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Parental Authority Conflicts

A Report for the Council of Europe Committee on Social Affairs, Health and Sustainable Development

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Cross-border parental authority conflicts

1. Introduction

In our globalised world, we find more and more bi-national couples and families whose everyday lives have a connection with more than one legal system. Since unfortunately, divorces and separations are part of life as are marriages and births, the number of child-related family disputes having an international element is increasing.

The breakdown of a relationship between parents of minor children is always a challenge. With whom will the children live: With one parent, or the other, or with both alternating? How will the holidays and in particular important family celebrations such as birthdays and Christmas be organised? Often financial issues play an important role too. Living in two households instead of one is an extra financial burden. Maintenance payments are regularly a connected further source of dispute.

Where the parents originate from different countries, a number of additional questions can play a role, such as: How can it be guaranteed that the child will continue to be raised in connection with both cultures, learning both languages? Furthermore, the relationship breakdown might lead to the wish of a parent to move back to his/her home country. How can exercising parental responsibility be organised across borders? How will a cross-border contact between a parent and child be maintained and who will bear the travel costs?

This report will briefly present existing international and regional instruments relevant in cross-border parental responsibility disputes, note how they assist in individual conflicts, refer to problems we face in practise in this field of law as well as to recent developments.

2. Example of a cross-border parental responsibility conflict

The following example situation shall illustrate an extreme case of cross-border parental responsibility conflict, namely a cross-border parental abduction. How the international and regional legal framework can assist to resolve this type of conflict will be presented below.

Anna (German national) and Andres (Spanish national) meet in Barcelona in 2009 where they both work. Following the birth of their twin daughters in 2013, they experience severe relationship problems. Anna feels not sufficiently supported by Andres in everyday life. She has difficulties to manage caring for the twins and getting back to work. Andres works long hours and is often absent due to missions abroad. Both the German and Spanish grandparents live far away and cannot help out.

In December 2016, with the agreement of Andres, Anna travels to Germany with the twins to spend the Christmas holidays with her parents. Anna does not return; she tells Andres on the phone that she is going to stay in Germany with the children. Andres is in shock and wants do everything he can to bring his children back home.

3. Overview of international and regional legal framework

Before exploring approaches to the solution of our example case, a brief overview of relevant international and regional legal framework shall be given including a reference to the geographical scope.

3.1. Global instruments of particular relevance:

The **United Nations Convention of 20 November 1989 on the Rights of the Child** (hereinafter "UNCRC")¹ sets forth fundamental principles for the protection of children's rights with specific attention given to children's rights in cross-border family matters. See in particular Article 10(2) concerning personal relations and contact between children and parents living in different States and Article 11 concerning child abduction. The Convention has 196 State Parties. All 47 Council of Europe Member States are a Party to this Convention.

¹ Convention text available at <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>>.

The ***Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children*** (hereinafter the “1996 Hague Child Protection Convention”)² provides for common rules on jurisdiction, applicable law, and recognition and enforcement in the field of parental responsibility and child protection. The Convention establishes a system of State-cooperation through Central Authorities assisting individuals concerned in each Contracting State in resolving cross-border family disputes. Any State can join this global instrument. Currently (March 2017), the Convention has 46 Contracting States. All EU Member States and 39 of the 47 Council of Europe Member States³ are a party to the Convention.

The ***Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*** (hereinafter the “1980 Hague Child Abduction Convention”)⁴ - aims to protect children from the harmful effects of their wrongful retention in or removal to a State other than their State of habitual residence. This Convention deals solely with the civil aspects a child's wrongful removal or retention and does not touch upon the question of possible penal law consequences of the removal or retention. Through the establishment of an international legal framework for the expeditious return of these wrongfully removed or retained children, the Convention assists in securing a continuous relationship of the child with both parents. The Convention prevents conflicting decisions on custody in the situation of a wrongful removal or retention of a child by forbidding the courts of the State to which the child was wrongfully removed (or in which the child is wrongfully retained) to take a decision on the merits of custody while return proceedings are ongoing. The Central Authority system set up by the Convention assists parents in abduction cases and also in cross-border contact cases in which no wrongful removal or retention has occurred. The 1980 Hague Child Abduction Convention is open for signature by all States and is currently (March 2017) in force for 97 States. All Council of Europe Member States with the exception of Azerbaijan and Liechtenstein are party to this Hague Convention.

