



# **The European Legal Forum**

## **Forum iuris communis Europae**

---

*Hausmann, Rainer*

### **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 (Part II)

*The European Legal Forum (E) 5-2000/01, 345 - 353*

© 2000/01 IPR Verlag GmbH München

In the action against one of the banks, the complainants claimed infringement of the rules for consumer credit and demanded in particular, the restitution of the paid interest to the extent that it was paid at a rate over and above the statutory interest rate of 4 %. The action did not succeed.

## 2. The Court's Decision

The judgment of consumer credit contracts which are not concluded personally by the consumer but through an authorised representative was until now very controversial under German law. A part of the legal literature and judicial decisions demanded that not only the credit contract itself, but also the power of attorney, on the basis of which a credit contract for the consumer is concluded by a third person, must comply with the statutory provisions regarding the written form and the minimum essential terms of consumer credit contracts.<sup>1</sup> Only in this way could consumer protection be effectively achieved. The opposing opinion however, considered it unnecessary to subject, beyond the consumer credit contract, also the power of attorney which validates the conclusion of the contract, to the special protective rules of the consumer credit law.<sup>2</sup> It must suffice when the credit contract itself is subject to the statutory requirements.

The BGH as the highest German civil court has now endorsed this last opinion. The BGH focuses on the fact that for the represented consumers, the representation at the conclusion of legal transactions runs generally hand in hand with the information given to the representative and necessary for the conclusion of the contract and that the representative then decides to conclude a contract based on this information. The general risks for the represented consumer arising from the

employment of an authorised representative are not as such limited by the consumer credit law.

The Court noted that otherwise a legal representation in consumer credit contracts would to a large extent be de facto not possible. If all the essential terms prescribed for the credit contract must be included in the power of attorney, then a representation, if needed, would still be possible in such a form that a power of attorney to conclude an already negotiated credit contract is given in which the prescribed essential terms are once again precisely referred to. The by no means rare case in the practice of an authorised representative being instructed to obtain credit on the best possible terms, would be practically ruled out. On the other hand, it cannot be drawn from the consumer credit law that only contracts concluded personally fall within its field of application.

The BGH emphasises that the addressee of the protective rules of consumer credit law is above all the lender. This obliges lenders to ensure that all the required essential terms are completely incorporated in credit contracts with consumers. In the case of infringement of this rule, the lender can be liable for the sanctions prescribed by the German VerbrKrG. In contrast, it remains within the sphere of the consumer, if he or she employs an authorised representative to conclude a credit contract. The lender has normally no influence over any possible legal anomalies in the relationship between the authorised representative and the consumer and therefore should not be held accountable for this.

(T.S.)

<sup>1</sup> See hereon the extensive references in the judgment, *supra* notes 2 and 3.

<sup>2</sup> Hereon the full details in the judgment, *supra* note 4.

## 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 (Part II) –

*Prof. Dr Rainer Hausmann*<sup>\*</sup>

#### I. Consideration of Foreign Lis Pendens

##### 1. General

A considerable driving force behind the creation of the new European matrimonial procedure law was the lack of uniform rules for the resolution of positive conflicts of jurisdiction, which arose from parallel divorce proceedings in the different States of origin or residence of spouses. Since the Council

Regulation (EC) No. 1347/2000 (hereinafter the “MatR”) – as shown<sup>1</sup> – provides a catalogue of alternative jurisdictional links, an appropriate rule was required to avoid the bringing of competing matrimonial proceedings and consequently, the possibility of irreconcilable judgments on the same issues from courts in different Member States. This solution is contained in Article 11 MatR, which although as a point of reference is modelled on Article 21 of the Brussels Convention, does however take into consideration the particularities of in-

<sup>\*</sup> Full professor at the University of Constance (D).

