C.L.A.S.S. 4EU

The project is co-funded by the
Justice Programme of the European Union
JUST-JTRA-EJTR-AG-2016-763874

4 EU training sessions on family law regulations for
Cross-border Lawyers And Social Services

TRAIN-THE-TRAINERS TOOL

A Guide for Training Sessions on EU Family Law Regulations

Edited by the Project Teams from
University of Verona (Italy), University of Milano-Bicocca (Italy), University of Minho (Portugal), Loránd Eötvös University (Hungary) and the Law Institute of Lithuania.

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Published in November 2019

1. Introduction

1.1. The C.L.A.S.S.4EU Project

The present Train-the-Trainers Tool has been developed and finalised within the **Project "C.L.A.S.S.4EU"**, that means "**4 EU training sessions on family law regulations for Cross-border Lawyers And Social Services**". The Project (no. JUST-JTRA-EJTR-AG-2016-763874) has been co-funded by the Justice Programme 2014-2020 of the European Union, and its activities have been carried out from 1 January 2018 to 31 December 2019.

The **Partnership** consisted of:

- the University of Verona (UNIVR, the Coordinator), scientific contact: Prof Maria Caterina Baruffi, and team members: Prof Caterina Fratea, Prof Francesca Ragno, Dr Diletta Danieli, Dr Cinzia Peraro;
- the University of Milano-Bicocca (UNIMIB), scientific contact: Prof Costanza Honorati, and team members: Dr Francesca Balbi, Dr Sara Bernasconi, Giovanna Ricciardi, and Prof Carola Ricci (expert, University of Pavia);
- the University of Minho, Braga (UMINHO), scientific contact: Prof Anabela Susana de Sousa Gonçalves, and team members: Prof Cristina Manuela Araújo Dias, Dr Diana Sofia Araújo Coutinho;
- the Loránd Eötvös University, Budapest (ELTE), scientific contact: Prof Orsolya Szeibert, and team member: Dr Lilla Király;
- the Law Institute of Lithuania (TEISE), scientific contact: Dr Agne Limante, and team member: Ana Pliner.

The Project's main **objectives** were (a) identifying the difficulties met by targeted practitioners (lawyers and social service workers) in applying the EU family law Regulations, with particular regard to the national experiences; (b) improving the knowledge of such practitioners regarding EU Regulations and their interplay, as well as facilitating dialogue between practitioners from different countries and different backgrounds; (c) developing a common expertise and promoting training standards and methodologies according to the specificity of cross-border relations; (d) fostering EU net-building processes among the practitioners of different Member States.

The Project intended to focus on **cross-border family disputes** and the very sensitive aspects of the **protection of children**. Therefore, the main **target groups** of the training activities consisted, on the one hand, of **lawyers** and legal practitioners in general, and on the other hand, of **social services workers** who are involved in family proceedings, given that the protection of children's rights in transnational disputes requires the support of a variety of experts from different disciplines and different countries.

The Project's **final aim** was to create **a guide** for the implementation of further cross-border training sessions, that collects presentations, case studies and other useful materials on the application of EU family law Regulations.

1.2. The Train-the-Trainers Tool

As the main comprehensive and final ready-to-use training material, the Train-the-Trainers Tool is intended to provide a **useful guide** which collects all presentations and case studies that have been elaborated by the Project Teams for the purposes of delivering the cross-border training sessions held in the two-year period and are thus drafted in English language.

Its **aim** is to enable and support other training providers to train practitioners involved in cross-border family disputes, including both legal professionals and social service workers, through the employment of presentations (in power point format) and examples of practical cases prepared in relation to the various topics on family law matters covered by the activities carried out within the Project.

These **materials** are included in the present guide and are mainly based on the presentations and case studies used during the final transnational training sessions held in the second year of the Project, that have been reviewed taking into account all comments and feedback received after the sessions. In particular, the **power point presentations** were elaborated by the Partner member(s) who acted as trainer(s) within the training sessions on one or two topics. They proved to be useful as training materials insofar as they allowed the participants to better follow the presentations. Moreover, the same member(s) drafted the **case study(ies)** related to the topic addressed, that were aimed at providing trainees with practical experience and actually testing the application of the relevant legal instruments. In relation to each case study, the trainers prepared **guidelines** for training providers in order to support the examination and discussion in working groups and allow a better assessment of the relevant issues.

The training materials also include additional documentation, such as the **glossary of legal terminology**, that contains all notions as defined in the relevant legal tools, prepared in the different languages of the countries involved, and a list of **bibliographic references**, with selected articles or books edited by Partners' members and recommended to trainees to support their study.

The present guide contains a description of the preliminary activities and training sessions delivered, under para. 2 "***Technical part***", and the final materials in the following para. 3 "***Scientific part***", that are complemented by ***Other materials*** included in para. 4.

2. Technical part

The Train-the-Trainers Tool represents the **final deliverable** of the Project, consisting in the main outcome of the implemented training activities.

Namely, the core **activities** planned during the Project's lifetime aimed at delivering training sessions and creating the final materials were:

- assessing the target groups' training needs through the examination of relevant national case law;
- preparing the training content and packages (presentations and case studies) for the transnational training sessions on different topics related to the EU family law Regulations;
- preparing other useful materials (glossary of legal terminology, relevant legal instruments, bibliographic references), to be uploaded on the project website as ready-to-use materials;
- evaluating the training contents and methodology on the basis of short-term evaluation questionnaires, as well as assessing the overall Project's implementation and impact on the trainees' daily professional activities through a long-term evaluation questionnaire;
- managing the overall implementation of the Project through coordination meetings, monitoring reports and on-going dissemination.

2.1. Organisational activities

As to the **practical arrangements** related to the training sessions, each Partner contributed to the **dissemination** of the activities through their communication channels and networks, and in collaboration with the Selection Committee that was made of associations representatives of the target groups from the Partners' countries, namely: AIJA (International Association of Young Lawyers), AIGA (Italian Association of Young Lawyers), AIAF (Italian Association of Family Lawyers), Lithuanian Bar Association, Lithuanian Child Rights and Adoption Service, ISS (International Social Service).

Each Partner was then in charge of the collection of applications and **selection** of the participants from the respective country, both when the training sessions were held in their country and abroad. For the selection procedure, an **application form** (see a template in para. 4) was elaborated and contained questions related to personal data, professional background and other information on knowledge and/or practical experience in European and international family law, as well as the level of knowledge of the English language.

The Partner in charge of the training session took care of the **practical arrangements**, organisation and logistics (venue, coffee and lunch breaks, information on accommodation and local transport means). Moreover, it prepared printed copies of the **training packages** (containing presentations,

case studies and relevant legal instruments) and was responsible for the welcome information and **registration** of participants, who were requested to sign a register of attendance (see a template in para. 4).

2.2. Preparation of the training programme

Through the preliminary activity consisting in the **analysis of national case law**, the Project Teams were able to identify the **training needs** by determining the most significant issues related to the application of the EU family law Regulations and relevant international conventions. These issues reflected the national trends and have been discussed among the Partners, who then finalised a list of the matters to be deepened and dealt with during the training sessions, both during the presentations of the topics and the examination of case studies.

The preliminary assessment of training needs was useful for the **determination of the training contents** and their adjustment in light of the attending **target groups**. In this respect, due attention was paid not only to the **legal aspects** of the application of the EU rules, but also to the **role of social service workers** as practitioners who are involved in family disputes mainly concerning the protection of children.

With a view to testing the contents and the overall organisation of the training sessions, **test-the-training sessions** have been organised and addressed to a small number of participants in order to facilitate the exchange of views and the discussion. The main goal was indeed to verify the suitability of the programme and organisation of the sessions, as well as the interaction and involvement of attendees in the cross-border training sessions.

Comments and suggestions have been collected during the sessions and then through the **short-term evaluation questionnaires**, that consisted in questions concerning the organisational aspects of the training sessions, contents and programme, presentations, case studies, trainers, self-evaluation and benefit for the trainees (see a template in para. 4). The outcomes have been transferred in reports drafted by the Partner hosting the training sessions and in charge of their organisation, and then published on the Project website.

Based on those reports, Partners defined the contents of the **final transnational training sessions** targeting a higher number of trainees, thus allowing the participation of more practitioners and social service workers from the Partners' countries.

2.3. Training activities

The **training activities**, that were implemented in the sessions held in the different Partners' countries, envisaged, firstly, the **presentations** of the selected topics as lectures, where the relevant provisions of the legal instruments were explained, also on the basis of the case law of the Court of Justice of the European Union, and practical issues were addressed with examples, and secondly, the analysis of the **case studies**, that allowed the trainees to apply the rules in practice.

With particular regard to the **practice-oriented training**, trainees have been divided into small **working groups** with a view to balancing their different nationality with a similar level of knowledge and/or familiarity with the application of the EU family law Regulations and other relevant international legal instruments. In this way, the exchange of views and experiences among professionals from different countries contributed to deepening the study and application of the provisions, as well as to creating synergies useful for their daily professional activities.

The impact, the overall *ex post* evaluation of and the follow-up to the training activities have been verified through the dissemination of a web-based **long-term evaluation questionnaire**, that contained questions related to the background of the participant, self-evaluation and benefit, general aspects of the transnational trainings, as well as the creation of a network among the Project members and trainees (see a template in para. 4).

3. Scientific part

The training materials produced within the Project cover **EU family law Regulations** and their interplay with the **relevant international conventions**.

The Project was indeed mainly aimed at addressing the application of Regulation No 2201/2003 in cross-border family disputes, both regarding parental responsibility and matrimonial matters, and its interplay with other Regulations dedicated to specific matters, such as Regulation No 1259/2010 on the law applicable to matrimonial matters, Regulation No 4/2009 on maintenance obligations, jointly with the 2007 Hague Protocol, Regulations No 2016/1103 and No 2016/1104 on matrimonial property regimes and property consequences of registered partnerships, as well as the 1980 Hague Convention on international child abduction and the 1996 Hague Convention on children protection measures.

Presentations and the respective case studies are collected and divided into the following main topics:

- warming up on international family law and terminology,
- parental responsibility,
- international child abduction,
- matrimonial matters,
- maintenance obligations,
- property regimes.

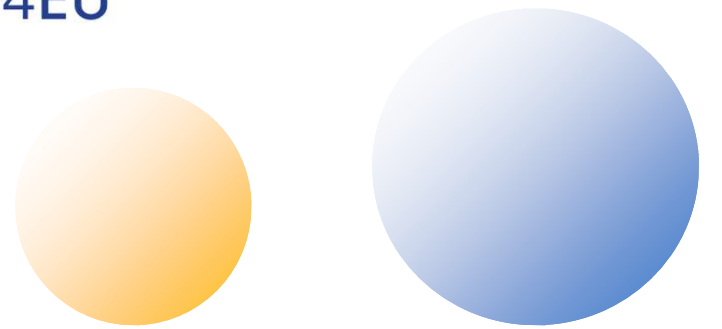
Presentation

- **Warming up: instruments in international family law and terminology**

  drafted by Prof Maria Caterina Baruffi (UNIVR, mariacaterina.baruffi@univr.it)

Warming up: Instruments in international family law and terminology

Source: https://epthinktank.eu/2017/12/07/a-europe-for-mobile-and-international-families



13 million
Europeans living in another EU Member State

16 million
International couples in the EU

Some 2.2 million marriages and 946 thousand divorces took place in the EU in 2016
Source: https://ec.europa.eu/eurostat/statistics-explained/index.php/Marriage_and_divorce_statistics

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   - the uniform interpretation of the CJEU
   - the autonomous concepts under EU law

Useful links

- European e-Justice Portal: https://e-justice.europa.eu/home.do
- On family matters: https://e-justice.europa.eu/content_family_matters-44-en.do
- European Judicial Network (EJN) in civil and commercial matters: https://e-justice.europa.eu/content_ejn_in_civil_and_commercial_matters-21-en.do?init=true
- EU law: http://eur-lex.europa.eu
- EU case law: http://curia.europa.eu
- HCCH (Hague Conference on Private International Law https://www.hcch.net/en/home

1) The development of EU law in family matters

1.a) The free movement of persons as background

1.b) The EU competence in civil judicial cooperation as broader context

1.a) The free movement of persons as background

- **EU Treaties**
- **EU secondary legislation**

→ **mutual recognition of personal and family status**

- **The EU has stepped into MS competences two-fold approach:**

  a) **enactment of EU PIL legislation**

  b) **in those areas that remain under the MS' competences** (e.g. civil status), **national legislations** still need to **comply with EU law**

  + role of the CJEU

1.b) The EU competence in civil judicial cooperation as broader context

- **Purpose** set out in the Treaties: building a European area of justice
- **Tools:** different levels of cooperation (mutual recognition and mutual trust)
- **Benefit** for EU citizens: no complexities
- Evolution of the competence (Amsterdam, Nice, Lisbon – Art. 81 TFEU).

- **Art. 81(3) TFEU**:
  - family law matters with transnational implications
  - **special legislative procedure**

- **Enhanced cooperation** (Art. 20 TEU, Arts. 326 to 334 TFEU)

- Special position of some MS
  - **the UK and Ireland (Protocol No. 21)**
  - **Denmark (Protocol No. 22)**

2) The EU PIL secondary legislation in family matters

2.a) Overview of the main EU PIL acts in civil judicial cooperation

2.b) The EU PIL instruments governing selected aspects of family law

2.c) The interplay with the international legal instruments

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On a preliminary note

PIL questions:

a) which **court** has international jurisdiction to hear the case? (*jurisdiction*)
b) which **law** governs the substantive aspects of the case? (*applicable law*)
c) under which conditions can a **decision** issued abroad be recognised and enforced in the requested State? (*recognition and enforcement*)

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2.a) Overview of EU PIL acts in civil judicial cooperation

Brussels regime (jurisdiction/ recognition and enforcement)	**Rome regime** (law applicable)
• **Brussels Ia** Regulation, for civil and commercial matters (Reg. No. 1215/2012) • **Brussels IIa** Regulation, for matrimonial matters and parental responsibility (Reg. No. 2201/2003)	• **Rome I** Regulation, for contractual obligations (Reg. No. 593/2008) • **Rome II** Regulation, for non-contractual obligations (Reg. No. 864/2007) • **Rome III** Regulation, for divorce and legal separation (Reg. No. 1259/2010)

“Complete” PIL instruments

- Maintenance Regulation (Reg. No. 4/2009)
- Succession Regulation (Reg. No. 650/2012)
- Matrimonial property (Reg. No. 2016/1103)
- Property consequences of registered partnerships (Reg. No. 2016/1104)

Acts on uniform EU procedures in civil and commercial matters

(alternative to domestic procedures)

- European enforcement orders for uncontested claims (Reg. No. 805/2004)
- European order for payment (Reg. No. 1896/2006)
- European small claims procedure (Reg. No. 861/2007)
- European account preservation order (Reg. No. 655/2014)

- **Insolvency proceedings** (Reg. No. 2015/848)
- **Service of documents** (Reg. No. 1393/2007)
- **Taking of evidence** (Reg. No. 1206/2001)

2.b) The EU PIL instruments governing selected aspects of family law

- acts of secondary law (Regulations)
- analysis of the respective scope of application and main issues
- focus on
  - Brussels IIa Reg.
  - Maintenance Reg. (and 2007 Hague Protocol)
  - Rome III Reg.

Predecessor:

Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters of 28 May 1998 (Brussels II Convention)

- **never ratified nor come into force**
- **limited scope of application** regarding **parental responsibility**

Reg. 1347/2000 (Brussels II)

- **Advantages** of a EU Regulation over an international Convention
- 1999 **proposal based on the Brussels II Convention → Reg. 1347/2000** on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses
  - Adopted: 29.5.2000. In force: 1.3. 2001
  - Scope of application

Reg. 2201/2003 (Brussels IIa)

- repealing Reg. 1347/2000 (Brussels II)
- concerning **jurisdiction** and **recognition and enforcement of judgments** in **matrimonial matters** and **matters of parental responsibility**
- In force: 1 March 2005
- binding on all EU MS (including the UK and Ireland) with the exception of Denmark

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Reg. 2201/2003 (Brussels IIa)

- **Scope of application – Art. 1(1)**
  - Divorce, legal separation or marriage annulment
  - Attribution, exercise, delegation, restriction or termination of parental responsibility

Unresolved issues

1) Definition of "marriage"
2) enforcement procedures
3) difficult interplay with the 1980 Hague Convention (Art. 11 BIIa)
4) no provisions on the applicable law
   - divorce/separation: Rome III Reg.
   - parental responsibility: 1996 Hague Convention

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Maintenance obligations

- **Jurisdiction:** originally Brussels I regime (Art. 5 of Reg. 44/2001)
- Key aspect: **applicable law** - negotiations between the **EU** and the **HCCH**
- **Scope of application**: maintenance obligations arising from a family relationship, parentage, marriage or affinity
- entry into force: 30.1.2009; applying since 18.6.2011
- binding on all EU MS (no Denmark)
- Complete PIL legal instrument, but **2 procedures on recognition and enforcement** (MS bound by the 2007 Hague Protocol or not)

Law applicable to separation/divorce claims

- 14 March 2005: **Commission's Green paper** on applicable law and jurisdiction in divorce matters (COM(2005)82 final)
- 17 July 2006: proposal complementing the BIIa Reg. (**COM(2006)399**), **withdrawn** by the Commission (lack of unanimity in the Council as required by Art. 81(3) TFEU)

Reg. 1259/2010 (Rome III)

- **enhanced cooperation** in the area of the **law applicable to divorce and legal separation**
- **17 MS** participating
  - originally, 14 MS (Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia)
  - 3 MS joined at a later stage (Lithuania, Greece, Estonia)

Reg. 650/2012 (Succession)

- concerning **jurisdiction, applicable law, recognition and enforcement of decisions** and **acceptance and enforcement of authentic instruments** in matters of succession, and the creation of a **European Certificate of Succession**
- it applies to deaths on or after 17 August 2015
- UK, Ireland and Denmark opted out

Reg. 2016/1103 (Matrimonial property)

- **enhanced cooperation** in the area of **jurisdiction**, **applicable law** and the **recognition and enforcement of decisions** in matters of matrimonial property regimes
- it applies as of 29 January 2019
- **18 MS** participating
  - Belgium, Bulgaria, Cyprus, the Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Luxembourg, Malta, Netherlands, Austria, Portugal, Slovenia, Finland and Sweden
  - Estonia announced its intention to take part

Reg. 2016/1104 (Property registered partnerships)

- **enhanced cooperation** in the area of **jurisdiction**, **applicable law** and the **recognition and enforcement of decisions** in matters of the property consequences of registered partnerships
- it will apply as of 29 January 2019
- **18 MS** participating
  - Belgium, Bulgaria, Cyprus, the Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Luxembourg, Malta, Netherlands, Austria, Portugal, Slovenia, Finland and Sweden
  - Estonia announced its intention to take part

2.c) The interplay with the international legal instruments

1980 Hague Convention (Child abduction)

- entered into force on 1 December 1983
- 100 Contracting States (**all EU MS**; most recently: Tunisia since 1.10.2017, Cuba 1.12.2018, Guyana 1.5.2019, Barbados 1.10.2019)
- interplay with **BIIa Reg.** with regard to child abduction (the Reg. **complements** the 1980 Hague Conv. **in intra-EU cases**)

1996 Hague Convention (Child protection)

- entered into force on 1 January 2002
- 49 Contracting States (**all EU MS**; most recently: Cuba since 1.12.2017, Honduras 1.8.2018, Fiji 1.4.2019, Paraguay 1.7.2019; only signatory States: USA, Canada, Argentina)
- interplay with **BIIa Reg.** with regard to the **law applicable to parental responsibility matters** (not governed by the Reg.)

2007 Hague Protocol (law applicable to maintenance obligations)

- entered into force on 1 August 2013
- 30 Contracting States (**all EU MS**, **except** the **UK** and **Denmark**, + Serbia, Kazakhstan and Brazil; Ukraine signed on 21.3.2016)
- interplay with **Maintenance Reg.** with regard to the **law applicable to maintenance obligations** (Art. 15 of the Reg. directly refers to the Protocol)

3) The EU family law instruments 'in action'

3.a) The uniform interpretation of the CJ

3.b) The autonomous concepts under EU law

3.a) The uniform interpretation of the CJ

I. **Reference for a preliminary ruling** (Art. 267 TFEU)
   - **national court or tribunal**
   - Role of the **parties**
   - **Requirements**
   - **costs and legal aid**

II. **Urgent preliminary ruling procedure** (Arts. 107-114 of the Rules of Procedure of the CJ, https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_it.pdf)
   - **AFSJ** (in particular, parental responsibility cases)
   - shorter deadlines in the procedure

3.b) The autonomous concepts under EU law

(I) common definitions to **overcome** (at least partially) the **differences** in national legislations (+ clarification by the CJ):

i. **COURT** (Art. 2 BIIa, Art. 2 Maint., Art. 2 RIII, Art. 3 Succ.)

CJ, 20.12.2017, C-372/16, *Sahyouni*

ii. **JUDGMENT** or **DECISION** (Art. 2 BIIa, Art. 2 Maint., Art. 3 Succ.)

iii. **LIS PENDENS** (Art. 19 BIIa, Art. 12 Maint., Art. 17 Succ.)

- False lis pendens (divorce/separation)
- CJ, 6-10-2015, case C-489/14, *A* v *B*

iv. **SEISING OF A COURT** (Art. 16 BIIa, Art. 9 Maint., Art. 14 Succ.)

- Interaction **Reg. No 1393/2007** on **service of documents**
- CJ, 22-6-2016, case C-173/16, *M.H. v M.H.*

(II) uniform notions

HABITUAL RESIDENCE (HR)

- **BIIa**: used as ground of jurisdiction in both matrimonial and parental responsibility matters
- **Maint.**: used as ground of jurisdiction, and by reference to the 2007 Hague Protocol, also as a connecting factor to determine the applicable law
- **RIII**: used as connecting factor for a choice of law, as well as in the absence of a choice
- **Succ.**: used both as general ground of jurisdiction and general connecting factor

BUT in none of them the notion is defined

- **Only** the **Succ. Reg.** provides **guidance on the determination of HR** of the deceased at the time of death (Recital 23)
- **overall assessment** of the circumstances of the life of the deceased during the years preceding his death and at the time of his death
  - relevant factual elements, in particular: duration and regularity of the deceased's presence in the State concerned, and conditions and reasons for that presence
- a **close and stable connection** with the MS must be established
- **possible inter-instrumental interpretation? NO**, given the specific subject matter dealt with in this Reg.

Case law on habitual residence

a) CJ, 15-9-1994, case C-452/93, *Pedro Magdalena Fernandez*, para. 22, regarding an **expatriation allowance**

b) CJ, 2-4-2009, case C-523/07, *A*, paras. 37-42 on the **HR of a child**

c) CJ, 15-2-2017, case C-499/15, *W and V v Z*, paras. 60-66, on the **HR of a child**

d) CJ, 28-6-2018, case C-512/17, *HR v KO,* on the **HR of a child** (MS of dual nationality or MS of residence)

e) CJ, 22-12-2010, case C-497/10 PPU, *Mercredi*, para. 56 on the **HR of an infant**

f) CJ, 8-6-2017, case C-111/17 PPU, *OL v PQ* on the **HR of an infant** born in a MS other than the parents' HR

g) CJEU, 9-10-2014, case C-376/14 PPU, *C v M*, para. 54 on the **HR of a child** in an **child abduction case**

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Summarising conclusions

When addressing an intra-EU cross-border family dispute:

	jurisdiction	applicable law	recognition & enforcement
matrimonial matters	Brussels IIa Reg.	Rome III Reg.	Brussels IIa Reg.
parental responsibility	Brussels IIa Reg.	1996 Hague Conv.	Brussels IIa Reg.
maintenance	Maintenance Reg.	Maintenance Reg. + 2007 Hague Protocol	Maintenance Reg. + 2007 Hague Protocol
international child abduction	1980 Hague Conv. + Brussels IIa Reg.		1980 Hague Conv. + Brussels IIa Reg.

PARENTAL RESPONSIBILITY

Presentations and case studies

- **Parental responsibility: general overview**
  drafted by Dr Lilla Király (ELTE, drkiralylilla71@gmail.com)

- **Jurisdiction in parental responsibility matters**
  drafted by Prof Orsolya Szeibert (ELTE, szeibert@ajk.elte.hu)

- **Law applicable to parental responsibility matters**
  drafted by Dr Diletta Danieli (UNIVR, diletta.danieli@univr.it) and
  Dr Cinzia Peraro (UNIVR, cinzia.peraro@univr.it)

- **Recognition and enforcement of decisions in parental responsibilities matters**
  drafted by Ana Pliner (TEISE, ana.pliner@gmail.com)

Parental responsibility: general overview

Contents

Overview of EU PIL acts on parental responsibility

jurisdiction	applicable law	recognition and enforcement
Brussels IIa Reg.	1996 Hague Convention	Brussels IIa Reg.

special issues	jurisdiction / recognition and enforcement
international child abduction	• Brussels IIa Reg. • 1980 Hague Convention

Reg. 2201/2003 (Brussels IIa)

- repealing Reg. 1347/2000 (Brussels II)
- concerning **jurisdiction** and **recognition and enforcement of judgments** in **matrimonial matters** and **matters of parental responsibility**
- **Not only for the children from marriage**
- civil proceedings relating to **divorce, legal separation or marriage annulment are not necessary**
- applying since 1 March 2005
- binding on all EU MS (including the UK and Ireland) with the exception of Denmark

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Reg. 2201/2003 (Brussels IIa)

Scope of application – Art. 1(1)

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

a) **divorce, legal separation or marriage annulment**;

b) **attribution, exercise, delegation, restriction or termination of parental responsibility**

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International legal instruments

1980 Hague Convention (Child abduction)

- entered into force on 1 December 1983
- 100 Contracting States (**all EU MS**; most recently: Tunisia since 1.10.2017, Cuba 1.12.2018, Guyana 1.5.2019, Barbados 1.10.2019)
- interplay with **BIIa Reg.** with regard to child abduction (the Reg. **complements** the 1980 Hague Conv. **in intra-EU cases**)

1996 Hague Convention (Child protection)

- entered into force on 1 January 2002
- 49 Contracting States (**all EU MS**; most recently: Cuba since 1.12.2017, Honduras 1.8.2018, Fiji 1.4.2019, Paraguay 1.7.2019; only signatory States: USA, Canada, Argentina)
- interplay with **BIIa Reg.** with regard to the **law applicable to parental responsibility matters** (not governed by the Reg.)

1. Practice on Child Protection: A. *Parental responsibility*

- Art. 2
- all rights and obligations towards a **child and its assets**.
- Although this concept varies between the Member States, it usually covers
  - **custody** and
  - **visiting rights**

What is custody ?

- **Art. 2(9):**

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

- parents living together: they usually hold custody over their children jointly.
- if the **parents get divorced or split up**, they need to decide how this **responsibility will be exercised in the future**.

- The parents may decide that the child shall live alternately with both parents, or with one parent. In the latter case, the other parent usually has a right to visit the child at certain times.
- Custody rights also cover **other rights and duties** linked to the **education** and **care of the child**, including the right to look after the child and his/her assets.
- The parents usually have the parental responsibility for a child, but parental responsibility may also be given to an institution to which the child is entrusted.

Who decides on the custody and visiting rights?

- **parents by mutual agreement**.
  - A mediator or lawyer can help them if they do not manage to reach an agreement

- **the court**: in case the **parents are unable** to reach an agreement
  - The court may decide that both parents shall have custody over the child (**joint custody**) or that one of the parents shall have custody (**single/sole custody**). In the case that only one parent has custody, the court may decide on **visiting rights for the other parent**.

- In the case of an **international couple**, **EU rules** determine which EU court has the responsibility to deal with the case.

- The main aim is **to avoid** both parents addressing the court in their own country and **two decisions being issued for the same case. <u>The principle is that the responsible court is the court in the country where the child habitually resides (art. 8).</u>**

Will the decision of the court be recognised and enforced in the other EU country?

- Yes
  - Specific mechanism for the recognition and enforcement of decisions of the EU courts. This makes it **easier** for subjetcs with parental responsibility to exercise their rights.

- In particular, a **judgment on access rights** will be recognized in another EU Member State without any special procedure being required, thus supporting the relationship between the child and both parents (art. 40 ff.).

Which EU rules apply?

- The rules settling cross-border matters between children and their parents are part of the **Brussels IIa Regulation (+ international conventions)**

- These rules apply equally to all children, whether they are born in wedlock or not.

1. Practice on Child Protection
B. *International child abduction*

- an international couple with children
  - are separating
  - one parent wishes to return to home country and take the child
  - without the consent of the other parent (who has custody rights over the child and effectively exercise those rights) or the court.

Which court is responsible?

- The court in the country where the **child had his/her habitual residence before abduction** will remain responsible until the abduction case has been settled (art. 10).

- avoiding parents abducting their child in the hope of getting a more favorable judgement before the court in their own country, where the child was taken.

How can a parent get an abducted child back?

- Central Authorities exist in all EU countries (except Denmark) to assist parents who are victims of cross-border child abduction.
- It is possible to launch a procedure to return the child. In this case, the court needs to rule on the matter within **six weeks** (art. 11, par. 3).
- The court should give the **child** the **opportunity to be heard** during the proceedings, unless this appears inappropriate due to his or her age and degree of maturity (art. 11, par. 5).

Can a court in the country where the child was abducted refuse the return of the child?

- The court in the country where the child was abducted to can only object to the return of the child if there is **a serious risk** that return would expose the child to **physical or psychological harm** (art. 11, par. 2)
- However, the return cannot be prevented if **adequate arrangements** have been made to **protect the child** (art. 11, par. 4)
- If a court finds that the child should not be returned, it must contact the court in the country where the child was abducted from (art. 11, par. 6 ff.)

Will the decision of the court be automatically enforceable?

- The final ruling by the court in the country of origin is automatically recognized and enforceable in the other EU country without the need for a declaration of enforceability ("**abolition of *exequatur***"), provided that the judge has issued a certificate

- (art. 40 ff. and art. 11, par. 8)

1. Practice on Child Protection: C. *Lawful removal of the child*

- conditions in which the parents can move across borders with their children or

- the steps they should take when travelling abroad with their child in a lawful way.

2. Brussels IIa Regulation
General topics

1. Jurisdiction (art. 8 ff.)
2. Recognition and Enforcement (art. 20 ff.)
3. Cooperation between Central Authorities and the Court (art. 53 ff.)

3. Case law
Types of proceedings

- **Court Proceedings in**
  - Matrimonial matters
  - Matters of wrongful removal or retention of the child
  - Recognition of the foreign court decisions
  - Mandatory mediation proceeding at the Hungarian court
- **Public Administration Proceedings in**
  - e.g.rights of custody, right of access of the child, provisional/protective measures inside Hungary
  - Contacts among the courts by central authorities
- **Enforcement Procedure of the Bailiff, Police, Child Care Authority**
  - Matters of wrongful removal or retention of the child
  - access of the child, provisional/protective measures

The Hungarian system of procedures in matters relating to parental rights of custody

1. Court proceeding

Court decisions on the establishment, exercise, restriction, termination and restitution of the parental right of custody (first, second instance proceedings and review as an extraordinary legal remedy).

Proceedings for the return of the child, over which the Central District Court of Pest has exclusive jurisdiction in Hungary (first, second instance proceedings and review as an extraordinary legal remedy).

Judicial approval of decisions made in (obligatory) court mediation procedures

2. Administrative proceeding

Proceedings of the guardianship authority

First and second instance proceedings of the guardianship authority

Judicial review of administrative decisions passed by the guardianship authority ("third instance proceedings")

Legality supervision procedure by the prosecution service as the organ having a supervisory function over the guardianship authority's measures taken for the child's protection.

The supervisory power of the Ministry of Human Resources over the administrative procedure of the guardianship authority.

Mediation procedure for the child's protection

Contact keeping between central authorities

Ministry of Justice as a central authority (cases falling within the scope of the Hague Convention of 1980-Third states)

The Ministry of Human Resources (according to Council Regulation (EC) 2201/2003 in cases within the EU)

3. Enforcement proceedings

- **Judicial enforcement proceedings (handing over the child)**
  - Recognition and ordering enforcement of a foreign judgment (Exclusive jurisdiction lies with district courts which operate at the seat of courts of justice, and in Budapest with the Central District Court of Buda)
  - Procedures by independent court bailiffs (enforcement proceedings involve Hungarian court bailiffs, the police, the guardianship authorities)

- **Administrative enforcement proceedings (measures in the interests of the child's protection, enforcement of rights of access to the child removed to Hungary)**
  - Proceedings by the guardianship authority
  - Child protection mediation
  - (Supervisory) proceeding by the prosecution

3. Case law in court proceedings I - child abduction Article 11

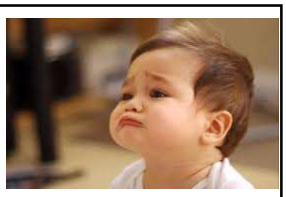
In order to prevent the ordering of the return, the parent who has brought the child to Hungary arbitrarily, in the vast majority of cases, usually refers to **Article 13 (b) of the Hague Convention (1980)** in his/her defence, namely that his or her return would expose the child to **physical or psychological harm**.

However, Hungarian judicial practice considers the refusal of the request for the return of the child as an exceptional decision and interprets it rather restrictively. Denial of the return of the child on the basis of Article 13 (b) happens relatively rarely, only in well-founded cases.

Case law in court proceedings II
child abduction - Article 13 (b)

- In general, in the case of a young child, respondents refer to the possibility of separation from the mother, which would cause serious harm to the child. According to Hungarian judicial practice, the **low age of the child itself** cannot constitute an obstacle to the return of the child; however, if concerning the case there is additional evidence and the additionally established facts are sufficient to confirm **the risk of emotional and physical harm**, the court shall refuse the request for the return of the child (BH 1998/86., Curia Pfv.II.20.018/2012.).

Case law in court proceedings III
child abduction - Article 13 (b)



The courts refused the return of the four-year-old child to Spain at all three instances based **on Article 13 (b) of the Hague Convention**. This is explained by the fact that in Spain, which constituted the child's former habitual residence, the mother had neither accommodation, nor a job, from which she could earn an income. Her stay in a home for mothers would have been ensured only for 6 months and she would not have been able to rent an apartment from the support paid by the applicant. Thus, ordering the return of the child would have endangered the healthy development of the child and would have placed her in an intolerable situation, since she would have been sent back to such circumstances where the appropriate living conditions were not ensured for her, with special regard to the fact that the father lived in Norway. The Spanish central authority only envisaged the possible taking of protection measures in general without any specific details, therefore there were not sufficient data for the court to establish what accommodation, support, or aid would be provided for the mother and the child. Therefore, the courts exceptionally refused the request for the return of the child.

(KIM XX-NMFO/GYELV2/601/2013., Central District Court of Pest 24.Pk.5000040/2013/18., Municipal Court of Budapest 50.Pkfv.634.214/20013/2., Curia Pfv. II.21.029/2013/4.),

Case law in court proceedings IV
child abduction - Article 11 (4)

the Hungarian court refused to grant the petition for the return of a 3-year-old child, because the Central Authority of Cyprus informed the first instance court only about the fact that there were three criminal procedures going on against the father for different crimes in Cyprus. Furthermore, to the questions of the first instance court (e.g.: about the provision of future protection for the child) the central authority of Cyprus made no statement in reply.

In addition, the father had failed to appear before the court 6 times and the mother showed a photo of the flat where the parents had lived together earlier, which – due to its condition - seemed unsuitable for bringing up a child.

(Central District Court of Pest Pk. 500.062/2010, Municipal Court of Budapest No. Pkfv. 637.192/2010) **Summary - the Hungarian court did not consider sufficient the information supplied by the foreign central authority .**

Case law in court and public administration proceedings I.
transfer a case by Article 15
Forum non conviniens

- According to Article 2 point 1 of the Regulation: the term **'court'** shall cover all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to Article 1;
- during the administrative proceedings of the EMMI, as central authority (and also the supervisory authority of the Hungarian guardianship authority), cases are often transferred to a foreign authority better placed to hear the case, or cases are also transferred from foreign authorities to the Hungarian guardianship authority with the permission of the EMMI (Ministry of Human Resources).

Case law in public administration proceedings I - Forum non conviniens Article 15

- the case was commenced in England (High Court of Justice, Family Division, Leeds District Registry Case No: -DG13C00051) The child protection service of the city council of Kirklees turned to the EMMI that **the Hungarian citizen mother gave birth to her child in England, then she left the child in England and travelled to Hungary.**
- The EMMI, as the central authority, made a decision granting the transfer of the case and thus, the competent Child Protection Centre of Fejér County took over the further administration of the case. The EMMI had two reasons for granting the transfer:
  - the placement of the child with the Hungarian relatives seemed expedient, since in England the child did not have any relatives,
  - a Hungarian citizen can be adopted only through a Hungarian authority according to Hungarian law.
- The English central authority requested the EMMI- as central authority- to **prepare a social inquiry report** on the family and to **initiate an administrative (guardianship) proceeding** at the time of the return of the child to Hungary. The EMMI, as the supervisory authority of the guardianship authority, ordered the territorially competent guardianship authority of Sárbogárd to prepare the social inquiry report.
- As a result of the social inquiry report, it turned out that the Hungarian relatives of the child were not suitable for bringing up the child. The English authority was informed about this fact through the EMMI.
- The child was brought to Hungary by the employees of the District Guardianship Authority of Sárbogárd, where the guardianship authority initiated the procedure for the placement of the child with foster parents. In the meantime the child was placed under child protection guardianship (if there is no contact with the parents for half a year, the child can be adopted, if no regular contact is maintained by the parents, the minor child can be adopted after one year). (Case No. 6473/2014/GYERGYAM)

Case law in public administration proceedings II. Placement of the child in another Member State Article 56

- **In H**ungary **a foster parent** undertakes the care of a **child of German citizenship for a specific period of time (1-2 years).** The Hungarian foster parent has a relationship with the German authorities, the German government finances the costs, the purpose of this measure is **to remove the German child from the German environment and resocialize the child in another country ("re-introduce" the child to the world of accepted social norms) with a pedagogical aim.** It is cheaper and more efficient than placement in a reformatory institution in Germany. The goal of the educational program is to remove the children from their environment where they are sexually harassed or to provide placement for children suffering from alcohol and drug problems. Children may participate in this program from the age of 12 (the children and their parents may choose between this solution or a juvenile detention centre). Contact with the German parents is only possible in the form of written letters, **the parents are not allowed to meet their children either in Hungary or in Austria, where they attend school.**
- From Hungary children are not sent abroad, this purpose is realized by the **Hungarian measure of supervised care**: the child has no room for manoeuvre – he/she cannot leave the building, there is even an option to confine the child - but parents are ensured access to their child. **(Case No. 40342/2013GYERGYAM)**

4. Conclusions

- Brussels IIa system on parental responsibility
  - Best interests of the child (jurisdiction, return)
  - Enforcement procedures

- From 1.08.2022: Brussels IIa Recast (Reg. 2019/1111 https://eur-lex.europa.eu/eli/reg/2019/1111/oj)

Useful links

- European e-Justice Portal: https://e-justice.europa.eu/home.do
- On family matters: https://e-justice.europa.eu/content_family_matters-44-en.do
- European Judicial Network (EJN) in civil and commercial matters: https://e-justice.europa.eu/content_ejn_in_civil_and_commercial_matters-21-en.do?init=true
- EU law: http://eur-lex.europa.eu

- EU case law:
http://curia.europa.eu
- HCCH (Hague Conference on Private International Law
https://www.hcch.net/en/home

- EUROPEAN CHILDREN AND THE DIVORCE OF THEIR PARENTS
http://www.figlipersempre.com/res/site39917/res666721_europeanchildren2.pdf

- Parental relocation Free movement rights and joint parenting
https://webcache.googleusercontent.com/search?q=cache:Jky1CaDkYKMJ:https://www.utrechtlawreview.org/articles/10.18352/ulr.67/galley/67/download/+&cd=11&hl=en&ct=clnk&gl=ch

- Practice guide (European Commission)
https://op.europa.eu/en/publication-detail/-/publication/f7d39509-3f10-4ae2-b993-53ac6b9f93ed

Jurisdiction in parental responsibility matters

Contents

C.L.A.S.S. 4EU

1) Basic situations I

- international situation – international factor
  - concerning a child
  - and parental responsibilites
- the question: **which MS has jurisdiction?**
- aim is to provide
  - clear answer
  - clear guidelines
  - transparent method
  - in the child's best interests
- key point is the requirement of proximity

C.L.A.S.S. 4EU

1) Basic situations II

- **habitual residence** in the foreground
- the child's nationality does not matter too much
- requires a different attitude
- the rules on jurisdiction are mandatory
- a lot of different situations -
  - parents have different nationalities and they live as a family in one MS
  - parents have same nationality but they live as family in third country
  - the child lives with one parent
  - the state will intervene

1) Basic situations III

habitual residence in the foreground

- parents can be spouses, cohabitants or in no partnership at all
- legal dispute can be between parents or parents and state (or even other relatives)

2) Brussels IIa covers 'civil matters'

Preamble (7) and Art 1(1)

- civil matters
- close connection to parental responsibilities
  - civil and public matters impact
- **broad interpretation is needed**
- **confirmed by the CJEU**
  - **'C' C-435/06 [2007]**
  - **'A' C-523/07 [2009]**
    - *decision ordering a child to be taken into care*

3) Structure of jurisdictional rules

If a court is seised – it examines its jurisdiction (Art 17)

1) Is there any jurisdiction acc. to Art 8? (general jurisdiction)
2) If not, is there any jurisdiction acc. to Arts 9, 10 12, 13? (special grounds)
3) Transfer to the court better placed (Art 15)
4) If not and other MS' court has jurisdiction
   → declares the lack of jurisdiction
5) Art 14 residual jurisdiction

4) Art 8 – child's habitual residence

- *The courts of the MS shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that MS at the time the court is seised.*
- Basis – the most appropriate forum due to its **proximity** to the child
- No definition – uniform and autonomous interpretation is needed
- Original idea is that one HR exists which is not hard to determine

4) Art 8 – child's habitual residence

- The existing definitions in national rules/other international documents cannot be used
- CJEU decisions provide some guidelines

  but it means a case-by-case basis
- MS should use the same standards
- Difference in the cases

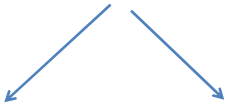
4) Art 8 – child's habitual residence

Which factors are important?

Which is more important?

fact **intention**

Whose intention is more important?



parent(s)' intention **child's intention**

4) Art 8 – child's habitual residence contra Art 13 (child's prsence)

The **physical presence alone** of the child in a Member State, as a jurisdictional rule alternative to that laid down in Article 8 of the Regulation, is not sufficient to establish the habitual residence of the child.

(CJEU, 2.04.2009, C-523/07, *A*)

5) Cases – Art 8

It corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and 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 must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case.

5) Cases – Art 8

The child's age may be taken into consideration both in the context of examining the loss of a habitual residence and in that of the acquisition of a new habitual residence. As a very young child is particularly dependent on his or her mother, who constitutes his or her 'life horizon', it is clear that the mother's wish lawfully to leave one Member State to settle or resettle in another Member State is a crucial factor in assessing the loss of that child's habitual residence. The child's extreme youth implies, moreover, that the conditions for her integration into her new family and social environment are likely to be satisfied very quickly.

That primary consideration of the wish of the person with sole parental authority does not in any way imply that there is no need to take other factors into account.

(CJEU, 22.12.2010, C-497/10 PPU, *Mercredi)*

5) Cases – Art 8

HR as a fact in case of a child who was born 'abroad'

*If a child **has been born and has lived continuously with her mother for several months**, in accordance with the **joint wishes** of her parents, **in a Member State other than that where those parents were habitually resident before her birth**, the **initial intention** of the parents with respect to the return of the mother, together with the child, to the latter Member State cannot allow the conclusion that that **child was 'habitually resident' there**, within the meaning of that regulation.*

(CJEU, 8.06.2017, C-111/17 PPU, *OL v PQ)*

5) Cases – Art 8

HR as a fact in case of infant - I

Decisive factors are:

- the fact that, from its birth until its parents' separation, the child **generally lived** with those parents in a specific place;
- the fact that the parent who, in practice, has had custody of the child since the couple's separation **continues to stay in that place** with the child **on a daily basis and is employed there** under an employment contract of indefinite duration; and
- the fact that the **child has regular contact** there with its other parent, who is still resident in that place.

(CJEU, 28.06.2018, C-512/17, *HR*)

5) Cases – Art 8

HR as a fact in case of infant – II

NOT decisive factors are:

- the stays which the parent who, in practice, has custody of the child has spent in the past with that child in the territory of that parent's Member State of origin in the context of **leave periods or holidays**;
- **the origins of the parent in question, the cultural ties** which the child has with that Member State as a result, and the parent's relationships with family residing in that Member State; and
- **any intention the parent** has of settling in that Member State with the child in the future.

5) Cases – Art 8

HR as a fact

A child must have been physically present in a Member State in order to be regarded as habitually resident in that Member State, for the purposes of that provision. Circumstances such as those in the main proceedings, assuming that they are proven, that is to say, first, the fact that the father's coercion of the mother had the effect of her giving birth to their child in a third country where she has resided with that child ever since, and, secondly, the breach of the mother's or the child's rights, ***do not have any bearing in that regard****.*

(CJEU, 17.10.2018, C-393/18 PPU, *UD* v *XB*)

5) Cases – Art 8

some issues also upon national cases - I

I. Moving abroad with family – **intention of final settlement?**
II. Having a registered address - **has it any meaning?**
III. Leaving property behind in the country of origin – **has it any meaning?**
IV. Possibility of having **two HRs**?

5) Cases – Art 8

some issues also upon national cases - II

I. **Child's dependence** upon the parent's (primary caregiver's) intention?
II. Importance of the **child's age**
III. **Infants** – serious dependence
IV. **Children in school-age** – independent integration
V. **Child's opinion** – hearing of the child
VI. **Child's HR** – children's HR (?)

6) Art 9 – continuing jurisdiction

I Child's lawful move from one MS to another one
II acquires a new HR
III holder of access rights has his/her HR in that former state
IV former HR's MS retain jurisdiction
V three-month period long
VI with the aim of modifying a judgment on access rights issued in that Member State before the child moved

6) Art 9 – continuing jurisdiction

Lawful move – HR

- Art 8-9
- Art 10-11 wrongful removal or retention of child
- Joint parental responsibilities as a tendency
  Consequence – both parents have PR
  Lawful removal requires the parents' agreement

7) Art 12 – prorogation of jurisdiction

- alternative forum for parental responsibility proceedings
- two different jurisdictional ground
- common point is the acceptance of the jurisdiction of the court
- one is – **divorce court**
  - some concentration of legal questions
  - procedural economy
- other is – **other court**
  - interest of the child
  - some respect of party-autonomy

7) Art 12 – prorogation of jurisdiction

Art 12 (1) – divorce court - I

The courts of a MS exercising jurisdiction by virtue of Article 3 on an application for divorce, legal separation or marriage annulment shall have jurisdiction in any matter relating to parental responsibility connected with that application where:

1 at least one of the spouses has parental responsibility in relation to the child

and

2 the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility, at the time the court is seized and is in the superior interests of the child

7) Art 12 – prorogation of jurisdiction

Art 12 (1) – divorce court - II

- Strong link between the PR case and the divorce court
  1 At least one spouse has parental responsibility (tendency – both of them have)
  2 Acceptance
  3 Superior interests of the child
  – judicial discreation
  – commentaries – if 1 and 2 is fulfilled it is diffcult to imagine that the exercise of jurisdiction would not be in the child's interest

7) Art 12 – prorogation of jurisdiction

Art 12 (3) – other court - I

- The courts of a MS shall also have jurisdiction in relation to parental responsibility in proceedings other than those referred to in paragraph 1 where:

1 the **child has a substantial connection** with that Member State, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State;

and

2 the jurisdiction of the courts **has been accepted expressly or otherwise in an unequivocal manner** by all the parties to the proceedings at the time the court is seised and is in the **best interests of the child**

7) Art 12 – prorogation of jurisdiction

Art 12 (3) – other court - II

- General exception
- Extension of party autonomy
  - 1 Substantial connection with some examples
  - 2 Acceptance
  - 3 Child's best interests
    - judicial discreation
    - difficult to see when it is not in the child's best interest
    - **(meaning of best interests)**

8) Cases – Art 12

Art 12 (3) – other court - III

No acceptance

where the defendant in those first proceedings subsequently brings a second set of proceedings before the same court and, on taking the first step required of him in the first proceedings, pleads the lack of jurisdiction of that court

(CJEU, 12.11.2014, C-656/13, *L* v *M*)

8) Cases – Art 12

Art 12 (3) – other court - IV

No acceptance

solely because the legal representative of the defendant, appointed by those courts of their own motion in view of the impossibility of serving the document instituting proceedings on the defendant, has not pleaded the lack of jurisdiction of those courts

(CJEU, 21.10.2015, C-215/15, *Gogova*)

8) Cases – Art 12

Art 12 (3) – other court - V

the joint lodging of proceedings by the parents of the child before the courts of their choice is an unequivocal acceptance by them of that court;

the fact that the residence of the deceased at the time of his death, his assets, which are the subject matter of the succession, and the liabilities of the succession were situated in the Member State of the chosen courts leads, in the absence of matters that might demonstrate that the prorogation of jurisdiction was liable to have a prejudicial impact on the child's position, to the conclusion that that prorogation of jurisdiction is in the best interests of the child.

