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## **The *Rinau* Case and the wrongful removal or retention of children**

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*ABSTRACT: The *Rinau* Case is a landmark decision of the ECJ regarding the wrongful removal or retention of children in the Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments both in matrimonial matters and those of parental responsibility (Brussels II bis). Having this case as starting point, this article explains the fast proceedings laid down in Brussels II bis Regulation for situations of wrongful removal or retention of children and the special rules for the recognition of the decision of return of the child wrongfully removed or retained in another Member State. However, as a preliminary point of discussion, and in order to allow a more comprehensive understanding of the proceedings concerning the wrongful removal or retention of children under the Regulation, a brief explanation of the framework of the regulation and the rules of international jurisdiction in matters of parental responsibility is provided.*

*KEYWORDS: wrongful removal or retention of children – international child abduction – Regulation 2201/2003 – Brussels II bis Regulation – *Rinau* Case.*

### **1. The *Rinau* Case**

We were asked to present a theme related to the role of Cunha Rodrigues as a judge of the European Union Court of Justice (ECJ) and the topic of judicial cooperation in civil matters. When searching through the ECJ case law, we came across the *Rinau* Case, from the 11th of June 2008, in which Cunha Rodrigues acted as judge-rapporteur, and which is currently a landmark decision on unlawful removal or retention of children, foreseen in Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility

(Brussels II *bis*). Having this important case law as a starting point, we intend to explain the proceedings that deal with the wrongful removal or retention of children regulated in the Brussels II *bis* Regulation and also to pay tribute to Cunha Rodrigues.

*Inga Rinau v. M Rinau*<sup>1</sup> deals with the unlawful removal or retention of children, also known as international child abduction. It is important to briefly explain the factual circumstances of the case.

In July 2003, Inga Rinau, of Lithuanian nationality, married M. Rinau of German nationality. They established their residence in Germany. In January 2005, their daughter, Luisa, was born and in March of the same year the couple began to live separately. As a result, later that year a divorce proceeding was brought in Germany. The child continued to live with the mother. In July 2006, Inga, after obtaining authorization from M. Rinau to leave Germany with their daughter, travelled to Lithuania for what was intended as two-week vacation, but decided to stay there for residential purposes. In August 2006, the German court provisionally awarded custody of Luisa to her father. The mother appealed against the decision but the German appeal court upheld the award of temporary custody to the father, in October of the same year.

Nevertheless, due to the decisions of the German courts, in October 2006, M. Rinau asked the Lithuanian court for the return of the child which, in response, rejected the application, in December 2006. This decision was communicated to the German central authority and to the German court. However, this decision within the Lithuanian judicial system was also subject to a first withdrawal that ordered for the child's return to Germany, in March 2007. Subsequently, in April 2007, there was an order which suspended the latter decision, but this order itself was subsequently cancelled on the 4<sup>th</sup> of June 2007. On the same date, Inga Rinau and the Attorney General of the Republic of Lithuania, on the basis of Article 13, first paragraph, of the Hague Convention of 25 October on Civil Aspects of International Child Abduction (1980 Hague Convention), invoked the change of circumstances and the child's interest and requested the reopening of the proceedings. This application was rejected by the Lithuanian court which considered that the jurisdiction to decide the issue belonged to the German courts. However, within the Lithuanian judicial system, there were a series of appeals, annulment and suspension of decisions already rendered.

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<sup>1</sup> Cf. Judgment *Rinau*, 11 July 2008, Case C-195/08 PPU.

Later, in July 2007, the German Court, taking into consideration the decision of non-return upheld by the Lithuanian court and the mother's claims, handed the permanent custody of the child to the father and ordered the immediate return of the child to Germany. The German court attached to its decision, a certificate issued pursuant the Article 42 of the Brussels II *bis* Regulation. In Lithuania, Inga Rinau submitted an application for the non-recognition of the German decision but the Lithuanian court dismissed it, arguing that the decision ordering the child's return should be implemented immediately, without the need for a declaration of enforcement and considered the application for non-recognition inadmissible. Inga Rinau appealed against this decision and consequently, the Court of Appeal stayed the proceedings and asked the ECJ whether the application for non-recognition and appeal of Inga Rinau in these circumstances would be possible.

## **2. Judicial cooperation in civil matters in family law**

The *Rinau* case is about wrongful removal or retention of children. The legal framework is laid down in Brussels II *bis* Regulation. This Regulation unifies the rules of international jurisdiction, recognition and enforcement of judgments in matrimonial matters and parental responsibility<sup>2</sup> and it is part of the policy of judicial cooperation in civil matters. Judicial cooperation in civil matters is a European Union policy, which aims to institute the European area of freedom, security and justice. The European area of freedom, security and justice is one more step towards European integration, as can be read in Article 67, section 1 of the Treaty on the Functioning of the European Union (TFEU), where it is stated that «[the] Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the United States».

The policy of judicial cooperation in civil matters is an embodiment of the area of freedom, security and justice and is provided in Article 81 of the TFEU. Judicial cooperation in civil matters covers the regulation of legal relations in civil and commercial nature whose elements are in contact with more than one Member State. This policy seeks to bring and establish means of cooperation between the judicial

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<sup>2</sup> About the Regulation cf. Anabela Susana de Sousa Gonçalves, “Âmbito de aplicação do Regulamento n.º 2201/2003 e reconhecimento de decisões em matéria matrimonial – Acórdão do TPR de 15.1.2013, Proc. 2186/06”, *Cadernos de Direito Privado*, 44 (2013), 51-57.

authorities of different Member States and it tries to ensure that the differences between the legal systems and legal orders of the Member States does not limit access to justice and the exercise of rights.<sup>3</sup> To this end, the policy of judicial cooperation in civil matters aims to promote *inter alia* coordination and harmonization between the various legal systems (always respecting the specificity of each one), to improve predictability and legal certainty and to facilitate the resolution of transnational litigation in the European Union.<sup>4</sup>

From our perspective, the policy of judicial cooperation in civil matters has been developed in four key areas: through the European Judicial Network in civil and commercial matters; in civil and commercial matters in family law, succession and wills; and in small procedural aspects.<sup>5</sup>

The issue of wrongful removal or retention of children of transnational feature falls within the matters relating to family law, whose intervention by the European Union legislature in judicial cooperation in civil matters, currently extends to a wide-ranging variety of issues, like matrimonial matters, maintenance obligations, divorce and legal separation.

