



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

Jurisdiction in matrimonial cases and in matters of
parental responsibility – Anna Wysocka-Bar

Rome, 18 October 2022



The project is co-financed with the support of the European Union's Justice programme

***Jurisdiction in matrimonial cases
(divorce, legal separation and marriage annulment)
and in matters of parental responsibility***

Anna Wysocka-Bar (Poland)

CiviLAW Seminar on EU Family Law

Rome, Tuesday, 18th October 2022

Brussels II ter Regulation

Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)

OJ L 178, 2.7.2019, p. 1–115

Matrimonial matters

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Material scope

Article 1(1)(a) divorce, legal separation or marriage annulment

Brussels II ter Regulation

Territorial scope

(95) In accordance with Article 3 and Article 4a(1) of Protocol No 21 on the position of the **United Kingdom and Ireland** (...), those Member States have notified their **wish to take part in the adoption and application of this Regulation**.

BUT BREXIT

(96) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, (...) **Denmark is not taking part** in the adoption of this Regulation and is not bound by it or subject to its application.

Brussels II ter Regulation

Temporal scope

Article 105(2)

This Regulation shall apply from **1 August 2022** (...)

Article 100(1)

This Regulation shall apply only to **legal proceedings instituted (...)** on or after **1 August 2022**.



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Relations with other instruments

Article 94(1)

(...) this Regulation shall, for the Member States, **supersede** conventions existing at the time of entry into force of Regulation (...) [Brussels II Regulation] which have been **concluded between two or more Member States** and relate to matters governed by this Regulation.

conventions with third states?

Brussels II ter Regulation

Court

Article 2(2)(1)

court means **any authority** in any Member State with jurisdiction in the matters (...) (14)

(...) should be given a broad meaning so as to also cover **administrative authorities**, or **other authorities**, such as **notaries**, who or which exercise jurisdiction in certain matrimonial matters (...). Any agreement approved by the court following an examination of the substance in accordance with national law and procedure should be recognised or enforced as a 'decision'.

Other agreements which acquire binding legal effect in the Member State of origin following the **formal intervention of a public authority** or other authority as communicated to the Commission by a Member State for that purpose should be given effect in other Member States in accordance with the specific provisions on authentic instruments and agreements in this Regulation (...)

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Court

Article 103(a)(1st part) – Public authorities or other authorities authorized to establish an authentic instrument referred to in point (2)(b) of Article 2(2), and public authorities authorized to register an agreement referred to in point (3) of Article 2(2)

a) The authorities referred to in Article 2(2)(2)(b) and 2(2)(3)

- Public authorities or other authorities empowered to draw up an authentic instrument as referred to in Article 2(2)(2)(b): **notary (*notaio*), civil registrar (*ufficiale dello stato civile*), court (*autorità giudiziaria*);**

- Public authorities empowered to register an agreement as referred to in Article 2(2)(3): **civil registrar, court (General Court (*Tribunale*) and Public Prosecutor's Office (*Procura della Repubblica*));**



Content provided by:



Italy

Brussels II ter Regulation

Court

Article 103(a)(1st part) – Public authorities or other authorities authorized to establish an authentic instrument referred to in point (2)(b) of Article 2(2), and public authorities authorized to register an agreement referred to in point (3) of Article 2(2)

None.



Content provided by:



Poland

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Article 6 Residual jurisdiction

Article (6)(2)

A spouse who is
habitually resident in the territory
of a Member State; or
a **national** of a Member State,



may be sued in another Member
State **only in accordance with**
Articles 3, 4 and 5.

Article (6)(1)

(...) where **no court** of a Member
State has jurisdiction pursuant to
Article 3, 4 or 5,



jurisdiction shall be determined,
in each Member State, by the
laws of that State.

Brussels II ter Regulation

Article 3 General jurisdiction

(...) jurisdiction shall lie with the courts of the Member State:

(a) in whose territory:

(i) the spouses are **habitually resident**,

(ii) the spouses were **last habitually resident**, insofar as one of them still resides there,

(iii) the **respondent is habitually resident**,

(iv) in the event of a joint application, either of the spouses is **habitually resident**,

(v) the **applicant is habitually resident** if he or she resided there for at least **a year** immediately before the application was made, or

(vi) the **applicant is habitually resident** if he or she resided there for at least **six months** immediately before the application was made and is a **national** of the Member State in question; or

(b) of the **nationality of both spouses**.

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Article 4 Counterclaim

The court before which proceedings are pending on the basis of Article 3 shall also have jurisdiction to examine a counterclaim, insofar as that counterclaim falls within the scope of this Regulation.

Article 5 Conversion of legal separation to divorce

Without prejudice to Article 3, a court of a Member State that has given a decision granting a legal separation shall also have jurisdiction to convert that legal separation to a divorce, if the law of that Member State so provides.

Brussels II ter Regulation

Article 20 Lis pendens and dependent actions

1. Where proceedings (...) between **the same parties** are instituted before courts of **different Member States**, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

(...)



3. Where the jurisdiction of the court **first seised** is established, the court second seised shall decline jurisdiction in favour of the court first seised.

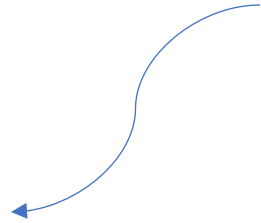
In that case, the party who instituted proceedings before the court second seised may bring those proceedings before the court first seised.

