Article 15 Brussels II-bis

Two Views from Different Sides of the Channel

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Abstract

Article 15 Brussels II-bis provides for the transfer of jurisdiction from one Member State to another. This contribution examines the conditions and practice surrounding the application of Article 15 Brussels II-bis from two jurisdictions, namely the Netherlands, and England and Wales. From this comparison it is clear that there are evident divergent viewpoints as to the approach to be taken with Article 15 Brussels II-bis. This article is, therefore, aimed at bringing those differences in approach to the forefront so as to assist the European legislature in the ongoing evaluation of the Brussels II-bis Regulation.

Keywords: international jurisdiction, transfer of proceedings, international parental responsibility.

A Introduction

The Brussels II-bis Regulation and the Hague Child Protection Convention 1996 provide *inter alia* for jurisdictional rules in the field of parental responsibility. One of the novel aspects included in both of these international instruments is the possibility for the transfer of jurisdiction. Article 15 Brussels II-bis Regulation and Articles 8 and 9 Hague Child Protection Convention 1996 (hereinafter HCPC 1996) provide for such a transfer of jurisdiction between states. Under which conditions such a transfer is possible and how it should be realised within the context of Article 15 Brussels II-bis will form the basis of this article.

After a brief background to Article 15 (§2), attention will be paid to the concurrence issues that have arisen with respect to the application of Article 15 (§3). Thereafter a division is drawn between the outgoing (§4) and incoming (§5) cases. Each section will deal with a variety of questions including how the transfer can be initiated, who may initiate such a transfer and what factors will be taken into account when dealing with the transfer. The article will conclude with a few brief remarks providing possible scope for reform, especially in light of the upcoming evaluation of the Brussels II-bis Regulation (§6).

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B Background

Although Article 15 Brussels II-bis was seen as a rather innovative provision within the European regulatory framework as it did not appear in the Regulation's predecessors (Brussels I and Brussels II), the provision was actually borrowed from the equivalent provisions in the HCPC 1996. In essence, these provisions allow for proceedings to be transferred upon the establishment of one or more factors including the best interests of the child analysis. The provision permits for jurisdiction to be transferred from a Member State that has jurisdiction in the main proceedings to another Member State that has a close connection with the child in question. The jurisdictional rules in Brussels II-bis are built on the fundamental idea that the appropriate forum to assess a child's best interests is in the state of the child's habitual residence. However by ensuring that proceedings can only be transferred to a state that has a close connection with the child in question (*e.g.* it is the country of the child's nationality or former habitual residence) and a state which is better placed to hear the case, this principle is maintained.[1]

Article 15 Brussels II-bis is a provision of increasing prominence, in respect of which there are now a number of reported authorities on its use to transfer proceedings from the UK and the Netherlands to other Member States. However, as will be seen below, Article 8 HCPC 1996, which allows for a request to be made of a better placed court that they assume jurisdiction in relation to a child, may be of far more limited application than Article 15 Brussels II-bis insofar as Member States of the European Union are concerned, as a result of the interplay between the Regulation and the Convention.

C Introductory Matters

I Concurrence between Brussels II-bis and HCPC 1996

Before delving into the substantive content of this provision, it is first worth mentioning the problematic issues that surround the concurrence provisions of these two instruments. The problem centres on the interpretation of Article 61(a) Brussels II-bis. This provision provides for a solution to the issue of concurrence between the Brussels II-bis Regulation, on the one hand, and the HCPC 1996, on the other. Put succinctly, this article means that if the child has his or her habitual residence in an EU Member State, then the Brussels II-bis Regulation claims precedence over and above the HCPC 1996, which in and of itself permits such a solution.[2] As a result the following examples will provide for suitable practical guidance.

1 *See* Recital 12 Brussels II-bis. Furthermore, Recital 13 to Brussels II-bis provides that there cannot be an onward transfer of proceedings following an effective Article 15 transfer to a third court, which may be seen as a further way of ensuring that the child remains proximate to the court that is determining his or her future.

