

# Private international law concerning children in the UK after Brexit: comparing Hague Treaty law with EU Regulations

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## A Introduction

The UK as a Member State of the EU is bound by two EU Regulations on private international law (PIL) - Brussels IIa<sup>1</sup> and Maintenance<sup>2</sup> – and by one international treaty – the Hague Maintenance Convention 2007<sup>3</sup> - which are important for children. It is a common understanding among members of the UK PIL Advisory Committee and relevant Government officials that after Brexit the UK will do what is necessary under public international law to remain a party to the Hague Maintenance Convention 2007 (Hague 2007) without any break in its operation. As the UK was one of the Members of the Hague Conference on Private International Law at the time of its Twenty-First Session (November 2007) it has the right to sign and ratify the Convention with no possibility of any other State objecting, see Art 58(1) and (2) of the Maintenance Convention. It could sign and ratify the Convention on the same day and it would then enter into force for the UK as a Contracting State, rather than the UK as a participating Member State of an Regional Economic Integration Organisation (REIO) that has approved the Convention (see Art 59(3) of the Convention), on the first day of the month following the expiration of three months after the deposit of its instrument of ratification (see Art 60(2)(a) of the Convention). In order for this to be done so that the Maintenance Convention remains in force for the UK without any break between it being in force as a member of an REIO and it being in force as a Contracting State, the UK will have to exercise its external competence while still bound by the Convention as a Member State of the EU when under EU law the EU still has exclusive external competence.<sup>4</sup>

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<sup>1</sup> 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 [2003] OJ L338/1.

<sup>2</sup> Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L7/1.

<sup>3</sup> See Council Decision of 9 April 2014 amending Annexes I, II and III to Decision 2011/432/EU on the approval, on behalf of the European Union, of the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance [2014] OJ L114/1 and Council Decision 2011/432/EU of 9 June 2011 on the approval, on behalf of the European Union, of the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance [2011] OJ L192/39. See also for the EU's declarations and reservations the Hague Conference website at <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1109&disp=resdn> accessed 6 April 2017.

<sup>4</sup> For a recent analysis of the breadth of the EU's external competence in private international law see P Franzina (ed) *The External Dimension of EU Private International Law After Opinion 1/13* (Intersentia, 2017). This is best done by agreement with the EU. The text of the Hague Maintenance Convention 2007 is available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=131> accessed 6 April 2017. The Convention is in force in 35 States, see <https://www.hcch.net/en/instruments/conventions/status-table/?cid=131> accessed 6 April 2017.

The UK is bound in public international law by two Hague Conventions which are important for children – the Hague Child Abduction Convention 1980<sup>5</sup> (Hague 1980) and the Hague Child Protection Convention 1996 (Hague 1996).<sup>6</sup> It is a common understanding among members of the UK PIL Advisory Committee and relevant Government officials that after Brexit the UK will remain a party to both of these Conventions as the UK ratified both of them as a Member of the Hague Conference. They were not approved by the EU as an REIO and therefore Brexit has no direct bearing on their continued binding force in international law for the UK and other Contracting States to those Conventions.<sup>7</sup> This clear cut statement even applies to States that have acceded to Hague 1980 where the acceptance of their accession has been authorised by the EU since the Court of Justice of the European Union gave the highly controversial Opinion 1/13 saying that the acceptance of the accession of non-EU States to Hague 1980 falls within the exclusive external competence of the EU.<sup>8</sup> The reason being that Hague 1980 does not recognise the possibility of an REIO making declarations under the Convention on the acceptance of the accession of States to that Convention. Instead, such declarations must be made by Contracting States to the Convention.<sup>9</sup> Therefore, the Council makes Decisions authorising the Member States of the EU (apart from Denmark) to declare the acceptance of non-EU States and it does so unanimously.<sup>10</sup> When an EU Member State makes such a declaration it follows the standard formula agreed by the Council:

*'[Full name of EU MEMBER STATE] declares that it accepts the accession of ... to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, in accordance with Council Decision (EU) ...'.*<sup>11</sup>

When the UK makes such a declaration and deposits it at the Ministry of Foreign Affairs of the Netherlands,<sup>12</sup> Hague 1980 takes effect between the UK and the acceding State concerned on the first day of the third calendar month after the deposit of the declaration of acceptance and Brexit will not affect the continued operation of such treaty relations because the UK makes such a declaration as a Contracting State to Hague 1980.<sup>13</sup> Following Brexit, the UK will be able to make its own decisions on whether or not to declare its acceptance of States acceding to Hague 1980 and the UK Government should be diligent to do so whenever it is clear that the acceding State has

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<sup>5</sup> For the text of the Convention and its status see the Hague Conference Child Abduction section at <https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction> accessed 6 April 2017.

<sup>6</sup> The text of the Convention is available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70> and the status table showing there are 46 Contracting States is available at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=70> both accessed 6 April 2017.

<sup>7</sup> However, as pointed out by Nigel Lowe in his paper in this special issue of *Child and Family Law Quarterly*, Hague 1996 was given force of law in the UK through an SI adopted under s 2 of the European Communities Act 1972. Therefore, the method of keeping Hague 1996 applicable in UK law after Brexit is part of the detail of the Great Repeal Bill.

<sup>8</sup> *Opinion 1/13 (Accession of third States to the Hague Convention)*, of 14 October 2014 EU:C:2014:2303. See generally Franzina above n 4 and in particular P Beaumont, 'A critical analysis of the judicial activism of the Court of Justice of the European Union in Opinion 1/13' 43.

<sup>9</sup> See Art 38(4) of Hague 1980.

<sup>10</sup> See K Vandekerckhove, 'Consequences of Opinion 1/13 on the Acceptance in the EU of Accession to the Hague Child Abduction Convention' in Franzina n 4 at 71.

<sup>11</sup> See eg Art 1(2) of Council Decision (EU) 2015/1023 of 15 June 2015 authorising certain Member States to accept, in the interest of the European Union, the accession of Andorra to the 1980 Hague Convention on the Civil Aspects of International Child Abduction [2015] OJ L163/29.

<sup>12</sup> As required by Art 38(4) of Hague 1980.

<sup>13</sup> The EU accepts that earlier declarations of acceptance made by some EU Member States, in relation to the acceding States for which the Council has authorised other EU Member States to accede, are still valid and binding in public international law, see eg Art 4 and recital 12 of Council Decision (EU) 2015/1023 n 11 above.

implemented the Convention properly with an appropriately staffed and equipped Central Authority. The position prior to Opinion 1/13 will be restored.

The UK Government in its White Paper on Brexit<sup>14</sup> mentions the possibility of a transitional arrangement to avoid a “cliff-edge” when the UK leaves the EU and one element in such arrangements might be the way in which the UK and EU “cooperate” on “civil justice matters”. One purpose of this paper is to see if any future cooperation on civil justice matters concerning the private international law of children is needed on a bilateral basis between the UK and EU or whether the multilateral regime that both the UK and EU are bound by is appropriate. There is no “cliff-edge” here because the legal regime provided by the three Hague Conventions will apply to our relations with the EU Member States immediately that the EU Regulations cease to apply.

## **B Brussels IIa Regulation compared to the Hague 1980 and 1996 Conventions**

The first comparison that needs to be made is between the way in which the Brussels IIa Regulation works for children and the way in which the Hague Conventions of 1980 and 1996 work. This comparison is divided up into three areas of law: child abduction, parental responsibility and access.

### **i. Child Abduction**

The only significant difference between the regime for international child abduction applicable at present to intra-EU cases as a result of Brussels IIa and the Hague 1980 Convention system that already applies to cases between the UK and non-EU Contracting States to the Convention and will apply after Brexit – in the absence of any special deal – to cases between the UK and EU Member States is the override mechanism. This mechanism enables a court in an EU Member State where a child was habitually resident before the child’s abduction to another EU Member State to override the non-return order by that other State if it was based on Article 13 of the Hague 1980 Convention and for the override return order to be automatically enforceable with no grounds for refusal in all EU Member States. The author of this paper led a Nuffield Foundation-funded study into how the override system is operating in the EU.<sup>15</sup> It reported in 2016 and the clear evidence from that study was of how ineffective the system is. The authors recommended scrapping it. These were the reasons given in the conclusion:

The research project has indicated that there are problems with the Article 11(6)-(8) Brussels IIa procedure and that return orders given under Article 11(8) are rarely ever implemented, either through legal enforcement or otherwise. The procedure often gives false hope to left-behind parents, is only accessible to those who are made aware of the procedure by solicitors or other organizations, and in some countries legal aid is limited so even those aware of the procedure might not be able to utilize it. The procedure also increases animosity between the parents, prolongs the period of instability for the child, and can delay contact between the child and the left-behind parent. Consequently the overall conclusion is that the procedure should be removed from a revised Brussels IIa.<sup>16</sup>

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<sup>14</sup> *The United Kingdom’s exit from and new partnership with the European Union* (HM Government, 2017) 12.2.