Parental responsibility matters

Brussels II ter Regulation

Material scope

Article 1(1)(b) the attribution, exercise, delegation, restriction or termination of **parental responsibility**.



Article 2(2)(7)

parental responsibility means all rights and duties relating to the person or the property of a **child** which are given to a natural or legal person by a decision, by operation of law or by an agreement having legal effect, including **rights of custody** and **rights of access**;

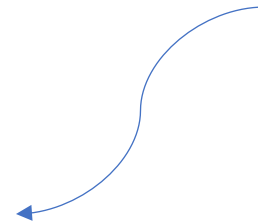
Brussels II ter Regulation

Material scope

Article 1(1)(b) the **attribution, exercise, delegation, restriction or termination** of parental responsibility.

Article 1(2)

- (a) rights of custody and rights of access;
- (b) guardianship, curatorship and similar institutions;
- (c) the designation and functions of any person or body having charge of the person or property of a child, or representing or assisting a child;
- (d) the placement of a child in institutional or foster care;
- (e) measures for the protection of the child relating to the administration, conservation or disposal of the property of a child.



Brussels II ter Regulation

Material scope

Article 2(2)(6)

child means any person below the age of 18 years;

Article 2(2)(8)

holder of parental responsibility means any person, institution or other body having parental responsibility for a child;

Article 2(2)(9)

rights of custody includes rights and duties relating to the care of the person of a child and in particular the right to determine the place of residence of a child;

Article 2(2)(10)

rights of access means rights of access to a child, including the right to take a child to a place other than his or her habitual residence for a limited period of time;

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Material scope

Article (1)4 This Regulation **does not apply** to:

- (a) the establishment or the contesting of a parent-child relationship;
- (b) decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption;
- (c) the name and forenames of a child;
- (d) emancipation;
- (e) maintenance obligations;
- (f) trusts or succession;
- (g) measures taken as a result of criminal law offences committed by children.

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Territorial scope

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BUT BREXIT

(96) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, (...) **Denmark is not taking part** in the adoption of this Regulation and is not bound by it or subject to its application.

Brussels II ter Regulation

Temporal scope

Article 105(2)

This Regulation shall apply from **1 August 2022** (...)

Article 100(1)

This Regulation shall apply only to **legal proceedings instituted (...)** on or after **1 August 2022**.



Brussels II ter Regulation

Article 97 Relation with the 1996 Hague Convention

1. (...) this Regulation shall apply:
 - (a) (...) where the child concerned has his or her **habitual residence in the territory of a Member State** (...)

 2. Notwithstanding paragraph 1,
 - (a) where the parties have **agreed upon the jurisdiction** of a court of a [non-EU] State Party to the 1996 Hague Convention (...)
 - (b) with respect to the **transfer of jurisdiction** between a court of a Member State and a court of a [non-EU] State Party to the 1996 Hague Convention (...)
 - (c) where proceedings relating to parental responsibility are **pending** before a court of a [non-EU] State Party to the 1996 Hague Convention (...)
- * 1996 Hague Convention prevails

Brussels II ter Regulation

General jurisdiction

Article 7(1)

The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is **habitually resident** in that Member State at the time the court is seised.

Brussels II ter Regulation

Continuing jurisdiction in relation to access rights

Article 8

1. Where a child moves lawfully from one Member State to another and acquires a new habitual residence there, the courts of the Member State of the child's **former habitual residence** shall (...) retain jurisdiction, for **three months** following the move, to **modify a decision on access rights** given in that Member State before the child moved if the person granted access rights by the decision continues to have his or her **habitual residence** in the Member State of the child's former habitual residence.
2. Paragraph 1 shall not apply if the holder of access rights referred to in paragraph 1 has accepted the jurisdiction of the courts of the Member State of the child's new habitual residence by participating in proceedings before those courts without contesting their jurisdiction.

Brussels II ter Regulation

Choice of court

Article 10

1. (...) the following conditions are met:
 - (a) the child has a **substantial connection** with that Member State (...)
 - (b) **the parties**, as well as any other **holder of parental responsibility** have:
 - (i) **agreed** freely upon the jurisdiction, at the latest at the time the court is seised; or
 - (ii) **expressly accepted** the jurisdiction in the course of the proceedings and the court has ensured that all the parties are informed of their right not to accept the jurisdiction; and
 - (c) the exercise of jurisdiction is in the **best interests** of the child.

Brussels II ter Regulation

Choice of court

Article 10

(...) a **substantial connection** with that Member State, in particular by virtue of the fact that:



- (i) at least one of the holders of parental responsibility is habitually resident in that Member State;
- (ii) that Member State is the former habitual residence of the child; or
- (iii) the child is a national of that Member State;

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Jurisdiction based on presence of the child

Article 11

1. Where the habitual residence of a child cannot be established and jurisdiction cannot be determined on the basis of Article 10 [choice of court], the courts of the Member State where the child is **present** shall have jurisdiction.
2. The jurisdiction under paragraph 1 shall also apply to **refugee children** or **children internationally** displaced because of disturbances occurring in their Member State of habitual residence.

