The Advent of Brussels II bis Recast

On 1 August 2022, all EU Member States but Denmark will adopt a revision to Regulation (EC) 2201/2003, the Brussels II bis Regulation. Helen Blackburn, at The International Family Law Group LLP (iFLG) discuss the key changes which will be introduced when the revision comes into force.

The Council of the European Union has adopted a revision to Regulation (EC) 2201/2003, also known as Brussels II bis, aimed at improving the protection of children in cases of cross-border parental responsibility dispute. The new rules amend several parts of Brussels II bis, including clearer rules on the opportunity for the child to express their views, on intra-EU child abduction cases, the circulation of authentic instrument and extra-judicial agreements and clearer provisions on the placement of a child in another Member State.

What Is the background for the revision of Brussels II bis?


The review of Brussels II bis began in earnest in 2014. While Brussels II bis was considered a ‘well-functioning instrument’, the EU Commission concluded that the existing rules could be improved and proposed several amendments to the regulation. Given the volume of proposed amendments, the EU Commission proposed that the regulation should be recast completely.

The wording of the recast regulation was adopted by the European Council on 25 June 2019 and will be known as Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) (Brussels II bis Recast).

Brussels II bis Recast was published in the Official Journal of the European Union on 2 July 2019 and will apply in all Member States of the European Union, save Denmark, from 1 August 2022.

What are some of the key changes introduced by
Brussels II bis Recast?

The key changes include:

1. the introduction of an obligation to provide subject children with a genuine and effective opportunity to express their views in proceedings that concern them;
2. the abolition of exequatur;
3. the introduction of clearer deadlines for the determination of intra-EU child abduction cases;
4. rules on the circulation of authentic instruments and extra-judicial agreements;
5. clearer rules regarding the placement of children in other Member States; and
6. harmonisation of rules for enforcement.

The voice of the child

Brussels II bis Recast broadens and clarifies the obligation of Member States to give subject children the opportunity to be heard during proceedings that concern them.

Article 21 of Brussels II bis Recast introduces an obligation for Member States to provide a subject child, who is capable of forming their own views, with a genuine and effective opportunity to express their views, either directly or through a representative or an appropriate body and this obligation extends to all proceedings concerned with matters of parental responsibility. Further, the courts in Members States are required to give due weight to the views of the child in accordance with their age and maturity.

Article 26 stipulates that the requirements, contained in Art 21, also apply in 1980 Hague Convention proceedings concerned with the summary return of the child.

Although many had hoped that the new regulation would harmonise the way in which children’s views were ascertained across the EU, the new regulation leaves Members States able to implement the obligation according to domestic practices. Accordingly, the new regulation does not stipulate the way in which the child’s view will be ascertained and instead recital 39 specifies that to whom and how the child’s voice will be heard will be left to Member States to determine in accordance with national law and procedure. Therefore, it is open to individual Member States to determine whether a child’s views are obtained by a judge or by a specially trained expert (such as a Children and Family Court Advisory and Support Services officer or a child psychologist). It is also not an absolute obligation and it is an issue that will still have to be assessed by the court considering the best interests of the child. One example when it may not be an absolute obligation is in cases involving
agreement between the parties.

The regulation also modifies the certificates that are issued to support decisions in matters of parental responsibility (Art 36, Brussels II bis Recast) and certificates in relation to decisions granting rights of access (Art 46, Brussels II bis Recast). Certificates issued to support decisions in matters of parental responsibility will, in future, take the form of that at Annex III of the new regulation and certificates in relation decisions granting rights of access will, in future, take the form of that at Annex V. Both new certificates include specific questions regarding the child’s views namely whether each subject child could form their own views and whether they were each given a genuine and effective opportunity to express their views in accordance with the regulation.

The complete abolition of exequatur for all decisions in matters of parental responsibility

The procedure for declaring a decision in another Member State enforceable (known as exequatur) frequently lead to unwelcome delay in enforcing orders. Brussels II bis Recast has abolished the need for exequatur.

The provisions, previously contained within Arts 27(2), 28 and 29 in Brussels II bis, which dealt with applications for a declaration of enforceability, have not been replicated in Brussels II bis Recast. The new regulation provides for a single procedure for the cross-border enforcement of all decisions in matters of parental responsibility. Applicants still need to apply for enforcement and there remain certain instances when enforcement will be refused but the new regulation has at least removed one additional unwelcome hurdle to enforcement.

Enhanced and clearer rules on intra-EU child abduction cases

The new rules in Brussels II bis Recast dealing with 1980 Hague Convention proceedings are designed to improve the efficacy of return proceedings after international parental child abduction.