### **3. The parental responsibility in the Regulation 2201/2003 (Brussels II bis)**

The Brussels II *bis* Regulation unifies international jurisdiction rules and creates a single system of recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility in the Member States. Parental responsibility is understood by the Regulation as «all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect», including the rights of custody and rights of access (Article 2, section 7). In relation to parental responsibility, according to Article 1, section 1 (b), the Regulation applies to civil matters involving parental responsibility, including its attribution, exercise, delegation, restriction or termination.

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<sup>3</sup> In more detail about the emergence of the policy of judicial cooperation in civil matters, its objectives and developments, Anabela Susana de Sousa Gonçalves, *Da Responsabilidade Extracontratual em Direito Internacional Privado, A Mudança de Paradigma* (Coimbra: Almedina, 2013), 106-127, 212-226.

<sup>4</sup> *Idem, ibidem.*

<sup>5</sup> *Idem, ibidem.*

Section 2 of the same Article explains the matters covered by the Regulation, in particular: decisions regarding custody and rights of access; guardianship, curatorship and similar institutions; the designation and functions of a person or body that is in charge of the child's person or property, representing or assisting the child; the placing of the child in a foster family or in an institution; the measures for the protection of the child relating to the administration, conservation and disposition of its assets (also in accordance with the provisions of Recital 9).<sup>6</sup> According to Recital 5, the Regulation also covers the measures that aim to protect the child in the context of parental responsibility. From the scope of the Regulation are excluded the topics listed in Article 1, section 3, in particular, those related to the establishment or contesting of a parent-child relationship; adoption; the name and forenames of the child; emancipation; maintenance obligations; trusts or successions; and measures taken as a result of criminal offences committed by the children.

According to Article 21, section 1, the Brussels II *bis* Regulation shall apply to judgments rendered by the courts<sup>7</sup> of the Member States<sup>8</sup> whose jurisdiction is determined according to the rules laid down in Articles 3 and subsequent articles.

As for its temporal scope, the Regulation applies to legal proceedings instituted, to documents formally drawn up or registered as authentic instruments and to agreements concluded between the parties after 1 March 2005 (Article 72 and Article 64, section 1).<sup>9</sup>

The relations between the Brussels II *bis* Regulation and the existing conventions linking two or more Member States on the date of the Regulation entry into force and which deal with the matters covered by the Regulation, is established in Article 59, section 1, which determines the primacy of the Regulation. Regarding multilateral conventions, the Brussels II *bis* Regulation takes precedence over the conventions listed in Article 60 in regards to the relations between the Member States. In this respect, it is

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<sup>6</sup> This list is indicative, as decided by the ECJ in the Judgment, *Korkein Hallinto-Oikeus - Finland*, 27 November 2007, Case C-435/065, recital 5.

<sup>7</sup> For the purposes of the Regulation, «court» adopts the meaning of that authority in the Member State that has jurisdiction in the matters contained in the material scope of the Regulation (Article 2, section 1).

<sup>8</sup> Excluding Denmark, in accordance with Article 2, section 3.

<sup>9</sup> Note, however, that Article 64, section 2, 3 and 4, lays down some situations in which the Regulation applies to proceedings initiated previously.

worth noting the primacy of the Brussels II *bis* Regulation in the relations between the Member States concerning the application of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (1980 Hague Convention). This Convention continues to apply, but its legal framework regarding the wrongful removal or retention of children is completed by the Regulation.<sup>10</sup>

#### **4. The international jurisdiction in matters of parental responsibility**

The rules of international jurisdiction on parental responsibility of Brussels II *bis* Regulation are aimed at safeguarding the best interests of the child (paragraph 12). This concern also results from Article 24, section 2 of the Charter of Fundamental Rights of the European Union of 7 December 2000. In regards to the international jurisdiction, the child's best interest is achieved through the principle of proximity, by attributing jurisdiction to the court that is closer to the child, because it will be the authority best placed to know the real situation of the child, its needs, its development, and therefore, the authority that will have more information to make the most appropriate decisions, in a timely manner. In addition, there is also the factor of legal effectiveness of the decisions concerning the child which justifies the attribution of jurisdiction to the court that is closer to the child, because in this way, decisions can be readily enforced in the place where the child's life unfolds.<sup>11</sup>

The courts considered to be the closest to the child, and consequently have international jurisdiction over issues of parental responsibility, are the courts of the Member State where the child has his habitual residence at the time the court is seized,<sup>12</sup> according to the general rule of Article 8. It was under this general rule of jurisdiction, that in the

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<sup>10</sup> Cf. European Commission, *Practical guide for the application of the new Brussels II bis Regulation [Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and parental responsibility, repealing Regulation (EC) 1347/2000]*, <http://ec.europa.eu>, accessed on 1<sup>st</sup> May 2013.

<sup>11</sup> With this opinion cf. Y. Lequette, "Le droit international privé de la famille à l'épreuve des conventions internationales", *RCADI*, 246 (1994-II), Vol. 246, 6, 52.

<sup>12</sup> According to the provisions of Article 16, the court is seized: i) on the date of lodging with the court of the document instituting the proceedings or an equivalent document (provided that the plaintiff did not fail to take all the measures he was required to take to have service effected on the defendant); ii) or if the document has to be served before being lodged with the court, at the time that it is received by the responsible for service (provided the applicant has not subsequently failed to take the measures he was required to take to have the document lodge with the court). At the time when the court is seized, it acquires jurisdiction and always intervenes. However, there are special situations that can alter this rule. The jurisdiction ceases, in accordance with Article 12, section 2, when there is a final decision or the circumstances that originated a different jurisdiction come to an end.

*Rinau* case the German courts considered themselves competent, as the courts of the habitual residence of the child.

From the moment when the process is seized, the court of the habitual residence acquires jurisdiction over the matters of parental responsibility for that child and intervenes until the change of the child's habitual residence to another Member State. An extension of this jurisdiction can even occur under Article 9, section 1: when the child lawfully moves to another Member State, and acquires a new habitual residence there. The courts of the child's previous habitual residence retain jurisdiction during the period of three months after the moving, to change the decisions taken before the removal, on the right to visit, provided that the holder of access rights continue to have its habitual residence in that Member State. This scenario will not take place, however, if the holder of access rights accepts the jurisdiction of the courts of the new habitual residence by simply participating in the proceeding without contesting the jurisdiction of the court (Article 9, section 2).