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Residual jurisdiction

Article 14

Where **no** court of a Member State has jurisdiction pursuant to Articles 7 to 11, jurisdiction shall be determined, in each Member State, **by the laws of that Member State.**

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Transfer of jurisdiction

Article 12

Transfer of jurisdiction to a court of another Member State

- exceptional circumstances
- application from a party or of its own motion
- “particular connection”
- better placed to assess the best interests of the child in the particular case
- Procedure and deadlines
- No if choice of court under Article 10

Article 13

Request for transfer of jurisdiction by a court of a Member State not having jurisdiction

- exceptional circumstances
- court requests the transfer
- “particular connection”
- better placed to assess the best interests of the child in the particular case
- Procedure and deadlines

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Transfer of jurisdiction

Article 12(4)

(...) the child shall be considered to have a particular connection with a Member State if that Member State:

- (a) has become the habitual residence of the child after the court (...) was seised;
- (b) is the former habitual residence of the child;
- (c) is the State of the nationality of the child;
- (d) is the habitual residence of a holder of parental responsibility; or
- (e) 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 that property.

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Provisional, including protective, measures in urgent cases

Article 15(1)

In urgent cases, even if the court of another Member State has jurisdiction as to the substance of the matter, the courts of a Member State shall have jurisdiction to take **provisional, including protective, measures** which may be available under the law of that Member State in respect of:

- (a) a child who is **present** in that Member State; or
- (b) property belonging to a child which is **located** in that Member State.

+ communication

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Incidental question

Article 16

1. If the outcome of proceedings in a matter not falling within the scope of this Regulation before a court of a Member State depends on the determination of an incidental question relating to parental responsibility, a court in that Member State may determine that question for the purposes of those proceedings even if that Member State does not have jurisdiction under this Regulation.
2. The determination of an incidental question pursuant to paragraph 1 shall produce effects only in the proceedings for which that determination was made.
3. If the validity of a legal act undertaken or to be undertaken on behalf of a child in succession proceedings before a court of a Member State requires permission or approval by a court, a court in that Member State may decide whether to permit or approve such a legal act even if it does not have jurisdiction under this Regulation.

+ communication

Brussels II ter Regulation

Lis pendens and dependent actions

Article 20(2)

first in time rule



BUT

Article 20(4)

Where a court of a Member State on which an acceptance of jurisdiction as referred to in Article 10 confers **exclusive jurisdiction** is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement or acceptance declares that it has no jurisdiction under the agreement or acceptance.



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

International Child Abduction – Grazia Ofelia Cesaro

Rome, 18 October 2022



The project is co-financed with the support of the European Union's Justice programme

What does «International Child Abduction» mean?

Definition of «International child abduction»

International child abduction occurs when:

- A child is unlawfully removed from the country of habitual residence in breach of another parent or guardian's custody rights.
- A child is unlawfully retained in a country outside his or her country of habitual residence in breach of another parent or guardian's custody rights: this usually happens when, following a legitimate trip abroad, a child does not return to his country of habitual residence.

ACTIVE CASES vs PASSIVE CASES

- **Active cases:** when a child is wrongfully removed from or retained outside of Italy (which is his or her State of habitual residence)
- **Passive cases:** when a child is wrongfully retained in Italy or removed from a foreign country to Italy (which is not his or her State of habitual residence)

Analysis of the phenomenon

International abductions of children is a growing phenomenon

- The increase in the number of families that are mobile across borders
- The increase of migration flows



- Cultural differences can lead to barriers between parents, when their different lifestyles and values are misunderstood, misinterpreted or not accepted.

Analysis of the phenomenon: statistics

Statistics of the Central Authority (2000-2021)

- Number of cases: 3535 (2300 active cases; 1235 passive cases)
- Most of the international child abductions occurred between:
 - I. Italy and Romania (349 active cases; 51 passive cases);
 - II. Italy and Germany (196 active; 176 passive);
 - III. Italy and Poland (164 active; 60 passive);
 - IV. Italy and United States (153 active; 82 passive)

Analysis of the phenomenon: statistics

Statistics of the Central Authority (2021)

- Number of cases: 158 (90 of them are active cases; 68 passive)
- Most of the international child abductions occurred between:
 - I. Italy and Romania (15 active; 3 passive);
 - II. Italy and United Kingdom (8 active; 11 passive);
 - III. Italy and French (6 active; 4 passive);
 - IV. Italy and Russia (6 active; 1 passive);
 - V. Italy and Germany (5 active; 8 passive);

RELEVANT LAW

- The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (*Italy ratified the Convention with law n. 64, 15th January 1994*)
- Council regulation (EU) 2019/1111 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (25th June 2019)
- The Hague Convention of 19th October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (*ratified by Italy with law 101, 18th June 2015*)

Different proceedings, different laws

EU PROCEEDINGS: THE HAGUE CONVENTION 1980 AND
COUNCIL REGULATION (EU) 2019/1111

EXTRA EU PROCEEDINGS: HAGUE CONVENTION 1980

EXTRA EU AND EXTRA HAGUE CONVENTION 1980
PROCEEDINGS

1980 Hague Convention: application

Art. 4:

“The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years”.

1980 Hague Convention: art. 3

The removal or the retention of a child is to be considered wrongful where

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention;

and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

CUSTODY RIGHTS: DEFINITION

1980 Hague Convention art. 5:

a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence

The habitual residence: definition

- The EU Court of Justice repeatedly remarked that the general ground for jurisdiction contained in EU Regulation 2201/2003 art. 8 is focused on the central role of the habitual residence of the child, that is instrumental in ensuring the proximity between the case and the competent court and in achieving the best interests of the child
- In the interpretation of Art. 8 of Regulation 2201/2003 the Court of Justice decided to preserve a degree of discretion and refused to frame a clear-cut definition.

