COMPETENT COURT ON THE MATTER OF PARENTAL LIABILITY IN ROMANIAN LEGISLATION AND INTERNATIONAL PRIVATE LAW

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Abstract

Within the article, aspects regarding the court competent on matters of parental liability are taken into consideration, thus presenting some cases relevant for the subject matter as well. Articles from national and international legislation on this subject matter will be present while taking into account also the situation of children that were moved in an illicit manner. The Hague convention of 1980, EC Regulation no. 2201/2003 known also as the Bruxelles 2 bis regulation, as well as the Romanian Civil Code are just a part of the legislative sources referred to.

Key Words*: Competence, residence, Convention, Hague, Regulation*

JEL Classification: [K33, K36]

1. Introductory aspects regarding family relations and applicable law

Family represents a fundamental element for any society from antiquity up until present days. Family may be viewed as the basic nucleus of any community given the fact that it offers all of the conditions necessary for a good development of the community. As per an official standpoint, family may be defined as "the basic form founded through marriage and consisting from a husband, a wife, and their descendants" (Romanian Academy, 1996).

At the opposite pole, one may notice that, family life is the basis of Islamic society being an institution founded by the will of Allah in the Quran and originating at the time of creation of the woman and man. This is also depicted by the Surah "Oh, you people! Fear your God who created you from one being and also created such being and its mate and who which spawned many men and women from them...." (Sarwar, 2003:180).

According to the legal provisions in force, family relations, along with aptitude, form the status of the natural person (personal statute) which includes: the individual statute (formed from the person's civil status and aptitude) and the family statute (consisting from family relations/reports).

Normally, family relations are ruled over by national law defined by the norms of international private law as being "the law of the state wherein the person at stake is a citizen; determination and evidence of such citizenship being made as per the law of the state whose citizenship is invoked.,,

Should such person have two or several citizenships, the law of that state to which the person is more tightly connected to, especially where such person's

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usual residence is found, is the applicable one. In the case of a person without citizenship, reference to national law is understood as being the law of the state where such person's usual residence is found.

The applicability of national law on the subject matter of family relations of the person is traceable in most states of the European continent, being deemed as a criterion resulting from the necessary affiliation to a certain state (Lupaşcu & Ungureanu, 2012:170).

On the matter of parental liability and child protection, according to article 2611 of the Civil Code, it is shown that "As per the Convention on authority, applicable law, acknowledgment, execution, and cooperation regarding parental liability and measures related to child protection, adopted at the Hague on October 19, 1996, ratified by Law no. 361/2007, published in the Official Journal of Romania, part I, no. 895 from December 28, 2007".[1]

The (EC) Regulation on the authority, acknowledgment, and enforcement of court decisions on matrimonial matters and parental liability matters, for the cancellation of (EC) Regulation no. 1347/2000 was adopted within the Hague convention.

2. The competence of courts on matters of parental liability

Within the meaning of the Convention, the term parental liability means "the ensemble of rights and obligations conferred unto a natural or legal person based on a court ruling, of a legislative document or of an agreement in force regarding the person or belongings of a child, this including especially assignment and the right to visit. "[2]

The Romanian Civil Code defines parental authority within article 483 as being "the ensemble of rights and obligations regarding both the person, and the belongings of a child" and that "such fall equally onto both parents" because, at article 487 it indicates that "parents have the right and obligation to raise the child, nurture its health and physical, and intellectual development, education, learning and professional training, as per their own convictions, the child's characteristics and needs, and are obligated to grant the child the orientation and advice required for an adequate exercise of the rights that the law recognizes for them".[3]

Parents exercise their parental authority together and equally[4] and, in the case of a child born outside the marriage, parental authority is exercised jointly and equally by the parents if, such live together.[5]

According to the international regulations applicable on the subject matter, any person exercising parental liability over a child is the holder of parental liability.

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[1] *Noul Cod Civil și 9 legi uzuale,* Bucharest, Hamangiu, updated January 2016.
[2] See article 2, par. 7 of Regulation 2201/2003 (2014) *Legislația privind relațiile de drept internațional privat.*
[3] *Noul Cod Civil și 9 legi uzuale.* (2016) Bucharest: Hamangiu.
[4] Civil Code, Article 503.
[5] Civil Code, Article 505.

