A pair of ornate, silver-colored scales of justice is positioned on the left side of the slide. The scales are set against a background of a white fabric with yellow stars, resembling the European Union flag. The scales are slightly out of focus, with the main text area being the primary focus.

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

Topic: Child Abduction - Czech Experiences
Speaker: Anna Márová

CiviLAW Webinar on Family Affairs
28 March 2022
Zoom Webinar



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

CHILD ABDUCTION

Abduction within the civil law matters is understood and explained in accordance with respective international documents

as WRONGFUL REMOVAL OF RETENTION OF THE CHILD outside of the state of the child habitual residence

REMOVAL – the child is removed without the consent of the second parent/other rightful care taker or judicial or administrative body

RETENTION – the child is removed with the consent of the second parent/other rightful care taker or judicial or administrative body, but the child is not returned



BINDING INTERNATIONAL DOCUMENTS IN CZECHIA

The Czech Republic is the member of the Hague Conference on Private International Law as of January 28, 1993 and the member of EU as of May 1, 2004

The Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (HCCH 1980 Child Abduction Convention) – ratified by the Czech Republic on March 1, 1998

When the removal or retention is considered to be wrongful:

- breach of exercised rights of custody
- the child is under 16 years of age

The Brussels Ila Regulation - Regulation (EC) No 2201/2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility



ÚMPOD

THE OFFICE FOR LEGAL PROTECTION OF CHILDREN (Úřad pro mezinárodněprávní ochranu dětí) seated in Brno

the Czech central body for the legal protection of children based not only on the Czech law but established to fulfil the obligations of the Czech Republic from the international treaties and conventions, international obligations

among many of its authorities, competencies and obligation belongs the guardianship of children in cross-boarder cases including international abductions



ABDUCTIONS FROM THE CZECH REPUBLIC

Cases of children removed from the Czech Republic or retained outside of the Czech Republic

2018 – 41

2021 – 18

2019 – 34

2022 – 4 (March 2022)

2020 - 18

How many abducted children were returned to the Czech Republic?

2018 – 19

2019 – 9

2020 – 3



ABDUCTIONS TO THE CZECH REPUBLIC

Number of cases of children abducted to the Czech Republic:

2018 – 22

2021 - 16

2019 – 19

2022 - 3 (by March 2022)

2020 – 13

In how many cases children were returned from the Czech Republic to the state of their habitual residence:

2018 – 9

2019 – 1

2020 – 0



NUMBER AND TYPE OF CASES

UMPOD solves approx. about 30 abductions per year
the most typical states with which the Czech Republic
shares abduction agenda are:

Slovakia

United Kingdom

Germany

United States

Italy

Spain

Austria

Ireland

The typical victim is a **child under six years of age**

Most of abductors are women (mothers)



TERITORRIAL AND SUBSTANTIVE JURISDICTION OF COURT

in case the child with habitual residence in the CZ is wrongfully removed or retained outside of the Czech Republic the jurisdiction of the recent presence child concerned shall be applied for its return

in case the child with habitual residence outside of the CZ is a subject of the wrongful removal or retention to the CZ the sole jurisdiction for the return procedures belongs to the Municipal Court in Brno (the same town where UMPOD has its seat)

The appeal court shall be solely the Regional Court in Brno



OUT-OF-COURT DISPUTE RESOLUTION

each case filed in the Municipal Court in Brno is reported to UMPOD

x not every case presented to UMPOD is being filed the court

in accordance with Article 55 (e) Brussels IIa UMPOD puts a great emphasis on out-of-court dispute resolution in the cooperation by its internal in languages skilled mediators and children psychologists, lawyers

Participation of children in the process, focus on their information having regard to their age or their degree of maturity belongs to the settled practice of the Office



TERITORRIAL AND SUBSTANTIVE JURISDICTION OF COURT

the extraordinary proceedings cannot be started after the appeal court decision

but the constitutional complaint may be filed the applicant does not have any obligation to be represented by a lawyer before the Municipal Court in Brno and before the Regional Court in Brno

the constitutional complaint must be filed by the attorney-at-law

preliminary rulings for questions brought by national courts within this agenda on the EU level are decided by the Court of Justice of the EU in Luxembourg



TERITORRIAL AND SUBSTANTIVE JURISDICTION OF COURT

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important decisions are sent by judges representing the Czech Republic in the International Hague Network of Judges to INCADAT (international Child Abduction Database) www.incadat.com



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current representatives of the Czech Republic in IHNJ for the family law agenda are Mr Lubomír Ptáček, Supreme Court in Brno and Ms Radka Círková, District Court in Český Krumlov

EUROPEAN COURT OF HUMAN RIGHTS

In case the national appeals and remedies have been exhausted the parent/rightful care taker may file an application to the European Court of Human Right in Strasbourg for the violation of the **right to respect to private and family life** in accordance with **Article 8.** of the European Convention on Human Rights – such a right does not belong only to the applicant, but to the child as an individual subject and bearer of the right



NATIONAL ABDUCTIONS

not only cross-boarder removals and retentions of the child may represent a severe impact to their right to be in the contact and custody of the second parent/right care taker

situation caused by covid-19 pandemia revealed how important for the minors is to have not only a right itself but the factual possibility to exercise such a right

in the Czech Republic we more emphatically talk about the right of both the parents to determine the place of habitance of the minor due to the fact that the distance does not need to be only due to state borders but as a matter of fact by the distance between the places within one state

in these proceedings esp. interim measures/preliminary decisions issued by guardianship courts play irreplaceable role





COM (2022) 131 final of March 23, 2022

EC issued on March 23 Communication from the European Commission: Welcoming those fleeing war in Ukraine: Readyng Europe to meet the needs (eur-lex.europa.eu Document 52022DC0131)

Point 2. of the Communication concentrates on SPECIAL PROTECTION FOR CHILDREN because:

- half of refugees are children
- they need swift access to their rights
- one of priorities is to provide safeguards for children, orphaned, unaccompanied, separated from families
- special vigilancy about children at risks of trafficking or abduction

COM (2022) 131 final of March 23, 2022

an EU Network for Children's Rights will be launched on March 31, bringing together national representatives, international organisations, NGOs, ombudspersons and children themselves

the EU-wide Child Helpline 116000 for missing children

should be widely known to anybody who will need such a help

important link <https://missingchildreneurope.eu/ukraine/>

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Thank you for your kind listening

If I can answer any related question,
please do not hesitate to ask me now or do not
hesitate to write me to my e-mail address
amara@attorney.cz



SOURCES

www.umpod.cz Annual reports, FAQ

Kapitán, Šínová and others: Family in International Consequences, Leges, 2019, ISBN 978-80-7502-397-1

www.eur-lex.europa.com


www.hcch.net

[www.https://www.echr.coe.int/](https://www.echr.coe.int/)

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

**Topic: Jurisdiction in matrimonial cases (divorce,
legal separation or marriage annulment) and in
parental responsibility matter**

Speaker: Cinzia Calabrese

CiviLAW Webinar on Family Affairs
28 March 2022
Zoom Webinar



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



**Which is the
competent judge
for the resolution
of disputes
involving cross
boarder families?**

**To which court should
an italian spouse ask for
separation or divorce
from his/her French
spouse residing in
another State?**

Jurisdiction in EU Regulations

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EU REGULATIONS concerning JURISDICTION and the recognition and enforcement of judgments in MATRIMONIAL MATTERS and MATTERS OF PARENTAL RESPONSABILITY

REGULATION (EC) N. 2201/2003

BRUXELLS IIa

From 1° March 2005

**Has repealed Regulation (EC) N.
1347/2000**

REGULATION (EC) N. 2019/1111

RECAST BRUXELLS IIa

Shall apply to proceedings instituted on
or after 1 August 2022

**It doesn't change criteria of
jurisdiction**



Regulations' scope



Establish **univocal criteria** to
determine jurisdiction in
matrimonial or parental
responsability proceedings
concerning **cross border**
families of different Member
States.



Jurisdiction
MATRIMONIAL
MATTERS

Brussels Ila Reg.
Arts. 3-7

Jurisdiction
PARENTAL
RESPONSABILITY

Brussels Ila Reg. Arts. 8-15

Hague Convention Arts. 5-14

Jurisdiction maintenance obligations

Regulation N. 4/2009

Jurisdiction property regimes of international couples

EU Regulations n. 2016/1103 – 2016/1104

Applicable law parental responsibility

1996 Hague Convention

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Applicable law maintenance obligations

2007 Hague Protocol

Applicable law divorce

Rome III Regulation or National Law

Applicable law matrimonial property

Regulation 2016/1104 or National Law

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Reg. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in **matrimonial matters** and the **matters of parental responsibility**

Article 1 **Scope**

1. This Regulation shall apply, whatever the nature of the court or tribunal, in **civil matters** relating to:

- (a) **divorce, legal separation or marriage annulment;**
- (b) **the attribution, exercise, delegation, restriction or termination of parental responsibility.**



Jurisdiction in matrimonial matters

Matrimonial matters?



The term 'matrimonial matters' is **interpreted narrowly**, since it is confined to the proceedings such as:

- Dissolution of a marriage link (**divorce or annulment**);
- Weakening of marriage link (**legal sepeation**).

Other interrelated issues are settled in national procedure, the Reg. does not apply to them.

Matrimonial matters?

The Reg. does not apply to other formal or informal relationships.



Do same sex marriages fall within the Regulation's scope?



The Regulation does not specify whether they fall within its scope.



Negative consequences

General jurisdiction

ART. 3 REG. 2201/2003



ART. 3 REG. 2019/1111

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General jurisdiction in matrimonial matters

Divorce, legal separation and marriage annulment

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Article 3

General jurisdiction

In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State

A. in whose territory:

- the spouses are **habitually resident**, or
- the spouses were **last habitually resident**, insofar as one of them still resides there, or
- the **respondent is habitually resident**, or
- in the event of a joint application, **either of the spouses is habitually resident**, or
- the **applicant is habitually resident** if he or she resided there for at least a year immediately before the application was made, or
- 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, in the case of the **United Kingdom and Ireland**, has his or her "**domicile**" there;

B. of the **nationality of both spouses** or, in the case of the United Kingdom and Ireland, of the "domicile" of both spouses.



