CHAPTER 7: Recognition and Enforcement in Parental Responsibility Cases

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Contents

1. Non-recognition of judgments in parental responsibility cases

1.1 Grounds for non-recognition

A Member State will recognise foreign judgments, i.e. orders or decrees of parental responsibility issued in the other Member States. This follows from Article 21 of the current Regulation. The exceptions to this general rule regarding recognition are laid down in Article 23.

If judgments relating to parental responsibility are recognised, they may still be changed. This may happen, as the case may be, as soon as the judgment requires an adjustment because of a change of circumstances. Judgments relating to parental responsibility may be considered final only insofar as a regular remedy is no longer available.[1] Article 23 also covers all judgments relating to parental responsibility pronounced by a court or an authority of a Member State whatever the judgment may be called, including a decree, an order or a decision (Article 2(4)). Judgments on the right of access (Article 41) and on the return of the child (Article 42) have to be recognised without any possibility of opposing their recognition if they have been certified in the Member State of origin in accordance with the provisions of Articles 41(2) or 42(2).[2]

According to Article 23(a) recognition may only be declined if the foreign judgment is 'manifestly' contrary to the public policy (*ordre public*) of the Member State in which recognition of the judgment is sought. This inclusion of the public policy exception as a ground for non-recognition should therefore be invoked cautiously and should be interpreted restrictively. In that respect, due regard should be given to the case's connection with the forum State. [3] This means, for example, that a court in the state of enforcement should not be permitted to reject a judgment only because it would have reached a different view about the best interests of the child in the case at hand. Thus, a court may very well not agree with the decision to be enforced, but this fact will not of itself be a sufficient ground to rely on the exception of public policy. To give an example, where a Portuguese court had ratified an agreement by the parents to the effect that the child in question would spend alternative two-month periods with his father in Portugal and his mother in the United Kingdom, the position of the Portuguese court in reaching its decision was not considered by the UK court to be 'so obviously and extremely abusive as to qualify as an exceptional case'. The judge at first instance was prepared to find that the decision was contrary to public policy on the basis of the mother's emotional and mental health at the time of the agreement, but this was overturned by the Court of Appeal, which held that the case fell far short of what was required to give rise to the public policy exception.[4]

Furthermore, protection is offered to persons in default, pursuant to Article 23(c). National rules of civil procedure apply as regards the service of documents, as do international

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[1] Magnus/Mankowski/Siehr, *op. cit.*, Article 23, note 2-3.
[2] Magnus/Mankowski/Siehr, *op. cit*., Article 23, note 4.
[3] Magnus/Mankowski/Siehr, *op. cit*, Article 23, note 11-13; Rauscher, 'Parental responsibility cases under the new Council Regulation 'Brussels IIA', *op. cit.*, p. I-44.
[4] Scott, *op. cit.*, p. 30 *et seq*. with reference to *In re L (A Child) (Recognition of Foreign Order)*, [2012] EWCA Civ 1157, [2013] Fam 94.

rules of service.[5] If documents have to be served on a person in Denmark or on a person in a non-Member State that is party to the 1965 Hague Convention, for example, the Convention will apply and documents will have to be served in accordance with this Convention.[6] In addition, sufficient time must be given and the documents must be sufficiently precise and clear.

The proposed recast states in the proposed Article 38 that, upon the application of any interested party, recognition shall be refused 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. Accordingly, the rule that recognition may be refused if the judgment was pronounced, except in the case of urgency, without the child having been given an opportunity to be heard, in violation of the fundamental ruls of procedure of the (specific) Member State in which recognition is sought, has been dispensed with.[7] Otherwise, on this point the proposed recast essentially remains the same.

1.2 Grounds for non-recognition – National Reports

The 'best interests of the child' should, in that connection, be evaluated in every single case taking into account the specific circumstances of each case.[8] In Austria, recognition and enforcement are refused, for example, in accordance with § 113 (1) no. 1 of the AußStrG if this would be contrary to the best interests of the child or other basic principles of Austrian law (*ordre public*). The National Report suggests that in Austrian law the principle of the best interests of the child is thus given a higher priority than in the Brussels IIbis Regulation. For example, a Serbian decision relating to the right of access was denied enforcement in Austria because of a violation of the best interests of the child.[9] Serbia is, of course, (still) a third state. Even so, the decision stipulated that the mother who held the right of custody could not spend weekends with her children during the school year. Only weekdays with the associated daily stress would have been allocated to her in order to be together with the children. However, it was considered to be not in the best interests of the children that she would not be able to spend leisure time with her children during the school year, especially when she had the right of custody. The Irish report suggests that Article 23(a) arguably reflects the common law grounds of fraud, duress and denial of justice.[10]

Under Irish law, Article 23(b) is not a stated ground for refusal but the 31st Amendment to the Constitution now lays down the right of the child to be heard, subject, however, to the court's discretion in entertaining those views.

