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Hausmann, Rainer

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issued to anyone besides the beneficiary designated in the order to pay, then it would have to be decided under the law of the State where execution is applied for whether it would be executable for another as well. Proof would have to be shown under Article 6(1) of the Act on Implementation of International Recognition and Enforcement Treaties in Civil Matters by means of official documents, unless it be a question of obvious facts. The Juvenile Protection Council had, according to what the court found, only the task of forwarding child support to the custodial parent. Support had to be paid in any case to the entitled beneficiary. After coming of age, the petitioner was then the entitled beneficiary.

3. References. The Hague Convention of 15 April 1958 Concerning the Recognition and Enforcement of Decisions Relating to Maintenance Obligations towards Children contains no express regulation of the question of whether legislative support adjustments of the decision State in case of price-indexed periodic maintenance orders as well as modification decisions under Article 2(2) in the enforcement State must be recognised. See in this vein: *Kropholler*, in: J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Mit Einführungsgesetz und Nebengesetzen, EGBGB/IPR, Articles 13-18; appendix on Article 13; appendices I-II to Article 18; 13th revised ed., Berlin (D), 1996, appendix III to Article 18 EGBGB, sec 153. *Kropholler*, appendix III to Article 18 EGBGB, sec 113, 114 rejects previous jurisprudence according to which writ of execution was denied in such cases since it would run counter to the purpose of the Convention and the declared intent of the legislator in the *travaux préparatoires* if the party entitled to support would be placed in a worse legal position in the recognition State than in the decision State in regard to statutory determination of periodic maintenance.

INTERNATIONAL AND EUROPEAN PROCEDURAL LAW

New International Procedure Law in Matrimonial Matters in the European Union

– Entry into Force of the "Brussels II" Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial and Custody Law Matters –

Prof. Dr Rainer Hausmann[*]

I. Introduction

On 1 March 2001, 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 (MatR)[1] went into force in the Member States of the European Union (EU) with the exception of Denmark. The objective of this regulation is to remove such obstructions to the free movement of persons within the EU as result from discrepant assessment of family status in different Member States. With this regulation, the foundation has been laid for the evolution of a European law of matrimonial proceedings. The following article seeks to present and critically evaluate the regulation's substantive contents.

1. Background

European integration basically limited itself until the beginning of the 1990s to commercial relations and fields of property law closely connected with commerce. At first, this applied as well to work on harmonisation of European civil procedure law. Thus, when the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 28 September 1968 (Brussels Convention)[2] was signed, the original six Member States of the EEC deliberately excluded matrimonial and family matters (with the exception of support matters)[3] in Article 1(2), point 1 of the Brussels Convention from the substantive scope of the convention although Article 220 of the EC Treaty had in fact provided the possibility of including decisions in the field of matrimonial law as well. The framers of the Brussels Convention justified this with reference to the significant legal differences in the fields of both international as well as substantive matrimonial law in the six Member States which would have entailed either judicial review of correct application of private international law in exequatur proceedings or a significant expansion of ordre public control and would thus have endangered progress already made in the area of recognition and enforcement of property law judgments.[4]

Legal differences in the field of divorce law between the present 15 Member States of the European Union have essentially not been abolished in the three decades since the Brussels Convention was signed. Admittedly, all Member States now have the institution of divorce.[5] By contrast, the possi-

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[*] *Full professor at the University of Constance. This article is dedicated with best wishes to my esteemed colleague Hartmut Maurer on the occasion of his 70th birthday on 6 March 2001.*

[1] OJ 2000 160, at 19 also reprinted in FamRZ 2000, at 1140 et seq. and in *Jayme/Hausmann*, Internationales Privat- und Verfahrensrecht, 10th ed. 2000, para. 170.

[2] OJ 1972 L 299, at 32.

[3] See hereon in this article under Section III. 4.

[4] *Jenard*-Report on Article 1 Brussels Convention, OJ 1979 C 59, at 1 et seq.

[5] Ireland, through its Family Law (Divorce) Act of 1996, was the last Member State to introduce the institution of divorce.

bility of separation without termination of the marriage tie as well as annulment of a marriage is still today unknown in some legal systems.[6] Differences are by no means limited to substantive matrimonial law. They exist instead in the same way in private international law and international procedure law as well. Due to different rules on conflict of laws and jurisdiction, in the case of nationally mixed marriages there were frequently cases of parallel divorce proceedings in the home countries of both marriage partners resulting in contradictory rulings on the existence of the marriage and on the effects of a divorce in support and inheritance law. The efforts both of the Hague Conference as well as of the International Commission for Civil Registry Affairs to improve the free movement of divorce judgments by means of multilateral treaties had no conclusive success due to the low number of ratifications of both the Hague Convention on Recognition of Divorce and Separation of 1 June 1970[7] as well as the CIEC Convention on recognition of decisions in matrimonial matters of 8 August 1967.[8]

Against this background, efforts were made since the beginning of the 1990s to extend European integration to certain aspects of international matrimonial and family law.[9] They were encouraged by expansion of the Community's competencies in the Maastricht Treaty which in its Article K.3 created the legal basis for further progress in integration in the field of "judicial cooperation in civil matters." On this basis, the Member States on 28 May 1998 signed in Brussels the Convention on jurisdiction and the recognition and enforcement of judgments in matrimonial matters (so-called "Brussels II Convention") that, however, did not go into effect.[10]

2. Legal Framework

Since the Treaty of Amsterdam[11] went into effect, the harmonisation of international family procedure law in the EU aimed at by the Convention of 28 May 1998 falls under the remit of Article 65 of the EC Treaty. In the framework of the intended creation of a region of freedom, security and law (Article 61 of the EC Treaty), Article 65 of the EC Treaty specifically authorises the Community's ruling bodies to take measures in the field of judicial cooperation in civil matters with transborder ramifications where they are required for the functioning of the Internal Market.[12] The EC's competency comprises according to Article 65, lit. a of the EC Treaty *inter alia* the regulation of recognition and enforcement of court judgments and out-of-court decisions in civil and commercial matters. Based on these new competencies, the European Council on 29 May 2000 issued Regulation (EC) No. 1347/2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses.[13]

This change in legal form from an international treaty to a regulation has the advantage that the problems of delayed intra-State implementation of international treaties in the Member States of the type known from the accession conventions to the Brussels Convention were eliminated; the regulation instead under its Article 46 went into effect simultaneously on 1 March 2001 in all Member States. The only exception applies to *Denmark*. The reason for this is in the systematic position of Article 65 in Part IV of the third section of the EC Treaty. Since judicial cooperation is communitarised there together with immigration and asylum policy, the reservation posed by Denmark under Article 7 of the protocol to the Treaty of Amsterdam also concerns legal instruments of the Community in the field of judicial cooperation. Accordingly, Article 1(3) of the MatR makes it clear that with "Member States" in the regulation all EU Member States with the exception of the Kingdom of Denmark were being referred to.[14]

In its recital 6, the MatR takes over the "essential content" of the Convention of 28 May 1998 that in turn relied heavily for its structure and terminology on the Brussels Convention. Since the Brussels Convention with effect as of 1 March 2002 is being replaced with Council Regulation (EC) No. 44/2001 of 22 December 2000[15] on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the MatR nonetheless takes into account several of the improvements proposed in the course of revising the Brussels Convention.

