

## FOREIGN JUDICIAL DECISIONS IN MATTERS OF PARENTAL RESPONSIBILITY

*Regulating relationships between parents and children and parental responsibility is highly important, not only for the protection of a child. If there is a foreign element in the area, then the situation becomes more complex, and given that different questions can be raised regarding the effect of the foreign judgments given in this topic in other countries. The cases of parental responsibility with a foreign element are fully regulated by the EU Regulation No 2201/2003, which, apart from parental responsibility, regulates the questions related to the dissolution of marriage. The effect of foreign decisions in this area depends not only on the rules of the state of recognition, but also on establishing jurisdiction of a court, as well as on the law applicable. In this paper a great attention has been given to this Regulation, but also to the provisions of Swiss, German and Serbian legislation analyzed herein. The provisions of the Swiss and Serbian legislation, the subject of analysis, are found in the laws regulating area of the Private International Law, whereas in the German legislation, a special act regulates procedure in these matters. This paper also discusses the Hague Convention on the Civil Aspects of International Child Abduction, given that Regulation 2201/2003 refers to its application. Finally, it is concluded from all of this that the rules in this area are heterogeneous and its application depends on relations when the question of parental responsibility has been raised.*

**Key words:** *parents, children, parental responsibility, foreign element, jurisdiction, foreign decision, recognition, enforcement.*

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Regulating relationships between parents and children and parental responsibility are extremely important, primarily due to the sensitivity of this area, and due to the issues related to the protection of children in the first

place. When we have a foreign element, then we cannot discuss only about the law applicable and its points of attachment, that can favour one of the parties (this refers to the parents and children), but also we can discuss about foreign decisions in this respect and its enforcement in the domestic territory - in the country of recognition. Furthermore, prior to giving focus on the status of foreign decisions concerning the cases of parental responsibility, matters covered by parental responsibility should be defined. Can all relationships between parents and children be eligible to fall under this subject? This also applies to the administration of property of child carried out by parents, matters of inheritance, maintenance, etc.. In the EU law the Act regulating this matter was passed. The Act precisely defines what is covered by the parental responsibility, and what does not fall therein. On the other side, in the national legislations more attention is given to determining the law applicable. However, in those jurisdictions attention is not given to the certain relationships between parents and children, and to the forms of parental responsibility. An exception is the German legislation, where the status of foreign decisions on these matters is regulated by the enactment of a special law.

### 1. Foreign element in family relationships

One of the important aspects in regulating family relationships with a foreign element, including relations concerning parental responsibility, is formulation of rules in order to determine jurisdiction and the law applicable. Family relationships fall under the relations of status, therefore the basic criteria used in the past, are still used to determine personal law: citizenship and domicile (domicile, habitual residence). For understanding the nature of these relations, it is necessary to focus on these rules (points of attachment). *Lex personalis*, as the personal law, is also *lex nationalis* (*lex patriae*), i.e. the law of the state<sup>1</sup>. Good sides of the legal institution of nationality (citizenship) demonstrate stability in relationships between a person and the law of the state of his belonging. A party can easily change its domicile and thus may disrupt resolution of relations in question<sup>2</sup>. It is a general rule in the local collision regulations of the Private International Law, that in the cases of status of foreign parties, basically, the law of their state is applied<sup>3</sup>. This means, that in the European Continental law, the principle of citizenship is considered fundamental principle for resolving statutory relations<sup>4</sup>. Particularly, when resolving statutory

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<sup>1</sup>B. Blagojević, *Međunarodno privatno pravo*, Beograd 1950, 208.

<sup>2</sup>S. Cigoj, *Međunarodno zasebno pravo*, Ljubljana 1966, 34-39.

<sup>3</sup>K. Sajko, *Međunarodno privatno pravo i pravo koje uređuje situacije sa međurepubličkim i međupokrajinskim obeležjem*, Beograd 1981, 261.

<sup>4</sup>A. Schnitzer, *Handbuch des Internationalen Privatrecht I*, Basel 1950, 147.

relations, the major differences between legal systems occur<sup>5</sup>. The law applicable for defining legal capacity of the natural persons is determined by the citizenship of those persons. Similarly, the concept of domicile is very important in the status relations. Some authors define several criteria for determining domicile, starting from the personal data, workplace and place of residence, to the origin.

When regulating relationships between parents and children and parental responsibility, primary rules are nationality and domicile. However, these relationships are complex, so these rules cannot be established easily, taking into account the different forms of these relationships. A particular problem is a concept of domicile and possibility of its existence in more than one country<sup>6</sup>. According to the provisions under the EU law, a domicile is defined as a place where is a person's centre of interest, determined by other elements which define the type of stay in one place<sup>7</sup>. In addition, other legal institutions different from domicile are also used for defining a person's residence in a certain place. We are going to highlight some of the most important rules defined under EU law, and then, rules of the above mentioned national legislations.

## 2. Regulations in EU Law

The Council Regulation (EU) No 2201/2003 dated November 27, 2003, concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (hereinafter: Regulation 2201/2003)<sup>8</sup>, which is also known as "Brussels II bis", is applied in the civil matters related to the dissolution of marriage and in the matters of parental responsibility, i.e. judgement, enforcement, delegation, restriction or termination of parental responsibility<sup>9</sup>. Repealed Regulation No 1347/2000

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<sup>5</sup>M. Pak, *Međunarodno privatno pravo*, Beograd 1991, 311.

<sup>6</sup>Allen N., Where does our client live? Habitual Residence and Residence under Brussels II (Revised) after Marinos, <http://www.familylawweek.co.uk/site.aspx?i=ed1176>, 25.01.2012.

