

Interaction of the Brussels IIa and Maintenance Regulations with [possible] litigation in non-EU States: Including Brexit Implications

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I. Introduction

The two core EU family law Regulations, Brussels IIa and Maintenance, are not well designed to regulate their interaction with possible litigation in non-EU States. Neither Regulation provides for a system whereby an EU court can decline to exercise jurisdiction on the basis that a non-EU court was seised first (*lis pendens*), or on the basis that a non-EU court is a more appropriate court to hear the dispute (*forum non conveniens*), or, with certain limited exceptions in relation to the Hague Children's Convention 1996, on the basis that the dispute should be transferred to a non-EU court. This short chapter will set out the position under both the Brussels IIa Regulation and the Maintenance Regulation, how this would be improved if the Commission's Recast of Brussels IIa is adopted, and finally suggest some improvements that the EU legislature should make to both Regulations in order to make EU private international law of family law a fair and just fit within the global world of private international law of family law.

II. Maintenance

A. No Power to Decline or Transfer Jurisdiction in Favour of a Non-EU Court

The EU Maintenance Regulation (Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations)¹ creates a comprehensive set of jurisdiction rules no matter where the parties are domiciled or habitually resident.² However, it only creates rules for conflicts of jurisdiction between Member States. The result is that an EU court can be seised in circumstances where a clearly more appropriate forum exists to hear the case outside the EU and that forum may indeed have been seised first but there is no mechanism under EU law for the court in the EU Member State to give up its jurisdiction in favour of the non-EU court. This problem was known to the negotiators of the Maintenance Regulation, (the author of this chapter being one of them, representing the UK in the Council Working

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¹ [2009] OJ L7/1.

² For an excellent analysis of the EU Maintenance Regulation and of the Hague Maintenance Convention 2007 see Lara Walker, *Maintenance and Child Support in Private International Law* (Hart, 2015).

Party) but due to a political desire to get the Maintenance Regulation finalised the problem was not resolved.³

The gravity of this problem is well illustrated by the following hypothetical case. A maintenance creditor who is habitually resident in the US brings proceedings against her spouse for maintenance for herself and for her two children. Spousal and child maintenance awards are relatively high value in the relevant US state. The spouses and children all have joint US and Bulgarian nationalities but have all been living together in the US for many years. Shortly before the US court gives its judgment, the husband decides to seek to reduce his maintenance liability to his wife and children by launching proceedings in Bulgaria based on the common Bulgarian nationality of the parties (a legitimate EU basis of jurisdiction in this case under Article 6 of the Maintenance Regulation). The Bulgarian court has no mechanism under EU law to decline to exercise jurisdiction in this case. If the US court gives its judgment before the Bulgarian court then at least the US judgment should be recognised and enforced in Bulgaria under the Hague Maintenance Convention 2007 because the US and EU are both parties to that Convention⁴ (see Article 22(c) and (d) of the Convention). However, if the fact scenario is changed slightly so that the couple and children are Bulgarian and Canadian nationals who have been living for a long time in Canada and the wife/mother initiated proceedings in Canada, there is no guarantee under EU law that the Bulgarian courts will recognise and enforce the Canadian judgment rather than continue to reach their own judgment because at present Canada is only a signatory to the Maintenance Convention. The same would apply were the parties linked to any non-EU state that is not a party to the Maintenance Convention.⁵

It is clear that the current EU regime does create an incentive for third States to ratify the Hague Maintenance Convention 2007 which is welcome. However, that incentive could be maintained and litigation efficiency and justice improved if a system like Articles 33 and 34 of the Brussels Ia Regulation were introduced into the Maintenance Regulation to allow the EU second seised court to decline jurisdiction in favour of the first seised non-EU court

³ This is based on the author's own work in the Council Working Party and the urgency to get the Regulation finalised is corroborated by the explanatory statement of 20 November 2008 of the European Parliament's Rapporteur on this Regulation that: "The rapporteur is very happy that finally the revised version of the regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations on which the European Parliament presented its opinion almost a year ago is presented. It is, however, a pity that we and more specifically the EU-Citizens have had to wait so long for this text... The rapporteur therefore decided to refrain from presenting amendments in order to have the final text available before the end of the year. It would make sure that EU-citizens could benefit from it as soon as possible." see <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A6-2008-456&language=EN> accessed in April 2018.

⁴ For a current list of the Contracting States to the Hague Maintenance Convention 2007 see <https://www.hcch.net/en/instruments/conventions/status-table/?cid=131>. As at 16 April 2018 it is clear that, by the end of 2018, 38 States will be bound by the Convention.

