THEMIS COMPETITION 2015

International cooperation in civil matters

Custody and visiting rights in cross-border separation

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Summary

Introduction

Family law is said to regulate the couple's rights as well as those of the children; matters of cross-border custody are at the heart of both. Ongoing European integration lasting for more than half a century has strengthened many ties. Firstly, Member States got closer dealing with steel and coal. Then, over time, borders have opened and workers have moved freely, taking their love lives with them across those borders.

In an international legal, judicial and political area such as the EU, it seems natural to see a growing number of trans-national couples. They may be EU citizens carrying different passports but meeting in another country, or the nationals of the same Member State living far from home. In both cases, the result is the same: the couple becomes international. The direct consequence is the growing number of internationally born children. But, most unfortunately for all the parties involved, the EU couple does not seem to be stronger than the purely national one, and separation is common amongst them. Whereas the couple's rights in this case are an issue on their own, matters become much more complex whenever a child is involved.

A couple's break-up, when it takes the ex-partners to different sides of a border, does raise a number of questions regarding the child. Which parent will he live with? Can shared custody be established? How can a reasonable *modus vivendi* be decided upon, given the circumstances? Unfortunately, as many of these questions sometimes seem hard to answer, one of the parents can be tempted to simply flee abroad, taking the children with him/her.

That said, international law has long adopted a number of legal instruments, in numerous attempts to regulate the matter. To give a few examples, the 1961 Hague Convention and the 1980 Luxembourg Convention deal with the issues of establishing and enforcing custody rights. Other Hague Conventions set out to regulate child abduction and parental responsibilities. The UN has also had its share with a cornerstone of children's rights, namely the New York Convention signed on November 20th 1989.

The EU, of course, could not afford not to have an integrated legal tool to articulate and harmonise legal proceedings in the field of family law. Such a tool was

to become the Brussels II *bis* regulation on November 27th 2003. Since then, it has been the major instrument for defining jurisdiction, applicable law, and ensuring mutual acknowledgment of judicial decisions.

The Brussels II *bis* regulation has not, thus far, provided an answer to the great many questions raised by cross-border child custody. This study aims at pointing out some of those unsolved problems, as a means to sparking new ideas that might bring about a solution.

First of all, it needs to be said that although the Brussels II *bis* regulation has addressed legislative and judicial jurisdiction issues, the contents and titleholders of custody and parenting rights are still defined by the internal laws of each Member State. In that respect, it does not allow for a truly integrated legal area regarding children's rights, nor does it offer a satisfactory means to protect those rights in cross-border family issues. Without a European substantial body of regulation, the risk of *forum shopping* and child abductions remains high. How to deal with this problem, however, is still debatable.

Secondly, the *child's interests*, as an autonomous concept, call for attention amidst the new standards for child welfare in the EU. Linked to the Proclamation of Fundamental Rights, the Court of Justice has decided that the child's most fundamental right is to maintain personal relationships with both parents[1]. When those parents are separated by a border, the enforcement of this child's right encounters many obstacles: schooling, housing, integration in a certain social and family environment, etc… It then becomes clear that the issue of cross-border child custody has to be seen through a broader spectrum than just legal regulations, whether European or not. The welfare of youngsters requires global thinking, in terms of legality and opportunity. This is undoubtedly one of the tough challenges that the EU must face in the years to come.

In trying to find an answer to all of these questions, we chose to start this study with a retrospective analysis of the regulations within the EU, to show the existing flaws and to point out a bigger need for harmonisation (I.). Subsequently, a prospective description of new challenges and trends leads to new paths worth

[1] CJEU 01.07.2010, n°C-211/10

exploring for better integration of children's rights in cross-border custody matters (II.).

I. Ongoing harmonisation on a European scale regarding custody rights and access enforcement

Custody rights and access enforcement are two parental rights that have to take into account the child's best interests. Children's rights raise legitimate stakes and the need for a European approach that is still flawed.