HABITUAL RESIDENCE

- HABITUAL RESIDENCE  Autonomous and Factual Definition

- IT IS NOT THE REGISTRED RESIDENCE
- IT IS NOT THE MAIN RESIDENCE
- IT IS NOT THE INTENTIONAL RESIDENCE

CG 2.4.2009, C-523/07,A

CG 22.12.2010, C- 497/10 PPU, Mercredi

CG 9.10.2014, C-376/14 PPU, C.v.M.

CG 8.6.2017 111/17 PPU, O.L

CG 17.10.2018, C-393/18 PPU, UD c XB

CG, 28.6.2018, C. 512/2017 HR

TWO DIFFERENT PROCEEDINGS

REQUEST OF RETURN OF THE CHILD

- HAGUE CONVENTION 1980 AND BRUXELLES II TER

CUSTODY RIGHTS

- HAGUE CONVENTION 1996 AND BRUXELLES II TER

Hague Convention 1980: art. 13

The judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that

- Art. 13 (1) point a: the person or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention.
- Art. 13 (1) point b: there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
- Art. 13 (2): the judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

The New Council Regulation (EU) 2019/1111
also know as Brussels II Ter

What are the main innovations of the new
Brussels II Ter?

THE PROCEEDING MUST BE MORE QUICKLY

Council Regulation (EU) 2019/1111

- The chapter III is titled: «International child abduction»
 - Articles 23 to 29, and Chapter VI, of this Regulation shall apply and complement the 1980 Hague Convention
- Innovation of the new Regulation:
 - According to art. 23 “*the requested Central Authority shall act expeditiously in processing an application*”: where the Central Authority of the requested Member State receives an application, it shall, within five working days from the date of receipt of the application, acknowledge receipt.

Council Regulation (EU) 2019/1111

Innovation of the new Regulation:

- According to art. 24 the Court proceeding must be expeditious:
 - A Court of first instance shall, except where exceptional circumstances make this impossible, give its decision no later than six weeks after it is seised.
 - Except where exceptional circumstances make this impossible, a Court of higher instance shall give its decision no later than six weeks after all the required procedural steps have been taken and the court is in a position to examine the appeal, whether by hearing or otherwise

Council Regulation (EU) 2019/1111

Innovation of the enforcement of decisions ordering the return of the child: art. 28

- An authority competent for enforcement to which an application for the enforcement of a decision ordering the return of a child to another Member State is made shall act expeditiously in processing the application.
- Where a decision has not been enforced within six weeks of the date when the enforcement proceedings were initiated, the party seeking enforcement or the Central Authority of the Member State of enforcement shall have the right to request a statement of the reasons for the delay from the authority competent for enforcement.

THE HEARING OF THE CHILD

Council Regulation (EU) 2019/1111

- Art. 26 establishes the right of the child to express his or her views in return proceedings




- Art. 21 “Rights of the child to express his or her views” :
 - The courts of the Member States shall, in accordance with national law and procedure, provide the child who is capable of forming his or her own views with a genuine and effective opportunity to express his or her views, either directly, or through a representative or an appropriate body.
 - Where the court, in accordance with national law and procedure, gives a child an opportunity to express his or her views in accordance with this Article, the court shall give due weight to the views of the child in accordance with his or her age and maturity.

THE IMPORTANCE OF THE MEDIATION

Council Regulation (EU) 2019/1111

Innovation of the new Regulation

- According to art. 25, the Court either directly or, where appropriate, with the assistance of the Central Authorities, shall invite the parties to consider whether they are willing to engage in mediation or other means of alternative dispute resolution.
- Exception  «unless this is contrary to the best interests of the child, it is not appropriate in the particular case or would unduly delay the proceedings».

INNOVATIVE ASPECTS OF THE PROCEDURE
FOR THE RETURN OF A CHILD

Council Regulation (EU) 2019/1111

Art. 27 Innovative aspects of the procedure for the return of a child:

- A Court cannot refuse to return a child unless the person seeking the return of the child has been given an opportunity to be heard.
- The Court may, examine whether contact between the child and the person seeking the return of the child should be ensured, taking into account the best interests of the child.

Council Regulation (EU) 2019/1111

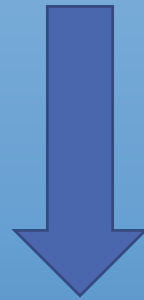
Art. 27

- The Court shall not refuse to return the child according art. 13 I paragraph if the party seeking the return of the child satisfies the court by providing sufficient evidence, or the Court is otherwise satisfied, that adequate arrangements have been made to secure the protection of the child after his or her return.
- The Court may, where appropriate, take provisional, including protective, measures in accordance with Article 15 of this Regulation in order to protect the child

WHAT ABOUT THE PROCEDURE FOLLOWING
A REFUSAL OF THE RETURN OF A CHILD?

Council Regulation (EU) 2019/1111

Procedure following a refusal to return the child



Overrule Proceeding

Article 29 shall apply where a decision refusing the return of a child to another Member State is based solely on point (b) of Article 13(1), or on Article 13(2), of the 1980 Hague Convention

PASSIVE CASES IN ITALY

- **Competent judicial Authority:** Juvenile Court of the place where the abducted child is currently living
- The other parent (according to art. 29 of the Convention) can apply directly to the judicial or administrative Authorities. Also the P.M. (Pubblico Ministero: Prosecutor) can make the request if the proceedings are initiated via the Central Authority.

