Conflicts between parents and between legal orders in respect of parental responsibility

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CONFLICTS BETWEEN PARENTS AND BETWEEN LEGAL ORDERS IN RESPECT OF PARENTAL RESPONSIBILITY

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I. Introduction

1. First, let me thank professors GUY-ECABERT and VOLCKRICK for inviting me to take part in today’s meeting.¹ The few lines through which they sketched the scope and intent of their proposed symposium immediately aroused my interest. The conflict both between “parents” and between “legal orders” was raised, with interna-

¹ Full Professor at the University of Geneva. This paper is an almost word-for-word translation of a paper titled Conflits entre parents et entre ordres juridiques en matière de responsabilité parentale which is included in Ch. GUY-ECABERT/ E. VOLCKRICK (eds), Enlèvement parental international d’enfants – Saisir le juge ou s’engager dans la médiation?, Basle (etc.), 2015, p. 85 s. I wish to express my gratitude to Rachel HARRISON for her help in translating the text.

¹ I also want to thank Clément BACHMANN, Didier BODEN, Joann CALOZ, Valérie FLUCKGER, Johannes FOLGER, Virginie JAQUIÉRY, Elena NEIDHART, Valentin RÉTORNAZ, Michel REYMOND for their valuable suggestions and Maître Anne REISER for the inspiring exchanges about two cases on which I had the privilege to work with her. Although the text, which is the outgrowth of a presentation made in Neuchâtel on 31 January 2013, has been considerably modified since, it largely preserves its original, spoken style. The paucity of the cited bibliography is explained, although by no means justified, by both the particular occasion from which the paper stems and the rather unusual standpoint it adopts, offering a chain of ideas that combine current and prospective law in highly perfectible coherence.
national mediation being tentatively proposed as a tool to overcome this two-fold conflict. Now, it seems to me that such a dual perspective is the right way to visualise and isolate the problems triggered by the “cross-border” activity and intercourse of human beings.

Here lies all the fascinating ambiguity of private international law; it is private in that the relationships that this area of law essentially targets arise between individuals (this term being here used as covering both physical and legal, or “moral”, persons); it is international in that these relationships, and the individuals involved in them, simultaneously fit within, and are part of, several national communities. State “sovereignty” means that each State is equipped with legislative, judicial and executive branches, and possesses an inherent “aptness” (“vocation” in French) to shape according to its own, independent view the human relationships that affect the society for which it is responsible. However, if each of the national communities that are “co-affected” by a “binational” (“tri-national” or, as the case may be, “tetra-national”, etc.) private relationship insists in its own judiciary adjudicating upon it in conformity with its own view of justice, this relationship, and the individuals involved, run the risk of not being ruled by the Law – of not benefiting from the Rule of Law – but of being struck instead by a “legal disorder” that is tantamount to a legal no man’s land. In other words, the two state communities, each being independent of the other when it comes to wholly domestic human relationships, are, in respect of human relationships affecting them both, whether they like it or not, interdependent, i.e. mutually dependent on each other. And so, they are party to an interstate relationship. A “bi-state” or “co-state” as I would like to say, area of sovereignty – an area of joint, “binational” sovereignty – must be pursued by both communities, at least to the extent that both communities are committed to those binational human relationships benefiting from the Rule of Law and, consequently, from a truly legal order. For this reason, it is in the “joint” interests of the two communities to coordinate their efforts in order to bilaterally forge a sort of “bi-state” legal order and make sure the cross-border private relationships at stake take advantage from such a legal order rather than being mired and languishing in a legal mess.

2. Since the key terms that are commonly used in children law and their meaning vary a bit among the different legislations, I will offer definitions that flow in part from a comparative analysis and in part from international instruments, particularly the Hague Convention 1996. “Custody” refers to the individual, substantive right, which also often constitutes a legal obligation (Pflichtrecht), to

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2 Or “penta-national”, or “hexa-national”, etc., depending on the number of States that the relationship in question presents links with.

3 Or “tri-state”, etc. Such variants will no longer be mentioned in the remainder of the text, but they continue to be implied.

4 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, concluded at The Hague on 19 October 1996 and entered into force in Switzerland on 1 July 2009 (RS 0.211.231.011).
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take daily care of the child and to live with him or her; it is an obligation especially towards the child and a right especially towards the “non-custodial” parent but also towards every public authority that should in principle defer to what is sometimes referred to as parental autonomy; “parental authority” means the power, which also often constitutes, for similar reasons, both a right and an obligation, to make (if it’s sole) or to contribute to making (if it’s joint) important decisions concerning the child, such as his or her residence, education, extracurricular activities, religion and medical treatments; the “right of contact”, including visitation rights, is the right to maintain a personal relationship with the child and to take him or her, while exercising such a right, to a place other than the place of custody; “parental responsibility” means the whole of these prerogatives and any one of them; “state responsibility” designates the duty, and the right that comes with it, of public authorities to take action, mainly on a subsidiary basis, to protect the child when parental authority is exercised by a parent or parents so irresponsibly that the welfare of the child is put at risk.

First, I suggest we look at the source and the essence of the “conflicts between legal orders”; often used as a synonym, the expression “conflict between legal systems” figures in the preamble to the Hague Convention 1996 which gives itself the aim to “avoid” the conflicts of this sort (I). I will then move on to review the legal provisions and mechanisms that are used in current law and those which could be used in future law in order to prevent or resolve such conflicts (II).

5 The expression “physical custody” may suggest that it relates to something other than a substantive right, i.e. a prerogative that is protected by law and may be enforced, if needed, by public authorities: see infra, no 4.

6 Since right and obligation exist here together, the former can be exercised in a way that prevents the fulfilment of the second, in particular when the custody rightholder puts the welfare of the child at risk. This is why parental autonomy vis-à-vis public authorities has limits which, once exceeded, trigger the intervention, which is no longer an undue interference, of state authorities that have a subsidiary responsibility to ensure the welfare of the child. The scope of parental autonomy remains nonetheless considerable and it is due to the large number of alternatives that are all a priori consistent with the welfare of the child that the conflicts discussed in this paper arise.

7 On this point, I am inspired by recent Swiss law under which determining the residence of the child constitutes an ingredient of parental authority (art. 301 a CC), whereas under the Hague Convention 1996 (art. 3 lit. b), this is rather an element of custody.

8 I will use the terms “welfare” and “well-being” as synonyms. As for the relationship between, on the one hand, the welfare or well-being of the child, and the “interests of the child”, on the other, it might be argued that the child’s interests require that the welfare and well-being of the child is satisfied to the fullest extent, the child’s interests constituting, as Thomists would say, an “intermediate end” and the welfare and well-being the “ultimate end”. Since it crops up more often in State legislation, the term “interests of the child” will occur more often in this article.

9 “The States signatory to the present Convention, considering the need to improve the protection of children in international situations, wishing to avoid conflicts between their legal systems […]”.
II. From Conflict between Parents to Conflict between Legal Orders

3. The case study I would like to offer as a starting point is inspired by two cases brought before the European Court of Justice.¹⁰ The facts are pretty conventional. The protagonists have no bonds with Switzerland. Such a geographical and emotional distance should allow us to observe things from a neutral, “bird’s eye” super partes perspective.

A German woman and a Spanish man get married and have a baby daughter who holds dual citizenship, Spanish and German. The family lives for a while in Germany and then moves to Spain. Marital discord arises and deepens and subsequently leads to a breakdown in their relationship. Taking the split as irretrievable, the spouses separate and agree to file for divorce. However, the bitterest disagreement divides them over the custody of their daughter. Both parents are prepared to do anything in their power to secure sole custody. Having little personal contact with Spain, the mother wishes to return to Germany with the girl. The father insists that she grows up with him in Spain.

It is first fitting to show how an interparental conflict can trigger an interstate conflict as well as to identify the links between the two types of conflict (A). Since the litigation between the parents is largely the result of their legitimately differing views on what the interests of their common child require, it is also useful to isolate the formal, universal component of the child interests concept (B).

A. The Origins of Interparental Conflict and Interstate Conflict and the Links between the Two Conflicts

4. To put it in simple terms, a “conflict” arises when two individuals¹¹ make and advance two incompatible claims, when they intend to exercise their “power of will” and their control over the same area of freedom. This is ultimately the core of a widespread definition of individual, substantive right (droit subjectif).¹² Two claims are incompatible when it is impossible in the real world – in the world of Sein, which is the one where the Law develops and the one that Law is intended to

¹⁰ On the one hand, the Purrucker v Vallés Perez case, that gave rise to the decisions of 15 July 2010 (C-296/10) and of 9 November 2010 (C-256/09), and, on the other, the Zarraga v Pelz case decided by judgment of 22 December 2010 (C-492/10 PPU). I will take the liberty of making some adjustments for pedagogical reasons so that my case study is not completely identical to either. If I specifically have married parents in mind – J.A. Aguirre Zarraga and S. Pelz were in fact married – most of the developments in this paper should also hold true for non-married parents – as were B. Purrucker and G. Vallés Perez – and also for parents that never lived together as a couple.

¹¹ Or several individuals.

¹² For several definitions of “droit subjectif”, see J. DABIN, Le droit subjectif, Paris 1952, p. 55-105.

¹³ Particularly as opposed to “ideal” or “oneiric” reality, or even “virtual” and “spiritual” realities.
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guide and influence – to satisfy them both and to fulfil the competing human desires and aspirations that they imply.

Now, the prerogatives that the parents claim here – each of which exists in the ideal (as opposed to real) unilateral, subjective representation of what ought to be according to each parent (Sollen) – cannot both exist as substantive rights. Because – and here is at least one thing we can be certain of and that would be wrong to neglect because it is the ultimate source of the conflicts that can arise in this domain – the child cannot become ubiquitous and live simultaneously at the domiciles of both the mother and the father. In our case, we are therefore confronted with an interindividual, and specifically interparental, conflict. How can it be resolved?

One option is to leave it to what is sometimes called self-justice (Selbstjustiz, justice privée) and allow each individual to do justice him or herself. And consequently, the most robust, cunning, enduring, the swiftest, the one who shouts louder, will prevail. This is the law of the jungle and takes us back to a state of nature. Or, civilised as we are, we may call upon justice, which we might characterise as public and which in fact administers the Law. It is generally recognized that justice requires the intervention of an impartial, super partes, third party authority, an authority which is not involved in a “conflict of interests”14, and whose task is to prevent (if it is “legislative”) or to settle (if it is “judicial”) the clash between inconsistent claims, more precisely the conflicts between the persons who advance those inconsistent claims, and, therefore, the conflicts of private interests that such claims seek to satisfy. Of course, for the Law to be in place, the (judicial or legislative) decision taken by such an authority must be enforceable, if necessary, through coercion:15 that is through the legitimate use of public force as opposed to private force which is the one that individuals exercise against each other. How will such an authority decide? Let’s say that it usually has to lean towards the claim that “holds the most weight”, the overriding private interest. Is Justice not a blindfolded goddess who holds scales in her hands and “weighs up” the opposing claims of those who call upon her to assess where the centre of gravity – the Schwerpunkt – of the balance is located? Added to which, if such an authority is composed of several members and is therefore “collegial”, as is almost always the case if the authority is legislative and often if it is judicial, its decision, whatever it says, as a rule, is made according to the majority principle. It is therefore the “weight” or “force of numbers” that determines where the centre of gravity of the tipping scale will lean.

5. However, in our case, things are more complex because the parental dispute is international, or more precisely binational, in that the protagonists have connections with Spain and Germany, and, therefore, are members of both German and Spanish communities. In this respect, it is possible to talk about “co-interested”

14 Notably between the public interest to prevent or resolve the litigation and a private interest in the dispute being prevented or resolved in a certain way.

