

CCBE position on the proposal for a recast of the Brussels IIa Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction

2/12/2016

I. Introduction

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 45 countries, and through them more than 1 million European lawyers. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.

Referring to its [response](#) to the public consultation on the functioning of the Brussels IIa Regulation, the CCBE welcomes the work and the efforts made by the European Commission in the area of parental responsibility and free movement of judgments. In this paper, the CCBE wishes to provide its views in relation to a number of issues concerning the proposed recast of the Brussels IIa Regulation.

II. Concerning divorce

1. Definition of habitual residence

Experts regret that the recast project has not taken the opportunity to codify the notion of “habitual residence”, which is fundamental for the proper functioning of the regulation.

This lack of definition is a major problem, since Member States interpret this notion in different ways whether it be the child’s or one of the spouse’s residence, despite the ECJ case law.

That raises the question of standardisation and harmonisation of the connecting criteria which would appear necessary for the proper application of the regulation, in order to avoid the possibility of several member states arguing that they constitute the country of habitual residence of the child or of one of the spouses.

We believe that the recasting of the Brussels IIa regulation is therefore an opportunity to clarify the definition of the habitual residence of the child and the spouse, in order to meet the objective of harmonisation.

To this end, some key criteria to take into account have been identified in another legal instrument in the family law area: the Succession Regulation (recitals 24 and 25).

Furthermore, the scope of the concept is regularly detailed by the European Court of Justice (ECJ, 2 avril 2009, A. C-523/07 point n°44, ECJ, 22 December 2010, Mercredi / Chaffe, C-497/10 point n°56, ECJ, 9 October 2014, n°C-376/14), regarding the habitual residence of children.

Given the different approaches between legal systems concerning the concept of "habitual residence", the CCBE would like this notion to be expressed in two specific recitals which would facilitate the harmonisation of the definition given by the Member States jurisdictions.

As the ECJ considers that the factors to take into account vary depending the age of the child, the CCBE deems it necessary to write two recitals, one under the article 8 of the regulation, and the other under article 3, because the habitual residence of children and adults have different characteristics.

Proposal for a recital setting out a definition of habitual residence of a child

The habitual residence of the child is the place which reflects his or her integration in a social and family environment. To this end, the following must be taken into consideration: the age of the child, the duration, the regularity, the conditions and the reasons for the settlement and the stay of the child and, if so, his or her family on the territory of a Member State, the nationality of the child, the place and the schooling conditions, the language skills and the family and social relationships of the child in that State.

Proposal for a recital setting out a definition of habitual residence of a spouse

The habitual residence of a spouse is the place which reflects some degree of integration of the spouse in a social, economic and family environment. To this end, the following must be taken into consideration: the duration, the regularity, the stability, the conditions and reasons for the stay on the territory of a Member State and the settlement in that State, the nationality of the spouse, the location and the integration in a socio-professional environment, the economic interests, the language skills, the family and social relationships and the administrative attachment of the spouse in that State.

2. Choice of jurisdiction

As already pointed out in its [response](#) to the public consultation on the functioning of the Brussels IIa Regulation, the CCBE regrets that, by leaving open the possibility of forum shopping, the Regulation is not conducive to mediation and other alternative dispute resolution. In line with the recent regulations stressing the importance of party autonomy, the CCBE considers that giving spouses a greater autonomy is meaningful at the stage of the conclusion of the marriage. Allowing the choice of jurisdiction before any situation of conflict would ensure better legal certainty in case of divorce proceedings.

The choice of jurisdiction must be approached in the context of anticipation and securing of the legal agreements between the parties.

Today, spouses may choose a matrimonial regime by marriage contract, but the correct application of the contract cannot be guaranteed. Indeed, some jurisdictions do not recognise this institution or consider that they have the power to avoid it, according to circumstances.

For instance, two French spouses conclude a separation of property contract under French law and live in England. If they did not choose a jurisdiction and if the first spouse seizes the English courts to hear the divorce, this contract may not be applied in accordance with the original intentions of the parties.

The way to ensure respect for the choice made by the spouses at the time of the marriage would be to allow them to designate, at the same time, the competent court in the event of a divorce.

Similarly, as part of a pre-nuptial agreement under English law, a provision which would be seen as a matrimonial advantage under French law, could be automatically revoked before a French court hearing the divorce, despite the expression in the agreement of the willingness of the parties that this advantage should be maintained even in the event of a divorce.

Here again, the ability to designate the court – English court, this time – as the only court entitled to hear the divorce, if needed, would prevent this type of situation.

Parties may seek to have the court whose law is to be applied decide issues relating to their marriage contract. While another court that is bound by Rome III may apply the law of the contract, this may be less attractive to parties than having a decision by a court applying its own law. Marriage contracts may well have cultural characteristics and their application would be best ensured by the judge of the law of the contract. Allowing parties to choose the law of the contract promotes certainty, as it allows parties to be confident of how their agreement will be interpreted and applied.

Allowing the parties to choose the applicable law increases the legal security of their relationship and more so if they have the certainty that this contract will be subject to interpretation and proper application.