3.2. EU-instruments of particular relevance:

The ***Charter of Fundamental Rights of the European Union*** (2010/C 83/02) (hereinafter EU Charter on Fundamental Rights)⁵ sets forth fundamental rights of European Union citizens and residents. The Charter, originally proclaimed in Nice in December 2000 has, as amended and proclaimed in December 2007, been given binding legal effect in the European Union with the entry into force of the Lisbon Treaty in December 2009.

The ***Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility*** (hereinafter “Brussels II bis Regulation”)⁶ unifies in the European Union Member States the rules on jurisdiction and recognition and enforceability of decision and enforceable agreements in the field of parental responsibility and establishes a system of administrative State cooperation through Central Authorities supporting individuals in need of assistance in cross-border family disputes concerning parental responsibility. This Regulation is only applicable between EU Member States (the Regulation does not apply to Denmark). It is important to note that the Regulation prevails over the 1996 Hague Child Protection Convention in matters covered by the Regulation, *i.e.*, jurisdiction, recognition and enforcement. The 1980 Hague Child Abduction Convention remains fully applicable in the EU but is supplemented by certain provisions of the Brussels II bis Regulation. Currently a recast of the Regulation is being discussed.⁷

² Convention text available at <<https://www.hcch.net/en/instruments/conventions/full-text/?cid=70>>; Explanatory Report available at <<http://www.hcch.net/upload/expl34.pdf>>; the Practical Handbook on the operation of the Convention available at <<https://assets.hcch.net/docs/eca03d40-29c6-4cc4-ae52-edad337b6b86.pdf>>.

³ The following Council of Europe Member States are not a party to the 1996 Hague Convention: Andorra, Azerbaijan, Bosnia Herzegovina, Iceland, Liechtenstein, Moldova San Marino and the former Yugoslav Republic of Macedonia.

⁴ Convention text available at <http://www.hcch.net/index_en.php?act=conventions.text&cid=24>; Explanatory Report available at <<http://www.hcch.net/upload/expl28.pdf>>.

⁵ Charter text available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:EN:PDF>>.

⁶ Regulation text available at <<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:338:0001:0029:EN:PDF>>; see also the “Practice Guide for the application of the Brussels IIa Regulation”, available at <http://ec.europa.eu/justice/civil/files/brussels_ii_practice_guide_en.pdf>.

⁷ See the Proposal COM(2016) 411 final of 30.6.2016 for the recast of the Brussels II bis Regulation <<https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-411-EN-F1-1.PDF>>

The **Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters** (hereinafter “European Mediation Directive”)⁸ aims to promote the amicable settlement of disputes concerning civil and commercial matters by encouraging the use of mediation and by ensuring “that parties to mediation can rely on a predictable legal framework”.⁹ All Member States of the European Union, except Denmark, are bound by the Directive and had to comply with the Directive before 21 May 2011.

3.3. Instruments of the greater European region of particular relevance:

The **Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950** (hereinafter “European Convention on Human Rights”)¹⁰ sets forth fundamental rights and freedoms, including the right to respect for private and family life, Article 8. To ensure the observance of the State Parties’ engagements, the Convention established the European Court of Human Rights in Strasbourg dealing with individual and inter-State petitions. All 47 Member States of the Council of Europe have signed and ratified this Convention.

The **European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children** (hereinafter “1980 European Custody Convention”)¹¹ protects custody and access rights in international situations and creates a Central Authority system providing for free, prompt, non-bureaucratic assistance in discovering the whereabouts and restoring custody of wrongfully removed children. This Convention is open for signature by all Council of Europe Member States as well as non-Member States invited to accede to the Convention (see Articles 21, 23). 37 Council of Europe Member States have currently (status March 2017) ratified the Convention, including all EU Member States except Slovenia.

