Priznanje in izvršitev tujih sodnih odločb v družinskopravnih zadevah
(RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS REGARDING FAMILY MATTERS)

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Introduction

The ultimate goal of every party that is litigating in front of a judicial authority (or another alternative dispute resolution institutions) is to obtain a decision that protects its rights. However, the protection of the party’s rights is not secured by the Court rendering a final judgment; the party must be satisfied according to the dispositive of the judgment. It is clear from the principle of territoriality that a judgment rendered in one legal system has legal effects in the territory of that legal system. The state has the necessary measures to enforce the judgment and to protect the party’s rights. However, in the absence of an international agreement a judgment delivered in one country cannot have a direct operation of its own force in another country. In that case, there have to be procedures which will give opportunity to the parties to avoid starting a new action in front of a court of a foreign country. This gives stability to all individual relationships between natural and legal persons. Such stability is fundamental for the protection of individual human rights, especially for the free movement of people. Therefore, there must be a goal set in order to achieve this stability, transnational legal certainty and the avoidance of repeated litigation and conflicting decisions. This goal is: Every state must adopt an efficient, prompt and balanced procedure for recognition and enforcement of foreign judgments with full respect of fundamental human rights and the fundamental principles of civil procedure.

In recent years the European Union (EU) has gone beyond the mere regulation of economic relations and the common market. The EU has increased the regulation of family relations, a field wherein conflicts were traditionally resolved under national legal rules or by international agreements. Such a diversity of legal sources has multiplied the number of potential legal rules that can be applied in a single situation and with that it further complicated this already convoluted private international law situation.

Another aspect which is also important regarding the recognition and enforcement of foreign judgments in family matters is that there have recently been great changes within the family itself. Globalization is not merely an economic phenomenon; it influences all social aspects. There has been a great change in the structure of family in particular. The long-lasting traditional concept of family law determined by a complex mixture of religious, social and cultural characteristics of one nation now more than ever is undergoing a change. These two tendencies (globalization and the change in the family structure) influence recognition and enforcement in different manners. Increased free movement of people in the EU produced complex cross-border family relations which require proper regulation based on fundamental
principles, especially on the principle of ‘mutual trust’ as a precondition of mutual recognition, which will allow free circulation of judgments between the Member States. In this manner the question of abolition of *exequatur* arises, whether it functions properly, and whether total abolition is required. On the other hand, the traditional concept of family law relations provides for certain discomfort when implementing such provisions and when circumventing the rules. In a way, this contradicts the principle of ‘mutual trust’. Therefore, the recognition and enforcement of family law decisions is particularly important, because it cuts to the core of the problem of ‘mutual trust’ and it ‘disembowels’ the functioning of mutual recognition in the EU.

1. The purpose of this doctoral thesis

The need for recognition and enforcement is undisputed in private international law because it is one of the most certain ways of avoiding repeated litigation and conflicting decisions and with that achieving transnational legal certainty. It helps the parties to avoid spending resources on re-litigation and to have harmonized decisions.

This doctoral thesis deals with the regulatory framework of the recognition and enforcement of foreign judgments regarding family matters. The recognition and enforcement of foreign judgments regarding family matters has three distinctions. First, these types of judgments are very frequent. For example, the number of ‘international’ divorce proceedings on the European level may be estimated at 170,000 annually, which constitutes approximately 16% of all European divorces. Second, the judgments regarding family matters are specific in their subject matter. Family relations have always been one of the central subjects of private international law, but as the number of cross-border marriage grows, the need of a balanced procedure that respects the parties’ rights increases accordingly. This causes the national legal systems to be more cautious when they are recognizing and enforcing foreign decisions. Third, there is a great divergence of sources on different levels whose scope of application is in the field of family matters. There are sources that apply when the judgments are rendered by courts of EU countries and are recognized and enforced in another EU country, but also there are vast numbers of international agreements and national rules that deal with this matter which apply to judgments coming from third countries.

This doctoral thesis presents a research conducted on the basic elements of the recognition and enforcement of foreign judgments and especially the characteristics of the *exequatur* of judgments regarding family matters. **Part one** of this thesis contains two chapters.
The **first chapter** will give a brief presentation of the transformation of the family from a sociological point of view and will show much it has transformed in its models and functions. This chapter will also address the modern phenomenon of ‘globalization’ and will point its influence on the shaping of the family. Lastly, this chapter will analyze the position of children during the dissolution of marriage and in its aftermath from a psychological perspective. The **second chapter** of this part will firstly give some preliminary remarks and a conceptual understanding of legal institutes’ recognition and enforcement. Then the chapter will address the types of decisions that can be recognized and enforced with the distinction between types of decisions which are undisputed and can undergo the process of exequatur and types of decisions which are debatable regarding whether they can be recognized and enforced in other countries. Following this, the chapter will give an overview of the basic doctrines of the recognition and enforcement. Then it will give a brief overview of the historical development of the recognition and enforcement of foreign decisions in Europe. In addition, this chapter will analyze the systems for recognition and enforcement present in most of the world. Lastly, this chapter will elaborate on the legal sources regarding recognition and enforcement.

**Part two** of this thesis consists of five chapters and will address the recognition and enforcement of foreign judgments regarding matrimonial matters and matters regarding parental responsibility within the EU. This especially refers to Regulation No 2201/2003 of November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility (Brussels IIbis Regulation). **Chapter one** will give an explanation of the scope of application of the Brussels IIbis Regulation. It will refer particularly to the material scope of the Regulation but it will also address the specifics of the territorial and temporal scope of its application. **Chapter two** will give an explanation of the relationship between the Brussels IIbis Regulation and the most relevant international agreements of the Hague Conference of Private International Law in this field, the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention. **Chapter three** will specially address the jurisdictional rules in the Brussels IIbis Regulation. This chapter will analyze the jurisdictional rules regarding matrimonial matters and its jurisdictional rules with specific reference to the problems that arise in the implementation of these rules. This chapter will also provide a detailed structure of the parental responsibility jurisdictional rules with specific reference to the rules regarding prorogation of the jurisdiction and the transfer of jurisdiction. In **chapter four**, this thesis will analyze the common provisions particularly *lis pendens* rules contained in Article 19 and rules regarding provisional and protective measures contained in Article 20. The main chapter in this part is
chapter five, and it is divided into three sub-chapters. The first sub-chapter illustrates the general systems of exequatur in the European Union. The second sub-chapter refers to the procedures for recognition and enforcement in the Brussels IIbis Regulation. This sub-chapter firstly analyzes the procedures and conditions regarding matrimonial matters and parental responsibility issues. A considerable portion of this second sub-chapter of chapter five is dedicated to the abolition of the exequatur procedure regarding access rights and child abduction cases. The third sub-chapter gives a detailed explanation of the jurisprudence of the European Court of Human Rights (ECtHR) regarding child abduction cases with specific reference to the relation between the protection of human rights and the procedures in the Brussels IIbis Regulation.

The third part of this thesis details the procedures for recognition and enforcement of Republic of Slovenia. It is consisted of three chapters where in the first chapter the historical development of the procedure for the recognition and enforcement in Slovenia is given. Also this chapter provides an overview of the legal sources that are relevant regarding recognition and enforcement in Slovenia The second chapter analyzes the procedure for recognition and enforcement in Slovenia. This chapter also explains the conditions for the recognition and enforcement in Slovenia and gives a comparative overview of similar conditions in the most relevant regional and European national PIL acts and will give an overview of the procedure for the recognition and enforcement of judicial decisions coming from third countries in Slovenia. The third chapter explains the procedure for the recognition and enforcement of judicial decisions coming from EU Member States. Lastly this thesis contains the concluding remarks.

2. The aim of the doctoral thesis

The primary objective of this thesis is to address to the problem of exequatur and to contribute to an efficient, prompt and balanced recognition and enforcement procedure of foreign judgments regarding family matters with full respect of fundamental human rights and the fundamental principles of civil procedure.

This thesis addresses the academic community as well the practitioners by giving a detailed structure and analysis of the procedure for the recognition and enforcement of foreign judgments in family matters. This will not only help in the understanding of such a complex part of private international law, but also it will provide legal certainty by giving guidelines to the proper application of the relevant legal sources and with that it will enable the protection
of fundamental human rights and the maintenance of the fundamental principles of civil procedures.

3. Hypothesis of the doctoral thesis

Recognition and enforcement represents one aspect of private international law whose goal is to avoid re-litigation and provide for harmonized decisions in which the parties’ rights are protected. That places the countries involved between two separate necessities: on one side, they have to protect their sovereignty and the integrity of their legal system, and on the other they have to satisfy the party’s needs by sparing them of starting a new action in front of a court of a foreign country on an issue and between the same parties which was already decided by a court of another country. In essence this relates to the balance between ‘trust’ in the procedural and substantive law standards of foreign legal systems and the extent of the ‘control’ of the state of enforcement that it imposes on the foreign decision and through that on the foreign legal order.

With the development of the EU, the Member States have transferred part of their sovereignty from the national level to the EU level. This is particularly important in the field of private international law where, in the Amsterdam treaty, parts of private international law are established in the first pillar. As a result of that, the EU has direct competences over recognition and enforcement of foreign judicial decisions coming from the EU Member States in particular legal fields. This directly influences the ‘trust’ between the countries where in the EU this principle is raised to a new level of ‘mutual trust’ and in the field of recognition and enforcement is manifested through the principle of ‘mutual recognition.’ This aspect in turn influences the ‘control’ of foreign judicial decisions in the EU where fewer and fewer standards are required and the tendency is to fully abolish exequatur.

During this process of ‘abolition’ of the exequatur in the EU, another social phenomenon becomes present. It is a social construction that influences people’s lives and development and, with that, directly influences the family: globalization. Historically it will be shown that the family is undergoing a perpetual change of its structure, functions and the relationships within it. This thesis will firstly analyze the transformation of the family and especially the position of the child during the course of and after the divorce. As marriages can be concluded, so also they can be dissolved. Today more than ever in Europe it is accepted that divorce represents the civilizational acquirement of ending dysfunctional marriages. However, this does not mean that the relationships in the families come to an end. They undergo a certain transformation which affects all members but most significantly affects the children. In this
light it will be shown that if the relations have deteriorated so tremendously between the parents and they have the right to end the relationship, the parents have to create a certain environment where a ‘normal’ relationship between both parents and children continue after the dissolution of the marriage. Such a result is guaranteed in most of the Conventions and other legal sources that relate to human rights.

The situation in cross-border cases goes even further. Presently, marriages between people from different countries are very frequent. Because of the fact that they are frequent it is required for the legal systems to adapt to these two ongoing process: the transformation of the family and the frequency of cross-border marriages. These two processes influence many legal fields. One of the legal fields which is directly influenced by these societal processes is private international law. An additional aspect that influences private international law is the European Union. Therefore, this thesis will analyze two aspects of private international law: firstly within the EU context and secondly within the national context of Slovenia. The purpose of the analysis is to answer the question whether the recognition and enforcement in the EU and in Slovenia respond to the position of the child in cross-border divorces so that he or she might have a meaningful relationship with both parents and be able to express his or her own feelings and views.

Regarding the recognition and enforcement of foreign judicial decisions in family matters within the EU context, this thesis will grapple with the issue of abolition of exequatur as provided in the Brussels IIbis Regulation. The first fields in which exequatur was fully abolished in the EU were child abduction cases and cases regarding access rights. These particular cases are very important not because they are frequent but because of the way they resonate with society. Often these cases are largely covered by the media with negative undertones and represent a genuine threat to the child abduction regime in the EU and therefore to the ‘mutual trust’ between EU legal orders. This thesis will propose that the main problems of the child abduction regime in the EU is not just the solutions in the Brussels IIbis Regulation, which are in fact rigid, but rather the ‘distrust’ of the main authorities that implement these rules. The EU child abduction system is positioned so the final arbitrator regarding these cases is the court where the child resided habitually before abduction was made. The country of enforcement has a limited, almost non-existent ability to refuse enforcement of the final court’s decision for the return of the children. In such a situation, the judicial authorities are circumventing the Brussels IIbis Regulation in order to protect the person possessing their nationality. This is done not only by the country of enforcement but also by the country of origin. In all of these cases the relevant authorities and the parties forget one important aspect:
The trauma which the child undergoes. Therefore, as a solution it is important that ‘mutual trust’ in the field of child abduction cases in the EU and in all other fields becomes ‘actual trust’ where the basic principles of the 1980 Hague Child Abduction Convention are protected. The determination of the theoretical solution for this problem is much clearer than determining the practical solution. In essence the idea behind the Brussels IIbis regime is that there could be no advantage gained from one parent by unilateral selection of the forum and that the proper forum for settlement of the custody issues is the place where the child resided habitually at the time of the abduction. Most important of all, the Brussels IIbis regime aimed to have the court decide it should not base its decision on the fact that one of the parents has the country’s nationality but rather on the best interest of the child. This principle of the ‘best interest of the child’ means that the transition in their lives is made easier for them by the fact that both parents will remain interested and responsible for them. This will mean that children can remain in contact with both of their parents and that they can express their feelings and views. Only if those principles are protected and implemented by all of the relevant authorities, then this abolition of the exequatur regarding child abduction cases and access rights can be said to be a complete success. However, the guidelines for resolution of these problems often cannot be separated from the political problems between the Member States and the substantive and procedural standards in the legal orders. On one hand, the EU’s legal sources lack the strength to lower the ‘control’ between the legal orders and to impose ‘trust’. This creates tension between the legal systems of the Member States and causes disobedience in the implementation of the Brussels IIbis Regulation. The proper way for building ‘actual trust’ must start from the authorities which are implementing these rules. All of them (in the country of enforcement and in the country of origin) must look beyond their national interests and work towards the one interest that is universal: the ‘child’s best interest’.

In response to this growing importance of trust, the number of bilateral and multilateral treaties in the field of family law has grown quickly. However, international agreements in this area have not become easier to implement. Both national law and international conventions have become more and more differentiated. This differentiation gives a tremendous task to the persons who are implementing the rules. They are required to be knowledgeable about the EU law, international conventions and their jurisprudence, but also to be able to cooperate between different institutions that are involved in family law disputes. Regarding matrimonial relations, this task is easier. Contemporary problems which are arising in the area of family relations are the new forms of marriages and other types of non-martial bonds. However, the most crucial problems arise regarding decisions which concern children. This thesis will address recognition
and enforcement in Slovenia, with a comparative analysis of other national PIL acts. The goal of the analysis is to see if the national procedure in Slovenia is sufficient to protect children’s rights and whether the national legal system is coordinated with the most important international agreements. The fact that Slovenia is member to these agreements prefaces this issue, however the development of this private international law field is so dynamic that it will be required to re-address this problem.

4. Methodology

For the purpose of methodological elaboration of the doctoral thesis and to prove the hypothesis in this thesis, several combined scientific methods are used, including the following:

The thesis uses the axiological method which presents the legal values that should be considered in the recognition and enforcement of foreign judgments. With this method, the ethical relation between the parties and the state will be shown in correlation to this legal phenomenon. This will be especially significant in the determination of the jurisprudence of the CJEU and the ECtHR regarding their legal sources and the judicial practice.

The teleological method shows the interpretation of the legislative provisions in the light of the purpose, values, and legal, social and economic goals these provisions aim to achieve. This is particularly important in the presentation and the summarization of the findings, proposals and the positions of this doctoral thesis.

To show the origin and evolution of the regulatory framework of the recognition and enforcement of foreign judicial decisions, the historical method is applied.

The legal comparative method enables the examination of a wider dimension of the legal instruments in different legal systems.

The method of description will display a variety of definitions and key elements of the terms that relate to the recognition and enforcement of foreign judicial decisions. The research techniques this doctoral thesis contains are:

Case studies within the European legal field, within the legal field in Republic of Slovenia and within other legal systems.

The available literature, all of the professional articles related to recognition and enforcement, and all of the legal sources and the technological advantages of the Internet.
Part I

Chapter I General aspects regarding the family

1.1 Transformation of the family and its models

The Universal *modus vivendi* of societies worldwide is perpetual change. This makes it difficult to capture the current time in order to be able to depict or describe it. Therefore, any categorization becomes highly controversial. The debate is around the question whether we are living in ‘modern’ society\(^1\) which is a product of the interaction of various sociohistorical phenomena such as the industrial revolution, the enlightenment, secularization, urbanization and the technological progress, or are we part of a new social formation; a ‘post-modern’, ‘post-industrial’ or ‘information’\(^2\) society.\(^3\) The implication of such a debate is whether the conditions that provided for the change from ‘traditional’ to ‘modern’ are themselves undergoing a transformation and whether informatics technology creates new transformations towards a new model in society.\(^4\) Nonetheless, whichever theory applies, it is undisputed that the family suffers a direct implication of these tendencies in society, and in the end the family itself is undergoing a transformation.

The family as a social construct is defined as a historical variable (in terms of its content, structure, and form) which holds some constants: its biological function, bio-social function, social function and economical function.\(^5\) From a historical perspective, the transformation of the family regarding its structure, content and form in the past was predetermined by the religious constellations that were dominant in the society in that time.

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1 Modernization, in sociology means transformation from a traditional, rural, agrarian society to a secular, urban, industrial society. Modern society is industrial society. To modernize a society is, first of all, to industrialize it. Historically, the rise of modern society has been inextricably linked with the emergence of industrial society. All the features that are associated with modernity can be shown to be related to the set of changes that, no more than two centuries ago, brought into being the industrial type of society. This suggests that the terms industrialism and industrial society imply far more than the economic and technological components that make up their core. Industrialism is a way of life that encompasses profound economic, social, political, and cultural changes. It is by undergoing the comprehensive transformation of industrialization that societies become modern, *Encyclopedia Britannica*, on-line version, <http://www.britannica.com/topic/modernization> accessed 15 March 2016. See also, Бест С., Келнер Д., *Постмодерната теорија*, Култура, Скопје 1996, 337
These religious aspects were predetermining the concept of Christian, Jewish, Islamic, Hindu and other family formations.\(^6\) Christian doctrine itself is based on the Bible as the first and principal source of law.\(^7\) In its time it represented a genuine revolution in comparison with other ancient ideas for marriage and the family present in the Roman and Jewish tradition.\(^8\) For example, in the time when Christianity was in its beginning stages, Roman law was lacking any obligatory civil or religious formalities for the conclusion of marriage.\(^9\) These revolutionary aspects were manifested in the ideas of the impossibility of dissolution of the marriage;\(^10\) the position that celibacy before marriage is one of the highest moral ideals of all Christians and that the sexual activities out of sin represent moral and spiritual degradation, the celibacy of the priests and their refrain from marriage; the duty of fidelity of not only the woman but also of the man in the marriage, marital obstacles and other aspects. Such ideas brought a revolution to the concept of marriage, the family and in the sexual relationships of that time.\(^11\) This canon of rules on marriage and divorce was collected and made uniform by the beginning of the XII century by Pope Gregory VII (1073-1084).\(^12\) With the acceptance of the Christianity among all of the tribes that lived in Europe and later the export of this concept to the ‘New World’, the ideas and the principles of Christianity became leading role model upon which the family law aspects were built.\(^13\)

### 1.1.1 The traditional family model

The traditional family model was built upon the ideas of Christianity. This model was based on canon law in both Catholic and Orthodox churches and was generally very similar between the two branches of Christianity.\(^14\) In such a family structured according to religious principles, the identity of every person in the family was determined by his or her position in society and the roles in the family and in society were strictly defined. In the family as in

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\(^7\) *ibid* 3.

\(^8\) Мицковиќ, Д., (n 3) 11.


\(^10\) In the Roman church, Matthew’s addition to the strict prohibition of divorce by Jesus – ‘except for fornication’ (Matt.5:32, 19:9) – has been interpreted since antiquity to mean that adultery by spouse does not entitle dissolution of the marital bond and subsequent remarriage, but rather personal separation of the spouses, Neuhaus P.H. and Falk Z.W. and Anderson N, (n 6) 20-21.

\(^11\) Мицковиќ, Д. (n 3) 11.

\(^12\) Antokolskaia V. M. (n 9) 53-54.

\(^13\) Мицковиќ, Д. (n 3) 11.

\(^14\) Antokolskaia V. M. (n 9) 52.
society, the desires and the needs of the individuals were arranged according to the interests of the groups to which they belonged. Thus in such a system the family was lacking privacy from the outside world (everyday life was closely connected with the market, the square, the church, the field) but also inside in the family’s ‘private’ space (it was usual that the whole family was sleeping in one or two rooms, on one bed). The passiveness, hierarchy, stability and the staticity of the relationships were some of the characteristics of the traditional concept of family. The mere concept of a traditional family is considerably different from the present understanding. It consisted of all of the people that lived in one household under the protection of the head of the family, including servants, season workers and others. In latter XIX century the definition of the family moved towards the present understanding where cohabitation and the consanguine aspect were considered as basic elements of the family.

Such a position of the traditional family model provided that the purpose of marriage would be primarily satisfaction and achievement of certain economic stability and gain, rather than the personal happiness of the spouses. The goal of both families which were uniting in marital unity was to fulfill their personal interests and needs, instead of satisfying the need for love of the spouses. Accordingly the head of the family took the responsibility for the conclusion of the marriage. This aspect was not so rigorous in the lower classes of society. The economic gain expected from their marriage was not attainable as it was among higher classes (due to lack of property) so their marriages generally had more personal sides than the higher classes. The traditional family model caused families to be strictly closed within their own social classes, lacking interaction with the other social classes. Even among persons from the same class they rarely mixed with persons of different sub-groups. For example, in France, the persons that produced wine were concluding marriages among themselves, as was the case with the bourgeoisie.

In the traditional family model there was strict hierarchy in the family structure itself. The husband had dominance over the wife. However, this characteristic was not absolute. He

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15 Мицковиќ, Д. (п 3) 38-39.
16 As Margaret Mead states ‘The past of one generation represents the future of the next generation’, (as cited in Мицковиќ, Д. (п 3) 27).
18 Мицковиќ, Д. (п 3) 29.
20 Flandrin J.L. (п 17) 83.
21 Мицковиќ, Д. (п 3) 44.
22 Stone L. (п 17) 76.
23 Мицковиќ, Д. (п 3) 50.
had some restrictions. Namely, the decisions that the husband made had to be in accordance with the religious, moral and customary laws and principles. The husband in the family couldn’t force his wife into prostitution, nor could he kill his wife. He had to provide her with food and clothing. He was even restricted in bringing another woman into the household. If the husband behaved against these principles, then it was permitted for the wife to leave the husband.24 In the pre-industrial period, there was a highly emphasized gender division of labor. This division of labor also extended to the other persons in the family.25 The main role of the wife per se in the aristocratic families was to give birth to healthy (male) children while in rural communities it was for the wife to be a laborer in the household and in the field.26

The most remarkable discrepancies that exist between the concept of the traditional family and contemporary concepts of the family was on the position of children, the concept of childhood, and the relations between parents and children. According to vast majority of the authors, in the traditional family there was not any high understanding of the childhood and its individualization in regards to the needs of children and the protection and care of them, concepts that would emerge in the modern family.27 Because of this approach and because of diseases, bad diet, weak or nonexistent health care, and the indifferent attitude of the parents, there was a high mortality rate among children in the seventeenth and eighteenth centuries.28 The mortality rate in England was high as 33% of all children before they reached age of 15,29 while in the other European countries it was even higher.30 On the other hand, the high mortality rate represented an ‘enchanted circle’ - it was the reason why parents had more distant relationships with their children.31 Very often, the children were sent to other households to work as servants.32

The main role in the child’s life was decided by the father. He decided if, how, and when the child would be educated, if he would be sent to work in another household, or where he should live.33 Children were excluded from possessing any property until they had reached maturity, and all of their income belonged to the father.34 Nevertheless, the position of marital

24 Мицковиќ, Д. (n 3) 54.
25 ibid 54.
27 Мицковиќ, Д. (n 3) 63.
28 Stone L.(n 19) 55.
29 ibid.
30 Мицковиќ, Д. (n 3) 66.
31 Stone L.(n 19) 57.
32 Мицковиќ, Д. (n 3) 75.
33 ibid 77.
34 ibid.
children was much better than the position of extra-marital children.\textsuperscript{35} They were excluded from succession, but given a right to have maintenance of property or estates. The reason was to prevent these categories of children from being left to rely on the mercy of the state.\textsuperscript{36}

1.1.2 The modern family model

The concept of the traditional family dominated in all of the European countries until the beginning of the industrialization and the beginning of the process of urbanization.\textsuperscript{37} These factors paved the way for the transformation of the family from the traditional concept to the concept of new nuclear family.\textsuperscript{38} The new economic and social conditions first influenced the so-called middle class to adapt to these conditions and later these conditions were accepted by other social groups. With adaptation to such new social and economic conditions the family itself went through a substantial change in its structure and this change resulted in the creation of new characteristics of the family: a decrease of the functions, closeness in relation to the community, dividing the labor according to gender, intensive care for the children and decrease of the birth rate, and the creation of close emotional ties between the spouses themselves and with the children.\textsuperscript{39} Such a new structure of the family compared to the traditional family model was referred to as modern family model.\textsuperscript{40}

One of the first characteristics of the modern family model was that the position in society was not inherited, but rather it was earned according to one’s contribution and the profit made in the free market. Such a position meant that reproduction was freed from the inheritance from the father and was now dependent on the qualities of the son.\textsuperscript{41} This new model meant that the status of the family was dependent on the economic and political position of the husband in society, while the wife was responsible for the socialization of the children and care of the household. In that context the labor was strictly divided by gender and a clear line was drawn between the public life which was the jurisdiction of the husband and the private life where the wife had the primary position. So the position in society was evaluated according to gender, where the husband was graded according to his work ethic, while the wife was graded

\textsuperscript{35} Antokolskaia V. M. (n 19) 55.
\textsuperscript{36} Мицковић, Д. (n 3) 78.
\textsuperscript{37} ibid 91.
\textsuperscript{38} There is no consensus between authors regarding factors which lead to the change of the family model. For these different understandings see, Мицковић, Д., (n 3) 91-102.
\textsuperscript{39} ibid 97.
\textsuperscript{40} ibid.
as a mother and housewife.\textsuperscript{42} The creation of private life, which didn’t exist in the traditional family model, provided for strengthening of the emotional bonds between the family members.\textsuperscript{43} This bond had influence in other functions of the family: education of children, their socialization, and as a barrier to delinquency and disobedience.\textsuperscript{44}

One of the most significant changes in the concept of the family from the traditional model to the modern model was the reasons for conclusion of marriage. In the traditional model, the reason for conclusion of marriage were generally about achieving some kind of economic, political or status interest for the families. Opposite of this reason, the modern family model finds the reason for conclusion of marriage in love, sympathies and close emotional attachment between the spouses.\textsuperscript{45} Such individualization of the reasons for conclusion of marriage generally corresponded with the basic tendencies in society in that time - that is, the development of the industrialization and urbanization which provided for the emerging of the free market, which was based on individual values.\textsuperscript{46} Nevertheless, these changes did not affect all countries and all classes in society in the same period. The lower classes accepted the changes much earlier than the aristocracy.\textsuperscript{47}

Another important change in the modern family was the relation between parents and their children. The main difference between the traditional model of the family and the modern one is in the fact that the children now have become a central part of the family.\textsuperscript{48} Contrary to the position of the child in the traditional model of family, where for example the education was left to boarding schools or they were sent as servants to other households, in the modern family the education or the general upbringing and socialization was left to the parents.\textsuperscript{49}

\textsuperscript{43} Antokolskaia V. M. (n 9) 58.
\textsuperscript{44} Мицковиќ, Д. (n 3) 97.
\textsuperscript{45} Antokolskaia V. M. (n 9) 53.
\textsuperscript{46} There is generally no consensus whether these reasons develop out of the free will of the persons to choose their partner and their financial independence (Shorter, Goode) or as an reaction to the dehumanization that happens in modern time (Weber), Мицковиќ, Д. (n 3) 102.
\textsuperscript{47} Especially in this context the abdication of King Eduard VIII because of his love towards Wallis Simpson is evident example, Мицковиќ, Д. (n 3) 112.
\textsuperscript{48} Мицковиќ, Д. (n 3) 122.
\textsuperscript{49} Historically significant influence on the more wide understanding of socialization of children has John Locke with his work ‘Some Thoughts Concerning Education’ where he proposed his understanding of children as ‘tabula rasa’ a blank sheet, which were gradually filled in by experience. His influence meant that gradually the traditional aspect of upbringing of children was abandoned and this new understanding that children should be taught at home by their parents or tutor was accepted. In debating whether children are better to be thought in home or sent abroad Locke argues ‘Were it not for this, a young man's bashfulness and ignorance in the world would not so much need an early care. Conversation would cure it in a great measure; or if that will not do it early enough, it is only a stronger reason for a good tutor at home. For, if pains be to be taken to give him a manly air and assurance betimes, it is chiefly as a fence to his virtue, when he goes into the world, under his own conduct. It is preposterous, therefore, to sacrifice his innocency to the attaining of confidence, and some little skill of bustling for himself among others, by his conversation with ill-bred and vicious boys; when the chief use of that sturdiness and
Among other changes towards children in this period was the increased care of the children’s health and hygiene which led to the decrease in mortality among children.\(^{50}\)

1.1.3 Implications of the transformation of the family model from traditional to modern

In the traditional family model, marriage was under the full influence of the Church. According to the Christian belief, marriage was introduced by God Himself at the creation of man and is therefore - unlike the previous Roman law,\(^ {51}\) - an institution for all people regardless of nationality and rank.\(^ {52}\) However, because marriage was introduced by God and the fact that the marital bond was a holy secret and symbolically represents the relationship between Jesus and the Church, the tie of marriage as a consequence is unbreakable.\(^ {53}\) Divorce was generally prohibited although there was no clear line between annulment and dissolution of marriage.\(^ {54}\) Another significant characteristic of the traditional family model was that the Church had dominance over the issues about the conclusion of marriage and other matrimonial relations.\(^ {55}\)

The reign of secular law over the regulation of family issues is, historically, a recent phenomenon. The family law of the whole European continent before the Reformation was mainly uniform canon law.\(^ {56}\) It has accompanied the rise of the modern state and the concentration and consolidation of power in the hands of elected officials and executive branch functionaries in lieu of priests, clerics and ecclesiastical authorities.\(^ {57}\)

During and after the Protestant Reformation, marriage in the protestant countries lost the status of ‘holy secret’ and with that, the dominance of the Church was diminished.\(^ {58}\) Furthermore, the separation between the Church and the State, transferred the marital affairs

\(^{50}\) Мицковиќ, Д. (n 3) 130.
\(^{51}\) In the period when Christianity was rising, Roman law considered marriage as a matter for the family and did not fall under the competences of the State or religious authorities. Also, in Roman Law, in absence of marriage impediments, legal marriage was created by the mutual consent of the spouses, Antokolskaia (n 9) 54.
\(^{52}\) Neuhaus P.H. and Falk Z.W. and Anderson N, (n 6) 12.
\(^{54}\) Antokolskaia V. M. (n 9) 55.
\(^{55}\) Мицковиќ, Д., (n 3) 142.
\(^{56}\) Antokolskaia V. M. (n 9) 53.
\(^{58}\) Rheinstein M., (n 53) 10.
from the Church courts to the state courts.\textsuperscript{59} The representatives of the Natural Law (Puffendorf, Grotius) accepted marriage not as a ‘holy secret’ but found its basis in the contractual theory. Furthermore, Voltaire in his \textit{Philosophical Dictionary} addressed the issue of Marriage and stated ‘marriage is a contract in the law of nations, of which the Roman Catholics have made a sacrament.’\textsuperscript{60}

This conflict reached its peak during the French Revolution, where after the revolution in the 1791 Constitution it was stated that ‘[T]he law considers marriage only as a civil contract.’\textsuperscript{61} With that the State sustained a victory over the Church in the secularization and power over marital affairs. This represented a turning point in family law generally. Many family law institutions were introduced or improved in that period, such as: divorce, limitation on the impediments for conclusion of marriage (mainly regarding relatives within certain degrees) and the position of the child was improved.\textsuperscript{62} The influence of the French revolutionary legislation, despite the contra-revolutionary legislation introduced after the revolution (which again abolished divorce in 1816), was felt in the secularization of marriage in Belgium (1830), Italy (1865), and Germany (1875 and 1900). However, the introduction of divorce was far harder task which is evident because for example, the last country in Europe to introduce divorce was Malta in October 2011. Nevertheless, the understanding of marriage in a contractual manner provided for the countries to introduce divorce as a way for marriage to be terminated on the basis of the will of the spouses (as contracts can be ended on the will of the parties).\textsuperscript{63} But this understanding must be taken together with the second nature of marriage which was that the marriage represents an institution. Such an understanding which was present in the French revolution legislation and later in the Code Civil of Napoleon in 1804 provided for some restrictions for the spouses. The form for conclusion of the marriage, the conditions, the procedure, rights and obligations of spouses, divorce and other issues were under control of the State. The spouses (parties) could not absolutely freely carry out these issues. This meant that the marriage had a dual nature.\textsuperscript{64}

\textsuperscript{59} ibid.
\textsuperscript{61} Article 7 of the 1791 Constitution
\textsuperscript{62} Мишковић, Д. (n 3) 142.
\textsuperscript{63} ibid 145.
\textsuperscript{64} ibid 147.
Out of all of newly introduced characteristics that the transformation of the traditional family model to the modern family brought, the emancipation of the woman was one of the hardest aspects to achieve. The Code Civil didn’t treat the wife on the same level with the husband. Although the position was improved, nevertheless the understanding was that the women moves from the protection of her father to the protection that is provided by her husband. Women were treated as the weaker part of the family. For example, in Article 213 of the 1804 Code Civil the husband owes protection to the wife, while the wife owes obedience to the husband.\textsuperscript{65} Also, the wife was obliged to live with her husband, and to follow him wherever he may think was proper to dwell, while the husband was bound to receive her, and to furnish her with everything necessary for the purposes of life, according to his means and condition.\textsuperscript{66} Moreover, the wife wasn’t able plead in her own name, without the authority of her husband, even if she were a public trader, or non-communicant, or separate in property.\textsuperscript{67} The wife according to the 1804 Code Civil was highly dependent on the husband, and had a secondary role in the family in most of the matrimonial aspects. For example, she could not freely compose a will without the authority of her husband.\textsuperscript{68} This role of the husband which was given according to the Code Civil of 1804, was not only towards the wife but also towards the children. The emancipation of the woman was acquired gradually, because Code Civil had an immense influence on other European codifications. The emancipation of women was an ongoing process which lasted until the middle of the twentieth century.

1.2. The ‘globalization’ and its influence on the family

The present time is largely influenced by the new methods through which we are collecting, processing and distributing information. These new methods are facilitated by the growing importance and capabilities of telecommunication and informatics, which are forming the basis of the economic, financial, trade, cultural, policy-making and communications

\textsuperscript{65}Article 213 du Code civil:
[L]e mari doit protection à sa femme, la femme doit obéissance à son mari.

\textsuperscript{66}Article 214 du Code civil:
[L]a femme est obligée d’habiter avec le mari, et de le suivre par-tout où il juge à propos de le résider: le mari est obligé de la recevoir; et de lui fournir tout ce qui est nécessaire pour les besoins de la vie, selon ses facultés et son état.

\textsuperscript{67}Article 215 du Code civil:
[L]a femme ne peut ester en jugement sans l’autorisation de son marin, quand même elle serait marchande publique, ou non commune, ou séparée de biens.

\textsuperscript{68}Article 226 du Code civil:
[L]a femme peut tester sans l'autorisation de son mari.
integration of the world known as ‘globalization’. In the recent past, globalization was often primarily focused on the economic side of world affairs, such as trade, foreign direct investment and international capital flows. Most recently the term has been expanded to include a broader range of areas and activities such as culture, media, technology, and socio-cultural, political, and even biological factors, with the crucial example of climate change. Globalization influences greatly all social aspects and the family is not an exception. Its influence can be observed in the concept of family itself, which has been changing rapidly in quite a short amount of time and today is undergoing a structural redefinition. This occurrence strongly influences family law, although only recently has this area of law been regarded as traditional, because of its complex interaction of religious, social and cultural characteristics.

Around these new tendencies in society the debate continues about whether we are now still in a modern society, or as many authors state (Drucker, Mills, Smith, Jenks) if we now find ourselves in a new era of cultural and social organization. In such a type of organization, the concept of individualism has a central role to play. The human is now living as an individual and not as a member of a family, profession or State. Humans are not sacrificing their personal interests, desires and needs for others, the family, the state, the nation or the class. In a way, ideals have become narcissistic and as a result the relations between the people are becoming more demanding for individuals and their personal gain, which does not leave space for sacrifice and compromise that are the product when two persons are living together. Such an ideology is becoming a stepping stone and a fundamental reason for the weakening of marital and family relations in post-modern society.

The transformation of the family from traditional to modern took place over centuries. On the other hand because of the information overflow we are experiencing presently, this change in the family structure is occurring much faster now than in any preceding generation. The normative and cultural ideal of the family as a small isolated group, which is based on marriage concluded out of love and not a material interest and in which there is strict division between the roles of the husband and the wife and close emotional relations between all of the family members, was disrupted in the middle of the 1960’s. Before this period, in the middle

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70 Мицковиќ, Д. (п 3)169
71 ibid 173-174.
72 Although some authors state that there is a whole circle in the transformation of family law in the direction of pre-Christian law. For example some of the characteristics of pre-Christian family - informal rules on the formation of marriage, easy divorce, tolerance towards concubinage and acceptance of illegitimate children resembled more the modern family law structures than medieval law, Antokolskaia V. M.(п 9) 56.
73 Мицковиќ, Д.(п 3)169.
of the twentieth century, the nuclear family was in its golden age. As a result of the family disruption and social hardship that took place in the 1930s and 1940s, and due in part to the postwar economic boom, the 1950’s are described as a ‘golden age’ of marriage.\textsuperscript{74} The ideal of the monistic model of family was, in a short period, changed with the introduction of the pluralistic concept of family forms.\textsuperscript{75} Such a pluralistic family configuration was termed the ‘post-modern family’.\textsuperscript{76} According to Shorter, the reasons for this transformation of the family can be found in three important changes in family life: 1. the increasing impact of the role that coevals have in the process of children’s socialization; 2. increasing marital instability; 3. a growing number of female employees.\textsuperscript{77} In the transformation from nuclear family to post-modern family, these three distinct characteristics of the modern family model are increasingly showing themselves. Firstly, the decreasing of the socialization of children inside the family (internal characteristic) is manifested by the children rejection of the views, values and norms which their parents espouse and attempt to transfer to them. For example, the adolescents in the 1960’s and 1970’s were giving much more importance to exterior socialization and the increased role of peers and this is why these generations are known as the rebellious generation. Secondly, the increasing instability of the marriage was caused by many factors among which is the intensification of the sexual life. Lastly, this change was greatly influenced by the financial independence of woman in society and the increased number of female workers.\textsuperscript{78}

This new understanding of the family model is not identical to the one given to the modern family model. The reason for that is that they differ in their natures. The modern family model has a monistic understanding, while the post-modern model consists of different family models (fluid, changeable, unstable and undefined).\textsuperscript{79} With this transformation, the understanding of the modern family as the ideal model for regulating the relationships between the spouses changes. In the contemporary society, marriage has substantially changed. The essence of such change is influenced by the functions that marriage now serves. These functions are today manifested as the increased need for providing emotional support, friendship, company, understanding and comfort.\textsuperscript{80} Such functions are different from previous models where the economic, protective and reproductive functions of the marriage had been

\textsuperscript{75} Мицковић, Д. (н 3) 184.
\textsuperscript{76} This name was given by Edward Shorter in his book ‘The making of the modern family’ published in 1975.
\textsuperscript{77} Мицковић, Д. (н 3) 184.
\textsuperscript{78} ibid.
\textsuperscript{79} ibid 187.
emphasized. With that change, the functions of the marriage for the first time in history primarily became individualistic and for purpose of satisfying the emotional and psychological needs of the spouses. In that way, marriage has become ‘individualized marriage’. ⁸¹ In that context, more forms of marriages and more alternatives to it are acceptable. The aspects that people seek through marriage are changing in such a way that individual aims and individual rewards are primarily important and if the relationship does not provide them with these individualized rewards then this bond is much more easily severed than in the past in ‘companionate marriage’. ⁸²

Another aspect of the decrease of the importance of marriage as an institution is that it fell in close connection with the sexual revolution that happened in the middle of the twentieth century. The sexual revolution had an effect of increased pre-marital sexual activities which changed the attitude, values and morals in western countries. ⁸³ This revolution affected men, but it more significantly affected women, who in the previous period had more submissive role. The separation of male and female spheres and the cult of female purity in the previous period created enormous emotional and sexual tensions between men and women. ⁸⁴ However, the acceptance of the woman as an equal partner brought an end to the dualistic sexual morality system, where it was socially accepted that men could engage in pre-marital and extra-marital relationships while all this was forbidden for the woman. ⁸⁵ Again, this emancipation was closely connected with the change in society because of the increased number of female employees and the financial independence that woman had gained during that period.

1.3. Divorce and the position of the child in course of proceedings

The described individualistic model of marriage, which dominates in most western countries today, provided for changes in the behavior of the marital partners, their expectations, as well as to the nature and functions of marriage. These changes disturbed one of the foundations of the modern family model; that is, the stability of marriage. Now instead of stability of the marriage as a foundation of the marriage, the quality of the marriage becomes

⁸² ibid 41.
⁸³ Мишковиќ, Д. (n 3) 228.
⁸⁴ Coonitz S., The Origins of Modern Divorce (n 74) 10.
⁸⁵ ibid 230.
primary. The qualities which elevated marriage in the modern sense above all other personal and familial commitments (concentration of emotions, passion, personal identity and self-validation in the couple relationship, attention, emotional attachments and obligations beyond the conjugal unit) - are the very same qualities that led to the rise of modern divorce. The same development that made good marriages so much more central to people’s happiness than in the past, becomes the reason for increased divorce in modern societies, that is, the nontraditional idea that marriage should be the most powerful commitment in people’s lives.

The 1950’s are often described as ‘golden age’ of marriage. Nevertheless, in that period another particularly important trend was ongoing and that was the acceptance of divorce as a social phenomenon. Another aspect which contributed to the increased rate of divorce were the financial independence that woman were gaining by the increased number of female employees and the liberalization of social values. These factors (raising expectation for happiness and fulfillment in marriage, financial independence of women and more liberal social values) laid the ground for the number of divorces to increase significantly in the 1970s and 1980s. Another aspect that contributed to the increased divorce rate was that there were increased divorce factors, all of which were influencing the destabilization of the marriage. This divorce factors ranged from liberalization of the legislation regarding divorce, the socioeconomic status of the spouses, the nature of marriage (differences in religion, ethnicity, education, socio-economic status and other differences between the spouses), age and other factors.

Regardless of what the reasons and factors are for divorce, one thing is for certain: divorce brings a certain turbulence, discomfort and hardship to children more than any other person in the family. The aspect of childhood, the protection of children, and the treatment of children as vulnerable entities was the product of the development of modern family model as the primary model of family structure. This model centers the family on the socialization of children in an environment which is responsive to their needs, empathetic with their emotions and strongly fulfills their basic desires, requirements and wishes with the goal of developing a healthy individual. Nevertheless, the postmodern society changes this positioning of children.

86 ibid 215.
87 Antokolskaia V. M. (n 9) 58.
88 Coonitz S., The Origins of Modern Divorce (n 74) 9.
89 ibid., pg.13
90 ibid., pg.14
91 Regardign the increased divorce factors more comprehensively see, Teachman D.J., Stability Across Cohorts in Divorce Risk Factors, Demography, Vol.39, No.2, (May 2002), 331-351; Coonitz S. (n 74) 14-15; Cherlin J. A. (n 81) 33-55; Михкович, Д., (n 3) 258-268.
Instead of treating children as vulnerable dependent beings, in the postmodern society children are treated as independent, autonomous beings capable from an early age of taking care of themselves.\textsuperscript{92} Such a position changes the treatment of children as human beings dependent on their parents who have no understanding of their surroundings, to more wise and independent creators of their own destinies with the right to be active participants in their future. The consequence of this change in children’s status is that their parents’ goal is not to protect them from their surroundings and withhold information, but rather to prepare them for what awaits them. This means that they have the right to know the needs of the modern world (sexuality, violence, injustice, suffering, death) and to know how life is really like for their parents, as well as their weaknesses and their strengths.\textsuperscript{93} Education is one of the areas where this new position of the child is best shown. The educational process today is more demanding with more criteria and responsibilities required to fulfill the tasks and duties of school than their preceding educational system. Children are taught from early age on that better involvement in education puts them in a better position to enroll in better schools and with that comes higher chances to reach success. Compared to their predecessors’ childhoods, todays children’s childhoods are much more organized with school and extracurricular activities such as languages, sports, and private lessons. However, such a demanding education has real drawbacks. All of these activities take away children’s free time and decreases their childhood play. In that way parents are organizing every second of their time and this leaves less to spontaneity and development of their personality based on their choosing.\textsuperscript{94}

If the divorce rates continue to follow current trends, one in four children will experience the divorce of their parents before they reach the age of 16.\textsuperscript{95} The two phenomena of frequency of divorce and transition of the family have a negative influence on development of children. Children who are going through a process of separation and divorce tend to have behavioral problems, problems in school, health problems, are more likely to experience friendship difficulties, suffer from low self-esteem, have problems with drugs and alcohol, and show other antisocial behavior.\textsuperscript{96} A comprehensive study conducted by Dowling and Gorell-Barnes on children who are undergoing or underwent a process of separation or divorce has shown that:

\textsuperscript{92} Мицковић, Д. (п 3) 269.
\textsuperscript{93} ibid 269.
\textsuperscript{94} ibid 271.
\textsuperscript{96} ibid.
• When children maintain good relationships with both parents, the negative effects of divorce are mitigated.\textsuperscript{97}

• Continuing conflict between parents after divorce has a negative effect on children, mainly because it affects the quality of the parent–child relationship.\textsuperscript{98}

Another finding of this study shows that there is an impact on children’s cognitive performance if the separation occurred before entry in school than on the cognitive performance school age children.\textsuperscript{99} If parents, who usually remain willing to be helpful towards their children in this period to help them overcome it, find the strength not to transfer to their children the conflict between them and their spouse, then the loss is mitigated much easily than if the opposite occurs. This fact gives good reason for the examining the balance the (ex) spouses and children and helping parents attend to their children’s needs. Also is necessary that parents accept and tolerate the sense of loss of the complete family felt by the children, even if they are certain it was the right decision for their family. Only if the children are allowed to mourn the family as it was can they begin to come to terms with the new situation and begin to adapt to it.\textsuperscript{100}

What is particular in these cases is that this process of divorce can be seen from the children’s perspective from two aspects. First, the divorce of the parents can be experienced by the children as a transition that, on the one hand, brings relief from the ongoing quarreling and high level of tension. On the other hand, it is seen as a tremendous loss, particularly of the parent who leaves the family home. In addition there are many disruptions to the children’s daily life, which result from reorganization of the family during and after separation.\textsuperscript{101} In such a case children which wish to remain in a positive relationship with both parents are caught in loyalty binds and find themselves under pressure to reevaluate in their minds of the most basic relations with their loved ones: Can I continue to love both parents? Will I hurt one parent if I have a good time with the other? How much I can tell the other parent?\textsuperscript{102} Further, there is great impact on their emotional state from the disruption of their contact with the parent who left the


\textsuperscript{98} Dowling E., Gorell-Barnes G. (n 95) 41.

\textsuperscript{99} Ibid 40.

\textsuperscript{100} Ibid 41.

\textsuperscript{101} Ibid 43.

\textsuperscript{102} Ibid 45.
family home. This part-time seeing of the other parent creates a confusion for their adaptation, where these changes have created a concrete impact on their daily lives. The study has shown that most of the children find sharing of two homes to be stressful except for those children for whom arrangements were made so they could call and see their non-resident parent whenever they wished.\textsuperscript{103} Schools play important role in this context. This institution provides continuity at a time of change. Teachers can be particularly helpful in diminishing the stress and normalizing the situation, but only if parents provide them with relevant information, especially context with situations from the children’s daily lives. Their role is important also in diminishing the stress which children have due to fear that the other parent might ‘abandon’ them too, or when more mature children have problems at school because of the fear of abandonment.\textsuperscript{104} Lastly, perhaps the most disturbing characteristic of the child’s emotional state is when they are positioned to be intermediaries. Such a position creates a burden on children to negotiate with one parent on behalf of the other or to be the recipient of negative feelings towards the other parent. It is very important for parents to have direct communication in order to avoid placing their children in such a position.\textsuperscript{105}

This study has highlighted three important needs which children have during a period of divorce or separation. Firstly, there is the need of a coherent story. It is crucial for children to be helped to find an explanation for what has happened and for them to understand that their parents, although no longer able to live together, will remain interested and responsible for them. Having an explanation will help children move on from the idea that they were responsible for the breakup or that if they try hard enough they might bring the parents back together.\textsuperscript{106} Secondly, children have to maintain contact with both parents. In this context, the parents must be clear with the children that such situation does not represent the end of the parent-child relationship, but it may be a new beginning. The children need to understand when and how they will see the other parent and must be free of guilt if they have good time with the other parent. The child must understand that the husband-wife relationship may have ended but the parent-child relationship has not. Thirdly, children must express their feelings and views. This is particularly important in the context of overcoming and accepting the new situation and their feelings of anger, disappointment and sadness. Doing so will enable them to gain considerable relief and to move on.\textsuperscript{107}

\textsuperscript{103} ibid 46.  
\textsuperscript{104} ibid.  
\textsuperscript{105} ibid 47.  
\textsuperscript{106} ibid 48.  
\textsuperscript{107} ibid.
Chapter II General remarks regarding the recognition and enforcement

2.1 Definition and nature of recognition and enforcement

The explanation of the legal mechanism for the implementation of judicial decisions emanating from one legal system which aim to produce an effect in another must start from the basic explanation of the general terms ‘recognition’, ‘enforcement’, ‘enforceability’, ‘enforcement title (titre exécutoire)’, ‘finality’ and ‘foreign judgment’.

2.1.1. Recognition and/or enforcement of foreign judgments

Recognition and enforcement are not synonyms. Although they are very often closely connected, every foreign decision that is recognized is not necessarily suitable for later enforcement. So, first, a distinction must be drawn between recognition of a foreign judgment and its enforcement.

2.1.1.1 Recognition of foreign judgments

Recognition as a term can have different meanings. As a general term it can be defined as ‘act of accepting that something is true or important or that it exists’; ‘the act of accepting someone or something as having legal or official authority’ or ‘the act of knowing who or what someone or something is because of previous knowledge or experience’. In legal terms recognition is determined as ‘acknowledgment of the existence, validity or legality of something’. However a distinction between acknowledgment and recognition must be made. Acknowledgment generally applies to the external admission of a fact, whereas recognition refers to the internal aspects. Meriam-Webster dictionary defines acknowledgment as ‘a persons expressed recognition to something, or a declaration or an avowal of one’s act or of a fact to give it legal validity’ while recognition belongs to the receiving end, it means ‘accepting or recognizing something’.

In the context of recognition and enforcement of foreign judgments, one group of authors determine recognition as ‘accepting the determination of the rights and the obligations

made by the court of origin’. They highlight the external effect of the recognition, which are the legal processes that were conducted in the country of origin. Doctrinally, they incline towards the understanding which emphasizes the private law aspects of the recognition, found mainly in the doctrine of obligation. For some of them the recognition refers to the res judicata effect of the foreign judgment which spreads out into the country of reception. Other groups of authors concentrate on the internal effect that recognition produces in the country where the recognition is sought that is the balancing of foreign and domestic judicial decisions. In their view, recognition means equalization of the foreign judicial decision in its effect with the domestic ones or accepting its finality. These authors mainly focus on the prerogatives that the country of recognition possess.

Nevertheless, to achieve complete understanding of the recognition of foreign judicial decisions one must not undermine two factors: the public law and private law aspects of the recognition. Indeed, the recognition of a foreign judicial decision is initiated and concerns rights of particular persons that need to have an effect in another country. Such a decision cannot have proprio vigore effect in another country. Some of the conditions for the recognition (right of a defense) are positioned so the country of recognition can determine whether the right of that particular individual was protected in the original process that lead to the rendering of that decision. However, it is without doubt that the recognition does solely not represent protection of an individual’s rights. The conditions for recognition (such as public policy and reciprocity), go beyond the protection of the individual’s rights and are focused on the protection of the public law interests of the country of recognition. Even if the individual’s rights were protected in the country of origin, the court of recognition would still not allow for that decision to produce effects if for example the effects of that decision would be contrary to its public policy or if reciprocity does not exist between these countries. Having these principles in mind, recognition contains both aspects: its goal is to accept the determined rights and

113 Text to n 255 Part I ch II sec 2.2.1.
115 Mainly belonging or emerging from the Yugoslavian legal doctrine.
obligations made by the court of origin and the res judicata effect which the foreign decision possess and with that on the basis of the principle ne bis in idem to spare the individuals from having to reinstitute the proceedings, but also it prioritizes the protection (provided by the conditions for recognition) of its public law interests in the process of the equalization of the foreign judicial decisions in its effects with the domestic ones.

Regarding the nature of the decision on recognition, there is a clear standpoint among the scholars that the decision is of a declaratory nature. Nevertheless, there are some authors who state that this unambiguous position can be questioned and give a constitutive nature to the decision on recognition. For these authors, in situations when recognition is sought as a main question, the decision is of a constitutive nature because the binding force of the foreign decision is the permission by the court of recognition to allow the foreign decision to produce the effect in that country and therefore gives a constitutive character to the foreign decision. For them this is more accurate position of the nature of the decision on the recognition, because the declaratory nature of a decision provides for this decision to ‘exist’ and the goal of the declaratory decisions is to recognize the preexisting legal situation. In their view, the argument for a constitutive nature was also proven by article 86(1) of the PIL act of 1982 where it was stated that the foreign decision produces an effect only if it is recognized by a Court of SFRY. For the Courts of SFry, the legal effect of the foreign judgments prior to the recognition was not important, only after recognition was granted then the legal effects the judgment could be considered. On the other hand, for these authors it clear that the decision on recognition in the situations when it appears as a preliminary question cannot be constitutive decisions, nevertheless they appear to point to the constitutive effects to the declaratory decision.

It is too far reaching to state that the foreign decision is non-existing and that the decision on recognition is of a constitutive character. The existence of the foreign judicial decision is provided by the court which rendered that decision. When a judgment is rendered this constitutes its existence. What is needed for this judgment to produce an effect in another country is that is accepted or recognized and with that to recognize the preexisting legal situation. The treatment of the foreign decision during the course of the procedure for the recognition is that the foreign decision is an existing one and that only certain procedural

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119 Grbin, Triva, Belajec, Dika, Wedam Lukić, Vuković (as cited by Dika M. and Knežević G. and Stojanović S., (n 116) 277); Varadi and others., (n 117), 565;
120 Dika M. and Knežević G. and Stojanović S., (n 116) 277-278.
121 ibid.
defects are inspected (some minor substantive issues are inspected in light of the public policy exception). Most of the systems for the recognition of foreign decisions treat the foreign decision as a decision. Only the *prima facie evidens* system treats the foreign decision as a fact that needs to be proved and only in that context the decision for the recognition can have a constitutive effect. In all of the other systems the treatment of the foreign decision is that it is pre-existing and only some procedural deficiencies are tested. So if the foreign decision fulfils these requirements this decision is recognized and can have the same effects as the domestic decisions. In conclusion for this thesis the decisions on the recognition of the foreign decision will be considered to be of a declaratory nature.

**2.1.1.2 Enforcement of foreign judgments**

Enforcement as a legal term can be understood in several ways. For example, it can be understood as a generic term that embraces all kinds and levels of legal implementation. The term ‘enforcement of decisions in domestic legal order’ means a process by which a final judgment of a court is carried into effect, or it is a process by which the sentence of the law is put into force. The term ‘enforcement’ can have multiple meanings and it is necessary to draw the distinction between ‘domestic enforcement’ and ‘enforcement of foreign judgments’. Nevertheless, some overlapping is unavoidable. While ‘recognition and enforcement of foreign judgments’ examines the ideal insertion of foreign judgments into domestic legal orders and restrains or does not refer to the further implementation of such foreign judgments, the enforcement in the understanding from the domestic legal order, (which is conducted according to the *lex fori* of the country of enforcement) deals mainly with the material or technical execution of foreign judgments. In the words of the French Supreme Court enforcement represents ‘an act of material execution on the assets or of committal of persons’.

Enforcement depends on the nature of the decisions. For some decisions, depending on their nature, it is enough that they are recognized in the country of recognition so they can have the effect that the judgment creditor desires. On the other hand, many decisions need to be enforced in the country of enforcement to bring some satisfaction to the judgment creditor.

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122 Kerameus D.K., (n 114), 215.
123 ibid 216.
124 ibid 331.
125 ibid 335.
126 For more on the nature of judgments see text to n 142 Part I ch II sec 2.1.2.1.
127 Kiestra R.L.(n 118) 200.
creditor. So in that context, ‘enforcement’ can be understood as ensuring that the judgment-debtor obeys the order of the court of origin.

Some of the authors that belonged to or have emerged from the Yugoslavian legal doctrine, enforcement is defined as acceptance or recognition of the *titre exécutoire* (enforcement title) or the enforceability of the foreign judicial decision. Others such as Triva/Belajec/Dika have stated that the enforcement of foreign judicial decisions was determined and conducted on the basis of the foreign decision and that the court in the enforcement proceedings does not render any special decision on recognition or decision recognizing its enforceability, but directly determines the enforcement on the same basis as domestic decisions.

Therefore, all of these legal institutes must be understood in accordance with the functions that they perform. Firstly, it is without doubt that in all of the legal systems in which the enforcement agents of the country of enforcement cannot directly be confronted with foreign judgments (these judgments cannot have *proprio vigore* effect), the court must firstly declare that the judgments are enforceable in the respective state. That is why the foreign decision must undergo the process of ‘recognition and enforcement’ to produce the desired effect in the country of recognition/enforcement. Recognition of the foreign judicial decision can be done as a main question or as a preliminary (prejudicial) question. Usually to produce the full effect of the recognition and enforcement of the foreign decisions in general, it will be raised as a main question. The next steps would depend on the nature of the foreign judgment. If the foreign decisions are of a declaratory or constitutive nature they are not undergoing the process of enforcement. However, the recognition of a foreign condemnatory decision is usually sought to be enforced later. Therefore recognition of foreign judgments

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128 ibid.
129 Hartley T., (n 112) 279.
130 Varadi and others, (n 117) 538; Čaruš T., (n 114) 293.
131 Dika M. and Knežević G. and Stojanović S. (n 116) 278; Jakšić A. (n 116) 209.
132 With such decision the recognition of the foreign judicial decision would be addressed in preliminary manner. Triva S and Belajec V. and Dika M., Građansko parnično procesno pravo, Zagreb, Narodne Novine, (1986) 86 (as cited by Dika M. and Knežević G. and Stojanović S., (n 116) 278).
134 With effect only to this proceeding. See Article 101(5) of the PIL act of 1982; Article 112(3) Macedonian PIL Act; Article 108(6) of the Slovenian PILP Act; Article 155 of the Montenegrin PIL Act and Article 184(2) of the Serbian draft PIL act.
135 Although some constitutive decisions would need to be registered in some civil status registry to produce legal effects, Živković M. and Stanivuković M., *Međunarodno privatno pravo (opšti deo)*, Beograd, Službeni glasnik, (2006) 388. See also, Kiestra R.L., (n 118) 200.
136 However, sometimes only recognition of condemnatory decision may be sought, for example to have effect prejudicially, with its substantive validity, Dika M. and Knežević G. and Stojanović S. (n 116) 278. See also, Kiestra R.L., (n 118) 200.
can mean two things: recognition of foreign judicial decision which would not contain recognition of its enforceability, that is, where the recognition is not reported in function of the later enforcement; or recognition of (condemnatory) foreign judgments which would contain recognition of their enforceability with emphasis on the recognition of the enforceability. In both situations the effect of the recognition is the same and the decision on the recognition has an erga omnes effect.

On the other hand, the recognition of the foreign judgment as a preliminary (prejudicial) question can occur in all types of procedures (contentious, non-contentious or enforcement), but more frequently it will be conducted in enforcement procedures regarding an application for enforcement where the foreign judgment (which didn’t undergo the procedure for recognition) represents the enforcement title (titre exécutoire). In such situations what is different from the recognition as a main question is that when for the recognition of a foreign decision is decided as a main question then the decision is legally binding for all other authorities. In the situations when the recognition is decided as an incidental question, then this decision has effect only for that particular proceeding and the parties can subsequently apply for recognition as a main question.

2.1.2. Types of decisions suitable for recognition and enforcement

Different types of decisions according to the EU and national legal sources are recognized and enforced between Member States and between member states and other countries. For some of these decisions, it is undisputed that they will be recognized and/or enforced in most of the legal systems. Others are debated on whether they are suitable for recognition and enforcement. Their future generally depends on the legal system of the country of recognition (or enforcement) recognizing the desired effect of the decision that it has in the country of origin and then enforcing it in the recognition country. This part of the thesis will firstly analyze the decisions that are undisputedly suitable for recognition and enforcement, and secondly, it will examine decisions that are disputed about whether they are suitable for recognition and enforcement.

137 Dika M. and Knežević G. and Stojanović S. (n 116) 278.
138 Varadi and others, (n 117) 565.
139 ibid 566.
140 ibid 565.
141 Varadi and others, (n 117) 565; Dika M. and Knežević G. and Stojanović S., (n 116) 341.
2.1.2.1 Foreign decisions which are suitable for recognition and enforcement

First of all, as was stated before, depending on the nature of the foreign decisions, for some judgments it will be enough that they are recognized in the country of recognition in order for them to have the effect that the judgment creditor desires. On the other hand, many decisions will need to be enforced in the country of enforcement so they will bring some satisfaction to the judgment creditor, such as monetary judgments, the enforcement of awarded damages, or maintenance obligations. If the foreign decisions are of a declaratory or constitutive nature they do not undergo the process of enforcement. Examples include divorce decrees, contesting paternity and maternity, attribution, exercise, termination or restriction of parental responsibility, etc. However, if the decision is of a condemnatory nature, to produce the proper effect they need to be enforced in the later stages.

Another term which requires particular attention regarding enforcement is the *titre exécutoire* (enforcement title). This term can be defined as an instrument that is capable of enforcement, such as a judgment, or the various types of instruments which permit enforcement by means of taxes, rates or rent. In the EU context an ‘enforceable title’ means any decision, judgment or order for payment issued by a court or other competent authority, including those that are provisionally enforceable, whether for immediate payment or payment by installments, which permits the creditor to have his claim against the debtor collected by means of forced execution.

The types of decisions which can be enforced in other countries vary depending on several grounds. So, the main question is what kind of decisions can represent enforcement titles which can be enforced in other countries? Firstly, according to the authority which renders

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142 Text to n 135 Part I, ch.II sec. 2.1.1.2 (21-22).
143 Although some constitutive decisions would need to be registered in some civil status registry to produce legal effects, Živković M. and Stanivuković M., (n 135)388; Kiestra R.L., (n 118) 200.
144 Živković M. and Stanivuković M. (n 135) 392; Kiestra R.L., (n 118) 200.
145 However, sometimes only recognition of condemnatory decision may be sought, for example to have effect prejudicially, with its substantive validity, Dika M. and Knežević G. and Stojanović S., (n 116) 278; Kiestra R.L., (n 118) 200.
146 Kennett A.W., *Enforcement of Judgments in Europe*, Oxford University Press, (2000), 63. However, what does represent ‘enforcement title’ depends on the legal system, for example in Slovenia in the Enforcement and Securing of Civil Claims Act (Zakon o izvršbi in zavarovanju, ZIZ, last amendment Uradni list RS, št. 54/15; the available at <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO7089> accessed 12 April 2015) in Article 17 as enforcement titles are given enforceable judicial decision or settlement made in court, enforceable notarial deed and other enforceable instruments. See also Macedonian Enforcement Act (last amendment 2013, Off. Gazz. of RM., No.187/13) contains more detailed enumeration of enforcement titles (in this context see also Article 13 of the Slovenian Enforcement and Securing of Civil Claims Act).
these decisions, they can be categorized as judicial decisions (orders and judgments), settlements made in court, arbitral awards, and authentic instruments. According to the finality of the decision, they can be categorized as final judgments and provisional or protective measures.

2.1.2.1 Judicial decisions and settlements made in court

Decisions rendered in contentious judicial proceedings that are final and based on the merit can be delivered as judgments and orders. **Judgments** represent a type of judicial decision by which the court decides on the grounds of the claim.\(^\text{148}\) They can be defined as court acts, by which at the end of the proceedings the court adjudicates on the main issue, which is subject to the proceedings.\(^\text{149}\) The **order** represents a type of decision which the court renders in a contentious procedure when it does not decide with a judgment\(^\text{150}\) or for all issues which are not envisaged to be decidable by judgment.\(^\text{151}\) In the non-contentious procedure, the court decides only with orders.\(^\text{152}\)

In terms of recognition and enforcement, the term ‘**foreign judgments**’ must be understood in a broader sense, covering a range of judicial decisions that may be categorized separately in various legal orders.\(^\text{153}\) Also, this broader understanding of the term ‘judgment’ is provided in the Brussels Regulations.\(^\text{154}\) In this context, what is particularly important is the question for the applicable law for the categorization of the decision as a judicial decision. The dilemma is whether this question should be resolved according to the country of enforcement or the country of origin of the decision. In legal theory\(^\text{155}\) and in many of private international law acts,\(^\text{156}\) the categorization of the foreign decisions as foreign judgments is conducted...

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\(^{148}\) Јаневски А., Зороска Камиловска Т., Граѓанско процесно право – Парнично право, Скопје, (2009), 418

\(^{149}\) ibid.

\(^{150}\) ibid 439.


\(^{152}\) Јаневски А., Зороска Камиловска Т., Граѓанско процесно право – Вонпарнично право, Скопје, (2010), 59.

\(^{153}\) Kennett A.W, op.cit., pg.64;

\(^{154}\) Article 2(a) of the Brussels Ibis Regulation

\[^{155}\] Judgment means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court’.

\[^{156}\] Article 2(4) of the Brussels Ibis Regulation

\[^{156}\] The term 'judgment' shall mean a divorce, legal separation or marriage annulment, as well as a judgment relating to parental responsibility, pronounced by a court of a Member State, whatever the judgment may be called, including a decree, order or decision’.

\[^{155}\] Dika M. and Knežević G. and Stojanović S., (n 116) 282; Varadi and others, (n 117) 543; Živković M. and Stanivuković M., (n 135) 391; Jakšić A., (n 116) 209.

\[^{156}\] See article 94 of the Slovenian PILP act, article 99 of the Macedonian PIL act, Article 182 of the Serbian draft of the PIL act. The Belgian PIL act contains definition of the term judgment which means ‘…any decision rendered by an authority exercising judicial power’ (Article 22(3)). In other legal sources (Bulgarian, Swiss) the
according to the country of origin of the decision. The country of origin is usually understood as the country where the judgment has been issued, the judgment has been given, the court settlement has been approved or concluded, or the authentic instrument has been formally drawn up or registered. Usually this place will correspond with the territory where the judgment has been rendered, however some exceptions exist.

A settlement of a dispute between the parties can also constitute an enforceable title in all of the jurisdiction of the Member states of the EU and in other candidate countries of the EU if the settlements are at least registered with the court or witnessed by it. Court settlements are enforceable under the EU Regulations. Under these EU instruments court settlements are defined as:

[A] settlement which has been approved by a court of a Member State or concluded before a court of a Member State in the course of proceedings.

Court settlements are recognized and enforced differently depending on the instrument which is applicable for that specific subject matter. Accordingly it is provided that court settlements are recognized and declared enforceable under the same conditions as judgments or as authentic instruments. In the EU, the recognition of court settlements on the basis of the Brussels I Regulation operated automatically; the only permissible objection to recognition was a manifest violation of public policy. This automatic position is reaffirmed in the Brussels Ibis Regulation.

As an example regarding the nature of court settlements, in the context of the Brussels...
Convention, the CJEU gave its opinion in the case C-414/92, Solo Kleinmotoren v. Boch\textsuperscript{169}. In the view of the Court, court settlements cannot be treated as judgments and firstly, they are essentially contractual in that their terms depend first and foremost on the parties' intentions, they bring legal proceedings to an end, and they must be approved and registered by the court.\textsuperscript{170} Court settlements do not enjoy the authority of \textit{res judicata} and as a consequence, consent judgments are not treated equally with court settlements and they are recognized and enforced according to the regular rules for recognition and enforcement.\textsuperscript{171}

For national legislation, as was the case with the judgments, categorization of the decision as court settlement is conducted according to the country of origin. In some countries if the country of origin determines that the court settlement is final and enforceable, and if the country of origin treats it like a judicial decision, only then can this decision be recognized and enforced in another country.\textsuperscript{172} If the country of origin does not treat the settlement as judicial decision, then the foreign settlement is not suitable for recognition.\textsuperscript{173}

\textbf{2.1.2.1.2 Arbitral awards}

Foreign arbitral awards cannot have direct effects in another country and, similar to the case with foreign judicial decisions, they need to undergo the process of \textit{exequatur}. However, their position is different and has, in fact, been made easier on a global scale because of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards from 1958. This convention, also known as the ‘New York Arbitration Convention’ or the ‘New York Convention,’ has been ratified by 156 countries.\textsuperscript{174} The New York Convention is considered to be the most successful multilateral instrument in the area of international trade law agreements.\textsuperscript{175} This Convention applies to the recognition and enforcement of foreign arbitral awards and the referral by a court to arbitration.\textsuperscript{176} Such worldwide enforceability of awards is considered one of the primary advantages of arbitration.\textsuperscript{177} The rate of enforcement is between

\footnotesize{\textsuperscript{169} Case C-414/92, Solo Kleinmotoren v. Boch ECR [1994] ECR I-2237
\textsuperscript{171} Hess B. and Pfeifer T. and Schlosser P., (n 160) 276.
\textsuperscript{172} Dika M. and Knežević G. and Stojanović S., (n 116) 283.
\textsuperscript{173} Varadi and others, (n 117) 544.
\textsuperscript{176} For more on the recognition and enforcement of foreign and domestic arbitral awards in Slovenia see, Galič A., \textit{Priznanje in izvršitev domačih in tujih arbitražnih odločb v Sloveniji}, Zbornik znanstvenih razprav, LXXIII. letnik, (2013).
\textsuperscript{177} Lew D.M.J and Mistelis A.L. and Kröll M.S, (n 174) 688.}
95%-98% of the awards, and this is a result of the virtually universal policy of favoring enforcement of awards and the extensive acceptance of the New York Convention.\textsuperscript{178} Other international legal sources worth mentioning, that have helped create such a favorable environment for such a for arbitration in the legal system are the 1961 European Convention on International Commercial Arbitration and the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006.

As was the case with judicial decisions, foreign arbitral awards can be recognized and/or enforced.\textsuperscript{179} This depends on their nature, purpose, and the national legal systems. For example, only recognition is sought when the court is asked to grant a remedy in respect to a dispute that has been the subject of previous arbitral proceedings (a dispute that has already been decided).\textsuperscript{180} On other hand, enforcement of a foreign arbitral award can be sought when the court is not only asked merely to recognize the legal force of the award, but also to ensure that is carried out, by using such legal sanctions as are available.\textsuperscript{181} Or as some authors illustratively explain:

\begin{quote}
[T]he purpose of recognition on its own is generally to act as a shield. Recognition is used to block any attempt to raise fresh proceedings issues that have already been decided in arbitration that gave rise to the award whose recognition is sought. By contrast, the purpose of enforcement is to act as a sword. Enforcement of an award means applying legal sanctions to compel the party against whom was made to carry it out.\textsuperscript{182}
\end{quote}

\section*{2.1.2.1.3 Authentic instruments}

Authentic instruments are regarded as enforceable titles.\textsuperscript{183} Nevertheless, their position varies in different Countries. While court-approved settlements are known in all Member States of the EU, notarial deeds (and similar authentic instruments) are unknown in England, Wales and Ireland.\textsuperscript{184} Usually in national legislation the term ‘authentic instrument’ is defined and contains several common characteristics. For example, in France,

\begin{quote}
[A]n authentic instrument is one which has been received by public officers empowered to draw up such instruments at the place where the instrument was received and with the requisite formalities’.\textsuperscript{185}
\end{quote}

\begin{flushright}
\textsuperscript{178} ibid.
\textsuperscript{179} Redfern A. and others, Redfern and Hunter on International Arbitration, Oxford University press, (2009), 627.
\textsuperscript{180} ibid.
\textsuperscript{181} ibid 628.
\textsuperscript{182} ibid.
\textsuperscript{183} France (Article L111-3, Code des procédures civiles d'exécution of 1 June 2012); Germany (§794 I(5), ZPO); Austria (§1(17) EO), etc.
\textsuperscript{184} Hess B. and Pfeifer T. and Schlosser P., (n 160) 276.
\textsuperscript{185} Article 1317 of the Civil Code (Code civil).
\end{flushright}
In Germany authentic instruments are understood as:

‘(1) Records and documents that have been prepared, in accordance with the requirements as to form, by a public authority within the scope of its official responsibilities, or by a person or entity vested with public trust within the sphere of business assigned to him or it (public records and documents), shall establish full proof, provided they have been executed regarding a declaration made before the public authority or the public official issuing the deed.

(2) Evidence proving that the transaction has been improperly recorded is admissible.\textsuperscript{186}

In Article 244 of the Polish Code of Civil Procedure the term ‘authentic instruments’ is defined as:

(1) Authentic instruments recorded in the prescribed form by public authorities instituted for this purpose or by other state authorities within the limits of their functions (competences) constitute proof of what they officially attest.

(2) The provision of paragraph 1 applies by analogy also to authentic instruments established by professional chambers, territorial organisations, cooperatives or other social organisations within the limits of the competences which have been entrusted to them by law within the public administration.

In Romania in Article 1171 of the 1864 Romanian Civil Code, an ‘authentic instrument’ is the act drawn up with the solemnities required by law by a civil servant in right of office in the place where the act was made.

Their common characteristics are:

- The instrument has to be issued by a public authority or an official.
- The authenticating authority or official has to be empowered to authenticate the type of act in question.
- The authenticating authority or official has to act within its competence in issuing authentic instruments.
- The authenticating authority or official must follow a specific authentication procedure.
- It must also follow the relevant rules on the formalities for drawing up and issuing authentic instruments.
- The resulting legal effect is that the authentic instrument provides conclusive proof of the content of the instrument.
- Generally, obligations arising from authentic instruments are enforceable (in some States by operation of law; in other States if a specific submission to enforcement is contained in a declaration in the authentic instrument).\textsuperscript{187}

\textsuperscript{186}§ 415 (1) of the German Code on Civil Procedure (Zivilprozessordnung) (ZPO).

\textsuperscript{187}Comparative Study on Authentic Instruments - National Provisions of Private Law, Circulation, Mutual Recognition and Enforcement, Possible Legislative Initiative by the European Union (United Kingdom, France, Germany, Poland, Romania, Sweden), (2008), pg. iv-v
The meaning of ‘authentic instrument’ in the EU context was firstly determined in the CJEU Case C-260/97 [1999] ECR I-3715, *Unibank A/S. v Flemming G. Christensen* where the Court took the view that:

Since the instruments covered by Article 50 of the Brussels Convention are enforced under exactly the same conditions as judgments, the authentic nature of such instruments must be established beyond dispute so that the court in the State in which enforcement is sought is in a position to rely on their authenticity. Since instruments drawn up between private parties are not inherently authentic, the involvement of a public authority or any other authority empowered for that purpose by the State of origin is needed in order to endow them with the character of authentic instruments.  

In this decision CJEU followed the directions given in the Jenard-Möller Report regarding the conditions which had to be fulfilled by authentic instruments in order to be regarded as authentic within the meaning of Article 50 of the Lugano Convention. For that convention’s requirements, the report mentions three conditions, namely:

- the authenticity of the instrument should have been established by a public authority;
- this authenticity should relate to the content of the instrument and not only, for example, the signature;
- the instrument has to be enforceable in itself in the State in which it originates.  

These views were taken into consideration in the Regulation creating the European enforcement order for uncontested claims, the new Brussels Ibis Regulation, the Maintenance Regulation and Succession Regulation. This regulation contains all definitions based on these instructions. The Regulation creating the European enforcement order for uncontested claims provides that ‘authentic instruments’ are: (a) a document which has been formally drawn up or registered as an authentic instrument, 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 by the Member State in which it originates; or b) an arrangement relating to maintenance obligations concluded with administrative authorities or authenticated by them. For the Brussels Ibis Regulation an ‘authentic instrument’ represents a document which has been formally drawn up or registered as an authentic instrument in the

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188 ibid para. 15.
190 ibid 80.
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.\textsuperscript{192} A similar definition is given in the Succession Regulation but with a specification of the subject matter to cases of succession.\textsuperscript{193} The definition in the Maintenance Regulation contains two cases: (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.\textsuperscript{194}

2.1.2.1.4 Provisional or protective measures

Traditionally, two arguments have been given for the lack of recognition and enforcement of provisional or protective measures. The first argument was that these measures are not final, in the sense that they bring an end to the dispute between the parties, and second regarded the nature of the provisional or protective measures, which are directly linked with the means of enforcement. As such, they were considered to be within the exclusive jurisdiction of the judicial authorities of the State where they were ordered.\textsuperscript{195} However in recent years this understanding has been shifting towards more liberal acceptance of recognition and enforcement of foreign provisional measures.\textsuperscript{196}

It is undisputed that decisions which are final and are res judicata, and also which are suitable for recognition and enforcement, can be considered enforcement titles. There is no clear standpoint whether provisional or protective measures can have the same consideration.


\textsuperscript{196} Kessedjian C., (n 195) par.108.
On a national level there is debate whether the lack of finality of the provisional measures preclude them to be recognized and enforced as judgments.\textsuperscript{197} On the EU level as well there is no consensus on whether provisional measures can be recognized and enforced according to particular EU instruments, whether they should be recognized and enforced according to the national rules, or according to rules provided in international agreements.\textsuperscript{198} For example, Brussels I and now the Brussels Ibis Regulation have specifically provided for recognition and enforcement of provisional or protective measures which were ordered by a court having jurisdiction as to the substance of the matter.\textsuperscript{199} In this context the Brussels Ibis Regulation doesn’t contain specific rules on the recognition of provisional measures, rather it was left to the CJEU to decide this issue. The CJEU has provided that provisional measures, which were rendered by court that assumed jurisdiction on the base of the jurisdictional rules from the regulation, are recognized and enforced on the basis of the rules in the regulation. They have also ensured that enforcement of provisional measures granted in accordance with article 20 of the Regulation is not conducted according to the rules in the Regulation.\textsuperscript{200}

International instruments contain specific rules regarding the recognition and enforcement of protective measures. For example, judgments on protective measures for children or adults must be recognized under Art. 8 Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants 1961 (‘Protection of Minors Convention’), Arts. 23–28 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation Respect of Parental Responsibility and Measures for the Protection of Children 1996 (‘Child Protection Convention’), and Arts. 22–27 Convention on the International Protection of Adults 1999 (‘Protection of Adults Convention’). Therefore, it is very important to briefly determine what provisional or protective measures represent, whether they represent \textit{titre exécutoire}, and if they can be recognized and enforced on national and EU levels.

Provisional and protective measures can be found in every developed legal system. These measures have a different scope or different requirements in different legal systems and for their proper understanding it is necessary to consider the whole procedural system of the

\textsuperscript{197} Varadi and others (n 117) 545; Živković M. and Stanivuković M., (n 135) 418.
\textsuperscript{199} On the position of the Brussels I Regulation see, Hess B. and Pfeifer T. and Schlosser P.(n 160) 264-271; for the position of the Brussels Ibis Regulation see Recital (33), Article 2(a), 40 and 42.
\textsuperscript{200} Case C-256/09, Purrucker I, par.101 and moreover see, Case C-256/09 Bianca Purrucker v Guillermo Vallés Pérez, [2010], I-07353, Opinion of AG Sharpstone, pg. I-7397, para.155,
country in which they originate. The common denominator for all of them is the function they preform: to secure the subsequent enforcement of judgments on the substance of a case (or their anticipated enforcement), organize factual situations or the parties’ rights pro tem, safeguard all interests affected pending settlements of the dispute, and provide measures for urgent cases. The measures can be categorized into three kinds of remedies: conservatory measures that are meant to secure the enforcement of the decision on the merits; regulatory measures that cover a wide range of measures that can be ordered to maintain the status quo or to give a provisional arrangement of some kind; and anticipatory measures, which can grant claims similar to those in principal proceedings, such as (interim) payments.

Due to the formation of the internal market and the free movement of goods, services, capital and persons, in legal terms it is vital that protective measures circulate freely within the territory of the EU because, according to the Brussels systems, they allow the judgment creditor to secure the debtor’s assets even before applying for a declaration of enforceability. In the context of the EU:

[A] provisional measure is, self-evidently, one which is intended to produce its effects only for a limited period – until a certain event occurs or a certain period of time has elapsed.

Article 47 of the Brussels I Regulation was the first provision of European procedural law that fully implemented the principle of mutual recognition. Such a position is derived from the fact that the provisions in the Brussels I Regulation did not require any previous recognition of the foreign title meaning that this decision was recognized without any exequatur proceedings. However, this position of Article 47 of the Brussels I Regulation has often been neglected by the Member States.

