Transnational Children orders within the European Union by Clare Renton, 29 Bedford Row Chambers

1. In this article new developments on the interpretation of Brussels II Revised ("BIIR") (Council Regulation 2201/2203) are considered together with enforcement of orders between EU states. The Borras Report of 1998, written for the purpose of the Brussels 2 Regulation 1347/2000, together with the Preamble to the Council Regulation 2201/2005 and the Practice Guide, are the starting point for practitioners. Some ground covered in the article published reconsidered in the light of recent cases. A continuing problem is that lawyers in the EU outside capital cities are unlikely to have any experience of the Regulation. Denmark is not a signatory to Brussels 2 Revised and has different legal rules to those set forth in this article.

2 Council Regulation 2201/2005 Article 8(i) provides :-

> "The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised."

- Underlying the Regulation is the principle that jurisdiction to determine issues of parental responsibility should generally be in the state of the child's habitual residence. The ECJ has now provided long awaited clarification to the issue of habitual residence. In Case C 523/07, promulgated on 2 April 2009 that intra EU an autonomous EU definition of habitual residence must be applied.
- The habitual residence of children is not primarily a matter of intention on the part of the parents.
- The court must focus upon the place in which the child has his or her centre of interests making an overall assessment of all the relevant factual circumstances, in particular the duration and stability of residence and familial and social integration.
- It is possible for a child to have no habitual residence (notwithstanding that this would deprive a child of the protection of the Hague Convention 1980)
- The Court indicated that some time was needed before habitual residence is established in a new state
- Assistance is not to be derived from the EU social security decisions appertaining to adults.
- The definition when the point is considered in a non Eu context is unresolved

3. The limited jurisdiction under Article 13(1) of the Regulation based on presence alone is applicable only if no habitual residence in the EU sense can be established (and there is no jurisdiction based on Article 12)

4. Article 8(2) subjects Article 8(1) to be subject to Articles 9, 10 and 12.

5. Article 9 provides for the courts of the member State of the child's former habitual residence to retain jurisdiction for three months after a lawful move for the purpose of jurisdiction to modify an access order. This means that the full inhibition upon

varying the previous home State's access Order will usually cease three months after a lawfully relocated child arrives here.

6. The child can therefore be the subject of Children Act 1989 proceedings in England pursuant to BIIR and the Family Law Act 1986, as well as the subject of proceedings in the State where the child formerly resided lawfully. If two courts have jurisdiction the "first past the post" principle applies (Article 19), although one court can stay or transfer the case under Article 15, which is considered below, provided that it is in the child's best interests.

Inter Judicial Co Operation

7. As Thorpe L.J. has pointed out (2008 Fam Law 105) there is a high chance of contemporaneous litigation in 2 member States. Coordination between the judges in each of the relevant member states is highly desirable. The growth of judicial liaison and co operation is an international EU obligation imposed by Articles 53 to 58 and is beginning to make a real difference. The English system headed by Thorpe L.J. as Head of International Liaison is widely regarded as the Rolls Royce of the EU fleet

8. The relevance of the habitual residence of the child is illustrated by the decision in Re S [2008] 2 FLR 1358. Wood J refused to enforce an extensive Polish contact order although the recognition and registration of the order in England stood. The judge decided that it was wrong in principle to go behind a properly sealed and acted upon Polish Certificate. However, the Polish Court had been under a misapprehension that the mother had consented to the Polish order. Since the child was habitually resident in England and the provisions of BIIR Article 8 operated, litigation to vary the Polish access order was to take place in England on a welfare basis. The judge ordered visiting contact to the father and made the child a ward of court.

The Fast And Two Stage Track To Enforcement

9. Articles 21 to 52 of BIIR provide the framework. Under the fast track procedure, the order can be enforced directly provided that the appropriate certificate has been issued by the Court of Origin. [Articles 40 to 42]. Underpinning the Regulation is the intention that intra EU enforcement of access orders and Hague return orders after a wrongful removal should be quick and simple. There are, therefore, two routes to enforcement – one for access orders under the fast track provided by Articles 40 to 42; and for the return of a child under Article 11(8) in cases of abduction. Other orders require two stages before enforcement is achieved. The two tier procedure requires a declaration of enforceability (or in the UK recognition and registration of the judgment) before enforcement upon application to the new EU state for (A) registration or, recognition and (B) enforcement of an order pursuant to Article 23 of BIIR for cases involving children (Article 28). The procedures in England are considered below.