A. The incorporation of a European approach

All EU Member States admit that children have the right to maintain personal relations and direct contact with both of their parents even if one of them lives abroad, whether in another EU Member State or not[2]. Thus, in the case of divorce or separation between two adults who have a child in common, one of the main stakes is to determine who this child is going to live with, which parent will hold custody rights and how access enforcement can be guaranteed with regard to the cross-border situation and the child's interests. The European approach has followed step-by step harmonisation (1), the current legal framework being the result of its evolution (2).

1. A step-by-step European approach towards better-harmonised regulation

The main issue identified has been the complete lack of special legislative rules applicable in the case of cross-border separation. This trans-boundary nature is still scarcely taken into account in national laws (mostly concerning the child's move abroad). The national laws are elaborated in light of internal situations. The cross-border situations are only regulated by applying the rules of private international law.

[2] Convention on Contact concerning Children, Strasbourg 15th May 2003

But then, the law applicable is the internal one, in accordance with the principle of equal treatment. From a legal standpoint, these different stakes lead to many implications concerning state authorities or a minimum of common rules to facilitate a harmonised right in the EU. The EU has attempted to integrate different legal considerations on this topic. Indeed, we know there are different rules concerning custody rights and access enforcement for each EU Member State, and in respect of the EU's goals[3] for greater cooperation, different conventions and regulations have been elaborated, with the Brussels II *Bis* Regulation being the ultimate benchmark.

Thus, the EU has conceived a single legal instrument organising divorce or separation consequences and parental responsibilities. The main goals to be dealt with by the EU are trying to ensure certain harmonisation and a common guarantee for one specific right despite the borders, with legal convergence in order to prevent congestion in the courts.

Indeed, and for several years now, the European Union has become involved in this matter and now Member States are more and more willing to cooperate and legislate. Two main issues have been addressed: the conflict of jurisdictions and the conflict of laws. Different projects and legal texts intervened within the EU to facilitate custody rights and access enforcement such as the Hague Convention in 1961, the Luxembourg Convention in 1980 regarding the recognition and execution of custody rights decisions, the Hague Convention in 1980 on the Civil aspects of international Child Abduction, the Hague Convention in 1996 regarding parental responsibilities etc…, all inspired by the main principles elaborated in the United Nations Convention on children's rights signed on 20th November 1989. These texts are a starter-tool against the danger of a conflict of decisions and therefore of the non-recognition of internal decisions, which implies legal uncertainty, paralysis, child abduction or risks for the child's wellbeing.

[3] Art 81 TFEU on judicial cooperation in civilian matters

2. The current legal framework: a genuine revolution

Faced with some weaknesses in these conventions, the EU tried to create a major tool in this matter through regulation n° 2201/2003 "Brussels II Bis" of 27th November 2003[4] concerning jurisdiction and the recognition and enforcement of judgments in matrimonial and parental responsibility matters, repealing Regulation n° 1347/2000. This regulation is a real revolution in our legal thinking and has been seen as a good palliative to solve the main issues in this matter. The main goal is to avoid each parent going to their national court and having contradictory decisions from the courts of several EU countries concerning the same judicial case.

With this regulation, the will to promote a peaceful and diverted solution has been facilitated. Indeed, all Member States seem to agree on the necessity to facilitate a peaceful resolution within the cross-border couple that wants to separate. Thus, the parents can try to find an agreement by mutual consent, with the opportunity to call for the intervention of a family mediator or lawyer, all the more accepted and complied to because it is a peaceful and joint decision. If the parents cannot reach a mutual agreement, then there is a need for a legal remedy that will determine questions of custody and access. The Brussels II *bis* regulation establishes that a judgment by a judicial authority in a Member State must be recognised and enforced in the other Member States without any required procedure[5]. The judgment application is facilitated in all EU countries, which is considerable progress in European cooperation. On legal competence, Brussels II *bis* provides more flexibility by offering the parents the chance to reach a common agreement before a dual competence of the national authorities and habitual residence. Thus, with regard to the determination of jurisdiction, the European regulation allows for the jurisdiction of the courts of the EU country of habitual residence to be competent in dealing with the parents' custody rights. By default, if there is no possibility of establishing where the habitual residence of the child is, the competent court is the one in the State where the child is located (for example concerning a refugee child). Here, the question has been raised about

[4] Applicable since 1st March 2005. The provisions indistinctly apply to all children, whether they are legitimate or not.

whether to apply divorce law or the law of the child. But this latter hypothesis poses the problem of dual citizenship (which is nowadays more and more frequent). Since 1961 and the signature of the Hague Convention, it has been decided that the first criteria would be habitual residence.

