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**THE VALUED ADDED BY A EUROPEAN UNION
INSTRUMENT ON JURISDICTION AND THE
ENFORCEMENT OF JUDGMENTS IN
MATRIMONIAL CAUSES
IN THE LIGHT OF EXISTING CONVENTIONS**

REPORT REQUESTED BY THE
COMMISSION OF THE EUROPEAN COMMUNITIES

SECRETARIAT-GENERAL
COOPERATION IN THE FIELDS OF JUSTICE AND HOME AFFAIRS

FINAL REPORT

by

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PREFACE

In the context of justice and home affairs cooperation the Commission is associated with the work of the coordinating committee for the preparation of an international convention between the Member States of the European Union on jurisdiction and the enforcement of judgments in matrimonial causes. The Commission has asked for a report on existing international instruments applying between some or all Member States with a view to ascertaining what value would be added by the convention now being drafted.

The study is subject to two constraints. First, regarding the subject matter covered, it proceeds from the assumption that the convention will be confined to marriage annulments, divorces and separations and ancillary measures relating, in particular, to children. Second, regarding objectives, it confines itself to supplying legal input material to assist with the work currently in hand.

The study is structured in two volumes. The first is the final report itself. The second contains materials used for it, falling into three types -- a detailed analysis of each existing convention, country reports on experience with those conventions and full texts for information purposes.

Countries for which individual reports were prepared were selected on the basis of a series of parameters, mainly the number of conventions ratified and the need to cover a wide variety of legal traditions; there was no obvious reason for looking exclusively at Union States. Cases from other countries were cited where they were easily accessible.

The report is the product of a team effort in the International Law Department at the Université Catholique de Louvain; the rapporteur was joined by Olivier Lhoest (Advocate and Assistant Lecturer in the Department), Sylvie Sarolea (Advocate and Assistant Lecturer in the Department), Jean-Louis Van Boxstael (Aspirant at the Belgian National Scientific Research Fund, FNRS) and Michel Verwilghen (Lecturer in Law, UCL).

Contributions for the country reports were sought from researchers belonging mostly to the European Private International Law Group -- Alegria Borrás (Barcelona University) for Spain, Michael Bogdan (Lund University) for Sweden, Andreas Bucher (Geneva University) for Switzerland, Nathalie Coipel (Belgian FNRS) for Germany, Rui Manuel Moura Ramos (Coimbra University) for Portugal, and Paul Torremans (Lecturer in Law, Leicester University) for the United Kingdom.

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OUTLINE

The conventions for the resolution of conflicts of jurisdiction in matrimonial causes do not constitute a formal obstacle to the preparation of a Community or Union instrument. And as their territorial scope is not extensive (relatively few contracting states) and they cover only a narrow subject-matter, their practical scope is limited.

Conclusion of a convention on jurisdiction and the enforcement of judgments in matrimonial causes within the Union's institutional set-up would meet the need for a clear distribution of powers between the States, the Community and the Union. There would be further considerable value added in that the European Court of Justice would have jurisdiction to interpret it.

Ideally, the full range of family-law matters should be covered. But even a convention confined to matrimonial causes would be useful if it clearly determined not only the international effectiveness of decisions but also the conferment of direct jurisdiction.

On the question of direct jurisdiction, it would not be enough to produce a list containing all the heads of jurisdiction currently allowed in the Union States or excluding all cases of *fora non convenientes*. While this would not be an especially inconsistent way of going about things, it would add little to what has already been achieved with the Hague Convention of 1 June 1970. Compromises might be sought in techniques allowing a *forum non conveniens* to be subject to a qualifying factor in the form of an additional condition or a degree of discretion for the court in which a case is brought. It might also be possible to allow a *forum a necessitate* together with a conflict rule whereby the substance of the case would be considered in the light of the rules of private international law of the state in which the case ought to have been heard.

