

The Child's Best Interests in International Jurisdiction Under the Brussels IIter Regulation



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I. Introduction

Within the European Union (EU), the mobility of family groups, sometimes consisting of members of different nationalities and origins, has led the EU legislator to consider the uniform regulation of certain family law aspects as necessary for the proper functioning of the internal market. Thus, the EU legislator has sought to provide families in the EU with uniform and coherent rules. These rules are supposed to give them a secure answer regarding, *inter alia*, the question of which courts they should go to in the event of a dispute arising in certain aspects and areas that affect them.

When it comes to the children involved in transnational situations,¹ the issue of parental responsibility is particularly relevant. The concept of “parental responsibility” is dynamic and covers, in its plurality, various situations with their own singularity, with the child in the centre. In this respect, the Brussels IIbis Regulation²

¹For an overall vision of the EU children protection system see: R. Espinosa Calabuig/L. Carballo Piñeiro, Child Protection in European Family Law, In: Pfeiffer/Lobach/Rapp (eds), *Facilitating Cross-Border Family Life — Towards a Common European Understanding: EUFams II and Beyond*, 2021, at pp. 49–90; R. Espinosa Calabuig, Cross-border Family Issues in the EU: Multiplicity of Instruments, Inconsistencies and Problems of Coordination, In: Ruiz Abou-Nigm/Noodt Taquela (eds), *Diversity and Integration in Private International Law*, 2019, at pp. 65 ff.

²Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

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and its successor, the Brussels IIter Regulation,³ have articulated a system of international jurisdiction in matters of parental responsibility that seeks to provide a predictable, flexible and appropriate response to this complex problem.⁴ Therefore, the Brussels IIter Regulation jurisdiction rules are an essential tool to offer solutions to the different situations that migrant children may face regarding parental responsibility issues.⁵

In this context, the aim of this chapter is to present the jurisdiction model on parental responsibility matters of the Brussels IIter Regulation from the necessary children-based approach that should be paramount in any case involving children, including Private International Law rules.⁶ This overview will reflect on how the jurisdiction rules seek to respond to the complexity of international movement of families through the articulation of the best interests of the child principle.

³Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast).

⁴For the definition of parental responsibility see Articles 1 and 2 para. 2 no. 7 of the Brussels IIter Regulation.

⁵Increasing attention is paid to the necessary link between Private International Law rules and Migration Law. On the topic see, among others, A. Fiorini, *The Protection of the Best Interests of Migrant Children — Private International Law Perspectives*, In: Biagioni/Ippolito (eds), *Migrant Children in the XXI Century. Selected Issues of Public and Private International Law*, 2016, at pp. 379–418; V. Van Den Eeckhout, *Private International Law Questions that Arise in the Relation between Migration Law (in the Broad Sense of the Word) and Family Law: Subjection of PIL to Policies of Migration Law?*, Background Paper, PILAGG-Presentation (20 January 2013).

⁶For the connection of human rights and Private International Law see J.J. Fawcett/M. Ní Shúilleabháin/S. Shah, *Human Rights and Private International Law*, 2016; R. Michaels/V. Ruiz Abou-Nigm/H. Van Loon, *Introduction: The Private Side of Transforming our World — UN Sustainable Development Goals 2030 and the Role of Private International Law*, In: Michaels/Ruiz Abou-Nigm/Van Loon (eds), *The Private Side of Transforming our World: UN Sustainable Development Goals 2030 and the Role of Private International Law*, 2021, at pp. 1–27; S. Vrells, *Quelques réflexions sur l'influence des droits fondamentaux en droit international privé*, *Revue Internationale de Droit Comparé*, n.º 1, 2017, at pp. 47–64; P. Franzina, *The Place of Human Rights in Private International Law of the Union in Family Matters*, In: Bergamini/Ragni (eds), *Fundamental Rights and Best Interests of the Child in Transnational Families*, 2019, at pp. 141–156; R. Espinosa Calabuig, *Derecho Internacional privado europeo y protección de grupos vulnerables*, *Revista General de Derecho Europeo*, n.º 54, 2021, at p. 2; R. Baratta, *Derechos fundamentales y Derecho internacional privado de familia*, *Anuario español de Derecho Internacional privado*, t. XVI, 2016, at pp. 103–126.

II. The Anchoring of the Brussels IIter Regulation Jurisdiction Rules in the Principle of the Best Interests of the Child

The rationale of any rule dealing with children is precisely to ensure that the principle of the best interests of the child is safeguarded to the maximum extent possible. The rules on international jurisdiction in matters of parental responsibility are no exception and therefore share this objective.⁷

This is precisely the case for the rules on international jurisdiction in matters of parental responsibility of the Brussels IIter Regulation,⁸ which are based on respect for, and the safeguarding of, the principle of the best interests of the child.⁹ Thus, the rules of jurisdiction are not only designed in accordance with this principle but must also be interpreted in the light of Article 3 para.1 of the CRC¹⁰ and Article 24 para. 2 of the EU Charter.^{11,12} In the area of international jurisdiction, this principle is embodied by the EU legislator in the criterion of proximity.¹³

In fact, references to the best interests of the child as a guide and limit to the functioning of the Brussels IIter Regulation can be found in its Recitals 19, 20, 23, 26, 27, 30, 39, 47, 48, 55, 57 and 84 as well as in various Articles of the Regulation (Articles 10, 12, 13, 15, 25, 27, 39, 56, 66 and 68 of the Brussels IIter

⁷A. Grammaticaki-Alexiou, *Best Interests of the Child in Private International Law*, Recueil Des Cours, Collected Courses, Tome 412, 2020; P. Hammje, *L'intérêt de l'enfant face aux sources internationales du droit international privé*, In: Jobard-Bachelier/Mayer et al (eds), *Le droit international privé: esprit et méthodes. Mélanges en l'honneur de Paul Lagarde*, 2005, 365, at pp. 371–373; A. Borrás Rodríguez, *El «interés del menor» como factor de progreso y unificación del Derecho internacional privado (discurs d'ingrés)*, 1993, at p. 14; M. Herranz Ballesteros, *El interés del menor en los Convenios de La Haya de Derecho Internacional Privado*, 2004, at p. 118.

⁸The reinforcement of the principle of the best interests of the child has been, precisely, one of the main goals of the Brussels IIbis Recast. However, of course, this principle was already mentioned in the aforementioned instrument, in particular, see Recitals 12, 13 and 33; and Articles 13 and 15 of the Brussels IIbis Regulation.

⁹This has been stated on several occasions by the Court of Justice of the European Union (CJEU). See e.g. CJEU 1 October 2014, case C-436/13, ECLI:EU:C:2014:2246 (E.) para. 45: "It follows that jurisdiction in matters of parental responsibility must be determined, above all, in the best interests of the child".

¹⁰UN 1989 Convention on the Rights of the Child (CRC).

¹¹EU Charter of Fundamental Rights (EU Charter).

¹²See Recital 19 of the Brussels IIter Regulation. Irrespective of the debate on the value of Recitals in EU instruments, this Recital reinforces the general obligation to apply and interpret EU law in accordance with the EU Charter, which derives from the post-Lisbon Treaty legal regime, L. Carpaneto, *Impact of the Best Interests of the Child on the Brussels IIter Regulation*, In: Bergamini/Ragni (eds), *Fundamental Rights and Best Interests of the Child in Transnational Families*, 2019, 265, at p. 275.

¹³As it is reminded by Recital 20 of the Brussels IIter Regulation, and previously, by Recital 12 of the Brussels IIbis Regulation.

Regulation). In all of them, the best interests of the child are considered to be the “paramount consideration”¹⁴ for the functioning of the system.

Focusing on the international jurisdiction model on parental responsibility matters in the Brussels IIter Regulation, the best interests of the child are considered in a double sense. The system of the Brussels IIter Regulation is structured around the general rule of the habitual residence of the child, linked to the criterion of proximity. However, it is acknowledged that the practical reality is extremely rich. This is projected in the Brussels IIter Regulation through the articulation of exceptions to the general rule of habitual residence. In these exceptions, the concept of proximity is either relativised or simply ignored. The first group of precisions to the general rule refers to cases of a legal or illegal modification of the habitual residence of the child, while the second category of forums involves the design of exceptions, opting for criteria other than habitual residence, such as party autonomy. This logic reflects the interplay between the best interests of the child *in abstracto* and *in concreto*.¹⁵

The attempt to improve the consideration of the best interests of the child in the jurisdiction rules of the Brussels IIter Regulation is undoubtedly one important step forward introduced by this instrument.¹⁶ Having said that, the truth is that the new Regulation does not introduce far-reaching changes in the jurisdiction rules model on parental responsibility issues.¹⁷ On the contrary, the Brussels IIbis system and its flexibility is maintained, with of course some modifications with certain nuances and updates, and with constant references to the principle of the best interests of the child.

¹⁴Recital 84 of the Brussels IIter Regulation.

¹⁵In this sense also G. Biagioni, Jurisdiction in matters of parental responsibility between legal certainty and children’s fundamental rights, *European Papers*, v. 4, n.° 1, 2019, 285, at p. 289; L. Carpaneto, La ricerca di una (nuova) sintesi tra interesse superior del minore «in astratto» e «in concreto» nella riforma del Regolamento bruxelles ii-bis, *Rivista di diritto internazionale privato e processuale*, n.° 4, 2018, 944, at p. 960.

¹⁶In fact, as opposed to Recital 12 of the Brussels IIbis Regulation, and the aforementioned new Recital 20 of the Brussels IIter Regulation, it reflects this balance in the jurisdiction rules in a much more precise way, thus responding to certain criticisms from the doctrine. I.e.: “The term “best interests of the child” is used in different senses, depriving it of sensible meaning. This magical term provides the basis of the jurisdiction rules, but at the same time also the basis for its exceptions. This confusion should be rectified by a rephrasing of the Recitals. It should be clear that the best interests of the child are paramount and that they do not necessarily coincide with the criterion of proximity”, T. Kruger/L. Samyn, *Brussels II bis: successes and suggested improvements*, *Journal of Private International Law*, v. 12, n.° 1, 2016, 132, at p. 155.