To allow the choice of the competent jurisdiction in case of divorce in advance and not only at the time of the divorce, thus appears to be a way of ensuring a greater legal certainty for the implementation of agreements reached between spouses.

This should also contribute to reaching the goal of unification of proceedings, and therefore achieving a global settlement of the financial consequences of a divorce (maintenance obligations and liquidation of the matrimonial property regime).

According to the Maintenance Regulation, it is now possible to designate the court of a Member State as the only competent court in matters relating to a maintenance claim. As long as it is impossible to designate the competent court for a divorce, the spouses will face the risk of a split of proceedings between maintenance claims in one Member State, and liquidation and the divorce in another Member State.

The difficulty can be even greater when the court does not recognise the concept of matrimonial property regime.

In conclusion, there is a significant risk of an inappropriate settlement of the consequences of divorce even though the spouses sought to provide for the possibility of breakdown of the marriage.

Regarding these practical difficulties in proceedings under the Brussels IIa regulation¹, the CCBE suggests it should be possible to choose the competent court for divorce proceedings before any litigation, and as early as the wedding is celebrated.

It seems to us that in order to unify the litigation the possible choices should be consistent with the ones allowed regarding the choice of court in matters relating to maintenance obligations.

Moreover, to ensure the best possible application of the pre-nuptial agreement between spouses, the opportunity to choose the competent judge in accordance with the applicable law of the pre-nuptial agreement should be provided.

Finally, an increasing amount of Member States allow the registration of a non-litigious divorce decision without the intervention of an authority in charge of controlling the respect of competence rules. *De facto*, the parties will be allowed to choose the jurisdiction. It therefore seems consistent to offer this possibility of this choice to everyone.

The CCBE therefore suggests the following wording:

“The parties may agree to designate the exclusive jurisdiction of an authority or court of a Member State regarding divorce and legal separation, provided that it is one of the following:

- ***The Member State where one of the parties has his or her habitual residence;***
- ***The Member State of nationality of either party or in the case of the United Kingdom and Ireland, of the ‘domicile’ of either party;***
- ***The Member State of the common residence of the spouses for at least one year before the date of the agreement;***
- ***The Member State chosen to settle the dispute regarding maintenance between spouses;***
- ***The Member State the law of which is applicable to the pre-nuptial agreement;***

¹ The UK Delegation to the CCBE believes that the problem of the ‘race to court’ in divorce proceedings could be addressed by including in the text of the proposal one or both of two alternatives:

- A power be given to authorities/ courts to transfer divorce proceedings to a more suitable authority / court – as is already possible under Article 15 in respect of proceedings concerning parental responsibility; and /or
- An express hierarchy be introduced into the jurisdictional bases found in the present Article 3(a) and (b), the following being a workable order of precedence: “...in whose territory
 - the spouses can be shown to have agreed should have jurisdiction,
 - the spouses are habitually resident,
 - the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the ‘domicile’ of the spouses,
 - the spouses were last habitually resident insofar as either one of them still resides there,
 - the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made,
 - the applicant is habitually resident if he or she resided there for at least six months before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her ‘domicile’ there the respondent is habitually resident”.

- **The Member State the law of which is applicable to the divorce.**

The conditions stated above must be met by the time the jurisdiction of the court is chosen.

This choice must be explicitly expressed in writing”.

The CCBE underlines that, with the exception of the final two options, these choices of courts have been proposed by the European Parliament.

We consider that, at the very least, the Regulation should designate the courts of:

- The Member State in which the parties have their common habitual residence for at least one year;
- The Member State of common nationality of both parties or in the case of the United Kingdom and Ireland, of the ‘domicile’ of both parties;
- The Member State chosen to settle the dispute regarding a maintenance claim between spouses;
- The Member State the law of which is applicable to the pre-nuptial agreement.

Considering the important issues related to a choice of court, the CCBE recommends that the Regulation should impose a requirement that each party obtains independent and prior legal counseling.

3. Subsidiary rule of European jurisdiction

We welcome the continuation of residual jurisdictions which are particularly valuable when two spouses of different Member States have their common habitual residence in a third State, where they don’t have a strong cultural link with that third State or where proceeding with divorce there is complex.

These provisions allow bringing proceedings before the courts of the Member State of nationality (or in the case of Ireland or the UK domicile) of one of the parties instead of the one of a third country, when the law of this Member State provides for it.

However, this is impossible when the International Private law of the Member State does not include a subsidiary rule based on the nationality (or domicile) of one of the spouses.

This increasingly frequent situation is a source of unequal treatment between spouses who are nationals of different Member States.

The CCBE suggests, to complete the existing subsidiarity rules, the creation of a subsidiary rule of European jurisdiction based on the nationality from one Member State of one of the spouses (or in the case of the United Kingdom and Ireland, of the ‘domicile’). For the sake of consistency with article 6, only the courts of the Member State of the nationality of the defendant could be seized.

