Verona Conference on the Rome I Regulation

The Faculty of Law at Verona are hosting a conference on the Rome I Regulation on 19-20 March 2009. The conference flyer describes its scope thusly:

> *Since it is believed that the proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-laws rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought, it cannot surprise that efforts have been made to draft uniform European conflict-of-laws rules in the area of contract law as well. This conference will examine in detail the result to which these efforts have led, namely the Regulation (EC) No 593/2008 of the European Parliament and the of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).*

The programme itself, along with details on how to register, can be found on the flyer.

Volume 4, Issue 3, Journal of Private International Law

The latest issue of the *Journal of Private International Law* is out, and the contents are:

- **Understanding the English Response to the Europeanisation of Private International Law** by *Jonathan Harris*
- **Licences and Assignments of Intellectual Property Rights Under the Rome I Regulation** by *Paul LC Torremans*
- **Matrimonial Property on Divorce: All Change in Europe** by *CMV*

Clarkson

- **A Defence of the Established Approach to the Grave Risk Exception in the Hague Child Abduction Convention** by *Peter Ripley*
- **Cross-Border Recognition and Enforcement of Foreign Judgments in Vietnam** by *Ngoc Bich Du*
- **The Damage of Damages: *Agreements on Jurisdiction and Choice of Law*** by *CJS Knight*

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Respect for Algerian/Moroccan Children's Origin

I am grateful to Horatia Muir Watt to have accepted to react to my post on Adoption of Algerian/Moroccan Children in France.

I certainly agree with Gilles Cuniberti that the prohibition resulting from article 370-3 of the Civil Code certainly lacks nuance. In many cases, it seems clearly contrary to the interests of a child who has been abandoned at birth in her country of origin and is growing up in France with a foster parent under a *kefala*, to refuse to allow the adoption. As Gilles Cuniberti points out, the lower courts are very often ready in such cases to overlook the prohibitive content of the personal law of the child and the *Cour de cassation*'s own approach before the legislative reform in 2001 was to facilitate adoption whenever the natural parents or guardians of the child were fully aware of the radical consequences of an "adoption plénière" under French law, which cuts off all blood-ties between the child and its natural family.

Beyond the policy of discouraging financial transactions between prosperous prospective adoptive parents and young women from poor countries who are ready to conceive and abandon a child for money (a problem not specific to cases involving children from countries where adoption is unknown or prohibited), which is more generally that of the 1993 Hague Convention (under the aegis of

which, henceforth, the 2001 channels the flow of inter-country adoptions), the 2001 reform was designed to defer to the refusal of other legal systems to accept adoption, either for religious reasons, or to avoid a generation of children from being drained from developing economies towards Western homes.

This "cultural deference" argument was not based on mere diplomatic considerations – as such it would not have passed muster under the New York Convention, which requires the interest of the child (not of governments) to be paramount – but was formulated in the name of the superior interest of the child. The idea was that the potential trauma linked, in the context of any adoption (whether domestic or inter-country, legal or illegal), to the fact that the child, whose own birth may often already be accompanied by psychologically damaging circumstances, is severed from her natural parents, is likely to be accentuated by ignoring the cultural content of the child's personal status. "Respect for the child's origins" meant respect for the prohibition contained in the child's national law.

This metaphor must of course be taken seriously. Adoption can be psychologically difficult for the child in any circumstances, however loving and understanding the adoptive parents may be, and when the child has been displaced from a very different cultural environment (be it exclusively pre-natal), involving far-reaching linguistic, religious, social and economic changes in her life, the consequences should not be under-estimated. One may wonder however whether the refusal to go against the prohibitive content of the child's personal status is not taking the (very legitimate) desire to "respect the child's origins" much too far. Forcing the consent of the child's mother, which should of course be severely sanctioned and is so under the Hague regime, is one thing; deferring to the content of the child's national law notwithstanding the present interest of the child is clearly another! This is, at any rate, what the French lower courts seems to think. Particularly when, as seems frequent in practice, the authorities of the country of origin allow the child (who may well not have a family to reclaim it) to leave the territory with a guardian by virtue of a *kefala*, knowing full well that the guardian may later ask for an adoption in France.

