CHILD ABDUCTION IN CROATIA: BEFORE AND AFTER THE EUROPEAN UNION LEGISLATION

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I. Introduction

The Republic of Croatia became a European Union (hereinafter: the EU) Member State on 1 July 2013. The accession to the EU led to many changes in the Croatian legal order, one of them dealing with international child abduction cases. From 1991, Croatia has been a signatory to the Hague Convention on the Civil Aspects of International Child Abduction of 1980[1] (hereinafter: the Convention, the Child Abduction Convention).[2] From the date of the country's accession to the EU, the Brussels II *bis* Regulation[3] (hereinafter: the Regulation), which also regulates child abduction cases, has been in force in Croatia.[4] However, the Regulation only deals with intra-EU child abduction[5], whereas the Convention remains applicable to all cases between Croatia and the Convention signatory states that are not EU Member States.

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1 Hague Conference on Private International Law, Convention on the Civil Aspects of International Child Abduction (concluded 25 October 1980, entered into force 1 December 1983), at www.hcch.net/index_en.php?act=conventions.text&cid=24 (7 July 2014) (Child Abduction Convention).

2 The Republic of Croatia became a party to the Convention via notification of succession after the Socialist Federal Republic of Yugoslavia ceased to exist. Therefore, Croatia is the party to the Convention from 8 October 1991, *Official Gazette (OG)* Int'l Agreements No 4/94.

3 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 [2003] OJ L338/1.

4 There is one implementing act - Act on the Implementation of the Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (OG 127/2013) – which designates the Ministry of Social Policy and Youth as central authority, the same one as for the Convention.

5 According to Article 10 of the Regulation, it applies to children habitually resident in one Member State that have been removed to or retained in another Member State. The term Member State does not include Denmark, according to Article 2(3) of the Regulation.

The Regulation builds on the Convention's system,[6] and this paper is going to demonstrate only the differences between the two systems and estimate how they fit within the Croatian legal order. This is especially interesting due to the entry into force of the new Family Act[7] (hereinafter: Family Act 2014) on 1 September 2014. Firstly, the Regulation regulates both the shift of jurisdiction in child abduction cases and the recognition and enforcement of judgments, whereas those provisions are not present in the Convention.[8] Also, the court of the state of removal or retention needs to assess whether adequate security arrangements have been made in the state of habitual residence of the child before issuing a non-return order.[9] The main controversy lies in the obligation to transmit the case once the court of state of removal has decided that the child should not be returned to the state of his/her habitual residence immediately prior to the unlawful removal or retention.[10] After the transmission, the court of the child's habitual residence may review the case according to Article 11(8) of the Regulation. If the return is ordered subsequently, such judgments circulate without an *exequatur* needed in the state of recognition and enforcement.[11] It is clear that the principle of restoration of *status quo* embedded into the Convention[12] is even more emphasized in the Regulation's system.

The Regulation nuanced the system of dealing with child abduction cases within the EU in several more ways. It has introduced the obligation to hear the child[13] as well as the obligation to hear the applicant when the non-return decision is to be issued.[14] Same as in the Convention, the courts are given 6 weeks to deal with the case, but unlike the Hague Conference, the EU has mechanisms to sanction the violations of the set deadlines through state liability.

The paper will follow the logic of the procedure and will therefore firstly present the jurisdictional issue, then the obligation to hear the child, to hear the

6 According to Articles 60 and 63, the Convention is still applicable to the intra-EU cases, but the specificities of the Regulation system need to be respected.

7 OG Nos. 75/14 and 83/14. The Family Act 2014 has been suspended by the Constitutional Court of the Republic of Croatia, and the old Family Act of 2003 currently applies.

8 Article 10 and Chapter III of the Brussels II *bis* Regulation.

9 Article 11(4) of the Brussels II *bis* Regulation.

10 Article 11(6) of the Brussels II *bis* Regulation.

11 Articles 40 and 42 of the Brussels II *bis* Regulation.

12 See also E. Pérez-Vera, *Explanatory Report of the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (The Hague, Hague Conference on Private International Law 1982) (Pérez-Vera Report) at: www.hcch.net/upload/expl28.pdf (21 July 2014).

13 Article 11(2) of the Brussels II *bis* Regulation.

14 Article 11(5) of the Brussels II *bis* Regulation.

applicant and to assess the security arrangements. After that, the possibility of state liability due to overstepping time limits will be assessed. Lastly, the biggest changes to the system will be elaborated – the obligation to transmit the case and the recognition and enforcement procedure.

II. Relevant changes in the child abduction system introduced by the Brussels II *bis* Regulation

1. Jurisdiction in child abduction cases

In order to estimate whether the abduction took place at all and whether it has jurisdiction to hear the issue, the court has to establish whether the removal or retention of the child was wrongful. If it is not wrongful, the Convention will not apply and other sections of the Brussels II *bis* Regulation might apply (e.g. Article 9 of the Regulation will apply to jurisdiction in case of a lawful removal of the child). The removal or retention of the child will be wrongful if it is in breach of actually exercised rights of custody acquired by judgment, *ex lege* or by an agreement under the law of the state where the child was habitually resident immediately before the removal or retention.[15] The Regulation managed to clarify the definition of child abduction by stating that there is a joint exercise of rights of custody "when, pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility".[16] But this novelty should not amount to major changes[17] since such a stance was already taken in the case law regarding the Convention.[18]

The Child Abduction Convention did not contain any jurisdictional rules; they were left out of the Convention due to lack of consensus. However, the mechanism of swift return warrants the custody proceedings being heard in

15 Article 2(11) of the Brussels II *bis* Regulation and Article 3 of the Child Abduction Convention.

16 Article 2(11)b of the Brussels II *bis* Regulation.

17 But see C. Dekar, '*JMCB. v. L.E.:* the intersection of European Union law and private international law in intra-European Union child abduction' 34 *Fordham International Law Journal* (2010-2011) p. 1430, stating on p. 1467 that the possible problems might arise from the fact that the definition of custody rights contains both "rights and duties" under the Regulation and only "rights" under the Convention.

18 E.g. *Marriage of Resina* [1991] FamCA 33; *2 Ob 596/91*, OGH, 5 February 1992, Oberster Gerichtshof; *C. v. C. (Minor: Abduction: Rights of Custody Abroad)* [1989] 1 WLR 654; *Abbott v Abbott*, 130 S. Ct. 1983 (2010).

the state of habitual residence prior to removal and retention.[19] The jurisdiction can shift to the state of removal if a non-return order is issued or the return proceedings are not commenced in due course.[20] However, Croatia is also a signatory to the 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 Children,[21] which regulates jurisdiction in case of wrongful removal in its Article 7 in a very similar manner as the Regulation does.[22]

The Regulation deals with the shift of jurisdiction in child abduction cases by providing two situations in its Article 10 when the jurisdiction can shift to the state of removal if the prescribed requirements are fulfilled. The first situation requires that the child has acquired habitual residence in the state of removal and everybody having rights of custody had acquiesced to the removal or retention. The other possibility also demands that the child has acquired new habitual residence, but has also settled in the new territory and more than a year has passed before the relevant person has had knowledge about the whereabouts of the child. In addition, one of the following conditions has to be met: no request for return has been lodged before the competent authorities of the state of removal, a request for return has been withdrawn and no new request has been lodged, a case before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed pursuant to Article 11(7),[23] a judgment on custody

19 See Pérez-Vera Report, *loc. cit.* n. 12, para 16.

20 See P. McEleavy, 'The New Child Abduction Regime in the European Union: Symbiotic Relationship or Forced Partnership?' 1 *Journal of Private International Law* (2005) p. 5, pp. 18-19.

