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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)

This document has been drawn up by the Commission services in consultation with the European Judicial Network in civil and commercial matters.

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Introduction

This Practice Guide concerns issues of parental responsibility within the European Union. It has been drawn up by the European Commission in consultation with the European Judicial Network in civil and commercial matters.

From 1 March 2005, jurisdiction, recognition and enforcement of decisions on parental responsibility is governed by 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 ("the Regulation"). This Regulation was adopted on 27 November 2003 and enters into application on 1 March 2005. It repeals and replaces Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses ("the "Brussels II Regulation"), which entered into force on 1 March 2001.

The Regulation brings together into a single text the provisions on matrimonial matters and matters of parental responsibility. Given that the provisions on matrimonial matters have been carried over from the Brussels II Regulation practically unchanged, the Practice Guide deals only with the provisions concerning matters of parental responsibility. A brief summary of the rules on matrimonial matters can be found in the attached Annex. For the purpose of this Guide, the word "divorce" is used for simplicity and is intended to encompass all matrimonial matters (divorce, legal separation and marriage annulment).

It seeks to give guidance to parties, judges, lawyers, notaries and central authorities. It also gives certain advice to Member States how best to ensure its implementation.

The Practice Guide is not legally binding, and does not prejudge any opinion given by the European Court of Justice, or any decision issued by national courts, concerning the interpretation of the Regulation.

I. Scope of application

1. Commencement provisions and geographical scope

In which States and from what date does the Regulation apply?

(a) General rule

Article 72

The Regulation applies as of 1 March 2005 in all Member States of the European Union, with the exception of Denmark. It applies in the ten Member States which joined the European Union on 1 May 2004. The Regulation is directly applicable in the Member States and prevails over national law.

Article 64

The Regulation applies **in its entirety** to:

- relevant legal proceedings instituted *and*
- documents formally drawn up or registered as authentic instruments *and*
- agreements concluded between parties

after 1 March 2005 (Article 64(1)).

(b) Transitional rules

The rules on **recognition and enforcement** of the Regulation apply, **in relation to legal proceedings instituted before 1 March 2005**, to three categories of judgments:

(a) Judgments given on and after 1 March 2005 in proceedings instituted before that date but after the date of entry into force of the Brussels II Regulation (Article 64(2));

(b) Judgments given before 1 March 2005 in proceedings instituted after the date of entry into force of the Brussels II Regulation in cases falling under the scope of the Brussels II Regulation (Article 64(3));

(c) Judgments given before 1 March 2005 but after the entry into force of the Brussels II Regulation in proceedings instituted before the date of entry into force of the Brussels II Regulation (Article 64(4)).

The Brussels II Regulation entered into force on 1 March 2001.

With regard to the ten "new" Member States which joined the European Union on 1 May 2004, the relevant date to determine the entry into force of the Brussels II Regulation is 1 May 2004.

Judgments falling under categories (a) to (c) are recognised and enforced pursuant to Chapter III of the Regulation under certain conditions:

– the court that handed down the judgment founded its jurisdiction on rules which accord with the Regulation, the Brussels II Regulation or a convention which is applicable between the Member State of origin and the Member State of enforcement ;

– and, for judgments given before 1 March 2005, provided they relate to divorce, legal separation or marriage annulment or parental responsibility for the children of both spouses on the occasion of these matrimonial proceedings.

It should be noted that Chapter III on recognition and enforcement applies in its entirety to these judgments, including the new rules in Section 4 thereof which dispenses with the *exequatur* procedure for certain types of judgments *(see chapters VI and VII)*.

Example:

A divorce proceeding is instituted before a court in Member State A on 1 December 2002 pursuant to the Brussels II Regulation. The court is on this occasion also seized with the question of parental responsibility over the children of the spouses. The court issues a judgment on 1 January 2004 conferring custody on the mother and access rights on the father. The mother subsequently moves to Member State B with the children.

Situation 1: If Member States A and B are both "old" Member States, the transitional rule in Article 64(3) allows the father to request that the access rights are directly recognised and enforceable in Member State B without the need for an *exequatur* procedure pursuant to Chapter III Section 4 of the Regulation, even though the legal proceedings were instituted before 1 March 2005.

Situation 2: If at least one of these two Member States is a "new" Member State, none of the transitional rules of Article 64 applies, since the judgment was issued on 1 January 2004, i.e. before the entry into force of the Brussels II Regulation vis-à-vis the "new" Member States.

Transitional provisions (Article 64)

Does the case concern :
a) a legal proceeding instituted or
b) an authentic instrument drawn up or
c) an agreement concluded by the parties
after 1 March 2005 ?

YES
The Regulation applies in its entirety (Art. 64(1)).

NO

Does the case concern a judgment given after 1 March 2005
in proceedings instituted after the date of entry into force of the Brussels II Regulation
and
is jurisdiction founded on rules which accord with the Regulation, the Brussels II Regulation or a convention in force between the Member State of origin and the Member State of enforcement?

YES
The judgment is recognised and enforceable pursuant to Chapter III of the Regulation (Art.64(2)).

NO

Does the case concern a judgment given before 1 March 2005 in proceedings instituted after date of entry into force of the Brussels II Regulation in a case falling under the scope of the Brussels II Regulation?

YES
The judgment is recognised and enforceable pursuant to Chapter III of the Regulation (Art.64(3)).

NO

Does the case concern a judgment given before 1 March 2005 but after the date of entry into force of the Brussels II Regulation in proceedings instituted before the date of entry into force of the Brussels II Regulation in a case falling under the scope of the Brussels II Regulation?
and
is jurisdiction founded on rules which accord with the Regulation, the Brussels II Regulation or a convention in force between the Member State of origin and the Member State of enforcement?

NO
The Regulation does not apply.

YES
The decision is recognised and enforced pursuant to Chapter III of the Regulation (Art.64(4)).

2. Material scope

2.1. Which matters are covered by the Regulation?

(a) Matters covered by the Regulation

The Regulation lays down rules on jurisdiction (Chapter II), recognition and enforcement (Chapter III) and co-operation between central authorities (Chapter IV) in the field of parental responsibility. It contains specific rules on child abduction and access rights.

- The Regulation applies to all civil matters concerning the "attribution, exercise, delegation, restriction or termination of parental responsibility."

Articles 1(1) (b), 1(2) and 2(7)

The term "parental responsibility" is widely defined and covers all rights and duties of a holder of parental responsibility relating to the person or the property of the child. This encompasses not only rights of custody and rights of access, but also matters such as guardianship and the placement of a child in a foster family or in institutional care. The holder of parental responsibility may be a natural or a legal person.

The list of matters qualified as "parental responsibility" pursuant to the Regulation in Article 1(2) is not exhaustive, but merely illustrative.

In contrast to the 1996 Hague Convention on child protection *(See chapter XI),* the Regulation does not define a maximum age for the children who are covered by the Regulation, but leaves this question to national law. Although decisions on parental responsibility concern in most cases minors below the age of 18, persons below 18 years may be subject to emancipation under national law, in particular if they marry. Decisions issued with regard to these persons do not in principle qualify as matters of "parental responsibility" and consequently fall outside the scope of the Regulation.

- The Regulation applies to "civil matters".

Article 1(1) and (2) and Recital 7

The Regulation applies to "civil matters". The concept of "civil matters" is broadly defined for the purposes of the Regulation and covers all matters listed in Article 1(2). Where a specific matter of parental responsibility is a "public law" measure according to national law, e.g. the placement of a child in a foster family or in institutional care, the Regulation shall apply.

- The Regulation applies to protective measures concerning the property of the child

Article 1(2)(c), (e) and Recital 9

When a child owns property, it may be necessary to take certain protective measures, e.g. to appoint a person or a body to assist and represent the child with regard to the property. The Regulation applies to any protective measure that may be necessary for the administration or sale of the property. Such measures may be necessary if, for instance, the child's parents are in dispute as regards such a question.

In contrast, measures that relate to the child's property, but which do not concern the protection of the child, are not covered by the Regulation, but by Council Regulation No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Brussels I Regulation"). It is for the judge to assess in the individual case whether a measure relating to the child's property concerns the protection of the child or not. Whilst the Regulation applies to protective measures, it does not apply to measures taken as a result of criminal offences committed by children (Recital 10).

(b) Matters excluded from the Regulation

Article 1(3)and Recital 10

Article 1(3) enumerates those matters which are excluded from the scope of the Regulation even though they may be closely linked to matters of parental responsibility (e.g. adoption, emancipation, the name and forenames of the child).

Recital 11

- The Regulation does not apply to maintenance obligations

Maintenance obligations and parental responsibility are often dealt with in the same court proceeding. Maintenance obligations are, however, not covered by the Regulation, since they are already governed by the Brussels I Regulation. A court which is competent pursuant to the Regulation will nevertheless generally have jurisdiction to rule also on maintenance matters by application of Article 5(2) of the Brussels I Regulation. This provision allows a court which is competent to deal with a matter of parental responsibility also to decide upon maintenance if that question is ancillary to the question of parental responsibility. Although the two issues would be dealt with in the same proceeding, the resultant decision would be recognised and enforced according to different rules. The part of the decision relating to maintenance would be recognised and enforced in another Member State pursuant to the rules of the Brussels I Regulation whereas the part of the decision relating to parental responsibility would be recognised and enforced pursuant to the rules of the new Brussels II Regulation.

2.2. Which decisions are covered by the Regulation?

- The Regulation applies to all decisions on parental responsibility.

Article 1(1)(b) and Recital 5

In contrast to the Brussels II Regulation, the present Regulation applies to all decisions issued by a court of a Member State in matters of parental responsibility.

The Brussels II Regulation applied to decisions on parental responsibility only to the extent that they were issued in the context of a matrimonial proceeding and concerned children common to both spouses. In order to ensure equality for all children, the scope of this Regulation extends to cover all decisions on parental responsibility, regardless of whether the parents are or were married and whether the parties to the proceedings are or are not both biological parents of the child in question.

- The Regulation is not confined to court judgments.

Article 2(1) and (4)

The Regulation applies to court judgments, whatever the judgment may be called (decree, order, decision etc.). However, it is not limited to decisions issued by courts, but applies to any decision pronounced by an authority having jurisdiction in matters falling under the Regulation (e.g. social authorities).

- The Regulation applies to "authentic instruments".

Article 46

Furthermore, the Regulation applies to documents which have been formally drawn up or registered as "authentic instruments" and which are enforceable in the Member State in which they were drawn up or registered. Such documents, which are to be recognised and declared enforceable in other Member States under the same conditions as a judgment, include, for example, documents drawn up by notaries.

- The Regulation applies to agreements between parties.

