4PB International Children Law Group response to 'Consultation paper issued by the Commission on on the functioning of the Brussels IIa Regulation (EC 2201/2003)

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Introduction

1. Before embarking on our response we feel it will assist to introduce ourselves in order to put in context why we believe we are well placed to provide a response based on both an analysis of the interpretation of the Regulation but also how it operates in practise in the Courts of England and Wales.

2. 4PB is the largest specialist family set of chambers in England. It is recognised domestically and internationally as the leading set in Children Law. It is ranked in Band 1 by Chambers and Partners and by Legal 500. Awards won by 4PB in the last 2 years include,

   (a) Family Law Awards 2103, Chambers of the Year, Family Silk of the Year; Jo Delahunty QC, Junior Barrister of the Year; Hassan Khan.
   (b) Chambers & Partners Awards 2012 Alex Verdan QC - Family Silk of the Year,
   (c) Jordans Family Law Awards 2012 Charles Hale - Junior of the Year and Michael Gration - Young Barrister of the year
   (d) Chambers & Partners Awards 2011 David Williams - Family Junior Barrister of the Year
   (e) Jordans Family Law Awards 2011 Winner of Family Law Set of the Year and Teertha Gupta - Winner of Family Barrister of the Year .

   In addition to these awards 4PB has had many other nominations.

3. 4PB has particular expertise in international children cases, including abduction, relocation, stranded spouses, forced marriage and others. Henry Setright QC, Teertha Gupta QC and Hassan Khan were all involved in the drafting of the Forced Marriage Act. Counsel from 4PB have appeared in most of the leading cases in international children law in England and cases referred to the Court of Justice of the European Union including

   (a) E-v-B Case C436/13. CJEU, 15.5.14 (Henry Setright QC, David Williams QC, Michael Gration)
   (b) A-v-A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening) [2013] 3 WLR 761; (UK Supreme Court; Henry Setright QC, Alistair Perkins, Hassan Khan)
   (c) In re L (A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening) [2013] 3 WLR 1597 (UK Supreme Court: Henry Setright QC, Teertha Gupta QC, Baroness Scotland QC, Ruth Kirby, Michael Gration, Michael Edwards, Rachel Chisholm)

(d) and In re LC (Children) (Reunite International Child Abduction Centre intervening) [2014] 2 WLR 124(UK Supreme Court: Henry Setright QC, David Williams QC, Jacqueline Renton, Michael Gration)
(e) Re S (a Child) [2012] UKSC 10 in the UK Supreme Court in February 2012 (Henry Setright QC)
(f) Re E (Children) [2011] UKSC 27 in the UK Supreme Court in May 2011 (Henry Setright QC, Baroness Scotland QC, David Williams QC)
(g) Mercredi-v-Chaffe in the Court of Justice of the European Union in December 2010 (Henry Setright QC, Marcus Scott Manderson QC, David Williams QC).

4. That specialism and expertise is offered and drawn upon in the field of continuing education for the judiciary and members of the professions both domestically and worldwide. Recently members have delivered lectures to European Judges at the Academy of European Law in Florence (David Williams QC), to an international audience of judges and practitioners at the World Children's Congress in Sydney (Rachel Chisholm) and to the family judges of the English Court of Appeal and High Court and other first instance courts (Henry Setright QC, David Williams QC, Michael Gration).

5. A significant amount of the work that we undertake involves the interpretation and application of the Council Regulation. We have extensive day to day experiences of how the Regulation works in practice and how it is understood by judges at all tiers of court and by practitioners.

6. Our response to the Consultation is divided into two part. Firstly the answers to the specific questions. Secondly other suggestions for improvements to the Regulation.

Responses to Questions posed.

7. We answer the questions as follows

1. Please indicate your role for the purposes of this consultation*

- ○ **Private individual**
- ○ **Judge**
- ○ **Court staff member**
- ○ **Prosecutor**
- ○ **Lawyer**
- ○ **Bailiff**
- ○ **Notary**
- ○ **Other legal practitioner**
- ○ **Central authority staff member**
- ○ **Academic**
- ○ **Member State**
- ○ **Other**

2. Please indicate the country where you are located*

- ○ **Austria**
- ○ **Belgium**
- ○ **Bulgaria**
- ○ **Croatia**
- ○ **Cyprus**
- ○ **Czech Republic**
- ○ **Denmark**
- ○ **Estonia**
- ○ **Finland**
- ○ **France**
- ○ **Germany**
- ○ **Greece**
- ○ **Hungary**
- ○ **Ireland**

- Italy
- Latvia
- Lithuania
- Luxembourg
- Malta
- Netherlands
- Poland
- Portugal
- Romania
- Slovakia
- Slovenia
- Spain
- Sweden
- United Kingdom
- Other

3. Have you had practical experience with the Regulation? *

- Yes
- No

If so, in what capacity?