21 Hague Conference on Private International Law, 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 Children (concluded 19 October 1996, entered into force 1 January 2002), at: http://www.hcch.net/index_en.php?act=conventions.text&cid=70 (7 July 2014).

22 For comparison, see also C. Holzmann, *Brüssel IIa VO: Elterliche Verantwortung und internationale Kindesentführungen* (Sipplingen, JWV 2008) pp. 221-224.

23 Under Article 11(7) of the Regulation, the case will be closed if, following the transmission of the case after a non-return decision has been issued, the parties fail to make submissions before the court in the state of habitual residence of the child.

that does not entail the return of the child[24] has been issued by the courts of the state where the child was habitually resident immediately before the wrongful removal or retention. The Court of Justice of the EU (hereinafter: the CJEU, the Court) has had the opportunity to deal with Article 10 in only one aspect and it decided in *Povse v Alapago* that a decision dealing only with provisional measures cannot be considered a decision that does not entail return for the purposes of Article 10 of the Regulation.[25]

The jurisdiction rules contained in Article 10 of the Regulation rely on the exceptions of return contained in Articles 12 and 13 of the Convention, but the shift of jurisdiction does not presuppose issuance of the non-return order, unlike in the Convention's system. This means that acquiescence, settlement of the child in the new territory and inactivity of the left behind parent will both be relevant for the issue of return and for jurisdiction for custody disputes.[26] This is especially important due to the difference in calculating the time of the left behind parent's inactivity – the Convention counts a period of one year from the date of removal or retention[27], whereas the Regulation[28] takes the knowledge about the whereabouts of the child as the starting point.[29] Additionally, the shift of habitual residence is the requirement for both situations in which the shift of jurisdiction may occur. This might cause some concerns in Croatia because habitual residence is not extensively employed in the Croatian private international law.[30] Moreover, habitual residence of the child may

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24 The expression "the decision does not entail return" should be interpreted extensively, i.e. even if there is no express order, the judgment might entail return. In between the English, Italian, Spanish, French, German and Croatian versions, only the German translation reads "angeordnet", which means "order", rather than "entail" return. This is important in the context of the Croatian legal order, which allows in Article 341(2) of the Family Act (OG Nos. 116/03, 17/04, 136/04, 107/07, 57/11, 61/11 and 25/13) as well as Article 515(1) of the Family Act 2014 the judge of enforcement to order return even if it was not expressly ordered in the judgment on custody.

25 ECJ, Case C-211/10 PPU *Doris Povse* v. *Mauro Alpago* [2010] *ECR* I-6673.

26 See É. Pataut, 'Article 10 Jurisdiction in cases of child abduction' in U. Magnus and P. Mankowski, eds., *Brussels II bis Regulation* (Munich, Sellier 2012) p. 123.

27 Article 12 of the Convention.

28 Article 10(1)b of the Regulation.

29 This might lead to discrepancies within a single case in practice. See: Pataut, *op. cit.* n. 26 at p. 125.

30 The Croatian PIL Act does not contain habitual residence as a connecting factor for any of the matters, but Croatia is a signatory to some Hague Conventions so it is bound to apply connecting factors contained therein. For conventions ratified by the Republic of Croatia see at http://www.hcch.net/upload/statmtrx_e.pdf. (2 September 2014).

be quite difficult to establish in child abduction cases,[31] and the CJEU has not been given the opportunity to present guidelines for habitual residence of the child in child abduction specifically.[32]

2. The obligation to hear the child

The Brussels II *bis* Regulation states in its Article 11(2) that the abducted child shall be heard during the proceedings and thereby introduces "a 'softer' and more child-centred approach in child abduction cases."[33] When compared to the Convention, this is a novelty, since the Convention only allowed return based on the objections of the child, but did not have a general obligation to hear the child during the proceedings.[34] Now, the child's opinion may be evaluated not only with respect to return, but whenever Articles 12 and 13 of the Convention are to be applied, i.e. whenever the decision on return has to be made.[35] The child's opinion may thus also be used in the estimation of e.g. the child's habitual residence and grave risk of harm.[36]

Still, the scope of the duty to hear the child is questionable. It is unclear whether the child has to be heard *ex officio*, as the court's duty or just the possibility has to be given to the parties to request that the child is heard.[37] This has to be evaluated especially having in mind that the court has discretion to refuse the application to hear the child depending on "his or her age or degree of maturity".[38] The issue may be resolved by national law since the Regulation "is not intended to modify national procedures applicable".[39] Within the

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31 See e.g.: R. Lamont, 'Habitual Residence and Brussels II bis: Developing Concepts for European Private International Family Law' 3 *Journal of Private International Law* (2007) pp. 276-280, Holzmann, *op. cit.* n. 22, pp. 181-185.

32 The Court has only had an opportunity to give answers to preliminary questions related to habitual residence of children in two cases under Brussels II bis: ECJ, Case C-523/07 *Proceedings brought by A* [2009] *ECR* I-02805 and ECJ, Case C-497/10 PPU *Barbara Mercredi* v. *Richard Chaffe* [2010] *ECR* I-14309.

33 K. Trimmings, *Child Abduction within the European Union (Studies in Private International Law)* (Oxford, Hart Publishing 2013) p. 211.

34 Baroness Hale in *Re D. (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 A.C. 619, at para 25 advocates for a wider use of this obligation so that the children are heard in all Convention proceedings, not only those to which the Regulation applies.

35 Article 11(2) of the Brussels II *bis* Regulation.

36 McEleavy, *loc. cit.* n. 20, pp. 28-29.

37 Pataut, *loc. cit.* n. 26, pp. 132-133.

38 Article 11(2) of the Brussels II *bis* Regulation.

39 Recital 19 of the Preamble to the Brussels II *bis* Regulation.

Croatian legal order, this would mean both that the child has the right to be heard[40] and the court has the duty to hear the child when his or her age and maturity allow[41].

Although this is a novelty within the international child abduction system, it should not change the Croatian practice drastically. Based on Article 12 of the United Nations Convention on the Rights of the Child,[42] the obligation to hear the child has been implemented into the national legal order in all proceedings in which the child's rights and interests are disputed.[43] Already now judges need to evaluate the child's maturity when assessing the child's ability to express his/her opinion and the court practice shows that usually children above seven years of age are heard during the proceedings involving their rights or interests, including child abduction cases.[44] According to the Family Act 2014, a child older than 14 years will always be heard, whereas younger children will be heard if there is a need to assess their affection to a person, conditions in which the child lives and for other very important reasons.[45] The manner in which the hearing is conducted is left for the national legislation.[46] In Croatia, children will remain to be heard either before the court or, more often, before the social welfare centre that will draft a report and submit it to the court.[47]

3. Obligation to hear the applicant

The Brussels II *bis* Regulation demands that the applicant is heard before a non-return order should be issued. According to the Regulation, the obligation to give the applicant the opportunity to be heard exists only when a non-return order is to be issued since "[a] court cannot refuse to return a child unless the person who requested the return of the child has been given an opportunity to

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40 Article 89(5) of the Family Act (as well as Article 360 of the Family Act 2014).

