Training of lawyers on EU Civil Law (TRADICIL) – Family Law Seminar

Roxana Catea

International Child Abduction

Madrid, 6 June 2025

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Legal framework

- The Hague Convention of 25 October 1980 on the Civil aspects of International Child Abduction
- The Hague Convention of 19th October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children
- Council Regulation (EU) 2019/1111 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (Brussels IIter)

Statistics – why is it important to have a proper legal framework on international child abduction?

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	2021	2022	2023
• Poland	150 cases	160 cases	175 cases
• Netherlands	178 cases	188 cases	260 cases
• Spain	434 cases	397 cases	477 cases

- Source – European Youth Forum – 2024 Motion for An active approach against child abduction in Europe

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Application domain

The Hague Convention of 1980

Applies to Contracting States

Child under 16 years

Who has the habitually residence in a Contracting State immediately (less than one year) before the removal or retention

Council Regulation (EU) 2019/1111 (Brussels IIter)

Applies to the EU Member States

Complements the Hague Convention of 1980

Child under 16 years

Who has the habitually residence in a Member State

The Hague Convention (1980)

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Purpose: Prompt return of children wrongfully removed or retained

100+ countries are signatories

Key principles: Habitual residence, breach of custody rights, return without delay

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Habitual residence of the child

- No definition in the Convention or in the Regulation
- Concept has to be interpreted autonomously and independently regardless of the national concepts, by reference to EU law and ECJ Jurisprudence
- Must by uniformity of interpretation in all the EU Member States
- Factual concept, not the main residence and not parental intention residence alone but a combination of the following criteria:

❑Physical presence of the child

❑Circumstances of the child's living

❑Degree of integration of the child (social, school and family)

❑Mobility of the parent in charge

- Relevant ECJ Decisions: Case C-497/10 PPU-Mercredi v Chaffe (2010) Case C-111/17 OL v PQ (2017)

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Rights of custody

Attributed to a person, an institution or any other body.

Defined by the national Law of the State of the child's habitual residence.

Includes rights relating to the care of the person of the child, the right to determine the child place of residence.

Derived from a judicial or administrative decision or from an agreement.

At the time of the removal or retention was actually exercised or would have been exercised.

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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.

The Hague Convention of 25 October 1980

Jurisdiction (I)

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- Determined by the habitual residence of the child
- The competence of the court of the Member State where **the child was habitually resident** immediately before the wrongful removal or retention (article 9 of the Regulation) until the child has acquired a habitual residence in another Member State and:
- (a) each person, institution or other body having rights of custody has acquiesced in the removal or retention;

or

- (b) the child has resided in that other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met:

Jurisdiction (II)

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- Conditions:

- i. within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no application for return has been lodged with the competent authorities of the Member State to which the child has been removed or where the child is being retained.
- ii. an application for return lodged by the holder of rights of custody has been withdrawn and no new application has been lodged within the time limit set in point (i)

Return procedure – The Hague Convention

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- The Contracting States designates a Central Authority (art.6).
- Requires an Application (art.8).
- The Central Authority should take all the necessary measures to ensure the voluntary return of the child if such voluntary (art.10).
- Expeditious Judicial or Administrative proceedings – 6 weeks from the date of the commencement of the proceedings, if more CA of the Requesting State ask the CA of the Requested State the reasons of the delay (art.11).
- An Administrative order or a Court decision.
- Right of access to the child (art.5 and 21).

Role of Central Authorities

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A system of Central Authorities in all Contracting Parties		
CA assist in locating the child and in achieving, if possible, a voluntary return of the child or an amicable resolution of disputes	CA cooperate to prevent further harm to the child by initiating, or helping to initiate, proceedings for the return of the child, and by making necessary administrative arrangements to secure the child's safe return	CA are also obliged to promote the peaceful enjoyment of rights of access and to take steps to remove, as far as possible, obstacles to the exercise of such rights (Art. 21)

Return procedure – Brussels IIter

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- Involves a court of a Member State
- The application can be done directly by the person/institution or other body alleging a breach of the rights of custody or with the assistance of the CA.
- The CA of the Requested State informs the CA of the Requesting State in 5 working days about the request of the return.
- Expeditious court proceedings–6 weeks in the first stage and 6 weeks in the appeal.
- Right of the child to express his/her views, art. 21 is applicable.
- Expeditious enforcement of the decision ordering the return of the child-6 weeks of the commencement of the enforcement procedure.

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Grounds for refusal of return

- Hague Convention –art. 13, Council Regulation (EU) 2019/1111 –art. 29
- 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
- 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 a intolerable situation.
- The court or administrative body 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.

Taking the decision not to return

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Difficulties in application – CJEU case law

- **C-195/08 PPU Inga Rinau [2008] ECR I-5271**

- multiple instances of adjudication in different EU Member States

- when it is appropriate to commence a second chance procedure under Article 11(8)?

- **C-491/10 PPU Aguirre Zarraga v Pelz [2011] ECR I-14247.**

- a return order issued under Article 11(8) must be enforced even if it has been rendered in violation of the requirements provided in Article 42

- **C-211/10 PPU Povse v Alpago [2010] ECR I-6673**

- whether Article 11(8) of the Regulation must be interpreted as meaning that a judgment of the court with jurisdiction ordering the return of the child only falls within the scope of that provision when the basis of that order is a final judgment by the same court on the rights of custody over the child

Taking the decision not to return

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Difficulties in application – CJEU case law

- **C-498/14 PPU David Bradbrooke v Anna Aleksandrowicz [2015] ECLI:EU:C:2015:3.**

- interpreting Articles 11(7) and 11(8) of the Regulation

- whether a MS was precluded from allocating exclusive jurisdiction to a specialised court to examine questions relating to the return or custody of a child, where proceedings on the substance of parental responsibility with respect to the child have already been brought before a particular court or tribunal

Interplay with Brussels IIter – recognition and enforcement

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- Direct recognition, no exequatur (art.30)
- No declaration of enforceability required for the decisions enforceable in another Member State
- Certificate–Annex IV–issued by the court of the Member State of origin in the language of the decision
- No security, bond or deposit (art. 75)
- Suspension (art. 56)
- Refusal of enforcement (art.56 paragraphs 4 and 6).

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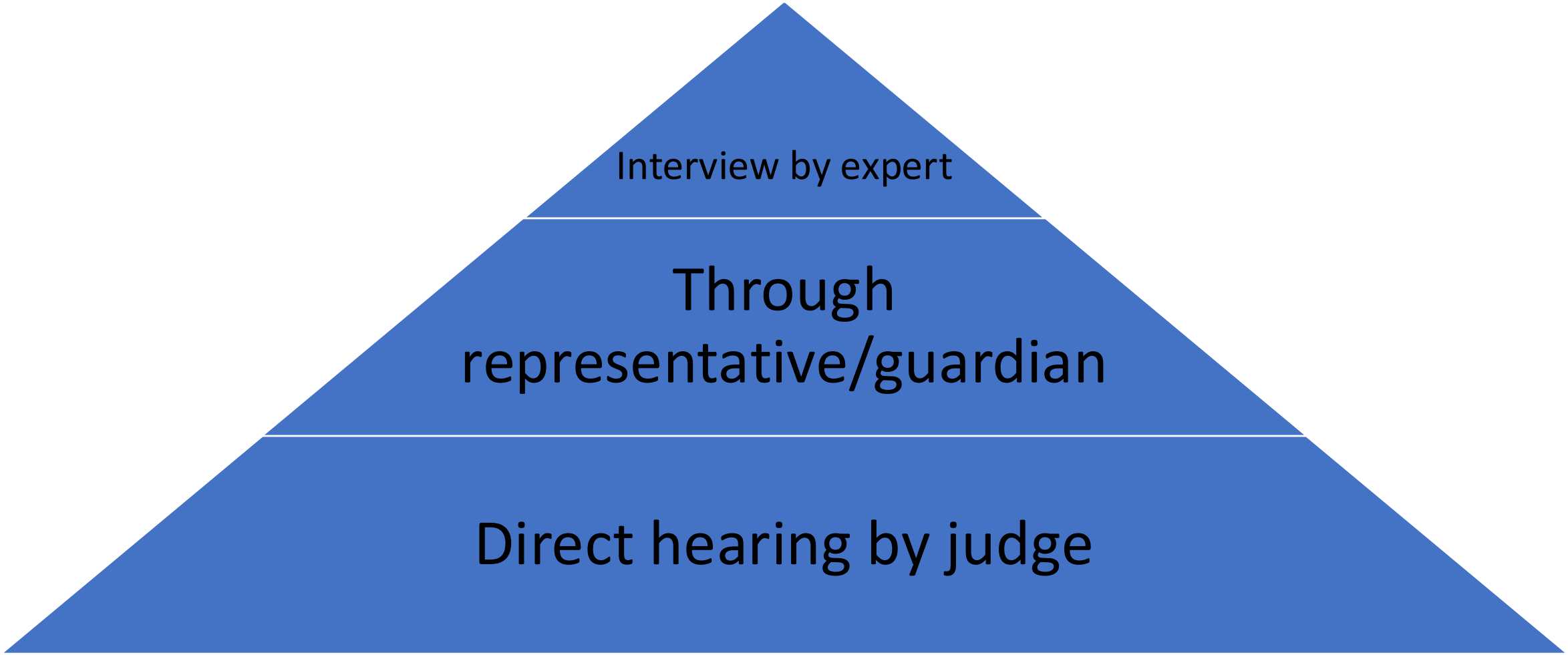
The right of the child to be heard



Testimony of an abducted child

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- *The child's life and entire childhood is often divided into **before and after sections** as the abduction takes over the family's identity and defines relationships, birthdays, connections with siblings, relationships with grandparents and extended family, culture, religion, identity, and so much more. …*
- *In the messy, tricky, difficult arena that is family dynamics, being faced with the idea that one of your parents is so awful that you must be taken to a different country and hidden from them by force, is psychological trauma.*
- *Parents are not supposed to be dangerous. It is a wound that will ooze for a lifetime, as it is so far removed from what a child's definition of family should be. Family is about togetherness, not being pulled apart*.
- Sarah Cecilie Finkelstein Waters, '*Long-Term Reflections of a Former Milk Carton Kid*' in Marilyn Freeman and Nicola Taylor (eds) Research Handbook on International Child Abduction: The 1980 Hague Convention (Edward Elgar Research Handbooks in Family Law Series, 2023, 19-29

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The Hague Convention of 1996 for protection of children

Art. 50

This Convention shall not affect the application of the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, as between Parties to both Conventions

Art. 7

Jurisdiction of the courts of the child habitual residence–similar to article no. 9 of Regulation EU 1111/2019

Additional EU Instrument

Art.11

Necessary measures in case of urgency by the authorities of any Contracting State in whose territory the child or property belonging to the child is present

Art.12

Provisional measures for protection of the person or property of the child by the authorities of any Contracting State in whose territory the child or property belonging to the child is present

Situation in Romania

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- Central Authority Ministry of Justice, Department of International Law and Judicial Cooperation
- Jurisdiction–Bucharest Tribunal and appeal before Bucharest Court of Appeal
- No official data of the of requests received by the C.A. Only unofficial data are available.
- During 2021-2022 between Romania and Italy there were 349 cases.
- In 2022 were registered with Bucharest Tribunal 85 cases, out of which 65 were solved.
- The enforcement of the return decision is quite inefficient. The bailiff is forbidden to take the child by force and only monetary sanctions are imposed.