The **European Convention on the Exercise of Children's Rights of 25 January 1996** (hereinafter “European Exercise of Children’s Rights Convention”)¹² aims to protect the best interests of children and promotes the exercise of children’s rights in legal proceedings concerning the child. This Convention is open for signature by all Council of Europe Member States as well as non-Member States that have participated in the Convention’s elaboration. Furthermore, other non-Member States can be invited to accede to the Convention (see Article 22). Currently (status March 2017), 20 Council of Europe Member States have ratified the Convention.¹³

The Council of Europe **Convention on Contact concerning Children of 15 May 2003** (hereinafter “Council of Europe Contact Convention”)¹⁴ sets forth general principles to be applied to contact decisions as well as safeguards and guarantees to ensure the proper exercise of contact and the immediate return of children at the end of the period of contact. The Convention aims to establish cooperation between all relevant bodies and authorities and reinforces existing international legal instruments in this field of law. The Convention is open for signature by all Council of Europe Member States and by non-Member States that have participated in its elaboration as well as by invited non-Member States (see Articles 22, 23). Nine Council of Europe member States have so far (status March 2017) ratified the Convention.¹⁵

⁸ Text available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF>>.

⁹ See recital 7 of the Directive.

¹⁰ Convention text available at <<http://www.conventions.coe.int/Treaty/en/Treaties/Html/005.htm>>.

¹¹ Convention text available at <<http://www.conventions.coe.int/Treaty/en/Treaties/Html/105.htm>>; Explanatory Report available at <<http://www.conventions.coe.int/Treaty/en/Reports/Html/105.htm>>.

¹² Convention text available at <<http://www.conventions.coe.int/Treaty/en/Treaties/Html/160.htm>>; Explanatory Report available at <<http://www.conventions.coe.int/Treaty/en/Reports/Html/160.htm>>.

¹³ These are: Albania, Austria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Italy, Latvia, Malta, Montenegro, Poland, Portugal, Slovenia, Spain, the former Yugoslav Republic of Macedonia, Turkey and Ukraine.

¹⁴ Convention text available at <<http://www.conventions.coe.int/Treaty/en/Treaties/Html/192.htm>>; Explanatory Report available at <<http://www.conventions.coe.int/Treaty/en/Reports/Html/192.htm>>.

¹⁵ Albania, Bosnia and Herzegovina, Croatia, Czech Republic, Malta, Romania, San Marino, Turkey and Ukraine.

3.4. Furthermore the following important recommendations and instruments of guidance should be mentioned:

Preventing and Resolving Disputes on Child Relocation, Recommendation CM/Rec(2015)4, adopted by the Committee of Ministers of the Council of Europe on 11 February 2015;¹⁶

The Washington Declaration on International Family Relocation, of 25 March 2010;¹⁷

Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice, adopted by the Committee of Ministers on 17 November 2010;¹⁸

Recommendation No. R (84) 4 to member States on parental responsibilities, adopted by the Committee of Ministers of the Council of Europe on 28 February 1984;¹⁹

Resolution 2079 (2015) on equality and shared parental responsibility: the role of fathers, adopted by the Parliamentary Assembly of the Council of Europe in October 2015;²⁰

Recommendation No. R (98) 1 to member States on family mediation, adopted by the Committee of Ministers of the Council of Europe on 21 January 1998;²¹

Guidelines for a better implementation of the existing recommendation concerning family mediation and mediation in civil matters, CEPEJ(2007)14;²²

Principles for the establishment of mediation structures in the context of the Malta Process, drawn up by the Hague Conference's Working Party on Mediation in 2010.²³

4. Resolution and prevention of cross-border parental responsibility conflicts

4.1. Human and Children's Rights with impact on international family law

When analysing the legal framework of cross-border parental responsibility conflicts, one must first of all take note of a number of important binding Human Rights and Children's Rights provisions, which shape legal practice in international family law. These include the provisions of the UNCRC, Article 8 of the European Convention on Human Rights, Article 7 and 24 of the EU Charter on Fundamental Rights but also provisions of the Convention on the Exercise of Children's Rights and the Council of Europe Contact Convention. The binding Human Rights and Children's Rights provisions are further elaborated by a number of non-binding instruments such as the Guidelines of Europe on child friendly justice.