¹⁷In this sense as well L. Carpaneto, In: Bergamini/Ragni (fn. 12), at p. 275.

III. The Triple Equation of the Best Interests of the Child, the Proximity and the Habitual Residence of the Child: The General Forum in Matters of Parental Responsibility

1. The Plural Role of the Habitual Residence of the Child in the Brussels IIter Regulation

The Brussels IIter Regulation — and its predecessor — following the trend of other international texts, such as the 1996 Child Protection Convention¹⁸ assume in the design of their solutions, in general, the equation of habitual residence of the child, greater proximity and better safeguarding of the best interests of the child.¹⁹

In this context, the child's habitual residence fulfils a dual function. It acts as a criterion for the attribution of international jurisdiction in matters of parental responsibility,²⁰ and it also plays a central role when determining the wrongful nature of a child's removal or retention to another member state in cases of international jurisdiction.²¹ Additionally, it should be borne in mind that the assessment of the habitual residence is also a key element for determining the relationship of the different sources of the parental responsibility legal framework, particularly in the case of the 1996 Child Protection Convention.²²

Article 7 para. 1 of the Brussels IIter Regulation establishes the general rule of jurisdiction in matters of parental responsibility, equating the best interests of the child with the criterion of proximity for the majority of cases. Following this logic, in general, the jurisdiction system of the Brussels IIter Regulation attributes competence in matters of parental responsibility to the courts of the member state where the child is habitually resident at the time the court is seised.

This is because it is understood that these courts are the closest to the child's living situation and, therefore, the best placed to determine questions relating to

¹⁸ 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 (1996 Child Protection Convention).

¹⁹ A discussion about the evolution of the use of the criterion of the habitual residence of the child can be found in A. Bucher, *L'enfant en droit international privé*, 2003, at p. 1.

²⁰ C. Chalas, *Précisions sur la résidence habituelle et la procédure de retour de l'enfant dans le règlement Bruxelles II bis*, *Revue Critique de Droit International privé*, n.° 1, 2018, para. 7.

²¹ See Article 2 para. 2 no. 11 and Chapter III of the Brussels IIter Regulation. The need to establish the habitual residence of the child as a pre-condition in any international child abduction case has also been outlined by the CJEU. See CJEU 8 June 2017, case C-111/17 PPU, ECLI:EU:C:2017:436 (O. L.), in particular paras. 38, 52 and 53.

²² Generally speaking, the Brussels IIter Regulation will be applicable when the child is habitually resident in a member state. However, Article 97 of the Brussels IIter Regulation has clarified certain exceptional situations in which, despite the fact that the child is habitually resident in an EU member state, the 1996 Child Protection Convention shall be applied.

parental responsibility issues.²³ This choice of jurisdiction in favour of the habitual residence of the child corresponds to the principle of the best interests of the child in the abstract (*in abstracto*), i.e., what the legislator — in this case the EU legislator — considers to be in the best interests of the child in the ordinary case.²⁴ Consequently, by using the forum of the habitual residence of the child, the principle of the best interests of the child would already have been taken into account implicitly, and it will not be necessary, in general, to justify the reasons why it is being used.

In line with the legislative option adopted by the EU legislator in the Brussels IIbis Regulation, the Brussels IIter Regulation does not incorporate any definition of the child's habitual residence.²⁵ It is assumed that it is a factual notion which must, therefore, be determined on the basis of the circumstances of the individual case by the courts of the EU countries, as an inherent characteristic of the criterion of proximity.²⁶ This operation of concretion has resulted to be one of the most litigated issues in the practice of the Brussels IIbis Regulation and this will, predictably, continue to be the case in the new Regulation.

The maintenance of the child's habitual residence as a factual notion in the new Brussels IIter Regulation provides a flexible and adequate response to the circumstances of each individual child involved in a cross-border case. Having said that, the legislator could have also opted, perhaps, to introduce the interpretative criteria of the CJEU in the new text, or at least in a Recital.²⁷ In any case, a highly recommended option would be to incorporate them into a future good practices guide.

²³ If not the closest connection, at least, a close connection, P. Lagarde, *Le principe de proximité dans le droit international privé contemporain*, RCADI, t. 196, 1986, at pp. 25 ff.

²⁴ This idea has been stated by the CJEU on several occasions. See, for example, CJEU 15 February 2017, case C-499/15, ECLI:EU:C:2017:118 (W. and V.) para. 51, and the opinion of Advocate General Bot, 1 December 2016, case C-499/15, ECLI:EU:C:2016:920 para 50: "The grounds of jurisdiction in matters of parental responsibility which Regulation No 2201/2003 establishes are shaped in the light of the best interests of the child, in particular on the criterion of proximity. It is for that reason that, pursuant to Article 8 of that regulation, jurisdiction in such matters lies, in the first place, with the courts of the member state in which the child is habitually resident at the time the court is seised. Indeed, because of their geographical proximity, it is those courts that are generally the best placed to assess the measures to be taken in the interests of the child".

²⁵ Following, as well, the 1996 Child Protection Convention. When these Conventions were drafted, habitual residence was considered to be a *de facto* criterion, so that a legal definition had no practical value. Following A. Limante/I. Kunda, *Jurisdiction in Parental Responsibility Matters* (Articles 8, 9 and 13, 14), In: Honorati (ed), *Jurisdiction in Matrimonial Matters, Parental Responsibility and International Abduction. A Handbook on the Application of Brussels IIa Regulation in National Courts*, 2017, 61, at p. 64.

²⁶ On the topic see T. Kruger, *Finding a Habitual Residence*, In: Viarengo/Villata (eds), *Planning the Future of Cross Border Families. A Path Through Coordination*, 2020, at pp. 117–132.

²⁷ Nonetheless, legal operators already handle them properly in practice, as evidenced by Spanish case law. For an analysis of this case law see M. González Marimón, *Menor y responsabilidad parental en la Unión Europea*, 2021, at pp. 149–153.

2. *The Notion of the Habitual Residence of the Child in the CJEU Case Law*

In this task of determining the autonomous notion of the child's habitual residence, the broad case law of the CJEU has been of enormous relevance in setting up uniform interpretative criteria. It is a special and unique notion that finds an additional significance, precisely, because of children's conditions: children are subjects with their own rights and whose interests need to be safeguarded. Their vital, social and family factual circumstances differ from those of adults.

The CJEU has recalled several times that the habitual residence of the child is an EU law autonomous concept²⁸ as well as a factual notion.²⁹ Therefore, it is for the courts of the member states to establish the habitual residence of the child on the basis of all the circumstances specific to each individual case,³⁰ by carrying out an overall analysis of all the particular factual circumstances surrounding the child in each case.³¹ Moreover, these circumstances ought to be, mainly, objective.³²

The key element in the process of determining the child's habitual residence is his/her social and family integration in a member state: that is, where his or her centre of life is located.³³ Therefore, the mere physical presence of the child in a member state is not sufficient to establish the habitual residence of the child.³⁴ It has to come with a presence that is not temporary or intermittent and which shows "some degree of integration in a social and family environment".³⁵

²⁸ See for example CJEU 22 November 2010, case C-497/10 PPU, ECLI:EU:C:2010:829 (Mercredi) paras. 45 and 46. This autonomous interpretation must be uniform for all the articles in the Brussels I Inter Regulation (CJEU 9 October 2014, case C-376/14 PPU, ECLI:EU:C:2014:2268 (C.) para. 55; CJEU 8 June 2017, case C-111/17 PPU, ECLI:EU:C:2017:436 (O. L.) para. 41) but not necessarily to other EU Regulations (CJEU 2 October 2009, case C-523/07, ECLI:EU:C:2009:225 (A.) para. 36). In consequence, there is not a common notion of habitual residence in the EU Regulations. See A. Limante/I. Kunda, In: Honorati (fn. 25), at p. 65.

²⁹ See for example CJEU 8 June 2017, case C-111/17 PPU, ECLI:EU:C:2017:436 (O. L.) para. 51.

³⁰ CJEU 2 October 2009, case C-523/07, ECLI:EU:C:2009:225 (A.) para. 37.

³¹ According to Lenaerts, the CJEU, with this balancing of the circumstances of the specific case, is modulating the principle of legal certainty in such a way as to guarantee the requirements of the principle of the best interests of the child in conjunction with the criterion of proximity. The CJEU thereby avoids a fixed and watertight concept of the child's habitual residence, which would not necessarily guarantee the best interests of the child in every specific case. K. Lenaerts, *The Best Interests of the Child Always Come First: the Brussels II bis Regulation and the European Court of Justice*, *Jurisprudencija/Jurisprudence*, v. 20, n.º 4, 2013, at p. 1307.

³² CJEU 28 June 2018, case C-512/17, ECLI:EU:C:2018:513 (H. R.) para. 64.

³³ CJEU 2 October 2009, case C-523/07, ECLI:EU:C:2009:225 (A.) para. 44.

³⁴ CJEU 2 October 2009, case C-523/07, ECLI:EU:C:2009:225 (A.) para. 33.

³⁵ CJEU 2 October 2009, case C-523/07, ECLI:EU:C:2009:225 (A.) para. 38. For this purpose some detailed factors are listed by the CJEU: "In particular, the duration, regularity, conditions and reasons for the stay on the territory of a member state and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family

Departing from this general premise, it has also been accepted that, under certain circumstances, some factual elements allow the solution to be nuanced or modulated in the light of the circumstances of the particular case. Notably, this has been the case for the age of the child³⁶ or the subjective requirement of the will or intention of the parents.³⁷ It also applies to the mandatory physical presence of the child in an EU member state to establish his or her habitual residence there,³⁸ which has been the discussed issue of the latest pronouncements of the CJEU.³⁹

and social relationships of the child in that State must be taken into consideration”, CJEU 2 October 2009, case C-523/07, ECLI:EU:C:2009:225 (A.) para. 39.

