European Family Courts and Inter-Country (Arbitration?) Courts to Deal with Cross-Border Custody Disputes

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EUROPEAN FAMILY COURTS AND INTER-COUNTRY (ARBITRATION?) COURTS TO DEAL WITH CROSS-BORDER CUSTODY DISPUTES

Gian Paolo ROMANO*

I want to thank our friends from the Aarhus University. They have shown a lot of leadership in putting together this founding conference of the *European Association of Private International Law*. I wish I were there will all of you to celebrate this event. But I thought it was in the best interests of *my child* for me to stay with him today and to participate remotely.

I mention this because what I would like to address has precisely to do with the protection of *children.* The case I want to make is in support of creating what I would call *European Family Courts* within the European Union, as well as – outside the EU – what I would call *inter-country tribunals*, including *arbitration* tribunals, possibly under the aegis of the United Nations, to deal with cross-border custody issues. This may sound like science fiction: *legal science* fiction. But I think it is consistent with the spirit of our Association to test new ideas when we feel the existing legal framework is not entirely satisfactory for the human beings it is designed to serve.

* Professor of law, University of Geneva. This paper reproduces with some additions the speech I delivered on June 4, 2022 at the conference of the *European Association of Private International Law*. Accordingly, bibliography is kept to a minimum. This paper is part of a wider research that I have been conducting for several years and whose findings should – hopefully soon – be published in greater detail and in a larger format.

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I. Isolating The Problem

A. Two Stories

Let me start with two stories.

The first is about Oliver Weilharter, whose terrible fate attracted some publicity in the media.[1] Oliver Weilharter is born in Denmark, the son of an Austrian mother, Marion Weilharter, and of a Danish father, Thomas Sørensen. The family lives primarily in Denmark although they regularly visit Austria. When Oliver is still a toddler, his parents split. They initially arrange for Oliver to live with the mother in Denmark so the father can continue to see him regularly. But the mother quickly feels unhappy with this state of affairs. She misses home, which is Austria for her. And so she takes Oliver to Graz. And she refuses to move back to Denmark. She argues she is entitled to determine Oliver's residence alone. The father, who's angry about this unilateral move by the mother – he feels he's been stabbed in the back – files before the Austrian authorities for return of Oliver to Denmark. He relies on the 1980 Hague Abduction Convention. But after multiple proceedings, the Austrian authorities refuse to return Oliver to Denmark. And they award custody to the Austrian mother.

Father's frustration increases. He contends the Austrian authorities are *biased*. When a citizen feels *public justice* betrays him, when he feels he's not treated *fairly*, what does he resort to? *Private* justice. And so he orchestrates what may look like a counter-abduction. When Oliver is at the *Kindergarten* in Graz, his father shows up – and assisted by a Danish acquaintance – takes him back to Denmark. It is now for the mother to be furious about this escalating turn of events. She files for return before the Danish authorities. The Danish authorities deny return and they award sole custody to the father. Which causes a journalist to wonder: (quote) "*How can it be possible that the Danish authorities can award sole custody to the Danish father and the Austrian authorities can award custody to the Austrian mother*?"[2] And another one to note: "*It's a battle between Denmark and Austria with little Oliver caught in the middle*".[3]

Now, does the mother at least enjoy visitation rights for Denmark? Problem number 1: she faces *criminal proceedings* for abduction in Denmark. Just as the father has been *convicted* for abduction in Austria. Problem number 2: if Oliver is permitted to leave Denmark even for a week to see his Austrian grand-parents or to take some fresh air in the Alps (Denmark is a beautiful but *flat* country), there is a high risk that the Austrian authorities won't cooperate to make sure he returns to Denmark. And so, Oliver, who's Austrian citizen, as well as Danish citizen, is not allowed to travel to Austria, his "*motherland*" ("*mère-patrie*" in French). In fact, Oliver is unable for long years to travel *outside Denmark* altogether. What about

[1] In Austria, Denmark and other countries, particularly Germany.

[2] "*Wenn Eltern ihre Kinder entführen. Hallo Deuschland*" aired by the ZDF on 13 October 2013, available on Youtube.

[3] "*Es ist ein Kampf zwischen Dänemark und Österreich und dazwischen der kleiner Oliver*": "*Guten Abend Österreich*", 2013-04-04 Puls4_Oliver_inkl_Talk (at 1:53 / 7:37).

his right to *freedom of movement* across the European territory? It looks as if he's held hostage by his "*fatherland*" ("*Vaterland*" in German), that is Denmark.

Out of despair, Marion Weilharter calls the European institutions for action. She thought this clash between two Member States has to be solved through *a European body.* And so, a delegation of members of European Parliament travels to Denmark and tries to sort out the situation *diplomatically.* To no avail. According to the last episode of this drama I am aware of, the mother turns to the United Nations. Austria and Denmark are "United Nations" although they are *disuniting* this Austrian-Danish family. The United Nations has, to Marion Weilharter' mind, an *inherent legitimacy* to deal with such a supranational deadlock. She particularly petitions to the *United Nations Committee for Women's Rights*.[4]

I will come back to this later.

What I would like to emphasize is the extent of hardship and pain all members of the family have been experiencing. This is, to me, one of the clearest examples of a *lose-lose-lose* situation: *three losers*. Oliver has been suffering under various disorders. A lot of health issues, some of them threatening to be permanent.[5] The mother has also been suffering under various disorders, which caused her to be on sickness leave for a long time. The father has been suffering tremendously as well. His career probably compromised. Both parents told about their plight to the media.[6] And you can clearly see this by their body language when you hear them recounting their ordeal. And it is not difficult to imagine the distress of the members of the two extended families – starting from the *grandparents* – in Austria and Denmark.