2 Article 52, HCPC 1996.

Example 1

Anna (8 years old) has her habitual residence in Belgium, where proceedings dealing with contact with her father have commenced. Since the commencement of proceedings, Anna has since changed her habitual residence and is now living in the Netherlands. On the basis of Article 61(a) Brussels II-bis, the Regulation would claim precedence because the child has her habitual residence in an EU Member State.

Example 2

Bart (4 years old) has his habitual residence in Switzerland, where custody proceedings have already commenced. It has come to the attention of the court that the German courts would in this case be better suited to hear the case. As the child has its habitual residence outside the EU, the Brussels II-bis Regulation would not apply in Germany. The German courts could therefore accept jurisdiction based on the provisions laid down in Article 8 and 9 HCPC 1996.

Neither one of these examples causes difficulty with respect to the issue of concurrence. This is slightly different, however, in the following situation.

Example 3

Caroline (6 years old) has her habitual residence in the Netherlands. The Dutch courts are seized of a petition claiming that the mother should be vested with sole parental authority. However, since the commencement of proceedings, Caroline has since left the country (with permission of all concerned). The child has now been living for 2 years in Albania. The court wishes to transfer the case to the courts of Albania. Is this possible?

As Albania has ratified the HCPC 1996, transfer would be possible according to this Convention. Albania is, however, not a member of the EU. Therefore, solving the issue of concurrence is essential in this matter. A strict reading of Article 61(a) Brussels II-bis together with a thorough private international law analysis would require that Article 61(a) Brussels II-bis would first be applied prior to any analysis of the jurisdictional rules themselves. After all, concurrence is an issue that precedes the application of the instrument itself. If one applies Article 61(a) Brussels II-bis first, and should determine that because the child has her habitual

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residence in a Member State, the Brussels II-bis would be exclusively applicable. This would result in transfer to Albania being impossible, because Article 15 Brussels II-bis only permits transfer to another EU Member State.

If, however, one applies a purposeful methodology and instead argues that each jurisdictional provision of the Brussels II-bis Regulation has its own jurisdictional scope, one could argue that Article 15 could never apply in this situation because the jurisdictional provision cannot be applied as the case cannot be transferred to another Member State. As a result, one would fall outside the scope of the Brussels II-bis Regulation. Accordingly, reference could then be made to the HCPC 1996.

It is proffered here that there is only one real possible solution in this particular case that makes sense taking into account the drafting of the Regulation and the interpretation of other EU private international law instruments. If the child has his or her habitual residence in a Member State, then by virtue of Article 8 Brussels II-bis, the facts satisfy the geographical scope of the Regulation. Accordingly, the Regulation is applicable and Article 61(a) forces application of the Regulation over and above the HCPC 1996. Especially given the idea that if a Member State has jurisdiction on the grounds of an EU Regulation, it has the obligation to exercise that jurisdiction,[3] it would seem to be incompatible to provide for the transfer of jurisdiction to a non-Member State in such circumstances. That being said, one cannot rule out that it may well be beneficial to allow for such a possibility. If the EU legislature wishes to ensure that such transfers are indeed possible, then the geographical scope of Article 15 Brussels II-bis must be made clearer.

II Overview of the Provision

Article 15 Brussels II-bis provides a mechanism for the transfer of proceedings concerning a child from a Member State which 'has jurisdiction as to the substance of the matter' (hereafter 'the transferring State') to another Member State with which a child has 'particular connection' ('the receiving State').

