

**Training of lawyers on EU instruments  
on Insolvency Law and Family Law  
(CiviLAW)**

**Topic: Matters of Matrimonial Property Regimes**

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Regulations (EU) Nr. 1103/2016 and 1104/2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and in matters of the property consequences of registered partnerships.

- Fundamental legal basis:
- Article 81(2) of the Treaty on the Functioning of the European Union (TFEU).
- European Council meeting in Tampere on 15 and 16 October 1999 (mutual recognition of judgments and other decisions of judicial authorities).
- The Hague Programme of 2004 (strengthening freedom, security and justice in the European Union).
- The Green Paper of 2006 on the conflict of laws in matters concerning matrimonial property regimes.
- The Stockholm Programme of 2009 (covering fields as matrimonial property rights, while taking into consideration Member States public policy).
- Proposal of 2011 for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and a proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships.
- Decision (EU) 2016/954 authorising enhanced cooperation between Belgium, Bulgaria, the Czech Republic, Germany, Greece, Spain, France, Croatia Italy, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Finland and Sweden in the area of the property regimes of international couples and, specifically, of the jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships.

Regulations (EU) Nr. 1103/2016 and 1104/2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and in matters of the property consequences of registered partnerships.

- **Scope of the Regulations:** The scope of these Regulations should include all civil-law aspects of matrimonial property regimes, both the daily management of matrimonial property and the liquidation of the regime, in particular as a result of the couple's separation or the death of one of the spouses and all civil-law aspects of the property consequences of registered partnerships, both the daily management of the partner's property and its liquidation, in particular as a result of the couple's separation or the death of one of the partners.
- **Excluded from the Scope of the Regulations:** the legal capacity of spouses, the existence, validity or recognition of a marriage or a registered partnership, the maintenance obligations, the succession to the estate of a deceased spouse, social security, the entitlement to transfer or adjustment between spouses, in the case of divorce, legal separation or marriage annulment, of rights to retirement or disability pension accrued during marriage and which have not generated pension income during the marriage, the nature of *rights in rem* relating to a property, because of the modulation of the institution, any recording in a register of rights in immovable or moveable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register.
- Member states preserve the competence to regulate matters of matrimonial property regimes.

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- Issues of jurisdiction:
- Connection to Regulation (EU) 650/2012: Where a court of a Member State is competent to decide on matters of the succession of a spouse (partner) pursuant to Regulation (EU) No 650/2012, the courts of that State shall have jurisdiction to rule on matters of the matrimonial property regime arising in connection with that succession case.
- Connection to Regulation (EU) 2201/2003: the court that is competent to decide on issues related to an application for divorce, legal separation or marriage (or registered partnership) annulment shall have jurisdiction to rule on matters of the matrimonial property regime arising in connection with the specific application.
- Jurisdiction based on former agreement of the spouses: **a)** the court of a Member State in which the applicant is habitually *resident* and the applicant had resided there for at least a year immediately before the application was made, **b)** the court of a Member State of which the applicant is a national and the applicant is habitually resident there and had resided there for at least six months immediately before the application was made, **c)** the court that is seized in cases of conversion of legal separation into divorce according Regulation 2201/2003 or **d)** in cases of residual jurisdiction according Regulation 2201/2003.

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- *Additional* jurisdiction (when the court does not have jurisdiction under the above provisions): **a)** the courts of the Member State in whose territory the spouses are habitually resident at the time the court is seized or failing that, **b)** the courts of the Member State in whose territory the spouses were last habitually resident, insofar as one of them still resides there at the time the court is seized or failing that, **c)** the courts of the Member State in whose territory the respondent is habitually resident at the time the court is seized; or failing that the court of the member state of the spouses' common nationality at the time the court is seized.
- Same provisions according Regulation 1104/2016 (habitual residence, common nationality, creation of the partnership).
- Jurisdiction based on applicable law (*the law of the State where the spouses/partners or future spouses/partners, or one of them, is habitually resident at the time the agreement is concluded or the law of a State of nationality of either spouse or future spouse at the time the agreement is concluded*). The above courts or the courts of the Member State of the conclusion of the marriage shall have exclusive jurisdiction to rule on matters of their matrimonial property regime (under a former written agreement of the spouses/partners – under the term “written” the legislator includes also electronic means).
- Jurisdiction based on the appearance of the defendant (*the court shall ensure that the defendant is informed of his right to contest the jurisdiction and of the consequences of entering or not entering an appearance*).

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- **Alternative jurisdiction:** In case that a court of the Member State that has jurisdiction pursuant to Article 4, 6, 7 or 8 of the Regulation holds that, under its private international law, the marriage in question is not recognized for the purposes of matrimonial property regime proceedings, it may decline its jurisdiction. If the court decides to decline jurisdiction, it shall do so without undue delay. Where a court that has jurisdiction pursuant to Article 4 or 6 declines its jurisdiction and in that case the parties agree to confer jurisdiction to the courts of any other Member State in accordance with Article 7 (applicable law), jurisdiction to rule on the matrimonial property regime shall lie with the courts of this particular Member State. In other cases, jurisdiction to rule on the matrimonial property regime shall lie with the courts of any other Member State pursuant to Article 6 or 8, or the courts of the Member State of the conclusion of the marriage.
- **Subsidiary jurisdiction:** Where no court has jurisdiction or a court has declined jurisdiction and no court has jurisdiction, the courts of a Member State shall have jurisdiction in so far as immovable property of one or both spouses are located in the territory of that Member State. In that event the court seized shall have jurisdiction to rule only in respect of the immovable property in question.
- **“Forum Necessitatis”:** If no court has jurisdiction under the beforementioned provisions, the courts of a Member State may, on an exceptional basis, rule on a matrimonial property regime case, if proceedings cannot reasonably be brought or conducted or would be impossible in a third state with which the case is closely connected (civil war). This case must have a sufficient connection with the Member State of the court seized.