<sup>15</sup> A paper giving a full analysis of the data and all the national reports from the EU Member States upon which the analysis was based are available on the Centre for Private International Law website at <http://www.abdn.ac.uk/law/research/conflicts-of-eu-courts-on-child-abduction-417.php> accessed 24 March 2017.

<sup>16</sup> P Beaumont, L Walker and J Holliday, ‘Conflicts of EU courts on child abduction: the reality of Article 11(6)-(8) Brussels IIa proceedings across the EU’ (2016) 12 *Journal of Private International Law* 211 at 258.

Some of the statistics on which this conclusion was based are repeated here in order to understand the empirical basis for the conclusion. The study uncovered only 66 applications concerning 70 children which involved Article 11(6)-(8) of Brussels IIa between its entry into force and June 2015. This was for the whole of the EU and is therefore a remarkably small number. The only countries where it has been used more than once a year are Italy (17 cases) and the UK (11 cases).<sup>17</sup> Out of the 66 cases the reason for the Hague non-return order was at least in part Article 13(1)(b) in 41 of them.<sup>18</sup> Of the 66 cases, 28 resulted in a return order and the issuance of an Article 42 Brussels IIa certificate (which is designed to make the override decision one that is not reviewable in other EU courts), in 28 cases a return order was refused and in 10 cases the outcome is unknown.<sup>19</sup> Of the 28 return orders a full welfare analysis was definitely carried out in 5 cases before the return order was made.<sup>20</sup> Furthermore, in 7 of the 28 cases where a return order was made was the child definitely returned to that country<sup>21</sup> and in only 5 of those 7 cases was the return done legally rather than by a re-abduction.<sup>22</sup> 14 out of the 70 children were definitely heard in the Article 11(6)-(8) Brussels IIa proceedings and in only one of those cases was a return ordered.<sup>23</sup> 9 out of the 33 children who were 6 and over involved in this type of proceedings were heard directly or indirectly in those proceedings.<sup>24</sup> In 28 of the 66 Article 11(6)-(8) Brussels IIa proceedings the abducting parent was not heard.<sup>25</sup>

It is also worth noting that the view that the override system in Brussels IIa should be scrapped is not unique to commentators in the UK. Thalia Kruger and Liselot Samyn reached the same conclusion:

The first problem is that it is not uncommon that a [Hague refusal to return a child order] is based on more than one ground. In these circumstances it is unclear whether the second chance procedure is available or not [as it expressly applies only where a refusal is based on Article 13 of the Hague Convention]. The second problem is that the second chance procedure takes up more time. Brussels II *bis* does not even provide a time limit in which this procedure must be completed. Third, the extra procedure potentially increases the conflict in the family. It increases the stress on the entire family and especially the child. Fourth, if we take children's rights seriously, as we have advocated above, it is inconceivable to listen to the child only the second time he or she says something.

Our proposal is to abolish the second chance procedure and return to the delicate balance struck by the Hague Child Abduction Convention. This will recover the same treatment of abducted children whether in or outside the EU. It will reiterate the approach of reverse subsidiarity.<sup>26</sup>

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<sup>17</sup> Ibid at 213-214.

<sup>18</sup> Ibid at 216. This relatively high figure for the grave risk of harm defence within the EU and other qualitative data from the study indicate that Art 11(4) of Brussels IIa is not being applied properly within the EU to reduce the number of non-return orders on Art 13(1)(b), see *ibid* at 218-9 and see also evidence from some EUPILLAR national reports that the extra requirements in intra-EU cases for child abduction, like Art 11(4) of Brussels IIa, are not always being referred to by national judges, see P Beaumont, M Danov, K Trimmings and B Yüksel, *Cross-Border Litigation in Europe* (Hart, 2017) esp Chapters 5 and 26.

<sup>19</sup> See Beaumont et al, above n 16 at 224-225.

<sup>20</sup> Ibid at 227.

<sup>21</sup> Ibid at 229.

<sup>22</sup> Ibid at 230.

<sup>23</sup> Ibid at 234-235. There were at least 3 other cases where the child was given the opportunity to be heard but it was prevented by the abducting parent or it was not clear if it transpired, *ibid*.

<sup>24</sup> Ibid at 241.

<sup>25</sup> Ibid at 242-246.

<sup>26</sup> Thalia Kruger and Liselot Samyn, "Brussels II bis: successes and suggested improvements" (2016) 12 *Journal of Private International Law* 132 at 159 (footnote omitted and words in brackets added by this author).

The Commission in its Proposal for a Recast of Brussels IIa is suggesting some welcome improvements to the override system<sup>27</sup> but keeping this extra layer of complexity in child abduction cases will still be less satisfactory than the Hague 1980 system.<sup>28</sup>

Currently Hague 1996 has an advantage over Brussels IIa in relation to provisional measures which can be ordered by the court where the child has been abducted to in order to facilitate the return of the child to the country of his or her habitual residence. Such measures under Article 11 of the 1996 Convention carry automatic recognition effects with them until the authorities in the State of habitual residence have taken the measures required by the situation. An order under the equivalent provision in Brussels IIa, Article 20, carries no such extra-territorial effects. It is not clear whether Article 11 of the 1996 Convention can be invoked in intra-EU cases at the moment but it should be possible.<sup>29</sup> If the Recast of Brussels IIa follows the Commission's Proposal, then this problem will be solved by moving Article 20 on provisional and protective measures to the new Article 12 within the core part of the jurisdiction chapter and thereby enabling the measures to be recognised and enforced in other EU Member States.<sup>30</sup>

## ii. Parental responsibility

The rules in Hague 1996 and Brussels IIa are very similar. This is no surprise as the latter was modelled on the former with a view to paving the way for Hague 1996 to be part of the EU acquis. The differences are subtle. In relation to the transfer provision, the Hague 1996 version, Articles 8 and 9, seems preferable to the Brussels IIa version, Article 15, because it is slightly more flexible and because Brussels IIa seems to have the undesirable consequence that whenever a child is habitually resident in an EU Member State, the case cannot be transferred to a non-EU Contracting State to the 1996 Convention to have his or her parental responsibility issues determined even though this would be in the best interests of the child.<sup>31</sup> The Commission's Proposal for a Recast of Brussels IIa will make transfers from EU Member States to Hague 1996 Contracting States easier as has been described by Paul Beaumont, Lara Walker and Jayne Holliday as follows:

In general terms the Regulation applies when the child is habitually resident in an EU Member State bound by Brussels IIa. It also applies to the recognition and enforcement of decisions between EU Member States bound by Brussels IIa, regardless of whether the child is habitually resident in a third State (Article 75(1)). However, there are some exceptions to these general rules. In cases where there is a choice of court agreement in favour of a court in a non-EU 1996 Hague Contracting State then Article 10 of the 1996 Convention applies (Article 75(2)(a)). Where the authority in a Member State wishes to transfer jurisdiction to a

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<sup>27</sup> See Commission's Proposal for a Recast of Brussels IIa 30 June 2016 COM(2016) Final 411. The effects of this change are explained in P Beaumont, L Walker and J Holliday, 'Parental Responsibility and International Child Abduction in the proposed recast of Brussels IIa Regulation and the effect of Brexit on future child abduction proceedings' (2016) *International Family Law* 307 at 309-313, see also for a slightly updated version Working Paper No. 2016/6 'Parental Responsibility and International Child Abduction in the proposed recast of Brussels IIa Regulation and the effect of Brexit on future child abduction proceedings' available at <http://www.abdn.ac.uk/law/research/working-papers-455.php> accessed on 24 March 2017.