Although common law lawyers are not unfamiliar with the principles of *forum non conveniens*, the idea of transferring proceedings is relatively uncommon in civil law jurisdictions. Due to the relatively novel nature of this possibility, civil law jurisdictions wished to ensure that a number of safeguards were in place before jurisdiction could indeed be transferred. Fundamentally these safeguards serve to bring the focus onto an examination of whether it is in the child's interests for the transfer to occur, firstly through requiring the court to consider whether the courts of the other Member State are 'better placed' to hear the case or a part of the case and secondly requiring that they undertake an evaluation of whether it would be in the best interests of the child for that Member State to hear the proceedings. The receiving court is also required to consider whether to accept jurisdiction based on their own analysis of whether it is in the best interests of the child to do so. This double check serves to allay the fears of the civil law jurisdictions of misuse of the provisions, whilst at the same time providing

3 *See*, for example, ECJ *Owusu*, 1 March 2005, ECLI:EU:C:2005:120, within the context of the Brussels I Regulation.

for a flexible approach to the rigid jurisdictional rules contained elsewhere in the Brussels II-bis Regulation.

Article 15 also has a safeguard that seeks to avoid the delay that might be associated with a request for transfer, in the form of Article 15(5) Brussels II-bis. Article 15(5) provides that if the courts of the other Member State to which proceedings may be transferred does not accept jurisdiction within six weeks of their seizure in accordance with Article 15 (1) (a) or (b), the court first seized will continue to exercise jurisdiction. By imposing specific time limit within which period jurisdiction has to be accepted, delay, which is considered inimical to a child's welfare in most jurisdictions, is avoided in the context of a transfer of proceedings. Furthermore, where a party has indicated that they wish to approach the court in question to request that they assume jurisdiction in relation to the child Article 15 (4) provides that a time limit must be set within which the court must be seized, and failure to adhere to that time limit will defeat the Article 15 transfer.

As the Brussels II-bis regulation ensures for tests to be levied by both the sending and the receiving court, it is important to draw a distinction between outgoing cases (§4) and incoming cases (§5).

D Outgoing Transfers

I When Should the Court Consider the Transfer of Proceedings under Article 15?

The first question that arises within the context of Article 15 is at what stage during the proceedings is a court permitted to hear the issue of the transfer of proceedings. The difference between the detail to which this issue has been dealt with in the United Kingdom and the Netherlands is very apparent. In England and Wales, a request for the transfer of proceedings from the courts of England and Wales to another Member State can be considered at any stage of the proceedings.[4] Nevertheless, guidelines do indicate, particularly in a public law context, that the question of an Article 15 transfer should be raised at the earliest possible opportunity.[5] Although this issue has not been dealt with explicitly in the case law in the Netherlands, it is expected that a similar analysis would also be applied since delay is also considered to be prejudicial to the welfare of any child that is the subject of court proceedings.

In the English context, the case law has gone even so far as to argue that consideration must be given to the issue of transfer of proceedings in *every* public law case with a European dimension.[6] On this point it is expected, however, that the fundamental difference between the civil and common law approaches as to

4 *Bush v. Bush* [2008] 2 FLR 1437.

5 S1(2) Children Act 1989. *See* Practice Direction 12 and 11.1(2) of Practice Direction 12B respectively.

6 Re E (A Child) [2014] EWHC 6 (Fam) per Munby P, para. 31, *Re J (A Child: Brussels II Revised: Article 15: Practice and Procedure)* [2014] EWHC 41 (Fam) Per Pauffley, J para. 1. In *Nottingham City Council v. LM* [2014] EWCA Civ 152 Munby P said (prior to the introduction of the revised PLO) that "It is...vital...that the Article 15 issue is considered at the earliest opportunity, that is... when the proceedings are issued and at the Case Management Hearing".

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forum non conveniens may raise its head. In the scarce literature on this point in the Netherlands, it would appear that attention is drawn to the 'exceptional character' of the procedure, noting the words 'by way of exception' at the opening of the provision.[7] From this perspective it would seem rather strange to oblige the court to consider should transfer proceedings as a matter of course in every procedure.

Article 55 of Brussels II-bis specifically provides that Central Authorities shall "facilitate communications between courts, in particular for the application of ... Article 15." In order for a court to consider the question of whether another Member State is better placed to hear the case and whether it is in the child's best interests for the case to be heard in that particular state, the transferring court will need to have information about where proceedings would take place if transferred and the practicalities of those proceedings. Proceedings cannot be transferred into a vacuum. If they are to be transferred, a line of communication has to be set up between the transferring and receiving courts so that there is clarity about what the receiving court is being asked to do and the timings for the acceptance of jurisdiction. It is also necessary for the receiving court to know what the case is about so that it can arrive at its own independent assessment of whether it is in the child's best interests to accept jurisdiction for the purposes of Article 15 (5) Brussels II-bis.[8]

II How Can the Application for Transfer Be Made?