41 Article 269(2) of the Family Act (and Article 86 of the Family Act 2014).

42 Convention on the Rights of the Child (concluded 20 November 1989, entered into force 2 September 1990) UNTS 1577, 3.

43 Articles 89 and 269 of the Family Act (Articles 86 and 360 of the Family Act 2014).

44 Z. Bulka, 'Primjena Konvencije o građanskopravnim aspektima međunarodne otmice djece na prava roditelja' [Application of the Convention on Civil Aspects of Child Abduction to Parental Rights] 5947 *Informator* (2011) p. 5, 6.

45 Article 360(2) of the Family Act 2014.

46 European Commission, *Practice Guide for the Application of the New Brussels II Regulation,* at: http://ec.europa.eu/civiljustice/divorce/parental_resp_ec_vdm_en.pdf (8 July 2014).

47 Article 269(2), 295(1) and 335 of the Family Act (Article 357 of the Family Act 2014).

be heard".[48] Although the Convention did not contain a similar provision, its added value is questionable due to the existence of Article 6 of the European Convention on Human Rights[49] that guarantees the right to a fair trial which encompasses the right to be heard[50] as well.[51]

In the Republic of Croatia, child abduction cases are usually held in the form of non-contentious proceedings, unless there is a dispute over facts when a hearing needs to be held.[52] In non-contentious proceedings, the judge can decide that the evidence and statements may be given only in written form, but this should not be considered to be a violation of a right to be heard as long as the applicant is given the opportunity to present his/her case.[53] According to the Family Act, in non-contentious proceedings the statements of parties and other participants in a procedure may also be given when other parties and participants are absent. The court does not necessarily have to give a party an opportunity to respond to these statements.[54] There is thus a danger of violating the Regulation whilst applying these rules. The courts need to be careful when exercising the discretion given to them by the Family Act when dealing with intra-EU child abduction cases. According to the *Simmenthal* doctrine, the judges need to avoid application of national rules running counter the EU law.[55] Croatian judges will therefore have to give the opportunity to the applicant to present his/her case when a non-return order should be issued notwithstanding the mentioned provision of the Family Act. However, the Family Act 2014 does not contain the mentioned provision.

The two procedural novelties – obligation to hear the child and the applicant – are tightly connected with the obligation to deliver the judgment expeditiously, seeing that they might prolong the process. The Regulation[56] itself

48 Article 11(5) of the Brussels II *bis* Regulation.

49 Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (concluded 4 November 1950, entered into force 3 September 1953) ETS 5.

50 See e.g.: *Ankerl v Switzerland* (2001) 32 EHRR 1, *Helle v Finland* [1998] 26 EHRR 159.

51 See Pataut, *loc. cit.* n. 26, pp. 138-139.

52 Article 309(5) of the Family Act. The County Court in Zagreb quashed a decision 148 R10-519/11-37 of the Municipal Court in Zagreb because it was brought in non-contentious proceedings and there was a dispute over facts.

53 See Pataut, *loc. cit.* n. 26, p. 139.

54 Article 309(4) of the Family Act.

55 ECJ, C-106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] *ECR* 629.

56 Recital 20 of the Preamble to the Brussels II *bis* Regulation.

suggests the use of the Evidence Regulation[57] in order to facilitate the hearing of the child. The Commission in its Practice Guide mentions the Evidence Regulation in the context of hearing the applicant as well.[58]

4. Time limits and using the most expeditious procedures

The Brussels II *bis* Regulation puts forward an obligation to use the most expeditious procedures available in national law in order to act expeditiously and to deliver the judgment in six weeks' time.[59] The change from the Convention is twofold – the Convention only stated that the judgment should be issued in six weeks whenever possible and there was no sanction if the swiftness was not respected.[60] Now, the judgment needs to be issued within six weeks unless there are some exceptional circumstances. What is to be considered as exceptional circumstance is not given, and this is most probably going to be resolved through CJEU's case law. If this obligation is violated, there is a possibility to sanction this through state responsibility for breach of EU law established in *Francovich*[61] since the Court has stated that national courts can also breach EU law.[62] The question that arises is whether the six-week time limit concerns only the first instance procedure or encompasses all the procedural steps. The Regulation is silent on that issue, but the Commission took stance that the decision should be enforceable in the given time since "this is the only interpretation which would effectively guarantee the objective of ensuring the prompt return of the child within the strict time limit."[63] It is questionable whether the Member States will be able to respect this obligation since already under the Convention some states had difficulties respecting the set time limits.[64] McEleavy rightly concludes that this novelty should be

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57 Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [2001] OJ L 174/1.

58 Practice Guide, *loc. cit.* n. 46, p. 33.

59 Article 11(3) of the Brussels II *bis* Regulation.

60 See Pataut, *loc. cit.* n. 26, pp.134-135.

61 ECJ, Joined cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991] ECR I-05357.

62 ECJ, Case C 224/01 *Gerhard Köbler* v *Republik Österreich* [2003] ECR I 10239, para 33.

63 Practice Guide, *loc. cit.* n. 46, p. 33.

64 For UK and France see: P. R. Beaumont and P. E. McEleavy, *The Hague Convention on International Child Abduction* (Oxford, OUP 1999) pp. 250, 251 and 256, and for Germany see: Holzmann, *op. cit.* n. 22, pp. 191-192.

welcomed due to the delicate nature of child abduction, but at the same time its full application in all the Member States seems a bit optimistic.[65]

Respecting the time limits might be problematic in the Republic of Croatia as well. According to Article 263(2) of the Family Act, all family law cases should be dealt with urgently. Article 265 prescribes that the first hearing shall be held within fifteen days from when the application has been received by the court. Article 266 states that the appellate decision shall be issued within sixty days. However, these rules are the so-called *lex imperfecta* since they do not provide for a sanction if the time limits are not respected. A limited insight into the child abduction case law shows that the first instance procedure may respect the six-week time limit. As soon as the parties appeal, delays occur.[66] Now, the question arises whether there are mechanisms in the national law that might shorten the proceedings. Firstly, the Family Act 2014 states that all disputes involving children are urgent, rather than all family law disputes as before.[67] There is no special priority given to child abduction cases, but looking at the whole body of family law, such priority might not be justified since all cases involving children are of a delicate nature.[68] Secondly, the new Act states that the decision shall be issued within fifteen days if no hearings are held and the appellate decision is to be issued within thirty days.[69] The Convention contains a rule that if the decision is not reached within six weeks, an explanation for that might be asked from the judge.[70] Such a possibility is not contained in the Regulation, which is unfortunate since such a request may put additional pressure on the judge.[71] However, under the new Croatian Family Act, the first instance judges have an obligation to report to the court's president that they have exceeded the time limit.[72]

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65 McEleavy, *loc. cit.* n. 20, pp. 25-26. Trimmings concludes, based on an empirical survey, that compliance with the six-weeks rule is "at best difficult and at worst hardly attainable". See Trimmings, *op. cit.* n. 33, p. 109.