Furthermore, if the child endures a lawful move to another country that has an impact on habitual residence, the courts of the EU country that already ruled on custody rights and access enforcement remain relevant. In case of emergency, the courts can take interim protective measures even if they are not competent pending judgement by the court with exclusive jurisdiction.[6]

Regulation Brussels II *bis* has brought about a landmark change in the way the EU has dealt with custody rights issues. Thanks to this regulation, unlawfully crossing borders within the European Union no longer permits a review of a court ruling.

Once the conflict of jurisdiction has been resolved, it is the turn of the conflict of law. Council Regulation of 20th December 2010, "Rome III "[7], regulates the law applicable in divorce and legal separation matters, implementing enhanced cooperation and authorising States to establish such cooperation between them based on the supreme principle of mutual recognition of judgments. Other EU countries can join this cooperation at any time. The main goal of this regulation is to guarantee a clearer framework for cross-border cases with more flexibility. Thus, the parents have the opportunity upfront to decide which national law will apply in case of separation. For example, a Franco-German couple that lives in Italy can decide whether the French, German or Italian law will apply in case of separation. If there is no upfront agreement, the applicable law is the one of the child's habitual residence[8].

Set up with this legal framework, for which Brussels II *bis* definitely constitutes a turning point encouraging European cooperation, participating countries have various legal instruments and rules to deal with cross-border cases that imply many different aspects and stakes.

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[5] Chapter 3, section 1 and 2 Brussels II *bis*
[6] Art 20 Brussels II *bis*
[7] Applies to legal proceedings instituted after 21st June 2012 (Art.18).
[8] Article 8, Rome II

B. European harmonisation which needs completing

Despite the strong European will to influence and underwrite common custody rights and access enforcement with regards the child's interests, some difficulties can be raised and we will try to highlight the main ones to give a global approach to this issue. Numerous problems in this area have been solved but others remain (1.), and we will focus on one iconic issue: the consideration of the child's word (2).

1. Persistent weaknesses in the current legal framework

First of all, the main difficulties that have to be solved in this matter concern the framework of the decision to move the child abroad after a separation. Different practices concerning the removal of a child abroad can be noted. Some legal systems, such as the UK or Poland, only authorise the move of the child from its home country if both parents indicate their agreement.[9] In France, the family court judge can order the addition on the child's passport of an exit ban without the authorisation of both parents[10]. Finally, the continuity principle seems broadly uniform but implemented differently.

EU cooperation leads to quite a consensual position: a custodial parent (contrary to the one who only holds access rights) can decide on the residence of the child, which does not mean that the opinion of the former spouse or partner is not needed. Quite the reverse, the custodial parent needs to alert the second parent within a limited and reasonable period (for example one month in France by recorded delivery). If he fails to do so, this is considered as a criminal offence. The second parent cannot oppose the move but can request a change in rights by asking the courts to decide whether or not it is in the best interests of the child to move away with his custodial parent. The reasons for moving have to be objective (they cannot conceal a desire to remove the child from his second parent)[11].

[9] Responsabilité parentale, garde des enfants et droit de visite en cas de séparation transfrontalière http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/425615/IPOL-PETI_ET(2010)425615_FR.pdf
[10] Article 373-2-6 French Civil Code
[11] www.europa.eu website

Secondly, difficulties may be encountered with the lack of harmonisation on a European scale and the fact that some countries are still resisting stronger cooperation in this matter. This is the case, for example, of Denmark, the United Kingdom or Ireland, who are not part of the 2003 Brussels II *bis* regulation. This is why Brussels II *bis,* that still appears as the central tool, presents flaws and weaknesses. The same can be noted regarding the 2010 regulation that does not bring together all the EU Member States. Thus, if European cooperation in civil matters has improved, there is still a need to enhance it.

