Recognition and Enforcement of Judgments
with particular focus on judgments regarding parental responsibility including rules on access rights and child abduction

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peter beaton
petermurdochbeaton@yahoo.co.uk
Scope of this presentation

- Background to and description of the EU Civil Justice Acquis in Family Law
- Description of the Rules under Br IIa on Parental Responsibility
- Description of the Rules under Hague 1980 and Brussells IIa on Child Abduction
- What can be recognised and enforced - in other words - what is a ‘judgment’?
- Rules for Recognition and Enforcement of judgments in Divorce
- ‘Standard Track’ rules for Recognition and Enforcement of judgments in Parental Responsibility
- ‘Fast Track’ rules as regards judgments on access rights
- ‘Fast Track’ rules and procedures as regards child abduction
- Recognition and enforcement in cross border placement cases under Art 56
- Recognition and Enforcement under the Hague 1996 Convention
- Some thoughts on good practice for enforcement of orders
- Some case law - CJEU and ECtHR
The EU Civil Justice Acquis in Family Law

EU Instruments -
- Regulation Brussels IIa,
- Maintenance,
- Rome II enhanced co-operation instrument

Hague Conventions -
- Hague 1980 Convention,
- Hague 1996 Convention,
- Hague Maintenance Convention and Protocol

Council of Europe - Luxembourg Convention
Rules under Brussels IIa on parental responsibility

- Basic jurisdiction rule - habitual residence of the child at the date the court is seised
- Exceptions - continuing jurisdiction where a child moves lawfully
- Child Abduction cases
- Agreed jurisdiction in divorce cases
- Presence jurisdiction rule
- Transfer to a court better placed
- Recognition and Enforcement follows where the judgment is made by a court with jurisdiction under the rules
Child Abduction under Hague 1980 and Brussells IIa

- Hague 1980 Convention continues to have effects among the EU MS except as regards matters regulated under the Regulation - Reg Art 62
- Scope - under the 1980 Convention children up to the age of 16 - Regulation (and 1996 Convention) children up to the age of 18
- Basic premise - abducted/retained child to be returned forthwith to her/his state of habitual residence to re-establish status quo ante - Conv Arts 1.a, 7, 10, 11 and 12
- Limited jurisdiction to the courts in the ‘state of refuge’ to take decisions on applications for return of children abducted to/retained in that state
- Limited exceptions to court’s duty to order return of child - Conv Arts 12/13
- Exceptions to duty to return to be construed narrowly - see PV Report para 34
- No procedure rules for enforcement of return orders provided in the Convention nor in the Regulation - so
- Enforcement procedure is regulated under the national law of the contracting States/MS - see Reg Art 51
- BUT duty on Contracting States to fulfill the aims of the Convention and of EU MS those aims as supplemented by the provisions of the REG - see Conv Art 2
What can be recognised and enforced - in other words - what is a ‘judgment’?

- ‘Judgment’ defined in Art 2.4 - any divorce, annulment or separation and a judgment on parental responsibility (def. in Art 2.7), pronounced by a MS court (def. in Art 2.1) whatever it may be called - including ‘decree’, ‘order’ or ‘decision’

- ‘court’ all authorities in MS with jurisdiction over matters within the material scope of the Regulation as defined in Art 1 - can include some ‘administrative’ authorities

- Authentic instruments and enforceable agreements are to be recognised and enforceable ‘under the same conditions’ as judgments - Art 46

- NB 1 - an order of a provisional nature within the meaning of Art 20 cannot be recognised and enforced under the Regulation - Purrucker (no 1) - C256/09

- NB 2 - it should be borne in mind that as there is no list of prohibited grounds of jurisdiction any judgment of a court in an MS on a matter which is within the material scope of the Regulation may be recognisable and enforceable
Recognition:

- Judgment to be recognised in EU MS without any special procedure - Art 21.1
- Civil status records to be updated on basis of final judgment of divorce, annulment or separation with no special procedure - Art 21.2
- Application for recognition or non-recognition may be made by ‘any interested party’ - Art 21.3
- Procedure rules for applications for declaration of enforcebaility apply to applications for recognition - Art 21.3 and see later slides on this
- A question of recognition raised as an incidental question may be decided by the court in the MS before which the question is raised - Art 21.4
- No review of jurisdiction of the court of origin is competent in the enforcement court and the public policy test cannot be applied to the jurisdiction rules of the Regulation - Art 24
Rules for Recognition and Enforcement of judgments in Divorce - briefly