Fast track: Access rights

10. Access rights are directly recognised and enforceable by another Member State only if accompanied by the appropriate certificate in prescribed form and compliance with other rules relating to service and process as required by Article 41.The intent is that it should not be possible to oppose recognition of these judgments except in very limited circumstances.

Article 41(1) Certificates
11. The Article 41 Certificate makes the order for contact which complies with the conditions set out in Article 41 directly recognised and enforceable in another member state. The Article 41(1) Certificate must be in prescribed form and no application must have been made to the court of origin to rectify it. The certificate is issued in the member state of origin providing certain conditions apply as required by Article 41 (2):

(a) It must be issued in the standard form as set out in Annex III (see Family Court Practice 2008, page 3251)
(b) If the judgment certified was given in default, the person defaulting had good and sufficient notice so as to arrange a defence or where service did not comply with conditions, the defendant accepted the decision unconditionally
(c) All parties were given an opportunity to be heard
(d) The child was given an opportunity to be heard unless a hearing was considered to be inappropriate having regard to age or maturity. (Art.41 (2))

The Certificate: When To Apply
12. A cross border element in an order for contact in England and Wales involving or potentially involving a second Member State, makes a request for the certificate immediately desirable when the order is made so as to avoid delay should a need for speedy future enforcement arise. If the order does not have a cross border character but subsequently acquires one, either party may request the Court of origin that delivered the judgment to issue a certificate.

Hearing The Child: Consent Orders
13. If appropriate, the child must be heard and this is not always the case where matters are compromised on a consensual basis. This is a point that needs to be taken into account when agreeing orders for contact after a planned relocation to a member state. Child consultation procedures remain a matter for national law. The child's views are sometimes elicited when the child is as young as 6 although their views will carry less weight. In England a CAFCASS officer generally reports. The court may order that the child be separately represented, particularly if there is a risk that the child's interests will not otherwise be properly be represented; however the cost and delay which will ensue make this course exceptional (*Re D* [2006] UKHL 51; [2007] 1 FLR 961) The English judge will occasionally be prepared to hear the child. In Germany the Judge always hears the child. (see also *Re C* [2008] EWHC 517 (Fam); [2008] 2 FLR 6, Ryder J)

Hague Non Return Orders
14. Also directly enforceable are BIIR Article 11 return orders made in State A following a non-return order under the Hague Convention 1980 Article 13, provided that the court in State A has issued the proper certificate in Annex IV form pursuant to BIIR Article 42. No Article 11 order may be made unless the non return is pursuant to the Hague Article 13.

15. In *Re A (Maltese return order)* [2007] 1 FLR 1923, Singer J explained how the English courts approach the possibility of a return order under Article 11. The Court will apply conventional welfare principles. Singer J in *Re A HB v HMB* **[2007] EWHC 2016 (Fam)**; [2008} 1 FLR 289 decided that it was wrong to treat a proper

contact order made in the home state (England) as requiring a return order if an order was to be made at all under BIIR Article 11. "To elevate an order for contact into an order requiring return of the child to state A (in this case England) would render the BIIR scheme unworkable." An Article 11 return order may be an unrealistic goal on the facts of a particular case. Public funding for an application for an Article 11 return order is means tested.

The Two Stage Process

16. Other orders with regard to children are enforced by a two stage process. Once a judgment of the EU state is enforceable then it is enforced according to local laws in the receiving state. It is therefore necessary to get to grips with local practice. Always find out what the receiving country will do for your client in practice as well as theory. Above all the time scale is vital. In France, for example, the judge and the police take a firm line against a party who does not comply with a clear registered access order. Other states are less vigilant.

17. Any interested party may apply for the decision to be recognised or for a decision that that the judgment be not recognised [Article 21] or enforced [Article 28]

18. Recognition proceedings may be stayed if the judgment is under appeal in the State of origin [Article 27].

19. The general principle is that a judgment shall be enforced in the Member State B when it is declared enforceable [Article 28], although in the UK the judgment must be registered prior to enforcement [Article28(2)]. The UK system is therefore slightly different. Although the national law of the enforcing state governs the procedure for application to enforce Article 31(3) provides that in no circumstances may the judgment be reviewed as to its substance. Partial enforcement is provided for [Article 36] as is a mechanism for appealing against an enforcement decision. The appeal process is important. The Borras Report addressed this in paragraphs 65 to 80.

Procedure On Applications In England For Recognition Or Registration Of Orders Made In Another Member State

20 The procedure for applying for the recognition or registration of a judgment is set out in the Family Proceedings Rules 1991 7.40 -7.55 However these are not entirely cohesive. The rules are currently in the process of revision.