For *interpretation* of the MatR it follows that the principles[16] developed by the ECJ for interpreting the Brussels

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6 As is the case in Finnish and Swedish Law.

7 German translation reprinted in *Jayme/Hausmann (supra* note 1) No. 183.

8 German translation reprinted in ibid., No. 182.

9 Cf. *Kohler*, L'article 220 du traité CEE et les conflits de juridictions en matière de relations familiales, Riv. Dir. Int. Priv. Proc. 28 (1992), at 221 et seq.; *Pirrung*, Internationales Privat- und Verfahrensrecht der Scheidung in den Europäischen Gemeinschaften, in: FS van Rijn van Alkmade (1993), at 189 et seq. Cf. also the proposal of the "Groupe Européen de Droit International Privé" for a European agreement on jurisdiction and enforcement in Family Law and the Law of Succession, IPRax 1994, at 67.

10 The Convention and the interpretation protocol are both reprinted in OJ 1998 C 221, at 27 et seq., as well as in FamRZ 1998, at 1416. Cf. on this Convention also the report by *Alegría Borrás*, OJ 1998 C 221, at 27 et seq., further, *Beaumont/Moir*, Brussels Convention II: A New Private International Law Instrument in Family Matters for the European Union, Euro L Rev 20 (1995), at 268, *Pirrung*, Unification en matière familiale: la Convention de l'Union Européenne sur la reconnaissance des divorces et la question de nouveaux traveaux d'Unidroit, Rev. dr. uniforme 1998, at 620 et seq., *Sturlèse*, JCP 1998, at 1145 et seq., *Hau,* Internationales Eheverfahrensrecht in der Europäischen Union, FamRZ 1999, at 484 et seq.

11 Treaty of 2 October 1997, OJ 1997 L 179/12.

12 Cf. *Besse*, Die justitielle Zusammenarbeit in Zivilsachen nach dem Vertrag von Amsterdam und das EuGVÜ, ZEuP 1999, at 107 et seq., *Hess*, Die Europäisierung des internationalen Zivilprozessrechts durch den Amsterdamer Vertrag – Chancen und Gefahren, NJW 2000, at 23 et seq., *Leible/Staudinger*, Article 65 of the EC Treaty in the EC System of Competencies, EuLF 2000/2001 (E), in this issue pp. 225 et seq.

13 *Supra* note 1.

14 Even though the United Kingdom and Ireland have expressed reservations to Part IV of the 3rd section of the Treaty of Amsterdam, both States have announced, in accordance with Article 3 of protocol No. 4 to the Treaty of Amsterdam, that they are willing to participate in the acceptance and application of this Regulation, hereon cf. recital 24 of the MatR.

15 Reprinted in OJ 2001 L 12, at 1 et seq., see hereon in more detail *Wagner*, Die geplante Reform des Brüsseler und des Lugano-Übereinkommens, IPRax 1998, at 241 et seq.; *Kohler*, Die Revision des Brüsseler und Luganer Übereinkommens, in: *Gottwald* (ed.), Revision des EuGVÜ/Neues Schiedsverfahrensrecht (1999), at 1 et seq.; *Hausmann*, The Revision of the Brussels Convention of 1968, EuLF 2000/01 (E), at 40 et seq.

16 Cf. *Wieczorek/Schütze/Hausmann*, ZPO, 3rd ed., 1994, Annex I to § 40,

Convention also apply here. In the interests of uniform application of the MatR in all Member States, the concepts used in it are as far as possible to be interpreted autonomously. The right to refer cases to the ECJ for preliminary rulings however has been restricted for subjects in the whole of Title IV in the course of revising the EC Treaty by the Treaty of Amsterdam. Unlike with the protocols to the Brussels Convention and the "Brussels II" Convention, under Article 68 of the EC Treaty only Member State courts of last resort are entitled to refer cases;[17] this limitation therefore applies as well to questions of interpreting the MatR.

II. Scope of application

1. Substantive scope of application

In substantive respects, the MatR limits itself, as the title itself indicates, to the harmonisation of certain aspects of procedure law in matrimonial matters and related custody matters.[18] The Member States were just as little able to agree on far-reaching harmonisation of the law of international jurisdiction and recognition of judgments for the whole of family and inheritance law, excluded from the Brussels Convention's scope of application under the latter's Article 1(2), point 1, as they could on parallel harmonisation of conflict-of-laws rules for divorce.[19]

a) Matrimonial matters

According to its Article 1(1), lit. a,[20] the MatR is primarily applicable to civil proceedings relating to divorce, legal separation without termination of the marriage bond and annulment of marriage. From a German point of view, these are in particular proceedings in divorce (Articles 1564 et seq. Civil Code) and annulment of marriage (Articles 1313 et seq. Civil Code). In Italian law, this includes actions for termination of marriage ("scioglimento del matrimonio") or for termination of the civil law effects of a concordat marriage ("cessazione degli effetti civili del matrimonio") under Articles 1 and 2 of Law No. 898 of 1 December 1970 as well as actions for annulment of the marriage ("azione di annullamento del matrimonio") under Articles 117 et seq. codice civile. Additionally encompassed are the actions (primarily known in Latin legal systems) for separation without termination of the marriage tie, e.g. legal separation ("separazione giudiziale") under Italian law (Article 151 codice civile). However, the regulation according to its own unambiguous wording relates only to court decisions changing status, that is of a constitutive nature. Although it would have been desirable to incorporate all matrimonial law-related status judgments in the substantive scope of the MatR's application, this was deliberately not done, apparently due to significant legal differences in Member States in regard to flaws in contracting marriage and their consequences. Contrary to a widespread belief in German professional literature,[21] the MatR accordingly does not apply to motions to ascertain the existence or non-existence of a marriage in the terms of Article 632 of the German Civil Procedure Code as well as for comparable *declaratory proceedings* in foreign law.[22] By way of contrast, agreed separation under Italian law ("separazione consensuale", Article 158 codice civile) belongs to the substantive remit of the MatR although the court in such proceedings is merely allocated a control and confirmation function in regard to the separation agreement reached by the marital partners; this is because it is only such judicial consent that actually produces the change in status. Excluded from the scope of the MatR there remain purely *private divorce proceedings* such as for example those of nationals of Islamic States that are conducted in Member States without the participation of courts or public authorities.[23]

