# CURRENT DEVELOPMENTS

## PRIVATE INTERNATIONAL LAW

Edited by Peter McEleavy

**I. Brussels II *bis*: Matrimonial Matters, Parental Responsibility, Child Abduction and Mutual Recognition**

**II. Enforcing Anti-Suit Injunctions Against Sovereign States**

## I. BRUSSELS II *BIS*: MATRIMONIAL MATTERS, PARENTAL RESPONSIBILITY, CHILD ABDUCTION AND MUTUAL RECOGNITION

### *A. Introduction*

At the Justice and Home Affairs (JHA) Council meeting in Brussels on 2 and 3 October 2003 final political agreement was reached on a new and expanded version of the Brussels II Regulation, a text which has commonly become known as Brussels II *bis*. The instrument, which was adopted by the JHA ministers on 27 November, has now received formal classification as *Council Regulation No 2201/2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and Matters Relating to Parental Responsibility Repealing Regulation (EC) No 1347/2000*.[1] The net result of this precipitous reform is that Brussels II shall cease to have effect from 1 May 2005,[2] a mere 4 years and 2 months after it entered into force. Henceforth there will be a single, integrated instrument which will cover, inter alia, the free movement of judgments in matters of parental responsibility as well as of matrimonial judgments and introduce provisions on cooperation between Member States.

In contrast to Brussels II, which originated as a Convention, the revised instrument has evolved solely as a piece of Community legislation and therefore there is no explanatory report to facilitate the understanding of its provisions or to trace the drafting history.[3] Notwithstanding this regrettable absence, an evaluation of the new initiative and the background against which it was elaborated would strongly suggest that the origins of the project as a whole and the motivation which drove it through several years of difficult negotiation, lay not so much in the pressing need for a separate European

[1] OJ 2003 L 338/1.

[2] This is the date on which the core of the new Regulation becomes directly applicable, see Art 72(2). The Regulation enters into force on 1 Aug 2004, but only Arts 67–70 apply from this date. These Articles deal with operational matters such as: information on central authorities, information relating to courts and redress procedures, amendments to standard forms and the existence of a committee to assist the Commission in monitoring the instrument.

[3] Cf *The Explanatory Report on the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction, Recognition and Enforcement of Judgments in Matrimonial Matters*, prepared by A Borrás, OJ 1998 C221/27, at para 25 [hereinafter: Borrás Report].

[*ICLQ* vol 53, April 2004 pp 503–518]

https://doi.org/10.1093/iclq/53.2.503 Published online by Cambridge University Press

family law instrument in this area, but in the politico-legal aspirations of the Commission and of certain Member States in the field of civil law generally.[4] It is of course possible to point to legal issues which required attention, namely the flaws manifest in Brussels II with regard to parental responsibility matters. However, it should not be ignored that the responsibility for the latter lies with the Member States who agitated for the incorporation of certain parental responsibility matters within the 1998 Convention.[5] Indeed the first Community family law instrument is more notable for what it leaves out than for what it contains in this area. Article 1(b) makes clear that it is concerned solely with civil proceedings relating to parental responsibility affecting children of both spouses where the children are habitually resident in a Member State,[6] and which arise on the occasion of civil proceedings relating to divorce, legal separation or marriage annulment.[7] The first restriction arguably gives rise to greatest complication given that separate rules are applied to children of both spouses and any step children.[8] Particular difficulty also attaches to the separate recognition and enforcement regimes which operate in respect of the different orders. While custody or access orders[9] relating to children of both spouses benefit from the favourable regime put in place by the Regulation, orders as regards other 'children of the family' have to fall back on the less satisfactory rules with their wide grounds of non-recognition found in the 1980 Council of Europe Convention.[10] This could, for example, lead to the unfortunate situation whereby a primary carer relocates within the European Union and is able to achieve recognition in that State for the custody order in her favour in respect of one of her children, but not the other.[11]

A new legislative initiative was nevertheless not the only means of addressing the gaps in Council Regulation No 1347/2000. Advantage could have been taken of a pre-existing solution, namely that Member States could have become parties to the 1996

[4] P McEleavy 'The Brussels II Regulation: How the European Community has Moved into Family Law' [2002] ICLQ 883–908. See also McEleavy 'First Steps in the Communitarisation of Family Law: Too Much Haste, Too Little Reflection?', in K Boele-Woelki (ed) *Perspectives For the Unification or Harmonisation of Family Law in Europe* (Antwerp Intersentia 2003) 509. M Jänterä-Jareborg 'Unification of International Family Law in Europe—a Critical Perspective' in Boele-Woelki, op cit, at 194.