Once it has been established that the court has addressed the issue of the transfer of proceedings at the correct and most opportune moment during the proceedings, the next question deals with how such an application may be made. Who may request for such a transfer? According to Article 15(2) Brussels II-bis, an application may be made:

i on an application by a party;
ii of the court's own motion; or
iii following a request made by the court of another Member State with which the child has a particular connection.

A court can only seek to transfer proceedings to another Member State of its own motion or following a request by the other Member State if at least one of the parties to the proceedings agrees to the transfer.[9]

In England and Wales, these rules have been further elaborated upon, and thus provide for a highly detailed procedure that needs to be followed. Where a

7 D. van Iterson, *Ouderlijke verantwoordelijkheid en kinderbescherming*, Maklu, Apeldoorn 2012, p. 158. One German author has even suggested that a distinction should be drawn between the degrees of exception, noting that a court that does not have jurisdiction should refer to these provisions in an even more exceptional manner: J. Pirrung, J. von Staudingers Kommentar zum Bürgelichen Gesetzbuch mit Einführungsgetsetz und Nebengesetzen, EGBGB/IPR Vorbem. C-H zu Art.19 EGBGB, Berlin 2009, C97/G70.

8 The "President's Guidance of 10 November 2014: The International Child Abduction and Contact Unit (ICACU)" provides practical guidance about approaching the Central Authority and the information that should accompany any request for information pursuant to Article 55.

9 Article 15(2).

party to proceedings seeks for the court to transfer proceedings to another Member State, they should usually make a formal application using the procedure laid down in Part 18 of the Family Procedure Rules 2010.[10] They must specify in their application whether they wish for domestic proceedings to be stayed while they introduce a request in the other Member State for assumption of jurisdiction or whether they wish for the court to make the request directly to the authorities of the other Member State.[11] The court can dispense with the requirement that an application form be filed and can therefore deem an application to have been made.[12]

The family procedural rules also provide timeframes for the hearing of the application, as well as the forms to be used, although the court has a wide discretion in the exercise of its case management powers to, for example, expedite the hearing of the application.[13]

The court may be faced with an unusual situation where it does not receive an application from a party that proceedings be transferred but instead receives an application from another Member State for the transfer of its proceedings pursuant to Article 15(2)(c) Brussels II-bis. Where this occurs, the court will be faced with the prospect of hearing an application made on behalf of a Member State rather than a party to proceedings. Where such an application is received, the court must serve the application on the other parties and list a hearing, giving the parties no less than five days notice of the hearing. The domestic Central Authority also has to be informed by the court of the existence of the application.[14]

Similarly, if the court in England and Wales proposes to exercise powers of its own motion under Article 15(2)(b) to transfer proceedings to another Member State, again the court officer will give the parties not less than five days notice of the hearing at which this issue will be considered.[15]

The question of whether proceedings should be transferred to another Member State will usually be considered at a hearing at which all parties are present, and the court may give directions for the filing of written argument or other material to assist it with reaching its decision.[16] The court may, if the parties agree, deal with the issue of transfer without a hearing, and it would be usual for written submissions to be given as to why a transfer is or is not in the child's best interests.[17]

In the Netherlands, on the other hand, no further procedure has been developed dealing with the procedure to be followed in such cases. Instead each individual judge or court is expected to develop their own method for dealing with such cases, with the aid and assistance of the Dutch liaison judge in The Hague. In

10 Family Procedural Rules (hereinafter: FPR) 2010 12.62 (2).
11 FPR 12.62 (1).
12 FPR 2010 18.4 (b).
13 FPR 12.62 (3). Not less than 5 days if the application is also made under Article 11 Brussels II Revised.
14 FPR 2010 12.63.
15 FPR 2010 12.64.
16 FPR 2010 12.61 (1).
17 FPR 2010 12.61 (2).