<sup>1</sup> Cf. Part I of this article under Section III, EuLF 2000/2001 (E), at 275 et seq.

ternational matrimonial procedural law via special rules for “dependent actions” in Article 11(2) MatR. In comparison to the autonomous German civil procedure law,<sup>2</sup> the most important reform is the omission of the so-called *positive prediction of recognition* (“positive Anerkennungsprognose”); consideration of an earlier *lis pendens* in relation to a matrimonial proceeding in another Member State does not therefore depend on whether the decision from this proceeding can be expected to be recognised.<sup>3</sup>

## 2. Identical Matter in Dispute

Exactly as in Article 21(1) of the Brussels Convention, Article 11(1) MatR breaks away from the different concepts of a disputed matter under the various national procedure laws of the Member States.<sup>4</sup> A foreign matrimonial proceeding, like the adjoining proceeding relating to parental responsibility, substantiates the objection of *lis pendens* instead when the “same cause of action” is filed in the domestic proceeding. This concept – according to the interpretation of Article 21 of the Brussels Convention by the ECJ<sup>5</sup> – is *autonomous*, i.e. it is to be interpreted in isolation from the concept of a disputed matter under the respective *lex fori* or alternatively under the *lex causae*. Thereafter, it depends in this context and that of Article 11(1) MatR, on whether the “central issue” of both proceedings is the same.<sup>6</sup>

The to this day controversial question under national procedure law of whether a petition for divorce on the one hand,

and an application for legal separation without dissolving the bond of marriage or for marriage annulment on the other hand, concern the same disputed matter or the “same cause of action”<sup>7</sup> does not require resolution under the MatR. This is because Article 11(2) MatR expressly extends the bar of *lis pendens* to cases where a petition for divorce, an application for legal separation without dissolving the bond of marriage, or an application for marriage annulment are filed in the courts of various Member States, even if they *do not* concern *the same cause of action*. If, for an example, an Italian wife filed her application for legal separation at the Italian court which according to Article 2(1) MatR has jurisdiction, the German husband – contrary to the former situation<sup>8</sup> – is then prevented from pursuing a divorce proceeding before a German court. The proposal to give precedence in such cases to the courts of the Member State, which could hand down the more far reaching decision, was not accepted in the discussions leading to the MatR.<sup>9</sup> Since the material scope of application of the MatR does not extend to *declaratory proceedings*,<sup>10</sup> the application for the declaration of non-existence of a marriage based on § 632 German Civil Procedure Code does not, however, have the effect of blocking a divorce petition or alternatively an annulment application in another Member State.<sup>11</sup> Even if one wanted to extend the scope of application of the MatR to declaratory proceedings, an action for the positive declaration of existence of a marriage would in any case only bar a later application for annulment of the marriage, not however, a later petition for divorce or for legal separation.

## 3. Relevant Point in Time

Since Article 11(1) and 11(2) MatR – like Article 21 of the Brussels Convention – are based on the principle of priority, i.e. the first proceeding to be pending has precedence, the point in time when the competing proceedings become pending is therefore of vital importance. Having adopted the reform proposals for Article 21 of the Brussels Convention,<sup>12</sup> Article 11(4) MatR now contains an autonomous provision to determine this point in time. Considering the various prerequisites for *lis pendens* under the national procedure laws of the Member States, the relevant point in time focuses on either the time when the document instituting the proceedings is lodged with the court, or if the document according to the *lex*

<sup>2</sup> Cf. hereon e.g. *Safferling*, *Rechtshängigkeit im deutsch-französischen Scheidungsverfahren*, Erlangen (D), 1996; *Burckhardt*, *Internationale Rechtshängigkeit und Verfahrensstruktur bei Eheauflösungen*, Heidelberg (D), 1997; *Heiderhoff*, *Die Berücksichtigung ausländischer Rechtshängigkeit in Ehescheidungsverfahren*, Bielefeld (D), 1998; most recently further *Gruber*, *Die „ausländische Rechtshängigkeit“ bei Scheidungsverfahren*, FamRZ 1999, at 1563 et seq.; *Finger*, *Ausländische Rechtshängigkeit und inländisches Scheidungsverfahren*, FuR 1999, at 310 et seq.; *Philippi*, *Doppelte Scheidungsprozesse im In- und Ausland*, FamRZ 2000, at 525 et seq.