Article 46

An innovative feature of the Regulation is that it also covers agreements concluded between parties to the extent that they are enforceable in the Member State in which they were concluded. The aim is to encourage parties to reach agreement on matters of parental responsibility outside court. Hence, an agreement is to be recognised and enforceable in other Member States under the same conditions as a judgment provided that it is enforceable in the Member State in which it is concluded, irrespective of whether it is a private agreement between the parties or an agreement concluded before an authority.

2.3. The Regulation does not prevent courts from taking provisional, including protective, measures in urgent cases.

Article 20

Article 20 enables a court to take provisional, including protective, measures in accordance with its national law in respect of a child situated on its territory even if a court of another Member State has jurisdiction as to the substance of the application. The measure can be taken by a court or by an authority having jurisdiction in matters falling within the scope of the Regulation (Article 2.1). A welfare authority or a youth authority may, for instance, be competent to take provisional measures under national law.

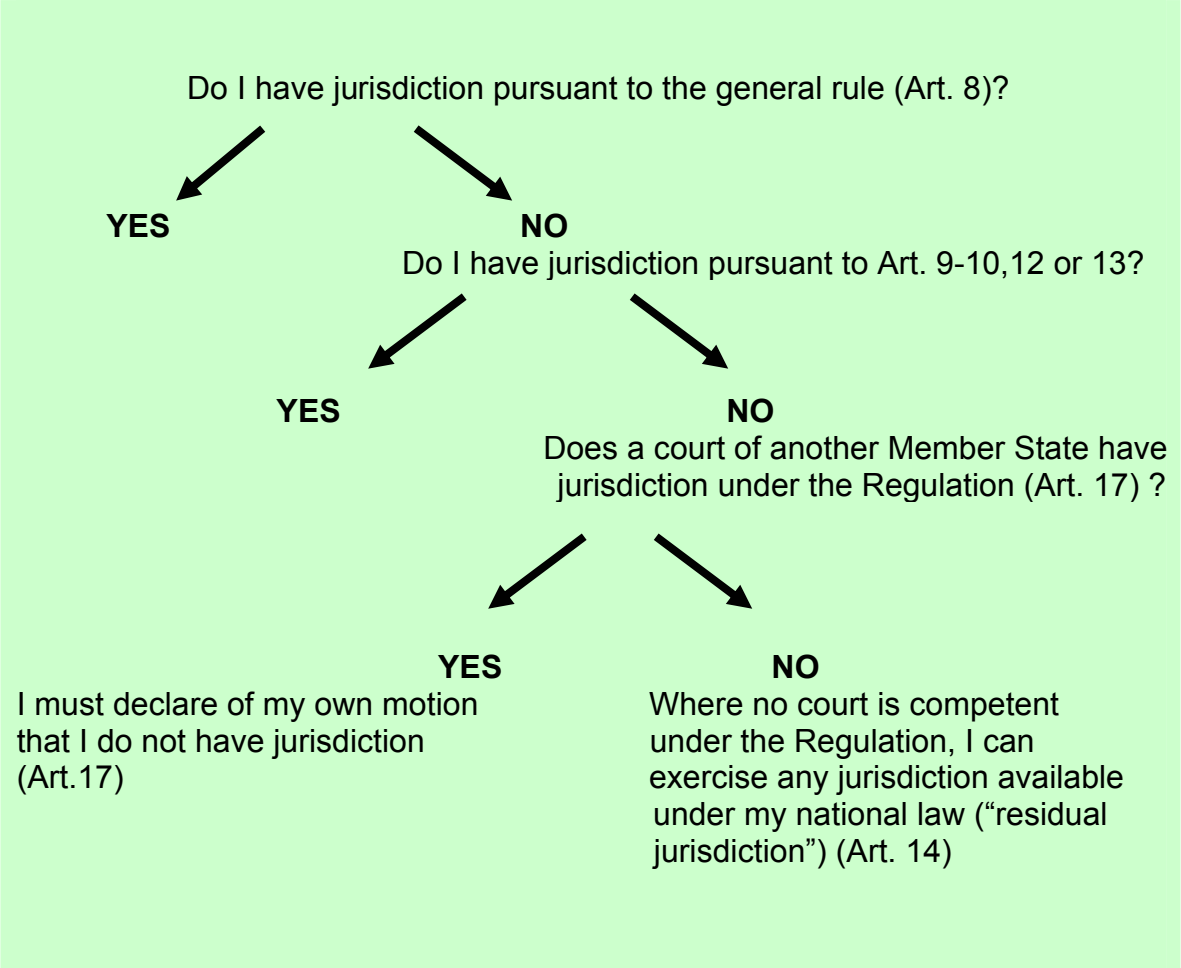
Article 20 is not a rule which confers jurisdiction. Consequently, the provisional measures cease to have effect when the competent court has taken the measures it considers appropriate.

Example: A family is travelling by car from Member State A to Member State B on their summer holiday. Once arrived in Member State B, they are victims of a traffic accident, where they are all injured. The child is only slightly injured, but both parents arrive at the hospital in a state of coma. The authorities of Member State B urgently need to take certain provisional measures to protect the child who has no relatives in Member State B. The fact that the courts of Member State A have jurisdiction under the Regulation as to the substance does not prevent the courts or competent authorities of Member State B from deciding, on a provisional basis, to take measures to protect the child. These measures cease to apply once the courts of Member State A have taken a decision.

II. Which Member State's courts have jurisdiction?

The jurisdiction rules listed in Articles 8 to 14 set out a complete system of grounds of jurisdiction to determine the Member State whose courts are competent. The Regulation determines merely the Member State whose courts have jurisdiction, but not the court which is competent within that Member State. This question is left to domestic procedural law (See European Judicial Network and Judicial Atlas*)*.

A court seised with a request concerning parental responsibility has to make the following analysis:



1. General rule – the State of the habitual residence of the child

Article 8

The fundamental principle of the Regulation is that the most appropriate forum for matters of parental responsibility is the relevant court of the Member State of the habitual residence of the child. The concept of "habitual residence", which is increasingly used in international instruments, is not defined by the Regulation, but has to be determined by the judge in each case on the basis of factual elements. The meaning of the term should be interpreted in accordance with the objectives and purposes of the Regulation.

It must be emphasised that this does not refer to any concept of habitual residence under national law, but an "autonomous" notion of Community law. If a child moves from one Member State to another, the acquisition of habitual residence in the new Member State, should, in principle, coincide with the "loss" of habitual residence in the former Member State. Consideration by the judge on a case-by-case basis implies that whilst the adjective "habitual" tends to indicate a certain duration, it should not be excluded that a child might acquire habitual residence in a Member State the very day of the arrival, depending on the factual elements of the concrete case.

The question of jurisdiction is determined at the time the court is seised. Once a competent court is seised, in principle it retains jurisdiction even if the child acquires habitual residence in another Member State during the course of the court proceeding (principle of *"perpetuatio fori").* A change of habitual residence of the child while the proceeding is pending does therefore not itself entail a change of jurisdiction.

However, if it is in the best interests of the child, Article 15 provides for the possible transfer of the case, subject to certain conditions, to a court of the Member State to which the child has moved (*see chapter III*). If a child's habitual residence changes as a result of a wrongful removal or retention, jurisdiction may only shift under very strict conditions (*see chapter VII*).

2. Exceptions to the general rule

Articles 9, 10, 12 and 13 set out the exceptions to the general rule, i.e. where jurisdiction may lie with the courts of a Member State in which the child is not habitually resident.

(a) Continuing jurisdiction of the child's former habitual residence

Article 9

When a child moves from one Member State to another, it is often necessary to review the access rights, or other contact arrangements, to adapt them to the new circumstances. Article 9 is an innovative rule which encourages holders of parental responsibility to agree upon the necessary adjustments of access rights before the move and, if this proves impossible, to apply to the competent court to resolve the dispute. It does not in any way prevent a person from moving within the European Community, but provides a guarantee that the person who can no longer exercise access rights as before does not have to seise the courts of the new Member State, but can apply for an appropriate adjustment of access rights before the court that granted them during a period of three months following the move. The courts of the new Member State do not have jurisdiction in matters of access rights during this period.

Article 9 is subject to the following conditions:

- **The courts of the Member State of origin must have issued a decision on access rights.**

Article 9 applies only to the situation where a holder of access rights wishes to modify a previous decision on access rights. If no decision on access rights has been issued by the courts in the Member State of origin, Article 9 does not apply, but the other jurisdiction rules come into play. The courts of the new Member State would have jurisdiction pursuant to Article 8 to decide on matters of access rights once the child acquires habitual residence in that State.

- **It applies only to "lawful" moves.**

It must be determined whether, according to any judicial decision or the law applied in the Member State of origin (including its rules on private international law), the holder of parental responsibility is allowed to move with the child to another Member State

without the consent of the other holder of parental responsibility. If the removal is unlawful, Article 9 does not apply, but Article 10 comes into play *(see chapter VII)*. If, on the other hand, the unilateral decision to change the child's habitual residence is lawful, Article 9 applies if the conditions set out below are fulfilled.

- **It applies only during the three-month period following the child's move.**

The three-month period is to be calculated from the date the child physically moved from the Member State of origin. The date of the move should not be confused with the date when the child acquires habitual residence in the new Member State. If a court in the Member State of origin is seised after the expiry of the three-month period from the date of the move, it does not have jurisdiction under Article 9.

- **The child must have acquired habitual residence in the new Member State during the three-month period.**

Article 9 applies only if the child has acquired habitual residence in the new Member State during the three-month period. If the child has not acquired habitual residence within that period, the courts of the Member State of origin would, in principle, retain jurisdiction pursuant to Article 8.

- **The holder of access rights must still have habitual residence in the Member State of origin.**

If the holder of access rights has ceased to be habitually resident in the Member State of origin, Article 9 does not apply, but the courts of the new Member State become competent once the child has acquired habitual residence there.

- **The holder of access rights must not have accepted the change of jurisdiction.**

Since the aim of this provision is to guarantee that the holder of access rights can seise the courts of his or her Member State, Article 9 does not apply if he or she is prepared to accept that jurisdiction shifts to the courts of the new Member State. Hence, if the holder of access rights participates in proceedings concerning access rights before a court in the new Member State without contesting the jurisdiction of that court, Article 9 does not apply and the court of the new Member State acquires jurisdiction (paragraph 2). Similarly, Article 9 does not prevent the holder of access rights from seising the courts of the new Member State for review of the question of access rights.

- **It does not prevent the courts of the new Member State from deciding on matters other than access rights.**

Article 9 deals only with jurisdiction to rule on access rights, but does not apply to other matters of parental responsibility, e.g. custody rights. Article 9 does not therefore prevent a holder of parental responsibility who has moved with the child to another Member State from seising the courts of that Member State on the question of custody rights during the three-month period following the move.

