

Template for the reports by the national legal experts

Introduction

This document constitutes the template to be used by the network of national legal experts in order to conduct an empirical analysis concerning the application of the Brussels IIa Regulation.

The objective of the preparation of national reports is to:

- conduct a mapping of national legislation in the Member States, consisting of a legal analysis of domestic proceedings on both matrimonial matters and parental responsibility matters setting out how decisions on these matters are currently taken in the Member States and addressing issues, such as:
 - type of proceedings used;
 - type of decisions available;
 - enforcement of these decisions etc.
- provide additional country-specific information, e.g.:
 - existence or otherwise of legal separation and annulment;
 - definition of a “child”.
- prepare a case law analysis identifying difficulties and practical problems encountered by:
 - citizens;
 - courts; and
 - practitioners.

Instructions concerning the preparation of the national report for your country

The report is structured in three sections:

National Family Law on proceedings on matrimonial proceedings;

National Family Law on and parental responsibility proceedings;

Identification of specific problems which have arisen in your jurisdiction with regard to the application of the Brussels IIa Regulation based on case law.

In the first two sections, you should provide a description of the specificities of national family law in your country.

In the third section, a number of specific issues related to the Brussels IIa Regulation¹ have been identified by the project team. The answers which you will provide in this section, based on case law, should validate whether the issues have been encountered in your Member State. In particular, practical problems/shortcomings and the possible difficulties relating to the interpretation of the Regulation should be reported. Based on the validation of these issues, the project team will assess the nature and scale of these issues in order to analyse the problems (e.g. costs and time delays) which they generate and their impact on citizens.

Background information:

Member State:	BELGIUM
Legal Expert:	PATRICK WAUTELET ²
Date for the submission of the draft national report	

National Family Law on matrimonial proceedings

The answers provided in this section should make reference to national legislation and national case law.

Analysis of standards in your jurisdiction in relation to matrimonial matters

- General overview of the rules concerning matrimonial matters setting out how decisions on matrimonial matters are currently taken and addressing issues, such as:
 - o types of decisions available
 - o types of proceedings used etc.

A distinction must be made depending on whether the spouses seek independent relief or relief in the framework of divorce proceedings.

Decisions on matrimonial matters may first be taken *during the course of the marriage*. If they experience difficulties, spouses may request a court to order provisional or protective measures. Requests for such relief may be filed independently of any divorce petition. Jurisdiction to grant such measures is reserved to the justice of peace ('juge de paix' - 'vrederechter'), which is a guarantee of accessibility. Proceedings are held *in camera*. The judge may order such measures as he/she considers are necessary given the situation of the spouses. Such measures may concern the personal relationships of the spouses (e.g. the judge may grant the spouses the authorization to reside separately) or their assets (e.g. the judge may order one of the spouses to make payments towards common expenses). The legal basis for such proceedings can be found in Article 223 of the Civil Code (or Article 1479 of the Civil Code for partners bound by a 'legal cohabitation'). The petition must be filed with the Justice of the Peace of their (last) common residence. Rulings by the Justice of peace may be appealed before the Court of First Instance. Pending the appeal, such rulings are duly enforceable (art. 1388 Code of Civil Procedure), provided the ruling has first been served (art. 1495 Code of Civil Procedure).

² I gratefully acknowledge the very useful assistance of Ms. Silvia Pfeiff, attorney at law (Brussels), PhD candidate and research assistant (University of Brussels and University of Liège) in the preparation of this report.

Spouses may also seek divorce (or legal separation or annulment of the marriage) – art. 229 of the Civil Code. This must be done before the Court of First Instance (CFI). Divorce may be sought either by mutual agreement, when the two spouses agree, or upon showing of an irretrievable breakdown.

Pending divorce proceedings, married partners can petition the President of the Court of First Instance (art. 1258 and 1280 Code of Civil Procedure) to seek provisional measures which may concern either the spouses themselves or their children.

These measures will stand after divorce (art. 302 Civil Code) until revocation by the competent Juvenile Court.

Starting on 1st of September 2014, family law disputes will be handled by one single court, i.e. the 'family court' ('*tribunal de la famille et de la jeunesse*' / '*familierrechtbank*'), composed of three chambers (Act of 30 July 2013 creating a Family and Youth Court, Official Gazette, 27 September 2013). This will avoid the current situation where disputes relating to one and the same family may be brought before different courts.

- Rules on the existence of registered partnerships and (if applicable) the modalities of judicial separation or dissolution of registered partnerships. Please mention any practical difficulties relating to the absence of EU law with respect to the dissolution, separation or annulment of registered partnerships.

Registered partnerships may be concluded since the coming into force of the Act of 23 November 1998, which entered into force on the 1st of January 2000. The primary statutory provision may be found in Article 1475 of the Civil Code.

According to Article 1476 par. 2 of the Civil Code, a registered partnership terminates as of right when one of the partners passes away or gets married. A registered partnership may also be terminated when the two partners agree on such termination. Alternatively, a registered partnership also terminates when one of the partners requests such termination. In order to do so, the partner must file a written declaration with the local registrar.

Whether or not two persons may conclude a registered partnership in Belgium, is determined by Belgian law (art. 60 of the Code of Private International Law). The habitual residence or nationality of the two partners is not relevant in this respect.

- Rules on the existence of same-sex marriages.

Same-sex marriages are allowed in Belgium since the coming into force of the Act of 13 February 2003, which entered into force on the 1st of

June 2003.

The Act did not create a new, separate form of marriage. Rather, the existing institution was opened to same-sex couples. Technically, this occurred through a simple modification of the primary statutory basis for marriage. Article 143 of the Civil Code now provides that two persons of different sex or same sex may conclude a marriage.

In order to facilitate the conclusion of same-sex marriages, a specific provision is included in the Code of Private International Law. According to Article 46 of the Code, reference must be made to the law of the nationality of the spouses in order to determine whether they may conclude a marriage. However, if one of these laws prohibits or does not make it possible in any other way for two persons to conclude a marriage because of the fact they are of the same sex, Article 46-2 of the Code provides that no account should be taken of the prohibition or restriction found in the foreign law. This provision must be read together with Article 44 of the same Code. According to Article 44, a marriage may only be concluded in Belgium provided one of the two spouses at least possesses the Belgian nationality, or has habitually resided in Belgium for the past three months or is domiciled in Belgium.

- National private international law rules concerning jurisdiction in divorce matters where no court of a Member State has jurisdiction pursuant to Articles 3, 4, 5 of the Brussels IIa Regulation (e.g. whether the nationality of one spouse suffices as a connecting factor if both spouses have their residence in a third country).

The rules of jurisdiction dealing with divorce matters may be found in the Code of Private International Law (Act of 16 July 2004, which entered into force on the 1st of October 2004).

According to Article 42 of the Code, divorce proceedings may be introduced in Belgium in various cases, such as when the two spouses possess the Belgian nationality.

When no court of a Member State has jurisdiction according to the Brussels II*bis* Regulation, jurisdiction could be found in Belgium based on Article 42 of the Code. The grounds of jurisdiction listed in Article 42 coincide, however, to a large extent with the grounds included in Article 3 of the Brussels II*bis* Regulation. The only case where Article 42 goes further than the Regulation, is when it allows courts to exercise jurisdiction when the last common habitual residence of the spouses was located in Belgium less than 12 months before the proceedings were issued. This could be the case, e.g., if a Belgian citizen married with a Turkish citizen live for a while in Belgium and then move to Turkey. If the couple separates, the Belgian spouse could file for divorce in Belgium provided the spouses have not left Belgium since more than 12 months. Account should also be taken of Article 11 of the same Code, which makes it possible to bring proceedings in Belgium when no other court has jurisdiction to hear the matter (*forum necessitatis*). This provision may only be used provided the case bears a substantial connection with Belgium. This may be the case e.g. when one of the spouses possesses

the Belgian nationality.

National Family Law on parental responsibility proceedings

The answers provided in this section should make reference to national legislation and national case law.

Analysis of standards in your jurisdiction in relation to parental responsibility proceedings

- General rules concerning parental responsibility proceedings setting out how decisions on parental responsibility are currently taken and addressing issues, such as:
 - o types of decisions available (please specify the authorities that can issue such decisions)
 - o types of proceedings used
 - o possibilities to enforce such decisions etc.

The current landscape in relation to parental responsibility proceedings is quite complex. The starting point is that such proceedings belong to the jurisdiction of the so-called 'Juvenile Court' (art. 387bis Civil Code). The Juvenile Court is a specialized chamber of the Court of First Instance ('*Tribunal de première instance*' / '*rechtbank van eerste aanleg*'). According to Art. 44 of the Juvenile Protection Act, the matter should be heard by the court of the place of residence of the parents. Proceedings are initiated by a petition ('*requête*' / '*verzoekschrift*'). It is important to note that once proceedings are started, they will remain pending on the court's list until the child turns eighteen (or is emancipated). If new circumstances require a ruling to be modified, the proceedings need not be initiated again. A written request to the court's registry is enough for the court to look at the case again.

The Juvenile Court will in all cases first attempt to reconcile the parties. The Court will also inform parties about the existence of mediation. It can stay proceedings in order to allow parties to mediate. When proceedings are pending, the Juvenile Court can order official inquiries as well as provisional measures. This may be done upon request of the parties or ex officio by the court. The Juvenile Court may also issue a temporary decision on the children's status, which may extend to a period of one year.

Next to the Juvenile Court, measures in relation to parental responsibility may also be sought from the President of the Court of First Instance, in case where urgency is shown. This follows from Article 584 of the Code of Civil Procedure, which grants general jurisdiction to the President in urgent matters. The President may order interim measures, which will remain in force until another court has ruled on the merits of the case.

Matters relating to parental responsibility may also be brought before the Justice of Peace, provided the parents are married or bound by a legal partnership. The Justice of Peace may order provisional measures in case of a strong disagreement between the parents. The Justice of Peace will issue orders in relation to custody, contact and access.

When divorce proceedings have been filed before the Court of First Instance, parties may also seek provisional and preliminary relief from the President of the Court of First Instance (Article 1258 and 1280 of the Code of Civil Procedure). Provisional measures ordered by the President will stand during the divorce proceedings and even after the divorce unless they are modified or annulled by the Juvenile Court.

Starting on 1st of September 2014, the creation of the 'Family Court' will make it easier to seek and obtain relief. The Family Court will have overall jurisdiction in family matters, including issues of parental responsibility. It will be possible to seek both relief on the merits and provisional and protective relief from the Family Court.