<sup>3</sup> To this effect also *Gruber*, *Die neue „europäische Rechtshängigkeit“ bei Scheidungsverfahren*, FamRZ 2000, at 1129 et seq. (1132); *Hau*, *Das System der internationalen Entscheidungszuständigkeit im europäischen Eheverfahrensrecht*, FamRZ 2000, at 1333 et seq. (1339); already to this effect on the Brussels II Regulation before 1998 *Hau*, *Internationales Eheverfahrensrecht in der Europäischen Union*, FamRZ 1999, at 484 et seq. (487); *Gruber* (*supra* note 2), FamRZ 1999, at 1568.

<sup>4</sup> Cf. hereon the *Borrás*-Report of 28 May 1998 on the Brussels II Regulation, OJ 1998 C 221, at 27 et seq., para. 52; *Isenburg-Epple*, *Die Berücksichtigung ausländischer Rechtshängigkeit nach dem europäischen Gerichtsstands- und Vollstreckungsübereinkommen vom 27. 9. 1968*, Frankfurt/M. (D), 1992, at 157 et seq.

<sup>5</sup> Cf. ECJ 8 December 1987 – 144/86 – *Gubisch Maschinenfabrik v Palumbo*, NJW 1989, at 665, paras. 16 et seq.; ECJ 6 December 1994 – C-406/92 – *Tatry v Maciej Rathhaj*, EuZW 1995, at 309 with commentary from *Wolf*, at 365 = EWIR 1995, at 463 with commentary from *Otte* = JZ 1995, at 616 with article from *Huber*, at 603; further *Kropholler*, *Europäisches Zivilprozessrecht*, 5<sup>th</sup> ed., Heidelberg (D), 1998, para. 3 on Article 21; *Geimer/Schütze*, *Europäisches Zivilverfahrensrecht*, Munich (D), 1997, paras. 27 et seq. on Article 21; in detail *Isenburg-Epple* (*supra* note 4), at 140 et seq., 205 et seq.; *Hau*, *Positive Kompetenzkonflikte im internationalen Zivilprozessrecht*, Frankfurt/M., 1996, at 132 et seq.; *Bäumer*, *Die ausländische Rechtshängigkeit und ihre Auswirkungen auf das internationale Zivilverfahrensrecht*, Cologne (D), 1999, at 119 et seq.

<sup>6</sup> To this effect also *Gruber* (*supra* note 3), FamRZ 2000, at 1131; *Hau* (*supra* note 3), FamRZ 2000, at 1339; on the “central issue theory” (“Kernpunkttheorie”) of the ECJ in the case of Article 21 Brussels Convention see the references contained in *supra* note 5; further BGH (D) 8 February 1995, EuZW 1995, at 378 with commentary from *Geimer* = IPRax 1996, at 192 with commentary from *Hau*, at 177; LG Düsseldorf (D) 27 January 1998, IPRax 1999, at 461 et seq. (463) with commentary from *Otte*, at 440.

<sup>7</sup> Cf. on the relationship between domestic divorce proceedings and foreign proceedings for marriage annulment OLG Karlsruhe (D) 2 February 1984, IPRax 1985, at 36 with commentary from *Schlosser*, at 16; on the relationship between domestic divorce proceedings and foreign separation proceedings KG (D) 11 February 1983, NJW 1983, at 2324; on the relationship between domestic separation proceedings and foreign divorce proceedings OLG Karlsruhe (D) 6 March 1984, IPRax 1985, at 106 with critical commentary from *Henrich*, at 88. Cf. hereon also *Staudinger/Spellenberg*, Berlin (D), 1997, §§ 606 et seq. ZPO, paras. 439 et seq.

<sup>8</sup> Cf. *Henrich*, *Internationales Scheidungsrecht*, Bielefeld (D), 1998, para. 14.

<sup>9</sup> Cf. the *Borrás*-Report (*supra* note 4), para. 54.

<sup>10</sup> Cf. in Part I of this article under Section II. 1 a), EuLF 2000/01 (E), at 273 et seq.

<sup>11</sup> *Gruber* sees this differently (*supra* note 3), FamRZ 2000, at 1132; *Hau* (*supra* note 3), FamRZ 2000, at 1339.