The Brussels Ibis Regulation maintained this position and further provided that the provisional measures, including protective measures, which are ordered by a court having jurisdiction as to the substance of the matter, can freely circulate under the provisions of the Regulation. Even if the courts of another Member State have jurisdiction as to the substance

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202 Kennet A.W. (n 146) 131.
203 Kramer X., Harmonistation of Provisional and Protective Measures in Europe, (n 201) 306.
204 ibid.
205 Hess B. and Pfeifer T. and Schlosser P., (n 160) 265.
206 Case C-256/09 Bianca Purrucker v Guillermo Vallés Pérez, [2010], I-07353, Opinion of AG Sharpstone, par.118
207 Hess B. and Pfeifer T. and Schlosser P., (n 160) 266.
208 ibid.
209 However, provisional, including protective, measures which were ordered by such a court without the defendant being summoned to appear should not be recognised and enforced under this Regulation unless the
of the matter, application may be made to the courts of a Member State for such provisional and protective measures as may be available under the law of that Member State.\textsuperscript{210} As for the question whether provisional or protective measures can be recognized and enforced between the Member States, Article 2(a) of the Brussels Ibis Regulation has undoubtedly stated that:

\[ \text{[P]rovisional, including protective, measures ordered by a court or tribunal which by virtue of this Regulation has jurisdiction as to the substance of the matter} \text{’ can be recognized and are included in the term ‘judgment’.} \]

However, provisional, including protective, measures which are ordered by such a court or tribunal without the defendant being summoned to appear (unless the judgment containing the measure is served on the defendant prior to enforcement) are not considered to be ‘judgments’ according to the meaning that is provided in the Regulation regarding recognition and enforcement, i.e. they are not recognized and enforced under the Brussels Ibis Regulation provisions.\textsuperscript{211}

In the Brussels Ibis Regulation the position of the Courts regarding the enforcement of provisional measures is not so clear.\textsuperscript{212} The regulation itself does not refer to this question specifically, leaving to the interpretation of the CJEU the determination of whether the provisions of Articles 21 et seq. of the Brussels Ibis Regulation according to the Article 2(4) also apply to provisional measures in terms of Article 20, or only to decisions on the merits of a case. The frequent use of provisional measures provided several opportunities for the CJEU to precisely interpret Article 20 of the Brussels Ibis Regulation. However the interpretations of the CJEU regarding provisional measures – including in \textit{Detiček},\textsuperscript{213} \textit{Purrucker I}\textsuperscript{214} and \textit{Purrucker II}\textsuperscript{215} – were considered as insufficiently exhaustive guidelines.\textsuperscript{216}

The CJEU in the \textit{Detiček} case distinguished between provisional measures taken on the basis of Article 20 of the Brussels Ibis Regulation and measures of a provisional character rendered by courts that have jurisdiction as to the substance of the case. Firstly it was

\begin{itemize}
  \item \textsuperscript{210} Article 35 of the Brussels Ibis Regulation.
  \item \textsuperscript{211} Article 2(a) of the Brussels Ibis Regulation.
  \item \textsuperscript{213} Case C-403/09 PPU, Jasna Detiček v Maurizio Sgueglia [2009] ECR I-12193.
  \item \textsuperscript{214} Case C-256/09 Bianca Purrucker v Guillermo Vallés Pérez [2010] ECR I-07353.
  \item \textsuperscript{215} Case C-296/10 Bianca Purrucker v Guillermo Vallés Pérez [2010] ECR I-11163.
  \item \textsuperscript{216} Final Report Regulation (EC) No 2201/2003 -Analytical annexes (n 212) 46.
\end{itemize}
considered that such application of the rule, which is an exception to the general rules of jurisdiction, can be carried out in exceptional circumstances.\textsuperscript{217} In the understanding of the CJEU, Article 20 enables a court that does not have jurisdiction as to the substance of the case to take, exceptionally, where urgency so requires, a provisional measure or a protective measure in respect of assets or persons in its territorial jurisdiction.\textsuperscript{218} This distinguishes Article 20 of the Brussels IIbis Regulation from measures of provisional character rendered by courts that have jurisdiction as to the substance of the case. In such circumstances, these decisions are recognized and enforced in other Member States in the same way as any other judgment adopted on the same basis, in accordance with the rules for recognition and enforcement of the Brussels IIbis Regulation.\textsuperscript{219} However, provisional measures adopted on the basis of national law in the circumstances provided in Article 20 of the Brussels IIbis Regulation are not recognized or enforced on the basis of the rules for recognition and enforcement provided in the Regulation. They are recognized on the basis of national law rules, bilateral and multilateral conventions.\textsuperscript{220}

In *Purrucker I* the CJEU confirmed that the enforcement of provisional measures granted in accordance with Article 20 of the Regulation is not conducted according to the rules in the Regulation.\textsuperscript{221} The CJEU clarified in *Purrucker II* that the *lis pendens* rule is not applicable when the court first seized in matters of parental responsibility is seized only for the adoption of provisional measures and the court seized second for an action aiming at the same measures is the court of another Member State having jurisdiction on the substance of the matter.\textsuperscript{222}

The CJEU takes this position having in mind the fact that the enforcement procedure is not governed by the Regulation, but by national law.\textsuperscript{223} In such situations it is of the essence that national authorities apply rules which secure efficient and speedy enforcement of decisions issued under the Regulation so as not to undermine its objectives.\textsuperscript{224} One of the objectives determined by the CJEU was that provisional measures cannot be used to defeat enforcement,

\textsuperscript{218} ibid para 82.
\textsuperscript{221} Case C-256/09 Bianca Purrucker v Guillermo Vallés Pérez [2010] ECR I-07353 para 100.
\textsuperscript{222} Case C-296/10 Bianca Purrucker v Guillermo Vallés Pérez [2010] I-11163, para 86.
\textsuperscript{223} Article 47 of the Brussels IIbis Regulation.
as was the situation in the Detiček case.\textsuperscript{225} With such situations the misuse of provisional measures increases and the gap widens between the Member States and potentially erodes the trust between them.\textsuperscript{226} Nevertheless, as much as the Practice Guide tries to give a detailed overview of rules of the Brussels IIbis Regulation and is a really helpful tool in the implementation of the regulation, it still it does not clarify Article 20 of the Brussels IIbis Regulation. For this reason, some Member States tried to define specific guidelines regarding the conditions that must be met for provisional measures to be recognized and enforced by the regulation.\textsuperscript{227} For example the German Federal Court gave the following guidelines:

(1) Should a court with jurisdiction as to the substance of a matter pursuant to Articles 8 et seq. Brussels IIa Regulation order provisional measures on parental responsibility, the recognition and enforcement of those measures in other Member States is governed by Articles 21 et seq. of the Regulation. Should a court, on the other hand, order provisional measures only on the basis of Article 20, then Articles 21 et seq. do not apply. In such a case, recognition and enforcement of the measures are governed by national law or by international conventions being in force in the Member State of enforcement. Should, finally, the requirements of Article 20 not have been fulfilled, a provisional measure falling into the material scope of Brussels IIa Regulation cannot be recognised and enforced in another Member State.

(2) When differentiating whether provisional measures have been ordered by a court with jurisdiction as to the substance of the matter under Articles 8 et seq. Brussels IIa Regulation, the deciding factor is not whether the court ordering the provisional measures actually had such jurisdiction but whether the court had the intention to base its jurisdiction on Articles 8 et seq. (and not only on Article 20 in combination with national law).

(3) Should a judgment ordering provisional measures not contain a clear foundation with regard to the jurisdiction of the court, and if jurisdiction is not self-evident from the judgment, it is to be assumed that the judgment has not been based on the jurisdiction rules of Articles 8 et seq. Brussels IIa Regulation (and cannot be recognised and enforced, therefore, according to Articles 21 et seq. of the Regulation in other Member States).\textsuperscript{228}

These guidelines represent the most detailed explanation of the complex structure and relations between provisional measures and the recognition and enforcement of such decisions on the basis of the Brussels IIbis Regulation. Therefore other EU authorities are more than welcome to provide for such clarifications of provisional measures and their enforcement in relation to the Brussels IIbis Regulation.

2.1.2.2 Foreign decisions which are disputable for recognition and enforcement

\textsuperscript{225} ibid.
\textsuperscript{227} ibid 74.
\textsuperscript{228} BGH 09.02.2011, FamRZ 2011, 542 = unalex DE-2038.
In legal theory and in the legal practice, there is debate on what foreign decisions are suitable for recognition and enforcement. Some of these debates are centered on the enforceability of some of the decisions that were mentioned before. Regarding the subject matter, there is consensus that only decisions in civil and commercial matters are suitable for recognition and enforcement. There is a limitation on the recognition of foreign decisions in criminal matters, in that only decisions on damages arising out of criminal proceedings can be recognized and enforced. Also, tax decision and orders qualify as administrative decisions and are not recognized and enforced.

From the point of view of the authority which renders the decisions, it is accepted that judicial and arbitral decisions are recognized and enforced. However, some decisions of other authorities, which in the country of origin are equaled with court decisions, can be recognized and enforced abroad. For example, it is debated whether decisions of administrative authorities can be recognized and enforced.

Another debated kind of decision which is ambiguous regarding recognition and enforcement is the interim decision. The debate is whether this type of decision has a substantive legal effect, that is, whether they are legally binding. Some authors state that interim decisions have substantive legal effects; that is, they are legally binding or suitable for recognition and enforcement. Other authors, however, argue that interim decisions lack this quality.

229 Varadi and others (n 117)544-546; Živković M. and Stanivuković M., (n 135)391-392
230 Ruling of the High Trade Court (Resenje Viseg Trgovinskog Suda), Pz 1041/2003, from 26 February 2003 godine (as cited by Varadi and others, (n 117) 545; Ruling No.1096/84 (Resenje Br 1096/84) (as cited by Živković M. and Stanivuković M., (n 135) str.391).
231 Text to n 142 Part I ch II sec. 2.1.2.1.
232 Živković M. and Stanivuković M., (n 135) 418.
233 Dika M. and Knežević G. and Stojanović S., (n 116) 284.
234 ibid 283. See also Živković M. and Stanivuković M., (n 135) 392.
235 Varadi and others (n 117) 544-545.
236 ibid.
2.2 Basic doctrines for the recognition and enforcement of foreign judicial decisions

There are several theoretical approaches that attempt to determine the doctrinal foundations of the recognition and enforcement. The principle of territoriality and the rise of the sovereignty among the countries provided for the limitations of the authority of judgments to within State boundaries. Due to these facts, no foreign judicial decision could be executed *proprio vigore* in another country. In this respect the doctrines of state sovereignty and territoriality tried to lay the theoretical and doctrinal foundations of the reasons for the recognition and enforcement of foreign judgments.

### 2.2.1 Doctrine of comity

The first attempt to breach this ‘sovereignty’ gap between countries was developed by the Dutch authors *John Voet, Paul Voet* and *Urilch Huber*. Their doctrine was founded on two principles: comity and reciprocity. The starting point of Huber’s maxims, given in a chapter of his work ‘*Praelectiones Iuris Civilis*’ entitled ‘*De conflictu legum diversarum in diversis imperiis*’ is that all laws are territorial and have no force or effect of *proprio vigore* beyond the limits of the enacting state, but bind all persons within the territory. Following these two maxims Huber gives his third maxim which indicated that the ‘sovereign’ of a state may ‘by way of comity’ recognize rights acquired under the laws of another state. He was the first to introduce the notion that the recognition in each state of so called foreign-created rights was a mere concession that the state made on grounds of convenience and utility, and not as the result of binding obligation or duty. What convenience and the tacit consent of nations might

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240 Michaels R., Recognition and Enforcement of Foreign Judgments (n 240) para 7.


242 III. Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita, teneant ubique suam vim, quatenus nihil potestari aut juri alterius imperantis ejusque civium praejudicetur (Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the power or rights of such government or of its subjects), Lorenzen E.G., (n 242) 376.

243 Lorenzen E.G., (n 242) 378.
prescribe was evidently a question for the courts, and so the term ‘comity’ came soon to be understood as judicial comity.\textsuperscript{244}

The teachings of Huber were accepted in England\textsuperscript{245} and in the United States. For example, it was held that English courts are bound to give effect to foreign judgments under the rules of the law of nations or of international comity.\textsuperscript{246} In the United States the principle of comity was defined by the US Supreme Court in the case \textit{Hilton v Guyot} follows:

\begin{quote}
[N]o law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent of which the law of one nation... shall be allowed to operate within the dominion of another nation, depends upon... the ‘comity of nations’... ‘Comity,’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.\textsuperscript{247}
\end{quote}

The other principle of reciprocity is founded on the idea that States will and should grant others recognition of judicial decisions only if, and to the extent that, their own decisions would be recognized.\textsuperscript{248} For example, Savigny believed that reciprocity would tend to unify conflict of laws rules. The idea which underlies reciprocity is to appeal to the self-interest of the foreign legislatures or courts in order to induce them to change a policy which is considered undesirable.\textsuperscript{249}

Both of these principles are not founded on duty but on prudence and politeness.\textsuperscript{250} The weak aspect of the doctrine of comity is that it does not explain anything and leads to the inadequate rule of reciprocity as a condition of recognition of foreign judgments.\textsuperscript{251} This doctrine was vigorously criticized for its uncertainty, vagueness, and difficulty of application by Bustamante\textsuperscript{252} and Dicey.\textsuperscript{253} Although the fight to modernize and improve the doctrine of

\begin{small}
\begin{itemize}
\item \textsuperscript{244} ibid.
\item \textsuperscript{245} Wier’s case (1607), 1 Roll Abr.530.
\item \textsuperscript{246} ibid.
\item \textsuperscript{247} 159 U.S. 113 (1895).
\item \textsuperscript{248} Michaels R., Recognition and Enforcement of Foreign Judgments (n 240) para 7.
\item \textsuperscript{249} Castel J.G., (n 240) 19.
\item \textsuperscript{250} ibid.
\item \textsuperscript{251} Wolff M., Private International Law, Oxford at the Clarendon Press, (1950) 251.
\item \textsuperscript{252} ‘Comity is a pretext for the evasion of the consequences of a strict territorial law. After the notion of such law is denied, it would be idle to combat it, for it becomes unnecessary. But it may not be amiss to observe that in its obscure and little defined concept, interest, courtesy, and reciprocity, ideas so important for the history of law, play a part... The name of science cannot be given to them, nor can a practical and useful system be based upon them. They authorize simply concessions ungoverned by rule, the supposed independence of a state consisting in an adjustment of its conduct to that followed by other states, resulting ultimately in a real isolation between the people of the different countries, and in making of courtesy and reciprocity a system of reprisal, instead of a furtherance of juridical relations’ Bustamante, “Tratado de derecho internacional privado,” I, 456 (as cited by Lorenzen E.G., (n 242) 397).
\item \textsuperscript{253} If the assertion that the recognition or enforcement of foreign law depends upon comity, means only that the
\end{itemize}
\end{small}
comity has generally been abandoned, there have been attempts by the Supreme Court of Canada, proposing more modern and more clearly defined concept of comity expressed through ‘justice, necessity and convenience’.254

2.2.2 Doctrine of obligation

Another theory, present in the common law countries, which supplanted the ‘doctrine of comity’ is the ‘doctrine of obligation’.255 This theory is based on the idea that the foreign judgment if made by a court of competent jurisdiction creates a contractual (or quasi-contractual) obligation.256 In such legal relationships (contractual and quasi-contractual) if the foreign court has adjudicated a certain sum to be owed from one person to another, the liability to pay that sum becomes a legal obligation that may be enforced in another country with an action of debt.257 Therefore the judgments are recognized in order to do justice to the parties.258

As it was stated in Schibsby v Westenholz:

[T]he judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce; and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action.259

This theory, which is influential in the common law countries, represents the opposite of the ‘doctrine of comity’ (which focusses on the public relations between States) which emphasizes the private law relations between the parties.260 The disposal of the doctrine of comity in favor of the doctrine of obligation can be seen in Russell v. Smith261 where it was

law of no country can have effect as law beyond the territory of the sovereign by whom it was imposed, unless by permission of the state where it was allowed to operate, the statement expresses, though obscurely a real and important fact. If on the other hand, the assertion that the recognition or enforcement of foreign laws depends upon comity is meant to imply that, to take a concrete case, when English judges apply French law, they do so out of courtesy to the French Republic, then the term ‘comity’ is used to cover a view, which if really held by any serious thinker, affords a singular specimen of confusion of thought produced by laxity of language. The application of foreign law is not a matter of caprice or option: it does not arise from the desire of the sovereign of England or of any other sovereign to show courtesy to other states. It flows from the impossibility of otherwise determining whole classes of cases without gross inconvenience and injustice to litigants, whether natives or foreigners. Dicey, The Conflict of Laws (5th ed. 1932), pg.10-11 (as cited by Castel J.G., (n 240) 17)

255 Fawcett J and Carruthers J., (n 256) 514.
256 Wolff M., (n 253) 251.
257 Fawcett J and Carruthers J., (n 256) 514.
258 Hartley T., (n 112) 279.
259 Schibsby v Westenholz (1870) LR 6 QB 155 at 159.
260 Michaels R., Recognition and Enforcement of Foreign Judgments (n 240) para 8.
261 (1842), 9 M. & W. 810 at pg.819 (as cited by Castel J.G., (n 240) 19).
held that the enforceability of a foreign money judgment follows from the legal character of the adjudicated obligation as a debt and is no longer subject to investigation on the merits. It is, therefore, irrelevant whether or not the foreign country in which the judgment was rendered grants reciprocal treatment to English judgments. The recognition and enforcement of a foreign judgment takes place *ex debito justiciae* and reciprocity has nothing to do with it.\(^{262}\) The effect of this theory is that what is enforced is not the judgment itself, but the obligation it produces.\(^{263}\) So because the liability to pay the sum becomes a legal obligation that may be enforced with an action of debt (in England), once the judgment is proved the burden lies on the defendant to show why he should not preform the obligation.\(^{264}\)

This doctrine has been criticized in two aspects. Firstly, it bases its explanation on the existence on a fictitious contract, and this does not justify the recognition of divorcee decrees and other judgments *in rem*.\(^{265}\) Secondly, it has been criticized in that it fails to reveal the policy considerations underlying the rules on recognition and enforcement and is more concerned with explaining in theoretical terms why we are recognizing and enforcing foreign judgments than with explaining in theoretical terms which foreign judgments should be recognized and enforced.\(^{266}\)

### 2.2.3 Doctrine of acquired (vested) rights

This doctrine is based on the assumption that rights acquired in one country must be recognized and legally protected in others.\(^{267}\) According to this theory, developed by Joseph Beale when opposing Joseph Story’s comity doctrine, is that the courts do not enforce the judgment itself, but the vested rights it creates.\(^{268}\) The main problem of this doctrine is that it presupposes a right as acquired, but still it does not address situations where the problem is whether or not the right is acquired.\(^{269}\) This theory lacks information about how and under what limitations foreign claims are to be recognized and enforced as vested rights.\(^{270}\)

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\(^{262}\) See also Williams v. Jones (1845), 13 M. & W. 628 at pg.633 (Quoted by Castel J.G., op.cit, pg.19)

\(^{263}\) Michaels R., Recognition and Enforcement of Foreign Judgments (n 240) para 8.

\(^{264}\) Fawcett J and Carruthers J., (n 256) 514.

\(^{265}\) Wolff M., (n 253) 251.

\(^{266}\) Fawcett J and Carruthers J., (n 256) 515.

\(^{267}\) Wolff M., (n 253) 2.

\(^{268}\) Michaels R., Recognition and Enforcement of Foreign Judgments (n 240) para 8.

\(^{269}\) Wolff M., (n 253) 251.

\(^{270}\) The truth is that the vested right doctrine is a somewhat diffused or diluted version of the internationalist position. It supposes the existence of a supra national body of law by virtue of which not the laws of each state but rights and other relations created by such laws are effective in other states. If foreign rights are to be regarded as effective in the forum why not the law which creates such rights? (Yntema H., *Review of Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth*, by H. E. Read. Yale L.J. 49 (1940), pg.1139, as cited by Castel J.G., (n 240) 23).
The doctrine of acquired (vested) rights has been highly criticized both in England and in the United States. At first glance, there are similarities between the doctrine of acquired rights and the doctrine of obligations, however the English authors have highlighted that the doctrine of acquired (vested) rights and the doctrine of obligations are different because the right which the foreign judgment creditor seeks to enforce in England is a right created by English law and not by foreign law. In England for example the proper determination of the jurisdiction is decided by the English rules and with that provides that the judgment must be valid according to the law of the enforcing state before any effect can be given to the judgment. So according to this, the court does not enforce the foreign vested right but creates a new right. In the United States in later stages this theory was completely undermined by later authors such as Currie and Brilmayer.

2.2.4 Doctrine of res judicata

The doctrine of res judicata does not address the public law aspect of the recognition as is provided by the doctrine of comity or the private law duty as is provided by the doctrine of obligation; instead it goes further and reasons that the recognition and enforcement of foreign judgments is derived from the res judicata principle. Res judicata requires that there be an end to litigation; that those who have contested an issue, here or abroad, be bound by the result of the trial, and that matters once tried will be considered forever settled between the parties. Although at first glance this doctrine seems very consistent and logical, it fails to comply with one very important aspect of the recognition and enforcement of foreign decisions: the public policy exception.

271 However, there are some authors that state that the country-of-origin principle in the EU displays a remarkable degree of similarities to the vested rights theory, Michaels R., EU Law as Private International Law? Re-Conceptualising the Country-Of-Origin Principle as Vested Rights Theory, ZERP Diskussionspapier 5/2006 (2006), <http://scholarship.law.duke.edu/faculty_scholarship/1573> accessed 12 December 2015, 4.
272 Castel J.G., (n 240) 23.
274 Castel J.G., (n 240) 24.
276 ibid.
277 ibid.
2.3 Historical development of the recognition and enforcement of foreign decisions in Europe

For centuries, European legal systems have attempted to refine their legal distinctions so as to account for the immense variations in real-life fact patterns. However, countries, kingdoms, principalities, and city-states have always been pragmatic in their approach to external affairs. Driven by this pragmatic component in their international relations, they have written and signed a number of international agreements among themselves in which there are examples that concern jurisdiction and composition of courts but also international agreements regarding enforcement of judgments.

Some of the first questions about foreign legal relations were questions about the recognition and enforcement of foreign judgments and covered not only foreign trade issues but also the very important issues of divorce decrees and nullity of marriage. Historically, ‘exequatur’ represented a way in which civil authority gave a certain power to an Papal Bull or other papal documents issued in the form of a decree or privilege (solemn or simple), and to some less elaborate ones issued in the form of a letter about a particular territory. Early in the era, before the emergence of the notion of national sovereignty firstly developed by the Dutch comity doctrine and the introduction of nationalism in private international law, territoriality as a general problem in civil procedure was not a central issue. Countries had developed techniques such as letter of rogatory (requisitio) by which one court requested another to depose a witness or enforce a judgment. With the emergence of nationalism among the countries and the codification of the private law and procedure, the territorial effect and the limitations of this type of legislation was becoming evident. Such a strong influence

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279 For example, various States of the Swiss Confederation had concluded treaties with surrounding empires and city states to ensure their citizens a judge from their state and also in regulating other jurisdictional aspects (Baumgartner, S. P., (n 280) 47).
280 For example, some German and Russian city states have concluded treaties promising each other that they will not enforce any judgments against their citizens unless entered by a Court at citizens (Baumgartner, S. P., (n 280) 47).
281 The earliest English decision on private international law deal with the recognition of foreign judgments, Wolff M., (n 253) 249.
282 For example, the case of the Prince Adolf Werde, more on this case see Wolff M., (n 253) 249.
283 Živković M. and Stanivuković M., (n 135) 388.
284 Text to n 240 Part I ch II sec.2.2.1. See also, comity doctrine of Urlich Huber and other Dutch theorist, Varadi and others, (n 117) 241 and Wolff M., (n 253) 27.
285 For more on the ideological aspects of Mancini see Varadi and others, (n 117) 248; Wolff M., (n 253) 27.
286 Baumgartner, S. P., (n 280) 38.
from the territoriality principle led to distancing from the pragmatic approaches regarding recognition and enforcement in the pre-nationalism era\(^{287}\) and towards the acceptance of the view that within its territory, a nation-state is free to determine whether to recognize foreign judgments, and if so, under what conditions.\(^{288}\) It was considered that ‘exequatur’ represented an exponent of national sovereignty and exercise of state power in the area of forced execution. Later, this application of the principle of comity in some countries was changed with the more drastic approach of non-recognition of foreign judicial decisions unless obligation arising out of an international treaty exists.\(^{289}\)

With such a situation in Europe, together with the exorbitant grounds of jurisdiction existing in the Civil Codifications,\(^ {290}\) cross-border recognition of foreign decisions drastically reduced and the danger of repeated litigation and conflicting decisions greatly increased. This circumstance lay the foundations for the development of transnational cooperation, first and foremost with the signing of bilateral international treaties.\(^ {291}\) The later phase of the development of cross-border recognition saw the possibility of signing multilateral international treaties under the patronage of the newly-developed Hague Conference of Private International Law.\(^ {292}\) Due to the work and the influence of this international organization, especially in the period after World War II, transitional cooperation achieved significant improvement. Recognition and enforcement of foreign judicial decisions, once considered to be in the exclusive power of the states, now is becoming much more unified and increasingly influenced by the developments of the European Union.\(^ {293}\) Also, the role of the ECHR and the jurisprudence of the ECtHR plays a significant role in this context.\(^ {294}\)

\(^{287}\) For example, in Venice in 1540 and expert found that the execution of judgments may be refused only if they are void under the law of rendition state or if violated the ius gentium vel natural. Another author observed that in the Middle Ages foreign judgments were generally effective in other jurisdictions, (Baumgartner, S. P., (n 280) 52).

\(^{288}\) ibid.

\(^{289}\) ibid.

\(^{290}\) Article 14 of Code Civil.

\(^{291}\) The agreements between France and Sardinia (1760) renegotiated with Italy in 1860, France and Switzerland (1828, renegotiated 1869), France and the Grand Duchy of Baden (1846), Spain and Italy (1831), Italy and Serbia (1880), Spain and Switzerland (1898), France and Belgium (1899, Austria-Hungary and Serbia 1881. Baumgartner, S. P., (n 280) 54.


\(^{293}\) Text to n 450 Part II ch V sec 5.1.

\(^{294}\) Text to n 1015 Part II ch V sec 5.2.
2.4 Systems of recognition and enforcement of foreign judgments

2.4.1 General

For the party who was not satisfied in the country where the decision was rendered i.e. the country of origin of the judicial decision, one question stands: whether this judgment is enforceable in another country for example in the place where the defendant is found or where some of his property is situated. In such situations the principle of territorial sovereignty of the countries does not allow for the foreign judicial decisions to have *proprio vigore* effect in another country.295 Because of that, the permission for enforcement (exequatur) is regarded as a natural prerequisite for the enforcement of judgments emanating from the courts of another country.296

Historically and comparatively there were different approaches and solutions regarding the integration of foreign legal acts in domestic legal systems. On the basis of these different solutions, legal theorists tried to create criteria for their categorization.297 Wolff divided the enforcement systems into two groups: The first group of systems is the German and English group, where the foreign judgment which fulfills the conditions for recognition can be enforced if the admissibility of execution has been pronounced by an ‘executive judgment’ of the Courts (German). The English is *prima facie evidence system*, where a foreign judgment which fulfils the conditions on which its recognition depends, that judgment only constitutes a good cause of action (the judgment to be enforced is not the foreign judgment itself but the judgment delivered upon it by English court)298 Finally, the second group was referring to the French system, where the French court is allowed before giving the *exequatur* to re-examine the case completely in order to make sure that both in fact and in law the judgment is satisfactory. Based on that examination, the Court has power not only to grant or refuse exequatur but also to alter the judgment by reducing the amount awarded (*revision au fond*).299

The early Yugoslavian doctrine had similar method of categorization of the systems of recognition and enforcement, basing it on the still-developing global doctrine regarding

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295 Fawcett J and Carruthers J., (n 256) 514.
297 Dika M., Knezevic G., Stojanovic S., (n 116) 276.
298 In small number of cases English law had allowed direct enforcement of a foreign judgment without the necessity of previously obtaining an English judgment upon *actio iudicati* and on the basis of reciprocity, Wolff M., (n 253) 272-273.
299 ibid 272.
recognition and enforcement. Eisner provided for different systems in regard to the recognition vis a vis the enforcement. He differentiated between countries which observe recognition and enforcement as different processes and which make a distinction between the finality and the enforceability of the foreign judicial decision. As for the enforcement of foreign judicial decisions, he categorized the countries into ones that did not provide for enforcement of foreign judicial decisions and did not give effect to the titre exécutoire (Sweden, Finland, Norway, Netherlands and USSR). The second category of countries generally did not provide for direct enforcement of the foreign decision, but referred the parties to a new process in the country of enforcement in which the foreign decision represented an important (prima facie) evidence (England) or them (Denmark, Germany, Italy, Austria, Romania, Poland, Bulgaria, Yugoslavia and others) for whom the decision represented the compulsory basis (actio ex judicato or actio judicati) of that new process (contrôle limite). The third group of countries (France, Turkey and Greece) were those which could conduct a revision of the merits (revision au fond). Cigoj differentiated between systems which do not allow for recognition and enforcement at all and ones which enable recognition of foreign judicial decisions without any procedure being required. Also he made a distinction between systems which provide procedure for substantive (revision au fond) and formal revision. Regarding the course of proceedings of recognition and enforcement, he categorized the systems as ones which provide for actio iudicati, others which contain the delibazione type of procedure, and finally the system where the recognition can arise as an incidental question and system of registration.

The later authors had a more defined and coordinated approach to the categorization. Pak created three systems for recognition and enforcement with subcategories. The first, which had restrictions regarding the intervention in the operative part of the judgment (limited and unlimited control); the second system where the foreign decision represents a solid evidence (prima facie); and the third system that does not recognize foreign judicial decision except when there is an international agreement. Dika/Knezević/Stojanović categorize the legal systems on two criteria: the method of inspection of the foreign decision and the form of incorporation into the domestic legal system. According to the first criteria, the authors divide

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300 Eisner B., Međunarodno privatno pravo, Zagreb, (1956) 305.
301 ibid 305-318.
302 Cigoj S., Mednarodno zasebno pravo (Pravna razmerja z inozemskimi elementi), Ljubljana, (1966) 92.
303 ibid.
304 ibid.
306 ibid.
the legal systems as systems of *revision au fond* and systems of limited control. The system of revision au fond has a subcategory known as the system of limited control. Regarding the second criteria, these authors divide the legal systems into systems where foreign legal acts can have direct effects and systems where the incorporation of foreign legal acts can be provided only in form of domestic legal act.\(^{307}\) Zivković/Stanivuković have a similar approach to the categorization as Dika/Knezević/Stojanović but categorize the legal systems of recognition and enforcement only on the second criteria; that is, only on the method of incorporation of foreign legal acts.\(^{308}\) According to them, legal systems can be categorized into four groups: first, systems where the foreign decision creates legal effects in the domestic system from the moment when the domestic court recognizes it in special exequatur proceedings; second, systems where the foreign decision can have direct effect without a special procedure being necessary (if it fulfills the necessary domestic requirements) but for enforcement of foreign decisions it is necessary to have a recognition and enforcement procedure; third, mixed systems where exequatur proceedings are necessary, with the exception being foreign decisions concerning status of persons which do not require for enforcement; and fourthly, systems which refuse to recognize foreign decisions unless there is international agreement between the countries about the decisions in question.\(^{309}\) Varadi/Bordaš/Knežević/Pavić divide legal systems into five types of systems in terms of recognition and enforcement. The first is the system of limited control, the second the system of unlimited control, the third the system of *revision au fond*, the fourth *prima facie evidens* system, and the fifth, systems which refuse to recognize foreign decisions unless there is international agreement between the countries about the decisions in question.\(^{310}\) Đžunov divided the systems for recognition and enforcement into five categories: countries which do not recognize foreign judicial decisions, *prima facie evidence* systems, systems of limited control, systems of unlimited control, and systems of revision au fond. Also, he provides for a separate categorization of the systems regarding the course of proceedings for the recognition and enforcement of foreign judicial decisions (simple *exequatur* procedure, *delibazione* procedure and *prima facie evidence* procedure).\(^{311}\) Gavroska/Deskoski follow systematization developed by Đžunov.\(^{312}\)

\(^{307}\) Dika M., Knezevic G., Stojanovic S., (n 116) 276.


\(^{309}\) Zivković M., Stanivuković M., (n 135) 416-418.

\(^{310}\) Varadi and others, (n 117) 540-542.

\(^{311}\) Đžunov T., (n 114) 294-296.

\(^{312}\) Гавроска П., Дескоски Т., (n 117) 463-464, 472.
The differences in the categorization of the legal systems related to recognition and enforcement, and the categorization itself, are general and it must be said that there are systems which have modifications or solutions which do not fit in any of these categories. On the basis of the two criteria given by Dika/Knezević/Stojanović (the method of inspection of the foreign decision and the form of incorporation in the domestic legal system), five systems can be detected: the system of limited control of the foreign judgment (contrôle limite); the system of unlimited control of the foreign judgment; the system of revision of the foreign judgment (revision au fond); the prima facie evidence system; and finally systems that don’t recognize foreign judgments unless an international agreement exists.

2.4.2. The System of limited control of foreign judgment (contrôle limite)

The system of the limited control of foreign judgments is today the most common system found in most of the Central and South European countries. This system is based on self-restriction of the country of enforcement not to inspect the applied substantive law, but limits itself only to the inspection of the conditions provided in its legal acts. The country of enforcement can conduct an inspection of the formal requirements and the possible violations of the procedural rights of the person against whom the recognition and enforcement is sought. In limited situations the court can examine some substantive aspects mostly relating to violations of the public policy.

Regarding the second criterion, incorporation in the domestic legal system, the country of enforcement can select only two possible outcomes: to recognize the foreign judgment as it is, or not to allow recognition. The court of enforcement cannot rectify, nullify, or return the foreign decision to the country of origin for reviewing and re-considering. This represents the second limitation of the court of enforcement.

2.4.3. The System of unlimited control of foreign judgments

The system of unlimited control of foreign judgments today is mostly abandoned. It

313 For example, Montenegro, Macedonia, Serbia, Slovenia, Croatia, Bulgaria, Bosnia and Herzegovina, Albania.
314 For the comparative overview of the conditions for recognition and enforcement see text to n 104 Part III ch II sec 3.
315 See, Varadi and others (n 117) 540; Џунов Т., (n 114) 295.
316 Varadi and others, (n 117) 540.
317 It is still present in some legal systems in question regarding the recognition of foreign decision on status of persons, Varadi and others, (n 117) 562.
is very similar to the system of limited control regarding the second criterion (incorporation in the domestic legal system), however, the court of enforcement can carry out a more detailed examination of the factual situation and the law which was applied. The recognizing court is not limited only to the more formal (procedural) requirements for the recognition, but it can conduct a full-scale examination of the facts of the case and the applied substantive law. Nevertheless, this court is limited regarding the method of incorporation of the foreign decision: it can only incorporate the decision as a whole or it can refuse the recognition.

2.4.4. The System of revision of foreign judgments (\textit{revision au fond})

In the past, French courts, in exercising a \textit{pouvoir de revision} (power of revision) not only did they examine the requirements for recognition and enforcement, but they also evaluated the merits of the foreign judgment and refused to grant an exequatur if, in their view, the foreign court decided the case incorrectly based either on the law or on the facts.\textsuperscript{318} The burden of proving that the judgment was wrong in the aspect of the merits was placed on the party seeking the exercise of this power.\textsuperscript{319} Regarding the second criterion, the French court were generally not permitted to modify the foreign decision, but only to grant or deny the exequatur; however, they could reduce the amount or they could refuse exequatur for one separable provision of the judgment and could grant exequatur for the rest.\textsuperscript{320}

For a long period of time, this system was abandoned in the realm of recognition and enforcement of foreign judicial decisions in France regarding personal status, however it was present in aspect of money judgments. With the decision of the \textit{Cour de Cassation}, in the \textit{Munzer} case on 7 of January 1967, this system was totally abandoned in France.\textsuperscript{321} Nevertheless, it continued to be present in Bolivia and in Belgium until the new PIL act was enacted in 2004.\textsuperscript{322} Today this system is non-existent.

2.4.5. The System of prima facie evidence

As was previously stated,\textsuperscript{323} in England a foreign judgment which fulfils the conditions on which its recognition depends only constitutes a good cause of action (the judgment to be

\textsuperscript{318} Herzog P., Weser M., Civil Procedure in France, Columbia University, (1967), 595.
\textsuperscript{319} ibid.
\textsuperscript{320} ibid.
\textsuperscript{321} Zivković M., Stanivuković M., (n 135) 426.
\textsuperscript{322} ibid.
\textsuperscript{323} Text to n 298 Part I ch II sec 2.4.1.
enforced is not the foreign judgment itself but the judgment delivered upon it by English court).\textsuperscript{324} These new proceedings are initiated by a new lawsuit (*action rei iudicati*). The consequences of this new proceeding are that the exception *rei judicatae* is ruled out, but the foreign decision represents a prima facie evidence in the new proceedings.\textsuperscript{325}

**2.4.6. The Systems that don’t recognize foreign judgments unless international agreement exists**

Lastly, there are countries (like Austria, Denmark, Netherlands, Norway, Finland Russia and Sweden) which do not recognize or enforce foreign judicial decisions unless an international agreement (bilateral or multilateral) exists between the country of enforcement and the country of origin of the foreign judicial decision.\textsuperscript{326} However, in some of the countries (Sweden and Netherlands) this aspect is not absolute. In certain areas with special national legal acts, these countries provide for recognition and enforcement after the fulfillment of certain conditions.\textsuperscript{327}

\textsuperscript{324} Text to n 298 Part I ch II sec 2.4.1.
\textsuperscript{325} Varadi and others, (n 117) 540.
\textsuperscript{326} Zivković M., Stanivuković M., (n 135) 417.
\textsuperscript{327} ibid.
2.5. Legal Sources

Recognition and enforcement of foreign decisions in the EU is regulated by different legal sources. There are several types of rules that apply to the exequatur of a foreign judgment. If the party seeks recognition and enforcement of a judgment in an EU country and this judgment is rendered by a national court of another EU country, in this case the recognition and enforcement is regulated by EU rules. The most significant EU sources that refer to the recognition and enforcement of foreign judgments are:

- Council Regulation No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (‘Brussels I’);\(^{329}\)
- Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and co-operation in matters relating to maintenance obligations(Maintenance Regulation);\(^{334}\)

the creation of a European Certificate of Succession (Succession Regulation);\(^{335}\)


All of these EU mechanisms have their base in Article 65 of the EC Treaty as a tendency for the improvement of the internal market.

The other set of rules refer to the judgment that is rendered by courts of non-EU countries. The recognition and enforcement in these cases can be regulated either by international agreements or by national rules. There are large numbers of bilateral agreements that the EU countries have signed in which are contained rules regarding recognition and enforcement.\(^{337}\) Also there is a fair number of multilateral agreements regarding the recognition and enforcement of judgments in family matters. The event with the most significant role in the harmonization of these rules is the Hague conference on private international law. Its most important conventions are:

- Hague Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants;
- Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations;
- Hague Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages;
- Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption;
- Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect to Parental Responsibility and Measures for the Protection of Children;
- Hague Convention of 13 January 2000 on the International Protection of Adults;

\(^{335}\) OJ L 201, 27.07.2012, p. 107-134.
\(^{337}\) For the bilateral treaties in force in Slovenia see text to n 68 Part III ch I sec 2.2.2.
Part II

Recognition and enforcement of foreign judgments in the Brussels IIbis Regulation

In recent years, the private international law of the European Union has extended to legal relations that do not primarily concern economic aspects and the common market. There is increased regulation of cross-border family law relationships, a field that was traditionally resolved under national legal rules or by international agreements. Today in the EU this field is regulated not only by those legal sources mentioned above but also by a much broader group of rules that follow the legal, regulatory and administrative developments in the EU. That has created a complex system of national, international and regional legal sources that can be applied in a single situation. In addition, there has been a great change in the structure of the family itself. Globalization today cannot be observed only as an economical phenomenon. It has a great influence on many other social aspects and the family is not an exception. Its influence can be observed in the concept of family itself, which has taken on a momentum and today is undergoing a redefinition of its structure. This is strongly influencing family law, although only recently has this area of law been regarded as traditional because its complex mix of religious, social and cultural characteristics. Such tendencies have a direct influence on the recognition and enforcement of foreign judgments.

This part of the dissertation will examine the current status of the recognition and enforcement of family law decisions in the European Union, especially the ones which are recognized and enforced according to the Brussels IIbis Regulation. It is very important here to emphasize that the purpose of the Regulation is not to unify the rules of substantive law and of procedure of the different Member States, nevertheless it is also important to note that the national rules and their application is restrained so they do not in any way impair the effectiveness of the Brussels IIbis Regulation.

The fragmentation of the international law is particularly present in private international law of the EU. Certain family law relationships between the Member States are regulated with different legal sources. Some of them are on an EU level. Another are regulated with bilateral

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1 Text to n 328 Part I ch II sec 2.5.
2 Case C-195/08 PPU Inga Rinau [2008] ECR I-05271, para 82; Case C-498/14 PPU David Bradbrooke v Anna Aleksandrowicz (9 January 2015) para 41.
and multilateral international agreements. Maintenance represents one of the border line issues that is debated if it represents family law issue or other civil law issue. Because traditionally maintenance issues were excluded from the scope of application of the Brussels IIbis Regulation and was generally regulated by the Brussels I Regulation or as it is in present time with the Maintenance Regulation, this issues will not be addressed in the thesis.

For a more comprehensive understanding of the functioning of the whole Brussels IIbis system, this part will firstly analyze the scope of the Brussels IIbis Regulation, than the jurisdictional rules, thirdly the common provisions of the Regulation (ascertaining of the jurisdiction, lis pendens and provisional including protective measures). Fourthly, large part of this part is dedicated to the recognition and enforcement of the decisions in matrimonial matters and in matters regarding parental responsibility. Also, this part will cover the abolishment of the exequatur on certain decisions. Lastly, the position of the ECtHR regarding the child abduction cases and the relationship between the ECHR and the CFR of the EU in these cases will be addressed.
Chapter I Scope of the Brussels IIbis Regulation

1.1 General

The Brussels IIbis Regulation is an EU instrument that regulates private international family law issues which were excluded from the Brussels I Regulation. Brussels IIbis Regulation covers two large areas of family law issues with cross-border dimensions: matrimonial matters and matters of parental responsibility. The scope of this Regulation is given in Article 1 where it is stated that Brussels IIbis Regulation applies in civil matters relating to:

- divorce, legal separation or marriage annulment;³
- the attribution, exercise, delegation, restriction or termination of parental responsibility⁴

For more precise implementation the scope of the Brussels IIbis Regulation is narrowed and the following issues are excluded:

- the establishment or contesting of a parent-child relationship;
- decisions on adoption, measures preparatory to adoption or the annulment or revocation of adoption; the name and forenames of the child;
- emancipation; maintenance obligations;
- trusts or successions;
- measures taken as a result of criminal offences committed by children.⁵

The Brussels IIbis Regulation applies only to civil proceedings in matrimonial matters and parental responsibility issues. Regarding judicial proceedings, the application of Brussels IIbis Regulation is undisputable. Nevertheless, because of the great divergences in family law relations in the Member States of the European Union,⁶ the aspect of ‘civil proceedings’ must be interpreted broadly, meaning that the interpretation of ‘civil proceedings’ refers to the

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³ Article 1(1)(a) Brussels II bis Regulation.
⁴ Article 1(1)(b) Brussels II bis Regulation.
⁵ Article 1(3) Brussels II bis Regulation.
inclusion and acceptance of other non-judicial proceedings.\textsuperscript{7} For the most part it includes administrative proceedings occurring in matrimonial matters\textsuperscript{8} and excludes private and religious proceedings, because these proceedings do not have the binding effect necessary in the civil law.\textsuperscript{9}

The other aspect of the regulation is that it is applicable in \textit{civil matters}. The interpretation of this term must be given in ‘autonomous understanding’.\textsuperscript{10} This position in not something new\textsuperscript{11} and the CJEU has repeatedly held that, in order to ensure, as far as possible, that the rights and obligations which derive from the Brussels Convention for the Contracting States and the persons to whom it applies are equal and uniform, the terms of the provision should not be interpreted as a mere reference to the internal law of one or other of the States concerned. It was then concluded that:

\textquotedblleft[\textit{C}ivil and commercial matters\textit{’} must be regarded as an independent concept to be interpreted by referring, first, to the objectives and scheme of the Brussels Convention and, second, to the general principles which stem from the corpus of the national legal systems.\textsuperscript{12}\right.

This view of the CJEU regarding the term ‘\textit{civil and commercial matters}\textit{’} opens the possibility for the broadening of the term in its understanding to measures which, from the point of view of the legal system of a Member State, fall under public law.\textsuperscript{13}

The Brussels IIbis Regulation distinguishes between two types of family law cases—matrimonial (divorce, legal separation or marriage annulment) and parental responsibilities (attribution, exercise, delegation, restriction or termination of parental responsibility). The Regulation further gives a detailed list of parental responsibility issues that are referred to in Art.1 (2):

(a) rights of custody and rights of access;

(b) guardianship, curatorship and similar institutions;

\textsuperscript{7} Article 1(1) of Brussels IIbis Regulation states \’[w]hatever the nature of the court or tribunal\’
\textsuperscript{10} Case C-435/06, C., [2007] ECR I-10141 para 46.
\textsuperscript{12} Case C-435/06, C., [2007] ECR I-10141, para 40.
\textsuperscript{13} Case C-435/06, C., [2007] ECR I-10141, para 51.
(c) the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child;
(d) the placement of the child in a foster family or in institutional care;
(e) measures for the protection of the child relating to the administration, conservation or disposal of the child's property.

On the other hand, Article 1(3) of Brussels IIbis Regulation expressly excludes from its scope the establishment or contesting of a parent-child relationship, adoption, the name and forenames of the child, emancipation, maintenance obligations, trusts or successions, and measures taken as a result of criminal offences committed by children.

1.1.1 The Material Scope of the Brussels IIbis Regulation

1.1.1.1 Matrimonial matters covered by the Brussels IIbis Regulation

Early, in the development of the European community it was observed that the proper formation of the internal market cannot be achieved without adequate legal protection, because the economic life of the Community can be met with disturbances and difficulties, unless recognition and enforcement is possible through various rights arising from the existence of a multiplicity of legal relationships. From this assumption, it was concluded that:

[1]egal protection and in the end legal certainty in the common market are essentially dependent on the adoption of a satisfactory solution to the problem of recognition and enforcement.15

This has proven to be particularly important in family law matters because the achievement of the free movement of persons and increasingly frequent establishment of family links between individuals who are nationals and residents of different countries demand judicial responses, taking account of the various elements involved.16

On the other hand, the European Union went beyond mere economic integration and has involved itself in a great number of matters that fuse different legal, social, lingual circumstances. One of these matters are family matters. From the beginning of the European integration process it was recognized that there are ‘extreme divergences’ between systems of law regarding family matters even when the European community consisted of 6 Member

15 Ibid
16 Borras Report (n 8) 29.
and these divergences had become even more apparent in 1998 by the time the EU consisted of 15 Member States. Today the European Union consists of 29 Member States. One possible approach is the unification of substantive family laws of the EU Member States. However, this approach is far-reaching. Some efforts have been attempted for the unification and harmonization of family law in Europe by the Commission on European Family Law (CEFL) but great discrepancies are still present between the countries in the aspect of family law.

The Brussels IIbis Regulation applies to matrimonial matters. These matters per se relate to divorce, legal separation and marriage annulment, or as one commentary stated, about ‘dissolution and weakening of the marital bond’. The provisions of the Regulation concerning matrimonial matters were taken over and remain practically unchanged from the Brussels II Regulation, which itself was based on the provisions of the Brussels II Convention. This position of the legal sources provides for continuity and relates the decisions and the literature devoted to the Convention and the Brussels II Regulation to the present Regulation regarding matrimonial matters.

1.1.1.1 The term ‘marriage’

The meaning of the term ‘marriage’ since the definition of ‘Lord Penzance’ in the case Hyde v. Hyde has considerably changed. Today its meaning is not easy to define because the meaning of the term ‘marriage’ is burdened by the recent developments or changes in the conceptual understanding of marriage with questions such as: the proper form of marriage, heterosexual/homosexual marriages, and registered partnerships.

The Brussels IIbis Regulation is using the term ‘marriage’ assuming exclusion informal bonds and factual relationships. However if formless marriages are considered equal to marriage by the applicable national law, in such cases they can be taken into account. The term

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17 Jenard Report, (n 14) 10.
18 Borras Report (n 8) 29.
19 For the work of CEFL visit their web site (www.ceflonline.net)
20 Magnus U. and Mankowski P., Commentary on Brussels II bis Regulation, (n 9) 57.
22 [I] conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others [L.R.] 1 P. & D. 130, March 20 1866.
23 Magnus U. and Mankowski P., Commentary on Brussels II bis Regulation, (n 9) 57. This refers to the factual relationships under article 12 of the Slovenian marriage and Family relationships act, (Official Gazette of the Republic of Slovenia, 69/2004 – abridged text) and the legal consequences of these stable relationships involving de facto cohabitation
24 For example, Islamic marriages.
‘marriage’ is to be interpreted autonomously\(^{25}\) as any other term in the Regulation.

The two most controversial questions of the interpretation of the term ‘marriage’ are whether the Brussels IIbis Regulation covers registered partnerships and whether it applies to same-sex marriages.

The answer to the question about whether the registered partnerships fall into the scope of Brussels IIbis Regulation cannot be found in the Regulation itself, because it does not provide a definition of the term ‘marriage’. The answer to this question also cannot be found in the Borras report because it does not provide an interpretation of the term ‘marriage’.\(^ {26}\) This leaves space for argument on whether the drafters of the Regulation had only the traditional marital bond in mind, or if they wanted to incorporate the more modern forms of bonds between partners, such as registered partnerships. If we examine this problem through the historical method, we cannot say that the European legislators were unaware of this problem.\(^ {27}\) In the Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, the European legislators clearly emphasized the needs for future measures that had to be undertaken separately in ‘areas of family law covered by the Brussels II Regulation, and family situations arising through relationships other than marriage.’\(^ {28}\)

The CJEU in a judgment from 31 May 2001 in the Case D. and the Kingdom of Sweden v. Council of the European Union\(^ {29}\) undoubtedly drew the line between registered partnership and marriage and decided that registered partnership should be treated as being equivalent to

\(^{25}\) Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation, (n 9), 57

\(^{26}\) As Borras refers to this question ‘…the reference is only to the ‘marital bond’ and the text [of the Regulation] deliberately refrains from specifying whether it is a traditional marriage or a homosexual union… There is deliberately no attempt to be more specific either in the text itself or in the Borras report.’ Borras A., ‘From Brussels II to Brussels IIbis and Further’ in Boele-Woelki K., Gonzalez-Beilfuss C. (ed.) Brussels IIbis Its impact and Application in the Member States (Antwerp-Oxford, 2007) 9.

\(^{27}\) Denmark was the first state to recognize a legal relationship for same-sex couples, establishing ‘registered partnerships’ in 1989 until 2012 when the law was replaced with the same-sex marriage act. The following countries and territories in Europe followed such development: Iceland (1991; initially opposite-sex only, since 2006 gender-neutral); Norway (1993-2009; same-sex only); Sweden (1995-2009; same-sex only); Iceland (1996-2010; same-sex only); Greenland (1996; same-sex only); Netherlands (1998; gender-neutral); France (1999; gender-neutral); Belgium (2000; gender-neutral); Germany (2001; same-sex only); Finland (2002; same-sex only); Luxembourg (2004; gender-neutral); Andorra (2005; gender-neutral); United Kingdom (2005; same-sex only); Czech Republic (2006; same-sex only); Slovenia (2006; same-sex only); Switzerland (2007; same-sex only); Greece (2008; initially opposite-sex only, since 2015 gender-neutral); Hungary (2009; same-sex only); Austria (2010; same-sex only); Ireland (2011-2015; same-sex only); Isle of Man (2011; same-sex only); Liechtenstein (2011; same-sex only); Jersey (2012; same-sex only); Gibraltar (2014; gender-neutral); Malta (2014; gender-neutral); Croatia (2014; same-sex only); Andorra (2014; same-sex only); Cyprus (2015; gender-neutral); Estonia (2016; gender-neutral); Italy (2016; gender-neutral).


Within this decision, the CJEU firstly accepted that generally the term ‘marriage’ means a union between two persons of the opposite sex. Secondly, it recognized that there are increasing numbers of Member states that have introduced in their legal systems various statutory arrangements that grant legal recognition to various forms of unions between the partners of same or opposite sex and which have same or comparable certain effects both between the partners and as regard third parties. Then the CJEU concluded that the European community cannot interpret legal situations distinct from marriage in the same way as marriage, when these situations are treated differently even among the different Member States. In the outcome of the D. case the Commission accepted that Dutch ‘same-sex marriages’ fall within the concept of marriage as defined in the Stuff Regulation. This lead to a new Stuff Regulation which provides for the same treatment for all registered partnerships.

The situation with the same-sex marriages in the Brussels regime was slightly different. When Brussels II Convention and the Brussels II Regulation were drafted, same-sex marriages were unknown in the European Union. During the time of the drafting of the Brussels Iibis Regulation, same-sex marriages were generally a new legal phenomenon, only being known in the Netherlands, which had adopted a law allowing same-sex partners to conclude marriage. Two years later Belgium was the second country in Europe in which same-sex partners could conclude marriage. Thereof, the European legislator was familiar with the developments in the Netherlands and in Belgium, however it did not include them in the Regulation and decided to preserve the traditional marriage concept as a basis of the aforementioned legal instruments. On the other hand, the concept of marriage in the Brussels Iibis Regulation has to be interpreted autonomously in a European context, not as it is understood in the national laws of the EU Member states. A broad interpretation of the inclusion of same-sex marriages in the term ‘marriage’ was given in the Stuff Regulation. However, Commissioner Vitorino
in another answer to written question E-3261/01, drew a distinction between the interpretation of the term ‘marriage’ in the Stuff Regulation (which is based on substantive community law (art.1a of the Stuff Regulation and Art.9 of the European Charter of Fundamental Rights)) and that of Brussels II which is a private international law instrument. Continuing his answer the Commissioner concluded that:

[As regards the relations between ‘spouses’, its purpose is to establish rules on jurisdiction and to allow recognition in a Member State of a divorce, a separation or an annulment of marriage given in another Member State in accordance with the law which is applicable according to its private international law. Even if it cannot be excluded that the regulation applies to procedures concerning the divorce of a same sex couple, this does not translate into an obligation on the courts neither to pronounce or recognize the divorce nor to recognize the marriage.]

To include same-sex marriages in the term ‘marriage’ assumes a wide consensus between the Member States of the EU regarding this question. Practically it will mean that non-recognition on the basis of public policy would not be possible. Thirteen European countries of which 11 Member States of the EU have recognized same sex marriages and twenty European countries legally recognize some form of civil union. Still, there are a significant differences between member states in this field. At present, it is better not to have a wide teleological interpretation and assimilation of registered partnerships and same sex marriages into the term ‘marriage’, and keep the conjugal character of this term in the Brussels IIbis Regulation. The situation regarding registered partnerships is much clearer and there is greater consensus that these relationships fall outside the scope of the Brussels IIbis Regulation. However, adaptation to the factual situation will be necessary in near future, and the European legislature will need to adopt new instruments that will cover registered partnerships. Regarding the inclusion of same-sex marriages in the scope of the Brussels IIbis Regulation, it will have to wait until more countries of the European Union adopt it in their national legal

40 OJ C 28 E, 06/02/2003, p.2
41 Present Article 1d.
42 Answer given by Mr Vitorino on behalf of the Commission regarding the Written Question E-3261/01 of Mr Swibel (OJ C 28 E, 06/02/2003), 2.
43 ibid.
45 Belgium, Denmark, Finland (effective from 2017), France, Iceland, Ireland, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom.
46 Andorra, Austria, Belgium, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Liechtenstein, Luxembourg, Malta, the Netherlands, Slovenia, Switzerland and the United Kingdom.
47 Borras A., From Brussels II to Brussels II bis and Further, (n 26) 9.
systems and with that create a common ground for understanding this new legal phenomenon in a European context.  

1.1.1.1.2 Factual Relationships

For more than 35 years the legal tradition in Republic of Slovenia has equalized marriage and cohabitation in martial and family relations. This favorable approach towards factual relationships dates from 1922 when Slovenia was part of the Kingdom of Yugoslavia. The oldest legal act giving a certain legal status to cohabitants was the Yugoslav Act of Insurance of Workers, which allowed the cohabitant of the deceased worker to gain material support, if she lived with him for at least one year in cohabitation and if a child was born to them in cohabitation.

Article 12 (1) of the Marriage and Family Law Relations Act of Slovenia (Zakon o zakonski zvezi in družinskih razmerjih) provides that:

[A] durable living community of a man and a woman who have not concluded marriage shall have the same legal consequence for them under this Act as if they had concluded marriage, provided that there is no reason by which marriage between them would be invalid; in other fields such a community shall have legal consequences if the law determines so.

The legal consequences of cohabitants living in valid cohabitation is transferred to other fields of law such as: succession, tax law, social security, civil procedural law, criminal procedural law, insurance, etc.

The position of the cohabitants in other countries that have emerged from Socialist Federative Republic of Yugoslavia is more or less similar. Croatia which is now a Member State of the EU in its Family Act describes that the:

Provisions of this Law regulating the effects of cohabitation shall be applied to a relationship between an unmarried woman and unmarried man which lasts at least three years or less, under the condition that a child has been born during the period of cohabitation.

These factual relationships have certain family law legal effects regarding personal,

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50 Workers Insurance Act of 1922, Sluzbene novinie (Official Gazette of the Kingdom of Yugoslavia) 117/1922
51 Official Gazette SRS, no. 15/76 (Consolidated version with the amendments Official Gazette RS-MP, no. 69/04)
52 See Article 12(1) of the Law on Marriage and Family Relations of Republic of Slovenia
54 Family Act of Republic of Croatia, Official Gazette of Republic of Croatia no.75/14.
55 Article 11 paragraph 1 of Family Act of Republic of Croatia.
maintenance, and property matters and also have effects in other fields of law. However, factual relationships do not fall into the scope of the Brussels IIbis Regulation, because they do not involve a change in legal status and they do not require a formal approval for their dissolution.

1.1.1.1.3 Divorce

Divorce is now part of all legal systems of the Member States of the European Union. In the time of the drafting of the Brussels I Convention, the differences between the legal systems of the Member States regarding the status and legal capacity of natural persons, especially regarding divorce, were so drastic that there was fear that the Convention would become ineffective because of the excessive use of public policy by the courts. Because of the complexity of the issue and the fact that they did not directly affect economic integration, they were excluded from the scope of the Brussels I Convention.

The problems of the recognition of cross-border marriages between Germany and France fueled the need in the European Community for an extension to the Brussels I Convention which would cover status matters. The solution to this problem was envisaged in a Brussels II Convention which would cover matrimonial and parental responsibility issues regarding jurisdiction and enforcement of judgments on the basis of the Brussels I Convention. The Brussels II Convention was formally adopted in May 1998. As the Convention of 28 May 1998 was not ratified before the Amsterdam Treaty entered into force, its provisions were not applicable. The Amsterdam Treaty changed the legal basis for judicial

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57 Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation, (n 9) 59; Pintens W., (n49) 335, 338.
58 Last Member State of the EU to introduce divorce in its legal system was Malta. It amended its Civil Code which introduced divorce legislation in Malta with effect as of the 1 October 2011 (Civil Code (Amendment) Act, Act No. XIV of 2011)
59 Jenard Report (n 14) 10.
60 Borras Report (n 8) 29.
62 Status matters or legal capacity of natural persons were excluded out of the Brussels Convention (see Article 1 of the Convention).
64 The Member States on 28-th of May 1998 signed the Brussels II Convention and the Protocol on its interpretation by the Court of Justice (Official Journal C 221 of 16.07.1998). Explanatory reports on the Convention and the Protocol were approved on the same day however the Convention was not ratified by the Member States, see Shúilleabháin, M.,(n 63) 3.
65 Explanatory Memorandum of the Commission of the European Communities on the Proposal for a Council
cooperation in civil matters, which was incorporated into the EC Treaty (Article 65) and ultimately led to the Convention being converted into a Community instrument.

The present Brussels IIbis Regulation applies to divorce judgments irrespective of their form or grounds.\(^{66}\) It is specifically stated in recital (8) of the Regulation\(^{67}\) that reasons for grounds are excluded from the Regulation. This recital also excludes from the scope of the Regulation property consequences of marriage and any other ancillary measures. This in the view of the Member States presents a problem because the divorce proceedings extend to relations such as: maintenance relations, ancillary measures, common domicile etc.\(^{68}\) All of these consequences of the dissolution or the weakening of the marital bond leads to the ‘depecage’ or ‘splitting up’ of the issues related to them\(^{69}\) and are regulated by other EC instruments or international conventions, in absence of such instruments within national private international law.

As was stated above, the Brussels IIbis Regulation is confined to relations which are related to the dissolution or weakening of the marriage bond. The decisions which are related to the dissolution or weakening of the marital bond are in general constitutive judgments.\(^{70}\) It is only applicable to positive judgments, that is to say those that do in fact grant a divorce, legal separation or marriage annulment.\(^{71}\)

1.1.1.4 Legal Separation

The Brussels IIbis Regulation also applies to legal separation. This legal phenomenon is generally known to Member States\(^{72}\) that belong to the Romanic family of Law or where Catholicism and canon law have greater influences.\(^{73}\) Legal separation is not a divorce, but a

\(^{66}\) Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation, (n 9) 68.

\(^{67}\) Recital (8) of the Brussels IIbis Regulation

\[^{66}\]judgments on divorce… should apply only to the dissolution of matrimonial ties and should not deal with issues such as the grounds for divorce, property consequences of the marriage or any other ancillary measures.

\(^{68}\) Boele-Woelki K., Gonzales Beilfuss C., (n 44) 28.


\(^{70}\) Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation, (n 9) 65.

\(^{71}\) Borras Report (n 8) 48.

\(^{72}\) Belgium, France, Italy, Luxembourg, Portugal, Spain, Ireland, Malta, Poland, Denmark, Lithuania and the United Kingdom.

\(^{73}\) Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation, (n 9) 69.
‘weakening’ of the marital bound by a decision of a competent authority. Legal separation, unlike divorce, does not dissolve the marriage. The duty of support and the obligation of fidelity remain in most cases, but the duty of cohabitation is suspended. Legal separation exists in France, Ireland, Luxembourg, the Netherlands, Portugal, the United Kingdom, Italy, Belgium, Denmark, Spain, Lithuania, Poland and Malta. In the legal systems that have accepted this legal institution, it is possible to convert the separation into divorce.

1.1.1.5 Marriage annulment

The Brussels IIbis Regulation is also applicable in situations of marriage annulment. Generally, marriage annulment is part of the legal systems of most of the Member States with Sweden and Finland being the only exceptions. Sweden and Finland have abolished marriage annulment and in these countries only divorce proceedings are available. However, their proceedings correspond to annulment proceedings in any other legal system. In such cases if a divorce proceeding is pending in Sweden and Finland on whatever ground, the court in another Member State will stay its proceedings under Article 19(1) of the Brussels IIbis Regulation (lis pendens rule) and will not be able to decide on a subsequent annulment claim. Also their annulment in the form of divorce will be recognized in another Member State.

In Slovenia in its national legislation, void marriages are not predicted but all marriages with some kind of deficiency are treated as voidable, with a distinction being made between absolute voidability and relative voidability. It is provided that only action for divorce and

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74 The consequence of such act is that the duties of the marriage are redefined, the obligation of the spouses to live together and to build marriage community ends etc. See Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation, (n 9) 69.


76 See Article 5 of the Brussels IIbis Regulation


79 Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation, (n 9) 70.

80 For example, in Slovenia absolute conditions for nullity are: majority, if the spouses are under 15 years, if there is existing marriage, if the marriage is lacking of conjugal character, if the marriage was concluded without free consent, if the person or persons are mentally disturbed or legally incompetent, if the persons are closely related, if the marriage is concluded without the intention of the marital pair to live together or if it is concluded between adopter and adoptee. (Marriage and Family Relations Act, Part2 (2) and (4)).

81 In Slovenia conditions for relative nullity are: Conclusion without free will, if one year has passed since the force or the error was recognized, and the couple have lived for this time (article 39 MFRA); majority, if the person is above 15 years (Articles 23 and 24 MFRA); relatives, if the center for social work allows it (Article 23 and 24 MFRA).
action for annulment of the marriage can be initiated and therefore action for declaration of either existence or non-existence or nullity of marriage is not possible. Other Member States such as Slovakia distinguish between void and voidable marriages.

In the Brussels IIbis Regulation there is no clear standpoint on whether the term annulment covers only voidable marriages or it can be applied to void marriages. Additionally it is debated whether declaratory judgments which are related to the marriage annulment fall under the scope of this Regulation, or as in the case of divorce only the constitutive judgments do.

The term ‘annulment’ as any other term in the regulation needs to be interpreted autonomously. In cases of marriage annulment the Brussels IIbis Regulation should cover void and voidable marriages. However, there is the problem of which type of decision to use (or even whether there is a need for a judgment at all) regarding void marriages. Because these marriages are considered nonexistent, they are *ipso iure* null and are not required for nullification. It is considered that a declaratory judgment can, at most determine the nullity or the validity of the marriage. This presents a problem because regarding the type of judgments, as stated in Article 2(4) of the Brussels IIbis Regulation and in the Borras Report, the term judgment should refer only to constitutive judgments which create a new legal status. From the standpoint of the national legal systems, this could be a problem, especially of those systems that distinguish between void and voidable marriages. Some of the circumstances which are considered to be grounds for void marriages in others states will represent grounds for voidable marriage. The exclusion of such matters from the scope of the Regulation would represent a potential conflict of application.

### 1.1.1.2 Parental responsibility issues covered with the Brussels IIbis Regulation

The second aspect of civil matters covered by the scope of application of the Brussels IIbis Regulation are issues that are related to parental responsibility. These issues include

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84 See Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation, (n 9) 71.

85 ibid 72.

86 ibid 70.

87 Hatapka M., The impact and application of the Brussels IIbis Regulation in Slovakia (n 83) 250.
attribution, exercise, delegation, restriction, or termination of parental responsibility. The term ‘parental responsibility’ is a term generally used in international instruments and is considered to have different meaning in the Member States but with a common core of meaning.

The United Nations Convention on Rights of the Child was the first international instrument which referred to the parents ‘responsibilities for the upbringing and development of the child.’ This concept was used then as a basis for the substitution of the term ‘relationship subjecting the infant to authority’ used in the Hague Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect to the protection of infants for the term ‘parental responsibility’ in the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect to Parental Responsibility and Measures for the Protection of Children. Although by then it was a well-established term, the definition of ‘parental responsibility’ in the 1996 Hague Child Protection Convention would be important for the Brussels IIbis Regulation because it would be used as a basis for the definition provided in it.

With Regulation 1347/2000 (Brussels II Regulation), the EU then transformed the Brussels Convention of 1998 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters (the Brussels II Convention) according to the newly required competences as given under the Amsterdam Treaty. This Regulation applied to civil proceedings relating to divorce, legal separation or marriage annulment and in civil

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88 Article 1(1)(b) Brussels II Regulation.
90 Boele-Woelki K., Gonzales Beilfuss C., The Impact and Application of the Brussels IIbis Regulation in the Member States: Comparative Synthesis (n 44) 31.
91 The concept in all of the Member States encompasses care, protection, maintenance of the personal relationship, education, legal representation, the determination of child’s residence, and the administration of the child’s property. Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation, (n 9) 73.
92 Article 18(1) UN Rights of the child Convention.
95 Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation, (n 9), 73. Also for the relationship between the 1996 Hague Child Protection Convention and the Brussels IIbis Regulation see text to n 122 Part II ch II sec 2.2.
96 Article 1(a) Brussels II Regulation.
proceedings relating to parental responsibility for the children of both spouses on the occasion of the matrimonial proceedings but which were connected to divorce, legal separation or marriage annulment.\textsuperscript{97} In the Brussels II Regulation there were two limitations. Firstly the Brussels II Regulation took on parental responsibility issues only if they were in a close conjunction with divorce, legal separation or marriage annulment.\textsuperscript{98} The second limitation was that it applied only to the children of both spouses, thus excluding children of one of the spouses.\textsuperscript{99}

These limitations were the reason for the EU legislators to adopt the new Brussels IIbis Regulation only two years after the adoption of the Brussels II Regulation.\textsuperscript{100} The new Regulation now ensures equality of all children and applies to all decisions issued by a court of a Member State in matters of parental responsibility, regardless of whether the parents are or were married and whether the parties to the proceedings are or are not both biological parents of the child in question.\textsuperscript{101} Also the Regulation does not require a link between parental responsibility proceedings and matrimonial proceedings. In the context of the term ‘parental responsibility’ a definition is given on the basis of the definition provided in the 1996 Hague Convention.\textsuperscript{102} It then enumerates a list of matters qualified as ‘parental responsibility’ matters that are included and excluded from the scope of application, which generally correspond with Articles 3 and 4 of the 1996 Hague Convention.\textsuperscript{103}

The term ‘parental responsibility’ in the Brussels IIbis Regulation is elaborated on in more detail as being the opposite of the same term regarding matrimonial matters. It covers the attribution, exercise, delegation, restriction, or termination of parental responsibility. Its autonomous interpretation in the Regulation is reaffirmed in Article 2(7) where a definition is given stating that the term ‘parental responsibility’ means:

\begin{quote}
[a]ll 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 also shall include rights of custody and rights of access.\textsuperscript{104}
\end{quote}

The idea of the EU legislators was to clarify the rights and duties included in the term, so it went even further specifying precisely: rights of custody and rights of access;

\textsuperscript{97} Article 1(b) Brussels II Regulation.
\textsuperscript{98} See Article 3(3) Brussels IIbis Regulation.
\textsuperscript{99} See Recital 11 of Brussels IIbis Regulation.
\textsuperscript{100} See Recital (5) and (6) of Brussels IIbis Regulation.
\textsuperscript{101} Practice Guide for the application of the Brussels Iia Regulation (n 21) 8.
\textsuperscript{102} Article 1(2) of the Hague Convention 1996.
\textsuperscript{103} Article 3 and 4 of the Hague Convention 1996. See also Borras A., From Brussels II to Brussels II bis and Further, (n 26) 10.
\textsuperscript{104} Article 2(7) Brussels IIbis Regulation.
guardianship, curatorship and similar institutions; the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child; the placement of the child in a foster family or in institutional care; measures for the protection of the child relating to the administration, conservation or disposal of the child's property. This list of matters qualified as 'parental responsibility’ is not exhaustive, but merely illustrative. For example, Article 1(2) (d) provides that the placement of a child in a foster family or in institutional care is a civil matter which falls within the regulation’s scope of application, but does not mention taking a child into care. However in the case C. it was ruled that taking a child into care and placement are decisions which relate to parental responsibility and that:

[...]the exclusion of a decision to take a child into care from the scope of Regulation No 2201/2003 would be likely to undermine the effectiveness of that regulation in Member States in which the protection of children, including their placement, requires the adoption of several decisions. Moreover since, in other Member States, such protection is afforded by means of a single decision, there is a risk that the equal treatment of the children concerned would be compromised.

All of these legal issues which are defined by Brussels IIbis Regulation are given an autonomous definition which is independent of the law of Member States. It follows from the need for uniform application of European Union law and from the principle of equality that the terms of a provision of that law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Union, having regard to the context of the provision and the objective pursued by the legislation in question.

From the material scope of the Regulation the legislators excluded: the establishment or contesting of a parent-child relationship; decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption; the name and forenames of the child;
emancipation; maintenance obligations; trusts or successions; and measures taken as a result of criminal offences committed by children.\textsuperscript{111}

1.1.2 Territorial Scope of the Brussels IIbis Regulation

The territorial scope of application of the Brussels IIbis Regulation generally corresponds with Article 52 TEU (ex Art.299 EC Treaty) and applies to every Member State of the European Union except Denmark. Denmark refrained from the communitarisation of the measures under Title V of Part III of the TFEU, Art.67 et seq. (ex Title IV of Part III of the EC Treaty, Arts 61 et seq.) The Regulation is therefore not applicable in Denmark.

Regarding jurisdiction, the necessary territorial element linking the dispute and the forum is for the habitual residence of one of the spouses or of the child to be found in one of the Member States.\textsuperscript{112} The territorial connecting factor regarding the recognition and enforcement of judgments is that the judgment is rendered by a court located in a Member State to which the Regulation extends.\textsuperscript{113}

1.1.3 Temporal scope of Brussels IIbis Regulation

The temporal scope of Brussels IIbis Regulation is provided in article 64, in which a distinction is made between temporal applicability to jurisdictional issues\textsuperscript{114} and to the recognition and enforcement of judgments.\textsuperscript{115} In most cases the temporal scope is limited in the aspect that it does not have retroactive effects.\textsuperscript{116} For the most of the EU Member States\textsuperscript{117} the date when the regulation went into effect was 1 March 2005, as for Bulgaria and Romania this was 1 January 2007 and for Croatia it was 1 July 2013.\textsuperscript{118}

This principle of non-retroactivity is applied in the cases regarding legal proceedings instituted, to documents formally drawn up or registered as authentic instruments, and to

\textsuperscript{111} Article 1(3) Brussels IIbis Regulation.
\textsuperscript{112} Articles 3 and 8 of the Brussels IIbis Regulation. These jurisdictional are not exclusive, jurisdiction can be determined according to the nationality/domicile of both of the spouses (Article 3(1)(b)), choice of court agreement (Article 12(1)) or presence of the child (Art.13).
\textsuperscript{113} Articles 21(1) and 28 of the Brussels IIbis Regulation.
\textsuperscript{114} Article 64(1) of the Brussels IIbis Regulation.
\textsuperscript{115} Articles 64(2)-(4) of the Brussels IIbis Regulation.
\textsuperscript{116} de Boer Th.M., \textit{What We Should Not Expect From a Recast of the Brussels IIbis Regulation}, Nederlands Internationaal Privaatrecht (NIPR), Issue 1, (2015) 12.
\textsuperscript{117} Except Denmark
agreements concluded between the parties after the date of application of the Regulation as provided in article 72. Regarding recognition and enforcement a more detailed and complex system is provided in Article 64(2)-(4). Also here the principle of non-retroactivity is applied with an exception given in Article 64(2) which extends the even more favorable rules on recognition and enforcement as implemented by the Regulation under specified circumstances to judgments given before the regulation entered into force.

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119 Article 64(1) of the Brussels IIbis Regulation.
120 Article 72 states:
‘This Regulation shall enter into force on 1 August 2004.
The Regulation shall apply from 1 March 2005, with the exception of Articles 67, 68, 69 and 70, which shall apply from 1 August 2004.
This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.’
121 For more on the transitional provision system provided in the Brussels IIbis Regulation see, Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation, (n 9) 434-445.
Chapter II The Relationship between the Brussels IIbis Regulation and the Hague Conventions

One specific problem of the European Union is the correlation and coordination of legal sources that cover subjects that can be resolved under two or sometimes more international agreements and specific EU Regulations. These matters are specific because the Member States of the European Union are at the same time signatories to these international agreements and they are also bound by EU Regulations. This problem can be resolved by the establishment of a ‘hierarchical correlation’ between these legal sources. One of these matters, that is regulated by a large number of international agreements and EU Regulations, is the position of the child in the determination of parental responsibilities in the cases that fall under the scope of the 1996 Hague Child Protection Convention and the pathological aspect of the determination of parental responsibilities in cases of child abduction, which fall under the scope of the 1980 Hague Child Abduction Convention.

2.1 1980 Hague Child Abduction Convention

The Hague Convention of 25 October 1980 on the Civil Aspects of International Child abduction (1980 Hague Child Abduction Convention) has been ratified by all the Member States of the European Union and continues to apply in cases of child abduction between Member States. On the other hand, the 1980 Hague Convention is supplemented by certain provisions of the Regulation, where in relations between Member States, the rules of the Regulation prevail over the rules of the Convention in so far as it concerns matters governed

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124 The 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
126 See Article 11 of the Brussels IIbis Regulation.
When the Brussels II Regulation was drafted, there were two different views among the Member States regarding the future of international child abduction. The first view was to create EU rules for the return of children which would be applicable only to EU countries, and the other view considered that such an approach would undermine the 1980 Hague Child Abduction Convention, which by then was signed and ratified by 74 states. The result of these differences was Article 37 of the Brussels II Regulation, by which precedence of the Regulation over some international agreements was determined. The Hague Abduction Convention wasn’t among these international agreements, because it was tendentiously left out. The Regulation itself referred to a conformal application of both instruments. However, this position was changed in Brussels IIbis Regulation.

The relationship between the Brussels IIbis Regulation and the 1980 Hague Child Abduction Convention is regulated in Article 60 of the Regulation, which provides for precedence of this EU instrument over enlisted international agreements, which includes the 1980 Hague Child Abduction Convention. In this article, supremacy is conferred to the Regulation over the 1980 Hague Child Abduction Convention. This ultimately leads to different outcomes on the return of children. However this result is just a starting point. Essentially, the Brussels IIbis Regulation adopts a compromise between the different positions of the Member States concerning this question. It actually ‘adapts’ the Hague Abduction Convention for the needs of the EU Member States. Instead of creating new rules for the return of abducted children that will be applicable in the EU, the rules of the Brussels IIbis Regulation are founded on the basis of the 1980 Hague Child Abduction Convention with an additional task of strengthening the procedure for the return of abducted children. It remains in force between the Member States, however matters that are covered by the rules of the

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127 Text to n 807 Part II ch V sec 5.2.2.1.
129 See Article 37 Brussels II Regulation.
130 Article 4 provides ‘The courts with jurisdiction within the meaning of Article 3 shall exercise their jurisdiction in conformity with the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, and in particular Articles 3 and 16 thereof.’
133 In the Rinau Case, it is reaffirmed that the guiding principles of the 1980 Hague Child Abduction Convention ‘were taken over’, meaning that they were adopted (together with the Brussels Convention) in matrimonial matters and matters of parental responsibility. See, Case C-195/08 PPU Inga Rinau [2008] ECR I-05271, para 48.
134 Art. 62 Brussels IIbis Regulation.
Brussels Iibis Regulation have precedence over the rules of the Hague Abduction Convention. As for the rules not covered by the Regulation, the Convention rules apply. It can be said that the instruments are ‘complementary’.  

This position was also reaffirmed in the Rinau case. In the case it was stated that the 1980 Hague Convention was adopted in the interest of children and that the guiding principles of the Convention with respect to matrimonial matters and matters of parental responsibility are also implemented in the Regulation. Further, AG Kokott in the opinion delivered on 29 January 2009 Case C-523/07, held the position, which was rendered in the Rinau case, that:  

[B]oth provisions pursue the aim that abducted children should return immediately to the State in which they had their habitual residence before the unlawful removal. That coordination also makes a uniform understanding of the concept of habitual residence necessary.

It can be concluded that the Brussels Iibis Regulation adopts the guiding principles of the 1980 Hague Child Abduction Convention. This is especially important because it provides continuity of the uniform understanding of the concepts provided in the 1980 Hague Child Abduction Convention, the case law, and the relevant writings by distinguished scholars.

### 2.2 1996 Hague Child Protection Convention

This Convention has the broadest scope of the Hague Conference’s children conventions and contains three types of rules. Firstly there are the procedural rules that refer to the determination of the jurisdiction and the recognition and enforcement; secondly there are the conflict of law rules that refer to the determination of the applicable law, and thirdly, the substantial number rules that refer to the cooperation between the authorities. The rationae materiae given in Articles 3 and 4 of the Convention is two-folded: On one hand it is illustrative (but it is a rather complete enumeration of the measures of protection which fall under the scope of the Convention), and on the other hand the matters which are excluded from the scope of the Convention are given in a numerus clausus manner, meaning that the issues

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137 Case C-195/08 PPU Inga Rinau [2008] ECR I-05271 para 48, 49 and 62
141 Article 3 of the 1996 Hague Child Protection Convention uses the phrase ‘…may deal in particular with…’ meaning that the ‘measures for protection’ are not exhaustive and are enumeration of issues on which these measures might bear, as some kind of examples that might be contained in the meaning of Article 3. (Lagarde Report, (n 93) 547, para18).
which are excluded in Article 4 are exhaustive.\textsuperscript{142} The measures provided in the Convention are refer to:

a) the attribution, exercise, termination or restriction of parental responsibility,\textsuperscript{143} 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 a \textit{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.\textsuperscript{144}

The issues which are excluded from the scope of application are given in Article 4 of the Convention and they refer to:

a) the establishment or contesting of a parent-child relationship;
b) decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption;
c) the name and forenames of the child;
d) emancipation;
e) maintenance obligations;
f) trusts or successions;
g) social security;
h) public measures of a general nature in matters of education or health;
i) measures taken as a result of penal offences committed by children;
j) decisions on the right of asylum and on immigration.

\textsuperscript{142} Lagarde Report, (n 93) 549, para 26.
\textsuperscript{143} For the purposes of this Convention, the term ‘parental responsibility’ includes parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child. (Article 1(2) of the 1996 Hague Child Protection Convention).
\textsuperscript{144} Article 3 of the 1996 Hague Child Protection Convention.
This coverage of issues given in the scope of the 1996 Hague Child Protection Convention results in for minimum risks of leaving gaps in the coverage.\textsuperscript{145} The \textit{ratione personae} is given in Article 2 of the Convention, and establishes application of the Convention towards children from the moment of their birth until they reach the age of 18 years.

The Brussels Ibis Regulation and the 1996 Child Protection Convention are very closely connected. The Convention acted as a primary foundation for those parts of the Regulation that regard with parental responsibility.\textsuperscript{146} It is in force among most of the Member States\textsuperscript{147} and other non-EU states.\textsuperscript{148} The Convention does not contain a adhesion clause for the Regional Economic Integration Organizations (REIO) and thus the Member States of the European Union must ratify the Convention themselves and also on the behalf of the European Union.\textsuperscript{149} The Brussels Ibis Regulation takes precedence over the 1996 Child Protection Convention, in the case that the child’s habitual residence is in a Member State.\textsuperscript{150} In another situation, when a judgment is rendered in another Member State, the recognition and enforcement is conducted on the basis of the rules in the regulation, even if the child was habitually resident in a country that is a member of the 1996 Child Protection Convention but is not a Member State of the European Union.\textsuperscript{151}

The 1996 Hague Child Protection Convention is particularly important in the EU because the Brussels Ibis Regulation is limited regarding the determination of the applicable law in parental responsibility issues. The main focus of the Brussels Ibis Regulation is the determination of jurisdiction, recognition and enforcement of foreign judgments and cooperation between the Member States of the EU. The 1996 Child Protection Convention, however, contains conflict of law rules for the determination of the applicable law in the cases of child protection. Such rules are not provided in the Brussels Ibis Regulation. This means that between the Member States of the EU, the determination of the applicable law is still determined by the 1996 Convention, even if the jurisdiction is based on the Regulation.\textsuperscript{152}

\textsuperscript{145} Lagarde Report, (n 93) 549, para 26.
\textsuperscript{146} Magnus U. and Mankowski P., Commentary on Brussels Ibis Regulation, (n 9), 430.
\textsuperscript{148} Albania, Armenia, Australia, Dominican Republic, Ecuador, Georgia, Lesotho, Monaco, Montenegro, Morocco, Russian Federation, Switzerland, Ukraine and Uruguay. USA have signed the Convention, but still have not ratified it (last seen on 24.02.2014 http://www.hcch.net/index_en.php?act=conventions.status&cid=70).
\textsuperscript{149} Magnus U. and Mankowski P., Commentary on Brussels Ibis Regulation, (n 9) 111.
\textsuperscript{150} Art. 61 (a) Brussels Ibis Regulation.
\textsuperscript{151} Art. 61 (b) Brussels Ibis regulation.
\textsuperscript{152} Magnus U. and Mankowski P., Commentary on Brussels Ibis Regulation, (n 9) 432.
Chapter III Jurisdictional regime in the Brussels IIbis Regulation

3.1 General

The Brussels IIbis Regulation is constructed to maintain and develop the EU as an area of freedom, security, and justice in which free movement of persons is assured. In order to do so, it contains unified rules on jurisdiction in the areas of matrimonial matters and parental responsibility with the purpose being to assure the free movement of persons and the functioning of the internal market.\(^{153}\) This ultimately leads to faster and simpler cross-border litigation within the EU. The jurisdictional rules in the Brussels IIbis Regulation regarding matrimonial matters are given in Chapter II Section 1, articles 3, 4 and 5 while the jurisdictional rules regarding parental responsibility issues can be found in Chapter II Section 2, Articles 8-15. To have more detailed understanding of the jurisdictional system of the Brussels IIbis Regulation, this chapter will follow the systematization of the regulation. Firstly it will analyze the jurisdictional rules for matrimonial matters, then the jurisdictional rules regarding parental responsibility issues will be addressed. Additionally, this chapter will deal with rules regarding continuing jurisdiction of the child’s habitual residence, jurisdiction in cases of child’s abduction, prorogation of jurisdiction, jurisdiction based on the child’s presence, residual jurisdiction, and rules regarding the transfer of the jurisdiction.

3.2 Jurisdiction regarding matrimonial matters

Article 3 of the Brussels IIbis Regulation is the main provision that sets the rules on international jurisdiction in matrimonial matters. This rule contains seven alternative jurisdictional criteria, and it is divided into two categories, the first being based on habitual residence\(^{154}\) and the second being based on nationality or domicile.\(^{155}\) The ‘habitual residence’ criteria determines jurisdiction with the courts of the Member State in which:

- both spouses have their habitual residence;
- the spouses had their last habitual residence, if one of the spouses still lives there;
- the respondent habitually resides;
- in the case of joint application, one of the spouses is habitually resident.

\(^{153}\) Recital (1) and (4) of the Brussels II Regulation.

\(^{154}\) Article 3(1)(a) of Brussels IIbis Regulation

\(^{155}\) Article 3(1)(b) of Brussels IIbis Regulation
The other two ‘habitual residence’ criteria are subject to specific conditions, namely the elapsing of a certain period of time. The jurisdiction lies with the courts of the Member States where:

- the applicant habitually resides for a period of at least a year immediately prior to the application;
- the applicant habitually resides for a period of at least six months immediately prior to the application, and providing that he/she was a national of said Member State (domicile, concerning UK and Ireland).