<sup>28</sup> Art 7 of Hague 1996, in a similar way to Art 10 of Brussels IIa, preserves the jurisdiction of the courts of the habitual residence of the child before the abduction to decide on parental responsibility/access until the child becomes habitually resident in the country where he or she was abducted to and certain other conditions are met to ensure respect for Hague 1980 but wisely does not create an override system in relation to a Hague 1980 non-return order.

<sup>29</sup> See Beaumont et al, n 16 above at 219-221.

<sup>30</sup> Commission's Proposal, n 27 above. The effects of this change are explained in Beaumont, Walker and Holliday, (2016) IFL 307 at 313-314 and in Working Paper No. 2016/6 n 27 above.

<sup>31</sup> See Kruger and Simon, n 26 above at 154.

third State, which is a Contracting State to the 1996 Convention, then Articles 8 and 9 of the 1996 Convention apply (Article 75(2)(b)). This provision will be particularly useful after Brexit (the UK leaving the EU) because it clarifies that the 1996 Convention will apply to transfers of jurisdiction between the EU Member States and the UK after the UK leaves the EU (assuming that Brussels IIa will no longer apply to the UK and that the 1996 Convention will continue to apply in all EU States and in the UK).<sup>32</sup>

Those authors went on to demonstrate why Hague 1996 provisions on transfer are preferable to Article 15 in Brussels IIa:

In this respect the 1996 Convention is better than Brussels IIa. From a drafting point of view, it is better to have two separate Articles making it very clear that the non-competent courts can request a transfer to them as well as the competent court requesting a transfer to a non-competent court. Brussels IIa restricts the courts that can request a transfer to a defined list in Article 15(3) whereas the 1996 Convention allows more flexibility, see Articles 8(2) and 9(1). Under Brussels IIa a transfer can only be ordered with the approval of one of the parties as required by Article 15(2) but no such condition is imposed by the 1996 Convention. The 1996 Convention seems preferable to Brussels IIa by allowing a transfer where the child is not a party to the case in the court competent to hear it and neither of the parents agrees to a transfer but that court wants to protect the best interests of the child by transferring the case to a court that is in a better position to assess the child's best interests. This could occur where in the non-competent State someone would be appointed to represent the child's interests or legal representation for the child would be properly funded there and the competent court believes that the parents are not acting in that child's best interests.

There is another important difference between the transfer provision in Article 15 of Brussels IIa and in Articles 8 and 9 of Hague 1996. In the former the drafters require that the court with jurisdiction may transfer the case to another court in the EU if it "is in the best interests of the child" (Article 15(1)) and that if it decides to transfer the case, the other court must only accept it if it decides that it is in the best interests of the child to do so (Article 15(5)). In contrast, under Hague 1996 it is only the court that is asked to accept the transfer that has to consider that this "is in the child's best interests" (Article 8(4)). The court considering giving up its jurisdiction is asked to consider whether the other court is better placed in the particular case to "assess the best interests of the child" (Article 8(1)) and before a court that does not have jurisdiction over the parental responsibility of the child can request the court having such jurisdiction to authorise them to exercise jurisdiction in a particular case it must consider that it is "better placed in the particular case to assess the child's best interests" (Article 9(1)).

Therefore it is clear that under Article 15 of Brussels IIa the requirement to be met for granting a transfer is to fulfil two independent tests:

- (a) which is the better placed court to deal with the parental responsibility case in issue; and
- (b) is it in the best interests of the child for the other court to hear the case in issue?

In contrast, the standard under Hague 1996 for requesting a transfer (Article 9(1)) or offering a transfer (Article 8(1)) is a single test where the assessment of whether another court is "better

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<sup>32</sup> See Working Paper No.2016/06, n 27 above at 'H'.

placed” to hear the case in issue is done on the basis of whether the other court is better placed to “assess the child’s best interests”.<sup>33</sup>

Therefore, the case law of the UK Supreme Court<sup>34</sup> and the CJEU<sup>35</sup> on Article 15 of Brussels IIa cannot be simply read across as being directly applicable to transfers under Hague 1996. Both of those courts interpret Article 15 of Brussels IIa as containing two separate tests: (1) is the other court “better placed” to decide the case in hand and (2) is the transfer of the case in the best interests of the child. The CJEU has even downplayed the importance of assessing the best interests of the child in Article 15 of Brussels IIa by placing the main emphasis on determining on a non-substantive law basis which court is better placed to decide the parental responsibility issue in hand:

To that end, the court having jurisdiction must determine whether the transfer of the case to that other court is such as to provide genuine and specific added value, with respect to the decision to be taken in relation to the child, as compared with the possibility of the case remaining before that court. In that context, the court having jurisdiction may take into account, among other factors, the rules of procedure in the other Member State, such as those applicable to the taking of evidence required for dealing with the case. However, the court having jurisdiction should not take into consideration, within such an assessment, the substantive law of that other Member State which might be applicable by the court of that other Member State, if the case were transferred to it.<sup>36</sup>

The Court of Justice then deliberately does not require the transferring court to consider that it will positively be in the best interests of the child to transfer the case to another court but only that:

the envisaged transfer of the case to a court of another Member State is not liable to be detrimental to the situation of the child concerned. To that end, the court having jurisdiction must assess any negative effects that such a transfer might have on the familial, social and emotional attachments of the child concerned in the case or on that child’s material situation.<sup>37</sup>

It seems to be the case that under Hague 1996 the court considering offering a transfer or considering making a transfer request has to compare which of the possible courts to hear the case is best placed to hear it from the perspective of *determining* the child’s best interests. Therefore, no consideration should be given to substantive law (as the CJEU rightly stated in relation to Article 15 Brussels IIa) but the examination of the relative merits of the two courts should focus on the ease with which those courts can determine the best interests of the child. Thus the most important factors seem to be the location of the child, the people contesting parental responsibility and any witnesses from whom oral testimony would be desirable. Other relevant factors may be whether

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<sup>33</sup> Indeed this was the test applied by Baker J in a judgment of 14 October 2016 *In the matter of the 1996 Hague Convention and in the Matter of M and L (Children)* [2016] EWHC 2535 (Fam) at [31]. He decided that the courts in Norway and England and Wales were in most respects equally well placed to assess the best interests of the two boys apart from the fact that the Norwegian court had not been asked and the mother was not seeking to ask it to hear the case in relation to both boys whereas he could ask the Norwegian court to surrender the case in relation to one boy so that he could hear the cases in relation to both boys together. Baker J, at [1], indicated that he thought this was the first reported judgment in England and Wales on the use of Arts 8 or 9 of Hague 1996.

<sup>34</sup> *N (Children), Re* [2016] UKSC 15. Decided on 13 April 2016, see K Trimmings 'Transfer of Jurisdiction and the Best Interests of the Child' (2016) 75 *Cambridge Law Journal* 471. Even though Baker J’s decision, *ibid*, was after the UK Supreme Court’s decision he did not refer to it in his judgment.

<sup>35</sup> Case C-428/15 *Child and Family Agency v J.D.* of 27 October 2016, EU:C:2016:458.

<sup>36</sup> *Ibid* at [57].

<sup>37</sup> *Ibid* at [58]-[59].

the parties (and possibly the child depending on the circumstances) can be legally represented and, where appropriate, the availability and cost-effectiveness of experts (eg child psychologists and social workers) to assist in the determination of the child's best interests.

In the global context it is easier to admit the transfer mechanism in Articles 8 and 9 is a development from the Scottish doctrine of *forum non conveniens*<sup>38</sup> than it is to say something similar in relation to Article 15 of Brussels Ia. The brilliant French Professor who wrote the explanatory report on Hague 1996, Paul Lagarde, said:

These Articles introduce into the Convention a reversible mechanism for *forum non conveniens* and *forum conveniens*, where it appears that the child's best interest is that his or her protection be ensured by authorities other than those of the State of the habitual residence.<sup>39</sup>

But perhaps Professor Lagarde should have said:

These Articles introduce into the Convention a reversible mechanism for *forum non conveniens* and *forum conveniens*, where it appears that authorities other than those of the State of the habitual residence are better placed to determine what measures of protection are needed in the child's best interests.

