

A question of trust? Recognition and enforcement of judgments

Abstract

The European Commission and the European Council propose to revise Brussels IIa to abolish exequatur in all matters of parental responsibility. There are some good reasons for extending direct enforcement, but this should not be at the expense of abandoning safeguards including those relating to public policy, nor should it involve diluting protection for children. If the Regulation is to deliver enforcement measures that work, then consideration must be given to how enforcement is made effective. This is likely to involve a continued role for the courts of the member state where a judgment is to be enforced.

1. Introduction

This article examines whether the political aspiration for changes to Council Regulation (EC) No. 2201/2003 to provide for direct enforcement of orders in matters of parental responsibility may drive potentially adverse practical consequences for children and families. An analysis of the existing rules for recognition and enforcement is undertaken to establish whether there should be a continuing role for the courts of the member state where enforcement is to take place.

The analysis starts with an examination of the political imperative for closer co-operation in the sphere of recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility and the proposal to abolish any requirement for declaration of enforceability or *exequatur* in the member state of enforcement (section 2). The next section (section 3) therefore looks in more detail at *exequatur* and the argument for its abolition. The following section (section 4) contains an analysis of the exceptions to recognition and enforcement in Brussels IIa, and the nature of decisions made by courts in the operation of those exceptions. Finally (in section 5) there is an examination of enforcement in practice, and the role of the court in that connection. Attention is drawn to risks of excluding judges from the process of enforcement. Section 6 contains certain general conclusions.

2. Proposals for change

Council Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility is designed to further the objective of creating an area of freedom, security and justice. To this end, as recital (21) of the Regulation states:

‘The recognition and enforcement of judgments given in a Member State should be based on the principle of mutual trust and the grounds for non-recognition should be kept to the minimum required.’

The Regulation establishes a system based on allocation of the central role in making decisions to the court of the member

state which has jurisdiction. It follows that the role of a court of another member states should be limited. The recognition and enforcement of judgments of the court exercising jurisdiction under Brussels IIa should be ‘almost automatic’.¹

It is easy to see that the recognition of judgments is important for free movement of persons in the EU. Council Regulation (EC) No. 2201/2003 (‘Brussels IIa’) concerns status, and citizens should have the same marital status in all member states. Of perhaps even greater practical significance is the question of parental responsibility. If families are to be able to move freely, then judgments relating to children must be recognised and generally enforced. In particular, if a court in one member state issues a judgment relating to access, there must be confidence that the access will take place (above and beyond the general confidence that exists in national situations), even if the child is taken to live in another member state.

In 2010 the Stockholm Programme² and the Stockholm Action Plan³ acknowledged the importance of mutual trust between member states and identified possible steps to further the recognition and enforcement of judgments, including judgments relating to parental responsibility. The Commission took this up when reporting to the European Parliament, the Council and the European Economic and Social Committee in April 2014.⁴ The European Council meeting on 26/27 June 2014 to set a strategic agenda identified as a priority the need to build bridges between the different judicial systems and traditions and the need for mutual recognition of judgments, so that citizens can more easily exercise their rights across the Union.⁵ This indicates that enforcement of orders relating to children and the need for increased trust between member states in each other’s legal systems remains a policy objective.

The proposals being presented by the European Commission in order to amend Brussels IIa are first of all to abolish any requirement for a declaration of enforceability (*exequatur*) as a precondition to enforcement of a judgment relating to parental responsibility. At present all such judgments require *exequatur*, with the exception of those relating to rights of access and return orders. The latter are orders for return of a child to the state of his or her original habitual residence after an application for return under the 1980 Hague Convention on the Civil Aspects of International Child Abduction has been refused on one of the exceptional grounds in Article 13 of that Convention. In both these cases judgments are directly enforceable without the need for any proceedings in the member state where they are to be enforced. Second there is consideration of possible minimum standards with regard to some of the practical aspects of recognition and enforceability.

The challenge facing the Commission and the Council is that family law is an area of particular sensitivity. Parties can become deeply entrenched in the course of a litigation. Measures designed to promote the best interests of children can backfire and cause damage if enforcement is inept. Circumstances

- 1 Case C-211/10 PPU, *Povse v. Alpaço*, [2010] ECR I-06673, NIPR 2010, 384 (per AG para. 31, see also judgment para. 40).
- 2 Stockholm Programme (Council document No. 17024/09 JAI 896), paras. 3.1.2 and 3.3.2.
- 3 Communication from the Commission to European Parliament, the Council and the Economic and Social Committee, Delivering an Area of Freedom, Security and Justice for Europe’s Citizens – Action Plan Implementing the Stockholm Programme of 20 April 2010, COM(2010) 171 final, p. 8 and 23.
- 4 Report on the application of Council Regulation (EC) No. 2201/2003, COM(2014) 225 final.
- 5 European Council 26/27 June 2014, Strategic Agenda for the Union in Times of Change.

* Westwater Advocates, Faculty of Advocates, Scotland.

change. Children grow and develop. What is appropriate at one time may not be helpful at a later stage. Recognition and enforcement of judgments represents a sharp test of whether the Regulation works, whether there is mutual trust between the courts of member states, whether Brussels IIa really does deliver what is intended. Enforcement is generally relevant when there is a dispute, and the more serious the dispute, the more robust the response required. If Brussels IIa does not deliver recognition and enforcement in disputed cases, then its words 'do truly speak into empty air', as commented by one clearly frustrated High Court judge in London, whose contact orders were first of all suspended in the country where the children lived, and then ignored.⁶ He urged serious consideration of requiring courts of member states to deliver enforcement measures that actually work, otherwise a Regulation filled with good intentions may prove to be completely ineffective in addressing real life issues.

There is a real risk that in focusing on the abolition of *exequatur* in this particular area the Commission and the Council may not be addressing the point at which difficulties arise and may be overlooking the benefit of involving courts in the member state of enforcement in the process of giving effect to a judgment. A system that pays lip service to mutual trust between member states will not serve the interests of citizens whose interests demand effective measures to enforce judgments. At the same time there remains a requirement for some residual safeguards to protect children from consequences that may not have been foreseen when the original order was made and which could cause unintended harm.