³⁶The age of the child directly influences the social and family integration of the child. For instance, the situation of a child in school age and the one of an infant are not the same. The environment of a young child is essentially a family environment (CJEU 22 November 2010, case C-497/10 PPU, ECLI:EU:C:2010:829 (Mercredi) paras. 53–55). Notwithstanding the fact that an infant’s environment is largely determined by the parent with whom he/she resides on a daily basis, the other parent may also be an important factor to be considered, for instance if he/she lives in the same city and has a regular relationship with the child (CJEU 28 June 2018, case C-512/17, ECLI:EU:C:2018:513 (H. R.) para. 48). The relevance of the age of the child is also addressed in CJEU 8 June 2017, case C-111/17 PPU, ECLI:EU:C:2017:436 (O. L.).

³⁷The CJEU has known different cases regarding the parents’ intention. They concern both the existence of a willingness to move to a different country expressed in the past — before the habitual residence has been changed — as well as projected into the future — i.e. the future intention to change the habitual residence. In this regard, the CJEU establishes that in cases of young children, “the parents’ intention to settle permanently with the child in another member state, manifested by certain tangible steps such as the purchase or lease of a residence in the host member state, may constitute an indicator of the transfer of the habitual residence” (CJEU 2 October 2009, case C-523/07, ECLI:EU:C:2009:225 (A.) para. 40). Despite the fact that the parent and the child are in the new place of residence for a short period of time, in this case, the lack of the objective criterion of “habituality” is compensated by the subjective criterion of the intention of the parent (CJEU 22 November 2010, case C-497/10 PPU, ECLI:EU:C:2010:829 (Mercredi) paras. 41–51). However, in other cases the CJEU has been reluctant to attribute too much weight to the intention of the parent, as this could be detrimental to legal certainty (following G. Biagioni (fn. 15), at p. 293). Therefore, the intention of the parents is an important factor to be considered, but it cannot be the only factor. It must be weighted together with all the circumstances of the case. Other external circumstances may have more relevance in a particular case, such as the presence of the child in the member state concerned since birth, his or her schooling, or the fact that he or she maintains a close relationship with the parent with whom he or she does not live (CJEU 28 June 2018, case C-512/17, ECLI:EU:C:2018:513 (H. R.)); or the provisional nature of a judgment (CJEU 9 October 2014, case C-376/14 PPU, ECLI:EU:C:2014:2268 (C.) para. 57).

³⁸For instance, in CJEU 15 February 2017, case C-499/15, ECLI:EU:C:2017:118 (W. and V.), even if one of the nationalities of the child was that of a specific EU member state — in this case Lithuania — the child’s habitual residence can never be established there, since he or she has never been physically present there.

³⁹As this might have seen to clarify the CJEU’s interpretation of the circumstance of the physical presence, two more cases were presented regarding this point. The peculiarity of both cases lies in the fact that the habitual residence of a young child who has resided in a single state since birth must be determined. Despite this indisputable geographical connection between the child and the territory of a specific state, on both occasions, the national courts have asked the CJEU to disregard this objective circumstance as a determining factor in establishing the habitual residence of the child, given the existence of other weighty factors that would cast doubt on the determining nature of such

This rigid requirement for the physical presence of the child in order to establish his or her habitual residence in an EU member state for the application of the general rule of the Brussels IIter Regulation, although reasonable for guaranteeing legal certainty,⁴⁰ may cause some frictions. For instance, it may have an important impact on international child abduction cases as it establishes a clear difference in treatment before and after the child is born.⁴¹ In addition, it should be borne in mind that a divergence between the terminology of the EU Regulation and other legal sources, especially the 1996 Child Protection Convention or the 1980 Child Abduction Convention,⁴² is always possible. For these instruments, the courts of other contracting parties might interpret that the physical presence is not a mandatory circumstance for the establishment of the habitual residence of the child.

To sum up, the CJEU requires the concurrence of two indispensable conditions — objective and subjective — in order to be able to affirm that a child has a habitual residence in a given member state: on the one hand, an objective criterion, the physical presence of the child in the territory together with the requirement of a certain degree of integration in the social and family environment, and on the other hand, a subjective criterion, a certain degree of (proven) intention to create a stable life in a given member state.⁴³ Therefore, this double condition should be met in order to apply the general rule of jurisdiction on matters of parental responsibility to a migrant child.

a link. In CJEU 8 June 2017, case C-111/17 PPU, ECLI:EU:C:2017:436 (O. L.), the other factor was the past intention of the parents to establish the habitual residence of the child where they lived — Italy — after the birth of the child — which was in Greece. More worryingly, in CJEU 17 October 2018, case C-393/18 PPU, ECLI:EU:C:2018:835 (U. D.), it is asked whether “circumstances such as those in the main proceedings, assuming that they are proven, that is to say, first, the fact that the father’s coercion of the mother had the effect of her giving birth to their child in a third country where she has resided with that child ever since, and, secondly, the breach of the mother’s or the child’s rights, have any bearing in that regard” (para. 43). For the first time, the CJEU must assess whether an alleged infringement of fundamental rights, protected by the EU Charter, can constitute a factor capable of counterbalancing the priority given hitherto to the physical presence of the child in a place — as an exponent of the criteria of proximity and legal certainty. However, the CJEU concludes that these circumstances “do not have any bearing” for the determination of the habitual residence of the child for the application of Article 8 para. 1 of the Brussels IIbis Regulation (para. 70). Instead, it suggests the possible application of Article 14 of the Brussels IIbis Regulation, verifying the possibility of the jurisdiction of the national courts under their national laws (para. 66).

⁴⁰G. Biagioni (fn. 15), at pp. 294–295; T. Kruger/L. Samyn, *Journal of Private International Law*, v. 12, n.° 1, 2016, 132, at p. 147.

⁴¹In practice, the paradox of a totally different response can occur in the case of a pregnant mother moving to any other state, and a parent moving after the child is born. Under the Regulation, the first case could not be qualified as a wrongful removal or retention, whereas the second case could.

⁴²Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (1980 Child Abduction Convention).

⁴³A. Limante/I. Kunda, In: Honorati (fn. 25), at p. 68.

IV. The Exceptions to the Habitual Residence of the Child as the General Rule: In Search of the Best Interests of the Child *In Concreto*

The EU legislator designs a series of nuances to the general rule of the habitual residence of the child, seeking to achieve maximum flexibility and adaptability to the complex practical reality. Therefore, it allows other courts within the EU than the one of the habitual residence of the child to hear a particular case when it is clear from the circumstances that this is precisely in the child's best interests. That is to say that, together with the general forum, the EU legislator articulates a series of alternative or complementary forums in order to safeguard the principle of best interests *in concreto*; that is the best interests of a child in a given case, which does not necessarily have to correspond, in all cases and on all occasions, to what is considered best for him or her in general. As the exceptional circumstances that they are, it will be necessary to justify on each occasion that the application of these forums constitutes the option that best guarantees the best interests of the child in that particular case.⁴⁴

This idea would explain why an express reference to the best interests of the child is added in most of the special grounds for jurisdiction, in one form or another. This is not even explicitly mentioned in the general rule although it is true that it is mentioned in the Recitals, but not in the provision relating to the general rule. Thus, when applying the special rules, the judge must take into account the circumstances surrounding the specific situation in order to ensure that the exercise of jurisdiction is the most appropriate option for guaranteeing the best interests of the child.

1. The Nuances to the Habitual Residence of the Child Jurisdiction Rule: Lawful vs. Unlawful Relocation

The first two exceptions provided by the Brussels IIter Regulation find their justification, precisely, on the change in the location of the child. The reply provided depends on the lawful or unlawful nature of the movement of the child to another member state.

⁴⁴ Also on the need to justify the application of the best interests *in concreto*, L. Carpaneto, Rivista di diritto internazionale privato e processuale, n°. 4, 2018, 944, at p. 960.

a) First Situation: The Lawful Change of the Habitual Residence of the Child

In a cross-border context, the mobility of families and children is a very common reality which can also alter the life of the child in different ways. Reality thus shows the presence of multiple situations in which a child changes its location. And therefore, that could also entail the modification of his or her habitual residence. This could lead, sometimes, to tense situations. Precisely, the so-called relocation disputes are a particularly problematic example: situations in which holders of parental responsibility of the child, and in particular the holders of the rights of custody,⁴⁵ do not agree on his/her place of residence.

In this context, while the EU legal framework provides a strong answer to cases of international child abduction, it hardly regulates the procedure for a parent to request a legal change of his or her child's habitual residence. Consequently, the EU law leaves this question to the domestic legislation of each member state.⁴⁶ Perhaps at this point, the EU legislator could have opted for a more proactive approach, since this problem has a direct impact on the mobility of families within the EU.

The rules of international jurisdiction in matters of parental responsibility confront this issue indirectly when they address the child's legal change of habitual residence. In this regard, certain exceptions to the general forum of the child's habitual residence are designed which seek to take into account and respond to different specific situations which may affect the child.

The treatment of the child's lawful relocation is designed around two forums which have not undergone major changes in the Brussels IIter Regulation: the general forum of the child's habitual residence⁴⁷ and the forum on continuing jurisdiction in relation to access rights⁴⁸ in the event of a legal change in the child's habitual residence.

Regarding the first one, in the recast of the Brussels IIbis Regulation the maintenance of *perpetuatio iurisdictionis* or *perpetuatio fori* principle was called into question.⁴⁹ According to this principle, and as a general rule, for procedures already

⁴⁵ This is understood, in terms of the Regulation, as the right to determine place of residence of the child. See Article 2 para. 2 no. 9 of the Brussels IIter Regulation.

⁴⁶ For instance, in Spain there has been different case law of the Supreme Court analysing the criteria for a legal change of the habitual residence of the child — both internal and international. On this topics see C. González Beilfuss, *El traslado lícito de menores: las denominadas relocation disputes*, *Revista Española de Derecho Internacional*, v. LXII, n.º 2, 2010, at pp. 51–75; M. Herranz Ballesteros, *Traslado del domicilio del menor a otro país. Doctrina del Tribunal Supremo*, In: Calvo Caravaca/Carrascosa González (eds), *El Tribunal Supremo y el Derecho Internacional Privado*. Volumen 2, *Rapid Centro Color*, 2019, at pp. 567–586.