<sup>7</sup>*Ibid.*

<sup>8</sup>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 - *Official Journal of the European Communities L 338*, 23.12.2003, p. 1–29

<sup>9</sup>Art.1(1) Regulation 2201/2003; Scott M.J., Resolving The Problems Of Jurisdiction In Family Law – Brussels II And Points West, <http://www.murraystable.com/news-articles/articles/resolving-the-problems-of-jurisdiction>, 24.01.2012.; Article 1(1) the Brussels II Regulation (No 2201/2003) must be interpreted as meaning that a decision ordering that a child be immediately taken into care and placed outside his original home is covered by the term 'civil matters', for the purposes of that provision, where that decision was adopted in the context of public law rules relating to child protection (see para. 29, operative part 1). ECJ 2

sets out rules on jurisdiction, recognition and enforcement of judgements in matrimonial matters and matters of parental responsibility for the children of both spouses rendered on the occasion of the matrimonial proceedings<sup>10</sup>. The attention will be given only to the provisions related to the parental responsibility. Certain provisions of the Regulation 2201/2003 are common provisions in matrimonial matters and matters of parental responsibility. Regulation 2201/2003 came into force on August 1, 2004 and has been applied from March 3, 2005<sup>11</sup>.

In Regulation 2201/2003 the matters where the said Regulation shall not be applicable are precisely specified, concerning parent-child relationship. These are: -the establishment or contesting of a parent-child relationship - decisions on adoption, measures preparatory to adoption, or annulment or revocation of adoption; - name and forenames of the child; - emancipation/liberation of children from parental supervision / proclamation of maturity, - obligation to child support; - fiduciary relationships or succession; - measures taken as a result of criminal offences committed by children<sup>12</sup>.

Regulation 2201/2003 foresees the establishment of the central authorities with the purpose of effective implementation of this act and in order to facilitate communication. The central authorities shall communicate information on national laws and procedures, and take measures to improve the implementation of Regulation 2201/2003<sup>13</sup>. These authorities are also responsible for strengthening cooperation. For this purpose the European Judicial Network in civil and commercial matters is created by the Decision on establishing a European Judicial Network, No 470/2001, of May 28, 2001<sup>14</sup>.

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April 2009 (Case C-523/07, ECR 2009 Page I-02805), <http://www.europeancivillaw.com/caselaw/brusregtwo001.htm>, 26.01.2012.

<sup>10</sup>[http://www.laweuropa.com/English/index.php?d=topluluk&mod=AB\\_Topluluk\\_9\\_6](http://www.laweuropa.com/English/index.php?d=topluluk&mod=AB_Topluluk_9_6)", 28.07.2011.

<sup>11</sup>Art. 72(1,2) Regulation 2201/2003: Stone P., *EU Private International Law*, Elgar European Law 2010., 419.

<sup>12</sup>Bordaš B., *Regulativa Saveta (EZ) br. 2201/2003 o nadležnosti i priznanju i izvršenju presuda u bračnim stvarima i stvarima roditeljske odgovornosti: odnos Regulative i drugih instrumenata (čl.60 i 61) – mogućnosti saradnje sa državama nečlanicama EU*, *Zbornik prispevkov z mednarodne znanstvene konference na Pravni fakulteti Univerze v Mariboru*, Maribor 2004., 68.; Art. 1(3) Regulation 2201/2003

<sup>13</sup>Forcada Miranda F.J., *The Judges' Newsletter on International Child Protection* vol. XV / autumn 2009 - Special Focus, Theme 3,

"[http://www.hch.net/index\\_en.php?act=text.display&tid=62](http://www.hch.net/index_en.php?act=text.display&tid=62)", 23.01.2012.

<sup>14</sup>Council Decision of 28 May 2001 establishing a European Judicial Network in civil and commercial matters 2001/470/EC, *Official Journal of the European Communities* L 174, 27/06/2001 p.0025-0031; Art. 54. Regulation 2201/2003

### **2.1. Reasons for enactment of Regulation 2201/2003**

A need for a comprehensive act regulating these relations arises from the intention of creation of a judicial area in which decisions relating to these cases will be carried out freely. The Regulation 2201/2003 covers all decisions on parental responsibility, including the measures for a child protection, regardless any connection with matrimonial proceeding. Regulation 2201/2003 gives special attention to recognition and enforcement of decisions given in the Member States. The recognition and enforcement of decisions given in a Member State should be based on the principle of mutual trust and the grounds for non-recognition should be kept to the minimum required. Authentic instruments and agreements between parties that are enforceable in one Member State, should be treated as equivalent to "judgments" for the purpose of the application of the rules on recognition and enforcement<sup>15</sup>.

The European Council considered that judgments in the field of family litigation should be "automatically recognized throughout the European Union without any intermediate proceedings or grounds for refusal of enforcement." This is why judgments on rights of access and judgments on return of a child, that have been certified in the Member State of origin in accordance with the provisions of this Regulation 2201/2003, should be recognized and should be enforceable in all other the Member States, without any further procedure being required. Mechanisms for the enforcement of such judgments continue to be governed by national law. The certificate issued to facilitate enforcement of the said judgment should not be subject to appeal. It should be rectified only where there is a material error, i.e. where it does not correctly reflect the judgment<sup>16</sup>.

### **2.2. Application of Regulation U2201/2003 in non-Member States**

The EU Council on July 7, 2009, passed a Regulation No 664/2009<sup>17</sup>, on establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction,

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<sup>15</sup>Čolović V., Regulisanje priznanja odluka u vezi sa pitanjima roditeljske odgovornosti u pravu EU (po Uredbi 2201/2003 – „Brisel II bis“), *Evropsko zakonodavstvo* br. 37-38/11, Beograd 2011., 31

<sup>16</sup>*Ibid.*

<sup>17</sup>Council Regulation (EC) No 664/2009 of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations -*Official Journal of the European Communities*, L 200, 31.7.2009., 46-51

recognition and enforcement of judgments and other decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to maintenance obligations. The Regulation 664/2009 was issued as a result of the special relationship between the Member States and non-Member States. A significant part of the non-member citizens lives in the Member States, and, of course, in many cases non-member State is adjacent to the Member State. Adoption of this Regulation 664/2009 has contributed to the Member States can enter into international agreements with third countries - non-Member States<sup>18</sup>. Therefore, the Regulation 2201/2003 has become even more important.

