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# Brussels II ter Regulation and the 1996 Hague Convention on Child Protection – the interplay of the European and Hague regimes in the matters of parental responsibility

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## 1. Introduction

The European Union and the Hague Conference on Private International Law are two major players in the ongoing process of cross-border cooperation concerning the unification of the rules of private international law in Europe<sup>1</sup>. Before the European legislator entered the game, the European countries were cooperating both within the Hague Conference and bilaterally. With new powers in private international law conferred by the Amsterdam Treaty, the European Community and the European Union as its legal successor have become a forum for the creation of conflict of laws' rules competing with the Hague Conference<sup>2</sup>. However, the links between the EU Regulations and the Hague Conventions do not only consist in the competition for regulation in the same scope. The European Union as a regional economic integration organization has been a member

<sup>1</sup> The relationship between the two fora is discussed inter alia by: J.J. Kuipers, *The European Union and the Hague Conference on Private International Law – Forced Marriage or Fortunate Partnership?* [in:] *The European Union's Emerging International Identity. Views from the Global Arena*, eds. H. de Waele, J.J. Kuipers, Leiden, Boston 2013, p. 159–186.

<sup>2</sup> The legal framework for judicial cooperation in civil matters in the EU is currently provided in Article 81(1) of the Treaty on the Functioning of the European Union (consolidated version OJ 2012 C 326, p. 47). Of the extensive literature on the stages of the transfer of legislative competence from the Member States to EU level see J. von Hein, *EU Competence to Legislate in the Area of Private International Law and Law Reforms at the EU Level* [in:] *Cross-Border Litigation in Europe*, eds. P. Beaumont, M. Danov, K. Trimmings, B. Yuksel, Oxford 2020, Part. I.2; M. Pilich, *Europeizacja prawa prywatnego międzynarodowego: cel, ograniczenia, wyzwania*, "Problemy Prawa Prywatnego Międzynarodowego" 2013/12, p. 53–83.

of the Hague Conference on Private International Law since 3 April 2007<sup>3</sup>. At the same time, the two regimes, the Hague and the UE interpenetrate each other, and the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children<sup>4</sup> and the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction<sup>5</sup> are good examples of such particularly strong interactions<sup>6</sup>.

Over the last decade, the unification of conflict of laws' rules in the EU has taken place primarily within the framework of enhanced cooperation. The most recent legal act, the Council 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<sup>7</sup> continues the model of universal cooperation among the Member States<sup>8</sup>. This new Regulation, widely referred to as the Brussels II ter Regulation, will replace the Council Regulation (EC) No. 2201/2003 of 27 November 2003 (Brussels II bis)<sup>9</sup>. The Brussels II ter Regula-

<sup>3</sup> See Article 3 of the Statute of the Hague Conference on Private International Law; on the accession process see A. Schuz, *The Accession of the European Community to the Hague Conference on Private International Law*, "The International and Comparative Law Quarterly" 2007/56(4), p. 939–949.

<sup>4</sup> The text of the Convention and the list of States that have acceded to it (currently 53) is available at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=70he> (access 4.11.2021). The Convention entered into force with respect to Poland on 1 November 2010. Official publication in Poland in the Polish Journal of Laws (hereinafter referred to as Dz.U.) Dz.U. of 2010, No. 172, item 1158.

<sup>5</sup> The Convention entered into force in 1983 and in Poland in 1995 (Dz.U. of 1995, No. 108, item 528; Corrigendum: Dz.U. of 1999, No. 93, item 1085).

<sup>6</sup> See P. McEleavy, *The 1996 Hague Convention and the European Union: Connection and Disconnection* [in:] *A commitment to private international law: essays in honour of Hans van Loon*, The Permanent Bureau of the Hague Conference on Private International Law, Cambridge 2013, p. 371–380.

<sup>7</sup> Council 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 (OJ L 178, p. 1).

<sup>8</sup> With the exception of Denmark.

<sup>9</sup> Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000 (OJ L 338, p. 1, as amended). The Regulation has been extensively covered in the literature, including commentaries and publications discussing specific issues. Among many see: *Brussels Ila – Rome III. An Article-by-Article Commentary*, ed. Ch. Althammer, München, Oxford, Baden-Baden 2019; *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR. Kommentar. Bearbeitung 2010. Brüssel Ila-VO, EG-UntVO, EG-ErbVO-E, HUntStProt 2007*, ed. T. Rauscher, Sellier 2010; *European Commentaries on Private International Law. Commentary. Vol. IV, Brussels Ibis Regulation*, eds. U. Magnus, P. Mankowski, Köln 2017; J. Ciszewski, *Europejskie prawo małżeńskie i dotyczące odpowiedzialności rodzicielskiej: jurysdykcja, uznawanie i wykonywanie orzeczeń: komentarz*, Warszawa 2004; P. Mostowik, *Władza rodzicielska i opieka nad dzieckiem w prawie prywatnym międzynarodowym*, Kraków 2014; K. Weitz, *Jurysdykcja krajowa w sprawach małżeńskich oraz w sprawach dotyczących odpowiedzialności rodzicielskiej w prawie wspólnotowym*, "Kwartalnik Prawa Prywatnego" 2007/1, p. 83–154; J. Zatorska, *Komentarz do rozporządzenia nr 2201/2003 dotyczącego jurysdykcji oraz uznawania i wykonywania orzeczeń w sprawach małżeńskich oraz w sprawach dotyczących odpowiedzialności rodzicielskiej*, LEX 2010.

tion will apply in all EU Member States (except for Denmark) starting from 1 August 2022<sup>10</sup>.

It would be an exaggeration to call the new Brussel II ter Regulation revolutionary, but it brings several important solutions<sup>11</sup>. One of the goals of the Brussel II ter Regulation is to clarify the relationship with the 1996 Hague Convention and to introduce solutions to the problems that have had arisen in jurisprudence concerning the delimitation of the scope of those two instruments.

This article presents the interplay between European Union law and the 1996 Hague Convention in the matters of parental responsibility. Both the 1996 Hague Convention and the Brussel II ter Regulation lay down the rules of jurisdiction and rules on the recognition and enforcement of judgments. Unlike in the 1996 Hague Convention, the European legislator has not chosen to introduce its own set of rules indicating the applicable law. Given the overlapping scope and the legislative *lacunae* in the Brussel II ter Regulation, it is important to clarify the relationship between the two instruments. The solutions provided hitherto in the Brussels II bis Regulation have left some room for doubt.

A court of a Member State before which a matter of parental responsibility is pending must first decide on its jurisdiction by referring to the rules of a legal act applicable in a given case. The court of a Member State must therefore delimit the scope of application of the possible legal acts at issue: an EU regulation, the 1996 Hague Convention, possibly a bilateral agreement, and national law. The next task of the court is to select the conflict of laws rule indicating the applicable law.

Section 2 of the paper explores relations between the Brussels II ter Regulation and the 1996 Hague Convention when it comes to establishing jurisdiction. Next, the question of the applicable law is discussed in Section 3.

## 2. Establishing jurisdiction: which rules should be applied?

### 2.1. Disconnection clauses

The 1996 Hague Convention contains in its Article 52 a set of disconnection clauses. The first paragraph of Article 52 gives priority to existing international agreements. The disconnection clause in the second paragraph of Article 52 authorizes the Contracting States “to conclude agreements which contain, in respect of children habitually resident in any of the States Parties to such agreements, provisions on matters governed by this Convention”. This clause was introduced into the 1996 Hague Convention with a consideration of the ongoing preparatory works on the Brussels II Convention. At the time,

<sup>10</sup> Article 105(2) of the Brussel II ter Regulation.

