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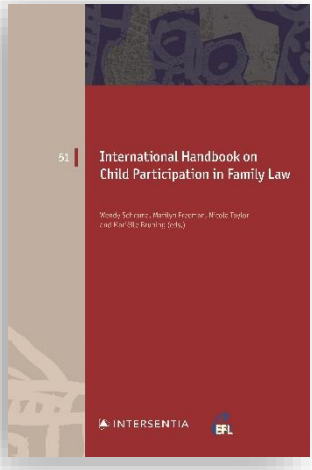

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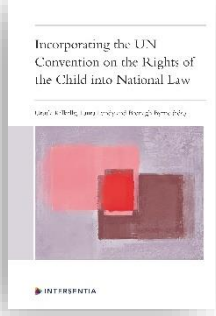

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THE HAGUE CONVENTIONS AND EU INSTRUMENTS IN PRIVATE INTERNATIONAL LAW

Thalia Kruger and Francesca Maoli*

1. INTRODUCTION

In this chapter, we will explain the role of private international law instruments in seeking to ensure children's right to participation.

* This chapter is the result of a collaboration between both authors. Sections 2.2 and 2.3 are attributed to Thalia Kruger and sections 2.1, 3.1 and 3.2 are attributed to Francesca Maoli. The introduction and the conclusions are attributed to both authors. The authors wish to acknowledge their colleagues, with whom they participated in an EU-co-funded research project, VOICE: Laura Carpaneto and Giovanni Sciaccaluga (University of Genoa) and Sara Lembrechts, Tine Van Hof and Wouter Vandenhole (University of Antwerp). Many of the ideas in this chapter have been developed from our common research and conversations.

Private international law instruments most often do not impose direct duties to hear the child or do not address the opportunity or the methods for child participation in judicial proceedings. This branch of law addresses four issues: which court has jurisdiction to hear disputes linked to two or more legal systems, what the applicable law is, what the conditions for the recognition and enforcement of foreign judgments are, and how authorities can cooperate across borders to solve disputes between individuals. In other words, private international law comprises road signs pointing the way to the legal system within which a certain case should be settled, not detailed traffic rules. Therefore, how children should participate in proceedings is generally a matter for national procedural law.

The fundamental rights of the child must be respected in all actions concerning the child, transnational cases included. This includes children's right to participate in all proceedings concerning them. In this context, the borders between private international law and human rights law are slowly fading, in the sense that the second influences the functioning of the first.

Supranational legislators of private international law are not blind to the importance of child participation, especially when their instruments have as a fundamental objective the protection of the best interests of the child. As will become apparent in this chapter, legislation on private international law more and more frequently makes explicit reference to the protection of the fundamental rights of the child as a primary concern and (at the same time) as a principle inspiring the interpretation and application of its rules.

In this chapter we identify indirect duties and careful nudges by supranational legislators to better respect children's right to participation. This includes explaining the role of private international law instruments like the 1980 Hague Convention on the Civil Aspects of International Child Abduction, the 1996 Hague Child Protection Convention, the Brussels II*bis* and *ter* Regulations and maintenance conventions and Regulation.

2. CHILD PROTECTION

2.1. 1980 HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

One of the areas in which the issue of child participation has emerged is international child abduction, a phenomenon that has become one of the most important concerns for public institutions since the second half of the 20th century.[1] The 1980 Hague Convention on the Civil Aspects of International

[1] L. Silberman, 'Co-Operative Efforts in Private International Law on Behalf of Children: The Hague Children's Conventions' (2006) 323 *Recueil des cours/Académie de droit international de la Haye* 261, 300.

Child Abduction (HCCA)[2] represents one of the oldest instruments adopted in the field of children's protection at the international level, predating by a few years the 1989 United Nations Convention on the Rights of the Child (UNCRC).[3] The 1980 Hague Convention has been, and continues to be, a great success. It is now in force in 101 states and still gaining adherents.[4] As concerns child participation, the approach of the Convention will be examined, taking into account the evolution in the interpretation of the original text due to the obligations arising from Article 12 UNCRC and to the influence of the case law of the European Court of Human Rights (ECtHR).

The Convention takes a unique approach to the problem of international child abduction,[5] providing – as a general rule – for the immediate return of the child to the state of habitual residence. At the same time, the Convention also gives relevance to the voice of the child in these proceedings, although in a limited and indirect way (section 2.1.1 below). Moreover, the legal framework of the Convention has to be interpreted in light of the evolutions in human rights law over the years, with particular reference to Article 12 UNCRC and the case law of the ECtHR. These evolutions (discussed in section 2.1.2 below) include the obligation to give the child the opportunity to be heard gradually becoming a principle of universal application:[6] reference is made here to the widespread ratification of the UNCRC (although with the notable exception of the United States), which makes it the most successful human rights treaty in the world. If courts apply the legal frameworks coherently, the desired result of child participation can be reached (section 2.1.3).

