Reflections on the Abolition of Exequatur in Family Law Cases Regarding the Exercise of the Right of Visitation

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Abstract: The 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 includes, along with uniform rules settling conflicts of jurisdiction between Member States, also a number of rules to ensure the free movement within the EU area of judgments, of authentic instruments and agreements, establishing provisions on their recognition and enforcement in another Member State. In the present paper we analyze the abolishing of the exequatur, under the situation where the judgments, concerning the exercise the rights of visitation, were passed in another Member State.

Keywords: cross-border cases; rights of visitation; legal recognition of the judgment; enforcement of the judgment passed in another state

1. Introduction

1. According to article 21, paragraph (1) of The 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[2] (hereinafter called "the

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[2] Published in OJ L 338, 23.12.2003, p. 1. The Regulation applies to all Member States of the European Union, except Denmark, from March 1, 2005 (except articles 67-70, which entered into force on 1 August 2004). It is known in the specialized literature as "Brussels II bis Regulation". On this regulation, see Ioana Burduf, Ulrike Frauenberger, Maria Kaller, katalin Markovits, Viviana Onaca, Flavius George Păncescu, Walter Rechberger, Camelia Tobă, *Cooperarea judiciară în materie civilă şi comercială, Manual/ Judicial cooperation in civil and commercial matters, Manual*, pp. 140-158. Address available at http://www.just.ro/Portals/0/CooperareJudiciara/Doc%201_Manual%20Civil.pdf; (Buglea, 2013, pp. 222-225)

Regulation"), the judgments on matters of divorce and exercise of parental authority passed in a Member State ***shall be fully recognized in all Member States***.

Regarding the recognition of judgments in matrimonial matters, we assist either to *a voluntary recognition*, which means that any interested party has the right to use the procedure of recognition of the divorce judgment (Păncescu, 2013, pp. 679-720) or the judgment on the exercise of parental authority, under the articles 28-36 of the Regulation, requiring, where appropriate, a judgment of recognition or non-recognition of the court decision; or *an incidental recognition*, which we suppose that before a court of another Member State, indirectly, is seeking recognition for the judgment passed in the Member State.

The regulation rules separately the situation of *judgments on the rights of visitation, i.e. returning the child, passed in a Member State*. We will analyze further the first case, the one related to the exercise of the right of visitation (Avram, 2013, pp. 470-472; Nicolae, 2014, p. 212), so as in a future paper we will address the second situation related to the returning of the child.

2. The Regulation facilitates the exercise of cross-border visitation rights, when the child and parental authority holders reside in different Member States. The legal mechanism is the legal recognition of the judgment on the exercise of the visitation rights issued in another Member State and the consecration of its enforceable character in the Member State (article 40-45 of the Regulation).

A decision on granting the visitation right[1] (the visitation right has the meaning specified in article 2, point 10 of the Regulation i.e. the right to take a child for a limited period in a place, other than the child's habitual residence) accompanied by a certificate on the right of visitation, which is directly recognized and enforceable in other Member States.

It is important to mention that: it does not matter who is the beneficiary of the right of visitation. Under the national law, the right of visitation can be attributed to the parent with whom the child does not live, grandparents and other relatives of the child, or persons with whom the child has developed emotional and spiritual bondage.

[1] The term "right of visitation" has the meaning specified in art. 2 point 10 of the Regulation, i.e. the right to take a child for a limited period of time in a place other than the child's habitual residence.

In relation to the time of issue of the certificate concerning the rights of visitation, there are two hypotheses based on the cross-border nature of the case, or not, since the judgment on the exercise of rights of access has been passed:

- *the case is cross-border* (Jugastru, 2014, pp. 81-99), and the judge issues *ex officio* the certificate judge, even if the *lex fori* does not allow a judgment to be enforceable, if against it, it was exercised an appeal.

- *the case is not cross-border*, the judge decides whether or not he issues the certificate, depending on the circumstances of the case.[1] If the judge has not issued the certificate, and after the judgment, the right holder of the visitation right or the child changes residence in another Member State, at the request of the interested party, the court shall issue the certificate.