⁴⁷ See Article 7 para. 1 of the Brussels IIter Regulation.

⁴⁸ See Article 8 of the Brussels IIter Regulation.

⁴⁹ In fact, the suppression of the *perpetuatio fori* principle was proposed. See European Commission, *Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)*, COM/2016/0411 final — 2016/0190 (CNS), at p. 39 and Recital 15. De

pending, the courts of the member state in which the proceedings have been initiated shall have jurisdiction until they have rendered a judgment that is final and no longer open to appeal, even if in the course of that procedure the child changes his or her habitual residence.⁵⁰ This solution differs from the general jurisdiction rule contained in Article 5 para. 2 of the 1996 Child Protection Convention,⁵¹ where the courts of the new habitual residence of the child immediately have jurisdiction even if there are pending proceedings in the previous contracting state. However, the EU legislator has finally chosen to maintain on the 2019 instrument the regime existing in the Brussels IIbis Regulation, although nuancing the principle⁵² as well as clarifying the diverse possible situations and their treatment.⁵³ Therefore, this represents one example of the different treatment for intra-EU mobility and mobility

Boer is highly critical of this system and believes that the EU legislator introduced the *perpetuatio fori* principle with intra-European movements in mind, not movements with third states. Above all, in this group of cases, the author believes that there may be negative consequences for the interests of the child and for the criterion of proximity. Fundamentally, the risk of parallel proceedings and the refusal to recognise and enforce the possible judgment of the EU member state. T. M. De Boer, What we should not expect from a recast of the Brussels IIbis Regulation, *Nederlands Internationaal Privaatrecht*, no. 1, 2015, 10, at pp. 15–18. Equally see H. Van Loon, The Brussels IIa Regulation: towards a review?, in European Parliament: Cross-border activities in the EU-Making life easier for citizens, Workshop for the JURI Committee, Directorate General for internal policies. Policy Department C: Citizens' Rights and Constitutional Affairs, 2015, 178, at p. 192; E. Rodríguez Pineau, La refundición del Reglamento Bruselas II bis: de nuevo sobre la función del Derecho Internacional privado europeo, *Revista Española de Derecho Internacional*, v. 69, no. 1, 2017, 139, at p. 156.

⁵⁰CJEU 22 November 2010, case C-497/10 PPU, ECLI:EU:C:2010:829 (Mercredi), confirmed that the habitual residence of the child must be determined at the time when the case is brought before the court in question, in accordance with Article 8 of the Brussels IIbis Regulation.

⁵¹Article 5 para. 2 of the 1996 Child Protection Convention establishes that: "Subject to Article 7, in case of a change of the child's habitual residence to another contracting State, the authorities of the State of the new habitual residence have jurisdiction". In this sense A. Borrás Rodríguez, Article 9. Continuing jurisdiction of the child's former habitual residence, In: Magnus/Mankowski (eds), *EC PIL European Commentaries on Private International Law Commentary Volume IV Brussels IIbis Regulation*, 2017, at p. 117; N. Lowe/M. Nicholls, *The 1996 Hague Convention on the Protection of Children, Family Law*, at p. 38; H. Setright/D. Williams et al, *International Issues in Family Law. The 1996 Hague Convention on the Protection of Children and the Brussels IIa, Family Law*, at p. 33.

⁵²In this sense C. Honorati, La proposta di revisione del regolamento bruxelles II-bis: Piu' tutela per i minori e piu' efficacia nell'Esecuzione delle decisioni, *Rivista di diritto internazionale privato e processuale*, v. 52, no. 2, 2017, 247, at p. 251.

⁵³See Article 7 para. 1 and Recital 21 of the Brussels IIter Regulation. The Recital suggests a differentiated solution depending on whether or not there is a pending case at the time of a change in the habitual residence of the child. In particular, it leaves the door open to a possible transfer of jurisdiction despite the existence of a pending case. However, unlike the Commission and Parliament proposals, it does not leave this power to the agreement of the parties, but to the court. Campuzano Díaz understands that a proper balance between legal certainty and flexibility has been achieved, B. Campuzano Díaz, *El nuevo Reglamento (UE) 2019/1111: análisis de las mejoras en las relaciones con el Convenio de La Haya de 19 de octubre de 1996 sobre responsabilidad parental*, *Cuadernos de Derecho Transnacional*, v. 12, no. 2, 97, at pp. 110–111.

towards a third country contracting state of the 1996 Child Protection Convention.⁵⁴

b) Second Situation: The Protection of the General Forum in Cases of International Child Abduction

Secondly, in cases of international child abduction,⁵⁵ the jurisdiction rule set forth in Article 9 of the Brussels IIter Regulation in practically identical terms as in its predecessor is articulated on a general rule and certain exceptions. They seek to provide a flexible response by dividing the competences between the two EU member states potentially affected by such a situation.⁵⁶ In general, this forum enhances the general rule of the habitual residence of the child,⁵⁷ but conversely, in certain justified circumstances, it allows the transfer of the jurisdiction on the substance to the courts of the member state in which the child is wrongfully located.⁵⁸

Therefore, the balance of the best interests of the child *in abstracto* and *in concreto* is reproduced and adapted to the inner logic of international child abduction cases, which face special problems both from a social and systemic point of view. In general, in the event of a wrongful removal or retention of a child to another state — in our case, within the EU — in breach of custody rights, it is understood that what

⁵⁴ Indeed, like its predecessor, once the habitual residence of the child has been acquired in a third state party to the 1996 Child Protection Convention, the latter instrument will apply, as specified in Article 97 para. 1 lit. a of the Brussels IIter Regulation. Therefore, with the new version of the Brussels IIter Regulation we continue to have this difference in treatment in the institutional and conventional regime when the child moves to a third state party to the 1996 Child Protection Convention once the proceedings have been initiated, as established in CJEU 14 July 2022, case C-572/21, ECLI:EU:C:2022:562 (CC) for the Brussels IIbis Regulation. In this sense too T. Garber, Article 7 General Jurisdiction, In: Magnus/Mankowski (eds), ECPIIL European Commentaries on Private International Law Commentary Volume IV Brussels IIter Regulation, 2023, at pp. 141 and 143. For an in-depth analysis of this topic see M. González Marimón, La movilidad de niños y niñas más allá de las fronteras de la Unión (traslado lícito e ilícito de menores de un Estado miembro a un Estado tercero), Bitácora Millenium DIPr, 2023, no. 18, at pp. 10–21.

⁵⁵ See Article 2 para. 2 no. 11 of the Brussels IIter Regulation for the definition of wrongful retention or removal of a child.

⁵⁶ This forum might only come into action when the wrongful retention or removal is produced from one EU member state to another. CJEU 24 March 2021, case C-603/20 PPU, ECLI:EU:C:2021:231 (M. C. P.).

⁵⁷ Therefore, the court of a member state where the child is wrongfully present does not have jurisdiction to hear an application for custody of the child, in the absence of any indication that the other parent has consented to the removal of the child or has not lodged an application for the child's return. See CJEU 10 April 2018, case C-85/18 PPU, ECLI:EU:C:2018:220 (C. V.) para. 57.

⁵⁸ In other words, a wrongful removal or retention of a child will not affect the determination of jurisdiction except in certain very limited circumstances. C. Honorati/A. Limante, Jurisdiction in Child Abduction Proceedings (Article 10, 11), In: Honorati (ed), Jurisdiction in Matrimonial Matters, Parental Responsibility and International Abduction. A Handbook on the Application of Brussels IIa Regulation in National Courts, 2017, 93, at p. 105.

best corresponds to his or her best interests is, precisely, his or her immediate return to the place of previous habitual residence. However, although this premise remains true in most cases, the answer must be weighted in the light of the circumstances of the particular case, in which the interests of the child involved may not be identified with that immediate return. This is precisely the equilibrium established by the 1980 Child Abduction Convention, by which the EU Regulation is inspired.⁵⁹

The legal response to international child abduction in the EU shows a landscape of a plurality of legal sources seeking to discourage this phenomenon. It is mainly a tripartite legal framework consisting of the interplay between the Brussels IIter Regulation and the 1980 Child Abduction Convention, which is supplemented by the timely interaction of the 1996 Child Protection Convention. The EU legislator opted for a peculiar regulation of international child abduction, consisting in the reference by the Brussels IIbis — now Brussels IIter — Regulation to the 1980 Child Abduction Convention, but with certain modifications. It goes without saying that to properly understand this rule of jurisdiction, it is also essential to study the legal framework of international child abduction, and in particular, the other provisions regarding international child abduction in the Brussels IIter Regulation, notably Chapter III.⁶⁰

Nowadays, a necessary redefinition of the legal framework of international child abduction is suggested, seeking to adapt it to new realities and nuances. In this line, there is a need to face the profound social changes of recent decades, reflected in the consolidation of different family models, or in the already targeted greater children rights centred approach, over his or her parents' rights. That is why recent cases are showing that the immediate return of the child might not always be the best solution for the child involved.⁶¹ Just as a paradigmatic example of the complexity of these cases, there is an increasing awareness of how to deal with cases where domestic or gender-based violence is alleged as a ground for denial of the return of the child.⁶²

⁵⁹ Article 9 of the Brussels IIter Regulation is very similar to Article 7 of the 1996 Child Protection Convention, both of them are clearly inspired by the 1980 Child Abduction Convention system for the return of the child, and its general rules and exceptions (Articles 12, 13 and 20 of the 1980 Child Abduction Convention).

⁶⁰ For a general study of the international child abduction regime in the EU see M. González Marimón, *La sustracción internacional de menores en el espacio jurídico europeo*, 2022; for a specific work on the novelties introduced by the Brussels IIter Regulation see M. González Marimón, *La regulación de la sustracción internacional de menores en el Reglamento Bruselas II ter y sus principales novedades: hacia una mejor protección del interés superior del menor*, *Cuadernos de Derecho Transnacional*, 2022, v. 14, no. 1, at pp. 286–312.