<sup>11</sup> For an overview of the changes brought about by the Regulation see: S. Corneloup, T. Kruger, *Le règlement 2019/1111, Bruxelles II: la protection des enfants gagnés du ter(rain)*, “Revue critique de droit international privé” 2020/109(2), p. 215–245; O. Bobrzyńska, *Nowa unijna regulacja spraw małżeńskich i rodzinnych – rozporządzenie Rady (UE) 2019/1111*, “Kwartalnik Prawa Prywatnego” 2020/3, p. 511–544.

however, it was assumed that the agreement adopted by the Member States would be limited only to narrowly defined cases. The so-called Brussels II Convention was intended to deal with the issue of parental responsibility linked to a matrimonial case and over children originating from that marriage who had their habitual residence in one of the Member States<sup>12</sup>. The Brussel II Convention was adopted in 1998 but didn't come into force due to a change in the form of cooperation between member states<sup>13</sup>. It took four years for the Member States to adopt the agreement, and during that time only a few Member States acceded to the 1996 Hague Convention. The final wording of Regulation No. 1347/2000 (Brussels II) covered only a part of parental matters, as indicated above<sup>14</sup>. However, it was quickly replaced by a new act (Brussels II bis), which has a scope rivaling that of the Convention<sup>15</sup>. The Brussels II bis Regulation contains rules concerning jurisdiction, recognition and enforcement of the decisions, as well as cooperation between central authorities. It is modeled on the 1996 Hague Convention but also introduces some specific solutions modifying those of the Convention. Both those acts base jurisdiction on the habitual residence of a child, establish a backup link in the form of the child's residence, and provide a ground for derived jurisdiction (linked to the matrimonial matters). While the 1996 Hague Convention stipulates that jurisdiction shifts when the habitual residence of a child changes, under the Brussels II bis Regulation a Member State court retains jurisdiction following the principle of *perpetuatio fori*.

The 1996 Hague Convention remains an important source of law for the Member States when they are coordinating cooperation with third countries. In addition, the Brussels II bis Regulation does not contain rules for determining the applicable law. It was important for the coordination of the two regimes that all Member States acceded to the 1996 Hague Convention. As the 1996 Hague Convention is not open to international organizations, only individual states can accede to it. The European Union implemented a plan for accession to the 1996 Hague Convention by all Member States. The process,

<sup>12</sup> See P. Lagarde, *Explanatory Report on the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* [in:] *Proceedings of the Eighteenth Session (1996), tome II, Protection of children*, The Permanent Bureau of the Conference, SDU Publishers 1998 (hereinafter Lagarde Report), p. 603; P. McEleavy, *Luxembourg, Brussels and now the Hague: Congestion in the promotion of free movement in parental responsibility matters*, "The International and Comparative Law Quarterly" 2010/59(2), p. 515–516.

<sup>13</sup> The objectives and solutions of the Brussel II Convention are presented in A. Borrás, *Explanatory Report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters*, OJ 1998, C 221, p. 27–64.

<sup>14</sup> Council Regulation (EC) No. 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses (OJ L 160, p. 19).

<sup>15</sup> On the evolution of the European regime of jurisdictional norms in matters of parental responsibility see A. Borrás, *Protection of Minors and Child Abduction under the Hague Conventions and the Brussels II bis Regulation* [in:] *Japanese and European Private International Law in Comparative perspective*, eds J. Basedow, H. Baum, Y. Nishitani, Tübingen 2008, p. 345–349.

long and turbulent as it turned out, was launched in December 2002 with the Decision 2003/93<sup>16</sup>, in which the Council authorized the Member States to execute the Convention<sup>17</sup>. The Council reiterated its call to the Member States in June 2008 in the Decision 2008/431<sup>18</sup>. It was only as late as 2015 when Italy as the last Member State acceded to the 1996 Hague Convention<sup>19</sup>.

At the time of the adoption of the Brussels II bis Regulation, still not all Member States had acceded to the Convention. The Brussels II bis Regulation reflected in its Article 61 a) the disconnection clause present in the 1996 Hague Convention providing for the application of the Brussels II bis regime where the child concerned has his or her habitual residence on the territory of a Member State. On the other hand, the connection with the 1996 Hague Convention was made in Article 62(1) of the Brussels II bis Regulation. Both those norms appear in Chapter V of the Brussels II bis Regulation entitled "Relations with other instruments".

This simple demarcation according to the child's habitual residence has proved insufficient and is perceived as a weakness of the Brussels II bis Regulation<sup>20</sup>. The case-law of the Member States' courts revealed some doubts as to the delimitation of the scope of application of the EU rules and those of the 1996 Hague Convention. The different approaches to the principle of *perpetuatio fori* and the lack of arrangements for cooperation between the courts of a Member State and a third 1996 Hague Convention Contracting State impede the application of the 1996 Hague Convention mechanisms in the non-EU Contracting States<sup>21</sup>. Specifically, problems occur in the following instances:

- 1) where a child has his/her habitual residence in a third non-contracting state or has no habitual residence at all and is present in a Member State<sup>22</sup>;

<sup>16</sup> Council Decision 2003/93 of 19 December 2002 authorising the Member States, in the interest of the Community, to sign the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children (OJ 2003, L 48, p. 1).

<sup>17</sup> One obstacle was the dispute between Spain and the UK over the convention status of Gibraltar. See P. McElevy, *The 1996 Hague Convention...*, p. 372–373.

<sup>18</sup> Council Decision 2008/431 of 5 June 2008 authorising certain Member States to ratify, or accede to, in the interest of the European Community, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children and authorising certain Member States to make a declaration on the application of the relevant internal rules of Community law – Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children (OJ L 151, p. 36).

<sup>19</sup> See the status table on <https://www.hcch.net/en/instruments/conventions/status-table/?cid=70> (access 4.11.2021).

<sup>20</sup> P. McElevy, *The 1996 Hague Convention...*, p. 374.

<sup>21</sup> And in Denmark, which is a Convention State and an EU Member State where the Regulation, according to the opt out clause, does not apply.

<sup>22</sup> M. Župan, I. Medić, P. Poretti, N. Lucić, M. Drventić, *The Application of the EU Fam's Regulations in Croatia* [in:] *Planning the Future of Cross Border Families. A Path Through Coordination*, eds. I. Viarengo, F.C. Villata, Oxford [etc.] 2020, p. 436.

- 2) where a refugee child or child internationally displaced is present in a Member State;
- 3) where, in the course of proceedings brought before a court of a Member State, a child moves to a non-Member State that is a Contracting State<sup>23</sup>;
- 4) where there is a need to transfer jurisdiction between a Member State and a 1996 Hague Convention Contracting State<sup>24</sup>;
- 5) where parallel proceedings are pending in a Member State and a 1996 Hague Convention Contracting State, and the question of *lis pendens* arises;
- 6) as to the possibility of selecting a court in a 1996 Hague Convention Contracting State (in cases of construction of derived jurisdiction), when the child is habitually resident in a Member State<sup>25</sup>.

The Brussels II ter Regulation was intended to provide answers to the concerns raised in doctrine<sup>26</sup> and by practitioners. The new Brussels II ter Regulation maintains the principle that the child's<sup>27</sup> habitual residence in a Member State is decisive for its application (Article 97(1)(a)) and preserves the principle of *perpetuation fori*. Its Article 97(2), on the other hand, bridges the gap between the Brussels II ter Regulation and the 1996 Hague Convention, allowing for the transition to the Convention. Recitals to the Brussels II ter Regulation clarify also the approach in cases hitherto doubtful<sup>28</sup>.

<sup>23</sup> H. Großerichter [in:] *Brussels IIa, Rome III: article-by-article commentary*, ed. Ch. Althammer, München, Oxford, Baden-Baden 2019, p. 268–269.

<sup>24</sup> M. Župan, I. Medić, P. Poretti, N. Lucić, M. Drventić, *The Application...*, p. 436–437.

<sup>25</sup> See T. Kruger, L. Samyn, *Brussels II bis: successes and suggested improvements*, "Journal of Private International Law" 2016/12(1), p. 152–153.