To apply Article 8, it is important to determine the concept of habitual residence of the child for the purposes of the Brussels II *bis* Regulation. According to ECJ case law,<sup>13</sup> this concept should be interpreted independently, taking into account the purpose and context of the rules as well as the best interests of the child, an objective of the Regulation in matters of parental responsibility which, as was earlier mentioned, is achieved through the proximity principle. Habitual residence, for the purposes of Article 8, must be understood as the place that reveals a certain integration of the child in a social and family environment, and shows some stability or regularity, characteristics determined by certain signs reflecting the social and family integration in the concrete case.<sup>14</sup>

According to the ECJ, these signs can be inferred by taking into account, for example, the duration, conditions, and reasons for the stay of the child and family in the territory of a Member State, the child's nationality, the place and conditions of education, language skills, family and social ties of the child in that State; the intention of the

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<sup>13</sup> Cf. Judgment *Korkein hallinto-oikeus*, 2 April 2009, Case C-523/07; Judgment *Barbara Mercredi*, 22 October 2010, Case 497/10PPU; Judgment *J.McB.*, 5 October 2010, Case C-400/PPU.

<sup>14</sup> Cf. Judgment *Barbara Mercredi*, 22 October 2010, Case 497/10PPU, recitals 44 and 47; Judgment *Korkein hallinto-oikeus*, 2 April 2009, Case C-523/07, recital 44.

holder of parental responsibility to settle with the child in another Member State, expressed by some external signs, such as the purchase or leasing of a house in the host Member State (which may be an indication of the transfer of the habitual residence), or the application for allocation of social housing made to social services of a Member State, i.e., the will of the interested to settle, with a stable character, the permanent or habitual centre of his interests in that same Member State.<sup>15</sup>

Important also for the application of Article 8 is to determine the concept of child. As this notion is not defined in the Regulation, we follow the doctrine that considers that it is only possible to solve this issue using the conflict-of-law rules of the *forum State* to determine the subjects to which parental responsibility concerns.<sup>16</sup> We must note that the European Commission also recognizes that this issue, given the silence of the Regulation, shall be settled in accordance with national laws.<sup>17</sup>

The general rule of Article 8 of the Brussels II *bis* Regulation is overridden by the special rules in situations of extension of jurisdiction, in some cases. Firstly, in favour of the courts that have jurisdiction to decide the divorce, legal separation or marriage annulment under Article 3, whenever there is a link between this request and the parental responsibility according to the conditions of Article 12, namely the agreement of the right-holders of the parental responsibility. Secondly, in favour of the courts of a Member State with which the child has a special connection, or because that State is the State of the habitual residence of the right holder of the parental responsibility, or the child has the nationality of that State, but only if the jurisdiction is accepted by all parties in the proceedings (on the date on which the proceedings is initiated) and if this

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<sup>15</sup> Among other indications that may result from a specific case cf. Judgment *Barbara Mercredi*, 22 October 2010, Case 497/10PPU, recitals 53-56; Judgment *Korkein hallinto-oikeus*, 2 April 2009, Case C-523/07, recital 44.

<sup>16</sup> Cf. P. Mayer/V. Heuzé, *Droit international privé* (Paris: Montchrestien, 2007, 9 Ed.), 403; A.L. Calvo Caravaca/J. Carrascosa González, *Derecho Internacional Privado* Vol. II (Granada: Editorial Comares, 2013, 14 Ed.), 394-395; W. Pintens, “Art. 1” in U. Magnus/P. Mankowski, *Brussels IIbis Regulation*, (Munich: Sellier European Law Publishers, 2012), 75; P. Stone, *EU Private International Law, Harmonization of Laws*, (Cheltenham/Northampton: Edward Elgar, 2008), 405.

<sup>17</sup> Cf. European Commission, *Practical guide for the application of the new Brussels II bis Regulation*, 9. Note, however, that under Article 4 of the 1980 Hague Convention, the convention applies only until the child reaches the age of 16. Cf. R. Espinosa Calabuig, «La responsabilidad parental y el *nuovo* regolamento de “Brusselas II bis”»: entre el interés del menor y la cooperación judicial interestatal», *RDIPP* (2003, 3-4), 754-755, presenting different arguments for the consideration of 16 years versus 18 years, concluding that the most convenient would be to find a criterion as uniform as possible so that the minor could enjoy a minimum common protection.

jurisdiction is in the best interests of the child (Article 12, section 3).<sup>18</sup> If it is not possible to determine the child's habitual residence, or resort to the extension of jurisdiction laid down in Article 12, the courts of the Member State in which the child is located (Article 13) shall have jurisdiction. Finally, and as a residual rule, in cases where the jurisdiction of the courts of the Member States cannot be determined by the rules above, the jurisdiction shall be governed by the law of each Member State (Article 14).

Article 15 exceptionally enables, on behalf of the best interests of the child, and according to requirements of the rules and the circumstances of the concrete case, that the court of a Member State which has jurisdiction over the parental responsibility to stay the proceedings and invite the parties to introduce a request, within a time limit, before the courts of another Member State, that by its proximity to the case or some aspect of the case, is best placed to hear the case or ask this court from assuming jurisdiction in accordance with paragraph 5 of Article 15 (*forum conveniens*).<sup>19</sup>

## **5. The wrongful removal or retention of children**

The Brussels II *bis* Regulation provides rules concerning the wrongful removal or retention of children, as was also previously done by the 1980 Hague Convention. The rules of the Regulation do not conflict with the provisions of the 1980 Hague Convention but aim to complete it (Recital 17 and Article 11, section 1) and to overcome the faults that the application of the Convention revealed, in particular in terms of effectiveness of decisions of return. Consequently, Article 60 of the Regulation lays down that that the Regulation prevails over the 1980 Hague Convention. Possible issues regarding the hierarchy of legal sources and the respect of international commitments by the Member States are solved by Article 36 of the 1980 Hague Convention, which provides that the Contracting States of the Convention may conclude agreements to reduce the existing restrictions on the return of the child.

