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HANDBOOK OF EUROPEAN CIVIL PROCEDURE LAW

(TEXTS, CASES AND MATERIALS)



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Introduction

This handbook was created under the framework of Operational programme Education for competitiveness project Support of the foreign language tuition of law at the Law faculty of Palacky University in Olomouc (Law in English) and is determined for students of the European Civil Procedure Law Course.

The handbook is divided into three main parts. The first of them contains general information about the European civil procedure law and its sources. The Second part, which may be considered as the principle part of the handbook introduces to the European system of jurisdiction. So called Brussels I, Brussel IIbis, Maintenance obligations and EEO regulations are covered. Finally the third part informs students about on the field of the European Union adopted measures concerning judicial cooperation between Member States. Through this part students may acquire basic knowledge about service of documents and taking of evidence system, rules for European order for payment procedure and small claims procedure. Principles of international insolvency law are mentioned as well.

With the intention of complex comprehension of the problematic the most important parts of relevant European courts cases are put directly into the text of the handbook in a differentiating graphic way and the legal sentences are in bold. Orientation shall be also simplified by Case list in the back part of the handbook, cases are listed according to the chapters in which the text refers to the cases.

During the course the students may also use annexes of this handbook, texts of Brussels I, Brussels IIbis and Maintenance obligations regulations.

We hope this book will be useful tool for students, not only for the course of European Civil Procedure, but also for courses of Private International Law, Civil procedure law and also their future praxis of legal advisors.

In Olomouc the 16th of February 2012

Authors

List of abbreviations

1980 HAGUE CONVENTION – The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

2007 HAGUE CONVENTION – The Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance

2007 HAGUE PROTOCOL – Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations

BRUSSELS I REGULATION – Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

BRUSSELS IIBIS REGULATION – 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

CJEU – The Court of Justice of the European Union

COM – The European Commission

CPC – The Czech Civil procedure code, Act no 99/1963 Coll.

ECJ – Court of Justice of the European Communities

EEC – European Economic Community

EEO REGULATION – Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims

EPO REGULATION – Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure

EU – The European Union

IP REGULATION – Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings

MC REGULATION – Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations

OJ – The Official Journal

SCP REGULATION – Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure

SERVICE REGULATION – Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000

TE REGULATION – Council Regulation (EC) No 1206/2001 of 28 May 2001 on co-operation between the courts of the Member States in the taking of evidence in civil or commercial matters

TFEU – Treaty on the Functioning of the European Union

PART ONE

General Information

Chapter I Introduction to the European Civil Procedure Law

I.I Background

*"Citizens of the European Union enjoy unparalleled freedom to travel, work and live anywhere in the EU. To benefit fully, people need to lead their lives and go about their business in security and safety. They must be protected against international crime and terrorism, and at the same time enjoy equal access to justice and respect for their fundamental rights across the Union."*¹

It is for this reason that EU creates the area of freedom, justice and security.

Once fully in place, it will cover issues like EU citizenship, personal mobility, asylum, immigration, visa policy, managing the EU's external frontiers and close cooperation between national police, judicial and customs authorities.

This package will ensure that laws which apply to EU citizens, visitors and immigrants from other parts of the world, as well as to criminals and terrorists, are uniformly implemented across the Union, e.g. there shall exist minimal standards which are guaranteed all over the EU.²

I.II General characteristics

Area of freedom, security and justice covers many areas like EU citizenship, asylum, immigration etc. When discussing judicial cooperation in civil matters, „civil matters having cross border implications“, especially its procedural part, European civil procedure takes place.

The notion „European civil procedure“ is not an official term, the official designation is „Judicial cooperation (of members states) in civil matters, or „European judicial area (of freedom, security and justice) in civil matters“. However, the term „European civil procedure“ is being used frequently, also as a title of various publications concerning judicial cooperation in civil matters.³

It may be characterized as body of acts of European law, e.g. Union law dealing in accordance with international element and mutual judicial cooperation with

¹ See http://europa.eu/pol/justice/index_en.htm [cit. 26.1.2012].

² See http://europa.eu/pol/justice/index_en.htm [cit. 26.1.2012].

³ E.g. RAUSCHER, Thomas. *Europäisches Zivilprozeßrecht. Kommentar*. München: Sellier, 2006. 1075 s., RAUSCHER, Thomas. *Europäisches Zivilprozeßrecht. Mit Insolvenzverordnung und Vollstreckungsverordnung: 2. Bände*. München: Sellier, 2006. 2016 p., VAN CAENEGEM, R. C. *History of European Civil Procedure*. Tübingen: J.C.B. Mohr (Paul Siebeck), 1973. 114 p.

chosen „institutes“ of national law which are usually composed as a part of national civil procedure law.

Within the Czech legal system European civil procedure was originally a part of international private law only, used when there was a need of general review of the problem from the international point of view. After the Czech Republic's entry, the acts of EU gained important influence in the national law. Concrete problems of the application of European law within the national context have arisen as well.⁴

I.III Historical Background

I.III.I Development till 1968

The primary aim of the foundation of European communities was the economic integration and cooperation within the Europe.⁵ One of the essential elements of intended integration was to assure the free movement of goods, people, services and capital. With increasing movement, the number of disputes with international element has also grown significantly.

Originally, the Communities had no competence in the field of civil procedure, only article ex 220 of EC Treaty (later 293) declared, that so far as is necessary, the Member States shall enter into negotiations with each other with a view to securing for the benefit of their nationals:

... the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.⁶

⁴ Also, some amendments of the Czech CPC had to be accepted due to the European legal regulation adopted within the judicial cooperation in civil matters.

⁵ The European Communities were set up with the aim of ending the frequent and bloody wars between neighbours, which culminated in the Second World War. As of 1950, the European Coal and Steel Community begins to unite European countries economically and politically in order to secure lasting peace, followed by the Treaty of Rome from 1957 that creates the European Economic Community (EEC), or 'Common Market'. See http://europa.eu/about-eu/eu-history/index_en.htm [cit. 26. 1. 2012]. Article 2 of the original version of EEC Treaty (Treaty establishing the European Economic Community) also stated: „It shall be the aim of the Community, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States“.

⁶ Article ex 220 of EC Treaty: „Member States shall, in so far as necessary, engage in negotiations with each other with a view to ensuring for the benefit of their nationals:

- the protection of persons as well as the enjoyment and protection of rights under the conditions granted by each State to its own nationals;
- the elimination of double taxation within the Community;
- the mutual recognition of companies within the meaning of Article 58, second paragraph, the maintenance of their legal personality in cases where the registered office is transferred

I.III.II The Brussels Convention (1968–1992)

On the basis of the article 220 of the EC Treaty an international convention was concluded in 1968, The Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, so called Brussels I convention. This convention represented an important progress in the cooperation, but reached in a form of an international convention, which brought up difficulties. For example new Member States had always the obligation to ratify the convention with all its updating, so in the end of ratification, there were in one moment different versions of the convention between different Member States all over the EU.

I.III.III The Lugano Convention (1988)

The Brussels Convention was not open for ratification of other than Member States. But many non – Member States were interested in the cooperation. The mutual interest resulted in 1988 when Member States concluded with Norway, Iceland and Switzerland (European Free Trade Association) so called Lugano convention on jurisdiction and the enforcement of judgments in civil and commercial matters. The main advantage of creating these treaties was that the provisions of both conventions had been kept precisely the same.

I.III.IV The Maastricht Treaty (1992–1997)

The Maastricht Treaty brought the foundation of the European Union and its pillars. Matters that European civil procedure focuses on were concentrated in the third pillar, so called judicial cooperation of Member States in civil and criminal matters. However the judicial cooperation still did not fall under the competence of the European Communities, although the level of cooperation had increased. According to the Maastricht Treaty the institutions of the EU gained the competence to issue union law acts, which were not directly binding.

I.III.V The Amsterdam Treaty (1997–2010)

The Amsterdam Treaty was the „break point“ in the field of judicial cooperation in civil matters, mainly because it creates the Area of freedom, security and justice. The Area falls into two parts, civil matters and criminal matters. The judicial cooperation in civil matters was „communitarized“, e.g. its legal regulation was „transferred“ into the first pillar of the EU, hence under the competence of the EC institutions.

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- from one country to another, and the possibility for companies subject to the municipal law of different Member States to form mergers; and
 - the simplification of the formalities governing the reciprocal recognition and execution of judicial decisions and of arbitral awards.”

I.III.VI The Lisbon Treaty (2010 till nowadays)

The Lisbon Treaty, valid from 1. 12. 2010, brings changes to EU Treaty and EC Treaty. EC Treaty is renamed and now goes by Treaty on the functioning of the European Union (TFEU). The three-pillar structure was abandoned, judicial cooperation in civil matters is now regulated in Article 81 of TFEU (Title V, Chapter 3).

I.III.VII The “new” Lugano convention 2007

In order to simplify the situation with Lugano Convention from 1988, the EU signed on 30. 10. 2007 so call „new“ Lugano convention. It also harmonizes regulation in Lugano convention with regulation in Brussels I regulation. For Norway it is valid from 1. 1. 2010, for Switzerland from 1. 1. 2011, for Iceland from 1. 5. 2011.

I.IV The Denmark situation

The Denmark does not cooperate in the field of judicial cooperation in civil matters. The legislation adopted under Title V, Chapter 3 is not binding on Denmark. However the level of cooperation with Denmark increases and Denmark agreed to adopt certain acts, but there has to be always special agreement between Denmark and the EU to apply acts adopted under the article 81 of the TFEU.⁷

It is also necessary to mention that there exists Protocol on the position of the United Kingdom and Ireland as well. According to the Protocol the United Kingdom and Ireland may notify their decision to take part or to not take part in adoption and application of acts adopted under the article 81 of the TFEU.

⁷ See further: Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (*OJ L 149, 12. 6. 2009, p. 80–80*), Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (*OJ L 299R, 16. 11. 2005, p. 62–70*), Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil or commercial matters (*OJ L 300R, 17. 11. 2005, p. 55–60*).

Chapter II Sources of European civil procedure

II.I General overview

Within the sources of European civil procedure it is necessary to distinguish between three “types” of acts:

II.I.I Primary law (founding Treaties)

This group of acts is represented by two founding Treaties, namely EU Treaty and Treaty on the functioning of the European Union (TFEU). In respect of European civil procedure article 81 of TFEU is crucial:

Article 81 of TFEU

“Paragraph 1:

The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.

Paragraph 2:

For these purposes the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:

- (a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;*
- (b) the cross-border service of judicial and extrajudicial documents;*
- (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;*
- (d) cooperation in the taking of evidence;*
- (e) effective access to justice;*
- (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;*
- (g) the development of alternative methods of dispute settlement;*
- (h) support for the training of the judiciary and judicial staff.*

Paragraph 3:

Notwithstanding paragraph 2, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament.

The Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament.

The proposal referred to in the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision."

II.I.II Secondary law

Secondary law group is divided into two subgroups according to criteria of number of parties involved:

Unilateral acts are understood as, on one hand, those listed in Article 288 of the Treaty on the Functioning of the EU: regulations, directives, decisions, opinions and recommendations; and on the other hand those not listed in Article 288 of the Treaty on the Functioning of the EU, i.e. "atypical" acts such as communications and recommendations, and white and green papers.⁸

According to the above mentioned article 288 TFEU a **regulation** shall have general application. It shall be binding in its entirety and directly applicable in all Member States.⁹

A **directive** shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.¹⁰

A **decision** shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.¹¹

Recommendations and opinions shall have no binding force.¹²

Lately Conventions and Agreements group together and as whole consist of international agreements, signed by the EU and a country or outside organization, agreements between Member State and interinstitutional agreements, i.e. agreements between the EU institutions.¹³ As an example relevant to European civil procedure the New Lugano Convention can be listed.

⁸ http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l14534_en.htm [cit. 29.1.2012].

⁹ For concrete sources see Part Two Section A Chapter II, Section B Chapter I, Part Three Section A Chapter I, Chapter II, Section B Chapter I, Section C Chapter I, Section D.

¹⁰ For concrete sources see for example Part One Chapter II.II.II.

¹¹ For concrete sources see for example Part One Chapter II.II.III and Case List.

¹² For concrete sources see for example Part One Chapter II.II.I.

¹³ http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l14534_en.htm [cit. 29. 1. 2012].

II.I.III Supplementary law

Besides the case law of the Court of Justice, supplementary law includes international law and the general principles of law. It has enabled the Court to bridge the gaps left by primary and/or secondary law. International law is a source of inspiration for the Court of Justice when developing its case law. The Court cites written law, custom and usage. General principles of law are unwritten sources of law developed by the case law of the Court of Justice. They have allowed the Court to implement rules in different domains of which the treaties make no mention.¹⁴

II.II Legal sources of European Civil Procedure (overview of concrete acts)

The judicial cooperation in civil matters is currently dealing with questions which are from the European Union point of view divided into five areas of common interest, namely cooperation in general (general framework), mutual recognition and enforcement of judgments, cooperation between Member States, applicable law and access to justice.¹⁵ To simplify the orientation in currently valid concrete legal sources of the European Civil procedure law (secondary law) we come out from this European Union judicial cooperation inner system.

II.II.I General overview

This area of judicial cooperation deals primarily with overall questions concerning cooperation of Member States that can be found, for example in The Stockholm Programme¹⁶ and Action plan to the Stockholm Programme¹⁷ or The Hague Programme¹⁸ setting 10 priorities of the five year period 2005–2010. General framework also entails conventions namely Convention on Choice of Court Agree-

¹⁴ http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l14534_en.htm [cit. 29. 1. 2012]

¹⁵ europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/index_en.htm [cit. 29. 1. 2012]

¹⁶ The Stockholm Programme – An open and secure Europe serving and protecting citizens [Official Journal C 115 of 4. 5. 2010].

¹⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 20 April 2010 – Delivering an area of freedom, security and justice for Europe's citizens – Action Plan Implementing the Stockholm Programme [COM(2010) 171 final – Not published in the Official Journal].

¹⁸ Communication from the Commission to the Council and the European Parliament of 10 May 2005 – The Hague Programme: ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice [COM(2005) 184 final – Official Journal C 236 of 24. 9. 2005].

ments¹⁹ signed in 2009 and Convention on parental responsibility and protection of children²⁰ and area of European contract law.²¹

II.II.II Mutual recognition and enforcement of judgements

Various acts represent this area. From many we select these examples:

1. Council Regulation (EC) No 44/2001, of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [Official Journal L 12 of 16. 01. 2001] – Brussels I Regulation.

2. Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [Official Journal L 338, 23. 12. 2003] – Brussels IIbis Regulation.

3. Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [Official Journal L 160 of 30. 6. 2000].

4. European Parliament and Council – IP Regulation. Regulation No 805/2004 of 21 April 2004 creating a European enforcement order for uncontested claims [Official Journal L 143, 30. 04. 2004] – EEO Regulation.

5. Regulation No 1896/2006 of the European Parliament and of the Council of 12 December creating a European enforcement order for payment procedure [Official Journal OJ L 300, 17. 11. 2005] – EPO Regulation.

6. Regulation No 861/2007 of the European Parliament and of the Council of 11 July establishing a European small claims procedure [Official Journal OJ L 199 of 31. 7. 2007] – SCP Regulation.

7. Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [Official Journal L 7 of 10. 1. 2009] – MC Regulation.

8. Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters [Official Journal L 136 of 24. 5. 2008].

II.II.III Cooperation between Member States

Judicial cooperation is also partially created through cooperation between EU Member States, e.g.:

¹⁹ Council Decision 2009/397/EC of 26 February 2009 on the signing on behalf of the European Community of the Convention on Choice of Court Agreements.

²⁰ Council Decision 2003/93/EC of 19 December 2002 authorising the Member States, in the interest of the Community, to sign the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children.

²¹ Communication from the Commission to the Council and the European Parliament on European contract law [COM(2001) 398 final – Official Journal C 255 of 13. 9. 2001].

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- Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil and commercial matters [Official Journal L 174 of 27. 06. 2001] – TE Regulation.
 - Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000 [Official Journal L 324 of 10. 12. 2007] – Service Regulation.
 - Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters [Official Journal OJ L 174 of 27. 6. 2001].

II.II.IV Applicable law

For purposes of this Handbook concerned with procedural law we only mention three regulations containing applicable law as another way of judicial cooperation, nevertheless we will focus on these acts no more.

- Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [Official Journal L 177 of 4. 7. 2008].
- Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [Official Journal L 199 of 31. 7. 2007].
- Council regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III) [Official Journal L 343 of 29. 12. 2010].

II.II.V Access to Justice

The last area of judicial cooperation entails efforts to simplify access to justice in EU via various means, for example:

- Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes [Official Journal L 26 of 31. 01. 2003]
- Commission Decision 2005/630/EC of 26 August 2005 establishing a form for the transmission of legal aid applications under Council Directive 2003/8/EC [Official Journal L 225 of 31. 08. 2005].
- Commission Decision 2004/844/EC of 9 November 2004 establishing a form for legal aid applications under Council Directive 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes [Official Journal L 365 of 10. 12. 2004].

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- Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee of 30 May 2008 – Towards a European e-Justice Strategy

II.III Electronic information sources concerning European civil procedure

<http://europa.eu> – Gateway to the European Union

http://ec.europa.eu/civiljustice/homepage/homepage_ec_en.htm - Judicial network in civil and commercial matters

http://ec.europa.eu/justice_home/judicialatlascivil/html/index_en.htm - European judicial atlas in civil matters



PART TWO
**System of jurisdiction within
the European Union, mutual recognition
and enforcement of judgments**

SECTION A

Civil and commercial matters

Chapter I The importance of international jurisdiction

Mutual cooperation of not only Member States of the EU, but also of other states, could help to cross over many obstacles when achieving legal protection of people's claims. However mutual intention to cooperate is hinting at the Anglo-American and continental different attitudes to the concept of jurisdiction itself. The Anglo-American attitude is e.g. by Michaels²² defined as "in or out" system. The concept of jurisdiction is unilateral, domestic and political paradigma, the American court is above all focussed on the relation between the claimant and the court. It is not important whether other courts have jurisdiction as well, it matters only whether the court in question has or does not have jurisdiction.²³ Jurisdiction is understood to be a political issue and should be always in accordance with so-called due process clause. European attitude is defined then as "us or them" system. It is horizontal, multilateral, international and non-political. The question which matters is not the relation between claimant and court, but between courts or different states.²⁴

Both attitudes were analyzed in case *Yahoo! Inc. v. La Ligue Contre Le Racisme et l'antisémitisme (LICRA)*, where the U.S. Court of Appeals for 9th Circuit dealt with validity of measures imposed to American company Yahoo! Inc. by French court (tribunal de grande instance of Paris) and with questions concerning personal jurisdiction of this court to French parties LICRA and l'Union des Etudiants Juifs de France (UEJF).²⁵

Mutual negotiations between European Union and the United States of America led at least to the conclusion of Convention of 30 June 2005 on Choice of Court Agreements. The Convention was concluded within the framework of Hague Conference on Private International Law.²⁶

²² Law professor from Duke University.

²³ See MICHAELS, Ralf. *Two paradigms of Jurisdiction*. In: Michigan Journal of International Law. Michigan: University of Michigan, Law School. Volume 27/2006, p. 1027 and ff.

²⁴ See MICHAELS, Ralf. *Two paradigms of Jurisdiction*. In: Michigan Journal of International Law. Michigan: University of Michigan, Law School. Volume 27/2006, p. 1038 and ff.

²⁵ For further information about the case see e.g. <http://law.justia.com/cases/federal/appellate-courts/F3/433/1199/546158/> [cit. 29. 1. 2012].

²⁶ The convention was so far signed by the European Union and the United States of America and ratified by Mexico.

Chapter II The Brussels I Regulation

[Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters]

II.I General information

The Brussels I Regulation is called by the Commission as „matrix“ of judicial cooperation in civil and commercial matters. The main aim of it was to substitute the Brussels I Convention with some mutually accepted changes.

The Regulation is composed of 76 articles divided into eight chapters:

- I – Scope of application
- II – Jurisdiction
- III – Recognition and enforcement
- IV – Authentic instruments and court settlements
- V – General Provisions
- VI – Transitional Provisions
- VII – Relations with other instruments
- VIII – Final Provisions courts and the recognition and enforcement of judgments in civil and commercial matters.

The Denmark situation

In 1997 when creating the Amsterdam Treaty the Member States agreed upon The Protocol on the position of Denmark, when Denmark is not cooperating within this field. However in 2005 mutual negotiations led to conclusion of an international agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.²⁷ Upon this agreement the provisions of the Brussels I regulation shall apply to the relations between the Community and the Denmark (with the exception given in the agreement). The Agreement entered into force on 1. 7. 2007.²⁸

II.II The Scope of application

We distinguish:

- a) Material scope of application – article 1 of the Regulation – civil and commercial matters.

²⁷ OJ 16. 11. 2005 L299 p. 62.

²⁸ For Denmark situation see above Part One Chapter I.IV.

- b) Territorial scope of application – domicile of the defendant in a Member State (all without Denmark).²⁹
- c) Temporal scope of application – proceedings after 1. 3. 2002.

The Brussels I regulation shall be applied only where the international element is involved. The international element usually consists in different nationalities of parties, but it can consist in many other circumstances of the case. According to ECJ the interpretation of the international element involved shall be extensive.

Owusu case³⁰

On 10 October 1997, Mr Owusu ('the claimant'), a British national domiciled in the United Kingdom, suffered a very serious accident during a holiday in Jamaica. He walked into the sea, and when the water was up to his waist he dived in, struck his head against a submerged sand bank and sustained a fracture of his fifth cervical vertebra which rendered him tetraplegic. Following that accident, Mr Owusu brought an action in the United Kingdom for breach of contract against Mr Jackson, who is also domiciled in that State. Mr Jackson had let to Mr Owusu a holiday villa in Mammee Bay (Jamaica). Mr Owusu claims that the contract, which provided that he would have access to a private beach, contained an implied term that the beach would be reasonably safe or free from hidden dangers.

The Brussels I regulation precludes a court of a Contracting State (Member State) from declining the jurisdiction conferred on it by Article 2 of that regulation on the ground that a court of a non-member State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other Member State is in issue or the proceedings have no connecting factors to any other Member State.

The material scope of application

Article 1 of the Brussels I Regulation states that the Regulation covers civil and commercial matters, whatever the nature of the court or tribunal. On the issue whether the matters in question are of private law the ECJ responded in case ***Volk-er Sonntag v. A. Waidman***.³¹

A claim for compensation for loss to an individual resulting from a criminal offence, even though made in the context of criminal proceedings, is civil in nature unless the person against whom it is made is to be regarded as a public authority which acted in the exercise of its powers. That is not the case where the activity called in question is the supervision by a state-school teacher of his pupils during a school trip. It follows that "civil matters" within the meaning of the first sentence of the first paragraph of Article 1 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters covers a claim for damages brought before a criminal court against a state-school teacher who, during a school trip, occasioned loss to a pupil as a result of a culpable and unlawful breach of his duties of supervision, even where there is coverage by a scheme of social insurance under public law.

²⁹ For Denmark see above.

³⁰ ECJ Case C-281/02 of 1st March 2005.

³¹ ECJ Case C-172/91 of 21 April 1993.

The material scope is completed by the exemptions in article 1 paragraph 2 of the Brussels I Regulation, so called negative material scope:

The Brussels I Regulation shall not apply to:

- (a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;
- (b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
- (c) social security;
- (d) arbitration.

The exclusion of arbitration

The exclusion is governed by the New York Convention³², to which all Member States are parties. It is also mentioned in ***West Tankers case***³³:

In August 2000 the Front Comor, a vessel owned by West Tankers and chartered by Erg Petroli SpA ('Erg'), collided in Syracuse (Italy) with a jetty owned by Erg and caused damage. The charter party was governed by English law and contained a clause providing for arbitration in London, United Kingdom.

Erg claimed compensation from its insurers Allianz and Generali up to the limit of its insurance cover and commenced arbitration proceedings in London against West Tankers for the excess. West Tankers denied liability for the damage caused by the collision. Having paid Erg compensation under the insurance policies for the loss it had suffered, Allianz and Generali brought proceedings on 30 July 2003 against West Tankers before the Tribunale di Siracusa (Italy) in order to recover the sums they had paid to Erg. The action was based on their statutory right of subrogation to Erg's claims, in accordance with Article 1916 of the Italian Civil Code. West Tankers raised an objection of lack of jurisdiction on the basis of the existence of the arbitration agreement.

In parallel, West Tankers brought proceedings, on 10 September 2004, before the High Court of Justice of England and Wales, Queens Bench Division (Commercial Court), seeking a declaration that the dispute between itself, on the one hand, and Allianz and Generali, on the other, was to be settled by arbitration pursuant to the arbitration agreement. West Tankers also sought an injunction restraining Allianz and Generali from pursuing any proceedings other than arbitration and requiring them to discontinue the proceedings commenced before the Tribunale di Siracusa ('the anti-suit injunction').

It is incompatible with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement.

³² Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

³³ ECJ Case C-185/07 of 10 February 2009.

II.III The system of Jurisdiction in Brussels I Regulation

The Brussels I Regulation determines the Member State have jurisdiction over the case. It has to be distinguished from internal jurisdiction – relations between courts of one Member State – regulated by the national law. Regulation states e.g. that in a particular case the Czech courts have jurisdiction in the matter, these national courts are obliged to apply national law, i. e. CPC., in order to establish which national court has jurisdiction over the case.

System of jurisdiction in Brussels I

II.III.I The basic rule of the jurisdiction

The basic rule of the jurisdiction is stated in article 2 of the Regulation:

„Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in that Member State“

This rule is a demonstration of principle “actor sequitur forum rei”, i.e. the claimant follows the defendant.

However the Brussels I Regulation, in articles 5–7, regulates so called special jurisdiction, alternative jurisdiction to the jurisdiction based upon the general (basic) principle in article 2. Special jurisdiction brings the possibility to „opt out“ the most suitable courts with the possibility to „keep“ the proceedings in „one’s“ state.

II.III.II The alternative jurisdiction

In article 5 of the Brussels I Regulation there is offered alternative jurisdiction for matters concerning:

- a) Place of performance;
- b) Maintenance claims;³⁴
- c) Tort;
- d) Civil claims for damages or restitution based upon act giving rise to criminal proceedings;
- e) Disputes arising out of the operation of a branch, agency or other establishment;
- f) Trust operations;
- g) Payment of remuneration claimed in respect of the salvage of a cargo or freight.

³⁴ The provisions of Brussels I Regulation concerning maintenance claims shall no longer be applied after the entry into force of MC Regulation. For further information see Part Two Section B Chapter II.

Article 5 paragraph 1 of the Brussels I Regulation – Place of performance

*“The person domiciled in one Member State, may be sued in another Member State:
a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;”*

The terms “in matters relating to a contract”, “in the courts for the place of performance of the obligation in question” and “place of performance” are interpreted directly in the Brussels I Regulation:

Place of performance of the obligation in question shall be:

- in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,
- in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided.

***Color Drack GmbH v Lexx International Vertriebs GmbH.*³⁵**

The first indent of Article 5(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as applying where there are several places of delivery within a single Member State. In such a case, the court having jurisdiction to hear all the claims based on the contract for the sale of goods is that for the principal place of delivery, which must be determined on the basis of economic criteria. In the absence of determining factors for establishing the principal place of delivery, the plaintiff may sue the defendant in the court for the place of delivery of its choice.

The Criteria for distinguishing between sale of goods and provision of services are interpreted in detail in the ***Car Trim GmbH v. Keysafety Systems Srl***³⁶:

Article 5(1)(b) must be interpreted as meaning that where the purpose of contracts is the supply of goods to be manufactured or produced and, even though the purchaser has specified certain requirements with regard to the provision, fabrication and delivery of the components to be produced, the purchaser has not supplied the materials and the supplier is responsible for the quality of the goods and their compliance with the contract, those contracts must be classified as a “sale of goods” within the meaning of the first indent of Article 5(1)(b) of that regulation.

The first indent of Article 5(1)(b) of Regulation No 44/2001 must be interpreted as meaning that, in the case of a sale involving carriage of goods, the place where, under the contract, the goods sold were delivered or should have been delivered must be determined on the basis of the provisions of that contract. Where it is impossible to determine the place of delivery on that basis, without reference to the substantive law applicable to the contract, that place is the place where the physical transfer of the goods took place, as a result of which the purchaser obtained, or should have obtained, actual power of disposal over those goods at the final destination of the sales transaction.

³⁵ ECJ Case C-386/05 of 3 May 2007.

³⁶ ECJ Case C-381/08 of 25 February 2010.

The Court of Justice of the European Union dealt in its jurisprudence also with performance in several Member States, hence the **Wood Floor case**³⁷:

The second indent of Article 5(1)(b) must be interpreted as meaning that that provision is applicable in the case where services are provided in several Member States, the court which has jurisdiction to hear and determine all the claims arising from the contract is the court in whose jurisdiction the place of the main provision of services is situated. For a commercial agency contract, that place is the place of the main provision of services by the agent, as it appears from the provisions of the contract or, in the absence of such provisions, the actual performance of that contract or, where it cannot be established on that basis, the place where the agent is domiciled.

Article 5 paragraph 3 of the Brussels I Regulation – Torts

“... in matters relating to tort, delict or quasi delict, in the courts where the harmful event occurred or may occur...”

This particular special jurisdiction is often accompanied by difficulties that bring up interpretation of the notion „harmful event“. Closer analysis provides ECJ case **Mines de Potasses d’Alsace**³⁸:

Where the place of the happening of the event which may give rise to liability in tort, delict or quasi-delict and the place where that event results in damage are not identical, the expression ‘place where the harmful event occurred’; in article 5 (3) of the convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it. The result is that the defendant may be sued, at the opinion of the plaintiff, either in the courts for the place where the damage occurred or in the courts for the place of the event which gives rise to and is as the origin of damage.

There are also other decisions dealing with harmful events:

Kronhofer case³⁹

Mr Kronhofer brought proceedings against the defendants in the main proceedings before the Landesgericht Feldkirch, Feldkirch Regional Court, Austria, seeking to recover damages for financial loss which he claims to have suffered as a result of their wrongful conduct. The defendants in the main proceedings persuaded him, by telephone, to enter into a call option contract relating to shares. However, they failed to warn him of the risks involved in the transaction. As a result, Mr Kronhofer transferred a total amount of USD 82 500 in November and December 1997 to an investment account with Protectas in Germany which was then used to subscribe for highly speculative call options on the London Stock Exchange. The transaction in question resulted in the loss of part of the sum transferred and Mr Kronhofer was repaid only part of the capital invested by him.

³⁷ (ECJ) CJEU Case C 19/09 of 11 March 2010.

³⁸ ECJ Case 21/76 of 30 November 1976.

³⁹ ECJ Case C-168/2002 of 20 November 2002.

Article 5(3) must be interpreted as meaning that the expression ‘place where the harmful event occurred’ does not refer to the place where the claimant is domiciled or where ‘his assets are concentrated’ by reason only of the fact that he has suffered financial damage there resulting from the loss of part of his assets which arose and was incurred in another Contracting State.

Shevil case⁴⁰

The case dealt with harm caused by the publication of a defamatory newspaper article. The question consisted in proper determination of place, where the harmful event occurred, when the newspaper is distributed in more countries.

On a proper construction of the expression “place where the harmful event occurred” in Article 5(3) the victim of a libel by a newspaper article distributed in several Contracting States may bring an action for damages against the publisher either before the courts of the Contracting State of the place where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all the harm caused by the defamation, or before the courts of each Contracting State in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which have jurisdiction to rule solely in respect of the harm caused in the State of the court seised.

The criteria for assessing whether the event in question is harmful and the evidence required of the existence and extent of the harm alleged by the victim of the defamation are not governed by the Convention but by the substantive law determined by the national conflict of laws rules of the court seised, provided that the effectiveness of the Convention is not thereby impaired.

Article 6 of the Brussels I Regulation, so called pending cases

- a) *In case where more defendants are being sued, the jurisdiction lies in the place, where any of them is domiciled,*
- b) *Third party – action on warranty or guarantee, the jurisdiction lies in the court seised of the original proceedings*
- c) *Counter-claim actions, jurisdiction lies in the court in which the original case is pending*
- d) *Matters relating to a contract – may be combined with action in matters relating to rights in rem against the same defendant.*

Glaxosmithkline and Laboratoire Glaxosmithklin v. Jean Pierr Rouard⁴¹

The rule of special jurisdiction provided for in Article 6(1) of Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters cannot be applied to a dispute falling under Section 5 of Chapter II of that regulation concerning the jurisdiction rules applicable to individual contracts of employment.

⁴⁰ ECJ Case C-68/93 of 7 March 1995.

⁴¹ ECJ C-462/06 of 22 May 2008.

II.III.III Exclusive Jurisdiction

Article 22 of the Brussels I Regulation sets down rules for jurisdiction regardless the domicile of the defendant, e.g. in proceedings which have as their object rights in rem in immovable property – the courts of Member State where immovable property is situated, in proceedings which have as their object validity of entries in public register, the courts of the Member State, in which register is kept.

II.III.IV Prorogation of jurisdiction

Article 23 of the Brussels I Regulation regulates a possibility for the parties, one or more of whom is domiciled in a Member State, to agree that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.

Such an agreement conferring jurisdiction shall be either:

- (a) in writing or evidenced in writing; or
- (b) in a form which accords with practices which the parties have established between themselves; or
- (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

In the general principle it is not allowed in: Insurance contracts, consumers' contracts, individual contracts of employment.⁴²

II.III.V Jurisdiction by appearance

Even if the jurisdiction rules in this regulation establish jurisdiction of different courts, courts of another Member State shall have jurisdiction if the defendant „enters an appearance“ (article 24 of the Brussels I Regulation).

This does not apply:

- a) in cases of exclusive jurisdiction,
- b) if the defendant appears only to contest the jurisdiction.

II.III.VI Jurisdiction in matters of insurance, consumers contracts and individual contracts of employment

The articles 8 to 21 of the Brussels I Regulation set down special rules for jurisdiction in chosen matters – insurance, consumer contracts and individual contracts

⁴² For further information concerning prorogation in insurance contracts, consumer contracts and individual contracts of employment see Part Two Section A Chapter II.III.VI.

of employment. The reason for such provisions is the protection of the “typically” weaker party.

II.III.VI.1 Jurisdiction in the matters relating to insurance

Articles 8 to 14 of the Brussels I Regulation regulate matters in question. The weaker party shall be either the policyholder, either the insured person or the one who benefits from the insurance contracts (beneficiary). The basic rule for determination of the jurisdiction in these matters provides article 9 of the Brussels I Regulation.

An insurer domiciled in a Member State may be sued:

- a) in the courts of the Member State where he is domiciled, or*
- b) in another Member State, in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the plaintiff is domiciled,*
- c) if he is a co-insurer, in the courts of a Member State in which proceedings are brought against the leading insurer.*

The prorogation agreement according to conditions set by the article 23 of the Brussels I Regulation is not allowed contrary the provisions of the section, but there is special provision in article 13.⁴³

FBTO Schadenverzekeringen NV v. Jack Odenbreit⁴⁴

On 28 December 2003 Mr. Odenbreit was involved in a road traffic accident in the Netherlands with a person insured with FBTO. As the injured party he brought a direct action against the insurer before the Amtsgericht Aachen, Aachen Local Court, which is the court for the place where he is domiciled, on the basis of Articles 11(2) and 9(1)(b) of Regulation No 44/2001.