Under Hague 1996 it is only when the court having jurisdiction authorises a possible transfer to another court that the other court must assess if "it considers that "it is "in the child's best interests" for it to assume jurisdiction in the case in issue. It will be aware that if it decides that it not in the best interests of the child for it to assume jurisdiction, the case in hand will have to be decided by the court that authorised the possible transfer of jurisdiction.<sup>40</sup> Interestingly, if the court that does not have jurisdiction requests the case to be transferred to it under Article 9 of Hague 1996 there is no requirement on any court to assess that the requesting court is correct to assume jurisdiction in "the child's best interests".<sup>41</sup>

Another example of the flexibility of Hague 1996 compared to Brussels Ia is that a transfer can be made to or requested by any court of a Contracting State "with which the child has a substantial connection" (see Article 8(2)(d)) whereas under Article 15(3) of Brussels Ia there is an exhaustive list of specific connecting factors. Once again the doyen of French private international law faithfully explains the origins of this flexibility in a global context as follows:

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<sup>38</sup> On the doctrine of *forum non conveniens* – Scotland's greatest legal export - see P Beaumont and P McElevy, *Anton's Private International Law* (3<sup>rd</sup> edn, SULI, 2011) 359-367 and for its origins in the Scottish mixed legal system before spreading throughout the common law world see A Arzandeh, 'The origins of the Scottish *forum non conveniens* doctrine' (2017) 13 *Journal of Private International Law* 130.

<sup>39</sup> See the Lagarde Explanatory Report on Hague 1996 available at <https://assets.hcch.net/upload/expl34.pdf> (accessed on 6 April 2017) at para 52.

<sup>40</sup> See *ibid* at para 56: "If the requested authority does not reply within a reasonable period of time to the request which has been addressed to it, it will be, since the text does not speak to this situation, for the authority whose jurisdiction was initially invoked to draw the consequences and to exercise its jurisdiction fully."

<sup>41</sup> Whereas under Art 15 of Brussels Ia the requesting court has to apply a test which seems to require it to assess whether the transfer of the case to it from the court having jurisdiction is "in the best interests of the child" but given the decision of the CJEU in Case C-428/15 n 35 above may only require them to consider that the transfer to it of the case would not be detrimental to the situation of the child, see text accompanying n 37 above.



Paragraph 2 mentions, finally, ‘a State with which the child has a substantial connection’. This formulation, the flexibility of which goes very well with the underlying theory of *forum non conveniens* which inspires Article 8, encompasses and exceeds the three preceding cases mentioned, which are only illustrations. It will permit, according to the case and always as a function of the child’s best interests, the possible jurisdiction, for example of the authorities of the State of the former habitual residence of the child, or of the State in which members of the child’s family live who are willing to look after him or her.<sup>42</sup>

Post- Brexit the UK and the EU Member States when considering whether to transfer cases on parental responsibility between the UK and an EU Member State or vice versa will be able to more openly acknowledge the *forum non conveniens* roots of the transfer provision that will then apply (Articles 8 and 9 of Hague 1996) and take advantage, where appropriate, of the slightly greater flexibility that the Hague 1996 version provides as to a court with a substantial connection with the child and of its clearer focus on finding the correct forum to determine the child’s best interests in the dispute in hand.

One area where Brussels IIa is clearly better than Hague 1996 is prorogation. Article 12 of Brussels IIa permits a wider set of options for choice of court than Article 10 of Hague 1996. The former permits prorogation of the divorce court in relation to parental responsibility matters even when neither party is habitually resident there. Furthermore, the former permits the parties to choose the courts of a country that is not hearing their divorce to deal with a parental responsibility measure where “the child has a substantial connection with that Member State” and certain other conditions are met.

A quick legislative fix for this is not easy. However, in practice many of the problems can be overcome by using the transfer system in Articles 8 and 9 of Hague 1996. Given that both parties want their chosen court to hear the case they can either go to that court and ask it to request a transfer of the case to it (using Article 9) from the court having jurisdiction under Hague 1996 or they can go to the court having jurisdiction under Hague 1996 and request it (using Article 8) to transfer the case to their chosen court. As long as their chosen court has a “substantial connection” with the child then this will be possible and one imagines that most judges will grant a non-contested transfer request.<sup>43</sup>

For a legislative fix Article 52 of Hague 1996 does allow for departure from the rules of Hague 1996 by way of an agreement between one or more Contracting States to the Convention or by “uniform laws based on special ties of a regional or other nature between the States concerned.” The former would allow for a part of the Brexit agreement between the UK and the EU to continue the operation of Article 12 of Brussels IIa in relations between the UK and the EU Member States. The uniform law approach might be a useful way of widening the limited possibility of choice of court in parental responsibility cases provided for by Article 10 of Hague 1996. This could have particular appeal in the Commonwealth where inter alia Australia is already a well-established Contracting State to Hague 1996. Another way forward is to conclude a new Convention at The Hague that will permit parents of a child to agree a jurisdiction to endorse an agreement that they have already reached on some or all of the following: custody, access, maintenance and property issues. It may even be the case that such a Convention – or perhaps a sister Convention to it – could give the parents of a child the power to choose a jurisdiction to resolve some or all of the following issues together: divorce, financial provision on divorce, custody, access, maintenance and property issues. Both these Conventions may well place limits on which jurisdictions the parents can choose but still

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<sup>42</sup> Ibid at para 55. Only the former of Lagarde’s two examples is covered by the exhaustive list in Art 15(3) of Brussels IIa.

<sup>43</sup> Thanks to Lara Walker for pointing this out.

create more flexibility than is provided at the moment by the combination of Brussels IIa and the Maintenance Regulation in the EU and by the combination of Hague 1980, 1996 and 2007.<sup>44</sup> An obvious example of a limit on choice of court would be to disallow the choice of another court where both parents and the child are habitually resident in one country.

The rules for recognition and enforcement of parental responsibility measures are very similar under Hague 1996 and Brussels IIa. However, Hague 1996 allows for a review of the jurisdiction of the authorities of the State where the child protection measure was taken by the enforcing authorities which is not permitted under Brussels IIa. This permits, eg a review of where the child was habitually resident at the relevant time when that was the basis of jurisdiction used by the authorities granting the measure which is sought to be enforced. This has the advantage that the enforcing authority can prevent the circulation of measures based on a clearly erroneous exercise of jurisdiction. One feature which will help to restrict the review by the enforcing authority is that it “is bound by the findings of fact on which the authority of the State where the measure was taken based its jurisdiction.”<sup>45</sup> However, it must be noted that although habitual residence is a factual concept – or perhaps better a mixed question of fact and law<sup>46</sup> – the finding that a child is habitually resident in the jurisdiction is not a finding of fact for this purpose.<sup>47</sup>

In relation to the other grounds for refusal of a parental responsibility measure there is a lot of symmetry between Brussels IIa and Hague 1996.<sup>48</sup> It is comforting that the Commission is not proposing to widen the divergence in its Proposal for the Recast of Brussels IIa<sup>49</sup> apart from removing what is now Article 23(b) (the mirror of Article 23(2)(b) of Hague 1996) and Article 23(g) (the mirror of Article 23(2)(f) of Hague 1996).<sup>50</sup> The former protects the ability of the requested State to not recognise a parental responsibility measure if it is not satisfied that the child had been given a proper opportunity to be heard by the authority granting the measure. The Commission’s proposal for a revised Brussels IIa tries to ensure that the child will be given such an opportunity to

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<sup>44</sup> See the work of the Experts’ Group at The Hague on Family Agreements involving Children that the present author has the privilege of chairing at <https://www.hcch.net/en/projects/legislative-projects/recognition-and-enforcement-of-agreements> accessed on 6 April 2017. It is worth noting that Brussels IIa partially helps with this problem compared to Hague 1996 in that Art 46 provides that “agreements between the parties [on parental responsibility and/or access] that are enforceable in the Member State in which they were concluded shall be recognised and declared enforceable under the same conditions as judgments.” The Commission Proposal for a Recast makes this Art 55 and changes “declared enforceable” to “enforced” and “judgments” to “decisions”.

<sup>45</sup> Art 25 of Hague 1996.