15 This is what the European Court of Human Rights never stops reminding: see, among others, in children-related matters, Matrakas and others v Poland and Greece, 7 November 2013, point 144, which I will discuss later (infra, note 106).
state communities. The least that we can say is that a State is always “interested” to ensure the final, conclusive resolution of an interindividual dispute that affects the society for which it is responsible because it has an obligation to conclusively settle those disputes. And one has obviously always an interest in fulfilling one’s obligations. If the dispute remains legally unresolved, the individuals involved in it might be encouraged to take up their own arms and will therefore be slipping into anarchy. Making sure that disputes between members of the community are prevented, or at least resolved, and that the demands of living side by side such as order, peace and security are satisfied, is one of the least controversial tasks of each independent and sovereign State. In short, it is because they are “jointly affected” by this interindividual, interparental conflict, that Germany and Spain are “jointly interested” in the resolution of such conflict. In this respect, they share a common state interest. In fact, both States are invested with responsibility – which is then a “joint state responsibility” – regarding the fate of a child who has strong connections with Spanish and German societies (and who has in fact both nationalities). The Spanish and German public authorities have the duty to take action when the welfare of such a child is threatened. Since the child needs to live in harmony with his or her environment, the child welfare is undoubtedly at risk when he or she is the subject of a dispute between his or her parents, this parental conflict being the very opposite of the desirable harmony.

However, as I said at the beginning, the great challenge here is that each of both countries, Spain and Germany, possesses an inherent aptness, and is fully equipped, to prevent parental conflict through its own legal rules and to settle it through its own judges. There lies the twofold problem commonly referred to in private international law parlance as conflict of laws and conflict of jurisdictions. As for the conflict of laws as is traditionally understood, we might think it is of little relevance here because the Spanish Código Civil and the German BGB are almost identical as they agree to rely on the analysis of the interests of the child, sometimes characterized as best or overriding. As a matter of fact, both Spanish and German laws leave the matter to the courts by awarding them all the discretion they need to determine which of the parents claiming primary responsibility for the child and which social and cultural context the child has developed the most significant in concreto bonds with, and consequently has the greatest physical, affective and emotional, but also cultural and linguistic, “proximity” to.

6. Let’s pause for a while to reflect on the concept of the “child interests”. And recall the unscrupulous words of Carbonnier, who realised some fifty years ago to which extent the child interests had been proclaimed as a “magic notion”:

16 Supra, no 1.
17 Supra, no 1.
18 Particularly since the Convention on the Rights of the Child, adopted in New York on 20 November 1989; article 3, paragraph 1 states that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”.
19 On the relationship between the interests of the child and the welfare of the child, see supra (note 8).
“It might well be in the law; but what isn’t, is today’s abuse of it [...]. And yet, there is nothing more evasive, nothing more likely to favour judicial arbitrariness”. As a matter of fact, a parental conflict most of the time reflects a conflict between the subjective, unilateral views maintained by the parents on what best serves the interests of their common child, a conflict between two “parenting plans” about the child’s future and about what would better assist his or her development and self-accomplishment. Thus, in our scenario, the father thinks that the girl’s interests are better satisfied if custody is awarded to him and if the girl continues to live within him in Spain. Whereas the mother considers that the girl’s well-being is more effectively ensured if custody is awarded to her and if the girl is allowed to move to Germany with her. Let’s further clarify that our litigants may be – and I will presume that this is so – both of good faith and both reasonably capable of taking day-to-day care of the child and making wise decisions as they are sufficiently “responsible” parents.

7. Let’s imagine – and this is what actually happened in the present case – that the Spanish court is seized by the father and the German court is seized by the mother, and that both courts affirm and entertain jurisdiction. Let’s further imagine that the Spanish court awards sole custody to the father while the German court awards sole custody to the mother. Here are the reasons offered by the Spanish court (fundamentos de derecho): the young girl’s Spanish roots go deeper than her German roots; she is now attending school in Spain and the “proximity principle” requires that she is not taken away from the environment with which she feels presently integrated. Here are the “counter arguments” (Gründe) articulated by the German court: the ties that the child has developed with the mother are more significant; the child lived in Germany for several years before moving to Spain and all the evidence suggests that she would quickly reintegrate there; the German period was the happiest of her short life; she speaks better German than Spanish. Both of the “co-affected” countries that are “jointly responsible” for the welfare of their common child believe that it is justified for them to decide which parent deserves to be awarded custody rights and decide that, in the present case, the child interests are better satisfied if these rights are conferred to the parent who is their national
and resides or plans to reside on their territory; and this isn’t because of the nationality or the actual or intended residence of that parent, but because of the connection that has arisen between the child and that parent, and more generally, between the child and that national community. Let’s further specify that, although they disagree as to the identity of the parent who should be awarded custody, the Spanish and German judges nevertheless agree that the non-custodial parent should benefit from fairly wide-ranging visitation rights and be able to exercise them in his or her country of residence. That’s at least one important area of common ground: having developed real bonds with both her mother and father, and more generally, with both State communities, the child should be able to maintain regular contact with both parents, to cultivate her dual origin which, beyond being a constant source of enrichment, has shaped so far her identity.

We are then confronted with a Spanish-German conflict of decisions reflecting not a potential but an actual, conflict of jurisdictions, a disagreement between judges about the best way to resolve the parental conflict, about what better serves the interests of this Hispano-German child. The national courts are organs of the State community that they derive their power from. The text of the German decision bears the epigraph: *im Namen des deutschen Volkes*; the Spanish decision proudly indicates that it is pronounced “on behalf of the King of Spain”, who is in turn an organ of the Kingdom of Spain. Let me repeat: a conflict exists when (at least) two persons advance incompatible claims, when they claim control over the same area of freedom. Here it is two States, that are both moral persons and subjects of international law, and whose judiciaries are mobilised by two natural persons, that both claim the right to determine, based on their own views, by which parent and within which national community the child must primarily be raised and which parent will be empowered to make decisions concerning her welfare. The Kingdom of Spain declared through the Spanish court: “the Spanish father shall take primary responsibility for this Hispano-German child and shall be able to decide on the day-to-day planning of her life, and notably, her place of residence”, and therefore, “I hereby direct that the child stays in Spain as the father wishes” and the “German mother shall benefit from contact rights which she can, in principle, exercise in Germany”. The Federal Republic of Germany, through a court that decides on its behalf, in turn stated: “the mother shall take primary responsibility for this Hispano-German child and shall have the right and duty to decide on the day-to-day planning of her life, and notably, her place of residence” and “I hereby direct that the child is brought up and educated in Germany, as the mother wishes, and that she is returned to the mother”, while the “father shall benefit from visitation rights that, in principle, can be exercised in Spain”.23 It seems that there is indeed a conflict of state claims – and therefore, in this sense, an

23 To paraphrase, the Spanish judge declared: “It’s me who allocates the rights and obligations relating to parental responsibility for this Spanish-German child and I award custody to the father”. And the German judge “counter-declared”: “It’s me who allocates the rights and obligations relating to parental responsibility for this Spanish-German child and I award custody to the mother”.

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Interstate conflict – on how best to resolve the conflict between individual claims advanced by the parents.24

Let’s note that both types of conflicts have similar roots, which ultimately turn on diverging views of what counts as fair terms of “proximity” or strongest connection. Just as each parent believes that the physical, emotional and affective bond that he or she has forged with the child is deeper than that developed with the other parent, each State community takes the view that the physical, emotional, affective, linguistic, cultural and social bond that “connects” the child to that State community, and to the parent who is part of it, is preponderant compared to the link that connects the child to the other State community, and to the other parent, and that it is within that State community where the Schwerpunkt or centre of gravity of the child’s affective, social and cultural sphere and the “seat” of his or her life and relationships are located. By virtue of this bond, each parent claims authority over the child – parental authority – and, as a consequence, the “competence” to make decisions that he or she believes are required by the child’s well-being. Each country also claims, by virtue of this same connection, authority over the same child – state authority – or, in other words, the “competence” to decide which of the two parents should be given the “competence” to determine what best corresponds to the child’s well-being. Each parent develops and advances his or her own “solution” as to the post-marital future of the child, and the solutions the parents come up with are incompatible with one another, there is a “disharmony of parental solutions”, there is a conflict of parental solutions, and this conflict should be resolved. Each country also develops and advances its own solution which is incompatible with the one advanced by the other country and so we are faced with, and the people involved are faced with, a “disharmony of state solutions”, which is the very opposite of the desired “harmony of solutions” but rather constitutes a conflict of state solutions about how to resolve the conflict of parental solutions.

8. This last remark leads me to clarify two points about the relationship that exists between the interparental conflict, on the one hand, and the interstate conflict, on the other.

24 For a case where the interstate dimension of the conflict is at the forefront, see ECtHR, Šneersone and Kampanella v Italy, 12 July 2011 (14737/09). The dispute was between Ms Šneersone, a Latvian national, and Mr Campanella, an Italian national. Marko Kampanella was born out of this relationship. Marko initially lived in Italy and, several years after his parents separated, was taken to Latvia by his mother. The father’s application for return of the child to Italy based on The Hague Convention 1980 was refused by the Latvian court, who subsequently confirmed its jurisdiction to decide on parental responsibility and concluded that it was in the best interests of Marko that sole custody be awarded to the mother (point 24 of the judgment) and that he live with her in Latvia. After affirming jurisdiction based on the last lawful habitual residence of the child, the Italian court held that it was in the best interests of Marko to live with his father and it ordered his return to Italy, pursuant to article 11, paragraph 8 of the Brussels II-bis Regulation. To resolve this conflict which had become interstate, the Republic of Latvia started proceeding against the Republic of Italy for breach of article 227 of the Treaty of the European Union (TEU) as well as article 259 of the Treaty on the functioning of the European Union (TFEU) by bringing the matter before the Commission (points 39-45 of the decision): see infra no 21.
The first point is that the disagreement between the two countries exists only to the extent that the disagreement between the two parents exists, and only for so long as such a parental disagreement lasts. Logically, and in fact tautologically, there cannot be a conflict between the two countries on how best to resolve a conflict between the two parents if there is no – or no longer – a conflict between the two parents. As soon as the parents agree on a shared view of the child’s best interests, as soon as they agree to establish and abide by a “joint parenting plan” – and, for example, they settle on giving either the mother or the father custody while recognising extensive visitation rights to the non-custodial parent – the two national communities and their authorities are undoubtedly reassured that the breakdown of the marital harmony has not led to a breakdown of the parental harmony and would both in principle be willing to abstain from interfering with, let alone disrupting, this continuing parental harmony. In other words, they would hardly be prepared to develop and impose a judicial regime of custody that contradicts the parental agreement in order to resolve a non-existent parental conflict. One might even claim that the respect for “parental autonomy” as I have defined it generally requires such an abstention, the state responsibility for the child only being triggered subsidiarily. In our example, the German authorities, in principle, are no more interested in awarding custody to the mother if she is willing to allow her daughter to live in Spain with her father, than the Spanish authorities have an interest in directing that the child remain in Spain with the father if the father is prepared to allow the girl to move to Germany and live there with her mother.

The second point is a ramification of the first. Generally, there would be no interstate conflict if, notwithstanding their dispute, the parents both consented to the authority of one of the “jointly affected” States and accepted to comply with the decision made by the court of this State without disputing it, i.e. if the parent who is unhappy with the outcome arrived at by the court seized is nonetheless willing to abide by it and does not attempt to challenge it before the court in the other State involved. The interstate conflict of the sort discussed in this paper does not arise unless the interindividual conflict leads both parents to effectively mobilise the courts in both state communities, with the mother typically seeking protection from the courts of one of them and the father seeking protection from the courts of the other. A conflict of jurisdictions does not arise when the two judges are not both seised by the individuals who have the power to do so. Just as a judge will not take action to resolve a parental conflict if there is no such parental conflict, a second judge will not take action to resolve a parental conflict if the parental autonomy that parents enjoy before their separation. For example, separated parents cannot any more than parents living together decide not to send the child to school. It is true that legislation in some countries prescribes that the divorce judge must uphold the parenting agreement and may require alterations. But the alterations required by the judge are likely to have little effect for so long as the parents agree to de facto implement the accord that they had reached before the judge modified it. Of course, if this implementation leads to putting the child at risk, child protection authorities will take action but they also have to do it to protect a child whose parents live in harmony with each other. Cf. supra (note 6).