<sup>12</sup> Cf. Article 30 of the Council Regulation (EC) No. 44/2001 of 22 December 2000, OJ 2001 L12, at 1 et seq.; hereon *Kohler*, in: *Gottwald* (ed.), *Revision der EuGVÜ, Neues Schiedsverfahrensrecht*, Bielefeld (D), 2000, at 1 et seq. (24 et seq.).

fori must be served before being lodged with the court, the time when it is received by the authority responsible for service. This is of course, in both cases subject to the proviso that the applicant has not subsequently failed to take steps to either have service of the document effected on the respondent or have the document lodged with the court which he or she was obliged to take according to the respective *lex fori*.<sup>13</sup> In this way, the previously effective “Windhundprinzip”<sup>14</sup> (“greyhound principle”) of Article 21 of the Brussels Convention in European procedure law is overcome and the determination of which proceeding has precedence is no longer dependent on the vagaries of international service.

#### 4. Consequences

The effect according to Article 11(1) and 11(2) MatR of the *lis pendens* of a proceeding based on the same cause of action or a dependent action is that the court later seised must *ex officio* stay its proceedings until the jurisdiction of the court first seised is established. To avoid negative conflicts of jurisdiction, the court second seised shall only then according to Article 11(3) sentence 1 MatR, decline jurisdiction and dismiss the application when the jurisdiction of the court first seised is established.<sup>15</sup> Whether the court first seised has jurisdiction, is to be determined by this court according to Articles 2-6 MatR or alternatively according to its autonomous domestic procedure law.<sup>16</sup> The relevant point in time for the determination of jurisdiction is when the proceeding was instituted according to Article 11(4) MatR. If the jurisdiction depends on the requirement of a minimum period of residence of the applicant in the State of the court claiming jurisdiction – e.g. Article 2(1), lit. a, brackets 5 and 6 MatR – then this requirement must already be fulfilled when the court is seised according to Article 11(4) MatR; the court first seised may not establish its jurisdiction by reference to a criterion which was not fulfilled until after the relevant point in time.<sup>17</sup> In such a case, the proceeding before the court second seised has precedence, as long as the conditions under Articles 2 through 8 MatR for granting jurisdiction to this court second seised were at an earlier point in time satisfied than those for the court first seised.

If the court second seised has declined jurisdiction, the applicant before this court may according to Article 11(3) sentence 2 MatR bring that action before the court first seised. The jurisdiction of the court first seised to examine this counterclaim arises as a rule from Article 5 MatR.<sup>18</sup> Article 11(2), sentence 2 MatR supersedes the *lex fori* of the court first seised in terms of its field of application; in particular, objections to the permissibility of the counterclaim based on the *lex fori* (e.g. expiry of a time limit) are not possible.<sup>19</sup> Arti-

cle 11(3), sentence 2 MatR is above all of practical importance if the counterclaim is more far reaching than the claim before the court first seised, e.g. the counterclaim seeks divorce or annulment of the marriage, whereas solely a legal separation proceeding is pending before the court first seised. In this way, the applicant before the court second seised (now the counter-applicant before the court first seised) gains above all time because he or she must not first wait for the outcome of the legal separation proceeding before the court first seised.<sup>20</sup> Due to lack of uniformity in conflict-of-laws provisions for divorce in the European Union, this course of action is naturally only advisable if the application before the court second seised is also likely to succeed according to the divorce law of the court first seised.<sup>21</sup>

The far-reaching barring effect of dependent actions under Article 11(1) MatR also has the further result that the *res judicata* effect of the judgment handed down by the court first seised can be different from this *lis pendens* effect. This is because the *res judicata* effect of a decision is judged according to the *lex fori* (i.e. law of the court first seised), whereas the *lis pendens* effect must be determined solely according to Article 11(2) MatR.<sup>22</sup> As a result, it follows that after the proceedings before the court first seised are concluded by final judgment, an application (which was previously disallowed while the proceeding before the court first seised was pending) to institute a matrimonial proceeding before the court of another Member State having a further reaching objective than the first proceeding, may be resumed. Therefore, if upon application of the wife, the parties to a German-Italian marriage are legally separated by final judgment of the Italian court first seised (“*separazione giudiziale*”), the German husband is thereafter no longer impeded from filing his petition for divorce before a German court, which while the legal separation proceeding was still pending, was disallowed.