[5] One can legitimately ask why certain matters relating to parental responsibility were ever incorporated into the Brussels II Convention in the first instance, see McEleavy 'The Brussels II Regulation' (n 4 at 892).

[6] For the habitual residence requirement see Art 3.

[7] It is for national law to determine what civil proceedings relating to parental responsibility will include.

[8] The Regulation will apply to adopted children of both spouses but not as regards a child adopted by only one of the parties; see Borrás Report (n 3) para 25.

[9] The traditional terms still prevail in private international law, rather than the modern alternatives, residence and contact.

[10] As implemented by the Child Abduction and Custody Act 1985. The other thirteen Member States to which the Regulation applies have all ratified the 1980 Convention.

[11] The United Kingdom government did attempt to have the scope of Brussels II extended to cover 'children of the family' but this was rejected by a significant number of other States under whose laws separate rules existed in respect of step-children; oral evidence of Oliver Parker to the House of Lords' Select Committee; Report of the House of Lords Select Committee on the European Communities 'Brussels II: The Draft Convention on Jurisdiction, Recognition and Enforcement of Judgments in Matrimonial Matters' HL Paper 19, Session 1997–8, q 169. This limitation is recognized in the Borrás Report (n 3) para 25.

https://doi.org/10.1093/iclq/53.2.503 Published online by Cambridge University Press

Hague Convention on the Protection of Children.[12] This would have had the not inconsiderable merit of ensuring that a single instrument governed private international law matters with regard to children at a global level. Notwithstanding the benefits inherent in such an approach, not least at a practical level, the underlying political dynamic, in which the creation of a European area of justice is key, meant that it was unrealistic to expect an external instrument to be embraced to resolve intra-Community parental responsibility matters.[13] The central issue in this context was that the Community was not simply interested in achieving equality for all children by constructing an instrument which would deal with all decisions in matters of parental responsibility, it wanted to go much further. The expanded Regulation was destined to become a vehicle for two additional policy objectives: to provide a Community remedy for European child abduction cases and to showcase the Tampere goal of the mutual recognition of judgments, by removing any intermediate steps to, and therein any grounds of opposing, the recognition of access orders.[14] In this initial presentation of the new Regulation it is not proposed to analyse the merits of such underlying policy aims, but simply to explore their impact as part of a general evaluation of the key changes introduced by the instrument.

### *B. Matrimonial Matters*

The reconstruction and expansion of the Brussels II Regulation does not change the substance of the rules with regard to matrimonial actions. The seven grounds of jurisdiction for matters relating to divorce, legal separation of marriage annulment found in Article 2 remain intact but are now in Article 3.[15] The latter provision is the first in a revised Chapter II, Section I which is now dedicated exclusively to matrimonial matters. Consequently the provisions on parental responsibility[16] and child abduction[17] have been removed and the remaining four Articles dealing with counterclaims, the conversion of a legal separation into a divorce, the exclusive nature of jurisdiction and residual jurisdiction, become Articles 4, 5, 6, and 7 respectively. The only amendments made are to reflect their application being solely to matrimonial actions. Elsewhere the

[12] Member States were not free to ratify the Convention on an individual basis, there being an overlap in the subject matter of the latter instrument and the Brussels II Regulation. If the Convention were to be ratified by EC Member States permission had to be granted by the Council, see generally on the issue of external competence: Case 22/70 *Commission v Council (ERTA)* [1971] ECR 263.

[13] As part of the political compromise reached on 29 Nov 2002 with regard to the treatment of child abduction cases (see J-P Stroobants 'Les Quinze Adoptent une Unification du Droit Familial Pour les Enfants Binationaux' *Le Monde* 1 Dec 2002), it was agreed that EC Member States would be permitted to sign the 1996 Convention, see OJ 2003 L48/1 (this occurred on 1 Apr 2003, see <http://www.hcch.net/e/status/proshte.html>). Where a matter falls within the scope of both instruments Art 61 of Brussels II *bis* makes clear that the Regulation will apply where a child is habitually resident in a Member State or where a judgment made in one Member State is to be recognized in another, even if the child concerned is habitually resident in a third State which is party to the Convention.