- Special rules concerning the definition of a child, the legal representation of the child in court (guardian ad litem), in particular form of representation, designation of guardian ad litem, his/her functions and powers etc.

There is one general definition of the 'child' under Belgian law. It may be found in Article 388 of the Civil Code, according to which a child is any person younger than 18 y.

A child cannot be a party to court proceedings, either as a plaintiff, defendant or joined part. A child is represented in court by his parents. When the parents live together, article 373 of the Civil Code provides that they exercise jointly the parental responsibility. Accordingly, the parents must agree on the representation. However, in practice, when only one parent represents the child, this parent is deemed to have acted upon agreement of the other parent in all relations with third parties (art. 376 Civil Code). This presumption applies unless the other parent demonstrates that the third party was acting in bad faith. When the parents do not live together, the principle is also that of joint exercise of parental responsibility (art. 374 Civil Code). The parents must therefore also agree on matters of representation of the child.

Special rules are put in place in cases there is a conflict of interests between the child and the parents, i.e. when a dispute concerns an asset of the child the fate of which is disputed among the parents. In that case, the court will appoint a guardian *ad litem* to represent the child.

In some limited cases, children may directly participate in court proceedings on their own. This is the case in proceedings before the Juvenile Court (see Article 54bis of the Juvenile Protection Act of 8 April 1965). The child must, however, be represented by counsel.

Some courts have in the past accepted that a child could intervene directly in court proceedings, among others in cases where courts are seized of disputes relating to a right to personal contacts with the child (e.g. see T. Robert, "De burgerrechtelijke procesbekwaamheid van de minderjarigen", in *De procesbekwaamheid van minderjarigen*, CBR, Intersentia, 2006, (37), 68 ff).

- Special rules concerning the hearing of the child, in particular minimum age of the child, form and procedure of the hearing, grounds for not hearing the child, grounds for invalidating the hearing, legal consequences of not complying with the obligation to hear the child if it is an obligation under your law, etc.

The situation in relation to the hearing of children in proceedings concerning them, is complex. Article 56*bis* of the Act of 8 April 1956 (introduced in 1995) provides that children must be heard by the Juvenile Court if the child has reached the age of 12 y. This obligation applies in matters relating to parental authority and parental responsibility. In proceedings brought before other courts (such the President of the CFI or the Justice of Peace), no such general obligation exists. Article 931 of the Code of Civil Procedure (adopted in 1994) makes it possible for the court to hear the child but does not impose any obligation to do so. The court may decide in its discretion whether such hearing is useful. A hearing could only be ordered if the child has reached the age of discrimination/discernment. Any decision in relation to such hearing, was final and could not be appealed. According to Article 931 of the Code, the hearing would take place without the presence of the other parties. Court practice in relation to Article 931 was not very coherent.

Starting on 1st of September 2014, the picture will change : a new section will be introduced in the Code of Civil Procedure, which will provide detailed rules on the hearing of children before the new Family Court (art. 1004/1 and 1004/2 of the Code of Civil Procedure). The principle will be that every child has the right to be heard in any proceedings which concern him/her (i.e. in proceedings relating to parental responsibility). The child has the right to be heard, but may refuse to be heard. The new provisions make a distinction depending on the age of the child : if the child is 12 y. old or more, he/she is informed of his/her right to be heard. The child is given a form in which he/she may indicate whether he/she would like to be heard. Even if the child does not provide any indication, the court may order the child to be heard.

If the child has not yet reached the age of 12 y., he may request to be heard. Parties may also request that the child be heard. The public prosecutor may also request a hearing of the child. If the request is made by the child or the public prosecutor, the court must hear the child. The court may, however, refuse to hear the child if the request for such hearing is made by parties. Such refusal must be justified in view of the "circumstances".

The court must hear the child in a place which is deemed to be appropriate. The hearing is held in camera, without the presence of parties or counsels. The court may, however, allow the counsels to be present. The court must draw a report of the hearing and warn the child that parties will be given a copy of the report. The court cannot make a selection among the declarations made by the child.

- Any findings / conclusions relating to the functioning of the standards relating to the hearing of the child or his/her legal representation in court in your country (strengths & weaknesses).

It is commonly accepted that the existing regulations in relation to the hearing of the child, were not coherent and left too many gaps (as was noted by the Constitutional Court in a ruling N° 9/2010 of 4 February 2010). Further, the existing legal framework left too much discretion to courts (see e.g. C. de Boe, "La place de l'enfant dans le procès civil", *J.T.*, 2009, 485-498; Th. Moreau, "Une approche juridique de la place de la parole du mineur dans la vie familiale et sociale", *J. dr. jeun.*, 2006, 23-38; M. Eeckhout and N. Desmet, "Een onderzoek naar de praktijk van het horen van minderjarigen in de Belgische rechtspraak", *T.J.K.*, 2005, 59-61 and K. Herbots, E. Roevens and J. Put, "Participatie van het kind in het gerechtelijk scheidingsproces : droombeeld of realiteit?", *TJK*, 2012, 23-39). This is why a new legal framework was adopted which will come into force on the 1st of September 2014. It is obviously too early to comment on the strengths and weaknesses of this new framework. What is certain, is that courts in Belgium do not have a long tradition in respect of hearing of children. There is a mild reluctance to setting and carrying out such hearings.

- The definition of a "child" according to national law.

There are many definitions of a 'child' under Belgian law. The most basic one is that a child is any person younger than 18 y. (art. 388C Civil Code). This definition applies in all family relationships. One may, however, find that in some specific domains of law, a child younger than 18 y. is not treated as such, but is rather treated as an adult. So it is that a person may draft a will starting at the age of 16 y., which may cover 50% of his assets (art. 904 Civil Code). The Act on Patients Rights (Act of 22 August 2002) also provides that a minor may exercise certain rights independently.

- Conditions for a judgement to be enforceable according to national law. Please include a reference to the hearing of the child and the service of documents.

Requirements for enforcement of judgments are provided for in the Code of Civil Procedure (artt. 1386 ff). Only court decisions (and notarial deeds) may be enforced. Court decisions should be first served upon the debtor before being enforced (art. 1495 Code of Civil Procedure). An enforcement form must be attached (art. 1386 Code of Civil Procedure). Appeal and other recourses do not lead to an automatic stay of enforcement of the ruling. An appeal will only stay the enforcement provided the decision is not immediately enforceable (art. 1388 and 1495 Code of Civil Procedure). Rulings of the Family and Youth Court (which will start to operate in September 2014) are enforceable as of right notwithstanding any appeal, unless the court has stated that an appeal will stay the enforcement (Art. 1398/ Code of Civil Procedure). Enforcement of court decisions is not a private matter. Enforcement has been entrusted primarily to bailiffs ('*gerechtsdeurwaarder*' / '*huissier de justice*'), with the assistance of the public authorities. Enforcement

cannot take the form of physical coercion. Physical coercion is prohibited.

When arrangements regarding children must be enforced, the Court may appoint a number of persons, such as a psychologist or a social worker, who will be present with the bailiff when the latter attempt to enforce the order. The Court may also order that civil servants from welfare agency be present. When this is in the interests of the children, the court may order that the arrangements be exercised in a neutral meeting point.

Starting in 1996, bailiffs ('huissiers de justice' / 'gerechtsdeurwaarder') started to refuse to cooperate with the actual enforcement of court rulings in relation to rights of access and rights of custody.

In order to facilitate the enforcement of family law decisions, a new *fast track* procedure was created in 2006. According to Article 387ter of the Civil Code, a judgment creditor may use this *fast track* procedure to enforce court decisions on the residence of and on contact and access rights with regard to children as well as to the agreement of the parties thereto in case of divorce with mutual agreement (art. 387ter, para. 1 and 2 Civil Code). The procedure may be used when one of the parents refuse to observe the arrangements made with regard to the children. The court is seized by one of the parties and must hear the other party. The court may also be seized *ex parte*, without any hearing of the other party, if the case is very urgent (art. 387ter par. 3 Civil Code). The Court must hear the request at very short notice. The Court may attempt to reconcile the parties or suggest a mediation. It may also order that an official inquiry be carried out, except if the urgency of the matter requires a swift ruling. The court may review the arrangements made with regard to the children (it may *e.g.* modify the primary residence of the children in case of non-observance of secondary residence rights granted to the other parent). The court may also allow the victim of non-observance to apply for coercive measures or impose a penalty payment ('astreinte' / 'dwangsom'). The court's decision is immediately enforceable, notwithstanding any appeal.

- National rules on enforcement with regard to the different types of measures that may be taken by authorities in the matters covered by the Brussels IIa Regulation (E.g., whether coercive measures may be used against children who oppose against the enforcement of a judgment).

Requests for the return of a child may only be brought before the President of the Court of First Instance of the place where a Court of Appeal is located and where, depending on the case, the child is present or where he habitually resides at the time that the application is filed or the request is sent. Hence, only 5 courts have jurisdiction over these matters.

The *fast-track* procedure set up in Chapter XIIbis of the Code of Civil

Procedure is applicable to cases falling under the scope of Regulation 2201/2003, although the first provision in the referred Chapter (Article 1322bis Code of Civil Procedure) only mentions the actions based upon the 1980 Hague Convention on the civil aspects of child abduction and the 1980 European Convention on the recognition and enforcement of decisions concerning children custody.

An order to return the child to his or her State of habitual residence is enforceable by its own motion, pursuant to Arts. 1322septies and 1039, 2nd para. of the Code of Civil Procedure. There is therefore no need to file a request to order the provisional enforcement of such return order. The Central Authority is the principal actor in the enforcement of the return order. Usually, the Central Authority examines the first place whether a voluntary execution of the order is possible. The Authority will accordingly allow a period of time for voluntary compliance.

However, in cases of extreme necessity (*e.g.* if the life of the child is in danger), coercive measures to ensure enforcement should be immediately available (by analogy with Article 1041 of the Code of Civil Procedure). In Belgian practice, the Central Authority takes the lead in ensuring the actual enforcement of return orders. The fast-track procedure for enforcement in domestic cases is available for abduction cases. The Court may appoint a qualified person, such as a psychologist or a social worker, to facilitate the enforcement of the return order. No costs are charged for the intervention of the Central Authority in order to ensure the enforceable of the return order. The Central Authority will, however, not assume costs for repatriation or made in order to locate the child, although the Central Authority may be willing to advance payment for such costs.