Think about how much Austrian taxpayers' and Danish taxpayers' money has been squandered. The end result is clearly *lose-lose* also from the perspective of the two *communities,* the two *countries*.

My second story is even more tragic.[7] It is about a Swiss mother and a Tunisian father. They have two children, who are both Swiss and Tunisian. The

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[4] Committee for the Elimination of Discriminations against Women or "CEDAW", CEDAW/C/59/D/46/2012, Communication No. 46/2012, https://juris.ohchr.org/Search/Details/2098.

[5] Studies show that a child who had to endure a several year-long high-intensity conflict between separating parents is several times more likely to underperform at school, and fall behind (Oliver began first grade at 8 whereas children in Denmark began first grade at 6: see Communication No. 46/2012, Views adopted by the CEDAW, at its sixty-third session,15 February-4 March 2016, p. 2), to experience child depression as well as several psychological and physical disorders (panic attacks, anxiety attacks, asthma attacks…), to display suicidal tendencies and, when they grow up, to develop inclinations to violence, to end up alcoholic or drug addict, to drop out of school prematurely, to struggle to find a good-paying job, to end up being dependent on public assistance, or in jail. Although reliable studies on this point seem to be lacking, those risks are arguably higher if a child had to endure conflicts not only between *mother* and *father* but also between "*motherland*" and "*fatherland*".

[6] See particularly the documentary "*Wenn Eltern ihre Kinder entführen. Hallo Deuschland*" aired by the ZDF on 13 October 2013, available on Youtube.

[7] For a summary of the case, see *Obergericht Zurich*, 31 August 2016, LC150021, available on the website of the Zurich courts: http://www.gerichtezh.ch.

family lives primarily in Switzerland but with frequent visits to Tunisia. At some point, the marriage starts deteriorating. The father travels to Tunisia with the children to visit their Tunisian grandparents. And he does not return them to Switzerland. It must have been for him a hard decision to make, but he made it. This unleashes an incredible number of procedures, and triggers the involvement of an incredible number of authorities and professionals: judges, diplomats, administrative services, central authorities, social services, lawyers, police and law enforcement, prison services, health professionals, most of them funded by Tunisian and Swiss public money. To make a (very) long story (very) short, the Courts in Zurich award custody to the mother. The Courts in Tunisia to the father. But when the father happens to be in Morocco, he gets arrested by the Moroccan authorities and extradited to Switzerland. The father is then convicted in Switzerland for child abduction. He serves several years in prison.

What about the children? They cannot move out of Tunisia, where they are looked after by their paternal grandparents. As the Court in Zurich puts it with dismay: (quote) "*the parents are in Switzerland without the children, the children are in Tunisia without the parents*".[8] The Swiss Ministry of Foreign Affairs had advised the mother *against* traveling to Tunisia where she has become a sort of *persona non grata*. Driven to despair for not being able to see her children, she commits *suicide.*

Tragic outcome. Not isolated though. There is a long list of attempted or successful suicides in cases like this. Sometimes it is the child who, caught in the middle of this *interparental* and this *inter-country* war, takes his or her life. Maybe not immediately, but five years later, ten years later.

B. Further Case-Law within the EU

I would like to go back to the European Union and wonder whether our first Case-study would have been different had Denmark been part of the so-called "*Brussels IIa Regulation*".[9] A look at the ECJ's case-law does not really support this assumption. Let me mention some of those cases.

I will start with Barbara Mercredi, who's French, and Richard Chaffe, British. They have a child, Chloé, who's born in London. When Chloé is barely one month, her parents have a fall out. The mother leaves the UK with Chloé and settles back to the French overseas territory she originates from. Not to Paris, which is two hours' train from London, but to the Réunion island, which is 9.000 kilometres away from where Chloé's father live. Chloe's father immediately turns to

[8] *Obergericht Zurich*, 31 August 2016, LC150021, p. 48: "*Die Kinder sind… ohne Eltern in Tunesien und die Eltern ohne Kinder in der Schweiz"*.

[9] 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 of August 1, 2022, Brussels IIa Regulation has been superseded by Council 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).

English courts. The dispute quickly escalates. Several English and French proceedings are initiated by the Chloe's parents, which result in a (I quote from the European Court of Justice) "*conflict between two courts of different Member States*".[10] French courts award custody to the French mother. English courts award custody… to *themselves*, making Chloé a "*ward of the court*", as well as – at least initially – to the British father.

Detiček v. Sgueglia: Italian father, mother from Slovenia, little girl, Antonella. After their divorce, Italian courts award custody to the Italian father. Mother escapes Italy and brings Antonella to Slovenia. No less than 6 proceedings. Slovenian courts refuse to return child to Italy and award custody to mother. At the time of the ECJ ruling,[11] after two and a half year, the child was still in Slovenia. I have no information about what happened afterwards. I tried to reach Mr Sgueglia and Mrs Deticek through LinkedIn. I got no reply.