(CJEU, 19.04.2018, C-565/16, *Saponaro*)

Acceptance

- The acceptance is a crucial issue
- What is **deemed to be an unequivocal acceptance ?**
  - ➢ not contesting jurisdiction
  - ➢ not contesting it while having a lawyer
  - ➢ not contesting while being there personally

Real acceptance ⟶ 'presumption' is enough?

Child best interests

- It is rarely scrutinized although important
- Real investigation
  - national examples
  - CJEU judiciary (?)
- Right to be heard?

9) Art 13 – child's presence

- No HR can be determined
- Art 12 cannot be applied
- The court of the MS where the child is present

CJEU, 22.12.2010, C-497/10 PPU, *Mercredi*

10) Art 15 – transfer to a court better placed

- It was a new form of judicial cooperation
- Transfer of the case
  - 1 child has particular connection to that MS
  - 2 would be better placed to hear the case
  - 3 it is in the best interests of the child
- Examples

10) Art 15 – transfer to a court better placed

In order to determine that a court of another Member State with which the child has a **particular connection** is better placed, the court having jurisdiction in a Member State must be satisfied that the transfer of the case to that other court is such as **to provide genuine and specific added value to the examination of that case,** taking into account, inter alia, the rules of procedure applicable in that other Member State;

– in order to determine that such a transfer is in the best interests of the child, the court having jurisdiction in a Member State must be satisfied, in particular, **that that transfer is not liable to be detrimental to the situation of the child**

(CJEU, 27.10.2016, C-428/15, *Child and Family Agency*)

(CJEU, 10.07.2019, C-530/18, *EP* v *FO)*

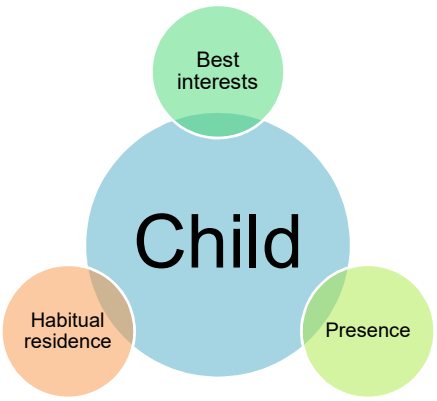
11) Art 20 – provisional measures

In urgent cases

'*measures in respect of persons or assets in that State as may be available under the law of that Member State, even if, under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter*'.

Exceptional rule

Summarising conclusions



The project is co-funded by the Justice Programme of the European Union
JUST-JTRA-EJTR-AG-2016-763874

Jurisdiction in parental responsibility matters

Case study

FACTS

Anita and Luc are former cohabitants. Anita is from Hungary and worked for EU, Luc is from France. They met in Brussels, lived together there and their common child Julie was born in Brussels. When the child was one month old, they separated.

They have severe discussion on the two-month-old child's habitual residence. Anita would like to leave Brussels as she does not work there anymore and argues that she always maintained her Hungarian 'habitual residence'. She argues that she was not ever really integrated into Belgium as she does not like French language, spoke to her child always Hungarian and had a definite-time employment in Brussels. By the way, her mother and sister lived temporarily with her and the child in Brussels to help her in taking care of Julie. Julie heard a lot of Hungarian and was not integrated to anywhere in Belgium.

Luc would like to argue for Belgium as the habitual residence of the child. He could not meet too much with her child as he worked as a soldier and actually could meet her only once, when she was born. He lived in Brussels with Anita only six months long, before Julie was born. He does not want actually to settle in Belgium but would like the Belgian court to proceed in the issue of parental responsibilities.

Related questions

1) Are Anita's arguments relevant? If not, or not enough, what kind of arguments would be relevant, if any?

2) Is Julie's habitual residence in Belgium? If yes/not, why?

VARIATION No. 1

Anita leaves the family's common home to Portugal when the child is one month old and Luc does not have any parental responsibilities or he has but agrees to the move to Portugal.

Related questions

3) Can the child change her habitual residence lawfully?

4) If Luc recognizes suddenly that he cannot keep contact with Julie well after their move into Portugal, which country has jurisdiction on contact?

VARIATION No. 2

Now assume that Julie is not an infant but four years old.

The parents lived separately since the child was one month old. Luc kept contact with Julie, however worked as a soldier and met her relatively rarely.

Related questions

5) Can Anita argue for having her and Julie's habitual residence established in Hungary?

6) What are the arguments for and against the establishment of the habitual residence in Hungary?

7) Is Julie's opinion relevant?

VARIATION No. 3

Now assume that Julie is 15 years old.

The parents lived separately since the child was two years old. Julie kept contact with her father but spent all holidays in Hungary. She is eager to develop her Hungarian and come to Hungary for a longer time as a secondary school student.

Related questions

8) Can Anita argue for having her and Julie's habitual residence established in Hungary?

9) What are the arguments for and against the establishment of the habitual residence in Hungary?

VARIATION No. 4

Julie is 15 years old.

The parents lived separately since the child was one month old. Luc left the army and works as an officer in France. The child lives alternately one week with Anita in southern Belgium, one week with Peter in northern France. She attends the same school which is very close to the border.

Related questions

10) Where is Julie's habitual residence?

VARIATION No. 5

Anita and Luc were married and both of them have Hungarian nationality. Julie is four years old. Anita would like to divorce in Hungary as she has quite good friends working as attorneys there. She would like that the Hungarian court should decide about the parental responsibilities.

Related questions

11) Is it possible that the Hungarian court which has jurisdiction in divorce should decide also on parental responsibilities? What are the requirements?

12) Are the requirements fulfilled?

LEGAL INSTRUMENT(S) TO BE APPLIED

Regulation No. 2201/2003

Questions with guidelines

1) **Are Anita's arguments relevant? If not, or not enough, what kind of arguments would be relevant, if any?**

Actually it is a point which can be heavily discussed. However, Anita's arguments do not seem to be convincing. The fact that she has maintained her habitual residence in Hungary may have an emotional meaning but it is not the fact. Similarly, the fact that little Julie could hear almost only the Hungarian language cannot be decisive as Julie was a little child at that time.

It is a key point that habitual residence is not defined at all in Brussels IIa Regulation. On the other side it has to be emphasized that habitual residence has to be interpreted according to the standards of the EU law and the judgments of the CJEU and not according to the national legal requirements.

Habitual residence depends upon a lot of circumstances. There are many valid arguments and those have to be weighed in their entirety. Habitual residence has factual and juridical components as well.

2) **Is Julie's habitual residence in Belgium? If yes/not, why?**

Julie's habitual residence is in Belgium as she has not lived anywhere else but in Belgium. It is a pure matter of fact.

Habitual residence is partly a matter of fact and as Julie has not lived anywhere else, she has her habitual residence in Belgium. It seems hard to argue for the fact that she has her habitual residence somewhere else. However, it is a great opportunity for the participants to discuss about the components of someone's habitual residence under Brussels IIa Regulation.

Possible issues to be discussed:

- Does it seem to be necessary that the components of habitual residence should be incorporated in the regulation itself?

- What would be the advantages and disadvantages of a definition of 'habitual residence'?

- Is habitual residence a matter of fact or a matter of juridical components?

- What are the differences between an adult's habitual residence and that of a child?

- What is the importance of the concerned child' age?

3) **Can the child change her habitual residence lawfully?**

The child can change his or her habitual residence only with his or her parents or at least the approval of the parents. Lacking the approval of one parent, a child abduction may occur with a lot of disadvantageous consequences. In this case Luc did not have

parental responsibilities or he agreed to the child's move to Portugal so Julie's habitual residence could change lawfully.

4) **If Luc recognizes suddenly that he cannot keep contact with Julie well after their move into Portugal, which country has jurisdiction on contact?**

According to Article 9 of Brussels IIa Regulation, Luc can turn to the court in Brussels. Where a child moves lawfully from one Member State to another and acquires a new habitual residence there, the courts of the Member State of the child's former habitual residence shall, by way of exception to Article 8, retain jurisdiction during a three-month period following the move for the purpose of modifying a judgment on access rights issued in that Member State before the child moved, where the holder of access rights pursuant to the judgment on access rights continues to have his or her habitual residence in the Member State of the child's former habitual residence.

5) **Can Anita argue for having her and Julie's habitual residence established in Hungary?**

Actually she cannot argue for that. It does not matter whether the parents lived together or separately or whether one parent maintained a regular contact with the child or not.

6) **What are the arguments for and against the establishment of the habitual residence in Hungary?**

There are many arguments which may be referred to as habitual residence is not defined at all. However, it seems to be difficult to argue for having a habitual residence in Hungary or somewhere else than Belgium.

7) **Is Julie's opinion relevant?**

There are different viewpoints on the child hearing and the importance of his or her opinion.

Possible issues to be discussed:

- In case of the child's habitual residence what is the importance of the child's views and opinion?

8) **Can Anita argue for having her and Julie's habitual residence established in Hungary?**

Although there are different circumstances than in Variation No 2, the main points have not changed. As Julie always lived in Brussels, her habitual residence is in Belgium irrespective of the fact whether she loves another country or not or whether she speaks the language of this other country or not.

9) What are the arguments for and against the establishment of the habitual residence in Hungary?

There is no special argument for having a habitual residence in anywhere else as in Belgium.

Possible issues to be discussed:

- The meaning of the child's age and his/her emotions and knowledge of language. It can be also a point that she is not so young anymore.

10) Where is Julie's habitual residence?

This variation directs the thoughts to a new direction, namely a new possible legal consequence of the parents' separation. Although the starting point of Brussels IIa Regulation is that the child has only one habitual residence, there are new styles of living – e.g. alternative residence of the child – which can have very thought-provoking consequences. We can suppose that if Julie belongs to the school of one country, she belongs to a doctor or other authorities in that country and she has her habitual residence in the country of the school.

Possible issues to be discussed:

- Any new situation which can emerge as a consequence of the changes in family law may be discussed.

11) Is it possible that the Hungarian court which has jurisdiction in divorce should decide also on parental responsibilities? What are the requirements?

According to Article 12 of Brussels IIa Regulation, the courts of a Member State exercising jurisdiction by virtue of Article 3 on an application for divorce, legal separation or marriage annulment shall have jurisdiction in any matter relating to parental responsibility connected with that application where: (a) at least one of the spouses has parental responsibility in relation to the child; and (b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility, at the time the court is seised, and is in the superior interests of the child.

As the Hungarian court has jurisdiction in divorce (as both spouses have Hungarian nationality) and as there are parallel jurisdictional grounds in the Regulation, they can refer to Article 12.

In this case, the requirements are as follows: the Hungarian court has jurisdiction in the divorce case, at least one of the spouses has parental responsibility in relation to

the child, the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and it serves the child' superior interests.

12) Are the requirements fulfilled?

As the Hungarian court has jurisdiction and both parents have parental responsibilities, they have to accept expressly that the Hungarian court has jurisdiction in the issue of parental responsibilities. This latter can be a crucial point as the CJEU's case law requires a real and expressed acceptance. The question whether this prorogation of jurisdiction serves the child's interests has not been decided very clearly yet.

Law applicable to parental responsibility matters

Contents

- Introduction
- The 1996 Hague Convention
- Interplay between BIIa Regulation and the 1996 Hague Covention
- The 1996 Hague Convention provisions on the applicable law
- Other provisions and issues
- Summarising conclusions

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Introduction

- Is there an EU legal instrument?

no (Brussels IIa Regulation: jurisdiction, recognition and enforcement of decisions, and co-operation between central authorities).

- Is there an international legal instrument?

the **1996 Hague Convention**

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The 1996 Hague Convention

Definitions:

- **parental responsibility** (Art. 1(2))
- **measures of protection** (Arts. 3-4) (excluded: among others, maintenance, succession, social security, public measures of a general nature in matters of education or health)
- **minors**: children until they reach age of 18 years (Art. 2)

Jurisdiction: Arts. 5 to 14 (habitual residence of the child)

Applicable law: Arts. 15 to 22

Recognition and enforcement: Arts. 23 to 28

Co-operation: Arts. 29 to 39

General provisions: Arts. 40 to 56

Final clauses: Arts. 57 to 63

The interplay between BIIa Regulation and the 1996 HC

- BIIa Reg and 1996 HC cover similar aspects
- their interplay
- and in particular with regard to the applicable law

- not regulated in the context of specific provisions on the applicable law, but rather **on a general level**:

→ **Arts. 61-62 BIIa** in **Chapter V 'Relations with other instruments'**

Art. 61 BIIa

The **Regulation supersedes** the 1996 HC whenever

a) the **child** concerned has his/her **habitual residence on the territory of a MS**

b) with regard to the **recognition and enforcement of a judgment** given in a court of a MS on the territory of another MS, even if the child concerned has his/her **habitual residence on the territory of a third State** which is a **contracting Party** to the Convention

Art. 62 BIIa (residual rule)

The **1996 HC** shall continue to **have effect** in relation to **matters not governed by the Regulation** (i.e. applicable law)

Art. 52(2) of the 1996 HC

- Contracting States may **conclude further agreements** that contain provisions on **matters regulated by the Convention**

↳ the possibility of an interference between different legal sources regulating parental responsibility matters was also expressly recognised in the 1996 HC

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➢ The 1996 HC as an international instrument applies only between Contracting Parties.

- in force in **49 States***
- most recent EIF*: Fiji (1.04.2019), Paraguay (1.07.2019)
- Future EIF*: Nicaragua and Guyana (from 1.12.2019), Barbados (from 1.05.2020)
- Only signatory States: Argentina, USA and Canada
- Brazil is not a contracting party.

'Entry into force – EIF': the relevant date for the application of the given legal instrument at the international level

- Data updated in October 2019
  (source: https://www.hcch.net/en/instruments/conventions/status-table/?cid=70)

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- **All EU Member States** are (now) **Contracting States** of the 1996 HC
  - Denmark, having opted out the Brussels IIa regime, is bound to the Convention in its capacity as member of the HCCH
  - Italy was the last MS to ratify the Convention (EIF: 1.01.2016)

(when the 1996 HC is not applicable, each MS has to refer to its **domestic PIL statutes** to determine the law applicable to parental responsibility matters)

Putting into practice

- The **1996 HC** is an **international legal instrument**, and **remains as such** also when applied by EU courts to determine the law applicable to parental responsibility matters

- it follows that the **applicability** of the 1996 HC in the given dispute has to be **preliminarily verified from an international law perspective**

It means that the preliminary question that all EU counsels and judges have to ask when approaching a parental responsibility claim to which the 1996 HC might apply, is **"are the States involved in the dispute Contracting States of the 1996 HC?"**

('States involved': it is necessary that an international element exists, e.g. nationality of the parties, their habitual residence, properties, etc.)

- **YES**: the **1996 HC** is **applicable**
- **NO**: **national law of the *forum*** is **applicable** (residual role), in particular the relevant national **PIL statutes to determine the LA to PR matters**

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…with a little help from the EU

- As a result of the **EIF of the 1996 HC in all EU MS**, the **preliminary question** regarding the applicability of the Convention from an international law perspective **always finds an answer in the positive**
- therefore, the **1996 HC** is the **only legal instrument** to determine the law applicable to parental responsibility matters **whenever the States involved in the dispute are EU MS**
- **BUT** the question **should not be forgotten** in case a **third State** is (also) involved

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The 1996 HC provisions on the applicable law

The competent authority

Art. 15

Attribution/extinction/
exercise/modification/
termination of parental responsibility
(also under **Art. 18)**

Art. 15(1): general rule

principle of **coincidence between *forum* and *ius***

- the authorities of Contracting States (having jurisdiction under this Conv.) shall **apply their domestic law** (i.e. the law they are most familiar with)
- this law shall govern all the **measures** covered by the Convention (see **Art. 3**)

Art. 15(2): exception to the general rule

(narrow interpretation)

- as the **protection** of the **person** or the **property** of the child requires, authorities may apply or take into consideration the **law of another State** (even a **non-Contracting** State) with which the situation has a **substantial connection** (even if the child is not physically there)
- no clarification of 'substantial connection' (nationality? place where the properties are located?)
- the **child's best interests** is paramount in the application of this provision

Art. 15(3): law applicable to the conditions of application of the measures in case of change of habitual residence

- a change in the child's habitual residence (to another Contracting State B) will result in a change of the authorities having jurisdiction (Art. 5(2)),
- this involves a **change in the law governing the conditions of application** of the **measures taken** in the **State A of the former habitual residence.**

Art. 15(3):

examples of conditions of application of the measure taken in the former State of habitual residence (A) and then governed by the law of the new State of habitual residence (B):

- exercise of the supervision by the public authority on the parents' care,
- request for authorization submitted by the guardian of the child to sell a child's property.

➢ In case of differences in the conditions of application between State A and State B: State B (of new HR) can take a new measure

After having determined the applicable law…

The substantive law regulates the case in practice.

Before taking the decision, judges may entrust the **social service workers** with tasks on

- hearing
- report on family situation
- report on family relationship

- How does it work in your jurisdiction?
  - In **Italy** there are **good practices** on cooperation among judges/lawyers/social service workers.
  - BUT what about in transnational cases? With other countries?

The 1996 HC provisions on the applicable law

The parties

Art. 16
Attribution/extinction
Art. 17
exercise
Art. 18
modification/termination

Example (1)

An **unmarried couple** living in Contracting State A separate before the birth of their child. The father moves to Contracting State B for his work. Under the law of Contracting State B, an unmarried father **does not automatically** acquire parental responsibility for a child upon the birth of the child. In contrast, under the law of Contracting State A, an unmarried father **does acquire** parental responsibility **automatically** upon the birth of the child.

Example (1)

Question

Does the father have the parental responsibility over the child?

- ❑ Yes
- ❑ No

Art. 16(1): attribution/extinction of parental responsibility by operation of law

- governed by the **law of the State of the child's habitual residence**
- requirement: **no intervention** of a judicial or administrative authority

Art. 16(2): attribution/extinction of parental responsibility by agreement/unilateral act

- governed by the **law of the State of the child's habitual residence** at the time when the agreement or unilateral act takes effect, even if it is the law of a non-Contracting State
- requirement: **no intervention** of a judicial or administrative authority

Example (1)

Answer

- When the child is born, the question as to whether the father has parental responsibility for the child is **governed by the law of the State of the habitual residence of the child**, in this case, the law of Contracting State A. The father therefore **automatically** acquires parental responsibility for the child in accordance with this law (**Art. 16(1)**).

In a nutshell

Art. 16: on the existence of parental responsibility (without the intervention of a judicial or administrative authority)

1) attribution/extinction of parental responsibility by operation of law
2) attribution/extinction of parental responsibility by agreement/unilateral act

Example (2)

A child is born in Contracting State A where **both unmarried parents** have parental responsibility for the child **by operation of law**.

The mother moves with the child to **Contracting State B** where the law provides that an unmarried father can only acquire parental responsibility **by court order**.

Question: has the unmarried father the parental responsibility after moving in State B?

Art. 16(3): change of habitual residence

- **parental responsibility** that exists under the law of the State of the child's habitual residence **subsists after a change** of that habitual residence
- underlying principle: **continuity** in the parent-child relationship

Example (2)

Answer

The parental responsibility of the father acquired in Contracting State A by operation of law **will subsist** after the move (> principle of continuity).

Example (3)

A child is born in Contracting State A. The child's parents divorce shortly after her birth. Under the law of Contracting State A, both parents retain parental responsibility for the child after the divorce. Two years later the mother re-marries and the new couple and the child move to Contracting State B. **Contracting State B** has a rule whereby a **step-parent has parental responsibility** for his or her step-children by operation of law.

Question: who has parental responsibility rights over the child?

Art. 16(4): change of habitual residence

- the **attribution** of parental responsibility **by operation of law** to a person who **does not** already have such responsibility is governed by the **law of the State of the new habitual residence**
- underlying principle: **mutability**, in order to ensure the exercise of parental responsibility over a child in the new State

Example (3)

Answer

In this case, after the child acquires his or her habitual residence in Contracting State B, there will be **three persons** who have parental responsibility for her: her mother, father and step-father.

Example (4)

In Contracting State A a holder of parental responsibility needs the consent of all other holders of parental responsibility before he or she can arrange a ***non urgent*** **surgical procedure** for the child.

The child lived with the parents in State B, where no **consent** is needed in similar situations, before moving to State A where they are living since one year and half.

Question: does the mother need the consent of the holders of parental responsibility?

Art. 17: exercise of parental responsibility

- governed by the **law of the State of the child's habitual residence**, **even in case of its change**
- underlying principle: **mutability**, with the consequence that the holder of parental responsibility under the law of the State of former habitual residence retains such right, but he/she shall exercise it under the conditions provided by the law of the State of the new habitual residence

Example (4)
Answer

- If the child is now habitually resident in Contracting State A, such **consent is *necessary*** even if the child was previously habitually resident in Contracting State B where the parental responsibility in respect of the child was originally attributed and where there was no such requirement (Art. 17).

In a nutshell

- **Art. 16: attribution/extinction of parental responsibility**

  (without the intervention of a judicial or administrative authority)

  Change of habitual residence: continuity/mutability

- **Art. 17: exercise of parental responsibility**

  (without the intervention of a judicial or administrative authority)

  Change of habitual residence: mutability

  = the law of the new State applies to the exercise of parental responsibility (e.g. consent of the other parent; conditions (periods) of the exercise of access rights)

Art. 18: termination of PR and modification of condition of the exercise of PR

- This Art. refers to the **PR rights conferred by operation of law** or **by agreement/unilateral act** without authority (Art. 16)
- The PR rights may be **terminated or modified by measures taken under this Convention**, that means under Art. 15 = in application of the *lex fori* by the judicial (or administrative) authority (which has jurisdiction under the Convention/i.e. Regulation).

Other provisions and issues

Art. 19: protection of third parties

- the validity of a **transaction** entered into **between a third party and another person** who would be entitled to act as the **child's legal representative** under the law of the State where the transaction was concluded **cannot be contested**, and the third party cannot be held liable, on the **sole ground** that the other person was **not entitled to act** as the child's legal representative under the law designated by the provisions of the Convention

Art. 20: universal character

- the rules concerning applicable law are of **universal application**, meaning that the designated law may even be the law of a **non-Contracting State**
- **only** when parental responsibility is attributed or extinguished **without a judicial or administrative authority being involved** (i.e. Art. 16), as the principle of coincidence between *forum* and *ius* would otherwise be compromised

Art. 21: *renvoi*

- **general rule**: *renvoi* is **excluded**
- **exception**: if the applicable law according to Art. 16 is that of a non-Contracting State, which designates the law of another non-Contracting State that would apply its own law, the law of the latter State applies

Art. 22: public policy

- the application of the law designated by the Convention can be **refused only** if it is **manifestly contrary to public policy**, 'taking into account the **best interests of the child**'

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Summarising conclusions

- Legal instrument governing the law applicable in intra-EU cross-border family disputes: 1996 Hague Convention
- Applicability of the Convention between Contracting States (all EU MS)
- Art. 15 of the 1996 HC (intervention of judicial/administrative authority)
- Arts. 16-18 of the 1996 HC (parties, i.e. without intervention of judicial/administrative authority)
- Art. 19-22 of the 1996 HC: other provisions on the law applicable

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The project is co-funded by the Justice Programme of the European Union
JUST-JTRA-EJTR-AG-2016-763874

Law applicable to parental responsibility matters

Case study 1

FACTS

Annika (Austrian national) and Alberto (Italian national) got married in Italy in 2010, and since then, have been habitually residing in Milan (Italy).

They had a son, Alexander (Austrian and Italian national), born in Italy in 2011 and habitually resident with them. According to the Italian law, both parents hold parental responsibility over the child from his/her birth and they exercise it jointly taking into account his/her capabilities, attitudes and desires (cp. Article 316 of the Italian Civil Code).

Their marriage started to break down.

On 15 September 2016, Annika filed for separation and custody of the child before the Tribunal of Milan. She further pleaded for the award of the family home in her favour.

Alberto wants to enter an appearance before the court and seeks legal counsel especially on how to address the custody issue.

Related questions

1) Has the Tribunal of Milan jurisdiction over the parental responsibility claims?

2) Which legal instrument regulates the law applicable to these claims?

3) Which Article is applicable? Which is the substantive law applicable to the claims?

VARIATION No. 1

On 15 June 2017, the Tribunal of Milan issued its decision, declaring the separation and granting to both parents the joint custody of the child (which, under Italian law, is the ordinary custody regime following the parents' separation or divorce, while the sole custody should be granted only upon certain conditions). Alexander should be placed with the mother Annika, who was also awarded the Milan family home where she was supposed to live with the child. Further, the father Alberto was granted the rights of access to the child to be exercised according to a specific schedule (on Saturdays and Sundays, Alexander would be staying with him).

After some months, Annika was planning to relocate to Austria with Alexander, and spent several holidays in Austria in her family home (together with Alexander) in order to arrange the practicalities (e.g. the home, the child's enrolment in school, healthcare). The relocation was supposed to take place as of September 2018, so Alexander could have started school in Austria.

Alberto objected to the relocation.

On 3 September 2018, Annika lodged an application before the Tribunal of Milan, seeking permission to relocate.

Alberto seeks legal counsel to appear before the court, contest Annika's application and claim a modification of his rights of access (an additional weekday, besides Saturdays and Sundays).

Related questions

4) Has the Tribunal of Milan jurisdiction over the application for the permission to relocate and the modification of the rights of access?

5) Which legal instrument regulates the law applicable to these claims?

6) Which Article is applicable to the application for the permission to relocate? Which is the substantive law applicable to this claim?

7) Which Article is applicable to the modification of the rights of access? Which is the substantive law applicable to this claim?

VARIATION No. 2

After a year since the decision of the Tribunal of Milan (issued on 15 June 2017), Annika relocated to Austria with Alexander. They started to build their new life there.

After some months, for business reasons Alberto could no longer travel each week to and from Austria, and thus was not able to effectively exercise his rights of access.

He seeks legal counsel to seise the local court in Austria, asking for a modification of his rights of access as regulated in the decision issued by the Tribunal of Milan (three days every other week, instead of Saturdays and Sundays).

Related questions

8) Has the Austrian court jurisdiction over the application for the modification of the rights of access?

9) Which legal instrument regulates the law applicable to this claim?

10) Which Article is applicable? Which is the substantive law applicable to the claim?

LEGAL INSTRUMENT(S) TO BE APPLIED

Regulation No. 2201/2003

1996 Hague Convention

Questions with guidelines

1) Has the Tribunal of Milan jurisdiction over the parental responsibility claims?

The Italian jurisdiction over the child's custody claim is grounded on Article 8 of Brussels IIa Regulation (the child, Alexander, has been habitually residing in Italy since his birth).

Likewise, the award of the family home should be considered as a measure of protection towards children, therefore subject to the same private international law regime. The Tribunal of Milan can ground its jurisdiction over this further claim pursuant to Article 8 of Brussels IIa Regulation.

Possible issues to be discussed:

- Could the award of the family home be further considered for the purposes of the determination of a maintenance allowance in favour of the child? In this case, would it be qualified as a maintenance obligation from a private international law perspective?

In the Italian practice, the child's custody or the parent's cohabitation with the child are a necessary pre-requisite for the award of the family home, which is consequently a measure of protection towards children: see, e.g., Cassazione civile, sez. I, judgment of 12 October 2018, no 25604.

Are there any examples from other Member States' practice?

2) Which legal instrument regulates the law applicable to these claims?

The law applicable to parental responsibility claims shall be determined on the basis of the 1996 Hague Convention. In this regard, whenever the States involved are EU Member States (in this case, Italy and Austria), the preliminary question as to whether the States involved are Contracting States to the Convention always finds an answer in the positive (all EU Member States are Contracting States thereto).

3) Which Article is applicable? Which is the substantive law applicable to the claims?

Article 15(1) of the 1996 Hague Convention is the relevant provision, because the measures of protection are taken by a judicial authority. According to this provision, the judicial authority shall apply its own law, which is the Italian law in this case.

As a result, the Tribunal of Milan shall rule on both the child's custody and the award of the family home applying the Italian substantive law.

4) **Has the Tribunal of Milan jurisdiction over the application for the permission to relocate and the modification of the rights of access?**

The Italian jurisdiction over both parental responsibility claims is grounded on Article 8 of Brussels IIa Regulation (the child Alexander is still habitually resident in Italy at the time the court is seised).

5) **Which legal instrument regulates the law applicable to these claims?**

The law applicable to both parental responsibility claims shall be determined on the basis of the 1996 Hague Convention. In this regard, whenever the States involved are EU Member States (in this case, Italy and Austria), the preliminary question as to whether the States involved are Contracting States to the Convention always finds an answer in the positive (all EU Member States are Contracting States thereto).

6) **Which Article is applicable to the application for the permission to relocate? Which is the substantive law applicable to this claim?**

As to the permission to relocate sought by the mother Annika, Article 15(1) of the 1996 Hague Convention is the relevant provision, because the measure of protection is taken by a judicial authority. According to this provision, the Tribunal of Milan shall apply its own law, which is the Italian law in this case.

7) **Which Article is applicable to the modification of the rights of access? Which is the substantive law applicable to this claim?**

Regarding the modification of the rights of access, a different reasoning could be made, given that the decision to be issued will modify the regulation of the rights of access following the relocation of Annika and Alexander to Austria.

Even though the applicable law is the Italian law pursuant to the general rule of Article 15(1) of the 1996 Hague Convention, the Tribunal of Milan may be entitled under Article 15(2) of the same Convention to take into consideration the Austrian law with a view to framing the decision according to the regime in which it will have effect. This appears to be in the child's best interests, as he will indeed relocate to Austria with the mother.

8) **Has the Austrian court jurisdiction over the application for the modification of the rights of access?**

The Austrian jurisdiction over the parental responsibility claim is grounded on Article 8 of Brussels IIa Regulation (Alexander had acquired his habitual residence in Austria at the time the court is seised).

9) **Which legal instrument regulates the law applicable to this claim?**

The law applicable to the parental responsibility claim shall be determined on the basis of the 1996 Hague Convention. In this regard, whenever the States involved are EU

Member States (in this case, Italy and Austria), the preliminary question as to whether the States involved are Contracting States to the Convention always finds an answer in the positive (all EU Member States are Contracting States thereto).

10) Which Article is applicable? Which is the substantive law applicable to the claim?

Under Article 15(3) of the 1996 Hague Convention, the change of habitual residence will leave subsisting the measure of protection (in this case, rights of access) already taken in respect of the child. Its conditions of application are, however, governed by the law of the State of the new habitual residence, that is the Austrian law.

As a result, the Austrian court will rule on the modification of the rights of access granted to Alberto by applying its own law pursuant to Article 15(1) of the Convention.

The project is co-funded by the Justice Programme of the European Union
JUST-JTRA-EJTR-AG-2016-763874

Law applicable to parental responsibility matters

Case study 2

FACTS

Annika (Austrian national) and Alberto (Italian national) got married in Italy in 2010, and since then, have been habitually residing in Milan (Italy).

They had a son, Alexander (Austrian and Italian national), born in Italy in 2011 and habitually resident with them. According to the Italian law, both parents hold parental responsibility over the child from his/her birth and they exercise it jointly taking into account his/her capabilities, attitudes and desires (cp. Article 316 of the Italian Civil Code).

Since January 2017, Alberto has been regularly travelling to China for business reasons, spending also several consecutive weeks abroad. The relationship between him and Alexander progressively loosened, and as of September 2017 Alberto left the family home and had no more contacts with his family in Italy.

On 3 September 2018 Annika lodged an application before the Tribunal of Milan, seeking revocation of the father's parental responsibility.

Alberto failed to enter an appearance before the court.

Related questions

1) Has the Tribunal of Milan jurisdiction over the application for the revocation of the parental responsibility?
2) Which legal instrument regulates the law applicable to the claim?
3) Can the judicial authority terminate the father's parental responsibility attributed by operation of law?
4) Which Article is applicable? Which is the substantive law applicable to the claim?

LEGAL INSTRUMENT(S) TO BE APPLIED

Regulation No. 2201/2003

1996 Hague Convention

Questions with guidelines

1) **Has the Tribunal of Milan jurisdiction over the application for the revocation of the parental responsibility?**

The Italian jurisdiction over the parental responsibility claim is grounded on Article 8 of Brussels IIa Regulation (the child, Alexander, has been habitually residing in Italy since his birth).

2) **Which legal instrument regulates the law applicable to the claim?**

The law applicable to the parental responsibility claim shall be determined on the basis of the 1996 Hague Convention. In this regard, whenever the States involved are EU Member States (in this case, Italy and Austria), the preliminary question as to whether the States involved are Contracting States to the Convention always finds an answer in the positive (all EU Member States are Contracting States thereto).

3) **Can the judicial authority terminate the parental responsibility of the father attributed by operation of law?**

Under Article 18 of the 1996 Hague Convention, the parental responsibility attributed by operation of law may be terminated by measures taken under the Convention. Therefore, the fact that the parental responsibility was attributed by operation of law does not prevent a judicial (or administrative) authority (in this case, the Tribunal of Milan) from taking the necessary measures of protection to terminate parental responsibility.

4) **Which Article is applicable? Which is the substantive law applicable to the claim?**

As a result of Article 18 of the 1996 Hague Convention, the Tribunal of Milan will rule on the revocation of the father's parental responsibility by applying its own law (i.e. the Italian law) pursuant to Article 15(1) of the Convention.

Recognition and enforcement of decisions in parental responsibilities matters

Contents

- Recognition and enforceability

(parental responsibility decisions – *not in child abduction cases*)

  - ➢Interplay of legal sources
  - ➢Brussels IIa Regulation: (Non) exequatur; Procedure and documents; possibility to challenge.
- Enforcement
- Role of Central Authorities

Interplay of legal sources

- EU Regulation 2201/2003 (Brussels IIa)
- Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children
- Multilateral and bilateral treaties
- National law

Brussels IIa Reg. - Recognition and enforcement of parental responsibility decisions

- Principle of mutual trust
  - No review of jurisdiction
  - No review of substance
- *De minimis* rule regarding grounds for non-recognition
- Enforceability of an instrument in the Member State of origin = "judgment" for the purpose of the application of the rules on recognition and enforcement.
- The certificate issued to facilitate enforcement of the judgment should not be subject to appeal, but can only be rectified where it does not correctly reflect the judgment.
- Cooperation of Central authorities both in general matter and in specific cases

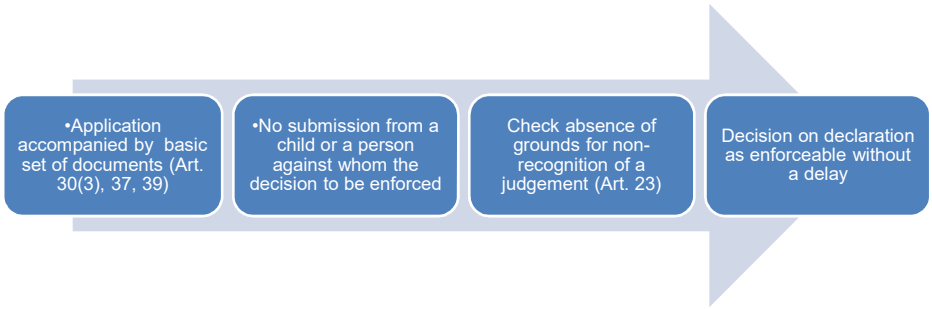
Principle of mutual trust
(Non) Exequatur

- **Art. 21 Automatic recognition of judgments**

- Enforceability of judgments
- on the **exercise of parental responsibility** in respect of a child - upon declaration as enforceable

- On the **right of access** to a child – upon presentation of a certificate issued by the judge in the Member State of origin

Judgments on exercise of parental responsibility - Exequatur



- Jurisdiction
- Address for service within the area of the court
- National procedure rules

Grounds for non-recognition of a judgement (Art. 23) - I

- The child was not heard (except for cases of urgency), and it violates fundamental principles of procedure in the EU Member State of enforcement;
- Any person having parental responsibility was not heard (and such person claims his or her rights);
- Given in default of appearance of the respondent, him/her being unaware of initiation of proceedings and not being able to arrange for the defence, unless the respondent has accepted the judgment unequivocally;

Grounds for non-recognition of a judgement (Art. 23) - II

- manifestly contrary to the public policy of the EU State of enforcement (and against best interest of the child);
- irreconcilable with a later judgment given in the Member State of enforcement or another EU/non-EU State of the habitual residence of the child provided that such judgment qualifies for recognition in the Member State of enforcement
- the procedure of consultation between CA is not followed before placement of a child in another MS (Art. 56)

Appeal (Art. 33-34)

- Appeal period is 1 or 2 months as of service of notice on enforceability of the judgement.
- Mandatory presence at the hearing.

Rights of access - Non exequatur (Art. 41)

- **Certificate** concerning rights of access issued by the judge in the MS of origin (issued *ex officio* in cross-border cases)
- **No** declaration of enforceability
- **No** possibility to oppose recognition or issuance of the certificate

Enforcement (Arts. 41, 45, 47-48)

- Documents to be delivered:

1) Certificate
2) Copy of the judgement
3) Translation of the certificate point 12 (relating to the arrangements for exercising right of access)

- Procedural rules of the state of enforcement apply
- Practical arrangements by a court in the MS of enforcement

Central Authorities and Legal Aid

Art. 55 (b): provide information and assistance to holders of parental responsibility seeking the recognition and enforcement of decisions on their territory, in particular concerning rights of access and the return of the child.

Art. 55(e): facilitate agreement between holders of parental responsibility through mediation or other means, and facilitate cross-border cooperation to this end.

Art. 57: legal aid in enforcement of the judgements regarding parental responsibilities.

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

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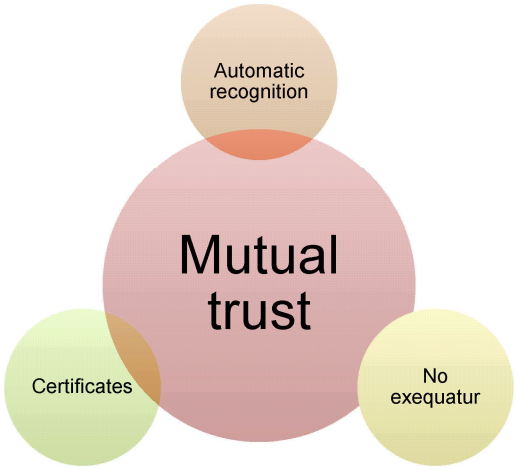
Summarising conclusions



The project is co-funded by the Justice Programme of the European Union
JUST-JTRA-EJTR-AG-2016-763874

Recognition and enforcement of decisions in parental responsibilities matters

Case study 1

FACTS

Nora and Valentin, both nationals of Hungary, got married in 2008. Their family installed in Pécs, hometown of both. For few years they enjoyed happy couple life, and in 2010 their daughter Sofia was born. In 2012, family was happy to greet little baby boy Andris, Sofia's brother. Already at that time, Nora and Valentin have been going through a tough period in their relationship. In 2014, they got divorced by the court decision, which inter alia, stated that Nora would keep custody over both children, and Valentin would have the right to take children every other weekend, first four weeks of school summer leave, and have kids spending with him either Christmas or Easter holidays, switching each year. Valentin also undertook to pay monthly maintenance of 200 EUR for each child.

Valentin visited Sofia and Andris from time to time, but due to difficulties of employment, he did not pay alimony on a regular basis. In such circumstances, Nora had to take care of children and ensure their welfare solely, often working extra hours. In June 2016, Nora contacted Valentin (who by that time had already moved to London looking for better employment opportunities), informing about certain of her health issues and asked to take children to stay with him. She also unrolled Sofia from school and Andris from nursery.

By Christmas time, Nora asked for her kids to be returned, however Valentin refused, stating that Nora herself gave away children to him, however Nora denied that, and said that her intention was to ask Valentin to take care of Sofia and Andris only during her recovery period, and she never intended to pass on custody to Valentin. She also reminded of the court order still valid, stating her right of the custody over their children. Valentin did not agree, and eventually, stopped communicating with Nora.

Nora applied to Central Authority of Hungary asking for assistance in getting her children back.

Related questions

1) Can Nora enforce in England the court decision confirming her custody rights? If yes, then what legal instrument is applicable? How would your answer change if Valentin moved with children Sofia and Adris not to the United Kingdom, but to Switzerland or Germany?
2) Which documents does Nora need and where she must submit them?
3) What will be the procedure for recognising and declaring as enforceable the Hungarian court decision?

4) How can Valentin defend against enforcement of the Hungarian court decision? What might be legal ground for such legal defence? Would it be able for Valentin to apply in England pleading for non-recognition or non-enforcement of the Hungarian court decision? Why?
5) If the appeal is possible, then to what court should Valentin appeal?
6) How can Central Authorities be helpful in this case?

LEGAL INSTRUMENT(S) TO BE APPLIED

Regulation No 2201/2003 (Brussels IIa)

Questions with guidelines

1) **Can Nora enforce in England the court decision confirming her custody rights? If yes, then what legal instrument is applicable? How would your answer change if Valentin moved with children Sofia and Adris not to the United Kingdom, but to Switzerland or Germany?**

Yes, for so long as the UK is in the EU, Regulation Brussels IIa shall apply.

You can also discuss Brexit issues here.

If the court decision should be enforced in Switzerland, the 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children would apply.

2) **Which documents does Nora need and where she must submit them?**

This is a custody rights case, therefore Nora has to follow rules of exequatur under the Regulation Brussels IIa. See See Art. 37-39 of the Regulation Brussels IIa for deliverables.

Art. 28(2) provides a specific rule of court decision registration, where such has to be enforced in a relevant part of the UK.

3) **What will be the procedure for recognising and declaring as enforceable the Hungarian court decision?**

See articles 30-32 of the Regulation Brussels IIa. Participants can be invited to share their experience on real cases, and share how procedure of declaration as enforceable works in their home jurisdictions, what is the average length of such proceedings, do courts require translations, or dispense with production of, eg. Court certificate, if such is not delivered, etc.

4) **How can Valentin defend against enforcement of the Hungarian court decision? What might be legal ground for such legal defence? Would it be able for Valentin to apply in England pleading for non-recognition or non-enforcement of the Hungarian court decision? Why?**

See article 31, stating that the court will give its decision on enforceability without delay, and no submissions are possible from the defendant or the child. However, the court may refuse to declare as enforceable basing on the grounds provided in the Art. 22-24. Discuss whether any of such grounds could work for Valentin. Again, participants can be encouraged to share their experience and knowledge from national case law.

Participants can be invited to discuss: if Valentin pleads for non-recognition, can he rely on the best interest of the child as public policy claiming that children are already settled in the UK, and their return to mother would traumatize them?

5) If the appeal is possible, then to what court should Valentin appeal?

See article 33. Participants can be guided to the e-Justice Portal (https://e-justice.europa.eu/content_matrimonial_matters_and_matters_of_parental_responsibility-377-en.do?clang=en) and be introduced to available tools, including competent courts for the purpose of the Brussles IIa Regulation.

Possible issue to be discussed: the Brussels IIa Regulation provides the time-limit within which the appeal should be lodged. Is it the same as the time-limit for lodging an appeal under national law?

6) How can Central Authorities be helpful in this case?

See article 55 for Central Authorities' functions. Participants can share their experience in this regard, how does mediation or agreement facilitation work in their home jurisdictions, what is the duration of child custody cases in their States, what is their experience of cooperation with Central Authorities of their and possibly other States, etc.

The project is co-funded by the Justice Programme of the European Union
JUST-JTRA-EJTR-AG-2016-763874

Recognition and enforcement of decisions in parental responsibilities matters

Case study 2

FACTS

Adrian and Daniela, both Bulgarian nationals, met in 2007 in Germany, where they both had left for working. Their romance developed quickly, Daniela got pregnant, and they came back to Bulgaria in the end of 2008. They got married in Bulgaria, and couple months after their daughter Isabella was born. Soon all together went back to Germany, where they continued to live as a family until their final break up in 2014. Adrian went back to Bulgaria where he initiated divorce proceedings, eventually resulting in court decision, delivered in 2016, declaring divorce of Adrian and Daniela and granting full custody rights over Isabella to her father, Adrian.

Related questions

1) Can Adrian enforce in Germany the court decision confirming his custody rights? If yes, then what legal instrument is applicable?
2) Which documents does Adrian need and where must he submit them?
3) What will be the procedure for recognising and declaring as enforceable the Bulgarian court decision?
4) How can Daniela defend against enforcement of the Bulgarian court decision? What might be legal ground for such legal defence?
5) If the appeal is possible, then to what court could any party appeal?
6) How can Central Authorities be helpful in this case?

VARIATION No. 1

Suppose that initially in divorce proceedings, Adrian requested contact rights, obliging Daniela to travel to Bulgaria twice a year to handle over Isabella to her father. Daniela was represented in the case by a Bulgarian lawyer. Divorce proceedings developed quite quickly. As spouses did not have any property to divide, the court took only one hearing, at which Adrian changed his mind and instead of contact right requested for full custody over Isabella. The court granted such full custody right to Adrian.

Related question

7) How can Daniela defend against enforcement of the Bulgarian court decision? What might be legal ground for such legal defence?

VARIATION No. 2

Suppose that divorce proceedings terminated by Adrian and Daniela making divorce settlement, leaving full custody of Isabella with her mother, Daniela, and Adrian having the right of contact: videocalls with Isabella at least twice a week, on Wednesday, and Saturday (or other weekdays, if the calls did not take place at prescribed time), spend with Isabella one week of her school leave of each Autumn and Spring vacations, and first three weeks of her summer school leave, and to take his daughter for Christmas in 2017 and then every other year. The settlement obliged Daniela to ensure conformity with this schedule, by making Isabella available for all contacts with her father, as prescribed, and stated that in case of violation of father's right to contact with the child, the mother would pay 100 EUR fine for each fact of violation, plus 50 EUR fine for each day of delay to allow for Adrian's and Isabella's contact.

For the first half a year all went smoothly, Isabella and Adrian regularly spoke on Skype, often on other weekdays than as prescribed by court settlement, and Adrian and Isabella spent one week of Spring holidays together. When summer came, Adrian got his three weeks with Isabella two weeks later than had been scheduled in the court settlement. However, his patience ran out when Daniela refused that Adrian takes Isabella for Christmas in 2017. Adrian decided he needed to enforce the court settlement.

Related questions

8) Can Adrian enforce in Germany the court decision confirming his visiting rights? Could Daniela defend against enforcement of the Bulgarian court decision? If yes, on what grounds?
9) Which legal instrument will apply to recognition and enforcement of the penalty provisions for non-conforming with Daniela's obligation to ensure for Adrian contact with his daughter?

VARIATION No. 3

Suppose that the dispute regarding access rights to Isabella was between Daniela and Adrian's parents, grandparents to Isabella, and the court judgement establishes grandparents' visiting rights.

Related question

10) What are the legal instruments applicable to recognition and enforcement of court judgement in such case?

LEGAL INSTRUMENT(S) TO BE APPLIED

Regulation No 2201/2003 (Brussels IIa)

National Law

Questions with guidelines

1) **Can Adrian enforce in Germany the court decision confirming his custody rights? If yes, then what legal instrument is applicable?**

Yes, as both Hungary and Germany are the EU member States, and therefore Regulation No 2201/2003 (Brussels IIa) applies to recognition and enforcement of the court decision.

