

Recognition and enforcement of decisions on international child abduction

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

Brussels Ia double track system

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

➤ **Standard Track** rules: Arts 21 + 28 ff

or

➤ **Fast Track** rules: Arts 11(8) and 42

I) THE “STANDARD TRACK” PROCEDURE

The **standard track** procedure

- Automatic recognition
- Exequatur → declaration of enforceability!



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

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

Grounds for non recognition/enforcement (Art 23)

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

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

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

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

Grounds for non recognition/enforcement (Art 23)

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

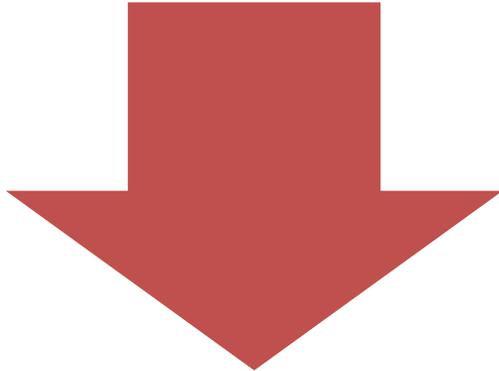
(e) irreconcilability with a later judgment relating to parental responsibility given in the MS where recognition is sought;

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

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

II) THE “**FAST TRACK**” PROCEDURE FOR “BRUSSELS RETURN ORDERS”

The scenario...



State of refuge

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

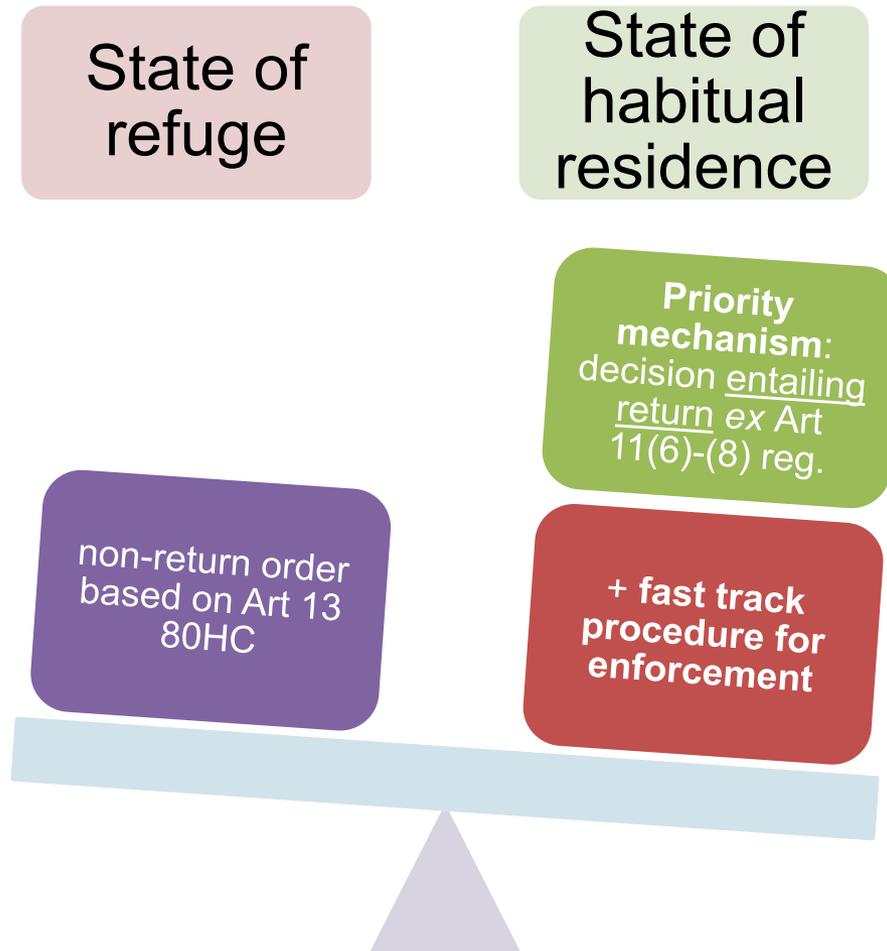
Conflict!

State of **child's
habitual residence**

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



... and its solution



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

Rationale of the priority mechanism

The priority mechanism is intended to:

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

Nota Bene!

- i. TIME! → huge responsibility on HR court:
child's best interest v general policy of
preventing abduction
- ii. Scope of competence of State of habitual
residence
Not a proceedings on return
....but a full proceedings on custody

Requirements

- i. Hearing of the child → a serious opportunity should be given
- ii. Hearing of the parties → also of abducting parent
- iii. Consideration of reasons and evidence used by the court of the State of refuge → cooperation among courts for a better understanding of situation

The **fast track** procedure

1) **Abolition of *exequatur***

- i. no need for a declaration of enforceability
- ii. no opposition to recognition and enforcement → see *Povse*

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

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

The **rationale** of the fast track

The fast track procedure is meant to:

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

→ **Time** is of essence!