When considering the development of children's rights in the past decades one could talk of a "revolutionary" development. In particular the UNCRC and connected initiatives have assisted in bringing about a major shift in the perception of the child's role in national and international family law. Today, children are recognised as subjects of rights and their role in proceedings has considerably changed. The change in perception is also illustrated by a change of terminology in family law: today the term "parental responsibility" has widely replaced the "rights of custody" and the term "contact rights" is used instead of "access rights" - both with the notion of better reflecting a reciprocal rights-relationship.

The fundamental principle that the best interests of the child shall be a primary consideration in all proceedings concerning children (Article 3 UNCRC) has been taken up and further elaborated in international and national legislation as well as in relevant case law including the case law of the European Court of Human Rights. Furthermore, the right of the child to express his / her views in all matters concerning the child and to have these views taken into consideration in accordance with the

¹⁶ Available at:

<[https://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec\(2015\)4E%20and%20Explanatory%20Memorandum_child%20relocation.pdf](https://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec(2015)4E%20and%20Explanatory%20Memorandum_child%20relocation.pdf)>.

¹⁷ Available at <https://assets.hcch.net/upload/decl_washington2010e.pdf>.

¹⁸ <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804b2cf3>>.

¹⁹ Available at <<https://www.coe.int/t/dghl/standardsetting/family/Rec.84.4.%20E.pdf>>.

²⁰ Available at <<http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=22220&lang=EN>>.

²¹ Available at <[http://www.coe.int/t/dghl/standardsetting/family/7th%20conference_en_files/Rec\(98\)1%20E.pdf](http://www.coe.int/t/dghl/standardsetting/family/7th%20conference_en_files/Rec(98)1%20E.pdf)>.

²² See <<https://wcd.coe.int/ViewDoc.jsp?p=&id=1223897&Site=&direct=true>>.

²³ Available at <<https://www.hcch.net/en/publications-and-studies/details4/?pid=5317&dtid=52>>.

age and maturity of the child (Article 12 UNCRC) is given particular importance in the resolution of cross-border family disputes.²⁴ It has to be noted that national standards and practice as to how and as of which age children are heard in family law proceedings differ from country to country and that these national differences can sometimes pose difficulties in transfrontier family matters.²⁵ Children's procedural rights are further elaborated by a number of multilateral and regional instruments. Here, in particular the European Exercise of Children's Rights Convention should be mentioned, which also promotes the right of the child to be informed and the right to separate representation. In the EU, the Lisbon treaty has brought about a further strengthening of children's rights.²⁶

4.2. Private international law instruments resolving cross-border parental responsibility conflicts

A number of private international law instruments in the field of international family law, namely the 1996 Hague Child Protection Convention, the 1980 Hague Child Abduction Convention and, inside the EU, the Brussels II *bis* Regulation as well as, in the greater European region, the 1980 European Custody Convention, provide tools to prevent and resolve cross-border parental responsibility conflicts. All mentioned instruments contribute to the same objective: avoiding conflicting decisions in matters of parental responsibility and bringing about a speedy resolution of the cross-border dispute in order to protect the children concerned. As typical for modern international family law instruments, all of these instruments contain rules on the establishment of a Central Authority cooperation system assisting individuals in the prevention and resolution of cross-border family disputes. The conflict of law rules promoted by these instruments constitute a further proof of a shift to a more child-centred approach in international family law: the favoured connecting factor for matters of parental responsibility is the habitual residence of the child. There is thus a focus on the proximity to the child's actual circumstances of everyday life. The court at the place of the habitual residence of the child is considered to be the one generally best suited to decide on child-related matters.