The reference in Article 11(2) of Council Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters to Article 9(1)(b) of that regulation is to be interpreted as meaning that the injured party may bring an action directly against the insurer before the courts for the

⁴³ Article 13 of Brussels I Regulation states: The provisions of this Section may be departed from only by an agreement:

1. which is entered into after the dispute has arisen, or
2. which allows the policyholder, the insured or a beneficiary to bring proceedings in courts other than those indicated in this Section, or
3. which is concluded between a policyholder and an insurer, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which has the effect of conferring jurisdiction on the courts of that State even if the harmful event were to occur abroad, provided that such an agreement is not contrary to the law of that State, or
4. which is concluded with a policyholder who is not domiciled in a Member State, except in so far as the insurance is compulsory or relates to immovable property in a Member State, or
5. which relates to a contract of insurance in so far as it covers one or more of the risks set out in Article 14.

⁴⁴ ECJ Case C-463/06 of 13 December 2007.

place in a Member State where that injured party is domiciled, provided that such a direct action is permitted and the insurer is domiciled in a Member State.

II.III.VI.II Jurisdiction over consumer contracts

Articles 15 to 17 of the Brussels I Regulation provide rules protecting the weaker party, in this case, the consumer. The consumer contracts are interpreted as the contracts for a purpose which can be regarded as being outside of his trade or profession.

In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5, if:

- it is a contract for the sale of goods on installment credit terms; or*
- it is a contract for a loan repayable by installments, or for any other form of credit, made to finance the sale of goods; or*
- in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities⁴⁵.*

This Section shall not apply to a contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation.

A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled.

Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.

According to article 15 paragraph 1 letter a) of the Brussels I Regulation, sale of goods on instalment credit, ECJ stated its opinion in **Bertrand v. Paul Ott case**⁴⁶:

Since the concept of a contract of sale on instalment credit terms varies from one Member State to another, in accordance with the objectives pursued by their respective laws, it is necessary, in the context of the convention, to consider that concept as being independent and therefore to give it a uniform substantive content allied to the community order.

Accordingly to the principles common to the laws of the Member States, the sale of goods on instalment credit is to be understood as a transaction on which the price is a discharged by way of several payments which is linked to a financing contract. However, a restrictive interpretation of the second paragraph of article 14 of the Convention, in conformity with the objectives pursued by Section 4, entails the restriction of the jurisdictional advantage for which provision is made by that article to buyers who are in need of protection, their economic position being one of the weakness in comparison with sellers by reason of that fact that they are private final con-

⁴⁵ Article 15 of the Brussels I Regulation.

⁴⁶ ECJ Case 150/77 of 21 June 1978.

sumers and are not engaged when buying the product acquired on instalment credit terms, in trade or professional activities.

The concept of the sale of goods on instalment credit terms within the meaning of article 13 of the Brussels Convention of 27 September 1968 is not to be understood to extend to the sale of a machine which one company agrees to make to another company on the basis of a price to be paid by way of bills of exchange spread over a period.

The regulation of the consumer contracts is, though, not complex because article 15 paragraph 1 letter c) of the Brussels I Regulation is focused only on „passive consumer“, e.g. the one who buys only in the Member State, where he is domiciled. The rule does not apply to contracts of transport, unless they are combined with accommodation. Also ECJ gives its opinion in **Pammer case**⁴⁷:

This dispute, between Mr. Pammer, who resides in Austria, and Reederei Karl Schlüter, a company established in Germany, concerns a voyage by freighter from Trieste, Italy, to the Far East organized by that company which gave rise to a contract between it and Mr. Pammer ('the voyage contract').

Mr Pammer booked the voyage through Internationale Frachtschiffreisen Pfeiffer GmbH, a company whose seat is in Germany ('the intermediary company').

The intermediary company, which operates in particular via the internet, described the voyage on its website, indicating that there was a fitness room, an outdoor swimming pool, a saloon and video and television access on the vessel. Reference was also made to three double cabins with shower and toilet, to a separate living room with seating, a desk, carpeting and a fridge, and to stopping at ports of call from which excursions into towns could be undertaken.

Mr. Pammer refused to embark and sought reimbursement of the sum which he had paid for the voyage, on the ground that that description did not, in his view, correspond to the conditions on the vessel. Since Reederei Karl Schlüter reimbursed only a part of that sum, that is to say, roughly EUR 3 500, Mr. Pammer claimed payment of the balance, roughly EUR 5 000, together with interest before an Austrian court of first instance, the Bezirksgericht, District Court, Krems an der Donau. Reederei Karl Schlüter contended that it did not pursue any professional or commercial activity in Austria and raised the plea that the court lacked jurisdiction.

A contract concerning a voyage by freighter, such as that at issue in the main proceedings in Case C-585/08, is a contract of transport which, for an inclusive price, provides for a combination of travel and accommodation within the meaning of Article 15(3) of Council Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

In order to determine whether a trader whose activity is presented on its website or on that of an intermediary can be considered to be 'directing' its activity to the Member State of the consumer's domicile, within the meaning of Article 15(1)(c) of Regulation No 44/2001, it should be ascertained whether, before the conclusion of any contract with the consumer, it is apparent from those websites and the trader's overall activity that the trader was envisaging doing business with consumers domiciled in one or more Member States, including the Member State of that consumer's domicile, in the sense that it was minded to conclude a contract with them.

⁴⁷ CJEU Case C-585/08 and C-144/09 of 7 December 2001.

The following matters, the list of which is not exhaustive, are capable of constituting evidence from which it may be concluded that the trader's activity is directed to the Member State of the consumer's domicile, namely the international nature of the activity, mention of itineraries from other Member States for going to the place where the trader is established, use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established with the possibility of making and confirming the reservation in that other language, mention of telephone numbers with an international code, outlay of expenditure on an internet referencing service in order to facilitate access to the trader's site or that of its intermediary by consumers domiciled in other Member States, use of a top-level domain name other than that of the Member State in which the trader is established, and mention of an international clientele composed of customers domiciled in various Member States. It is for the national courts to ascertain whether such evidence exists.

On the other hand, the mere accessibility of the trader's or the intermediary's website in the Member State in which the consumer is domiciled is insufficient. The same is true of mention of an email address and of other contact details, or of use of a language or a currency which are the language and/or currency generally used in the Member State in which the trader is established.

The application of the article 23 of the Brussels I Regulation contrary the provisions of this section is not allowed, however the article 17 allows prorogation agreement over consumer contracts with certain conditions.⁴⁸

II.III.VI.II.I ECJ Cases concerning consumer contracts

Johann Gruber v. Bay Wa AG⁴⁹

According to the documents in the main proceedings Mr. Gruber, a farmer, owns a farm building constructed around a square ('Vierkanthof'), situated in Upper Austria, close to the German border. He uses about a dozen rooms as a dwelling for himself and his family. In addition over 200 pigs are kept there, and there are fodder silos and a large machine room. Between 10% and 15% of the total fodder necessary for the farm is also stored there. The area of the farm building used for residential purposes is slightly more than 60% of the total floor area of the building.

Bay Wa operates a number of separately managed businesses in Germany. In Pocking, Germany, not far from the Austrian border, it has a building material business and a DIY and garden centre. The latter published brochures which were also distributed in Austria.

⁴⁸ Article 17 of the Brussels I Regulation states: The provisions of this Section may be departed from only by an agreement:

1. which is entered into after the dispute has arisen; or
2. which allows the consumer to bring proceedings in courts other than those indicated in this Section; or
3. which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.

⁴⁹ ECJ Case C-464/01 of 20 January 2005.

Wishing to replace the roof tiles of his farm building, Mr. Gruber became aware of those advertising brochures, which were sent out with the *Braunauer Rundschau*, a local periodical distributed to households. The tiles offered for sale by Bay Wa's building materials department in Pocking did not feature in those brochures.

Mr. Gruber made several telephone enquiries to an employee of Bay Wa concerning the different types of tiles and the prices, stating his name and address but not mentioning the fact that he was a farmer. The employee made him an offer by telephone but Mr. Gruber wished to inspect the tiles on site. On his visit to Bay Wa's premises, he was given by the employee a written quotation dated 23 July 1998. During that meeting Mr. Gruber told Bay Wa's employee that he had a farm and wished to tile the roof of the farm building. He stated that he also owned ancillary buildings that were used principally for the farm, but did not expressly state whether the building to be tiled was used mainly for business or for private purposes. The following day, Mr. Gruber called the employee, from Austria, to say that he accepted Bay Wa's quotation. Bay Wa then faxed a confirmation of the order to Mr. Gruber's bank in Austria.

The rules of jurisdiction laid down by the Brussels Convention must be interpreted as follows: a person who concludes a contract for goods intended for purposes which are in part within and in part outside his trade or profession may not rely on the special rules of jurisdiction laid down in Articles 13 to 15 of the Convention, unless the trade or professional purpose is so limited as to be negligible in the overall context of the supply, the fact that the private element is predominant being irrelevant in that respect;

it is for the court seized to decide whether the contract at issue was concluded in order to satisfy, to a non-negligible extent, needs of the business of the person concerned or whether, on the contrary, the trade or professional purpose was negligible;

to that end, that court must take account of all the relevant factual evidence objectively contained in the file. On the other hand, it must not take account of facts or circumstances of which the other party to the contract may have been aware when the contract was concluded, unless the person who claims the capacity of consumer behaved in such a way as to give the other party to the contract the legitimate impression that he was acting for the purposes of his business.

So called "Bingo decisions"

Gabriel case⁵⁰

In October 1999 Mr. Gabriel received at his private address and in a sealed envelope several personalized letters from *Schlank & Schick* which he claims were of such a kind as to lead him to believe that, following a draw, he was the lucky winner of ATS 49 700 and that he was entitled to receive that amount simply on demand, subject only to the condition that he ordered at the same time from that company goods to a minimum value of ATS 200, to be selected in a catalogue and entered on an order form attached to those letters.

The jurisdiction rules set out in the Brussels I Convention are to be construed as meaning that judicial proceedings by which a consumer seeks an order, in the Contracting State in which he is domiciled and pursuant to that State's legislation, requiring a mail-order company established in another Contracting State to pay him a financial benefit in

⁵⁰ ECJ Case C-96/00 of 11 July 2002.

circumstances where that company had sent to that consumer in person a letter likely to create the impression that a prize would be awarded to him on condition that he ordered goods to a specified amount, and where that consumer actually placed such an order in the State of his domicile without, however, obtaining payment of that financial benefit, are contractual in nature in the sense contemplated in Article 13, first paragraph, point 3, of that Convention.

Missis Engler case⁵¹

At the beginning of 2001 Mrs. Engler received a letter personally addressed to her at her domicile from Janus Versand, which carries on business as a mail order company. That letter contained a 'payment notice', whose form and content led her to believe that she had won a prize of ATS 455 000 in a 'cash prize draw' organised by Janus Versand, and a catalogue of goods marketed by the latter (which apparently also called itself, in its relations with its customers, 'Handelskontor Janus GmbH') with a 'request for a trial without obligation'. In the advertising brochure sent to Mrs Engler Janus Versand stated that it could also be contacted on the Internet at the following address: www.janus-versand.com.

Furthermore, Mrs. Engler was requested to affix to the 'payment notice', in the space provided for that purpose, the 'official stamp of the chambers' accompanying the letter and to return the request for the 'trial without obligation' to Janus Versand. A box for the date and signature, a request to 'fill it in' and a reference in small print to the terms and conditions and the award of the prize supposedly won also feature on the 'payment notice'. Mrs. Engler had to declare on the 'payment notice' that she had read and accepted those conditions. Finally, it also urged the addressee to return 'today' the document duly completed in order that it could be processed, and an envelope was attached for that purpose.

In those circumstances Mrs. Engler, as Janus Versand had requested, returned the 'payment notice' to it, as she believed that that was sufficient in order to obtain the promised prize of ATS 455 000. At first Janus Versand did not react, it then refused to pay that sum to Mrs. Engler.

The rules of jurisdiction of the Brussels I regulation must be interpreted in the following way: legal proceedings by which a consumer seeks an order, under the law of the Contracting State in which he is domiciled, that a mail order company established in another Contracting State award a prize ostensibly won by him is contractual in nature for the purpose of Article 5(1) of that convention, provided that, first, that company, with the intention of inducing the consumer to enter a contract, addresses to him in person a letter of such a kind as to give the impression that a prize will be awarded to him if he returns the 'payment notice' attached to the letter and, second, he accepts the conditions laid down by the vendor and does in fact claim payment of the prize announced; on the other hand, even though the letter also contains a catalogue advertising goods for that company and a request for a 'trial without obligation', the fact that the award of the prize does not depend on an order for goods and that the consumer has not, in fact, placed such an order has no bearing on that interpretation.

⁵¹ ECJ Case C-27/02 of 20 January 2005.

Illsinger case⁵²

In August 2002, Ms Illsinger, an Austrian national domiciled in Austria, received an envelope from the mail-order company Schlank & Schick GmbH, established in Aachen, Germany. The envelope, on which the words 'important documents', 'please open immediately' and 'private' were written, contained a notification which was addressed personally to her, stating that she had won a prize of EUR 20 000. It was clear from that notification that Ms Illsinger would obtain the prize 'if she had the identification number which authorised her to obtain the prize,' and attached to her prize claim certificate a coupon containing the identification number and returned it to Schlank & Schick within seven days. It is also clear from the prize notification that the claim for payment of the prize was not made conditional upon ordering goods. Ms Illsinger attached to the prize claim certificate the coupon containing the identification number and returned it to Schlank & Schick.

In December 2002, having failed to obtain payment of the prize from Schlank & Schick, Ms Illsinger brought an action against the company before the Landesgericht St. Pölten, the court for the place where she is domiciled, under Paragraph 5j of the Austrian Consumer Protection Law in conjunction with Article 16(1) of Regulation No 44/2001, in order to obtain payment of the prize. In the context of those proceedings, Schlank & Schick claimed that the Austrian court lacked jurisdiction. By order of 15 June 2004, the Landesgericht St. Pölten simultaneously dismissed the objection of lack of jurisdiction and rejected the claims of the applicant in the main proceedings.

Article 15(1)(c) must be interpreted as meaning that the right of action by which consumers may, under the law of the Member State in which they are domiciled, claim in the courts, from undertakings established in another Member State, prizes ostensibly won by them where the undertakings send them prize notifications or other similar communications worded so as to give the impression that they have won a prize, where the claiming of that prize was not made conditional upon actually ordering goods or placing a trial order and where no goods were actually ordered but the recipient of the communication is nevertheless seeking to claim the prize, may be a right connected with a contract for the purposes of that article of the regulation in question, if a consumer contract within the meaning of that article has been concluded in the case in the main proceedings. It is for the national court to determine whether a consumer contract within the meaning of that article has been concluded in the case in the main proceedings.

The right of action by which consumers may bring legal proceedings against suppliers for payment of prizes ostensibly won is a right connected with a contract for the purposes of Article 15(1)(c) of the regulation if the claim for payment of the prize was not made conditional upon ordering goods but the recipient of the communication has actually placed an order for goods.

II.III.VI.III Jurisdiction over individual contracts of employment

This particular jurisdiction is regulated by articles 18 to 21 of the Brussels I Regulation. The weaker party in individual contracts of employment is employee.

An employer domiciled in a Member State may be sued:

1. *in the courts of the Member State where he is domiciled; or*

⁵² ECJ Case C-180/06 of 14 May 2009.

2. in another Member State:

- (a) in the courts for the place where the employee habitually carries out his work or in the courts for the last place where he did so, or
- (b) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.⁵³

An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled.⁵⁴

Jurisdiction over individual contracts of employment – prorogation agreement

The application of the article 23 of the Brussels I Regulation contrary the provisions of this section is not allowed, however the article 21 of the Brussels I Regulation allows prorogation agreement individual contracts of employment, in certain situations⁵⁵

Decisions

Petrus Rutten v. Cross Medical Ltd. Case⁵⁶

Where, in the performance of a contract of employment, an employee carries out his work in several Contracting States, the place where he habitually carries out his work, is the place where he has established the effective centre of his working activities. When identifying that place, it is necessary to take into account the fact that the employee spends most of his working time in one of the Contracting States in which he has an office where he organizes his activities for his employer and to which he returns after each business trip abroad.

Giulia Pugliese v Finmeccanica SpA, Betriebsteil Alenia Aerospazio⁵⁷ – two employers

In a dispute between an employee and a first employer, the place where the employee performs his obligations to a second employer can be regarded as the place where he habitually carries out his work when the first employer, with respect to whom the employee's contractual obligations are suspended, has, at the time of the conclusion of the second contract of employment, an interest in the performance of the service by the employee to the second employer. The existence of such an interest must be determined on a comprehensive basis, taking into consideration all the circumstances of the case.

⁵³ Article 19 of the Brussels I Regulation.

⁵⁴ Article 20 of the Brussels I Regulation.

⁵⁵ Article 21 of the Brussels I Regulation states: The provisions of this Section may be departed from only by an agreement on jurisdiction:

- 1. which is entered into after the dispute has arisen; or
- 2. which allows the employee to bring proceedings in courts other than those indicated in this Section.

⁵⁶ ECJ Case C-383/95 of 1 December 1995.

⁵⁷ ECJ Case C-437/00 of 10 April 2003.

II.III.VII **Lis pendens and related actions**

Lis pendens

Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.⁵⁸

Related actions

According to Article 28 of the Brussels I Regulation here related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

II.IV **The recognition and enforcement of judgments**

II.IV.I **General remark**

Within the judicial cooperation in civil matters two systems of enforcement of a judgement of one Member State in another Member State have developed:

1. System which requires special procedure, so called exequatur (declaration of enforceability). Without this particular step decision issued in one Member State cannot be enforced in another Member State.
2. System where exequatur is not required and the decision issued in one Member State can be in another Member State enforced directly when certain formal requirements are fulfilled.

Currently both systems can be found in regulations concerning European civil procedure law.

⁵⁸ Article 27 of Brussels I Regulation states:

1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

The Brussels I Regulation is so far built upon the first system.⁵⁹

Generally the enforcement and recognition are governed by simpler rules than the rules regulating the jurisdiction. The rules are concentrated within Chapter III of the Brussels I Regulation, articles 33 to 56. Basic aim of the recognition and enforcement of judgments is to support the fifth free movement, the movement of judgments. Interpretation is provided by the Court of justice.

The procedure of recognition and enforcement consists of three phases:

1. Recognition
2. Declaration of enforceability of judgment
3. Enforcement of judgment

Article 32 of the Brussels I Regulation sets down the interpretation of notion „judgment“ as „*any judgment given by a court or tribunal of a Member State, whatever the judgment may be called*“.

II.IV.II The recognition of judgments

The recognition is based on the principle of automatic recognition of judgments. It means that there is no special procedure, no special decision is required. Also no review of the substance of the judgment is allowed.

A judgment shall not be recognized only, as stated in Article 35 of the Brussels I Regulation:

1. *if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;*
2. *where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defense, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;*
3. *if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought;*
4. *if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.*

⁵⁹ However, the necessity of exequatur is being discussed in these days (beginning of 2012).

II.IV.III Declaration of enforceability (exequatur procedure) and enforcement

Declaration

Article 38 of the Brussels I Regulation states that a judgment of one Member State may be enforced in another Member State after it has been declared enforceable, so called exequatur proceeding. Application for the declaration of enforceability is required. Application shall be submitted to courts in Annex II of the Brussels I Regulation.

The procedure is strictly formal. If the conditions required, e.g. copy of decision + certificate according to articles 54 to 58 of the Brussels I Regulation are fulfilled, the court issues decision of enforceability immediately without any review.

The defendant does not know about the application in that phase, the delivered decision is served to him, only then he acquires information about the procedure.

Against the decision about enforceability an appeal is permissible as to the courts stated in Annex III of the Brussels I Regulation. The term to appeal is one month, if the defendant is domiciled in other Member State, than where the decision was issued the term doubles to two months.

Draka NK Cables v. Omnipol case⁶⁰

Article 43(1) of the Regulation must be interpreted as meaning that a creditor of a debtor cannot lodge an appeal against a decision on a request for a declaration of enforceability if he has not formally appeared as a party in the proceedings in which another creditor of that debtor applied for that declaration of enforceability.

Against the decision of appeal a remedy is permissible. It is regulated by national law according to Annex IV of the Brussels I Regulation.

Enforcement

The enforcement of the judgment which has been declared enforceable is regulated by the national law of the state. The application for the enforcement can be raised together with the application for the declaration of the enforceability.

However, according to the possibility of raising an appeal, the decision allowing the enforcement cannot come into legal force earlier than the decision about the enforceability.

II.V Commission proposal of amendment

The Commission issued Green Paper of 21 April 2009 on the Review of Council regulation no 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial matters. The most discussed points were:

⁶⁰ ECJ Case C-167/08 of 23 April 2009.

1. Abolition of the exequatur procedure for decisions of Member State courts. Although the procedure is mostly successful (90 up to 100 %), it takes too long and is expensive.
2. Third states' judgments. Commission calls for harmonization of rules concerning recognition and enforcement of third states' judgments.
3. Filing suits against defendant from third states before EU courts.
4. Strengthening prorogation of jurisdiction (by e.g. standardized clauses to prorogate jurisdiction).
5. Collective redress, *lis pendens* and related actions. Problem of „torpedoes“, when the rule of *lis pendens* allows abusive procedural tactics, admitting proceedings of several plaintiffs against one defendant, mainly in consumer protection suits and damages actions for breach of antitrust rules.
6. Extension of protective measures.
7. Coordination between public courts and arbitration boards.⁶¹

II.VI Practical Cases

Case Bauer v. Leonidu

Mister Petr Bauer from Germany is planning to stay two months (July and August) in Greece. For this purpose he enters into contact with Mister Christophus Leonidu from Greece, who is offering the tenancy of his summer villa in Chalkidiki. They agree on all the conditions by phone and per email and decide to conclude a contract. Because Mister Bauer is not willing to travel to Greece because of signing of the contract and Mister Leonidu is not willing to travel to Germany either, they decide to conclude the contract per email. Therefore Mister Leonidu sends to Mister Bauer a draft of a contract, which had been between both parties discussed in detail, and Mister Bauer responds: "Ok, Accepted." Mister Leonidu attaches to his email general instructions for using the villa, where following clause was included:

XII. Submmission to jurisdiction

The courts of England shall have exclusive jurisdiction to settle any dispute arising out of or in connection with this contract (including a dispute regarding the existence, validity or termination of this contract). The Parties agree that the courts of England are the most appropriate and convenient courts to settle disputes and accordingly no Party will argue to the contrary.

⁶¹ For further information see e.g. <http://www.ipex.eu/IPEXL-WEB/dossier/document.do?code=COM&year=2009&number=0175&extension=FIN> [cit. 31. 1. 2012].

Mister Bauer spends two months in Greece and then he does not pay the agreed amount for the tenancy. Mister Leonidu decides to raise a claim against Mister Bauer.

Consider:

- 1) Whether the jurisdiction clause represents a valid prorogation agreement?
- 2) Whether the article 22 of the Brussels I Regulation could not be applicable to this situation?
- 3) And upon the result of your consideration decide which courts have jurisdiction upon the case and
- 4) As a lawyer of Mister Bauer resume, what would you advice to your client, if the proceeding was commenced in the United Kingdom?

Case Dvořák v. Free Travel

Mr. Tomáš Dvorak, a citizen of the Czech Republic, living in Brno, accepted offer of Free Travel, joint-stock company, with principle residence in Liverpool, GB and branches in Austria, Germany, France and Slovak Republic, to enjoy four-day trip to Poland. The transport by bus from Bratislava to Krakow and Warsaw, accommodation in hotels in Krakow and Warsaw and entry into the Wawel castle in Krakow were included in the price. The bus stopped Mr. Tovar in Brno as it was going from Bratislava to Krakow, as he expressly required in his email communication with Free Travel branch in Bratislava. The transport was provided by Hulak&Hulak limited, Slovak transport company. Free Travel's branch website was available in English and Slovak, the responsible person for the branch was Günter Hahn, Austrian citizen living partly in Bratislava and in Vienna. During the trip in Krakow Mr. Dvorak took part at presentation of Tovarski company (was part of the programme organised by Free Travel) and bought dish made of special steel for 2000 Euros. On route back the bus driver did not pay attention and caused near Olomouc a traffic accident. Due to the accident the dish Mr. Dvorak bought in Krakow broke and split into many pieces. Further Mr. Dvorak broke his leg.

As he returned home Mr. Dvorak required damages from Free Travel who hired the transport company. Free Travel left the dish checked up by an expert and found out that the dish was not made of the steel promised by Tovarski. The steel promised by Tovarski would have, according to the opinion of the expert, gone through the accident without harm. Free Travel refused to pay damages to Mr. Dvorak stating it is Tovarski who shall return to Mr. Dvorak his money.

Mr. Dvorak raised a claim at Municipal Court in Brno against Free Travel for reimbursement of lost joy expected from the four day trip, against Tovarski for payment of 2000 Euro (price of the broken dish) and against Hulak&Hulak limited for damages caused by the broken leg. The jurisdiction was in the writ justified by article 15 of the Brussel I Regulation.

- 1) Free Travel objected the lack of jurisdiction stating that Mr. Dvorak is not a consumer according to Brussels I regulation, respectively he is not protect-

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- ed by this Regulation because Free Travel did not direct its commercial activities into the Czech Republic.
- 2) Tovarski objected the lack of jurisdiction stating that Mr. Dvorak is not a consumer according to Brussels I regulation, respectively he is not protected by this Regulation because he, within the relationship with Tovarski, acted as active consumer.
 - 3) Hulak&Hulak limited objected the lack of jurisdiction stating that between Mr. Dvorak and "them" did not exist any consumer contract.
- Resume the righteousness of the defendants' objections.

Chapter III European enforcement order for uncontested claims

(Regulation No 805/2004 of the European Parliament and of the Council of April 21 2004)

III.I EEO Regulation's background

Since 2001 it has been possible to enforce decision in civil and commercial matters of one Member State in another Member State when the requirements of exequatur proceedings stated by Brussels I Regulation were fulfilled.

Member States were not completely satisfied with the situation and they expressed will to create simpler rules for enforcement of some „uncontested decisions“. In 2004, this common need resulted in regulation creating „European enforcement order for uncontested claims“ (EEO regulation).

III.II Relation to the Brussels I Regulation

Both regulations represent for the creditor „way how to enforce a decision“. They apply in similar scope of application. The EEO Regulation can be regarded as special legal regulation, the Brussels I Regulation as general legal regulation, since the EEO Regulation applies only to uncontested claims. The EEO Regulation brings simpler way of enforcement, especially because it includes no exequatur proceeding.

III.III Scope of application

The EEO applies in civil and commercial matters, whatever the nature of the court or tribunal.

It is not applicable to (so called negative scope of application):

- a) revenue, customs, administrative matters or liability of the State for the exercise of state authority,
- b) status of legal capacity of natural person, rights in property arising of matrimonial relationship, wills and succession,
- c) bankruptcy proceedings and analogous proceedings,
- d) social security,
- e) arbitration.

III.IV Important notions

The EEO is applicable to judgments, court settlements and authentic instruments on uncontested claims and decisions following challenges of these decisions. The regulation provides its own interpretation⁶², so when speaking about:

- **judgment**, it means any decision given by court or tribunal of a Member State, whatever it is called,
- **claim**, it is a claim for payment of a specific sum of money that has fallen due or for which due date is indicated in the judgment, settlement or instrument,
- **authentic instrument**, a document, which has been formally drawn up or registered as authentic instrument and the authenticity of which either relates to the signature and the content of the instrument or has been established by a public authority or other authority empowered for that purpose by the State.

Uncontested claims as set down in article 3 of the EEO Regulation are situation when:

- a) the debtor has agreed to it by means of admission or court settlement⁶³,
- b) the debtor has never objected to it (in compliance with the relevant provisions of the national law)⁶⁴,
- c) the debtor has not appeared – tacit admission of the claim (in compliance with relevant provisions of the national law, the debtor must be instructed about consequences of his default of appearance)⁶⁵,
- d) the debtor has expressly agreed to it in an authentic instrument.⁶⁶

III.V The enforcement procedure

No exequatur proceeding is required. The Member State who issued the decision on uncontested claim certifies the decision as the European enforcement order. The certificate can be in form of judgment (Annex I will be used), court settlement (Annex II), authentic instrument (Annex III). Decision certified as EEO shall be re-

⁶² See Article 4 of the EEO Regulation.

⁶³ In the Czech civil procedure it could refer to Article 99 CPC Court settlement and 153a CPC Judgment for admission.

⁶⁴ In the Czech civil procedure it could refer to Article 153a CPC Judgment for admission in compliance with Art. 114b CPC and Payment order that was never contested according to article 174 CPC.

⁶⁵ In the Czech civil procedure it could refer to Article 153b CPC Default judgment or admission judgment according to 114c CPC.

⁶⁶ In the Czech civil procedure it could refer notarial and executorial deed with admission of enforceability, according to Notarial Order Act no 358/1992 Coll. and Executorial Order Act no 120/2001 Coll.

cognised and enforced in another Member State without need for declaration of its enforceability and without any possibility of opposing its recognition.

However certain requirements have to be met in order to certify the decision as EEO.

The decision on uncontested claim shall be upon application certified as EEO if:

- a) it is enforceable in the state of origin,
- b) it does not conflict with the rules on jurisdiction as laid down in Brussels I Regulation⁶⁷,
- c) the proceedings met the requirements of chapter III of the EEO Regulation and
- d) the judgment was given in the Member State of debtor's domicile in cases where:
 - a claim is uncontested within the meaning of article 3 para 1 letters b) or c) of the EEO Regulation,
 - it relates to contract concluded by consumer,
 - the debtor is consumer.

Requirements on the procedure

The requirements are concentrated in Chapter III of the EEO Regulation. They concern especially the service of the decision to the debtor, however, the conditions can be considered as not so strict. Article 16 of the EEO Regulation sets down minimum standards of information which must be given to the debtor, for example obligatory information about the claim and information about procedural steps necessary to contest the claim.

Enforcement of the EEO

The enforcement of the EEO shall be governed by provisions of national law of the Member State. The article 23 of the EEO Regulation sets down stay or limitation of enforcement that may occur in case the debtor challenges the decision certified as EEO or applies for the rectification or withdrawal of EEO using Annex VI.

III.VI Other provisions

According to the article 6 paragraph 2 of the EEO Regulation, in case the EEO has ceased to be enforceable or its enforceability has been suspended or limited, certification in Annex IV is in place.

According to the article 6 paragraph 3, in case the EEO has been challenged, Annex V provides form of certification of the following decision which replaces the EEO.

Article 8 sets down so called partial EEO, situation that occurs if only a part of decision meets the requirements of the EEO Regulation to be certified as EEO.

⁶⁷ For further information see Part Two Section One Chapter II.III.

SECTION B

Family law matters

Chapter I The Brussels Ibis Regulation

[The Council Regulation no 2201/2003 concerning the jurisdiction and the recognition and enforcement of judgment in matrimonial matters of parental responsibility, repealing Regulation (EC) No 1347/2000]

I.I The historical background

The free movement of people led into increase of international marriages together with the necessity of mutual recognition and enforcement of judgments. The increase manifested itself not only in matrimonial matters, but also in matters relating to the care of children as well.

The Brussels I convention did not regulate the matrimonial matters, so upon mutual negotiations of Member States so called Brussels II convention was draft.

In the meantime the Amsterdam Treaty came into effect bringing communitarization of judicial cooperation in civil matters, so there was no need to ratify the international convention. The prepared text of the Brussels II convention was transformed into Regulation of the Council no 1347/2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses – so called Brussels II Regulation.

The Brussels II Regulation from 2000, composed of 46 articles, did not deal with all problems which arose. In 2002 Commission prepared a draft of new regulation concerning these matters especially with the aim to extend the scope of application.⁶⁸ The draft was accepted in November 2003 as Regulation of the council no 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 – so called Brussels IIa Regulation or Brussels Ibis, further referred to as Brussels Ibis Regulation.

⁶⁸ As it is obvious from the name of Brussels II regulation (2000), it could have been applied only to children of spouses. It was not possible to apply the regulation for situations where children of unmarried couples were concerned.

I.II Current situation in cooperation concerning Family law matters

The European Union is strengthening cooperation in Family law matters. At 2005 the Commission issued Green paper on applicable law and jurisdiction in divorce. So called "Rome III regulation", officially, Council Regulation (EU) No 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation was issued on of the 20. 10. 2010. Pursuant to its Article 21(2), the regulation should apply from 21. 6. 2012 in the 14 Member States which currently participate in the enhanced cooperation. Those are Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia.

Currently several questions are regulated also by Council Regulation (EC) No 664/2009 of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations that entered into force in August 2009.

I.III General characteristics

The Brussels IIbis Regulation is composed of 72 articles, 26 more than the previous regulation from 2000, which are divided into seven chapters:

- I. Scope and definitions;
- II. Jurisdiction;
- III. Recognition and enforcement;
- IV. Cooperation between central authorities in matters of parental responsibility;
- V. Relations with other instruments;
- VI. Transitional provisions;
- VII. Final provisions.

The Brussels IIbis regulation was amended by Council Regulation (EC) No 2116/2004 of 2 December 2004 amending Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, as regards treaties with the Holy See.

I.III.I Scope of application

According to article 1 of the Brussels IIbis Regulation, the Regulation shall apply, whatever the nature of court or tribunal, in civil matters relating to:

-
- a) divorce, legal separation of marriage annulment,
 - b) the attribution, exercise, delegation, restriction or termination of parental responsibility.

The Regulation itself contains definitions interpreting lots of important notions especially in article 2 of the Brussels IIbis Regulation, such as judge, court, Member State, parental responsibility, rights of custody etc.

The matters of parental responsibility are further explained in article 1 paragraph 2 of the Brussels IIbis Regulation.

Matrimonial matters

Divorces, legal separation of marriage, marriage annulment are considered to be matrimonial matters.

The Brussels IIbis Regulation is applicable as well on the proceeding on existence of marriage (despite it is not expressly listed in the article 1), but is not applicable on registered partnership or other kinds of legally regulated relationships of persons of the same sex.

Only personal aspects of divorce, legal separation and marriage annulment are regulated, the Brussels IIbis Regulation does not deal with questions of property.⁶⁹

The matters of parental responsibility

Positive determination (article 1 paragraph 2 of the Brussels IIbis Regulation)

- a) rights of custody and rights of access,
- b) guardianship, curatorship and similar institutions,
- c) the designation and function of any person or body having charge of the child's person or property, representing or assisting the child,
- d) the placement of the child in a foster family or in institutional care,
- e) measures for the protection of the child relating to the administration, conservation or disposal of the child's property.

Negative determination, as set down in article 1 paragraph 3 of the Brussels IIbis Regulation, includes:

- a) the establishment or contesting of a parent-child relationship,
- b) decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption,
- c) the name and forenames of the child,
- d) emancipation,
- e) maintenance obligations (regulation no. 4/2009),
- f) trusts or succession,
- g) measures taken as a result of criminal offences committed by children.

⁶⁹ Neither does Brussels I Regulation (see article 1 of Brussels I Regulation), however discussions concerning European regulation of matrimonial property regimes have already started.

The scope of application for the recognition and enforcement of judgments:
Judgments concerning the matters which are included in the material scope of application can be subject to enforcement as well as authentic instruments and agreements between the parties that are enforceable in the Member State, in which they were concluded.

I.III.II Cases concerning scope of application

J.McB Case⁷⁰

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 not precluding a Member State from providing by its law that the acquisition of rights of custody by a child's father, where he is not married to the child's mother, is dependent on the father's obtaining a judgment from a national court with jurisdiction awarding such rights to him, on the basis of which the removal of the child by its mother or the retention of that child may be considered wrongful, within the meaning of Article 2(11) of that regulation.