<sup>46</sup> See Centre for Private International Law Working Paper No. 2015/3- [Recent Developments on the Meaning of "Habitual Residence" in Alleged Child Abduction Cases](http://www.abdn.ac.uk/law/research/working-papers-455.php) by Paul Beaumont and Jayne Holliday available at <http://www.abdn.ac.uk/law/research/working-papers-455.php> accessed 10 April 2017.

<sup>47</sup> This is discernible from the Lagarde Explanatory Report, n 39 above at para 131 on Art 25: “If, for example, the authority of origin decided as an authority of the State of the child’s habitual residence, the authority of the requested State will not be able to review the facts on which the authority of origin *based its assessment* of habitual residence.” (emphasis added)

<sup>48</sup> Compare Arts 23 and 26 of Brussels IIa with Arts 23 and 27 of Hague 1996. Both systems contain a public policy exception, an exception where the person claiming that the measure infringes his or her parental responsibility was not given an opportunity to be heard and an exception for a conflict with a later measure given in a third State that is recognisable in the requested State.

<sup>49</sup> It would abolish the exequatur (declaration of enforceability stage) in relation to parental responsibility measures in line with the current position in relation to child abduction override return orders and access orders, see recital 33. However, as in Brussels Ia (see P Beaumont & L Walker ‘Recognition and enforcement of judgments in Civil and Commercial Matters in the Brussels I Recast and some lessons from it and the recent Hague Conventions for the Hague Judgments Project’ (2015) 11 *Journal of Private International Law* 31 esp 33-35) the grounds for refusal are moved to the actual enforcement stage rather than abolished.

<sup>50</sup> See Art 38(1) of the Commission Proposal n 27 above.

be heard by the authorities exercising jurisdiction to take the parental responsibility measure<sup>51</sup> and to have to certify that they have done so<sup>52</sup> and then for the enforcing authorities to rely on mutual trust that it has actually happened. The Brussels IIa reforms to try to ensure that a child is heard by the authorities taking the decision on a parental responsibility measure are welcome. However, the Brussels IIa system of automatic enforcement of the override of a non-return order in child abduction cases was predicated on the idea of guaranteeing that the child should be given a proper opportunity to be heard in the country of the child's habitual residence before the override order could be granted but the evidence shows that often such orders are being granted without a child being given a real opportunity to be heard.<sup>53</sup> It seems that the Commission are being overly optimistic and risking the rights of the child by taking away the protection of the child's right to be heard being reviewed by the enforcement authorities in other Member States. Such a review was upheld by the English and Welsh Court of Appeal in relation to a Romanian decision where the child was not given an adequate opportunity to be heard because it did violate a fundamental principle of English procedure.<sup>54</sup> Briggs LJ said:

Article 23 contains exceptions to the core principle of mutual recognition which lies at the heart of BIIIR. It must therefore be narrowly construed. But I do regard the failure even to consider whether to give David an opportunity to be heard as fully deserving being described as a violation of a fundamental principle of the procedure of our courts. Although some might regard the age of seven as lying near the borderline above which the giving of such an opportunity might be regarded as routine, the very large implications for him of the decision sought by his father, namely a complete change in his main carer and a move to a country in which he had not lived since very soon after his birth, cried out for consideration of the question whether he should be heard, all the more so since the mother, who might have been supposed to be likely to put the case for preserving the status quo, appeared to be taking no part in the appeal.<sup>55</sup>

It will be one benefit of Brexit if this opportunity to review whether the fundamental principle of the law of the relevant part of the UK on a child having an opportunity to be heard has been respected by the authorities in an EU Member State remains under Hague 1996 even if it is removed from Brussels IIa by the Recast.<sup>56</sup>

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<sup>51</sup> Ibid at Art 20 which says: "When exercising their jurisdiction under Section 2 of this Chapter, the authorities of the Member States shall ensure that a child who is capable of forming his or her own views is given the genuine and effective opportunity to express those views freely during the proceedings. The authority shall give due weight to the child's views in accordance with his or her age and maturity and document its considerations in the decision."

<sup>52</sup> Ibid at Art 53(5) – certifying that the child was given a "genuine and effective" opportunity to express his or her views in accordance with Art 20.

<sup>53</sup> See text accompanying notes 23 and 24 above.

<sup>54</sup> See *In re D (A Child) (Recognition of Foreign Order) (Reunite Child Abduction Centre intervening)* [2016] EWCA Civ 12; [2016] 1 WLR 2469.

<sup>55</sup> Ibid at [108]. See also Ryder LJ at [44] who said: "the rule of law in England and Wales includes the right of the child to participate in the process that is about him or her. That is the fundamental principle that is reflected in our legislation, our rules and practice directions and our jurisprudence. At its most basic level it involves asking at an early stage in family proceedings whether and how that child is going to be given the opportunity to be heard."

<sup>56</sup> The UK has opted in to the negotiations on the Brussels IIa Recast but that does not give it a veto over any changes to the Recast even while the UK is still a member of the EU, see Art 3(2) of the Protocol on the Position of the UK and Ireland in respect of the area of freedom, security and justice [2008] OJ C115/295.

### iii. Access

One of the realities of cross-border enforcement of access is that it is usually an attempt to enforce an order in the country where the child is now habitually resident. In those circumstances if the foreign access order is controversial, the courts in the place where the child is habitually resident will have jurisdiction to alter it rather than enforce it.<sup>57</sup> This is highlighted by a European Court of Human Rights decision in *Manic v Lithuania* that will be examined shortly.<sup>58</sup> One of the differences between Hague 1996 and Brussels IIa is that the latter creates a special temporary continuation of access jurisdiction for the courts of the former habitual residence for a three month period after the child has moved lawfully from one Member State to another and acquired a new habitual residence in the State it has moved to. This jurisdiction only applies for a three month period following the move, only for the purpose of modifying a judgment on access rights already issued in that Member State before the child moved, and where the holder of the access rights is still habitually resident in that Member State and has not accepted the jurisdiction of the courts of the Member State of the child's new habitual residence by participating in proceedings before those courts without contesting the jurisdiction.<sup>59</sup> The question is whether this very limited jurisdiction coupled with the automatic enforcement of access judgments under Article 41 of Brussels IIa adds any value to the Hague 1996 system.

In *Manic v Lithuania*, a Romanian/Moldovan man and a Lithuanian woman met in the UK in 2005. They had a son on 18 September 2007. In July 2008, while the mother was in Lithuania with the son, she told the father that their relationship was over and she was keeping the child in Lithuania. The father launched Hague 1980 return proceedings in Lithuania and the Vilnius Regional Court gave its decision on 6 March 2009. It accepted that the child was habitually resident in England and Wales in July 2008 and that the child's father had custody rights under English law. However, it refused to return the child, on the basis of Article 13(1)(b) Hague 1980, because the baby was dependent on being looked after by his mother and she could not look after the baby in London without financial support which the father was not promising to provide.<sup>60</sup>

The father started new proceedings in the English and Welsh High Court seeking an order under Articles 11(6)-(8) of Brussels IIa to get the child returned to England. Charles J gave a judgment on 28 April 2010.<sup>61</sup> It was based on a full welfare inquiry.<sup>62</sup> The judge was disappointed that the English proceedings took 12 months and that this had been a factor in creating the "very considerable degree of antagonism" that had grown between the parents.<sup>63</sup> The judge correctly noted that he could order interim contact between the child and the father in England without this being a return order and it appears that this was successfully done in March 2010.<sup>64</sup> In his final order Charles J decided that the mother should be allowed to relocate permanently to Lithuania with the child and that there should not be a shared care arrangement involving the father and mother.<sup>65</sup> Instead, the father is to have staying contact of 7 to 10 days four times a year with the child.<sup>66</sup> Rather

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<sup>57</sup> See eg *Re S (Brussels II (Revised): Enforcement of Contact Order)* [2008] 2 FLR 1358.

<sup>58</sup> App no 46600/11 judgment of the Second Section of 13 January 2015.

<sup>59</sup> Art 9 of Brussels IIa.

<sup>60</sup> See the judgment of the Second Section of the ECtHR at paras 9-12. It is not clear from that judgment that the refusal to return the child by the Vilnius Regional Court was based on Art 13(1)(b) but this is clear from the judgment of Charles J in *M v T (Abduction: Brussels II Revised, Art 11(7))* [2010] EWHC 1479 (Fam) at [9] and [41]-[43].