### 2.3. General jurisdiction – jurisdiction by child's habitual residence

We will only mention the basic provision on jurisdiction. Regulation 2201/2003 determines the general jurisdiction of the court of the Member States to take decisions relating to parental responsibility. The court has general jurisdiction by the child's habitual residence in a Member State at the time of initiation of proceeding<sup>19</sup>. This Regulation 2201/2003 contains a provision on the continuing jurisdiction by the habitual residence of a child. Specifically, if a child moves lawfully from one Member State and acquires a new habitual residence there, the courts of the Member State of the child's former habitual residence retain jurisdiction during the period of three months from the date of the move, for the purpose of modifying a court judgment on access right issued in that Member State before the child moved, where the holder of access rights to the child, pursuant to the court decisions on access rights, continues to have his or her habitual residence in the Member State of the child's former habitual residence. Above mentioned shall not apply if the holder of the said access rights has accepted the jurisdiction of the courts of the Member State of the child's new habitual residence<sup>20</sup>. This Regulation 2201/2003 contains provisions on jurisdiction in cases of child abduction, there after the provisions of the agreement on

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<sup>18</sup>J. Alihodžić, Uticaj vanjske nadležnosti Evropske unije na sklapanje međunarodnih ugovora država članica u oblasti Međunarodnog privatnog prava – osvrt na Uredbu EZ br.664/2009 i njen značaj za BiH, *Anali Pravnog fakulteta Univerziteta u Zenici* br.6, god.3, 86

<sup>19</sup>Art. 8(1) Regulation 2201/2003; Scott M.J.; Beaumont P., Jurisdiction in cross-border parental responsibility cases, publication of European Commission „*Jurisdiction of cross-border cases and recognition and enforcement of judgments in family law matters*“, 2010., 15.

<sup>20</sup>Art.9. Regulation 2201/2003; Beaumont P.,18; *Practice Guide for the application of the new Brussels II Regulation* (Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000), 13. "[http://ec.europa.eu/civiljustice/divorce/parental\\_resp\\_ec\\_vdm\\_en.pdf](http://ec.europa.eu/civiljustice/divorce/parental_resp_ec_vdm_en.pdf)", 25.01.2012.

jurisdiction, the provision on the determination of jurisdiction based on the child's presence, etc.

#### 2.4. Recognition of Foreign Decisions

The foreign decision relating to parental responsibility, under Regulation 2201/2003, are referred to: - the right to parental care and the access rights to the child, - taking care of child, upbringing and similar institutions, - designation of duties of any person or body having charge of the child's person and property, i.e. representing or assisting the child; - Placement of the child, - measures for child protection relating to the administration, conservation and disposal of the child's property.<sup>21</sup>

Under Regulation 2201/2003 the conditions for recognition and enforcement of foreign judgements are specified. A number of other rules is designed in order to make a request for recognition and enforcement more efficient. The conditions do not derogate from the general rules in this area. These conditions are related to the recognition and enforcement of foreign judgments. This Regulation 2201/2003 does not contain any provisions on recognition of acts adopted by other authorities. The basic rule is that, without conducting any particular procedure, the judgment is to be recognized in other Member States<sup>22</sup>. Any interested party may request the recognition or non-recognition of a judgement relating to the parental responsibility. Furthermore, on the basis of the above mentioned it can be concluded that interested party may apply for non-recognition of foreign judgment, with the appropriate documentation, if a procedure for recognition has been initiated.

It is essential, that a substance of a judgment may not be reviewed in the procedure for recognition<sup>23</sup>. A court of a Member State in which recognition is sought of a judgement given in another Member State, may suspend the procedure if against the judgment a regular legal remedy as been lodged in the State of its adoption<sup>24</sup>.

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<sup>21</sup>Art. 3. Regulation 2201/2003

<sup>22</sup>Renton C., EU Regulations and Children in English Family Law, <http://www.familylawweek.co.uk/site.aspx?i=ed24757>, 24.01.2012.

<sup>23</sup>Art.26. Regulation 2201/2003

<sup>24</sup>Art.27. Regulation 2201/2003, Harsági V., Recognition and Enforcement of Foreign Judgments and Authentic Instruments, 3., <http://www.cnue.be/fr/congres-varsovie-fr/harsaqi.pdf>, 23.01.2012.

A procedure for recognition of a judgment shall be implemented by the local competent court. Each Member State is obliged to submit to the European Commission a list of the courts competent for conducting procedures for recognition of a judgment. Otherwise, the local jurisdiction is determined pursuant to the laws of each Member State, where proceedings for recognition or non-recognition of judgment are brought. A recognition of foreign judgment can be established as a preliminary question. A court before this question is raised shall decide on it.<sup>25</sup>

A party seeking contestation of recognition of judgment or applying for a declaration of enforceability shall submit: -a copy of the judgment which fulfils all the conditions necessary to establish its authenticity, and-the certificate regarding judgments on matrimonial matters, regulated by the Regulation 2201/2003, more specifically, a competent court shall, or other competent authority of the Member State of origin, at the request of any interested party, issue a certificate on it<sup>26</sup>. Moreover, when a decision was made without presence in the court, the party seeking recognition or applying for the declaration of enforceability shall submit: -the original or certified true copy of the document confirming that the party, not present in the court, received the document instituting the proceeding or an equivalent document, or - any document indicating that the defendant has accepted the judgment unequivocally<sup>27</sup>. The process of enforcement of judgment is provided by the law of the state of enforcement<sup>28</sup>.