By promoting the habitual residence of the child as principal ground of jurisdiction, the 1996 Hague Child Protection Convention contributes to avoiding parallel proceedings and conflicting decisions. The Brussels II *bis* Regulation, whose jurisdiction rules replace inside the EU those of the 1996 Hague Convention, follows the same logic. The 1996 Hague Convention introduces, in addition, common applicable law rules for international child protection matters: As a general rule, the competent courts apply their own law (Article 15). In connection with the principal connecting factor for jurisdiction "habitual residence of the child", this means that the law principally applied in child protection matters is the law of the State of habitual residence of the child. A further very important aspect of the applicable law rules of the 1996 Hague Child Protection Convention is to be highlighted: The Convention ensures that the change of habitual residence of the child and consequently the change of the law applicable to child protection matters cannot lead to an extinction of parental responsibility existing under the former law of habitual residence of the child, see Article 16(3) of the Convention. Finally, the 1996 Hague Convention, the Brussels II *bis* Regulation and the 1980 European Custody Convention provide for a simplified and speedy recognition and enforcement of decisions.

4.3. Differences in national law

It is important to note that private international law instruments do not intend to harmonise the substantive family law of different States. All the above-mentioned instruments are based on the principle of mutual respect of different legal traditions. Of course, binding and nonbinding human rights and children's rights norms have impacted on national family law and have led to common developments and similar reforms in past years. Nonetheless, we continue to see a number of bigger differences in national family law in the greater European region as concerns parental responsibility. Supported by the children's rights movement, the past decades have more and more erased the differences between children born in and out of wedlock. However, a number of differences subsist between different national laws with regard to parental responsibility of unmarried fathers. In some

²⁴ The right of the child to be heard is also promoted also the 1996 Hague Convention and the Brussels II *bis* Regulation, see Article 23 2 b) of the 1996 Hague Child Protection Convention and Articles 11 (2) and (5), 23 b), 41 (2) c) 42 (2) a) of the Brussels II *bis* Regulation.

²⁵ As the discussions on a recast of the Brussels II *bis* Regulation in the EU have revealed, there are "discrepancies in the interpretation of the grounds for non-recognition of decisions given in other Member States, in particular in relation to the hearing of the child", see the Proposal COM(2016) 411 *supra* footnote 7, p. 4.

²⁶ See Canetta / Meurens / McDonough / Ruggiero, EU Framework of Law for children's rights, PE462.445, 2012, pp. 18 et seq., available at [http://www.europarl.europa.eu/RegData/etudes/note/join/2012/462445/IPOL-LIBE_NT\(2012\)462445_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2012/462445/IPOL-LIBE_NT(2012)462445_EN.pdf).

States an unmarried father who recognises paternity automatically has parental responsibility of his child: in other States further steps are required.

Another matter in which national laws and legal practice differ in Europe is the question of how parental responsibility will be exercised following a separation of the parents. A big step has been made towards the recognition of fathers' rights in the past decades. While not too long ago it was considered as rather normal that following the divorce the "custody" of the child was given to the mother and that the father merely had "access" rights, today the standard is that both father and mother following a divorce continue to have joint rights of parental responsibility independent of with whom the child actually lives. This means for example that both parents have the right and duty to jointly decide on important matters in the child's life. The big difference in national law and practice with regard to parental responsibility of separated parents concerns the question with whom the child will live. In some States the child will, as a general rule, live with either one or the other parent (more often the mother). In other States courts will, as a general rule, follow the principle of shared residence (*residence alternée*),²⁷ as a result of which the child will live partly with the mother and partly with the father. In case the child resides with only one parent, a further difference in national law concerns the question whether this parent has the right to solely decide to relocate nationally and internationally.

4.4. Solution of the example case

Coming back to our example situation of a cross-border parental responsibility conflict, which is what one can refer to as a typical "international child abduction" situation. One parent removes a child from the country of habitual residence without the consent of the other parent in breach of actually exercised custody rights. Or, as in our example, one parent retains a child in a State other than the State of habitual residence in breach of actually exercised custody rights. The 1980 Hague Child Abduction Convention, the 1996 Hague Child Protection Convention and the Brussels II *bis* Regulation all use the same definition of international parental child abduction in form of either wrongful removal or retention.²⁸ The question whether the left-behind parent has rights of custody in the sense of these instruments is to be determined by the law of the State of habitual residence immediately before the wrongful removal or retention of the child, *i.e.* the law of Spain in our case. In Spain a father has, by operation of law, parental responsibility as a consequence of parenthood independent of the marital status of the parents.²⁹ The retention of the children in Germany without the consent of the father is thus unlawful in the sense of the three instruments.