<sup>61</sup> See *M v T (Abduction: Brussels II Revised, Art 11(7))* [2010] EWHC 1479 (Fam).

<sup>62</sup> *Ibid* at [14].

<sup>63</sup> *Ibid* at [15].

<sup>64</sup> *Ibid* at [22].

<sup>65</sup> *Ibid* at [84] and [100].

<sup>66</sup> *Ibid* at the question and answer session recorded at the end of the judgment.

surprisingly, Charles J did not just make an order for contact/access for the father that would be enforceable under Brussels IIa but insisted on an Article 11(8) “return order” just for the child to come back to England for 6 weeks to allow a more intensive period of contact with the father – provided he paid for the mother to come to England as well at a cost of £3000 – before he would allow the mother to relocate to Lithuania with the child permanently.<sup>67</sup> The judge recognised that after the relocation to Lithuania the jurisdiction to decide on future access arrangements would pass to the Lithuanian courts.<sup>68</sup>

On 18 June 2010 the England and Wales High Court issued a revised judgment and order which is referred to by the Second Section of the European Court of Human Rights but which is not reported in the UK.<sup>69</sup> It required the mother to bring the child to the UK from 19 June until 14 July 2010 to allow contact between the father and son in England if he paid the mother £3000 to cover her costs and for two further contact visits in England from 18-25 September and 11-18 December 2010 provided he paid £600 to cover the costs of the mother coming with the child for each of those visits. The June to July 2010 visit took place and therefore the mother was free to relocate permanently with the child to Lithuania. On 16 September 2010 the mother’s lawyer informed the father that she would not be making the contact visit with the child to England on 18 September and said that the jurisdiction over the child’s contact arrangements had now passed to the Lithuanian courts.<sup>70</sup> The father then tried to enforce the English contact order in Lithuania requiring this contact visit in England by going through the English and Welsh Central Authority. The response from the Lithuanian Central Authority was that such a contact order is directly enforceable in Lithuania and that it had been submitted to a bailiff for enforcement.<sup>71</sup> Between 30 October 2010 and 10 February 2011 the father wrote twenty six emails to the bailiff and produced the evidence that he had an Article 41 certificate under Brussels IIa from the English judge which gives him a directly enforceable right to have his contact rights enforced by the Lithuanian authorities.<sup>72</sup> On 27 December 2010 the bailiff initiated court proceedings against the mother concerning the non-enforcement of the English contact order after the bailiff established that the mother had not gone to England with the child for the father to have contact between 11 and 18 December 2010.<sup>73</sup> The Utena District Court dismissed the bailiff’s complaint on 27 April 2011 following its decision of 1 March 2011 to grant interim protective measures for the mother preventing contact outside Lithuania and requiring the father to have supervised contact with his son in Lithuania.<sup>74</sup> The Utena District Court made a final contact order on 26 June 2012 which still allowed the father significant in person access in Lithuania even though it understood that there had been no in person contact between him and the child since June 2010 and telephone or other electronic communication.<sup>75</sup> The father’s appeals against this order were out of time and his request to reopen the proceedings were dismissed by the Regional Court on 4 March 2014 and by the Supreme Court on 12 May 2014.<sup>76</sup>

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<sup>67</sup> Ibid at [96]-[101]. The judge did leave room to change the arrangements at the end of the 6-week contact period in England but there would need to be a “very significant change” of circumstances before he would not allow the mother to permanently relocate with the child to Lithuania at that point [101]. Charles J did not issue an Art 42 Brussels IIa certificate for the return of the child for the contact visit, see *Beaumont et al*, n 16 above at 226, n 67.

<sup>68</sup> Ibid at the question and answer session recorded at the end of the judgment.

<sup>69</sup> App no 46600/11 judgment of the Second Section of 13 January 2015 at paras 21-23.

<sup>70</sup> Ibid at para 30. She also repaid the £600 for that visit.

<sup>71</sup> See *ibid* at paras 31-33.

<sup>72</sup> Ibid at para 34.

<sup>73</sup> Ibid at 37.

<sup>74</sup> Ibid at paras 40 and 45-49.

<sup>75</sup> Ibid at paras 56-58.

<sup>76</sup> Ibid at paras 63-65.

The Second Section of the European Court of Human Rights accepted that under Brussels IIa jurisdiction had passed to the Lithuanian courts to decide on contact issues three months after the mother moved permanently with the son from the UK to Lithuania in July 2010 and that therefore the Lithuanian courts had jurisdiction when the mother addressed her request to them in December 2010.<sup>77</sup> However the majority of the Court (five judges) went on to conclude that the way in which the State officials, the bailiff, the father's court appointed lawyer and the Utena District Court had handled the decision-making in relation to altering the father's contact arrangements was a violation of his Article 8 ECHR rights to family life because they took the decision without ensuring; in the case of the first two that the father's position was put forward properly and in the case of the court that the father was heard. They awarded him 7000 Euros in non-pecuniary damages but did not even try to insist that the father be given contact with his son outside Lithuania.

The minority of two judges said there was no violation of Article 8 ECHR because the father had not exhausted his domestic remedies due to the fact that he did not appeal on time in relation to three different Lithuanian orders. They also decided that there had been no violation of the State's positive obligations to enforce the English contact order because it had been replaced by the interim contact order in Lithuania by 1 March 2011. Strangely, the minority did not really address the majority's concern that Lithuania had failed to ensure that the father was heard by the Lithuanian courts before altering his contact arrangements instead noting that the father had not contacted his son in Lithuania despite having the right to do so under the interim and final Lithuanian orders.<sup>78</sup>

This is a very sad saga but it does seem to illustrate the futility of making access orders automatically enforceable under Article 41 of Brussels IIa when they can be changed by the courts of the child's new habitual residence 3 months after the child arrives there. In this case the ECtHR were not able to identify a failure to enforce the English order within that three month window (the child was already in Lithuania for 3 months by October 2010) or even in this case by the time of the Lithuanian court having changed the English order on an interim basis on 1 March 2011 to rule out contact outside of Lithuania. The majority only found a violation of the ECHR on the basis of the way the State treated the father in the proceedings in Lithuania changing his contact arrangements.

It seems that the Hague 1996 system with no special continuation of jurisdiction for the courts of the former habitual residence for access cases as provided for by Article 9 of Brussels IIa and no automatic enforcement of access rights as provided for by Article 41 of Brussels IIa is a more realistic system.<sup>79</sup> No false hope is created because it is understood that the courts where the non-custodial parent lives cannot determine what will happen to contact arrangements for that parent once the child has been allowed to lawfully relocate to another State.

Brussels IIa has different recognition and enforcement of judgments regimes for parental responsibility and access whereas Hague 1996 has the same regime for both. The Commission's Proposal for the Recast of Brussels IIa plans to bring the two EU regimes a little closer together in a compromise between the two existing regimes. So, at present in the EU, enforceable judgments given in one EU Member State in relation to rights of access which are certified in accordance with Article 41 of Brussels IIa are enforceable automatically in all other EU Member States (apart from Denmark) with no grounds for refusing enforcement. Under the Commission's Proposal it will be possible at the enforcement stage to object to enforcement of an access order on the same basis as a child abduction override return order ie that is irreconcilable with certain later decisions on parental responsibility or:

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<sup>77</sup> Ibid at para 107.

<sup>78</sup> See dissenting opinion of Judges Spano and Kjolbro.

<sup>79</sup> For doubts about the automatic enforcement of access judgments under Brussels IIa see Kruger and Samyn, above n 26 at 160.

where, by virtue of a change of circumstances since the decision was given, the enforcement would be manifestly contrary to the public policy of the Member State of enforcement because one of the following grounds exists:

- (a) the child being of sufficient age and maturity now objects to such an extent that the enforcement would be manifestly incompatible with the best interests of the child;
- (b) other circumstances have changed to such an extent since the decision was given that its enforcement would now be manifestly incompatible with the best interests of the child.<sup>80</sup>

In a post-Brexit era, even if the Commission's Proposal above is adopted by the Council, it will in principle be harder to enforce access orders in other EU Member States because all of the Hague 1996 grounds for non-recognition and enforcement come into play but conversely it will become easier in principle for judges in the UK not to enforce access orders.<sup>81</sup> It has been noted by one English and Welsh judge interviewed under the EUPILLAR project that even when every effort is made to enforce foreign contact orders, because of an inevitable change of circumstances the judge "always" has to "change it in some way".<sup>82</sup> This reality is better reflected by the less rigid system of Hague 1996.