### **2.5. Grounds for non-recognition of foreign judgments relating to the parental responsibility**

Regulation 2201/2003 particularly regulates reasons for refusal of recognition of foreign judgments relating to parental responsibility. A foreign judgment shall not be recognized:

- a) if such recognition is contrary to the public policy in the Member State in which recognition is sought. We must take into consideration the best interests of the child;

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<sup>25</sup>Art. 21. Regulation 2201/2003; Harsági V., 4-5.; Schulz A., Brussels II bis Regulation: Recognition and enforcement of judgments in matters of parental responsibility; practical and legal aspects of abolition of exequatur for decisions of return of a child and on access rights, publication of European Commission „*Jurisdiction of cross-border cases and recognition and enforcement of judgments in family law matters*“, 2010., 23.

<sup>26</sup>Art. 37. and 39. Regulation 2201/2003

<sup>27</sup>Art. 37. (2) Regulation 2201/2003

<sup>28</sup>Art. 47.(1) Regulation 2201/2003; Schulz A., 24.; *Practice Guide for the application of the new Brussels II Regulation*, 27.



- b) if a foreign judgment rendered in a process in which an opportunity to be heard was not given to the child. It is necessary that the basic procedural rules of a Member State have been violated, in which recognition is sought;
- c) where the foreign judgment was given in default, the document on initiation of the proceeding was not delivered to the person, or otherwise in writing, from which it can be concluded that the proceedings initiated and which enable that person to arrange his or her defence. The above shall not be applied if unequivocally proven that the person accepted the decision;
- d) on the request of any person claiming that the judgment in fringes his or her parental responsibility, if rendered without giving an opportunity to such person to be heard;
- e) if a foreign judgment is irreconcilable with a later judgment given in the Member State in which recognition is sought;
- f) if a foreign judgment is irreconcilable with a later judgment given in another Member State or in non-Member State of the habitual residence of the child provided that the later judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought; and
- g) if a procedure given by Regulation 2201/2003, relating to the child's placement in other Member State, has not been complied with<sup>29</sup>.

If we look at the aforementioned grounds for non-recognition, we see the general rules relating to the infringement of proceedings, a person's inability to participate in the proceedings, a failure to deliver document in writing, and then, the later decision already rendered, but before recognition was sought, etc.

## **2.6. Enforcement of foreign judgements relating to the parental responsibility**

A judgement relating to the parental responsibility in respect of a child, given in a Member State and enforceable in that Member State, shall be enforceable in another Member State, when on the application of any interested party, it has been declared enforceable there. However, it is required that the judgment is delivered in a proper way in the State of adoption<sup>30</sup>. A court in which the application for enforcement is sought, shall render decision without adjournment. Neither the person against whom enforcement is sought, nor the child shall, at this stage, be entitled to make

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<sup>29</sup>Art. 56. Regulation 2201/2003

<sup>30</sup>Art. 28. Regulation 2201/2003

any submissions on the application for enforcement. The application for enforcement may be refused only for the reasons specified in Regulation 2201/2003<sup>31</sup>. The authorized officer of the court promptly shall notify the applicant on the decision given in accordance with the procedure prescribed by the Member State of enforcement<sup>32</sup>.

Either party may appeal against the decision on the application for a declaration of enforceability of the decision. The appeal shall be lodged with the competent court. If the appeal is brought by the applicant for a declaration of enforceability, the party against whom enforcement is sought shall be summoned to appear before the appellate court. The appeal must be filed within one month from the date of service of the decision on the enforceability. If the party against whom the declaration of enforceability is sought, is habitually resident in a Member State other than that in which the declaration of enforceability was given. If the party against whom enforcement is sought is habitually resident in a Member State other than the Member State in which the decision on enforceability was given, the period for appealing shall be two months and shall run from the date of service of decision, either on him or at his residence<sup>33</sup>. The application for a declaration of enforceability of the decision shall be submitted to the court appearing in the special list, which is submitted to the European Commission. The local jurisdiction will be determined by reference to the residence of the person against whom enforcement is sought<sup>34</sup>. The authorized officer of the court must promptly notify the applicant on the decision given on the application of enforcement<sup>35</sup>. This Regulation 2201/2003 also regulates the partial enforcement of a judgment.

### **2.6.1. Special regime of enforcement and issuing of certificate of enforcement**

The Regulation 2201/2003 contains special provisions relating to the special (default) regime of enforcement of special judgements relating to rights of access to a child, and the return of a child, entailed by a judgment<sup>36</sup>. The judgments in another Member States shall be enforced: - without the need for a declaration of enforceability; - no possibility of opposing recognition of foreign judgments; - provided that a judgment in the Member State of origin a special certificate has been issued; - provided that the certificate shall take effect only within the limits of the enforceability of the

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<sup>31</sup>Art. 31. (1,2) Regulation 2201/2003; Harsági V., 8.

<sup>32</sup>Art. 32. Regulation 2201/2003

<sup>33</sup>Art. 33. Regulation 2201/2003; Schulz A., 23.

<sup>34</sup>Art. 29.(1,2) Regulation 2201/2003

<sup>35</sup>Art. 32. Regulation 2201/2003

<sup>36</sup>Art. 40.-44. Regulation 2201/2003; Harsági V., 4-5.

judgment. No appeal shall be lodged against the issuing of the certificate, and in respect of correction of the certificate, the law of the State of origin shall be applicable.

As for default enforcement of a judgment concerning the access rights, the judgment must be confirmed in a Member State of its origin. The Court of the State in which a judgment was given, may declare, notwithstanding the fact that national law does not provide for enforceability by operation of law, that the judgment shall be enforceable notwithstanding any appeal, even when it is possible according to the national law of that State.