The authority of the State of origin shall issue the certificate only after the verification of compliance with the procedural guarantees provided by article 41, paragraph 2 of the Regulation, namely: all parties have had an opportunity to be heard by the court; if these proceedings were made in absentia, the document instituting the proceedings or an equivalent document was sent or notified in a timely manner to the person who was not present, for that person to prepare his defense or, if it has been notified or communicated without the compliance with these conditions, it is nevertheless established that he has accepted the decision unequivocally; the child has the opportunity to be heard, unless a hearing was considered inappropriate, due to the age and degree of maturity of the child.

The decision on exercising the right to visit will not be directly recognized and declared enforceable in other Member States, the applicant will submit an application of exequatur request to the Member State court where it will be executed.

In connection with the appeal, the parties have not the opportunity to promote any appeal against the decision of issuing the certificate (article 43), but there is the possibility to apply for a *rectification application*, in the case where the contents of the certificate do not contain correct information of the judgment.

3. What are the legal consequences of the court of origin issuing the certificate concerning the right of visitation? Simply the judgment passed in that Member

[1] For example, holders of parental authority, though they live in the same state with the child, are of different nationalities, having the possibility for one of them establish the residence abroad, in another Member State.

State is considered as if it were a judgment passed in another Member State, which means that, firstly, there is no need of the exequatur procedure, being sufficient submitting a copy of the judgment and the certificate, without its translation (except section 12 concerning the practical arrangements for the exercise of the right of visitation). Secondly, the parties no longer have the possibility of opposing to the recognition of the judgment passed by another court, which means that the non-recognition reasons listed in article 23 of the Regulation cannot be invoked in such a case.

According to **article 23** of the Regulation, a judgment in matters of parental authority is not recognized by a court of another Member State in one of the following situations:

- taking into account the best interests of the child, the recognition is manifestly contrary to public order of the Member State in which the recognition is sought[1];

- except the urgent cases, the decision was rendered, but the child had not had the opportunity to be heard, thus violating the fundamental principles of the procedure of the Member State in which recognition is sought;

- the document instituting the proceedings or an equivalent document was not sent to the defendant in a timely manner, and who has not had the opportunity to prepare a defense, except the case where the defendant has accepted the judgment unequivocally;

- at the request of any person claiming that the decision opposes the exercise of parental responsibility, if the judgment was given, but such person had not had the opportunity to be heard;

- the recognition is irreconcilable with a judgment previously passed, relating to parental responsibility in the Member State in which recognition is sought;[2]

[1] See further (Sitaru, 2013, pp. 92-108).

[2] In Case C211- 10, the demand for a decision from a preliminary judgment was made during the proceedings between Ms. Povse, on the one hand, and Mr. Alpago, on the other hand, on the return to Italy of their daughter, who was currently in Austria, with her mother, and with the custody of this child. CJEU held that article 47, paragraph (2), second subparagraph of Regulation no. 2201/2003 must be interpreted in the meaning that a pervious judgment of a court of the Member State of enforcement, which has had provisionally decided upon the custody and which is deemed to be enforceable under the law of that State may not hinder the execution of a certified judgment delivered prior to the court of the Member State of origin, ordering the child's return. The enforcement of a certified judgment cannot be refused in the executing Member State on the ground that, following a change of circumstances after passing the judgment, it might be seriously detrimental to the best

- recognition ***is irreconcilable with a previous***[1] ***judgment*** relating to parental responsibility in another Member State or in the third country in which the child is habitually resident, since the previous judgment fulfills the necessary conditions for its recognition in the addressed State;

- it was not complied with the procedure laid down in article 56, which regulates the placement of the child in another Member State. Thus, in the case where the court has jurisdiction pursuant to article 8-15 of the Regulation it envisages placing the child in an orphanage or foster family and where such placement is to take place in another Member State, the court **shall first consult** the central authority or other competent authority of the country of placement[2], having two solutions:

a) if the public authority intervention is provided the Member State for domestic cases of child placement, situation according to which the judgment on placement of the child may not be taken in the requesting State, only if the competent authority of the requested State has approved the placement;[3]

interests of the child. Such a change must be pleaded before the court of the Member State of origin, which should be seized also with a possible application for suspension for the execution of its judgment.

[1] Analyzing article 22, letter d) containing the phrase "earlier passed judgment", referring to the divorce, on the one hand, and article 23, letter f) which contains the phrase "later passed judgment", referring to the judgments in matters of parental responsibility, on the other hand, it results that a judgment in matters of parental responsibility is subject to change and the subsequent judgment is prevailing and therefore it is acknowledged.