The right of visitation means especially the right to take the child, for a limited period of time, to another place that his/her usual residence, and the illicit travelling or hold-back of a child were defined as the travelling or hold-back of a child in the case when, a violation of assignment acquired though a court ruling, a legislative document, or an agreement in force took place, pursuant to the legislation of the member state wherein the child will have his/her usual residence immediately before such travelling or hold-back and subject to such assignment being effectively exercised, alone or together, at the time of such travelling or hold-back, or would have been exercised should such events have not occurred. Assignment is deemed as exercised jointly when, one of the holders of parental liability cannot, based on a court ruling or as an effect of the law, decide over the place of residence of the child without the consent of the other holder of parental liability.[6]

In the regulation applicable on the subject matter, respectively Regulation no. 2201/2003, parental liability is regulated in Section 2, title II.As per the provisions of the present section, basic authority regarding a parental liability belongs to the courts where a child has his/her usual residence in this member state, at the time when the court is appraised.[7]

As an exception, article 8 of the convention stipulates that, should the authority of the contracting state, with competence on the above analyzed rules, deem that, in certain situations, the authority from another contracting state would be more competent to assess the child's higher interest, it may: either request such authority, directly or through the intercession of that state's central authority, to accept the competence of adopting those measures of protection that it may deem necessary; either to stay the resolution of the case and invite the parties to submits such a motion before the authority of the other state.

The Convention limits the meaning of the notion "another contracting state" whose authorities may by appraised in such manners to: the state wherein the child is a citizen; the state where the child's belongings are located; state whose authorities are appraised by means of a divorce motion or by a motion for legal separation of the parents or for the annulment of their marriage; the state wherewith the child has the most tight connections.

The authority so motioned or appraised may accept competence, should it deem that this is in the higher interest of the child (Lupaşcu & Ungureanu, 2012).

Furthermore, in article 9, the Regulation stipulates that "in the event wherein the child moves, legally, from one member state to another and a new usual residence is set, the courts of law from the member state of the child's former usual place of residence preserve their competence, by way of derogation from article 8, for a period of 3 months after moving, for the amendment of a decision regarding the right to visit issued in such member state before the child's

[6] EC Regulation no. 2201/2003 (2014) *Legislația privind relațiile de drept internațional privat.* Bucharest. Beck publishing house.

[7] Article 8, par. 1 of Regulation no. 2201/2003: "the Court of law of a member state have authority on the matter of parental liability regarding a child who's usual residence is located in that particular member state where the court is appraised".

relocation if the holder of visiting rights based on such decision regarding the child, continues to reside usually in the member state wherein the child's former usual residence was located."[8]

In the case of refugee children, of children whose usual residence cannot be determined or children who, due to internal disturbances in their country are moved internationally, competence is exercised by the authorities of the contracting state wherein these children presently are as a result of their relocation.

In the event of an illicit travelling or hold-back of the child, the authorities of the contracting state wherein the child's usual residence was situated immediately before such travelling or hold-back preserve competence until the child has been attributed usual residence in another state and: a) each person, court, or another body with assignment rights has approved such travelling or hold-back; or b) the child has lived in that particular state for a period of at least one year after the person, institution or another body with assignment rights has had or should have had knowledge about the place where the child is, but no demand for return has been submitted or examined during this period, and the child has integrated well into such new environment.

The authorities of the contracting state wherein the child has been relocated or held-back may adopt, when necessary, urgent measures for the protection of the person or the child's belongings, as per article 11 of the Convention (Lupaşcu & Ungureanu, 2012:171-172).

One may notice that in all cases, the interested authorities may proceed with an exchange of opinions.

As per the provisions of article 11 of Regulation no. 2201/2003 "in case a person, institution or any other body to whom the child was entrusted petitions the competent authorities from a member state to issue a ruling based on the Hague Convention of October 25th 1980 on the civil aspects of international child abduction in view of returning he child who was illicitly relocated in another state than the one where the child's usual residence is located immediately after such illicit travelling or hold-back, paragraphs (2) - (8) are applicable".

Considering the provisions of paragraphs 2-8, such stipulate that the possibility to hear the child within the procedure exists, with the exception of the case when such procedure is inadequate based on the child's age or degree of maturity. A court appraised with a motion for a child's return will act with celerity within the procedure regarding the motion, using the urgent procedures set-forth by internal law. At the same time, the court of law cannot deny returning the child during a procedure wherein the person requesting such return of the child was not granted the opportunity to be heard. In the event wherein a court of law has issued a decision of no-return as per article 13 of the 1980 Hague Convention, the court has to immediately convey, whether directly , whether through the intercession of its central authorities, a copy of the court ruling on this solution and of the pertinent documents, especially a record of accounts of the meetings , to such

[8] EC Regulation no. 2201/2003.

competent court or central authorities of the member state wherein the child's usual residence was located immediately before such illicit travelling or hold-back, as per internal law, the court should receive all documents mentioned within a month from the date of the non-return decision.[9]

In consideration of the provisions contained by article 3 of the 1980 Hague Convention, travelling or holding-back of a child is deemed illicit: a) when it occurs with violation of a right related to assignment conferred onto a person, an institution or any other body acting either separately, either jointly, through the law of the state wherein the child's usual residence was located immediately before travelling or being held-back; and b) if, at the time of such travelling or holding-back, this right was actually exercised, acting separately or jointly, or would have been so exercised should such circumstances not have occurred.