Chapter III deals with International child abduction and the 1980 Hague Convention is required to apply to Member States as complimented by Chapter III.

Article 24 contains specific rules governing the need for ‘expeditious court proceedings’. This requirement is already well established. The 1980 Hague Conference has already done much to encourage contracting states to expedite Hague Convention proceedings.

Article 11 of the 1980 Hague Convention stipulates:
'The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.'

Consequently, Member States should already aim to conclude proceedings within 6 weeks. This was further reinforced in Brussels II bis. Article 11(3) of Brussels II bis stipulated that courts hearing 1980 Hague Convention applications for the return of a child ‘shall act expeditiously in proceedings on the application, using the most expeditious procedures available in national law’ and that the court shall ‘except where exceptional circumstances make this impossible, issue its judgment no later than 6 weeks after the application is lodged’. Although some Members States, including the UK, have endeavoured to work to this deadline, other Member States have systematically failed to abide by the deadline.

The need for expedition has been reinforced in the new regulation. The new regulation provides further guidance in relation to the required deadlines in an attempt to achieve greater compliance across the EU.

The new regulation stipulates that a court of first instance shall, except where exceptional circumstances make this impossible, give its decision no later than 6 weeks after it is seized. Further, except where exceptional circumstances make this impossible, a court of higher instance shall give its decision no later than 6 weeks after the required procedural steps have been taken and the court is able to examine the appeal whether by hearing or otherwise.

The new regulation also places an onus on Member States to concentrate jurisdiction for 1980 Hague Convention proceedings. This is something that has also already been encouraged by the Hague Conference for years, but it is the first time that it has been included in an EU regulation.

Recital 41 stipulates that in order to conclude Hague Convention proceedings as quickly as possible Member States should concentrate jurisdiction for the proceedings upon as limited a number of courts as possible. Concentrating jurisdiction ensures that a small number of judges become specialists and are then able to hear cases with great speed and efficiency. Although many Member States have already set about concentrating jurisdiction (Germany has already reduced the number of courts able to hear Hague cases from over 600 to 24) and some Member States have allocated one court to hear Hague cases (England and Wales, the Netherlands, Sweden etc), many other Members States have much work to do to
implement this requirement.

Recital 42 also requires Member States to consider limiting the number of appeals possible to one. The intended restriction on the number of appeals would clearly impact upon child abduction cases heard in England and Wales as appeals are currently possible to the Court of Appeal and if appropriate to the UK Supreme Court.

The new regulation also provides a stronger emphasis on mediation in all cases concerning children and especially in the case of cross-border parental conflicts about the custody of and right of access to a child and in cases of international child abduction.

The regulation reflects similar initiatives that have already been implemented in this jurisdiction. In this jurisdiction parties are already encouraged to use a non-court dispute resolution procedure if the court considers it appropriate and the obligation imposed by the Family Procedure Rules 2010, SI 2010/2955, r 3.3(1) to consider whether non-court dispute resolution is appropriate at every stage of the proceedings, applies equally to international child abduction proceedings. In addition, last year a child abduction mediation scheme was launched in England and Wales by the court in conjunction with the organisation Reunite. The operation of the child abduction mediation scheme is facilitated by the presence at the Royal Courts of Justice of mediators from Reunite with specialised knowledge of international child abduction. Participation in the child abduction mediation scheme is voluntary, and mediation runs in parallel to the proceedings.

**Clearer provisions on the placement of a child in another Member State**

The new regulation provides for clearer provisions on the placement of a child in another Member State including the need to obtain prior consent for all placements, except where a child is going to be placed with a parent (Art 82(2)). Where an authority of a Member State considers the placement of a child with family members, in a foster family or in an institution in another Member State, a consultation procedure through the Central Authorities of both Member States concerned should be carried out prior to the placement. The authority considering the placement should obtain the consent of the competent authority of the Member State in which the child should be placed before ordering the placement (Arts 82(1) and (5)). In order to speed up the consultation, the procedure sets a time limit of 3 months for the response from the Member State where the child should be placed (Art 82(6)). The procedure for obtaining consent, however, continue to be governed by the national law of the requested Member State (Art 82 (7)).

**What is the likely impact of Brexit?**

The UK was fully involved in the lengthy negotiations regarding the wording of the new regulation. However, given that the new regulation is set to come into force in EU Member
States in three years’ time and the UK is currently set to leave the EU, the new regulation may never apply to the UK.

The changes made by Brussels II bis Recast are very welcome and should improve protection for children in cases of cross-border disputes though Brexit may intervene and preclude us reaping the benefits of the new regulation in this jurisdiction.

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