2) **Which documents does Adrian need and where must he submit them?**

See Art. 37-39 of the Regulation Brussels IIa for deliverables. In Variation No. 1 you will discuss the aspect of awareness of the court, hence short and clear basic answer here would suffice to verify participants' understanding of deliverables' set.

See. Art. 28(1) and 29, for competent court to which application for declaration of enforceability shall be submitted.

3) **What will be the procedure for recognising and declaring as enforceable the Bulgarian court decision?**

See articles 30-32 of the Regulation Brussels IIa. Participants can be invited to share their experience on real cases, and share how procedure of declaration as enforceable works in their home jurisdictions, what is the average length of such proceedings, do courts require translations, or dispense with production of, eg. Court certificate, if such is not delivered, etc.

4) **How can Daniela defend against enforcement of the Bulgarian court decision? What might be legal ground for such legal defence?**

See article 31, stating that the court will give its decision on enforceability without delay, and no submissions are possible from the defendant or the child. However, the court may refuse to declare as enforceable basing on the grounds provided in the Art. 22-24. Discuss whether any of such grounds could work for Daniela.

Again, participants can be encouraged to share their experience and knowledge from national case law.

5) **If the appeal is possible, then to what court could any party appeal?**

See article 33. Participants can be guided to the e-Justice Portal (https://e-justice.europa.eu/content_matrimonial_matters_and_matters_of_parental_responsibility-377-en.do?clang=en) and be introduced to available tools, including competent courts for the purpose of the Regulation Brussles IIa.

NB, the Regulation Brussels IIa provides the time-limit within which the appeal should be lodged. Is it the same as the time-limit for lodging an appeal under national law?

6) **How can Central Authorities be helpful in this case?**

See article 55 for Central Authorities' functions.

Participants can share their experience in this regard, how does mediation or agreement facilitation work in their home jurisdictions, etc.

7) **How can Daniela defend against enforcement of the Bulgarian court decision? What might be legal ground for such legal defence?**

Possible issue to be discussed: can such situation be regarded as a court decision given in default? Does the fact that Daniela was actually aware of the court proceedings but did not attend the only hearing personally, and appointed a lawyer to represent her in front of the court, confirm that the court decision was not given in her default?

Although all EU member states are also participants to ECHR, and are bound by art. 6 of the ECHR guaranteeing the right to be heard and a fair trial, it is however true that on a case by case basis the case law in different states is very different in regards to whether the person was actually heard. For instance, in the UK, it is quite likely that the court would regard such situation as Daniela "not being heard" (as an example, see you can consult case of English court *Casey v Cervi [2017] EWHC 1669 (Fam),* where the judge regarded similar situation as mother not being heard).

Participants from different Member States can be invited to share their experience and opinion in regards to their home jurisdictions' national rules and also case law.

8) **Can Adrian enforce in Germany the court decision confirming his visiting rights? Could Daniela defend against enforcement of the Bulgarian court decision? If yes, on what grounds?**

Yes, as divorce settlement in terms of the Regulation Brussels IIa is a judgment. In accordance with the Article 41, the court of origin will issue court certificate in the form as provided in Annex III, no requirement for exequatur. The Regulation does not provide any additional rights to oppose the certificate, thus the only possible recourses could be either (a) review of the existing divorce settlement provisions (as long as there is legal and factual ground for such under applicable substantive law), or (b) any rights that Daniela may have under applicable national enforcement rules. Although Regulation is straight forward in this regard, the reality in family law cases is quite different and more complicated.

Participants can be offered to share their experience and national case law.

9) **Which legal instrument will apply to recognition and enforcement of the penalty provisions for non-conforming with Daniela's obligation to ensure for Adrian contact with his daughter?**

See case CJEU 9.09.2015, C-4/14, *Bohez* v *Wiertz*: “Recovery of a penalty payment — a penalty which the court of the Member State of origin that gave judgment on the merits with regard to rights of access has imposed in order to ensure the effectiveness of those rights — forms part of the same scheme of enforcement as the judgment concerning the rights of access that the penalty safeguards and the latter must therefore be declared enforceable in accordance with the rules laid down by Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000”.

10) What are the legal instruments applicable to recognition and enforcement of court judgement in such case?

In case access rights granted to grandparents, see case CJEU 31.05.2018, C-335/17, *Valcheva* v *Babanarakis*: “The concept of ‘rights of access’ referred to in Article 1(2)(a) and in Article 2.7 and 2.10 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, must be interpreted as including rights of access of grandparents to their grandchildren”.

INTERNATIONAL CHILD ABDUCTION

Presentations and case studies

- **International child abduction: general overview**
  drafted by Prof Anabela Gonçalves (UMINHO, asgoncalves@direito.uminho.pt)

- **International child abduction: return proceedings and exceptions to return**
  drafted by Dr Agne Limante (TEISE, agne.limante@gmail.com)

- **International child abduction in Brussels IIa Regulations (Arts 10-11)**
  drafted by Prof Anabela Gonçalves (UMINHO, asgoncalves@direito.uminho.pt)

- **Recognition and enforcement of decisions on international child abduction**
  drafted by Prof Costanza Honorati (UNIMIB, costanza.honorati@unimib.it) and Dr Sara Bernasconi (UNIMIB, sara.bernasconi@unimib.it)

International child abduction: general overview

Contents

- International child abduction
- Relevant legal texts
- Objectives of the Hague Convention
- The scope of application of the Hague Convention
- Central Authorities
- The Hague Convention System
- Grounds for the decision of retention
- Summarising conclusions

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International child abduction

European Court of Human Rights (ECtHR):

- Case *Ignaccolo-Zenide v. Romania*, App. No. 31679/96.
- Case *Bianchi v. Switzerland*, App. No. 7548/04.
- Case *Susanne Paradis and Others against Germany*, App. No. 4065/04.

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International child abduction

Court of Justice of the European Union (CJEU):

CJEU, 11.07.2008, C-195/08 PPU, *Rinau*

CJEU, 1.07.2010, C-211/10 PPU, *Povse*

CJEU, 9.10.2014, C-376/14 PPU, *C* c. *M*

CJEU, 9.01.2015, C-498/14 PPU, *Bradbrooke*

Relevant legal texts

- **Regulation 2201/2003** concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation 1347/2000 (Brussels IIa Regulation).
- **Hague Convention of 25 October 1980** on the civil aspects of international child abduction (Hague Convention).

Relevant legal texts

Article 60 BIIa Reg.

Relations with certain multilateral conventions

In relations between Member States, this Regulation shall take precedence over the following Conventions in so far as they concern matters governed by this Regulation:

(e) the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

Relevant legal texts

- when a child is abducted from one **EU Member** State to another, the Hague Convention applies, but is complemented by the Brussels IIa Regulation;
- when a child is abducted from a Hague Convention Contracting State **3rd State** to the EU to an EU Member State, or from an EU Member State to a Hague Convention Contracting State 3rd State to the EU, the Hague Convention applies.

Objectives of the Hague Convention

«**Article 1**

The objects of the present Convention are

a) to secure the **prompt return** of children wrongfully removed to or retained in any Contracting State; and

b) to ensure that **rights of custody and of access** under the law of one Contracting State are effectively **respected** in the other Contracting States».

Scope of application of the Hague Convention

Article 3

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

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

Scope of application of the Hague Convention

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 **rights of custody** mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Scope of application of the Hague Convention

Article 5

For the purposes of this Convention

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

b) "**rights of access**" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence

Scope of application of the Hague Convention

- The Hague Convention applies to **children habitually resident in a Contracting State** before the breach of the right of custody or access and its application ceases when the child reaches the **age of 16** (**Article 4**).
- The Hague Convention has 100 contracting States: all EU Member States, Brazil, Argentina, Australia, Canada, Chile, Japan, Paraguay, Switzerland, United States of America, China, Russia (update Oct. 2019)

Central Authorities

Functions of the central authority:

- to locate the child;
- to prevent further damage to the child or to the parties concerned by the promotion of precautionary measures;
- to seek a friendly solution or voluntary return of the child;
- if it is useful, to exchange information on the social situation of the child;
- to exchange information about the law of their State within the scope of the Convention;

Central Authorities

- if necessary to obtain a return decision, it shall initiate or facilitate the opening of judicial or administrative proceedings for that purpose;
- to facilitate or advise legal aid;
- to guarantee the safe return of the child, taking all necessary administrative measures;
- to exchange information with the other central authorities to remove obstacles to the implementation of the Convention.

Central Authorities

Article 55 Brussels IIa

Cooperation on cases specific to parental responsibility

The central authorities shall, upon request from a central authority of another Member State or from a holder of parental responsibility, cooperate on specific cases to achieve the purposes of this Regulation. To this end, they shall, acting directly or through public authorities or other bodies, take all appropriate steps in accordance with the law of that Member State in matters of personal data protection to:

(a) collect and exchange information:

(i) on the situation of the child;

(ii) on any procedures under way; or

(iii) on decisions taken concerning the child;

Central Authorities

Article 55 Brussels IIa

(b) provide information and assistance to holders of parental responsibility seeking the recognition and enforcement of decisions on their territory, in particular concerning rights of access and the return of the child;

(c) facilitate communications between courts, in particular for the application of Article 11(6) and (7) and Article 15;

(d) provide such information and assistance as is needed by courts to apply Article 56; and

(e) facilitate agreement between holders of parental responsibility through mediation or other means, and facilitate cross-border cooperation to this end

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Central Authorities

- https://e-justice.europa.eu/content_matrimonial_matters_and_matters_of_parental_responsibility-377-pt-en.do?member=1

- https://www.hcch.net/en/instruments/conventions/authorities1/?cid=24

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Hague Convention System

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the **return of the child**.

The **application** shall contain -

a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;

b) where available, the date of birth of the child;

c) the grounds on which the applicant's claim for return of the child is based;

d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

Hague Convention System

The application may be accompanied or supplemented by -

e) an authenticated copy of any relevant decision or agreement;

f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;

g) any other relevant document.

Hague Convention System

Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the **child is in another Contracting State**, it shall directly and without delay **transmit** the **application** to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Hague Convention System

Article 10

The Central Authority of the State where the child is shall take or cause to be taken all **appropriate measures** in order to obtain the voluntary return of the child.

Hague Convention System

Article 11

The judicial or administrative authorities of Contracting States shall **act expeditiously in proceedings** for the return of children.

If the judicial or administrative authority concerned has not reached a decision **within six weeks** from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Hague Convention System

Article 14

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

Hague Convention System

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a **period of less than one year has elapsed from the date of the wrongful removal or retention**, the authority concerned shall order the **return** of the child forthwith.

Hague Convention System

(Article 12)

The judicial or administrative authority, even where the **proceedings** have been **commenced after the expiration of the period of one year** referred to in the preceding paragraph, shall also order the **return** of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Hague Convention System

Grounds for the decision of retention:

1. The child has been abducted more than a year earlier and has become settled in his or her new environment (Article 12, Section 2).
2. The person requesting the return has not actually exercised his or her rights of custody at the time of the removal or retention or had subsequently acquiesced in the removal or retention [Article 13, Section 1 (a)].

Hague Convention System

3. There is a grave risk that returning the child would expose him or her to psychological harm or otherwise place him or her in an intolerable situation retention [Article 13, Section 1 (b)].
4. The child objects to the return while it is appropriate to take account of his or her views, given his or her age and degree of maturity (Article 13, Section 2).
5. Returning the child is not permitted under the law of the requested State as it would be contrary to the fundamental principles (Article 20).

Hague Convention System

Two options:

- After considering the grounds of retention, the court of the abducted State orders the return of the child.
- Using one of the grounds of refusal listed in the Hague Convention, the court of the abducted State rules that the child must not return.

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Summarising conclusions

- Rapid procedure for the return of the child
- Cooperation among Central Authorities

HCCH official publications at
https://www.hcch.net/en/instruments/conventions/publications1/?dtid=3&cid=24

The project is co-funded by the Justice Programme of the European Union
JUST-JTRA-EJTR-AG-2016-763874

International child abduction: general overview

Case study

FACTS

António and Beatriz, a Brazilian couple, who live in Portugal. They have been married for 10 years and decided to move to Portugal 8 years ago.

They have a 4 years old child, Tomás, born in Portugal, that has Brazilian and Portuguese nationality.

António and Beatriz decided to get a divorce and the divorce proceedings are still pending.

Beatriz takes Tomás to visit their relatives in Brazil. António has agreed with the visit to Brazil during the summer vacation for two weeks.

Beatriz and Tomás did not return as planned. António tried to phone to Beatriz, unsuccessfully, until he gets an e-mail, on 15 September 2018, from Beatriz, where she states that she does not like Portugal, and she will stay with Tomás in Rio de Janeiro. She also states that she already rent an apartment and she is looking for a school for Tomás.

Related questions

1) What is the legal instrument applicable?

2) What can António do?

VARIATION No. 1

Consider that no amicable solution was found.

Related questions

3) What should be done?

LEGAL INSTRUMENT(S) TO BE APPLIED

Regulation No 2201/2003

1980 Hague Convention

Questions with guidelines

1) What is the legal instrument applicable?

The 1980 Hague Convention applies. The Hague Convention applies when a child is abducted from a Hague Convention Contracting Third State to an EU Member State, or from an EU Member State to a Hague Convention Contracting Third State.

Possible issues to be discussed:

- Spatial scope of the Hague Convention: Article 4: Applies to children habitually resident in a Contracting State before the breach of the right of custody or access and its application ceases when the child reaches the age of 16. Portugal and Brazil (Third State) are Contracting States of the 1980 Hague Convention.

- Scope of application of the Hague Convention: Definition of removal, retention, wrongful, custody rights. Art. 2(11) Brussels IIa Regulation and Art. 3 Hague Child Abduction Convention.

2) What can António do?

António should start proceedings in Brazil because the 1980 Hague Convention adopts the principle that the child return procedure should be started in the State where the child currently is (article 12).

However, the person claiming that the child has been abducted may apply to the Central Authority of the child´s prior habitual residence in securing the return of the child (article 8 of the HC): António can contact the Central Authority in Portugal.

Possible issues to be discussed:

- Art. 8 Hague Child Abduction Convention: the documents the applicant (António) must submit to the Central Authority and the documents the applicant (António) may submit to the Central Authority.

- The tasks of the Central Authority: Art. 7, 9 and 10 Hague Child Abduction Convention; Consideration 25 and Articles 11(6), 54 and 55 Brussels IIa Regulation.

3) What should be done?

If no amicable solution can be found The Brazilian Central Authority will assist in instituting legal proceedings for the return of the child. The Brazilian court considers the application for the return of the child. In doing so, it respects certain procedural requirements and it considers the limited number of grounds for refusal.

Possible issues to be discussed:

- Procedural possibilities: Arts. 14 and 15 Hague Child Abduction Convention.
- Grounds for refusal: Arts. 12 and 13 HC

International child abduction: return proceedings and exceptions to return

A client approaches you claiming that his child was abducted by the mother of the child to another country.

He asks your advise how to have the child back.

What are the questions you will have to find out first?

- Was there abduction?
  - Does the client have “right of custody”?
  - Were the rights of custody actually exercised?
  - Where was the child’s habitual residence?
  - Is there a court order/clients consent allowing removal?
- When removal / non-return happened?
- To which country was the child brought?
  - defines the instrument to be applied
- Has the client already applied to some institution?
- (Why did the abduction happened?)

Legal instruments to be applied

Countries involved	Instruments to be applied
Both countries are EU Member States	1980 Hague Convention and Brussels IIa Regulation
One country is EU Member State, the other – not EU Member State but party to 1980 Hague Convention	1980 Hague Convention
One country is EU Member State, the other is not party to 1980 Hague Convention	Bilateral treaty on legal assistance (if signed) and national law apply

1980 Hague Convention (HC) and Regulation Brussels 2201/2003 (BIIa)

- BIIa builds upon 1980 HC, however, it strengtens 1980 HC rules amongs Member States
- Under Article 60 of BIIa, in relations between MS Regulation is to take precedence over the 1980 HC
- Convention's scope of application is not altered - see CJEU, 5.10.2010, C-400/10 PPU, *McB*

- Regulation BIIa provides additional rules on safeguards as regards:
  - expeditious proceedings
  - mandatory hearing of the child and a left-behind parent
  - non-possibility of refusal to return a child if adequate protection measures are ensured
  - Art 11(8) overruling procedure

Where to apply in case of abduction?

- Central authorities → important assisting institutions
- Police?
- Court of State of refuge → an application to return a child (starting return proceedings under the 1980 HC)

- In addition, sometimes the court of child's HR is approached → an application for parental responsibility and custody/access.

Court of State of refuge

- Verifies if there was an abduction
- Hearing of the child and of the left-behind parent (duty under Regulation BIIa)
- Has a general duty to issue a decision to return the abducted child
- Order a return within **6 weeks**
- Checks if there are no grounds to refuse return

The essence of the order to return the abducted child

- Procedure before courts of State of refuge is **not about the future** of the child, **but about the returning** of the child to his/her original home-State so that the custody questions be decided there
- Main questions to be covered: was there abduction and is there ground to refuse return

Exceptions to return

- Art. 12(2) HC – elapse of one year + settlement
- Art. 13 (1)(a) HC – acceptance or acquiescence
- Art. 13 (1)(a) HC – lack of exercise of custody rights
- Art. 13 (1)(b) HC – grave risk of physical or psychological harm
- Art. 13 (2) HC – child opposes return
- Art.20 HC– violation of fundamental rights in the State of refuge
- (also) Art. 3 HC – lack of habitual residence in the State of origin (no abduction)

Case study

Edina (Hungarian) and Nick (British) live in Brussels. They have 3 kids: John (16), Adam (6) and Eva (2). After separation in 2016, children mostly live with the mother, however, they sometimes stay with the father.

Edina decides to move to Budapest and informs Nick about this in August 2018.

On 1st September, John starts French school, Adam and Eva are placed in Hungarian pre-school. Edina begins working.

In March 2019, Nick decides to get children back.

- 1. Can Nick start abduction proceedings? How and where this should be done?
- 2. Do we have child abduction here? What importance should be attached to the fact that the couple was not married? Were the custody rights exercised properly by the father?
- 3. Would the situation change if Nick would not start abduction proceedings until 1 September 2019? Under what conditions return could then be refused?

Question block 1: Father's consent?

Edina claims that she informed the father that she intends to leave with children and he did not object.

Almost 7 months passed since they moved to Hungary.

4. Was there father's consent to removal? How consent should be expressed?

Acceptance or acquiescence to removal – Art 13a

- Only true and unequivocal consent counts
- This does not mean that it should necessarily be expressed in a formal written document (can be inferred from the circumstances)
- The burden of proving the consent/ acquiescence rests on the party who asserts it

Question block 1: Children's integration?

Almost 7 months passed since they moved to Hungary. Edina claims that time children settled in the new environment.

Kids go to school / day care. All children considerably improved their Hungarian, have many friends and relatives here.

5. Can return be refused due to children's integration?

Would Edina have more chances to persuade the court in non-return if return proceedings would be started in October 2019?

Article 12(2) HC

Two cumulative conditions:

- Return procedure was initiated after a period of 1 year from the date the abduction took place
- Child is now settled in its new environment

Question block 1: Child objections?

6. Should the kids' opinion as to their return be heard?

- *What if John and Adam oppose return?*

Art. 13 (2) HC – child opposes return

- Hearing of the child is the duty of the court
- Age from which the child is heard varies in MS
- Child is heard, objections are considered, but they are not decisive in court's judgement

Child's opinion should be linked to the return to the State of prior residence itself, and not to the question of custody or with whom of the parents he/she prefers to stay

Question block 2: Grave risk exception?

Edina claims they separated due to the fact that the father became mean, aggressive and started abusing her. She worries that he might also be aggressive towards children. In addition, he started drinking beer in big quantities and often.

7. Could abuse of the mother and father drinking result in grave risk exception?

Also consider possible use of adequate arrangements (Article 11(4) of Regulation 2201/2003).

Grave risk exception – Art 13b

"there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation "

NB!

In the EU context, the **use of this exception is restricted by Article 11(4)** of the Regulation BIIa, which prohibits refusal on this ground where **adequate arrangements** have been made to secure the protection of the child after the return.

"adequate arrangements"

- measures guaranteeing safe temporary return
- make return (nearly) **always** possible
- focuses on how to minimize/avoid harm
- adds additional question to court's evaluation

Examples of adequate measures

- providing secure accommodation for the mother and/or for the child
- ensuring that the left-behind parent keeps away from the mother and the child
- requiring the left-behind parent to bear the costs associated with the return (or share them)
- suspending/withdrawing criminal proceedings for abduction of minor

Question block 2: Grave risk exception?

Edina also considers that due to Brexit there are almost no chances that Nick's employment with the EU will continue. As a result, neither she, nor him will have job in Brussels. She and kids are financially better in Hungary.

8. Could economic situation be linked with 'grave risk' exception?

Example: Court of Appeal of Lyon, 19 September 2011, No de RG 11/02919

Question block 3: Separation from the mother /siblings as 'intolerable situation'?

For John this will be the last year at school thus he should stay in Hungary.

Edina has to stay due to her business here and no job in Brussels.

9-11.Returning Adam and Eva would place children in 'intolerable situation' as they would need to be separated from the mother and siblings?

See, as examples:

- Schleswig Holsteinisches Oberlandesgericht, 12 UF 169/13, 08 January 2014 (INCADAT reference HC/E/DE 1410)
- *Court of Appeal of Paris, 5 July 2013, No de RG 13-11509*).
- *High Court of England and Wales, In WA (A Child) (Abduction) (Consent; Acquiescence; Grave Risk of Harm or Intolerability) [2015] EWHC 3410 (Fam)*

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Summarising conclusions

Return proceedings:

BIIa + Hague Convention

- exceptions
- adequate arrangements

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The project is co-funded by the Justice Programme of the European Union
JUST-JTRA-EJTR-AG-2016-763874

International child abduction: return proceedings and exceptions to return

Case study

FACTS

Edina is Hungarian national. Her partner William is British. The couple met in Brussels where they both worked for the EU Commission. In 2002, their first son John was born and in 2013 they welcomed their second son Adam. In 2016, the couple started living apart. However, in January 2017 their daughter Eva was born.

After separation, children mostly lived with the mother, however, they would often stay with the father over the weekends or when the mother travelled because of her work. In summer 2018, Edina's contract with the EU Commission ended, at the same time she found out that she inherited small family business in Budapest.

On 30th August 2018, Edina called William informing that she is leaving Brussels. She took all three children and all her belongings and moved to Budapest. On 1st September, John started French school there, Adam and Eva were placed in Hungarian pre-school. Edina began working with the family business and with her active personality the business blossomed.

In the beginning, the father hesitated to start abduction proceedings. But in March 2019, William turned 50 and this was a breaking point for him. William understood that children are all he has and he decided to get them back. William hires you as his lawyer. Edina opposes return.

Related questions

1) Can William start abduction proceedings? How and where this should be done?

2) Do we have child abduction here? What importance should be attached to the fact that the couple was not married? Were the custody rights exercised properly by the father?

3) Would the situation change if William would not start abduction proceedings until 1 September 2019? Under what conditions return could then be refused?

VARIATION No. 1

Question block 1: Father's consent? Integration of children? Child's objections?

Edina claims that she informed the father that she intends to leave with children, and he did not object.

Moreover, almost 7 months passed since they moved to Hungary. In that time children settled in the new environment. John goes to school, Adam and Eva attend day care, moreover, Adam was already accepted to school which he will start in September. All children considerably improved their Hungarian (in fact Eva speaks only Hungarian),

have many friends here. In addition, they have many extended family members in Budapest who have regular contacts with children.

Related questions

4) Was there father's consent to removal? How consent should be expressed?

5) Can return be refused due to children's integration? Would Edina have more chances to persuade the court in non-return if return proceedings would be started in October 2019?

6) Should the kids' opinion as to their return be heard? What if John and Adam oppose return?

VARIATION No. 2

Question block 2: Grave risk exception?

Edina claims they separated due to the fact that the father became mean, aggressive and started abusing her. She is psychologically distressed and worries that the father might also be aggressive towards the children. In addition, he started drinking beer in big quantities and often.

Edina also considers that due to Brexit there are almost no chances that William's employment with the EU will continue. As a result, neither she, nor him will have job in Brussels. In Budapest, on the other hand, family's economic situation is much better. She owns wonderful large apartment in the city centre and can afford much better extra-curriculum activities for children.

Related questions

7) Could abuse of the mother and father drinking result in grave risk exception?

8) Could economic situation be linked with 'grave risk' exception?

VARIATION No. 3

Question block 3: Grave risk exception? Separation from the mother and separation of siblings as 'intolerable situation'?

Edina argues that for John this will be the last year at school thus he should stay in Hungary. Changing school again would be very bad for his results. She also has to stay due to her business here and no job in Brussels. And returning small Adam and little Eva (she is still being breastfeed) would place children in 'intolerable situation' as they would need to be separated from her and siblings.

Related questions

9) Article 13(b) exception to be invoked?

10) How important is the possible separation from the mother?

11) How important is the possible separation of siblings here? Could this mean the application of grave risk exception?

LEGAL INSTRUMENT(S) TO BE APPLIED

Regulation No 2201/2003

1980 Hague Convention on Child Abduction

Questions with guidelines

1) **Can William start abduction proceedings? How and where this should be done?**

Yes. In Hungary.

2) **Do we have child abduction here?**

Pursuant to Article 4, the Convention ceases to apply once the child reaches age 16. This is true regardless of when return proceedings were commenced and irrespective of their status at the time of the child's sixteenth birthday. John is over 16, the others are younger. Child abduction proceeding may only be started in respect of the two younger children.

What importance should be attached to the fact that the couple was not married?

None.

Were the custody rights exercised properly by the father?

Yes. The father had indeed exercised his rights of custody, and there was long-term contact between father and children on a regular basis.

Possible issues to be discussed:

in what situations could we claim that rights of custody were not exercised properly?

3) **Would the situation change if William would not start abduction proceedings until 1 September 2019? Under what conditions return could then be refused?**

Yes, the situation would change. Under Article 12 of the 1980 Hague Convention, the request for the return of the child may be refused if: (i) from the day of abduction to the date of the commencement of the return proceedings in the State of refuge more than **one year** has passed and (ii) it is demonstrated that the child is now **settled** in its new environment.

4) **Was there father's consent to removal? How consent should be expressed?**

Under the 1980 Hague Convention, return may be refused if the left-behind parent had consented to or subsequently acquiesced in the child's removal or retention.

The fact that the father was informed is not enough. For a child to be deemed to have been taken abroad illegally, there is no requirement that this must have been done in secret (see, e.g. Schleswig Holsteinisches Oberlandesgericht, 12 UF 169/13, 08 January 2014).

In this situation, there was no evidence of the father having consented to the removal. There are strict conditions to be met to prove consent, and it is the abducting parent who bears the burden of proof for this.

In a case before the French court the question arose whether certain steps taken by the father could be seen as his acquiescence. The case concerned a Greek father and a French mother who lived in Belgium with their two children. At some point the mother decided to move to France with the kids. When she returned to Belgium to pick up some belongings, she entrusted one child to his father for one night. The next day the father returned the child to the mother at the French-Belgian border. However, he then applied to the Belgian central authorities seeking the return of both children. In the proceedings, the mother alleged that the father had acquiesced in the removal. The French court disagreed with the arguments of the mother and ordered immediate return of the children to Belgium. The court considered that the father had not acquiesced in the removal of the children. The fact that he had brought the son to the French-Belgian border in order to return him to his mother should only be seen as acting for the children's interest. (Tribunal de grande instance Lille (Lille Court of Appeal), 31 January 2008).

5) **Can return be refused due to children's integration? Would Edina have more chances to persuade the court in non-return if return proceedings would be started in October 2019?**

Integration is only relevant when more than one year since the removal passes. Under Article 12 of the 1980 Hague Convention, the request for the return of the child can also be refused if: (i) from the day of abduction to the date of the commencement of the return proceedings in the State of refuge more than **one year** has passed and (ii) it is demonstrated that the child is now **settled** in its new environment. In other words, in such a situation, acting in the interests of the child, the court in the State of refuge has a **discretionary right** to determine whether return should be granted.

6) **Should the kids' opinion as to their return be heard? What if John and Adam oppose return?**

Hearing of the child is the duty of the court. Age from which the child is heard varies in EU Member States. As John is 17, the 1980 Hague Convention does not apply to him, abduction should only be considered in respect of younger children.

If the child is heard, his/her objections are considered, but they are not decisive in court's judgement.

Possible issues to be discussed:

rules and practices of hearing of the child in different jurisdictions.

7) Could abuse of the mother and father drinking result in grave risk exception?

The 'grave risk' defence provided for in Article 13(b) of the 1980 Hague Convention is the most commonly invoked exception for objecting to the return of the child in many countries. It should, however, be **narrowly construed** by linking the evaluation of grave risk to the seriousness of the harm that the child could confront upon return. It is thus not enough that the risk be 'real'. It must have reached such a level of seriousness as to be characterized as 'grave'.

As the UK Supreme Court noted in the context of 1980 Hague Convention proceedings, although 'grave' characterizes the risk rather than the harm, there is in ordinary language a link between the two. Thus, a relatively low risk of death or of really serious injury might properly be qualified as 'grave', while a higher level of risk might be required for other less serious forms of harm (Re E (Children) [2011] UKSC 27 (UK Supreme Court)).

In this case, there is no risk of physical harm to children, however, we should consider potential risk of psychological harm. Psychological harm could be found, for example, in situations where the aggressiveness of the left behind parent is observed not towards the child itself, but towards the mother or siblings.

We should also take into account that the father regularly looked after his children alone for several hours a day/days, showing that the mother did not previously consider there to be a serious risk and making it improbable that the children were in danger in his presence.

See: HCCH draft Guide to Good Practice on Article 13(1)(b) of the Child Abduction Convention.

Also, it is necessary to consider possible use of **adequate arrangements** (Article 11(4) of Regulation 2201/2003).

In the EU context, the use of grave risk exception is restricted by Article 11(4) of the Regulation, which prohibits refusal on this ground where adequate arrangements have been made to secure the protection of the child after the return. If the court in the State of refuge contemplates denying return of the child due to a grave risk of danger, it is a prior requirement in intra-EU cases to ascertain the existence of adequate arrangements. Thus, a two-step approach should be taken. Namely, the court of refuge should (i) identify the risks associated with the return and, if the risk exists, (ii) consider whether arrangements that have been made to secure the protection of the child after the return are adequate.

8) Could economic situation be linked with 'grave risk' exception?

In principle, the existence of more favourable living conditions in the State of refuge could not be taken into consideration when evaluating the 'grave risk' exception.

The court is not to embark on a comparison between the living conditions that each parent (or each State) may offer. This may be relevant in a subsequent custody case but has no relevance to an Article 13(1)(b) analysis.

See: HCCH draft Guide to Good Practice on Article 13(1)(b) of the Child Abduction Convention.

9) Article 13(b) exception to be invoked?

10) How important is the possible separation from the mother?

A typical situation when abducting parents seek to invoke the psychological harm exception is where the separation from the primary care-giver, especially in regard of babies or very small children, could arise from the return. If the child is small, the abducting mother will often declare she will not return herself and then claim that returning the child without her would expose him/her to physical or psychological harm or otherwise place him in an intolerable situation.

However, courts need to be extremely cautious when appraising such defence. Clearly to follow such line of reasoning would give a powerful weapon in the hands of the mother and imply that a small child or a baby abducted by his/her mother will never be returned. This approach would undermine the rationale of 1980 HC on Abduction and the Regulation.

See also: HCCH draft Guide to Good Practice on Article 13(1)(b) of the Child Abduction Convention.

11) How important is the possible separation of siblings here? Could this mean the application of grave risk exception?

In some cases, a separation of siblings may be difficult and disruptive for each child. The focus of the Article 13(1)(b) analysis, however, is whether the separation would affect the child in a way and to such an extent as to constitute a grave risk upon return. This analysis must be made for each child individually, without turning into a “best interests” analysis. Consequently, the separation of the siblings resulting from the non-return of one child (regardless of the legal basis for the non-return) does not automatically result in a grave risk determination for the other child. In assessing the grave risk for each child, courts may also consider the broader factual circumstances of the case, and the strength and / or meaning of the sibling relationship.

See also: HCCH draft Guide to Good Practice on Article 13(1)(b) of the Child Abduction Convention.

In this case separation from the oldest brother, aged over 17, is not likely to constitute a risk to the younger children wellbeing. It has to be expected that a sibling of this age might move away from other siblings (e.g. in order to spend time in a foreign country or study at university). (See e.g. Schleswig Holsteinisches Oberlandesgericht, 12 UF 169/13, 08 January 2014)

International child abduction in Brussels IIa Regulation (Articles 10 and 11)

Contents

- Introduction: justification for international child abduction in Brussels IIa Regulation
- Legal notions
- Article 10
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- Article 11 and the Hague Convention
  - The decision of the court of the country of abduction
  - The priority of the court of habitual residence of the child
  - The right of the child to be heard
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Legal notions

Article 2

9. the term '**rights of custody**' shall include rights and duties relating to the care of the person of a child, and in particular the right to determine the child's place of residence;

11. the term '**wrongful removal or retention**' shall mean a child's removal or retention where:

(a) it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention; **and**

Legal notions

(b) provided that, at the time of removal or retention, the rights of custody were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Custody shall be considered to be exercised jointly when, pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility.

Article 10

- **General rule**: Article 8 - child´s habitual residence at the time the court is seized
- Article 8 is overridden by special rules, like Article 10
- **Article 10**: In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction

Article 10

The **courts** of the Member State where the **child was habitually resident** immediately before the wrongful removal or retention retain their jurisdiction 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

Article 10

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:**

(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 request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained;

Article 10

(ii) a **request for return** lodged by the holder of rights of custody has been **withdrawn** and no new request has been lodged within the time limit set in paragraph (i);

(iii) a **case** before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been **closed** pursuant to Article 11(7);

(iv) a **judgment on custody** that does not entail the return of the child has been **issued** by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention.

Article 11

Articulation with the **1980 Hague Convention** (**article 11, section 1**):

1. Where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, in order to obtain **the return** of a child that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, paragraphs 2 to 8 shall apply.

Article 11

- **Expeditious proceedings** and deadline (**Article 11, Section 3**):

3. The court shall, except where exceptional circumstances make this impossible, issue its judgment **no later than six weeks after the application is lodged**.

Decision of the **court of the country of abduction**: preferably a return decision, but may also result in a retention order.

- **Grounds** provided for in the 1980 Hague Convention.
- **Article 13 (b) of the 1980 Hague Convention**: the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that (…) there is a **grave risk** that his or her **return** would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

Article 11

4. A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that **adequate arrangements** have been made to secure the protection of the child after his or her return.

Article 11

Safeguard of the position of the person who made the request for return (Article 11, **section 5**):

5. A court cannot refuse to return a child unless the person who requested the return of the child has been given an opportunity to **be heard**.

Priority of the **court of habitual residence of the child**:

- Article 11,Section 6, 7 and 8

CJEU, 11.07.2008, C-195/08 PPU, *Rinau*

CJEU, 1.07.2010, C-211/10 PPU, *Povse*

CJEU, 9.10.2014, C-376/14 PPU, *C c. M*

CJEU, 9.01.2015, C-498/14 PPU, *Bradbrooke*

Article 11

6. If a court has issued an **order on non-return** pursuant to Article 13 of the 1980 Hague Convention, the court must immediately either directly or through its central authority, transmit a copy of the court order on non-return and of the relevant documents, in particular a transcript of the hearings before the court, **to the court with jurisdiction** or central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law. The court shall receive all the mentioned documents within one month of the date of the non-return order.

Article 11

7. Unless the **courts in the Member State where the child was habitually resident** immediately before the wrongful removal or retention have already been **seised** by one of the parties, the court or central authority that receives the information mentioned in paragraph 6 must **notify** it to the parties and **invite** them to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child.

Without prejudice to the rules on jurisdiction contained in this Regulation, the court shall close the case if no submissions have been received by the court within the time limit.

Article 11

8. Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, **any subsequent judgment** which requires the **return** of the child issued **by a court having jurisdiction** under this Regulation **shall be enforceable** in accordance with Section 4 of Chapter III below in order to secure the return of the child.

Right of the child to be heard (Article 11, section 2)

2. When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be **ensured** that the **child** is given the **opportunity to be heard** during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.

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Summarising conclusions

- Jurisdiction: Article 10
- Return: Article 11(2) to (5)
- Non return order: Article 11(6) to (7)
- Return decision: Article 11(8)

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The project is co-funded by the Justice Programme of the European Union
JUST-JTRA-EJTR-AG-2016-763874

International child abduction in Brussels IIa Regulation (Articles 10 and 11)

Case study

FACTS

António and Beatriz, a Portuguese couple, who live in Paris. The divorce proceedings are pending.

Beatriz takes their 4 years old child, Mathieu (Portuguese nationality, born in Paris), to Portugal to visit their relatives, for a short two-week vacation.

António agreed to the visit.

After two weeks, they did not return as planned.

António phones Beatriz, and she tells him that she and Mathieu are going to stay in Portugal and they are not going back to Paris.

Beatriz has started looking for an apartment and a school for Mathieu.

Related questions

1) What is the legal instrument applicable?

2) What can António do?

3) What documents should he submit?

VARIATION No. 1

The Central Authority of France contacted the Central Authority in Portugal.

The Central Authority in Portugal contacted Beatriz and attempted to establish the voluntary return of the child, with no success.

The Portuguese Central Authority assists in instituting legal proceedings for the return of the child.

Related questions

4) What should be done, taking into consideration that the Portuguese court has ruled that Mathieu must not return, because the abduction took place more than a year earlier and the child has become settled in his or her new environment (Article 12 Hague Convention)?

5) What should be done, taking into consideration that the Portuguese court has ruled that Mathieu must not return, because there is a grave risk that returning the child would expose him to physical or psychological harm, or would place him in an

intolerable situation, while no adequate measures to protect the child have been taken in the State to which the child is to be returned?

LEGAL INSTRUMENT(S) TO BE APPLIED

Regulation No 2201/2003

1980 Hague Convention

Questions with guidelines

1) What is the legal instrument applicable?

The Brussels IIa Regulation and the 1980 Hague Convention apply.

Possible issues to be discussed:

Scope of application: Article 2(11) Brussels IIa Regulation and Article 3 Hague Child Abduction Convention.

2) What can António do?

Article 12 of the Hague Convention: return proceedings are to be conducted in the State where the child was abducted. However, the person claiming that the child has been abducted may apply to the Central Authority of the child´s prior habitual residence in securing the return of the child (article 8 of the HC) – António should start proceedings in Portugal.

The Brussels IIa Regulation holds that the State of the child´s habitual residence still has the final say on the return. The Regulation allows parallel proceedings concerning custody rights in the State of the child´s habitual residence – António should start parallel proceedings concerning custody rights in the State of the child´s habitual residence in France.

3) What documents should he submit?

Article 8 Hague Child Abduction Convention provides the documents the applicant António) must/may submit to the Central Authority.

Possible issues to be discussed:

- The tasks of the Central Authority: Art. 7, 9 and 10 Hague Child Abduction Convention; Consideration 25 and Articles 11(6), 54 and 55 Brussels IIbis Regulation.

4) What should be done, taking into consideration that the Portuguese court has ruled that Mathieu must not return, because the abduction took place more than a year earlier and the child has become settled in his or her new environment (Article 12 Hague Convention)?

5) What should be done, taking into consideration that the Portuguese court has ruled that Mathieu must not return, because there is a grave risk that returning the child would expose him to physical or psychological harm, or would place him in an intolerable situation, while no adequate measures to protect the child have been taken in the State to which the child is to be returned?

The court that has issued the non-return order informs the court that has jurisdiction or the Central Authority in the State where the child was habitually resident immediately prior to the removal or retention. The first court may send the information directly, or through the Central Authority of its State. The information includes a transcript of the hearings and must be received within one month following the order.

The court in the State where the child was habitually resident immediately before the removal or retention, notifies the parties and invites them to make submissions so that the court can examine the question of the custody of the child. The submissions must be made within three months.

If the court receives no submissions, it closes the case.

If the court receives submission, it deals with the merits of the case.

If the decision of the French court entails that Mathieu must stay in Portugal, Portugal becomes her new habitual residence.

If the decision of the French court entails that Mathieu must return to France, this decision will prevail over the Portuguese non-return order. The French court issues a certificate with the judgment entailing Mathieu's return. With this certificate, the French judgment is directly enforceable in Portugal, and throughout the EU, notwithstanding the prior Portuguese non-return order.

Recognition and enforcement of decisions on international child abduction

Contents

A double track-system for recognition and enforcement in parental responsibility cases

1) The “Standard Track” procedure
   - Procedure
   - Grounds for non recognition/enforcement

2) The “Fast track” procedure for “Brussels return orders”
   - Decisions subject to the fast track
   - Abolition of exequatur
   - Certificate

3) Concluding remarks

A DOUBLE TRACK SYSTEM FOR RECOGNITION AND ENFORCEMENT IN PARENTAL RESPONSIBILITY CASES

Brussels IIa double track system

When given by the State of the child's habitual residence, decisions may be recognised and enforced under:

- Standard Track rules: Arts 21 + 28 ff

or

- Fast Track rules: Arts 11(8) and 42

I) THE "STANDARD TRACK" PROCEDURE

The standard track procedure

- Automatic recognition
- Exequatur → declaration of enforceability!

applies also to decisions given by the court of the child's habitual residence ordering that the child, unlawfully removed, must be returned

(CJEU, 19.09.2018, C-325/18 PPU and C-375/18 PPU.*Hampshire County Council v C.E.*)

Grounds for non recognition/enforcement (Art 23)

A judgment relating to parental responsibility shall not be recognised when:

(a) recognition is manifestly contrary to public policy of the MS where recognition is sought, taking into account the best interests of the child;

(b) the child was not given an opportunity to be heard (except in case of urgency), in violation of fundamental principles of procedure of the MS where recognition is sought;

(c) given in default of appearance if the person in default was not served with the document commencing proceedings in sufficient time and in such a way as to enable that person to arrange for his or her defence → unless unequivocal acceptance of the judgment;

Grounds for non recognition/enforcement (Art 23)

(d) no opportunity to be heard given to the person claiming that the judgment infringes his or her parental responsibility (upon his/her request);

(e) irreconcilability with a later judgment relating to parental responsibility given in the MS where recognition is sought;

(f) irreconcilability with a later judgment on parental responsibility given in another MS or in the third State of the child's habitual residence, which fulfils the conditions necessary for its recognition in the MS where recognition is sought;

(g) violation of procedure laid down in Art 56 for the child's placement in an institutional care or a foster family in another MS.

II) THE "FAST TRACK" PROCEDURE FOR "BRUSSELS RETURN ORDERS"

The scenario…

State of **refuge**

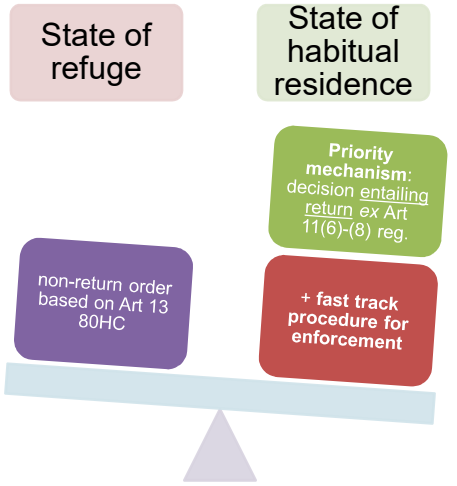
- **Non-return order** pursuant to Art. 13 80HC

Conflict!

State of **child's habitual residence**

- **Decision on custody that implies return,** ordered on the ground of Art 11(6)-(8) B2a

… and its solution



Primacy of the State of the child's habitual residence!

Rationale of the priority mechanism

The priority mechanism is intended to:

- **strengthen** the competence of the court of **habitual residence → natural judge of the child!**
- reinforce children' protection in a more integrated area, such as the EU → 1980 HC *v* Brussels *IIa*: ***same* objectives** but **different balance** btw. State of refuge – State of habitual residence

→ **Priority** to the State of habitual residence, which should have the last word!

Nota Bene!

i. TIME! → huge responsibility on HR court: child's best interest *v* general policy of preventing abduction

ii. Scope of competence of State of habitual residence

Not a proceedings on return ….

….but a full proceedings on custody

Requirements

i. Hearing of the child → a serious opportunity should be given

ii. Hearing of the parties → also of abducting parent

iii. Consideration of reasons and evidence used by the court of the State of refuge → cooperation among courts for a better understanding of situation

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The fast track procedure

1) **Abolition of *exequatur***
   i. no need for a declaration of enforceability
   ii. no opposition to recognition and enforcement → see *Povse*

   \+ **Certification** by the MS of origin pursuant to Art 42(2) → the certificate **replaces** exequatur proceedings

2) **Enforceability** is grounded on Reg. <u>also if not provided under national law</u> and also if pending an appeal

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The rationale of the fast track

The fast track procedure is meant to:

- strengthen the priority mechanism → the decision of the natural judge of the child (i.e. that of habitual residence) should not be rendered futile by lengthy court proceedings (*exequatur*)

→ **Time** is of essence!

Conditions to issue a certificate

Conditions to be cumulatively met

1) conflict btw. 2 decisions given in 2 different MSs
2) child's (serious) opportunity to be heard
3) parties' opportunity to be heard (esp. abducting parent)
4) taking account of the decision under Art 13 80HC → consideration of reasons for and evidence underlying the non-return order + reasons and evidence for overruling
5) information on specific measures for the protection of the child → translation needed!

The **State of habitual residence** ordering **custody and return** can issue the certificate!

PS → **NOT ALL** decisions on return are granted a **certificate**!

Contents: Standard form

ANNEX IV

CERTIFICATE REFERRED TO IN ARTICLE 42(1) CONCERNING THE RETURN OF THE CHILD (1)

1. Member State of origin
2. Court or authority issuing the certificate
   - 2.1. Name
   - 2.2. Address
   - 2.3. Tel./fax/e-mail
3. Person to whom the child has to be returned (to the extent stated in the judgment)
   - 3.1. Full name
   - 3.2. Address
   - 3.3. Date and place of birth (where available)
4. Holders of parental responsibility (2)
   - 4.1. Mother
     - 4.1.1. Full name
     - 4.1.2. Address (where available)
     - 4.1.3. Date and place of birth (where available)
   - 4.2. Father
     - 4.2.1. Full name
     - 4.2.2. Address (where available)
     - 4.2.3. Date and place of birth (where available)
   - 4.3. Other
     - 4.3.1. Full name
     - 4.3.2. Address (where available)
     - 4.3.3. Date and place of birth (where available)

5. Respondent (where available)

5.1. Full name

5.2. Address (where available)

6. Court which delivered the judgment

6.1. Name of Court

6.2. Place of Court

7. Judgment

7.1. Date

7.2. Reference number

8. Children who are covered by the judgment (1)

8.1. Full name and date of birth

8.2. Full name and date of birth

8.3. Full name and date of birth

8.4. Full name and date of birth

9. The judgment entails the return of the child

10. Is the judgment enforceable in the Member State of origin?

10.1. Yes

10.2. No

11. The children were given an opportunity to be heard, unless a hearing was considered inappropriate having regard to their age or degree of maturity

12. The parties were given an opportunity to be heard

13. The judgment entails the return of the children and the court has taken into account in issuing its judgment the reasons for and evidence underlying the decision issued pursuant to Article 13 of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

14. Where applicable, details of measures taken by courts or authorities to ensure the protection of the child after its return to the Member State of habitual residence

15. Names of parties to whom legal aid has been granted

Done at ..... date .....

Signature and/or stamp

Can the certificate be challenged ?

- Does further appeal or legal proceedings on return in the MS of refuge matter?

  No! (see *Rinau*)
- Other remedies against an incorrectly granted certificate?