As to the wrongful removal or retention of children, the Brussels II *bis* Regulation establishes expeditious proceedings that, on behalf of the best interests of the child, aim

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<sup>18</sup> See, to that effect, the presumption established in Article 12, section 4.

<sup>19</sup> This transfer of jurisdiction in favor of a more appropriate forum must be triggered at the request of a party, at the initiative of the court or at the request of a court of another State with which the child has a special connection [Article 15, section 2 (a), (b) and (c)].

at the immediate return of the child to his country of habitual residence (Recital 17). The mechanism set in the Regulation is based on judicial cooperation between the courts and the central authorities of the Member States<sup>20</sup> and intends to discourage the abduction of children within the Union, mainly in order to respect the interests of the children and their affective ties. In these situations, the purpose is to guarantee an immediate return of the child, not rewarding the parent who abducted the child with a long process.

Before explaining the mechanism provided for in the Regulation, it is necessary to clarify some concepts. First of all, it is important to evaluate what is wrongful removal or retention of a child for the purposes of the Regulation. The concept provided in Article 2, section 11 of this legal instrument, follows the notion of Article 3 of the 1980 Hague Convention, and considers the removal or retention of a child unlawful when «(a) it is in breach of rights of custody acquired by a judgment or by the operation of law, or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention; and (b) provided that, at the time of removal or retention, the rights of custody were actually exercised, either jointly<sup>21</sup> or solely, or would have been so exercised but for the removal or retention».

Therefore, we are facing a wrongful removal or retention of children when, through the removal or retention, rights of custody are violated. The notion of custody rights is provided in Article 2, section 9 of Regulation [also coinciding with the notion set forth in Article 5(a) of the Hague Convention], as including the rights and duties relating to the care and support of the person of the child, as well as the right to determine the child's habitual residence. Finally, regarding the acquisition of rights of custody, according to Article 2, section 11, it is the law of the Member State where the child had

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<sup>20</sup> In the Regulation is laid down that central authorities general objectives are the strengthening of the cooperation among Member States and the improvement of the implementation of the Brussels II *bis* Regulation (Article 54 and 55). Part of their duties (Article 54 and 55) are, among others: promoting the exchange of information on legislation and relevant national proceedings (Article 54); or collecting and exchanging information about the child's situation, on any ongoing proceedings and any decisions taken concerning the child [Article 55(a)]; or facilitating communications between the courts of different Member States [Article 55(c)]. In Portugal, the central authority is the Directorate-General of Social Welfare.

<sup>21</sup> The concept of right of custody is considered to be exercised jointly when «pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility» [Article 2, section 11 (b) in fine].

his habitual residence before the abduction, which determines the conditions under which the acquisition of the rights of custody of the child by the parent or parents is done.<sup>22</sup>

One of the main ideas enshrined in the Regulation, regarding the wrongful removal or retention of children, is that the courts of the Member State of the habitual residence of the child before the abduction keep the jurisdiction after the abduction, until the child is provided with a habitual residence in another EU country, which only happens if the conditions provided in the sections of Article 10 are met. The stability of the jurisdiction of the court of habitual residence of origin of the child allows a faster decision of return, if necessary, avoiding delaying disputes over jurisdiction. Simultaneously, also avoiding favouring the parent who illicitly moved the child to another Member State, by the attribution of jurisdiction to a court that is closest to him at that moment. It was under this Article that in the *Rinau* Case, the German court upheld its jurisdiction when the child was already retained (wrongfully) in Lithuania.

However, in a situation of child abduction it is possible to get a transfer of the habitual residence to another Member State, but to this end, there must be consent to the removal or retention from the person who has the rights of custody [Article 10(a)]. Alternatively, and according to Article 10(b), the transfer of habitual residence will occur, if the child has been residing in another State of the Union for one year after the holder of the rights of custody has been notified of his whereabouts (or should have been) and the child is settled in its new environment, provided that: during this period, the holder of the rights of custody has not asked for the return of the child to the competent authorities of the Member State to which the child has been taken or is retained (i); or has withdrawn the request for return and has not lodged a similar request in the same period (ii); or the case that aims to promote the return of the child has been dropped according to the conditions of Article 11, section 7 (iii); or the courts of the original country of habitual residence of the child pronounced a decision on custody, that does not entail the return of the child (iv). The period of one year provided in this subsection (b) is dependent on the knowledge of the holder of the rights of custody and of the whereabouts of the child.

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<sup>22</sup> That may depend even of a decision of the court that assigns custody cf. Judgment *J.McB.*, 5 October 2010, Case C-400/PPU, recital 43.

As for the proceedings to adopt in a case of wrongful removal or retention of a child in another Member State, Article 11 of the Brussels II *bis* Regulation completes the provisions of the 1980 Hague Convention. In this situation, according to Article 8 of the 1980 Hague Convention, any person, institution or agency may report the facts to the competent authorities of the State of habitual residence of the child (central authority) or to another Contracting State of the Hague Convention, asking for assistance to ensure the return of child. This request should be accompanied by the elements provided in the second part of the rule. The central authority that was informed of that fact shall transmit it to the central authority of the Contracting State where the child is (Article 9 of the Hague Convention of 1980), which should try to promote the necessary measures for the voluntary return of the child (Article 10 of the Hague Convention of 1980). Article 11 of the 1980 Hague Convention also imposes on the judicial or administrative authorities of the Contracting States the obligation to adopt emergency procedures for the return of the child.

Implicit in Article 11 of the Brussels II *bis* Regulation (applicable when the holder of the rights of custody requests to the competent authorities of another Member State a decision for the return of a child wrongfully retained or removed in that State on the basis of the 1980 Hague Convention) it is a concern of establishing an emergency procedure. Accordingly, section 3 of the rule stipulates that the court where the application for the return of the child is made shall adopt the most expeditious procedure possible in accordance with its national law,<sup>23</sup> and issue its judgment within six weeks after the application is lodged (Article 11, section 3).<sup>24</sup> This is a relatively short-term period that takes into account the fact that the time of maturity and development of children is different to that of adults. For example, a one year old child, within a year's time, develops his motor abilities, language and cognitive skills.