The judge (the Regulation 2201/2003 explicitly mentions the word "judge", not the "court") of the State in which the decision was given, shall issue a certificate if the following cumulative conditions are fulfilled:

- a. where the judgment was given in default. This means the person was served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way to enable that person to arrange his defence, or the person has been served with the document but not in compliance with these conditions, it is nonetheless established that he or she accepted the decision unequivocally;
- b. all parties involved in the judgment were given an opportunity to be heard, and
- c. the child was given an opportunity to be heard, unless a hearing was considered in appropriate having regard to the age or maturity of the child.

Concerning automatic enforcement of foreign judgments ordering a return of the abducted child, the Regulation 2201/2003 stipulates that the judgment concerning the return of the child, shall be recognized and enforced in another Member State, without a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been confirmed in that Member State of origin of decision. The judgment shall be made by a court of a Member State in which, immediately before the wrongful removal or retention, the child was habitually resident, and only after the courts of a Member State in which the child was unlawfully brought, refuse to order the judgment on return of the child<sup>37</sup>. An automatic and prompt enforceability is the only way to avoid the endless battle between the courts of the Member States.

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<sup>37</sup>Art. 11. Regulation 2201/2003; *Practice Guide for the application of the new Brussels II Regulation*, 32-34.

## 2.7. Wrongful removal of a child

In cases of wrongful placement of the child in another environment, as well as retention of the child, the return of the child should be obtained without delay. The Hague Convention on the Civil Aspects of International Child Abduction of October 25, 1980 (hereinafter: Hague Convention) should be applied, in particular Article 11 of the Regulation 2201/2003<sup>38</sup>. Where a person or a body having rights of custody over child, applies in one of the Member State to deliver a judgment on the basis of the Hague Convention, in order to obtain the return of a child that has been wrongfully removed or retained, the provisions of the Regulation 2201/2003 shall apply<sup>39</sup>. We will mention some of them. First of all, it shall be ensured that the child is given an opportunity to be heard during the proceedings, unless this appears inappropriate. Then, the court to which an application for the return of the child shall act expeditiously in the proceedings on the application, using the most expeditious procedures available in national law of a Member State. The court shall issue its judgment within six weeks from the date of filing application, except where exceptional circumstances make this impossible. A court cannot refuse to return a child on the basis of the Article 13 of the Hague Convention, if it is established that adequate arrangements have been made to secure the protection of the child after his return. A court cannot refuse to return a child unless the person who requested the return of the child is given an opportunity to be heard<sup>40</sup>.

### 2.7.1. The Hague Convention on the Civil Aspects of International Child Abduction

Considering the fact that the Regulation 2201/2003 contains the provisions on the application of the Hague Convention, we will briefly focus our attention on this international source. The Hague Convention has been signed by 81 states. One of the main objectives of the Hague Convention is protecting children from the harmful effects of abduction when taken abroad by one parent. Otherwise, in France, about 1000 children each year are illegally taken abroad, in Germany about 100, in the U.S. about 1500<sup>41</sup>.

The objects of the Hague Convention are:- a cooperation between central executive authorities of the Contracting States; -the assumption that a

<sup>38</sup>Preamble no. 17 Regulation 2201/2003; Renton C.;

<sup>39</sup>Art.11 Regulation 2201/2003; Rauscher T., Parental Responsibility Cases under the new Council Regulation "Brussels IIA", *The European Legal Forum*, Issue 1-2005, München 2005., 43.

<sup>40</sup>Rauscher T., 44.

<sup>41</sup>Kovaček-Stanić G., Haška konvencija o građanskopravnim aspektima međunarodne otmice dece, ppt., [www.pars.rs/active/sr-cyrillic/d/download/\\_params/file.../2346.html](http://www.pars.rs/active/sr-cyrillic/d/download/_params/file.../2346.html), 26.01.2012.

wrongful removal of a child is not in child's best interests; - a principle of prompt return of a child to the State of his or her last habitual residence;- regain the status which existed before the wrongful removal; - disabling obtain of advantages in the battle for a custody over the child, for a parent which wrongfully took a child.

The conditions for giving a decision ordering the return of a child, require an application to be lodged, which shall establish the following<sup>42</sup>: a) a child is habitually resident in a State other than the State in which the child has been brought and b) the abduction of the child is a breach of the rights of custody in the State from which the child was taken and whether there is a decision of a body or the by the law; c) the applicant actually exercised the rights of custody over a child at the time of abduction, and d) a child is younger than 16years of age. If the applicant has proven these facts his or her application may be refused: -if it can be proven that a parent had consented to or subsequently acquiesced in the removal of a child<sup>43</sup>, - if there is a serious risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation<sup>44</sup>; -if a child is old enough and attains degree of maturity and objects being returned<sup>45</sup>, - if a process for return has been initiated more than a year after the abduction, and the child in the meantime, is settled in its new environment<sup>46</sup>, and - if the return would violate the basic principles of human rights and fundamental freedoms of the requested State<sup>47</sup>. The request maybe submitted by any person or the institution or body claiming that a child has been removed or retained in breach of custody. Against this requirement can appeal an abductor, shelter provider, parent or guardian, or any person to whom has been given a decision on taking care of child.

The application of the Hague Convention is limited to return of the status that existed prior to the wrongful removal of the child, then disabling the abducting person to benefit in the battle for a custody over child, and the decision given in connection with the return of the child cannot be regarded as meritorious, on any matter concerning the right to custody.

Certain problems occur in the application of the Hague Convention. We will highlight some of them: a)it is necessary to standardize certain

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<sup>42</sup>Art. 3.1a and 3.1b Hague Convention; Lamont R., *International Child Abduction and Domestic Violence in the European Union, Gender and Migration in 21st Century Europe* (ed. Stalford H., Currie S., Velluti S.), Ashgate Publishing Company 2009., 31.