Our case falls within the geographical scope of all three instruments. As stated above, the 1980 Hague Convention is not replaced but supplemented by the Brussels II *bis* Regulation. For a cross-border child abduction case inside the EU the expeditious return mechanism of the 1980 Hague Convention can thus be used.

The 1980 European Custody Convention has a narrower scope of application and would not immediately apply in our example. The improper removal of a child as defined in Article 1 d) of the Convention presupposes a breach of a decision relating to custody. In our case, the father has "custody rights" by operation of law. He would have to first obtain a custody decision in Spain declaring the removal unlawful in the sense of the Convention (Article 12) before being able to use the Convention. Once obtained, the custody decision could be enforced with the help of the Convention's provisions on recognition and enforcement requesting Contracting States to apply simple and expeditious procedures (Article 14 of the Convention). Similarly to the 1980 Hague Child Abduction Convention, the applicant would receive Central Authority support (Articles 4 and 5). The author of this report is not aware of statistics on the use of the 1980 European Custody Convention. It seems, however, that in practice the use of this instrument is much less frequent than that of the 1980 Hague Abduction Convention. This may be owed to the broader scope of application of the latter instrument, the expeditious *sui generis* return proceedings and the reinforcement of the Convention by the 1996 Hague Convention and, inside the EU, by the Brussels II *bis* Regulation.

²⁷ As promoted for example by the Resolution 2079 (2015) of the Parliamentary Assembly of the Council of Europe on Equality and shared parental responsibility: the role of fathers, point 5.5.

²⁸ See Article 3 of the 1980 Hague Convention, Article 7 of the 1996 Hague Convention and Article 10 of the Brussels II *bis* Regulation.

²⁹ See national report on parental responsibility, prepared by Prof Cristina Gonzalez Beilfuss <<http://ceflonline.net/wp-content/uploads/Spain-Parental-Responsibilities.pdf>>.

Using the facts of our example case, it shall briefly be explained how the return mechanism of the 1980 Hague Convention works in practice: the left-behind parent, Andres, can contact the Spanish Central Authority under the Convention for assistance. The Spanish Central Authority will liaise with the German Central Authority to assist in locating the children and try to bring about a voluntary return of the children. Should the taking parent, Anna, not voluntarily return the children, the German Central Authority will institute the return proceedings under the Convention. In Germany, as in a number of other Contracting States to the 1980 Hague Convention, the Convention return proceedings are concentrated in a small number of specialised courts. The court seized will, with short notice, order the return of the children to the State of habitual residence, unless one of the limited exceptions to return defined by the Convention applies. The facts of the case do not give any indication as to circumstances justifying an exception to return under the Convention. The German court would thus order the return of the children to Spain. Anna can appeal the decision but given the facts known in our case, the result of the second and last instance would be the same. Should Anna not comply with the decision, the decision will be enforced.

The timeframe “envisaged” by the Convention to render a decision in return proceedings is six weeks, see Article 11 of the Convention. Under the Brussels II *bis* Regulation the six-week-period has been turned into an obligation, see Article 11 (3) of the Regulation. Statistics on return proceedings indicate, however, that courts in many States, even though expeditious proceedings have been introduced, struggle with meeting this tight timeline and that despite the stricter Brussels II *bis* rules, return proceedings inside the EU are not faster.³⁰ It should be noted that this issue is among the matters discussed for the recast of the Brussels II *bis* Regulation.³¹

This sounds like a straightforward solution to our cross-border parental dispute. But a number of issues remain yet to be addressed. The parental dispute is not over. The 1980 Hague Child Abduction Convention intends to restore the *status quo ante* abduction but is without prejudice as to the decision on the “merits of custody”, see Article 19 of the Convention. Assuming Anna returns with the children to Spain, it is still not clear with whom the children will be living after the parents’ separation. This is a matter that is, in accordance with the jurisdiction rules of the Brussels II *bis* Regulation to be decided by the courts of Spain.