However, the MatR relates only to the *status proceedings as such*. Not encompassed by it are the effects of divorce on family assets (e.g. marital property, adjustment of pension rights, marital residence and household effects), alimony or other ancillary effects of divorce such as the right to continue bearing the family name.[24] In its substantive scope of application, the MatR according to Articles 36 and 37 supersedes multilateral and bilateral international treaties concluded by the Member States on recognition and enforcement of judgments in matrimonial matters.[25]

paras. 28 et seq.; *Geimer/Schütze*, Europäisches Zivilverfahrensrecht (1997), Introduction paras. 55 et seq.; *Kropholler*, Europäisches Zivilprozessrecht, 6th ed., 1998, Introduction paras. 45 et seq.; see also in this issue *Leible/Staudinger*, (*supra* note 12), EuLF 2000/01 (E), pp. 225 et seq., with further references.

17 Cf. hereon the criticism of *Hausmann* (*supra* note 15), EuLF 2000/01 (E), at 42.

18 The matrimonial, respectively the custody matter itself must be *subject matter of the action*. The provisions of the MatR concerning jurisdiction and the consideration of foreign litispendency are therefore not applicable, if the matrimonial or custody matter in the domestic proceedings is merely to be decided as a preliminary question. On the contrary, the foreign courts are then also bound by the provisions of the MatR on the recognition of judgments in matrimonial or custody matters, when the issue of the recognisability of such a judgment of another Member State stands merely as a preliminary question.

19 On the problems arising from a lack of harmonisation of conflict-of-laws rules, cf. below section VI of this article.

20 The term "judicial proceedings" in the MatR is broadly applicable and may, according to its Article 1(2) apply to matrimonial proceedings before other courts.

21 *Hau* (*supra* note 10), FamRZ 1999, at 485; *Pirrung*, Europäische justizielle Zusammenarbeit in Zivilsachen – insbesondere das neue Scheidungsübereinkommen, ZEuP 1999, at 834 (843 et seq.); *Gruber,* Die neue „europäische Rechtshängigkeit" bei Scheidungsverfahren, FamRZ 2000, at 1129 et seq. (1130); *Vogel,* Internationales Familienrecht – Änderungen und Auswirkungen durch die neue EU-Verordnung, MDR 2000, at 1045 et seq. (1046).

22 For a similar view see *Helms,* Die Anerkennung ausländischer Entscheidungen im Europäischen Eheverfahrensrecht, FamRZ 2001, at 257 et seq. (260).

23 For an accordant view see *Hau*; *Gruber*, op. cit., (both *supra* note 21); *Helms* (*supra* note 22), *Wagner*, Die Anerkennung und Vollstreckung von Entscheidungen nach der Brüssel II-Verordnung, IPRax 2001, at 73 et seq. (76). Critical thereof *Jayme*, Zum Jahrtausendwechsel: Das Kollisionsrecht zwischen Postmoderne und Futurismus, IPRax 2000, at 165 et seq. (170).

24 Cf. recital 10 on the MatR; this was already expressed in a similar vein by the *Borrás*-Report (*supra* note 10), para. 22. In determining the jurisdiction for the recognition and enforcement of judgments in *support cases*, the Brussels Convention is applicable, cf. hereon *Hausmann*, EuGVÜ und Familienrecht, FamRZ 1980, at 418 et seq.; *Stolz*, Zur Anwendbarkeit des EuGVÜ auf familienrechtliche Ansprüche, (Diss.) Constance (D), 1995, at 73 et seq.

25 This applies particularly to the Hague Convention of 1 June 1970 and the CIEC-Convention of 8 September 1967; hereon see *supra* notes 7

b) Custody law cases

The MatR, according to its Article 1(1), lit. b, is furthermore applicable to civil court proceedings relating to parental responsibility for children of both parents provided that such proceedings are conducted "on the occasion of" one of the matrimonial proceedings referred to in lit. a. "Children of both spouses" means both the spouses' biological children as well as children adopted by both parents.[26] In contrast to this, proposals to include children of the spouses from previous marriages, where they were living in the spouses' family at the time when proceedings are initiated, were not accepted. To that extent, such matters remain as they were stipulated in international treaties superseded by the MatR[27] or according to the rules of each domestic civil procedure law. The prerequisites for jurisdiction in custody matters under Article 3 of the MatR must nevertheless be reviewed for each child individually.[28]

The concept of "parental responsibility" is not defined more precisely in the MatR.[29] It relates primarily to decisions on regulating custody (e.g. deprivation of custody or transfer of custody to another parent). There are, on the other hand, doubts whether decisions on *regulating visitation access* of the non-custodial parent with the child[30] are encompassed. But an indication of such a broad meaning lies in the choice of the concept "parental responsibility" which goes beyond simple exercise of the right of custody. The non-custodial parent meets his responsibilities for the child precisely by maintaining personal relations with the child.[31] In addition to this, decisions on parental custody and visitation rights are in practice frequently coordinated and linked with each other; but it cannot therefore be assumed that the framers of the regulation wished to sever this unitary regulation of custody and access.[32] Nor does anything else emerge from the fact that the Hague Convention on the Protection of Children of 19 October 1996 uses a narrower concept of "parental responsibility",[33] since even the latter Convention expressly extends its substantive scope of application in Article 3, lit. b to measures relating to the right to personal access and in Article 23(1) ensures recognition of court-decided access arrangements in other convention States. In the same way, the European Custody Convention of 20 May 1980[34] is according to its Article 1, lit. c based on a broad concept of "custody rulings" which also includes decisions concerning the child's right of residence or the right to personal contact with the child. Since the two Conventions cited in internal relations amongst the MatR Member States have been superseded by that latter Regulation since it went into effect,[35] the Regulation would remain far behind the legal situation achieved prior to 28 February 2001 in regard to access rights. But in that way, the Regulation's goal would have been turned into its very opposite. For this reason, a broad concept of "parental responsibility" in Article 1(1), lit. b must be assumed, one which would include proceedings to regulate visitation rights.[36]