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25 “Parental autonomy” after the separation of the parents – the freedom of the parents to continue to organise the child’s life without interference from public authorities – has more or less the same limits as the “parental autonomy” that parents enjoy before their separation. For example, separated parents cannot any more than parents living together decide not to send the child to school. It is true that legislation in some countries prescribes that the divorce judge must uphold the parenting agreement and may require alterations. But the alterations required by the judge are likely to have little effect for so long as the parents agree to de facto implement the accord that they had reached before the judge modified it. Of course, if this implementation leads to putting the child at risk, child protection authorities will take action but they also have to do it to protect a child whose parents live in harmony with each other. Cf. supra (note 6).
conflict ceases to exist as a result of the decision that was made by the first judge and that was not questioned by any of the parents.

9. One might however be tempted to believe that, since each State only holds the power to enforce its decision within its “sovereign” territory, there is no such thing as an actual *interstate conflict*, there being a clearly marked dividing line between the Spanish and German boundaries which is undisputed between these two countries?

To confine my response to the essential, let me note in the first place that if the two judicial decisions could exist and be enforced independently of each other within the countries that made them, there would be no question of *conflict of judicial decisions*, but rather of *decisional harmony*, of *harmony of decisions*, and of the *harmony of the solutions* that they embrace. There is good reason to believe that the term “conflict” – which features in the recurring expression “conflict of decisions” – means what it says. The fact is that both State decisions claim the same binational area of control and application. This is hardly surprising if we think that the human relationship that both judicial decisions are directed at and seek to govern is the same one and, spatially, it is Hispano-German. In other words, from a Spanish perspective, the decision transcends the Spanish national community and boundaries to also reach into the German national community, and vice versa. A national court, and the State that such court derives its authority and power from, is bound to claim a domain of jurisdiction which is *coextensive with* – i.e. which covers the same area as – *the particular relationship that it intends to regulate*. And so, this area must here also reach beyond Spanish borders, from a Spanish perspective, and beyond German borders, from a German perspective. Isn’t *international* – or more precisely “binational” – jurisdiction, as opposed to *internal* jurisdiction, that is at stake here? There has to be a “commensurability”, a “congruence”, a “coextension” between the context in which the private relationship arises and develops, which here is binational, “bi-state” and “bi-societal”, and the context in which the judicial decision that seeks to regulate the relationship spatially operates. If such judicial decision purports to govern a “binational” private relationship, it must *follow* the relationship into the territory across which the relationship spans, which is here a “binational” territory. Indeed, the nature of the private relationship is not such that Germany can bear the responsibility to govern the German “side” while leaving Spain to take care of the Spanish “side”, because the two sides are inseparable. Germany cannot claim, for example, to shape the rights and obligations of the mother who lives in Germany as it pleases, while leaving Spain and the Spanish decision to take care of shaping the rights and obligations of the father who lives in Spain. If the German decision awards a substantive custody right to the mother, in order for this custody right to exist, it presupposes an obligation of the father notwithstanding the fact that the father lives in Spain, and conversely. A judicial decision, which contains an individual legal norm, comes with a scope of application, just like any abstract and general legal rule, and just like any abstract and general rule, the scope of application of an individual norm can be “extraterritorial” and, more precisely, “territorial” and “extraterritorial” at the same time, or, in this context, “bi-territorial”, binational. The proof is that, in our example, the German court’s decision to award custody to the mother who lives in Germany aims to be binding on both parents, father included,
regardless of the fact that the father lives in Spain. And if the German judge orders the father to hand over the child to the mother, the German judge prescribes a conduct that must also take place in Spain, i.e. outside the German territory. This conduct is therefore, from the German judge’s point of view, “trans-territorial”. If the child is in Germany with the mother and the Spanish judge awards custody to the father, there is also a conduct that must at least partially take place in Germany, that is to say, from a Spanish perspective, “trans-territorially”. All one can say is that there is a discrepancy, a rift, between the areas of juridictio and imperium; the area of juridictio is international, binational and extends beyond the territory of the State that makes the decision because the human relationship that this exercise of jurisdiction seeks to govern is international, binational, “trans-territorial” or “bi-territorial”; whereas the area of imperium stops at the national boundaries, does not reach beyond the territory of the State which yields such imperium. However – I hasten to add – indirect means of coercion can be ordered by a State and implemented on its own territory to prompt individual conduct on the territory of another State. Suffice it to think about the imposition of civil penalties which “constrain individuals’ will by hitting their pockets”, or criminal sanctions. Indirect coercion can be exercised trans-territorially because it is indirect. More precisely, the indirect result – which is the ultimate end – of this type of coercion can occur trans-territorially.

So, let’s conclude that there truly is a Hispano-German decisional conflict, that is a conflict of individual legal norms which is the consequence of a Spanish-German conflict between courts and manifests itself as a Spanish-German conflict of jurisdictions. There is little doubt that we are faced with the very “conflict of legal systems” that the Hague Convention 1996 is designed to “avoid”. By the way, let’s not forget the aim of the Law is to avert or resolve conflicts between human beings and the associations, organisations or groupings they form, including States. And put in a tautological way, for so long as these conflicts are not settled by Law, the Law is not in place, there is no Rule of Law, and the human beings, and the aggregate persons they give rise to, do benefit from it.

B. The Relativity of the Substantive Element and the Universality of the Formal Element of the Child’s (Best) Interests

10. I suggest returning to the best interests-of-the-child concept. Should we conclude that this concept is not very useful because it calls for a relative and subjective analysis, two persons or instances or bodies being free to interpret and apply it in different ways and reach incompatible outcomes? To do so would, however, mean overlooking the absolute – because “formal” – and objective component of

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26 In the words of J. CARBONNIER, “elles frappent le portefeuille pour contraindre la volonté”.

27 As a result of a contempt of court in common law systems, which flows from failure to comply with a court order.

28 Supra (note 9).
such interests. Admittedly, this constitutes a minimal and self-evident component, but one that we shouldn’t disregard for reasons that will appear later.

In order to illustrate this component, I will appeal to your memories of the Bible. King Solomon was called upon to settle a dispute between two women who both claimed to be the mother of the same child. He then famously proposed to sever the child in two, just as is done with a piece of fruit or a slice of cake. Such a solution is obviously contrary to the interests of the child. And not actually what King Solomon intended, as he had devised it as a simple – yet brilliant – trick to find out which of the alleged mothers spoke the truth.29 The interests of the child first of all require that the child can carry on his or her life despite the separation of his or her parents, that, if the parents tear themselves apart, the child is not also torn apart, nor by the parents nor by any authority having the power to resolve the dispute between the parents, nor by any two authorities that both claim to be “legitimate” and who both, mobilised by a parent, would pretend to “pull” the child on the side of a different litigant to get him or her under their control and determine what’s best for him or her, and who, if unable to keep him or her whole, would be content with one half.

This leads us to take a further step on the path to understanding the formal and universal dimension of the child’s interests. In order to visualise its purview, let’s take a purely domestic case. The interests of a child who has developed significant bonds with both his or her mother and father and who is, against his or her will, caught up in a parental conflict, undeniably requires that this parental conflict be ended. So, there must be the possibility to settle the conflict between the parents absolutely, no matter how, the decision on “how” being to a measurable extent a matter of discretion. This is the first aim of any legal system in this area. And the decision as to “how”, though depending on discretion, has however – this is a second requirement of any legal system in this area – to emanate from a super partes authority, an authority that is not caught up in conflict of interests, that is able to keep the necessary distance from the case and from the parents involved, in order to be able to weigh up the strengths and weaknesses of each of the claims for custody that they put forward. Through its decision, such authority aims to establish a custody regime which is binding on both parents and capable of resulting in “res judicata”, of being conclusive.30 Unless there is a supervening event – and I suggest ignoring this possibility here – this requires that there must be ways to force both parents to comply with such a custody regime and to preclude continued litigation between them. Strange as it may sound, this also means that it should be possible to enforce the res judicata decision not only against the parents but also against the courts other than the one that entered the decision, and in fact also against the one who entered it and then is tempted to change its mind, take it back and decide differently.31 So the courts have to recognise and defer to the judicial

29 Only the real mother was concerned with the universal element of the child’s best interest, whereas the fake mother declared: “The child shall be neither mine nor yours. Divide him!”.
30 And, of course, the child.
31 After giving me the details of a particularly mind-boggling case that he had to deal with a while before, a friend, who is a judge, shared with me the following: “I regret the way
regime that has come into force and become final, they have to abstain from disputing such regime, to abstain from accepting to “re-judge” the case and making a counter-decision that may uphold a custody counter-regime that would neutralise the first. It must further be possible to make law-enforcing bodies materially pay heed to this regime and lend support to its implementation, which requires that those bodies abstain from resisting its enforcement even if they inwardly disagree with the custody regime that has been prescribed by the adjudicating body, even if, had they themselves been vested with the power to decide, they would have done so differently, and also even if they find the decision entered by the competent judge utterly shocking, offending their own most basic perceptions of what justice requires in that particular case. In order for the decision to bind the individuals that it is directed at and resolve the conflict between them, the principle of ne bis in idem which precludes continued litigation must first bind the courts and law-enforcing bodies. Isn’t the fact that the courts and public authorities are subject to the law one of the deepest rooted principles of a constitutional state? This means that the courts and public authorities are also subject to the res judicata that has arisen in conformity with the law. If they weren’t, the matter would never be decided – the res would never be iudicata – and the dispute could continue indefinitely. For there would be no solution to the interindividual conflict if the solution proposed by an authority seized by one of the litigants could be perpetually challenged by the other litigant before other judicial bodies or before the law enforcement bodies. No law, no Rule of Law, would be in place.

It follows that the (formal) interests of the child that, as I have already said, require the conflict between the parents to be resolved, also require that domestic conflicts between judges – the disagreement between two or several judicial authorities who get their power from the same state community and who each believes it has jurisdiction to decide on the (substantive) interests of the child – are too prevented or resolved. And the interests of the child further require, for the same reason, that potential disagreements between members of the same competent collegial panel be overcome, which in general is achieved through the majority principle, with the opinion of judges disagreeing with the majority opinion being labelled as “dissenting”. The interests of the child also require that he or she is not left in uncertainty as to the place where he or she is to live or the school he or she is to attend, that he or she is not being torn apart and pulled in different directions by his or her parents, with the public authorities being unable to bring the parents together for they are unable to overcome the disagreement between themselves over the best way to bring the parents together. This would be a “denial of justice” – whose first victim is the child –, which is a “denial of Law” (Rechtsverweigerung), of the Rule of Law, with the child being deprived of the protection of the Law and prevented from taking advantage of the Law and enjoying harmony and stability in his or her personal relationships. The public authorities would together fail to fulfil the duty that they owe to the members of their communities.

that I decided this case but now it’s done, it’s res judicata and there’s no more I can do, I am myself bound”.

32 The objective interests of the child require that the school he or she will attend at the start of the term doesn’t remain uncertain, regardless of whether it is the school recommended by the mother or that recommended by the father, because if this uncertainty is not
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In short, the formal, minimum interests of the child require that the conflict between the diverging views about his or her best interests advanced by those who are supposed to ensure his or her welfare is resolved, that this conflict is resolved by a super partes authority which is not in a conflict of interests, and that it is possible to force those that disagree with the way the conflict was definitively resolved (parents, judges and law enforcement bodies) to respect this solution all the same and, in accordance with their roles, lend their support to its enforcement and implementation.

11. Pondering the formal component of the child’s interests is useful because, this component being universal, it must be abided by regardless of the domestic or international nature of the parental dispute. The fact that the controversy between the parents is cross-border does not mean that child interests stop requiring that this controversy is definitively resolved by a super partes authority. However – and here I move from the obvious to the less so –, since the parents’ behaviours must take place in two different countries, in order for the parents to be bound by the decision and the way it allocates custody and parental responsibility, it is first necessary that the judicial and law enforcement bodies of both countries are bound by such decision and such regime.