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- Lis pendens: In case proceedings involving the same cause of action and between the same parties are brought before courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.
- Provisional measures: Application may be made to the courts of a Member State for provisional measures, including protective measures or other measures available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.
- Applicable law: Unity of the applicable law: The law applicable to a matrimonial property regime (or to the property consequences of a registered partnership) shall apply to all assets falling under that regime, regardless of where the assets are located.
- Choice of the applicable law by spouses/partners: a) the law of the State where the spouses/partners or future spouses/partners, or one of them, is habitually resident at the time the agreement is concluded or b) the law of a State of nationality of either spouse or future spouse at the time the agreement is concluded. The agreement for the applicable law must be written (including electronic means). The matrimonial property agreement must also be written.

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- Applicable law in the absence of a choice by the parties: In that case, the law applicable to the matrimonial property regime shall be the law of the State: a) of the spouses' first common habitual residence after the conclusion of the marriage; or, failing that b) of the spouses' common nationality at the time of the conclusion of the marriage; or, failing that c) with which the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances.
- Upon application by either spouse, the judicial authority having jurisdiction to rule on matters of the matrimonial property regime may decide that the law of a State other than the State whose law is applicable pursuant to point (a) of paragraph 1 shall govern the matrimonial property regime if the applicant demonstrates that: a) the spouses had their last common habitual residence in that other State for a significantly longer period of time than in the State designated pursuant to provisions above and b) both spouses had relied on the law of that other State in arranging or planning their property relations.
- [Similar provisions are applicable according regulation 1104/2016].

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- Scope of the applicable law: The applicable law governs: 1) the classification of property of either or both spouses into different categories during and after marriage, 2) the transfer of property from one category to the other one, 3) the responsibility of one spouse for liabilities and debts of the other spouse, 4) the powers, rights and obligations of either or both spouses with regard to property, 5) the dissolution of the matrimonial property regime and the partition, distribution or liquidation of the property, 6) the effects of the matrimonial property regime on a legal relationship between a spouse and third parties and 7) the material validity of a matrimonial property agreement.
- Effects on third parties: The law applicable to the matrimonial property regime between the spouses may not be invoked by a spouse against a third party in a dispute between the third party and either or both of the spouses, unless the third party knew or, in the exercise of due diligence, should have known of that law. The third party is deemed to possess knowledge of the law when this law is the law: a) of the State whose law is applicable to the transaction between a spouse and the third party, b) the State where the contracting spouse and the third party have their habitual residence, c) in cases involving immovable property, the State in which the property is situated.
- Also the third party is deemed to possess knowledge of the applicable law when a spouse has complied with the applicable requirements for disclosure or registration of the matrimonial property regime specified by the law of: a) the State whose law is applicable to the transaction between a spouse and the third party, b) the State where the contracting spouse and the third party have their habitual residence or c) in cases involving immovable property, the State in which the property is situated.

Regulations (EU) Nr. 1103/2016 and 1104/2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and in matters of the property consequences of registered partnerships.

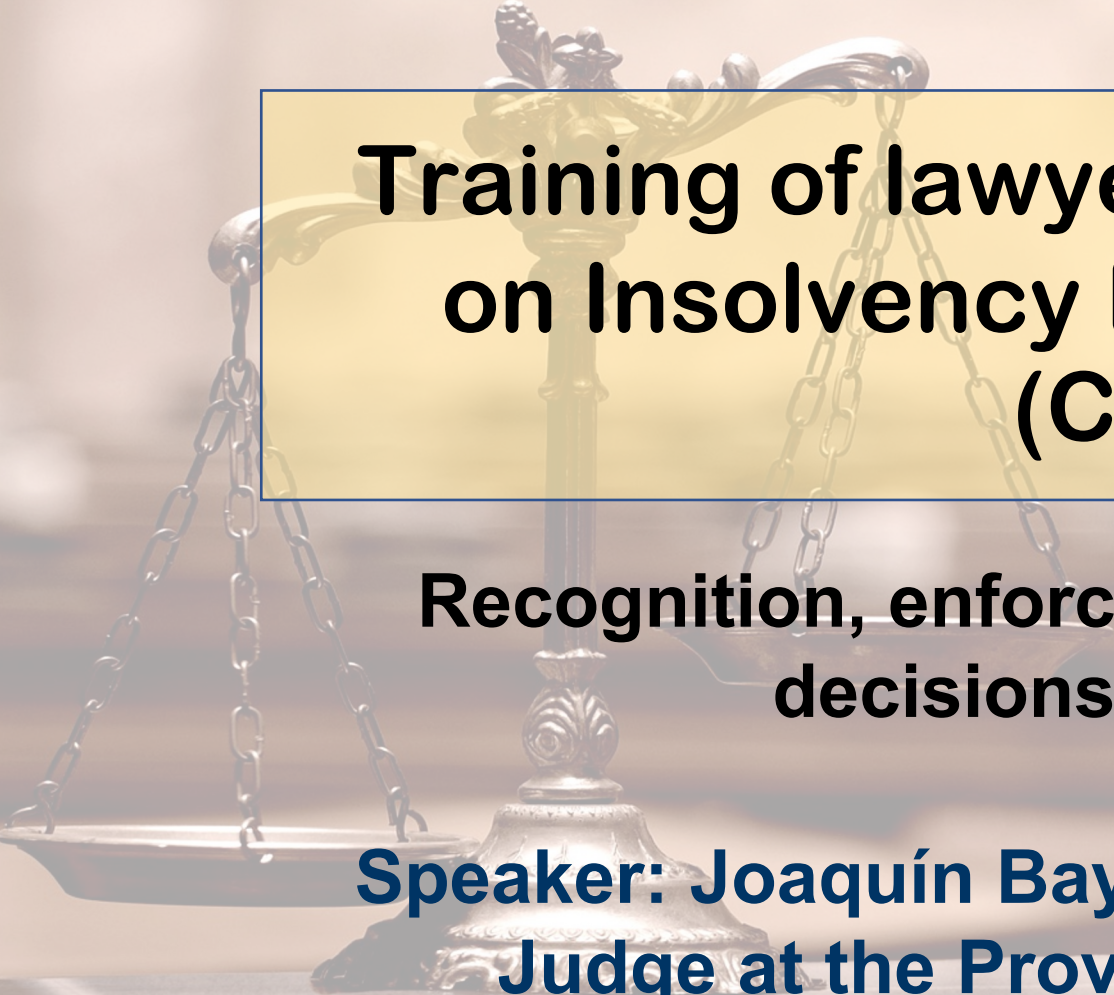
- Where the law applicable to the matrimonial property regime between the spouses cannot be invoked by a spouse against a third party the effects of the matrimonial property regime in respect of a third party will be governed by a) by the law of the State whose law is applicable to the transaction between a spouse and the third party or b) in cases involving immovable property or registered assets or rights, by the law of the State in which the property is situated or in which the assets or rights are registered.
- According Art. 29, in case a person invokes ***a right in rem*** to which he is entitled under the law applicable to the matrimonial property regime and the law of the Member State in which the right is invoked does not know the right in rem in question, that right shall, if necessary and to the extent possible, be adapted ***to the closest equivalent right under the law of that State***, taking into account the aims and the interests pursued by the specific right in rem and the effects attached to it.
- The application of the law of a member state has to be not manifestly incompatible with the public policy (*ordre public*) of the forum.
- Exclusion of renvoi (Art. 30) The application of the law of any State specified by this Regulation means the application of the rules of law in force in that State other than its rules of private international law.