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one instance, a woman petitioned the Dutch court in The Hague requesting that the case be transferred from the *Courd'Appel* in Limogne, France to the Netherlands. The Dutch court determined that this procedure had been commenced frivolously and denied her claim, as well as forcing her to pay for all the costs of the case.[18]

III When Will the Court with Jurisdiction Approve the Transfer of Proceedings to Another Member State?

Once these initial questions have been answered, it is subsequently important to ascertain whether a transfer will be permitted in the given circumstances. There are three questions that need to be considered in the context of a potential transfer of proceedings.[19]

1 Does the Child Have a Particular Connection with the Receiving State?

This is a question of fact. The question that the court has to determine at the first stage of the process is whether the Member State in question falls within one of the categories at Article 15(3)(a)-(e) vis-à-vis the child. Those categories are:

a That the Member State has become the habitual residence of the child after the court of the transferring State was seized, or
b It is the former habitual residence of the child, or
c It is the place of the child's nationality, or
d It is the habitual residence of a holder of parental responsibility, or
e It is the place where property of the child is located and the case concerns measures for the protection of the child relating to the administration, conservation, or disposal of this property.

The case law in the Netherlands has up until now been mainly focussed on this stage of the procedure. Published decisions tend to refer to the lack of one of the abovementioned factors.[20]

2 Will the Court of the Receiving State 'Be Better Placed to Hear the Case'?

The line of authorities from England and Wales which have examined this question, which arises from Article 15 (1) Brussels II-bis, have made clear that the judicial task is to undertake an evaluative exercise "in the light of all the circumstances of the particular case".[21] Value judgments about which State has a better judicial or child protection system are clearly not appropriate factors to consider in the evaluative exercise.[22] The judicial and social care arrangements in other Member States are to be treated by the courts in England and Wales as being equally competent, and principles of comity and co-operation between Member

18 Court of Appeal, The Hague, 22 February 2006, ECLI:NL:GHSGR:2006:AV2662.
19 *See AB v. JLB* (Brussels II Revised: Article 15) [2009] 1 FLR 517.
20 Court of Appeal's-Hertogenbosch 19 December 2013, ECLI:NL:GHSHE:2013:6103, *JPF* 2015/12, annotated I. Curry-Sumner.
21 *AB v. JLB*, para. 28.
22 *Re M* [2014] EWCA Civ 152 per Ryder LJ, para. 19.

States are the starting point for the enquiry[23] In an early case on the application of this provision, the District Court Maastricht argued that the Dutch courts would be better placed seeing as the child still lived in the Netherlands.[24]

3 Is It in the Best Interests of the Child for Proceedings to Be Transferred?

The courts of England and Wales have made clear that the determination of whether a child's best interests are met by transferring the proceedings to another Member State is very distinct from the question about the child's best interests generally in the context of the substantive proceedings. It is important not to conflate the two assessments of best interests, not least because there is a danger of straying into an evaluation of the comparative merits of the family justice systems in the two states. The best interests inquiry in the context of a potential Article 15 transfer is limited to a question of whether a change of forum for the dispute would be in the child's best interests.[25] Recent research in the Netherlands has indicated that the judges are very reticent to publish the reasons for determining why the decision was reached in the best interests of the child. Instead it is simply stated that it is in the best interests of the child.[26] One case did, however, indicate that financial reasons are not relevant.[27] In this case, the father had indicated that a transfer of the case would lead to reduced legal costs; however, the court stated that this was not one of the factors that could be taken into account in this analysis.