2. Geographic and personal scope of application

According to Article 1(3), the MatR applies to all EU members except for Denmark. What the geographical linkage of matrimonial proceedings to the scope of MatR's application must be is answered in different ways regarding the different issues dealt with by the Regulation. In order to establish jurisdiction under Articles 2 through 6, it depends according to Article 7 of the MatR on whether or not the *respondent* in matrimonial proceedings is habitually resident in the territory of a Member State or is the national of a Member State. If only one of these two linkage attributes exists, then the respondent may be sued in another Member State only in accordance with Articles 2 through 6 of the MatR.[37] By contrast, the criteria of Article 7 of the MatR are irrelevant when it is a question of whether a court in one Member State must respect the ongoing litispendency of matrimonial proceedings in another Member State. The authoritative provision in Article 11 of the MatR for this is in fact also to be applied if the initially seised court does not derive its jurisdiction from Articles 2 through 6 of the MatR but bases its jurisdiction on reference to Article 8(1) of the MatR.[38] In the framework of recognition and

and 8. Special provisions are in effect for the further application of the Nordic Convention of 6 February 1931 by Finland and Sweden comprising international private law provisions on marriage, adoption and guardianship, pursuant to Article 36(2) MatR.

26 *Borrás*-Report *(supra* note 10), para. 25.

27 The MatR has according to its Article 37, with regard to the custody matters it governs, shall take precedence over the Hague Convention of 5 October 1961 on the Protection of Minors, the European (Luxembourg) Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children and the new Hague Convention of 19 October 1996 on the Protection of Children.

28 *Borrás*-Report, (*supra n*ote 10), para. 26. See hereon also in this article under Section II. 3.

29 The *Borrás*-Report also does not explain this term.

30 Cf. under German law § 1684(3) and (4) of the Civil Code.

31 According to the new version of § 1684(1) of the German Civil Code, as a result of the child law reform the parents are not just entitled to access to their children, rather they are *obliged*, as well the child has the right to access to each parent.

32 Cf. in this sense for an accurate appraisal, *Wagner* (*supra* note 23) IPRax 2001, at 76. The text of the Convention is reprinted in *Jayme/Hausmann* (*supra* note 1), No. 55.

33 According to Article 1(2) CPC, this term includes "parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child."

34 BGBl. 1990 II, at 220; reprinted in *Jayme/Hausmann*, *(supra* note 1), No. 184.

35 Cf. *supra* note 27.

36 Cf. in this sense, with thorough supporting arguments *Wagner* (*supra* note 23), IPRax 2001, at 77; *Vogel* (*supra* note 21), MDR 2000, at 1047. The draft of an EC-Regulation on the mutual enforcement of decisions relating to the law of access is also based on this broad understanding (the text is reprinted in IPRax 2000, at 444); for a critical view on this project, which was initiated by France, cf. *Hess*, Der Verordnungsvorschlag der französischen Ratspräsidentschaft vom 26. 6. 2000 über einen „Europäischen Besuchstitel", IPRax 2000, at 361 et seq. and *Jayme/Kohler*, Europäisches Kollisionsrecht 2000: Interlokales Privatrecht oder universelles Gemeinschaftsrecht?, IPRax 2000, at 455 (458).

37 Cf. *Hau*, Das System der internationalen Entscheidungszuständigkeit im europäischen Eheverfahrensrecht, FamRZ 2000, at 1333 et seq. (1340); hereon in more detail see in this article under Section III. 5.

38 Cf. *Gruber* (*supra* note 21), FamRZ 2000, at 1131.

enforcement of judgments the applicability of the MatR depends under its Article 13(1) on the fact that the ruling has been handed down by a court in another Member State.[39]

3. Temporal scope of application

The transitional provisions in Article 42 of the MatR are shaped by parallel regulations in Article 54 of the Brussels Convention. According to this, the MatR only applies to matrimonial proceedings instituted after the Regulation has entered into force (paragraph 1).[40] The question of when litigation in the terms of Article 42(1) has been "instituted" is decided under the procedural law of the first court seised.[41] Just as in Article 54(2) of the Brussels Convention, Article 42(2) of the MatR also makes provision for recognition and enforcement of judgments in proceedings instituted before the MatR entered into force in accordance with its simplified prerequisites. This presupposes, however, that the judgment in the State of its origin has been "given" after 1 March 2001 and that the jurisdiction of the court in the State of origin was founded on rules which accorded with those provided for either in Articles 2 through 8 of this Regulation or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

III. Jurisdiction

1. General remarks

The real point of progress in the MatR is the fact that it does not, like bilateral and multilateral treaties previously signed between the Member States, limit itself to facilitating mutual recognition of judgments but, following the example of the Brussels Convention, creates standard regulations on jurisdiction of courts in the Member States which override intra-State jurisdictional provisions.[42] But whereas the Brussels Convention in its Article 2 in principle proceeds from general jurisdiction in the respondent's place of residence and in Articles 5 and 6 contrasts this general jurisdiction to special jurisdictions by way of exception,[43] the MatR declines to establish a "general" jurisdiction of a particular forum in matrimonial and custody matters. The system of jurisdiction under the MatR is much more characterised by the fact that jurisdiction is established objectively, alternatively and exclusively.[44]

Accordingly, Articles 2 and 3 of the MatR contain only jurisdiction criteria which can be determined *objectively* such as habitual residence, nationality or "domicile". By contrast, the parties' intentions are in principle of no significance. This not only bars choice-of-forum agreements between spouses but also the voluntary appearance of the respondent in divorce or separation proceedings initiated before a court without jurisdiction in accordance with Articles 2 through 6 of the MatR. In this sense, Article 9 of the MatR makes it unmistakably clear that a Member State court shall declare *of its own motion* that it has no jurisdiction if it has been seised of a case for which it has no jurisdiction according to the Regulation and for which the court of another Member State has jurisdiction on the basis of this Regulation.

The sufficient relationship of the litigation to a Member State of the MatR is determined both in matrimonial as well as custody cases primarily by the *habitual residence* of one of the spouses. The significance of the nationality link,[45] which has heretofore been the focus in the autonomous civil procedure law of the Continental Member States, has been strongly diminished. The same applies to the predominant link with the "domicile" in common law which in Article 2(2) of the MatR takes the place of nationality in the case of the United Kingdom and Ireland.