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2 Hague Convention of 25 October 1980 on civil aspects of international child abduction, http://www.hcch.net. For a complete and in-depth analysis of the Convention, see P.R. Beaumont and P.E. McEleavy, *The Hague Convention on International Child Abduction*, Oxford University Press, Oxford 1999; R. Schuz, *The Hague Child Abduction Convention: A Critical Analysis*, Hart Publishing, Oxford 2013. On the topic see also C. Gonzalez Beilfuss, 'Child Abduction' in J. Basedow et al., *Encyclopedia of Private International Law*, Edward Elgar Publishing, Cheltenham 2017, pp. 297–304; M. Freeman, 'International Child Abduction: Is It All Back to Normal Once the Child Returns Home?' (2001) *International Family Law* 39; M. Freeman, 'International Family Mobility: Relocation and Abduction: Links and Lessons' (2013) *International Family Law* 41; T. Kruger, *International Child Abduction – The Inadequacies of the Law*, Hart Publishing, Oxford 2011; S. Vigers, *Mediating international child abduction cases: the Hague Convention*, Hart Publishing, Oxford 2011.

3 United Nations Convention on the Rights of the Child, New York, 20 November 1989.

4 The updated status table of the Convention is available at: http://www.hcch.net.

5 L. Silberman, above n. 1, pp. 308, 465; W. Duncan, 'Conclusions on the Globalization of Child Law and the Role of the Hague Conventions' in S. Detrick and P. Vlaardingerbroek (eds.), *Globalization of Child Law: The Role of the Hague Conventions*, Martinus Nijhoff Publishers, The Hague 1999, p. 90.

6 In the words of Lady Hale in the House of Lords' decision *Re D (A Child) (Abductions: Rights of Custody)* [2006] UKHL 51, at [58]. See H. Stalford and K. Hollingsworth, 'Towards a Children's Rights-Based Approach to Judging Child's Objections Cases' (2018) *The Judge's Newsletter on International Child Protection* 50.

2.1.1. The HCCA's Provisions and Child Participation

The summary return mechanism established by the Hague Convention has the aim of preventing and discouraging the removal or retention of a child under the age of 16 when this is wrongful as a result of the violation of rights of custody.[7] In the spirit of the Convention, the best interests of the child wrongfully removed or retained are better served through the prompt return to their country of habitual residence, considered as the place in which the child has settled and has their social and family ties.[8] The general rule of immediate return is subject to a limited number of exceptions.[9] The authorities of the state in which the child has been wrongfully conducted may refuse to order the return when: (i) more than one year has elapsed between the date of the abduction and the initiation of proceedings (Art. 12(1) HCCA); (ii) the child is settled in their new environment (Art. 12(2) HCCA); (iii) custody rights were not exercised at the time of the abduction and the abduction was consented to or acquiesced in (Art. 13(1)(a) HCCA); (iv) there is a grave risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation (Art. 13(1)(b) HCCA); (v) the child objects to return and has attained an age and maturity at which it is appropriate to take these views into account (Art. 13(2) HCCA); or (vi) return would not be permitted by the protection of human rights and fundamental freedoms (Art. 20 HCCA).

The exception laid down by Article 13(2) is relevant for the scope of the current chapter[10] and will be discussed further. The first element that the court has to consider is whether the child has expressed an objection to return. It is interesting to note that the HCCA does not oblige courts to hear the child or even to investigate whether the child objects. It must merely take into account an objection of which it is aware. It can become aware of the objection through statements made by the parties or by the child themselves. The Convention in itself thus does not greatly enhance child participation.

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7 Art. 3 of the 1980 Hague Convention.

8 On the concept of habitual residence T. Kruger, 'Habitual Residence: The Factors that Courts Consider' in P. Beaumont, M. Danov, K. Trimmings and B. Yüksel (eds.), *Cross-border litigation in Europe*, Hart Publishing, Oxford 2017, pp. 741 ff.; A. Fiorini, 'The Protection of the Best Interests of Migrant Children Through Private International Law and Habitual Residence', in F. Ippolito and G. Biagioni (eds.), *Migrant Children: Challenges for Public and Private International Law*, Editoriale Scientifica, Napoli 2016, pp. 379 ff.; E. Di Napoli, 'A place called home: Il principio di territorialità e la localizzazione dei rapporti familiari nel diritto internazionale privato post-moderno' (2013) *Rivista di Diritto Internazionale Privato e Processuale* 899, 907; R. Lamont, 'Habitual Residence and Brussels IIbis: Developing Concepts for European Private International Family Law' (2007) *Journal of Private International Law* 261.

9 Laid down in Arts. 12(2), 13 and 20.

10 See R. Schuz, above n. 2, p. 317; L.D. Elrod, '"Please Let Me Stay": Hearing the Voice of the Child in Hague Abduction Cases' (2011) 63 *Oklahoma Law Review* 663.

This ground for refusal applies when the child has attained an age and degree of maturity at which it is appropriate to take into account their views. Therefore, the second element that needs the attention of the court is the assessment of age and maturity. The Convention does not provide for a minimum age threshold[11] and does not give further indications on how to conduct the assessment. Therefore, the age and maturity test depends on the domestic law of each court considered and on the approach of the judge regarding the application of these parameters. Several studies have highlighted different approaches by courts according to the geographical area, the culture and the individual perception.[12]

As a third element in the decision-making process, even when it has been established that the child is of an age and degree of maturity at which it is appropriate to take account of their views, the court still has a certain degree of discretion regarding whether to order the return. Therefore, the child's objection does not automatically result in a rejection of the return application. In origin, this approach was perfectly integrated into the overall objectives and structure of the Convention. The ground for refusal on the basis of the objection by the child was inspired mainly by pragmatism and in order to avoid the return of children of 14 or 15 years old against their will.[13] However, the objection should now be seen in a context where the child's views have assumed a central role in the assessment of their best interests, including in return proceedings. Even if the latter are not concerned with the merits of custody rights – and do not have to take a final decision on the future of the child in respect of their best interests – the valorisation of the best interests principle within return proceedings has resulted in a more respectful consideration of the child's opinion. Thus, in exercising its discretion, the court should find a balance between the strict application of the ground for non-return and respect for the child's right to be heard, which does not imply that the opinion of the child should always be followed by the judge, but merely that the child's views should be carefully evaluated.