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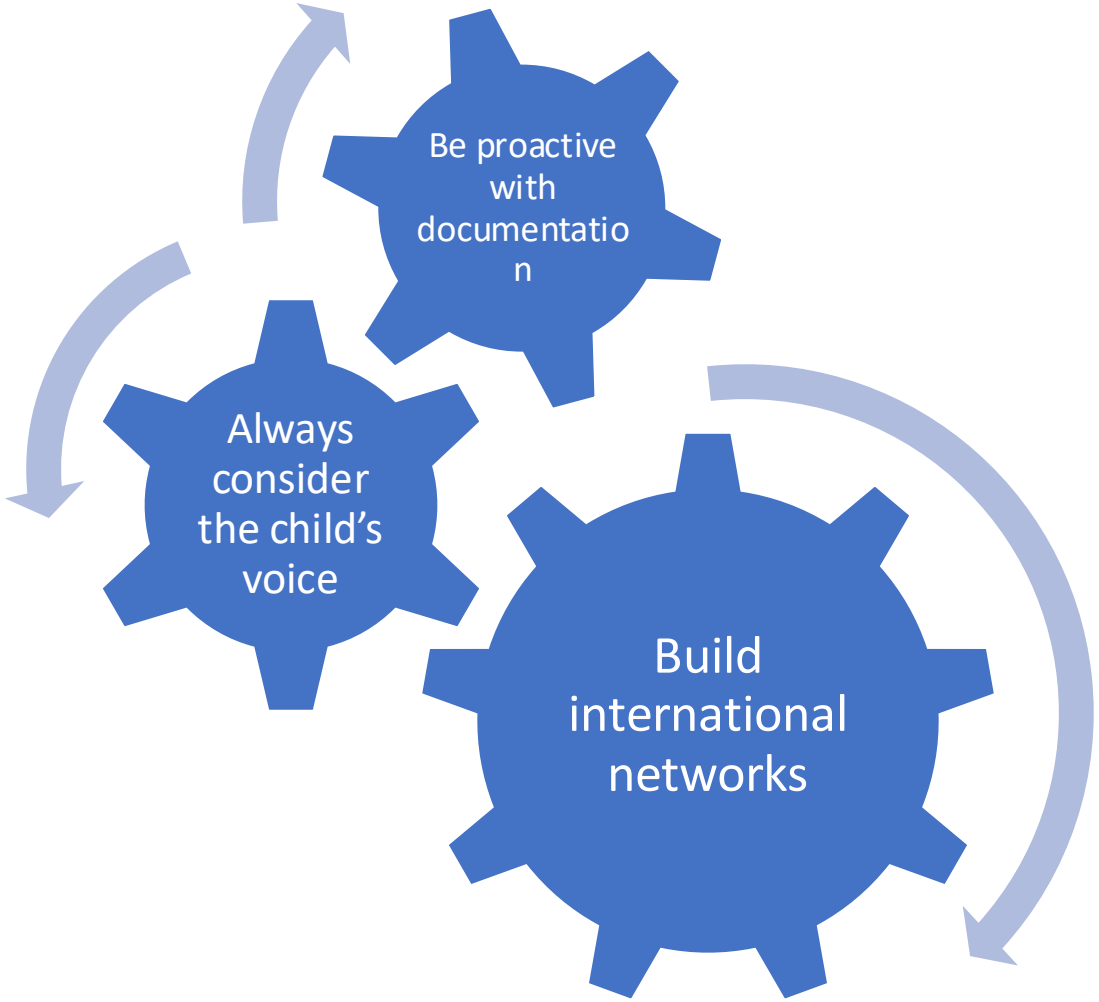
Best practices



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Potential approach to be considered

Conclusions

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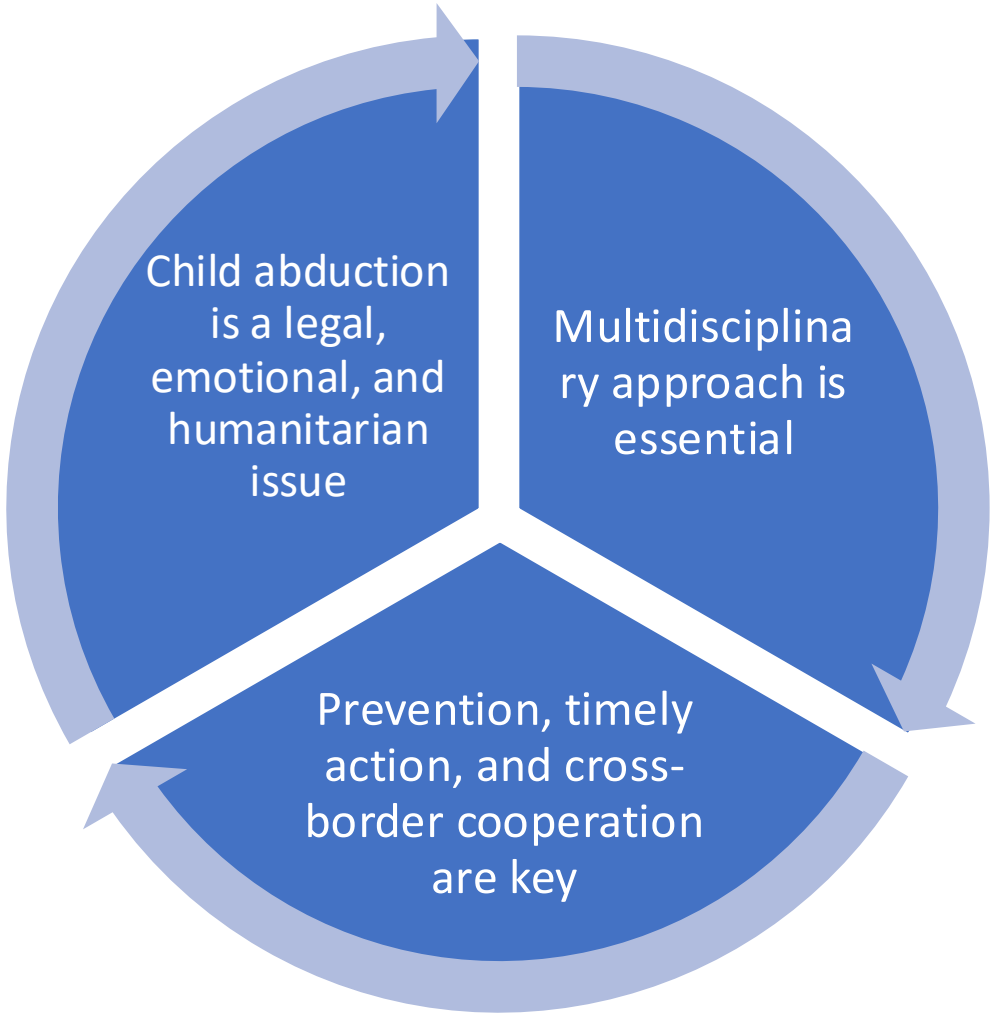

Available online sources

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Available online sources

- **EUR-Lex / Brussels II ter –**Document information: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32003R2201
- **e-Justice Portal / European Judicial Atlas**: https://e-justice.europa.eu/topics/taking-legal-action/european-judicial-atlas-civil-matters/brussels-iib-regulation-matrimonial-matters-and-matters-parental-responsibility-recast_en
- **HCCH Child Protection Section:** https://www.hcch.net/en/instruments/conventions/specialised-sections/child-protection
- **HCCH Child Abduction Section:** https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction

In particular: INCADAT (International Child Abduction Database: a post-Convention service) https://www.incadat.com/en

Country Profile: https://www.hcch.net/en/publications-and-studies/details4/?pid=5289&dtid=42

Training of lawyers on EU Civil Law (TRADICIL) – Family Law Seminar

Mayte García

Property of international couples (marriages and registered partnerships)

Madrid, 6 June 2025

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REGULATION (EU) 2016/1103
ON MATRIMONIAL PROPERTY REGIME

REGULATION (EU) 2016/1103
ON MATRIMONIAL PROPERTY REGIME

1. Context and Origin of the Regulation

- **Motivation of the Regulation**:

  The increasing mobility of individuals within the European Union (EU) and the complexities surrounding matrimonial property regimes in international situations.

  The need for a harmonized regulatory framework to address jurisdictional issues, applicable law, recognition, and enforcement of judgments concerning matrimonial property regimes.

Main Objective: To create a common legal framework to resolve conflicts of law, avoid negative competition between national courts, and facilitate the recognition and enforcement of judicial decisions in matters of matrimonial property regimes.

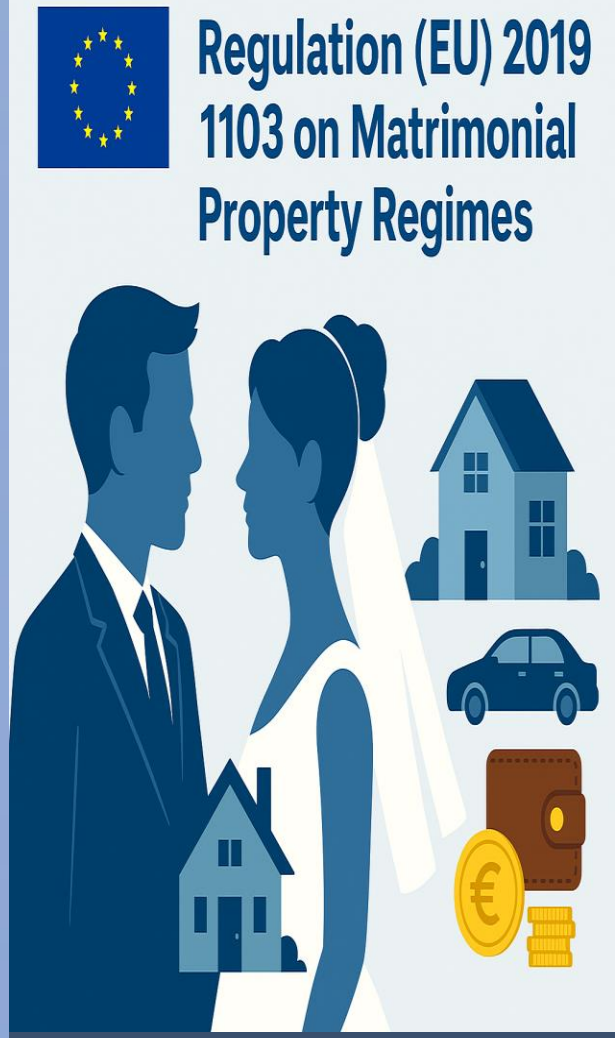
REGULATION (EU) 2016/1103
ON MATRIMONIAL PROPERTY REGIME

APPLICATION

Scope of Application: The Regulation applies to 18 member States, not all UE members.

EXCLUSIONS

Exclusions: It does not apply to matters related to personal status and capacity, adoption, inheritance, etc.



REGULATION (EU) 2016/1103
ON MATRIMONIAL PROPERTY REGIME

Structure of the Regulation

Chapter I: General provisions.

Chapter II: Rules on judicial competence.

Chapter III: Rules on applicable law.

Chapter IV: Recognition and enforcement of judgments.

Chapter V: Transitional and final provisions.

REGULATION (EU) 2016/1103
ON MATRIMONIAL PROPERTY REGIME

Key Legal Concepts

"The regulation is built around four core ideas:"

- Applicable law – which national law governs the property regime.
- Jurisdiction – which country's courts can rule on the case.
- Recognition and enforcement – making sure decisions are respected across borders.
- Party autonomy – the spouses' ability to choose their law and forum.

REGULATION (EU) 2016/1103
ON MATRIMONIAL PROPERTY REGIME

“If no law is explicitly chosen by the spouses, the regulation provides default rules:”

1. The law of their first common habitual residence after marriage.

2. If no such residence, then the law of common nationality.

3. If neither, the law with the closest connection.

“As you can see, it's vital to reconstruct the couple’s life timeline to apply these rules properly.”

REGULATION (EU) 2016/1103
ON MATRIMONIAL PROPERTY REGIME

Party Autonomy – Choice of Law

a) “Now here’s where the regulation shines: spouses can choose which law governs their matrimonial property regime.”
b) “They can choose the law of the nationality or habitual residence of either spouse. But: the agreement must be written and meet formal requirements, such as being notarized or in a valid legal form.”
c) “This is where law firms can play a key preventive role by helping couples draft and register these agreements early.”

REGULATION (EU) 2016/1103
ON MATRIMONIAL PROPERTY REGIME

Jurisdiction Rules:

- Jurisdiction usually follows the divorce proceeding's forum. But if the parties have agreed on a law, they can also agree on the jurisdiction to rule on property matters."
- "This opens the door to forum shopping—but also demands careful planning. Cross-border family litigation requires strategic alignment between property law and family law forums."

