, where they both worked. They were never married. In October 2006 their daughter, Laura, is born and in November 2008 their son, Nicolas. Paul has formally (in the presence of a civil servant) acknowledged that he is the father of the children and he is mentioned as such on the birth certificates. Under Belgian law this has the result that Heidi and Paul share parental responsibility for the children.

In February 2010 Paul gets an unexpected opportunity to work in Paris on secondment for two years. He takes this up in March 2010. He commutes between Brussels and Paris and also rents an apartment in Paris where he stays over two or three nights every week. The change in lifestyle puts strain on the family and Heidi and Paul's relationship deteriorates and eventually breaks up by the summer of 2010. Paul moves into his apartment in Paris. Both parents want the children to live with them.

- Where can Paul institute court proceedings to request that the children reside principally with him in Paris?

#### ***Suggested solution:***

In an action on parental responsibility jurisdiction lies with the court of the place of habitual residence of the children (Art. 8 Brussels IIbis Regulation). According to the facts given, this is Brussels.

NB: the European Court of Justice has ruled on the determination of the habitual residence of the child.

See case C-523/07, A, ECR 2009, I-2805, paras 37-39:

*"(37) The 'habitual residence' of a child, within the meaning of Article 8(1) of the Regulation, must be established on the basis of all the circumstances specific to each individual case.*

*(38) In addition to the physical presence of the child in a Member State other factors must be chosen which are capable of showing that that presence is not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in a social and family environment.*

*(39) 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."*

Regarding the habitual residence of an infant, see C-497/10PPU, *Mercredi v. Chaffe*, not yet reported in ECR, [www.curia.eu](http://www.curia.eu). The court considers the criteria it has established in the case A, but states *"As a general rule, the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of."* (para 54) and *"That is even more true where the child concerned is an infant. An infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent. Consequently, where,*

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*as in the main proceedings, the infant is in fact looked after by her mother, it is necessary to assess the mother's integration in her social and family environment. In that regard, the tests stated in the Court's case-law, such as the reasons for the move by the child's mother to another Member State, the languages known to the mother or again her geographic and family origins may become relevant."* (para 55).

**Extra question the trainer can ask:** Are there exceptions or alternatives to the general rule of the habitual residence of the child?

The parents can agree to have the case heard in France, a State with which the children have a close connection (Art. 12(3) Brussels IIbis Regulation).

If the habitual residence of the child cannot be established, a court may take jurisdiction on the basis of the presence of the child (Art. 13 Brussels IIbis Regulation).

It is also possible for a court that has jurisdiction under the Regulation to refer the case to another court (Art. 15 Brussels IIbis Regulation). This rule allows a court to directly contact a court in another EU Member State, with which the child has a close connection. The referral can take place on the initiative of the court where the case is pending, another court (claiming a close connection with the child), or one of the parties. If one of the courts takes the initiative, at least one of the parties must agree with the referral before it can take place.

➤ **If the parties mediate their dispute in Belgium and reach an agreement, does this agreement have legal effect in France?**

#### ***Suggested solution:***

If the agreement takes the form of an authentic instrument, it can be recognised under the Brussels IIbis Regulation, under the same conditions as a judgment. Art. 46 of the Regulation provides for recognition of authentic acts. If the authentic act is enforceable in the State in which it was granted, it is also enforceable under the Regulation.

#### ***What is an authentic instrument?***

Can be a notarial act in the civil law countries.

Can be a court settlement (one must look at the national mediation legislation). Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters (Official Journal L 136, 24/05/2008, 3) places an obligation on Member States to ensure enforceability of mediation agreements (Art. 6).

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Same Case, but:

Let us assume that the Brussels court ruled in November 2010 that the children must live with Heidi in Brussels every Saturday evening from 6.00pm until Wednesday 4.00pm and with Paul from Wednesday 4.00pm until Saturday 6.00pm. Heidi is responsible for taking the children to Paris on Wednesday afternoons. (She has the day off as she works 4 days a week.) Paul is responsible for taking the children back to Brussels on Saturday evenings. This arrangement works well for the first month. By mid-December, Paul starts to bring the children late and then takes up the habit of bringing them only on Sundays. Heidi is unsatisfied, as she wants to spend Sundays with her children.

- Can Heidi enforce the Belgian court order in France? What are the possible grounds for refusal?

### *Suggested solution:*

In order to be enforced in another Member State (in this case France), the court order must be enforceable in the State of origin (in this case Belgium) (Art. 28).

If this condition is met, there are two possibilities for this case:

- Direct enforcement (no exequatur procedure required) if one obtains the certificate in Annex III from the Belgian Court (Art. 41: Rights of Access). In this case, enforcement cannot be refused. By this certificate, the Belgian court order becomes equivalent to a French order, and it can be enforced in France in the same way as a French decision.
- Enforcement through the exequatur procedure (Art. 28). The exact form of this procedure is determined by national law (Art. 30). In essence, Heidi would have to approach the French court to request enforcement. Only after the enforcement is granted can the court order be enforced in France. In this case, the grounds for refusal are determined by Art. 23 Brussels IIbis Regulation. They are:
  - If the recognition would be manifestly contrary to public policy;
  - If the child was not heard, in violation of the fundamental principles of the State where enforcement is sought, except in an urgent matter;
  - If the judgment was given in default of appearance and the defendant was not served in a timely manner so as to organise his or her defence, unless he or she has unequivocally accepted the decision;
  - If a person claims that the judgment infringes his or her parental responsibility and this person was not heard in the proceedings and this person applies for the refusal of the enforcement;
  - If the judgment is irreconcilable with a later judgment of a court in the State where enforcement is sought;
  - If the judgment is irreconcilable with a later judgment of another Member State or a non-Member State where the child was habitually resident and this judgment can be enforced in the State where enforcement is sought.

