

Brussels II Encore

A summary of Brussels II bis

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Brussels II is possibly the most anti family and unconciliatory piece of legislation in family law. It directly discourages mediation, reconciliations and early settlements. So when the EU announced that it was engaging on a review and revision, there was much rejoicing. Alas hopes were unfulfilled and the new law, in force from 1 March 2005, is restricted to changes in jurisdiction and recognition of orders in children matters. However in those respects it has made real improvements and changes. Given the number of cases with an international aspect, especially across a Europe with an enlarged population of about 480 million, it is important that all family lawyers are aware in summary of these changes.

What is it and where to find it

Brussels II is Regulation (EC) No 1347/2000, in force on 1 March 2001, on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses. It was known, shorthand, as BII. The new law completely repeals BII. It is Council Regulation (EC) No 2201/2003 of 27 November of 2003 and described as “concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility”. It is known variously as BII revised or BIIr or, more often in my experience, BII bis; bis meaning approximately encore, although encore more in the way of repeat than rejoice!

BII bis can be found at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32003R2201&model=guichett. Crucially the EU has published an invaluable Practice Guide at http://europa.eu.int/comm/justice_home/ejn/parental_resp/parental_resp_ec_vdm_en.pdf. Both are, perhaps surprisingly, easy to read. Given the complexity of situations which can arise, this article highlights issues and directs to the areas for more reading.

In summary

BII bis makes no changes to divorce jurisdiction or divorce forum law save for changes to numbers of the Articles.

It extends the children provisions of BII to all children involved in proceedings, makes changes to the process of recognising and enforcing access orders in other countries, changes the jurisdiction rules on children cases and strengthens return provisions in child abduction cases.

General and divorce

It comes into force across all of the enlarged EU, save for Denmark, which again opted out.

The divorce jurisdiction rules are the same as BII but there is renumbering of the Articles. For example, Article 2(1) as referred to in most divorce petitions on jurisdiction is now Art 3(1). But content has not changed on divorce, divorce jurisdiction and first to issue.

Children and jurisdiction

BII bis covers children in all civil matters (Art 1(1)(b)). Previously it was only children of divorcing parents.

This was a much needed expansion of the law. BII bis includes private law custody, access (now known as contact in England), guardianship and property protection (e.g. appointment of representatives). It includes parental responsibility as widely defined in Art 2(7) as “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.” It covers enforceable agreements made after 1 March 2005 and decisions by authorities with jurisdiction which covers social services, arrangements in public law care proceedings, international foster care. It does not cover adoption, maintenance, trusts and criminal matters of children.

BII bis has created a helpful hierarchy of jurisdiction rules on children matters. The Practice Guide sets out a flow chart.

The starting point is Art 8 which gives priority to the state of the habitual residence of a child. This jurisdiction does not normally change even if the child later moves to another country. There are exceptions to this general priority to habitual residence when the child has lived previously in another member state (Art 9), cases of child abduction (Art 10), cases where the closer connection may not be habitual residence (Art 12), the mere presence of a child other than habitual residence (Art 13) and transfers to a country better placed to deal with a case (art 15). But each of these Articles have strict preconditions. The general and most used rule is that jurisdiction is based on a child’s habitual residence. A phrase not defined! It is left to individual judges.

Where a child has moved from one member state to habitual residence in another state, the original state may still have jurisdiction but the provisions in Article 9 are detailed and dependant on the movement being lawful, action being taken in three months etc, and reference should be made to the Convention and to the Practice Guide.

Child abduction is dealt with below.

Where there are divorce proceedings in a member state, that country can deal with issues of parental responsibility, which as above covers custody and access, in accordance with Art 12 provided it is in the best (described as “superior”) interests of the child. Jurisdiction on this basis ends when the divorce action ends e.g. with a DA. Even if no divorce proceedings, a country can still take jurisdiction when a child is not habitually resident if the child has a substantial connection with the country and all relevant parties agree to that country dealing with the matter and again it is in the best interests of the child (Art 12).

If a child is present in a country then it can deal with matters of parental responsibility if it is impossible to determine habitual residence (Art 13).

A new innovation in Art 15 is to allow a transfer of a case (or part of a case) from one country to another if the latter is better placed to hear it and the transfer is in the best interests of the child. The specific criteria for any transfer are in Art 15(3). A second transfer is not allowed. The application for the transfer can be by a party, the court of its own motion or the court of another member state. There are strict time limits and procedures to invoke Art 15 but it is a very valuable addition. Again the Practice Guide has a very valuable flow chart.

The first to issue rules, so hated in divorce matters in BII, still exist but are unlikely to feature materially in children cases because of the priority rules on habitual residence under Art 8. But they are still there in Art 19.

Recognition and enforcement of decisions

The process in BII known as exequatur governing recognition and enforcement of children orders has

been abolished in access cases and is inapplicable in abduction cases. It is found in Arts 21 and 23-39.