<sup>26</sup> The analysis of the Brussels II bis provisions, identification of problems and proposed solutions are presented, among others, in publications produced as part of the project *Cross-Border Proceedings in Family Law Matters before National Courts and CJEU*, funded by the European Commission's Justice Programme (GA - JUST/2014/JCOO/AG/CIVI/7722) coordinated by the T.M.C. Asser Instituut and partnered by the Utrecht University, International Legal Institute (ILI), the Ghent University and the University of Valencia: *Regulation Brussels II bis: Guide for application (As part of the final output from the project 'Cross-Border Proceedings in Family Law Matters before National Courts and CJEU', funded by the European Commission's Justice Programme (GA - JUST/2014/JCOO/AG/CIVI/7722))*, ed. V. Lazić, 2018, <https://www.asser.nl/projects-legal-advice/cross-border-proceedings-in-family-law-matters-2016-2018/guide-for-application-of-the-brussels-iibis-regulation/> (access 9.10.2021); *Recommendations To Improve the Rules on Jurisdiction and on the Enforcement of Decisions in Matrimonial Matters and Matters of Parental Responsibility in the European Union. As part of the final output from the project 'Cross-Border Proceedings in Family Law Matters before National Courts and CJEU', funded by the European Commission's Justice Programme (GA - JUST/2014/JCOO/AG/CIVI/7722)*, ed. V. Lazić, 2018, <https://www.asser.nl/media/4662/m-5796-ec-justice-cross-border-proceedings-in-family-law-matters-10-publications-00-publications-on-asser-website-recommendations.pdf> (access 9.10.2021).

<sup>27</sup> In Article 2(2)(6) of the Brussels II ter Regulation now clearly defines a child as a person under 18 years of age which is in line with the scope of application of the 1996 Hague Convention and the Hague Convention of 13 January 2000 on the International Protection of Adults. Poland has signed the latter convention, but has not ratified it.

<sup>28</sup> The problems which have arisen in the application of the Brussels II bis jurisdiction rules have been further discussed in: O. Bobrzyńska, *Nowa...*, p. 526–532.

## 2.2. Jurisdiction based on presence

The doctrine has considered cases where the jurisdiction of a court of a Member State is to be based on a mere presence of a child. When the habitual residence cannot be determined, both the Brussels II bis Regulation and the 1996 Hague Convention base jurisdiction on the child's presence<sup>29</sup>. The same applies to refugee children or children internationally displaced. The Brussels II bis Regulation does not have a general priority over the 1996 Hague Convention. Therefore, when a child has no habitual residence anywhere, the disconnection clause contained in Article 61 a) of the Brussels II bis Regulation does not provide for a clear solution, as it is based on habitual residence<sup>30</sup>.

Article 11(1) of the new Brussels II ter Regulation follows the approach taken in Article 13(1) of the Brussels II bis Regulation and creates an ancillary basis of jurisdiction in cases where the habitual residence of a child cannot be established and jurisdiction cannot be determined through the choice of court. It can be inferred from the Recital 25 to the Brussels II ter Regulation, which refers further to disconnection clauses in the Brussels II ter Regulation and the 1996 Hague Convention, that the European legislator, in this case, assumes the application of the Brussels II ter Regulation and not of the 1996 Hague Convention<sup>31</sup>. The second paragraph of new Article 11 of the Brussels II ter Regulation clarifies that the jurisdiction of a court of the Member State where the child is present in respect of refugees or children internationally displaced may be established based on that provision when the reason for displacement were disturbances occurring in the Member State of child's habitual residence. Recital 25 provides further additional clarification on the relationship with the 1996 Hague Convention, which should apply where the habitual residence of the child before the displacement was in a third state.

On the other hand, when a child is habitually resident in a third state (i.e. in a state that is a party to the 1996 Hague Convention) and present in the Member State, the 1996 Hague Convention cannot be applied to establish general jurisdiction. As of today, a court of a Member State may base its jurisdiction on the Brussels II bis Regulation as long as the conditions for the prorogation of jurisdiction outlined in its Article 12 are fulfilled<sup>32</sup>. Moreover, under the new Brussels II ter Regulation which introduces in Article 10 a choice of the court (no longer in a derived jurisdiction, but independent of the jurisdiction in matrimonial matters), a court of a Member State might have jurisdiction when the child's habitual residence is in a third country.

<sup>29</sup> Article 13(1) of the Brussels II bis Regulation and Article 6(2) of the 1996 Hague Convention.

<sup>30</sup> When, on the other hand, the child is habitually resident in a third State and present in the Member State, the Convention does not apply. A court of a Member State may base its jurisdiction on the Brussels II bis Regulation as long as the conditions for prorogation of jurisdiction set forth in the Article 12 are fulfilled. See P. McEleavy, *Luxembourg...*, p. 517.

<sup>31</sup> The ground set forth in Article 11(1) should be reserved for situations where the child's habitual residence cannot be established at all, not where it is outside the European Union. Cf. P. McEleavy, *The 1996 Hague Convention...*, p. 375.

<sup>32</sup> See P. McEleavy, *Luxembourg...*, p. 517.

### 2.3. Transfer of jurisdiction

As already mentioned, the Brussels II ter Regulation, just like its predecessor, adopts the principle of *perpetuatio fori*, whereas the 1996 Hague Convention provides for a change of jurisdiction in the event of a change of habitual residence. One of the cases that raised questions was the change of the child's habitual residence from a Member State to a 1996 Hague Convention Contracting State. Under the Brussels II bis Regulation, the Court of a Member State retains its jurisdiction. In case of a lawful change of the child's habitual residence, it might be reasonable to transfer jurisdiction to the court of the new habitual residence. However, the Brussels II bis Regulation provides only for such transfer between the courts of Member States. The application of the rules of the 1996 Hague Convention, on the other hand, is not obvious from the point of view of the priority of the regulation established at the initiation stage. According to one view, the courts of a Member State should therefore adjudicate the case to the end<sup>33</sup>. On the other hand, it is argued that, according to the disconnection clause in Article 61 a) of the Brussels II bis Regulation, the Regulation in question does not take precedence when the habitual residence is not in the European Union and the 1996 Hague Convention should apply in such circumstances. Such a position has, for example, emerged in the German case law<sup>34</sup>.

The new Brussels II ter Regulation closes this loophole by expressly allowing to apply in such cases the mechanisms provided for in Articles 8 and 9 of the 1996 Hague Convention (Article 97(2)(b) Brussels II ter).

### 2.4. Parallel proceedings and *lis pendens*

The new Regulation also makes clear how to deal with proceedings brought in parallel in a non-EU 1996 Hague Convention Contracting State and an EU Member State. Article 97(2)(c) of the Brussels II ter Regulation refers in such case to Article 13 of the 1996 Hague Convention, which imposes an order "to decline to exercise jurisdiction" on the court of an EU Member State before which the proceedings are subsequently brought until a court of another 1996 Hague Convention Contracting State would have dealt with the case.

### 2.5. Choice of court

Both the Brussels II bis Regulation and the 1996 Hague Convention provide for grounds of derived jurisdiction. Under certain conditions, Article 10 of the 1996 Hague

<sup>33</sup> See M. Župan, I. Medić, P. Poretti, N. Lucić, M. Drventić, *The Application...*, p. 436–437.

<sup>34</sup> See the decision of the Berlin court of 2 March 2015 (Kammergericht Berlin, DES20150302) cited by T. Kruger, *Finding a Habitual Residence* [in:] *Planning the Future...*, eds. I. Viarengo, F.C. Villata, p. 127.