It is furthermore worthy of being stressed that the linkage criteria used in Articles 2 and 3 of the MatR are "*exclusive*" in the sense that proceedings can only be conducted before the courts of another Member State under the provisions of Articles 2 through 6 of the MatR against a spouse that either has his habitual residence on the territory of a Member State or is the national of a Member State. By means of these provisions, and contrary to what was the case with Article 16 of the Brussels Convention, exclusive jurisdiction of courts of a Member State is not established in the sense that in that case jurisdiction of courts in all other Member States would thereby be barred. Rather the MatR's jurisdictional links are equally weighted amongst each other and not infrequently establish *alternative* jurisdictions in several Member States at the same time.[46] What is exclusive here is solely the catalogue of jurisdictions regulated in the MatR in the sense that courts of the Member States may not base their jurisdiction on other (e.g. autonomous) statutes, unless the MatR allows this by way of exception.[47]

While the Brussels Convention, particularly in its provisions on special jurisdictions (Articles 5 and 6) establishes *local jurisdiction* at the same time that it establishes international

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39 Cf. Article 1(3) MatR; hereon *Wagner* (*supra* note 23), IPRax 2001, at 76.

40 Accordingly, the provisions of this Regulation shall apply only to documents formally drawn up or registered as authentic instruments and settlements which have been approved by a court in the course of its proceedings after 1 March 2001.

41 Hereon *Wagner* (*supra* note 23) IPRax 2001, at 80; see also on the issue of "filing an application" in accordance with Article 54(1) Brussels Convention, *Kropholler* (*supra* note 16), para. 1. In Germany, the service of an action is decisive, § 253 German Civil Code of Civil Procedure (ZPO) (cf. to Article 54(1) Brussels Convention, BGH NJW 1993, at 1070; BGH WM 1997, at 980).

42 Cf. on this "rule-exception-relationship" most recently ECJ 13 July 2000 – C-412/98 – *Group Josi* v *UGIC* – para. 34; hereon *Geimer*, EuLF 2000/01 (E), at 49 et seq.

43 Emphasised accurately also in *Kohler*, Internationales Verfahrensrecht für Ehesachen in der Europäischen Union: Die Verordnung „Brüssel II", NJW 2001, at 10 et seq. (11).

44 Cf. *Borrás*-Report (*supra* note 10), No. 28.

45 For example, cf. § 606 a No. 1 ZPO, Article 14 of the French Code civil and Article 32 of the Italian IPRG 1995.

46 Cf. *Borrás*-Report (*supra* note 10), No. 29; *Hau* (*supra* note 37), FamRZ 2000, at 1334; *Kohler* (*supra* note 42), NJW 2001, at 11.

47 See hereon in more detail in this article under section III. 5.

jurisdiction, the MatR basically limits itself to establishing international jurisdiction. Local jurisdiction in matrimonial matters continues to be decided according to the Member States' domestic procedure law.[48]

2. Matrimonial cases

In matrimonial cases, Article 2 of the MatR provides a total of *seven* jurisdictional links between which spouses are free to choose.

a) Habitual residence

The central linkage point for jurisdiction according to Article 2(1), lit. a of the MatR is the habitual residence of one or both of the marital partners. Here the framers of the Regulation have foregone a definition of the term "habitual residence" just as they declined to include a reference to the lex fori or the definition of "habitual residence" of the State where an habitual residence is said to have been established equivalent to what is contained in Article 52 of the Brussels Convention. One instead preferred to trust to the ECJ's ability to determine[49] autonomously the concept of "habitual residence" for the MatR analogously to the case-law developed by the court in regard to place of residence.[50] However, it cannot be expected that this "European" concept of habitual residence is in any appreciable measure different from the concept taken from the Hague Convention and adopted in the autonomous law[51] of the Member States.[52]

Jurisdiction in any case is attributed to the courts of the Member State in which the *respondent* is habitually resident. This corresponds to the principle of "actor sequitur forum rei" recognised by most legal systems. This principle has admittedly been far more limited in favour of the applicant than in the Member States' previous family procedure law.[53] Nonetheless, the applicant's habitual residence only establishes jurisdiction if it is qualified by other attributes. Thus, according to Article 2(1), lit. a, bracket 5 of the MatR, he must have resided there for at least one year immediately before the application was made in order to establish a forum actoris. The period is shortened to six months, however, if the applicant is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his "domicile" there. With this provision, the spouse that returns to his or her home country after breakdown of a marriage abroad is to be granted a hearing in that jurisdiction.[54]

Without regard to any minimum length of habitual residence, the applicant can seise the courts in the State in which *both* spouses were last habitually resident, without necessarily having resided together, i.e. in the same city. In this way, the applicant is in all cases where the respondent returns to his own country after separation not required to follow him there or to meet the requirements of minimum residence under Article 2(1), lit. a, brackets 5 and 6 of the MatR. The same ultimately applies as well if the spouses do not maintain, or no longer maintain, their joint residence in the same State but file a *joint application* for divorce or separation (Article 2(1), lit. a, bracket 4 MatR). The concept of the "joint application" is in this case to be interpreted broadly and also comprises such cases where formally only one of the spouses files the suit but where the other spouse also consents to the suit.[55] In this way, this jurisdictional link comes close to the voluntary appearance of the respondent in proceedings initiated before a court without jurisdiction which is of little importance in matrimonial matters.[56]

b) Nationality

While nationality of the applicant only entails a qualifying characteristic for early justification of a forum actoris under Article 2(1), lit. a, bracket 6, the *common* nationality of the spouses is given independent significance under Article 2(1), lit. b of the MatR as a linkage criterion for jurisdiction in matrimonial matters. The difference in designation between literae a and b distinguishes residence and nationality links without any order of precedence; both grounds for jurisdiction are available to the spouses as equally ranked alternatives.[57] Relevant is the nationality of the spouses at the time when the suit is filed. Thus previous nationality of the spouses has no bearing on the matter. This applies in particular to so-called *initial access jurisdiction* in autonomous German civil procedure law (Article 606 a(1), point 1 of the German Civil Procedure Code) according to which German courts have jurisdiction in matrimonial matters if one spouse had been German at the time of entering into the marriage.[58]

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[48] In Germany, §§ 606 and 621(2) No. 1 ZPO are therefore applicable. The local jurisdiction is regulated only in Article 5 (Counterclaim) and 6 MatR (Conversion of legal separation into divorce).

[49] The ECJ defines the "place of residence" as the place "that the party concerned has intentionally chosen as permanent or normal centre of vital interests for a long-term period, the definition of which will be established, however, by taking all factual merits and elements of the concept of the habitual residence into account", Cf. ECJ 15 September 1994 – C-452/93 – *Pedro Magdalena Fernandez* v *Commission,* para. 22.