3. *Exequatur*

3.1 *Procedure for enforcement*

Exequatur involves process in the court of the country where enforcement is to take place. The precise procedure is a matter for the member state of enforcement.⁷ When an application is made under Brussels IIa neither the person against whom enforcement is sought, nor the child, is entitled to make any submissions at the initial stage. The court should give its decision without delay.⁸ The appropriate officer of the court will bring the decision to the notice of the applicant.⁹ That decision may then be appealed by the applicant or by another party. The appeal should be lodged within one month of service of the declaration of enforceability. This period is extended to two months from the date of service if the person against whom enforcement is sought is habitually resident in a member state other than that in which *exequatur* is given.¹⁰ If there is to be any argument about whether the order should be recognised for the purposes of enforcement, that argument must generally take place in the context of the appeal.

The procedure for enforcement without *exequatur* involves the judge of origin issuing a certificate. When dealing with access rights, if the judgment was given in default of appearance, the judge must certify that the person defaulting was served with the document instituting the proceedings, or an equivalent document, in sufficient time and in such a way as to enable him or her to arrange for a defence, or that the person concerned has accepted the decision unequivocally.¹¹ In the case of a return order the judge must certify that the court has taken into account the reasons for and evidence underlying the original refusal of return under Article 13 of the Hague Convention.¹² These certificates are to be completed in the language of the judgment. In return cases such a certificate will always be required. In access cases a certificate is only required in cases involving a cross-border element, when the certificate should be issued *ex officio*. In cases that acquire a

cross-border element after the judgment has been issued, the parties may request a certificate. All that is required to seek enforcement of judgments to which these provisions apply is a copy of the judgment which satisfies the conditions necessary to establish authenticity, and the relevant certificate.¹³

3.2 *The argument for abolition of exequatur*

Brussels IIa was the first EU instrument to abandon *exequatur* in any civil matter. It did so in respect of only the two types of judgment. The point was to achieve rapid and effective enforcement of judgments relating to access and return orders. This did however leave an anomaly in Brussels IIa between access and return orders and other orders relating to parental responsibility. Since Brussels IIa came into force other EU instruments have dispensed with the need for *exequatur*.¹⁴ In particular decisions on maintenance given in member states bound by the 2007 Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations are recognised and enforceable in other member states without *exequatur*.¹⁵ There are some good reasons to move all enforcement of judgments relating to parental responsibility to the direct route by abolishing entirely the need for *exequatur*. The requirement to apply to the courts of the state where enforcement is to take place leads to complex, lengthy and costly procedures.¹⁶ Not only is an application required to secure *exequatur*, but there will then generally be a delay to allow a period in which the declaration of enforceability may be appealed. This has led to concerns that enforcement cannot be guaranteed. Delay in enforcing judgments is recognised to cause damage to relationships and to be harmful to the interests of children.¹⁷

The existence of two possible approaches to enforcement also presents problems. Rights relating to custody or residence require *exequatur*. In the meantime access rights may be recognised without *exequatur*. This leads to the anomaly that access rights may be enforced before a judgment in relation to where the child should live can be acted upon. The practical inconsistency between judgments requiring *exequatur* and those that do not has been exacerbated by the Maintenance Regulation. Since decisions on maintenance are now recognised and enforceable in most other member states without *exequatur* maintenance may also be enforceable, before residence is enforced.

6 *Re ML and AL (Children) (Contact Order: Brussels II Regulation) (No 2)*, [2006] EWHC 3631 (Fam), [2007] 1 FCR 496.

7 Art. 21.

8 Art. 31. A person against whom enforcement may be ordered may apply for non-recognition, in which case the bar on submissions cannot be maintained; Case C-195/08 PPU, *Rinau v. Rinau*, [2008] ECR I-5271, NIPR 2008, 159.

9 Art. 32.

10 Art. 33.

11 Art. 41.

12 Art. 42.

13 Art. 45.

14 Regulation No. 805/2004 establishing a European enforcement order for uncontested claims; Regulation No. 1896/2006 creating a European Order for Payment Procedure; Regulation No. 861/2007 creating a European Small Claims Procedure; Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and co-operation in matters relating to maintenance obligations; and Brussels I recast, Regulation No. 1215/2012.

15 All member states other than the UK and Denmark are bound by this Protocol.

16 See Report from the Commission, COM(2014) 225 final, at p. 10.

17 See e.g. *Rinau v. Rinau*, *supra* note 8.

While there are therefore a number of benefits to abolishing *exequatur* there are drawbacks. Removing the requirement for *exequatur* will mean the abandonment of certain safeguards, and the introduction of a fresh set of problems, without necessarily solving some of the intractable difficulties that can arise in relation to enforcement of judgments relating to parental responsibility. In practice it may be neither desirable nor possible to relinquish all the safeguards associated with *exequatur*, even if *exequatur* itself is abolished.

3.3 Abolition of *exequatur* in Brussels I recast

The difficulty of totally abandoning the safeguards of the *exequatur* process is demonstrated by the history of reform of the Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.¹⁸ The European Commission proposed abolition of *exequatur* when revising Brussels I.¹⁹ However, following consultation based on a 2009 Green Paper,²⁰ the Commission proposed only a partial abolition, maintaining safeguards in the form of extraordinary remedies that permitted limited review of the judgment to be enforced, but with no public policy exception.²¹ Following two years of negotiation the Council adopted a recast Brussels I Regulation²² that abolished *exequatur* altogether, but permits an application by any interested party for refusal of recognition (including refusal on public policy grounds),²³ and application by the person against whom enforcement is sought for refusal of enforcement.²⁴ Exceptions to recognition and enforcement were thus preserved, but only if expressly invoked by application.