- Judge
- Lawyer
- Notary
- Other legal practitioner
- Prosecutor
- Bailiff
- Court's staff member
- Central authority staff member
- Spouse
- Parent
- Other

Which capacity?

4. Please provide your contact information: name, institution, address, e-mail address*

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The functioning of the Regulation in General

5. Do you think that the Regulation is a helpful tool for spouses involved in cross-border divorce/legal separation/marriage annulment?

Yes

6. Do you think that the Regulation is a helpful tool in cross-border cases concerning custody over a child?

Yes

7. Do you think that the Regulation is a helpful tool in cross-border cases concerning access rights to children?

Yes

8. Do you think that the Regulation is a helpful and efficient tool in cases of cross-border parental child abduction?

Yes

Some EU courts are very slow in dealing with abduction cases within the 6 week obligation under Article 11(3).

Some courts do not appear to apply either the 1980 Hague Convention or the Regulation in the way that was intended. In particular some courts appear to apply a broader welfare assessment than the narrow exceptions provided. This may arise because in some countries there is no concentration of these cases in a small number of courts or judges.

The level of efficiency and engagement of the central authorities and Liaison Judges is also inconsistent across Member States.

We suggest the obligations imposed by the Regulation should be set out more clearly.

While the Regulation is undoubtedly helpful, it could be made more efficient. We suggest the wording of Article 11(4) could be made clearer and stronger. What does adequate mean? Effective to negate or reduce the risk identified? 'Adequate arrangements to secure the protection of the child' does not

demand strong bridging protective measures to be in place and enforceable until the court of origin decides they are no longer required. The provisions of the 1996 Convention, or Article 20 of the Regulation could serve as a useful precedent to achieve this. This would require either an amendment to Article 20 to specify that such protective measures were enforceable in another country when made in an application under the 1980 Hague Convention or that Article 20 be moved from Section 'Common Provisions' to Section 2.

Article 61 is intended to state the relation with the 1996 Hague Convention, setting out when this (2201/2003) Regulation shall apply. We question whether in the circumstances set out in paragraphs a) and b) of Article 61 the intention is that the Regulation applies exclusively.

If so, then our argument above regarding bridging and enforcement of protective orders is strengthened.

In any event, efficiency would be greatly improved if the answer to this question were to be clearly set out in the Regulation.
What is the situation where a child was habitually resident but is no longer? What happens if the 1996 Convention covers a matter not covered by the Regulation. There would be merit in including the 1996 Convention within Article 60.

There should be more clarity regarding the process of safe transfer of the child to requesting state pursuant to a return order.

<u>Jurisdiction (identifying the court responsible to hear the case)</u>
a) Matrimonial matters
9. Do you think that the ways of identifying the responsible court in matrimonial matters should be revised so as to better reduce the risk of a "rush to court"?

If there is to be a list of factors to be considered, (possibly including nationality, which could be problematic where parties have more than one nationality) how could an equitable hierarchy of factors be designed? If there is no such hierarchy, satellite litigation is likely to result.

A relevant question might be the extent to which the 'marriage' has a link with a jurisdiction rather than any link of the individual parties, and generally we would like to see parties' choice of forum limited to such jurisdictions.

There would also be a need to consider forum non-conveniens which is a familiar concept in English law and is a part of the Regulation in respect of children in Article 15. There is not an equivalent procedure to deal with divorces but rather Article 19 imposes a 'first seised' rule which encourages the 'rush to court'. If there was a hierarchy of jurisdictional grounds or an ability to transfer divorce proceedings to a country better placed to hear them that would avoid the rush to court. This could also include provision for a stay or transfer to a Third State.

10. Should there be a possibility for spouses to choose the responsible court by a common agreement?

Yes, there is little difficulty in practice with this. The jurisdictional grounds are so wide that it is unlikely that one of the existing Grounds will not apply. In the unusual case of such a ground not existing but the parties wishing to have their divorce heard in a country with which they had no real connection, if the court had the power to stay or transfer to another court better placed this would provide the court with a fall back position if it did not feel it should determine the case.