In Austria, § 113 of the AußStrG lacks a provision that is comparable to Article 23 (b). However, that does not mean that a foreign decision is recognized and declared enforceable even when the child has not had the opportunity to be heard, thereby infringing essential

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[5] Magnus/Mankowski/Siehr, *op. cit.*, Article 23, note 25-29.
[6] Magnus/Mankowski/Siehr, *op. cit*., Article 23, note 28-29.
[7] See also the 2016 Commission's Proposal.
[8] Magnus/Mankowski/Siehr, *op. cit*., Article 23, note 14.
[9] National Report Austria, question 31; Regional Court for Civil Law of Vienna [LGZ Wien] 19.09.2008 43 R 605/08a EFSlg [Ehe-und familienrechtliche Entscheidungen] 122.329.
[10] National Report Ireland, question 31.

procedural principles of the Member State in which recognition or enforcement is sought. The infringement in the hearing will either be regarded as a breach of the best interests of the child or as such against the procedural ordre public.

According to the Austrian National Report, a court[11] has to hear minors in personal proceedings concerning care and education or personal contacts. Minors who have reached the age of 14 may be able to take legal action in proceedings relating to care and education or personal contacts. In other words, a minor who has reached the age of 14 has the same legal rights as the other parties to the proceedings.

Recognition will be refused if the child has not been granted a hearing. Moreover, according to § 138 ABGB,[12] the best interests of the child must be taken into account and ensured in all matters relating to minor children, in particular care and personal contacts. Important criteria for the best interests of the child that are listed in Austrian law include, among other things, the consideration of the child's opinion as a function of his/her understanding and his/her ability to form opinions (no 5) and the prevention of the child's impairment through the implementation and enforcement of a measure against his/her will (no. 6).

In the National Report of Poland, mention is made of the decision of the Supreme Court dated 24 August 2011, IV CSK 566/10[13] which concerned the rejection of a contention that the judgment presented for recognition (a declaration of enforceability) was directly opposed to another, later judgment relating to parental responsibility making these judgments irreconcilable.

A person may waive the requirement of a fair hearing as a ground for non-recognition and accept the decision rendered without his or her appearance, but the acceptance must be made unequivocally. A tacit acceptance is insufficient unless special circumstances reveal that the foreign decision has been expressly accepted.[14]

Pursuant to Article 23(d), the recognition of a judgment relating to parental responsibility may be declined if an interested person, such as a parent, had not been heard.[15] Irreconcilability with a later local judgment (Article 23(e)) as a ground for non-recognition is not limited to a judgment based on changed circumstances but may include situations such as those mentioned in Article 11(8).[16] In Belgium, a case from the Court of Appeal of Antwerp can be mentioned here.[17] The court allowed the recognition of a British judgment of the High Court of Justice, Family Division that ordered the immediate return of the child after the father had refused to bring the child back to the UK. In this case the mother had the right of custody.

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[11] National Report Austria, question 31. However, this inquiry may also be carried out by a person or authority named in § 105 (1) sentence 2 of the AußStrG.
[12] General Civil Code [Allgemeines Bürgerliches Gesetzbuch], JGS [Justizgesetzsammlung] 1811/946, last amended by BGBl [Bundesgesetzblatt] I 2016/43.
[13] National Report Poland, question 31.
[14] Magnus/Mankowski/Siehr, *op. cit.*, Article 23, note 33.
[15] Magnus/Mankowski/Siehr, *op. cit.*, Article 23, note 34.
[16] Magnus/Mankowski/Siehr, *op. cit.*, Article 23, note 36.
[17] National Report Belgium, question 31; Court of Appeal of Antwerp 22 June 2011, no. 2011/AR/1143, available at: http://www.eurprocedure.be.

In June 2010, the High Court had enacted an agreement between the parties relating to the father's rights of access during holidays. The father had refused to bring the child back to the UK after the summer holiday in Belgium. The High Court had subsequently ordered the immediate return of the child in September 2010. The mother had requested the enforcement of both decisions of the High Court in Belgium.

