The Revised Brussels II Regulation from the perspective of the English children's jurisdiction

A History of Diversity

1. Free cross-border movement of people within the Community was a fundamental objective of the founding fathers at the inception of the European Union, albeit initially with the economic goal of a free labour market in mind. It has been achieved, and its consequence has been social as well as economic. When, as inevitably has happened, disputes arise in families and in respect of children whose lives have transcended internal borders, there has been the potential for duplication, or conflict, of legal jurisdiction, and the temptation to engage in forum shopping with the objective of gaining perceived advantage, or avoiding unwelcome obligation.

2. In another, much older union of states, the United States of America, in which political federalism is far more advanced, and (save for a civil war some years ago now) has been broadly accepted, the scope for exploiting any diversity of approach in the individual domestic children's jurisdictions has been regulated by uniform custody jurisdiction statutes, which were still being refined over two centuries after the declaration of independence. These also provide a regime for inter-state enforcement and for the return of children. Unifying legislation of this kind, whilst plainly necessary and advantageous on a utilitarian basis, is inevitably far more politically sensitive in Europe, which started expressly as an economic community, and in which political union remains highly

controversial. Therefore, logically, whilst European Union laws relating to economic integration are highly developed, there has been understandably relatively little emphasis on family and children's law.

3. As a result, there is a background of considerable domestic diversity in the individual European states against which any unifying legislation has to operate. Most are what we in England call 'Civil Law' jurisdictions in which there is a written constitution from which the fundamental principles of law flow and from which the legislators and the courts derive their power. The remaining law (including family and children's law) is also codified in accordance with the constitution. England is different. It is a 'Common Law' country. It has not got, and never has had, a written constitution. It does not have, and never has had, a clear, self-contained, and comprehensive codification of its domestic law, although there are now numerous statutes dealing with individual matters – including the Children Act 1989, which sets out to be a codification of domestic children's law, but which takes its place in a patchwork of other relevant statutes. Domestic procedures, precisely codified in most Civil Law countries, may be (at least to an external audience) harder to discern in England. In an English children's case, by long-established judicial practice, as specifically expressed in the Children Act 1989, the subject child's best interest is the first priority for the court. This principled approach is shared with the other states of the European Union. However, the lack of a written constitution and of comprehensive legal codification has had two significant effects in English children's law. The first is that (at least historically) the law

has tended to develop from judicial decision-making rather than vice versa. The second, which is linked, is that judicial discretion is particularly wide in the hearing of English children's cases, and there is a very pragmatic approach to procedure – and a reluctance to allow consideration of cases to be delayed or distracted by procedural arguments.

4. The practical effect of disparity between domestic jurisdictions is of course highlighted by any international co-ordinating legislation, including the revised Brussels II regulation.

5. Such jurisdictional co-ordination as had developed in European children's law had, up until Brussels II revised, then emerged in three ways. First, by the reaction of the courts and legislatures of individual domestic states to interjurisdictional cases. For example, in England, a practice of returning abducted children grew up in wardship, and a respect for comity and for jurisdictions based on the habitual residence of the child developed alongside it, with assistance from the complex provisions of the Family Law Act 1986.

6. A second way was by the embracing of international conventions. Two prime examples are the 1980 Hague Child Abduction Convention, which is world-wide, and seeks to deal in a practical but very limited way with specific extreme manifestations of inter-country cases, and the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, which is Europe-wide, and is an inevitably very general expression of commonly held fundamental humanitarian standards. Both allow significant scope for

domestic interpretation, but both nevertheless quietly draw children's jurisdictions together. For example, whilst in England we still have no written constitution, the incorporation of the ECHR has given us some entrenched overarching principles which shape or restrain our domestic laws in a way common (subject to interpretation) to all the states of the European Union.

7. The third way was by limited and relatively conservative European regulation which built on developments that had already taken effect, including for example the experience of working within international conventions, and which did not require very radical legal or philosophical change.