21 *Re D* [2008] 1 FLR 516 demonstrated the difficulties inherent in the new regime. In England there was no proper system of registration in existence and the route for appeal was not set forth clearly in the Family Proceedings Rules. Black J drew attention to lacuna. A father in France wished to have his order for residence in France registered in England and enforced; he applied without notice for registration and enforcement in accordance with FPR 7.42. Coleridge J gave the father permission to register the judgment pursuant to Article 28(2) of BIIR. The order directed the officer at the PRFD to enter the judgment and the grant of permission into the register of judgments. It transpired that there was no register of judgments but the judgment was validly registered. The mother was served with the permission order which contained incorrect information as to the appeal period. She appealed against the registration and applied for non recognition of the French judgment. The father

cross applied for its enforcement. Held dismissing the mother's appeal and application for non recognition and listing for consideration of enforcement, Article 21 to 27 of BIIR governed recognition and Article 28 to 36 governed an application for a declaration of enforceability. It was unlikely that permission for registration was tantamount to registration. Registration suggested registration in a book or computer ledger. FPR 7.46, requiring notice of registration of a judgment to be given, seemed to be contemplating more than simply serving the permission order. A notice of registration was a better way of conveying information. The failure to serve a valid notice of registration in accordance with FPR 7.46 was not so fundamental a flaw as to require the court to decline to entertain the father's enforcement proceedings. Once a judgment from another Member state had been registered the only way of preventing its enforcement was to appeal against registration. The English court could not entertain the argument that the judgment should not be recognised on welfare grounds as to do so would be to review a decision as to its substance prohibited by Article 26 and 31(3).

22. Subject to the observations of Black J in *Re D*, practitioners should apply in the Principal Registry of the Family Division without notice being given to any other party. The application must be supported by either a statement sworn to be true or an affidavit set forth above [FPR 7.41, 7.42 and Article 31 – see also 7.43(1)]. The affidavit must summarise the grounds and the statement or affidavit must contain the appropriate exhibits as set forth in the rules. The registration of a judgment in England under FPR 7.48(1) serves as a decision that the judgment is recognised under Article 21(3)

Register Of Judgments
23.FPR 7.44 provides that an order giving permission to register the judgment must be drawn by the Court. FPR 7.44(2) requires that it state the period within which an appeal may be made and that the Court will not enforce the judgment until the expiry of that period. The register of judgments is maintained pursuant to BIIR Article 28(2) in the Principal Registry [FPR 7.45] although, as Mrs Justice Black pointed out in *Re D* [2008] 1 FLR 516, there was at that time no register of incoming foreign access orders at the Principal Registry.

Service of Registration
24. Notice of the registration of a judgment under Article 28(2) must be served on the person against whom judgment was given by delivering it to him or her personally in accordance with the FPR 7.46 (see Black J *Re D* [2008] 1 FLR 516 and FPR 1991 10.6)

Non Recognition
25. Article 23 sets out the only grounds for refusing to recognise the judgment. Article 23 provides for non-recognition if :-

- the judgment is manifestly contrary to the public policy of the Member State in which recognition is sought
- taking into account the best interests of the child it was given, except in the case of urgency, without the child being given an opportunity to be heard
- the judgment is in violation of the fundamental principles of procedure in that Member State

- the judgment is irreconcilable with the later judgment given in that state or another Member State or the state of the child's habitual residence
- that it was given in default of appearance and the person in default was not served and without being given an opportunity for a holder of parental responsibility to be heard.

26. Article 23 has been narrowly construed. There is no case reported where an EU order has been found to be manifestly contrary to public policy in England and Wales. In *Re S (Brussels II)* [2004] 1 FLR 571 the mother sought to invoke the first of the exceptions – now Article 23A – that should have prevented recognition of a Belgian access. Holman J decided that the word 'manifestly' raised the threshold and that neither of the arguments came close to crossing the hurdle.

Power To Alter an Order For Access

27. *Re S* [2004] (supra) Holman J decided that he could and should modify an order for access. The child was lawfully relocated from Belgium to England to live with its mother but with the father to have extensive access rights in Belgium despite being only one year old. Upon application for recognition, registration and enforcement it was held, under the comparable Article 21 of the original Brussels II, that while there was an overriding duty to enforce an order previously recognised under the Regulation, there remains a limited discretion to refuse enforcement on the basis provided by what is now Article 23 of BIIR which is addressed below. Holman J stated that he had power to "phase in" the Belgian order which in practical terms was critical

28. Black J in *Re D* [2008] 1 FLR 516 similarly endorsed the policy of the Regulation: enforcement proceedings the English court could not defeat the purpose of the European Court order on the basis of welfare considerations. These must be left to the European court which made the order to be enforced. However it must be borne in mind that in *Re D* the French court had allowed the father's appeal so that the children were subject to a French order to reside with him in France, as indeed they later did.