⁵ It would be a matter for Bulgarian law to determine what effects it would give to a maintenance judgment from a non-EU State that is not a Contracting State to the Hague Maintenance Convention 2007 in a case where the matter is pending before its own courts, because the EU Maintenance Regulation does not apply to this issue. Article 24(d) of the EU Maintenance Regulation only regulates the scenario where there is a clash between a maintenance judgment coming from another EU Member State and one coming from a non-EU State and gives priority to the latter where it is first in time unless the latter (EU judgment) is a modification decision.

whenever this is good for the proper administration of justice taking into account the likelihood of the non-EU proceedings leading to a judgment that will be recognised and enforced in the EU State whose courts have been second seised. As illustrated above, if the third State is a party to the Hague Maintenance Convention 2007 it is much easier to assess whether the judgment of the third State courts will be recognised and enforced in the EU State without needing to delve into the national law in that EU State concerning recognition and enforcement of non-EU maintenance judgments.

B. [Partial] Respect for the Jurisdictional Obligations Accepted by the EU under the Lugano Convention and for those Accepted under the Hague Maintenance Convention 2007

The comprehensive system of jurisdiction rules in the EU Maintenance Regulation does take account of the EU's jurisdictional obligations under two international Conventions to which the EU is a party, but sadly not fully.

i. Lugano Convention

The EU Maintenance Regulation only enables the EU to partially comply with its international law obligations under the Lugano Convention. The jurisdiction rule in the EU Maintenance Regulation on choice of court, Article 4, is more restrictive than its predecessor in the Brussels I Regulation and in the Lugano Convention (Article 23). Article 4(4) of the Maintenance Regulation gives way to Article 23 of the Lugano Convention where the parties have agreed to confer “exclusive” jurisdiction on a non-EU Lugano Contracting State court,⁶ except in relation to a ‘dispute relating to a maintenance obligation towards a child under the age of 18.’ It is very unfortunate that the EU unilaterally derogated from this provision of the Lugano Convention rather than abiding by the Lugano Convention in full until an opportunity arose for the Lugano Convention to be revised based on the consensus of all the Contracting Parties to the Convention. It does not augur well for the EU's willingness to abide by its treaty obligations with its near neighbours. A future revision of the Lugano Convention should discuss the pros and cons of jurisdiction agreements in relation to maintenance obligations towards a child under the age of 18. It can make a lot of practical common sense for parents to be able to agree on one jurisdiction to resolve all their financial arrangements (spousal support and child support – ideally also other matters that might be classified in some jurisdictions as matrimonial property) especially if they have already reached an agreement on the substance and want that court to endorse the agreement.⁷

⁶ At present these States are Iceland, Norway and Switzerland. Other States are interested in joining the Lugano Convention as non-EU Contracting States, notably Andorra and the UK. In relation to the latter see *Providing a cross-border civil judicial cooperation framework: a future partnership paper* (UK Government, August 2017, paper available at <https://www.gov.uk/government/publications/providing-a-cross-border-civil-judicial-cooperation-framework-a-future-partnership-paper>) where at para 22 it is stated that ‘we will seek to continue to participate in the Lugano Convention’ and the speech of Prime Minister May on Brexit on 2 March 2018 (available at <https://www.gov.uk/government/speeches/pm-speech-on-our-future-economic-partnership-with-the-european-union>) in which she said: ‘We will want our agreement to cover civil judicial cooperation, where the EU has already shown that it can reach agreement with non-member states, such as through the Lugano Convention.’

⁷ See the work of the Hague Experts’ Group on Family Agreements (available at <https://www.hcch.net/en/projects/legislative-projects/recognition-and-enforcement-of-agreements>) of

Another area of discrepancy between the Lugano Convention and the EU Maintenance Regulation is where the non-EU Lugano State has been seised on the basis of a non-exclusive jurisdiction clause in relation to adult maintenance. If the non-EU Lugano State is seised first, it should be given priority over any other court seised in a Lugano Contracting State due to the *lis pendens* rule in Article 27 of the Lugano Convention . However, a possible construction of Article 4(4) of the EU Maintenance Regulation is that for courts in EU Member States it overrides Article 27 of the Lugano Convention in a case where the non-EU Lugano court is first seised on the basis of a non-exclusive jurisdiction agreement. This seems to be wrong in principle because even acceptable bases of non-exclusive jurisdiction in a non-EU Lugano Contracting State within the meaning of Article 4(1) of the Maintenance Regulation are not protected by the Lugano Convention *lis pendens* rule because of the wording of Article 4(4) of the Regulation.