Accordingly, it would appear that the formal element of the interests of a child who lives in a binational context first of all requires that the conflict between the two state communities of which he or she is the child (in the sense that we speak of l’enfant du pays, “child of a country”) on what corresponds to his or her interests and, in particular, on how best to solve the conflict between the mother and father who are the people “primarily” responsible for his or her well-being of the child, is averted or resolved. In other words, as the two state communities are jointly responsible for the welfare of the child – although on a subsidiary basis, i.e. after the parents –, the two state communities must abstain, and if need be, be forced to abstain, from each of them purporting to impose its own views of the substantive interests of the child. Otherwise, the parental conflict will be not be resolved, the minimum formal interests of the child that are pursued by both of the co-affected States would not be satisfied, the subsidiary, joint responsibility they share to care for the child welfare would not be met and their common interest in this respect would be missed. 33 Put simply, the child’s interests require that, in the absence of interparental harmony, there should at least be interstate harmony between the “co-affected” States – harmony between the “motherland”, mère patrie in French, and the “fatherland”, Vaterland in German – and their authorities, and in particular, their courts as to how to solve the interparental conflict. 34 The

33 Supra, no 5.

34 As will be explained in part II, such interstate harmony of solutions may be achieved, in particular, either by preventing the disagreement between the two state communities through rules that distribute jurisdiction between them, coupled with rules that provide that the decision made by the State of competent jurisdiction also binds the authorities (judicial and law enforcement bodies) of the other State, or by using mechanisms that promote the taking of joint, binational decisions. But interstate harmony can also be achieved to the
child’s interests also require that the authority responsible for establishing the “bi-nationally” enforceable custody regime has the broadest possible view of the context within which the child’s present and future life should fit.\(^{35}\) Since this context is cross-border and, more specifically, binational, the authority in question should have a binational, binocular vision of things or be able and willing to rise to this binational vision. This leads me to underscore that it is generally necessary that the child can continue to maintain bonds with both communities of which he or she is a member and continue to develop “bi-nationally”, to fuel his or her dual national identity, at least to the extent that both parents are sufficiently responsible within the meaning offered above, which is what I have assumed.

12. Let’s go back to our Hispano-German conflict of judicial decisions and assess its consequences in light of what’s just been said.

Not only the dispute between the Spanish father and the German mother is not settled yet, but there is even more reason for such dispute to continue as each of the competing parental claims has been endorsed by a court which has found it legitimate. No wonder, therefore, that both parents are willing to continue to fight over the child – and to force the child to endure such a fight – because the two States involved have failed to agree between themselves on how the parental dispute should be resolved. The two judgments collide and neutralise each other. As a consequence, there is really no judgment at all, the res is not iudicata, there is no res iudicata. So long as Justice does not resolve the conflict between the two inconsistent judicial decisions, so long as she fails to overcome the disagreement between the domestic judges who made them, the goddess who holds the scales in her hands has not pronounced a decision. She remains elusive. She is not only blind, but also deaf and dumb. These States in fact are denying justice to the individuals who are members of their communities. They fail to meet their joint responsibility to ensure peace, security and justice to the human relationships simultaneously affecting them both, to the individuals involved in those relationships. For when they examine their rights and obligations, what do those individuals find? A paternal right of custody awarded by a Spanish court and a maternal right of custody awarded by a German court which are inconsistent with each other, and consequently, a conflict of custody rights. That’s not a legal order. That’s a legal disorder. That’s no private international law and order. For how can a “legal

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\(^{35}\) Another dimension of the overriding (“supérieurs” in French) interests of the child manifests itself as they “override” not only the interest that each parent in his or her capacity as the (physical) person primarily responsible for the child welfare might have in advancing his or her own vision of his or her child’s interest, but also the interest that each State community in its capacity as the (legal) person subsidiarily responsible for the child welfare might have in advancing its own.
order” possibly benefit the individuals involved in cross-border relationships which are gripped by an unresolved “conflict of legal orders”? Those human relationships are no longer legal relationships because they are no longer ruled by the Law, no Rule of Law is in place for them. As for the child, in a similar French-Swiss case, one of the lawyers told me: “The child is a great deal of distress. He feels responsible for the conflict between his parents. And now he also feels responsible for the conflict between the States [the State of his father, his fatherland, the State of his mother, his motherland] concerning the best way to resolve the conflict between his parents. All of this is intolerable for him. He felt suicidal”. Everyone is bound to agree, we are faced here with the utmost irresponsibility on the part of both States. They are jointly responsible for the welfare of their common child and yet they together behave in the most irresponsible way, they jointly fail to lit up to their responsibility. It’s a joint, binational failure. A bilateral fiasco.

If order is established, and sooner or later it will be – every war is bound to come to an end – this order is not legal, in the sense that it is not the result of the Law. War, when it’s over, also generally brings about an order. The order I am referring to can take place above the conflicting legal orders and may be the product of non-legal factors, of law-of-the-jungle behaviours, of self-justice conducts that the Law precisely tries to degrade, such as muscular strength, cunning, threat and exhaustion.

One might however think that the parent who is right according to the country in which the child is found at the time of the first judicial decision prevails, and that it’s just tough luck for the other parent and the other state community. If this country is Spain, it is only the decision given by Germany that is ineffective, and vice versa. But, far from being prompted by the Law, this seeming “nudge in the right direction” might actually be the result of a coup de force. More importantly, each time the child crosses the border to go from Spain to Germany to visit her mother, her status changes and the mother can keep her in Germany. Indeed, from a German perspective, such a conduct by the mother would not be unlawful but rather a way to achieve implementation of the German decision which awarded custody to the mother. To avoid the child becoming a victim of a vicious circle of retention and counter-retention that would result in “tearing her apart”, the Spanish authorities might be tempted to prevent the child from ever travelling to Germany. This would once again be the peak of irresponsibility and injustice! Would the child be forced to keep herself away from a community which is part of her cultural, social and emotional world? Would proximity be the reason for forcing such a distancing? Here the child would be subject to a kind of social, cultural and psychological “disintegration” and would be deprived of an essential component of her identity. Furthermore, this does not conform to the idea that the welfare of the child demands that she can preserve ties with both communities and that visitation rights of the non-custodial parent can also be exercised in the non-custodial parent’s country of residence, as recognized by both decisions in our case study.36

In other words, this common objective inherent in the views of the child’s interests developed by both States is not achieved by either.

36 See supra, no 7.
III. Ways to Prevent and to Resolve Conflicts between Legal Orders

13. In order for the cross-border dispute between the mother and the father to be resolved, there must be a single “bi-nationally” valid and enforceable decision\(^{37}\) that binds, in the sense described above, the judicial and law enforcement bodies of both state communities, and consequently, both parents.\(^{38}\) As for its scope and content, this decision must pay heed to, and be reflective of, the binational character of the private relationship at stake and, in particular, the dual identity of the child as well as the “bicultural” context in which the child has grown up until the parents’ separation and which would be in his or her general interest to continue to be raised in afterwards.

Let’s first ask ourselves whether a national court is structurally up to the challenge of such a task (A). Assuming that it is, I suggest we subsequently move to the international jurisdiction stage and assess where the law stands on this point (B). By finally shifting the perspective to the international recognition, it appears that more work needs to be done, including within the European Union, to prevent or reduce conflicts of legal orders and thereby satisfy the basic component of the best interests of the binational children (C).

A. “Binational” Courts as the Best Guarantors of the Impartiality of Justice?

14. Even though a national court – a “mono-national” court, as I will most of the time refer to it – has jurisdiction based on a binational or supranational jurisdiction-allocating rule, does such a mono-national court possess the required knowledge, evenhandedness, impartiality and vision to resolve a binational child custody dispute? The question is a momentous one. I hasten to add that the doubts one may have in this respect do not necessarily pose a generalised challenge to the traditional posture of private international law that relies on mono-national courts to rule upon multi-national disputes. The fact is that child custody disputes seem to present a certain number of unique features that set them apart from other types of litigation. Let me mention three of them.

First, the judicial decision that is sought here is prospective in that it aims to shape the future of the child, which is why the regime of parental responsibility it seek to implement is supposed to last for a certain duration. On the contrary, when the litigation relates to financial issues, and particularly when it is about money, the judicial decision that rules on it is most commonly retrospective in so much that it aims to clarify the consequences of past events,\(^{39}\) and is most often enforced through a single conduct, that of an individual transferring money to another indi-

\(^{37}\) At least for every non-severable aspect of the relationship.

\(^{38}\) As well as the child himself or herself, of course.

\(^{39}\) By deciding on matters such as: Is such a contract valid or not? Does such a fact entail contractual (or non-contractual) liability? Is this person a beneficiary of a will or not?
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vidual. Second, the general and abstract rule enacted by the legislatures in this area generally abstains from allocating specific rights and obligations to the parties but rather gives the task to determine those rights and obligations to judges, whose discretion is of a magnitude that is unknown to other legal areas, such as contracts, inheritance, matrimonial regime or even maintenance. In other words, predictability of the law and of outcome of litigation counts less than in other domains and, as a rule, gives way to flexibility and individual, case-by-case justice (justice du cas concret, Einzelfallgerechtigkeit). Part of the reason is that a State community may afford the luxury of a litigation for every child that endures the separation of his or her parents but cannot, typically, afford the luxury of a litigation for every single contract that is entered into by members of its community. This also explains why legislations are more concerned about the resolution than the prevention of parental disputes. 40 Third, custody law is principally concerned with the factors that the judge may take into account when exercising his discretion in awarding custody. The objective pursued here is the child’s welfare, which requires that the child harmoniously develops and is prepared for adulthood. Now, the child’s harmonious development is not only ensured by his or her family life, but also by his or her extra-family life, including education, recreational activities, sports, religion, in a word, his or her “social” life. So, when adjudicating on custody, a court not only decides and chooses between the competing, potential family environments that the mother and father promise to offer the child, but also between the social environments (in the larger sense that I have just proposed) that the forum state community and the foreign “co-affected” state community are able to ensure. To the extent that protection of children and youth is not only a concern for the parents but also for the society at large, not only a task for the parents but also a task for the State community, and even without insisting on the fact the child generally constitutes a resource for the society in which he or she will principally grow up, it is likely that the intersocietal component of the disputes over children is more significant than the intersocietal component of disputes between contracting parties, spouses or prospective heirs.

If some recognition is given to the preceding arguments, it is tempting to indicate two factors that may potentially curtail the mono-national judge’s ability to adequately hear and resolve a binational child custody dispute. On the one hand, while he must have thorough knowledge of the society which has appointed him and in which he operates, including its educational system, the child protection services available and more generally the family support policies, schools, education and recreational facilities that are offered by his community, the mono-national judge might be unaware of or, at any rate, inadequately informed about the corresponding foreign system, structures, facilities and policies. Therefore, he may be lacking the required knowledge of all elements that need to be put on balance and “weighed up” in order for him to make a just, principled and informed decision.