There is also an interesting provision for adaptation of a judgment containing a measure or order not known in the law of the member state addressed. The measure is to be adapted, to the extent possible, to an order known in that member state, which has equivalent effects attached to it and which pursues similar aims and interests. The adaptation should not result in effects going beyond those provided for in the law of the member state of origin. It may be challenged by any party.²⁵ This history demonstrates that even in commercial matters the issues that once arose in the course of application for declaration of enforceability have remained relevant. Despite a shift of emphasis, scope to object to recognition and enforceability has required to be preserved. Some of the practical issues arising from differences in law and practice between different member states have been addressed. It may be argued that in the rather more personal and sensitive area of matrimonial matters and parental responsibility, there is even greater necessity for a nuanced approach, with the possibility of engaging the courts in the member state of enforcement both in relation to safeguards and the practicalities of enforcement.

4. Exceptions to recognition and enforcement

4.1 Recognition

Recognition itself requires no process. A judgment to which Brussels IIa applies that is given in one member state must be recognised in the other member states without any special procedure being required.²⁶ Certain judgments are effectively self-executing. In particular judgments relating to divorce, legal separation and marriage annulment should be recognised, but do not generally require to be enforced. The same applies to some issues relating to children, such as recognition that a person has been appointed guardian. Recognition may however affect matters of inheritance, title to property or in the case of guardianship authority to transact on behalf of the

child. In such cases a declaration that the judgment be recognised may be of assistance.

Article 21(3) allows any interested party to apply for a decision that a judgment be or not be recognised. The procedure for doing so is found in section 2 of Chapter III. This is in fact the *exequatur* procedure. It is not suggested that the possibility of making an application in respect of recognition should be withdrawn altogether. To do so would be to court difficulty over practical issues. Further, as family law is changing rapidly there are potential difficulties of classification looming. On the matrimonial front these relate to issues such as recognition of judgments relating to civil partnership, or marriage between persons of the same sex. Not all member states recognise such partnerships or marriages and there may be issues about whether judgments relating to such partnerships or marriages fall within the scope of Brussels IIa. In relation to parental responsibility there is a rapidly developing trend for surrogacy²⁷ which may give rise to issues of recognition. These are issues relating to scope, that is whether a particular judgment is one to which Brussels IIa applies at all. Such difficulties will require resort to some sort of procedure if they are to be resolved in the member state where the issue arises, even if some such cases result in reference to the CJEU.

The possibility of an application to court must therefore remain, even if this is not a mandatory precursor to enforcement. The difficulty then is the extent to which a court in the state of enforcement may render a judgment ineffective by refusing recognition. In practice however the problem is likely to arise at a more pragmatic level as the positive assistance of the court may be necessary to achieve enforcement.

4.2 The public policy exception

Where *exequatur* is required this allows the court of the place of enforcement to apply some basic safeguards. That court cannot under any circumstances review the judgment as to its substance.²⁸ The court does however have the opportunity to reject recognition, and therefore enforcement, where this would be manifestly contrary to public policy. The public policy exception applies both in relation to recognition of

18 Council Regulation (EC) No. 44/2001 of 22 December 2000.

19 Report from the European Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 21 April 2009, COM(2009) 174 final, p. 4.

20 Green Paper on the review of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 21 April 2009, COM(2009) 175 final.

21 Proposal for a Regulation of the European Parliament and Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 14 December 2010, COM(2010) 748 final.

22 Council Regulation (EU) No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

23 Brussels I recast, Art. 45.

24 Brussels I recast, Art. 46.

25 Brussels I recast, Art. 54.

26 Brussels IIa, Art. 21(1).

27 Hague Conference on Private International Law, 'A Study of Legal Parentage and the Issues arising from International Surrogacy Arrangements', March 2014, available at <www.hcch.net/upload/wop/gap2014pd03c_en.pdf>.

28 Art. 26.

judgments relating to divorce, legal separation and marriage annulment²⁹ and recognition and enforcement of judgments relating to parental responsibility.³⁰ It represents a safeguard against recognition, and in cases of parental responsibility enforcement, of a judgment that would be unacceptable in a national context, either because the law applied by the court of origin is unacceptable, or because the judgment itself is unacceptable. In practice the public policy exception is often invoked, but seldom applied.³¹

The public policy exception can only apply where there is a manifest contradiction to the fundamental values of the state where recognition and enforcement is sought. The limits of the public policy objection were effectively set by the ECJ in *Krombach v. Bamberski*³² under reference to Article 27(1) of the 1968 Brussels Convention. Application of the public policy exception is only possible where recognition

'would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle.... The infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as fundamental within that legal order.'³³

The CJEU will not define the public policy of a member state, but will review the limits of the application of the public policy exception.³⁴ In *Krombach* the German defendant to French proceedings was prevented from having his defence presented because he had not appeared in person. This was sufficient to invoke the public policy exception to recognition.

The CJEU case law was referred to in the English case of *Golubovich v. Golubovich*³⁵ where the Court of Appeal held that whether to refuse of recognition of a foreign decree was not a question of discretion. It required the judge to form a proportionate judgment giving proper weight to all the factors and circumstances and to determine whether it would be manifestly contrary to public policy to grant recognition. If he or she concluded that it would, then refusal of recognition would follow. While that case related to divorce, the same exercise will apply to a judgment relating to parental responsibility.³⁶

In the cases of parental responsibility there is an additional consideration. Recognition should be refused if this would be manifestly contrary to the public policy of the member state in which recognition is sought taking into account the best interests of the child.³⁷ This does not permit a court in the state of enforcement to reject a judgment simply because it would have reached a different view about the best interests of the child. The court may not approve of the decision to be enforced, but this will not of itself be sufficient to invoke the exception. Thus where a Portuguese court ratified an agreement by parents that a child should spend alternating two month periods with his father in Portugal and his mother in the United Kingdom, this 'shuttlecock' arrangement was not considered 'so obviously and extremely abusive as to qualify as an exceptional case'. The judge at first instance was prepared to find the public policy exception established on the basis of the mother's emotional and mental health at the time of the agreement, but this was reversed by the Court of Appeal, which held that the case fell far short of what was required to bring the public policy exception into play.³⁸

