INTERNATIONAL CHILD ABDUCTION: THE NEW CHALLENGES

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Introduction

Ladies and gentlemen,

Francisco Javier Forcada Miranda has kindly invited me to give a presentation on the experiences of the Dutch Office of the Liaison Judge for International Child Protection (*Bureau Liaisonrechter Internationale Kinderbescherming,BLIK*) with regard to 'jurisdiction in the event of child abduction and the return of the child, articles 10 and 11 of Brussels II (B) Regulation, and the right of access and international child abduction'. Allow me to introduce myself. My name is Jacques Keltjens. I have been a judge at the District Court of The Hague, the Netherlands for 15 years now. Since 2004 I have been working as vice-president and deputy chairman of the Family Division of this court and I am one of the two Dutch Liaison Judges for International Child Protection.

The Dutch Office of the Liaison Judge for International Child Protection *(BLIK*)

By decision of 14 July 2005, the Dutch Council for the Judiciary appointed the President and Vice-President of the Family Division of the District Court of The Hague as Liaison Judges. Currently, these positions are held by Mrs. Robine de Lange and myself. The appointment was made pursuant to section 24 of the Dutch International Child Protection Implementation Act[1], which implements the 1996 Hague Convention on the International Protection of Children [2] and the Brussels II (bis) Regulation[3].
In order to perform the duties of a Liaison Judge, the Family Division of the District Court of The Hague set up the Dutch Office of the Liaison Judge for International Child Protection

[1]Act of 16 February 2006, Staatsblad 2006, 123. The act came into force on 1 May 2006.
[2] 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.

[3]EU Regulation no. 2201/2003 of the Council of the European Union dated 27 November 2003 regarding the Jurisdiction, Recognition and Enforcement of Decisions in Matrimonial cases and Parental Responsibility.

(further: *BLIK*). A total of five judges and five staff-members from the Family Division of the District Court of The Hague dedicate their working time to BLIK. The judges, however, do so on a part time basis, as they also work as family court judges in the Family Division. The BLIK started its activities on 1 January 2006.

It serves as a contact point for judges in the Netherlands who hear child abduction cases or other cases involving aspects of international child protection, and who want to contact a foreign judge in this respect. And vice versa: foreign judges who want to contact a judge in the Netherlands can also call on BLIK. Their work includes all duties ensuing from the Brussels II (bis) Regulation. Contacts between Dutch judges and their foreign counterparts are preferably established through the foreign Liaison Judge. If no Liaison Judge has been appointed in the State involved, we try to make contact through the Central Authorities. Contact is usually made by email or telephone.

How do we actually make contact with foreign Liaison Judges and other foreign judges? There are currently three international Liaison Judges networks: a world-wide network under the auspices of the Hague Conference on Private International Law; a –newer– European network under the auspices of the European Judicial Network; and a network of South-American states with which BLIK with which BLIK seeks to co-operate, called IBEred.

A request to make contact is dealt with immediately. BLIK aims to establish contact within one week and has been successful so far.

In addition to facilitating contacts between judges in the Netherlands and their foreign counterparts, BLIK serves as a helpdesk for Dutch judges. This helpdesk is necessary because cases of international child abduction are relatively scarce in terms of numbers, so it is quite likely that a family court judge will hear only one such case in his career, while the legal framework in these cases is difficult to grasp – especially since the introduction of the Brussels II (bis) Regulation –.

BLIK has also created a website[4], available to the Dutch judiciary only. This website not only provides information on BLIK but also professional, job-related information. On the website judges can, for example, consult manuals, memorandums and case law. Foreign Liaison Judges or Central Authorities may, of course, also call on BLIK with requests and questions. Once a year BLIK organises an expert meeting.

[4] Intro landelijk; link:The Dutch Office of the Liaison Judge International Child Protection (Bureau Liaisonrechter Internationale Kinderbescherming, BLIK).

In addition, ten judges and staff members hear cases concerning international child abduction and other cases involving aspects of international child protection that are brought before the Family Division of the District Court of The Hague. These cases are always heard by a three-judge panel, assisted by one or two staff members as clerks. If a case requires that BLIK contacts a foreign judge, one of the judges not involved in the case will make the contact as a Liaison Judge. In this way the roles of the Liaison Judge and the ordinary family court judge are kept separate.