11. Should the formal requirements of such agreement draw inspiration from other EU instruments such as:

- ☐ The Maintenance Regulation Article 4(2)
- ☐ Other

Article 12 allows 'expressly or otherwise'. We would advocate a requirement that jurisdiction should always be expressly accepted. It is right that the superior/ best interests of the child are determinative.

b) Parental responsibility matters (custody and access rights)
12. Do you think that the conditions for the application of these provisions should be improved?

Yes. It is not clear whether the parties can prorogue for the child's minority. It would be helpful to have a clause which allowed the parties to prorogue either for the minority of the child or for a specific period of time. The court would always have to consider whether it was at the relevant time in the child's best interests to hear the case and consider whether to transfer under Article 15 to another MS or non-MS and this would be a safeguard which would prevent parents electing a plainly inappropriate forum.

13. Do you think that the cooperation mechanism aimed at ensuring a smooth functioning of the transfer should be improved?

Yes

Over a period, a process for smooth and rapid transition of cases between Eire and England and Wales has emerged. Standard forms have been developed to flesh out the vague terms of Article 15 and 56. This local arrangement between two states works very well. More details could be provided to the Commission. It is, however, an expensive process, being dependent on expert counsel being available to operate it.

The Regulation requires the courts to cooperate either directly or through the designated central authorities. The court considering the case is often unclear of the process required by another state. It would be helpful if Article 15 at least included a timeframe, which could be achieved by adding the words, 'in order to ensure the application is brought before the court or other competent authority within xxxx period'.

Article 11(6) might serve as a useful starting point for consideration of how documents are to be supplied to the receiving court. 11(6) is not prescriptive in respect of who is to take the action required, and this should be made clear in any revision of Article 15.

It might be possible to make more frequent use of direct judicial liaison in cases to be transferred, with the court identifying the intended receiving court through the judicial atlas, and the respective judges clarifying administrative procedures. This could be criticised as denying the parties their opportunity to make representations in a transparent court process.

Practitioners question whether Article 15 enables a case to be transferred to a state which has jurisdiction, and which is better placed to hear the case if the proposed receiving state does not have ongoing proceedings in relation to the child. It should be made clear (if this is the intention) that the court having original jurisdiction cannot be prevented from making a request to a court by reason of there being no proceedings as long as the requested state has jurisdiction.

A suggestion could be to require the receiving state in such circumstances to open a case, notify the parties and invite representations on how to proceed. This could be problematic as states have many varied administrative processes in relation to such cases.

Should it be made clearer (if this is the case) that the requested court cannot revisit the decision of the requesting court for the case to be transferred to the requested court on the basis that the gateway criteria in 15(3) are not met? It is agreed that the question of the best interests of the child is to be considered by both the requesting and the requested court.

More clarity is required on the question of how Article 15 fits with Article 12(3).

Article 16(1)(a) should make it clear that it is for the court whose process is to be served that has the exclusive role of determining whether the applicant has subsequently failed to take the required steps. It is not for the courts of another MS (who chronologically is 2nd seised, but for the issue of whether the required steps have been taken)) to rule on ,

c) Jurisdiction – questions common to matrimonial matters and matters of parental responsibility

14. Do you think that the existing rules have helped effectively in preventing parallel proceedings?

Yes, in the main.

How should these rules be improved?
All orders and any relevant annexure/certificates should be required to include a judicial statement of the basis on which the court exercised jurisdiction in the case. For example, a finding the child is habitually resident in the jurisdiction. This would reduce the scope of subsequent challenge to the orders.

15. Do you think that the Regulation should address parallel proceedings brought before the court of an EU country and those brought before the court of a non-EU country?

Yes

For the reasons set out in the question, we would urge consideration be given to giving the court discretion to make use of the provisions within the Regulation when considering a case involving a non-EU country. For example, 'nothing in this Regulation shall prevent jurisdictions in Member States having such relations as are set out in Article 12(3) and Article 15 with a non Member State'.

16. Do you think that the existing rules function well?
How should they be improved?
Article 20 as interpreted by the CJEU identifies when a court can take protective measures in respect of a child over whom another MS has substantive jurisdiction.
The lacunae is that Article 20 measures are not (according to the CJEU decision in the 'Purrucker' cases) enforceable in the country with substantive jurisdiction. This does not present a problem if identical measures can be taken very swiftly in the country of substantive jurisdiction but our experience is that very often that is not possible either because the parties lack funds or ability to access the court or because the court process is too long.
It should be possible for Article 20 measures to be enforceable in the other MS up until the time that court considers and determines the issue of whether such protective measures are in fact required.