Grounds for non-recognition: A judgment shall not be recognised if one of the following grounds is established - Art 22

1. If it is manifestly contrary to public policy in the MS of recognition - Art 22(a)

2. BUT - refusal of recognition is not permitted on the grounds that the law of the MS where recognition is sought does not allow a divorce on the same facts as those founded on and established by the court of origin - Art 25

3. Judgment in absentia unless initiating document was served on the respondent in sufficient time to allow her/him to arrange for a defence - Art 22(b)

4. Irreconcilability with a judgment between the same parties in the MS where recognition is being sought - Art 22(c)

5. Irreconcilability with an earlier judgment between same parties given in another EU MS or a third State if this can be recognised in the MS where recognition is sought
Rules for Recognition and Enforcement of judgments in Divorce - briefly

Enforcement:-

- There is no need for a declaration of enforceability of a judgment on divorce, annulment or separation given the rule on direct recognition (Art 21.1) and the amendment of civil status records (Art 21.2) - see also Borras Report para 80

- Procedure rules for ‘exequatuur’ are restricted to children issues - Art 28

- For enforcement in another MS the following documents are needed -
  
  1. a copy of the judgment whose authenticity is established - Art 37.1(a)
  
  2. certificate issued under Art 39 in the form set out in Annex 1 - Art 37.1(b)

- For a judgment in absentia there must be produced by the party seeking recognition original or certified copy of the initiating document and proof of its service on the respondent - Art 37.2(a)

- Any document which establishes that the respondent accepted the judgment unequivocally - Art 37.2(b)

NB Recognition for this purpose usually is about establishing the right to marry again without committing bigamy
‘Standard Track’ Rules for Recognition and Enforcement of judgments in Parental Responsibility

Recognition:

- The general rules applicable to matrimonial matters also apply in the main to parental responsibility orders - except the rules in Art 21.2 and Art 25

Non-recognition:

- The rules for matrimonial matters (Art 22 - and see slide 8) apply *mutatis mutandis* to parental responsibility judgments - see Art 23 (a), (c), (e) and (f)
- Additional grounds applying only to parental responsibility are as follows -
  1. except in cases of urgency where a child is not given the opportunity to be heard in violation of the general principles of procedure in the MS where recognition is sought - see Art 23(b) and UNCRC Art 12 - also CFR Art 24.1
  2. where judgment is given without a person who claims that it infringes her/his parental responsibility being given the opportunity to be heard, on the request of such a person - Art 23(d)
  3. in the specific case of placement of a child in institutional care or with a foster family in another EU MS, where the special consultative procedure set out in Art 56 is not complied with - Art 23(g) - see also the case of HSE v SC and AC, C92/12 PPU
‘Standard Track’ Rules for Recognition and Enforcement of judgments in Parental Responsibility

Enforcement:- declaration of enforceability -

- Judgment on PR enforceable in one MS shall be enforced in another MS when it has been declared enforceable there - Art 28.1

- NB - Judgment must be served (on the respondent) before the declaration is applied for - See Art 28.1

- NB In the UK law districts the judgment has to be registered in the appropriate law district on application of any interested party - Art 28.2

- Jurisdiction of local courts is published by the Commission in the OJ - this should be available on the European E-Justice Portal - see link


- At present much of the material on the portal is only in the language of the MS concerned; meanwhile the Civil Judicial Atlas still has some information - e.g.

‘Standard Track’ Rules for Recognition and Enforcement of judgments in Parental Responsibility

Declaration of enforceability - procedure:

- Procedure law of the MS where the declaration is sought governs - Art 30.1
- Address for service or if this is not provided for in the MS where declaration is sought, representative ad litem to be given by the applicant - Art 30.2
- Court to give its decision without delay - no submissions at this stage - Art 31.1
- Grounds of refusal as set out in Arts 22 or 23 and 24 - Art 31.2
- Appeal possible by either (any?) party to the court specified on the list - Art 33
- Applicant for declaration appealing the other party is summoned and if she/he does not appear the court may stay proceedings under Art 18 - Art 33.4
- Time limit for appeal - one mont or two where the party against whom enforcement is sought is HR in MS other than that where the declaration was given - Art 33.5
- If an appeal is lodged against the judgment in the MS of origin or the days of appeal have not expired the court may stay the declaration proceedings - Art 35
- Partial enforcement is possible - Art 36
‘Standard Track’ Rules for Recognition and Enforcement of judgments in Parental Responsibility