- Indication of the national authority/authorities designated as the central authority/authorities referred to in Article 53 of the Regulation.

The authority appointed on the basis of Article 53 is the Ministry of Justice – Child Abduction Unit. The contact details are as follows:
FOD Justitie

Directoraat-generaal Wetgeving en Fundamenteel Rechten en Vrijheden
Dienst Internationale Samenwerking in Burgerlijke Zaken
Federaal Aanspreekpunt Internationale Kinderontvoeringen
Waterloolaan 155
1000 Brussels

The appointment of the Ministry of Justice follows from Article 1322terdecies Code of Civil Procedure (which was adopted in the Act of 10 May 2007 implementing the Brussels IIbis Regulation in Belgium). The same authority has been appointed under the 1980 Hague Abduction Convention and the European Abduction Convention of 20 May 1980.

- National private international law rules concerning jurisdiction in matters of parental responsibility where no court of a Member State has jurisdiction pursuant to Articles 8 to 13 of the Brussels

IIa Regulation.

The rules of jurisdiction dealing with divorce matters may be found in the Code of Private International Law (Act of 16 July 2004, which entered into force on the 1st of October 2004).

According to Article 33 of the Code, proceedings related to the parental responsibility may be introduced in Belgium in various cases:

- such proceedings may first be introduced when the child habitually resides in Belgium (a definition of the habitual residence may be found in Article 4 of the Code);
- proceedings may also be introduced when the child possesses the Belgian nationality;
- proceedings may also be introduced in Belgium in matters relating to the administration of the assets of the child when the relevant assets are located in Belgium;
- finally, proceedings may also be introduced in Belgium in relation to children younger than 18 y., if the courts in Belgium are already seized of divorce proceedings. Unlike under art. 12 of the Regulation, it is not required that the exercise of such jurisdiction by the courts be approved by the parties (see *e.g.* CA Brussels, 25 June 2013, *Tijdschrift@ipr.be*, 2013/3, 59 : the Court was seized of divorce proceedings and various claims in relation to parental responsibility; it was accepted that the children lived outside the EU; the court first noted that it could not exercise jurisdiction under Article 12 of the Regulation as the parents had not accepted this jurisdiction. Turning to Art. 33 of the Code, it concluded, however, that it could exercise jurisdiction under this provision as it was also seized of divorce proceedings for which it had jurisdiction).

Account should also be taken of Article 11 of the same Code, which makes it possible to bring proceedings in Belgium when no other court has jurisdiction to hear the matter (*forum necessitatis*). This provision requires that it is demonstrated that the matter bears a substantial connection with Belgium.

Identification of specific problems which have arisen in your jurisdiction with regard to the application of the Brussels IIa Regulation based on case law

The aggregated answers provided in this section should refer to around 20 pieces of case law, from 2012. If there are no such cases for 2012, or an insufficient number of cases, then this analysis can be complemented by cases from the period 2010 - 2011 or before. Case law should however only be used for relevant issues.

Scope of the Regulation

Matrimonial Matters

- Practical difficulties in matters of divorce, legal separation or annulment of same-sex marriages under the Regulation. Please specify the difficulties with regard to jurisdiction on the one hand and recognition and enforcement on the other hand.

The question whether or not the Brussels IIbis Regulation may be applied to proceedings concerning same sex couples has been discussed in commentaries (e.g. W. PINTENS, "Marriage and Partnership in the Brussels Iia Regulation", in *Liber Memorialis Petar Sarcevic. Universalism, Tradition and the Individual*, V. TOMLJENOVIC et al. (eds.), Sellier, 2006, 335-344 and M. PERTEGÁS SENDER, "The impact and application of the Brussels IIbis Regulation in Belgium", in *Brussels IIbis: its impact and application in the member states*, K. Boele-Woelki and C. Gonzalez Beilfuss (eds.), Intersentia, 2007, 64-65). It has not yet been extensively discussed by court. In one recent case, a court of first instance applied the rules of jurisdiction included in the Brussels IIbis Regulation when seized of a divorce petition between two women. Unfortunately, the court did not comment on the applicability of the Regulation. Apparently, this applicability was taken for granted (CFI Brussels, 19 June 2013, *Tijdschrift@ipr.be*, 2013/4, 70, with comments P. Wautelet).

A side issue has been raised in court in respect of same-sex couple, i.e. the question whether the Regulation could apply to proceedings whereby a marriage had first been transformed into a registered partnership, after which the partnership had been terminated. The transformation took place in the Netherlands under Dutch law, at a time where such transformation was still allowed. A first instance court has found that neither the process whereby the marriage was transformed in a partnership, nor the resulting partnership or its dissolution, could benefit from the application of the Brussels IIbis Regulation (CFI Malines, 12 January 2006, *EJ*, 2006, 153).

- The issue of whether or not declaratory judgments are covered by the Regulation (Articles 1 and 2(4))

The question whether or not declaratory judgments are covered by the Regulation has not yet been addressed by courts.

- Any other matrimonial issues identified relating to the scope of the Regulation

No additional issue has been identified based on existing case law.

Parental Responsibility

- Different interpretations of the term "child" across the Member States (Article 2)

At this stage, it does not appear that courts in Belgium have struggled with the definition of the concept of 'child' used by the Brussels II *bis* Regulation.

- Any other parental responsibility issues identified relating to the scope of the Regulation

The issue of the scope of the Regulation in relation to parental responsibility matters has been addressed in several decisions.

The Supreme Court has decided the applicability of the provisions of the Brussels II *bis* Regulation in relation to parental responsibility was not prevented by the fact that the claim belonged under domestic law to public law (Supreme Court, 21 November 2007, *Rev. trim. dr. fam.*, 2008, 176). The Court found that the characterization of the claim under domestic law, was not relevant to assess whether the Regulation applied.

In another decision, the court of appeal of Brussels has held that the Regulation may be applied to a claim by grand-parents wishing to obtain a right of access (Court of Appeal of Brussels, 4 April 2007, *J.T.*, 2007, 623; *Rev. trim. dr. fam.*, 008, 508).

Another court has held that the Regulation could apply to a claim in relation to the 'unofficial guardianship' ('*tutelle officieuse*'), which is based on an agreement concluded between parties to the effect that a child will be raised by another person than his parents (art. 475bis ff. Civil Code) (Court of Appeal of Brussels, 28 November 2006, *Rev. trim. dr. fam.*, 2008, 90).

Jurisdiction Issues

Horizontal Issues

- Exclusion of certain groups of citizens due to non-harmonisation of rules on residual jurisdiction (Articles 7 and 14)

The problem of the exclusion of certain groups of citizens due to the non-harmonisation of the rules on residual jurisdiction has not arisen in practice. This is probably because the rules on residual jurisdiction only play a marginal role in disputes arising in connection with matrimonial matters and issues of parental responsibility. Further, the rules of residual jurisdiction existing under Belgian law, are not exclusively based on the nationality of the persons concerned.

- Practical difficulties due to the fact that the Regulation does not contain a *forum necessitatis* (Articles 7 and 14)

In a limited number of cases, courts in Belgium have been faced with situations where no jurisdiction could be derived from the rules of jurisdiction included in the Brussels II*bis* Regulation. These instances mainly concern binational couples who did not have any residence within the EU before their separation. In one case submitted to the Court of First Instance of Brussels, the couple did not share the same nationality (the husband was a Belgian national, while the wife possessed the Chinese nationality). The couple had lived together in Singapore before the separation. After they split up the husband took up residence in Thailand while the wife settled in China. The husband filed for divorce in Belgium (CFI Brussels, 9 December 2011, *Rev. trim. dr. fam.*, 2012, 384).

In the second case, a Moroccan national had been married twice. The two marriages had been celebrated in Morocco. The second marriage had been terminated by a divorce decree issued in Morocco. When this decree was not recognized in Belgium, the Moroccan national sought to have his second marriage also terminated in Belgium. To that end, he filed for divorce. He had not lived in Belgium since 1975. His wife had never lived in Belgium. He alleged that he still possessed a substantial band with Belgium because he had worked in Belgium until 1975 and his son lived in Belgium (CFI Brussels, 2 December 2011, *Rev. trim. dr. fam.*, 2012, 359; both cases have been commented by Caroline Henricot, "Le for de nécessité de l'article 11 du Code de dip : premières illustrations jurisprudentielles en divorce", *Rev. trim. dr. fam.*, 2012, 369-372).

In both cases, the court found out that no jurisdiction could be exercised under the Articles 3 to 5 of the Brussels II*bis* Regulation. Looking further at the provisions of Belgian law (i.e. the Code of Private International Law), the court found in both cases that no jurisdiction existed under the regular rules.

The absence of a *forum necessitatis* in the Regulation was, however

easily solved since such forum exists under the Code of Private International Law. The court of first instance therefore examined in the two cases whether application could be made of such *forum necessitatis* (art. 11 Code of Private International Law). It found that in the first case, there was a sufficient nexus with Belgium, while in the second case, the applicant had not shown that there was a sufficient connection with Belgium to justify the exercise of jurisdiction under the *forum necessitatis*.

In a more recent case, the question of the *forum necessitatis* again appeared in relation to a divorce petition filed by a Belgian woman who was married to a US citizen. The spouses had lived together in Belgium. After they split, the US citizen settled in the US, while the Belgian plaintiff settled in France. The difficulty was that at that time, it was unlikely that either France or the US would entertain a divorce petition, since the two spouses were of the same sex. After having verified that no proceedings could be introduced in France or the US, the court verified whether it had jurisdiction under Article 11 of the Belgian Code of Private International Law (CFI Brussels, 19 June 2013, *Tijdschrift@ipr.be*, 2013/4, 70, with comments P. Wautelet). Again, the fact that Belgian law provides a *forum necessitatis*, has solved the difficulty raised by the absence of such rule under the Brussels IIbis Regulation.

- Practical difficulties due to the absence of provisions determining in which cases Member State courts can decline their jurisdiction in favour of a court in a third State

This issue does not seem to have attracted the attention of courts in Belgium yet.