Therefore, it is surely for the EU to be open to finding a genuine agreed line on jurisdiction agreements in maintenance cases with its nearest neighbours who are non-EU Lugano Contracting States rather than unilaterally imposing its own solution for its own courts by way of an EU Regulation in cases previously governed by the Lugano Convention. The EU must move away from this cavalier approach to its international law obligations.

ii. The Hague Maintenance Convention 2007

The Hague Maintenance Convention 2007 does not have harmonised jurisdiction rules apart from one negative rule of direct jurisdiction found in Article 18.⁸ This negative rule requires, with a few exceptions, a maintenance debtor to go to the court of the habitual residence of the creditor in order to modify an existing maintenance decision or to seek a new maintenance decision if the original decision was taken by the courts of the habitual residence of the creditor and the creditor is still habitually resident there. Article 8 of the Maintenance Regulation is designed to ensure that EU courts comply with Article 18 of the Convention by not allowing EU debtors to invoke a jurisdiction in an EU court when a non-EU Hague 2007 Maintenance Convention State has already given a maintenance decision when that court was, at the time of those proceedings, and still is, the place where the creditor habitually resides. However, the EU Maintenance Regulation is not designed to protect the freedom of adult parties to choose to go to a non-EU court, either in advance by a choice of court agreement⁹ or by one party submitting to the jurisdiction of the court selected by the other party¹⁰, which is in a Contracting State to the Hague Maintenance Convention 2007, which is not the court where the maintenance creditor is habitually resident, when the original decision was given by a court in an EU Member State and the creditor is still habitually resident there.

which the author is the chair, and the forthcoming article in the *Journal of Private International Law* on this topic by Lara Walker.

⁸ See Paul Beaumont, “International Family Law in Europe – The Maintenance Project, the Hague Conference and the EC: A Triumph of Reverse Subsidiarity” (2009) 73 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 509-546 at 532-536.

⁹ See Article 18(2)(a) of the Hague Maintenance Convention 2007 compared to Article 8(2)(a) of the EU Maintenance Regulation.

¹⁰ See Article 18(2)(b) of the Hague Maintenance Convention 2007 compared to Article 8(2)(b) of the EU Maintenance Regulation.

In other words the EU is not respecting the party autonomy of adult parties to agree to go to the court of a non-EU Contracting State to the Hague 2007 Maintenance Convention when an EU court has already ruled on maintenance between those adult parties and where the creditor was, at the time those proceedings were instituted in the EU court, and is, habitually resident in the EU State where the decision was made.

The question of whether this is a breach of the EU's obligations under the Hague Maintenance Convention depends on whether one should only construe the main obligation under Article 18(1) of the Convention (not to allow a departure from the courts of the habitual residence of the creditor when those courts have already given a maintenance decision and the creditor is still habitually resident there) as binding on Contracting States or whether those States are also bound to give full effect to the exceptions to the obligation which are found in Article 18(2). A strong case can be made for arguing that from an international law point of view the exceptions are permissive (despite being drafted in mandatory language) because they were designed to allow States to depart from the clear obligation created by Article 18(1), in certain limited cases, but not to create new obligations on Contracting States to accept prorogation or submission jurisdiction (only in cases where another court has already ruled on a maintenance obligation). However, from a policy point of view it seems unfair, and potentially unjust, to allow parties to agree to move away from the courts of the habitual residence of the creditor (whether in the EU or in a non-EU Hague Contracting State) to an EU court by prorogation or submission but not to do so when the parties want to move away from an EU court that is the habitual residence of the creditor to prorogate or submit to a non-EU court that is a Contracting State to the Hague Maintenance Convention.

It is worth noting that if the UK and the EU are not able to agree, or decide not to agree a special deal on civil judicial cooperation relating to maintenance, it is clear that the UK will become a party to the Hague Maintenance Convention 2007 and the Convention will, in principle, govern the relationship between the UK and the EU on maintenance.¹¹

III. Brussels IIa

A. Divorce

¹¹ See Paul Beaumont "Private international law concerning children in the UK after Brexit: comparing Hague Treaty law with EU Regulations" (2017) *Child and Family Law Quarterly* 213-232 at 228-230. Of course if the UK also remains a party to the Lugano Convention post-Brexit (which is the aim of the UK Government, see *supra* n 6), then the Lugano Convention rules will apply to jurisdiction in maintenance cases, apart from matters covered by Article 18 of the Hague Maintenance Convention 2007 which is the only rule of jurisdiction in the Hague Convention. The Lugano Convention gives way to Conventions on particular matters like the Hague Maintenance Convention (see Article 67 of the Lugano Convention), for jurisdiction and recognition and enforcement of judgments, so the Hague Convention should apply to recognition and enforcement of judgments. It will also apply to legal aid and administrative cooperation through Central Authorities because these matters are not regulated by the Lugano Convention. However, sadly, there are still two Lugano Contracting States that are not yet party to the Hague Maintenance Convention 2007, ie Iceland and Switzerland.