Conditions to issue a certificate

Conditions to be cumulatively met

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



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

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

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

Contents: Standard form

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

5. Respondent (where available)
 - 5.1. Full name
 - 5.2. Address (where available)
 6. Court which delivered the judgment
 - 6.1. Name of Court
 - 6.2. Place of Court
 7. Judgment
 - 7.1. Date
 - 7.2. Reference number
 8. Children who are covered by the judgment ⁽¹⁾
 - 8.1. Full name and date of birth
 - 8.2. Full name and date of birth
 - 8.3. Full name and date of birth
 - 8.4. Full name and date of birth
 9. The judgment entails the return of the child
 10. Is the judgment enforceable in the Member State of origin?
 - 10.1. Yes
 - 10.2. No
 11. The children were given an opportunity to be heard, unless a hearing was considered inappropriate having regard to their age or degree of maturity
 12. The parties were given an opportunity to be heard
 13. The judgment entails the return of the children and the court has taken into account in issuing its judgment the reasons for and evidence underlying the decision issued pursuant to Article 13 of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction
 14. Where applicable, details of measures taken by courts or authorities to ensure the protection of the child after its return to the Member State of habitual residence
 15. Names of parties to whom legal aid has been granted
- Done at date

Signature and/or stamp

Can the certificate be challenged ?

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

No! (see *Rinau*)

- Other remedies against an incorrectly granted certificate?

No! → should be challenged in the State of HR
except for mere **rectification** of typing or similar errors (Art. 43 reg.)

- **No** opposition possible even in case of
 - subsequent change of circumstances (see *Povse*)
 - violation of fundamental rights (see *Zarraga*)

Effects of certification

Return order + certificate = enforceable title



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

Enforceability v Enforcement

Enforceability

Arts 28
and 42
B2a

Enforcement
procedure

Art 47 B2a
→ *lex fori*

Enforcement procedure (Art. 47)

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

Documents to be submitted

The party seeking enforcement must submit:

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

CONCLUSIONS

Concluding remarks

Does the system work? Does it work well?

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

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

CJEU relevant case-law

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

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

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

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

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

Recognition and enforcement of decisions on international child abduction

Case study

FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

Related questions

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

VARIATION No. 1

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

Related questions

- 3) Under which respect is this decision different from the previous? What should its content be, in order to be consistent with the Regulation?
- 4) Can an Article 42 certificate be issued? What are the effects thereof?
- 5) Can the decision be challenged? Where? On what grounds?
- 6) Can the certificate be challenged? Where? On what grounds?
- 7) What is the procedure that Daniel should follow to enforce this decision? How can Daniel be sure that the child will effectively be returned?

VARIATION No. 2

Some days later, on 20 September 2016, Marina lodges an application with the Court in Florence, the court of Thomas' habitual residence since July 2014, seeking sole custody over her son and, consequently, asking the court to refuse recognition and enforcement of the Hungarian judgment of 1 May 2016.

On 20 November 2016, the Florence court issues a provisional order awarding the mother exclusive custody over Thomas and granting the father access rights to his son.

Related questions

8) Can the Italian provisional order concerning custody over the child affect the recognition and enforcement of the Hungarian certified judgment entailing the return of the child?

LEGAL INSTRUMENT(S) TO BE APPLIED

Regulation No 2201/2003

Questions with guidelines

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

Art. 11(8) of Regulation (EC) No 2201/2003 provides that notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under the Regulation is enforceable in accordance with Section 4 of Chapter III of the Brussels Regulation (i.e. no *exequatur*), in order to secure the return of the child. Such so called “priority mechanism” is meant to i) **strengthen** the competence of the court of **habitual residence**. i.e. the **natural judge of the child**, and ii) to reinforce children’ protection in a more integrated area, such as the EU, by setting a **balance** between the State of refuge and the State of habitual **different** from the one established by the 1980 Hague convention at a global level, although sharing the **same objectives**. According to the priority mechanism the State of habitual residence should have the last word in a child abduction case.

Under Art. 11(8) Brussels IIa, the priority mechanism applies only if the authorities in the State of refuge has refused to return the child on the basis of Art 13 of the 1980 Hague Convention. If has a non-return order based on Art 13 of the 1980 Hague Convention has been given in the State of refuge, any decision given by the authorities of the State of habitual residence implying return of the child prevails over the first order.

Possible issues to be discussed:

Is the non-return order issued by the Italian authorities (State of refuge) grounded on Art 13 of the 1980 Hague convention?