Enforcement:

- Documents to be produced - copy of judgment authenticated and certificate issued under Art 39 in the form of Annex II in respect of a judgment on parental responsibility - Art 37.1
- Similar requirement for judgment in absentia - see Art 37.2 and slide 8
- NB - To be noted that in addition to basic information Annex II requires information about the practical arrangements on the exercise of rights of access - see section 10
- This implies that the judgment should contain the necessary information to enable that section of the certificate to be completed
- Also where the judgment entails the return of the child (after wrongful removal and retention where a court has refused an order for return and the court of origin has made such an order under Art 11.8 - see later) the person to whom the child is to be returned is to be stated in the certificate to the extent that this is stated in the judgment - see section 11
‘Fast Track’ Rules for Recognition and Enforcement of judgments in Parental Responsibility

Scope - apply to orders for rights of access/contact (def. Art 2.10) - and ‘return of a child entailed by a judgment given pursuant to Art 11.8 - Art 40.1

Common features - No need for a declaration of enforceability - Arts 41.1/42.2

- No opposition to recognition of a judgment certified in the MS of origin -
- Such a judgment may be declared enforceable by the court of origin even if there is an appeal possible even if this is not provided for by national law
- Certificate to be issued by the ‘judge’ of origin on conditions - Arts 41.2 and 42.2

- Common condition 1 - child must have been given the opportunity to be heard unless this was considered inappropriate having regard to her/his age and maturity - Art 41.2 (c) and Art 42.2(a)

- Common condition 2 - the parties (‘all’ parties in the case of access judgments) were given an opportunity to be heard - Art 41.2(b) and Art 42.2(b)

- Certificate completed in the language of the judgment - Arts 41.2 and 42.2

- Certificated judgment cannot be enforced if incompatible with a subsequent enforceable judgment - Art 47.2
‘Fast Track’ Rules for Recognition and Enforcement of judgments in Parental Responsibility

Specialities applicable to judgments for access -

- In default judgments same condition applies as for standard track enforcement (see Art 23(c) namely that the respondent should have been served with the initiating document in sufficient time to arrange a defence or has accepted the judgment unequivocally - Art 41.2(a) and Annex III section 9

- Timing of issue of the certificate - by the court ex officio when the judgment becomes enforceable and at the time of the giving of the judgment the access involves a cross-border situation - or

- at the request of a party when the situation later acquires a cross border character - Art 41.3

- Practical arrangements for the exercise of access to be stated on the certificate - Annex III section 12

- NB - Where the certificated judgment does not have adequate arrangements for the exercise of rights of access these can be made by the court in the MS where the judgment is to be enforced - Art 48.1

- Where the MS with jurisdiction makes a subsequent judgment on the substance (of access) any practical arrangements made by the court in the MS of enforcement are to cease - Art 48.2

NB The provisions for enforcement of orders for access under Art 41.1 extend to cover an order for payment of a monetary penalty for failure to fulfill access requirements - see *Bohez v Miertz* C-4/14
‘Fast Track’ Rules for Recognition and Enforcement of judgments in Parental Responsibility

Specialities applicable to judgments for return under Art 11.8 -

- Certificate cannot be issued unless, and must contain a declaration that, the child was given an opportunity to be heard ‘unless ....considered inappropriate having regard to her or his age or...maturity’ - Art 42(a) & Annex IV section 11

- Arrangements for hearing the child are left to national law - see Art 23(b)

- Subject to applicable international norms - UNCRC Art 12 and CFR Art 24

- It is not open to the court in the MS of enforcement to take measures to avoid a certificate issued in breach of Art 42 - see Aguirre v Pelz C-491/10 PPU - in which the court of origin certified that it had heard the child when that was not the case; CJEU held that remedy had to be pursued in that MS

- The court of origin must also take into account the reasons for and evidence underlying the non return order - see Art 11.6-8, Art 42.2(c) and Annex IV section 13 - for an early example see the english case re A [2007] 1 FLR 1923

- If the court or other authority takes measures to protect the child after return these are to be detailed in the certificate - Art 42.2 and Annex IV section 14 - see also Art 11.4 where non return is excluded if measures of protection are available after the return of the child