REGULATION (EU) 2016/1103
ON MATRIMONIAL PROPERTY REGIME

Case Study 1 – Spanish-French Marriage

“This couple marries in Spain in 2020 and moves to France. They divorce in France and fight over shares in a Spanish business.”

“Although the court is in France, the Spanish law governs their property regime, because Spain was their first habitual residence.”

“So the French judge must apply Spanish matrimonial regime of Sociedad de gananciales rules. This shows how vital it is for lawyers to identify the applicable law early on, regardless of forum.”

REGULATION (EU) 2016/1103
ON MATRIMONIAL PROPERTY REGIME

Case Study 2 – British-German Couple

“Here’s another case: a UK-German couple marries in London, moves to Germany, and owns a house in Málaga.”
“Since the UK is not part of the Regulation, this creates a legal gap. But Germany and Spain **do** apply the regulation.”
“So German and Spanish lawyers must coordinate. Any prenuptial agreement, if valid and registered, will be decisive.”
“This case highlights how Brexit has changed the legal map and why **early documentation** is more important than ever.”

REGULATION (EU) 2016/1103
ON MATRIMONIAL PROPERTY REGIME

Case Study 3 – German/British marriage

“This couple marriaged in Malaga in a lovely weeding in the beach. After the weeding the wife went to Berlin and the husband went to London. No Prenuptial Agreement signed or Marriage Contract.

Two years later the german wife moved to London and one year later they moved to Spain where he has a property for vacations.

After 3 years they initiated a divorce proceedings in Spain, what will be the aplicable matrimonial régimen?

REGULATION (EU) 2016/1103
ON MATRIMONIAL PROPERTY REGIME

Challenges in Practice

“Despite its advantages, the Regulation is not problem-free.”

“Challenges include:”

- **Lack of knowledge among local courts.**
- **Difficulty proving foreign law and complying with formalities.**
- **Risk of invalid agreements due to missing translations or notarization.**
- **Conflicts of jurisdiction if not well coordinated.**

REGULATION (EU) 2016/1103
ON MATRIMONIAL PROPERTY REGIME

Practical Tips for Law Firms

“To navigate these challenges, international family lawyers should:”

- **Promote the use of marital property agreements, pre or post nuptial agreements.**
- **Rigorously verify formal requirements.**
- **Collaborate with notaries and foreign lawyers before the clients moving.**
- **And regularly training in EU family law developments.**

“These are simple but powerful steps to make cross-border work safer for clients.”

REGULATION (EU) 2016/1103 ON MATRIMONIAL PROPERTY REGIME

Summary of Key Points:

Regulation (EU) 2016/1103 provides clear and consistent rules on judicial competence, applicable law, and the recognition and enforcement of judgments regarding matrimonial property regimes.

While it does not harmonize substantive laws, it simplifies the resolution of cross-border cases within the EU.

Practical Impact on Legal Practice:

Increased legal certainty for lawyers advising clients involved in international marriages or divorce proceedings across different EU Member States.

The importance of understanding provisions related to applicable law and jurisdictional rules to effectively handle cross-border matrimonial property cases.

Potential Challenges and Questions:

How should lawyers deal with cases involving property located outside the EU?

What difficulties might arise in practice when spouses disagree on the choice of law applicable to their matrimonial property regime?

REGULATION (EU) 2016/1103
ON MATRIMONIAL PROPERTY REGIME

Conclusions:

“Regulation 2019/1103 is a critical tool for achieving predictability and fairness in cross-border separations.”

“It empowers lawyers to provide strategic, preventive advice—and allows clients to protect their financial interests regardless of where they live or divorce.”

“Law firms that master this Regulation offer true international service.”

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Arantxa Cagigal Casquero

Recognition, enforceability and enforcement of decisions in family matters

Madrid, 6 June 2025

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Recognition, enforceability and enforcement of decisions in family matters

Regulation 4/2009, in matters relating maintenace obligations

Regulation EU 2103/1111, Brussels IIb, recast

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THE MAINTENANCE REGULATION

1.- INTRODUCTION

Temporal scope of application: 18th of June 2011. Art. 75

Geographical scope of application: 25 ME and partially Denmark, and specially UK.

Material scope of application: maintenance obligations arising from a family relationship, parentage, marriage or affinity.

What maintenance is? It includes alimony, maintenance, compensatory pension, duty to provide assistance, marriage expenses, allocation of a common habitual residence, extraordinary expenses in regard minors…

The maintenance regulation applies to court decisions, decisions enacted by administrative authorities, court settlements and authentic instruments

Connection with two international instruments:

a) ***2007 Hague Convention*** (international recovery of child support)

b)***The Hague Protocol of 2007*** (law applicable to maintenance obligations)

THE MAINTENANCE REGULATION

<table>
<tr><th colspan="2">Proceedings instituted after 18 June 2011</th><th colspan="3">Proceedings instituted before or on 18 June 2011</th></tr>
<tr><td colspan="2">Chapter IV, Section 1 applies
(no declaration of enforceability needed)

Abstract of the decision: Annex I

However, note that</td><td colspan="3"></td></tr>
<tr><td colspan="2"></td><td colspan="2">If the decision was given in a Member State in which the Brussels I Regulation was in force at that time[106] and</td><td rowspan="2">If the decision was given in a Member State in which the Brussels I Regulation was not in force at that time[107]</td></tr>
<tr><td colspan="2"></td><td>either
a) the decision was given after 18 June 2011</td><td>or
b) the request for enforcement was made after 18 June 2011</td></tr>
<tr><td>If the decision was given in Denmark

Chapter IV, Section 2 applies (a declaration of enforceability is needed)

Abstract of the decision: Annex II</td><td>If the decision was given in the UK and the proceedings were instituted before or on 31 December 2020
(the end of the transition period[108])

Chapter IV, Section 2 (a declaration of enforceability is needed)

Abstract of the decision: Annex II</td><td colspan="2">Chapter IV, Sections 2 and 3 apply
(a declaration of enforceability is needed)

Abstract of the decision: Annex II</td><td>Chapter IV does not apply

(the 2007 Hague Convention may apply regarding the recognition and declaration of enforceability)</td></tr>
</table>

THE MAINTENANCE REGULATION

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- **PRINCIPLES:**
  - CHAPTER IV for decisions, and CHAPTER VI FOR COURT SETTLEMENTS AND AUTHENTIC INSTRUMENTS
  - TWO LEGAL SCHEMES:
    - DECISIONS GIVEN IN A MEMBER STATE BOUND BY THE PROTOCOL, all ME except Denmark.
    - DECISIONS GIVEN INA MEMBER STATE NOT BOUND BY THE PROTOCOL ANT TO THE DECISIONS FALLING WITHIN THE SCOPE OF TRANSITIONAL PROVISIONS (ART. 75).

    Alternative ways to apply for the recovery of a maintenance obligation:

    - directly, pursuant provision in Chapter IV of this regulation
    - Indirectly, through the Central Authorities (Chapter VII), and the choice is optional to the creditor

THE MAINTENANCE REGULATION

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DECISIONS GIVEN IN PROCEEDINGS INSTITUTED ON OR AFTER 18TH OF JUNE 2011 IN MEMBERS STATES **BOUND** BY THE PROTOCOL

- CHAPTER IV, art. 17-22 and 75
- Recognition is automatic, no procedure is needed
- A enforceable decision in the Member State of origin is enforceable in another Member State without the need for a declaration of enforceability
- The party seeking enforcement of a decision must submit the authorities of the requested Member State an **authentic copy of the judgment**, and the **extract from the decision issued after verification of the enforceability by the court of origin, using the form set out in annex I**, and where appropriate, a **document showing the amount of any arrears and the date such amount was calculate** (The European Judicial Network has developed a non-compulsory standard form on the statement of maintenance arrears98 to facilitate the recovery ofsuch arr
- ears, form available at https://e-justice.europa.eu/47/EN/family_maintenance?clang=en).
- The enforceability of decisions declared enforceable as so cannot be challenge.

THE MAINTENANCE REGULATION

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DECISIONS GIVEN IN PROCEEDINGS INSTITUTED ON OR AFTER 18TH OF JUNE 2011 IN MEMBERS STATES **BOUND** BY THE PROTOCOL

- Debtor procedural remedies are available in the Member State of origin
- Debtor has the right to request a review of the decision in the ME of origin, and allows even the review of the substance of the decision.
- This **review** is an extraordinary remedy for decisions that have become FINAL.
- It applies in order to protect the right of defense so the conditions are limited to the case of failing to enter an appearance, not serving with the documents instituting the proceeding to defendant or it was impossible to contest the maintenance claim for force majeure.
- The defendant must lodged the review in 45 days.
- Rejection of the review makes final the decision; granting the review the decision will be null, but the creditor does not loose the interruption of prescription won and still can claim retroactive maintenance. If debtor seized a review, enforcement will stay.
- The defendant can also apply for refusal of enforcement:
  - Refusal is mandatory, wholly or in part, if the the right to obtain enforcement of the decision is time barred or prescript, applying the most favorable law for the creditor between the one from ME of origin or of enforcement
  - Refusal is discretionary if the decision given in the ME of origin is irreconcilable

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DECISIONS GIVEN IN PROCEEDINGS INSTITUTED ON OR AFTER 18TH OF JUNE 2011 IN MEMBERS STATES BOUND BY THE PROTOCOL

Case: X obtains a provisionally enforceable decision in **Finland in 2015**, giving her, following conjugal separation, a maintenance claim against her former husband **Y**. She intends to enforce that decision in **Estonia where Y's immovable property is located**. X lodges the documents listed in Article 20 with the Estonian enforcement authority in 2021 and, in accordance with the procedure provided for by the law of Estonia, brings enforcement proceedings in respect of Y's immovable property. The right to enforce a decision becomes time-barred after 5 years under the law of Finland (the Member State of origin) and after 10 years under the law of Estonia (the Member State of enforcement). Y decides to challenge X's initiative claiming that: (i) the decision given in Finland is irreconcilable with the divorce decision given in Estonia; and (ii) in any event, the right to enforce the decision is time-barred under the Finnish law. Y will have to ask the authority of Estonia with jurisdiction to refuse enforcement pursuant to Article 21(2) of the Maintenance Regulation. As regards Y's ground (i), refusal of enforcement is discretionary. As regards Y's ground (ii), refusal of enforcement is mandatory. However, **the Estonian authority must reject this ground (ii) because, although the right to enforce the decision is time-barred under the law of Finland (at least for some monthly payments due for the year 2015), the longer time limitation period provided for by the law of Estonia has not expired.**

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DECISIONS GIVEN IN PROCEEDINGS INSTITUTED BEFORE 18TH OF JUNE 2011 IN DENMARK AND MEMBERS STATES **NOT BOUND** BY THE PROTOCOL

- RECOGNITION: automatic recognition, but article 24 relates the grounds for refusal of recognition.
- ENFORCEABILITY. These decisions are not automatically enforceable in the requested Member State, and need an EXEQUATUR.
- The local jurisdiction shall be determined by reference to the place of habitual residence of the person against whom enforcement is sought, or the place of enforcement.
- Decision must be enforceable in the ME of origin, and the procedure is related in article 26.
- The application for a declaration of enforceability must be accompanied by an authentic copy of the decision and the extract from the decision using the form set out in **ANNEX II.**
- 30 days to the decision to be declared enforceable (art. 30)
- The decision declaring the enforceability must be served on the party against whom the enforcement order is sought, and he may appeal the declaration.
- Creditor may apply for provisional or protective measures governed by the law of the ME requested.
- ENFORCEMENT: The declaration of enforceability implies the power to proceed to any protective measures against the property of the debtor.
- Central authorities provide information relating debtor´s income or assets

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DECISIONS GIVEN IN PROCEEDINGS INSTITUTED BEFORE 18TH OF JUNE 2011 IN DENMARK AND MEMBERS STATES **NOT BOUND** BY THE PROTOCOL