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11 Due to the impossibility of establishing an age that could be valid in every situation: see E. Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention*, 1982, https://assets.hcch.net/docs/a5fb103c-2ceb-4d17-87e3-a7528a0d368c.pdf, para. 30. Indeed, the practice of courts in different countries concerning the hearing of children in general also shows that a common solution in this regard is unlikely to be found, it being understood that, when it comes to children, a case-by-case assessment is desirable.

12 R. Schuz, above n. 2, p. 349. For an extensive analysis of the topic, concerning 17 countries, see the research carried out by L. Carpaneto, T. Kruger, W. Vandenhole, F. Maoli, S. Lembrechts, G. Sciaccaluga and T. Van Hof, within the EU-co-funded project VOICE, 'The VOICE of the child in international child abduction proceedings in Europe', JUST-AG-2016/JUST-AG-2016-02/764206. The research report (2018) can be consulted at: https://repository.uantwerpen.be/docman/irua/b0c972/157267.pdf See also H. Stalford, K. Hollingsworth and S. Gilmore, *Rewriting Children's Rights Judgments – From Academic Vision to New Practice*, Hart Publishing, Oxford 2017.

13 E. Pérez-Vera, above n. 11, §30.

Indeed, research has shown a wide divergence in the decisions of judges in refusing return orders on the basis of the child's objection. Firstly, the exception seems to be applied less frequently than the other grounds for non-return: as highlighted by Lowe and Stephens, among the decisions of non-return adopted in 2015, only 15% of applications were based on the child's objection under Article 13(2) of the Convention.[14] Even if the application of the provision at hand depends to a large extent on the age and maturity of the children involved and on the factual background of each individual case, this data may indicate that (i) judges are reluctant to hear children, (ii) children are heard but their objections are not taken in to account, or (iii) the children do not object to return. Moreover, different approaches among judges have been highlighted in terms of how to consider the weight which should be given to the child's views,[15] and of the role of the latter in interpreting the best interests of children involved in abduction procedures:[16] these considerations do not necessarily result in a negative impact on the situation of children, but may be an indicator of the inconsistent application of Article 13(2) of the Convention and of the principles enshrined in Article 12 UNCRC.

2.1.2. The HCCA under the Influence of Children's and Human Rights Law

Underlying the ground for refusal based on the child's objection, one can read a concern that the opinion of the child should be given due weight in accordance with their age and maturity.[17] Those proceedings are linked to the fundamental right of the child to be heard, as stated by Article 12 UNCRC and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

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14 See N. Lowe and V. Stephens, *A statistical analysis of applications made in 2015 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Global report*, Prel. Doc. No 11 A of September 2017 – Part I, 3, 15, available on the official website of the Hague Conference on Private International Law: http://hcch.net. According to the research, 'In 2015, 243 applications ended in a judicial refusal. Some cases were refused for more than one reason and if all reasons are combined, the most frequently relied upon ground for refusal was Article 13(1)(b) (47 applications, 25%) and the child not being habitually resident in the Requested State (46 applications, 25%). Article 12 was a reason for refusal in 32 applications (17%) and the child's objections in 27 applications (15%).'

15 On this topic see the research of N.J. Taylor and M. Freeman, 'Outcomes for objecting children under the 1980 Hague Convention on the Civil Aspects of International Child Abduction' (2018) XXII(Summer-Fall) *The Judges' Newsletter* (Special Focus: The Child's Voice – 16 Years Later) 8–12.

16 See L. Carpaneto et al., above n. 12.

17 T. Kruger, above n. 2, p. 36; B. Ubertazzi, 'The Hearing of the Child in the Brussels IIa Regulation and its Recast Proposal' (2017) *Journal of Private International Law* 568, 583.

This is increasingly recognised by the (national and international) case law and the legal literature.[18]

The child's participation has a greater relevance than only assessing whether they actually object to returning. Their views may be relevant even if they do not object. They can help the court to determine their habitual residence or to verify the preconditions for the application of other grounds for non-return.[19] For instance, by talking to the child, a judge may be able to better assess whether the child would face a risk if returned. In addition, there might be beneficial effects that the hearing has on the child, and the corresponding harm that may result from excluding the child from participation, as revealed by recent research.[20]

In the EU, Article 24 of the Charter of Fundamental Rights (Charter)[21] echoes the UNCRC's participation right for children. The Charter applies when national courts or EU institutions have to apply EU law.[22] The HCCA has been drawn into EU law by the fact that the EU legislated on the matter (see the discussion of Brussels II*bis* in section 2.3.1 below).[23] Thus, when courts in EU Member States apply the HCCA, they have to also respect the Charter.

A different but equally relevant issue is the interaction with Article 8 ECHR and how it is interpreted by the ECtHR. The obligation to hear the child in return proceedings under the 1980 Hague Convention has become even more stringent in light of the different understanding of such proceedings by the ECtHR. Assessing alleged violations under Article 8 ECHR, the Court has required judicial authorities to conduct an effective examination of the situation of the child involved in each particular case, in order to also take into account the child's best interests in the context of return proceedings.[24]

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18 UN Committee on the Rights of the Child, *General Comment No. 12: The Right of the Child to be Heard*, CRC/C/GC/12, 20 July 2009, https://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf, §32.