Therefore, the CCBE suggests the drafting of an article 6a:

“Where no authority of a Member State has jurisdiction pursuant to Articles 3, 4, 5 and 6 and pursuant to national rules of residual jurisdiction, and when spouses have nationalities from different Member States, the authority of the Member States of the nationality of the defendant, or, in the case of the United Kingdom and Ireland, the Member State of his or her ‘domicile’, shall have jurisdiction”

4. The creation of a Certificate of seisure

In view of the implementation of article 3 and having regard to the *lis pendens* provisions of article 19, practitioners regret that litigants are forced to spend significant costs in order to demonstrate the first seisure by the competent court, according to the above mentioned article.

In order to limit these proceedings where the main issue consists in the determination of the date and time of the seisure, the CCBE suggests that a European certificate of seisure should be created and issued at the request of any interested party. This would need to take into account that seisure may occur when the document instituting the proceedings is lodged with the court, or when it is received by the authority responsible for service. It should include:

- the name of the parties,
- the subject of the seizure,
- the date and time of the seizure,
- the confirmation of compliance of the seizure with article 15.

While precedence is secured by taking the appropriate first step required by article 15 (as decided by the CJEU in *P v M* (case C-507/14), parties should thereafter serve the document instituting proceedings or lodge the document that has been served. There should therefore be scope for any certificate to be endorsed to confirm that this second step has occurred.

III. Regarding the children

The CCBE welcomes several provisions, and especially the clarification of the time limits. However, a few points could be improved.

1. On the duration of the continuing jurisdiction

The new article 8 (former article 9) allows the continuing jurisdiction for three months when a child moves lawfully from one Member State to another and acquires a new habitual residence.

The CCBE believes that the three month period is not long enough. An extension to six months would be more appropriate. It would ensure that the right of access is correctly implemented.

2. On the transfer of jurisdiction

The new article 7 (former article 8) provides:

*“The authorities of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State. **Where a child moves lawfully from one Member State to another and acquires a new habitual residence there, the authorities of the Member State of the new habitual residence shall have jurisdiction**”.*

The last sentence must be read considering thereticals 15 and 16 of the recast proposal providing:

*“(15) Where the child's habitual residence changes following a lawful relocation, jurisdiction should follow the child in order to maintain the proximity. This should apply where no proceedings are yet pending, **and also in pending proceedings. In pending proceedings, however, parties may agree in the interests of the efficiency of justice that the courts of the Member State where proceedings are pending retain jurisdiction until a final decision has been given, provided that this is in the best interests of the child. This possibility is of particular importance where proceedings are nearing conclusion and one parent wishes to relocate to another Member State with the child.***

*(16) Under certain conditions and where it is in the best interests of the child, jurisdiction in matters of parental responsibility may also be established in a Member State where proceedings for divorce, legal separation or marriage annulment are pending between the parents, or in another Member State with which the child has a substantial connection and upon which the parties have agreed, even if the child is not habitually resident in that Member State. Such jurisdiction, which is an exception to the principle of proximity embodied in the jurisdiction of the Member State of habitual residence of the child for which *perpetuatio fori* does not exist, should cease at the latest as soon as a decision in those proceedings on parental responsibility matters has become final, in order to respect the requirement of proximity for any new proceedings in the future.”*

This provision calls for the submission of a new application in the Member State in which the child has its new habitual residence. Therefore, lawyers may recommend that their clients oppose a change of the residence of the child while proceedings are pending.

This provision runs contrary to the aim of easing the tensions between the parties and the shortening of legal proceedings.

Without prejudice to the new article 14, the transfer of jurisdiction while proceedings are ongoing seems to be problematic.

The CCBE asks therefore the removal of the bold text above-mentioned.

3. On the limitation of remedies

Finally, regarding the proposal to modify article 25, experts wonder if subparagraph 4 effectively removes the appeal or, a layer of jurisdiction. The concept of appeal should be clarified. The main question we have concerns the opposition procedure, which should not be treated as an appeal in accordance with article 25.

To avoid any misunderstanding, and in order to be able to challenge a decision without exhausting possible remedies before a court of higher instance, the word “appeal” should be replaced with “appeal to a court of higher instance”.

4. Procedure for the return of the Child

The CCBE disagrees with the new provision of Article 25(3) which provides that “the court may declare the decision ordering the return of the child provisionally enforceable notwithstanding any appeal, even if national law does not provide for such provisional enforceability”.

Practice has shown that the possibility to order the immediate return by the court of first instance is not practical.

Since only one appeal is possible (Article 25(4)) and the proceedings before the court of second instance should only last another six weeks (Art. 23(1)), the CCBE suggests Art. 25(3) be deleted. The decision to return should be enforceable only after the decision of the court of second instance in accordance with national procedural law.

5. Right of the child to express his or her views

The CCBE welcomes the inclusion of article 20 in the draft proposal in order to afford a better guarantee that the views of the child are respected. As clarified in recital 23, this Regulation is not intended to set out how to hear the child. The CCBE, however, considers that some common minimum standards on the hearing of the child could be established. For example, the Regulation might specify a minimum age above which children should be generally heard.

In this context, it is also important to point out that it is possible for a Member State to refuse enforcement, if the common standards and/or the procedure of the hearing as set out in article 20 have not been met.