Case*: X* obtained an enforcement decision in the UK in 2018, under which, given a divorce decision, she is entitled to a maintenance payment due from 1 January 2020 from her former spouse ***Y.*** She decides to enforce that decision in Romania where Y resides and owns immovable property. Because the decision was taken and the proceedings were instituted when the UK was still a Member State, and because the **UK is not a party to the Protocol**, **X needs to obtain a declaration of enforceability under Section 2 of Chapter IV** of the Maintenance Regulation. **X therefore submits an application for a declaration of enforceability to the competent authority in Romania, lodging an authentic copy of the decision and the extract of the decision issued by the court of origin in the UK using the form set out in Annex II of the Maintenance Regulation**. The application is granted and Y is notified of the decision of enforceability. **Y lodges an appeal against this decision within 30 days of notification, seeking its annulment**. He claims that the decision given by the UK court is **irreconcilable with a divorce decision previously issued in Romania in January 2019, which had set a lower maintenance amount**. Given that the decision on marital status is recognized on the basis of the rules laid down by the Brussels IIa Regulation, the Romanian court must revoke the declaration of enforceability pursuant to Article 24(c) of the Maintenance Regulation in view of the irreconcilability of the two decisions. In fact the judgments at issue have legal consequences which are mutually exclusive. The decision granted in the UK necessarily presupposes the existence of the matrimonial tie, and would have to be enforced although that relationship has been dissolved by a decision given in a dispute between the same parties in Romania. Pending the decision on the appeal, X may nonetheless ask the competent authorities in Romania to take protective measures concerning Y's property. (see CJEU case Hoffman v Krieg)

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DECISIONS GIVEN IN PROCEEDINGS INSTITUTED BEFORE 18TH OF JUNE 2011 IN DENMARK AND MEMBERS STATES **NOT BOUND** BY THE PROTOCOL

Case*:* Former wife ***X*** is habitually resident in **Latvia**, which in 2015 ordered her former husband ***Y*** to pay her maintenance. **X decides to enforce the decision in Germany where Y owns both movable and immovable property**. **Y decides to challenge enforcement** on the ground that the maintenance claim has already been partly satisfied through a public fund, which has been set up in Latvia to pay the maintenance allowance and which has been making the necessary payments to X since 2018. Within the limits of his financial capacity, Y has reimbursed the fund for the amounts paid to X. **Y will have to challenge enforcement before the court of Germany, which has jurisdiction under Article 41(1) of the Maintenance Regulation.** It is before this court that Y will be able to challenge that X's claim is partially extinguished. (See CJEU, case FX. v. GZ1)

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COURT SETTLEMENTS AND AUTHENTIC INSTRUMENTS

- These documents also fall under the rules which differentiate for decisions according to whether or not have been given in a Member State bound by the Protocol
- The authenticity of a document must relate both to the signature and to its content.
- The party seeking for recognition or enforcement must produced the same documents: authentic copy of the court settlement or the authentic instrument; and an extract of these with the forms set out in ANNEX I and II; and III and IV, depending on if it is a court settlement, or an authentic instrument.

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COOPERATION BETWEEN CENTRAL AUTHORITIES

Available applications for a maintenance **creditor –** Article 56:

A creditor seeking to recover maintenance in a Member State other than that of residence can apply to the Central Authority in the Member State of residence for assistance in submitting applications to obtain the recognition, declaration of enforceability or enforcement of a decision already given; or the establishment of a new decision; or the modification of a decision already given.

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COOPERATION BETWEEN CENTRAL AUTHORITIES

Case:(Article 56), **X and Y** were a married couple with a child. They were **habitually resident in the Netherlands**. After their relationship broke up, they obtained a divorce decision in the Netherlands in **2010** which **required X to pay maintenance** for the child After the divorce, **Y and the child continued to reside in the Netherlands, but X moved to France**. After this move, X failed to pay the required amount for several months. When he gained a regular job, X resumed his payments and promised Y that he would pay her the arrears as soon as possible. Y agreed to wait but also decided to prepare for the possibility that X might stop paying again. **She therefore decided to seek, in France, recognition and declaration of enforceability of the decision that established the maintenance allowance, but without proceeding to its enforcement**. The declaration of enforceability is **necessary because the decision was issued before the date on which the Maintenance Regulation came into effect (Article 75(2)** of the Maintenance Regulation). Y therefore **contacts the Central Authority of the Netherlands (where Y resides), which transmits an application for recognition and a declaration of enforceability of the decision issued in the Netherlands to the Central Authority of France** on Y's behalf. If X stops paying the arrears, Y will be able to contact the Central Authority of the Netherlands, which will transmit the application for the enforcement of the decision issued in the Netherlands to the Central Authority of France, which has already recognised the decision and declared it enforceable by virtue of the previous application

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COOPERATION BETWEEN CENTRAL AUTHORITIES

Available applications for a **debtor** against whom there is a maintenance decision – Article 56:

A) Recognition of a decision leading to the suspension, or limiting the enforcement, of a previous decision in the requested Member State.

B)Modification of a decision given in the requested Member State.

C) Modification of a decision given in a state other than the requested Member State

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COOPERATION BETWEEN CENTRAL AUTHORITIES

Case: A married couple, **X and Y,** divorced in 2018 through the courts of **Slovenia**, where the couple was habitually resident. The divorce decree required X to pay monthly maintenance. In 2019, X began to pay only part of the maintenance owed. In order to collect the entire amount, **Y initiated an enforcement procedure pursuant to Article 56 in the Czechia**, where X owns a property that he rents out. Y obtained a decision that a portion of the monthly rent payable by the third-party tenant must be directly assigned to Y. X's total income decreased significantly in 2020. **X has obtained - in Slovenia, where the two ex-spouses continue to reside - a decision that reduces the amount of the maintenance obligation.** Following this, **the debtor turns to the Central Authority of Slovenia and applies to the judicial authority of the Czechia, through the Central Authority of the Czechia, seeking the recognition of the decision obtained in Slovenia that decreases the amount of maintenance**, in order to reduce the proportion of the rent to be paid by the third-party tenant directly to Y

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REGULATION 2019/1111

- **PRINCIPLES:**
  - **CHAPTER IV for decisions, and CHAPTER VI FOR COURT SETTLEMENTS AND AUTHENTIC INSTRUMENTS**

- Brussels II b/ter or Recast, is in force since 1 August 2022 and replaces Brussels II a.
- Scope: marriage, parental responsibility, child abduction
- Chapter IV of Regulation:

  Section 1: General provisions (art. 30 to 41)

  Section 2: Recognition and enforcement of certain privileged decisions (art. 42 to 50)

  Section 3: Common provisions on enforcement (art. 51 to 63)

  Section 4: Provisions on recognition and enforcement of authentic instruments and agreements (art. 64 to 68)

  Section 5: Miscellaneus provisions (art. 69 to 75)

1.- INTRODUCTION

1.1.2 Characteristics of recognition and enforcement:

* A dual regime is maintained, distinguishing between a general system and a privileged one.

- Decisions subject to the **GENERAL REGIME**, section 1.

  Documents: authentic copy of decision and certificate issued pursuant to article 36, *annex II, III, IV.*

  - Automatic recognition

  - Application: for recognition or application for a decision that there are no grounds for the refusal of recognition

  - Stay of proceeding

  - Grounds of refusal

  - Enforcement does not require declaration of enforceability

  - Proceeding pursuant to articles 59 to 62

1.- INTRODUCTION

- Decisions subject to **the PRIVILEGED REGIME**, section 2:
  - Decisions granting right of access and decisions issued under article 29.6 when they involve the return of a child. A party also can choose apply the provisions of section 1
  - Documents: authentic copy of decision and certificate issued pursuant article 47, *annex IV* and *VI*
  - **Recognition is automatic.**
    - Application for recognition or application for a decision that there are no grounds for the refusal of recognition
    - Stay of proceeding
    - Grounds of refusal listed in article 50
  - **Enforcement does not require declaration of enforceability**
    - Proceeding pursuant to articles 59 to 62

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1.- INTRODUCTION

Principles:

a) **Documents to be produced:**

- Autentic copy of the decision, and its translation (art. 90, sworn translation)

- Certifcate of **article 36** (annex II, III and IV), **article 47** (annex V and VI), **article 66** (annex VIII and IX).

- Certificates of article 36 may be rectified; but the ones in article 47 and 66 may also be withdrawn.

b) **language t**o be use is the one from the Member State or origin but translations or transliterations could be needed.

c) Even if recognition and enforcement are automatic, parties may submitt **aplicación for refusal** on the grounds listed in the Regulation

d) **Jurisdiction** is governed by articles 3 and sequens.

e**) Service and notification** rules are the same for recognition and enforcement

f) It is **prohibited the review of jurisdiction of the court of origin**

g) It is **prohibited the review as to substance** of the decision from the Member State of origin

h) Legal aid for any party who has benefit from legal aid in the Member State of origin

i) Regulation eliminates the exequatur and relates **suspension** of the proceeding applying for recognition and enforcement

j) Regulation includes the recognition and enforcement of **authentic instruments and agreements**

2.- TITLES TO BE RECOGNICED AND ENFORCED

2.1 BRUSSELS II TER

ARTICLE 2:

DECISION:

- Judgement, decree, order
- Been down by a court with jurisdiction
- Court covers administrative or other authorities exercising jurisdiction in matrimonial matters or matter on parental responsibility
- Decisions approved by the court issued following the examination of the substance
- Decisions granting divorce, separation or annulment of marriage
- Decisions on the substance of parental responsibility, including decisions ordering the return of a child to another Member State, provisional/protective measures.

AUTHENTIC INSTRUMENTS AND AGREEMENTS:

- Authentic instruments drawn up or registrered as authentic by a public authority empowered by a Member State
- Agreements conclued between the parties and registered afterwards by a public authority (France, private or consensual divorces)

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2.- TITLES TO BE RECOGNICED AND ENFORCED

Documents to be produced in order to apply for recognition and enforcement:

Authentic copy of the decision

A CERTIFICATE ISSUED PURSUANT TO ARTICLES 36, 47, 54 AND 66 must be produced in order to apply for recognition or enforcecent:

- Annex II: decisions in matrimonial matters (article 36)
- Annex III: decisions in parental responsibility (article 36)
- Annex IV: decisions ordering the return of a child (article 36)
- Annex V: privileged decisions concerning right of access (article 47)
- Annex VI: privileged decisions on the substance of rights of custody entailling the return of a child (article 47)
- Annex VII: certificate concerning the lack or limitation of enforceability of certain decisions granting right of access or entailling the return of a child (article 49)
- Annex VIII: certificate for authentic instruments and agreements in matrimonial matters
- Annex IX certificate for authentic instruments and agreements of parental responibility

Annex X is a correlation table between Brussels IIa and IIb.

3.- **RECOGNITION AND ENFORCEMENT OF DECISIONS AND AUTHENTIC INSTRUMENTS AND AGREEMENTS**

A) **RECOGNITION OF DECISIONS**

A.1 GENERAL DECISIONS IN MATRIMONIAL AND PARENTAL RESPONSIBILITY MATTERS

A.1.1 DECISIONS IN MATRIMONIAL MATTERS

- Authentic copy of the decision and certificate issued pursuant to article 36 is needed, annex II, which may be rectified.

- Incidental registral recognition: no procedure is required to update the civil records on the basis of a final decision involving a matrimonial matter.

- Incidental judicial recognition before a court in another Member State hearing a case. Case: modification of any measure of a judgement granting divorce in a different ME of the one that gave it. Also, a party may allegue in a proceeding as defendant that a judgement must be recogniced.

- Application for a decision that there are no grounds for the refusal of recognition following procedure pursuant to art. 59 to 62.