17. Would it be useful to address the lack of a uniform rule so as to allow in all situations the identification of the responsible court?

Yes some clarification would assist.

We would suggest that the Regulation could include express provision that Article 12 applies to such situations and which allows the Courts of an MS to transfer the case to another under Article 15 even where the jurisdiction it is exercising is one derived from Article 14 (application of national law).

18. Do you think that the Regulation should ensure access to justice in cases where the responsible courts outside the EU cannot exercise their jurisdiction?
Yes, although such cases will be rare and Article 13(2) covers this to some degree but requires presence. It is not clear how it would operate where the child was not present.

Return of the child in cases of cross-border parental child abduction within the EU
19. Do you think that the Regulation has ensured the immediate return of the child within the EU?

No.
There are many delays and many courts do not appear to enforce the Hague Convention and Art 11(6) with the strictness that was envisaged.

This question also brings into play the practical effect of the Regulation's overlay on the 1980 Hague Convention process.

In England automatic legal aid would be available to pursue proceedings under the 1980 Hague Convention but not to enforce an order from another MS. It possible to issue enforcement proceedings in the state with jurisdiction in parallel with the Hague application but it is not clear which should have precedence because both enforcement and intra-EU Hague applications are made under the Regulation.

Abolition of exequatur
20. Do you consider that all judgments, authentic instruments and agreements concerning parental responsibility should circulate freely between EU countries without exequatur?

It would be a very significant change to abolish exequatur, but considered use could be made of the 1996 model. The judgment/instrument/ agreement could be registered on a challengeable basis.
At present there does not appear to be sufficient uniformity of approach across the EU to issues such as assessment of welfare, hearing the voice of the child and service to make abolition of exequatur possible.

We do not believe there is a simple answer to the issue of whether judgments placing a child in foster care or institutional care should circulate without exequatur. Judgments placing a child in care involve a serious infringement of the rights of the child and the parents. They are arguably so draconian that enforcement should be subject to exequatur so that procedural or other irregularity can be considered. On the other hand there is an assumption that before making such a draconian order there will have been a very thorough

process where all rights have been fully protected and that a child then removed into care is likely to need certainty and the minimum of delay.

21. If abolition of exequatur should be expanded, do you consider that maintaining safeguards is required in relation to:

☑ Public policy reasons

☑ Proper service of documents

☑ Right of the parties to be heard

☑ Right of the child to be heard

☑ Irreconciliable judgments

☑ Compliance with the procedure relating to the placement of a child in another EU country

☐ Other. *The requested court is now the court of the child's habitual residence and has been seised of but not adjudicated upon an application in matters of parental responsibility concerning the child.*

These grounds seem appropriate.

Hearing of the child

22. Do you think that common minimum standards for the hearing of a child could help in avoiding the refusal of recognition, enforceability and/or enforcement of a judgment from another EU country?

Practice diverges so widely it is difficult to see how this could be done. For instance in England a judge seeing a child to hear their views is very rare whereas in other countries it may be standard. Other than to say that the child's views on the issues should be heard in a way which so far as possible allows them to express their views in an independent way.

Enforcement

23. Do you think that it is important to improve the actual enforcement of decisions concerning parental responsibility given in another EU country?

Yes. Such decisions must be backed by an enforcement process that ensures rapid enforcement. The court in liaison with public authorities should control the process of enforcement.

24. Do you think that it is important to improve the actual enforcement of return orders?

Yes. In England such decisions can be enforced in a matter of days by a combination of the court process and police.

Cooperation between Central Authorities

25. In general, do you think that the cooperation between the Central Authorities functions well?

Difficulties are caused by the lack of uniform procedures. There is experience of particular difficulty in respect of consultation and obtaining consent to the placement of a child in another Member State under Article 56.

Article 55 is to be operated 'in accordance with the law of that Member State in matters of personal data protection.' Many European states operate very powerful data protection regimes. It would help to specify more clearly on what areas co-operation is to take place and the limits on this. Many people have expectations which are not capable of being fulfilled by CA's.