Articles 12 And 15

29. The extent to which Articles 12 and 15 could and should be used creatively has vexed practitioners since BIIR came into effect. Emerging case law suggests that creativity is to be discouraged.

Prorogation

30. BIIR confers jurisdiction with regard to matters of parental responsibility pursuant to Article 12 (1) and (2) within proceedings for divorce, separation or annulment. An issue of parental responsibility connected with those proceedings shall be heard by the courts of the same Member State provided that the jurisdiction of that court has been accepted by the spouses expressly or unequivocally and by the holders of parental responsibility and is in the superior interests of the child.

31. Article 12(3) provides that the courts of a Member State shall have jurisdiction in relation to parental responsibility where the child has a "substantial connection" with that State, particularly if one of the holders of parental responsibility is habitually

resident in that State or if the child is a national of that State; and if jurisdiction has been accepted unequivocally - and is in the best interests of the child.

32. The question of unequivocal acceptance partially resolved by the decision in *Bush v Bush* **[2008] EWCA Civ 865**; [2008] 2 FLR 1437 considered below

Transfer
33 Article 15 enables the courts of EU State A to transfer proceedings relating to children to the courts of EU State B. In children matters the court is not terminally hamstrung by the "first past the post" regime which bedevils divorce jurisdiction. However, it is limited in scope in that three criteria have to be satisfied:-

- The power is only exercisable "by way of exception".
- The court of EU State A must consider either that the child has a particular connection with EU State B, or that the courts of Country B would be better placed to hear the case or a specific part of it.
- The transfer must be "in the best interests of the child".

Judicial Interpretation
34 The scope of Article 12 and the interaction with Article 15 was first considered in *Re C v C* [2006] AllER (d) 278 where Hedley J considered a consent order giving permission to a wife and children to relocate to Spain permanently with provision for contact and directed the mother to return the children to England if directed to do so. The dispute as to contact continued. The mother obtained her divorce in England and then sought to have her contact dispute heard in Spain. The father sought in England a declaration that the English courts had jurisdiction rather than the Spanish. By this time the children had been in Spain for more than a year and so by Article 8 habitual residence primarily governed that the dispute should be heard in Spain unless Article 12 (prorogation) applied (Article 9 which provides the 3 month continuing jurisdiction rule for access had ceased to apply). The outcome turned upon the application of Article 12. Held that the unresolved contact issue fell within Article 12(2)(b) and hence the English court still had jurisdiction. All the children spoke English and the parties could put their case well in England. Hedley J stated that if Article 12 (1) or (3) are satisfied the court should accept jurisdiction. The father's application succeeded.

35 In *Bush v Bush* **[2008] EWCA Civ 865**; [2008] 2 FLR 1437, the issue arose as to whether the English or Spanish court was seised under Article 12 so as to found the basis for enforcement. The children were habitually resident in Spain. The divorce proceedings were commenced in England by the mother who had brought one child with her to England. The father filed a statement of arrangements objecting to the relocation. A month later the father began proceedings in Spain for custody of all the children. The mother obtained a stay of the Spanish proceedings in Spain and the father failed to obtain a declaration under Article 17 in England to the effect that the English court had no jurisdiction

36. The trial judge, adopting a similar approach to Hedley J in *C v C* supra, decided that the English court was properly seised by virtue of the father's participation in the English proceedings by filing the statement of arrangements. . Held on appeal to the Court of Appeal that: (i) only filing a CA form C2 could seise the English court of the

issues. There had been no unequivocal acceptance of the English jurisdiction by filing the certificate of arrangements and; (ii) the Court of Appeal further considered the effect of the stay of Spanish proceedings. The stay merely held the Spanish court in reserve. If the English court declared that it had no jurisdiction the Spanish proceedings would revive. The English judge should have considered whether, if she had jurisdiction, which was the more appropriate court for the relocation dispute, which would usually be that of the child's habitual residence on grounds of fairness and forum conveniens