The court of first instance had refused recognition based on Article 23(e) Brussels IIbis (the judgment is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought). The president of the Court of First Instance of Mechelen had previously awarded custody of the child to the father in October 2010. In the meantime, that decision of the president of the Court of First Instance of Mechelen had been reviewed in third-party proceedings. In its new decision of 16 May 2011, the president of the court of first instance declared that it had no jurisdiction on the basis of Article 19 of Brussels IIbis. The father had also initiated separate summary proceedings to obtain provisional measures on the basis of Article 20 of Brussels IIbis, but no order has been issued at the time when the Court of Appeal had to make its decision. Therefore, the Court of Appeal could not apply the exception of Article 23(1)(e).

The Court of Appeal also considered the grounds of refusal in Articles 23(a), 23(c) and 23(d), but found that these grounds could not be applied in the present case.

- Article 23(a): The court emphasized that the public policy exception can only be used if the judgment is 'manifestly' contrary to public policy. The fact that the mother had a small apartment and financial difficulties did not suffice to justify the exception. Neither did the limited social integration of the mother in the UK, nor the fact she only had a temporary residence permit.
- Article 23(c): The father claimed the right to an interpreter in the proceedings in the UK. The fact that this was not offered to him would be in violation of Article 6, § 3 of the European Convention on Human Rights. The Court of Appeal did not agree with this argument.
- Article 23(d): It was only because the father did not return the child to the UK, in violation of the British judgments concerning the father's right of access, that the UK ordered a 'passport order' against him, thereby preventing him from going to the UK and exercising his parental responsibility. Once the father would allow his daughter to return to the UK, this 'passport order' would be lifted and he would once again be able to exercise his parental duties.

In Lithuania, a court decision rendered in the Netherlands was not recognised by the Court of Appeal of Lithuania according to the provisions (c) and (d) of Article 23.[18] There was no additional information except for the date of the hearing on 10 December 2012. One of the parents sent a message to the court by fax on 10 December 2012, before the time of the hearing, requesting that another date be appointed for the court hearing as she could not participate on

[18] National Report Lithuania, question 31.

the date notified. The court did not allow the request of the parent and reached a final decision on 10 December 2012. The Court of Appeal of Lithuania ruled that the grounds for the refusal of recognition, determined in the provisions of (c) and (d) of Article 23, were applicable and withheld its recognition of the decision of the Dutch court.[19] Likewise, a court decision which had been rendered in Italy was not recognised by the Court of Appeal of Lithuania according to Articles 23(a), 23(c) and 23(d). There was evidence that one of the parents could not participate in the court hearing because she had left Italy before being informed about the hearing and hence could not participate. The Court of Appeal of Lithuania took the view that there was enough evidence to confirm that the child's residence with the mother was in the best interests of that child, and refused to recognise the decision ordering the child to reside with the father.[20]

As for 'irreconcilability with a foreign judgment' as a ground for non-recognition (Article 23(f)) there is little evidence in the National Reports to suggest that the decision regarding recognition or non-recognition is often hampered by conflicting or irreconcilable judgments given on the same or different facts. This may be accounted for by the fact that later judgments can adjust earlier decisions to subsequent changed circumstances or replace an earlier decision even if it was given on the basis of the same facts.[21]

Article 56 deals with decisions relating to the placement of a child in another Member State. In such cases the central authorities or other authorities having jurisdiction in the latter State have to be consulted or, at least, be informed. If this has not been done, the Member State in which the placement is to take place is not obliged under Article 23(g) to recognise the placement decision by the Member State of origin.[22]

The National Reports indicate that in both Italy and Romania Article 23 does not play a very significant role. The same could be said for Luxembourg, where none of the judgments reviewed dealt with claims for the recognition or enforcement of judgments from non-EU Member States in cases of parental responsibility.[23] The National Report states that in such a situation the Luxembourg court would check the following: the grounds of jurisdiction applied by the foreign court; the enforceability of the decision; whether the right to due process had been respected; the application of the appropriate law; and compliance with Luxembourg's public policy.