C Case⁷¹

On 23 February 2005, the Social Welfare Board of the town of L, Sweden, ordered the immediate taking into care of the children A and B, who were living in that town, with a view to placing them with a foster family. A, born in 2001, and B, born in 1999, both have Finnish nationality; A also has Swedish nationality.

On 1 March 2005, Ms C, accompanied by her children A and B, took up residence in Finland. Her move to that Member State was declared on 2 March 2005. The Finnish authorities registered her new residence on 10 March 2005, with effect from 1 March 2005.

The decision of the Social Welfare Board of the town of L was confirmed on 3 March 2005 by the Länsrätten i K län, County Administrative Court of K, Sweden, before which the case had been brought for that purpose on 25 February 2005. That judicial confirmation procedure is required under Swedish law in all cases where a child is taken into care without the consent of the parents.

Having accepted that the case fell within the jurisdiction of the Swedish Courts, the Kamrarrätten i M, Administrative Court of Appeal of M, Sweden, dismissed the appeal brought by Ms C against the decision of the Länsrätten i K län.

The jurisdiction of the Swedish courts was confirmed, on 20 June 2006, by the Regeringsrätten, Supreme Administrative Court, Sweden.

On the same day that the Länsrätten i K län delivered its decision, the Swedish police had requested the Finnish police of the town of H, where the two children were staying with their grandmother, to assist them in the enforcement of that decision. That request was submitted pursuant to Swedish law.

⁷⁰ CJEU Case C-400/10 of 5 October 2010.

⁷¹ ECJ Case C-435/06 of 27 November 2007.

Article 1(1) of Brussels IIbis regulation, is to be interpreted to the effect that a single decision ordering a child to be taken into care and placed outside his original home in a foster family is covered by the term 'civil matters' for the purposes of that provision, where that decision was adopted in the context of public law rules relating to child protection.

Brussels IIbis regulation is to be interpreted as meaning that harmonised national legislation on the recognition and enforcement of administrative decisions on the taking into care and placement of persons, adopted in the context of Nordic Cooperation, may not be applied to a decision to take a child into care that falls within the scope of that regulation.

Subject to the factual assessment which is a matter for the national court alone, Brussels IIbis regulation is to be interpreted as applying racione temporis in a case such as that in the main proceedings.

Territorial scope of application: all Member States with the exception of Denmark.

Temporal scope of application: the Brussels IIbis Regulation entered into force 1. 8. 2004 and shall apply from 1. 3. 2005.

I.IV The jurisdiction of courts

I.IV.I Jurisdiction in matrimonial matters

Jurisdiction in matters of divorce, legal separation or marriage annulment is generally grounded on these circumstances:

- a) Habitual residence;
- b) Nationality;
- c) Domicile (UK and Ireland).

The Brussels IIbis Regulation does not use the term „domicile“ as a general criterion, but in comparison within the Brussels I Regulation grounds the jurisdiction on „habitual residence“. The term „habitual residence“ shall be interpreted autonomously, it can be understood as „permanent and usual centre of interests of a person chosen by the person with the intention to live there permanently“.

Jurisdiction in matrimonial matters is set down in article 3 of the Brussels IIbis Regulation. The jurisdiction lies with the courts of the Member State

- a) in whose territory:
 - the spouses are habitually resident, or
 - the spouses were last habitually resident, insofar one of them still resides there, or
 - the respondent is habitually resident, or
 - in the event of joint application, either of the spouses is habitually resident, or

- the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or
- the applicant is habitually resident if he or she resided there at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of UK or Ireland, has his or her „domicile“ there.

The last two possibilities stand for „a fight against“ the so-called forum shopping.

- b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland of the „domicile“ of both spouses.

The given rules how to determine the jurisdiction a) and b) may be used alternatively.

Residual jurisdiction

Article 7 of the Brussels IIbis Regulation represents so-called residual jurisdiction. In case no court of Member State had jurisdiction pursuant all the previously given rules, the jurisdiction shall be determined in each Member State by its own national law.

I.IV.II Matrimonial matters – cases

Sundelind Lopez case⁷²

Mrs Sundelind Lopez, a Swedish national, is married to Mr Lopez Lizazo, a Cuban national. When living together, they were resident in France. Currently, Mrs Sundelind Lopez is still resident in France but her husband is resident in Cuba.

Acting on the basis of the Swedish legislation, Mrs Sundelind Lopez petitioned the Stockholms tingsrätt (District Court, Stockholm) (Sweden) for divorce. Her petition was dismissed by decision of 2 December 2005 on the ground that, under Article 3 of Regulation No 2201/2003, only the French courts have jurisdiction and that, accordingly, Article 7 of that regulation precludes Swedish rules on jurisdiction from applying.

By judgment of 7 March 2006, the Svea hovrätt, Court of Appeal, Svea, Sweden, dismissed the appeal brought against that judgment.

Mrs Sundelind Lopez appealed against that judgment to the Högsta domstolen, Supreme Court. In her appeal, she submitted that Article 6 of Regulation No 2201/2003, which establishes the exclusive nature of the jurisdiction of the courts of Member States pursuant to Articles 3 to 5 of that regulation where the respondent has his habitual residence in or is a national of a Member State, implies that those courts do not have exclusive jurisdiction where the respondent has neither of those attributes. Consequently, national law is an appropriate basis, in the present case, on which to establish the competence of the Swedish courts.

Articles 6 and 7 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,

⁷² ECJ Case C-68/07 of 29 November 2007.

as amended by Council Regulation (EC) No 2116/2004 of 2 December 2004, as regards treaties with the Holy See, are to be interpreted as meaning that where, in divorce proceedings, a respondent is not habitually resident in a Member State and is not a national of a Member State, the courts of a Member State cannot base their jurisdiction to hear the petition on their national law, if the courts of another Member State have jurisdiction under Article 3 of that regulation.

Hadadi case⁷³

In 1979, Mr Hadadi and Ms Mesko, both of Hungarian nationality, married in Hungary. They immigrated to France in 1980, where, according to the order for reference, they still reside. In 1985, they became naturalised French citizens, so that they each hold Hungarian and French nationality.

On 23 February 2002, Mr Hadadi instituted divorce proceedings before Pest Court. Ms Mesko instituted proceedings for divorce on the ground of fault before the Tribunal de grande instance de Meaux, Meaux Regional Court, France, on 19 February 2003.

On 4 May 2004, that is after the accession of the Republic of Hungary to the European Union on 1 May 2004, the couple's divorce was granted by judgment of Pest Court. According to the order for reference, that judgment has become final.

By order of 8 November 2005, the Juge aux Affaires Familiales (Family Court) of the Tribunal de grande instance de Meaux declared the divorce proceedings brought before it by Ms Mesko to be inadmissible.

On 12 October 2006, following Ms Mesko's appeal against that order, the Cour d'appel de Paris, Paris Court of Appeal, France, held that the divorce granted by judgment of Pest Court could not be recognised in France. The Cour d'appel de Paris therefore held Ms Mesko's proceedings for divorce to be admissible.

Where the court of the Member State addressed must verify, pursuant to Article 64(4) 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 Council Regulation (EC) No 1347/2000, whether the court of the Member State of origin of a judgment would have had jurisdiction under Article 3(1)(b) of that regulation, the latter provision precludes the court of the Member State addressed from regarding spouses who each hold the nationality both of that State and of the Member State of origin as nationals only of the Member State addressed. That court must, on the contrary, take into account the fact that the spouses also hold the nationality of the Member State of origin and that, therefore, the courts of the latter could have had jurisdiction to hear the case.

Where spouses each hold the nationality of the same two Member States, Article 3(1) (b) of Regulation No 2201/2003 precludes the jurisdiction of the courts of one of those Member States from being rejected on the ground that the applicant does not put forward other links with that State. On the contrary, the courts of those Member States of which the spouses hold the nationality have jurisdiction under that provision and the spouses may seize the court of the Member State of their choice.

⁷³ ECJ C-168/08 of 16 July 2009.

I.IV.III Jurisdiction in the matters of parental responsibility

The rules of jurisdiction in the matters of parental responsibility are more complicated than in matrimonial matters. Article 8 of the Brussels IIbis Regulation brings basic rule of the jurisdiction, articles 9 to 15 special legal regulation of jurisdiction of courts.

Basic rule, as set down in article 8 of the Brussels IIbis Regulation, states the jurisdiction lies with the courts of that Member State where the child is habitually resident in the moment the court is seised.

Article 9 of the Brussels IIbis Regulation regulates so-called „**continuing jurisdiction of the child's former residence**“, e.g. the situation when the child moves lawfully from one Member State to another, but the holder of access rights stays in the former state. In that case the jurisdiction of the former state is retained for the period of three months.

Article 10 of the Brussels IIbis Regulation regulates jurisdiction in cases of **child abduction** (the case of wrongful removal or retention of the child). Until the child requires the habitual residence in another Member State the jurisdiction remains in the former state, e.g. where the child was habitually resident before the abduction.

Return of the child is regulated in article 11 of the Brussels IIbis Regulation. Where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, hereinafter “the 1980 Hague Convention”, in order to obtain the return of a child that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, article 11 of the Brussels IIbis Regulation shall apply.

It shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity. A court to which an application for return of a child is made shall act expeditiously in proceedings on the application, using the most expeditious procedures available in national law. The court shall, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged. A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return. A court cannot refuse to return a child unless the person who requested the return of the child has been given an opportunity to be heard.

The continuance of jurisdiction of the court which had jurisdiction in the matrimonial matters for the matters of parental responsibility as well is called „**prorogation of jurisdiction**“. Article 12 of the Brussels IIbis Regulation enables to do so

under condition, that there has to be an acceptance of this rule of the holders of the parental responsibility.

Jurisdiction based upon the child's presence is set down in article 13 of the Brussels IIbis Regulation. This special jurisdiction is used in cases where the habitual residence cannot be established or the jurisdiction cannot be determined, that is why the jurisdiction is based upon the child's presence.

As well as in the matrimonial matters shall no court have jurisdiction upon the previous rules, **residual jurisdiction**, article 14 of the Brussels IIbis Regulation, establishes that the jurisdiction may be determined upon the national law of the state.

Under the article 15 of the Brussels IIbis Regulation the rule that enables **transfer to a court better placed to hear the case** is set down. In this provision the Brussels IIbis Regulation brings possibility to change the jurisdiction of one court to another with which the child has particular connection, when it is in the best interests of the child. This rule is subjected to lot of conditions in the Brussels IIbis Regulation.

I.IV.III.I Relevant cases

Mercredi case⁷⁴

The appellant in the main proceedings, Ms Mercredi, who was born on the island of Réunion and is a French national, moved in the year 2000 to England, where she was employed as a crew member by an airline company. For several years, she and Mr Chaffe, a British national, lived together in England as an unmarried couple.

That relationship produced a daughter named Chloé, a French national, who was born on 11 August 2009. In the week following the birth of that child, Ms Mercredi and Mr Chaffe, whose relationship had not been stable for some time and who were no longer living together after Mr Chaffe had left the family home, separated.

On 7 October 2009, when Chloé was two months old, Ms Mercredi and her daughter left England for the island of Réunion, where they arrived on the following day. The child's father was not told beforehand of the departure of the mother and the child but he received a letter, on 10 October 2009, in which Ms Mercredi set out the reasons for that departure.

It is common ground that the child's habitual residence, before her departure on 7 October 2009, was in England. It is also common ground that Chloé's removal to the island of Réunion was lawful, since at that time Ms Mercredi was the only person with 'rights of custody' within the meaning of Article 2(9) of the Regulation.

The concept of 'habitual residence', for the purposes of Articles 8 and 10 of the Brussels IIbis Regulation, must be interpreted as meaning that such residence corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, where the situation concerned is that of an infant who has been staying with her mother only a few days in a Member State – other than that of her habitual residence – to which she has been removed, the factors which must be taken into consideration include, first, the duration, regularity, conditions and reasons for the stay in the territory of that Member State and for the mother's move to that State and, second,

⁷⁴ CJEU Case C-497/10 of 22 December 2010.

with particular reference to the child's age, the mother's geographic and family origins and the family and social connections which the mother and child have with that Member State. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances of fact specific to each individual case.

If the application of the above mentioned tests were, in the case in the main proceedings, to lead to the conclusion that the child's habitual residence cannot be established, which court has jurisdiction would have to be determined on the basis of the criterion of the child's presence, under Article 13 of the Regulation.

Povse case⁷⁵

Ms Povse and Mr Alpagó lived together as an unmarried couple in Vittorio Veneto, Italy, until the end of January 2008 with their daughter Sofia, born 6 December 2006. In accordance with Article 317a of the Italian Civil Code, the parents had joint custody of the child. At the end of January 2008, the couple separated and Ms Povse left the family home taking her daughter Sofia with her. Although the Tribunale per i Minorenni di Venezia, Court for matters concerning minors in Venice, by a provisional and urgent decision of 8 February 2008 at the father's request, prohibited the mother from leaving Italy with the child, Ms Povse and her daughter travelled in February 2008 to Austria, where they have lived since that date. Then Mr Alpagó required in Austria decision about the return of the child.

Italian court decided and allowed Ms Povse to stay provisionally in Austria. Mr Povse then brought an action in front of Austrian court seeking the rights of custody should be granted to her only. The Austrian court confirmed its jurisdiction upon article 15 and asked the Italian court to decline jurisdiction.

Article 10(b)(iv) of the Brussels IIbis regulation, must be interpreted as meaning that a provisional measure does not constitute a 'judgment on custody that does not entail the return of the child' within the meaning of that provision, and cannot be the basis of a transfer of jurisdiction to the courts of the Member State to which the child has been unlawfully removed.

Article 11(8) of the Regulation must be interpreted as meaning that a judgment of the court with jurisdiction ordering the return of the child falls within the scope of that provision, even if it is not preceded by a final judgment of that court relating to rights of custody of the child.

The second subparagraph of Article 47(2) of the Brussels IIbis regulation must be interpreted as meaning that a judgment delivered subsequently by a court in the Member State of enforcement which awards provisional rights of custody and is deemed to be enforceable under the law of that State cannot preclude enforcement of a certified judgment delivered previously by the court which has jurisdiction in the Member State of origin and ordering the return of the child.

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.

⁷⁵ CJEU Case C-211/10 of 1 July 2010.

I.IV.IV Provisional, including protective, measures

In urgent cases, the provisions of Brussels IIbis Regulation shall not prevent the courts of a Member State from taking such provisional, including protective, measures in respect of persons or assets in that State as may be available under the law of that Member State, even if, under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter (article 20).

These measures shall cease to apply when the court of the Member State having jurisdiction under Brussels IIbis Regulation as to the substance of the matter has taken the measures it considers appropriate.

Detiček case⁷⁶

Ms Detiček, of Slovene nationality, and Mr Sgueglia, of Italian nationality, spouses in the course of divorce proceedings, lived in Rome, Italy, for 25 years. Their daughter Antonella was born on 6 September 1997.

On 25 July 2007 the competent court in Tivoli, Italy, the Tribunale di Tivoli, before which divorce proceedings were pending between Ms Detiček and Mr Sgueglia which also related to the custody of Antonella, provisionally granted sole custody of Antonella to Mr Sgueglia and ordered her to be placed temporarily in the children's home of the Calasantian Sisters in Rome. On the same date Ms Detiček left Italy with her daughter Antonella to go to Zgornje Poljčane in Slovenia, where they are still living today.

By judgment of 22 November 2007 of the Okrožno sodišče v Mariboru, Regional Court, Maribor, Slovenia, confirmed by judgment of the Vrhovno sodišče, Supreme Court, Slovenia, of 2 October 2008, the order of the Tribunale di Tivoli of 25 July 2007 was declared enforceable in the territory of the Republic of Slovenia.

On the basis of the judgment of the Vrhovno sodišče, enforcement proceedings were brought before the Okrajno sodišče v Slovenski Bistrici, District Court, Slovenska Bistrica, Slovenia, for the child to be returned to Mr Sgueglia and placed in the children's home. However, by order of 2 February 2009, that court suspended enforcement until the final disposal of the main proceedings.

On 28 November 2008 Ms Detiček made an application to the Okrožno sodišče v Mariboru for a provisional and protective measure giving her custody of the child. By order of 9 December 2008, that court allowed Ms Detiček's application and gave her provisional custody of Antonella.

Article 20 of The Brussels IIbis regulation must be interpreted as not allowing, in circumstances such as those of the main proceedings, a court of a Member State to take a provisional measure in matters of parental responsibility granting custody of a child who is in the territory of that Member State to one parent, where a court of another Member State, which has jurisdiction under that regulation as to the substance of the dispute relating to custody of the child, has already delivered a judgment provisionally giving custody of the child to the other parent, and that judgment has been declared enforceable in the territory of the former Member State.

⁷⁶ CJEU Case C-403/09 of 23 December 2009.

A case⁷⁷

Article 1(1) of The Brussels IIbis regulation, must be interpreted as meaning that a decision ordering that a child be immediately taken into care and placed outside his original home is covered by the term ‘civil matters’; for the purposes of that provision, where that decision was adopted in the context of public law rules relating to child protection.

The concept of ‘habitual residence’ under Article 8(1) of Regulation No 2201/2003 must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family’s move to that State, the child’s nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case.

A protective measure, such as the taking into care of children, may be decided by a national court under Article 20 of Regulation No 2201/2003 if the following conditions are satisfied:

- **the measure must be urgent;**
- **it must be taken in respect of persons in the Member State concerned, and**
- **it must be provisional.**

The taking of the measure and its binding nature are determined in accordance with national law. After the protective measure has been taken, the national court is not required to transfer the case to the court of another Member State having jurisdiction. However, in so far as the protection of the best interests of the child so requires, the national court which has taken provisional or protective measures must inform, directly or through the central authority designated under Article 53 of Regulation No 2201/2003, the court of another Member State having jurisdiction.

Where the court of a Member State does not have jurisdiction at all, it must declare of its own motion that it has no jurisdiction, but is not required to transfer the case to another court. However, in so far as the protection of the best interests of the child so requires, the national court which has declared of its own motion that it has no jurisdiction must inform, directly or through the central authority designated under Article 53 of Regulation No 2201/2003, the court of another Member State having jurisdiction.

I.V Recognition and enforcement of judgments

The recognition and enforcement under the Brussels IIbis Regulation can be deemed principally the same as in the Brussels I Regulation.

Complete procedure requires three steps:

1. Recognition, governed by principle of automatic recognition with exceptions, the reasons for declination of the judgment;

⁷⁷ ECJ Case C-523/07 of 20 June 2009.

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2. Exequatur proceeding (or the declaration of the enforceability of the judgment in other words);
 3. Enforcement of the decision.

I.V.I The recognition of the judgment

The reasons for declination of the recognition of the judgment are divided according to the two areas of application, matrimonial matters and matters of parental responsibility. No review of the substance of the judgment is allowed. The non-compliance with the rules of jurisdiction in the Brussels IIbis Regulation is not a reason for declination of the recognition.

The reasons for declination of the recognition of judgments in matrimonial matters are almost the same as in the Brussels I Regulation, contrary to public policy, default of appearance, irreconcilable decisions. Article 25 of the Brussels IIbis Regulation expressly states that the differences of the national law in matrimonial matters cannot be the reason for declination of the recognition of judgment.

The reasons for declination in the matters of parental responsibility are, contrary to public policy, taking into account the best interests of the child:

- the child did not have opportunity to be heard (except the case of urgency),
- infringement of any person's parental responsibility (the person did not have the opportunity to be heard),
- default of appearance,
- irreconcilable decisions.

The proceeding on declaration of enforceability is again strictly formal procedure. There is again right to appeal within one month period and the enforcement itself is regulated by the national law.

I.V.II Special procedures

Certain matters which fall under the scope of application of the Brussels IIbis Regulation are in need of quick enforcement that is the reason the Brussels IIbis Regulation contains two special „quick“ procedures of enforcement:

- 1) enforceability of certain judgments concerning the rights of access and
- 2) enforceability of certain judgments which require the return of the child.

The rights of access, as set down in article 41 of the Brussels IIbis Regulation, granted in an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with the condition given conditions in the Brussels IIbis Regulation.

The judge of the state of origin issues certificate, if:

- (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 defence, or, the person has been served with the document but not in compliance with these conditions, 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.

The certificate shall be completed in the language of the judgment and shall be issued ex officio whether there is cross-border situation.

Return of the child, established in article 42 of the Brussels IIbis Regulation, entailed by an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with conditions of this Regulation.

The judge of origin 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.

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. The judge of origin issues the certificate of his own motion. The certificate shall be completed in the language of the judgment.

Aguirre Zarraga case⁷⁸

Mr Aguirre Zarraga, of Spanish nationality, and Ms Pelz, of German nationality, were married on 25 September 1998 at Erandio, Spain. That marriage produced a daughter named Andrea who was born on 31 January 2000. The family's habitual place of residence was Sondika, Spain.

When, towards the end of 2007, the relationship of Ms Pelz and Mr Aguirre Zarraga deteriorated, they separated, and thereafter both parties brought divorce proceedings before the Spanish courts.

Both Ms Pelz and Mr Aguirre Zarraga sought sole rights of custody in respect of the child of the marriage. By judgment of 12 May 2008 the Juzgado de Primera Instancia e Instrucción No 5 de Bilbao, Court of First Instance and Preliminary Investigations No 5 of Bilbao, provisionally

⁷⁸ CJEU Case C-491/10 of 22 December 2010.

awarded rights of custody to Mr Aguirre Zarraga, while Ms Pelz was granted rights of access. Following that judgment, Andrea went to her father's home.

That judgment was based on, *inter alia*, the recommendations made by the Equipo Psicosocial Judicial, a body providing psychosocial services to the courts, in a report prepared at the request of the judge concerned. That report stated that custody should be awarded to the father, since he was best placed to ensure that the family, school and social environment of the child was maintained. Since Ms Pelz had repeatedly expressed her wish to settle in Germany with her new partner and her daughter, the court considered that the award of custody to the mother would have been contrary to the conclusions of that report and would also have been detrimental to the child's welfare.

In June 2008 Ms Pelz moved to Germany and settled there, and now lives there with her new partner. In August 2008, at the end of the summer holidays which she had spent with her mother, Andrea remained with her mother in Germany. Since then, Andrea has not returned to her father in Spain.

The father requested Spanish court to issue decision prohibiting Andrea to leave Spain. Andrea did not come to the proceedings and was not heard. The Spanish court issued judgment granting the right of custody to the father. The father wanted the German courts to enforce the Spanish judgment.

In circumstances such as those of the main proceedings, the court with jurisdiction in the Member State of enforcement cannot oppose the enforcement of a certified judgment, ordering the return of a child who has been wrongfully removed, on the ground that the court of the Member State of origin which handed down that judgment may have infringed Article 42 of the Brussels IIbis regulation interpreted in accordance with Article 24 of the Charter of Fundamental Rights of the European Union, since the assessment of whether there is such an infringement falls exclusively within the jurisdiction of the courts of the Member State of origin.

Chapter II Maintenance claims

(Council Regulation No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations)

II.I Historical background

Maintenance claims are generally understood to be of specific importance, especially there where minor children are involved. Jurisdiction in maintenance claims was originally covered by the Brussels I Regulation, where the protection of maintenance creditor was guaranteed by alternative jurisdiction (article 5 paragraph 2 of the Brussels I Regulation). Maintenance creditor had the right to choose between courts with jurisdiction based upon the basic rule in article 2 of the Brussels I Regulation (domicile of the maintenance debtor) and courts with jurisdiction based upon article 5 of the Brussels I Regulation (domicile or habitual residence of the creditor). The application of article 5 of the Brussels I Regulation was also analyzed by Court of Justice in Case ECJ Case C- 433/01 of 15 January **Freistaat Bayern v Jan Blijdenstein**⁷⁹.

Mr Blijdenstein lived in the Netherlands. In the 1993/94 academic year, his daughter began training in an establishment in Munich, Germany. From 1 September 1993, she received an education grant from Freistaat Bayern.

Freistaat Bayern brought, first, an action for recovery against Mr Blijdenstein before the Amtsgericht, local court, of Munich seeking reimbursement of the grant paid for the 1993/94 academic year. The action resulted in judgment being entered against the defendant. Freistaat Bayern commenced a second action before the Amtsgericht of Munich claiming reimbursement from Mr Blijdenstein of the grants paid for the 1994/95 and 1995/96 academic years. Mr Blijdenstein disputed the jurisdiction of the Amtsgericht of Munich.

Article 5(2) must be interpreted as meaning that it cannot be relied on by a public body which seeks, in an action for recovery, reimbursement of sums paid under public law by way of an education grant to a maintenance creditor, to whose rights it is subrogated against the maintenance debtor.

However the application of the Brussels I Regulation turned out to be ineffective, respectively to be not sufficiently effective, since the Brussels I Regulation requires the exequatur proceedings. The maintenance obligations therefore became part of special interest of Commission and proposals concerning new regulation on maintenance obligations appeared in Council and Commission Action

⁷⁹ ECJ Case C-433/01 of 15 January 2004.

Plan implementing The Hague Programme: strengthening freedom, security and justice in the European Union from June 2005. Mutual negotiations within the Hague Conference on Private International law also led in 2007 to adoption of Convention on the International Recovery of Child Support and other Forms of Family Maintenance (2007 Hague Convention) and the Protocol on the Law Applicable to Maintenance Obligations (2007 Hague Protocol). In December 2008 new Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations), which took into account both these Hague documents, was published.

The importance of international recovery of maintenance is in the field of European Union also supported by the Council Regulation (EC) No 664/2009 of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations [OJ L 200, 31. 7. 2009, p. 46–51].

As concerns mutual relation of MC Regulation with the Brussels I Regulation according to article 68 of the MC Regulation this Regulation replaces provisions of the Brussels I Regulation applicable to matters relating to maintenance obligations.

II.II Scope of application

The MC Regulation covers all maintenance obligations arising from a family relationship, parentage, marriage or affinity (article 1), in order to guarantee equal treatment of all maintenance creditors. For the purposes of MC Regulation, the term “maintenance obligation” should be interpreted autonomously. This Regulation shall further apply both to court decisions and to decisions given by administrative authorities, provided that the latter offer guarantees with regard to, in particular, their impartiality and the right of all parties to be heard.

As concerns the territorial scope of application it is primary necessary to deal with the Denmark situation. Denmark which is not generally cooperating within the field of judicial cooperation in civil matters expressed in Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters signed in 2005 intention to notify the Commission of its decision whether or not to implement the content of Brussels I Regulation amendments. Denmark sent his decision to implement MC Regulation in January 2009 and therefore the provisions of this Regulation will be applied to relations between the Community and Denmark with the exception of the provisions in Chapters III and VII. The provisions in Article 2 and Chapter IX of MC Regulation, however, are applicable only to the ex-

tent that they relate to jurisdiction, recognition, enforceability and enforcement of judgments, and access to justice.

The United Kingdom on the other hand used its right to refuse cooperation (according to Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community) and is not bound by the subject of the MC Regulation.

II.III Jurisdiction

We can conclude that the MC Regulation, in comparison to the Brussels I Regulation, brings more complicated and detailed system of jurisdiction in maintenance claims. The same, as jurisdiction in matters of parental responsibility, there are primary the general rules of jurisdiction (article 3 of the MC Regulation) and then the Regulation brings exceptions, respectively alternatives to this general rules: choice of court, jurisdiction based on the appearance of the defendant, subsidiary jurisdiction and forum necessitatis).

General rules of jurisdiction (article 3 of the MC Regulation)

In matters relating to maintenance obligations in Member States, the jurisdiction shall lie with:

- (a) the court for the place where the defendant is habitually resident, or
- (b) the court for the place where the creditor is habitually resident, or
- (c) the court which, according to its own law, has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties, or
- (d) the court which, according to its own law, has jurisdiction to entertain proceedings concerning parental responsibility if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties.

From the general rules it is obvious, that they not only seek protection of maintenance creditor as a weaker party (giving him/her the opportunity to sue there where he/she is habitually resident), but also try to cover specific procedural situations which may be for maintenance claims in certain Member States typical.⁸⁰

Choice of court (article 4 of the MC Regulation)

The MC Regulation allows prorogation agreement in all matters falling under the scope of application with the exception of maintenance obligation towards a child

⁸⁰ E.g. letter c) would within the Czech national legal system correspond to paternity suits and letter d) then to judicial care for minors (article 176 and following of the Czech CPC).

under the age of 18. The prorogation agreement can however only determine that the jurisdiction lies with:

- (a) a court or the courts of a Member State in which one of the parties is habitually resident;
- (b) a court or the courts of a Member State of which one of the parties has the nationality;
- (c) in the case of maintenance obligations between spouses or former spouses:
 - (i) the court which has jurisdiction to settle their dispute in matrimonial matters; or
 - (ii) a court or the courts of the Member State which was the Member State of the spouses' last common habitual residence for a period of at least one year.

A choice of court agreement shall be in writing. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to "writing".

Jurisdiction based upon the appearance of the defendant (article 5 of the MC Regulation)

Even though the jurisdiction was determined according to article 3 or 4 of the MC Regulation in the favour of courts of a different Member State, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction.

Subsidiary jurisdiction (article 6 of the MC Regulation)

Where no court of a Member State has jurisdiction pursuant to Articles 3, 4 and 5 of the MC Regulation and no court of a State party to the Lugano Convention which is not a Member State has jurisdiction pursuant to the provisions of that Convention, the courts of the Member State of the common nationality of the parties shall have jurisdiction.

Forum necessitatis (article 7 of the MC Regulation)

The maintenance obligations regulation contains special rule of forum necessitatis, which is common to Anglo-American legal system. The principle of the rule comes out of close connection between the case and the place where it should be sued. In this Regulation the article 7 seeks to justify jurisdiction of a Member State court there where it is impossible to determine Member State court jurisdiction pursuant to the previous provisions. Where no court of a Member State has jurisdiction according to articles 3, 4, 5 and 6 of the MC Regulation, the courts of a Member State may, on an exceptional basis, hear the case if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely connected. The dispute must have a sufficient connection with the Member State of the court seised.

II.IV Procedural rules in MC Regulation

Lis pendens and related actions

The same as in the Brussels I Regulation concrete steps which shall be taken in situations where lis pendens or related actions occur are covered. According to article 12 of the MC Regulation where proceedings involving the same case of action and between the same parties are brought in the courts of different Member States, any court than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings. The time where the court is understood to be seised is further explained in article 9 of the MC Regulation.⁸¹

Provisional (including protective) measures

Protective measure may be issued by courts of a Member States, even if courts of a different Member States have jurisdiction over the case. These measures must be available under the law of the Member Stated where the measure was required.⁸²

Limit on proceedings

Since the maintenance claims are usually long lasting matters and more than one decision are issued, the MC Regulation contains article 8 dealing with so call limit on proceedings rule. According to the general rule in the first paragraph of this article where a decision is given in a Member State or a 2007 Hague Convention Contracting State where the creditor is habitually resident, proceedings to modify the decision or to have a new decision given cannot be brought by the debtor in any other Member State as long as the creditor remains habitually resident in the State in which the decision was given. Second paragraph of the article gives then exceptions to this rule, e.g. where the choice of court agreement was signed.

Legal aid

Chapter V of the MC Regulation constitutes conditions of right to legal aid. Parties involved in a dispute covered by the Regulation are granted legal consisting

⁸¹ Article 9 of the MC Regulation states: For the purposes of this Chapter, a court shall be deemed to be seised:

- (a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the claimant has not subsequently failed to take the steps he was required to take to have service effected on the defendant; or
- (b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the claimant has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

⁸² For detailed information see Article 14 of the MC Regulation.

in assistance necessary to enable them to know and assert their rights and to ensure that their applications are fully and effectively dealt with (article 45 of the MC Regulation).

II.V The applicable law

Although the questions concerning applicable law are not covered by this Handbook, since in matters of maintenance the issue is covered in the MC Regulation together with question of jurisdiction and judgments enforcement, we will briefly mention it, so the information about the Regulation is complex.

According to article 15 of the MC Regulation the law applicable to maintenance obligations shall be determined in accordance with the 2007 Hague Protocol in the Member States bound by that instrument. The MC Regulation therefore does not contain special rules on the applicable law but refers to the content of the 2007 Hague Protocol. The 2007 Hague Protocol then brings the general rule to determine the law applicable in its article 3. It is the law of the habitual residence of the creditor. The 2007 Hague Protocol further regulates exceptions to this general rule based on favour creditoris principle (article 4) and law applicable for specific categories (spouses and ex-spouses in article 5 and special rule on defence – article 6). Finally, according to articles 7 and 8, choices of law agreements are allowed.

II.VI Recognition and enforcement of decisions

The system of mutual recognition and enforcement of decision is different for Member States bound by the 2007 Hague Protocol and for Member States not bound by the 2007 Hague Protocol.

II.VI.I Member States bound by the 2007 Hague Protocol

The recognition is based on the principle of automatic recognition. Simultaneously for decisions given which were given in a Member State bound by the 2007 Hague Protocol and are in this state enforceable shall be enforceable in another Member State without the need for a declaration of enforceability. Enforcement can be refused or suspended under the law of the Member State of enforcement.

In article 19 of the MC Regulation defendant who did not enter an appearance in the Member State of origin is granted the right to apply for a review the decision.⁸³

⁸³ For the conditions of such right as well as the maximum time limit for application for a review see article 19 of the MC Regulation.

The regulation requires the claimant to provide competent enforcement authority with certain documents listed in article 20 of the MC Regulation. The recognition and enforcement of a decision on maintenance under this Regulation shall not in any way imply the recognition of the family relationship, parentage, marriage or affinity underlying the maintenance obligation which gave rise to the decision.

Enforcement is governed by the law of Member State of enforcement.

Under no circumstances may a decision given in a Member State be reviewed as to its substance in the Member State in which recognition, enforceability or enforcement is sought.

Recovery of any costs incurred in the application of this Regulation shall not take precedence over the recovery of maintenance.

II.VI.II Member States not bound by the 2007 Hague Protocol

The conditions for recognition and enforcement of decision issued in a Member State not bound by the 2007 Hague Protocol are stricter. Firstly there is generally no recognition procedure required, but any interested party can raise the recognition of a decision as principal issue in a dispute and then apply for a decision of recognition. Also, grounds of refusal are stated in article 24 of the MC Regulation. The decision shall not be recognised:

- (a) if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought. The test of public policy may not be applied to the rules relating to jurisdiction;
- (b) where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the decision when it was possible for him to do so;
- (c) if it is irreconcilable with a decision given in a dispute between the same parties in the Member State in which recognition is sought;
- (d) if it is irreconcilable with an earlier decision given in another Member State or in a third State in a dispute involving the same cause of action and between the same parties, provided that the earlier decision fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

For the enforcement exequatur proceedings is required. Article 28 of the MC Regulation gives documents which have to be submitted together with the application for declaration of enforceability. The decision shall be declared enforceable without any review immediately on completion of the formalities in Article 28 and

at the latest within 30 days of the completion of those formalities, except where exceptional circumstances make this impossible. The party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application. The declaration of enforceability is then served to the applicant and the party against whom enforcement is sought. Each of the parties may contest the decision by appeal and further the decision on appeal may be contested shall the Member State notify to the Commission such procedure.

In proceedings for the issue of a declaration of enforceability, no charge, duty or fee calculated by reference to the value of the matter at issue may be levied in the Member State of enforcement.

Enforcement is governed by the law of Member State of enforcement.