PASSIVE CASES IN ITALY

If the proceedings in Italy are initiated via the Central Authority

- The Italian Central Authority will evaluate if the conditions for asking the return of the child are satisfied
- If the conditions are satisfied: the Italian police shall localize the child
- If the abducting parent does not bring the child back voluntarily, the Italian Central Authority instructs the Prosecutor to start judicial proceedings in front of the Juvenile Court

PASSIVE CASES IN ITALY

- Child must be heard
- The participation of the Prosecutor is mandatory.
- The proceedings take place in «closed session» (camera di consiglio)
- During the proceedings the parents are always heard, as well as the people with whom the child is currently staying.
- The requesting parent is informed of the date of the hearing by the Central Authorities.
- An interpreter can be requested.
- Children are heard if they are 12 years old or older
- If younger, they are heard if deemed capable of understanding the situation.

PASSIVE CASES IN ITALY

- In Italy children are usually heard directly by the Judge.
- A professional Judge and a “lay” Judge may hear the child, sometimes together. The presence of the “lay” Judge is particularly important when a child is younger than 12 years old.
- The hearing of the child takes place only at the presence of the Judges and of his guardian ad litem, when and if appointed. The parents, their lawyers and the Prosecutor cannot participate.
- Before the hearing, they can suggest the Judge to focus on some relevant matters.
- If the child is safeguard through appropriate technical means (mirror-glass, closed circuit phone system) they can follow the hearing staying in a different place connected with the room where the hearing takes place.

PASSIVE CASES IN ITALY

- Decision: the Court's order is immediately enforceable
- The decision can be appealed in front of the Italy's Supreme Court (Corte di Cassazione)
- Anyway, the order is enforceable even if the case is pending before the Court.
- Enforcement: by the Prosecutor with the help of police

CRIMINAL CODE

- According to article 574-bis of the Italian criminal code it is a crime to remove or retain a minor abroad illicitly (i.e. without the consent of the other parent or of the legal guardian, provided they effectively exercise their parental/custodial rights and duties).
- If the perpetrator of the crime is the child's parent, he/she can be deprived of his/her parental rights if convicted.
- The crime is considered against both the other parent and the child.



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

Jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and on the property consequences of registered partnership – Joaquín Bayo

Rome, 18 October 2022



The project is co-financed with the support of the European Union's Justice programme



Basic ideas (1)

- REGULATIONS 2016/1103 & 2016/1104
 - Parallel regulations, but
 - Enhanced cooperation regulations (Belgium, Bulgaria, the Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Finland and Sweden)
- Applicability of both regulations
 - Jurisdiction:
 - As in all regulations: *erga omnes*
 - They are not applied by non participant EU ME, but are applicable in participant EU ME vis-à-vis non participant EU ME (as non EU Estates)
 - As in all regulations, there are bilateral articles (ex. *Lis pendens*)
 - Applicable law
 - *Erga omnes*
 - Article 32: Exclusion of renvoi
 - Recognition and enforcement
 - Only bilaterally between participant ME
- Transitional provisions (Art. 69)
 - Jurisdiction: As from 29 January 2019
 - Applicable law: marriages/partnerships or agreements established as from 29 January 2019
 - Recognition and enforcement of decisions, authentic instruments and court settlements of 29 January 2019 and posterior ones. If proceedings of origin are anterior, as long as rules of jurisdiction are complied with.



Basic ideas (2)

- Material scope

- No definition of marriage: Article 9 Alternative jurisdiction:
 - *1. By way of exception, if a court of the Member State that has jurisdiction pursuant to Article 4, 6, 7 or 8 holds that, under its private international law, the marriage in question is not recognised for the purposes of matrimonial property regime proceedings, it may decline jurisdiction*
- Definition of registered partnerships:
 - *'registered partnership' means the regime governing the shared life of two people which is provided for in law, the registration of which is mandatory under that law and which fulfils the legal formalities required by that law for its creation*
 - *Ope legis* partnerships
- Matrimonial property regimes
 - the classification of property of either or both spouses into different categories during and after marriage;
 - the transfer of property from one category to the other one;
 - the responsibility of one spouse for liabilities and debts of the other spouse;
 - the powers, rights and obligations of either or both spouses with regard to property;
 - **the dissolution of the matrimonial property regime and the partition, distribution or liquidation of the property;**
 - the effects of the matrimonial property regime on a legal relationship between a spouse and third parties; and
 - the material validity of a matrimonial property agreement.
- Patrimonial effects of registered partnerships: equivalent



JURISDICTION Matrimonial reg. (1)

- Art. 4. The courts of the ME where a court is dealing with succession of one of the spouses
- Art. 5. The courts of the ME where a court is dealing with the divorce, separation or matrimonial annulment:
 - The other party can oppose is jurisdiction for divorce, etc, is based on
 - Habitual residence of the applicant
 - Conversion of legal separation into divorce
 - Residual jurisdiction (national rules, because no other EU EM has jurisdiction, art. 6 R 2019/1111)
 - Possibility of previous agreement
- Art. 6. Jurisdiction in other cases:
 - Only if there is no jurisdiction pursuant Articles 4 or 5
 - Connections
 - Habitual residence of spouses, or failing that
 - Last habitual residence, provided one spouse still resides, or failing that
 - Respondent's habitual residence, or failing that
 - Common nationality, or failing that



JURISDICTION Matrimonial reg. (2)

- Art. 7. Choice of court:
 - Courts of the ME of
 - applicable law, or
 - the conclusion of the marriage
 - Exclusive jurisdiction
- Art. 8. Appearance of the respondent
- Art. 10. When no ME has jurisdiction, only for immovable property located in the ME
- Art. 11. Forum necessitates, when no ME has jurisdiction and there is connection with the ME



JURISDICTION Partnerships

- Art. 5: jurisdiction of ME of dissolution or annulment always needs agreement
- Art. 6: + ME of registration
- Art. 7: choice of courts of ME of applicable law only

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Applicable law, matrimonial reg.