### **C The EU Maintenance Regulation compared to the Hague Maintenance Convention 2007**

In accordance with the best application of the principle of reverse subsidiarity, the EU Maintenance Regulation 2009 was adopted after the Hague Maintenance Convention 2007 was concluded and built on, and affirmed two of the key pillars of the Convention: free legal aid for child support and an effective system of Central Authorities to assist people to obtain cross-border maintenance.<sup>83</sup> The Convention and Regulation and their roles in cross-border recovery of maintenance have been extensively analysed in two major books.<sup>84</sup>

Post-Brexit the legal systems in the UK (England and Wales, Northern Ireland and Scotland) will be free to determine the rules of jurisdiction that apply to maintenance cases because Hague 2007 only creates indirect rules of jurisdiction. The one exception to this statement is that limitations must be placed on the ability of the maintenance debtor to seek to modify a decision given by the courts of the habitual residence of the creditor in any State other than the State where that decision was given, unless the conditions in Article 18 of Hague 2007 are satisfied.<sup>85</sup> This condition will be satisfied if the jurisdiction rules in the EU Maintenance Regulation are retained as part of the Brexit Great Repeal Bill. The opportunity should be taken to abandon a strict *lis pendens* system vis-à-vis the EU Member States because, absent a special Brexit deal on the point, it will no longer be reciprocated

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<sup>80</sup> COM(2016) 411 final, Art 40.

<sup>81</sup> See the discussion on recognition and enforcement of parental responsibility measures above for an idea of the Hague 1996 system. See in more depth *The Practical Handbook on the Operation of the 1996 Child Protection Convention* (HCCH, 2014) available at <https://www.hcch.net/en/publications-and-studies/details4/?pid=6096&dtid=3> accessed 10 April 2017.

<sup>82</sup> See M Danov, 'Data analysis: Important issues to be considered in a cross-border context' in Beaumont et al n 18 above in chapter 32 (n 64).

<sup>83</sup> See P Beaumont 'International Family Law in Europe – The Maintenance Project, the Hague Conference and the EC: A Triumph of Reverse Subsidiarity' (2009) 73 *Rebels Zeitschrift für ausländisches und internationales Privatrecht* 509.

<sup>84</sup> See P Beaumont, B Hess, L Walker and S Spancken (eds) *Recovery of Maintenance in the EU and Worldwide* (Hart, 2014); L Walker, *Maintenance and Child Support in Private International Law* (Hart, 2015); and the review of the two books by D McClean, 'Maintenance surveyed' (2017) 13 *Journal of Private International Law* 219.

<sup>85</sup> See Beaumont n 83 above.

by the other EU Member States as, unlike Brussels Ia (see Articles 33 and 34), the Maintenance Regulation does not have any provisions permitting even the discretionary decline of jurisdiction in favour of a third State court that is first seised with the same or a related dispute.<sup>86</sup> Repealing the *lis pendens* rules would mean that the common law discretionary system of *forum non conveniens* would revive.

In relation to recognition and enforcement of maintenance decisions post-Brexit, it is clear that unless a deal is reached in the Brexit negotiations for a transitional or permanent bilateral agreement between the UK and EU on maintenance, the framework will be Hague 2007. This has some clear advantages for the UK over the continuation of the EU Maintenance Regulation regime. Under the latter, UK judgments are subject to an exequatur process in the rest of the EU that is similar to the one provided for by Brussels I before the Recast with some time limits added.<sup>87</sup> Therefore, there is no review of jurisdiction or of the merits but there is review on the basis of public policy, the rights of the defence being violated due to poor service or the right to a hearing not being respected, and conflicting judgments. The only difference after Brexit would be that the other EU Member States would apply Hague 2007 in relation to maintenance decisions from the UK. This would mean that a review of the jurisdiction exercised by the authorities in the UK would be undertaken to see if it complied with the indirect rules of jurisdiction in Article 20 of Hague 2007. Those indirect rules of jurisdiction are very generous to maintenance creditors because they include the habitual residence of the creditor and the EU has not made a reservation in relation to that key ground because it is a vital part of the jurisdiction regime in the Maintenance Regulation. It is also true to point out that there are two more grounds for refusal of recognition and enforcement of a UK maintenance decision that could be invoked under Hague 2007 than can be invoked under the EU Maintenance Regulation. The first of these is that the decision was obtained by fraud in connection with a matter of procedure but this is not a change of substance as such a fraud could be handled under public policy under the EU Maintenance Regulation (as it can in other contexts under Brussels Ia).<sup>88</sup> The second of these is that the decision was made in violation of Article 18 of Hague 2007 but this should never happen in the UK because our rules of jurisdiction and the careful application of them by the judges in the UK should prevent the UK from breaching its international law obligations under Article 18. Thus, the weaker party will still be able to sue for maintenance in her own habitual residence in the UK and get the maintenance decision enforced in EU Member States without difficulty.

In relation to maintenance decisions coming from EU Member States to the UK, the UK currently has to comply with the Maintenance Regulation which has abolished the exequatur for all maintenance decisions coming from those States (apart from Denmark). It is a radical style of abolition of exequatur where even at the actual enforcement stage the only ground for refusing to enforce a maintenance decision is that it conflicts with another maintenance decision.<sup>89</sup> The reason for the unequal treatment of UK and Danish decisions compared to decisions from other EU Member States is that in the EU only the former States are not party to the Hague Maintenance Protocol of 2007 that harmonises the applicable law rules in relation to maintenance issues.<sup>90</sup> Thus, after Brexit the

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<sup>86</sup> Ibid at 541.

<sup>87</sup> See Walker, n 84 above at 98-104.

<sup>88</sup> Ibid at 157-160 and Beaumont & Walker n 49 above at 54-56.

<sup>89</sup> See Art 21 of Regulation 4/2009, n 2 above. The only other ground is that the prescription and limitation periods for enforcement of a judgment have expired under both the law of the State of origin and the law of the requested State.

<sup>90</sup> The Hague Maintenance Protocol is in force for 28 States, the EU 26, Kazakhstan and Serbia, see <https://www.hcch.net/en/instruments/conventions/status-table/?cid=133> accessed 11 April 2017. The UK chose to opt in to the EU Maintenance Regulation at the end of the negotiations conscious of the unequal treatment of its judgments compared to those of the other Member States because it was keen to show that



UK will no doubt continue not to be a party to the Hague Maintenance Protocol because as a matter of policy it does not wish to apply foreign law to child and spousal support issues, and because at least in relation to the former of those issues it does not think the extra costs of applying foreign law are justified when dealing with relatively low value claims. The UK would apply the Hague Convention of 2007 to the question of whether or not to recognise and enforce a maintenance decision from an EU Member State. Thus, the UK courts could review whether the authority in the requesting State had jurisdiction compatible with the indirect rules of jurisdiction in Article 20, and will be able to refuse recognition and enforcement not only when it is incompatible with a conflicting judgment but also where it is manifestly incompatible with public policy, where the decision was obtained by fraud in connection with a matter of procedure, where proceedings between the same parties and having the same purpose were instituted in the UK first, where the defendant did not have adequate notice of the proceedings and an opportunity to be heard and where the decision was made in violation of Article 18 of the Convention. These additional safeguards may rarely be needed but there are exceptional cases where the complete abolition of grounds of refusal can result in unfairness to the maintenance debtor.<sup>91</sup> It is possible in many Member States of the EU for a maintenance decision to be granted against adult children on the ground that they are not maintaining their elderly parents. Some protection against this happening can be found in Article 6 of the Hague Maintenance Protocol but some judgments may not be contested in that State or may slip through the Protocol protection. In such circumstances it will often be appropriate on grounds of public policy, in relation to children that are strongly connected with the UK, not to enforce a judgment requiring them to maintain their elderly parents in another EU Member State. The restoration of a public policy exception is a wise thing that should be reinstated in the EU and having it reinstated through the application of Hague 2007 to post-Brexit recognition and enforcement of EU judgments in the UK is to be welcomed.