Furthermore, Member States have different conceptions of the modes of custody rights and access enforcement. Thus, a shared custody regime, with residence alternating between the parents, is allowed in France or England but forbidden in Poland. Similarly, concerning visitation rights, including all kinds of communication with the non-custodial parent, which is important to point out when it comes to cross-border situations, the disagreements can affect the binding force. For instance, a parent can refuse to exercise his access enforcement in France whereas it is a duty in Germany[12] or a right that may be refused by a child in Sweden.[13]

2. Consideration of the child's word: an iconic issue reflecting the importance of better harmonisation

With regards the child's word, legal systems take different approaches when assigning this right. Brussels II *bis* makes reference several times to the importance of the child's word: Article 11 concerning the return of a child wrongfully removed, Article 41 concerning rights of access or Article 42 when the judge declares a return decision enforceable. Thus, if a judge has to intervene to fix custody rights or visitation rights, the views of the child will be taken into consideration. Put to best use, the child's word is a great indication in serving his interests and bringing about peaceful custody and visiting rights, but European regulations have difficulty in strictly containing the parents' risks of manipulation and fixing a uniformly applicable rule in all Member States imposing systematic interviews. Nevertheless, the issue of the lack of harmonisation still remains.

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[12] http://cdpf.unistra.fr/travaux/personnes-famille-bioethique/droit-compare/droit-de-la-famille/autorite-parentale/allemagne/la-legislation-allemande-relative-aux-soins-parentaux-par-f-granet/

Indeed, some countries place great importance on hearing the child's opinion, such as Germany, Sweden or Spain, where discernment is considered sufficient. Meanwhile, other countries only place minimum importance on this. An interview of the child is a basic German Law requirement: a judge can interview a child from the age of 3, as soon as the child can make itself understood. The child is not only the subject of this matter but also has a real role to play in the proceedings. In Spain, the child can be heard at the age of 12, whereas the required age in Poland is 13. In France, no minimum age has been fixed, the judge assessing the need on a case by case basis.[14]

The current European trend is to take the child's word into account generally at the age of 12 or if his discernment is sufficient. Brussels II *bis* does not impose any age for the child to express his opinion or any hearing procedures common to all EU Member States but clearly this is an invitation to restrict cases excluding the child's word as far as possible. Nevertheless, it is important to avoid the child's guilt in these conditions, as he might have the feeling that the decision depends on his words. This example of imperfect uniformity of conceptions in the EU is significant in demonstrating that even if problems are clearly highlighted, there is still a need to increase and refine European cooperation.

As we can see at this stage of our analysis, much progress has been accomplished in the past decade. Though not perfect, European regulations are now taking into account the international aspect of a couple's break-up, by harmonising jurisdiction and setting up mutual decision recognition amongst Member States. But integration is an ongoing process that has to face new challenges as they arise over time. A new trend has been gaining in strength within European countries: shared child custody between separated parents. This matter is as yet to be regulated by common European rules, and thus creates new material and legal problems that need to be addressed globally on a European scale. New solutions must also be set up with this in mind, and alternative dispute resolution methods can be seen as a new way to deal with the rising number of cross-border separations.

[13] http://www.coe.int/t/dghl/standardsetting/family/access99f.pdf
[14] http://www.ahjucaf.org/L-enfant-dans-le-reglement.html

II. Alternative dispute resolution: a new perspective

This first part will lead us to analyse the new global trends upsetting the legal setting of cross-border child-custody (A) and the perspectives that alternative dispute resolutions could offer in the short and long term (B).

A. The new global trends upsetting the legal setting of trans-border child-custody

The last decade has brought about a number of new perspectives regarding cross-border child custody within the EU territory. There is a shifting trend within several countries to foster shared custody amongst separated parents, so as to protect every child's right to maintain personal relationships with both his father and mother (1). As such, this sharing of parental custody calls for a renewed analysis of the legal tools involved in its setting up and enforcement (2).

1. A shifting trend: alternate cross-border custody and protection of children's interests

Over the last few years, the European legal area has seen the rise of shared child custody in various countries, as we shall see. Lacking common rules for settling custody, as well as the holders of parental responsibility, the EU must rely on the internal law of each Member State to fix the child's residence, which itself has consequences from a legal standpoint.