Under no circumstances may a decision given in a Member State be reviewed as to its substance in the Member State in which recognition, enforceability or enforcement is sought.

Recovery of any costs incurred in the application of this Regulation shall not take precedence over the recovery of maintenance.

PART THREE
Cooperation between
Member States

SECTION A

Special (quick) procedures

Chapter I. European payment order

[Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure]

I.1 General characteristics

Payment procedure is within the civil procedure law generally understood as „shorter procedure“, procedure without oral hearing. The legal force of the decision is contingent on no „negative“ reaction from the defendant.

In 1999 in Tampere there the Member States expressed they interest in harmonised procedure dealing with uncontested monetary claims. In 2000 joint programme of Council and Commission was adopted. Two years later in 2002 the Green Paper followed.

Finally EPO Regulation no 186/2006 was adopted in 2006 and become applicable 12. 12. 2008.

The aim of the EPO Regulation is to simplify, speed up and reduce the costs of litigation in cross-border cases concerning uncontested pecuniary claims by creating a European order for payment procedure and to permit the free circulation of European orders for payment throughout the Member States by laying down minimum standards, compliance with which renders unnecessary any intermediate proceedings in the Member State of enforcement prior to recognition and enforcement.

The claimant can use a different procedure according to the national law of the relevant Member State or Community law.

Subject matter of the EPO Regulation are cross-border cases in civil and commercial matter, whatever the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or the liability of the State for acts and omissions in the exercise of State authority.

The EPO Regulation does not concern (negative determination of the scope of application):

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- (a) rights in property arising out of a matrimonial relationship, wills and succession;
 - (b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
 - (c) social security;
 - (d) claims arising from non-contractual obligations, unless:
 - (i) they have been the subject of an agreement between the parties or there has been an admission of debt, or
 - (ii) they relate to liquidated debts arising from joint ownership of property.

Cross-border case is one in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court seised. **Domicile** is in this case interpreted according to Brussels I regulation.

Territorial scope of application concerns all Member States except Denmark.

I.II European order for payment procedure

I.II.I The application

The European order for payment procedure shall be established for the collection of pecuniary claims for a specific amount that have fallen due at the time when the application for a European order for payment is submitted.

The claimant raises his claim at a relevant court. Jurisdiction of such court is determined in accordance with the Brussels I Regulation or by article 6(2) of the EPO Regulation. The claim shall be made using form in the Annex of the EPO Regulation and shall contain all the information according to article 7 of the EPO Regulation.

The application shall be submitted in paper form or by any other means of communication, including electronic, accepted by the Member State of origin and available to the court of origin. Article 7 paragraph 6 of the EPO Regulation states the condition upon which the application may be signed electronically in accordance with Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures.

In the application the claimant may indicate to the court that he opposes a transfer to ordinary civil proceedings within the meaning of Article 17 of the EPO Regulation in the event of opposition by the defendant.

Article 11 of the EPO Regulation sets down reasons for which the application can be rejected, for example when the application does not meet specific requirements; the claim is clearly unfounded; the claimant fails to send his reply within the time limit when the court asked him for completion or rectification of the application, the claimant fails to send his reply within the time limit specified by the

court or refuses the court's proposal, when the requirements of the regulation are met for only part of the claim. If the requirements of the regulation are met, the court shall issue, as soon as possible and normally within 30 days of the lodging of the application, a European order for payment using standard form E as set out in Annex V of the EPO Regulation.

I.II.II The payment order

In the European order for payment, the defendant shall be advised of his options to:

- a) pay the amount indicated in the order to the claimant, or
- b) oppose the order by lodging with the court of origin a statement of opposition, to be sent within 30 days of service of the order on him.

In the European order for payment, the defendant shall be informed that:

- (a) the order was issued solely on the basis of the information which was provided by the claimant and was not verified by the court;
- (b) the order will become enforceable unless a statement of opposition has been lodged with the court in accordance with Article 16 of the EPO Regulation;
- (c) where a statement of opposition is lodged, the proceedings shall continue before the competent courts of the Member State of origin in accordance with the rules of ordinary civil procedure unless the claimant has explicitly requested that the proceedings be terminated in that event.

The EPO Regulation sets down conditions for service of the European order for payment⁸⁴.

Article 13 of the EPO deals with service with proof of receipt by the defendant⁸⁵ and article 14 of the EPO Regulation with service without proof of receipt by the defendant then⁸⁶.

⁸⁴ In comparison with the Czech civil procedure law the conditions are not so strict. According to the Czech CPC the payment order has to be delivered into defendant's proper hands.

⁸⁵ Article 13 of the EPO Regulation states: The European order for payment may be served on the defendant in accordance with the national law of the State in which the service is to be effected, by one of the following methods:

- (a) personal service attested by an acknowledgement of receipt, including the date of receipt, which is signed by the defendant;
- (b) personal service attested by a document signed by the competent person who effected the service stating that the defendant has received the document or refused to receive it without any legal justification, and the date of service;
- (c) postal service attested by an acknowledgement of receipt, including the date of receipt, which is signed and returned by the defendant;
- (d) service by electronic means such as fax or e-mail, attested by an acknowledgement of receipt, including the date of receipt, which is signed and returned by the defendant.

⁸⁶ 1. The European order for payment may also be served on the defendant in accordance with the national law of the State in which service is to be effected, by one of the following methods:

I.II.III Opposition to the European order for payment

The defendant may lodge a statement of opposition to the European order for payment with the court of origin using standard form F as set out in Annex VI of the EPO Regulation, which shall be supplied to him together with the European order for payment. The statement of opposition shall be sent within 30 days of service of the order on the defendant. The defendant shall indicate in the statement of opposition that he contests the claim, without having to specify the reasons for this. The statement of opposition shall be submitted in paper form or by any other means of communication, including electronic, accepted by the Member State of origin and available to the court of origin.

If a statement of opposition is entered within the time limit, the proceedings shall continue before the competent courts of the Member State of origin in accordance with the rules of ordinary civil procedure unless the claimant has explicitly requested that the proceedings be terminated in that event.

Where the claimant has pursued his claim through the European order for payment procedure, nothing under national law shall prejudice his position in subsequent ordinary civil proceedings.

The claimant shall be informed whether the defendant has lodged a statement of opposition and of any transfer to ordinary civil proceedings. When no opposi-

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- (a) personal service at the defendant's personal address on persons who are living in the same household as the defendant or are employed there;
 - (b) in the case of a self-employed defendant or a legal person, personal service at the defendant's business premises on persons who are employed by the defendant;
 - (c) deposit of the order in the defendant's mailbox;
 - (d) deposit of the order at a post office or with competent public authorities and the placing in the defendant's mailbox of written notification of that deposit, provided that the written notification clearly states the character of the document as a court document or the legal effect of the notification as effecting service and setting in motion the running of time for the purposes of time limits;
 - (e) postal service without proof pursuant to paragraph 3 where the defendant has his address in the Member State of origin;
 - (f) electronic means attested by an automatic confirmation of delivery, provided that the defendant has expressly accepted this method of service in advance.
2. For the purposes of this Regulation, service under paragraph 1 is not admissible if the defendant's address is not known with certainty.
3. Service pursuant to paragraph 1(a), (b), (c) and (d) shall be attested by:
- (a) a document signed by the competent person who effected the service, indicating:
 - (i) the method of service used; and
 - (ii) the date of service; and
 - (iii) where the order has been served on a person other than the defendant, the name of that person and his relation to the defendant; or
 - (b) an acknowledgement of receipt by the person served, for the purposes of paragraphs (1) (a) and (b).

tion has been lodged, the court shall declare the European order for payment enforceable. No procedure on declaration of enforceability is required.

The enforcement procedure is governed by the national law of the Member State.

I.II.IV Review in exceptional cases

After the expiry of the time limit the defendant shall be entitled to apply for a review of the European order for payment before the competent court in the Member State of origin where:

- (a) the order for payment was served by one of the methods provided for in Article 14, and service was not effected in sufficient time to enable him to arrange for his defence, without any fault on his part, or
- (b) the defendant was prevented from objecting to the claim by reason of force majeure or due to extraordinary circumstances without any fault on his part, provided in either case that he acts promptly.

After expiry of the time limit laid down in Article 16 paragraph 2 of the EPO Regulation the defendant shall also be entitled to apply for a review of the European order for payment before the competent court in the Member State of origin where the order for payment was clearly wrongly issued, having regard to the requirements laid down in this Regulation, or due to other exceptional circumstances.

The refusal of enforcement is regulated in article 22 of the EPO Regulation, stay or limitation of enforcement in article 23 then.⁸⁷

⁸⁷ Article 22 of the EPO Regulation regulates refusal of enforcement:

1. Enforcement shall, upon application by the defendant, be refused by the competent court in the Member State of enforcement if the European order for payment is irreconcilable with an earlier decision or order previously given in any Member State or in a third country, provided that:
 - (a) the earlier decision or order involved the same cause of action between the same parties; and
 - (b) the earlier decision or order fulfills the conditions necessary for its recognition in the Member State of enforcement; and
 - (c) the irreconcilability could not have been raised as an objection in the court proceedings in the Member State of origin.
2. Enforcement shall, upon application, also be refused if and to the extent that the defendant has paid the claimant the amount awarded in the European order for payment.
3. Under no circumstances may the European order for payment be reviewed as to its substance in the Member State of enforcement.

Article 23 is concerned with stay or limitation of enforcement:

Where the defendant has applied for a review in accordance with Article 20, the competent court in the Member State of enforcement may, upon application by the defendant:

- (a) limit the enforcement proceedings to protective measures; or
- (b) make enforcement conditional on the provision of such security as it shall determine; or
- (c) under exceptional circumstances, stay the enforcement proceedings.

Costs are regulated in Article 25 of the EPO Regulation. The combined court fees of a European order for payment procedure and of the ordinary civil proceedings that ensue in the event of a statement of opposition to a European order for payment in a Member State shall not exceed the court fees of ordinary civil proceedings without a preceding European order for payment procedure in that Member State.

Chapter II Small claims procedure

[Regulation (EC) No 861/2007 of European Parliament and of the Council of 11 July establishing a European Small Claims Procedure]

II.I General Characteristics

The reason for creation of community legislation was the amount of costs compared the claim. First steps towards regulation were made in Tampere 1999. In 2000 the Joint programme of the Commission and of the Council and Green Book were issued.

The Regulation is composed of four chapters, 29 articles:

Chapter I – Subject matter and scope

Chapter II – The European Small Claims Procedure

Chapter III – Recognition and enforcement in another Member State

Chapter IV – Final provisions

Application dates itself from the 1. 1. 2009.

Subject matter

This Regulation establishes a European procedure for small claims, hereinafter “European Small Claims Procedure”, intended to simplify and speed up litigation concerning small claims in cross-border cases, and to reduce costs. The European Small Claims Procedure shall be available to litigants as an alternative to the procedures existing under the laws of the Member States. The procedure also eliminates the intermediate proceedings necessary to enable recognition and enforcement, in other Member States, of judgments given in one Member State in the European Small Claims Procedure.

Cross-border cases and interpretation of term “domicile”

Cross-border case is a case, in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court or tribunal seised. Domicile is interpreted according to Brussels I Regulation.

Cross-border cases, in civil and commercial whatever the nature of the court and tribunal, where the value of a claim does not exceed EUR 2000 excluding all interest, expenses and disbursements. It shall not apply to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority.

Negative scope of application

The SCP Regulation shall not apply to:

- a) the status or legal capacity of natural persons;
- b) rights in property arising out of a matrimonial relationship, maintenance obligations, wills and succession;
- c) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
- d) social security;
- e) arbitration;
- f) employment law;
- g) tenancies of immovable property, with the exception of actions on monetary claims; or
- h) violations of privacy and of rights relating to personality, including defamation.

II.II The procedure

The claimant fills in form A in the Annex of the SCP Regulation and lodges it to the court. He describes the claim and evidence to support it. The form may be lodged directly, by post or by any other means of communication, such as fax or e-mail, acceptable to the Member State in which the procedure is commenced. Member States inform the Commission which means of communication are acceptable.

Where a claim is outside the scope of this Regulation, the court or tribunal shall inform the claimant to that effect. Unless the claimant withdraws the claim, the court or tribunal shall proceed with it in accordance with the relevant procedural law applicable in the Member State in which the procedure is conducted.

If the claim appears to be regarding to the information given in the form inadequate or insufficiently clear or if the claim form is not filled in properly, the court gives the claimant the opportunity to complete, rectify the claim or to withdraw it using Form B in the Annex II of the SCP Regulation.

Where the claim appears to be clearly unfounded or the application inadmissible or where the claimant fails to complete or rectify the claim form within the time specified, the application shall be dismissed.

The Procedure shall be written and is governed by the procedural law of the Member State, where it is conducted. Oral hearing shall be held only if the court considers it to be necessary of if the parties require it be. The SCP Regulation sets down conditions upon which such a request can be refused.

After receiving the claim the court sends the claim within 14 days together with „answer form“ to the defendant. The defendant shall answer within a period of 30 days. Finally the court sends the answer of the defendant to the claimant in 14 days period.

All the documents, e.g. claim, response, counterclaim etc. shall be submitted in the language or one of the languages of the court or tribunal. In case the documents are in a different language, the court may require translation only if the translation appears to be necessary for giving the judgement. Representation of the parties by lawyer is not mandatory.

The court or tribunal shall determine the means of taking evidence and the extent of the evidence necessary for its judgment under the rules applicable to the admissibility of evidence. The court or tribunal may take expert evidence or oral testimony only if it is necessary for giving the judgment. In making its decision, the court or tribunal shall take costs into account and use the simplest and least burdensome method of taking evidence.

The court shall give judgement within 30 days from the receipt of the defendant's response. The unsuccessful party shall bear the costs of the proceedings. The judgement is enforceable notwithstanding any possible appeal.

Member States shall inform the Commission whether an appeal is available under their procedural law against a judgment given in the European Small Claims Procedure and within what time limit such appeal shall be lodged.⁸⁸

II.III Recognition and enforcement

The judgement given in the European Small Claims Procedure is recognized automatically. Also no declaration of enforceability is required. Enforcement is governed by the law of the Member State addressed.

The possibility to refuse enforcement is stated in the article 22 of SCP Regulation. It is possible only under circumstances mentioned in article above.⁸⁹

⁸⁸ As concerns the Czech Republic the law does not provide for appeals against decisions ordering the payment of sums not exceeding CZK 10 000, nor will adjudicated claims (interest) be reviewed. This does not apply to judgments of recognition and default judgments, against which appeals can be lodged even in the event of small claims.

⁸⁹ Article 22 of the SCP Regulation states:

1. Enforcement shall, upon application by the person against whom enforcement is sought, be refused by the court or tribunal with jurisdiction in the Member State of enforcement if the judgment given in the European Small Claims Procedure is irreconcilable with an earlier judgment given in any Member State or in a third country, provided that:
 - (a) the earlier judgment involved the same cause of action and was between the same parties;
 - (b) the earlier judgment was given in the Member State of enforcement or fulfils the conditions necessary for its recognition in the Member State of enforcement; and
 - (c) the irreconcilability was not and could not have been raised as an objection in the court or tribunal proceedings in the Member State where the judgment in the European Small Claims Procedure was given.
2. Under no circumstances may a judgment given in the European Small Claims Procedure be reviewed as to its substance in the Member State of enforcement.

Article 23 is concerned with possibility to stay or limit the enforcement. In case the defendant applies for a review of the payment order, competent court in the Member State of enforcement may, limit the enforcement to protective measures; or make enforcement conditional on the provision of such security as it shall determine; or under exceptional circumstances, stay the enforcement proceedings definitely.

SECTION B

Service of documents

Chapter I Service of documents within European Union

[Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000]

I.I Historical Background

Article 6 of the European convention on human rights and Fundamental Freedoms grants among other rights the right to be heard. The defendant must have the right to be heard in the proceedings, i.e. he must get to know about the proceedings. But the European system of service of documents was not well elaborated, in many cases the recognition of decision had to be declined because the defendant had not the right to be heard. This situation led to mutual negotiations and drafting of Convention on service of documents in civil and commercial matters, before the ratification, Amsterdam Treaty has been ratified and brought communitarization of the area of judicial cooperation in civil matters. The text of the convention was transferred into Regulation and issued as Council regulation no 1348/2000.

There exists Hague convention on service of documents from 1965 with similar system, the application of the Service Regulation is easier though.⁹⁰

Regulation (EC) No 1348/2000 has generally improved and expedited the transmission and the service of documents between Member States since its entry into force in 2001, but the application of certain provisions was not fully satisfactory. New regulation was prepared in 2007, in vision which shall secure more efficient ways of service of documents.

It is valid from 13. 11. 2008 for all Member States except Denmark, but there is Agreement between the European Community and the Kingdom of Den-

⁹⁰ See more at http://www.hcch.net/index_en.php?act=conventions.text&cid=17 [cit. 26. 2. 2012].

mark on the service of judicial and extrajudicial documents in civil or commercial matters.⁹¹

I.II Scope of application

Free conditions must be fulfilled:

1. The Regulation is applicable to the service of judicial and extrajudicial documents:
 - a) Judicial document is a document which comes from judicial proceedings: decision, interim measure, notice for the payment of the judicial fee etc.
 - b) Extrajudicial document is a document that is not directly connected with judicial proceedings, but whose service is required to secure the effects of such document in the private law area. These documents must be drawn up by authority or person in authority e.g. notarial deeds, arbitration award etc.
2. The document must be in civil or commercial matters, in the lato sensu interpretation, wide interpretation, all documents in civil and commercial matters.
3. There must be qualified international element meaning that the service must be effected from one Member State to another.

I.III General information

The Service Regulation regulates the role of following subjects:

1. **Applicant** – the person who applies for the service of documents.
2. **Addressee** – the person to be served, the address of the addressee must be known.
3. **Transmitting agency** – the public officers, authorities or other persons, competent for the transmission of judicial or extrajudicial documents to be served in another Member State. The transmitting agency takes the document from the applicant, sends the document to the relevant state and gives information about the result of the service to the applicant. A Member State may designate one transmitting agency and one receiving agency, or one agency to perform both functions.⁹²

⁹¹ Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil or commercial matters [OJ L 300, 17. 11. 2005, p. 55]

⁹² In Czech Republic transmitting agencies are: district courts, regional courts, high courts, the Supreme Court, the Supreme Administrative Court, court executors, district state prosecution offices, regional state prosecution offices, high state prosecution offices and the Supreme State Prosecution Office.

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4. **Receiving agency** – public officer, authority or other person, competent for the receipt of judicial or extrajudicial document in the Member State. The receiving agency accepts the document sent to it, executes the service itself and informs the transmitting agency about the result.⁹³
 5. **Central body** – each Member State designates a central body responsible for supplying information to the transmitting agencies, seeking solutions to any difficulties which may arise during the transmission of documents for service and in exceptional cases for forwarding at the request of a transmitting agency a request for service to the competent receiving agency.⁹⁴

The language used within the service procedure is ambiguous. It is necessary to distinguish the language of the form and the language of the document to be served:

- a) The language of the form is the official language of the Member State or the language the Member State has indicated as acceptable.⁹⁵
- b) The language of the document is more important one, the receiving agency shall always inform the addressee that he or she may refuse the document if it is in a language other than language which the addressee understands or the official language of the Member State addressed.

The applicant shall be advised by the transmitting agency to which he forwards the document for transmission that the addressee may refuse to accept it if it is not in one of the languages above.

The applicant shall bear any costs of translation prior to the transmission of the document, without prejudice to any possible subsequent decision by the court or competent authority on liability for such costs.

I.IV The regulated ways of service

The Regulation brings two possibilities how to serve a document from one Member State to another Member State:

1. Service „using the international legal aid“, e.g. directly between agencies
2. Service „non-using the international legal aid“, e.g. by other means of transmission.

These terms are not official, the Regulation does not specify the ways of service this way. These terms may be used only to distinguish the procedures!

⁹³ In the Czech Republic – district courts.

⁹⁴ In the Czech Republic – the Ministry of Justice.

⁹⁵ In the Czech Republic they are Czech + Slovak, English, and German.

I.IV.I The service using the international legal aid

The first type may be understood as the basic system and is described in this scheme:

The advantages of this way of service:

- expressly regulated periods of time meaning that there is a hope that the service will be effected within one month,
- more languages than only the national language are acceptable,
- the way of „quick communication“ for example fax, email etc. are allowed.

I.IV.II The service non-using the international legal aid

The Service Regulation contains three ways of the service non-using the international legal aid:

1. Transmission by consular or diplomatic channels (article 12 of the Service Regulation).

This way shall be used in exceptional circumstances. One Member State may use diplomatic or consular channel to forward the judicial document to the receiving agency or another Member State.

Special regulation is provided in article 13 of the Service Regulation, the service by diplomatic or consular agents.

2. Service by post (article 14 of the Service Regulation)

The service may be effected directly by post in way of registered letter with acknowledgement of receipt or equivalent.

3. Direct service (article 15 of the Service Regulation)

Directly through judicial officers, officials or other competent persons of the Member State addressed, Member State may refuse such way of service.⁹⁶

I.V Defendant non entering an appearance

The Regulation contains in article 19 the Service regulation of further process in case the writ of summons of equivalent document had been served under the provisions of the Service Regulation and the defendant had not appeared. It sets down conditions upon which the judgment may be given if the defendant would not appear.

⁹⁶ The Czech Republic did refuse!

SECTION C

Taking of evidence

Chapter I Taking of evidence within the European Union

(Council regulation no 1206/2001 on cooperation between the courts of Member States in the taking of evidence in civil and commercial matters)

I.I Historical background

A court of Member State may be in need to take some evidence in another Member State. This possibility brings up a question of necessity to established common rules for this evidence taking.

Some regulation existed in Hague conventions, such as Hague convention on civil procedure from 1954, Hague convention of the taking of evidence abroad in civil and commercial matters from 1970. European Council in Tampere and activities of Germany led to the commencement of legislative work on regulation with the aim to improve the mechanism of evidence taking established by 1954 Hague convention.

In 2001 was created a new regulation no 1206/2001 on cooperation between the courts of Member States in the taking of evidence in civil and commercial matters applicable in general from 1. 1. 2004. Speciality of this regulation was that it brought direct provisions on evidence taking creating „real european civil procedure“. In the annexes there were practical forms attached providing simple and effective way of realization of evidence taking.

I.II General Characteristics

Scope of application

For the TE Regulation to apply three conditions must be fulfilled:

1. Evidence must be for use in judicial proceedings, meaning only the court may request the evidence taking upon the regulation, no other authority or complement person may ask for or provide the evidence taking.

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2. The evidence taking must be concerned with civil and commercial matters using wide interpretation „lato sensu“ – all civil and commercial matters.
 3. One Member State must ask for the evidence taking in another Member State, so called qualified international element must be present.

Subjects of the Regulation

The Regulation regulates the role of the following subjects:

1. **Requesting court**

It is the court before which the proceedings are commenced or contemplated which requests the evidence taking.

2. **Requested court**

It is a competent court of another Member State, which shall provide the evidence taking. Each Member State shall prepare a list of competent „requested“ courts, together with its internal local and subject-matter jurisdictions.⁹⁷

3. **Central body**

Each Member State shall designate central body responsible for:

- a) Supplying information to the courts;
- b) Seeking solutions to any difficulties which may arise in respect of a request;
- c) Forwarding in exceptional cases, at the request of a requesting court, a request to the competent court.⁹⁸

When talking about the languages used within the evidence taking procedure, it's necessary to distinguish language of the forms and language of other documents:

1. Language of the forms or language of the legal aid is the official language of Member State or the language the Member State has indicated as acceptable.⁹⁹
2. Language of other documents concerns documents which are necessary for the execution of the evidence taking. These shall be supplied by the translation into the language of the form.

I.III The ways of evidence taking

The TE Regulation brings two possibilities for one Member State how to execute evidence taking in another Member State:

⁹⁷ In the Czech Republic there are the requested courts, district courts and regional courts, concrete courts are defined by manual e.g. for testimony the court where the witness has domicile (address).

⁹⁸ In the Czech Republic the central body is the Ministry of Justice.

⁹⁹ In the Czech Republic official language is Czech and languages indicated as acceptable are Slovak, English and German.

1. Evidence taking using the international legal aid, described in the TE Regulation as so called „direct transmission between the courts“
2. Direct taking of evidence by the requesting court.

I.IV Evidence taking using the international legal aid

The principle is that one court asks second court in another Member State directly to take evidence which is needed in judicial proceedings, commenced or contemplated. The requesting court submits to the requested court request on the form A of the TE Regulation.

The request shall be submitted by the swiftest ways possible, which are indicated by the Member State as acceptable.¹⁰⁰

It is necessary to take into account:

- Every Member State has its own national regulation of taking of evidence.
- The national regulation sets down the individual ways of evidence, e.g. declaration on word of honour is not known by the Czech law.
- It is necessary to keep the rights of the relevant person to be heard regulated by the appropriate law

In accordance with last point the form A shall contain the following details¹⁰¹:

- a) the requesting and, where appropriate, the requested court;
- b) the names and addresses of the parties to the proceedings and their representatives, if any;
- c) the nature and subject matter of the case and a brief statement of the facts;
- d) a description of the taking of evidence to be performed;
- e) where the request is for the examination of a person,
 - the name(s) and address(es) of the person(s) to be examined,
 - the questions to be put to the person(s) to be examined or a statement of the facts about which he (or she) is (they are) to be examined,
 - where appropriate, a reference to a right to refuse to testify under the law of the Member State of the requesting court,
 - any requirement that the examination is to be carried out under oath or affirmation in lieu thereof, and any special form to be used,
 - where appropriate, any other information that the requesting court deems necessary,
- f) where the request is for any other form of taking of evidence, the documents or other objects to be inspected;
- g) where appropriate, any request pursuant to Article 10 paragraphs 3 and 4, and Articles 11 and 12 of the TE Regulation and any information necessary for the application thereof.

¹⁰⁰ In the Czech Republic service is acceptable by post, email or fax.

¹⁰¹ See Article 4 of the TE Regulation.

The requested court sends to the requesting court receipt of request within seven days using form B. If the request cannot be executed, the requested court informs the requesting court within 30 days, using form C, and indicates the information missing or if it cannot be executed because deposit is necessary the requested court informs the requesting court about that within the same period.

The execution of the request is founded upon two basic principles:

- a) the request must be executed within 90 days from the receipt of the request,
- b) the request is executed in accordance with the national law of the requested court, the requesting court may ask for the request to be executed in accordance with a special procedure of its Member State. Such procedure may be refused by the requested court:
 - if it is incompatible with its national law, or
 - by reason of major practical difficulties.

The requesting court may ask the requested court to use a communication technology at the performance of taking evidence, in particular videoconference and teleconference.

The requested court may refuse:

- if it is incompatible with its national law, or
- by reason of major practical difficulties.

The request may be refused only if¹⁰²:

- a) the request does not fall within the scope of this regulation,
- b) the execution does not under the law of the Member state requested fall within the functions of judiciary,
- c) the requesting court does not comply the request properly,
- d) a deposit required was not made in the period of 60 days after the requested court asked for it.

The request for the hearing of a person shall not be executed when the person concerned claims the right to refuse to give evidence or to be prohibited from giving evidence:

- a) under the law of Member State of requested court,
- b) under the law of Member State of requesting court, if such right was specified in the request or confirmed by the requesting court.¹⁰³

Article 11 of the TE Regulation regulates the performance of evidence taking with the presence and participation of the parties. If it is provided by the law of requesting court, the parties and the representatives have the right to be present

¹⁰² See article 14 of the TE Regulation.

¹⁰³ According to the Czech law, namely article 126 CPC, a witness is entitled to refuse testimony if it could raise criminal charges and prosecution upon himself or his close persons.

at the performance of the evidence taking at the requested court. The requested court informs the parties about the time and place of evidence taking and may determine conditions under which they may participate.

Article 12 of the TE Regulation regulates the performance with the presence and participation of representatives of the requesting court. The representatives of the requesting court have the right to be present in the performance of the taking of evidence by the request court if it is compatible with the law of the Member State of the requested court. "Representative" is to be understood as member of judicial personnel. An expert may be designated as well. The requested court informs the representatives about the time and place of evidence taking and may determine conditions under which they may participate.

During the performance of the request the requested court may use necessary coercive measures.

The request shall be executed within 90 days. If it is not possible the requested court informs the requesting court and designates grounds for the delay. After the execution of the request the requested court sends to the requesting court documents establishing the execution of the request and returns all the documents received from the requesting court.

I.V Costs of evidence taking

The execution of the request shall not give rise to a claim for any reimbursement of the taxes and costs, with the exemption of:

- a) fees paid to experts and interpreters,
- b) the costs of usage of communication technologies.

The duty for the parties to bear the cost is governed by the national law of the Member State of the requesting court. Where opinion of expert is required a deposit or advance towards the requested costs may be asked by the requested court.

Weryński case¹⁰⁴

Mr Weryński brought an action before the Sąd Rejonowy dla Warszawy Śródmieścia, district court for Warsaw City Centre, Poland, against Mediatel 4B spółka z o.o., his former employer, for damages arising from a non-compete agreement.

In those proceedings, the referring court requested the Dublin Metropolitan District Court, Ireland, on 6 January 2009 to examine a witness on the basis of Regulation No 1206/2001. However, the requested court made the examination of the witness conditional on payment, by the requesting court, of witness expenses of EUR 40 under Irish law. By letter of 12 January 2009, it requested the Polish court to pay that amount. The referring court contested the legitimacy of that demand.

¹⁰⁴ CJEU Case C-283/09 of 17 February 2011.

Recourse to the central bodies in Poland and Ireland, established in accordance with Article 3 of Regulation No 1206/2001 and responsible for seeking solutions to any difficulties which arise in respect of a request to take evidence, did not prove fruitful.

According to the requested court and the Irish central body, the prohibition on charging payment set out in Article 18(1) of Regulation No 1206/2001 does not include witness expenses. Under Irish law, witnesses are entitled to reimbursement of expenses. That law is stated to be applicable in the present case because, in accordance with Article 10(2) of the regulation, the taking of evidence is governed by the law of the requested court. Since Article 18(2) and (3) of the regulation does not contain any provision relating to the reimbursement of witness expenses, the requested court may ask the requesting court to reimburse them. The Irish central body also relies on a similar practice in England and Wales.

Articles 14 and 18 of Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters must be interpreted as meaning that a requesting court is not obliged to pay an advance to the requested court for the expenses of a witness or to reimburse the expenses paid to the witness examined.

I.VI Direct taking of evidence

If a court requests to take the evidence directly it shall submit a request of the form to the central body of the relevant Member State.

The Regulation sets down these conditions of direct evidence taking¹⁰⁵:

- a) it can be performed on a voluntarily basis without the need of coercive measures,
- b) when it implies that a person shall be heard the person must be informed that the performance is on voluntarily basis,
- c) it shall be performed by a member of judicial personnel or other person designated, e.g. expert, in accordance with the national law of the Requesting Member State.

The central body informs the requesting court within 30 days whether the request was accepted or refused. The request may be refused only, if:

- a) the request does not fall within the scope of the Regulation,
- b) the request does not contain all the necessary information,
- c) the direct taking of evidence is contrary to fundamental principles of the Member State requested.

¹⁰⁵ See article 17 of TE Regulation.

I.VII The advantages in comparison with the 1954 Hague convention

In comparison to the Hague convention from 1954 the Regulation brings certain improvements. Primary, periods to realize the evidence taking are expressly stated in the Regulation. Secondly, according to the legal regulation and declarations of the Member States, more languages can be accepted (usually not only the national language of requested court) and also means of modern technologies are allowed for the mutual communication of the courts. Finally, in the 1954 Hague convention there no direct taking of evidence is allowed.

SECTION D

Insolvency proceedings

Chapter I Basic principles of European transnational insolvency law

(Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings)

I.I General characteristics

Insolvency may be generally understood as situation when the debtor has not sufficient financial resources to comply with his obligations, in another words the debtor is not able to pay his debts. Insolvency proceedings are regulated in every national law, but between the national legislations there exist big differences. Insolvency law could be understood as part of commercial law, part of civil procedure etc. The problems in praxis arose especially there where the debtor's assets were situated in more Member States. The competent authorities did not know whether they could cover assets situated on a territory of a different state.

Therefore effort was made to settle down some basic principles of insolvency proceedings where more than one states is involved. In 1997 UNCITRAL Commission prepared Model law on cross-border insolvency. However according to this Model law proceeding, which can be understood as insolvency proceeding, has no direct effect in another state. Also, on the field of European Council, European convention on certain international aspects of bankruptcy exists. The convention was merely signed by seven states, out of which only Cyprus finished the ratification.

The European Communities prepared a draft of convention concerning international insolvency as well, but since the Amsterdam Treaty had been meanwhile adopted, the content of the convention was transferred into EC Regulation no 1346/2000 of 29 May 2000 on insolvency proceedings.

The IP Regulation entered into force on 31. 5. 2002 for all Member States with the exception of Denmark. The regulation covers not only procedural aspects of the insolvency law (jurisdiction for insolvency proceedings, and some aspects of their course), but also substantial law (such as position of "liquidator") and insolvency conflict rules.

Scope of application

The IP Regulation applies according to article 1 to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator. It does not apply to insolvency proceedings concerning undertak-

ings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties or to collective investment undertakings.

Insolvency proceedings are collective proceedings listed in the Annex A of the IP Regulation.¹⁰⁶ Liquidator is any person of body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs. Concrete persons are listed in Annex C of the IP Regulation.¹⁰⁷

I.II The principle of controlled universality

Generally, the international insolvency law is based upon principle of universality, i.e. the intention is to cover all debtor's assets no matter whether they are situated. The European insolvency law is based upon so called controlled universality principle. There shall exist one insolvency proceeding, so called primary insolvency proceeding, which affects all the assets of the debtor. The liquidator appointed in this proceeding may exercise his powers in another Member State, as long as no other proceeding has been opened there. Beside this primary proceeding, secondary proceeding may exist in another state which may affect only the assets situated on the territory of that state and support the primary proceeding.

I.III The jurisdiction

The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary. The debtor's main interest was further interpreted in case **Eurofood**.

Eurofood Case¹⁰⁸

1. Where a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption laid down in the second sentence of Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, whereby the centre of main interests of that subsidiary is situated in the Member State where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which location at that

¹⁰⁶ In the Czech Republic these are konkurz, reorganizace and oddlužení. For further information see Act no 182/2006 Coll., Insolvency Act.

¹⁰⁷ In the Czech Republic these are insolvenční správce, předběžný insolvenční správce, oddělený insolvenční správce, zvláštní insolvenční správce, zástupce insolvenčního správce.

¹⁰⁸ ECJ Case C-341/04 of 2 May 2006.

registered office is deemed to reflect. That could be so in particular in the case of a company not carrying out any business in the territory of the Member State in which its registered office is situated. By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by that Regulation.

2. On a proper interpretation of the first subparagraph of Article 16(1) of Regulation No 1346/2000, the main insolvency proceedings opened by a court of a Member State must be recognised by the courts of the other Member States, without the latter being able to review the jurisdiction of the court of the opening State.

3. On a proper interpretation of the first subparagraph of Article 16(1) of the Regulation, a decision to open insolvency proceedings for the purposes of that provision is a decision handed down by a court of a Member State to which application for such a decision has been made, based on the debtor's insolvency and seeking the opening of proceedings referred to in Annex A to the Regulation, where that decision involves the divestment of the debtor and the appointment of a liquidator referred to in Annex C to the Regulation. Such divestment implies that the debtor loses the powers of management that he has over his assets.