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<sup>23</sup> Note that, for this purpose and to guarantee a faster decision, Article 14 of the Hague Convention of 1980 states that to assess the wrongful removal of the child, the competent authorities of the Contracting States may have direct knowledge of the law of the habitual residence of the child, without recourse to specific procedures to prove its contents. Likewise, they can have direct knowledge of judicial or administrative decisions, recognized or not, of the State of habitual residence of the child, without recourse to the specific procedures of recognition of foreign judgments.

<sup>24</sup> Except in extraordinary circumstances that prevent the compliance with this term, which might include, for example, the difficulty of locating the child. The Regulation does not have a penalty for the non-compliance of the indicated term, however, in these cases we may consider the liability of the State that does not fulfill these requirements. With this opinion, Pataut E., "Art 11" in *Brussels II bis Regulation*, ed. U. Magnus/P. Mankowski, (Munich: Sellier European Law Publishers, 2012), 135.

This application may result in a decision for the return of the child to the original country of habitual residence or in a non-return decision. One may question the value of a decision pronounced in a six weeks' time, since the Regulation does not expressly establish this deadline. In this respect, the European Commission considers that the decision which declares the order of return of the child, issued within six weeks, is enforceable<sup>25</sup> and that each Member State must ensure that the decision has this same nature.<sup>26</sup> Similar reasoning must be held regarding the decision of non-return of the child.<sup>27</sup> This position of the European Commission results from the need to ensure the immediate return of the child.<sup>28</sup> This issue was also discussed in the *Rinau* Case and the ECJ decided that the procedural incidents occurring in the Member State of enforcement after the non-return order, and communicated to the court of origin, are irrelevant to the application of the Regulation and to the issuance of the certificate as provided in Article 42.<sup>29</sup> According to the ECJ, deciding otherwise could deprive the Regulation of its useful effect, because «since the objective of the immediate return of the child would remain subject to the condition that the redress procedures allowed under the domestic law of the Member State in which the child is wrongfully retained have been exhausted».<sup>30</sup> That is a result that cannot be accepted, especially in a case involving younger children, whose physical and psychological evolution is faster<sup>31</sup> and the emotional ties with the parent who stayed behind can easily fade.

However, the return of the child may be refused by a decision of non-return that can be based upon one of the grounds provided for in Article 13 of the 1980 Hague Convention. Article 13 (b) of the 1980 Hague Convention sets out that there may be a justification for a decision of non-return if the return represents a serious risk to the

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<sup>25</sup> Cf. *Practical guide for the application of the new Brussels II bis Regulation*, 38.

<sup>26</sup> Cf. *Practical guide for the application of the new Brussels II bis Regulation*, 38, in which the European Commission suggests some solutions that national law can entail to guarantee this effect: either they prevent the appeal of the return decision; or allow the appeal of the return decision, maintaining their enforceability pending the appeal; or the Member States shall establish procedures that allow for swift appeals to ensure the compliance with the deadline of six weeks.

<sup>27</sup> Cf. *Practical guide for the application of the new Brussels II bis Regulation*, 38.

<sup>28</sup> *Idem, ibidem*.

<sup>29</sup> Cf. Judgment *Rinau*, 11 July 2008, Case C-195/08 PPU, recitals 80-89.

<sup>30</sup> *Idem, ibidem*, recital 81.

<sup>31</sup> *Idem, ibidem*.

physical or mental health of the child or if places the child in an intolerable situation. To make this assessment, the administrative authorities or other competent authorities shall take into account the social situation of the child based on the information provided by the Central Authority or any other competent authority of the State of the habitual residence of the child [Article 13, last section of the 1980 Hague Convention]. According to the explanatory report of the Hague Convention, Article 13 (b) shall have a restrictive interpretation, because the non-return decisions are considered an exception to the regime of returning of the child that the Convention tries to implement and it is the result of a *fragile*<sup>32</sup> compromise between the Contracting States. However, the Brussels II *bis* Regulation sets a limit to the use of Article 13(b) of the 1980 Hague Convention as basis of a decision of non-return in Article 11, section 4: the justification that the return represents a serious risk to the physical or mental health of the child or could place the child in an intolerable situation (Article 13(b) of the 1980 Hague Convention) cannot constitute grounds for the refusal of return, when it is proven that concrete and adequate measures have been taken to ensure the protection of the child after his return.<sup>33</sup> Therefore, the Regulation restricts the scope of Article 13 (b) of the 1980 Hague Convention, limiting the situations of non-return decisions based on that justification. Consequently, we conclude that there is in the Brussels II *bis* Regulation a tendency towards issuing a decision of return of the child wrongfully removed or retained in the circumstances described.

The refusal can also be based on other grounds. One is the opposition of the child to his return, provided that the child is already at an age and a degree of maturity that allows one to give relevance to his refusal to return (Article 13, section 3 of the 1980 Hague Convention),<sup>34</sup> and provided that the child can express his opinion freely and without the imposition of another's will.<sup>35</sup>

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<sup>32</sup> As it can be read in the explanatory report on the Convention: E. Pérez-Vera, *Explanatory Report*, 49, <http://www.hcch.net>, accessed on 5 January 2013.

<sup>33</sup> Recognizing the difficulty of the judge seized to assess whether the appropriate protective measures were adopted in the Member State, the European Commission stresses on the *Practical guide for the application of the new Brussels II bis Regulation*, 37, the crucial role of assistance that the central authorities may play in the country of origin.

<sup>34</sup> This was the reason underpinning the decision of non-return in Judgment *Aguirre Zarraga*, 22 December 2010, Case C-491/10PPU.