Convention and Article 12 of the Brussels II bis Regulation grant the court, which has jurisdiction in a matrimonial case, the power to hear parental responsibility cases. An important change is brought about by the Brussels II ter Regulation with the introduction in Article 10 of a choice of court independent of jurisdiction in matrimonial matters. The choice may be made in favor of a court of a Member State with which the child has a substantial connection. The Brussels II ter Regulation gives examples of circumstances that prove such a connection. The connection exists where at least one of the holders of parental responsibility is habitually resident in that Member State, that Member State is the former habitual residence of the child or the child is a national of that Member State. The freedom of the parties to the proceedings to choose the court is even greater because under the provision of Article 97(2)(a) of the Brussels II ter Regulation, the parties are able also to invoke Article 10 of the 1996 Hague Convention and submit the matter of parental responsibility to a court of another 1996 Hague Convention Contracting State which has jurisdiction over the matrimonial matter, even if a child is habitually resident in an EU Member State. For the purposes of the considerations in the next section, it should be noted that the scope of the jurisdiction rule included in Article 10 of the 1996 Hague Convention is narrower than its counterpart in the new regulation. In addition to the link to the jurisdiction in the divorce (or legal separation) case, the conditions for exercising jurisdiction include that one of the parents be habitually resident in the State of the court, while the child must be habitually resident in the Convention area, i.e. in one of the Contracting States.

### **3. Law applicable in the matters of parental responsibility**

#### **3.1. Approach to determining the applicable law in EU Regulations**

In Section 2 above, solutions for the geographical demarcation of the two instruments in terms of jurisdictional norms were discussed. Unlike the 1996 Hague Convention, which includes a comprehensive conflict of laws regulation, the Brussels II and the Brussels II bis Regulations have left out of their scope the rules for determining the applicable law. The approach to the regulation of the regime in matters of parental responsibility, therefore, differs from the approach taken in other areas, in which the European legislator lays down a comprehensive set of rules covering jurisdiction, applicable law, as well as recognition and enforcement of decisions. Steps in this direction have been taken one by one, as was the case of contractual and non-contractual obligations<sup>35</sup>. As it was not possible to reach unanimity among the Member States on the conflict-of-law rules concerning divorce and separation, instead of amending the Brussels II bis Regulation, selected Member States adopted the Rome III Regulation under enhanced cooperation

<sup>35</sup> In matters of obligations, the Rome and Rome II Regulations have joined the Brussel I Regulation (now recast).

in 2010<sup>36</sup>. The Member States could also not reach a consensus in the case of matrimonial property regimes (Council Regulation (EU) 2016/1103<sup>37</sup>) and matters of the property consequences of registered partnerships (Council Regulation (EU) 2016/1104)<sup>38</sup>. However, a complete and comprehensive regime has been adopted for succession (Regulation (EU) 650/2012)<sup>39</sup>.

A specific construction has been adopted for maintenance obligations. The Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations<sup>40</sup>, establishes the applicable law by cross-reference to an instrument adopted within the Hague Conference. Chapter III of Regulation 4/2009 entitled “Applicable Law” contains only Article 15 “Determination of the applicable law” that provides: “The law applicable to maintenance obligations shall be determined in accordance with the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations (hereinafter referred to as the 2007 Hague Protocol) in the Member States bound by that instrument”. The uniformity of conflict of laws rules within the Member States was ensured with the accession of the European Union to the Hague Protocol<sup>41</sup>.

<sup>36</sup> Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (OJ L 343, p. 10). The regulation is in force only in those Member States that participate in the enhanced cooperation, i.e.: Austria, Belgium, Bulgaria, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Portugal, Romania, Slovenia, Spain.

<sup>37</sup> Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (OJ L 183, p. 1).

<sup>38</sup> Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships (OJ L 183, p. 30).

<sup>39</sup> Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (OJ L 201, pp. 107–134).

<sup>40</sup> Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (OJ 2009, L 7, p. 1).

<sup>41</sup> With its decision of 30 November 2009 on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations (2009/941/EC), the Council of the European Union approved the Hague Protocol of 2007 on behalf of the European Community and authorized next steps in the conclusion process (OJ 2009 L 331, p. 17). The Hague Protocol was signed by the European Union on 8 April 2010 and it has been applied since 18 June 2011 between all Members of the European Union (except for Denmark and the United Kingdom). The doctrine points out that since the entry into force of the Hague Protocol for the EU on 1st August 2013, Article 15 performs only an informative function. P. Franzina, *The interplay of EU legislation and international developments in private international law* [in:] *The External Dimension of EU Private International Law After Opinion 1/13*, ed. P. Franzina, Cambridge, Antwerp, Portland 2017, p. 193.

### 3.2. Doubts about the wording of Article 15(1) of the 1996 Hague Convention

The Brussels II bis Regulation does not contain an explicit reference to the law applicable to the matters of parental responsibility. When adopting the Brussels II bis Regulation, it was assumed that the Member States would apply the 1996 Hague Convention in this respect, both in their relations with other Contracting States and among themselves. This assumption is expressed in Article 62(1) of the Brussels II bis Regulation from which it follows that the 1996 Hague Convention “(...) shall continue to have effect in relation to matters not governed by this Regulation”. Rules concerning applicable law to parental responsibility are considered as such matters<sup>42</sup>.

The conflict rules for matters of parental responsibility are contained in Chapter III of the 1996 Hague Convention. The general rule is that the authorities of the 1996 Hague Convention Contracting States apply their own law (*lex fori*) in exercising their jurisdiction under the provisions of Chapter II of the 1996 Hague Convention (Article 15 (1))<sup>43</sup>. The 1996 Hague Convention aimed at limiting situations in which the authority dealing with the matter would need to apply foreign law. The parallelism between jurisdiction and applicable law was justified by the facilitation of the decision-making process when the authority applies the law with which it is most familiar<sup>44</sup>. Therefore, if there is a transfer of jurisdiction to a country other than the country of the habitual residence of the child, again the *lex fori* applies. By way of exception, it is possible to depart from the application of *lex fori* in favor of law with which the situation has a substantial connection, provided that the protection of the child's person or property so requires (clause in Article 15(2) of the 1996 Hague Convention). The separate set of conflict-of-law rules is laid down for the attribution, extinction, and exercise of parental responsibility, and the 1996 Hague Convention subjects them to the law of the state of the child's habitual residence (Articles 16 and 17, first sentence). The rules ensuring the continuity of the child's protection in the case of a change of habitual residence are also provided (Articles 15(3) and 16(4); Article 17, second sentence)<sup>45</sup>.

The wording of Article 15(1) of the 1996 Hague Convention has raised questions in cases brought before the courts of the EU Member States. The strict literal interpretation

<sup>42</sup> This is the position of the European Commission expressed in successive versions of the *Practice guide for the application of the Brussels IIa Regulation*; See the latest version of the Guide available at <https://op.europa.eu>, p. 89 (access 9.10.2021); On this matter see P. McElevay, *The 1996 Hague Convention...*, p. 378–379.

<sup>43</sup> On the criticism of this solution and the arguments in favor of using the habitual residence as a connecting factor in the general rule, see P. Mostowik, *Władza...*, p. 312.

<sup>44</sup> *Lagarde Report*, p. 573.

<sup>45</sup> The conflict of laws rules of the Convention are subject of thorough analyses in foreign and Polish literature: N. Lowe, M. Nicholls, *The 1996 Hague Convention on the Protection of Children*, Bristol: Family Law 2012; N. Lowe, *International Developments: the 1996 Hague Convention on the Protection of Children – a Fresh Appraisal*, “Child and Family Law Quarterly” 2002/14(2), p. 191–206; P. Mostowik, *Władza...*, p. 165–180; P. Mostowik [in:] *System Prawa Prywatnego. Tom 20C. Prawo prywatne międzynarodowe*, ed. M. Pazdan, Warszawa 2015.

of Article 15(1) of the 1996 Hague Convention would lead to the conclusion that its direct application to determine the applicable law is possible only when the jurisdictional rules of the 1996 Hague Convention apply (that is when they take precedence over the Brussels II bis Regulation)<sup>46</sup>. If the application of the 1996 Hague Convention would be excluded in cases when jurisdiction was based on another act, the authorities would be obliged to resort to national provisions.

To overcome the wording of Article 15(1) of the 1996 Hague Convention and to ensure its application within the Brussels II bis Regulation jurisdiction regime, it has been advocated in the doctrine that the Member States should give general application to Article 15 of the 1996 Hague Convention<sup>47</sup>.