Continuing jurisdiction of the child's former habitual residence (Art. 9)

Has a decision on access rights been issued by the courts in the Member State from which the child moved ("the MS of origin")?

NO
Article 9 does not apply, but the courts of the other MS become competent once the child acquires habitual residence there according to Article 8.

YES

Has the child moved **lawfully** from the MS of origin to another Member State ("the new MS")?

NO
If the removal is unlawful, Article 9 does not apply. Instead, the rules on child abduction apply.

YES

Has the child acquired habitual residence in the new MS within the 3 months period?

NO
Article 9 does not apply. If the child still has habitual residence in the MS of origin after 3 months, the courts of that MS remain competent according to Article 8.

YES

Does the holder of access rights still have habitual residence in the MS of origin?

NO
Article 9 does not apply.

YES

Has the holder of access rights participated in proceedings before the courts of the new MS without contesting their competence?

YES
Article 9 does not apply.

NO
Article 9 applies.

(b) Jurisdiction in cases of child abduction

Article 10

Jurisdiction in child abduction cases is governed by a special rule *(See chapter VII)*.

(c) Prorogation of jurisdiction

Article 12

The Regulation introduces a limited possibility to seise a court of a Member State in which the child is not habitually resident, either because the matter is connected with a pending divorce proceeding, or because the child has a substantial connection with that Member State.

Article 12 covers two different situations:

Situation 1:

Jurisdiction of a divorce court in matters of parental responsibility

Article 12(1) and (2)

When divorce proceedings are pending in a Member State, the courts of that State also have jurisdiction in matters of parental responsibility connected with the divorce even if the child concerned is not habitually resident in that Member State. This applies whether or not the child is the child of both spouses.

The divorce court has jurisdiction provided the following conditions are met:

- At least one of the spouses has parental responsibility in relation to the child.
- The judge should determine whether, at the time the court is seised, all holders of parental responsibility accept the jurisdiction of the divorce court, whether by formal acceptance or unequivocal conduct.
- The jurisdiction of that court is in the superior interests of the child.

The jurisdiction of the divorce court ends as soon as:

(a) the divorce judgment has become final or

(b) a final judgment is issued in proceedings on parental responsibility which were still pending when the divorce judgment became final or

(c) the proceedings on divorce and parental responsibility have come to an end for another reason (e.g. the applications for divorce and parental responsibility are withdrawn).

No distinction was intended by the drafters between the term "superior interests of the child" (Article 12(1)(b)) and the term "best interests of the child" (Article 12(3)(b)) in the English language version. Versions of the Regulation in other languages employ an identical wording in both paragraphs.

Situation 2:

Jurisdiction of a court of a Member State with which the child has a substantial connection

Article 12(3)

Where there are no pending divorce proceedings, the courts of a Member State may have jurisdiction in matters of parental responsibility even if the child is not habitually resident in that Member State provided the following conditions are met:

- The child has a substantial connection with the Member State in question, in particular because one of the holders of parental responsibility is habitually resident there or the child is a national of that State. These conditions are not exclusive, and it is possible to base the connection on other criteria.
- All parties to the proceedings accept the jurisdiction of that court explicitly or otherwise unequivocally at the time the court is seised (cf. the same requirement in situation 1).
- The jurisdiction is in the best interests of the child (as above in Article 12(1)).

Article 12(4) specifies in which circumstances jurisdiction under this Article shall be deemed to be in the "child's best interest" when the child in question is habitually resident in a third State that is not a contracting State to the 1996 Hague Convention on Child Protection (*see chapter XI).*

(d) Presence of the child

Article 13

If it proves impossible to determine the habitual residence of the child and Article 12 does not apply, Article 13 allows a judge of a Member State to decide on matters of parental responsibility with regard to children who are present in that Member State.

(e) Residual jurisdiction

Article 14

If no court has jurisdiction pursuant to Articles 8 to 13, the court may found its jurisdiction on the basis of its own national rules on private international law. Such decisions are to be recognised and declared enforceable in other Member States pursuant to the rules of the Regulation.

III. Transfer to a better placed court

Article 15

The Regulation contains an innovative rule which allows, by way of exception, that a court which is seised of a case transfers it to a court of another Member State if the latter is better placed to hear the case. The court may transfer the **entire case** or a **specific part thereof.**

According to the general rule, jurisdiction lies with the courts of the Member State of the child's habitual residence at the time the court was seised (Article 8). Therefore, jurisdiction does not shift automatically in a case where the child acquires habitual residence in another Member State during the court proceedings.

However there may be circumstances where, exceptionally, the court that has been seised ("the court of origin") is not the best placed to hear the case. Article 15 allows in such circumstances that the court of origin may transfer the case to a court of another Member State provided this is in the best interests of the child.

Once a case has been transferred to the court of another Member State, it cannot be further transferred to a third court (Recital 13).

1. In what circumstances is it possible to transfer a case?

The transfer is subject to the following conditions:

The child must have a "particular connection" with the other Member State. Article 15(3) enumerates the five situations where such connection exists according to the Regulation:

- the child has acquired habitual residence there after the court of origin was seised; or
- the other Member State is the former habitual residence of the child; or
- it is the place of the child's nationality; or
- it is the habitual residence of a holder of parental responsibility; or

- the child owns property in the other Member State and the case concerns measures for the protection of the child relating to the administration, conservation or disposal of this property.

In addition, both courts must be convinced that a transfer is in the best interests of the child. The judges should co-operate to assess this on the basis of the "specific circumstances of the case".

The transfer may take place:

- on application from a party **or**
- of the court's own motion, if at least one of the parties agrees **or**
- on application of a court of another Member State, if at least one of the parties agrees.

2. What procedure applies?

A court which is faced with a request for a transfer or which wants to transfer the case of its own motion has two options:

(a) It may stay the case and invite the parties to introduce a request before the court of the other Member State

or

(b) It may directly request the court of the other Member State to take over the case.

In the former case, the court of origin shall set a time limit by which the parties shall seise the courts of the other Member State. If the parties do not seise such other court within the time limit, the case is not transferred and the court of origin shall continue to exercise its jurisdiction. The Regulation does not prescribe a specific time limit, but it should be sufficiently short to ensure that the transfer does not result in unnecessary delays to the detriment of the child and the parties. The court which has received the request for a transfer must decide, within six weeks of being seised, whether or not to accept the transfer. The relevant question should be whether, in the specific case, a transfer would be in the best interests of the child. The central authorities can play an important role by providing information to the judges on the situation in the other Member State. The assessment should be based on the principle of mutual trust and on the assumption that the courts of all Member States are in principle competent to deal with a case.

If the second court declines jurisdiction or, within six weeks of being seised, does not accept jurisdiction, the court of origin retains jurisdiction and must exercise it.

3. Certain practical aspects

➢ How does a judge, who would like to transfer a case, find out which is the competent court of the other Member State?

The European Judicial Atlas in Civil Matters can be used to find the competent court of the other Member State. The Judicial Atlas identifies the territorially competent court in the different Member States with contact details of the different courts (name, telephone, e-mail, etc.) (See Judicial Atlas*).* The central authorities appointed under the Regulation can also assist the judges in finding the competent court in the other Member State *(see chapter X).*

➢ How should the judges communicate?

Article 15 states that the courts shall co-operate, either directly or through the central authorities, for the purpose of the transfer. It may be particularly useful for the judges concerned to communicate to assess whether in the specific case the requirements for a transfer are fulfilled, in particular if it would be in the best interests of the child. If the two judges speak and/or understand a common language, they should not hesitate to contact each other directly by telephone or e-mail. Other forms of modern technology may be useful, e.g. conference calls. If there are language problems, the judges may rely on interpreters. The central authorities will also be able to assist the judges.

The judges will wish to keep the parties and their legal advisers informed, but it will be a matter for the judges to decide for themselves what procedures and safeguards are appropriate in the context of the particular case.

The courts may also co-operate through the central authorities.

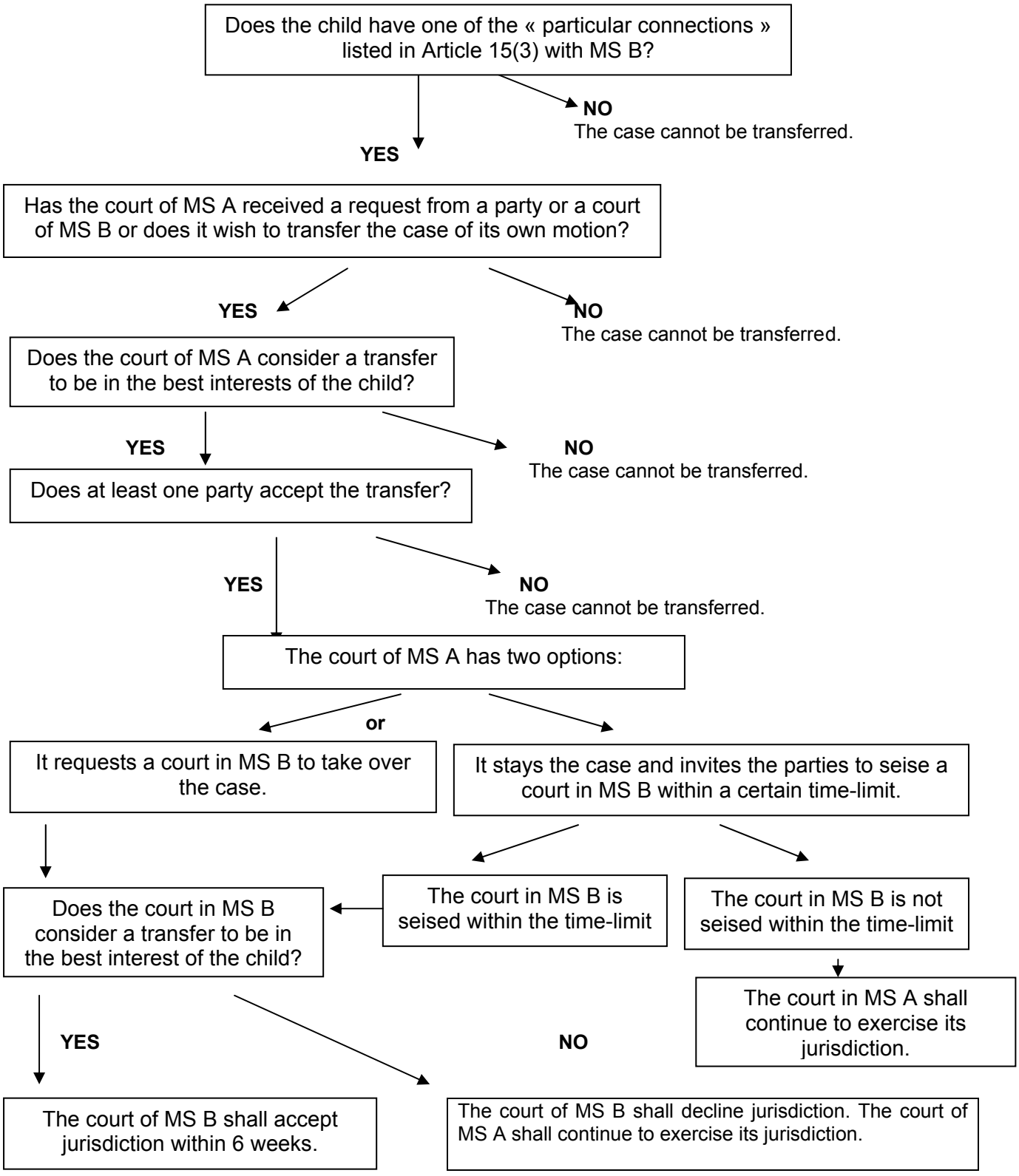
➢ Who is responsible for the translation of documents?