⁶¹ In this sense see M. Herranz Ballesteros, *El retorno seguro del menor: ¿puente entre la excepción de grave riesgo y la obligación de devolución?*, *Bitácora Millenium DIPr: Derecho Internacional Privado*, n.º. 19, 2024; and I. Pretelli, *Una reinterpretación del Convenio de La Haya sobre la sustracción de menores para proteger a los niños de la exposición al sexismo, la misoginia y la violencia contra las mujeres*, *Cuadernos de Derecho Transnacional*, v. 14, n.º. 2, 2022, pp. 1310–1337.

⁶² K. Trimmings et al (eds), *Domestic Violence and Parental Child Abduction*, 2022. Directly related to the object of this book, particularly interesting is CJEU 2 August 2021, case C-262/21

2. *The Special Grounds of Jurisdiction in Matters of Parental Responsibility Proceedings*

As it has already been stated, the general forum of the habitual residence of the child is based on the premise that it is identified as the one that best guarantees the best interests of the child *in abstracto*. However, in certain circumstances, the best interests of the child *in concreto* may recommend that the courts of another member state have jurisdiction. On that basis, the Brussels IIter Regulation proceeds to make that rule more flexible by articulating a number of exceptions to it, two of which have presented a special relevance in practice.

Specifically, we are referring to the choice of court forum and the forum relating to transfer of proceedings to a court better placed to hear the case. Both of them share the fact that they are based on the principle of flexibility that is characteristic of questions of parental responsibility, seeking to provide a response adapted to the intrinsic complexity of this matter.

a) Choice of Court Forum: The Best Interests of the Child as a Limit to Party Autonomy in Matters of Parental Responsibility

Party autonomy in Private International Family Law is known to be a developing sector with an increasing — but unequal — role in the EU.⁶³ In line with this tendency, and specifically in relation to international jurisdiction, the EU legislator has improved and advanced its regulation in the Brussels IIbis Regulation recast process towards the Brussels IIter Regulation. Although the spirit of the previous legislation is maintained, certain relevant modifications have been introduced.

PPU, ECLI:EU:C:2021:640 (A.), connecting European Asylum Law, domestic violence and a removal of a child to another member state. See B. Heiderhoff, Geflüchtete und HKÜ, IPRax, Issue 6/2022, 1, at pp. 1–3; S. Corneloup, Demande de retour d'un enfant enlevé et principe de non-refoulement des réfugiés: lorsque la Convention de La Haye de 1980 rencontre la Convention de Genève de 1951, *Revue Critique de Droit International Privé*, no. 4, 2021, aT pp. 773–787; C. Ruiz Sutil, International Removals in Contexts of Violence between European Asylum Law and the Best Interests of the Child. The CJEU case a. V. B., of 2 august 2021, *Yearbook of Private International Law*, v. 23, 2021/2022, at pp. 349–363.

⁶³ González Beilfuss talks about an “emerging tendency”, specially thanks to the EU Regulations in family law: C. González Beilfuss, Reflexiones en torno a la función de la autonomía de la voluntad conflictual en el Derecho internacional privado de familia, *Revista Española de Derecho Internacional*, v. 72, no. 1, 2020, 101, at pp. 101–102. There are plenty of academic works on the topic, for all see C. González Beilfuss, Party Autonomy in International Family Law, 2020; E. Jayme, Party autonomy in International Family and Succession Law: New tendencies, *Yearbook of Private International Law*, v. 11, 2009, at pp. 1–10; L. Walker, Party Autonomy, Inconsistency and the Specific Characteristics of Family Law in the EU, *Journal of Private International Law*, v. 14, no. 2, 2018, 225, at pp. 225–261; J. Gray, Party Autonomy in EU Private International Law, 2021.

As a first visual change, the reference to the “prorogation of jurisdiction” of Article 12 of the Brussels IIbis Regulation is abandoned in Article 10 of the Brussels Iter Regulation to speak directly of “choice of court”. Additionally, and reflecting the CJEU transcendent case law in this area, one of the major innovations is the suppression of any reference to the prorogation of jurisdiction on matrimonial or substantially connected grounds.⁶⁴ Instead, the text generically refers to the choice of forum, so that proceedings in matters of parental responsibility acquire their own autonomy.⁶⁵

This demonstrates the significant advance of party autonomy in international jurisdiction in matters of parental responsibility. That autonomy, however, is clearly limited, finding the child’s best interests as an impassable limit. This conditionality translates into the presence of three cumulative requirements, which are remarkably similar to the wording of the former Article 12 of the Brussels IIbis Regulation: (1) the substantial connection of the child with the member state in question,⁶⁶ (2) the acceptance by all the parties of the choice of forum — freely and expressly,⁶⁷ (3) and finally, logically, that the exercise of the choice of forum is in the best interests of the child.⁶⁸

The intense CJEU case law regarding the application of these requirements in the Brussels IIbis Regulation perfectly shows the difficulties in properly assessing the best interests of the child in each particular case. And more importantly, the judgments highlight the difficulties in establishing common guidelines that ensure

⁶⁴ Article 12 of Brussels IIbis Regulation contained different concrete situations where the prorogation of jurisdiction was allowed: prorogation of jurisdiction on cases of matrimonial matters linked to parental responsibility issues (Article 12 para. 1), prorogation of jurisdiction in cases of a substantial connection of the child with another member state (Article 12 para. 3) and prorogation in cases where the child has his or her habitual residence in the territory of a third state which is not a contracting party to the 1996 Child Protection Convention (Article 12 para. 4). However, although the first two situations no longer appear in the provision, they are still referred to in Recital 23 of the new Regulation. On the contrary, the reference of 12 para. 4 of the Brussels IIbis Regulation is suppressed in the new regime.

⁶⁵ As established by CJEU 12 November 2014, case C-656/13, ECLI:EU:C:2014:2364 (L. versus M.) para. 45. In this sense C. Honorati, *Rivista di diritto internazionale privato e processuale*, v. 52, no. 2, 2017, 247, at p. 254; C. González Beilfuss, *Party Autonomy in International Family Law*, 2020, at p. 160.

⁶⁶ “In particular by virtue of the fact that: (i) at least one of the holders of parental responsibility is habitually resident in that Member State; (ii) that Member State is the former habitual residence of the child; or (iii) the child is a national of that Member State” (Article 10 para. 1 lit. a of the Brussels Iter Regulation).

⁶⁷ Article 10 para. 1 lit. b of the Brussels Iter Regulation. This requisite is the manifestation of the line of thought which revendicates the need to adapt party autonomy in family law to the logic and notions of family relations. For instance, family relations are not horizontal but rather interdependent, and they usually develop in a context of cooperation, altruism and solidarity. The theory of vulnerability is an example, situating the caring works at the centre, which have been traditionally influenced by gender roles. On this topic see C. González Beilfuss (fn. 65), at pp. 193–201; L. Walker (fn. 63), at pp. 244–245.

⁶⁸ Article 10 para. 1 lit. c of the Brussels Iter Regulation.

certain legal certainty in their application. As in other European instruments, the Brussels IIter Regulation has assumed the various pronouncements of the CJEU in interpreting the requirements for the activation of the forum.⁶⁹ It can certainly be stated that the Brussels IIter Regulation has improved the structure and procedure of the aforementioned forum, as well as the formulation of other points relating to the extent of the parties' consent, the moment of exercising it, or the formal requirements of the agreement.⁷⁰

However, this new provision leaves some open questions. Particularly noteworthy is Article 10 para. 4 of the Brussels IIter Regulation, which provides that competence granted in accordance with one of the modalities of acceptance shall be exclusive.⁷¹ Perhaps this is the most controversial uncertainty of the new forum, because it raises doubts about the scope, and even nature of that exclusive character.⁷² Finally, a further unanswered aspect by the new regulation, which might have a direct impact on migrant families, is whether it is possible to apply the elective forum of Brussels IIter when the child has his/her habitual residence in a third country — non-party of the 1996 Child Protection Convention. This question is accentuated by the fact that Article 12 para. 4 of the Brussels IIbis Regulation, which specifically addressed this situation, has been suppressed.

⁶⁹ CJEU 1 October 2014, case C-436/13, ECLI:EU:C:2014:2246 (E.); CJEU 12 November 2014, case C-656/13, ECLI:EU:C:2014:2364 (L. versus M.); CJEU 21 October 2015, case C-215/15, ECLI:EU:C:2015:710 (Gogova); CJEU 19 April 2018, case C-565/16, ECLI:EU:C:2018:265 (Saponaro); CJEU 16 January 2018, case C-6044/17, ECLI:EU:C:2018:10 (P. M. versus A. H.); CJEU 3 October 2019, case C-759/18, ECLI:EU:C:2019:816 (O. F. versus P. G.).

⁷⁰ Focusing on the aforementioned conditions, the Article 12 of the Brussels IIbis Regulation clause "the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner" has been particularly problematic, as well as the concretion of the moment when such consent must be controlled by the chosen court. These points have now been clarified by the EU legislator, albeit incorporating a quite complex regulation. It distinguishes between two modalities of acceptance, depending on the moment when it takes place: before the procedure — including, therefore, choice of court agreements (Article 10 para. 1 lit. b i) of the Brussels IIter Regulation); or during the procedure, as a novelty to the previous regime (Article 10 para. 1 lit. b ii) of the Brussels IIter Regulation). The formal requirements are established by Article 10 para. 2 of the Brussels IIter Regulation.

⁷¹ Article 10 para. 4 and para. 1 lit. b ii) of the Brussels IIter Regulation.