  No! → should be challenged in the State of HR

  except for mere **rectification** of typing or similar errors (Art. 43 reg.)
- **No** opposition possible even in case of
  - subsequent change of circumstances (see *Povse*)
  - violation of fundamental rights (see *Zarraga)*

Effects of certification

Return order + certificate = enforceable title

- No appeal or stay of proceedings
- Only 1 reason to refuse enforcement → i.e. irreconcilability with a subsequent enforceable judgment (Art 47(2) 2nd sent.)
- Enforcement cannot be refused because, due to a subsequent change of circumstances, it might be seriously detrimental to the best interest of the child (see *Povse*)

Enforceability *v* Enforcement

Enforceability	Enforcement procedure
Arts 28 and 42 B2a	Art 47 B2a → *lex fori*

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Enforcement procedure (Art. 47)

- Enforcement is governed by national law of the MS of enforcement (lex fori)
- same conditions as a national decision apply
- Relevant principles set forth by the CJEU → *effet utile* reg.
- Some principles also set by the ECtHR in cases of breach of Art 8 ECHR
  - obligation to equip itself with adequate and effective means (see e.g. the cases *Maire v. Portugal,* 26 June 2003; *Ignaccolo-Zenide v. Romania*, 25 January 2000)
  - duty to make adequate and effective efforts to secure the return of the child to be reunited with parent (see e.g. *Santos Nunes v. Portugal*, 22 May 2012; *Iglesias Gil and A.U.I. v. Spain,* 29 July 2003)

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Documents to be submitted

The party seeking enforcement must submit:

1) copy of the decision
2) Art 42 certificate
3) *If applicable*: a translation of the adequate arrangements taken to ensure the child's safe return pursuant Art. 11(4)

CONCLUSIONS

Concluding remarks

Does the system work? Does it work well?

- *e.g. Povse* and *Zarraga* cases → **Time** is a crucial issue! → huge responsibility on HR court to balance individual child's best interest *v* general policy of preventing abduction
- System based on cooperation among courts
- MSs do not enforce decisions against the child's will
- need for more effective instruments → pressure on abducting parents to discourage non-compliance: e.g. monetary penalties (see *Bohez v. Wiertz*)

- **Recast** COM(2016) 411 fin. → Council General Agreement 12 Dec. 2018
  - Art 11(6)-(8) → Art 21 ff recast
  - Fast track procedure confirmed!
  - General abolition of *exequatur* → replaced by certification
  - Minimum procedural standards for enforcement
  - Uniform grounds for refusing enforcement → also for return orders!
  - Possibility to challenge and revoke the certificate

CJEU relevant case-law

11.07.2008, C-195/08 PPU, *Rinau*,

1.07.2010, C-211/10 PPU, *Povse v Alpago*

22.12.2010, C-491/10 PPU, *Aguirre Zarraga v Pelz*

19.09.2018, C-325/18 PPU and 375/18 PPU, *Hampshire County Council v C.E. and N.E.*

9.09.2015, C-4/14, *Bohez v Wiertz*

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The project is co-funded by the Justice Programme of the European Union
JUST-JTRA-EJTR-AG-2016-763874

Recognition and enforcement of decisions on international child abduction

Case study

FACTS

Marina, an Italian national, and Daniel, a Hungarian national, met in Italy in May 2010. They immediately fell in love and moved to live together in Milan (Italy). In December 2011 they got married In Italy.

At the beginning of 2013 Daniel receives an incredible job offer from an important company in Budapest. Marina agrees to move to Hungary, also because she works as a freelance reporter and she can easily manage to do her job everywhere.

Daniel flies to Budapest, rents an apartment and starts his new job on 1 March 2013. Marina joins him a month later. Immediately after her arrival in Hungary, she discovers to be pregnant and on 2 December 2013 gives birth to a baby boy, Thomas.

Soon the spouses' relation begins to deteriorate due to Daniel's absence: although he loves his family very much, he works more than 10 hours a day, including the weekends, and goes very often on business trips abroad.

Tired of fighting, the spouses agree that spending separate holydays could help them to think over their relation and decide how to continue. On 1 July 2014, Marina obtains Daniel's consent to leave Hungary with their 8-month son for a two-month holidays at her parents' house in Tuscany (Italy) with the promise to return to Budapest at the end of August. Marina travels with Thomas to Italy, where she has remained ever since.

From September 2014 on Daniel repeatedly phones Marina asking her to return to Budapest with Thomas. She promises to think over his proposal and asks to stay until December. He then flies twice to Italy to see his son and persuade Marina to go back with him.

Marina and Thomas however did not return to Hungary. She texts her husband saying: "I and Thomas are settled here in Italy. Coming back to Hungary would be extremely detrimental for both of us as we will be completely alone".

Daniel seeks for legal advice and on 1 March 2015 files an application to the Italian Central Authority in order to obtain the return of his son to Hungary, pursuant to the 1980 Hague Convention. An application for return is lodged with the Court in Florence on 1 July 2015.

At the same time, on 1 September 2015, Daniel applies also to the court in Budapest seeking for divorce from Marina and the sole custody of their son Thomas.

On 1 February 2016 the Italian Court seised for child abduction hands down a decision refusing the return of the child on the following grounds: a) the application was filed more than a year from the removal of the child, and the child is now settled, as the report made by the courts experts shows; b) when in Hungary the father was not effectively exercising his parental rights, he gave no daily care to Thomas; c) the child – who in the judge's opinion is too young to be heard directly – was heard indirectly

trough social services and their report says he proved happy and very well integrated in his mother's family network so that d) separating from the mother, his only reference, to return to Hungary with a father he barely knows and with whom he has no strong emotional ties would risk to cause him serious psychological harm.

On 1 February 2016 Daniel lodges the Budapest court, already seised for divorce and parental responsibility, with an application for overruling the Italian non-return order pursuant to Art 11(8) Brussels II*a*. He asks that the decision is properly 'reviewed' as he claims that none of the grounds used by the Italian court to refuse return is founded.

On 1 April 2016 the Budapest court grants divorce and provisionally awards joint custody to both parents over Thomas, therefore commanding his immediate return to Hungary. The court upholds Daniel statement and says that the Italian decision was wrongly taken.

Related questions

1) Can the order of the Budapest court be qualified as a priority decision under Art 11(8) and prevail over the Italian non-return order (even if provisional)?

2) Can such decision be enforced in Italy? How?

VARIATION No. 1

On 1 May 2016 the Budapest court gives a final decision on parental responsibility, confirming its previous provisional order and, at Daniel's request, issues a certificate under Art 42 Brussels IIa. Daniel seeks to enforce such decision in Italy but Thomas does not return to Hungary, either alone or with her mother.

Related questions

3) Under which respect is this decision different from the previous? What should its content be, in order to be consistent with the Regulation?

4) Can an Article 42 certificate be issued? What are the effects thereof?

5) Can the decision be challenged? Where? On what grounds?

6) Can the certificate be challenged? Where? On what grounds?

7) What is the procedure that Daniel should follow to enforce this decision? How can Daniel be sure that the child will effectively be returned?

VARIATION No. 2

Some days later, on 20 September 2016, Marina lodges an application with the Court in Florence, the court of Thomas' habitual residence since July 2014, seeking sole custody over her son and, consequently, asking the court to refuse recognition and enforcement of the Hungarian judgment of 1 May 2016.

On 20 November 2016, the Florence court issues a provisional order awarding the mother exclusive custody over Thomas and granting the father access rights to his son.

Related questions

8) Can the Italian provisional order concerning custody over the child affect the recognition and enforcement of the Hungarian certified judgment entailing the return of the child?

LEGAL INSTRUMENT(S) TO BE APPLIED

Regulation No 2201/2003

Questions with guidelines

1) **Can the order of the Budapest court be qualified as a priority decision under Art 11(8) and prevail over the Italian non-return order (even if provisional)?**

Art. 11(8) of Regulation (EC) No 2201/2003 provides that notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under the Regulation is enforceable in accordance with Section 4 of Chapter III of the Brussels Regulation (i.e. no *exequatur*), in order to secure the return of the child. Such so called "priority mechanism" is meant to i) **strengthen** the competence of the court of **habitual residence**. i.e. the **natural judge of the child**, and ii) to reinforce children' protection in a more integrated area, such as the EU, by setting a **balance** between the State of refuge and the State of habitual **different** from the one established by the 1980 Hague convention at a global level, although sharing the **same objectives**. According to the priority mechanism the State of habitual residence should have the last word in a child abduction case.

Under Art. 11(8) Brussels II*a*, the priority mechanism applies only if the authorities in the State of refuge has refused to return the child on the basis of Art 13 of the 1980 Hague Convention. If has a non-return order based on Art 13 of the 1980 Hague Convention has been given in the State of refuge, any decision given by the authorities of the State of habitual residence implying return of the child prevails over the first order.

Possible issues to be discussed:

Is the non-return order issued by the Italian authorities (State of refuge) grounded on Art 13 of the 1980 Hague convention?

In particular:

Which are the grounds for refusing the child's return according to the Italian court, seised for return? Are they include in Art 13?

N.B. Non-return orders based on other (legitimate) grounds, i.e. Arts 12 or 20 of the Convention, do not trigger the application of Art 11(8) of the Brussels II*a* Regulation.

i) Does the fact the Italian non-return order is based on several grounds, included those provided for Art 13, affect its qualification as a basis for the priority mechanism under Art 11(8) Brussels II*a*?

ii) Does the provisional character of the order given by the Budapest court on 1 April 2016 the Budapest (granting divorce and provisionally awarding joint custody to both parents over Thomas, therefore commanding his immediate return to Hungary) affect the application of Art 11(8) Brussels II*a*? Does such provision apply only to final decisions given by the court of the State of child's habitual residence on parental responsibility and entailing return or does it cover also provisional orders?

2) Can such decision be enforced in Italy? How?

Under Art 11(8) of Regulation (EC) N. 2201/2003, any judgment given by the authorities of the State of the child's habitual residence entailing his/her the return is enforceable in accordance with Section 4 of Chapter III of the Brussels Regulation. That means first of all that no *exequatur* is needed, i.e.

- no declaration of enforceability is needed in order to enforce such judgment in any other member State and
- no opposition to its recognition and enforcement is possibile (see CJEU, 1 July 2010, *Povse v Alpago*, Case C-211/10 PPUE),

provided that the judgment is accompanied by a certificate issued by the member State of origin pursuant to Art 42 using a standard form (see *Annex IV* of the Regulation). Art 42 certificate replaces *exequatur* proceedings!

However, not all judgments given by the court of the State of the child's habitual residence deserve a certificate!

Under Art. 42(2) Brussels II*a* Regulation the court of the State of the child's habitual residence who delivered the judgment shall issue the certificate only if:

(a) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity;

(b) the parties were given an opportunity to be heard; and

(c) the court has taken into account in issuing its judgment the reasons for and evidence underlying the order issued pursuant to Article 13 of the 1980 Hague Convention.

Moreover, in the event that the court or any other authority takes measures to ensure the protection of the child after its return to the State of habitual residence, the certificate shall contain details of such measures.

Possible issues to be discussed:

i) Are all the requirements to issue the certificate met in the case at stake? Can the Budapest court issue a certificate Under Art 42(2) to accompany its decision of 1 April 2016?

In particular:

- has Thomas had a serious opportunity to be heard in the Budapest proceedings?

- have his parents, and especially his abducting mother, had the opportunity to be heard in the Budapest proceedings?

- has the Budapest court taken into account the Italian non-return order based, inter alia, under Art 13 of the Hague Convention? Has the Hungarian court given reasons and evidence for overruling?

- In case the Budapest court has taken any specific measures for the protection of the child after his return, does the certificate contains a translation of paragraph 14 of the standard form?

3) Under which respect is this decision different from the previous? What should its content be, in order to be consistent with the Regulation?

On 1 April 2016 On 1 April 2016 the Budapest court grants divorce and provisionally awards joint custody to both parents over Thomas, therefore commanding his immediate return to Hungary. On 1 May 2016 the Budapest court gives a final decision on parental responsibility, confirming its previous provisional order and, at Daniel's request, issues a certificate under Art 42 Brussels II*a*.

Therefore, the second judgment given by the Budapest court is different from the first one under two respects:

i) is final and

ii) is accompanied by a certificate issued under Art 42 Brussels II*a* Regulation.

4) Can an Article 42 certificate be issued? What are the effects thereof?

Under Art 11(8) of Regulation (EC) N. 2201/2003, any judgment given by the authorities of the State of the child's habitual residence entailing his/her the return is enforceable in accordance with Section 4 of Chapter III of the Brussels Regulation. That means that no *exequatur* is needed, i.e.

- no declaration of enforceability is needed in order to enforce such judgment in any other member State and
- no opposition to its recognition and enforcement is possibile (see CJEU, 1 July 2010, *Povse v Alpago*, Case C-211/10 PPUE),

provided that the judgment is accompanied by a certificate issued by the member State of origin pursuant to Art 42 using a standard form (see *Annex IV* of the Regulation). Art 42 certificate replaces *exequatur* proceedings!

However, not all judgments given by the court of the State of the child's habitual residence deserve a certificate!

Under Art. 42(2) Brussels II*a* Regulation the court of the State of the child's habitual residence who delivered the judgment shall issue the certificate only if:

(a) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity;

(b) the parties were given an opportunity to be heard; and

(c) the court has taken into account in issuing its judgment the reasons for and evidence underlying the order issued pursuant to Article 13 of the 1980 Hague Convention.

Moreover, in the event that the court or any other authority takes measures to ensure the protection of the child after its return to the State of habitual residence, the certificate shall contain details of such measures.

Possible issues to be discussed:

i) Are all the requirements to issue the certificate met in the case at stake? Can the Budapest court issue a certificate Under Art 42(2) to accompany its decision of 1 May 2016?

In particular:

- has Thomas had a serious opportunity to be heard in the Budapest proceedings?
- have his parents, and especially his abducting mother, had the opportunity to be heard in the Budapest proceedings?
- has the Budapest court taken into account the Italian non-return order based, inter alia, under Art 13 of the Hague Convention? Has the Hungarian court given reasons and evidence for overruling?
- In case the Budapest court has taken any specific measures for the protection of the child after his return, does the certificate contains a translation of paragraph 14 of the standard form?

The return order together with Art 42 certificate constitutes the so called enforceable title.

Possible issues to be discussed:

Once Art 42 certificate has been issued:

- is any appeal or stay of proceedings possible?
- is there any reason to to refuse enforcement?

Pursuant to Art 47(2) 2nd sent., the enforcement of a certified decision can be refused only in case of irreconcilability with a subsequent enforceable judgment

- can enforcement be refused because, due to a subsequent change of circumstances, it might be seriously detrimental to the best interest of the child?

See CJEU 1 July 2010, *Povse v Alpago*, Case C-211/10 PPU

5) Can the decision be challenged? Where? On what grounds?

The decision can be challenged only in the State of origin, that is the State of the child's habitual residence, according to rules national rules.

Possible issues to be discussed:

What are, if any, the possible grounds for challenging the return decision according to Hungarian law?

6) Can the certificate be challenged? Where? On what grounds?

Under Art 43(2) of the Regulation (EC) No 2201/2003 no appeal shall lie against the issuing of a certificate pursuant to Articles 41(1) or 42(1).

The Regulation does not provide for any remedy against an incorrectly granted certificate – that can only be challenged in the State of the child's habitual residence – except for mere rectification of typing or similar errors pursuant to Art 43 Brussels II*a*.

Possible issues to be discussed:

i) does any further appeal or legal proceedings on return in the member State of refuge matter?

According to the Court of Justice Art 42 certificate is not affected by any subsequent proceedings in the member State of origin: see CJEU 11 July 2008, *Rinau*, Case C-195/08 PPU

ii) does any subsequent change of circumstances ans/or violation of fundamental rights affect the circulation of a decision accompanied by Art 42 certificate? Is any opposition against the certificate possible?

Currently, the answer seems to be negative in the light of the Court of Justice case law: see 1 July 2010, *Povse v Alpago*, Case C-211/10 PPUE and 22 December 2010, *Aguirre Zarraga v Pelz*, Case C-491/10 PPU.

iii) Will the answer be different under the Brussels II*a* Recast?

7) What is the procedure that Daniel should follow to enforce this decision? How can Daniel be sure that the child will effectively be returned?

Under Art 45 of Regulation (EC) No 2201/2003, the party seeking enforcement must submit:

- a copy of the decision
- Art 42 certificate,
- and, *if applicable*, a translation of the adequate arrangements taken to ensure the child's safe return pursuant Art. 11(4).

Pursuant to Art 47 of Regulation (EC) No 2201/2003, enforcement is governed by national law of the MS of enforcement (*lex fori*)

Possible issues to be discussed:

i) difference between enforceability (governed by the Regulation: see Arts 28 and 42) and enforcement (governed by national law of the requested State: see Art 47)

ii) How is enforcement regulated under the law of the requested member State?

iii) Is there any outer condition and/or limit to the application of national law to the enforcement of a certified decision exist in order to ensure that enforcement is effective?

Although enforcement is subject to national law pursuant to Art 47 of the Regulation, member State of enforcement must ensure that:

- under Art 47(2) Brussels II*a* the judgment is enforced at the same conditions as if it had been delivered in its territory;

- all the relevant principles set forth by the CJEU (e.g.) are complied with;

- all the relevant principles also set by the ECtHR in cases of breach of Art 8 ECHR are taken into consideration, and in particular a) the obligation to equip itself with adequate and effective means (see e.g. the cases *Maire v. Portugal,* 26 June 2003; *Ignaccolo-Zenide v. Romania*, 25 January 2000) and b) the duty to make adequate and effective efforts to secure the return of the child to be reunited with parent (see e.g. *Santos Nunes v. Portugal*, 22 May 2012; *Iglesias Gil and A.U.I. v. Spain,* 29 July 2003)

iv) Is there any coercive means for ensuring enforcement of return orders certified under Art 42 under Italian law?

Do effective instruments for discouraging abducting parents from non compliance with the return order exist in the national laws of the member State? e.g. monetary penalties (see *Bohez v. Wiertz*)

8) Can the Italian provisional order concerning custody over the child affect the recognition and enforcement of the Hungarian certified judgment entailing the return of the child?

No, as the Court of Justice case-law saga has shown, any further proceedings in the member State of refuge is irrelevant to the enforceability of a certified judgment.

MATRIMONIAL MATTERS

Presentations and case studies

- **Brussels IIa and Rome III Regulations in cross-border divorce and separation cases**
  drafted by Prof Maria Caterina Baruffi (UNIVR, mariacaterina.baruffi@univr.it), and Prof Costanza Honorati (UNIMIB, costanza.honorati@unimib.it) [respectively, case study 1 and case study 2]

- **Recognition of judgments in matrimonial matters: general frame common to all Regulations**
  drafted by Dr Lilla Király (ELTE, drkiralylilla71@gmail.com)

- **Special issues on recognition of matrimonial decisions**
  drafted by Dr Agne Limante (TEISE, agne.limante@gmail.com)

Brussels IIa and Rome III Regulations in cross-border divorce and separation cases

Contents

II. Selected topics

1) Brussels IIa Regulation
   a) scope of application in matrimonial matters
   b) jurisdiction in matrimonial matters
2) Rome III Regulation
   a) scope of application
   b) applicable law regime: choice of law or default
   c) general provisions

Summarising conclusions

Useful links

- European e-Justice Portal: https://e-justice.europa.eu/home.do
- On family matters: https://e-justice.europa.eu/content_family_matters-44-en.do
- European Judicial Network (EJN) in civil and commercial matters: https://e-justice.europa.eu/content_ejn_in_civil_and_commercial_matters-21-en.do?init=true
- EU law: http://eur-lex.europa.eu
- EU case law: http://curia.europa.eu
- HCCH (Hague Conference on Private International Law) https://www.hcch.net/en/home

I. General overview

I.1) EU legal instruments in family matters

a) Overview of the EU PIL instruments governing selected aspects of family law

b) The interplay with the international legal instruments

c) What is next: the Brussels IIa Recast proposal

I.1.a) Overview of the EU PIL instruments governing selected aspects of family law

Scope of application

of the EU Regulations in family matters

Reg. 2201/2003 (Brussels IIa) of 27.11.2003

- Repealing Reg. 1347/2000 (Brussels II)
- concerning **jurisdiction** and **recognition and enforcement of judgments** in **matrimonial matters** and **matters of parental responsibility**
- it applies since 1 March 2005
- binding on all EU MS (including the UK and Ireland) with the **exception of Denmark**

Art. 1(1)

Civil matters relating to:

a) **divorce, legal separation or marriage annulment**;

b) **attribution, exercise, delegation, restriction or termination of parental responsibility**

Reg. 4/2009 (Maintenance) of 18.12.2008

- Concerning **jurisdiction, applicable law, recognition and enforcement of decisions and cooperation** in matters relating to maintenance obligations (complete PIL instrument)
- entry into force: 30 January 2009
- it applies since 18 June 2011
- binding on all EU MS (including the UK and Ireland) with the **exception of Denmark** (which has nonetheless implemented the contents of this Reg. to the extent that it amends Reg. 44/2001)

Art. 1

Maintenance obligations arising from

- a **family relationship**
- **parentage**
- **marriage**
- **affinity**

→ broad notion

Reg. 1259/2010 (Rome III) of 20.12.2010

- **Enhanced cooperation** in the area of the **law applicable to divorce and legal separation**
- **17 MS** participating
  - originally, 14 MS (Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia)
  - 3 MS joined at a later stage (Lithuania, Greece, Estonia)
- it applies since 21 June 2012

Reg. 650/2012 (Succession) of 4.7.2012

- Concerning **jurisdiction, applicable law, recognition and enforcement of decisions** and **acceptance and enforcement of authentic instruments** in matters of succession, and the creation of a **European Certificate of Succession** (complete PIL instrument)
- it applies to deaths on or after 17 August 2015
- UK, Ireland and Denmark opted out

Art. 1

- **Succession to the estates of deceased persons** (not revenue, customs or administrative matters)
- **exclusions**: status of natural persons and family relationships; legal capacity; disappearance, absence or presumed death; property regimes; maintenance obligations (other than those arising from death); formal validity of dispositions of property upon death made orally; property rights; company law; trusts; nature of rights *in rem*; recording in a register of rights in immovable or movable property

Reg. 2016/1103 (Matrimonial property) of 24.6.2016

- **Enhanced cooperation** in the area of **jurisdiction**, **applicable law** and the **recognition and enforcement of decisions** in matters of matrimonial property regimes (complete PIL instrument)
- it applies since 29 January 2019
- **18 MS** participating
  - Belgium, Bulgaria, Cyprus, the Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Luxembourg, Malta, Netherlands, Austria, Portugal, Slovenia, Finland and Sweden
  - Estonia announced its intention to take part (info at https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=CELEX:32016R1104)

Art. 1

- **Matrimonial property regimes** (not revenue, customs or administrative matters)
- **exclusions**: legal capacity of spouses; existence, validity or recognition of marriage; maintenance obligations; succession to the estate of a deceased spouse; social security; entitlement to transfer or adjustment between spouses of rights to retirement or disability pension; nature of rights *in rem* relating to a property; recording in a register of rights in immovable or movable property

Reg. 2016/1104 (Registered partnerships) of 24.6.2016

- **Enhanced cooperation** in the area of **jurisdiction**, **applicable law** and the **recognition and enforcement of decisions** in matters of the property consequences of registered partnerships (complete PIL instrument)
- it applies since 29 January 2019
- **18 MS** participating
  - Belgium, Bulgaria, Cyprus, the Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Luxembourg, Malta, Netherlands, Austria, Portugal, Slovenia, Finland and Sweden
  - Estonia announced its intention to take part (info at https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=CELEX:32016R1104)

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Art. 1

- **Property consequences of registered partnerships** (not revenue, customs or administrative matters)
- **exclusions**: legal capacity of partners; existence, validity or recognition of registered partnerships; maintenance obligations; succession to the estate of a deceased partner; social security; entitlement to transfer or adjustment between partners of rights to retirement or disability pension; nature of rights *in rem* relating to a property; recording in a register of rights in immovable or movable property

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I.1.b) The interplay with the international legal instruments

1980 Hague Convention (Child abduction)

- entered into force on 1 December 1983
- **in force in 100 States** (all EU MS)
- most recently: most recently: Tunisia since 1.10.2017, Cuba 1.12.2018, Guyana 1.5.2019, Barbados 1.10.2019)
- interplay with **BIIa Reg.** with regard to child abduction (the Reg. **complements** the 1980 Hague Conv. **in intra-EU cases**)

1996 Hague Convention (Child protection)

- entered into force on 1 January 2002
- **in force in 49 States** (all EU MS)
- most recently: most recently: Cuba since 1.12.2017, Honduras 1.8.2018, Fiji 1.4.2019, Paraguay 1.7.2019; only signatory States: USA, Canada, Argentina)
- only signatory States: USA, Canada, Argentina
- Brazil is not a Contracting State
- interplay with **BIIa Reg.** with regard to the **applicable law to parental responsibility matters** (not governed by the Reg.)

2007 Hague Protocol
(law applicable to maintenance obligations)

- entered into force on 1 August 2013
- **in force in 30 States** (all EU MS, except the UK and Denmark, plus Serbia, Kazakhstan and Brazil)
- only signatory State: Ukraine
- interplay with **Maintenance Reg.** with regard to the **law applicable to maintenance obligations** (Art. 15 of the Reg. directly refers to the Protocol)

I.1.c) What is next:

the Brussels IIa Recast proposal

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

https://eur-lex.europa.eu/eli/reg/2019/1111/oj

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Overall framework

When addressing a cross-border family dispute intra EU countries:

	jurisdiction	applicable law	recognition and enforcement
matrimonial matters	Brussels IIa	Rome III	Brussels IIa
maintenance	Reg. 4/2009	Reg. 4/2009 + 2007 Hague Protocol	Reg. 4/2009 (+ 2007 HP)
succession	Reg. 650/2012	Reg. 650/2012	Reg. 650/2012
property regimes	Reg. 2016/1103-1104	Reg. 2016/1103-1104	Reg. 2016/1103-1104

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2) EU family law instruments 'in action'

The autonomous concepts under EU law

Introduction

- existing diversity among substantive national legislations
- harmonisation
  - ➢ **interpretation** of the CJEU (preliminary ruling pursuant to Art. 267 TFEU and possible urgent procedure),
  - ➢ **terminology**, i.e. through a number of common definitions, PIL and procedural rules given for the purposes of application of these legal instruments

1) COURT (Art. 2 BIIa, Art. 2 Maint., Art. 2 RIII, Art. 3 Succ.)

- all authorities in the MS with jurisdiction in the matters falling within the scope of each Reg.
- broad definition

- CJEU, 20.12.2017, C-372/16, *Sahyouni*

Divorce resulting from a **unilateral declaration** made by one of the spouses **before a religious court** in Syria (private divorce): is it a **divorce decision for the purposes of Rome III Reg.**?

- **NO**
  - Reg. covers **only** divorces pronounced
    - **by a national court** or
    - **by a public authority, or under its supervision** (coherence with the notion of "judgment" under BIIa Reg.)

2) **JUDGMENT** or **DECISION** (Art. 2 BIIa, Art. 2 Maint., Art. 3 Succ.)

- any decision on the matters falling within the scope of each Reg., given by a court of a MS, whatever the decision may be called (e.g. order, decree, judgment, etc.)
- broad definition

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3) ***LIS PENDENS*** (Art. 19 BIIa, Art. 12 Maint., Art. 17 Succ.)

- when proceedings regarding the **same parties** and the **same cause of action** are brought before **courts of different MS**, the **court second seised** (or any other than the court first seised) shall **of its own motion stay** its proceedings until such time as the jurisdiction of the court first seised is established
- when jurisdiction of the court first seised is **established**, the other **declines** its jurisdiction

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- **Art. 19 BIIa** covers also the so-called **false *lis pendens***
  - ***Separation***
  - ***divorce***

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4) **SEISING OF A COURT** (Art. 16 BIIa, Art. 9 Maint., Art. 14 Succ.)

2 instances, depending on the **domestic rules of civil procedure**

a) lodging of the document instituting the proceedings with the court, or

b) receipt of the document by the authority responsible for service (in case of service before lodging)

In both cases: the **applicant** has been "**active**" (i.e. taking the steps to have service effected on the respondent or have the document lodged with the court)

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- Interaction with **Regulation No 1393/2007**, on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (**service of documents**)

- CJEU, 22.6.2016, C-173/16, *M.H. v M.H.*

"is **lodged with the court**"

=

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

- **Uniform notions used as grounds of jurisdiction and/or connecting factors** for the operation of the PIL rules

- also these uniform notions have been further clarified by the CJEU under various perspectives, thus developing a broad record of cases to refer to in many factual situations

HABITUAL RESIDENCE (HR)

- **BIIa**: ground of jurisdiction in matrimonial and parental responsibility matters
- **Maint.**: ground of jurisdiction, and by reference to the 2007 Hague Protocol, also as a connecting factor to determine the applicable law
- **RIII**: connecting factor for a choice of law, as well as in the absence of a choice
- **Succ.**: general ground of jurisdiction and general connecting factor

BUT in none of them the notion is defined

(except in Recital 23 of the Succ. Reg.)

Case law on habitual residence

a) CJEU, 15.9.1994, case C-452/93, *Pedro Magdalena Fernandez* (expatriation allowance)

b) CJEU, 2.4.2009, case C-523/07, *A*, (HR of a child)

c) CJEU, 15-2-2017, case C-499/15, *W and V v Z* (HR of a child)

d) CJEU, 28.6.2018, case C-512/17, *HR v KO* (child's HR between the MS of (dual) nationality and the MS of residence)

e) CJEU, 22.12.2010, case C-497/10 PPU, *Mercredi* (HR of an infant)

f) CJEU, 8-6-2017, case C-111/17 PPU, *OL v PQ* (HR of an infant born in a MS other than that where the parents were habitually resident)

g) CJEU, 9.10.2014, case C-376/14 PPU, *C* v *M* (HR of a child in an abduction case)

Which are the relevant factual elements? (case-by-case approach)

- duration, conditions and grounds for the stay on the territory of a given MS
- nationality
- enrolment in school
- linguistic knowledge
- family and social relationships
- Parents' willness

II. Selected topics

1) Brussels IIa Regulation

a) Scope of application in matrimonial matters

b) Jurisdiction in matrimonial matters

II.1.a) Scope of application in matrimonial matters

Exclusions

- decisions that **deny the claim** for divorce, legal separation or marriage annulment (i.e. negative decisions)

- **property consequences** of the marriage (governed by Reg. 2016/1103)

- **non-traditional partnerships**

  BUT **no definition** of marriage in the Reg.: autonomous interpretation or rather a formal concept of marriage defined by national substantive law? The Reg. applies to same-sex marriages only in those MS that recognize them

- **fault-based claims** in proceedings for legal separation or divorce

II.1.b) Jurisdiction in matrimonial matters

To determine the MS whose courts can hear the case, and also the territorial competence within that MS

Art. 3 BIIa

- **7 ALTERNATIVE grounds of jurisdiction** based on either the **habitual residence** (lett. a) or the **common nationality** of the parties (lett. b)
- reference to the same grounds of jurisdiction is made under Art. 4 (counterclaim) and Art. 5 (conversion of legal separation into divorce)

Art. 3 BIIa - grounds

Competent courts of the MS

(a) in whose territory:

- the spouses are habitually resident, or
- the spouses were last habitually resident, insofar as one of them still resides there, or
- the respondent is habitually resident, or
- in the event of a joint application, either of the spouses is habitually resident, or
- the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or
- the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is a national of that MS

(b) of the nationality of both spouses

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2 main connecting factors in matrimonial matters

a) habitual residence

b) Nationality

- CJEU, 7.7.1990, C-469/90, *Micheletti* (freedom of establishment)
- CJEU, 16.7.2009, C-168/08, *Hadadi* (dual nationality common to both spouses)

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Forum shopping

Art. 3 + Art. 19 (*lis pendens*)

- **favour** towards the spouse who **first brings an action** before the court
- **wide margin of discretion** in choosing the court having jurisdiction on the case
- an example:

  what if a party **manipulates (or omits) factual elements** in order to support the existence of **habitual residence in a more 'favourable' forum State**? Particularly relevant when in the MS of habitual residence divorce/legal separation proceedings are time-consuming or very expensive

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Exclusive nature of jurisdiction – Art. 6 BIIa
Residual jurisdiction – Art. 7 BIIa

CJEU, 29.11.2007, C-68/07, *Sundelind Lopez*

- BIIa Reg. applies **also to nationals of non-MS** whose **links** with the territory of a **MS** are **sufficiently close**
- the courts of a MS **cannot base** their jurisdiction to **on their national law**, if the courts of **another MS** have **jurisdiction under Art. 3 BIIa**

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II. Selected topics

2) Rome III Regulation

a) Scope of application

b) Applicable law regime: choice of law or default

c) General provisions

II.2.a) Scope of application

Objectives

- enhancing the **adjustability** of the EU PIL system by introducing a (limited) party autonomy
- promoting **legal certainty and predictability**
- **preventing** "rush to court" and "forum shopping" strategies of the spouses against one another

BUT this objective is only partially fulfilled, among those MS that participate in the enhanced cooperation

Issues on the scope of application

- It applies **only to divorce and legal separation**, not to marriage annulment
- **no definition of marriage**
- competence of MS
- what about the **dissolution of registered partnerships**?

Universal application – Art. 4

- Under the Reg., it is possible to designate the law of
  - a **participating MS**
  - a **non-participating MS**
  - a **non-EU MS** (third country)
- Rome III Reg. provides a **system of uniform conflict-of-laws rules**

  BUT it does not harmonise national substantive laws in matrimonial matters

II.2.b) Applicable law regime
choice of law

Basic principle: informed choice (Recital 18)

- choice to be exercised without prejudice to the rights of, and equal opportunities for, the two spouses
- judges in the participating MS should be aware of the importance of an informed choice on the part of the two spouses concerning the legal implications of the choice-of-law agreement concluded

Art. 5 Rome III

Designation by the spouses of:

a) the law of the State where the spouses are **habitually resident** at the **time the agreement is concluded**; **or**

b) the law of the State where the spouses were **last habitually resident**, in so far as **one of them still resides there** at the **time the agreement is concluded**; **or**

c) the law of the **State of nationality of either spouse** at the time the agreement is concluded; **or**

d) the **law of the *forum***

Choice of law under Rome III Reg.

Set of **4 ALTERNATIVE criteria** to determine the applicable law

- no hierarchy
- the spouses may agree on the application of either of these criteria
- the connecting factors must exist at the time of the agreement is concluded

Conclusion and modification of the agreement – Art. 5(2)

- at any time, but **at the latest at the time the court is seised, but**
- yet **also during the proceedings**, if it allowed under the law of the forum
- the existence of an actual agreement is not required, it is also possible that **each party** requests the **application of the same law** in its **respective court documents**
- **deadline** for a **valid choice-of-law agreement** to be reached **during the proceedings**: it depends on the **domestic rules of civil procedure of each MS**

Art. 6

Existence and validity of the agreement

- determined by the **law which would govern it under this Reg.** if the agreement or term were valid

Non consent of one of the spouses

- determined **also** by the **law of the country in which he/she has his/her habitual residence** at the time the court is seised

Formal validity of the agreement – Art. 7

- **in writing**, **dated** and **signed by both spouses**
- equivalent to writing = any communication by **electronic means** which provides a durable record of the agreement (including e-mails; and what about text messages?)
- date: the **date of the last signature** in case the spouses did not sign the agreement at the same time
- signature of the spouses: difficulties in case of communication by electronic means
- all the **additional requirements** under the law of the common habitual residence of the spouses at the time of the agreement

II.2.b) Applicable law regime
Default applicable law – Art 8 Rome III

In the **absence of a choice** pursuant to Art. 5, divorce and legal separation shall be subject to the law of the State:

a) where the **spouses** are **habitually resident** at the time the court is seized; or, **failing that**

b) where the spouses were **last habitually resident**, provided that the period of residence **did not end more than one year** before the court was seized, in so far as **one of the spouses still resides** in that State at the time the court is seized; or, **failing that**

c) of which **both spouses are nationals** at the time the court is seized; or, **failing that**

d) where the **court is seized**

Default applicable law

List of **SUCCESSIVE connecting factors**

- hierarchy
- the application of the first factor excludes the following ones, and so on until the residual criterion of the law of the *forum*
- otherwise, the effectiveness of the Reg. would have been undermined

II.2.c) General provisions

Art. 10

If the **law applicable** determined by Arts. 5-8

- makes **no provision for divorce**, or
- does **not grant** one of the spouses **equal access to divorce or legal separation** on grounds of their sex,

the **law of the *forum*** applies (avoid discrimination)

Art. 11

Exclusion of *renvoi* (only substantial law, not rules on private international law), in order to preserve the effectiveness of the actual choice of law

Art. 12

Refusal of the application of a law determined by the Reg. only if such application is **manifestly incompatible** with the **public policy of the *forum***

Art. 13

The court is **not obliged to pronounce a divorce** by virtue of the application of the Reg. where **its national law**

- does **not provide for divorce**, or
- does **not deem the marriage** in question **valid** for the purposes of divorce proceedings

Summarising conclusions

Matrimonial matters
(separation/divorce/annulment)

- Jurisdiction: alternative grounds, no choice
- Applicable law: (limited) choice or default law

The project is co-funded by the Justice Programme of the European Union
JUST-JTRA-EJTR-AG-2016-763874

Brussels IIa and Rome III Regulations in cross-border divorce and separation cases

Case study 1

FACTS

Amaya, a woman of Iranian and Italian nationality, and Hamid, a man of Iranian and Hungarian nationality, got married in 2010 in Hungary, and they have been habitually residing in Budapest since the marriage.

Amaya works for an international humanitarian organization and is very committed to her job. Indeed, in early 2017 she enthusiastically accepted a promotion that required her to travel to Milan (Italy) on a regular basis, also spending several weeks there before returning to Hungary. Hamid works as financial consultant in an important Hungarian bank, and since his wife's job promotion, he regularly visited her in Italy during her long stays there.

They do not share any children, but have the dog Jack, who has been living with them for many years. The dog was registered in Hungary, where Amaya and Hamid also had an insurance policy for him, and was assisted by a Hungarian veterinarian.

In 2008, when they were engaged, the couple concluded a prenuptial agreement before a Hungarian notary, whereby they agreed on practical arrangements in case of separation/divorce and waived all reciprocal obligations provided by statutory law.

Since Amaya's job promotion in early 2017, she has spent progressively longer periods in Italy, to the extent that the couple was considering the possibility of a permanent relocation in Milan. With this idea in mind, in early 2018 they concluded, by means of an authentic instrument, a further agreement designating Italian law as applicable to their separation/divorce and all legal consequences deriving from it. According to this agreement, all previous arrangements between them shall have no effect.

As from spring 2018, however, Amaya has been entirely dedicated to her job, and has not travelled back to Hungary ever since. Also the dog Jack has been staying with her in Milan.

Amaya and Hamid did not survive the long-distance relationship, which took a toll on both of them.

On 10 May 2019, Hamid filed for divorce in Hungary, and the document instituting the proceedings should have been served to Amaya by no later than 25 May. However, she was served only on 10 June 2019, as stated by the stamp on the registered letter received by her.

Meanwhile, on 27 May 2019, Amaya sought for legal advice as she wanted to seise the Italian courts with separation proceedings. After evaluating the factual and legal background, the Italian counsel, on behalf of Amaya, lodged a separation petition against Hamid with the Tribunal of Milan on 3 June 2019. Also, she claimed the custody of the dog Jack.

Related questions

1) Has the Tribunal of Milan jurisdiction over the separation petition filed by Amaya? Which are the relevant legal instrument and provisions?
2) Has the Hungarian court jurisdiction over the divorce petition filed by Hamid? Which are the relevant legal instrument and provisions?
3) Could there be a situation of *lis pendens* between the two sets of proceedings instituted in Hungary and in Italy, respectively? Which is the court first seised?
4) Could the choice-of-law agreement on the separation/divorce concluded between Amaya and Hamid be deemed to be valid? Which is the law applicable to assess its validity? And, in case the agreement should be deemed to be invalid, how would the court assess the applicable law?
5) Has the prenuptial agreement previously concluded between Amaya and Hamid any effect on their separation/divorce?
6) How could the Tribunal of Milan assess the claim for the custody of the dog Jack?

LEGAL INSTRUMENT(S) TO BE APPLIED

Regulation No. 2201/2003

Regulation No 1259/2010

National law

Questions with guidelines

1) **Has the Tribunal of Milan jurisdiction over the separation petition filed by Amaya? Which are the relevant legal instrument and provisions?**

Under Article 3(a), sixth indent, of Regulation 2201/2003 (Brussels IIa), jurisdiction lies with the courts of the Member State in whose territory the applicant is habitually resident if he/she resided there for at least six months immediately before the application was made and is a national of the Member State in question.

In this case, Amaya has both Italian and Iranian nationality and has been living and working in Milan since spring 2018, without travelling back to Hungary. Therefore, it could be successfully argued that her habitual residence has moved to Italy, and this lasted for more than six months before she seised the Tribunal of Milan (i.e. on 3 June 2019).

- The Tribunal of Milan has jurisdiction pursuant to Article 3(a), sixth indent, of Brussels IIa Regulation and can consequently rule on the separation petition filed by Amaya.

2) **Has the Hungarian court jurisdiction over the divorce petition filed by Hamid? Which are the relevant legal instrument and provisions?**

Under Article 3(a), second indent, of Regulation 2201/2003 (Brussels IIa), jurisdiction lies with the courts of the Member State in whose territory the spouses were last habitually resident, insofar as one of them still resides there.

In this case, Amaya and Hamid have been habitually residing in Hungary since the marriage, and did so even after she accepted the job promotion in Italy, insofar as she travelled back and forth between Hungary and Italy and he regularly visited her in Italy.

As from spring 2018, however, it can be argued that Amaya's habitual residence has moved to Milan, while Hamid kept his habitual residence in Budapest. The last habitual residence of the spouses is therefore in Hungary, and Hamid is still resident there.

- The Hungarian court has jurisdiction pursuant to Article 3(a), second indent, of Brussels IIa Regulation and can consequently rule on the divorce petition filed by Hamid.

Possible issues to be discussed:

- Suppose that Hamid argues that the Hungarian court should be deemed to have jurisdiction pursuant to Article 3(a), first indent, of Brussels IIa Regulation, claiming that both spouses have their habitual residence in Hungary and presenting as evidence the residence certificates of both Amaya and himself (her residence is, indeed, still registered in Budapest, notwithstanding her recent move to Italy).

On which grounds would the Italian counsel argue that Amaya's habitual residence has changed? Which factual elements may be relevant in this regard?

3) Could there be a situation of *lis pendens* between the two sets of proceedings instituted in Hungary and in Italy, respectively? Which is the court first seised?

Both the Tribunal of Milan and the Hungarian court can be deemed to have jurisdiction on the separation and the divorce petition, respectively, on the grounds mentioned above. As a result, and taking into account the broad notion of *lis pendens* between proceedings concerning matrimonial matters (which comprises proceedings relating to divorce, legal separation and marriage annulment according to Article 19(1) of Brussels IIa Regulation), a question of parallel proceedings may indeed arise in this case.

It becomes relevant to establish which is the court first seised. Pursuant to Article 16(a) of Brussels IIa Regulation, a court shall be deemed to be seised at the time when the document instituting the proceedings 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. In this regard, the fact that Amaya was served with the document instituting the Hungarian proceedings only on 10 June appears relevant, as it took almost one month for the service to Amaya, which was supposed to be effected by no later than 25 May. Therefore, it can be argued that Hamid did not take the necessary steps to have service effected on Amaya, and that the Hungarian court was deemed to be seised only on 10 June (*for similar considerations, see Tribunale di Palmi, 28 January 2013*).

The Tribunal of Milan was seised with the separation proceedings on 3 June, thus becoming the court first seised.

- The Italian counsel can successfully claim that the Tribunal of Milan is the court first seised in the matrimonial proceedings between Amaya and Hamid.

Possible issues to be discussed:

- Suppose that you are required to give legal advice to Hamid: how would you support his defence that he had taken the necessary steps to have service effected on Amaya, so that the Hungarian court could be deemed to be the first seised? (e.g. evidence of means of service, no liability for the delay)

- Suppose that the Hungarian court, notwithstanding the *lis pendens* situation, does not stay the proceedings and hears the divorce case, delivering its decision on the very same day as the Tribunal of Milan (i.e. on 20 November 2019).

Could the Hungarian decision be recognised in Italy? On which ground could the Italian counsel oppose to the recognition?

Case law:

on *lis pendens* between separation and divorce proceedings and on time difference between the Member States, see CJEU, 6 October 2015, Case C-489/14, *A* v *B*;

on the violation of the *lis pendens* rule as a possible ground of non-recognition, see CJEU, 16 January 2019, Case C-386/17, *Liberato* v *Grigorescu*.

4) Could the choice-of-law agreement on the separation/divorce concluded between Amaya and Hamid be deemed to be valid? Which are the rules to assess its validity? And in case the agreement should be deemed to be invalid, how would the court assess the applicable law?

By means of an authentic instrument, in early 2018 Amaya and Hamid have chosen the Italian law as applicable to their separation/divorce and all legal consequences deriving from it.

a) Choice of law regarding the separation/divorce

The relevant instrument that the Italian court shall consider when assessing the validity of the agreement, and whether the choice of law was validly made, is Regulation 1259/2010 (Rome III).

According to its Article 6(1), the existence and the validity of a choice-of-law agreement shall be determined by the law which would govern it under the Regulation if the agreement were valid. In this case, the chosen law is one of those alternatively provided by Article 5 of Rome III Regulation, and namely the law of the State of nationality of either spouse at the time the agreement was concluded, i.e. the Italian law. This law therefore governs the validity of the choice-of-law agreement, which appears to be valid under this law.

According to Article 7 of Rome III Regulation, for a choice-of-law agreement to be formally valid it is required that it be expressed in writing, dated and signed by both spouses. In this case, the agreement has been concluded by means of an authentic instrument, and therefore appears to possess the formal requirements set out by the mentioned provision.

b) Choice of law regarding all legal consequences deriving from the separation/divorce

Are these aspects covered by Rome III Regulation?

i) *Property regimes*

Taking into account the exclusions from its scope of application set out in Article 1(2), the property consequences of the marriage are not governed by this Regulation. However, neither the Regulation 2016/1103 on property regimes can apply, as its rules concerning the law applicable (Chapter III) have effect only with regard to spouses that have made the choice only on or after 29 January 2019. In this case, however, the designation was made in early 2018.

Assuming that the Tribunal of Milan has jurisdiction over property consequences*, the relevant instrument that the court shall consider when assessing the choice of law made by Amaya and Hamid appears to be the national law (in the absence of any applicable international legislation), which is the Italian PIL Act (Law 218/1995). Article 30(1) thereof provides that spouses can designate the law of the State of nationality of either of them, or of the State in which either of them resides, as applicable to their patrimonial relationships.

In this case, the spouses have indeed chosen the law of the State of nationality of the wife Amaya, i.e. Italian law. Furthermore, the choice-of-law agreement appears formally valid pursuant to Article 30(2) of the Italian PIL Act, as its validity is subject to the chosen law or the law of the State where the agreement was concluded (i.e. Italian law).

In this case, the agreement concluded in the form of an authentic instrument meets the requirements set out by the Italian Civil Code as regards the formal validity of marriage contracts.

* The Tribunal of Milan shall assess its jurisdiction on the basis of Regulation 2016/1103. In this case, we assume that the parties have agreed on the Italian jurisdiction at the first hearing. Indeed, they have designated Italian law as applicable and they acknowledge that the Italian court would have been able to properly apply its own law. *These issues will be further deepened in the next training sessions.*

ii) *Maintenance*

Maintenance obligations between the spouses do not fall within the scope of application of the Rome III Regulation, pursuant to its Article 1(2). In this regard, the relevant instrument to assess both jurisdiction and applicable law is Regulation 4/2009 (Maintenance), which refers to The Hague Protocol of 2007 as regards the applicable law provisions. *These issues will be further deepened in the next training sessions.*

In conclusion, the Tribunal of Milan shall rule on the separation petition filed by Amaya applying the Italian law chosen by the spouses, which shall govern also the further claims regarding the property consequences and the spousal maintenance.

- Amaya and Hamid have made a valid choice in favour of Italian law to regulate their separation/divorce and all legal consequences deriving from it.

Possible issues to be discussed:

- Suppose that the choice-of-law agreement had been concluded by the spouses by means of an exchange of messages on WhatsApp. Then, Amaya followed up with an e-mail summarising the content of the agreement, to which Hamid replied with a text message that simply stated ‘OK to your last e-mail’.

Could this agreement be deemed to meet the formal requirements set out in Article 7 of Rome III Regulation? Was there a communication by electronic means which provides a durable record of the agreement?