Article 4 of the same convention indicates that this is applicable for any child whose usual residence is located in a contracting state immediately before such infringement of assignment or visiting rights. Enforcement of the convention ceases when the child reaches the age of 16.In the sense of the present convention, in article 5: a) the right related to assignment includes the right related to the care due for the child's person and, especially, that of deciding on the location of such child's residence; b) the right for visitation includes the right to take the child, for a limited period of time, to another place than such child's usual residence.

Chapter 3 of the 1980 Hague Convention contains the provisions applicable on the matter of returning the child. As such, article 8 stipulates "The person, institution, or body claiming that a child was moved or held-back in violation of the right related to assignment may apprise either the central authority of the child's usual residence, either that of any contracting state so that such may grant their assistance in view of securing such child's return. The motion should include: a)information on the plaintiff's identity, the child's identity and identity of the person supposedly taking or holding-back the child; b) the child's date of birth if possible to be obtained; c) reasons that the plaintiff counts on when asking for the child to be returned; d) all information available regarding the child's whereabouts and identity of the person with whom the child supposedly is; e) an authenticated copy or any useful decision or agreement; f) a certification or affidavit under oath originating from the central authority or from any other competent authority of the state wherein the child's usual residence is or from a person proficient as to the state's laws on the matter; g) any other useful document."

On the matter of protecting the child's person or belongings, the doctrine and jurisprudence have shown that, the authorities of a contracting state may settle the motion for divorce of legal separation of the parents of a child whose usual residence is in another contracting state or for the annulment of their marriage if the state's law allows it, to take measures for the protection of the child and its belongings if: at the time of initiation of procedures, one of the parents' usual

[9]*Legislaţia privind relaţiile de drept internaţional privat.* (2014) Bucharest:.C.H. Beck.

residence is in that state and one or the parents exercises parental liability in regard to the child and, the competence of such authorities to adopt such measures was accepted by the parents, as well as by any other person who exercises parental liability in regard to the child and, this competence is in the child's higher interest.

This competence to adopt protective measures for the child ceases as soon as the ruling allowing or rejecting the motion for divorce, legal separation or marriage annulment has become final or, the procedure has ended for another reason.

In emergency situations, the authorities of any contracting state wherein the child or its belongings are located have the competence to adopt the required protective measures.

The authorities of a contracting state competent to adopt protective measures for the child's person or belonging should abstain from ruling if, at the time of initiation of the procedure, measures adequate to the situation were demanded before the authorities of another contracting state who also have competence at the time for such motion, and such procedure are still undergoing examination. These provisions do not apply if the authorities before whom the motion for adoption of measures was initially introduced have waived their competence (Lupaşcu & Ungureanu, 2012).

On the matter of competence, one may notice that the court of law of a member state appraised with a case wherefore it is not competent but another court from another member state is, will declare itself incompetent ex officio.[10] In case when actions regarding parental liability related to a child with the same res as the other case, are submitted before courts of law from different member states, the court appraised secondly will stay the procedure, ex officio, until such time the competence of the first court is determined.[11]

It is noticed that, a court of law deems itself apprised on the date of submission before such court, of the court's apprise document or an equivalent, subject to the plaintiff not having continuously adopted the measures that he/she should have adopted for the document to be notified or conveyed to the defendant or, in case the document should be notified or conveyed before submission with the court, on the date of its reception by an authority in-charge for such notification or conveyance, subject to the plaintiff not having continuously adopted the measures that he/she was obligated to adopt so that the document would be submitted before the court.[12]

On the matter of acknowledging court orders, regulation no. 2201/2003 stipulates , at article 21 "Court orders issued in a member state are acknowledged in the other member states without the necessity of any procedure" while article 23 indicates the reasons to deny the acknowledgment of court orders on the subject matter of parental liability. As such, a court order issued on the matter of parental liability is not acknowledged: in case such acknowledgment obviously contradicts public order in the member state where acknowledgment is requested

[10] Article 17 of Regulation no. 2201/2003.
[11] Article 18 of regulation no. 2201/2003.
[12] Article 16 of regulation no. 2201/2003.

taking into account the child's higher interest; in cases when, with the exception of urgent measures, such order was issued without giving the child the possibility to be heard thus violating the fundamental procedural rules of the member state wherein acknowledgment is requested; in the event wherein the courts apprise document or an equivalent document was not notified or conveyed in due time to the person who did not show up so as to be able to prepare a defence, with the exception of the case when, it is ascertained that such person has unequivocally accepted the order; upon the request of any person claiming that the order contradicts the exercise of his/her parental liability, in cases when the order was issued without such person having had the possibility to be heard; in cases when such order is incompatible with an order issued later on parental liability in the member state wherein acknowledgement is requested; in the event wherein such is incompatible with an order issued subsequently on the matter of parental liability in another member state or in the third state wherein the child's usual residence is located, seeing as the subsequent order meets the requirements necessary for acknowledgment in the petitioned member state."[13]

In the event wherein, measures adopted in a contracting state are enforceable and presume implementation acts in another contracting state, such will be declared enforceable or will be registered in view of execution in this other state, at the request of the interested party.