40 While a domestic legislature can order a judge to award custody and parental authority to “the most deserving parent” (without further clarification), it would be inconceivable to direct him to award contractual rights to “the most deserving contracting party” or inheritance rights to “the most deserving next-of-kin” (without further clarification) because this would bring about generalised uncertainty and the courts would be swamped with petitions and living in this society would no longer be viable.
The second point is yet more fundamental and is about the *independence* and *impartiality* of the mono-national court in assessing these elements. Even if we assume he is able to access the required knowledge about the foreign system, structures, facilities and policies,\(^{41}\) we are still left to wonder whether the mono-national judge is systematically able to maintain an appropriate and “fair” distance towards all sides of the litigation, where he is able to rise up to a *super partes* vision of the conflict, in short, and to put it bluntly, whether he may not be, when appreciating the interests of a binational child, himself involved in a “conflict of interests”. For so long as it’s only the parents who are competing against each other over the custody of their common child, it is easier to be satisfied that independence and impartiality exist in a sufficient measure than if we conclude that, in the child custody area, *State communities* may also have an interest, and therefore may also found themselves to compete against each other, although subsidiarily and in the background of the parental dispute, to seek control over their common binational child. As a matter of fact, the way in which the conflict between the parents is resolved will determine which culture the child will principally be raised in,\(^{42}\) which country will primarily exercise state responsibility,\(^{43}\) which will probably be where he or she will spend most of his or her adult life and where he or she will mainly serve professionally taking advantage of the skills and capabilities that his or her family and community allowed him or her to acquire while growing up. And, to the extent that a potential contest between two State communities over child control parallels the conflict between the parents, the mono-national court that is dependent on one of those State communities as an “organ” that relies on the organism it’s attached to and is dependent on, may precisely not be “independent” and *super partes* because, as an organ or body of one of the competing societies, he is part of one of these societies, and therefore “part of one party”. The mono-national court is not *super societates*, but is actually entrenched within and representative of one of these societies, he is *intra societatem*. Of course there are large numbers of domestic judges who, confronted with the kind of transdomestic disputes at issue, would be able to put themselves behind a “veil of ignorance”\(^{44}\) and become oblivious to the role they actually play within one of the competing societies without being unduly influenced by that role. Some of them would likely be able to do this even if the child were, if not theirs, that of a close relative, a brother or sister for example. However, for a person to be in a conflict of interests means for that person to be in an objective position that undermines the confidence in the legitimacy of the task – here the judicial task – given to him or her, while proof that he or she has actually been biased in his or her actual determinations is not required. And a conflict of interests is particularly perilous in hard cases because it is less obvious to detect as it may operate in the subconscious of the affected person, without this person being aware of it, particularly in the situations where both parents show an

\(^{41}\) By the cooperation established by chapter V, the Hague Convention 1996 promotes interstate exchange of information not only about “laws” but also about “services available […] relating to the protection of children” (article 30(2)).

\(^{42}\) Sometimes including religious culture.

\(^{43}\) *Supra*, no 11.

\(^{44}\) According to John RAWLS’s evocative imagery.
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*a priori* equivalent inclination and aptness to take on primary responsibility for the child so much so that, in order to determine who should have custody, it is necessary to fall back on extra-family factors. These factors of secondary importance may indeed prove tie-breaking when the weighing up of primary factors results in an inconclusive outcome.45

15. If we share these concerns or part of them – which I will not explore here any further – a solution might be to consider having “mixed”, binational tribunals to adjudicate upon the merits of those binational child custody cases.46 Within the European Union, we could think of European courts sitting within the Member States’ territories, following the example of the federal courts of the United States, with their composition mirroring the binational nature of the dispute.

It might be argued that all this only exists in a utopian reality. Let me recall, however, that “mixed”, *international*, including *binational*, courts – based on the origin of their members48, the way they are appointed, the consolidated knowledge of the state communities involved that they possess and the “wide-angle”, cross-border vision they have – settle private international cases every day all over the world: the *courts of arbitration*. Among the advantages they offer, let me highlight their supranational composition which can truly reflect the different nationalities, domiciles and backgrounds of the parties and ensure clarity of vision and equal distance from the parties and therefore evenhandedness. Admittedly, the area of parental responsibility is, as we speak, impervious to international arbitral justice and arguably represents one of the last fortresses of mono-national state justice.49 But is the current state of affairs really satisfactory? Firstly, it may come as surprise that, in our example, the Spanish father and the German mother are deprived of what we might call the *right to the “bi-nationality” of the court* that will decide their case, that any interparental agreement expressing a common desire to have their dispute resolved by a Hispano-German court50 is invalid and ineffective, the options available to them being reduced to seizing either an *entirely German* court or an *entirely Spanish* court.51 Whereas, if their dispute was, for example, about matrimonial property, they would most often be awarded the right to a binational (arbitration) tribunal, a Hispano-German tribunal that would ensure both an

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45 We might wonder whether the mono-national judge is ideally equipped and has the necessary tools to weigh up the alternative options available to the binational child, whether he has a “complete vision”, a “binocular” vision, an “aerial view”, or whether the mono-national vantage point only offers him a “truncated” and therefore “biased” view of the reality that he is supposed to shape and organise.

46 Or tri-national, etc.: see *supra* (note 3).

47 This clarification is better understood in light of later developments. *Infra*, no 20.


50 Reference is made to an arbitration tribunal here.

51 Reference is made to a judicial court here.
equal proximity and an equal distance and, consequently, fairness to the parties. Particularly if we look at things from the child’s perspective, it is questionable whether it is really consistent with her interests to systematically deny her the right to have her fate decided by a tribunal that, through the way it’s constituted and the background, culture and training of its members and their "consolidated" first-hand experiences of the family and social environments prevailing in their societies, truly matches and mirrors the Hispano-German context in which she is integrated and should, as a rule, continue to be so.

Second, if we look at the reasons which are commonly relied on to explain the exclusion of child custody disputes from arbitration, we cannot help noting that all those reasons militate for preventing conflicts between legal orders of the kind discussed in this paper. The “unalienability” of substantive rights (indisponibilité des droits) and the mandatory character of legal norms in this area are often cited, alongside public policy arguments and state interests that are at stake. First, we must recognize that the parents would by no means “dispose” of, let alone “alienate”, their custody and parental responsibility rights to the extent that, faced with a conflict of custody and parental responsibility rights which is tantamount to having no true custody and parental responsibility rights at all, they seek to overcome this conflict by having the conflict of mono-national decisions and legal orders resolved by a binational tribunal whose determination would award them true, effective binationally protected and enforceable custody and parental responsibility rights. This is also true for the mandatory character of the norms in this area. The

52 Reference is made to an arbitration tribunal here.

53 To be sure, a conflict of legal orders might arise when, for example, the arbitral decision is not recognised in a country other than that of the seat of arbitration or it is quashed in the latter while recognised in the former. However, as is often claimed, an arbitral decision ruling on an international case is likely to circulate more easily and freely than a judicial decision given on the same case. Part of the reason why this is so arguably lies in the binational character of the composition and appointment process of the arbitration tribunal, which directly contrasts with the mono-national composition and appointment process of a wholly domestic court of law. Human beings and the associations they form, including States, tend to more promptly abide by and pay heed to something that they have, even indirectly, contributed to shape than to something they played no role in shaping. The appointment of arbitrator x by litigant a who is connected (by his residence, nationality, etc.) to state community A, notably if arbitral judge x is also connected to state community A, entails that country A is, at least ceteris paribus, in a better disposition towards the arbitral decision emanating from a tribunal composed of x, y and z in which arbitral judge x sits and whose seat of is in country B to which litigant b is connected who has also appointed arbitral judge y who is also connected to state community B. “In a better disposition” over a judicial decision made by a mono-national court of law that sits in state community B and is constituted by judicial judges y, y1 and y2 who are all exclusively appointed by state community B and, just like litigant b, are exclusively attached to state community B, particularly if this court has been unilaterally seized by litigant b. To the extent that international recognition of decisions made by binational tribunals faces less resistance than international recognition of decisions made by mono-national tribunals, conflicts of legal orders in respect of parental responsibility would be less common to the extent that, as long as no binational courts of law are available to the individuals, States allow them recourse to arbitration tribunals which are binational as to their composition and appointment process.
Conflict between two individual norms contained in two judicial decisions that both claim to be imperative result in them both losing their imperativeness, as the parents cannot abide by them both, just like two equally ranked commanders-in-chief who pretend to issue contradictory orders to the same troops lose their capacity to require obedience. The fact is that, to be truly imperative, a decision must, in a binational case, be bi-nationally imperative, which is not the case when a binational decisional conflict arises. As for the public policy argument, a decisional conflict is often the product of a conflict of public policies, which is the very opposite of public policy and of public justice, and might even lead to the development of a private non-legal order that is a product of self-justice (Selbstjustiz). Let’s be honest: It’s better to have arbitral justice than self-justice resulting from a conflict of public policies and of public justices, because self-justice is tantamount to the law of the jungle and indeed constitutes a denial of justice. With respect to the state interests that are inherent in this area and allegedly make this area incompatible with arbitration – which is often, far too often, characterized as a “private” means of dispute resolution54 – let’s remind ourselves that arbitration can be interstate, in the sense that the parties to it may well be two States. The first international arbitration of the modern era was indeed an interstate arbitration.55 Let’s also remind ourselves that, if the term “state interest” designates the interest that a State may have in prescribing a particular substantive solution to the parental dispute, such state interest is, as discussed, only subsidiary in the area of parental responsibility. Let’s further not forget that if the parental dispute is cross-border, that’s because there are at least two States affected by that parental dispute. And so, to the extent that a state-related component is inherent in such dispute, and this accounts for the state interest, and the states affected are two, we may be faced with a “conflict of state interests”. Isn’t a conflict of state decisions sufficient evidence of the existence of a “conflict of state interests” of this sort? And finally, let’s not forget that it is in the States’ joint interest to resolve their differences about what their common child’s welfare requires because the resolution of the interparental conflict which threatens the welfare of the child that both countries have a duty to protect is achieved via the resolution of the disagreement between themselves.

It follows that all the arguments relied on to support hostility towards arbitration in the area of parental responsibility actually lead to the conclusion that, for

and whose decisions are likely therefore to face less resistance internationally, including bi-nationally, than the mono-national decisions.  

54 Decisions made by arbitration tribunals, no less than decisions made by judicial tribunals, rely on public authorities for their implementation. As the European Court of Human Rights has often underlined, a vital step of the administration of justice is the enforcement of the decision, which is in fact a decision only to the extent that it can be enforced through public force. And so, the administration of arbitral justice which involves the enforcement of the arbitral decision that takes places under the control and at the hand of public authorities that have the monopoly of public power, involves a public phase which is quintessential to that justice.

so long as they don’t make access to binational or supranational courts of law available to the individuals to resolve conflicts of child custody judicial orders between them, the States should at least be responsible enough as to allow the individuals to have recourse to an international (arbitration) tribunal in order to overcome those interstate conflicts of child custody judicial orders and, therefore, to have the interindividual binational dispute conclusively resolved. In other words, in our example, it is precisely the arguments about inalienability of rights, mandatory nature of the rules in this area, public policy and state interests that should encourage Germany and Spain to allow the German mother and the Spanish father to agree to submit to a Hispano-German court of arbitration in order to overcome the Hispano-German conflict of judicial decisions. This would mean for Germany and Spain to accept to be in principle bound by a supranational arbitral decision that would replace the conflicting mono-national judicial decisions. For let me insist on this point: the choice is here not between arbitration justice and state justice, but rather between arbitration justice and the failure of state justice flowing from the unresolved conflict between two state justices, between two views of state justice, the conflict of legal orders in fact leading to a denial of state justice. However, if we allow recourse to arbitration *a posteriori* to remedy this denial and this failure, could we not take a further step and allow *a priori* access to arbitration so as to avert such a denial and such a failure, to prevent a conflict of legal orders?56

Despite their being more onerous and complex to establish, we might think that binational courts of law would be better suited than courts of arbitration to the peculiarities of international child disputes. The European Union and the Hague Conference on Private International Law are surely, in their respective geographical purview, capable to offer an appropriate platform and framework. As I will mention below, the European Union already provides a basic infrastructure which one can build on as well as “co-decisional” mechanisms. As for the Hague Conference, some alterations of and additions to the text of the 1996 Hague Convention – which already includes a substantial section on “co-operation” between the concerned States and authorities – may assist in this respect. The choice to bring the dispute before a binational or European court as an alternative to a mono-national court could be left to one of the parties, including the child, as with the *diversity jurisdiction* cases in the United States or with the transfer to a better placed jurisdiction that already exists in international and European legislation and which I will discuss later.57 Since the judges would in this scenario be State-appointed, they might be chosen from mutually agreed upon lists, and, for the States bound by the 1996 Hague Convention, those lists might be filed with the Permanent Bureau of the Hague Conference, just as is done for the list of central national authorities.

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56 Germany and Spain might submit the Hispano-German conflict of decisions in respect of parental responsibility to a Hispano-German arbitration tribunal where both States would be party to the procedure. It would be a Hispano-German *interstate arbitration* which is perfectly permissible under (international) law (L. Caflisch, L’avenir de l’arbitrage interétatique, *Annaire français de droit international* 1979, p. 9 et seq.). One may then wonder whether it does make much sense for those States to deny individuals the right to submit to the decisions of a Hispano-German arbitration tribunal in cases of a Hispano-German conflict of judicial adjudications.