19 See e.g. *Re LC (Children)* [2014] UKSC 1; Italian Corte di cassazione, sez. I, 5 December 2017, no. 29118.

20 On this topic see the contribution by D.J.H. Smeets and S. Rap in this Handbook.

21 The Charter entered into force on 1 December 2009, as part of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, *OJ C* 306, 17 December 2007, 1.

22 This limitation is expressed in Art. 51 of the Charter.

23 See CJEU Opinion 2/13 of 14 October 2014, ECLI:EU:C:2014:2303.

24 The ECtHR in *Neulinger and Shuruk v Switzerland* [GC] (Appl. No. 41615/07), 6 July 2010, favoured an in-depth analysis of the child's best interests. This approach has been nuanced in *X v Latvia* [GC] (Appl. No. 27853/09), 26 November 2013, where the ECtHR explained how the best interests analysis can be done in the return procedure, even though this procedure

2.1.3. Coherent Interpretation of the HCCA and Children's and Human Rights Instruments

While Article 13(2) of the Hague Child Abduction Convention applies where the child objects to return and it prescribes the conditions under which the judge may take into account (but not necessarily follow) the child's views, Article 12 UNCRC states the general duty for the court to give, on its own initiative, the child the opportunity to be heard and explains how to take into consideration the child's perspective.[25]

Hearing the child – as well as the necessary procedural guarantees – may be difficult in the context of child abduction proceedings, where the court has to act expeditiously and must take a decision on (non-)return within six weeks.[26] Moreover, the court must refrain from entering into the merits of the case, as the court of the habitual residence of the child will decide on this.[27] Therefore, a tension may arise between the summary nature of return proceedings and the child's right to participate. How the judiciary deals with this tension varies significantly between states.[28]

The human rights standards that national courts must follow in addressing child abduction cases, as well as the duty to find a solution that is respectful of the child's best interests in each case, implies that the obligation to hear the child has become even more stringent and advisable, as underlined by the ECtHR itself in more recent judgments.[29] This is in line with the duty under the UNCRC.

In conclusion, we are of the view that a coherent interpretation of the HCCA with the UNCRC and, in the states where they apply, with the ECHR and the EU's Charter[30] guarantees children's participation rights. If all applicable legal

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does not relate to the merits. On the topic P. McEleavy, 'The European Court of Human Rights and the Hague Child Abduction Convention: Prioritising Return or Reflection?' (2015) 62 *Netherlands International Law Review* 365; P. Beaumont, K. Trimmings, L. Walker and J. Holliday, 'Child Abduction: Recent Jurisprudence of the European Court of Human Rights' (2015) *International and Comparative Law Quarterly* 39.

25 On Art. 12 UNCRC and on child participation in other international human rights instruments see the contribution by M. Bruning and C. Mol in this Handbook. On the importance of the child's participation and views in international abduction proceedings, see also J. Tobin, N. Lowe and E. Luke, 'Article 11' in J. Tobin (ed.), *The UN Convention on the Rights of the Child: A Commentary*, Oxford University Press, Oxford 2019, p. 385; E. Sthoeger, 'International child abduction and children's rights: two means to the same end' (2011) *Michigan Journal of International Law* 511, 528; L.D Elrod, above n. 10; R. Schuz, 'The Hague Child Abduction Convention and Children's Rights' (2002) 12(2) *Transnational Law and Contemporary Problems* 393, 422–423.

26 Arts. 2 and 11 of the 1980 Hague Convention.

27 E. Pérez-Vera, above n. 11, §16.

28 L. Carpaneto et al., above n. 12, p. 86.

29 ECtHR *MK v Greece* (Appl. No. 51312/16), 1 February 2018, para. 75.

30 States outside Europe could rely on other human rights instruments to the same effect.

frameworks are respected, there is no need to amend the HCCA. The HCCA can be applied in a way that is respectful of children's participation rights.

2.2. 1996 HAGUE CHILD PROTECTION CONVENTION

The Hague Child Protection Convention of 1996[31] regulates private international law matters in child protection more generally, complementing the system of the HCCA. The Child Protection Convention took some time to gain support, but is now in force in 52 states, including all EU Member States.[32]

This Convention is a traditional private international law instrument concerned with jurisdiction, applicable law, recognition and enforcement, and cross-border administrative cooperation. Such cooperation includes for instance attempting to find amicable solutions for the protection of children in cross-border family conflicts, or assisting in finding the whereabouts of a child who might be in need of protection while present in a contracting state other than that of their habitual residence.[33] Like the HCCA, it was set up with the aim of protecting children.[34] The preamble affirms that the best interests of the child are a primary consideration and refers explicitly to the UNCRC.

The Hague Child Protection Convention mentions the child's right to be heard only once, in the chapter on recognition and enforcement:[35] if the child has not been given the opportunity to be heard, recognition and enforcement of the decision may be refused. The yardstick to apply this ground for refusal is the 'fundamental principles of procedure of the requested State'. This is a classical private international law approach: public policy as a ground for refusal also uses the fundamental principles of the requested state as yardstick. The Convention does not introduce or refer to an international standard for child participation. Such a standard would probably have been very difficult to agree on between the negotiators. It would also have gone beyond the mandate and core business of the Hague Conference on Private International Law.[36] However, the explicit reference to the child's right to participate in this manner is positive for the evolution of this right. The knowledge that a judgment may be refused recognition and enforcement serves as a reminder to judges to grant children

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31 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.