Shared custody, meaning the alternate residence of a child shared between the homes of its separated parents, is older in common-law countries. In England, as well as in Wales, the *shared residence order* defines the rights of both parents, and settles the precise rules for the child's day to day life. The ground rules for settling shared custody were laid down in France by the parental rights law on March 3rd 2002. The timeframe for neighbouring countries comes quite close: July 5th 2005 for Spain, July 18th 2006 for Belgium, and February 8th 2006 for Italy. The common trait of these legislations is that shared custody is to be favoured whenever possible, so as to keep both parents involved in the child's upbringing.

In this emerging field, the lack of European harmonisation, let alone substantial rules for settling cross-border custody, leaves each Member State to regulate the issue through domestic rights. As a consequence, each parent is free to file a complaint with the court of its choice, meaning the one of the country he or she chose to live in. This leads to a great variety of situations, raising different challenges.

In a few cases, parents happen to live in different countries, but in immediate vicinity of the border. This is not uncommon in Western Europe: the northern regions of France, sharing a border with Belgium, the Netherlands, Germany, and, a little further south, with Switzerland, can be given as an example. In this case, one judge from either side of the border usually fixes the shared custody in the same way as he would do for a purely internal situation. The closeness between the cross-border parental homes then allows for this simpler solution.

In a few other situations, when the separated parents move far from each other, annual shared custody can be established. The child then gets to spend one year with one parent, and the next year with the other, if his best interests so allow. But again, such custody is set up only in accordance with the law of whichever judge is first addressed.

The EU, however, has a few legal tools that may help in settling cross-border custody, though they have their flaws and do not make up for a lack of substantial rules.

2. The European legal tools ensuring the protection of the child's best interests

The EU legal tools in this matter happen to regulate two precise aspects of cross-border custody. On the one hand, the child's residency has been given an autonomous definition by the European Court of Justice, and has a direct impact on legal competence. On the other hand, the mutual acknowledgment of judicial decisions, set to be straightforward in the Brussels II *bis* regulation, is yet to be completed regarding shared custody matters.

In contrast with what has been said previously regarding the establishment of shared custody itself, the child's residency was defined by the Luxembourg Court of Justice in a ruling of April 2nd 2009. The definition chosen by the Court is specifically autonomous from the internal rights of Member States. This ruling defines *habitual*

residence, as mentioned in article 8, §1 of the Brussels II *bis* regulation. The Court states that "the residence of the child reflects some degree of integration in a social and family environment", and "in particular, the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration"[15].

The importance of this definition cannot be understated, as it is precisely what settles the jurisdiction of the courts of the Member State the child lives in. An autonomous definition of the child's residency is, unquestionably, a step forward for European integration. It strays away from the peculiarities of national rights, and is therefore to be welcomed as a starting-point for a unified set of rules regarding cross-border custody. But it also has its drawbacks: according to the 19th article of the Brussels II *bis* regulation, the first judge to be assigned to the case remains competent. This simply means that so far, the sole definition of residency is not enough to prevent *forum shopping* by the speediest parent.

One of the strongest aspects of the Brussels II *bis* regulation regarding European harmonisation as a whole is the systematic mutual acknowledgment of judicial decisions. With very few exceptions, the 20th article of the regulation allows for the judicial decision establishing custody in one Member State to be acknowledged in all other Member States, without further proceedings. Still, the system has its flaws, taking into account the potential instability produced by the lack of global European harmonisation. Without unified substantial rules to establish cross-border child custody, and given that the first judge to be addressed is to remain competent, the risk is great in seeing fleeing parents move to a Member State with friendlier rights.

The only failsafe to this risk would have been the provisional measures regulated by the 21st article of the Brussels II *bis* regulation. The article allows the Courts of a Member State to take fast and effective measures to protect a child, if needs be. However, the CJEU has decided that "Article 20 of Regulation No 2201/2003 must be interpreted as not allowing, in circumstances such as those of the main proceedings, a court of a Member State to take a provisional measure in matters of

[15] CJEU, February 2nd 2009, n° C-523/07

parental responsibility granting custody of a child who is in the territory of that Member State to one parent, where a court of another Member State, which has jurisdiction under that regulation as to the substance of the dispute relating to custody of the child, has already delivered a judgment provisionally giving custody of the child to the other parent, and that judgment has been declared enforceable in the territory of the former Member State"[16].