The new Regulation

8. By these means, there was a gradual, quiet progress towards some co-coordination of European children's jurisdictions. The original Council Regulation (EC) No 1347/2000, or 'Brussels II', which came into force on 1st March 2001, primarily regulated and co-ordinated jurisdiction and recognition in matters relating to divorce, separation, and annulment. It had relatively little effect on children's litigation in England, restricted as it was to matrimonial cases. However, the much wider scope of the new Council Regulation (EC) No 2201/2003, or 'Brussels II revised' marks what is probably the most significant introduction of co-ordinating European legislation, certainly in the field of family law, since the incorporation of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 by the Human Rights Act of 1998.

9. Brussels II revised although ostensibly (as its title implies) building on the original regulation, in fact is wide in its scope and radical in its approach. It came neither gradually nor quietly. Its origins were controversial, and frankly political. The French initiative which started the process had at its heart particular experience, in the context of Franco-German children's cases, of the practical consequences of the temptation to engage in forum shopping with the objective of gaining perceived advantage, or avoiding unwelcome obligation, which I mentioned earlier. Both countries were and are signatories to the Hague child abduction convention, and to the Luxembourg or 'European' convention on the recognition and enforcement of orders in children's cases. Yet, it was said, in both cross-border retention and removal cases, and in enforcement of contact cases, a domestic diversity of approach between these two neighbouring jurisdictions at the heart of the original European Community thwarted a consistent approach to family justice and to the best interests of the children concerned.

Enforcing Access Orders

10. It was clear that a harder-edged means of enforcing cross-border access orders was needed – with more procedural streamlining than under Brussels II. The simple, straightforward route is to provide that the original court should certify access orders for enforcement in other EU states, on being satisfied that prescribed minimum standards for the hearing had been met. The certificate[1] must contain a verification that

(a) all parties have been given the opportunity to be heard;

[1] In the form set out at Annex III

(b) the child has been given an opportunity to be heard, unless a hearing was considered inappropriate having regard to the age and maturity of the child;

(c) where the judgment was given in default, the defaulting party has been served with the document instituting the proceedings in sufficient time and in a manner enabling that person to prepare his or her defence, or if the person was served with the document but not in compliance with these conditions, it is nevertheless established that the person has accepted the judgment unequivocally.

Once certified the order is in effect domesticated, and virtually unchallengeable. The relatively complex process of exequatur (which survives in other classes of enforcement) is abolished.

Regulating Child Abduction

11. More controversially however, what should be done with abduction cases? A more consistent and purposive approach as between member states (inferentially, one more likely to result in the speedy return of abducted children) was sought. Should the EU states, all of which were Hague signatories, simply be left to deal with them under that popular world-wide convention, or should a new European abduction code be introduced? If this was done, would this mean creating a rival to the Hague Convention, causing a proliferation of abduction jurisdictions? And what about the 1996 Hague Convention, which sets out to cover some of the same ground as Brussels II revised?

12. The end result was of course a compromise – and memorably, one non child-centred ingredient was a deal in the dispute between

England and Spain over Gibraltar - which has preserved the Hague Convention as the vehicle for resolving abduction cases, but as redefined in the new regulation. The world-wide standard remains, but with detailed control over the approaches of domestic courts to hearings, to timing – a mandatory 6 weeks limit save in 'exceptional' circumstances[2] - to interpretation – Article 13(b) defences will not run unless arrangements to safeguard a return cannot be made[3] - and to ensure that in those relatively rare cases in which a return is refused, the jurisdictional sequelae are deal with, in a way that gives priority to the jurisdiction of the child's habitual residence. Where a summary return has been refused under the Hague Convention, it is therefore possible in limited circumstances (although surely this will be unusual) for the original court to carry out a welfare investigation, and order a return. That return order can be certified as enforceable by the court which makes it, in a similar manner to an access order, and becomes in practical effect unchallengebly domesticated in the country which refused the Hague return.