[14] See Conclusions 33 and 34 of the European Council Meeting at Tampere, 15 and 16 Oct 1999, <http://www.europa.eu.int/comm/justice_home/doc_centre/civil/recognition/doc_civil_recognition_general_en.htm>.

[15] The new Art 2 provides a list of eleven definitions of core concepts employed within the Regulation.

[16] Ex Art 3.

[17] Ex Art 4.

https://doi.org/10.1093/iclq/53.2.503 Published online by Cambridge University Press

other changes which may be noted are that a drafting modification has been made to the *lis pendens* provision so that there are no longer distinct paragraphs dealing with competing matrimonial proceedings between the same parties which do and do not involve the same cause of action.[18] Of greater note there is now no provision made for agreements with third States. Article 16 of Brussels II allowed for the possibility of a Member State entering into an agreement with a non-Member State to the effect that the Member State would not have to recognize judgments made in other Member States where jurisdiction had been taken on a basis other than in Articles 2–7. It is far from clear why this provision was in the original Regulation at all for in adopting common rules in respect of matrimonial matters the Community acquired exclusive external competence with the effect that Member States lost their freedom to undertake obligations with third States which affected those rules. The limited scope of Brussels II may have made this relatively unimportant, but that is certainly not the case with the new instrument, thereby in making no express provision the Community has retained control of all third party negotiations with regard to matters falling within the scope of the Regulation.[19]

Finally an amendment to a provision of general application does bring a measure of uncertainty with regard to matrimonial matters. Ex Article 12 provided that nothing in Brussels II prevented the courts of a Member State from taking such provisional or protective measures in respect of persons or assets in that State as might be available under the law of that Member State, even if the court of another Member State had jurisdiction as to the substance of the matter. As the Regulation did not apply to property matters of any sort, it was clear that in using the word 'assets' the drafters intended the provision to incorporate matters lying outside the material scope of the instrument.[20] However, such clarity of purpose does not automatically attach to the same wording in Article 20 of the revised Regulation. Firstly, measures relating to the protection of a child's property are now within the scope of the Regulation[21] and secondly, an additional paragraph in Article 20 affirms that any provisional and protective measures taken shall cease to apply when the court of the Member State having jurisdiction under the Regulation as to the substance of the matter has taken the measures it considers appropriate. The latter clause would clearly suggest that provisional and protective measures should relate to matters coming within the scope of the Regulation. In the absence of an explanatory report one is left to wonder whether the drafters have now sought to limit the questionable breadth of Article 12.[22]

### *C. Matters Relating to Parental Responsibility*

In seeking to delimit the material scope of Brussels II *bis* insofar as the instrument relates to parental responsibility matters, reference must first be made to Article 1(1)(b) which affirms that the Regulation shall apply in civil matters relating to: 'the attribution, exercise, delegation, restriction or termination of parental responsibility.' Further precision is provided in Article 1(2) which specifies that the latter shall include private

[18] Art 19(1), ex Art 11(1) and (2).
[19] See McEleavy 'The Communitarization of Divorce Rules: What Impact for English and Scottish Law?' (forthcoming).
[20] Borrás Report (n 3) para 59.
[21] Art 1(2)(e).
[22] See McEleavy 'The Communitarisation of Divorce Rules' (forthcoming).

https://doi.org/10.1093/iclq/53.2.503 Published online by Cambridge University Press

law matters: custody, access, guardianship, but not the naming of the child or the establishment or contesting of a parent–child relationship; public law matters: the placement of a child in a foster family or in institutional care, but not to adoption issues; and, measures for the protection of the child relating to the administration, conservation, or disposal of the child's property,[23] but not to trusts, succession issues or maintenance obligations.[24] Other matters excluded are emancipation issues and measures taken as a result of criminal offences committed by children. In contrast to Brussels II there is also a definition of the term 'parental responsibility'. Article 2(7) states that it shall mean:

> all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access.[25]