[50] *Borrás*-Report *(supra* note 10), para. 32; *Hau* (*supra* note 37), FamRZ 2000, at 1335.

[51] On German law, cf. *Baetge*, Der gewöhnliche Aufenthalt im IPR (1994); *Palandt/Heldrich,* BGB, 60th ed., 2000, paras. 10 et seq. on Article 5 EGBGB; on the rules of international jurisdiction see *Staudinger/Spellenberg*, Internationales Verfahrensrecht in Ehesachen (1997), §§ 606 et seq., paras. 182 et. seq., with further references.

[52] In the same vein, refer to *Hau* (*supra* note 37), FamRZ 2000, at 1334.

[53] That the basic principle "actor sequitur forum rei" has been made in the MatR, as in Article 2 Brussels Convention – "to the point of departure for a general venue of jurisdiction", according to *Hau* (*supra* note 37), can hardly be asserted in view of the considerable importance of the "fora actoris" in Article 2(1) brackets 5 and 6.

[54] Critical of this generous allowance of the "fora actoris", *Pirrung (supra* note 21), ZEuP 1999, at 834 (844); *Jayme* (*supra* note 23), IPRax 2000, at 165 et seq. On the contrary, it is correctly emphasised by *Hau* (*supra* note 37), FamRZ 2000, at 1334, the advantages of jurisdiction based on centre of vital interests of at least one of the spouses in comparison with the link previously common in many Member States to the mere nationality of one of the spouses.

[55] Cf. § 1566 I, alternative 2 German Civil Code (BGB); Articles 233 et seq. Code civil.

[56] Accurately *Hau* (*supra* note. 37), FamRZ 2000, at 1334.

[57] *Borrás*-Bericht (*supra* note 10), para. 28; *Hau* (*supra* note 35), FamRZ 2000, at 1335.

[58] On initial access jurisdiction see *Staudinger/Spellenberg*, (*supra* note

Not explicitly addressed by the framers of the Regulation is the issue of what effects in the context of Article 2(1), lit. b of the MatR *dual or multiple nationality* of one or both of the spouses might have. While the private international law of the Member States overwhelmingly gives priority to its own nationality and in the case of competition between several foreign nationalities favours the link to an effective nationality,[59] in international procedure law the nationality of the forum State is always sufficient to establish its jurisdiction, also in the event that it is a matter of a "non-effective" nationality.[60] It certainly appears doubtful whether in the context of interpreting the MatR in regard to the treatment of multiple nationalities one should take recourse to the domestic law of the forum State.[61] It would seem preferable in the interest of uniform interpretation of the MatR in all Member States to favour an *autonomous* interpretation of the concept of "nationality" in Article 2(1), lit. b of the MatR. The ECJ's case law must take the latter into account since according to it national courts without a special mandate may not simply brush off the fact that another Member State has given a certain person its nationality.[62] Otherwise, the interpretation must do justice to the requirement of *legal security* in the field of jurisdiction law; however, this requirement is poorly compatible with any kind of effectiveness control. But it follows from this that the jurisdiction in the State of common nationality of the spouses is established without regard to whether or not that nationality can be considered "effective" at the time when the application is filed.[63]

3. Custody cases

Jurisdiction in custody cases is currently handled in eight of the fourteen MatR Member States under the Hague Convention of 5 October 1961 on the Protection of Minors (CPM).[64] That convention will shortly be superseded by the Hague Convention of 19 October 1996 on the Protection of Children (CPC).[65] Since it is not predictable at the moment if the CPC will be ratified by all Member States, the framers of the regulation correctly opted for independent regulation of jurisdiction in the MatR for custody matters related to a matrimonial matter. The latter supersedes in relations between the Member States (according to Article 37 of the MatR) the jurisdiction rules in Articles 1 et seq. of the CPM as well as Articles 5 et seq. of the CPC. In order to avoid collision with the Hague Conventions, Article 3 of the MatR sticks as closely as possible to specifications in the CPC.

Accordingly, Article 3 of the MatR provides for a supplementary jurisdiction in matters relating to the parental responsibility over a child of both spouses for courts in the Member State, which, according to Article 2 of the Regulation, has jurisdiction in the matrimonial matter. If the matrimonial proceedings are pending before the court of a Member State which has based its jurisdiction not on Article 2 of the MatR but, pursuant to Article 8(1) of the MatR, on its national law of civil procedure, Article 3 of the MatR is not applicable; in that case the court is only allowed to decide on matters relating to parental responsibility if it has jurisdiction according to existing international conventions or under its national law of civil procedure.[66] A precondition for making use of the jurisdiction under Article 3(1) of the MatR is – correlating with Article 5(1) of the CPC, the habitual residence of the child in the forum State. If the child is not habitually resident in the State with jurisdiction over the matrimonial matter but in another Member State, then such supplementary jurisdiction only exists under the further precondition that at least one of the spouses has parental responsibility[67] in relation to the child (paragraph 2, lit. a) and that the jurisdiction of the courts has been accepted by the spouses and is in the best interests of the child[68] (paragraph 2, lit. b).[69]

Since the MatR only relates to custody proceedings conducted "on the occasion of" proceedings in matrimonial matters, the supplementary jurisdiction under Article 3 of the MatR presupposes that the matrimonial matter is already pending. Accordingly, jurisdiction ends under Article 3(1) and (2) as soon as the judgment (sustaining or dismissing the case) in the matrimonial matter becomes final and binding. If pro-

51), §§ 606 et seq. ZPO, paras. 159 et seq.

59 Cf. Article 5(1) sentences 1 and 2 EGBGB; see hereon *Martiny,* Probleme der Doppelstaatsangehörigkeit im IPR, JZ 1993, at 1145; *Dethloff*, Doppelstaatsangehörigkeit und IPR, JZ 1995, at 64 et seq.; *Fuchs*, Neues Staatsangehörigkeitsgesetz und IPR, NJW 2000, at 489 et seq. (491 et seq.); *Benicke*, Auswirkungen des neuen Staatsangehörigkeitsrechts auf das deutsche IPR, IPRax 2000, at 171 et seq. (177).

60 Cf. under German law, BayObLG FamRZ 1997, at 959; *Schack,* Internationales Zivilverfahrensrecht, 2nd ed., 1996, para. 371; *Johannsen/Henrich,* Eherecht, 3rd ed., 1998, § 606 a ZPO para. 13; *Wieczoreck/Schütze/Becker-Eberhard*, ZPO, 3rd ed., 1998, § 606 a para. 38, *Hohloch*, Internationales Scheidungs- und Scheidungsfolgenrecht, 1998, § 1 para. 6; advocating a more restrictive view *Staudinger/Spellenberg* (*supra* note 51), §§ 606 et seq., paras. 152 et seq.