The Brussels IIa Regulation (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, repealing Regulation (EC) No 1347/2000)¹² provides for rules of jurisdiction and conflicts of jurisdiction for cross-border divorce cases. However, the rules on divorce jurisdiction do not allow for any means of declining jurisdiction in favour of a non-EU court even when that court is first seised (*lis pendens*) or clearly more appropriate to deal with the divorce (through *forum non conveniens* or a transfer mechanism). The Brussels IIa Recast Proposal from the Commission does not touch upon divorce jurisdiction.¹³ This unwillingness to tackle the topic is partly because it is difficult to agree on a hierarchy of jurisdiction for divorce cases or to agree on how any transfer mechanism, even between EU courts, would operate in divorce cases. It is also because the issue of divorce for same sex couples is particularly controversial in certain parts of the EU and if that issue had been on the table in the Brussels IIa Recast negotiations, it may have prevented the necessary unanimity in the Council from being arrived at. It is unfortunate that at least something like Articles 33 and 34 of Brussels Ia has not been proposed for the Recast of Brussels IIa. Where divorce proceedings have already been commenced in a non-EU court these can be given way to by a second seised EU court if this is good for the proper administration of justice taking into account whether the foreign court's divorce ruling would be recognised in the country of the EU court. Of course in the real world the issues in a divorce case before a court in an EU Member State do not usually turn on what is within the scope of Brussels IIa, deciding on jurisdiction to grant a divorce and recognition and enforcement in another Member State of the divorce itself, but are usually concerned with what are euphemistically referred to as "ancillary matters" ie the finance, property, and the custody and access in relation to any children. The jurisdiction in relation to these ancillary matters to divorce is regulated by the parental responsibility provisions in Brussels IIa, by the maintenance provisions in the Maintenance Regulation and by, in the EU Member States that have chosen to be party to them, the enhanced cooperation instruments on property matters between spouses and between registered partners.¹⁴ These other instruments give a place to the divorce jurisdiction rules so the Brussels IIa divorce jurisdiction rules can usually be utilised to resolve the ancillary matters.¹⁵

¹² [2003] OJ L338/1.

¹³ Proposal for a COUNCIL REGULATION on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) COM(2016) 411 final.

¹⁴ Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [2016] OJ L183/1 and Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships [2016] OJ L183/30.

¹⁵ However, if proceedings are pending concerning divorce in one EU Member State and concerning parental responsibility in another EU Member State, it is only the latter court that is competent to adjudicate on child maintenance as an ancillary matter, see Case C-184/14 *A v B* EU:C:2015:479. Article 5 of Regulation 2016/1103 also presents constraints on some of the heads of divorce jurisdiction in the Brussels IIa Regulation. Regulation 2016/1104 does not link to the Brussels IIa divorce jurisdiction rules expressly but instead Article 5 simply states that: "Where a court of a Member State is seised to rule on the dissolution or annulment of a registered partnership, the courts of that State shall have jurisdiction to rule on the property consequences of the registered partnership

The global context for divorce is a relatively unsuccessful Hague Convention on recognition of divorces (Hague Divorce Convention).¹⁶ The UK is a party to this Convention and therefore in a post-Brexit environment, in the case where no deal is done on divorce jurisdiction or recognition and enforcement of divorce judgments between the EU and the UK, the Hague Divorce Convention will provide a framework for recognition of divorces and legal separations between the following EU Member States: Cyprus, Czech Republic, Denmark, Estonia, Finland, Italy, Luxembourg, Netherlands, Poland, Portugal, Slovakia, Sweden, and the UK. In relation to the other 15 EU Member States, recognition of UK divorces and legal separations (and vice versa) would rely on the unilateral rules on recognition and enforcement of foreign divorces in each of those States. It does not seem likely that this will give rise to any problems in practice apart perhaps from recognition of divorces in relation to same sex marriages or partnerships (however, it is not clear how those issues are handled under Brussels IIa anyway).¹⁷ It is unfortunate that EU Member States did not agree to ratify the Hague Divorce Convention as a minimum standard for its dealings with third States before embarking on the predecessor to Brussels IIa in order to go further in dealing with jurisdiction and recognition and enforcement of divorce judgments within the EU.¹⁸ It would be highly beneficial if the EU were to reconsider its position on divorce and agree to mandate (or at least encourage) its Member States that are not Contracting States to the Hague Divorce Convention to become Contracting States to that Convention. This in turn would breathe new life into the Hague Divorce Convention and persuade more non-EU States to become party to it. The Convention is not moribund as Albania and Moldova have become party to it since 2011. If some EU Member States really still have substantive concerns with the Hague Divorce Convention that prevent them from ratifying it then it could be a good initiative from the EU to ask for the issue of divorce to be reopened at The Hague.¹⁹ Janeen