<sup>43</sup>Art.13.1a Hague Convention

<sup>44</sup>Art.13.1b Hague Convention, Lamont R., 31.

<sup>45</sup>Art. 13.2 Hague Convention

<sup>46</sup>Art.12. Hague Convention

<sup>47</sup>Art.20. Hague Convention

procedural questions, such as the type of procedure, procedural principles, deadlines for taking certain procedural actions, use of mediation, effect of appeal, etc., b) it is necessary to prescribe specific rules of the enforcement procedure; c) ineffectiveness of government authorities in application of the Hague Convention, in general, d) lack of appropriate enforcement measures and indecisiveness in carrying out compulsory measures during enforcement; e) problems related to the special conduction of enforcement process, for each attempt of enforcement of the decision; f) unreasonable delays in proceedings made by central authorities<sup>48</sup>.

### 3. Legislation of Switzerland

As we said at the beginning, our attention will be given to the legislations of Switzerland and Serbia in the area of parental responsibility. The Federal Act on Private International Law of Switzerland, of 18/12/1987 (hereinafter: the Swiss Act) contains provisions on matters of parental responsibility, concerning jurisdiction and the law applicable, and recognition of foreign judgments. These provisions contain the matters with regards to the establishment of origin, parent – child relationship, this relationship in connection with recognition of a child, as well as in connection with the adoption. In addition, Swiss Act contains provisions on effects of that relationship, i.e. the effects of origin. We will not give attention to the provisions relating to adoption.

When it comes to establishment of the origin regarding the parent - child relationship, Swiss Act provides that the Swiss courts at the place of habitual residence of the child or at the domicile of one of the parents, shall have jurisdiction over actions to establish or contest the origin<sup>49</sup>. If parents are not domiciled in Switzerland, and the child is not habitually resident in that country, the Swiss courts shall have jurisdiction by the place of origin of one of the parents over actions to establish or contest a parent-child relationship, if the action cannot be brought in the country of domicile of one of the parents, or at the place of habitual residence of the child, or if it is unreasonable to require the above mentioned<sup>50</sup>.

The law applicable to the creation, establishment and contest of a origin shall be determined by the place of the habitual residence of the child. However, if the father and mother are not habitually resident in the State of habitual residence of the child and if the child's parents are citizens of the

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<sup>48</sup>Vujović R., Haška konvencija o građanskopravnim aspektima međunarodne otmice dece – situacija u Srbiji, ppt., <http://www.mpravde.gov.rs/cr/news/vesti/otmica-dece-gradjansko-pravni-aspekti-haska-konvencija.html>, 26.01.2012.

<sup>49</sup>Art. 66. Swiss Act

<sup>50</sup>Art. 67. Swiss Act

same State, then the law of that State shall be applicable<sup>51</sup>. The law applicable to the creation, establishment, or contest of a parent-child relationship, the date of the commencement of an action shall be determinative if a preponderant interest of the child so requires<sup>52</sup>.

Foreign decisions concerning the establishment or contest of a parent-child relationship shall be recognized in Switzerland if rendered in the State of the child's habitual residence or citizenship of the child or in the State of domicile or citizenship of the father or of the mother<sup>53</sup>.

Swiss authorities shall have jurisdiction to receive an act of acknowledgment of a child at the place of birth or at the habitual residence of a child, as well as authorities at the place of domicile or citizenship of the mother or the father<sup>54</sup>. Acknowledgment in Switzerland maybe effected in accordance with the law of the State of habitual residence of the child, or citizenship of the child, or the law of the State of domicile or citizenship of the mother or the father. The date of acknowledgement is determinative. The form of acknowledgement is governed by Swiss law. The same law shall be applied to the contest of an acknowledgement<sup>55</sup>. An act of acknowledgement of a child made abroad shall be recognized in Switzerland if it is valid in the State of habitual residence or citizenship of the child or in the state of domicile or citizenship of the mother or the father<sup>56</sup>.

The Swiss courts shall have jurisdiction to act over actions regarding the relations between parent and child, and, in particular, maintenance of the child, at the place of habitual residence of the child or his or her domicile, in the absence of such domicile then those at the place of habitual residence of the defendant parent<sup>57</sup>. If neither the child or the defendant parent is domiciled or habitually resident in Switzerland and if one of them is a Swiss citizen, the courts at the place of origin shall have jurisdiction<sup>58</sup>. The relations between parent and child shall be governed by the law of the State of the habitual residence of the child. If neither parentis domiciled in the State of habitual residence of the child and if the parents and the child are citizens of the same State, the law of that State shall be applicable<sup>59</sup>.

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<sup>51</sup>Art. 68. Swiss Act

<sup>52</sup>Art. 69. Swiss Act

<sup>53</sup>Art. 70. Swiss Act

<sup>54</sup>Art. 71. (1)Swiss Act

<sup>55</sup>Art. 72. Swiss Act

<sup>56</sup>Art. 73. (1) Swiss Act

<sup>57</sup>Art. 79. (1)Swiss Act

<sup>58</sup>Art. 80. Swiss Act

<sup>59</sup>Art. 82. (1,2) Swiss Act

Foreign decisions regarding the relations between parent and child shall be recognized in Switzerland if they were rendered in the State of habitual residence of the child or in the State of domicile or habitual residence of the defendant parent<sup>60</sup>.

As you can see, the Swiss legislator has particularly regulated the matters with the element of foreignism concerning establishment of the origin (establishing and contesting), and in particular the relations between a parent and child. It should be emphasized the all matters referring to the recognition of foreign decisions are related to the State of citizenship, or habitual residence and domicile, as conditions for recognition.

