WORKSHOP
Recasting the Brussels IIa Regulation
8 November 2016
The Role of Family Mediation in Matters of Parental Responsibility

Christoph C Paul
Cross-border Family Mediation (CBFM)

- 1999: German-French Mediation Project
- 2002: Adoption of the model by professional mediators
- 2010: EU-funded CBFM training - 2 mediators from each EU Member State
- Since then, regular MiKK 50-hour Cross-border Family Mediation Training for mediators from the EU and internationally
Cross-border Family Mediation MiKKK Model

- Both Cultures
- Both Languages
- Bi-professional
  - both legal & psycho-social professional background
- Both Genders
MiKK Mediators Network

- 150+ qualified, specialised mediators
- based in the EU and worldwide
- mediating in 30+ languages
Requests for Cross-border Mediation and Information received by MiKK’s Advisory Service

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<td>39</td>
<td>59</td>
<td>79</td>
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<td>143</td>
<td>159</td>
<td>142</td>
<td>165</td>
<td>150 – Sept.</td>
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MiKK Statistics 2015
Enquiries from 54 Countries

- USA (22)
- France (14)
- Poland (10)
- Spain (9)
- Belgium (8)
- Great Britain (7)
- Mexico (7)
- Turkey (7)
- Italy (5)
- Switzerland (5)

Countries: USA, Spain, Mexico, Switzerland, Norway, Canada, Austria, China, Estonia, Ireland, Sweden, Algeria, Dominican Republic, Hungary, Japan, Morocco, Portugal, Thailand, France, Belgium, Turkey, Argentina, Russian Federation, The Netherlands, Bosnia and Herzegovina, Croatia, Greece, Mali, Tunisia, Cyprus, Egypt, Iran, Lebanon, Paraguay, Romania, Uruguay, Poland, Great Britain, Italy, Australia, Brazil, Pakistan, Chile, Czech Republic, Indonesia, Slovakia, Albania, Denmark, Finland, Israel, Libya, Phillippines, South Africa.
# International Mediation Requests (as % of enquiries)

<table>
<thead>
<tr>
<th>Type</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
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<th>2013</th>
<th>2014</th>
<th>2015</th>
<th>2016/August</th>
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<tr>
<td>Custody/Visitation</td>
<td>49</td>
<td>37</td>
<td>53</td>
<td>42</td>
<td>16</td>
<td>20</td>
<td>23</td>
<td>34</td>
<td>35</td>
</tr>
<tr>
<td>Child Abduction</td>
<td>36</td>
<td>49</td>
<td>37</td>
<td>40</td>
<td>48</td>
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<td>44</td>
<td>39</td>
<td>35</td>
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<td>Prevention/Relocation</td>
<td>8</td>
<td>2</td>
<td>0</td>
<td>7</td>
<td>21</td>
<td>17</td>
<td>20</td>
<td>20</td>
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<td>Others</td>
<td>7</td>
<td>12</td>
<td>10</td>
<td>11</td>
<td>15</td>
<td>19</td>
<td>13</td>
<td>7</td>
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RECOMMENDATIONS

- The training of judges across the EU should be facilitated to encourage them to refer parties to mediation.

- Courts and Central Authorities should be encouraged to refer parties to mediation by providing parties with information on mediation.

- The Hague Conference’s Working Group on cross-border recognition and enforcement of mediated agreements should be continued and extended beyond the borders of the EU and Hague Convention Contracting States.
RECOMMENDATIONS

- EU Member States should be encouraged to provide state-financed mediation aid in cases of cross-border family conflicts.

- Training programmes for mediation in cross-border child custody disputes with non-EU States that have not acceded to the Hague Convention should be facilitated because of increasing demand.
Presentation by

Christoph C. Paul

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Recasting the Brussels Ila Regulation: enhancing cross-border cooperation

Thalia Kruger

Proposed additions by Parliament to Commission’s Proposal
Throughput of cases

- Two months (Art. 64(6))
  - Shorter timeframe in urgent cases, upon request

- Six weeks for child abduction cases (Art. 63(1)(g))
  - Until submission to court
Division of costs

- Each Central Authority bears own costs (Art. 66(4))
  - Unless agreed otherwise
Cooperation among judges and between CAs and judges

- **New Recital 48bis:**
  - Where interests of child require -> direct communication between judges and CAs

- Space in judges’ workload
Provisional measures

- Enforceable across borders (Art. 48 et seq. & Recital 17)
  - Information by court with jurisdiction on substance

CA where provisional measures issued (New Art. 12(3))
Child abduction cases

- Return orders enforceable across borders (Art. 49)
  - Information by court with jurisdiction on substance
    - CA where return order granted (New Art. 25(6))
Parallel Proceedings