Another justification that can sustain the decision of non-return is proof that the person, institution or body that has the child in his care was not actually exercising the custody rights at the time of the child's removal, or has subsequently consented to that removal, according to Article 13(a) of the 1980 Hague Convention. Nevertheless, in the case when the holder of the rights of custody acquiesced to the removal of the child, the court of the original habitual residence of the child can only conclude, in accordance with Article 10(a) of the Brussels II *bis* Regulation that the child has acquired a new habitual residence, and in accordance with Article 17 of the Regulation, it shall declare of its own motion that it has no jurisdiction.<sup>36</sup> Regarding the situation in which the person who has the custody of the child was not actually exercising the custody rights at the time of the child's removal, this may raise doubts about the existence of a wrongful removal or retention. Regarding the concept of effective exercise of the rights of custody, the Explanatory Report of the 1980 Hague Convention clarifies that custody is exercised effectively when «the custodian is concerned with the care of the child's person, even if, for perfectly valid reasons (illness, education, etc.) in a particular case, the child and its guardian do not live together» – which must be inferred from the circumstances of the case.<sup>37</sup>

Article 11, section 5, of the Brussels II *bis* Regulation safeguards the position of the person who made the request for return, since it provides that the return of the child cannot be refused if the person making the request has not had an opportunity to be heard. To this end, taking into account the limited time set by the Regulation, this hearing should be held quickly and effectively, and the court can use the means provided for in the Regulation (EC) 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, as suggested in the practical guide on the application of the Brussels II *bis* Regulation,<sup>38</sup>

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<sup>35</sup> With this opinión cf. A.L. Calvo Caravaca/J. Carrascosa González, *Derecho Internacional Privado*, 461.

<sup>36</sup> Cf. P. Stone, *EU Private International Law*, 424.

<sup>37</sup> Cf. E. Pérez-Vera, *Explanatory Report*, 49. This explanatory report also states that Article 13(a) of the Hague Convention cannot base a decision of non-return if the exercise of the rights of custody has not been possible due to the removal of the child: *idem, ibidem*.

<sup>38</sup> Cf. *Practical guide for the application of the new Brussels II bis Regulation*, 37.

namely «the use of videoconferencing and teleconferencing provided in Article 10, section 4, of that Regulation».<sup>39</sup>

If the court of the State where the child was removed or is retained decides to withhold the child under Article 13 of the 1980 Hague Convention, it is obliged to immediately send to the court that has jurisdiction (court of the country of habitual residence of the child prior to the removal), a dossier with the decision, the motivations, related documents and the minutes of the hearing. This dossier must arrive within one month of the date of the non-return decision, in accordance with Article 11, section 6. This legal provision also reflects the priority of the jurisdiction of the court of the child's habitual residence, since the important documents that justified that decision and the decision itself must be sent to this court. Although the Regulation does not provide for the need to translate the documents, according to the European Commission, the judges shall choose the quickest and most pragmatic solutions relative to the specific circumstances of the case, with the assistance, for instance, of the central authorities<sup>40</sup>. This is another example of the cooperation that the Regulation establishes among the judicial authorities of different countries, because Article 11, section 6, regulates the communication between the courts of different Member States, which can be done directly or through the central authorities.

Then the court of the original habitual residence of the child notifies the parties of the decision and of the file it has received, and invites them to submit any observations they deem pertinent to the case in question within three months of the notification (Article 11, section 7). After considering these elements, the court of the habitual residence of the child may reach a different decision and order the return of the child. According to Article 11, section 8, of the Brussels II *bis* Regulation, this last decision of return is automatically recognized and enforceable in another Member State without the need for any further declaration of enforceability (suppression of exequatur) and without the possibility of opposing its recognition. To this end, as required by Article 41, section 2 of the Brussels II *bis* Regulation, it is necessary that the court of the Member State of origin issues the certificate provided by the standard form in Annex IV of the Regulation, and whose terms of issue are described in Article 42, section 2.

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<sup>39</sup> *Idem, ibidem.*

<sup>40</sup> Cf. *Practical guide for the application of the new Brussels II bis Regulation*, 41.

In the described proceedings, it should be ensured that the child is given the opportunity to be heard, except if it is deemed to be inadequate, considering the age or degree of maturity of the child (Article 11, section 2). The need for the child's hearing in those cases, depending on his maturity and age, is justifiable because it is assumed that the interests of the child, as a subject of rights, are one of the central interests of the proceedings in question. The right of the child to be heard in the proceedings is a fundamental right of the child itself, as shown by various international treaties: for example, Article 3 of the European Convention on the Exercise of Children's Rights;<sup>41</sup> Article 12 of the Child Rights Convention;<sup>42</sup> Article 13 of the Hague Convention of 1980. It is also provided for in Article 24 of the Charter of Fundamental Rights of the European Union.

The Regulation does not determine on what terms the hearing of the child should be done (by a court hearing, by the judge, or by a skilled technician), so it is understood that this should be done according to the law and the procedure of the Member States, provided that there is a guarantee that the child can freely express his opinion<sup>43</sup>. In the *Aguirre Zarraga* Case, the ECJ clarified that it is not necessary to bring a hearing before the court of the Member State of origin, but depending on the circumstances of the case, all the procedures must be adopted and all the legal conditions must be secured so that the child has a real and effective opportunity to freely express his opinion, and that his opinion shall be considered by the judge.<sup>44</sup> And this is important, because, as the ECJ recognized, litigations involving the «awarding of custody of a child to one of the parents, and the associated tensions, create situations in which the hearing of the child, particularly when (...) the physical presence of the child before the court is required, may prove to be inappropriate, and even harmful to the psychological health of the child, who is often exposed to such tensions and adversely affected by them».<sup>45</sup> For the child's hearing, the judge may resort to all means that are offered by his national

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<sup>41</sup> Council of Europe, 25 January 1996.

<sup>42</sup> Adopted by the General Assembly at the United Nations on 20 November 1989 and ratified by Portugal on 21 September 1990.

<sup>43</sup> Cf. *Practical guide for the application of the new Brussels II bis Regulation*, 47.

<sup>44</sup> Cf. Judgment *Aguirre Zarraga*, 22 December 2010, Case C-491/10PPU, recitals 64-67.

<sup>45</sup> *Idem, ibidem*.

law, as well as the instruments of judicial cross-border cooperation,<sup>46</sup> and the form of the child's hearing should be adapted to his age and degree of maturity.