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General jurisdiction in matrimonial matters

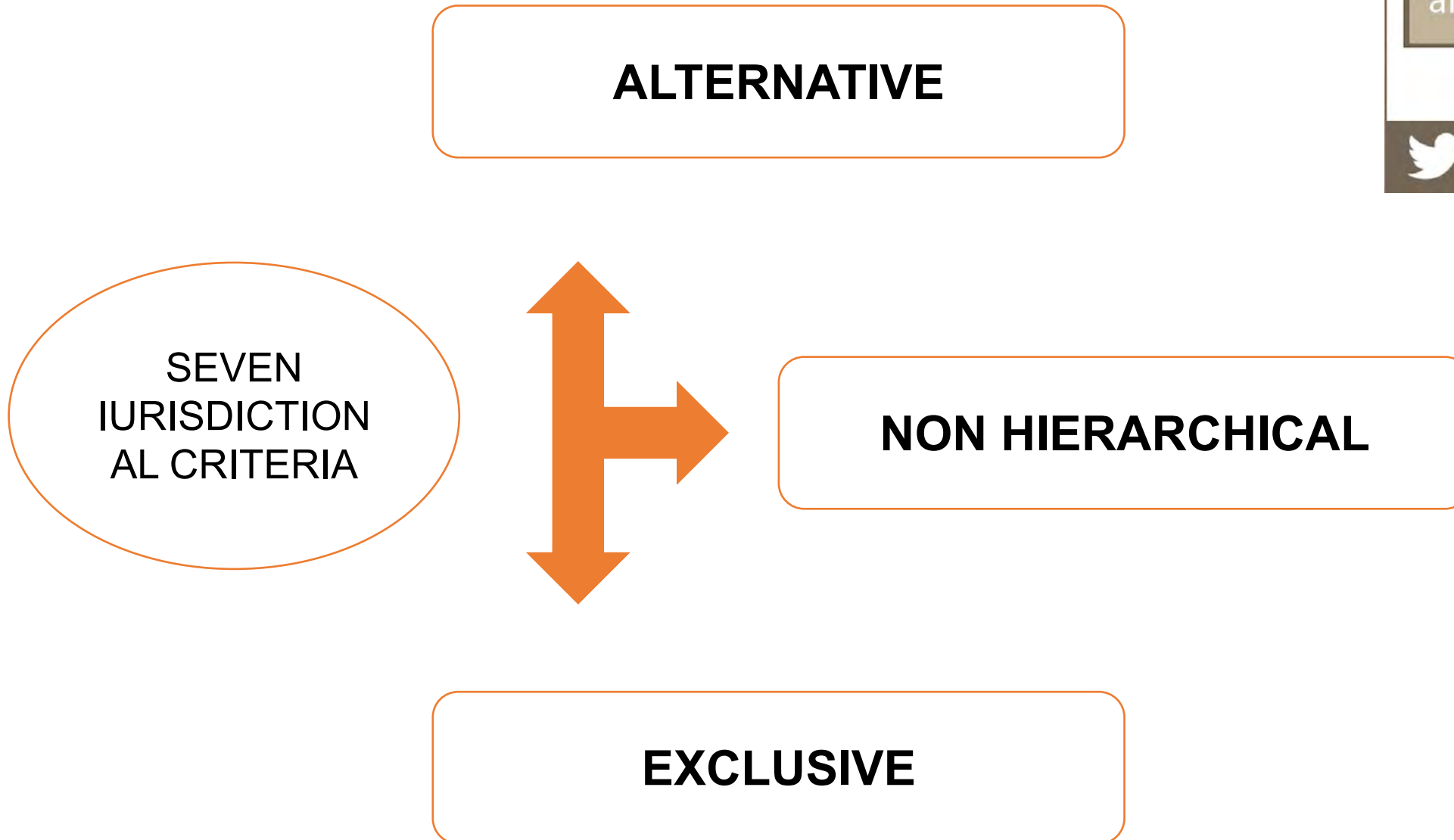
The grounds for determining the jurisdiction of a Member State Court are based on the principle of an **objective connection** between one or both spouses and the forum State.

There are **two basic criteria** for establishing such connection:

HABITUAL RESIDENCE

COMMON NATIONALITY







NON HIERARCHICAL

HADADI, 16 July 2009, C-168/08

The «principle of favor divortii» enshrined in the Brussels IIA Regulation allows jurisdiction of the courts of a Member State to be determined in the presence of just one of the objective links indicated under Article 3 and thus also when the applicant «does not put forward other links» with the State. As a result, even if the plaintiff is linked to the court seised only, for example, on the basis of the sole common nationality of the couple, that is enough to determine the jurisdiction of such a judge (no other links are required with the forum).

Criteria

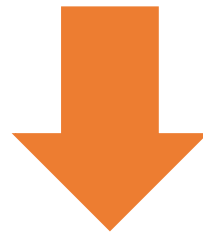
Criteria are alternatives in order to offer to the applicants the **widest range of options from which choose jurisdiction.**



According to art. 3 Reg. N. 2201/2003 and N. 2019/1111, **there may be several competent courts on the request in marriage matters.**

Criteria

The **multiplicity of alternative fora**, together with the lis pendens rules and the diversity of substantive law regimes on divorce, legal separation and annulments in each Member State **gave rise to a rush to the forum by those spouses searching for the most favourable substantive rules** to be applied to their marriage breakup.



**FORUM SHOPPING
PHENOMENON**



Directed to bring the action before the court whose law is more favourable in order either to put a faster end to marriage or, the opposite, to postpone that moment



Six grounds based on **HABITUAL RESIDENCE**

Either **common actual habitual residence of the couple**

Last common habitual residence **of the couple**

Habitual residence of the **respondent**

Habitual residence of **either of the spouses**,
in the event of a **joint application**

Habitual residence of the **applicant**, where
**the applicant resided there for at least a
year before the application**

Habitual residence of the **applicant**, where
**the applicant resided there for at least six
months immediately before the
application**



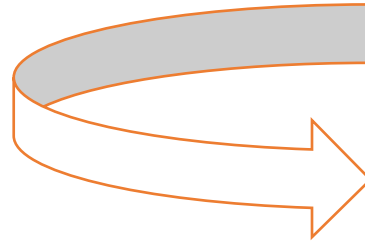
Habitual residence?



The notion is **not defined in the Regulation**, but due to the well-established principle requiring a uniform interpretation of EU law, reference to the internal notion of member State shall be avoid.

A **uniform autonomous interpretation** is required in the light of the context of the provisions and the objectives of the Regulation

The CJEU so far has given no guidance for determining spouses' habitual residence



The accompanying report to Reg. n. 1347/2000, replaced by Brussels II bis, defined «habitual residence» as «**PLACE WHERE THE INTERESTED PARTY HAS ESTABLISHED THE PERMANENT OR USUAL CENTER OF HIS INTERESTS WITH CHARACTER OF STABILITY**»

Habitual residence?

CJEU, 15 September 1994, C-452/93, Fernandez

The place of habitual residence is that in which the official concerned **has established with the intention that it should be of a lasting character, the permanent or habitual center of his interests**. However, for the purposes of determining habitual residence, **all factual circumstances** which constitute such residence must be taken into account.



Habitual residence?

Italian jurisprudence: Cass. Civ. SS. UU. ord. 17 febbraio
2010 n. 3680

"The concept of habitual residence must be understood as the place where the interested party has established the permanent or habitual center of his interests with a stable nature, with a clear substantive nature and not merely formal or registry based on Community law, being relevant to identify this "effective" residence pursuant to Reg. n. 2201/2003, the place of the concrete and continuous development of personal and possibly working life, on the date of the submission of the application "



Habitual residence: case

A wife, an Italian citizen, and her husband, a Belgian citizen, traveled a lot throughout Europe during their marriage and resided for a long time in Belgium. Subsequently they lived apart: the wife chose **Italy as her place of residence**, where her son attended university and where she chose to follow him.

The wife invokes the jurisdiction of the **Italian judge**

The husband states that the **residence of his wife in Italy is only formal** and due to the son's enrollment in university. She would continue to live in her marital home in Belgium, where she had lived for over 30 years, paying taxes, as evidenced by her registered residence.



Habitual residence: case

QUAESTIO IURIS

**How is the habitual
residence of a spouse
determined?**

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Habitual residence: case



SOLUTION

The accompanying report to Reg. n. 1347/2000 defined «habitual residence» as «PLACE WHERE THE INTERESTED PARTY HAS ESTABLISHED THE PERMANENT OR USUAL CENTER OF HIS INTERESTS WITH CHARACTER OF STABILITY»



It is necessary to identify the effective residence, the place of the concrete and continuous development of personal or working life. In this case, it can be assumed that the wife has lived in Italy for more than a year and that the **son's university attendance**, as the main reference of the wife's emotional relationships, **shows that the habitual center of the woman's relationships is in Italy**, where he lives with his son. So, the wife, residing in Italy for over a year, correctly identified the judge of her application.



Common nationality of spouses

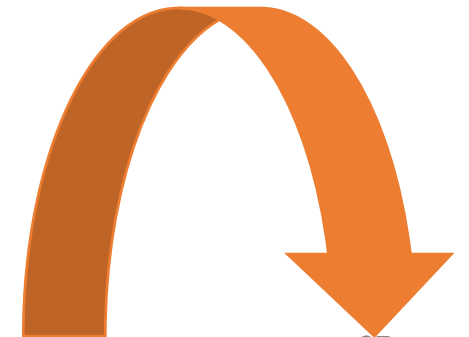
Under Article 3(1)(b) of the Brussels Ia Regulation, **nationality determines the jurisdiction only when it is common to both spouses**. The Regulation does not allow the filing for proceedings in the courts of the State where only one partner has his/her nationality, since this would admit the pure forum actoris, which on many occasions would not lead to objective connection.

Common nationality of spouses

QUAESTIO IURIS

What happened in case of double common nationality of the spouses?