arising in connection with that case of dissolution or annulment, where the partners so agree.” This requirement of the partners having to agree, in all cases, to the jurisdiction of the court seised with the dissolution or annulment of their registered partnership before it can deal with property matters makes it a narrower jurisdiction than Article 5 of Regulation 2016/1103 which only requires an agreement between the parties in some cases.

¹⁶ Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations to which there were 20 Contracting States on 21 March 2018, see <https://www.hcch.net/en/instruments/conventions/status-table/?cid=80> . The non-EU Contracting States are: Albania, Australia, China (for Hong Kong only), Egypt, Moldova, Norway and Switzerland.

¹⁷ See eg the brief discussion of whether Brussels IIa applies to same sex divorces or same sex registered partnerships in P Beaumont and P McEleavy, *Anton’s Private International Law* (3rd edn, W Green/SULI, 2011) at 769-770 and 779-782.

¹⁸ Neither France nor Germany had ratified the Hague Divorce Convention and did not see it as a solution for the problems they had between themselves in this field. For a discussion of the history of this matter see Paul Beaumont and Gordon Moir, “Brussels Convention II: A New Instrument in Family Matters for the European Union or the European Community” (1995) 20 *European Law Review* 268-288, and a rebuke for the failure to respect reverse subsidiarity and an exhortation for all EU Member States to ratify the Hague Divorce Convention at 284. Of course since the adoption of Brussels II the external competence to ratify the Hague Divorce Convention has shifted to the EU. On external competence of the EU in private international law see Pietro Franzina (ed), *The External Dimension of EU Private International Law After Opinion 1/13* (Intersentia, 2017).

¹⁹ Of course the concerns over same sex marriages in some EU Member States, which prevented the EU Commission from proposing changes to the divorce provisions in Brussels IIa in the Recast of

Carruthers and Elizabeth Crawford have provided a lively and entertaining internal debate between themselves in an article considering the relative merits of retaining something like Brussels IIa between the UK and the EU or falling back on the Hague Divorce Convention.²⁰ The present author's view is that the latter is a better course for the UK and the EU to follow. The problem with Brussels IIa is that it combines quite broad rules of jurisdiction with a rigid *lis pendens* system for conflicts of jurisdiction. This means that both the husband and wife have quite a significant opportunity to forum shop and they both have an incentive to launch divorce proceedings quickly in order to make sure that the divorce, and crucially the ancillary relief, is decided in their preferred forum. Surely it is better to encourage marriages to be saved or if they have to be dissolved to do it in a civilised way where the financial arrangements are agreed between the spouses or determined by the courts in a country with which the marriage had a close connection. Elsewhere the author has written with others about the problem of England and Wales being the "venue of choice for high value matrimonial disputes" particularly for women even when the marriage has a very thin connection with England and Wales and for the tendency for husbands to initiate divorce proceedings elsewhere in the EU to try to reduce their "maintenance" liability to their wives even when the marriage has a strong connection with England and Wales.²¹ Ideally, in a post-Brexit framework the UK courts will be able to reduce the "magnet effect of high financial provision after divorce for women in England and Wales if the English courts could return to the practice of being able to decline jurisdiction on the basis of *forum non conveniens*."²² Indeed, post-Brexit Brussels IIa should be reformed to prevent husbands running away from their marriage in England (or the United States) to the country of their nationality (even though it may also be the nationality of their wife) in an EU Member State to get a divorce.²³ It should be possible for the EU court to decline jurisdiction in favour of the non-EU court, at least where the EU court is seised second but ideally even where the EU court is seised first, if the non-EU court is clearly a more appropriate forum to determine the divorce and deal with ancillary relief given the much stronger connection between the marriage and the non-EU forum than the EU forum. In order to avoid wasted costs on satellite litigation, the bar for judges upholding a *forum non conveniens* plea should be set high so that it is only upheld in clear cases of forum shopping where one party is running away from the forum that the marriage was strongly connected to.