57 *Infra*, no 20.
Appropriate specialisation and training in family law may be required as a precondition to sit in those binational tribunals. Needless to say, a great number of questions would need to be addressed. I will not dwell on them because what I intended to do was simply to outline one possible route that future law could embark on.

16. In connection with what has just been said, let me briefly mention another dispute-settling mechanism, that offered by mediation. It seems that the Law implies the right to a tribunal and that the right to a tribunal entails the right to be in disagreement with one’s counterpart and to not be forced to negotiate an agreed solution with him or her. In other words, it is the right to be faithful to oneself, one’s view of things and one’s principles, as subjective and biased as they are. This right to disagreement further entails the right to seek the resolution of such disagreement by a third party authority, a right which is accompanied by an obligation to respect and submit to the decision made by such an authority, regardless of how far it strays from the principles each of the parties has defended and would be willing, if need be, to continue to defend. It is, however, no less trivial to observe that many parental conflicts would be avoided if parents could rely on help from people who are able to favour a harmonious separation, particularly in respect of children, which is fundamentally what mediation aims to do in this area. It is also important to note that this dispute resolution method may be binational as, on the one hand, it is not yet regulated in many countries or geographical regions and, on the other, the national or supranational legislation that exists does not prevent the appointment of two (or more) mediators, typically from the countries that that the parents come from and that the child has significant ties with. Even though the law hasn’t gone so far as to provide for judicial or arbitral binational tribunals, it already allows the setting up and shaping of a mediation process that is binational, “bicultural”, bilingual, “bisexual” (involving a male and a female mediator) and, if need be, “bi-religious”. The proposals made by the panel of mediators so appointed are even more legitimate and worthy of confidence since they emanate from a panel who has the required distance and independence and whose members may have had to reconcile their own potentially disparate opinions to reach a joint proposal which is the product of a “mediation among mediators”. And so, to this day, mediation appears to be the only dispute-settling tool which is able to reflect the international dimension of the parental dispute through the composition, legitimacy, expertise and background of those in charge of it.

Let me also highlight that mediation could assist here not only to reconcile the diverging views of justice maintained by the two parents, but also those maintained by the two States and their authorities. Here lies the dual dimension of the conflict that I touched upon, interparental and interstate. Starting once again with the Hispano-German example, the logical structure of the process would be that, if the parents agree to interparental mediation, and that mediation fails, and the

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58 If we could force humans to avoid conflicts or to cope with resolving their conflicts themselves, if necessary with help from their close ones, we wouldn’t need judges.

59 Whatever the “seat” or “forum” of this mediation might be.

60 See, supra, no 1.
disagreement between the parents continues, the normal judicial route would then be open to them; if the interparental disagreement leads to a disagreement between national courts, here the German and the Spanish courts (we will see how this can happen later\(^{61}\)), the countries of the conflicting courts may have recourse to interstate, including inter-jurisdictional,\(^ {62}\) mediation to overcome their disagreement. This would involve the task of encouraging them to negotiate a solution, with the mediator or mediators submitting proposals which help the States find a harmony of solutions in order to supersede the initial disharmony of decisions made by the judicial authorities, all this in the interest of the individuals, and above all in the child’s best interests. It is only where this interstate mediation fails that there would be recourse to a supranational court responsible, not only for proposing, but for imposing a solution to the conflict between the legal orders involved.\(^ {63}\)

B. The Allocation and Exercise of International Jurisdiction

17. To return closer to today’s law, a step towards a single, bi-nationally enforceable decision requires that both co-affected countries, through a bilateral or multilateral instrument, forge, and abide by, a rule on jurisdiction which adopts a single connecting factor, that they agree to allocate jurisdiction to the courts of one of them, the one that is designated in each individual case through the operation of this connecting factor. A rule of this sort has then binational (or multinational) origins and legitimacy because both (or several) state communities have contributed to its development and enactment, as is true with any “private convention” between two (or several) individuals, in short any contract, which is a bilateral (or multilateral) instrument that is enforceable against those who made it and “takes the place of the law”\(^ {64}\) between them. Such a rule would distribute jurisdiction among the contracting States and their courts by determining and allocating to each of them what is due to it according to a fair and equitable criterion (\textit{suum cuique tribuere}).

Therefore, assuming that the only bilaterally (or multilaterally) agreed upon jurisdictional connecting factor is, in our case study, the child’s \textit{habitual residence} and that this residence is in Germany, the German judge has the sole power to adjudicate on this Hispano-German dispute. Such a power is part of a “state sub-

\(^{61}\) \textit{Infra}, no 22.

\(^{62}\) This could take place under the aegis of a third party State (as often happens in interstate disputes) and, within the European Union, under the supervision of the European Commission.

\(^{63}\) The increasing recourse to international parental mediation makes one wonder why not allow recourse to international interparental arbitration. Because, if the proposals emanating from a Hispano-German panel of mediators have the power to bind both parents once those proposals have been accepted by the parents, what is the point of not allowing the parents to consent to the decisions of a Hispano-German panel of arbitrators that the parents, fearing the risk of bias and impartiality of a mono-national domestic court, have agreed to empower?

\(^{64}\) “\textit{tiennent lieu de loi}”, according to language of the Napoleonic Code.
stantive right” (droit subjectif étatique), a right of a State – here of Germany – to determine and distribute the substantive rights and obligations among the individuals, here of the Spanish father and the German mother. To be sure, such right of the State is also part of a responsibility and, therefore, an obligation of the State, much like custody, which is, as we have seen, both a right and an obligation (Pflichtrecht): a right against every other State involved, here Spain, and an obligation towards the individuals, here the parents and the child, who are seeking a legal solution to the dispute involving them. Indeed, should the German judge refuse to hear or decide the case, he would be guilty of a denial of justice. As for Spain and its authorities, they will, in principle, be under an obligation to abide by the agreed upon rule and by the German jurisdiction that it confers in this particular case. And so, if one of the parents files an application with the Spanish court, the Spanish court should decline jurisdiction and defer to the German courts, who have the legitimate authority to rule on the German-Spanish dispute, “legitimate” because flowing from a legitimate law, and the law is “legitimate” here because it is a binational law, because both countries involved have participated in developing and enacting it and agreed to be bound by it.

This is what the Hague Convention 1996, of which both Spain and Germany, as well as several other countries, are signatory, attempts to do, albeit on a wider, multilateral scale. This treaty establishes a jurisdiction-allocating rule which is not only binational, but also multinational, because of the participation and ratification of Spain, Germany and many other countries. This rule recognizes the central role of the habitual residence of the child.65 The Brussels II-bis Regulation66 is also binding between Germany and Spain and, as a matter of fact, takes precedence over the Hague Convention with respect to relationships that fall within the geographical scope of both. Consequently, it is ultimately Brussels II-bis that governs our case study. The jurisdictional rule adopting the child’s habitual residence67 that is included in the Brussels II-bis Regulation has then been further formally sanctioned by a supranational authority, namely a legislative body or several legislative bodies within the European Union, which is in turn a multi-state and supra-state entity which is composed of all the “Member” States, including Spain and Germany, and enjoys normative, including regulatory, power to distribute international jurisdiction in this area as a result of a transfer of such power from the Member States, including Germany and Spain.68

Let’s note that the national court here formally possesses a binational legitimacy because both countries have agreed, by an international treaty or accepting to be bound by a supranational regulation, to vest the national court with the power to settle this binational dispute. In our example, the Spanish court not only rules

65 Article 5. See, e.g. the Explanatory Report drafted by P. LAGARDE, no 6.
68 Particularly through the Treaty of Amsterdam, signed on 2 October 1997 and entered into force on 1st May 1999.
behalf of the King of Spain” as the epigraph to its decision suggests, but also on behalf of the European Union, including on behalf of Germany, because the rule that awards the Spanish court with jurisdiction is not domestic, is not mono-national, is not Spanish only, but European, and consequently also Hispano-German. And for the same reason, the German court not only rules “on behalf of the German people” (im Namen des deutschen Volkes), but also on behalf of the European Union, including Spain. In order to make the mono-national judge aware of the binational role and responsibility he is entrusted with, it might be appropriate to adjust the epigraph of the decision he is called on to render. Regarding a Spanish court’s decision, the Unión europea may for example be mentioned next to the Reino de España, and, regarding a German court’s decision, the Europäische Union may be mentioned next to im Namen des deutschen Volkes.69

18. The place of residence of a child that lives across two state communities can sometimes be controversial, as the courts of these two countries – just as different courts in the same country – may be inclined to “locate” such residence in different places and, particularly, each of them on its own territory. A “conflict of habitual residences” will then arise. In particular, the appropriate time to determine the residence might be debatable – the Hague Convention failing to provide a decisive clarification on this point70 – just as the factors that can effect a change of residence. As is also well-known, the Hague Convention does not ensure a multilateral interpretation – binding on all the contracting States and their courts – of the multilaterally developed and adopted provisions that it contains.

We also know that this is different for the Brussels II-bis Regulation. For a supranational, multinational jurisdiction, the European Court of Justice, is responsible for resolving interpretative doubts which are submitted to it by national courts by way of so-called “preliminary” questions. Such questions may typically concern undefined, or insufficiently defined, concepts used by the regulation. The answers are provided through rulings that are supranational, just like the Court from with they emanate and the general rules that they are designed to clarify. These rulings bind not only the “referring” national judge, but also the judge of the Member State that is “co-affected” by the interindividual dispute that led to the reference for a preliminary ruling, as well as every other national court that is faced with the same uncertainty in future cases.71 However, it is true that, when it comes to determining the habitual residence, the factors identified by the Court as playing a role in that analysis are fairly “open”, with the national judge enjoying a measure of appre-

69 A bit like for passports of Spanish and German citizens and those issued by any other Member State.

70 For example, in respect of the issue of perpetuatio fori, P. LAGARDE’s explanatory Report states two different opinions.

71 The Court resolves issues of interpretation that national courts ask it but in the cases before the Court, all Member States, not only those affected by the interindividual dispute, but also all others, have the “right to be heard”: see, article 40 of Protocol No 3 on the Statute of the Court of Justice of the European Union. In other words, they can submit their observations, so much so that the court’s activity is preceded by “multilateral” effort, just like the one leading to the adoption of the regulation that it interprets.
Conflicts in Respect of Parental Responsibility

citation.72 Even if its work contributes to preventing disagreement between judges of the Member States involved in a binational human relationship, the Court of Justice, when responding to a preliminary question, does not directly settle a conflict between the judges of two Member States. If the courts of both Member States have applied the criteria as determined and spelled out by the Court of Justice and they both take the view that they have jurisdiction based on the Brussels II-bis Regulation due to the child’s habitual residence being located within their territory, a “conflict of jurisdictions” may arise.

So having one single connecting factor determining jurisdiction is not sufficient to prevent and resolve the conflict of legal orders of the type under scrutiny here. Other rules are required.

19. These additional rules are all the more needed that the two instruments in question do not completely relinquish the plurality of fora as they provide for others, alongside the habitual residence of the child. To be sure, availability of these additional fora is subject to rigorous conditions, which I will not examine here. Here it is important to note that the variety of jurisdictional bases does not per se stand in the way of ensuring a single bi-nationally enforceable decision – which is, let me repeat, the condicio sine qua non for the dispute being resolved in Law and by the Law – provided that this variety is controlled and accommodated by bilateral (or multilateral) rules, that is by rules developed and adopted by both States involved and designed to guarantee the coordinated exercise of jurisdiction by the courts that do have jurisdiction. This is how the contest of jurisdictions is prevented from developing into a conflict of jurisdictions. The fact is that two or several judges may be vested with competent jurisdiction but only one of them may be allowed to actually exercise it. The factors most commonly relied on to ensure this coordination are the chronological priority, i.e. primacy of the court first seised – which is commonly, although not unambiguously, referred to as lis pendens rule – and the primacy of one jurisdictional factor over the other or others, which last primacy is often justified by the greater ties and connections with the dispute, and especially with the child. It should be clarified that this primacy may be established in abstracto, through a general provision to which both States consent, or may be the result of an in concreto analysis, which is more problematic because it is once again necessary to determine which authority is empowered to make this analysis and to generally bind through its findings the other authorities. Let’s generally say that such analysis may be bilateral, i.e. the result of the joint determination of two courts, or unilateral, the determination of just one of them.