- Practical difficulties in relation to the application of the provisions on the seizing of a court (Article 16)

It does not appear that that definition of the time at which a court is seized for the purpose of the application of the Regulation has raised any difficulty in court. Courts apply the definition without apparent problem (see e.g. CA Brussels, 21 June 2012, *Rev. trim. dr. fam.*, 2013, 263, comments C. Henricot and CA Brussels, 25 October 2012, *Rev. trim. dr. fam.*, 2013, 617 - in both cases, the question of the application of the *lis alibi pendens* mechanism arose in relation to provisional measures which had been sought by the two parents in relation to their parental responsibility) It may be ventured that courts in Belgium have grown familiar with the structure of this definition due to the fact that it is also used in the framework of the Brussels I Regulation (Regulation 44/2001).

- Practical difficulties due to the absence of provisions covering third countries' courts in *lis pendens* rule (Article 19)

Contrary to France, where the issue has given rise to several court

rulings, courts in Belgium do not appear to have been faced yet with the issue of parallel proceedings pending in Belgium and in a non Member State.

Courts have, however, duly applied the *lis alibi pendens* rule in relation to proceedings pending in other MS (see *e.g.* CA Brussels, 21 June 2012, *Rev. trim. dr. fam.*, 2013, 263, comments C. Henricot – in relation to England; CA Brussels, 17 November 2011, *Act. dr. fam.*, 2012, 38 – in relation to proceedings pending in Italy and CA Brussels, 25 October 2012, *Rev. trim. dr. fam.*, 2013, 617 – in relation to Italy).

- **Any other horizontal issues identified relating to jurisdiction**

In most cases, the issue of jurisdiction in matrimonial matters (divorce proceedings) does not give rise to any difficulty. Courts routinely and swiftly verify that they have jurisdiction based on Art. 3.

In most cases in fact, courts handle the jurisdiction issue very shortly. Practice has shown that the localization of the habitual residence of spouses does not in most cases give rise to any difficulty. A decision by the CFI Liège is a good example of such court practice : the court simply notes in one sentence that both spouses (a Belgian-Greek couple who married in Greece) habitually reside in Belgium (CFI Liège, 5 November 2013, RG 13/2658/A, available at www.vreemdelingenrecht.be). Likewise, a recent decision of the CFI Brussels only devotes one sentence to the issue of jurisdiction, noting that the plaintiff was a Belgian national who resided since at least 6 months in Belgium (CFI Brussels, 12 March 2013, *Rev. trim. dr. fam.*, 2013, 768). See also CFI Liège, 5 November 2013, *Tijdschrift@ipr.be*, 2013/4, 66 (the court deals with the issue of jurisdiction in one sentence); CFI Liège, 16 April 2013, *Tijdschrift@ipr.be*, 2013/2, 47 and CFI Hasselt, 27 December 2011, *Tijdschrift @ipr.be*, 2011/4, 107.

In other cases, however, courts are faced with situations where spouses have substantial connection with different countries, which makes it difficult to locate the spouses' habitual residence (see *e.g.* CA Brussels, 17 November 2011, *Act. dr. fam.*, 2012, 38 – the Court was seized of divorce proceedings between a German citizen and an Italian citizen, who had lived together in Belgium before the family moved to Italy, where the spouses did not, however, live together; the husband was then posted to non EU Member States for a number of years, while keeping a place he could reside in both in Belgium and Italy before moving back to Brussels; the Court's assessment of the habitual residence extends over several pages).

Courts in Belgium attach great importance to the registration of the spouses in the 'National Register' ('registre national' / 'rijksregister'), i.e. a national register of all persons living in Belgium, compiled on the basis of data which are provided by municipal authorities. Courts have, however, also ruled that such registration in Belgium does not in itself demonstrate that the person concerned habitually resides in Belgium

(see *e.g.* CFI Brussels, 17 November 2010, *Act. dr. Fam.*, 2011, 98; CFI Brussels, 2 November 2011, *Act. dr. fam.*, 2011, 96, 97). In one interesting case, the CFI Brussels was seized of a divorce petition filed by a German citizen who had lived together with his Italian wife in Brussels for a few years. The spouses then moved to Italy. After the couple separated, the husband resided in other countries (Afghanistan, Tunisia) where he worked. He remained, however, owner of an apartment in Brussels, where he was still registered. He was also a tax resident in Belgium. The CFI ruled that this was not sufficient to demonstrate that the habitual residence was located in Belgium (CFI Brussels, 2 February 2011, *Act. dr. fam.*, 2011, 96).

One issue which has arisen in practice, is whether embassy staff, international civil servants and officials of the EU institutions who work in Brussels, may be deemed to have their habitual residence in Belgium. It is sometimes said that civil servants working for international organizations or European institutions, do not habitually reside in Belgium because they are not subject to the obligation to register in Belgium. It may also be that they keep their domicile in their country of origin. Although courts do not seem to have followed this reasoning (see *e.g.* CFI Brussels, 2 February 2011, *Act. dr. fam.*, 2011, 96 and in appeal CA Brussels, 17 November 2011, *Act. dr. fam.*, 2012, 38 - the husband was employed by an EU institution; both in first instance and in appeal, the courts nevertheless undertook to examine whether the person habitually resided in Belgium), a clarification would be welcome.

Matrimonial matters

- The "rush to court" and "forum shopping" issues arising due to current grounds on jurisdiction (alternative grounds) and the limited application (only 16 Member States) of the Rome III Regulation on the applicable law to divorce (Article 3 in combination with Article 19)

It has been widely recognized that the rules of jurisdiction included in the Brussels IIbis Regulation make it possible in a large number of cases for the plaintiff to select which court will hear the divorce petition. Taken together with the rigid *lis alibi pendens* rule found in Article 19 of the Brussels IIbis Regulation, this creates a fertile ground for tactical rush to the court, in the hope of preventing a divorce petition before a court deemed to be less favorable.

Court practice in Belgium has revealed a number of instances where strategic motives explained why proceedings were brought in Belgium or on the contrary why proceedings were first brought before another court. In all these cases, the plaintiff sought to benefit from the *lis alibi pendens* rule. Two typical scenarios emerge : in a few cases, proceedings were brought in Belgium in order to avoid being faced with divorce proceedings in England. The plaintiff in those cases, seek to avoid the high costs associated with proceedings before English courts and more fundamentally, the very wide discretion enjoyed by courts in England when ruling on the consequences of the termination of marriage (as opposed to the legal regime applicable to division of assets and award of maintenance under Belgian law). In those cases, the jurisdiction of Belgian courts was based on the common Belgian nationality of the spouses.

In other cases, proceedings are brought before a court in Italy in order to avoid being subject to divorce proceedings in Belgium. In those cases, the party seeking relied in Italy seeks to benefit from the fact that divorce proceedings in Italy typically extend over a long period of time, with a first stage of two years where spouses continue to be married but may live separately. During those two years, one of the spouses may be awarded alimony and therefore extend the period of time during which he/she will enjoy alimony. If proceedings had been brought in Belgium on the other hand, a divorce would have come in much sooner, thereby reducing the extent of time during which the spouse may enjoy alimony. In those cases, the spouses typically both enjoy the Italian nationality and resided together in Belgium during the marriage.

Turning to the limited application of the Rome III Regulation, it appears to be too early to draw any conclusion from court practice. The Rome III Regulation indeed only entered into force in June 2012. What is more, one should take into account the fact that the rules included in the Rome III Regulation to determine the law applicable to divorce proceedings, coincide to a large extent with the rules appearing in the 2004 Code of Belgian Private International Law (art. 55). Hence, the coming into force

of the Rome III Regulation did not represent a major change for Belgian courts handling divorce proceedings and did not create an additional incentive to file divorce proceedings in Belgium.

- **Potential discrimination based on nationality due to the current jurisdiction grounds (Article 3)**

The question whether or not the reference in Article 3 of the Brussels IIbis Regulation to the common nationality of the spouses, constitutes a discrimination, has not been raised before courts. Courts in Belgium routinely exercise jurisdiction in matrimonial matters when the two spouses possess the Belgian nationality (see *e.g.* CFI Arlon, 12 December 2008, *Rev. trim. dr. fam.*, 2009, 728), without this raising questions of discrimination.

- **Problems arising due to the lack of provisions allowing for a choice of court**

The lack of possibility for the spouses to conclude a choice of court clause has been regretted in practice, in particular since the coming into force of the Rome III Regulation, which makes it possible for spouses to conclude a choice of law in divorce matters. However, this has not yet given rise to any case law. The absence of court decision may certainly be explained by the fact that the current jurisdiction regime allows in most cases for a choice between several jurisdictions. Further, it is still open for debate whether spouses will effectively make use of the possibility to choose the court before a conflict arises. Experience with the choice of law made possible by the Rome III Regulation (and a provision of Belgian private international law allowing choice of law in divorce proceedings) has shown that very few spouses actually make use of the possibility to choose the law *ex ante*.

- **Differing interpretation of the provisions on exclusive jurisdiction (Article 6)**

From the start, the interpretation of Article 6 of the Regulation has given rise to difficulties. In an early commentary, some authors argued that the exclusive nature of the rules of jurisdiction, did not mean that no application could be made of the rules of jurisdiction of Member State vis-à-vis a defendant habitually resident in a Member State or possessing the nationality of a Member State. According to these authors, the application of national rules of jurisdiction is only excluded in this situation if the defendant is sued in another Member State than that of his habitual residence or nationality. When a defendant habitually resident in one Member State or having the nationality of one Member State is sued in that Member State, Article 6 would not prevent the application of national rules of jurisdiction (see J.-Y. Carlier, S. Francq and J.-L. van Boxstael, "Le Règlement de Bruxelles II - compétence,

reconnaissance et exécution en matière matrimoniale et en matière de responsabilité parentale”, *Jtdr. Eur.*, 2011, 78-79, nr. 18-20). This could be relevant as one of the national rules of jurisdiction in force in Belgium, makes it possible for spouses to choose the court with jurisdiction in matters of divorce. This reading has, however, not been tested in courts. The *Sundelind Lopez* case law of the ECJ has not given rise to any application in Belgium.

The question could arise, however, in a situation where the two spouses live outside the EU and seek divorce in Belgium. If they seek divorce by mutual agreement, they could attempt to lodge a petition before a court in Belgium based on Article 6 of the Code of Private International Law. Article 6 of the Code makes it possible for parties to choose the jurisdiction. This provision has been interpreted, albeit controversially, as authorizing spouses to conclude an agreement on the court which has jurisdiction in matters of divorce. If one of the spouses is a Belgian national, the reading of article 6 of the Regulation which has just been explained, could allow the spouses to bring the proceedings in Belgium and benefit from the national rules of jurisdiction.