It is true that the prohibition contained in article 370-3 is only effective when the child is actually born in the country which prohibits adoption. When a foreign child is abandoned at birth in France, she will be given French citizenship and a brand new personal status (article 19 of the Code Civil). But does it make sense to

treat a child differently according to the place in which he has the fortune, or the misfortune, of being abandoned? Of course, if the child grows up in France, she may also accede to French nationality on her majority (article 21-7 of the Civil Code). But is it really worthwhile to maintain the barrier during her childhood? The child will grow up with a status which is not in line with reality. The case-law to which Gilles Cuniberti refers tends to show that the difficulty is very real. It seems to me that an eminently respectable idea such as "respect for the child's origins" should not be used to justify the rigid application of a prohibitive personal status when the child is growing up in France, with the full consent of her natural parent(s), if any, and the tacit approval of the authorities of the country of origin.

No Adoption in France for Algerian/Moroccan Children

Children from Algeria or Morocco may not be adopted in France. This is because under French law, the law of the child controls the issue of whether adoption is possible at all. Thus, children from countries where adoption is unknown are unadoptable. As there is no adoption in Islam, children from countries such as Algeria and Morocco may not be adopted.

The rule is not new. It is the result of a statutory intervention of 2001, which has amended the Civil Code.

Article 370-3 of the Civil Code now provides:

> *The requirements for adoption are governed by the national law of the adopter or, in case of adoption by two spouses, by the law which governs the effects of their union. Adoption however may not be ordered where it is prohibited by the national laws of both spouses.*
>
> *Adoption of a foreign minor may not be ordered where his personal law prohibits that institution, unless the minor was born and resides usually in France.*

> *Whatever the applicable law may be, adoption requires the consent of the statutory representative of the child. Consent must be free, obtained without any compensation, subsequent to the birth of the child and informed as to the consequences of adoption, specially where it is given for the purpose of a plenary adoption, as to the entire and irrevocable character of the breaking off of the pre-existing parental bond.*

The law is crystal clear, but this does not prevent French couples or individuals to try to adopt Algerian or Moroccan children. They find the children in Algeria or Morocco, come back to France, ask a French court to grant the adoption, and … win before lower courts, including courts of appeal! French prosecutors then appeal to the supreme court for private and criminal matters (*Cour de cassation*), which allows the appeal and sets aside the judgment granting the adoption.

Only last summer, the *Cour de cassation* allowed the appeal against a judgment of the court of appeal of Limoges. The adopter was a Franco-Algerian woman who had found the child in Algeria where it had been abandoned at birth. The woman obtained from Algerian authorities the right to look after the child (*kafala*), came back to France and sought a judgment of adoption. She won before the first instance court of Limoges, then before the Court of appeal. In a judgment of July 8, 2008, the *Cour de cassation* held that *kafala* was not an adoption, and that, as the Court of appeal had noticed in its judgment, Algerian law does not allow adoption. The judgment and the adoption were set aside. On October 10, 2006, the *Cour de cassation* had already made the same decision in respect of an Algerian and a Morrocan *kafala*. In each of these cases, the lower courts had resisted and granted the adoption.

So, here are, on the one hand, tons of French couples who cannot have children, are trying to adopt, and cannot find what they are looking for. On the other hand, it is likely that there are quite a few, if not very many, children in Algeria or Morocco who have been abandoned by their parents and would have a much better life with these couples. If these couples could adopt these children, everybody would be happy. This may well appear clearly to French judges all over France, since so many lower courts just look for a way to allow the adoption. And indeed, it might be that the *Cour de cassation* does not disagree, since its case law before the reform was precisely that, as long as the person in charge of the

child in the foreign country had actually understood and consented to the change of parenthood, whether the law of origin of the child allowed was irrelevant.

But now, the law has changed, and the *Cour de cassation* probably thinks that it does not have the legitimacy to challenge the will of the French parliament.

How could the French society end up with a rule which, in most cases, so patently hurts the interests of all the persons involved?

Uruguay – Case on Carrier's Liability

I am grateful to Henry Saint Dahl, the President of the Inter-American Bar Foundation, for contributing this report on this case from Uruguay.

On October 10, 2008, the Civil Court of Appeals in Montevideo, Uruguay, affirmed the decision of the 14th Civil Court of Montevideo in *Royal & Sun Alliance Seguros Uruguay Sociedad Anónima v. Panalpina, Pantainer Express Line* holding that in a multimodal transportation contract between Guatemala and Montevideo, Guatemalan law exempted the carrier from liability when the carrier had followed instructions from the owner, which lead to the cargo being stolen from the place where it was left in custody.