The mechanisms of translation are not covered by Article 15. The judges should try to find a pragmatic solution which corresponds to the needs and circumstances of each case. Subject to the procedural law of the State addressed, translation may not be necessary if the case is transferred to a judge who understands the language of the case. If a translation proves necessary, it could be limited to the most important documents. The central authorities may also be able to assist in providing informal translations (*See chapter X)*.

ARTICLE 15:

Transfer to a better placed court

When a court in a Member State ("MS A") has been seised of a case pursuant to Articles 8 to 14 of the Regulation, it may, as an exception, transfer it to a court of another Member State ("MS B"), if the following conditions are met:



IV. What happens if the same proceedings are brought in two Member States?

Article 19(2)

It may happen that parties initiate court proceedings on parental responsibility concerning the same child and the same cause of action in different Member States. This may result in parallel actions and consequently the possibility of irreconcilable judgments on the same issue.

Article 19(2) regulates the situation where proceedings relating to parental responsibility are brought in different Member States concerning:

- the same child and
- the same cause of action

In that situation, Article 19(2) stipulates that the court first seised is, in principle, competent. The court second seised has to stay its proceedings and wait for the other court to decide whether it has jurisdiction. If the first court considers itself competent, the other court must decline jurisdiction. The second court may only continue its proceedings if the first court comes to the conclusion that it does not have jurisdiction or if the first court decides to transfer the case pursuant to Article 15.

It is expected that the *lis pendens* mechanism will be rarely used in proceedings relating to parental responsibility since the child is usually habitually resident in only one Member State in which the courts have jurisdiction according to the general rule of jurisdiction (Article 8).

The Regulation provides for another way of avoiding potential conflicts of jurisdiction by allowing a transfer of the case. Hence, Article 15 allows a court, as an exception and under certain conditions, to transfer a case, or a part thereof, to another court *(see chapter III)*.

V. How can a decision be recognised and enforced in another Member State?

Articles 21, 23-39

Any interested party may request that a judgment on parental responsibility, issued by a court of a Member State, shall be or not be recognised and be declared enforceable in another Member State *("exequatur procedure")*.

The request shall be made to the competent court in the Member State in which recognition and enforcement is sought. The courts designated by the Member States for this purpose are found in list 1. This court shall declare, without delay, that the judgment

is enforceable in that Member State. Neither the person against whom enforcement is sought, nor the child, is entitled to submit observations to the court.

The court shall only refuse to declare the judgment enforceable if:

- this would be manifestly contrary to the public policy in the Member State addressed;
- the child has not been given the opportunity to be heard except in case of urgency;
- the judgment was given in the absence of a person who was not served with the documents instituting the proceedings in sufficient time and in such a way as to enable him or her to arrange for his or her defence, unless it is determined that he or she has accepted the judgment unequivocally;
- the person claiming that the judgment infringes his or her parental responsibility has not been given an opportunity to be heard;
- the judgment is irreconcilable with another judgment, in the conditions set out in Article 23(e)(f);
- the case concerns the placement of a child in another Member State and the procedure prescribed in Article 56 has not been complied with.

The parties may appeal against the decision. The appeal shall be lodged with the courts designated by the Member States for this purpose which can be found in list 2. Both parties may submit comments to the court at this stage.

When applying for *exequatur*, a person is entitled to legal aid if he or she was so entitled in his or her Member State of origin (Article 50). Such a person may also be assisted by the central authorities, which shall have the role of informing and assisting holders of parental responsibility who seek the recognition and enforcement of a decision on parental responsibility in another Member State (Article 55(b)).

The procedure described above has been carried over from the Brussels II Regulation. It applies to decisions on parental responsibility, e.g. in matters of custody rights. There are, however, two exceptions where the Regulation dispenses with this procedure and where a decision is to be recognised and enforceable in other Member States without any procedure. The exceptions concern access rights *(See chapter VI)* and the return of the child following abduction (*See chapter VII)*.

VI. The rules on access rights

1. Access rights are directly recognised and enforceable under the Regulation

Articles 40,41

One of the main objectives of the Regulation is to ensure that a child can maintain contact with all holders of parental responsibility after a separation even when they live in different Member States. The Regulation will facilitate the exercise of cross-border access rights by ensuring that a judgment on access rights issued in one Member State is directly recognised and enforceable in another Member State provided it is accompanied by a certificate. The consequence of this new rule is two-fold: (a) it is no longer necessary to apply for an "*exequatur"* and (b) it is no longer possible to oppose the recognition of the judgment. The judgment is to be certified in the Member State of origin provided certain procedural safeguards have been respected. The new procedure does not prevent holders of parental responsibility from seeking recognition and enforcement of a judgment by applying for *exequatur* under the relevant parts of the Regulation if they wish to do so (Article 40(2)) *(See chapter V).*

2. Which access rights are concerned?

"Access rights" include in particular the right to take a child to a place other than the habitual residence for a limited period of time (Article 2(10)).

The new rules on access rights apply to any access rights, irrespective of who is the beneficiary thereof. According to national law access rights may be attributed to the parent with whom the child does not reside, or to other family members, such as grandparents or third persons.

"Access rights" include all forms of contacts between the child and the other person, including for instance contact by telephone or e-mail.

The new rules on recognition and enforcement apply only to judgments that grant access rights. Conversely, decisions that refuse a request for access rights are governed by the general rules on recognition.

3. What are the conditions for issuing a certificate?

A judgment on access rights is directly recognised and enforceable in another Member State provided it is accompanied by a certificate, which shall be issued by the judge of origin who issued the judgment. The certificate guarantees that certain procedural safeguards have been respected during the procedure in the Member State of origin.

Articles 40,41 and Annex III

The judge of origin shall issue the certificate once he/she has verified that the following procedural safeguards have been respected:

- all parties have been given the opportunity to be heard;
- the child has been given an opportunity to be heard, unless a hearing was considered inappropriate having regard to the age and maturity of the child;
- where the judgment was given in default, the defaulting party has been served with the document instituting the proceedings in sufficient time and in a manner enabling that person to prepare his or her defence, or if the person was served with the document but not in compliance with these conditions, it is nevertheless established that the person has accepted the judgment unequivocally.

The judge of origin shall issue the certificate by using the standard form in Annex III in the language of the judgment. The certificate not only indicates whether the above-mentioned procedural safeguards have been respected, but it also contains information of a practical nature, intended to facilitate the enforcement of the judgment (e.g. the names and addresses of the holders of parental responsibility and the children concerned, any practical arrangements for the exercise of access rights, any specific obligations on the holder of access rights or the other parent and any restrictions that may be attached to the exercise of access rights). All obligations mentioned in the certificate concerning access rights are, in principle, directly enforceable pursuant to the new rules.

Although this is not regulated in the Regulation, judges may consider that it would be good practice to include in their judgment a description of the reasons why a child has not been given an opportunity to be heard.

If the procedural safeguards have not been respected, the decision will not be directly recognised and declared enforceable in other Member States, but the parties will have to apply for an *exequatur* to this end (*see chapter V).*

4. When shall the judge of origin issue the certificate?

Article 41(1),(3)

This depends on whether, at the time that the judgment is delivered, the access rights are likely to be exercised in a cross-border context.

(a) The access rights involve a cross-border situation

If, at the time the judgment is issued, the access rights concern a cross-border situation, e.g. because one of the parents is a resident of or plans to move to another Member State, the judge shall issue the certificate of his/her own initiative *("ex officio")* when the judgment becomes enforceable, even if only provisionally.

The national laws of many Member States provide that judgments on parental responsibility are "enforceable" notwithstanding appeal. If national law does not enable a judgment to be enforceable, whilst an appeal against it is pending, the Regulation confers this right on the judge of origin. The aim is to prevent dilatory appeals from unduly delaying the enforcement of a decision.

(b) The access rights do not involve a cross-border situation

If, at the time the judgment is delivered, there is no indication that the access rights will be exercised across national borders, the judge is not obliged to deliver the certificate. However, if the circumstances of the case indicate there is an actual or potential chance that the access rights will have a cross-border character, judges may consider it good practice to issue the certificate at the same time as the judgment. This could, for instance, be the case where the court in question is situated close to the border of another Member State or where the holders of parental responsibility are of different nationalities.

If the situation subsequently acquires an international aspect, e.g. because one of the holders of parental responsibility moves to another Member State, either party may at that time request the court of origin that delivered the judgment to issue a certificate.

5. Is it possible to appeal against the certificate?

Article 43 and Recital 24

No, it is not possible to appeal against the issuing of a certificate. If the judge of origin has committed an error in filling in the certificate and it does not correctly reflect the judgment, it is possible to make a request for rectification to the court of origin. The national law of the Member State of origin shall apply in that case.

6. What are the effects of the certificate?

Articles 41(1), 45

- A judgment on access rights, which is accompanied by a certificate, is directly recognised and enforceable in other Member States

The fact that the judgment on access rights is accompanied by a certificate entails that the holder of access rights may request that the decision is recognised and enforced in another Member State without any intermediate procedure *("exequatur").* In addition,

the other party may not oppose the recognition of the judgment. Consequently, the grounds of non-recognition listed in Article 23 do not apply to these judgments.

A party who wishes to request the enforcement of access rights in another Member State shall produce a copy of the judgment and the certificate. It is not necessary to translate the certificate, with the exception of point 12 concerning the practical arrangements for the exercise of access rights.