In the event that this agreement could not be deemed to be formally valid, how would the Tribunal of Milan determine the law applicable to the separation petition? What does Rome III Regulation provide in the case of the absence of a choice?

According to Article 8 of the Regulation, it appears that the separation should be governed to the law of the State of which both spouses are nationals at the time the court is seised, i.e. the Iranian law (letter *c* of the provision).

And now suppose that the Iranian law allows the husband to exercise the right of repudiation of his wife. Could the application of this law be refused by the Tribunal of Milan? If so, on which ground?

- Suppose that the Hungarian court, which is also hearing the divorce petition filed by Hamid, is required to assess the choice-of-law agreement concluded by the spouses. With regard to the property consequences of the marriage, what does the Hungarian PIL Act provide?

According to Section 28 thereof, the spouses may choose the law of the State of which one of the spouses is a national as applicable to their property relations. In this case, Italian law appears to be validly chosen.

5) Has the prenuptial agreement previously concluded between Amaya and Hamid any effect in their separation/divorce?

The prenuptial agreement of 2008 concluded before a Hungarian notary provided practical arrangements in case of separation/divorce, thereby waiving all reciprocal obligations under statutory law.

However, the valid choice-of-law agreement of 2018 provided that all previous arrangements between them shall have no effect.

As a result, the prenuptial agreement is superseded by the choice-of-law agreement of 2018 designating Italian law as the law applicable to the separation/divorce and all related consequences. The Tribunal of Milan shall thus rule on the separation petition according to the Italian law chosen by Amaya and Hamid in their second agreement.

- The prenuptial agreement concluded between Amaya and Hamid shall not have effect in the separation proceedings before the Tribunal of Milan.

Possible issues to be discussed

Suppose that the choice-of-law agreement of 2018 did not contain any express reference to all previous arrangements between the spouses. In this case, could the prenuptial agreement have any effect on the separation/divorce between Amaya and Hamid? In particular:

a) should the law designated by the choice-of-law agreement (i.e. the Italian law) be applied also to assess the validity of the prenuptial agreement?

In this case, in the Italian legal order prenuptial agreements are considered void, as they would allow the parties to decide on the rights deriving from the *status* of spouse in advance of the possible separation/divorce proceedings. Therefore, the Tribunal of Milan should rule for the invalidity of the prenuptial agreement in application of the Italian law chosen by the subsequent agreement concluded between Amaya and Hamid;

b) would the choice-of-law agreement supersede the previous prenuptial agreement concluded between Amaya and Hamid, and therefore would the law designated as

applicable (i.e. the Italian law) be considered as governing, on a substantive level, the separation between Amaya and Hamid?

In this case, the prenuptial agreement should be deemed to have no effect in the separation proceedings, given that the valid choice of law made by the spouses has indeed designated the Italian substantive law to govern the separation/divorce and all related consequences.

6) How could the Tribunal of Milan assess the claim for the custody of the dog Jack?

In purely internal situations, Italian case law has occasionally applied the Civil Code provisions governing the custody of children, by way of analogy, to claims related to the custody of pets (e.g. *Tribunale di Roma, 15 March 2016, no. 5322, in a case of separation by mutual consent; Tribunale di Sciacca, decree of 19 February 2019*).

Following this approach, in the cross-border case at issue, the relevant legal instruments to rule on the claim for the custody of the dog Jack could be found in the Brussels IIa Regulation (jurisdiction), and the 1996 Hague Convention (applicable law).

Where could the habitual residence of the dog Jack be located? Has the Tribunal of Milan jurisdiction by virtue of Article 8 of Brussels IIa Regulation?

Possible issues to be discussed

Do you agree with the approach taken by the Italian case law in comparing the PIL regime applicable to the custody of children to the issue of the custody of pets? Which elements would you consider to support this view?

C.L.A.S.S. 4EU
The project is co-funded by the Justice Programme of the European Union
JUST-JTRA-EJTR-AG-2016-763874

Brussels IIa and Rome III Regulations in cross-border divorce and separation cases

Case study 2

FACTS

In June 2009 Alma meets Giorgio in Portofino where both are on vacation and soon fall in love with each other. Alma is British and works in Milan as an employee in a pharmaceutical company; Giorgio is an Italian and French businessman active in the luxury hotels and living in Genoa.

On 22 April 2010 they appear before a notary in Brighton (UK), Alma's hometown, to sign a prenuptial written agreement whereby they attribute exclusive jurisdiction over their divorce to UK courts, and agree on the application of English law. In the same document they reciprocally waive all maintenance rights eventually provided for by any other applicable law. On 29 April 2010 they get married on the island of Wright.

Soon after their honeymoon in Nassau (Bahamas) they move to live together in a big apartment in Genoa and Alma resigns from her job in Milan to follow her husband. Family life with Giorgio is all but boring. In order to take care of his businesses, in fact, he travels a lot and is abroad for long periods. In particular, during summer they usually spend some months, from mid May to September, in Mallorca (Spain), where Giorgio owns two hotels. After that time, they go back to Genoa, where he maintains his main office and have his parents, waiting for the winter season. Winter means French Alps, where the couple usually spends several months, from November to mid-April, supervising the activities of the hotels he owns in Chamonix. Once the winter season is over, the couple returns to Genoa again for almost a month.

Alma travels and works with Giorgio for years. In October 2016 she discovers to be pregnant with their first child. Soon afterwards, in order to protect their future child, they send an e-mail (jointly signed) to their family lawyer to ask him to draft a new agreement, replacing the prenuptial one, to confer jurisdiction on any dispute arising from their family relation to Italian courts, and to apply Italian law.

After the birth of little Megan, in June 2017, Alma starts spending more time in Brighton, where she has a quieter life and enjoys her parents' support. She now tends not to go around that much with Giorgio and also asks him to limit his future engagements abroad to shorter periods. She talks about relocating to UK with the baby. Giorgio however refuses to change his life and to reduce his stays abroad, as he fears that not being 'on-site' will harm his businesses.

Alma is now in Genoa very little, although she does join Giorgio in Mallorca, which she has always enjoyed, and in Chamonix, for the whole winter season. However, in December 2018 she decides to stay in the UK for Christmas holidays, but Giorgio does not join them. Notwithstanding their continuing arguments, on 20 February 2019, Alma decides to make Giorgio a surprise and flies to Chamonix to celebrate his birthday together. This turns out to be a bad idea. When she arrives to her destination she finds Giorgio with another woman, whom he is dating for some months.

Shocked with anger and shame, Alma flies immediately back to Brighton, where she seeks for legal advice in order to obtain:

- divorce from his husband,
- assignment of the family house in Genoa,
- a monthly sum for her needs,
- maintenance for little Megan,
- compensation for moral damages suffered as a consequence of her husband adultery.

After evaluating the factual and legal background, her lawyer lodges a divorce petition against Giorgio before the *High Court, Family Division,* in London on 2 May 2019, claiming also a monthly sum for her needs, together with the assignment of the family house in Genoa and moral damages suffered as a consequence of her husband behaviour.

On 20 May 2019 on his arrival to UK, Giorgio is served with Alma's application together with the decree fixing the first hearing before the Court on 10 June 2019.

On that day he appears in court with the assistance of a British lawyer to object UK jurisdiction and to state that, in any case, proceedings for separation are already pending in Italy, before the *Tribunale di Genova*, seised by him with a petition for separation filed by his lawyer with the Italian court on 30 April 2019 and served on Alma on 25 May 2019. The first hearing is scheduled for the 12 July.

At the first hearing before the High Court in London on 10 June 2019, the Judge orders the parties to provide the court with a pleading specifically concerning jurisdiction and applicable law issues due within the 15 July 2019.

Please consider that starting on 1st May 2019, UK is no longer a Member State of the EU. Brexit has taken place without a Withdrawal Agreement. On the 6th March 2019 the UK Government has enacted guidelines through the *The Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019.* A copy thereof is attached (*Annex 1*).

Related questions

Trainees are required to plead, respectively, in favour of Alma's or Giorgio's case considering the following questions.

1) How does Brexit affect the case? Do Italian courts apply EU Regulations in regard of a UK citizen, who is (possibly) habitually resident in Italy? Do UK courts apply EU Regulations?
2) Which courts have jurisdiction to hear the claim for marriage dissolution? Which are the relevant legal instrument and provisions?
3) Which courts have jurisdiction over the assignment of marital home? Which are the relevant legal instrument and provisions?

4) Which courts have jurisdiction over the claim for compensation for moral damages suffered as a consequence of adultery committed by her husband? Which are the relevant legal instrument and provisions?

5) Is there any situation of *lis pendens* between the two sets of proceedings instituted in the UK and in Italy? Which is the court first seised?

6) Assume that we are before the Italian court, because it is the court first seised and shall rule on the separation claim.

   Can the 2010 prenuptial agreement on choice-of-law on the separation/divorce be deemed to be valid? Which is the law applicable to assess its validity? And in case the agreement is invalid, how would the court assess the applicable law?

   Can the common written request made via e-mail by the spouses in 2016 to their family lawyer be sufficient to qualify as a valid choice of law agreement? Under which law? In the negative, can the spouses agree on the law applicable to separation/divorce also after proceedings are commenced?

7) Alma wants to ask for the fault-based separation against the husband.

   Which courts have jurisdiction over the issue concerning the husband's fault as a basis for separation? Which are the relevant legal instrument and provisions?

LEGAL INSTRUMENT(S) TO BE APPLIED

Regulation No. 2201/2003

Regulation No. 1259/2010

National law

Annex 1

* * *

STATUTORY INSTRUMENTS

2019 No. 519

EXITING THE EUROPEAN UNION

FAMILY LAW

JUDGMENTS

The Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019

Made 6th March 2019

Coming into force in accordance with regulation 1

The Secretary of State makes these Regulations in exercise of the powers conferred by section 8(1) of, and paragraph 21 of Schedule 7 to, the European Union (Withdrawal) Act 2018(**a**).

In accordance with paragraph 1(1) of Schedule 7 to that Act, a draft of this instrument has been laid before and approved by a resolution of each House of Parliament.

PART 1

Introduction

Citation, commencement and extent

1. (1) These Regulations may be cited as the Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019 and come into force on exit day.
(2) Subject to paragraphs (3) and (4) these Regulations extend to the United Kingdom.

(3) The following provisions do not extend to Scotland

(a) regulation 3;

(b) paragraph 15(6) to (8) of the Schedule.

(4) Subject to paragraph (3), any revocation or amendment made by these Regulations, and any saving or transitional provision in these Regulations, has the same extent as the provision to which it relates.

Interpretation

2. In these Regulations

(**a**) 2018 c. 16.

"Council Regulation No. 2201/2003" means Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No. 1347/2000;

"Council Regulation No. 4/2009" means Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark;

"the relevant Central Authority" means—

(i) for England and Wales, the Lord Chancellor;

(ii) for Scotland, the Scottish Ministers;

(iii) for Northern Ireland, the Department of Justice;

"the relevant competent authority" means—

(i) for England and Wales, the family court or the High Court, as specified under the law of England and Wales;

(ii) for Scotland, the sheriff court or the Court of Session, as specified under the law of Scotland

(iii) for Northern Ireland, a magistrates' court or the High Court, as specified under the Scotland; law of Northern Ireland.

PART 2

Revocation of retained direct EU legislation

Revocation of Council Regulation No. 2201/2003

3. Council Regulation No. 2201/2003 is revoked.

Revocation of Council Regulation No. 4/2009

4. Council Regulation No. 4/2009 is revoked.

Revocation of Council Regulation No 2116/2004

5. Council Regulation (EC) No 2116/2004 amending Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, as regards treaties with the Holy See is revoked.

Revocation of Council Regulation No. 664/2009

6. Council Regulation (EC) No 664/2009 of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations is revoked.

PART 3

Amendment of primary and secondary legislation

Amendment of primary and secondary legislation

7. The Schedule, which sets out amendments of primary and secondary legislation, has effect.

PART 4

Saving and transitional provisions

Saving and transitional provisions

8. (1) The amendments and revocations made by these Regulations do not apply in relation to—

(a) proceedings before a court in a Member State seised before exit day in reliance upon—

(i) the provisions of Chapter II (jurisdiction) of Council Regulation No. 2201/2003, or

(ii) the provisions of Chapter II (jurisdiction) of Council Regulation No. 4/2009;

(b) proceedings before a court seised in reliance upon a choice of court agreement, whether made before or after exit day, in accordance with Article 4 of Council Regulation No. 4/2009;

(c) payments of maintenance which fall due before exit day or applications, requests for assistance or specific measures, where the application or request is received by the relevant Central Authority or where the relevant competent authority is seised before exit (i) Chapter III (recognition and enforcement) or Chapter IV (cooperation between day, in accordance with—

(i) Chapter III (recognition and enforcement) or Chapter IV (cooperation between Central Authorities in matters of parental responsibility) of Council Regulation No. 2201/2003, or

(ii) Chapter IV (recognition and enforcement), Chapter VI (court settlements and authentic instruments), Chapter VII (cooperation between Central Authorities) or Chapter VIII (public bodies) of Council Regulation (EC) No. 4/2009.

(2) For the purposes of this regulation, a court is seised—

(a) at 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 the applicant was required to take to have service effected on the respondent; or

(b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the applicant has not subsequently failed to take the steps the applicant was required to take to have the document lodged with the court.

(3) For the purposes of paragraph (1), references to “Member State” in Council Regulation No 2201/2003 and Council Regulation No. 4/2009 and any implementing legislation are to be read as including the United Kingdom.

6 March 2019

Lucy Frazer

Parliamentary Under Secretary of State

Ministry of Justice

* * *

Questions with guidelines

1) **How does Brexit affect the case? Do Italian courts apply EU Regulations in regard of a UK citizen, who is (possibly) habitually resident in Italy? Do UK courts apply EU Regulations?**

i. Before UK courts

According to Part 2 of *The Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019,* an act coming into force on Brexit day, the Brussels IIa and the Maintenance Regulations are revoked. Thus, both Regulations are no more applicable in the UK on and after the Brexit day (please note: the *2019 regulation* does not revoke Brussels IIa in regard to Scotland).

However, Part 4 derogates the revocation of the Regulation in regard of proceedings that are pending before a court in a Member State seised before exit day in reliance upon the provisions of Chapter II of Brussels IIa and of Chapter II of the Maintenance Regulations. Further exceptions apply to choice-of-court agreements and maintenance payment. (see article 8, Part 4).

In regard of UK courts, one should therefore determine if the proceedings are started before or after the exit day in order to establish if the EU Regulation apply. Please note that the relevant provision (article 8(1)(a)) refers to proceedings pending in *a court in a Member State* seised before the exit day. It does not refer to a proceedings pending in a UK court , but to proceedings pending in any EU court.

The provision *could* be interpreted as meaning that the separation/divorce proceedings (to be considered as a whole) is started before the Brexit day (1st May 2019) in Italy and the Regulations apply.

However, one could also offer an opposite interpretation and conclude that each court establishes when it is seized and if it is to apply EU Regulations. In this latter case, the UK court is seized after the Brexit day and is under no duty to apply the EU regulations.

(*As Alma's or Giorgio's counsel different groups could lead to different conclusions*).

For the purpose of the training we shall assume that UK courts will apply EU Regulations. This solution appears also the more in line with a textual interpretation. At this time there is however no clear solution.

ii. Before Italian courts

Italian courts should apply EU regulations also after Brexit day. EU Regulations apply in all cases where a ground for jurisdiction is established. In this case there are several cases for jurisdiction, so EU regulation is established. It is totally irrelevant that Alma is a British citizen, possibly having her habitual residence in UK.

2) **Which courts have jurisdiction to hear the claim for marriage dissolution? Which are the relevant legal instrument and provisions?**

i) Choice-of-court clauses on divorce claim in the agreements

Alma and Giorgio concluded a prenuptial agreement in 2010 and a new draft agreement in 2016.

According to Regulation 2201/2003 (Brussels IIa) party autonomy is not allowed. It does not provide for any party autonomy in matrimonial matters, any choice of court agreement possibly concluded between the spouses has no effect on the issue of determining jurisdiction over the separation/divorce claim.

- Hence, there is no need to assess the validity of Alma and Giorgio's prenuptial agreement concluded in 2010 and of the new draft agreement of 2016.

ii) Determining the jurisdiction

Art. 3 of Regulation 2201/2003 (Brussels IIa) provides for the alternative jurisdiction of seven different *fora*. The choice is left to the plaintiff, i.e. the faster spouse to commence proceedings for marriage dissolution.

a) If you were Alma's counsel on which grounds would you argue that Alma's habitual residence is in the UK in order to establish the English court's jurisdiction?

   Art 3(a) 5th indent or 6th indent may apply.

   Which factual elements may be relevant in this regard?

   e.g. main centre of business and life interests, family life with her parents and baby. Alma is still resident with her parents' or own a house of her own?

b) If you were Giorgio's counsel, on which grounds would you argue that Alma's habitual residence is in Italy in order to establish the Italian court's jurisdiction?

   Giorgio should contest the UK jurisdiction arguing that the Italian court has competence to hear the dispute pursuant to Art. 3(a) 1st or 2nd indent.

   Which factual elements may be relevant in this regard?

   e.g. residence certificates, main centre of business and life interests.

   More precisely, Giorgio could maintain that family life, although being fragmented in different Member States, is centred in Genoa, then Italian courts have jurisdiction under Art. 3(a) 1st indent, which provides for the competence of the courts of the Member State where the spouses are habitually resident.

   However, Art. 3(a) 2nd indent may appear a stronger ground for jurisdiction because it provides for the jurisdiction of the courts of the country where the spouses were last habitually resident, insofar as one of them still resides there. Giorgio still lives in Italy and Alma lived there until June 2017 and occasionally returned in Genoa.

   As a further argument to contest the UK jurisdiction, Giorgio could maintain that Alma has not acquired her habitual residence/domicile in the UK because they usually spent the summer season in Spain and the winter season in France.

   Which factual elements may be relevant in this regard?

e.g. quantitative analyses of time spent per year in the UK and abroad.

Possible issues to be discussed:

- habitual residence of the spouses whose family life is "fragmented" in different member States (e.g. Italy, Spain and France, UK) → how is habitual residence established?

In particular:

- Is it possible to have multiple habitual residences? → multiple courts competent to hear the claim?

- or must the court assess where the spouses have their main habitual residence by combining both quantitative and qualitative elements connecting the case with a certain country (see e.g. *Tribunale di Milano*, 16 April 2014)?

3) Which courts have jurisdiction over the assignment of marital home? Which are the relevant legal instrument and provisions?

According to its Recital No 8, Regulation 2201/2003 (Brussels IIa) applies only to the dissolution of matrimonial ties and does not deal with issues such as the grounds for divorce, property consequences of marriage or other ancillary measures.

Moreover, under its Art. 1(3)(e), the Regulation does not apply to maintenance obligations.

It is thus necessary to qualify the claim concerning the assignment of marital home in favour of Alma in order to determine the applicable PIL regime.

In particular:

- is it a measure of protection of children, thus falling under parental responsibility matters and subject to Regulation 2201/2003?, or
- is it a means for protecting the weaker spouse, thus qualifying as maintenance under Regulation 4/2009?, or
- does it qualify as a measure concerning matrimonial property regimes, thus subject to Regulation 2016/1103?

(*As Alma's or Giorgio's counsel the qualification may lead to different conclusions*).

Possible issues to be discussed:

- qualification of the claim concerning the assignment of marital home in favour of one spouse when no children are involved.

Case law:

In one case Italian courts applied Art. 32 of Law No 218/1995 (on patrimonial relationships between the spouses) to the assignment of the marital home (see *Tribunale di Belluno*, 30 December 2011).

4) Which courts have jurisdiction over the claim for compensation for moral damages suffered as a consequence of adultery committed by her husband? Which are the relevant legal instrument and provisions?

Again, Recital No 8 defines a very limited scope of application for Regulation 2201/2003 (Brussels IIa) as far as matrimonial matters are concerned.

Although certainly connected to marriage dissolution, the Alma's claim for damages suffered by one spouse as a consequence of adultery seems to better fall within the notion of non-contractual matters, relevant under Art. 7 No 2 of Regulation No 1215/2012 (Brussels I-*bis*), according to which in matters relating to tort, delict or quasi-delict, the courts for the place where the harmful event occurred or may occur has jurisdiction (that must be considered as the place where the damages are suffered).

- Alma's counsel shall ground the UK jurisdiction based on the fact that Alma has suffered damages in the UK, where she lives.
- Giorgio's counsel shall contest the UK jurisdiction and maintain that the Italian courts are competent to hear the case because the event occurred in Italy, where he was dating the other woman.

Possible issues to be discussed:

- qualification of the claim for moral damages suffered as a consequence of adultery committed by one spouse.

5) Is there any situation of *lis pendens* between the two sets of proceedings instituted in the UK and in Italy? Which is the court first seised?

Both Italian and English courts can be deemed to have jurisdiction on the separation/divorce petition, respectively, on the grounds mentioned above at No 1. As a result, and taking into account the broad notion of *lis pendens* between proceedings concerning matrimonial matters (which comprises proceedings relating to divorce, legal separation and marriage annulment according to Art. 19(1) of Brussels IIa Regulation), a question of parallel proceedings may indeed arise in this case.

Therefore, it is key to establish which is the court first seised. Pursuant to Art. 16(a) of Brussels IIa Regulation, a court shall be deemed to be seised at the time when the document instituting the proceedings 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.

In the case at stake, the only relevant dates are those when the two applications were filed with the Italian and English courts, i.e. 30 April 2019 and 2 May 2019, respectively.

As to the dates of service, the fact that Alma's application has been served on Giorgio (on 20 May 2019) before that his application has been served to her (on 25 May 2019) is completely irrelevant provided that both parties have diligently taken the subsequent steps required by national law to effectively serve their application.

- Hence, it can be argued that the Italian court has been seised first (30 April 2019); on the contrary, the UK court is the court second seised (2 May 2019) and under Art. 19(3) Brussels IIa shall, of its own motion, stay its proceedings until such time as the jurisdiction of the court first seised is established.

Here again the possible impact of Brexit can have different outcomes.

As Alma's or Giorgio's counsel you may want to offer different conclusions and elements for reasoning.

Possible issues to be discussed:

- Suppose that the UK court, despite the *lis pendens*, does not stay its proceedings and deliver its decision on the very same day as (or even earlier than) the Italian court. Can the English decision be recognised in Italy? Is there any ground for opposing its recognition in Italy?

Relevant case-law:

- CJEU, 6 October 2015, Case C-489/14, *A* v *B* on *lis pendens* between separation and divorce proceedings and on time difference between the Member States

- CJEU, 16 January 2019, Case C-386/17, *Liberato* v *Grigorescu* on the breach of the *lis pendens* rule as a possible ground of non-recognition.

6) **Assume that we are before the Italian court, because it is the court first seised and shall rule on the separation claim.**

   Can the 2010 prenuptial agreement on choice-of-law on the separation/divorce be deemed to be valid? Which is the law applicable to assess its validity? And in case the agreement is invalid, how would the court assess the applicable law?

   Can the common written request made via e-mail by the spouses in 2016 to their family lawyer be sufficient to qualify as a valid choice of law agreement? Under which law? In the negative, can the spouses agree on the law applicable to separation/divorce also after proceedings are commenced?

NB - These issues are discussed before the Italian court, since the UK is not a part to the enhanced cooperation of Rome III Regulation and thus shall apply its national law to assess the agreements.

I) Prenuptial agreement of 2010

By means of an agreement signed before a notary in Brighton in 2010 Alma and Giorgio chose to confer exclusive jurisdiction over their divorce to UK courts which should apply English law. *(On choice-of-courts clause see supra, Question No. 1)*

a) Choice of law regarding the separation/divorce

The relevant instrument that the Italian court should consider when assessing the validity of the agreement, and whether the choice of law was validly made, is Regulation 1259/2010 (Rome III).

According to its Art. 6(1), the existence and the validity of a choice-of-law agreement shall be determined by the law which would govern it under the Regulation if the agreement were valid. In this case, the chosen law is one of those alternatively provided by Art. 5 of Rome III Regulation, namely the law of the State of nationality of either spouse at the time the agreement was concluded, i.e. English law. This law therefore governs the validity of the choice-of-law agreement.

According to Art. 7 of Rome III Regulation, for a choice-of-law agreement to be formally valid it is required that it be expressed in writing, dated and signed by both spouses. In the case at stake, the agreement was concluded by means of an authentic instrument, and therefore appears met the formal requirements set out by Art. 7.

b) Choice of law regarding all other claims consequences deriving from the separation/divorce.

See the remarks made under Questions 2 and 3.

- The Italian court should apply the English law to marriage dissolution, *unless it considers the joint request made by Alma and Giorgio via e-mail to their family lawyer in 2016 to prepare a draft agreement sufficient to qualify as a valid choice of law agreement*.

II) New draft agreement of 2016

In October 2016, in order to protect their future child, Alma and Giorgio have sent an e-mail (signed by both of them) to their family lawyer to ask him to draft a new agreement, replacing the prenuptial one, to confer Italian courts jurisdiction to decide any possible disputes arising from their family relation according to Italian law.

Pursuant to Art. 6(1) Rome III Regulation, the existence and the validity of a choice-of-law agreement shall be determined by the law which would govern it under the Regulation if the agreement were valid. In this case, the chosen law would be one of those alternatively provided by Art. 5 of Rome III Regulation (which one depends on the solution given to the issue of determining the spouses' habitual residence). Italian law would then in principle govern the separation/divorce between Alma and Giorgio, provided that all requirements for its formal validity are met.

Under Art. 7 of Rome III Regulation, a choice-of-law agreement is valid as its form if it is made in writing, dated and signed by both spouses. Moreover, any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing.

- The Italian court should apply the Italian law to assess the validity of the choice-of-law agreement sent via e-mail in 2016, since the e-mail should be deemed as an electronic means providing a durable record of the agreement.
- Moreover, the Italian court should also verify in accordance with its own law the validity of the choice-of-law clause contained in the previous prenuptial agreement concluded in 2010.

  In this case, according to Italian law, prenuptial agreements are considered void as they would allow the parties to decide on rights deriving from the status of spouse in advance of the possible separation/divorce proceedings.

  - Thus, the choice-of-law made in the prenuptial agreement has no effect in the Italian separation proceedings and the Italian court should rule on the separation according to the law chosen via e-mail, that is the Italian law.

7) Alma wants to ask for the fault-based separation against the husband.

Which courts have jurisdiction over the issue concerning the husband's fault as a basis for separation? Which are the relevant legal instrument and provisions?

According to Recital No 8, Regulation 2201/2003 (Brussels IIa) applies only to the dissolution of matrimonial ties and does not deal with issues such as the grounds for divorce, property consequences of marriage or other ancillary measures.

It is thus necessary to qualify the claim concerning the ascertainment of any responsibility of one of the spouses in the matrimonial crisis leading to separation/divorce.

From a procedural point of view, does it qualify as:

a) an autonomous claim concerning non-contractual liability of one party (and, hence, subject to autonomous grounds of jurisdiction)?
   - Art. 7, n. 2 of Brussels I-*bis* applies (place of the harmful event/where the damages are sustained).

     Alma's counsel may support the UK jurisdiction, whereas Giorgio's counsel the Italian jurisdiction.

b) a claim dependent from the claim for separation/divorce (and, hence subject to the same or similar provisions on jurisdiction, i.e. Brussels IIa)?
   - Art. 3 of Brussels IIa applies. *See the remarks under Question 1*.

Case law:

Italian case-law has mostly extended Brussels IIa scope of application by way of analogy to cover also the claim concerning fault in causing separation/divorce,

because from a logical point of view, although being an autonomous claim, it is inextricably connected to the claim for marriage dissolution and cannot be separated from it (e.g. *Tribunale di Belluno*, 30 December 2011; *Tribunale di Padova*, 6 February 2015; *Tribunale di Parma*, 18 November 2016); in one case the court qualified the claim for fault assessment as a claim on non-contractual liability of one of the spouses subject to Art 5 No 3 of Brussels I Regulation: e.g. *Tribunale di Tivoli*, 6 April 2011).

Recognition of judgments in matrimonial matters: general frame common to all Regulations

Contents

1. Introduction

PIL instruments come into play whenever a case is characterized by **an international element,** in order to answer the following questions:

a) which court has international jurisdiction to hear the case? (***jurisdiction***)
b) which law governs the substantive aspects of the case? (***applicable law***)
c) under which conditions can a decision issued abroad be recognized and enforced in the requested State? (***recognition and enforcement***)

Different types of EC/EU regulations

- Rome Regulations – applicable law (e.g. 593/2008; 864/2007 Reg.)
- Brussels Regulations – jurisdiction + enforcement (e.g. 2201/2003; 1215/2012 Reg.)
- Mixture of both (e.g. 4/2009; 650/2012; 2016/1103; 2016/1104 Reg.)
- Judicial cooperation (e.g. 1393/2007;1206/2001 Reg.)

Family law matters

EC/EU Regulations concerning enforcement in Family Law

- Council Regulation (EC) No **2201/2003** of 27 November 2003 concerning jurisdiction and the **recognition and enforcement of judgments in matrimonial matters** and the matters of parental responsibility
- Regulation (EC) No **4/2009** of 18 December 2008 on jurisdiction, applicable law, **recognition and enforcement of decisions** and cooperation in matters relating to **maintenance obligations**.
- Regulation (EU) No **1259/2010** of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to **divorce and legal separation**.

EC/EU Regulations concerning enforcement in Family Law

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

- Regulation (EU) **2016/1104** of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the **recognition and enforcement of decisions** in matters of the **property consequences of registered partnerships**

Conventions and National Laws

- Multilateral and bilateral treaties, e.g.:
  - Lugano Convention (30 October, 2007) between the EU member states and Norway, Switzerland and Iceland
  - Hague Convention of 23 November, 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance

- National laws

2. Enforcement of judgments

Recognition and enforceability of the judgment

- Court/Notary

Enforcement of the judgment

- Bailiff

2.a) Application for a declaration of recognition

- Jurisdiction of the court/notary
- Application for the declaration of recognition
  - EC 2201/2003 Reg.
  - EU 1103/2016 Reg.
  - EU 1104/2016 Reg.

Except for:

- EC 4/2009. Reg. (under Hague Protocol)
- EC 805/2004. Reg.
- EC 1896/2006. Reg.
- EC 861/2007. Reg.
- EU 1215/2012. Reg.

- Documents to be attached:
  - The judgment - state of origin (its translation)
  - Certificate (application form) of the court of origin (no translation) e.g.:
    - 2201/2003 EC Reg. Article 28, 39 (exercising parental responsibility)
      ⇨ exequatur in the state of enforcement
    - 2201/2003 EC Reg. Article 40, 41 (1) or 41 (2) – (right of access; child return in child abduction)
      ⇨ no exequatur in the state of enforcement

2.b) Recognition procedure

- The court of the enforcement issues an enforcement certificate for the foreign judgement
- It is a court order, which means that the foreign judgment = national judgment in terms of enforceability

Court order

recognition or no recognition

- The judgment must not be reviewed as to its substance

- Grounds for non-recognition of judgments
  - recognition is manifestly contrary to the public policy of the Member State in which recognition is sought
  - in default of appearance of the defendant, if he/she was not served with the document, to arrange for his or her defense
  - Res iudicata (national judgments)
  - Res iudicata (foreign, recognized judgments)

2.c) Appeal/Remedy

- Both parties receive the court order
- Both parties can appeal against the court order (second instance)
- Deadline: national rules or under e.g. Reg. 2201/2003 Art. 33 (5) one month
- Another remedy (third instance)
- Final order enters into force without any further remedies

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3. Enforcement procedure

- The court/notary issued writ of execution

Bailiff's procedure

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4. Abolition of exequatur ?

judgment of state of origin= judgment of the state of enforcement

Previous enforcement procedure

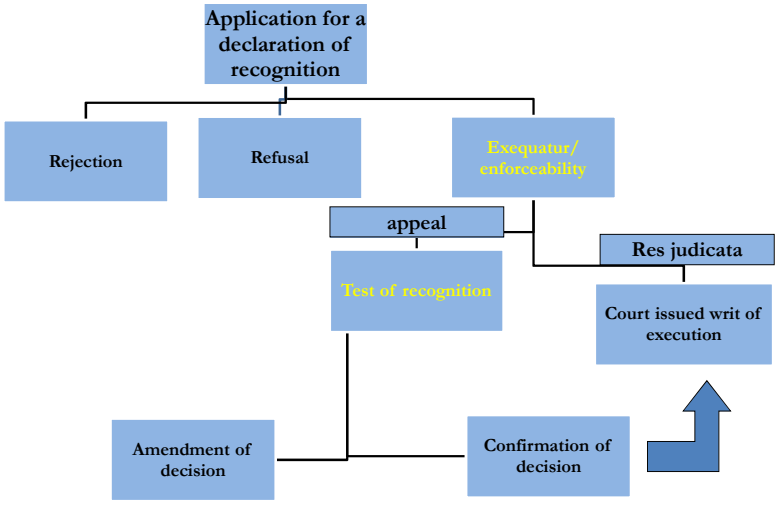
1.Application for a declaration of recognition

2. Exequatur procedure (enforceability)

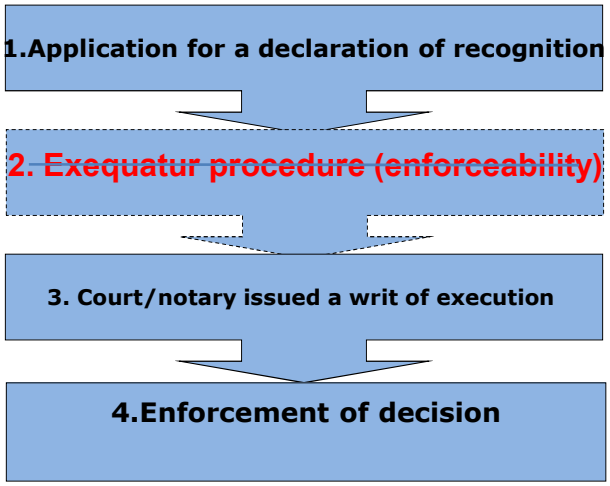
3. Court/notary issued a writ of execution

4.Enforcement of decision

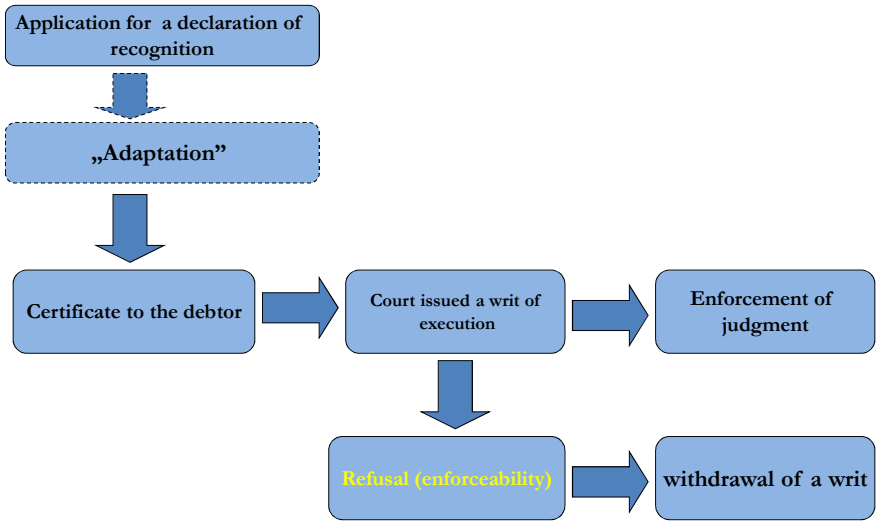
Previous enforcement procedure



New enforcement procedure



New enforcement procedure



Abolition of exequatur

- **Reg. 44/2001**

  the debtor was allowed to defend his grounds for non-recognition of judgments in the appeal procedure

- **Reg. 1215/2012 (recast)**

  the grounds for non-recognition of judgments transferred to the stage of recognition and enforcement

No application for a declaration of recognition

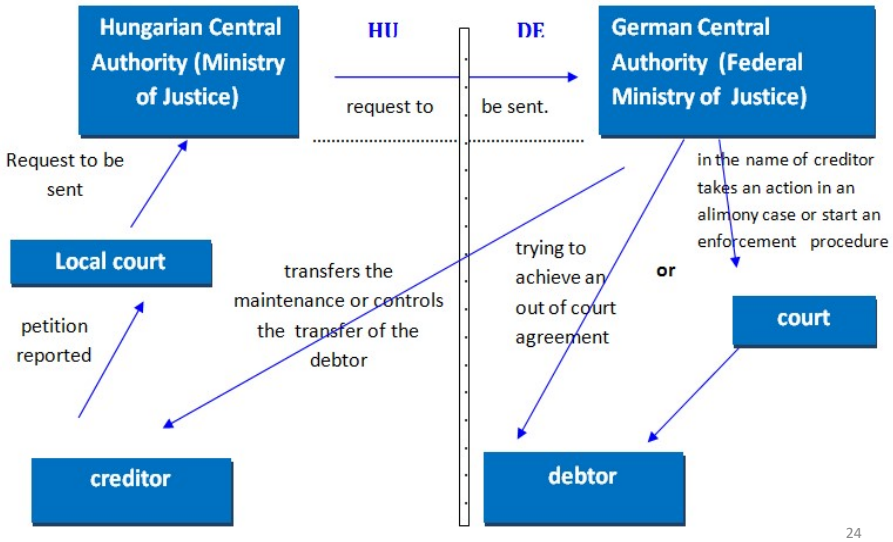
- Reg. 4/2009 (under Hague Protocol)
- Reg. 805/2004
- Reg. 1896/2006
- Reg. 861/2007
- Reg. 1215/2012

- Documents to be attached:
  - The judgment - state of origin
  - The court certificate – state of origin
  - The court certificate –state of enforcement
  - court/notary issued a writ of execution – state of enforcement

Provisional measures

Competent authority (jurisdiction)	No competent authority (no jurisdiction)
decision	decision
Legal effect in all EU member states	Legal effect only in the given EU member state
Recognizable and enforceable in all EU member states	Not recognizable and enforceable in another EU member

Maintenance Regulation



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5. Summarising conclusions

characteristics of the enforcement procedure

- Mutual recognition [Article 36(1)]
- Foreign judgment = national judgment in enforcement
- The law of the state of enforcement is applicable [Article 41(1)]
- The State of enforcement has the exclusive competence for enforcement procedures [Article 24, point 5]
- Under no circumstances may a judgment given in a Member State be reviewed as to its substance in the Member State addressed [Article 52]

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The project is co-funded by the Justice Programme of the European Union
JUST-JTRA-EJTR-AG-2016-763874

Recognition of judgments in matrimonial matters: general frame common to all Regulations

Case study

FACTS

A Hungarian national nurse applied for a home care job in Germany. In Germany she engaged in an intimate relationship with her employer's son, a German national. They got married and settled in Germany after her employer's death. Their child was born in Germany, where the little girl received German citizenship. Because of her husband's business interests, they lived in Denmark for a few years, and they signed a matrimonial property agreement under Danish law, according to which the wife could benefit only from a part of their matrimonial property. Later they moved back to Germany and after 17 years of marriage they divorced. The wife decided to return to Hungary together with her little daughter aged 10. Following a 6 month stay in Hungary the wife brought an action against her husband *for divorce, the division of the matrimonial property and the child maintenance.*

In her statement of claim the applicant refers to the invalidity of the matrimonial property contract, claiming that under the Hungarian Act on Private International Law the law of the country of the last common residence of the married couple should be applied to matrimonial property agreements, moreover, the agreement is to be deemed formally invalid under German law.

The parents could agree with each other on exercising of parental rights, the regulating of contact with the child in order to an action in these claims is not necessary.

Since the birth of the child, the husband receives a family allowance from the German State, which he does not want to release to his wife.

Related questions

1) Can the jurisdiction of the Hungarian courts and the jurisdiction of the court in the matter of divorce be established and, if so, on what basis? Is there a possibility of an agreement on jurisdiction?
2) Which law should be applied to divorce? Is there a choice of law?
3) Can the jurisdiction of the Hungarian courts and the jurisdiction of the court in the case of an application for child maintenance be established, and if so, on what basis? Is there a choice of law? Is there a possibility of an agreement on jurisdiction?
4) Which State's law should be applied to an application for child maintenance? Is there a choice of law?
5) Can the jurisdiction of the Hungarian courts and the jurisdiction of the court in matters of matrimonial property law be established - and, if so, on what basis?

6) Which State's law should be applied to the adjudication of a matrimonial property claim? Is there a choice of law?
7) What can the court do in the case of family allowance from Germany? Which court is responsible to take an action?

LEGAL INSTRUMENT(S) TO BE APPLIED

Regulation No 2201/2003

Regulation No 4/2009 (and 2007 Hague Protocol)

Regulation No 1259/2010

Regulation No 883/2004/EC (recast 988/2009/EC Regulation)

National Law

Questions with guidelines

1) Can the jurisdiction of the Hungarian courts and the jurisdiction of the court in the matter of divorce be established and, if so, on what basis? Is there a possibility of an agreement on jurisdiction?

The applicant is deemed habitually resident if he or she resided in the given country for at least six months immediately before the application was made, or is the national of the Member State in question (2201/2003 EC Regulation, Article 3)

According to the Hungarian Code of Civil Procedure, if the defendant was not domiciled in Hungary, the place of residence or domicile of the plaintiff determines the jurisdiction of the court. [New Hungarian Code of Civil Procedure, Section 25 (2)]

No agreement on jurisdiction is possible

2) Which law should be applied to divorce? Is there a choice of law?

According to Articles 5-7 of Regulation (EU) No. 1259/2010, there is a possibility of a choice of law. In Hungary the parties may exercise choice of law at the latest until the deadline set by the court at the first hearing. Pursuant to Article 7 (1) of the Regulation, such agreement on the designation of law is valid, only if it is expressed in writing.

In the absence of choice of law pursuant to Article 5, divorce and legal separation shall be subject to the law of the state where the spouses were last habitually resident, provided that the period of residence did not end more than 1 year before the court was seized, in so far as one of the spouses still resides in that state at the time the court is seized (Article 8 of Regulation 1259/2010 EU). Therefore, in the absence of a choice of law by the parties, German law must be applied to the divorce.

A legal advice: the judge should direct the parties towards the choice of law, in order that the national law can be applied.

3) Can the jurisdiction of the Hungarian courts and the jurisdiction of the court in the case of an application for child maintenance be established, and if so, on what basis? Is there a choice of law? Is there a possibility of an agreement on jurisdiction?

In matters relating to maintenance obligations in Member States, jurisdiction shall lie with:

(a) the court for the place where the defendant is habitually resident, or

(b) the court for the place where the creditor is habitually resident, or

(c) the court which, according to its own law, has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties (4/2009 EC Regulation, Article 3)

(d) the court for the place where the defendant is habitually resident, or

(e) the court for the place where the creditor is habitually resident, or

(f) the court which, according to its own law, has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties (4/2009 EC Regulation, Article 3)

Agreement on jurisdiction (choice of court, 4/2009 EC Regulation, Article 4): this Article shall not apply to a dispute relating to a maintenance obligation towards a child under the age of 18. Jurisdiction is partially derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction. (4/2009 EC Regulation, Article 5) - it is irrelevant when brought together with a marriage lawsuit.

4) Which State's law should be applied to an application for child maintenance? Is there a choice of law?

The law applicable to maintenance obligations shall be determined in accordance with the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations (hereinafter referred to as the 2007 Hague Protocol) in the Member States bound by that instrument. (4/2009 EC Regulation, Article 15.)

(1) Maintenance obligations shall be governed by the law of the State of the habitual residence of the creditor, save where this Protocol provides otherwise. (2) In the case of a change in the habitual residence of the creditor, the law of the State of the new habitual residence shall apply as from the moment when the change occurs. (Hague Protocol of 23 November 2007, Article 3)

(2) Notwithstanding Articles 3 to 6, the maintenance creditor and debtor for the purpose only of a particular proceeding in a given State may expressly designate the law of that State as applicable to a maintenance obligation.

(3) A designation made before the institution of such proceedings shall be in an agreement, signed by both parties, in writing or recorded in any medium, the information contained in which is accessible so as to be usable for subsequent reference. (Hague Protocol, Article 7)

Advice: at the opening of the case it is worthwhile to procure that the parties state their choice of law, because in this case the “link” applicable in the absence of choice of law does not apply.

5) Can the jurisdiction of the Hungarian courts and the jurisdiction of the court in matters of matrimonial property law be established - and, if so, on what basis?

In Hungary EU Regulation 2016/1103 must not be applied; Act XXVIII of 2017 on Private International Law:

The spouses may choose the law applicable to their property relationship, provided that it is one of the following rights:

(a) the law of the State of which one of the spouses is a national at the time the agreement is concluded;

(b) the law of the State in which one of the spouses has his habitual residence at the time the agreement is concluded;

(c) the law of the State of the court seized. [Section 28 (1)]

Jurisdiction: Hungarian Code of Civil Procedure

6) Which State's law should be applied to the adjudication of a matrimonial property claim? Is there a choice of law?

In Hungary EU Regulation 2016/1103 must not be applied; Act XXVIII of 2017 on Private International Law

(1) The law applicable to the spouses' personal and property relations - with the derogations provided for in Article 16 (3) - (5) - shall be the law of the State of which both spouses are nationals at the time of judgment.

(2) If the nationality of the spouses is different at the time of the examination, the law of the State in which the spouses have their habitual residence, failing which the last common habitual residence of the spouses shall apply. (German Law)

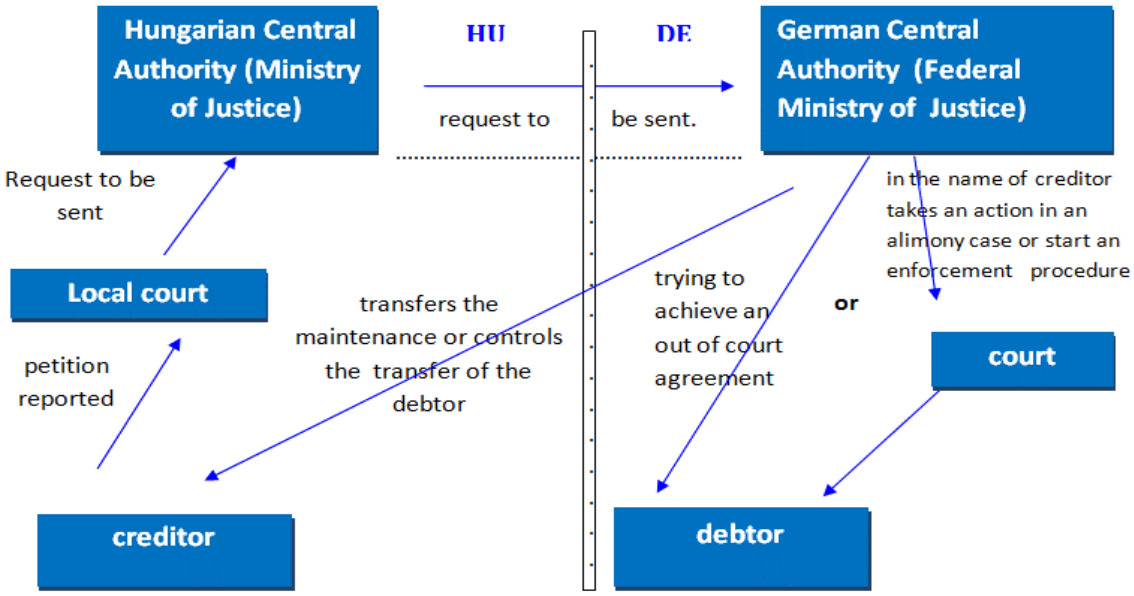
(3) If the spouses did not have their common habitual residence, the law of the State of the court seized shall apply. [Article 27 (1)]

There is no choice of law.