In particular:

Which are the grounds for refusing the child’s return according to the Italian court, seised for return? Are they include in Art 13?

N.B. Non-return orders based on other (legitimate) grounds, i.e. Arts 12 or 20 of the Convention, do not trigger the application of Art 11(8) of the Brussels IIa Regulation.

i) Does the fact the Italian non-return order is based on several grounds, included those provided for Art 13, affect its qualification as a basis for the priority mechanism under Art 11(8) Brussels IIa?

ii) Does the provisional character of the order given by the Budapest court on 1 April 2016 the Budapest (granting divorce and provisionally awarding joint custody to both parents over Thomas, therefore commanding his immediate return to Hungary) affect the application of Art 11(8) Brussels IIa? Does such provision apply only to final decisions given by the court of the State of child’s habitual residence on parental responsibility and entailing return or does it cover also provisional orders?

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

Under Art 11(8) of Regulation (EC) N. 2201/2003, any judgment given by the authorities of the State of the child's habitual residence entailing his/her the return is enforceable in accordance with Section 4 of Chapter III of the Brussels Regulation. That means first of all that no *exequatur* is needed, i.e.

- no declaration of enforceability is needed in order to enforce such judgment in any other member State and
- no opposition to its recognition and enforcement is possible (see CJEU, 1 July 2010, *Povse v Alpage*, Case C-211/10 PPUE),

provided that the judgment is accompanied by a certificate issued by the member State of origin pursuant to Art 42 using a standard form (see *Annex IV* of the Regulation). Art 42 certificate replaces *exequatur* proceedings!

However, not all judgments given by the court of the State of the child's habitual residence deserve a certificate!

Under Art. 42(2) Brussels IIa Regulation the court of the State of the child's habitual residence who delivered the judgment shall issue the certificate only if:

- (a) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity;
- (b) the parties were given an opportunity to be heard; and
- (c) the court has taken into account in issuing its judgment the reasons for and evidence underlying the order issued pursuant to Article 13 of the 1980 Hague Convention.

Moreover, in the event that the court or any other authority takes measures to ensure the protection of the child after its return to the State of habitual residence, the certificate shall contain details of such measures.

Possible issues to be discussed:

i) Are all the requirements to issue the certificate met in the case at stake? Can the Budapest court issue a certificate Under Art 42(2) to accompany its decision of 1 April 2016?

In particular:

- has Thomas had a serious opportunity to be heard in the Budapest proceedings?
- have his parents, and especially his abducting mother, had the opportunity to be heard in the Budapest proceedings?
- has the Budapest court taken into account the Italian non-return order based, inter alia, under Art 13 of the Hague Convention? Has the Hungarian court given reasons and evidence for overruling?

- In case the Budapest court has taken any specific measures for the protection of the child after his return, does the certificate contains a translation of paragraph 14 of the standard form?

3) Under which respect is this decision different from the previous? What should its content be, in order to be consistent with the Regulation?

On 1 April 2016 the Budapest court grants divorce and provisionally awards joint custody to both parents over Thomas, therefore commanding his immediate return to Hungary. On 1 May 2016 the Budapest court gives a final decision on parental responsibility, confirming its previous provisional order and, at Daniel's request, issues a certificate under Art 42 Brussels IIa.

Therefore, the second judgment given by the Budapest court is different from the first one under two respects:

- i) is final and
- ii) is accompanied by a certificate issued under Art 42 Brussels IIa Regulation.

4) Can an Article 42 certificate be issued? What are the effects thereof?

Under Art 11(8) of Regulation (EC) N. 2201/2003, any judgment given by the authorities of the State of the child's habitual residence entailing his/her the return is enforceable in accordance with Section 4 of Chapter III of the Brussels Regulation. That means that no *exequatur* is needed, i.e.

- no declaration of enforceability is needed in order to enforce such judgment in any other member State and
- no opposition to its recognition and enforcement is possible (see CJEU, 1 July 2010, *Povse v Alpagó*, Case C-211/10 PPUE),

provided that the judgment is accompanied by a certificate issued by the member State of origin pursuant to Art 42 using a standard form (see *Annex IV* of the Regulation). Art 42 certificate replaces *exequatur* proceedings!

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- (b) the parties were given an opportunity to be heard; and
- (c) the court has taken into account in issuing its judgment the reasons for and evidence underlying the order issued pursuant to Article 13 of the 1980 Hague Convention.

Moreover, in the event that the court or any other authority takes measures to ensure the protection of the child after its return to the State of habitual residence, the certificate shall contain details of such measures.

Possible issues to be discussed:

i) Are all the requirements to issue the certificate met in the case at stake? Can the Budapest court issue a certificate Under Art 42(2) to accompany its decision of 1 May 2016?