- The certificate ensures that the judgment is treated in the other Member State as a judgment issued in that Member State for the purpose of recognition and enforcement

Articles 44, 47

The fact that a judgment is directly recognised and enforceable in another Member State means that it is to be treated as a "national" judgment and be recognised and enforced under the same conditions as a judgment issued in that Member State. If a party does not comply with a judgment on access rights, the other party may directly request the authorities in the Member State of enforcement to enforce it. The enforcement procedure is not governed by the Regulation, but by national law *(See chapter VIII)*.

7. The power of the courts in the Member State of enforcement to make practical arrangements for the exercise of access rights

Article 48

Enforcement can be rendered difficult or even impossible if the judgment contains no or insufficient information on the arrangements of access rights. To ensure that the access rights can nevertheless be enforced in such situations, the Regulation gives the courts of the Member State of enforcement the power to make the necessary practical arrangements for organising the exercise of access rights, whilst respecting the essential elements of the judgment.

Article 48 does not confer jurisdiction as to the substance on the court of enforcement. The practical arrangements ordered pursuant to this provision cease therefore to apply once a court of the Member State having jurisdiction as to the substance of the matter has issued a judgment.

VII. The rules on child abduction

Articles 10, 11, 40, 42, 55

The Hague Convention of 25 October 1980 on the civil aspects of international child abduction ("the 1980 Hague Convention"), which has been ratified by all Member States, will continue to apply in the relations between Member States. However, the 1980 Hague Convention is supplemented by certain provisions of the Regulation, which come into play in cases of child abduction between Member States. The rules of the Regulation prevail over the rules of the Convention in relations between Member States in matters covered by the Regulation.

The Regulation aims at deterring parental child abduction between Member States and, if such nevertheless take place, ensuring the prompt return of the child to his or her Member State of origin. For the purpose of the Regulation, child abduction covers both wrongful removal and wrongful retention (Article 2(11)). What follows applies to cases both situations.

Where a child is abducted from one Member State ("the Member State of origin") to another Member State ("the requested Member State"), the Regulation ensures that the courts of the Member State of origin retain jurisdiction to decide on the question of custody notwithstanding the abduction. Once a request for the return of the child is lodged before a court in the requested Member State, this court applies the 1980 Hague Convention as complemented by the Regulation. If the court of the requested Member State decides that the child shall not return, it shall immediately transmit a copy of its decision to the competent court of the Member State of origin. This court may examine a question on custody at the request of a party. If the court takes a decision entailing the return of the child, this decision is directly recognised and enforceable in the requested Member State without the need for *exequatur*. *(See flowchart on p. 41)*

The main principles of the new rules on child abduction

1. Jurisdiction remains with the courts of Member State of origin (see chart p. 31).

2. The courts of the requested Member State shall ensure the prompt return of the child (see chart p. 35)

3. If the court of the requested Member State decides not to return the child, it must transmit a copy of its decision to the competent court in Member State of origin, which shall notify the parties. The two courts shall co-operate (see chart p. 40)

4. If the court of the Member State of origin decides that the child shall return, *exequatur* is abolished for this decision and it is directly enforceable in the requested Member State (see chart on p. 40).

5. The central authorities of the Member State of origin and the requested Member State shall co-operate and assist the courts in their tasks.

As a general remark, it is appropriate to recall that the complexity and nature of the issues addressed in the various international instruments in the field of child abduction calls for specialised or well-trained judges. Although the organisation of courts falls outside the scope of the Regulation, the experiences of Member States which have concentrated jurisdiction to hear cases under the 1980 Hague Convention in a limited number of courts or judges are positive and show an increase of quality and efficiency.

1. Jurisdiction

Article 10

To deter parental child abduction between Member States, Article 10 ensures that the courts of the Member State where the child was habitually resident before the abduction ("Member State of origin") remain competent to decide on the substance of the case also after the abduction. Jurisdiction may be attributed to the courts of the new Member State ("the requested Member State") only under very strict conditions (*see flowchart p. 31)*.

The Regulation allows for the attribution of jurisdiction to the courts of the requested Member State in two situations only:

Situation 1:

- The child has acquired habitual residence in the requested Member State

and

- All those with rights of custody have acquiesced in the abduction.

OR

Situation 2:

- The child has acquired habitual residence in the requested Member State and has resided in that Member State for at least one year after those with rights of custody learned or should have learned of the whereabouts of the child

and

- the child has settled in the new environment

and, additionally, at least one of the following conditions is met:

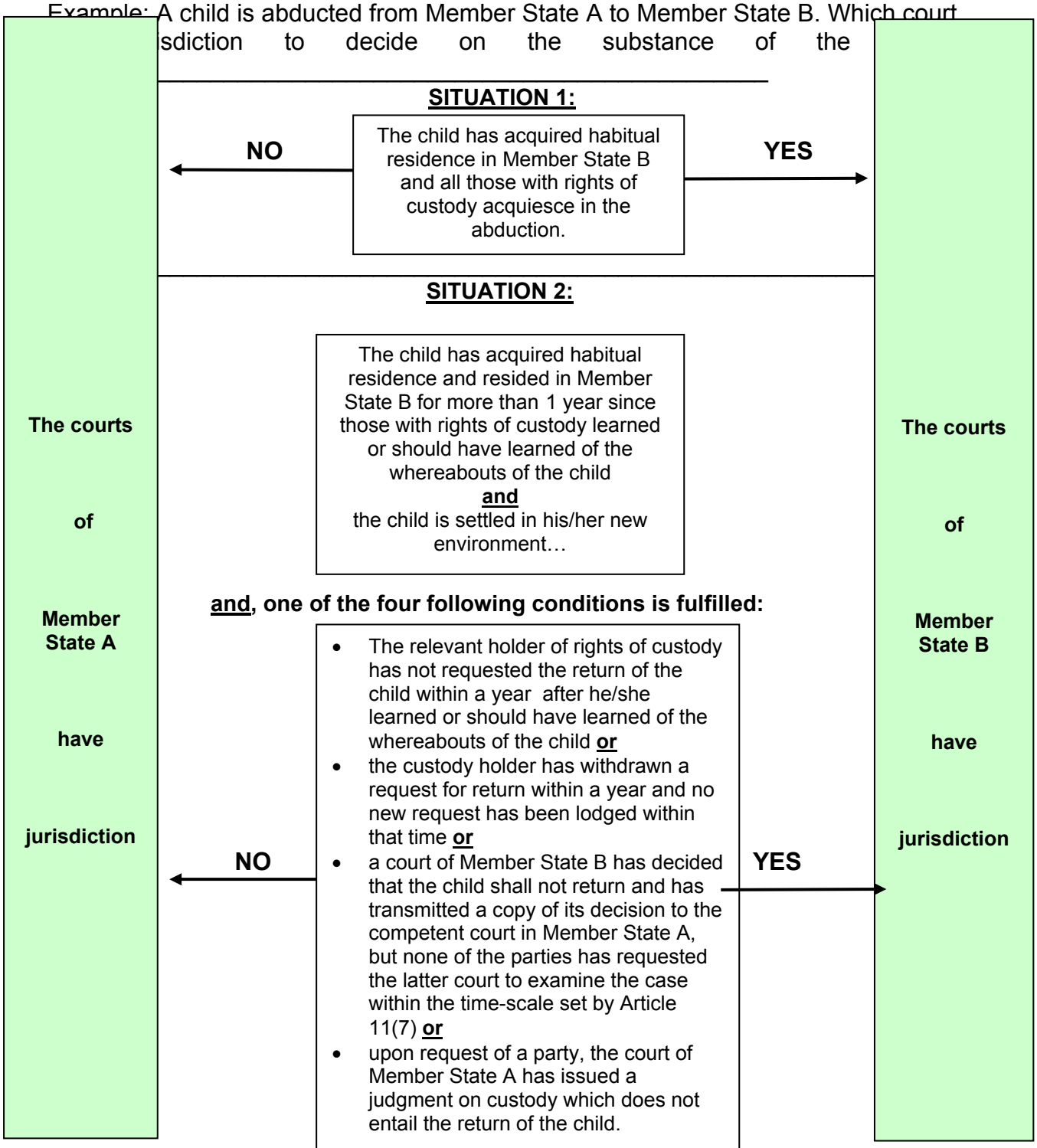
- no request for the return of the child has been lodged within the year after the left-behind parent knew or should have known the whereabouts of the child;
- a request for return was made but has been withdrawn and no new request has been lodged within that year;

- a decision on non-return has been issued in the requested State and the courts of both Member States have taken the requisite steps under Article 11(6), but the case has been closed pursuant to Article 11(7) because the parties have not made submissions within 3 months of notification;

- the competent court of origin has issued a judgment on custody which does not entail the return of the child.

Article 10:
Jurisdiction in child abduction cases

Example: A child is abducted from Member State A to Member State B. Which court sdiction to decide on the substance of the



2. Rules to ensure the prompt return of the child

Article 11(1)-(5)

When a court of a Member State receives a request for the return of a child pursuant to the 1980 Hague Convention, it shall apply the rules of the Convention as complemented by Article 11 (1) to (5) of the Regulation (*see flowchart p. 35*). To this end, the judge may find it useful to consult the relevant case-law under this Convention which is available at the INCADAT database set up by the Hague Conference on Private International Law. The explanatory report and the Practice Guides concerning this Convention can also be of use (see website of the Hague Conference on Private International Law).

2.1. The court shall assess whether an abduction has taken place under the terms of the Regulation — Article 2(11)(a),(b)

The judge shall first determine whether a "wrongful removal or retention" has taken place in the sense of the Regulation. The definition in Article 2(11) is very similar to the definition of the 1980 Hague Convention (Article 3) and covers a removal or retention of a child in breach of custody rights under the law of the Member State where the child was habitually resident before the abduction. However, the Regulation adds that custody is to be considered to be exercised jointly when one of the holders of parental responsibility cannot decide on the child's place of residence without the consent of the other holder of parental responsibility. As a result, a removal of a child from one Member State to another without the consent of the relevant person constitutes child abduction under the Regulation. If the removal is lawful under national law, Article 9 of the Regulation may apply.

2.2. The court shall always order the return of the child if he or she can be protected in the Member State of origin — Article 11(4)

The Regulation reinforces the principle that the court shall order the immediate return of the child by restricting the exceptions of Article 13(b) of the 1980 Hague Convention to a strict minimum. The principle is that the child shall always be returned if he/she can be protected in the Member State of origin.

Article 13(b) of the 1980 Hague Convention stipulates that the court is not obliged to order the return if it would expose the child to physical or psychological harm or put him/her in an intolerable situation. The Regulation goes a step further by extending the obligation to order the return of the child to cases where a return could expose the child to such harm, but it is nevertheless established that the authorities in the Member State of origin have made or are prepared to make adequate arrangements to secure the protection of the child after the return.