The second category is based on nationality/domicile criteria. The jurisdiction is based in the territory of a Member State where both of the spouses have their nationality (in the case of UK and Ireland, have their domicile). Article 4 and 5 are jurisdictional rules that cover a smaller area: the cases of counterclaims and conversion of legal separation into divorce. In the case regarding counterclaims, the Regulation adopts the classic solution—the court having jurisdiction to hear a claim or proceeding in accordance with Article 3 of the Regulation also has jurisdiction to hear the counterclaim. Article 3(1) (a) and (b) of Regulation No 2201/2003 lays out a number of grounds for jurisdiction, without establishing any hierarchy. All the objective grounds set out in Article 3(1) are alternatives and there is no order of precedence between these jurisdictional criteria. In that context, the CJEU in the case Hadadi concluded:

[T]he system of jurisdiction established by Regulation No 2201/2003 concerning the dissolution of matrimonial ties is not intended to preclude the courts of several States from having jurisdiction. Rather, the coexistence of several courts having jurisdiction is expressly provided for, without any hierarchy being established between them.

The structure and the jurisdictional criteria of Article 3 of the Brussels IIbis Regulation has been taken from the Article 2(1) of the Brussels II Regulation. Both of these rules are substantially similar to the rules provided in Article 2(1) of the Brussels II Convention. In most of the cases these rules are based on the “habitual residence” criterion and accordingly they can apply to a national of a non-Member State who is a resident in the EU.

According to Article 6, the jurisdictional criteria in the Brussels IIbis Regulation are exclusive and a spouse who is habitually resident in the territory of a Member State or is a

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156 Article 4 of Brussels IIbis Regulation.


158 Ibid para 49.

159 Shúilleabháin, M.N., (n 63) 133.

160 One ambiguity could arise because of the same term used in different context in Article 22 of the Brussels I Regulation (Article 24 of the recast). More appropriate term for Article 6 of the Brussels IIbis Regulation would be ‘exhaustive’ because the term ‘exclusive’ would confer more to situations such as those provided in Article 22.
national of a Member State, or, in the case of the United Kingdom and Ireland, has his or her
‘domicile’ in the territory of either the U.K. or Ireland, may be sued in another Member State
only (exclusively) in accordance with Articles 3, 4 and 5. If jurisdiction cannot be established
in the courts of a Member State on none of the connecting factors provided in the Regulation,
then the jurisdiction will be determined by the national jurisdictional rules.\textsuperscript{161} To use these
rules, the applicant must be a national of a Member State, habitually resident in another
Member State, or the respondent must habitually reside outside the Member States and must
not be a national of a Member State (domicile in UK and Ireland case).\textsuperscript{162}

The term of this type of jurisdiction is ‘residual’ in view of its nature and the place it
occupies in relation to the grounds of jurisdiction established by the Regulation.\textsuperscript{163} This concept
being understood as referring to cases where the European law currently does not provide
uniform grounds of jurisdiction, but rather borrows the rules of national law.\textsuperscript{164} Two general
restrictions appear. Firstly, where, in divorce proceedings, if a respondent is not habitually
resident in a Member State and is not a national of a Member State, the courts of a Member
State cannot base their jurisdiction to hear the petition on their national law, if the courts of
another Member State have jurisdiction under Article 3 of Brussels II\textsuperscript{bis} Regulation\textsuperscript{165} and have
to declare of their own motion under Article 17 that it has no jurisdiction.\textsuperscript{166} Secondly, the
national rules on residual jurisdiction which establish this right differ and do not always
guarantee access to court on the basis of the nationality of one of the spouses.\textsuperscript{167} This may
result in cases arising that are not admissible in any court in a given Member State or in a third
country.\textsuperscript{168} For example, German courts have international jurisdiction when (1) one spouse is
German or was German when the marriage took place; (2) one spouse is stateless and is

\textsuperscript{161} Article 7(1) of the Brussels II\textsuperscript{bis} Regulation.
\textsuperscript{162} Article 7(2) of the Brussels II\textsuperscript{bis} Regulation.
\textsuperscript{163} Borras Report (n 26) 43.
\textsuperscript{164} General Report, Study on Residual Jurisdiction (Review of the Member States’ Rules concerning the ‘Residual
Jurisdiction’ of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations),
prepared by Prof. Arnaud Nuyts (http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf)
\textsuperscript{166} Practice Guide for the application of the Brussels II\textsuperscript{a} Regulation (n 21) 14.
\textsuperscript{167} Study to inform a subsequent Impact Assessment on the Commission proposal on jurisdiction and applicable
law in divorce matters drawn up by the European Policy Evaluation Consortium (EPEC) - Commission Staff
\textsuperscript{168} Ibid 50.
habitually resident in Germany; or (3) one spouse is habitually resident in Germany, except where any judgement reached in their case could not be recognized in any of the States to which either spouse belongs\textsuperscript{169}; Austrian courts have jurisdiction where (1) one of the spouses has Austrian citizenship or (2) the defendant has its habitual residence in Austria or (3) the claimant has its habitual residence in Austria. Austrian jurisdiction is also applied if the spouses either had their last common residence in Austria or the claimant has no citizenship or at the time of marriage had Austrian citizenship\textsuperscript{170}; in France according to Article 14 of the Civil Code, French courts can have jurisdiction if the petitioner had French nationality.\textsuperscript{171} According to Article 48(1) of the Slovenian PILP Act, if the defendant’s permanent residence is in Slovenia then Slovenian courts shall have jurisdiction. But even when the defendant lacks domicile in Slovenia, the courts of Republic of Slovenia shall have jurisdiction (1) if both spouses are Slovene citizens, regardless of where they have their permanent residence; (2) if the applicant is a Slovene citizen with permanent residence in Slovenia; (3) if the last joint permanent or temporary residence of the spouses was in Slovenia and the plaintiff still has residence in Slovenia\textsuperscript{172}; or (4) if both spouses are foreign citizens and their last joint permanent residence was in Slovenia, but the defendant does not object to jurisdiction and if the regulations of the country of the spouses’ citizenship permit such jurisdiction.\textsuperscript{173}

Overall the solutions given in these rules are inflexible, mandatory, and strict and do not leave any degree of discretion to the judge\textsuperscript{174} and because of that they have been largely criticized.\textsuperscript{175} The main problem lies in the alternative, rather than hierarchical jurisdictional criteria which together with the disharmonized conflict-of-law rules\textsuperscript{176} causes ‘rush to the court’ in the EU by the spouses. Further, with Article 19 which establishes the priority of the court first seized (lis pendens rule), the situation becomes unsolvable. In such situations ‘rush to the court’ is seen as obstacle in the mitigation of the consequences of divorce, where the spouses

\textsuperscript{169}Sections (1), (3) and (4) of Article 606 of the German Code on Civil Procedure (Zivilprozessordnung) (ZPO)

\textsuperscript{170}§ 76 par. 2 Jurisdiktionsnorm (JN)

\textsuperscript{171}Article 14 of the French Civil Code (Code civil des Français)

\textsuperscript{172}Article 68 of the PILP Act of Slovenia (Zakon o mednarodnem zasebnem pravu in postopku) (ZMZPP).

\textsuperscript{173}Article 69 of the PILP Act of Slovenia. More on the position of Republic of Slovenia see Galič A., The impact and application of the Brussels Ibis Regulation in Slovenia, (n 82) 266.

\textsuperscript{174}Magnus U. and Mankowski P., Commentary on Brussels Ibis Regulation, (n 9) 43.


\textsuperscript{176}Rome III Regulation in the area of conflict of laws regarding divorce is applicable only in 16 Member States based on the ‘enhanced cooperation’ procedure.
are positioned to plead in front of court that can apply substantive rules to which the defendant does not feel closely connected or which fail to take into account his/her interests. In line with this reasoning is the possibility of introducing of party autonomy in matrimonial matters, where the spouses could designate the competent court by common agreement. There is an ongoing trend in the PIL regulations of the EU (Maintenance Regulation or Succession Regulation) where such possibility is being introduced. This will allow the spouse to determine the legal system to which they have a close connection. However, they will have to demonstrate a connection with that system, which will make party autonomy in certain aspects limited. During the negotiations and the drafting of the Matrimonial Property Regulation the possibility was also introduced. Although this regulation didn’t come into force, the rules still give some guidelines where the future working on the concept of party autonomy in the new Brussels Ibis Regulation could find inspiration.

3.3 Jurisdiction regarding parental responsibility issues

The jurisdictional rules regarding parental responsibility issues are given in Chapter II Section 2, articles 8-15 in the Brussels IIbis Regulation. In most cases, the main connecting factor and the main jurisdictional criterion, is the place where the child has his/her habitual residence. It is the main jurisdictional criteria for determining the forum in which parental responsibility is decided, and is of great importance in child abduction cases. Further, as a criterion it is of paramount importance in determining the continued jurisdiction of the child's former habitual residence and also on the jurisdiction based on the child’s presence. So for the purpose of proper determination of the jurisdiction of courts of Member States, according to the Brussels IIbis Regulation, it is of essence to choose the modalities of the determination of the child’s habitual residence.

178 Article 4 of the Maintenance Regulation.
179 Article 5 of the Succession Regulation.
181 ibid.
183 Art.8 Brussels IIbis Regulation.
184 Art.10 Brussels IIbis Regulation.
185 Art 9 Brussels IIbis Regulation.
186 Art.13 Brussels IIbis Regulation.
3.3.1 ‘Child’s habitual residence’ in the Brussels IIbis Regulation

In legal theory there have been several attempts to propose a definition and to explain the legal institution of the ‘child’s habitual residence.’ Its main significance is that this legal institution is a modern one and is not burdened by several definitions and redefinitions. It is accepted that the determination of habitual residence is a matter of facts rather than legal definitions.\textsuperscript{187} In fact, one of the main reasons why this institution is preferable over the domicile is that there is a need to avoid the confusion which has arisen due to an unclear understanding of the circumstances, which are the primary contributor to the establishment or loss of domicile.\textsuperscript{188} As one commentary explains:

\begin{quote}
...this has been a matter of deliberate policy, the aim being to leave the notion free from technical rules which can produce rigidity and inconsistencies between different legal systems.\textsuperscript{189}
\end{quote}

On the other hand there is a certain paradox where in all of the cases in which there is a need to determine the habitual residence (especially in common law countries), they tend to define the subject, as well as create a list of factors or circumstances which will together amount to the creation or loss of habitual residence in a certain territory.\textsuperscript{190} These circumstances, together with the absence of definitions in the Hague Conventions, create space for a different understanding of habitual residence before the courts of different legal systems. It is to the law of the forum to determine, in each factual situation, whether the parents or child/children have habitual residence. The vast number of judicial decisions allows for the proper understanding and the correct determination of habitual residence.

Legal theory and practice together take the same approach. For example, according to Cheshire, North u Fawcett there is no certain definition for habitual residence, and in support of this argument it refers to the court decision rendered by ‘Lord Scarman’ in the case Barnet London Borough Council, ex p Shah\textsuperscript{191} that holds that there is no difference in principle between the traditional concept of ordinary residence and the more contemporary concept of habitual residence and that they both refer to:

\begin{quote}
[a] person’s abode in a particular place or country which he has adopted voluntary and for settled
\end{quote}

\textsuperscript{187} The reporter of the 1980 Hague Abduction Convention, didn’t refer to this concept since it was ‘well established concept in the Hague Conference’ and it is ‘a question of pure fact’. See Perez-Vera report, Actes et Documents de la Quatorzieme Session, October 1980, Vol III par. 66, 445.


\textsuperscript{189} Morris J.H.C., Dicey and Morris on the Conflict of Laws (10th ed. 1980) 144


purposes as part of the regular order of his life for the time being, whether of short or of long duration.\textsuperscript{192}

A similar approach was taken in a CJEU case, \textit{Swaddling v. Adjudication Officer},\textsuperscript{193} where the Court stated that the Member State in which the person resides is

\[\text{[t]he State in which the persons concerned habitually reside and where the habitual center of their interests is to be found}.\textsuperscript{194}\]

In this case the Court elaborated in detail on the circumstances that should be of particular focus in the determination of the habitual center of interest such as: the employed person's family situation; the reasons which have led him to move; the length and continuity of his residence; the fact (where this is the case) that he is in stable employment; and his intention as it appears from all the circumstances.\textsuperscript{195}

In another statement given by Lord Slynn in an opinion of the House of Lords, regarding the case \textit{Nessa v Chief Adjudication Officer},\textsuperscript{196} it was held that there is no actual definition of habitual residence and that the fact-finding approach must be applied. The factors, among others, which have to be taken into account in determining habitual residence are steps like bringing possessions, doing everything necessary to establish residence before coming, having a right of abode, seeking to bring family, and ‘durable ties’ with the country of residence or intended residence.\textsuperscript{197}

Perhaps the most influential definition of the term ‘habitual residence’ comes from the English case of \textit{reBates}. In this case, at first the court concluded that the notion of habitual residence has to be freed from technical rules, which can produce rigidity and inconsistencies between legal systems, and that the facts and circumstances of each case should be assessed without resorting to presumptions or presuppositions.\textsuperscript{198}

Then it gave the following definition:

\[\text{[T]here must be a degree of settled purpose. The purpose may be one or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. That is not to say that the propositus intends to stay where he is indefinitely. Indeed his purpose while settled may be for a limited period. Education, business or profession, employment, health, family or merely love of the place spring to mind as common reasons for a choice of regular abode, and there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of}\]

\textsuperscript{192} Fawcett J. and Carruthers J., (n 139) 185.
\textsuperscript{193} Case C-90/97, \textit{Robin Swaddling v Adjudication Officer} [1999], ECR I-1075.
\textsuperscript{194} ibid para 29.
\textsuperscript{195} ibid.
\textsuperscript{196} [1999] 1 WLR 1937 (HL).
continuity to be properly described as settled.\footnote{ibid.}

The United States’ approach is similar to the course taken by the English courts. In the understanding of the term habitual residence, the American legal system has a more practical approach. The American approach opposes giving the term ‘habitual residence’ a strict definition and is in favor of instructing the court to interpret the expression ‘habitual residence’ according to:

\[
\text{[t]he ordinary and natural meaning of the two words it contains [as] a question of fact to be determined by references to all the circumstances of any particular case.}\footnote{Mozes v. Mozes 239 F. 3d at 1071.}
\]

The term should be interpreted from the child’s perspective\footnote{Friedrich v. Friedrich 983 F.2d 1396, 1401 (6th Cir 1993), 78 F.3d 1060 (6th Cir 1996).} and in the context of his family and social environment in which his or her life has developed.\footnote{Perez Vera Report, (n 187) 428.} The main factors that predetermine the habitual residence are based on cultural, educational and social experiences. The place of habitual residence shouldn’t ordinarily be determined by the expectations of either parent or by future plans.\footnote{Janakis-Kostun v. Janakis, 6 S.W. #d 843, 847-848 (Ky. App.1999) \(3\text{rd. Cir. 1995}\) 63 F.3d 217.}

In \textit{Feder v. Evans-Feder,}\footnote{Rohna Schuz, Policy considerations in Determining the Habitual Residence, (n 190) 5.} the court stated its definition of habitual residence as follows:

\[
\text{[W]e believe that a child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a ‘degree of settled purpose’ from the child's perspective. We further believe that a determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child's circumstances in that place and the parents' present shared intentions regarding their child's presence there.}\footnote{Borras Report (n 26) 38.}
\]

The European Union avoids proposing a definition of habitual residence in its legal sources. The predominant understanding of habitual residence comes from the Explanatory report concerning Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters, prepared by Professor Alegria Borras (OJ C 221, 16.7.1998). This definition is in compliance with the above-mentioned definitions given on numerous occasions by the European Court of Justice. It states that the habitual residence is

\[
\text{[t]he place where the person had established, on a fixed basis, his permanent or habitual center of interests, with all the relevant facts being taken into account for the purpose of determining such residence.}\footnote{Borras Report (n 26) 38.}
\]
3.3.1.1 National definitions

Several states have adopted a definition of habitual residence in their national Private International Law Acts.

The Swiss Private International law act\textsuperscript{207} from 1987 holds a simple definition of habitual residence. The habitual residence of a natural person is the place where that person has his place of habitual residence in the State in which he lives for an extended period of time, even if this time period is limited from the outset.\textsuperscript{208}

In its Code of Private International Law\textsuperscript{209} Belgium has adopted a definition on habitual residence of natural persons. It provides that habitual residence is

\[ \text{[t]he place where a natural person has established his main residence, even in the absence of registration and independent of a residence or establishment permit; in order to determine this place, the circumstances of personal or professional nature that show durable connections with that place or indicate the will to create such connections are taken into account.} \textsuperscript{210} \]

A similar definition is given in the Bulgarian PIL Code.\textsuperscript{211} For the purpose of the Code

\[ \text{[h]abitual residence of a natural person’ shall denote the place where the said person has settled predominantly to live without this being related to a need of registration or authorization of residence or settlement. For determination of this place, special regard must be had to circumstances of personal or professional nature arising from sustained connections of the person with the said place or from the intention of the said person to establish such connections.} \textsuperscript{212} \]

The PIL Act of Macedonia\textsuperscript{213} adopted a definition for habitual residence, but it is only applicable in the determination of the applicable law in non-contractual obligations:

\[ \text{[F]or the purposes of this Law the habitual residence for a natural person is the place where the person has established a permanent center of his/her activities, and it is not necessary to be filled any documents associated with registering or obtaining a residence permit from the competent national authorities. In determining the habitual residence, especially should be considered the circumstances of a personal or professional character, arising from permanent connections with the place or intention to make such connections. In every case, the natural person has his/her habitual residence in one country,} \]

\textsuperscript{208} Article 20 (1)(b)
\textsuperscript{210} Article 4 § 2
\textsuperscript{212} Article 48 (7)
\textsuperscript{213} Official Gazette of the Republic of Macedonia (Службен Весник на РМ) no. 87/2007, 156/2010.
if he/her stays in that country longer that 6 mounts.\textsuperscript{214}

In its PIL Code,\textsuperscript{215} Montenegro envisaged a definition of habitual residence

[F]or the purpose of this law the habitual residence of natural person is the place in which the person has settled predominantly without this being related to a need of registration or authorization of residence or settlement and without taking into account if the residence is temporally predetermined. In determining the habitual residence, especially should be considered the circumstances of a personal or professional character, arising from permanent connections with the place or intention to make such connections.\textsuperscript{216}

In its draft of the PIL Code,\textsuperscript{217} Serbia also envisaged a definition of the habitual residence.

1. Habitual residence of natural persons is the place in which the person habitual center of interests is and in which it ordinary resides, without this being related to a need of registration or authorization of residence by relevant authority or settlement or obtaining a residence permit.
2. In determining the habitual residence, as referred in paragraph 1, especially should be considered the circumstances of a personal or professional character, referring to permanent connections with the place or intention to make such connections.\textsuperscript{218}

3.3.1.2 Practice of the Court of Justice of the European Union in the determination of the Child’s habitual residence

In the judgment of 02.04.2009 regarding the A. case\textsuperscript{219} the Court of Justice of the European Union (CJEU) referred to the problem of ‘habitual residence’. In December 2001, the children C, D and E settled in Sweden accompanied by their mother, Ms. A, and their stepfather, Mr. F. Previously, D and E had been taken into care by municipality X in Finland. The reason for their being taken into care was their stepfather’s violence, but that measure was subsequently discontinued. In the summer of 2005, the family left Sweden to spend the holidays in Finland. They stayed in Finnish territory, living in caravans, on various campsites, and the children did not go to school. On 30 October 2005, the family applied to the social services department of the Finnish municipality Y for social housing. By decisions of the Welfare Committee of 16 November 2005, adopted on the basis of Law 683/1983, the children C, D and E were taken into immediate care in Finland and placed in a foster-family on the
grounds that they had been abandoned. Ms. A and Mr. F applied for the decisions relating to the urgent taking into care to be quashed. By decisions of 15 December 2005, the Welfare Committee rejected the application and, under Paragraph 16 of Law 683/1983, took the children C, D and E into care and ordered them to be placed in a childcare unit. Ms. A brought an action before the courts, seeking to have those decisions quashed, and requested that her children be returned to her custody. The courts dismissed the action and upheld the contested decisions. Ms. A lodged an appeal against that decision before the Supreme Administrative Court (Finland), alleging that the Finnish authorities lacked competence. In that connection, Ms. A stated that the children C, D and E had, since 2 April 2007, been Swedish nationals and that their permanent residence had for a long time been in Sweden. Therefore, she argued the case fell within the jurisdiction of the Swedish courts. The Supreme Administrative Court decided to stay the proceedings and to refer some questions to the European Court for a preliminary ruling. The second question that was proposed stated:

[H]ow is the concept of habitual residence in Article 8(1) of the regulation, like the associated Article 13(1), to be interpreted in Community law, bearing in mind in particular the situation in which a child has a permanent residence in one Member State but is staying in another Member State, carrying on a peripatetic life there?

The European Court of Justice reached the following conclusion: The concept of ‘habitual residence’ under Article 8(1) of Regulation No 2201/2003 must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child into a social and family environment.\(^{220}\) To that end, in particular the duration, regularity, conditions and reasons for the stay in 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.\(^{221}\)

To reach such a conclusion, the European Court of Justice (basing its assumptions on the differences between the Article 8(1) and Article 13 of the Brussels IIbis Regulation) first affirmed that mere physical presence in a Member State was not sufficient to establish the habitual residence of the child.\(^{222}\) Following that assumption in the same case the CJEU in paragraph 34 of argued for:

\(^{220}\) This position was also reaffirmed in the Case C-497/10 PPU Barbara Mercredi v. Richard Chaffe [2010] ECR I-14309 para 47.


\(^{222}\) ibid para 33.
[n]eed for uniform application of Community law and from the principle of equality’ and that the ‘terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Community’.

After reaching for the uniform application of Community law and the principle of autonomous and uniform interpretation, the CJEU concluded that’…it is for the national court to establish the place of the children’s’ habitual residence,’223 having in mind the guidelines that are given by the CJEU. In this context, the CJEU in the Mercredi case delved even further into the details by providing that since the articles of the Regulation which refer to ‘habitual residence’ make no express reference to the law of the Member States for the purpose of determining the meaning and scope of that concept, the meaning and scope must be decided in the light of the context of the Regulation’s provisions and the objective pursued by it. Of particular attention is the objective stated in recital 12 in the preamble to the Regulation that the grounds of jurisdiction established in the Regulation are shaped in the light of the best interests of the child, and are particularly based on the criterion of proximity.224

The habitual residence should be established on the basis of all the circumstances specific to each individual case,225 but an exception was made with the case-law of the Court relating to the concept of habitual residence in other areas of European Union law and that this could not be directly transposed in the context of the assessment of the habitual residence of children for the purposes of Article 8(1) of the Regulation.226

The child’s habitual residence should correspond with the place where the child has some degree of integration in a social and family environment.227 This position was further defined by adding several general indicators such as duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family’s move to that State. Also, several specific indicators such as 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 account.228 In the end, the judgment of the CJEU directly referred to the Opinion of the Advocate General and broadened the indicators for determination

223 ibid para 42.
226 ibid para 36.
227 In addition to the physical presence of the child in a Member State, other factors must be chosen which are capable of showing that presence is not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in a social and family environment, Case C-523/07 A. [2009] ECR I-2805 para 38.
of the child’s habitual residence to include the parents’ intention to settle permanently with the child in another Member State, which is manifested by certain tangible steps such as the purchase or lease of a residence in the host Member State. Another indicator that was mentioned that could be taken into account was the lodging of an application for social housing with the relevant services of that State. The short-term stay or the ‘peripatetic life’ as it was referred to in the judgment does not constitute a situation which could lead to change of habitual residence from one State to another.

A more precise interpretation of habitual residence was given in the opinion of AG Kokott regarding this case. This opinion again affirmed the autonomous interpretation of the term ‘habitual residence’ and the differences between habitual residence and mere presence. What was important about this opinion was that it directly and undoubtedly linked the Hague Conventions and their case-law with the Brussels IIbis Regulation, stating that:

\[\text{c]oordination also makes a uniform understanding of the concept of habitual residence necessary.}\]

This opened the doors for the enormous database of cases from the Hague Conference to be used for uniform understanding and determining habitual residence.

In this opinion, the Advocate General positions the concept of habitual residence in Article 8(1) of the Regulation at the actual center of interests of the child. The understanding of the habitual residence of the children in family law is distinguished from that of other cases since in these cases the emphasis is on the intention of the person concerned. This is evident in the distancing from the proposed understanding of habitual residence given in the Borrás Report. The basic indicators are categorized according to the duration and regularity of residence and according to the familial and social situation of the child.

The duration of the residence is the factor that distinguishes presence from habitual residence. There is no time frame given in the Regulation so this should be determined based on the circumstances of the individual case. There is a direct link between the age or the maturity of the child and the familial and social circumstances that influence the duration of

230 ibid para. 41.
233 ibid para 30.
234 http://www.incadat.com
236 Such as social law, law of the officials of the EU.
238 ibid.
239 In the case Case C-497/10 PPU Barbara Mercredi v. Richard Chaffe [2010] ECR I-14309 it was positioned that the child’s age is liable to be of particular importance ‘To that end, where the situation concerned is that of
the transformation from mere presence into habitual residence.\textsuperscript{240}

Regarding the regularity of the stay, the residence does not have to be uninterrupted. Temporary absence of the child, for instance during the holidays, does not call into question the continuation of habitual residence. However, if a return to the original place of residence is not foreseeable in view of the actual circumstances, habitual residence can no longer be assumed.\textsuperscript{241} Another factor that influences the duration of the transformation from mere presence into habitual residence is the lawfulness of the stay. If the move is lawful, habitual residence can shift to the new State even after a very short period.\textsuperscript{242} The intention of the parents is also an important circumstance. An indication that the habitual residence has shifted may be in particular the corresponding common intention of the parents to settle permanently with the child in another State. The parents’ intention may manifest itself, for example, in external circumstances such as the purchase or lease of a residence in the new State, notifying the authorities of the new address, establishing an employment relationship, and placing the child in a kindergarten or school. As a mirror image, abandoning the old residence and employment and notifying the authorities of departure suggest that habitual residence in the former State is at an end.\textsuperscript{243} If the move is unlawful (as in the cases of international child abduction) the duration of the transformation is a longer period. Although under article 10 there is continuing jurisdiction of the courts of the former habitual residence, it is ascertained that in a longer period of time under some strict conditions transfer of habitual residence from one State to another can occur.\textsuperscript{244}

The second category of indicators is referred to as ‘Familial and social situation of the child’. These indicators provide the court with a clear picture of the stability (or lack thereof) which distinguishes habitual residence from mere presence. In its opinion the Advocate

\textsuperscript{240} Case C-523/07 A. [2009] ECR I-2805 para 41
\textsuperscript{241} ibid para 42
\textsuperscript{242} ibid para 43. This is evident from the Article 9(1) of the Regulation which is based on the idea that even before three months have passed there may be habitual residence in the new place of residence, so that a rule on jurisdiction is required, as an exception to Article 8, for the benefit of the courts of the former place of habitual residence. See also Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation, (n 9), 116-119.
\textsuperscript{243} Case C-523/07 A. [2009] ECR I-2805 para 44.
\textsuperscript{244} ibid para 46. Article 10 describes two situations. First the situation where both parents acquiesced with the removal, and second where a period of one year has passed. However, the one-year period is not the sole deciding factor here. The transfer of jurisdiction depends rather on the circumstances listed additionally in points (i) to (iv) of Article 10(b).
General stated that ‘It is for the referring court to obtain an overall picture of this, taking account of all factors, whose relevance may vary according to the children’s age.’

The concrete manifestation of familial situation are the persons with whom a child lives at the place of residence or is in regular contact, in other words parents, siblings, grandparents or other close relatives; and for the social situation, circumstances such as school, friends, leisure activities and, above all, command of language are taken into consideration.

The CJEU referred to the concept of ‘habitual residence’ in C. case. In this case the Supreme Court of Ireland asked for a preliminary ruling on whether the existence of the French proceedings relating to the custody of the child preclude, in the circumstances of this case, the establishment of habitual residence of the child in Ireland and whether the Irish courts are entitled to consider the question of habitual residence of the child in the circumstance that she has resided in Ireland since July 2012, at which time her removal to Ireland was not in breach of French law? In other words the CJEU was asked whether a lawful removal could have turned into a wrongful detention and with therefore whether the Irish courts are entitled to consider the question of habitual residence.

It was considered by the CJEU that Articles 2(11) and 11 of the Regulation must be interpreted as meaning that where the removal of a child has taken place in accordance with a judgment which was provisionally enforceable and which was thereafter overturned by a judgment which fixed the residence of the child at the home of the parent living in the Member State of origin, the court of the Member State to which the child was removed, seized of an application for the return of the child, must determine, by undertaking an assessment of all the circumstances of fact specific to the individual case, whether the child was still habitually resident in the Member State of origin immediately before the alleged wrongful retention. As part of this assessment, it is important that account be taken of the fact that the judgment

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246 For younger children and particularly infants their dependence on the primal caretaker (usually the mother) creates a position that the family environment is determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of. As far as infants are concerned. They necessarily shares the social and family environment of the circle of people on whom he or she is dependent. Consequently, where, as in the main proceedings, the infant is in fact looked after by her mother, it is necessary to assess the mother’s integration in her social and family environment. For that reason for the move by the child’s mother to another Member State, the languages known to the mother or again her geographic and family origins may become relevant, Case C-497/10 PPU Barbara Mercredi v. Richard Chaffe [2010] ECR I-14309 para.54 and 55

authorizing the removal could provisionally be enforced and that an appeal had been brought against it. However, those factors are not necessarily conducive to a finding that the child’s habitual residence was transferred, since that judgment was provisional and the parent concerned could not be certain, at the time of the removal, that the stay in that Member State would not be temporary.

It can be concluded that the favorable aspect of the application of habitual residence as a jurisdictional criterion in family matters, is its adaptability to the needs of a mobile society, a characteristic that is absent in the criteria of domicile or nationality. However, to properly apply it in practice, it needs consistent application in cross-border cases, because its incorrect use could lead to parallel litigations and essentially to legal uncertainty.

3.3.2 General jurisdiction for parental responsibility issues in the Brussels IIbis Regulation

Article 8 of the Brussels IIbis Regulation spells out the rule on international jurisdiction regarding parental responsibility issues. The general rule contained in Article 8(1) of the Brussels IIbis Regulation establishes that the courts of the Member State of the habitual residence of the child at the time when the court is seized shall have jurisdiction. It can be seen that the determination of the child’s habitual residence is of great importance, because it fixates the jurisdiction to the court which is most competent to hear the case due to its proximity with the child. The use of this criterion is considered to be particularly appropriate, because in practice it is essential that the authorities in the place where the child actually lives should be responsible for his/her physical welfare and be involved in determining his/her financial needs.

Article 8(2) however allows in specific situations when the interest of child prevails that the case can be heard before the courts which are not in the place of the habitual residence

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251 Case C-376/14 PPU, C. v. M. of 9 October 2014 para 57.
252 Ibid para 55.
254 Article 8 of the Brussels IIbis Regulation pins the jurisdiction to the circumstances as they exist at the time the court is seized (perpetuation fori). Such aspect is not provided in Article 5 of the 1996 Hague Convention, see de Boer, What we should not expect from a recast of the Brussels IIbis Regulation (n 116) 15; Final Report Regulation (EC) No 2201/2003 Analytical annexes (n 6) 29-30.
255 The grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity. This means that jurisdiction should lie in the first place with the Member State of the child's habitual residence, except for certain cases of a change in the child's residence or pursuant to an agreement between the holders of parental responsibility. 'Recital (12) of the Brussels IIbis Regulation.
256 Schuz R., Habitual Residence of Children (n 188) 3.
of the child. This refers to the situations provided in Articles 9, 10 and 12 which are relocation disputes (article 9), child abduction cases (article 10) and regarding ‘prorogation of jurisdiction’ (article 12). In all of these specific cases the courts which are applying the Brussels Ibis Regulation in relation to parental responsibility issues must take into consideration and be in line with the principle of mutual trust. Also their judgments must be precise and they have to make it clear on which basis they have ascertained their jurisdiction.\textsuperscript{257}

The general rule and its exceptions are very similar to ones provided in 1996 Hague Convention on protection of Children\textsuperscript{258} but with additional elements.\textsuperscript{259} In general, the 1996 Hague Convention was modeled on the experience from the application of The Hague 1961 Convention concerning the powers of authorities and the law applicable in respect of the protection of infants.\textsuperscript{260} The basic goal of such rules was to eliminate all competition between the authorities of different States in taking measures of protection for the person or the property of the child.\textsuperscript{261} With such a position of the jurisdictional criteria, the place where the child’s habitual residence is established is the most relevant factor in determining the jurisdiction in cases which fall under the scope of 1996 Hague Childs Protection Convention. The main method for how to archive this goal was to centralize jurisdiction in the authorities of the state of the Child’s habitual residence and avoid all competition of authorities to have concurrent jurisdiction.\textsuperscript{262} In this way, the Child’s habitual residence becomes the main jurisdictional criteria in the determination of the forum which is best suited to protect the child’s person or its property, subject to only limited exceptions and which is in compliance with the principle of best interest of the child which guarantees that in most of the cases the responsible court will be the court which is best connected to the child.\textsuperscript{263} The exceptions to article 8 are the cases where the situation has changed, so the jurisdiction must be changed accordingly (Articles 5(2), 7 and 14), or the child lacks habitual residence (Article 6).

The 1996 Hague Child Protection Convention also holds rules that refer to transfer (or request for transfer) to a Court better placed to hear the case (Articles 8 and 9), attraction of jurisdiction with the divorce court (Article 10), jurisdiction in cases of urgency (Article 11), provisional measures of territorial effect (Article 12) and the \textit{lis pendens} rule (Article 13). Other

\textsuperscript{257} Case C-256/09 \textit{Bianca Purrucker v Guillermo Vallés Pérez} [2010] ECR I-07353, para 73.  
\textsuperscript{258} Magnus U. and Mankowski P., Commentary on Brussels Ibis Regulation, (n 9) 111.  
\textsuperscript{259} De Boer, What we should not expect from a recast of the. Brussels Ibis Regulation (n 116) pg.15  
\textsuperscript{260} Lagarde Report (n 93) para 6.  
\textsuperscript{261} Ibid.  
\textsuperscript{262} Lagarde Report (n 93) par.37.  
jurisdictional rules in the Convention provide for certain exceptions of the general jurisdictional criteria (the child’s habitual residence), in situations for category of children who have left their countries because of conditions (disturbances) which were arising there, and who often are not accompanied and, in any case, are temporarily or definitively deprived of their parents and are internationally displaced.  

For these children normal jurisdiction attributed by the Convention to the authorities of the State of their habitual residence is here inoperative, since these children have by hypothesis broken all links with the State of their previous habitual residence, and the precariousness of their stay in the State where they have provisionally found refuge does not allow it to be considered that they have acquired a habitual residence there. The authorities of the State on the territory on which these children are present will have the general jurisdiction which in normal situations would be attributed to the authorities of the State of the child’s habitual residence. This position is given also to the children whose habitual residence cannot be established.

3.3.3 Continuing jurisdiction of the child's former habitual residence

When a child moves from one Member State to another, it is often necessary to review the access rights, or other contact arrangements, to adapt them to the new circumstances. Article 9 of the Brussels IIbis Regulation has in mind the problems that arise due to the complications relating to access and visitation rights. The rationale behind this rule is that the courts of the Member State where the child was habitually resident prior to the move 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. If the holder of access rights accepts the jurisdiction of the courts of the Member State of the child's new habitual residence by participating in proceedings before those courts without contesting their jurisdiction, then the continuing jurisdiction of the child’s former habitual residence ceases to exist. So for the jurisdiction of the court of the former habitual residence to continue to be

264 Lagarde Report (n 83) para 44.
265 Ibid.
266 Article 6(2) of the 1996 Hague Child Protection Convention.
268 Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation, (n 9) 117.
269 Article 9(2) of the Brussels IIbis Regulation.
The idea behind this rule is not to restrain a person from moving within the European Union. What it does is provide a guarantee that the person, who can no longer exercise access rights as before, does not have to seize the courts of the new Member State, but can apply for an appropriate adjustment of access rights before the court that granted them during a period of three months following the move. The courts of the new Member State (where the child has relocated) do not have jurisdiction in matters of access rights during this period.271

3.3.4 Jurisdiction in cases of child’s abduction

The Brussels IIbis Regulation contains jurisdictional rules regarding child abduction cases. Article 10 of the Brussels IIbis Regulation was influenced by Article 7 of the 1996 Hague Child Protection Convention. These two articles generally correspond with slight differences between them. The rules in the 1996 Hague Convention provide that 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.272 This jurisdiction remains until the child has acquired a habitual residence in another State, and a) each person, institution or other body having rights of custody has acquiesced in the removal

270 Practice Guide for the application of the Brussels IIa Regulation (n 21) 29.
271 ibid.
or retention; or b) the child has resided in that other State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment.

The 1996 Hague Child Protection Convention and the 1980 Hague Child Abduction Convention are closely interconnected with the primacy of the 1980 Convention. However there is a significant difference between 1980 Hague Abduction Convention and 1996 Child Protection Convention. The difference is in the possibility of shifting the jurisdiction only on the basis of a issuing of a non-return order or the settlement of the jurisdictional issue in the aftermath of the wrongful removal or retention. In the 1980 Hague Abduction Convention, there are several conditions under which a non-return order can be issued. Acquiescence is one of these conditions. Normally an issuing of a non-return order on the basis of the 1980 Child Abduction Convention led to shifting of the jurisdiction from the place where the child had his/her habitual residence to the country of the abduction because this led to the acquiring of a new habitual residence. According to Article 7 of the 1996 Child Protection Convention, a non-return order is not enough to give jurisdiction to the courts of the new habitual residence. Only acquiescence can have such an effect, or passive inactivity from the person, institution or other body having rights of custody over the child and settlement of the child in the new environment for a period of at least one year after the knowledge of the whereabouts of the child.

The Brussels IIbis Regulation has gone into further details, subdividing the conditions of general inactivity into few hypotheticals. The rules in Article 10 are generally positioned between two opposite objectives. The first is that the Regulation doesn’t want to promote the unlawful removal or retention of a child and that such conduct cannot lead to an alteration of


After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.
275 Beaumont P., McEleavy P., (n 273) 218.
276 Article 13 and Article 12(2) of the 1980 Hague Abduction Convention.
277 Article 16 of the 1980 Hague Abduction Convention.
278 Magnus U. and Mankowski P., *Commentary on Brussels IIbis Regulation*, (n 9) 123.
279 Ibid 125.
its habitual residence. It wants to discourage the abductor from finding a better forum that will
decide on parental responsibility issues.\textsuperscript{280} That’s why these rules are drafted so they can
prohibit forum shopping. The only effective remedy is to maintain and defend as inviolable the
initial jurisdiction of the court seized as to the substance; that is, the court of the habitual
residence of the child before the removal and retention happened.\textsuperscript{281} The second objective is
that there must be some moment in time that will transform involuntary residence in a certain
territory to habitual residence. It wouldn’t be logical, for example, for a person not to acquire
habitual residence although he/she resides in that territory for years.

The basic idea in the Brussels Iibis Regulation for determining jurisdiction in child
abduction cases is that the court of the state where the child was habitually resident immediately
before the wrongful removal or retention will retain jurisdiction on substantial issues regarding
the child at least for a year after the abduction happens (and the unlawful change of the child’s
habitual residence occurred), and during that period there is no agreement of the holders of the
right of custody on this newly developed situation.\textsuperscript{282}

In fact, Article 10 provides that in the 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. This rule corresponds with the first
objective of the Article 10, to deter the abductor from finding a more suitable forum and to
block the advantage he/she might gain by the removal and retention.\textsuperscript{283}

The second objective of this Article is to recognize the factual situation. This factual
situation requires that in some cases the jurisdiction of the courts of the State where the child
has acquired new habitual residence can be acceptable. Such a position is shown in the
exceptions given in Article 10(a) and (b). Both of these exceptions require that the child has
acquired new habitual residence in another Member State.

The first exception given in Article 10(a) provides explicitly that each person,
institution or other body having rights of custody has acquiesced in the removal or retention.
Acquiescence of the left-behind parent with the newly developed situation of the removal or
retention of the child in a new Member State is a one of the conditions of issuing a non-return

\textsuperscript{280} It was in the past an all too common practice in cases of divorces of spouses of different nationalities for
whichever parent wanted to obtain custody of a child or children to take refuge with the child or children in
question in his or her country of origin and to apply to the national courts for a ruling on custody, taking no account
of any judgments delivered in another State.’ Case C-403/09 PPU Jasna Detiček v Maurizio Sgueglia [2009] ECR
I-12193 Opinion of the AG Bot, para 70.


\textsuperscript{282} Article 10 of the Brussels Iibis Regulation.

\textsuperscript{283} Magnus U. and Mankowski P., Commentary on Brussels Iibis Regulation, (n 9) 122.
order by the court where the child is removed or retained according to the 1980 Hague Abduction Convention. However there is a considerable difference between 1980 Hague Child Abduction Convention and the regime established by the 1996 Hague Child protection Convention and which was later taken as basis of the Brussels IIbis Regulation. The difference is in the possibility of shifting of the jurisdiction only on the basis of a issuing of a non-return order. In the 1980 Hague Abduction Convention, there are several conditions under which a non-return order can be issued. Acquiescence is one of these conditions. In the 1996 Child Protection Convention and Brussels IIbis Regulation in Article 10, a non-return order is not enough to give jurisdiction to the courts of the new habitual residence. Only acquiescence can have such an effect.

The second exception given in Article 10(b) of the Brussels IIbis Regulation necessitates two additional requirements to the basic prerequisite of this rule that the child had acquired new habitual residence. The first requirement is that 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 had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment. This condition is also positioned to be on fixed basis. The other conditions are given alternatively and if one of these conditions is fulfilled then the jurisdiction can shift from the court of the former habitual residence to the court of the new habitual residence. These conditions are:

(i) within one year after the holder of rights of custody 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;

(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

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284 Article 13(a) of the 1980 Hague Abduction Convention.
286 Article 13 and Article 12(2) of the 1980 Hague Abduction Convention.
288 Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation (n 9) 123.
289 'Judgment on custody that does not entail the return of the child’ is a final judgment, adopted on the basis of full consideration of all the relevant factors, in which the court with jurisdiction rules on arrangements for the
by the courts of the Member State where the child was habitually resident immediately before
the wrongful removal or retention.

The first three of those situations involve, *de facto*, tacit acquiescence of the holders of
a right of custody (that is, usually, the parent left behind), in so far as no application for return
of the child has been made in the Member State of wrongful removal, and that such an
application has been either withdrawn or refused without the applicant taking further steps in
the proceedings in the Member State of former habitual residence, in accordance with Article
11(7) and (8) of the Regulation. The fourth situation is that of a judgment on custody that
does not entail the return of the child is issued by a court of the Member State of former habitual
residence. This involves not the tacit acquiescence of that court to the transfer of jurisdiction,
but rather a judgment that endorses the acquisition by the child of a new habitual residence in
another Member State, which will lead to the transfer of jurisdiction. Thus, although the
transfer of jurisdiction takes place automatically under Articles 8 and 9 of the Regulation where
a child changes habitual residence by moving lawfully from one Member State to another, to
achieve the same result in the case of wrongful removal, the court of the Member State of
former habitual residence must legalize that removal by approving it.

These two divergent positions of Article 10 are based the fundamental principles
regarding child abduction cases. The rule upholding the jurisdiction of the court of the former
habitual residence is consistent with the fundamental principle of the Regulation – namely that
of depriving the unlawful act of the abducting parent of any legal effect, while the exception is
consistent with another fundamental principle, since it is a rule of jurisdiction ‘shaped in the
light of the best interests of the child, in particular on the criterion of proximity’. The balance
between these two principles is the genuine aim of Article 10: a balance between allowing the
court that is now closest to the child to assume jurisdiction and preventing the abductor from
reaping the benefit of his or her unlawful act.

The result of the rule given in Article 10 of the Brussels IIbis is the fact that the non-
return order is not a key aspect in transfer of the jurisdiction from one Member State to another.

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custody of a child who is no longer subject to other administrative or judicial decisions. Case C-211/10 *Doris Povse v Mauro Alpago* [2010] ECR I-06673 Opinion of AG Sharpston delivered on 16 June 2010 para 46.
291 ibid para 54.
292 Text to n 884 Part II ch V sec 5.2.2.1.4.
293 Case C-211/10 *Doris Povse v Mauro Alpago* [2010] ECR I-06673 Opinion of AG Sharpston delivered on 16 June 2010 para 44 et seq.
If a person lodges his request for return of the removed or retained child in the provided time limit of one year, the only way in which a shift of the jurisdiction can occur is if person, institution or other body having rights of custody has acquiesced in the removal or retention, or the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention decide not to include a mandate for the return of the child in a judgment on custody rights. In all other cases the court of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction, and is the final arbiter in the cases of child abduction.

### 3.3.5 Prorogation of jurisdiction

The basic principle in Article 12 is to establish an alternative forum for parental responsibility proceedings. As was stated previously, the main rule for determining jurisdiction in matters of parental responsibility in Brussels IIbis Regulation is the court of the Member State where the child has his/hers habitual residence. Another peculiar aspect of these cases is that the proceedings relating to parental responsibility are stripped of the link that was imposed with the Brussels II Regulation that parental responsibility issues are addressed only if they are in a close conjunction with divorce, legal separation or marriage annulment. In that aspect, Article 12 provides that a Court of a Member State, other than that in which the child’s is habitually resident, be seized in any matter of parental responsibility if the matter is connected with a pending divorce proceedings, or the child has a substantial connection with that other state.

The rules in Article 12 paragraph (1) and (2) of the Brussels IIbis Regulation provide that the jurisdiction of the divorce court can concentrate both questions (matrimonial and parental responsibility matters), even when the child’s habitual residence is in another Member State, but only under specific certain circumstances. Article 12(1) gives to the courts seized of an application for divorce, legal separation or marriage annulment, jurisdiction over matters relating to parental responsibility that are connected with that application for divorce, legal

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295 In such cases, provisional measure does not constitute a ‘judgment on custody that does not entail the return of the child’ within the meaning of that provision, and cannot be the basis of a transfer of jurisdiction to the courts of the Member State to which the child has been unlawfully removed, Case C-211/10 Doris Povse v Mauro Alpago [2010] ECR I-06673 para 50.


297 Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation, (n 9) 146.

298 Text to n 254 Part II ch III sec 3.3.2.

299 Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation, (n 9) 19.
separation, or marriage annulment. The divorce court can have its jurisdiction seized in any matter of parental responsibility if three different conditions, listed in sub-paragraphs (a) and (b) are met. The first condition is that at least one of the spouses has parental responsibility over the child. Sub-paragraph (b) provides for two different conditions: that the spouses and holders of parental responsibility accept the jurisdiction of the divorce court whether by express acceptance or unequivocal conduct, which is determined by the court at the time that it is seized and that the jurisdiction of that court is in the ‘superior interest of the child.’

Article 12(2) admits that the extension of the jurisdiction of the court seized of a divorce to paternal responsibility is temporary in nature. The jurisdiction conferred in the preceding paragraph ceases as soon as: (a) the judgment allowing or refusing the application for divorce, legal separation or marriage annulment has become final; (b) in those cases where proceedings in relation to parental responsibility are still pending on the date referred to in (a), a judgment in these proceedings has become final; or (c) the proceedings referred to in (a) and (b) have come to an end for another reason.

It’s logical to presume that in most of the cases the proceedings relating to matrimonial matters and parental responsibility issues will be dealt in same proceedings and before the same forum. The jurisdictional grounds given in article 12 are competing and not exclusive, meaning that the courts of the State of the habitual residence of the child are not deprived of their jurisdiction in the circumstances described in article 12. This can lead to parallel proceedings which are resolved by Article 19 (lis pendens rule).

The second situation in Article 12(3) of the Brussels IIbis Regulation stipulates that the Courts of Member States before which proceedings other than for divorce, legal separation or marriage annulment have been initiated on grounds of jurisdiction set out in Article 3 of the Brussels IIbis Regulation, shall also have jurisdiction in matters of parental responsibility, on grounds of jurisdiction set out in Article 3 of the Brussels IIbis Regulation.

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300 Text to n 398 Part II ch IV sec 4.3 and n 304 Part II ch III sec 3.3.5.

301 There is an omission from the drafters and the translators in the English version of the regulation regarding the term ‘superior interest of the child’ provided in Article 12(1)(b) and ‘best interest of the child’ in Article 12(3)(b). In other language versions of the regulation these two terms are the same and from that it can be concluded that there was no intention to make any distinction of this term, Practice Guide for the application of the Brussels Ia Regulation [2015], Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation, (n 9) 31.

302 Text to n 359 Part II ch IV sec 4.2.

303 In the Case C-656/13 L v M. of 12 November 2014 a request for a preliminary ruling to the CJEU asking as to whether Article 12(3) must be interpreted as establishing jurisdiction over proceedings concerning parental responsibility even where no other related proceedings (that is, ‘proceedings other than those referred to in paragraph 1’) are pending. The CJEU concluded ‘…that the prorogation of jurisdiction provided for in Article 12(3) of Regulation No 2201/2003 in matters of parental responsibility may be applied without it being necessary for those proceedings to be related to other proceedings already pending before the court in whose favour the prorogation of jurisdiction is sought.’ From that it gave the answer to the question that ‘…for the purposes of proceedings in matters of parental responsibility, the jurisdiction of a court of a Member State which is not that of the child’s habitual residence to be established even where no other proceedings are pending before the court.
even if the child is not habitually resident in that Member State, if additional conditions are fulfilled. Three conditions are required in order to confer jurisdiction: the first is that there is exists a substantial connection between the child and the court seized. The child has a substantial connection with the Member State in question in particular, if one of the holders of parental responsibility is habitually resident there or that the child is a national of that State. These circumstances are not exhaustive, and it is possible to base the connection on others. Secondly, all parties to the proceedings accept the jurisdiction of those courts expressly or otherwise unequivocally at the time the court is seized. The third condition is that the jurisdiction is in the best interests of the child. This jurisdiction in matters of parental responsibility, ascertained on the basis of Article 12(3), ceases following a final judgment in those proceedings.

Article 12(4) states that when the child has his or her habitual residence in the territory of a third State which is not a contracting party to the Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and cooperation in respect to parental responsibility and measures for the protection of children, jurisdiction under this Article shall be deemed to be in the child's interest, in particular if it is found to be impossible to hold proceedings in the third State in question.

304 In the same Case C-656/13 L v M. of 12 November 2014, the referring court asked the CJEU whether ‘...jurisdiction of the court seised by one party of proceedings in matters of parental responsibility has been ‘accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings’ within the meaning of that provision 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.’ The CJEU found that according to the actual wording of Article 12(3)(b) of Regulation No 2201/2003, the jurisdiction of the court chosen must have ‘been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised’. Article 16 of that regulation states that a court is deemed to be seised, in principle, at the time when the document instituting the proceedings or an equivalent document is lodged with the court. Consequently it was concluded that ‘The clear wording of that provision, read in the light of Article 16, thus requires the existence to be shown of an agreement, express or at least unequivocal, on the prorogation of jurisdiction between all the parties to the proceedings, at the latest at the time when the document instituting the proceedings or an equivalent document is lodged with the court chosen’. The CJEU concluded that such position of the Regulation does not allow to consider the fulfilment of this condition in the case where the court in question is seised on the initiative of only one of the parties to the proceedings, another party to the proceedings brings other proceedings before the same court at a later date, and that other party, on taking the first step required of him in the first proceedings, pleads the lack of jurisdiction of the court seised. Case C-656/13, L v M, R and K, par.53-59. However, some scholars find that this requirement that an agreement on jurisdiction has been accepted by the parties 'at the time when the court is seised' can be modeled in another way. They propose elimination of such requirement and argue that the consent could be given in another point (time when the parties are filing their response or even tacitly by accepting the jurisdiction), see de Boer, What we should not expect from a recast of the Brussels IIbis Regulation (n 116)18.

305 Case C-436/13, E. v B. of 1 October 2014 para 50.
3.3.6 Jurisdiction based on the child's presence

Article 13 of the Brussels IIbis Regulation details specific situations where it is either impossible or irrelevant to use habitual residence as connecting factor.\(^{306}\) This article corresponds with Article 6 of the 1996 Hague Convention.\(^{307}\) There are two hypothetical scenarios in this rule. In the first scenario, it is a rule creating ‘*forum necessitates*’ where no court in Member State can hear the case and the court of the place where the child is present acts as a jurisdiction out of necessity.\(^{308}\) It argues for a rule that the child’s habitual residence cannot be established and jurisdiction cannot be determined on the basis of Article 12 of the Brussels IIbis Regulation, meaning that the jurisdiction of the matrimonial matters cannot be extended to parental responsibility matters. The outcome of this rule is that the mere presence of the child in a territory of a State is considered to be as sufficient to give jurisdiction to the court of that State. The second scenario is similar and it refers to refugee children or children internationally displaced because of disturbances occurring in their country\(^{309}\) with the same outcome- the court where the child is present shall have jurisdiction.

It’s important to make a distinction between this jurisdiction and the jurisdiction of the courts in urgent cases to take the provisional measures provided in Article 20.\(^{310}\) The nature of these two rules is different. Article 20(1) of the Brussels IIbis Regulation enables a court which does not have jurisdiction as to the substance to take, exceptionally, where urgency so requires, a provisional measure or a protective measure in respect to assets or persons in its territorial jurisdiction. The provision is not a criterion of general jurisdiction, but rather a permission to take action under the dual pressures of the child being in danger and the need for urgent action to take the child out of danger.\(^{311}\) These measures are subject to three conditions: the measures concerned must be urgent; they must be taken in respect to the persons or assets in the Member State where the court seized of the dispute is situated, and they must be provisional.\(^{312}\) Those

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\(^{306}\) Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation, (n 9) 159.

\(^{307}\) Lagarde Report (n 93) 555

\(^{308}\) Ibid.

\(^{309}\) Article 6(2) Brussels IIbis Regulation. The characterization of these category of children is adopted from the 1996 Child Protection Convention which itself adopted the term from the Recommendation by the Special Commission of the Hague Conference on 21 October 1994 concerning the application to these children of the Convention of 29 May 1993 on intercountry adoption. The category of children is limited to those who left their countries because of the conditions which were arising there, and who often are not accompanied and, in any case, are temporarily or definitively deprived of their parents. This category does not concern, children who were internationally displaced, such as runaway or abandoned children. (Lagarde Report (n 93) 555)

\(^{310}\) Text to n 401 Part II ch IV sec 4.4.


\(^{312}\) Case C-523/07 A. [2009] ECR I-2805 para 47.
measures are applicable to children who have their habitual residence in one Member State but stay temporarily or intermittently in another Member State and are in a situation likely seriously to endanger their welfare, including their health or their development, thereby justifying the immediate adoption of protective measures. The provisional nature of such measures arises from the fact that, pursuant to Article 20(2) of the Regulation, they cease to apply when the court of the Member State having jurisdiction as to the substance of the matter has taken the measures it considers appropriate.313

Article 13(1) on the other hand is a rule that provides a forum necessitatis to the child in situations where no other forum in the Member States exists that can hear the case. To apply this rule the child must lack a habitual residence. It must be total lack of habitual residence. If for example, the child has his/her habitual residence in a third State, then the conditions given in article 13(1) are not fulfilled and the courts of the Member State where the child is present cannot seize jurisdiction on the basis of Article 13. Moreover if the second condition of Article 13(1) is not fulfilled that the jurisdiction cannot be determined on the basis of Article 12 of the Brussels Iibis Regulation, (jurisdiction of the matrimonial matters extended to parental responsibility matters) then the national rules of the Member States will determine the jurisdiction.314

Another peculiar aspect of this rule is that it is of its temporary nature. When the child acquires a new habitual residence, then the necessity for any specific jurisdiction based on the mere presence of the child disappears and the courts are deprived of the jurisdiction given by virtue of article 13(1).315 The place where the child acquires new habitual residence is also irrelevant in that respect. If the child acquires new habitual residence in a Member State then other rules for parental responsibility of the Regulation apply and if the child acquires new habitual residence in third State, then the court can hear the case, basing its jurisdiction on specific rules of the regulation (for example Article 12), or could have limited jurisdiction for provisional measures.

Article 13(2) is also different from Article 20. The same distinction made between Article 13(1) and Article 20 also applies in the case of Article 13(2) with special notice to the nature of Article 13(2). The rationale of Article 13(2) is that the refugee children or children internationally displaced because of disturbances occurring in their country have severed their link with the State of their previous habitual residence and they still have not obtained new

314 On the basis of Article 14 of Brussels Iibis Regulation.
315 Magnus U. and Mankowski P., Commentary on Brussels Iibis Regulation, (n 9) 160.
habitual residence in the Member State where they are present.

For these children, the normal jurisdiction attributed by the Regulation to the authorities of the State of their habitual residence is here inoperative, since these children have by hypothesis broken all links with the State of their previous habitual residence, and the precariousness of their stay in the State where they have provisionally found refuge does not allow it to be considered that they have acquired a habitual residence there.\(^3\)\(^\text{16}\) It is important in some situations (which are not of an urgent nature) such as designating a legal representative, organizing the children’s protection, etc. to confer the jurisdiction to the authorities where the child is present. However, in these cases the emergency is not a ground for jurisdiction.\(^3\)\(^\text{17}\) It was considered that submitting such cases under the jurisdiction for protective measures or even broadening the jurisdiction, based on urgency, to cover these circumstances would weaken the system by creating incitement to utilize urgency jurisdiction in all circumstances.\(^3\)\(^\text{18}\)

### 3.3.7 Residual Jurisdiction

If no court has jurisdiction pursuant to Articles 8 to 13, the court may found its jurisdiction on the basis of its own national rules on private international law. Such decisions are then recognized and declared enforceable in other Member States pursuant to the rules of the Regulation.

Article 14 of the Brussels IIbis Regulation is in connection with the rule of residual jurisdiction in matrimonial matters and in correlation with Article 7 of the Brussels IIbis Regulation. The purpose of these rules is to set a hierarchy between community and national grounds of jurisdiction.\(^3\)\(^\text{19}\)

### 3.3.8 Transfer to a Court better placed to hear the case (Forum Non Conveniens)

Article 15 of the Brussels IIbis Regulation is a rule that introduces *forum non conveniens* doctrine\(^3\)\(^\text{20}\) in the area of parental responsibility issues. This rule, under certain strict conditions and by way of exception, allows the transfer of a case from a court of one Member State to a court of another Member State, when the court first seized considers that the other

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\(^3\)\(^\text{16}\) Lagarde Report (n 93) 555.
\(^3\)\(^\text{17}\) Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation, (n 9) 161.
\(^3\)\(^\text{18}\) Lagarde Report (n 93) 555.
\(^3\)\(^\text{19}\) Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation, (n 9) 160.
\(^3\)\(^\text{20}\) For more on Forum non conveniens doctrine see Fawcett J. and Carruthers J., (n 139) 426.
court is better placed to hear the case. It is very unusual for the European jurisdictional system to have this sort of rule and to allow discretionary judicial cooperation among Member States and between Member States and third States, a position which was reaffirmed by the CJEU in the C-281/02, Owusu vs. Jackson case.\(^{321}\) Rules such as these are generally found in the common law legal systems where the court can have some practical considerations of procedural convenience\(^{322}\), powers which the courts in the continental law legal systems are not given.

The origin of this article can be traced to articles 8 and 9 of the 1996 Hague Convention, but have been modified from an EU perspective.\(^{323}\) Article 15(1) of the Brussels Ibis Regulation provides, by way of exception (if this is in the best interests of the child), that the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State, with which the child has a particular connection, would be better placed to hear the case, or a specific part of it: (a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with Article15(4); or (b) [directly] request a court of another Member State to assume jurisdiction in accordance with Article15(4). This transfer to a Court better placed to hear the case can be activated in three ways: (a) upon application from a party; (b) of the court's own motion; or (c) upon application from a court of another Member State with which the child has a particular connection, in accordance with Article15(3). In the first and the second situation, a transfer made of the court's own motion or by application of a court of another Member State must be accepted by at least one of the parties. Article 15(3) contains *numerus claususul* of what is considered to be a ‘particular connection’ to a Member State. The child shall be considered to have a particular connection to a Member State, if that Member State: (a) has become the habitual residence of the child after the court referred to in Article 15(1) was seised; or (b) is the former habitual residence of the child; or (c) is the place of the child's nationality; or (d) is the habitual residence of a holder of parental responsibility; or (e) is the place where property of the child is located and the case concerns measures for the protection of the child relating to the administration, conservation or disposal of this property.

In the situations when the court of the state of origin stays the case or the part thereof in question and invites the parties to introduce a request before the court of another Member

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322 Fawcett J. and Carruthers J., (n 139) 428-440
323 Lagarde Report (n 93) 559-563.
State, by virtue of Article 15(4), the court of the Member State having jurisdiction as to the substance of the matter shall set a time limit by which the courts of that other Member State shall be seized. If the courts are not seized by that time, the court which has been seized shall continue to exercise jurisdiction in accordance with Articles 8 to 14 of the Brussels IIbis Regulation. In some specific circumstances, the courts of the ‘receiving State’, may, if this is in the child’s best interest, accept jurisdiction within six weeks of their seizure. In this situation, the court first seized shall decline jurisdiction. Otherwise, the court first seized shall continue to exercise jurisdiction in accordance with Articles 8 to 14.  

In order for this rule to properly function, the courts must cooperate, either directly or through the central authorities designated pursuant to Article 53.  

Finally it should be stated that recital (13) which provides for interpretation guidance on this Regulation, does not allow for sub-transfers from the court in the receiving Member State to a third court.  

This rule is complex and there is ambiguity in the understanding of the exceptional nature of this article. In the Povse Case it was regarded by the Venetian Court that if the circumstances are not exceptional, but considered part of an ordinary dispute between parents relating to the custody of their child, Article 15 does not apply because this article applies ‘by way of exception’. It was rightfully concluded by AG Sharpstone that it does not seem correct to exclude the application of Article 15 of the Regulation on the grounds that the proceedings are concerned with an ordinary dispute between parents relating to the custody of their child. The introductory words ‘by way of exception’ do not require, that the circumstances must be exceptional before the provision may be applied. Rather, they allow a court having jurisdiction to derogate from the general rules of jurisdiction and to transfer the case, or a part thereof, to a court of another Member State, with which the child has a particular connection, if it considers that the latter court is better placed to hear the case and that the transfer will be in the best interests of the child – a situation which will, in principle, be exceptional.  

Another aspect of Article 15 of the Brussels IIbis Regulation is that it does not allow a court to assume jurisdiction of its own motion. Article 15(5) clearly specifies that before it can assume jurisdiction in that way, a court must be seized ‘in accordance with paragraph 1(a) or

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324 Article 15(5) Brussels IIbis Regulation.  
325 Article 15(6) Brussels IIbis Regulation.  
328 ibid.  
329 ibid.
1(b) – that is to say, directly or indirectly, on the initiative of the court having jurisdiction, which stays the proceedings and invites the parties to seize the court of another Member State, or itself requests that court to assume jurisdiction. Although it is true that a transfer request, made by a court of another Member State with which the child has a ‘particular connection’, is possible under paragraph 2(c), the outcome of that request is a matter for the court having jurisdiction as to the substance of the case – and therefore for the court of the Member State of (former) habitual residence. 330

Article 15 is a part of the Brussels IIbis Regulation jurisdictional system. This rule is very closely connected to Article 8 and is a counterbalance to the perpetuatio fori principle introduced by it. 331 Article 8 wants to preserve the jurisdiction of the place where the child had his/hers habitual residence even if the child established habitual residence in another Member State. Thus, Article 15 adds some flexibility to the Brussels IIbis Regulation, by allowing a transfer to a court which is better placed or which has established proximity with the child. Due to these characteristics, the jurisdictional system provides for the both aspects; on the one hand it introduces stability, with the main jurisdictional criterion and the limited exceptions, and on the other it gives flexibility through Article 15 of the Brussels IIbis Regulation. What is significant is that there is genuine trust between the authorities which will position the child’s best interest before everything and not their own struggle for dominance, but these ideas stretch beyond the limitations of this thesis.

Chapter IV Common provisions

Section 3 of the second chapter of the Brussels IIbis Regulation contains provisions that generally refer to three situations: firstly, regarding the ascertaining of the jurisdiction, secondly, the question of *lis pendens*, and thirdly, provisional including protective measures. The order of the articles adopted in the Brussels IIbis Regulation is slightly different from the one adopted in the other European Private International Law instruments preceding the Brussels IIbis Regulation, such as the Brussels Convention\(^ {332} \) and the Brussels I Regulation.\(^ {333} \) The PIL instruments that were adopted later than the Brussels IIbis Regulation also have a different approach to these questions. The Maintenance Regulation\(^ {334} \) adopts generally the same structure of these rules as the Brussels IIbis Regulation, while the Brussels Ibis Regulation holds the same structure as the Brussels I Regulation.\(^ {335} \) The structural logic of these rules points towards inconsistency in the case of Brussels IIbis Regulation because Article 16 is in correlation with Article 19, while Article 17 is related with Article 18. These three situations are positioned in the same section in the Brussels IIbis Regulation, while in the Brussels I Regulation and in the Brussels Ibis Regulation they are positioned in three different sections.\(^ {336} \) In the repealed Brussels II Regulation, the structure was the same as in the Brussels Convention and the Brussels I Regulation. For the purpose of better elaboration of these aspects, the ‘old’ Brussels II Regulation structure will be kept and explained in that manner.

4.1 Ascertaining jurisdiction

One of the vulnerabilities of the having multiple jurisdictional criteria as in the Brussels IIbis Regulation is that it could lead to *forum shopping*.\(^ {337} \) This availability of a large number of potential forums is perceived differently between the Member States. Those who are in

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\(^{333}\) Articles 25-31 of the Brussels I Regulation.

\(^{334}\) Articles 9-14 of the Maintenance Regulation.

\(^{335}\) Articles 27-35 of the Brussels Ibis Regulation.

\(^{336}\) Sections 8, 9 and 10 of Brussels I Regulation and Brussels Ibis Regulation.

\(^{337}\) Boele-Woelki K., Gonzales Beilfuss C., The Impact and Application of the Brussels IIbis Regulation in the Member States: Comparative Synthesis (n 44) 33.
favor of favor divortii policy are fond of such an approach,\textsuperscript{338} while others with more strict attitudes towards divorce such as Ireland\textsuperscript{339} and Malta\textsuperscript{340} fear that this could lead to people circumventing their rigid divorce rules. The awareness of the great differences between the family laws of the Member States led the EU legislators early in the period of the drafting the Brussels II Convention to compose a rule that gave power to the courts of a Member State which were first seized to examine their jurisdiction and to declare of their own motion that they have no jurisdiction if they finds that they has no jurisdiction, and a court of another Member State has jurisdiction on the basis of the Convention.\textsuperscript{341} The reasoning was that the great number of alternatives in the Convention could lead to attempt by the spouses of filing an application in front of a Court of a Member State by whose conflict-of-law rules legislation would be applied which most favorable for their interests, or, in other words, could lead to forum shopping.\textsuperscript{342}

Article 17 of the Brussels IIbis Regulation is identical to Article 9 of the Brussels II Regulation. However the declaration that this rule is a cure for ‘forum shopping’ is rightfully criticized.\textsuperscript{343} The large number of alternative jurisdictional grounds provided in Article 3 of the Brussels IIbis Regulation produces the possibility of concurrent jurisdiction. Effectively, the large number of jurisdictional grounds, together with Article 19 of the Brussels IIbis Regulation, creates rush to the court with the winner being the one commencing the proceedings first.\textsuperscript{344} Therefore, one of the prerequisites for forum shopping is that there needs to be ‘live’ jurisdiction, which happens when the court seized and the courts concerned do have jurisdiction if jurisdiction is ascertained according to the respective jurisdictional rules.\textsuperscript{345} This is not the case in Article 17. The conditions for application of Article 17 are that the court seized lacks jurisdiction over a case under the Regulation and cumulatively a court of another Member State has jurisdiction over that case by virtue of the Regulation. The positive aspect for the parties in such a case is that the court has the responsibility to investigate and determine, on its own motion (\textit{ex officio}), whether the jurisdiction lies with the court on the basis of the

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\textsuperscript{340} Farrugia, R., The Impact and Application of the Brussels IIbis Regulation in Malta (n 175) 211.
\textsuperscript{341} Article 9 of the Brussels II Convention (Article 9 of the Brussels II Regulation).
\textsuperscript{342} Borras Report (n 8) 45.
\textsuperscript{343} Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation (n 9) 202.
\textsuperscript{344} Wermuth v. Wermuth (No.1) (2003) 1 FLR 1022, 1023.
\textsuperscript{345} Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation (n 9) 202.
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jurisdictional rules of the Regulation. The consequence of this rule is that the court must declare that it has no jurisdiction to entertain the pending proceedings. In Case A. the CJEU gave guidance on what a court should do in such circumstances:

\[
\text{[w]here the court of a Member State does not have jurisdiction at all, it must declare of its own motion that it has no jurisdiction, but is not required to transfer the case to another court. However, in so far as the protection of the best interests of the child so requires, the national court which has declared of its own motion that it has no jurisdiction must inform, directly or through the central authority designated under Article 53 of the Regulation, the court of another Member State having jurisdiction.}^{346}
\]

So Article 17 of the Brussels IIbis Regulation is not just a rule that intends to provide a cure for ‘forum shopping’. Its aim is to strengthen the jurisdictional system provided in the Brussels IIbis Regulation as a whole against attempts of the parties to circumvent it.\(^347\) Article 17 needs to be in correlation with Article 18 of the Brussels IIbis Regulation. Article 18, in combination with Article 17, establishes a European minimum standard of protection for the respondent in order to guarantee a fair trial and the respondents’ right to a legal hearing.\(^348\) The first rule guarantees that the case will be heard in front of a proper court that has jurisdiction by virtue of the Regulation, while the latter rule guarantees that the respondents’ rights to a legal hearing and the right of a fair trial will be respected.

Article 18 of the Brussels IIbis Regulation intends to guarantee the right of the respondent to be heard before a competent court and the opportunity to receive an effective defense.\(^350\) It applies in three cases. First, the general gist of this rule is that where a respondent habitually resident in a State other than the Member State where the action was brought does not enter an appearance, the court with jurisdiction shall stay the proceedings so long as it is not shown that the respondent has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defense, or that all necessary steps have been taken to this end. The second and the third scenario are referring to two other instruments Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters and the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. In the cases where the document instituting the proceedings or an equivalent document had to be transmitted from one Member

\(^347\) This article is closely connected with Article 7 and Article 14 (See, Case C-68/07, Kerstin Sandelind Lopez v Miguel Enrique Lopez Lizazo, [2007] ECR I-10403 par. 20)
\(^348\) Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation (n 9) 202.
\(^349\) ibid 211.
\(^350\) Borras Report (n 8) 45.
State to another pursuant to Regulation 1348/2000, instead of the rule given in Article 18(1) of the Brussels IIbis Regulation, Article 19 of Regulation 1348/2000 will apply. In the third scenario, when the provisions of Regulation 1348/2000 are not applicable, for the Member States of the Hague Service Convention, Article 15 of the Convention will apply. These

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352 Article 19 of Regulation 1348/2000 states:  
Defendant not entering an appearance  
1. Where a writ of summons or an equivalent document has had to be transmitted to another Member State for the purpose of service, under the provisions of this Regulation, and the defendant has not appeared, judgment shall not be given until it is established that:  
(a) the document was served by a method prescribed by the internal law of the Member State addressed for the service of documents in domestic actions upon persons who are within its territory; or  
(b) the document was actually delivered to the defendant or to his residence by another method provided for by this Regulation;  
and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.  
2. Each Member State shall be free to make it known, in accordance with Article 23(1), that the judge, notwithstanding the provisions of paragraph 1, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled:  
(a) the document was transmitted by one of the methods provided for in this Regulation;  
(b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document;  
(c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities or bodies of the Member State addressed.  
3. Notwithstanding paragraphs 1 and 2, the judge may order, in case of urgency, any provisional or protective measures.  
4. When a writ of summons or an equivalent document has had to be transmitted to another Member State for the purpose of service, under the provisions of this Regulation, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled:  
(a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal; and  
(b) the defendant has disclosed a prima facie defence to the action on the merits.  
An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.  
Each Member State may make it known, in accordance with Article 23(1), that such application will not be entertained if it is filed after the expiration of a time to be stated by it in that communication, but which shall in no case be less than one year following the date of the judgment.  
5. Paragraph 4 shall not apply to judgments concerning status or capacity of persons.  
353 Article 19(2) of the Brussels IIbis Regulation.  
355 Article 15 of the Hague Service Convention states:  
Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that -  
a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or  
b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention,  
and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant
three scenarios have a hierarchical system, which positions the second paragraph to take precedence over the third and the third to take precedence over the first. Generally, the rules in the Regulation 1348/2000 and in the Hague Service Convention are more detailed, while the rule in the Brussels IIbis Regulation is more general. This hierarchy is logical, because the nature of these instruments is different. The Service Regulation and the Hague Service Convention are specifically relating to cross-border service, while in the Brussels IIbis Regulation, this is just one of the aspects of the jurisdiction.

The impact of Article 18 of the Brussels IIbis Regulation must be viewed as being the first safeguard of the respondent’s right to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defense, or that all necessary steps have been taken to this end. The obligation to stay the proceedings is on the competent court. The second safeguard regarding the party’s right to be served is given in the recognition stage of a foreign judgment of a Member State. One of the grounds on which a judgment shall not be recognized is default of service. Therefore, the intention of Article 18 is that court can thus satisfy itself that international jurisdiction is well-founded and thus avoid possible causes of refusal of recognition wherever possible. It does so by providing that the competent court could, on its own motion, stay the proceedings until respondents’ rights are respected.

4.2 Lis Pendens rules

The *lis pendens* mechanism is designed to avoid parallel actions and consequently the possibility of irreconcilable judgments on the same issues. In the Brussels IIbis Regulation the objective of this rule is to provide, on the basis of the basic principle of prior temporis, a

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357 Articles 22(b) and 23(c) of the Brussels IIbis Regulation.
358 Borras Report (n 8) 45.
359 For more on *lis pendens* and other options of declining jurisdiction, see Shúilleabháin, M.N., Cross Border Divorce Law, (n 63) 188-230.
solution for the various possibilities in family law, which differ from those in property law. Rules regarding *lis pendens* are one of the mechanisms through which Member States attempt to prevent the problem of *‘forum shopping’*. This problem arises because of the different *fora* in front of which the parties can engage in proceedings. The *system archetype* of concurrent proceedings is caused by the inherent differences, both in procedure and substance, among the State’s legal orders, with the result being that each litigant is naturally drawn to introduce an action before his or her domestic courts whenever the possibility of so doing so arises, rather than submitting to the jurisdiction of a foreign court chosen by his or her opponent.361

Generally the *lis alibi pendens* solution is mainly adopted in the civil law jurisdictions.362 The common law countries are more in favor of the *‘forum non conviniens’* doctrine.363 This doctrine allows courts that have jurisdiction over a case to stay or dismiss the case upon a determination that the case may be more appropriately heard in another court.364 The difference between these two doctrines lies in the role that is given to the judge. Generally the role of the judge in the civil law countries is more passive and is in conflict with the idea behind *‘forum non conviniens’* that the judge can exercise discretion to stay or dismiss a case in favor of a foreign court if the interest of justice is best served if the trial takes place in another court.365

Article 19 of the Brussels IIbis Regulation establishes the *lis pendens* rule and ‘dependent actions’. Its goal is to avoid bringing about contending matrimonial proceedings and, as a consequence, the possibility of irreconcilable judgments on the same issue rendered by courts in different Member States.366 So the possible conflict of concurrent proceedings in the Brussels IIbis Regulation is solved by Article 19, which establishes a rule based on the principle of *‘Qui prior est tempore potior est iure’*. According to this rule, proceedings brought before the court first seized take precedence over all other competing actions. Hence, the aim behind this provision is to prevent and avoid complex and prolonged arguments over the better or more convenient forum when there are competing jurisdictions within the EU. However, this rule creates utter unfairness in the problem of *‘forum shopping’*.367 As a rule, it is envisaged to give support to the idea of developing European legislation in the family law field that is

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360 Borras Report (n 8) 46.
363 ibid.
364 ibid.
365 ibid 1005.
366 Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation (n 9) 222.
367 ibid 223.
based on the necessity to impose clear and simple rules to establish the primary jurisdiction and to ensure that once that primary jurisdiction is established it is given the fullest support in the discharge of its consequent responsibilities.\textsuperscript{368} Nevertheless in the cases with a foreign element where the temptation for the parties is first to maneuver and then to fight to establish the jurisdiction which one believes will be more generous and the other believes will be less generous,\textsuperscript{369} the problem of ‘forum shopping’ is specially emphasized and the rush to the court creates great advantages both in procedural and in substantive aspects. It can rightfully be said that this rule favors social interests and highlights its own efficiency and predictability over the values which are focused on individual interests such as equity and fairness.\textsuperscript{370}

\textit{Lis pendens} and the dependent action mechanism in the Brussels IIbis Regulation can find their counterparts in Articles 27-31 of the Brussels I Regulation. The base of this rule was originally taken from Articles 21-23 of the Brussels Convention\textsuperscript{371} and was drafted having in mind Article 13 of the 1996 Hague Child Protection Convention.\textsuperscript{372} The rule itself was amended in the Brussels Convention by Article 8 of the 1989 Accession Convention, because in the version form 1968 the second court was required to decline jurisdiction in the event that another court had previously been seized.\textsuperscript{373} It was considered that this approach was too radical,\textsuperscript{374} because it could lead to situations where the second seized court would decline jurisdiction in favor of another court and then the first seized court could decide that it did not have jurisdiction and with this create legal uncertainty. As a result of this, Article 21 of the Brussels Convention was amended so that the court other than the court first seized could of its own motion stay its proceedings (rather than decline) until the jurisdiction of the other court has been established. This common ground\textsuperscript{375} of the \textit{lis pendens} rules of the Brussels I Regulation

\begin{itemize}
\item \textsuperscript{368} Prazic v. Prazic (2006) 2 FLR 1124, 1136.
\item \textsuperscript{369} Wermuth v. Wermuth (No.1) (2003) 1 FLR 1022
\item \textsuperscript{370} Brand A., R, (n 362) 1010.
\item \textsuperscript{371} Which are the same as those in Brussels I Regulation
\item \textsuperscript{372} Article 13 of the 1996 Hague Child Protection Convention states:
\begin{enumerate}
\item The authorities of a Contracting State which have jurisdiction under Articles 5 to 10 to take measures for the protection of the person or property of the child must abstain from exercising this jurisdiction if, at the time of the commencement of the proceedings, corresponding measures have been requested from the authorities of another Contracting State having jurisdiction under Articles 5 to 10 at the time of the request and are still under consideration.
\item The provisions of the preceding paragraph shall not apply if the authorities before whom the request for measures was initially introduced have declined jurisdiction.
\end{enumerate}
On this issue also see, Borras Report (n 8) 46.
\item \textsuperscript{373} Article 21 of the 1968 Brussels Convention.
\item \textsuperscript{375} cf Case C-351/89 Overseas Union Insurance Ltd and Deutsche Ruck Uk Reinsurance Ltd and Pine Top Insurance Company Ltd v New Hampshire Insurance Company [1991] ECR I-03317 where the CJEU has stated that \textit{lis pendens} rules in the Brussels I regime are intended ‘to prevent parallel proceedings before the courts of different Contracting States and to avoid conflicts between decisions which might result therefrom.’ Such aspect
\end{itemize}
and the Brussels IIbis Regulation allows, when applying Article 19 of the Brussels IIbis Regulation, regard to be given to the rulings of the CJEU referring to the *lis alibi pendens* rules in the Brussels Convention and the Brussels I Regulation.\(^\text{376}\)

Article 19 of the Brussels IIbis Regulation originates from the predecessors of the Brussels regime and it is similar to its counterparts, however it has been modified for its material scope and it has been drafted differently. Article 19(1) refers to applications for **divorce, legal separation or marriage annulment** between the same parties but it does not cover any proceedings relating to parental responsibility. Article 19(1) covers two situations, firstly regarding proceedings relating to the same subject-matter and where cause of action is brought before courts of different Member States and secondly proceedings which do not relate to the same cause of action, but which are ‘dependent actions’ that are brought before courts of different Member States.\(^\text{377}\) This means that the ‘material scope’ of Article 19(1) is wide, covering all of the matrimonial legal issues covered by the Brussels IIbis Regulation (divorce, legal separation or marriage annulment), and when one of these proceedings are pending in one Member State, subsequent action on any of these three issues cannot proceed in another Member State.\(^\text{378}\)

In contrast to Article 19(1), Article 19(2) applies if several proceedings relating to **parental responsibilities** relate to the same child and involve the ‘same cause of action’. For the mechanism in Article 19(2) to have effect, the proceedings in the two Member States must both be proceedings on the substance of the matters of parental responsibility that were raised.\(^\text{379}\) If, for example, the proceedings in one Member State are for issuing provisional and protective measures under Article 20,\(^\text{380}\) then any proceedings in another Member State raised subsequently which deal with the substance of parental responsibility issues in relation to the same child will not be subject to the rule in Article 19(2). This aspect was considered in the *Purrucker II* case,\(^\text{381}\) where the *Amtsgericht Stuttgart* referred to the CJEU for a preliminary ruling on whether the provisions of Article 19(2) dealing with *lis pendens* and related actions applied in two cases. The first case was where the court in one Member State was seized only of an action to obtain an order for provisional measures within the meaning of Article 20 of the

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\(^{376}\) Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation (n 9) 224.

\(^{377}\) Practice Guide for the application of the Brussels IIa Regulation (n 21) 15.

\(^{378}\) Shuilleabhain, M.N. (n 63) 188.

\(^{379}\) Ibid 38.

\(^{380}\) Text to n 401 Part II ch IV sec 4.4.

Regulation. The second case was where a court of another Member State that has jurisdiction as to the substance of the matter within the meaning of the Regulation was the second court seized by the other party of an action with the same object: seeking to obtain a judgment as to the substance of the matter of parental responsibility, whether on a provisional or on a final basis. To these questions, the CJEU answered that the provisions of Article 19(2) are not applicable in either circumstance. The reasoning behind this is that, as the provisional measures are not enforceable in the other Member State [according to the rules of the Brussels IIbis Regulation, there is no possibility of the judgments conflicting.]