- Application for refusal of recognition following procedure pursuant to articles 59 to 62:

  * Grounds for refusal are listed in article 38

3.- RECOGNITION AND ENFORCEMENT OF DECISIONS AND AUTHENTIC INSTRUMENTS AND AGREEMENTS

A) RECOGNITION OF DECISIONS

A.1.1 GENERAL DECISIONS IN MATRIMONIAL AND PARENTAL RESPONSIBILITY MATTERS

Grounds for refusal of recognition:

- Public Policy: discrimination on the grounds of sex, religion or race. Case Liberato, the violation of the rules of lis pendens is not a question of public policy

- Grounds depending on the right of defense of the defendant

- Irreconciliabiliy with another decision. Decision granting separation but there is another decision granting divorce.

3.- RECOGNITION OF DECISIONS AND AUTHENTIC INSTRUMENTS AND AGREEMENTS

A) **RECOGNITION OF DECISIONS**

A.1 GENERAL DECISIONS IN MATRIMONIAL AND PARENTAL RESPONSIBILITY

A.1.2 DECISIONS IN MATTERS OF PARENTAL RESPONSIBILITY

-Authentic copy of the decision and certificate, annex III and IV, issued pursuant to article 36 is needed, which may be rectified and withdrawn.

- Incidental judicial recognition before a court in another Member State hearing a case

- Application for a decision that there are no grounds for the refusal of recognition following procedure pursuant to art. 59 to 62.

- Application for refusal of recognition following procedure pursuant to articles 59 to 62:

- Grounds for refusal are listed in article 39, and decision may be refused if **it was given without the child who is capable of forming his wiews having been given the opportunity to express his views** in accordance with article 21.

3.- RECOGNITION OF DECISIONS AND AUTHENTIC INSTRUMENTS AND AGREEMENTS

A) RECOGNITION OF DECISIONS

A.2 PRIVILED DECISIONS, ARTICLE 42

Decisions in so far as they grant right of access, including right of access of grandparents to grandchildren; and decisions pursuant to article 29.6 in so far as the entail the return of a child, and for this decisiones prevails the mechanism of overriding in order to respect the order of return o a child, although it is possible a declaration of irreconcilability. (C-195/08 PPU Rinau, C-403/09 Desticek, C-211/10 Povse, C-491/10 Aguirre Zagarra)

Documents to be produced: authentic copy of the decision and certificate issued pursuant to article 47, annex V and VI. It is important to include in the decision and in the certificate the reasons why a child could not be heard.

Parties may apply in the court of the Member State of origin for rectifying or withdrawing the certificate pursuant to article 48.

It is possible the stay of the proceeding of recongniton pursuant to article 44 if an application has been submitted alleging irreconcilability or an application for the withdrawal of the certificate has been submitted

Application for refusal of recognition following procedure pursuant to articles 59 to 62

Grounds for refusal of recognition of privileged decisions from article 42 are the one set in article 50: irreconcilable decisions with a later decision relating to parental responsibility concerning the same child given in the Member State where recognition is invoked, or in another Member State or in the non-Member State of the habitual resident of the child provided that the later decision fulfills the conditions for its recognition in the Member State where recognition is invoked.

3.- RECOGNITION OF DECISIONS AND AUTHENTIC INSTRUMENTS AND AGREEMENTS

A) **RECOGNITION OF DECISIONS**

A.2 PROCEDURE. Procedure for refusal of recognition in accordance with article 40 shall be applied pursuant to articles 59 to 62 to the court or authority competent under the law of the Member State of recognition

A.3 STAY OF PROCCEDINGS :

- GENERAL DECISIONS, article 33, the court before a decision given in another Member State is invoked may stay its proceeding in whole or in part where an ordinary appeal has been logded in the Member State of origin; or if an application for a decision that there are no grounds for refusal has been submitted

- PRIVILEGED DECISIONS, article 44, the court may stay its proceeding in whole or a part if an application alleging irreconcilability as referred in article 50 has been submitted; or the person whom recognition is sought has applied for the withdrawal of a certificate issued pursuant to article 47

3.- RECOGNITION OF DECISIONS AND AUTHENTIC INSTRUMENTS AND AGREEMENTS

B) **RECOGNITION OF AUTHENTIC INSTRUMENTS AND AGREEMENTS, section 4 (articles 64 to 68)**

To be recognized in another Member State, these instruments and agreements must have BINDING EFFECT IN THE MEMBER STATE OF ORIGIN, and the ones in matters of parental responsibility must be enforceable.

The instruments or the agreement must be provided to the competent authority in a copy and the certificate issued pursuant to article 66 (annex VIII for matrimonial matters; and annex IX for mattes of parental responsibility), which may be rectified or withdrawn.

Procedure is related in article 51.

Grounds for refusal of recognition are listed in article 68:

- Matrimonial matters:

  * instruments and agreement contrary to the public policy

  * Authentic instruments and agreement in matrimonial matters can be refused if it irreconcilable with a decision, an authentic instrument or agreement between the same parties in the ME of recognition; or if it is irreconcilable with an earlier decision, authentic instrument or agreement given in another ME or in a non ME between the same parties provided the earlier decision, authentic instrument or agreements fulfils the conditions necessary for its recognition in the ME of recognition

- Matters of parental responsibility only can be refused if they are irreconcilable with a later decision, authentic instrument or agreement in matters of parental responsibility given in the ME of enforcement; or irreconcilable with a later decision given in another ME or in a non ME of the habitual residence of the child provided fulfills the conditions necessary for its recognition in the ME of enforcement; or upon application by any person who claims that was concluded without that person having been involved or without the child capable of forming his own views having been given the opportunity to express his views; or, at least, if long lasting risk occurs.

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4.- ENFORCEABILITY

Regulation abolishes any declaration of enforceability, exequatur.

A decision given in a Member State may be directly enforceable in another Member Sate in the same manner as a domestic decision, and no needs any procedure to declare enforceability. This requires that the decision must be enforceable in the Member State of origin, but it applies also to provisional enforcement.

The exequatur is replaced by a certificate accompayining the decision issued by the court of the Member State of origin that declares the decision is enforceable

The control of regularity of the decisions to be enforced stays on the courts of the Member State of origin, which may even withdraws the certificate if a party applies for in the case of privileged decisions and authentic instruments and agreements.

This certificate must say if the decision is enforceable and if there is still chance to appeal, or it is possible provisional enforcement

But the court of the Member State of enforcement will control the regularity also, since the parties may apply for refusal of enforcement for the grounds listed in the Regulation.

As said, Recast maintains a dual enforcement framework, for general decisions and privileged decisions.

5.- ENFORCEMENT OF DECISIONS AND AUTHENTIC INSTRUMENTS AND AGREEMENTS

Section 3, articles 51-63

5.1.- AUTHORITIES AND COURTS COMPETENTS FOR ENFORCEMENT (ARTICLE 52, RECITAL 60)

- Application for enforcement is to be submitted to the authority under the law of the ME of enforcement, according with the rules of jurisdiction of chapter 2 and 3 of the Regulation.

- The party seeking enforcement is not required to have a postal address in the ME of enforcement, but is required to have an authorized representative if the law of the ME requires it as mandatory.

5.- ENFORCEMENT OF DECISIONS AND AUTHENTIC INSTRUMENTS AND AGREEMENTS

5.2.- DOCUMENTS TO BE PRODUCED FOR ENFORCEMENT

Authentic copy of the decision, and the appropriate certificate issued pursuant to article 36, 45 and 66, so take care about the annexes.

The appropriate certificate shall confirm the enforceability of the decision, as well as certifying that the court of origin has jurisdiction as so the merits of the case or that the provisional measure has been issued in order to protect a child from a grave risk when the return of the child is ordered. If a provisional measure is issued, a party requesting its enforcement has to produce proof that the decision has been served properly to defendant.

A decision ordering a provisional or protective measure may be enforceable, but IT IS IMPORTANT TO PROBE THE MEASURE WAS ORDERED WITHOUT THE RESPONDANT BEEING SUMMONED TO APPEAR AND PROVIDING PROOF OF SERVICE OF THE DECISION

A competent court may require the party to provide translations or transliteration of a relevant part of the certificate and of the decision. Must be a sworn translation.

Articles 37, 48 and 67 determine the rectification, and withdrawal of the certificate in the Member State of origin in case of privileged decisions and authentic documents and agreements.

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5.3.- PARTIAL ENFORCEMENT, ARTICLE 53

For a decision given in respect of several matters, the enforcement could be refused for any of the matters, but enforcement shall nonetheless be possible for the parts of the decision not affected by the refusal.

Nevertheless, partial enforcement is expressly exclude as regards enforcement of decision ordering the return of a child containing provisional or protective measures which have been ordered to protect the child from a risk referred in article 13 of the 1980 Hague Convention. Since these measures need to be effective in the ME where the child resided habitually prior to the wrongful removal or retention.

5.- ENFORCEMENT OF DECISIONS AND AUTHENTIC INSTRUMENTS AND AGREEMENTS

5.4.- ARRANGEMENTS FOR THE EXERCISE OF RIGHT OF ACCESS (ARTICLE 54, RECITAL 61)

In the case a decision given in one Member State concerning right of access cannot be enforced in another Member State due to lack of specific arrangements in the decision needed under the law of the ME of enforcement, in order to facilitate the enforcement, the authorities competent for enforcement or the courts in the ME of enforcement are entitled, pursuant to article 54, to make arrangements for organizing the exercise of right of access, due to the principle of the best interest of the child.

It refers to details regarding where and when the child should picked up or dropped off, where supervised contact shall be envisaged, or the participation of a child protection authority in the access.

The arrangements for the exercise of the rights of access cease to apply following a later decision by the courts of the ME having jurisdiction as to the substance of the matter.

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5.5.- SERVICE OF THE DECISION AND THE CERTIFICATE, ARTICLE 55

- In order to respect for the rights of the defense, it requires that no enforcement measure may be taken before the appropriate certificate and the decision has been served on the person against whom enforcement is sought.
- The certificate is to be accompanied by the decision if not already served on that person in the ME of origin and, where applicable, accompanied by the details of the arrangement for the exercise of the rights of custody ordered in the ME of enforcement.
- So, before applying for recognition, service of the decision and certificate must have been done.
- Service shall take place in accordance with national law of the ME of origin, but if the service is in another ME, service shall be performed in compliance with the service of documents, Regulation EU 2020/1784. And to third parties may be executed pursuant to the Hague Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters.

5.- ENFORCEMENT OF DECISIONS AND AUTHENTIC INSTRUMENTS AND AGREEMENTS

5.6.-SUSPENSION OF ENFORCEMENT, ARTICLE 56

Article 56.1-4 introduces uniform grounds for suspension of the enforcement proceedings, where one of the grounds may even amount to refusal of enforcement (article 56.4 and 6)

Suspension of enforcement is applicable to general and privileged decisions under article 42, and to authentic instruments and agreements.

Article 57 permits suspension of the enforcement on grounds envisaged under the law of the ME of enforcement as far as they are not incompatible with the application of articles 41, 50 y 56.

Grounds for suspension of the enforcement:

1.- Where de enforceability of a decision is suspended in the ME of origin, the court or authority of the ME of enforcement is obliged to suspend the enforcement of its own motion or upon application of the person against whom enforcement is sought, or of the child concerned.

2.- Appeal against the decision, application for refusal of enforcement or withdrawal of the certificate according to article 47.

Suspension of the enforcement proceedings under article 56.2 is possible where an ordinary appeal against the decision has been lodged in the ME of origin, or an application for refusal of enforcement based on articles 41, 50 or 57 has been submitted in the ME of origin, or the person against whom enforcement is sought has applied in accordance with article 48 for the withdrawal of a certificate issued pursuant to article 47 in the ME of origin (privileged decisions).

3.- exposure of the child to a grave risk of physical or psychological harm

4.- Grounds for suspension under the national law. These grounds should be apply alongside those provided for by the regulation in so far as they are not incompatible with the application of articles 41, 50 and 53. For example: challenges based on formal errors under national law in an act of enforcement, if the enforcement has become impossible in case of force majeure, serious illness of the person to whom the child is to be handed over, or a war breaks out in the ME to where the child is to be returned.