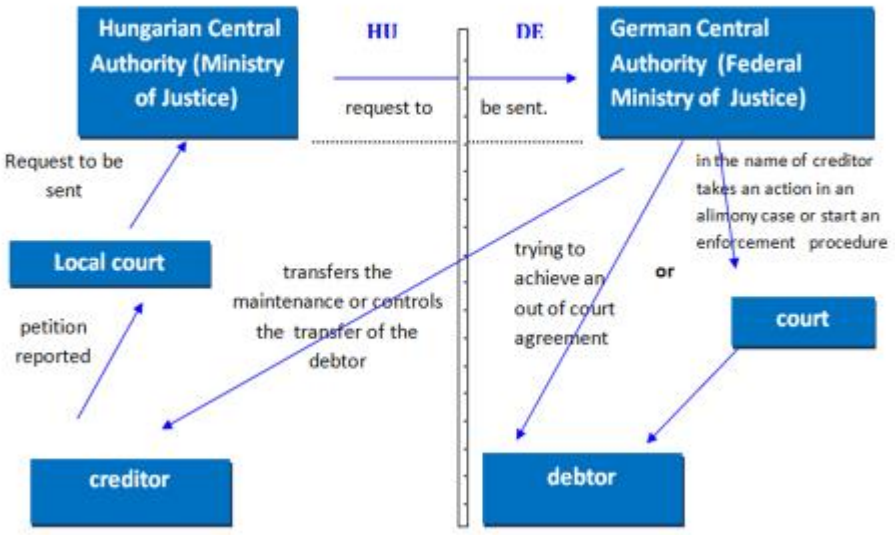
7) What can the court do in the case of family allowance from Germany? Which court is responsible to take an action?

The legal separation (and also the divorce) is such a circumstance that makes the husband not eligible for the German family allowance, if the child does not live with him any more. The husband has to pay this German family allowance to the mother , this can be enforced under the Article 84 of the 883/2004/EC Regulation (recast 988/2009/EC Regulation) and the 4/2009 EC Regulation.

The mother reports a petition at the Hungarian court and the German Central Authority starts an enforcement procedure in the name of the mother in Germany. The Hungarian court sends the request of the mother to the Hungarian Central Authority only when the requirement that she grants for legal aid is complied with. (This Hungarian law is not compatible with the 4/2009 EC Regulation!)



Maintenance Regulation



Special issues on recognition of matrimonial decisions

Contents

- Recognition in case of violation of *lis pendens*
- Recognition of private and out-of-court divorces
- Recognition of matrimonial decisions and Brexit

Recognition in case of violation of lis pendens

- Is violation of *lis pendens* a ground not to recognise a judgment rendered in another country?
- **CJEU, 16.01.2019, C-386/17, *Liberato***

CJEU in *Liberato*

The rules of lis pendens must be interpreted as meaning that where, in a dispute in matrimonial matters, parental responsibility or maintenance obligations, the court second seised, in breach of those rules, delivers a judgment which becomes final, those articles preclude the courts of the Member State in which the court first seised is situated from refusing to recognise that judgment solely for that reason. In particular, that breach cannot, in itself, justify non-recognition of a judgment

Recognition of private and out-of-court divorces: types of divorces

Out of court divorce	Private divorce
• Divorce without court • The court is often replaced by another public authority • Also includes private divorces • > not all EU countries provide for out-of-court divorces	• One of the types of out-of-court divorces • 'Private divorces' - divorces pronounced without the constitutive intervention of a court or public authority.

Divorce before notary /civil registry

- Rome III Regulation explicitly states that those divorces are treated as a "public divorce" by a court
- Article 3(2) Rome III Regulation: "the term 'court' shall cover all the in the participating Member States with jurisdiction in the matters falling within the scope of this Regulation"
- Also Brussels IIa Regulation defines: "the term "court" shall cover all the authorities in the MS

Recognition of divorce before the notary/civil registry

→the parties may ask the notary who has officially recorded the divorce agreement to issue them with the certificate under Brussels II a

Notary/civil registry divorce is available in: Romania, Latvia, Estonia, Spain, Portugal

NB: (check for limitations if divorce will need to be recognised outside the EU)

Other out-of-court divorces

Italy

- possibility of *negoziazione assistita* (assisted negotiations)
- agreement on divorce is made, lawyers file the document to public office (Procura della Repubblica)
- Public Officer has the possibility to declare the divorce invalid for reasons of substantive law

France

- divorce by mutual consent → court proceedings are not required
- agreement is drafted and signed by the counsels and spouses
- agreement is sent to public notary to register it
- *notaire* has no duty to check the fairness of the contract

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Brussels IIa Recast

"Having regard to the growing number of MS which allow extra-judicial agreements on legal separation and divorce or on matters of parental responsibility, the Presidency compromise text makes it clear that the circulation of such authentic instruments and agreements is a horizontal issue, and ***should be facilitated, subject to certain safeguards****.*

As the Regulation ***should not allow free circulation of mere private agreements****, the solution should be that circulation is possible* ***only if an authority depending on each national system - formally drew up or registered the authentic instrument or registered the agreement****."*

Consilium, 30.11.2018: http://data.consilium.europa.eu/doc/document/ST-14784-2018-INIT/en/pdf

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Recognition of divorces between EU MS and UK after Brexit

Cases ongoing in England and Wales on exit day

UK MoJ Guidance "Family law disputes involving EU after Brexit: guidance for legal professionals" 29/03/2019

"If the UK leaves the EU without a deal, the court in England and Wales will continue to recognise divorces granted in EU Member States in the same way under Brussels IIa, if the recognition proceedings started ahead of exit."

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Recognition of divorces between EU MS and UK after Brexit

Cases ongoing in EU MS on exit day

EU Commission.
"Notice to stakeholders.
Withdrawal of the UK and EU rules in the field of civil justice and private international law"
18/01/2019

"Where the relevant instrument foresees exequatur, if a judgment of a UK court has been exequatured in the EU-27 before the witdrawal date but not yet enforced before that date, the judgment can still be enforced in the EU-27, and the fact that it was originally a judgment handed down by UK courts is irrelevant."

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Recognition of divorces between EU MS and UK after Brexit

UK	EU MS
The court in England and Wales will, after a no deal exit, recognise divorces granted in EU Member States in the same way as they currently do for orders from non-EU countries.	EU law will not apply

Possible instruments

- 1970 Hague Divorce Convention will provide a framework for recognition of divorces and legal separations Cyprus, Czech Republic, Denmark, Estonia, Finland, Italy, Luxembourg, Netherlands, Poland, Portugal, Slovakia, Sweden, and the UK
- Bilateral agreements + national rules

Summarising conclusions

Special issues related to the circulation of divorce decisions

- Different forms
- Brexit

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The project is co-funded by the Justice Programme of the European Union
JUST-JTRA-EJTR-AG-2016-763874

Special issues on recognition of matrimonial decisions

Case study

FACTS

Oliver (British national) and Valentina (Italian national) met in Brussels where they were both working for a British company. They married in 2010 in Bruge (Belgium). In 2004, their son Leonardo was born, and in 2016 they welcomed their daughter Rebecca. In 2017, Oliver lost his job and at the same time Valentina got a very good job proposal in Verona. The family moved to Italy.

However, their family life was not going well. They started living separately in September 2018 and since November 2018 the father lives and works in London. In 2019, they decided they should divorce. In fact, they both agree on divorce and its consequences. Their son who was going to private British school, will live with the father in London (Leonardo prefers so, in a couple of years he will finish school and plans to start university in the UK). The daughter is small and will stay with the mother. They agree on visiting rights. As for maintenance, until the son will get 18, no maintenance would be paid by the father or the mother or vice versa (set-off), later, the father will pay maintenance (500 euros/month) for Rebecca. Spouses do not ask maintenance for themselves. They have 3 apartments – in London, Verona and Bruge, and they decided that the one in London will be for Oliver and the ones in Verona and Bruge for Valentina.

They approach you as a lawyer and ask for your advice. They have several questions.

Related questions

1) They heard of *negoziazione assistita* (assisted negotiations) and think this could be a good option as it might be quicker and, possibly, cheaper. Would this fit in their case? Or better is to go to court?
2) Does *negoziazione assistita* fall into the Brussels IIa Regulation? Would it be recognised in the UK? And in Belgium?
3) They need the court to divide their real estate. Is this possible through *negoziazione assistita* and would this be recognised in the UK and Belgium?
4) What would be the documents that Oliver would need to present in London?
5) Brexit is coming. How this will affect their divorce? Can they still divorce in Italy? Would such divorce be recognised under the Regulation Brussels II a?
6) Knowledge sharing: Do you have private divorces in your own jurisdiction? Did you have any practical cases on this? You are kindly invited to share your knowledge and experience.

LEGAL INSTRUMENT(S) TO BE APPLIED

Regulation No 2201/2003

1996 Hague Convention

Regulation No 1259/2010

National law

Questions with guidelines

1) **They heard of *negoziazione assistita* (assisted negotiations) and think this could be a good option as it might be quicker and, possibly, cheaper. Would this fit in their case? Or better is to go to court?**

The question here is whether *negoziazione assistita* (assisted negotiations) fall under private divorces or not. Because if so – recognition problems would arise. In short, the answer would be not, but *it is suggested to give floor to trainees to discuss why and what are the main features of negoziazione assistita (in what cases this is appropriate solution, whether possible when children are involved, how hearing of the child would be organized, etc)*.

'Private divorces' - divorces pronounced without the constitutive intervention of a court or public authority. It is important not to confuse private divorces with non-judicial divorces in which the court is replaced by another public authority.

In Italian situation, *negoziazione assistita* is divorce with intervention of public authority. In case of such divorce, the spouses have to sign an agreement in the presence of their attorneys. As soon as the negotiation agreement is finally drafted and executed, the lawyers must authenticate the signatures, file the document to the competent public office (Procura della Repubblica) and wait for the security clearance (nulla osta) by the competent Public Officer (Procuratore). The Public Office has the possibility to declare the divorce invalid for reasons of substantive law.

Issue to discuss: why there is reluctance to advise out of court divorces when cross-border issues are involved?

2) **Does *negoziazione assistita* fall into the Brussels IIa Regulation? Would it be recognised in the UK? And in Belgium?**

As noted above, it is not private divorce and thus it falls under Brussels IIa Regulation.

Legal provisions:

Brussels IIa Regulation defines: "the term "court" shall cover all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to Article 1".

Article 3(2) Rome III Regulation: "the term 'court' shall cover all the authorities in the participating Member States with jurisdiction in the matters falling within the scope of this Regulation").

Therefore, such divorce should be recognised in the UK and Belgium as EU MS (Brexit to be discussed later).

3) **They need the court to divide their real estate. Is this possible through *negoziazione assistita* and would this be recognised in the UK and Belgium?**

Again, this gives floor to Italian participants to discuss more about *negoziazione assistita* and its possibilities.

Within *negoziazione assistita,* divorce and the division of their property may be handled. This will include their properties in Italy, Belgium and the UK. However, as the UK does not participate in Regulation 2016/1103, we should also take into account the law of this country in relation to real estate there.

Issue to discuss: the trainees can be invited to discuss specifics with enforcement and possible risks when real estate is located in third countries.

4) **What would be the documents that Oliver would need to present in London?**

Authentic instruments are recognised and enforced in the same way as court decisions.

The parties can order the certificate referred to in Article 39 of Brussels IIa from the court or other authority which issued the divorce decree/ registered divorce. This certificate together with the divorce decree are EU-wide recognized as sufficient proof of a valid divorce.

5) **Brexit is coming. How this will affect their divorce? Can they still divorce in Italy? Would such divorce be recognised under the Regulation Brussels II a?**

Yes, they can divorce in Italy, in fact since the Brexit is coming they would benefit from starting divorce procedure before this date if it is possible to finish the case before the exit date.

Divorcing before Brexit:

As stated by the MoJ of England and Wales[1], if the UK leaves the EU without a deal, the court in England and Wales will continue to apply Brussels IIa to divorce proccdivorces granted in EU Member States in the same way under Brussels IIa, if the recognition proceedings is started before the exit day.

Divorcing after Brexit:

With Brexit date, under Art. 50(2) TEU the Treaties will cease to apply to the UK. From the EU point of view the UK will become a third State.

The court in England and Wales will, after a no deal exit, recognise divorces granted in EU Member States in the same way as they currently do for orders from non-EU countries. The rules on recognition are to be found in the Family Law Act 1986 which implemented the 1970 Hague Convention on the recognition of divorce and legal separations.

[1] https://www.gov.uk/government/publications/family-law-disputes-involving-eu-after-brexit-guidance-for-legal-professionals/family-law-disputes-involving-eu-after-brexit-guidance-for-legal-professionals

(The 12 EU Member States that are party to the 1970 Hague Convention on Divorce Recognition at the time of exit are Cyprus, Czech Republic, Denmark, Estonia, Finland, Italy, Luxembourg, Netherlands, Poland, Portugal, Slovakia, Sweden.)

6) **Knowledge sharing: Do you have private divorces in your own jurisdiction? Did you have any practical cases on this? You are kindly invited to share your knowledge and experience.**

The trainers could ask participants whether they had negoziazione assistita *in their practice, as well as whether such options exist in Portugal, Hungary, Lithuania, whether they had any problems with recognizing such divorces abroad, etc.*

MAINTENANCE OBLIGATIONS

Presentations and case studies

- **Regulation No. 4/2009 and jurisdiction over maintenance obligations**
  drafted by Dr Diletta Danieli (UNIVR, diletta.danieli@univr.it) and
  Dr Cinzia Peraro (UNIVR, cinzia.peraro@univr.it)

- **Law applicable in maintenance obligations cases**
  drafted by Prof Anabela Gonçalves (UMINHO,
  asgoncalves@direito.uminho.pt)

- **Recognition and enforcement in maintenance obligations cases**
  drafted by Ana Pliner (TEISE, ana.pliner@gmail.com)

Regulation No 4/2009 and jurisdiction over maintenance obligations

Contents

1) The scope of application of Reg. 4/2009
2) The concept of maintenance obligations
3) Jurisdiction over maintenance obligations
4) Summarising conclusions

1) The scope of application of Reg. 4/2009

General overview:

- complete PIL legal instrument
- applicable since 18 June 2011
- all EU MS, except **Denmark** (which has nonetheless implemented the contents of this Reg. to the extent that it amends Reg. 44/2001)
- interplay with the **2007 Hague Protocol** with regard to the applicable law (Art. 15 Maint. Reg.)
- partial harmonisation of **enforcement** procedures (abolition of *exequatur* for those MS bound by the Hague Protocol)

Objective scope

- "**maintenance obligations": no definition** in the Reg.
- **Art. 1: maintenance obligations** arising from a **family relationship**, **parentage**, **marriage** or **affinity** (irrespective of a possible family breakdown)

Recital 11: **autonomous interpretation**, in order to ensure equal treatment to all creditors

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Subjective scope

i. **individuals** within the meaning of **Art. 2**

- "**creditor**": the person to whom maintenance **is owed or alleged to be owed**
- "**debtor**": the person who **owes or is alleged to owe** maintenance

does it cover **only** persons entitled to maintenance by virtue of a **previous decision**, or **also** those bringing an action for the **first time**?

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CJEU, 20.3.1997, C-295/95, *Farrell*

- Art. 5(2) of the 1968 Brussels Conv. did not clarify the notion ('individual')
- the Court: it is a **general term**, without distinction between those already recognised and those not yet recognised as entitled to maintenance

  - interpretation codified in the Maint. Reg.
  - **not limited** to those who have **already been recognised** as entitled to maintenance rights/duties, but also **those who seek for** maintenance

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ii. **public bodies** within the meaning of Recital 14 and Art. 64

- for the purposes of **recognition and enforcement** of a maintenance decision, they can **serve as** "**creditors**" if acting in place of an individual to whom maintenance is owed

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2) The concept of maintenance obligations

- concept of maintenance obligations: **no reference to national law** for the purposes of determining its meaning and scope

- Thus, in light of CJEU case law: an **autonomous interpretation** must be given, taking into account
  - the **context**, and
  - the **objective**

  of the relevant provisions

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- The **concept of maintenance obligations**
  - payment of an interim compensation granted to one spouse in a divorce judgment
  - payment of a lump sum to one spouse
  - transfer of ownership of property between spouses

may be ancillary claims to divorce proceedings,

but they are considered civil matters, since they are financial obligations between former spouses determined according to their needs and resources.

See: CJEU 6.3.1980, 120/79, de Cavel v de Cavel (II), CJEU 27.2.1997, C-220/95, van den Boogard v Laumen

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For example, **under Italian law** the EU concept of maintenance obligations is applicable to

- **maintenance obligations arising out of family relationships**
  - between the spouses (Art. 143 of the Italian Civil Code - ICC)
  - between parents and children (Arts. 147, 315-*bis*, 316-*bis* ICC)
- **alimony**
  - obligation imposed, by operation of law, on next of kin and relatives to provide material assistance to a person in need who is unable to provide for him/herself (Arts. 433-448 ICC)
- **maintenance obligations in the context of the breakdown of family life**
  - between the spouses, in case of separation (Art. 156 ICC) or divorce (Law 898/1970)
  - towards the children (Arts. 337-ter, 337-septies ICC; Law 898/1970)

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What is the nature of maintenance obligations?

CJEU 6.3.1980, 120/79, *de Cavel v de Cavel (II)*

- The case concerned the **payment of an interim compensation** granted to one of the parties (wife) **in a French divorce judgment**
- the relevant instrument in force at that time (**1968 Brussels Conv.**) **excluded** from its scope the status of natural persons, as well as rights in property arising out of a matrimonial relationship

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- can the Brussels Conv. **apply** to an ancillary order concerning maintenance, even though the main dispute (divorce proceedings) falls out of its scope? **YES**
  - the nature of the maintenance ancillary claim was found in the **financial obligations between former spouses** after divorce, fixed **on the basis of their respective needs and resources**
  - as such, it was considered a **civil matter** within the meaning of the 1968 Brussels Conv.

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Does the form of payment or a possible transfer of ownership of property matter? NO

CJEU 27.2.1997, C-220/95, *van den Boogard v Laumen*

- The case concerned the **payment of a lump sum** and **transfer of ownership of property** by one party to his former spouse in the context of **divorce proceedings**
- again, the nature of maintenance was found in its objective to **enable one spouse to provide for himself/herself**, and in the determination of its **amount** according to **needs and resources of both spouses**

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- to establish the nature of maintenance, the **method of payment** (lump sum or periodic instalments) is **not relevant**

  ↳ even a lump sum may be designed to ensure a predetermined level of income

- likewise, the **transfer of ownership of property** between the former spouses **does not alter** the nature of maintenance

  ↳ it still is a capital sum for the maintenance of one of the former spouses

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3) Jurisdiction over maintenance obligations

Overview of the jurisdictional regime in the Maint. Reg.

- general grounds
- choice of court
- submission to jurisdiction
- subsidiary jurisdiction
- necessary jurisdiction (*forum necessitatis*)

Recital 15

- regardless of whether the defendant has his/her habitual residence in a MS or not
- no room for application of national law

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General grounds (Art. 3)

- **Autonomous maintenance claims**:
  jurisdiction lies with the **court for the place** where
  a) the **defendant** has his/her **habitual residence**, **or**
  b) the **creditor** has his/her **habitual residence**

  - rules determining both international and territorial jurisdiction ("for the place")
  - pro-claimant provisions, designed to protect the maintenance creditor (i.e. the weaker party)
  - proximity between the forum and the creditor also for evaluating the creditor's needs

Case law on letter *b* and the concentration of jurisdiction in a MS

CJ, 18.12.2014, C-400 and 408/13, *Sanders and Huber*

Under German law, in case a party is not habitually resident in Germany, it is provided that jurisdiction to rule on cross-border maintenance obligations is concentrated on the local court (*Amtsgericht*) having jurisdiction for the district of the higher regional court (*Oberlandesgericht*) where the defendant or creditor has his/her habitual residence

↳ a **centralisation of jurisdiction** is **precluded** by the Maint. Reg., **UNLESS**

- the objective of **proper administration of justice** is achieved
- the **interests of maintenance creditors** are protected

- **Ancillary maintenance claims (Art. 3)**:
  jurisdiction lies with the court which
  c) has **jurisdiction** to hear proceedings concerning the **status of a person** (i.e. divorce, separation, nullity or annulment of marriage), **or**
  d) has **jurisdiction** to hear proceedings concerning **parental responsibility**

  UNLESS, in both cases, jurisdiction is **based solely on the nationality** (or domicile for Ireland and the UK) **of one of the parties**

On which provisions can the **jurisdiction based solely on nationality** be grounded?

- <u>in matrimonial matters</u>
  - Art. 3(b) of Brussels IIa Reg.

- <u>in parental responsibility matters</u>
  - Art. 12(1) + Art. 3(b) of Brussels IIa Reg.

➢ **Relationship** between the general grounds of jurisdiction (letters *a*, *b*, *c* and *d*)

- considered **together**, they are **alternative** (i.e. there is no hierarchy, and claimant can choose to sue on the basis of each one of them)
- the **two ancillary provisions** (letters ***c*** and ***d***), however, are **mutually exclusive**, with the consequence that claims regarding child maintenance could only be ancillary to parental responsibility proceedings, and not to those on the status of a person (for example, the parents)

Case law on the relationship between Art. 3, letters *c* and *d*

CJ, 16.7.2015, C-184/14, *A v B*

The relationship of **mutual exclusivity** has a number of **reasons**

- an application involving maintenance in respect of minor children is **not necessarily linked** to divorce or separation proceedings
- the court with jurisdiction to hear proceedings on parental responsibility is **in the best position** to evaluate *in concreto* the issues involved in the application relating to child maintenance
- the **best interests of maintenance creditors** (i.e. the children) are guaranteed

Case law on the relationship between Art. 3, letters *a* and *d* and Art. 5

CJ, 5.09.2019, C-468/18, *R v P*

where there is an action before a court of a MS on the divorce of the parents of a minor child, parental responsibility in respect of that child and the maintenance obligation with regard to that child,

- the court ruling on the divorce, which has declared that it has no jurisdiction to rule on the claim concerning parental responsibility, **nevertheless has jurisdiction** to rule on the claim concerning the **maintenance obligation with regard to that child** where
  - it is also the court for the place where the defendant is habitually resident or
  - the court before which the defendant has entered an appearance, without contesting the jurisdiction of that court.

Case law on Art. 3(d)

CJ, 12.11.2014, C-656/13, *L. v M.*

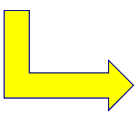
- The jurisdiction of the Czech court in parental responsibility matters is grounded on Art. 12(3) of BIIa Reg. (prorogation).
- Is it also competent on the ancillary maintenance claims?

YES

The court which has jurisdiction under Art. 12(3) of BIIa will, in principle, also have jurisdiction to hear an application for maintenance which is ancillary to the parental responsibility proceedings pending before it (unless that jurisdiction is based solely on the nationality of one of the parties)

CJEU, 15.2.2017, C-499/15, *W, V v Z*

- the courts of the Member State which made a decision that has become final concerning parental responsibility and maintenance obligations with regard to a minor child, **no longer have jurisdiction** to decide on an application for **variation** of the provisions ordered in that decision, inasmuch as the habitual residence of the child is in another Member State.



as a consequence of the ancillary relationship (= change of HR, change of jurisdiction)

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CJEU, 16.1.2018, C-604/17, *PM. v AH.*

- Art. 3(d) of the Maint. Reg. cannot apply whenever the courts of a given MS lack jurisdiction to rule on parental responsibility matters

  ↳ again, as a consequence of the ancillary relationship

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CJEU, 10.4.2018, C-85/18 PPU, *CV v DU*

- The Romanian court, being the MS of refuge in a case of wrongful removal, lacked jurisdiction in custody matters as the conditions laid down in Art. 10 of BIIa Reg. were not met.
- Is it competent on the ancillary maintenance claims?

  NO

The courts of the **MS of refuge do not have jurisdiction** to rule on an application relating to custody or the determination of a maintenance allowance with respect to that child, in the absence of any indication that the other parent consented to his removal or did not bring an application for the return of that child.

Choice of court (Art. 4)

- **Limited choice** to confer jurisdiction to a court of a MS to settle disputes (actual or future) in matters concerning maintenance obligations
- **NOT applicable** to maintenance proceedings concerning **children under the age of 18**
- the jurisdiction conferred by agreement is **exclusive** (only the chosen court has the power to adjudicate the case)

Possible choices, generally applicable (Art. 4):

a) the court(s) of the MS where **one of the parties** has his/her **habitual residence,**

b) the court(s) of the MS of which **one of the parties** is a **national** (or is domiciled in the case of Ireland and the UK)

these conditions have to be met
at the time the agreement is concluded, or
the court is seised

Possible choices, applicable **only** to maintenance obligations **between spouses or former spouses** **(Art. 4, c):**

i) the **court** which has jurisdiction to hear their **matrimonial disputes**

ii) the court(s) of the MS where they had their **last common habitual residence**, provided that the residence has lasted for **at least one year**

these conditions have to be met
at the time the agreement is concluded, or
the court is seised

Art. 4(2): **formal requirements** of the agreement (similar to RIII Reg.)

- **in writing**
  - not necessarily an agreement signed by both parties, but also a choice expressed in the parties' court documents
- any **communication by electronic means** that provides a **durable record** of the agreement is equivalent to writing

Art. 4(4): in case the parties agreed to confer jurisdiction to court(s) of a **State party to the 2007 Lugano Convention that is <u>not</u> a MS** (i.e., currently, Iceland, Norway, Switzerland)

↳ the Reg. **gives way to the Convention**, which shall apply **except** in relation to a dispute relating to maintenance obligations towards **children under the age of 18**

Submission to jurisdiction (Art. 5)

A court of a MS **acquires jurisdiction** – even though it is not competent pursuant to the general and special grounds/no agreement – in case **the defendant enters an appearance** before this court **without contesting** its jurisdiction

- it is meant to **prevent delays** in the proceedings
- it is a form of **consent-based** jurisdiction, insofar as a "procedural" acceptance of jurisdiction is inferred from the submission

!! For lawyers

- it is advisable to raise a **timely exception of lack of jurisdiction** of the court seised, not only to contest the claimant's application on the merits
- otherwise the court, when examining its jurisdiction pursuant to Art. 10, shall retain it by virtue of the defendant's acceptance/appearance without contestation (even though it is not competent on the basis of the general or special grounds)

Subsidiary jurisdiction (Art. 6)

The meaning of "subsidiary":

- when **neither the defendant nor the creditor** are **habitually resident in a MS**
- when **no choice of court** has been made by the parties
- when the **defendant** has **not submitted** (accepted/not contested) to the jurisdiction of the court seised
- when **no court of a non-EU State party to the Lugano Conv.** has jurisdiction

the court seised can have **jurisdiction if** it is **in the MS of common nationality of the parties**

Art. 6: example

A couple of Italian nationals moves to Croatia, where they habitually reside,

marriage breakdown, followed by a separation by mutual consent approved by the Croatian court,

the wife relocates to Sweden for employment purposes, and regularly spends several months in Asia for business,

the husband relocates to Tunisia with other relatives, and shortly after files for maintenance before the Italian court,

the wife enters an appearance before the court and contests its jurisdiction.

- has the Italian court (MS of common nationality) jurisdiction to hear the maintenance proceedings?

YES

- neither the defendant (wife) nor the creditor (husband) have their habitual residence in a MS (the husband lives in Tunisia, while the wife spends several months in Asia),
- the parties did not make any choice of court,
- the Italian court has not acquired jurisdiction by virtue of the defendant's (wife) submission (she has entered an appearance and contested the jurisdiction),
- the courts in (Iceland, Norway or) Switzerland have no jurisdiction on the basis of the Lugano Conv. (Art. 5(2), similar to Maint.Reg., but no HR/domicile defendant).

Necessary jurisdiction/*Forum necessitatis* (Art. 7)

- When **no court of a MS** has **jurisdiction** pursuant to **Arts. 3, 4, 5 and 6** and
- if proceedings **cannot reasonably be brought** or would be **impossible in a third State** with which the dispute is **closely connected**

a court of a MS can hear the case

- on an **exceptional basis**,

and

- if it has a **sufficient connection** with the dispute

The meaning of "**exceptional basis**":

examples given in **Recital 16** of the Maint. Reg.

- the proceedings would be impossible in the third State due to **civil war**

  (extremely unlikely possibility, and rarely applicable)
- when the applicant **cannot be reasonably expected** to initiate or conduct proceedings in the third State

  (likely possibility)

The meaning of "**sufficient connection**" between the MS and the dispute:

- example given in **Recital 16** of the Maint. Reg.
  - one of the parties is a **national of that MS** (or has his/her domicile in case of Ireland and the UK)
- other situations
  - the **debtor's goods/properties** are located **in that MS**
  - the **creditor** is **present in that MS**

Art. 7: example

A French man and a woman of African origin got married and habitually reside in Bulgaria,

marriage breakdown, and divorce declared by the Bulgarian court,

after the divorce, the man, who retains properties in Bulgaria, has no fixed home and lives between Italy and Asia,

the woman relocates to her State of origin,

two years since the divorce, she intends to bring maintenance proceedings against the former husband, but

- in her State of origin, local traditions prevent a woman from suing her husband (otherwise she would be prosecuted and possibly imprisoned)
- in Bulgaria, the former husband appears before the court seised with maintenance proceedings and contests its jurisdiction

➢ can the Bulgarian court retain its jurisdiction as *forum necessitatis*?

YES

- the applicant (former wife) cannot reasonably initiate proceedings in the third State of her habitual residence,
- it is impossible to determine the habitual residence of the defendant/debtor (former husband),
- no choice-of-court agreement has been concluded,
- the Bulgarian court has not acquired jurisdiction by virtue of the defendant's submission,
- the parties have no common nationality of a MS,
- the Bulgarian court has a sufficient connection with the dispute, being the MS where the debtor's properties are located.

Limit on proceedings (Art. 8)

What if a **maintenance decision given in a MS or a Contracting State of the 2007 Hague Conv.** needs to be **modified or replaced** by a new decision?

As long as the **maintenance creditor** was and continues to be **habitually resident in that MS/Contracting State**, changes in the existing decision can **only** be issued **by the courts of that State**

continuing jurisdiction
of the creditor's habitual residence

Exceptions to the rule of continuing jurisdiction:

- choice-of-court agreement between the parties to confer jurisdiction to the courts of another MS (Art. 4),
- creditor's submission to the jurisdiction of the courts of another MS (Art. 5),
- it is impossible to obtain changes to the original decision or a new decision from the competent authority in the 2007 HC Contracting State (the court cannot, or refuses to, exercise jurisdiction),
- the decision given in the 2007 HC Contracting State cannot be recognised or declared enforceable in the MS where the proceedings for modification are contemplated.

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4) Summarising conclusions

- Jurisdiction:
  - Coordination among general grounds
  - Party autonomy: choice of court
  - Appearance without contesting
  - Subsidiary jurisdiction (common nationality)
  - Forum necessitatis (conditions)

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The project is co-funded by the Justice Programme of the European Union
JUST-JTRA-EJTR-AG-2016-763874

Regulation No 4/2009 and jurisdiction over maintenance obligations

Case study

FACTS

A couple of Italian nationals, Giovanna and Marco, married in Milan (Italy) in February 2010 and shortly after (in mid-2012) moved to Lisbon (Portugal) due to professional grounds of both spouses. Notably, Giovanna is the executive director of an important fashion brand and Marco works in the restaurant business. They have been habitually resident in Portugal for several years.

In January 2015 they had a child, Tommaso, who was born and grown up in Portugal.

Few years later, the husband had some financial problems due to the loss of a business opportunity. As a consequence of the difficult and stressing situation, difficulties arose in the marriage too.

In December 2017 they went back to Italy to spend Christmas holidays with their relatives. During their stay, the spouses decided to relocate in Italy by Spring 2019, hoping that the change would have helped their relationship.

Marco stayed in Italy in order to take care of the renovation of the home in Milan, which was owned by both spouses at 50% each and where they would have wanted to reside. He also started a new commercial activity in Milan.

The wife returned to Portugal with the child and her mother. They were supposed to move in Italy when the renovation was finished.

However, due to continuous arguments mainly related to financial issues, Marco decided to seek divorce. So, on 20 March 2019 he applied before the Tribunal of Milan (Italy) asking for:

- Separation of the couple,
- joint custody of the child,
- placement of the child with the father,
- maintenance for him and the child,
- the award of the home in Milan,

With the introductory claim Marco submits a written agreement signed by both spouses and concluded in Milan in 2010, few days after the marriage, which provided the following clauses for the case of separation or divorce:

- the choice of Portuguese law with regard to the matrimonial disputes (according to which the divorce can be declared after one year of *de facto* separation);
- the choice of Italian courts with regard to both spousal and children maintenance;
- the choice of Italian law on both spousal and children maintenance.

Meanwhile, on 19 April 2019, Giovanna initiated custody proceedings in Portugal asking for the sole custody of Tommaso on the ground that Marco had not been taking

proper care of the child and was often away from home when they lived together in Portugal. She did not file a claim for maintenance as she recalled the signed agreement giving jurisdiction to the Italian court.

The first hearing before the President of the Tribunal of Milan will take place in early July 2019.

Giovanna is asking your legal assistance. She is asking to:

- contest the validity of that agreement;
- enter an appearance before the Italian court and contest the Italian jurisdiction over parental responsibility;
- have the Italian court dismiss the spousal maintenance claims, on the ground that her husband has never provided financial support to the family and she has always paid for family subsistence both in Italy and in Portugal;
- contest the Italian jurisdiction over the child maintenance claim filed by the father;
- She also wants to be able to sell the home in Milan and receive half of the price;
- She wants to know if she can claim damages, in case the husband does not pay the child maintenance;
- Finally, she informs you that she will move to Switzerland by the end of 2019 and wants to know which court has jurisdiction to modify the child maintenance obligation.

Related questions

1) Is the agreement valid? Which are the relevant legal instrument and provision?
2) How would you contest the Italian jurisdiction over parental responsibility matters?
3) Has the Tribunal of Milan jurisdiction over spousal maintenance claims?
4) Has the Tribunal of Milan jurisdiction over child maintenance claims? More generally, could Giovanna file a child maintenance claim against Marco?
5) Which is the law applicable to spousal maintenance obligations?
6) Which is the law applicable to child maintenance obligations?
7) How would you consider the claim concerning the award of the home in Milan? Could it be qualified as the family home? If yes, which are the relevant provisions to determine jurisdiction and applicable law?
8) How would you address the claim concerning damages for unpaid child maintenance? Does it relate to family matters?
9) When the wife and the child will move to Switzerland, which court will have jurisdiction over the modification of child maintenance obligations?

LEGAL INSTRUMENT(S) TO BE APPLIED

Regulation No 4/2009

2007 Hague Protocol

Questions with guidelines

1) Is the agreement valid? Which are the relevant legal instrument and provision?

Regulation 4/2009 provides for the party autonomy (even if it is limited – see *infra* question no. 3) in the selection of the courts having jurisdiction over maintenance obligations.

Under Article 4(2) of Regulation 4/2009 the agreement must be in writing.

- Therefore, the agreement between the spouses is valid as to the formal aspect.

Possible issues to be discussed:

Could an e-mail be a valid proof of the agreement?

See Article 4 of the Regulation according to which also a communication by electronic means which provides a durable record of the agreement is valid because it is considered equivalent to 'writing'.

2) How would you contest the Italian jurisdiction over parental responsibility matters?

Marco asked the Italian judge to rule on parental responsibility matters, but Giovanna wants to contest the Italian jurisdiction.

The Italian judge should decline its jurisdiction according to Article 8 of Brussels II *bis* Regulation because the child is habitually resident in Lisbon (at the time the Italian court was seised).

3) Has the Tribunal of Milan jurisdiction over spousal maintenance claims? Which is the relevant provision?

In the agreement, the spouses have chosen Italian courts for maintenance claims towards both the spouse and the child.

With regard to the spousal maintenance, the Italian court has jurisdiction, because, according to Article 4(1)(a), Italy is the place where one of the parties is habitually resident (the husband), at the time the court is seised, and also because both parties have the nationality of this Member State (letter b), both at the time the agreement was concluded and the court was seised.

Moreover, Article 4(1)(c) provides that, in the case of maintenance obligations between spouses or former spouses, (i) the court which has jurisdiction to settle their dispute in matrimonial matters, shall have jurisdiction over spousal maintenance. This is the case; the Italian courts have jurisdiction over the divorce claim under Article 3(b) of Regulation 2201/2003 (they are both Italian nationals).

- Insofar, Italian courts have jurisdiction over spousal maintenance claims.

Possible issues to be discussed:

With regard to the previous session: is it possible a choice-of-court agreement over matrimonial matters?

What if no valid agreement was signed? Which court could have jurisdiction over the spousal maintenance claim filed by Marco against Giovanna?

See under Article 3:

- Portuguese court under Article 3(a)

- Italian court under Article 3(b)

- Italian court under Article 3(c)? (>>> see what is the triggered ground for divorce?)

4) Has the Tribunal of Milan jurisdiction over child maintenance claims? Which is the relevant provision?

As to the child maintenance, the agreement is not applicable because Article 4(3) states that the provisions therein shall not apply to a dispute relating to a maintenance obligation towards a child under the age of 18.

The grounds of jurisdiction under Article 3 are alternative.

The Italian courts do not have jurisdiction pursuant to Article 3 on the child maintenance claim filed by the father Marco, because the defendant (the mother Giovanna) is habitually resident in Portugal (letter *a*), and so is the creditor, i.e. the child (letter *b*); and also because the Italian court has no jurisdiction over the child custody, thus letter *d* on maintenance claims ancillary to parental responsibility proceedings cannot apply.

On the other side, letter *d* could be applicable to ground the jurisdiction of the Portuguese courts, because the child is habitually resident in Portugal, and the mother has already initiated custody proceedings there.

- Thus, Giovanna can challenge the Italian jurisdiction on the child maintenance claim filed by the father due to i) inapplicability of prorogation under Article 4; ii) lack of jurisdiction under Article 3.

Possible issues to be discussed:

- Italian court lacks jurisdiction on the child maintenance claim filed by the father. NO operation for Article 3: no 3(a) (defendant is mother, resident in Portugal); no 3(b) (creditor is child, also resident in Portugal)); no 3(d) (because custody proceedings are pending in Portugal).

- Should Giovanna not contest the Italian jurisdiction, she could file a counterclaim (before the Italian court) for child maintenance against the father (for instance, realizing Italian courts would award higher maintenance than what the courts in Portugal would do).

Has the Italian court jurisdiction over this counterclaim? Yes, it can ground its jurisdiction on Article 3(a) (the defendant in the counterclaim, i.e. the father, is habitually resident in Italy). This head of jurisdiction is autonomous from the ancillary one in Article 3(d), and the father could not contest the Italian jurisdiction opposing Article 3(d), not even if in the meantime a maintenance claim had been filed there.

- Does *lis pendens* apply? Is *lis pendens* given in this case, where the Portuguese court was previously seized with a custody claim, but not with a maintenance obligation? Does the maintenance claim have to be filed for *lis pendens* to exist? (No, there would be no *lis pendens*; and also not a case for Article 3(d): no ancillary claim was lodged before the Portuguese court) Would you have suggested Giovanna to file for child maintenance in Portugal?

- Food for thought: Do you think letter *d* should be applied in all cases involving children?

How would you support the claim to apply letter *d* and contest the application of letter *a*?

Case law: on ancillary claims (letters *c* and *d*): see CJEU, 16 July 2015, Case C-184/14, *A* c. *B*.

See also Italian Supreme court, 15 November 2017 no. 27901, which, allegedly mistakenly, has qualified letters *c* and *d* as grounds of jurisdiction that prevail over the others laid down in letters *a* and *b*.

5) Which is the law applicable to spousal maintenance obligations?

In the 2010 agreement the spouses have chosen the Italian law to be applied to both spousal and child maintenance.

According to Article 15 of Regulation 4/2009, The Hague Protocol of 2007 applies to determine the applicable law.

Article 8 provides the possibility to choose the applicable law between (a) the law of any State of which either party is a national at the time of the designation; (b) the law of the State of the habitual residence of either party at the time of designation; (c) the law designated by the parties as applicable, or the law in fact applied, to their property regime; (d) the law designated by the parties as applicable, or the law in fact applied, to their divorce or legal separation.

- Therefore, the Italian law can be applied because it is the law of the State of which both parties are nationals (a), as well as it is the law of the State of the habitual residence of the spouses at the time of designation (b). The other provisions (*c* and *d*) are not applicable.

6) Which is the law applicable to child maintenance obligations?

The chosen Italian law is applicable only to spousal maintenance and not towards the child.

Therefore, according to Article 3 of the Protocol, the law of the State of the habitual residence of the creditor (the child) will apply, which is the Portuguese law since the child is habitually resident there.

- Italian courts shall apply Portuguese law on child maintenance claim (as also Portuguese courts would do in case they were seised with a child maintenance claim).

Possible issues to be discussed:

Is there any possible ground of non-application of the Portuguese law?

The limit of the public order of the *forum*.

Case law:

on the choice of the applicable law under Arts. 7 and 8 of the Protocol: see CJEU, 20 September 2018, Case C-214/17, *Mölk*

7) How would you consider the claim concerning the award of the home in Milan? Could it be qualified as the family home? If yes, which are the relevant provisions to determine jurisdiction and applicable law?

In the main case, only the father has lived in the home in Milan, so it could not be considered as the family home. Therefore, it would fall under the matrimonial property regime. In this regard, Giovanna's defense against the husband's claim may result well-founded.

On the contrary, if the apartment were qualified as the family home *[the trainees should imagine grounds for doing so: for instance relying on the couple's intention to relocate the whole family there],* according to the Italian case law, such issue is deemed to be related to the protection of children, and therefore subject to the respective jurisdictional regime and the rules on the determination of the applicable law.

- In the latter case, Portuguese courts shall decide over the award of the family home and apply the Portuguese law (similar to the claim on parental responsibility – based on the habitual residence of the child).

Possible issues to be discussed:

When does an apartment, property of one of the spouses, qualify as family home?

Is the award of a family home part of the maintenance obligation? And which is the applicable regime?

8) How would you address the claim concerning damages for unpaid child maintenance? Does it relate to family matters?

According to Italian law, damages for unpaid child maintenance can be claimed in the same proceedings, in accordance with family procedural law (Article 709-ter cpc). However, as the Italian Supreme Court has interpreted, this issue does not fall within family matters, but relates to civil and commercial matters. Therefore:

- Jurisdiction over damages for unpaid maintenance must be determined according to Brussels I *bis* Regulation (no. 1215/2012), because the situation consists in a breach of an obligation as it could be considered as a compensation for the delay of the payments, even if it is related to the maintenance obligation. Thus, Article 7(2) applies (the place of the harmful event, which is interpreted as the place where the damage occurs: in most cases at the residence of the child).
- The applicable law must be determined according to Rome II Regulation (no. 864/2007), Article 4, according to which the law of the country in which the damage occurs applies.
    - In this case, whether the Italian court is requested to rule on this matter, it shall decline its jurisdiction in favor of the Portuguese courts, which shall apply Portuguese law.

Possible issues to be discussed and Case law:

Possible inconsistency of the Italian case law with the interpretation given by the CJEU with regard to the enforcement of penalty payment in case of breach of rights of access, which was considered relating to parental responsibility matters: see CJEU, 9 September 2015, Case C-4/14, *Bohez*.

9) When the wife and the child will move to Switzerland, which court will have jurisdiction over the modification of child maintenance obligations?

In case the wife and the child will move to Switzerland, where they will habitually reside, the situation involves Italy and Switzerland (a non-EU State).

The relevant instrument to determine jurisdiction over maintenance claims is the Lugano Convention of 2007 (which applies among EU Member States and Switzerland, Denmark, Norway, Iceland).

According to Article 5(2)(a), actions in matters relating to maintenance can be brought before the courts for the place where the maintenance creditor (the child) is domiciled or habitually resident.

- Thus, the wife can bring an action before the Swiss court to request the modification of child maintenance obligation.

As to the applicable law, Switzerland is a contracting party to The Hague Convention of 2 October 1973 on the law applicable to maintenance obligations (it is not a contracting party to the 2007 Convention and Protocol).

According to Article 4, the law of the habitual residence of the creditor (the child) shall apply.

- Thus, Swiss law should be applied.

Law applicable in maintenance obligations cases

Contents

- The law applicable to maintenance obligations
- The 2007 Hague Protocol and its scope of application
- General rule
- Special rules
- Party autonomy
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- Public policy
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The law applicable to maintenance obligations

Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (Maintenance Regulation)

The law applicable to maintenance obligations

Article 15

«The law applicable to maintenance obligations shall be determined in accordance with the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations (hereinafter referred to as the 2007 Hague Protocol) in the Member States bound by that instrument».

The law applicable to maintenance obligations

Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations (2007 Hague Protocol)

2007 Hague Protocol and its scope of application

- Material scope: (Article 1, Section 1)
- Spatial Scope: (Article 2)
- Coordination other international instruments (Articles 18 and 19)

General rule

Article 3:

«(1) Maintenance obligations shall be governed by the law of the State of the **habitual residence** of the **creditor**, save where this Protocol provides otherwise.

(2) In the case of a **change** in the habitual residence of the creditor, the law of the State of the **new habitual residence** shall apply as from the moment when the change occurs».

Special rules

A – **Article 4** - Special rules favouring certain creditors.

B – **Article 5** - Special rule with respect to spouses and ex-spouses

C – **Article 6** - Special rule on defence

Article 4

«(1) The following provisions shall **apply** in the case of maintenance obligations of -

a) **parents towards their children**;

b) **persons**, other than parents, towards persons who have **not** attained the age of **21** years, except for obligations arising out of the relationships referred to in Article 5; and

c) **children towards their parents**.

Article 4

(2) If the creditor is unable, by virtue of the law referred to in Article 3, to obtain maintenance from the debtor, the **law of the forum** shall apply.

(3) Notwithstanding Article 3, if the creditor has seised the competent authority of the State where the debtor has his habitual residence, the **law of the forum shall apply**. However, if the creditor is unable, by virtue of this law, to obtain maintenance from the debtor, the **law of the State of the habitual residence of the creditor** shall apply.

(4) If the creditor is unable, by virtue of the laws referred to in Article 3 and paragraphs 2 and 3 of this Article, to obtain maintenance from the debtor, the **law of the State of their common nationality**, if there is one, shall apply».

Article 5

(ex-spouses)

«In the case of a maintenance obligation between **spouses, ex-spouses** or parties to a marriage which has been annulled, Article 3 shall not apply if **one of the parties objects** and the law of **another State**, in particular the State of their last common habitual residence, has a **closer connection** with the marriage. In such a case the law of that other State shall apply».

Article 6

«In the case of maintenance obligations other than those arising from a parent-child relationship **towards a child** and those referred to in **Article 5**, the **debtor may contest** a claim from the creditor on the ground that there is no such obligation under both the law of the State of the habitual residence of the debtor and the law of the State of the common nationality of the parties, if there is one».

Party autonomy

- **Article 7** - Designation of the law applicable for the purpose of a particular proceeding
- **Article 8** - Designation of the applicable law

Party autonomy – Article 7

«(1) Notwithstanding Articles 3 to 6, the maintenance **creditor and debtor** for the purpose only of a particular proceeding in a given State **may expressly designate** the law of that State as applicable to a maintenance obligation.

(2) A designation made before the institution of such proceedings shall be in an **agreement**, **signed** by both parties, **in writing** or **recorded** in any medium, the information contained in which is accessible so as to be usable for subsequent reference».

Party autonomy – Article 8

(1) Notwithstanding Articles 3 to 6, the maintenance **creditor and debtor** may **at any time designate** one of the following laws as applicable to a maintenance obligation -

a) the law of any State of which either party is a national at the time of the designation;

b) the law of the State of the habitual residence of either party at the time of designation;

c) the law designated by the parties as applicable, or the law in fact applied, to their property regime;

d) the law designated by the parties as applicable, or the law in fact applied, to their divorce or legal separation.

Party autonomy – Article 8

(2) Such **agreement** shall be **in writing** or **recorded** in any medium, the information contained in which is accessible so as to be usable for subsequent reference, and shall be signed by both parties.

(3) Paragraph 1 shall **not** apply to maintenance obligations in respect of a person under the age of 18 years or of an adult who, by reason of an impairment or insufficiency of his or her personal faculties, is not in a position to protect his or her interest.

Party autonomy – Article 8

(4) Notwithstanding the law designated by the parties in accordance with paragraph 1, the question of whether the **creditor can renounce** his or her right to maintenance shall be determined by the law of the State of the habitual residence of the creditor at the time of the designation.

(5) Unless at the time of the designation the parties were fully informed and aware of the consequences of their designation, the law designated by the parties shall **not apply** where the application of that law would lead to manifestly unfair or unreasonable consequences for any of the parties.