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- **Recognition of decisions:** A decision given in a Member State shall be recognized in the other Member States without any special procedure being required.
- Grounds of non-recognition: 1) if such recognition is manifestly contrary to public policy (*ordre public*) in the Member State in which recognition is sought, 2) where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his legal defense, 3) if it is irreconcilable with a decision given in proceedings between the same parties in the Member State in which recognition is sought or 3) if it is irreconcilable with an earlier decision given in another Member State or in a third State involving the same cause of action and between the same parties.
- The jurisdiction of the court of the Member State of origin may not be reviewed.
- Under no circumstances may a decision given in a Member State be reviewed as to its substance.

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- **Enforceability:** Decisions given in a Member State and enforceable in that State shall be enforceable in another Member State when, on the application of any interested party, they have been declared enforceable there.
- Lack of “exequatur”: The application for a declaration of enforceability shall be submitted to the court or competent authority of the Member State of enforcement (competence ruled by the national law). The application procedure shall be governed by the law of the Member State of enforcement. Provision of appeal against the relevant decision. Grounds of non recognition are also grounds against enforceability.
- Acceptance and enforceability of authentic instruments: An authentic instrument established in a Member State shall have the same evidentiary effects in another Member State as it has in the Member State of origin. An authentic instrument which is enforceable in the Member State of origin shall also be declared enforceable in another Member State on the application of any interested party. Authentic instruments are mainly acts issued by notaries. For the purposes of the Regulations, the term ‘court’ should therefore be given a broad meaning so as to cover not only courts in the strict sense of the word, exercising judicial functions, but also for example notaries in some Member States who, in certain matters of matrimonial property regime, also exercise judicial functions.



**Training of lawyers on EU instruments  
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**Recognition, enforceability and enforcement of  
decisions in family matters**

**Speaker: Joaquín Bayo-Delgado, Barrister, Former  
Judge at the Provincial Court of Barcelona**

**CiviLAW Seminar on Family Affairs  
Athens, 26 September 2022**



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# Basic ideas (1)

- Each matter has its own rules:
  - Declaration of divorce, matrimonial separation and annulment
  - Parental responsibility
  - Maintenance / child support
  - Matrimonial regimes
  - Property consequences of registered partnerships
- Basic concepts
  - Recognition
    - Automatic recognition
    - Incidental recognition
    - Registering of a EM decision in a public register
    - Proceedings for recognition / no grounds for refusal of recognition / refusal of recognition (“exequatur” or proceedings ad hoc)
  - Enforceability
    - Not applicable to declaration of divorce, matrimonial separation and annulment
    - Exequatur
    - Direct enforceability (many times referred to also as “enforcement”)
    - Proceedings for no grounds for refusal of enforceability / refusal of enforceability
  - Enforcement (properly said)



# Basic ideas (2)

- Regulation applicable only for recognition or enforcement of decisions from other ME, except from Denmark.
- Different models:
  - **Always automatic recognition** (+ possibility of questioning/ratifying it on limited grounds), but
  - **Enforcement:**
    - **R 2019/1111:** direct enforcement with *ex post* possibility of questioning/ratifying enforceability (political policy of the EU) on limited grounds + limited reasons to halt enforcement
    - **R 4/2009:** direct enforcement (except Denmark) + limited reasons to halt enforcement
    - **R 2016/1103 & 1104:** previous exequatur with possibility of questioning/ratifying enforceability on limited grounds + limited reasons to halt subsequent enforcement



# Regulation 2019/1111 (Brussels II ter)

## Divorce, matrimonial separation and annulment

- Possibilities:
  - Automatic recognition: Art. 30
  - Incidental recognition: Art. 30.5; example:
    - Denial of recognition of a divorce sentence of France based on an prior divorce sentence in Italy
  - Registering of a EM decision in a public register: Art. 30.2
  - Proceedings for recognition (no grounds for refusal of recognition) or for refusal of recognition (“exequatur”);
- Grounds for refusal of recognition, Art. 38:
  - contrary to the public policy of the Member State in which recognition is invoked;
  - given in default of appearance, if the respondent was not properly served
  - irreconcilable with a decision [**earlier or later**] given in proceedings between the same parties in the Member State in which recognition is invoked
  - irreconcilable with an **earlier** decision, between the same parties, given in another Member State or in a non-Member State, which can be/has been recognized