The court must examine this on the basis of the facts of the case. It is not sufficient that procedures exist in the Member State of origin for the protection of the child, but it must be established that the authorities in the Member State of origin have taken concrete measures to protect the child in question.

It will generally be difficult for the judge to assess the factual circumstances in the Member State of origin. The assistance of the central authorities of the Member State of origin will be vital to assess whether or not protective measures have been taken in that country and whether they will adequately secure the protection of the child upon his or her return. (*see chapter X)*.

2.3. The child and the requesting party shall have the opportunity to be heard Article 11(2),(5)

The Regulation reinforces the right of the child to be heard during the procedure. Hence, the court shall give the child the opportunity to be heard unless the judge considers it inappropriate due to the child's age and degree of maturity. (*See chapter IX*).

In addition, the court cannot refuse to return the child without first giving the person who requested the return the opportunity to be heard. Having regard to the strict time-limit, the hearing shall be carried out in the quickest and most efficient manner available. One possibility is to use the arrangements laid down in Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in taking of evidence in civil or commercial matters ("the Evidence Regulation"). This Regulation, which applies as of 1 January 2004, facilitates the co-operation between courts of different Member States in the taking of evidence in e.g. family law matters. A court may either request the competent court of another Member State to take evidence or take evidence directly in the other Member State. Given that the court must decide within 6 weeks on the return of the child, the request must necessarily be executed without any delay, and considerably within the general 90 days time limit, prescribed by Article 10(1) of the Evidence Regulation. The use of video-conference and tele-conference, which is proposed in Article 10(4) of the above Regulation, could be particularly useful to take evidence in these cases.

2.4. The court shall issue a decision within a six-week deadline Article 11(3)

The court must apply the most expeditious procedures available under national law and issue a decision within six weeks from being seised with the request (*a link to a list of the applicable procedures of the different Member States will be added)*. This time limit may only be exceeded if exceptional circumstances make it impossible to respect.

With regard to decisions ordering the return of the child, Article 11(3) does not specify that such decisions, which are to be given within six weeks, shall be enforceable within the same period. However, this is the only interpretation which would effectively guarantee the objective of ensuring the prompt return of the child within the strict time-limit. This objective could be undermined if national law allows for the possibility for appeal of a return order and meanwhile suspends the enforceability of that decision, without imposing any time-limit on the appeal procedure.

For these reasons, national law should seek to ensure that a return order issued within the prescribed six week time-limit is "enforceable". The way to achieve this goal is a matter of national law. Different procedures may be envisaged to this end, e.g.:

(a) National law may preclude the possibility of an appeal against a decision entailing the return of the child, or

(b) National law may allow for the possibility for appeal, but provide that a decision entailing the return of the child is enforceable pending any appeal.

(c) In the event that national law allows for the possibility of appeal, and suspends the enforceability of the decision, the Member States should put in place procedures to ensure an accelerated hearing of the appeal so as to ensure the respect of the six-week dead-line.

The procedures described above should apply *mutatis mutandis* also to non-return orders in order to minimise the risk of parallel proceedings and contradictory decisions. A situation could otherwise arise where a party appeals against a decision on non-return that is issued just before the six weeks deadline elapses and at the same time requests the competent court of origin to examine the case.

The return of the child

NB: The rules of the Regulation (Art. 11(2 to 5)) prevail over the relevant rules of the Convention.

Relevant rules of the 1980 Hague Convention	Relevant rules of the Regulation
The obligation to order the return of the child	
Article 12: The court of the MS to which the child has been abducted ("the court") shall in principle order the immediate return of the child if less than a year has elapsed from the abduction.	Article 11 (2 to 5): The Regulation confirms and reinforces this principle.
The exception to this obligation	
Article 13(1)(b): The court is not obliged to order the return if there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.	Article 11(4): The court must order the return of the child even if it would put the child at risk, if it is established that the authorities in the MS of origin will secure the protection of the child upon his/her return.
Hearing the child	
Article 13(2): The court is not obliged to order the return of the child if he or she objects and has attained a certain age and maturity.	Article 11(2): The court shall ensure that the child is given an opportunity to be heard, unless it is inappropriate having regard to the child's age and maturity.
The hearing of the non-abducting custody holder	
(no provision)	Article 11(5): The court cannot refuse to return the child unless the person who requested the return has been given an opportunity to be heard.
The time limit for handling requests for return	
Article 11: The court shall act expeditiously for the return of the child. If the court has not reached a decision within 6 weeks, it may be requested to state the reasons for its delay.	Article 11(3): The court shall use the most expeditious procedures available in national law. The court shall issue its decision within 6 weeks from when the application is lodged, unless this proves impossible due to exceptional circumstances.

3. What happens if the court decides that the child shall not return?

Article 11 (6)-(7)

- **The competent court shall transmit a copy of the decision on non-return to the competent court in the Member State of origin.**

Having regard to the strict conditions set out in Article 13 of the 1980 Hague Convention and Article 11(2) to (5) of the Regulation, the courts are likely to decide that the child shall return in the vast majority of cases.

However, in those exceptional cases where a court nevertheless decides that a child shall not return pursuant to Article 13 of the 1980 Hague Convention, the Regulation foresees a special procedure in Article 11(6) and (7).

This requires a court which has issued a decision on non-return to transmit a copy of its decision together with the relevant documents to the competent court in the Member State of origin. This transmission can take place either directly from one court to another, or via the central authorities in the two Member States. The court in the Member State of origin is to receive the documents within a month of the decision on non-return.

The court of origin shall notify the information to the parties and invite them to make submissions, in accordance with national law, within three months of the date of notification, to indicate whether they wish that the court of origin examines the question of custody of the child.

If the parties do not submit comments within the three month time-limit, the court of origin shall close the case.

The court of origin shall examine the case if at least one of the parties submits comments to that effect. Although the Regulation does not impose any time-limit on this, the objective should be to ensure that a decision is taken as quickly as possible.

- **To which court shall the decision on non-return be transmitted?**

The decision on non-return and the relevant documents shall be transferred to the court which is competent to decide on the substance of the case.

If a court in the Member State has previously issued a judgment concerning the child in question, the documents shall in principle be transmitted to that court. In the absence of a judgment, the information shall be sent to the court which is competent according to the law of that Member State, in most cases where the child was habitually resident before the abduction. The European Judicial Atlas in Civil Matters can be a useful tool to find the competent court in the other Member State (Judicial Atlas). The central authorities appointed under the Regulation can also assist the judges in finding the competent court in the other Member State *(see chapter IX)*.

➢ Which documents shall be transmitted and in which language?

Article 11(6) provides that the court which has issued the decision on non-return shall transmit a copy of the decision and of the "relevant documents, in particular a transcript of the hearings before the court". It is for the judge who has taken the decision to decide which documents are relevant. To this end, the judge shall give a fair representation of the most important elements highlighting the factors influencing the decision. In general, this would include the documents on which the judge has based his or her decision, including e.g. any reports drawn up by social welfare authorities concerning the situation of the child. The other court must receive the documents within one month from the decision.

The mechanisms of translation are not governed by Article 11(6). Judges should try to find a pragmatic solution which corresponds to the needs and circumstances of each case. Subject to the procedural law of the State addressed, translation may not be necessary if the case is transferred to a judge who understands the language of the case. If a translation proves necessary, it could be limited to the most important documents. The central authorities may also be able to assist in providing informal translations. If it is not possible to carry out the translation within the one month time limit, it should be carried out in the Member State of origin.

4. The court of origin is competent to deal with the substance of the case in its entirety

Articles 11(7) and 42

The court of origin which takes a decision in the context of Article 11(7) is competent to deal with the substance of the case in its entirety. Its jurisdiction is therefore not limited to deciding upon the custody of the child, but may also decide for example on access rights. The judge should, in principle, be in the position that he or she would have been in if the abducting parent had not abducted the child but instead had seised the court of origin to modify a previous decision on custody or to ask for a authorisation to change the habitual residence of the child. It could be that the person requesting return of the child did not have the residence of the child before the abduction, or even that that person is willing to accept a change of the habitual residence of the child in the other Member State provided that his or her visiting rights are modified accordingly.

5. The procedure before the court of origin

The court of origin should apply certain procedural rules when examining the case. Compliance with these rules will later allow the court of origin to deliver the certificate mentioned in Article 42(2).

Article 42

The judge of origin should ensure that:

- all parties are given the opportunity to be heard;
- the child is given an opportunity to be heard, unless a hearing is considered inappropriate having regard to the age and maturity of the child;
- his/her judgment takes into account the reasons for and evidence underlying the decision on non-return.

Certain practical aspects

- **How can the judge of origin take account of the reasons underlying the decision on non-return?**

It is necessary to establish cooperation between the two judges in order for the judge of origin to be able properly to take account of the reasons for and the evidence underlying the decision on non-return. If the two judges speak and/or understand a common language, they should not hesitate to make contact directly by telephone or e-mail for this purpose. If there are language problems, the central authorities will be able to assist *(see chapter X)*.

- **How will it be possible to hear the abducting custody holder and the child if they stay in the other Member State?**

The fact that the abducting custody holder and the abducted child are not likely to travel to the Member State of origin to attend the proceeding requires that their evidence can be given from the Member State where they find themselves. One possibility is to use the arrangements laid down in Regulation (EC) No 1206/2001 ("the Evidence Regulation") This Regulation, which applies as of 1 January 2004, facilitates the co-operation between courts of Member States in the taking of evidence in e.g. family law matters. A court may either request the competent court of another Member State to take evidence or take evidence directly in that other Member State. The Regulation proposes the taking of evidence by means of video-conference and tele-conference.

The fact that child abduction constitutes a criminal offence in certain Member States should also be taken into account. Those Member States should take the appropriate measures to ensure that the abducting custody holder can participate in the court proceeding in the Member State of origin without risking criminal sanctions. Again a solution could be found by using the arrangements laid down in the Evidence Regulation. Another solution could be put in place special arrangements to ensure the free passage to and from the Member State of origin to facilitate the personal participation in the procedure before the court of that State of the individual who abducted the child.

If the court of origin takes a decision that does not entail the return of the child, the case is to be closed. Jurisdiction to decide on the question of substance is then attributed to the courts of the Member State to which the child has been abducted (*See flowcharts p. 35 and 41).*

If, on the other hand, the court of origin takes a decision which entails the return of the child, that decision is directly recognised and enforceable in the other Member State provided it is accompanied by a certificate *(see point 5 and flowchart p. 41).*

6. The abolition of exequatur for a decision of the court of origin entailing the return of the child

Articles 40, 42

As described above (point 2), a court that is seised with a request for the return of a child pursuant to the 1980 Hague Convention shall apply the rules of the Convention as complemented by Article 11 of the Regulation. If the requested court decides that the child shall not return, the court of origin will have the final say in determining whether or not the child shall return.