- Art. 21. Unity of the applicable law
- Art. 22. Choice of the applicable law (art. 23, in writing):
 - the law of the State where the spouses or future spouses, 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.
- Art. 25. Possibility of matrimonial property agreement
- Art. 26. Applicable law in the absence of choice by the parties, State
 - of the spouses' first common habitual residence after the conclusion of the marriage; or, failing that
 - of the spouses' common nationality at the time of the conclusion of the marriage; or, failing that
 - with which the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances.
 - Exception, the court may decide that the law of a State
 - Where the spouses had their last common habitual residence in that other State for a significantly longer period of time, and
 - both spouses had relied on the law of that other State in arranging or planning their property relations.



Applicable law, partnerships

- Art. 22: choice of law: + ME of registration
- Art. 26. Applicable law in the absence of choice by the parties,
 - State of registration only.
 - Also exception of other State of habitual residence whose law they have relied on.



Recognition, enforceability and enforcement: judicial decisions (1)

• RECOGNITION

– Art. 36:

- automatic recognition: *A decision given in a Member State shall be recognised in the other Member States without any special procedure being required.*
- Main proceedings for recognition or non recognition can be followed (= *exequatur*)
- Incidental question of recognition in another proceedings

– Art. 37, Grounds of non-recognition:

(a) if such recognition is manifestly contrary to **public policy (ordre public)** in the Member State in which recognition is sought;

(b) 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 defence, unless the defendant failed to commence proceedings to challenge the decision when it was possible for him to do so;

(c) if it is **irreconcilable with a decision** given in proceedings between the same parties **in the Member State** in which recognition is sought;

(d) 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, provided that the earlier decision fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

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Recognition, enforceability and enforcement: judicial decisions (2)

- RECOGNITION
 - Art. 39, Prohibition of review of jurisdiction of the court of origin
 - Art. 40, No review as to substance
- ENFORCEABILITY: before enforcement, it is necessary the declaration of enforceability.
 - Art. 42: *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 in accordance with the procedure provided for in Articles 44 to 57.*
 - Art. 45, **Procedure**
 1. The **application procedure shall be governed by the law of the Member State of enforcement. (exequatur)**
 2. The applicant shall not be required to have a postal address or an authorised representative in the Member State of enforcement.
 3. The application shall be accompanied by the following **documents**:
 - (a) a **copy** of the decision which satisfies the conditions necessary to establish its **authenticity**;
 - (b) the attestation issued by the court or competent authority of the Member State of origin using the **form established** COMMISSION IMPLEMENTING REGULATION (EU) 2018/1935
<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R1935&from=En>



Recognition, enforceability and enforcement: judicial decisions (3)

- ENFORCEABILITY

- Art. 47, **Declaration of enforceability *inaudita parte***
- Art. 48, Notice of the decision
 - To the applicant
 - Served on the party against whom enforcement is sought
- Art. 49, Appeal against the decision on the application for a declaration of enforceability
 - Either party can appeal
 - Within 30 days of service (60 days if the party against whom enforcement is sought is domiciled in another Member State)
- Art. 50, Further appeal by the procedure communicated by the Member State concerned (**European Judicial Atlas in civil matters**)
https://e-justice.europa.eu/559/EN/matters_of_matrimonial_property_regimes
https://e-justice.europa.eu/560/EN/matters_of_the_property_consequences_of_registered_partnerships
- Art. 51: **the same ground of denial of enforceability as in recognition**
- Art. 56, No security, bond or deposit
- Art. 57, No charge, duty or fee



Recognition, enforceability and enforcement: Authentic instruments and court settlements

- **Authentic instruments**

- Art. 58:

- Same **evidentiary effects** in the Member State of origin
- Any challenge relating to the authenticity of an authentic instrument shall be made before the courts of the Member State of origin

- Art. 59:

- **Enforceability**: the same procedure as for judicial decision, **but**
- **Only** ground for non enforceability: **public policy (ordre public)**

- **Court settlements (Art. 60)**

- **Enforceability**: the same procedure as for judicial decision, **but**
- **Only** ground for non enforceability: **public policy (ordre public)**



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

Recognition, enforceability and enforcement of
decisions in family matters – Olivia Lopes Pegna

Rome, 18 October 2022



The project is co-financed with the support of the European Union's Justice programme

From Regulation n. 2201/2003 (Brussels IIa) to Regulation n. 2019/1111 (Brussels IIb)

Applicability in Time

- The new regulation **applicable from 1 August 2022** (art. 105)
- **Transitional provisions** (art. 100):
 1. This Regulation shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to agreements registered on or after 1 August 2022.
 2. Regulation (EC) No 2201/2003 shall continue to apply to decisions given in legal proceedings instituted, to authentic instruments formally drawn up or registered and to agreements which have become enforceable in the Member State where they were concluded before 1 August 2022 and which fall within the scope of that Regulation

Applicability

Territorial applicability: EU Member States - Denmark excluded

«Cross border» implications needed?