In principles, the measures taken cannot be revised as to merits on occasion of execution.

The implementation of measures is performed taking into account the child's higher interest.

With regard to Romania's situation, it is noticed that, on occasion of submission of admission acts, Romania has reserved: competence of its authority to adopt measures for the protection of the child's belongings located on its territory, the right to not acknowledge parental liability or measures that are incompatible with measures adopted by its authorities with regard to such belongings. Finally, by means of Law no. 361/2007,the "central authority" was set to be the National authority for protection of children's' rights" Likewise, certain responsibilities fall on the Ministry of Justice, as well as on the Bucharest court of Law (who has the obligation to issue the certificate set-forth by article 40 of the Convention) (Lupaşcu&Ungureanu, 2012: 174). At the same time, as per article 1095 civil procedure Code, foreign decisions are rightfully acknowledged in Romania if they refer to the personal status of citizens of the state wherein they were issued or if, while being issued in a third state, they were first acknowledged by each parties' citizenship state or, in the absence of acknowledgment, they were determined as applicable as per Romanian private law, they do not contradict public order, international laws, Romanian private law, and the right for defence was observed. Furthermore, article 1096 civil Procedure Code indicates that decisions regarding other processes than those set-forth by article 1095 may be

[13] EC Regulation no. 2201/2003.

acknowledged in Romania, in order to benefit from the authority of "res judicata" if, the following conditions are met cumulatively: the decision is final according to the laws of the state wherein it was issued, the court issuing it had, as per the laws of the competent state, the competence to hear the case nevertheless without being exclusively founded on the presence of the defendant or of its property or without any direct link to the dispute in the seat state of that respective jurisdiction, there is reciprocity with regard to the effects of foreign decision between Romania and the state of the court issuing the decision .

Foreign decisions that are not willingly enforced by those obligated to do so may be enforced in Romania, based on the given consent, at the request of the interested party, by the court wherein such enforcement is about to be made.[14]

3. Decision of the Court of Justice, on the subject matter

The issue of parental liability and competent court may be discussed also through relevant court orders on the subject matter, like:

1. Case C-491/10 Competence, acknowledgment, and enforcement of court decisions on matrimonial matters and parental liability matters - Parental liability - Assignment - Child abduction - Article 42 - Enforcement of a certified court order commanding the return of a child, issued by a competent (Spanish) court - Competence of the petitioned court (German) to deny the enforcement of the mentioned order in the event of severe infringement of the child's rights.

In fact, Mister Aguirre Zarraga and Misses Pelz were married September 25th 1988 in Erandio (Spain).Following this marriage, their daughter Andrea was born January 31st 2000.The parents' family home was located in Spain. The parents separated at the end of 2007.Each of them filed a motion for divorce and requested the Andrea be exclusively entrusted to them.

Through its decision dated May 12 2008, the 5th First Instance Court of Bilbao (Spain) entrusted the child, provisionally, to the father. As such, Andrea had moved to his domicile. In June 2008, Andrea's mother moved to Germany. At the end of the 2008 summer vacation, a period when she visited her mother, the latter held Andrea back with her. As such, starting with August 15 2008, Andrea lives at her mother's residence from Germany. At the same date, the Spanish court issued a decision forbidding Andrea to leave Spanish territory.

Andrea's father requested, in this situation, that his daughter be returned to Spain pursuant to the provisions of the 1980 Hague Convention. This motion was denied through a decision dated July 1st 2009 adopted pursuant to article 13, second sentence of this convention. Andrea's hearing which took place at that time, demonstrated that the child insistently and definitely opposed her return to Spain. The expert appointed by the court as a consequence of this hearing ruled in

[14]Civil Procedure Code, Article 1103.

the sense that, Andrea's opinion should be taken into account both in regard to her age, as well as with her degree of maturity.

The German Ministry of Justice conveyed this decision to the Spanish central authorities by means of the letter dated July 8, 2009. That same month, the trial regarding the assignation of rights regarding assignment was continued before the 5th First Instance Court of Bilbao. This court deemed that it was necessary to draft an expert report as well as to hear Andrea in person and set the terms for such measures to be enforced in Bilbao. Neither Andrea nor her mother responded to this summoning. The Spanish court did not accept the motion, previously formulated by the mother whereby she pursued the attainment of an approval, for both her and her daughter, to freely leave Spanish territory after the performance of the expertise and Andrea's hearing. The Spanish court also denied the mother's express motion whereby she requested that Andrea be heard by means of a videoconference.

In the decision dated December 16 2009, the 5th First Instance Court of Bilbao entrusted the child exclusively to the father.

The child's mother filed an appeal against this decision underlining, among others, the need to hear Andrea. Through its decision passed April 21st 2010, Audiencia Provincial de Biscaya (Spain) rejected this motion to organize the child's hearing.