4. On a proper interpretation of Article 26 of the Regulation, a Member State may refuse to recognize insolvency proceedings opened in another Member State where the decision to open the proceedings was taken in flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoys.

Court of another Member State other where the centre of debtor's main interests is situated shall have jurisdiction to open insolvency proceeding against the same debtor only if he possesses an establishment, meaning any place of operation where he carries out non-transitory economic activity with human means and goods, within the territory of that Member State. It is so called secondary insolvency proceeding. The effects shall be restricted to the assets of the debtor situated in the territory of that Member State.

Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State. When proceeding was open in the State where the centre of debtor's main interests is situated other proceedings are secondary and may be only winding up proceedings.

I.IV Recognition and the applicable law

Article 16 of the IP Regulation sets down the principles of recognition. Any judgment opening insolvency proceeding issued by court having jurisdiction upon this Regulation shall be recognised in all other Member States from the time it

becomes effective in the State of opening proceedings. This does not mean that a secondary insolvency proceeding may not be opened.

The law applicable (article 4 of the IP Regulation) to main insolvency proceeding and its effect shall be the law of the Member State within the territory of which such proceeding was opened (state of opening of the proceedings).

Case list

Cases pointed out in Part II Section A Chapter II

Bertrand v. Paul Ott ECJ Case 150/77 of 21 June 1978
Car Trim GmbH v. Keysafety Systems Srl ECJ Case C-381/08 of 25 February 2010
Color Drack GmbH v Lexx International Vertriebs GmbH ECJ Case C-386/05 of 3 May 2007
Draka NK Cables v. Omnipol ECJ Case C-167/08 of 23 April 2009
FBTO Schadenverzekeringen NV v. Jack Odenbreit ECJ Case C-463/06 of 13 December 2007
Gabriel ECJ Case C-96/00 of 11 July 2002
Giulia Pugliese v Finmeccanica SpA, Betriebsteil Alenia Aerospazio ECJ Case C-437/00 of 10 April 2003
Glaxosmithkline and Laboratoire Glaxosmithkline v. Jean Pierre Rouard ECJ Case C-462/06 of 22 May 2008
Ilsinger ECJ Case C-180/06 of 14 May 2009
Johann Gruber v. Bay Wa AG ECJ Case C-464/01 of 20 January 2005
Kronhofer ECJ Case C-168/2002 of 20 November 2002
Mines de Potasses d'Alsace ECJ Case 21/76 of 30 November 1976
Missis Engler ECJ Case C-27/02 of 20 January 2005
Owusu ECJ Case C-281/02 of 1st March 2005
Pammer CJEU Case C-585/08 and C-144/09 of 7 December 2001
Petrus Rutten v. Cross Medical Ltd. ECJ Case C-383/95 of 1 December 1995
Shevil ECJ Case C-68/93 of 7 March 1995.
Volker Sonntag v. A. Waidman ECJ Case C-172/91 of 21 April 1993
West Tankers ECJ Case C-185/07 of 10 February 2009
Wood Floor CJEU Case C-19/09 of 11 March 2010

Cases pointed out in Part II Section B Chapter I

A ECJ Case C-523/07 of 20 June 2009
Aguirre Zarraga CJEU Case C-491/10 of 22 December 2010
Deticek CJEU Case C-403/09 of 23 December 2009
Hadady ECJ Case C-168/08 of 16 July 2009

J.McB CJEU Case C-400/10 of 5 October 2010

Mercredi CJEU Case C-497/10 of 22 December 2010

C ECJ Case C-435/06 of 27 November 2007

Povse CJEU Case C-211/10 of 1 July 2010

Sundelind Lopez ECJ Case C-68/07 of 29 November 2007

Cases pointed out in Part II Section B Chapter II

Freistaat Bayern v Jan Blijdenstein ECJ Case C-433/01 of 15 January 2004

Cases pointed out in Part III Section C Chapter I

Weryński CJEU Case C-283/09 of 17 February 2011

Cases pointed out in Part III Section D Chapter I

Eurofood Case ECJ Case C-341/04 of 2 May 2006

Annexes

Annex 1 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I regulation)

Council Regulation (EC) No 44/2001 of 22 December 2000

on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and Article 67(1) thereof,
Having regard to the proposal from the Commission(1),
Having regard to the opinion of the European Parliament(2),
Having regard to the opinion of the Economic and Social Committee(3),

Whereas:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is ensured. In order to establish progressively such an area, the Community should adopt, amongst other things, the measures relating to judicial cooperation in civil matters which are necessary for the sound operation of the internal market.

(2) Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid

and simple recognition and enforcement of judgments from Member States bound by this Regulation are essential.

(3) This area is within the field of judicial cooperation in civil matters within the meaning of Article 65 of the Treaty.

(4) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, the objectives of this Regulation cannot be sufficiently achieved by the Member States and can therefore be better achieved by the Community. This Regulation confines itself to the minimum required in order to achieve those objectives and does not go beyond what is necessary for that purpose.

(5) On 27 September 1968 the Member States, acting under Article 293, fourth indent, of the Treaty, concluded the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by Conventions on the Accession of the New Member States to that Convention (hereinafter referred to as the "Brussels Convention") (4). On 16 September 1988 Member States and EFTA States concluded the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which is a parallel Convention to the 1968 Brussels Convention. Work has been undertaken for the revision of those Conventions, and the Council has approved the content of the revised texts. Continuity in the results achieved in that revision should be ensured.

(6) In order to attain the objective of free movement of judgments in civil and commercial matters, it is necessary and appropriate that the rules governing jurisdiction and the recognition and enforcement of

judgments be governed by a Community legal instrument which is binding and directly applicable.

(7) The scope of this Regulation must cover all the main civil and commercial matters apart from certain well-defined matters.

(8) There must be a link between proceedings to which this Regulation applies and the territory of the Member States bound by this Regulation. Accordingly common rules on jurisdiction should, in principle, apply when the defendant is domiciled in one of those Member States.

(9) A defendant not domiciled in a Member State is in general subject to national rules of jurisdiction applicable in the territory of the Member State of the court seized, and a defendant domiciled in a Member State not bound by this Regulation must remain subject to the Brussels Convention.

(10) For the purposes of the free movement of judgments, judgments given in a Member State bound by this Regulation should be recognised and enforced in another Member State bound by this Regulation, even if the judgment debtor is domiciled in a third State.

(11) The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.

(12) In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close link between

the court and the action or in order to facilitate the sound administration of justice.

(13) In relation to insurance, consumer contracts and employment, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for.

(14) The autonomy of the parties to a contract, other than an insurance, consumer or employment contract, where only limited autonomy to determine the courts having jurisdiction is allowed, must be respected subject to the exclusive grounds of jurisdiction laid down in this Regulation.

(15) In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States. There must be a clear and effective mechanism for resolving cases of *lis pendens* and related actions and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For the purposes of this Regulation that time should be defined autonomously.

(16) Mutual trust in the administration of justice in the Community justifies judgments given in a Member State being recognised automatically without the need for any procedure except in cases of dispute.

(17) By virtue of the same principle of mutual trust, the procedure for making enforceable in one Member State a judgment given in another must be efficient and rapid. To that end, the declaration that a judgment is enforceable should be issued virtually automatically after purely formal checks of the documents supplied, without there being any possibility for the court to raise of its own motion any of the grounds for non-enforcement provided for by this Regulation.

(18) However, respect for the rights of the defence means that the defendant should be able to appeal in an adversarial procedure, against the declaration of enforceability, if he considers one of the grounds for non-enforcement to be present. Redress procedures should also be available to the claimant where his application for a declaration of enforceability has been rejected.

(19) Continuity between the Brussels Convention and this Regulation should be ensured, and transitional provisions should be laid down to that end. The same need for continuity applies as regards the interpretation of the Brussels Convention by the Court of Justice of the European Communities and the 1971 Protocol⁽⁵⁾ should remain applicable also to cases already pending when this Regulation enters into force.

(20) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation.

(21) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application.

(22) Since the Brussels Convention remains in force in relations between Denmark and the Member States that are bound by this Regulation, both the Convention and the 1971 Protocol continue to apply between Denmark and the Member States bound by this Regulation.

(23) The Brussels Convention also continues to apply to the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 299 of the Treaty.

(24) Likewise for the sake of consistency, this Regulation should not affect rules governing jurisdiction and the recognition of judgments contained in specific Community instruments.

(25) Respect for international commitments entered into by the Member States means that this Regulation should not affect conventions relating to specific matters to which the Member States are parties.

(26) The necessary flexibility should be provided for in the basic rules of this Regulation in order to take account of the specific procedural rules of certain Member States. Certain provisions of the Protocol annexed to the Brussels Convention should accordingly be incorporated in this Regulation.

(27) In order to allow a harmonious transition in certain areas which were the subject of special provisions in the Protocol annexed to the Brussels Convention, this Regulation lays down, for a transitional period, provisions taking into consideration the specific situation in certain Member States.

(28) No later than five years after entry into force of this Regulation the Commission will present a report on its application and, if need be, submit proposals for adaptations.

(29) The Commission will have to adjust Annexes I to IV on the rules of national jurisdiction, the courts or competent authorities and redress procedures available on the basis of the amendments forwarded by the Member State concerned; amendments made to Annexes V and VI should

be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission(6),

HAS ADOPTED THIS REGULATION:

CHAPTER I SCOPE

Article 1

1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

2. The Regulation shall not apply to:

- (a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;
- (b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
- (c) social security;
- (d) arbitration.

3. In this Regulation, the term „Member State“ shall mean Member States with the exception of Denmark.

CHAPTER II JURISDICTION Section 1 General provisions

Article 2

1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

2. Persons who are not nationals of the Member State in which they are domiciled

shall be governed by the rules of jurisdiction applicable to nationals of that State.

Article 3

1. Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.

2. In particular the rules of national jurisdiction set out in Annex I shall not be applicable as against them.

Article 4

1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State.

2. As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force, and in particular those specified in Annex I, in the same way as the nationals of that State.

Section 2 Special jurisdiction

Article 5

A person domiciled in a Member State may, in another Member State, be sued:

1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;
- (b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:
 - in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,
 - in the case of the provision of services, the place in a Member State where, un-

der the contract, the services were provided or should have been provided,
(c) if subparagraph (b) does not apply then subparagraph (a) applies;

2. in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident or, if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties;

3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;

4. as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings;

5. as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated;

6. as settlor, trustee or beneficiary of a trust created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, in the courts of the Member State in which the trust is domiciled;

7. as regards a dispute concerning the payment of remuneration claimed in respect of the salvage of a cargo or freight, in the court under the authority of which the cargo or freight in question:

- (a) has been arrested to secure such payment, or
- (b) could have been so arrested, but bail or other security has been given;

provided that this provision shall apply only if it is claimed that the defendant has an interest in the cargo or freight or had such an interest at the time of salvage.

Article 6

A person domiciled in a Member State may also be sued:

1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;

2. as a third party in an action on a warranty or guarantee or in any other third party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case;

3. on a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending;

4. in matters relating to a contract, if the action may be combined with an action against the same defendant in matters relating to rights in rem in immovable property, in the court of the Member State in which the property is situated.

Article 7

Where by virtue of this Regulation a court of a Member State has jurisdiction in actions relating to liability from the use or operation of a ship, that court, or any other court substituted for this purpose by the internal law of that Member State, shall also have jurisdiction over claims for limitation of such liability.

Section 3
Jurisdiction in matters relating
to insurance

Article 8

In matters relating to insurance, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5.

Article 9

1. An insurer domiciled in a Member State may be sued:

(a) in the courts of the Member State where he is domiciled, or

(b) in another Member State, in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the plaintiff is domiciled,

(c) if he is a co-insurer, in the courts of a Member State in which proceedings are brought against the leading insurer.

2. An insurer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

Article 10

In respect of liability insurance or insurance of immovable property, the insurer may in addition be sued in the courts for the place where the harmful event occurred. The same applies if movable and immovable property are covered by the same insurance policy and both are adversely affected by the same contingency.

Article 11

1. In respect of liability insurance, the insurer may also, if the law of the court permits it, be joined in proceedings which

the injured party has brought against the insured.

2. Articles 8, 9 and 10 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted.

3. If the law governing such direct actions provides that the policyholder or the insured may be joined as a party to the action, the same court shall have jurisdiction over them.

Article 12

1. Without prejudice to Article 11(3), an insurer may bring proceedings only in the courts of the Member State in which the defendant is domiciled, irrespective of whether he is the policyholder, the insured or a beneficiary.

2. The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Article 13

The provisions of this Section may be departed from only by an agreement:

1. which is entered into after the dispute has arisen, or

2. which allows the policyholder, the insured or a beneficiary to bring proceedings in courts other than those indicated in this Section, or

3. which is concluded between a policyholder and an insurer, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which has the effect of conferring jurisdiction on the courts of that State even if the harmful event were to occur abroad, provided that such an agreement is not contrary to the law of that State, or

4. which is concluded with a policyholder who is not domiciled in a Member Sta-

te, except in so far as the insurance is compulsory or relates to immovable property in a Member State, or

5. which relates to a contract of insurance in so far as it covers one or more of the risks set out in Article 14.

Article 14

The following are the risks referred to in Article 13(5):

1. any loss of or damage to:
 - (a) seagoing ships, installations situated offshore or on the high seas, or aircraft, arising from perils which relate to their use for commercial purposes;
 - (b) goods in transit other than passengers' baggage where the transit consists of or includes carriage by such ships or aircraft;
2. any liability, other than for bodily injury to passengers or loss of or damage to their baggage:
 - (a) arising out of the use or operation of ships, installations or aircraft as referred to in point 1(a) in so far as, in respect of the latter, the law of the Member State in which such aircraft are registered does not prohibit agreements on jurisdiction regarding insurance of such risks;
 - (b) for loss or damage caused by goods in transit as described in point 1(b);
3. any financial loss connected with the use or operation of ships, installations or aircraft as referred to in point 1(a), in particular loss of freight or charter-hire;
4. any risk or interest connected with any of those referred to in points 1 to 3;
5. notwithstanding points 1 to 4, all „large risks“ as defined in Council Directive 73/239/EEC(7), as amended by Council Directives 88/357/EEC(8) and 90/618/EEC(9), as they may be amended.

Section 4

Jurisdiction over consumer contracts

Article 15

1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5, if:

- (a) it is a contract for the sale of goods on instalment credit terms; or
- (b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or
- (c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.

2. Where a consumer enters into a contract with a party who is not domiciled in the Member State but has a branch, agency or other establishment in one of the Member States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.

3. This Section shall not apply to a contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation.

Article 16

1. A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for

the place where the consumer is domiciled.

2. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.

3. This Article shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Article 17

The provisions of this Section may be departed from only by an agreement:

1. which is entered into after the dispute has arisen; or

2. which allows the consumer to bring proceedings in courts other than those indicated in this Section; or

3. which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitual resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.

Section 5

Jurisdiction over individual contracts of employment

Article 18

1. In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5.

2. Where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agen-

cy or establishment, be deemed to be domiciled in that Member State.

Article 19

An employer domiciled in a Member State may be sued:

1. in the courts of the Member State where he is domiciled; or

2. in another Member State:

(a) in the courts for the place where the employee habitually carries out his work or in the courts for the last place where he did so, or

(b) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

Article 20

1. An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled.

2. The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Article 21

The provisions of this Section may be departed from only by an agreement on jurisdiction:

1. which is entered into after the dispute has arisen; or

2. which allows the employee to bring proceedings in courts other than those indicated in this Section.

Section 6

Exclusive jurisdiction

Article 22

The following courts shall have exclusive jurisdiction, regardless of domicile:

1. in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated.

However, in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the Member State in which the defendant is domiciled shall also have jurisdiction, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same Member State;

2. in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. In order to determine that seat, the court shall apply its rules of private international law;

3. in proceedings which have as their object the validity of entries in public registers, the courts of the Member State in which the register is kept;

4. in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of a Community instrument or an international convention deemed to have taken place.

Without prejudice to the jurisdiction of the European Patent Office under the Convention on the Grant of European Patents, signed at Munich on 5 October 1973, the courts of each Member State shall have exclusive jurisdiction, regardless of domicile,

in proceedings concerned with the registration or validity of any European patent granted for that State;

5. in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced.

Section 7

Prorogation of jurisdiction

Article 23

1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

- (a) in writing or evidenced in writing; or
- (b) in a form which accords with practices which the parties have established between themselves; or
- (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to „writing“.

3. Where such an agreement is concluded by parties, none of whom is domiciled in a Member State, the courts of other Member States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.

4. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved.

5. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 13, 17 or 21, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22.

Article 24

Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 22.

Section 8 Examination as to jurisdiction and admissibility

Article 25

Where a court of a Member State is seized of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 22, it shall declare of its own motion that it has no jurisdiction.

Article 26

1. Where a defendant domiciled in one Member State is sued in a court of another Member State and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Regulation.

2. The court shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.

3. Article 19 of Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters⁽¹⁰⁾ shall apply instead of the provisions of paragraph 2 if the document instituting the proceedings or an equivalent document had to be transmitted from one Member State to another pursuant to this Regulation.

4. Where the provisions of Regulation (EC) No 1348/2000 are not applicable, Article 15 of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters shall apply if the document instituting the proceedings or an equivalent document had to be transmitted pursuant to that Convention.

Section 9 Lis pendens - related actions

Article 27

1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.

2. Where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favour of that court.

Article 28

1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

Article 29

Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 30

For the purposes of this Section, a court shall be deemed to be seised:

1. at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have service effected on the defendant, or

2. if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

Section 10

Provisional, including protective, measures

Article 31

Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.

CHAPTER III

RECOGNITION AND ENFORCEMENT

Article 32

For the purposes of this Regulation, „judgment“ means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.

Section 1

Recognition

Article 33

1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

2. Any interested party who raises the recognition of a judgment as the principal issue in a dispute may, in accordance with the procedures provided for in Sections 2 and 3 of this Chapter, apply for a decision that the judgment be recognised.

3. If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question of recognition that court shall have jurisdiction over that question.

Article 34

A judgment shall not be recognised:

1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;
2. where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;
3. if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought;

4. if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.

Article 35

1. Moreover, a judgment shall not be recognised if it conflicts with Sections 3, 4 or 6 of Chapter II, or in a case provided for in Article 72.

2. In its examination of the grounds of jurisdiction referred to in the foregoing paragraph, the court or authority applied to shall be bound by the findings of fact on which the court of the Member State of origin based its jurisdiction.

3. Subject to the paragraph 1, the jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in point 1 of Article 34 may not be applied to the rules relating to jurisdiction.

Article 36

Under no circumstances may a foreign judgment be reviewed as to its substance.

Article 37

1. A court of a Member State in which recognition is sought of a judgment given in another Member State may stay the proceedings if an ordinary appeal against the judgment has been lodged.

2. A court of a Member State in which recognition is sought of a judgment given in Ireland or the United Kingdom may stay the proceedings if enforcement is suspended in the State of origin, by reason of an appeal.

Section 2 Enforcement

Article 38

1. A judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.

2. However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland, or in Northern Ireland when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom.

Article 39

1. The application shall be submitted to the court or competent authority indicated in the list in Annex II.

2. The local jurisdiction shall be determined by reference to the place of domicile of the party against whom enforcement is sought, or to the place of enforcement.

Article 40

1. The procedure for making the application shall be governed by the law of the Member State in which enforcement is sought.

2. The applicant must give an address for service of process within the area of jurisdiction of the court applied to. However, if the law of the Member State in which enforcement is sought does not provide for the furnishing of such an address, the applicant shall appoint a representative ad litem.

3. The documents referred to in Article 53 shall be attached to the application.

Article 41

The judgment shall be declared enforceable immediately on completion of the formalities in Article 53 without any review under Articles 34 and 35. The party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.

Article 42

1. The decision on the application for a declaration of enforceability shall forthwith be brought to the notice of the applicant in accordance with the procedure laid down by the law of the Member State in which enforcement is sought.

2. The declaration of enforceability shall be served on the party against whom enforcement is sought, accompanied by the judgment, if not already served on that party.

Article 43

1. The decision on the application for a declaration of enforceability may be appealed against by either party.

2. The appeal is to be lodged with the court indicated in the list in Annex III.

3. The appeal shall be dealt with in accordance with the rules governing procedure in contradictory matters.

4. If the party against whom enforcement is sought fails to appear before the appellate court in proceedings concerning an appeal brought by the applicant, Article 26(2) to (4) shall apply even where the party against whom enforcement is sought is not domiciled in any of the Member States.

5. An appeal against the declaration of enforceability is to be lodged within one month of service thereof. If the party against whom enforcement is sought is domiciled in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be two months and shall run from the date of service, either on him in person or at his residence. No extension of time may be granted on account of distance.

Article 44

The judgment given on the appeal may be contested only by the appeal referred to in Annex IV.

Article 45

1. The court with which an appeal is lodged under Article 43 or Article 44 shall refuse or revoke a declaration of enforceability only on one of the grounds specified in Articles 34 and 35. It shall give its decision without delay.

2. Under no circumstances may the foreign judgment be reviewed as to its substance.

Article 46

1. The court with which an appeal is lodged under Article 43 or Article 44 may, on the application of the party against whom enforcement is sought, stay the proceedings if an ordinary appeal has been

lodged against the judgment in the Member State of origin or if the time for such an appeal has not yet expired; in the latter case, the court may specify the time within which such an appeal is to be lodged.

2. Where the judgment was given in Ireland or the United Kingdom, any form of appeal available in the Member State of origin shall be treated as an ordinary appeal for the purposes of paragraph 1.

3. The court may also make enforcement conditional on the provision of such security as it shall determine.

Article 47

1. When a judgment must be recognised in accordance with this Regulation, nothing shall prevent the applicant from availing himself of provisional, including protective, measures in accordance with the law of the Member State requested without a declaration of enforceability under Article 41 being required.

2. The declaration of enforceability shall carry with it the power to proceed to any protective measures.

3. During the time specified for an appeal pursuant to Article 43(5) against the declaration of enforceability and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures against the property of the party against whom enforcement is sought.

Article 48

1. Where a foreign judgment has been given in respect of several matters and the declaration of enforceability cannot be given for all of them, the court or competent authority shall give it for one or more of them.

2. An applicant may request a declaration of enforceability limited to parts of a judgment.

Article 49

A foreign judgment which orders a periodic payment by way of a penalty shall be enforceable in the Member State in which enforcement is sought only if the amount of the payment has been finally determined by the courts of the Member State of origin.

Article 50

An applicant who, in the Member State of origin has benefited from complete or partial legal aid or exemption from costs or expenses, shall be entitled, in the procedure provided for in this Section, to benefit from the most favourable legal aid or the most extensive exemption from costs or expenses provided for by the law of the Member State addressed.

Article 51

No security, bond or deposit, however described, shall be required of a party who in one Member State applies for enforcement of a judgment given in another Member State on the ground that he is a foreign national or that he is not domiciled or resident in the State in which enforcement is sought.

Article 52

In proceedings for the issue of a declaration of enforceability, no charge, duty or fee calculated by reference to the value of the matter at issue may be levied in the Member State in which enforcement is sought.

Section 3

Common provisions

Article 53

1. A party seeking recognition or applying for a declaration of enforceability shall produce a copy of the judgment

which satisfies the conditions necessary to establish its authenticity.

2. A party applying for a declaration of enforceability shall also produce the certificate referred to in Article 54, without prejudice to Article 55.

Article 54

The court or competent authority of a Member State where a judgment was given shall issue, at the request of any interested party, a certificate using the standard form in Annex V to this Regulation.

Article 55

1. If the certificate referred to in Article 54 is not produced, the court or competent authority may specify a time for its production or accept an equivalent document or, if it considers that it has sufficient information before it, dispense with its production.

2. If the court or competent authority so requires, a translation of the documents shall be produced. The translation shall be certified by a person qualified to do so in one of the Member States.

Article 56

No legalisation or other similar formality shall be required in respect of the documents referred to in Article 53 or Article 55(2), or in respect of a document appointing a representative ad litem.

CHAPTER IV AUTHENTIC INSTRUMENTS AND COURT SETTLEMENTS

Article 57

1. A document which has been formally drawn up or registered as an authentic instrument and is enforceable in one Member State shall, in another Member State, be declared enforceable there, on appli-

cation made in accordance with the procedures provided for in Articles 38, et seq. The court with which an appeal is lodged under Article 43 or Article 44 shall refuse or revoke a declaration of enforceability only if enforcement of the instrument is manifestly contrary to public policy in the Member State addressed.

2. Arrangements relating to maintenance obligations concluded with administrative authorities or authenticated by them shall also be regarded as authentic instruments within the meaning of paragraph 1.

3. The instrument produced must satisfy the conditions necessary to establish its authenticity in the Member State of origin.

4. Section 3 of Chapter III shall apply as appropriate. The competent authority of a Member State where an authentic instrument was drawn up or registered shall issue, at the request of any interested party, a certificate using the standard form in Annex VI to this Regulation.

Article 58

A settlement which has been approved by a court in the course of proceedings and is enforceable in the Member State in which it was concluded shall be enforceable in the State addressed under the same conditions as authentic instruments. The court or competent authority of a Member State where a court settlement was approved shall issue, at the request of any interested party, a certificate using the standard form in Annex V to this Regulation.

CHAPTER V GENERAL PROVISIONS

Article 59

1. In order to determine whether a party is domiciled in the Member State who-

se courts are seised of a matter, the court shall apply its internal law.

2. If a party is not domiciled in the Member State whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another Member State, the court shall apply the law of that Member State.

Article 60

1. For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:

- (a) statutory seat, or
- (b) central administration, or
- (c) principal place of business.

2. For the purposes of the United Kingdom and Ireland „statutory seat“ means the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place.

3. In order to determine whether a trust is domiciled in the Member State whose courts are seised of the matter, the court shall apply its rules of private international law.

Article 61

Without prejudice to any more favourable provisions of national laws, persons domiciled in a Member State who are being prosecuted in the criminal courts of another Member State of which they are not nationals for an offence which was not intentionally committed may be defended by persons qualified to do so, even if they do not appear in person. However, the court seised of the matter may order appearance in person; in the case of failure to appear, a judgment given in the civil action without the person concerned having had the opportunity to arrange for his de-

fence need not be recognised or enforced in the other Member States.

Article 62

In Sweden, in summary proceedings concerning orders to pay (betalningsföreläggande) and assistance (handräckning), the expression „court“ includes the „Swedish enforcement service“ (kronofogdemyndighet).

Article 63

1. A person domiciled in the territory of the Grand Duchy of Luxembourg and sued in the court of another Member State pursuant to Article 5(1) may refuse to submit to the jurisdiction of that court if the final place of delivery of the goods or provision of the services is in Luxembourg.

2. Where, under paragraph 1, the final place of delivery of the goods or provision of the services is in Luxembourg, any agreement conferring jurisdiction must, in order to be valid, be accepted in writing or evidenced in writing within the meaning of Article 23(1)(a).

3. The provisions of this Article shall not apply to contracts for the provision of financial services.

4. The provisions of this Article shall apply for a period of six years from entry into force of this Regulation.

Article 64

1. In proceedings involving a dispute between the master and a member of the crew of a seagoing ship registered in Greece or in Portugal, concerning remuneration or other conditions of service, a court in a Member State shall establish whether the diplomatic or consular officer responsible for the ship has been notified of the dispute. It may act as soon as that officer has been notified.

2. The provisions of this Article shall apply for a period of six years from entry into force of this Regulation.

Article 65

1. The jurisdiction specified in Article 6(2), and Article 11 in actions on a warranty of guarantee or in any other third party proceedings may not be resorted to in Germany and Austria. Any person domiciled in another Member State may be sued in the courts:

- (a) of Germany, pursuant to Articles 68 and 72 to 74 of the Code of Civil Procedure (Zivilprozessordnung) concerning third-party notices,
- (b) of Austria, pursuant to Article 21 of the Code of Civil Procedure (Zivilprozessordnung) concerning third-party notices.

2. Judgments given in other Member States by virtue of Article 6(2), or Article 11 shall be recognised and enforced in Germany and Austria in accordance with Chapter III. Any effects which judgments given in these States may have on third parties by application of the provisions in paragraph 1 shall also be recognised in the other Member States.

CHAPTER VI TRANSITIONAL PROVISIONS

Article 66

1. This Regulation shall apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after the entry into force thereof.

2. However, if the proceedings in the Member State of origin were instituted before the entry into force of this Regulation, judgments given after that date shall be recognised and enforced in accordance with Chapter III,

- (a) if the proceedings in the Member State of origin were instituted after the entry into force of the Brussels or the Lugano Convention both in the Member State of origin and in the Member State addressed;
- (b) in all other cases, if jurisdiction was founded upon rules which accorded with those provided for either in Chapter II or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

CHAPTER VII RELATIONS WITH OTHER INSTRUMENTS

Article 67

This Regulation shall not prejudice the application of provisions governing jurisdiction and the recognition and enforcement of judgments in specific matters which are contained in Community instruments or in national legislation harmonised pursuant to such instruments.

Article 68

1. This Regulation shall, as between the Member States, supersede the Brussels Convention, except as regards the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 299 of the Treaty.

2. In so far as this Regulation replaces the provisions of the Brussels Convention between Member States, any reference to the Convention shall be understood as a reference to this Regulation.

Article 69

Subject to Article 66(2) and Article 70, this Regulation shall, as between Member States, supersede the following conventi-

ons and treaty concluded between two or more of them:

- the Convention between Belgium and France on Jurisdiction and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Paris on 8 July 1899,
- the Convention between Belgium and the Netherlands on Jurisdiction, Bankruptcy, and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Brussels on 28 March 1925,
- the Convention between France and Italy on the Enforcement of Judgments in Civil and Commercial Matters, signed at Rome on 3 June 1930,
- the Convention between Germany and Italy on the Recognition and Enforcement of Judgments in Civil and Commercial Matters, signed at Rome on 9 March 1936,
- the Convention between Belgium and Austria on the Reciprocal Recognition and Enforcement of Judgments and Authentic Instruments relating to Maintenance Obligations, signed at Vienna on 25 October 1957,
- the Convention between Germany and Belgium on the Mutual Recognition and Enforcement of Judgments, Arbitration Awards and Authentic Instruments in Civil and Commercial Matters, signed at Bonn on 30 June 1958,
- the Convention between the Netherlands and Italy on the Recognition and Enforcement of Judgments in Civil and Commercial Matters, signed at Rome on 17 April 1959,
- the Convention between Germany and Austria on the Reciprocal Recognition and Enforcement of Judgments, Settlements and Authentic Instruments in Civil and Commercial Matters, signed at Vienna on 6 June 1959,
- the Convention between Belgium and Austria on the Reciprocal Recognition and Enforcement of Judgments, Arbitral Awards and Authentic Instruments in Civil and Commercial Matters, signed at Vienna on 16 June 1959,
- the Convention between Greece and Germany for the Reciprocal Recognition and Enforcement of Judgments, Settlements and Authentic Instruments in Civil and Commercial Matters, signed in Athens on 4 November 1961,
- the Convention between Belgium and Italy on the Recognition and Enforcement of Judgments and other Enforceable Instruments in Civil and Commercial Matters, signed at Rome on 6 April 1962,
- the Convention between the Netherlands and Germany on the Mutual Recognition and Enforcement of Judgments and Other Enforceable Instruments in Civil and Commercial Matters, signed at The Hague on 30 August 1962,
- the Convention between the Netherlands and Austria on the Reciprocal Recognition and Enforcement of Judgments and Authentic Instruments in Civil and Commercial Matters, signed at The Hague on 6 February 1963,
- the Convention between France and Austria on the Recognition and Enforcement of Judgments and Authentic Instruments in Civil and Commercial Matters, signed at Vienna on 15 July 1966,
- the Convention between Spain and France on the Recognition and Enforcement of Judgment Arbitration Awards in Civil and Commercial Matters, signed at Paris on 28 May 1969,
- the Convention between Luxembourg and Austria on the Recognition and Enforcement of Judgments and Authen-

- tic Instruments in Civil and Commercial Matters, signed at Luxembourg on 29 July 1971,
- the Convention between Italy and Austria on the Recognition and Enforcement of Judgments in Civil and Commercial Matters, of Judicial Settlements and of Authentic Instruments, signed at Rome on 16 November 1971,
 - the Convention between Spain and Italy regarding Legal Aid and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, signed at Madrid on 22 May 1973,
 - the Convention between Finland, Iceland, Norway, Sweden and Denmark on the Recognition and Enforcement of Judgments in Civil Matters, signed at Copenhagen on 11 October 1977,
 - the Convention between Austria and Sweden on the Recognition and Enforcement of Judgments in Civil Matters, signed at Stockholm on 16 September 1982,
 - the Convention between Spain and the Federal Republic of Germany on the Recognition and Enforcement of Judgments, Settlements and Enforceable Authentic Instruments in Civil and Commercial Matters, signed at Bonn on 14 November 1983,
 - the Convention between Austria and Spain on the Recognition and Enforcement of Judgments, Settlements and Enforceable Authentic Instruments in Civil and Commercial Matters, signed at Vienna on 17 February 1984,
 - the Convention between Finland and Austria on the Recognition and Enforcement of Judgments in Civil Matters, signed at Vienna on 17 November 1986, and
 - the Treaty between Belgium, the Netherlands and Luxembourg in Jurisdiction, Bankruptcy, and the Validity and

Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Brussels on 24 November 1961, in so far as it is in force.

Article 70

1. The Treaty and the Conventions referred to in Article 69 shall continue to have effect in relation to matters to which this Regulation does not apply.

2. They shall continue to have effect in respect of judgments given and documents formally drawn up or registered as authentic instruments before the entry into force of this Regulation.

Article 71

1. This Regulation shall not affect any conventions to which the Member States are parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments.

2. With a view to its uniform interpretation, paragraph 1 shall be applied in the following manner:

- (a) this Regulation shall not prevent a court of a Member State, which is a party to a convention on a particular matter, from assuming jurisdiction in accordance with that convention, even where the defendant is domiciled in another Member State which is not a party to that convention. The court hearing the action shall, in any event, apply Article 26 of this Regulation;
- (b) judgments given in a Member State by a court in the exercise of jurisdiction provided for in a convention on a particular matter shall be recognised and enforced in the other Member States in accordance with this Regulation.

Where a convention on a particular matter to which both the Member State of origin and the Member State addressed are parties lays down conditions for the reco-

gnition or enforcement of judgments, those conditions shall apply. In any event, the provisions of this Regulation which concern the procedure for recognition and enforcement of judgments may be applied.

Article 72

This Regulation shall not affect agreements by which Member States undertook, prior to the entry into force of this Regulation pursuant to Article 59 of the Brussels Convention, not to recognise judgments given, in particular in other Contracting States to that Convention, against defendants domiciled or habitually resident in a third country where, in cases provided for in Article 4 of that Convention, the judgment could only be founded on a ground of jurisdiction specified in the second paragraph of Article 3 of that Convention.

CHAPTER VIII FINAL PROVISIONS

Article 73

No later than five years after the entry into force of this Regulation, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation. The report shall be accompanied, if need be, by proposals for adaptations to this Regulation.

Article 74

1. The Member States shall notify the Commission of the texts amending the lists set out in Annexes I to IV. The Commission shall adapt the Annexes concerned accordingly.

2. The updating or technical adjustment of the forms, specimens of which appear in Annexes V and VI, shall be adopted in accordance with the advisory procedure referred to in Article 75(2).

Article 75

1. The Commission shall be assisted by a committee.

2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply.

3. The Committee shall adopt its rules of procedure.

Article 76

This Regulation shall enter into force on 1 March 2002.