66 The case law looked into consists of eight judgments of the Municipal Court in Zagreb from 2004 until 2014. Four of eight first instance judgments have been issued within six weeks, whereas the average for the rest of the first instance proceedings was four months. None of the procedures that have led to an appeal respected the six weeks period. Average amount of time necessary for the second instance judgment is six months.

67 Article 347(1) of the Family Act 2014.

68 McEleavy, *loc. cit.* n. 20, p. 26.

69 Article 347(2) and 6 of the Family Act 2014.

70 Article 11(2) of the Convention.

71 I. Medić Musa, *Komentar Uredbe Bruxelles II bis u području roditeljske skrbi* [Commentary of the Brussels II bis Regulation in the area of parental responsibility] (Osijek, Pravni fakultet u Osijeku, 2012) p. 75.

72 Article 347(5) of the Family Act 2014.

Additionally, the Commission in its Practice Guide puts forward several suggestions as to how the time limit might be respected.[73] The most suitable approach would be allowing the appeal that does not suspend enforcement, which is one of the Commission's suggestions. According to the Croatian Family Act, an appeal lodged in due time suspends the enforcement unless the court decision itself stipulates differently. Moreover, the court may decide that an appeal does not suspend enforcement if measures of protection of rights and welfare of children are being taken.[74] Since discretion regarding suspension of enforceability already exists in the relevant provisions of the Croatian Family Act, the approach in case law could easily change. The judges should thus, having in mind the obligation to use most convenient national procedures stemming from the Regulation, develop their practice in the direction that precludes suspension of enforceability in child abduction cases. In some cases, this would still not provide an appropriate outcome since the decision might be quashed at the appellate instance. Unfortunately, only a systematic reform of judiciary would resolve the problem of lack of swiftness due to a huge case load that has slowed judicial proceedings, leading to many cases having been brought before the European Court of Human Rights against the Republic of Croatia.[75]

5. Grave risk of harm and security arrangements

The Child Abduction Convention has as its primary goal the swift return of children to their place of habitual residence prior to removal or retention. Still, some exceptions to return do exist, one of them being "a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation".[76] The exception of grave risk of harm is to be interpreted strictly in order to ensure the wanted functioning

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73 "(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 provided 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 deadline.", Practice Guide, *op. cit.* n. 46, p. 33.

74 Article 316(3) and 4 of the Family Act and Article 445(3) and 4 of the Family Act 2014.

75 See e.g.: *Mikulić* v *Croatia* (53176/99); *Počuča* v *Croatia* (38550/02); *Smoje* v *Croatia* (28074/03); *Štokalo* v *Croatia* (15233/05) at: http://hudoc.echr.coe.int. (11 July 2014).

76 Article 13(1)b of the Child Abduction Convention. The other exceptions concern objections of the child (Article 13(2)), child's settlement in the new territory (Article 12/2) and violation of human rights under Article 20 of the Convention.

of the Convention,[77] but it is unfortunately the most often cited reason for not returning the child.[78] The Regulation makes the interpretation of that exception even more restrictive[79] by prescribing that "a court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return."[80] Some states, especially those belonging to the common law circle, already interpreted the grave risk of harm exception in the Regulation's manner. So even when there was a grave risk of harm, the courts would order the return if security arrangements have been made in the country of habitual residence and the child could safely return there.[81] This provision is considered to be an improvement of the existing regime,[82] and its application leads to a diminished number of refusals of return based on the exception of existence of grave risk of harm.[83]

The new provision is far from being flawless. As Trimmings notes, there are still some open concerns – whose is the burden of proving that the arrangements have been made; what are the responsibilities of central authorities under the new provision; there is an issue of proper application due to a different level of protection in different Member States; the extent of investigations which the court has to undertake and the questionable safety of the returning parent are still left open.[84] Nonetheless, the provision "has the potential to bring a most welcome benefit for it does not make the assumption that children will be protected upon return, rather it has to be shown that adequate arrangements have been made."[85] According to the Practice Guide on the

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77 Pérez-Vera Report, *loc. cit.* n. 12, para. 34.

78 N. Lowe, *A Statistical Analysis of Applications Made in 2008 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Part I – Global Report*, Prel Doc No 8A 2 update November 2011, 17 as referred in J. Paton, 'The Correct Approach to the Examination of the Best Interests of the Child in Abduction Convention Proceedings Following the Decision of the Supreme Court in Re E (Children) (Abduction: Custody Appeal)' 8 *Journal of Private International Law* (2012) p. 547, at p. 553.

79 Holzmann, *op. cit.* n. 22, at p. 197. It is to be noted that Article 11(4) of the Regulation concerns only the grave risk of harm exception provided in Article 13(1)b of the Convention. See Holzmann, *op. cit.* n. 22, pp. 196-197 and Pataut, *loc. cit.* n. 26, p. 138.

80 Article 11(4) of the Brussels II *bis* Regulation.

81 Beaumont and McEleavy, *op. cit.* n. 64, pp. 156 *et seq*.

82 R. Lamont, 'Free movement of persons, child abduction and relocation within the European Union' 34 *Journal of Social Welfare & Family Law* (2012) p. 231, p. 237.

83 The smaller number of returns is not only an outcome of this provision, but the whole system of child abduction within the EU. See also Trimmings, *op. cit.* n. 33, pp. 107-108.

84 Trimmings, *op. cit.* n. 33, pp. 138-161.

85 McEleavy, *loc. cit.* n. 20, p.26.

Brussels II *bis* Regulation, concrete measures to protect the child need to be taken in the state of origin.[86] For the judge, this means that after establishing the existence of grave risk of harm, there must be an evaluation of the security arrangements made in each case. Only if after that the grave risk of harm still exists, the child will not be returned.[87] The return should not in any case compromise the child's safety.[88]

The way to achieve the proper functioning of the Brussels II *bis* return mechanism is to support the creative approach of competent authorities and strengthen the co-operation between central authorities.[89] A more creative approach could be seen in introducing into the continental law circle undertakings and mirror orders (safe harbours) developed in the common law systems.[90] In order to support and strengthen the judicial and administrative co-operation, the European Judicial Network in civil and commercial matters was created by the Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters.[91]

Looking at the Croatian legal order, a limited insight into the case law of the Municipal Court in Zagreb shows that the exception of grave risk of harm is most often used to support the decision on non-return.[92] Looking at the interpretation of the exception, it is sometimes interpreted too broadly.[93] Reasons such as separation from the parent who is the abductor cannot be used to support the grave risk of harm unless the grave risk actually exists.[94] The usual harm which will unfortunately take place due to separation cannot be enough to constitute the exception.[95] Otherwise, the abductor would benefit from his/her own illegal actions.[96] The Croatian judges put too much emphasis on the

86 Practice Guide, *loc. cit.* n. 46, p. 32.

87 Holzmann, *op. cit.* n. 22, p. 208

88 Trimmings, *op. cit.* n. 33, p. 136.

89 Pataut, *loc. cit.* n. 26, p. 137.

90 For more on undertakings and safe harbours see Beaumont and McEleavy, *op. cit.* n. 64, pp. 156-168 and specifically regarding the Brussels II *bis* Regulation Holzmann, *op. cit.* n. 22, pp. 198-207.

