

## **Brussels II a-Regulation: Recognition and enforcement of judgments in matters of parental responsibility; Practical and legal aspects of abolition of exequatur for decisions on return of a child and on access rights**

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### **1. The general regime for recognition and enforcement of judgments in matters of parental responsibility under the Brussels II a-Regulation**

#### **a) Scope of the Regulation**

- Scope of Brussels II a: **all decisions concerning the parental responsibility for children** – including custody orders, contact orders, placements of children in institutions, foster care etc., the appointment of legal guardians and any other protective measure (see Article 1 of the Regulation)

#### **b) Recognition**

- **Recognition** in other EU Member States **by operation of law** (Article 21(1))
- Possibility to obtain a **declaratory judgment on recognition** (Article 21(3))

#### **c) Declaration of enforceability**

- For enforcement, a **declaration of enforceability**/registration for enforcement (exequatur) is required (Article 28) to make the order “enforceable”.
- **Two levels of legal challenge** against the grant or refusal of the declaration of enforceability (Articles 33, 34)
- Courts which have jurisdiction to issue a declaration of enforceability and to decide about the legal challenges: see the European Judicial Atlas ([http://ec.europa.eu/justice\\_home/judicialatlascivil/](http://ec.europa.eu/justice_home/judicialatlascivil/))

#### **d) Enforcement**

- **Enforcement** is governed by **national law**.
- Normally a **judge** must order **specific coercive measures**.
- **Coercive measures** existing in different legal systems include:
  - monetary fines
  - arrest
  - physical force
- **Conditions** of application and **legal challenges** are governed by **national law**.

#### **e) Grounds for refusal of recognition and/or declaration of enforceability**

- **Grounds (Article 23):**
  - public policy
  - child not given an opportunity to be heard

- in case of default judgments: no service or no timely service of document instituting the proceedings unless there is unequivocal acceptance of the judgment by the party not properly served
- holders of parental responsibility were allegedly infringed upon by not having been given an opportunity to be heard before the order was made
- foreign order irreconcilable with a later domestic order relating to parental responsibility
- foreign order irreconcilable with a later order given in another EU Member State
- foreign order irreconcilable with a later order given in the non-Member State of habitual residence of the child
- consultation procedure for cross-border placement under Article 56 of the Regulation not observed.
- **To be applied:**
  - by a court requested to rule on the **recognition** of a judgment from another EU Member State (Article 21(3))
  - by a court requested to **declare** a judgment from another EU Member State **enforceable** (Article 31(2))
  - by any court or authority that has to decide about the recognition of a judgment from another EU Member State as a **preliminary question** in proceedings pending before it.

## **2. Practical and legal aspects of abolition of exequatur for decisions on the return of a child and on access rights**

- Regulation contains **fast-track option for enforcement** of two types of orders concerning parental responsibility: contact orders and certain return orders (Articles 40-42)
- **Choice** of the judgment **creditor** (the applicant parent) between the two options (Article 40(2))
- **No choice** for the judgment **debtor** (normally the parent with whom the child is currently staying)

### **a) Decisions on access rights (contact orders)**

- Contact orders from other EU Member States which are enforceable in the State of origin are **recognised and enforceable** in another Member State **without** the need for a **declaration of enforceability** if accompanied by a **certificate** from the Member State of origin.

- **Conditions for issuing a certificate (Article 41(2)):**
  - (a) where the judgment was given in **default**, 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, the person has been served with the document but not in compliance with these conditions and it is nevertheless established that he or she **accepted the decision** unequivocally;
  - (b) all **parties** concerned were given an **opportunity to be heard**; and
  - (c) 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**.
- **Neither the certificate nor the contact order on the merits may be challenged in the State where enforcement is sought.**
- The **certificate cannot be challenged in State of origin** either (Article 43(2)). But if the contact order as such is challenged and the next instance makes a new contact order or excludes contact altogether, the certificate issued by the first instance court has to be withdrawn and, if appropriate, replaced by a new one.

## **b) Return decisions**

### **aa) Purpose of Articles 11, 40, 42 of the Regulation**

- Article 11(6)-(8) of the Regulation governs the **interaction between the Hague Child Abduction Convention and the Brussels II a-Regulation**.
- **The Hague Convention** (Article 12) **remains the legal basis for return** of a child from one EU Member State to another.
- **The Regulation specifies and harmonizes certain aspects of the application** of the Hague Convention between EU Member States.
- **The purpose of the Hague Convention** is to **protect the jurisdiction of the State of the child's habitual residence**, assuming that the courts there are best placed to find a long-term solution for the child.
- The Regulation builds on this and goes one step further: Even where the child is not returned under the Hague Convention because there are grounds for refusal under Article 13 of the Convention, the **courts of the State of the habitual residence of the child** shall one last time have the opportunity to exercise their jurisdiction and **make an order regulating custody** for this particular child, even **in the absence of the child**.

### bb) The procedure under Article 11(6)-(8) of the Regulation

- **Hague return proceedings** in one EU Member State result in an order **refusing return** of the child to the EU Member State of habitual residence **under Article 13 of the Convention**.
- The court having made the non-return order must **transmit a copy** of it and of other relevant documents, in particular a transcript of the court hearings, **to the court in the State of habitual residence** of the child having jurisdiction in custody matters **within one month** from the date of the non-return order (Article 11(6) of the Regulation).
- If the court is not already seized with custody proceedings, it shall **notify the parties** of the information received and invite them to make submissions to the court within three months from the date of notification so that **the court can examine the issue of custody** of the child (Article 11(7) of the Regulation).
- If the court having jurisdiction over custody matters **orders the return of the child** to this State, this return order is **directly enforceable** in all EU Member States, including the State where return under the Hague Convention was refused, if it is accompanied by a **certificate** in accordance with Articles 40, 42 of the Regulation (Article 11(8) of the Regulation).
- **Neither the certificate nor the return order on the merits can be challenged in the State where enforcement is sought.**
- The **certificate cannot be challenged in State of origin** either (Article 43(2)). But if the custody and return order as such is challenged and the next instance no longer orders return, the certificate issued by the first instance court has to be withdrawn.

### cc) Relation with Hague return proceedings

- **Any** order refusing return of the child under Article 13 of the Hague Convention triggers the procedure of cross-border information and communication between courts which will possibly lead to a custody and return order on the merits.
- The **Hague order need not be final**. If a first-instance non-return order is appealed, it is thus possible that **parallel proceedings** will be pending on different but related issues: in one State on return under the Hague Convention, and in the other State on custody (including return).
- A **return order made by the courts of the State of habitual residence** which was made **after a non-return order under the Hague Convention in the other State** will “trump” the latter also in that other State and is directly enforceable there if accompanied by a certificate (Article 11(8) of the Regulation).

**dd) Conditions for issuing a certificate (Article 42(2)):**

- 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**.
- the **parties** concerned were given an **opportunity to be heard**; 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.
- This last element provides the **link between the two proceedings**. **Not every custody order** that is made in an EU State having jurisdiction under the Regulation any time after a non-return order under Article 13 of the Hague Convention in another EU Member State **enjoys direct enforceability** in all EU States. This privilege is granted **only** to those **orders that are issued by a court to which the non-return order was transmitted before or during the custody proceedings pending before it**. If the custody proceedings are unrelated to the Hague non-return order, the court making a custody order is not allowed to issue a certificate.

**3. Leading case: ECJ C-195/08 PPU – Rinau; judgment of 11 July 2008 ([www.curia.eu](http://www.curia.eu))**