Some legislators have chosen to address concerns through national legislation. In the United Kingdom (following Brexit, the UK is now a third country under the Brussels regime) “The Parental Responsibility and Measures for the Protection of Children (International Obligations) (England and Wales and Northern Ireland) Regulations 2010” had clarified that “The reference to Chapter II of the Convention in Article 15(1) of the Convention is to be read as including a reference to Chapter II of the Council Regulation”<sup>48</sup>. Likewise, in 2014 an amendment to the Belgian Code of Private International Law introduced in Article 35 a referral to the 1996 Hague Convention and its application to matters of parental responsibility for persons under the age of 18, also where jurisdiction should be based on the Brussels II bis Regulation<sup>49</sup>.

The Permanent Bureau of the Hague Conference found the solution in a broad interpretation of Article 15(1) of the 1996 Hague Convention when jurisdiction is based on another instrument. The “literal and overly narrow interpretation of the Convention in this regard” must be avoided in order “to avoid conflicts between (...) legal systems in

<sup>46</sup> Such reasoning was once recalled by Thomas Rauscher, who indicated that the 1996 Hague Convention did not establish an independent rule of the application of the law of the court. In theory, a court having its jurisdiction based on Brussels II bis should not apply directly Article 15 of the 1996 Hague Convention. The author points out that if the conflict law of the *lex fori* should apply, that would lead to the application of the *lex fori* in most cases anyway. T. Rauscher, *Parental Responsibility Cases under the new Council Regulation “Brussels IIA”*, “The European Legal Forum” 2005/1, p. 46.

<sup>47</sup> P. McEleavy, *Luxembourg...*, p. 517.

<sup>48</sup> Statutory Instruments 2010, No. 1898, reg. 7. The text available at <https://www.legislation.gov.uk/ukxi/2010/1898/made> (access 9.10.2021).

<sup>49</sup> See Article 35 of the Belgian Code, as amended in 2014 by the law of 27 November 2013. “Loi visant à assurer la mise en oeuvre de la Convention de La Haye du 19 octobre 1996 concernant la compétence, la loi applicable, la reconnaissance, l’exécution et la coopération en matière de responsabilité parentale et de mesures de protection des enfants”. Article 35 was amended again in 2019 in terms of an explicit reference to jurisdiction determined by national norms, as will be discussed further. The previous, original version of the Code of 2004 contained national rules providing for jurisdiction of Belgian courts based alternatively on child’s habitual residence in Belgium, Belgian nationality or derived jurisdiction from matrimonial matters (Article 33 of the Code adopted in 2004). The applicable law was, in principle, the law of the State of the child’s habitual residence, with the possibility of applying either *lex patris* or Belgian law as subsidiary statutes (Article 35 of the Code adopted in 2004).

respect of (...) applicable law”, and to promote purposes of the 1996 Hague Convention. Such an interpretation allows the authorities of the 1996 Hague Convention Contracting States to apply their own law that they know best<sup>50</sup>. “The Practical Handbook on the Operation of the 1996 Hague Child Protection Convention” refers explicitly to Brussels II bis Regulation as an agreement that contains rules regarding jurisdiction and which was concluded by the 1996 Hague Convention Contracting States (i.e. Member States of the EU, excluding Denmark) under Article 52(2) of the 1996 Hague Convention. However, a purposive interpretation has its limits. The rules on applicable law contained in the 1996 Hague Convention should apply to children habitually resident in an EU Member State<sup>51</sup> and the application of Article 15 of the 1996 Hague Convention is accepted if the ground of jurisdiction under the rules of this other instrument (the Brussels II bis Regulation) exists in Chapter II of the 1996 Hague Convention<sup>52</sup>. Following this approach, the German courts have adopted the test of hypothetical jurisdiction under the provisions of the 1996 Hague Convention<sup>53</sup>.

In the Polish doctrine, such a solution was at the time advocated by Piotr Mostowik, who also presented, from the Polish perspective, “backup” variants of applying conflict-of-law rules of the 1996 Hague Convention based on the provisions of the Private International Law Act of 2011<sup>54</sup> which will be discussed later on below.

The interpretation adopted by the Permanent Bureau means that the court exercising its jurisdiction based on the Brussels II bis Regulation should compare the ground of jurisdiction in both those acts. It should be noted that these rules differ, e.g. in the case of prorogation of the jurisdiction where the child is habitually resident in a third state.

### 3.3. Evolution of interpretation and solutions adopted in Brussels II ter

Legislative work on the Brussels II ter Regulation provided an opportunity to fill that legislative gap. The introduction of its own regime of conflict-of-law rules was not considered. What was discussed was how to regulate the reference to the conflict-of-law rules

<sup>50</sup> *The Practical Handbook on the Operation of the 1996 Hague Child Protection Convention* published by The Hague Conference on Private International Law Permanent Bureau in 2014, <https://assets.hcch.net/docs/eca03d40-29c6-4cc4-ae52-edad337b6b86.pdf>, p. 91, f.n. 251 (access 9.10.2021).

<sup>51</sup> *The Practical Handbook...*, p. 134, f.n. 439.

<sup>52</sup> *The Practical Handbook...*, p. 91, f.n. 251.

<sup>53</sup> See *Questionnaire concerning the practical operation of the 1996 Child Protection Convention*, Prel. Doc. No. 1 of December 2016 and Response to the Questionnaire of December 2016 by Germany, p. 4, published at <https://www.hcch.net/en/instruments/conventions/publications1/?dtid=33&cid=70> (access 9.10.2021): “Initially it was discussed whether Art. 15 (1) also encompasses authorities exercising their jurisdiction under the Brussels II bis Regulation. This question seems to be answered in the affirmative predominantly (see OLG Hamm, 2 Feb 2011, II-8 UF 98/10, 8 UF 98/10) in particular in cases where the authority in question would (hypothetically) also have jurisdiction under the 1996 Hague Convention (see OLG Karlsruhe 5 March 2013, 18 UF 298/12)”.

<sup>54</sup> Private International Law Act of 4 February 2011 (consolidated version Dz.U. of 2015, item 1792). P. Mostowik, *Władza...*, p. 167–169.

of the 1996 Hague Convention in Chapter III. As the work on the revision of Brussels II bis Regulation commenced, suggestions were made to introduce an explicit referral to the 1996 Hague Convention. One of the arguments was the desire to help judges figure out the fragmentation of rules<sup>55</sup>.

The European Commission intended to insert the reference to the conflict of laws rules of the 1996 Hague Convention into the legislative part of the Brussels II bis Recast Regulation<sup>56</sup>. Article 75(3) of the Commission Proposal stipulated that “When applying Chapter III – Applicable Law of the 1996 Hague Convention in proceedings before an authority of a Member State, the reference in Article 15(1) of that Convention to «the provisions of Chapter II» of that Convention shall be read as «the provisions of Section 2 of Chapter II of this Regulation»”. During the ensuing discussion, an even more general reference was proposed. The Permanent Bureau of the Hague Conference on Private International Law suggested the introduction of a separate chapter on the applicable law to parental responsibility using the same drafting technique as in Regulation 4/2009 on Maintenance Obligations<sup>57</sup>. With none of the proposals accepted, finally, the reference was moved from the legislative part into the recitals.

Therefore, like its predecessor, the new Brussels II ter Regulation does not contain provisions on the law applicable to parental responsibility. Following the example of the Brussels II bis Regulation, the 1996 Hague Convention is listed among the conventions that shall continue to have effect in relation to matters not governed by the new regulation (Article 98 (1) Brussels II ter ). The amendment consists of the introduction of Recital 92 indicating that rules on the law applicable are provided by the 1996 Hague Convention. Recital 92 specifies that: “The law applicable in matters of parental responsibility should be determined in accordance with the provisions of Chapter III of the 1996 Hague Convention. When applying that Convention in proceedings before a court of a Member State in which this Regulation applies, the reference in Article 15(1) of that Convention to «the provisions of Chapter II» of that Convention should be understood as referring to «the provisions of this Regulation»”.