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### Same Case :

From June 2011 on Heidi becomes very unhappy in Brussels. She starts looking for a new job in Cologne, where her parents and sister live. She does not tell Paul of her plans. In March 2012 Paul moves back to Brussels (his secondment having come to an end), into a new apartment. The arrangement concerning the children carries on as before.

In May 2012 Heidi moves to Cologne without a word to Paul. On the first Wednesday after the move she does not take the children to Paul's place. He calls her mobile phone, but she has cancelled her contract and he is unable to reach her. After phoning several mutual friends, he learns that Heidi is in Germany, presumably with the children. He phones Heidi's parents, but they refuse to give him any information about where Heidi and the children are. They blame him for having broken up the family and tell him that he has no say over what Heidi can and must do. As an unmarried father, their view is that he has no right to have the children living with him.

Paul is devastated. He has no idea what to do.

- Can you help Paul? Explain the steps he must take and the course of the procedure that will follow.

### Suggested solution:

This is a case of international child abduction. This is defined as wrongful removal of the children, i.e. in breach of custody rights of Paul, which he has pursuant to the Belgian court decision (Art. 3 Hague Child Abduction Convention). The Brussels IIbis Regulation applies in conjunction with the Hague Child Abduction Convention of 1980 (which is applicable in all EU Member States).

The first step that Paul must take, is contact the Central Authority in the country where he lives. Contact details are available at:

- The European Judicial Atlas in Civil Matters: [http://ec.europa.eu/justice\\_home/judicialatlascivil/html/rc\\_jmm\\_centralauthorities\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/rc_jmm_centralauthorities_en.htm), or
- The website of the Hague Conference on Private International Law: [http://www.hcch.net/index\\_en.php?act=conventions.authorities&cid=24](http://www.hcch.net/index_en.php?act=conventions.authorities&cid=24),

That Central Authority will tell him which documents he needs and contact the Central Authority of the country where the children are. Where necessary, the Central Authority will help to discover the whereabouts of the children (Art. 7 of the Hague Convention).

The Central Authorities will try to establish the return of the children.

If the return of the children cannot be established (for instance voluntarily or through mediation), the Central Authority of the country where the children are, will assist in the institution of legal proceedings in that country (Germany in this case).

The German court will only rule on the return, and not on the merits of the dispute about where the children will reside in future. In principle the court has to order the return of the children, unless one of the limited grounds for refusal can be applied (Arts. 12, 13 and 20 of the Hague Convention). Note that the Brussels IIbis Regulation further limits these grounds for refusal (Art. 11). Read together, the court has to consider the following grounds for refusal:

1. The child has been in the country to which he or she was abducted for more than a year and the child is settled in his or her new environment;

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2. The person requesting the return was not actually exercising the custody rights at the time of the abduction, or had subsequently consented in the abduction;
3. There is a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation, except if adequate measures to protect the child are taken in the Member State to which the child is to be returned;
4. The child was given the opportunity to be heard, unless this is inappropriate given the child's age and degree of maturity, and he or she objects to the return while it is appropriate to take account of his or her views;
5. Returning the child would be contrary to the fundamental principles (of human rights and fundamental freedoms) of the State where the return is requested.

After the return of the children, the Belgian court has jurisdiction to hear the dispute on parental responsibility, i.e. the dispute about where the children will reside.

Thus, the Belgian court has retained its jurisdiction. This jurisdiction is not altered by the wrongful removal of the children (Art. 10 Brussels IIbis Regulation).

Same Case :

Let us assume that the German court has refused Paul's application.

➤ What can he do?

#### Suggested solution:

This depends on the ground for refusal that the German court has used.

If the court has used Art. 13 of the Hague Convention (numbers 2-4 above), Paul has a second chance in Belgium, where the case on parental responsibility will be heard (Art. 11(6) and (7) Brussels IIbis Regulation).

A subsequent decision by the Belgian court that requires the return of the children, is enforceable (Art. 11(8)), notwithstanding the German refusal. For this situation, the exequatur procedure has been abolished (Art. 42 and Annex IV). This means that the judgment is immediately enforceable in all other Member States, without the requirement of any approval by a court of these States.

If the refusal was based on Article 12 or 20 of the Hague Convention (numbers 1 and 5 above), the so-called second chance does not exist. In these cases Germany becomes the new habitual residence of the children and proceedings on parental responsibility must be conducted there.

Appeal possibilities against the refusal in Germany are determined by German national law.

#### Legislation:

Council 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 IIbis Regulation)

Convention on the Civil Aspects of International Child Abduction, concluded in The Hague on 25 October 1980 (All EU Member States are party to this Convention.)