Article 19(3) covers the situation where the court first seized accepts the jurisdiction. The consequence of such an action is that the court second seized is mandated to stay the proceedings pending before it, if it regards the cause of both proceedings as identical. It was disputed in the Purrucker II case about the duration of the time that the court second seized should wait before making a decision as regards the question whether the court first seized has jurisdiction on the substance of the matters raised. The CJEU indicated that

\[\text{notwithstanding efforts made by the court second seised to obtain information by enquiry of the party claiming lis pendens, the court first seised and the central authority, the court second seised, lacks any evidence which enables it to determine the cause of action of proceedings brought before another court and which serves, in particular, to demonstrate the jurisdiction of that court in accordance with Regulation No 2201/2003, and where, because of specific circumstances, the interest of the child requires the handing down of a judgment which may be recognised in Member States other than that of the court second seised, it is the duty of that court, after the expiry of a reasonable period in which answers to the enquiries made are awaited, to proceed with consideration of the action brought before it. The duration of that reasonable period must take into account the best interests of the child in the specific circumstances of the proceedings concerned.}\]

Article 19 is a single article that contains rules for lis pendens and for related actions. This characteristic is slightly different from the other Regulations. They all contain separate rules for lis pendens and for related actions. The lis pendens rules are referring to concurrent proceedings that presuppose identical proceedings, both as concerns the cause of action and the parties. Whether for related or unrelated actions, the actions present a close connection

\[\text{Case C-296/10, Bianca Purrucker v Guillermo Valles Perez [2010] ECR I-11163 para 86.}\]
\[\text{Practice Guide for the application of the Brussels IIa Regulation (n 21) 39.}\]
\[\text{Case C-296/10, Bianca Purrucker v Guillermo Valles Perez [2010] ECR I-11163 para 86.}\]
\[\text{Brussels I Regulation Brussels Ibis Regulation, Maintenance Regulation, etc.}\]
\[\text{See Article 27 and 28 of the Brussels I Regulation, Articles 29 and 30 of the Brussels Ibis Regulation, Article 12 and 13 of the Maintenance Regulation.}\]
\[\text{Although the ‘identical’ aspect can be appraised with a certain degree of flexibility.}\]
\[\text{Marongiu Buonaiuti, F., (n 362) 513.}\]
to one another that is expedient to having them treated jointly in order to prevent the risk of irreconcilable judgments that may arise if they were treated separately.\textsuperscript{389}

Generally, this articles aim is to achieve same preventive form of coordination among the jurisdictions, which is also the aim of the recognition and enforcement of foreign decisions. In fact it can be said that the rules relating to \textit{lis alibi pendens} and related actions may foster the recognition and enforcement of foreign judgments\textsuperscript{390} because they tend to provide order to the establishment of jurisdiction by the courts of Member States based on the \textit{prior tempore} principle, and they prevent refusal of recognition because of the existence of a contrast between judgments. But Article 19 of the Brussels IIbis Regulation cannot be interpreted in isolation from the other rules. Articles 22 and 23 of the Brussels IIbis Regulation (grounds for non-recognition relating to matrimonial matters and parental responsibility issues) approach the problem of irreconcilable judgments from another standpoint. Articles 22 and 23 represent a cure for the problem of irreconcilable judgments, a last resort so this problem could be avoided, while the \textit{lis pendens} and the related action rule is more of an attempt to prevent parallel proceedings and irreconcilable judgments.\textsuperscript{391} Article 19 (1) and (2) give power to the court first seized to determine in which Member State proceedings might be brought, so in a way it can be said that these are rules concerning jurisdiction – jurisdiction to determine jurisdiction. By contrast Article 19(3), which provides that the court second seized shall decline jurisdiction in favor of the first seized court if that court has established jurisdiction, is a rule concerning the recognition of foreign judgments- foreign judgments within the Community establishing jurisdiction.\textsuperscript{392}

Eventually, the rules provided in Article 19 would come to be seen in the Brussels IIbis Regulation system as rules which have not e prevented but rather have resulted in ‘forum shopping’ and ‘rush to the Court’\textsuperscript{393} especially in matrimonial matters. This rule in conjunction with Article 3 of the Brussels IIbis Regulation, where more than one Court can have jurisdiction on matrimonial matters, and also with the limited number of Member States where the Rome III Regulation applies, creates a fertile ground for financial disadvantages and physical inconvenience for the respondent.\textsuperscript{394} In the cases of parental responsibility, some of

\begin{itemize}
  \item \textsuperscript{389} ibid 525.
  \item \textsuperscript{390} ibid 516.
  \item \textsuperscript{392} ibid 500.
  \item \textsuperscript{393} Final Report Regulation (EC) No 2201/2003, Analytical annexes, (n 6) 17; Shúilleabháin, M.N. (n 63) 221.
  \item \textsuperscript{394} Shúilleabháin, M.N. (n 63) 221.
\end{itemize}
these negative aspects have been mitigated thanks to the rule on transfer on jurisdiction.\textsuperscript{395} In such cases, a Court of a Member State can decline jurisdiction to one court in favor of another court which is in a better position to hear the case. This has provided for more a flexible approach to the question of \textit{lis pendens}. If such possibility is present regarding the parental responsibility issues, which are issues that are equally if not more sensitive, there is a possibility of future introduction of such a rule regarding matrimonial matters,\textsuperscript{396} although the current use of the rule for transfer of jurisdiction regarding parental responsibility issues remains limited in the Member States.\textsuperscript{397}

\textbf{4.3 The Seizing of a Court}

Article 16 of the Brussels IIbis Regulation is essentially a provision of a definition and its goal is to establish materially uniform approach as to how to ascertain the point of time when a court is deemed to be seized. This rule employs an autonomous notion and formula of EU law. It was introduced because of the generally bad experiences with the Brussels I Convention where the lack of an autonomous definition of ‘seizing’ of court created a fertile ground for confusion and conflicting decisions.\textsuperscript{398}

The approach taken in article 16 of the Brussels IIbis Regulation is that it does not introduce any notion of seizing to be applied universally throughout the Member States in their procedural laws, nor does it attempt to unify the existing definitions of seizing in national law. Article 16 takes into account the divergences in national law as to the definitions of seizing between the national laws of the Member States and tries to reflect these divergences in its two alternatives. Also, it only establishes a position when a certain court is seized and does not attempt to refer to the position of ‘first seized’ court.\textsuperscript{399}

Article 16 of the Brussels IIbis Regulation requires that a court will be seized at the time that the proceedings were formally initiated, but only if subsequently the necessary initiation procedures will have been completed. There are two alternatives to this position: Article 19(a) provides that a court is only seized by the filing of the claim if subsequently the

\textsuperscript{395} Text to n 320 Part II ch III sec 3.2.8.
\textsuperscript{396} Shúilleabháin, M.N. (n 63) 225.
\textsuperscript{397} Final Report Regulation (EC) No 2201/2003, Analytical annexes, (n 6) 34.
\textsuperscript{398} Shúilleabháin, M.N. (n 63) 192.
\textsuperscript{399} Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation (n 9) 184.
claim is served and Article 19(b) provides that a court is only seized by service of the claim if subsequently the claim is filed.\textsuperscript{400}

4.4 Provisional, including protective measures (Article 20)

Provisional, including protective, measures are frequently used in cases decided according to the Brussels IIbis Regulation.\textsuperscript{401} As legal instruments, they generally represent measures that are intended to produce effects for only a limited period - until a certain event occurs or a certain period of time elapses.\textsuperscript{402} Such measures are particularly vital in urgent cases,\textsuperscript{403} where a provisional arrangement in respect to person or assets may prove essential while the substance is decided elsewhere.\textsuperscript{404} Family law cases are considered very delicate and sensitive especially where children are involved. The decisions in family law cases compared to other civil law issues are considered to be more changeable, because the circumstances in cases involving children can change rapidly and something that is favorable towards them at one time can prove to be harmful in other time. Therefore, it is for the Courts to follow the development of new circumstances and act accordingly so they can be responsive to and protect the children’s best interest.

On the other hand, very often circumstances necessitate prompt and decisive acts by the authorities of a Member State where the children are situated and not by those that, according to the Brussels IIbis Regulation, have the jurisdiction. In these cases, a court that lacks jurisdiction regarding parental responsibility issues must act promptly and take measures in order to protect the integrity of the children or their assets. At the same time, these measures also lack a finality in the proportion that parental responsibility decisions have. Therefore, this sub-chapter will analyze the provisional including the protective measures in the Brussels IIbis Regulation and will try to highlight the positive and negative aspects in order to answer the question on how to properly restrain the Courts that take such measures from occupying the jurisdiction of courts which have rightfully determined jurisdiction to be theirs according to the rules of the Brussels IIbis Regulation.

\textsuperscript{400} ibid 188-198.
\textsuperscript{403} See the example given in the Practice Guide for the application of the new Brussels II Regulation (n 106) 11.
\textsuperscript{404} Magnus U. and Mankowski P., Commentary on Brussels Ibis Regulation (n 9) 248.
4.4.1. General

Article 20 of the Brussels IIbis Regulation enables an applicant to seek provisional, including protective, measures from a court even if, under the Regulation, another court has jurisdiction as to the substance of the case. Article 20(2) provides that the taken measures will be of temporary nature; they cease to apply when the court entrusted with jurisdiction under the Regulation as to the substance of the matter has taken the appropriate measures.

The origin of this rule can be found in the Brussels II Convention and in the Brussels II Regulation. Article 12 of the Brussels II Regulation and of the Brussels II Convention contain substantially similar provisions to Article 20(1) of the Brussels IIbis Regulation. Also Article 31 of the Brussels I Regulation contains a similar rule.405 Such common ground among these rules provides for the case law and the legal writings of these legal sources to be used in the interpretation of Article 20 of Brussels IIbis Regulation.406 The difference between these rules and the rule in Brussels IIbis Regulation is in the temporal limitation provided in Article 20(2).

Another rule from the 1996 Hague Child Protection Convention also served as a model for Article 20 of the Brussels IIbis Regulation. Article 11 of the 1996 Convention contains rules for provisional measures taken in cases of urgency. It provides that in all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection,407 which lapse as soon as the authorities of the State of habitual residence have taken these measures required by the situation.408

However, Article 20 of the Brussels IIbis Regulation and Article 11 of the 1996 Hague Convention have significant differences. Firstly, the provisions in Article 11 and Article 12409 of the 1996 Hague Convention are jurisdictional rules,410 while the position of Article 20 in the jurisdictional system of the Brussels IIbis Regulation is different. Namely, Articles 8 to 15 of

405 In the Case C-261/90 Reichert and Kockler [1992] ECR I-2149, provisional including protective measures were defined as measures 'intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter'. Following this case a series of CJEU cases were referring to the Dutch 'kort geding procedure' which represents an important provisional procedure, which can be commenced in urgent cases, independently from the main proceedings (C-391/95 - Van Uden Maritime v Kommanditgesellschaft in Firma Deco-Line and Others [1998], ECR I-7091). For more on the issue and the jurisprudence of the CJEU on this subject see, Kramer X., 'Harmonisation of Provisional and Protective Measures in Europe' in Storme M. (ed) Procedural Laws in Europe, Towards Harmonisation, Maklu Publishers, (2003), 305-319
408 Article 11(2) of the 1996 Child Protection Convention.
409 Provisional measures of territorial effect.
410 Lagarde Report (n 93) 567.
the Brussels IIbis Regulation sets out a comprehensive list of rules on jurisdiction in relation
to matters of parental responsibility. According to the nature of such cases, many decisions will
be of a provisional character, as AG Sharpstone stated:

[i]t is of the nature and essence of family law that, as children grow up and circumstances
change, substantive decisions on parental responsibility may need to be varied (or indeed reversed).
Consequently, no such decision is definitive or final in the sense that a decree of divorce is definitive or
final. And all decisions on parental responsibility produce their effects only for a limited period, in that
they necessarily lapse when the child reaches the age of majority.\(^{411}\)

Article 20 of the Brussels IIbis Regulation makes it clear that those jurisdictional rules
do not prevent courts of a Member State from taking urgent provisional measures under
national law in respect of persons in that State, even if a court of another Member State has
jurisdiction as to the substance, and it also makes clear that such measures will cease to apply
when the latter court has taken appropriate action. This rule does not seek to regulate all
provisional measures. Also this provision does not seek to confer any substantive jurisdiction.
It merely allows, in specified circumstances, another court, which is temporarily better placed
for that purpose than the court having substantive jurisdiction, to take urgently necessary
provisional measures which remain subordinate to the measures decided on by the court of
jurisdiction.\(^{412}\) In this context, AG Bot reached, in its Opinion on the Detiček Case, a similar
conclusion: that Article 20 is not a criterion of general jurisdiction, but rather a permission to
take action under the dual pressures of the child being in danger and the need for urgent action
to take the child out of danger.\(^{413}\) Another argument in this manner, can be found in the
structural position of Article 20 in the Brussels IIbis Regulation. It is positioned as the last
article of Chapter II of the Regulation, separately in a different section with title ‘Common
provisions’ and is set up as the opposite of the rules of jurisdiction, which are given in Sections
I and II and under a different section title.\(^{414}\) This is not the case in the 1996 Hague Child
Protection Convention. Article 11 of the 1996 Hague Convention is the same chapter with all
of the other jurisdictional rules, and it bears the same title ‘Jurisdiction’.\(^{415}\)

\(^{411}\) Case C-256/09 Bianca Purrucker v Guillermo Vallés Pérez [2010] ECR I-07353 Opinion of AG Sharpston
delivered on 20 May 2010 para 119.
\(^{412}\) Case C-256/09 Bianca Purrucker v Guillermo Vallés Pérez [2010] ECR I-07353 para 61; Case C-256/09 Bianca
para 106.
Secondly, the 1996 Hague Convention provides for the recognition and enforcement of measures adopted in accordance with Article 11 and the measures thereof.\(^\text{416}\) It should be borne in mind that, under the rules laid down in that convention – more specifically, in Article 23(2)(a) on recognition, and Article 26(3), which refers back to Article 23(2) on enforcement – review of the international jurisdiction of the court which adopted the measure is permissible. That is not true of the system of recognition and enforcement provided for in the Brussels IIbis Regulation, since Article 24 of that regulation prohibits any review of the jurisdiction of the court of the Member State of origin.\(^\text{417}\)

To properly understand Article 20 of the Brussels IIbis Regulation, it is vital to elaborate on the circumstances under which it can be applied. In a recent Study on the assessment of the Brussels IIbis Regulation,\(^\text{418}\) the main problems identified in the application of Article 20 were found in the lack of clarity on the definition and scope of the provisional measures as well as the impossibility of applying provisional measures in matrimonial matters cases.\(^\text{419}\) So these ambiguities ask for a clearer position of the provisional measures in the system of the Brussels IIbis Regulation through two necessary aspects: first, the scope of this rule must be determined and secondly, the limits of this rule must be explained in detail.

The *ratio tempori* of this rule applies from the moment the dispute occurs or even the moment when the proceedings on the merit are no longer pending, until the court of the Member State that has jurisdiction as to the substance takes measures it considers appropriate.\(^\text{420}\) It is in the nature of these measures to give power to the court to take the necessary measures to protect the person or assets from the point in time when these ‘exceptionally serious and directly linked to the child’ situations occur until the point when the court that has jurisdiction as to the substance takes over and assures that protection. Therefore, the temporal scope of application of this rule is positioned between these two points in time. The territorial scope of application of Article 20 is the same as that of the Regulation. It applies only between the Member States that find the Regulation applicable. In other countries (Denmark or other countries), the Regulation does not preclude provisional measures being adopted by courts on the basis of other international instruments. The fragmentation of the *ratione materiae* of the Brussels IIbis Regulation is evident. Today this Regulation is not the

\(^{416}\) See Article 23 (1) and especially *in contrario* of Article 23(2)(a) of the 1996 Hague Child Protection Convention.

\(^{417}\) Case C-256/09 Bianca Purrucker v Guillermo Vallés Pérez [2010] ECR I-07353 par.90. See also, Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation (n 9) 249.


\(^{420}\) Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation (n 9) 249.
only set of rules that covers cross-border family law relations in the EU. The Maintenance Regulation and other possible future regulations are creating the fragmentation of this area of law and thus it makes difficult to accept the extensive interpretation of the material scope of Article 20 of the Brussels IIbis Regulation, which argues that it covers provisional measures outside the scope of the Regulation itself.\textsuperscript{421} Also within the Brussels IIbis Regulation, it is questionable whether such rules can be applied to matrimonial matters or they can be applied only regarding parental responsibility issues.\textsuperscript{422}

\textbf{4.4.2. Conditions for application of Article 20 of the Brussels IIbis Regulation}

Article 20 of the Brussels IIbis Regulation does not specifically explain the conditions for the application of provisional including protective measures in cases covered by the Brussels IIbis Regulation. Generally, it states that:

\begin{quote}
[I]n urgent cases, the provisions of this Regulation shall not prevent the courts of a Member State from taking such provisional, including protective, 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.
\end{quote}

The limits of Article 20 of the Brussels IIbis Regulation were first given in the Case C-523/07 (A. case), where it was stated that the adoption of measures in matters of parental responsibility by courts of Member States which do not have jurisdiction as to the substance of the matter is subject to three cumulative conditions, namely: (1) the measures concerned must be urgent; (2) they must be taken in respect to persons or assets in the Member State where the court seised of the dispute is situated, and (3) they must be provisional.\textsuperscript{423}

\textbf{4.4.2.1 The measures must be urgent}

The first prerequisite is that the measures taken by the court that doesn’t have substantive jurisdiction are of an urgent nature. However, this term is not specifically explained in the Regulation. This can be problematic, because the application of this rule is based on the criterion of urgency and not on the criterion of proximity, the basis for the grounds on jurisdiction in matters of parental responsibility.\textsuperscript{424} In specific situations this criterion for a

\textsuperscript{421} Opposite of this approach see Borras Report (n 8) para 59.
\textsuperscript{422} Final Report Regulation (EC) No 2201/2003 Analytical annexes (n 6) 45.
\textsuperscript{423} Case C-523/07 A. [2009] ECR I-2805 para 47.
\textsuperscript{424} Recital (12) of the Brussels IIbis Regulation
limited time prevails over the other criteria and allows a court of a Member State to apply *lex fori* irrespective of any criterion of initial jurisdiction.\(^{425}\) The sole jurisdictional system of the Brussels IIbis Regulation is positioned as such way that it discourages forum shopping in matters relating to parental responsibility by maintaining and defending as inviolable the initial jurisdiction of the court seized as to the substance of the case.\(^{426}\) The Brussels IIbis Regulation was structured in a manner such that it has a general rule of jurisdiction and has limited exceptions to the general rule, and for the provisional measures it lifts the level of urgency only in exceptional cases.\(^{427}\) This structure allows the court that has most proximity to the case (which is the court of the habitual residence of the child) to maintain its jurisdiction, but nevertheless it acknowledges that there will be some situations, which are exceptionally serious and directly linked to the child’s situation,\(^{428}\) that can allow a court to take appropriate measures in cases of urgency. Because Article 20 is a rule that functions as an exception and can allow a court of a Member State to take measures irrespective of the court which has jurisdiction as to the substance, its interpretation has to be very strict and very narrow.\(^{429}\)

The characterization of a situation as urgent, an action conducted by national law, can produce ambiguity and inconsistency of the implementation of the Regulation,\(^{430}\) so the CJEU in several preliminary rulings developed an explanation of the term ‘urgent situations’. In the *A. Case*, the court referred to this situation as one in which the children:

[a]re in a situation likely seriously to endanger their welfare, including their health or their development, thereby justifying the immediate adoption of protective measures.\(^{431}\)

In *Detiček* case, the CJEU stated that:

[i]t must be considered that the concept of urgency in that provision relates both to the situation of the child and to the impossibility in practice of bringing the application concerning parental responsibility before the court with jurisdiction as to the substance.\(^{432}\)

Also in this case, the CJEU made a distinction between change of circumstances in the situation of wrongful removal and retention and the criterion of urgency, disallowing the

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\(^{426}\) Ibid para 74.

\(^{427}\) As the example given in the Practice Guide for the application of the new Brussels II Regulation (n 106) 11.


\(^{430}\) Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation (n 9) 253.


circumvention of the principles on which the Regulation is based. Moreover, AG Bot in the Opinion on this case specified that:

[I]t is very clear that this necessary exception to the general rule of jurisdiction can be justified only in exceptional circumstances, such as those which arise when there is an imminent danger which can be prevented only by urgent action in response to a situation which either produces the danger or is incapable of averting it.

[S]o this limitation to the criterion of urgency is positioned between the ‘the dual pressures of the child being in danger and the need for urgent action to take the child out of danger.

### 4.4.2.2 The measures must be taken in respect to persons or assets in the Member State where the court seized of the dispute is situated

The second condition in the application of Article 20 is that the provisional measures must be taken in respect to persons or assets in the Member State where the court seized of the dispute is situated. This condition is based on the territoriality principle, which requires that the provisional measures taken with regard to the person or assets are filed in front of the court where the person and assets are present. Such an approach is different from the one taken in relation to the Article 31 of the Brussels I Regulation, which requires the existence of a ‘real connecting link’ with the subject matter of the requested measure. The approach outlined in Article 20 of the Brussels Ibis Regulation raised two questions that needed to be addressed by the CJEU: firstly, which persons need to be present in the Member state of the court seized, and secondly, about the relocation of the person/persons. Regarding the first question the CJEU has no clear standpoint. In *Detiček* case, the CJEU provided that:

[a]s is apparent from the very wording of Article 20(1) of Regulation No 2201/2003, provisional measures must be taken in respect of persons in the Member State in which the courts with jurisdiction to take such measures are located. A provisional measure in matters of parental responsibility ordering a change of custody of a child is taken not only in respect of the child but also in respect of the parent to whom custody of the child is now granted and of the other parent who, following the adoption of the measure, is deprived of that custody.

Latter, in the *Purricker* case, AG Sharpstone in its opinion took quite the opposite standpoint and concluded:

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435 ibid para 83.
436 Magnus U. and Mankowski P., Commentary on Brussels Ibis Regulation (n 9) 255.
It might appear, from paragraphs 50 to 52 of the judgment in Detiček, that, for a provisional measure concerning parental responsibility to be taken in the circumstances set out in Article 20, not only the child but also the persons previously and/or newly exercising that responsibility must be present in the Member State concerned. However, I agree with the view expressed at the hearing by a number of those present that such an approach would be incorrect, and that it is the presence of the child alone which determines whether urgent provisional measures may be taken with respect to him or her.  

This position is much closer to the goal of Article 20, which it wants to achieve. Specifically, Article 20 is based on the criterion of urgency and not on the criterion of proximity as the grounds on which jurisdiction in matters of parental responsibility are based. It is envisaged as a rule that allows a court that does not have jurisdiction as to the substance to temporarily take necessary measures as to the persons or assets which are located in its territory, until the court that has jurisdiction as to the substance ‘joins’ in the protection of the person(s) and assets. It is not envisaged as a rule that permanently grants rights. Only the persons and assets directly involved are subject to this rule and it is only applied for specific urgent cases. So only the presence of the child who is in some kind of urgent situation determines what kind of measures are needed for his/her protection.

Regarding the second question, it is accepted that the relocation should have no impact on the applicability of Article 20 of the Brussels IIbis Regulation. Nevertheless, such decisions in these kind of situations raise the question of enforcement in another Member State. The standpoint of AG Sharpstone, which was also the standpoint taken in the Purrucker case, was to distinguish between provisional measures adopted by a court of a Member State on the basis of competence derived by that court, from the rules on substantive jurisdiction in the Brussels IIbis Regulation and provisional measures adopted by a court of a Member State on the basis of national law in the circumstances set out in Article 20 of Brussels IIbis Regulation. If the court adopted provisional measures:

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440 Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation (n 9) 255.
441 The idea of AG Sharpstone was to develop a way how to ascertain whether the court relied upon the rules of jurisdiction provided in regulation Brussels IIbis or it assumed its competence according to Article 20. ‘A court hearing an application for recognition or non-recognition of a provisional measure, or for a declaration of enforceability, is entitled to ascertain the basis of jurisdiction relied on by the court of origin either from the terms or content of its decision or, if necessary, by communicating with that court directly or through the appropriate central authorities. If, but only if, neither of those means produces a clear and satisfactory result, it should be presumed that jurisdiction was assumed in the circumstances set out in Article 20(1). In the case of provisional decisions on parental responsibility, the same means of communication may be used to verify whether the decision is (still) enforceable in the Member State of origin, if the accuracy of a certificate issued pursuant to Article 39 of Regulation No 2201/2003 is challenged; and, if such communication is unsuccessful, other means of proof may be used, provided that they are adduced in a timely manner.’ Case C-256/09 Bianca Purrucker v Guillermo Vallés Pérez [2010] ECR I-07353 Opinion of AG Sharpston para 186.
on the basis of competence derived by that court from the rules on substantive jurisdiction in Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and [in] matters of parental responsibility must be recognized and enforced in other Member States in the same way as any other judgment adopted on the same basis, in accordance with Article 21 et seq. of that Regulation.  

But if the court adopted the measures:

on the basis of national law in the circumstances set out in Article 20 of Regulation No. 2201/2003 the measures do not have to be recognised or enforced in other Member States in accordance with Article 21 et seq. of the Regulation.

This restrictive approach was made less rigorous with the aspect that the:

regulation does not, however, preclude their recognition or enforcement in accordance with procedures derived from national law, in particular those required by multilateral or bilateral conventions to which the Member States concerned are parties.

4.4.2.3 The measures must be provisional

There is an inherent risk present in the situations where proceedings of a provisional nature might lead de facto to measures of a more permanent nature if some kind of temporal limitation is not presented in this rule. Article 20(2) of the Brussels IIbis Regulation states that measures provided under this article cease to apply when the court of the Member State having jurisdiction under the Regulation as to the substance of the matter has taken the measures it considers appropriate. This limitation however raises two questions: what is the length for which this provisional measures remain in force and what if the court that has jurisdiction as to the substance of the case does not take actions for the protection of the persons or assets?

The Brussels IIbis Regulation is an EU act and as such, an autonomous interpretation of its rules is exercised and implemented. Article 20 is no exception to this ‘autonomous’ interpretation, and its temporal limitation and implementation stands, irrespective of the domestic law of the seized court. But on the other hand, the measures are taken on the basis of the provisional measures known in the national legal system and in some cases these measures can be decided on without a specific time limit. As such, the requirement of Article 20 regarding temporal limitation is not to a priori position a specific time frame, but to limit generally the court that takes them in the respect that these measures are not definite. The most effective

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443 ibid.
444 ibid.
445 Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation (n 9) 255.
446 ibid 31.
length of these measures, however, depends on the parties and on the actions taken by the court that has jurisdiction as to the substance of the case.\textsuperscript{447}

As for the cases where the court having jurisdiction as to the substance of the case does not take appropriate measures for the protection of the persons or assets the result could be prolongment of the provisional measures and also to them becoming \textit{de facto} permanent measures.\textsuperscript{448} Generally this kind of development is not desirable in the implementation of the Brussels IIbis Regulation, because such an implementation of Article 20 leads to circumvention of the general rules of jurisdiction. For this jurisdictional system to be properly implemented, actions preventing such circumvention are not only taken on the court level but also regarding persons concerned, who can take proactive measures by filing proceedings on the merits and resolve this kind of dispute in a more permanent manner.

Provisional including protective measures represent an important tool in the implementation of the Brussels IIbis Regulation, especially regarding parental responsibility issues. Moreover, their frequent use provided for several references of the CJEU to some aspects of Article 20. In these aspects, the CJEU has provided some guidelines and principles with which Article 20 is to be applied, but still the complexity of this rule asks for a further explanation or some form of detailed guidelines for its application by the relevant authorities. This is particularly important because sometimes these provisional measures can become final measures and they could lead to the circumvention of the whole jurisdictional regime. In this context, the elaboration of the CJEU about the measures in matters of parental responsibility which were rendered by courts of Member States which do not have jurisdiction as to the substance of the matter must be in accordance with three cumulative conditions, namely: (1) the measures concerned must be urgent; (2) they must be taken in respect to persons or assets in the Member State where the court seized of the dispute is situated, and (3) they must be provisional. Furthermore, the elaboration by the CJEU on these aspects gives the Courts of Member States more formality and rigidity in the implementation of Article 20 as a rule, which is something different and could potentially endanger the jurisdictional rules in the Brussels IIbis Regulation.

Another aspect regarding the provisional including protective measures which can be seen as problematic is the enforcement of such measures. While domestic enforcement is generally seen as unproblematic, the cross-border enforcement of these measures has always

\textsuperscript{447} ibid 256.
\textsuperscript{448} ibid.
been highly debated and seen from different angles. Because of the nature of the EU, some kind of ground rules for the enforcement of such measures within the EU have been given in the relevant PIL regulations, but there are still large differences between the Member States in the understanding and the implementation of such rules. In that context the most problematic aspect of the enforcement of provisional including protective measures in parental responsibility issues is whether such measures are adopted on the basis of Article 20 or if they are rendered by court that assumed jurisdiction on the basis of the jurisdictional regime in the Brussels IIbis Regulation. This difference influences whether recognition and enforcement of such measures can be conducted according to the rules in the Brussels IIbis Regulation or other national or international legal sources. Such position strongly necessitates the Courts to properly apply the whole private international law system established by the EU. In this context some particular guidelines given by the relevant authorities are highly welcomed, such of those given by the German Federal Court.449

449 Text to n 228 Part I ch I sec 2.1.2.1.4.
Chapter V Recognition and enforcement of foreign judgments according to Brussels IIbis Regulation

5.1 The system of exequatur in the area of Private International Law of the European Union

Some of the main objectives of all European instruments regarding recognition and enforcement of foreign judgments is to achieve the ‘free movement of court decisions’, to create a ‘genuine judicial area’ within the ‘area of freedom security and justice’ and recognizing and enforcing all judgments given in Member States in the European Union without a formal recognition procedure. The basis for the functioning of the whole EU legal system and with that the system for recognition and enforcement in the EU is mutual trust. It is often reiterated that ‘mutual trust is cornerstone of judicial co-operation in the EU’. This position is even reassured by the ECtHR; it states that the Brussels regime in the EU ‘is based on the principle of ‘mutual trust in the administration of justice' in the European Union’.

This shows how important ‘mutual trust’ is for recognition and enforcement procedures in the EU. The understanding of the term ‘mutual trust’ must be derived from its definition as a basic fact of social life that is the understanding of trust as a component of human behavior. Trust is described as ‘confidence in one’s expectations for other peoples’ behavior’. So trust directly influences the perception of complexity of life with all its incidents and possibilities. Trust is a behavior meant to reduce complexity to the degree that decisions about present alternatives of actions can be taken with a view to the future. On the other hand, trust is reduced where control is guaranteed. In this context law plays important role in society, because it provides certainty by control. So from a sociological point of view, law and trust represent functional equivalents. In context of recognition and enforcement within the EU,

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450 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘The EU Justice Agenda for 2020 - Strengthening Trust, Mobility and Growth within the Union’, COM (2014) 144 final of 11 March 2014
453 Avotiņš v Latvia, app.no. 17502/07, par.49.
455 Weller, M., Mutual Trust (n 454) 68.
456 Luhmann N., (n 454) 19.
457 Weller, M., Mutual Trust, (n 454) 68
458 ibid 69.
the search for better procedures represents a search for the balance between trust and control.

The principle of ‘mutual trust’ from the perspective of the recognition and enforcement of foreign decisions in the EU is manifested through the principle of ‘mutual recognition’. However, ‘mutual trust’ and ‘mutual recognition,’ understood as terms and principles, are not synonyms. Mutual recognition of judgments is a goal, an objective, while the principle of mutual recognition is a legal principle of EU law, a cornerstone of the internal market, and a fundamental principle in judicial cooperation on civil matters. On the other hand, mutual trust is an obligation of all the authorities of a Member State to trust the authorities of the other Member State and therefore to assume their decisions and is the cornerstone in the construction of a true European judicial area. So in a way, mutual trust is a factual and political ground for the implementation of mutual recognition: and on the other hand when mutual trust exists, mutual recognition should be improved.

Currently in EU law there are five systems of recognition and enforcement. The first system is the classical model of exequatur which was firstly implemented by the Brussels Convention and then transposed into the Brussels I Regulation. Later it was applied in a modified version according to the subject matter of the regulations in the Brussels IIbis Regulation, the Insolvency Regulation and the Succession Regulation. This system, for the purpose of enforcing a judgment rendered by the courts of another Member State, entails intermediate measures. It envisages that the competent authority of the Member State of enforcement issues a declaration of enforceability after some formalities are satisfied. This declaration then can be appealed by the party against whom enforcement is sought by invoking limited grounds of refusal.

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459 But also in other fields of EU law.
463 Arenas García R., (n 460) 375.
465 Arenas García R., (460) 362.
468 Kramer, X., Cross-Border Enforcement and the Brussels I-bis Regulation: Towards a New Balance between
The second model in the Brussels IIbis Regulation, which will be explained in more detail in this chapter, allows for the first time in the history of the European Union free circulation of decisions (abolishment of exequatur), limited to cases of child abduction and access rights. For these decisions, the court of origin certifies the judgment as enforceable, provided that certain requirements are fulfilled. This certified judgment is then enforceable in the Member State of enforcement, without having to issue a declaration of enforceability and is without the possibility of an appeal. The other two procedures for the recognition and enforcement of decisions relating to matrimonial matters and matters relating to parental responsibility are undergoing the classical exequatur procedure, very similar to the procedure provided in the Brussels I Regulation.

The third model of recognition and enforcement of foreign decisions in the EU is specific. With this model, certain instruments regarding specific types of legal issues (uncontested claims, small claims, and preservation of accounts) were created. Regulation (EC) No 805/2004 creates a European enforcement order for uncontested claims, which abolishes the traditional grounds of refusal, including public policy, and replaces them with particular minimum standards to be reviewed by the court of origin. Later, on this basis, three special procedures were created, the European Order for Payment Procedure, the European Small Claims Procedure and lastly adopted the European Account Preservation Order. Such harmonized procedures result in a issuing of European titles that are enforceable through the European Union.

The forth model is provided in the Maintenance Regulation. Generally, its distinction is that there are two types of procedures, one for the Member States which are bound to the 2007 Hague Protocol to Maintenance Convention, for which a similar model that provides

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475 Most of the EU Member States except Denmark and the United Kingdom

for a review mechanism in case the defendant did not provide an appearance in the situation of default service or force majeure and second, the use of the classical exequatur model for the Member States which are not bound by the Hague Maintenance Protocol.

The fifth model was constructed for the new Brussels I bis Regulation\(^\text{477}\) by which for a foreign judgment to be enforced in a Member State, a declaration of enforceability is no longer required. However the initial expectations for the complete abolition of exequatur which was intended to be introduced for civil and commercial matters\(^\text{478}\) were not fulfilled.\(^\text{479}\) The final result from the long negotiations was that the Brussels Ibis Regulation generally abolishes *exequatur* but permits an application by any interested party for refusal of recognition (including refusal on public policy grounds), and application by the person against whom enforcement is sought for refusal of enforcement. In that context, exceptions to recognition and enforcement were preserved, but only if expressly invoked by application.\(^\text{480}\)

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\(^\text{479}\) See Chapter III Articles 36-57 of the Brussels Ibis Regulation.

5.2 Procedures of recognition and enforcement of judgments according to the Brussels IIbis Regulation

The Recognition and enforcement of judgments in the Brussels IIbis Regulation is stipulated in Chapter III (Articles 21-52) and it is systematically divided into five sections. This Regulation establishes a system which is based on the giving over of the central role in making decisions to the court of the member state that has jurisdiction.481 The role of a court of another member state is limited.482 As it is stated in the Opinion of AG Sharpstone regarding the Povse case, the recognition and enforcement of judgments of the court exercising jurisdiction under Brussels IIbis Regulation should be ‘almost automatic’.483

There are two separate procedures for recognition and enforcement of decisions that are suitable to be recognized and enforced according to the Brussels IIbis Regulation, where suitability is determined on by whether or not they fall under the scope of the Regulation. The first procedure is the classical *exequatur* procedure which applies for matrimonial matters and parental responsibility cases, and the second is the procedure which abolishes the *exequatur* limited to the cases of child abduction and access rights. The exequatur procedures are similar but differ in the grounds for non-recognition and in the enforcement.484 However these procedures are considered classical exequatur procedures by issuing a declaration of enforceability.485 In addition, the Brussels IIbis Regulation consists of a different kind of procedure that was novel at the time when the regulation was adopted: a procedure which presents the abolition of the exequatur procedure, meaning that the certified judgments relating to certain child abduction cases and access rights cases are enforceable in the Member State of enforcement, without needing to issue a declaration of enforceability and without possibility of an appeal. This chapter will examine firstly the exequatur procedure in matrimonial matters and later the procedure for issuing a declaration of enforceability regarding parental responsibilities matters. Thirdly, it will address the special procedure relating to child abduction cases and cases of access rights.

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481 Scott M. J., A Question of Trust? (n 480) 27.
482 Text to n 532 Part II ch V sec 5.2.1.1.2.
483 Case C-211/10 PPU, Doris Povse v Mauro Alpago, [2010], ECR I-06673 para 40 and see also Case C-211/10 PPU, Doris Povse v Mauro Alpago, [2010], ECR I-06673 Opinion of AG Sharpstone delivered on 16 June 2010, para 31.
484 The divorce decisions are of a constitutive nature and the marriage annulment decisions are of a declaratory nature which do not require enforcement.
485 Kramer X., Cross-Border Enforcement and the Brussels I-bis Regulation (n 468) 349.
5.2.1 Classical exequatur (application for a declaration of enforceability) procedure in the Brussels IIbis Regulation

The origin of the rules for recognition and enforcement in the present EU instruments which apply for the classical model of exequatur can be traced back to the 1968 Brussels Convention, which served as a model in the drafting of the future EU mechanisms regarding the recognition and enforcement of foreign judgments between the Member States, primarily influencing the Regulation Brussels I and later the Brussels II and IIbis Regulation.\(^{486}\)

The idea of having a unified procedure for recognition and enforcement of judgments in matters covered by Brussels IIbis Regulation is founded on the principle of mutual trust and on the premise that the grounds for non-recognition should be kept to the minimum required.\(^{487}\) Also, this unified procedure produces another desired effect for the recognition and enforcement of family law decisions- it provides an easily accessible instrument known to all persons and it has as a consequence a procedure which can be used in all Member States of the EU.\(^{488}\)

However, such a procedure has some limitations. Firstly, the Brussels IIbis Regulation is only applicable for recognition of judgments among the Member States of the European Union, excluding Denmark.\(^{489}\) This follows from the wording of Article 21(1).\(^{490}\) Secondly, the recognition and enforcement applies only to judgments on matrimonial matters and matters of parental responsibility, which are judgments that fall under the scope of the Brussels IIbis Regulation.\(^{491}\) The term ‘judgment’ is defined in Article 2(4) as ‘judgment’ on divorce, legal separation or marriage annulment, as well as a judgment relating to parental responsibility, pronounced by a court of a Member State. Because the *ratione materiae* of the Regulation has limited prospects, this limitation on the collateral aspects decided by a court seized of matrimonial matters or matters of parental responsibility, such as matrimonial property,


\(^{487}\) Recital 21 Brussels IIbis Regulation.

\(^{488}\) Shúilleabháin, M.N., (n 63) 245.

\(^{489}\) Article 2(3) of the Brussels IIbis Regulation.

\(^{490}\) Article 21(1) of the Brussels IIbis Regulation

‘A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.’

\(^{491}\) Text to n 3 Part II ch I sec 1.1.
maintenance obligations, and others\textsuperscript{492} is followed in the recognition and enforcement procedures. These other collateral aspects of matrimonial/parental rights proceedings are recognized and enforced according to other EU instruments,\textsuperscript{493} multilateral or bilateral agreements,\textsuperscript{494} or according to the rules provided in the national law of the Member States.

Thirdly, it is without significance for the recognition and enforcement procedures if the judgment is called by a different name, such as decree, order or decision.\textsuperscript{495} Such a position in the Brussels IIbis Regulation provides that every judgment relating to matrimonial matters or parental responsibilities that, regardless of its title, fulfils the preconditions for recognition, must be recognized under the rules of the Regulation.\textsuperscript{496}

Fourthly, the provisions laid down in Article 21 \textit{et seq.} of Regulation No 2201/2003 do not apply to provisional measures rendered by a Court on the basis of Article 20 of the Brussels IIbis Regulation. However they can apply to such measures if these measures were rendered by Courts that ascertained jurisdiction under the rules of the Brussels IIbis Regulation.\textsuperscript{497}

\subsection*{5.2.1.1 Recognition of foreign decisions relating to matrimonial matters according to the Brussels IIbis Regulation}

Most of the decisions which fall under the above-described meaning of the term ‘matrimonial matters’\textsuperscript{498} are of a constitutive and declaratory nature, which do not require enforcement. Their recognition in the Brussels IIbis Regulation can proceed as a main cause of action\textsuperscript{499} or as an incidental question.\textsuperscript{500} Article 21(1) of the Brussels IIbis Regulation allows a judgment given in a Member State to be recognized in the other Member States without any special procedure being required. This produces the effect that foreign judgments are recognized automatically unless it has been decided that they cannot be recognized.\textsuperscript{501} Also, the possibility is open for rendering a decision on recognition or non-recognition in situations regarding issues that are not central but incidental to the main issue.\textsuperscript{502} In the situation that the recognition of a judgment is raised as an incidental question, the question about whether the

\begin{footnotesize}
\begin{enumerate}
\item Recitals 9-11
\item Maintenance Regulation.
\item 1996 Hague Child Protection Convention, 2007 Hague Maintenance Convention, etc.
\item Article 2(4) of the Brussels IIbis Regulation
\item Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation (n 9)258
\item Text to n 195 Part I ch II sec 2.1.2.1.4 and text to n 401 Part II ch IV sec 4.4.
\item Text to n 14 Part II ch I sec 1.1.1.
\item Article 21(1) of the Brussels IIbis Regulation.
\item Article 21(4) of the Brussels IIbis Regulation.
\item Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation (n 9)258.
\item Article 21(4) of the Brussels IIbis Regulation
\end{enumerate}
\end{footnotesize}
Member State should stay the proceedings until the application for a declaration of enforceability is applied for under Article 21(3) of the Brussels Iibis Regulation is decided by the procedural rules of every Member State.503

The procedure for the recognition and enforcement of foreign judgments as a main cause of action is unified and simplified with the provisions provided in the Brussels Iibis Regulation.504 In matrimonial matters the proceedings for recognition of a judgment of another Member State can be simplified to the point that a foreign judgment can be implemented in the legal system even without the participation of a court505 or it can be recognized by a competent court of a Member State, but using a very simplified procedure.506

5.2.1.1.1 Updating civil-status records

Regarding the updating of the civil status, the procedure has been significantly simplified. In particular if no appeal is lodged or no further appeal can be made against the judgment in the Member State of its origin, there is no special procedure required to update the civil status records of a Member State on the basis of a judgment.507 Generally, it is conducted without a court process508 and only with a copy of the judgment that confirms their change of status509 and a certificate provided in the form of Annex I of the Brussels Iibis Regulation.510 This out-of-court simplified procedure, can be seen as a novel in civil law countries because in most of them511 to update of a civil status, prior recognition of the judgment relating to divorce, legal separation or marriage annulment is required.512

5.2.1.1.2 Recognition

Article 21(3) of the Brussels Iibis Regulation, sets the court procedure for recognition

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503 Magnus U. and Mankowski P., Commentary on Brussels Ibis Regulation (n 9) 261.
504 ibid 290.
505 The out of court process is in a very narrow field of updating of a civil status (Article 21(2) of the Brussels Ibis Regulation)
506 Article 21(3) of the Brussels Ibis Regulation.
507 Practice Guide for the application of the Brussels IIa Regulation (n 21) 15.
508 Borras Report (n 8) para 63.
509 Article 37 of the Brussels Iibis Regulation
510 Article 39 of the Brussels Iibis Regulation
512 Shúilleabháin, M.N. (n 63)243
of a judgment. It is envisaged as an *ex parte* procedure, primarily suited for those situations which are used in the context of enforcement in accordance with the procedures for application for a declaration of enforceability conducted according to Section 2 (Articles 28-36 of the Regulation). This procedure is the same for judgments relating to matrimonial matters and judgments relating to parental responsibilities issues. However this section will examine only the procedure and the grounds for non-recognition of decisions regarding matrimonial matters.

Any party that has legal interest in a cross-border recognition within the EU, can apply for that decision to be recognized or not to be recognized in another Member State. The term ‘interested party’ is to be interpreted according to the applicable law and is given very broad sense, meaning that a member of the family or even public authorities such as public prosecutors can apply for (non-) recognition. This ‘interested party’ should apply to the courts of the Member States which have local jurisdiction for recognizing such judgments and according to Article 68 of the Brussels IIbis Regulation are nominated for this purpose by each Member State. For example, in Republic of Slovenia this would be the district courts (Okrožno sodišče), in Italy the appellate courts (Corte d'appello), and in Austria district court (Bezirksgericht) etc. This is different from the jurisdiction for the updating of a civil status, which is determined by the national law of the Member State where recognition is sought.

The formal requirements that the ‘interested party’ or the person seeking a recognition of a judgment should provide take the form of two documents: an authenticated copy of the respective judgment and a certificate using the standard form provided by Annex I of the Brussels IIbis Regulation. No formality of legalization is required for these documents. Another document is optional, but only for the situations when the decision was given in

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513 The term ‘judgment’ is defined in Article 2(4) of the Brussels IIbis Regulation and has broader meaning covering other decisions such as decrees, orders etc.
514 Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation (n 9) 293; Shúilleabháin, M.N., (n 63) 244.
515 n 484 Part II ch V sec 5.2 and text to n 498 Part II ch V sec 5.2.1.1.
516 For recognition and enforcement of parental responsibilities issues see text to n 680 Part II ch V sec 5.2.1.2.
517 Article 21(3) of the Brussels IIbis Regulation.
518 Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation (n 9) 260.
519 Borras Report (n 8) 50.
521 Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation (n 9) 260.
522 Article 37(1) of the Brussels IIbis Regulation.
523 Article 52 of the Brussels IIbis Regulation.
default. In these cases despite the above-mentioned documents, the person seeking recognition, should accompany also the original or certified true copy of the document which establishes that the defaulting party was served with the document instituting the proceedings or with an equivalent document or any document indicating that the defendant has accepted the judgment unequivocally. In a manner this rule determines autonomously what documentation is needed for recognition, and clears away the uncertainty of the different rules which are applicable under the national laws of the Member States. However, it is still for the national law of the Member State where the judgment has been rendered according to the principle of *locus regit actum* to ‘establish the authenticity’ or to meet the requirements of authentication, because there is no need for an original of the judgment, but a copy can suffice. One of the tendencies of the Brussels IIbis Regulation is not to create additional obstacles for the recognition of foreign judgments and in that context it does not require translation of the documents, but allows on request by the competent Court for a translation to be provided and certified by a competent person.

According to Article 38(1) of the Regulation, the minimum documents required for a party that has a legal interest for a foreign decision on divorce, legal separation and marriage annulment to be recognized in another Member State is a copy of the judgment. If the other documents (certificate and proof of service) are not provided when the party is applying for recognition, the court may specify a time for their production, accept equivalent documents or, if it considers that it has sufficient information before it, dispense with their production.

The recognizing court of a Member State must act without delay. Generally the court has very limited powers on which it could not recognize the foreign judgment. The grounds on are given in article 22(for matrimonial matters), article 23(for parental responsibilities) and article 24 (prohibition of review of jurisdiction of the court of origin). In the regulation there is strict prohibition of the *révision au fond* regarding the foreign judgment and the court must examine only the specific procedural requirements and cannot entertain reviewing the judgment in the substantive aspects. Also the recognition cannot be opposed because divorce,
legal separation and marriage annulment is not allowed in the Member State where recognition is sought.\textsuperscript{534} These grounds for non-recognition will be explained later in this chapter.\textsuperscript{535} The interested party can apply for recognition or non-recognition.\textsuperscript{536} If the party is pleading for non-recognition, presumption of recognition exists and this party has the burden to prove that a ground for non-recognition exists.\textsuperscript{537} There is no difference if the recognition was raised as a main cause of action\textsuperscript{538} or as an incidental question.\textsuperscript{539} In both of these situations the same grounds apply. During this stage, the procedure is \textit{ex parte}, and the respondent cannot make any submissions on the application.\textsuperscript{540} This rule does not preclude the situations when the court receives some submissions other than the ones given in Article 37. In those situations when the court receives broader submissions then the one required by the Court, it could also take them into account.\textsuperscript{541} Simply put, the main aim of Brussels IIbis Regulation is not to turn the proceedings into \textit{inter partes} proceedings at this stage.\textsuperscript{542}

The Court in which a declaration is sought may stay the proceedings, if an ordinary appeal against the judgment has been lodged in the Member State where the judgment has been given.\textsuperscript{543} Although they pursue same goal, Article 27 is different from Article 35 of the Brussels IIbis Regulation. In the first place, Article 27 is predicted as a rule which allows the court that is conducting the recognition procedure to stay the proceedings on its own motion, while according to Article 35, the party appealing against the decision authorizing enforcement must apply for a stay of the proceedings. Secondly, under Article 27 the stay may only be granted if an appeal ‘has been lodged.’ It is not enough that the time limit for the appeal has not yet expired. In contrast, under Article 35, the power to stay proceedings also applies to cases where an ordinary appeal has not been lodged if the time limit for such an appeal has not yet expired.\textsuperscript{544}

The idea behind this rule is that the judgment should be \textit{res judicata}, given that there could be considerable inconvenience if possible subsequent changes could be made by appeal in the Member State of origin. This rule gives the power to the court of recognition to stay the

\begin{itemize}
\item \textsuperscript{534} Article 25 of the Brussels IIbis Regulation.
\item \textsuperscript{535} See text to n 595 ch V sec 5.2.1.1.4. and text to n 734 Part II ch V sec 5.2.1.2.2.
\item \textsuperscript{536} Article 21(3) of the Brussels IIbis Regulation.
\item \textsuperscript{537} Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation (n 9) 264.
\item \textsuperscript{538} Article 21(3) of the Brussels IIbis Regulation.
\item \textsuperscript{539} Article 21(4) of the Brussels IIbis Regulation.
\item \textsuperscript{540} Article 31(1) of the Brussels IIbis Regulation.
\item \textsuperscript{541} Thessaloniki District Court, (Case 511/1994) (as cited by Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation (n 9) 301).
\item \textsuperscript{542} Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation (n 9) 301.
\item \textsuperscript{543} Article 27 of the Brussels IIbis Regulation.
\item \textsuperscript{544} Magnus U. and Mankowski P., Commentary on Brussels I Regulation (n 391) 629.
\end{itemize}
proceedings until the proceedings in the Member State on appeal are finished. However, it does not impose an obligation to stay the proceedings, leaving it to the full discretion of the court and imposing no mandatory duty to stay the proceedings. It presupposes that an ‘ordinary appeal’ has been lodged in the Member State of origin of the judgment. The aspect of ordinary-extraordinary appeals was addressed by the European Court in the Riva case\(^ {545} \) where it was concluded that the meaning of the term ‘ordinary appeal’ should have an autonomous connotation and should mean:

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\text{[a]ny appeal which forms part of the normal course of an action and which as such constitutes a procedural development which any party must reasonably expect.} \quad ^{546}
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### 5.2.1.1.3 Appeal against decision on (non-) recognition

The decision of the Court on the application for a declaration of recognition or non-recognition can be appealed by either party. This appellate procedure is exclusively governed by Article 33 of the Brussels IIbis Regulation and it is exhaustive.\(^ {547} \) This means that there are no other opportunities to appeal against decisions that are provided in the national laws of the Member States.\(^ {548} \) With this article, the string of protection of the parties is continued and their right to appeal a first instance decision in the EU legal sources is guaranteed, starting with the Brussels Convention,\(^ {549} \) then with the similar rules given in the Brussels II Convention,\(^ {550} \) and finally with the direct source of this procedure, which was transposed from the Brussels I Regulation\(^ {551} \). It is generally positioned in line with Article 6(1) of the ECHR and Article 47 of the Charter of Fundamental Rights of the European Union, especially with the fact that in the first instance the procedure for the recognition is conducted \textit{ex parte} and the respondent doesn’t have a chance to present his side.\(^ {552} \) Without such a possibility, the parties would be deprived of the protection of human’s rights standards, specifically the right to a fair trial.\(^ {553} \)

Both parties, the applicant and the respondent, can appeal the decision. The applicant can appeal on a negative declaratory decision on the application, and the respondent can appeal on a positive outcome allowing the foreign decision to be recognized in the Member State. This

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\(^ {545} \) Case 43/77 \textit{Industrial Diamond Supplies v. Luigi Riva} [1977] ECR 2175.


\(^ {547} \) Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation (n 9) 305.

\(^ {548} \) Ibid.

\(^ {549} \) Articles 36-40 of the Brussels Convention.

\(^ {550} \) Articles 25-29 of the Brussels II Convention.

\(^ {551} \) Article 43 of the Brussels I Regulation.

\(^ {552} \) Text to n 514 Part II ch V sec 5.2.1.1.2.

\(^ {553} \) Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation (n 9) 304.
appeal can be given in a limited time frame. An appeal against a declaration of enforceability must be lodged within one month of the service thereof. If the party against whom enforcement is sought is habitually resident in a Member State other than that state in which the declaration of enforceability was given, the time frame for appealing shall be two months and shall run from the date of service, either on him or at his residence. In that context two criteria become relevant for the determination of the time limits for the appeal. The first is the moment when the decision was properly served to the respondent and the second is the place where the respondent is habitually resident.

What is considered proper service must be understood according to the national law of the respondent’s habitual residence. The service itself has two functions for the process. Firstly, it safeguards the respondent: it protects his/her rights, especially the right to appeal. This is slightly different from the aspect of simply making him/her factually knowable of the decision. This position is upheld in the Brussels Convention, the Brussels I Regulation and the Brussels IIbis Regulation. From the actual wording of this article it can be concluded that for the applicant it suffices to be notified by the relevant authorities about the decision, while for the respondent the term ‘service’ is used in a formal sense. This formal service as a rule guarantees that he/she receives notice of the enforcement order and is able to appeal against it. The second function of the service is that it performs an evidentiary function and enables the period for bringing an appeal to be calculated accurately.

Regarding the habitual residence of the respondent, three scenarios are possible. Firstly, if the respondent is habitually resident in the Member State where the exequatur proceedings were commenced, the time limit for lodging an appeal is one month from the service. The second scenario involves the respondent being habitually resident in another Member State other than the one where the exequatur decision was given. In this situation the time limit is two months from the date of service no matter if it was given in personam or at

554 Article 33(5) of the Brussels IIbis Regulation.
555 Jenard Report (n 14) 51.
557 Article 40
558 Articles 42 and 43
559 Articles 32 and 33
561 Ibid para 56.
562 Ibid.
563 A fourth scenario may be added for the case of Denmark.
564 Article 33(5) of the Brussels IIbis Regulation.
his/her residence. The third scenario, relates to the situation when the respondent is habitually resident in a country outside the EU. In such circumstances, the appeal must be lodged within one month of the service. There can be no extensions of time because of the distance. This is problematic, because in these situations the EU Service Regulation is inapplicable and the service should be commenced according to multilateral treaties, bilateral treaties, or national rules on service abroad.

The party who is appealing the decision for the recognition should lodge the appeal in front of the court that is identified by the Member States as the one that has competence over these matters. There is a difference in the categorization of the Courts that are competent to hear the appeal. Some Member States have appointed different courts from the one that originally recognized the foreign decision and others have appointed the same court, but the principle that the first instance court cannot be involved in the appeal proceedings remains the same, and this aspect is resolved internally in every court separately. Other Member States have notified different courts for the applicant and for the respondent. Article 33(2) of the Brussels IIbis Regulation is applied ex officio and is exclusive, meaning no other court of the Member State can hear an appeal on a decision for (non-) recognition given according to the Regulation.

The relationship between the national law procedures of the Member States and the appellate procedure in the Brussels IIbis Regulation is best exemplified in Article 33(3) of the Brussels IIbis Regulation. What this rule does is that it actually gives the principles and the model upon which this procedure will take place and it refers to rules governing procedure in contradictory matters. These complementing principles given in Article 33(3)-(5) of the Brussels IIbis Regulation might be modifying national rules in some Member States, but the details of the procedure are to be governed by the national law rules of the Member States. This can be seen in the fact that there cannot be interference in the contradictory nature of the

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565 Article 33(5) of the Brussels IIbis Regulation.
566 Article 33(5) of the Brussels IIbis Regulation.
568 Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation (n 9) 312.
569 Article 33(5) of the Brussels IIbis Regulation.
570 France, Spain, Greece, Netherlands, Poland, etc.
571 Austria, Slovenia, Italy, Sweden, etc.
572 Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation (n 9) 308.
573 Belgium
574 Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation (n 9) 308.
575 ibid.
proceedings because of some restrictions in the national law rules.\(^{576}\) Again, this derives from the whole *exequatur* procedure in the Brussels IIbis Regulation. The first instance procedure, which is generally conducted without the presence of the respondent, must be balanced by his or her presence in the later stages of the procedure. So this is the time when the respondent could use his right to present his/her point. To deny the respondent this right would generally oppose Article 6(1) of the ECHR and Article 47 of the Charter of Fundamental Rights of the European Union and the right to a fair trial. Article 33(3) of the Brussels IIbis Regulation guarantees that each party has the opportunity to exercise its rights to a fair trial and that this appellate instance would not be decided without hearing the respondents’ arguments (in the case when the appeal is lodged on his/her request) or to the applicants’ arguments (in the case when there was a decision that deices non-recognition). Nevertheless, in both situations the court of the Member State is obliged to produce contradictory proceedings and cannot dismiss the appeal without proper hearing. This could happen only in evident and beyond reasonable doubt situations\(^{577}\) when the procedural economy and efficiency overwhelm the case and the court cannot waste any resources to implement full contradictory proceedings.

If the appeal is brought by the applicant on the basis of Article 33(4) of the Brussels IIbis Regulation, the party against whom this enforcement is sought shall be summoned to appear before the appellate court. If he or she fails to appear, then the provisions of Article 18 (Examination as to admissibility)\(^{578}\) of the Brussels IIbis Regulation shall apply. Again with this article the contradictory aspect of the appellate proceedings is underlined, especially in those circumstances when the decision in the first instance was in favor of the respondent and he/she lacks the interest to participate in the proceedings. Nevertheless, there is an obligation for him/her to appear in these proceedings. If he/she doesn’t appear, then the minimum standards of protection of Article 18 need to be guaranteed. The court will check if he/she has been properly served, and if there was proper service (but still the respondent lacks to appear) then he/she is held responsible for the lack of appearance.\(^{579}\)

This judgment on appeal can only be contested on limited grounds which are established by every Member State in a list of notified proceedings.\(^{580}\) Such limited grounds for appeal against an appellate decision is predicted to be one of the points of law which is

\(^{576}\) ibid.
\(^{577}\) ibid 309.
\(^{578}\) Text to n 350 Part II ch IV sec 4.1.
\(^{579}\) Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation (n 9) 310.
\(^{580}\) Article 34 of the Brussels IIbis Regulation.
present in the national law of the Member States. Consequently, further appeals on point of facts and fact-finding are not permitted by Article 34. There are various procedures according to the national law of the Member States such as: Revisionsrekurs (Austria), appeal to the Supreme Court of Cassation (Bulgaria), pritožba na Vrhovno sodišče Republike Slovenije (Slovenia), pourvoi en cassation (France), Rechtsbeschwerde (Germany), Ricorso per cassazione (Italy) and etc. In any aspect, this appeal does not have suspensory effects.

The only way in which there can be a suspensory effect as to the enforcement of the judgment is if some of the conditions in Article 35 of the Brussels Ibis Regulation are satisfied. This conditions refer to situations where an appeal is lodged against the decision of a court of that state declaring a foreign judgment enforceable or against judgment given on appeal concerning such a decision. Accordingly the courts of all appellate instances can stay the proceedings. The reasoning behind this rule is to ensure flexibility and avoid the potentially irreversible consequences of enforcement even in the third instance. Another condition, which differs from Article 27 of the Brussels Ibis Regulation, is that an ordinary appeal was lodged or if it is still possible to lodge (if the time for such appeal has not yet expired). A peculiar aspect of this rule is that in this stage the application for stay of proceedings can be submitted by the party against whom the enforcement is sought and not by the court of its own motion. As was in the case in Article 27, the court has full discretion whether to stay the proceedings. Also in its powers is the possibility to specify the time within which an appeal is to be lodged in the case when the time for an appeal has not yet expired.

If the procedure for recognition of decision in matrimonial matters has been finished

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581 If for example national law permits appeal on points of procedural law (Magnus U. and Mankowski P., Commentary on Brussels Ibis Regulation (n 9) 314).
582 Magnus U. and Mankowski P., Commentary on Brussels Ibis Regulation (n 9) 314.
584 Magnus U. and Mankowski P., Commentary on Brussels Ibis Regulation (n 9) 315.
585 Article 33 of the Brussels Ibis Regulation.
586 Article 34 of the Brussels Ibis Regulation.
587 Magnus U. and Mankowski P., Commentary on Brussels Ibis Regulation (n 9) 318.
589 The meaning of ‘ordinary appeal’ is the same as for Article 27 of the Brussels Ibis Regulation. See text to n 545 Part II ch V sec 5.2.1.1.2.
590 Text to n 554 Part II ch V sec 5.2.1.1.3.
591 As can be in the case of Article 27 of the Brussels Ibis Regulation. See text to n 544 Part II ch V sec 5.2.1.1.2.
592 Article 35(1) of the Brussels Ibis Regulation.
and the foreign decision was recognized in the Member State, then it is considered that the marriage has been terminated by the divorce. As for the cases of legal separation, it is considered that the spouses have been legally separated, and in the case of marriage annulment, the marriage has been annulled. This situation is conclusive and binding for all Member States. But in situations where the grounds for non-recognition provided in Articles 22-26 were fulfilled, then the legal situation remains the same, and the Courts in the Member State of recognition may be approached for divorce, legal separation or marriage annulment, if they can have the jurisdiction, under the Brussels IIbis Regulation jurisdictional rules.

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

As was stated above, a decision of a Member State regarding matrimonial matters can be recognized or can be denied recognition in another Member State only according to the conditions set in Articles 22-26 of the Brussels IIbis Regulation. These grounds on which a court of a Member State may not recognize a foreign judgment are given in Article 22 (for matrimonial matters), article 23 (for parental responsibilities) and Article 24 (prohibition of review of jurisdiction of the court of origin). As also was stated previously, revision au fond is expressly excluded and the recognition cannot be opposed because divorce, legal separation and marriage annulment are not allowed in the Member State where recognition is sought.

Article 22 sets forth the grounds for recognition of foreign judgments relating to divorce, legal separation or marriage annulment. These rules are given as negative assumptions meaning that recognition is generally admitted unless existence is determined of certain circumstances that prevent the recognition. According to Article 22, a judgment relating to a divorce, legal separation or marriage annulment shall not be recognised:

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

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593 Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation (n 9) 275.
594 ibid.
595 Text to n 532 Part II ch V sec 5.2.1.1.2.
596 For grounds of non-recognition for parental responsibility matters see text to n 735 Part II ch V sec 5.2.1.2.2.
597 Article 31(2) of the Brussels IIbis Regulation.
598 Text to n 533 Part II ch V sec 5.2.1.1.2.
599 Article 26 of the Brussels IIbis Regulation.
600 Article 25 of the Brussels IIbis Regulation.
601 Article 22(a) of the Brussels IIbis Regulation.
• where it was given in default of appearance, if the respondent was not served with the

document which instituted the proceedings or with an equivalent document in sufficient
time and in such a way as to enable the respondent to arrange for his or her defence
unless it is determined that the respondent has accepted the judgment unequivocally;602
• if it is irreconcilable with a judgment given in proceedings between the same parties in
the Member State in which recognition is sought;603
• if it is irreconcilable with an earlier judgment given in another Member State or in a
non-Member State between the same parties, provided that the earlier judgment fulfills
the conditions necessary for its recognition in the Member State in which recognition
is sought.604

5.2.1.4.1 Public policy (ordre public)

Article 22(a) of the Brussels IIbis Regulation details the first ground on which a
decision from a Member State would not be recognized in another Member State. This
condition refers to situations where the foreign decision is utterly wrong and its recognition
is manifestly contrary to the public policy of the Member State in which recognition is being
sought. So, unsurprisingly,605 the first ground is ordre public or public policy. Within the
national contexts it is very difficult directly to define the meaning ordre public (public policy),
because of the differences in the understanding of the meaning of this legal institute in the
different legal systems.606 The main function of public policy is to protect the fundamental
values of the forum state against unacceptable results which may derive either from the
application of foreign law or from the recognition of foreign judgments.607 However, in the
area of Private International Law of the EU, one question comes to the forefront about the
limits of the public policy, which is: what values should be considered or protected with the
public policy exception - fundamental principles and norms of the domestic legal systems of
EU Member States and/or the European principles.608 In answering this question a much

602 Article 22(b) of the Brussels IIbis Regulation.
603 Article 22(c) of the Brussels IIbis Regulation.
604 Article 22(d) of the Brussels IIbis Regulation.
605 This ground for non-recognition is present from the first EU legal sources (see Brussels Convention art.27; Brussels II Convention art.15; Brussels I Regulation art.34 (1)).
608 Hess B., Pfeifer T., Study on the Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law, prepared for the European Parliament's Committee on Legal Affairs
broader aspect has to be given, because the interconnections of these values extends beyond the borderlines of the national legal systems. There is a consensus in the EU that the ECHR and the CFR significantly influence the determination of the content of the public policy clause. The shared values are sometimes referred to as ‘European public policy’. This aspect was especially utilized by the CJEU in the Krombach case, where for the limits of the public policy exception, it was determined that the Member States are free to determine what public policy requires, however, it is imperative that the outer limits of the defense are controlled by the CJEU as a matter of interpretation of the Brussels I Regulation. It was also concluded that

[T]he Court has consistently held that fundamental rights form an integral part of the general principles of law whose observance the Court ensures.... For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. In that regard, the European Convention for the Protection of Human Rights and Fundamental Freedoms has particular significance.

In this case the CJEU also stated that, if the Court of the Member State where recognition is sought should refuse to recognize a foreign decision, it should have in mind that only where recognition or enforcement of the judgment delivered in another Contracting State would be at odds to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes on a fundamental principle, should the public policy exception be used. This provides for use of the public policy exception, more restrictively, as a kind of ‘European public policy’ or ‘ordre public européen’. This assumption may be drawn from the goal that the Brussels Ilbis Regulation wants to achieve, which is ‘creating an area of freedom, security and justice.’ In that context, this position introduces a two-folded specification on the implementation of the public policy exception.

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609 Škerl Kramberger J., Evropeizacija javnega reda v mednarodnem zasebnem pravu, Pravni Letopis, Ljubljana (2008) 51
611 Article 47 of the Charter of Fundamental Rights of the EU.
612 Hess B. and Pfeifer T., (n 608) 29.
613 Siehr K, General problems of private international law in modern codifications—de lege lata and—de lege europea ferenda, Yearbook of Private International Law (2005) 54; Šker Kramberger J., Evropeizacija javnega reda, (n 609) 352.
618 Magnus U. and Mankowski P., Commentary on Brussels Ilbis Regulation (n 9) 267.
619 ibid.
Firstly, it gives a larger dimension of the issues it covers, and in doing so, it values (more restrictively) the seriousness of the violation of the public policy not only in limited national level standards, but in a larger, regional dimension. A more unified implementation of these standards has been introduced through the practice of the ECtHR, especially in the implementation of the Article 6(1) of the ECHR and the standards provided by the CJEU in the implementation of the public policy exception in the Private International Law legal sources in the EU. The second part of the specification gives a broader protection by this ‘Europisation’ of public policy, namely excluding nationality as a primary factor in the connection with the forum (Inlandsbeziehungen), and establishing instead equal treatment of all EU citizens, as long as they have created some territorial connection with the Member State of the EU through domicile or habitual residence.

The first guiding principle of Article 22(1) in the implementation of the public policy exception as a ground for non-recognition of decisions from other Member States in matrimonial matters is that it applies only to situations which are covered by the subject matter of matrimonial matters in the Brussels IIbis Regulation. This is especially important in the case of same-sex marriages, which are becoming more frequent in the national courts of the Member States. For example, because of the divergent understanding on this subject, for a divorce that was given in the Netherlands, the marriage can also be dissolved in Belgium on the basis of the Brussels IIbis Regulation, while in Greece it is considered that same-sex marriages are non-existent and Article 22(a) will be applied. It is very questionable whether invoking of Article 22(a) for non-recognition of foreign matrimonial decisions is justifiable in situations/Member States where there is no clear standpoint on the subject matter of matrimonial matters and the inclusion of same-sex marriages in the Brussels IIbis Regulation. If same-sex marriages fall under the scope of the Brussels IIbis Regulation, then the invoking of Article 22(a) would be used by those Member States that do not provide such an institute in

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620 ibid.
621 Text to n 36 Part I ch I sec 1.1.1.1.1.
622 Because from Dutch perspective, the Regulation does not preclude same-sex marriages and to make distinction between same-sex marriages and different sex marriages would be counter Article 1 of the Dutch Constitution, (All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted). See Mostermans P.M.M., 'The impact and application of the Brussels IIbis Regulation in The Netherlands' in Boele-Woelki K., Gonzalez-Beluff C. (ed.) Brussels IIbis Its impact and Application in the Member States (Antwerpen-Oxford, 2007) 250
their legal systems. As a guideline in such situations, the standards provided in the Krombach case could be used. Until the CJEU makes their standpoint clear, the relations between countries that do not recognize same-sex marriages fall outside the scope of the Brussels IIbis Regulation and they should still be decided according to the national PIL rules.

One situation has been accepted to be a ground for invoking public policy defense in most of the EU Regulations and that is fraud. Legal fraud can happen but in general it is very rare. So it is without a doubt that obtaining a decision by fraud and then applying for a recognition in other Member State constitute an offence against the public policy of the State addressed. However, giving this reason to invoke the public policy exception as a ground for non-recognition is radically limited in the Brussels IIbis Regulation. The first example of the limitation of fraud has to do with the principles derived from the application of the public policy exception from the Brussels I Regulation. Schlosser in his report observed that:

> the legal systems of all Member States provide special means of redress by which it can be contended, even after the expiry of the normal period for an appeal, that the judgment was the result of a fraud. Accordingly, the Court of recognition should see if:

> proceedings for redress can be, or could have been, lodged in the courts of the State of origin against the judgment allegedly obtained by fraud.

This aspect was confirmed in the Interdesco S.A. v Nullifire Ltd case where the English Court held that where a judgment was challenged on public policy grounds, it was preferable for the issue to be resolved by remedies available in the foreign jurisdiction and it would only be if none were available that English Courts would consider the issue. In Régie Nationale des Usines Renault SA v Maxicar and Formento, the CJEU reaffirmed the position

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625 Although there are different opinions, such that if the same-sex marriages fall within the scope of Brussels IIbis Regulation, then the non-recognition would not be possible on the grounds of public policy, Boele-Woelki K. and Gonzales Beilfuss C., The Impact and Application of the Brussels IIbis Regulation in the Member States: Comparative Synthesis (n 44) 29.


627 Shíilleabháin, M., (n 63) 262.

628 Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation (n 9) 267.

629 Report by Professor Dr Peter Schlosser on the Convention of 9 October 1978 on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (Official Journal of the European Communities, C 59, 5 March 1979) 128.

630 As was the case in the famous Bauffremont case. See Cass.18 March 1878, Recueil Sirey 1878, I, 193 and also see Kendall v. Kendall [1977] Fam 208.

631 Schlosser Report (n 629) 128.

632 Shíilleabháin, M. (n 63) 260.

633 Schlosser Report (n 629) 128.

634 ibid.


636 Interdesco S.A. v Nullifire Ltd [1992] 1 Lloyd's Rep at 188

that the defendant should exhaust the remedies in the Court of origin. Additionally, fraud as a ground for invoking public policy defense is limited by the regulation itself, as stated in Articles 24 (prohibition of review of the jurisdiction) and Article 26 (Non-review as to the substance), which provide for additional limitations.

The second guiding principle in the implementation of the public policy ground for non-recognition of decisions from other Member States in matrimonial matters is given in the wording itself of Article 22(a) of the Brussels IIbis Regulation. As is the case for the predecessors of the Brussels IIbis Regulation, this exception applies only to cases which are utterly wrong, or in the words of the EU legal sources, ‘manifestly contrary’ to the public policy of the Member State.

Some limitations of public policy derive from other rules in the Brussels IIbis Regulation, namely articles 24-26. Article 24 provides for the first limitation of the public policy exception: prohibiting the Court where recognition is sought to review the jurisdiction of the Court of origin. This rule is particularly important because it prohibits the Court of recognition to apply the public policy exception and thus not to grant recognition, because the Court of origin didn’t properly apply Articles 3-7 of the Brussels IIbis Regulation or didn’t stay the proceedings according to Article 19. With this rule, the principle of mutual trust is enhanced by imposing ‘trust’ on the determination of the jurisdiction by the court of origin, nevertheless the fact that this rule is explicitly imposed brings up some collisions between the ideas behind this principle.

The second limitation is based on the notion that there are diverse family laws among the Member States of the EU. Although in very different manners, all of the Member States have introduced the dissolution of the marriage by divorce. However, there are still differences between the states regarding legal separation and marriage annulment. Article 25 limits the public policy exception and prohibits non-recognition of foreign decisions if the law of the Member State in which such recognition is sought would not allow divorce, legal separation or marriage annulment on the same facts (for which another Member State would allow it). The objective of Article 25 is simply to ensure that differences between legislation in

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639 Jenard Report (n 14) 44; Borras Report (n 8) 50.
640 Although Article 22(c) refers to decisions of concurrent proceedings. On Article 19 of the Brussels IIbis Regulation see text to n 359 Part II ch IV sec 4.2 and on the application of Article 22(c) and Article 22 (d) see text to n 673 Part II ch V sec 5.2.1.1.4.3 and text to n 676 Part II ch V sec 5.2.1.1.4.4.
641 Last Member State to introduce divorce was Malta in 2011.
642 Text to n 72 Part I ch I sec 1.1.1.1.4 and text to n 77 Part I ch I sec 1.1.1.1.5.
the Member States cannot result in non-recognition. The *ratio* of this rule is designed to meet the concerns of States with more tolerant internal provisions on divorce who fear that the judgments given by their courts might not be recognized in another State because they are based on grounds unknown in the legislation of the State in which recognition is sought. The provision therefore limits indiscriminate use of public policy.

In any of the circumstances, the Court of the Member State where the recognition is sought, may not review the judgment as to its substance. This prohibition of *révision au fond* is established so the recognition procedure may not become a procedure where the court in the State in which recognition is sought can rule again on the ruling made by the court in the State of origin. Eventually, the Court of the Member State of recognition can evaluate (in order to find out whether the public policy has been violated) only the results of the foreign decision and can decide if they are incompatible with the public policy of that state, but it cannot review the foreign decision as to its substance. This means that the Court cannot look at the errors as to the facts, or argue that the Court of origin misunderstood the evidence or misapplied the law.

The practical significance of the application of the public policy exception for the recognition of foreign decisions according to the Brussels IIbis Regulation is very small. Only five cases of it have been reported. It seems that the reasoning of Professor Borras that the public policy exception is ‘something Member States do not want to give up even though experience demonstrates that the corresponding provision in Article 27(1) of the Brussels Convention has been of no practical significance’ is more than applicable in the recent developments in the newest EU private international law Regulations.

5.2.1.4.2 The defense of the party was obstructed or denied

One of the aspects that the court of recognition traditionally ‘controls’ is the aspect of fair trial or the natural justice defense. Article 22(b) qualifies it as a ground for non-recognition in such situations when the judgment in the Member State of origin

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643 Borras Report (n 8) 53.
644 ibid.
645 Article 26 of the Brussels IIbis Regulation.
646 Borras Report (n 8) 53.
647 Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation (n 9) 267.
648 Shúilleabháin, M.N. (n 63) 258.
649 Hess B.and Pfeifer T., (n 608) 156.
650 Borras Report (n 8) 50.
651 See Article 45(1)(a) of the Brussels Ibis Regulation.
was given in default of appearance, if the respondent was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable the respondent to arrange for his or her defense unless it is determined that the respondent has accepted the judgment unequivocally.652

This rule must not be examined in isolation from the other rules of the Regulation, because the protection of the rights of the parties to a fair trial, and especially providing their rights to a defense, is predicted to be secured in different stages of the proceedings.653 Article 22(b) of the Brussels Ibis Regulation is the last resort for situations where court of origin has disrespected all of the safeguards provided in the regulation and the standards of the ECtHR and has rendered a decision given without proper service to the respondent or sufficient time to prepare his position in the case. Such situations are simply intolerable and cannot be recognized in the Member State of recognition.

The protection of the respondent’s rights to a fair trial does not start with Article 22(b) of the Brussels Ibis Regulation. The first instance of the protection of these rights of the respondent is Article 18 of the Brussels Ibis Regulation, which intends to guarantee the right of the respondent to be heard before a competent court and the opportunity to an effective defense.654 So for this aspect of protection of the respondent’s right for notification, Article 22(b) serves as a ‘double check’.655 Another safeguard for the rights of the respondent, especially when the judgment was given in default, is Article 37 of the Brussels Ibis Regulation. This technical rule lays out the formal requirements that the applicant must provide when applying for recognition. Among other requirements (a copy of the judgments which satisfies the conditions necessary to establish authenticity and a certificate in accordance with Annex I of the regulation), if the judgment was given in default then another document must be provided which establishes that the defaulting party was properly served or any document indicating that the defendant has accepted the judgment unequivocally.656

Such rules are not unfamiliar in EU regulations which cover cross-border cases. The counterparts of Article 22(b) of the Brussels Ibis Regulation can be found in Article 34(2) of the Brussels I Regulation,657 Article 27(2) of the Brussels Convention and Article 15(1) (b) of the Brussels II Convention. However, the Brussels I Regulation and the Brussels Ibis

652 Article 18 of the Brussels Ibis Regulation also protects the respondent’s right of notification.
653 See Article 18 and Article 33 of the Brussels Ibis Regulation.
654 Text to n 350 Part II ch IV sec 4.1.
655 Fawcett J. and Carruthers J., (n 139) 616.
656 Article 37(2) (a) and (b) of the Brussels Ibis Regulation.
657 However, in the new Brussels I Recast the protection of these rights are given in the enforcement stage (see, article 45(1)(b) of the Brussels I bis Regulation).
Regulation contain a difference in one exemption from the rule regarding the actions of the respondent/defendant in the aftermath of the rendering of the decision. Namely, the exemption of the rule contained in the Brussels I Regulation provides that the rule applies:

\[\text{unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so.}\]  

On the other hand, the exemption in the Article 22(1) (b) of the Brussels IIbis Regulation states:

\[\text{unless it is determined that the respondent has accepted the judgment unequivocally.}\]

These two exemptions are rather different. The exemption in the Brussels I Regulation provides for situations where the parties cannot apply for non-recognition on the basis of Article 34(2) if they had opportunity to challenge the judgment in the Member State of Origin, but failed to do so. This is not the case in the Brussels IIbis Regulation, where the respondent can apply for non-recognition of the decision because of unrighteous service in the Member State of recognition, even if he had opportunity to challenge the judgment in the Member State of origin. The protection of the rights of the respondent which was not properly served under the Brussels IIbis Regulation is much broader and allows for direct application for non-recognition on the basis of Article 22(1)(b) in the Member State of recognition, without returning to the Member State of origin first.

All of these rules have the same goal: the protection of the rights of both parties during the proceedings and the assurance that they will have the opportunity to present their position in front of the Court. The rules protect the procedural aspects of service of documents, and create sufficient time for the preparation and arrangement of the defense.

Regarding the service, the national law of civil procedure will decide which documents have to be served to the respondent in order to start the proceedings. The intention is just to make sure that the respondent is treated fairly in the proceedings, meaning that he/she is served with the document that institutes the proceedings or an equivalent. If the respondent is situated in the Member State where the proceedings have been initiated, then the national procedural law of that Member State regarding service will be applied in the dispute. However, if the respondent is located in another Member State (except Denmark) then the Service

\[658\] Article 34(2) of the Brussels I Regulation and Article 45(1)(b) of the Brussels Ibis Regulation contain identical rules.

\[659\] See Article 22(1)(b) of the Brussels Ibis Regulation.

\[660\] Shúilleabháin, M.N. (n 63) 265

\[661\] Magnus U. and Mankowski P., Commentary on Brussels Ibis Regulation (n 9) 272-273.

\[662\] ibid.
Regulation\textsuperscript{663} will apply regarding service. Another option, if the respondent is in Denmark or any other non-EU State which is part of The Hague Service Convention,\textsuperscript{664} then this same convention will apply. Lastly, if the respondent is residing in a country which is not a member of The Hague Service Convention, then other bilateral/multilateral international agreements will apply or as a last resort, the national rules of service of documents for persons living abroad.\textsuperscript{665}

After proper service has been conducted on the basis of some of these legal sources, sufficient time should be given to the respondent to prepare for appearance in front of the court. There is no prescribed period for this time limit so that it will be deemed ‘sufficient’, but the standards should be given according to the circumstances of the dispute, namely, the whereabouts of the respondent, and on whether or not he/she lives in the same country where the proceedings have been initiated, or he/she lives abroad. If the person lives in the same country, then the period and the efforts for the preparation of the case would be less time-consuming (same language, familiar legal surrounding, etc.). However, if the respondent lives in a different country than the one where the proceedings were initiated, in such circumstances, a longer period for preparation for appearance in front of the Court should be given, because of the technical details that need to be settled (translations, hotels, transportation, etc.) and the legal aspects (attorney, preparation for the case, etc.).\textsuperscript{666} And lastly, , the documents that are served to the respondent need to be precise and clear, so that he/she has proper understanding of the matter raised in front of the Court.\textsuperscript{667}

If there are flagrant irregularities which would disable the respondent to properly represent his/her case in front of the Court of the Member State where the proceedings were initiated, then this rule confers absolute right of objection on the part of the respondent who is not served at all or is served inadequately, relying on article 22(1)(b) in the recognition stage in the Member State of recognition. This rule applies unless the respondent makes an appearance at the court.\textsuperscript{668} If the respondent has accepted the judgment unequivocally\textsuperscript{669} then


\textsuperscript{664} Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

\textsuperscript{665} Magnus U. and Mankowski P., Commentary on Brussels Iibis Regulation (n 9) 273.

\textsuperscript{666} ibid.

\textsuperscript{667} ibid.

\textsuperscript{668} Shúilleabháin, M.N. (n 63) 266.

\textsuperscript{669} Tacit acceptance is insufficient unless special circumstances reveal that the foreign decision is expressly accepted. (Magnus U. and Mankowski P., Commentary on Brussels Iibis Regulation (n 9) 273).
he/she cannot rely on this ground for non-recognition and thus the result is that the judgment must be recognized, as is the normal consequence of the proper operation of the Regulation.\textsuperscript{670} Examples of such conduct are entering into another marriage\textsuperscript{671} or applying for the updating of civil status records on the basis of foreign decisions relating to divorce or marriage annulment.\textsuperscript{672}

**5.2.1.4.3 The foreign judgment is in a conflict with a judgment in a member state in which the recognition is sought**

As was stated above,\textsuperscript{673} Articles 22(c) and 23(e) of the Brussels IIbis Regulation approach the problem of irreconcilable judgments from another point in time. It is undeniable that the rules on *lis pendens* will cover a majority of the cases of concurrent proceedings. However it is very possible \textsuperscript{674} that because of unawareness of the Courts of the Member States, when the proceedings between the same parties are processed, the second seized court will not stay the proceedings. If the proceedings are concluded, then a judgment on matrimonial matters between the same parties can be given. For these cases, Article 22(c) of the Brussels Ibis Regulation applies and does not allow for a recognition of a judgment that was given between the same parties to be recognized in the Member State where the recognition is sought, because of the existence of a conflicting judgment between the same parties, even if the judgment rendered by Court of a Member State of recognition was given later than the judgment that needs to be recognized.\textsuperscript{675}

**5.2.1.4.4 The foreign judgment is in a conflict with a judgment given in another Member state or in a third state**

Article 22(d) of the Brussels IIbis Regulation is similar to Article 22(c), but it additionally refers to the situations when two decisions on matrimonial matters are given in other Member States or Non-member States between the same parties. In such circumstances,

\begin{itemize}
\item[F670] Borras Report (n 8) 51.
\item[F671] ibid.
\item[F672] Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation (n 9) 273.
\item[F673] Text to n 391 Part II ch IV sec 4.2.
\item[F674] Although in proceedings relating to matrimonial matters (because of the nature of these proceedings), it is very unimaginable that the second seized court will not stay the proceedings, however hypothetically the proceedings may continue because the Courts would assume that the other Court is second seized. (Shúilleabháin, M., (n 63) 269).
\item[F675] Such aspect is highly criticized in the legal doctrine, see Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation (n 9) 274.
\end{itemize}
the earlier decision will prevail if it fulfils the conditions for recognition in the Member State where recognition is sought. Both, Article 22(c) and Article 22(d) can be criticized for the fact that they represent very strict and almost mechanical rules, however their advantage is that they provide the certainty of avoiding ‘limping marriages’.  

5.2.1.1.5 Authentic Instruments

The Brussels IIbis Regulation contains a separate provision for the recognition and enforcement of authentic instruments. Generally the Brussels IIbis Regulation seeks to ensure that authentic instruments and agreements between parties that are enforceable in one Member State are treated as equivalent to ‘judgments’ for the purpose of the application of the rules on recognition and enforcement. In that context, Article 46 provides that documents which have been formally drawn up or registered as authentic instruments and are enforceable in one Member State, and also agreements between the parties that are enforceable in the Member State in which they were concluded, shall be recognised and declared enforceable under the same conditions as judgments.