#### 4. Legislature of Serbia

The Act on Resolving Conflict of Laws with Regulations of Other Countries (hereinafter: the Act on PIL)<sup>61</sup> does not contain particular provisions on recognition and enforcement of foreign judgments relating to the parental responsibility. The conditions for recognition are the same to those which are applied to all foreign decisions. However, the Act on PIL provides for rules on jurisdiction of the courts in these cases.

This country shall have jurisdiction in proceedings on care, upbringing and education of the children under parental custody, even where the defendant does not have habitual residence in this country, provided that the both parents are nationals of this country. If the defendant parent and the child are nationals and both reside in this country, the jurisdiction of a court of this country shall be exclusive. These provisions shall apply, accordingly, to determination of jurisdiction of other local authorities in the cases concerning care, upbringing and guidance to the children under parental custody<sup>62</sup>.

According to the provisions of the Act on PIL, a court of this country shall have jurisdiction in the decisions on deprivation of parental rights and restoration of parental rights, appointing parent to the position of guardian over a child's property, declaring a child born in wedlock, as well as other matters concerning personal status and relationships between parents and children. This jurisdiction shall apply even if conditions in Article 46, paragraph 4 of the Act on PIL are not met, if the applicant and respondent

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<sup>60</sup>Art.84. (1) Swiss Act

<sup>61</sup>Zakon o rešavanju sukoba zakona sa propisima drugih zemalja – Zakon o MPP, *Sl.list SFRJ*, br. 43/82, 72/82, *Sl.list SRJ*, br. 46/96 (Act on Resolving Conflict of Law with Regulation of Other Countries – Act on PIL, *Off.Journal of SFRY*, no. 43/82, 72/82, *Off.Journal of FRY* no. 46/96)

<sup>62</sup>Art.66. Act on PIL



are nationals, i.e. in the proceedings only one person which has citizenship of this country is involved<sup>63</sup>. Article 46, paragraph 4 of the Act on PIL refers to a situation where more co-defendants are involved in the proceedings as substantive co-defendants, therefore a court of this country shall have jurisdiction where one of the defendants is habitual resident or domiciled in this country.

We will mention the rules for establishing the law applicable covering these matters. In the matters concerning relationships between parents and children, pursuant to the Article 40 of the Act on PIL, primarily the law applicable shall be the law of the country of their citizenship. In the event, that they are nationals of different countries, then the law applicable shall be the law of the country where they all reside (both parents and children). If parents and children are nationals of different countries and not residing in the same country, and if a child or either of the parents is a national, then domestic law shall be applied. Finally, the Act on PIL stipulates that all relationships which are not covered by the previous provisions, the law applicable shall be the law of country of which the child is a national. The Article 43 of the Act on PIL stipulates that the legitimating of a child may be effected in accordance with the law of the country of citizenship of the parents, and if the parents are not nationals of the same country– in accordance with the law of the parent's country under which the legitimating is valid. If the conditions for legitimating a child are not fulfilled according to the above mentioned, and both parents and child are residents of this country, the law of this country shall apply.

We only wish to remind on the general conditions applied to the foreign judicial decisions, including decisions relating to the matters of parental responsibility. All conditions for recognition and enforcement of foreign decisions are divided into the general and specific. The general conditions are applied to all foreign decisions, and the specific are applied to the foreign decisions concerning the matters of status. The general conditions refer to the status of decision whose recognition is sought, as well as to its substance<sup>64</sup>. These are: a) the relation of reciprocity between domestic and foreign country; b) the validity and enforceability of the decision; c) irregularity in the proceedings before the foreign court; d) exclusive jurisdiction of domestic court; e) final judgment of the domestic court or other authority; f) recognized foreign judgment in respect to the same subject matter and between the same parties; g) earlier proceedings (litigation) with respect to the same subject matter in this country and h) violation of domestic public policy. The foreign judicial decision must fulfil

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<sup>63</sup>Art. 69. Act on PIL

<sup>64</sup>Art. 87. to 92. Act on PIL

all the conditions specified under the Act on PIL. If the foreign judicial decision fulfils all the above mentioned conditions, shall acquire equal treatment as a domestic judicial decision. Therefore it is equal to the domestic judicial decision. However, in the matters of the enforcement of foreign judicial decision, a question of particular procedural specificities may be raised.

A deficiency of the Act on PIL refers to defining the application of the conditions for recognition and enforcement of foreign judgments, regardless of the subject matter. In particular, this refers to the parental responsibility. The legislator has not sufficiently taken into consideration the specificities of this area. In fact, there are particular conditions for the recognition of foreign judicial decision in the matters of status. However, the question is whether and how those decisions can be applied to the said matters, having in mind their limitations of defining. Of course, we can make objections to the legislator regarding points of attachment when determining the law applicable.

## 5. Legislation of Germany

The International Family Law Procedure Act with foreign element, was enacted in Germany, on January 26, 2005 and amended of May 23, 2011, (hereinafter: German Act)<sup>65</sup>. The German Act was enacted primarily to execute Council Regulation 2201/2003, the Hague Convention and other international acts. This act contains in the first place, the provisions on jurisdiction of the courts, and recognition and enforcement of foreign decisions on the said matters.

The exclusive jurisdiction in the matters of recognition and enforcement shall be determined in accordance with Regulation 2201/2003, then in accordance with the Hague Convention on Protection of Child<sup>66</sup>, and in accordance with the Custody Convention<sup>67</sup>(on guardianship). The jurisdiction the Family Court is determined, at the time of application, primarily by the residence of the person against whom the request is filed or by the residence of a child<sup>68</sup>.

In order to implement decision in the national territory, it is necessary to have an endorsement for enforcement. An application for grant such endorsement can be submitted to the competent family court, in writing or

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<sup>65</sup>[http://www.gesetze-im-internet.de/englisch\\_intfamrvlg/englisch\\_intfamrvlg.html](http://www.gesetze-im-internet.de/englisch_intfamrvlg/englisch_intfamrvlg.html), 26.01.2012.