# Regulation 2019/1111 (Brussels II ter)

## Parental responsibility (1)

- Possibilities:
  - Automatic recognition: Art. 30
  - Incidental recognition: Art. 30,5; examples:
    - Recognition of a parental responsibility decision of a ME to be modified
    - Denial of enforcement of a ME decision based on a **later** decision in a ME
  - Registering of a EM decision in a public register: Art. 30.2
  - Enforcement of a ME decision
  - Proceedings for recognition (no grounds for refusal of recognition) or for refusal/ratification of recognition/enforceability);
- Grounds for refusal of recognition/enforceability (except overriding decision on return or granting access rights), Art. 39:
  - contrary to the public policy of the Member State in which recognition is invoked;
  - given in default of appearance, if the respondent was not properly served
  - application by any person claiming that the decision infringes his or her parental responsibility, if it was given without such person having been given an opportunity to be heard
  - irreconcilable with a **later** decision of the Member State in which enforcement takes place
  - irreconcilable with an **later** decision given in another Member State or in a non-Member State, which can be/has been recognized
  - If the procedure of placement of the child has not been followed

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# Regulation 2019/1111 (Brussels II ter)

## Parental responsibility (2)

- Grounds for refusal of enforceability of a **overriding decision on return or granting access rights**), Art. 50:
  - irreconcilable with a **later** decision of the Member State in which enforcement takes place
  - irreconcilable with an **later** decision given in another Member State or in a non-Member State where the child has habitual residence, which can be/has been recognized
- Common grounds for halting enforcement
  - an ordinary appeal against the decision has been lodged
  - the time for an ordinary appeal in the Member State of origin has not yet expired
  - an application for refusal of enforcement [enforceability] based on Article 41, 50 or 57 has been submitted
  - the person against whom enforcement is sought has applied in accordance with Article 48 for the withdrawal of a certificate issued pursuant to Article 47
  - if enforcement would expose the child to a grave risk of physical or psychological harm due to temporary impediments which have arisen **after** the decision was given, or by virtue of any other significant change of circumstances
  - where the grave risk is of a lasting nature, the authority competent for enforcement or the court may refuse the enforcement of the decision (**overriding system of the overriding decision on return**).

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# Regulation 2019/1111 (Brussels II ter)

## Proceedings: Arts. 59-62

- The procedure for making an application for refusal of enforcement [enforceability] shall, in so far as it is not covered by the Regulation, be governed by the law of the Member State of enforcement.
- The applicant shall provide the authority competent for enforcement or the court with a **copy of the decision** and, where applicable and possible, the **appropriate certificate**
- The authority competent for enforcement or the court may, where necessary, require the applicant to provide a **translation or transliteration of the translatable content of the free text fields of the appropriate certificate**
- If the authority competent for enforcement or the court is unable to proceed without a **translation or transliteration of the decision**, it may require it
- Either party may **challenge or appeal** against a decision on the application for refusal of enforcement [enforceability]
- The decision given on the challenge or appeal may only be contested by a **further challenge or appeal** communicated by the ME

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# Regulation 4/2009

## Maintenance / child support

- R 4/2009 applicable to maintenance (after marriage or legal partnership) and child support
- Possibilities:
  - Denmark (not party to Hague Protocol 2007):
    - Automatic recognition and exequatur for enforceability
    - Limited grounds of refusal of recognition and enforceability (Art. 24)
  - Rest of EU ME:
    - **Automatic recognition** without possibility of opposing it, but a defendant who did not enter an appearance in the Member State of origin shall have the right to apply for a review of the decision before the competent court of that Member State of origin
    - No declaration of enforceability: **direct enforcement**, but the grounds of refusal or suspension of enforcement under the law of the Member State of enforcement shall apply in so far as they are not incompatible with
      - **prescription or the limitation of action**, either under the law of the Member State of origin or under the law of the Member State of enforcement, whichever provides for the longer limitation period
      - **Irreconcilability** with a decision given in the Member State of enforcement or with a decision given in another Member State or in a third State which can be/has been recognized; **no modification decision is irreconcilable**.
      - If a **revision application** has been filed in the ME of origin
      - Rest of grounds for refusal or suspension of enforcement of the ME of enforcement

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# Additional regulations

- Regulation 606/2013: mutual recognition of protection measures in civil matters (except Denmark)
  - cross-border case: the recognition of a protection measure ordered in one Member State is sought in another Member State
  - Protective measures concerning children [R 2019/1111] out of the scope
  - 12 months limited effect
  - Automatic recognition and direct enforcement
  - Limited grounds for refusal of recognition or enforcement:
    - manifestly contrary to public policy in the Member State addressed; or
    - irreconcilable with a judgment given or recognized in the Member State addressed
- Regulation 655/2014: European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters (except Denmark)
  - Debts arising out of maintenance or child support not excluded
  - Possibility of a request for the obtaining of account information
  - Automatic recognition and direct enforcement of the order
  - Remedies of the debtor against the Preservation Order in the ME of origin
  - Limited grounds for remedies of the debtor against enforcement of the Preservation Order in the ME of enforcement
- Regulation 2016/1191: simplifying the requirements for presenting certain public documents in the European Union
  - multilingual standard forms
  - Exemption from legalization and similar formalities

# International child abduction

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## ▼ Introduction

### 1. Importance of theme

With the increase in the number of international families, currently estimated at 16 million, the number of cross-border family law disputes in the EU has also increased.

If an international couple separates, the temptation for one spouse to return to their country of origin with the child may be great. If both parents exercise parental authority over the child, the parent who takes the child without permission violates the other parent's custodial rights and endangers the child's best interests.

Approximately 1.800 cases of child abduction by one of the parents are registered annually in the EU.

### 2. Structure of presentation

1. Definition and seat of the matter
2. Three parts:
  1. Hague Convention Principles and procedures
  2. The additions of Brussels IIa/IIbis Regulation
  3. ECHR relevant rulings

## ▼ Definition

- **Wrongful retention or removal**

Important rule: The provisions of the Hague Convention apply only to children up to the age of 16

## ▼ Seat of the matter

- [Hague Convention on the Civil Aspects of International Child Abduction](#) also known as **Hague Abduction Convention** is a multilateral treaty that provides an expeditious method to return a child internationally abducted by a parent from one member country to another. As 2021, there are 101 parties to the Convention.
- **REGULATION (EC) NO. 2201/2003 OF THE COUNCIL - Brussels IIa or Brussels IIbis**
- For any file of this type, the court sh also consider the content of the **Vera Perez Report**, a document through which the intentions of the editors of the Hague Convention are explained and detailed.