The child's right to be heard, as a fundamental right of the child, plays a prominent role in the Regulation and its importance is evident from: firstly, Article 42, because the child's hearing is a prerequisite for the abolition of the exequatur of the decision ordering the return of the child; secondly, the absence of the child's hearing is one of the reasons for contesting the recognition and enforcement of a decision on parental responsibility [Article 23(b)]. It should be noted, however, that the ECJ has clarified that the child's right to be heard is not absolute and must be weighed in the concrete case, taking into account the best interests of the child, based on Article 24, section 2, of the Charter of Fundamental Rights of the European Union and the wording of Article 42, section 2 (a).<sup>47</sup>

In case of a wrongful removal or retention of a child, the proceedings laid down in Article 11 of the Brussels II *bis* Regulation seek to ensure the prompt return of the child. As the final decision rendered by the court of the original habitual residence of the child, this decision prevails over any other proceeding done before the court of the State where the child was removed. In this case, the court addressed can only observe the enforceability of the certified decision and provide for the immediate return of the child. Analysing the described proceedings, we can only conclude that the decision of the court of the original habitual residence of the child prevails over the judgment of the court of the place where the child was wrongfully removed or retained. Additionally, we have to agree that this is mainly a procedure of cooperation between the judicial authorities of different Member States,<sup>48</sup> which may have different views on the decision that best safeguards the interests of the child. Notwithstanding, in this case, prevails the position of the court of the original habitual residence of the child.

The short deadlines and the proceedings laid down in Article 11 of the Regulation reflect the urgency of those steps and tend to ensure the swift return of the child to the Member State in which the child had his habitual residence before the wrongful removal

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<sup>46</sup> It will be the case, for example, of the Regulation 1206/2001, 28 May 2001, on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

<sup>47</sup> Cf. Judgment *Aguirre Zarraga*, 22 December 2010, Case C-491/10PPU, recital 64.

<sup>48</sup> As considered by B. Ancel/H. Muir Watt, "L'intérêt supérieur de l'enfant dans le concert des juridictions : le Règlement Bruxelles II bis", *RCDIP*, 94 (4), 599.

or retention. However, we should note that the procedure laid down in Article 11, section 6 and 7, and the issue of the certificate provided for in section 8 only apply when there is a non-return order based on Article 13 of the 1980 Hague Convention and does not cover the grounds of non-return provided by Article 12 and Article 20 of the Convention.<sup>49</sup>

Article 20 of the Hague Convention states that the return of the child can be refused when it «would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms». In some cases, it is hypothetically possible that the plea referred to in Article 20 of the Hague Convention is used to circumvent the fast procedure laid down in Article 11, section 6 to section 8 of the Regulation, and the immediate enforceability of the decision of return that is accompanied by the certificate issued according to Article 42. However, it seems to us, that this plea involves exceptional situations of violation of the fundamental principles of the requested State and therefore, will have a reduced application.

## **6. The enforcement of the decision of return of the child wrongfully removed or retained in another Member State**

The system of recognition under the Brussels II *bis* Regulation is based on the principle of mutual recognition. According to Article 21, section 1, "[a] judgment given in a Member State shall be recognized in the other Member States without any special procedure being required", thereby aiming to implement the principle of trust among the judicial authorities of the Member States. Thus, according to Article 21, section 3 of the Regulation, any interested party may apply for the proceedings of recognition or non-recognition of the decision. The Brussels II *bis* Regulation also determines the need to obtain a prior declaration of enforceability, at the request of the party concerned, of the judgments given in a Member State on the exercise of parental responsibility in respect to a child, and enforceable in the Member State of origin, so they can be enforced in another Member State (Article 28, section 1).<sup>50</sup>

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<sup>49</sup> With this opinion cf. E Pataut, "Art. 11", 140-141; L. Walker/P. Beaumont, "Shifting the Balance Achieved by the Abduction Convention: The Contrasting Approaches of the European Court of Human Rights and the European Court of Justice", *JPIL* (Vol. 7, 2011), 242.

<sup>50</sup> About the system of recognition of judgments set by the Brussels II *bis* Regulation, cf. Anabela Susana de Sousa Gonçalves, "A Deslocação ou Retenção Ilícitas de Crianças no Regulamento n.º 2201/2003 (Bruxelas II bis)", *Cuadernos de Derecho Transnacional* (Vol. 6, n.º 1, 2014), 156-158.

However, the Brussels II *bis* Regulation has special rules for the enforcement of decisions on the rights of access (Article 41) and the judgments which order the return of the child in the situations ruled by Article 11 (Article 42). The goal of these special enforcement rules is to provide a fast execution of those decisions. For this purpose, both in terms of rights of access, and in relation to decisions regarding the return of the child, it is enough that these decisions satisfy the conditions present in Article 41 and Article 42 to become enforceable and no prior proceeding is required to declare that enforceability. Once more, this is a solution that reflects the principle of trust among the judicial authorities of the different Member States and the principle of mutual recognition (principles that are at the foundation of the judicial cooperation policy in civil matters, pursuant to Article 81 of the TFEU). It is also a solution that, in case of a wrongful removal of the child, allows a fast resolution of the litigation through the immediate return of the child, without any hindrance or possibility of using dilatory expedients.

The court of the original habitual residence of the child pronounces the return decision issuing the certificate concerning the return of the child in the language of the proceedings, whose standard form is in the Annex IV of the Regulation, provided that the conditions of Article 42, section 2, are satisfied: 1) the child has been given the opportunity to be heard, unless the child's age and maturity does not permit ; 2) the opportunity has been given to the parties to express their views; 3) the judgment took into account the reasons and the evidence underlying the non-return order issue according to Article 13 of the 1980 Hague Convention. Article 42, section 2, third paragraph, establishes that the certificate is issued *ex officio* using the standard form in the Annex IV of the Regulation and is written in the language of the judgment. The second paragraph of the same rule establishes that details on the measures taken by the court or other authority to ensure the protection of the child after his return shall be described in the certificate, when they exist.

Decisions certified, under the conditions described above, and in the Member State of origin, shall be enforceable in any Member State without the need for further formalities and without any possibility of opposing its recognition. They are enforced in another Member State as if they had been issued there (Article 42, section 1, first paragraph), implementing the principle of trust that must exist between the Member States on the judgments given by the courts of other Member States. However, in the *Rinau* Case, the

ECJ stated, in a case of wrongful removal of children, «that a certificate cannot be issued pursuant to Article 42 of the Regulation unless a judgment of non-return has been issued beforehand».<sup>51</sup> So, this procedure shall only be applied in situations where there is a decision of return subsequent to a decision of non-return of the child.<sup>52</sup>

The certificate issued can never be the subject of an appeal even in the Member State of origin<sup>53</sup> (Article 43, section 2), or be the subject of an application for non-recognition as decided in the *Rinau* Case.<sup>54</sup> However, it may be subject to rectification in the event of a material error «where it does not correctly reflect the judgment», as explained in recital 24. If there is a change in the circumstances which implies that the enforcement of the certified judgment could undermine the overriding interest of the child, this will be a matter of substance, it should be made known to the court of origin, which can be asked to stay the execution of the judgment or to change the return decision.<sup>55</sup> Accordingly, the court of the enforcing Member State can only rule in favour of the enforcement of the judgment that goes along with the certificate and it can never control the conditions for the issuing of that certificate (established in Article 42), or refuse to recognize or to enforce that judgment, having only the option of enforcing it.