The court applied Art. 2399 of the Uruguayan Civil Code and, as the most important conflict rule, Art. 34 (4) (b) of the 1889 Montevideo Civil International Law Treaty (Tratado sobre Derecho Internacional Civil de 1889), which states that

> *… contracts concerning things certain are ruled by the law of the place where they are situated at the time the contract is made … if the effects of such contracts relate to a special place, those contracts are ruled by the law of such place.*

The court held that the effect of the contract related to Guatemala, which made Guatemalan law applicable. In its turn, Art. 817 of the Guatemalan Commercial Code relieved the carrier from liability when the total or partial loss of the cargo resulted from "an act or instructions given by the owner or his representative." Interestingly, domestic Uruguayan law would have lead to the opposite result since it imposes strict liability on the carrier (obligación de resultado). The mere fact that the cargo did not arrive to its final destination would have made the carrier liable.

In support of the applicability of Guatemalan law, the judgment stressed that the relevant events (instructions given and cargo stolen) took place in Guatemala.

The text of the decision was provided by Uruguayan attorney Eduardo Lapenne.

Reference from Irish Supreme Court to ECJ: Same Proceedings Pending in a non European State

I am grateful to Michelle Smith de Bruin BL for preparing the following report on a recent reference from the Irish Supreme Court to the European Court of Justice.

On 30 January 2009, the Irish Supreme Court decided in *Goshawk Dedicated Limited and Kite Dedicated Limited formerly known as Goshawk Dedicated (No. 2) Ltd, and Cavell Management Services Ltd, and Cavell Managing Agency Ltd v. Life Receivables Ireland Limited* ([2009] IESC 7) to refer to the European Court of Justice the question of whether the Brussels I Regulation has mandatory application in circumstances where there are pre-existing proceedings between the same parties in a non-Member State.

Facts
The defendant was incorporated in Ireland and had its principal place of business in Ireland. The plaintiffs were companies incorporated in England and had their

principal places of business in London. In June 2005 the defendant purchased a partnership interest in a Delaware partnership known as Life Receivables II LLP in which the defendant and Life Receivables Holdings are the only partners but in which the defendant would appear to be the only partner with a financial stake. The partnership is, in turn, a beneficiary of Life Receivables Trust whose commercial value derives from trust property, being life insurance policies purchased in the early years of this decade together with a contingent cost insurance issued by Goshawk in respect of those policies. The defendant, as plaintiff in the U.S. proceedings, alleged that it was induced into buying into the partnership as a result of misrepresentation on the part of the defendants in the U.S. proceedings. The defendant has commenced proceedings in Georgia, U.S.A., against the plaintiffs and a number of others who were involved in a series of transactions which were at the heart of the dispute between the parties.

Briefly, the complaint in those proceedings alleges securities fraud, common law fraud, negligent misrepresentation and conspiracy to commit fraud in connection with a transaction valued at a figure in excess of U.S.$14 million. The primary jurisdiction invoked is in respect of the securities fraud pursuant to United States law, and a supplemental jurisdiction is alleged of the common law claims, again pursuant to United States law, on the grounds that the same facts and circumstances give rise to all claims. Apart from the securities claims, one of the major allegations made is that Goshawk, relying on material furnished through or by an actuarial company located in Atlanta, Georgia, American Viatical Services, made representations appearing on the face of the life policies, to persons including Life Receivables, the defendant in the Irish proceedings. It is also alleged that Cavell, acting through one of its principals, devised a run off scheme to commute Goshawk's obligations to, *inter alia*, Life Receivables. It is alleged that at certain times that principal, acting on behalf of both Goshawk and Cavell, made material misrepresentations and omissions.

Proceedings

The proceedings commenced by the defendant in Georgia, U.S.A., on the 29th June, 2007, were first in time. The plaintiffs commenced the Irish proceedings which seek declarations that the plaintiffs did not make the misrepresentations, together with other similar relief, on the 6th September 2007. The Irish proceedings are a mirror image of the Georgia proceedings, except that none of the additional co-defendants in Georgia are parties in the Irish proceedings. On

the 5th September, 2007, the plaintiffs in the Irish proceedings moved, in the U.S. District Court, by motion, to dismiss the defendant's complaint, on the basis that that court lacks "subject matter jurisdiction" over the defendants because the transactions in issue in the case are "predominantly foreign" and lack the necessary domestic conduct or effects to permit the application by that court of American securities laws. The defendant in these proceedings resisted that motion, and a ruling by the US District Court was awaited, at the time of the appeal to the Irish Supreme Court.