Scope of the applicable law

Article 11

The law applicable to the maintenance obligation **shall determine** *inter alia* -

a) whether, to what extent and from whom the creditor may claim maintenance;

b) the extent to which the creditor may claim retroactive maintenance;

c) the basis for calculation of the amount of maintenance, and indexation;

d) who is entitled to institute maintenance proceedings, except for issues relating to procedural capacity and representation in the proceedings;

e) prescription or limitation periods;

f) the extent of the obligation of a maintenance debtor, where a public body seeks reimbursement of benefits provided for a creditor in place of maintenance.

Public policy

Article 13

«The application of the law determined under the Protocol may be refused only to the extent that its effects would be manifestly contrary to the **public policy** of the **forum**».

Other provisions

Article 10 - Public bodies

«The right of a public body to seek reimbursement of a benefit provided to the creditor in place of maintenance shall be governed by the law to which that body is subject».

Other provisions

Article 14 - Determining the amount of maintenance

«Even if the applicable law provides otherwise, the needs of the creditor and the resources of the debtor as well as any compensation which the creditor was awarded in place of periodical maintenance payments shall be taken into account in determining the amount of maintenance».

Other provisions

Article 12 - Exclusion of *renvoi*

«In the Protocol, the term "law" means the law in force in a State other than its choice of law rules».

C.L.A.S.S. 4EU

Summarising conclusions

- Habitual residence, closer connection vs (limited) party autonomy

- CJEU relevant case-law

7.06.2018, C-83/17, *KP* c. *LO*

20.09.2018, C-214/17, *Mölk*

C.L.A.S.S. 4EU
The project is co-funded by the Justice Programme of the European Union
JUST-JTRA-EJTR-AG-2016-763874

Law applicable in maintenance obligations cases

Case study

FACTS

Beatriz, a Portuguese woman, and Davide, an Italian man, met in Lisbon, where both are resident and where they married in March 2010. Beatriz works as a licencing specialist in company seated in Porto, and Davide is a sports freelance reporter working for several European broadcasting companies.

In April 2015, Beatriz received an incredible job offer from a multinational company having its headquarters in Milan and they agreed to move to Italy, Davide's home country where he was able to find further useful contacts for his activity.

Married life went on happily in Milan and on 1st September 2015 Beatriz gave birth to a beautiful baby girl, Amelia.

In January 2016 Davide accepted a job offer from Eurosport to cover and report the most important cycling tour all over the world. As a consequence, he started travelling regularly all over Europe and outside the continent for longer periods, usually 2-to-4-week-periods each month from February to November.

Due to Davide's continued absence, the spouses' relation begins to deteriorate. In June 2017, tired of the situation, Beatriz asks Davide to spend separate holydays so to think over their relation and to decide next steps. On 1 July 2018, with Davide's consent, Beatriz flies to Portugal with Amelia, to spent some weeks near Porto at her parents' house. Beatriz and Davide agree to reunite the family again in their home in Milan at the end of August.

By the end of August, Beatriz informs Davide that she needs more time to understand if their relationship has come to an end. Davide agrees that she and Amelia can remain in Porto some more time, provided that such situation is intended to be only temporary and that meanwhile he can visit her daughter any time he is free. And so he does, visiting Amelia in Porto for a couple of days once a month until January 2019.

On 1 February 2019, Beatriz brings a lawsuit against Davide before the Porto court seeking for:

- divorce from his husband Davide,
- full custody over Amelia, on the ground that Davide is always travelling all over the world and cannot take daily care of their daughter,
- a periodic maintenance payment for her and
- a periodic maintenance payment for her child.

Surprised by such an action, Davide immediately seeks for legal advice from his best friend, Marco, who is a lawyer in Milan. In particular, Davide asks Marco to:

- contest the jurisdiction of the Porto court in relation to all claims (divorce, parental responsibility, maintenance obligations towards his wife and maintenance in favour of his daughter);

- start proceedings in Milan for legal separation from Beatriz and joint custody over Amelia;
- have the Italian court establish that Amelia should live alternatively one month with him, in their family home, and one month with the mother in a house of her choice in Milan, and set her maintenance accordingly, as equally shared among parents;
- contest Beatriz's entitlement to any maintenance due to fact that she earns more than him from her job.

Related questions

1) How would you contest the jurisdiction of Portuguese courts over Beatriz's claims for:
    a. divorce?
    b. parental responsibility?
    c. maintenance towards the spouse?
    d. maintenance in favour of the child?
2) Have Italian courts jurisdiction over:
    a. legal separation?
    b. parental responsibility?
    c. possible maintenance counterclaims made by Beatriz when entering her defence?
3) What's the relation between the proceedings possibly initiated by Davide before the Italian competent court and the ones already commenced in Portugal? In particular, what about Beatriz's claims for maintenance?
4) Which is the law applicable to spousal maintenance obligations?
5) Which is the law applicable to child maintenance obligations?

VARIATION No. 1

Suppose that Beatriz and Davide, in 2015, immediately after Amelia's birth, drew up an agreement (made in writing and signed by both of them) providing that, in case of marriage dissolution, Italian courts should have jurisdiction to hear any claim concerning parental responsibility and maintenance issues stemming therefrom and that those courts were to apply Italian law.

Davide uses such deed in its first defence before the Portuguese court seised by Beatriz to object to its jurisdiction, and also before the Italian court he himself has seised to support his application.

Related questions

6) Is the spouses agreement valid as to:
    a. parental responsibility?

b. maintenance towards the child?

7) Does the agreement cover maintenance claims in favour of both the child and the spouse?

8) Does such agreement affect the answer given to questions No 1.b), 1.c) and 1.d)? How? Which is the court competent to hear parental responsibility, child's maintenance claim and spouse's maintenance claim?

9) Does such agreement affect the answer given to questions No 4 and 5? How? Which is the law applicable to child's maintenance claim and spouse's maintenance claim?

LEGAL INSTRUMENT(S) TO BE APPLIED

Regulation No 4/2009

2007 Hague Protocol

Questions with guidelines

1) **How would you contest the <u>jurisdiction of Portuguese courts</u> over Beatriz's claims for:**

a. divorce?

Art. 3, lit. *a*, 6th indent, Brussels II*a* provides for the jurisdiction, *inter alia*, of the courts of the applicant's habitual residence if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her "domicile" there: Portuguese courts would have jurisdiction.

<u>Possible issues to be discussed</u>:

Change of habitual residence of the wife-applicant: is a 7-month period (1 July 2017-1 February 2018) sufficient for her to acquire a new habitual residence? Yes, to Art. 3, lit. *a*, 6th indent, when the wife has the nationality of the Member State.

- does Davide's understanding that his wife and daughter's stay in Porto is only temporary prevent the establishment of Beatriz's new habitual residence in such place? No.

- Beatriz could have asked for and additional period in Porto only to make Art. 3, lit. *a*, 6th indent applicable to her claim → is it possible to qualify such situation as an abuse of law? In the positive, can such abuse affect the applicability of Art. 3, lit. *a*, 6th indent? It could be understood as an abuse of law, but that is not relevant in the applicability of Article 3.

b. parental responsibility?

Art. 8 Brussels II*a* provides for the jurisdiction of the courts of the child's habitual residence → Italy is the State of Amelia's habitual residence (stay in Italy Sept. 2015 - June 2017 *v* stay in Portugal 1 July 2017 -1 February 2018): Portuguese courts do not have jurisdiction, which in turn lies with Italian courts only.

<u>Possible issues to be discussed</u>:

- Change of the child's habitual residence → is a 7-month period sufficient for a 2-year-old child to acquire a new habitual residence? Does her parents' intention to move on a stable basis (maybe her mother) / only temporary (her father) in another country play any role? fragmentation of EU PIL rules in family matters leading to fragmentation of proceedings. The displacement of the child to Portugal was made on the assumption that it would be temporary, with agreement of both parents – there was not a change of the habitual residence of the child.
- Fragmentation of EU PIL rules → separation of family proceedings on different claims

- Does Art 12 on prorogation of jurisdiction apply to the case at stake? No, art. 12 demands that the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility, at the time the court is seised, which does not seem to be the case.
- Is Art 15 on transfer of case to better placed court applicable in the case at stake? It could be possible, filled the requirement of the particular connection of the child to Portugal and if it is considered to be the best interests of the child

c. maintenance towards the spouse?

Art. 3 lit. *c* reg. 4/09 provides that as jurisdiction the court which has jurisdiction to entertain proceedings concerning the status of a person (divorce) if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties: Portuguese courts would have jurisdiction.

Possible issues to be discussed:

- coordination with B2a: in matrimonial matters jurisdiction based solely in jurisdiction are grounded on art. 3 (b) of Brussels IIa.
- coordination between grounds for autonomous and ancillary maintenance claims under Art 3 reg. 4/09. They are alternative (there is no hierarchy). However, the two ancillary provisions are mutually exclusive (*c* and *d*).
- notion of ancillary claim under Art 3 lit. *c* r*eg*. 4/09. Actions that are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings; best position of the court; best interest of the creditor.

d. maintenance in favour of the child?

Art. 3 lit. *d* reg. 4/09 provides that as jurisdiction the court the court which has jurisdiction to entertain proceedings concerning parental responsibility if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties: Italian courts (Portuguese courts would not have jurisdiction).

Possible issues to be discussed:

- coordination between grounds for autonomous and ancillary maintenance claims under Art 3 reg. 4/09. In parental responsibility jurisdiction based solely in jurisdiction are grounded on art. 3 b) + art. 12 section 1 Brussels IIa; and 12 section 3 Brussels IIa.
- notion of ancillary claim under Art 3 lit. and *d* reg. 4/09. Actions that are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings; best position of the court; best interest of the creditor.

- fragmentation of EU PIL rules in family matters leading to fragmentation of proceedings. Art. 13 requires that the action is related, and where it is it gives some form of discretion to the court second seized do decide where to stay proceedings or not.

2) Have <u>Italian courts jurisdiction</u> over:

a. legal separation?

Art. 3, lit. *a*, 2th indent, Brussels II*a* could provide jurisdiction to the Italian courts (the spouses were last habitually resident, insofar as one of them still resides there), however Beatriz already brought a lawsuit in Portugal seeking the divorce. See answer (3).

<u>Possible issues to be discussed</u>:

- no hierarchy among grounds of jurisdiction provided for by Art. 3 Brussels II*a*. No hierarchy, but there is a *lis pendens* rule.
- possible *forum shopping* under Art 3 Brussels II*a* → time/party's promptness to act becomes crucial! That´s the reason why Art. 3 is accused of encouraging the rush to the courts – *qui prior est in tempore potior est iure*.

b. parental responsibility?

Beatriz already brought a lawsuit in Portugal regarding the parental responsibilities, but the Portuguese court shall decline jurisdiction.

Art. 8 Brussels II*a* provides for the jurisdiction of the courts of the child's habitual residence → Italy is the State of Amelia's habitual residence (stay in Italy Sept. 2015 - June 2017 *v* stay in Portugal 1 July 2017 -1 February 2018): Portuguese courts do not have jurisdiction, which in turn lies with Italian courts only.

<u>Possible issues to be discussed</u>:

Habitual residence of the child. Is in Italy

c. possible maintenance counterclaims made by Beatriz when entering her defence?

Art. 5º: a court of a Member State before which a defendant enters an appearance shall have jurisdiction, unless where appearance was entered to contest the jurisdiction - consent-based jurisdiction. If the appearance had the objective of contesting the jurisdiction, art. 5 is not relevant. If the appearance did not had the objective of contesting the jurisdiction – acceptance of the jurisdiction is inferred from the submission. Italian courts have jurisdiction (art. 10).

Possible issues to be discussed:

Is a counterclaim sufficient to transfer jurisdiction to the Italian court under Art 5 reg. 4/09 (jurisdiction based on the defendant's appearance)? Only if it does not contest jurisdiction.

3) What's the relation between the proceedings possibly initiated by Davide before the Italian competent court and the ones already commenced in Portugal? In particular, what about Beatriz's claims for maintenance?

Article 19(1) Brussels IIa covers two situations: a. Proceedings relating to the same subject-matter and cause of action are brought before courts of different Member States and b. Proceedings which do not relate to the same cause of action, but which are "dependent actions" are brought before courts of different Member States.

If a legal separation claim is brought to the Italian courts, Italian courts shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established. Where the jurisdiction of the Portuguese court is established, the Italian court shall decline jurisdiction in favour of that court (Article 19).

Possible issues to be discussed:

- *Lis pendens*: Proceedings relating to the same subject-matter and cause of action are brought before courts of different Member States.
- False *lis pendens* between proceedings for divorce and separation. An action for separation and an action for divorce might be seen as not to have the same object since only the latter but not the former might lead to the dissolution of the marriage. Article 11 (2) Brussels II: «Where proceedings for divorce, legal separation or marriage annulment not involving the same cause of action and between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established».

4) Which is the law applicable to spousal maintenance obligations?

Art. 15 Reg. 4/09 – 2007 Hague Protocol.

Art. 3 Hague Protocol: law of the State of the habitual residence of the creditor – Portuguese law.

Art. 5 Hague Protocol: Article 3 shall not apply if one of the parties objects and the law of another State, in particular the State of their last common habitual residence, has a closer connection with the marriage. In such a case the law of that other State shall apply. The husband can request the application of the Italian law, claiming that it is closer with the marriage. In that case, Italian law shall apply.

Possible issues to be discussed:

- law applicable absent a choice: the rationale of closest connection vs favor creditoris
- habitual residence of the wife: is a 7-month period stay in Portugal sufficient to establish her new habitual residence in Portugal? → effects of a change of residence on the law applicable to maintenance obligations. Habitual residence, implies a measure of stability (mere residence of a temporary nature is not sufficient to determine the law applicable to the maintenance obligation).
- relation between Art 3 (general rule) and Art 5 (special rule with respect to spouses) 2007 Hague Protocol → in particular possible objection by the husband to the application of Portuguese law (as law of the creditor's habitual residence) in favour of Italian law, law of the spouses' last common habitual residence having a closer connection with marriage and family life

5) Which is the law applicable to child maintenance obligations?

Special Rule: art. 4º, Section 1 (a): parents towards their children.

1st cascade: The law applicable is that of the habitual residence of the creditor (art. 3) – Italian law; should the creditor is unable to obtain maintenance, the law applicable is that of the forum (art. 4º, Section 2) - Italian law; should the creditor is unable to obtain maintenance under this law, the law applicable is that of the common nationality, if there is one (art. 4º, Section 4).

2nd cascade: Should the creditor seize the court of the State of the habitual residence of the debtor: the law primarily applicable to the child maintenance claim is the lex fori, Article 4 (3); should the creditor be unable to obtain maintenance, the law of the habitual residence of the creditor applies, Article 4 (3); and finally should the creditor be unable to obtain maintenance under that law, the law applicable is that of the common nationality of the debtor and the creditor if there is one, Article 4(4).

Possible issues to be discussed:

relation between Art 3 (general rule) and Art 4 (special rule with respect to spouses) 2007 Hague Protocol → creditor's impossibility to obtain maintenance and

6) Is the spouses agreement valid as to:

a. parental responsibility?

Is not possible a choice-of-court agreement over parental responsibility (Brussels II a).

Possible issues to be discussed:

- Is it possible a choice-of-court agreement over parental responsibility matters? No.
- Do either Art 12 on prorogation of jurisdiction or Art 15 on transfer of case to better placed court apply to the case at stake? Art. 12 and 15 are not choice-of-court agreement rules.

b. maintenance towards the child?

The EU Maintenance Regulation expressly bars the choice-of-court for child maintenance, Article 4 (3) of the 4/09 Regulation.

The couple would also be unable to include a binding choice of law applicable to child maintenance in their agreement, Article 8 (3) Hague Protocol.

Possible issues to be discussed:

- Party autonomy as to jurisdiction over child's maintenance under Art 4 reg. 4/09 → are Italian courts a valid option for the parties?
- Party autonomy as to choice of law: formal and substantive requirements (is Italian law a valid option?) under Art 8 Hague Protocol

7) Does the agreement cover maintenance claims in favour of both the child and the spouse?

The EU Maintenance Regulation allows the spouses to agree that the court or courts of a certain EU Member State should have jurisdiction in matters of spousal/ex-spousal maintenance, Article 4 (c) 4/09 Regulation: courts of the Member State where the spouses has their last common habitual residence, provided that the residence has lasted at least for an year – conditions to be met at the time the agreement is concluded or the court is seised – Italy.

Article 8 of the Protocol allows creditor and debtor to choose a law applicable to a maintenance obligation: b) the law of the State of the habitual residence of either party at the time of designation – Italy.

Possible issues to be discussed:

Scope of the agreement

8) Does such agreement affect the answer given to questions No 1.b), 1.c) and 1.d)? How? Which is the court competent to hear parental responsibility, child's maintenance claim and spouse's maintenance claim?

1.b), parental responsibility: no.

1.c) spouse's maintenance claim: yes, the jurisdiction conferred by the agreement is exclusive, which mean that only the Italian court can decide the case. The Portuguese court shall declare of its own motion that it has no jurisdiction (art. 10).

1.d) child's maintenance claim: no.

Possible issues to be discussed:

Coincidence *forum* and *ius*

9) Does such agreement affect the answer given to questions No 4 and 5? How? Which is the law applicable to child's maintenance claim and spouse's maintenance claim?

No 4 spouse's maintenance claim: Italian law applies.

No 5 child's maintenance claim: no.

Possible issues to be discussed:

Coincidence *forum* and *ius*

Recognition and enforcement in maintenance obligations cases

Contents

- **Recognition and enforceability**
  - Interplay of legal sources
  - Maintenance Regulation (No. 4/2009)
    - Abolition of exequatur and its scope Hague/non-Hague Protocol
    - Procedures and documents
- **Enforcement**
  - Assistance by cooperation between Central Authorities (Maintenance Regulation No. 4/2009)
  - National rules

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Interplay of legal sources

- Regulation No. 4/2009 (Chapter IV, Art. 75)
- Lugano Convention (30 October 2007) between the EU member states and Denmark, Norway, Switzerland and Iceland
- Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance
- Multilateral and bilateral treaties
- National law

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Maintenance Regulation
Abolition of exequatur (I)

Maintenance Regulation 4/2009
see Recital 9

A maintenance creditor should be able to obtain easily, in a Member State, a decision which will be automatically enforceable in another Member State without further formalities.

CJEU, 9.02.2017, C-283/16, *M.S.* v *P.S.*

"Member States are to adjust all the procedures to make direct applications for enforcement to competent institutions possible. This also includes change of case-law, and reusal to apply contradicting provisions of the national law."

Abolition of exequatur (II)
2 sets of rules

Article 17(1) – decision originating from the Member State bound by the 2007 Hague Protocol – no special procedure required – no possibility to oppose recognition

Article 23 – decision originating from the Member State NOT bound by the 2007 Hague Protocol – declaration of enforceability – possibility of appeal

Abolition of exequatur (III)
Ratione temporis

- CJEU, 20.12.2017, C-467/16, *Schlömp*

Procedure and documents
Decision is from Member State bound by the 2007 Hague Protocol

Documents to be presented to the enforcement authority in the Member State of enforcement:

- Copy of the decision sufficient for establishing its authenticity (no need to translate as a general rule)
- Extract from the decision (Annex I)
- Optional:
  - Documents related to calculations
  - Translation or transliteration of the extract (Annex I)

Rights of the Debtor to oppose enforcement (I)

- Apply for review in the Member State of origin:

- Non-awareness of the process

- Force majeure or extraordinary circumstances prevented the Debtor from contesting the maintenance claim

- Non-extendable term of 45 days.

Rights of the Debtor to oppose enforcement (I)

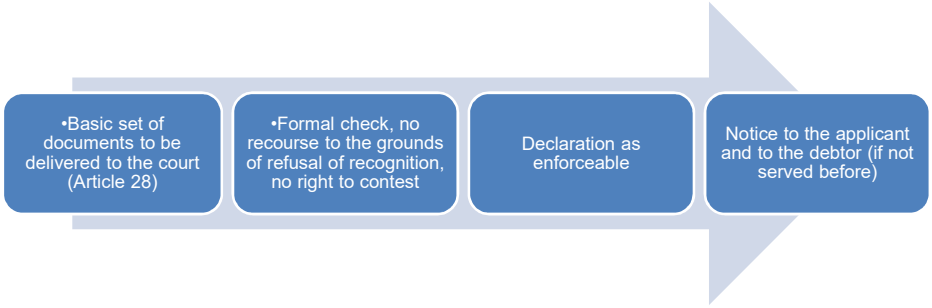
- Apply for suspension or refusal of enforcement

- Where the right to enforce is extinguished under the law of either the Member State of enforcement or of origin, whichever provides for a longer limitation period;

- For the time period of review of the decision as requested under Article 19

- If the decision from another Member State is irreconcilable with a decision given in the Member state of enforcement

Procedure and documents: Decision is from Member State NOT bound by the 2007 Hague Protocol (I)



Similar to the procedure under Regulation Brussels I (No. 44/2001), however with strict time limits.

Decision is from Member State NOT bound by the 2007 Hague Protocol. Appeal – Grounds for revocation

Exhaustive list in Article 24

- Contradiction to public policy (autonomous interpretation of the definition)
- Failure to notify the debtor of the proceedings
- Irreconcilability with another decision, as set in Article 24(c) and (d)

Central Authorities

Right or obligation to act through a Central Authority?

(CJEU, 9.02.2017, C-283/16, *M.S.* v. *P.S.*)

It follows from Articles 51 and 56 of Regulation No 4/2009, read in the light of recitals 31 and 32 thereof, that a person has a right but is not under any obligation to make an application to the Central Authorities for assistance pursuant to the provisions in Chapter VII of the regulation. It is, therefore, optional and that right will be exercised only if the maintenance creditor wishes to avail herself of it, in order, for example, to overcome certain specific difficulties, such as the location of the maintenance debtor.

Enforcement

- National law applies:
  - Direct application of national law of other States?
  - Challenges due to cross-border nature of the case
- Cooperation through Central Authorities
  - Applies to all stages of the case
  - Repetitious requests to be granted

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Summarising conclusions

- Recognition and enforcement > no exequatur
- MS bound or not by the 2007 Hague Protocol

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The project is co-funded by the Justice Programme of the European Union
JUST-JTRA-EJTR-AG-2016-763874

Recognition and enforcement in maintenance obligations cases

Case study

FACTS

Eric and Catherine, both French nationals, married in 2005 in Nantes, France, hometown of both. They have a son Paul, of 12 years old, and a daughter Isabelle of 10 years old.

Right after marriage the couple moved to London, where Eric has started his own small investment firm. Catherine, after graduating from the university has never worked. Her primary occupation was taking care of the home, family life in general, and children, as they were born very soon after the marriage; in her spare time, Catherine participated in voluntary and charity programmes supported by local women club in the place of their residence.

While Eric was devoting a lot of his time for building his career, Catherine was not happy living in London. Affection between spouses has passed away gradually, as each of them has started living his own life.

In 2011, Eric and Catherine divorced in England. They also consented on division of family assets and spousal maintenance, the arrangement being approved by order of the Central Family Court of London. The terms of consent were as follow:

1. Eric retained sole ownership in investment firm and ancillary rights to profit from his investment business, as Catherine waived any right in regards to it.
2. In regards to Catherine and children, the court order provided for:
   (a) the family home in Hampstead, London was to be sold and, after discharge of the mortgage and other associated costs of sale, the net proceeds (GBP 925,389) were to be paid to the wife;
   (b) the husband was to pay a lump sum of GBP160,000. This amount was a compensation for the sum that the couple has accumulated up to the date of delivery of the court order through the life insurance plan, which has further been modified by splitting into two separate plans: Eric has retained the existing plan and a new life insurance plan has been made for Catherine and children. Eric undertook to further pay Catherine's and children insurance fees;
   (c) In respect of Catherine's income for herself (spousal periodical payments) and the two children of the family (child support), the husband agreed to pay a total sum of GBP 70,000 per annum (index-linked) "for the benefit of herself and the children of the family" until Paul reaches age of 18; then until Isabelle's 18 year old the sum would be reduced by 25 percent, and upon age of maturity of both children, the sum of maintenance would constitute 40% of the initial amount (always indexed);
   (d) Eric was to pay the children's school fees and summer camps (up to GBP 20 000 per year);

(e) Finally, Eric had to compensate to Catherine the expenses of her lawyers in England, in total GBP 30,000 for carrying out her total divorce case; and

(f) For any delay of payment, Eric would pay to Catherine monthly penalty amounting to 3% of the total unpaid sum.

While Eric has been providing financial support to Catherine from time to time, however he has never paid any of listed sums in full, thus Catherine decided to seek for assistance to enforce the order of the London family court in France, from where, due to approaching Brexit, Eric has started servicing the EU customers.

Related questions

1) Which legal instruments would apply at the stage of recognition and enforcement of the maintenance order? If further, Catherine may need to seek recovery of maintenance debt in Switzerland or the United States, which legal instrument(s) would apply then?
2) In order to enforce the English court order (maintenance and other claims) in France, does it need to be recognized and/or declared as enforceable? What would be the procedure, and which documents does Catherine need to deliver?
3) Suppose that the court order originates from France and Catherine needs to enforce it in England. What would be the procedure for recognition and enforcement, and which documents would be neccessary then?
4) Which Annex of the Regulation 4/2009 should the Family Court of London use for issuing the extract of the court decision? Working in group, fill in the appropriate Annex of the Regulation 4/2009 by deciding which categories of payments could be recovered as “maintenance”.
5) Should Catherine need legal aid, could she refer to Central Authorities? How else Central Authorities may assist Catherine in seeking for enforcement of the English court order in France?

Variation No 1

Suppose that Catherine has succeeded to initiate recovery procedure of maintenance order in France, however it does not go successfully, as suspiciously Eric’s bank accounts are from time to time in deficit of money. At the meeting in the club, she finds out that Eric’s firm has now moved its activities to Frankfurt, Germany, as his investment firm has merged into a German company. Now Eric’s income is split between England and Germany. Catherine files petition to the court in England pleading for issuance of another extract of court order intended for starting enforcement procedure in Germany, however her petition is rejected on the ground of civil procedure rules, stating that at the same time only one enforcement document shall be issued in respect of the same claim.

Related questions

6) Is English court's refusal to issue second extract of the court decision in breach of the Regulation 4/2009?

Variation No 2

Suppose that Catherine moves to Belgium, where maintenance income is subject to the maintenance tax (applicable under Belgian law, payable by recipient of the maintenance), payable by the person in receipt of maintenance instalments.

Related questions

7) Can tax on maintenance, applicable in Belgium, be recovered through mechanism of recognition and enforcement of maintenance decisions under the Regulation 4/2009? How would this circumstance affect procedure of English court order enforcement?

8) What could Catherine do in order to receive the amount of tax which she is paying from the amount of received maintenance?

LEGAL INSTRUMENT(S) TO BE APPLIED

Regulation No. 4/2009

2007 Hague Protocol

Questions with guidelines

1) **Which legal instruments would apply at the stage of recognition and enforcement of the maintenance order? If further, Catherine may need to seek recovery of maintenance debt in Switzerland or the United States, which legal instrument(s) would apply then?**

The court order originates from the UK, and enforcement is seeked in France, both are the EU member states, thus Maintenance Regulation applies.

If recognition and enforcement is seeked in Switzerland, the Lugano Convention (The Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Lugano, 30 October 2007) will apply (it is also applicable in case of Iceland, Norway).

In case of recognition and enforcement in the US, the Hague Convention (Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance) will apply.

Possible issues to be discussed:

Application of national PIL rules. What if the country of enforcement or if the country of origin of the court decision is not the EU MS, or is not party to the Hague Convention (eg., Russia, Israel,)?

Brexit. If/when UK quits the EU, which legal instrument would apply? – it is not sure yet, as we do not know the deal, however the UK has acceded to the Hague Convention, therefore the most likely scenario is that depending on the rationae temporis, either MaintReg or Hague Convention will apply.

2) **In order to enforce the English court order (maintenance and other claims) in France, does it need to be recognized and/or declared as enforceable? What would be the procedure, and which documents does Catherine need to deliver?**

NB: In question 4 you will have to specify which claims are “maintenance” and which are not, therefore here concentrate only on applicable instrumentas and procedures for maintenance/non-maintenance claims. The idea is to point out is that when seeking for enforcement on cross-border basis, different claims will fall under different recognition and enforcement regimes, thus different rules apply and mulptiple enforcement cases are very possible in case of a cross-border matter.

1. Maintenance claims (discuss further in question 4, which claims are in scope and out of it for the purpose of MaintReg): The UK is a non-Hague Protocol country, therefore court order need not to be recognized (Art.23), but must be declared as enforceable (see Art. 26).
   Procedure: - See article 27 for defining the competent court in the state of enforceability to approach for declaration of enforceability.

- See art. 28 for procedure and deliverable documents.
- See art. 30-31 for timing of declaration as enforceable and service of the declaration of enforceability.

2. Non-maintenance claims. The UK did not adopt the Council Regulation (EU) 2016/1103 (also should other MS be involved, due to rationae temporis), therefore it is not applicable, and Catherine should rely on French national law at seeking enforcement of matrimonial property claims.

   National rules will apply in respect of documents and procedure.

   If the Council Regulation (EU) 2016/1103 was applicable, then declaration as enforceable in accordance with the Chapter IV of the Regulation.

Possible issues to be discussed: translation of the decision and extraction from the decision. If done voluntarily in advance of court requirement to provide a translation, will tralsation costs be covered? (Lithuanian court has refused to cover such costs, stating that translation has not been requested and is not mandatory under the MaintReg thus are out of scope of litigation costs).

3) Which Annex of the Regulation 4/2009 should the Family Court of London use for issuing the extract of the court decision? Working in group, fill in the appropriate Annex of the Regulation 4/2009 by deciding which categories of payments could be recovered as "maintenance".

France is a Hague Protocol state, thus Art. 17 abolishing exequatur, should apply (notwithstanding that it is being enforced in the non-Hague Protocol country).

The court order shall be directly applicable in France, therefore Catherine will simply have to submit necessary documents (Art. 20 copy of the decision, extract from the decision issued by the court of origin in the form of Annex I, if needed translation of the extract, and necessary calculation of amounts/their parts payable).

Please note that the court order dates back to 2011, not specifying the exact date. MaintReg entered into force on the 18 of June 2011. In accordance with art. 75(1), abolition of exequatur will aply only to decisions delivered in proceedings initiated after 18/06/2011. Otherwise, the non-Hague Protocol regime procedure will apply.

4) Which Annex of the Regulation 4/2009 should the Family Court of London use for issuing the extract of the court decision? Working in group, fill in the appropriate Annex of the Regulation 4/2009 by deciding which categories of payments could be recovered as "maintenance".

Art. 28(1)(b) – Annex II will be issued.

Maintenance/non-maintenance classification of amounts payable to Catherine :

(a) Money received for sale of the family home in the UK: in this situation, this is NOT maintenance. In the context of other receivable sums this is an amount received at distribution of property;

Possible issue to be discussed: If amount received from sale of the family house was the only sum the wife would be receiving, or the house would have been attributed to Catherine for the purpose of living there with children, could it be regarded as maintenance?

(b) - Lump sum as part of accumulated sum from the life insurance plan: should NOT be regarded as maintenance, as life insurance plans are intended for savings, they do not provide for satisfying any current need of a spouse (as an example, there is a Lithuanian court order refusing to issue extract of decision in accordance with the MaintReg for the amounts payable to the life insurance plan for the benefit of a child).
- Life plan insurance fees for Catherine and children: should neither be considered a form of maintenance for the reasons provided above. NB, even if they are defined as for the purpose of ensuring children's future education, their purpose is savings;

(c) Annual maintenance fee for Catherine and children – is maintenance.

Possible issue to be discussed: does lump sum of maintenance for spouse and children without specifying portions attributable to each person receiving maintenance, contradict to public order/imperative rules of your country? May this be a ground for refusing to enforce? – NO, because of the autonomous interpretation of the concept of public order.

(d) children's school fees and summer camps (up to GBP 20 000 per year) – are maintenance as they are intended for satisfying needs of children.

Possible issue to be discussed: do only basic needs fall into the scope of maintenance? Is the stage of recognition and enforcement of a court decision suitable for questioning this issue? – this may be an issue at the stage of litigation and defining, under applicable law, to what extent the spouse and/or children are entitled to receive maintenance, is it inly basic needs, or more. However in accordance with Art. 42, the decision given in another MS may in no circumstance be reviewed as to its substance.

(e) legal expenses for carrying out total divorce case – they are not maintenance, but procedural costs incurred at litigation over maintenance. In MaintReg Art. 2, decision is defined also to cover a decision by an officer of the court determining the costs or expenses.

Possible issues to be discussed:
- Where the decision is delivered in respect of multiple claims, how to determine which of them are related to maintenance? – Answer not clear, probably determined by each court in accordance with national rules on litigation costs.

- MaintReg provided for the scheme of legal aid, which is broader than legal aid available under B2a. Basically, Central Authorities undertake to provide legal aid to any applicant. If legal aid has not been used, but was available for such applicant, does it fall within the scope of MaintReg?

(f) Penalty for unpaid amounts. – ref. Case CJEU Bohez v. Miertz

5) Should Catherine need legal aid, could she refer to Central Authorities? How else Central Authorities may assist Catherine in seeking for enforcement of the English court order in France?

Ref. MaintReg Art. 44-47 for legal aid provisions. In particular, art. 45 provides for the range of assistance to be provided. Art. 56 provides that at recognition, declaration as enforceable and enforcement of court decisions Central Authorities will assist both creditor and debtor by facilitating or provision of legal aid, collection of necessary data and evidence, encouragement of amicable solutions, facilitate collection of recovered amounts, etc. (art. 51).

Possible issues to be discussed:

You can consider asking participants to share their experience at co-operation with Central Authorities, or social workers to share their experience at assisting in recovering maintenance and problems of applying MaintReg they mainly face.

6) Is English court's refusal to issue second extract of the court decision in breach of the Regulation 4/2009?

There isn't a clear answer to this question. The MaintReg is silent about enforcement simultaneousy in two MS. Neither CJEU has provided any interpretation in regards to this matter. However it should be questioned whether limitation of application of MaintReg basing on national procedural rules is generally compliant with the principle of superiority of the EU law.

The rationale for restricting renforcement to only one MS could be protection of debtor's rights against creditor's fraud. However is it proportionate to the purpose of the MaintReg?

On another hand, if recognition and enforcement is sought on the basis of Hague Convention, or basing on national procedural rules, generally the creditor seeking for enforcement of a monetary claim is not required to provide evidence that enforcement is not commenced in another State.

Conclusion: most likely, MaintReg does not prohibit enforcement in more than one MS at the same time, thus issuance of extract of the decision should not be restricted.

7) Can tax on maintenance, applicable in Belgium, be recovered through mechanism of recognition and enforcement of maintenance decisions

under the Regulation 4/2009? How would this circumstance affect procedure of English court order enforcement?

Tax issues (if any applicable to maintenance) are not in scope of the MaintReg, thus there is no possibility to gross up maintenance payments by payable tax amount.

Tax should be then deducted from the amount of maintenance as appears in the court order, and subsequently in the extract of the decision, and paid to local tax authorities in accordance with Belgian law.

8) **What could Catherine do in order to receive the amount of tax which she is paying from the amount of received maintenance?**

Catherine can consider applying for modification of the court order in scope of maintenance. However this is a procedure out of scope of recognition and enforcement.

Possible issues to be discussed: You can consider discussing the jurisdiction for modification of maintenance court order and the possibility to *suspend enforcement* of the current maintenance court order.

PROPERTY REGIMES

Presentations and case studies

- **Jurisdiction on property regimes of international couples: Regulations No 2016/1103 and No 2016/1104**
  drafted by Prof Carola Ricci (expert, University of Pavia, carola.ricci@unipv.it)

- **Law applicable to matrimonial property regimes**
  drafted by Prof Orsolya Szeibert (ELTE, szeibert@ajk.elte.hu)

Jurisdiction on property regimes of international couples: Regulations No 2016/1103 and No 2016/1104

Contents

- Timeline
- Key terms
- Aim pursued
- Territorial scope of application
- Temporal scope of application
- Material scope of application
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- Notion of court - Recital 29
- General features of jurisdiction rules
- 'Basic' grounds (Arts 4-8)
- Main basic grounds Art 5.1 and Art 5.2
- Other basic grounds (Art 6)
- Derogations from the general rules of jurisdiction
- Possibility of choice of court (Art. 7)
- Common rules
- Summarising conclusions

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Timeline:

- Nov. 2004: the Hague Programme
- July 2006: Green Book launched (public consultation)
- Dec. 2009: Stockholm Programme: Council invites the Commission to submit a proposal
- March 2011: Proposal of two regulations
- 3 Dec. 2015: it is clear that no unanimity can be found

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- Dec. 2015 - Feb. 2016: **Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, France, Germany, Greece, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Spain and Sweden** manifest their intention to make recourse to enhanced cooperation
- March 2015: **Ciprus** joins the group
- 9 June 2016: Council adopts **decision (UE) 2016/954 authorising the enhanced cooperation**

The Council approved two **twin acts on 24 June 2016**:

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

➢ Same structure, almost same wording and numbering of the provisions

Key terms

- **Matrimonial property regime**: rules concerning the property relationships between spouses and in their relations with third parties, as a result of marriage or its break-up.
- **Registered partnership**: the regime governing the shared life of two people which is provided for in law, the registration of which is mandatory under that law and which fulfils the legal formalities required by that law for its creation.
- **Property consequences of a registered partnership**: rules concerning the property relationships of the partners, between themselves and in their relations with third parties, as a result of the legal relationship created by the registration of the partnership or its break-up.

Aim pursued

- **Recital 15**: **certainty** and **foreseeability** of solutions
- **Recital 18**: harmonized connecting factors to determine the **law applicable** to matrimonial property regimes (MPR) and property consequence of registered partnerships (PCRP) + the **jurisdiction** to rule on all civil law aspects thereof, concerning both the ***everyday management of the couple's property*** and the ***liquidation*** of the property regimes of international couples due to natural termination - death of one spouse- or to divorce, legal separation, annulment of the marriage or dissolution of the partnership
- **Recital 16**: to simplify the **recognition and enforcement** of judgments and the acceptance and enforcement of authentic instruments linked to MPR and PCRP

Territorial scope of application

- **18 Member States** participating
- Any EU Member can join enhanced cooperation (both Regulations) at any time

BUT till that moment, each non-participating Member States will be considered as a third State

- the Regulations shall prevail on existing conventions concluded between participating Member States
- Exception: specific conventions between Denmark, Finland, Iceland, Norway and Sweden continue to be applicable

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Temporal scope of application

- Regulations shall **apply** only to legal *proceedings* instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded **on/after 29 January 2019**, regardless of the date of the marriage
- If the proceedings in the Member State of origin were instituted before 29 January 2019, decisions given after that date shall be **recognised** and enforced in accordance with the rules of the Regulations as long as the *rules of jurisdiction applied comply with those set out in the Regulations*

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Material scope of application
Art. 1 Regs. No 2016/1103 and 1104

The following are **excluded** from the scope:

- ✓ Revenue, customs or administrative matters
- ✓ The legal capacity of spouses (except *specific powers* and rights of either or both spouses with regard to property, either as between themselves or as regards third parties, **recital 20**)
- ✓ The existence, validity or recognition of a **marriage** (no common definition BUT subject to the law designated by the private international law of the forum, **recitals 17, 21 and 64**) ⇒ **problems of coordination with MS; ≠ reg. 1104 which defines registered partnership at Art. 3(1)(a)**
- ✓ Maintenance obligations (refer to Reg. 4/2009 and to the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations) ⇒ **coordination needed**

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- ✓ Social security
- ✓ The entitlement to transfer or adjustment between spouses, in the case of divorce, legal separation or marriage annulment, of rights to retirement or disability **pension** accrued during marriage and which have *not* generated pension income *during* the marriage (Should be strictly interpreted, **recital 23**: amount that have been already paid during marriage/compensation in case of pension with common assets are included)
- ✓ The nature of *rights in rem*, the recording in a register of rights in immovable or moveable property and the effects of recording or failing to record such rights (**recital 24**) but 'adaptation' is possible (**recital 25**)

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Notion of 'matrimonial property' – Reg. 1104

- An **autonomous** concept is required;
- the CJEU case-law is indicative, even when the Court decided:

on civil and commercial matters

- *De Cavel II* (27-3-1979, C-143/79) confirmed in *Realchemie* (18-10-2011, C-406/09)
- *van Den Boogaard* (27-2-1997, C-220/95)

on succession matters

- *Iliev* (14-6-2017, C-67/17,)
- *Mahnkopf* (1-3-2018, C-558/16)

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Notion of 'matrimonial property' – Reg. 1104 - Art 3(a)

= property relationships between the spouses and in their relations with third parties, *as a result of marriage* or its *dissolution*; thus it should encompass as specified in **recital 18**:

As to the nature

- rules from which the spouses may **not derogate**
- any **optional** rules to which the spouses may agree in accordance with the applicable law
- any **default** rules of the applicable law

As to the substance

- **property arrangements** specifically and exclusively envisaged by certain national legal systems in the case of marriage but also
- any **property relationships**, between the spouses and in their relations with third parties, resulting directly from the matrimonial relationship, or the dissolution thereof.

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Notion of court - Recital 29

The term 'court' should be given a **broad meaning** so as to cover (**recital 29**):

- **courts** exercising judicial functions
- **notaries** in some Member States who, in certain matters of matrimonial property regime, exercise judicial functions (in France under Art. 255 c.c.?)
- **notaries and legal professionals** who, in some Member States, exercise judicial functions in a given matrimonial property regime by delegation of power by a court

- All courts should be bound by the rules of jurisdiction set out in the Regulation

- The **term 'court'** should **not cover** non-judicial authorities of a Member State empowered under national law to deal with matters of matrimonial property regime (such as the *notaries in most Member States* where, as is usually the case, they are not exercising judicial functions, thus the authentic instruments they issue should circulate in accordance with the provisions of this Regulation on *authentic instruments* – not as judgments)

Notion of court - Art. 3.2

Any **judicial authority** and **all other authorities** and **legal professionals** with competence in matters of matrimonial property regimes

- which **exercise judicial functions** or **act by delegation of power by a judicial authority** or **under its control**,
- provided that such other authorities and legal professionals offer guarantees with regard to:
  - **impartiality** and
  - the **right of all parties to be heard**,
  - and provided that their ***decisions*** under the law of the Member State in which they operate (a) may be made the subject of an *appeal* to or *review* by a *judicial authority*; and (b) have a *similar force and effect as a decision* of a judicial authority on the same matter

- **Italy** has notified pursuant to Art. 64 that are to be considered as court under the regulation: both **lawyers** for the '*negoziazione assistita*' procedures provided for Art. 6 law decree no. 132/2014; and **civil servants** *(ufficiali di stato civile)* in the 'de-jurisdictionalised regimes' under art. 12 same l.d.

General features of jurisdiction rules

- Overall layout of the regime:
  - **'basic' grounds (Arts 4-8):** distinguished differently depending on the existing connection with – weak or strong – between the forum State and the parties/claim;
  - **alternative/exceptional fora (Art. 9):** allows for an exception to the basic rules by enabling the court designated to decline jurisdiction in certain circumstances, identifying the other courts having jurisdiction *in case of dismissal* by the former;

- **subsidiary/extra-grounds (Arts. 10-11):** jurisdiction may be asserted where no court is having jurisdiction under the previous rules and there's still a *connection* with a participating State,

- **counterclaim (Art. 12):** an already seized court of a MS having jurisdiction on any of the previous grounds, shall have jurisdiction over the counterclaim.

- The system is "**self-contained" regime**, namely because is:

  - **Uniform** (without interference from domestic rules and with **no** possibility to decline for reasons other than those indicated, eg. because another court is considered 'better placed'- no!)

  - **Exhaustive** (no gaps; no residual grounds left to other sources: if there is no court having jurisdiction on 'basic' grounds ⇒ jurisdiction can only be asserted on the basis of Arts 10-11)

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'Basic' grounds (Arts 4-8)

Aim: to **concentrate** jurisdiction on matrimonial property before the same court seized for the matrimonial matters and successions (**one-stop shop**):

- The competent court *already seized* for the succession (pursuant to reg. 650/2012) has jurisdiction also for matters of the matrimonial property regime in the event of the death of one of the spouses (**Art. 4**)

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- When the forum is objectively connected to the forum State (**Art. 5.1**), jurisdiction in matters of **matrimonial property regimes** in cases of divorce, legal separation or marriage annulment falls under the jurisdiction of the court *already seized* to rule on the matrimonial dispute in compliance with Reg. 2201/2003

☞ BUT when the connection is weak, the **spouses' *agreement*** is required – see **Art. 5.2**

Main basic grounds (Art. 5.1)

- When the forum is **objectively connected** to the *forum* State?
- The same court, already seized, having jurisdiction under Art. 3(1)(a) (first four indents) reg. 2201/2003 shall decide over **both** the matrimonial matters **and** the matrimonial property regimes whenever the forum State is the:
  - ✓ Last common habitual residence;
  - ✓ Last habitual residence in case one still resides there
  - ✓ Habitual residence of the defendant
  - ✓ In case of joint request, habitual residence of one of the spouses
- No further requirement; no agreement between the spouses

Main basic grounds (Art. 5.2)

When the connection is **weak**, the spouses' ***agreement*** is required where the court that is seized to rule on the application for divorce, legal separation or marriage annulment:

a) is the court of a Member State in which the **applicant** is habitually resident and the applicant had resided there for at least a year immediately before the application was made, in accordance with the fifth indent of Art. 3(1)(a) of Reg. 2201/2003;

b) is the court of a Member State of which the **applicant** is a **national** and the applicant is habitually resident there and had resided there for at least six months immediately before the application was made (sixth indent of Art. 3(1)(a) of Reg. 2201/2003);

c) is seized pursuant to Art. 5 Reg. 2201/2003 in cases of conversion of legal separation into divorce (not always possible); or

d) is seized pursuant to Art. 7 of Reg. 2201/2003 in cases of residual jurisdiction (ex.: in Italy, celebration of the marriage or domicile of the defendant).

The **agreement** must be written, signed and dated (**Art. 7**)

- It seems the legislator instituted a hierarchy (forbidden by Hadadi case 16.7.2009)
- The agreement being required, procedural tactics could be pursued (the defendant refusing the agreement under Art. 5.2 could in the meanwhile start an action first under Art. 5.1)

Other basic grounds (Art. 6)

In other cases*, jurisdiction to rule on the spouses' matrimonial property regime shall lie with the courts of the Member State having an objective/strong connection:

* ***when?*** The court on succession or matrimonial matters has been not seized yet or has already concluded the procedure; the court is potentially competent under Art. 5.2 but no agreement is found or valid; a non-participating Member State is seized.

- of the **spouses' common habitual residence** at the time the court is seised; **or failing that**
- of the **spouses' last habitual residence**, insofar as one of them still resides there at the time the court is seised; **or failing that**
- of the **habitual residence of the respondent** at the time the court is seised; **or failing that**
- of the **spouses' common nationality** at the time the court is seised.

Derogations from the general rules of jurisdiction

- **Jurisdiction based on the appearance of the defendant** before the court of the Member State whose law is applicable **(Art. 8)**
- **Alternative jurisdiction**: where a court having jurisdiction pursuant to the abovementioned rules does not recognize the marriage in question, it may *decline* jurisdiction. In this case, the spouses may *agree* to confer jurisdiction to *any other* Member State. In the absence of an agreement, the Member *State of the conclusion of the marriage* shall have jurisdiction **(Art. 9)**

- **Subsidiary jurisdiction**: Where no court has jurisdiction, the court of the territory in which one of the spouses has immoveable property shall have jurisdiction to rule in respect of the immoveable property in question **(Art. 10)**

- Finally, the case of ***forum necessitatis*** is provided **(Art. 11)** where no court has jurisdiction, the courts of a Member State may, on an exceptional basis, rule on the matrimonial property regime if proceedings cannot reasonably be brought or conducted or would be *impossible* in a third state with which the case is closely connected
  - The case must have a **sufficient connection** with the Member State of the court seized

Possibility of choice of court (Art. 7)

The spouses may agree that the Member State

- **whose law is applicable** or
- **where the marriage was concluded**

shall have jurisdiction to rule on matters of their matrimonial property regime

(***except*** for cases of death of one of the spouses or matrimonial dispute: no derogation of a forum already seized for succession or matrimonial matters under arts 4-5)

- Such an **agreement** shall be expressed in writing and dated and signed by the parties (**Art. 7(2)**), and any communication by electronic means which provides a *durable record* of the agreement shall be deemed equivalent to writing.