In *Re S (Brussels II (revised): Enforcement of Contact Order)*³⁹ a judge in the English Family Division refused to enforce a contact order made by a Polish court on public policy grounds, holding that to enforce the order was not in the child's best interests. The order had been made on the basis that the child would be residing in Poland. The child was removed from Poland following duplicity on the part of his mother and had

become habitually resident in England. The judge concluded that the Polish order could not operate in the way intended as the child was no longer in Poland. He decided that a completely fresh approach to contact was required. While at first sight this is couched in terms that reflect the public policy exception, it can be explained by reference to non-recognition of a judgment irreconcilable with a later judgment relating to parental responsibility. The court made fresh orders for contact, appropriate to the child's current situation. These effectively superseded the original Polish order. The case illustrates the dilemma in relation to the changing situation of a child, of which more below. While there can be no review of the original judgment,⁴⁰ that judgment may no longer be appropriate to the child's situation. It is not necessary to characterise this as a matter of public policy.⁴¹

The public policy exception may be invoked on substantive or procedural grounds. In relation to procedure the content of the exception is significantly dependent on the right to a fair hearing in terms of Article 6 of the European Convention on Human Rights, and now the right to an effective remedy and to a fair trial under Article 47 of the Charter of Fundamental Rights of the European Union. If fundamental procedural rights, as they are understood in the light of the Convention and Charter, are breached then the judgment will be manifestly contrary to public policy. The public policy exception is more frequently invoked on procedural grounds than substantive grounds.⁴² This basis for non-recognition could be excluded if *exequatur* is not required. The loss of the right to claim non-recognition on procedural grounds may however reduce to a question of where, rather than whether, protest may be made. All member states recognise the right to a fair trial in terms of the Convention and the Charter. It will not be possible to claim non-recognition in the state of enforcement, but as will be seen, it should be possible to protest in the state that issued the original judgment.

The impact of the loss of the public policy exception will however be at its most severe in relation to substantive matters of public policy. If *exequatur* is abolished then the public policy exception as regards substantive issues will no longer be available. On one view this is no great loss, as there are so few cases where the public policy exception to recognition and enforcement is applied. On the other hand, just because a measure is not frequently resorted to, does not mean it has no effect. Its mere existence may have a restraining influence. This may be

29 Art. 22(a).

30 Art. 23(a).

31 B. Hess and T. Pfeiffer, 'Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law', IPOL-JURI_ET(2011)453189_EN, 2011, available at <www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2011/453189/IPOL-JURI_ET(2011)453189_EN.pdf>.

32 Case C-7/98, *Krombach v. Bamberski*, [2000] ECR I-1935, NIPR 2000, 126.

33 *Ibid.*, para. 37.

34 See Case C-394/07, *Gambazzi v. Daimler Chrysler Canada Inc and another*, [2009] ECR I-2563, NIPR 2009 129.

35 *Golubovich v. Golubovich*, [2010] EWCA Civ 810, [2011] Fam 88. This case involved whether a Russian divorce should be recognised.

36 See e.g. *MD v. CT*, [2014] EWHC 871 (Fam), [2014] I.L.Pr. 31.

37 Art. 23(a).

38 *In re L (A Child) (Recognition of Foreign Order)*, [2012] EWCA Civ 1157, [2013] Fam 94.

39 *Re S (Brussels II (revised): Enforcement of Contact Order)*, [2008] 2 FLR 1358.

40 Art. 26.

41 See 4.5 below in relation to irreconcilable decisions.

42 Hess and Pfeiffer 2011, *supra* note 31.

exactly the wrong time to remove the safeguard of the public policy exception. As mentioned above there is unprecedented change in family structures. There is no particular consensus between member states on same sex relationships,⁴³ or on the status of the children who are members of the family of adults in same sex relationships.⁴⁴ Parentage is becoming more complex with the increasing resort to surrogacy.⁴⁵ A child may have one or more genetic mothers who are different from the mother who has given birth and who is different again from the mother caring for the child. He or she may have a genetic father, a legally recognised father and belong to the family of a different father. These are complexities that may well give rise to substantive public policy issues. There is an argument for retention of the opportunity to make an application to the court in the place of enforcement for non-recognition in exceptional cases, even if *exequatur* is abolished as a prior condition of enforcement.⁴⁶ It is, therefore, to be hoped that the European Commission in amending the Brussels IIA Regulation would certainly pay heed to the need to retain the right for the courts of the state in which enforcement is sought to be able to test on the basis of the public policy exception, as is currently the case according to the Brussels I recast Regulation.

4.3 Children's views

The procedure for *exequatur* allows the court of the state of enforcement to ensure that children have been given the opportunity to express a view, where this is appropriate, before the judgment concerned is made. Article 23(b) of Brussels IIA provides that a judgment relating to parental responsibility shall not be recognised if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the member state in which recognition is sought. This reflects Article 12 of the United Nations Convention on the Rights of the Child, which assures to children capable of forming views the right to express those views freely in all matters affecting them, and for this purpose to be provided the opportunity to be heard in any relevant judicial and administrative proceedings. The principle that children should be able to express their views is reinforced by Article 24(1) of the EU Charter of Fundamental Rights. It is not necessary to arrange a hearing in every case for this purpose, but a court making a decision in a case relating to parental responsibility should take all measures appropriate to offer the child a genuine and effective opportunity to express his or her views.⁴⁷ If a child is in another state this might include resort to videoconferencing or teleconferencing.⁴⁸

At first sight this is a much more straightforward proposition than the public policy exception. It has been invoked to support non-recognition in England of a Romanian decision transferring custody of a seven year old boy from his mother to his father. The boy was only six when the Romanian Court of Appeal reached its decision and the mother opposed his being given the opportunity to be heard, but her appeal against recognition still succeeded on this, and other grounds for non-recognition, thus defeating the father's attempt to enforce judgment.⁴⁹ The case underlines the proposition that the right to express a view appertains to the child. The court has a duty to safeguard the child's right, regardless of the position of the parents.