This leaves a huge gap in the protection of children's interests, leaving the other parent without any possibility of asking for provisional measures.

More generally, we can see that custody rights and access enforcement issues could be the source of numerous conflicts, due to disputes between parties of course, but also because the judicial authorities have no means of giving a fast and effective reaction to emergencies concerning the child's situation. As our aim is not only to build a critical analysis but also to put forward new solutions and perspectives in line with our topic, we have chosen to end our study by focusing on solutions that already work but that have to be developed in order to facilitate dispute resolution, not only from a judicial standpoint, but also from the point of view of the families.

We will thus discover the interest of alternative dispute resolution in all family disputes, through situations in which emergencies like child abduction definitely have to be taken into account.

B. Alternative dispute resolution, a short and long-term issue

We will thus analyse the perspective that alternative dispute resolution can offer in emergency situations (1), and when dealing with all family conflicts (2).

1. Dealing with emergencies: bringing immediate European solutions to custody rights and access enforcement

As custody rights and access enforcement sometimes appear so conflictual that an isolated judge or court cannot do enough to protect children, emergency procedures have to be thought up in order to give a rapid answer to pathological situations. The

[16] CJEU, December 23rd 2009, C-403/09

issue of cross-border child abduction gives a particular sense to the notion of emergency. Indeed, this phenomenon is well-known since the beginning of the 1980's as « legal kidnapping » and mixes the will of parents to «confiscate » a child from their former spouse and to take advantage of what Jean PAULIN NIBOYET, expert in international private law, called « *the border phenomenon*[17]» which means dealing with discontinuity of judicial orders and multiple ways of crossing borders easily.

In her 2013 study, Sara GODECHOT-PATRIS underlines the fact that this type of situation happens particularly when the two parents are from different cultures, as the conflict in education or religion appears more significantly after the divorce[18]. Faced with this emergency, European Union Members have found solutions in order to allow a rapid answer to intra-European child abduction. The adoption of the Brussels II bis regulation is clear proof of EU Member improvement in this issue. To find the competent jurisdiction to deal with cross-border parental responsibility easily, the court of the EU country in which the child was habitually resident immediately before the abduction continues to have jurisdiction until the child is habitually resident in another EU country[19].

Protection of children's interests is not only inherent to the European Union, as numerous conventions already involve a larger alliance of countries, such as The 1980 Hague Convention or the United Nations Convention on children's rights. The European Court of Human Rights also has to deal with custody rights and access enforcement, notably through article 8 of the European Convention on Human Rights. According to the Court's case law, children's interests differ from those of their parents and before taking any judicial measure regarding cross-border parent responsibility, courts have to bear in mind the impact of their decision towards a child's educational and affective welfare[20].

More generally, these texts have tried to improve cooperation between European authorities, especially concerning communication, assistance for parents in

[17] PAULIN-NIBOYET Jean, *Traité de droit international privé français*, 1949
[18] GODECHOT-PATRIS Sara, LE_cooperation_in_civil_matters/l33194_fr.htmQUETTE Yves, *Répertoire de droit international / Mineur,* 2012
[19] Jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility("BrusselsII"), http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l33194_fr.htm
[20] Hromadka et Hromadkova / Russia, European Court of Human Rights, 12-11-2014

obtaining recognition of the judicial decision regarding their children, and the opportunity to go through mediation to find solutions to conflicts on parental responsibility. This notion of mediation is crucial, as it facilitates dialogue instead of litigation between the parties, since dispute management can be solved faster, and allows a more individualised response to family disputes.