As was the case with matrimonial matters in Brussels II, the delineation of the territorial scope of the new Regulation in terms of parental responsibility matters is one which is enveloped in uncertainty. Article 14 affirms that jurisdiction will be determined by national law where no court of a Member State has jurisdiction pursuant to Articles 8–13. Consequently one can deduce that the Regulation jurisdiction rules apply where a child is habitually resident in a Member State,[26] or where a child is not habitually resident in a Member State but parental responsibility proceedings are brought in conjunction with matrimonial proceedings, jurisdiction for the latter having been taken under Article 3,[27] or, where the child has a substantial connection with a Member State[28] and jurisdiction has been accepted unequivocally by all the parties to the proceedings at the time the court is seised and is in the best interests of the child,[29] or finally, on the basis of the child's presence in a Member State,[30] provided the child's habitual residence cannot be established and jurisdiction cannot be determined on the basis of Article 12. Seen together these rules may appear impenetrable but in any given case it should be relatively apparent as to which, if any, will be applicable thereby triggering the application of the Regulation in respect of a matter falling within the material scope. The issue not resolved by the Regulation however is the interrelationship of these rules and the internal rules of Member States. The legal basis from which Brussels II *bis* derives its legitimacy, Article 65 of the EC Treaty, makes clear that the measures which may be adopted in the field of judicial cooperation in civil matters are those which have '*cross-border implications*' consequently there is no obligation for the Brussels II *bis* rules on parental responsibility to apply in purely internal cases. It

[23] Para 9 of the Recital stresses that any measures relating to a child's property which do not concern the protection of the child should be governed by the Brussels I Regulation.

[24] Cf Art 3, 1996 Hague Convention.

[25] Cf Art 1(2), 1996 Hague Convention.

[26] Art 8.

[27] Art 12(1). The more permissive formulation of Art 3(1) of Brussels II, where the child is habitually resident in the State with jurisdiction over the matrimonial proceedings has been removed. Moreover the formulation adopted in 12(1) represents a further tightening of the ex Art 3(2) by requiring the acceptance of the jurisdiction by the any holders of parental responsibility as well as of the spouses. This reflects the fact that the material scope of new Regulation is not limited to children of both spouses.

[28] Art 12(3)(a) suggests that this may be by virtue of the child being a national of that Member State or that one of the holders of parental responsibility is habitually resident in that Member State.

[29] Art 12(3).

[30] Art 13.

https://doi.org/10.1093/iclq/53.2.503 Published online by Cambridge University Press

is highly questionable though how this theory will translate into practice since the very structure and nature of the jurisdiction rules would make a dual system impractical.[31]

*1. Jurisdiction*

Under the general ground in Article 8 jurisdiction in matters of parental responsibility is attributed to the courts of the Member State in which the child is habitually resident at the time the court is seised. This is subject to the provision on prorogation,[32] identified above, a transfer of jurisdiction rule applicable following the wrongful removal or retention of a child,[33] and a rule providing for a limited continuing jurisdiction of a child's former habitual residence, where that is another Member State.[34] Article 9 provides that where a child lawfully relocates from one Member State to another and acquires a habitual residence in the new place of residence then the courts of the former State of habitual residence shall retain jurisdiction for a 3-month period following the move.[35] The continuing jurisdiction is limited to the purpose of modifying a judgment on access rights issued in the previous State of habitual residence before the move, provided the holder of access rights continues to be habitually resident in that State.[36]

While the rationale behind this provision is clear to see and not without some merit, the methodology is flawed. The rule would appear to be based on the presumption that there will be an immediate acquisition of habitual residence in the new State following the move. If the interpretation of the connecting factor given by the ECJ in the case of *Swaddling v Adjudication Officer*[37] is given general application and extended to children, then there is some justification for this, although the wider consequences of such an approach would be extremely regrettable.[38] However, this is most certainly not the general interpretation of the concept which has traditionally been applied in the United Kingdom, where the House of Lords has made it clear that there must be a factual element, which is ordinarily residence for a 'period' of time.[39] If the latter understanding of habitual residence is applied then in a relocation case where there is a definitive departure from one State with the intention of settling elsewhere[40] there will necessarily be an interregnum during which the child has lost the previous habitual residence but not yet acquired a new one. If a child has no habitual residence then Article 9 cannot operate. In itself this is not a serious problem, but, difficulties could arise if a child is deemed to be habitually resident in the new State say two months after the move. In such a case Article 9 could be activated, albeit that the continuing jurisdiction could only apply for one month, but, there is a potential for conflict because during the

[31] Cf the position adopted in England and Wales and Scotland with regard to the matrimonial rules in Brussels II, considered in McEleavy 'The Communitarization of Divorce Rules' (forthcoming).