➢ This provision was included to ensure the coincidence among *forum* and *ius* in order to facilitate the ascertainment and application of law.

➢ The spouses may agree that the Member State **whose law is applicable*** or **where the marriage was concluded**

➢ * the choice can be made only among some *fora*:

- indicated in ***Arts. 22*** *in case there is agreement,*

(a) the State where the spouses or future spouses, or one of them, is habitually resident at the time the agreement is concluded; or

(b) State of nationality of either spouse or future spouse at the time the agreement is concluded

- indicated in ***Art. 26 (1),*** *lacking the agreement:*

(a) State of the spouses' first common habitual residence ***after the conclusion*** *of the marriage; or,* ***failing that***

(b) spouses' common nationality ***at the time*** *of the conclusion of the marriage*

(⇒both referred to the past; what if they loose contacts as time goes by?)

Example - A bi-national homosexual couple (Belgian/French) concluded their marriage in Paris. Having lived in Vienna since their marriage, they preferred to submit any matters relating to their matrimonial property regime to the French courts (place marriage concluded). The same couple will also have the possibility to submit any matter relating to its matrimonial property regime to French law and the French courts /or to Austrian law and the Austrian courts.

Common rules

- Art. 12 Counterclaims
- Art. 14 Seising a court (except *ex officio* under lett. c)
- Art. 15 (*mutual trust*)
- Art. 16 Examination as to jurisdiction
- Art. 19 Examination as to admissibility

Common rules

- ***Lis pendens* (Art. 17)**

1. Where proceedings involving the **same cause of action** and between the same parties are brought before courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

Common rules

- ***Lis pendens* (Art. 17)**

2. In the cases referred to in paragraph 1, upon request by a court seised of the dispute, any other court seised shall without delay inform the former court of the date when it was seised.

3. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

Common rules

- **Related actions (Art. 18)**

= so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable decisions resulting from separate proceedings

1. Where related actions are pending in the courts of different Member States, any court other than the court first seised **may stay** its proceedings

2. Where the actions are pending at first instance, any court other than the court first seised **may** also, *on the application of one of the parties*, **decline** jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

Summarising conclusions

- Enhanced cooperation on matrimonial and registered partnership property issues
- Complete instrument: all PIL aspects
- Coordination with other PIL Regulations

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The project is co-funded by the Justice Programme of the European Union
JUST-JTRA-EJTR-AG-2016-763874

Jurisdiction on property regimes of international couples: Regulations No 2016/1103 and No 2016/1104

Case study

FACTS

A couple of Italian nationals, Giovanna and Marco, married in Milan (Italy) in February 2010 choosing the regime of community of property («comunione dei beni») set under the Italian law, and shortly after (in mid-2012) moved to Lisbon (Portugal) due to professional grounds of both spouses. Notably, Giovanna is the executive director of an important fashion brand and Marco works in the restaurant business. They have been habitually resident in Portugal for several years, in a nice rented apartment in the center of Lisbon, paid entirely by the Giovanna.

In January 2015 they had a child, Tommaso, who was born and grown up in Portugal.

Few years later, the husband had some financial problems due to the loss of a business opportunity. As a consequence of the difficult and stressing situation, difficulties arose in the marriage too.

In December 2017 they went back to Italy to spend Christmas holidays with their relatives. During their stay, the spouses decided to relocate in Italy by Spring 2019, hoping that the change would have helped their relationship.

Marco stayed in Italy in order to take care of the renovation of the home in Milan, which was owned by both spouses at 50% each and where they would have wanted to reside. He also started a new commercial activity in Milan, which turned out to be very successful allowing Marco to invest just after two months in a small flat he decides to locate for short periods, earning a relatively good income therefrom. The economically advantageous term continues: at the end of February 2019 he is appointed as sole heir by its dear uncle, who passed away without children and other relatives. His uncle's assets comprise both 100.000 euros deposited in a bank account and a wonderful villa in Crans-Montana, Switzerland, where he used to spend long periods because of the high quality of the air, beneficial for his bad phthisis.

The wife returned to Portugal with the child. They were supposed to move to Italy when the renovation was finished. Unfortunately, soon after their return Tommaso's started feeling seriously sick, requiring continuous assistance by Giovanna who, being alone, could not cope with her job rhythm and had to stop working to assist her child.

However, due to continuous arguments mainly related to financial issues, Marco decided to seek divorce. So, on 20 March 2019 he applied before the Tribunal of Milan (Italy) asking for:

- separation of the couple,
- joint custody of the child,
- placement of the child with the father,
- maintenance for him and the child,
- the award of both homes in Milan.

With the introductory claim Marco submits a written agreement signed by both spouses and concluded in Milan in 2010, few days after the marriage, which provided, the following clauses for the case of separation or divorce:

- the choice of Portuguese law with regard to the matrimonial disputes (according to which the divorce can be declared after one year of *de facto* separation);
- the choice of Italian courts with regard to both spousal and children maintenance;
- the choice of Italian law on both spousal and children maintenance;
- the choice of Italian courts with regards to matrimonial property regime.

Meanwhile, on 19 April 2019, Giovanna initiated custody proceedings in Portugal asking for the sole custody of Tommaso on the ground that Marco had not been taking proper care of the child and was often away from home when they lived together in Portugal. She did not file a claim for maintenance as she recalled the signed agreement giving jurisdiction to the Italian court.

The first hearing before the President of the Tribunal of Milan will take place in early July 2019.

Giovanna is asking your legal assistance. She is asking to:

- contest the validity of that agreement;
- enter an appearance before the Italian court and contest the Italian jurisdiction over parental responsibility;
- have the Italian court dismiss the spousal maintenance claims, on the ground that her husband has never provided financial support to the family and she has always paid for family subsistence both in Italy and in Portugal;
- contest the Italian jurisdiction over the child maintenance claim filed by the father;
- She wants to know if she can claim damages, in case the husband does not pay the child maintenance;
- She informs you that she will move to Switzerland by the end of 2019 because she has discovered that the child is affected by phthisis (as the granduncle) and the doctor has advised to bring the kid to Crans-Montana, famous for the high quality of air; she wants to know which court has jurisdiction to modify the child maintenance obligation;
- She also wants to be able to sell the two homes in Milan and receive half of the price, and to receive half of the gains from the rentals obtained by Marco;
- She asks for the judicial declaration of a quota of the assets inherited by Marco for herself (as a ‘compensation’ for all her personal and economic efforts and commitment in the family *menage* during the marriage, including the costs incurred for the house in Lisbon, the lost profits from her previous job she had to interrupt to assist their child and the burden of the responsibility she bear alone, giving the continuous absence of the husband) and for their child (in need of medical treatments and rehabilitation care). Namely, she asks for: both 50.000 euros and the transfer to her of 50% of the bare ownership (“nuda proprietà”) and transfer of the right of utilization of the house in Crans-Montana (“usufrutto”) to her and the

child for the entire life-time of their kid, in order for the latter to benefit of the best air quality possible and enjoy a healthier standard of living, with the physical support of the mother.

Related questions

1) Is the agreement valid for the part referring to the jurisdiction on the matrimonial property regime?
2) Has the Tribunal of Milan jurisdiction over matrimonial property regime? Which are the relevant provisions?
3) How would you consider the claim concerning the award of the larger home in Milan? Could it be qualified as the family home?

   If yes, which are the relevant provisions to determine jurisdiction and applicable law? Would you consider the claim of property of the flat and the gains from the rentals differently? Which provisions would you apply to determine the jurisdiction and applicable law for the smaller apartment?
4) Which court should have jurisdiction to settle the award of money deposited in the bank account? Would it be the same court to settle the transfer of the use of the immovable property located in Switzerland? Would you consider such claims as pertaining to maintenance obligation or matrimonial property definition? Would the form chosen for the award – lump sum payment/transfer of rights *in rem* – be relevant in such definition?

LEGAL INSTRUMENT(S) TO BE APPLIED

Regulation No 2016/1103

Questions with guidelines

1) Is the agreement valid for the part referring to the jurisdiction on the matrimonial property regime?

Regulation 2016/1103 provides for the possibility for (married or even future) spouses to select the court having jurisdiction over matrimonial property regimes, even if it is limited.

Under Article 7(2), referred to in Article 5(3), the agreement must be written, dated and undersigned if the agreement is concluded before the court is seised to rule on matters of matrimonial property regimes.

- Therefore, the forum selection clause inserted in the agreement signed after the marriage in Italy and before the commencement of the matrimonial proceedings is formally valid.

Possible issues to be discussed:

Could an e-mail be a valid proof of the agreement?

See the second proposition of Article 7(2) of the Regulation 2016/1103.

2) Has the Tribunal of Milan jurisdiction over matrimonial property regime? Which are the relevant provisions?

In the agreement, the spouses have chosen Italian courts for claims on matrimonial property regime, since where they were just married.

With regard to the matrimonial property regime, the Italian court has jurisdiction, because, according to **Article 5(2)(b)** of the Regulation 2016/1103, Italy is the place where the *agreement* was concluded, where the applicant brought the *action for separation* and where he is both a *national* and *habitually resident for more than six months* immediately before the application was made, in accordance with sixth indent of Article 3(1)(a) of Regulation (EC) No 2201/2003, referred to by the same provision.

- Therefore, the Italian court has jurisdiction for the separation, for the spousal maintenance and for the matrimonial property regime in the present case.

Possible issues to be discussed:

With regard to the previous session: is it possible a choice-of-court agreement over matrimonial matters?

What if no valid agreement was signed? Which court could have jurisdiction over the matrimonial property regime?

See under Articles 6 and 8 reg. 2016/1103:

(*i*) If the factual elements are the same at the time the court is seised:

- Portuguese under **Article 6**, since in Portugal there is: under lett. **(a)** common habitual residence; under **(b)** common last habitual residence, insofar as Giovanna still resides there; under **(c)** habitual residence of Giovanna (as respondent).

- Italian court under Article 6**(d)** given the Italian common nationality

(*ii*) If Giovanna agrees to enter an appearance before the Milan court (lacking a valid agreement, since Italian law is applicable pursuant to Article 26(1)(a) because the spouses' first *common habitual residence after the marriage was in Italy*)

- Italian court shall have jurisdiction under **Article 8**. This rule shall not apply where Giovanna's appearance was entered to contest the jurisdiction. Anyway, before assuming jurisdiction, the Italian court shall ensure that the Giovanna is informed of her right to contest the jurisdiction and of the consequences of entering or not entering an appearance.

3) **How would you consider the claim concerning the award of the larger home in Milan? Could it be qualified as the family home?**

   If yes, which are the relevant provisions to determine jurisdiction and applicable law? Would you consider the claim of property of the small flat and the gains from the rentals differently? Which provisions would you apply to determine the jurisdiction and applicable law for the smaller apartment?

In the main case, only the father has lived in the home in Milan, so it could **not** be considered as the family home. Therefore, it would fall under the matrimonial property regime, namely, the Italian court shall have jurisdiction under Article 5(2)(b). This is valid (and even more evident) for the small flat bought recently and for the profits derived by the rentals. In both regard, Giovanna's defense against the husband's claim may result well-founded.

On the contrary, if the apartment were qualified as the family home *[the trainees should imagine grounds for doing so: for instance, relying on the couple's intention to relocate the whole family there],* according to the Italian case law, such issue is deemed to be related to the protection of children, and therefore subject to the respective jurisdictional regime and the rules on the determination of the applicable law.

- In the latter case, Portuguese courts shall decide over the award of the family home and apply the Portuguese law (similar to the claim on parental responsibility – based on the habitual residence of the child).

Possible issues to be discussed:

When does an apartment, property of one of the spouses, qualify as family home?

Is the award of a family home part of the maintenance obligation? And which is the applicable regime?

How can you distinguish between maintenance obligation and matrimonial property? Which is their respective functions? ⇒ refer to CJEU case-law (*De Cavel II, van der Boogaard*…)

4) **Which court should have jurisdiction to settle the award of money deposited in the bank account? Would it be the same court to settle the transfer of the use of the immovable property located in Switzerland? Would you consider such claims as pertaining to maintenance obligation or matrimonial property definition? Would the form chosen for the award –lump sum payment/transfer of rights *in rem* – be relevant in such definition?**

The different further requests by Giovanna must be distinguished, as some can be referred to matrimonial property regime and others to the maintenance obligations, falling each under the corresponding rules identified earlier. The already quoted case-law by EUCJ allow us to identify the two categories:

- *Spousal maintenance obligations*: amount to be defined with the scope of economic support of the spouse that cannot provide for herself, having lost her job and lacking other sources of income; the amount could correspond both to periodic (usually monthly) allowances but also to a lump sum quantified *una tantum or as an interim compensation order* (50% of the sum; 50% of the sole property of the villa in Switzerland)
- *Child maintenance*: right to the use of the house in Switzerland?
- *Matrimonial property*: definition of the rights in property of the different assets acquired during the marriage ('arising out of the spouse matrimonial relationship') to be shared equally (50%) in favour of each spouse, considering the total value of all the accrued profits and estates.

For the peculiarity of the present case, the fact that the immovable property inherited by Marco is situated within the territory of a *third States* does not affect the definition of the jurisdiction of the authority on the transfer of the bare ownership (nuda proprietà). Both **Articles 10** (subsidiarity) **and 11** (*forum necessitatis*) do not seem applicable, given the jurisdiction of the Italian court established under **Article 5(2)** reg. 2016/1103 for matrimonial property regimes, attracted by the matrimonial proceedings (Art. 3(1)(b) reg. 2201/2003), decided by the same judge together with the spousal alimentary obligations (Art. 4(1)(c) reg. 4/2009); see *supra* under question n. 3.

Possible issues to be discussed:

What could it happen in case − being the immovable property in a third State, such as Lybia, where bringing proceedings would be almost impossible for the political instability due to the civil war − no court of the participating Member States had jurisdiction under Articles 4, 5, 6, 7, 8 or 10, for example because the proceeding on matrimonial dispute is brought in Poland (non-participating Member State) when there is no agreement on a different court between the two Polish spouses, having resided in Lybia before 2014 for several years, no appearance of the defendant before the

court of a participating State, no jurisdiction has been declined? Could for example the *domicile of the defendant* in Italy be a sufficient connection to assert jurisdiction under **Article 11**? No guidance is offered by reg. 2016/1103 but most probably yes.

Law applicable to matrimonial property regimes

Contents

Introduction

- Two Regulations
- little differences between Reg
  2016/1103 and 2016/1104

- Importance of family law/property **law**

1. Meaning of matrimonial property regime

Recital (18)

autonomous interpretation is needed

«all civil-law» aspects any property relationships between the spouses and in their relations with third parties, resulting from the matrimonial relationship or the dissolution thereof

- Matrimonial property regime – matrimonial property relations
- Civil law aspects, family law aspects
- ‘Matrimonial property regime’ has a meaning in family law sense
- Applicable law will determine the matrimonial property regime
- Therefore the regime itself is of huge relevance

2. Differences among national property regimes

- huge differences among MS

civil law / common law

different techniques in their function

- deep connection with property law
- deep connection with contract law and general law of obligations

- 3 regimes may be hightlighted in Europe

- separation of property regime
- regime of participation in acquisitions
- regime of community of acquisitions

- **What are similarities and differences?**
- **Are there differences concerning any regime in European countries?**
  - **Default regime**
  - **Alternative regimes**

Hungary
Italy
Lithuania
Portugal

DEFAULT REGIME: community of property

e.g. in Catalonia – separation of assets
e.g. in Germany – participation of acquisitions
e.g. in Austria – deferred community
(2013 CEFL Principles)

Hungary
Italy
Lithuania
Portugal

ALTERNATIVE REGIMES
community of property
or/and separation of property

e.g. in Hungary – also participation of acquisitons (2014)

Changes

Consciousness, legal help (notaries, lawyers, attorneys)

3. Definition of matrimonial property agreement

- Definition (CEFL 2013)

any agreement by which spouses organise their property relations

- differences in family law rules
  - freedom to enter into an agreement
  - freedom to choose another regime
  - freedom to modify a regime
- Default regimes
- Alternative regimes

4. Main issues concerning applicable law

- Universal application

  Art 20 → even if it is not a MS's law

- Unity of applicable law

  Art 21 → to all assets falling under that regime, regardless of their location

- Limited freedom to choose the applicable law

5. Applicable law in absence of choice

for spouses there is an order [**Art 26(1)**]

1. first common HR after conclusion of marriage
2. common nationality at time of conclusion of marriage
3. closest connection at the time of conclusion of marriage

DIFFERENCE for registered partners –

Law of the State under which the RP was created

Art 26(3) is exceptional rule

derogating to Art 26(1) → the applicable law is the law of the last common HR

- if they lived there a significantly longer period
- such law was taken into attention when arranging property relations
- these are demonstrated by applicant

6. Matrimonial property agreement

- Applicable law of a country

- for its default matrimonial property regime
- for its alternative matrimonial property reg.

- Possibility of entering into a matrimonial property **agreement**

Formal validity (Art 25)

simple – written, dated, signed

communication by electronic means

- **Formal validity**

  further possible formal requirements
  - common HR when concluding this agreement
    if different - one is enough
    if only one has HR in MS
  - the law which is the applicable law

- **Material validity**
  - the law which is the applicable law

7. Choice of applicable law

- Autonomy (Art 22)
- Spouses/future spouses
- Limited options
  - common HR or HR of either of them at the time of conclusion of the agreement on applicable law
  - nationality of either of them at the time of conclusion of the agreement on applicable law

Prospective effect

Protection of creditors

Formal validity (Art 23)

- simple – written, dated, signed
- communication by electronic means
- further possible formal requirements

  - common HR when concluding this agreement
    if different - one is enough
    if only one has HR in MS
  - the law which is the applicable law

- Existence

- Material validity (Art. 24)
  – according to the law which would govern it, if the agreement or terms were valid

- DIFFERENCE for registered partners –
  – They can choose also the law of the State under the law of which the RP was created

8. Scope..

Non-exhaustive list (**Art 27**)

- ✓ classification of property
- ✓ transfer of property between categories
- ✓ rights and obligations of parties with regard to property
- ✓ dissolution of matrimonial property regime
- ✓ effects of the regime

..and adaptation of rights *in rem*

- Matrimonial property rules are embedded in national property law

Art 29

- the right in rem will be adapted to the closest equivalent right under the law of that State

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9. Conclusion: considerations of public interest

Court can take into consideration public interest.

However – strict interpretation is needed

- ✓ Imperative rules (Art 30)

'overriding mandatory provisions' are to be applied (e.g. protection of family home)

- ✓ Public order (Art 31)

certain foreign law provisions should not be applied

- ✓ EU Charter of Fundamental Rights!

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The project is co-funded by the Justice Programme of the European Union
JUST-JTRA-EJTR-AG-2016-763874

Law applicable to matrimonial property regimes

Case study

FACTS

Ingrid is a Hungarian woman living in Austria. One day she meets a man, Salvatore, from Italy, who is an Erasmus doctorate student in Wien. Salvatore is Italian but he lives in Portugal with his family, as his father has a Portuguese background.

They fall in love with each other, but their personal plans for the future differ. They decide to live together, as a first step before marrying. Salvatore is deeply in love with Ingrid but is uncertain as to whether they should get properly married, or if they should not enter into a registered partnership, maybe under Italian law. Salvatore strongly promotes an agreement on the matrimonial property regime, even before they decide for their future marriage /relationship. (Salvatore seems to be very conscious about property relations as he comes from a family being moderately rich and with a lot of legal experiences.)

Ingrid is a bit embarrassed. She wants to get married. Marriage is important to her. Plus she does not like registered partnership, as in Hungary a registered partnership is maintained for same-sex couples.

She seeks for some legal advice.

They are thinking about a property agreement and not sure whether there is such an agreement for registered parterns and/or spouses.

The lawyer informs them that even if they do not enter into a property agreement they can choose the applicable law which can be useful if they terminate their eventual registered parternship or divorce.

She is not sure whether an agreement on applicable law is useful at all.

Related questions

1) Is it possible for them to agree on any property regime before they get married but formalize their partnership/and when they marry? What are the main differences?
2) What are the (substantial and formal) requirements for the validity of such a property agreement?
3) Is it possible for them to agree on applicable law before entering a registered partnership/marriage or only as registered partners/spouses?
4) If yes, which law can be chosen?
5) What is needed for the validity of such an agreement?
6) Does such an agreement comprise all their assets?
7) What if she changes her mind? Can they change their agreement after some time?

8) What happens if they do not agree on applicable law concerning their matrimonial property regime but they terminate their registered partnership/divorce later?
9) If they enter into an agreement on applicable law, can it happen that the court will not apply it?

LEGAL INSTRUMENT(S) TO BE APPLIED

Regulation No. 2016/1103

Regulation No. 2016/1104

Questions with guidelines

1) **Is it possible for them to agree on any property regime before they get married but formalize their partnership?**

Yes, if they enter into a registered partnership they can enter into a so called partnership property agreement according to Art 25 of Reg 2016/1104. If they marry they can enter into a matrimonial property agreement according to Art 25 of Reg 2016/1103.

Although they can do that the main issue is which property regime they choose.

Possible issues to be discussed:

What are the possible advantages/disadvantages of the different property regimes?

Is it a requirement that both parties should be informed by the lawyer together?

When can we be sure that a special partnership is registered partnership in the sense of the regulation?

2) **What are the (substantial and formal) requirements for the validity of such a property agreement?**

If they are registered partners the requirements are the following according to Art 25 of Reg 2016/1104. It has to be expressed in writing, dated and signed by both partners. If the law of the Member State in which both partners have their habitual residence at the time the agreement is concluded lays down additional formal requirements for partnership property agreements, those requirements shall apply. If the partners are habitually resident in different Member States at the time the agreement is concluded and the laws of those States provide for different formal requirements for partnership property agreements, the agreement shall be formally valid if it satisfies the requirements of either of those laws. *This case Ingrid and Salvatore have their habitual residence in different MSs*

If the marry, the requirements are the following according to Art 25 of Reg 2016/1103. It shall be expressed in writing, dated and signed by both spouses. If the law of the Member State in which both spouses have their habitual residence at the time the agreement is concluded lays down additional formal requirements for matrimonial property agreements, those requirements shall apply. If the spouses are habitually resident in different Member States at the time the agreement is concluded and the laws of those States provide for different formal requirements for matrimonial property agreements, the agreement shall be formally valid if it satisfies the requirements of either of those laws. *This case Ingrid and Salvatore have their habitual residence in different MSs.*

3) Is it possible for them to agree on applicable law before entering a registered partnership/marriage or only as registered partners/spouses?

If they decide to enter a registered partnership they can do that as future partners [Art 22(1) of Reg 2016/1104].

If they decide to marry, they can do that as future spouses [Art 22(1) of Reg 2016/1104].

They can designate the law applicable to their property consequences of their registered partnership [Art 22(1) of Reg 2016/1104].

They can designate the law applicable to their matrimonial property regime as spouses [Art 22(1) of Reg 2016/1103].

Possible issues to be discussed:

What does it mean ‘future partners’ or ‘future spouses’?

When do they have to enter into a registered partnership or marry after having chosen the applicable law?

What does exactly ‘electronic communication’ mean?

4) If yes, which law can be chosen?

If they agree on applicable law as (future) registered partners, they can choose one of the following [Art 22(1) of Reg 2016/1104],

a) the law of the State where the partners or future partners, or one of them, is habitually resident at the time the agreement is concluded

b) the law of a State of nationality of either partner or future partner at the time the agreement is concluded, or

c) the law of the State under whose law the registered partnership was created.

In case of marriage, the law of the State where the spouses or future spouses, or one of them, is habitually resident at the time the agreement is concluded; or the law of a State of nationality of either spouse or future spouse at the time the agreement is concluded can be chosen.

Salvatore has his habitual residence in Portugal, Ingrid in Austria. Ingrid is Hungarian, Salvatore is Italian, so they can choose among several national laws. Besides, if they choose the applicable law as registered partners they can choose the law of the State under whose law the registered partnership was created, this case maybe Italian law. This possibility does not exist if they marry with each other.

Possible issues to be discussed:

The issue if nationality is not a question this case but the habitual residence of either partners is an issue to be discussed. Can the habitual residence change if the decide

to live together further on in Austria? Or if they do not decide it clearly but enter into an agreement while being in Austria?

5) What is needed for the validity of such an agreement?

Consent has to be expressed in writing, dated and signed by both registered partners/spouses.

What concerns the further requirements it depends on the law where both of them has habitual residence at the time the agreement. If it lays down additional formal requirements those have to be applied [Art 23(2) of Reg 2016/1103]. However, if the spouses are habitually resident in different Member States at the time the agreement is concluded and the laws of those States provide for different formal requirements for matrimonial property agreements, the agreement shall be formally valid if it satisfies the requirements of either of those laws [Art 23(3) of Reg 2016/1103].

The same rules are contained in Art 23(2)-(3) of Reg 2016/1104.

Possible issues to be discussed:

The issue of habitual residence emerges.

6) Does such an agreement comprise all their assets?

Yes, as according to Art 21 of both Regulations the law applicable to the property consequences of a registered partnership shall apply to all assets that are subject to those consequences, regardless of where the assets are located and the law applicable to a matrimonial property regime pursuant to Article 22 or 26 shall apply to all assets falling under that regime, regardless of where the assets are located, respectively.

Possible issues to be discussed:

We do not see now the problems but can count with them. The principle of 'unity of applicable law' can bring a lot of difficulties especially because of the so called universal application which means that the law designated as applicable by the is Regulation(s) shall be applied even if it is not the law of a MS.

Besides, the scope of applicable law is quite wide according to Art27 of both Regulations. The rule "adaptation of rights in rem" has to be applied. (Where a person invokes a right in rem to which he is entitled under the law applicable to the matrimonial property regime and the law of the Member State in which the right is invoked does not know the right in rem in question, that right shall, if necessary and to the extent possible, be adapted to the closest equivalent right under the law of that State, taking into account the aims and the interests pursued by the specific right in rem and the effects attached to it.) (§29 of both Regulations).

7) **What if either of them changes her/his mind? Can they change their agreement after some time?**

Actually, yes, but it has some restrictions.

Unless the spouses agree otherwise, a change of the law applicable to the matrimonial property regime made during the marriage shall have prospective effect only [Art 22(2) of Reg 2016/1103].

Unless the partners agree otherwise, a change of the law applicable to the property consequences of their registered partnership made during the partnership shall have prospective effect only [Art 22(2) of Reg 2016/1104].

The formal requirements always depend at the time when the agreement is concluded and the fact whether where is their habitual residence at that time. However, change requires an agreement of course.

8) **What happens if they do not agree on applicable law concerning their matrimonial property regime but they divorce later? What if they are registered partners and terminate their partnership?**

If they divorce in a Member State where the Regulation is in force the MS will apply Art 26 concerning applicable law in the absence of choice by the parties. It will apply the law of the State the law of the spouses' first common habitual residence after the conclusion of the marriage; or, failing that that of the spouses' common nationality at the time of the conclusion of the marriage; or, failing thatwith which the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances.

It means that if they will start their common life in Austria, the Austrian law will be applied. They presumably won't have a common nationality.

It makes a great difference as if they were not spouses but registered partners as in the absence of a choice-of-law agreement pursuant to Art 22, the law applicable to the property consequences of registered partnerships shall be the law of the State under whose law the registered partnership was created [Art 26 of Reg 2016/1104].

Possible issues to be discussed:

By way of exception and upon application by either spouse, the judicial authority having jurisdiction to rule on matters of the matrimonial property regime may decide that the law of a State should govern the matrimonial property regime if the applicant demonstrates that the spouses had their last common habitual residence in that other State for a significantly longer period of time than in the State designated pursuant to point (a) of paragraph 1; and had relied on the law of that other State in arranging or planning their property relations.

This possibility cannot be seen at the time of entering into marriage.

9) **If they enter into an agreement on applicable law, can it happen that the court will not apply it?**

They can refer e.g. the invalidity of the agreement according to §24 of Reg 1103/2016. The existence and validity of an agreement on choice of law or of any term thereof, shall be determined by the law which would govern it pursuant to Article 22 if the agreement or term were valid.Nevertheless, a spouse may, in order to establish that he did not consent, rely upon the law of the country in which he has his habitual residence at the time the court is seised if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1.

The court may apply § 30 and 31, which means that the application of the overriding mandatory provisions of the law of the forum are not restricted by the Regulation. Besides, the court can refer to the public policy clause as well.

Possible issues to be discussed:

The public policy clause and the so-called mandatory may cause problems, especially considering the interpretation of provisions of the law of forum.

4. Other materials

The following materials have been produced with the aim of better managing and supporting the delivery of the training activities:

- application form,
- short-term evaluation questionnaire,
- long-term evaluation questionnaire,
- glossary of legal terminology,
- bibliography.

A summary of all the activities, training sessions, reports and materials developed within the Project are available on the official website ***www.univr.it/class4eu****.*

C.L.A.S.S. 4EU

The project is co-funded by the Justice Programme of the European Union
JUST-JTRA-EJTR-AG-2016-763874

APPLICATION FORM

(Please, fill in, sign, scan and return it via e-mail)

FAMILY NAME	
NAME	
GENDER	M ☐ F ☐
DATE OF BIRTH	
PLACE OF BIRTH	
NATIONALITY	
ADDRESS	
Tel.	
E-mail	

PROFESSION	☐ lawyer ☐ social service worker ☐ academic ☐ other:

I am applying for:	☐ Training Session No… ☐ Training Session No.

Other information:

I would qualify my knowledge and/or practical experience in European and international family law as:

☐ null ☐ scarce ☐ basic ☐ advanced

I have attended other training courses in European and international family law:

☐ never ☐ rarely (1 to 5) ☐ often (6 or more)

I would qualify my knowledge in English language as:

☐ null ☐ scarce ☐ basic ☐ advanced

Please, find attached: 1) a copy of the identity card;

2) *curriculum vitae*.

In compliance with the relevant applicable legislation, I hereby authorize you to use and process my personal details contained in this form and in the documents attached.

(Place, date) _____ (Signature) _____

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JUST-JTRA-EJTR-AG-2016-763874

SHORT-TERM EVALUATION SURVEY

Training Session No. 00 | (PLACE) (DATE)

This survey is part of the European judicial training project "C.L.A.S.S.4EU – 4 EU training sessions on family law for Cross-border Lawyers And Social Services". The main purpose is to allow us to better plan future events and tailor them to meet your needs. Please, feel free to answer each question with a grade ranging from 1 (extremely dissatisfied/low rate) to 5 (extremely satisfied/high rate) and add comments or suggestions. All data will be processed anonymously and only for the purposes of this project. Thank you for your collaboration.

I) BACKGROUND

a	Please indicate your professional background ☐ lawyer ☐ social service staff ☐ academic ☐ other _____
b	Please indicate your country of residence ☐ Hungary ☐ Italy ☐ Lithuania ☐ Portugal ☐ other _____

II) ORGANISATION AND LOGISTICS OF THE EVENT		1	2	3	4	5
a	Did you feel comfortable with the overall schedule of the event (timing, length of the pauses, lunch breaks, etc.)?					
b	Was the location and the technical equipment appropriate to the event?					
c	How do you evaluate the travel and accommodation organisation?					

III) OVERALL EVALUATION OF THE TRAINING		1	2	3	4	5
a	What is your overall evaluation of the training?					
b	How useful do you rate a training in a foreign language and the interaction with colleagues from other countries?					
c	To what extent did the content of the training meet your expectations?					
d	How clear and effective were the training materials?					
e	Has the content been delivered using the appropriate didactic tools and methodologies (slides, practical case studies, in presence training, discussion etc.)?					
f	How clear and effective were the case studies presented during the training?					
g	To what extent did the case studies address the training needs?					

IV) TRAINERS		1	2	3	4	5
a	Were the trainers well-prepared?					
b	Were the presentations well-structured and effective?					
c	To what extent did the trainers address the main issues related to your profession?					
d	Were the trainers able to effectively engage in the discussions?					

V) SELF-EVALUATION AND BENEFIT		1	2	3	4	5
a	What was the level of your knowledge on the subject matter before the training sessions as to take full advantage of the course?					
b	Did the training sessions improve your knowledge?					
c	Did the training sessions improve your specific professional skills?					
d	To what extent do you think you will use the acquired knowledge in your daily work life?					

VI) SPECIFIC QUESTIONS RELATED TO EACH SESSION

1) TITLE (GENERAL OVERVIEW)		**1**	**2**	**3**	**4**	**5**
a	Were the contents of the presentation well-structured, clear and effective?					

2) TITLE		**1**	**2**	**3**	**4**	**5**
a	Were the contents of the presentation well-structured, clear and effective?					
b	Were the case study/ies well-structured to properly understand topic?					

(copy and paste for each specific topic, and complete according to it)

Any comments you may wish to include on specific aspects of the training:

_____

_____

Thank you for your collaboration!

The project is co-funded by the Justice Programme of the European Union
JUST-JTRA-EJTR-AG-2016-763874

C.L.A.S.S.4EU Long-term Evaluation Questionnaire

This survey is part of the European judicial training project "C.L.A.S.S.4EU – 4 EU training sessions on family law regulations for Cross-border Lawyers And Social Services" (more info at www.univr.it/class4eu).

The main purpose of this survey (in English language) is to gather information and feedback on the C.L.A.S.S.4EU training sessions, as well as professional activities, personal experience and knowledge regarding the application of EU regulations in family matters, especially after having attended any of the C.L.A.S.S.4EU training sessions.

All data will be processed anonymously, in compliance with data protection legislation and for the purposes of this Project only.

Thank you for your collaboration!

C.L.A.S.S.4EU Project Team

I) Background

a) Please indicate your professional occupation

☐ Lawyer

☐ Social Service Worker

☐ Academic

☐ Other:

b) Please indicate your gender

☐ Male

☐ Female

☐ Undetermined

c) Please indicate your country of residence

☐ Hungary

☐ Italy

☐ Lithuania

☐ Portugal

☐ Other:

d) With which of the following aspects of cross-border family matters do you (at least occasionally) deal in your professional activity?

☐ Matrimonial matters

☐ Parental responsibility

☐ Maintenance obligations

☐ International child abduction

☐ Patrimonial regimes

☐ Successions

☐ Other:

II) Follow-up on CLASS4EU training sessions

a) After attending any CLASS4EU training sessions, how would you rate your level of knowledge of European family law on

	1	2	3	4	5
Matrimonial matters	○	○	○	○	○
Parental responsibility	○	○	○	○	○
Maintenance obligations	○	○	○	○	○
International child abduction	○	○	○	○	○
Patrimonial regimes	○	○	○	○	○

Please, answer each question with a grade ranging from 1 (extremely dissatisfied/low rate/not sufficient) to 5 (extremely satisfied/high rate/excellent).

b) After attending any CLASS4EU training sessions, have you benefitted in your professional activity and daily practice from the knowledge you acquired during the training sessions?

☐ Yes

☐ No

☐ I don't know

b.1) If yes, please specify the topic

☐ Matrimonial matters

☐ Parental responsibility

☐ Maintenance obligations

☐ International child abduction

☐ Patrimonial regimes

☐ Other:

b.2) If no, please specify the reason

☐ No cross-border cases to be addressed

☐ No need to apply EU or international instruments

☐ Presentations and case studies were not sufficiently helpful

☐ Presentations and case studies were not sufficiently clear

☐ Other:

c) Has the training provided you sufficient guidance for the application of the specific EU or international legal instrument?

☐ Yes

☐ No

☐ I don't know

d) Have you referred to the relevant presentation when addressing a cross-border family dispute in your daily practice?

☐ Yes

☐ No

☐ I don't know

e) Did the relevant presentation and case studies contribute to a clearer understanding of the operation of the specific EU or international legal instrument?

☐ Yes

☐ No

☐ I don't know

f) Do you think that training sessions with participants from different backgrounds (eg. lawyers/social service workers) could contribute to improve knowledge and awareness of the various aspects of international disputes in family matters?

☐ Yes

☐ No

☐ I don't know

f.1) If yes, could you please provide your opinion on the interaction among different categories of professionals involved in international family disputes?

f.2) If no, could you please justify your answer?

g) Have you ever considered to contact the Project team members to request for more information/clarification on certain topics?

☐ Yes

☐ No

☐ I don't know

h) Have you ever thought / had the opportunity to contact any of the other trainees within your professional activity?

☐ Yes

☐ No

☐ I don't know

i) Would you consider valuable to build a network among the participants for professional purposes?

☐ Yes

☐ No

☐ I don't know

i.1) If yes, please leave your details (name surname, profession and office details, country, e-mail, phone/mobile, web site, social accounts)

i.2) If yes, please, give your consent to the publication of your data on the project website *

☐ Yes

☐ No

j) Do you have other comments or suggestions related to the organisation of the CLASS4EU training sessions?

☐ Length of the training session (please specify: eg. appropriate, too long, more breaks needed)

☐ General overview (please specify: eg. appropriate, clear, useful, too general, not needed)

☐ Training sessions provided for basic and advanced level (please specify: eg. needed, not necessary)

☐ Accreditation by the relevant associations of abroad training sessions (please specify: eg. needed, not necessary)

☐ Other

k) Do you have other comments or suggestions related to the programme and contents of the CLASS4EU training sessions?

☐ Topics (please specify: eg. fair amount of topics, properly selected topics, properly met trainees' needs, too many topics, too few topics)

☐ Presentations (please specify: eg. clear, useful, not clear, understandable, practice-oriented, too theoretical, not updated)

☐ Case studies (please specify: eg. clear, useful, properly met trainees' needs, not clear, too complex, not useful for real practice)

☐ Other (please specify)

III) Training experience and needs

a) Do you consider that your profession requires training on European family law regarding the following topics?

	1	2	3	4	5
Matrimonial matters	○	○	○	○	○
Parental responsibility	○	○	○	○	○
Maintenance obligations	○	○	○	○	○
International child abduction	○	○	○	○	○
Patrimonial regimes	○	○	○	○	○
Successions	○	○	○	○	○
Other	○	○	○	○	○

Please, answer each question with a grade ranging from 1 (extremely dissatisfied/low rate/not sufficient) to 5 (extremely satisfied/high rate/excellent).

b) To what extent do you think that the following aspects should be addressed in a training session on European family law?

	1	2	3	4	5
Jurisdiction	○	○	○	○	○
Applicable law	○	○	○	○	○
Recognition and enforcement of decisions	○	○	○	○	○
Cooperation among central authorities	○	○	○	○	○
Coordination of EU and international legal instruments	○	○	○	○	○
Special institute: private divorces	○	○	○	○	○
Special institute: circulation of public acts and personal status	○	○	○	○	○

Please, answer each question with a grade ranging from 1 (extremely dissatisfied/low rate/not sufficient) to 5 (extremely satisfied/high rate/excellent).

b.1) If other, please specify

c) To what extent do you think one or more of the following reasons may affect the knowledge of European family law?

☐ Lack of or inadequate training offer at national level

☐ Lack of or inadequate training offer at European level

☐ Complexity of EU legal instruments

☐ Other:

d) To what extent do you think the following aspects contribute to the development of professionals' knowledge and skills?

☐ Participation in transnational training sessions with trainees of different nationalities

☐ Delivery of training sessions in English language

☐ Practice-oriented training sessions

☐ Different background of the trainees (eg. lawyers, judges, social service workers)

☐ Similar background of the trainees (eg. only lawyers)

☐ Preliminary activities (study of materials, case studies…)

☐ Other:

e) To what extent do you think the following factors may affect the attendance at training sessions abroad?

	1	2	3	4	5
Professional commitments	○	○	○	○	○
Expenses	○	○	○	○	○
Time	○	○	○	○	○
Language	○	○	○	○	○
No reimbursement	○	○	○	○	○

Please, answer each question with a grade ranging from 1 (extremely dissatisfied/low rate/not sufficient) to 5 (extremely satisfied/high rate/excellent).

e.1) If other, please specify

f) In addition to CLASS4EU training, in the past two years have you attended other training on European family law in your country of residence?

☐ Yes

☐ No

f.1) If yes:

☐ How many?

☐ How long did it last?

☐ To what extent did you find it useful for your professional activities? (Please, answer with a grade ranging from 1 to 5)

g) In addition to CLASS4EU training, in the past two years have you attended other training on European family law at international level?

☐ Yes

☐ No

g.1) If yes:

☐ How many?

☐ How long did it last?

☐ To what extent did you find it useful for your professional activities? (Please, answer with a grade ranging from 1 to 5)

h) To what extent do you think the following factors may affect the attendance at training sessions abroad?

	1	2	3	4	5
Professional commitments	○	○	○	○	○
Expenses	○	○	○	○	○
Time	○	○	○	○	○
Language	○	○	○	○	○
No reimbursement	○	○	○	○	○

Please, answer each question with a grade ranging from 1 (extremely dissatisfied/low rate/not sufficient) to 5 (extremely satisfied/high rate/excellent).

h.1) If other, please specify

IV) Other comments

Please, provide any comments or suggestions on specific aspects of the training or in general:

Thank you for your collaboration!

In case you have provided your e-mail address, you will receive an e-mail confirming your submission.

For any information or inquiries, please contact class4eu@ateneo.univr.it or class4eu@gmail.com and visit the website www.univr.it/class4eu.

C.L.A.S.S.4EU Project Team

C.L.A.S.S. 4EU
The project is co-funded by the Justice Programme of the European Union
JUST-JTRA-EJTR-AG-2016-763874

Glossary of legal terminology

Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility	
Matrimonial matters	divorce, legal separation or marriage annulment
Parental responsibility matters	the attribution, exercise, delegation, restriction or termination of parental responsibility
court	all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation
judge	the judge or an official having powers equivalent to those of a judge in the matters falling within the scope of the Regulation
Member State	all Member States with the exception of Denmark
judgment	a divorce, legal separation or marriage annulment, as well as a judgment relating to parental responsibility, pronounced by a court of a Member State, whatever the judgment may be called, including a decree, order or decision
Member State of origin	the Member State where the judgment to be enforced was issued
Member State of enforcement	the Member State where enforcement of the judgment is sought
parental responsibility	all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access
holder of parental responsibility	any person having parental responsibility over a child
rights of custody	rights and duties relating to the care of the person of a child, and in particular the right to determine the child's place of residence
rights of access	the right to take a child to a place other than his or her habitual residence for a limited period of time
wrongful removal or retention	a child's removal or retention where:

	(a) it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention; and (b) provided that, at the time of removal or retention, the rights of custody were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Custody shall be considered to be exercised jointly when, pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility.

Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations	
maintenance obligations	maintenance obligations arising from a family relationship, parentage, marriage or affinity
decision	a decision in matters relating to maintenance obligations given by a court of a Member State, whatever the decision may be called, including a decree, order, judgment or writ of execution, as well as a decision by an officer of the court determining the costs or expenses. For the purposes of Chapters VII and VIII, the term 'decision' shall also mean a decision in matters relating to maintenance obligations given in a third State
court settlement	a settlement in matters relating to maintenance obligations which has been approved by a court or concluded before a court in the course of proceedings
authentic instrument	(a) a document in matters relating to maintenance obligations which has been formally drawn up or registered as an authentic instrument in the Member State of origin and the authenticity of which: (i) relates to the signature and the content of the instrument, and (ii) has been established by a public authority or other authority empowered for that purpose; or, (b) an arrangement relating to maintenance obligations concluded with administrative authorities of the Member State of origin or authenticated by them
Member State of origin	the Member State in which, as the case may be, the decision has been given, the court settlement has been approved or concluded, or the authentic instrument has been established
Member State of enforcement	the Member State in which the enforcement of the decision, the court settlement or the authentic instrument is sought

requesting Member State	the Member State whose Central Authority transmits an application pursuant to Chapter VII
requested Member State	the Member State whose Central Authority receives an application pursuant to Chapter VII
2007 Hague Convention Contracting State	a State which is a contracting party to The Hague Convention of 23 November 2007 on the International Recovery of Child Support and other Forms of Family Maintenance (hereinafter referred to as the 2007 Hague Convention) to the extent that the said Convention applies between the Community and that State
court of origin	the court which has given the decision to be enforced
creditor	any individual to whom maintenance is owed or is alleged to be owed
debtor	any individual who owes or who is alleged to owe maintenance
court	Includes administrative authorities of the Member States with competence in matters relating to maintenance obligations provided that such authorities offer guarantees with regard to impartiality and the right of all parties to be heard and provided that their decisions under the law of the Member State where they are established: (i) may be made the subject of an appeal to or review by a judicial authority; and (ii) have a similar force and effect as a decision of a judicial authority on the same matter. These administrative authorities shall be listed in Annex X. That Annex shall be established and amended in accordance with the management procedure referred to in Article 73(2) at the request of the Member State in which the administrative authority concerned is established.
domicile	For the purposes of Articles 3, 4 and 6, it replaces the concept of 'nationality' in those Member States which use this concept as a connecting factor in family matters. For the purposes of Article 6, parties which have their 'domicile' in different territorial units of the same Member State shall be deemed to have their common 'domicile' in that Member State.

Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation	
scope	This Regulation shall apply, in situations involving a conflict of laws, to divorce and legal separation

participating Member State'	a Member State which participates in enhanced cooperation on the law applicable to divorce and legal separation by virtue of Decision 2010/405/EU, or by virtue of a decision adopted in accordance with the second or third subparagraph of Article 331(1) TFEU
court	all the authorities in the participating Member States with jurisdiction in the matters falling within the scope of this Regulation

Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, and **Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships**	
matrimonial property regime	a set of rules concerning the property relationships between the spouses and in their relations with third parties, as a result of marriage or its dissolution.
matrimonial property agreement	any agreement between spouses or future spouses by which they organise their matrimonial property regime.
authentic instrument	a document in a matter of a matrimonial property regime which has been formally drawn up or registered as an authentic instrument in a Member State and the authenticity of which (i) relates to the signature and the content of the authentic instrument; and (ii) has been established by a public authority or other authority empowered for that purpose by the Member State of origin.
registered partnership	the regime governing the shared life of two people which is provided for in law, the registration of which is mandatory under that law and which fulfils the legal formalities required by that law for its creation.
property consequences of a registered partnership	the set of rules concerning the property relationships of the partners, between themselves and in their relations with third parties, as a result of the legal relationship created by the registration of the partnership or its dissolution.
partnership property agreement	any agreement between partners or future partners by which they organise the property consequences of their registered partnership.

Hague Convention on the civil aspects of international child abduction of 25 October 1980	
wrongful removal or retention	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.
rights of custody	rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence
rights of access	the right to take a child for a limited period of time to a place other than the child's habitual residence

Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children of 19 October 1996	
parental responsibility	parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child
measures directed to the protection of the person or property of the child	a) the attribution, exercise, termination or restriction of parental responsibility, as well as its delegation; b) rights of custody, including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, as well as rights of access including the right to take a child for a limited period of time to a place other than the child's habitual residence; c) guardianship, curatorship and analogous institutions; d) the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child; e) the placement of the child in a foster family or in institutional care, or the provision of care by kafala or an analogous institution; f) the supervision by a public authority of the care of a child by any person having charge of the child; g) the administration, conservation or disposal of the child's property.

wrongful removal or retention	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.

Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance and Hague Protocol on the Law Applicable to Maintenance Obligations of 23 November 2007	
creditor	an individual to whom maintenance is owed or is alleged to be owed
debtor	an individual who owes or who is alleged to owe maintenance
legal assistance	the assistance necessary to enable applicants to know and assert their rights and to ensure that applications are fully and effectively dealt with in the requested State. The means of providing such assistance may include as necessary legal advice, assistance in bringing a case before an authority, legal representation and exemption from costs of proceedings
agreement in writing	an agreement recorded in any medium, the information contained in which is accessible so as to be usable for subsequent reference
maintenance arrangement	an agreement in writing relating to the payment of maintenance which i) has been formally drawn up or registered as an authentic instrument by a competent authority; or ii) has been authenticated by, or concluded, registered or filed with a competent authority, and may be the subject of review and modification by a competent authority
vulnerable person	a person who, by reason of an impairment or insufficiency of his or her personal faculties, is not able to support him or herself

The project is co-funded by the Justice Programme of the European Union
JUST-JTRA-EJTR-AG-2016-763874

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The project is co-funded by the
Justice Programme of the European Union
JUST-JTRA-EJTR-AG-2016-763874