- NB Issues of protection should only arise if a ‘grave risk’ exception under Art 13.1.b is established and cannot found a non return because of Art 11.4 if such measures are available - this does not apply to other Art 13 exceptions eg child objections
Further specialities common to enforcement of judgments -

- Enforcement procedure governed by law of the MS of enforcement - Art 47.1
- This does NOT mean that MS have a free hand - enforcement has to be executed in accordance with the aims of the Regulation - see Povse infra
- In child abduction cases the aims of the 1980 Convention are also to be interpreted in accordance with ECHR so enforcement measures have to be in place and also used effectively to secure the prompt return if the child -
- Under the Regulation a judgment declared or certified as enforceable is treated as a judgment delivered in the MS of enforcement - Art 47.2
- However this does not mean that the court of enforcement can make changes in the judgment for enforcement on matters of substance as the court of origin alone has jurisdiction to do that - see Povse v Alpago - C - 211/10 PPU
- NB No legalisation is required of any document which is required under the rules on recognition and enforcement including the judgment and certificate - Art 52
- Court may allow equivalents to original documents and may require certified translations - Art 38
Recognition and enforcement in cross border placement cases under Art 56

- Where a child is to be placed in care or with foster parents in another MS and in that MS public authority intervention is needed for such placement consultation with competent authorities in the other MS is to take place before the court makes the order - Art 56.1

- No order can be made without consent of the competent authority - Art 56.2

- Where no public authority intervention is needed in the placement MS the authority making the decision on placement is to inform the competent authority in the placement MS - 56.4

- Questions arose as to whether a declaration of enforceability is required before the placement order, once made, can be executed and on this CJEU has held

  - that an order placing a child across borders within the EU is within the scope of the Regulation and can be enforced but only for the period stated,
  - that the consent required under Art 56 must be given by a competent authority, not just the institution where the placement is to take effect,
  - that before it is executed the order must be declared enforceable and any appeal against the declaration should not have suspensive effect and
  - that the consent given will not apply to any subsequent order continuing the placement for which a separate consent must be sought - see the judgment in the case Health Service Executive v SC and AC - C 92/12
Recognition and Enforcement under the Hague Child Protection Convention of 1996

- Currently 43 Contracting States including all EU MS - Italy as from 1st Jan 2016
- Governs matters between EU MS and non-EU States Parties - not within the EU
- Other recent States party include Serbia - with effect from 1 Nov 2016, Georgia - 1 March 2015 - Russian Federation - 1 June 2013 - Ukraine - 1 February 2008
- Scope - similar to the Regulation as regards parental responsibility - Art 3
- Contains rules on recognition and enforcement similar to the ‘standard track ‘ procedure under the Regulation - Arts 23 - 28 - except that -
- Only measures taken by authorities with jurisdiction under the rules of the Convention are recognised and enforced thereunder - Art 23.2(a)
- Grounds of non recognition - discretionary as to refusal - Art 23.2
- Best interests of the child to be taken into account at enforcement - Art 28

NB The provisions of the 1996 Convention can be used to assist the return of a child or organise access rights as between States party both to the Hague Convention of 1980 and the 1996 Convention - Art 50
Other relevant international obligations

ECHR Provisions - Art 8 Right to the peaceful enjoyment of family life - also CFR Art 7
Art 6 right to secure civil rights within a reasonable time -
- Relevant as regards the duty to return the child under 1980 Convention
- ECtHR decisions based on Art 8 emphasise the duties of States party to ECHR and 1980 Hague Convention to have effective enforcement of return orders
- Art 6 breaches if the procedures for return or enforcement take too long

Charter of Fundamental Rights of the EU (CFR) - Art 24 on rights of the child -
- To express a view and to have views taken into consideration
- Best interests children a primary consideration in actions concerning them
- Children have the right to direct relations with both parents

UNCRC - Art 3 - Best interests of the child to be a primary consideration
- Art 9 - States to respect the right of the child 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.
- Art 12 - Child to be given opportunity to state a view also in judicial or other proceedings concerning her or his interests
Some thoughts on good practice for enforcement of orders

