



Recognition and enforcement of decisions under Brussels IIa Recast Regulation

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Overview

- Introduction
- Definition of decision
- Recognition
- Enforcement
- Refusal of Recognition and Enforcement
- Authentic Instruments and Agreements



Introduction

- ▶ COM proposal
 - Brussels I Recast Model of abolition of exequatur (uniform for all decisions)
 - combined with conditions of Article 41 of current Brusel IIa
 - abolition of 2 grounds of refusal in PR cases (lack of hearing of the child, and failure to follow the procedure in Article 56)
- ▶ Unintended result – narrowing of scope for circulation of decisions



► **End result**

- Brussels I Recast Model, **BUT**
- retention of different categories of decisions (privileged decisions);
- conditions of Article 41 only for privileged decisions (privileged decisions which do not qualify may be enforced under general rules)
- all ground of refusal retained, but lack of hearing of the child as a discretionary ground

Decision - Article 2(1)

- ▶ 'Decision' means a decision of a court of a Member State, including a decree, order or judgment, granting divorce, legal separation, or annulment of a marriage, or concerning matters of parental responsibility.
- ▶ For the purposes of Chapter IV, 'decision' **includes**:
 - (a) a decision given in one Member State and ordering the return of a child to another Member State pursuant to the 1980 Hague Convention which has to be enforced in a Member State other than the Member State where the decision was given;
 - (b) provisional, including protective, measures ordered by a court which by virtue of this Regulation has **jurisdiction as to the substance** of the matter or measures ordered in accordance with Article 27(5) in conjunction with Article 15;

For the purposes of Chapter IV, 'decision' **does not include** provisional, including protective, measures ordered by such a court without the respondent being summoned to appear, unless the decision containing the measure is served on the respondent prior to enforcement.



Two channels

Sections 1 & 2

- ▶ **Section 1 – General provisions** on recognition and enforcement
 - Subsection 1 – **Recognition** (Articles 30 – 33)
 - Subsection 2 – **Enforceability** and Enforcement (Articles 34 and 35)
 - Subsection 3 – **Certificate** (Articles 36 and 37)
 - Subsection 4 – **Refusal** of recognition and enforcement (Articles 38-41)
- ▶ **Section 2** – Recognition and enforcement of certain **privileged decisions**
 - Article 42 – **Scope**
 - Subsection 1 – **Recognition** (Articles 43 and 44)
 - Subsection 2 – **Enforceability** and Enforcement (Articles 45 and 46)
 - Subsection 3 – **Certificate** for privileged decisions (Articles 47 -49)
 - Subsection 4 - **Refusal** of recognition and enforcement (Article 50)



One Channel for Enforcement

Section 3

- ▶ **Section 3 – Common provisions** on enforcement
 - Subsection 1 – **Enforcement** (Articles 51 – 55)
 - Subsection 2 – **Suspension** of enforcement proceedings and **Refusal** of enforcement (Articles 56-63)
- ▶ **Section 4** – Authentic **instruments** and **agreements** (Articles 64-68)
- ▶ **Section 5** – **Other** provisions



Privileged decisions (Section 2)

- ▶ **Scope:**

- (a) decisions in so far as they grant **rights of access** (current Art. 41); and
- (b) decisions pursuant to Article 29(6) in so far as they **entail the return** of the child (current Art. 42).

- ▶ Party may also seek recognition/enforcement of such a decision in accordance with the Section 1.

Recognition – main features

General system (Article 30)

Privileged system (Article 43)

Recognition without any special procedure

Recognition with possibility to oppose
(Articles 38 and 39)

Recognition without any possibility of
opposing except irreconcilability
(Article 50)

Invocation of recognition

General system (Article 31)

Possibility to waive the production of decision and/or certificate (Article 32)

Privileged system (Article 43)

No possibility to waive

Stay of proceedings

General system (Article 33)	Privileged system (Article 44)
The court may stay its proceedings, in whole or in part, where:	
(a) an ordinary appeal has been lodged in the MS of origin	?
(b) application has been submitted <ul style="list-style-type: none">- for a declaration that there are no grounds for refusal under Art. 30(3)- for refusal of recognition under Art. 40	(a) application has been submitted alleging irreconcilability with a later decision under Article 50
	(b) person against whom enforcement is sought has applied for the withdrawal of certificate under Article 47

Enforceability

General system (Article 34)

Decision in matters of parental responsibility is enforceable **without any declaration of enforceability**.

Privileged system (Article 45)

A „privileged“ decision is enforceable without any declaration of enforceability.

Decision must be enforceable in the MS of origin

Decision granting rights of access may be declared provisionally enforceable by the court of origin.