## II. Recognition and Enforcement of Judgments

### 1. General

The recognition and enforcement of judgments is regulated by Chapter III of the Regulation. In this Chapter, the concept of a “decision” is first of all defined and is then followed by Sections on the recognition (Articles 14 to 20), the enforcement (Articles 21 to 31) and the common provisions (Articles 32 to 35).

The provisions of Chapter III apply to all judgments pronounced by a court of a Member State on a matrimonial matter or on the parental responsibility of a child of both spouses given on the occasion of a matrimonial proceeding.<sup>23</sup> Like the

<sup>13</sup> Gruber (*supra* note 3), FamRZ 2000, at 1133.

<sup>14</sup> Geimer/Schütze (*supra* note 5), para. 10 on Article 21.

<sup>15</sup> In principle, this presupposes the legal force of the relevant (intermediate) judgment of the court first applied to, cf. Gruber (*supra* note 3), FamRZ 2000, at 1133; to this effect on Article 21 Brussels Convention Geimer/Schütze (*supra* note 5), para. 44 on Article 21.

<sup>16</sup> Cf. on Article 21 Brussels Convention ECJ 27 June 1991 – 351/89 – *Overseas Union v New Hampshire Insurance*, IPRax 1993, at 34 (para. 23) with commentary from Rauscher/Gutknecht, at 21; Kropholler (*supra* note 5), para. 21 on Article 21.

<sup>17</sup> To this effect also Hau (*supra* note 3), FamRZ 2000, at 1339.

<sup>18</sup> Cf. the Borrás-Report (*supra* note 4), paras. 42 and 55.

<sup>19</sup> Gruber (*supra* note 3), FamRZ 2000, at 1134; see to this effect the Borrás-Report (*supra* note 4), para. 55; for a different view Vogel, Interna-

tionales Familienrecht – Änderungen und Auswirkungen durch die neue EU-Verordnung, MDR 2000, at 1045 et seq. (1049).

<sup>20</sup> Gruber (*supra* note 3), FamRZ 2000, at 1134.

<sup>21</sup> Gruber (*supra* note 3) correctly refers to this in n. 55.

<sup>22</sup> *Ibid.*; see also to this effect on the Brussels Convention Kropholler (*supra* note 5), paras. 9 et seq. on Article 26; Geimer/Schütze (*supra* note 5), paras. 32 on Article 26.

<sup>23</sup> On the concepts “matrimonial matter” and “parental responsibility” see Article 1; hereon in more detail in Part I under Section II. 1, EuLF 2000/01 (E), at 273 et seq.; further Wagner, Die Anerkennung und Vollstreckung von Entscheidungen nach der Brüssel II-Verordnung, IPRax 2001, at 73 et seq. (76 et seq.).

Brussels Convention, the MatR proceeds from a broad concept of “judgment”.<sup>24</sup> In particular, the recognition according to Article 13(1) MatR – different to the updating of civil status records under Article 14(2) MatR – does not depend on the matrimonial judgment having become *res judicata* in the first State.<sup>25</sup> Therefore, according to Article 13(1) MatR, provisional orders for relief – e.g. provisional rulings to govern the custodial, determination of residence or access rights during the matrimonial proceeding – are also capable of recognition within the scope of application of the MatR.<sup>26</sup> This also applies to provisional measures which are taken by courts of the Member States in urgent cases according to Article 12 MatR and based on their autonomous law regarding jurisdiction, as long as the cases concern people or assets situated in the State making the decision.<sup>27</sup> Under Article 13(3) MatR, documents which have been formally drawn up or registered as authentic instruments and are enforceable in one Member State as well as settlements which have been approved by a court, are expressly put on the same footing as judgments. Furthermore, the scope of Chapter III extends, according to Article 13(2) MatR, to decisions fixing the costs and expenses of proceedings under this Regulation.