- Court first seised has right of way (Art. 19)
  - Court may ask other court: date seised (New Art. 19(2bis))

- CAs provide assistance on date (Art. 63(1)(d) should refer to Art. 19)
Information on foreign law

- Sometimes application of foreign law
  - CAs must assist to provide information on foreign law

(New Art. 64(5bis))
Recognition and enforcement

- Abolition of exequatur (Art. 30 & Recital 31)
  - CAs’ assistance also at this stage
  - Eg locating child
    (Art. 63(1)(a) -> broader; not only requests)
Protecting children’s rights

- Hearing the child
  - CAs provide practical assistance (New Art. 63(1)(fbis))
- CAs also assist holders of parental responsibility (Art. 63(2))
  - Also for locating child (Art. 63(2) -> refer also to Art. 63(1)(a))
Mediation

- Obligation for courts to consider mediation in child abduction cases (Art. 23(2))
  - Court can ask assistance of CAs
  - More general
    (New Art. 20bis)
  - CAs provide assistance in arranging mediation
    (New Art. 63(1)(i))
Presentation by

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Recasting the Brussels IIa Regulation: the experience of a national Central Authority

Lukáš Fridrich
Presentation structure

- Role of the Office for International Legal Protection of Children (“Office”)
- Recasting the Brussels IIa Regulation
  - cooperation between Central Authorities
  - child abduction cases
  - risk factors, recommended changes, comments
- Key findings
Role of the Office

- Central Authority of the Czech Republic
  - child abductions, right of access
  - enforcement of maintenance
  - intercountry adoption of children
- Social and legal protection of children
  - children's guardian *ad litem*
- Conceptual activities
  - development of good practice
Cooperation between Central Authorities – problematic issues

- Speed and flexibility of cooperation
  - delays in processing requests
  - delays in communication

- Quality and scope of services provided
  - different standards of provided services
  - rare application of some provisions
Cooperation – Commission proposal

- Speed and flexibility of cooperation
  - adequate financial and human resources
  - time limits

- Quality and scope of services provided
  - specification, clarification and strengthening of the competences of the Central Authorities
  - who, for what, from whom may apply
Child abduction cases – problematic issues

- Speed of handling a case
  - time limits are not met
  - delays in communication/procedures

- Functioning of the mechanism
  - no specialized courts/judges
  - no special rules on return proceedings in domestic law
  - overriding mechanism is not applied
Child abduction cases – Commission proposal

- Speed of handling a case
  - time limits for Central Authorities/Courts

- Functioning of the mechanism
  - concentration of jurisdiction/specialized courts
  - specific instruments (undertakings, mediation)
  - overriding mechanism is amended
Risk factors, recommended changes, comments

- Fulfilment of the stipulated obligations
- Recommended changes
  - specification of some provisions
  - safety mechanisms
  - revision of other provisions
- Strengthened role of mediation and participation rights of children
Key findings

● The Commission proposal
  • may improve the quality of services provided
  • may harmonize the procedures and standards
  • reflects the current trends in family law

● Risk factor - fulfilment and enforcement of the stipulated obligations

● Other changes may be recommended
Presentation by

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Office for International Legal Protection of Children

Úřad pro mezinárodněprávní ochranu dětí

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Recasting the Brussels IIa Regulation: a judge’s perspective on the cooperation mechanisms

Judge Annette Olland
Recasting the Brussels IIa Regulation: a judge’s perspective on the cooperation mechanisms

The importance of direct judicial communication: ‘oil in the machine’
Recasting the Brussels IIa Regulation: a judge’s perspective on the cooperation mechanisms

An example from practice: UK-NL Family

in good times

parents split up
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Child is removed from UK to Netherlands by the mother

Two court cases pending at the same time in NL and in UK
The Brussels IIa Regulation in practice:

- Proceedings about one family can be pending at the same time in two different Member States
- Both court decisions are immediately enforceable in the other Member State
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NL court: Child abduction return case 1980 Hague Convention (immediate return or not?)

UK court: custody case (should the child live with mother or with the father?)

Both NL and UK courts have jurisdiction for these two matters
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Possible scenario if no communication between NL judge and UK:
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NL judge orders the return -> child should go to UK
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At the same time: UK judge decides the child should live with mother -> child should go back to NL
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This leads to:

- Total confusion
- ‘Ping-ponging’ of the child between Member States
- Insecurity and harm for the child and the parents
Recasting the Brussels IIA Regulation: a judge’s perspective on the cooperation mechanisms

In this case, there was direct judicial communication between NL court and UK court.