This Regulation is binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, 22 December 2000.

For the Council
The President
C. Pierret

- (1) OJ C 376, 28.12.1999, p. 1.
- (2) Opinion delivered on 21 September 2000 (not yet published in the Official Journal).
- (3) OJ C 117, 26.4.2000, p. 6.
- (4) OJ L 299, 31.12.1972, p. 32.
OJ L 304, 30.10.1978, p. 1.
OJ L 388, 31.12.1982, p. 1.
OJ L 285, 3.10.1989, p. 1.
OJ C 15, 15.1.1997, p. 1.
For a consolidated text, see OJ C 27, 26.1.1998, p. 1.
- (5) OJ L 204, 2.8.1975, p. 28.
OJ L 304, 30.10.1978, p. 1.
OJ L 388, 31.12.1982, p. 1.
OJ L 285, 3.10.1989, p. 1.
OJ C 15, 15.1.1997, p. 1.
For a consolidated text see OJ C 27, 26.1.1998, p. 28.
- (6) OJ L 184, 17.7.1999, p. 23.

- (7) OJ L 228, 16.8.1973, p. 3. Directive as last amended by Directive 2000/26/EC of the European Parliament and of the Council (OJ L 181, 20.7.2000, p. 65).
- (8) OJ L 172, 4.7.1988, p. 1. Directive as last amended by Directive 2000/26/EC.
- (9) OJ L 330, 29.11.1990, p. 44.
- (10) OJ L 160, 30.6.2000, p. 37

Annex 2 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 (Brussels libis regulation)

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

THE COUNCIL OF THE EUROPEAN UNION, Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and Article 67(1) thereof, Having regard to the proposal from the Commission(1),

Having regard to the opinion of the European Parliament(2),

Having regard to the opinion of the European Economic and Social Committee(3),

Whereas:

(1) The European Community has set the objective of creating an area of freedom, security and justice, in which the free movement of persons is ensured. To this end, the Community is to adopt, among others, measures in the field of judicial cooperation in civil matters that are necessary for the proper functioning of the internal market.

(2) The Tampere European Council endorsed the principle of mutual recognition of judicial decisions as the cornerstone for the creation of a genuine judicial area, and identified visiting rights as a priority.

(3) Council Regulation (EC) No 1347/2000(4) sets out rules on jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility for the children of both spouses rendered on the occasion of the matrimonial proceedings. The content of this Regulation was substantially taken over from the Convention of 28 May 1998 on the same subject matter(5).

(4) On 3 July 2000 France presented an initiative for a Council Regulation on the mutual enforcement of judgments on rights of access to children(6).

(5) In order to ensure equality for all children, this Regulation covers all decisions on parental responsibility, including measures for the protection of the child, independently of any link with a matrimonial proceeding.

(6) Since the application of the rules on parental responsibility often arises in the context of matrimonial proceedings, it is more appropriate to have a single instrument for matters of divorce and parental responsibility.

(7) The scope of this Regulation covers civil matters, whatever the nature of the court or tribunal.

(8) As regards judgments on divorce, legal separation or marriage annulment, this Regulation should apply only to the dissolution of matrimonial ties and should not deal with issues such as the grounds for divorce, property consequences of the marriage or any other ancillary measures.

(9) As regards the property of the child, this Regulation should apply only to measures for the protection of the child, i.e. (i) the designation and functions of a person or body having charge of the child's property, representing or assisting the child, and (ii) the administration, conservation or disposal of the child's property. In this context, this Regulation should, for instan-

ce, apply in cases where the parents are in dispute as regards the administration of the child's property. Measures relating to the child's property which do not concern the protection of the child should continue to be governed by Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters(7).

(10) This Regulation is not intended to apply to matters relating to social security, public measures of a general nature in matters of education or health or to decisions on the right of asylum and on immigration. In addition it does not apply to the establishment of parenthood, since this is a different matter from the attribution of parental responsibility, nor to other questions linked to the status of persons. Moreover, it does not apply to measures taken as a result of criminal offences committed by children.

(11) Maintenance obligations are excluded from the scope of this Regulation as these are already covered by Council Regulation No 44/2001. The courts having jurisdiction under this Regulation will generally have jurisdiction to rule on maintenance obligations by application of Article 5(2) of Council Regulation No 44/2001.

(12) The grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity. This means that jurisdiction should lie in the first place with the Member State of the child's habitual residence, except for certain cases of a change in the child's residence or pursuant to an agreement between the holders of parental responsibility.

(13) In the interest of the child, this Regulation allows, by way of exception and

under certain conditions, that the court having jurisdiction may transfer a case to a court of another Member State if this court is better placed to hear the case. However, in this case the second court should not be allowed to transfer the case to a third court.

(14) This Regulation should have effect without prejudice to the application of public international law concerning diplomatic immunities. Where jurisdiction under this Regulation cannot be exercised by reason of the existence of diplomatic immunity in accordance with international law, jurisdiction should be exercised in accordance with national law in a Member State in which the person concerned does not enjoy such immunity.

(15) Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters⁽⁸⁾ should apply to the service of documents in proceedings instituted pursuant to this Regulation.

(16) This Regulation should not prevent the courts of a Member State from taking provisional, including protective measures, in urgent cases, with regard to persons or property situated in that State.

(17) In cases of wrongful removal or retention of a child, the return of the child should be obtained without delay, and to this end the Hague Convention of 25 October 1980 would continue to apply as complemented by the provisions of this Regulation, in particular Article 11. The courts of the Member State to or in which the child has been wrongfully removed or retained should be able to oppose his or her return in specific, duly justified cases. However, such a decision could be replaced by a subsequent decision by the court of the Member State of habitual residence of the child prior to the wrongful removal or re-

tention. Should that judgment entail the return of the child, the return should take place without any special procedure being required for recognition and enforcement of that judgment in the Member State to or in which the child has been removed or retained.

(18) Where a court has decided not to return a child on the basis of Article 13 of the 1980 Hague Convention, it should inform the court having jurisdiction or central authority in the Member State where the child was habitually resident prior to the wrongful removal or retention. Unless the court in the latter Member State has been seised, this court or the central authority should notify the parties. This obligation should not prevent the central authority from also notifying the relevant public authorities in accordance with national law.

(19) The hearing of the child plays an important role in the application of this Regulation, although this instrument is not intended to modify national procedures applicable.

(20) The hearing of a child in another Member State may take place under the arrangements laid down in Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters⁽⁹⁾.

(21) The recognition and enforcement of judgments given in a Member State should be based on the principle of mutual trust and the grounds for non-recognition should be kept to the minimum required.

(22) Authentic instruments and agreements between parties that are enforceable in one Member State should be treated as equivalent to "judgments" for the purpose of the application of the rules on recognition and enforcement.

(23) The Tampere European Council considered in its conclusions (point 34) that judgments in the field of family litigation should be “automatically recognised throughout the Union without any intermediate proceedings or grounds for refusal of enforcement”. This is why judgments on rights of access and judgments on return that have been certified in the Member State of origin in accordance with the provisions of this Regulation should be recognised and enforceable in all other Member States without any further procedure being required. Arrangements for the enforcement of such judgments continue to be governed by national law.

(24) The certificate issued to facilitate enforcement of the judgment should not be subject to appeal. It should be rectified only where there is a material error, i.e. where it does not correctly reflect the judgment.

(25) Central authorities should cooperate both in general matter and in specific cases, including for purposes of promoting the amicable resolution of family disputes, in matters of parental responsibility. To this end central authorities shall participate in the European Judicial Network in civil and commercial matters created by Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters(10).

(26) The Commission should make publicly available and update the lists of courts and redress procedures communicated by the Member States.

(27) The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission(11).

(28) This Regulation replaces Regulation (EC) No 1347/2000 which is consequently repealed.

(29) For the proper functioning of this Regulation, the Commission should review its application and propose such amendments as may appear necessary.

(30) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation.

(31) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, is not participating in the adoption of this Regulation and is therefore not bound by it nor subject to its application.

(32) Since the objectives of this Regulation cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

(33) This Regulation recognises the fundamental rights and observes the principles of the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure respect for the fundamental rights of the child as set out in Article 24 of the Charter of Fundamental Rights of the European Union,

HAS ADOPTED THE PRESENT REGULATION:

CHAPTER I
SCOPE AND DEFINITIONS

Article 1

Scope

1. This Regulation shall apply, whatever the nature of the court or tribunal, in civil matters relating to:

- (a) divorce, legal separation or marriage annulment;
- (b) the attribution, exercise, delegation, restriction or termination of parental responsibility.

2. The matters referred to in paragraph 1(b) may, in particular, deal with:

- (a) rights of custody and rights of access;
- (b) guardianship, curatorship and similar institutions;
- (c) the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child;
- (d) the placement of the child in a foster family or in institutional care;
- (e) measures for the protection of the child relating to the administration, conservation or disposal of the child's property.

3. This Regulation shall not apply to:

- (a) the establishment or contesting of a parent-child relationship;
- (b) decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption;
- (c) the name and forenames of the child;
- (d) emancipation;
- (e) maintenance obligations;
- (f) trusts or succession;
- (g) measures taken as a result of criminal offences committed by children.

Article 2

Definitions

For the purposes of this Regulation:

- 1. the term „court“ shall cover all the au-

thorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to Article 1;

2. the term „judge“ shall mean the judge or an official having powers equivalent to those of a judge in the matters falling within the scope of the Regulation;

3. the term „Member State“ shall mean all Member States with the exception of Denmark;

4. the term „judgment“ shall mean a divorce, legal separation or marriage annulment, as well as a judgment relating to parental responsibility, pronounced by a court of a Member State, whatever the judgment may be called, including a decree, order or decision;

5. the term „Member State of origin“ shall mean the Member State where the judgment to be enforced was issued;

6. the term „Member State of enforcement“ shall mean the Member State where enforcement of the judgment is sought;

7. the term „parental responsibility“ shall mean all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access;

8. the term „holder of parental responsibility“ shall mean any person having parental responsibility over a child;

9. the term „rights of custody“ shall include rights and duties relating to the care of the person of a child, and in particular the right to determine the child's place of residence;

10. the term „rights of access“ shall include in particular the right to take a child to a place other than his or her habitual residence for a limited period of time;

11. the term „wrongful removal or retention“ shall mean a child’s removal or retention where:

- (a) it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention;
and
- (b) provided that, at the time of removal or retention, the rights of custody were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Custody shall be considered to be exercised jointly when, pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child’s place of residence without the consent of another holder of parental responsibility.

CHAPTER II JURISDICTION

SECTION 1 Divorce, legal separation and marriage annulment

Article 3

General jurisdiction

1. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State

- (a) in whose territory:
 - the spouses are habitually resident, or
 - the spouses were last habitually resident, insofar as one of them still resides there, or
 - the respondent is habitually resident, or

- in the event of a joint application, either of the spouses is habitually resident, or
 - the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or
 - the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her „domicile“ there;
- (b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the „domicile“ of both spouses.

2. For the purpose of this Regulation, „domicile“ shall have the same meaning as it has under the legal systems of the United Kingdom and Ireland.

Article 4

Counterclaim

The court in which proceedings are pending on the basis of Article 3 shall also have jurisdiction to examine a counterclaim, insofar as the latter comes within the scope of this Regulation.

Article 5

Conversion of legal separation into divorce

Without prejudice to Article 3, a court of a Member State that has given a judgment on a legal separation shall also have jurisdiction for converting that judgment into a divorce, if the law of that Member State so provides.

Article 6

Exclusive nature of jurisdiction
under Articles 3, 4 and 5

A spouse who:

- (a) is habitually resident in the territory of a Member State; or
- (b) is a national of a Member State, or, in the case of the United Kingdom and Ireland, has his or her „domicile“ in the territory of one of the latter Member States,

may be sued in another Member State only in accordance with Articles 3, 4 and 5.

Article 7

Residual jurisdiction

1. Where no court of a Member State has jurisdiction pursuant to Articles 3, 4 and 5, jurisdiction shall be determined, in each Member State, by the laws of that State.

2. As against a respondent who is not habitually resident and is not either a national of a Member State or, in the case of the United Kingdom and Ireland, does not have his „domicile“ within the territory of one of the latter Member States, any national of a Member State who is habitually resident within the territory of another Member State may, like the nationals of that State, avail himself of the rules of jurisdiction applicable in that State.

SECTION 2

Parental responsibility

Article 8

General jurisdiction

1. The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.

2. Paragraph 1 shall be subject to the provisions of Articles 9, 10 and 12.

Article 9

Continuing jurisdiction of the child's
former habitual residence

1. Where a child moves lawfully from one Member State to another and acquires a new habitual residence there, the courts of the Member State of the child's former habitual residence shall, by way of exception to Article 8, retain jurisdiction during a three-month period following the move for the purpose of modifying a judgment on access rights issued in that Member State before the child moved, where the holder of access rights pursuant to the judgment on access rights continues to have his or her habitual residence in the Member State of the child's former habitual residence.

2. Paragraph 1 shall not apply if the holder of access rights referred to in paragraph 1 has accepted the jurisdiction of the courts of the Member State of the child's new habitual residence by participating in proceedings before those courts without contesting their jurisdiction.

Article 10

Jurisdiction in cases of child
abduction

In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State and:

- (a) each person, institution or other body having rights of custody has acquiesced in the removal or retention;
or
- (b) the child has resided in that other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and

the child is settled in his or her new environment and at least one of the following conditions is met:

(i) within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained;

(ii) a request for return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the time limit set in paragraph (i);

(iii) a case before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed pursuant to Article 11(7);

(iv) a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention.

Article 11

Return of the child

1. Where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter „the 1980 Hague Convention“), in order to obtain the return of a child that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, paragraphs 2 to 8 shall apply.

2. When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be

ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.

3. A court to which an application for return of a child is made as mentioned in paragraph 1 shall act expeditiously in proceedings on the application, using the most expeditious procedures available in national law.

Without prejudice to the first subparagraph, the court shall, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged.

4. A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return.

5. A court cannot refuse to return a child unless the person who requested the return of the child has been given an opportunity to be heard.

6. If a court has issued an order on non-return pursuant to Article 13 of the 1980 Hague Convention, the court must immediately either directly or through its central authority, transmit a copy of the court order on non-return and of the relevant documents, in particular a transcript of the hearings before the court, to the court with jurisdiction or central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law. The court shall receive all the mentioned documents within one month of the date of the non-return order.

7. Unless the courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seized by

one of the parties, the court or central authority that receives the information mentioned in paragraph 6 must notify it to the parties and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child.

Without prejudice to the rules on jurisdiction contained in this Regulation, the court shall close the case if no submissions have been received by the court within the time limit.

8. 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 this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child.

Article 12

Prorogation of jurisdiction

1. The courts of a Member State exercising jurisdiction by virtue of Article 3 on an application for divorce, legal separation or marriage annulment shall have jurisdiction in any matter relating to parental responsibility connected with that application where:

- (a) at least one of the spouses has parental responsibility in relation to the child; and
- (b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility, at the time the court is seised, and is in the superior interests of the child.

2. The jurisdiction conferred in paragraph 1 shall cease as soon as:

- (a) the judgment allowing or refusing the application for divorce, legal separation or marriage annulment has become final;
- (b) in those cases where proceedings in relation to parental responsibility are still pending on the date referred to in (a), a judgment in these proceedings has become final;
- (c) the proceedings referred to in (a) and (b) have come to an end for another reason.

3. The courts of a Member State shall also have jurisdiction in relation to parental responsibility in proceedings other than those referred to in paragraph 1 where:

- (a) the child has a substantial connection with that Member State, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State; and
- (b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised and is in the best interests of the child.

4. Where the child has his or her habitual residence in the territory of a third State which is not a contracting party to the Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, jurisdiction under this Article shall be deemed to be in the child's interest, in particular if it is found impossible to hold proceedings in the third State in question.

Article 13

Jurisdiction based on the child's presence

1. Where a child's habitual residence cannot be established and jurisdiction cannot be determined on the basis of Article 12, the courts of the Member State where the child is present shall have jurisdiction.

2. Paragraph 1 shall also apply to refugee children or children internationally displaced because of disturbances occurring in their country.

Article 14

Residual jurisdiction

Where no court of a Member State has jurisdiction pursuant to Articles 8 to 13, jurisdiction shall be determined, in each Member State, by the laws of that State.

Article 15

Transfer to a court better placed to hear the case

1. By way of exception, the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State, with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child:

- (a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with paragraph 4; or
- (b) request a court of another Member State to assume jurisdiction in accordance with paragraph 5.

2. Paragraph 1 shall apply:

- (a) upon application from a party; or
- (b) of the court's own motion; or
- (c) upon application from a court of another Member State with which the

child has a particular connection, in accordance with paragraph 3.

A transfer made of the court's own motion or by application of a court of another Member State must be accepted by at least one of the parties.

3. The child shall be considered to have a particular connection to a Member State as mentioned in paragraph 1, if that Member State:

- (a) has become the habitual residence of the child after the court referred to in paragraph 1 was seised; or
- (b) is the former habitual residence of the child; or
- (c) is the place of the child's nationality; or
- (d) is the habitual residence of a holder of parental responsibility; or
- (e) is the place where property of the child is located and the case concerns measures for the protection of the child relating to the administration, conservation or disposal of this property.

4. The court of the Member State having jurisdiction as to the substance of the matter shall set a time limit by which the courts of that other Member State shall be seised in accordance with paragraph 1.

If the courts are not seised by that time, the court which has been seised shall continue to exercise jurisdiction in accordance with Articles 8 to 14.

5. The courts of that other Member State may, where due to the specific circumstances of the case, this is in the best interests of the child, accept jurisdiction within six weeks of their seisure in accordance with paragraph 1(a) or 1(b). In this case, the court first seised shall decline jurisdiction. Otherwise, the court first seised shall continue to exercise jurisdiction in accordance with Articles 8 to 14.

6. The courts shall cooperate for the purposes of this Article, either directly or

through the central authorities designated pursuant to Article 53.

SECTION 3

Common provisions

Article 16

Seising of a Court

1. A court shall be deemed to be seised:
 - (a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent; or
 - (b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the applicant has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

Article 17

Examination as to jurisdiction

Where a court of a Member State is seised of a case over which it has no jurisdiction under this Regulation and over which a court of another Member State has jurisdiction by virtue of this Regulation, it shall declare of its own motion that it has no jurisdiction.

Article 18

Examination as to admissibility

1. Where a respondent habitually resident in a State other than the Member State where the action was brought does not enter an appearance, the court with jurisdiction shall stay the proceedings so long as it is not shown that the respondent has been able to receive the document institu-

ting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.

2. Article 19 of Regulation (EC) No 1348/2000 shall apply instead of the provisions of paragraph 1 of this Article if the document instituting the proceedings or an equivalent document had to be transmitted from one Member State to another pursuant to that Regulation.

3. Where the provisions of Regulation (EC) No 1348/2000 are not applicable, Article 15 of the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters shall apply if the document instituting the proceedings or an equivalent document had to be transmitted abroad pursuant to that Convention.

Article 19

Lis pendens and dependent actions

1. Where proceedings relating to divorce, legal separation or marriage annulment between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where proceedings relating to parental responsibility relating to the same child and involving the same cause of action are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

3. Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court.

In that case, the party who brought the relevant action before the court second

seised may bring that action before the court first seised.

Article 20

Provisional, including protective, measures

1. In urgent cases, the provisions of this Regulation shall not prevent the courts of a Member State from taking such provisional, including protective, measures in respect of persons or assets in that State as may be available under the law of that Member State, even if, under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter.

2. The measures referred to in paragraph 1 shall cease to apply when the court of the Member State having jurisdiction under this Regulation as to the substance of the matter has taken the measures it considers appropriate.

CHAPTER III RECOGNITION AND ENFORCEMENT

SECTION 1 Recognition

Article 21

Recognition of a judgment

1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

2. In particular, and without prejudice to paragraph 3, no special procedure shall be required for updating the civil-status records of a Member State on the basis of a judgment relating to divorce, legal separation or marriage annulment given in another Member State, and against which no further appeal lies under the law of that Member State.

3. Without prejudice to Section 4 of this Chapter, any interested party may, in accordance with the procedures provided for in Section 2 of this Chapter, apply for a decision that the judgment be or not be recognised.

The local jurisdiction of the court appearing in the list notified by each Member State to the Commission pursuant to Article 68 shall be determined by the internal law of the Member State in which proceedings for recognition or non-recognition are brought.

4. Where the recognition of a judgment is raised as an incidental question in a court of a Member State, that court may determine that issue.

Article 22

Grounds of non-recognition for judgments relating to divorce, legal separation or marriage annulment

A judgment relating to a divorce, legal separation or marriage annulment shall not be recognised:

- (a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought;
- (b) where it was given in default of appearance, if the respondent was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable the respondent to arrange for his or her defence unless it is determined that the respondent has accepted the judgment unequivocally;
- (c) if it is irreconcilable with a judgment given in proceedings between the same parties in the Member State in which recognition is sought; or
- (d) if it is irreconcilable with an earlier judgment given in another Member State or in a non-Member State between

the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

Article 23

Grounds of non-recognition for judgments relating to parental responsibility

A judgment relating to parental responsibility shall not be recognised:

- (a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child;
- (b) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought;
- (c) where it was given in default of appearance if the person in default was not 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 defence unless it is determined that such person has accepted the judgment unequivocally;
- (d) on the request of any person claiming that the judgment infringes his or her parental responsibility, if it was given without such person having been given an opportunity to be heard;
- (e) if it is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought;
- (f) if it is irreconcilable with a later judgment relating to parental responsibility given in another Member State or in the non-Member State of the habitu-

al residence of the child provided that the later judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

or

- (g) if the procedure laid down in Article 56 has not been complied with.

Article 24

Prohibition of review of jurisdiction of the court of origin

The jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in Articles 22(a) and 23(a) may not be applied to the rules relating to jurisdiction set out in Articles 3 to 14.

Article 25

Differences in applicable law

The recognition of a judgment may not be refused because the law of the Member State in which such recognition is sought would not allow divorce, legal separation or marriage annulment on the same facts.

Article 26

Non-review as to substance

Under no circumstances may a judgment be reviewed as to its substance.

Article 27

Stay of proceedings

1. A court of a Member State in which recognition is sought of a judgment given in another Member State may stay the proceedings if an ordinary appeal against the judgment has been lodged.

2. A court of a Member State in which recognition is sought of a judgment given in Ireland or the United Kingdom may stay the proceedings if enforcement is suspended in the Member State of origin by reason of an appeal.

SECTION 2
Application for a declaration
of enforceability

Article 28

Enforceable judgments

1. A judgment on the exercise of parental responsibility in respect of a child given in a Member State which is enforceable in that Member State and has been served shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.

2. However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland or in Northern Ireland only when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom.

Article 29

Jurisdiction of local courts

1. An application for a declaration of enforceability shall be submitted to the court appearing in the list notified by each Member State to the Commission pursuant to Article 68.

2. The local jurisdiction shall be determined by reference to the place of habitual residence of the person against whom enforcement is sought or by reference to the habitual residence of any child to whom the application relates.

Where neither of the places referred to in the first subparagraph can be found in the Member State of enforcement, the local jurisdiction shall be determined by reference to the place of enforcement.

Article 30

Procedure

1. The procedure for making the application shall be governed by the law of the Member State of enforcement.

2. The applicant must give an address for service within the area of jurisdiction of the court applied to. However, if the law of the Member State of enforcement does not provide for the furnishing of such an address, the applicant shall appoint a representative ad litem.

3. The documents referred to in Articles 37 and 39 shall be attached to the application.

Article 31

Decision of the court

1. The court applied to shall give its decision without delay. Neither the person against whom enforcement is sought, nor the child shall, at this stage of the proceedings, be entitled to make any submissions on the application.

2. The application may be refused only for one of the reasons specified in Articles 22, 23 and 24.

3. Under no circumstances may a judgment be reviewed as to its substance.

Article 32

Notice of the decision

The appropriate officer of the court shall without delay bring to the notice of the applicant the decision given on the application in accordance with the procedure laid down by the law of the Member State of enforcement.

Article 33

Appeal against the decision

1. The decision on the application for a declaration of enforceability may be appealed against by either party.

2. The appeal shall be lodged with the court appearing in the list notified by each Member State to the Commission pursuant to Article 68.

3. The appeal shall be dealt with in accordance with the rules governing procedure in contradictory matters.

4. If the appeal is brought by the applicant for a declaration of enforceability, the party against whom enforcement is sought shall be summoned to appear before the appellate court. If such person fails to appear, the provisions of Article 18 shall apply.

5. An appeal against a declaration of enforceability must be lodged within one month of service thereof. If the party against whom enforcement is sought is habitually resident in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be two months and shall run from the date of service, either on him or at his residence. No extension of time may be granted on account of distance.

Article 34

Courts of appeal and means of contest

The judgment given on appeal may be contested only by the proceedings referred to in the list notified by each Member State to the Commission pursuant to Article 68.

Article 35

Stay of proceedings

1. The court with which the appeal is lodged under Articles 33 or 34 may, on the application of the party against whom enforcement is sought, stay the proceedings if an ordinary appeal has been lodged in the Member State of origin, or if the time for such appeal has not yet expired. In the

latter case, the court may specify the time within which an appeal is to be lodged.

2. Where the judgment was given in Ireland or the United Kingdom, any form of appeal available in the Member State of origin shall be treated as an ordinary appeal for the purposes of paragraph 1.

Article 36

Partial enforcement

1. Where a judgment has been given in respect of several matters and enforcement cannot be authorised for all of them, the court shall authorise enforcement for one or more of them.

2. An applicant may request partial enforcement of a judgment.

SECTION 3

Provisions common to Sections 1 and 2

Article 37

Documents

1. A party seeking or contesting recognition or applying for a declaration of enforceability shall produce:

- (a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity;
and
- (b) the certificate referred to in Article 39.

2. In addition, in the case of a judgment given in default, the party seeking recognition or applying for a declaration of enforceability shall produce:

- (a) the original or certified true copy of the document which establishes that the defaulting party was served with the document instituting the proceedings or with an equivalent document;
or
- (b) any document indicating that the defendant has accepted the judgment unequivocally.

Article 38

Absence of documents

1. If the documents specified in Article 37(1)(b) or (2) are not produced, the court may specify a time for their production, accept equivalent documents or, if it considers that it has sufficient information before it, dispense with their production.

2. If the court so requires, a translation of such documents shall be furnished. The translation shall be certified by a person qualified to do so in one of the Member States.

Article 39

Certificate concerning judgments in matrimonial matters and certificate concerning judgments on parental responsibility

The competent court or authority of a Member State of origin shall, at the request of any interested party, issue a certificate using the standard form set out in Annex I (judgments in matrimonial matters) or in Annex II (judgments on parental responsibility).

SECTION 4

Enforceability of certain judgments concerning rights of access and of certain judgments which require the return of the child

Article 40

Scope

1. This Section shall apply to:

- (a) rights of access;
and
- (b) the return of a child entailed by a judgment given pursuant to Article 11(8).

2. The provisions of this Section shall not prevent a holder of parental responsibility from seeking recognition and enforcement of a judgment in accordance with the provisions in Sections 1 and 2 of this Chapter.

Article 41

Rights of access

1. The rights of access referred to in Article 40(1)(a) granted in an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2.

Even if national law does not provide for enforceability by operation of law of a judgment granting access rights, the court of origin may declare that the judgment shall be enforceable, notwithstanding any appeal.

2. The judge of origin shall issue the certificate referred to in paragraph 1 using the standard form in Annex III (certificate concerning rights of access) only if:

- (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, 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.

The certificate shall be completed in the language of the judgment.

3. Where the rights of access involve a cross-border situation at the time of the

delivery of the judgment, the certificate shall be issued ex officio when the judgment becomes enforceable, even if only provisionally. If the situation subsequently acquires a cross-border character, the certificate shall be issued at the request of one of the parties.

Article 42

Return of the child

1. The return of a child referred to in Article 40(1)(b) entailed by an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2.

Even if national law does not provide for enforceability by operation of law, notwithstanding any appeal, of a judgment requiring the return of the child mentioned in Article 11(b)(8), the court of origin may declare the judgment enforceable.

2. The judge of origin who delivered the judgment referred to in Article 40(1)(b) shall issue the certificate referred to in paragraph 1 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.

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 certi-

cate shall contain details of such measures.

The judge of origin shall of his or her own motion issue that certificate using the standard form in Annex IV (certificate concerning return of the child(ren)).

The certificate shall be completed in the language of the judgment.

Article 43

Rectification of the certificate

1. The law of the Member State of origin shall be applicable to any rectification of the certificate.

2. No appeal shall lie against the issuing of a certificate pursuant to Articles 41(1) or 42(1).

Article 44

Effects of the certificate

The certificate shall take effect only within the limits of the enforceability of the judgment.

Article 45

Documents

1. A party seeking enforcement of a judgment shall produce:

- (a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity;
- and
- (b) the certificate referred to in Article 41(1) or Article 42(1).

2. For the purposes of this Article,

- the certificate referred to in Article 41(1) shall be accompanied by a translation of point 12 relating to the arrangements for exercising right of access,
- the certificate referred to in Article 42(1) shall be accompanied by a translation of its point 14 relating to the arrangements for implementing the measures taken to ensure the child's return.

The translation shall be into the official language or one of the official languages of the Member State of enforcement or any other language that the Member State of enforcement expressly accepts. The translation shall be certified by a person qualified to do so in one of the Member States.

SECTION 5
Authentic instruments
and agreements

Article 46

Documents which have been formally drawn up or registered as authentic instruments and are enforceable in one Member State and also agreements between the parties that are enforceable in the Member State in which they were concluded shall be recognised and declared enforceable under the same conditions as judgments.

SECTION 6
Other provisions

Article 47

Enforcement procedure

1. The enforcement procedure is governed by the law of the Member State of enforcement.

2. Any judgment delivered by a court of another Member State and declared to be enforceable in accordance with Section 2 or certified in accordance with Article 41(1) or Article 42(1) shall be enforced in the Member State of enforcement in the same conditions as if it had been delivered in that Member State.

In particular, a judgment which has been certified according to Article 41(1) or Article 42(1) cannot be enforced if it is irreconcilable with a subsequent enforceable judgment.

Article 48

Practical arrangements for the exercise
of rights of access

1. The courts of the Member State of enforcement may make practical arrangements for organising the exercise of rights of access, if the necessary arrangements have not or have not sufficiently been made in the judgment delivered by the courts of the Member State having jurisdiction as to the substance of the matter and provided the essential elements of this judgment are respected.

2. The practical arrangements made pursuant to paragraph 1 shall cease to apply pursuant to a later judgment by the courts of the Member State having jurisdiction as to the substance of the matter.

Article 49

Costs

The provisions of this Chapter, with the exception of Section 4, shall also apply to the determination of the amount of costs and expenses of proceedings under this Regulation and to the enforcement of any order concerning such costs and expenses.

Article 50

Legal aid

An applicant who, in the Member State of origin, has benefited from complete or partial legal aid or exemption from costs or expenses shall be entitled, in the procedures provided for in Articles 21, 28, 41, 42 and 48 to benefit from the most favourable legal aid or the most extensive exemption from costs and expenses provided for by the law of the Member State of enforcement.

Article 51

Security, bond or deposit

No security, bond or deposit, however described, shall be required of a party who in one Member State applies for enforcement of a judgment given in another Member State on the following grounds:

- (a) that he or she is not habitually resident in the Member State in which enforcement is sought; or
- (b) that he or she is either a foreign national or, where enforcement is sought in either the United Kingdom or Ireland, does not have his or her „domicile“ in either of those Member States.

Article 52

Legalisation or other similar formality

No legalisation or other similar formality shall be required in respect of the documents referred to in Articles 37, 38 and 45 or in respect of a document appointing a representative ad litem.

CHAPTER IV

COOPERATION BETWEEN CENTRAL AUTHORITIES IN MATTERS OF PARENTAL RESPONSIBILITY

Article 53

Designation

Each Member State shall designate one or more central authorities to assist with the application of this Regulation and shall specify the geographical or functional jurisdiction of each. Where a Member State has designated more than one central authority, communications shall normally be sent direct to the relevant central authority with jurisdiction. Where a communication is sent to a central authority without jurisdiction, the latter shall be responsible for forwarding it to the central authority with jurisdiction and informing the sender accordingly.

Article 54

General functions

The central authorities shall communicate information on national laws and procedures and take measures to improve the application of this Regulation and strengthening their cooperation. For this purpose the European Judicial Network in civil and commercial matters created by Decision No 2001/470/EC shall be used.

Article 55

Cooperation on cases specific to parental responsibility

The central authorities shall, upon request from a central authority of another Member State or from a holder of parental responsibility, cooperate on specific cases to achieve the purposes of this Regulation. To this end, they shall, acting directly or through public authorities or other bodies, take all appropriate steps in accordance with the law of that Member State in matters of personal data protection to:

- (a) collect and exchange information:
 - (i) on the situation of the child;
 - (ii) on any procedures under way; or
 - (iii) on decisions taken concerning the child;
- (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;
- (c) facilitate communications between courts, in particular for the application of Article 11(6) and (7) and Article 15;
- (d) provide such information and assistance as is needed by courts to apply Article 56; and
- (e) facilitate agreement between holders of parental responsibility through mediation or other means, and facilitate cross-border cooperation to this end.

Article 56

Placement of a child in another Member State

1. Where a court having jurisdiction under Articles 8 to 15 contemplates the placement of a child in institutional care or with a foster family and where such placement is to take place in another Member State, it shall first consult the central authority or other authority having jurisdiction in the latter State where public authority intervention in that Member State is required for domestic cases of child placement.

2. The judgment on placement referred to in paragraph 1 may be made in the requesting State only if the competent authority of the requested State has consented to the placement.

3. The procedures for consultation or consent referred to in paragraphs 1 and 2 shall be governed by the national law of the requested State.

4. Where the authority having jurisdiction under Articles 8 to 15 decides to place the child in a foster family, and where such placement is to take place in another Member State and where no public authority intervention is required in the latter Member State for domestic cases of child placement, it shall so inform the central authority or other authority having jurisdiction in the latter State.

Article 57

Working method

1. Any holder of parental responsibility may submit, to the central authority of the Member State of his or her habitual residence or to the central authority of the Member State where the child is habitually resident or present, a request for assistance as mentioned in Article 55. In general, the request shall include all available information of relevance to its enforcement. Where the request for assistance concerns the

recognition or enforcement of a judgment on parental responsibility that falls within the scope of this Regulation, the holder of parental responsibility shall attach the relevant certificates provided for in Articles 39, 41(1) or 42(1).

2. Member States shall communicate to the Commission the official language or languages of the Community institutions other than their own in which communications to the central authorities can be accepted.

3. The assistance provided by the central authorities pursuant to Article 55 shall be free of charge.

4. Each central authority shall bear its own costs.

Article 58

Meetings

1. In order to facilitate the application of this Regulation, central authorities shall meet regularly.

2. These meetings shall be convened in compliance with Decision No 2001/470/EC establishing a European Judicial Network in civil and commercial matters.

CHAPTER V

RELATIONS WITH OTHER INSTRUMENTS

Article 59

Relation with other instruments

1. Subject to the provisions of Articles 60, 63, 64 and paragraph 2 of this Article, this Regulation shall, for the Member States, supersede conventions existing at the time of entry into force of this Regulation which have been concluded between two or more Member States and relate to matters governed by this Regulation.