Purrucker[12]: Spanish man, German woman, two twins. Merlín, a boy, Samira, a girl, born in Spain. They are dual citizens, Spanish and German. Their parents' union breaks down. Before the case reaches the ECJ, no less than 16 proceedings, 11 in Germany, 5 in Spain. Spanish courts awarded custody of *both twins* to Spanish father. German courts hesitated, filed two requests for preliminary ruling – so they bought some time – and they ultimately concluded that the German mother had "*exclusive custody of both twins*". The clash between Germany and Spain caused the twins not to see each other for at least *four years*: Samira was in Spain with the father and was prohibited from traveling to Germany, Merlín was in Germany with the mother, and was prohibited from traveling to Spain.

The *Aguirre Zarraga* case was similar. Mr Aguirre Zarraga, Spanish, and Mrs Pelz, German, were married in 1998 in Spain. A daughter, Andrea, was born there in 2000. In 2007, Andrea's parents separated. The Spanish court awarded custody to the Spanish father and right of access to the German mother. Shortly after, the mother moved back to Germany. Andrea was allowed to spend the summer holidays with her in Germany. At the end of the summer, she refuses to return Andrea to Spain. There followed 10 court proceedings, 7 in Spain and 3 in Germany. Stark conflict of decisions between the two Andrea's homelands: Spanish courts maintained custody to the Spanish father, German courts awarded it to the German mother.[13] The ruling by CJEU suggested Germany should comply with Spanish custody order and return Andrea to Spain. The dispute was still not over three years later for, according to reports in April 2014, the German authorities had not enforced the return order on the ground that Andrea, after having being held in Germany for six years – she was not allowed to spend a single day with her Spanish family in Spain for *six years* – now opposed the enforcement. The European Commission started an investigation against Germany.

The most high-profile case is probably *Rinau*. Lithuanian woman, a prominent politician, German man, a winemaker. Their union produces Luisa, who's

[10] CJEU, 22 Dec. 2010, *Mercredi*, C-497/10, para. 68.

[11] CJEU, 23 December 2009, *Detiček*, C-403/09 PPU.

[12] CJEU, 15 July 2010, *Purrucker I*, C-256/09, and 9 Nov. 2010, *Purrucker II*, C-296/10.

[13] CJEU, 22 December 2010, *Zarraga*, C-491/10.

born in Germany. Matrimonial crisis. The mother is graciously allowed by the father to travel with Luisa to Lithuania for two weeks. And she does not come back. There follows, in an initial stage of the battle, 16 judgments, 4 in Germany, and 12 in Lithuania. German courts award custody to German father. The Lithuanian courts and Lithuanian enforcement authorities and Lithuanian public opinion side with the mother. Luisa is not returned to Germany. Preliminary ruling by the ECJ.[14] Then the battle continues and produces 12 additional decisions. The case is then brought by Mr. Rinau – who went to Lithuania and took himself Luisa back to Germany, which triggered a criminal proceeding for (counter-)abduction against him – before the European Court of Human Rights.[15] In the words of the Strasbourg Court (quote) "*Lithuanian and German courts had adopted more than thirty decisions which had often been contradictory and invalidated one another*".[16]

Another case brought both before the ECJ[17] and – twice – before the ECHR[18] involves Mauro Alpago, Italian, and Doris Povse, Austrian. They meet in Venice, where Doris Povse has moved to learn Italian. Romantic city, stimulating mutual attraction. A little girl, Sofia, is born. The romance vanishes soon though. Mother goes back to Vienna, taking Sofia with her. Father cries foul. A first stage of the dispute generates 14 decisions, 3 in Italy, 11 in Austria. Appeals, counter-appeals, applications for interim measures, for change of circumstances… If you read the summary provided by the ECJ, you easily get lost. But here's the gist: Italian courts award custody to Italian father and ordered Sofia to return to Italy. Austrian courts concluded custody should be awarded to Austrian mother and Sofia should remain in Austria. ECJ's ruling. Then the battle continues with 16 more proceedings, 30 in total. It reaches twice the European Court of Human Rights, who was unable to put an end to it. For the battle carries on, with at least 3 more rulings.[19] So, for at least 7 years, Sofia, caught in middle of the arm-wrestling contest between *mother* and *father,* and between *motherland,* Austria, and *fatherland,* Italy, was not permitted to visit Italy.

Mrs Šneersone, Latvian, and Mr Campanella, Italian, meet in Rome. Their union produces a child, Marko, a dual national of Latvia and Italy. Marko's parents live together in the *Eternal City*. Yet their relationship is more fleeting than eternal. Marko is barely a year when his parents separate. Feeling she has little prospects in Italy, Mrs Šneersone returns to Latvia with Marko. The father files a petition for return with the District Court of Riga. The Riga Court refuses to order Marko's repatriation to Rome which they concluded would result in an "*intolerable situation*".[20] This unleashes six years of legal wrangling on Italian and

[14] CJEU, 11 July 2009, *Rinau*, C-195/2008.

[15] ECHR, 14 January 2020, *Rinau v. Lithuania* (Application No 10926/09).

[16] ECHR, 14 January 2022, *Rinau v. Lithuania*, para. 111.

[17] CJEU, 1 July 2010, *Povse*, C-211/2010.

[18] ECHR, 18 June 2013, *Povse v. Austria* (Application No 3890/11), ECHR, 15 April 2015, *M.A. v. Austria*, Application No 4097/13.

[19] ECHR, 6 mars 2018, *Royer v. Hungary* (Application No 9114/16).

[20] On the basis of Article 13(b) of the Convention on the Civil Aspects of International Child Abduction of 25 October 1980.