32 https://www.hcch.net/en/instruments/conventions/status-table/?cid=70.

33 Arts. 31 et seq. Hague Child Protection Convention.

34 See the Preamble of the Hague Child Protection Convention.

35 Art. 23(2)(b) Hague Child Protection Convention.

36 This intergovernmental organisation's purpose is the progressive unification of rules of private international law: see Art. 1 of its Statute, https://www.hcch.net/en/instruments/conventions/full-text.

the opportunity to be heard. It is not known whether the Convention in fact has this effect, although the similar provision in Brussels II*bis* does (see below). It furthermore encourages judges to express in their judgments whether the child has been given such opportunity and if not why not. This could lead to convergence on children's participation rights. Even if such development is slow, small steps forward are happening, as discussed in the next section.

2.3. EU REGULATIONS ON PARENTAL RESPONSIBILITY: BRUSSELS II*BIS* AND *TER*

In 2000 the European Union legislator moved into the area of international family law, first with the Brussels II Regulation,[37] replaced in 2003 by the Brussels II*bis* Regulation,[38] and in 2019 by the Brussels II*ter* Regulation.[39] Brussels II*ter* will enter into force on 1 August 2022.[40] This section therefore considers both Brussels II*bis* and *ter*. These pieces of EU legislation cover jurisdiction in cross-border matters and the recognition and enforcement of judgments on divorce and on parental responsibility, including international child abduction.[41] It will for instance determine whether a Spanish court can hear a dispute on where the children will live after their French and Spanish parents divorce.

*2.3.1. Brussels II*bis

Brussels II*bis* addresses child participation explicitly in two provisions. The first concerns international child abduction, on which the Regulation aimed to strengthen within the European Union the legal framework created by the HCCA.[42] One of the modifications that Brussels II*bis* made to child abduction law relates to the child's objection as a ground for refusal of return. Brussels II*bis*

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37 Council Regulation 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, 30 June 2000, 19. This Regulation became fully applicable on 1 March 2001 (Art. 46).

38 Council Regulation 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, *OJ L* 338, 23 December 2003, 1. This Regulation has been applicable since 1 March 2005 (Art. 72).

39 Council Regulation 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, 2 July 2019, 1.

40 Art. 105(2) Brussels II*ter*.

41 Art. 1 determines the scope of each Regulation. The first version, Brussels II, dealt only with parental responsibility disputes that were related to a divorce, while Brussels II*bis* and *ter* cover all cross-border parental responsibility disputes.

42 See P. McEleavy, 'The new child-abduction regime in the European Union: symbiotic relationship or forced partnership?' (2005) 1 *Journal of Private International Law* 5, 15.

provides that in child abduction cases the child must be given the opportunity to be heard '*unless* this appears inappropriate having regard to his or her age or degree of maturity' (emphasis added).[43] This is a different approach to that in the HCCA, where a court may refuse the return if the child objects '*if* it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views' (emphasis added).[44] Brussels II*bis* imposed a duty on courts to give children the opportunity to participate regardless of the fact that they object to return, which was not the case under the HCCA.

This duty in Brussels II*bis* is more of a reminder than a new obligation, as the UNCRC already imposes this duty on states.[45] However, a reminder in a piece of EU legislation has proved to be useful, as EU law is directly applicable in the Member States and judges receive training on it.

The second explicit reference to child participation in Brussels II*bis* is the same as that in the Hague Child Protection Convention (discussed above): the fact that the child has not been given the opportunity to be heard, in violation of the fundamental principles of the requested Member State, is a ground for refusal of recognition and enforcement.[46] This reference applies to all cases of parental responsibility, and is not restricted to child abduction cases. As explained above, this provision allows diversity in legal systems and does not harmonise child participation. However, it is an encouragement for courts to grant this opportunity to children or to explain why they have not heard the children involved. For instance, German law requires the participation of children from a very young age.[47] Judges often know this German requirement. Thus, when realising that their judgment might at a later stage require recognition in that country, they sometimes consider child participation more explicitly. If they do not hear the child, they have to explain the reasons why they did not hear them.[48]

Apart from these two rules, Brussels II*bis*'s recitals also make reference to the important role of hearing the child. This is qualified, however, by the statement that the Regulation does not aim to modify national procedures.[49] Such a specification is not surprising in a private international law Regulation, as procedural law mostly remains national. This concerns issues such as who hears the child (judges themselves or social or welfare workers who then report to the judge), where the child is heard (in open court or in the judge's chambers),

43 Art. 11(2) Brussels II*bis*.

44 Art. 13(2) Hague Child Abduction Convention; see the discussion above.

45 Art. 12 UNCRC, which applies to all EU Member States.

46 Art. 23(b) Brussels II*bis*.

47 See the chapter by N. Dethloff and D. Schröder on Germany in this Handbook.

48 See I. Viarengo and F. Villata (eds.), *Planning the Future of Cross Border Families: A Path through Coordination. Final Study*, http://www.eufams.unimi.it/wp-content/uploads/2017/12/EUFams-Final-Study-v1.0.pdf, p. 222.