On February 5th 2010, the 5th First Instance Court of Bilbao certified the decision dated December 16, 2009 pursuant to article 42 of Regulation no. 2201/2003.

In her turn, the child's mother requested the cancellation of the forced execution and that this decision is not acknowledged.

Through the decision dated April 28 2010, the First Instance Court - Family Court from Celle, Germany, allowed this motion reasoning that the 5th First Instance court from Bilbao had not heard Andrea before ruling.

On June 18 2010, the child's father had filed an appeal against this decision.

Oberlandesgericht Celle, apprised with this action, showed that it was confronted with the following questions:

Even though the decision dated December 16 2009 is a decision commanding the return of a child subsequent to a decision of non-return in regard to which the court of the execution member state is, in principle, lacking competence for control as results from the decisions previously referred to Rinau and Povse, the referring court finds that, in the event of an especially severe violation of fundamental rights, it should benefit from control competence in order to oppose the enforcement of such a decision.

As such Oberlandesgericht Celle deems that, within the main action, the absence of Andrea's hearing by the court of the origin member state constitutes an infringement of article 24, par. (1) of the Bill of Fundamental Rights. This refers to a violation that represents such an importance it would justify the acknowledgment of the control competence of the court within the member state of enforcement

pursuant to an interpretation of article 42, par. (1) of Regulation no. 2201/2003 in accordance with the Bill of Fundamental Right. In addition, Oberlandesgericht Celleraises the question of whether, in the event wherein, despite such violation of fundamental rights, the court within the member state of enforcement would lack any control competence, can it be obligated through a certificate, drafted pursuant to article 42 of Regulation no. 2201/2003 whose content would obviously be fake. This would be the case, especially in the file at stake, wherein the certificate would include an obviously incorrect statement namely; the child's hearing had taken place before the 5th First Instance court of Bilbao.

Oberlandesgericht Celle therefore decided to stay the resolution of the case and to address the Court the following preliminary questions: "1) Subject to an interpretation of article 42 of Regulation no. 2201/2003 compliant with the Bill of Fundamental Rights, does the court of the enforcement state exceptionally hold an inherent competence of control when the decision of the origin member state to be enforced is affected by a severe violation of fundamental rights?"2) Does the court of the enforcement member state have the obligation to enforce the decision of the origin member state court even when from the documents on file it ensures that, the certificate drafted pursuant to article 42 of Regulation no. 2201/2003 by the origin member state court contains an obviously incorrect mention?

By right, the court of referral wishes to find out, first of all, whether Regulation no. 2201/2003 should be interpreted in the sense that the court of the petitioned member state may oppose the enforcement of a decision ruling on the returning of a child, issued pursuant to article 11, par. (8) of said Regulation when it ensures that such child had not been heard in violation of said provisions of article 42 of the above-mentioned regulation, interpreted in accordance with the fundamental right set-forth by the Bill of Fundamental Rights. In addition, the referral court requests a finding as to whether, in the event of a negative answer to the first question, that respective court is obligated to continue with such enforcement when it ensures that, the certificate accompanying the decision at stake is obviously incorrect in the sense that it erroneously indicated that this child was heard.

According to the referral court, the hearing under debate and referral to such hearing within the Decision dated December 16 2009 do not allow for a conclusion that the child's fundamental right, enforced by article 42, par. (2), line (a) of Regulation no. 2201/2003 was observed. We should point out that this provision stipulates that, the court of the origin member state deciding to rule on the returning of the child despite of a decision of non-return, cannot certify the decision and confer on it such a consolidated enforceable character unless the child was given the possibility to be heard, with the exception when such hearing was deed noncompliant with the child's age and degree of maturity.

The premise of the referral court is founded, therefore, on an interpretation of article 42 of Regulation no. 2201/2003 whereby, the court of the origin member state could not limit itself to refer to such hearing of the child performed by the judicial authorities of the petitioned state, within the procedure wherein the non-return decision was adopted, but should have, by itself, proceed with a new

hearing of the child, subject to the sanction of severely harming the child's fundamental right stipulated by article 24 of the Bill of Fundamental Rights.

Following this decision, it was concluded and proposed that the preliminary questions addressed by Oberlandesgericht Celle would be answered as follows: "Article 42, par. (2) item (a) of EC Regulation no. 2201/2003 of the Council, dated November 27 2003 on the competence, acknowledgment, and enforcement of court decision on matrimonial matters and parental liability matters, for the cancellation of EC Regulation no. 1347/2000 should be interpreted in the sense that, the requisite stipulated by this provision is met when the child was heard by the judicial authorities of the enforcement member state within the procedure leading to the issuance of a non-return decision, and the court of the competent member state has taken into account such hearing when issuing the decision ruling on returning the child, pursuant to article 11, par. (8) of the same Regulation.