5.- ENFORCEMENT OF DECISIONS AND AUTHENTIC INSTRUMENTS AND AGREEMENTS

5.7 PROCEDURE FOR SUBMITTING AN APPLICATION FOR REFUSAL

- The procedure is regulated in ***articles 59 to 63.***
- This procedure also applies to the application for a declaration that there are no grounds for refusal of recognition (article 30.3) and to the application for refusal of recognition (article 40.1). And it is also relevant for applications for refusal of enforcement of authentic instruments and agreements.
- Application for refusal of enforcement is regulated in articles 58, 59 and 60.
- If the application is based on the grounds set out in article 56, 57 and 68, it shall be submitted to the authority or the Court depending on the national law, but **if the application of enforcement based on article 39, shall be submitted only to the courts (parental responsibility)**
- The local jurisdiction is determined by the law of the Member State in which the proceedings are brought.
- The procedure is governed by the law of the Member State of enforcement in so far as it is not covered by uniform rules of the Regulation.
- The Regulation determines which documents are to be provided, an authentic copy of the decision, and the certificate issued pursuant articles 36, 47 and 66
- The authority competent for enforcement or the court should act without undue delay in procedures concerning the application for refusal of enforcement.
- Once applying for the refusal of enforcement, the court or authority competent shall give the decision, and this decision may be challenged or appealed.
- National law determines if the decision given on the challenge or appeal may be subject to further challenge or appeal.

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5.8.- REFUSAL OF ENFORCEMENT

5.8.1- General

- Once a party has applied for the enforcement of a decision given in another ME, the person against the enforcement is sough may apply for refusal basing on the grounds for refusal listed in the regulation. These grounds are exhaustive and it is possible to apply for more than one.
- The regulation expressly prohibits the review of jurisdiction of the Court of origin (article 69) and as to its substance (article 71).
- National law determines whether the grounds for refusal of enforcement set out in regulation are to be examined ex officio or upon application, for example the review of the order public ground.

5.- ENFORCEMENT OF DECISIONS AND AUTHENTIC INSTRUMENTS AND AGREEMENTS

5.8.2- GROUNDS FOR REFUSAL OF ENFORCEMENT FOR GENERAL DECISIONS IN MATTERS OF PARENTAL RESPONSIBILITY

ARTICLE 41 in conjunction with ARTICLE 39 determines grounds for refusal of enforcement for DECISIONS IN PARENTAL RESPONSIBILITY MATTERS:

1º. Decisions manifestly contrary to the public policy of the ME of enforcement taking into account the best interests of the child. Examples of this ground are the situation of illness of the child, or a child who is mature enough and doesn't want to comply the decision about one of his parents.

STJUE 16 January 2019, case law Liberato, C 386/17, which refers to a decision issued violating rules of lis pendens.

2º.- Decisions 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 way as to enable that person to arrange for his defense unless it is determined that such a persona has accepted the decision unequivocally.

3º.- Decision irreconcilable with a later decision relating to parental responsibility given in the ME of enforcement. Only a later decision relating the same matter given in a ME of enforcement may justify the refusal.

4º.- Decision irreconcilable with a later decision relating to parental responsibility given in another ME or in non ME of the habitual residence of the child provided that the later decision fulfils the conditions necessary for its recognition in the ME of enforcement.

5º.- Refusal upon application by any person claiming that the decision infringes his parental responsibility if it as given without such person having been given the opportunity to be heard. This refers to the cases of withdrawal of custody of any parent, but it includes even an institution.

6º.- if the procedure laid down in article 82 has not been complied with, it refers to placement of a child in another ME

7º.- If the decision was given without the child who is capable of forming his own views having been given the opportunity to be heard in accordance with article 21.

8º.- Long lasting grave risk, article 56.6, and in these cases is important the court or authority to be assisted of professionals, such as social workers or psychologists

5.- ENFORCEMENT OF DECISIONS AND AUTHENTIC INSTRUMENTS AND AGREEMENTS

5.8.- REFUSAL OF ENFORCEMENT

5.8.3- GROUNDS FOR THE REFUSAL FOR PRIVILEGED DECISION.

ARTICLE 50 determines grounds for refusal of enforcement for privileged decisions

The so called certain privileged decisions (article 42) , these granting a right of access and return orders within the context of the overriding mechanism. So the court in the requesting state has retained the right to override a decision not to return the child issued by the court in the requested member state, provided that such a non return order is based on the reason under article 13 of the 1980 Child Abduction Convention.

The decision certified in accordance with article 42 is automatically enforced with no possibility of opposition its enforcement, but

1º If the decision is irreconcilable with a later decision relating parental responsibility given in the ME of enforcement.

2º. – If the decision is irreconcilable with a later decision given in a non ME of the habitual residence of the child provided the later decision fulfills the conditions necessary for its recognition in the ME of enforcement

3º.- if exists a long lasting grave risk

5.- ENFORCEMENT OF DECISIONS AND AUTHENTIC INSTRUMENTS AND AGREEMENTS

5.8.- REFUSAL OF ENFORCEMENT

5.8.4- GROUNDS FOR THE REFUSAL OF ENFORCEMENT OF AUTHENTIC INSTRUMENTS AND AGREEMENTS

ARTICLE 68 lists the grounds for refusal of enforcement of authentic instruments and agreements.

1º.- Authentic instruments and agreement in matrimonial matters, only can be refused if it is manifestly contrary to the public policy of the Member State of recognition, or it is irreconcilable with a decision, an authentic instrument or agreement between the same parties in the Member State of recognition; or if it is irreconcilable with an earlier decision, authentic instrument or agreement given in another Member State or in a non Member State between the same parties provided the earlier decision, authentic instrument or agreements fulfils the conditions necessary for its recognition in the Member State of recognition

2º.- Authentic instruments and agreements in matters of parental responsibility only can be refused if they are irreconcilable with a later decision, authentic instrument or agreement in matters of parental responsibility given in the Member State of enforcement; or irreconcilable with a later decision given in another Member State or in a non Member State of the habitual residence of the child provided fulfills the conditions necessary for its recognition in the Member State of enforcement; or upon application by any person who claims that was concluded without that person having been involved or without the child capable of forming his own views having been given the opportunity to express his views; or, at least, if long lasting risk occurs.

6.- CONCLUSIONS

Good Practices and Common Mistakes

✅ **Good Practices:**

- Proper legal advising in family matters when applying for measures in divorces which affects maintenance, child custody, right of access and children who could be relocated both in defended divorce or mutual consent divorce proceedings, and even in MIAMI/alternative dispute resolution. THINK OF FUTURE NOT PRESENT
- Check certificates in advance and provide to the courts, and try the best on the content
- Ensure child is heard, or parental responsible, when applicable according to national law of the habitual residence of the child
- Provide translation if required
- Service and appearance of the defendant
- Application of multiple PIL instruments dealing with closely related matters: maintenance, protection measures, matrimonial property regimes and property consequences of register partnerships; and succession; and servicing.

❌ **Common Errors:**

- Missing appropriate certificate
- Inadequate service of documents
- Wrongly applying for enforcement
- Decisions given in default of appearance

Training of lawyers on EU Civil Law (TRADICIL) – Family Law Seminar

Dervla Browne

European family law concepts in Irish Law

Madrid, 6 June 2025

Co-funded by the European Union

EUROPEAN CONCEPTS IN IRISH LAW

1.0. As Ireland is, following Brexit, the only common law jurisdiction remaining in the European union, it is important to emphasize the role of the court in interpreting and giving effect to the relevant EU Regulations. In this paper I will identify and explore how some of the fundamental concepts have been dealt with in the Irish courts. In particular there have been a number of referrals to the European Court of Justice for assistance in the interpretation of concepts such as custody rights, habitual residence of children and habitual residence of spouses for the purpose of Regulation 2201/2003.[1] I shall be touching on issues that arise in the context of the topics discussed in Modules 1, 2 and 3 of the Conference so far.

2.0. Custody rights for the purpose of the 1980 Hague Convention on Child Abduction and Council Regulation (EU) 2201/2003[2]

2.1. In the case of **McB.v E.**[3] the applicant was a father of children born outside marriage. In national law he could apply to be appointed a guardian of his children (thereby acquiring custody rights within the meaning of the 1980 Hague Convention on Child Abduction) but had not done so prior to the secret removal of the children by their mother to the UK.

2.2. This seminal case dealt with meaning of "rights of custody" as set out in Article 2(9) of Regulation 2201/2003[4]. It was argued that these had to be interpreted in light of the right to respect of "private and family life" guaranteed by virtue of Article 7 of the Charter of Fundamental Rights of the EU.

2.3. The Court of Justice decided *" the Charter should be taken into consideration solely for the purposes of interpreting Regulation No 2201/2003…"*
However, as pointed out by the Court, the ECHR had decided in *Guichard -v- France* (ECHR 2003-X 714) that there had been no breach of Article 8 of the Convention on Human

[1] Many of the cases dealt with in this Paper concern EU Regulation 2201/2003. I will in the footnotes reference the equivalent articles in Council Regulation (EU) 2019/1111 and highlight any changes.

[2] The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction is referred to herein as the 1980 Hague Convention on Child Abduction

[3] Case C-400/10 PPU

[4] And now Article 2(9) of Council Regulation (EU) 2019/1111

Rights by France in imposing an obligation on a father of a child born outside of marriage to apply to court to acquire parental responsibility.

2.4. Therefore the Court found *"...the Charter must be interpreted as not precluding a situation where, for the purposes of applying Regulation No 2201/2003, rights of custody are granted, as a general rule, exclusively to the mother and a natural father possesses rights of custody only as the result of a court judgment. Such a requirement enables the national court with jurisdiction to take a decision on custody of the child, and on rights of access to that child, while taking into account all the relevant facts, such as those mentioned by the referring court, and in particular the circumstances surrounding the birth of the child, the nature of the parents' relationship, the relationship of the child with each parent, and the capacity of each parent to take the responsibility of caring for the child. The taking into account of those facts is apt to protect the child's best interests, in accordance with Article 24(2) of the Charter."*

3.0. Habitual Residence of Children

3.1. In **C. -v- M.** [5] the Supreme Court referred to the Court of Justice the question as to whether the existence of French proceedings relating to the custody of a child precluded, in the circumstances of that case, the establishment of habitual residence of the child in Ireland . The Supreme Court also asked whether the fact that the father or the French courts continued to maintain custody rights in relation to the child rendered wrongful the retention of the child in Ireland unlawful and whether the Irish courts were entitled to consider the question of habitual residence of the child in circumstances where she resided in Ireland since July 2012 at which time her removal to Ireland was not in breach of French law

3.2. The facts of that case were that a child born to married parents was the subject of custody proceedings in France where the parties had lived since her birth. The mother sought permission to move to Ireland from France and the Court of First Instance allowed her set up residence in Irelan. That order was enforceable as of right on a provisional basis. The husband immediately appealed to the Court of Appeal. The President to the appellate court refused a stay . Thereafter in July of 2012, the mother travelled with the child to Ireland and continued to live there. The French Court of Appeal by judgment on the 5th of March 2013 overturned the judgment concerning the residence of the child and directed that the child should reside with the father and the

[5] C-376/14 PPU

mother should have access and accommodation rights. The mother refused to return and the father applied under the Hague Convention for the return of the child to France and for a declaration that the mother had wrongfully retained the child in Irelan. The High Court dismissed the action stated that the removal of the child was lawful and that the habitual residence of the child had changed by the time the application under the Hague Convention was commenced in May of 2013. The father appealed this judgment to the Supreme Court which court made the referral to the European Court of Justice.

3.3. The Court of Justice stated

"50. As regards the concept of 'habitual residence', the Court has previously stated, in interpreting Article 8 of the Regulation in the judgment in A (EU:C:2009:225) and Articles 8 and 10 of the Regulation in the judgment in Mercredi (EU:C:2010:829), that the Regulation contains no definition of that concept and has held that the meaning and scope of that concept must be determined in the light of, in particular, the objective stated in recital 12 in the preamble to the Regulation, which states that the grounds of jurisdiction established in the Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity (judgments in A, EU:C:2009:225, paragraphs 31 and 35, and Mercredi, EU:C:2010:829, paragraphs 44 and 46).