A wide scope

13. As well as making firm provision for access and abduction cases, Brussels II revised extends the scope of the original regulation to cover the determination of the appropriate domestic jurisdiction in virtually all children's cases. No longer is there an obligatory link to divorce proceedings, and therefore to marriage. Instead, the regulation encompasses all children in civil matters relating to the 'attribution, exercise, delegation, restriction, or termination ...of

[2] Article 11
[3] Article 11(4)

parental responsibility[4].' It expressly includes *inter alia* (but is not limited to) private law custody and access cases, guardianship, placements in foster or institutional care, and property protection[5].

Parental Responsibility

14. Parental responsibility is a term wholly familiar in the English jurisdiction as being the encapsulation of the broad rights of custody given to an enfranchised parent under the Children Act 1989. The Brussels II revised definition, however, echoing the 1996 Hague Convention, included 'all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access.''[6] In addition to Court judgements, therefore, agreements, and decisions by authorities with jurisdiction[7] (eg social authorities with statutory power) subject to their having legal effect are covered, and in contradistinction to the English approach parental responsibility includes rights of access. Arrangements – such as non-parental placements - made for a child including under public law care proceedings (in which in England local authorities can acquire parental responsibility) are covered by the revised Brussels II, and specific provisions for international consultation by the Court are made for cases where a placement in public law or foster care in another country is contemplated[8].

[4] Article 1(1)(b)
[5] Article 1(2)
[6] Article 2(7)
[7] Article 2(1), (4)
[8] Article 56

Domestic Enforcement

15. Whilst introducing strong executive provisions, Brussels II revised gives considerable scope to, and respect for, existing domestic procedures to ensure compliance with them.

Identifying a regulation case, considering jurisdiction

16. The domestic Court is responsible under the revised regulation for investigating and identifying cases in which it has no jurisdiction, and refusing to hear them, save where this is vital to protect a child, and then without prejudice as to jurisdiction. In a case coming before an English Court, the first question is, 'is the child habitually resident in England and Wales at the time the Court becomes seised?'[9] If the answer is 'yes', then there is an English jurisdiction. The child's habitual residence is the cornerstone of the regulation. If the answer is 'no', there may nevertheless be

(a) a residual jurisdiction following a lawful move to another country[10] in access cases. Where (subject to detailed restrictions) there is a lawful move to another member state, the original (English) jurisdiction remains competent for 3 months thereafter, where there is an English access order in place. The other country's jurisdiction is competent to deal with non-access matters during this period,

(b) a jurisdiction in terms of the specific child abduction provisions of the regulation[11],

(c) a jurisdiction based on the specific provisions of Article 12, including a divorce-based children's jurisdiction – but such jurisdiction must now be based on at least one of the spouses having

[9] Article 8
[10] Article 9
[11] Article 10

parental responsibility, all holders of parental responsibility accepting the jurisdiction (either expressly or by conduct) and the exercise of the jurisdiction being in the best interests of the child[12], and it ends with a final order in the divorce[13]: or a 'substantial connection' jurisdiction, based on the best interests of the child, and on factors which may include the nationality of the child or the habitual residence of one of the parents, and a consent to the jurisdiction by all parties[14],

(d) a jurisdiction where the child is physically present in England and Wales, but no habitual residence can be established anywhere[15], including refugee children.

If there is no jurisdiction as above, then 'does the Court of another member state have jurisdiction under the regulation'?[16] If the answer is 'no', then the English Court can exercise such jurisdiction as may be available to it under domestic law. If the answer is 'yes', then the English Court must declare by its own motion that it has no jurisdiction, subject, of course, to the ability to make necessary provisional orders, including for the protection of the child.