Instead, to ensure contact even if a child moves across borders, it is now no longer possible to oppose recognition of an access order. A certificate is issued as a preliminary to enforcing an access order. It is issued by the judge who made the original access order and certifies, in summary, that all parties had the opportunity to be heard, the child had the opportunity to be heard subject only to age and maturity and that any defaulting judgement gave the defaulting party notice and opportunity to prepare a defence or has accepted the judgement. The certificate is Annexe III to BII bis. The access judgement, when certified, becomes automatically recognised and enforceable in all member states. Enforcement is then by local law and procedure. This changes the cumbersome procedure under BII. Also by Art 48 the state where the enforcing of the access order is occurring has express duties to make practical arrangements to organise the exercise of access rights.

The Central Authority, as in the Hague Convention process, acts as communication for requests of assistance of holders of parental responsibility and to facilitate international co-operation in the exercise of BII bis especially in the context of comity, child welfare and child protection (Arts 54 and 55). It is to encourage mediation between those with parental responsibility. It also encourages communication between courts including in child abduction. This builds on the European Judicial Network (http://europa.eu.int/comm/justice_home/ejn/index_en.htm) which covers civil and commercial matters but in the family law context has the total and active support of top family law judges such as Thorpe LJ in promoting judicial co-operation. See also for example his comments in Chorley (2005) Fam Law 276 commentary. We are immensely fortunate in this country in having some of the world's most internationally aware family law judges, at all levels, who are actively encouraging judicial co-operation on individual cases. The EJM is building in family law and already has had some great successes in chambers cases.

Child protection

Immediate child protection measures will always be available notwithstanding any jurisdiction issues (Art 20).

Child abduction

There had been worries that the Brussels jurisdiction would work against the Hague jurisdiction on child abduction. These worries are mostly unfounded. Indeed some commentators feel that BII bis has strengthened the likelihood of a return. The Practice Guide states that BII bis aims at deterring child abduction and when it does occur, to ensure the prompt return to the member state of origin.

BII bis gives a continuing jurisdiction for the state from which the child was taken to deal with the matter and elaborates on Hague (Art 11) e.g. in reference to the wishes of the child. In only two sets of circumstances will the state to which the child has been abducted have jurisdiction (Art 10) other than to direct a return, and neither will arise in cases where there has been reasonably prompt action for the return.

It then goes further and enables the country from which a child has been taken to be able to make orders including for a mandatory return (Arts 11 and 42). BII bis lays down a framework for determining jurisdiction in the decision of custody of an abducted child. (Art 10). BII bis specifies that an application for a return of an abducted child shall result in a judgement expeditiously and in any event in six weeks of the application, unless exceptional circumstances (Art 11). Having experienced six months delays in Sydney, Australia, in first instance abduction cases, this explicit requirement is most commendable.

BII bis expects states to put in place arrangements to secure the protection of a child after its return

following an abduction (Art 11). This will make it less easy to allege the risk of harm of a return.

If there is an order for non return from the country to which the child has been abducted, it is sent to the court of the country from which the child was taken, which can invite comments from the relevant parties and then take its own decision. If that decision is that the child should return, the country to which the child was taken must return the child, notwithstanding its own court's contrary decision. (Art 42)

One change, which affects other parts of Europe more than England is that a court cannot refuse a return order until it has heard the parent who seeks the return (Art 11 (5)). In England, free legal representation is provided by Central Authorities under Hague. This is not so in some European countries which will now have to adapt and provide better rights. The Practice Guide presumes at least a video link.

As before, there are very helpful flow charts in the Practice Guide. This is compulsory reading for any practice with any child abduction work. One chart compares the Hague and the BII bis Conventions.

Conclusion

Despite unhappy that no opportunity was taken to change the first to issue principle in BII, there is a great deal that is good and to be praised in BII bis. Separating jurisdiction in children cases from divorce cases. The principle and the structure of a hierarchy of jurisdiction, especially based on habitual residence. Opportunity to transfer cases if best for the child and best for the case. A much improved automatic system of recognition of contact orders. Easier enforcement of children orders. Building on Hague on child abduction and strengthening the basic principles. And all in a manner with which we would be happy in England in accordance with the principles of the Children Act. A commendable piece of legislation in regard to children.

But the problems in divorce are still there. A Green Paper in March 2005 by the EU tries to deal with some of the divorce forum issues but in the context of choice of law, known also as applicable law; a system operating across most of Europe in which a law of the parties or one of them is applied by the local court, even though it may be the law of another country. A concept totally alien to all English family lawyers yet up for open discussion. Responses have to be in by the end of September. It may mean the most radical changes we have yet seen in family law!

Brussels may seem a sleepy city, no doubt induced by delectable frites and bountiful beers. But it is actively pursuing a policy in family law of harmonisation across Europe. In some ways this helps us greatly as we are well advanced in our treatment of child cases and many other aspects of family law. Other changes are scary. However it is to Brussels that we will increasingly be looking to find our family law of the future. Will that be mayonnaise with your chips and beer, sir?

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