The two instruments under scrutiny – the Hague Convention 1996 and the Brussels II-bis Regulation – use both criteria, alternatively or cumulatively. I will not address the technical details of the relevant provisions. I will simply note that the potential conflict between the courts of two Member States which may both claim to be the place of the child’s habitual residence is in principle solved – and, as a matter of fact, most often averted – based on the chronological priority of seisin, which also applies to the infrequent cases of the judge of the habitual

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72 ECJ, Mercredi, 22 December 2010, C-497/10 PPU: “It is for the national court to establish the habitual residence of the child, taking account of all the circumstances of fact specific to each individual case”.

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residence competing against the judge which has jurisdiction for divorce.\textsuperscript{73} The contest between the forum at the habitual residence and other fora, such as that of the child’s nationality or the habitual residence of one of his or her parents, is accommodated through the primacy of the former; primacy not in the sense that jurisdiction is always exercised by the court of the habitual residence (it would otherwise make little sense to provide for other bases for jurisdiction), but in the sense that the court of the habitual residence has both the power and the responsibility to hear the dispute in situations when the courts having jurisdiction disagree on which among them should go ahead and exercise it.

As a matter of fact, the Hague Convention 1996 and the Brussels II-bis Regulation set up a “bilateral”, as opposed to a unilateral, binational, as opposed to mono-national, process in which both “co-affected” contracting or Member States may engage through their courts. Faced with a parental disagreement, with a breakdown in the dialogue between the parents of a child, the courts of the contracting or Member States with which the child has significant connections – typically the “fatherland” and the “motherland” – are permitted and encouraged to reach a joint, binational, “bi-state” agreement on who among them is “better placed to hear [and decide] the case”\textsuperscript{74}. This interstate, and more specifically interjudicial, interjurisdictional agreement may typically be the result of an “exchange of views”,\textsuperscript{75} of an interjudicial and interjurisdictional dialogue.\textsuperscript{76} In the event of a persistent disagreement between the courts of the two contracting or Member States as to who should rule on the dispute between the parents – each court typically taking the view that it is better placed to do so than the other\textsuperscript{77} – the conflict between the courts and the contracting or Member States on behalf of which they are acting is prevented or resolved either through the chronological priority or the primacy of the habitual residence of the child, according to the scheme outlined above.

20. Another possible pathway takes inspiration from some domestic systems of civil procedure. This is to refer the conflict to a higher court, a judge of judges (“juge des juges”), a supra-jurisdictional judge, in other words, a court placed above the jurisdictions that are party to the conflict of jurisdictions. Such a system is in place in France, for example, when it comes to the “conflicts of competences” (conflits de compétences), which term designates the jurisdictional contest between

\textsuperscript{73} However, it is rare that in such a case, a true jurisdictional conflict arises because the jurisdiction of the divorce judge is subject to acceptance by the parents “as well as by any other person who has parental responsibility in relation to the child”: article 10(1) lit. b) of the Hague Convention 1996 and article 12(1) lit. b) of the Brussels II-bis Regulation.

\textsuperscript{74} This is the title of article 15 of the revised Brussels II regulation (“Transfer to a court better placed to hear the case”).

\textsuperscript{75} Article 8 para. 3 of the Hague Convention 1996 states that “[t]he authorities concerned may proceed to an exchange of views”. More stringently, article 1 para. 6 of the revised Brussels II Regulation prescribes that “[t]he courts shall cooperate for the purposes of this Article, either directly or through the central authorities […]”.


\textsuperscript{77} Or – in rarer cases – each judge believes that the other is better placed to exercise jurisdiction.
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civil and administrative courts. This conflict, once it arises, is settled by a *Tribunal des conflits*, which is a mixed, bi-jurisdictional court whose members are judges from the *Cour de cassation* and judges from *Conseil d'Etat*, in equal number. We may also cite, under French procedural law, the “conflict of jurisdictions” (*conflit de juridictions*), this expression meaning the conflicts between judges from the same jurisdictional order that, in civil law, were formerly settled by the French Supreme Court and, in criminal law, still are. In Italy, the designation “conflict of jurisdictions” (*confitti di giurisdizioni*) refers to conflicts between civil and administrative courts which are too resolved by the Italian Supreme Court (*Corte di cassazione*) as a result of a procedure that is called *regolamento di giurisdizione*. The Italian Supreme Court also has the responsibility to settle the “conflicts of competences” (*confitti di competenza*) which designates the situation when two civil judges think they are both competent or both incompetent to hear a (domestic) case, the procedure being then referred to as *regolamento di competenza*.

And so, according to a system of this sort, when a disagreement between the Spanish and German courts arises, with both of them claiming that they have jurisdiction on the grounds that the child’s residence is located within their territory and that they are better placed to exercise it, the solution to the conflict of jurisdictions would not be to require the second court to abide by the unilateral determination of the first court – of the court that was seized by the fastest parent – but to refer the conflict for adjudication to a “court of conflicts” (*tribunal des conflits*), a “supranational”, higher court whose task would then be to assess the merits of both claims for jurisdiction and the arguments advanced by each of them. This can be the European Court of Justice or the General Court of the European Union or an *ad hoc*, mixed “specialised tribunal” where, in a Hispano-German case, a Spanish judge and a German judge would sit, with a judge from a third Member State typically serving as president.

21. Let me remind that the European Court of Justice can already be mobilised by a Member State which claims that another Member State is in breach of

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78 Created by article 89 of the 1848 Constitution and then abolished under the Second Empire, the *Tribunal des conflits* has been recreated by the law of 24 May 1872 and its role has been reinforced by the law of 20 April 1932 and the decree of 25 July 1960.

79 Article 659 of the Criminal Procedure Code (*Code de procédure pénale*).


81 Articles 42 to 50 of the *Codice di procedura civile*.

82 In the framework of the Study PE 510.012 financed by the European Parliament and carried out at the Swiss Institute of Comparative Law by L. Heckendorf Urscheler/I. Pretell et al., an intervention of the General Court of the European Union is envisaged in order to solve the most acute and intractable cases of intra-European conflict of decisions in child abduction cases. See p. 20 et seq. and 95 et seq.

83 And we might perhaps be in the presence of a tri-national, tri-state Court, in the style of the “Benelux Court of Justice”. See, article 5 of the Benelux Treaty as amended by the protocols of 10 June 1981 and 23 November 1984: “La Cour siège en principe au nombre de neuf juges, trois de chaque pays. Elle peut cependant, dans les cas prévus par son Règlement d’ordre intérieur, siéger au nombre de trois juges, un de chaque pays”.
a treaty obligation, including an obligation under a private international law regulation.84 Interestingly, this is what Latvia did against Italy in a recent case involving an Italian father domiciled in Italy and a Latvian mother who, following their separation, relocated to Latvia.85 The Latvian court awarded custody of the Italian-Latvian child to the Latvian mother, while the Italian court awarded custody of that child to the Italian father and ordered the return of the child to Italy. Recognising the standstill that this situation meant for the child and the parents, Latvia attempted to have that conflict settled in favour of the Latvian decision by invoking a failure of Italy to meet its obligations under the Brussels II-bis Regulation. An interstate dispute arose – with both litigants being two States: the Republic of Latvia and the Republic of Italy – concerning the best way to decide an interparental dispute. However, as I will underscore later, the text of Brussels II-bis Regulation makes it possible for conflicts of legal orders to arise without either of the “co-affected” Member States having committed the slightest breach of that European law instrument.

It is perhaps within the Hague Convention 1996 that a supranational, permanent or ad hoc tribunal responsible for settling conflicts of legal orders between the contracting States would bear the most interesting fruit. In its chapter on “recognition”, the Hague Convention provides that, when a decision made by a contracting State is presented for recognition in another contracting State, the court of the State addressed may exercise control over the jurisdiction of the court that made the decision in the first place.86 The provision on parallel proceedings does not require the second court to stay proceedings when it believes that the first court has no jurisdiction under the Convention, a “recognition prognosis” being not excluded.87 Since there is no supranational court that can make its interpretation binding on the Contracting States, it is possible that the first court interprets the text in a way that gives it jurisdiction and the second court also interprets the text in a way that gives it jurisdiction and denies the former’s. And so, the second court might refuse to defer to the first court and exercise its own jurisdiction, thus paving the way to a conflict of legal orders.88

But is it true that such a supranational court does not yet exist? It is tempting to wonder whether the International Court of Justice might not already be mobilised in this kind of situation. Let’s think about the recent case Belgium v Switzerland, which involved a dispute between the former Belgian company Sabena and the former Swiss group SwissAir concerning the interpretation of provisions on, among others, lis pendens under the Lugano Convention. Belgium

84 Article 259 TFEU (ex-article 227 TCE).
85 For a summary of the case, see supra, no 12.
86 Article 23 par. 1 lit a) Hague Convention 1996.
87 Article 13 Hague Convention 1996.
88 Thus, in the French-Swiss case that I mentioned (supra, note 12), the French court of the habitual residence of the child at the time when his mother, who was also living in France, filed for a custody order, confirmed its jurisdiction by virtue of the perpetuation fori despite the later transfer of the residence of the child to Switzerland. Seized by the father, the Swiss court of the new habitual residence of the child also upheld its jurisdiction by excluding the perpetuation fori and refusing to apply lis pendens.
argued that the Swiss court should refuse to exercise its jurisdiction since the Belgian court had been seized first and had confirmed its power to settle the dispute. Just like the Italian-Latvian case already discussed, this Swiss-Belgian case is a good example of the dual level and dimension of the conflict at stake. An international, binational, Swiss-Belgian conflict arose in the first place between two private entities, one Belgian and one Swiss. But as both applied to different national courts and both national courts claimed to have jurisdiction to rule on this interindividual conflict, this resulted in an interstate conflict between Belgium and Switzerland and between the claims they made for exercising their jurisdiction and resolving the interindividual dispute. It was precisely in order to resolve such an interstate dispute that Belgium applied to the International Court of Justice, although the application was later withdrawn. This case seems to suggest that there is nothing that stands in the way of the International Court of Justice being called upon, based on the particular ways in which it can be seized, to rule on an interstate disagreement over the interpretation and implementation of an international or binational convention designed to resolve a cross-border private dispute.89

C. Recognition, Refusal of Recognition and Possibilities for Overcoming the Adverse Effects of Such Refusal

22. We haven’t yet said anything about the possible content of the substantive custody decision. Without prejudice to what I will discuss in a moment in relation to the Brussels II-bis Regulation,90 none of the international or supranational instruments in force in this area compels the States which are bound by them to recognise or enforce, unconditionally and in all circumstances, the decision of another “co-affected” State that is also bound by them. Neither do those instruments force the States that they bind to abstain from making a decision that risks not being recognised in another State with which the individuals involved and typically the child also have significant connections. The list of the reasons which may justify denying recognition is still long: public policy, notably based on the child’s best interests as perceived by the State addressed, the right of the child to be heard as ensured and organised in the State addressed, the right to a fair trial as recognised in the State addressed etc.91 In other words, both “co-affected” Member States are still permitted to be in disagreement over public policy – so as to give rise to a conflict of public policies92 – over procedural demands and requirements, over the need to hear the child, and so on, and there are not yet any means to overcome this disagreement. Put yet another way, it is possible for the States bound by

89 For a summary of the case, see B. UBERTAZZI, Private international law before the International Court of Justice, Yearbook of Private International Law 2013/2014, p. 57 et seq., esp. p. 66.

90 Infra, no 23.

91 See, article 23 of the Hague Convention 1996 and article 23 of the Brussels II-bis Regulation.

92 I owe the expression conflit d’ordres publics to Ms Anne Reiser.
the Regulation not to be bound by a single judicial decision, with their legal orders being allowed to remain perfectly disconnected and uncoordinated.