English practice - Hearing parties

17. Inevitably there are areas in which any significant co-coordinating legislation will highlight differences between the subject domestic jurisdictions. The way parties and children are ‘heard’ is an area of divergence between English domestic practice and the approach of some other European jurisdictions. Brussels II revised makes it

[12] Article 12(a) and (b)
[13] Article 12(2)
[14] Article 12(3)
[15] Article 13
[16] Article 17

necessary for a court to certify[17] in a case where the an access order is to be made enforceable that all parties have been given the opportunity to be heard, and in a child abduction case, in certain circumstances, that the left-behind parent has been heard.

18. In English children's cases, the common-law tradition of oral evidence, heard in a public court, has been modified by the need to protect children from the sometimes harmful effect of publicity, where there is no real public interest in a family dispute. So, cases are normally heard in a court closed to the public, and with evidence – at least at first – in the form of written, sworn statements by the witnesses. In most cases, the witnesses then give oral evidence – and can be cross-examined about what they have put in their written statements. However, there is no absolute right to give oral evidence – and in some classes of case, most notably applications for the return of an abducted child under the 1980 Hague Convention, oral evidence is not normally permitted. The need to ensure an effective and speedy summary process (and therefore the Article 6 human rights of the child and of the left-behind parent) overrides any claim (usually by the abducting parent) to give oral evidence.

19. Long before the incorporation of the ECHR, English Judges maintained principles of 'natural justice' which they applied to the hearing of cases. One of these fundamental principles was that of 'audi alteram partem' – that both parties should be 'heard' if a hearing was to be fair and lawful. By well-established interpretation, a party did not need to give oral evidence, or even to be present in

[17] Annexe III

court, to be ‘heard’. If a party was represented by a lawyer, able to make submissions and put in written material on his or her client’s behalf, that party was ‘heard’ through that lawyer, even if the party was not present in court.

20. In 1980 Hague Convention cases, every left-behind parent who applies to the English jurisdiction for the return of an abducted child is provided with high quality personal representation by specialist Solicitors and Counsel. This is funded by the state, with no financial contribution required from the client parent. Therefore, there is no need for the left-behind parent to come to the hearing – his or her case can be expertly and speedily prepared and presented on London, whilst he remains in his home country.

21. Left-behind parents represented in this way are ‘heard’. The same method of free representation is available to left-behind parents in abduction cases brought under Brussels II revised.

English practice - Hearing the child

22. Article 11(2) of Brussels II revised provides that, ‘when applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity'. Similarly, when certifying an access case for enforcement, the court must confirm that the child has been given an opportunity to be heard, unless a hearing was considered inappropriate having regard to the age and maturity of the child.

23. The requirement that a subject child in a 1980 Hague Convention case is ‘heard’ is unrelated to the presence or otherwise of a ‘child’s objections’ defence under Article 13. Therefore English practice has necessarily changed – children will now be ‘heard’ in all cases – although in practical terms, given the restricted nature of the defences under Articles 12 and 13, there may be little practical purpose in so doing. But how is a child ‘heard’ in England?

24. In England, there is a requirement in a children’s case that the subject child’s ‘wishes and feelings’ are considered by the court as part of a ‘welfare check list’ in the Children Act 1989. Those wishes and feelings will sometimes be determinative of the case – in other cases, perhaps because the child is very young, or has no views that relate to the issue, they will be irrelevant. If there are relevant wishes and feelings, they must be brought before the court. How is this done? In contrast some other European states, most notably Germany, in England it is very unusual indeed for a Judge to speak to a subject child. English Judges are not specifically trained to interview children, and in England a subject child is normally not present in the court-room or even in the court building during the hearing.

25. However, bringing children’s wishes and feelings before the court is taken very seriously. The usual method in an abduction case that a trained officer of the Child and Family Advisory Service (‘CAFCASS’) is asked by the Judge to interview the child and to produce a written report for the court. The officer can also be made available to give oral evidence at the hearing. In this way the child is kept away from the court-room atmosphere, and the investigation and

representation of the child's wishes and feelings can be both thorough and independent of the parties and of the decision-maker. In some cases where the court considers it necessary for a proper consideration of the child's case (including, exceptionally, some 1980 Hague Convention hearings) children are represented with the help of Solicitors and Counsel represents the child as full participants in the adversarial hearing, and can (also wholly exceptionally in child abduction cases) instruct independent experts such as child psychiatrists on the child's behalf. Children are routinely represented as full parties by independent guardians in all public law cases – those in which social services intervene in the care of the child by the natural parents. The system is elaborate, comprehensive, and expensive (the cost is usually met by the state).