The transfer of the reference to the preamble was determined by political and pragmatic considerations. It was feared that introducing such a provision into legislative part leading to the acquisition by the European Union of an external competence would not gain the required support of all Member States participating in the Brussels II bis Regu-

<sup>55</sup> A. Gandia Sellens, C. Camara, A. Faucon Alonso, P. Siaplaouras, *Internationally Shared Good Practices* [in:] *Planning the Future...*, eds. I. Viarengo, F.C. Villata, p. 601.

<sup>56</sup> The Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) COM/2016/0411 final – 2016/0190 (CNS).

<sup>57</sup> The Permanent Bureau of the Hague Conference on Private International Law, *The link with International Instruments & Third countries* [in:] *Recasting the Brussels IIa Regulation. Workshop 8 November 2016. Compilation of briefings for the JURI Committee*, Directorate General for Internal Policies. Policy Department C: Citizens' Rights and Constitutional Affairs. Legal affairs, 2016, [https://www.europa.europa.eu/RegData/etudes/STUD/2016/571383/IPOL\\_STU\(2016\)571383\\_EN.pdf](https://www.europa.europa.eu/RegData/etudes/STUD/2016/571383/IPOL_STU(2016)571383_EN.pdf), p. 65 (access 9.10.2021).

lation<sup>58</sup>. At the same time, the linking of external competence with the exercise of internal competence, when the latter consists in a reference to the conflict-of-law rules of an international agreement and not on establishing its own conflict of laws rules, may be controversial<sup>59</sup>. Nonetheless, the reference changed its place in the structure of finally adopted act; therefore, it is worth considering what the importance of Recital 92 of the new Brussels II ter Regulation is and whether it has brought changes to the current state of the law. The consequences of introducing a reference to the 1996 Hague Convention into the preamble of the Brussels II ter Regulation are worth presenting in the broader context of the role of recitals in EU regulations. The main role of recitals is to give reasons for the adoption of a given regulation<sup>60</sup>. The recitals are clearly separated from operative provisions (“enacting terms”). They are contained in the preamble that precedes the legislative part of the act<sup>61</sup>. The recitals do not have mandatory character<sup>62</sup> (which is reflected in their wording<sup>63</sup>) and cannot overrule a relevant operative provision.

The line of demarcation between the recitals and the enacting terms should be clear-cut. While the structure of the legislation is preserved, the nature of recitals in the new Brussels II ter Regulation varies to a great extent. The new Brussels II ter Regulation contains 98 recitals, almost as many as articles (105)<sup>64</sup>. Most of the recitals provide commentary

<sup>58</sup> A. Gandia Sellens, C. Camara, A. Faucon Alonso, P. Siaplaouras, *Internationally...*, p. 605. On the external competences of the UE see: M. Niedźwiedz, P. Mostowik, *Implications of the ECJ ‘Lugano II’ Opinion for European Union’s External Actions Concerning Private International Law*, “Yearbook of Polish European Studies” 2010/13, p. 129–148; P. Franzina, *The interplay...*, p. 183–209; E. Kamarad, *Wpływ Traktatu Lizbońskiego na unijne prawo prywatne międzynarodowe*, “Politeja” 2018/3: *Traktat Lizboński: dobre rozwiązanie w czasach kryzysów?*, p. 215–228.

<sup>59</sup> Cf. the comments of E. Pataut on the Council’s reference to Regulation No. 4/2009, including Article 15 referring to the 2007 Hague Protocol in order to justify the exercise of external competence to ratify the Hague Protocol. E. Pataut, *The External Dimension of Private International Family Law* [in:] *Private Law in the External Relations of the EU*, eds. M. Cremona, H-W. Micklitz, Oxford 2016, p. 133–114.

<sup>60</sup> Article 296, second sentence of the Treaty on the Functioning of the European Union states that “Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties” (OJ 2016 C 202, p. 175).

<sup>61</sup> See points 7.2. and 7.3. of the *Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation*, 2016, <https://op.europa.eu/en/publication-detail/-/publication/3879747d-7a3c-411b-a3a0-55c14e2ba732> (access 9.10.2021).

<sup>62</sup> As ECJ stated: “the preamble to a Community act has no binding legal force and cannot be relied on as a ground for derogating from the actual provisions of the act in question”. Judgment of the of 19 November 1998, C-162/97, Nilsson and Others, Rep. 1998 I-07477.

<sup>63</sup> See point 10.1. of the *Joint Practical Guide...*: “The «recitals» are the part of the act which contains the statement of reasons for its adoption; they are placed between the citations and the enacting terms. The statement of reasons begins with the word «whereas:» and continues with numbered points (see Guideline 11) comprising one or more complete sentences. It uses non-mandatory language and must not be capable of being confused with the enacting terms”.

<sup>64</sup> The expansion of the preamble from Recitals 33 to 57 has drawn the attention of the doctrine and sparked a discussion about the role of that part of the regulation. See P. Beaumont, L. Walker, J. Holliday, *Parental Responsibility and International Child Abduction in the proposed recast of Brussels Ila*

on individual provisions, including a description of the content of the provision and comments on the purpose, scope, and interpretation of the provision. Some recitals that are addressed to lawmakers reiterate the imperatives of the Brussels II ter Regulation<sup>65</sup> or call for legislative action<sup>66</sup>. Some recitals only organize the structure of the preamble and the flow of argument<sup>67</sup>, while others touch on important issues such as the scope of the Brussels II ter Regulation which has been of concern under its predecessor – the Brussels II bis Regulation<sup>68</sup>. There is a group of recitals that recall selectively the application of the other EU legislative acts<sup>69</sup>.

Is the Recital 92 of the Brussels II ter Regulation to be understood as an example given by the EU legislator of the relation with the 1996 Hague Convention laid down in Article 98 (“Scope of effect”)? Given its legal significance, Recital 92 of the Brussels II ter Regulation cannot in itself overcome the wording used in Article 15 of the 1996 Hague Convention<sup>70</sup>. Such a purposive interpretation can only take place based on the conflict rules of the 1996 Hague Convention. Recital 92 of the Brussels II ter Regulation is therefore rather intended to impose on the EU Member States a broad interpretation of the conflict-of-law rules of the 1996 Hague Convention and to cover matters of parental responsibility whenever a court of a Member State exercises jurisdiction based on the new Brussels II ter Regulation, including those departing from the 1996 Hague Convention rules (e.g. a possible choice of the court of a Member State when the child is habitually resident in a third State – Article 10 of the Brussels II ter Regulation).

The initially planned reference in the legislative part would bring greater legal certainty, but its consequences would be different from the reference in Article 15 of Regulation 4/2009. The similarity would end with the wording. Since 1 August 2013, the date of entry into force of the Hague Protocol, the conflict-of-law rules contained therein have been applied in the Member States by virtue of the EU’s accession to the Protocol. *Nota*

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*Regulation and the effect of Brexit on future child abduction proceedings*, 2016, available at: [http://www.abdn.ac.uk/law/documents/CPII\\_Working\\_Paper\\_No\\_2016\\_6\\_revised.pdf](http://www.abdn.ac.uk/law/documents/CPII_Working_Paper_No_2016_6_revised.pdf), p. 14–15 (access 9.10.2021).

<sup>65</sup> Recital 72.

<sup>66</sup> Recitals 41 and 42.

<sup>67</sup> Recitals 12 and 40.

<sup>68</sup> Recital 9.

<sup>69</sup> Recital 10 evokes Regulation (EU) No. 1215/2012 of the European Parliament and of the Council that governs measures relating to the child’s property which do not concern the protection of the child. Recital 13 points to the Council Regulation (EC) No. 4/2009 that covers maintenance obligations. Recital 36 recalls the application of the Regulation (EC) No. 1393/2007 of the European Parliament and of the Council to the service of documents in proceedings instituted pursuant to Regulation. Recital 91 recalls the application of Article 351 of TFEU for agreements with one or more third States concluded by a Member State before the date of its accession to the Union. Those Recitals are purely informative.