Even presuming that this child had not had the possibility to be heard, contrary to the remarks included in the content of a certificate drafted as per article 42 of Regulation no. 2201/2003 and infringing the provisions of said article, as well as the fundamental right stipulated by article 24, par. (1) of the Bill of Fundamental Rights of the European Union, this regulation should be interpreted in the sense that, the court of the petitioned member state cannot oppose the enforcement of a certified decision whereby the returning of a child is commanded, a decision issued as per article 11, par. (8) of said Regulation."[15]

At the same time, the Court (First Chamber) states:"In circumstances like those of the main action, the competent court of the enforcement member state cannot oppose the enforcement of a certified court decision whereby the returning of a child held-back illicitly is ruled on based on the fact that the court of the origin member state issuing such decision would have supposedly violated article 42 of EC Regulation no. 2201/2003of the Council, dated November 27 2003 on the competence, acknowledgment, and enforcement of court decision on matrimonial matters and parental liability matters, for the cancellation of EC Regulation no. 1347/2000 , interpreted as per article 24 of the Bill of Fundamental Rights of the European Union, because assessing such a violation is exclusively the competence of courts within the origin member state." [16]

2. Case -211/10 PPU - Illicit travelling of a child - Provisional measures regarding "the power of parental decision" - Assignment - court order whereby returning of the child is commanded - Enforcement - Competence - Preliminary emergency procedure

In fact, from the file submitted with the Court, it results that Mrs. Povse and Mr. Alpago, an unmarried couple who has resided up until the end of January

[15] http://curia.europa.eu/juris/document/document.jsf?text=&docid=83864&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=510138[Accessed on May 15, 2016].
[16] http://curia.europa.eu/juris/document/document.jsf?text=&docid=83464&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=575215[Accessed on May 15, 2016].

2008 along with their daughter Sofia, born December 6 2006 in Vittorio Veneto, Italy According to article 317 bis of the Italian Civil Code; the parents exercised all parental rights jointly. At the end of January 2008, the couple broke up, and Mrs. Povse left their joint domicile accompanied by the daughter Sofia. Even though the underage child court from Venice, through a provisional and urgent decision issued February 8 2008 at the father's request, forbid the mother to leave the country with the child, the mother took her daughter, during February of 2008, to Austria where they have been residing ever since the above mentioned date.

On April 16 2008, Mr. Alpago petitioned an Austrian court in order to obtain the return of his child to Italy pursuant to article 12 of the 1980 Hague Convention.

On May 23rd 2008, the underage children court from Venice issued a ruling whereby it lifted the ban enforced on the mother to leave Italian territory with the child and provisionally ruled on the child being entrusted to both parents stating, at the same time, that up until the issuance of a final decision, the child could reside in Austria along with the mother to whom it granted the power of "ordinary administrative decision making". Through that same provisional ruling, the Italian court set-forth that the father should participate in expenses related to the child's upbringing, set the means and periods of visits granted to the father and commanded on the performance of an expertise report by a social worker in order to verify the relations between the child and the two parents.

Despite this decision, from the report dated May 15 2009 by the so appointed social worker, it ensued that the father's visits where only allowed by the mother in a minimal manner that was insufficient to assess the daughter's relations with the father, especially with regard to his parental skills, and for this reason, the above mentioned social worker determined that such mission could not be completely fulfilled in the best interest of the child.

On July 3rd 2008, Bezirksgericht Leoben rejected the motion of Mr Alpago from April 16th 2008 but this decision was cancelled on September 1st 2008 by Landesgericht Leoben (Austria) for the reason that Mister Alpago had not been heard in accordance with article 11, par. (5) of the Regulation.

On November 21st 2008,Bezirksgericht Leoben once more rejected the petition of mister Alpago based on the decision of the Venice underage child Court dated May 23rd 2008 whereby it results, the provisionally the child could remain with her mother.

On January 7th 2009, Landesgericht Leoben confirmed the decision for the rejection of Mr. Alpago's motion invoking a severe risk of psychological trauma for the child in the meaning set-forth by article 13, item (b) of the 1980 Hague Convention.

Mrs. Povse went before Bezirksgericht Judenburg (Austria), competent from a regional standpoint, and requested that the child be entrusted to her. On May 26 2009, this court, without giving Mr. Alpago the possibility to express himself as per the principle of contradiction, ruled itself competent pursuant to article 15, par. (5) of the regulation and asked the Venice court for underage children to decline its

competence. Nevertheless, on April 9 2009, Mr. Alpago had already petitioned the "Tribunale per i Minorenni di Venezia" during the procedure on trial regarding assignment, to which he had requested to rule on his child being returned to Italy pursuant to article 11 par. (8) of the Regulation. During a meeting organized by this court on May 19, 2009, Mrs. Povse stated to being willing to observe the meeting schedule between father and daughter set by a social worker. Mrs. Povse did not mention the judiciary intercession before the Bezirksgericht Judenburg which determined the decision dated May 26 2009 and mentioned above.