4 Discretion

Article 15 (1) Brussels II-bis states that the court with substantive jurisdiction *may* request that another Member State assume jurisdiction where those circumstances set out above are met. It is not mandatory for a court to request a transfer of proceedings to another Member State notwithstanding that all of the criteria within Article 15 are met. That said, the approach within England and Wales has been in recent years has been, in contrast to the approach in the Netherlands, to actively consider the possibility of transfer and pursue it as an option where it is viable, and it is difficult to envisage a factual scenario where all of the criteria in Article 15 are met but nonetheless the court exercises its discretion not to transfer the proceedings. However, the factors that might be considered in the exercise of discretion in this context have not yet been the subject of a reported authority in England and Wales.

IV Putting the Transfer of Proceedings into Effect

If the court with substantive jurisdiction considers that the criteria in Article 15 are met and that a request should be made to the Member State with which the

23 *Re T (Brussels II Revised, Art 15)* [2014] 1 FLR 749, para. 24 per Thorpe LJ.

24 District Court Maastricht, 3 December 2009, ECLI:NL:RBMAA:2009:BL0241, *JPF* 2010/158, annotated I. Curry-Sumner.

25 *Re I (A Child) (Contact Application: Jurisdiction)* [2010] 1 AC 319, para. 36, confirmed to be the correct approach in *Re M (A Child) ibid.* and *Re T (A Child) (ibid.)*.

26 I. Curry-Sumner, 'Internationale bevoegdheid in gezagskwesties', *REP*, Vol. 4, 2014, p. 358.

27 District Court, The Hague, 20 April 2011, ECLI:NL:RBSGR:2011:BQ3004, *JPF* 2012/170.

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child has a 'particular connection' that they assume jurisdiction in relation to the child, the Member State in question will need to be formally asked whether they are prepared to accept the request and they will then need to consider whether it is in the child's best interests that they assume jurisdiction.

As set out above, considering the impact of delay on the welfare of children more generally, the Regulation has incorporated within it timescales within which the transfer must be put into effect.

There are two methods for the request to be conveyed to the receiving court. Firstly, one or more of the parties may introduce a request before the court of the receiving Member State that it assume jurisdiction. Where this route is taken, which is embodied in Article 15(1)(b), the court of the transferring Member State will stay its proceedings, or a specific part of its proceedings, while the request is introduced. A time limit must be set within which the court of the receiving Member State will be seized by the parties.[28] The Brussels II Revised Practice Guide highlights that the time limit should be sufficiently short to ensure that the transfer "does not result in unnecessary delays to the detriment of the child and the parties".[29]

Article 15 (4) provides that if the parties do not adhere to the time limit set by the court and fail to seize the court within that specified time limit, jurisdiction will continue to be exercised by the courts of the transferring State in accordance with Articles 8-14 of the Regulation.[30] However, if the court is seized within the time limit prescribed, the court of the receiving State must formally 'accept jurisdiction' within six weeks of seizing. If it does not do so, again jurisdiction will continue to be exercised by the court of the transferring State.[31]

As an alternative method, the court of the transferring State may request that the court of the receiving State assume jurisdiction in relation to the proceedings. Again, Article 15 (5) applies and the courts of the receiving State must accept jurisdiction within six weeks of seizing, otherwise the case will continue before the courts of the transferring State. There would appear to be a distinction between seizing and the formal acceptance of jurisdiction within Article 15 and both stages need to be met in order for there to be an effective transfer of proceedings. When the receiving Member State is considering whether it will accept jurisdiction, it must consider whether to do so would be in the best interests of the child to accept jurisdiction, thus completing the second best interests evaluation in Article 15 procedure.[32]

The Family Procedure Rules 2010 provide that, pending the acceptance of jurisdiction in the receiving State, any directions in force immediately prior to

28 Article 15(4).

29 The Practice Guide for the Operation of the Brussels II-bis Regulation, p. 35.

30 Article 15(4).

31 Court of Appeal, The Hague, 15 May 2013, ECLI:NL:GHDHA:2013:CA2202, *JPF* 2013/117, annotated I. Curry-Sumner.

32 Article 15(5).

transfer will continue to apply until jurisdiction is accepted.[33] This means that there continues to be an effective legal framework even whilst the practicalities of transfer are being put into effect. Domestic proceedings can be stayed pending the assumption of jurisdiction in the receiving Member State. The stay can only be removed in accordance with Article 15 (*i.e.*, if the court of the receiving State does not accept jurisdiction within the required time limit, if the said court is not seized within the required time limit, or if the court declines to assume jurisdiction).[34]