Latvian side – approximately *twenty* proceedings. Latvian courts affirmed jurisdiction based on the new residence of Marko, and they concluded "*it is in Marko's overriding interests that the custody be awarded to the mother*". In the meantime, the father had applied to the Courts in Rome, which ruled in his favour and ordered Mrs Šneersone to bring Marko back to Italy. To overcome this jurisdictional tug-of-war, the *Republic of Latvia commences proceedings against the Republic of Italy* before the CJEU. *Motherland* sues *fatherland.* The case was then brought by Mrs Šneersone before the ECHR.[21] The *Latvian government* sided with Mrs Šneersone and blamed the Italian judiciary for *partisanship*. The *Italian government* sided with the *Italian judiciary* in support of the Italian adjudication.

A Frenchman, Patrick Royer, and a Hungarian woman. They live in France for four years. A little boy is born in 2013. Soon after his birth, the parents have a fall out. The Hungarian mother leaves France for Hungary with the boy. There follows two years thick with legal proceedings, 7 in France and 15 in Hungary. The case landed multiple times before the highest court in France (*Cour de cassation*) and before the highest court in Hungary (*Kúria*). French courts prescribe child's residence in France and custody to the French father. The Hungarian courts dismiss the petition for return to France, refuse to recognize French rulings based on *public policy* and award custody to the mother.

Stefano Liberato, from Italy, and Luminita Grigorescu, from Romania, get married in Rome in 2005. They move into a home together. A child is born in February 2006. The parents split in 2007. Ms Grigorescu takes the child to Bucharest. This begins *12 years* of struggle (twelve!) until the ECJ rules in 2019.[22] During *twelve years*, the child, a national of Italy and Romania, was not able to set foot in Italy and visit there with the Italian part of his family, some of whose members have probably died in the meantime.

An Italian man, Emilio Vincioni, and a Greek woman, met on a Greek island. They get married in 2013 in Sassoferrato, Italy, where they established their marital home. In 2015, the wife becomes pregnant. Mr Vincioni agreed to her travelling to Greece in December 2015 to give birth. A girl is born in Athens early 2016. Soon after the delivery, the mother resolved to stay in Greece with the girl. There follows a fight involving *dozens* of proceedings before *civil* courts and *criminal* courts in Italy and Greece. The mother is convicted for abduction by the Italian *criminal* courts. The father – who "*spends a significant part of his salary in legal fees*"[23] – is imprisoned in Greece for failing to pay maintenance. On the *civil* front, the *Italian* courts pronounce the divorce and attribute the responsibility to the wife. The *Greek* courts[24] award custody of the girl to the mother and allow her to prevent the common daughter from travelling to Italy to meet there with her father and her Italian family – Alberto Vincioni, the Italian "*nonno*", being also

[21] ECHR, 12 July 2012, *Šneersone and Kampanella v. Italy* (Application No 14737/09).

[22] CJEU, 16 January 2019, *Liberato*, C-386/17.

[23] Andrea OSSINO, "*Bambina portata in Grecia dalla madre, il dramma del padre*", *La Repubblica*, 14 September 2021.

[24] The Greek courts regarded themselves as having international jurisdiction based on habitual residence of the child based on CJEU, 8 June 2017, *OL v PQ*, C-117/17.

particularly devastated – while ordering the father to pay in the hands of the mother a significant amount in child support. A child who's *Italian and Greek*, who's *six and a half* year at the time of this writing, has *never* been allowed by *motherland*, Greece, to spend a single week-end in Italy, his *fatherland*, for fear that *fatherland* might fail to cooperate to return her to Greece should the father fail to return her *spontaneously.* The dispute is still ongoing. The last episode features an emotionally, physically, financially drained yet remarkably combative father, and members of various associations, embarking on a rotating hunger strike to raise awareness on those issues.[25]

I will stop there, not because my stock of cases is running out – I could mention many more.

C. A Short Analysis

So, what do all these cases suggest?

First, if we are serious about *child best interests*, we have to recognize that the interests of Oliver, Chloé, Antonella, Luisa, Merlín, Samira, Marko, Andrea, Sofia, have largely gone by the window. Their childhood has been largely ruined. A whole bunch of their rights under the United Nations Convention on the Rights of the Child have been infringed upon by both countries involved.

Second, what is striking is that the parents involved are most of the time rather good people. There is not often *in those cases* a history of domestic violence for example. Take Marion Weilharter and Thomas Sørensen. Two clever and well-educated persons.[26] And Denmark and Austria rank very high in terms of prosperity and living standards and facilities for their children.

So why did the *parents* do what they did? And why did the *Danish and Austrian* authorities do what they did?

Remember: the first move was *by the mother*. Mrs Weilharter took Oliver to Austria without applying to Danish court to be *authorized* to relocate to Austria. Why? She thought Danish court would deny *relocation,* they won't allow a child issued by a Danish father and an Austrian mother and who had primarily lived in Denmark to move to Austria against the will of the Danish father. But she also most certainly thought: "*It is unfair for me to have to rely on a Danish court that might be biased in favor of the Danish side of the family*".

The crux of the matter is there are two sides: Danish and Austrian. The Danish mother perceived a judge who embodies the Danish side, and is part of the Danish community, and is closer to the Danish parent, *not to be sufficiently neutral* to serve even-handed justice. She perpetrated what was probably an abduction. But the reason she did so was because she wanted to move away from a justice system that, in her eyes, to her perception, was *biased.* I believe this feeling was shared by

[25] See the documentary: "*Vera Mattina – Uno sciopero della fame contro la sottrazione dei minori*", 21 Feb. 2022, available on Youtube.