On July 10 1009, The Venice Court for Underage Children confirmed its competence in the extent wherein, it its opinion, the conditions for a transfer of competence pursuant to article 10 of the regulation were not met, and ascertained that the expert's report filed by the social worker and commanded by the court had not been finalized because the mother did not observe the plan that the above mentioned social worker had set on the issue of visits.

On August 25th 2009, Bezirksgericht Judenburg issued a decree regarding provisional measures whereby it entrusted the child with Mrs. Povse, on a provisional basis. This court had sent, by post, a copy of this decree to Mr. Alpago, in Italy, without informing him on his right to reject reception and without enclosing a translation. The above-mentioned decree became final on September 23rd 2009 and enforceable in Austrian law.

On September 22nd 2009, Mr. Alpago petitioned Bezirksgericht Judenburg with regard to allowing the enforcement of the Italian court's decision dated July 10th 2009 whereby the latter commanded that the child be returned to Italy. Bezirksgericht Judenburg rejected this motion based on the reason that such enforcement of the Italian court's decision would pose a significant threat for the child mental well-being.Seeing as Mr. Alpago filed an appeal against this decision before the Landesgericht Leoben, the latter, pursuant to the Court's Decision dated July 11th 2008, Rinau (C-195/08 PPU, Rep., p. I - 5271) reformed this decision and ruled on the child being returned.

Oberster Gerichtshof was apprised by Mrs. Povse through an appeal (Revisionsrekurs) against the decision issued by the Landesgericht Leoben pursuing the rejection of the petition to allow enforcement. Seeing as it had doubts o the interpretation of the Regulation, this court decided to stay the resolution of the case and to address the Court the following preliminary questions:

Through: "such a decision of assignment that does not imply the child being returned" in the sense of article 10, par. (B), item (iv) of the Regulation [....] should we additionally understand provisional measure whereby "the power of parental decision making" and especially the right to determined the child's residence are attributed to the parent who abducted the child while awaiting for a final ruling as to such assignment of the minor?"

2) Does a decree whereby it is commanded that the child be returned fall under the inclusion criteria of article 11, par. (8) of the regulation only when the court rules on return pursuant to a decision regarding assignment that the court itself issued?

3) In the event of affirmative answers for either the first or second question: a) Can the lack of competence of the court of origin (first question) or inapplicability of article 11, par. (8) of the regulation (second question) be invoked by the second state against the enforcement of a decision certified by the origin court of law in accordance with article 42, par. (2) of the regulation?; b) or is it possible, in such a case, that the opposing party petitions the origin state court to withdraw the certificate thus allowing for enforcement in the second state to be stayed pending the issuance of a decision by the origin state?

4) In the event of a negative answer for the first, second, and third questions item a): Should a decision ruled upon by a court of the second state, which should be deemed enforceable as per national law and whereby the temporary assignment of the child in the care of the parent who abducted such child is decided, oppose, as per article 47, par. (2) of the regulation, the enforcement of a decision of return previously issued in the state of origin pursuant to article 11, par. (8) of the regulation even when, such decision of return previously issued in the origin state does not encumber the enforcement of the return decision that would have been issued by the second state as per the Hague Convention?

5) In the event of a negative answer for the fourth question as well: a) Can enforcement of a certified decision, in the meaning set-forth by article 42, par. (2) of the regulation, by the origin state's court be denied in the second state if, after such ruling, the circumstances have changed so much that such an enforcement would severely endanger the higher interest of the child?; b) or should the opposing party invoke the change of such circumstances in the state of origin, which would mean that, in the second state, the suspension of such enforcement could be petitioned pending the issuance of a decision by the origin state's court?"

The court (third chamber) stated, on the issue of this case: Article 10, par. (B), item (iv) of EC Regulation no. 2201/2003 of the Council, dated November 27th 2003 on the competence, acknowledgment, and enforcement of court orders on matrimonial matters and parental liability matters, for the cancellation of EC Regulation no. 1347/2000 should be interpreted in the sense that a provisional measure does not constitute " a decision of assignment that does not imply the child being returned", within the meaning of this provision and, it cannot justify a transfer of competence onto the courts of law of the member state where the child was illicitly relocated.

At the same time, the Court showed that article 11, par. (8) of Regulation no. 2201/2003 should be interpreted as a decision of the competent court of law whereby the child's return is decided, falls under the jurisdiction of application of this provision even if, such a decision is not preceded by a definitive decision by that same court regarding the assignment of the child.

With reference to article 47, paragraph (2), second sentence of Regulation no. 2201/2003, such should be construed as a decision issued subsequently by a court of law of the enforcement member state whereby, a provisional decision about the assignment is made and deemed enforceable according to the laws of that state, and which cannot be opposed to the enforcement of a certified decision

previously issued by the court of law competent in the origin member state whereby the return of the child is commanded.