51 In those judgments the Court also held that a child's habitual residence must be established by the national court, taking account of all the circumstances of fact specific to each individual case (judgments in A, EU:C:2009:225, paragraphs 37 and 44, and Mercredi, EU:C:2010:829, paragraphs 47 and 56). The Court held in that regard that, 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 and that the child's residence corresponds to the place which reflects some degree of integration in a social and family environment (judgments in A, EU:C:2009:225, paragraphs 38 and 44, and Mercredi, EU:C:2010:829, paragraphs 47, 49 and 56).

52 The Court explained that, to that end, account must be taken of, inter alia, the duration, regularity, conditions and reasons for the stay in the territory of a Member State and for the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State (judgments in A, EU:C:2009:225, paragraphs 39 and 44, and Mercredi, EU:C:2010:829, paragraphs 48, 49 and 56). The Court also held that the intention of the parents or one of them to settle permanently with the child in another Member State, manifested by certain tangible steps such as the purchase or

lease of a residence in that Member State, may constitute an indicator of the transfer of the child's habitual residence (see the judgments in A, EU:C:2009:225, paragraphs 40 and 44, and Mercredi, EU:C:2010:829, paragraph 50).

53 Further, in paragraphs 51 to 56 of the judgment in Mercredi (EU:C:2010:829), the Court held that the duration of a stay can serve only as an indicator, as part of the assessment of all the circumstances of fact specific to each individual case, and set out the factors which are particularly to be taken into account when the child is young.

54 The concept of the child's 'habitual residence' in Article 2(11) and in Article 11 of the Regulation cannot differ in content from that elucidated in the abovementioned judgments with regard to Articles 8 and 10 of the Regulation. Accordingly, it follows from the considerations set out in paragraphs 46 to 53 of this judgment that it is the task of the court of the Member State to which the child has been removed, when seised of an application for return on the basis of the 1980 Hague Convention and Article 11 of the Regulation, to determine whether the child was habitually resident in the Member State of origin immediately before the alleged wrongful removal or retention, taking into account all the circumstances of fact specific to the individual case, using the assessment criteria provided in those judgments.

55 When examining in particular the reasons for the child's stay in the Member State to which the child was removed and the intention of the parent who took the child there, it is important, in circumstances such as those of the main proceedings, to take into account the fact that the court judgment authorising the removal could be provisionally enforced and that an appeal had been brought against it. Those factors are not conducive to a finding that the child's habitual residence was transferred, since that judgment was provisional and the parent concerned could not be certain, at the time of the removal, that the stay in that Member State would not be temporary.

56 Having regard to the necessity of ensuring the protection of the best interests of the child, those factors are, as part of the assessment of all the circumstances of fact specific to the individual case, to be weighed against other matters of fact which might demonstrate a degree of integration of the child in a social and family environment since her removal, such as those mentioned in paragraph 52 of this judgment and, in particular, the time which elapsed between that removal and the judgment which set aside the judgment of first instance and fixed the residence of the child at the home of the parent living in the Member State of origin. However, the time which has passed since that judgment should not in any circumstances be taken into consideration.

57 In the light of all the foregoing, the answer to the first and third questions is that Articles 2(11) and 11 of the Regulation must be interpreted as meaning that where the removal of a child has taken place in accordance with a judgment which was provisionally enforceable and which was thereafter overturned by a judgment which fixed the residence of the child at the home of the parent living in the Member State of origin, the court of the Member State to which the child was removed, seised of an application for the return of the child, must determine, by undertaking an assessment of all the circumstances of fact specific to the individual case, whether the child was still habitually resident in the Member State of origin immediately before the alleged wrongful retention. As part of that assessment, it is important that account be taken of the fact that the judgment authorising the removal could be provisionally enforced and that an appeal had been brought against it.

3.4. In the case of **A.K. v. US.** Murray J delivered the unanimous judgment of the Court of Appeal on the 16th of March 2022 in relation to habitual residence of children for the purposes of the 1980 Hague Convention on Child Abduction.[6]

3.5. The case concerned a husband and the wife together with their three small children ranging in ages at the time of their move to Ireland from the ages of 7 down to 15 months. As of July 2020, there was no doubt that the parents together with their children were habitually resident in England. They came regularly to Ireland as the mother was from Ireland. The mother was of mixed Indian Irish heritage and the father was of Indian heritage. The family came to Ireland in July 2020 for a holiday. The visit coincided with the Covid 19 pandemic and at the end of their scheduled stay the parties decided to remain in Ireland. This was prompted by the increasing restrictions from the pandemic and the rise in cases in London. The parties remained until December 2020 whereupon they extended the stay into the new year and then from time to time until the events that transpired in July 2021. The facts as found were that connections with Ireland developed during the course of the stay. The Applicant father rented a studio space near their rented house. Both elder children went to school here. The youngest child was enrolled in a creche, the children made friends, joined local sporting clubs and societies. They were registered with a local

6

GP. The parties opened a bank account. The children obtained Irish PPS numbers. The Respondent mother as a writer/producer could work from any jurisdiction.

3.6. The relationship between the parents deteriorated between March and May 2021. The Applicant returned to England in May 2021 and in June he came back to Ireland. At that stage a new long-term rental home had been secured in Ireland. On the 30th of June the Applicant assisted the family move to their residence in that new home and on the 12th of July he returned to England bringing the two boys with him with the agreement of the Respondent. The Respondent maintained that her agreement was given on foot of the Applicant's assurance that the trip to England was for the purposes of a holiday and that the children would return to Ireland with her. The Applicant disputed that saying that he at all times made it clear that he was not agreeable to the children remaining in Ireland. However, in the course of cross-examination at the High Court hearing he accepted that that was the case.

3.7. During the period in England the boys spent 4 nights with their paternal grandmother. On the 24th of July the mother and youngest child travelled to England whereupon the Applicant made clear his intention to prevent the children from returning to the jurisdiction. He retained possession of the children's passports. On the 12th of August 2021 the Respondent mother told the Applicant that she was bringing the children to lunch but in fact it was her intention to remove the children from the United Kingdom, which she did, travelling back to Ireland through Belfast.

3.8. Hague Convention proceedings were commenced. The High Court Judge heard oral evidence in relation to habitual residence. It proceeded on the basis of affidavit evidence on foot of which each was cross-examined. Gearty J in the High Court gave her judgment on the 14th of December 2021 finding that the two boys were habitually resident in England but the youngest girl was habitually resident in Ireland as of the date of removal from England. She declined to order the return of the boys as it would result in the boys being separated from their sister and this put the boys in an intolerable situation. The Applicant appealed and the Respondent cross-appealed the judgment.

3.9. The Court of Appeal reviewed the evidence and findings of fact of the trial judge wherein she found that "*up until May 2021 there is no question of a change of habitual residence as both parents, until then, understood the situation to be temporary albeit of longer duration than expected"*. The judge found that there was no real agreement as to where the children would live long-term, that neither party acted appropriately, both acted

unilaterally. She found that the stay in Ireland from July 2020 did not displace England as the country of habitual residence of the boys. She stressed the fact that the intentions of the parents were in opposition. She noted that the Respondent was the primary caregiver of the youngest child, that the parties had agreed that the children should not be separated and by the 24th of July 2021 the Respondent had the requisite intention to change her habitual residence to Ireland. She found that the youngest child's habitual residence was in Ireland, as she had no social ties in England that compared with those of her brothers, she was in a creche in Ireland, was seeing her mother's family regularly, she was integrated into a social and family environment in Ireland, her mother was likely to be working in Ireland for a considerable in the immediate future, she had known no other primary carer and that her habitual residence was where her mother resided.

3.10. On appeal the Court reviewed all of the legal principles concerning habitual residence. He found that *although "habitual residence is not a term of art, the meaning of the term is one of law to be determined in the light of the purpose, text and context of the legislative instrument in which it appears".* He found that in interpreting the phrase *"primacy must be given to the ordinary meaning of the two words comprised within it. Put most simply a person is habitually resident where they live, where their stable home for the time being is located, where their social and family life is and where they are integrated into an identified environment".* He found that "*these are concepts that are universally understood and widely applied by ordinary people in their everyday lives, they should not in the vast majority of cases give rise to any difficulty of identification or analysis*". He found that when dealing with habitual residence of the children in the context of the Hague Convention on Child Abduction that *"the central enquiry when identifying habitual residence of a child is directed to his or her integration into both family and society and to that extent the degree to which he or she has mixed with or become absorbed into a community moderating their way of life, habits and customs accordingly. It is thus that the jurisdiction most closely connected with the factors relevant to the care and welfare is identified. That gives effect to the purpose of Convention and, to bring the matter back full circle, explains why the draftsman shows habitual residence as the center piece of the power to direct repatriation provided for by Article 12".*

3.11. The Applicant maintained that Irish law was that set out in the Supreme Court judgment of **S (A) v S(C)**[7] wherein the court approved the principles set out by Waite J. in Re B: (Minors: Abduction) (No. 2) [8] that is that *"the habitual residence of young children of*

[7] [2010] 1 IR 370
[8] [1993] 1 F.L.R. 993

parents who are living together is the same as the habitual residence of the parents themselves and neither parent can change it without the express or tacit consent of the other or an order of the court."

3.12. The father A.K. maintained that as he never agreed to the children becoming habitually resident in Ireland, all three children maintained their habitual residence in England.
The Court found this argument to be misconceived. The Court approved of the statement by Whelan J in **Hampshire County Council-v- C.E. and NE**[9]
"*Hague Convention decisions which considered parental intention to be of pre-eminent importance are no longer good law. There is no requirement that there be an intention on the part of one or both parents to reside in the country in question permanently or indefinitely. The purposes of intentions of the parents are only one of the relevant factors".*

3.13. The Court found this to be a correct statement of law and referred to the decision of **A v. A**[10] and the judgment of Lady Hale (at paragraph 54(v)) "*the test adopted by the European Court is preferable to that earlier adopted by the English Courts being focused on the situation of the child, with the purposes and intentions of the parents being merely one of the relevant factors*". Murray J found that this proposition reflects the general position adopted more recently by the courts in this jurisdiction and he stated *"I agree both with it and with the resulting implication that the courts here should interpret habitual residence as the phrase appears in the Hague Convention to correspond with the construction the CJEU has placed on the term in Council Regulation EC2201/2003 governing jurisdiction and the recognition of enforcement of judgments in matrimonial matters and matters of parental responsibility. From there, inevitably, the courts in England and Wales have reached the conclusion that there is no 'rule' that where both parents had joint responsibility neither could unilaterally change the child's habitual residence, and that the position now is that the issue is resolved by a factual enquiry tailored to the circumstances of the individual case".*

3.14. The Court placed specific reliance of the decision of the CJEU of **OL v. PQ**[11]

"the argument that the parents jointly exercise rights of custody and that the mother could not therefore decide alone on the child's place of habitual residence cannot be determinative for the purposes of establishing where the child is "habitually resident""

[9] [2020] IECA 100
[10] [2013] UKSC 60
[11] Case C-111/17 PPU

The Court found if the applicant had been allowed a veto on the youngest child changing her place of habitual residence this would be to take an approach rejected by modern authorities and "*would have resulted in the precise outcome the concept of habitual residence is intended to avoid – a conclusion that the youngest child's habitual residence was in a jurisdiction with which she has had no connection of any kind for a very significant part of her life in preference to a place where she had been for a year and into which she had, as a matter of fact, significantly integrated."*

4.0. Enforcement of decisions concerning parental responsibility

4.1. In the case of **Hampshire County Council -v- CE and NE**[12] the Court of Appeal referred questions to the Court of Justice concerning the enforcement of an order made in the High Court of England and Wales directing the return of children who had been brought to Ireland by their parents to avoid their being placed in care. Chapter III Council Regulation (EU) 2201/2003 and the procedure set out in Articles 31 and 33 were interpreted in this judgment.[13]

(a) The Court of Justice found that an order made in the exercise by the High Court in the in England and Wales of its wardship jurisdiction which included a direction that the children be brought back from Ireland to England was a decision concerning parental responsibility within the meaning of paragraph 2.