If the court of origin takes a decision that entails the return of the child, it is important to ensure that this decision can be enforced quickly in the other Member State. For this reason, the Regulation provides that such judgments are directly recognised and enforceable in the other Member State provided they are accompanied by a certificate. The consequence of this new rule is two-fold: (a) it is no longer necessary to apply for an "*exequatur"* and (b) it is not possible to oppose the recognition of the judgment. The judgment shall be certified if it meets the procedural requirements mentioned above under point 4.

The judge of origin shall issue the certificate by using the standard form in Annex IV in the language of the judgment. The judge shall also fill in the other information requested in the Annex, including whether the judgment is enforceable in the Member State of origin at the time it is issued.

The court of origin shall in principle deliver the certificate once the judgment becomes "enforceable", implying that the time for appeal shall, in principle, have elapsed. However, this rule is not absolute and the court of origin may, if it considers it necessary, declare that the judgment shall be enforceable, notwithstanding any appeal. The Regulation confers this right on the judge, even if this possibility is not foreseen under national law. The aim is to prevent dilatory appeals from unduly delaying the enforcement of a decision.

Article 43 and Recital 24

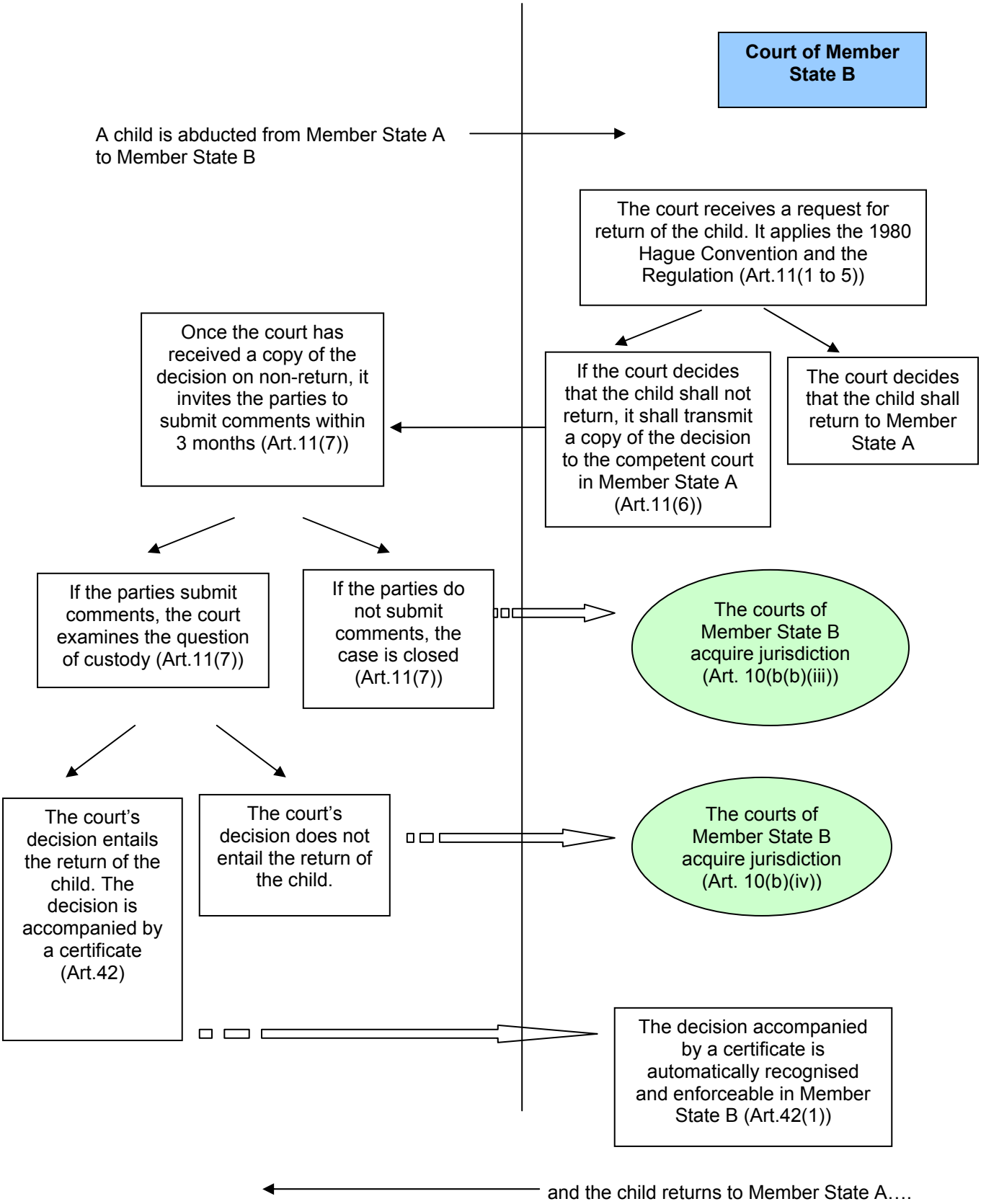
It is not possible to appeal against the issuing of a certificate. If the judge of origin has committed an error in filling in the certificate and it does not correctly reflect the judgment, it is possible to make a request for rectification to the court of origin. The national law of the Member State of origin shall apply in that case. A party who wishes to request the enforcement of the judgment entailing the return of the child shall produce a copy of the judgment and the certificate. It is not necessary to translate the certificate, with the exception of point 14 concerning the measures taken by the authorities in the Member State of origin to ensure the protection of the child upon his or her return.

7. New removal of the child to another Member State

Article 42

It must be emphasised that the decision of the court of origin is automatically enforceable in all the Member States and not only in the Member State in which the decision of non-return was pronounced. This results clearly from the wording of Article 42(1) and corresponds to the objective and spirit of the Regulation. A removal of the child to another Member State has therefore no effect on the decision of the court of origin. It is not necessary to start a new procedure for the return of the child pursuant to the 1980 Hague Convention, but merely to enforce the decision of the court of origin.

Procedure in child abduction cases



VIII. Enforcement

Although the enforcement procedure is not governed by the Regulation, but by national law, it is of the essence that national authorities apply rules which secure efficient and speedy enforcement of decisions issued under the Regulation so as not to undermine its objectives.

This applies in particular with regard to access rights and the return of the child following an abduction for which the exequatur procedure has been abolished in order to speed up the procedure.

In this context, the European Court of Human Rights has consistently ruled that once the authorities of a Contracting State to the 1980 Hague Convention have found that a child has been wrongfully removed pursuant to the Convention, they have a duty to make adequate and effective efforts to secure the return of the child. A failure to make such efforts constitutes a violation of Article 8 of the European Convention on Human Rights (right to respect for family life) (see e.g. the Case of Iglesias Gil and A.U.I. v. Spain of 29 July 2003, paragraph 62). Each contracting State must equip itself with adequate and effective means to ensure compliance with its positive obligations under Article 8 of the Convention (see e.g. the Cases of Maire v. Portugal of 26 June 2003, paragraph 76 and Ignaccolo-Zenide v. Romania of 25 January 2000, paragraph 108).

The European Court of Human Rights has also emphasised that proceedings relating to the award of parental responsibility, including the enforcement of the final decision, require urgent handling as the passage of time can have irremediable consequences for the relations between the child and the parent with whom he or she who does not live. The adequacy of a measure is therefore to be judged by the swiftness of its implementation (see e.g. the Cases of Ignaccolo-Zenidi v. Romania of 25 January 2000, paragraph 102 and Maire v. Portugal of 26 June 2003, paragraph 74).

IX. Hearing the child

Articles 23, 41, 42

The Regulation emphasises the importance of giving children the opportunity to express their views in proceedings concerning them. Hearing the child is one of the requirements for the abolition of the *exequatur* procedure for access rights and decisions entailing the return of the child *(see chapters VI and VII)*. It is also possible to oppose the recognition and enforcement of a judgment relating to parental responsibility on the basis that the child concerned was not given the opportunity to be heard *(see chapter V)*.

The Regulation sets out the main principle that a child shall be heard in proceedings that concern them. As an exception, a child may not be heard if this would be inappropriate having regard to the child's age and maturity. This exception should be interpreted restrictively.

The Regulation does not modify the applicable national procedures on this question (Recital 19). In general, listening to the child needs to be carried out in a manner which

takes account of the child's age and maturity. Assessing the views of younger children needs to be done with special expertise and care and differently from adolescents.

It is not necessary for the child's views to be heard at a court hearing, but they may be obtained by a competent authority according to national laws. For instance, in certain Member States, the hearing of the child is done by a social worker who presents a report to the court indicating the wishes and feelings of the child. If the hearing takes place in court, the judge should seek to organise the questioning to take account of the nature of the case, the age of the child and the other circumstances of the case. In any situation it is important to enable the child to express his or her views in confidence.

Whether the hearing of the child is carried out by a judge or another official, it is of the essence that that person receives adequate training, for instance how best to communicate with children and to be aware of the risk that parents seek to influence and put pressure on the child. When carried out properly, and with appropriate discretion, the hearing may enable the child to express his or her own wishes and to release him or her from a feeling of responsibility or guilt.

Hearing the child may have different purposes depending on the type and objective of procedure. In a proceeding concerning custody rights the objective is usually to assist in finding the most suitable environment in which the child should reside. In a case of child abduction the purpose is often to ascertain the nature of the child's objections to return and why they have developed, and also to ascertain whether, and if so in what way, the child may be at risk. There is always a possibility that parents try to influence the child in such cases.

X. Co-operation between central authorities and between courts

Articles 53-58

The central authorities will play a vital role in the application of the Regulation. The Member States must designate at least one central authority. Ideally, these authorities should coincide with the existing authorities entrusted with the application of the 1980 Hague Convention. This could create synergies and allow the authorities to benefit from the experiences acquired by the authorities in child abduction cases.

The central authorities must be given sufficient financial and human resources to be able to fulfil their duties and their personnel must receive adequate training before the entry into force of the Regulation. The use of modern technologies should be encouraged.

The Regulation foresees that the central authorities will be effectively integrated in the European Judicial Network on civil and commercial matters (*European Judicial Network)* and that they will meet regularly within this Network to discuss the application of the Regulation.

The specific duties of the central authorities are listed in Article 55. They include facilitating court-to-court communications, which will be necessary in particular where a case is transferred from one court to another *(See Chapters III and VII).* In these cases,

the central authorities will serve as a link between the national courts and the central authorities of other Member States.