Enforcement of a certified decision cannot be denied, in the enforcement member state for the reason that, following a change of circumstances arising after its issuance, such enforcement could severely prejudice the child's higher interest. Such a change should be invoked before the competent court of law from the origin member state which should by apprised with a possible petition to stay the enforcement of its decision as well.[17]

3. Case 400/10 (children whose parents are not married - Rights of the father regarding assignment.

From the file submitted before the Court in fact, it ensures that the plaintiff in the main action, Mr. McB, an Irish citizen, and the defendant of that same procedure, Mrs. E, of British citizenship formed an unmarried couple and lived together for 10 years in England, Australia, and Northern Ireland and, starting with November of 2008, in Ireland. The couple had three children together namely, J born in England December 31st 2000, E., and born November 20th 2002 in Northern Ireland, and J.C., born July 22nd 2007 in Northern Ireland as well.

After the relation of the parents deteriorated at the end of 2008 and beginning of 2009 the mother, invoking special aggressions from the father, ran away several times with her children, going to a women's shelter. In April of 2009, the two parents got back together and decided to get married October 10 2009.Nevertheless, on July 11th 2009, while returning from a business trip to Northern Ireland, the father had discovered that the mother had abandoned the family home again, with the children, and took shelter in the women's centre once more.

On July 15th 2009, the father's attorneys drafted, at his request, a motion appraising the competent Irish courts whereby he pursued to obtained rights regarding assignment in relation to his three children. Nevertheless, on July 25th 2009, the mother left to England by plane and took the above-mentioned three children with her, as well as her other older child resulted from a previous relationship. At that date, the above mentioned motion had not been notified to the mother so, according to Irish procedural rules, the action had not been adequately filed, hence the Irish court not properly apprised.

On November 2nd 2009, Mr. McB filed an action before the High Court of Justice (England & Wales), Family Division (United Kingdom) whereby he pursued the return of his children to Ireland, as per the provisions of the 1980 Hague convention and Regulation no. 2201/2003.Through the decree dated November 20th 2009, this court asked the father, as per article 15 of said convention, to file a decision or a certification originating from the Irish authorities whereby it is ascertained that the children's relocation was illicit within

[17] http://curia.europa.eu/juris/document/document.jsf?text=&docid=83999&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=586747[Accessed on May 15, 2016].

the meaning of article 3 of the above-mentioned convention.

On December 22nd 2009, Mr. McB filed an action before the High Court (Ireland) whereby he petitioned, on one hand, for the issuance of a decision or a certification finding that such relocation of his three children on July 25th 2009 was illicit in the meaning set-forth by article 3 of the 1980 Hague Convention and, on the other hand, certain rights regarding assignment.

Through its decision dated April 28th 2010, the High Court rejected the first of these petitions seeing as, the father, did not benefit, with regard to his children, from rights regarding assignment at the date of their relocation therefore such relocation was not illicit within the meaning of the 1980 Hague Convention or Regulation no. 2201/2003.

The father challenged this decision before the referral court. In the motion for the issuance of a preliminary decision, this court shows that the father did not benefit, with regard to his children, from rights related to assignment as of July 25th 2009 within the meaning of the 1980 Hague Convention. Nevertheless, this court emphasizes that, the notion of "assignment" is presently defined, for the purpose of filling motions for the return of children from a member state to another pursuant to the 1980 Hague Convention, at article 2, par. 9 of said regulation.

The referral court believes that neither the provisions of Regulation no. 2201/2003, nor article 7 of the Bill ensue that, the natural father of a child mandatorily benefits, with regard to that child, from rights regarding assignment, in view of determining the illicit or lawful character of a child's relocation, in the absence of a court decision conferring such rights onto the father. Nevertheless, the referral court admits that the interpretation of these provisions of Union's legislation falls under the authority of the Court.

As such, the Supreme Court decided to stay the resolution of the case and to address the court, the following preliminary question:

"Does [Regulation no. 2201/2003], construed as per article 7 of the [Bill] or in another manner, oppose the possibility that a member state could enforce, through national law, that a child's father who is not married with such child's mother, obtain a court decision from a competent court whereby the child is entrusted to him, in order for the father to be acknowledged such "assignment" which makes the relocation of that respective child from the country where his usual residence is illicit within the meaning of article 2, par. 11 of said regulation?"

EC Regulation no. 2201/2003 of the Council, dated November 27 2003 on the competence, acknowledgment, and enforcement of court decision on matrimonial matters and parental liability matters, for the cancellation of EC Regulation no. 1347/2000 should be interpreted as not opposing the possibility for a member state legislation to condition the attainment of rights related to assignment by a child's father who is not married to that same child's mother by the attainment, on behalf of the father, of a court decision issued by a national competent court conferring such rights onto him and which could make the

mother's travelling with the child, or the mother holding-back the child illicit within the meaning of article 2, par. 11 of this regulation.[18]

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