37. In *S-R (A Minor)* **[2008] EWHC 1932 (Fam)**, Jonathan Baker QC considered the issue of Article 15 transfer. The Spanish court had, with the agreement of the parties, acquired jurisdiction over matters of parental responsibility when the divorce proceedings were commenced. Held, having acquired jurisdiction, the court retained it until either it ceased automatically within Article 12 or the court transferred the case pursuant to Article 15. Although the initial acquisition of jurisdiction must be demonstrated to be in child's best interest, the continuing jurisdiction of a court under Article 12 could not be terminated by the court of another State. Only an invitation to transfer could be made under Article 15. The English court would not enforce the Spanish access order, but that would be adjourned for 4 months with liberty to apply. Only the Spanish court could vary the Spanish contract order. Meanwhile, any application under the Children Act 1989 would be stayed inevitably.

38 Most recently in a decision from Munby J, *B v B* **[2008] EWHC 2965 (Fam)**; [2009] 1 FLR 517, the mother sought transfer pursuant to Article 15 (2)(c) from the Netherlands where there was an ongoing dispute regarding her son. The parties were British. The divorce proceedings were taking place in London but the child proceedings in Holland. The mother sought in the Netherlands a transfer pursuant to Article 15 (1) to England. The Dutch court refused. She then made an application in England for transfer arguing that there had been a change of circumstances such as to warrant the transfer from the Netherlands to England. Munby J held that only the court seised could make the transfer under Article 15, the most that the English court could do was to invite the Dutch court to consider transfer.

39. These two cases demonstrate the extent to which Article 15 is judicially circumscribed

Provisional Measures

40. Provisional and Protective measures pursuant to Article 20 are permitted by the courts of a member state in urgent cases even when another court is seised. These end when the court of the member state has addressed the substance of the matter. [FPR 7.44(3)]. The scope of proper provisional measures remains controversial particularly with regard to the interface between Articles 20 and Article 12 and 15.

41. In *Re ML and AL (Children)* **[2006] EWHC 2385 (Fam)**; [2007] 1 FLR 475 a mother was given leave to relocate to Austria under Article 12. The order gave limited interim contact and directions for the final determination in Austria. The mother and child moved to Austria and the habitual residence changed. The father argued that the change of habitual residence had not changed because the mother had obtained the order by fraud. The Judge rejected this, however, because the parties had agreed under Article 12 that England would be the court of primary jurisdiction that underlay the

litigation rules. An order for contact was made in England for one occasion. The mother then went to the court in Austria and obtained an emergency order suspending contact, relying on Article 20, which vested the court in urgent cases with power to make orders to protect the child, even when another Court has primary jurisdiction. The Judge deprecated the mother's invocation of the emergency protective measure provisions in Article 20 in Austria rather than accept the English primary jurisdiction. The mother's manipulation of the protective regulations undermined the letter and spirit of BIIR.

Hague Convention and Article 20
42. The ECJ decision C-523/07 supra confirmed the legitimacy of Article 20 urgent provisional measures in Hague Convention abduction cases. There is urgency if immediate action is, in the view of the court seised in the State of the child's presence, necessary to preserve the child's welfare. The ECJ decided that those measures need not be expressly designated as provisional measures under national law. Otherwise it is for the referring court (State A) to determine which measures may be taken under national law and whether the provisions of national law are binding. The regulation does not oblige the court which has taken a provisional measure under Article 20(1) to transfer the case to the court to the Member State with jurisdiction over the substance of the matter. A court which under the Regulation lacks jurisdiction over the substance of the matter and does not consider any provisional measures under Article 20(1) of the regulation to be necessary must declare that it lacks jurisdiction, under Article 17 of the Regulation. The Regulation does not provide for a transfer to the court with jurisdiction.

43. Practitioners sometimes make bold attempts to argue that their suggested orders are mere protective measures. The borderline between Article 20 orders and impermissible review of an EU order is fine.

Costs
44. In *Re C* [2008] 1 FLR 619, Munby J criticised the lawyers of the Italian father for spending a substantial amount of money in anticipated defence of an application to enforce a contact order under BIIR Article 41. The appropriate certificate was issued to the mother's solicitors. The father spent £41,000 and sought his costs. All that was required in his Lordships view was an affidavit in support of the summons and a brief affidavit exhibiting the foreign orders. The translation costs were excessive. The mother was ordered to pay only a modest amount towards the father's costs

Conclusion
45 A number of BIIR cases, including some referred to in this article, are ongoing with expensive and complex international ping-pong in each jurisdiction. It remains difficult to advise in many cases. BIIR was never going to be easy to work out despite the intention that certainty should prevail over flexibility

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