[26] As shown by the multiple interviews they delivered to the media: see in particular "*Wenn Eltern ihre Kinder entführen. Hallo Deuschland*" aired by the ZDF on 13 October 2013, available on Youtube.

the Austrian authorities. They failed to order Oliver's return to Denmark because, first, they *did not want to cooperate* with a system they too perceived as unbalanced. Second, because they deliver justice *on behalf of the Austrian community* ("*im Namen der [österreischen] Republik*"),[27] to which the Austrian mother belongs, the Austrian authorities had a special sympathy for her.

Pay attention though: that's precisely what Thomas Sørensen felt. So, let us move to the Danish father's perspective. In his eyes, Austrian courts were not fair to him: "*They protected the mother based on her nationality*" *and residence*.[28] Same problem. And so, he dismissed the Austrian custody decision as unworthy of his respect. And he took justice into his own hand. And he took the child back to Denmark.

To sum up, the Austrian mother – and to some extent the Austrian authorities – *question the neutrality* of the Danish authorities. The Danish father – and to some extent the Danish authorities – *question the neutrality* of the Austrian authorities.

This dual perception underpin pretty much all cases I mentioned.

Interestingly, the United Nations Committee for *Women*'s Rights largely concluded that Marion Weilharter was, as a *foreign* woman, unfairly discriminated against by the *Danish* authorities and issued a series of recommendations to Denmark. But if there existed a United Nations Committee for *Men*'s Rights, chances are that it would conclude Thomas Sørensen was too unfairly discriminated against by the *Austrian* authorities as a *foreign* man. The European Court of Human Rights held in a number of cases that there had been a *bias* on the part of the mononational authorities of a country in favour of the parent – father or mother, man or woman – who was *their national and their resident* and to the detriment of the parent who was a *foreign national and foreign resident*. Think about *Rinau.* The President of the Lithuanian Supreme Court – the highest-ranking member of the Lithuanian judiciary – is blamed by the Strasbourg court for siding with the *Lithuanian mother*, for discriminating against Michael Rinau as a foreign *man,* for not displaying sufficient neutrality.[29] But the Strasbourg court should also recognize – and it does so, more or less explicitly, in other cases: for example in *Šneersone* – that the Lithuanian mother retained Luisa in Lithuania because she felt the German authorities, including the seemingly all-powerful *Jugendämter*, had exactly the *same bias.* They would not permit a German (and Lithuanian) child to lawfully relocate to Lithuania with his Lithuanian mother against the German father's will.

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[27] This is the *epigraph* of the rulings delivered by Austrian courts.

[28] "*Die österreichische Justiz schütze Marion Weilharter aufgrund ihrer Nationalität*": "*Wenn Eltern ihre Kinder entführen. Hallo Deutschland*" aired by the ZDF on 13 October 2013, available on Youtube (at 6:56 / 19:05).

[29] ECHR, 14 January 2020, *Rinau v. Lithuania* (Application No 10926/09), para. 215-219. See also para. 211: "*The foregoing findings demonstrate that, with the exception of the President of the Republic… the Lithuanian authorities – and this includes politicians, child care officials, and prosecutors – failed to ensure fair decision-making in the applicants' case… It goes without saying that their efforts, aimed at creating a negative atmosphere around the legal actions of the first applicant and constituting direct attempts to interfere in those proceedings, were unacceptable in a system based on the rule of law*".

Self-justice is triggered by a perception of an *injustice.* And things then escalate.

II. Looking for a Remedy to the Problem

A. European Family Courts

Let me quote *The Vienna Review* of 5 November 2012. The reporter mentions that (quote) "*Weilharter finds the current situation agony: 'I would prefer such matters were decided by a neutral court in another country*', she said".[30] The article further reports Mag. Britta Schönhart, Austrian attorney, to say: (quote) "*We need a European body or higher court deciding cases like these*". And Danish attorney, Marianne Linaa Steiness, (quote) "*wholeheartedly agrees, suggesting that… international conflicts like this would be treated by a European Family Court*".[31]

Both Danish and Austrian sides seem to call for – and be willing to submit to – a European Family Court, where an Austrian judge sits next to a Danish judge, and presided over by, say, a *Dutch* or a *French* judge or an *Italian* judge.

I am not going to address here how we might organise those panels. I want to focus on some of the benefits that are likely to flow.

Number 1, *both* parents will have *at long last* the impression they are treated *fairly*. *We have to be fair to both.* The anger, the frustration, associated with the perception of being the victim of a judicial bias is likely to diminish. Less frustration, less anger for the parents means less sadness for their children. When parents are frustrated, children feel it – they are like a sponge – and suffer as well. Do we care about children's welfare, about being fair to children? *Let's start by being fair to both parents*.

Number 2, those bi-national, European courts are likely to be perceived by bi-national, European children – by a significant number of those who have reached sufficient maturity to express their views – as better reflecting their own dual identity and language and culture. I conducted some informal interviews with multinational children like Oliver (I have some in my own extended family, my own child, Leonardo Édouard, is dual national, Swiss and Italian). The principle of multi-national courts *invariably resonate* with the multi-national children I sounded out. Do we care about children's views? Let's ask them for their views. Let's ask Danish-Austrian kids like Oliver: "*Would you rather have a wholly Danish panel or a wholly Austrian panel directing whether you should live with your Mom in Austria or with your Dad in Denmark, or a panel who's both, and at the same time, Danish and Austrian?*" And let's take their opinion into serious account.