[32] Art 12. [33] Art 10. [34] Art 9.

[35] It is not clear if the 3-month period is absolute or if proceedings commenced before the deadline may be continued until completed.

[36] Cf *Re S (Residence Order: Forum Conveniens)* [1995] 1 FLR 314.

[37] Case C90/97 [1999] ECR I-1075. The Court ruled, in the context of entitlement for social security, that length of residence was not an intrinsic element of the concept habitual residence.

[38] This is because children would be connected to a jurisdiction with which they had no real and meaningful connection.

[39] *Nessa v Chief Adjudication Officer* [1999] 4 All ER 677, at 682.

[40] In such a situation the existing habitual residence will be lost upon departure, see *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562.

https://doi.org/10.1093/iclq/53.2.503 Published online by Cambridge University Press

two preceding months the courts in the new State of habitual residence might have lawfully been taking measures in respect of access on the basis that the child was present in the jurisdiction.[41] Moreover it must be remembered that under the new Regulation access orders have the potential to benefit from the new 'fast track' recognition regime.[42]

Of the remaining grounds of jurisdiction reference has already been made to jurisdiction based on presence[43] and residual jurisdiction.[44] The specific inclusion of the latter within the Regulation is a matter of some regret as it means that decisions in matters relating to parental responsibility taken on potentially exorbitant bases of jurisdiction will be able to benefit from the instrument's recognition and enforcement regime. The final ground of jurisdiction in Chapter II, Section 2 is something of a novelty for a Community private international law instrument as it allows, albeit to a very limited extent, for a court having jurisdiction under the Regulation to transfer jurisdiction to another Member State.[45]

### *D. Child Abduction*

From an early stage in the elaboration of the Regulation it was clear that a number of Member States wished to include substantive provisions within the Regulation to deal with intra-Community cases of child abduction. This was a highly controversial issue as an equal number of States were of the view that this area did not require legislative intervention since it was more than adequately dealt with by the 1980 Hague Convention to which all Member States were party. Contrary to the available statistical evidence the advocates for reform were convinced that abducting parents were able to use the Convention to their advantage by successfully invoking the exceptions to a return order and to legitimize a change in the child's jurisdictional connection.[46] The compromise brokered by ministers at the JHA Council meeting on 29 November 2002 sought quite naturally to reflect both viewpoints but as these were entirely opposing the result was a very unsatisfactory settlement which is likely to cause years of confusion and may prove to be a retrograde step in this very sensitive and public area of law.

Paragraph 17 of the Recital reflects the essence of the compromise that the Convention will continue to apply in abduction cases, but will be complemented by the Regulation. The latter will reinforce the position of the State of habitual residence and indeed give it ultimate control over whether a change of jurisdiction can follow a wrongful removal or retention.[47] Given the fundamental nature of the changes it may

[41] Art 13. If the holder of access right has participated in such proceedings, other than to contest jurisdiction, then the continuing jurisdiction of the previous State of habitual residence will be de-activated, Art 9(2).

[42] Art 41, discussed below, at 511.

[43] Art 13. [44] Art 14. [45] Art 15.

[46] In 1999 statistics for fourteen of the fifteen EC Member States (there are no figures for Greece) revealed that there were 295 admissible incoming Hague Convention applications of which fifty-one (17.3 per cent) led to a non-return order being made on the basis of one of the exceptions. The data is derived from N Lowe, S Armstrong, and A Mathias 'A Statistical Analysis of Applications made in 1999 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction' (Prel Doc No 3 of Mar 2001 for the attention of the Special Commission of March 2001), revised Nov 2001.