It is therefore unsurprising to find that the same principle applies to judgments that are eligible for 'fast track' enforcement, where there is no *exequatur*. Brussels IIA seeks to safeguard the child's right by requiring the court of origin to certify that the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age

or degree of maturity.⁵⁰ However, a statement in a certificate that the opportunity to be heard was offered to the child cannot be questioned by any procedure in the state of enforcement. Were the authorities in that state to look behind the certificate, or try to check its contents, that would compromise the effectiveness of enforcement under the Regulation. Thus where a child wrongfully retained in Germany successfully resisted return under the Hague Convention on the Civil Aspects of International Child Abduction, but her return was nevertheless ordered by a court in Spain that stated it had fulfilled its obligation to hear the child, the only recourse was to challenge the certificate in Spain.⁵¹ Abolition of *exequatur* does not therefore abrogate the child's right to be heard, but it may make it very much more difficult to protest that the right has not been respected, as the courts in the state where enforcement is sought would no longer be able to investigate such claims.

There is currently a significant practical problem in this area. The Commission have noted that member states have diverging rules governing the hearing of the child.⁵² There are widely differing national practices. In some member states judges expect to see and interview children. In others they rarely see and interview children. In the eyes of the former a question may arise as to whether the child in the latter has truly been given an opportunity to be heard. In jurisdictions where children convey their views indirectly it may be argued that judges do not have the training or experience to assess the maturity of a child, and the independence of the view expressed by the child from that of the parent.⁵³ In such jurisdictions courts are encouraged to enlist the assistance of a professional person skilled in listening to children. There are also different practices in relation to when a child should be heard. In some states there is a real reluctance to seek the views of young children, on the ground that this will cause distress and expose them to conflict.⁵⁴ There is no uniformity about the age at which views should be sought.⁵⁵

The solution proposed by the Commission is the adoption of common minimum standards concerning hearing the child.⁵⁶ This could involve, for example, specification of the age at

43 See *Schalk and Kopf v. Austria*, (2011) 53 EHRR 20.

44 See Hague Conference Study of Legal Parentage, *supra* note 27.

45 See Hague Conference Study of Legal Parentage, *supra* note 27.

46 This was the solution adopted in Brussels I recast, Council Regulation (EU) No. 1215/2012, see 3.3 above.

47 Case C-491/10 PPU, *Aguirre Zarraga v. Pelz*, [2011] I.L.Pr.32, NIPR 2011, 4.

48 Council Regulation (EC) No. 1206/2001 on co-operation between the courts of the Member States in the taking evidence in civil and commercial matters, Art.10(4).

49 *MD v. AA*, [2014] EWHC 2756 (Fam); recognition was also refused under Art. 23(c) and (d), see 4.4 below.

50 Arts. 41(2)(c) and 42(2)(a).

51 *Zarraga v. Pelz*, *supra* note 47.

52 Report from the Commission, COM(2014) 225 final, p. 10.

53 See e.g. *W v. W*, 2004 SC 63 (a Scottish appeal decision).

54 See e.g. *S v. S*, [2012] CSIH 17, 2012 Fam LR 32, where questions were couched indirectly to a six year old child who knew nothing of the dispute between his parents about relocation, no material significance was attached to what he said. Contrast this decision with the decision in *MD v. AA*, *supra* note 49.

55 See generally J. Cashmore and P. Parkinson, *Voice of a Child in Family Law Disputes*, Oxford: OUP 2008; also R.M. Stahl, "'Don't Forget About Me': Implementing Article 12 of the United Nations Convention on the Rights of the Child", *Arizona Journal of International & Comparative Law* (24) 2007, p. 803-842.

56 Report from the Commission, COM(2014) 225 final, p. 14.

which children should be heard and an age at which they may be heard depending on the maturity of the individual child. In some member states a child of 12 or more is presumed to be of sufficient age and maturity to form a view, but views may be sought from children under that age if it is practicable to do so.⁵⁷ Minimum standards could apply to the manner in which children's views are heard. This would allow recognition that there are a number of possible methods, including interview by the judge, or a psychologist or social worker, or by a lawyer appointed for the purpose. If common minimum standards are effective this will go a long way towards compensating for loss of the right to protest about a failure to give the child the opportunity to express a view in the state where enforcement is sought.

4.4 The procedural exception

Both Article 22 and Article 23 have express procedural grounds for non-recognition. Where a judgment was given in default of appearance, if the person in default was not served with the document which instituted the proceedings or with an equivalent document, in sufficient time and in such a way as to enable that person to arrange for his or her defence then unless the person has accepted the judgment unequivocally, it will not be recognised.⁵⁸ In addition, in relation to enforcement of judgments relating to parental responsibility a person may request that the judgment is not recognised if it infringes his or her parental responsibility and was given without that person being given an opportunity to be heard.⁵⁹ These grounds for non-recognition may thus far have been superfluous, as serious procedural defects also fall within the public policy exception to recognition and enforcement. On the other hand specification of these exceptions gives a clear basis for refusal, whereas the public policy ground involves questions of degree in deciding whether recognition would be manifestly contrary to public policy.

For example in the English case of *MD v. AA*⁶⁰ a father in Romania appealed against a decision allowing a boy to live with his mother in England. The mother was not served with the documents initiating the appeal. These were said to have been delivered to the child's maternal grandmother, although the mother said they had not been received. The appeal hearing was adjourned on a number of occasions but no attempt was made to notify the mother of the new dates. Service satisfied the requirements of Romanian law, but the English judge held that recognition and enforcement should be refused on (*inter alia*) the procedural grounds in Article 23(c) and (d).⁶¹ If *exequatur* is no longer required then this decision could not have been challenged in England.