This was the position of the ECJ in the *Aguirre Zarraga* Case, in which the court held that this interpretation reflects the fact that the grounds for non-recognition or the non-declaration of enforceability under the Regulation do not apply to such judgments and that another understanding would undermine the effectiveness of the system adopted by the Regulation that specifically aims, at the immediate return of the child to the country of original habitual residence.<sup>56</sup> From the *Rinau* Case, it is also clear that the child's

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<sup>51</sup> Cf. Judgment *Rinau*, 11 July 2008, Case C-195/08 PPU, recital 59.

<sup>52</sup> Cf. Judgment *Rinau*, 11 July 2008, Case C-195/08 PPU, recital 69.

<sup>53</sup> As held by the ECJ in the Judgment *Aguirre Zarraga*, 22 December 2010, Case C-491/10PPU, recital 50.

<sup>54</sup> Cf. Judgment *Rinau*, 11 July 2008, Case C-195/08 PPU, recital 109 and subsequently in the Judgment *Aguirre Zarraga*, 22 December 2010, Case C-491/10PPU, recital 50.

<sup>55</sup> Cf. Judgment *Doris Povse*, 1 July 2010, Case C-211/10 PPU, recitals 81 and 83.

<sup>56</sup> Cf. Judgment *Aguirre Zarraga*, 22 December 2010, Case C-491/10PPU, recitals 54-57. This decision was seen by some doctrine in a very critical way, as the court of the Member State of enforcement considered that there should be an exception to the system of immediate enforcement of Article 42, in cases concerning the violation of a fundamental right (in the case the right of the child to have an opportunity to be heard): in those cases it was argued that court should have the power to review that decision, position which was denied by the ECJ. About this issue, cf. C. Honorati, "Sottrazione

return cannot be subject to the condition of an exhaustion of the redress procedures allowed under the domestic law of the Member State in which the child is wrongfully retained, due to the risk of unfairly circumventing the proceedings of immediate return laid down in the Regulation.<sup>57</sup> Accordingly, the ECJ held that «questions concerning the lawfulness of the judgment ordering return as such, and in particular the question whether the necessary conditions enabling the court with jurisdiction to hand down that judgment are satisfied, must be raised before the courts of the Member State of origin, in accordance with the rules of its legal system».<sup>58</sup>

The only grounds admissible for non-enforcement of a return decision, issued in accordance with Article 42, section 1, exist when this decision is irreconcilable with a subsequent enforceable judgment (Article 47, section 2, second part). The ECJ clarified that there can only be a irreconcilability between a certified judgment and a subsequent enforceable judgment «only in relation to any judgments subsequently handed down by the courts with jurisdiction in the Member State of origin»,<sup>59</sup> not just in situations where the judgment was annulled or reformed following legal action brought in the Member State of origin, but also when the court that has jurisdiction, «on its own motion or, in some circumstances, at the request of the social services, revisit its own position, when the interests of the child so require, and hand down a fresh enforceable judgment, without expressly withdrawing the first, which would thereby lapse».<sup>60</sup>

The judgment in question is automatically enforceable throughout the territory of the Union, not having its effects confined to the Member State which issued the non-return decision, according to the European Commission, in an interpretation that is compatible

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internazionale dei minori e diritti fondamentali”, *RDIPP* (1, 2013), 33-38, accentuating the tension between the principle of mutual recognition which underlies the regulation and need to ensure the respect for fundamental rights in the forum state; M. Marchegiani, “Rispetto della vita privata e familiare e sottazione internazionale di minori nella giurisprudenza recente della corte europea dei diritti dell’uomo”, *RDIPP* (4, 2011), 1009-1010; L. Walker/P. Beaumont, “Shifting the Balance Achieved by the Abduction Convention”, 245-246.

<sup>57</sup> Cf. Judgment *Rinau*, 11 July 2008, Case C-195/08 PPU, recitals 81 and 89.

<sup>58</sup> Cf. Judgment *Aguirre Zarraga*, 22 December 2010, Case C-491/10PPU, recital 51; Judgment *Rinau*, 11 July 2008, Case C-195/08 PPU, recital 79.

<sup>59</sup> Cf. Judgment *Doris Povse*, 1<sup>st</sup> July 2010, Case C-211/10 PPU, recital 76.

<sup>60</sup> Cf. Judgment *Doris Povse*, 1<sup>st</sup> July 2010, Case C-211/10 PPU, recital 77.

with the wording of Article 42.<sup>61</sup> The range of this interpretation seems important for reasons of expediency and economical efficiency of the procedure, since in the case of removal of the child to another Member State, it is not necessary to establish a new proceeding to ask for the return of the child, but only to enforce the judgment of return upheld by the court of origin.<sup>62</sup>

The part seeking enforcement of the judgment shall produce a copy of the latter that has to comply with the necessary requirements to establish its authenticity and also the certificate referred to in Article 42, section 1, accompanied by a translation of the part concerning the arrangements for implementing the measures taken to ensure the return of the child (Article 45). This translation shall be certified by a qualified person and made in one of the official languages of the Member State of enforcement or into a language that this State agreed to accept (Article 45, section 2, final paragraph 2).<sup>63</sup>

In addition to the procedure described, the right-holder of the parental responsibility can apply for recognition under the general provisions of Article 28 and subsequent rules. All the other judgments which are not given under Article 11, section 8, but that decide for the return of the child, also follow the system of recognition established under Article 28 and following rules.

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<sup>61</sup> Cf. *Practical guide for the application of the new Brussels II bis Regulation*, 44.

<sup>62</sup> *Idem, ibidem*.

<sup>63</sup> Portugal accepts Portuguese and English.