<sup>70</sup> Cf. M.C. Baruffi, *The 1996 Convention on the Protection of Children* [in:] *Planning the Future...*, eds. I. Viarengo, F.C. Villata, p. 263. The Author observes that Recital 92 “(...) bridges the gap existing in the Regulation” and that “This clarification is considered necessary to overcome the wording of Article 15 of the Hague Convention (...)”.

*bene*, the solution adopted by the EU to ensure the application of the Hague Protocol's conflict-of-law rules for a two-year period between the date of application of the Regulation (i.e. 18 June 2011) and the date of entry into force of the Protocol (which occurred on 1 August 2013), is an example of "non-standard" solutions, reasonable but legally questionable<sup>71</sup>. The reference in the legislative part would ensure that the conflict of laws rules in the 1996 Hague Convention would apply also in the jurisdictional regime of the new Brussels II ter Regulation. However, not being a party to the 1996 Hague Convention, the EU could theoretically change this reference and establish its own conflict of law rules<sup>72</sup>.

As the legislative part of the reference was withdrawn, the Member States have retained the competence to establish conflict-of-law rules in matters of parental responsibility. Recital 92 of the Brussels II ter Regulation will certainly have an impact on the practice of the courts in the EU Member States. When exercising jurisdiction under the Brussels II ter Regulation, the courts will determine the law applicable based on the 1996 Hague Convention, without comparing whether the ground of jurisdiction in the case at hand has an equivalent in the 1996 Hague Convention. This requires that the conflict of law rules in the 1996 Hague Convention were to be made independent of the situational scope of the 1996 Hague Convention as determined by the 1996 Hague Convention grounds of jurisdiction. While this applies to a narrow category of cases, it may affect the 1996 Hague Convention's coherent regime. The *forum* and *ius* links in Article 15 of the 1996 Hague Convention were based on the assumption that jurisdiction would be exercised primarily at the place of the child's habitual residence. The objective has been further supported by the rejection of the principle of *perpetuatio fori*.

While the solution adopted in the new Brussels II ter Regulation can be criticized from a legal point of view, the motives of the EU legislator, i.e. ensuring the application of uniform conflict-of-law rules in Member States, are justified. The consequence of the assumption that the conflict-of-law rules of the 1996 Hague Convention do not apply to the part of the cases dealt with by the Member States based on the jurisdiction rules of the Brussels II ter Regulation would mean that the recourse to national conflict-of-law rules is necessary. The same applies to the cases which do not fall within the situational scope of the Brussels II ter Regulation and the 1996 Hague Convention jurisdictional rules, but a court of a Member State has jurisdiction based on national rules.

<sup>71</sup> See the EU Declaration made in the process of approval the Hague Protocol, available at: <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1065&disp=resdn> (access 4.11.2021).

<sup>72</sup> P. Franzina considered the case of a reference in EU law to the Hague Convention of 13 January 2000 on the International Protection of Adults. This convention is also available only to states. As a result of the reference in EU legislation to the text of the Convention, the provisions of the Convention would be applied in the Member States in the same way as in the other Convention States. However, the effect of the legislative referral does not correspond to the effect of binding as a result of EU accession to the Convention. The European legislator retains the freedom to amend the rules of origin of the Convention. On the other hand, the EU does not have the influence on relations with third countries that it would have as a party to the Convention. P. Franzina, *The interplay...*, p. 196–197.

In order to ensure the uniform treatment of family relationships subject to their jurisdiction some legislators have previously decided to introduce provisions designed to lead to the application of the 1996 Hague Convention conflict-of-law rules in all cases heard by courts of the country concerned. These include the Polish legislator. According to the provision of Article 56(1) of the Polish Private International Law Act, the law applicable to matters of parental responsibility is determined by the 1996 Hague Convention<sup>73</sup>. The Polish doctrine advocates for purposive interpretation of Article 15 (1) of the 1996 Hague Convention and its direct application for cases in which jurisdiction is based on the Brussels II bis Regulation<sup>74</sup>. Justification is provided by the objectives of the Convention including determination “which law is to be applied by such authorities in exercising their jurisdiction” and “the law applicable to parental responsibility” (Article 1(b)(c) of the 1996 Hague Convention) and the uniform treatment of cases heard by the courts of the Contracting States<sup>75</sup>. Assuming such an interpretation, one would have to conclude that the provisions of Article 56(1) of the Polish Act are merely informative. If, on the other hand, a broad interpretation of Article 15(1) of the 1996 Hague Convention were to be challenged, it was proposed to treat the provision of Article 56(1) of the Polish Act of 2011 as having a normative character<sup>76</sup>. The same was proposed for cases, in which a Polish court has jurisdiction pursuant to national provisions (in practice based on the child and applicant’s nationality – Article 1106<sup>3</sup>(2) of the Polish Code of Civil Procedure)<sup>77</sup>. Otherwise, it would be necessary to refer to the conflict-of-laws rule in Article 67 of the Polish Act of 2011 which provides, in the absence of an indication of the law, for the application of the law to which a given situation is most closely connected. However, it should be assumed that the Polish legislator has abandoned its own conflict of laws rules, so that in cases before Polish courts the conflict of laws rules of the 1996 Convention apply<sup>78</sup>.

<sup>73</sup> The norms of bilateral conventions that take precedence over the Hague Convention and the Polish Act of 2011 are outside the scope of consideration of this publication. See comments by P. Mostowik on the necessity to analyze the material scope and situational range of particular relations of bilateral agreements, the 1996 Hague Convention and for the purposes of jurisdiction also UE law. P. Mostowik, *Władza...*, p. 352–359.

<sup>74</sup> P. Mostowik [in:] *Prawo prywatne międzynarodowe. Komentarz*, ed. J. Poczobut, Warszawa 2017, p. 870–871; P. Twardoch, *Konwencja o jurysdykcji, prawie właściwym, uznawaniu, wykonywaniu i współpracy w zakresie odpowiedzialności rodzicielskiej oraz środków ochrony dzieci. Komentarz* [in:] *Prawo prywatne międzynarodowe. Komentarz*, ed. M. Pazdan, Warszawa 2018, commentary on article 15.

<sup>75</sup> P. Mostowik [in:] *Prawo prywatne...*, ed. J. Poczobut, p. 870–871.

<sup>76</sup> P. Mostowik, *Władza...*, p. 165–169.

<sup>77</sup> Polish Code of Civil Procedure of 17 November 1964 (consolidated version Dz.U. 2021, item 1805 as amended). M. Wojewoda, *Jurysdykcja krajowa i prawo właściwe w sprawach dotyczących stosunków między rodzicami a dziećmi – studium przypadku w relacjach Polska–USA*, “Europejski Przegląd Sądowy” 2018/4, p. 29–32.

<sup>78</sup> Unless a bilateral agreement takes precedence.

The Polish courts hearing a parental responsibility case will therefore always determine the applicable law based on the 1996 Hague Convention. It is worth noting that Brussels II ter Regulation will take over some cases falling under the rules of national jurisdiction. The Brussels II ter Regulation introduces a link between the jurisdiction of a court of a Member State and the child's nationality of that state, once the parties to the proceedings choose the court or accept its jurisdiction (with the consent of all holders of parental responsibility) and this is in the best interests of the child (Article 10 Brussels II ter Regulation).