2. (a) Finland and Sweden shall have the option of declaring that the Convention of 6 February 1931 between Denmark, Finland, Iceland, Norway and Sweden com-

prising international private law provisions on marriage, adoption and guardianship, together with the Final Protocol thereto, will apply, in whole or in part, in their mutual relations, in place of the rules of this Regulation. Such declarations shall be annexed to this Regulation and published in the Official Journal of the European Union. They may be withdrawn, in whole or in part, at any moment by the said Member States.

- (b) The principle of non-discrimination on the grounds of nationality between citizens of the Union shall be respected.
- (c) The rules of jurisdiction in any future agreement to be concluded between the Member States referred to in subparagraph (a) which relate to matters governed by this Regulation shall be in line with those laid down in this Regulation.
- (d) Judgments handed down in any of the Nordic States which have made the declaration provided for in subparagraph (a) under a forum of jurisdiction corresponding to one of those laid down in Chapter II of this Regulation, shall be recognised and enforced in the other Member States under the rules laid down in Chapter III of this Regulation.

3. Member States shall send to the Commission:

- (a) a copy of the agreements and uniform laws implementing these agreements referred to in paragraph 2(a) and (c);
- (b) any denunciations of, or amendments to, those agreements or uniform laws.

Article 60

Relations with certain multilateral conventions

In relations between Member States, this Regulation shall take precedence over the following Conventions in so far as they

concern matters governed by this Regulation:

- (a) the Hague Convention of 5 October 1961 concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Minors;
- (b) the Luxembourg Convention of 8 September 1967 on the Recognition of Decisions Relating to the Validity of Marriages;
- (c) the Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations;
- (d) the European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children;
- and
- (e) the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

Article 61

Relation with the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children

As concerns the relation with the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, this Regulation shall apply:

- (a) where the child concerned has his or her habitual residence on the territory of a Member State;
- (b) as concerns the recognition and enforcement of a judgment given in a court of a Member State on the territory of another Member State, even if the child concerned has his or her habitual resi-

dence on the territory of a third State which is a contracting Party to the said Convention.

Article 62

Scope of effects

1. The agreements and conventions referred to in Articles 59(1), 60 and 61 shall continue to have effect in relation to matters not governed by this Regulation.

2. The conventions mentioned in Article 60, in particular the 1980 Hague Convention, continue to produce effects between the Member States which are party thereto, in compliance with Article 60.

Article 63

Treaties with the Holy See

1. This Regulation shall apply without prejudice to the International Treaty (Concordat) between the Holy See and Portugal, signed at the Vatican City on 7 May 1940.

2. Any decision as to the invalidity of a marriage taken under the Treaty referred to in paragraph 1 shall be recognised in the Member States on the conditions laid down in Chapter III, Section 1.

3. The provisions laid down in paragraphs 1 and 2 shall also apply to the following international treaties (Concordats) with the Holy See:

(a) „Concordato lateranense“ of 11 February 1929 between Italy and the Holy See, modified by the agreement, with additional Protocol signed in Rome on 18 February 1984;

(b) Agreement between the Holy See and Spain on legal affairs of 3 January 1979.

4. Recognition of the decisions provided for in paragraph 2 may, in Italy or in Spain, be subject to the same procedures and the same checks as are applicable to decisions of the ecclesiastical courts handed down in accordance with the international treat-

ties concluded with the Holy See referred to in paragraph 3.

5. Member States shall send to the Commission:

(a) a copy of the Treaties referred to in paragraphs 1 and 3;

(b) any denunciations of or amendments to those Treaties.

CHAPTER VI

TRANSITIONAL PROVISIONS

Article 64

1. The provisions of this Regulation shall apply only to legal proceedings instituted, to documents formally drawn up or registered as authentic instruments and to agreements concluded between the parties after its date of application in accordance with Article 72.

2. Judgments given after the date of application of this Regulation in proceedings instituted before that date but after the date of entry into force of Regulation (EC) No 1347/2000 shall be recognised and enforced in accordance with the provisions of Chapter III of this Regulation if jurisdiction was founded on rules which accorded with those provided for either in Chapter II or in Regulation (EC) No 1347/2000 or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

3. Judgments given before the date of application of this Regulation in proceedings instituted after the entry into force of Regulation (EC) No 1347/2000 shall be recognised and enforced in accordance with the provisions of Chapter III of this Regulation provided they relate to divorce, legal separation or marriage annulment or parental responsibility for the children of both spouses on the occasion of these matrimonial proceedings.

4. Judgments given before the date of application of this Regulation but after the date of entry into force of Regulation (EC) No 1347/2000 in proceedings instituted before the date of entry into force of Regulation (EC) No 1347/2000 shall be recognised and enforced in accordance with the provisions of Chapter III of this Regulation provided they relate to divorce, legal separation or marriage annulment or parental responsibility for the children of both spouses on the occasion of these matrimonial proceedings and that jurisdiction was founded on rules which accorded with those provided for either in Chapter II of this Regulation or in Regulation (EC) No 1347/2000 or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

CHAPTER VII FINAL PROVISIONS

Article 65

Review

No later than 1 January 2012, and every five years thereafter, the Commission shall present to the European Parliament, to the Council and to the European Economic and Social Committee a report on the application of this Regulation on the basis of information supplied by the Member States. The report shall be accompanied if need be by proposals for adaptations.

Article 66

Member States with two or more legal systems

With regard to a Member State in which two or more systems of law or sets of rules concerning matters governed by this Regulation apply in different territorial units:

- (a) any reference to habitual residence in that Member State shall refer to habitual residence in a territorial unit;
- (b) any reference to nationality, or in the case of the United Kingdom „domicile“, shall refer to the territorial unit designated by the law of that State;
- (c) any reference to the authority of a Member State shall refer to the authority of a territorial unit within that State which is concerned;
- (d) any reference to the rules of the requested Member State shall refer to the rules of the territorial unit in which jurisdiction, recognition or enforcement is invoked.

Article 67

Information on central authorities and languages accepted

The Member States shall communicate to the Commission within three months following the entry into force of this Regulation:

- (a) the names, addresses and means of communication for the central authorities designated pursuant to Article 53;
- (b) the languages accepted for communications to central authorities pursuant to Article 57(2);
and
- (c) the languages accepted for the certificate concerning rights of access pursuant to Article 45(2).

The Member States shall communicate to the Commission any changes to this information.

The Commission shall make this information publicly available.

Article 68

Information relating to courts and redress procedures

The Member States shall notify to the Commission the lists of courts and redress

procedures referred to in Articles 21, 29, 33 and 34 and any amendments thereto.

The Commission shall update this information and make it publicly available through the publication in the Official Journal of the European Union and any other appropriate means.

Article 69

Amendments to the Annexes

Any amendments to the standard forms in Annexes I to IV shall be adopted in accordance with the consultative procedure set out in Article 70(2).

Article 70

Committee

1. The Commission shall be assisted by a committee (committee).

2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply.

3. The committee shall adopt its rules of procedure.

Article 71

Repeal of Regulation (EC)

No 1347/2000

1. Regulation (EC) No 1347/2000 shall be repealed as from the date of application of this Regulation.

2. Any reference to Regulation (EC) No 1347/2000 shall be construed as a reference to this Regulation according to the comparative table in Annex V.

Article 72

Entry into force

This Regulation shall enter into force on 1 August 2004.

The Regulation shall apply from 1 March 2005, with the exception of Articles 67, 68, 69 and 70, which shall apply from 1 August 2004.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, 27 November 2003.

For the Council

The President

R. Castelli

- (1) OJ C 203 E, 27.8.2002, p. 155.
- (2) Opinion delivered on 20 September 2002 (not yet published in the Official Journal).
- (3) OJ C 61, 14.3.2003, p. 76.
- (4) OJ L 160, 30.6.2000, p. 19.
- (5) At the time of the adoption of Regulation (EC) No 1347/2000 the Council took note of the explanatory report concerning that Convention prepared by Professor Alegria Borrás (OJ C 221, 16.7.1998, p. 27).
- (6) OJ C 234, 15.8.2000, p. 7.
- (7) OJ L 12, 16.1.2001, p. 1. Regulation as last amended by Commission Regulation (EC) No 1496/2002 (OJ L 225, 22.8.2002, p. 13).
- (8) OJ L 160, 30.6.2000, p. 37.
- (9) OJ L 174, 27.6.2001, p. 1.
- (10) OJ L 174, 27.6.2001, p. 25.
- (11) OJ L 184, 17.7.1999, p. 23.

Annex 3 Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations

Council Regulation (EC) No 4/2009 of 18 December 2008

on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations

THE COUNCIL OF THE EUROPEAN UNION, Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and Article 67(2) thereof, Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament [1],

Having regard to the opinion of the European Economic and Social Committee [2],

Whereas:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is ensured. For the gradual establishment of such an area, the Community is to adopt, among others, measures relating to judicial cooperation in civil matters having cross-border implications, in so far as necessary for the proper functioning of the internal market.

(2) In accordance with Article 65(b) of the Treaty, these measures must aim, inter alia, to promote the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction.

(3) In this respect, the Community has among other measures already adopted Council Regulation (EC) No 44/2001 of 22

December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [3], Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters [4], Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [5], Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes [6], Council Regulation (EC) No 2201/2003 of 27 November 2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility [7], Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims [8], and Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) [9].

(4) The European Council in Tampere on 15 and 16 October 1999 invited the Council and the Commission to establish special common procedural rules to simplify and accelerate the settlement of cross-border disputes concerning, inter alia, maintenance claims. It also called for the abolition of intermediate measures required for the recognition and enforcement in the requested State of a decision given in another Member State, particularly a decision relating to a maintenance claim.

(5) A programme of measures for the enforcement of the principle of mutual recognition of decisions in civil and commercial matters [10], common to the Com-

mission and to the Council, was adopted on 30 November 2000. That programme provides for the abolition of the exequatur procedure for maintenance claims in order to boost the effectiveness of the means by which maintenance creditors safeguard their rights.

(6) The European Council meeting in Brussels on 4 and 5 November 2004 adopted a new programme called „The Hague Programme: strengthening freedom, security and justice in the European Union“ (hereinafter referred to as The Hague Programme) [11].

(7) At its meeting on 2 and 3 June 2005, the Council adopted a Council and Commission Action Plan [12] which implements The Hague Programme in concrete actions and which mentions the necessity of adopting proposals on maintenance obligations.

(8) In the framework of The Hague Conference on Private International Law, the Community and its Member States took part in negotiations which led to the adoption on 23 November 2007 of the Convention on the International Recovery of Child Support and other Forms of Family Maintenance (hereinafter referred to as the 2007 Hague Convention) and the Protocol on the Law Applicable to Maintenance Obligations (hereinafter referred to as the 2007 Hague Protocol). Both those instruments should therefore be taken into account in this Regulation.

(9) A maintenance creditor should be able to obtain easily, in a Member State, a decision which will be automatically enforceable in another Member State without further formalities.

(10) In order to achieve this goal, it is advisable to create a Community instrument in matters relating to maintenance obligations bringing together provisions on jurisdiction, conflict of laws, recogni-

on and enforceability, enforcement, legal aid and cooperation between Central Authorities.

(11) The scope of this Regulation should cover all maintenance obligations arising from a family relationship, parentage, marriage or affinity, in order to guarantee equal treatment of all maintenance creditors. For the purposes of this Regulation, the term „maintenance obligation“ should be interpreted autonomously.

(12) In order to take account of the various ways of resolving maintenance obligation issues in the Member States, this Regulation should apply both to court decisions and to decisions given by administrative authorities, provided that the latter offer guarantees with regard to, in particular, their impartiality and the right of all parties to be heard. Those authorities should therefore apply all the rules of this Regulation.

(13) For the reasons set out above, this Regulation should also ensure the recognition and enforcement of court settlements and authentic instruments without affecting the right of either party to such a settlement or instrument to challenge the settlement or instrument before the courts of the Member State of origin.

(14) It should be provided in this Regulation that for the purposes of an application for the recognition and enforcement of a decision relating to maintenance obligations the term „creditor“ includes public bodies which are entitled to act in place of a person to whom maintenance is owed or to claim reimbursement of benefits provided to the creditor in place of maintenance. Where a public body acts in this capacity, it should be entitled to the same services and the same legal aid as a creditor.

(15) In order to preserve the interests of maintenance creditors and to promote the proper administration of justice wi-

thin the European Union, the rules on jurisdiction as they result from Regulation (EC) No 44/2001 should be adapted. The circumstance that the defendant is habitually resident in a third State should no longer entail the non-application of Community rules on jurisdiction, and there should no longer be any referral to national law. This Regulation should therefore determine the cases in which a court in a Member State may exercise subsidiary jurisdiction.

(16) In order to remedy, in particular, situations of denial of justice this Regulation should provide a forum necessitatis allowing a court of a Member State, on an exceptional basis, to hear a case which is closely connected with a third State. Such an exceptional basis may be deemed to exist when proceedings prove impossible in the third State in question, for example because of civil war, or when an applicant cannot reasonably be expected to initiate or conduct proceedings in that State. Jurisdiction based on the forum necessitatis should, however, be exercised only if the dispute has a sufficient connection with the Member State of the court seised, for instance the nationality of one of the parties.

(17) An additional rule of jurisdiction should provide that, except under specific conditions, proceedings to modify an existing maintenance decision or to have a new decision given can be brought by the debtor only in the State in which the creditor was habitually resident at the time the decision was given and in which he remains habitually resident. To ensure proper symmetry between the 2007 Hague Convention and this Regulation, this rule should also apply as regards decisions given in a third State which is party to the said Convention in so far as that Convention is in force between that State and the Community and covers the same mainte-

nance obligations in that State and in the Community.

(18) For the purposes of this Regulation, it should be provided that in Ireland the concept of „domicile“ replaces the concept of „nationality“ which is also the case in the United Kingdom, subject to this Regulation being applicable in the latter Member State in accordance with Article 4 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community.

(19) In order to increase legal certainty, predictability and the autonomy of the parties, this Regulation should enable the parties to choose the competent court by agreement on the basis of specific connecting factors. To protect the weaker party, such a choice of court should not be allowed in the case of maintenance obligations towards a child under the age of 18.

(20) It should be provided in this Regulation that, for Member States bound by the 2007 Hague Protocol, the rules on conflict of laws in respect of maintenance obligations will be those set out in that Protocol. To that end, a provision referring to the said Protocol should be inserted. The 2007 Hague Protocol will be concluded by the Community in time to enable this Regulation to apply. To take account of a scenario in which the 2007 Hague Protocol does not apply to all the Member States a distinction for the purposes of recognition, enforceability and enforcement of decisions needs to be made in this Regulation between the Member States bound by the 2007 Hague Protocol and those not bound by it.

(21) It needs to be made clear in this Regulation that these rules on conflict of laws determine only the law applicable to maintenance obligations and do not determine the law applicable to the establishment

of the family relationships on which the maintenance obligations are based. The establishment of family relationships continues to be covered by the national law of the Member States, including their rules of private international law.

(22) In order to ensure swift and efficient recovery of a maintenance obligation and to prevent delaying actions, decisions in matters relating to maintenance obligations given in a Member State should in principle be provisionally enforceable. This Regulation should therefore provide that the court of origin should be able to declare the decision provisionally enforceable even if the national law does not provide for enforceability by operation of law and even if an appeal has been or could still be lodged against the decision under national law.

(23) To limit the costs of proceedings subject to this Regulation, the greatest possible use of modern communications technologies, particularly for hearing parties, would be helpful.

(24) The guarantees provided by the application of rules on conflict of laws should provide the justification for having decisions relating to maintenance obligations given in a Member State bound by the 2007 Hague Protocol recognised and regarded as enforceable in all the other Member States without any procedure being necessary and without any form of control on the substance in the Member State of enforcement.

(25) Recognition in a Member State of a decision relating to maintenance obligations has as its only object to allow the recovery of the maintenance claim determined in the decision. It does not imply the recognition by that Member State of the family relationship, parentage, marriage or affinity underlying the maintenance obligations which gave rise to the decision.

(26) For decisions on maintenance obligations given in a Member State not bound by the 2007 Hague Protocol, there should be provision in this Regulation for a procedure for recognition and declaration of enforceability. That procedure should be modelled on the procedure and the grounds for refusing recognition set out in Regulation (EC) No 44/2001. To accelerate proceedings and enable the creditor to recover his claim quickly, the court seized should be required to give its decision within a set time, unless there are exceptional circumstances.

(27) It would also be appropriate to limit as far as possible the formal enforcement requirements likely to increase the costs to be borne by the maintenance creditor. To that end, this Regulation should provide that a maintenance creditor ought not to be required to have a postal address or an authorised representative in the Member State of enforcement, without this otherwise affecting the internal organisation of the Member States in matters relating to enforcement proceedings.

(28) In order to limit the costs of enforcement proceedings, no translation should be required unless enforcement is contested, and without prejudice to the rules applicable to service of documents.

(29) In order to guarantee compliance with the requirements of a fair trial, this Regulation should provide for the right of a defendant who did not enter an appearance in the court of origin of a Member State bound by the 2007 Hague Protocol to apply for a review of the decision given against him at the stage of enforcement. However, the defendant must apply for this review within a set period which should start no later than the day on which, in the enforcement proceedings, his property was first made non-disposable in whole or in part. That right to apply for a review should be

an extraordinary remedy granted to the defendant in default and not affecting the application of any extraordinary remedies laid down in the law of the Member State of origin provided that those remedies are not incompatible with the right to a review under this Regulation.

(30) In order to speed up the enforcement in another Member State of a decision given in a Member State bound by the 2007 Hague Protocol it is necessary to limit the grounds of refusal or of suspension of enforcement which may be invoked by the debtor on account of the cross-border nature of the maintenance claim. This limitation should not affect the grounds of refusal or of suspension laid down in national law which are not incompatible with those listed in this Regulation, such as the debtor's discharge of his debt at the time of enforcement or the unattachable nature of certain assets.

(31) To facilitate cross-border recovery of maintenance claims, provision should be made for a system of cooperation between Central Authorities designated by the Member States. These Authorities should assist maintenance creditors and debtors in asserting their rights in another Member State by submitting applications for recognition, enforceability and enforcement of existing decisions, for the modification of such decisions or for the establishment of a decision. They should also exchange information in order to locate debtors and creditors, and identify their income and assets, as necessary. Lastly, they should cooperate with each other by exchanging general information and promoting cooperation amongst the competent authorities in their Member States.

(32) A Central Authority designated under this Regulation should bear its own costs, except in specifically determined cases, and should provide assistance for

all applicants residing in its Member State. The criterion for determining a person's right to request assistance from a Central Authority should be less strict than the connecting factor of „habitual residence“ used elsewhere in this Regulation. However, the „residence“ criterion should exclude mere presence.

(33) In order to provide full assistance to maintenance creditors and debtors and to facilitate as much as possible cross-border recovery of maintenance, the Central Authorities should be able to obtain a certain amount of personal information. This Regulation should therefore oblige the Member States to ensure that their Central Authorities have access to such information through the public authorities or administrations which hold the information concerned in the course of their ordinary activities. It should however be left to each Member State to decide on the arrangements for such access. Accordingly, a Member State should be able to designate the public authorities or administrations which will be required to supply the information to the Central Authority in accordance with this Regulation, including, if appropriate, public authorities or administrations already designated in the context of other systems for access to information. Where a Member State designates public authorities or administrations, it should ensure that its Central Authority is able to access the requisite information held by those bodies as provided for in this Regulation. A Member State should also be able to allow its Central Authority to access requisite information from any other legal person which holds it and controls its processing.

(34) In the context of access to personal data and the use and transmission thereof, the requirements of Directive 95/46/EC of the European Parliament and of the Coun-

cil of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [13], as transposed into the national law of the Member States, should be complied with.

(35) For the purposes of the application of this Regulation it is however necessary to define the specific conditions of access to personal data and of the use and transmission of such data. In this context, the opinion of the European Data Protection Supervisor [14] has been taken into consideration. Notification of the data subject should take place in accordance with national law. It should however be possible to defer the notification to prevent the debtor from transferring his assets and thus jeopardising the recovery of the maintenance claim.

(36) On account of the costs of proceedings it is appropriate to provide for a very favourable legal aid scheme, that is, full coverage of the costs relating to proceedings concerning maintenance obligations in respect of children under the age of 21 initiated via the Central Authorities. Specific rules should therefore be added to the current rules on legal aid in the European Union which exist by virtue of Directive 2003/8/EC thus setting up a special legal aid scheme for maintenance obligations. In this context, the competent authority of the requested Member State should be able, exceptionally, to recover costs from an applicant having received free legal aid and lost the case, provided that the person's financial situation so permits. This would apply, in particular, where someone well-off had acted in bad faith.

(37) In addition, for maintenance obligations other than those referred to in the preceding recital, all parties should be guaranteed the same treatment in terms of legal aid at the time of enforcement of a

decision in another Member State. Accordingly, the provisions of this Regulation on continuity of legal aid should be understood as also granting such aid to a party who, while not having received legal aid in the proceedings to obtain or amend a decision in the Member State of origin, did then benefit from such aid in that State in the context of an application for enforcement of the decision. Similarly, a party who benefited from free proceedings before an administrative authority listed in Annex X should, in the Member State of enforcement, benefit from the most favourable legal aid or the most extensive exemption from costs or expenses, provided that he shows that he would have so benefited in the Member State of origin.

(38) In order to minimise the costs of translating supporting documents the court seised should only require a translation of such documents when this is necessary, without prejudice to the rights of the defence and the rules applicable concerning service of documents.

(39) To facilitate the application of this Regulation, Member States should be obliged to provide the Commission with the names and contact details of their Central Authorities and with other information. That information should be made available to practitioners and to the public through publication in the Official Journal of the European Union or through electronic access to the European Judicial Network in civil and commercial matters established by Decision 2001/470/EC. Furthermore, the use of forms provided for in this Regulation should facilitate and speed up communication between the Central Authorities and make it possible to submit applications electronically.

(40) The relationship between this Regulation and the bilateral or multilateral conventions and agreements on maintenance

obligations to which the Member States are party should be specified. In this context it should be stipulated that Member States which are party to the Convention of 23 March 1962 between Sweden, Denmark, Finland, Iceland and Norway on the recovery of maintenance by the Member States may continue to apply that Convention since it contains more favourable rules on recognition and enforcement than those in this Regulation. As regards the conclusion of future bilateral agreements on maintenance obligations with third States, the procedures and conditions under which Member States would be authorised to negotiate and conclude such agreements on their own behalf should be determined in the course of discussions relating to a Commission proposal on the subject.

(41) In calculating the periods and time limits provided for in this Regulation, Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits [15] should apply.

(42) The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [16].

(43) In particular, the Commission should be empowered to adopt any amendments to the forms provided for in this Regulation in accordance with the advisory procedure provided for in Article 3 of Decision 1999/468/EC. For the establishment of the list of the administrative authorities falling within the scope of this Regulation, and the list of authorities competent to certify the right to legal aid, the Commission should be empowered to act in accordance with

the management procedure provided for in Article 4 of that Decision.

(44) This Regulation should amend Regulation (EC) No 44/2001 by replacing the provisions of that Regulation applicable to maintenance obligations. Subject to the transitional provisions of this Regulation, Member States should, in matters relating to maintenance obligations, apply the provisions of this Regulation on jurisdiction, recognition, enforceability and enforcement of decisions and on legal aid instead of those of Regulation (EC) No 44/2001 as from the date on which this Regulation becomes applicable.

(45) Since the objectives of this Regulation, namely the introduction of a series of measures to ensure the effective recovery of maintenance claims in cross-border situations and thus to facilitate the free movement of persons within the European Union, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Regulation, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article this Regulation does not go beyond what is necessary to achieve those objectives.

(46) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Ireland has given notice of its wish to take part in the adoption and application of this Regulation.

(47) In accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community,

the United Kingdom is not taking part in the adoption of this Regulation and is not bound by it or subject to its application. This is, however, without prejudice to the possibility for the United Kingdom of notifying its intention of accepting this Regulation after its adoption in accordance with Article 4 of the said Protocol.

(48) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application, without prejudice to the possibility for Denmark of applying the amendments made here to Regulation (EC) No 44/2001 pursuant to Article 3 of the Agreement of 19 October 2005 between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [17],

HAS ADOPTED THIS REGULATION:

CHAPTER I SCOPE AND DEFINITIONS

Article 1

Scope of application

1. This Regulation shall apply to maintenance obligations arising from a family relationship, parentage, marriage or affinity.

2. In this Regulation, the term „Member State“ shall mean Member States to which this Regulation applies.

Article 2

Definitions

1. For the purposes of this Regulation:

1. the term „decision“ shall mean a decision in matters relating to maintenance obligations given by a court of a Member State, whatever the decision may be cal-

led, including a decree, order, judgment or writ of execution, as well as a decision by an officer of the court determining the costs or expenses. For the purposes of Chapters VII and VIII, the term „decision“ shall also mean a decision in matters relating to maintenance obligations given in a third State;

2. the term „court settlement“ shall mean a settlement in matters relating to maintenance obligations which has been approved by a court or concluded before a court in the course of proceedings;

3. the term „authentic instrument“ shall mean:

(a) a document in matters relating to maintenance obligations which has been formally drawn up or registered as an authentic instrument in the Member State of origin and the authenticity of which:

(i) relates to the signature and the content of the instrument, and

(ii) has been established by a public authority or other authority empowered for that purpose; or,

(b) an arrangement relating to maintenance obligations concluded with administrative authorities of the Member State of origin or authenticated by them;

4. the term „Member State of origin“ shall mean the Member State in which, as the case may be, the decision has been given, the court settlement has been approved or concluded, or the authentic instrument has been established;

5. the term „Member State of enforcement“ shall mean the Member State in which the enforcement of the decision, the court settlement or the authentic instrument is sought;

6. the term „requesting Member State“ shall mean the Member State whose Central Authority transmits an application pursuant to Chapter VII;

7. the term „requested Member State“ shall mean the Member State whose Central Authority receives an application pursuant to Chapter VII;

8. the term „2007 Hague Convention Contracting State“ shall mean a State which is a contracting party to the Hague Convention of 23 November 2007 on the International Recovery of Child Support and other Forms of Family Maintenance (hereinafter referred to as the 2007 Hague Convention) to the extent that the said Convention applies between the Community and that State;

9. the term „court of origin“ shall mean the court which has given the decision to be enforced;

10. the term „creditor“ shall mean any individual to whom maintenance is owed or is alleged to be owed;

11. the term „debtor“ shall mean any individual who owes or who is alleged to owe maintenance.

2.??? For the purposes of this Regulation, the term „court“ shall include administrative authorities of the Member States with competence in matters relating to maintenance obligations provided that such authorities offer guarantees with regard to impartiality and the right of all parties to be heard and provided that their decisions under the law of the Member State where they are established:

- (i) may be made the subject of an appeal to or review by a judicial authority; and
- (ii) have a similar force and effect as a decision of a judicial authority on the same matter.

These administrative authorities shall be listed in Annex X. That Annex shall be established and amended in accordance with the management procedure referred to in Article 73(2) at the request of the Member

State in which the administrative authority concerned is established.

3. For the purposes of Articles 3, 4 and 6, the concept of „domicile“ shall replace that of „nationality“ in those Member States which use this concept as a connecting factor in family matters.

For the purposes of Article 6, parties which have their „domicile“ in different territorial units of the same Member State shall be deemed to have their common „domicile“ in that Member State.

CHAPTER II JURISDICTION

Article 3

General provisions

In matters relating to maintenance obligations in Member States, jurisdiction shall lie with:

- (a) the court for the place where the defendant is habitually resident, or
- (b) the court for the place where the creditor is habitually resident, or
- (c) the court which, according to its own law, has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties, or
- (d) the court which, according to its own law, has jurisdiction to entertain proceedings concerning parental responsibility if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties.

Article 4

Choice of court

1. The parties may agree that the following court or courts of a Member State shall have jurisdiction to settle any dispu-

tes in matters relating to a maintenance obligation which have arisen or may arise between them:

- (a) a court or the courts of a Member State in which one of the parties is habitually resident;
- (b) a court or the courts of a Member State of which one of the parties has the nationality;
- (c) in the case of maintenance obligations between spouses or former spouses:
 - (i) the court which has jurisdiction to settle their dispute in matrimonial matters; or
 - (ii) a court or the courts of the Member State which was the Member State of the spouses' last common habitual residence for a period of at least one year.

The conditions referred to in points (a), (b) or (c) have to be met at the time the choice of court agreement is concluded or at the time the court is seised.

The jurisdiction conferred by agreement shall be exclusive unless the parties have agreed otherwise.

2. A choice of court agreement shall be in writing. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to „writing“.

3. This Article shall not apply to a dispute relating to a maintenance obligation towards a child under the age of 18.

4. If the parties have agreed to attribute exclusive jurisdiction to a court or courts of a State party to the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [18], signed on 30 October 2007 in Lugano (hereinafter referred to as the Lugano Convention), where that State is not a Member State, the said Convention shall apply except in the case of the disputes referred to in paragraph 3.

Article 5

Jurisdiction based on the appearance of the defendant

Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction.

Article 6

Subsidiary jurisdiction

Where no court of a Member State has jurisdiction pursuant to Articles 3, 4 and 5 and no court of a State party to the Lugano Convention which is not a Member State has jurisdiction pursuant to the provisions of that Convention, the courts of the Member State of the common nationality of the parties shall have jurisdiction.

Article 7

Forum necessitatis

Where no court of a Member State has jurisdiction pursuant to Articles 3, 4, 5 and 6, the courts of a Member State may, on an exceptional basis, hear the case if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely connected.

The dispute must have a sufficient connection with the Member State of the court seised.

Article 8

Limit on proceedings

1. Where a decision is given in a Member State or a 2007 Hague Convention Contracting State where the creditor is habitually resident, proceedings to modify the decision or to have a new decision given cannot be brought by the debtor in any other Member State as long as the creditor

remains habitually resident in the State in which the decision was given.

2. Paragraph 1 shall not apply:

- (a) where the parties have agreed in accordance with Article 4 to the jurisdiction of the courts of that other Member State;
- (b) where the creditor submits to the jurisdiction of the courts of that other Member State pursuant to Article 5;
- (c) where the competent authority in the 2007 Hague Convention Contracting State of origin cannot, or refuses to, exercise jurisdiction to modify the decision or give a new decision; or
- (d) where the decision given in the 2007 Hague Convention Contracting State of origin cannot be recognised or declared enforceable in the Member State where proceedings to modify the decision or to have a new decision given are contemplated.

Article 9

Seising of a court

For the purposes of this Chapter, a court shall be deemed to be seised:

(a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the claimant has not subsequently failed to take the steps he was required to take to have service effected on the defendant; or

(b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the claimant has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

Article 10

Examination as to jurisdiction

Where a court of a Member State is seised of a case over which it has no jurisdiction under this Regulation it shall declare of its own motion that it has no jurisdiction.

Article 11

Examination as to admissibility

1. Where a defendant habitually resident in a State other than the Member State where the action was brought does not enter an appearance, the court with jurisdiction shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.

2. Article 19 of Regulation (EC) No 1393/2007 shall apply instead of the provisions of paragraph 1 of this Article if the document instituting the proceedings or an equivalent document had to be transmitted from one Member State to another pursuant to that Regulation.

3. Where the provisions of Regulation (EC) No 1393/2007 are not applicable, Article 15 of the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters shall apply if the document instituting the proceedings or an equivalent document had to be transmitted abroad pursuant to that Convention.

Article 12

Lis pendens

1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such

time as the jurisdiction of the court first seised is established.

2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 13

Related actions

1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

Article 14

Provisional, including protective, measures

Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.

CHAPTER III APPLICABLE LAW

Article 15

Determination of the applicable law
The law applicable to maintenance obligations shall be determined in accordance

with the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations (hereinafter referred to as the 2007 Hague Protocol) in the Member States bound by that instrument.

CHAPTER IV RECOGNITION, ENFORCEABILITY AND ENFORCEMENT OF DECISIONS

Article 16

Scope of application of this Chapter

1. This Chapter shall govern the recognition, enforceability and enforcement of decisions falling within the scope of this Regulation.

2. Section 1 shall apply to decisions given in a Member State bound by the 2007 Hague Protocol.

3. Section 2 shall apply to decisions given in a Member State not bound by the 2007 Hague Protocol.

4. Section 3 shall apply to all decisions.

SECTION 1

Decisions given in a Member State bound by the 2007 Hague Protocol

Article 17

Abolition of exequatur

1. A decision given in a Member State bound by the 2007 Hague Protocol shall be recognised in another Member State without any special procedure being required and without any possibility of opposing its recognition.

2. A decision given in a Member State bound by the 2007 Hague Protocol which is enforceable in that State shall be enforceable in another Member State without the need for a declaration of enforceability.

Article 18

Protective measures

An enforceable decision shall carry with it by operation of law the power to proceed to any protective measures which exist under the law of the Member State of enforcement.

Article 19

Right to apply for a review

1. A defendant who did not enter an appearance in the Member State of origin shall have the right to apply for a review of the decision before the competent court of that Member State where:

- (a) he was not served with the document instituting the proceedings or an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence; or
- (b) he was prevented from contesting the maintenance claim by reason of force majeure or due to extraordinary circumstances without any fault on his part;

unless he failed to challenge the decision when it was possible for him to do so.

2. The time limit for applying for a review shall run from the day the defendant was effectively acquainted with the contents of the decision and was able to react, at the latest from the date of the first enforcement measure having the effect of making his property non-disposable in whole or in part. The defendant shall react promptly, in any event within 45 days. No extension may be granted on account of distance.

3. If the court rejects the application for a review referred to in paragraph 1 on the basis that none of the grounds for a review set out in that paragraph apply, the decision shall remain in force.

If the court decides that a review is justified for one of the reasons laid down in

paragraph 1, the decision shall be null and void. However, the creditor shall not lose the benefits of the interruption of prescription or limitation periods, or the right to claim retroactive maintenance acquired in the initial proceedings.

Article 20

Documents for the purposes of enforcement

1. For the purposes of enforcement of a decision in another Member State, the claimant shall provide the competent enforcement authorities with:

- (a) a copy of the decision which satisfies the conditions necessary to establish its authenticity;
- (b) the extract from the decision issued by the court of origin using the form set out in Annex I;
- (c) where appropriate, a document showing the amount of any arrears and the date such amount was calculated;
- (d) where necessary, a transliteration or a translation of the content of the form referred to in point (b) into the official language of the Member State of enforcement or, where there are several official languages in that Member State, into the official language or one of the official languages of court proceedings of the place where the application is made, in accordance with the law of that Member State, or into another language that the Member State concerned has indicated it can accept. Each Member State may indicate the official language or languages of the institutions of the European Union other than its own which it can accept for the completion of the form.

2. The competent authorities of the Member State of enforcement may not require the claimant to provide a translation of the decision. However, a translation may

be required if the enforcement of the decision is challenged.

3. Any translation under this Article must be done by a person qualified to do translations in one of the Member States.

Article 21

Refusal or suspension of enforcement

1. The grounds of refusal or suspension of enforcement under the law of the Member State of enforcement shall apply in so far as they are not incompatible with the application of paragraphs 2 and 3.

2. The competent authority in the Member State of enforcement shall, on application by the debtor, refuse, either wholly or in part, the enforcement of the decision of the court of origin if the right to enforce the decision of the court of origin is extinguished by the effect of prescription or the limitation of action, either under the law of the Member State of origin or under the law of the Member State of enforcement, whichever provides for the longer limitation period.

Furthermore, the competent authority in the Member State of enforcement may, on application by the debtor, refuse, either wholly or in part, the enforcement of the decision of the court of origin if it is irreconcilable with a decision given in the Member State of enforcement or with a decision given in another Member State or in a third State which fulfils the conditions necessary for its recognition in the Member State of enforcement.