49 Recital 19 Brussels II*bis*.

how the child is summoned or informed of the hearing and whether the child is afforded independent legal representation. The age at which a child is given the opportunity to be heard is a grey area. At first sight, an age requirement is a matter of national law. However, as is discussed in other chapters in this Handbook, there is relevant international law.

It should be recalled here, as noted above, that Member States have to abide by the Charter when implementing EU law.[50] The Charter provides that children may express their views freely and that those views 'shall be taken into consideration on matters which concern them in accordance with their age and maturity'.[51] This of course applies whenever Brussels II*bis* is applicable.

*2.3.2. Improvements Made by Brussels II*ter

Brussels II*ter* has taken various steps forward concerning children's rights.[52] It is relevant that this piece of legislation was drafted after the Charter came into existence. This means that the legislator knew that the new Regulation would operate under the auspices of the Charter. The initial proposal for the new Regulation, drafted by the European Commission, explicitly mentioned respect for the rights set out in the Charter.[53] Brussels II*ter*'s recitals mention not only the Charter,[54] but also the UNCRC[55] and the ECHR.[56] There is thus an explicit concern for children's rights from the legislator's side.

It is significant to note that the Brussels II*ter* Regulation was passed by unanimity in the Council (where all Member States are represented).[57] This shows that there was broad support for the solidification of children's rights, at least to the extent of the accepted amendments, discussed below.

The issues with the wording of the child's objection and whether the child must get the opportunity to be heard only *if* mature or *unless* not mature have been fixed. Brussels II*ter* uses the language of the UNCRC: courts must give children capable of forming their own views the opportunity to express those views and give due weight to these views in accordance with their age

50 Art. 51(1) Charter.

51 Art. 24(1) Charter.

52 See also L. Carpaneto, 'Impact of the Best Interests of the Child on the Brussels II ter Regulation' in E. Bergamini and C. Ragni, *Fundamental Rights and Best Interests of the Child in Transnational Families*, Intersentia, Cambridge 2019, pp. 265–286.

53 Commission's Proposal for the Recast of Brussels II*bis*, 30 June 2016, COM(2016) 411 final, p. 12.

54 Recitals 19, 39 and 71 Brussels II*ter*.

55 Recitals 19, 39, 71 and 84 Brussels II*ter*.

56 Recital 83 Brussels II*ter*.

57 Except for Denmark, which does not participate in this chapter of EU law. See Protocol No. 22 to the Treaty on the EU and to the Treaty on the Functioning of the EU on the position of Denmark, and Recital 96 Brussels II*ter.*

and maturity.[58] In other words, a court deciding whether to hear a child must assess the child's capability of forming their own views and not their maturity to form an opinion that should be taken into account for the decision.[59] Only when considering the weight that the court will give to the child's views do the age and degree of maturity become relevant.

The EU legislator has enhanced children's rights further by providing that the opportunity must be 'genuine and effective'.[60] The provision applies to all cases that fall within the scope of Brussels II*ter* and is not restricted to child abduction cases, as it was under Brussels II*bis*.

As under Brussels II*bis*, the EU legislator steered clear of national procedural law. The opportunity to be heard must be given 'in accordance with national law and procedure'. That law still determines whether the child is heard directly or indirectly. The European Parliament's Committee on Petitions for the Committee on Legal Affairs (PETI) was the only EU organ in the legislative procedure that proposed age limits.[61] This was not taken over by the European Parliament or in the text of the Regulation. As stated earlier, introducing an age limit is not only difficult in an international setting where negotiators from different legal systems have to agree, but also controversial.[62]

*2.3.3. What Brussels II*ter *did not Improve*

While taking several positive steps to enhance child participation, the EU legislator has removed the ground for refusal of recognition and enforcement in cases where the child has not been given the opportunity to be heard. The idea is that all Member States respect children's rights and trust each other to respect children's rights. From an EU law point of view, this makes sense, but its impact on children's rights on the ground remains to be seen. The previous ground for refusal did have some impact on child participation. In EUfams, an EU-co-funded research project, researchers found for instance that the Tribunal of Bolzano, in the north of Italy and close to the German border, was more inclined to hear small children due to the influence of the extensive child participation practices in Germany.[63] The Italian Central Authority moreover told the researchers that

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58 Art. 21 Brussels II*ter*.

59 The issue of capability under the UNCRC has been discussed in the chapter of this Handbook by M. Bruning and C. Mol. See also S. Lembrechts, M. Putters, K. Van Hoorde, T. Kruger, K. Ponnet and W. Vandenhole, 'Conversations between children and judges in child abduction cases in Belgium and the Netherlands' *Family & Law*, February 2019, DOI: 10.5553/FenR/.000039.

60 Art. 21(1) Brussels II*ter*.

61 Opinion of the Committee on Petitions for the Committee on Legal Affairs, 15 January 2017, 2016/0190(CNS), proposed Amendment 18, pp. 13–14.