To explain the so-called “overriding mechanism” the Brussels II *bis* Regulation adds to the operation of the 1980 Hague Child Convention inside the EU, we assume that the facts in our case indicate a grave risk that return of the twins to Spain would expose them to physical or psychological harm and that the German court seized with the return proceedings decided against a return of the children. Article 11 (6) of the Brussels II *bis* Regulation obliges the court that issues a non-return order pursuant to Article 13 of the 1980 Hague Convention to “*immediately either directly or through its central authority, transmit a copy of the court order on non-return and of the relevant documents, in particular a transcript of the hearings before the court, to the court with jurisdiction or central authority in the member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law*”. The time period foreseen is one month. The court with jurisdiction in the Member State where the child was habitually resident immediately before the abduction can in its subsequent judgement on the merits of custody request the return of the child and thus “override” the non-return decision, Article 11(8) of the Brussels II *bis* Regulation. In addition, the Regulation abolished the exequatur for the “overriding” return decision. Heated discussions have been led on the usefulness of the “overriding mechanism” which was meant to constitute a reinforcement of the Hague return mechanism but turned out to create some discord among EU Member States. Adaptations to the “overriding mechanism” are thus being proposed in for the recast of the Brussels II *bis* Regulation.³²

4.5. Ongoing work to improve the operation of Hague Conventions

Continuous work is undertaken by the Hague Conference on Private International Law (HCCH) and the Convention’s Contracting States to further improve the operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, in particular through Special commission meetings on the effective operation of these Conventions held every 4 to 5 years. The next upcoming Special Commission on these two instruments is envisaged for autumn 2017.

³⁰ Prel. Doc. No 8 B of May 2011 - A statistical analysis of applications made in 2008 under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*. Part II - Regional Report, p. 10, <<https://assets.hcch.net/upload/wop/abduct2011pd08be.pdf>>.

³¹ See Proposal COM(2016) 411 *supra* footnote 7, at p. 13.

³² See Proposal COM(2016) 411 above footnote 7, at pp. 3, 12 *et seq.*

Despite the fact that the overall operation of the 1980 Hague Child Abduction Convention is considered satisfactory, a number of issues pose problems in practice. These include: Problems with parallel criminal prosecution of the abducting parent in the country of return hindering the parent's return with the child; problems with a failure of some Contracting States to introduce sufficiently expeditious return procedures and / or provide expeditious enforcement mechanisms for return decisions; problems due to the involvement of non-specialised judges, lawyers and other stakeholders. Clearly where the expeditious return mechanism of the 1980 Hague Child Abduction Convention is not well-applied problematic situations can arise as is, *inter alia*, reflected in the case law of the European Court of Human Rights.³³ A further matter discussed in recent years was, whether the 1980 Hague Child Abduction Convention, having been adopted more than three decades ago, was still appropriate in view of modern developments. The statistics on the operation of the Convention indicate that other than thought at the outset, the majority of cross-border child abductions are conducted by the sole primary or joint primary carer of the child. Often it is the mother having left her home country to live with her husband abroad who, following the relationship breakdown, leaves with the child to her home State. The dangers a cross-border child abduction imply for children remain: In contrast to children lawfully relocated to another State, wrongfully removed or retained children are at risk of losing contact with the left-behind parent, extended family and friends and risk losing touch with the cultural links to the other country, which is why the international legal framework needs to provide remedies for these situations. However, the fact that the primary carer is often the taking parent has brought about unforeseen complications in practice. How can the *status quo ante* abduction be restored as envisaged by the Convention, if the primary carer decides not to accompany the returning child (or if due to criminal proceedings in the State of return the taking parent cannot accompany the child without risking prison)? The return decision of the Hague Child Abduction Convention is meant not to affect the decision on the merits of custody but in the above mentioned cases it factually can bring about a short and long-term change of the primary carer of the child. In view of the above issues, some Contracting States have proposed to reform the 1980 Hague Convention and to create a Protocol to the Convention. The in-depth exploration³⁴ of the matter by the Sixth Special Commission to review the operation of the instrument in 2011 / 2012 brought about a preference to rather further develop and elaborate good practices under the Convention and tools of guidance in order to make the instrument compatible with new challenges and to assist, in particular, newly acceding States in the considerate application of the Convention's return mechanism.³⁵ Further work is currently undertaken in particular in three areas: "cross-border recognition and enforcement of mediated agreements; legal basis for cross-border direct judicial communications; and allegations of domestic violence in the context of return proceedings".