An important restriction can be inferred from the German wording of Article 13 MatR only with difficulty, but results from the other language versions of Article 13 MatR,<sup>28</sup> the 15<sup>th</sup> recital of the Regulation as well as the materials leading to the Brussels II Convention of 28 May 1998:<sup>29</sup> according to this restriction, only such judgments which *sustain* a petition for divorce or an application for legal separation or annulment of marriage, can be recognised under Articles 14 to 20 MatR. In contrast, Chapter III of the MatR is not applicable to the recognition of judgments which reject the application in the matrimonial matter as impermissible or unfounded.<sup>30</sup> The aim of this restriction is to prevent courts in Member States with liberal divorce laws from being impeded in granting a divorce only because the court of another Member State having jurisdiction under the MatR had previously rejected the petition for divorce according to its stricter divorce laws.<sup>31</sup> For these reasons, the recognition of judgments having dismissed an ac-

tion in matrimonial matters is also excluded, within the territorial scope of application of the MatR, under the multilateral or bilateral agreements now supplanted by the MatR or alternatively under the autonomous law of the Member States.<sup>32</sup>

Lastly, it must be noted that according to the MatR, only the judgment relating to the dissolution of matrimonial ties or the legal separation (i.e. status proceedings) is recognised; therefore, recognition under the Regulation does not extend to (ancillary) judgments on the financial consequences of the divorce (maintenance, matrimonial property rights, adjustment of pension rights etc),<sup>33</sup> even if these are incorporated in the judgment.<sup>34</sup> Also excluded from recognition are the dictums of the court concerning the fault of one or both of the spouses, which are still provided for under the laws of some Member States.<sup>35</sup> The same applies to the motions to ascertain the existence or non-existence of a marriage<sup>36</sup> and to private divorce proceedings.<sup>37</sup>

## 2. Grounds for Non-Recognition

The prerequisites for the recognition of judgments in matrimonial or custody matters are to a large extent aligned to those of the Brussels Convention. The provisions of the MatR in this respect refer to the principle of mutual trust between the Member States. The grounds of non-recognition of a judgment are therefore necessarily limited to a minimum.<sup>38</sup> In particular, a review as to the substance of a judgment (“*révision au fond*”) is ruled out. (cf. Article 19 MatR).<sup>39</sup> Furthermore, the MatR in Article 17, sentence 1 prohibits – in accordance with the principle of Article 28(3) of the Brussels Convention – the review of the jurisdiction of a court of the Member State of origin.<sup>40</sup> This applies regardless of whether the court of the Member State of origin based its jurisdiction on Articles 2 to 6 MatR, or on its national law<sup>41</sup> within the boundaries of Article 8(1) MatR.<sup>42</sup> The recognition of foreign matrimonial or custodial judgments may not be refused, even

<sup>24</sup> For this reason it is of no importance whether the judgment is given as a decree, order, decision or whatever else the judgment may be called; cf. Article 13(1) MatR (at the bottom).

<sup>25</sup> Article 13(1) MatR only requires, just as Article 25 Brussels Convention, that the judgment is “pronounced” (“given” under the Brussels Convention) by a court of a Member State; cf. *Helms*, Die Anerkennung ausländischer Entscheidungen im Europäischen Eheverfahrensrecht, FamRZ 2001, at 258 et seq. (260); see also to this effect on Article 25 Brussels Convention *Geimer/Schütze* (*supra* note 5), para. 33 on Article 25.

<sup>26</sup> *Helms* (*supra* note 25).

<sup>27</sup> *Helms* deviates from this view (*supra* note 25), in that he maintains only provisional rulings made in the forum of jurisdiction of the main proceedings under Article 3 MatR may be recognised in accordance with Article 13(1) MatR.

<sup>28</sup> Article 13(1) MatR clarifies this matter: “Judgment means a divorce, legal separation or marriage annulment pronounced by a court (...)”

<sup>29</sup> Cf. the *Borrás-Report* (*supra* note 4), para. 60.

<sup>30</sup> *Kohler*, Internationales Verfahrensrecht für Ehesachen in der Europäischen Union: Die Verordnung „Brüssel II“, NJW 2000, at 10 et seq. (13); *Wagner* (*supra* note 23), at 73 et seq. (76); *Helms* (*supra* note 25), FamRZ 2001, at 258.

<sup>31</sup> *Wagner* (*supra* note 30); similar *Hau* (*supra* note 3), FamRZ 1999, at 485.