26. Could the cooperation between the Central Authorities be improved through the mandatory use of forms translated into all EU languages to facilitate the exchange of information between Central Authorities?
Yes

27. Do you think that it would be useful for the Regulation to provide for additional provisions so as to enhance the use of mediation?
Not sure how this could be done

28. Do you think that this provision should be improved?
A time frame for the provision of information would assist.

29. Do you think that the cooperation between Central Authorities and the local child welfare system in cross-border situations works as well as it should in order to ensure the smooth operation of the Regulation?
A requirement on MS to impose an obligation on domestic child welfare authorities would ensure they co-operate in a timely way.

30. Is there a need to adapt the cooperation between a Central Authority and the local child welfare authorities to better take account of cross-border cases?
See above

<u>Placement of a child in another EU country</u>
31. Do you think that the rules in the Regulation governing the placement of a child in another EU country function in a satisfactory manner?
Yes. But a timeframe would assist.

<u>Certificates</u>
32. Do you think that the certificates annexed to the Regulation function in a satisfactory manner?
Yes
Annexures/Certificates should include a judicial statement of the basis on which the court exercised jurisdiction in the case. For example, a finding the child is habitually resident in the jurisdiction. This would reduce the scope of subsequent challenge to the orders.

Relation with other instruments

33. Do you think that the rules governing the relations between the Regulation and the 1980 Hague Convention work satisfactorily?

No

Lack of clarity on the position of regulation of relations between Member States and non member states can result in confusion in practice.

We suggest replicating some of the EU provisions, for example, certification for Article 20 orders; in particular when made on a 1980 Hague return order as this will facilitate the transfer of the child by bridging a gap following physical transfer of the child until the other court is seised and/or in a position to actually determine whether such orders are needed.

The relationship between the Convention and the Regulation should be clarified, and measures available should be simple and consistent.

It would be helpful to have a clear statement of applicability of the 1996 Convention when there is no provision in the Regulation dealing with a particular situation.

34. Do you think that the rules governing the relations between the Regulation and the 1996 Hague Convention work satisfactorily?

It would be helpful to have a power to stay enforcement of an order made in the original jurisdiction upon issue of a real and substantive application in the court where the child is currently habitually resident. This is much clearer in the 1996 Convention than in the Regulation.

Other issues

35. Are there any other provisions of the Regulation which, in your view, would need to be improved?

See below

36. Are there any other comments that you wish to make?

See below.

Suggestions for other improvements

8. Our experience suggests the following matters be addressed

Recitals

9. A Recital confirming whether or not the provisions of Chapter II apply when the other country concerned is not an EU member state would assist. If they do, it would assist to have clarification of whether the courts of a

MS can decline to exercise jurisdiction in favour of the courts of a non-MS.

10. We also consider that there should be a clearer statement that upon the transfer of the habitual residence of a child the courts of the MS of habitual residence have unlimited substantive jurisdiction over a child and may decline to enforce an order on the basis that (a) they have conducted or are conducting a full welfare assessment and (b) enforcement (or interim enforcement) of the order is not in the child's best interests

Article 2

11. Confirmation that a public body may include a court would be beneficial.

Article 3

12. There is a need for clarification of whether the terms 'habitually resident' and 'resident' are intended to mean the same or different.

Article 10 and 11

13. There is a need to clarify whether jurisdiction is lost if a case was opened after the 3 month period mentioned in Article 11(6).

Article 23

14. We refer back to para 10 above. In many cases enforcement is sought when the court of enforcement is also the court of habitual residence. Although enforcement can be declined if that court has already issued a subsequent irreconcilable judgment it is not clear what the position is if that has not occurred. If at the time application for enforcement is made, or subsequently an application is made for a substantive order it should be clear that the MS of enforcement can decline to enforce pending determination of the application over which it has substantive jurisdiction.

15. It is relevant in this context that while under Article 9, there is a limit of three months during which the original court can modify its own judgment on access rights issued before the child moved and changed habitual residence, there is generally no time-frame/limit for enforcing an enforceable judgment (Article 28(1)).

This may be problematic as the circumstances of the child are likely to change materially over time.

Should courts review their orders in the best interests of the child to ensure that orders subject to certification are appropriately enforceable?
Should certificates 'expire' after 12 months?

Or, it might be possible to say that 'old' orders should not be enforced on public policy grounds, for example, 'manifestly not in the interests of the child to enforce this order due to the amount of time which has passed since the order was made'.

This is dealt with much more satisfactorily in the 1996 Convention.

Article 36/48

16. When undertaking partial enforcement or practical arrangements this often in practise means adapting the access provided for. It should be made clear that this can be done on a temporary basis if in the interests of the child.

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