The question of child-related measures requires consideration of the Hague Conventions of 25 October 1980 (child abduction) and 5 October 1961 (protection of infants). The foreign effectiveness of measures decided on by the state of divorce needs to be preserved, but it must be possible in relations with the authorities of the state of divorce to rely on measures decided on in the child's state of residence. Several techniques can be envisaged to reconcile the two, either by establishing priority of one over the other or by removing the risk of conflicts by limiting the jurisdiction of the authorities of the state of divorce, or even by incorporating one instrument in the other.

THE RESULTS OF THE WORK

This report sets out to do two things. It is an attempt, first of all, to assess what, if anything, is to be gained from a convention concluded in the context of judicial cooperation on civil matters, a "Brussels II Convention" for short, as compared with other, existing conventions. Secondly, it analyses the way these instruments interact. All this is based on an evaluation of the scope of the existing conventions, with particular reference to the way they are put into effect in various contracting states.

1. The scope of the existing conventions

The analysis bears mainly on the Hague Convention of 5 October 1961 concerning the Powers of Authorities and the Law applicable in respect of the Protection of Infants, that of 1 June 1970 on the Recognition of Divorces and Legal Separations and that of 25 October 1980 on the Civil Aspects of International Child Abduction, and the Luxembourg Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children.

Overall, the scope of these instruments is reduced, apart from the Hague Convention of 25 October 1980. This assessment is based on several parameters which take account of the territorial and material scope of each instrument and the extent to which its content ensures uniform implementation in the contracting states.

From the point of view of the geographical area covered by the instruments, i.e. the number of ratifications, the Hague Convention of 1980 (child abduction) and the Luxembourg Convention of 1980 (recognition of custody of children) are the only ones with significant territorial scope. It might therefore be advisable to recommend that they be ratified, as far as Union Member States are concerned, by Belgium and Italy in the first case and Italy in the second.

- *Conventions on divorce*

The material scope of the Hague Convention on divorce is too narrow and its content too inflexible. It does not, however, seem to have raised any major difficulties of interpretation. As regards the material scope, it excludes annulment of marriage, findings of fault, ancillary applications and decisions not to grant a divorce; as regards its purpose, it lays down no rules on direct jurisdiction or implementing measures: in fact it confines itself to ensuring the international effectiveness merely of the principle of dissolution or modification of the marital relationship and its corollary, the ability to remarry. As for its content, it certainly widens out the list of criteria for indirect jurisdiction which can be used as grounds for rejecting a foreign judgment in that it includes a considerable number of alternative criteria. The list is, however, more restrictive than those laid down either by other treaties, such as the CIEC (International Commission on Civil Status) Convention of 1967, or by the domestic law of the contracting states, which, under the Convention, is acknowledged to prevail, in the interests of freer movement of judgments. From the point of view of its content, again, the main contributions made by the Hague Convention are that it abolishes a review of the merits of a case and, with certain nuances, an investigation into the law applied.

- *Conventions on measures affecting children*

In relation to measures of protection for children, the main weakness of the Hague Convention of 1961 is that its authors were unable to choose between the criteria of nationality and residence. This leads not just to differences of interpretation as regards the scope of the Convention but to the risk of decisions given by authorities in different states contradicting each other. This weakness is accentuated by another shortcoming, the fact that the Convention does not cover the international effect of a measure when compulsory enforcement of that measure has to be secured. Weaknesses of this kind have prompted a number of the contracting states to conclude bilateral agreements on protection for infants, for instance the French-Portuguese agreement of 20 July 1983, with each other.

The multiplicity of conventions on infant protection has not caused any open conflicts, as they deal with complementary issues: the 1961 Hague Convention acts as a general agreement covering jurisdiction and the determination of which law is applicable, while the Luxembourg Convention of 1980 regulates the international effect of measures. The Hague Convention of 1980, meanwhile, merely neutralizes wrongful removal of children, without prejudice to the merits of the dispute; the fact that it is so simple to apply seems to have given it *de facto* primacy over the part of the Luxembourg Convention which deals with abduction.