26. By these means, whilst the child will normally (save for teenagers who express a strong wish to attend the hearing), not be present in court, English Judges hear children in compliance with the requirements of Brussels II revised.

Existing English practice reflected

27. Apart from the concepts of 'hearing' parties and children, most aspects of Brussels II revised cause little difficulty for the English children's jurisdiction, either in compliance or in an understanding of its position by other European states. Parental responsibility (so described in the Children Act 1989) is a concept which is already basic to English domestic law as the foundation for parental rights and responsibilities. Habitual residence has for many years been the primary qualifying basis for taking on – or ceding – jurisdiction in a

children's case. A child who is physically present but not habitually resident has always qualified for emergency protection. Despite the mandatory jurisdictional provisions of the revised regulation, immediate child protection measures (and other provisional measures, not restricted to children's cases) will always be possible where necessary[18]. In contrast to the well-established tradition in some other European countries, nationality – of the parent or the child – is normally irrelevant as an arbiter of jurisdiction or applicable law, the 'long reach' for English children in wardship cases having been laid to rest.

28. The requirement that return applications in abduction cases are dealt with in 6 weeks save in exceptional circumstances (Article 11) is one which the English courts will strive to achieve – the current average in a 1980 Hague Convention case is 6 weeks.

29. English practice is already consistent with the provisions of Article 11(4) which provides that a 'court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return'. In appropriate cases, instead of relying on undertakings – which are not always familiar to or accepted in non Common-law jurisdictions – English Judges can now ensure that safeguards giving protection for a return are made in the requesting state.

Transfers and Children in Divorce – a logical development

[18] Article 20

30. The revised regulation introduces the possibility for transfers of jurisdiction, on a predominantly welfare basis, as well as transitional arrangements to safeguard contact following an inter-country move. One aspect of the English jurisdiction is now subject to change. Parents who petition for divorce in England may (and occasionally do) start proceedings when their children are neither present nor habitually resident in that country. The entry requirements, and provisions for transfers, in Brussels II revised[19] will bring a discretion based on habitual residence into children's cases based on a divorce petition. In those very rare cases in which a child is not habitually resident in England, but in which the parties are entitled to bring divorce proceedings there, the court will now have to consider whether it is in the children's best interests to accept jurisdiction to deal with their case, as opposed to the divorce suit.

Practical emphasis - Judicial and Administrative collaboration

31. Brussels II revised, unlike its predecessor, has been given a judge-made practice guide, available on the internet, which sets out, with graphic illustration where appropriate, the workings of the regulation. The benefit is obvious – the regulation is largely demystified. In England, a Central Authority building on the experience of that which has since 1986 dealt with Hague child abduction cases will not merely receive applications. It is fundamental to the regulation that there is liaison between central

[19] Articles 8, 12, and 15

authorities and judges to ensure that comity works in individual cases, especially where there is a real controversy over jurisdiction, or where, as in a Hague refusal case, there is obvious scope for misunderstanding. The translation and transfer of documents, including orders and transcripts of judgements and evidence is also provided for. The international judicial network, together with the judicial atlas, establishes a means of ensuring – so long as each country has made adequate domestic provision – the reliable identification of judges and courts for liaison purposes. In England there is already substantial experience of informal judicial collaboration, and Lord Justice Thorpe is the liaison judge. In England, as with Hague abduction cases, Brussels II revised work will primarily be restricted to the Family Division High Court judges, who can and do bring specialist experience and a consistent approach to international work.

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