On a practical level, there are benefits to the request being made by one court to another. This avoids the need for the parties to incur legal fees, potentially may avoid delay, and avoids misunderstandings or miscommunications about the nature of the proceedings by the parties or their representatives, which could lead to a skewed analysis by the receiving court as to whether it is in the child's best interests that they assume jurisdiction. In fact, in the Netherlands this has even been placed in legislative form by way of Article 24(6) Implementation (International Child Protection) Act. This provision notes the preference for the courts to have direct contact, rather than the parties initiating the claim themselves. Nevertheless, it would appear that this preference is not always followed by the courts.[35]

Member States have different approaches as to the transmission of requests under Article 15 when they originate from the court under Article 15 (5) rather than the parties under Article 15 (4). In England and Wales, the Family Procedure Rules 2010 envisage that the transfer request will be routed through the Central Authority and provide that the court officer will serve the request on the parties, the domestic Central Authority, and the Central Authority of the receiving Member State. In practice, judicial liaison is often used to channel a request for the assumption of jurisdiction, although parties are encouraged to use the Article 55 process to ascertain how the receiving State would wish for the request to be transmitted in accordance with their national procedures. The Netherlands prefers the channelling of the cases through the expertise centre in The Hague.

E Incoming Transfers

I Request Made in Receiving State Directly

In the first scenario, an application may be made to the competent authority for a request to be made of another Member State that they transfer their proceedings to the receiving state under Article 15(2)(c) Brussels II-bis. In this situation, the child must have a 'particular connection' to the receiving state in accordance with

33 FPR 2010 12.61 (3), subject to any variation or revocation of the directions. The FPR provides that the court or court officer will take a note of the giving, variation or revocation of directions and serve a copy of any directions order on every party (FPR 12.61 (4) and requires that a register or all applications and requests for transfer or jurisdiction be kept at the Principal Registry (FPR 12.61 (5)).

34 Family Law Act 1986 s. 5 (2) (c) & s. 3A.

35 *Ibid.*

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Article 15(3) of the Regulation, but the court of another Member State will have and be exercising substantive jurisdiction in relation to the child. In England and Wales, the application can be made by "any person with sufficient interest in the welfare of the child and who would be entitled to make a proposed application in relation to that child, or who intends to seek the permission of the court to make such application if the transfer is agreed".[36] Effectively this is an application to the court, for the court to then in turn make an application to the Member State with substantive jurisdiction, that they transfer their proceedings under Article 15.

Applications of this nature are relatively uncommon in England and Wales. It is open to a party that wishes to achieve an incoming transfer of proceedings to make an application in the Member State that has substantive jurisdiction that they transfer their proceedings to the receiving state in accordance with Article 15(1). In the Netherlands, such a request has been made to the Court of Appeal in The Hague, but was denied.[37] In *AB v. JLB*,[38] the English court was faced with an application under Article 15 (2) (c) by the Mother who wished for the English court to request that the District Court in The Hague transfer its proceedings to England and Wales. She had however already made an application under Article 15 (1) in the Netherlands that the court in The Hague transfer its proceedings to England and Wales, and that application was refused. In dismissing the Mother's application, the court said that such an application should only be contemplated where there has been a change of circumstances since the court hearing the main proceedings considered the Article 15 (1) application "such as so entirely to change the aspect of the case as to make it highly probable that the court seised of the case will, despite having already refused an application under Article 15, now come to a different decision and relinquish the case to the court which has made the request under Article 15(2)(c)".[39]