International Child Abduction: the New Challenges

This conference is called 'International Child Abduction: the New Challenges'. I have to admit that being a Liaison Judge is a real challenge to me. As of 1 March 2005, the Brussels II (bis) Regulation is applicable in all EU Member States except Denmark. The Netherlands is a small country, as you all know, which explains why so far only a small number of child abduction cases have been filed in which sections 10 or 11 of the Brussels II (b) Regulation were applicable. As a consequence, we cannot draw on extensive experience when it comes to these provisions. Nor do I know how much knowledge and experience you have on the matter. Therefore, I will give you some general background information on the Brussels II (b) Regulation and how it works in practice. In so doing, I will limit myself to the main issues. More extensive information on the content of the Brussels II (bis) Regulation and how it operates is provided in the '*Practice Guide for the application of the new Brussels II Regulation*'. I will draw your attention to situations, taken from real cases, in which the provisions of the Regulation need further clarification. These concern the interpretation of certain concepts laid down in article 10 of the Regulation, such as 'holder of rights of custody' and 'a judgment on custody that does not entail the return of the child'. The practical consequences of following different procedures, and in a different order, based on the 1980 Hague Convention on the Civil Aspects of International Child Abduction (further: 1980 Hague Convention) and the Brussels II (bis) Regulation respectively, will also be addressed. Finally, I will conclude this presentation by telling you something about a new Dutch initiative that seeks to speed up and improve the return order procedure based on the 1980 Hague Convention or the Brussels II (b) Regulation.

The 1980 Hague Convention and the Brussels II (bis) Regulation

The 1980 Hague Convention, to which all EU Member States are a party, is still applicable in the event that a child has been wrongfully removed or retained. This Convention provides for an emergency procedure, aimed at securing the prompt return of children to the State of their habitual residence, and the protection of rights of access. The 1980 Hague Convention is not so much about the recognition and enforcement of decisions on rights of custody, but rather a convention on mutual legal assistance in order to return children to their lawful *status quo ante* in cases where they have been unlawfully removed or retained.

The Brussels II (bis) Regulation complements the 1980 Hague Convention on a number of issues as far as the EU Member States are concerned. Article 60 of the Brussels II (bis) Regulation states that the Regulation takes precedence over the 1980 Hague Convention in the event of conflicting provisions. *The Practice Guide,* pages 32-40 gives a further explanation.

Jurisdiction and parental responsibility; articles 8-14 Brussels II (bis) Regulation

The Brussels II (bis) Regulation provides a balanced system of grounds for the jurisdiction of the courts of a Member State in matters of parental responsibility, in order to avoid conflicts about jurisdiction as much as possible. The best interest of the child and the criterion of proximity have been the leading principles in drawing up the provisions of the Regulation that deal with jurisdiction.

Article 8 paragraph 1 Brussels II (bis) Regulation sets out the principal rule on jurisdiction in matters of parental responsibility: jurisdiction is vested in the courts of the Member State in which the child has his habitual residence at the time the case is brought before the court. This applies to cases concerning divorce and to cases concerning non-marital relationships alike. The concept of 'habitual residence' refers to the place of social domicile just as in the 1980 Hague Convention, and has to be established in each individual case.

The exception of article 10 Brussels II (bis) Regulation

Article 10 Brussels II (bis) Regulation makes an exception to the principal rule on jurisdiction as set out in article 8 paragraph 1 of the Regulation, in case of 'wrongful removal or retention of the child'. The intention of this provision is to prevent the situation, as a result of the

wrongful removal by one party, whereby the jurisdiction of the courts of the Member State where the child had its habitual residence shifts to the courts of the child's new place of residence, thus precluding the left-behind parent from bringing custody right matters before his or her own national court. Article 10 Brussels II (bis) Regulation supplements article 16 of the 1980 Hague Convention, which prohibits the courts of the Member State to which the child has been wrongfully removed or in which it has been retained, from deciding on the merits of rights of custody until it has been determined that the child is not to be returned under the 1980 Hague Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice. *The Practice Guide* deals with Article 10 on pages 30 and 31.
However, pursuant to article 20 of the Brussels II (bis) Regulation, the courts of the other Member State are not prevented from taking provisional, including protective, measures.