61 In this manner, however, the *Borrás*-Report (*supra* note 10), at the bottom of para. 33, according to which "the judicial bodies of each State will apply their national rules within the framework of general Community rules on the matter."

62 Cf. ECJ 7 July 1992 – C 369/1990 – *Micheletti* – paras. 10 et seq.; ECJ 2 October 1997 – C-122/96 – *Saldanha* v *Hiross Holding* para. 15 = IPRax 1999, at 358, with comment by *Ehricke*, at 311.

63 In this vein see also *Hau* (*supra* note 37), FamRZ 2000, at 1337.

64 In BGBl. 1971 II, at 219, reprinted in *Jayme/Hausmann* (*supra* note 1), No. 54, see there also an overview of the present status of the ratification.

65 Text of the Convention reprinted in RabelsZ 62 (1998), at 502 et seq., as well in *Jayme/Hausmann* (*supra* note 1), No. 55; hereon in more detail *Siehr*, RabelsZ 62 (1998), at 464 et seq.; *Pirrung,* FS Rolland (1999), at 277 et seq.

66 *Jayme/Kohler* (*supra* note 36), IPRax 2000, at 454 et seq. (457).

67 Article 3(2) lit. a. MatR orientates itself on Article 10(1) CPC. For this reason, the term "parental responsibility" may be narrowly interpreted similar to in Article 1(2) CPC. One of the spouses must have custody in relation to the child; here, a mere right to access is not – by contrast to the stipulation under Article 1(1), lit. b – sufficient.

68 The dependence of the jurisdiction on the best interests of the child is, with regard to the aspect of legal certainty, not unproblematic, cf. in this sense also *Vogel* (*supra* note 21), MDR 2000, at 1045.

69 Should these requirements not be met, the jurisdiction of the court seised of the matrimonial matter for the decision of the custody case shall be determined by the lex fori. In Germany, the Hague Convention on the Protection of Minors will then, as a rule, be applicable. Cf. on the absence of harmonisation between the MatR and the CPM, *Jayme/Kohler* (*supra* note 36), IPRax 2000, at 454 et seq. (457 et seq.).

ceedings on parental responsibility are still pending at that time, then jurisdiction nonetheless extends until these proceedings also have been brought to an end with a final and absolute judgment (Article 3(3), lit. b).[70]

While the MatR under Article 37 claims priority over the Hague CPM and CPC, the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980[71] is not superseded by the Regulation. Article 4 of the MatR actually obliges courts having jurisdiction under Article 3 to exercise their jurisdiction in conformity with the provisions of the Hague Child Abduction Convention.[72] Courts having jurisdiction under Article 3 are therefore particularly called upon only to hand down a decision on custody in a child abduction case if it has been decided under the Convention that the child is not to be returned although it had been illegally taken to the forum State or is being illegally detained there. On the other hand, jurisdiction established under Article 3(1) of the MatR does not lapse simply because the child was illegally taken to another country.[73]

4. Alimony and support law

For other consequences of divorce or separation besides custody for joint offspring of the parents, the MatR, unlike autonomous German family procedure law[74] does not provide for jurisdiction on the basis of the principle of joint proceedings for these consequential matters (*Entscheidungsverbund*). To that extent the Member States' civil procedure law remains applicable. This applies in particular for judgments on statutory adjustment of pension rights and marital property compensation claims.

By contrast, jurisdiction in *alimony and support matters*,[75] including where connected with divorce proceedings, is determined under the provisions of the Brussels Convention. However, the latter's personal scope of application, unlike Article 7 of the MatR, is only established if the respondent is resident in a Member State. In that case, the Brussels Convention supersedes national jurisdiction rules and thus likewise takes precedence over any divorce-related joint proceedings under the autonomous procedural provisions of the lex fori. Except in the respondent's State of residence (Article 2(1) Brussels Convention), Article 5, point 2 of the Brussels Convention optionally establishes jurisdiction of a court where the party entitled to support is normally resident.[76] In that case, in the most usual situation where the wife entitled to alimony sues to obtain it, a "parallel handling" (*Gleichlauf*) in terms of the jurisdiction for both the matrimonial matter and the support matter will be attained, if only one of the spouses has his or her habitual residence in the forum State (Article 2(1), lit. a MatR). If jurisdiction in the matrimonial matter only is based on the common nationality of the spouses (Article 2(1), lit. b MatR) because none of the spouses has his habitual or qualified residence in the forum State, then the court seised only has jurisdiction under the provisions of Article 5(2), alternative 3 of the Brussels Convention to decide on support. This presupposes that the court under its own autonomous procedure law has supplementary jurisdiction to decide on claims for support. In German law, this joint jurisdiction for consequential claims emerges from Article 621(2) of the Civil Procedure Code. It comprises, at least in analogous application, support claims raised in connection with separation without termination of the marital bond as well.[77]

5. Relation to the autonomous procedure law of the Member States

The borderline between the jurisdiction law of the MatR and the national jurisdiction law of Member States is determined by Articles 7 and 8 of the MatR. In order to understand what at first glance appears to be unclear interplay of these two provisions, a distinction must accordingly be made whether the prerequisites of Article 7 of the MatR obtain or not.

a) Application of Article 7 of the MatR

If the respondent either has his habitual residence in the territory of a Member State of the MatR (lit. a) or if he is a national of such a Member State (or domiciled in the United Kingdom or Ireland in the terms of Article 2, lit. b MatR), then proceedings before courts of another Member State under Article 7 can only be conducted under the provisions of Articles 2 through 6 of the MatR. The decisive moment for the Article 7 MatR link to obtain is the date when suit is filed[78] so that priority under Articles 2 through 6 of the MatR remain in place over the autonomous law of the Member States if the prerequisites of Article 7 lapse in the course of proceedings.[79]

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70 According to Article 3(3), lit. c, if the proceedings have come to an end for another reason (e.g. withdrawal of the application for divorce), this is to be regarded equivalent to a final decision in the matrimonial, respectively the custody matter.

71 Text of the Convention in BGBl. 1990 II, at 207, and reprinted in *Jayme/Hausmann* (*supra* note 1), No. 222.

72 Cf. hereon *Borrás*-Report (*supra* note 10), para. 40.

73 Cf. recital 13 of the MatR.

74 Cf. for instance *Wieczorek/Schütze/Kemper*, ZPO, 3rd ed., 1998, § 621 paras. 136 et seq., for a more restrictive view see *Staudinger/Spellenberg* (*supra* note 51), §§ 606 et seq., paras. 337 et seq.