It may be that if the application under Article 15 (2) (c) is made otherwise than against the context of an unsuccessful Article 15 (1) application in the court with substantive jurisdiction it is more likely to find favour. If the court agrees to make the request to the Member State with substantive jurisdiction, and that Member State agrees to transfer the proceedings, the Family Procedure Rules 2010 provide that the court officer will serve on the applicant a notice that jurisdiction has been accepted by the Courts of England and Wales.[40] The court will consider the specific timing and conditions for the transfer together with receiving court or other competent authority.[41] Although an application under Article 15 (2) (c) needs to be made to the High Court, once jurisdiction has been accepted, proceedings do not need to continue in the High Court.[42]

36 FPR 2010 12.3.
37 Court of Appeal, The Hague, 22 February 2006, ECLI:NL:GHSGR:2006:AV2662.
38 *AB v. JLB* [2008] EWHC 2965 (Fam).
39 *Ibid.*, para. 44.
40 FPR 12.65 (4).
41 FPR 12.65 (4).
42 FPR 12.65 (6).

II Request Made Abroad

The receiving court may receive a request from another Member State under Article 15 that it accept jurisdiction in relation to a child. Where the court of another Member State which has substantive jurisdiction has determined that the receiving court is better placed to deal with the case and it would be in the child's best interests if proceedings were transferred, that court must transmit a request (whether by inviting the parties to the proceedings to introduce a request to the relevant court in the UK/the Netherlands, or itself through the Central Authority or by judicial liaison) to the court in the UK/the Netherlands asking that it accept jurisdiction in relation to the child.

According to English law, set rules have been laid down as to the time frame within which such an application be dealt with, namely not less than five days before the hearing of the application.[43] Where this request is received by any court other than the High Court, the request must be referred to a judge of the High Court for a decision regarding acceptance of jurisdiction to be made.[44] Once again, such detailed legislation is absent in the Netherlands. However, the Netherlands has a number of published decisions in which jurisdiction pursuant to these provisions has been accepted.[45]

As is the case with an incoming transfer under Article 15 (2) (c), if jurisdiction is accepted, the case has to be allocated as if the application had been made in England and Wales and a directions hearing must be fixed upon allocation.[46] The proceedings need not continue in the High Court. The court officer will serve notice of the directions hearing on all parties to the proceedings in the other Member State no later than five days before the date of that hearing.[47] The court officer must also serve an order relating to transfer of jurisdiction on all parties, the Central Authority of the other Member State, and the domestic central authority.[48]

F Conclusion

Article 15 Brussels II-bis provides for a useful safety valve for the rigid application of the main jurisdictional rule laid down in Article 8 Brussels II-bis. Due to the application of the principle of *perpetuatiofori*, the main jurisdictional rule can lead to jurisdiction being retained in rather peculiar circumstances. Article 15 goes some way in correcting that anomaly. Nonetheless, this fairly unique provision would appear to be rather underdeveloped in a civil law jurisdiction such as the Netherlands. When comparing the implementation legislation between the Neth-

43 FPR 12.63.

44 FPR 2919 12.66 (1).

45 For example, District Court, The Hague, 1 February 2013, ECLI:NL:RBSHA:2013:BZ2426 (Belgium to the Netherlands), Court of Appeal 's-Hertogenbosch, 10 April 2012, ECLI:NL:GHSHE:2012:BW1503 (Belgium to the Netherlands) and District Court, The Hague, 13 March 2008, ECLI:NL:RBSGR:2008:BC6817 (Italy to the Netherlands).

46 FPR 2010 R 12.66 (2) & (3).

47 FPR 2010 R 12.66(4).

48 FPR 12.67.

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erlands and England and Wales, it is abundantly clear that England and Wales (as a common law) has provided for highly detailed practical provisions detailing the exact procedure to be followed in both incoming and outgoing cases. Whether this is related to the common law with *forum non conveniens* principles can only be speculated upon.

At any rate, it is clear on the basis of this short expose that countries such as the Netherlands have not clearly developed their own internal procedure for dealing with such cases. If the EU wishes such provisions to become part and parcel of the overall package of European private international law provisions in the field of family law, then linguistic and content-based revision of the provisions is advisable.