On the basis of article 10 Brussels II (bis) Regulation the courts of the Member State in which the child was habitually resident immediately before the wrongful removal or retention retain jurisdiction until the child has acquired a habitual residence in another Member State and the parent having rights of custody has acquiesced in the removal or retention or the child has resided in that other Member State for at least one year and is settled in his or her new environment. In the latter case, it is also necessary that one of the circumstances mentioned in article 10 sub b) i-iv occur:

1. within one year after the holder of rights of custody has had knowledge of the whereabouts of the child, no request for return has been lodged; or
2. a request for return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged; or
3. a case before the court in the Member State from which the child was wrongfully removed has been closed; or
4. a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State from which the child was wrongfull removed.

<u>Article 11 Brussels II (bis) Regulation</u>

In addition to the provisions of the 1980 Hague Convention, article 11 Brussels II (bis) Regulation lays down further rules applicable in child abduction cases. It does not give rules on jurisdiction.

Article 11 paragraph 3 Brussels II (bis) Regulation requires that a court to which an application for the return of a child is made pursuant to the provisions of the 1980 Hague Convention decides on the case within 6 weeks. The 1980 Hague Convention 'only' states that judicial authorities must act 'expeditiously'. If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of the application for the return of the child, the applicant has the right to request a statement of the reasons for the delay.

Article 11 paragraph 4 Brussels II (bis) Regulation gives an instruction to any judge who contemplates refusing an order to return on the ground mentioned in article 13 sub b) 1980 Hague Convention, where there is a grave risk that his or her return would expose the child to physical or psychological harm. The judge may not refuse to return a child on this ground if it has been established that adequate arrangements have been made to secure the protection of the child after his or her return. It follows from this provision that a judge should obtain all necessary information on what is going to happen after the child's possible return before making a decision on the child's return. This naturally gives rise to the question of what constitutes 'adequate arrangements' to secure the protection of the child after his or her return. It could be argued that only child protection agencies in the Member State in which the child had his or her habitual residence can provide such guarantees.

The Brussels II (bis) Regulation also contains provisions about hearing the child and the applicant for the return of the child (article 11, paragraphs 2 and 5 respectively). The Brussels II (bis) Regulation demands that the child is given the opportunity to be heard unless this appears inappropriate having regard to his or her age or degree of maturity. The 1980 Hague Convention lacks such a provision. Nevertheless, the practice in the Netherlands is that with a view to article 13 paragraph 2 of the 1980 Hague Convention we interview children from the age of 12 onwards, as well as younger children who show such a degree of maturity that their opinion should be taken into consideration. In Germany the age limit is lower than 12.

Article 11 (6) - (8) Brussels II (bis) Regulation pertain to the situation in which a court of a Member State to which the child was removed refuses to issue an order for return on the basis of article 13 of the 1980 Hague Convention. In this case, the court must 'immediately', either directly or through its Central Authority, transmit a copy of the court order on non-return and of the 'relevant documents', in particular a transcript of the hearings before the court, to the court with jurisdiction or Central Authority in the Member State from which the

child was wrongfully removed. A Liaison Judge in a Member State may assist in transmitting these documents.

What documents must be transmitted? The English text mentions only 'relevant documents'. It appears, however, that - having regard to the addition of 'in particular a transcript of the hearings before the court' - the words 'relevant documents' are not equivalent to the entire case file. Indeed, if the intention was the transmittal of the entire case file, the addition of 'in particular a transcript of the hearings before the court' would be superfluous. The *Practice Guide* (p. 37) confirms this, for it reads: 'It is for the judge who has taken the decision to decide which documents are relevant'. We recommend transmitting at least the decision itself and the transcript of the hearings before the court.