This position is different from that of the Brussels I Regulation. While Article 57 of the Brussels I Regulation provided only of a declaration of enforceability regarding these instruments, Article 46 of the Brussels IIbis Regulation maintains that authentic instruments must undergo the full procedure of recognition and enforcement as judgments. Due to this, authentic instruments come under the complete control of the conditions for the non-recognition of foreign judgments. The justification for such a different position lies in the nature of these two EU instruments. It was considered that authentic instruments are given different levels of significance in the field of family matters in different Member States.

676 Shúilleabháin, M.N., (n 63) 269.
677 The meaning of ‘authentic instrument’ was given in CJEU Case C- 260/97 Unibank A/S. v Flemming G. Christensen [1999] ECR I-3715. Maintenance Regulation in Article 2(3) provides for definition of ‘authentic instruments’ where the term means:
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.
678 Recital 22 of the Brussels IIbis Regulation.
679 Borras Report (n 8) p.49.
5.2.1.2 Recognition and enforcement of foreign decisions relating to parental responsibility matters, according to the Brussels IIbis Regulation

The fifth recital of the Brussels IIbis Regulation undoubtedly underlines that all decisions on parental responsibility are covered by the Brussels IIbis Regulation (including measures for the protection of children) independently of any link with matrimonial proceedings, because the idea is to ensure equality of all children. However, pragmatism comes to the forefront in the next Recital, where it is concluded that:

[0]ften, parental responsibility issues will arise in proceedings on matrimonial matters.

Section 2 of Chapter III of the Brussels IIbis Regulation holds the title ‘Application of declaration of enforceability’. The name of this section is different from the traditional one, ‘enforcement,’ which is the name used in a majority of the EU procedural legal sources. This section differs from the one in Article 47 of the Brussels IIbis Regulation, and addresses the circumstance in which a foreign judgment is rendered enforceable in another Member State. It stipulates that a judgment on the exercise of parental responsibility in respect to a child given in a Member State which is enforceable in that Member State and has been served shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there. Both the meaning of the term ‘judgment’ and ‘parental responsibility’ are to be understood as provided in Article 2 of the Brussels IIbis Regulation: in light of the systematic and autonomous meaning given through the method of concept definitions.

There are two preconditions given in Article 28 of the Brussels IIbis Regulation for the possibility of an application for a declaration of enforceability: firstly, that the decision on parental responsibility is ‘enforceable’ in the Member State of origin and secondly, that the

680 See Recital (5) of the Brussels IIbis Regulation.
681 Recital (4) of the Brussels IIbis Regulation.
682 Chapter III Section 2 of Brussel I Regulation is named ‘Enforcement’; Tittle III Section 2 of the Brussels 1968 Convention is also named ‘Enforcement’.
683 Which rules refer to the ‘enforcement procedure’
684 Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation (n 9) 293.
685 For the understanding of the meaning of ‘interested party’ see text to n 518 Part II ch V sec 5.2.1.1.2.
686 Article 28(1) of the Brussels IIbis Regulation.
687 Article 2(4) of the Brussels IIbis Regulation
the term ‘judgment’ shall mean a divorce, legal separation or marriage annulment, as well as a judgment relating to parental responsibility, pronounced by a court of a Member State, whatever the judgment may be called, including a decree, order or decision.
688 Article 2(7) of the Brussels IIbis Regulation
the term ‘parental responsibility’ shall mean all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access.
689 Text to n 110 Part II ch I sec 1.1.1 and text to n 104 Part II ch I sec 1.1.1.2.
decision has been served. The aspect of enforceable judgments is correlated with the aspect of the res iudicata effect of the judgments. However, this aspect is very peculiar in the case of judgments relating to parental responsibility, which are final insofar as there is no longer a regular remedy. They can be changed as soon as the judgments have adjusted to the circumstances, which were changed to fit the best interest of the child. Therefore for the applicant to apply for a declaration of enforceability, the judgment doesn’t need to be res iudicata, as in a majority of the Member States. Judgments can be enforceable even if they are subject to a pending appeal. Such a position was given in the Coursier v. Fortis Bank SA (a Brussels Convention case), where the term 'enforceable':

[refers solely to the enforceability, in formal terms, of foreign decisions and not to the circumstances in which such decisions may be executed in the State of origin.]

The second precondition given in Article 28 of the Brussels Ibis regulation for the application for declaration of enforceability is that the judgments has been properly served to the other party. The service of the judgment to the other party is attested by a certificate that accompanies the judgment and which, on the basis of Article 39, is issued by the Court that rendered the judgment. It confirms that the judgments were served to the other party and at which address and on what date. The service of the judgment is conducted according to the rules of the Member State of Origin.

The applicant according to Article 29 applies for a declaration of enforceability to the courts of the Member States which, on the basis of Article 68 of the Brussels Ibis Regulation, were nominated for this purpose by each Member State. In such a situation, local jurisdiction is determined in reference to the place of habitual residence of the person against whom enforcement is sought or in reference to the habitual residence of any child to whom the

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691 ‘The fact that this ruling on the question of custody of the child provides for a review or reconsideration at regular intervals, within a specific period or in certain circumstances, of the issue of custody of the child does not mean that the judgment is not final.’, Case C-211/10 Doris Povse v Mauro Alpago [2010] ECR I-06673 para 46.
694 Annex II of the Brussels Ibis Regulation, point 9.2
695 If there is need for a service of the judgment in another member State other EU rules apply such as Service Regulation. (Magnus U. and Mankowski P., Commentary on Brussels Ibis Regulation (n 9) 294).
If, in a certain situation, the person against whom enforcement is sought or the child is not habitually resident there, then in such cases the local court for the place of enforcement will have the jurisdiction.\(^{698}\)

The procedure for issuing a declaration of enforceability is governed by the law of the Member State of enforcement and is accompanied by the relevant documents specified in Article 37 and 39 of the Brussels IIbis Regulation.\(^{699}\) The applicant must give an address for service or designate a representative *ad litem*.\(^{700}\) After the filing of the application, the court shall give its decision without delay. Neither the person against whom enforcement is sought nor the child shall, at this stage of the proceedings, be entitled to make any additional submissions on the application.\(^{701}\) This means that during this stage, the procedure is *ex parte*, and no edits to the application can be made. However, this power isn’t absolute; and is reversed in particular cases so that the defendant, who is seeking recognition, to make additional submissions.\(^{702}\)

Article 31 of the Brussels IIbis Regulation enumerates the grounds for refusal of the application, given in Articles 22, 23 and 24.\(^{703}\) These grounds on which the Court will not recognize the foreign judgment are given in article 22 (for matrimonial matters), article 23 (for parental responsibilities) and article 24 (prohibition of review of jurisdiction of the court of origin).\(^{704}\) Also, the court may not implement the principle *révision au fond* regarding the foreign judgment.\(^{705}\)

\(^{697}\) Article 29(2) of the Brussels IIbis Regulation.
\(^{698}\) Article 29(2) of the Brussels IIbis Regulation.
\(^{699}\) Text to n 656 Part II ch V sec 5.2.1.4.2 and text to n 694 Part II ch V sec 5.2.1.2.
\(^{700}\) Article 30 (2) of the Brussels IIbis Regulation.
\(^{701}\) Article 31(1) of the Brussels IIbis Regulation.
\(^{702}\) In Rinau Case the CJEU concluded ‘…in so far as it provides that neither the person against whom enforcement is sought nor the child is, at this stage of the proceedings, entitled to make any submissions on the application, is not applicable to proceedings initiated for non-recognition of a judicial decision if no application for recognition has been lodged beforehand in respect of that decision. In such a situation, the defendant, who is seeking recognition, is entitled to make such submissions.’ Case C-195/08 PPU Inga Rinau [2008] ECR I-05271 para 107.
\(^{703}\) Article 31(2) of the Brussels IIbis Regulation.
\(^{704}\) Article 31(2) of the Brussels IIbis Regulation.
\(^{705}\) Article 26 of the Brussels IIbis Regulation. The position of this rule was highlighted in the CJEU judgment Case C-455/15 PPU P v Q. of 19 November 2015 where the Court was asked to refer to the question ‘Should the [referring court], in accordance with Article 23(a) of [Regulation No 2201/2003] or any other provision and notwithstanding Article 24 of that regulation, refuse to recognise the judgment of the [Šilutės rajono apylinkės teismas (District Court, Šilutė)] of 18 February 2015 … and consequently continue the proceedings in the custody case pending before the [referring court]?’. These question was imposed on the ambiguity contained in the Article 24 for which the CJEU stated that ‘The jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in Articles 22(a) and 23(a) may not be applied to the rules relating to jurisdiction set out in Articles 3 to 14.’ The problem had arisen due to the fact that Article 15 is also a jurisdictional rule which refers to the question of ‘forum non convinienis’. As such the CJEU has concluded that ‘…alleged breach of Article 15 of that regulation by a court of a Member State does not allow a court of another Member State to review the jurisdiction of that court, despite the fact that the prohibition in Article 24 of the regulation
After the Court preforms this *ex parte* procedure, then the decision is given to the applicant, who can appeal the decision on the application for a declaration of enforceability. Generally, the idea behind this position of ‘fully ex parte procedure’ in the Brussels Regime is not to have ‘a reduction in the element of surprise’ which is necessary in an enforcement procedure if the respondent is not to have the opportunity of withdrawing his assets from any measure of enforcement. This aspect of ‘surprise’ is less important in the Brussels IIbis Regulation, with some exceptions granted in child abduction cases.

The appellate procedure is the same as the one followed for the recognition of decisions regarding matrimonial matters. Again as was stated in the case of matrimonial matters, Article 35 of the Brussels IIbis Regulation gives the only suspensory effect to the enforcement of the judgment if some of the conditions are satisfied. In two distinct situations, according to article 36, partial enforcement can authorized by the Court. The first situation refers to the *ex officio* partial enforcement and the second situations entails partial enforcement on application for partial enforcement by the applicant. In *ex officio* partial enforcement, where a judgment has been given in respect to several matters and enforcement cannot be authorized for all of them, the court shall authorize enforcement for one or more of them. From this provision it can be concluded that the first aspect in the *ex officio* partial enforcement is that the judgment itself consists of several matters of parental responsibilities which can be separated and the second aspect is that the other parts of the judgment must not be enforceable. In application for partial enforcement, partial enforcement is made through application by the applicant for partial enforcement. In such a situation, the judgment again must be severable, but differs from Article 36(1) in the aspect that it is not necessary for the rest of the judgment to be unenforceable.

does not refer expressly to Article 15.’ With that the CJEU has made it clear that a Court of a Member State cannot use Article 23(a) of the Brussels IIbis Regulation to refuse to recognize a foreign decision of a Member State in cases where it considers that another Court wrongfully determined the jurisdiction based on Article 15 of the Brussels IIbis Regulation.

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706 Article 32 of the Brussels IIbis Regulation.
707 Article 33 of the Brussels IIbis Regulation.
708 Jenard Report (n 14) 50.
709 ibid.
710 Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation (n 9) 302.
711 Text n 547 Part II ch V sec 5.2.1.1.3.
712 Text n 584 Part II ch V sec 5.2.1.1.3.
713 Article 36(1) of the Brussels IIbis Regulation.
714 Article 28(1) of the Brussels IIbis Regulation.
715 For example, situations which do not fall under Brussels IIbis Regulation, or are not satisfying the requirements for enforcement (Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation (n 9) 324).
716 Article 36(2) of the Brussels IIbis Regulation.
717 Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation (n 9) 325.
5.2.1.2.1 Enforcement

The enforcement procedure is not regulated in detail in the Brussels IIbis Regulation, but is left to the national law to govern.\(^{718}\) However, it is very important from the perspective of the goals that the regulation tries to achieve, that the national authorities apply rules which secure efficient and speedy enforcement of decisions issued under the Regulation.\(^{719}\) Such efficient and speedy enforcement is important regarding all parental responsibility decisions, but in the cases where the declaration of enforceability is abolished (access rights and child abduction cases) it is particularly important, because the goal for abolishing the intermediate procedure is to even more promptly restore the status quo, which was disturbed with the wrongful removal or retention.

Enforcement does not apply to provisional measures. As was previously stated\(^{720}\) and also in the *Purrucker I* Case,\(^{721}\) provisional measures which were rendered on the basis of Article 20 of the Brussels IIbis Regulation are not enforceable in another Member State on the basis of provision from the Brussels IIbis Regulation. This aspect also extends to the situations where an enforceable order granting provisional measures of parental responsibility in favor of a parent has been made and declared enforceable in one Member State and an attempt is made by the other parent to defeat the enforcement of that order in another Member State by seeking there provisional measures in favor of themselves.\(^{722}\) In such a case, the CJEU has also made clear that the court in that other Member State is simply not entitled to order such measures and would be required under the Regulation to enforce the original order.\(^{723}\) In that case, the CJEU held that if a provisional judgment in matters of parental responsibility which was delivered by the court with jurisdiction as to the substance\(^{724}\) was declared enforceable in the Member State where the child is present, the change of circumstances resulting from a gradual process such as the child’s integration into a new environment are not enough, under Article 20(1) of Regulation No 2201/2003, to entitle a court not having jurisdiction as to the substance to adopt a provisional measure amending the measure in matters of parental responsibility taken.

\(^{718}\) Article 47 of the Brussels IIbis Regulation.

\(^{719}\) Practice Guide for the application of the Brussels IIa Regulation (n 21) 69.

\(^{720}\) Text to n 221 Part I ch II sec 2.1.2.1.4


\(^{722}\) See also Case C-403/09 PPU Jasna Detiček v Maurizio Sgueglia [2009] ECR I-12193.


\(^{724}\) It was the Tribunale di Tivoli.
by the court with jurisdiction as to the substance. Such prolongation of the enforcement procedure in the requested Member State can contribute to the creation of conditions that would allow the former court to block the enforcement of the judgment that had been declared enforceable. This interpretation suggests that the prolongation of the enforcement procedure would ultimately undermine the very principles on which that Regulation is based on.

Article 47(2) of the Brussels IIbis Regulation provides that any judgment delivered by a court of another Member State and declared to be enforceable in accordance with Section 2 or certified in accordance with Article 41(1) or Article 42(1) [of the Brussels IIbis Regulation] shall be enforced in the Member State of enforcement under the same conditions as if it had been delivered in that Member State. In particular, a judgment which has been certified according to Article 41(1) or Article 42(1) cannot be enforced if it is irreconcilable with a subsequent enforceable judgment. Such a position provides that the Courts of Member States, in situations when they are enforcing a decision from other Member State, must be very careful and observant and they must obey the very strict limits given implicitly in the terms of the provision, and not to second-guess or try to circumvent the decision in the court of origin. Some aspects of ‘the same conditions as if it had been delivered in that Member State’ clause have the practical meaning that the procedural arrangements under which the return of the child must take place will be under the ‘same conditions’ and will on no account provide a substantive ground of opposition to the judgment of the court which has jurisdiction.

The CJEU referred to these notions in the Povse Case. It concluded that it is not for the court in the Member State of enforcement under Article 47(2) to go beyond procedural matters in the enforcement of the certified judgment and certainly not to entertain any plea in law as to the substance of the matters at stake which, under a proper application of the Regulation, can only be heard in the courts of the Member State of origin and in accordance with the rules of its legal system. Likewise, an application to suspend enforcement of a certified judgment can be brought only before the court which has jurisdiction in the Member State of origin, in accordance with the rules of its legal system.

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726 ibid para 47.
727 Article 47(2) of the Brussels IIbis Regulation.
728 Practice Guide for the application of the Brussels IIa Regulation (n 21) 70.
729 Case C-211/10 PPU, Doris Povse v Mauro Alpago [2010], ECR I-06673 para 73.
730 ibid.
731 ibid para 74.
and which orders the return of the child would amount to circumventing the system set up by Section 4 of Chapter III of the regulation. Such an exception to the jurisdiction of the courts in the Member State of origin would deprive of practical effect Article 11(8) of the Regulation, which ultimately grants the right to decide to the court with jurisdiction and which takes precedence, under Article 60 of the regulation, over the 1980 Hague Convention, and would recognise the jurisdiction, on matters of substance, of the courts in the Member State of enforcement.\(^{732}\)

Another aspect that the CJEU addressed in the Povse Case referring to enforcement of judgments according to Brussels IIbis Regulation was the issue of change of circumstances and its effect on the enforcement. It that aspect the CJEU stated that:

\>[a] significant change of circumstances in relation to the best interests of the child constitutes an issue of substance, which may, in appropriate cases, cause the decision of the court which has jurisdiction over the return of the child to change. However, in accordance with the division of jurisdiction referred to more than once in this judgment [par.70 et seq.], such an issue must be resolved by the court with jurisdiction in the Member State of origin. Moreover, that court, within the system established by the regulation, also has jurisdiction to assess the best interests of the child, and that is the court which must hear an application for any suspension of enforcement of its judgment.\(^{733}\)

From this assumption it was concluded that the enforcement of a certified judgment cannot be refused in the Member State of enforcement because, as a result of a subsequent change of circumstances, it might be seriously detrimental to the best interests of the child. Such a change must be pleaded before the court which has jurisdiction in the Member State of origin, which should also hear any application to suspend enforcement of its judgment.\(^{734}\)

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\(^{732}\) ibid para 78.
\(^{733}\) ibid para 81.
\(^{734}\) ibid para.83.
5.2.1.2.2 Grounds for non-recognition of judgments relating to parental responsibility (Article 23)

Article 23 lists the grounds for non-recognition of foreign judgments relating to parental responsibility. It is modeled according to Article 15(2) of the Brussels II Regulation with some small differences. As was the case with Article 22, these rules are also given as negative assumptions. According to Article 23, a judgment relating to parental responsibility shall not be recognized:

- if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought, taking into account the best interests of the child;
- if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought;
- where it was given in default of appearance if the person in default was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence, unless it is determined that such person has accepted the judgment unequivocally;

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735 Article 15 (2) of the Brussels II Regulation
A judgment relating to the parental responsibility of the spouses given on the occasion of matrimonial proceedings as referred to in Article 13 shall not be recognised:
(a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child;
(b) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought;
(c) where it was given in default of appearance if the person in default was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence unless it is determined that such person has accepted the judgment unequivocally;
(d) on the request of any person claiming that the judgment infringes his or her parental responsibility, if it was given without such person having been given an opportunity to be heard;
(e) if it is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought;
or
(f) if it is irreconcilable with a later judgment relating to parental responsibility given in another Member State or in the non-member State of the habitual residence of the child provided that the later judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

736 Article 23(a) of the Brussels Ibis Regulation.
737 Article 23(b) of the Brussels Ibis Regulation.
738 Article 23(c) of the Brussels Ibis Regulation.
on the request of any person claiming that the judgment infringes on his or her parental responsibility, if it was given without such person having been given an opportunity to be heard;\textsuperscript{739}

- if it is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought;\textsuperscript{740}

- if it is irreconcilable with a later judgment relating to parental responsibility given in another Member State or in the non-Member State of the habitual residence of the child, provided that the later judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought;\textsuperscript{741}

- if the procedure established in Article 56 has not been complied with.\textsuperscript{742}

\textbf{5.2.1.2.2.1 Public policy}

Similarly to the systematization of the grounds for non-recognition of judgments relating to matrimonial matters, the public policy exception in the case of parental responsibility judgments is positioned as the first ground for non-recognition of such judgments.\textsuperscript{743} However, this rule more closely mirrors article 23(2) (d) of the 1996 Hague Child Protection Convention.\textsuperscript{744} The formulation of the public policy exemption in article 23(a) of the Brussels IIbis Regulation is tailored for these cases because, firstly, the recognition of a judgment relating to parental responsibility can be refused if it manifestly contrary to the public policy of the Member State where recognition is sought and secondly, the best interest of the child must be taken into account.

Regarding the first aspect of the public policy exemption, the understanding of manifest violation is no different than the understanding regarding Article 22(a) of the Brussels IIbis Regulation.\textsuperscript{745} In addition, the recognizing Court must apply Articles 24-26 and restrain itself

\textsuperscript{739} Article 23(d) of the Brussels IIbis Regulation.
\textsuperscript{740} Article 23(e) of the Brussels IIbis Regulation.
\textsuperscript{741} Article 23(f) of the Brussels IIbis Regulation.
\textsuperscript{742} Article 23(g) of the Brussels IIbis Regulation.
\textsuperscript{743} Text to n 605 Part II ch V sec 5.2.1.1.4.1.
\textsuperscript{744} Article 23
\textsuperscript{745} Text to n 639 Part II ch V sec 5.2.1.1.4.1.
from reviewing the jurisdiction and substance of the judgment or to refuse recognition based on the fact that the Member State of origin applied different law.\textsuperscript{746} Article 24 applies even in situations where the jurisdiction was determined in accordance with Article 15 of the Brussels IIbis Regulation, although this rule is not specifically mentioned in Article 24.\textsuperscript{747}

The second aspect, ‘best interest of the child,’ is to be taken into account in the situations when the recognition of judgments is refused because of the public policy exemption. This necessitates a clear understanding of the ‘best interest of the child’ principle. However, the concept of the ‘best interest’ of the child is ambiguous. There is little consensus about what criteria constitute a child’s best interests or how these criteria should be applied.\textsuperscript{748} Generally, it is accepted that the definition is left ambiguous intentionally, because the legislators are unable to envisage the entire range of complex and various situations a child can be in, and instead choose to pass the responsibility to the competent institutions (legal courts, administrative structures), which are supposed to evaluate the specific circumstances and to decide with accuracy what is the best interest of the child.\textsuperscript{749} Furthermore, the Brussels IIbis Regulation does not contain a definition for it, and neither does the UN Convention on the Rights of the Child.\textsuperscript{750}

The guiding principles for determining a child’s best interest are very broad. They range from personal aspects of the child itself\textsuperscript{751} to the aspects of the person or persons to whom the child relates personally and who have an impact on the education, growth or professional formation of the child.\textsuperscript{752} Also the particular relations between the child and the parent/parents can be taken into account and play important role in the determination of the ‘best interest of the child’.\textsuperscript{753} This large number of variable factors that each represent an indicator of what forms the best interest of the child makes it impracticable to define the meaning of the term in advance. Every decision that is made must consider the individual child’s developmental and psychological needs.\textsuperscript{754} That is why the ‘best interest’ standard represents a willingness on the part of the court and the law to consider children on a case-by-case basis rather than adjudicating children as a class or a homogeneous group with identical

\textsuperscript{746} Text to n 640 Part II ch V sec 5.2.1.1.4.1.
\textsuperscript{747} Case C-455/15 PPU P v Q. of 19 November 2015 para 45.
\textsuperscript{750} Article 3(1) of the UN Convention of 20 November 1989 on the Rights of the Child
\textsuperscript{751} Age, personality, sex, maturity level, institutionalized education, the child’s social, academic, and psychological adjustment, etc.
\textsuperscript{752} Parental adjustment, parenting skills, morality issues, criminal record, financial criteria, etc.
\textsuperscript{753} Emotional ties to each parent, etc.
\textsuperscript{754} Kelly Joan B., (n 748) 385.
needs and situations. So the best interest of the child has to be evaluated in every single case, taking into account the special circumstances of that case.

5.2.1.2.2 The denial of the right of the child to be heard

A special emphasis in the Brussels IIbis Regulation has been given to the best interest of the child, as well as the right of the child to have his own view on the circumstances that involve him/her if the child is mature enough to understand these surroundings. In an expressive form, this principle is manifested in the right of the child to be heard. This rule is in correlation with Article 12 of the UN Convention on the Rights of the Child and Article 24 of the Charter of Fundamental Rights of the European Union. The application of Article 24 of the Charter is explained and emphasized in recital 33 of the Brussels IIbis Regulation where it is acknowledged that this legal institute recognizes the fundamental rights and observes the principles of the Charter of Fundamental Rights of the European Union. In particular, the Brussels IIbis Regulation seeks to ensure respect for the fundamental rights of the child as set out in Article 24 of the Charter of Fundamental Rights of the European Union. In that context it is predicted that the hearing of the child plays and will play an important role in the application of the Brussels IIbis Regulation. However, the Regulation does not contain specific rules that explain how this right will be manifested and instead refers its application in practice to the national rules of each Member State.

755 ‘The best guidelines that can be given to the Court is rather than focusing on parental demands, societal stereotypes, cultural tradition, or legal precedent, the best interest standard asks the decision makers to consider what this child needs at this point in time, given this family and its changed family structure.’ (Kelly Joan B., (n 748) 385).

756 Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation (n 9) 281.

757 Recognition of parental responsibility judgments, Article 23(b); Child abduction cases Article 11(2); when issuing certificate concerning rights of access, Article 41(2)(c); when issuing certificate concerning return of child, Article 42(2)(a)

758 Article 12
1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

759 The rights of the child (Article 24)
1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration

760 Recital (19) of the Brussels IIbis Regulation.

761 ibid.
Article 23(b) of the Brussels IIbis Regulation states that a judgment regarding parental responsibilities matters shall not be recognized in the Member State of recognition when that judgment has been rendered in proceedings, if the child wasn’t given opportunity to be heard. It is considered that such a judgment represents the violation of the fundamental principles of procedure of the Member State in which recognition is sought. This Article has been modeled on the basis of Article 23(2) (b) of the 1996 Hague Child Protection Convention. However, there is no clear model how to properly determine the maturity of the child and similarly, there is no proper model detailing how the child should be heard. The assessment should be made by the Court for every case individually, with some guidelines given in the ECtHR case *Egbert Elsholz against Germany.*

Lastly, the only exemption that Article 23(b) of the Brussels IIbis Regulation itself provides is if the judgment was given in case of urgency. In such situations the Court is exempt from conducting a hearing of the child in order to protect the child itself or its property. Nevertheless, when Courts of Member States are confronted with such situations of urgency, the child’s best interest must of course still be guaranteed and protected.

### 5.2.1.2.2.3 The defense of the party was obstructed or denied

Article 23(c) is almost identical to Article 22(b) of the Brussels IIbis Regulation and holds similar position as Article 34(2) of the Brussels I Regulation and Article 27 of the Brussels Convention. Like these rules, article 23(c) is intended to protect a person from a judgment rendered in the Member State of Origin which was given in default of appearance or if the person was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defense, unless it is determined that the person has accepted the judgment unequivocally. Again, as was the case for Article 22(b) of the Brussels IIbis Regulation, this rule must not be seen in isolation of the other provisions of the Regulation. Firstly, Article 18(1) provides that the court that established jurisdiction on the basis of articles 8-15 of the Brussels IIbis Regulation has to stay the proceedings and to allow for the person habitually resident in a Member state other than the one where the proceeding was brought to have proper service and an effective defense. The position of this rule is strengthened in Article 37(2),

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762 *Egbert Elsholz against Germany* [2000], ECHR 2000-VIII 345,366-367

763 Text to n 350 Part II ch IV sec 4.1.
specifically, by the protection of the person against whom the decision in default of appearance was given. In such circumstances, the party seeking or contesting recognition or applying for a declaration of enforceability has to provide (together with the other relevant documents provided in Article 37) an original or certified true copy of the document which establishes that the defaulting party was served with the document instituting the proceedings or with an equivalent document, or the provision of any document indicating that the defendant has accepted the judgment unequivocally.

Regarding service of documents, the state’s national law of civil procedure will decide which documents have to be served to the respondent in order to start the proceedings. The intention is just to ensure that the respondent is treated fairly in the proceedings, meaning, that he/she is served with the document that institutes the proceedings or an equivalent. The application of the legal sources regarding service of documents depend on the territory where the respondent is situated. If the respondent is situated in the Member State where the proceedings have been initiated, then the national procedural law of that Member State regarding service will be applicable in the dispute. However, if the respondent is located in another Member State (except Denmark) then the Service Regulation\textsuperscript{764} will apply regarding service. Another circumstance presents itself if the respondent is in Denmark or any other non-EU State which is part of The Hague Service Convention. If they are, then this convention will apply. Lastly, if the respondent is residing in a country which is not a member of The Hague Service Convention, then other bilateral/multilateral international agreements will apply or, as a last resort, national rules of service of documents for persons living abroad.\textsuperscript{765}

The standards which were given regarding Article 22(b) apply also for Article 23(c). There is no certain length that the time limit should be to amount to ‘sufficient’, but the standards should be given according to the circumstances of the dispute, namely, the whereabouts of the person: if he lives in the same country where the proceedings have been initiated, or he/she lives abroad. Additionally, minor irregularities cannot be seen as situations which fall under Article 23(c). Finally, the person must not expressively accept the judgment which was given in default, because such conduct represents acceptance of the newly established situation and cannot fall under Article 23(c) of the Brussels Iibis Regulation.


\textsuperscript{765} Magnus U. and Mankowski P., Commentary on Brussels Iibis Regulation (n 9) 284.
5.2.1.2.4 The party against whom the recognition is sought was denied right to be heard

Article 23(d) of the Brussels IIbis Regulation applies to situations where a person’s right to be heard in a parental responsibilities case was violated and eventually the judgment was rendered without the Court having heard the voice/position of that person. In such circumstances, on the request of that person, the judgment will be not recognized in the Member State of recognition. This rule generally protects the rights which are provided by virtue of Article 8 of the ECHR and which can be restricted only in very limited cases. What is peculiar about this provision is that the person whose ‘right to be heard’ was violated, and thus whose parental responsibilities rights were violated, can request the Court of the Member State of recognition not to recognize the judgment.

5.2.1.2.5 The foreign judgment is in conflict with a later judgment in a member state in which the recognition is sought

As was previously stated, judgments regarding parental responsibility issues are peculiar, because they remain open and cannot be categorized as res iudicata. Following this assumption, Article 23(e) and Article 22(c) of the Brussels IIbis Regulation, which generally contain same aim of regulating the problem of irreconcilable judgments, are not identical. While Article 22(c) as a ground for non-recognition applies to situations where the judgment of a Member State of origin is irreconcilable with a judgment in Member State of recognition between the same parties, Article 23(e) applies to situations where the foreign judgment is irreconcilable with a latter judgment relating to parental responsibilities. This provision exists because parental responsibilities judgments may be changed later because they need to be adjusted to new circumstances or because of a change in the best interest of the child. In that manner, latter judgments replace earlier ones.

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766 Article 8 of the ECHR:
1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
767 And has the burden of proof.
768 Text to n 690 Part II ch V sec 5.2.1.2.
769 Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation (n 9) 277.
5.2.1.2.2.6 Foreign judgment is in a conflict with a judgment given in another Member state or in a third state

On first sight, Article 23(f) of the Brussels IIbis Regulation appears to be a counterpart of Article 22(d) of the Brussels IIbis Regulation, as both relate to irreconcilability of foreign judgments. However, these two articles are substantially different. The different understandings of the concept of the nature of the parental responsibility decisions as stated in the case of Article 23(e) of the Brussels IIbis Regulation results in these substantial differences. While Article 22(d) is envisaged as a ground for non-recognition in the cases when a judgment on matrimonial matters ‘…is irreconcilable with an earlier judgment given in another Member State or in a non-Member State between the same parties…’, Article 23(f) applies in the situations where the judgment on parental responsibility issues ‘… is irreconcilable with a later judgment relating to parental responsibility given in another Member State…’.

Another difference between these two articles is that Article 22(d) refers to judgments given in a non-member state. These judgments are recognized according to international law instruments and national law rules for recognition in the Member State. In the situation of Article 23(f), there is a limitation to this end that the decision originates from the State where the child was habitually resident at the time the judgment was given. This means that the evaluation of whether such judgment will be recognized in a Member State will be based on a non-European law, because Article 23(f) requires that the Non-Member State is the State in which the child was habitually resident at the time when the judgment was given.

5.2.1.2.2.7 The foreign judgment is in violation of the procedure laid down in Article 56 (the placement of a child in another Member State)

Placement measures of a child in a foster family or in institutional care are the prototypes of measures of protection. In order to ensure equal treatment for all children, the Brussels IIbis Regulation covers all decisions on parental responsibility, including measures for the protection of children. This is reaffirmed in Article 1(2) (d) of the Brussels IIbis Regulation, which expressly provides that the Regulation applies to ‘the placement of the child in a foster family or in institutional care’. The operational part of the measures for placement

770 Irreconcilability with local judgment.
771 Article 23(f) of the Brussels IIbis Regulation
772 Lagarde Report (n 93) 547.
773 Recital (5) of the Brussels IIbis Regulation
of the child in another Member State is given in Article 56 of the Brussels IIbis Regulation. This article provides that consultation of the Central Authority of the requested Member State or that of another authority having jurisdiction in that Member State is mandatory where public authority intervention is required for domestic cases of child placements. In this situation, the competent authority must consent to the placement. Where no such intervention is required, there is merely an obligation to inform the Central Authority of the requested Member State or any other Authority having jurisdiction in that Member State.

Article 23(g) of the Brussels IIbis Regulation is intended to protect the procedure for placement of the child as provided in Article 56. If this procedure is violated in any way, for example if there is no consent by the competent authority of the Member State to place the child in a certain place, there is no obligation to recognize the placement decision of the Member State of origin.

5.2.2 Abolition of the application for a declaration of enforceability relating to child abduction and access rights cases according to the Brussels IIbis Regulation

The classical *exequatur* procedures in the Brussels IIbis Regulation refer to foreign judgments given in a Member State over divorce, legal separation or marriage annulment cases and over parental responsibility cases. The matrimonial matters cases are specific because they are only undergoing the process of recognition of the foreign judgment. On the other hand, parental responsibility cases (especially access rights and custody rights) are not only undergoing the process of recognition but also they need to be enforced in another Member State. These types of decisions are enforced by issuing a declaration of enforceability. The initiation of this procedure according to the Brussels IIbis Regulation is conducted after the applicant files an application with all of the necessary documents listed in Article 30. Against such decision there is possibility of an appeal. There are two exceptions to the procedure laid out in Article 30 of the Brussels IIbis Regulation. These exceptions are the cases of access rights and child abduction. What is peculiar about these cases is that they are recognized and enforced in another Member State without the need for a declaration of enforceability and

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774 Article 56(1) of the Brussels IIbis Regulation
775 Article 56(2) of the Brussels IIbis Regulation
776 Article 56(4) of the Brussels IIbis Regulation.
777 Article 28(1) of the Brussels IIbis Regulation.
778 Article 33 of the Brussels IIbis Regulation.
779 Article 40 of the Brussels IIbis Regulation.
without any possibility of opposing the recognition, simply by issuing a special certificate on the appropriate standard form that is attached to the Regulation (Annexes III and IV). This special certificate, issued by the judge that has rendered the decision regarding access rights and in child abduction cases, certifies that the parties concerned and the child have been given an opportunity to be heard. When it comes to the cases of access rights, the above-mentioned preconditions also have to be fulfilled and the service has to be conducted in a proper manner. This means that if the decision was given in default, the certificate can be issued only if the person defaulting was served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defense, or, if the person has been served with the document but not in compliance with these conditions, it is nevertheless established that he or she accepted the decision unequivocally. In the cases of child abduction, the issuing of the certificate is conditional on the hearing of the parties, the procedural action that the court takes into account in issuing its judgment, and the reasons for and evidence underlying the order issue pursuant to Article 13 of the 1980 Hague Convention.

There is no requirement of any special procedure for recognition. Such procedures for application of declaration of enforceability are governed by the law of the Member state of enforcement. In all of these situations, the guiding principles behind the Regulation are: that the recognition and enforcement of judgments given in a Member State firstly, must be based on the principle of mutual trust and secondly, its grounds must be kept to the minimum. The Regulation is also based on the idea that the best interests of the child must prevail, with respect for the fundamental rights of the child, as set out in Article 24 of the Charter of

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780 Article 41 and 42 of the Brussels Ibis Regulation.
781 In such circumstances the Court of the enforcement of the Member State is obliged to enforce the judgment which is so certified, and it has no power to oppose either the recognition or the enforceability of that judgment. Support for that interpretation can be found in the fact that the grounds laid down in Articles 23 and 31 of Regulation No 2201/2003 which justify the court of the Member State of enforcement not recognising or declaring not enforceable a judgment on matters of parental responsibility, which include a manifest conflict with the public policy of that Member State and the violation of fundamental principles of procedure of that Member State which require that the child be given the opportunity to be heard, were not repeated as grounds capable of justifying opposition by the courts of the Member State of enforcement in the proceedings covered by the provisions of Chapter III, Section 4 of that regulation. Case C-491/10 PPU, Joseba Andoni Aguirre Zarraga v Simone Pelz, [2010] ECR I-14247 para 57. See also, to that effect, Case C-195/08 PPU Inga Rinau [2008] ECR I-05271 para 91, 97 and 99.
782 Article 41(2) (b) and (c); Article 42 (2)(a) and (b) of the Brussels Ibis Regulation.
783 Article 41(2) (a) of the Brussels Ibis Regulation.
784 Article 42(2)(b) of the Brussels Ibis Regulation.
785 Article 21 of the Brussels Ibis Regulation.
786 Article 30 of the Brussels Ibis Regulation.
787 Recital 12 and 13 of the Brussels Ibis Regulation.
Fundamental Rights of the European Union. To that end, the Regulation seeks, in particular, to deter child abductions between Member States and, in cases of abduction, to bring about the child’s return without delay.

The idea of the abolition of the exequatur has been in development for almost 20 years. Its origin can be traced back to the summit of the European Council held in Tampere on 15-16 October 1999 (Tampere summit), which is known as a starting point of the development of the European Union as an area of freedom, security and justice. Among the 62 conclusions, regarding cross-border recognition and enforcement the European Council held that:

[E]nhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights.

In civil matters, the Commission was called upon to make a proposal for further reduction of the intermediate measures which were still required to enable the recognition and enforcement of a decision or judgement in the requested State. The idea was that such decisions would be automatically recognized throughout the Union without any intermediate proceedings or grounds for refusal of enforcement, and could be accompanied by the setting of minimum standards on specific aspects of civil procedural law.

From that moment on it started to be considered that mutual recognition is a ‘cornerstone of judicial cooperation.’ The first instrument that abolished exequatur for particular decisions was the Brussels IIbis Regulation. This policy initiated legislative

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789 ‘Finally, the most important principle governing both the Convention and the Regulation is beyond any doubt that of protecting the superior interests of the child...’ with special reference to Article 24(2) of the Charter of Fundamental Rights of the European Union, Case C-195/08 PPU Inga Rinau [2008] ECR I-05271 Opinion of AG Sharpston delivered on 1 July 2008 para 20.


791 Even before the summit in Tampere, there were considerations about the abolishment of the exequatur, nevertheless because of differences of procedural law regarding enforcement it became official EU policy at the Tampere summit, Kramer, X., Cross-Border Enforcement and the Brussels I-bis Regulation (n 468) 348.

792 The Tampere Summit was the first summit in which the head of states and governments of 15 EU Member States come together to discuss the justice and home affairs policies of the European Union. European Commission, Fact Sheet #3.1 Tampere Kick-start to the EU’s policy for justice and home affairs, available at <http://ec.europa.eu/councils/bx20040617/tampere_09_2002_en.pdf> accessed 12 March 2016.


794 Point 33 of the Presidency Conclusions of the summit in Tampere.

795 Visitation rights was pointed out as one of the fields, point 34 of the Presidency Conclusions of the summit in Tampere.

796 Point 33 of the Presidency Conclusions of the summit in Tampere.

797 Kramer, X., Cross-Border Enforcement and the Brussels I-bis Regulation (n 468) 348.

798 The abolishment of exequatur in family matters was outlined in Programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters (OJ 2001, C12/1).
activities that at the beginning were expected to lead to abolition of exequatur\textsuperscript{799} in the new Brussels I Regulation.\textsuperscript{800} The Commission conducted consultations on the basis of the Green Paper of 2009\textsuperscript{801} and proposed only partial abolition, maintaining safeguards in the form of extraordinary remedies that permitted a limited review of the jurisdiction to be enforced but with no public policy exception.\textsuperscript{802} However as was stated above,\textsuperscript{803} the final result is that the Council adopted a recast Brussels I Regulation that abolished exequatur generally but permits an application by any interested party for refusal of recognition (including public policy)\textsuperscript{804} and application by the person against whom the enforcement is sought for refusal of enforcement.\textsuperscript{805} In this way the possibility of opposing recognition and enforcement was maintained in the Brussels Ibis Regulation, but limited significantly by the fact that the exceptions must be expressly invoked by application.\textsuperscript{806}

\textbf{5.2.2.1 Child Abduction Cases under the Brussels IIbis Regime}

The Brussels Ibis Regulation, as was mentioned above\textsuperscript{807} establishes a complementary mechanism to the 1980 Hague Child Abduction Convention for the return of the wrongfully removed or retained children within the European Union.\textsuperscript{808} From the point of view of the goals that both instruments want to achieve, the Brussels Ibis Regulation and the 1980 Hague Child Abduction Convention are quite similar to each other.\textsuperscript{809} The 1980 Hague Child Abduction Convention provides for the restoration of the status quo with ‘by means of ‘the prompt return of children wrongfully removed to or retained in any Contracting State’ as a main objective.\textsuperscript{810}

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\textsuperscript{799} Report from the Commission to the European Parliament, the Council and The European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters COM (2009) 174 final p.4. For more on evolution of the systems for the recognition and enforcement in the EU see text to n 450 Part II ch V sec 5.1.

\textsuperscript{800} More on the Brussels Ibis Regulation see text to n 477 Part II ch V sec 5.1.


\textsuperscript{803} Text to n 477 Part II ch V sec 5.1.

\textsuperscript{804} Article 45 of the Brussels Ibis Regulation.

\textsuperscript{805} Article 46 of the Brussels Ibis Regulation.

\textsuperscript{806} Scott M. J., (n 480) 29.

\textsuperscript{807} About the relationship between the Brussels Ibis Regulation and the 1980 Hague Convention on Child Abduction, see text to n 122 Part II ch II sec 2.1.

\textsuperscript{808} McEleavey P., \textit{The new child abduction regime in the European Union} (n 135) 17.

\textsuperscript{809} Case C-195/08 PPU Inga Rinau [2008] ECR I-05271 Opinion of AG Sharpston delivered on 1 July 2008 para 16.

\textsuperscript{810} ‘The Convention's objects, which appear in article 1, can be summarized as follows: since one factor characteristic of the situations under consideration consists in the fact that the abductor claims that his action has
On the other hand, it is shown in the recitals to the Brussels IIbis Regulation, in particular recitals 17, 21, 23 and 24, and in the provisions of Article 11, that the Regulation shares the same aim of ensuring, in principle and in practice other than in special circumstances, the child’s swift and automatic return to the Member State from which he or she has been removed and where he or she was habitually resident before the removal.\(^811\)

The 1980 Hague Abduction Convention is still in force between the Member States of the European Union in one regard.\(^812\) But on the other hand, the Brussels IIbis Regulation modifies some rules of the Hague Convention for the needs of the European judicial area. Generally, the EU restrained itself from imposing ‘comunitarisation’ of the 1980 Hague Child Abduction Convention, but some new rules are different from the older ones. In all of the situations where different rules are provided in the Brussels IIbis Regulation, those rules apply instead of the rules given in the 1980 Hague Child Abduction Convention. These changed rules are given in Article 11 of the Brussels IIbis Regulation, which supplement the 1980 Hague Child Abduction Convention in the cases of wrongful removal or retention between Member States of the European Union.\(^813\)

Article 11 of the Brussels IIbis Regulation is not about conferring jurisdiction, but about triggering the application of the return procedure. In that context, a clear distinction must be made between the rules of jurisdiction (Articles 8, 9, 10 and 12) and article 11, especially from the perspective of habitual residence, where for Article 11 only the habitual residence of the child immediately before the alleged wrongful retention or removal is relevant.\(^814\) Despite their differences, the understanding of the basic concept of ‘habitual residence’ is the same, based on the relevant case-law of the CJEU.\(^815\)

When a Court of a Member State receives a request for the return of the child pursuant to the 1980 Child Abduction Convention, it must apply the rules of the Convention as complemented by Article 11(1) to (5) of the Brussels IIbis Regulation.\(^816\) This means that the judge will first determine whether ‘wrongful removal or retention’ has taken place. The definition of the term ‘wrongful removal or retention’ is given in Article 2(11) of the Brussels

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\(^{814}\) Case C-376/14 C.v M. of 9 October 2014 Opinion of AG Szpunar delivered on 24 September 2014, para 71 and 72

\(^{815}\) ibid para 73.

\(^{816}\) Practice Guide for the application of the Brussels IIa Regulation (n 21) 53.
Ilbis Regulation and it is very similar in wording to Article 3 of the 1980 Hague Child Abduction Convention. The term ‘wrongful removal or retention’ understands 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.

So, for the correct application of Article 11 of the Brussels Ilbis Regulation, it is essential to determine whether the removal or retention of a child was in breach of custody rights under the law of the Member State where the child was habitually resident immediately before the abduction, or, in other words, the wrongfulness of the child’s removal for the purposes of applying Brussels Ilbis Regulation is entirely dependent on the existence of rights of custody (which is conferred by the relevant national law) and the breach of that right with the act of removal that has taken place.

Article 2(9) of Brussels Ilbis Regulation defines ‘rights of custody’ as covering

[r]ights 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.

This term (right of custody) has to be given a meaning which is not solely determined by the law of the Member State of the habitual residence of the child concerned. It has to be given a meaning which is autonomous and must reflect the terms of the Regulation and of the Convention. On the other hand, it is to the national courts (or by operation of law or agreement) to determine who will be attributed with the right of custody individually.

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817 Article 3 of the 1980 Hague Child Abduction Convention
818 Article 2(11) of the Brussels Ilbis Regulation.
820 See Article 2(9) of the Brussels Ilbis Regulation.
822 An entirely separate matter is the identity of the person who has rights of custody. In that regard, it is apparent
follows that Regulation No 2201/2003 does not determine which person must have such rights of custody as may render a child’s removal wrongful within the meaning of Article 2(11), but rather refers to the law of the Member State where the child was habitually resident immediately before its removal or retention to answer the question of who has such rights of custody. Accordingly, it is the law of that Member State which determines the conditions under which a person acquires rights of custody in respect to his or her child, within the meaning of Article 2(9) of Brussels IIbis Regulation, and which may provide that his acquisition of such rights is dependent on his obtaining a judgment from the national court with jurisdiction awarding such rights to him.\(^\text{823}\)

In the determination of the existence and exercise of custody rights the Courts of Member States are not isolated from other legal sources. They have to consider the determination of the existence and exercise of custody rights in terms of the provisions of the Charter of Fundamental Rights of the European Union(\(^\text{824}\) given that Article 7 corresponds to that in Article 8 of the ECHR, which states that everyone has the right to respect for his or her family life.\(^\text{825}\) This means that once the authorities of a Contracting State to the 1980 Hague Convention have found that a child has been wrongfully removed pursuant to the Convention, they have a duty to make adequate and effective efforts to secure the return of the child. A failure to make such efforts constitutes a violation of Article 7 of the CFR (Article 8 of the ECHR).\(^\text{826}\) In this context every contracting State must equip itself with adequate and effective measures to ensure compliance with its positive obligations under Article 7 of the CFR (Article 8 of the ECHR).\(^\text{827}\)

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\(^\text{823}\) From Article 2(11)(a) of that regulation that whether or not a child’s removal is wrongful depends on the existence 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’, Case C-400/10 PPU, J. McB. v L. E. [2010] ECR I-08965 para 42.


\(^\text{825}\) By Article 51 of the Charter in the implementation of EU law the EU institutions and the Member States are to respect the rights, observe the principles and promote the application thereof. (Practice Guide for the application of the Brussels IIa Regulation (n 21) 53).


Article 11 of the Brussels IIbis Regulation represents a complex structural rule that highly influences and alters the 1980 Hague Child Abduction Convention. Article 11(1) provides that this rule is applicable in situations 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.

This action of which the object is the return, to the Member State of origin, of a child who has been wrongfully removed or retained in another Member State, does not concern the substance of parental responsibility.\(^\text{828}\) Also according to Article 19 of the 1980 Hague Child Abduction Convention, a decision under that convention concerning return is not to be taken to be a determination on the merits of any custody issue. Consequently, this position provides that return of children and actions relating to parental responsibilities issues don’t have the same object or the same cause of action and therefore there cannot be *lis pendens* between such actions.\(^\text{829}\)

Article 11(2) of the Brussels IIbis Regulation states that 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. This modification is made also in Article 11(3) of the Brussels IIbis Regulation. Differently from the Hague Child Abduction Convention, it provides for a time limit where the competent court the court shall, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged, using the most expeditious procedures available in national law.

Another deviation from the rules provided in the Hague Child Abduction Convention is given in Article 11(4) and 11(5) of the Brussels IIbis Regulation. With these provisions, the grounds for issuing a non-return order as given in Article 13 of the 1980 Hague Child Abduction Convention are modified. These two modifications provide firstly, that a court cannot refuse to return a child on the basis of Article 13(b) of the 1980 Hague Convention\(^\text{830}\) if

\(^{828}\) Case C-376/14 PPU, C v. M. of 9 October 2014 para 40.

\(^{829}\) ibid.

\(^{830}\) Article 13 of the 1980 Hague Child Abduction Convention states: 'Notwithstanding the provisions of the preceding Article, 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.
it is established that adequate arrangements have been made to secure the protection of the child after his or her return. Secondly, 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.

The subsequent paragraphs of Article 11 of the Brussels IIbis Regulation, provide for the procedure in the situations where a non-return order is given for the return of the wrongfully removed or retained child on the basis of Article 13 of the 1980 Hague Child Abduction Convention. Article 11(6) of the Brussels IIbis Regulation, provides that 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 all 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 time limit for this transmission of the documents is one month after the date of the non-return order. On the other hand, Article 11(7) of the Brussels IIbis Regulation sets time limits for the submissions of the parties involved in these proceedings and states that unless the courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seized by one of the parties, the court or central authority that receives the information given in Article 11(6) of the Brussels IIbis Regulation must notify 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 the custody of the child. Without prejudice to the rules on jurisdiction contained in the Brussels IIbis Regulation, the court shall close the case if no submissions have been received by the court within the time limit.

Lastly, the final modification of the child abduction cases for the European Union member states, given in Article 11(8) of the Brussels IIbis Regulation, 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 establishes that -

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

831 Article 11(4) of the Brussels IIbis Regulation.
832 Article 11(5) of the Brussels IIbis Regulation.
833 Article 11(6) of the Brussels IIbis Regulation.
having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III of the Brussels IIbis Regulation, in order to secure the return of the child. This modification effectively introduces the abolition of exequatur in child abduction cases.

All of these modifications are based on three fundamental principles. Firstly, the Regulation is based on the primacy of the interests of the child and the respect for its rights. Secondly, the Regulation seeks to ensure that any wrongful removal of a child has no legal effect, unless subsequently accepted by the other interested parties. Thirdly, it requires national courts to show a high level of mutual trust, keeping the grounds for non-recognition of judgments issued by a court in another Member State to the minimum required and making the recognition and enforcement of those judgments almost automatic.

These modified solutions given in Article 11 of the Brussels IIbis Regulation represent solutions complementary to the 1980 Hague Child Abduction Convention. They supplement the existing rules with slightly different rules whose goal is to adjust the return of the wrongfully removed or retained children in the EU’s perspective. As was already said, The Hague Abduction Convention still remains in force between the Member States of the European Union and applies in child abduction cases, especially those rules which have not been modified. However, the modifications given in Article 11 of the Brussels IIbis Regulation apply instead of the original solutions provided in the Hague Child Abduction Convention.

There are five main modifications. The first modification is the obligation of the courts for a prompt procedure, the second is the mandatory obligation for hearing of the child if its old enough to express its own views, the third is the mandatory obligation for hearing of the person who applied for return order, the fourth is the modification of the procedure in the case of rendering a non-return order, and the fifth is the abolition of the exequatur of certified decisions on child abduction cases.

834 Case C-211/10 PPU, Doris Povse v Mauro Alpago, [2010], ECR I-06673 Opinion of AG Sharpstone delivered on 16 June 2010 para 27.
835 That idea is expressed not only in the objective of taking into account, in each case, the best interests of the child himself or herself but also, and in particular, in the general rule that it is the courts of the child’s place of habitual residence which are best placed to settle any issues regarding custody or parental responsibility and which must therefore, in principle, have jurisdiction in the matter. See Case C-211/10 PPU, Doris Povse v Mauro Alpago, [2010], ECR I-06673 Opinion of AG Sharpstone delivered on 16 June 2010 para 28.
836 To that end, it first lays down an almost automatic mechanism for securing the return of the child without delay. Second, it strictly limits the possibilities of transferring jurisdiction to the courts of the Member State of wrongful removal, allowing those of the Member State of former habitual residence to bypass any judgment of non-return made on the basis of Article 13 of the Convention. See Case C-211/10 PPU, Doris Povse v Mauro Alpago, [2010], ECR I-06673 Opinion of AG Sharpstone delivered on 16 June 2010 para 29.
837 Case C-211/10 PPU, Doris Povse v Mauro Alpago, [2010], ECR I-06673 Opinion of AG Sharpstone delivered on 16 June 2010 para 31.
839 Text to n 122 Part II ch II sec 2.1.
5.2.2.1.1 The Duty of the courts for prompt procedures

The duty of the courts to conduct a prompt procedure (in the cases of child abduction) is not a genuine novelty. The 1980 Hague Child Abduction Convention provides that Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention and for this purpose they shall use the most expeditious procedures available.840 This goal is again highlighted in Article 11 of the Hague Child Abduction Convention where it is stated that the judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children. The aspect of ‘expeditious proceedings’ needs to be understood as being within the timeframe of six weeks that is provided for the involved persons and institutions to take all the necessary measures which will result in a decision on return or a non-return of the child to the state of its habitual residence. However, this timeframe is not so strict and does not impose an obligation on the competent authorities to produce a decision in this period of six weeks, only giving right to the applicant to ask for a statement of the reasons for the delay.841

Opposite from this approach taken in the 1980 Hague Child Abduction Convention, which allows greater space for the competent authorities to take into account all of the circumstances, especially those that can be categorized as exceptions from the obligation for prompt return of the child in the state where his/her habitual residence is, the Brussels IIbis Regulation adopts a new, complementary solution which substitutes for the one in the 1980 Hague Child Abduction Convention. According to this solution, the court shall, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged.842 This article imposes an obligation to the court of the Member State where the child has been removed or retained to act expeditiously and to render a decision within a timeframe of six weeks. However, there is no specific reference on whether the decision should be enforced in this time limit.843 If this opposite interpretation of the aspect is adopted, it could lead to insecurities of in the return of the abducted children. For example, if national rules of appeal suspend the enforceability of the decision without imposing any time limit on the appeal procedure844, this could ultimately jeopardize the whole return system.

842 Article 11(3) of the Brussels IIbis Regulation.
843 Practice Guide for the application of the new Brussels II Regulation (n 106) 33.
844 ibid.
Having this in mind, the position given in the guidelines of the European Commission should prevail and the court should seek to ensure that a return order issued within the prescribed six-week time limit is ‘enforceable’. The reason for this approach is because this rule aims to create a more expeditious procedure, which tends to eliminate detailed examinations of the well-being of the child and to minimize the uncertainty involved particularly in cases involving the unlawful removal and retention of children. These two reasons will allow these cases to be examined by the court which is in the best position to address these issues; that is, the court of the Member State where the child had its habitual residence before the wrongful removal or retention took its course. Such an interpretation is in line with the approach taken by the European Court of Human Rights (ECtHR) in relation with Article 8 of the ECHR where proceedings relating to the return of children and ‘proceedings relating to the award of parental responsibility, including the enforcement of the final decision, require urgent handling as the passage of time can have irremediable consequences for relations between the child and the parent who does not live with it.’ The ECtHR then provided that the answer to the question on whether or not the measures are adequate will be answered ‘by the swiftness of its implementation’.

The obligation imposed on the court to act expeditiously is welcomed. However, such strict application in the Brussels IIbis Regulation can be assessed as too optimistic and problematic. The functioning of the whole system for the return of the wrongfully removed or retained children does not depend exclusively on the Courts of the Member States. In these cases, other relevant public and private authorities are involved whose role is to allow the Court to render the right decision for the return of the wrongfully removed or retained children. This asks for flawless coordination between the involved authorities in the process of the return of the children to the Member State of their habitual residence.

On the other hand, the imposed obligation of the Court to mandatorily take into account the views of the child having regard to his or her age or degree of maturity, as given in Article 11(2) of the Brussels IIbis Regulation, and the duty to hear the person who requested the return of the child, represent procedural actions which directly influence the duration of the

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845 Practice Guide for the application of the Brussels IIa Regulation (n 21) 72.
846 Fawcett J. and Carruthers J. (n 139) 1119.
849 Article 11(3) of the Brussels IIbis Regulation.
procedure. The technical aspect and the methods implemented for these rules are left to the
national law of the Member States. This variance directly affects the time limit of six weeks. If
the Court issues a non-return order, then the procedure for return of the child expands with
more procedural actions and prolongs the time limit so that it outlasts the one provided in
Article 11(3) of the Brussels IIbis Regulation.

The conclusion can be reached that when acting on an application for return of
wrongfully removed or retained children, the court must act expeditiously and promptly to
assure that the child is returned to the place of his/her habitual residence. However, the strict
time limit given in Article 11(3) of the Brussels IIbis Regulation, as well as the
recommendations of the European Commission to incorporate all of the mandatory procedural
actions provided in Articles 11(3) and (4) of the Brussels IIbis Regulation and above all to
include the appellate procedure in this time frame, lead to conclusion that the six-week time
limit for the completion of the procedure for the return of the abducted children is to optimistic.
It is undisputed that there is need for expeditious and prompt procedures in child abduction
cases because of the harm that the children are exposed to, but it is very optimistic to believe
that the whole procedure could complete itself within this timeframe of six weeks, especially
when these cases are often regarded as sensitive and usually the Court of the Member State of
refugee must take many procedural actions and involve many other relevant institutions.

5.2.2.1.2 Hearing of the child

One of the exemptions for the return of the wrongfully removed or retained children to
the place of their habitual residence is provided in Article 13(2) of the 1980 Hague Child
Abduction Convention. This rule provides that the judicial or administrative authority:

[ may also refuse to order the return of the child if it finds that the child objects to being returned
and has attained an age and degree of maturity at which it is appropriate to take account of its views.\textsuperscript{850}

However, the position of this rule in the 1980 Hague Child Abduction Convention gives
full discretion to the relevant authorities to take into account the view of the child.\textsuperscript{851}

The Brussels IIbis Regulation specifically provides that the:

[ h]earing of the child plays an important role in the application of this Regulation.\textsuperscript{852}

This aspect is highlighted in Recital 33 where it is reaffirmed that the'\textsuperscript{r}egulation
recognizes the fundamental rights and observes the principles of the Charter of Fundamental

\textsuperscript{850} Article 13(2) of the 1980 Hague Child Abduction Convention
\textsuperscript{851} Perez Vera Report (n187) 433.
\textsuperscript{852} Recital (19) of the Brussels IIbis Regulation.
Rights of the European Union..." particularly Article 24 of the Charter, which refers to four postulates:

1) Children shall have the right to such protection and care as is necessary for their well-being;  
2) They may express their views freely and such views shall be taken into consideration on matters which concern them in accordance with their age and maturity;  
3) In all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration; and  
4) Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.  

The main guiding principles given in Recitals 19 and 33 that refer to children play an important role in the solutions provided in Article 11 of the Brussels Ilbis Regulation. Such a manifestation of these principles is given in the imposed obligation arising from Article 11(2) of the Brussels Ilbis Regulation for the Courts of the Member States which are applying the Hague Child Abduction Convention, especially Articles 12 and 13, that they:

shall [emphasis added] 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.  

In this way, Article 11(2) of the Brussels Ilbis Regulation imposes that children (conditionally if they have reached certain age and maturity) must be given the opportunity to be heard in child abduction cases that involves them. With this, the Brussels Ilbis Regulation reinforces the right of the child to be heard during the procedure.

The position of the CJEU in the Zarraga Case regarding this question preceded a large debate over the right of the child to be heard, which was ultimately connected to the infringement of fundamental rights such as those in Article 24 of the Charter. The arguments provided by the German government and the European Commission, which were against the possibility of the hearing of the child by the judicial authorities of the Member State of enforcement in proceedings which lead to non-return order (on which latter judgment for return of the child based on Article 11(8) of the Brussels Ilbis Regulation was given by the Court of

853 Clear division of jurisdiction between the courts of the Member State of origin and those of the Member State of enforcement established by the provisions of Chapter III, Section 4 of Regulation No 2201/2003 (see, to that effect, Case C-211/10 PPU, Doris Povse v Mauro Alpago, [2010], ECR I-06673, para 73) rests on the premiss that those courts respect, within their respective areas of jurisdiction, the obligations which that regulation imposes on them, in accordance with the Charter of Fundamental Rights. In that regard, since Regulation No 2201/2003 may not be contrary to the Charter of Fundamental Rights, Article 42 of that regulation, the provisions of which give effect to the child’s right to be heard, must be interpreted in the light of Article 24 of that charter (see, to that effect, Case C-491/10 PPU, Joseba Andoni Aguirre Zarraga v Simone Pelz, [2010] ECR I-14247 para 59-60.  
854 Fawcett J. and Carruthers J., (n 139) 1119.  
855 Article 11(2) of the Brussels Ilbis Regulation.  
856 Practice Guide for the application of the Brussels Ia Regulation (n 21) 55.
Member State of origin) to meet the standards for ‘hearing of the child’ as provided in Article 42(2)(a) of the Brussels IIbis Regulation, were:

1. The hearing before the court of the Member State of enforcement and the hearing referred to in Article 42(2)(a) of Regulation No 2201/2003 serve different purposes, since the former relates to the return of the child whereas the latter is intended to enable a final ruling to be given on rights of custody in respect of the child and therefore has much wider scope.

2. Accepting the proposition that the condition laid down in Article 42(2)(a) of Regulation No 2201/2003 is satisfied where the child was heard by the court of the Member State of enforcement would have the effect of systematically discharging the court of the Member State of origin from the obligation to hear the child and would therefore make it possible to circumvent that provision. This would also be contrary to the scheme of that provision, which lays down the obligation, in subparagraph (a), to hear the child, and not only the duty, in subparagraph (c), to take into account the evidence underlying the judgment of non-return.

3. According to the Commission, in this case, the time which elapsed between the hearing of the child by the court of the requested Member State and the delivery of the judgment ordering the child’s return, that is to say almost nine months, did not justify the conclusion that the condition laid down in Article 42(2)(a) of Regulation No 2201/2003 was satisfied.\(^857\)

The opposite arguments given by the Spanish Government and Mr. Zarraga, were upheld by AG Bot and serving as a unifying component between the 1980 Hague Abduction Convention and the new Brussels IIbis model, were:

1. That the fundamental right of the child to be heard, as implemented in Article 42 of Regulation No 2201/2003, must have an autonomous content.\(^858\)

2. Article 42(2)(a) of Regulation No 2201/2003 establishes a right which may be derogated from only on the ground referred to in that provision, that is to say where the hearing is ‘inappropriate’ having regard to the child’s age or degree of maturity.\(^859\)

3. Article 42(2)(a) of Regulation No 2201/2003 establishes the right of a child to have been given an opportunity to be heard. It does not provide that the child must have been heard. This statement has two consequences.

   First, a child sufficiently capable of forming his or her own views must have been informed that he or she is entitled to express his or her opinion freely. In so far as the hearing of a child, in particular a young child, depends in practice on the cooperation of the parent who has wrongfully removed or retained the child, the Member States must provide the court with the means to overcome any obstacles which that parent may place in the way of the child being heard.\(^860\)


\(^858\) ibid para 78.

\(^859\) ibid para 84.

\(^860\) ibid para 86.
Secondly, that wording implies that the child is also entitled not to express any views. The child must not be forced to choose between the parent who has wrongfully removed or retained him or her and the other parent. Nor must the child be put in a position which might give him or her the impression that he or she is alone responsible for the decision on his/her return and, therefore, for any suffering which that decision may cause to one of his or her parents. The conditions under which the child’s views are obtained must be suited to the circumstances, as well as to the child’s age and maturity, so as to ensure that this does not represent a traumatic experience for him or her.\textsuperscript{861}

4. The opinion expressed by the child at the hearing is not binding on the court of the Member State of origin, which has jurisdiction to deliver a judgment under Article 11(8) of Regulation No 2201/2003.\textsuperscript{862}

5. The main characteristic of the Brussels IIbis Regulation system in the event of a child’s abduction lies in the fact that the proceedings before the court of the Member State of enforcement which led to a judgment of non-return and those before the court of the Member State of origin required to deliver the final judgment on that return are not separate, competing proceedings. They are the complementary components of one and the same set of proceedings, which concern the situation of a child whose parents are in dispute over custody and in which two courts in different Member States have an overriding duty under Regulation No 2201/2003 to work together to find the solution best suited to safeguarding that child’s interests.\textsuperscript{863}

The position which the CJEU took in the Zarraga Case was that there should not be limitations on a hearing of a child, meaning that the Regulation does not provide that the hearing must exclusively take place before the court of the Member State of origin.\textsuperscript{864} It was observed that in Recital 33 of the Brussels IIbis Regulation it was emphasized, that, more generally, the Regulation recognizes the fundamental rights and observes the principles of the Charter of Fundamental Rights, ensuring, in particular, respect for the fundamental rights of the child as set out in Article 24 of the Charter. In that regard, it was derived from Article 24 of that Charter and from Article 42(2)(a) of Regulation No 2201/2003 that those provisions refer not to the hearing of the child \textit{per se}, but to the child’s having the opportunity to be heard,\textsuperscript{865} and also that the court which has to rule on the return of a child would assess whether such a hearing is appropriate.\textsuperscript{866} Accordingly, it was ruled that:

\begin{itemize}
\item \textsuperscript{861} ibid para 87.
\item \textsuperscript{862} ibid para 89.
\item \textsuperscript{863} ibid para 96
\item \textsuperscript{864} Case C-491/10 PPU, Joseba Andoni Aguirre Zarraga v Simone Pelz, [2010] ECR I-14247 para 65.
\item \textsuperscript{865} ibid para 62.
\item \textsuperscript{866} ‘…since the conflicts which make necessary a judgment awarding custody of a child to one of the parents, and the associated tensions, create situations in which the hearing of the child, particularly when, as may be the case, the physical presence of the child before the court is required, may prove to be inappropriate, and even harmful to the psychological health of the child, who is often exposed to such tensions and adversely affected by them.’, Case C-491/10 PPU, Joseba Andoni Aguirre Zarraga v Simone Pelz, [2010] ECR I-14247 para 64.
\end{itemize}
[w]hile remaining a right of the child, hearing the child cannot constitute an absolute obligation, but must be assessed having regard to what is required in the best interests of the child in each individual case, in accordance with Article 24(2) of the Charter of Fundamental Rights. 867

Following that standpoint, the CJEU in the Zarraga ruled in line with the position of the Spanish Government and Mr. Zarraga that

[i]t is not a necessary consequence of the right of the child to be heard that a hearing before the court of the Member State of origin take place, but that right does require that there are made available to that child the legal procedures and conditions which enable the child to express his or her views freely and that those views are obtained by the court. 868

Another limitation on Article 11(2) comes from its relation with Article 11(3) of the Brussels IIbis Regulation. Article 11(2) has to be viewed together with Article 11(3) and the imposed obligation to finish the whole return procedure, including the appellate procedure, within the proposed time frame of six weeks. Therefore, to achieve such an optimistic goal the procedural action of hearing of the child must be taken in the most prompt and efficient way possible, without a possibility of modification of the national procedures. 869

This necessity to act quickly is however not a novelty for the most of the Member States. 870 In the view of these states, this obligation is based on the implementation of Article 6 and 8 of ECHR and also on Article 12 of the UN Convention on the Right of the Child. The practical arrangements for the method which will be implemented for the ascertaining the view of the child for its position in the child abduction cases vary depending on the national legal systems of each Member State. One of the possible methods is the direct hearing of the child in the Court. In such cases the judge directly asks the questions which will enable him/her to ascertain the factual situation of the child. However, the judge must take into account the age and the maturity of the child and other relevant circumstances in each case individually. In the Brussels IIbis Regulation, there is not a direct mandate that the child’s view must be taken directly by the judge. 871

Another possible method through which the child’s view can be ascertained, is if the view of the child is taken by a social worker or other person specialized in working with children. It is necessary that this person conduct the hearing of the child and later present the

867 Case C-491/10 PPU, Joseba Andoni Aguirre Zarraga v Simone Pelz, [2010] ECR I-14247 para 64.
868 ibid para 65.
869 Although the hearing of the child is crucial for the return of the wrongfully removed or retained children in the Brussels IIbis regulation, the method according to which the child should be heard should be according to the understandings of each Member State individually. Re H (A Child)(Child Abduction)[2006] EWCA Civ 1247,[2007] 1 FLR 242, per Thorpe LJ, at [16] (as cited by Fawcett J. and Carruthers J. (n139) 1119).
871 ibid.
report in which the desires and feelings of the child regarding its own case are noted. In this way, recognition is given to the diversity of national legal systems and the different legal traditions of the EU Member States. However, the main goal must not be forgotten: the view of the child of the position in which he/she has been placed and the necessity for this aspect to be taken into account when rendering a decision for the return or non-return in the Member State of the child’s habitual residence. If the court chooses the most appropriate method for conducting such procedural action and in the safest possible way, then in such a situation the child will be free and express its desires and emotions, and in the end feel liberated from the feeling of responsibility or guilt.

It is possible and favorable for the Courts to use the arrangements established in the Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (Evidence Regulation). The Evidence Regulation facilitates cooperation between courts of different Member States in the taking of evidence in civil and commercial matters including family law cases. A Court of a Member State can follow a request to another competent court of a Member State to take evidence which is, under the Regulation, obliged to execute the request within a 90-day time limit. If it is not possible for the request to be executed within 90 days of receipt by the requested court, the requested court should inform the requesting court accordingly, stating the reasons which prevent the request from being executed swiftly. Also under the rules of the Evidence Regulation, it is possible, in order to facilitate the taking of evidence, for a court in a Member State, in accordance with the law of its Member State, to take evidence directly in another Member State, if accepted by the latter, and under the conditions determined by the central body or competent authority of the requested Member State. Video-conferences and tele-conferences, which are proposed as possible tools in Article 10(4) of the Evidence Regulation, can be particularly useful for taking evidence in cases involving children.

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872 Practice Guide for the application of the new Brussels II Regulation (n 106) 42.
873 ibid.
875 Practice Guide for the application of the Brussels IIa Regulation (n 21) 55.
876 Article 10(1) and Recital 10 of the Evidence Regulation.
877 Article 17 and Recital 15 of the Evidence Regulation.
878 Practice Guide for the application of the Brussels IIa Regulation (n 21) 55. However, in the Zarraga case, the Spanish court ‘…rejected Ms Pelz’s application that she and her daughter be permitted to leave Spanish territory freely after the expert report and Andrea’s hearing. Nor did that court agree to Ms Pelz’s express request that Andrea be heard via video conference.’ Case C-491/10 PPU, Joseba Andoni Aguirre Zarraga v Simone Pelz, [2010] ECR I-14247 para 22.
The solution taken in Brussels IIbis Regulation for the hearing of the child is a step forward from the Hague Child Abduction Convention. Although the right of the child to be heard and the actual hearing of the child cannot be considered to be identical, the solution in Article 11(2) of the Brussels IIbis Regulation significantly raises the participation of the child in the procedure for his/her return in the Member State of its habitual residence. On the other hand, these additional procedural actions (which the court must take) increase the consideration to slow the procedure down. The modalities and the methods through which these hearings are carried by the court or other relevant authorities depend exclusively on the national law of the competent authorities. In other words, before a court of the Member State of origin can issue a certificate which accords with the requirements of Article 42 of Regulation No 2201/2003, that court must ensure that, having regard to the child’s best interests and all the circumstances of the individual case, the judgement to be certified was made with all due regard to the child’s right freely to express his or her views and that a genuine and effective opportunity to express those views was offered to the child, taking into account the procedural means of national law and the instruments of international judicial cooperation. No matter the manner in which this procedural action is taken, it holds the possibility of prolonging the procedure for the return of children. There is a real danger of the collision of Article 11(2) and 11(3) of the Brussels IIbis Regulation, of the necessity of accurately and adequately hearing the child and also the mandate that it takes place within a timeframe of six weeks. It is to the competent authorities to respond to this challenge for conducting the whole procedure in such a short time frame.

5.2.2.1.3 Hearing of the applicant for the return of the child

The Brussels IIbis Regulation in Article 11(5) provides that a court cannot refuse return a child unless the person who requested the return of the child has been given an opportunity to be heard. This means that the Court, when rendering a decision for non-return of the child in the Member State of its habitual residence, cannot give this decision unless it takes into account the views of the person who applied for the return of the child. The purpose of this rule is that the Court will be acquainted with the whole factual situation which led to the wrongful removal or retention. However, Article 11(5) does not represent a collision with Article 26 of

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879 Lamont R. (n 132) 128.
881 See JPC v SLW and SMW (Abduction) [2007] EWHC 1349(Fam), [2007] 2 FLR 900; Re F (Children: Abduction) [2008] EWHC 272 (Fam), [2008] 2 FCR 120.
the Brussels IIbis Regulation and the prohibition as for review of the judgment as to its substance. Nevertheless, in the circumstances where rendering a decision on the non-return is taking place, there is a need for more thorough examination (because of the need for the protection of the child’s best interest) for the Court. This means that the position of the applicant must be ascertained. The dangers of prolonging the procedure for the return of children are real and in those situations, the Court should face this challenge without relegating it to the parties concerned.

5.2.2.1.4 Limitations on Article 13(1) (b) of the Hague Child Abduction Convention

One of the novelties in the Brussels IIbis Regulation, by which the 1980 Hague Child Abduction Convention has been modified, is provided in Article 11(4) of the Regulation. This provision is not a general rule and is intended to limit the application of Article 13(1) (b) of the 1980 Hague Child Abduction Convention. With this rule the Brussels IIbis Regulation goes a step further by extending the obligation to order return of the child to cases where a return could expose the child to harm, but it to that end it is established that adequate arrangements must have been made to secure the protection of the child after the return. The basis for this modification can be found in the 1980 Hague Child Abduction Convention in Article 36, which provides for derogation from the provision in the Convention by subsequent bilateral or multilateral agreements, in order to limit the restrictions to which the return of the child may be subject.

The 1980 Hague Child Abduction Convention is built on the premise that the wrongful removal or retention of children is harmful but nevertheless in certain instances a reestablishment of the status quo ante could endanger the child. For such situations several grounds for refusal are provided for the obligation of prompt return of the child to his/her place of habitual residence prior to the abduction. One of these grounds is provided in Article 13(1) (b) of the 1980 Hague Child Abduction Convention and states that:

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882 Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation (n 9) 138.
883 Article 11(4) of the Brussels IIbis Regulation.
884 The Preamble of the Convention provides ‘Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access…’
‘the judicial or administrative authority of the requested State are 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.’

The “rigidity” in the civil law countries where judges are limited to order what is provided in the statute or what is requested by the parties has led to refusal of the return of wrongfully removed or retained children, because it was likely that the children would again be exposed to domestic violence or some other forms of physical or psychological harm or otherwise be placed in an intolerable situation. Ultimately this exception became the most commonly used justification on behalf of the abducting parent as opposed to the other exceptions.

To strengthen the strict interpretation of Article 13(1) (b) of the 1980 Hague Child Abduction Convention and to encourage a more proactive approach by applicants and relevant authorities in the requesting state to address any concerns which might exist, Article 11(4) in the Brussels IIbis Regulation creates a complementary instrument to the Convention and tries to diminish this ground for refusal and limit its functioning by reducing its application to a ‘strict minimum’.

This strict minimum will require that the party that seeks return according to Article 11(4) of the Brussels IIbis Regulation will have to prove that adequate arrangements have been made to secure the protection of the child after its return to the Member State of its habitual residence. These arguments will counteract the claims of the person that wrongfully removed or retained the child on the basis of Article 13(1)(b) of the 1980 Hague Child Abduction Convention. If the claims of the person applying for return of child are proven, then the Court of the Member State of refugee cannot render a non-return order based on Article 13(1) (b). The Court is supposed to examine these arrangements on the basis of the facts of the case. It is not sufficient that procedures exist in the Member State of origin for the protection of the child,

888 For detailed examples and Court practice of the application of Article 13(1)(b) of the 1980 Hague Abduction Convention see, Beaumont P. and McEleavy P. (n 273) 135-172.
889 In 2008 the number of cases which based their refusal for a return of the abducted children on the basis of Article 13(1)(b) was 56 cases out of 269 and represented 21%, of all of the refusals. It is the most common sole ground for issuing a non-return order. (Prel. Doc. No 8 A of May 2011 - A statistical analysis of applications made in 2008 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. Part I - Global Report, 28)
890 Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation, (n 9) 137.
892 Practice Guide for the application of the Brussels IIa Regulation (n 21)54.
893 Ballesteros M.H. (n 131) 355.
but it must be established that the authorities in the Member State of origin have taken concrete measures to protect the child in question.894

This requirement of taking adequate arrangements for the protection of the child after its return to the Country of its habitual residence, called ‘restitution without danger’, 895 is not unknown to the 1980 Hague Child Abduction Convention. The Central Authorities are obliged to co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention and, among other measures, they should either directly or through any intermediary provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child.896 This means that the relevant authorities will have made all of the necessary arrangements for the protection of the welfare of children upon return in certain cases where their safety is at issue, until the jurisdiction of the appropriate court has been effectively invoked.897 The measures which may be taken in fulfilment of the obligation under Article 7 h) to take an action or cause an action to be taken to protect the welfare of children, may include, for example: a) alerting the appropriate protection agencies or judicial authorities in the requesting State of the return of a child who may be in danger; b) advising the requested State, upon request, of the protective measures and services available in the requesting State to secure the safe return of a particular child; or c) encouraging the use of Article 21 of the Convention to secure the effective exercise of access or visitation rights. It is recognised that the protection of the child may also sometimes require steps to be taken to protect an accompanying parent.898 This position of cooperation between the relevant authorities and the central authorities for rendering necessary and adequate measures (especially conditional measures, such as undertakings), which is provided by the 1980 Hague Child Abduction Convention and results in flexible conditioning of the return of the child to its country of habitual residence, is usual for common law countries900 while in continental law countries it is negligible.

With Article 11(4) of the Brussels Ibis Regulation this principle ‘restitution without danger’ became part of the EU law and must now be applied by all Member States of the EU.

894 Practice Guide for the application of the Brussels IIa Regulation (n 21) 55.
895 ibid.
896 See Article 7(a)-(i) of the 1980 Hague Child Abduction Convention.
897 Article 7(h) of the 1980 Hague Child Abduction Convention.
899 ibid.
900 For more on undertakings see, Beaumont P. and McEleavy P. (n 273) 156-169.
This will shift the more rigid position of the Member States of the EU which are part of the civil law legal systems towards a position provided with Article 11(4) of the Brussels IIbis Regulation of a rule which has to be understood in a broader context, where it will not be sufficient that procedures exist in the Member State of origin for the protection of the child, but rather it must be established that the authorities in the Member State of origin have taken concrete measures to protect the child in question. To assess whether those measures are sufficient to ensure safe return for the child, cooperation between the Central Authorities as detailed in Articles 53-58 of the Brussels IIbis Regulation is of great importance. One possible solution for further improvement of the child abduction mechanism comes from the Brussels IIbis Regulation itself, where the enhanced cooperation between the relevant authorities is part of the Regulation and the principles of ‘mutual trust’ and ‘mutual cooperation’ play important roles in child abduction cases. In that context, for the facilitation of Article 11(4) of the Brussels IIbis Regulation rule, Recital 25 provides that:

[C]entral authorities should cooperate both in general matters and in specific cases, including for purposes of promoting the amicable resolution of family disputes and in matters of parental responsibility. To this end central authorities shall participate in the European Judicial Network in civil and commercial matters created by Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters’.

For this part of the provision, the EJN can play an important role in the building of ‘actual trust’ between the relevant authorities which at the end would have a positive influence on the solution of these complex child abduction situations and on the protection of the ‘child’s best interest’.

**5.2.2.1.5 The position of the Courts of the Member States in the case of a non-return order pursuant to Article 13 of the 1980 Hague Child Abduction Convention**

One of the main characteristics of the new child abduction regime in the European Union is the possibility of reviewing the non-return orders in the child’s State of habitual residence. Article 11(6) and (7) provide for special rules that are complementary to the rules

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901 For the differences of the common law Member States and civil law Member States in the implementation of Article 11(4) of the Brussels II Regulation see, Schulz A., *The New Brussels II Regulation and the Hague Conventions of 1980 and 1996* (n 128) 24.
902 Practice Guide for the application of the new Brussels II Regulation, (n 106) 32.
903 Magnus U. and Mankowski P., *Commentary on Brussels II Regulation* (n 9)137
in the 1980 Hague Abduction Convention and basically reinforce their position. If a court has issued an non-return order 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 the central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law. This transmission of documents must be conducted within a one-month time frame from the day when the non-return order was issued. The explicit reference to national law indicates, inter alia, that it is for the Member State where the child was habitually resident immediately before the removal to determine, with due regard to the objectives of the Regulation, which court has jurisdiction to rule on the issue of the return of the child, after an order on non-return has been issued in the Member State to which the child was removed. Even such a position does not preclude Member States from allocating to a specialized court the jurisdiction to examine questions of return or custody with respect to a child in the context of the procedure set out in Article 11(7) and (8) of the Brussels IIbis Regulation, even where proceedings on the substance of parental responsibility with respect to the child have already, separately, been brought before a court or tribunal.

In such cases, the court or central authority will assist the left-behind parent in having the matter reviewed in the State of the child’s habitual residence. This Court will immediately hold a custody hearing by promptly notifying the parties and inviting them to make submissions to the court. A three-month time limit is given to the parties to make submissions to the Court. For this review mechanism to be activated, it will suffice if just one of the parties makes the submission. If both parties fail to make submissions within that time limit then the court will ‘close the case’. On the other hand, if the Court renders a judgment on the custody issue and if this judgment requires return of the child, then this judgment will

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906 Article 11(6) of the Brussels IIbis Regulation.
907 Article 11(6) of the Brussels IIbis Regulation.
908 Case C-498/14 PPU, David Bradbrooke v Anna Aleksandrowicz of 9 January 2015 para 43.
909 Ibid para 54.
910 Article 11(7) of the Brussels IIbis Regulation.
911 The judge should, in principle, be in the position that he or she would have been in if the abducting parent had not abducted the child but instead had seised the court of origin to modify a previous decision on custody or to ask for a authorisation to change the habitual residence of the child (Practice Guide for the application of the new Brussels II Regulation (n106) 37).
912 Practice Guide for the application of the new Brussels II Regulation (n 106) 36.
913 One consequence that comes from this rule is when the case is closed on the basis of failed submissions by the parties then this open the way for shifting of the jurisdiction in accordance to Article 10(b)(iii) of the Brussels IIbis Regulation.
be automatically enforceable\textsuperscript{914} in the Member State where the child is present.\textsuperscript{915} These rules does not apply when the Courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seized by one of the parties.

From the wording of Article 11(7) and (8) and from the position of the time limit, a conclusion can be drawn that it is unnecessary for the non-return order to be enforceable or even still in force at the moment when the court of the Member State of habitual residence gives its judgment in the context of Article 11(8) of the Brussels Ibis Regulation.\textsuperscript{916} That chain of obligations and procedures forms a complete, unbreakable whole, and is set in motion automatically as soon as the non-return order is issued. The only factor envisaged as being able to interrupt it is the non-receipt of submissions from the parties by the court of the Member State of habitual residence\textsuperscript{917} – which would amount, in effect, to a discontinuance of the proceedings by the parent left behind.\textsuperscript{918}

The ratio of such changes in the child abduction regime of the European Union is the positioning of the authorities in the child’s former habitual residence as final arbiter regarding the children’s fate. Even the certified judgment cannot be refused in the Member State of enforcement because, as a result of a potential subsequent change of circumstances, it might be seriously detrimental to the best interests of the child. Such a change must be pleaded before the court that has jurisdiction in the Member State of origin and which should also hear any application to suspend enforcement of its judgment.\textsuperscript{919} With this, the Regulation shifts the balance to the Courts of the former habitual residence and allows them to order return of the child in accordance with Article 11(8) of the Brussels Ibis Regulation. The direct consequence of Articles 11(6) and (7) is increased cooperation between the Courts of the requested Member State and the courts of the Member State of Origin.\textsuperscript{920}

The position of the Court of Refugees, given that it can oppose the return of the children in specific, duly justified cases,\textsuperscript{921} is based on the 1980 Hague Child Abduction Convention.