Brussels IIa, probably make it difficult in the near future for the EU to make any proposals on divorce in The Hague.

²⁰ See Janeen M Carruthers and Elizabeth B Crawford, "Divorcing Europe: reflections from a Scottish perspective on the implications of Brexit for cross-border divorce proceedings" (2017) *Child and Family Law Quarterly* 233-252.

²¹ See Paul Beaumont, Mihail Danov, Katarina Trimmings and Burcu Yüksel, "Great Britain" in same authors (eds) *Cross-Border Litigation in Europe* (Hart, 2017) 79, 95-98. For a spectacular case example see *S v S* [2014] EWHC 3613 (Fam) which became Case C-489/14 *A v B* EU:C:2015: 654 and see also Case C-184/14 (*supra* n 10).

²² See Beaumont et al, *ibid* at 123. For an early, and still relevant, analysis of how *forum non conveniens* operates in divorce cases in England and Wales see Paul R Beaumont, "Conflicts of jurisdiction in Divorce Cases: *Forum Non Conveniens*" (1987) 36 *International and Comparative Law Quarterly* 116-131.

²³ The problematic jurisdictions in Article 3 of Brussels IIa are: (a) nationality of one spouse and that person's habitual residence in the country of their nationality for the last six months; and (b) nationality of both spouses.

B. Parental Responsibility

In the area of parental responsibility the problems are not so great because the EU has accepted that the Hague Children's Convention 1996 (Hague Children's Convention) is part of the EU *acquis communautaire*.²⁴ Therefore, in relations between EU Member States and non-EU Hague Contracting States to the Children's Convention there is a system based on transfer of jurisdiction that enables the court that is best placed to determine the best interests of the child to hear the case whether it is an EU Member State court or a non-EU Contracting State regardless of which court is seised first. The relevant provisions are found in Articles 8 and 9 of the Hague Children's Convention.²⁵ In cases where no transfer is agreed or sought, there is the fall-back position of *lis pendens* between all Contracting States to the Hague Children's Convention in Article 13. However, the current Article 61 of Brussels IIa restricts the application of the Hague Children's Convention whenever "the child concerned has his or her habitual residence on the territory of a Member State". This is too big a disconnection from the Hague Convention as it means the transfer provisions of Articles 8 and 9 are much more restrictive than they should be. The main purpose of those provisions is to allow the transfer of a parental responsibility case from the courts of the habitual residence of the child to the courts of another country because in that particular case the latter courts are better placed to determine the best interests of the child. This point is rectified by the Commission's Proposal for the Recast of Brussels IIa at Article 75(2).²⁶

²⁴ See Council Decision of 19 December 2002 authorising the Member States, in the interest of the Community, to sign the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children (2003/93/CE) [2003] OJ L48/1; Council Decision of 5 June 2008 authorising certain Member States to ratify, or accede to, in the interest of the European Community, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children and authorising certain Member States to make a declaration on the application of the relevant internal rules of Community law (2008/431/EC) [2008] OJ L151/36; and the statement in *EU acquis and policy documents on the rights of the child* (Commission, 2016) that the Hague Children's Convention is part of the EU *acquis* that States acceding to the EU must become party to at 67, see https://ec.europa.eu/info/sites/info/files/euacquisandpolicydocumentsontherightsofthechild_4.pdf accessed April 2018.

²⁵ Elsewhere the author has made a detailed comparison between those provisions and the provision for transfer of cases between the courts in EU Member States in Article 15 of Brussels IIa. See Beaumont *supra* n 11 at 217-222.

²⁶ COM(2016) Final 411. It also makes an exception to the priority of Brussels IIa over the Hague Children's Convention, when the child is habitually resident in an EU Member State, where: (a) the parties have agreed on a choice of a non-EU court in a Hague Children's Convention Contracting State in accordance with Article 10 of that Convention; and (b) where a non-EU court in a Hague Children's Convention Contracting State is still seised of a case in accordance with Article 13 of that Convention. For a more detailed analysis of these issues see P Beaumont, L Walker and J Holliday, "Parental responsibility and international child abduction in the proposed Recast of Brussels IIa Regulation and the effect of Brexit on future child abduction proceedings" (2016) *International Family Law* 307 and in a slightly updated form in Centre for Private International Law, University of Aberdeen, Working Paper No. 2016/6- [Parental Responsibility and International Child Abduction in the proposed recast of Brussels IIa Regulation and the effect of Brexit on future child abduction proceedings](#) by Paul Beaumont, Lara Walker and Jayne Holliday at "H".