However, although the agreements complement each other, there are still inconsistencies between them. The Hague Convention of 1980 conceals within it an implied rule on judicial and legislative jurisdiction in favour of the state of the habitual residence of an infant which is stricter than that laid down in the 1961 Convention. The effect of the Luxembourg Convention, meanwhile, can be to secure the recognition of measures adopted by authorities other than those designated by the 1961 Convention, or the rejection of measures adopted by the authorities designated by that Convention: on the one hand, the rules on direct and on indirect jurisdiction do not coincide and, on the other, the discrepancy may arise because the criterion of the child's best interests has been invoked, which is something which the court addressed assesses at its discretion.

- *The continuing need for common rules on conflicts of jurisdiction*

In terms of the needs to be met, a new instrument relating to matrimonial causes would probably satisfy expectations as long as it provided for direct jurisdiction and laid down a procedure for implementing foreign decisions as precise as that established by the Brussels Convention of 1968. As far as transparency is concerned, if there were such an instrument, it would be possible to do without the dense network of bilateral conventions which exists in Europe at the moment and to avoid having to go through some of the highly inflexible enforcement procedures laid down in certain states.

As regards measures affecting children, there is still no instrument which covers both direct jurisdiction and the effectiveness of decisions and which could be used, at the stage where jurisdiction was being decided on, to iron out the contradictions between decisions given in different states. The Hague Conference is considering revising the 1961 Convention to that effect, but the difficulties it is facing in relation to whether the court of divorce has jurisdiction to order measures affecting children are a sign of the drawbacks of any harmonization in one particular sector: the difficulty arises partly

because harmonization of the rules on jurisdiction in relation to divorce falls outside the scope of the convention.

Where conflicts between conventions are concerned, none of the instruments considered prevents the conclusion of new agreements between contracting states or between them and non-contracting states. That does not mean, however, that the road is completely open to a Brussels II Convention, since, if effectiveness is the aim, the content of such a convention would have to take account of the content of those of the instruments under discussion which might affect the way it operated. This question arises only in relation to measures affecting children, which the Brussels II Convention would cover in the context of ancillary petitions. With that in view, it would be appropriate to take the experience of implementing the Hague Conventions on the protection of infants (1961) and child abduction (1980) into account.

2. Determining what would be gained by adopting a Union instrument

Any assessment of what would be gained from a Brussels II Convention must consider two factors, the institutional framework of the instrument and its potential content, particularly the extent of its material scope.

- Borrowing from the European Union's institutional framework

As far as the institutional framework is concerned, the conclusion of a convention between Union Member States laying down common rules on conflicts of jurisdictions would meet a need within the meaning of Article 220 of the Treaty establishing the European Union or could supply an appropriate response to a question of common interest within the meaning of Article K.1 of the Treaty on European Union. The basis of assessment is an analysis of the existing conventions, and an appraisal of the distribution of powers between the state and the Community or the Union: both the method of approximation used, which is conventional, and its purpose, to ensure freedom of movement for judgments, are an effective response to a problem which the Member States are powerless to solve either unilaterally or in other international forums. One reason for the weaknesses in the existing conventions is the lack of a common interpretation process. Here, the conferring of power to interpret the Brussels II Convention on the Court of Justice of the European Communities would mark a significant gain. So would as close as possible an alignment on the method followed by the Brussels Convention of 1968.

- The scope of the instrument

As regards the material scope of the instrument, a strictly scientific approach to the questions under consideration suggests it should be an instrument covering the whole range of family matters. If political imperatives dictate a different choice centring on disputes over the annulment, dissolution or modification of the marital relationship, the instrument would represent a further step forward if it bore on both direct jurisdiction and the effectiveness of decisions. It ought to be possible to give thought to extending the scope of the instrument to ancillary measures, particularly those affecting children, given the need to reach a comprehensive settlement of the international situation. This would not cause an insoluble conflict with the Hague Convention of 5 October 1961. There could be various conciliation techniques for introducing flexibility into the jurisdiction of the authorities in the state of divorce to recognise such measures.

The essence of rules on jurisdiction is such as to call for a number of general recommendations regarding the structure of such rules and the possible criteria for jurisdiction.