Recognition and enforcement regime applicable to every decision rendered by a member State (even if rendered in a case not having cross-border implications)

Also to decisions based on Residual grounds of Jurisdiction (art. 6)

Basic Principles

Mutual Trust (Recital 54):

- No review of jurisdiction
- No review of the substance
- Binding effects of the Certificate

De minimis rule on grounds for refusal (Recital 55)

Favor divortii (Brussels II – Rome III)

Best interests of the child (see public policy - art. 39, a))

Material scope (art. 1)

Matrimonial matters (divorce, separation, annulment) – exclusions:

- Maintenance obligations (Reg. 4/2009)
- Property consequences of marriage and registered partnerships (Reg. 2016/1103 and 2016/1104)
- Succession (Reg. 650/2012)
- Preliminary questions on status (existence, validity recognition of the marriage): **national law*** (Recital 12)
- Decisions *refusing* divorce, separation, annulment (recital 9)

Italy does not recognise as marriage a **same sex marriage** (art. 32-bis L. 218/1995) => different scope of application in Member States

Matrimonial Matters - Recognition

- **The term «Decision»: art. 2 – Recital n. 14**
- **No special procedure for Recognition (Recital 54; art. 30)** (recognition “by operation of law”)
- **No procedure for updating of civil status records** (only “final” decisions) **(art. 30)**

Possible **application for a decision that there are NO grounds for refusal** (Art. 30) (“accertamento negativo”) – procedure: art. 59 (see below)

Matrimonial Matters - Recognition

Documents needed to invoke a decision (for example before a Court) (art. 31):

- a) An authentic copy of the decision
- b) The certificate** issued pursuant art. 36 (Annex II) – no challenge-only rectification
- c) (translation may be required-not obligatory)

Competent authority for the issuing of the certificate (to be communicated to the Commission (art. 103)

Italy: General court, Public Prosecutor's Office, Civil registrar (see Circolare 2018 on Brussels IIa)

Enforcement

Usually no enforceable content

When necessary: Procedure: art. 34 (=Parental Responsibility)

Example: enforcement of penalty payments imposed in a decision falling into the material scope of application of Brussels IIa Regulation: CJEU judgment of 9 September 2015 in Case C-4/14, [Bohez](#)

«a penalty which the court of the Member State of origin that gave judgment on the merits with regard to rights of access has imposed in order to ensure the effectiveness of those rights — forms part of the same scheme of enforcement as the judgment concerning the rights of access that the penalty safeguards and the latter must therefore be declared enforceable in accordance with the rules laid down by Council Regulation (EC) No 2201/2003 of 27 November 2003»

Order concerning costs: See Art. 73 Brussels IIb

Grounds for refusal of recognition (art. 38)

The recognition of a decision relating to a divorce, legal separation or marriage annulment shall be refused:

- (a) if such recognition is manifestly contrary to the **public policy** of the Member State in which recognition is invoked;
- (b) where it was given **in default of appearance**, if the respondent 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 the respondent to arrange for his or her defence unless it is determined that the respondent has accepted the decision unequivocally;
- (c) if it is **irreconcilable** with a decision given in proceedings between the same parties in the Member State in which recognition is invoked;
- (d) if it is **irreconcilable** with an *earlier** decision given in another Member State or in a non-Member State between the same parties, provided that the earlier decision fulfils the conditions necessary for its recognition in the Member State in which recognition is invoked

* **n.b. difference with art. 39 on parental responsibility**

Restrictions on control

The Court **may not**:

- review the basis of jurisdiction of the court of the Member State of origin which issued the judgment (Art 69);
- apply the test of public policy to the jurisdiction rules set out in Articles 3 to 6 of the Regulation (Art 69); (ECJ 19 November 2015, C-455/15, *P – see after*)
- refuse to recognise the decision because the law of the Member State of recognition would not have allowed a decision in matrimonial matters on the same facts (Art. 70); or
- in any event review the decision as to its substance (Art. 71).

No additional grounds (Recital n. 56)

(for ex. violation of *lis pendens* rule – CGUE 16 January 2019, C-386/17, [Liberato](#) - Italy Cass. n. 13412/2019)

Material scope (art. 1)

Parental Responsibility:

Art. 1 (b): “the attribution, exercise, delegation, restriction or termination of parental responsibility”

Definition (art. 2 (7)): 'parental responsibility' means *all rights and duties relating to the person or the property of a child* which are given to a natural or legal person by a decision, by operation of law or by an agreement having legal effect, *including rights of custody and rights of access (def. n, (9) and (10));*

It includes (art. 1, par. 2):

- rights of custody and rights of access (included the right of access of *granparents Valcheva C-335/17*);
- guardianship and curatorship and the like;
- designation and functions of a person or body having charge of the person or property of a child or who represents or assists the child;
- *the placement of a child in institutional or foster care*, measures for protection of a child in relation to the administration, conservation, or disposal of the property of a child (recital n. 11)

ECJ

Placement in a Foster Family («in»): C C-435/06 (Brussels IIa)

Parents asking for judicial authorisation to *renounce an inheritance* from the grandfather on behalf of a minor («in»): *Saponaro* C-565/16 (Brussels IIa)

But: art. 16 (3) and Recital n. 33 Brussels IIb mitigate this effects: the Court competent for succession may decide

Parental Responsibility – Recognition and enforcement

- **The term «decision»** (art. 2 (1)) – recital 7 «independent of any link with matrimonial proceedings or other proceedings»
- **No special procedure for Recognition (Recital 54; art. 30)**
- **No declaration of enforceability required (Recital 58; art. 34)***
- **Documents for Enforcement (art. 35)**
- **The Certificate (art. 36 – Annex III)**