Another practical problem in this respect is the translation of the documents that must be transmitted. Article 11 paragraph 6 Brussels II (bis) Regulation is silent on this subject. In the *Practice Guide*, judges are encouraged 'to find a pragmatic solution which corresponds to the needs and circumstances of each case'. It may be that – depending on the national law of procedure – a translation is not necessary if the case is referred to a judge with a thorough command of the language used in the transmitted documents. Alternatively, it may be that only the most important documents need translation. Another possibility would be for the Central Authorities to provide an informal translation of the documents. If these suggestions do not offer a feasible solution and the documents cannot be translated within the one month time frame mentioned in article 11 paragraph 6, according to the *Practice Guide* the documents will have to be translated in the Member State to which the documents have been transmitted. It can be inferred from this text that the authority that has issued the non-return order has to make arrangements for the translation of the documents to be transmitted; only if this cannot be done within the set time frame can this obligation be shifted to the recipient court. Presumably, there are cases in which a translation is not necessary, for example when the language of the case file can relatively easily be understood by the foreign judges. In other cases, informal translations, limited to the core documents, could suffice. In any event, article 11 paragraph 6 does not call for a translation by a certified translator.

The foreign court must receive the documents within one month of the date of the non-return order. It will then inquire whether the parties involved want the court to examine the question of custody of the child, if proceedings are not already pending. If they do, the parties will have to make their submissions to the court within three months of the date of

notification. If the parties fail to do so, the case will be closed and the non-return order given by the court in the other Member State will remain in force.

When taking a decision on the custody of the child, the court in the Member State where the child was habitually resident must take into account the underlying grounds for the non-return order. Contact with the judge who issued the non-return order may be established through the Liaison Judge. If the decision on the custody of the child implies his or her return to the Member State where the child was habitually resident, this decision takes precedence over the earlier non-return order issued by the court of the other Member State. This is known as an overruling decision.

The decision on the custody of the child is enforceable in the Member State to which the child has been removed without the need to apply for leave to enforce. This presupposes, however, that a number of requirements are satisfied. The judge of origin must issue a certificate to that effect (article 40 in conjunction with article 42 Brussels II (bis) Regulation). 'Enforceable' does not automatically mean that a decision may be enforced in another Member State; the national requirements of the law of the Member State of enforcement remain applicable (article 47 Brussels II (bis) Regulation).

Practical issues

A number of specifically practical issues were raised in the following two cases.

The first case is about a Greek-Dutch couple who were married in 1994. Two children were born during the marriage. They divorced in 2000. The parties were given joint parental responsibility of the children. The children had their main residence with the mother in the Netherlands while the father had parental access rights. At some stage, the mother entered into a romantic relationship with a new partner (also a Greek).

In 2006, the mother petitioned the District Court to modify the father's parental access rights. In response to this, the father submitted a request to prevent the mother and their children from leaving for Greece. The Family Division of the District Court treated both requests as a joint case. On the day of the oral hearing before the court, 19 June 2006, the mother left with the children for Greece, without prior consultation with or consent from the father, and without notification of their new address. At the hearing on 19 June 2006, the father filed an alternative request for the children's principal residence to be with him. By decision of 19 June 2006, the Family Division of the District Court found for the father. The

mother appealed against this decision. The Court of Appeal confirmed the District Court's decision on 19 December 2006.

In August 2006, through the Central Authority, the father applied to the Greek authorities for a return order. By decision of 1 March 2007, the Greek judge of first instance ordered the return of the children to the Netherlands. The mother appealed against this decision. In its decision of 4 May 2007, the Greek Court of Appeal ruled against the return of the children. This decision and the transcript of the hearings before the court were transmitted to the District Court of The Hague, the Netherlands, through the Central Authority, in accordance with article 11 paragraph 6 Brussels II (bis) Regulation in order for the Dutch court to commence with the procedure referred to in article 6 paragraph 7 Brussels II (bis) Regulation, the overruling decision procedure.

On 25 July 2007, the father filed a petition with the District Court of Maastricht in order to obtain sole custody of the children. The District Court reflected that, pursuant to article 11 paragraph 8 Brussels II (bis) Regulation, it could set aside the decision of the Greek Court of Appeal and come to a judgment which required the return of the children to the Netherlands. The court also reflected that such a situation would only materialize if the court decided to grant the father sole custody of the children. The District Court came to this conclusion because article 11 paragraph 8 Brussels II (bis) Regulation, about a subsequent judgment which requires the return of the child, is immediately preceded by paragraph 7, which states that the court can examine the question of custody of the child. The District Court found that in the circumstances of this case, a change in custody rights was not in the children's interests.