As regards the structure of jurisdiction rules, it is still, no doubt, an awkward matter, from the theoretical point of view, to arrive at a choice between a purely either/or structure and a structure in which jurisdiction passes down by successive stages. Yet the first of these does seem to have more to be said for it, not just because of its flexibility from the petitioner's point of view, which makes it easy to gain access to the courts of another country, but also because it is simple to use and in line with national traditions and the method followed by the Brussels Convention. Such a structure could, however, innovate in allowing the court addressed to assess its jurisdiction in cases where the ground of jurisdiction is marginal by comparison with another ground of jurisdiction, regarded as "normal", which might suggest application should properly be made to the courts of another state. This method can be used in respect of measures affecting children by the authorities of the state in which divorce was granted, or in respect of matrimonial causes by the authorities in a *forum a necessitate* applied to by virtue of a criterion relating to an attribute of the petitioner, e.g. his or her habitual place of residence, or by virtue of the criterion of shared nationality of the parties. An improvement in the operations of a *forum a necessitate* could also be achieved by means of a rule on conflict of systems whereby the authority applied to would apply the private international law of the state whose authorities would normally have had jurisdiction under the Convention, though that approach presupposes that the authorities in question could be designated with any certainty by applying a single criterion and not by means of rules which allow for substitution.

As for the choice of criteria for jurisdiction, a number of recommendations can, we believe, be made, when it comes to settling matrimonial causes, in relation to the criterion of nationality, the criterion of the petitioner's habitual residence and the method of fixing the place of domicile or habitual residence. The role of the first two criteria must be limited by the use of qualifiers entailing either an assessment by the court applied to or the application of a further criterion of localization designed to secure proximity of court and cause. Where appropriate, common nationality - or common domicile of origin - of the spouses could be brought into play in the alternative, as determining the court of necessity when none of the criteria for jurisdiction applied otherwise is located in a contracting state. As for the criterion of the habitual residence of the petitioner, attaching a definite duration to it does not seem an adequate approach: in a more general sense, adding the qualifying objective "habitual" is enough to fix its whereabouts, while at the same time allowing for the requisite flexibility by leaving the court room to exercise its discretion in accordance with the circumstances of the case.

As regards the adoption of ancillary measures affecting children, the conferring of jurisdiction on the authorities of the state where the divorce was granted should go hand in hand with giving the court the option of assessing whether such jurisdiction is in the best interests of the child, given the circumstances of the case. The factors to be taken into consideration would include the wishes of the spouse and the child and the possibility of having a measure adopted or orders given for the upbringing of the child in his or her state of residence.

3. Determining the territorial scope of a Union instrument

Evaluating the territorial scope of the Brussels II Convention raises two questions, the introduction of criteria for applicability which define situations involving more than one country and the interaction of the Brussels II Convention with other existing conventions.

- *Territorial scope of the instrument*

With regard to the introduction of one or more criteria for territorial applicability such as would limit the scope of the conventional rules on jurisdiction, the Brussels Convention of 1968 is certainly a precedent in that, for all practical purposes, it uses the domicile of the defendant for that purpose. Transposing this approach to the Brussels II Convention would be a sensitive matter, however, as long as the latter does not include a general criterion for deciding whereabouts which could perform a function similar to that performed by the domicile of the defendant in the Brussels Convention. Opting for the nationality of one or more parties, or indeed their place of residence, could certainly be justified on grounds of the concept of citizenship. It would, however, introduce pointless complications into the implementation of the Convention and significantly reduce its scope.

- *Interaction between the instrument and other international conventions*

Regarding the interaction of international instruments, none of the existing conventions formally prohibits a regional agreement such as the Brussels II Convention. In the interests of efficiency, however, it does seem appropriate to take some action to reconcile these agreements, not just by means of the compatibility clauses traditional to the law governing conflicts of conventions, such as the principle of maximum effect and the special provision, but also by preventive provisions affecting the actual content of the conventional jurisdiction rules.