<sup>66</sup>Convention on protection of children and co-operation in respect of intercountry adoption (29 May 1993)

<sup>67</sup>European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (Luxembourg Convention 1980.)

<sup>68</sup>Art.10. (1,2(p.1)) German Act

orally to be recorded by the court registry. This shall not apply when referred to in Articles 41 and 42 of Regulation 2201/2003<sup>69</sup>. The court can order the issuance of the endorsement for enforcement, which must be in German language. If the request is not admissible or not well-founded, then the court shall render a decision on refusal of application in an order setting out the reasons<sup>70</sup>. An order made pursuant to Article 20 shall enter into force when becomes final<sup>71</sup>. On the basis of this order, the registrar shall issue the endorsement for enforcement in the prescribed form. The form should contain the name of this law, then, designation of the court and order, the grounds for compulsory enforcement as well as against whom the endorsement is issued, or, who is the obligor<sup>72</sup>.

The German Act contains provisions which specify the delivery of the child, in the scope of application of Regulation 2201/2003, of the Hague Convention on Protection of the Child and of the European Custody Convention<sup>73</sup>. Also, the German Act contains provisions on the issuance of a certificate on decision of the national courts in accordance with Regulation 2201/2003. Specifically, this certificate, pursuant to Article 39 of Regulation 2201/2003, shall be issued by the official clerk of the court registry of first instance court, and where the proceedings are pending before a higher court, then the certificate shall be issued by the clerk of that court. The certificates, in accordance with Articles 41 and 42 of Regulation 2201/2003 shall be issued by the Family Court judge of first instance court<sup>74</sup>.

These are some of the provisions of the German Act which have been made in the scope of implementation of these acts, primarily the Regulation 2201/2003. What distinguishes this Act from Regulation 2201/2003 it refers to the endorsement for enforcement of foreign decision and particular form of this act.

## 6. Conclusion

The status of foreign decisions relating to the matters of parental responsibility should be perceived from three different perspectives. Firstly, the criteria for determining the jurisdiction of the court that rendered a decision may be of importance for the implementation of the decision in another country. Then, the points of attachment by which the law applicable is determined, and the conditions that a foreign decision must fulfil in order to have effects in the territory of recognition. The relationships between

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<sup>69</sup>Art. 16. (1,2) German Act

<sup>70</sup>Art. 20. (1,3) German Act

<sup>71</sup>Art. 22. German Act

<sup>72</sup>Art. 23. (1) German Act

<sup>73</sup>Art. 33. and 44. German Act

<sup>74</sup>Art. 48. German Act

parent and child are complex and heterogeneous. Each of those relationships deserves a special attention when rendering a decision, determining the law applicable, conditions that foreign decision must fulfil in another country. The parental relationship is only partly regulated by Regulation 2201/2003, as well as by legislations of the abovementioned countries.

When regulating matters of parental responsibility, the rules to be implemented cannot be proposed. It is impossible, as we said, due to the complexity and diversity of those relationships. It could be suggested that this matter should be regulated by areas covered by this matter. Special rules should be defined in relation to the matters concerning the administration of property and its maintaining, and other rules should be defined for carrying out parental responsibility by one or both parents or, in a situation where the question is return of a child and the application of the Hague Convention.

The main objective for regulating this area according to the provisions of Regulation 2201/2003 is the recognition and enforcement of decisions given in the Member States, in order to be recognized and enforceable in the territories of other Member States. The importance of Regulation 2201/2003 is emphasized by adoption of Regulation 664/2009 and by allowing application of these provisions in the territories of non-EU countries. Regulating these areas in the national legislation refers to the definition of rules for determining jurisdiction and the law applicable. However, on the other hand the German legislature passed an act which adapts the application of Regulation 2201/2003.

Prof.dr Vladimir Čolović  
Institut za uporedno pravo Beograd

## STRANE SUDSKE ODLUKE U STVARIMA RODITELJSKE ODGOVORNOSTI

*Regulisanje odnosa između roditelja i dece i roditeljske odgovornosti je od velikog značaja, ne samo zbog zaštite deteta. Ukoliko je u toj oblasti prisutan element inostranosti, problem je složeniji, imajući u vidu da se, tada, mogu postaviti različita pitanja vezana za dejstvo stranih odluka donesenih u ovoj oblasti u drugim zemljama. Predmeti roditeljske odgovornosti sa elementom inostranosti su najpotpunije uređeni Uredbom EU br. 2201/2003 koja, osim roditeljske odgovornosti, uređuje i pitanja vezana za prestanak braka. Dejstvo stranih odluka u ovoj oblasti ne zavisi samo od pravila u zemlji priznanja, već i od određivanja nadležnosti suda, kao i od merodavnog prava. U radu se najveća pažnja posvećuje ovoj Uredbi, ali se analiziraju i odredbe švajcarskog, nemačkog i srpskog zakonodavstva. Odredbe švajcarskog i srpskog zakonodavstva, koje su predmet analize, nalaze se u zakonima koje regulišu oblast Međunarodnog privatnog prava, dok se u okviru nemačkog zakonodavstva, analizira poseban akt koji reguliše postupak u navedenim stvarima. U radu se govori i o Haškoj konvenciji o građanskopravnim aspektima otmice dece, obzirom na to da se Uredba 2201/2003 poziva i na njenu primenu. Na kraju, daje se zaključak o tome da su pravila u ovoj oblasti heterogena i da njihova primena zavisi od odnosa, u kome se postavlja pitanje roditeljske odgovornosti.*

**Ključne reči:** roditelji, deca, roditeljska odgovornost, element inostranosti, nadležnost, strana odluka, priznanje, izvršenje.