

Recognition and enforcement of decisions in parental responsibilities matters

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(parental responsibility decisions – *not in child abduction cases*)
 - Interplay of legal sources
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Procedure and documents; possibility to
challenge.
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Interplay of legal sources

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

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

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

Principle of mutual trust (Non) Exequatur

- **Art. 21 Automatic recognition of judgments**
- Enforceability of judgments
 - on the **exercise of parental responsibility** in respect of a child - upon declaration as enforceable
 - On the **right of access** to a child – upon presentation of a certificate issued by the judge in the Member State of origin

Judgments on exercise of parental responsibility - Exequatur

Application accompanied by basic set of documents (Art. 30(3), 37, 39)

No submission from a child or a person against whom the decision to be enforced

Check absence of grounds for non-recognition of a judgement (Art. 23)

Decision on declaration as enforceable without a delay

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

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

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

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

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

Appeal (Art. 33-34)

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

Rights of access - Non exequatur (Art. 41)

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

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

- Documents to be delivered:
 - 1) Certificate
 - 2) Copy of the judgement
 - 3) Translation of the certificate point 12 (relating to the arrangements for exercising right of access)
- Procedural rules of the state of enforcement apply
- Practical arrangements by a court in the MS of enforcement

Central Authorities and Legal Aid

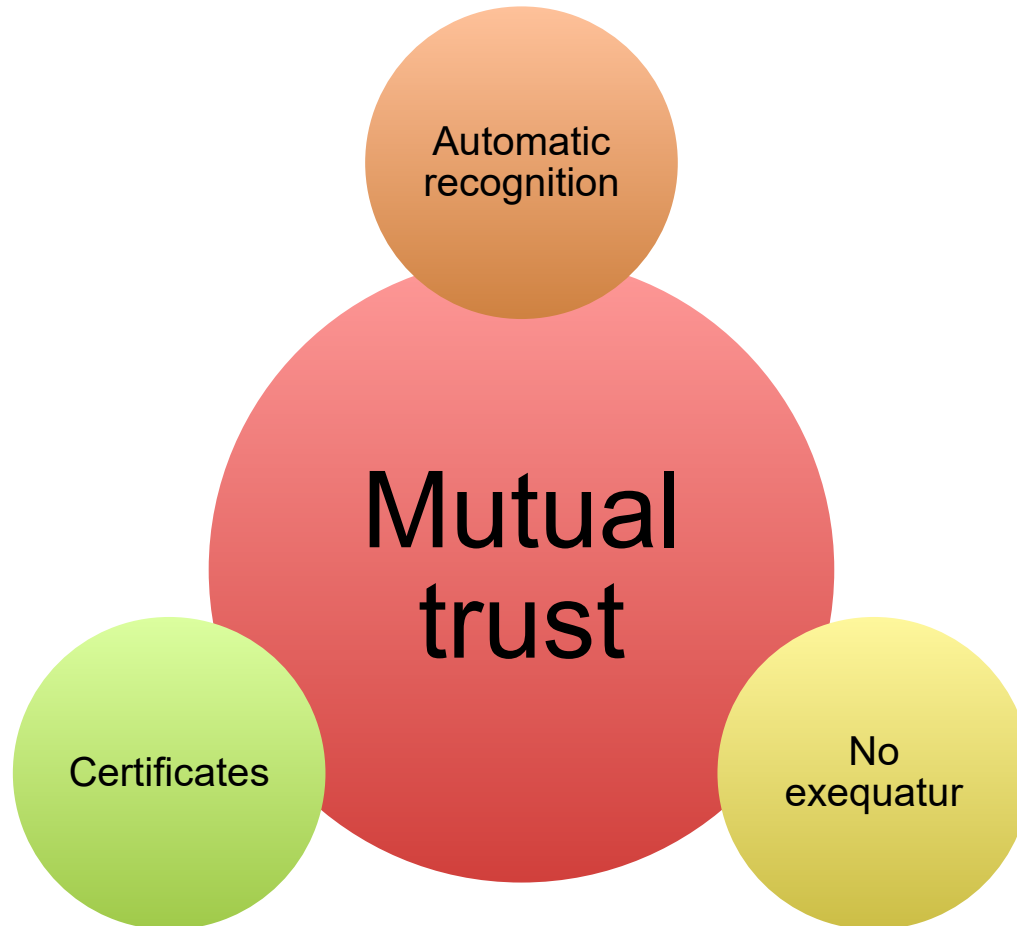
Art. 55 (b): provide information and assistance to holders of parental responsibility seeking the recognition and enforcement of decisions on their territory, in particular concerning rights of access and the return of the child.

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

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

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

Summarising conclusions



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Case study 1

FACTS

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

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

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

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

Related questions

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

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

LEGAL INSTRUMENT(S) TO BE APPLIED
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Regulation No 2201/2003 (Brussels IIa)

Questions with guidelines

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

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

You can also discuss Brexit issues here.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Recognition and enforcement of decisions in parental responsibilities matters

Case study 2

FACTS

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

Related questions

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

VARIATION No. 1

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

Related question

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

VARIATION No. 2

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

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

Related questions

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

VARIATION No. 3

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

Related question

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

LEGAL INSTRUMENT(S) TO BE APPLIED

Regulation No 2201/2003 (Brussels IIa)

National Law

Questions with guidelines

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

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

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

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

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

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

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

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

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

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

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

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

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

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

See article 55 for Central Authorities' functions.

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

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

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

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

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

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

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

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

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

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

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

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