Another task of the central authorities is to facilitate agreements between holders of parental responsibility through e.g. mediation. It is generally considered that mediation can play an important role in e.g. child abduction cases to ensure that the child can continue to see the non-abducting parent after the abduction and to see the abducting parent after the child has returned to the Member State of origin. However, it is important that the mediation process is not used to unduly delay the return of the child.

The central authorities do not have to carry out these duties themselves, but may act through other agencies.

In parallel with the requirements for central authorities to co-operate, the Regulation requires that the courts of different Member States co-operate for various purposes. Certain provisions impose specific obligations upon judges of different Member States to communicate and to exchange information in the context of a transfer of a case (*see chapter III)* and in the context of child abduction (*see chapter VII*).

To encourage and facilitate such co-operation, discussions between judges should be encouraged, both within the context of the European Judicial Network and through initiatives organised by the Member States. The experience of the informal "liaison judge arrangement" organised in the context of the 1980 Hague Convention may prove instructive in this context.

It may be that some Member States may consider it worthwhile to establish liaison judges or judges specialised in family law to assist in the functioning of the Regulation. Such arrangements, within the context of the European Judicial Network, could lead to effective liaison between judges and the central authorities as well as between judges, and thus contribute to a speedier resolution of cases of parental responsibility under the Regulation.

XI. Relationship between the Regulation and the 1996 Hague Convention on child protection

Articles 61, 62

The scope of application of the Regulation is very similar to that of the Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of the child ("the 1996 Hague Convention") . Both instruments contain rules on jurisdiction, recognition and enforcement of decisions on parental responsibility.

Six Member States have ratified or adhered to the Convention to this date (June 2005): the Czech Republic, Latvia, Estonia, Slovakia, Lithuania and Slovenia. The remaining Member States, with the exception of Hungary and Malta, have all signed but not yet

ratified the Convention. It is foreseen that the Convention will enter into force in the Member States once they have all ratified it in the interest of the Community. The relationship between the two instruments is clarified in Articles 61 and 62.

Articles 61 and 62

In order to determine whether the Regulation or the Convention applies in a specific case, the following questions should be examined:

(a) Does the case concern a matter covered by the Regulation?

The Regulation prevails over the Convention in relations between Member States in matters covered by the Regulation. Consequently, the Regulation prevails in matters of jurisdiction, recognition and enforcement. On the other hand, the **Convention applies** in relations between Member States in matters of **applicable law**, since this subject is not covered by the Regulation.

(b) Does the child concerned have his/her habitual residence on the territory of a Member State?

If both (a) and (b) apply, the Regulation prevails over the Convention.

(c) Does the case concern the recognition and/or enforcement of a decision issued by a court in another Member State?

Question (c) must be addressed on the basis that the rules on recognition and enforcement of the Regulation apply with regard to all decisions issued by the competent court of a Member State. It is irrelevant whether the child concerned lives within the territory of a particular Member State or not so long as the courts of that State have competence to take the decision in question. Hence, the rules on recognition and enforcement of the Regulation apply to decisions issued by the courts of a Member State even if the child concerned lives in a third State which is a contracting Party to the Convention. The aim is to ensure the creation of a common judicial area which requires that all decisions issued by competent courts within the European Union are recognised and enforced under a common set of rules.

Article 12(4)

As described in Chapter II, Article 12 of the Regulation introduces a limited prorogation option for a party to choose to seise a court of a Member State in which the child is not habitually resident, but with which the child has nevertheless a substantial connection.

This option is not limited to situations where the child is habitually resident within the territory of a Member State, but it applies also where the habitual residence of the child is in a third State that is not a contracting party to the 1996 Hague Convention. In that case, jurisdiction under Article 12 shall be deemed to be in the child's best interests, in particular, but not only, if it is found impossible to hold proceedings in the third State in question (Article 12(4)).

By contrast, if the child is habitually resident in the territory of a third State which is a contracting party to the Convention, the rules of the Convention apply.

ANNEX

Divorce proceedings in the European Union

Brief summary of the rules on matrimonial matters

I. Introduction

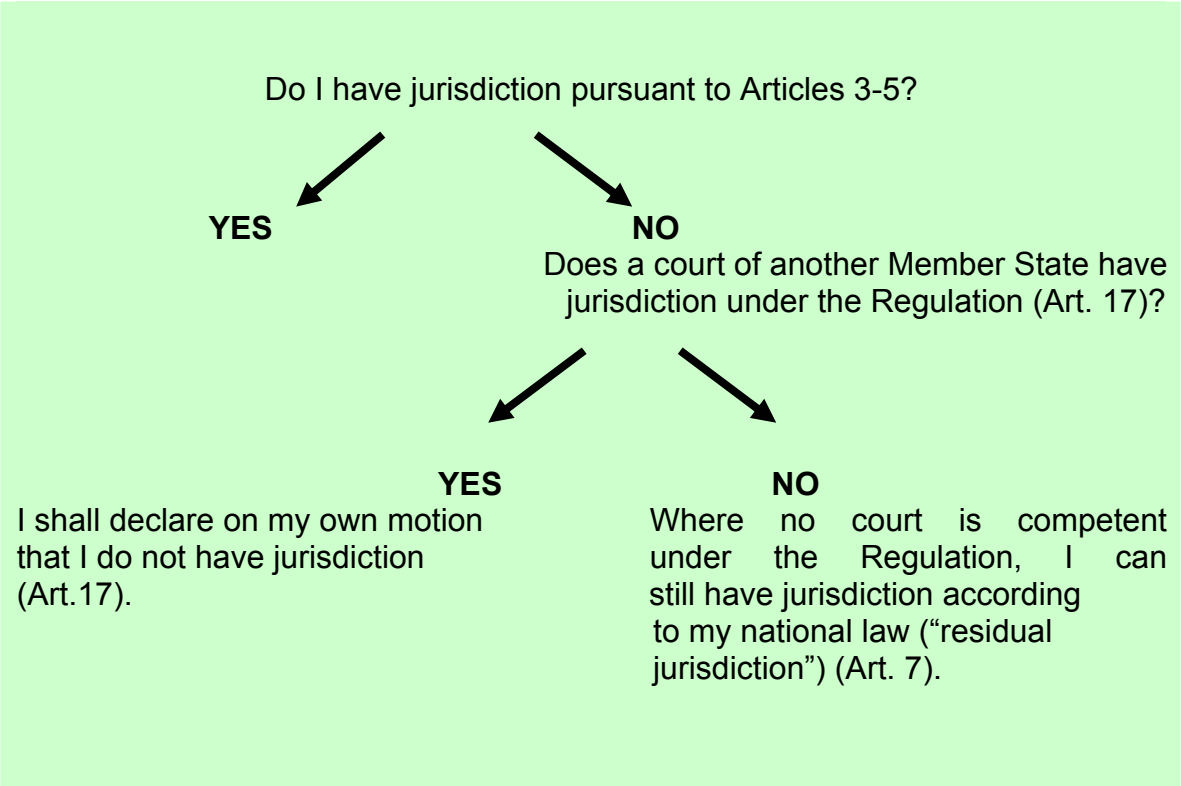
The provisions of the Regulation concerning matrimonial matters have been adopted from the Brussels II Regulation practically unchanged. The literature devoted to the Brussels II Regulation since its entry into force on 1 March 2001 can therefore serve as guidance also for the present Regulation. The explanatory report concerning the Convention of 28 May 1998, which preceded the Brussels II Regulation, could e.g. be useful in this context *(OJ C 221, 16.7.1998, p. 27)*.

The Regulation contains rules on jurisdiction and recognition in civil matters relating to divorce, legal separation and marriage annulment ("divorce"). Its scope is confined to the dissolution of the matrimonial ties and it does not apply to any ancillary issues, such as the property consequences of the marriage or the grounds for divorce.

II. Which Member State's courts have jurisdiction?

The jurisdiction rule in Article 3 set out a complete system of grounds of jurisdiction to determine in which Member State the courts are competent. The Regulation determines merely the Member State whose courts have jurisdiction, but not the court which is competent within that Member State. This question is left to domestic procedural law.

A court that is seised with an application for divorce has to make the following analysis:



Several alternative grounds of jurisdiction

Article 3

There is no general jurisdiction rule in matrimonial matters. Instead, Article 3 enumerates several grounds of jurisdiction. The grounds are **alternative**, implying that that there is no hierarchy between them.

Article 3 of the new Brussels II Regulation enumerates seven alternative grounds of jurisdiction in matters of divorce, legal separation and marriage annulment. The grounds do not take precedence over each other and the spouses may file a petition with the courts of the Member State of:

(a) their habitual residence or

(b) their last habitual residence if one of them still resides there or

(c) the habitual residence of either spouse in case of a joint application or

(d) the habitual residence of the respondent or

(e) the habitual residence of the applicant provided that he or she has resided there for at least one year before making the application or

(f) the habitual residence of the applicant provided that he or she has resided there for at least six months before making the application and he or she is a national of that Member State or

(g) their common nationality (common "domicile" in the case of the U.K. and Ireland).

The grounds are **exclusive** in the sense that a spouse who is habitually resident in a Member State or who is a national of a Member State (or who has his or her "domicile" in the United Kingdom or Ireland) may only be sued in another Member State on the basis of the Regulation.

Example: A man who is a national of Member State A is married to a woman who is a national of Member State B. The couple are habitually resident in Member State C. After a few years, their marriage deteriorates and the wife wants to divorce. The couple can only apply for divorce before the courts of Member State C pursuant to Article 3 on the basis that they have their habitual residence there. The wife cannot seise the courts of Member State B on the basis that she is a national of this State, since Article 3 requires the common nationality of the spouses.

The **prorogation rule** of Article 12 stipulates that a court which is seised of divorce proceedings under the Regulation also has jurisdiction in matters of parental responsibility connected with the divorce if certain conditions are met (*see chapter II, point 2 c*).

III. What happens if proceedings are brought in two Member States?

Article 19 (1)

Once a court has been seised pursuant to Article 3 of the Regulation and declared itself competent, courts of other Member States are no longer competent and must dismiss any subsequent application. The aim of the **"lis pendens"** rule is to ensure legal certainty, avoid parallel actions and the possibility of irreconcilable judgments.

The wording of Article 19(1) has been modified slightly compared to Article 11(1) and (2) of the Brussels II Regulation. The change was introduced to simplify the text without changing the substance.

Article 19(1) covers two situations:

(a) Proceedings relating to the same subject-matter and cause of action are brought before courts of different Member States and

(b) Proceedings which do not relate to the same cause of action, but which are "dependent actions" are brought before courts of different Member States.

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