62 See the chapter by M. Bruning and C. Mol in this Handbook.

63 See I. Viarengo and F. Villata (eds.), above n. 48, p. 222.

abductions involving northern European countries were problematic and that there was a need in such cases to show that hearing the child was impossible.[64] The research report also indicates that 64% of surveyed experts responded 'yes' to the question whether 'a higher degree of harmonization at the EU level would prove useful in order to minimize the recourse of the ground of non-recognition provided in Article 23 (b).'[65]

Another element of concern is the so-called 'second chance procedure' or 'trumping order'. This is a custody procedure on the merits after an order for non-return in a child abduction case.[66] If the return is refused on the basis of the objection of the child, this is not the end of the matter. The court of the former habitual residence of the child maintains jurisdiction to decide on the custody dispute (i.e. with which parent and where the child will live in the future and what the contact arrangement with the other parent will be). This procedure encompasses an amendment to the mechanism of the HCCA and a different version of it was introduced by Brussels II*bis*.[67] Whether one regards this as a positive or a negative modification of the Hague system,[68] there is concern for child participation. It is not only the judge deciding on the return that will have to assess the child's objection, but the judge in the second chance procedure will have to do this again. The court has to make this assessment while the child is at that moment in a different country. The judge can use the Evidence Regulation to either organise a video conference with the child or ask a judge in the country where the child is present to hear the child and send a report or recording.[69] Asking a judge in the country where the child is might be a bit awkward, because a judge in that country might have already heard the child in the initial return proceedings and is now asked to do so again with the explicit object of achieving the opposite result.

Assessing the objection can be difficult, as the judge has to determine whether it is a true objection or merely a preference concerning where to live.

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64 I. Viarengo and F. Villata (eds.), above n. 48, p. 222.

65 I. Viarengo and F. Villata (eds.), above n. 48, p. 222.

66 Art. 29 Brussels II*ter*.

67 Art. 11(6)–(8) Brussels II*bis*. Under this provision it was not explicit that second chance proceedings may only be custody proceedings. It might have been the initial intention of the legislator, but did not function in this way in practice.

68 For criticism of this procedure, see P. Beaumont, L. Walker and J. Holliday, 'Conflicts of EU Courts on Child Abduction: The Reality of Article 11(6)-(8) Brussels IIa proceedings across the EU', https://www.abdn.ac.uk/law/documents/CPIL_Working_Paper_No_2016_1.pdf; for a more positive view, see L. Carpaneto, 'In-depth Consideration of Family Life v Immediate Return of the Child in Child Abduction Proceedings within the EU' (2014) *Rivista di diritto internazionale privato e processuale*, 931, 943.

69 Council Regulation 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, *OJ L* 174, 27 June 2001, 1. The Brussels II*bis* and II*ter* Regulations refer to the Evidence Regulation in their Recitals 20 and 39 respectively.

An objection falls within the ambit of the return procedure, while a preference is something that should be taken into account by the judge assessing the custody. This is a very fine line, which is difficult enough for judges and lawyers, but which they moreover have to explain to the child in order to respect participation rights fully. If children do not receive a proper explanation, they might get the impression that judges are not listening to them and that they have to tell the same story twice.[70]

All in all, with Brussels II*ter* the EU legislator has made important progress in the assurance of children's right to participation, but the legal framework is not yet perfect. It gives important nudges to national judges, but a lot is still in their hands. As explained above, private international law cannot encroach on national procedural law. The EU legislator is pushing the boundaries, and has done so in a good way. Whether subsequent versions of the Regulation will push further remains to be seen. But for now, the proof of the pudding is in the application of Brussels II*ter* as from August 2022.

3. MAINTENANCE

3.1. HAGUE CONVENTIONS AND PROTOCOL

The general obligation to enable children's participation in all proceedings affecting them, as stated by Article 12 UNCRC, is also relevant in the context of support and family maintenance. However, as in other contexts, it is always necessary to ascertain whether the matter under discussion 'affects' the child and, subsequently, that the child is capable of forming their own views. Under these conditions, Article 12 UNCRC also applies in cases of maintenance. This seems to be the position of the Committee on the Rights of the Child within the General Comment No. 12 to the UNCRC, which states that '[i]n cases of separation and divorce, the children of the relationship are unequivocally affected by decisions of the courts. Issues of maintenance for the child as well as custody and access are determined by the judge either at trial or through court directed mediation'.[71] It is not uncommon for issues on maintenance to heard by the court in the context of a family dispute in a broader sense, i.e. in the context of divorce, separation or parental responsibility: in this case, the participation of

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70 See S. Lembrechts et al., above n. 59, giving this quote from an interview with a child: 'I mean, I could indeed say something to the judge, but I do not know what the judge will then say, he can say whatever he wants, isn't it.' See also K. Van Hoorde, M. Putters et al., 'Bouncing Back. The wellbeing of children in international child abduction cases', Research Report of the EU-co-funded research project EWELL, https://biblio.ugent.be/publication/8561029/file/8561030.pdf, p. 101.

71 General Comment No. 12, above n. 18, §51.

the child has its legal basis in the relevant legislation examined in the previous sections. Indeed, when considered as a part of the judicial determinations issued within a proceeding of this kind, a decision on maintenance contributes to affecting the child's living conditions, health, education or general well-being.

The Hague Convention of 2007 on child support and family maintenance[72] and the Hague Protocol on the law applicable to maintenance obligations[73] do not explicitly address the issue of child participation in legal proceedings. Indeed, the main objective of these instruments is to ensure the swift administration of maintenance obligations in cross-border cases, in particular when the creditor and debtor are in different countries. They focus on child support and seek to ensure respect for the best interests of the child.[74] For this purpose, the Convention and the Protocol aim at making effective the recovery of maintenance at the international level through accessible, efficient and cost-effective procedures and clear rules.[75]

The Convention has a general public policy ground for the refusal of recognition and enforcement.[76] Unlike the Hague Child Protection Convention discussed above, this provision does not explicitly refer to the child's participation rights. This silence is interesting: it does not mean that the fact that a child was not heard is excluded as a fundamental principle (a state would still be able to invoke it). The reason for the silence is not apparent.