Under the Hague Convention of 25 October 1980 on international child abduction, the authorities of the state of divorce should take decisions on parental authority only in accordance with the provisions of the Convention. Were this not so, a measure adopted in the state of divorce would stand little chance of being recognized in a state party to that Convention; but if that state is also a party to the Brussels II Convention, the authorities requested to recognize the measure will be faced with a dilemma, in that the Convention provides for a principle of automatic recognition without any checks as to indirect jurisdiction.

Under the Hague Convention of 5 October 1961, wording preventive provisions is clearly a more sensitive matter, particularly in view of the present uncertainties over the progress of discussions in the Hague Conference. There are several possibilities open to the law-making authorities.

Firstly, a "cross-convention" rule on *lis pendens* and related actions would make it possible to settle conflicts of procedure between the authorities of the state of divorce when that state is a party to the Brussels II Convention, on the one hand, and the authorities of the state where the child resides when that state is a party to the Hague Convention, on the other. Were there no such rule, a measure adopted in the state of divorce would probably be stopped in its tracks later from the point of view of its international effect.

Then there could be a number of methods, not mutually exclusive, of making the jurisdiction of the authorities in the state of divorce subject to conditions. One such method is a form of cooperation technique which involves either addressing letters rogatory to the authorities in the state of residence for the purpose of hearing the child, or even referring the application to the authorities in the state of residence for them to take action within an appropriate time limit. Another way of limiting jurisdiction involves not extending the jurisdiction of the authorities in the state of divorce to applications for measures subsequent to the decision granting a divorce. A third method entails persuading the authorities in the state of divorce to apply the rules of private international law prevailing in the state where the child resides. However, this method, which relies on a rule on conflict of systems, helps only to resolve the question of the law applicable to the merits of the measure but not to reduce the geographical distance between the child and the court where the action is being heard.

Another way of trying to establish interaction between the conventions may be to make it easier for foreign measures to have international effect. The Brussels II Convention would extend its provisions on the recognition and enforcement of decisions to measures adopted on a main claim under the Hague Convention, in order to make it at least possible to challenge such a measure before the authorities in the state of divorce. If the state addressed is a member of the European Union and a party to the Hague Convention, this option to challenge would arise from the application of that Convention. At all events, the Brussels II Convention would provide a streamlined procedure for the enforcement of a foreign measure.

The method involving recognition of measures is not to be confused with that merely involving a referral to the Hague Convention. The Brussels II Convention, as regards its material scope, would then cover any measure linked to a matrimonial cause. Under jurisdiction, it would be stipulated that where measures affecting children are concerned, the authorities who enjoy jurisdiction under the Hague Convention also do so for the purposes of the Brussels II Convention. Under recognition and enforcement, the Brussels II Convention would extend to measures affecting children by virtue of the extension of its material scope. The problem of linking these rules on recognition and enforcement to those laid down in the Hague Convention would be easy to resolve by applying the rule of maximum effect.

INTRODUCTION

1. The report has three objectives.

First, it analyses the international instruments that currently bind all or some of the Member States of the European Union in a way that is likely to affect the draft being prepared by the working party on extension of the Brussels Convention for a convention on jurisdiction and the enforcement of judgments in matrimonial causes, the Brussels II Convention for short (Chapter 1). The instruments are assessed in the light of a series of parameters related to the extension of their territorial and material scope, the rules of private international law that they determine and the way they treat relationships with other agreements to which the contracting states are party.

Second, it attempts to measure the value added by concluding a new Brussels II Convention, having regard to the strengths and weaknesses of existing conventions and to the potential benefits of an instrument within the specific institutional set-up of the European Community or Union (Chapter 2). The assessment is based on an analysis of the material scope of the draft instrument and a presentation of techniques that might be used to determine international jurisdiction rules.

Third, this assessment of the value added by the new instrument goes hand in hand with consideration of the interaction of the Brussels II Convention with existing conventions (Chapter 3). Two questions arise: what will be the international scope of the planned instrument and what will be the techniques for resolving conflicts between conventions.