91 OJ L 174/25 (2001).

92 In two of eight judgments, the return was ordered. In four of six non-return judgments, the grave risk of harm exception was used. In one judgment, it was in combination with the Convention's Article 13(2) exception – objections of the child.

93 In all four non return judgments, separation from the abducting parent was mentioned as the reason for the grave risk of psychological harm.

94 Beaumont and McEleavy, *op. cit.* n. 64, p. 145.

95 Holzmann, *op. cit.* n 22, pp. 210-212.

96 Beaumont and McEleavy, *op. cit.* n. 64, p. 149.

harm inflicted by separation from the mother.[97] The decision is often based on the opinion issued by a welfare centre, and it is questionable whether its staff is educated for the special purpose and operation of the Convention and subsequently the Regulation.[98] New rules will hopefully influence the interpretation of the grave risk of harm exception in Croatia.[99]

6. Obligation to transmit the case file

One of the biggest novelties introduced by the Brussels II *bis* Regulation is contained in its Article 11(6) and 11(7). Those provisions relate to the obligation to transmit the case file to the court of the habitual residence of the child in case of issuance of a non-return order. The obligation to transmit the case file follows the general Brussels II *bis* scheme of prioritising return.[100] The obligation is limited only to non-return orders issued based on exceptions from Article 13[101] of the Convention.[102] The case file needs to be transferred to the

97 Other reasons that support the existence of grave risk of harm are: the fact that the child and the abductor do not have citizenship of the state of origin (judgment R1o-27/11-12 of 6 April 2011, not published), the fact that the child would have to stay in kindergarten until 17.45 in the state of origin (judgment R1o-27/11-12 of 6 April 2011, not published), the fact that the mother was abused in the state of origin (although there was never a formal application to the authorities) (judgment R10-519/11-37 of 15 March 2012, not published), the fact that the child had eight cavities and neurodermatitis prior to removal (Judgment V-R1-1696/06-9 of 17 November 2006, not published).

98 According to Articles 275-279 of the Family Act (Article 353-357 of the Act 2014), the social welfare centre shall take part in the proceedings involving children's rights and interests. Also, it will submit an opinion and proposal in custody disputes and disputes concerning protection of the child according to Articles 295 and 335 of the Family Act, which are usually used in child abduction proceedings. It seems, however, that in child abduction cases, the centre submits the same type of analysis as when participating in custody proceedings. The same is provided in the Family Act 2014, Articles 357 and 416.

99 For example, even when there was a risk of domestic violence, the exception of grave risk of harm was not found due to Article 11(4) in other member States. See CA Paris, 15 février 2007, No de RG 06/17206, INCADAT cite HC/E/FR 979.

100 McEleavy, *loc. cit.* n 20, p. 25.

101 The reasons contained therein are: the applicant was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; the grave risk of harm exception and the child's objections to return.

102 See also Pataut, *loc. cit.* n. 26, p. 140.

competent court[103] or the central authority in the state of origin[104] immediately, and the court in the state of origin shall receive the file within one month. The transfer should include "the relevant documents, in particular a transcript of the hearings before the court".[105] The procedural specificities of the transfer have not been dealt with within the Regulation. The Practice Guide gives only limited guidelines, which is why judges and central authorities' staff will have to be quite creative in order to deal with the time requirements. The main issue is the translation of the documents, and the Guide invites judges to use direct communications and informal translations whenever possible.[106]

After the court in the state of origin has received the case file, it has two options depending whether it has already been seized by the parties[107] or not. If the court has not already been seized, it or the central authority will notify and invite the parties to make submissions within three months. If they fail to do so, the case will be closed.[108] The applicant's proactive approach will thus be crucial for the continuance of the proceedings.[109] If the court has already been seized on the custody issue, the proceedings will continue according to rules of national law.[110] The court in the state of origin will decide custody issues as well as the issue of return.[111] In the proceedings in the state of origin, the court should rather give due regard to the reasons for refusing the return of the child than doing the overall assessment of the abduction issue.[112] If that court decides that the child should be returned, such decision will be subject to fast

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103 The competent court will be the one that has already issued a judgment regarding the child or the one competent according to national rules of the state of origin. Practice Guide, *loc. cit.* n. 46, p. 36.

104 The choice of the institution for the transmission will depend on the role of the central authority in the state of origin. If its role is greater, the transmission should go through it. Pataut, *loc. cit*. n. 26, p. 141.

105 Article 11(6) of the Brussels II *bis* Regulation.

106 Practice Guide, *loc. cit.* n. 46, p. 37; Pataut, *loc. cit.* n. 26, p. 142 states that such practical and informal arrangements should be generally supported in child abduction cases.

107 The parties to the proceedings may be the person, institution or other body having the care of the person of the child. Pataut, *loc. cit.* n. 26, p. 143.

108 Article 11(7) of the Brussels II *bis* Regulation.

109 McEleavy, *loc. cit.* n. 20, p. 30.

110 Pataut, *loc. cit.* n. 26, pp. 143-144. But see McEleavy, op.cit. n. 20, p. 31 who states that the exact way of proceeding with the case is not clearly stated.

111 Pataut, *loc. cit*. n. 26, p. 144.

112 See McEleavy, *loc. cit.* n. 20, p. 32.

track recognition and enforcement,[113] notwithstanding the previous non-return decision.[114]

There are some problems that might arise from the obligation to transmit the case file in the Croatian legal system. If a Croatian court acts as the court of habitual residence, there is an issue with using uncertified translations. The Croatian Civil Procedure Act [115] states in its Article 232/2 that all submitted documents in a foreign language need to be accompanied by certified translations to Croatian language. The Practice Guide does suggest that "[i]f 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".[116] This may solve the problem of observing the one month time limit for transmission, but may still be problematic due to the general need for urgent conduct in child abduction cases.[117]

The other problem that might arise is the question of how custody proceedings will be initiated.[118] The Regulation leaves the issue to national law.[119] According to the Croatian Family Act, the court has no competence to initiate custody proceedings *ex officio*[120] but has the duty to decide the issue in a decision establishing that marriage does not exist or is annulled or divorced or in a decision establishing maternity or paternity.[121] If no such proceedings are pending, the initiation of the procedure needs to be dealt with according to the rules of the Croatian civil procedure. If the first submission made by the notified party

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113 See infra, section 7.2.

114 Article 11(8) of the Brussels II *bis* Regulation.

115 Civil Procedure Act OG Nos 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 123/08, 57/11, 148/11, 25/13.

116 Practice Guide, *loc. cit.* n. 46, p. 37.

117 As McEleavy, *loc. cit.* n. 20, p. 31 rightly concludes: 'The Practice Guide expresses the woolly aspiration that "judges should try to find a pragmatic solution which corresponds to the needs and circumstances of each case" before naively suggesting that central authorities might be able to provide "informal" translations. The lack of appreciation of civil procedure and the realities of legal practice continues in the optimistic expectation that the documentation will be able to find its way to an appropriate court in the child's State of habitual residence.'

118 See also McEleavy, *loc. cit.* n. 20, p. 31.

119 Article 11(7) of the Brussels II *bis* Regulation.

120 The Family Act allows the child, the parents and the social welfare centre to initiate court proceedings by analogous application of Article 101 of the old Family Act (See M. Alinčić et al., *Obiteljsko pravo* [Family Law] 3rd ed. (Zagreb, Narodne novine 2007) at p. 270). The new Act 2014 gives that procedural right expressly to the parents, the child, the social welfare centre and other custodians (Article 479(1)).