In particular:

- has Thomas had a serious opportunity to be heard in the Budapest proceedings?
- have his parents, and especially his abducting mother, had the opportunity to be heard in the Budapest proceedings?
- has the Budapest court taken into account the Italian non-return order based, inter alia, under Art 13 of the Hague Convention? Has the Hungarian court given reasons and evidence for overruling?
- In case the Budapest court has taken any specific measures for the protection of the child after his return, does the certificate contains a translation of paragraph 14 of the standard form?

The return order together with Art 42 certificate constitutes the so called enforceable title.

Possible issues to be discussed:

Once Art 42 certificate has been issued:

- is any appeal or stay of proceedings possible?
- is there any reason to refuse enforcement?

Pursuant to Art 47(2) 2nd sent., the enforcement of a certified decision can be refused only in case of irreconcilability with a subsequent enforceable judgment

- can enforcement be refused because, due to a subsequent change of circumstances, it might be seriously detrimental to the best interest of the child?

See CJEU 1 July 2010, Povse v Alpaço, Case C-211/10 PPU

5) Can the decision be challenged? Where? On what grounds?

The decision can be challenged only in the State of origin, that is the State of the child's habitual residence, according to rules national rules.

Possible issues to be discussed:

What are, if any, the possible grounds for challenging the return decision according to Hungarian law?

6) Can the certificate be challenged? Where? On what grounds?

Under Art 43(2) of the Regulation (EC) No 2201/2003 no appeal shall lie against the issuing of a certificate pursuant to Articles 41(1) or 42(1).

The Regulation does not provide for any remedy against an incorrectly granted certificate – that can only be challenged in the State of the child’s habitual residence – except for mere rectification of typing or similar errors pursuant to Art 43 Brussels IIa.

Possible issues to be discussed:

i) does any further appeal or legal proceedings on return in the member State of refuge matter?

According to the Court of Justice Art 42 certificate is not affected by any subsequent proceedings in the member State of origin: see CJEU 11 July 2008, *Rinau*, Case C-195/08 PPU

ii) does any subsequent change of circumstances and/or violation of fundamental rights affect the circulation of a decision accompanied by Art 42 certificate? Is any opposition against the certificate possible?

Currently, the answer seems to be negative in the light of the Court of Justice case law: see 1 July 2010, *Povse v Alpagó*, Case C-211/10 PPUE and 22 December 2010, *Aguirre Zarraga v Pelz*, Case C-491/10 PPU.

iii) Will the answer be different under the Brussels IIa Recast?

7) What is the procedure that Daniel should follow to enforce this decision? How can Daniel be sure that the child will effectively be returned?

Under Art 45 of Regulation (EC) No 2201/2003, the party seeking enforcement must submit:

- a copy of the decision
- Art 42 certificate,
- and, *if applicable*, a translation of the adequate arrangements taken to ensure the child’s safe return pursuant Art. 11(4).

Pursuant to Art 47 of Regulation (EC) No 2201/2003, enforcement is governed by national law of the MS of enforcement (*lex fori*)

Possible issues to be discussed:

- i) difference between enforceability (governed by the Regulation: see Arts 28 and 42) and enforcement (governed by national law of the requested State: see Art 47)
- ii) How is enforcement regulated under the law of the requested member State?
- iii) Is there any outer condition and/or limit to the application of national law to the enforcement of a certified decision exist in order to ensure that enforcement is effective?

Although enforcement is subject to national law pursuant to Art 47 of the Regulation, member State of enforcement must ensure that:

- under Art 47(2) Brussels IIa the judgment is enforced at the same conditions as if it had been delivered in its territory;
- all the relevant principles set forth by the CJEU (e.g.) are complied with;
- all the relevant principles also set by the ECtHR in cases of breach of Art 8 ECHR are taken into consideration, and in particular a) the obligation to equip itself with adequate and effective means (see e.g. the cases *Maire v. Portugal*, 26 June 2003; *Ignaccolo-Zenide v. Romania*, 25 January 2000) and b) the duty to make adequate and effective efforts to secure the return of the child to be reunited with parent (see e.g. *Santos Nunes v. Portugal*, 22 May 2012; *Iglesias Gil and A.U.I. v. Spain*, 29 July 2003)
- iv) Is there any coercive means for ensuring enforcement of return orders certified under Art 42 under Italian law?

Do effective instruments for discouraging abducting parents from non compliance with the return order exist in the national laws of the member State? e.g. monetary penalties (see *Bohez v. Wiertz*)

8) Can the Italian provisional order concerning custody over the child affect the recognition and enforcement of the Hungarian certified judgment entailing the return of the child?

No, as the Court of Justice case-law saga has shown, any further proceedings in the member State of refuge is irrelevant to the enforceability of a certified judgment.