The Regulation does not rule on the consequences of double common nationality to determine the member State judges having jurisdiction, **but the CJEU...**



Double common nationality: CH 16.7.2009, C-168/08 Hadadi



The European Court of Justice has established that, **in the case of double common nationality, each spouse has the right**, pursuant to art. 3 n. 1 lett. b) reg. n. 2201/2003 (and Reg. N. 1111/2019), to apply for divorce the **courts of one or the other of the two member states of which the spouses hold nationality.**



Jurisdiction criteria «in action»

Jurisprudence and cases

Case: spouses who habitually reside in the same member states

AUSTRIAN CITIZEN HUSBAND



BELGIAN CITIZEN WIFE



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The spouses lived for over ten years in Italy, where they had established their habitual residence.

The wife wants divorce and applies the Belgian judge.
The husband opposes, affirming that the court appealed is not competent.

Case: spouses who habitually reside in the same member states



For separation and divorce, if the spouses are citizens of different member states and reside in another member state, can one of them appeal to the court of the country of which he is a national?

Case: spouses who habitually reside in the same member states

The husband correctly contested the jurisdictional competence of the Belgian judge, appealed by the wife on the wrong assumption of citizenship.

Among the criteria indicated by art. 3 of Reg. N. 2201/2003 (and also N. 1111/2019) , the **criterion of citizenship can only be used when both the spouses have the same nationality or when the applicant is a citizen of the member state and has had his habitual residence in the same state for six months.**

In the present case, neither of the two requirements existed.

The nationality of a single spouse no longer makes possible to identify a link with the territory capable of justifying the competence of that state. For this reason this criterion can't be used to identify the competent judge.



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Case: spouses who habitually reside in different member states



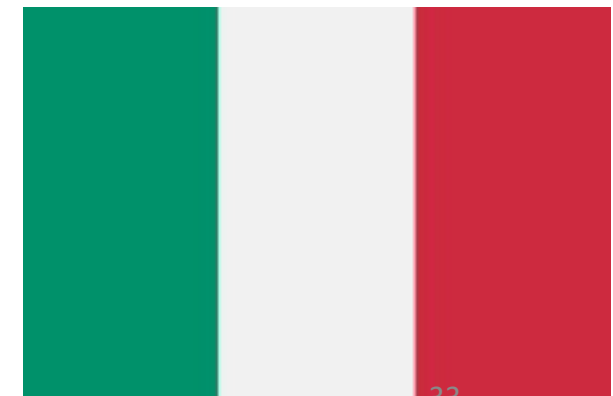
Husband and wife, respectively Italian and Belgian citizens, decide to divorce after living for over fifteen years in Italy.

After the de facto separation, the wife returns to Belgium where she lives for four months before the husband appeals to the Italian judge with a request for personal separation.



WIFE

HUSBAND



Case: spouses who habitually reside in different member states



Which is the competent authority
to decide on the separation
application?



Case: spouses who habitually reside in different member states

Spouses have the following **options available**:

- Each one can apply the Italian courts, because Italy was the last habitual residence of both spouses (art. 3 lett. a);
- the husband can apply the Belgian authorities because the wife has her habitual residence in that State (habitual residence of the respondent);
- the wife can apply the Italian authorities, because the husband habitually resides there;
- In the event of a joint application, in either State.



OTHERS RULES ON JURISDICTION

ARTICLE 6 ARTICLE 7

Exclusive nature of jurisdiction under Articles 3, 4 and 5: Reg. 2201/2003



Article 6

Exclusive nature of jurisdiction under Articles 3, 4 and 5

A spouse who:

- a) is habitually resident in the territory of a Member State; or
 - b) is a national of a Member State, or, in the case of the United Kingdom and Ireland, has his or her 'domicile' in the territory of one of the latter Member State,
- may be sued in another Member State only in accordance with Articles 3,4 and 5.

Residual jurisdiction: Reg. 2201/2003



Article 7

Residual jurisdiction

Where no court of a Member State has jurisdiction pursuant to Articles 3, 4 and 5, jurisdiction shall be determined, in each Member State, by the laws of that State.

As against a respondent who is not habitually resident and is not either a national of a Member State or, in the case of the United Kingdom and Ireland, does not have his 'domicile' within the territory of one of the latter Member States, any national of a Member State who is habitually resident within the territory of another Member State may, like the nationals of that State, avail himself of the rules of jurisdiction applicable in that State.

Residual jurisdiction

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Article 7: residual
jurisdiction



Where no court of a MS has
jurisdiction pursuant to Artt. 3, 4
and 5, jurisdiction shall be
determined, in each SM, by the
laws of that State.



CLOSING RULE
EXCEPTIONAL RULE

Residual jurisdiction: CJ 29.11.2007, C-68/2007, Lopez



Wife: Swedish citizen;
Husband: Cuban citizen. They live in France. After the legale separation, she stays in France, he returns to Havana.

The wife asked for divorce to the Stockholm court, which declared herself incompetent, considering the French courts competent. The Court of Appeal confirms this decision.

The Swedish Court of Cassation suspends the judgment and questions the European Court of Justice on the scope of Articles 6 and 7 Reg. N. 2201/2003.

Residual jurisdiction: CG 29.11.2007, C-68/2007, Lopez

SOLUTION

Articles 6 and 7 of regulation n. 2201/2003, relating to the jurisdiction, recognition and enforcement of decisions in matrimonial matters and in matters of parental responsibility, must be interpreted as meaning that in the course of a divorce , if a respondent does not have his habitual residence in a Member State and is not a national of a Member State, the courts of a Member State may not, in order to rule on such a request, base their jurisdiction on their national law if the courts of another Member State have jurisdiction pursuant to art. 3 of the same regulation.



Residual jurisdiction: Reg. 2019/1111

Article 6

Residual jurisdiction

1. Subject to paragraph 2, 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.
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.
3. As against a respondent who is not habitually resident in and is not a national of a Member State, any national of a Member State who is habitually resident within the territory of another Member State may, like the nationals of that State, avail himself of the rules of jurisdiction applicable in that State.





Jurisdiction in parental responsability matters

**NOT ONLY UE
REGULATIONS 2201/2003
and 2019/1111**



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HCCH

Connecter Protéger Coopérer Depuis 1893
Connecting Protecting Cooperating Since 1893

**BUT ALSO HAGUE
CONVENTION 19 Ottobre 1996**

HAGUE CONVENTION 19 Ottobre 1996: scope

Article 1

The objects of the present Convention are -

- a) **to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child;**
- b) to determine which law is to be applied by such authorities in exercising their jurisdiction;
- c) to determine the law applicable to parental responsibility;
- d) to provide for the recognition and enforcement of such measures of protection in all Contracting States;
- e) to establish such co-operation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of this Convention.





A wide range of material
scope of application of the
Reg. 2201/2003 in respect
of parental responsibility
overlaps with the scope of
the 1996 Hague
Convention on Protection
of Children



Which relations
between Regulation
and Convention ?

Relations between Hague Convention and Regulation n. 2201/2003



In relations between Member States, the Regulation prevails over the Convention when the minor is habitually resident in a member state

Since the TFEU gives precedence to the EU acquis over other legal sources, the Regulation has predominant priority within its specific scope of application.

Relations between Hague Convention and Regulation n. 2201/2003



Reg. 2201/2003

Article 61

Relation with the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children

As concerns the relation with the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, **this Regulation shall apply:**

- (a) **where the child concerned has his or her habitual residence on the territory of a Member State;**
- (b) as concerns the recognition and enforcement of a judgment given in a court of a Member State on the territory of another Member State, even if the child concerned has his or her habitual residence on the territory of a third State which is a contracting Party to the said Convention.

Relations between Hague Convention and Regulation n. 2201/2003



Hague Convention **Article 52**

- (1) **This Convention does not affect any international instrument to which Contracting States are Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the States Parties to such instrument.**
- (2) This Convention does not affect the possibility for one or more Contracting States to conclude agreements which contain, in respect of children habitually resident in any of the States Parties to such agreements, provisions on matters governed by this Convention.
- (3) Agreements to be concluded by one or more Contracting States on matters within the scope of this Convention do not affect, in the relationship of such States with other Contracting States, the application of the provisions of this Convention.
- (4) The preceding paragraphs also apply to uniform laws based on special ties of a regional or other nature between the States concerned

Parental responsibility



Reg. 2201/2003
Art. 2 (7)

The term "parental responsibility" shall mean all **rights and duties relating to the person or the property of a child** which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include **rights of custody and rights of access;**

Parental responsibility



Hague
Convention
Art. 1 (2)



The term 'parental responsibility' includes **parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child**

Habitual residence of the child in Hague Convention



- Lack of definition in the Convention.
- In an interpretative way, the habitual residence is the place where the minor established with a stable character his center of business and interests.
- The minor doesn't lose the residence in the event of temporary absence for school, vacation or foster care reasons.



Parental responsibility matters?

Reg. 2201/2003
Art. 1



2. The matters referred to in **paragraph 1(b)** may, in particular, deal with:
- (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 **child's person or property, representing or assisting the child**;
 - (d) the **placement of the child** in a foster family or in institutional care;
 - (e) **measures for the protection** of the child relating to the administration, conservation or disposal of the child's property.

Parental responsibility matters?



Considering n. (5) Reg. 2201/2003

In order to ensure equality for all children, **this Regulation covers all decisions on parental responsibility**, including measures for the protection of the child, independently of any link with a matrimonial proceeding.

Parental responsibility matters?

CASE

Three minors, children of a **Swedish couple** who went on holiday in Finland, are taken into Finnish Fundamental Social Rights Guarantee Commission care because the family unit remained on Finnish territory living in a caravan for several months during which the minors didn't attend school. It appeared that they were in a state of neglect.

The parents file an appeal with the **Finnish judge**, who rejects the appeal on the matter, believing that the Commission acted within its competences. The parents then appeal to the Supreme Administrative Court alleging the incompetence of the Finnish authorities.





QUAESTIO IURIS



Does a decision which, at the same time, orders the taking charge of minors and the placement of a minor outside his or her family of origin fall within the scope of application of art. 1 reg. 2201/2003?