[19] National Report Lithuania, question 31. The Court of Appeal of Lithuania decision of 08-07-2013 in civil case No. 2T-26/2013.
[20] National Report Lithuania, question 31. The Court of Appeal of Lithuania decision of 16-03-2015 in civil case No 2T-23-407/2016.
[21] Magnus/Mankowski/Siehr, *op. cit.*, Article 23, note 37.
[22] Magnus/Mankowski/Siehr, *op. cit.*, Article 23, note 39; Francisco Javier Forcada Miranda, 'Revision with respect to the cross-border placement of children' (2015) 1 NIPR, p. 36.
[23] National Report Luxembourg, question 31.

1.3 Comparison between the grounds for non-recognition laid down in Article 23 and in national laws

In some Member States, such as Malta and Portugal, the grounds for non-recognition in national private international law are said to mirror the grounds which are found in Article 23.[24] In the Czech Republic a recognition rule in national private international law based on reciprocity (where recognition and/or enforcement is sought against a Czech national) is also included in § 15 under 6 of the PIL Act.[25] In Spain, a comparison between Law 29/2015, of 30 July, on international judicial cooperation in civil matters and Article 23 of the Brussels IIbis Regulation demonstrates that four of the grounds for non-recognition which are to be found in Spanish private international law essentially amount to the same grounds (public policy, infringement of the rights of defence and both cases of the irreconcilability of decisions). As for differences with the Regulation, Spanish Law includes two additional grounds for non-recognition that do not appear in the Regulation (Articles 46(c) and 46(f) Law 29/2015, of 30 July, on international judicial cooperation in civil matters).[26] However, at the same time, three of the grounds for non-recognition in Articles 23(b), 23(d) and 23(c) are not provided in the Spanish legislation. This can be explained by the fact that these grounds are very specific, whereas the Spanish ones deal with general situations.

In France, the grounds for refusing the recognition of judgments emanating from non-EU Member States provided in French national law are more manifold and also include a 'review of the jurisdiction of the courts of the State of origin' and a 'review that the foreign courts were not fraudulently seized'. Even though procedural grounds for refusing jurisdiction are allegedly not detailed (e.g., default of appearance, irreconcilability of judgments) the public policy ground is sufficiently broad to be able to include them.[27] In Greece, the conditions laid down by Article 23 are included in the relevant provision concerning recognition and enforcement in the Greek Code of Civil Procedure. Additionally, according to Greek law, in order to recognise a foreign decision, the foreign Court that has issued the judgment should be competent to rule on the case, according to the criteria adopted by the Greek Code of Civil Procedure. Furthermore, the final judgment must actually be final and considered as *res judicata* in the state of issuance.[28]

In Hungary, too, a foreign decision cannot be recognised when it is contrary to the Hungarian public order; when the party against whom the decision was made had not attended the proceedings either in person or by proxy because the subpoena, statement of claim, or other document on the basis of which the proceeding was initiated had not been property served at his domicile or residence or had not been served in a timely fashion in order to allow him/her to have adequate time to prepare his/her defence; when it was based on the findings of a procedure that seriously violated the basic principles of Hungarian law; when the prerequisites for litigation on the same right from the same factual basis between the same parties before a

[24] National Report Portugal, question 31; National Report Malta, question 31.
[25] National Report the Czech Republic, question 31.
[26] National Report Spain, question 31.
[27] National Report France, question 31.
[28] National Report Greece, question 31.

Hungarian court or another Hungarian authority materialized before the foreign proceeding was initiated (the suspension of a plea); and when a Hungarian court or another Hungarian authority had already resolved a case by a definitive decision concerning the same right from the same factual basis between the same parties.[29]

The Latvian national report makes mention of bilateral agreements in matrimonial and parental responsibility matters with the Russian Federation and Belarus.[30] Otherwise, in terms of the grounds for refusing the recognition of judgments in parental responsibility matters the main distinction is whether a judgement of an EU Member State is involved or whether it is from a non-EU Member State.[31] The Polish grounds for non-recognition lack provisions concerning the child not having been heard as a justification for non-recognition as well as when a person claiming that the judgment infringes her/his parental responsibility has not been heard.