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[30] Anett Kristensen, A Mother Fights For Custody – Without EU-wide rules, battles across borders put parents increasingly at odds, The Vienna Review, Nov. 5, 2012 https://www.theviennareview.at/archives/2012/a-mother-fights-for-custody.

[31] Anett Kristensen, A Mother Fights For Custody – Without EU-wide rules, battles across borders put parents increasingly at odds, The Vienna Review, Nov. 5, 2012 https://www.theviennareview.at/archives/2012/a-mother-fights-for-custody.

Number 3, the mere possibility of relying on a supranational court would actually help the parents to reach an *amicable settlement*. So the number and the duration of interparental conflicts are likely *to go down*. I am persuaded that, had we made European Family Courts available to the parents, *some* of the cases I mentioned would not have actually *landed* before the European Family Court, they would have *stayed away from courts altogether*. The psychological comfort of being able to rely on a neutral body would, in at least *some* of those cases, have encouraged good faith negotiations and parenting agreements. This would be a *win-win-win* situation: *three winners*, the child, the mother, the father. Actually *five winners*: the two State communities would have been better off.

Number 4, we will remove a powerful incentive to intra-European child abduction. Most of the cases involved child abduction, by *mothers* most of time. It is the *first unilateral* move that caused the relationship to gradually move to an *inferno.* Mothers like Marion Weilharter or Doris Povse or Inge Rinau will be less tempted to remove unilaterally their child if they feel they can rely on a neutral body to hear their application to *relocate to Austria or Lithuania*. Intra-European abductions will be reduced. *Even if it is by 10%, this is thousands of European kids and European parents and extended families we will have spared the trauma of abductions.*

Number 5, whatever the parent who's awarded custody, and whether they allow for relocation or not in each particular case, those European panels will be able to organise *cross-border* visitation rights and make sure those rights are implemented. A child who is Austrian *and* Danish, and whose mother lives in Austria and whose father lives in Denmark, a child who is German *and* Spanish, and whose mother lives in Germany and whose father lives in Spain, a child who's Italian *and* Greek, and whose mother lives in Greece and whose father lives in Italy, will be allowed to spend time with each of his or her *parents* and with each part of his or her *extended family* – grandparents, cousins, uncles, aunts, etc. – and on the territory of each of his or her *homelands*. Is the Danish father awarded custody over Oliver? At least Oliver will be allowed to spend a significant part of his holiday in Austria, his *motherland*, with his Austrian mother, with his Austrian grandparents and with the Austrian part of his family. Is the Austrian mother awarded custody over Oliver? At least Oliver will be allowed to spend a significant portion of his holiday in Denmark, his *fatherland*, with his Danish father and the Danish part of his family. We will have avoided the situation – which is at odds with a lot of principles which lie at the core of the European Union – where a child, who's national of two Member States, and who's caught in the middle of a clash between those two Member States, between *motherland* and *fatherland*, is held *hostage* by one of those Member States and prevented *for long years* to set foot on the territory of the other and visit there his or her parent and the part of his or her family living there. This inevitably causes him or her to *become estranged* from a component of his or her family and to lose contact with a fundamental part of his or her *European cultural and linguistical and biological identity and heritage.*

Number 6, some of the European taxpayers money that today is financing 10, 15 and up to 35 proceedings in two countries – with judgments that cancel each other out – will be saved. And it can be invested to finance scholarships for those

kids and, for example, when they reach sufficient maturity, to encourage them to spend an exchange school year in one of their homelands, the one where the non-custodian parent lives. And also think about how much *private money* will be saved. We interviewed Doris Povse. She disbursed over 100.000 Euros in courts and attorney's fees. The same is likely to be true for the father, Mauro Alpago. This is money they were not be able to invest in Sofia's education. Emilio Vincioni has been since 2016 spending *"a significant part of his salary in legal fees"*.[32] As a consequence, he was permitted to reduce the amount of money he can afford paying to financially support his daughter.

Science fiction? Well, the fact is *European Courts* with a *multi-national composition* will soon be in operation. This is in the area of *patents*: Unified Patent Court. Let me quote a passage from its official website: *"Litigation in multiple countries is expensive and there is a risk of diverging decisions... Forum shopping is often inevitable, as parties seek to take advantage of differences between national courts and their procedures. The UPC Agreement addresses these shortcomings by creating a specialized… court"*.[33]

Now "*these shortcomings*" seem to be *exactly the ones* which affect cross-border child custody litigation. And so, why should we think European Family Courts specialising in custody issues are something unrealistic? Why?

B. Inter-Country Tribunals (Including Arbitration Tribunals)

Remember Case-study 2: Switzerland and Tunisia have blatantly disregarded the children's most basic rights under the *1989 United Nations Convention on Children's Rights* to which they are both parties. Also, remember what Mrs Weilharter did in Case-study 1: she instinctively turned to the *United Nations.*

The United Nations also adopted a Convention that has to-date been by far the most widely ratified in the area of cross-border relationships between private persons (including corporate persons): the 1958 U.N. Convention on *international arbitration*.[34] 160 plus countries are parties to it. Almost all Islamic countries and a vast majority of Asian countries are signatory.

Why shouldn't the United Nations be willing to endorse a *similar* instrument for cross-border child custody? This can be done through an additional protocol to the 1989 U.N. Convention on Children's Rights.[35] When the mother is Swiss and wants to live with the children in Switzerland, the father is Tunisian and wants to live with the children in Tunisia, they would be able to rely on a *Swiss-Tunisian, mixed, intercountry, binational, bi-religious* tribunal or committee or

[32] See *supra*, note 23.