75 On the terms alimony and support in Article 5, point 2 Brussels Convention cf. ECJ 6 March 1980 – 120/79 – *de Cavel II*, paras. 5 et seq.; hereon *Hausmann,* IPRax 1981, at 5 et seq.

76 Cf. on the fixing of the term "dependent" as contained in Article 5, point 2 Brussels Convention, ECJ 20 March 1997 – C-295/95 – *Farrell* v *Long*, paras. 12 et seq.; hereon *Fuchs,* IPRax 1998, at 327 et seq.

77 In this vein, see also *Hau* (*supra* note 37), FamRZ 2000, at 1338; further *Schulze,* Internationale Annexzuständigkeit nach dem EuGVÜ, IPRax 1999, at 21 (22 et seq.); *Thomas/Putzo/Hüßtege*, ZPO, 22nd ed., 1999, para. 8 on Article 5; for a discordant view KG (D), 17 November 1997, FamRZ 1998, at 564.

78 Article 11(4) MatR is geared to this moment for the observance of proceedings pending in another Member State; cf. hereon below in this article under section IV. 3. for an analogous application of this provision in international jurisdiction rules see also *Hau* (*supra* note 37), FamRZ 2000, at 1340.

79 The basic principle of the *perpetuatio fori* is also recognised under the Brussels Convention to be a rule inherent to the Convention, cf. *Wiezcorek/Schütze/Hausmann* (*supra* note 16), para. 25 on Article 2; *Geimer/Schütze* (*supra* note 16), paras. 90 et seq. on Article 2; *Kro-*

The exclusive nature of harmonised jurisdiction links under Articles 2 through 6 of the MatR is, however, supposed to protect the respondent only from a more far-reaching subjection to jurisdiction under national procedure law in *another* Member State than in his own State of nationality or residence. By contrast, Article 7 of the MatR does not oust jurisdiction based on national law by the courts of the respondent's State of residence or nationality. A prerequisite in any case is under Article 8(1) of the MatR that jurisdiction under Articles 2 through 6 of the MatR is not provided for either in the Member State of residence or nationality nor in any other Member State. But since the Regulation in Article 2(1), lit. a, bracket 3 always establishes jurisdiction in the respondent's State of residence, recourse to national jurisdiction law is only possible in the *respondent's State of nationality* (Article 7, lit. b MatR) provided that the respondent has his habitual residence in a non-Member State (otherwise: Article 2, lit. 1 a, bracket 3 MatR) and the applicant has neither a qualified habitual residence in a Member State (otherwise: Article 2(1), lit. a, bracket 5 or 6 MatR) nor possesses the same nationality as the respondent (otherwise: Article 2(1), lit. b MatR). Thus if an Italian has lived with his German wife in Switzerland, then Article 7, lit. b of the MatR makes it impossible for him to conduct divorce proceedings in Italy based on Article 32 of the Italian Act of 1995 on Private International Law. By contrast, German courts would have jurisdiction over an application for divorce by the husband according to Article 8(1) of the MatR, read together with Article 606 a(1), point 1 of the German Civil Procedure Code, as long as the spouses maintain their habitual residence in Switzerland.[80]

b) Non-applicability of Article 7 of the MatR

If the respondent, on the other hand, has his habitual residence in a non-Member State and if he is not a national of a Member State either (or does not have a "domicile" in the United Kingdom or Ireland) then he may not invoke the protection of Article 7 of the MatR. He is therefore in principle subject to the jurisdiction of courts in all Member States of the MatR under the autonomous domestic procedure law applicable there. He is even further disadvantaged beyond that by Article 8(2) of the MatR if the applicant has the nationality of a Member State, since in that case the applicant residing in a Member State besides his own may there invoke applicable jurisdictional provisions on an equal footing with a national of that State. Accordingly, an Italian who moves his permanent residence from Switzerland to Germany after separating from his Swiss wife residing in Switzerland can immediately invoke the jurisdiction of German courts under Article 606 a(1), point 1 of the German Civil Procedure Code the same as a German could without having to wait out the one-year period in Article 2(1), lit. a, bracket 5 of the MatR. The recognisability of the German divorce judgment in Italy and Switzerland (cf. Article 606 a(4), point 4 German Civil Procedure Code) is no longer decisive due to Article 8(2) of the MatR.

It is still questionable whether the applicant may in such a case also invoke national procedure law in his State of residence or nationality in order to establish jurisdiction if a court of another Member State has jurisdiction in accordance with Article 2 of the MatR. The clear wording of Article 8(1) of the MatR, leaving the path to "residual jurisdiction" under national procedure law open only "where no court of a Member State has jurisdiction pursuant to Articles 2 through 6", suggests a negative answer to this question. The MatR is, therefore, even claiming priority over the autonomous jurisdiction rules of the Member States if the respondent is not included amongst the particularly protected persons under Article 7 of the MatR.[81] Accordingly, a German wife can file an application for divorce with a German court against her Swiss husband residing in Switzerland under Article 8(1) of the MatR read together with Article 606 a(1), point 1 of the German Civil Procedure Code as long as her habitual residence is also in Switzerland. This jurisdiction does not simply lapse because the wife after separation from her husband moves to France, Italy or Austria. However, if she has already resided in her new State of residence for more than one year before filing for divorce, then the courts of that State have jurisdiction for divorce proceedings in accordance with Article 2(1), lit. a, bracket 5 of the MatR; filing an application for divorce with a German court under Article 606 a(1), point 1 of the German Civil Procedure Code is then no longer possible.

c) Interlocutory relief

General recourse to national jurisdiction law is, finally, permitted by Article 12 of the MatR in "urgent cases" for measures of interlocutory relief (including safeguards) in relation to persons or assets located in the forum State. This also applies if for decision in the principal action, thus in matrimonial or custody matters, under the Regulation the courts of another Member State have exclusive jurisdiction in the terms of Article 7.

pholler (*supra* note 16), Preliminary Remark to Article 2, paras. 12 et seq.

80 Conversely, the German wife could also file an application for separation/divorce before the Italian courts in her husband's State of origin. For a critical view of Article 7 lit. b MatR, insofar as this benefits nationals of the Member States, although Article 2 MatR does not in any way provide for an international jurisdiction, see *Hau* (*supra* note 37), FamRZ 2000, at 1340.

81 In this sense see also *Hau* (*supra* note 37), FamRZ 2000, at 1340 et seq.