The solution adopted in 'fast track' direct enforcement is to require the court of origin to certify that parties procedural rights have been respected. In the case of access rights the judge of origin can only issue a certificate for the purposes of enforcement in a case where the judgment was given in default, if the person defaulting was served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence. Where the person has been served with the document but not in compliance with these conditions then the certificate may be issued if it is nevertheless established that the person concerned accepted the decision unequivocally. All parties concerned must have been given an opportunity to be heard. For a judgement requiring return of the child a certificate can only be issued if the parties were given an opportunity to be heard. The form of certificate in each case must bear a statement to this effect. Such a statement cannot be questioned in the state of enforcement.⁶²

Problems such as arose in *MD v. AA* should be rare. There is common acceptance among member states of the fundamental right to a fair trial embodied in Article 6 of the European Convention on Human Rights and Article 47 of the EU Charter of Fundamental Rights. It is however worrying that such situations do arise and that if *exequatur* is abolished they will be hard to rectify. As far as Romania was concerned the appeal in that case had been properly conducted and there had been service of documents. Requiring the mother to take her objection to enforcement to the Romanian courts would have been difficult, expensive and potentially futile. Some further consideration requires to be given to what is meant by giving parties an opportunity to be heard. Common minimum standards might, for example, demand personal service of initiating documents.

4.5 Conflicts of jurisdiction and irreconcilable decisions

Brussels IIa regulates jurisdiction. Adherence to its jurisdictional requirements should preclude any argument over jurisdiction. Where *exequatur* is relevant the Regulation expressly prohibits any review of the jurisdiction of the member state of origin. The test of public policy will not permit a review of the jurisdiction of the member state giving the judgment.⁶³ Even if the court of origin has assumed jurisdiction on a basis that is contrary to the Regulation, this will not permit a court in the state where recognition and enforcement is sought to refuse recognition of a judgment.⁶⁴ Abolition of *exequatur* should not therefore affect this point.

In practice this position is not quite so straightforward. Mistakes happen. There have been instances of courts being seised of a case, only to find that a second court purports to exercise jurisdiction in breach of the *lis pendens* provisions of Article 19 of Brussels IIa. If this occurs the court first seised is permitted not only to question jurisdiction, but should decline to enforce an order of the court second seised.⁶⁵ If *exequatur* is abolished then there are obvious difficulties. The authorities in the member state first seised will be presented with a certificate requiring enforcement of an order that is not *prima facie* challengeable in that state. There may be an impasse with no clear means of resolution, or worse still a child may be passed to and fro between competing jurisdictions. If potential damage to the child is to be avoided there should be some exceptional provision for the court that is properly seised to declare the order made by the court that should have declined jurisdiction should not be recognised nor enforced.

The related problem of irreconcilable judgments is currently solved in the course of proceedings relating to declaration of enforceability. Irreconcilable judgments are judgements that

57 See e.g. Children (Scotland) Act 1995, section 11(7)(b) and (10).

58 Arts. 22(b) and 23(c).

59 Art. 23(d).

60 *MD v. AA*, [2014] EWHC 2756 Fam.

61 In this case enforcement was also successfully challenged on the ground that the child had not been given the opportunity to be heard, see 4.3 above.

62 *Zarraga v. Pelz*, *supra* note 47.

63 Art. 24.

64 *Krombach v. Bamberški*, *supra* note 32. Note, however that provisional and protective measures taken under Art. 20 cannot be enforced under Chapter III of Brussels IIa. While a court should specify the basis on which it is exercising jurisdiction, unless it is clear that orders are being made on the basis of Art. 20 the judgment should be recognised and enforced; Case C-256/09, *Purrucker v. Perez*, [2010] ECR I-7353, NIPR 2011, 289.

65 Case C-947/10 PPU, *Mercredi v. Chauffe*, [2011] 1 FLR 1293, NIPR 2011, 5; followed in *Re C* [2012] EWHC 907 (Fam).

entail 'legal consequences that are mutually exclusive'.⁶⁶ Thus where a German court ordered a husband to pay maintenance to his wife, but he was then divorced in the Netherlands, the Netherlands could not recognise the German maintenance order because payment of spousal maintenance was irreconcilable with decree for divorce.⁶⁷ The provisions for irreconcilable judgments relating to parental responsibility operate by giving precedence to the later judgment. A judgment from another member state will not be recognised and enforced if irreconcilable with a later judgment relating to parental responsibility given in the member state in which recognition is sought. A judgment that is irreconcilable with a later judgment relating to parental responsibility given in another member state or in a non-member state of the habitual residence of the child will not be recognised and enforced if the later judgment fulfils the conditions necessary for recognition in the member state in which recognition is sought.⁶⁸ This provision recognises that circumstances relating to a child change. The regime of orders relating to the child is likely to require adjustment. On this basis a competent later order will supersede an earlier inconsistent order. The effect is that in a case where the court of the member state of enforcement has jurisdiction⁶⁹ it may effectively supersede the order sought to be enforced.

There is similar provision applying to cases proceeding without *exequatur*. A judgment that has been certified according to Article 41 or 42 cannot be enforced if it is irreconcilable with a subsequent enforceable judgment.⁷⁰ However any question as to whether a certified judgment is irreconcilable with a subsequent enforceable judgment should be addressed in the state of origin of the certified judgment.⁷¹ Particularly in the case of return orders, allowing the member state of enforcement to preclude enforcement by issuing a judgment that is irreconcilable with the return order would be tantamount to circumventing the system set out in this part of Brussels IIa.