- **Difficulties with regard to the scope of the rules on provisional measures (Article 20).**

There has been discussion in scholarly commentaries on the scope of the rule on provisional and protective measures. More specifically, the question arose whether Article 20 could be used to order provisional or protective measures which could be beyond the scope of the Regulation. As the Regulation is only concerned with the termination of marriage (divorce, legal separation or marriage annulment) and does not cover the consequences of such termination, the question was asked whether Article 20 could be relied upon when a person seeks preliminary relief such as the authorization to reside separately from a spouse. A comment made in the Borrás Report has given rise to extensive discussion in commentaries (see *e.g.* N. WATTÉ et H. BOULARBAH, « Le Règlement communautaire en matière matrimoniale et de responsabilité parentale (Règlement dit « Bruxelles II » », *Rev. trim. dr. Fam.*, 2000, (539), 580, § 63bis ; V. VAN DEN EECKHOUTE, “Europees echtscheiden”, in *Het nieuw Europees IPR : van verdrag naar verordening*, H. VAN HOUTTE en M. PERTEGÁS SENDER (éds.), Anvers, Intersentia, 2001, (69), 94 and K. VANDERKERCKHOVE, “Voorlopige of bewarende maatregelen in de EEX-Verordening, in EEX-II en in de Insolventieverordening”, in *Le droit processuel et judiciaire européen*, G. DE LEVAL (éd.), La Chartre, Brugges, 2003, (119), 137-138, § 51).

Courts have only briefly touched on this issue. A Court of Appeal has ruled that Article 20 could be used to examine whether spouses could be provisionally authorized to reside separately (CA Brussels, 3 March 2005, *Revue@dipr.be*, 2006/3, 48).

- **Any other matrimonial issues identified relating to jurisdiction**

As already indicated, court practice in relation to cross-border divorce proceedings does not seem to have faced many difficulties when assessing jurisdiction under the Brussels *II bis* Regulation. The examination of jurisdiction is usually very brief and limited to a few sentences.

It is striking that the two major rulings of the ECJ in relation to article 3 of the Regulation (i.e. *Hadadi*, case C-168/08 and *Sundelind Lopez*, case C-68/07) have apparently not led to any discussion in court practice.

One issue which has, however, received substantial attention in court practice, concerns the issue of venue : courts have struggled to determine whether they have domestic territorial jurisdiction in cases where Belgian courts possess international jurisdiction under the Regulation. The difficulty arises from the fact that the rule on domestic venue tie venue to the habitual residence of the defendant or the last common habitual residence of the spouses (art. 628-1° of the Code of Civil Procedure). In situations where Belgian courts derive their international jurisdiction from the common Belgian nationality of the spouses, this rule does not make it possible to allocate territorial domestic jurisdiction. Courts have in this situation proceeded to apply the solution of Article 13 of the Belgian Code of Private International Law, i.e. base the territorial jurisdiction on the same criteria as the international jurisdiction and if that solution fails, grant territorial jurisdiction to the courts in Brussels (see *e.g.* CFI Liège, 24 November 2009, *Tijdschrift@ipr.be*, 2010/3, 131; CFI Liège, 16 April 2013, *Tijdschrift@ipr.be*, 2013/2, 47). Article 13 of the Code reads as follows : “When Belgian courts have jurisdiction by virtue of the present statute, the territorial jurisdiction of the court will be established according to the relevant provisions of the Code of Civil Procedure and special statutes, except in the case provided for in article 23.

In the absence of a provision that determines the territorial jurisdiction of the court, the latter will be established according to the provision of the present statute regarding the international jurisdiction. If these provisions do not allow designating the court that has territorial jurisdiction, the action may be brought before the court of the district of Brussels. ”

Parental Responsibility

- Use of the principle of *perpetuatio fori* (Article 8)

The question of the *perpetuatio fori* has been raised often in courts, as it is no uncommon that the habitual residence of children is moved during the proceedings.

In many instances, courts have been seized of requests in relation to parental responsibility in relation to children who had been removed to another Member States. Courts have no difficulty holding that the habitual residence of the child must be determined on the day the court is seized, without taking into account the illegal removal/non return of the child (e.g. CA Ghent, 6 November 2008, *Tijdschrift@ipr.be*, 2010/1, 83; CA Brussels, 15 May 2012, *Rev. trim. dr. fam.*, 2013/2 608). In one such case, a child born in Belgium had been moved to the Netherlands only a few days after his birth. Proceedings were launched afterwards by the public prosecutor, as it appeared that the child had been sold by his mother to a couple residing in the Netherlands. The court of appeal hearing the matter found that the child's habitual residence was located in the Netherlands when proceedings had been initiated. According to the court, the circumstance that the transfer of the child to the Netherlands by all accounts constituted a criminal offense, did not have any influence on the localization of the child's habitual residence (CA Ghent, 5 September 2005, *RW*, 2005-06, 432).

One question which has puzzled courts, relates to the moment at which the habitual residence of the child should be determined when proceedings are pending in appeal. When a first instance court has issued a ruling and that ruling is appealed, the question arises whether the court of appeal should investigate the child's habitual residence taking into account the circumstances existing at the time the initial proceedings were launched or at the time of the appeal (adopting the first interpretation, see e.g. CA Ghent, 10 December 2009, *Revue@dipr.be*, 2010/1, 64 and CA Brussels, 11 March 2013, *Tijdschrift@ipr.be*, 2013/2, 40)

Another difficult question which has also given rise to case law, relates to the interpretation of the *perpetuatio fori* principle in case when a court has already issued a decision in relation to a child. In some instances, when a court is seized of a dispute in relation to parental responsibility, it remains seized of this dispute even after having issued a ruling. This 'continuous' jurisdiction of the court is justified on account of the fact that the ruling already issued may be modified if circumstances change. The court may therefore revisit its initial ruling. The question arises, however, whether a court which benefits from such continuous jurisdiction under Belgian law, may continue to rely on the habitual residence of a child, which existed at the time proceedings were initiated. If a first decision is issued and a child moves after that decision to another Member State, may the court which issued the

ruling, consider that it has remained seized of the matter, so that it may continue to exercise jurisdiction under Article 8? Or should it consider that even if it remains seized of the matter under its own domestic law which deems it *not* to be *functus officio*, it must accept that the initial proceedings have been terminated, so that the new matter brought before it, must be looked at taking into account current circumstances? If the first solution applies, the court will look back at the time of the initial proceedings to determine whether it has jurisdiction. It could therefore exercise jurisdiction even if the child/children have moved in the meantime. If the second solution applies, the court should therefore look at the current habitual residence of the child/children in order to determine whether it has jurisdiction and not at the habitual residence existing at the time of the initial proceedings. The only possibility for the court initially seized, to continue to exercise jurisdiction, would be within the strict limits of Article 9 of the Regulation.

This question was put to the Supreme Court (Supreme Court, 21 November 2007, *Rev. trim. dr. fam.*, 2008, 176) in case where a court in Belgium had been seized of a petition by the public prosecutor. The court had issued a ruling in December 2006, whereby the child had been entrusted to his father. In May 2007, the matter came back before the same court. The court found that the child had legally moved to Germany with his father. It concluded that it did not have jurisdiction. The Supreme Court disagreed and held that the lower court had not exhausted its jurisdiction and was still seized of the matter. As a consequence, the Supreme Court held that the lower court should not have taken into account the fact that the child had moved. It may be questioned whether this ruling may be reconciled with the principle underlying Article 9. This ruling has been followed by the Court of Appeal in Brussels (CA Brussels, 11 March 2013, *Tijdschrift@ipr.be*, 2013/2, 40 – in this case, a child had been moved by his mother from Belgium to Luxembourg following a decision by a first instance court authorizing such removal; the decision was challenged by the father; in appeal, the Court held that even though the child had moved from Belgium to Luxembourg, the court's jurisdiction should nonetheless be assessed taking into account the circumstances existing at the time the initial claim was filed with the first instance court; the court held specifically that “La saisine de la cour d'Appel des mêmes demandes que celles débattues en première instance, ne constitue que la prolongation de cette procédure et ne peut remettre en cause la compétence internationale acquise par le juge de première instance”). In any case, a clarification would be welcome on the application of the principle of *perpetuatio fori* in the case in which a court remains continuously seized of a matter even after having issued a ruling.

In other cases, courts have been careful to disregard any illegal removal or retention of a child when assessing where a child's habitual residence is established for the purpose of applying Article 8 (see *e.g.* CFI Brussels, 17 November 2011, *Act. dr. fam.*, 2011, 222 – in relation to

a child who had been removed by his mother to Germany).

- **Use of the procedural rules related to child abduction (Article 11)**

Courts in Belgium have been faced with a number of cases based on Article 11 of the Regulation. Among the issues they have tackled in this respect, the first one relates to the determination of the existence of a case of wrongful removal or non-return. When a court is seized of a request to order the return of a child, it must first determine whether there was a wrongful removal (see *e.g.* CFI Verviers, 7 June 2007, *Rev. trim. dr. fam.*, 2008, 217). When the court is seized on the basis of Article 11 par. 7 and 8, it does not have to assess whether the removal or non-return of the child was in the first place illegal in light of the standards of the 1980 Hague Abduction Convention. However, practice has shown that courts tend to look into this issue as well before deciding on the merits of the case (see *e.g.* CA Brussels, 17 June 2010, *Act. dr. fam.*, 2010, 191). Courts have also been faced with the difficulty of untangling the various proceedings which may be based on Article 11 : this provision first aims at the proceedings seeking the return of the child but also covers further proceedings brought before the courts of the Member State where the child initially resided, when the request to order the return of the child, has been refused. The position of the court in each of this scenario and what it may order, is different (as has been correctly analyzed by courts, *e.g.* CFI Brussels, 15 June 2006, *Act. dr. fam.*, 2008, 117).

Courts have been sensitive to the need to proceed diligently with requests based on Article 11. The CFI Verviers for example refused to allow additional time for the parties to exchange written submissions, in view of the need to proceed diligently (CFI Verviers, 7 June 2007, *Rev. trim. dr. fam.*, 2008, 217).

Another court also refused to stay proceedings, which had been filed on the basis of Article 11 par. 7 of the Regulation. It is not uncommon when a child's habitual residence is moved, that the parents initiate multiple proceedings to obtain relief on the merits or preliminary relief. The question arises whether a court seized of a request based on Article 11 par. 7 of the Regulation, should stay its proceedings when other proceedings have already been initiated, for example when criminal proceedings have been initiated against the parent who modified the child's habitual residence. The Court of Appeal of Brussels has determined that no such stay should be granted, as requests based on Article 11 should be treated with priority (CA Brussels 17 June 2010, *Act. dr. fam.*, 2010, 191).