## A. HAGUE CONVENTION PRINCIPLES AND PROCEDURES

### ▼ Standard Hypotesis

- The child, with respect to whom both parents exercise **parental authority** and whose **habitual residence** is in State A, is retained by one of the parents in State B, **without the consent** of the other parent.

## ▼ Conditions

1. **Parental authority** ("right to custody" in the language of the Convention) refers exclusively to the right of each parent (or, at least, to the right of the parent invoking the abduction) to decide on the establishment of the minor's residence. This right can result either from a previous court decision, or from the legal norms of the state where the child is claimed to have been abducted - state A. If this right results from these rules of state A, but until the abduction file is resolved a court decision has intervened in that state by which the parent loses the opportunity to decide on the child's residence, the condition is not fulfilled. Similarly, the condition is not fulfilled if the parent acquires this right after an alleged kidnapping. Last but not least, in the sense of the Convention, not only a parent can invoke a situation of kidnapping, but also *another person (or institution)* who had the right to decide about the child's residence.
2. Parental authority within the meaning of the Convention must be **effectively exercised immediately before the alleged international abduction**. This issue presupposes the fact that, concretely, the applicant parent exercised this right, that is, in one form or another, he was involved in the life of his child.
3. The establishment of the state of **habitual residence** is carried out by the court that resolves the kidnapping claim. If the fulfillment of this condition is disputed by the alleged abductor parent, in the sense that it is argued that the minor did not have a habitual residence in State A, the court will analyze this matter in detail. Because the meaning of the notion of "usual residence" does not have a legal definition, the effective interpretation is left to the discretion of the court that resolves the case. However, through several interpretation decisions of the CJEU, some **criteria** have been established that the courts should take into account:
  - The court should take into account objective matters, related to the child's actual situation: where he lived specifically, where he was educated, where he was medically insured, where he created attachment relationships with other relatives, friends, etc.
  - When such an objective analysis of the child's situation is not possible, the court should take into account the parents' intention regarding the establishment of their home and the child in a certain state; as a rule, the objective analysis of the child's situation is not possible when the child was very young at the time of the alleged kidnapping and, as such, was not in school, did not have a group of friends, did not carry out activities, etc.; the intention of the parents is to be analyzed also through an objective analysis, but, this time, of their own situations - residential, professional, educational, etc.
  - When the state of habitual residence of the child cannot be established by any method, it will be considered that the state of residence is the one in which the child **lived immediately before** the alleged kidnapping.
  - In order to establish the habitual residence, the court will exclusively take into account **the actual situation immediately before the alleged kidnapping**, not what happened afterwards. That is why, for example, it is irrelevant if the child, after the alleged abduction, spent a longer period of time in State B than he had previously spent in State A.
4. In the sense of the Convention, the retention of a child refers to one of the following situations:
  - the child is moved to state B without the consent of the parent who accuses the kidnapping - **wrongful removal** ;
  - the child is moved to state B with the consent of the other parent, but only for a determined period of time, a situation in which it is illegal for the child not to return to state A - **wrongful retention** .

For example, the latter situation is encountered in practice in the case where one of the parents agrees with the child's travel, accompanied by the other parent, to state B for purely touristic purposes, but, at the end of the vacation, the child is not returned to the state A.

5. The consent of the applicant parent must be **absent both** at the time of the alleged kidnapping and at the time of the settlement of the claim. More precisely, if this agreement intervenes until the settlement (the parent "consents or buys later", in the language of the Convention), the request is rejected.
6. The **child's opinion** is relevant in such a case, even if his "agreement" or "disagreement" does not represent one of the actual conditions for accepting the request. Specifically, the request can be rejected if the child objects. In accordance with the text of the Convention and the Romanian implementing law, the court will compulsorily hear the minor, if he has reached the age of 10 and, optionally, if he is younger, each time in the presence of a psychologist, and will take into account his opinion depending on his degree of maturity.

### ▼ The usual effect of fulfilling the conditions

Fulfillment of the previously mentioned conditions leads to the admission of the abduction request, with the only consequence of the **mandatory return of the child to State A**.

Therefore, this procedure does not have as its objective or effect the establishment of measures regarding the relations between parents and children, such as the exercise of parental authority, the establishment of the child's residence with one of the parents, the way in which the parents will keep in touch with the child or the manner in which the parents will contribute to the child's raising and education expenses.

On the other hand, the court invested with a request of this type automatically resolves the issue of determining the state of habitual residence of the child, an aspect that has legal relevance outside the actual litigation. With a few exceptions, the state of the child's habitual residence is the only one that has the competence regarding the substantive establishment of the measures regarding the relations between parents and the child.

### ▼ Exceptions

Even if the court finds that the previously mentioned conditions are fulfilled, there are certain situations in which the request for kidnapping is **rejected** and, as such, the return of the child to State A is denied.

In principle, it is about two types of situations:

1. When **more than 1 year has passed** between the alleged international abduction, regardless of whether it is a displacement or a non-return, and the moment when the parent from State A started the procedures to request the return, and the minor has adapted (has "integrated" in its new environment", in the language of the Convention) in state B;

Therefore, the court finds that all the conditions of kidnapping have been met, including the fact that state A is the child's habitual residence, but the lack of diligence of the plaintiff parent, combined with the fact that the minor has adapted to state B, leads to the rejection of the request.

Whether or not the minor is adapted is determined by an analysis of the factual situation in which he is in state B. This analysis, however, does not equate to a substantive assessment of the child's best interest to stay with the parents or not alleged kidnapper.

2. When **the child's return would place him in an unacceptable situation** ("that there is a serious risk that the child's return will expose him to a physical or mental danger or that in any other way he will be placed in an intolerable situation ", in the language of the Convention).

This exception refers to the existence of objective reasons due to which the child's return and, in essence, the circumstance that he would resume living in State A, could be dangerous for his growth and development.

This analysis also does not involve an assessment of the child's best interest to stay or not in State B and, as a rule, excludes any kind of issues related to the way in which the parents take care or would take care of the child in the future. In other words, in principle, this analysis refers to elements that are external to the child or his parents.