[47] In addition to Art 11, discussed below, reference should also be made to Art 10 which introduces very strict conditions as to where there will be a transfer of jurisdiction from a child's State of habitual residence after a wrongful removal or retention, cf Art 7 1996 Hague Convention.

https://doi.org/10.1093/iclq/53.2.503 Published online by Cambridge University Press

be questioned to what extent there is complementarity between the instruments or whether Brussels II *bis*, and in particular Article 11, in fact fundamentally alters the 1980 regime. Paragraphs 2–5 of Article 11 introduce minor changes: when applying Articles 12 and 13 of the 1980 Convention children *shall* be given the opportunity to be heard unless this is inappropriate given their age or maturity;[48] a court seised of a return application *shall* issue its judgment within 6 weeks unless exceptional circumstances make this impossible;[49] a non-return order *cannot* be made on the basis of Article 13(1)(b) if it is established that adequate arrangements have been made to secure the protection of the child after his return;[50] and, a non-return order *cannot* be made unless the applicant has been given an opportunity to be heard.[51]

The more substantive changes are to be found in the subsequent paragraphs, where it is specified that where a non-return order is made on the basis of Article 13[52] then the court order and a transcript of the proceedings must be forwarded to the authorities in the child's State of habitual residence within a month.[53] Thereafter if a court is not already seised in that State the authorities must notify the parties and invite them to make submissions to the court within 3 months (and thereby commence proceedings it may be presumed) so the court can examine the question of custody.[54] Notwithstanding the existence of a non-return order, the court in the State of habitual residence may make an order requiring the return of the child;[55] such an order is capable of fast-track recognition and as such it would not be possible for the abducting parent to challenge recognition.[56]

This mechanism of allowing subsequent return orders to 'trump' non-return orders made under Article 13 of the 1980 Convention may fit in nicely to the new 'fast-track' recognition regime, but, it is clearly at variance with the principle which has underpinned the 1968 Brussels Convention and all subsequent initiatives in this field, namely that there should be mutual trust between the Member States.[57] The drafters of the Hague Convention were very clear that the grounds of non-return in Article 13 were only to operate in exceptional circumstances.[58] By and large this is what has happened in practice, particularly in the United Kingdom. Therefore if courts are acting responsibly and only using the safety valve when required, there is no justification to allow courts in another Member State to go behind such findings and in essence have a re-hearing. If 'trumping orders' are made as a matter of course it will undoubtedly give rise to a body of ill-feeling and resentment between courts in Member States. To take an obvious example, if a German court declines to make a return order on the basis of the objections of a wrongfully removed 9-year-old child,[59] should a court in the child's State of habitual residence, which does not generally listen to the views of a child so

[48] Art 11(2). Cf Art 13(2) 1980 Hague Convention.
[49] Art 11(3). Cf Art 11 1980 Hague Convention.
[50] Art 11(4). See, eg, *Re H (Children) (Abduction)* [2003] All ER (D) 308, [2003] EWCA Civ 355.
[51] Art 11(5).
[52] Cf exceptions in Arts 12(2) and 20, 1980 Hague Convention.
[53] Art 11(6).
[54] Art 11(7).
[55] Art 11(8).
[56] Art 42.
[57] Somewhat ironically this is reiterated in para 21 of the Recital.
[58] See Explanatory Report of the Convention on the Civil Aspects of International Child Abduction, E Pérez-Vera *Actes et Documents of the XIVth Session*, Volume III, 1982, 426, at 434, para 34.
[59] Art 13(2) Hague Convention.

https://doi.org/10.1093/iclq/53.2.503 Published online by Cambridge University Press

young, be entitled to re-evaluate whether the child should be sent back? Surely in the interests of comity it should not, although an argument could be made that the child's future should be determined under the law of the child's State of habitual residence. Possibly less controversial is where a court makes a factual finding that the left behind custodian has consented to or acquiesced in a removal[60] and exercises its discretion not to make a return order. Why in such a case should the authorities in the State of habitual residence be entitled to impose a different interpretation? These are but some of the many problems which are likely to arise under the new combined Hague Convention, Brussels II *bis* arrangement.

### *E. Recognition and Enforcement*

The new Regulation contains two separate recognition and enforcement regimes. The well known traditional or 'standard' track, applicable to matrimonial orders and the majority of decisions in matters relating to parental responsibility, and a new 'fast' track which, if the requisite procedural safeguards are complied with, can be used for access orders and return orders after a non-return order is made on the basis of Article 13 of the 1980 Hague Convention.