<sup>32</sup> To this effect *Kohler* (*supra* note 30), NJW 2001, at 14 (see n.58); *Gruher* (*supra* note 3), FamRZ 2000, at 1135; for a different view see *Helms* (*supra* note 25), FamRZ 2001, at 258 et seq.

<sup>33</sup> Cf. hereon already in Part I of this article under Section II. 1, EuLF 2000/01 (E), at 273 et seq.

<sup>34</sup> *Wagner* (*supra* note 23).

<sup>35</sup> Cf. recital (10) on the MatR as well as the *Borrás-Report* (*supra* note 4), paras. 22 and 64.

<sup>36</sup> Cf. in Part I of this article under Section II. 1 a), EuLF 2000/01 (E), at 273 (see n. 21 with further references).

<sup>37</sup> *Ibid.*, see n. 23 with further references.

<sup>38</sup> Cf. recital (16) on the MatR.

<sup>39</sup> Cf. *ibid.*, recital (17). This ruling out corresponds to the common practice in more recent State treaties, cf. e.g. Article 29 Brussels Convention, Article 27 CPC. However, this does not preclude a review and if necessary an alteration of the custody matter judgment rendered in another Member State on the basis of a change in circumstances, cf. the *Borrás-Report* (*supra* note 4), para. 78.

<sup>40</sup> Cf. also hereon recital (17) on the MatR.

<sup>41</sup> The recognition rules of the MatR are also for this reason valid for judgments in matrimonial matters and the related custody matters, which – from the perspective of the Member State of origin – in no way display any foreign connection, cf. *Wagner* (*supra* note 23), IPRax 2001, at 77 et seq.; also to this effect on the Brussels Convention *Kropholler* (*supra* note 5), para. 4 on Article 25.

<sup>42</sup> Cf. on these boundaries in Part I of this article under Section III. 5, EuLF 2000/01 (E), at 278 et seq.

if the court of the Member State of origin assumed jurisdiction based on a gross misunderstanding of the provisions of Chapter II of the MatR.<sup>43</sup> In particular, this court's infringement of the jurisdiction rules of the MatR (Articles 2 to 8) cannot be sanctioned in the State in which recognition is sought referring to the public policy clause in Article 15(1), lit. a MatR or alternatively Article 15(2), lit. a MatR.<sup>44</sup> The sole exception applies, according to Article 16 MatR, when recognition is sought in a Member State having concluded an agreement on the recognition and enforcement of judgments with a third State. In this case the recognition may be refused if the court of the Member State of origin has based its judgment according to Article 8(1) MatR on its domestic law which is not in line with Articles 2 to 7 MatR.<sup>45</sup> Moreover, the MatR differentiates between the grounds of non-recognition of judgments in matrimonial and those in custodial matters.<sup>46</sup>

### a) Matrimonial Matters

The grounds for non-recognition of judgments in matrimonial matters, which are standardised in Article 15(1) MatR, correspond to a large extent almost word for word to the respective rules of the Brussels Convention (Article 27) or alternatively the EC Directive No. 44/2001 (Article 34), which will take its place.<sup>47</sup>

Deviations result mostly from the requirement of timely service of the documents instituting the proceedings under Article 15(1), lit. b MatR and safeguards against judgments in default. Contrary to Article 27(2) of the Brussels Convention, but consistent with the new version of the provision in Article 34 No. 2 of the Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, an examination of whether proper service occurred is dispensed with. In this way, the refusal of recognition cannot be based only on the infringement of procedural provisions for service<sup>48</sup> in the Member State of origin;<sup>49</sup> rather it depends more on whether the respondent had sufficient opportunities to defend him or herself in the proceedings in the Member State of origin. In accordance with the scope of this rule, the

respondent cannot apply for non-recognition based on the improper institution of proceedings, if it is established that he or she has accepted the judgment unequivocally, e.g. it may be deduced from the behaviour of the respondent (for instance a subsequent marriage) that he or she assumed that the marriage ties were validly dissolved.<sup>50</sup>