C. Child Abduction

In principle Brussels IIa does not apply to cases concerning a wrongful removal or retention of a child where one of the countries involved is a non-EU Contracting State to the Hague Child Abduction Convention 1980 (Hague Abduction Convention). In such cases it is the Hague Abduction Convention that applies as part of the EU's *acquis communautaire* of dealing with non-EU Contracting States. The EU requires any Member State of the EU to be a Contracting State to the Hague Abduction Convention (it is not possible under that Convention for the EU itself to become a Party to it).

Furthermore, the Court of Justice of the European Union has established that the question of whether the accession of a non-EU Contracting State (a third State) to the Hague Abduction Convention should be accepted for the purposes of applying the Convention between an EU State and that third State falls within the exclusive external competence of the EU.²⁷

Therefore, the EU Member States have to achieve unanimity in the Council before they accept the accession of new Contracting States to the Hague Abduction Convention creating legal relations under the Convention between EU Member States and the acceding non-EU State. Individual EU Member States can no longer accept on their own the accession of a third State to create binding legal obligations under the Hague Abduction Convention with that third State.²⁸ The decision of the Court of Justice in Opinion 1/13 is based on the idea that an EU Member State may “affect common [EU] rules or alter their scope” by accepting the accession of a non-EU Contracting State to the Hague Abduction Convention. The Court is not explicit about how such an acceptance could affect the common EU rules found in the Brussels IIa Regulation but asserts that it “may”. One reason for doing so is based on the assertion that if EU law “largely covers the area” then effectively EU law is deemed to cover the whole area because it is assumed that any external action by an EU Member State in that whole area (of which EU law is regarded as largely covering) could affect the EU law rules or alter their scope. The problem is that Brussels IIa does not objectively largely cover the area of international child abduction because it only applies to child abductions between EU Member States and even then only to the judicial cooperation element and not the administrative cooperation element through Central Authorities.²⁹ In reality, accepting the accession of a non-EU Contracting State to the Hague Abduction Convention has an impact only on administrative and judicial cooperation between the EU Member State and the third State it does not impact on the judicial cooperation between EU Member States on child abduction between those States. The judge in an EU Member State dealing with a Brussels IIa child abduction case is not going to be affected by any obligations his State has taken on by accepting the accession of a third State to the Hague Abduction Convention. The reason is that the child can only have one habitual residence or no habitual residence for the purposes of Brussels IIa and the Hague Abduction Convention. Thus it is impossible to envisage a clash between the two instruments arising before a judge who has to apply the Brussels IIa

²⁷ Opinion 1/13, EU:C:2014:2303.

²⁸ On all these issues see Pietro Franzina (ed), *The External Dimension of EU Private International Law After Opinion 1/13* (Intersentia, 2017) especially Paul Beaumont, “A Critical Analysis of the Judicial Activism of the Court of Justice of the European Union in Opinion 1/13” 43-61 and Karen Vandekerckhove, “Consequences of Opinion 1/13 on the acceptance in the EU of accessions to the Hague Child Abduction Convention” 71-76.

²⁹ See Beaumont, *ibid*, at 54-57.

provisions on child abduction. If the child has no habitual residence, neither instrument applies; if the child has his or her habitual residence in an EU Member State, the Brussels IIa Regulation applies; and if the child has his or her habitual residence in the third State, then the Hague Abduction Convention applies.³⁰

Thus, once it is established that the impact of the operation of the Hague Abduction Convention between a non-EU Contracting State and an EU Member State on the application of Brussels IIa is entirely theoretical (if not imagined solely to achieve EU external competence), the reality is that no special provisions are needed in Brussels IIa to ensure that EU Member States comply with their obligations under the Hague Abduction Convention to non-EU Contracting States.

Thus, if no special post-Brexit deal is done between the UK and the EU on child abduction, the Hague Abduction Convention will immediately apply in the relations between the UK and each EU Member State. The UK long ago ratified the Hague Abduction Convention³¹ and once it ceases to be an EU Member State and any transitional deal has expired, the Convention will automatically operate between the UK and EU Member States. The latter have no option to consider whether or not to accept the accession of the UK to the Convention because that does not apply to the UK as one of the original negotiators of the Convention that has exercised its right to ratify it and create automatic binding relations between the UK and any other ratifying State and to create binding relations between the UK and any acceding State the UK chooses to accept.³² The effect of Brexit (without a deal keeping Brussels IIa or a comparable arrangement in place) on child abduction law will be to remove the application of the Article 11 Brussels IIa override system³³ from UK law. Given the empirical findings in the Nuffield Foundation funded research³⁴ on that override system, which led the author and his colleagues who worked on that research to recommend the abolition of that system,³⁵ this would be a welcome outcome.³⁶