The father appealed against the decision. The Dutch Court of Appeal was of the opinion that article 11 paragraph 8 Brussels II (bis) Regulation was applicable in this particular case. According to the court, the decision on the non-return of the children by the Greek Court of Appeal could only be set aside by a subsequent judgment which required the return of the children, given by a court having jurisdiction on the basis of the Brussels II (bis) Regulation. The Appeal Court shared the opinion of the District Court that in this particular case only the *decision to grant the father sole custody of the children* would set aside the decision of the Greek Court of Appeal. By decision of 19 June 2006, the Dutch District Court had already decided that the principal residence of the children was with the father, but this decision was followed by the order of non-return from the Court of Appeal of Thessaloniki,

Greece, which order was of a temporary nature. Consequently, only if the court found for the father and granted him sole custody of the children could there be a final judgment requiring the return of the children. The Dutch Court of Appeal subsequently ordered an investigation in order to examine whether the custody rights should be altered.

This decision leads me to ask the following questions.

1. Is it true that only a decision to grant the father sole custody of the children could set aside the decision of the Greek Court of Appeal? In other words: what is meant exactly by 'the question of custody of the child' in article 11 paragraph 7? Does the decision that the children's principal residence was with the father fall outside the scope of 'the question of custody of the child'?

   It has been argued in Dutch legal literature, by Professor T. De Boer, that 'the question of custody of the child' in article 11 paragraph 7 refers to a decision which explicitly *or implicitly* requires the return of the child (article 40 paragraph 1 sub b in conjunction with article 11 paragraph 8 Brussels II (bis) Regulation. In a decision of the Family Division of the District Court of the Hague, reference LJN BD 9068, it was held that pursuant to article 11 paragraph 7 Brussels II (bis) Regulation the Dutch court was the competent forum to decide on the father's petitions relating to the custody and place of residence of the child(ren), and that Dutch law applied.

   In my opinion the Court of Appeal interpreted 'the question of custody of the child' too narrowly. The intention of article 11 paragraphs 6, 7 and 8 intend to give a court's refusal to grant a return order a temporary nature. The decision on the merits relating to the child's final habitual residence should be taken by the court in the Member State where the child was habitually resident immediately before his removal. Now that joint parental responsibility is on the rise in Europe, it is illogical to interpret the text of article 11 paragraphs 6,7 and 8 in such a way that an overruling decision can only be realised by changing joint parental responsibility into sole custody. The interests of the child may demand that his or her principal place of residence be with the left-behind parent, while at the same time continuation of joint parental responsibility may also be in the child's interests. It should be possible for a court hearing the case on the merits to come to such a decision.

2. The other question that springs to mind here is what importance should be attached to the judgment of the District Court of 19 June 2006, which ruled that the children's habitual

residence was to be with their father, bearing in mind that this decision was followed by the Greek order of non-return? Did the Dutch decision not entitle the father to enforcement on the basis of article 28 Brussels II (bis) Regulation? It could be maintained that article 23 paragraph e) Brussels II (bis) Regulation precludes this – since a decision relating to parental responsibility is not recognised if it is irreconcilable with a later decision relating to parental responsibility given in the Member State in which recognition is sought–. Does this mean that a decision must always be taken after a non-return order in order to qualify as an overruling decision?

If this is the case, it might be advisable to stay the proceedings relating to custody pending the other court's decision on the child's return, but only if this can be expected within a reasonable time, otherwise it is better to give a decision anyway. In this respect, too, I wonder how courts in other Member States deal with similar situations[5].