#### **D The Role of the Court of Justice of the European Union**

One factor in favour of keeping an involvement in the EU civil judicial cooperation on family law matters can be said to be the uniform interpretation that can be enhanced by the role of the Court of Justice of the European Union (CJEU). However, this is not a strong factor if the CJEU is not well equipped to play this role in relation to private international law of family law. It is clear that very few if any of the Judges and Advocates General in the EU have any background in judicial or legal practice, or the academic analysis, of either private international law or family law.<sup>92</sup> The recent EUPILLAR study, funded by the EU Commission, has shown that in a significant percentage of CJEU cases the judgments in private international law (and particularly in family law aspects) have met with significant disapproval from some academics and EU officials.<sup>93</sup> The study has advocated that a specialist chamber should be created in the CJEU to deal with preliminary rulings on private (international) law issues with specialist Judges and at least one Advocate General and supporting

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the UK could be a good member of the EU even when it has an opt out system. The UK secured the right not to apply the Hague Maintenance Protocol by those issues being left out of the body of the Maintenance Regulation and instead being dealt with by the EU approving the Protocol for all its Member States apart from Denmark and the UK. For a brief analysis see Beaumont, n 83 above at n 66.

<sup>91</sup> For an analysis of when some controls can be useful in relation to recognition and enforcement of maintenance decisions see Walker, n 84 above at 105-120. See eg the Polish case where the alleged father was required to pay maintenance even though he said he was not the father and was willing to undergo a DNA test to prove it but the Polish court gave its decision without ordering such a paternity test. Under the old Brussels I system applicable at the time the German courts were able to refuse to recognise and enforce the maintenance decision on the basis that it was contrary to public policy, *ibid* at 123-124.

<sup>92</sup> Notable exceptions include the current President of the CJEU, Koen Lenaerts who does have an academic background in private international law, Judge Toader and Advocate General Szpunar.

<sup>93</sup> See Beaumont et al n 18 above in chapters 1, 3, 32, 33, 35, 37, 41 and 47.

Legal Secretaries who have specialist expertise in practice and/or academia in these fields.<sup>94</sup> However, the study also reveals that any such change would only be made unanimously by the Member States of the EU and it would have to be done against the will of many if not all of the current members of the CJEU who seem very proud of its status as a generalist court on all aspects of EU law.<sup>95</sup> It makes little sense to advocate remaining under the jurisdiction of the CJEU for private international law of family matters not only for the political reason that removing the binding authority of all CJEU decisions in the UK is a red line issue in the Brexit negotiations<sup>96</sup> but also because, objectively, it is not an appropriately qualified court to take final decisions on such sensitive matters. In this regard, the UK Supreme Court has much stronger legal credentials in terms of the relevant experience of its judges.<sup>97</sup> Another relevant factor is that the CJEU's overriding objective of helping to establish an ever closer Union can cloud its ability to act as a leading Court in the interpretation of international treaties to which the EU is a party or its Member States are parties. This can be seen in the Court's case law on the relationship between Brussels I and certain specialist international treaties and in some of its case law under Brussels IIa where the relationship with Hague 1980 and Hague 1996 is not fully assessed by reading foreign case law on the interpretation of those Conventions and trying to promote the uniform interpretation globally of those Conventions.<sup>98</sup>

## E Conclusion

There is nothing to fear in the UK from Brexit in relation to private international law applicable to children. There is a clear exit strategy of falling back on the Hague Conventions of 1980, 1996 and 2007 for the regime applicable to the UK's relations with EU Member States. The only parts of Brussels IIa and the Maintenance Regulation that could usefully be kept in the Great Repeal Bill are the jurisdiction provisions. The legislature will have to consider what jurisdiction rules to apply in relation to cases that do not fall within the scope of Hague 1996. The best combination seems to be Articles 5-7 and 11-12 of Hague 1996 and Articles 12 and 14 of Brussels IIa with references to Member State and Contracting State being replaced by the UK or the relevant part of the UK. The common law *forum non conveniens* should apply to declining jurisdiction in favour of non-Contracting States to Hague 1996. It would have to be made clear that the prorogation rule would give way to the Hague 1996 jurisdiction provisions in cases where the parties have chosen a court or the child is habitually resident in another Hague 1996 Contracting State. In the long run, efforts should be made to improve the choice of court regime for parental responsibility and access under the 1996 Convention by supporting the work of the Experts' Group in the Hague Conference on Private International Law that is trying to widen party autonomy for family agreements involving children considerably beyond what is possible under Hague 1980, 1996 and 2007 and even beyond what is possible under Brussels IIa and the Maintenance Regulation (and the EU enhanced

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<sup>94</sup> Ibid at chapters 35 and 47.

<sup>95</sup> Ibid at chapter 3.

<sup>96</sup> See n 14 above at 2.3.

<sup>97</sup> Notably Lady Hale (academic and judicial background in family law) and Lord Wilson (legal practice and judicial background in family law) but also many of the other Supreme Court Justices either had family law and/or private international law experience in practice or as a judge in a lower court and certainly had extensive experience of private law matters. Though the UK would be well advised post-Brexit to ensure that all qualified lawyers have studied private international law (only Scottish advocates have this requirement at present) and this could be a very outward looking and sensible replacement for requiring a pass in EU law.

<sup>98</sup> See Beaumont et al n 18 above in chapters 3, 33, 41 and 47. See also Working Paper No. 2016/6 n 27 above at 'K' saying: "the UK Supreme Court will be able to give a lead in uniform interpretation of the Conventions unfettered by the dynamics of the EU integration agenda which may distort the CJEU's ability to carefully interpret international conventions consistent with the intentions of the drafters. The CJEU does not have a practice of referring to the leading jurisprudence of the courts of Contracting States when interpreting international conventions which makes it difficult for that Court to reflect an internationalist interpretation of those conventions."

cooperation instruments on matrimonial property) by creating a one stop shop for all issues to be dealt with together in one forum (ideally divorce, financial consequences of divorce, maintenance, matrimonial property, parental responsibility, access and property issues relating to the children).

The Hague Convention regime has certain advantages for the UK over the EU Regulation regime. In particular, it means that the unsuccessful experiment in overriding foreign Hague 1980 non-return orders can be abandoned and will not be applied in relation to child abduction cases between the UK and EU Member States in either direction. This means that the UK's crucial role in helping to lead the world in the best interpretation and practice of the Hague 1980 Convention can be revitalised uncluttered by EU integration agendas and overblown conceptions of mutual trust that simply do not work. In relation to Hague 1996 the UK is well positioned to become the leader in best practice and interpretation of that Convention because it will have much more extensive case law under that Convention once all the cases with the EU Member States fall under it rather than Brussels IIa. That Convention is on the cusp of becoming truly successful and its greater visibility in the UK will give a much greater incentive for the UK to push for ratification and accessions to that Convention by the US, Commonwealth countries and other non-EU States. This in turn will create benefits for the EU in its promotion of the operation of Hague 1996 with the rest of the world. In relation to the substance of Hague 1996 compared to Brussels IIa, it has a more flexible and realistic regime in relation to access both for jurisdiction and recognition and enforcement. Finally, in the context of maintenance the UK will benefit from being free of the almost completely unqualified duty to recognise and enforce maintenance decisions from other EU Member States which is not reciprocated in other EU Member States (which nonetheless will apply the Hague Maintenance Protocol in cases involving one or more parties from the UK because the provisions of that Protocol have universal application and therefore UK citizens will still get the benefit of the special rules in Articles 5 and 6). In addition, the UK can choose to abandon the strict *lis pendens* rules in the Maintenance Regulation and restore a more flexible system based on the Scottish doctrine of *forum non conveniens*.

In all these matters students, practitioners and judges will be grateful to have fewer operative legal regimes post-Brexit than exist currently where we have a Hague international regime, an EU regime and in some cases residuary regimes operative in the UK. This can be reduced to an international regime and in some cases residuary regimes operative in the UK (which can be differentiated in the different legal systems in the UK to respect subsidiarity).