(b) The Court found that "*the possibility of applying in accordance with national law for such a decision to be stayed constitutes an essential safeguard of the fundamental right to an effective remedy*" "*an enforcement of a of the decision directing that the children be returned to the UK to England and Wales which was declared enforceable in the requested member state prior to service of the declaration of enforceability is contrary to article 33 (1) of Regulation 2201/2003 read in light of Article 47 of the Charter of Fundamental Rights*

5.0. Jurisdiction in Matrimonial Matters – Habitual Residence

[12] C-325/19PPU and C-375/18 PPU

[13] Chapter IV Council Regulation (EU) 2019/1111 replaces Chapter III. It removes the necessity to obtain a declaration of enforceability, rendering all decisions concerning parental responsibility automatically enforceable. This requires service of the decision which it is sought to enforce, together with the certificate. The person against whom it is sought to enforce the order can apply to suspend enforcement proceedings or apply for non-recognition.

5.1. In the case of **I.B. -v- F.A.**[14] that court dealt with the issue as to whether a spouse can be habitually resident in more that one place at the same time.

The ECJ referred to the French court's view that

"…IB's ties with Ireland do not rule out his having ties with France, where, since 2017, he returned every week to work, and finds, like the court of first instance, that for many years IB had in fact two residences, one, a family residence, in Ireland and the other, for professional reasons, in France, with the result that IB's ties to France are, in the view of the referring court, neither occasional nor circumstantial and that, from 15 May 2017 onwards at least, the centre of IB's professional interests has been in France.

20 ……. *The referring court infers from this that the Irish courts and the French courts both have jurisdiction to rule on the divorce of the spouses concerned."*

5.2. The Court went on to find

"*39 Given that Regulation No 2201/2003 does not provide any definition of that concept and makes no reference to the law of the Member States for the purpose of determining the meaning and scope of that concept, that concept has to be given an autonomous and uniform interpretation, taking into account the context of the provisions referring to that concept and the objectives of that regulation (see, by analogy, as regards the habitual residence of the child, judgment of 28 June 2018, HR, C-512/17, EU:C:2018:513, paragraph 40 and the case-law cited).*

40 First, it must be pointed out that neither Article 3(1)(a) of that regulation nor any other provision of that regulation refers to that concept in the plural. Regulation No 2201/2003 refers to the courts of the Member State of 'habitual residence' of one or both of the spouses or of the child, as appropriate, systematically using the singular, and it is not envisaged that the same person may, at the same time, have several habitual residences or be habitually resident in several places. In that regard, the EU legislature also specified, in Article 66(a) of that regulation, that, with regard to a Member State in which two or more systems of law concerning matters governed by that regulation apply in different territorial units, 'any reference to habitual residence in that Member State shall refer to habitual residence in a territorial unit'.

41 Secondly, the Court has already held, in interpreting provisions of Regulation No 2201/2003, that the use of the adjective 'habitual' indicates that the residence must

[14] C-289/20 although a reference from France, the parallel proceedings were conducted in Ireland. It is worth noting the proceedings were settled in Ireland prior to the judgment of the ECJ being published.

have a certain permanence or regularity and that the transfer of a person's habitual residence to a Member State reflects the intention of the person concerned to establish there the permanent or habitual centre of his or her interests, with the intention that it should be of a lasting character (see, to that effect, judgment of 22 December 2010, Mercredi, C-497/10 PPU, EU:C:2010:829, paragraphs 44 and 51).

42 That interpretation is, moreover, supported by the Explanatory Report, drawn up by Dr Borrás, on the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters, known as the 'Brussels II' Convention (OJ 1998 C 221, p. 1), which inspired the wording of Regulation No 2201/2003. It is apparent from point 32 of that report (OJ 1998, C 221, p. 27), that, as regards 'habitual residence' as a criterion for attributing jurisdiction to dissolve matrimonial ties, particular account was taken of the definition given by the Court of Justice, in other fields, according to which that concept refers to the place where the person had established, on a fixed basis, his or her permanent or habitual centre of interests.

43 Equating the habitual residence of a person – the spouse in the present case – with his or her permanent or habitual centre of interests does not support the conclusion that several residences may have that character at the same time.

44 That assessment is, thirdly, supported by the objective pursued by the rules on jurisdiction laid down in Article 3(1)(a) of Regulation No 2201/2003, namely to ensure a balance between the free movement of persons within the European Union and legal certainty (see, to that effect, judgment of 13 October 2016, Mikołajczyk, C-294/15, EU:C:2016:772, paragraph 33 and the case-law cited).

45 It is true that, in order to encourage the free movement of persons within the European Union, Regulation No 2201/2003 pursues the objective of facilitating the possibility of obtaining the dissolution of matrimonial ties by establishing, in Article 3(1)(a) thereof, in favour of the applicant, a number of alternative criteria, without establishing any hierarchy between them. That is why the system for sharing jurisdiction established by that regulation concerning the dissolution of matrimonial ties is not intended to preclude several courts having jurisdiction (see, to that effect, judgment of 13 October 2016, Mikołajczyk, C-294/15, EU:C:2016:772, paragraphs 46 and 47 and the case-law cited), which are coordinated by means of the lis pendens rules set out in Article 19 of that regulation.

46 However, to accept that a spouse may be habitually resident in several Member States at the same time would be liable to undermine legal certainty, by making it more difficult to determine in advance which courts have jurisdiction to rule on the dissolution of matrimonial ties and by making it more difficult for the court seised to determine whether it has jurisdiction. As the Advocate General observed, in essence, in point 94 of his Opinion, there would then be a risk that international jurisdiction would ultimately be determined, not by the criterion of 'habitual residence', for the purposes of Article 3(1)(a) of Regulation No 2201/2003, but by a criterion based on the mere 'de facto' residence of one or other of the spouses, which would infringe that regulation.

47 Fourthly, it must be observed that the interpretation of the rules on jurisdiction set out in Article 3(1)(a) of Regulation No 2201/2003 has consequences which go beyond the dissolution of matrimonial ties as such.

48 In particular, both Article 3(c) of Regulation No 4/2009 and Article 5 of Regulation 2016/1103 refer to the jurisdiction established in Article 3(1)(a) of Regulation No 2201/2003 and provide that, in proceedings for the dissolution of matrimonial ties, the court seised is to have ancillary jurisdiction to rule on certain matters relating to maintenance obligations and the matrimonial property regime. Thus, to accept that a spouse may have several habitual residences would also be liable to undermine the requirement, common to those regulations, that the rules on jurisdiction be predictable (see, as regards Regulation No 4/2009, judgment of 4 June 2020, FX (Opposing enforcement of a maintenance claim), C-41/19, EU:C:2020:425, paragraph 40 and the case-law cited, and, as regards Regulation 2016/1103, inter alia, recitals 15 and 49 thereof).

49 Fifthly, all of those considerations are not called into question by the interpretation of Article 3(1)(b) of Regulation No 2201/2003 adopted in the judgment of 16 July 2009, Hadadi (C-168/08, EU:C:2009:474, paragraph 56), in respect of which the Court accepted that the courts of several Member States may have jurisdiction where the persons concerned have several nationalities.

50 As the Advocate General noted, in essence, in point 92 of his Opinion, although the Court held in that judgment that the connecting factor set out in Article 3(1)(b) of Regulation No 2201/2003, namely the nationality of both spouses, was not limited to their 'effective nationality', that circumstance is irrelevant to the interpretation of Article 3(1)(a) of that regulation.

51 It follows from all those considerations that, while it cannot be ruled out that a spouse may have several residences at the same time, he or she may have, at a given time, only one habitual residence for the purposes of Article 3(1)(a) of Regulation No 2201/2003."

6.0. **Article 17 Council Regulation (EU) 2019/111 Seising the Court[15]**

6.1. In **M.H.-V- M.H.,[16]** an issue arose as to when a court became seised under Article 16(a) of Council Regulation (EC) 2201/2003 so the Irish court could decide whether it, or the Courts of England and Wales, were first seised for the purposes of Article 19[17]. Initiating documents were lodged in the Irish and English High Court on the same day (the petition in England being lodged first). However the Irish High Court had issued the summons immediately on receipt of the papers whereas the English High Court did not issue same until some days later.

The Court of Justice noted that the rules are intended to prevent parallel proceedings before the courts of different Member States and to avoid conflicts between decisions which might result therefrom. For that purpose, the EU legislature intended to put in place a mechanism which is clear and effective in order to resolve situations of lis pendens (see judgment of 6 October 2015 in A, C-489/14, EU:C:2015:654, paragraph 29).

6.2. It went on to find

"*As is apparent from the words 'court first seised' and 'court second seised' in Article 19(1) and (3) of Regulation No 2201/2003, that mechanism is based on the chronological order in which the courts concerned have been seised.*

In order to determine when a court is deemed to be seised and thereby establish which is the court first seised, it is necessary to refer to Article 16 of that regulation, entitled 'Seising of a Court'.

The Court has held, in paragraph 30 of the order of 16 July 2015 in P (C-507/14, not published, EU:C:2015:512), that that article contains an autonomous definition of the time when a court is deemed to be seised. The EU legislature adopted a uniform concept of the time when a court is seised, which is determined by the performance of a single act, namely, depending on the procedural system under consideration, the lodging of the document instituting the proceedings or the service of that document,

[15] Article 16 Council Regulation (EC) 2201/2003
[16] C-173/16
[17] Article 20 Council Regulation (EC) 2201/2003

but which nevertheless takes into consideration whether the second act was in fact subsequently performed. Thus, pursuant to Article 16(1)(a) of Regulation No 2201/2003, the time when the court is seised is the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent (order of 16 July 2015 in P, C- 507/14, not published, EU:C:2015:512, paragraph 32).

The Court stated that, for the court to be deemed seised, Article 16(1)(a) of Regulation No 2201/2003 requires the satisfaction not of two conditions, namely that the document instituting the proceedings or an equivalent document must have been lodged and service thereof must have been effected on the respondent, but merely of one - that of lodging the document instituting proceedings or an equivalent document. Pursuant to that provision, the lodging of the document of itself renders the court seised, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent (order of 16 July 2015 in P, C-507/14, not published, EU:C:2015:512, paragraph 37).

6.3. *The Court observed, in respect of that condition, that its objective is to ensure protection against abuse of process. Thus, for the purposes of checking compliance with that condition, account would not be taken of delays caused by the judicial system applicable, but only of any failure of the applicant to act diligently (order of 16 July 2015 in P, C-507/14, not published, EU:C:2015:512, paragraph 34).*

It is apparent from the foregoing considerations that, as the referring court has stated, once it has been established which of the two options in Article 16(l)(a) and (b) of Regulation No 2201/2003 applies, in accordance with the choice made by the Member State concerned, the time when a court was seised may be objectively established solely on the basis of the time, as provided for in the case of the first option under Article 16(1)(a), when the document instituting the proceedings or an equivalent document was lodged with that court, irrespective of any national procedural rule intended to determine when and in what circumstances proceedings are initiated or are considered to be pending, provided that the applicant has not subsequently failed to comply with the condition relating to service of that document on the respondent.

Consequently, the answer to the question referred is that Article 16(1)(a) of Regulation No 2201/2003 must be interpreted to the effect that the 'time when the document instituting the proceedings or an equivalent document is lodged with the court', within the meaning of that provision, is the time when that document is lodged with the court concerned, even if under national law lodging that document does not in

itself immediately initiate proceedings."

7.0. Conclusion

7.1. I hope I have contributed in some way to knowledge of how the Irish courts interpret and implement the European Regulations governing jurisdiction recognition and enforcement of decisions in matrimonial matters and matters of parental responsibility. There are many issues , outside the scope of this paper , which the Irish court must grapple with. For example how does the common law doctrine of *forum non conveniens* apply in divorce and maintenance cases involving third party states and Ireland. I believe that there is the potential for many further referrals to the ECJ for assistance.

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