There is no space in this brief report to enter into further details. However, the subject of mediation in cross-border family disputes must be given some attention.

4.6. Cross-border family mediation

All modern international and regional family law instruments encourage the amicable resolution of disputes. Most of these instruments thereby make an express reference to "mediation". In parallel, a number of international and regional organisations including the Council of Europe, have in the past years undertaken initiatives to promote cross-border family mediation and to provide guidance and elaborate minimum standards in order to safeguard the quality of mediation.³⁶ The probably most detailed work on cross-border family mediation, including mediation in the context of international child abduction, has been undertaken by the Hague Conference on Private International Law. In 2010, a Working Group elaborated the so-called "Principles for the establishment of mediation structures in the

³³ The court has repeatedly held that States were in breach of their obligation under Article 8 of the European Convention of Human Rights when not taking effective measures to ensure the expeditious return children under the 1980 Hague Child Abduction Convention.

³⁴ See, *inter alia*, Prel. Doc. No 7 of May 2011 - Consultations on the desirability and feasibility of a Protocol to the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* - a preliminary report available at <http://assets.hcch.net/upload/wop/abduct2011pd07e.pdf> and the Report of Part II of the Sixth Special Commission Meeting (25-31 January 2012), at para. 4, available at < https://assets.hcch.net/upload/wop/concl28-34sc6_en.pdf >.

³⁵ See on the discussions of improving the Hague return mechanism in the context the discussions on the recast of the Brussels II bis Regulation, *inter alia*: van Loon, The Brussels IIa Regulation towards a review?, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510003/IPOL_STU\(2015\)510003_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510003/IPOL_STU(2015)510003_EN.pdf), pp. 178 *et seq.*

³⁶ To mention is, in particular, the work of the Council of Europe in this regard, see Recommendation No. R (98) 1 to member States on family mediation later followed by the 2007 Guidelines for a better implementation of the existing recommendation concerning family mediation and mediation in civil matters both addressing the matter of cross-border family mediation; furthermore, the EU Mediation Directive aiming to set minimum common standards for cross-border family mediation.

context of the Malta Process” aiming to set up contact points for international family mediation assisting individuals in finding specialised mediators and setting out general requirements for cross-border family mediation. In 2012, the Guide to Good Practice on Mediation in the context of the 1980 Hague Child Abduction was published. Following the identification of problems concerning the cross-border recognition and enforceability of mediated agreements, the Hague Conference has set up an Experts’ Group, which is mandated to further explore the matter and *“to develop a non-binding “navigation tool” to provide best practices on how an agreement made in the area of family law involving children can be recognised and enforced in a foreign State under the 1980, 1996 and 2007 Hague Conventions.”*³⁷

To illustrate the identified problems concerning mediated agreements, we can once more use our example case. Assuming Anna and Andres had been encouraged by the German courts to use specialised mediation to resolve their conflict and assuming they would have been able to come to an agreement, the question would occur whether the mediated agreement could be rendered legally binding and enforceable in Germany and Spain. The matter would be complicated by the inclusion of different subjects in the agreement, for example, matters of parental responsibility, practical matters concerning travel arrangements and maintenance matters. If families are encouraged to solve their cross-border dispute in mediation, tools have to be provided allowing them to obtain a reliable and recognised outcome.

5. Final remarks:

A number of well-functioning international and regional instruments assist effectively in the prevention and resolution of cross-border parental responsibility conflicts in the greater European region. Continuing work is needed to further improve the operation and considerate use of these instruments and to enlarge the geographical scope of application of the important principles promoted by them. Cross-border family mediation has the potential to become an important factor in the resolution of cross-border family disputes, however, further work is needed to assist parties in the elaboration of reliable and legally binding solutions in line with the applicable international legal framework.

³⁷ See the mandates given by the Council on General Affairs and Policy of the Hague Conference in 2012 and 2016.