In one of the cases that has inspired these reflections, the Spanish court, seized first, affirmed its jurisdiction based on the habitual residence of the child. But the child wasn’t heard during the Spanish proceedings. For at the time he should have been heard, he was actually in Germany following a move by his mother which the German court decided did not entail an obligation to return the child to Spain based on the Hague Convention 1980. The child’s right to be heard in the proceedings concerning him is constitutionally guaranteed in Germany and forms part of German public policy. As a result, the Spanish decision was denied recognition by the German court of first instance. And the German court of appeal was also inclined to resist recognition.93 But what would be the effect of such a denial? The German court is likely to have to hear the dispute again – it must in principle do so at the request of any of the individuals involved – and it is obviously free to decide it in a way which conflicts with the way its Spanish counterpart has decided it. If the Spanish public order (ordre public) and the Germany public order clash, there is no public order resulting from this clash, but a Hispano-German conflict of public orders, that is a legal disorder, which could lead to a private order flowing from self-justice and law-of-the-jungle conducts.

Let me insist on this point: As long as one of the two States that are affected by a parental dispute is permitted to make a decision on this dispute and, at the same time, the other State that is equally affected by the same dispute is permitted not to recognize this decision – and we leave matters there – the cross-border conflict between the parents threatens not to be solved by Law and the child will not benefit from a legal order but has to endure a legal disorder. And the basic, universal component of his or her interests goes by the window. For – let me repeat – the interests of a binational child require the two States involved to reach an agreement, to achieve harmony between them: either on the substantive solution to the parental conflict that affects them, either on a mechanism allowing to overcome the disagreement between them on what the substantive interests of that particular child require.

I will mention two ways to remedy this situation; the first, more radical method, aims to prevent it (1), the second aims to neutralise it after it has arisen (2).

23. (1) The first method is about making mandatory the mutual recognition and enforcement of child custody decisions, about preventing a State to resist recognition and enforcement of a child custody decision made by another State. As

93 Zarraga v Pelz (supra, note 10), point 32: “By judgment of 28 April 2010 the Amtsgericht Celle held that the judgment of the Juzgado de Primera Instancia e Instrucción No 5 de Bilbao was neither to be recognised nor enforced, on the ground that the Spanish court had not heard Andrea before handing down its judgment”. And the Oberlandesgericht Celle believed it had a duty to uphold the first instance decision, observing “that the Juzgado de Primera Instancia e Instrucción No 5 de Bilbao did not obtain Andrea’s current views and was therefore unable to take account of those views in its judgment of 16 December 2009 concerning, inter alia, rights of custody in respect of that child; and that the efforts made by the Spanish court to hear Andrea were inadequate given the importance attached to taking into account the child’s views in Article 24(1) of the Charter of Fundamental Rights”.
Conflicts in Respect of Parental Responsibility

a result, the recognition and exequatur proceedings would be made redundant. For what is the point of checking something that we are obliged to accept anyway?94 A decision made by the Spanish court would then not only bind this court, which is not allowed to change its mind,95 not only all other Spanish courts and the Spanish law-enforcing bodies, but also the German courts, which would be forced to give effect to the decision by abstaining from permitting re-litigation and “re-judging” the case, as well as German law-enforcing bodies which, just as their Spanish counterparts, would be compelled to enforce it even at the price of acting against their own views and even their own principles.

Should we fear such an evolution? Let us keep in mind that this is ultimately what happens in most domestic legal orders. Think about an inter-cantonal case involving a father from Zurich who is domiciled in Zurich and a mother from Geneva who is domiciled in Geneva. The court in Zurich affirms jurisdiction by virtue of the habitual residence of the child and awards custody to the father and visitation rights every other weekend to the mother. The child will therefore grow up primarily – and unless a change in circumstances occurs, which I will assume it will not – in Zurich. The Geneva court might inwardly disagree with the decision by the Zurich court and the reasons relied on by the Zurich court, and might even find such decision shocking,96 but it is nonetheless not permitted to resist it and refuse to lend support to its implementation, typically when the mother refuses to return the child to the custodial father after a visitation period spent in Geneva.

However, one may think that this analogy is of limited worth because two subdivisions of a sovereign State are more likely to share the same sets of values than two different States, even if they are both “members” of a supranational entity or “union”. This is a complex point and any generalisations would be dangerous. A softened version of the mandatory recognition principle may be envisaged though. It would be to make the obligation to recognise dependent on the State of origin having, at the request of one of the private persons involved, sought the opinion of the “co-affected” State or, at any rate, on the “co-affected” State having been heard, having had the opportunity to share its opinion with the State of origin on the best way to solve the parental dispute. In our example, the German court would be under an obligation to recognise the Spanish decision only to the extent that the German court, typically on application by the German mother, has been involved in an “exchange of views” with the Spanish court, and had the chance to deliver its opinion on the child’s best interest to the Spanish court. The decision would then almost be a Hispano-German decision, a “bi-state”, joint state decision, a binational or “bi-judicial decision”, even if one court, here the Spanish court, has the final word and has the power to cut the knot. Let us remind ourselves that such an exchange of views, such a judicial debate and the effort to reconcile initially diverging opinions that it prompts often occur within judicial bodies that are composed

94 Which, of course, would go further than Regulation (EU) No 1215/2012, called the “recast Brussels I Regulation”, which abolishes the exequatur (see article 39 in particular) without abolishing recognition (articles 45 et seq.).
95 See, supra, no 10.
96 It is not altogether rare for commentators to find the judgments which they report and on which they comment shocking, including those of supreme courts.
of several members, the principle of *collegiality* allowing each of them to form and enrich his reflections through the contact with others while ensuring that the resulting decision is not influenced by bias. And let us keep in mind that the “co-judge” whose opinion is dissenting, whose opinion is not reflected in the final decision, in the operational part of the final decision, has nonetheless served as judge in the case, he has been “co-judge” in the matter, he has jointly been responsible for it alongside the fellow judges whose opinion resulted in the final decision.

This suggestion might sound audacious. However, I do not believe it is unrealistic. As a matter of fact, current law provides some examples of joint, bi-national decisions similar to those envisaged here. I have already recalled the possibility for an interjudicial dialogue offered by the Brussels II-*bis* Regulation at the stage of determining jurisdiction.\(^7\) Let me now specify that this instrument goes further in the event of wrongful removal of a child. The State to which the child has been removed, and which might have refused the child’s return based on the Hague Convention 1980, has nonetheless to recognise and enforce the subsequent child custody decision emanating from the State of habitual residence of the child, including if such decision directs the return of the child to that State. However, before making a child custody decision that direct the child’s return, the court of State of the habitual residence must take into account the reasons that led the State of removal to refuse the child’s return in the first place.\(^8\) The recognition is here *mandatory*, even public policy does not stand in its way. And we might think that the justification for the State of removal being under an *obligation* to recognise the decision by the State of the habitual residence is that the former has had the right to be heard, to express its opinion to the latter, and that opinion had to be taken into account, just as a co-judge whose opinion remains ultimately dissenting has nonetheless the right (and in fact the duty) to share it with his fellow judges. An example offered by the Hague Convention 1996 concerns access rights. The court of the residence of the parent seeking access rights has the authority to “make a finding on the suitability of that parent to exercise access and on the conditions under which access is to be exercised”. Even though it has the final word, the court of the child’s habitual residence “shall admit and consider such […] finding before reaching its decision”.\(^9\) This is also, in a way, a “bi-state” decisional process because the courts of both States are associated with and jointly responsible for it even if they play different roles.

24. (2) The second method is about allowing, on the one hand, the State addressed to object to recognition, as the Brussels II-*bis* Regulation and the Hague Convention 1996 actually do\(^10\), while however, on the other hand, designing and putting in place a system to resolve the international conflict of decisions that such a refusal may trigger, which is what these two instruments fail to do. In particular, a third, higher court should be given the task to settle the conflict between national decisions by replacing them through a supranational decision whose contents may be the same as one of those replaced or different from both of them or even refer

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\(^7\) *Supra*, no 19.

\(^8\) See, paras 7 and 8 respectively of the Brussels II-*bis* Regulation.


\(^10\) As indicated *supra*, no 22.
the case back to one of the national courts for a fresh adjudication. In the European Union, this might be a European court, including the General Court of the European Union or the European Court of Justice. As for the States party to the Hague Convention 1996, this might be a court sitting in The Hague under the auspices of the Hague Conference. Because such a supranational decision would bind both States, it would be capable of bringing harmony between them and their legal orders and consequently, ensure peace, order and Rule of Law for the benefit of the individuals involved, parents and children, whose lives span across both country. A conflict of decisions being likely to arise as a result of the non-recognition in one State of the decision emanating from another State, such non-recognition may already open recourse to a mechanism aimed at resolving the conflict between the “positive” decision of one State and the “negative” decision of the other, negative because it refuses to recognise the first.

Going back to our case study, Germany could still refuse to recognise the Spanish decision based on one of the grounds set out in the Brussels II-bis Regulation. But this text would be completed by allowing recourse to a higher, European court, perhaps after an interstate mediation procedure, for example, before the Commission, similar to what is provided in the case of an action for breach of European law which is brought by one Member State against another. As for its content, the decision by the European court may reproduce the solution embraced by the Spanish judge and so, award custody to the father and visitation rights to the mother, in which case Germany would have to abide by, not the Spanish decision as such, but the European decision that substantially upholds it. Or it might award custody to the mother and visitation rights to the father, in which case the Spanish decision that was not recognised by Germany would also cease being enforceable in Spain. Or it might adopt a third solution awarding custody to the father or the mother while adjusting the visitation rights and other details of the parental responsibility regime in favour of the other parent. Or finally, and particularly when the German court only refuses to recognise the Spanish decision (negative decision) – for example due to the child not being heard – the court might annul the vitiated Spanish decision and refer the case back to the Spanish court so it can adjudicate anew after hearing the child.

The difficulties that will have to be overcome to put such a system into place should not be exaggerated. And mechanisms in place within national legal orders to settle domestic conflicts of decisions may be looked upon as a useful source of inspiration.

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101 Supra (note 84).
102 Supra, no 16.
103 See, supra, no 21.
104 Cf. for example, article 618 of the French Civil Procedure Code: “Lorsque la contrariété des décisions est constatée, la Cour de cassation annule une des décisions ou s’il y a lieu les deux”.

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IV. Conclusion

25. I must conclude. It is safe to assume that, within the European Union, the developments that have been outlined above are prompted by the task the European Union has been entrusted with to build an “area of freedom, security and justice.” As a matter of fact, if the interstate disagreement that underlies a conflict of decisions on how best to solve a conflict between private persons is not prevented or at least resolved, it clearly impairs justice, those individuals being in fact denied justice. This also threatens their freedom because the mere prospect of such an interstate disagreement may ultimately encourage them to “de-internationalise” their lives and activities, to play “domestic”, the cross-border component of their proposed activities and intercourse being ultimately responsible for the legal mess, the legal no man’s land, in which they run the risk of being mired. We might surely think that the European Union already is under an obligation vis-à-vis its citizens and residents to prevent conflicts of legal systems among the Member States and to perfect the work that it has courageously undertaken to avert and settle these conflicts.

As for the Member States of the Council of Europe, the European Court of Human Rights has suggested, in relation to child-related disputes, that conflicts of legal orders may be contrary to human rights, and this is so because they defeat the very essence of law and order. It is to be anticipated that the judges in Strasbourg will not wait long to confirm this unambiguously and that this will even one day be regarded as a self-evident truth.

105 Title V of the Treaty on the Functioning of the European Union opens with article 67 whose first subsection goes as follows, “The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States”.

106 In the Greek-Polish case Matrakas and others v Poland and Greece, decided on 7 November 2013, two children of a Polish mother and a Greek father, together with their mother, requested the European Court of Human Rights to uphold complaints against both Poland and Greece on the ground that Poland made a decision that Greece had failed to recognise due to Greek public policy. The Court essentially held that a disagreement of this type between two State communities over the rights and obligations of natural persons whose lives span across them both leads to “situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention” (point 144).