⁷² Regarding, in particular, the possibility to transfer the proceedings and in cases of *lis pendens*. See Articles 12 para. 5, 20 paras. 4 and 5, and Recital 38 of the Brussels IIter Regulation. It also might imply a different treatment of the previously mentioned two modalities of acceptance, and the possible effect on choice of court agreements. Therefore, it is still unclear whether exclusive prorogation is possible beyond the cases named in Article 10 para. 4 of the Brussels IIter Regulation. Legal doctrine has also identified this issue, see B. Heiderhoff: *Das Sorgerechtsverfahren nach der EuEheVO 2019 — Beschwörungen, Kompromisse und Hoffnungen*, IPRax, Issue 4/2023, 333, at p. 334; S. Corneloup/T. Kruger, *Le Règlement 2019/1111, Bruxelles II: la protection des enfants gagne du terrain*, *Revue Critique de Droit International Privé*, no. 2, 2020, 215, at pp. 229–230; B. Campuzano Díaz, *Los acuerdos de elección de foro en materia de responsabilidad parental: un análisis del art. 10 del Reglamento (UE) 2019/1111*, *Revista Electrónica de Estudios Internacionales*, n.º 40, 2020, at p. 31.

b) The Transfer of Proceedings to a Better Court to Hear the Case as a Paradigmatic Example of the Best Interests of the Child in Concreto: The Flexibilisation of the Response

The Brussels IIter Regulation system also foresees the transfer of jurisdiction, inspired by the figure of *forum non conveniens*, and directly based on the principle of flexibility. Therefore, this ground of jurisdiction represents the paradigmatic example of the balance between the best interests of the child *in abstracto* and *in concreto*. It also demonstrates the need to strike the great balance between legal certainty and the proper guarantee of the principles of the best interests of the child and of proximity. This delicate balance leads to allowing, in certain exceptional circumstances, or for practical reasons, that the transfer of jurisdiction constitutes the best response to the specific case.⁷³

As a novelty, the new Regulation, in line with the 1996 Child Protection Convention, abandons the asymmetry of the previous text and articulates the transfer of jurisdiction in two provisions. One relates to the transfer of jurisdiction by the competent court as set out in Article 12 of the Brussels IIter Regulation. The other asks for such a transfer as stipulated in Article 13 of the aforementioned Regulation. Moreover, it improves its procedural functioning by clarifying some problematic issues which have been raised in practice, and resolved by the CJEU.⁷⁴

As far as the transfer of jurisdiction is concerned, according to the CJEU's case law, it must be interpreted restrictively.⁷⁵ The strong presumption in favour of the court having jurisdiction is questioned just in the light of the circumstances of the particular case. In order to ensure such an exceptional application, Article 12 para. 1 of the Brussels IIter Regulation establishes three requisites: (1) the child's particular connection with the member state concerned,⁷⁶ (2) that the court is better placed

⁷³E. Pataut, Article 15. Transfer to a court better placed to hear the case, In: Magnus/Mankowski (fn. 51), at p. 175; C. Honorati/A. Limante, Transfer of Proceedings (Article 15), In: Honorati (ed), Jurisdiction in Matrimonial Matters, Parental Responsibility and International Abduction. A Handbook on the Application of Brussels IIa Regulation in National Courts, 2017, 199, at pp. 202–203.

⁷⁴On the interpretation of Article 15 of the Brussels IIbis Regulation see CJEU 27 October 2016, case C-428/15, ECLI:EU:C:2016:819 (D.); CJEU 4 October 2018, case C-478/17, ECLI:EU:C:2018:812 (I. Q.); CJEU 10 July 2019, case C-530/18, ECLI:EU:C:2019:583 (E. P.). And after the entry into force of Brussels IIter Regulation CJEU 27 April 2023, case C-372/22, ECLI:EU:C:2023:364 (C. M. versus D. N.); CJEU 13 July 2023, case C-87/22, ECLI:EU:C:2023:571 (T. T.).

⁷⁵CJEU 27 October 2016, case C-428/15, ECLI:EU:C:2016:819 (D.), para. 29.

⁷⁶Article 12 para. 4 of the Brussels IIter Regulation further establishes an exhaustive list of the concrete situations of particular connection and proximity between the child and the member state. However, the CJEU recalls that the existence of this proximity does not necessarily mean that the other two requisites are met in the particular case. CJEU 27 October 2016, case C-428/15, ECLI:EU:C:2016:819 (D.), paras. 52–55.

to hear the case,⁷⁷ (3) and finally, and again quite logically, that the transfer is found to be in the best interests of the child.⁷⁸

In addition to these three conditions, the question of which court is qualified to activate the transfer could be added as a sort of prerequisite to them. On this point, and although the new regulatory text is not entirely coherent in some points, it may be concluded that any court having jurisdiction under the Regulation is entitled to activate the transfer and not just the court which has assumed jurisdiction on the basis of the child's habitual residence.⁷⁹

Similarly, doubts have also been raised in the case law as to whether a court already having jurisdiction under the Regulation is entitled to receive the transfer of jurisdiction if it accomplishes the three mandatory conditions. Regarding this point, the CJEU's firm negative response has been reflected in the new Regulation in its Article 12.⁸⁰ Additionally, this restriction is now accompanied by a second one, since the transfer of jurisdiction may only be requested by the court of the habitual residence of the child, as established by Article 13 of the Brussels IIter Regulation.

Even if it is true that the EU legislator has merely incorporated the CJEU's interpretation on this point, perhaps it should be re-evaluated to what extent so many limitations could undermine the very purpose of the mechanism of transfer of jurisdiction: that is, to provide flexibility to the system of international jurisdiction schemed by the Regulation.

3. The Closing Forums in Matters of Parental Responsibility: The Protection of the Child Involved in Migratory Flows

The reality of international families, with their complexities and heterogeneities, can in practice lead to a situation in which neither the general forum of the child's habitual residence nor the various special forums on parental responsibility set out in the Regulation are applicable to the specific case. This could ultimately lead to a potential situation of lack of protection for the child involved. By way of example, the situation of many children may not allow to confirm that they have had a habitual residence in an EU member state, irrespective of any links their parents may have

⁷⁷ On this condition the CJEU has stated that "the court having jurisdiction must determine whether the transfer of the case to that other court is such as to provide genuine and specific added value. . .", CJEU 27 October 2016, case C-428/15, ECLI:EU:C:2016:819 (D.), para. 57.

⁷⁸ The CJEU has clarified that the assessment of the best interests of the child is a requirement in its own. That is to say, it should not be assessed together with the requirement of the court better placed to hear the case. CJEU 27 October 2016, case C-428/15, ECLI:EU:C:2016:819 (D.), paras. 58–59.

⁷⁹ In this regard see Article 12 para. 1 and Recital 26 of the Brussels IIter Regulation.

⁸⁰ See CJEU 4 October 2018, case C-478/17, ECLI:EU:C:2018:812 (I. Q.). This option has been said to go against the finality of this forum, see S. Álvarez González, *De nuevo sobre la interpretación y alcance del artículo 15 del Reglamento Bruselas II bis (Una alternativa efímera a la STJ de 4 de octubre de 2018)*, LA LEY Unión Europea, no. 66, enero 2019, at p. 11.

with a member state of the EU. Migration of people from third countries also aggravates the problem of unaccompanied children arriving in the EU without a known habitual residence.⁸¹

In order to provide an adequate response to all types of situations, the Brussels IIter Regulation system closes with the design of residual forums in matters of parental responsibility that allow for the protection of children who are in a particularly vulnerable situation. These forums, in contrast to what has happened with other solutions included in the 2019 text, remain practically unchanged after the recasting process of the Brussels IIbis Regulation. These forums are, on the one hand, the forum based on the presence of the child and, on the other hand, the residual forum that refers to the national law of the member states.

a) Jurisdiction Based on the Presence of the Child: Protecting Migrant Children

Practice shows the potential existence of situations where it is very complex or not feasible at all to determine the habitual residence of the child. The migration crisis of recent years in the EU is an additional reason for this. The need to deal with these situations, avoiding the insecurity generated by the possible lack of regulatory response, is resolved through Article 11 of the Brussels IIter Regulation — a forum that accepts the mere presence of the child in a member state as a criterion of competence for this type of case.

This forum is subsidiary, so that it only comes into operation where it is neither possible to determine the habitual residence of the child in the case in question, nor is there a choice of court agreement in accordance with Article 10 of the Brussels IIter Regulation.⁸²

Article 11 para. 2 of the Brussels IIter Regulation has been slightly modified by introducing the following terms: “The jurisdiction under paragraph 1 shall also apply to refugee children or children internationally displaced because of disturbances occurring in their Member State of habitual residence”. Therefore, the previous term “their country” has been modified by “Member State of habitual residence”.⁸³

This modification introduced by the 2019 text has clarified the relationship of the EU Regulation with the 1996 Child Protection Convention in these situations, as the

⁸¹M. Requejo Isidro, *La protección del menor no acompañado solicitante de asilo: entre Estado competente y Estado responsable*, Cuadernos de Derecho Transnacional, v. 19, no. 2, 2017, 482, at pp. 482–505.

⁸²Particular emphasis should be placed on the idea that the court should not be able to determine the habitual residence of the child on the basis of the available circumstances. Consequently, the mere presence of the child in a member state is not sufficient to trigger the forum in question, but the child must not be habitually resident in another state — member state or non-member state.

⁸³While Article 13 para. 2 of Brussels IIbis Regulation established that: “Paragraph 1 shall also apply to refugee children or children internationally displaced because of disturbances occurring in their country”.

conventional text has a very similar forum in Article 6.⁸⁴ Indeed, as Recital 25 of the Brussels I^{ter} Regulation recalls, Article 11 of this legal text might only be applied when the child has his/her habitual residence in another EU member state. On the contrary, if the child has his/her habitual residence in a third country before the displacement — we ought to suppose therefore, both contracting and non-contracting parties of the 1996 Child Protection Convention — the 1996 Child Protection Convention is applicable.⁸⁵

More worryingly, further doubts have been raised as to the personal scope of the application of the presence forum. And, in particular, it is unclear if the expression “refugee children and children internationally displaced because of disturbances” might leave outside some other categories of children in similar circumstances, and hence in need of protection. Notably, the question arises whether or not children seeking asylum, children whose asylum applications have been rejected, or simply those children who arrive in an EU member state from a third state for economic reasons may or may not be included in this ground of jurisdiction.