A decision which has the effect of modifying an earlier decision on maintenance on the basis of changed circumstances shall not be considered an irreconcilable decision within the meaning of the second subparagraph.

3. The competent authority in the Member State of enforcement may, on application by the debtor, suspend, either wholly

or in part, the enforcement of the decision of the court of origin if the competent court of the Member State of origin has been seised of an application for a review of the decision of the court of origin pursuant to Article 19.

Furthermore, the competent authority of the Member State of enforcement shall, on application by the debtor, suspend the enforcement of the decision of the court of origin where the enforceability of that decision is suspended in the Member State of origin.

Article 22

No effect on the existence of family relationships

The recognition and enforcement of a decision on maintenance under this Regulation shall not in any way imply the recognition of the family relationship, parentage, marriage or affinity underlying the maintenance obligation which gave rise to the decision.

SECTION 2

Decisions given in a Member State not bound by the 2007 Hague Protocol

Article 23

Recognition

1. A decision given in a Member State not bound by the 2007 Hague Protocol shall be recognised in the other Member States without any special procedure being required.

2. Any interested party who raises the recognition of a decision as the principal issue in a dispute may, in accordance with the procedures provided for in this Section, apply for a decision that the decision be recognised.

3. If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question of

recognition, that court shall have jurisdiction over that question.

Article 24

Grounds of refusal of recognition

A decision shall not be recognised:

- (a) if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought. The test of public policy may not be applied to the rules relating to jurisdiction;
- (b) where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the decision when it was possible for him to do so;
- (c) if it is irreconcilable with a decision given in a dispute between the same parties in the Member State in which recognition is sought;
- (d) if it is irreconcilable with an earlier decision given in another Member State or in a third State in a dispute involving the same cause of action and between the same parties, provided that the earlier decision fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

A decision which has the effect of modifying an earlier decision on maintenance on the basis of changed circumstances shall not be considered an irreconcilable decision within the meaning of points (c) or (d).

Article 25

Staying of recognition proceedings

A court of a Member State in which recognition is sought of a decision given in

a Member State not bound by the 2007 Hague Protocol shall stay the proceedings if the enforceability of the decision is suspended in the Member State of origin by reason of an appeal.

Article 26

Enforceability

A decision given in a Member State not bound by the 2007 Hague Protocol and enforceable in that State shall be enforceable in another Member State when, on the application of any interested party, it has been declared enforceable there.

Article 27

Jurisdiction of local courts

1. The application for a declaration of enforceability shall be submitted to the court or competent authority of the Member State of enforcement notified by that Member State to the Commission in accordance with Article 71.

2. The local jurisdiction shall be determined by reference to the place of habitual residence of the party against whom enforcement is sought, or to the place of enforcement.

Article 28

Procedure

1. The application for a declaration of enforceability shall be accompanied by the following documents:

- (a) a copy of the decision which satisfies the conditions necessary to establish its authenticity;
- (b) an extract from the decision issued by the court of origin using the form set out in Annex II, without prejudice to Article 29;
- (c) where necessary, a transliteration or a translation of the content of the form referred to in point (b) into the official language of the Member State of en-

forcement or, where there are several official languages in that Member State, into the official language or one of the official languages of court proceedings of the place where the application is made, in accordance with the law of that Member State, or into another language that the Member State concerned has indicated it can accept. Each Member State may indicate the official language or languages of the institutions of the European Union other than its own which it can accept for the completion of the form.

2. The court or competent authority seized of the application may not require the claimant to provide a translation of the decision. However, a translation may be required in connection with an appeal under Articles 32 or 33.

3. Any translation under this Article must be done by a person qualified to do translations in one of the Member States.

Article 29

Non-production of the extract

1. If the extract referred to in Article 28(1)(b) is not produced, the competent court or authority may specify a time for its production or accept an equivalent document or, if it considers that it has sufficient information before it, dispense with its production.

2. In the situation referred to in paragraph 1, if the competent court or authority so requires, a translation of the documents shall be produced. The translation shall be done by a person qualified to do translations in one of the Member States.

Article 30

Declaration of enforceability

The decision shall be declared enforceable without any review under Article 24 immediately on completion of the forma-

lities in Article 28 and at the latest within 30 days of the completion of those formalities, except where exceptional circumstances make this impossible. The party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.

Article 31

Notice of the decision on the application for a declaration

1. The decision on the application for a declaration of enforceability shall forthwith be brought to the notice of the applicant in accordance with the procedure laid down by the law of the Member State of enforcement.

2. The declaration of enforceability shall be served on the party against whom enforcement is sought, accompanied by the decision, if not already served on that party.

Article 32

Appeal against the decision

on the application for a declaration

1. The decision on the application for a declaration of enforceability may be appealed against by either party.

2. The appeal shall be lodged with the court notified by the Member State concerned to the Commission in accordance with Article 71.

3. The appeal shall be dealt with in accordance with the rules governing procedure in contradictory matters.

4. If the party against whom enforcement is sought fails to appear before the appellate court in proceedings concerning an appeal brought by the applicant, Article 11 shall apply even where the party against whom enforcement is sought is not habitually resident in any of the Member States.

5. An appeal against the declaration of enforceability shall be lodged within 30 days of service thereof. If the party against whom enforcement is sought has his habitual residence in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be 45 days and shall run from the date of service, either on him in person or at his residence. No extension may be granted on account of distance.

Article 33

Proceedings to contest the decision given on appeal

The decision given on appeal may be contested only by the procedure notified by the Member State concerned to the Commission in accordance with Article 71.

Article 34

Refusal or revocation of a declaration of enforceability

1. The court with which an appeal is lodged under Articles 32 or 33 shall refuse or revoke a declaration of enforceability only on one of the grounds specified in Article 24.

2. Subject to Article 32(4), the court seised of an appeal under Article 32 shall give its decision within 90 days from the date it was seised, except where exceptional circumstances make this impossible.

3. The court seised of an appeal under Article 33 shall give its decision without delay.

Article 35

Staying of proceedings

The court with which an appeal is lodged under Articles 32 or 33 shall, on the application of the party against whom enforcement is sought, stay the proceedings if the enforceability of the decision is sus-

pending in the Member State of origin by reason of an appeal.

Article 36

Provisional, including protective measures

1. When a decision must be recognised in accordance with this Section, nothing shall prevent the applicant from availing himself of provisional, including protective, measures in accordance with the law of the Member State of enforcement without a declaration of enforceability under Article 30 being required.

2. The declaration of enforceability shall carry with it by operation of law the power to proceed to any protective measures.

3. During the time specified for an appeal pursuant to Article 32(5) against the declaration of enforceability and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures against the property of the party against whom enforcement is sought.

Article 37

Partial enforceability

1. Where a decision has been given in respect of several matters and the declaration of enforceability cannot be given for all of them, the competent court or authority shall give it for one or more of them.

2. An applicant may request a declaration of enforceability limited to parts of a decision.

Article 38

No charge, duty or fee

In proceedings for the issue of a declaration of enforceability, no charge, duty or fee calculated by reference to the value of the matter at issue may be levied in the Member State of enforcement.

SECTION 3
Common provisions

Article 39

Provisional enforceability

The court of origin may declare the decision provisionally enforceable, notwithstanding any appeal, even if national law does not provide for enforceability by operation of law.

Article 40

Invoking a recognised decision

1. A party who wishes to invoke in another Member State a decision recognised within the meaning of Article 17(1) or recognised pursuant to Section 2 shall produce a copy of the decision which satisfies the conditions necessary to establish its authenticity.

2. If necessary, the court before which the recognised decision is invoked may ask the party invoking the recognised decision to produce an extract issued by the court of origin using the form set out in Annex I or in Annex II, as the case may be.

The court of origin shall also issue such an extract at the request of any interested party.

3. Where necessary, the party invoking the recognised decision shall provide a transliteration or a translation of the content of the form referred to in paragraph 2 into the official language of the Member State concerned or, where there are several official languages in that Member State, into the official language or one of the official languages of court proceedings of the place where the recognised decision is invoked, in accordance with the law of that Member State, or into another language that the Member State concerned has indicated it can accept. Each Member State may indicate the official language or languages of the institutions of the European

Union other than its own which it can accept for the completion of the form.

4. Any translation under this Article must be done by a person qualified to do translations in one of the Member States.

Article 41

Proceedings and conditions
for enforcement

1. Subject to the provisions of this Regulation, the procedure for the enforcement of decisions given in another Member State shall be governed by the law of the Member State of enforcement. A decision given in a Member State which is enforceable in the Member State of enforcement shall be enforced there under the same conditions as a decision given in that Member State of enforcement.

2. The party seeking the enforcement of a decision given in another Member State shall not be required to have a postal address or an authorised representative in the Member State of enforcement, without prejudice to persons with competence in matters relating to enforcement proceedings.

Article 42

No review as to substance

Under no circumstances may a decision given in a Member State be reviewed as to its substance in the Member State in which recognition, enforceability or enforcement is sought.

Article 43

No precedence for the recovery
of costs

Recovery of any costs incurred in the application of this Regulation shall not take precedence over the recovery of maintenance.

CHAPTER V
ACCESS TO JUSTICE

Article 44

Right to legal aid

1. Parties who are involved in a dispute covered by this Regulation shall have effective access to justice in another Member State, including enforcement and appeal or review procedures, in accordance with the conditions laid down in this Chapter.

In cases covered by Chapter VII, effective access to justice shall be provided by the requested Member State to any applicant who is resident in the requesting Member State.

2. To ensure such effective access, Member States shall provide legal aid in accordance with this Chapter, unless paragraph 3 applies.

3. In cases covered by Chapter VII, a Member State shall not be obliged to provide legal aid if and to the extent that the procedures of that Member State enable the parties to make the case without the need for legal aid, and the Central Authority provides such services as are necessary free of charge.

4. Entitlements to legal aid shall not be less than those available in equivalent domestic cases.

5. No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in proceedings concerning maintenance obligations.

Article 45

Content of legal aid

Legal aid granted under this Chapter shall mean the assistance necessary to enable parties to know and assert their rights and to ensure that their applications, lodged through the Central Authorities or directly with the competent autho-

rities, are fully and effectively dealt with. It shall cover as necessary the following:

- (a) pre-litigation advice with a view to reaching a settlement prior to bringing judicial proceedings;
- (b) legal assistance in bringing a case before an authority or a court and representation in court;
- (c) exemption from or assistance with the costs of proceedings and the fees to persons mandated to perform acts during the proceedings;
- (d) in Member States in which an unsuccessful party is liable for the costs of the opposing party, if the recipient of legal aid loses the case, the costs incurred by the opposing party, if such costs would have been covered had the recipient been habitually resident in the Member State of the court seised;
- (e) interpretation;
- (f) translation of the documents required by the court or by the competent authority and presented by the recipient of legal aid which are necessary for the resolution of the case;
- (g) travel costs to be borne by the recipient of legal aid where the physical presence of the persons concerned with the presentation of the recipient's case is required in court by the law or by the court of the Member State concerned and the court decides that the persons concerned cannot be heard to the satisfaction of the court by any other means.

Article 46

Free legal aid for applications through Central Authorities concerning maintenance to children

1. The requested Member State shall provide free legal aid in respect of all applications by a creditor under Article 56 concerning maintenance obligations arising

from a parent-child relationship towards a person under the age of 21.

2. Notwithstanding paragraph 1, the competent authority of the requested Member State may, in relation to applications other than those under Article 56(1)(a) and (b), refuse free legal aid if it considers that, on the merits, the application or any appeal or review is manifestly unfounded.

Article 47

Cases not covered by Article 46

1. Subject to Articles 44 and 45, in cases not covered by Article 46, legal aid may be granted in accordance with national law, particularly as regards the conditions for the means test or the merits test.

2. Notwithstanding paragraph 1, a party who, in the Member State of origin, has benefited from complete or partial legal aid or exemption from costs or expenses, shall be entitled, in any proceedings for recognition, enforceability or enforcement, to benefit from the most favourable legal aid or the most extensive exemption from costs or expenses provided for by the law of the Member State of enforcement.

3. Notwithstanding paragraph 1, a party who, in the Member State of origin, has benefited from free proceedings before an administrative authority listed in Annex X, shall be entitled, in any proceedings for recognition, enforceability or enforcement, to benefit from legal aid in accordance with paragraph 2. To that end, he shall present a statement from the competent authority in the Member State of origin to the effect that he fulfils the financial requirements to qualify for the grant of complete or partial legal aid or exemption from costs or expenses.

Competent authorities for the purposes of this paragraph shall be listed in Annex XI. That Annex shall be established and amen-

ded in accordance with the management procedure referred to in Article 73(2).

CHAPTER VI

COURT SETTLEMENTS AND AUTHENTIC INSTRUMENTS

Article 48

Application of this Regulation to court settlements and authentic instruments

1. Court settlements and authentic instruments which are enforceable in the Member State of origin shall be recognised in another Member State and be enforceable there in the same way as decisions, in accordance with Chapter IV.

2. The provisions of this Regulation shall apply as necessary to court settlements and authentic instruments.

3. The competent authority of the Member State of origin shall issue, at the request of any interested party, an extract from the court settlement or the authentic instrument using the forms set out in Annexes I and II or in Annexes III and IV as the case may be.

CHAPTER VII

COOPERATION BETWEEN CENTRAL AUTHORITIES

Article 49

Designation of Central Authorities

1. Each Member State shall designate a Central Authority to discharge the duties which are imposed by this Regulation on such an authority.

2. Federal Member States, Member States with more than one system of law or Member States having autonomous territorial units shall be free to appoint more than one Central Authority and shall specify the territorial or personal extent of their functions. Where a Member State has appointed more than one Central Authority,

it shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that Member State. If a communication is sent to a Central Authority which is not competent, the latter shall be responsible for forwarding it to the competent Central Authority and for informing the sender accordingly.

3. The designation of the Central Authority or Central Authorities, their contact details, and where appropriate the extent of their functions as specified in paragraph 2, shall be communicated by each Member State to the Commission in accordance with Article 71.

Article 50

General functions of Central Authorities

1. Central Authorities shall:

- (a) cooperate with each other, including by exchanging information, and promote cooperation amongst the competent authorities in their Member States to achieve the purposes of this Regulation;
- (b) seek as far as possible solutions to difficulties which arise in the application of this Regulation.

2. Central Authorities shall take measures to facilitate the application of this Regulation and to strengthen their cooperation. For this purpose the European Judicial Network in civil and commercial matters established by Decision 2001/470/EC shall be used.

Article 51

Specific functions of Central Authorities

1. Central Authorities shall provide assistance in relation to applications under Article 56 and shall in particular:

- (a) transmit and receive such applications;
- (b) initiate or facilitate the institution of proceedings in respect of such applications.

2. In relation to such applications Central Authorities shall take all appropriate measures:

- (a) where the circumstances require, to provide or facilitate the provision of legal aid;
- (b) to help locate the debtor or the creditor, in particular pursuant to Articles 61, 62 and 63;
- (c) to help obtain relevant information concerning the income and, if necessary, other financial circumstances of the debtor or creditor, including the location of assets, in particular pursuant to Articles 61, 62 and 63;
- (d) to encourage amicable solutions with a view to obtaining voluntary payment of maintenance, where suitable by use of mediation, conciliation or similar processes;
- (e) to facilitate the ongoing enforcement of maintenance decisions, including any arrears;
- (f) to facilitate the collection and expeditious transfer of maintenance payments;
- (g) to facilitate the obtaining of documentary or other evidence, without prejudice to Regulation (EC) No 1206/2001;
- (h) to provide assistance in establishing parentage where necessary for the recovery of maintenance;
- (i) to initiate or facilitate the institution of proceedings to obtain any necessary provisional measures which are territorial in nature and the purpose of which is to secure the outcome of a pending maintenance application;
- (j) to facilitate the service of documents, without prejudice to Regulation (EC) No 1393/2007.

3. The functions of the Central Authority under this Article may, to the extent permitted under the law of the Member State concerned, be performed by public

bodies, or other bodies subject to the supervision of the competent authorities of that Member State. The designation of any such public bodies or other bodies, as well as their contact details and the extent of their functions, shall be communicated by each Member State to the Commission in accordance with Article 71.

4. Nothing in this Article or in Article 53 shall impose an obligation on a Central Authority to exercise powers that can be exercised only by judicial authorities under the law of the requested Member State.

Article 52

Power of attorney

The Central Authority of the requested Member State may require a power of attorney from the applicant only if it acts on his behalf in judicial proceedings or before other authorities, or in order to designate a representative so to act.

Article 53

Requests for specific measures

1. A Central Authority may make a request, supported by reasons, to another Central Authority to take appropriate specific measures under points (b), (c), (g), (h), (i) and (j) of Article 51(2) when no application under Article 56 is pending. The requested Central Authority shall take such measures as are appropriate if satisfied that they are necessary to assist a potential applicant in making an application under Article 56 or in determining whether such an application should be initiated.

2. Where a request for measures under Article 51(2)(b) and (c) is made, the requested Central Authority shall seek the information requested, if necessary pursuant to Article 61. However, the information referred to in points (b), (c) and (d) of Article 61(2) may be sought only when the creditor produces a copy of the decision, court

settlement or authentic instrument to be enforced, accompanied by the extract provided for in Articles 20, 28 or 48, as appropriate.

The requested Central Authority shall communicate the information obtained to the requesting Central Authority. Where that information was obtained pursuant to Article 61, this communication shall specify only the address of the potential defendant in the requested Member State. In the case of a request with a view to recognition, declaration of enforceability or enforcement, the communication shall, in addition, specify merely whether the debtor has income or assets in that State.

If the requested Central Authority is not able to provide the information requested it shall inform the requesting Central Authority without delay and specify the grounds for this impossibility.

3. A Central Authority may also take specific measures at the request of another Central Authority in relation to a case having an international element concerning the recovery of maintenance pending in the requesting Member State.

4. For requests under this Article, the Central Authorities shall use the form set out in Annex V.

Article 54

Central Authority costs

1. Each Central Authority shall bear its own costs in applying this Regulation.

2. Central Authorities may not impose any charge on an applicant for the provision of their services under this Regulation save for exceptional costs arising from a request for a specific measure under Article 53.

For the purposes of this paragraph, costs relating to locating the debtor shall not be regarded as exceptional.

3. The requested Central Authority may not recover the costs of the services referred to in paragraph 2 without the prior consent of the applicant to the provision of those services at such cost.

Article 55

Application through Central Authorities

An application under this Chapter shall be made through the Central Authority of the Member State in which the applicant resides to the Central Authority of the requested Member State.

Article 56

Available applications

1. A creditor seeking to recover maintenance under this Regulation may make applications for the following:

- (a) recognition or recognition and declaration of enforceability of a decision;
- (b) enforcement of a decision given or recognised in the requested Member State;
- (c) establishment of a decision in the requested Member State where there is no existing decision, including where necessary the establishment of parentage;
- (d) establishment of a decision in the requested Member State where the recognition and declaration of enforceability of a decision given in a State other than the requested Member State is not possible;
- (e) modification of a decision given in the requested Member State;
- (f) modification of a decision given in a State other than the requested Member State.

2. A debtor against whom there is an existing maintenance decision may make applications for the following:

- (a) recognition of a decision leading to the suspension, or limiting the enforce-

ment, of a previous decision in the requested Member State;

- (b) modification of a decision given in the requested Member State;
- (c) modification of a decision given in a State other than the requested Member State.

3. For applications under this Article, the assistance and representation referred to in Article 45(b) shall be provided by the Central Authority of the requested Member State directly or through public authorities or other bodies or persons.

4. Save as otherwise provided in this Regulation, the applications referred to in paragraphs 1 and 2 shall be determined under the law of the requested Member State and shall be subject to the rules of jurisdiction applicable in that Member State.

Article 57

Application contents

1. An application under Article 56 shall be made using the form set out in Annex VI or in Annex VII.

2. An application under Article 56 shall as a minimum include:

- (a) a statement of the nature of the application or applications;
- (b) the name and contact details, including the address, and date of birth of the applicant;
- (c) the name and, if known, address and date of birth of the defendant;
- (d) the name and the date of birth of any person for whom maintenance is sought;
- (e) the grounds upon which the application is based;
- (f) in an application by a creditor, information concerning where the maintenance payment should be sent or electronically transmitted;
- (g) the name and contact details of the person or unit from the Central Autho-

riety of the requesting Member State responsible for processing the application.

3. For the purposes of paragraph 2(b), the applicant's personal address may be replaced by another address in cases of family violence, if the national law of the requested Member State does not require the applicant to supply his or her personal address for the purposes of proceedings to be brought.

4. As appropriate, and to the extent known, the application shall in addition in particular include:

- (a) the financial circumstances of the creditor;
- (b) the financial circumstances of the debtor, including the name and address of the employer of the debtor and the nature and location of the assets of the debtor;
- (c) any other information that may assist with the location of the defendant.

5. The application shall be accompanied by any necessary supporting information or documentation including, where appropriate, documentation concerning the entitlement of the applicant to legal aid. Applications under Article 56(1)(a) and (b) and under Article 56(2)(a) shall be accompanied, as appropriate, only by the documents listed in Articles 20, 28 and 48, or in Article 25 of the 2007 Hague Convention.

Article 58

Transmission, receipt and processing of applications and cases through Central Authorities

1. The Central Authority of the requesting Member State shall assist the applicant in ensuring that the application is accompanied by all the information and documents known by it to be necessary for consideration of the application.

2. The Central Authority of the requesting Member State shall, when satisfied that the application complies with the requirements of this Regulation, transmit the application to the Central Authority of the requested Member State.

3. The requested Central Authority shall, within 30 days from the date of receipt of the application, acknowledge receipt using the form set out in Annex VIII, and inform the Central Authority of the requesting Member State what initial steps have been or will be taken to deal with the application, and may request any further necessary documents and information. Within the same 30-day period, the requested Central Authority shall provide to the requesting Central Authority the name and contact details of the person or unit responsible for responding to inquiries regarding the progress of the application.

4. Within 60 days from the date of acknowledgement, the requested Central Authority shall inform the requesting Central Authority of the status of the application.

5. Requesting and requested Central Authorities shall keep each other informed of:

- (a) the person or unit responsible for a particular case;
 - (b) the progress of the case;
- and shall provide timely responses to enquiries.

6. Central Authorities shall process a case as quickly as a proper consideration of the issues will allow.

7. Central Authorities shall employ the most rapid and efficient means of communication at their disposal.

8. A requested Central Authority may refuse to process an application only if it is manifest that the requirements of this Regulation are not fulfilled. In such a case, that Central Authority shall promptly inform the requesting Central Authority of

its reasons for refusal using the form set out in Annex IX.

9. The requested Central Authority may not reject an application solely on the basis that additional documents or information are needed. However, the requested Central Authority may ask the requesting Central Authority to provide these additional documents or this information. If the requesting Central Authority does not do so within 90 days or a longer period specified by the requested Central Authority, the requested Central Authority may decide that it will no longer process the application. In this case, it shall promptly notify the requesting Central Authority using the form set out in Annex IX.

Article 59

Languages

1. The request or application form shall be completed in the official language of the requested Member State or, if there are several official languages in that Member State, in the official language or one of the official languages of the place of the Central Authority concerned, or in any other official language of the institutions of the European Union which that Member State has indicated it can accept, unless the Central Authority of that Member State dispenses with translation.

2. The documents accompanying the request or application form shall not be translated into the language determined in accordance with paragraph 1 unless a translation is necessary in order to provide the assistance requested, without prejudice to Articles 20, 28, 40 and 66.

3. Any other communication between Central Authorities shall be in the language determined in accordance with paragraph 1 unless the Central Authorities agree otherwise.

Article 60

Meetings

1. In order to facilitate the application of this Regulation, Central Authorities shall meet regularly.

2. These meetings shall be convened in compliance with Decision 2001/470/EC.

Article 61

Access to information for Central Authorities

1. Under the conditions laid down in this Chapter and by way of exception to Article 51(4), the requested Central Authority shall use all appropriate and reasonable means to obtain the information referred to in paragraph 2 necessary to facilitate, in a given case, the establishment, the modification, the recognition, the declaration of enforceability or the enforcement of a decision.

The public authorities or administrations which, in the course of their ordinary activities, hold, within the requested State, the information referred to in paragraph 2 and which control the processing thereof within the meaning of Directive 95/46/EC shall, subject to limitations justified on grounds of national security or public safety, provide the information to the requested Central Authority at its request in cases where the requested Central Authority does not have direct access to it.

Member States may designate the public authorities or administrations able to provide the requested Central Authority with the information referred to in paragraph 2. Where a Member State makes such a designation, it shall ensure that its choice of authorities and administrations permits its Central Authority to have access, in accordance with this Article, to the information requested.

Any other legal person which holds within the requested Member State the in-

formation referred to in paragraph 2 and controls the processing thereof within the meaning of Directive 95/46/EC shall provide the information to the requested Central Authority at the latter's request if it is authorised to do so by the law of the requested Member State.

The requested Central Authority shall, as necessary, transmit the information thus obtained to the requesting Central Authority.

2. The information referred to in this Article shall be the information already held by the authorities, administrations or persons referred to in paragraph 1. It shall be adequate, relevant and not excessive and shall relate to:

- (a) the address of the debtor or of the creditor;
- (b) the debtor's income;
- (c) the identification of the debtor's employer and/or of the debtor's bank account(s);
- (d) the debtor's assets.

For the purpose of obtaining or modifying a decision, only the information listed in point (a) may be requested by the requested Central Authority.

For the purpose of having a decision recognised, declared enforceable or enforced, all the information listed in the first subparagraph may be requested by the requested Central Authority. However, the information listed in point (d) may be requested only if the information listed in points (b) and (c) is insufficient to allow enforcement of the decision.

Article 62

Transmission and use of information

1. The Central Authorities shall, within their Member State, transmit the information referred to in Article 61(2) to the competent courts, the competent authorities

responsible for service of documents and the competent authorities responsible for enforcement of a decision, as the case may be.

2. Any authority or court to which information has been transmitted pursuant to Article 61 may use this only to facilitate the recovery of maintenance claims.

Except for information merely indicating the existence of an address, income or assets in the requested Member State, the information referred to in Article 61(2) may not be disclosed to the person having applied to the requesting Central Authority, subject to the application of procedural rules before a court.

3. Any authority processing information transmitted to it pursuant to Article 61 may not store such information beyond the period necessary for the purposes for which it was transmitted.

4. Any authority processing information communicated to it pursuant to Article 61 shall ensure the confidentiality of such information, in accordance with its national law.

Article 63

Notification of the data subject

1. Notification of the data subject of the communication of all or part of the information collected on him shall take place in accordance with the national law of the requested Member State.

2. Where there is a risk that it may prejudice the effective recovery of the maintenance claim, such notification may be deferred for a period which shall not exceed 90 days from the date on which the information was provided to the requested Central Authority.

CHAPTER VIII
PUBLIC BODIES

Article 64

Public bodies as applicants

1. For the purposes of an application for recognition and declaration of enforceability of decisions or for the purposes of enforcement of decisions, the term „creditor“ shall include a public body acting in place of an individual to whom maintenance is owed or one to which reimbursement is owed for benefits provided in place of maintenance.

2. The right of a public body to act in place of an individual to whom maintenance is owed or to seek reimbursement of benefits provided to the creditor in place of maintenance shall be governed by the law to which the body is subject.

3. A public body may seek recognition and a declaration of enforceability or claim enforcement of:

- (a) a decision given against a debtor on the application of a public body which claims payment of benefits provided in place of maintenance;
- (b) a decision given between a creditor and a debtor to the extent of the benefits provided to the creditor in place of maintenance.

4. The public body seeking recognition and a declaration of enforceability or claiming enforcement of a decision shall upon request provide any document necessary to establish its right under paragraph 2 and to establish that benefits have been provided to the creditor.

CHAPTER IX
GENERAL AND FINAL PROVISIONS

Article 65

Legalisation or other similar formality

No legalisation or other similar formality shall be required in the context of this Regulation.

Article 66

Translation of supporting documents

Without prejudice to Articles 20, 28 and 40, the court seized may require the parties to provide a translation of supporting documents which are not in the language of proceedings only if it deems a translation necessary in order to give a decision or to respect the rights of the defence.

Article 67

Recovery of costs

Without prejudice to Article 54, the competent authority of the requested Member State may recover costs from an unsuccessful party having received free legal aid pursuant to Article 46, on an exceptional basis and if his financial circumstances so allow.

Article 68

Relations with other Community instruments

1. Subject to Article 75(2), this Regulation shall modify Regulation (EC) No 44/2001 by replacing the provisions of that Regulation applicable to matters relating to maintenance obligations.

2. This Regulation shall replace, in matters relating to maintenance obligations, Regulation (EC) No 805/2004, except with regard to European Enforcement Orders on maintenance obligations issued in a Member State not bound by the 2007 Hague Protocol.

3. In matters relating to maintenance obligations, this Regulation shall be without prejudice to the application of Directive 2003/8/EC, subject to Chapter V.

4. This Regulation shall be without prejudice to the application of Directive 95/46/EC.

Article 69

Relations with existing international conventions and agreements

1. This Regulation shall not affect the application of bilateral or multilateral conventions and agreements to which one or more Member States are party at the time of adoption of this Regulation and which concern matters governed by this Regulation, without prejudice to the obligations of Member States under Article 307 of the Treaty.

2. Notwithstanding paragraph 1, and without prejudice to paragraph 3, this Regulation shall, in relations between Member States, take precedence over the conventions and agreements which concern matters governed by this Regulation and to which Member States are party.

3. This Regulation shall not preclude the application of the Convention of 23 March 1962 between Sweden, Denmark, Finland, Iceland and Norway on the recovery of maintenance by the Member States which are party thereto, since, with regard to the recognition, enforceability and enforcement of decisions, that Convention provides for:

- (a) simplified and more expeditious procedures for the enforcement of decisions relating to maintenance obligations, and
- (b) legal aid which is more favourable than that provided for in Chapter V of this Regulation.

However, the application of the said Convention may not have the effect of de-

priving the defendant of his protection under Articles 19 and 21 of this Regulation.

Article 70

Information made available to the public

The Member States shall provide within the framework of the European Judicial Network in civil and commercial matters established by Decision 2001/470/EC the following information with a view to making it available to the public:

- (a) a description of the national laws and procedures concerning maintenance obligations;
- (b) a description of the measures taken to meet the obligations under Article 51;
- (c) a description of how effective access to justice is guaranteed, as required under Article 44, and
- (d) a description of national enforcement rules and procedures, including information on any limitations on enforcement, in particular debtor protection rules and limitation or prescription periods.

Member States shall keep this information permanently updated.

Article 71

Information on contact details and languages (modelled on Article 25 of Regulation (EC) No 861/2007)

1. By 18 September 2010, the Member States shall communicate to the Commission:

- (a) the names and contact details of the courts or authorities with competence to deal with applications for a declaration of enforceability in accordance with Article 27(1) and with appeals against decisions on such applications in accordance with Article 32(2);
- (b) the redress procedures referred to in Article 33;

- (c) the review procedure for the purposes of Article 19 and the names and contact details of the courts having jurisdiction;
- (d) the names and contact details of their Central Authorities and, where appropriate, the extent of their functions, in accordance with Article 49(3);
- (e) the names and contact details of the public bodies or other bodies and, where appropriate, the extent of their functions, in accordance with Article 51(3);
- (f) the names and contact details of the authorities with competence in matters of enforcement for the purposes of Article 21;
- (g) the languages accepted for translations of the documents referred to in Articles 20, 28 and 40;
- (h) the languages accepted by their Central Authorities for communication with other Central Authorities referred to in Article 59.

The Member States shall apprise the Commission of any subsequent changes to this information.

2. The Commission shall publish the information communicated in accordance with paragraph 1 in the Official Journal of the European Union, with the exception of the addresses and other contact details of the courts and authorities referred to in points (a), (c) and (f).

3. The Commission shall make all information communicated in accordance with paragraph 1 publicly available through any other appropriate means, in particular through the European Judicial Network in civil and commercial matters established by Decision 2001/470/EC.

Article 72

Amendments to the forms

Any amendment to the forms provided for in this Regulation shall be adopted in accordance with the advisory procedure referred to in Article 73(3).

Article 73

Committee

1. The Commission shall be assisted by the committee established by Article 70 of Regulation (EC) No 2201/2003.

2. Where reference is made to this paragraph, Articles 4 and 7 of Decision 1999/468/EC shall apply.

The period laid down in Article 4(3) of Decision 1999/468/EC shall be set at three months.

3. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply.

Article 74

Review clause

By five years from the date of application determined in the third subparagraph of Article 76 at the latest, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation, including an evaluation of the practical experiences relating to the cooperation between Central Authorities, in particular regarding those Authorities' access to the information held by public authorities and administrations, and an evaluation of the functioning of the procedure for recognition, declaration of enforceability and enforcement applicable to decisions given in a Member State not bound by the 2007 Hague Protocol. If necessary the report shall be accompanied by proposals for adaptation.

Article 75

Transitional provisions

1. This Regulation shall apply only to proceedings instituted, to court settlements approved or concluded, and to authentic instruments established after its date of application, subject to paragraphs 2 and 3.

2. Sections 2 and 3 of Chapter IV shall apply:

(a) to decisions given in the Member States before the date of application of this Regulation for which recognition and the declaration of enforceability are requested after that date;

(b) to decisions given after the date of application of this Regulation following proceedings begun before that date, in so far as those decisions fall with the scope of Regulation (EC) No 44/2001 for the purposes of recognition and enforcement.

Regulation (EC) No 44/2001 shall continue to apply to procedures for recognition and enforcement under way on the date of application of this Regulation.

The first and second subparagraphs shall apply *mutatis mutandis* to court settlements approved or concluded and to authentic instruments established in the Member States.

3. Chapter VII on cooperation between Central Authorities shall apply to requests and applications received by the Central Authority as from the date of application of this Regulation.

Article 76

Entry into force

This Regulation shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

Articles 2(2), 47(3), 71, 72 and 73 shall apply from 18 September 2010.

Except for the provisions referred to in the second paragraph, this Regulation shall apply from 18 June 2011, subject to the 2007 Hague Protocol being applicable in the Community by that date. Failing that, this Regulation shall apply from the date of application of that Protocol in the Community.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, 18 December 2008.

For the Council
The President
M. Barnier

- [1] Opinion given on 13 December 2007 (not yet published in the Official Journal) and opinion given on 4 December 2008 following re-consultation (not yet published in the Official Journal).
- [2] Opinion given following non-obligatory consultation (OJ C 185, 8.8.2006, p. 35).
- [3] OJ L 12, 16.1.2001, p. 1.
- [4] OJ L 174, 27.6.2001, p. 25.
- [5] OJ L 174, 27.6.2001, p. 1.
- [6] OJ L 26, 31.1.2003, p. 41.
- [7] OJ L 338, 23.12.2003, p. 1.
- [8] OJ L 143, 30.4.2004, p. 15.
- [9] OJ L 324, 10.12.2007, p. 79.
- [10] OJ C 12, 15.1.2001, p. 1.
- [11] OJ C 53, 3.3.2005, p. 1.
- [12] OJ C 198, 12.8.2005, p. 1.
- [13] OJ L 281, 23.11.1995, p. 31.
- [14] OJ C 242, 7.10.2006, p. 20.
- [15] OJ L 124, 8.6.1971, p. 1.
- [16] OJ L 184, 17.7.1999, p. 23.
- [17] OJ L 299, 16.11.2005, p. 62.
- [18] OJ L 339, 21.12.2007, p. 3.