[33] https://www.epo.org/applying/european/unitary/upc.html.

[34] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

[35] The UNCRC is already supplemented with three Optional Protocols: an Optional Protocol on the sale of children, child prostitution and child pornography, an Optional Protocol on the involvement of children in armed conflict, an Optional Protocol on a communications procedure.

commission, whatever the name, that represents both sides, both identities, both languages, both religions. The parents are likely to trust it more than the Swiss mother trusts a Tunisian court, than the Tunisian father trusts a Swiss court.

Thanks to the 1958 United Nations instrument on arbitral awards, a Swiss corporation and a Tunisian corporation, when they enter into some business with each other, are entitled to rely on *Swiss-Tunisian* (arbitral) tribunal to settle any potential dispute arising between them.

Why such a right should be denied to a Swiss-Tunisian family?

Why should we show less concern for the well-being of Swiss and Tunisian families than for the well-being of Swiss and Tunisian commercial companies?

C. Advantages Traditionally Ascribed to International Arbitration

We ought to recognize that some of the *celebrated advantages* flowing from international *arbitration* over *litigation* before *mono-national* State courts are particularly welcome in the area of cross-border parental responsibility. Here is a list of them.

"*The principal advantage of international arbitration* [as perceived by the human beings which resolve to resort to it] *is its neutrality*",[36] as is often contended. Why on earth should this guarantee of neutrality be denied to children and parents involved in situations where the perceived risk of lack of sufficient neutrality on the part of the single-State authorities could be even *more pronounced* than, typically, in *commercial* disputes?

International arbitration – it is generally submitted – is *less confrontational*. And the reason is because the two parties have to *cooperate* to choose the adjudicators, rather than each of them being encouraged to unilaterally "forum shop" to secure the most favorable forum for itself. All other things being equal, isn't a system that *reduces* the risk of escalation of a conflict between parents *more consistent with the child interests* than a system that *encourages* such an escalation?

International arbitration – it is also submitted – avoids the costs and hassle and undesirable consequences of *parallel proceedings* and the risk of *conflict of jurisdictions and conflict of judgments*. As the examples offered make clear, such a risk is particularly high when two parents living in different countries fight over custody. And the consequence of an international conflict of custody orders are often *tragic* for children and parents alike.

International arbitration is associated with *less public exposure* and a greater protection of *confidentiality and privacy* of the parties. Isn't this what is *sorely needed* when one of the parties is a *minor*? A greater *informality* when it comes to

[36] Gabrielle KAUFMANN-KOHLER/ Antonio RIGOZZI, *International Arbitration – Law and Practice in Switzerland*, Oxford University Press, 2016, p. 13; also see Emmanuel GAILLARD, "L'apport de la pensée française à l'arbitrage international", *Journal de droit international*, 2016 p. 530: "*The advantage of arbitration is not, as was once written..., that it is quick, inexpensive and maintains solid relations between the parties... The advantage of arbitration is elsewhere. It is in the neutrality, both geographical and national, of arbitrators (neither wanting to litigate in the other forum), the participation of the parties in the appointment of the arbitrators...*" (translation is mine).

organizing the procedure may also be a good thing for children and parents. In a similar vein, to the extent that international arbitration is viewed as being less concerned with *state sovereignty* and more focused on solving actual, mostly "*private*" issues, wouldn't it be adjusted to the true children and parents' needs?

International arbitration is often reported to be generally *quicker* than state litigation. Here again, isn't *time of the essence* when it comes to children? Children ought to know where they have to live – in Switzerland with Mom? in Tunisia with Dad? – and to go to school. If they are cut off from one of their parents for just *two* or *three* years, they are at risk of becoming estranged from that parent and that part of their family. Children grow fast and, after some years, they are no longer (minor) children. In many of the cases I reported, the question of which parent was custodian has been legally *unsettled* for as many as 7, 10, 13 years due to the fight between the tribunals, which prolonged the fight between the parents rather than putting an end to it.

International arbitration – according to statistics – fosters *goodwill* and stimulates *voluntary compliance*. Most of the arbitral awards are *spontaneously* honored. The greater the *legitimacy* of the adjudicative body in the eyes of the human beings who are supposed to comply with its decision, the greater the chance of a *voluntary compliance*. *Voluntary compliance* is particularly important and the *risk of non-compliance* is particularly high when it comes to cross-border custody issues. We have seen it: *a parent* who is national of and resident in Country A all too often tends not to comply with a Country B's court order that he or she perceives as *unfair* to him or her. We have seen it: the *judicial authorities* of Country A all too often fail to cooperate with Country B's court order because they too feel the court order is biased to the detriment of their community and of the parent who is part of their community. Even when judges of Country A feel they are under an international obligation to implement Country B's court order, the *enforcement authorities* of Country A all too often find all sorts of "*escape devices*" not to implement it.[37] This paves the way for an arm-wrestling contest between the two countries with devastating consequences for children and parents.