Does this decision fall within the notion of civil matters, even if it was adopted in the context of public law rules relating to the protection of minors?

Parental responsibility matters?

The placement of the child in a foster family or in an institution belongs to matters relating to parental responsibility. **the Reg. regulates all the decisions on parental responsibility including the protection measures for minors.** (art. 1 and Considering n. 5)

The notion of "civil matters" must be interpreted in the sense of including measures which, according to the law of a Member State, fall under public law.

The decision of the judge ordering the immediate taking into account and the placement of a minor outside the family falls within the notion of civil matters.



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CJEU, 2 April 2009, C-523/07, A.

The classification of a measures as «private» or «public» is irrelevant.



Was the Finnish judge competent to decide on the placement of a minor outside his family?

Let's see the **rules on jurisdiction in parental responsibility matters.**

General jurisdiction in parental responsibility matters: Hague Convention



Article 5

(1) The judicial or administrative authorities of the Contracting State of the **habitual residence of the child** have jurisdiction to take measures directed to the protection of the child's person or property.

(2) Subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, **the authorities of the State of the new habitual residence have jurisdiction.**

General jurisdiction in parental responsibility matters: Reg. 2201/2003

Article 8

General jurisdiction

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.**



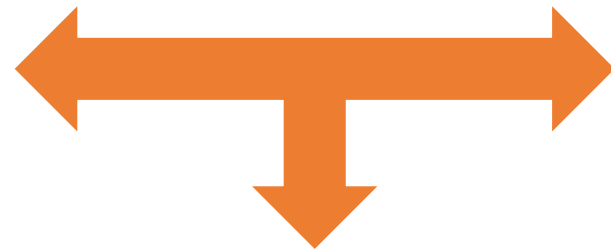
Perpetuatio iurisdiction: a later relocation to another Member State, although lawful, will not affect jurisdiction





Hague Convention

Reg. 2201/2003



HABITUAL RESIDENCE OF THE CHILD

WHY THE HABITUAL
RESIDENCE OF THE
CHILD?



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The rationale for this choice is explained in Recital 12 of the regulation preamble where it is stated that the grounds of jurisdiction in matters of parental responsibility are shaped **in the light of the best interest of the child**, in particular the **CRITERION OF PROXIMITY**



How should the court verify its
competence?

CASE



The **Spanish judge**, seized in a dispute concerning parental responsibility between a **German citizen** and a **Spanish citizen**, orders with urgent and provisional measures (ex art. 20 Reg. 2201/2003) on the custody of minor children.

The **German judge**, subsequently appealed to obtain the enforcement of the provisional measure, questions the competence of the first judge and raises a preliminary question regarding the interpretation of art. 20 Reg. 2201/2003.



CASE: solution

The **CG (C-256/09, Purrucker c. Valles Perez)** established that, when the competence of a judge who has ordered interim measures is not **apparent from the elements of the decision adopted** or, when this decision does not contain an **unambiguous reasoning**, then this decision is not adopted in compliance with the rules of jurisdiction sanctioned by the regulation.

Habitual residence of the child



- Recital n. 12) of Regulation n. 2201/2003 (Recital 20 of Regulation 2019/1111)

The grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped **in the light of the best interests of the child, in particular on the critterion of proximity**. This means that jurisdiction should lie in the first place with the Member State of the child's habitual residence, except for certain cases of a change in the child's residence or pursuant to an agreement between the holders of parental responsibility.

- **Lack of definition** in the Regulation.
- **Inter-instrumental interpretation** with others EU regulations **is not possible**.

Habitual residence of the child?

CJ 22 aprile 2009, C-523/07, A. c. C.

The habitual residence of the child is **the place of the concrete and continuous development of personal life.**





Habitual residence in the italian jurisprudence

App. Firenze, 15 gennaio 2014

The court considers that italian jurisdiction exists in a case between two English spouses regarding the placement of the minor son habitually resident in Italy.

Trib. Roma, 5 novembre 2013

The court considers existing the italian jurisdiction in a case of custody of a minor citizen of Bangladesh, habitually resident in Italy, even if the parents and the minor were non-EU citizens

Habitual residence of the child

CASE



A girl is born in England from the relationship between a **French citizen** and an **English citizen**.

When the little girl is only 2 months old, her mother takes her to France, where she settles without the father's consent.

Judgments are instituted for the custody of the child both in France and in England. The English judge declares himself competent because when he was appealed (2 days after the departure of the minor) the child must still be considered resident in England.

The mother contests the decision and the court of appeal **questions the criteria that must be applied to determine the habitual residence of the minor.**



Which court is competent to decide on matters relating to the custody of a child who has been lawfully brought by a parent to a different state compared where he stays for only a few days?



Habitual residence of the child?

CJ, C-497/10, MERCREDI C. CHAFFE

The judge, to ascertain the habitual residence of the infant who stays for a few days in a different state, **must take into consideration the duration, regularity, conditions and reasons for the stay in the territory of that state.**

Furthermore, the judge must **take into consideration the age of the minor, the geographic and family origin of the mother, the family and social relationships that the mother and the minor have in the state.**

If these criteria do not make possible to identify the habitual residence of the minor, the competent court must be determined on the basis of the criterion of the place where the minor is present, pursuant to art. 13 Reg. 2201/2003.



Habitual residence of the child?

The CJ ruled that the **habitual residence is the place that shows a certain integration of the minor in a social and family environment.**



This place must be determined by the judge taking into account all the specific circumstances of the case.

The **age of the minor** is of particular importance because his **social and family environment is made up of different elements according to his age.**

The environment of an infant is the family environment, made up of the person or persons of reference with whom the minor lives, by whom he is looked after and who take care of him.

OTHERS EXCEPTIONALS RULES ON JURISDICTION IN PARENTAL RESPONSABILITY MATTERS

article 13

article 14

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Jurisdiction based on the child's presence



Article 13 Reg. 2201/2003

1. Where a child's habitual residence cannot be established and jurisdiction cannot be determined on the basis of Article 12, the courts of the Member State **where the child is present shall have jurisdiction.**
2. Paragraph 1 shall also apply to refugee children or children internationally displaced because of disturbances occurring in their country.

Jurisdiction based on the child's presence



Article 6 Hague Convention

(1) For refugee children and children who, due to disturbances occurring in their country, are internationally displaced, the authorities of the Contracting State **on the territory of which these children are present** as a result of their displacement have the jurisdiction provided for in paragraph 1 of Article 5.

(2) The provisions of the preceding paragraph also apply to children whose habitual residence cannot be established.

Residual jurisdiction

Article 14 Reg. 2201/2003

Where no court of a Member State has jurisdiction pursuant to Articles 8 to 13, **jurisdiction shall be determined, in each Member State, by the laws of that State**





Thank you for your kind attention

AVV. CINZIA CALABRESE

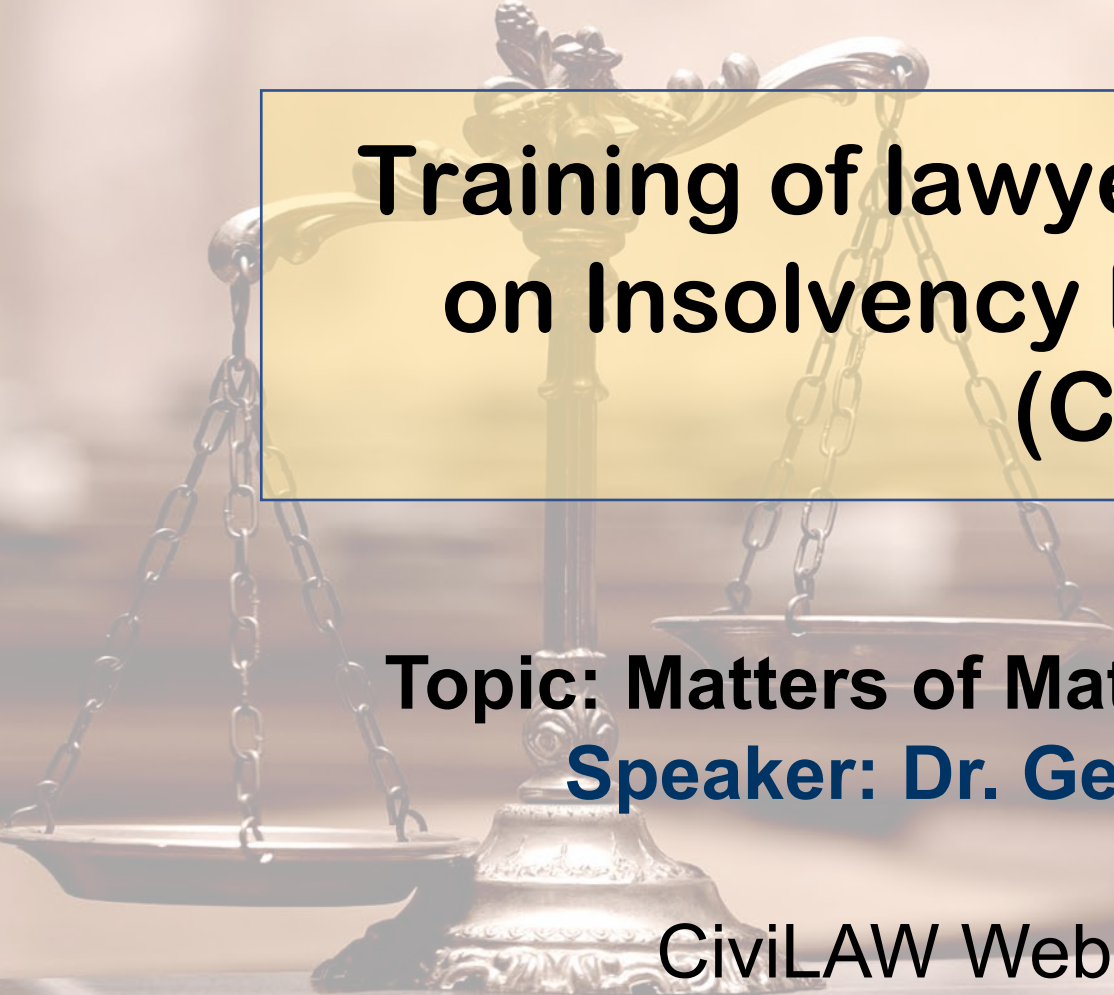
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Training of lawyers on EU instruments on Insolvency Law and Family Law (CiviLAW)

Topic: Matters of Matrimonial Property Regimes

Speaker: Dr. Georgios Kontis, Lawyer

CiviLAW Webinar on Family Affairs

28 March 2022

Zoom Webinar



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

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.