Documents for enforcement

General system (Article 35)	Privileged system (Article 46)
Party seeking enforcement shall provide:	
(a) copy of decision	(a) copy of decision
(b) certificate under Art. 36	(b) certificate under Art. 47
<i>special rule for provisional/protective measures</i> (c) proof of service of decision, if measure was ordered <i>ex parte</i>	N/A

Certificate

General system	Privileged system
Court issues a certificate upon application (Art. 36 & 47)	
N/A	May be issued only if specific requirements are met (Art. 47(3))

Changes to Certificate

General system	Privileged system
Court, upon applition shall , ex officio may , rectify certificate where there is dicrepancy with the decision, due to a material error or ommission (Art. 37 & Art. 48)	
N/A	Court, upon applition shall , ex officio may , withdraw certificate where it was wrongly granted (requirements Art. 47)
N/A	Court shall issue, upon application , certificate on lack or limitation of enforceability if enforceability ceased, was limited or suspended (Art. 49)

Refusal of recognition and enforcement - **grounds**

General system (Articles 38 & 39)	Privileged system (Article 50)
<p>Mandatory grounds common (for matrimonial matters and parental responsibility)</p> <ul style="list-style-type: none">a) public policyb) rights of defencec) irreconcilability with<ul style="list-style-type: none">(i) decision of requested MS(ii) earlier decision of third State	<p>Mandatory ground:</p> <p>irreconcilability with later</p> <ul style="list-style-type: none">(i) decision of requested MS(ii) decision of thirds State of habitual residence of the child
<p>Specific (parental responsibility):</p> <ul style="list-style-type: none">d) upon application of holder of PR if decision given without opportunity to be heard.	<p>N/A</p>

Refusal of recognition and enforcement - **grounds**

General system (Article 39)

Discretionary ground: if the decision was given without the child who is capable of forming his/her views having been given an opportunity to express his/her view in accordance with Article 2, the court **may**, but **has no obligation to refuse. It may not refuse** in 2 situations:

- (a) the proceedings only concerned the **property** of the child and provided that giving such an opportunity was not required in light of the subject matter of the proceedings; or
- (b) there were **serious grounds** taking into account, in particular, the urgency of the case.

Privileged system

N/A (failure to give the child an opportunity to express their views may be a ground for withdrawal of certificate if it was even issued)

Refusal of recognition and enforcement - **procedure**

General System	Privileged system
Procedure for refusal of recognition : Articles 40, 59-62 (63?), Section 5 Chapter IV and Chapter VI (accordingly)	? - Article 44 lit.a/ regulates stay of proceedings in case an application was submitted alleging the irreconcilability. No harmonised procedure in regulation (lex fori?)
Procedure for refusal of enforcement for grounds of non-recognition : Articles 41, Section 3 of Chapter IV (Articles 59-63), Section 5 Chapter IV and Chapter VI (accordingly)	
Procedure for refusal of enforcement for other grounds (harmonised Article 56(6) or national Article 57): Section 3 (Subsection 2) Chapter IV, Section 5 Chapter IV and Chapter VI (accordingly)	



Enforcement



- ▶ procedure governed by *lex fori* subject to provisions of Regulation (Article 51)
- ▶ **same treatment** of foreign decisions as national decisions, without prejudice to Articles 41, 50, 56 and 57 (Article 51)
- ▶ no obligation to have postal address or representative unless national law requires representation irrespective of nationality (Article 51)
- ▶ competent authority for enforcement determined by reference to the law of the MS of enforcement (Article 52)
- ▶ partial enforcement is possible, except when enforcing a decision on return under the Hague Convention and protective measures had been ordered (Article 53)



Service of certificate (Article 53)

- ▶ Certificate (Articles 36 or 47) shall be served on the person against whom enforcement is sought prior to the first enforcement measure.
- ▶ Certificate shall be accompanied by the decision if it had not already been served on the person (this is *not* service of the decision).



Suspension and refusal of enforcement

Suspension or refusal of enforcement possible under:

- ▶ Harmonised grounds of suspension and refusal (Article 56)
- ▶ National grounds of suspension and refusal in so far as they are incompatible with the application of Articles 41, 50 and 56 (Article 57)



Special (harmonised) ground for suspension or refusal based on best interest of the child

- ▶ In **exceptional cases** (upon application) suspension **may** be granted:
if enforcement would expose the child to a **grave risk of physical or psychological harm** due to **temporary impediments** which have arisen **after the decision** was given, **or** by virtue of any other significant **change of circumstances**.
- ▶ Enforcement shall be resumed as soon as the grave risk of physical or psychological harm ceases to exist.
- ▶ Where the **grave risk is of a lasting nature**, the authority (upon application) **may refuse** the enforcement
- ▶ Before refusing enforcement, the authority shall take appropriate steps to facilitate enforcement in accordance with national law and the best interests of the child.

Authentic instruments and agreements (Articles 64 – 68)

- ▶ Scope: **divorce, legal separation** or parental responsibility;
- ▶ MS of origin must have **jurisdiction** under Chapter II
- ▶ Authentic instrument or agreement must have **binding legal effects** in the MS of origin and, in case of parental responsibility, must be enforceable in the MS of origin
- ▶ **certificate** certifying the above requirements **must** be produced for recognition or enforcement (Article 66(5)).
- ▶ Certificate may be rectified or withdrawn (same as with privileged decisions)
- ▶ Specific grounds for refusal in Article 68 similar to decision but without protection of the defaulting party