#### *1. 'Standard Track'*

The four grounds of non-recognition for matrimonial orders in Article 22 are the same as those found in the original Brussels II.[61] Similarly no changes have been made to the grounds of non-recognition for parental responsibility judgments but these have been moved to a separate provision[62] and there is an additional ground[63] to cover the situation if there is non-compliance with the procedure put in place with regard to public law proceedings where a child is to be put into care in a Member State other than the one seised of the application.[64]

#### *2. 'Fast Track'*

Under the 'fast-track' regime access orders and orders for the return of the child made under Article 11(8) which are made in a Member State shall be recognized and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of recognition being challenged.[65] To be fast-track compliant the judgment must be certified in the Member State of origin to ensure that it has complied with grounds of procedural fairness,[66] although in the case of a return order the court of origin, ie, the court in the child's State of habitual residence prior to the wrongful removal or retention, must also have taken into account in issuing its judg-

[60] Art 13(1)(a), Hague Convention.
[61] Art 15(1).
[62] Art 23.
[63] Art 23 (g).
[64] Art 56. This is one of the provisions of Chapter IV which has put in place a central authority network to ensure cooperation between Member States and courts as well as for holders of parental responsibility.
[65] See Art 41(1)—rights of access, Art 42(1)—return orders.
[66] See Arts 41(2) and 42(2).

https://doi.org/10.1093/iclq/53.2.503 Published online by Cambridge University Press

ment the reasons for and evidence underlying the non-return order made under Article 13 of the 1980 Hague Convention.[67] It has previously been noted that the automatic recognition of return orders may give rise to problems in practice, however, it must be pointed out that 'fast tracking' extends only to recognition, enforcement remains a matter for national law[68] and as has sometimes happened in Hague Convention proceedings a return order may be made but then not enforced either because of the objections of the children or the harm which might result to them by being sent back.[69]

PETER MCELEAVY*

## II. ENFORCING ANTI-SUIT INJUNCTIONS AGAINST SOVEREIGN STATES[1]

The Court of Appeal (Pill and Waller LJJ and Sir Martin Nourse) has considered interesting jurisdiction issues arising out of a projects dispute between a Pakistani company ('Sabah') and the Government of Pakistan (the 'GOP'). The Court gave welcome guidance on the principles underlying the grant of anti-suit injunctions in cases where the parties have agreed to the non-exclusive jurisdiction of the English courts. However, questions of how an anti-suit injunction obtained against a State may be enforced largely remain unanswered.

### *A. The Facts*

Sabah was incorporated by its Malaysian parent for the sole purpose of entering into certain agreements with the GOP and a State-owned corporation, the Karachi Electrics Supply Corporation Limited. As part of the arrangements, the GOP also entered into a guarantee in favour of Sabah. The guarantee contained a waiver of sovereign immunity clause and a jurisdiction clause in favour of the courts of England.

Disputes arose and Sabah made a demand under the guarantee. The GOP refused to pay and issued proceedings in Pakistan obtaining an injunction preventing Sabah from commencing proceedings in England. The case was adjourned in Pakistan until a specified date. Sabah asserted that the anti-suit injunction ceased to have effect after that date whilst the GOP asserted that it remained effective. In any event, Sabah made an application to the English court and David Steel J (who did not feel it necessary to resolve what had happened in the Pakistani proceedings) granted an anti-suit injunction restraining proceedings in Pakistan.

### *B. The Jurisdiction Clause*

On appeal, Lord Justice Waller, who gave the leading judgment, held that on its true

[67] Art 42(2)(c).
[68] Art 47(1).
[69] See *Re B (Children) (Abduction: New Evidence)* [2001] 2 FCR 531 and the subsequent report in *The Times*, 18 May 2001.

* Lecturer in Law, University of Aberdeen.

[1] *Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan* [2002] All ER (D) 201 (Nov), [2002] EWCA Civ 1643. Also reported at [2003] 2 Lloyd's Rep 571.

https://doi.org/10.1093/iclq/53.2.503 Published online by Cambridge University Press