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.

- 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.

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.

- *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*).

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.

- 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. This case must have a sufficient connection with the Member State of the court seized.

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.

- 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.

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.

- 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].

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 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.

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.


- **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.

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.

- **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.

Thank you very much for your attention!

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



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



Training of Lawyers on EU Instruments on Insolvency and Family Law

CATALAN CIVIL LAW EXPERIENCE IN FAMILY LAW, by Joaquín BAYO-DELGADO

#CIVILAW

Autonomous Communities with their own family civil law, in different degrees

All Autonomous Communities have partnership laws, with civil effects or just taxation/administrative effects

INTRODUCTION

Training of Lawyers on EU
Instruments on Insolvency
and Family Law

CATALAN CIVIL LAW EXPERIENCE IN FAMILY
LAW, by Joaquín BAYO-DELGADO



#CIVILAW

- Plurilegislative State
- Asymmetrical
- Only one judiciary, but 6 Superior Courts with cassation jurisdiction over autonomous civil laws (Supreme Court only competent for common civil law)
- Seven civil systems: 6 autonomous + 1 common for the rest (or complementary in areas not covered by civil autonomic legislation)
- No procedural differences (except some Catalan special procedural rules for Catalan civil specificities, v.gr. matrimonial regime)
- Legislative competence on conflict rules lays with the National parliament and are the same for international and domestic conflicts of law

	Divorce, legal separation or marriage annulment	Parental responsibility		Child support and other forms of family maintenance	Matrimonial property regimes	Unmarried couples			Division of non-matrimonial common property
		In general	International child abduction			Existence	Property consequences	Maintenance	
IF SPANISH LAW IS TO BE APPLIED	Divorce, legal separation: Regulation EU/1259/2010 → Spanish Civil Code (CC)	1996 Hague Convention (← Arts. 9.4 y 9.6 CC) Art. 48.b Convention → Catalan Civil Code	1996 Hague Convention Art. 48.b (<16 years old) 1996 Hague Convention (Art. 3) → Catalan Civil Code	2007 Hague Protocol (← Art. 9.7 CC) 1956 New York Convention Art. 6.3 → Catalan Civil Code	Regulation EU/2016/1103 Art. 33 → Catalan Civil Code	Closest international connection and Spanish Autonomous Communities laws on partnerships → Catalan Civil Code	No mandatory registration in Catalonia: Art. 3.1.a Regulation EU/2016/1104	2007 Hague Protocol (← Art. 9.7 CC) 1956 New York Convention Art. 6.3 → Catalan Civil Code	Art. 10.1 CC → Catalan Civil Code
	Marriage annulment: Art. 107.1 of Spanish Civil Code (CC) → Spanish Civil Code (CC)	→ Catalan Civil Code	→ Catalan Civil Code	→ Catalan Civil Code	For marriages and nuptial agreements before 29/01/2019 & between Spaniards: Art. 9.2 & 9.3 CC → Catalan Civil Code		Closest international connection and Spanish Autonomous Communities laws on partnerships → Catalan Civil Code		

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- Conditions for divorce and matrimonial separation and causes for annulment are common for the entire Spain.
- Divorce is always granted (three months after marriage)

	Divorce, legal separation or marriage annulment	Parental responsibility		Child support and other forms of family maintenance	Matrimonial property regimes	Unmarried couples			Division of non-matrimonial common property
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- Article 9.4 CC refers to 1996 Hague Convention
- So, international and domestic rules are the same: 1996 Hague Convention
- Arts. 15, 16 y 17: Location of the Court or habitual residence of the child
- In Catalonia, Catalan CC.

	Divorce, legal separation or marriage annulment	Parental responsibility		Child support and other forms of family maintenance	Matrimonial property regimes	Unmarried couples			Division of non-matrimonial common property
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- Article 3 of 1980 Hague Convention defines abduction by referring to **the law of the State in which the child was habitually resident immediately before the removal or retention**
- **So, domestically is the law of the Autonomous Community.**
- **In Catalonia**, parents need agreement to change the child's residence (even if only one parent has the exercise of parental authority)

	Divorce, legal separation or marriage annulment	Parental responsibility		Child support and other forms of family maintenance	Matrimonial property regimes	Unmarried couples			Division of non-matrimonial common property
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- Article 9.7 CC refers to 2007 Hague Protocol
- So, international and domestic rules are the same: 2007 Hague Protocol
- Art. 3: Law of the habitual residence of the creditor/beneficiary of maintenance.
- In Catalonia, Catalan CC.

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- Marriages before 29/01/2019, art. 9.2 CC; after art. 26 Regulation 2016/1103: when common personal law or immediate residence in Catalonia, Catalan CC.
- **In Catalonia** (unlike most other Spanish Autonomous Com.) **separation of assets, with an equitable compensation of up to 25 % of the difference of property increase of the spouses.**

	Divorce, legal separation or marriage annulment	Parental responsibility		Child support and other forms of family maintenance	Matrimonial property regimes	Unmarried couples			Division of non-matrimonial common property
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- No international or domestic conflict rules on existence of un-married couples/partnerships
- In Catalonia, when they reside there and become partners according to Catalan law

	Divorce, legal separation or marriage annulment	Parental responsibility		Child support and other forms of family maintenance	Matrimonial property regimes	Unmarried couples			Division of non-matrimonial common property
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- In Catalonia no mandatory registration, so Regulation 2016/1104 is not applicable to Catalan partnerships.
- When the partnership is ruled by Catalan law, parallel regimen as that of marriages on property consequences.

	Divorce, legal separation or marriage annulment	Parental responsibility		Child support and other forms of family maintenance	Matrimonial property regimes	Unmarried couples			Division of non-matrimonial common property
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- Article 9.7 CC refers to 2007 Hague Protocol
- So, international and domestic rules are the same: 2007 Hague Protocol
- Art. 3: Law of the habitual residence of the creditor/beneficiary of maintenance.
- In Catalonia, Catalan CC.: possibility of short term maintenance among ex-partners

	Divorce, legal separation or marriage annulment	Parental responsibility		Child support and other forms of family maintenance	Matrimonial property regimes	Unmarried couples			Division of non-matrimonial common property
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- Article 10,1 CC: law of the place where property is.
- In Catalonia (because of the separation of property, aside compensation) very frequently immovables are shared 50/50%.
- So division is very frequent when they divorce.



THANK YOU

ANY QUESTIONS OR COMMENTS?

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Instruments on Insolvency
and Family Law

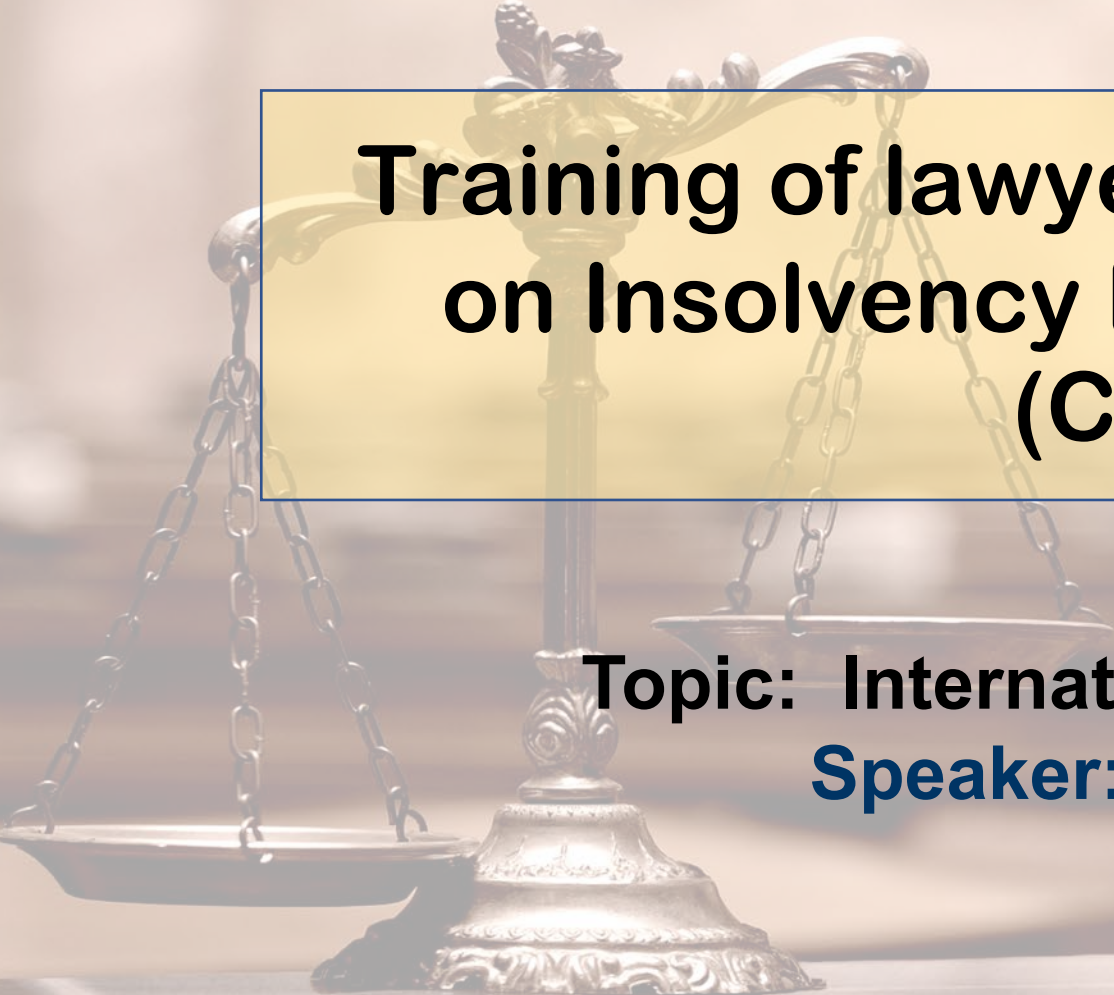
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Training of lawyers on EU instruments on Insolvency Law and Family Law (CiviLAW)