That is not to say that there are no attempts to prevent enforcement by resort to local courts, even when these have no jurisdiction. The reaction to a certificate has on occasion been to resort to provisional measures under Article 20. This article applies where three cumulative conditions are satisfied. The measures concerned must be urgent, they must be taken in respect of persons or assets in the member state where the courts making the orders are situated, and they must be provisional.⁷² The provisional nature of the measures arise from the fact that pursuant to Article 20(2) they cease to apply when the court of the member state having jurisdiction as to the substance of the matter has taken the measures it considers appropriate.⁷³ Accordingly provisional measures under Article 20 should not be used to block enforcement of a judgment that has been declared enforceable, or certified for enforcement. And yet that is exactly what has happened, for example in the case of *ML and AL* mentioned at the outset.⁷⁴

This is a difficult area because it involves deliberate action by courts that is inconsistent with the spirit and the letter of Brussels IIa. The English judge in *ML and AL* was well-versed in the formal requirements of the Regulation and the informal support structures that underpinned it. He sent his first judgment to the liaison judge in the country where enforcement should have taken place, expressing the view that this was a paradigm case for judicial co-operation, but nothing happened. No measures were taken to implement an access order that was judged to be in the child's best interests. This was, of course, that did not require *exequatur*. It is tempting to ask whether, had the court in the member state that should have been enforcing the order been engaged, as a result of an application to it for *exequatur*, the order would have been by-passed and then ignored.

5. Enforcement in practice

There is an argument that excluding the involvement of the court in the state of enforcement is a mistake. A responsible judicial officer is exactly the person who should be engaged in determining how a judgment should be enforced. Judgments relating to parental responsibility are different from judgments in most other civil and commercial matters. Such judgments do not relate to money or inanimate objects. They apply to children. This calls for particular sensitivity. Children grow and develop, their circumstances change. They have views of their own. Judgments cannot be applied to children as if they were some species of goods or chattels. Enforcing judgments relating to children can be extraordinarily difficult. There are no simple solutions.

Brussels IIa provides that enforcement procedure is governed by the law of the member state of enforcement.⁷⁵ Matters are made more complicated by the fact that there is at present no consensus between member states as to how to enforce a judgment relating to parental responsibility. Member states have widely varying methods of enforcement.⁷⁶ Some states offer mediation to encourage parties to comply with orders.⁷⁷ This may be through the court, or could involve social workers. Some measures for enforcement operate by attempting to coerce parents by fines or even imprisonment.⁷⁸ Some will operate by force applied directly to the child. There are member states where a child will never be forced.⁷⁹ There are a wide variety of agencies involved in enforcement, including courts, police, bailiffs and children's rights protection services.

If *exequatur* is abolished and enforcement has to proceed purely on the basis of a certificate, then a number of options for sensitive and effective enforcement may be lost. This is because the court often plays a vital role in the actual process of enforcement. In the absence of court involvement the most obvious method of enforcement, in those states that permit coercion, is direct on the child. This can be productive of considerable trauma. Requiring enforcement officers to find a child,

66 Case 145/86, *Hoffmann v. Kreis*, [1988] ECR 645 at para. 22.

67 *Ibid.*

68 Art. 23(e) and (f).

69 As in *Re S (Brussels II (revised): Enforcement of Contact Order)*, *supra* note 39.

70 Art. 47(2).

71 *Povse v. Alpaço*, *supra* note 1.

72 Case C-403/09 PPU, *Detiček v. Sguelia*, [2009] ECR I-12193, NIPR 2010, 1.

73 Art. 20(2); see Case C-523/07, *Proceedings brought by A*, [2009] ECR I-2805 at para. 48, NIPR 2009, 85.

74 [2006] EWHC 3631 (Fam), [2007] 1 FCR 496, see section 2.

75 Art. 47(1).

76 See T.M.C. Asser Instituut, 'Comparative Study of Enforcement Procedures of Family Rights', JLS/C4/2005/06, The Hague, 19 December 2007.

77 For example, in Belgium the court has the option of proposing mediation; in Finland the primary method of enforcement is by mediation. Indirect measures are also a first option in Austria, Denmark, Greece and Latvia. See study mentioned at footnote 76.

78 Direct enforcement based on the concept that disobedience constitutes contempt of court is the only or main method of enforcement in common law jurisdictions, i.e. UK, Ireland, Malta and Cyprus. See study mentioned at footnote 76.

79 In Austria coercion is not available for decisions on contact; see *Re ML and AL (Children) (Contact Order: Brussels II Regulation) (No 2)*, *supra* note 6. In Estonia coercive measures are not considered in line with the aims of enforcement procedure. In France and Greece there is no breach of a judgment if the child opposes enforcement, although a parent is expected to persuade the child to comply. In Germany children 'mature' minors (usually children over 14) cannot be coerced. See study mentioned at footnote 76.

and then to lift the child from the grip of a reluctant parent is not designed to encourage the child's relationship with the other parent. The child is likely to be distressed. If the enforcement relates to rights of access the child may be put off contact altogether. The parent enforcing the order is also likely to be disturbed and discouraged from repeating the exercise. When a court next comes to consider matters of parental responsibility the judicial officer is likely to be unimpressed by a scene at enforcement, and may blame the parent insisting on enforcement, as well as the parent whose recalcitrance has made enforcement difficult. Direct enforcement applied to the child is justifiably regarded as a last resort, but may be the only option available if courts are excluded from the process of enforcement.

On the other hand, if the court is involved in the actual process of enforcement, there is scope for employment of a range of measures, including approaches designed to encourage co-operation, such as mediation or supervision of contact. Further, Article 48 does permit the courts of a member state of enforcement to make practical arrangements for organising the exercise of rights of access, if the necessary arrangements have not or have not sufficiently been made in the original judgment. The court may, for example specify a suitable location, or precise dates and times of contact to coincide with school holidays. For this to work there does require to be recourse to the court and this is exactly what abolition of *exequatur* is designed to avoid.