In any event, it is for national law to determine the modalities and the conditions of child participation, while respecting the state's duties under the UNCRC.

3.2. MAINTENANCE REGULATION

The conclusions reached for the Hague Convention on 2007 and its Protocol are also valid for the Maintenance Regulation.[77] This Regulation does not contain

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72 Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance, entered into force on 1 January 2013.

73 Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, available at: http://www.hcch.net.

74 See the Preamble of the Convention, where it states that 'in all actions concerning children the best interests of the child shall be a primary consideration', as well as the *Explanatory Report* by A. Borrás and J. Degeling, 2013, §§36–41.

75 Preamble of the 2007 Hague Convention.

76 Art. 22(a) Hague Maintenance Convention.

77 Council Regulation 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, *OJ L* 7, 10 January 2009, 1. On the Regulation F. Gascón Inchausti, 'Le recouvrement des aliments en Europe' in M. Douchy-Oudout and E. Guinchard (eds.), *La justice civile europeénne en marche*, Dalloz, Paris 2012, p. 147; F.C. Villata, 'Obblighi alimentari e rapporti di famiglia secondo il regolamento n. 4/2009' (2011) *Rivista di Diritto Internazionale* 731; H. Muir Watt, 'Aliments sans frontiéres. Le reglément CE n° 4/2009

any specific reference to child participation in legal proceedings and it does not prescribe the duty for judicial authorities of the Member States to hear the child before issuing a decision on maintenance. It does not provide for a specific ground for refusal if the child was denied a right to participate.[78]

Nevertheless, national authorities are bound by Article 24 of the EU Charter of Fundamental Rights and thus have the duty to listen to children and take into consideration their views in accordance with their age and maturity. Indeed, Article 24 of the EU Charter has a broad scope of application and is relevant in every proceedings that affects the child. In any event, the decision of the European legislator to adopt a specific Regulation on maintenance obligations, separating the subject from the general legal framework provided for civil and commercial matters,[79] was motivated by (and resulted in) greater attention to the rights of the child. The Maintenance Regulation is inspired, inter alia, by the objective of protecting the child from the difficulties that may arise in the recovery of maintenance obligations within the European Union.[80] This means that the proceedings within the scope of the Regulation are subject to the legal framework that protects the best interests and the fundamental rights of the child, including the promotion of child's participation and the right of the child to express their opinion in matters affecting them.

Moreover, specific obligations concerning the child's participation may derive from other instruments applicable to a dispute on family issues as a whole.

4. CONCLUSION

This brief overview of private international law shows that while some international conventions and EU regulations make reference to child participation, few hard rules exist. Some instruments contain provisions that address possible grounds for refusal or they contain nudges for national courts to take into account the views of the child.

Private international law conventions and regulations do not function on their own: they interact with national law, especially procedural law.

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du 18 décembre 2008 relatif à la compétence, la loi applicable, la reconnaissance et l'exécution des décisions et la coopération en matière d'obligations alimentaires' (2020) *Revue Critique du Droit International Privé* 457; P. Beaumont, B. Hess. L. Walker and S. Spancken (eds.), *The Recovery of Maintenance in the EU and Worldwide*, Hart Publishing, Oxford 2014.

78 Art. 24 of the Maintenance Regulation contains the grounds for refusal, but makes no mention of the child's right to participation.

79 Previously maintenance was covered by Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ L* 12, 16 January 2001, 1.

80 An indication in this sense derives from Art. 4 of the Regulation, which excludes the possibility of concluding choice-of-court agreements in disputes relating to a maintenance obligation towards a child under the age of 18.

National law determines the modalities of how children will be made aware of the proceedings, how and by whom they will be listened to and whether they will have a right to separate legal representation.

Private international law instruments can cautiously move national procedural law in the right direction. They can for instance contain grounds for refusal if the child has not been heard. This can lead to a race to the top: if judges know that a judgment might be refused recognition in a state that takes a more stringent stance on child participation, they might consider such participation more carefully, and if they do not hear the child, at least explain why they do not.

Brussels II*ter*, which will only enter into force on 1 August 2022, has made significant progress: it contains a general obligation for courts to give the child the opportunity to be heard. The obligation is phrased in clear children's rights language. This is a step forward from older conventions and regulations that made children's right to participation conditional upon their age and maturity. The fact that the EU Member States all agreed on the amendments shows a great commitment to children's rights. It is appropriate that children will have the right to participate, with their age and maturity only becoming relevant when a court assesses the weight it will give to their views.

Some difficulties regarding guaranteeing child participation are particular to cross-border cases. Sometimes the judge is in a different country from the child. There are instruments that can be used to overcome this challenge, such as the Evidence Regulation. However, judges can be in a difficult position when they have to rely on colleagues in a different country who might have a different view on the case and children might find it strange that a judge in a different place decides about them.

Other difficulties regarding child participation are equally present in domestic procedures: gaining the trust of children, finding enough time for a meaningful conversation, showing children that they are really listened to and giving feedback. A cross-border element to a case might enhance such difficulties of trust and time.

Private international law instruments can regulate the cross-border elements and create incentives for better national procedures.