Regarding the protection of migrant children, the European Parliament proposed in the Recast procedure to include a new Recital with the aim to clarify that the Brussels I^{ter} Regulation jurisdiction rules “(...) should also be applicable to all children who are present on Union territory and whose habitual residence cannot be established with certainty. The scope of such rules should extend in particular to cover refugee children and children who have been internationally displaced either for socioeconomic reasons or because of disturbances occurring in their country”.⁸⁶

However, this proposal has not been included in the final text, perhaps as a symbolic sign of the little importance that is given to migration in Private International Law rules. Even if it had been desirable to include an open formula that would clearly have embraced the inclusion of all migrant children, it is still possible to interpret the presence forum broadly. Precisely, if we are dealing with a residual forum whose aim is to fill in the gaps in the system of jurisdiction of the Brussels I^{ter} Regulation and to offer protection to all children, it would be logical that, despite the limited wording of the provision, it was to be interpreted broadly. It can

⁸⁴ This amendment would be prompted by doubts as to which instrument applies — Regulation or Convention — when the child was habitually resident prior to the movement in a third state — not a party to the 1996 Child Protection Convention. J. Pirrung, Article 61, In: Magnus/Mankowski (fn. 51), at p. 467; A. L. Calvo Caravaca/J. Carrascosa González, *Derecho Internacional Privado*, Volumen II, Comares, Granada, 18^a ed., 2018, at pp. 431–432. Anyway, the problem had little practical impact, as both instruments contain the same solution, B. Campuzano Díaz, *Cuadernos de Derecho Transnacional*, v. 12, no. 2, 97, at p. 108.

⁸⁵ See Recital 25 of the Brussels I^{ter} Regulation.

⁸⁶ European Parliament, European Parliament legislative resolution of 18 January 2018 on the proposal for a Council regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and matters of parental responsibility, and on international child abduction (recast) (COM(2016)0411 — C8-0322/2016 — 2016/0190(CNS)), Amendment 6.

hence be understood as including any child “on the move” in need of protection, irrespective of their specific situation.⁸⁷

b) The Residual Forum in Matters of Parental Responsibility as a Solution for Separated Families in a Migratory Context

Closing the system of jurisdiction in matters of parental responsibility, Article 14 of the Brussels IIter Regulation allows jurisdiction to be determined, in each member state, by the laws of that member state. Like the previous forum, it has a residual character. Consequently, it will again only be activated when jurisdiction cannot be determined by virtue of the other grounds for jurisdiction contained in the Brussels IIter Regulation. Nor will this forum be applicable when the child is habitually resident in a third state party to the 1996 Child Protection Convention, since in that case, the latter legal instrument would apply.⁸⁸

The use of this forum in practice is therefore infrequent, almost marginal, given its nature and the peculiarities of its design. Nevertheless, in practice there have been some cases in which the residual forum has been applied, those in which the child is habitually resident in a third state not party to the 1996 Child Protection Convention — and again if no other forum of the Brussels IIter Regulation was applicable.⁸⁹ Indeed, this has been the forum used in some cases where the habitual residence of the child in a member state could not be established because the child had not been physically present in an EU member state.⁹⁰ In addition, another example of the application of the residual forum concerns foreign parents residing in an EU member state who ask the courts of this member state to apply measures on parental responsibility for their children, who maintain their residence in the state of origin.⁹¹

⁸⁷ In this sense A. Limante/I. Kunda, In: Honorati (fn. 25), at p. 88.

⁸⁸ As Recital 29 of the Brussels IIter Regulation clarifies: “The term ‘laws of that Member State’ should include international instruments in force in that Member State”.

⁸⁹ The application of the Brussels IIbis Regulation to children residing in third states is an issue that has raised doubts in the legal doctrine. J. Pirrung, Article 61, In: Magnus/Mankowski (fn. 51), at p. 467.

⁹⁰ See, for example, CJEU 17 October 2018, case C-393/18 PPU, ECLI:EU:C:2018:835 (U. D.) para. 66. In this case the CJEU held that the habitual residence of a child born in Pakistan cannot be fixed in the UK because it has never physically been in the former state, but affirmed that the application of the residual forum of Article 14 of the Brussels IIbis Regulation is possible.

⁹¹ Thus, in Spain, this case has typically arisen in respect of persons originally from third states who work in Spain, but whose children reside in the country of origin in the care of a relative. In the Spanish system, if the Brussels IIter Regulation, the 1996 Child Protection Convention or any other international convention ratified by Spain are not applicable, Article 22 *quáter* d) — or even Article 22 *Octies* para. 3 — of the Ley Orgánica del Poder Judicial would then be applicable. I.e. SAP de León 18 July 2018, 232/2018, ECLI: ES:APLE:2018:841, this case concerns the divorce of two Pakistani nationals residing in Spain, whose daughter resides in Pakistan with her maternal grandparents. Equally see SAP de Barcelona 31 May 2018, 400/2018, ECLI:ES:APB:2018:5395, which applies the residual forum to an application for divorce by a Spanish national resident in

It, therefore, provides a solution to the reality of thousands of families subject to complex migratory processes, in which the family does not necessarily remain united.

V. Further Modifications to Reinforce Children's Rights in the Brussels IIter Regulation

The Brussels IIter Regulation designs a set of mechanisms of different nature in support of its practice. They have been affected by the new text of 2019, seeking to ensure the achievement of the objectives of the regulatory text, and specifically, the better and faster safeguarding of the rights of the child and his or her best interests. Three areas particularly show the EU legislator's aim to better protect children's rights in international cases.

1. Provisional, Including Protective, Measures in Urgent Cases as a Guarantee for the Best Interests of the Child

Provisional and interim measures provide an immediate response aimed at temporarily protecting the child while the procedure is pending. Moreover, they play an additional role in rebalancing two relevant approaches to the best interests of the child. On one side, as a rule of procedure, this principle translates into the need for speed and effectiveness of judicial proceedings. On the other side, from a substantial approach, it requires that all the circumstances surrounding the child's particular situation are carefully evaluated.⁹²

The practical projection of the provisional and interim model in matters of parental responsibility in the Brussels IIbis Regulation has not escaped from certain

Spain against a Spanish national who is also resident in India, together with her three children. For an in-depth analysis of this matter see M. Herranz Ballesteros, *Proyección de la competencia de las autoridades de los Estados miembros sobre menores residentes en terceros Estados: la experiencia española*, *Revista General de Derecho Europeo*, no. 52, 2020, at p. 15; A. Del Ser López and Carrizo Aguado, D., *Reglas de competencia judicial internacional en materia de responsabilidad parental: análisis del foro de la "residencia habitual del menor" y estudio de la "competencia residual"*, *Revista Aranzadi Unión Europea*, no. 10, 2019, at pp. 62 ff.

⁹²In Sandrini's words: "the conflict between speed and thoroughness is heightened in matters of parental responsibility, and is balanced within domestic legal systems by procedural rules that provide for interim measures of protection". L. Sandrini, *Provisional Measures and the Best Interests of the Child in the Field of Parental Responsibility*, In: Bergamini/Ragni (eds), *Fundamental Rights and Best Interests of the Child in Transnational Families*, 2019, 287, at p. 288.

doubts and tension, as evidenced by the practice of the CJEU.⁹³ In particular, doubts have focused on the faculty of the non-competent courts on the substance of the matter, under the Regulation, to issue provisional and interim measures. In addition to this, the scope of such measures has been questioned, both in terms of their content and their subsequent effectiveness in other EU member states.

As far as the international jurisdiction system is concerned, the new regime improves its predecessor both in terms of its clarity and its technical precision, facilitating its future implementation, also, thanks to the interpretation of the CJEU regarding the requirements for implementing it. Thus, Article 15 of the Brussels IIter Regulation is systematically placed within the set of rules of international jurisdiction, thereby clarifying the doubts surrounding its nature in the previous regime.⁹⁴

2. The Formal Improvement in the Brussels IIter Regulation of the Fundamental Right of Children to Express Their Views

Secondly, the right of the child to express his or her opinions in accordance with his or her age and maturity constitutes one of the greatest exponents of the new conception of children as right holders.⁹⁵ However, despite the importance of this right, recognised both at the international and national level, the practice of the Brussels IIbis Regulation has shown that its regulation has very important limitations which are now being addressed in the Brussels IIter text.⁹⁶

⁹³See Article 20 of the Brussels IIbis Regulation and the CJEU's interpretation of this Article in CJEU 2 October 2009, case C-523/07, ECLI:EU:C:2009:225 (A.); CJEU 23 December 2009, case C-403/09 PPU, ECLI:EU:C:2009:810 (Detiček); CJEU 15 July 2010, case C-256/09, ECLI:EU:C:2010:437 (Purrucker); CJEU 26 April 2012, case C-92/12 PPU, ECLI:EU:C:2012:255 (Health Service Executive). On this topic see A. Dutta/A. Schulz, First Cornerstones of the EU Rules on Cross-Border Child Cases: The Jurisprudence of the Court of Justice of the European Union on the Brussels IIa Regulation From C to Health Service Executive, *Journal of Private International Law*, v. 10, no. 1, 2014, 1, at pp. 14–15; M. Requejo Isidro, El artículo 20 Reglamento (CE) número 2201/2003 ante el TJCE, *Diario La Ley*, no. 7479, 2010, at pp. 1–15.

⁹⁴Maintaining the EU requirements relating to the urgency and the provisional nature, the new Regulation restricts the subjective requirement to the person of the child, compared to the old reference to "persons", thereby correcting a dubious interpretation of the CJEU. For an in-depth analysis of the new regime of provisional measures see I. Pretelli, *Provisional Measures in Family Law and the Brussels IIter Regulation*, *Yearbook of Private International Law*, v. 20, 2018–2019, at pp. 113–148.