\textsuperscript{914} In accordance with Chapter III Section 4 of the Brussels Ibis Regulation.
\textsuperscript{915} Article 11(8) of the Brussels Ibis Regulation. See also, McElevy P., The new child abduction regime in the European Union (n 135) 29.
\textsuperscript{916} Case C-195/08 PPU 	extit{Inga Rinau} [2008] ECR I-05271 Opinion of AG Sharpston delivered on 1 July 2008 para 75.
\textsuperscript{917} Article 11(7) of the Brussels Ibis Regulation.
\textsuperscript{918} Case C-195/08 PPU 	extit{Inga Rinau} [2008] ECR I-05271 Opinion of AG Sharpston delivered on 1 July 2008 para 77.
\textsuperscript{919} Case C-211/10 PPU, 	extit{Doris Povse v Mauro Alpago}, [2010], ECR I-06673 para 83.
\textsuperscript{920} Magnus U. and Mankowski P., Commentary on Brussels Ibis Regulation (n 9) 139.
\textsuperscript{921} Recital 17 of the Brussels Ibis Regulation.
On the other hand, it is recognized in the Brussels IIbis Regulation that such a decision could be replaced by a subsequent decision by the court of the Member State of child’s habitual residence prior to the wrongful removal or retention. If that judgment entails return of the child, the return should take place without any special procedure being required for recognition and enforcement of that judgment in the Member State to or in which the child has been removed or retained.922 However, this position does not refer to situations where the proceedings for return of the child are commenced when the issue of custody rights is sought to be resolved (especially about where the child should reside).923 In such circumstances it is very unclear if the non-return order should be supported if Court of the Member State of habitual residence of the child resolves the case in favor of the abducting parent while return proceedings under the 1980 Hague Child Abduction Convention are ongoing.

The change of the decisions is only supported if they originate from a subsequent decision of the Member State of Origin on the certified judgment. The Brussels IIbis Regulation establishes a clear division of jurisdiction between the courts of the Member State of origin and those of the Member State of enforcement. These rules are intended to secure the rapid return of the children. In that context a certificate is issued under Article 42 of the Regulation, which gives to the judgment thus certified a specific enforceability that is not subject to any appeal. The requested court can do no more than declare such a judgment to be enforceable, since the only pleas in law which can be relied on in relation to the certificate are those to support an action for rectification or doubts as to its authenticity, according to the rules of law of the Member State of origin.924 The only rules of law of the requested Member State that are applicable are those governing procedural matters.925 On the other hand, questions concerning the merits of the judgment as such, and in particular the question whether the necessary conditions enabling the court with jurisdiction to hand down that judgment are satisfied, including any challenges to its jurisdiction, or inapplicability of Article 11(8) of the Brussels IIbis Regulation, must be raised before the courts of the Member State of origin. The only legal remedy is to appeal against the judgment itself (and not against the certificate) in accordance with the rules of the legal system where this judgment is rendered.926 Likewise, an application to suspend enforcement of a certified judgment can be brought only before the court that has

922 ibid.
923 Fawcett J. and Carruthers J. (n 139) 1121.
924 Case C-195/08 PPU Inga Rinau [2008] ECR I-05271 para 85, 88 and 89.
925 Case C-211/10 PPU, Doris Povse v Mauro Alpago, [2010], ECR I-06673 para 73.
jurisdiction in the Member State of origin, in accordance with the rules of its legal system. The question whether a certified judgment is irreconcilable, within the meaning of the second subparagraph of Article 47(2) of the Brussels II bis Regulation, with a subsequent enforceable judgment can be addressed only in relation to any judgments subsequently handed down by the courts with jurisdiction in the Member State of origin. In contrario, to hold that a judgment delivered subsequently by a court in the Member State of enforcement can preclude enforcement of an earlier judgment which has been certified in the Member State of origin and which orders the return of the child would amount to circumventing the system set up by Section 4 of Chapter III of the Regulation. Such an exception to the jurisdiction of the courts in the Member State of origin would deprive Article 11(8) of the Brussels IIbis Regulation of its practical effect, which ultimately would grant the right to decide to the court with jurisdiction. This granting of the right to decide would take precedence under Article 60 of the Regulation, over the 1980 Hague Convention, and would therefore recognize the jurisdiction, on matters of substance, of the courts in the Member State of enforcement. As a consequence, a judgment delivered subsequently by a court in the Member State of enforcement which awards provisional custody rights and is deemed to be enforceable under the law of that State cannot preclude enforcement of a certified judgment delivered previously by the court which has jurisdiction in the Member State of origin and ordering the return of the child. The CJEU has extended these effects so that they will occur even if there is evidence that the certificate issued by the court under Article 42 contains a false statement.

Another potentially problematic aspect of Articles 11(6) and (7) is that they are based on the assumption that the Court ‘...has issued an order on non-return pursuant to Article 13 of the 1980 Hague Convention’. The exceptions in the 1980 Hague Abduction Convention are not limited only to Article 13, but also restrictively they are given in Article 20 (public

928 Article 47 Enforcement procedure
1. The enforcement procedure is governed by the law of the Member State of enforcement.
2. Any judgment delivered by a court of another Member State and declared to be enforceable in accordance with Section 2 or certified in accordance with Article 41(1) or Article 42(1) shall be enforced in the Member State of enforcement in the same conditions as if it had been delivered in that Member State. In particular, a judgment which has been certified according to Article 41(1) or Article 42(1) cannot be enforced if it is irreconcilable with a subsequent enforceable judgment.
930 Ibid para 78.
931 Ibid para 79.
932 Case C-491/10 PPU, Joseba Andoni Aguirre Zarraga v Simone Pelz, [2010] ECR I-14247 para 74 and 75.
policy)\textsuperscript{933} and Article 12(2) (the child settled in its new environment).\textsuperscript{934} For example, if the child is not being returned to the State of its habitual residence on the basis of Article 12(2) then Articles 11(6)-(8) of the Regulation do not apply, because the order for non-return was based on a 2 provision other than that of Article 13 of the 1980 Hague Abduction Convention. In such circumstances, the substantive jurisdiction will belong to the courts of the child’s current habitual residence according to Article 8 of the Brussels IIbis Regulation.\textsuperscript{935}

Even when the non-return order was issued on the basis of Article 13 of the 1980 Hague Child Abduction Convention, some uncertainties are present. Articles 11(6) and (7) of the Brussels IIbis Regulation are particularly compatible with Articles 13(1)(b)\textsuperscript{936} and 13(2)\textsuperscript{937} of the 1980 Hague Child Abduction Convention. However, there is no certain position given in the cases when the non-return order is issued on the basis of Article 13(1)(a).\textsuperscript{938} In such a circumstance, the Court of the habitual residence of the child will according to Article 11(6) assume the jurisdiction and will be entitled to be provided with a copy of the court order on non-return and of the relevant documents (in particular a transcript of the hearings before the court). But Articles 8, 10, 17 and 26 of the Brussels IIbis Regulation preclude the Courts of the Member State of origin from reviewing the findings of acquiescence and to require the courts to determine the child’s habitual residence at the time of their seizure in the light of that finding.\textsuperscript{939} In such circumstances, the Court of origin may be bound to decline jurisdiction in favor of the Court where in which the child had become habitually resident before the proceedings in the Member State of origin were instituted.\textsuperscript{940}

Another peculiar aspect of this EU child abduction regime are the situations where the authorities of the Member State of refuge do not respond or do not render a non-return order in the time limit provided in Article 11(3) of the Brussels IIbis Regulation while the authorities of the Member State of habitual residence of the child render an order for the child’s return.\textsuperscript{941} The main question is whether the Court of the Member State of habitual residence is entitled to render this decision when the Court of the Member State of refuge hasn’t still rendered a non-return order, or if the court of the Member State where the child is actually present has not

\textsuperscript{933} For more on this exception see, Beaumont P. and McEleavy P. (n 273) 172-177.
\textsuperscript{934} For more on this exception see, Beaumont P. and McEleavy P. (n 273) 203-210.
\textsuperscript{935} Stone, \textit{EU Private International Law} (n 813) 474.
\textsuperscript{936} Physical and psychological harm of the child.
\textsuperscript{937} The child objects its return.
\textsuperscript{938} Consent or acquiescence from the disposed parent. For more on this exception see, Beaumont P. and McEleavy P. (n 273) 114-131.
\textsuperscript{939} Stone, \textit{EU Private International Law} (n 813) 474.
\textsuperscript{940} ibid.
\textsuperscript{941} As was the situation in the Case C-195/08 PPU \textit{Inga Rinau} [2008] ECR I-05271.
taken a decision within a certain period, there is a *de facto* non-return order capable of triggering the application of Article 11(8).\textsuperscript{942} This problem is closely connected with the *lis pendens* rules.\textsuperscript{943} According to paragraphs 2 and 3 of Article 19, where proceedings relating to parental responsibility for the same child and involving the same cause of action are brought before courts of different Member States, the court second seized must of its own motion stay its proceedings until the jurisdiction of the court first seized is established. Where that jurisdiction is established, the court second seized must decline jurisdiction in favor of that court. In normal cases, as long as proceedings for a return order are pending in the Member State where the child is actually present, the court of the Member State of habitual residence must not examine the same question. Insofar as the six-week time-limit imposed by Article 11(3) applies, that result in no way delays the return procedure, whereas the simultaneous conduct of two sets of proceedings concerning the same child could give rise to complications.\textsuperscript{944} However, once the court of the Member State where the child is actually present has issued its decision, *lis pendens* no longer applies and there is thus no longer any barrier to the exercise of jurisdiction by the court of the Member State of habitual residence. Article 11(8) of the Brussels IIbis Regulation specifically confirms jurisdiction in the event of an initial non-return decision, and there is no reason to rule out that jurisdiction (as conferred by Articles 8 and 10) if the initial decision orders the child’s return. The only difference is that, in that event, the specific provisions of Article 11(8) will not apply and, in practice, a second return order will normally be redundant.\textsuperscript{945}

For the functioning of this European model of child abduction situations, it will be significantly important that all the relevant authorities and especially the Courts of the EU Member States act promptly regarding the transfer of the relevant documents. The importance of this lies in the fact that this documentation will be necessary for the Court of the child’s habitual residence in the assessment of the actual situation when it will make a decision regarding the custody rights. On the other side, the EU is consisted of 28 Member States with 24 different official languages. This can be shown as problematic, because the Brussels IIbis Regulation does not contain specific rules about the translations of these documents. The solutions for this problem are not specific and provide vague directions such as that the ‘judges


\textsuperscript{943} Text to n 359 Part II ch IV sec 4.2.

\textsuperscript{944} Case C-195/08 PPU *Inga Rinau* [2008] ECR I-05271 Opinion of AG Sharpston delivered on 1 July 2008 para 63.

\textsuperscript{945} ibid para 64.
should try to find a pragmatic solution which corresponds to the needs and circumstances of each case.\textsuperscript{946} This fact is disturbing because the wording of these documents directly influences the procedure by providing the Court with the most important aspect of the non-return order. In general, the court where the child has been wrongfully removed or retained should include the documents on which the judge has based his or her decision, including for example any reports drawn up by social welfare authorities concerning the situation of the child. The other court must receive the documents within one month after the decision.\textsuperscript{947} This time frame in which translation and transfer of the documents is needed to be accomplished directly leans in favor of the 6-week period in which the EU child abduction procedure is predicted to be conducted.

\textbf{5.2.2.1.6 Abolition of exequatur in the Brussels IIbis Regulation regarding child abduction cases and decisions on access rights}

The greatest novelty in Brussels IIbis Regulation represents the abolition of the exequatur proceedings in cases regarding access rights and child abduction. As was elaborated above,\textsuperscript{948} in the Brussels IIbis Regulation there are two distinct procedures for issuing declaration of enforceability. These procedures provide for exequatur of foreign judgments that are rendered in a Member State regarding matrimonial matters or judgments relating to parental responsibility matters. These two procedures are similar, differing in some procedural aspects, and most significantly in the grounds for non-recognition and in the enforcement. Nevertheless, both of these procedures represent classical exequatur procedures (i.e., declaration of enforceability). The Brussels IIbis Regulation consists of a third procedure that abolishes the exequatur procedure, meaning that certified judgments relating to child abduction cases and access rights are enforceable in the Member State of enforcement without the need for an intermediate procedure of issuing a declaration of enforceability and also without the possibility of an appeal. The rules for this procedure are given in Section 4 of the third chapter (Articles 40-45).

The idea behind these provisions is the same as the one referred in the 1980 Hague Child Abduction Convention: that is, not only to protect the custodial parent, but also to enable

\textsuperscript{946} Practice Guide for the application of the Brussels IIa Regulation (n 21) 59.
\textsuperscript{947} ibid.
\textsuperscript{948} Text to n 484 Part II ch V sec 5.2.
the child to have a meaningful relationship with both parents.\footnote{Steward P., \textit{Access Rights: A Necessary Corollary to Custody Rights under the Hague Convention on the Civil Aspects of International Child Abduction}, Fordham International Law Journal vol 21 (1997) 331.} Such efforts correspond with Article 24 of the Charter of Fundamental Rights of the European Union.\footnote{Article 24 (3) of the Charter of Fundamental Rights of the European Union: ‘Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.’} This is why the Brussels IIbis Regulation provides for abolition of the exequatur as an intermediate procedure regarding two situations: access rights and certain decisions regarding child abduction cases.\footnote{Case C-195/08 PPU \textit{Inga Rinau} [2008] ECR I-05271 para 65.} However, the procedure provided by these rules does not preclude the possibility that the person with legal interest can seek recognition and enforcement according to the regular procedure provided in the Brussels IIbis Regulation.\footnote{Article 40(1)(a) and (b) of the Brussels IIbis Regulation} As was highlighted in the \textit{Rinau} case, Article 21(3) of the Brussels IIbis Regulation is intended to make clear that the option afforded by that provision to any interested party to apply for a decision that the judgment issued in a Member State be or not be recognized does not preclude the possibility, where the conditions are satisfied, of recourse to the rules provided for in Articles 11(8), 40 and 42 of the Regulation in the event of return of a child following a judgment of non-return, since those rules take precedence over those provided for in Sections 1 and 2 of Chapter III.\footnote{Practice Guide for the application of the Brussels Ila Regulation (n 21) 62.} With such a position the CJEU has shown that the procedure provided under Article 11(6) to (8) of the Brussels IIbis Regulation has to be seen as independent of any other procedure for issuing a declaration of enforceability under the Regulation. Once an order not to return a child is made on the basis of Article 13 of the 1980 Hague Convention, irrespective of whether the order is subject to appeal, a subsequent return order under Article 11(6) to (8) of the Regulation has to be enforced under Article 42. On this basis, the objective of the Regulation to ensure that the return of a child to the Member State of her or his habitual residence can take place when the minimum deadline is fulfilled.\footnote{ibid 43.}

### 5.2.2.1.6.1 Access Rights

One of the main policy objectives of the Regulation is to ensure that a child throughout her or his childhood can maintain contact with all holders of parental responsibility, even after a separation and if they live in different Member States.\footnote{ibid 43.} The Brussels IIbis Regulation itself gives recognition to these fundamental rights and takes into consideration the principles of the
The Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure respect for the fundamental rights of the child as enumerated in Article 24 of the Charter of Fundamental Rights of the European Union. To this effect, Article 24 of the Charter includes the right of the child to maintain on a regular basis a personal relationship and direct contact with both of his or her parents. These rules are also in correlation with the principle provided in Article 9 and 10 of the UN Convention on the Rights of the Child that the States should respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

Also, such relationships are covered by Article 8 of the ECHR (the right to respect for family life). The violation of Article 8 of the ECHR extends to ensuring the exercise of rights of contact as it was shown in the cases Shaw v Hungary and Prizzia v Hungary in which a breach was said to have occurred where the authorities in Hungary failed to ensure that the applicants could exercise rights of contact with their children.

The Brussels IIbis Regulation goes one step further. Access rights are defined in Article 2(10) of the Brussels IIbis Regulation. They include, in particular, the right to take a child to a place other than his or her habitual residence for a limited period of time. The term used in the Regulation is the same as the one provided in Article 3 (b) of the 1996 Hague Child Protection Convention, which itself is reproduced from the 1980 Hague Child Abduction Convention. However, the term used in the Brussels IIbis Regulation is much broader and applies to any access rights, irrespective of who the beneficiary thereof is. According to national law, access rights may be attributed to the parent with whom the child does not reside, or to other family members, such as grandparents or third persons. Moreover, ‘access rights’

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956 Recital (33) of the Brussels IIbis Regulation.
957 Case C-400/10 J.McB. v L.E. [2010] ECR I-08965 para 60; Case C-498/14 PPU, David Bradbrooke v Anna Aleksandrowicz of 9 January 2015 para 42.
958 See Articles 9 and 10 of the UN Convention on the Rights of the Child.
961 Practice Guide for the application of the Brussels IIa Regulation (n 21) 71.
962 Article 2(10) of the Brussels IIbis Regulation.
963 Article 3 (c) of the 1996 Hague Convention provides:

Article 3
The measures referred to in Article 1 may deal in particular with –

(b) . . . 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;
964 Lagarde Report (n 93) 547.
965 Practice Guide for the application of the Brussels IIa Regulation (n 21) 43.
can include any form of contact between the child and the other person, including for instance, contact by telephone, skype, internet or e-mail.  

Article 41 of the Brussels Iibis Regulation provides that decisions regarding right of access that have been granted in an enforceable judgment given in one Member State will be recognized and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in the proper form provided in the Brussels Iibis Regulation. ‘Proper form’ means that the judgment has been certified and the conditions in Article 41(2) of the Brussels Iibis Regulation have been satisfied. The Court of origin must verify that the following safeguards have been respected:

- all parties concerned were given an opportunity to be heard;
- the child was given an opportunity to be heard, unless a hearing was considered inappropriate due to the age and maturity of the child; and
- where the judgment was given in default, the defaulting party has been served with the document instituting the proceedings in sufficient time and in a manner enabling that person to prepare his or her defence, or if the person was served with the document but not in compliance with these conditions, it is nevertheless established that the person has accepted the judgment unequivocally.

Some situations provide that the rights of access involve a cross-border situation at the time of the delivery of the judgment. In these situations the certificate shall be issued ex officio when the judgment becomes enforceable, even if only provisionally. If the situation subsequently acquires an international aspect, either party may at that time request the court of origin that delivered the judgment to issue a certificate. At the end, if the procedural safeguards have not been respected, the decision will not be directly recognized and declared enforceable in other Member States, but rather the parties will have to apply for an exequatur to accomplish this end.

966 Magnus U. and Mankowski P., Commentary on Brussels Iibis Regulation, (n 9) 85.
967 Certification of the judgments in accordance with Brussels Iibis Regulation means that the court of origin of its on motion has issued a certificate using the standard form in Annex III of the Regulation and completed in the language of the judgment. See Stone, EU Private International Law (n 813) 480.
968 Article 41(2) of the Brussels Iibis Regulation.
969 One of the parents is a resident of or plans to move to another Member State (Practice Guide for the application of the new Brussels II Regulation, (n 106) 25).
970 Article 41(3) of the Brussels Iibis Regulation.
971 For example, because one of the holders of parental responsibility moves to another Member State Practice Guide for the application of the new Brussels II Regulation, (n 106) 26.
972 Practice Guide for the application of the new Brussels II Regulation, (n 106) 25.
The purpose of the certificate is not only to indicate whether the above-mentioned procedural safeguards have been respected, but it also contains information of a practical nature, intended to facilitate the enforcement of the judgment. This includes, for example, the names and addresses of the holders of parental responsibility and the children concerned, any practical arrangements for the exercise of access rights, any specific obligations on the holder of access rights or the other parent and any restrictions that may be attached to the exercise of access rights.\textsuperscript{973}

\textbf{5.2.2.1.6.2 Child Abduction Cases}

The second exception to the regular recognition and enforcement procedure in the Brussels IIbis Regulation is regarding decisions in child abduction cases. However, not all decisions regarding child abduction cases are excluded from recognition and enforcement procedures, but only the return of a child entailed by a judgment given pursuant to Article 11(8) of the Brussels IIbis Regulation.\textsuperscript{974} The competent court of the Member State of habitual residence may, under the jurisdiction which it already enjoys from Articles 8, 10 and, where applicable, 12, order the child’s return in the context of Article 11(8) if a non-return decision has been issued pursuant to Article 13 of the 1980 Hague Child Abduction Convention. This judgment of the court with jurisdiction ordering the return of the child falls within the scope of the provision of Article 13, even if it is not preceded by a final judgment of that court relating to rights of custody of the child.\textsuperscript{975} In that event, its order will not require a declaration of enforceability in accordance with the procedure in Chapter III, Section 2.\textsuperscript{976} On the other hand, this is not the case when the certificate under Article 42 is issued ‘prematurely’ and relates to a decision granted in the State of origin before a non-return order is issued in the requested State. In such a case, despite the certificate, the procedure for declaration of enforceability is to be followed in case there is a need for enforcement.\textsuperscript{977} So in order not require a declaration of enforceability in accordance with the procedure in Chapter III, Section 2, the essential factors are that: (a) a non-return order was made; (b) the child has still not been returned; (c) time is passing; and (d) the court of the Member State of habitual residence still has sole jurisdiction

\textsuperscript{973} ibid 44.
\textsuperscript{974} Article 40(b) of the Brussels IIbis Regulation.
\textsuperscript{975} Case C-211/10 Doris Povse v Mauro Alpago [2010] ECR I-06673 para 67.
\textsuperscript{976} Case C-195/08 PPU Inga Rinau [2008] ECR I-05271 Opinion of AG Sharpston delivered on 1 July 2008 para 59.
\textsuperscript{977} Case C-195/08 PPU Inga Rinau [2008] ECR I-05271 paras 68 and 69.
to decide on custody, which necessarily implies the power to ensure, by interim order where appropriate, the child’s presence with the person to whom it awards custody.\footnote{Case C-195/08 PPU Inga Rinau [2008] ECR I-05271 Opinion of AG Sharpston delivered on 1 July 2008 para 78.}

The consequence provided by these rules is that a return of a child entailed by an enforceable judgment given in a Member State shall be recognized and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in the proper form provided in the Brussels IIbis Regulation.\footnote{Article 42(1) of the Brussels IIbis Regulation.} As was the case with access rights, ‘proper form’ means that the judgment has been certified\footnote{Certification of the judgments in accordance with Brussels IIbis Regulation means that the court of origin of its on motion has issued a certificate using the standard form in Annex IV of the Regulation and completed in the language of the judgment. Stone, EU Private International Law (n 813) 480.} and that the conditions in Article 42(2) of the Brussels IIbis Regulation have been satisfied. These conditions provide that the Court of origin must refuse to issue a certificate unless:

- all parties concerned were given an opportunity to be heard,\footnote{Article 42(2)(a) of the Brussels IIbis Regulation.}
- 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\footnote{Article 42(2)(b) of the Brussels IIbis Regulation.} and
- 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.\footnote{Article 42(2)(c) of the Brussels IIbis Regulation. See also, Case C-195/08 PPU Inga Rinau [2008] ECR I-05271 para 67.}

Even if national law does not provide for enforceability by operation of law, notwithstanding any appeal, of a judgment requiring the return of the child mentioned in Article 11(b)(8), the court of origin may declare the judgment enforceable.\footnote{Article 42(1) of the Brussels IIbis Regulation.} The certificate must contain details of measures for the protection of the child after its return to the State of habitual residence.\footnote{If such measures are provided in the decision.} The language of the certificate and the judgment should be the same\footnote{Article 42(2) of the Brussels IIbis Regulation.} and it is not necessary to translate the certificate, with the exception of item 14 of Annex IV concerning the measures taken by the authorities in the Member State of origin to ensure the protection of the child upon his or her return.\footnote{Practice Guide for the application of the Brussels IIa Regulation (n 21) 64.}
This mechanism of ‘re-evaluation and overriding’ of the non-return orders by the Court of the Member State of the habitual residence of the child encounters some specific problems. Namely, this exception from the classical exequatur procedure regarding child abduction cases does not only refer to the abolition of the intermediate procedures, but it goes even further by creating a parallel system of reevaluation of the decisions by the Court of the habitual residence of the child with a goal that this court should be the final arbitrator of the child’s future.\textsuperscript{988} Additionally, this system is positioned in a way not to encroach upon the parties’ procedural rights or interests by discouraging the abducting parent from challenging a non-return order in the Member State where the child is actually present and that the left-behind parent will normally be the best placed to present his or her arguments before the courts of the Member State of habitual residence.\textsuperscript{989}

This structure is based on the mutual recognition principle, where the custody orders (containing a return of the child), which fulfill the necessary conditions and are in the proper form, can be certified and can be directly enforceable in all Member States without formal application for recognition and without any possibility of recognition being refused. A removal of a child to another Member State has therefore no effect on the decision of the court of origin. It is not necessary to start a new procedure for the return of the child pursuant to the 1980 Hague Convention, but merely to enforce the decision of the court of origin.\textsuperscript{990}

Even in situations even where there has been a potential breach of some fundamental rights, the court with jurisdiction in the Member State of enforcement cannot oppose the enforcement of a certified judgment by ordering the return of a child who has been wrongfully removed on the ground that the court of the Member State of origin which handed down that judgment may have violated Article 42 of Regulation No 2201/2003, interpreted in accordance with Article 24 of the Charter of Fundamental Rights, because the assessment of whether there is such an infringement falls exclusively within the jurisdiction of the courts of the Member State of origin.\textsuperscript{991} In doing so, the Court of refuge must immediately, either directly or through its central authority, transmit a copy of the court order on non-return and copies of the relevant documents, in particular a transcript of the hearings, to the court to the Court of the habitual residence of the child.\textsuperscript{992} It is for the Court of refuge that has taken the decision to decide which

\textsuperscript{988} McEleavy P., \textit{The new child abduction regime in the European Union} (n 135) 34.
\textsuperscript{989} Case C-195/08 PPU \textit{Inga Rinau} [2008] ECR I-05271 Opinion of AG Sharpston delivered on 1 July 2008 para 80.
\textsuperscript{990} Practice Guide for the application of the Brussels IIa Regulation (n 21) 65.
\textsuperscript{992} Article 11(6) of the Brussels IIbis Regulation.
documents are relevant. To this end, this Court shall give a fair representation of the most important elements, highlighting the factors influencing the decision. In general, this would include the documents on which the judge has based her or his decision, including for example any reports drawn up by social welfare authorities concerning the situation of the child. The other court must receive the documents within one month of the decision. This Court or central authority that receives the information and documents must notify 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. The Court that rendered the custody decision, which could contain the duty to return the child, is obliged to hear the child and the other party and to take into account the reasoning of the Court of refuge which issued the non-return order. Nevertheless, this final decision can be issued, notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention by the Court of refuge.

The return mechanism in the Brussels Ibis Regulation represent a manifestation of the concept of ‘mutual recognition’. This policy should reflect the integration and the trust that exists in the European Judicial Area. At the core, there are two main rationales for this policy stance: is the economical and the political. Regarding the former rationale, this abolition of the exequatur increases the economic welfare of the European economic actors and citizens. Regarding the latter rationale, ‘mutual recognition’ exists to ensure that judgments circulate freely within the European Union. In civil and commercial matters, to achieve these goals brings certainty and efficiency. However, the implementation of this policy in the aspect of parental responsibility issues, namely child abduction cases, creates a certain discomfort.

The basis for the functioning of this return mechanism is that the Courts and the Central Authorities cooperate among themselves. Each case holds its peculiarities and at the same time basic principles have to be taken into account by the relevant institutions. This means that the Court must apply the rules of the Brussels Ibis Regulation and protect the principles of the 1980 Child Abduction Convention. This aspect is in conflict with the short time in which these
procedures should be completed. These ‘procedures’ refer not only to the measures that the Court should take regarding the case in the Member State of refuge, but also to the transfer of the information and documents to the Court of habitual residence of the child. Problems may arise because of the language barriers which are result of the multi-lingual character of the EU and as a consequence represent a problem for direct communication between the relevant authorities. This can be a real danger to the proper transfer of the guiding principles according to which the Court of refuge rendered the non-return order. They could easily be neglected and improperly applied, according to the application guidelines provided in article 42(2) (c) of the Brussels IIbis Regulation. Article 11(8) of the Brussels IIbis Regulation gives discretionary power to the Court of habitual residence of the child has the power to determine whether or not to issue a certificate of enforceability to the extent that it follows the guiding principles. In such an event, procedural steps which have been taken after a non-return decision has been rendered are not decisive and may be regarded as irrelevant for the purposes of implementing the Regulation. This position is provided so that the Regulation might achieve its full effect, which is the immediate return of the children.

If the Court of habitual residence renders a certified decision, that decision cannot be appealed, but only rectified, according to the Member State of origin. Even if national law does not provide for enforceability by operation of law, notwithstanding any appeal, of a judgment requiring the return of the child, the court of origin may declare the judgment enforceable. By excluding any appeal against the issuing of a certificate pursuant to Article 42(1), other than an action seeking rectification within the meaning of Article 43(1), the

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1003 ibid.
1005 If the position were otherwise, there would be a risk that the Regulation would be deprived of its useful effect, since the objective of the immediate return of the child would remain subject to the condition that the redress procedures allowed under the domestic law of the Member State in which the child is wrongfully retained have been exhausted. That risk should be particularly balanced because, as far as concerns young children, biological time cannot be measured according to general criteria, given the intellectual and psychological structure of such children and the speed with which that structure develops. See Case C-195/08 PPU Inga Rinau [2008] ECR I-05271 para 81.
1006 Case C-195/08 PPU Inga Rinau [2008] ECR I-05271 para 84.
1007 Article 43 of the Brussels IIbis Regulation. In the Rinau case it was stated that this article reflects ‘procedural autonomy’ meaning that the enforceability of a judgment requiring the return of a child following a judgment of non-return enjoys procedural autonomy, so as not to delay the return of a child who has been wrongfully removed to or retained in a Member State other than that in which that child was habitually resident immediately before the wrongful removal or retention. This procedural autonomy of the provisions in Articles 11(8), 40 and 42 of the Regulation and the priority given to the jurisdiction of the court of origin, in the context of Section 4 of Chapter III of the Regulation, are reflected in Articles 43 and 44 of the Regulation, which provide that the law of the Member State of origin is to be applicable to any rectification of the certificate, that no appeal is to lie against the issuing of a certificate and that certificate is to take effect only within the limits of the enforceability of the judgment. Case C-195/08 PPU Inga Rinau [2008] ECR I-05271 para 63 and 64.
1008 Article 42(1) of the Brussels IIbis Regulation.
Regulation seeks to ensure that the effectiveness of its provisions is not undermined by abuse of the procedure.\textsuperscript{1009} Moreover, Article 68 does not list among the redress procedures any appeal against decisions taken pursuant to Section 4 of Chapter III of the Regulation.\textsuperscript{1010} Once a non-return decision has been made and brought to the attention of the court of origin, it is irrelevant, for the purposes of issuing the certificate provided for in Article 42 of the Regulation, if that decision has been suspended, overturned, set aside or, in any event, has not become \textit{res judicata} or has been replaced by a decision ordering return, insofar as the return of the child has not actually taken place. If no doubt has been expressed as regards the authenticity of that certificate and if it was rendered in accordance with the standard form set out in Annex IV to the Regulation, opposition to the recognition of the decision ordering return is not permitted and it is for the requested court only to declare the enforceability of the certified decision and to allow the immediate return of the child. In doing so, the Court of the refuge is put in a position to ‘trust’ the foreign order even if this trust not been reciprocated by the authorities of the Member State of habitual residence of the child.\textsuperscript{1011} However, the Regulation seeks from the court of the Member State of enforcement to evince the mutual confidence on which the area of freedom, security and justice depends, but it does not ask that court to demonstrate blind trust. On the contrary, the system established by the Regulation requires the court of the Member State merely recognize and respect the integrity, objectivity and independence of a court in another Member State, and which would allow its decisions to be appealed against by the party against whom enforcement is sought, in the same way as it would for the courts of its own State.\textsuperscript{1012}

As much as the rationale of this abolition of exequatur can be accepted, that the child must be returned to the place from which it was abducted, still, the imposed mutual trust creates a certain discomfort. The principle of mutual recognition corresponds with the principle of mutual trust. It is said that where mutual trust exists, mutual recognition should be improved.\textsuperscript{1013} Nevertheless, in child abduction cases the question arises, which should be first? Does this statement mean that the Member States should firstly develop increased trust among their legal systems and then they should abolish every possibility of opposing enforcement of a certified decision, or they should rely on the imposed trust gained through the political sense

\textsuperscript{1009} Case C-491/10 PPU, Joseba Andoni Aguirre Zarraga v Simone Pelz, [2010] ECR I-14247 para 55.
\textsuperscript{1010} Case C-195/08 PPU Inga Rinau [2008] ECR I-05271 para 85; Case C-491/10 PPU, Joseba Andoni Aguirre Zarraga v Simone Pelz, [2010] ECR I-14247 para 50
\textsuperscript{1011} McEleavy P., \textit{The new child abduction regime in the European Union} (n 135) 33.
\textsuperscript{1012} Case C-195/08 PPU Inga Rinau [2008] ECR I-05271 Opinion of AG Sharpston delivered on 1 July 2008, para 96.
\textsuperscript{1013} Arenas García R. (n 460) 362.
of the EU institutions transposed in the Brussels IIbis Regulation and it is through its implementation that they should build actual trust? The answer seems to fall somewhere in the middle. The EU should firstly develop necessary facilities, something that is manifested in the enhanced cooperation between the relevant authorities (for example, EJN), the Justice scoreboard\textsuperscript{1014}, and the Guidelines for proper implementation of the Brussels IIbis Regulation measures which should represent a ‘physical’ manifestation of the proper implementation of the Regulation by the authorities. These activities taken together can establish actual trust. Then for the final stage, full abolition of the exequatur should be introduced and the authorities should help the children involved in the cases. Nevertheless, these two processes have been ongoing and both of them informed the other. It is left for the future amendments to the Brussels IIbis Regulation to gradually accept the differences between the legal systems of the EU and their distrust of one another and to build trust as it should be built. This is achieved by showing that the ‘other’ legal system applies the same rules properly, as they are applied in the domestic court, and caring for what is most significant: the child’s best interest. In such way the trust would cease to be imposed and become a reality, something that the EU needs desperately. It will be a trust in the fact that the whole EU system functions as a whole and not as a ‘battlefield’ where Member States strive to prove whose system is better.

5.3 Jurisprudence of the European Court of Human Rights (ECtHR) regarding recognition and enforcement with particular reference to child abduction cases

5.3.1 General

The position of the Courts of Member States regarding the enforcement of foreign decisions is not only influenced by the goals and principles of the Brussels IIbis Regulation, but also by the fact that when faced with a petition for execution, they must act in accordance with the positive obligations regarding enforcement which arise out of the European Convention of Human Rights (ECHR).\(^{1015}\) It has been shown that the ECtHR, from the three main issues of PIL (jurisdiction, applicable law and recognition and enforcement of foreign decisions) has delivered by far the most decisions on the third issue of recognition and enforcement of foreign judgments.\(^{1016}\) On a general level the ECtHR has provided that there is obligation for the Contracting Parties that certain rights guaranteed by the ECHR must be recognized and enforced, but there is also an obligation requiring Contracting Parties to deny recognition and enforcement of foreign judgments under certain conditions.\(^{1017}\) These requirements arise from the general obligations under Article 6(1) of the ECHR (the procedural right to a fair trial), but also from other rules such as Article 1 of the Protocol No.1 ECHR (the right to property) and Article 8 of the ECHR which refers to the right of respect for private and family life. For the purpose of this sub-chapter and the subject matter of this thesis, the issue of Article 1 of the Protocol No.1 ECHR will be left out.

The wording of Article 6(1) of the ECHR\(^{1018}\) does not specifically indicate that recognition and enforcement of foreign decisions is covered by this rule. However, in several cases, the ECtHR has derived an obligation to recognize and enforce foreign judgments from

\(^{1015}\) Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation (n 9) 390.


\(^{1017}\) Ibid.

\(^{1018}\) Article 6(1) of the ECHR states:

‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.’
Article 6(1) of the ECHR.1019 Beginning with the case Hornsby v. Greece,1020 this right was provided for domestic enforcement1021 and since then this right has been extended to foreign judgments.1022 This obligation to recognize and enforce foreign judgments extends to all civil judgments including foreign family law judgments.1023 The ECtHR has not been consistent regarding the binding force behind this obligation. Firstly, it derived the obligation from the fact that recognition and enforcement are an integral part of the trial and thus such an obligation is provided within the right of fair trial.1024 Secondly, in two following cases, the Court instead of deriving the obligation to recognize and enforce the foreign judgment from the general right of fair trial, it based the violation on the more specific right of access to the Court.1025 Moreover in the case of Roman´czyk v. France, the ECtHR treated the obligation to enforce the judgment as a positive obligation of the State.1026 Nevertheless, from this obligation to enforce foreign judgments according to the ECHR and the position of the Court, a conclusion can be drawn that Contracting Parties have to have some system according to which foreign decisions can be introduced in domestic legal system.1027 The infringement of this obligation is treated as a restriction to Article 6(1) of the ECHR that triggers the reasoning of the Court in such situations: it has to review the proportionality of such restrictions specifically.1028 This means the belief whether such restrictions can be allowed depends on whether the restriction is

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1019 See cases Hornsby v. Greece, 19 March 1997, no. 18357/91; Sylvester v. Austria (dec.), no. 54640/00, 9 October 2003; McDonald v. France (dec.), no. 18648/04, 29 April 2008; Jovanovski v. The Former Yugoslav Republic of Macedonia, no. 31731/03, 7 January 2010; Vrbica v. Croatia, no. 32540/05, 1 April 2010; Roman´czyk v. France, no. 7618/05, 18 November 2010; Négrépontis-Giannisis v. Greece, no. 56759/08, 3 May 2011; Pini and Others v. Romania, nos. 78028/01 and 78030/01, ECHR 2004-V; Saccoccia v. Austria, no. 69917/01, 18 December 2008 and Ern Makina Sanayi ve Ticaret A.S v. Turkey, no. 70830/01, 3 May 2007.

1020 Hornsby v. Greece, [1997], no. 18357/91

1021 ‘However, that right would be illusory if a Contracting State’s domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6 para. 1 (art. 6-1) should describe in detail procedural guarantees afforded to litigants - proceedings that are fair, public and expeditious - without protecting the implementation of judicial decisions; to construe Article 6 (art. 6) as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention (see, mutatis mutandis, the Golder v. the United Kingdom judgment of 21 February 1975, Series A no. 18, pp. 16-18, paras. 34-36). Execution of a judgment given by any court must therefore be regarded as an integral part of the ‘trial’ for the purposes of Article 6 (art. 6).’ Hornsby v. Greece, [1997], no. 18357/91, para 40.

1022 Kiestra R.L., (n 1016) 211.

1023 ibid.

1024 Hornsby v. Greece, [1997], no. 18357/91, para 40; McDonald v. France (dec.), no. 18648/04, [2008].

1025 Jovanovski v. The Former Yugoslav Republic of Macedonia, no. 31731/03, [2010] and Vrbica v. Croatia, no. 32540/05, [2010] para 72-73. In the Case Vrbica v. Croatia the Court found that ‘In these circumstances, the refusal of the domestic courts to allow the enforcement of the recognised foreign judgment of 15 October 1991 rendered in the applicant's favour infringed the proportionality principle and thus impaired the very essence of his right of access to a court.’

1026 Roman´czyk v. France, no. 7618/05, para 58

1027 Kiestra R.L., (n 1016) 211

1028 ibid.
proportionate to the legitimate aim pursued.\textsuperscript{1029} This aspect of the principle of proportionality was even stretched to the substantive public policy exception the Court found in the case \textit{Négrépontis-Giannis v. Greece}\textsuperscript{1030}, where it was concluded that the interpretation of the notion of public policy by the Greek courts should not be made in an arbitrary or disproportionate manner.\textsuperscript{1031}

ECtHR has addressed the issue of the relationship between Article 8(1) of the ECHR (Right to respect for private and family life) and the enforcement of family law orders in general and the execution of return orders in particular.\textsuperscript{1032} Article 8(1) of the ECHR and its violations were initially focused on public law situations, but were later extended to private law situations and have been relied upon, with success, in child abduction cases and access rights.\textsuperscript{1033} This is especially important regarding how the exceptions provided in Article 13 of the 1980 Hague Child Abduction Convention are to be applied in a manner that is consistent with Article 8 of the ECHR and how the Courts of the EU Member States handle child abduction cases where the courts of the habitual residence have made use of their power under Article 11 of the Brussels IIbis Regulation.\textsuperscript{1034}

### 5.3.2 The Position of the ECtHR regarding Article 13 of the 1980 Hague Child Abduction Convention

In a series of cases the ECtHR has held, in general, that returning a child under the procedures set out in the Brussels IIbis Regulation and in the 1980 Hague Child Abduction Convention who has been wrongfully removed or retained is not in breach of obligations under the ECHR, in particular of Article 8 thereof.\textsuperscript{1035} With such an approach of supporting the functioning of the child abduction regime established by the Brussels IIbis Regulation and the

\textsuperscript{1029} ibid.

\textsuperscript{1030} \textit{Négrépontis-Giannis v. Greece}, no. 56759/08, para 90-91.

\textsuperscript{1031} \textit{Négrépontis-Giannis v. Greece}, no. 56759/08, para 87.

\textsuperscript{1032} See, cases Maumousseau and Washington v. France (Application No 39388/05); Lipkowsky and McCormack v. Germany (Application No 26755/10); Sofia Posse and Doris Posse v. Austria (Application No 3890/11); Raban v. Romania (Application No 25437/08); Šneersone and Kampanella v. Italy (Application No 14737/09); B. c. Belgique (Requête No 4320/11); Neulinger and Sharuk v. Switzerland (Application No 41615/07) X. v. Latvia (Application No 27853/09); Ignaccolo-Zenide v. Romania, Application No 31679/96, (2001); Maire v. Portugal, (Requête no 48206/99); P.P. v. Poland, (Application no. 8677/03); H.N. v. Poland, (Application no. 77710/01); Raw and Others v. France, (Application no. 10131/11).

\textsuperscript{1033} Magnus U. and Mankowski P., Commentary on Brussels IIbis Regulation, (n 9) 390.


\textsuperscript{1035} See, Maumousseau and Washington v. France (Application No 39388/05); Lipkowsky and McCormack v. Germany (Application No 26755/10); Sofia Posse and Doris Posse v. Austria (Application No 3890/11); Raban v. Romania (Application No 25437/08).
1980 Hague Child Abduction Convention, the ECtHR has shown that it supports the restitution of the status quo, which was unilaterally disturbed by the wrongful removal or retention. The ECtHR has in only a small number of cases, and mostly in exceptional circumstances, held that the return of a child after a wrongful removal or retention may constitute a breach of Article 8 of the ECHR.\textsuperscript{1036} The most criticized of these cases is the Neulinger Case,\textsuperscript{1037} where the ECtHR conceded that a ‘margin of appreciation’ must be afforded to national authorities to determine whether to return a child.\textsuperscript{1038} Specifically, the ECtHR held that the Court must assess the situation at the time of the enforcement of the return order and not at the time when the return order was made.\textsuperscript{1039} Following this position, the ECtHR relied on Article 12 of the 1980 Hague Child Abduction Convention to justify the non-return.\textsuperscript{1040} This aspect is a bit worrying and problematic because Article 12 provides that if a case is commenced more than one year after the wrongful removal or retention, return is not required if the child is settled in its new environment.\textsuperscript{1041} In Neulinger, return proceedings under the 1980 Hague Convention were instituted in Switzerland well within a year of the abduction, even though it took almost a year to learn the whereabouts of the child.\textsuperscript{1042} But the Grand Chamber applied the ‘well-settled’ concept to the length time the child has been in Switzerland since his abduction in 2005, despite the fact that the delay in the enforcement of the return order can be traced to the proceedings in the European Court itself and its direction not to enforce the 2007 order.\textsuperscript{1043}

Especially problematic in the Neulinger case was the assessment of the ‘best interest of the child.’ The ECtHR has stated that the best interest of the child must be assessed in each individual case.\textsuperscript{1044} Further, the ECtHR elaborated that this assessment should include an ‘in-depth examination of the entire family situation.’\textsuperscript{1045} For the application of a such deep examination, it would be necessary that the Court examines a series of factors ‘in particular [those] of a factual, emotional, psychological, material and medical nature.’\textsuperscript{1046} However, this

\textsuperscript{1036} See, Šneersone and Kampanella v. Italy (Application No 14737/09); B. c. Belgique (Requête No 4320/11); Neulinger and Shuruk v. Switzerland (Application No 41615/07) and X. v. Latvia (Application No 27853/09).
\textsuperscript{1038} Neulinger and Shuruk v. Switzerland (Application No 41615/07), para 145.
\textsuperscript{1039} ibid.
\textsuperscript{1040} ibid para145-147.
\textsuperscript{1041} See Perez Vera Report (n 187) 458-460.
\textsuperscript{1042} Neulinger and Shuruk v. Switzerland (Application No 41615/07) para 29 and 30.
\textsuperscript{1043} Silberman L., A Brief Comment on Neulinger (n 1037) 18.
\textsuperscript{1044} Neulinger and Shuruk v. Switzerland (Application No 41615/07), para 138.
\textsuperscript{1045} ibid para 139.
\textsuperscript{1046} ibid.
aspect of ‘in-depth examination’ is somewhat questionable as to the return mechanism of the 1980 Hague Child Abduction Convention, especially because this mechanism is based on the promptness of the summary return procedure and the in-depth examination would evidently prolong the return of the abducted children.1047 The ECtHR, in the Case X v. Latvia, changed the reasoning that was given in Neulinger and required that the national courts carry out an ‘effective’ examination of any allegations made in connection with refusal of return,1048 under the provisions of the 1980 Hague Child Abduction Convention. In the understanding of the ECtHR, ‘effective examination’ is provided if the two following requirements are met. Firstly, the national courts must consider any ‘arguable claims’1049 against return based on the exceptions contained in Articles 12, 13 and 20 of the 1980 Hague Child Abduction Convention.1050 Secondly, the court must give a decision that is sufficiently reasoned regarding those claims, in order to show that those exceptions have been effectively examined.1051 When doing this examination, the national court must evaluate these factors in light of Article 8 of the Convention.1052 A contrario, the ECtHR considered that

[B]oth a refusal to take account of objections to the return capable of falling within the scope of Articles 12, 13 and 20 of the Hague Convention and insufficient reasoning in the ruling dismissing such objections would be contrary to the requirements of Article 8 of the Convention and also to the aim and purpose of the Hague Convention.1053

The ECtHR also provided several guidelines regarding the consideration of the allegations of a ‘grave risk’ for the child in the event of return; namely, the allegations must not be ‘automatic or stereotyped’1054 and ‘must be interpreted strictly’1055 as was the case in Maumousseau and Washington v. France.1056

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1047 Beaumont and others, Child Abduction: Recent Jurisprudence of the European Court of Human Rights (n 1034) 41.
1048 X. v. Latvia (Application No 27853/09), para 118.
1049 In the Joint Dissenting Opinion of Judges Bratza, Vajić, Hajiyev, Šikuta, Hirvelä, Nicolaou, Raimondi and Nussberger it was provided that ‘In particular, we agree that despite the undeniable impact that return of the child may have on the rights of the child and parents, Article 8 of the Convention does not call for an in-depth examination by the judicial or other authorities of the requested State of the entire family situation of the child in question. We further agree that the Article nevertheless imposes on the national authorities of that State, when examining a case under Article 13 (b) of the Hague Convention, to consider arguable claims of a ‘grave risk’ for the child in the event of his or her return and, where such a claim is found not to be established, to make a ruling giving sufficient reasons for rejecting it.’ X. v. Latvia (Application No 27853/09), point 2.
1050 X. v. Latvia (Application No 27853/09), par.106.
1051 ibid.
1052 ibid.
1053 ibid para 107.
1054 ibid.
1055 ibid.
1056 ‘In the Court's view, if the first applicant's arguments were to be accepted, both the substance and primary purpose of the Hague Convention, an international legal instrument in the light of which the Court applies Article 8 of the Convention, would be rendered meaningless, thus implying that the above-mentioned exceptions must be interpreted strictly’ (see, to this effect, the Perez Vera Report (n 187) para 34). The aim is indeed to prevent
The shifting of the approach by the ECtHR from an ‘in-depth’ examination to an ‘effective’ examination represents a positive and constructive change regarding the goals that both instruments want to achieve. Effective examination standards represent a genuine link between the protection of Article 8(1) of the ECHR and the need for a prompt summary mechanism for the return of the abducted children. The approach taken in Neulinger; is better situated for proceedings that deal with the substance of the issue (custody rights), while the 1980 Hague Child Abduction Convention does not intend the Courts to work with such issues. That’s why the ‘effective’ examination lifts that burden off the courts and simply requires that the national courts carry out an effective examination of the exceptions contained in 1980 Hague Child Abduction Convention. With this, the strict application of the 1980 Hague Child Abduction Convention is reaffirmed while the protection of the best interest of the child is also ensured.

In the X. v. Latvia case, the ECtHR took a positive and pro-Hague Convention approach regarding determination and application of the exemptions provided in the 1980 Hague Child Abduction Convention and assertion of the best interest of the child. However there have been some departures from the conventional approach of application of Article 20 of the 1980 Hague Child Abduction Convention. Article 20 represents a very limited public policy clause where the return of the child may be refused if it would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms. Generally it is intended is to give ‘moral authority’ to the Convention and to be very restrictively applied in extreme cases. However, in the X. v. Latvia case, the ECtHR made a dangerous departure and made suggestions to the Latvian Courts on how to apply Article 20 of the 1980 Hague Child Abduction Convention in the case, despite the fact that it had not been raised in the proceedings before the national courts. It was stated by the ECtHR that

[T]he Court further emphasises that, in any event, since the rights safeguarded by Article 8 of the Convention, which is part of Latvian law and directly applicable, represent ‘fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms’ within the

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1057 Beaumont and others, Child Abduction: Recent Jurisprudence of the European Court of Human Rights (n 1034) 43.
1059 Ibid. 176.
1060 Beaumont and others, Child Abduction: Recent Jurisprudence of the European Court of Human Rights, (n 1034) 46.
meaning of paragraph 20 of the Hague Convention, the Regional Court could not dispense with such a review in the circumstances of this case.\footnote{X. v. Latvia (Application No 27853/09), para 117.}

This approach was rightfully left out by the dissenting opinion’s side. Article 20 of the 1980 Hague Child Abduction Convention is intended to be applicable to human rights situations that constitute a reason for refusing to return the child. This is different from the obligation proposed by the ECtHR for the Latvian Courts on their own motion to investigate whether the mother could return to Australia and maintain contact with the child. With this, the ECtHR creates procedural rights as to how the Courts should go about the process of determining whether or not a return of the child would be a breach of human rights or if it would be contrary to one of the Article 13 exceptions in the 1980 Hague Child Abduction Convention.\footnote{Beaumont and others, Child Abduction: Recent Jurisprudence of the European Court of Human Rights, (n 1034) 47.} This obligation cannot be created by the ECtHR on what procedural rights, if any, Article 20 imposes, because this is a matter of national and international law and not ECHR law.\footnote{ibid.}

There is a clear standpoint in the application of the 1980 Hague Child Abduction Convention, also especially emphasized in the Brussels IIbis Regulation, that the Court of the Member State where the child had his habitual residence should retain jurisdiction over matters regarding his/her well-being, because of its proximity to the everyday life of the child. The transfer of the jurisdiction can occur in limited cases. Providing the interpretation that there is a bigger interest that is connected with the child, to transfer the jurisdiction with a unilateral act, such as wrongful removal or retention, gives lawfulness to the act of the abductor to voluntarily choose a forum which in his/her opinion is best suited to hear the case regarding the parental responsibility issues. In that context, there is the well-founded risk that if this line of thinking goes too far it might have the effect of undermining one of the basic principles of both the 1980 Hague Child Abduction Convention and the Brussels IIbis Regulation, namely that the long-term interest of children should be decided in the Courts of the Member States of their habitual residence and that a wrongful removal or retention should in principle not have the effect of changing such position except in circumstances such as those set out in Article 10 (jurisdiction in child abduction cases) of the Brussels IIbis Regulation.\footnote{Practice Guide for the application of the Brussels IIa Regulation (n 21) 73.}
5.3.3 The Position of the ECtHR on Article 11 of the Brussels IIbis Regulation

The second set of cases are regarding how the Courts of the EU Member States handle child abduction cases where the courts of the habitual residence have made use of their power under Article 11 of the Brussels IIbis Regulation. The most recent cases over this question are Šneersone and Kampanella v. Italy (Application No 14737/09) and Sofia Povse and Doris Povse v. Austria (Application No 3890/11). In the first case, the ECtHR for the first time dealt with the procedure introduced by Article 11(6)-(8) and Article 42 of the Brussels IIbis Regulation.

In this case, in March 2009 the mother and the child lodged an application against Italy with the ECtHR stating that the Italian Government had violated their right to respect for their family guaranteed by Article 8 of the Convention. They furthermore pointed out that the first applicant’s absence from the hearing of the Rome Youth Court had rendered the decisionmaking process in the Italian courts unfair. The ECtHR sought to determine whether the decision of the Rome Youth Court from 21 April 2009 constituted an interference with the applicants' right to respect for family life, and the decisive issue was regarding the interference being ‘necessary in a democratic society’ within the meaning of Article 8(2) of the ECHR. In essence the ECtHR sought to answer:

[w]hether a fair and proportionate balance between the competing interests at stake – those of the child, of the two parents, and of public order – was struck, within the margin of appreciation afforded to States in such matters.

The ECtHR stated that the reasoning of the Italian court contained in the decisions of 21 April 2008 and 21 April 2009 was rather scant. In the view of the ECtHR, the Italian Courts, ‘…in their decisions failed to address any risks that had been identified by the Latvian authorities’, even though their reasoning stood that their role was limited by Article 11 (4) of the Brussels IIbis Regulation to assessing whether adequate arrangements had been made to secure the child’s protection after his return to Italy from any identified risks.

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1065 Which lasted for almost 3 years and different procedures under different legal sources were involved. For more comprehensive explanation of the factual situation see, Šneersone and Kampanella v. Italy (Application No 14737/09), para 6-45.
1066 Šneersone and Kampanella v. Italy (Application No 14737/09), para 1.
1067 ibid para 3.
1068 ibid para 91.
1069 ibid.
1070 ibid para 28.
1071 ibid para 37.
1072 ibid para 93.
1073 ibid.
within the meaning of Article 13 (b) of the Hague Convention. In general, the ECtHR rightfully drew the conclusion that the Italian Courts did not take into consideration the report from the expert psychologist, or at least they did not mention this report in the decisions.

After showing some suspicion that the Italian Courts did not take into consideration the report of the Latvian psychologist, the ECtHR questioned the ‘adequate arrangements’ that needed to be provided under Article 11(4) of the Brussels IIbis Regulation for the protection of the child after his/her return in order to override the non-return order given on the basis of the Article 13(b) of the 1980 Hague Child Abduction Convention. Despite the verified and upheld ‘adequate arrangements’ by the Italian Courts, there were very strong contra arguments by the Latvian authorities that raised serious concerns that there were potential dangers to the child’s psychological health. These considerations were based on several factors. Firstly, the fact that the child was well adjusted to living with his mother in Riga and that his separation from his mother would adversely affect his development and might create neurotic problems, illnesses or both and that strong ties had formed between the child and his mother. Secondly, the mother was unable to accompany the child to Italy, since she did not have sufficient financial means to reside there, was essentially unemployable and didn’t know the Italian language. Thirdly, the child and his father had no language in common, they had never lived together without the mother, and had not seen each other for more than three years at the time when the Rome Court of Appeal dismissed the first applicant’s appeal against the decision of 21 April 2008. Fourthly, although the child and the father had not seen each other since 2006, in the meantime the father had made no effort to establish contact with the child.

1074 ibid.
1075 ibid.
1076 *By a decision of 21 April 2008 the Rome Youth Court upheld the father’s request. It considered that the only role left to it by Article 11 (4) of the Regulation was to verify whether adequate arrangements had been made to secure the protection of the child from any identified risks within the meaning of Article 13 (b) of the Hague Convention after his or her return. After considering the first applicant’s submissions, the court noted that the father had proposed that Marko would stay with him, while the first applicant would be authorised to use a house in Aranova for periods of fifteen to thirty consecutive days during the first year and subsequently for one summer month every other year (the first applicant would have to cover her own travel expenses and one half of the rent of the house in Aranova), during which time Marko would be staying with his mother, while the father would retain the right to visit him on a daily basis. Marko would be enrolled in a kindergarten which he had attended before his removal from Italy. He would also attend a swimming pool he had used before his departure from Italy. The father furthermore undertook to ensure that the child would receive adequate psychological help and would attend Russian-language classes for Russian children. The court considered such an arrangement adequate to fulfil the requirements of the Regulation and ordered an immediate execution of its decision to return Marko to Italy and to have him reside with his father. The court also pointed out that it would be preferable if the first applicant accompanied Marko on his way to Italy but, should that prove to be impossible, his return would be arranged by the Italian embassy in Latvia. Due to the urgent nature of the case, the decision was pronounced to be immediately executable.* Šneersone and Kampanella v. Italy (Application No 14737/09), para 28.
1077 Šneersone and Kampanella v. Italy (Application No 14737/09), para 95.
1078 ibid par.94.
These factors in the opinion of the ECtHR seriously raised ‘red flags’ about the position of the child in this case. The Italian Courts didn’t even (if they had suspicion about the Latvian Report) request a report from a psychologist of their own choosing. They didn’t make efforts to inspect the habitat of the child or the living conditions proposed by the father, finding out whether they were suitable for the child to live in them in Italy. Those conditions, taken cumulatively, left the ECtHR unpersuaded that the Italian courts sufficiently appreciated the seriousness of the difficulties which the child was likely to encounter in Italy.

Regarding the adequacy of the ‘safeguards’ of the child’s well-being proposed by his father and accepted by the Italian courts as adequate, the ECtHR considered that allowing the mother to stay with the child for fifteen to thirty days during the first year and then for one summer month every other year after that was a manifestly inappropriate response to the psychological trauma that would inevitably follow a sudden and irreversible severance of the close ties between mother and child. In the opinion of the ECtHR, the order to drastically immerse a child in a linguistically and culturally foreign environment cannot in any way be compensated by attending a kindergarten, a swimming pool and Russian-language classes. While the father’s undertaking to ensure that the child receives adequate psychological support is indeed laudable, the ECtHR didn’t agree that such an external support could ever be considered as an equivalent alternative to psychological support that is intrinsic to strong, stable and undisturbed ties between a child and his mother. These ‘adequate arrangements’ in the view of the Italian courts were the only ones made; they didn’t consider any alternative solutions for ensuring contact between the child and his father.

Following this reasoning, the ECtHR concluded that the interference with the applicants’ right to respect for their family life was not ‘necessary in a democratic society’ within the meaning of Article 8(2) of the ECHR. Accordingly the ECtHR found that there had been a violation of Article 8 of the ECHR as a result of the order of the Italian Courts to return the child to Italy.

In the second case, Sofia Povse and Doris Povse v. Austria (Application No 3890/11), the proceedings trudged through different legal labyrinths for almost 5 years and 4 months (and also involved procedures under the Brussels IIbis Regulation). In January 2011 the mother

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1079 ibid para 95.
1080 ibid.
1081 ibid para 96.
1082 ibid para 97.
1083 ibid par.98.
1084 For more comprehensive explanation of the factual situation see, Povse v. Austria (Application No 3890/11), par.3-52.
and the child lodged an application against Austria with the ECtHR and in it, complained that, under Article 8 of the ECHR, the Austrian courts’ decisions had violated their right to respect for their family life. In particular, they argued that the Austrian courts had limited them to ordering the enforcement of the Italian court’s return order and had not examined their argument that the child’s return to Italy would constitute a serious danger to her well-being and lead to the permanent separation of the mother and the child. They submitted, in particular, that the child had not had any contact with her father since mid-2009 and did not speak Italian, while her father did not speak German. Moreover, they claimed that the mother would not be able to accompany the child to Italy or to exercise any access rights, as criminal proceedings for child abduction were pending against her in Italy.1085

The ECtHR was asked to refer to the question of abolition of *exequatur* provided in Article 11(8) of the Brussels IIbis Regulation in correlation with infringement of Article 8 of the ECHR. At first, in the decision from 18 June 2013, a chamber of the ECtHR applied the doctrine of ‘presumption of compliance’ or the ‘Bosphorus presumption’ to the Brussels IIbis Regulation regarding the abolishment of exequatur in intra-EU child abduction cases.1086 This doctrine had been first introduced in the *Bosphorus v. Ireland* case.1087 Generally the doctrine holds that if a Member State is complying with EU law and has no discretion whilst doing so, then the ECHR will not review the application of EU law in question unless it is regarded as ‘manifestly deficient’ in how it protects human rights.1088 Applying the reasoning provided by the *Bosphorus* presumption to the *Povse* case, the ECtHR stated that ‘It is not in dispute that the Austrian courts’ decisions ordering the enforcement of the Venice Youth Court’s return orders interfered with the applicants’ right to respect for their family life within the meaning of Article 8 of the Convention’,1089 but an exception of the infringement of Article 8 exists if such interference is ‘in accordance with the law’, pursues one or more of the legitimate aims referred to in Article 8(2), or is ‘necessary in a democratic society’ to achieve the aim or aims concerned.1090 In determining these three conditions for the exception (Was the interference in accordance with the law? Did the interference have a legitimate aim? Was the interference necessary?) the ECtHR held that the interference was in accordance with the law1091 and

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1085 *Povse v. Austria* (Application No 3890/11), para 57.
1086 Ibid para 77.
1089 *Povse v. Austria* (Application No 3890/11), par.70.
1090 Ibid para 71.
1091 Ibid para 72-74.
decided that Sofia and Doris Povse’s application for a breach of Article 8 of their ECHR rights was inadmissible as manifestly ill-founded and must be rejected in accordance with Article 35 (3) (a) and 4 of the ECHR. 1092

The aim of ECHR and CFR generally is the same; both protect and guarantee fundamental rights and both contain provisions which are intended to protect the rights of the child. Nevertheless, they may not share the same methodology in the assessment of the existence of a violation, nor give exactly the same weight to the various factors which make up the process.1093 It was nonetheless expected that these two legal orders would be addressed over the child abduction, because these cases have a high intensity of emotional charge and the participants in these proceedings would use almost every legal remedy at their disposal because they represent a ‘pathological aspect’ of the custody disputes.

The Bosphorus case provides a solution and gives a certain order in the interaction between ECtHR and CJEU legal orders in that it accepts the change in the dominance of the ECtHR over human right issues.1094 This case in a certain way was inspired by the Solange II case-law of the German Constitutional Court1095 and gives input to the reasoning of the ECtHR by developing a translation, a kind of ‘Europeanisation of the Solange’.1096 Bringing along the inspiration of the Solange II, the ECtHR in the case M. & Co. v. Germany [1990] ruled that applications against individual EU Member States concerning material acts of Community law were inadmissible only under one condition: ‘Provided that within that organization fundamental rights will receive an equivalent protection.’1097 This principle, which evolved during the Bosphorus judgment, was referred to as the ‘principle of compliance’ and provides that the ECtHR has no competence to review Community acts as such. Nonetheless, the Court recognizes a competence to review these acts indirectly through examining specific implementation measures at the national level.1098 In the Michaud v. France Case, the ECtHR when applying this ‘principle of compliance’ stated that ‘...the Court may, in the interest of

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1092 Povse v. Austria (Application No 3890/11), para 89.
1095 Solange II, [1986], BVerfGE 73, p. 339
international cooperation, reduces the intensity of its supervisory role’.\textsuperscript{1099} This doctrine now represents a ‘bridge’\textsuperscript{1100} between these two legal orders, moreover because the CJEU gave opinion that

\begin{quote}
[T]he agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is not compatible with Article 6(2) TEU or with Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.\textsuperscript{1101}
\end{quote}

However, this doctrine of ‘principle of compliance’ is not without criticism. The principle is criticized for representing a political gesture on behalf of the ECtHR and for the fact that it applies a much lower standard of protection of human rights to EU law than to non-EU law.\textsuperscript{1102}

The ‘Bosphorus presumption,’ which allows an overlapping consensus between the two legal orders, is now brought into the equation of the Povse v. Austria case for the abolition of exequatur in Article 11(8) of the Brussels IIbis Regulation.\textsuperscript{1103} This presumption required that the ECtHR inspect three basic aspects: whether the EU protects fundamental rights, did the Austrian Courts exercise any discretion or have they just implemented the EU law, and are there any circumstances surrounding the case that could show that there was ‘manifestly deficient’ protection of human rights.

As a starting point, the ECtHR reaffirmed its findings that the EU protects fundamental rights in a manner equivalent to that of the ECHR as regards both the substantive guarantees offered and the mechanisms controlling their observance.\textsuperscript{1104} In that regard, the ECtHR considered that the ‘principle of compliance’ would apply to this case if the Austrian courts, without exercising any discretion, did no more than implement the legal obligations resulting from Austria’s membership in the European Union.\textsuperscript{1105} In observing the rules provided in the Brussels IIbis Regulation, particularly Articles 42 and 11(8) and the fact that the Supreme Court asked the CJEU/CJEU for a preliminary ruling during the first set of proceedings concerning

\textsuperscript{1099} Michaud v. France (App. No. 12323/11), para 104.
\textsuperscript{1101} Opinion on the draft agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms and identifies problems with regard to its compatibility with EU law (2/13) (Press Release No.180, 2014 (18.12.14))
\textsuperscript{1102} Kuhert K. (n 1098) 188; Beaumont and others, Child Abduction: Recent Jurisprudence of the European Court of Human Rights, (n 1034) 56.
\textsuperscript{1103} There were serious concerns, because if the standpoint of the Pellegrini case (Pellegrini v. Italy, app.no. 30882/96) was followed by the ECtHR, the unconditional system of recognition set in Article 42 of the Brussels IIbis Regulation would be incompatible with the ECHR, Requejo M., Requejo on Povse, (n 1100).
\textsuperscript{1104} Povse v. Austria (Application No 3890/11), para 77.
\textsuperscript{1105} ibid para 78.
the enforcement of the Venice Youth Court’s judgment of 10 July 2009, the ECtHR stated that:

[the Austrian courts could not and did not exercise any discretion in ordering the enforcement of the return orders. Austria has therefore done no more than fulfil the strict obligations flowing from its membership of the European Union.

From that standpoint it was considered whether there are some circumstances surrounding the case which could show that there was ‘manifestly deficient’ protection of human rights that could lead to rebutting the presumption of ECHR compliance. The applicants had argued that returning the child to Italy would cause her serious psychological harm and would constitute a gross violation of the right of both applicants, the mother and the child, to respect for their family life. Nevertheless, the ECtHR ruled that the protection of human rights under the Brussels IIbis Regulation was not manifestly deficient as the applicants had not exhausted their rights in the Italian courts to get the Italian return order changed or stayed in light of a change of circumstances.

After considering all of these aspects, the ECtHR decided that the application was inadmissible as it was manifestly ill-founded and that it must be rejected. With this the ECtHR reaffirmed the ‘Bosphorus presumption’ that when a Member State is applying EU law without exercising any discretion it is presumed to be in compliance with the ECHR.

5.3.4 The position of the ECtHR regarding the Brussels IIbis Regulation child abduction regime

These cases have shown how complex the situation is regarding the existence of several legal sources that can be applied in a certain case. The ‘Bosphorus presumption’ provides for some resolution between ECHR and EU law. Nevertheless, this aspect is just a starting position because in essence the national courts (local judges) have to decide this ‘mega-conflict’ between two supra-national regimes which both purport to promote the interests of the child.

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1106 Where the CJEU ‘…made it clear that where the courts of the State of origin of a wrongfully removed child had ordered the child’s return under Article 11(8) of the Brussels IIa Regulation and had issued a certificate of enforceability under Article 42 of that Regulation, the courts of the requested State could not review the merits of the return order, nor could they refuse enforcement on the ground that the return would entail a grave risk for the child owing to a change in circumstances since the delivery of the certified judgment. Any such change had to be brought before the courts of the State of origin, which were also competent to decide on a possible request for a stay of enforcement.’ Posse v. Austria (Application No 3890/11), para 81.

1107 Posse v. Austria (Application No 3890/11), para 82.

1108 Ibid para 78.

1109 Ibid para 64.

1110 Ibid para 86.

1111 Muir Watt H., (n 1093).
For example, the local judge, when deciding for return of the child under Article 11(8) Brussels IIbis Regulation, must act promptly and thoroughly because this fast-track procedure and the abolition of the exequatur is counterbalanced by the particular duty to properly conduct ‘in-depth examinations’ as regards the reasons for such refusal (as was the case in Šneersone and Kampanella v. Italy, which was reiterated the Neulinger approach) and that the child is heard, unless is inappropriate (as was the case in Zarraga). If the Court of habitual residence of the child fails to do so, or does it unsatisfactorily, it is open to the applicant to challenge the order – including through an individual application to the ECtHR (as indicated in Povse v. Austria case).

The Brussels IIbis Regulation in Article 11(6)-(8) is positioned in such a way that the court of origin (the court where the child had his habitual residence before the wrongful removal or retention) is the final arbiter regarding child abduction cases. The procedure was designed as such because of the restoration of the status quo ante, which is the main goal in the child abduction cases. Nevertheless, infringement on human rights in correlation with the Charter of the EU and the ECHR can occur in both places, in the country of origin (country of the habitual residence of the child prior to the abduction) and the country of enforcement (country of refuge). This aspect cannot be disregarded, because the procedure provided in Article 11(6)-(8) of the Brussels IIbis Regulation is intended to have limitations in the country of enforcement for the reasons of the child’s best interest and the unilateral disturbance of the jurisdictional regime by the abducting parent who voluntarily choose that forum. From the point of view of the Brussels IIbis regime, such conduct is intolerable and the CJEU allowed no exceptions to the concertation of the jurisdiction in the country of origin, (the country of the child’s habitual residence prior the abduction) including for human right protection (Article 24 of the Charter of the EU), reasoning that there are locally available remedies despite the fact that the abducting parent and the child are found elsewhere. At the same time, the ECtHR in the Šneersone and Kampanella v. Italy case evidently left a possibility to the abducting parent to raise human rights infringementin the country of enforcement. Between these two standpoints, there is the Bosphorus presumption in the Povse v. Austria case, which tries to reconcile these two regimes by diminishing the distress of the national courts to be put in a position to choose between two competing international obligations and by that to
demonopolize human rights protection. Following this presumption, the ECtHR did not find justification to rebut it and rejected the application.

Such a position of the ECtHR regarding the application of Article 11(6) – (8) of Brussels IIbis Regulation ultimately leads to the two most essential questions regarding the abolition of the exequatur in the Brussels IIbis Regulation: Does the abolition of the exequatur, as a part of the child abduction procedure, deprive the child of adequate protection? And secondly, taking into consideration the procedure provided in the Brussels IIbis Regulation regarding child abduction cases, can the abductor and the child still possibly raise human rights infringement before the country of refuge, if in particular case the court of origin ordering the return did not deal or dealt inadequately with the human’s right challenge?

Regarding the first question, the CJEU and the ECtHR are in line in the reasoning that the court of origin is the forum in which all infringements of are to be addressed. The CJEU held this position in the Zarraga Case and in the Povse (preliminary ruling) case, that questions concerning the lawfulness of the judgment ordering return as such, and in particular the question whether the necessary conditions enabling the court with jurisdiction to hand down that judgment are satisfied, are solely questions for the national courts of the Member State of origin to examine, in particular, by Article 24 of the Charter of Fundamental Rights and Article 42 of Regulation No 2201/2003. The ECtHR reached a similar conclusion by applying the Bosphorus presumption in the Povse case and providing, firstly, that the Austrian Courts (court of enforcement) had no discretion but to order the return of the child; secondly, that the CJEU in its preliminary ruling considered that the child and the mother could search for adequate humans right protection, namely Article 8 of the ECHR, in front of the Italian Courts (court of origin). With these two factors in mind and applying the ‘Bosphorus presumption,’ the protection of these rights according to ECHR, which is provided by the ECtHR, is equivalent to the protection afforded by the Brussels IIbis Regulation. In the context of the Povse case, there is also a condition which is in line with the Bosphorus presumption, that the parties must avail themselves of all local remedies and challenge the order in the Court of origin (with the possibility of lodging an application with the ECtHR if such an attempt fails). All of these factors provide that in the cases with questions which are specific to the infringement of human rights and are conducted by the abolition of the exequatur in the Brussels IIbis Regulation, are to be addressed in the Country of origin. However, this does not

1116 ibid para 69.
1117 Povse v. Austria (Application No 3890/11) para 86.
preclude the challenge of the return order in the country of enforcement, which is shown by the mere fact that Bosphorus presumption is rebuttable, but only in extreme cases.

This aspect of the rebuttable presumption (praesumptio iuris tantum) under the Bosphorus presumption requires quite strict standards of proof of violation and the presumption can be rebutted if, in the circumstances of the particular case, it is considered that the protection of ECHR rights was manifestly deficient. In such cases, the interest of international cooperation is outweighed by the Convention's role as a ‘constitutional instrument of European public order’ in the field of human rights.\footnote{Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland (App. No. 45036/98) para 156.} So the questions stands, can the abductor and the child still possibly raise human rights infringement before the country of refuge, if in that particular case the court of origin ordering the return did not deal or dealt inadequately with the human rights challenge? If this aspect is seen only through the Šneersone and Kampanella v. Italy case, then the answer would be yes. But this case does not bring into the equation the Bosphorus presumption. What this presumption does, together with all that was said about the access to justice in the court of origin, is mandate that only severe disallowance to such access (which includes disallowance of application to the ECtHR) could lead to the possibility of effectively raising the access argument in front of the court of enforcement.\footnote{Muir Watt H., Muir Watt on Abolition of Exequatur and Human Rights (n1093) 4.} From another point of view, if both safeguards are applied and used, that the parties use all of their remedies in front of the Court of origin (provided that they are accessible!) and if that court fulfils its obligations under Article 42 of the Brussels Ibis Regulation, then there wouldn’t be any need to call for help from the courts of the country of refuge under the ECHR.\footnote{Ibid.}

What is of essence here is the promptness of the procedure. The abolition of the exequatur in these cases is engineered so that it provides very swift and prompt procedures for the return of the abducted children.\footnote{Van Iterson D., The CJEU and ECHR Judgments on Povse and Human Rights – a Legislative Perspective, Online Symposium: Abolition of Exequatur and Human Rights, <http://conflictoflaws.net/2013/the-CJEU-and-echr-judgments-on-povse-and-human-rights-a-legislative-perspective/> accessed 12 March 2016 1-2.} This direct cross-border enforceability of a court order without intermediary enforcement proceedings, which is sometimes described as a ‘nuclear missile’\footnote{Muir Watt H., (n 1093) 1.}, assures that all necessary procedural requirements have been fulfilled in order to re-establish the status quo, which means that the child is returned to his/her habitual residence. Nevertheless, Šneersone and Kampanella v. Italy case has shown that there can be a risk that the ECtHR could misapply the need for speed in these cases. First, the requirement for ‘in-depth examination’ of the entire family situation is too high of a burden for the national Courts.
The ECtHR, rightfully departed from this requirement of ‘effective examination’ in the X v. Latvia case, which allows faster examination, ‘tailored’ to child abduction cases. Secondly, the position of the ECtHR in relation to the European Commission in the Šneersone and Kampanella v. Italy case can act as a Court of Fourth Instance and redefine the position of the Courts of habitual residence. Finally, regarding the fast-track procedure, the preventing of the enforcement of the 1980 Hague Child Abduction Convention return orders, as was the case in Neulinger, presents worrying aspect, because as the procedure under the ECHR in front of the ECtHR can last significantly, it is in collision with the need for a prompt procedure for the return of the child. This requires for some fast track procedures, that can be disposed in the prescribed 6-8 week and would be in line with the ‘time is of an essence’ reasoning which is highlighted in these cases.

With all of which was said, the ECtHR and the CJEU have put on the court of origin, very important role, to swiftly and thoroughly examine all of the circumstances when applying Article 11(6)-(8) of the Brussels IIbis Regulation and to allow access to justice to the parent which wrongfully removed or retained the child in the country of refugee. This role is evidently not an easy one, but it’s necessary, because here at stake is very fragile right. That is the child future, its relation with the environment and its self-awareness. For that there could not be any excuses that the role is hard.

1123 Beaumont and others, Child Abduction: Recent Jurisprudence of the European Court of Human Rights (n 1034) 54.
Part III

The procedure for Recognition and Enforcement of foreign judicial decisions in the Republic of Slovenia

Chapter I The historical development, structure and legal sources of Private International Law in Slovenia

1. General

Recognition and enforcement of foreign judicial decisions in Slovenia is regulated in the Private International Law and Procedure Act (PILP act of Slovenia).\(^1\) In its structure, this legal act has many similarities with the Act Concerning the Resolution of Conflicts of Laws with Provisions of Other States in Certain Matters (PIL act of 1982)\(^2\) which was a law enacted on a federal level in the Socialist Federative Republic of Yugoslavia (SFRY).\(^3\) The PIL act of 1982 law represented the first codification of private international law rules in SFRY. Before that law came into force, private international law legal issues in SFRY were either scattered among different acts or they were not regulated.\(^4\) Recognition of foreign judicial decisions before the enactment of the PIL act of 1982 was provided according to the Law on Civil Procedure\(^5\) while the enforcement of foreign judicial decisions was left to the Law on Enforcement procedure.\(^6\) In this legal act it was provided that it is possible to enforce any foreign judgment in SFRY which fulfils the conditions provided by law.\(^7\) All of these legal issues and the legal vacuum that existed over some issues in SFRY were settled with the codification and coming into force of the PIL act of 1982.\(^8\)

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\(^1\) Private International Law and Procedure Act (Zakon o mednarodnem zasebnem pravu in postopku), Official Gazette RS, no. 56/99.
\(^5\) Articles 16 to 22 of the Law on civil procedure, Official Gazette of the FPRY, no.4/57. For more on the Yugoslavian system for recognition and enforcement of foreign judicial decisions from that period see, Cigoj S., *Medunarodno zasebno pravo*, 1. Knjiga, Splošni nauki, Ljubljana, (1966), pg.93
\(^6\) Official Gazette of the SFRY, no.20/78
\(^8\) For the historical aspects of the PIL act of 1982 see, Živković M. and Stanivuković M, *Medunarodno privatno pravo*
The similarity between the Slovenian PILP act and the PIL act of 1982 is evident. Both laws are systematically divided into six chapters containing rules for international jurisdiction (and procedure), conflict of law rules, recognition and enforcement rules and other rules are also contained within them. Regarding family law issues, the Slovenian PILP act is strongly influenced by its predecessor. This provides for consistent understanding of the rules and the use of practical and doctrinal materials in the interpretation of the solutions in both PIL acts.

The scope of application of both laws, the PILP act of Slovenia and the PIL act of 1982 is identical and given in Article 1 which states that:

[the act contains rules on determination of the applicable law, rules on jurisdiction of courts and other authorities in Slovenia, rules of procedure, and rules on recognition and enforcement of foreign judgments, as well as decisions rendered by other authorities of foreign states in legal categories that refer to status of persons, family, labor, pecuniary and other civil relationships having an international character.]

A large part of these acts is directed towards solutions to private international law problems which refer to family relationships. There are special conflict of law rules, jurisdictional criteria and rules regarding recognition and enforcement that regulate family law issues with foreign elements.

Specifically, in the PIL acts, there are rules for the determination of the applicable law in a vast number of family law issues such as matrimonial matters, matrimonial property regimes, relationships between parents and children, recognition, establishment and contesting of paternity or maternity, maintenance obligations, legitimization, adoption, custody rights and provisional measures.

The PILP act of Slovenia contains rules for the determination of the jurisdiction of courts and other authorities of Slovenia in matters having international elements. The general rules determines the jurisdiction of the courts of Slovenia on the basis of the domicile of the defendant. However in many kinds of family law issues, the rules depart from the general jurisdictional criteria and covers many family law issues with specific jurisdictional rules.

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9 cf Article 1 of the PILPA of Slovenia and Article 1 of the PIL act of 1982.

10 Articles 34-37 of the PILP act of Slovenia.

11 Articles 38-40 of the PILP act of Slovenia. Also Article 41 covers the determination of the applicable law regarding the property regimes in non-marital relationships.

12 Article 42 of the PILP act of Slovenia.

13 Article 43 of the PILP act of Slovenia.

14 Article 44 of the PILP act of Slovenia.

15 Article 45 of the PILP act of Slovenia.

16 Articles 46-47 of the PILP act of Slovenia.

17 Article 15 of the PILP act of Slovenia.

18 cf Article 48 of the PILP act of Slovenia and Article 46 of the 1982 PIL Act.
referring to matrimonial property regimes,\textsuperscript{19} matrimonial matters,\textsuperscript{20} establishment and contesting of paternity or maternity,\textsuperscript{21} parental responsibility issues,\textsuperscript{22} maintenance,\textsuperscript{23} granting marriage license to minors,\textsuperscript{24} adoption,\textsuperscript{25} custody rights,\textsuperscript{26} and provisional measures.\textsuperscript{27}

Recognition and enforcement of foreign judicial decisions in the Slovenian PILP act is regulated in the fourth chapter and contains the conditions and the procedure for recognition and enforcement of all judicial decisions\textsuperscript{28} or court settlements\textsuperscript{29} rendered by a foreign court or another authority which is in the State of origin equivalent to the judgment or settlement in court.\textsuperscript{30} As was the case with the other PIL issues that are regulated with this law, recognition and enforcement applies to all matters which fall under the scope of application given in Article 1. Although in this aspect the grounds for recognition are referring to all decisions, there are several rules specifically mentioning family matters. These rules are related to the exception to the ground on non-recognition of decision in the cases of violation of the exclusive jurisdiction of the Slovenian courts\textsuperscript{31} and decisions relating to personal status.\textsuperscript{32}
2. Legal Sources

Private international law subject matter is complex, covering a variety of legal issues which differ from one country to another.\(^33\) However the nucleus of private international law is regarded to cover three issues: foreign jurisdiction, applicable law and recognition and enforcement.\(^34\) Also, the rules relating to recognition and enforcement of foreign judgments in principle differ from country to country.\(^35\) Despite the differentiation of the national legal sources, there is diversity of legal sources for the recognition and enforcement of foreign judicial decisions which can be found in multilateral and bilateral treaties and for the EU Member States in the relevant EU legal sources.\(^36\) In all of these legal sources there is a common denominator and most of the countries recognize the foreign decisions provided that certain requirements are met, but the exact conditions depend on the legal regime concerned.\(^37\)

The recognition and enforcement of foreign judicial decisions in Slovenia, as in the majority of the countries, is regulated by both national and international legal sources.\(^38\) The subject matter of PIL is specific and contains rules that cover a large number of different legal issues (status of persons, family, labor, pecuniary and other civil relationships). These legal issues are covered by many different national and international legal sources, so this part will focus only on the legal sources connected mostly with family law relations.