[2] In the arrangements for the mentioned consultation or consent are governed by the internal law of the requested State and for Romania, according to article 100 of Law no. 272/2004 on the protection and promotion of children's rights, the competent authority is the National Authority for Child Protection and Adoption, which operates within the Ministry of Labor, Family, and Social Protection (G.D. no. 344/30 April 2014, published in the Official Monitor of Romania, no. 322 of 7 May, 2014). Also, according to article 2 of Law no. 361/2007 for the ratification of the Hague Convention of 1996, the National Authority for Child Protection and Adoption is the central authority for the fulfillment of the obligations established by the Convention, in compliance with article 29, paragraph 1 of the Convention.

[3] In Case C-92/12, application of the reference for a preliminary ruling concerns the interpretation of Regulation (EC) no. 2201/2003, in particular Articles 1, 28 and 56, and it was made during the proceedings between the Health Service Executive (Department of Public Health, hereinafter "HSE"), on the one hand and a child with Irish citizenship and residing in Ireland, and his mother, with residency in London, on the other hand, on the placement of the child in an orphanage closed regime offering therapeutic and educational care situated in England. The judgment of a court of a Member State which requires the placement of a child in a foster care closed regime, situated in another Member State, involving, for protection, a deprivation of liberty for a specific period, enters into the scope of Regulation (EC) no. 2201/2003. The approval referred to in article 56 paragraph (2) of the Regulation must be given prior to the adoption judgment, ordering the placement of a child, by a competent authority under the public law. It is not enough for the orphanage where the child should

b) if the public authority intervention is not provided in the latter Member State for domestic cases of child placement, the court shall notify the Central Authority or a competent authority in that Member State.

4. Finally, the question is what happens if a party fails to comply with a judgment on the visitation right issued by the court of the State of origin? The other party may **directly** demand the authorities of the Member State of enforcement to enforce it (article 44). In the enforcement procedure it is determined by the law of the Member State of enforcement (article 47). The courts of the Member State of enforcement are entitled under article 48, as in the absence of sufficient information on the practical arrangements for exercising the right of visitation in its judgment, for them to settle the necessary practical arrangements for organizing the exercise of right of visitation, respecting the essential elements of the judgment.

Conclusions

The exercise of the right of visitation, in violation of a judgment given on a minor child of a member state of the European Union can provide the basis for case classification in cases of international child abduction. The Court of Justice of the European Union and the European Court of Human Rights established a set of principles in their jurisprudence on international child abduction, primarily taking into account the best interests of the child. The ECJ confirmed that the Regulation aims at preventing child abduction between Member States and without delay returning the child, if the kidnapping occurred. In turn, the ECHR[1] has held that,

be placed to give its consent. In circumstances such as those in the main proceedings, the court of the Member State which decided the placement has doubts as to whether it was validly given an approval in the requested Member State, as it was not possible to determine with certainty which was the competent authority in the latter state, it is possible a regulation in order to ensure that the requirement of approval referred to in article 56 of Regulation no. 2201/2003 has been fully complied with. Regulation no. 2201/2003 must be interpreted as in the meaning that a judgment of a court of a Member State which requires the mandatory placement of a child in an orphanage with closed regime in another Member State shall, before executing it in the requested Member State, be declared enforceable in that Member State. In order not to miss the regulation of its effectiveness, the requested Member State court decision on the application for a declaration of enforceability must be taken with a special prompt celerity, the appeal against such a judgment of the court of the requested Member State cannot have suspensive effect. In the case where it was given for a specified period, the placement approval under article 56 (2) of Regulation No. 2201/2003 does not apply to decisions which have as purpose the placement extension. In such circumstances, a new approval must be sought.

[1] See, for example, cases Šneersone and Kampanella/Italy (application no. 14737/09), paragraph 85 (iv); Iglesias Gil and AUI/Spain (application no. 56673/00); Ignaccolo-Zenide/Romania (application

once it was found that a child has been wrongfully removed, the Member States should endeavor adequately and effectively to ensure the return of the child and the failure to submit these efforts represents a violation of the right to family life provided for in article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. More about that, in a future paper.

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