In relation to the hearing of the child (art. 11 par. 2 Regulation), the courts have struggled because of the existing legal framework, which until recently was not coherent. The CA of Mons for example has

decided to dispense with a hearing of a child because of the fact that the child resided in Spain during the proceedings (CA Mons, 5 March 2007, *Rev. trim. dr. fam.*, 2008, 163). The Court noted that the child had been duly represented in court and that there was some doubt that the child could speak freely because of the circumstances of the case (the mother had attempted to murder the child's father before fleeing to Spain). In other cases, courts have deferred to the obligation to hear the child (e.g. CFI Verviers, 7 June 2007, *Rev. trim. dr. fam.*, 2008, 217 – hearing of a child who was 12 y. old). In one instance, a request to use the mechanism put in place by the Taking of Evidence Regulation (Regulation 1206/2001) to obtain that a child residing in another Member State be heard, was turned down by a court.

Turning to the issue of the “adequate arrangements” which may be made in order to secure the protection of the child after his/her return, a specific provision has been adopted – article 1322 *duodecies* of the Code of Civil Procedure provides that the Public Prosecutor must bring proceedings before the Juvenile Court, which has jurisdiction to order such protective measures as may be necessary to guarantee that the child will not run any risk. This procedure has been applied in a case where children had been removed to Spain : the Juvenile Court had been seized of a request by the Public Prosecutor to order protective measures in relation to two children held by their mother in Spain. The Court of Appeal held that it is not sufficient that the law provides a possibility for such measures to be adopted; article 11 par. 4 directs that such measures be effectively adopted taking into account the circumstances of the case (CA Mons, 5 March 2007, *Rev. trim. dr. fam.*, 2008, 166). Court practice has also revealed that the obligation imposed by Article 11 par. 4 of the Regulation on the court seized of a request to order the return of the child under the 1980 Hague Convention, to take into account whether “adequate arrangements” have been made to secure the protection of the child, is difficult to apply. Indeed, such examination requires that the court seized of the request to order the return of the child, is informed about what arrangements could be made. The Regulation does not indicate whether it is incumbent on the court seized of the request to order the return, to take contact with the authorities of the State where the child initially resided, in order to obtain information on such proper arrangements. In one case put to the CFI Brussels, the Court noted that a Polish court had refused to order the return of the child, without examining at all whether any proper arrangements could be made in Belgium to protect the children. The Court found that the Polish court should have attempted to obtain information from the authorities in Belgium (CFI Brussels, 9 January 2009, *Rev. dr. étr.*, 2009, 737, with comments by TH. KRUGER).

Article 11 par. 5 provides that the person who has requested the return of the child should be given an opportunity to be heard. In a case decided by the CFI Verviers, the court found that the person who had

requested the return, had been invited twice to appear in court to be heard, but had neglected to do so. The person was, however, duly represented in court by counsel. The court concluded that Article 11 par. 5 had been duly applied (CFI Verviers, 7 June 2007, *Rev. trim. dr. fam.*, 2008, 217).

Another question which has arisen in relation to the mechanism put in place by Article 11 par. 6, is whether a court is allowed to use the mechanism, when the court which has issued an order of non-return pursuant to the 1980 Hague Convention, has not specifically referred to Article 13 of the Convention, but it appears from the substance of that ruling that the court indeed based the refusal to order the return on Article 13. The Court of Appeals of Brussels refused to limit itself to the actual order of the foreign court and undertook to verify what had been the actual ground for the order refusing the return of the child. In that case, a court in Spain seized by the father of a request to return the child to Belgium, had ruled that no return could be ordered as there had been no wrongful removal of the child in the sense of Article 3 of the Hague Convention. After examining in details the Spanish court's decision, the Court of Appeal of Brussels determined that the refusal to order the return of the child was in fact based on two of the grounds mentioned in Article 13 of the Hague Convention, so that Article 11 par. 6 of the Regulation could apply (CA Brussels 17 June 2010, *Act. dr. fam.*, 2010, 191).

A similar question has been put to the CFI Brussels in a case where children had been removed to Poland. A Polish court had refused to order the return of the four children : for two of the children, the Polish court had justified its decision by reference to Article 12 of the 1980 Hague Convention. The decision in relation to the two oldest children was justified on the basis of the existence of a risk (art. 13 1980 Hague Abduction Convention). The CFI Brussels nevertheless found that it could apply the special mechanism put in place by Art. 11 par. 7/8 of the Regulation, at least in relation to the two oldest children (CFI Brussels, 9 January 2009, *Rev. dr. étr.*, 2009, 737, comments T. Kruger). The Court distinguished the situation of the children and only looked at the situation of the two children in relation to whom the refusal to return had been justified on the basis of Article 13 of the Convention.

In another case, a one year child born in Belgium had been removed to another Member State by one of his parents. The courts of the Member State where the child was living with the abducting parent, turned down a request for return of the child under the 1980 Hague Convention, arguing that the child always had never had his residence in Belgium and on the contrary had always resided in this country. This was a blatant denial of reality, as the child had been born in Belgium and had lived there (except for occasional stays in the other Member State during holidays) before being removed to the other Member State. Nonetheless, this situation renders the mechanism put in place by

article 11 of the Regulation useless, as there is no decision refusing the return of the child, but rather a decision that the child has not been illegally removed.

Turning to the actual application of the mechanism put in place by Article 11 par. 7/8, the Court of Appeal of Brussels has held that when deciding on a request based on Article 11 par. 7/8, the court should only be guided by the best interests of the child, without taking into consideration the conflict between the parents (CA Brussels 17 June 2010, *Act. dr. fam.*, 2010, 191). The Court added that no account may be taken of a divergence between the two courts (in that case, the Spanish court had refused to order the return of a child, a decision which had been seriously questioned by the Court of Appeal).

- **The interpretation of the conditions that must be met for the application of the rules for the prorogation of jurisdiction favouring a consensual solution (Article 12)**

Courts in Belgium have had the opportunity in several cases to review the requirements for the application of Article 12.

The courts have in particular focused on the requirement that the parents agree with the exercise of jurisdiction by the court. In one case, the Court of Appeal of Brussels suggested that when one of the parents appear in court without challenging the court's jurisdiction, this could be accepted as a clear and unequivocal acceptance of the court's jurisdiction (CA Brussels, 6 April 2006, *Rev. trim. dr. fam.*, 2007, 223). Another court has also held in this respect that the fact that the public prosecutor challenged the possibility for the court to exercise jurisdiction based on Article 12, was not relevant to assess whether such jurisdiction could be exercised, as the public prosecutor was not a party to the proceedings (CA Brussels, 28 November 2006, *Rev. trim. dr. fam.*, 2008, 90). In other cases, the parents did not agree on the application of Article 12 (see e.g. CA Brussels, 21 June 2012, *Rev. trim. dr. fam.*, 2013, 263, comments C. HENRICOT; CA Brussels, 25 June 2013, *Tijdschrift@ipr.be*, 2013/3, 59; CA Antwerp, 12 January 2011, *T. Vreemd.*, 2011, 341).

In another case, a court was faced with a situation in which the parents has reached an agreement on the exercise of a right of access during a certain period. This was a provisional agreement which only concerned a given holiday season. The CFI Brussels held that such limited agreement was not an outright and unequivocal acceptance of the court's jurisdiction as foreseen in Article 12, as the court was now seized of a general claim in relation to the children's situation (CFI Brussels, 21 November 2007, *Act. dr. fam.*, 2007, 10).

Courts have, however, struggled with the assessment whether or not the exercise of jurisdiction under Art. 12 is in the superior interests of the child. One Court dispensed shortly with this assessment, simply

noting that the parent who had launched the proceedings resided in Belgium and that the children possessed the Belgian nationality (CA Brussels, 6 April 2006, *Rev. trim. dr. fam.*, 2007, 223, comments M. Fallon). In another case, the same court undertook to review whether any other court could exercise jurisdiction, in order to decide whether the exercise of jurisdiction under Art. 12 was in the superior interests of the child (CA Brussels, 28 Nov. 2006, *Rev. trim. dr. fam.*, 2008, 90). Another court noted that the exercise of jurisdiction under Article 12 was certainly not in the best interests of the child, since the child had always lived in Germany and the courts in Belgium therefore did not have any possibility to obtain accurate information on the child's situation (CA Antwerp, 12 January 2011, *T. Vreemd.*, 2011, 341).

Courts have also attempted to verify the existence of a “substantial connection” required by Article 12 par. 3 letter a of the Regulation. In one case, a court accepted that the fact that some members of the child's family resided in Belgium and possessed the Belgian nationality, was sufficient to demonstrate such connection (CA Brussels, 28 Nov. 2006, *Rev. trim. dr. fam.*, 2008, 90).

- **Actual use of the possibility to transfer a case (Article 15)**

Article 15 of the Brussels IIbis Regulation has given rise to interesting applications by courts.

In a first series of cases, courts have considered whether the courts of another Member State were indeed “better placed to hear the case”. According to the Court of Appeals of Brussels, this is the case when it appears necessary to order some investigative measures, such as a hearing of the child by a psychologist or social worker. In that case, the children have moved from Belgium to France during the course of the proceedings. The grand-parents, who resided in Belgium, requested a right of access. The court found that courts in France were better placed since the inquiry as to the current circumstances in which the children lived, had to take place in France (CA Brussels, 4 April 2007, *J.T.*, 2007, 623; *Rev. trim. dr. fam.*, 2008, 508). In another case, the court found that German courts were not better placed even though the child's habitual residence had been moved from Belgium to Germany during the proceedings. The court noted that it had already issued two provisional decisions and had ordered an expert to hear the child. These elements led the court to conclude that courts in Germany were not better placed to hear the case (CFI Eupen, 9 December 2005, *JLMB*, 2006, 1331). Another court decided that the foreign court was not better placed to hear a case in relation to a child who had moved with his mother to Austria (CFI Brussels, 25 April 2006, *JT*, 2007, 208).

Courts have also attempted to apply the criterion of the “best interests” of the child. In a case where a child's habitual residence had been moved during the proceedings from Belgium to Italy, the court of

appeal of Brussels has undertaken to review whether a transfer of proceedings based on article 15 would be in the “best interests” of the child (CA Brussels, 21 February 2008, *Rev. trim. dr. fam.*, 2008, 515).