The District Court of The Hague recently experienced how an interim decision of a Belgian Court can affect a return order case based on the 1980 Hague Convention. The case may serve as an example. In this case the parents were married in Belgium in 2004. Their only child was born in 2007. According to Belgian law, both parents have parental responsibility over their minor children during their marriage. The mother and the minor, with the consent of the father, went on vacation to the Netherlands on 6 July 2008. They did not return to Belgium, however. By decision of 23 March 2009, the Court of first instance in Belgium ruled that the mother was temporarily authorised to live with the minor in the Netherlands and declared that the joint parental responsibility remained unaltered. On 8 August 2008 the father filed a petition through the Belgian Central Authority before the District Court of The Hague for the return of the minor. The District Court of The Hague found that the mother had wrongfully retained the minor and that no grounds had been established for refusing a return order on the basis of article 13 of the 1980 Hague Convention. According to article 12 paragraph 1 of the 1980 Hague Convention, the Hague District Court should order the immediate return of the child since the father's petition had been filed through the Central Authority within one year of the date of wrongful retention. However, the District Court refused the return order because

[5] In this context, see also the report by the Dutch Royal Commission on Private International Law "Knelpunten bij de uitvoering van het Haags Kinderontvoeringsverdrag 1980 in Nederland" [Practical problems in relation to the enforcement of the 1980 Hague Convention] "The Royal Commission stresses that the Regulation does not contain any provision that precludes the left-behind parent from obtaining leave to enforce, rather than following the course of proceedings envisaged in the 1980 Hague Convention. Likewise, the 1980 Hague Convention does not preclude the left-behind parent from invoking another international rule that can lead to the child's return. Consequently, the applicant who has been granted a custody right by a court in the Member State of origin is free to choose between the return order procedure under the 1980 Hague Convention and the procedure for leave to enforce under the Brussels II (bis) Regulation.

of the decision, albeit an interim decision, of the Belgian Court of first instance which, according to article 21 of the Brussels II (bis) Regulation, the District Court of the Hague was bound to recognise.
What do you think of this decision and what action should the Dutch Court take?

Article 11 Brussels II (bis) Regulation seems to have been drawn up for the ideal situation: if the return of the child is refused, this decision can be overruled. But is it possible to 'overrule' before a decision of non-return is given, in which case the grounds for refusal as set out in aricle 13 of the 1980 Hague Convention have not been considered at all (see article 11 paragraph 8 Brussels II (Bis) Regulation)? Or had it been better if the Belgian Court had stayed the proceedings, pending the decision of the Dutch court on the return order?

It is safe to say that these cases have demonstrated how important it is for courts and other authorities that have to take decisions in child abduction and related cases to have easy access to all relevant information. The Central Authorities and/or Liaison Judges could play an essential role in achieving this.

Right of access and international child abduction

The lower house of the Dutch parliament has adopted a motion requesting the government to ensure that, to the extent possible, parental access arrangements are in place before a child is returned.

In response to this motion, the Dutch Minister of Justice stated that the Netherlands Central Authority at present already endeavours, to the extent possible, to assist former partners in making parental access arrangements. It helps parents contact the Central Authority in the State of the child's habitual residence. This Central Authority can assist a parent in organizing or securing the effective exercise of his or her rights of access in that particular country. In addition, where possible, the Netherlands Central Authority encourages parents to make arrangements about access rights for the post-return period *before* the child's actual return. After the child's return to the State of habitual residence, the competent court can be requested to confirm these arrangements, or to ensure compliance with them.

I endorse the importance of making parental access arrangements before the child is returned. And, for that matter, even if the child is not to be returned. The question, however, is to which extent it is possible to establish a parental access arrangement in such cases. Does the court that decides on the return also have jurisdiction to rule on matters regarding access? I believe this decision is in principle reserved to the courts of the State from which the child has been removed. If it concerns a wrongful removal from an EU Member State, in the event

of a return the jurisdiction remains with the court of that EU Member State (that is, the State from which the child has been removed); this is based on article 8 Brussels II (bis) Regulation and in view of article 10 Brussels II (bis) Regulation. And also in the event that the child is not returned, jurisdiction remains with the court of that EU Member State (that is, from which the child has been removed) until the child is habitually resident in another EU Member State, and the provisions of article 10 Brussels II (bis) Regulation have been met.