Contact/Access - depends on the situation how much the court needs to regulate

- For the certificate under Annex III details of the arrangements need to be made by the court of origin
- Access arrangements should be realistic and preferably agreed
- If not agreed, or if enforcement may be needed, enforcement may need to be accompanied by sanctions for non implementation
- During proceedings for return of a child under the 1980 Convention the court hearing the return application may be able to regulate interim access to the left behind parent in the ‘state of refuge’- see Art 7.2.b and f
- The views of the child need to be sought for cross border enforcement of access orders and in any event both CFR and UNCRC require this
- To be borne in mind that Art 15 can be used to split cases and so to allow for different aspects of the situation to be dealt with in different MS
Some thoughts on good practice for enforcement of orders

Orders for return of the child - under the 1980 Convention and the Regulation

- Duty of EU MS to ensure that a child is returned promptly is to be fulfilled using procedures for enforcement under national law

- ECHR cases make clear that States have to have effective systems in place; not enough to say that the systems do not exist on national law or the systems on place are not functioning properly

- Enforcement may not be necessary of agreement can be reached

- Even if agreement is reached it is important that the details of the return are recorded in the order made by the court -

- Need to consider preparatory measures by way of protecting the child against further abduction or concealment which can frustrate enforcement

- Courts should offer opportunities to the parties to consider carefully and preferably in consultation with each other what are the appropriate measures and practical arrangements for the return of the child- Conv Art 7.2.c and h

- All involved should have in mind the issues surrounding return and its potential enforcement as early as possible given the terms of the Convention and the Regulation

- Of particular importance is knowing where the child is throughout until the return has actually taken place
Some thoughts on good practice for enforcement of orders

Orders for return of the child - involvement of the child

- Need to bear in mind that the views of the child should be sought and taken into account where she/he is of sufficient age and maturity -

- Certificate under Art 42.2(b) should not be issued by the court unless that has taken place - *Aguirre v Pelz* is not a good example to follow

- Child should be prepared for the eventuality that she/he will be returning to the other country by arrangements being made for re-introduction to the ‘left behind’ parent with whom she/he has not been living

- Involvement of persons with knowledge and experience in dealing with children should be sought in cases where this is necessary and especially where agreement is not reached between parents

- Need to bear in mind from the outset the likelihood of the use of interim orders of protection both to prevent further harm to the child as well as to regulate access

- Interim orders ex parte cannot be enforced across borders under the Regulation
Some case law - CJEU

- **Application of Inga Rinau** - C-195/08 PPU - where a non return order has been followed by an order for return within the meaning of Reg Art 11.8 on which a certificate under Art 42.2 has been issued it is irrelevant that the non return order has been overturned on a subsequent appeal and no opposition to recognition and enforcement of the certificated judgment is permitted; also

- No application is permitted under Reg Art 31.1 for non-recognition of a return order under Art 11.8 on which a certificate has been issued under Art 42.2.

- **Povse v Alpago** - C-211/10 PPU - Article 11.8 covers a judgment of the court of origin with jurisdiction ordering the return of the child even if not preceded by a final judgment of that court relating to rights of custody of the child;

- Article 47.2 of Regulation No 2201/2003 must mean that enforcement of a judgment ordering the return of the child certified under Art 42.2 cannot be precluded by a subsequent judgment awarding provisional rights of custody given by a court in the Member State of enforcement and deemed to be enforceable under the law of that State

- 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.
Some case law - ECtHR

- There are positive obligations on States parties under Art 8 of ECHR to apply the 1980 Convention in an effective manner. As regards enforcement this means that adequate and effective methods must be made to enforce the rights of a left behind parent to return of the child as well as of the child to be reunited with that parent and so to execute orders for return under the 1980 Convention - see Ignaccolo-Zenide v Romania no 31679/96, Iglesias Gil v Spain No 56673/00, Iosub Caras v Romania No 7184/04, and Deak v Romania and the UK No 19055/05;

- these ideas supporting the basic structure and aims of the 1980 Convention have been confirmed in subsequent cases including in enforcement of return orders - examples include Rouiller v Switzerland No 3592/08, MR v Estonia No 13420/12, GS v Georgia No 2361/13, M.A. v Austria 4097/13 and Cavani v Hungary No 5493/13

- However recently in some cases the ECtHR has sought to favour the interests of the individual child in considering both the substance of the making of return orders and their enforcement which can lead to the idea that a breach of Art 8 can occur when a child is returned under the Convention or the Regulation - key relevant cases include Neullinger v Switzerland [GC] No 41615/07, X v Latvia [GC] No 27853/09, Sneersone v Italy No. 14737/09) in which case the court found that a return order under Art 11.8 was in breach of Art 8 ECHR.