2.1 National legal Sources

The private international law aspects in Slovenia are regulated in the Private International Law and Procedure Act (Zakon o mednarodnem zasebnem pravu in postopku). This law is a general law which covers many different legal issues. One of the specific legal fields that is covered with the PIL act of Slovenia are family law issues with a foreign element. Nevertheless, these situations are considered to be complex and they are covered with variety of legal sources, both national and international. Substantive family law issues are covered in the Marriage and Family Law Relations Act (Zakon o zakonski zvezi in družinskih razmerjih).\(^39\)

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34 ibid.
35 Text to n 104 Part III ch II sec 3.
36 Kiestra, R.L., (n 33) 200.
37 ibid.
39 Official Gazette SRS, no. 15/76 (Consolidated version with the amendments Official Gazette RS-MP, no. 69/04).
These issues in Slovenia can be settled either in contentious or non-contentious procedures. For those family law issues that are settled in contentious procedure (divorce and parental and access rights, when these issues are decided within the framework of divorce litigation)\textsuperscript{40} the Civil Procedure Act (\textit{Zakon o pravednem postopku})\textsuperscript{41} applies. The issues which are decided in non-contentious procedure (withdraw of parental rights, the prolongation of parental rights beyond the age of maturity, a decision concerning the exercising of parental responsibilities, a decision on custody and visitation rights when parents do not live together and cannot agree on these issues and \textit{etc.})\textsuperscript{42} are regulated under the Non-Contentious Procedure Act (\textit{Zakon o nepravednem postopku}).\textsuperscript{43} Enforcement of judgments concerning custody and judgments on right of access are contained in a separate chapter in the Enforcement of Judgments and Protective Measures Act (\textit{Zakon o izvršbi in zavarovanju}).\textsuperscript{44} Lastly, the special and very important position which the Center for Social Work has in the settlement of family law issues is regulated in the Social Assistance Act (\textit{Zakon o socialnemvarstvu}).\textsuperscript{45}

\section*{2.2 International legal sources}

Legal rights and duties arising out of international treaties that are considered binding for Slovenia are a part of the legal structure and rank above statutory provisions in the hierarchy of legal acts.\textsuperscript{46} This hierarchy of the legal sources in Slovenia is established in the Constitution of Republic of Slovenia (CRS).\textsuperscript{47} Article 8 of the CRS provides that:

\begin{quote}
[L]aws and other regulations must comply with generally accepted principles of international law and with treaties that are binding on Slovenia. Ratified and published treaties shall be applied directly.
\end{quote}

Article 153 of the CRS elaborates even further and determines that

\begin{quote}
[L]aws, regulations, and other general acts must be in conformity with the Constitution. Laws must be in conformity with generally accepted principles of international law and with valid treaties ratified by the National Assembly, whereas regulations and other general acts must also be in conformity with other ratified treaties. Regulations and other general acts must be in conformity with the Constitution and laws. Individual acts and actions of state authorities, local community authorities, and bearers of public
\end{quote}


\textsuperscript{41} Official Gazette RS, no. 27/99 and 36/04.

\textsuperscript{42} Galič A., The impact and application of the Brussels IIbis Regulation in Slovenia, (n 40) 261.

\textsuperscript{43} Official Gazette of RS, no. 30/86.

\textsuperscript{44} Official Gazette of RS, no. 51/98 and 75/02.

\textsuperscript{45} Official Gazette of RS, no. 03/07.

\textsuperscript{46} Sovdat J., \textit{The Constitutional Court of the Republic of Slovenia and European Union Law}, Hrvatska i komparativna javna uprava, Vol. 13 No. 3, 2013, 898. See also the case of the Constitutional Court of Republic of Slovenia, Rm – 1/97, point 12.

\textsuperscript{47} Official Gazette of the RS Nos. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.
authority must be based on a law or regulation adopted pursuant to law.

These provisions provide that the application of international law in the Slovenian legal order is either direct or indirect. There are three methods of reception of international law in Slovenian legal order: statutory *ad hoc* incorporation, automatic *ad hoc* incorporation and automatic standing incorporation. The main method how the treaties are incorporated in the national legal system of Slovenia is on the basis of a law on the ratification of a treaty, which is an automatic *ad hoc* incorporation. Also in this context it is notable to give regard to Article 15 (5) of the CRS which stipulates that:

[N]o human right or fundamental freedom regulated by legal acts in force in Slovenia may be restricted on the grounds that this Constitution does not recognise that right or freedom or recognises it to a lesser extent.

This provision is especially related to international human rights agreements and refers to the ‘self-executing’ character of their norms by which provisions of international instruments binding on Slovenia that determine human rights and fundamental freedoms have direct legal effects for individuals who can refer directly to them when invoking their rights. By this provision, the Constitution established the principle of the highest protection of rights, which means that a treaty can have priority even over the Constitution if it guarantees a higher level of protection of a human right.

Following these articles, it can be concluded that the international agreements are above the national legal statutes and other legislative measures but they must be in conformity with the CRS. With such a position, the international legal sources are positioned above the laws and other national legal sources but not above the Constitution, whose position is above the international agreements, as was explicitly ruled by the Constitutional Court of Republic of Slovenia.

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49 For more on the methods of reception of international law in Slovenian legal order see Olaj A., (n 48) 144.


52 ibid. In this context see Article 53 of the ECHR.


54 ‘In our constitutional system, international agreements rank above statutory provisions in the hierarchy of legal acts. According to the provision of Article 8 of the Constitution, statutes and other legislative measures shall accord with international agreements which bind Slovenia. According to the provision of paragraph 2 of Article 153 of the Constitution, statutes must conform with international agreements currently in force and adopted by the National Assembly, and regulations and other legislative measures must also conform with other ratified international agreements. To actually ensure such conformity, the constitutioner in indent 2 of paragraph 1 of
Article 3a of the Constitution regulates the transfer of the exercise of part of Slovenian sovereign rights to international organizations which are based on respect for human rights and fundamental freedoms, democracy, and the principles of the rule of law. Among the things which this Article regulates is the position of the legal sources arising out of the European Union in the Slovenian legal system. In Article 3a/III it is provided that

[L]egal acts and decisions adopted within international organizations to which Slovenia has transferred the exercise of part of its sovereign rights shall be applied in Slovenia in accordance with the legal regulation of these organizations.

This provision ensures direct applicability of EU law and recognizes its supremacy over national law.55

2.2.1 Multilateral agreements in the field of family law relations in Slovenia

Slovenia is a member of a large number of international organizations which have adopted multilateral international treaties. As a member state, Slovenia is part of the following international agreements in relation to family law issues:

2.2.1.1 Council of Europe

Slovenia acceded to the Council of Europe on 14 May 1993. In the area of cross-border family law relations and legal cooperation in civil matters, it is member to the following Conventions:

- European Convention of Human Rights;56
- European Convention on the Exercise of Children's Rights;57
- European Convention on Information on Foreign Law.58

2.2.1.2 Hague Conference on Private International Law

Slovenia has been member to the Hague Conference on Private International Law since

Article 160 of the Constitution laid down the jurisdiction of the Constitutional Court to decide upon the conformity of statutes, regulations and by-laws with international agreements adopted by the State. Thus, in the hierarchy of legal acts in Slovenia, international agreements rank above statutory provisions. Our legal system, however, does not recognize the primacy of international law over constitutional provisions. ’Rm-1/97 of 5 June 1997.

55 For more on the relation between the EU law and Slovenian legal order see, Sovdat J, (n 46) 907.
56 Official Gazette of the RS, No. 7/94 (Republic of Slovenia 33/94)
57 Official Gazette of the RS, No. 86/99, MP, No. 26/99
58 Slovenia ratified the convention on 01.04.1998 and entered into force on 02.06.1998.
18 June 1992. In the area of family law and legal cooperation in civil matters, it has been member to the following Conventions:

- The Hague Convention of 1 March 1954 on civil procedure;\(^{59}\)
- The Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters;\(^{60}\)
- The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters;\(^{61}\)
- The Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption;\(^{63}\)
- The 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;\(^{64}\)
- The Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance;\(^{65}\)

2.2.1.3 International Commission on Civil Status (ICCS)/La Commission Internationale de l'État Civil (CIEC)

The Socialist Federative Republic of Yugoslavia was a party to the International Commission on Civil Status. Slovenia acceded to the following Conventions on 01.12.1992:

- n° 1 relative à la délivrance de certain sex traitsd' actes de l'état civil destinés à l'étranger, signée à Paris le 27.09.1956 (Convention on the issue of certain extracts from civil status records for use abroad);

\(^{59}\) Ratified on 08.06.1992 Republic of Slovenia is one of the successor States to the former Socialist Federal Republic of Yugoslavia which became a Party to the Convention on 11 December 1962. On 8 June 1992 the Slovenia declared itself to be bound by the Convention.

\(^{60}\) Slovenia ratified the convention on 18.09.2000 and entered into force on 01.06.2001.


\(^{62}\) Slovenia ratified the convention on 22.03.1994 and entered into force on 01.06.1994.

\(^{63}\) Slovenia ratified the convention on 24.01.2002 and entered into force on 01.05.1994.

\(^{64}\) Slovenia ratified the convention on 11.10.2004 and entered into force on 01.02.2005.

\(^{65}\) Applicable in Slovenia as a result of an approval by an REIO since 01.08.2014.

\(^{66}\) Applicable in Slovenia as a result of an approval by an REIO since 01.08.2013.
• n° 16 relative à la délivrance d'extraits plurilingues d'actes de l'état civil, signée à Vienne le 08.09.1976 (Convention on the issue of multilingual extracts from civil status records).

2.2.1.4 United Nations

Slovenia was accepted as the 176th member state of the UN on 22 May 1992. As an independent state it has become a member of the following conventions in the area of family law and legal cooperation in civil matters by succession from SFRY:

- The Convention on the Rights of the Child, New York, 20 November 1989,\(^\text{67}\)

2.2.2 Bilateral agreements in the field of family law relations to which Slovenia is a party

Slovenia is a party to a large number of bilateral agreements.

**Algeria:**

- Agreement on legal assistance in civil and criminal matters (Pogodba o pravni pomoči v civilnih in kazenskih zadevah) dated 31 March 1982,\(^\text{68}\)

**Austria:**

- Agreement on mutual recognition and enforcement of child support obligations, (Sporazum o vzajemnem priznanju in izvršitvi odločb v preživninskih zadevah) dated 10 October 1961;\(^\text{69}\)

**Belgium:**

- Agreement on legal assistance in civil and commercial matters (Sporazum o pravni pomoči v civilnih in trgovinskih zadevah) dated 24 September 1971;\(^\text{70}\)

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\(^{67}\) Ur. l. SFRJ (Official Gazette of the Socialist Federative Republic of Yugoslavia) - International Treaties No. 15/90) to which Slovenia succeeded with the Act notifying succession to United Nations Conventions and Conventions adopted by the International Atomic Energy Agency, (Official Gazette RS Nos. 9/92, 3/1993, 9/93, 5/99), which was deposited with the Secretary General of the United Nations on 6 July 1992, who confirmed the succession as of 25 June 1991 (Notice of the Ministry of Foreign Affairs, Ur. l. RS (Official Gazette of the Republic of Slovenia) No. 7/93

\(^{68}\) Official Gazette SFRY- IT, no. 2/83

\(^{69}\) Official Gazette SFRY- IT, no. 2/63

\(^{70}\) Official Gazette SFRY- IT, no.7/74
• Convention on the recognition and enforcement of alimony decisions (Konvencija o priznavanju in izvršitvi sodnih odločb o preživljanju) dated 12 December 1973;\textsuperscript{71}

**Bulgaria:**

• Agreement on mutual legal assistance dated 23 March 1956 (Pogodba o vzajemni pravni pomoči z dne 23.03.1956);\textsuperscript{72}

**Croatia:**

• Agreement on legal assistance in civil and criminal matters (Pogodba o pravni pomoči v civilnih in kazenskih zadevah z dne 07.02.1994) dated 7 February 1994;\textsuperscript{73}

**Cyprus:**

• Agreement on legal assistance in civil and criminal matters (Pogodba o pravni pomoči v civilnih in kazenskih zadevah) dated 19 September 1984;\textsuperscript{74}

**Czech Republic and Slovakia:**

• Agreement on regulation of legal relations in civil, family and criminal matters (Pogodba o ureditvi pravnih odnosov v civilnih, rodbinskih in kazenskih zadevah) dated 20 January 1964;\textsuperscript{75}

**France:**

• Agreement on facilitating the use of the Hague Convention on Civil Procedure (Sporazum o olajšavah pri uporabi Haaške konvencije o civilnem postopku) dated 1 March 1954;\textsuperscript{76}

• Convention on the issue of copies of public register personal data and abolishing legalisation (Konvencija o izdajanju listin o osebnem stanju in o oprostitvi njihove legalizacije) dated 29 October 1969;\textsuperscript{77}

• Convention on the recognition and enforcement of judicial decisions in civil and commercial matters (Konvencija o priznanju in izvršitvi sodnih odločb v civilnih in trgovinskih zadevah) dated 18 May 1971;\textsuperscript{78}

• Convention on jurisdiction and the law applicable to family law (Konvencija o

\textsuperscript{71} Official Gazette SFRY- IT, no. 45/76
\textsuperscript{72} Official Gazette FPRY- IT, no. 1/57
\textsuperscript{73} Official Gazette RS- IT, no. 10/94
\textsuperscript{74} Official Gazette SFRY- IT, no. 2/86
\textsuperscript{75} Official Gazette SFRY- IT, no. 13/64
\textsuperscript{76} Official Gazette SFRY- IT, no. 21/71
\textsuperscript{77} Official Gazette SFRY- IT, no. 3/71
\textsuperscript{78} Official Gazette SFRY- IT, no. 7/72
pristojnosti in o zakonu, ki se uporablja na področju osebnega in družinskega prava) dated 18 May 1971; 79

Greece:
- Convention on the mutual recognition and enforcement of judicial decisions (Konvencija o vzajemnem priznanju in izvršitvi sodnih odločb) dated 18 June 1959; 80
- Convention on reciprocal legal relations (Konvencija o vzajemnih pravnih razmerjih) dated 18 June 1959; 81

Iraq:
- Agreement on legal and judicial cooperation (Pogodba o pravnom in sodnem sodelovanju) dated 23 May 1986; 82

Italy:
- Convention on the legal and judicial protection of citizens (Konvencija o pravni in sodni zaščiti državljanov) dated 6 April 1922; 83
- Convention on mutual legal assistance in civil and administrative matters (Konvencija o vzajemni pravni pomoči v civilnih in upravnih zadevah) dated 3 December 1960; 84

Macedonia:
- Agreement on legal assistance in civil and criminal matters (Pogodba o pravni pomoči v civilnih in kazenskih zadevah) dated 6 February 1996; 85

Mongolia:
- Agreement on legal assistance in civil, family and criminal matters (Pogodba o pravni pomoči v civilnih, družinskih in kazenskih zadevah) dated 8 June 1981; 86

Romania:
- Agreement on legal assistance dated 18.10.1960 with additional protocol dated 21.01.1972; 87

Russia:

79 Official Gazette SFRY- IT, no. 55/72
80 Official Gazette SFRY- IT, no.6/60
81 Official Gazette SFRY- IT, no. 7/60
82 Official Gazette SFRY- IT, no. 1/87
83 Official Gazette of Kingdom of Yugoslavia no. 42/31
84 Official Gazette SFRY- IT, no. 5/63
85 Official Gazette RS- IT, no. 11/97
86 Official Gazette SFRY- IT, no. 7/82
87 Official Gazette SFRY- IT, no. 8/61 and 4/73
• Agreement on legal assistance in civil, parental and criminal matters dated 24.2.1962,\(^8\)

**Turkey:**

• Convention on mutual relations in judicial, civil and commercial matters (3.7.1934)

**UK:**

• Convention on regulation of mutual assistance in procedures in civil and commercial matters that take place before judicial authorities (Konvencija o ureditvi medsebojne pomoči pri vodenju postopkov v civilnih in trgovinskih zadevah, ki tečejo ali utegnejo teči pred zadevnim i sodnimi oblastmi) dated 27 February 1936,\(^9\)

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\(^8\) Official Gazette SFRY- IT, no. 5/63
\(^9\) Official Gazette of Kingdom of Yugoslavia no. 116/37
Chapter II Recognition and enforcement of foreign judicial decisions from non-EU Member States in Slovenia

1. General

A foreign judicial decision can be incorporated in the Slovenian legal system only if that decision undergoes the process of recognition. So without this procedure, foreign decisions cannot have the *proprio vigore* effect in Slovenia. Therefore, all of the foreign decisions, if they intend to produce some desired effect either directly through recognition, or as it will be in most of the cases, through enforcement, must be recognized and enforced by a Court according to the relevant rules, which in the case of decisions coming from non-EU Member States (third countries) will be the rules in the PILP act of Slovenia or other binding multilateral or bilateral agreements. This distinction is rather important because other decisions coming from EU Member states will be recognized and enforced according to other EU rules.

As was stated above, the basic act that regulates recognition and enforcement of foreign judicial decisions in Slovenia is the Private International Law and Procedure Act (*Zakon o mednarodnem zasebnem pravu in postopku*). This act contains a separate chapter (Chapter Four, Articles 94-111) in which the most relevant aspects regarding the recognition and enforcement are covered: what types of decisions can be recognized and enforced in Slovenia and under which conditions and by which procedures. This sub-chapter will follow the following method of elaboration: Firstly, it will address the issues regarding what types of decisions are recognized and enforced in Slovenia and which is the competent Court for such actions. Secondly, it will consider the conditions under which a recognition can be refused. Lastly, it will refer to the procedure for recognition and enforcement.

2. Types of decisions and jurisdiction regarding recognition

The first two issues that need to be addressed regarding the recognition and enforcement of foreign decisions in Slovenia is what type of decisions can be recognized and which is the competent court that is responsible for the recognition?

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90 Article 94(1) of the Slovenian PILP act.
91 See text to n 46 Part III ch I sec 2.2.
92 See text to n 328 Part I ch II sec 2.5.
93 See text to n 1 Part III ch I sec 1.
The PILP act of Slovenia directly refers to the explanation of the types of decisions which are recognized and enforced in Slovenia. Article 94 of the PILP act of Slovenia regarding the issue of types of decisions that can be recognized and enforced in Slovenia gives a broader meaning to the term ‘foreign decisions’. It does not restrain itself only to the Court decisions but also broadens this aspect with court settlements and other decisions made by the relevant authority in the country of origin which have the same effect as judicial decisions, provided that they refer to the rationae materiae of the PILP act given in Article 1 of the same act. This aspect is particularly important in the field of family matters because the practice regarding the type of decisions is such matters differs in different states based on their traditions. The intention of Article 94 of the PILP act of Slovenia was to cover a larger area of foreign decision which would be eligible for recognition in Slovenia. In that context, courts in Slovenia will be faced with diverse family law decisions that need to produce some kind of effect in Slovenia. Article 94, by giving a broader meaning to the term ‘foreign decisions’ restrains Slovenia from disqualifying foreign decisions because they bear a different name or because the country of origin has a different procedure of rendering those decisions. Therefore, Article 94 of the PILP act of Slovenia is focused on the subject matter of the decision and not on the authorities which delivered it or the name of the decision. By such a position, the PILP act of Slovenia upholds the sovereignty of the foreign states and the national character of their legal systems. Consequently, all types of decisions (declaratory, constitutive and condemnatory), whatever their title, can be recognized and have legal effects in Slovenia, but only condemnatory decisions can be enforced, because of their nature.

Regarding the second issue ‘jurisdiction of the Courts in Slovenia regarding the recognition of foreign decisions’ this issue depends whether the recognition is sought as a main question or as a preliminary one. In Slovenia, competence to decide in independent proceedings regarding the recognition of foreign judgments is given to the district courts (Okrožna

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94Article 94(1) of the Slovenian PILP act.
95Article 94(2) of the Slovenian PILP act.
96Article 94(3) of the Slovenian PILP act.
97For example, in Norway the divorces are conducted either administratively by the County Governor (Fylkesmannen) or very rarely by the Court. See Sverdrup T., ‘Norwegian Report concerning the CEFL Questionnaire on Grounds for divorce and Maintenance between Former Spouse’ CEFL, (2002) <http://ceflonline.net/wp-content/uploads/Norway-Divorce.pdf> accessed 02 May 2015, 4.
98cf Brussels IIbis Regulation where Article 2(4) states ‘the term ‘judgment’ shall mean a divorce, legal separation or marriage annulment, as well as a judgment relating to parental responsibility, pronounced by a court of a Member State, whatever the judgment may be called’ [emphasis added], including a decree, order or decision’
Territorial jurisdiction over the recognition of a foreign judicial decision lies with any court that has substantive jurisdiction. However, such a position does not preclude the possibility that the recognition of the foreign judgment arises as a preliminary question by the executing court. If no special ruling has been rendered as to the recognition of a foreign judicial decision, any court may decide thereon as on a preliminary question, however, with an effect referring only to this procedure.

3. Conditions for recognition and enforcement of foreign judicial decisions in Slovenia

Every country is free to impose conditions for recognition and enforcement based on its prerogatives derived from their sovereignty. Historically this has led to different systems and different conditions for recognition and enforcement. Nevertheless, comparatively there are certain common requirements for the recognition and enforcement of foreign judgments. For example, the most common requirement are that the judgment should be final, that the judgment should not violate either procedural or substantive public policy, and that the judgment is not contrary to another judgment between the parties. Other requirements refer to issues of jurisdiction, proper service and some even include a fraud (fraude à la loi) or choice-of-law requirement.

The conditions for the recognition of foreign judicial decisions in Slovenia coming from third countries are given in Articles 95 to 103 of the PILP act of Slovenia. The intention of the lawmaker was to provide for controlle limite of foreign judicial decisions in Slovenia, meaning that the Court is limited to the conditions provided in the PILP act and cannot change the foreign decision in its substance. In that way the Court is put in a position to allow or refuse recognition only on grounds for non-recognition in the PILP act of Slovenia.

Another distinction between recognition and enforcement as separate processes of the
The effectuation of foreign decisions in Slovenia arise from Article 103 of the PILP act. This Article refers to the conditions for enforcement of foreign judicial decisions in Slovenia. In this Article it is provided that in the course of the enforcement of foreign judicial decisions, the Court will be limited to the requirements provided in Articles 95 to 101 of the PILP act and that the applicant must, in addition to the requirements given in Article 95 also provide a certificate of enforceability of that decision issued under the law of the country of origin of the decision.

All of these conditions regarding recognition and enforcement are given as positive or negative conditions (assumptions). The positive conditions for recognition and enforcement are given in Article 95 and 103 of the PILP act, while all the other conditions are given as negative. This part will firstly analyze the positive conditions (formal requirements) for the recognition and enforcement of foreign decisions and then it will discuss the negative conditions.

### 3.1 Positive conditions for recognition and enforcement of foreign judicial decisions in Slovenia (formal requirements)

The positive conditions which refer to formal requirements for recognition and enforcement of foreign judicial decisions are given in Article 95 and Article 103 of the PILP act of Slovenia. These conditions represent requirements where the recognition and enforcement is admitted only if the existence of certain circumstances is determined. The proof of these requirements needs to accompany the application for the recognition and already in that stage of the recognition procedure they need to be fulfilled so the foreign decision can be recognized and/or enforced. If the court fails to recognize (positively) the existence of these requirements, it will refuse the recognition.

Article 95 provides that the applicant for recognition of a foreign judicial decision shall attach to his application:

- the foreign judicial decision or authenticated copy thereof and
- the certificate of a competent foreign court or another authority on finality of

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110 Article 103 of the PILP act.
111 The applicant must provide the foreign judicial decision which is to be recognized, certificate of finality of the decision and translation in the language of the Court.
112 Wedam Lukić D., Civilno Izvršilno Pravo, (n 7) 8.
113 Ibid 9.
the decision under the law of the State in which the decision was rendered.

This is a very important aspect: because of the diversity of languages existing in the world, the party that seeks recognition must produce a certified translation of a foreign judicial decision in the language officially used by the Court.115

Regarding the enforcement of foreign decisions, Article 103 starts with the same formal requirements for the enforcement of the foreign decisions as those which were are stipulated in Article 95.116 However, because of the nature of the enforceable judgments, the PILP act of Slovenia in Article 103 seeks additional formal requirements, where the applicant for enforcement of a foreign judicial decision must also produce a certificate on enforceability according to the law of the country of origin. This act will serve as a proof that the foreign judgment is enforceable according to the law of the country of origin.117

The reason for the creation of these positive requirements is that they represent proof that the decision is final and cannot be altered in the Country of origin. However, regarding the finality of the decisions in family matters, especially regarding parental responsibility issues, it can be difficult to provide for absolute finality, because generally these decisions can be altered if new circumstances develop.118 Nevertheless, the formal requirements are particularly important and the courts investigate and determine these conditions on its own motion, ex officio. The burden to prove the existence of the finality and the enforceability of the foreign judicial decision is on the party seeking recognition or enforcement.

In contrast, the PIL act of 1982, the predecessor of the PILP act of Slovenia, didn’t contain specific rule about the certified translation of the foreign judicial decision in the language used by the Court.119 Almost all of the later PIL laws enacted after the PIL act of 1982 contain specific rules regarding the translation of the foreign decision in the language of the Court.120 Regarding the formal requirements, they are very similar to the ones provided in the Articles 95 and 103 of the PILP act of Slovenia.121

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115 Article 95(2) of the Slovenian PILP act.
116 Article 103 of the Slovenian PILP act.
117 Dika M. and Knežević G. and Stojanović S., (n 114) 317.
118 Text to n 690 Part II ch V sec 5.2.1.2.
120 See Article 101 Macedonian PIL Act; Article 142 Montenegrin PIL act; Article 187 of the Serbian draft PIL act. In this context see also Article 119(2) and (3) of the Bulgarian PIL act.
121 See Article 101 Macedonian PIL Act; Article 142 Montenegrin PIL act; Article 187 of the Serbian draft PIL act. In this context see also Article 119(2) and (3) of the Bulgarian PIL act.
3.2. Negative conditions for recognition and enforcement of foreign judicial decisions in Slovenia

All the other conditions for the recognition and enforcement of foreign judicial decisions represent negative conditions. These conditions refer mainly to particular situations where the procedural aspects of the rendering of the foreign decision contain deficiencies and because of the existence of such deficiencies the foreign judicial decision cannot be recognized in Slovenia, and secondarily to the substantive aspect where in exceptional cases the court can entertain in an overview of the applied substantive law. However, the substantive aspect of these requirements does not mean that the court can entertain in-depth analysis on the substantive issues. Slovenia has accepted the *controle limite* system of recognition and enforcement by which the court is restrained from analyzing the application of the substantive (material) law of the country of origin. However, a limited amount of such analysis is allowed in the case of the public policy exception. \(^{122}\)

Negative conditions are requirements where the recognition and enforcement is admitted unless existence is determined of certain circumstances that prevent the recognition and enforcement. \(^{123}\) These negative conditions are formulated as legal obstacles. \(^{124}\) Such an understanding can be derived from the actual construction of the wording of the Articles where it is stated that ‘*A foreign judicial decision shall not be recognized if...*’ They are modeled as such so they shift the burden of proof from the applicant to the person against whom the decision is rendered, because it will be in their favor to prove that some legal obstacles exist which will prevent the recognition and enforcement. \(^{125}\) However this doesn’t mean that the Court is free from examining the legal obstacles, on contrary, the Court has the duty to examine some conditions, but only those which are determined *ex officio*. \(^{126}\) Eventually if the Court, despite its effort, does not prove that these legal obstacles do or do not exist, then it will be considered that they do not exist and the application will be upheld. \(^{127}\) It could be said that it is presumed that legal obstacles do not exist until their existence is proven. \(^{128}\)

Some of the conditions the Courts in Slovenia will examine *ex officio* and some upon objection by the party which opposes the recognition and enforcement. The conditions which

\(^{122}\) Text to n 227 Part III ch II sec 3.2.4.
\(^{123}\) Wedam Lučić D., Civilno Izvršilno Pravo (n 7) 9.
\(^{124}\) Dika M. and Knežević G. and Stojanović S., (n 114) 330
\(^{125}\) Varadi and others (n 4) 549.
\(^{126}\) ibid.
\(^{127}\) Dika M. and Knežević G. and Stojanović S., (n 114) 549.
\(^{128}\) Dika M. and Knežević G. and Stojanović S., (n 114) 330
the Courts of Slovenia examine *ex officio* are referring to:

- exclusive jurisdiction of Slovenian courts (Article 97 of the Slovenian PILP act);
- final judgment between the same parties on the same subject matter (Article 99 (1) of the Slovenian PILP act);
- public policy (Article 100 of the Slovenian PILP act);
- reciprocity (Article 101 of the Slovenian PILP act).

The other conditions, which the Court examines upon objection by the party, are:

- violations of the right of defense (Article 96 of the PILP act of Slovenia);
- exorbitant jurisdiction of the courts of the country of origin based exclusively on:
  - the plaintiff’s citizenship (Article 98(1)(1) of the Slovenian PILP act);
  - the presence of the defendant’s property in the State in which the decision was rendered (Article 98(1)(2) of the Slovenian PILP act);
  - service in person of the summons or another document instituting the proceedings to the defendant (Article 98(1)(3) of the Slovenian PILP act);
- violation of the agreement on jurisdiction of the Court of Slovenia (Article 98(2) of the Slovenian PILP act);

In the PILP act of Slovenia there are separate rules for the recognition and enforcement of foreign judicial decisions that refer to the status of persons. These rules are provided in Article 102 of the PILP act of Slovenia.

### 3.2.1 Violations of the jurisdiction of Slovenian courts

In most legal systems, the proper determination of jurisdiction is the most important condition for the recognition and enforcement of foreign judicial decisions. The affirmation of the properly determined jurisdiction is vital for international cooperation between the legal systems and this coordination of the legal systems is one of the goals that private international law wants to achieve. With the positioning of the proper determination of the jurisdiction as a condition for recognition and enforcement, legal systems are also providing for a system of controlling the coordinating purpose of PIL and control of the assumption that legal orders take into consideration the proper determination of the jurisdiction. Every country can determine their own rules upon which international jurisdiction is determined. Usually most countries

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129 Živković M. and Stanivuković M. (n 8) 421.
130 Varadi and others (n 4) 549.
131 ibid.
determine unilateral jurisdictional rules, which determine jurisdiction of the national courts in situations with foreign elements (direct jurisdiction).\(^\text{132}\) However, rules on jurisdiction are not binding upon another State's decision to recognize foreign decisions.\(^\text{133}\) If the State of enforcement claims exclusive jurisdiction in an area, recognition of a foreign decision in that area is usually denied.\(^\text{134}\) Another method is the application of the 'mirror principle', where the Court of enforcement imposes its grounds of jurisdiction as a standard which the foreign judicial decision (the foreign legal system) needs to meet in order for the decision to have effect in the country of enforcement.\(^\text{135}\) However, the right proportion of coordination between these jurisdictional criteria (or search for ‘natural forum’) is hard to achieve,\(^\text{136}\) but is vital for the facilitation of the international cooperation, because otherwise this can lead to unwanted results such as forum shopping and retorsion. The last resort method for how legal systems cope with such unwanted results are by providing for conditions that refer to jurisdiction.

The Slovenian PILP act does not contain a ‘mirror principle’ rule, but rather contains several types of jurisdictional conditions for the recognition and enforcement of foreign decisions. They refer to the violation of the exclusive jurisdiction of the courts of Slovenia, exorbitant jurisdiction of the country of origin, and lastly violation of the prorogation of jurisdiction of Slovenian courts.

### 3.2.1.1 Exclusive jurisdiction of the courts of Slovenia

Article 97 of the Slovenian PILP act provides that:

[A] foreign judicial decision shall not be recognized if the exclusive jurisdiction over the matter involved lies with the court or some other authority of the Republic of Slovenia.\(^\text{137}\)

Exclusive jurisdiction can be provided by the rules of the PILP act or another statute.\(^\text{138}\) The Slovenian courts according to PILP act shall have exclusive jurisdiction in the cases that refer to:

- establishment, dissolution and changes in the legal status of companies, provided that the principle place of business is in Slovenia (Article 60 of the Slovenian PILP act);

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\(^\text{132}\) See Živković M. and Stanivuković M. (n 8) 421-423


\(^\text{134}\) ibid.

\(^\text{135}\) See for example Section 328 (1)(1) of the German Code on Civil Procedure- Zivilprozessordnung (ZPO)

\(^\text{136}\) Michaels R., Recognition and Enforcement of Foreign Judgments (n 133) 6.

\(^\text{137}\) The provision is identical with Article 89 of PIL act of 1982, Article 104 of the Macedonian PIL act.

\(^\text{138}\) Article 50 of the Slovenian PILP act.
- disputes relating to entries into public registers kept in Slovenia (Article 61 of the Slovenian PILP act);
- disputes over filling of applications and validity of inventions and distinctive marks if the application was filed in Slovenia (Article 62 of the Slovenian PILP act);
- permission and carrying out execution of enforcement if the execution is carried out in the territory of Slovenia (Article 63(1) of the Slovenian PILP act);
- disputes between the executory and the bankruptcy proceedings if the proceedings are instituted before the court of Slovenia (Article 63 (2) of the Slovenian PILP act);
- disputes referring to property rights on immovable property, disputes over trespassing on immovable property, as well as disputes relating to lease or rent of immovable property if such property is situated in Slovenia (Article 64 (1) of the Slovenian PILP act);\(^{139}\)
- matrimonial disputes when the defendant is a Slovenian citizen and has domicile in Slovenia (Article 68 (2) of the Slovenian PILP act);
- disputes relating to recognition or contesting of paternity or maternity when the action is brought against a child with Slovenian citizenship and with domicile or temporary residence in Slovenia (Article 71(2) of the Slovenian PILP act);
- disputes relating to the care and education of children who are under the care of parents, if the defendant and the child are Slovenian citizens and if they both have domicile in Slovenia (Article 73 (2) of the Slovenian PILP act);\(^{140}\)
- declaration of a death of a missing Slovenian citizen, irrespective of his domicile (Article 78 (1) of the Slovenian PILP act);
- disposal of immovable property of a deceased Slovenian citizen if the property is situated in Slovenia (Article 79 (1) of the Slovenian PILP act);
- disposal of immovable property of a deceased foreign citizen if the property is situated in Slovenia (Article 80 of the Slovenian PILP act);
- disposal of immovable property of a deceased person without citizenship, of a deceased person whose citizenship cannot be established, or of a deceased person with the status of refugee, if the property is situated in Slovenia (Article 81(1) of the Slovenian PILP act);

\(^{139}\) This also extends to situation where the rights to immovable property are subject to non-litigious civil procedure (Article 64(2) of the Slovenian PILP act).
\(^{140}\) This rule applies to other Slovenian authorities (Article 73 (3) of the Slovenian PILP act).
• in cases where a minor applying for marriage license is a Slovenian citizen or if the persons wishing to enter into marriage are Slovenian citizens and marriage is celebrated abroad (Article 82(2) of the Slovenian PILP act);
• over decision for adoption and termination of adoption of a person who is Slovenian citizen and has domicile in Slovenia (Article 83(1) of the Slovenian PILP act); and
• in matters of guardianship relating to Slovenian citizens, irrespective of their domicile (Article 84 of the Slovenian PILP act).

Nevertheless, particularly important for the recognition and enforcement of matrimonial decisions is Article 97 (2) of the Slovenian PILP act which provides that

[If the recognition of a foreign judicial decision rendered in a dispute arising from marriage is requested by the respondent, or if such a request is made by the petitioner and the respondent does not object thereto, the exclusive jurisdiction of the court of Republic of Slovenia shall not impede the recognition thereof.

This rule is referring to the exclusive jurisdiction of Slovenian courts provided in matrimonial disputes when the defendant is Slovenian citizen and has domicile in Slovenia (Article 68 (2) of the Slovenian PILP act). Generally the exclusive jurisdiction of Slovenian courts represent an absolute legal obstacle for recognition. However, Article 97(2) of the Slovenian PILP act departs from such a position in that the exclusive jurisdiction is not a legal obstacle for the recognition if the respondent requests recognition of the decision in matrimonial matters or if the request is made by the petitioner and the respondent does not object thereto. With this rule the legislator left a possibility of a tacit disposition and with that indirectly to derogate the exclusive jurisdiction of the Slovenian courts. This makes sense, especially in the context of the coordination of different legal orders and different treatment of same legal relationship in front of different courts. It can be concluded that the exclusive jurisdiction condition for the recognition and enforcement represents an absolute legal obstacle for recognition in Slovenia, except in matrimonial matters where it represents relative legal obstacle.

This Article was drafted on the basis of Article 89 of the PIL act of 1982. An identical rule is contained in the Macedonian PIL act in Article 104. However, the new Montenegrin PIL act and the Serbian draft PIL act have departed from this rule. These PIL acts have

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141 Dika M. and Knežević G. and Stojanović S., (n 114) 292
142 ibid.
143 This means that the Court can recognize foreign decision in matrimonial matters conditionally if the respondent does not object such recognition. See Dika M. and Knežević G. and Stojanović S., (n 114) 293.
144 Article 144 and 145 of the Montenegrin PIL act.
145 Article 185 (b) and (c) of the Serbian draft PIL act.
provided for the combination of the non-recognition of a foreign judicial decision with the violation of the exclusive jurisdiction of the courts of the country of enforcement and a ‘mirror principle’ rule. In doing so, these PIL acts have left out the part regarding the exception of the exclusive jurisdiction requirement as a legal obstacle in the cases of matrimonial matters if the request is made by the petitioner and the respondent does not object thereto. Whether such a combination of exclusive jurisdiction protection and the ‘mirror principle’ rule promotes the idea of ‘natural forum’ is not so clear. On the one hand, such a combination viewed from the exclusive jurisdiction protection perspective provides for protection of the territoriality of the courts of enforcement in specific cases which are provided with the exclusive jurisdiction and with that, protection of the sovereignty of the state of enforcement. From the other point of view, the imposing of the ‘mirror principle’ rule means broadening the jurisdictional criteria of the state of enforcement towards other sovereignties. It can be even said that such a combination imposes double standards, because the court of enforcement offends and defends the territoriality and the sovereignty of the courts. However, the need for coordination between the legal orders asks for certain measures, which can be achieved by this combination of exclusive jurisdiction and the ‘mirror principle’ rule. Nevertheless, proportionality is required for balanced implementation of the control of the jurisdictional requirements. There are certain preconditions that are required, mainly that the exclusive jurisdictional rules have to be kept to a minimum and the importation of standardized jurisdictional criteria. Without this unified approach, the combination of exclusive jurisdiction protection and the ‘mirror principle’ rule can discoordinate the judicial systems and provide for lack of legal certainty.

3.2.1.2 Exorbitant jurisdiction of the Country of Origin

Exorbitant jurisdiction can be defined as a jurisdiction which is prohibited according to the accepted rules of international law, because it is based on criteria which do not represent a solid connecting ground between the parties, the dispute and the court. In international litigation, there are commonly accepted jurisdictional criteria which play an important role in the coordination between the legal orders. For example, it is accepted that the domicile of the defendant is a basic jurisdictional criterion regarding the general jurisdiction. It would represent an exorbitant jurisdictional criterion if the general jurisdiction were established according to

146 See Article 144 of the Montenegrin PIL act; Article 185(b) of the Serbian Draft PIL act.
147 Živković M. and Stanivuković M. (n 8) 171.
the citizenship of the plaintiff.\textsuperscript{148} When it is determined that there is expansion of the jurisdiction of other legal systems, the countries usually provide for \textit{forum reciprocum vel retorsionis}, or they do not recognize and enforce foreign judicial decision rendered by courts which founded their jurisdiction upon such criteria. The mirror effect of the \textit{forum reciprocum vel retorsionis} is given in Article 51 of the PILP act of Slovenia. This rule provides that the Slovenian courts can base their jurisdiction upon criteria which are not given in the provisions of jurisdiction of the Slovenian courts, but on the basis of jurisdicational criteria of foreign states, provided that:

- the respondent is a foreign citizen; and
- in that foreign state there is jurisdiction of courts in cases against Slovenian citizens based on criteria that are not contained in the provisions of jurisdiction of Slovenian courts.

However, if this aspect does not deter other legal orders to provide for meaningful jurisdictional criteria, then the last resort is Article 98, which provides that Slovenian courts would, upon objection of a person against whom the decision was rendered, refuse to recognize a foreign judicial decision if the jurisdiction of a foreign court was based exclusively on one of the following circumstances:

- the plaintiff’s citizenship (Article 98(1)(1) of the Slovenian PILP act);
- the presence of the defendant’s property in the State in which the decision was rendered (Article 98(1)(2) of the Slovenian PILP act);
- service in person of the summons or another document instituting the proceedings upon the defendant (Article 98(1)(3) of the Slovenian PILP act).

With this provision, the legislator protects the domestic legal order from decisions rendered by courts of foreign countries which were lacking a reason upon which they based their jurisdiction. In this aspect, Article 98 of the PILP act is a two-fold rule which directly protects the domestic legal order and indirectly provides for enhanced coordination between the countries’ legal orders by providing for some boundaries in the sovereign rights of the countries to envisage jurisdictional criteria upon which they will construct their legal order in an international context.

The PIL act of 1982 didn’t contain a similar condition for recognition of foreign judicial decisions. In comparison with the other PIL act, the Slovenian PILP act has more comprehensive criteria for exorbitant jurisdiction as a legal obstacle for recognition. For

\textsuperscript{148}Article 14 of the French Civil Code (Code civil)
example, the Macedonian PIL act provides only for the criterion of citizenship as a base for exorbitant jurisdiction and the Montenegrin PIL act provides a general rule on exorbitant jurisdiction, while the Serbian Draft of the PIL act contains a similar general rule on exorbitant jurisdiction, but also specifying that the Serbian courts will recognize a foreign judicial decision if the foreign court based the jurisdiction on jurisdictional criteria which are the basis for jurisdiction in the PIL act of Serbia. The Bulgarian PIL act contains a ‘mirror principle’ rule which provides that the Court will recognize a foreign judicial decision if the foreign Court had jurisdiction according to the provisions of the Bulgarian PIL act, but not if the nationality of the plaintiff or the registration thereof in the State of the Court seized was the only ground for foreign jurisdiction over disputes in rem. The manifestation of the full potential of the ‘mirror principle’ rules can be seen specifically in the cases regarding the protection of the domestic legal order against exorbitant jurisdictional criteria of the foreign courts. These rules fulfill two goals: they protect the domestic jurisdictional regime, but also they provide for a certain unification of the jurisdictional criteria. However, as was the case with exclusive jurisdiction, certain preconditions (minimum exclusive jurisdiction rules and importation of standardized jurisdictional criteria) are required in order for the ‘mirror principle’ rules to have its full effect.

3.2.1.3 Violation of the prorogation of jurisdiction of Slovenian courts

Party autonomy has been well established as a connecting factor in the situations when the parities choose their applicable law. This opportunity is often provided for them in the cases of contractual obligations. However, recent trends show this opportunity being provided in non-contractual obligations, divorce, maintenance obligations and succession. In particular cases, parties can use their procedural party autonomy and

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149 Article 105(1) of the PIL act of Macedonia.
150 Article 145 of the PIL act of Montenegro.
151 Article 117 (1) of the Bulgarian PIL act.
152 Varadi and others (n 4) 375
156 See Article 15 of the Maintenance Regulation which refers to the Hague Protocol on the Law Applicable to Maintenance Obligations of 23 November 2007 where in Article 8 it is provided that the parties may at any time designate the applicable law regarding maintenance obligations.
prorogate jurisdiction of a court\textsuperscript{158} or they can submit their disagreement to arbitration.\textsuperscript{159} In the PILP act of Slovenia, this possibility is provided in such a way that the parties can prorogate jurisdiction of Slovenian courts (and derogate the foreign jurisdiction) or they can prorogate foreign jurisdiction (and derogate the domestic one). The \textit{prorogation jurisdictio}nis is conducted by the parties by reaching an agreement of jurisdiction.\textsuperscript{160}

Article 98(2) of the Slovenian PILP act represents a safeguard of the parties’ autonomy manifested in the jurisdictional agreement of jurisdiction of Slovenian courts. With this provision the Court, upon objection of a person against whom a foreign judicial decision was rendered, will refuse to recognize the foreign decision in the cases when the court rendering the decision failed to observe the agreement on jurisdiction of Slovenian courts. This condition is not considered \textit{ex officio}, but on objection on the parties, namely the party against whom the recognition is sought.

The PIL act of 1982 didn’t contain a similar condition for the recognition of foreign judicial decisions. The Macedonian PIL act followed the rules of the Slovenian PILP act and introduced that legal requirement. However, the most recent PIL acts (Belgian, Bulgarian, Montenegrin and Serbian draft) have not provided for this specific rule. Instead the Belgian, Montenegrin and the Serbian draft of the PIL acts have taken an indirect approach by providing that the choice-of-court-agreements have an exclusive jurisdictional character (if not otherwise determined by the parties)\textsuperscript{161} and that the foreign judgments will not be recognized if the Court of recognition has exclusive jurisdiction.\textsuperscript{162} The Bulgarian PIL act gives an exclusive jurisdictional character to the choice-of-court-agreements,\textsuperscript{163} but fails to refer to exclusive jurisdiction as a condition for recognition. Instead it only provides for the ‘mirror principle’ rule as a condition for the recognition and enforcement of foreign decisions, stating that the judgments and authentic acts of the foreign courts and other authorities shall be entitled to recognition and enforcement where:

\begin{quote}
[the foreign court or authority had jurisdiction according to the provisions of Bulgarian law, but not if the nationality of the plaintiff or the registration thereof in the State of the court seized was the only ground]
\end{quote}

\begin{footnotesize}
\begin{enumerate}
\item[158] Varadi and others (n 4) 507.
\item[159] Redfern A. and others, Redfern and Hunter on International Arbitration, Oxford University press, (2009), 1.
\item[161] See Article 6 of the Belgian PIL act, Article 104 of the PIL act of Montenegro and Article 25 of the Serbian draft of PIL.
\item[162] See Article 25(1)(7) of the Belgian PIL act, Article 144 of the PIL act of Montenegro and Article 185(b) of the Serbian draft of PIL act.
\item[163] Article 23 and 24 of the Bulgarian PIL act.
\end{enumerate}
\end{footnotesize}
for the foreign jurisdiction over disputes in rem.\textsuperscript{164}

The effect of both approaches, the one taken in the Slovenian and the Macedonian PIL acts, and the other in the Bulgarian, Montenegrin PIL acts and the Serbian draft of the PIL act, is the same: foreign judgments are not recognized if they violate the allowed and rightful parties’ choice-of-court-agreement. However, the second approach seems to raise the awareness of the Courts and the importance of the choice-of-court-agreement by providing them with exclusive jurisdictional character (and also allowing them to opt out if they choose to), and protecting this aspect together with the other situations where exclusive jurisdiction is provided. In this manner, the Countries are recognizing the parties’ autonomy to freely choose the forum in front of which they intend to settle their dispute and obtain a decision which can then be recognized and enforced in other countries, a tendency that is in line with the development of private international law in general.\textsuperscript{165}

Slovenia should follow these developments in private international law. \textit{De lege ferenda} for the prorogation iurisdictions cases there are certain requirements that should be met, namely that the Slovenian authorities should provide that the choice-of-court-agreements have exclusive jurisdictional character (if not otherwise determined by the parties) and that the foreign judgments will not be recognized if there is exclusive jurisdiction of the Court of recognition.

In the context of the jurisdictional requirements \textit{de lege ferenda}, Article 97 and 98 of the Slovenian PILP act should be amended with two rules which will be as following:

“A foreign judicial decision shall not be recognized if the exclusive jurisdiction over the matter involved lies with the court or some other authority of the Republic of Slovenia.”

“A foreign judicial decision shall not be recognized if the courts of the state to which the foreign judgment belongs ascertained its international jurisdiction according to jurisdictional criteria which are not provided in the Slovenian law for resolving the same kind of dispute.”

3.2.2 Violations of the right of defense

In most legal systems, the right of the defense of the opposing party (the party against whom the foreign judicial decision is to be enforced in the Country of enforcement) is protected

\textsuperscript{164} Article 117 (1) of the Bulgarian PIL act.
\textsuperscript{165} See Article 5(1)(d) of the Proposed Draft Text on The Recognition and Enforcement of Foreign Judgments, Preliminary Document No 1 of April 2016 for the attention of the Special Commission of June 2016 on the Recognition and Enforcement of Foreign Judgments.
in the procedure for recognition and enforcement against severe violations by the judicial authorities of the Country of origin.\textsuperscript{166} However the methods through which this right is protected vary. In some countries the protection is qualified under the principle of ‘natural justice’ and is protected by public policy;\textsuperscript{167} other countries specifically refer to proper service as a violation of the right of defense, but differ on the standards according to which the violation is considered.\textsuperscript{168} Another very important aspect for the recognition and enforcement and the protection of the right of defense is the aspect of equality of arms and the hearings of both of the parties.

Article 96 of the Slovenian PILP act borrows heavily from Article 88 of the PIL act of 1982, however there are slight differences. Specifically, Article 96 of the Slovenian PILP act provides that:

The court of the Republic of Slovenia shall refuse the recognition of a foreign judicial decision if upon objection the person against whom the decision was rendered it has been established that due to irregularities in the proceedings he had no opportunity to participate therein.

This paragraph is identical to the one in Article 88 of the PIL act of 1982.\textsuperscript{169} The second paragraph provides for \textit{in concreto} cases when is considered that these legal obstacles exist.\textsuperscript{170} Article 96 (2) of the Slovenian PILP act states that

In particular, a person against whom a foreign judicial decision was rendered shall be considered as having no opportunity to participate in the proceedings if the summons, the document or the ruling instituting the proceedings were not served upon him in person or if service in person was not even tried, except when the person pleaded to the merits of the plaintiff’s claim in the first instance procedure.’

In this aspect ‘…if service in person was not even tried…’ Article 96(2) of the Slovenian PILP act and Article 88(2) of the PIL act of 1982 differ. This aspect was not provided in the

\textsuperscript{166} Živković M. and Stanivuković M. (n 8) 423.

\textsuperscript{167} See France for example, Article 509 of Code de procedure civile provides ‘Les jugements rendus par les tribunaux étrangers et les actes reçus par les officiers étrangers sont exécutoires sur le territoire de la République de la manière et dans les cas prévus par la loi (Judgements rendered by foreign Courts and deeds received by foreign officers shall be enforceable on the territory of the French Republic in the manner and under the circumstances specified by law).’ In the Cornelissen Cass.Civ February 20th, 2007 n°05-14082, the Cour de cassation ruled that French courts must verify that the foreign Judgment meets 3 conditions: The foreign Court has proper jurisdiction under French law, the foreign Judgment complies with French procedural and substantive public policies and that the foreign Judgment was rendered without fraudulent forum shopping (evasion of the law). Their application is cumulative and applicable in situations when France haven’t signed international treaty.

\textsuperscript{168} These standards may be judged according to the country of origin (Peru, Germany), country of recognition (Brazil) and the Country of the residence or habitual residence of the party which need to be served (Swiss PIL act Article 27 (2)(a)). For more on the standards of proper service see Živković M. and Stanivuković M. (n 8) 423.

\textsuperscript{169} Also this rule has taken over the ambiguous \textit{rationae personae} whose procedural rights were infringed that is ‘…the person against whom the decision was rendered…’ This construction provides for wide range of persons (not only the parties but also third persons) whose right of fair trial can be infringed (Dika M. and Knežević G. and Stojanović S., (n 114) 289). The more appropriate \textit{rationae personae} of this rule should be ‘…the person against whom the recognition is sought…’. See also Kramberger Škerl J., Javni red pri priznanju in izvršitvi tujih sodnih odločb, (n 108) 266).

\textsuperscript{170} Dika M. and Knežević G. and Stojanović S., (n 114) 287

The legal obstacle provided in Article 96 of the Slovenian PILP act against the recognition and enforcement of a foreign judicial decision represents a negative condition and the Court examines it upon objection by the party. The second paragraph represents a presumption according to which the decision which was rendered in a process that consists of a violation of the rights of defense of the party against whom the recognition and enforcement is sought. Article 96(2) consists several in concreto ‘scenarios’ that have to exist in case a defense based on this provision is raised. The first type of scenarios refer to specific situations where the summons, the document or the ruling instituting the proceedings, was not served upon the person against whom enforcement is sought. The second type of scenarios is regarding the situations where service in personam was not even tried. However, from the second sentence of the same paragraph it can be concluded that this presumption is rebuttable. In this case the burden of proof that the person has entertained proceedings on the merits in first instance shifts to the person who applied for recognition and enforcement.

In the PIL act of Macedonia, the Slovenian approach was followed. However the in concreto scenarios were broadened with other scenarios such as ‘...if service in person was not even tried... ’ aspect, but with difference in respect to the reference to the law according to which the service needs to be conducted, which is contained in the PIL act of Macedonia. The Montenegrin PIL act contains a very similar rule, but it differs slightly by specifically referring to the scenario where the right of the defense was obstructed or denied to the party by not producing enough time for the preparation for the proceedings. The Bulgarian PIL act contains a more general rule where as a requirement for the protection of the right of defense, the defendant needs to be served with a copy of the statement of action, the parties need to be duly summoned and the fundamental principles of Bulgarian law related to defense of the parties must not be compromised. However, the defendant in the proceedings for recognition and enforcement of foreign judicial decision cannot invoke this violation if he could have raised it before the foreign court. The Belgian PIL act contains merely a general rule that the right

172 Dika M. and Knežević G. and Stojanović S., (n 114) 291.
173 ibid.
174 ‘...in a way provided by the law on procedure of the State in which the decision was rendered... ’ Article 103 of the PIL act of Macedonia.
175 Article 103 (2) of the PIL act of Macedonia.
176 Article 143 (2) of the PIL act of Montenegro.
177 Article 117 (2) of the Bulgarian PIL act.
178 Article 120 (2) of the Bulgarian PIL act. This rule is based on Article 34(2) of the Brussels I Regulation. Similar
of defense must not be violated.\textsuperscript{179} The Serbian Draft PIL act contains the most detailed rule, providing for several safeguards to the ‘right of defense’ provided to the parties.\textsuperscript{180} It starts with a slight variation of Article 88 (2) of the PIL Act of 1982 and provides that

The party had no opportunity to participate in the proceedings:
- if the summons, the document or other act instituting the proceedings were not served upon him in person and if service in person was not even tried, except when the person pleaded to the merits of the plaintiff’s claim in the first instance procedure.

The next aspect refers to the cases where the party had been deprived of real possibility in the proceedings leading to the rendering of the decision to present his/her views. Following this scenario, the Serbian Draft PIL Act provides that the ‘right of defense’ (similarly to the Montenegrin aspect) covers the proper time for the preparation of its position and arguments, but also specifies the timeframe – from the time of the service of the act instituting the proceedings until the first hearing. Lastly, the Serbian PIL draft provides that the ‘right of defense’ also covers personal service to the party that didn’t participate in the proceedings and service in person was not even tried.\textsuperscript{181}

The right of every person to have a fair trial is a universal right.\textsuperscript{182} Moreover, the protection of this right is extended in the \textit{exequatur} procedures. The respect of fair trial in the country of origin as a prerequisite for the recognition and enforcement of a foreign decision represents a common standard in the national PIL acts and in the international agreements and EU Regulations.\textsuperscript{183} This ‘universal’ aspect of the protection of the right of a fair trial is inseparably connected to the duties imposed by the ECHR (namely Article 6(1)).\textsuperscript{184} According to the practice of the ECtHR, countries are obliged, before authorizing an enforcement, to consider if the parties had been able to have a fair trial in the Country of Origin.\textsuperscript{185} However, a

\textsuperscript{179} Article 25(2) of the Belgian PIL act.
\textsuperscript{180} Article 185 (e) of the PIL draft act of Serbia.
\textsuperscript{181} Article 185 (e) of the PIL draft act of Serbia.
\textsuperscript{182} Article 6(1) of the ECHR states:
‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice’.
\textsuperscript{183} Text to n 652 Part II ch V sec 5.2.1.1.4.2 and text to n 763 Part II ch V sec 5.2.1.2.2.3.
\textsuperscript{185} Pellegrini v. Italy, [2001] ECHR Rep. VIII 369, although this case raised more questions than answers in particular regarding the standards of Article 6(1) of the ECHR which should be applied in cases regarding recognition and enforcement, see Kiestra R.L., (n 33) 254-259.
certain ambiguity exists in terms of how this right can be protected. In cases of recognition and enforcement in connection with Article 6(1) of the ECHR, the foreign judgments which contain some procedural deficiencies, which result in infringement the right of a fair trial, could be denied recognition and/or enforcement upon the conditions of public policy and upon the right of defense.\footnote{Fawcett J.J., The Impact of Article 6(1) of the ECHR on Private International Law (n 184) 24.} \textit{Krombach} case\footnote{Case C-7/98 \textit{Dieter Krombach v André Bamberski.}, [2000] ECR I-1935} influenced the national legal systems in the manner that in the EU it determined the content of (procedural) public policy by a direct reference to Article 6 of the European Convention on Human Rights and to the CJEU’s case-law.\footnote{Hess B. and Pfeiffer T., ‘Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law’ (European Parliament 2011) <www.europarl.europa.eu/studies> accessed 5 May 2016, 13. More on this issue see, Kramberger Škerl J., \textit{European Public Policy (With an Emphasis on Exequatur Proceedings)}, Journal of Private International Law vol.7 (2011) 466-477; Kramberger Škerl J., \textit{Evropeizacija javnega reda v mednarodnem zasebnem pravu}, Pravni letopis, Inštitut za primerjalno pravo pri Pravni fakulteti v Ljubljani, Ljubljani (2009) 354-358; Hoško T., \textit{Public Policy as an Exception to Free Movement within the Internal Market and the European Judicial Area: A Comparison}, Croatian Yearbook of European Law and Policy, 10 (2014), 201-202, Kiestra R.L. (n 33) 248 et seq.} Prior to \textit{Krombach}, Article 6(1) of the ECHR was used by German Courts as guidance on the question of proper service.\footnote{Fawcett J.J., The Impact of Article 6(1) of the ECHR on Private International Law, (n 184) 28.} Thus, such overlapping is a consequence of the broad content of the public policy exception, which covers procedural and substantive issues, among which Article 6(1) of the ECHR is unavoidable.\footnote{On the interpretation of the Slovenian public policy see text to n 242 Part III ch II sec 3.2.4.} Therefore the understanding of the interconnection between these two defenses (public policy and the right of defense) must be provided in a deductive manner (from general to specific) where the public policy exception can deal with other aspects which do not arise from, for example deficient service, and can have much more broader meanings.

In Slovenia the manifest infringement of procedural rights in the country of origin can be denied under Article 96 of the PILP act of Slovenia (the right of defense, which is provided upon objection by the parties) or under Article 100 (public policy which the court determines \textit{ex officio}). However, there is no clear answer to the question which of these two defenses can be applied in certain cases.\footnote{Kramberger Škerl J., \textit{Javni red pri priznanju in izvršitvi tujih sodnih odločb}, (n 188) 263-266.} In other countries the situation is similar. For example, in Germany, some authors state that manifest infringement of procedural rights in the country of origin can be covered by the public policy defense \textit{ex officio} by the German court.\footnote{ibid 264} Moreover the jurisprudence of the Slovenian courts does not provide a precise answer to this question. The Slovenian courts have used the ‘public policy’ or the ‘procedural public policy’ defense \textit{ex officio} for situations which could be covered under Article 96; however in all of these cases the

\textit{Krombach} case

\textit{Dieter Krombach v André Bamberski.}
parties also have raised an objection.\textsuperscript{193}

During the course of the recognition and enforcement procedure in Slovenia,\textsuperscript{194} these two conditions (public policy and right of defense) are not available at the same time. The PILP act of Slovenia in Article 109 states that the court determines whether the requirements set out in Articles 94 to 107 have been fulfilled. However, during the adoption of this first ruling (which later is served to the party against whom recognition is sought) the procedure is conducted \textit{ex parte} and the Court examines only those conditions which can be examined \textit{ex officio} (exclusive jurisdiction, \textit{ne bis in idem}, public policy and reciprocity).\textsuperscript{195} In the context of the right to a fair trial provided in Article 6(1) of the ECHR, this means that if it possesses sufficient information which can be determined from the decision that needs to be recognized in Slovenia (for example, if the party against whom recognition is sought was not allowed to participate in the proceedings in the country of origin), the Slovenian court should refuse to recognize and enforce this foreign decision based on Article 100, that is, on public policy. In such cases the overwhelming interest of the basic principles of Legal State (Rechtsstaat), among which is certainly the right of a party to participate in a judicial procedure, provides for intervention of the courts on their own motion.\textsuperscript{196} Such position does not preclude the possibility, given according to Article 109(3) of the PILP act of Slovenia, of the party against whom the recognition is sought appealing the ruling given by the Court if it didn't find any obstacles to recognition. The opposing party can invoke Article 96 of the PILP act of Slovenia and provide for certain documents, based on which it can claim that its right of defense was obstructed or denied because of the irregularities in the Country of origin.

In conclusion, \textit{de lege ferenda}, Article 96 should be amended with the following rule: “The court of the Republic of Slovenia shall refuse the recognition of a foreign judicial decision if, upon objection, the person against whom the recognition is sought it has established that due to irregularities in the proceedings he had no opportunity to participate in them.

In particular, a person against whom a foreign judicial decision was rendered shall be considered as having no opportunity to participate in the proceedings if the summons, the document or the ruling instituting the proceedings were not served upon him in person or if service in person was not even tried, except when the person pleaded to the merits of the plaintiff’s claim in the first instance procedure.

\textsuperscript{193} ibid.
\textsuperscript{194} Text to n 290 Part III ch II sec 5.
\textsuperscript{195} Text to n 128 Part III ch II sec 3.2
\textsuperscript{196} Kramberger Škerl J., \textit{Javni red pri priznanju in izvršitvi tujih sodnih odločb} (n 188) 264.
Notwithstanding the provisions of paragraph (1) and (2) of this Article, foreign judicial decisions shall be recognized, if the party, having no opportunity to participate in the proceeding, failed to commence proceedings to challenge the judgment in the country of origin when it was possible for him to do so.”

3.2.3 Existence of final judgment on the same subject matter between the same parties or pending concurrent proceedings

Article 99 of the Slovenian PILP act and Article 90 of the PIL act of 1982 are identical. These rules are modeled to protect the national legal system against irreconcilable judgments rendered in other legal systems on same subject matter (between same parties). As was the case with the other legal obstacles for recognition and enforcement, Article 99 is also given as a negative one, meaning that a foreign judicial decision shall not be recognized if the court or another authority in Slovenia rendered a final decision on the same matter or if another foreign judicial decision rendered on the same matter was recognized in Slovenia.\(^{197}\) The court shall stay recognition of a foreign judicial decision in the cases when, before a Slovenian court, proceedings in the same legal matter and between the same parties, which were instituted earlier, are still pending until the judgment in these proceedings become final.\(^{198}\) The determination of the existence of this legal obstacle is ex officio.

Such a position of this Article refers to two different procedural situations. The first paragraph is referring to cases where in Slovenia the courts have already rendered a final judicial decision regarding the same matter or a foreign judicial decision has already been recognized in Slovenia when a request for recognition is made. The second paragraph of the same Article is referring to cases where Slovenian courts have seized jurisdiction and proceedings are ongoing when request for recognition is made.

There are some specifics which must be observed regarding these two situations provided in Article 99 of the Slovenian PILP act. Firstly, the time is not of the essence in the first situation, while in the second situation the time when the proceedings were initiated gives priority to the proceedings. In the first situation, even if the proceedings in the foreign state had been initiated earlier, if the judicial decision of the Slovenian courts is final, then nevertheless these court still has to refuse to recognize the foreign judicial decision. With this, the finality

\(^{197}\) Article 99(1) of the PILP act of RS.
\(^{198}\) Article 99(2) of the PILP act of RS.
of the decision rendered from the national legal system has priority over earlier *lis pendens* in front of a foreign court.¹⁹⁹ Such position is based on the *ne bis in idem* principle and the party requesting recognition cannot recognize the foreign decision because in the Slovenian legal system there is already a judicial decision on the same subject matter (and between the same parties).²⁰⁰ Article 99 also extends to a foreign judicial decision which has been recognized prior to when the request for recognition of another judicial decision on the same matter (and between the same parties) is filed. This aspect is logical and derives from Article 94 of the PILP act of Slovenia, where a foreign judicial decision (a court settlement or decision of another authority with judicial prerogatives) which underwent the procedure for recognition and is recognized in Slovenia is equivalent to a judicial decision of a Slovenian court. On the other hand, the party with a legal interest could have prevented such an outcome if it timely requested the Slovenian court to stay the proceedings,²⁰¹ because proceedings involving the same matter and between the same parties are pending before a foreign court.²⁰²

In the second situation (where proceedings on the same subject matter and between the same parties are still pending in front of Slovenian courts) the *prior tempori potior iure* principle applies. Therefore, when the interested party has requested a recognition of a foreign judicial decision in front of the Slovenian courts, but proceedings on the same matter and between the same parties were instituted earlier in front of the Slovenian courts, then the recognizing court will stay the proceedings until the judgment becomes final. If the Slovenian court renders final judgment, then the request for recognition will be refused based on the fact that there is a final judgment on the same matter (Article 99 (1) of the PILP act of RS). This rule is intended to have a moderate *retorsion* character towards the foreign court which did not take into consideration the earlier seizing of the jurisdiction of the Slovenian court on the same matter.²⁰³

Secondly, as was stated, Article 99 of the Slovenian PILP act is identical to Article 90 of the PIL act of 1982. However, several inconsistences are present in this Article. As can be seen from the wording of Article 99, paragraphs (1) and (2) defer in the aspect of the identity

¹⁹⁹ Živković M. and Stanivuković M. (n 8) 408
²⁰⁰ Varadi and others (n 4) 554.
²⁰¹ Article 88 of the PILP act of Slovenia.
²⁰² This stay of the proceedings by the Slovenian courts is conditioned by three requirements: that the documents initiating the proceedings were served to the defendant prior to the documents initiating the proceedings in Slovenia (or if it’s a non-litigious procedure that the procedure abroad was instituted prior to the non-litigious procedure in Slovenia), if it’s probable that the foreign decision may be recognized in Slovenia and if reciprocity exists (Article 88 of the PILP act of RS).
²⁰³ Dika M. and Knežević G. and Stojanović S., (n 114) 298
of the legal matter. While Article 99(1) of the Slovenian PILP act refers only to ‘... a final decision on the same matter...’ Article 99(2) of the Slovenian PILP act speaks of ‘... proceedings in the same legal matter and between the same parties...’ This obvious inconsistency could lead to differentiation in the elements which would be necessary to prove for determining the identity of the legal matter. While in the first paragraph only an objective element would be necessary to prove the identity of the legal matter, for the second paragraph it would be necessary to prove objective and the subjective elements. However, to properly determine the identity of the legal matter, the judicial decision must be consistent in the objective element (same subject matter) and subjective element (between the same parties). That is why in the determination of the identity of the legal matter the objective and the subjective element in both paragraphs of Article 99 must be applied.

The second inconsistency which was largely debated regarding Article 90 (2) of the PIL act of 1982 is the different understanding of the situation when the proceedings are initiated, or when is the relevant moment in time when the proceedings are considered to be being instituted. One understanding was that the relevant time is the filing of the initial act (the lawsuit) to the court. Another understanding was that Article 90(2) was referring to the moment when the procedure is individualized by service of the lawsuit to the defendant. It also was debated whether the understanding should be only according to lex fori or should the foreign law be taken into consideration. It is evident that the moment when the proceedings are initiated differs among the countries. It is also accepted that the national courts apply their own procedural laws. The Slovenian Civil Procedure law accepts the understanding that the proceedings are initiated when the lawsuit is serviced to the defendant. Also, if we compare Articles 99 and 88 of the Slovenian PILP act, Article 88 is referring to ‘process/procedure (postopek)’ while Article 99 is referring to ‘proceedings (pravda)’. These two distinct procedural moments are different and in the context of the Article, the initiation of the proceedings can occur differently in different countries. The relevant moment when the proceedings are considered to be initiated in Slovenia is the moment when the lawsuit was

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204 Ibid., pg.296
205 For similar interpretation see Dika M. and Knežević G. and Stojanović S., (n 114) 296
206 For more on this issue see Dika M. and Knežević G. and Stojanović S., (n 114) 298; Varadi and others (n 4) 555; Poznić B., Osvrt na neke procesno pravne odredbe Zakona o rešavanju sukoba zakona sa propisima drugih zemalja u određenim odnosima, Pravniživot, 6–7/83, pg.731
207Varadi and others (n 4)555; Poznić B, Osvrt na neke procesno pravne odredbe (n 206) 731.
208Dika M. and Knežević G. and Stojanović S., (n 114) 298
209 For more on the theoretical debates on this question see, Dika M. and Knežević G. and Stojanović S., (n 114) 256-257.
210Article 189 of the Slovenian Civil Procedure Law, Official Gazette of the RS, No. 36/04
served to the defendant. This approach cannot be applied to determine the moment when the proceedings were initiated in another country because it can provide for erroneous situations or create procedural rights and obligations which were not created in the country in question. This moment can be determined only by the law of that country.\(^{211}\)

Thirdly, although there are not specific references in the Article, the application of Article 99 of the Slovenian PILP act extends to decisions from other authorities and not just only to judicial authorities. This can be concluded from Article 94 which gives broader meaning to the term ‘judicial decision’.

The Macedonian PIL act\(^{212}\) and the Montenegrin PIL act\(^{213}\) provided for the same solution as the Slovenian PILP act. The systematization of this rule in the Bulgarian PIL Act\(^{214}\) and the Serbian draft of the PIL act\(^{215}\) differs slightly. The rule provided in Article 117 (3) of the Bulgarian PIL act regarding the identity of the legal matter is the broadest because it covers not only legal matters between same parties in the same subject matter but also refers to the same facts. In this aspect, the Serbian rule refers only to the same parties and regarding the same subject. Nevertheless, the effect is the same regarding a decision which was rendered by the national court: this decision will have priority over the foreign judicial decision disrespectfully which proceedings were instituted earlier. On the other hand, when in front of the national court (Bulgarian and Serbian) a foreign judicial decision is irreconcilable with other foreign judicial decisions, then the time plays important role. In the Serbian case, the judgments which were first rendered in proceedings instituted earlier and fulfills the requirements for recognition in Serbia has priority over the other decision which recognition is sought. The Bulgarian rule provides that foreign judicial decisions will be recognized in Bulgaria if no proceedings based on the same facts, involving the same cause of action between the same parties, are brought before Bulgarian Court earlier than a case instituted before the foreign court in the matter of which judgment recognition is sought and the enforcement is applied has been rendered.\(^{216}\) The Bulgarian PIL act does not refer to the conduct of the Bulgarian Court when the first instituted concurrent proceedings have not been finished in Bulgaria. The Serbian PIL draft act contains provision which states that the Serbian Court will stay the proceedings regarding recognition and enforcement until the decision in the

\(^{211}\) See Dika M. and Knežević G. and Stojanović S., (n 114) 257.

\(^{212}\) Article 106 of the PIL act of Macedonia.

\(^{213}\) Article 146 of the PIL act of Montenegro.

\(^{214}\) Article 117 (3) and (4) of the Bulgarian PIL act.

\(^{215}\) Article 185 (f) of the PIL draft act of Serbia.

\(^{216}\) Article 117 (4) of the Bulgarian PIL act.
proceedings on the same subject matter between the same parties becomes final.\textsuperscript{217}

In conclusion, \textit{de lege ferenda} Article 99 of the PILP act of Slovenia should be amended with the following rule:

“A foreign judicial decision shall not be recognized if the court or another authority of the Republic of Slovenia rendered a final decision on the same legal matter and between the same parties or if another foreign judicial decision rendered on the same legal matter and between the same parties was recognized in Republic of Slovenia.

The Court shall stay the recognition of a foreign judicial decision in cases when before the court of the Republic of Slovenia proceedings in the same legal matter and between the same parties, which were instituted earlier, are still pending, until the judgment in these proceedings becomes final.”

3.2.4 Public Policy

Public policy as a condition for recognition and enforcement of foreign judicial decisions by now is universally recognized.\textsuperscript{218} This is not something new. In the famous decision of the \textit{Boll} case\textsuperscript{219} Judge Lauterpacht in his separate opinion stated:

[I]n the sphere of private international law the exception of ordre public, of public policy, as a reason for the exclusion of foreign law in a particular case is generally – or, rather, universally – recognized. (…) On the whole, the result is the same in most countries – so much that the recognition of the part of ordre public must be regarded as a general principle of law in the field of private international law.\textsuperscript{220}

This position is not different in Slovenia, where courts, when deciding upon recognition and enforcement of foreign judicial decisions, are restricted only to examining the requirements provided in Articles 94-107 of the Slovenian PILP act.\textsuperscript{221} Therefore it can be stated that Slovenia adopts the \textit{contrôle limite} system for recognition and enforcement of foreign judicial decisions.\textsuperscript{222} This system provides that Slovenian Courts can only inspect the requirements provided by law and they only refer generally to procedural aspects.\textsuperscript{223} The Courts do not entertain analysis on whether the Court of origin rightfully determined the applicable law or whether it rightfully ascertained the factual situation. As it is now a well-established principle

\textsuperscript{217} Article 185 (2) of the PIL draft act of Serbia.
\textsuperscript{218} Kiestra, L.R., (n 33) 21.
\textsuperscript{219} International Court of Justice, Netherlands v. Sweden (Case concerning the Application of the Convention of 1902 governing the Guardianship of Infants, Judgment of 28 November 1958), ICJ Rep. 55
\textsuperscript{220} Separate Opinion of Judge Sir Hersch Lauterpacht in the Boll case 92.
\textsuperscript{221} Article 109(1) of the PILP act of Slovenia
\textsuperscript{222} Kramberger Škerl J., Javni red pri priznanju in izvršitvi tujih sodnih odločb (n 108) 261. On systems of recognition and enforcement see more Wedam Lukić D., Priznanje in izvršitev tujih sodnih odločb v Republiki Sloveniji, (n 171) 134.
\textsuperscript{223} Text to n 313 Part I ch II sec 2.4.2.
in the EU PIL law, the Court of recognition (enforcement) cannot review the foreign judgment as to the substance. With it, the revision au fond of the foreign judgment in Slovenia is prohibited. However, courts are given a certain limited authorization to inspect the merits of the decision for the sole purpose of determining whether there are some elements in the decision which could effectively collide with the Slovenian public policy.

The conformity of the foreign judicial decision with domestic public policy is determined in two aspects. Firstly, the conformity of the foreign judicial decision is determined having in mind the decision as a whole with all of its elements, meaning when analyzing the foreign judgment the courts are not only limited to the dispositive of the judgment but also they carry out a more comprehensive approach with incorporated explanations and other procedural aspects of the judgments. With this approach, the public policy exemption incorporates substantive and procedural public policy. Secondly, the interpretation of the public policy test must be provided very restrictively, only as a last resort when the lack of its application would result in consequences that would prove unbearable for the domestic legal order. This means that the foreign judicial decision shall not be recognized if the effect of the recognition thereof is contrary to the Slovenian public policy. The predecessor of this rule, Article 91 of the PIL act of 1982, had a more extensive solution, according to which the foreign judicial decision was not recognized in SFRY if it was in collision with of the basic principles of the civil order determined by the Constitution of SFRY. Generally, this provided for broader implementation of the public policy requirement where all of the foreign decisions which were in a way maleficent to the public policy (in that time it had the legal construction ‘in collision with of the basic principles of the civil order determined by Constitution of SFRY’) would not be recognized and enforced in SFRY. This produced broadening of the position and the goal of the public policy exemption.

The position of Article 100 of PILP act of Slovenia is different. It accepts Lagarde’s understanding that the legal norm of the foreign law does not by itself confront the domestic

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224 See Articles 26 of the Brussels Ibis Regulation; Article 36 Brussels I Regulation; Article 52 Brussels Ibis Regulation.
225 Čp 16/2006
226 Živković M. and Stanivuković M. (n 8) 407.
227 Article 100 of the PILP act of RS.
228 Živković M. and Stanivuković M. (n 8) 407; Varadi and others (n 4) 559
229 ibid.
230 Case II Ips 462/2009, pg.9, par.12
231 For more on the position of Article 91 of the PIL act of 1982 see Dika M. and Knežević G. and Stojanović S., (n 114) 300-305; Varadi and others (n 4) 559-561
232 Kramberger Škerl J., Javni red pri priznanju in izvršitvi tujih sodnih odločb (n 108) 260.
legal order itself, but only in correlation with concrete aspects of the domestic legal order. This means that the goal of the public policy is to ‘remove the incoherency’ in the interconnection of the foreign and domestic legal orders. Such an understanding of the public policy exception provides that the infringement must be in the context that the foreign legal norm by itself does not violate the public policy but only the effect of the foreign decision that it creates in context.

Public policy has very broad meaning and its interpretation varies according to the national legal systems. Its scope and contents depend on the manner in which an individual state values its interests. This means that public policy or *ordre public* in Private International Law and Procedure can be understood as the sum of the values on which the legal, social and cultural order of a particular country depend and which must also be complied with in the so-called relationships with an international element. Generally there are two distinct methodological approaches in the determination of the content and the boundaries of public policy: the first provides for one abstract definition and the second follows a more detailed enumeration and listing of the legal norms that make up public policy. Today, most countries and legal orders follow the first approach.

Slovenia in its PILP act does not contain a definition of public policy, but it states that the effect of the law (or the decision) must not be contrary to the Slovenian public policy. Such a provision creates certain problems, namely, from this statement it cannot be concluded whether the content of the public policy refers to the substantive issues or the procedural issues. The PILP act of Slovenia does not specifically refer to ‘procedural public policy’ and neither did its predecessor, the PIL act of 1982, but as today this category is globally recognized, it is assumed that it is also applicable in Slovenia.

Another problem regarding ‘public policy’ is the correlation with Article 96 (right of defense) which was referred to earlier.

The mere determination of ‘public policy’ is left to the courts (and relevant authorities) in the process of the application of the private international law rules. The Supreme Court of

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234 Varadi and others (n 4) 159.
235 Case II Ips 462/2009, pg.6-7, par.9.
236 Kramberger Škerl J., *Evropeizacija javnega reda v mednarodnem zasebnem pravu* (n 188) 349.
237 Varadi and others (n 4)155
238 Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, France, Germany, Macedonia, Serbia, Slovenia, Switzerland etc.
239 See Articles 5 and 100 of the PILP act of RS
241 Text to n 182 Part III ch II sec 3.2.2.
242 Kramberger Škerl J., *Evropeizacija javnega reda v mednarodnem zasebnem pravu* (n 188) 349.
the Republic of Slovenia has in several cases referred to the question of the content of public policy. In the *II Ips 462/2009* case, the Supreme Court had held that:

The basic legal principles of domestic law, i.e. those on which the domestic legal order is founded and indirectly form the framework of public order, consist of: (i) legal norms: constitutional principles, basic principles arising from laws, basic principles of the legal order of the Council of Europe, European Communities and international agreements adopted to guarantee the minimum standard of legal protection, all with the restriction which prevents the institute of the recognition of a foreign judicial decision to fail: not every cogent (forced) regulation is a part of public order, only those where violation would threaten the legal and moral integrity of the domestic legal system; (ii) international customary law; (iii) basic moral principles, and (iv) vital economic, political … interests of the state.

The Supreme Court went even further by dividing the public policy into substantive and procedural public policy. Regarding the content of procedural public policy, the Supreme Court provided that procedural public policy is consisted of

[c]onstitutional principles, the fundamental principles of individual legal branches, the fundamental principles of EU law, the principles derived from international treaty law, in particular the Convention on the Protection of Human Rights and Fundamental Freedoms (Official Gazette of RS, Nos. 33/94, no. 7/94, ECHR), customary international law and basic moral principles.

In this same decision the Supreme Court had held that it recognizes the abolition of the revision of the foreign court decision in its merits, however the Court must ascertain the substantive effect of the decision that would be derived from the recognition (substantive public policy) and the procedure by which the decision was adopted in the country of origin (procedural public policy). In this context the Supreme Court defined that the Slovenian procedural public policy represents:

[t]he right to a fair trial (Article 6 ECHR), some constitutional rights (the right to appeal - Article 25 of the Constitution, the right to use its own language of Article 62 of the Constitution) and fundamental principles of Slovenian civil litigation.

The Supreme Court also has addressed the issue of the incorporation of the ‘European public policy’ in its national concept of public policy. In *II Ips 462/2009* case the Court held that European public policy is part of the Slovenian international public policy.

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244 Case II Ips 462/2009, pg.6-7, para 9.
245 Cp 16/2006
246 Which is narrower concept than jus cogens (See Cp 16/2006).
247 Cp 16/2006
248 Cp 16/2006
249 See Kramberger Škerlj J., Evropeizacija javnega reda v mednarodnem zasebnem pravu (n 188) 361-366.
250 Case II Ips 462/2009, pg.8, par.11. For more meaning of the ‘international public policy’ see Živkovič M. and Stanivukovič M. (n 8) 306; Kramberger Škerlj J., Evropeizacija javnega reda v mednarodnem zasebnem pravu (n 188) pg.349
understanding of what Slovenian international public policy is consisted of had been referred to in two previous decisions.\textsuperscript{251} In the decision of the Cpg 3/2003 case the Supreme Court held that international public policy

\[ \text{[d]oes not include all mandatory provisions of domestic law, but only those imperative legal norms and moral rules, the violation of which would jeopardize the legal and moral integrity of the Slovenian legal order.}\textsuperscript{252} \]

From this standpoint regarding international public policy, the Supreme Court broadened or gave an additional element to the Slovenian international public policy as a consequence of the membership of Slovenia in the EU and the Council of Europe with the

\[ \text{[l]egal sources of these organizations (community and convention public policy which are constituting the so-called European public policy).}\textsuperscript{255} \]

Following this position, the Court then gave instructions that:

Within the national public order the elements arising from the European legal sources also have to be protected, which means (i) that the courts have to reject the recognition of a foreign judicial decision, even if it is not contrary to the public order of their state, but is contrary to the common values, and (ii) that the courts can no longer reject the recognition of a foreign court judgement, if it is contrary to their public order, however from the ‘European perspective,’ this rejection would not be justified or proportional.\textsuperscript{254}

Although the public policy has its own national characteristics regarding the structure of the rule, the PIL act of Macedonia uses the same wording as the rule provided in the PILP act of RS.\textsuperscript{255} The Serbian PIL draft act contains a much broader rule.\textsuperscript{256} First, it specifies that the foreign decision must not be obviously contrary to Serbian public policy. Following this position, it states that the relation between the legal relationship and the connection of the forum (Inlandsbeziehnung) plays an important role together with the significance of the consequences which would result from the recognition of the foreign decision. The Bulgarian PIL act contains a much simpler rule regarding the public policy criterion.\textsuperscript{257} It just insists that the recognition and enforcement should not be contrary to Bulgarian public policy. The Montenegrin PIL act has provided for a similar rule as the Slovenian one where the requirement is that the foreign judicial decision will not be recognized in Montenegro if the effects of its recognition would be contrary to Montenegrin public policy.\textsuperscript{258} It is considered that this rule

\textsuperscript{252} This elaboration was reaffirmed in the Case Cpg 4/2004, par.6.
\textsuperscript{253} Case II Ips 462/2009, pg.8, par.11
\textsuperscript{254} ibid.
\textsuperscript{255} Article 107 of the PIL act of Macedonia.
\textsuperscript{256} Article 185 (d) of the PIL draft act of Serbia
\textsuperscript{257} Article 117 (5) of the Bulgarian PIL act.
\textsuperscript{258} Article 147 of the PIL act of Montenegro.
purpose is to establish substantive and procedural public policy in connection with effects with the forum.\textsuperscript{259}

3.2.5 Reciprocity

The historical and doctrinal principles upon which recognition and enforcement are based are comity\textsuperscript{260} and reciprocity.\textsuperscript{261} The main idea behind the principle of reciprocity is that ‘...states will and should grant others recognition of judicial decisions only if, and to the extent that, their own decisions would be recognized.’\textsuperscript{262} Such a position is developed to influence other States to recognize and enforce other judicial decisions and to enter into international conventions that consider recognition and enforcement.\textsuperscript{263} Today, a large number of States still include reciprocity as a condition for recognition and enforcement,\textsuperscript{264} although some States in their recent PIL acts have been abandoning reciprocity.\textsuperscript{265}

The SFRY PIL act of 1982 provided for reciprocity as a legal obstacle regarding the recognition and enforcement of foreign judicial decisions.\textsuperscript{266} An identical solution was given in the Slovenian PILP act in Article 101. With this rule, a foreign judicial decision is not recognized in Slovenia if there is no reciprocity.\textsuperscript{267} However there are three exemptions\textsuperscript{268} from this rule where the (non-) existence of reciprocity is not an obstacle in the recognition and enforcement of foreign judicial decisions. These three exemptions are referring to judgments rendered in 1) matrimonial disputes; 2) disputes relating to establishment and contesting of paternity and maternity or 3) cases where the recognition and enforcement of a foreign judicial decision is requested by a Slovenian citizen.