The judges presiding over the case in the two countries contacted each other, first by e-mail, through the Network Judges, and then by phone.
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They discussed and agreed the following:

The NL court was going to decide upon return or non-return within six weeks

The UK court would need about eight weeks after the NL decision
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- The UK court knew that the outcome would be in six weeks so it planned its hearing after six weeks.

- The Dutch court ordered the return but ordered that the execution of this decision could only be done 6 + 8 weeks later.
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Result:
- After 14 weeks the UK court decided the child should live with the mother in the NL
- The child could stay in NL for the final decision of the UK court
- No ‘ping-ponging’ of the child
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Direct judicial communication was the key
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What is necessary to get the European Judges to contact each other when handling a cross border case,

on top of:
Recasting the Brussels IIa Regulation: a judge’s perspective on the cooperation mechanisms
Recasting the Brussels IIa Regulation: a judge’s perspective on the cooperation mechanisms

They need a Network Judge in their own country:

to find out which is the competent Court or Judge in the other Member State

to establish (the first) contact with the fellow Judge/Court in the other Member State
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The European Judges will need:
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An “address-book” with the names and addresses of one or more specialised Family Judges in each Member State, acting as a contact point:

“the Brussels IIa Network of Judges”
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Time for the Network Judges to do the job and legal and practical assistance
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Communication tools for the (Network) Judges (phone, secured e-mail addresses etc)
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Knowledge and understanding of the Regulation, and experience with its mechanism in practice
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Training and education

Professional meetings with colleague family judges in other Member States
Recasting the Brussels IIa Regulation: a judge’s perspective on the cooperation mechanisms

My text proposals in short:

- The proposed Article 14 (6) of the Regulation

“The authorities shall cooperate for the purposes of this Article, (…) either through the European Judicial Network in civil and commercial matters -> “or through the Brussels IIa Network of Judges”
Recasting the Brussels IIa Regulation: a judge’s perspective on the cooperation mechanisms

The proposed Article 25 (1) (a) of the Regulation

To this end the court shall:

*investigate* the possibilities of protection the child against the grave risk of harm in the particular case in the Member State where the child was habitually resident immediately before the wrongful removal or retention. It shall do so *in cooperation with* the competent authorities of the Member State where the child was habitually resident immediately before the wrongful removal or retention, either directly, with the assistance of the Central Authorities, *or through the IHNJ judge in the other Member State*. This investigation shall be conducted *expeditiously* and will *take no longer than two weeks*. If no contact has been *established* with the Authorities of the other Member State within two weeks, the court referred to under (1) will *give its decision with no further delay*. (…)

Presentation by

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Recasting the Brussels IIa Regulation: developing training and meeting opportunities for national judicial authorities

Wojciech Postulski
Recasting the Brussels IIa Regulation: developing training and meeting opportunities for national judicial authorities

- Judges and prosecutors, as well as other legal practitioners, play a fundamental role in guaranteeing respect for the law of the European Union.
- It is not enough to have rights only on paper. These rights must be applied and implemented in practice.
- Any significant amendment to the law requires the judiciary to be involved: aware of the changes, well prepared to its application and committed to its goals. The tool to achieve this is judicial training.
Recasting the Brussels IIa Regulation: developing training and meeting opportunities for national judicial authorities

- The European Judicial Training Network (EJTN) and its Members, 35 national judicial training institutions from all 28 Member States and the Academy of European Law, are at the heart of the processes of answering the challenges mentioned.

- Council conclusions – Training of legal practitioners: an essential tool to consolidate the EU acquis:

  “EJTN is best placed to coordinate, through its members, national training activities and to develop a cross-border training offer for judges and prosecutors.”
Recasting the Brussels IIa Regulation: developing training and meeting opportunities for national judicial authorities

- EJTN activities in the area of Brussels IIa
  - seminars
  - Exchange Programme
  - linguistic training
  - e-learning
  - AIAKOS
  - Themis competition
Recasting the Brussels IIa Regulation: developing training and meeting opportunities for national judicial authorities

- Challenges in judicial training
  - workload of judges
  - limited linguistic capacities
  - lack of specialisation
  - austerity measures
  - lack of awareness of stakeholders as well as judges
Recasting the Brussels IIa Regulation: developing training and meeting opportunities for national judicial authorities

- Post recast training needs
  - at both European and national level
  - raising awareness
  - recast scope and consequences
  - trust in other Member States’ judicial systems
Recasting the Brussels IIa Regulation: developing training and meeting opportunities for national judicial authorities

- Post recast training needs
  - capacity to deal expeditiously with child rights related cases
  - specialised exchange programmes, building a network of specialised judges
  - language skills
  - intercultural competence
  - communication skills
  - dealing with all persons involved appropriately and sensitively
  - important social concerns
  - mediation