International arbitration – it is believed – does a better job at *preserving the relationships between the parties once the dispute is settled.* Once again, isn't this *absolutely critical* when it comes to parents who, even if they split, continue to carry joint parental responsibility over their common child and should continue to cooperate to implement each other's visitation rights and custody rights? A system

[37] In the context of Brussels IIa Regulation, a whole bunch of cases were brought before the European Court of Human Rights or before the European Commission because of non-compliance by the *judicial* or, more often, by the *enforcement* authorities of Country B of their euro-international obligation under Art. 11(8) to recognize and enforce custody orders of Country A. In cases like *Rinau, Povse, Aguirre Zarraga* and others, the competent *judicial* authorities of Country B ended up, often after years of legal battle and rather *grudgingly*, ordering the return of the child to Country A. But the *enforcement* authorities of Country B stepped in to make sure the return order was not implemented ("*We cannot, under our laws – and it is our laws and our practices which should govern actual enforcement – use coercion against children". "This is against our enforcement laws as we actually practice them". "At present, the child opposes enforcement: change in circumstances, which supersedes the return order"*).

that promises to more frequently encourage a *collaborative* post-separation relationship between parents is, all things being equal, emphatically more consistent with the *child best interests* and the *parents' best interests* than a system that encourages ongoing fights between the parents.

International (arbitral) decisions tend to inspire *greater trust* and, therefore, tend to be viewed as endowed with an intrinsically greater propensity to *international circulation* than mono-national court decisions. The fact that more than 160 countries of *all Continents* have accepted to mutually recognize and enforce *international* arbitral decisions and that no instrument requiring mutual recognition of their *mono-national* court decisions has ever achieved a comparable success seems to be a testament to this. A lot of Arab countries – like Egypt or Algeria or Saudi Arabia – and Asian countries – take China, India or Japan… – have difficulties recognizing *mono-national* custody orders coming from, typically, *Western* countries, like France, Switzerland, Germany or the United States. As suggested by their adherence to the United Nations Convention on Arbitral Awards, Egypt, Saudi Arabia, China, India and Japan are likely to have less trouble recognizing an *international* decision emanating from a *bi-national* adjudicative panel that incorporates an Egyptian, Saudi Arabian, Chinese, Indian or Japanese component, where their community and the private party belonging to their community – the Egyptian, Saudi Arabian, Chinese, Indian or Japanese parent – are represented on a par with the other private party – the "*Western*" French, Swiss, the German or U.S. parent – and the other community involved – France, Switzerland, Germany or the United States. Only a few countries outside the European continent have ratified the 1996 Hague Children Protection Convention. Why should India be willing to be bound to honor a U.S. decision that prohibits an Indian mother to relocate with her Indian-American daughter to India – and threatens to, or does in fact, award custody to the father, a U.S. national and resident? A decision that the Indian mother and the Indian community may perceive as tainted with *judicial bias*, as stemming from the desire of the U.S. authorities to protect the U.S. parent and from an inherent conviction on the part of the U.S. authorities of the *superiority* of the U.S. legal system and the U.S. way of life, if not from a *quasi-neocolonialist or imperialist mindset*? A lot of countries, including India, still haven't ratified the 1980 Hague Abduction Convention. And too many of those who have – typically, among the Arab and Asian countries mentioned: *Japan* – do not fully comply with its fundamental scheme. If the Indian mother manages to move back to India with her daughter, India wants to be free from any *international obligation* that may under mine their liberty to allow the Indian mother and her daughter to escape a U.S. system they may perceive as too one-sided and to remain in India.[38] It is also, for a country, a question of *national pride*, of not being seen, as a sovereign country, to be subjugating to the dictates of another country. A mono-national court *order* is often associated with *sovereignty* because a mono-national court of a country is *an organ* of that country and delivers justice *on behalf of* that country

[38] Shalini NAIR, "India Will Not Ink Hague Treaty on Civil Aspects of Child Abduction", *Indian Express*, Nov. 27, 2016); Anil MALHOTRA and Ranjit MALHOTRA, "To Return or Not to Return: Hague Convention v Non-Convention Countries" (2017) 2017 *Int'l Surv Fam L* 129.

and of the "*people*" of that country, as often indicated in the *epigraph* of those orders.

Wouldn't a U.N. instrument on international arbitration courts – adjusted to the *specifics* of cross-border child custody issues – have greater chances of looking *attractive* to some of the countries in the eyes of which the 1996 Hague Children Protection Convention and the 1980 Hague Abduction Convention have so far not been *sufficiently attractive*? And wouldn't such an instrument assist the signatories of the 1980 Hague Abduction Convention in more effectively pursuing the Convention's primary purpose, *i.e.* the purpose they aspired to achieve in ratifying it, which is to *combat* international abductions by *preventing* them, for it would stand to remove the most powerful incentive for a parent to abduct his or her child from Country A to Country B, which is the combination of both the *fear* of having to face *hostile* mono-national authorities of Country A and the *hope* of securing the benevolence of *allied* mono-national authorities of Country A? This a crucial point: If we can ensure that the transfer of the child unilaterally effected by one parent from the territory of Country A to the territory of Country B *remains without influence on the composition of the court competent to hear custody issues* – for, whether the transfer takes place or not, an international (arbitration) court in which both parents and both communities are likely to feel equally represented will rule on custody and access –, then both the *fear* of dealing with *hostile* authorities and the *hope* of dealing with *allied* authorities should greatly diminish and, with them, the incentive that the combination of both this *fear* and this *hope* provide to a parent to engage in cross-border abduction. And wouldn't the fact that international arbitration is perceived as having less to do with *State sovereignty and national pride* – international arbitrators are *not organs* of any of the State communities involved – and more with delivering *a fair and quick solution* to the actual and mostly "*private*" family problems children and parents are confronted with encourage widespread adherence to such an instrument?