In the years before the enactment of the PIL act of 1982, reciprocity was the most commonly-used legal obstacle based on which domestic courts refused to recognize and

\begin{itemize}
\item \textsuperscript{259} Kostić Mandić M.,(n 99) 10
\item \textsuperscript{261} Michaels R., Recognition and Enforcement of Foreign Judgments (n 133) 2.
\item \textsuperscript{262} ibid.
\item \textsuperscript{263} ibid.
\item \textsuperscript{264} Australia, Germany, Japan, Turkey, Spain, etc.
\item \textsuperscript{265} See for example PIL act of Macedonia.
\item \textsuperscript{266} Article 92 of the PIL act of 1982.
\item \textsuperscript{267} Article 101 (1) of the PILP Act of RS.
\item \textsuperscript{268} Article 101(2) of the PILP act of RS.
\end{itemize}
enforce foreign judicial decisions.\textsuperscript{269} The reason for this reliance was the fact that according to the legal rules of that time, the existence of reciprocity needed to be proved in each case.\textsuperscript{270} According to Article 92(3) of the PIL act of 1982 (Article 101(3) of the Slovenian PILP act), there is a presumption of existence of reciprocity until the contrary is proved. The question is, which kind of reciprocity is needed to be present so this condition is satisfied?

In legal theory, there is consensus that formal reciprocity cannot be called upon to satisfy the requirements of Article 101 of Slovenian PILP act (Article 92 of PIL act of 1982).\textsuperscript{271} The reason for that is because to rely upon formal reciprocity means that there is formal equal treatment of foreign and domestic persons regarding some right.\textsuperscript{272} In the context of recognition and enforcement, foreign and domestic judicial decisions would be considered equal and thus they cannot undergo the procedure for recognition and enforcement.\textsuperscript{273} Therefore, substantive reciprocity is more appropriate, because it means that a foreign judicial decision will be processed in the same way as a domestic judicial decisions are processed in the country of the origin of the judicial decision which is to be recognized.\textsuperscript{274}

However, when it comes to the question of whether to insist on diplomatic, factual or legal reciprocity, the legal doctrine is not so unanimous. It is considered that factual reciprocity suffices\textsuperscript{275} and also that diplomatic reciprocity is present in a number of international agreements.\textsuperscript{276} Nevertheless, questions have been raised on the assumption of factual reciprocity. The first question is whether the court can determine the existence of reciprocity upon its own motion. Article 101 (3) of the Slovenian PILP act stipulates that there is a presumption on the existence of reciprocity until proven differently and that if the court has doubts about reciprocity an explanation can then be given by the ministry competent for justice. At first glimpse, this rule positions the court in a ‘passive’ role, in that if there is no objection from the other party (the party against whom recognition is sought) then reciprocity exists.\textsuperscript{277} However, courts have also ‘active’ prerogatives and can determine whether reciprocity exists

\textsuperscript{270} Dika M. and Knežević G. and Stojanović S., (n 114) 306
\textsuperscript{271} See, Dika M. and Knežević G. and Stojanović S., (n 114) 306; Varadi and others (n 4) 555.
\textsuperscript{272} Varadi and others (n 4)204
\textsuperscript{273} Dika M. and Knežević G. and Stojanović S., (n 114) 306; Varadi and others (n 4)555.
\textsuperscript{274} Varadi and others (n 4)555.
\textsuperscript{275} Varadi and others (n 4)555, Dika M. and Knežević G. and Stojanović S., (n 114) 306, Živković M. and Stanivuković M. (n 8) 403.
\textsuperscript{276}Živković M. and Stanivuković M. (n 8) 403.
\textsuperscript{277} Poznić B., ‘O priznanju i izvršenju stranih sudskih i arbitražnih odluka’ Anali Pravnog Fakulteta u Beogradu, br. 6/83, 1063-1064
irrespective of the parties’ behavior, and whether this means that they will ask the ministry competent for justice.

The second question refers to the situation whether the factual existence of reciprocity needs to be in concreto (that a judicial decision coming from the state of recognition is recognized and enforced in the state of origin) or in abstracto (that a judicial decision cannot be recognized in state of origin). It is considered that in abstracto evidence is sufficient to prove that factual reciprocity does not exist and consequently that a judicial decision from the country of origin cannot be recognized in the country of recognition. This means for example that the existence of a rule that is conditioned and that its expected that the foreign judicial decision would not meet such requirements (the defendant does not have domicile in Switzerland), then reciprocity does not exist and thus reciprocity represents a legal obstacle in the recognition and enforcement of the decision.

In the new PIL acts, there is no consensus on the question whether there is a need for the existence of reciprocity as a legal obstacle in the recognition and enforcement of foreign judicial decisions. The Bulgarian, Macedonian and the Montenegrin PIL acts have completely abandoned this requirement for the recognition and enforcement of foreign judicial decisions. On the other hand, the Serbian draft PIL act provides for partial abandonment. Specifically, in this act, reciprocity as a requirement for recognition and enforcement is abandoned in legal relations regarding personal status, family matters and succession, while it is still applicable in relations regarding rights in rem, shares and securities, intellectual property, and contractual and non-contractual relations.

Countries strive for gaining recognition of their sovereignty and larger availability of rights for their nationals in another country. This fact serves as a basis for reciprocity as a condition for recognition and enforcement. However, in situations where the speed, reliability and the protection of individual procedural guarantees provide for more effective access to justice, the protection of national sovereignty is gradually losing importance. The availability of foreign rights today is achieved through increased cooperation between the countries and

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278 Živković M. and Stanivuković M. (n 8) 404
279 For example, one scenario in Article 149 of the Swiss PIL Act provides that Foreign decisions relating to a right pertaining to the law of obligations shall be recognized in Switzerland if the decision pertains to a contractual obligation, was rendered in the State of performance of the characteristic obligation and the defendant was not domiciled in Switzerland.
281 Article 185 (3) of the Serbian draft PIL act.
through a large number of bi- and multilateral agreements. In such circumstances, reciprocity as a condition for recognition and enforcement can be considered as a residue of a certain period where an increased emphasis on national sovereignty was present.

4. Rules for recognition of the status of persons

The Slovenian PILP act in Article 102 contains rules that refer to the personal status of a person who possesses the nationality (citizenship) of the country of origin of the judgment that is to be recognized in Slovenia. A foreign judicial decision referring to the personal status of a citizen of the State in which it was rendered shall be recognized in the Slovenia without examination according to Articles 97, 100 and 101 of the Slovenian PILP act (exclusive jurisdiction, public policy and reciprocity). This rule is largely identical to Article 94 (1) of the PIL act of 1982. It had a particular ratio that there are no solid arguments to maintain regular control of the foreign decision because in most cases there wouldn’t be exclusive jurisdiction of the domestic courts, where the power to determine the personal status of citizens should be confined to each country and that the goal of reciprocity (to protect its own domestic citizens) in these cases does not apply. Nevertheless, there is not an absolute abolition of exequatur, but only of the requirements provided in Articles 97, 100 and 101. The other requirements, the finality of the decision (Article 95 of the Slovenian PILP act), res judicata and lis alibi pendes effects (Article 99 of the Slovenian PILP act), right of defense (Article 96 of the Slovenian PILP act), exorbitant jurisdiction of the court of country of origin and violation of the agreement on the jurisdiction of the Slovenian Court (Article 98 of the Slovenian PILP act) are to be controlled by the relevant authorities. It is understandable that the requirements provided in Articles 95, 96 and 99 of the Slovenian PILP act are protected. These rules provided for control of the identity and the properties of the decision (Article 95), the elemental right of defense (Article 96) and the authority of the domestic legal system (Article 99). Nevertheless, the safeguard of the requirements provided in Article 98 seems to be less obvious, especially when the threshold of exclusive jurisdiction is not examined in these cases and when the prorogation of the jurisdiction seems illogical. The approach taken in Article 102 of the

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282 Article 102(1) of the Slovenian PILP act
283 Article 94 of the PIL act of 1982 contained the words ‘…without examination of court…’ This was left out in the PILP act of RS and given a broader aspect ‘…without examination according to Articles…’
284 Although PIL act of 1982 had more comprehensive set of rules regarding personal status. See Articles 93, 94 and 95 of the PIL act of 1982.
285 Dika M. and Knežević G. and Stojanović S., (n 114) 314
286 ibid.
Slovenian PILP act seems to be an incorporation of Article 94 of the PIL act of 1982 by analogy and that brought an omission by the lawmaker which resulted a non-exclusion of Article 98 from the group of requirements that are not controlled.287

Article 102(2) of the Slovenian PILP act provides that if in the opinion of the competent authority of Republic of Slovenia, the decision of a foreign court refers to the personal status of a Slovenian citizen, the recognition of that decision shall be subject to examination according to the provisions of Article 95 to 101 of the Slovenian PILP act. This rule is identical to Article 94(2) of the PIL act of 1982. It was considered that this rule in the PIL act of 1982 was unnecessary because it was redundant--that the relevant authority would nevertheless conduct full control under the PIL act even when there wouldn’t be specific requirement of it doing so under a particular rule.288 The real meaning of this rule represents the fact it highlights, that in cases when a foreign judicial decision refers to a foreign and domestic (Slovenian) citizen, the decision would be treated as a decision referring to a Slovenian citizen and with that, it would undergo full control according to the requirements provided in Articles 95 to 101 of the Slovenian PILP act.289

5. Types of procedures and courses of action (proceedings) for the recognition of foreign judicial decisions

5.1. Types of procedures

The procedure for the recognition of foreign judicial decisions in Slovenia is a special, non-contentious procedure.290 Such a conclusion can be drawn directly from Article 111 of the PILP act of Slovenia, where it is stated that if it’s not otherwise provided in the PILP act, then the rules of the Non-Litigious Civil Procedure Act apply together with the rules for recognition of foreign judicial awards in the PILP act. The consequence of this rule is that, for all the issues of the procedure which are not covered by the rules provided in the PILP act, the rules of the Non-Litigious Civil Procedure Act are applicable.291 Nevertheless, any court may decide about the recognition of a foreign judicial decision as a preliminary question but with an effect

287 The requirements provided in Article 98 of the PILP act of RS did not exist as requirements in PIL act of 1982 which may be a logical explanation why the law maker made such omission.
288 Dika M. and Knežević G. and Stojanović S., (n 114) 314-315
289 Ibid.
290 Wedam Lukić D., Priznanje in izvršitev tujih sodnih odločb v Republiki Sloveniji, (n 171) 136.
291 According to Article 37 of the Non-Litigious Civil Procedure Act, for all the issues which are not covered with this act, the rules of the Civil Procedure Act apply.
referring only to that particular procedure.292 The territorial jurisdiction over a recognition of a foreign judicial decision lies with the court having substantive jurisdiction.293 Regarding the enforcement of foreign judicial decisions, the territorial jurisdiction lies with the district court in the territory where the execution is to be carried out.294 The rules for the course of action regarding recognition and enforcement of foreign judicial decisions in Slovenia are provided in the PILP act of Slovenia in Articles 108 to 111.

Another peculiar aspect regarding the procedure for recognition in Slovenia is that it is envisaged as a ‘delibazione’ procedure (delebacijski postopek).295 The basic characteristic of this type of procedure is that the party against whom recognition (enforcement) is sought is an active participant in the process envisaged as a procedure that is contradictory to all of the legal remedies available in those kinds of circumstances.296 Against the decision of the Slovenian district court, a legal remedy is available and in such situations there is an adversarial procedure at the same court. This decision can also be appealed with another legal remedy which is provided; that is, an appeal to the Supreme Court.297

5.2. Courses of action (proceedings) for the recognition of foreign judicial decisions

The procedure for recognition and enforcement in Slovenia can be divided into three stages which are similar to the systematization provided in the Brussels IIbis Regulation (Brussels I Regulation).298 The first stage is the ex parte procedure, which is completed without the participation of the person against whom the recognition/enforcement is sought.299 Firstly, the procedure for the recognition of a foreign judicial decision is instituted upon application.300 In matters referring to personal status, recognition may be sought by anyone that has legal interest.301 This first stage of the recognition is adjudicated by a single judge of a district court.302 This court, after considering the formal requirements (submission together with the application of the foreign judicial decision, or an authenticated copy, and the certificate of a...
competent foreign court or another authority on the finality of the decision under the law of the State in which the decision was rendered), and those which it determines *ex officio* (exclusive jurisdiction of Slovenian courts, the final judgment between the same parties on the same subject matter, public policy and reciprocity) if it finds that there are no obstacles to recognition, adopts a ruling on recognition of the foreign decision.\(^{303}\)

As was previously stated, one of the main characteristics of the first stage of the procedure is that it is conducted *ex parte*. Such a position of the procedure serves the purpose of having the element of surprise, which is necessary in a later enforcement procedure if the respondent is not to have the opportunity of withdrawing his assets from any measure of enforcement.\(^{304}\) This aspect of ‘surprise’ is less important in family matters, with some exceptions in child abduction cases.\(^{305}\)

After this stage, the ruling on recognition is served by the Court upon the opposite party and/or upon other parties in the proceedings in which the foreign judicial decision was rendered with the instruction that an appeal can be filed within fifteen days of service.\(^{306}\) There is one exception to this second stage of the procedure that is particularly important for the recognition and enforcement of foreign decisions in family matters. In situations regarding divorce, the Court shall not serve the ruling on recognition of a foreign judicial decision relating to divorce upon the opposite party if the person applying for recognition is a Slovenian national and the opposite party has neither domicile nor temporary residence in Slovenia.\(^{307}\)

The appeal against this first stage ruling is dealt by the same district Court (the Court that has adopted the ruling on recognition) but now in a chamber of three judges.\(^{308}\) In this stage, the Court can rule if the decision on the appeal depends on disputable facts, after a court hearing.\(^{309}\) It must be stated that this adversarial hearing is not obligatory and the court can decide whether to hold this hearing if it finds it necessary. Nevertheless, whether it holds an adversarial hearing or if the court decides only according to the submissions by both of the parties, the principle of ‘equality of arms’ in the PILP act of Slovenia is provided and the opposing party can appeal the ruling on recognition in a way that is limited only to the

\(^{303}\) Article 109(2) of the PILP act of RS.


\(^{306}\) Article 109(3) of the PILP act of RS.

\(^{307}\) Article 109(6) of the PILP act of RS.

\(^{308}\) Article 109(4) of the PILP act of RS.

\(^{309}\) Article 109(4) of the PILP act of RS.
conditions provided in the PILP act of RS.

The third stage of this procedure is conducted in front of the Supreme Court of the Republic of Slovenia. Against the court that refused the application for recognition and against the court ruling as to appeal, an appeal to the Supreme Court is permissible. The costs of the procedure are determined by the court in accordance with the rules that would be applicable if the matter were governed by the court or another authority of the Republic of Slovenia.

When it comes to the enforcement of foreign judicial decisions, as was stated, territorial jurisdiction lies with the district court in the territory in which the enforcement or execution is to be carried out. However, in the cases regarding the recognition of a foreign judicial decision where a special procedure has not been instituted, any court may decide on the recognition as on a preliminary ruling, for example if the party refers on that question to the court having jurisdiction as to the enforcement. This court can decide on the recognition as a preliminary matter but only to the effect of that procedure. However, this does not preclude that on the request of the party, the recognition of the foreign judgment can be decided also as a main question, especially in the cases when the party fears that another enforcement will be necessary on the basis of the same decision.

Generally, with slight modifications, these type of procedures are provided in the PIL acts of Macedonia, Montenegro and the draft PIL act of Serbia. The first stage is the ex parte procedure, the second stage is the participation of the party against whom enforcement is sought, and the third stage is an appeal to the higher court.

6. The enforcement of decisions concerning custody and the right of access in Slovenia

The enforcement of judgments concerning custody and judgments on rights of access is contained in the Enforcement of Judgments and Protective Measures Act (Zakon o izvršbi in zavarovanju). In Articles 238a to 238g, there are contained rules that provide for two methods in which the execution of judgments relating to custody and judgments on rights of

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310 Article 109(5) of the Slovenian PILP act.
311 Article 110 of the Slovenian PILP act.
312 Article 108(5) of the Slovenian PILP act
313 Wedam Lukić D., Priznanje in izvršitev tujih sodnih odločb v Republiki Sloveniji, (n 171) 136-137
314 ibid.
315 Articles 111 to 116 of the Macedonian PIL act.
316 Articles 152-158 of the Montenegrin PIL act.
317 Articles 186-192 of the Serbian draft PIL act.
318 Official Gazette RS, no. 03/07
access are carried out. The first method is indirect coercion, by which the parent that holds the child must, upon a judicial decision, hand over the child. If the parent does not do so, then financial penalties are carried out against him/her. The second method of execution of judgments concerning custody and judgments on rights of access is direct coercion, by which a bailiff physically executes the decision and hands over the child to the person who has the custody rights. The enforcement of such decisions is effective towards any person who has the child. Regarding the right of access, the execution of any such decision is primarily conducted by indirect coercion (financial penalties), while direct coercion is utilized only in exceptional cases.

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319 Article 238d of the Enforcement of Judgments and Protective Measures Act.
320 Article 238e of the Enforcement of Judgments and Protective Measures Act.
321 Galič A., The impact and application of the Brussels IIbis Regulation in Slovenia, (n 40) 268.
322 Article 238f of the Enforcement of Judgments and Protective Measures Act.
Chapter III The recognition and enforcement of foreign judicial decisions in family matters from EU Member States in Slovenia

Slovenia is a Member State of the European Union. In the context of recognition and enforcement of foreign judicial decisions, this means that two types of rules are applicable by the courts. The first set of rules which are applicable towards judicial decisions coming from non-EU states are provided in the Slovenian PILP act. The second set of rules which are applicable towards judicial decisions from EU Members States in specific subject matters which are provided in the legal sources of the EU are generally directly applicable in Slovenia and replace the Slovenian PILP act.

Accordingly, the Brussels IIbis Regulation is directly applicable in Slovenia, meaning that there has been no implementing legislation enacted in Slovenia. Specifically, this means that the Brussels IIbis Regulation is directly applicable in Slovenia and, with that, for all of the issues which are left to the domestic law of the Member States, the relevant Slovenian legal sources apply. For these cases, firstly, the issues which fall under the Brussels IIbis Regulation are mainly resolved under the Non-Contentious Procedure Act, and secondly, the provisions of the Civil Procedure Act apply as a subsidiary legal source.

In Slovenia, the jurisdiction for recognition (as an independent proceeding) and for the issuing of a declaration of enforceability according to the Brussels IIbis Regulation is confined to the district court (Okrožno sodišče). Regarding appeal, there are two institutions in Slovenia which under the Brussels IIbis Regulation are given jurisdiction to hear the case upon appeal. These legal remedies are provided in Article 33 and 34 of the Brussels IIbis Regulation. The decision of the district court can be subject to a legal remedy on the basis of Article 33 of the Brussels IIbis Regulation in front of the same court (district court – Okrožno sodišče) and the appealed procedure is envisaged as an adversarial procedure. In the course of proceedings, this decision can be appealed on the basis of Article 34 of the Brussels IIbis Regulation in front of the Supreme Court (pritožba na Vrhovno sodišče Republike Slovenije). In comparison with the procedure provided in the PILP act of the Republic of Slovenia

323 Text to n 90 Part III ch II sec 1.
324 Wedam Lukić D., Priznanje in izvršitev tujih sodnih odločb v Republiki Sloveniji, (n 171) 134.
325 Galič A., The impact and application of the Brussels IIbis Regulation in Slovenia, (n 40) 272.
327 Text to n 547 Part II ch V sec 5.2.1.1.3.
328 Galič A., The impact and application of the Brussels IIbis Regulation in Slovenia, (n 40) 271.
regarding recognition of judicial decisions from non-EU states, it can be seen that these two courses of actions substantially comply with one another.\textsuperscript{329} Nevertheless, some differences exist. What was novel for the Slovenian legal system was the fact that the institution of declaration of enforceability was unfamiliar.\textsuperscript{330} Specifically, the recognition of foreign judicial decisions in Slovenia can also be conducted also as a preliminary question, and this can be done by the court having jurisdiction for enforcement, with an effect only for that procedure.\textsuperscript{331} From that it can be seen that the previous recognition or declaration of enforceability is not a prerequisite for execution in Slovenia.\textsuperscript{332}

The procedure for making the application for declaration of enforceability is governed by the law of the Member State of enforcement.\textsuperscript{333} This means that when a foreign judicial decision from an EU Member State needs to be enforced in Slovenia the relevant rules of the Non-Contentious Procedure Act apply and, as a subsidiary, the rules of the Civil Procedure Act also apply. Such an analogy is drawn from the procedure for recognition and enforcement provided in the Slovenian PILP act, where the procedure for recognition and enforcement is non-contentious.\textsuperscript{334} Nevertheless, this does not contradict the implementation of the Brussels IIbis Regulation, because it does not infringe on the necessary requirements of the Regulation, especially in those provided in Article 33 (3), for a contradictory nature of the procedure for appeal. Namely, the district court which has jurisdiction regarding the legal remedy provided in Article 33, can (as is also the case in the recognition of foreign decisions from non-EU states) in the course of a non-contentious procedure fulfill the legal requirement in Article 33(3) of the Brussels IIbis Regulation and allow the party to be heard. This is particularly important because during the first stage of the proceedings they are conducted as an \textit{ex parte} procedure, where the court inspects the legal requirements for recognition provided in the Brussels IIbis Regulation without the participation of the other party.\textsuperscript{335} The right of the party to be heard in contradictory proceedings, as is the case in the recognition of non-EU foreign decisions, is provided in the stage of appeal where the party against whom enforcement is sought can provide for its legal position and therefore the principle of ‘equality of arms’ is protected. This principle is also provided in the Non-Contentious Procedure Act in Article 5, where the Court at all times during the course of proceedings is obliged to protect the rights and legal interest

\textsuperscript{329} Text to n 298 Part III ch II sec 5.2.
\textsuperscript{330} Galič A., The impact and application of the Brussels IIbis Regulation in Slovenia, (n 40) 271.
\textsuperscript{331} Text to n 313 Part III ch II sec 5.2.
\textsuperscript{332} Galič A., The impact and application of the Brussels IIbis Regulation in Slovenia, (n 40) 271.
\textsuperscript{333} Galič A., The impact and application of the Brussels IIbis Regulation in Slovenia, (n 40) 272.
\textsuperscript{334} Article 30 of the Brussels IIbis Regulation.
\textsuperscript{335} Text to n 540 Part II ch V sec 5.2.1.1.2.
of all participants and with that the right of the party to be heard. 336

The District Court, composed of a single judge, conducts the procedure and inspects if the necessary requirements given in the Brussels IIbis Regulation are fulfilled. Following this procedural stage, the ruling is served to the other party (the party from which enforcement is sought). In such cases the service is effectuated on the basis of Slovenian law, conducted through the Court. For that, the party first submits all of the necessary documents to the Court and the Court then serves the documents to the other party. 337 The parties can file for legal remedy against the decision on the application for a declaration of enforceability on the basis of Article 33 of the Brussels IIbis Regulation in front of the same court. In this case, again the District court composed of a single judge can decide on the appeal. 338 In the next stage, on appeal according to Article 34 of the Brussels IIbis Regulation, the Supreme Court of Republic of Slovenia decides. An appeal which is lodged on the basis of Article 342 of the Civil Procedure Act is filled in the court of first instance. The time limit for an appeal is 15 days, 339 while the opposing party can respond to the appeal within 8 days. 340

In the interest of the procedure, Article 30(2) of the Brussels IIbis Regulation provides that ‘The applicant must give an address for service within the area of jurisdiction of the court applied to. However, if the law of the Member State of enforcement does not provide for the furnishing of such an address, the applicant shall appoint a representative ad litem.’ In the case of Slovenia, according to Articles 146 and 147 of the Civil Procedure Act, the plaintiff who lives in other country, if he does not have an attorney in Slovenia, must, upon filing the action, appoint a person authorized to accept the service in Slovenia on his behalf. If the plaintiff does not appoint an attorney, or a person to receive service in his/her behalf, the court will appoint a temporary representative authorized to accept service, and through him or her it will order plaintiff to appoint a person authorized to accept the service within a specified period of time. If the plaintiff fails to appoint the authorized person within a reasonable amount of time, the court will dismiss the action. 341

336 This is especially important because the first stage proceedings regarding the recognition on the basis of Brussels IIbis Regulation (and also according to the PILP act of RS) is ex parte procedure where the party against whom the recognition is sought does not participate or is noticed. Namely in the second stage, the ruling is served to that party.
337 Galič A., The impact and application of the Brussels IIbis Regulation in Slovenia, (n 40) 271.
338 ibid 274
339 Article 31 (3) of the Non-Contentious Act and Article 333 of the Civil Procedure Act. Although according to Article 33 of the Non-Contentious Act conditionally, it is possible to file the appeal after the expiry of this time limit, if the person whose rights could be affected agrees to the appeal.
340 Article 31 (4) of the Non-Contentious Act.
341 Galič A., The impact and application of the Brussels IIbis Regulation in Slovenia, (n 40) 276.
Conclusion

1.1 The enforcement of foreign decisions from the point of view of public international law is clear—foreign courts do not have the power to enforce judgments unless there is an international agreement or it is permitted by domestic law. While the non-enforcement of a foreign judgment is not a violation of public international law, it represents a tremendous inconvenience for the parties (or one of them) and a step back in the appraisal of their substantive rights. Therefore, to deny recognition of foreign judgments not only represents refusing enforcement of these judgments, but it actually means denying foreign created (declared) rights to have their full effect. The solution adopted by most of the countries to avoid re-litigation and provide for harmonized decisions in which parties’ rights are protected is that under certain conditions foreign judgments undergo recognition and later, if the nature of the decision requires it, they are enforced in the country of enforcement. With this, the country of enforcement balances between these two aspects—‘trust’ in the procedural and substantive law standards of the foreign legal system and the extension of ‘control’ of the state of enforcement that it imposes on foreign decisions and through that of the foreign legal order. This decomposition of the *exequatur* to its components leads us to the two basic questions which should be firstly answered on general level: how much ‘trust’ can the countries have in each other and how far they can go with the ‘control’.

1.2 ‘Trust’ as an elementary fact of social life has been described by the eminent German sociologist Niklas Luhman as a ‘confidence in one’s own expectation to another person’s behavior’. Its purpose is to reduce the complexity of life with all its incidents and possibilities by the reliance of one’s expectation. So therefore, ‘trust’ as a behavior reduces the complexity of life to the degree where decisions about present alternatives of actions can be taken with a view to the future. This ties directly the ‘trust’ with the ‘control’. Where ‘control’ is guaranteed, there is no need for ‘trust’. Countries have provided a system of values which controls person’s behavior and have created institutions that protect these values. In that sense it can be said that ‘law provides certainty by control’. If we look at the ‘trust’ and the ‘control/law’ from an inversely proportional aspect, we can conclude that if the ‘control/law’ is emphasized, meaning that it ‘reliably stabilizes expectations’, then ‘trust’ is lowered because the incidents and the possibilities are reduced. From the perspective of the goal that ‘trust’ and ‘control’ want to achieve, they serve the same purpose; they represent functional equivalents. To answer to the proposed questions, it is crucial to determine the balance between ‘trust’ and ‘control’ and with
that to expose the tools and modalities in achieving this balance.

1.3 Countries historically have had different approaches and different concepts regarding *exequatur*. From the first position of free circulation of judgments to the *révision au fond*, the balance has shifted to the extremes. Because of some practical aspects, it was much easier to lower the ‘control’ regarding the way how the foreign court applied the substantive law. As a consequence, ‘trust’ was achieved much faster regarding this requirement. Minimum ‘control’ of the application of the foreign substantive law is still kept if these errors amount to violation of public policy.

1.4 Still, the description of the interaction between the ‘trust’ and ‘control’ in the cases of *exequatur* does not explain why there is reduced legal control of foreign judicial decision. There were several theories and doctrines which proposed the answer to the question: why do countries recognize and enforce foreign decisions? In most of these theories, it was shown that the main reason for allowing recognition of foreign judgments was a question of policy by the recognizing country. The comity doctrine stated that the ‘trust’ in the foreign legal system was based on prudence and politeness. This understanding of the ‘trust’ afforded on the foreign legal system did not explain the existence of reciprocity ‘control’ of the foreign judgment. Scholars and practitioners went even further in the explanation on why a country should recognize and enforce a foreign decision. In the common law countries, the doctrine of obligation and the doctrine of acquired rights were proposed; however, they contained ambiguities and did not propose a realistic explanation. The doctrine of *res judicata* tried to be more pragmatic, but still failed to address the issue of public policy. In essence, all of these theories and doctrines were trying to explain some aspects of the *exequatur*. In fact, the ‘trust’ afforded to the foreign legal system is not so much based on the abstract legal comity between the countries, but on the ‘trust’ of the administration of justice by the foreign courts when addressing individuals’ rights of access to justice in due time and without disproportionate effort in international cases. Therefore ‘trust’ is not something general, but is an effective individualization in the performance of the judicial authorities when addressing cross-border cases. As has previously been stated, ‘trust’ in other countries’ administration of justice may be conceptualized as a practice for optimizing the individual’s effective access to justice in cross-border cases.

1.5 Having in mind these interactions of the ‘trust’ and the ‘control’ on general level, the answer
to the two proposed questions further stretches to the jurisdictional limits of the country of origin. Jurisdiction which has been properly determined on basis of reasonable, rational or harmonized jurisdictional criteria directly influences ‘trust’ and reduces the ‘control’ of law. So the jurisdictional requirements for the recognition and enforcement of foreign judgments which are based on jurisdictional criteria of the country of recognition (mirror principle) or jurisdictional criteria which are agreed upon (in the EU or in international conventions) represents ‘controlled trust’. This is especially important because the main goal here is not only to protect individual’s effective access to justice in cross-border cases, but it is also to protect defendants’ rights because exorbitant jurisdiction puts at risk the defendants’ rights. In that aspect, this jurisdictional requirement represents a very important tool in the balancing of ‘trust’ and ‘control’. Also, other tools are available which directly influence the amount of ‘trust’ the countries have in each other and how far they can go in the ‘control’. These modalities refer to: the protection of the defendant’s rights, the existence of an earlier judgment or lis pendens of proceedings that conflict with the foreign judgment to be recognized, reciprocity, and (historically) the application of different substantive laws by the country of origin regarding some questions on the basis of different conflict of law rules from the country of enforcement. All of these requirements represent measures upon which ‘control’ is conducted by the country of enforcement and are regarded as minimum standards of this control. However, one question stands: can these controls be conducted by other authority, namely the court of origin? Yes; if it is agreed, if the countries share common procedural and substantive standards, and if their legal systems are harmonized on a larger scale, then this control can shift to the country of origin. The ‘confidence in one’s own expectation to other person’s behavior’ means that effective administration of justice is present in the country of origin and the country of enforcement is confident about what to expect from that judgment (regarding the minimum procedural standards). However, historically, it has been shown that this ‘trust’ is more effective when some kind of ‘control’ is exercised by someone other than the one controlled.

2.1 All of these explanations refer to exequatur on a general level. However, on a specific level, some distinction must be made regarding judicial decisions in family matters. Family law is an area of particular sensitivity. Certain matrimonial matter judgments, such as judgments relating to divorce, marriage separation or marriage annulment are self-executing; That is, they require to be recognized but not to be enforced. This can also apply for some of the issues relating to children, such as an appointment of a guardian. Nevertheless, many of the decisions relating to children will need to be enforced. In such cases, when enforcement of decisions regarding
children is required, the whole procedure should be designed around the best interest of the child. Here the link between enforcement and best interest of the child is of particular importance, because inept enforcement has serious consequences and can result in untold emotional and physical damage of the child. When it comes to children, circumstances surrounding them are particularly important because ‘change’ is much more compressed in time and in space and has a much larger resonance that it has among adults. Children grow and develop, so what is appropriate at one time may not be helpful at a later stage. In that context, judgments relating to parental responsibility are different from judgments in most other civil and commercial matters. They cannot be treated as equal with other judgments that relate to money or inanimate objects. Children are much more sensitive, and judgments cannot be applied to children as if they were some species of chattel or some type of good. Therefore, enforcement of judgments relating to children are particularly difficult and require more comprehensive solutions.

2.2 The *Dowling and Gorell-Barnes* study has shown that a good relationship between children and their parents in the aftermath of divorce or separation is inversely proportional to the negative effects of the divorce. Children from divorcing families are caught between two feelings. They experience relief from the ongoing quarreling and high level of tension, but on the other hand they experience tremendous loss for the parent who leaves the home. In that aspect, they want to have a conclusion of their situation and have a meaningful relationship with the parent with whom they do not live. This study has also shown that a steady environment in the aftermath of the divorce helps them substantially and that it is crucial that children must express their feelings and their views. In these aspects, schools play a significant role because they provide for continuity at a time of change.

2.3 In the context of the recognition and enforcement of foreign judicial decisions that refer to children, the Dowling and Gorell-Barnes study could be referenced in several aspects. Firstly, the whole procedure should be swift. Children need a conclusion for their situation. Lengthy, complex and costly procedures for recognition and enforcement lead to serious damages and endanger the wellbeing of children. If the opposite path is taken, then children would live in an unresolved situation which would make their environment uncertain. At least this would prolong and thus normalize their situation. However, this swift procedure must be supported by some minimum requirements. Children should be heard during the course of proceedings regarding themselves and should freely express their views regarding the situation. Further,
they should maintain contact with the non-custodial parent or the parent with whom they do not live. This would help them mitigate the negative effects of divorce and provide for ‘normality’ in the newly-developed situation. Lastly, if they attend school and if they have increased interaction with their environment, then the parents should try not to interrupt these ties because this would again expose children to an emotional roller-coaster. In this aspect, the wrongful removal or retention of children is so harmful. With a unilateral act by the abducting parent, all of these ties are undermined. Children are removed from their familiar environment, they are severed of any contact with the left-behind parent, and they are put in an uncertain situation with no possibility to express their feelings. So these are the basic principles upon which recognition and enforcement should be built: A swift procedure with the abovementioned safeguards.

3.1 In light of the above said now, we should look at the recognition and enforcement procedures in the EU and in Slovenia. The idea of free circulation of judgments within the EU has existed for more than 35 years, but it was realized for the first time in the Brussels IIbis Regulation for limited cases of child abduction and access rights. The principles upon which this abolition of exequatur is build are ‘mutual trust’ and ‘mutual recognition’. So in a way, increased ‘trust’ (constructed in the EU in the political idea of ‘mutual trust’) between the Member States is responsible among other reasons for the decrease of the ‘control’ that Member States have regarding exequatur. The basic formula is this: where ‘mutual trust’ exists, procedures for recognition and enforcement should be improved. However, this ‘trust’ (‘confidence in one’s own expectation to other person’s behavior’) is not something which was totally acquired through experience during the interaction between legal orders (‘actual trust’), but it is rather imposed ‘trust’, a political decision that Member States can have confidence not in their own expectation, but rather in the political assessment of the EU institutions that other Member States’ behaviors are satisfying expectations. So, for this trust it can be said that it represents an ‘indirect trust’ gained through the assessment of the EU institutions. In some cases, it was shown that the lack of the imposed ‘mutual trust’ was creating problems and resulted in the circumvention of the application of the Brussels IIbis Regulation regarding ‘mutual recognition’. Thus, the cure which was proposed by the EU legislator is that the lack of ‘mutual trust’ should be improved by imposing an obligation for ‘mutual recognition’. Again here the problem is what comes first. Should ‘mutual trust’ be gained first and then the Member States should proceed in building system of ‘mutual recognition’ with further free circulation of judgments in mind or through the process of ‘mutual recognition’ the EU should build
‘mutual trust’? What is necessary is that instead of building politically imposed ‘mutual trust’, Member States should steadily build ‘actual trust’ through direct contact between the authorities of different Member States and with trust in each other’s administration of justice. In this approach, the work of the European judicial network (EJN) and the European judicial training network (EJTN) play important roles.

3.2 Because family laws among nations is different due different social backgrounds and legal traditions of the Member States full harmonization in this branch of law cannot be achieved. With the Rome III Regulation in the area of conflict of laws, certain efforts have been made on the basis of enhanced cooperation, but because of its nature the impact is limited only to 16 Member States. So for having free movement of judgments within the EU in certain areas of family law, there is a need for unified jurisdicational criteria which would minimize ‘forum shopping’ and ‘rush to the court’. The present jurisdictional system in the Brussels IIbis Regulation facilitates ‘rush to the court’ between the spouses in matrimonial matters cases. Also, in some cases the jurisdictional rules for transfer of jurisdiction have been found to be ambiguous and as a consequence they were referred to the CJEU for further interpretation. Therefore, what is needed is a more comprehensive, jurisdictional system that allows spouses to choose the competent court in matrimonial matters by common agreement and which has more precise rules for residual jurisdiction and for transferring of jurisdiction. Such a system would help improve and create a more stable environment for processing these cases that are delicate and filled with emotional charge.

3.3 Regarding the abolition of the exequatur, the position is much clearer as a policy consideration and as a theoretical observation than as a practical solution. As a policy consideration, the abolition of the exequatur should provide for judgments to move freely, as families do. The exequatur procedure leads to complex, lengthy and costly procedures. This could result in damaging the relationship between the child and his/her parents and can be harmful to the child’s interests. Another aspect in the Brussels IIbis Regulation which is problematic in view of the parental responsibility decisions is the existence of two possible approaches to enforcement. One, which is applied to custody or residence decisions, requires issuing a declaration of enforceability, and the other, which is applied regarding access rights, where the issuing of a declaration of enforceability is abolished. In that sense, such a situation could lead to a possible scenario where access rights may be enforced prior to a judgment deciding the child’s residence.
3.4 Therefore, in view of enforcement of parental responsibility decisions in the EU, a question of balance between the ‘trust’ and ‘control’ stands. If we look at the recent approach taken by the EU regarding the abolition of exequatur in Brussels Ibis Regulation, certain safeguards were kept. So total ‘trust’ was not achieved but rather the approach of limited ‘control’ was postponed to a later stage. ‘Control’ was taken in the form that the *ex ante* control by the state now is transformed to *ex post* control initiated by the parties. So the abolition of the exequatur in the Brussels regime represents moving the coordination to a later stage of the implementation of recognition and enforcement. It is very realistic to assume that the new Brussel IIbis Regulation will follow these new tendencies in the Brussels regime. Again the question of balance regarding the Brussels IIbis Regulation translates to the answer of the question whether removing the requirement of exequatur could mean abandonment of certain ‘control’ and with that introducing new problems, without tackling what is important here, the child’s best interest.

3.5 In that sense, what is expected from the new Brussels IIbis Regulation is the introduction of measures that will help facilitate this ‘tense’ situation. Because of their nature, Brussels IIbis Regulation cases are much more personal and emotional than the rest of the cases. In the legal aspect, this provides that the parties have fundamental objections to the judgment concerned and do not want them to be enforced. If we again look at the *Dowling and Gorell-Barnes* study, it gave the basic requirements for the protection of the child’s best interest. At the end, in all of these cases, the child’s best interest is what needs to be protected. In legal terms this means that the child’s voice has to be heard, that the procedure needs to be prompt and all of the authorities should facilitate the normalization of the situation through the available modalities of judicial cooperation in the European Union Justice system. For these purposes, there is a need for all of the authorities to be involved, because the exclusion of all judicial involvement in the Member State of enforcement creates certain disadvantages. The removal of any safeguards would worsen the resistance by depriving parties of recourse to the court or by making protest difficult. So on a theoretical level, balance between the ‘trust’ and the ‘control’ lies in building ‘actual trust’ by the involvement of all of the authorities, especially the courts, in adaptation of their powers for the benefit of the child and the abolition of exequatur with the adoption of minimum standards. However, it is naïve to think that only abolition of exequatur and adoption of minimum standards would resolve the problems of enforcing parental responsibility judgments. The EU contains different modalities and networks that could help
ease this problem. Only with comprehensive mobilization of all of the necessary resources can this situation have a positive outcome. Otherwise, the political ideas and the desires of the EU institutions would still be in front of the real practical issues.

4.1 Regarding the recognition and enforcement of foreign judgments in Slovenia on the basis of the PILP act of Slovenia, it can be stated that there is space for certain improvements of the conditions for recognition and enforcement of this procedure. Regarding the violations of the jurisdiction of Slovenian courts provided in Articles 97 and 98 of the PILP act of Slovenia, it must be stated that these rules are only the last resort of the tackling of the jurisdictional issues. For comprehensive change, as a prerequisite for the amendment of Article 97 and 98 of the PILP act of Slovenia, there is need for a revision of the exclusive jurisdictional criteria in the PILP act of Slovenia (for example, this characteristic is not attributed to the choice-of-court agreements). Moreover, certain jurisdictional standards (habitual residence of the child) are not provided in the PILP act of Slovenia. If such standardization is accomplished, then de lege ferenda, the introduction of the combination of exclusive jurisdiction protection and the ‘mirror principle’ rule would be a welcomed solution.

4.2 Article 96 of the PILP act of Slovenia covers the issue of violation of the right to a fair trial in the country of origin. However, the infringement of this right is also covered with the rule on (procedural) public policy contained in Article 100 of the same act. Although both of these rules can cover the same issue, there is no obstacle for the Court to deny recognition on both of these requirements, but the rule in Article 100 covers much broader issues and is determined ex officio, while Article 96 is determined after the initial ruling is served to the other party (the party against whom the decision was rendered) upon his objection. Moreover, the amendment of Article 96 should cover another aspect regarding the identity of the person who can object the recognition. Instead of objection upon the ‘…party against whom the decision was rendered…’ the new rule should be initiated upon the ‘…party against whom the recognition is sought…’ Lastly, there should be a third paragraph added in the new rule for the cases where the foreign judicial decision should be recognized despite the infringements on the right to a fair trial, if the party, having no opportunity to participate in the proceeding, failed to commence proceedings to challenge the judgment in the country of origin when it was possible for him to do so.

4.3 Article 99 of the PILP act of Slovenia contains the requirements regarding the ne bis in
idem principle for the recognition and enforcement of foreign judicial decisions. Generally, this rule covers the main issues, however certain improvements can be made regarding the identity of the legal matter in specifying the subjective and objective elements (the same legal matters and between the same parties).

4.4 The public policy rule in the PILP act of Slovenia is given in Article 100. Its content has been determined in several cases by the Supreme Court of Republic of Slovenia. These cases provide for a unified approach where the content is consisted of: (i) legal norms: constitutional principles, basic principles arising from laws, basic principles of the legal order of the Council of Europe, European Communities and international agreements adopted to guarantee the minimum standard of legal protection, all with the restriction which prevents the concept of the recognition of a foreign judicial decision to fail: not every cogent (forced) regulation is a part of public order, only those are where their violation would threaten the legal and moral integrity of the domestic legal system; (ii) international customary law; (iii) basic moral principles, and (iv) vital economic, political … interests of the state. It covers (although not directly specified in Article 100), both substantive and procedural public policy. In the case of procedural public policy, the Supreme Court even further defined the content of the procedural public policy containing the constitutional principles, the fundamental principles of individual legal branches, the fundamental principles of EU law, the principles derived from international treaty law, in particular the ECHR, customary international law and basic moral principles.

4.5 Reciprocity loses its significance in the modern PIL acts. It has come to be seen as ‘relic’ from the past. The position of reciprocity is in collision with the need for speedy, reliable and more effective access to justice procedures. Moreover, the availability of foreign rights through increased cooperation between the countries and large number of bi- and multilateral agreements diminishes its significance even more in the modern PIL acts. So for future prospects it is expected de lege ferenda that the reciprocity requirement will be abolished or that its subject matter would be substantially narrowed.

4.6 In Slovenia, in legal aspects, there generally are no drawbacks which would seriously jeopardize the application of the Brussels IIbis Regulation. The substantive law and the national procedures are in line with the basic requirements of the Regulation but also there are some differences. The child and the parents can express their position in cases concerning them. There is no special procedure for recognition and enforcement of foreign decisions in family matters (only general) but in structure it resembles the procedure in the Brussels IIbis
Regulation. Such a procedure can be decided as a main question and as an incidental question. There are some differences between the Brussels IIbis Regulation and the Slovenian law in the context of the declaration of enforceability, where in the Slovenian legal tradition such an instrument is unknown. This can be a bit confusing because in Slovenia there is no need to request declaration of enforceability and the recognition can be decided directly in enforcement procedure as an incidental question. However, the main problems in the application of the Brussels IIbis Regulation again are not found in the application of the rules, but in the lack of ‘trust’ between the implementing authorities of the Regulation. As it was shown with the Detiček case, there is a certain level of distrust between the authorities. This case is an example of the negative effects of the imposed ‘trust’. The court of enforcement is put in a position to blindly ‘trust’ the court of origin, where at the same time it is deprived of any possibility of ‘control’. In such a situation the circumvention of the Regulation comes into play and becomes the leading fundamental objection of the enforcement.

4.7 As much as the political will of the EU is understandable, there must be some kind of realistic expectations for the modalities of building ‘actual trust’. This cannot be achieved by imposing an obligation that Member States have to ‘trust’ other authorities. ‘Trust’ is not something which can be built by theoretical or political will. The persons who are implementing the Regulation have to have confidence in what to expect from the other person’s behavior in the application of the Regulation. Also, they have to understand the regulation and the values which it protects. When they have understood these values and when they are certain that the other persons also have understood the values, then the ‘actual trust’ would emerge. Without ‘trust’ all that would be left are ineffective rules, as much as they are flawlessly drafted or constructed. The protection of the best interest of the child is a universal value. It must be understood and it must be protected. Children especially do not know boundaries. They understand only environments in which they can feel free, secure and loved. It is the duty of the countries to assure that nothing in their legal systems would be used so that children would be deprived of what is necessary for them and that is to have happy childhoods and to develop into healthy individuals.
Povzetek


V zadnjih letih je Europska unija (EU) presegla samo urejanje gospodarskih odnosov in skupnega trga. EU je dopolnila uredbo o družinskih razmerij, področje kje se običajno spori rešujejo v skladu z nacionalnimi predpisi ali z uporabo mednarodnih pogodb. Takšna raznolikost pravnih virov je podvojila število potencialnih pravnih pravil, ki se lahko uporabijo v enem položaju, a s tem še bolj zapletuje tako že zapleteni mednarodni zasebni položaj.

Drugi vidik, ki je zelo pomemben glede priznavanja in izvršitev tujih sodnih odločb v družinskopravnih zadevah, je, da nedavno prišlo do velike spremembe znotraj same družine.
Globalizacija ni le gospodarski pojav; ampak vpliva na vse družbene vidike. Zlasti so se zgodile velike spremembe v strukturi družine. Dolgotrajni tradicionalni koncept družinskega prava ki je sestavljen iz mešanico verskih, družbenih in kulturnih značilnosti enega naroda, sedaj doživlja večje spremembe kot kadarkoli. Te dve smeri (globalizacija in sprememba v strukturi družine) vplivata na priznavanje in izvršitev sodnih odločb na različne načine. Povečanje prostega pretoka ljudi v EU povzroča zapletene čezmejne družinske odnose ki zahtevajo primerno urešitev, ki temelji na temeljnih načelih, še posebej na načelo "medsebojnega zaupanja" kot predpogoj medsebojnega priznavanja, ki bo omogočal svobodni pretok sodnih odločb med državami članice. Na ta način vprašanje o ukinitvi postopka izvršljivosti (eksekvature) se poveča, če deluje primerno, ali če je zahtevana popolna ukinitev. Po drugi strani, tradicionalni koncept družinskih odnosov predvideva določeno nelagodje pri izvajanju teh določb ter izogibanju spoštovanja pravil. Na nekateri način to je v nasprotju z načelom "medsebojnega zaupanja". Zaradi tega, priznavanje in izvršitev družinskopravnih odločb je zelo pomembno, saj se znižuje do jedra problema "medsebojnega zaupanja" in razpredeli delovanja vzajemnega priznavanja v EU.

Ta doktorska disertacija predstavlja raziskavo, ki je izvedena na podlagi osnovnih elementov priznavanja in izvršitve tujih sodnih odločb in posebej značilnosti priznanja in izvršljivosti (exequatur) teh odločb (in njeno ukinitev) glede družinskih zadevah. Sestavljena je iz uvoda, treh delov, sklepa in bibliografije. Uvod zagotavlja uvodne ugotovitve o tezi, kakor tudi podrobnno opredeljuje namen, cilj ter hipoteze doktorske disertacije. Uvodni del vsebuje pregled znanstvenih metod, ki se uporabljajo v disertaciji.

Prvi del teze je sestavljen iz dveh poglavij. Prvo poglavje vsebuje kratak pregled preobrazbe družine z sociološkega vidika in prikazuje spremembe tega modela in njegove funkcije. To poglavje se začne z razumevanjem družine kot družbeno konstrukcio z zgodovinske spremenljivke (v smislu njegove vsebine, strukture in oblike) in nekaj konsantov: biološko funkcijo, bio-družbeno funkcijo, družbeno funkcijo in ekonomsko funkcijo. V tem poglavju je zelo na kratkem prikazano, da je družina čez zgodovino doživela trajno spremembo njene strukture, funkcije kakor tudi odnosov znotraj nje, kateri so že vnaprej določeni z gospodarskih, socialnih in verskih postavitvah ki so bile prevladujoče v družbi v določenem času. V tem poglavju se poudarja na svetovnem pojavu "globalizacije" in njen vpliv na oblikovanju družine.

Druga točka, ki je obravnavana v tem poglavju prvega dela, se nanaša na položaj otroka v času prenehanja zakonske veze in njene posledice. Kakor se zakonske zveze sklenejo tako se razveljavijo. Danes je bolj kot kadar koli v Evropi sprejeto da razveza predstavlja
civilizacijski proces prekinitev nefunkcionalne zakonske zveze. Vendar, to ne pomeni da se odnosi v družini končajo. Gredo skozi določeno preobrazbo, ki vpliva na vse člane, ampak predvsem otrokom. V skladu s študije Dowling and Gorell-Barnes teza prikazuje to, da če so se odnosi med starši tako silno poslabšali in posledično imajo pravico do prekinitev te zveze, potem starši in ostale institucije, ki so vpletene v tem procesu so dolžne poskrbeti za “normalni” odnos med obema staršema in otrokom tudi po prenehanju zakonske zveze. Zato je potreba o ohranjanju pomembnih odnosov s staršev in potreba otroka o zastopanju svoje lastne poglede človekova pravica določena v Konvenciji Združenih narodov o otrokovih pravicah ter v Listino Evropske unije o temeljnih pravicah. Standard, ki mora biti implementiran v vseh pravnih virih vključuje tudi mednarodne zasebne pravne vire.

Priznavanje in izvršitev predstavlja en vidik mednarodnega zasebnega prava kateri cilj je izogniti se ponovnega postopka in zagotoviti vsklajene odločitve v katerem so pravice strank zaščitene. To pomeni, da morajo države spošťovati potrebe obema in to: na eni strani, morajo varovati svojo suvereniteto in integriteto pravnega sistema, a na drugi strani pa morajo zadovoljiti potrebe strankam in preprečiti ponovnega prožanja procesa pred tujem sodišču za isto zadevo in med istimi strankami za kateri je že bilo odločeno pred sodišču druge države. V bistvu to je povezano z ravnoresjem med “zaupanjem” v proceduralnimi in vsebinskimi pravnimi standardi tujega pravnega sistema in obseg “nadvora” država, ki izvršuje naložene tuje odločbe ter skozi to do tujega pravnega sistema in obseg nadzora države, ki izvršuje naložene tuje odločbe ter skozi to do tujega pravnega sistema. V zvezi tega, da bi imeli bolj celovito razumevanje o priznavanju in izvršitvi, drugo poglavje prvega dela, najprej vsebuje nekaj predhodnih pripomb in konceptualnih razumevanj pravnega pojma “priznavanje” in “izvršitev”. Po tej konceptualni razlagi na osnovne pravne pojme v tezo, poglavje obravnava vrste odločb, ki se lahko priznajo in izvršijo z razlikovanjem med vrstami odločb ki so nedvoumne in so izvršljive (eksekvature) ter vrstami odločb, ki so sporne v odvisnosti ali jih je mogoče priznati in izvršiti v drugih državah. Na podlagi terminološke določitve pomena priznavanja in izvršitev, v drugem poglavju je podan pregled osnovnih doktrin (vljudnosti, doktrina obveznosti, pridobljene pravice in prenesene pravice ter res iudicata). V tem poglavju je obravnavan zgodovinski razvoj priznavanja in izvršitve tujih sodnih odločb v Evropi. Da bi imeli celotno terminološko razumevanje priznavanja in izvršitvi, to poglavje obravnava sisteme, ki so prisotni v večini pravnih sistemov (sistem omejenega nadzora tujih sodnih odločb (revision au fond), sistem prima facie evidence, sistem revizije tujih sodnih odločb in sistemi, ki ne priznajajo tujih sodnih odločb razen če obstajajo mednarodni sporazumi. Zadnje, v tem poglavju je podan pregled pravnih virov vezanih na priznavanje in izvršitev v EU in Haško konvencijo o mednarodnem zasebnem pravu.
Drugi del predstavlja bistveni del teze v katerem je prikazana podrobnana analiza Uredbe sveta (ES) št. 2201/2003 z dne 27. novembra 2003 o pristojnosti ter izvršitev sodnih odločb v zakonskih sporih in sporih v zvezi s starševsko odgovornostjo, ter razveljavitvi uredbe (ES) št. 1347/2000 (Bruselj IIbis) s poudarkom na postopka o priznavanju in izvršitev ter ukinitev postopka izvršljivosti (eksekvature) v primerih ugrabitve otroka in pravice do stikov.

Ta del je sestavljen iz petih poglavij in obravnava priznavanje in izvršitev tujih sodnih odločb v zakonskih sporih in v zvezi s starševsko odgovornostjo v EU predvsem v Bruseljsko Ilbis uredbo. Prvo poglavje obsega področje uporabe Bruseljske Ilbis uredbe. Predvsem poudarja vsebinske uporabe uredbe, tudi poveča vprašanje glede ozemeljske in začasne uporabe. Bruseljska Ilbis uredba zajema dva velika področja družinskega prava z čezmejnih dimenzij: zakonske spore in spore v zvezi s staševsko odgovornostjo. Zakonski spori se per se nanašajo na razveze, prenehanju življenske skupnosti ali razveljavitvi zakonske zveze, ali kot je bilo v enem komentarju navedeno, prenehanju in oslabitve zakonske zveze. Nadalje, v tezo je terminološko obdelanem avtonomnem pomenu pojma "zakonska zveza" oziroma kako se razume v pravnem sistemu EU. Vendar, ta izraz ni brez polemike. Njenega pomena ni enostavno opredeliti, ker je pomen pojma "zakonska zveza" obremenjen z nedavnim razvojem in spremembam v konceptualnem razumevanju zakonske zveze v vprašanjih kot so: pravilna oblika zakonske zveze, heteroseksualne/homoseksualne poroke ter registrirane partnerske skupnosti. Dve najbolj sporni vprašanji glede razlage pojma "zakonska zveza" v Bruseljsko uredbo zajemajo partnerske skupnosti ali bodisi se uporablja za istopolne poroke. V sklepu te teze se predlaga, zaradi številnim razlikam med državam članic na tem področju, da je v sedanjem bolje, da ne obstaja široka teleološka razlaga o partnerskih skupnosti in istopolne poroke v položaju "zakonska zveza", in ohraniti poročnega partnerstva v Bruseljski Ilbis uredbo. Glede registriranimi partnerstvi, je bolj jasno in je večjo soglasje o tem, da te odnosi ne sodijo v področju uporabe Bruseljske Ilbis uredbe. Vendar prilagajanje na dejansko stanje bo v bližnji prihodnosti potrebno in Evropska zakonodaja bo morala sprejeti nove instrumente, ki bojo zajeli registrirane partnerske skupnosti. Glede stališča o vključitvi istopolnih porok v področju uporabe Bruseljske Ilbis uredbe, teza predlaga, da se na to mora počakati dokler čim več držav EU ne sprejmejo tega v svoje nacionalne pravne sisteme in s tem se ustvari skupno podlago za razumevanje novega fenomena v evropskem kontekstu.

V drugem poglavju se obravnava razmerje med Bruseljsko Ilbis uredbo in najbolj ustreznih mednarodnih sporazumov Haaške konvencije na področju mednarodnega zasebnega prava – Haaško konvencijo iz leta 1980 o civilnopraavnih vidikih mednarodne ugrabitve otrok
in Haaške konvencije iz leta 1996 o pristojnosti, pravu, ki se uporabi, priznavanju, izvršitvi in sodelovanju na področju straševske odgovornosti in ukrepop za zaščito otrok. To vprašanje je še bolj pomembno, ker so države članice Evropske unije hkrati podpisnice teh mednarodnih sporazumov in so tudi zavezane z uredbo EU. Prav tako, večina rešitev ki so določeni v uredbi Bruselj IIbis so se pojavile ali so podobne tistim ki so bile določeni v Haaško konvencijo iz leta 1980 ter leta 1996. Ta medsebojna povezava med pravili zagotavlja povezanost in usklajenost pravnih virov, ki lahko pokrivajo področja, ki jih je mogoče razrešiti na podlagi dveh ali včasih več mednarodnih sporazumov in s posebnim predpisom EU.


Konvencija za zaščito otrok iz leta 1996 ima najširšo področje uporabe otroških konvencij Haaške konference in je sestavljena iz treh vrst pravil. Kot prvo, so pravila postopka ki se nanašajo na določitev pristojnosti in priznavanju ter izvršitev; kot drugo pa so konfliktna pravna pravila, ki se nanašajo na določitev veljavnega prava, in tretjič, precejšno število pravil, ki se nanašajo na sodelovanj med oblastmi. Bruseljska Ilibis uredba in Konvencija o zaščiti otrok, iz leta 1996, sta zelo tesno povezana. Konvencija predstavlja glavni temelj za tiste dele uredbe, ki so v zvezi z starševsko odgovornostjo. Ta velja v večini držav, ki so člane Evropske unije za tiste države, ki niso članice EU. Konvencija je vsebuje klauzule o adheziji za Organizacijo o regionalnem gospodarskem povezovanjem (ORGP) in zaradi tega morajo države članice Evropske unije same ratificirati konvencijo tudi v imenu Evropske unije. Bruseljska Ilibis uredba ima prednost pred konvencijo za zaščito otrok iz leta 1996, v primeru če ima otrok...
običajno prebivališče v pristojno državo članico. V drugi situaciji, ko je sodba izdana v drugi
štavi članici, priznavanje in izvršitev pa se izvajajo na podlagi pravil iz uredbe, četudi je
otrokojo običajno prebivališče v državi ki je članica Konvencije o zaščiti otrok iz leta 1996,
vendar ni država članica Evropske unije. Haška konvencija o zaščiti otrok iz leta 1996 je še
posebej pomembna v EU, ker je Bruseljska Iibis uredba omejena glede določitve veljavne
zakonodaje za zadeve povezane z starševsko odgovornostjo. Glavni cilj Bruseljske Iibis uredbe
je določitev pristojnosti, priznavanju in izvršitev tujih sodnih odločb in sodelovanje med
državami članicami EU. Konvencija o zaščitu otrok vsebuje konflikte pravnih pravil za
določitev veljavne zakonodaje v primeru ukrepe za zaščito otrok. Takšna pravila niso navedena
v Bruseljsko Iibis uredbi. To pomeni, da med državami članicami EU, je določitev veljavne
zakonodaje določena s konvencije iz leta 1996, čeprav je pristojnost na podlagi uredbe.

Tretje poglavje analizira pravila o pristojnosti glede zakonskih sporih in odločbah v
zvezi s starševsko odgovornostjo ter se izrečno sklicuje na težave, ki se pojavljajo pri izvajanju
teh pravil.

V četrtrem poglavju, teza analizira skupne določbe, ki so predvidene v 16-20 člena
Bruseljske Iibis uredbe. Ta del uredbe je imenovan “skupne določbe” ki se splošno nanašajo
na treh primerih: prvič, ugotavljanje pristojnosti, drugič, vprašanje o lis pendens, in tretjič
začasni ukrepi zaščite.

Glavno poglavje v tem delu je peto poglavje in je razdeljeno v treh podpoglavi. V
prvem podpoglavju so prikazane splošne sisteme eksekvature v Evropski uniji. To obdeluje pet
sistemov oziroma modelov za priznavanje in izvršitev sodnih odločb v EU ki so določeni v
pravnih aktih EU.

Drugo podpoglavje se nanaša na postopke o priznavanju in izvršitvi uredbe Bruselj
Iibis. To podpoglavje najprej analizira postopke in pogoje glede zadeve o zakonskih sporih in
nato za vprašanje v zvezi s starševsko odgovornostjo. Precejšni del drugega podpoglavja,
petega poglavja je namenjen za odpravo postopka eksekvature v zvezi s pravico do stikov in v
primerih o ugrabitve otrok.

Z razvojem EU, države članice so prenesle del svoje suverenosti z nacionalne ravne na
ravni EU. To je precej pomembno na področju mednarodnega zasebnega prava, v
Amsterdamski pogodbi, ki je del mednarodnega zasebnega prava uveljavljen v prvem stebru.
Kot posledica tega, EU ima neposredne kompetence nad priznavanjem in izvršitvi tujih sodnih
odločb, ki prihajajo iz države članice EU, zlasti v določenih pravnih področjih. To neposredno
vpliva na "zaupanje" med državami, kjer to načelo v EU postavlja se na novi ravni
"medsebojnega zaupanja" in na področju priznavanja in izvršitev se odraža v načelu

xxi
"vzajemnega priznavanja". Ta vidik tudi vpliva na "nadzor" tujih sodnih odločb v EU, kjer vse manj in manj standardov so potrebni in tendenca celotne odprave (abolicijo, razveljavitev, ukinitev) eksekvature. V procesu o razveljavitvi eksekvature v EU, druga družbena pojava postane prisotna. To je družbena konstrukcija ki vpliva na življenje in razvoj ljudi, in s tem neposredno vpliva na družino: globalizacija. Priznavanje in izvršitev sodnih odločb je predpisana v III poglavja Bruseljske IIbis uredbe (členov 21-52) in je sistematično razdelejna na pet področij. V uredbi je vzpostavljen sistem, ki temelji na dajanje osrednje vloge sodišča države članice, ki ima pristojnost za določanje odločb. Vloga sodišča druge države članice je omejena.

Obstajata dva ločena postopka priznavanja in izvršitev odločb, ki so primerni za priznavanje in izvršitev v skladu z Bruseljsko IIbis uredbo, kjer se primernost določi ne glede na to ali spadajo ali ne v področju uporabe te uredbe. Prvi postopek je klasični postopek eksekvature, ki se uporablja v zakonskih sporih in zadevah v zvezi s starševsko odgovornostjo, drugi postopek pa je tisti ki odpravlja eksekvature, ki je omejen na primerih o ugrabitvi otrok in pravice do stikov. Postopki eksekvature so podobni, vendar se razlikujejo v razloge za nepriznanje in izvršitev. Toda ti postopki se štejejo med klasične postopke eksekvature z razglasitev izvršljivosti. Poleg tega, Bruseljska IIbis uredba je sestavljena iz drugačnih vrst postopkov, ki so bili novost v času ko je uredba bila sprejeta: postopek ki predstavlja razveljavitev postopka eksekvature, kar pomeni, da so odločbe, ki se nanašajo na določene primere o ugrabitvi otrok in pravice do stikov so izvršljivi v države članice izvršitve in, da jim ni treba izdajati izjavo o izvršljivosti in brez možnosti pritožbe.

Glede priznavanja in izvršitve tujih sodnih odločb v družinskih zadevah v okviru EU, ta teza se spopada z vprašanjem odpravo eksekvature, kot je določeno v Bruseljski IIbis uredbi. Prvo področje, na katero je bila eksekvatura v EU v celoti ukinjena, so primeri na ugrabitvi otroka in pravice do stikov. Ta dva posebna primera sta zelo pomembna, ne zato ker sta zelo pogosta, vendar zaradi načina kako odmevajo v družbi. Pogosto so v veliki meri ti primeri zajeti v medijah z negativnim prizvokom in predstavljajo resnično nevarnost za režimo ugrabitve otroka v EU in s tem do "medsebojnega zaupanja" med pravnimi odredbami EU.

Teza predlaga, da je glavni problem režima ugrabitve otroka v EU ni so le rešitve v Bruseljski IIbis uredbi, ki so v resnici strome, temveč "nezaupanje" glavnih organov, ki izvajajo ta pravila. Evrospki sistem ugrabitve otroka je postavljen tako da je končni arbiter sodišče, ki je pristojno za mesto kjer je otrok običajno prebival, preden je bila ugrabitev. Država, ki izvršuje je omejena in ima skoraj neobstoječo priložnost da zavrne izvršitev končne odločbe o vrnitvi otroka. V takšni situaciji, sodni organi se izogibajo Bruseljske IIbis uredbe, da bi

V zvezi z odpravo eksekvature, je ta položaj veliko boljjasen kot upoštevanka politika in kot teoretično opazovanje in ne le kot praktično rešitev. Kot upoštevamo politiko, odpravo eksekvature bo predvidevalo sodne odločbe da se gibljijo prosto, kot družine delajo. Postopek eksekvature privede do zapletenih, zapletenih in dragih postopkov. To lahko privede do poškodovanja odnosov med otrokom in njegov/njen starši in lahko škoduje interesom otroka. Drugi vidik Bruseljske IIbis uredbe, ki je problematičen glede odločitve o starševski odgovornosti, je obstoj dveh možnih pristopov k izvršitvi. Prvi pristop, ki se uporablja za
odločitve o skrbništvu in prebivališča, zahteva razglasitev izvršljivosti in drugi pristop, ki se uporablja glede pravice do stikov, kjer razglasitev izvršljivosti bo razveljaviti. V tem smislu, takšna situacija lahko pripelje do možnega scenarija, kjer se najprej izvršijo pravice do stikov pred sodbo o otrokovo prebivališču.

Glede izvršitev odločb o starševski odgovornosti v EU, izstopa vprašanje med "zaupanjem" in "nadzorom". V nedavnam pristopu, ki ga je EU sprejela, v zvezi z odpravo eksekvature, so nastali nekateri zaščitni ukrepi. Torej, skupno "zaupanja" ni bilo doseženo, ampak pristop o omejenem "nadzor" se odloži v naslednji fazi. "Nadzor" je sprejet v obliki tako da \textit{ex ante} nadzora države se pretvori v \textit{ex post} nadzor sprejet s strani stanke. Torej odprava eksekvature v Bruseljski IIbis režim predstavlja premik usklajevanja izvedbe priznavanja in izvršitev v poznejši fazi. To je zelo realno za pričakovati, da bo nova Bruseljska IIbis uredba bo sledila novim trendom Bruseljskega režima. Spet se postavlja vprašanje o ravnovesje glede Bruseljske IIbis uredbe, ki pomeni odgovor na vprašanje, ali lahko ukinitev zahteve o eksekvature pomeni opustitev določenega "nadzor" in s tem uvedbo novih problemov, brez rešitev tega kar je najbolj pomembno, oziroma kaj je najbolj v interesu za otroka.

V tem smislu, kaj je za pričakovati iz nove Bruseljske IIbis uredbe, je odvisno od uvedbe ukrepov, ki bodo pomagali olajšati nastalo "napeto" situacijo. Zaradi njihove narave, Bruseljski IIbis primeri so veliko bolj osebni in čustveno občutljivi kot ostalih primerih. Z pravnega vidika, se zagotavlja, da imajo stranke temeljne pripombe na navedene sodne odločbe, in ne bojo želeli, da se izvrši. Študij Dowling in Gorell-Barnes daje osnovne zahteve za zaščito interesov otroka. Na koncu, v vseh teh primerih, interesi otroka morajo biti zaščiteni. V pravnem smislu to pomeni, da je treba slišati otrokovega glasa, postopki se morajo izvajati hitro in vsi organi bi morali olajševati normalizacijo razmer s pomočjo razpoložljivih modalitetih sodnega sodelovanja pravosodnega sistema Evropske unije. Za te namene, obstaja potrebo sodelovanja od vseh organov, ker je izključitev vseh sodnih organov države članice iz postopka izvršitve ustvarja določene slabosti. Odstranitev vseh zaščitnih ukrepov bo stranke prikrajšalo za pritožbo ko sodišča ali bi protest težje. Tako na teoretični ravni, ravnovesje med "zaupanjem" in "nadzorom" leži v izgradnji "dejanskega zaupanja" z vključevanjem vseh organov, zlasti sodišča, z prilagoditvam svojih pristojnosti v koristi otroka in odpravo eksekvature s sprejetjem minimalnim standardov. Vendar pa je naivno misliti, da je odpravo eksekvature in sprejem minimalnih standardov rešilo probleme z izvršitev sodnih odločb v zvezi s starševsko odgovornostjo. EU vsebuje nekaj načine in mreže, ki lahko pomagajo ublažiti ta problem. Le s celovito mobilizacijo vseh potrebnih virov, lahko ima ta situacija
pozitiven izid. V nasprotju, politične ideje in želje institucije EU bo še vedno pred dejanskim praktičnim vprašanjem.

Tretjo podpoglavlje podaja podrobno razlago sodne prakse Evropskega sodišča za človekove pravice (ESČP) glede primerih o ugrabitvi otrok, z podrobnejši opis odnosov med zaščito človekovih pravic in postopkov iz Bruseljske Ilbis uredbe.

Tretji del teze razloži postopke za priznavanje in izvršitev tujih sodnih odločb v Republiki Sloveniji, z posebnim poudarkom glede odločbe iz družinskega prava. Sestavljen je iz treh poglavij, v prvem poglavju je podan zgodovinski razvoj postopka o priznavanju in izvršitev v Sloveniji. To poglavje sledi razvoju mednarodnega zasebnega prava v Sloveniji. V obdobju pred Zakona o mednarodnem zasebnem pravu (MZP) iz leta 1982 do uveljavitvi Zakona o mednarodnem zasebnem pravu in postopku (MZPP), ki je danes veljaven v Sloveniji, to poglavje prikazuje skladni (dosledni) razvoj mednarodnega zasebnega prava in s tem postopku o priznavanju in izvršitev v socialnih in gospodarskih razmerah v določenem obdobju. Zakon v skladu z uredbo Konfliktne pravila s predpisov drugih držav v določenih zadevah (ZMZP iz leta 1982) predstavlja prvo kodifikacijo mednarodnega zasebnega prava v vseh državah ki so tvorile Socialistično federativno republiko Jugoslavijo (SFRJ). Podobnost med Slovenskega zakona MZPP in MZP iz leta 1982 je očitna. Oba zakona sta sistematično razdeljena na šest poglavij, ki vsebujejo pravila za mednarodne pristojnosti (in postopka), konfliktne pravne pravila, pravila za priznavanje in izvršitev in drugih predpisov, ki so vsebovani znotraj njih. Glede vprašanja na področju družinskega prava, močan vpliv na slovenskega zakona o MZPP ima njegov predhodnik. Kot zaključek, to omogoča(zagotavlja) dosledno razumevanje pravil in uporabo praktičnih ter doktrinarnih snovi pri razlagi rešitve v obeh zakona o MZP.

Tudi to poglavje vsebuje pregled pravnih virov, z nacionalnega in mednarodnega vidika, ki so pomembne glede priznavanja in izvršitev v Sloveniji.

Drugo poglavje analizira postopek o priznavanju in izvršitev v Sloveniji. Po splošnih ugotovitvah, to poglavje se ukvarja z vprašanjem glede vrst odločb ki jih je mogoče priznati ter katero sodišče je pristojno za priznavanje v Sloveniji. Glede prvega vprašanja, teza opozarja na 94. člena slovenskega zakona o MZPP, kjer je razvidno, da je to pravilo osredotočeno na vsebino odločbe in ne na oblasti(organov), ki ga določijo ali ime same odločbe. S takšnega položaja, slovenski zakon o MZPP spoštuje suverenosti tuje države in nacionalne identitete tujih pravnih sistemov. Posledično, vse vrste oddločb (ugotovitvene, konstitutivne in obsodilne), ne glede na njihov naziv, so lahko priznane in imajo pravne učinke v Sloveniji, vendar le obsodilnih oddločb je mogoče izvršiti, zaradi njihove narave. Glede drugega vprašanja,
"pristojnosti sodišč v Sloveniji glede priznavanja tujih odločb" je odvisno ali se zahteva kot glavno vprašanje ali kot predhodno vprašanje. V Sloveniji, pristojnost za odločanje v neodvisnega postopka glede priznavanja tujih sodnih odločb je na voljo na okrožnih sodišč. Krajevna pristojnost za priznavanje tujih sodnih odločb je pri kateremkoli sodišču, ki je materijalno pristojno. Vendar, takšno pozicijo ne izključuje možnosti da priznanje tuje sodne odločbe nastane kot prethodno vprašanje, s strani sodišča, ki ga izvršuje. Če ni bilo nobenega posebnega pravila izdano glede priznanja tujih sodnih odločb, lahko vsako sodišče o tem odloči kot predhodno vprašanje, vendar z učinkom, ki se nanaša samo na ta postopek.

Velik del tega poglavja je namenjen za razlago pogojev za priznavanje in izvršitev v Sloveniji. Poleg tega, pogoji za priznavanje in izvršitev v Sloveniji so dodatno pojasnjeni, s primerjalno metodo, pri kateri je določena širša dimenzija s primerjavo podobnih pravil v različnih pomembnih regionalnih in evropskih zakonih MZP.

Vsi pogoji glede priznanja in izvršitve so podane kot pozitivni ali negativni pogoji. Pozitivni pogoji za priznavanje in izvršitev so v 95. in 103. člena zakona MZPP, medtem ko so vsi drugi pogoji podani kot negativni. Člen 95 določa, da mora prosilec za priznanje tuje sodne odločbe, da priloži k svoji vlogi: tujo sodno odločbo ali njegovo overjeno kopijo in potrdilo pristojnega tujega sodišča ali drugega organa o pravnomočnosti odločbe po pravu države v kateri je bila odločba izdana. Glede izvršitve tujih sodnih odločb, 103. člena se začne z istimi formalnimi zahtevi za postopka izvršitve tujih sodnih odločb za tista, ki so bila predvidena v 95. člena. Vendar, zaradi narave izvršljivih odločb, zakon o MZPP v Sloveniji in v 103. člena išče dodatne formalne zahteve, kjer prosilec za izvršitev tuje sodne odločbe mora priložiti tudi potrdila o izvršljivosti po pravu države porekla. Ta zakon bo služil kot dokaz da je tuja sodna odločba izvršljiva v skladu prava države porekla.

Vsi ostali pogoji za priznavanje in izvršitve tujih sodnih odločb predstavljajo negotivne pogoje. Te pogoje se predvsem nanašajo na konkretne primere, ko postopkovne vidike izdaje tuje odločbe, ki vsebujejo pomanjkljivosti, in zaradi obstoja takih pomanjkljivosti tuja sodna odločba ne more biti priznana v Sloveniji, ter sekundarno z vsebinskega vidika, kjer v izjemnih primerih sodišča lahko imajo pregled uporabljenega materialnega prava. Vendar, vsebinski vidik teh zahtev ne pomeni, da ima lahko sodišče poglobljeno analizo o vsebinskih izvršenjih. Slovenija je sprejela sistem o nadzoru limita priznanja in izvršitev, s katerim sodišče je zadržalo analizo uporabe materialnega prava države porekla. Vendar pa je omejena količina takšne analize dovoljena v primeru izmej javnega reda.

Negativni pogoji so zahtevni kjer so priznavanja in izvršitve sprejete, razen če obstajajo v določenih okoliščinah, ki preprečujejo priznavanje in izvršitev. Ti negativni pogoji so
oblikovani kot pravne ovire. Takšno razumevanje je lahko izpeljati iz dejanske izgradnje besedila členov, kjer je navedeno da "Tuja sodna odločba se ne prizna, če ...". So modelirani tako, da dokaznega bremena premakne od prosilca na osebo proti katero je bila izdana odločba, saj bo v njihovo korist če dokaže da obstajajo nekaterih pravnih ovir ki preprečujejo priznavanje in izvršitev odločbe. Vendar pa to ne pomeni, da je sodišče sprečeno od preučitvijo pravnih ovir, nasprotno, sodišče ima dolžnost preučiti pogoje, vendar le tiste ki so določeni po uradni dolžnosti.

V Zakonu MZPP obstajajo ločena pravila za priznavanje in izvršitev tuhih sodnih odločb, povezana s statusom oseb. Ta pravila so določena v 102. člana Zakona MZPP.

Ta teza vsebuje obsežna izvedba pogojev za priznavanje in izvršitev, razlaga njihove uporabe s strani ustreznih organov in opozarja na težave s katerimi se srečujejo. Primerjalni del teze predlaga obsežno razumevanje tega pravnega področja, zlasti skozi regionalno primerjavo, ker se "korenine" zakona MZP segajo že iz leta 1982 takratnega zakona MZP. V leti po razpadu Jugoslavije, so se pojavile nekaj različnih tendenc na področju priznavanja in izvršitev tuhih sodnih odločb. Ta del teze, analizira vseh teh tendenc in zagotavlja najbolj primerne rešitve za nadaljnje izboljšave postopka priznavanja in izvršitev v Sloveniji in v širši regiji.

Na podlagi svojih ugotovitvah, teza predvideva(predlaga) da je glede priznavanja in izvršitve tuhih sodnih odločb v Sloveniji na podlagi zakona o MZPP dovolj prostora za določenih izboljšav pogojev za priznavanje in izvršitev omenjenega postopka. Glede kršitev(neupoštevanja) pristojnosti slovenskih sodišč, določenih v 97. in 98. člana zakona MZPP je treba poudariti, da so ta pravila zadnja priložnost v reševanju vprašanj glede pristojnosti. K popolni spremembi, kot predpogoj za dopolnilo(amandma) 97. in 98. člana zakona o MZPP v Sloveniji, obstaja potreba po revizijo izključnih meril pristojnosti v zakonu o MZPP (na primer, ta lasnost ni pripisana v sporazumih o izbiro pristojnega sodišča). Poleg tega, nekateri standardi o pristojnosti (običajno prebivališče otroka) niso predvideni v zakonu o MZPP v Sloveniji. Če se takšna standardizacija doseže, potem de lege ferenda, uvedbo izključno zaščito pristojnosti in pravilo "načelo ogledalo" bo pozdravljena rešitev.

96. člen zakona o MZPP Slovenije pokriva vprašanje o kršitvi pravice poštenega sojenja v državi porekla. Vendar, kršitev te pravice je zajeta tudi s pravilom (proceduralnim) javnega reda ki je določeno v 100. členu istega zakona. Čeprav, oba pravila lahko pokrivata isto vprašanje ni nobene ovire, da sodišče razlikuje izvršitev obeh zahtev, toda pravilo iz 100. člena vključuje širšo področje vprašanj in se določi po uradni dolžnosti ex officio, medtem ko se 96. člena določi po prvotna odločitev ki se vroči nasprotni stranki (stranko, zoper katero je bila izdana odločba) ob ugovoru. Poleg tega, dopolnilo 96.člena bo zajemalo en drugačen vidik
identite glede osebe ki lahko ugovarja priznavanje odločbe. Namesto ugovor na "...stranke zoper katero je bila odločba izdana..." novo pravilo se treba začenjati "stranke zoper katero se priznavanje zahteva" Končno, treba je dodati tretji odstavek v novega pravila za zadeve (primeri) kjer se tuja sodna odločba treba priznati kljub kršitvah pravice do poštenega sojenja, če stranka, ki nima možnosti sodelovati v postopku, ni začela postopka za izpodbijanje sodne odločbe v državi porekla ko je mogel to storiti.

Člen 99 iz zakona o MZPP vsebuje zahteve glede načela ne bis in idem za priznavanje in izvršitev tujih sodnih odločb. Na splošno, v to pravilo so zajete glavne teme, možni so nekatere izboljšave glede identitete pravne zadeve v opredelitvijo subjektivnih in objektivnih elementov (iste pravne zadeve in med istimi strankami).

Pravilo javnega reda je podano v 100. člena zakonu MZPP. Vsebina (čega) je bila ugotovljena v več primerih s strani Vrhovnega sodišča Slovenije. Ti primeri zagotavljajo enoten pristop kjer je vsebina sestavljena iz: (i) pravnih norm: ustavna načela, temeljna načela, ki izhajajo iz zakona, temeljna načela pravnega reda Sveta Evrope, Evropske skupnosti in sprejetih mednarodnih sporazumov za zagotovitev minimalnih standardov pravne zaščite, vsi z omejitvijo, ki preprečuje koncept priznavanja tujih sodnih odločb da propade: ni vsaka prepričljiva (prisilna) uredba del javnega reda, samo tisti, kjer bo njihova kršitev ogrožala pravno in moralno integriteto domačega pravnega sistema; (ii) mednarodnega običajnega prava; (iii) temeljna moralna(etična) načela ter (iv) ključnih gospodarskih, političnih... interesov države. Zajema (čeprav ni neposredno določeno v 100. člena) obe vsebinske in postopkovne javne politike. V primeru postopkovne javne politike, Vrhovno sodišče še dodatno opredeluje vsebino te politike, kjer so vsebovani ustavna načela, osnovna načela posameznih pravnih vej, osnovna načela prava EU, načela ki izhajajo iz mednarodnega pogodbenega prava, zlasti EKČP, mednarodnega običajnega prava in temeljna moralna (etična) načela.

Vzajemnost izgubi svoj pomen v sodobnih zakonov MZP. Prišlo je do tega obravnavati kot "ostanek (preostanek)" iz preteklosti. Položaj vzajemnosti je v konfliktu s potrebo od hitro, zanesljivo in bolj učinkovitega dostopa do sodnih postopkov. Poleg tega, dostopnost tujih pravic preko povečanega sodelovanja med državami in številnih dvostranskih in večstranskih sporazumov, zmanjšuje njen pomen v sodobnem zakonu o MZP. Torej za prihodne možnosti se pričakuje de lege ferenda, da bo zahteva po vzajemnosti biti odpravljena ali pa se bo njena tematika (vsebina) bistveno zmanjšala.

Tretje poglavje razlaga postopek o priznavanju in izvršitev sodnih odločb ki prihajajo iz držav članic EU. V kontekstu priznavanja in izvršitev tujih sodnih odločb, to bi pomenilo, da sta dve vrsti pravil ki veljajo na sodiščih. Prvi sklop pravil, ki veljajo za sodne odločbe, ki
prihajajo iz držav, ki niso članice EU so na voljo v slovenskem zakonu o MZPP. Drugi sklop pravil, ki velja za sodne odločbe, ki prihajajo iz držav člani EU v specifičnih zadevah, ki so določeni v pravnih virov EU na splošno se neposredno uporabljajo v Sloveniji in zamenjajo slovenski zakon o MZPP. V skladu s tem, Bruseljska IIbis uredba se neposredno uporablja v Sloveniji, kar pomeni, da ni bila sprejeta izvedena zakonodaja v Sloveniji. Natančneje to pomeni, da se Bruseljska IIbis uredba neposredno uporablja v Sloveniji, s tem, da za vsa vprašanja, ki so jih pustili v domačem pravu držav članic veljajo ustreznì slovenski pravni viri. Za te primere, so vprašanja, ki sodijo v Bruseljsko IIbis uredbo se v glavnem rešujejo v skladu z Zakona o izvensodnem postopku in tudi določbe Zakona o pravdnem postopku, uporabljajo se kot pomožni pravni viri.

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