The Court reviewed in particular three arguments raised by the father, who opposed the application of Article 15, i.e. the fact that a referral would require some documents to be translated into Italian, the fact that the courts in Italy would apply Italian law, which according to the father unduly favored the mother and finally the fact that courts in Italy could more easily order investigative measures. The Court of Appeal came to the conclusion that none of these arguments demonstrated that the best interests of the child would not be served by a transfer of the case to Italy.

The same court of appeal had noted that in order to apply the test of the 'best interests' of the child, one could take into account the fact that it would be difficult for the court seized to obtain relevant and current information on the child's situation (CA Brussels, 4 April 2007, *Rev. trim. dr. fam.*, 2008, 505, comments C. Henricot).

Courts have also attempted to apply the test of the “particular connection” laid out in Article 15 par. 3 of the Regulation. In one case, a court has noted that the children concerned lived in the other country since a few months, that they went to school there and had made friends and created social links which demonstrated the existence of a particular connection (CA Brussels, 4 April 2007, *J.T.*, 2007, 623; *Rev. trim. dr. fam.*, 2008, 508). In another case, the same court found that a child who resided since two years in a Member State possessed a sufficient connection with that State to justify the application of Article 15 (CA Brussels, 21 February 2008, *Rev. trim. dr. fam.*, 2008, 515, comments C. HENRICOT).

Some confusion may have existed regarding the practical application of the mechanism provided by Article 15 of the Regulation in the first years of its application. This appears from a case which was submitted to the Supreme Court in 2007: a lower court had been seized of a request in respect of a child habitually resident in Belgium. After a first decision had been taken, the child's habitual residence was moved to Germany. Two years after this decision, the matter came back before the court, which refused to exercise its jurisdiction and transferred the matter to a court in Germany. This decision was overruled by the Supreme Court, which recalled that no transfer could take place outside the specific framework put in place by Article 15 (Supreme Court, 21 November 2007, *Rev. trim. dr. fam.*, 2008, 176).

Other difficulties have appeared in situations where the proceedings in Belgium have reached the appeal stage. One court took argument of this to refuse the application of Article 15, arguing that if the matter was sent to a court in another Member State, this could only be done in first instance (CFI Brussels, 25 April 2006, *JT*, 2007, 280). Other courts have not clearly distinguished the various requirements laid out in Article

15 (e.g. CA Brussels, 11 March 2013, *Tijdschrift@ipr.be*, 2013/2, 40 - the court does not discuss the best interests of the child, nor the question whether the courts in Luxembourg were better placed to hear the case).

In general, practice reveals that courts have, however, mastered the application of Article 15. Courts do not hesitate to apply article 15 *ex officio*, without waiting for a request to that end by the parties. The Court of Appeal of Brussels has for example undertaken on its own motion to inquire whether a court in France would be willing to accept jurisdiction in a case where the children's habitual residence was moved from Belgium to France during the proceedings (CA Brussels, 4 April 2007, *J.T.*, 2007, 623; *Rev. trim. dr. fam.*, 2008, 508). Courts are also fully aware that Article 15 grants them a discretion whether or not to transfer the case to another court (CFI Brussels, 25 April 2006, *JT*, 2007, 208).

In most cases, courts in Belgium apply Article 15 when they are of the opinion that another court is better placed to hear the case given the circumstances of the case (see e.g. CA Brussels, 4 April 2007, *J.T.*, 2007, 623; CA Brussels, 21 February 2008, *Rev. trim. dr. fam.*, 2008, 515; CA Brussels, 27 June 2011, *Rev. trim. dr. fam.*, 2012, 653). In one recent case, however, a court has applied Article 15 after first finding out that it did not have jurisdiction under Article 8. The court was of the opinion that it was better placed to hear the case than the courts of England, where the child habitually resided when the proceedings were launched (CA Brussels, 21 June 2012, *Rev. trim. dr. fam.*, 2013, 263, comments C. Henricot).

One question which arose in relation to article 15, is whether this provision could be used in order to transfer a case to a Member State where a child had been illegally removed by one of the parents to that Member State. The Court of Appeal of Brussels has ruled that article 15 could not find any application in this case, as it would give a reward to the parent who illegally removed the child (CA Brussels, 25 October 2012, *Rev. trim. dr. fam.*, 2013, 617, 626).

Practice reveals that parties are, however, not always willing to accept a transfer of proceedings to another Member State. In a number of cases, courts have faced opposition from the parties when suggesting on their own motion such transfer (see e.g. CA Ghent, 5 September 2005, *Ej.*, 2005, 183 - transfer to the Netherlands; in this case, the court held that the fact that the public prosecutor agreed with the transfer was of no relevance for the operation of Article 15); CFI Brussels, 13 February 2007, *Rev. trim. dr. fam.*, 2007, 792 (the court had suggested to parties to transfer the proceedings to Germany, where the children's habitual residence had been moved after the proceedings had started; both parents strongly refused to entertain this possibility).

One question which has arisen in practice is whether a court, which applies the mechanism provided for by Article 15 of the Regulation, may transfer not only the issue of parental responsibility, but also other

claims made in relation to a child and in particular a claim relating to maintenance. One court has taken the position that such global transfer was possible (see CA Brussels, 21 February 2008, *Rev. trim. dr. fam.*, 2008, 505).

The application of Article 15 has also led to a number of interesting publications - see *e.g.* Caroline Henricot, "Le mécanisme de renvoi dans l'article 15 du Règlement Bruxelles IIbis", *Revue trimestrielle de droit familial*, 2008, 526-533; B. Jacobs, "La vérification d'office de la compétence internationale par le juge saisi, le moment où cette vérification doit se faire la question de l'intérêt de l'enfant au regard des règles procédures de compétence", *Act. dr. fam.*, 2008, 3-7.

- **Any other parental responsibility issues identified relating to jurisdiction**

Courts have sometimes struggled with the concept of 'habitual residence' which is fundamental for the application of the Regulation. In one recent case decided by the Court of Appeal in Brussels, the court was faced with a situation where a one year old child born in Belgium, had been moving back and forth between England and Belgium with his mother, the two parents dividing their time between various residences. Although the court came to a firm conclusion on the child's habitual residence, the decision reveals the very delicate nature of the assessment to be carried out (CA Brussels, 21 June 2012, *Rev. trim. dr. fam.*, 2013, 263, at pp. 275-278, with comments C. Henricot). In another case, a court was faced with a situation where a child born in France and who had lived in France, came to Belgium with his both parents only to be removed back to France after a couple of days. The Court was manifestly embarrassed when deciding where the child's habitual residence was located (CA Liège, 29 June 2010, *Act. dr. fam.*, 2011, 94).

In other cases, it is easier to determine where is the habitual residence of the child (see *e.g.* CA Brussels, 25 October 2012, *Rev. trim. dr. fam.*, 2013, 617 - the Court easily comes to the conclusion that the child habitually resided in Belgium before being moved to Italy by his mother; CA Ghent, 27 May 2010, *Tijdschrift@ipr.be*, 2010/3, 62 - the Court very easily comes to the conclusion that all children involved habitually reside in Belgium).

Recognition and enforcement Issues

Horizontal Issues

- Practical difficulties with regard to the recognition of judgments (Article 21)

Court practice has not revealed any difficulty with the application of Article 21 of the Regulation.

- Use of the list of grounds for non-recognition of judgments (Articles 22 and 23)

No significant difficulty has appeared in relation to the application of Articles 22 and 23 of the Regulation.

- Practical difficulties with regard to the use of certificates (Articles 39, 41 and 42)

Article 39 certificates have not given rise to practical difficulties.

Courts appear to be aware of the working of Article 41 and 42. Courts routinely deliver Article 41 certificates on their own motion, without being asked to do so by the parties (see *e.g.* CA Ghent, 10 December 2009, *Revue@dipr.be*, 2010/1, 64 – the Court notes that the dispute has a clear cross border dimension and delivers an Article 41 certificate *ex officio*; CA Ghent, 6 November 2008, *Tijdschrift@ipr.be*, 2010/1, 83, at p. 91 – the Court likewise notes that given the cross-border dimension of the case, the certificate should be granted *ex officio*).

The main difficulty with certificates issued under Articles 41 and 42 is that bailiffs ('huissiers de justice' / 'gerechtsdeurwaarders') appear to believe that such certificate may only be enforced in Belgium after having been subject to a declaration of enforceability. Bailiffs routinely turn down requests to proceed to enforcement of judgments from other Member States with such certificates, arguing that such judgments should first be declared enforceable by a court in Belgium. This is manifestly an erroneous reading of Articles 41 and 42. However, until now, it has not proven possible to convince bailiffs to enforce Article 41 and 42 certificates directly.

- Any other horizontal issues identified relating to recognition and enforcement

Questions have arisen in relation to judgments ordering a daily fine (i.e. a judgment dealing with rights of access of one parent and providing that any violation of such right, shall be punished with a daily fine). The Brussels IIbis regime does not include any specific provision in relation to daily fine (contrary to the Brussels I Regulation, which includes a specific provision, i.e. Article 49). As a consequence, doubts have arisen first in relation to the question whether the Brussels IIbis Regulation may be applied to the enforcement of a daily penalty (i.e. whether such

daily penalty may be dealt with independently of the ruling to which it is attached or whether it should follow the main ruling) and second, if the Brussels IIbis Regulation applies, if the amount of the payment must first be finally determined by the court of origin before being enforceable.

Matrimonial Matters

- The possibility of the recognition of private divorces under Article 21 et seq. (Article 21 et seq.)

No problem seem to have arisen in this respect.

- Practical difficulties relating to the automatic updating of civil status documents (Article 21)

Authorities appear to have fully mastered the consequences of Article 21.

- Any other matrimonial issues identified relating to recognition and enforcement

No other matrimonial issue has arisen.

Parental Responsibility

- Difficulties encountered with regard to the system of abolition of exequatur (Articles 41 and 42)

Practice has revealed that decisions are not always enforced even when a certificate is issued (see *e.g.* CA Brussels 17 June 2010, *Act. dr. fam.*, 2010, 191 – a court in Belgium had issued a decision with a certificate under Article 41, which, however, could not be enforced in Spain). It seems that in some Member States, the abolition of the exequatur for decisions in relation to rights of access and return of the child has not yet been fully accepted. In a recent case, the media reported that a judgment ordering the return of the child could not be enforced in Poland, even though an Article 42 certificate had been issued.