121 Article 294 of the Family Act (and Article 413 of the Family Act 2014).

is a statement of claim, there will be no problem.[122] However, it may happen that the first submission does not represent a statement of claim and thus cannot present the document by which the proceedings are commenced. The Civil Procedure Act in its Article 109 deals with such situations – submission of incomprehensive documents and documents that do not adhere to the necessary formal requirements (including statement of claims). If such document is submitted, the court has to invite the party to correct it within eight days. If the party does that, the date of first submission will be the date of the valid submission of the document, i.e. the initiation of the proceedings. If it is not corrected, it will be found inadmissible. Within the specific procedure following the transmission of the file, this will mean that the parties should be notified by the court or the central authority to make submissions in three months. The date of the first submission, even if it is incomprehensible and does not adhere to formal requirements for statement of claims, will be the date of lodging the statement of claim if it is corrected after the invitation from the court to do so. So the party may in fact "violate" the three-month time limit by submitting an "invalid" statement of claim within those three months, although the correction came a few days outside the set time limit.

7. Recognition and enforcement

Due to the entry into force of the Brussels II *bis* Regulation, there are several systems of recognition and enforcement of child abduction judgments in Croatia. The old regime still remains towards non-EU Member States that is based on the Croatian Private International Law Act,[123] its Articles 86 to 96. The Brussels II *bis* Regulation introduced two new systems – the "standard track" recognition and enforcement under Chapter III of the Regulation and the "fast track" recognition and enforcement of return judgments issued in the state of habitual residence of the child after the non-return order has been issued in the state of removal based on Articles 11(8), 40 and 42 of the Regulation. In order to use the Brussels II *bis* Regulation recognition and enforcement systems, the judgement has to be issued when both the state of origin and state of

122 The litigation is commenced by the statement of claim and the litigation is pending once the statement of claims is delivered to the defendant (Articles 185 and 194 of the Civil Procedure Act).

123 Act on Resolving Conflict of Laws with Rules of other Countries in Certain Areas (PIL Act) (OG 53/91, 88/01). The Act is currently in the process of being revised.

recognition and enforcement are EU Member States.[124] Each of the systems will be discussed in a separate section.

7.1. "Standard track" recognition and enforcement

The standard track recognition and enforcement of child abduction judgments is based on mutual trust between EU Member States.[125] Article 21 of the Regulation provides for automatic recognition of judgments without any special procedure required. The judgment can either be recognised incidentally or an application for recognition or non-recognition can be decided as the main issue.[126] The application that the judgment is to be or not be recognised in Croatia has to be submitted to municipal courts competent to decide on declaration of enforceability[127] as notified in accordance with Article 68 of the Regulation.[128] In child abduction cases, that will usually be the court that has jurisdiction to enforce the return decision – the court of domicile of the party against whom enforcement is sought or the party who seeks enforcement or the court in whose territory the child is present.[129] There are limited grounds that can be invoked for non-recognition of a judgment,[130] and they can be raised as soon as the judgment is claimed to be valid.[131] The court of recognition is not allowed to review the substance or the jurisdiction of the court of origin of the judgment, nor can it refuse recognition based on differences in

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124 This means that the system will apply to judgments issued after 1 July 2013, when Croatia became a Member State. See, in the context of Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 1968 ECJ, Case C-514/10 *Wolf Naturprodukte GmbH* v *SEWAR spol. s r.o.* [2012] ECR I-0000.

125 Recital 21 of the Preamble to the Brussels II *bis* Regulation.

126 Article 21(3) and 21(4) of the Brussels II *bis* Regulation. See also: ECJ, **Case** C-195/08 PPU Inga Rinau [2008] ECR I-5271.

127 The Croatian PIL Act in its Article 101 states that the competent court is the one in whose territory the recognition and enforcement has to be conducted. The party who seeks recognition and enforcement has to show that the decision will be "used" (e.g. enforced there, used in a procedure, entered into public registry etc.) within the territory of that court. See M Dika *et al.*, *Komentar Zakona o međunarodnom privatnom i procesnom pravu* [Commentary of the Act on International Private and Procedural Law] (Belgrade, Nomos 1991) p. 338.

128 https://e-justice.europa.eu/content_croatia__cooperation_in_civil_matters-276-en.do. (27 July 2014).

129 Article 340 of the Family Act (and Article 512 of the Family Act 2014).

130 See Article 23 of the Brussels II *bis* Regulation.

131 K. Siehr 'Chapter III Recognition and Enforcement' in U. Magnus and P. Mankowski, eds., *Brussels II bis Regulation* (Munich, Selp 2012) p. 277.

applicable law.[132] That court may, however, stay proceedings on recognition if ordinary appeal[133] is pending in the state of origin according to Article 27 of the Regulation.

Any interested party may apply for enforcement of a foreign judgment that has been declared enforceable in the country of origin. The competent court is to be established based on the habitual residence of the person against whom the enforcement is sought or of the relevant child. If neither of the places can be found in the state of enforcement, the competent court shall be the court of the place of enforcement.[134] In Croatia, enforcement should be sought before the municipal courts.[135] In order to obtain the declaration of enforceability, the party shall submit an authentic copy of the judgment and the certificate of enforceability issued in the country of origin of the judgment in accordance with Annex II of the Regulation, as well as some other documents in case of a judgment given in default.[136] All of them need to be translated by a certified translator.[137] The applicant has to give an address for service in the country of enforcement or appoint an applicant *ad litem*, depending on national law.[138] In Croatia, a representative *ad litem* needs to be appointed if the applicant is not present in the Croatian territory and has no legal representative in Croatia.

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132 Articles 24-26 of the Brussels II *bis* Regulation.

133 A definition of ordinary appeal given by the Court of Justice of the EU for the purposes of Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 1968 may be transposed to the Brussels II *bis* Regulation and it reads: "Within the meaning of Articles 30 and 38 of the Convention, any appeal which is such that it may result in the annulment or the amendment of the judgment which is the subject matter of the procedure for recognition or enforcement under the Convention and the lodging of which is bound, in the state in which the judgment was given, to a period which is laid down by the law and starts to run by virtue of that same judgment constitutes an 'ordinary appeal' which has been lodged or may be lodged against a foreign judgment." ECJ, Case 43-77 *Industrial Diamond Supplies* **v** *Luigi Riva* [1977] ECR 02175, OP 2.

134 Articles 28 and 29 of the Brussels II *bis* Regulation.

135 https://e-justice.europa.eu/content_croatia__cooperation_in_civil_matters-276-en.do (27 July .2014).

136 Article 37 of the Brussels II *bis* Regulation. Also, Article 30 of the Regulation states that the procedure shall be governed by national law. D. McClean 'Chapter III Recognition and Enforcement Section 2 Application for a declaration on enforceability' in U. Magnus and P. Mankowski, eds., *Brussels II bis Regulation* (Munich, Selp 2012), p. 299, states that this mainly relates to method of delivery, form and time for the application and office for submission. Croatian law does not contain any specific rules on those issues.