However, it is not excluded that the court may also take into account issues related to the method of raising and educating children. For example, the situations in which the plaintiff parent was abusive towards the child are sometimes relevant.

### ▼ **Elements of the factual situation and the legal situation that are not relevant in an international child abduction procedure**

If the previously mentioned exhaustive conditions are met and no exceptional case is verified, the court is obliged to admit the request.

Therefore, there are certain elements that are not related to solving such a case:

- Citizenship of the child or parents;
- The child's age at the time of the alleged kidnapping or the child's age at the time of the settlement of the request;
- The length of time the child spent in state A, by reference to the length of time he spent in state B;
- The personal reason (for example, the violence of the other parent towards him, economic problems, adaptation problems in the respective state, etc.) for which the alleged abducting parent chose to leave state A with the child.

Also, it is important to emphasize and reiterate the fact that the court does not order measures based on parental relationships, nor does it carry out an analysis of the child's best interests.

### ▼ **The main features of the court procedures in Romania**

Romania joined the Hague Convention in 1992. In 2004, a law was adopted on the application of the Convention on the Civil Aspects of International Child Abduction.

A request for international kidnapping of minors is under the substantive jurisdiction of the Tribunal of Bucharest and in appeal the Bucharest Court of Appeal.

The essential condition for the Romanian courts to be competent to resolve such a request is that, both at the time of referral and at the time of the resolution of the case, the minor should be on the territory of Romania.

The applicant parent can be represented in the case either by an ex officio appointed lawyer, or by an elected defense attorney, or by both.

The resolution procedure should not, theoretically, exceed 6 weeks from the notification to the court.

From an evidentiary point of view, no evidence other than the writings is admissible, with the exception of the situation in which the court considers that they are absolutely necessary.

The only admissible appeal is the appeal.

Last but not least, the notification of the court with such a request obliges any other court notified with a request regarding a minor from State B to suspend the resolution of the respective case until the completion of the kidnapping file.

## B. THE ADDITIONS OF BRUSSELS II BIS REGULATION

The Brussels IIa Regulation is the cornerstone of EU judicial cooperation in cross-border matrimonial matters, including international child abduction. The Regulation applies from 1 March 2005 in all Member States except Denmark.

The Regulation only applies in cases involving several EU Member States:

- its provisions establish, in the case of disputes involving more than one country, which is the country whose courts are competent to resolve matrimonial matters, those related to parental authority and child abduction.
- it guarantees that judgments handed down in one member state are recognized and enforced in another EU country.

### ▼ Completion of the Hague Convention

The reformed Brussels II Regulation prevents the relocation of children to another country by establishing a mechanism that allows the rapid return of the child to the Member State where he lived before the abduction. This mechanism is largely based on the return mechanism established by the Hague Convention, which the Regulation complements.

But with regard to the application of the Hague Convention in the relations between member states, the provisions of the Regulation **prevail over** the provisions of the Convention with regard to the matters covered by the Regulation.

### ▼ Main improvements

#### 1. *Faster resolution of cross-border child abduction cases*

The time limits applicable to the different stages of the child return procedure will be limited to a maximum of **six weeks** for the trial court and six weeks for each court dealing with an appeal. Central authorities will also process return requests more quickly.

#### 2. *Ensuring that the minor is listened*

Children capable of forming their own opinions shall be given the opportunity to **express their opinion** in all proceedings concerning them. This will apply in the matter of parental authority and in cases of international child abduction. The manner in which the child will be heard and the person who will do so are aspects whose regulation will be left to national law.

#### 3. *Ensuring a quick execution of judgments in other member states*

Under the new rules, the **exequatur procedure**, an intermediate procedure necessary to obtain cross-border enforcement, will be eliminated for all judgments.

Under the new rules, enforcement can be refused or suspended under largely the same conditions in all Member States, which increases legal certainty for all citizens and, in particular, for the children concerned.

#### 4. *Improving cooperation between Member States' authorities*

Good cooperation between central authorities in different Member States in dealing with cases involving children is an indispensable precondition for establishing a relationship of mutual trust. The new rules promote **better cooperation** between central authorities, which are the direct point of contact for parents. Also, the authorities responsible for the welfare of children will be better integrated in these cross-border cooperation actions.

The new rules also clarify the sensitive issue of placing the child in another Member State and establish a clear procedure for obtaining the consent of the Member State where the child is to be placed.

#### 5. *Establishing clearer rules on the circulation of authentic documents and agreements*

Given the increasing number of Member States that allow out-of-court agreements on legal separation and divorce or on parental authority, the new rules will **facilitate the circulation of these instruments and agreements**.

### ▼ **Main principles**

If a child is abducted from one Member State („**state of origin**“) and moved to another Member State ("**Requested Member State**"), the Regulation guarantees that the courts of the Member State of origin remain competent to decide on custody, notwithstanding the abduction. Once a request for the return of the child is made before a court in the requested Member State, that court applies the Hague Convention as supplemented by Regulation. If the court in the requested Member State decides not to order the return of the child, on the grounds set out in Article 13 of the Convention, it must immediately transmit a copy of its decision to the competent court in the Member State of origin (the "**origin court**"), which may consider in this situation, at the request of a party, an action on **entrustment**, if it has not already been referred in this regard. If the court in the Member State of origin adopts a decision providing for the return of the child, the decision is recognized and enforceable directly in the requested Member State, without the need for the exequatur procedure:

**Therefore, we have 5 steps:**

1. After the wrongful removal or retention of a child, in principle, jurisdiction still lies with the courts of the Member State of origin.
2. Courts in the requested Member State must ensure the rapid return of the child.
3. If the court in the requested Member State decides not to return the child on any of the grounds set out in Article 13 of the Convention, it must transmit a copy of its decision to the competent court in the Member State of origin, which must notify the parties. The two courts must cooperate.
4. If the court in the Member State of origin decides to return the child, the exequatur procedure for the judgment in question is waived, and it becomes directly enforceable in the requested Member State.
5. Central authorities in the home Member State and in the requested Member State must cooperate with each other and provide assistance to the courts in the performance of their duties.