⁹⁵See Article 12 of the CRC; Article 3 of the 1996 European Convention on the Exercise of Children's Rights of the Council of Europe; Article 24 of the EU Charter.

⁹⁶The Commission's 2016 Proposal identifies the right of the child to be heard as one of the six main shortcomings in the practical functioning of the Brussels IIbis Regulation (European Commission, Proposal for a Council Regulation (fn. 49), at p. 5. On the topic see B. Ubertazzi, The hearing of the child in the Brussels IIa Regulation and its Recast Proposal, *Journal of Private International Law*, v. 13, no. 3, 2017, at pp. 568–601.

The Brussels IIbis Regulation did not generally proclaim, for all decisions on parental responsibility, the right of the child to express his or her views. This deficiency has now been adequately resolved in the Brussels IIter Regulation. This Regulation introduces a provision which emphasises the importance of giving children a real and effective possibility to be heard in accordance with the requirements of the CRC and the EU Charter.⁹⁷ Hereby, the new Brussels IIter Regulation improves the children's protection by stressing and recognising the importance of listening to children in all matters affecting them, including as well, cross-border parental responsibility and international child abduction procedures, although they are more complex than in internal proceedings.

It can be concluded that the right of the child to express his or her views is improved at the legislative and theoretical level, even though it is also true that such standards were previously already applicable in accordance with the CRC and the EU Charter. Nevertheless, it is considered that to achieve a proper functioning and protection of this right, the existence of some minimum common standards in both material and procedural rules for the hearing of the child will continue to be necessary: without such minimum standards, it is extremely difficult to create a real climate of trust between courts of the EU countries.⁹⁸

That is why, in addition to strengthening the right of the child to be heard at the legislative level, it should be enhanced and promoted by the EU institutions through a whole range of complementary measures. Examples could be the training of judges and other legal professionals involved, the creation of common guides of best practices, and in general, the promulgation and development of child-friendly civil procedures.⁹⁹

⁹⁷Article 21, situated in Section 3 "Common Provisions" of Chapter II of the Brussels IIter Regulation. See also Recital 39 of this legal instrument.

⁹⁸A further limitation identified in the Brussels IIbis Regulation in relation to the hearing of the child is the absence of a minimal EU harmonisation of both procedural and material rules on the matter (for a comparison of the different national procedural laws in this area see B. Ubertazzi, *The Child's Right to Be Heard in the Brussels System*, European Papers, v. 2, no. 1, 2017, at pp. 64 ff.). This has greatly affected the establishment of an adequate climate of trust between the judicial administrations of member states (this is concluded in European Commission, *Study on the assessment of Regulation (EC) No 2201/2003 and the policy options for its amendment*, Directorate-General for Justice and Consumers, 2015, at p. 47). Furthermore, it has shown to have a negative impact on the regime for the recognition and enforcement of foreign judgments, and even on the very consideration of the principle of the best interests of the child. See on this regard CJEU 22 December 2010, case C-491/10 PPU, ECLI:EU:C:2010:828 (Aguirre Zárraga).

⁹⁹This generic reference to the right of the child to be heard might be useful to accelerate the necessary change of mentality still required in some member states regarding this right, as stated by C. Honorati, *Rivista di diritto internazionale privato e processuale*, v. 52, no. 2, 2017, 247; T. Kruger, *Brussels IIa Recast moving forward*, *Nederlands internationaal privaatrecht*, v. 35, no. 3, 2017, 462, at p. 466.

3. A Shy Commitment of Promoting Mediation as a Way to Solve Parental Responsibility Disputes

Finally, in the context of the growing global trend towards exploring alternative routes to state courts, also promoted by the EU,¹⁰⁰ the new Brussels IIter Regulation introduces a shy — but clear — commitment to its promotion in the context of conflict resolution in matters of parental responsibility, and more precisely, in international child abduction cases.¹⁰¹ Leaving behind the almost absolute silence in the area of its predecessor,¹⁰² the new Regulation represents a step forward in the regulation of this issue, introducing in Article 25 *intra judicial* mediation.¹⁰³ It, therefore, gives an active role to the courts in the search of an agreement between the parties, which is a clear sign of the change of philosophy.¹⁰⁴

There remains, however, a basic problem regarding the circulation of these agreements within the EU — and that is also shared in the Brussels IIter Regulation — which is the nature of the agreement reached and the need for it to be enforceable. On this premise, which severely limits the steps taken by the Regulation in this area, the new model of recognition and enforcement of the Brussels IIter Regulation will benefit the circulation of mediation agreements, once they have been given the

¹⁰⁰Vid. S. Barona/C. Esplugues, ADR Mechanisms and Their Incorporation into Global Justice in the Twenty-First Century: Some Concepts and Trends, In: Barona/Esplugues (eds), *Global Perspectives on ADR*, 2014, 1, at pp. 7–16.

¹⁰¹It should be borne in mind that the relevant Article is in Chapter III of the Regulation, dedicated specifically to International Child Abduction. However, Recital 43 of the Brussels IIter Regulation refers to both parental responsibility procedures and those relating to the international child abduction: “In all cases concerning children, and in particular in cases of international child abduction, courts should consider the possibility of achieving solutions through mediation and other appropriate means (...)”.

¹⁰²Only Article 55 lit. e of the Brussels IIbis Regulation mentioned cooperation of Central Authorities to “facilitate agreement between holders of parental responsibility through mediation or other means, and facilitate cross-border cooperation to this end”. This article is reproduced in Article 79 of the Brussels IIter Regulation.

¹⁰³Article 25 of the Brussels IIter Regulation: “As early as possible and at any stage of the proceedings, the court either directly or, where appropriate, with the assistance of the Central Authorities, shall invite the parties to consider whether they are willing to engage in mediation or other means of alternative dispute resolution, unless this is contrary to the best interests of the child, it is not appropriate in the particular case or would unduly delay the proceedings”. For an in-depth analysis of this new provision see M. González Marimón, *El fomento de la mediación en casos de sustracción internacional de menores en el Reglamento Bruselas II ter*, In: Barona Vilar (ed), *Meditaciones sobre mediación (Med+)*, 2022, at pp. 399–418; P. Diago Diago, *Artículo 25 Formas alternativas de resolución de conflictos*, In: Palao Moreno/González Marimón (eds), *El nuevo marco europeo en materia matrimonial, responsabilidad parental y sustracción de menores Comentarios al Reglamento (UE) n° 2019/1111*, 2022, at p. 283 ff.

¹⁰⁴See in this regard C. Esplugues Mota, *El Reglamento Bruselas II ter y el recurso a los MASC in materia de responsabilidad parental y sustracción internacional de menores*, *Cuadernos de Derecho Transnacional*, v. 13, no. 2, 2021, 132, at p. 159.

necessary enforceability.¹⁰⁵ There is a second issue likely to arise in these cases: namely the fragmentation of international jurisdiction for the homologation of a mediation agreement when such an agreement is reached not only on the (non-) return of the child, but also on parental responsibility.¹⁰⁶

VI. Final Remarks

Cross-border conflicts dealing with parental responsibility matters have a wide diversity which is projected in the Brussels IIter Regulation international jurisdiction model. In particular, the system is based on the principle of the best interests of the child, linked to the criterion of proximity. Following this logic, the Brussels IIter Regulation, inheriting the system from its predecessor, reflects a much more accurate balance between the two conceptions of the best interests of the child, *in abstracto* and *in concreto*. This is achieved thanks to the articulation of a general rule, based on the notion of habitual residence of the child, as an exponent of the criterion of proximity. This general rule must be seen together with a range of exceptions to this general forum, in which the aforementioned notion of the child's habitual residence is either relativised or simply ignored. This set of forums designed by the EU legislator takes into account the practice of the Brussels IIbis Regulation and seeks to address some of the problems and limitations identified in its practice.

One of the main challenges of the Brussels IIbis Regulation recast is considered to be the harmonisation of the integration objectives with a better protection of children's rights and their best interests. In this sense, the new Brussels IIter Regulation evolves towards the recognition of a greater centrality of the child and his or her rights in resolving cross-border cases in the EU. It thereby constitutes a clear manifestation of the growing influence of the principle of the best interests of the child in all areas and issues affecting them, also from the perspective of Private International Law as well as the tendency to accept a greater influence of human rights in this discipline.

Overall, the Brussels IIter Regulation reflects a better and greater enhancement not only of the principle of the best interests of the child *in abstracto* and *in concreto*, but also in its triple dimension as a substantive right, an inspiring principle, and as a procedural rule. Firstly, it is the child's subjective right to have his or her best

¹⁰⁵ In this regard, see Article 2 and Chapter IV of the Brussels IIter Regulation. In depth on the new regime of recognition and enforcement of judgments and authentic instruments in matters of parental responsibility see M. González Marimón, *Menor y responsabilidad parental en la Unión Europea*, at pp. 331 ff.

¹⁰⁶ In the new regime this problem may be resolved thanks to the choice of court forum, see Articles 9 and 10 of the Brussels IIter Regulation. C. González Beilfuss, *La sustracción de menores en el nuevo Reglamento 2019/1111*, In: Álvarez González/Arenas García et al (eds), *Relaciones transfronterizas, globalización y Derecho. Homenaje al Prof. Dr. José Carlos Fernández Rozas*, 2020, 383, at p. 389.

interests as a primary consideration in all cross-border matters of parental responsibility in the EU. Secondly, the concept of the child's best interests acts as an inspiring principle of the Regulation, both in the drafting of its PIL rules and in its subsequent application by the national courts and by the CJEU. Thirdly, the best interests can be regarded as a procedural rule, which in jurisdiction is identified with the existence of effective mechanisms, but also with flexible clauses. Within this approach, the fulfilment of the right of the child to be heard also in cross-border matters is particularly important.

That is why it can be concluded that the EU legislator advances towards a deeper level of cooperation in the context of the Private International Law harmonisation in family law. This will imply, undoubtedly, an improvement of transnational families' realities, including those of migrant children.

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