Article 55 of the Brussels II *bis* regulation stipulates that « *The central authorities shall, (...) cooperate (and) acting directly or through public authorities or other bodies, (...) to: (...) facilitate agreement between holders of parental responsibility through mediation or other means, and facilitate cross-border cooperation to this end »*[21]. Different methods are used today in order to allow non-judicial resolution of parenthood disputes such as the ombudsman which encourages parties to think about modification of practices and expectations in order to find solutions[22]. Arbitration or « collaborative law » also exist, each method having, as their objective, to resolve disputes by soliciting a third party to find a constructive solution in a less intimidating context than within legal structures.

But the most common procedure is mediation. This method has had variable success among European countries but a clear desire to harmonise mediation throughout Member States has lead the Commission to give a benchmark framework to alternative dispute resolution. In 1987, the European Parliament Mediator for International Parental Child Abduction was created whose mission was to *help find mutually acceptable solutions in the child's best interest when following the separation of spouses/partners*[23]. The purpose of the European Parliament was then clearly established: « *An agreement reached by the parties during a mediation procedure can avoid unnecessary relocation of the child, allows the parents actively and purposefully to address all issues affecting the family and is speedier and less costly than court proceedings*[24] ».

But as the office of this mediator seemed insufficiently accessible, and suffered from a lack of visibility in July 2004, the European Commission proposed a

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[21] Art 55 Brussels II bis regulation, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:338:0001:0029:EN:PDF,

[22] http://www.droit-collaboratif.org/wysiwyg/test-tiny/uploads/File/article-observateur-de-bruxelles-n-67.pdf

[23] The European Parliament Mediator for International Parental Child Abduction, http://www.europarl.europa.eu/atyourservice/en/20150201PVL00040/Child-abduction-mediator

[24] The European Parliament Mediator for International Parental Child Abduction, http://www.europarl.europa.eu/atyourservice/en/20150201PVL00040/Child-abduction-mediator

code of conduct for mediators, whose objective was to allow the system of family mediation to be extended to each European Union Member State, facing a variety of practices in systems where mediation was already established.

Alternative dispute resolution could therefore be very efficient in a child abduction context. But more generally, and in a long-term perspective, our research has converged on the idea that mediation and all alternative dispute resolution methods could be beneficial to all judicial issues regarding custody rights and access enforcement.

2. Dealing with the future: developing Alternative Dispute Resolution for custody rights and access enforcement

Some European Union Member States like Germany or France have developed international family mediation, in order to help parents focus debate on the child's interests, and find equitable solutions. This help could occur before or after judicial procedures, but according to the French Justice Ministry early intervention is essential to avoid parental opposition freezing the debate over secondary considerations such as the division of assets. International mediation also allows accompanying measures to ensure that any agreement dispositions are effectively applied[25].

It is by following these examples that the European Union could provide new solutions for custody rights and access enforcement issues. Nevertheless, Member State agreement might not be sufficient, without the consent of parents involved in these types of procedures. Indeed, without the trust of the parties, any mediation would appear useless.

Moreover, certain disputes over child interests underline the importance of reasonable time in a process. A third party could respond to this imperative, but only if every participant in the dialogue plays by the same rules, which means that every party wants the situation to be solved and does not delay proceedings. In a really conflictual context, professionals can use many methods to calm the situation down, but the parents have to be the major players.

[25] Enlèvements internationaux d'enfants et droits de visite transfrontières,http://www.justice.gouv.fr/justice-civile-11861/enlevement-parental-12063/

However, the use of alternative dispute resolution methods could be very different regarding all European Union Member States, which brings about the necessity of European harmonisation of judicial texts, and the importance of considering alternative dispute resolution as a priority.

Family conflicts seem particularly to suit alternative dispute resolution, as this could allow a reconstructive process in the breakdown of dialogue between the parties. It can also bring about appeasement due to the fact of having an independent third party as an intermediary, whose mission is to facilitate communication, regarding certain crucial points such as parental responsibility. Instead of blaming parties, the latter reminds them of their duties as parents, underlines the importance of keeping family links between children and both parents, and by extension, the need for keeping siblings safe from any conflict.

Different European countries have used early alternative dispute resolution methods, namely the Netherlands, where mediation on divorce consequences was developed at the end of the 1980's. The method has since had growing success which explains why divorce disputes currently represent the greatest part of Dutch judicial mediation. Thanks to an extremely exhaustive regulation on the subject in 2003, Austrian Justice has also often resorted to mediation, as well as the United Kingdom, especially Wales, where a study published in 2007 revealed the advantages of Alternative Dispute Resolution in divorce, not only for parents and families, but also for Justice[26].