In order to deter the abduction of children by one of the parents between Member States, Article 10 provides that the courts of the Member State in which the child had his habitual residence before his wrongful removal or detention ("**Member State of origin**") remain competent to rule on the merits of the case and subsequently. Jurisdiction can only be assigned to the courts of the new Member State (hereinafter referred to as the "requested Member State") under very strict conditions :

The Regulation allows for the assignment of jurisdiction to the courts of the requested Member State only in **two cases**:

**Case 1:**

- the child has acquired habitual residence in the requested Member State
- and*
- all persons entrusted with the child have consented to child abduction.

**Case 2:**

- the child acquired habitual residence in the requested Member State and lived there for at least one year after the persons entrusted with it had or should have had knowledge of the child's whereabouts and
- the child has integrated into the new environment and, in addition, at least one of the following conditions is met:
  - no request for the return of the child has been made within one year from the time when the parent remaining in the Member State of origin had or should have known where the child was;
  - a return request was made, but it was withdrawn and no other request was submitted in that year;
  - a non-refoulement order was issued in the requested State and the courts in both Member States took the necessary steps under Article 11(6), but the case was closed under Article 11(7) as the parties did not observations within 3 months of notification;
  - the competent court of origin has issued a decision regarding custody that does not involve the return of the child. In this regard, it should be noted that the CJEU has clarified that the criterion provided for in Article 10 letter (b) point (iv) must be interpreted in a strict sense, and the said judgment must be a final judgment. Therefore, a decision to establish a provisional and protective measure does not meet the mentioned criterion, not being able to produce a transfer of jurisdiction to the courts of the Member State where the child was moved

**The court applies the 1980 Hague Convention as supplemented by Article 11 paragraphs (1)-(5)**

If a court in a member state is referred to a request for the return of a child under the Hague Convention, it applies the rules set out in the convention, as supplemented by Article 11 paragraphs (1)- (5) of the Regulation. For this purpose, the judge may consider it useful to consult the relevant jurisprudence under the Convention, which is available in the INCADAT database created by the Hague Conference on Private International Law. The explanatory report and practical guides to the Convention may also be useful (the website of the Hague Conference on Private International Law). The European Judicial Network in Civil Matters has also developed a practical guide providing information on methods of processing and hearing return cases.

**The court assesses whether a kidnapping has taken place – Article 2( 11) (a) and (b)**

The judge must first determine whether an *"unlawful removal or retention"* has occurred. The definition in Article 2 (11) of the Regulation is very similar to that in Article 3 of the Hague Convention and covers the removal and retention of a child in breach of custody rights under the law of the Member State in which the child resided usual immediately before the abduction.

### **Meaning of "entrustment" - Article 2 (9) and (11)**

It goes without saying that the meaning of the term *"entrustment"* is central to whether or not there has been an unlawful removal or retention. This term must be given a meaning which is not determined exclusively by the law of the Member State of the habitual residence of the child concerned. The meaning given to it must be autonomous and reflect the provisions of the Regulation and the Convention. The existence and exercise of entrustment rights should also be analyzed from the perspective of the provisions of the Charter of Fundamental Rights of the European Union, given that the provision of Article 7 of the Charter, which corresponds to Article 8 of the European Convention on Human Rights, stipulates that every person has the right to respect for his family life. According to Article 51 of the Charter, in implementing EU law, EU institutions and Member States must respect rights and principles and promote their application.

### **The court must always order the return of the child if the child can be protected in the Member State of origin – Article 11 (4)**

The Regulation reinforces the principle that the court must order the immediate return of the child, by limiting the exceptions provided for in Article 13(1)(b) of the Hague Convention to what is strictly necessary. The principle is that if the child can be protected in the Member State of origin, it must always be returned.

Pursuant to Article 13 (1) (b) of the Hague Convention, the court is not obliged to order the return if, in doing so, the child would be exposed to physical or mental harm or would be in an intolerable situation. The Regulation goes further by extending the obligation to order the return of the child to cases where the return could expose the child to such harm, but it is still clear that appropriate measures have been taken to ensure the protection of the child after return .

The court must examine this aspect on the facts of the case. It is not enough to have procedures for the protection of the child in the Member State of origin, but it must be **confirmed** that the authorities in the Member State of origin have taken **concrete measures** to protect the child in question.

In general, it will be difficult for the judge to assess the factual circumstances in the home Member State. The assistance provided by the central authorities in the home Member State will be essential to assess whether or not protective measures have been taken in that country and whether these will adequately ensure the protection of the child after his return.

### **Listening to the child – Article 11 (2) and (5) (61). The child and the complainant must have the opportunity to be heard**

The Regulation strengthens the child's right to be heard during the procedure. Therefore, the court must give the child the opportunity to be heard, unless the judge considers that this is inappropriate due to the child's age and maturity. The Regulation does not provide criteria to establish the appropriate age or degree of maturity, nor the procedure used to listen to the child. Likewise, the court cannot refuse the return of the child without first giving the person who requested the return the opportunity to be heard. Given the tight deadline, the hearing should be conducted in the most expeditious and efficient manner available.

### **The court must issue a decision within six weeks – Article 11 (3)**

The court must apply **the fastest procedures provided for in national law** and issue a decision within **six weeks** from the date on which it was referred with a request for the return of the child. The deadline can only be exceeded if exceptional circumstances make it impossible to meet it.

With regard to judgments ordering the return of the child, Article 11 (3) does not specify that such judgments, which must be delivered within six weeks, are enforceable within the same period.

However, such an interpretation is the only one that would effectively guarantee the objective of ensuring the immediate return of the child within the strictly established deadline. This objective could be compromised if national law provides for the possibility of appealing a return decision and, in the meantime, suspends the execution of that decision, without imposing any deadline for the appeal procedure.

For these reasons, Member States should try to ensure that a return court order issued within the six-week deadline is "enforceable". How to achieve this objective depends on national legislation.