137 Article 38(2) of the Regulation in combination with Article 232 of the Croatian Civil Procedure Act.

138 Article 30(2) of the Brussels II *bis* Regulation.

If the party fails to do so, the application will be dismissed[139] since the consequences of failure to obey Article 30/2 are to be governed by national law.[140]

The court will issue a decision on enforceability without the party against whom enforcement is sought being notified, and the decision itself needs not to be notified to that party. After the notification, the parties have the right to appeal the decision within one month if the party against whom the enforcement is sought has his/her habitual residence in the country of the enforcement or two months if not.[141] In Croatia, the appeal is to be lodged to the county court via the municipal court that has issued the judgment.[142] After the appellate decision is issued, a motion for retrial may be submitted in accordance with Articles 421 to 428 of the Civil Procedure Act to the court which issued the first instance judgment.[143] The application for retrial has to contain the legal basis for the application, evidence supporting the claims from the application as well as evidence that the application has been submitted within the deadline of thirty days.[144],[145] The reasons on which the application may be based are the following: the judge who issued the judgment was or should have been removed from the proceedings; breach of the right to be heard; lack of procedural capacity of a party or misrepresentation; the judgement was based on a false witness or expert witness statement, on a forged document, on a criminal action of a judge, legal representative, the opposing party or a third person; the party gained opportunity to use the final judgment between the same parties; *res iudicata* and new evidence favourable to that party. Both during the first and second appeal, the court has the discretion to stay proceedings if ordinary appeal has been lodged in the country of origin or the deadline for it has not yet expired according to Article 35 of the Regulation.

The recognition and declaration of enforceability of a judgment related to child abduction may only be refused:

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139 Article 146(1) of the Civil Procedure Act.

140 Siehr, *loc. cit.* n. 131, p. 300.

141 Article 33 of the Brussels II *bis* Regulation.

142 https://e-justice.europa.eu/content_croatia__cooperation_in_civil_matters-276-en.do. (27 July 2014).

143 See https://e-justice.europa.eu/content_croatia__cooperation_in_civil_matters-276-en.do. (27 July 2014) and Article 34 of the Brussels II *bis* Regulation.

144 The deadline for the application counts from the date of service of the judgment or from the date when the party has had knowledge of the relevant fact or the date from which the party was able to invoke the reason on which the application is based. The commencement of the deadline depends on the reason on which the application is based (Article 423 of the Civil Procedure Act).

145 Article 424 of the Civil Procedure Act.

(a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child;

(b) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought;

(c) where it was given in default of appearance if the person in default was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence unless it is determined that such person has accepted the judgment unequivocally;

(d) on the request of any person claiming that the judgment infringes his or her parental responsibility, if it was given without such person having been given an opportunity to be heard;

(e) if it is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought;

(f) if it is irreconcilable with a later judgment relating to parental responsibility given in another Member State or in the non-Member State of the habitual residence of the child provided that the later judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.[146]

The mere execution of the judgment is still governed by national law.[147] The national procedures may not in any case undermine the purpose of the intra-EU child abduction regime, which is primarily the swift return of abducted children.[148] This is especially so when the principle of effectiveness is considered. It has been well established by the CJEU that national procedures should not make it "impossible in practice to exercise the rights which the national courts are obliged to protect".[149] The Family Act provides for enforcement by taking the child, monetary penalties and imprisonment as means of

146 Article 23 of the Brussels II *bis* Regulation. For a detailed elaboration of the reasons, see: Siehr, *loc. cit.* n. 131, pp. 275-286 and Medić Musa, op.cit. n. 71, pp. 103-106.

147 Article 47(1) of the Brussels II *bis* Regulation.

148 See also U. Magnus 'Chapter III Recognition and Enforcement Section 4 Enforceability of certain judgments concerning rights of access' in U. Magnus and P. Mankowski, eds., *Brussels II bis Regulation* (Munich, Selp 2012) p. 317, p. 364.

149 ECJ, Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* [1976] *ECR* 1989, para 5.

enforcement. [150] These did not always lead to the most favourable results.[151] The Family Act 2014 introduces a bit more detailed provisions on enforcement by coercive measures towards the child.[152] It compels the judge, the police and the social welfare centre to co-operate in order to protect the child's interest.[153] It also gives the court a possibility to direct the child to a conversation with a professional and therefore stay the enforcement proceedings.[154] This could lead to more successful enforcement procedures in some cases, although coercive measures are not generally desirable. Therefore, the Croatian authorities will have to apply them carefully; only "in the event of unlawful behaviour by the parent with whom the children live"[155] in order to comply with the European Convention on Human Rights, namely its Article 8 that protects the right to family life. In some situations, on the other hand, it may be justifiable not to enforce the return judgment. These are limited to most exceptional cases when the child strongly objects to return and when there is a new fact that may result in severe harm for the child upon return.[156]

7.2. "Fast track" recognition and enforcement

One of the main controversies in the new intra-EU child abduction regime lies in new Articles 11(8) and 42. According to them, the return judgment issued in the state of habitual residence that has been preceded by a non-return judgment issued in the state of removal will be automatically recognised without a need for *exequatur*. What this actually means is that the court in the state of habitual residence has the right to overturn the judgment of the court of the state of removal after the latter has transmitted the case to the first under Article 11/6 of the Regulation. This is "easy to understand and perfectly consistent with the general policy underlying Articles 10 and 11".[157] However, it is difficult to understand having in mind the often invoked principle of mutual

150 Article 345(1) of the Family Act.

151 As an example, see *Karađić* v *Croatia* (2005) 44 ECHR 896.

152 Article 514(1) of the Family Act 2014.

153 Article 516(1) of the Family Act 2014.

154 Article 517(2) and 519/1 of the Family Act 2014.

155 *Ignaccolo-Zenide* v *Romania* (2001) 31 EHRR 7, at para 106; Karadžić v Croatia, n. 151, at para 61.

156 See P. McEleavy 'Chapter III Recognition and Enforcement Section 6 Other provisions' in U. Magnus and P. Mankowski, eds., *Brussels II bis Regulation* (Munich, Selp 2012) p. 387, p. 395.

157 Pataut, *loc. cit.* n. 26, p. 144.

trust between national courts of EU Member States.[158] The system thus, controversially enough, promotes mistrust between the two courts.[159]

This system only applies to judgments issued after a non-return judgment based on reasons from Article 13 of the Convention has been issued.[160] After such subsequent return judgment has been issued, if certified, it will be susceptible to automatic recognition and enforcement without any need for *exequatur*.[161] The purpose of Article 42 and the system found within is to prevent lengthy proceedings following the return judgment.[162] Certification of the judgment will take place if the judge issuing the judgment establishes that the following requirements are fulfilled:

"the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity; the parties were given an opportunity to be heard; and the court has taken into account in issuing its judgment the reasons for and evidence underlying the order issued pursuant to Article 13 of the 1980 Hague Convention."[163]

The judgment itself may be declared enforceable notwithstanding any appeal in the country of origin.[164] The Croatian judges may therefore avail themselves of the provisions of the Family Act which allow them to declare that the appeal does not suspend the enforceability of the judgment.[165] The certificate issued may only be rectified in accordance with national law, which means, under the Croatian Civil Procedure Act, that the parties may seek correction of evident typographical and numerical errors, formal mistakes and differences between the original and the copy of the certificate at any time.[166]

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158 The principle is endorsed within the Brussels II *bis* Regulation as well as in Recital 21 of the Preamble to the Regulation.