In Sweden, in the absence of statutory provisions to the contrary, foreign judgments emanating from third countries are in principle not recognised, even though they can be given evidentiary value regarding facts and/or foreign law. Some recent decisions[32] indicate that some legal effects, for example in the field of social benefits, may even be given to foreign judgments that are not valid in Sweden.[33]

Throughout the various jurisdictions of the United Kingdom, there is no automatic recognition of foreign judgments regarding matters of parental responsibility, but the national report of the UK suggests that UK courts will generally 'give grave consideration…subject to the principle that such orders are always variable'.[34] The question of whether or not the person against whom the judgment was made was present in the foreign jurisdiction, and had engaged in the proceedings there, is also important.[35]

1.4 Grounds for non-recognition – CJEU case law

The *Rinau* case indicates that, once a decision refusing the return of a child has been taken and once this decision has been brought to the attention of the court of origin, its replacement by a decision to return the child does not prevent the court of origin from certifying the enforceability of its own decision ordering the return of the child.[36] The facts of this case are set out in detail *supra* in Chapter 4, under 4.2 '*Difficulties in application – CJEU case law*'.

The Court's case law further shows that recourse to the public policy rule in Article 23(a) of that Regulation should occur only very exceptionally. In the case of *P v. Q,*[37]

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[29] National Report Hungary, question 31.
[30] National Report Latvia, question 31.
[31] *Ibid.*
[32] E.g. NJA 2013 N 17.
[33] National Report Sweden, question 31.
[34] National Report the United Kingdom, question 31.
[35] *Ibid.*
[36] CJEU Case C-195/08 PPU *Inga Rinau* [2008] ECR I-5271. An application for the non-recognition of a judicial decision is not permitted if an Article 42 certificate has been issued.
[37] CJEU Case C-455/15 PPU *P v Q* [2015] ECLI:EU:C:2015:763.

the CJEU firstly referred to the principle of mutual trust on which the recognition and enforcement of judgments delivered in a Member State should be based on, and emphasised that the grounds for non-recognition should be kept to the minimum required, as indicated in Recital 21 of the Regulation. It concluded that recourse to the public policy rule as mentioned in Article 23(a) of the Regulation is only possible when the recognition of a judgment given in another Member State would be unacceptable to a considerable extent within the legal order of the State in which the recognition is sought. Also, the best interests of the child should always be taken into consideration. In complying with the Regulation's Article 26 prohibition of any review of the substance of a judgment given in another Member State (*révision au fond*) the infringement would have to constitute a manifest breach, having regard to the 'best interests of the child', of a rule of law regarded as so 'essential' in the legal order of the State in which recognition is sought or of a right recognised as being fundamental within that legal order.

Furthermore, under Article 23(b) the recognition of a foreign decision relating to parental responsibility must be declined if the child has not been heard, either directly or indirectly, i.e. if the child was, at the time of the decision, capable of forming his or her own views and if there was no case of urgency. In *Aguirre Zarraga v Pelz*[38] the child's German mother tried to resist enforcement in Germany on the ground that the Spanish judgment had been rendered in violation of human rights, as it appeared that the child had not been heard in the Spanish proceedings, and this was considered to be contrary to Article 24 of the EU Charter of Fundamental Rights. The Court ruled that it was not a requirement that the court of the Member State of origin had to obtain the views of the child in every case by means of a hearing, but that the right of the child to be heard does require that the legal procedures and conditions are made available to enable the child to express his or her views freely. (This case is detailed *infra* in Chapter 9, under 4.2 '*Difficulties in application of Article 42 – CJEU case law*').

1.5 Commission's proposal

The recognition of a decision in the proposal would be refused only if one or more of the grounds for refusal of recognition provided for in the proposed Articles 37 and 38 are present.[39] The grounds mentioned in points (a) to (c) of Article 38(1), however, may not be invoked against decisions on rights of access and the decisions on return pursuant to the second subparagraph of Article 26(4) which have been certified in the Member State of origin.

[38] CJEU Case C-491/10 PPU *Aguirre Zarraga v Pelz* [2011] ECR I-14247.
[39] 2016 Commission's Proposal, p. 27, 51-52.

GUIDELINES – Summary

The grounds for non-recognition should be used very restrictively and always only if the refusal of recognition can be justified in view of the best interests of the child. The interest of the Member States in ensuring a very high level of the recognition of judgments between the Member States also indicates a very restricted use of the grounds for non-recognition.

By and large, the grounds for non-recognition mentioned in Article 23 appear to mirror those that are found in the private international law of the Member States but they can, generally, be considered to be more restrictive.

This stricter regime at the European level is justifiable given the common European legal order envisaged by the Regulation which is based firmly on the principle of mutual trust regarding the recognition of judgments between the Member States only.

It is therefore also to be hoped and expected that the amendments proposed by the Recast will promote greater respect for the principle that the child should be given the opportunity to be heard in parental responsibility matters that affect her or him, even in ‘urgent’ situations.