- Different interpretations of the term “enforcement” amongst Member States’ authorities (Articles 28 et seq.)

This issue has apparently not given rise to difficulties.

- The grounds for which the application for enforceability of a judgment may be refused (Article 31)

No difficulty has arisen in relation to the grounds of refusal listed in Article 31.

- Difficulties arising from the fact that exequatur proceedings have not been abolished for all types of decisions on parental responsibility (in addition to Articles 41 and 42), in particular for the placement of a child in another Member State.

- Please specify what safeguards should be maintained in case of expansion of abolition of exequatur to all types of decisions on parental responsibility.

There has not been any report of difficulties in relation to placement of a child outside Belgium and the need for such orders to obtain the exequatur. It may, however, be that such difficulties have arisen. In order to uncover them, contact should be taken with specialized authorities dealing with placement of children.

- Possible difficulties arising from the fact that return orders are currently not automatically recognised and enforceable in several Member States of the EU (Article 42)

Practice has shown that in several Member States of the EU, return orders based on Article 42, are not taken seriously. Such certified orders are deemed not to be enforceable without first obtaining a declaration of enforceability.

- Types of authentic instruments and agreements to be recognised and enforced under the Regulation (Article 46)

Practice has apparently not revealed cases where enforcement of such instruments is sought.

- Actual enforcement of the return orders: (i) the enforcement in the territory of the Member State to which the child was abducted of a return order issued by that Member State under Article 11(3), and (ii) the enforcement in the territory of the Member State to which the child was abducted of a certified return order issued by the court of origin under Article 11 (8).

In several cases, it appeared very difficult to obtain the enforcement of a certified return order issued under Article 11(8). However, these cases have not been reported in courts. They have rather been dealt with in the country where the enforcement should take place.

- Practical difficulties in relation to the enforcement of the access rights judgments, authentic instruments and agreements (Article 47)

No practical difficulties have been reported.

- Any other parental responsibility issues identified relating to recognition, enforceability and enforcement

A minor problem has been reported in relation to access rights granted for a short holiday period. Even when such access right is certified under Article 41, some Member States request that the judgment be declared enforceable. Proceedings in order to obtain a declaration of enforceability may extend over a certain period, sometimes several weeks or months, in which case it may be too late to exercise the access rights as the relevant holiday period has already lapsed.

The cooperation between central authorities

Horizontal Issues

- Practical difficulties with regard to the cooperation between central authorities (Article 55)

It appears from practice that Central Authorities are quite reluctant to explore the possibility to use *mediation* to solve difficulties between parents. This may be regretted as mediation could offer a very useful way out of the problems arising in relation to parental responsibility.

- Practical difficulties with regard to the placement of the child in another MS (Article 56)

No such difficulty has been reported.

- Any other issues identified relating to the cooperation between central authorities

N/A

Practical aspects of proceedings on parental responsibility

Parental Responsibility

- Practical difficulties in relations to provisional measures taken under Article 20 (for example, on recognition and enforcement).

One issue which has arisen, is that the system put in place by the Regulation does not create enough incentive for the parents to try to reach an agreement. Parents may indeed fear that if they agree to let a child stay, even for a limited period in another Member State, the other parent may take argument out of this residence to request provisional and protective measures under Article 20.

- Problems arising from the fact that there are currently no common minimum standards concerning the hearing of the child (Articles 39, 41 and 42)

Courts in Belgium are sometimes quite hesitant to hear children. As already explained, the legal framework for such hearing was until shortly not fully coherent. The existing legal framework and the future one do not impose an absolute obligation to hear children. Courts retain a discretion to decide whether or not to do so, depending on the age of the children. In some cases, courts have therefore refused to hear the children even when delivering Article 41 certificates (see *e.g.* CA Ghent, 10 December 2009, *Revue@dipr.be*, 2010/1, 64 - the Court notes that there is no obligation under Belgian law to hear the children; the Court then note that the children are too young to be heard; in this case, the children were 10, 7 and 4 y. old; CA Ghent, 6 November 2008, *Tijdschrift@ipr.be*, 2010/1, 83, at p. 91 - the Court likewise notes that there is no statutory duty to hear the child under Belgian law and that

the child is too young to be heard; in this case, the child was 5 y. old).

Courts have also noted the difference between the Article 23 regime and the Article 41 regime : under Article 23 of the Regulation, recognition may be denied if the child has not been given the opportunity to be heard, except in the case of urgency, while Article 41 does not include any caveat for cases of urgency. One court has decided that the urgency caveat should also be read in Article 23 (CFI Brussels, 13 February 2007, *Rev. trim. dr. fam.*, 2007, 792, at p. 794).

The difficulties in relation to the hearing of children also concern regular enforcement proceedings under article 28 of the Regulation. Article 31 (2) refers to the grounds of refusal listed in Article 23. Enforcement may therefore be denied if the ruling has been given without that the child was afforded an opportunity to be heard. Courts in Belgium are, as already stated, quite reluctant to hear children. A child younger than 10 y. will rarely be heard. This may mean that the enforcement of a ruling concerning a child will be refused in other Member States. This appears to have been the case in Germany, which has a much stricter policy of hearing children (§ 159 of the *Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit* and the comments of Stefan Schlauß, „Fehlende persönliche Anhörung des Kindes durch den ausländischen Richter – ein Anerkennungshindernis?“, *Familie, Partnerschaft und Recht* 2006, 228-229), although the denial of enforcement is not automatic. The new legal framework for court proceedings in relation to parental responsibility which will come into force on the 1st of Sept. 2014 may alleviate the difficulties.

- Problems arising from the fact that there are currently no common minimum standards concerning the representation of the child in court

Court proceedings in relation to parental responsibility do not require the child/children to be represented, at least in civil cases. The children are not deemed to be parties to such proceedings. Only the parents take therefore part in the proceedings. As a consequence the issue of the representation of the child has not arisen.

- The role of child welfare authorities in proceedings relating to children, in particular the cooperation between Central Authorities and the local child welfare system in cross-border situations in order to ensure the smooth operation of the Regulation.

No particular difficulty appears to have arisen.

- Any other issues identified relating to proceedings on parental responsibility

N/A

General Issues

- Different interpretations across the Member States related to the guarantee of rights of defence (e.g. Articles 11, 18, 22, 23)

This issue does not seem to have given rise to any difficulty.

- Difficulties arising from different provisions across the Member States concerning the service of documents

No difficulty seems to have appeared in this respect.

- Practical difficulties related to the guarantee of legal aid (Article 50)

No difficulty seems to have appeared in this respect.

- Any other general issues

N/A.

The Relationship with other Legal Instruments³

Horizontal Issues

- Practical difficulties in relation to the delineation of scope with other Union instruments (Article 1)

As of yet, no particular difficulty seems to have arisen.

- Practical difficulties in relation to the interrelations with the Nordic Convention (Article 59)

No difficulty has appeared.

- Practical difficulties in relation to the interrelations with other instruments mentioned in the Regulation (Articles 60 to 63)⁴

No difficulty has arisen in relation to the 1996 Hague Convention, as that Convention is not yet in force in Belgium. In respect of the other instruments mentioned in the articles 60 to 63, the difficulties which have arisen, pertain to the need for courts to master the scope of application of and relationships between the various instruments.

- Any other horizontal issues relating to the relationship with other legal instruments

N/A

Parental Responsibility

- Relation between the Regulation and the Hague Convention on child abduction of 1980 (Article 60 e)), the Hague Convention on the protection of children of 1996 (Article 61) and the European Convention of 20 May 1980 on Recognition and Enforcement of decisions

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concerning Custody of Children and on Restoration of Custody of Children (Article 60 d)

Courts seem to have understood and mastered the intricate relationship between the Regulation and the 1980 Hague Abduction Convention. The European Convention of 1980 on Custody of Children is almost never applied. The 1996 Hague Convention on Protection of Children is not yet applicable.

- Any other parental responsibility issues relating to the relationship with other legal instruments

N/A

Conclusions

Conclusions should be drawn based on your own conclusions, based on the analysis carried out.

- The main issues / problems regarding the application of the Brussels IIa Regulation in the relevant Member State

One of the central issue continues to be the correct application of the 1980 Hague Abduction Convention. Court practice reveals that some courts abusively refuse to order the return of a child who has been illegally removed. In theory, the mechanism put in place by Article 11 par. 7 and 8 of the Regulation makes it possible for the court of the Member State in which the child initially resided, to have the last word on the child's habitual residence. Courts must, however, taken into account the best interests of the child. The court called upon to rule on a request ex article 11 par. 7 and 7 usually intervenes a long time after the child has been wrongfully removed. Hence the return of the child may not be in the child's best interests, especially if the child is really young. This was the case in a dispute decided by the Court of Appeals of Brussels, in which a child had wrongfully been removed to Spain. After having noted that the child had been wrongfully removed and that Spanish court had abusively refused the return of the child, the Court of Appeal nonetheless decide that the child should remain in Spain with her mother, as she was very young and had spent the last 18 months with her mother who in the meantime had started a new life in Spain where she got married. While this ruling is certainly in the best interests of the child, the Court was forced to give priority to a parent who had wrongfully removed a child (CA Brussels 17 June 2010, *Act. dr. fam.*, 2010, 191). The matter would surely have played out differently if the Spanish court had given proper consideration to the request for the return of the child under the 1980 Convention. The problem is therefore not so much that the Brussels II*bis* regime does not work. It is that some

courts take requests for return under the 1980 Hague Convention too lightly. More investment should be made to make sure that judges in all Member States have a proper understanding of the 1980 Hague Convention.

Another difficult issue relates to the existence among Member States of different standards in relation to matters of divorce and parental responsibility. This is not very problematic in relation to divorce, as there seems to be a convergence of standards. Things are different for parental responsibility, where courts appear to have to work with very different standards.

- Proposals for Articles / terms etc. to be amended based on the findings described in the template.

Member States should pay very close attention to the principles developed by the Commission on European Family Law, in particular the Principles of European Family Law Regarding Parental Responsibilities. It is submitted that, if the revised Regulation is to include any substantive rules on matters of parental responsibility, these rules should be closely inspired by the European Principles. This is in particular the case in relation to the hearing of children. Principles 3:6 and 3:37 should be leading any efforts at the European level to come to an agreement on guiding principles on this question.

- Any other comments

N/A

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