159 See Holzmann, *op. cit.* n. 22, p. 221; McEleavy, *loc. cit.* n. 20, p. 32.

160 Article 11(8) of the Brussels II *bis* Regulation. According to Trimmings, *op. cit.* n. 33, p. 107, the result of the new system is some degree of avoidance of Article 13(1)b.

161 Article 42(1) of the Brussels II *bis* Regulation.

162 Magnus, *loc. cit.* n. 148, at p. 362. Undue delay may in some cases constitute the grave risk of harm exception. See: *S. v. S. & S.* [2009] EWHC 1494 (Fam), INCADAT cite HC/E/UKe 1016.

163 Article 42(2) of the Brussels II *bis* Regulation.

164 Article 42(1) of the Brussels II *bis* Regulation.

165 See n. 74 and accompanying text.

166 Article 342 of the Civil Procedure Act.

In the country of recognition, the recognition may not be refused and the parties may not apply for a declaration of non-recognition.[167] Accordingly, the provision of the Croatian Private International Law Act that allows to appeal on a decision on recognition and/or enforceability[168] should not be applied, in accordance with the *Simmental* doctrine mentioned above. The judgment shall be enforceable as if it were a domestic judgment.[169] Non-enforcement might thus take place in case of changed circumstances,[170] but non-enforcement should not take place due to a different standpoint on the merits of the judge in the country of enforcement.[171] The Regulation provides for one explicit reason for non-enforcement – if there is a subsequent irreconcilable[172] and enforceable judgment, the judgment on return certified in the country of origin of the judgment shall not be enforced.[173] Objection of a subsequent irreconcilable judgment should thus be found admissible at any time in order to ensure the correct functioning of the Regulation.[174]

7.3. The old recognition and enforcement regime

Both regimes of recognition and enforcement under the Brussels II *bis* Regulation are based on the principle of mutual recognition of judicial decisions that is crucial for the creation of a genuine judicial area.[175] Such judicial area does not exist towards non-EU Member States, so no mutual trust between courts is presumed.[176] Therefore, recognition and enforcement of child abduction judgments coming from non-EU Member States remains to be governed by the Croatian Private International Law Act, namely its Articles 86 to 96. The main difference is that the decision from a non-EU state needs to be recognised and

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167 Article 42(1) of the Brussels II *bis* Regulation. See also: *Rinau*, n. 126, at OP 1 and 2.

168 Article 101(2) of the PIL Act allows appeal to be lodged within fifteen days.

169 Article 47(2) of the Brussels II *bis* Regulation.

170 Medić Musa*, op. cit*. n. 71, p. 114.

171 McEleavy, *loc. cit.* n. 156, p. 395.

172 According to case law under the Brussels Convention of 1968, the judgments are irreconcilable if "they entail legal consequences that are mutually exclusive". ECJ, Case 145/86 *Horst Ludwig Martin Hoffmann* v *Adelheid Krieg* [1988] ECR 645, para 22.

173 Article 47(2) of the Brussels II *bis* Regulation. The notion "subsequent irreconcilable enforceable decision" does not encompass decisions that award only provisional rights of custody. *Povse*, n. 25, at OP 2.

174 See Magnus, *loc. cit.* n. 148, p. 362.

175 Recital 2 of the Preamble to the Brussels II *bis* Regulation.

176 Holzmann, *op. cit.* n. 22, p. 218.

declared enforceable; there is no automatic recognition.[177] Other differences can be found in the documents that need to be submitted, procedure and the reasons for refusing recognition and enforcement of a foreign judgment.

In order to secure recognition of a foreign judgment, the applicant should submit the judgment itself as well as the certificate of finality issued by the authority and in accordance with the law of the state of origin.[178] Reasons that may lead to a non-recognition and refusal of enforceability are the following: breach of the right to be heard of the person against whom the judgment was issued (especially lack of notice of the proceedings if the party has not entered into appearance); exclusive jurisdiction of Croatian courts in the matter; domestic or enforceable foreign previous judgment between the same parties and in the same matter;[179] public policy;[180] lack of reciprocity with the state of origin of the judgment.[181],[182] The objection of exclusive jurisdiction of domestic courts may come into consideration when both the defendant and the child are Croatian and have their domicile in Croatia.[183] The hypothetical is the following: the child and the mother are Croatian and have their domicile and habitual residence in Croatia. The child is then wrongfully removed to a foreign country, e.g. the United States of America, and the USA court issues a decision regarding the child's return or non-return. Although this would completely contravene the purpose of the Child Abduction Convention, the Croatian court may not recognise and enforce the USA court's judgment due to existence of exclusive jurisdiction. When compared with the standard track recognition and enforcement, the differences in reasons for non-recognition are significant. Only the public policy and the violation of the right to be heard exceptions overlap, but do not necessarily have identical interpretation.

The procedure is not regulated in details. Article 101 of the PIL Act provides that the decision may be recognised incidentally and as the main issue in the proceedings. However, unlike in the Regulation's system, the party against whom recognition and enforcement is sought needs to be notified of the ap-

177 Article 86(1) of the PIL Act.

178 Article 87 of the PIL Act.

179 The criterion of both objective and subjective identity of the subject matter is accepted by analogy with the rule on *lis pendens* from Article 90(2) of the PIL Act. Dika, *op. cit*. n. 127, p. 296.

180 The Act uses the phrase "contrariety to basis of the state system as set in the Constitution", but this is perceived as public policy objection. Dika, *op. cit.* n. 127, p. 300.

181 The reciprocity is presumed until proven otherwise. If there is doubt, the Ministry of Justice shall issue a clarification. (Article 92(3) of the PIL Act).

182 Articles 88-91 of the PIL Act.

183 Article 66(2) of the PIL Act.

plication in order to secure the requirement of fair trial.[184] The proceedings for recognition and enforcement may be stayed, but only if the proceedings in the same matter and between the same parties are pending before domestic courts.[185]

III. Conclusion

Entry into force of the Brussels II *bis* Regulation has changed the Croatian child abduction disputes' regime in several manners. Primarily, it has set two different regimes depending on the place of habitual residence of the child. If the place is within the EU, the Regulation applies. Towards non-EU states, the regime remained the same, governed by the Child Abduction Convention. Looking at the Regulation's regime specifically, there are some changes and some nuances. The changes are seen in the obligation to transmit the case after a non-return decision has been issued and in the recognition and enforcement system of judgments coming from the EU. Nuances are to be seen with respect to obligations to hear the child and the applicant. Two novelties need to amount to changes in order to enhance the Croatian practice in dealing with the child abduction cases. First are the set time limits that will hopefully influence the length of the procedure. Second is the needed change of interpretation of grave risk of harm. Now it is coupled with the duty to check the security arrangements that have been made in the country of habitual residence. Although it is only applicable to cases governed by the Regulation, this new duty might restrain the tendency of a too wide interpretation of the grave risk of harm defence that appears in some Croatian cases.

184 Dika, *op. cit.* n. 127, pp. 340-341.

185 Article 90(2) 0f the PIL Act.