In my view the situation is different when parties make arrangements about parental access after the child's return. In that case, a court could assume jurisdiction pursuant to article 12 paragraph 3 Brussels II (bis) Regulation, if the following conditions have been satisfied:

'…the child has a substantial connection with that Member State, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State;

and

the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all parties involved in the proceedings, at the time of the application, and is in the superior interests of the child.'

If the court deciding on the return confirms such a parental access arrangement, it must issue an ex officio certificate pursuant to the Brussels II (bis) Regulation if the country of origin is an EU Member State. This makes the parental access arrangement enforceable in that other EU Member State without separate leave to enforce.

Pilot: mediation in child abduction cases

The District Court of The Hague / BLIK is presently developing a pilot project for mediation in child abduction cases. In brief, in this pilot project two sessions will usually be held in child abduction cases. The first hearing will be a pre-trial review (single judge division). The judge in the pre-trial review will list the points of dispute and will, inter alia, explore the possibility of mediation. If the first hearing has not resolved the dispute, a second hearing will be held before a three-judge panel, which will usually result in a final decision. I am referring to incoming cases only, i.e. where a child is abducted from a foreign country into the Netherlands.

The purpose of this pilot project is to shorten the return procedure. At present, the Central Authority often does not bring return proceedings before the court until nearly a year after the child's removal. A lot of time may be lost in the Central Authority's attempt to have a case settled out of court. Taking this task away from the Central Authority and incorporating the settlement attempt into the proceedings before the court, will result in a more efficient and speedier process. After all, both parties are usually present at the court hearing, which makes it easier to encourage mediation. The future residence of the child, as well as international parental access, can be arranged through mediation.

After successful mediation, the parties can request the court to include a settlement agreement in the court order, or file other applications in respect of parental responsibility, such as establishing a parental access arrangement. Here, too, the question arises whether the court deciding on the return also has jurisdiction in matters of parental responsibility, such as parental access arrangements. Assuming that the removal is wrongful, and that the child thus had its habitual residence in another State before it was removed, the following situations could occur.

I. After successful mediation, the parties agree that the child will remain in the Netherlands, and the application for the return is withdrawn. As regards the other EU Member States, I would have thought that, based on article 10 opening sentence and sub a) or sub b) Brussels II (bis) Regulation, jurisdiction no longer lies with the court of the State from which the child was removed, and that jurisdiction of the Dutch court can be assumed on the basis of article 8 Brussels II (bis) Regulation. I am assuming here that meanwhile, at the time of the application, the child has taken up his or her habitual residence in the Netherlands.

As far as non-EU Member States are concerned, I believe that article 10 Brussels II (bis) Regulation is not applicable, and that jurisdiction of the Dutch court can be assumed on the basis of article 8 Brussels II (bis) Regulation. Again, I am assuming here that in the meantime, at the time of the application, the child has taken up his or her habitual residence in the Netherlands.

II. After successful mediation, parties agree that the child will return to the State from which it was removed, and they petition the Dutch court to decide on the matter of parental responsibility.

In principle, jurisdiction to rule on matters of parental responsibility lies with the court of the State from which the child was removed. In relation to the other EU Member States, based on article 8 Brussels II bis and in view of article 10 Brussels II (bis) Regulation, jurisdiction is retained. However, I do believe that the Dutch court, too, can assume jurisdiction pursuant to article 12 paragraph 3 Brussels II (bis) Regulation, if the conditions in this article have been fulfilled.

Proceedings concerning parental responsibility pending in a foreign country

If, after successful mediation, the parties would like the Dutch court to rule on matters of parental responsibility, it is only logical that they will withdraw any proceedings involving the same subject matter that are pending in another country. This issue can be addressed at the hearing.

Conclusion

The legal development of provisions relating to child abduction and rights of access in the Brussels II (bis) Regulation and the 1980 Hague Convention has not as yet come to an end. Many other situations that raise questions are conceivable. The challenge the Central Authorities and courts are faced with is to find, in the interests of the child, legally sound and practical solutions. Unnecessary delay is to be avoided when and where possible, without sacrificing due care. New initiatives to achieve this goal should be welcomed. In this respect, judicial co-operation in the area of information and communication is essential.

Thank you all for your attention!