Judgments of Irish Courts

The High Court considered the doctrine of forum non conveniens and lis pendens (including the decision in Owusu) and held that, under the Brussels I Regulation, as and between Member States, a strict application of the doctrine of *lis pendens* applies. Courts of one jurisdiction are precluded from exercising jurisdiction over a dispute until the courts of a jurisdiction first seised with that dispute have dealt with the question of whether that court first seised has jurisdiction. The Supreme Court agreed with this.

Another issue was whether the recognition afforded to both the doctrine of *lis pendens* and the appropriateness of affording recognition, in accordance with private international law of the relevant Member State, to third party state judgments, is sufficient to warrant a departure from what seems to be the clear mandatory language of Article 2, as interpreted by the European Court of Justice Owusu.

The High Court concluded that there was no basis for staying the proceedings. There is nothing wrong with negative declaratory proceedings. The Court held that a court in Ireland retains and must exercise the mandatory jurisdiction conferred on it by Article 2, notwithstanding the fact that there may be proceedings in a non-Member State.

Reference

Approximately eleven grounds of appeal were made to the Irish Supreme Court. The Supreme Court ultimately decided to refer two questions to the ECJ. The exact form and wording is still to be finalised, but the two principal issues are:

(i) If a defendant is sued in its country of domicile, is it inconsistent with Regulation 44/2001 for the court of a Member State to decline jurisdiction or to

stay proceedings on the basis that proceedings between the same parties and involving the same cause of action are already pending in the courts of a non-Member State and therefore first in time?

(ii) What criteria is to be applied by a Member State in coming to a decision whether to stay pending proceedings in a Member State, depending on the response to the first, primary, question to be posed.

Consumer Protection: Directive 2008/122/EC

A Directive on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, repealling Directive 94/47/EC, has been published today (OJ, L, nº 33). The new Directive aims to update Directive 94/47/EC, covering new holiday products similar to timeshare that did not exist in 1994, and also some transactions related to timeshare that were not regulated by the old Directive.

The new text differs significantly from the old one. Directive 94/47/EC contained (art. 11) a minimum harmonisation clause, that is, Member States could adopt stricter rules in order to improve consumer protection. The outcome of doing so was a fragmented regulatory framework across the Community that caused significant compliance cost when entering into cross border transactions. The new Directive provides for full harmonisation, though only for certain aspects (sale and resale of timeshares and long-term holiday products, as well as the exchange of rights deriving from timeshare contracts), in which Member States are not allowed to maintain or introduce national legislation diverging from the Directive. Where no harmonised provisions exist, Member States remain free; due to this fact, conflict of laws rules are still needed. In this sense, Whereas 17 specifies that

> *The law applicable to a contract should be determined in accordance with the Community rules on private international law, in particular Regulation (EC) nº 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).*

In spite of this caution, it is still disputable whether consistency with Regulation (EC) nº 593/2008, Rome I, has really been respected. Actually, due to the differences regarding their respective juridical consequence, a careful job of delimitation is to be made between art. 6 of the Regulation (remember para. 1 and 2 shall not apply to a contract relating to a right in rem in immovable property or a tenancy of immovable property *other than a contract relating to the right to use immovable properties on a timeshare basis within the meaning of Directive 94/47/EC),* and Art. 12 of Directive 2008/122/EC, establishing that "2. Where the applicable law is that of a third country, consumers shall not be deprived of the protection granted by this Directive, as implemented in the Member State of the forum if:
– any of the immovable properties concerned is situated within the territory of a Member State or,
– in the case of a contract not directly related to immovable property, the trader pursues commercial or professional activities in a Member State or, by any means, directs such activities to a Member State and the contract falls within the scope of such activities." Whilst art. 6 Rome I points to the protection provided by the law of the country of the consumer habitual residence, the Directive leans on the law of the forum.

Art. 3.4 of the Regulation, providing for the application of provisions of Community law that cannot be derogated from by agreement, when the parties have chosen as applicable law other than that of a Member State and *all other elements relevant to the situation* are located in one or more Member States, may also be a source of confusion.

The new instrument will enter into force on the 20th day following its publication; Member States shall adopt and publish, by 23 February 2011, the laws, regulations and administrative provisions necessary to comply with the Directive; they will apply from the same date.