If some form of coercion is required, then if a court is involved the coercion may be applied to the parent, rather than to the child. That said, judges dislike imposing punishments on parents with care of children. For understandable reasons they do so with great reluctance. At the most extreme a parent may be sent to prison for failing to obey a contact order, but instances of this happening are rare.⁸⁰ Alternatively a penalty such as a fine may be imposed. These are however often viewed as penalties for contempt of court. Disobedience to the judgment is seen as an affront to the authority of the court. But it is one thing to impose punishment for an affront to the authority of the domestic court, it may be another to impose a penalty for what is in effect an affront to the authority of a court in another member state. *Exequatur*, for all its drawbacks, allows the member state where enforcement is to take place to put its own seal of authority on an order, allowing the court direct 'ownership' of the order it seeks to enforce.

The actual practice of enforcement is probably the area where the good intentions of Brussels IIa break down. If the Regulation is to achieve the desired effect further consideration must be given to practice. In this connection it may be important to consider the potential for judicial involvement, albeit on a basis that may be different from *exequatur*. Judicial involvement would be consistent with national law in many member states and is appropriate given the nature of the judgments to be enforced. Common minimum standards on the range of possible means of enforcement would also be helpful. This could reinforce practices such as mediation. There may be agreed limits on the extent to which force may be applied to the child and the nature and extent of any penalties imposed on persons with care. A further area for common standards would be timescales within which enforcement should generally take place. It is recognised that delay in these cases damages relationships.⁸¹ Urgent enforcement prevents changes of circumstances taking place before an order is enforced.

There is also scope for common minimum standards in relation to the precision with which orders are framed, although these will not resolve all current difficulties. Two problems have been identified.⁸² The first is where the modalities of the decision have not been formulated sufficiently precisely by the

original court. Courts of some member states, Germany in particular, make very precise and detailed orders. Less detailed orders may be considered inapt for enforcement. It is difficult however to anticipate all the circumstances for enforcement of an order. The place specified for access may not be available. The school holidays may not be quite when anticipated by the order. The child may not be living at the address mentioned in the order. Precision may make enforcement more difficult, rather than less difficult. The problem can be solved in the case of access orders, provided a court is involved. Under Article 48 the court may make practical arrangements for organising the exercise of rights of access. Second, modalities may have been formulated that are inconsistent with the approach generally followed in the member state of enforcement. This could, for example, be a requirement for supervision of contact in a state that does not have facilities for such supervision. Again difficulties may be resolved if there is a possibility of judicial intervention to find the closest appropriate national solution.

A potential benefit of judicial involvement in enforcement is the possibility of judicial liaison between the court of enforcement and the court of origin. This has the potential to resolve misunderstandings about the order to be enforced or the procedure leading to the making of the order. It may also assist parties who wish to protest about statements in a certificate upon which enforcement is to be based by providing a preliminary link back to the court of origin. Judicial liaison has not to date operated entirely successfully in this area,⁸³ but such systems take time and persistence to establish.

A further area for consideration if *exequatur* is abolished relates to documents formally drawn up or registered in a member state as authentic instruments and agreements between parties. Article 46 provides that if these are enforceable in the member state in which they are concluded they should be recognised and declared enforceable under the same conditions as judgments. Such agreements may arise as a result of alternative dispute resolution, such as mediation. *Exequatur* currently applies to such instruments and agreements. If *exequatur* is to be abolished, then some consideration should be given to how this affects recognition and enforcement of authentic instruments and agreements. While agreements in matters relating to parental responsibility are to be encouraged, in the absence of judicial scrutiny there could be concerns of a public policy nature, or the child's views may not have been sought. This argues for retention of some judicial role in relation to enforcement of authentic instruments and agreements.

In the circumstances it would be naïve to assume that abolition of *exequatur* and adoption of minimum standards will resolve the problems of enforcement of judgments relating to parental responsibility. The Stockholm Programme referred to strengthening mutual trust by supporting member states to improve the efficiency of their judicial systems by encouraging exchange of best practice and the development of innovative projects relating to the modernisation of justice.⁸⁴ The

80 In Austria coercion is available for enforcement of custody (not contact) but its use is considered a final remedy, while in England and Cyprus legal practice prefers to avoid the use of contempt orders; see study mentioned at footnote 76. In Scotland imprisonment was imposed as a last resort to enforce contact orders in e.g. *M v. S*, [2009] CSIH 44, 2011 SLT 918 and *G v. B*, [2011] CSIH 56, 2011 SLT 1253.

81 *Rinau v. Rinau*, *supra* note 8.

82 See T.M.C. Asser Instituut 2007, *supra* note 76.

83 Cf. *Re ML and AL (Children) (Contact Order: Brussels II Regulation) (No 2)*, *supra* note 6.

84 Stockholm Programme (Council document No. 17024/09 JAI 896), para. 3.2.

possibilities now under consideration include making judicial training available at an EU level and establishing a website, linked to the existing eJustice portal to facilitate sharing information. The experience of member states with special family courts could be shared and a network of experts established. Campaigns to raise public awareness are also a possibility. 'Soft measures' of this kind are likely to be helpful, but are no substitute for a viable legislative framework.

6. Conclusions

Requiring a declaration of enforceability is not consistent with the aim of free movement of judgments. If there is trust between member states, based on commonly held values, then *exequatur* should be unnecessary. Brussels IIa already has a procedure for enforcement, based on the issue of a certificate in the court of origin that can be extended to other judgments that require enforcement. A single method of enforcement is

logical. While this is satisfying at a political and theoretical level, it does not answer the practical issues that arise. Adoption of common minimum standards and soft measures to build trust will go some way towards addressing matters, but at bottom the difficulties arise because parties have a fundamental objection to the judgment concerned and do not want it to be enforced.

Objections to enforcement may have some substantive legal basis, or they may be personal and emotional. Removal of all substantive safeguards in the member state of enforcement risks exacerbating resistance by depriving parties of recourse to the court, or by making protest difficult. There are disadvantages to exclusion of all judicial involvement in the member state of enforcement. Judges are likely to be the best hope of delivering enforcement measures that work. This does not necessarily mean retaining *exequatur*, nor abandoning the establishment of common minimum standards. It means sanctioning the role of courts in giving effect to judgments.