Topic: International Child Abduction
Speaker: Laris Vrahimis

CiviLAW Webinar on Family Affairs
28 March 2022
Zoom Webinar





Definition

- International parental child abduction is the removal or retention of a child outside their country of habitual residence in breach of another parent or guardian's custody rights



The main legal instruments

- The main instruments are:
 - The 1980 Hague Convention on the Civil Aspects of International Child Abduction (for abductions between member states of the convention)
 - Brussels II Regulation (in addition to the Hague Convention for abduction between EU member states)
 - Bilateral agreements if available (for all other cases)



The 1980 Hague Convention

- The Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980
- It is an open convention so any state may accede to the convention under article 38 of the convention. However, the accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession.
- You can review which states have acceded and which states have accepted the accession in by visiting <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24>



The Objects of the Convention

- The objects of the Convention as set out in Article 1 of the Convention are:
 - a) To secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
 - b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.
- These objectives are, as stated in the preamble to the Convention, based on the desire to protect children from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access.



When does the Convention Apply

- Under article 3, the Convention to apply it has to
 - Relate to a child under the age of 16 and
 - The child must have been habitually resident in a contracting state immediately before the removal or retention.
- Under article 4
 - The removal or retention must have been wrongful



What is a child?

- The convention applies only to a born child under the age of 16.
 - It therefore does not apply to children over 16.
 - This should include cases where proceedings started before the child becomes 16 but were not concluded before the child attained that age.



Habitual Residence

- For the Convention to apply, the habitual residence of a child immediately before the wrongful removal or retention must be that of a Contracting State.
- The term must have an autonomous meaning, that is it has to be interpreted uniformly and not according to the provisions of national law.



Habitual Residence (cont)

- The term has been interpreted by the CJEU in the case of **Mercredi v. Chaffe (C-497/10 PPU)** corresponds to the place which reflects some degree of integration by the child in a social and family environment.
- That place must be established by the national court, taking account of all the circumstances of fact specific to each individual case including:
 - the conditions and reasons for the child's stay on the territory of a Member State,
 - the child's nationality
 - in addition to the physical presence of the child in a Member State, other factors must also make it clear that that presence is not in any way temporary or intermittent



Habitual Residence (cont)

- the intention of the person with parental responsibility to settle permanently with the child in another Member State, manifested by certain tangible steps such as the purchase or rental of accommodation in the host Member State, may constitute an indicator of the transfer of the habitual residence
- in order to distinguish habitual residence from mere temporary presence, the former must as a general rule have a certain duration which reflects an adequate degree of permanence. However, the Regulation does not lay down any minimum duration.
- Before habitual residence can be transferred to the host State, it is of paramount importance that the person concerned has it in mind to establish there the permanent or habitual centre of his interests, with the intention that it should be of a lasting character.



Habitual Residence (cont)

- Accordingly, the duration of a stay can serve only as an indicator in the assessment of the permanence of the residence, and that assessment must be carried out in the light of all the circumstances of fact specific to the individual case
- The social and family environment of the child, which is fundamental in determining the place where the child is habitually resident, comprises various factors which vary according to the age of the child
- As a general rule, the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of



Wrongful removal or retention

- According to Article 3, the 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



Meaning of removal and retention

- Removal and retention should be treated as separate events occurring once and for all on a specific occasion:
 - Removal occurs when a child is transferred across the frontier of its state of habitual residence to another state.
 - Retention occurs when a child which is already outside its state of habitual residence for a limited period of time, is not returned to the state of habitual residence at the expiry of that period of time
(see for example **Re H (Minors) (Abduction: Custody Rights)**, **Re S (Minors) (Abduction: Custody Rights)** [1991] 2 AC 476, HL)



Rights of Custody

- To be wrongful, the removal or retention must be in breach of rights of custody.
- This should be approached as a two fold question (see for example **Hunter v Murrow (Abductions: Right of Custody) [2005] EWCA Civ 976**):
 - The “Domestic Law Question”: What rights does the applicant have under the law of the state of the child’s habitual residence immediately before the removal or retention
 - The “Convention Question”: Are these rights properly categorised as rights of custody under the convention.



Rights of Custody (Cont)

- According to Article 5 of the Convention rights of custody 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
- Article 3 provides that the rights of custody may arise in particular
 - by operation of law, or
 - by reason of a judicial or administrative decision, or
 - by reason of an agreement having legal effect under the law of that State



Rights of Custody (Cont)

- These rights may be vested in an individual, institution of any other body including the court.
- Rights of custody are distinguished from rights of access. However, the term should cover cases where the parent has the right to refuse to allow relocation.



Rights Actually Exercised

- Article 3(b) requires that 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. This requirement should be construed widely.



Wrongful Removal or Retention

- As we have seen, a removal is wrongful if it is in breach of the rights of custody attributed to a person, an institution or any other body.
- So a removal or retention will be wrongful among others if it is in breach of an express court order, or if it is prohibited by the general law of the jurisdiction of the child's habitual residence from which the child is removed, or if a consent is required from the left behind parent before a removal can be lawful under the law of that jurisdiction.
- An abductor is usually one of the two parents but it may be both parents who remove the child in breach of the custody rights of an institution or even by a third party.



Judicial Notice of Foreign Law

- Under Article 14, in ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.



Declaration as to wrongfulness of removal or retention

- If there is doubt regarding the legality of the removal or retention, then the judicial or administrative authorities of a Contracting State may request, under article 15 of the Convention, that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention.
- Such a declaration if given may not be strictly binding on the court but should generally be conclusive on the issue.



Mandatory return and its exceptions – Article 12

- Under article 12 of the Convention, once wrongful removal or retention of a child has been established the return of the child is mandatory if less than one year has elapsed between the wrongful removal or retention and the commencement of the proceedings, unless one of the defences set out in article 13 are established.
- Even if more than one year has elapsed, then the court may still order a return of the child unless it is demonstrated that the child is now settled in its new environment.



Decision relates to return not custody

- Under Article 19 of the Convention, a decision concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.



The exceptions of Article 13

- Article 13 establishes four cases where the court is not bound to order the return of the child in the following cases:
 - *[Article 13(1)(a)]* If the person, institution 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; or
 - *[Article 13(1)(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; or
 - 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



Non-exercise of rights of custody (13(1)(a))

- It should be rare that a return is refused under this provision. For example, there is not a single reported case in England where return was refused solely on this ground. In fact, in England it has been held that even an imprisoned or hospitalised parent is still exercising rights of custody.



Consent and Acquiescence (13(1)(a))

- Consent precedes the actual wrongful removal or retention whereas acquiescence follows the wrongful removal or retention.
- One would expect that for the exception to apply the refusal has to be clear and unequivocal though it may be indirect.



Grave risk of harm or intolerable situation (13(1)(b))

- Under Article 13(1)(b) a return may be refused if 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.
- The risk is to the child, it must be “grave” and is “forward-looking” that is it focuses on the circumstances the child will face upon return. The assertions must be specific and not general and the court has to consider possible protective measures that may be put in place in case it issues an order of return. Generally, the taking parent’s refusal to return with the child should not be accepted as a ground for refusal under Article 13(1)(b).



Grave risk of harm or intolerable situation (cont)

- 1980 Child Abduction Convention. Guide to Good Practice. Part VI. Article 13(1)(b)
- However: Article 11.4 of Brussels II Regulation provides that:
 - A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return.



Child's objections (13)

- Article 13 also provides that 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.



Article 20

- Under Article 20, the return of the child may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.



Statistics

- Grounds for refusal:
 - Article 13(b) – intolerable situation: 25%
 - The child not being habitually resident in the Requested State: 25%.
 - Article 12: 17%
 - The child's objections: 15%.



Central Authority

- Under Article 6, each contracting state shall designate a Central Authority to discharge the duties imposed by the convention on such authorities.
- Among others the Central Authorities duties include under Article 7:
 - to discover the whereabouts of a child who has been wrongfully removed or retained;
 - to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;
 - to provide information of a general character as to the law of their State in connection with the application of the Convention;



Central Authority (cont)

- to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access;
- to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;



Application to the Central Authority

- Under Article 8, any person may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.
- Under Article 24, any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English. However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.



Expeditious proceedings

- Article 2 provides that the contracting states must use the most expeditious procedures available
- If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay



Article 16

- After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.



Brussels II – Further Safeguards

- Article 11.2: Right of the child to be heard:
 - When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.
- Article 11.3:
 - The court has to use the most expeditious procedures available in national law and, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged.



Brussels II – Further Safeguards (cont)

- Article 11.4. Adequate arrangements for protection of child:
 - A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return.
- Article 11.5. Right of applicant to be heard:
 - A court cannot refuse to return a child unless the person who requested the return of the child has been given an opportunity to be heard.



Brussels II – Further Safeguards (cont)

- Article 11.6-8
 - If an order of non-return order is issued pursuant to article 13, then the court decision and the transcript of the hearing has to be transmitted to the court of the country of habitual residence within one month of the judgment and the court that receives the information must notify the parties and invite them to make submissions to the court within three months so that the court can examine the question of custody of the child. Such court may issue a judgment requiring the return of the child to the jurisdiction which shall be enforceable under the regulation.