### **Non-return decision**

In exceptional cases where a court nevertheless decides not to order the return of a child in accordance with Article 13 of the Hague Convention, Article 11 (6) and (7) of the Regulation provides for a special procedure. For this, a court that has issued a final or appealable non-return decision must send a copy of the decision, together with the relevant documents, to the competent court in the Member State of origin. The transfer can take place either directly, from one court to another, or through the central authorities of two Member States. The court in the Member State of origin must receive the documents within **one month** of the date of the non-return decision.

Unless it has already been notified by one of the parties, the court of the Member State of origin must communicate the information to the parties and invite them to submit **observations**, in accordance with the provisions of domestic law, within **three months** of the date of notification, to indicate whether they want the court in the home Member State to examine the matter of custody of the child.

If the parties do not submit observations within the three-month period, the court in the Member State of origin closes the case.

The court in the home Member State examines the case if at least one of the parties submits observations in this regard. Although the Regulation does not impose any time limit for this, the aim should be to ensure that a decision is delivered in the shortest possible time.

The court of origin making a decision under Article 11 (7) has jurisdiction to deal with the case as a whole because it was the court of the child's habitual residence immediately before his wrongful removal or retention. Therefore, its competence is not limited to deciding on custody of the child, but it can also decide on other aspects of parental responsibility, including, for example, visitation rights. The judge should, in principle, be in the position in which he would have been if the abducting parent had not abducted the child, but had referred the court of origin to modify a previous custody decision or to request authorization to change the child's habitual residence. It is possible that the person requesting the return of the child did not have the same residence as the child before the abduction, or it is possible that the person concerned may even be willing to accept a change of the child's habitual residence to the other Member State, provided that his contact rights with the child be modified accordingly.

Therefore, if the requested court decides, under Article 13 of the Convention, not to order the return of the child, the court of origin will have the final ruling on whether or not the child should be returned. If the court in the home Member State makes a judgment involving the return of the child, it is important to ensure that the judgment can be enforced without delay in the other Member State. For this reason, the Regulation provides that such judgments are recognized and directly enforceable in the other Member State, provided that they are accompanied by a **certificate**. The consequences of that rule are twofold: (a) it is no longer necessary to request an "*exequatur*" procedure and (b) opposition to the recognition of the judgment is not possible.

The judge of the court of origin issues the certificate based on the standard form in Annex IV of Regulation, in the language of the court decision. The judge must also complete the other information requested in the Annex, including whether the judgment is enforceable in the Member State of origin on the date the certificate is issued.

The court of origin issues the certificate, in principle, after the judgment becomes "*enforceable*", which implies that the period for filing an appeal has, in principle, expired. However, this rule is not absolute and the court of origin can, if it considers it necessary, declare that the decision is enforceable, despite a possible appeal.

It should be emphasized that the judgment of the court of origin is automatically enforceable in all Member States and not only in the Member State where the non-return judgment was issued. This interpretation follows clearly from the wording of Article 42 (1) and corresponds to the objectives and spirit of the Regulation. Therefore, moving the child to another Member State has no effect on the decision of the court of origin. It is not necessary to start a new procedure for the return of the child under the Hague Convention, but only to **enforce the judgment of the court of origin**.

## C. ECHR RELEVANT RULINGS

In the field of international child abductions, the obligations imposed by art. 8 of the European Convention on Human Rights on the contracting states must be interpreted taking into account the requirements of the Hague Convention.

The decisive question is whether the just balance that must exist between the competing interests at stake - those of the child, of the two parents, and those of public order - has been preserved within the margin of appreciation granted to the states in such matters [...] , taking into account, however, the fact that the best interests of the child must be considered paramount and that the objectives of prevention and immediate return correspond to a specific conception of the «best interests of the child».

▼ **Ignaccolo-Zenide against Romania**

Following the applicant's divorce, a French court decided, in a judgment which became final, that the two children resulting from the marriage should live with her. In 1990, during the summer vacation, the children went to her ex-husband, who had dual citizenship, French and Romanian, and lived in the United States. However, at the end of the vacation, he refused to return the children to the applicant. After changing his address several times to avoid being found by the US authorities, to whom the case had been referred under the Hague Convention on international child abduction, the applicant's ex-husband managed to flee to Romania in March 1994. On December 14, 1994, the first instance court in Bucharest, by presidential decree, ordered the return of the applicant's children. The order could not be executed, despite the best efforts of the applicant. After 1990, the applicant saw her children only once, in a meeting organized by the Romanian authorities, on 29 January 1997. The applicant claimed that the Romanian authorities had not taken sufficient measures to ensure the speedy execution of court decisions and to facilitate the return of her daughters to her.

The Court decided that it was violated art. 8 of the European Convention on Human Rights, finding that the authorities had not made adequate and effective efforts to implement the applicant's right to have her children returned and had thus violated her right to respect for her family life. The Court observed, in particular, that the authorities had not taken the necessary measures to ensure the return of the applicant's children, measures provided for in art. 7 of the Hague Convention.

▼ **M.K. against Greece**

This case concerned the impossibility of the applicant, a mother of two children, to exercise parental authority over one of her sons, A, despite a decision of the Greek courts granting her permanent custody. Her ex-husband lived in Greece with their two sons, while she lived in France. The applicant complained, in particular, that the Greek authorities had not complied with the judgments of the courts in Greece and France in her favor regarding the custody of her son. She also claimed that they had refused to facilitate the child's return to France and had not followed through on her complaints against her ex-husband for abducting the child.

The Court decided that there was no violation of art. 8 (right to respect for private and family life) of the Convention, finding that the Greek authorities had taken the measures that could reasonably be expected of them to comply with their positive obligations arising from art. 8. Among other things, they had taken into account the overall family situation, its evolution over time and the best interests of the two brothers, and especially of A. The latter, who was 13 at the time, had expressed his clear will to the Greek authorities the will to stay with his brother and father in Greece. In this case, the Court recalled, in particular, that the will expressed by a child who has sufficient discernment is a key factor that must be taken into account in any judicial or administrative procedure concerning him. The child's right to be heard and to participate in decision-making in any family proceedings primarily affecting the child was also guaranteed by several international legal instruments. In particular, art. 13 of the Hague Convention provided that the authorities could refuse to order the return of a child if he objects and has reached an age and degree of maturity that allows his views to be taken into account.