Rome I: Commission Decision on

the UK's Opt-In Published in the OJ – Response to the UK Government's Consultation

Following the publication in the OJ (no. L 10 of 15 January 2009, p. 22) of the formal **Commission Decision of 22 December 2008 on the request from the United Kingdom to accept the Rome I reg.** (see our previous post on the Commission opinion), **the UK government has published the response to the public consultation** launched in April 2008.

There were 37 responses to the consultation (see the detailed list in Annex A to the document), from the academic sector (5), commercial, financial and insurance organisations (18), consumer organisations (2), the legal sector (11) and the transport sector (1). **The overwhelming majority of the respondents (95%) agreed that the UK should participate in the Regulation.**

Here's an excerpt from the conclusion (see also, on pp. 16-38, the article-by-article analysis, with the points raised by the respondents and the government response, as well as the comments on various issues relating to EC action in PIL matters, such as the UK's position in future EU dossiers, the role of the ECJ and the Danish government's ambition to put its opt-outs to a referendum):

> *104. The majority of respondents to the consultation were of the view that, given the satisfactory outcome of the negotiations, there was an advantage to British business if the rules determining the governing law were uniform throughout the EU. Aligning UK law in this respect to that in the rest of the EU would reduce legal expense and transaction costs. In addition, some respondents expressed the view that our original decision to opt out of the Regulation had helped to achieve the final positive result. However, they also made the point that if the UK did not participate in Rome I now, having achieved such a good result, it could significantly weaken the effectiveness of our right to not participate in future and damage our negotiating strength in relation to other EU dossiers.*
>
> *105. […] The European Commission adopted a decision to extend the application of the Rome I Regulation to the United Kingdom on 22 December*

> *2008. The Ministry of Justice, the Department for Finance & Personnel (Northern Ireland) and the Scottish Executive will shortly progress implementation planning for the Regulation. The UK will be required to implement the Regulation by 17 December 2009.*
>
> *106. By opting in to the Regulation, it shall be binding and directly applicable to the UK. The Regulation will apply to the UK (England, Northern Ireland, Scotland and Wales) and also to Gibraltar. The UK's participation in the Regulation does not, however, undermine the UK's future use of the Protocol to Title IV of the EC Treaty.*

(Many thanks to Federico Garau, Conflictus Legum blog, and to Andrew Dickinson)

Article: "Extra-territorial Application of Antitrust – The Case of a Small Economy (Israel)"

Michal Gal (University of Haifa, NYU School of Law) has on the NELLCO Legal Scholarship Repository posted a paper titled "Extra-territorial Application of Antitrust – The Case of a Small Economy (Israel)", which also analyses legal aspects of private international law. This paper is part of a book on Cooperation, Comity And Competition Policy (Andrew Guzman ed., Oxford University Press, 2009).

AG Opinion on Brussels II bis Regulation

Yesterday, Advocate General *Kokott* delivered her opinion in case C-523/07 (*Applicant A*).

The case, which has been referred to the ECJ by the Finnish *Korkein hallinto-oikeus*, concerns three children who lived originally in Finland with their mother (*A*) and stepfather. In 2001 the family moved to Sweden. In summer 2005 they travelled to Finland – originally with the intention to spend their holidays there. In Finland, the family lived on campsites and with relatives and the children did not go to school there. In November 2005 the children were taken into immediate care and placed into a child care unit. This was unsuccessfully challenged by the mother and the stepfather.

The *Korkein hallinto-oikeus*, which is hearing the appeal, had doubts with regard to the interpretation of the Brussels II *bis* Regulation and referred the following **questions** to the ECJ for a preliminary ruling:

> *1(a) Does Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, (the Brussels IIa Regulation) apply to the enforcement, such as in the present case, of a public-law decision made in connection with child protection, as a single decision, concerning the immediate taking into care of a child and his or her placement outside the home, in its entirety,*
>
> *(b) or, having regard to the provision in Article 1(2)(d) of the regulation, only to the part of the decision relating to the placement outside the home?*
>
> *2 How is the concept of habitual residence in Article 8(1) of the regulation, like the associated Article 13(1), to be interpreted in Community law, bearing in mind in particular the situation in which a child has a permanent residence in one Member State but is staying in another Member State, carrying on a peripatetic life there?*
>
> *3(a) If it is considered that the child's habitual residence is not in the latter*

Member State, on what conditions may an urgent measure (taking into care) nevertheless be taken in that Member State on the basis of Article 20(1) of the regulation?

(b) Is a protective measure within the meaning of Article 20(1) of the regulation solely a measure which can be taken under national law, and are the provisions of national law concerning that measure binding when the article is applied?