IV Conclusion

This chapter has shown that the EU takes some account of its obligations to non-EU States that are parties to Conventions which are part of EU law or part of the EU *acquis communautaire* (notably the limitation on debtors under Article 18 of the Hague Maintenance Convention 2007, the maintenance jurisdiction provisions under the Lugano Convention, and the parental responsibility provisions under the Hague Children's Convention). However, in

³⁰ For the refutation of the Court's assertions of impact on Brussels IIa in relation to the cooperation of Central Authorities see Beaumont, *ibid*, at 58-59.

³¹ 20th May 1986, see <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24> accessed on 16 April 2018.

³² See Beaumont, *supra* n 11 at 214-215 and Articles 37 and 38 of the Hague Abduction Convention.

³³ Article 11(6)-(8).

³⁴ See "Conflicts of EU Courts on Child Abduction" including comprehensive information in relation to all the EU Member States apart from Denmark available at <https://www.abdn.ac.uk/law/research/conflicts-of-eu-courts-on-child-abduction-417.php> accessed on 22 March 2018.

³⁵ See Paul Beaumont, Lara Walker and Jayne Holliday, "Conflicts of EU courts on child abduction: the reality of Article 11(6)-(8) Brussels IIa proceedings across the EU" (2016) 12 *Journal of Private International Law* 211-260.

³⁶ See Beaumont, *supra* n 11 at 215-217 and 231-232.

each of these cases the compliance by the EU with its, or its Member States', obligations under those international Conventions is imperfect. It is positive that the EU Commission Proposal for the Recast of Brussels IIa contains provisions that, if adopted by the Council, will rectify the imperfect compliance by the EU with the Hague Children's Convention. It is reasonable for the EU only to create respect for prorogation clauses and first seised proceedings in non-EU States that are Hague Children's Convention Contracting States and only to consider the transfer of cases outside the EU to Hague Children's Convention Contracting States. This has the desirable effect of encouraging non-EU States to ratify or accede to the Hague Children's Convention and thereby promote the progressive unification of private international law globally.³⁷ The EU should also actively encourage the reform of the Lugano Convention to bring alignment with the EU rules on maintenance jurisdiction or to take maintenance out of the scope of the Lugano Convention by getting all the non-EU Lugano States to ratify Hague Maintenance Convention 2007 and then all Lugano States agreeing to remove maintenance from the scope of the Lugano Convention. The latter solution would be preferable and it is to be hoped that Iceland and Switzerland will soon ratify the Hague Maintenance Convention 2007. When the EU Maintenance Regulation is reformed, the EU should give full effect to the exceptions (in Article 18(2) of the Hague Maintenance Convention 2007) to the obligation on maintenance debtors to only sue the maintenance creditor in the habitual residence of the creditor (in Article 18(1) of the Hague Maintenance Convention 2007) in relation to any party who is habitually resident in a non-EU Hague Contracting State.

However, there are areas where the EU should review its internal rules as they impact on the same issues being determined in non-EU States in cases where there is no relevant multilateral international regime, notably in relation to the jurisdiction rules and conflict of jurisdiction rules for maintenance and for divorce. In these cases the EU should consider the viability of seeking multilateral solutions in The Hague (not likely at this stage) and then consider at least some minimal unilateral action along the lines of Articles 33 and 34 of Brussels Ia (preferably not restricted to a first seised approach) to allow judges in the EU to defer to non-EU courts in cases where the non-EU courts are clearly more appropriate to determine the divorce (including ancillary matters) or to determine a maintenance case.

Given that recognition of non-EU divorces is almost certainly caught by EU external competence the EU should consider at least authorising the Member States, that have not already done so, to ratify the Hague Divorce Convention. If an analysis of that Convention by the Commission and the Member States considers that a new Hague Convention would be an improvement and could be achieved in the Hague (seemingly unlikely at present, due, if nothing else, to differences of view on same sex marriages), then they should try to put that on the Hague Conference agenda.

³⁷ The EU has a similar incentive plan in the Brussels Ia Regulation to encourage non-EU States to ratify the Hague Choice of Court Agreements Convention 2005 in order for the EU courts to decline jurisdiction in favour of a non-EU chosen court that is seised after an EU Member State court is seised. See Paul Beaumont, "The revived Judgments Project in The Hague" (2014) *Nederlands Internationaal Privaatrecht* (NIPR), no. 4, 532-539 at 535.