By way of comparison, a reference may be made to the provisions of the Belgian Code of Private International Law, which expressly links the application of the conflict-of-law rules of the 1996 Hague Convention to cases governed by European and national rules of jurisdiction. The amendments were introduced in 2019<sup>79</sup>. The law expressly states that jurisdiction is based on the Brussels II bis Regulation, and, where it does not apply, based on the 1996 Hague Convention. The Belgian Code of Private International Law also provides for its own jurisdictional norms. As is clear from Article 33 paragraph 2 of the Belgian Code of Private International Law, in cases not covered by the Brussels II bis Regulation or the 1996 Hague Convention, the Belgian courts shall have jurisdiction according to general provisions of the Code, taking into account the interests of the child, i.a. if the child is a Belgian national<sup>80</sup>. As regards the applicable law, the new provision of Article 35 paragraph 1 of the Belgian Code of Private International Law explicitly provides for the application of the 1996 Hague Convention when the international jurisdiction is based on the provisions of the Brussels II bis Regulation or the provisions of the Belgian Code.

For the EU Member States where national legislation refers to the 1996 Hague Convention, it is not the designation of the applicable law that is problematic, but the determination of the basis for the application of the 1996 Hague Convention: either

<sup>79</sup> By the Act on Implementation of the Hague Convention of 13 January 2000 on the International Protection of Adults: Loi du 10 Mars 2019 *de mise en oeuvre de la Convention de La Haye du 13 janvier 2000 sur la protection internationale des adultes*. Amendments have entered into force on 1 January 2021 (Article 28 of the Act). As indicated in the explanatory rapport, the Act took the opportunity to reform the various rules on conflict of laws and international jurisdiction contained in the part of the Code of Private International Law devoted to incapacity, so that the whole part would be consistent. This should make it easier for legal practitioners to determine in which cases and under which conditions the rules contained in an international private international law instrument or those contained in the Code of Private International Law should be applied. See Chambre des Représentants de Belgique, 22 février 2019, *Projet de loi de mise en oeuvre de la Convention de La Haye du 13 janvier 2000 sur la protection internationale des adultes. Rapport fait au nom de la Commission de la Justice par M. Stefaan Van Hecke*, DOC 54 3422/003, p. 5. Rapport available at <https://www.lachambre.be/FLWB/PDF/54/3422/54K3422003.pdf> (access 9.10.2021).

<sup>80</sup> The previous original version of the Code of 2004 contained rules providing for jurisdiction of Belgian courts based alternatively on child's habitual residence in Belgium, Belgian nationality or derived jurisdiction from matrimonial matters (Article 33 of the Code adopted in 2004). The Belgian legislator has therefore removed from the Code those grounds that have lost their relevance in favor of the provisions of the Brussels II bis Regulation.

directly or through national rules. The distinction between situations where the rules of the 1996 Hague Convention are directly applicable and those where the intermediation of national law is needed is important from the point of view of the possibility of amending the referral or establishing conflict-of-law rules which are only possible for national legislators for these matters where the 1996 Hague Convention would apply indirectly<sup>81</sup>.

The consequence of adopting – at the 1996 Hague Convention level – a broad scope of application of the conflict-of-law rules themselves, i.e. in isolation from the jurisdictional basis for the purposes of the Member States, would raise questions concerning the interpretation of this kind for cases where jurisdiction is based on national rules by EU and non-EU Contracting States.

Since the new Brussels II ter Regulation did not in any way incorporate the 1996 Hague Convention's conflict-of-law rules, it is difficult to speak of a legal change with regard to the legal situation under the Brussels II bis Regulation. In so far it is possible to speak of an interpretation well established by the 1996 Hague Convention which allows recourse to its conflict-of-law rules in cases in which jurisdiction is founded on EU regulation, provided that the ground of jurisdiction has an equivalent in the 1996 Hague Convention. The purpose of the Recital 92 is to promote a broad interpretation of Article 15(1) and to remove uncertainty regarding the direct applicability of the 1996 Hague Convention to the category of cases in which the ground of jurisdiction deviates from those contained in the 1996 Hague Convention. Although, in such cases the 1996 Hague Convention's objectives behind the indication of the *lex fori* in its Article 15 may be distorted. A solution may be to make use of the possibility provided for in Article 15(2) of the 1996 Hague Convention and to apply for example the law of the child's habitual residence as the law of another state with which the situation has a substantial connection, which may facilitate the subsequent enforcement of the judgment<sup>82</sup>.

Without doubt, the guideline, although hidden in the voluminous preamble, will draw attention of the courts to the need to analyze the conflict of law rules concerning the issue of parental responsibility. The case-law of the courts of the Member States shows that the courts have problems delimiting the spheres of application of the 1996 Hague Convention and the Brussels II bis Regulation not only at the level of establishing jurisdiction, but also at the level of conflict-of-law rules, between the 1996 Hague Convention and national law. With respect to parental responsibility, in particular when it is considered during a divorce case, courts happen not to apply the conflict-of-law rules at all<sup>83</sup>.

<sup>81</sup> On the issue of the extension of the scope of application of an international agreement by the national law see M. Czepelak, *Umowa międzynarodowa jako źródło prawa prywatnego międzynarodowego*, Warszawa 2008, p. 148–153.

<sup>82</sup> P. Mostowik [in:] *Prawo prywatne...*, ed. J. Poczobut, p. 871–872.

<sup>83</sup> See case law review by Eufams II Consortium, *Eufams II. Facilitating cross-border family life: towards a common European understanding. Comparative report on national case law*, 11 February 2020, available at: <http://www2.ipr.uni-heidelberg.de/eufams/indexDateien/microsites/download.php?art=projektbericht&cid=20> (access 9.10.2021).

#### 4. Conclusions

The new Brussels II ter Regulation clarifies and organizes the relationship with the 1996 Hague Convention in a more pragmatic way and in line with the requirements of practice. At the level of jurisdictional rules, the new Brussels II ter Regulation attempts to reconcile the spheres of application of both instruments by allowing recourse to the provisions of the 1996 Hague Convention also in situations where the child is habitually resident in an EU Member State.

Given that the Brussels II ter Regulation does not contain rules on law applicable in matters of parental responsibility, the 1996 Hague Convention remains the main multi-lateral source of law for the EU Member States. In the absence of the prospect of introducing conflict-of-law rules into the Brussels II ter Regulation or revising the 1996 Hague Convention, the legislator “stretches” the scope of application of the Convention by influencing judicial practice and purposive interpretation of the conflict-of-laws rules of the Convention. Such action is understandable in order to achieve uniformity and predictability of the designation of the law in any case in which a court of an EU Member State would have jurisdiction based on the Brussels II ter Regulation.

#### Abstrakt

***Rozporządzenie Bruksela II ter i Konwencja haska z 1996 r. a ochrona dzieci – wzajemne oddziaływanie systemu europejskiego i haskiego w sprawach dotyczących odpowiedzialności rodzicielskiej***

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*Artykuł omawia kwestię stosowania norm kolizyjnych zawartych w konwencji haskiej z 1996 r. o jurysdykcji, prawie właściwym, uznawaniu, wykonywaniu i współpracy w zakresie odpowiedzialności rodzicielskiej oraz środków ochrony dzieci w sprawach dotyczących odpowiedzialności rodzicielskiej rozpoznawanych przez sądy państw członkowskich UE w sytuacji, gdy jurysdykcja jest oparta o przepisy rozporządzenia unijnego. Zagadnienie to zostało omówione w kontekście relacji konwencji haskiej z 1996 r. i nowego rozporządzenia Bruksela II ter (rozporządzenie Rady (UE) 2019/1111 z 25.06.2019 r. w sprawie jurysdykcji, uznawania i wykonywania orzeczeń w sprawach małżeńskich i w sprawach dotyczących odpowiedzialności rodzicielskiej oraz w sprawie uprowadzenia dziecka za granicę), w tym rozgraniczenia zastosowania norm jurysdykcyjnych konwencji i rozporządzenia. W nowym rozporządzeniu starano się zaradzić problemom, które pojawiły się w tym względzie na tle stosowania rozporządzenia Bruksela II bis.*

**Słowa kluczowe:** Rozporządzenie Bruksela II bis (wersja przekształcona), Konwencja haska z 1996 r., zakres stosowania, odpowiedzialność rodzicielska, prawo właściwe

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