Indeed, family conflicts resolved by this method are solved more rapidly and are significantly cheaper for the parties and for Member States. If evolution in the conception of family disputes is notably due to evolution in society's view of couple and parenthood issues, it also stems from the will of the States to limit their involvement in family matters. Following this idea, Germany created the *Trennungsberatungsstellen*, in other words consultation centres for separating couples, whose mission is to facilitate divorce consequences particularly regarding the

[26] FERRAND Frédérique, *Les modes alternatifs de résolution des différends en matière familiale* – AJ fam., 2013

children's situation. In Germany, 200 000 divorces are pronounced every year, and more than 1.5 million children are concerned by this issue[27].

In order to respond to congestion in the courts and hence the uncontrollable length of proceedings, diversion has been considered by many European countries as an imperative first step before any judicial resolution. Therefore, consideration of this pre-judicial phase implies the transfer of certain competencies to non-judicial organs, mainly in order to offer a space of expression outside the judicial area that applicants would have to request beforehand, to find an amicable settlement.

This transfer of competencies could only come from the clear will of European Member States to take the path of alternative dispute resolution. The legal basis seems to be there, but it now has to become a natural reflex, both for jurisdictions and families.

Conclusion : *Extending family procedures: a necessity for the future*

The impact of alternative dispute resolution is already known and at the heart of parental responsibility on a European scale. However, as practices continue to differ greatly from one country to the next, and as the interest of justice, and of families subject to litigation, raises the necessity of harmonisation, we want to insist on certain points that could provide a key for future reforms in family dispute resolution. Indeed, legal texts already exist, but they are weakened by the courts' lack of ability to deal with the absolute emergency.

Firstly, the debate should focus on the relations between the parents in conflict and the judge. At which step of the dispute should the latter intervene? In our opinion, the answer would be "not too early", as mediation offers statistically better chances of success than judicial procedures, and because an agreement stemming from mediation after discussion, is generally better understood and accepted. Moreover, mediation could, along with judicial procedures, be formalised by a judge and recognised by foreign jurisdictions. Nevertheless, the development of the mediator's

[27] FERRAND Frédérique, *Les modes alternatifs de résolution des différends en matière familiale* – AJ fam., 2013

mission has to be linked with an extension of power, and consequently an ambitious transfer of competences.

This transfer of competences from a judge to a mediator raises the issue of mediator skills. Parents subject to justice have to be sufficiently trusting in the mediator to entrust him with the future of what constitutes their family. Practical guides have been published by the European Council namely in order to apply the Brussels II *bis* regulation, but the issue of mediator skills goes further. We are not only talking about judicial skills here, but more generally aptitudes to create a consensus between parents, facilitate expression of both parties, propose pragmatic solutions to each specific situation and allow dispute resolution to be as harmonious as possible. Currently, most mediators are childhood professionals, but the lack of harmonisation in terms of skills needed could make them suffer from a lack of legitimacy.

Furthermore, progress could be made as regards families being welcomed outside the judicial area. In a context of cross-border parental dispute, one country has to be preferred in order to organise mediation, and this could be disruptive for the foreign parent. Harmonising standards in terms of parent welcoming, like rules of communication between parties and the mediator, possibilities for a parent to share transport costs with the one that lives further away, or explaining ways to go to Court in case of mediation failure, would secure and give points of reference to parents dealing with a foreign system that they do not necessarily master.

Finally, the real need in family dispute resolution today is that it should be more and more suited to each parent's and child's special needs, in a context in which justice, and more generally court-workers have to face the challenge of the multiplication of litigation and more drastic cost supervision. New ways of dealing with family disputes already exist, but the current context leads to faster work and reduced costs. However, alternative dispute resolution could only be efficient with sufficient human, material and financial resources. As far as we are concerned, in light of the success of current methods, we consider that development in this matter should be one of the budgetary priorities on the European Union judicial agenda.