Brussels II – Further Safeguards (cont)

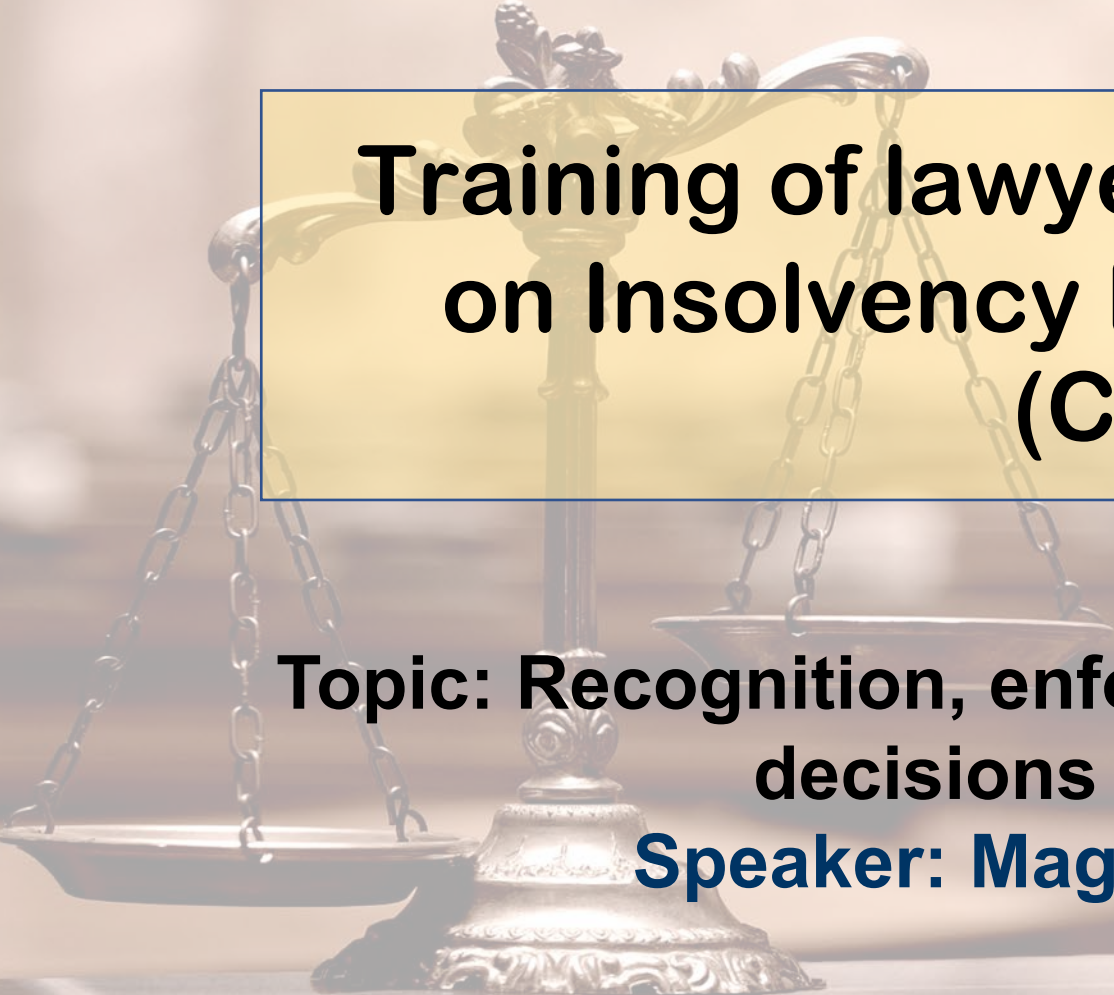
- We should also keep in mind Article 10 under which in case of of wrongful removal or retention of a child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction in matters of custody until one of the conditions set out in Article 10 is met.



Best interest of the child – Article 8 ECHR

- **X. v. Latvia (Application No. 27853/09), Grand Chamber, 26 November 2013**

106. The Court considers that a harmonious interpretation of the European Convention and the Hague Convention ... can be achieved provided that the following two conditions are observed. Firstly, the factors capable of constituting an exception to the child's immediate return in application of Articles 12, 13 and 20 of the Hague Convention, particularly where they are raised by one of the parties to the proceedings, must genuinely be taken into account by the requested court. That court must then make a decision that is sufficiently reasoned on this point, in order to enable the Court to verify that those questions have been effectively examined. Secondly, these factors must be evaluated in the light of Article 8 of the Convention.

A pair of ornate, silver-colored scales of justice stands on a decorative base. The scales are positioned on the left side of the frame, with the pans hanging from a central point. The background is a soft, out-of-focus image of a building facade with windows.

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

**Topic: Recognition, enforceability and enforcement of
decisions in family matters**

Speaker: Magdalena Bartosiewicz

CiviLAW Webinar on Family Affairs

28 March 2022

Zoom Webinar



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

- 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,
- Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes



Council Regulation (EC) No 2201/2003

The Regulation shall apply in civil matters relating to:

- divorce,
- legal separation,
- marriage annulment,
- attribution, exercise, delegation, restriction or termination of parental responsibility, in particular rights of custody and rights of access, guardianship, curatorship and similar institutions,
- the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child,
- the placement of the child in a foster family or in institutional care and measures for the protection of the child relating to the administration, conservation or disposal of the child's property.

The material scope of the regulation covers two categories of cases: matrimonial matters and matters of parental responsibility.



#CIVILAW

Council Regulation (EC) No 2201/2003

„Court" shall cover all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to Article 1.

„Judge" shall mean the judge or an official having powers equivalent to those of a judge in the matters falling within the scope of the Regulation.

„Judgment" shall mean a divorce, legal separation or marriage annulment, as well as a judgment relating to parental responsibility, pronounced by a court of a Member State, whatever the judgment may be called, including a decree, order or decision.

„The term "Member State of origin" shall mean the Member State where the judgment to be enforced was issued.

„The term "Member State of enforcement" shall mean the Member State where enforcement of the judgment is sought.



Council Regulation (EC) No 2201/2003

Article 21 Recognition of a judgment

- 1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.*
- 2. In particular, and without prejudice to paragraph 3, no special procedure shall be required for updating the civil-status records of a Member State on the basis of a judgment relating to divorce, legal separation or marriage annulment given in another Member State, and against which no further appeal lies under the law of that Member State.*
- 3. Without prejudice to Section 4 of this Chapter, any interested party may, in accordance with the procedures provided for in Section 2 of this Chapter, apply for a decision that the judgment be or not be recognised.*

The local jurisdiction of the court appearing in the list notified by each Member State to the Commission pursuant to Article 68 shall be determined by the internal law of the Member State in which proceedings for recognition or non-recognition are brought.
- 4. Where the recognition of a judgment is raised as an incidental question in a court of a Member State, that court may determine that issue.*



Council Regulation (EC) No 2201/2003

The regulation does not specify either the circle of persons entitled to file an application for establishing that a decision is or is not subject to recognition.

„Party in interest“ may also be a third party if he can show that the possible consequences of the recognition or non-recognition of the judgment will have an effect on his legal situation, e.g. a child if the consequences of the judgment will have an effect on his family law position.

Article 68 Information relating to courts and redress procedures.

The Member States shall notify to the Commission the lists of courts and redress procedures referred to in Articles 21, 29, 33 and 34 and any amendments thereto.

The Commission shall update this information and make it publicly available through the publication in the Official Journal of the European Union and any other appropriate means.

European Judicial Atlas in civil matters:

https://e-justice.europa.eu/321/EN/european_judicial_atlas_in_civil_matters?init=true



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Council Regulation (EC) No 2201/2003

Article 22 Grounds of non-recognition for judgments relating to divorce, legal separation or marriage annulment

A judgment relating to a divorce, legal separation or marriage annulment shall not be recognised:

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

(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 judgment unequivocally;

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

(d) if it is irreconcilable with an earlier judgment given in another Member State or in a non-Member State between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

„ordre public” = fundamental principles



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

(d) if it is irreconcilable with an earlier judgment given in another Member State or in a non-Member State between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.



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Council Regulation (EC) No 2201/2003

The CJEU defines "statement of claim or equivalent document" as the document provided for in the State of origin by which the defendant (the debtor) first has notice of the proceedings against him and which, if duly served, enables the defendant to arrange for his defence before the decision is delivered in the State of origin (ECJ judgment of 13 July 1995, C-474/93, in Hengst BV v. Campense, Slg. 1995-7, p. I-2113).

The letter should contain full details of the elements of the dispute enabling the defendant to defend himself (judgment of 21 April 1993 in Case C-172/91 Sonntag [1993] ECR I-1963). 1993, p. I-1963, paragraph 39).



Council Regulation (EC) No 2201/2003

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

(d) if it is irreconcilable with an earlier judgment given in another Member State or in a non-Member State between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

Recognition of a foreign judgment is not possible if the legal effects of the two judgments are mutually exclusive, regardless of whether the subject matter of the two proceedings was the same or different and whether the domestic judgment was earlier or later than the foreign judgment.



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Council Regulation (EC) No 2201/2003

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(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 judgment unequivocally;

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

(d) if it is irreconcilable with an earlier judgment given in another Member State or in a non-Member State between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

The difference between Article 22(c) and Article 22(d) is the origin of the judgments. The former refers to the relationship between the foreign decision to be recognised and the national decision, the latter to the relationship between the foreign decision to be recognised and the earlier foreign decision (given in a Member State or in a third State).



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Council Regulation (EC) No 2201/2003

Article 23 Grounds of non-recognition for judgments relating to parental responsibility

A judgment relating to parental responsibility shall not be recognised:

- (a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child;*
 - (b) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought;*
 - (c) where it was given in default of appearance if the person in default 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 that person to arrange for his or her defence unless it is determined that such person has accepted the judgment unequivocally;*
 - (d) on the request of any person claiming that the judgment infringes his or her parental responsibility, if it was given without such person having been given an opportunity to be heard;*
 - (e) if it is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought;*
 - (f) if it is irreconcilable with a later judgment relating to parental responsibility given in another Member State or in the non-Member State of the habitual residence of the child provided that the later judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.*
- or*
- (g) if the procedure laid down in Article 56 has not been complied with.*



Council Regulation (EC) No 2201/2003



- Recognition cannot be refused on the ground that, under the law of the Member State where recognition is sought, divorce, legal separation or marriage annulment would be inadmissible on the same factual basis.
- A judgment may not under any circumstances be reviewed on its merits.
- The possibility of suspending proceedings for recognition of a foreign judgment if an ordinary appeal has been lodged in the State of origin.