***declaration for enforceability abolished for enforcement of all decisions on parental responsibility**

(recital 58 decision given by a Court of any Member State to be treated «as if it had been given in the Member State of enforcement»)

Refusal of recognition and enforcement

Grounds for refusal (see art. 39) - Recital n. 55

Par. 2 (and Recital n. 57) : decision rendered without the child having been given the opportunity to express his/her views (see art. 21)

Exceptions

ECJ, 19 November 2015, C-455/15, *P*, (art. 23 a) *Brussels IIa – public policy*):

“in the absence of a manifest breach, having regard to the best interests of the child, of a rule of law regarded as essential in the legal order of a Member State or of a right recognised as being fundamental within that legal order, that provision **does not allow a court of that Member State which considers that it has jurisdiction to rule on the custody of a child to refuse to recognise a judgment** of a court of another Member State which has ruled on the custody of that child.”

+ grounds for suspension or refusal **under national law** (if not incompatible with art. 41, 50, 56) (art. 57)

Procedure for refusal of recognition and enforcement

Procedure for refusal of recognition (art. 40)

Procedure for refusal of enforcement (art. 59)

(Communications pursuant to art. 103) in Italy:

- General Court
- Court of Appeal
- Court of Cassation

[Italy: l. 206/2021, G.U. n. 292 del 9.12.2021, art. 1, par. 14 – government delegated to adopt implementing procedural rules – «rito sommario di cognizione»]

Privileged decisions (art. 42-44) – right of access and return of the child

No grounds for recognition

Except for irreconcilable *later* decisions (art. 50) (n.b. the later decision prevails)

Enforcement (art. 45-46)

Issuance of **the certificate** (art. 47-Annexes V and VI))

n.b. Conditions: Art. 47, par. 3

Common provisions on enforcement

Art. 51 : law of the Member State of enforcement

Art. 52 : authority competent for enforcement (art. 103)

Art. 53 : partial enforcement

Possible cooperation of Central Authorities in the implementation of decisions on parental responsibility (art. 81)

Suspension or refusal of enforcement

Grounds for suspension or refusal (art. 56)

Par. 4 suspension «In exceptional cases» «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**»

Par. 6 refusal «where the grave risk referred to in par. 4 is of a lasting nature»

Enforcement of Return Decisions and Protection of the best interests of the child - subsequent change of circumstances (Brussels IIa)

ECJ

No discretion on the courts of the State of enforcement (art. 42 Reg. 2201/2003 Brussels IIa)

Povse, 1 July 2010, case C-211/10

“Enforcement of a certified judgment cannot be refused in the Member State of enforcement because, as a result of a **subsequent change of circumstances**, it might be seriously detrimental to the best interests of the child. **Such a change must be pleaded before the court which has jurisdiction** in the Member State of origin, which should also hear any application to suspend enforcement of its judgment”

ECJ

ECJ, Zarraga, 22 December 2010, case C-491/10:

“In circumstances such as those of the main proceedings, the court with jurisdiction in the Member State of enforcement **cannot oppose the enforcement of a certified judgment**, ordering the return of a child who has been wrongfully removed, on the ground that the court of the Member State of origin which handed down that judgment may have infringed Article 42 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, interpreted in accordance with Article 24 of the Charter of Fundamental Rights of the European Union, **since the assessment of whether there is such an infringement falls exclusively within the jurisdiction of the courts of the Member State of origin**”

[concerning the child’s right to be heard]

ECHR

Best interest of the child

Possible breach of art. 8 only in exceptional circumstances in cases of return of a child

«in-depth examination of the entire family situation and of a whole series of factors»

Neulinger v. Switzerland (2010), par. 139

Kampanella v. Italy (2011), par. 85

But:

Povse v. Austria, 18 June 2013: enforcement of an Italian certified return order - no discretion for austrian Court; still possible to request a review of the return order in Italy (even for change of circumstances) - no violation of art. 8

And other similar cases – no violation

Authentic instruments and Agreements

Recital n. 14

Definitions art. 2 (2) (2) and 2 (2) (3)

Only authentic instruments formally drawn up or registered, and agreements registered, **in a Member State assuming jurisdiction under Chapter II (Art. 64)**

Recognition – Art. 65

(important for Italy – previous doubts on the application of Brussels Ila to some «non judicial» divorces – Circolare 22 maggio 2018)

Certificate (art. 66)

Competent authority

Autonomous grounds for refusal (art. 68)

Not applicable to «private divorces»: CJEU order of 12 May 2016 in Case C-281/15, *Sahyouni*

Private agreements

Court of Appeal (Milan) 19 August 2006:

Agreement on conditions and modalities of return of the child: the Regulation (Brussels IIa) is not applicable

(it was not an «executive agreement» pursuant art. 46 – now Art. 65)

Brussels IIb Recital n. 14: the Regulation does not apply to purely private agreements concluded without the intervention of a court or public authority

Central Authorities

Art. 79

(c) legal aid in enforcement of the judgements regarding parental responsibility.

(g) **Facilitate agreements between holder of p.r.**

NB: arrangements made by/through central Authorities do not deny or change rules regarding recognition and enforcement of court judgements (CJEU, 26.04.2012, C-92/12 PPU, Health Service Executive)



Where to find additional information

<https://e-justice.europa.eu/>

<https://aldricus.giustizia.it/> (english version available)