(c) Must the case, after the taking of the protective measure, be transferred of the court's own motion to the court of the Member State with jurisdiction?

4 If the court of a Member State has no jurisdiction at all, must it dismiss the case as inadmissible or transfer it to the court of the other Member State?

AG *Kokott* suggested in her **opinion** to answer these questions as follows:

1. Article 1(1) of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, as amended by Council Regulation (EC) No 2116/2004 of 2 December 2004, must be interpreted as meaning that a single decision ordering a child to be taken into care immediately and placed outside his or her original home in a child care unit is covered by the term "civil matters" for the purposes of that provision, where that decision was adopted in the context of public law rules relating to child protection.

With regard to this first question, the AG could refer to the judgment given by the ECJ in case C-435/06 *(Applicant C*) since the question referred to the Court has essentially been the same. *(See with regard to case C-435/06 our previous posts on the reference, the opinion and the judgment).*

2. A child is habitually resident under Article 8(1) of Regulation No 2201/2003 in the place in which the child – making an overall assessment of all the relevant factual circumstances, in particular the duration and stability of residence and familial and social integration – has his or her centre of interests. Only if no habitual residence in that sense can be established and if no jurisdiction based on Article 12 exists do the courts of the Member State in which the child is present have jurisdiction under Article 13(1) of the

regulation.

Of particular interest are the AG's remarks on the second question which concerns the interpretation of the concept of the child's habitual residence – which is not defined in the Regulation itself. Here, the AG emphasises that the basic idea underlying the rules on jurisdiction in Brussels II *bis* is that the courts of the Member State should have jurisdiction which are best placed to take decisions concerning parental responsibility. And these are – because of proximity – the courts of the Member State in which the child is habitually resident (para. 18). Even though also mere presence may establish proximity to the courts of the respective State, the AG stresses that mere presence does not lead to a relationship of the same quality as habitual residence (para. 20). Thus, criteria must be developed in order to distinguish habitual residence from mere presence.

Taking into consideration the wording and objectives of Brussels II *bis* as well as the relevant multilateral conventions, AG *Kokott* states that "the concept of habitual residence in Article 8 (1) of the Regulation should therefore be understood as corresponding to the actual centre of interests of the child." (para. 38)

As relevant criteria for the distinction between habitual residence and the mere (temporary) presence, the AG designates in particular a certain duration and regularity of residence, which might be interrupted as long as it is only a temporary absence (para. 41 et seq.). Further, the familial and social situation of the child constitute important indicators for habitual residence (para. 47 et seq.).

3. (a) Article 20(1) of Regulation No 2201/2003 allows the courts of a Member State in urgent cases to take all provisional measures for the protection of a child who is present in that Member State, even if the courts of another Member State have jurisdiction under the regulation over the substance of the matter. There is urgency if immediate action is, in the view of the court seised in the State of the child's presence, necessary to preserve the child's welfare.

With regard to this question, the AG stresses that Art. 20 (1) Brussels II *bis* has to be interpreted narrowly since it authorises courts to act which do not have jurisdiction over the substance of the matter (para. 56). Further, the AG clarifies

that there are basically three requirements which have to be taken into consideration with regard to the application of Art. 20 (1): First, the measure may relate only to children who are present in the respective Member State (para. 57). Second, there must be an urgent case (para. 58) and third, Art. 20 (1) permits only provisional measures since the final decision is reserved to the court which has jurisdiction over the substance of the matter (para. 60).

> *(b) Article 20(1) of the regulation allows the taking of the provisional measures that are available under the law of the Member State of the court seised, and those measures need not be expressly designated as provisional measures under national law. It is otherwise for the referring court to determine which measures may be taken under national law and whether the provisions of national law are binding.*
>
> *(c) The regulation does not oblige the court which has taken a provisional measure under Article 20(1) to transfer the case to the court of another Member State with jurisdiction over the substance of the matter. However, it does not preclude the court seised from informing the court with jurisdiction, directly or via the central authorities, of the measures taken.*
>
> *4. A court which under the regulation lacks jurisdiction over the substance of the matter and does not consider any provisional measures under Article 20(1) of the regulation to be necessary must declare that it lacks jurisdiction, under Article 17 of the regulation. The regulation does not provide for a transfer to the court with jurisdiction. However, it does not preclude the court seised from informing the court with jurisdiction, directly or via the central authorities, of its decision.*

See with regard to this case also our post on the reference which can be found here.