Council Regulation (EC) No 2201/2003

Article 28 sec. 1 Enforceable judgments

A judgment on the exercise of parental responsibility in respect of a child given in a Member State which is enforceable in that Member State and has been served shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.

- The concept of enforceability was considered by the European Court of Justice in Case C-267/97 Eric Coursier v. Fortis Bank S.A. Marine Bellami. The Court held that in the examination of whether a judgment is enforceable, what matters is only whether that judgment is enforceable due to its formal conditions.
- The application for a declaration of enforceability shall be submitted to the court appearing in the list notified by each Member State to the Commission pursuant to Article 68.
- The procedure for making the application is governed by the law of the Member State of enforcement.





Council Regulation (EC) No 2201/2003

- The decision on the application for a declaration of enforceability may be appealed against.
- The right to appeal against the decision on the application for a declaration of enforceability shall lie with both parties.
- The appeal shall be lodged with the court appearing on the list notified by each Member State to the Commission pursuant to Article 68.
- The Regulation sets a time-limit of one month for an appeal against a declaration of enforceability.
- The appeal is examined in accordance with the rules applicable to contentious proceedings, which means that the proceedings before the court of second instance are adversarial in nature.

If a party fails to appeal against a decision declaring a given foreign judgment enforceable, it thereby deprives itself of the possibility to raise in the enforcement proceedings the objections it could have raised in the appeal (judgment of the ECJ in *Horst Ludwig Martin Hoffman v. Adelheid Krieg*, 145/86).

Council Regulation (EC) No 2201/2003

Documents:

A party seeking recognition or non-recognition of a judgment or a declaration of enforceability shall produce:

- a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and
- the certificate referred to in Article 39 of the Regulation, namely the certificate concerning judgments in matrimonial matters and judgments on parental responsibility.

In the case of a **decision given in default of appearance**, the party seeking recognition or a declaration of enforceability shall produce:

- the original or a certified copy of a document which establishes that the document instituting the proceedings or an equivalent document was served on the party who did not appear in court; or
- a document stating that the other party expressly agrees with the decision.



#CIVILAW

Council Regulation (EU) 2016/1103

- The rules for the recognition and enforceability of judgments are very similar to those in the Regulation (EC) No 2201/2003
- A decision given in one Member State shall be recognised in the other Member States without any special procedure being required.
- Any interested party who raises the recognition of a decision as the main issue in a dispute may apply for that decision to be recognised.



Council Regulation (EU) 2016/1103

Article 37 Grounds of non-recognition

A decision shall not be recognised:

- (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.*



Council Regulation (EU) 2016/1103

- There is also a prohibition on reviewing the jurisdiction of the court of origin.
- Review on the merits is also excluded.
- The court of the Member State in which recognition is sought of a judgment given in another Member State is given the power to stay the proceedings if an ordinary appeal has been lodged against the judgment in the Member State of origin.
- Decisions given in these matters in a Member State and enforceable in that State are 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 the Regulation.
- The application for a declaration of enforceability shall be submitted to the court or competent authority of the Member State of enforcement notified by that Member State to the Commission in accordance with Article 64, which is also to be determined in the European Judicial Atlas in civil matters.



Council Regulation (EU) 2016/1103

The application shall be accompanied by the following **documents**:

- a copy of the decision which satisfies the conditions necessary to establish its authenticity;
- the certificate issued by the court or competent authority of the Member State of origin using the form established in accordance with the advisory procedure referred to in Article 67(2) of the Regulation.
- The judgment shall be declared enforceable immediately after these formalities have been completed.
- The party against whom enforcement is sought is not entitled to make any statements on the application at this stage of the proceedings.
- The decision on the application for a declaration of enforceability shall forthwith be brought to the notice of the applicant in accordance with the procedure laid down by the law of the Member State of enforcement.
- The party against whom enforcement is sought shall be served with the declaration of enforceability and with the judgment, unless it was previously served on that party.





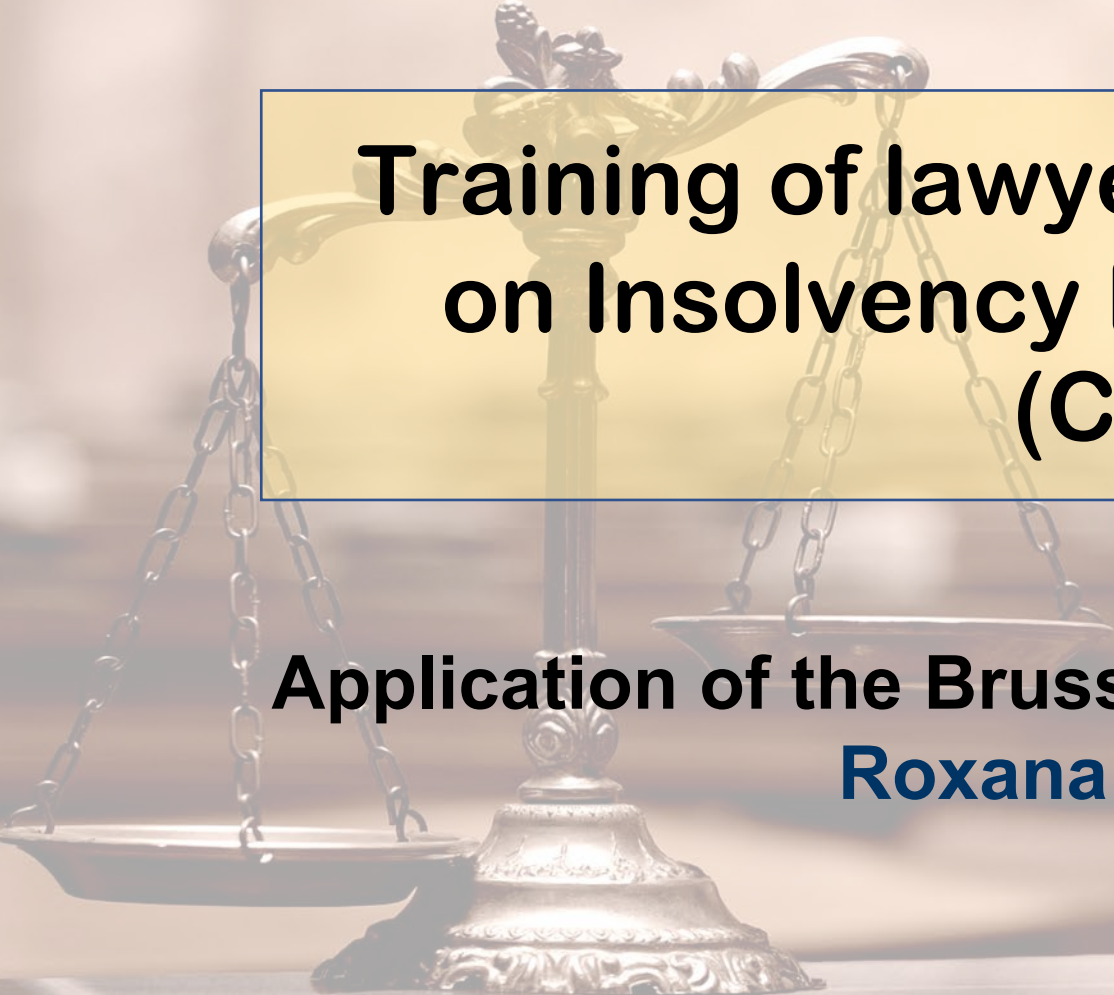
Council Regulation (EU) 2016/1103

- Each party may appeal against the decision given on the application for a declaration of enforceability.
- The appeal shall be lodged with the court notified by the Member State concerned to the Commission.
- The appeal shall be dealt with in accordance with the rules governing procedure in contradictory matters.
- An appeal against the declaration of enforceability shall be lodged within 30 days of service thereof. If the party against whom enforcement is sought is habitually resident in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be 60 days and shall run from the date of service, either on him in person or at his residence.
- Where a decision has been given in respect of several matters and the declaration of enforceability cannot be given for all of them, the court or competent authority shall give it for one or more of them. An applicant may request a declaration of enforceability limited to parts of a decision

Q&A



Thank you!

A pair of ornate, silver-colored scales of justice stands on a decorative base. The scales are positioned on the left side of the frame, with the pans hanging from a central pillar. The background is a soft-focus image of a courtroom or a similar formal setting.

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

Application of the Brussels II a Regulation in Romania
Roxana Mihaela Catea

CiviLAW Webinar on Family Affairs
28 March 2022
Zoom Webinar



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

Presentation outline and topics



- Analysis of frequent grounds for refusal of return, as disposed by Romanian courts of law
- Analysis of frequent grounds for approval of return, as disposed by Romanian courts of law
- Length of proceedings vs. The right to a fair trial
- Enforcement of the return decision



Grounds for refusal of return – Romanian case law



- Relevance of EU court practice invoked before Romanian courts of law
- Reasoning of Romanian courts of law in specific refusal cases
- Recent examples



Grounds for approval of return – Romanian case law

- Relevance of EU court practice invoked before Romanian courts of law
- Reasoning of Romanian courts of law in specific refusal cases
- Recent examples

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Length of proceedings vs. The right to a fair trial

- Mandatory provisions related to length of procedures under the Regulation
- Usual duration of procedures before Romanian courts of law
- What is to be expected as “reasonable time” before Romanian courts of law ?
- Recent examples

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Enforcement of the return decision

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Brussels II bis Regulation	Privileged decisions – art. 40 - Return
Recognition	automatic
Application for (non-)recognition	Non-recognition art. 42 (1)
Declaration of enforceability	Not needed if certificate annex III/IV Art. 41 (1) and 42 (1)
Documents required	
Grounds for refusal	
Enforcement	Art. 47 (1) + not irreconcilable with subsequent enforcement judgement
	Art. 47 (2)
	National laws



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- wrap up and conclusions -
Thank you!



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