In view of the still considerable material differences between the divorce laws of the Member States, the most important ground for non-recognition in matrimonial matters is probably the public policy clause under Article 15(1), lit. a MatR. However, Article 18 MatR states clearly that the recognition of a judgment in matrimonial matters may not be refused for the sole reason that the law of the Member State in which such recognition is sought would not allow divorce, legal separation or annulment of marriage based on the same facts. A period of separation which according to the divorce law of the Member State of origin is shorter than that prescribed by the State in which recognition is sought, thus impedes the recognition of the divorce judgment no more than a petition for divorce based on the consensus of the spouses (and not on fault or irretrievable breakdown of marriage).<sup>51</sup>

Since the concept of "law" in Article 18 MatR according to the legislative history of the provision<sup>52</sup> includes private international law provisions of the State in which recognition is sought, the correct application of conflict-of-laws rules by the court of the Member State of origin cannot be reviewed at the stage of recognition.<sup>53</sup> This results also from the fact that a provision corresponding to Article 27, No. 4 of the Brussels Convention is missing in Article 15 MatR.<sup>54</sup> Apart from that, the principles developed by the ECJ for interpretation of Article 27, No. 1 of the Brussels Convention also apply to the interpretation of the public policy proviso in Article 15 MatR. Accordingly, this proviso can only lead to non-recognition of matrimonial judgments given in other Member States in limited exceptional cases and the ECJ reserves the power to monitor the boundaries within which the courts of Member States may rely on its national public policy.<sup>55</sup>

The legal consequences of the judgment for which recognition is sought, being *irreconcilable* with a judgment of the State in which recognition is sought or with a judgment of a non-Member State which is recognised in this State, are also regulated under the MatR using the Brussels Convention as an example. Accordingly, the principle of priority applies under Article 15(1), lit. d MatR if the competing judgments are judgments of Member States<sup>56</sup> or alternatively judgments of

<sup>43</sup> Helms (*supra* note 25), FamRZ 2001, at 262.

<sup>44</sup> Article 17 sentence 2 MatR also to this effect on Article 28(3) Brussels Convention ECJ 23 September 1999 – C-7/98 – *Krombach v Bamberski*, EuLF 2000/01 (E), at 129 et seq. = IPRax 2000, at 406 (paras. 32 et seq.) with commentary from *Pieckenbrock*, at 364.

<sup>45</sup> Cf. on the parallel provision in Article 16 of the Brussels II Regulation the *Borrás-Report* (*supra* note 4), para. 74. From the German point of view, the significance of Article 16 MatR is slight, as both multi- and bilateral recognition agreements concluded by the Federal Republic of Germany merely seek to make recognition easier, not more difficult, cf. *Schack*, Internationales Zivilverfahrensrecht, 2<sup>nd</sup> ed., Munich (D), 1996, para. 807 with further references.

<sup>46</sup> On the reasons for this differentiation cf. the *Borrás-Report* (*supra* note 4), para. 74.

<sup>47</sup> Cf. on the grounds for non-recognition in detail the *Borrás-Report* (*supra* note 4), paras. 69 et seq.; further *Wagner* (*supra* note 23), at 78.

<sup>48</sup> Decisive for the service of judicial and extrajudicial documents amongst the Member States of the EU since 31 May 2001 is the new Council Regulation (EC) No. 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters of 29 May 2000, OJ 2000 L160, at 37 et seq.

<sup>49</sup> Helms (*supra* note 25), FamRZ 2001, at 264. Up to now, a different view has been held in the case-law of the ECJ on Article 27, No. 2 Brussels Convention, cf. ECJ 3 July 1990 – C-305/88 – *Lancray v Peters*, IPRax 1991, at 177 with commentary from *Rauscher*, at 155 = EuZW 1990, at 352 with commentary from *Geimer*.

<sup>50</sup> Cf. the *Borrás-Report* (*supra* note 4), para. 70 with examples. The mere failure to make use of legal remedies against the judgment of the State of origin does not, however, establish such an unequivocal acceptance on the part of the respondent, cf. *Helms* (*supra* note 25), FamRZ 2001, at 264.

<sup>51</sup> Helms views this correctly (*supra* note 25), FamRZ 2001, at 263.

<sup>52</sup> Cf. the *Borrás-Report* (*supra* note 4), para. 76.

<sup>53</sup> *Wagner* (*supra* note 23), at 77; *Helms* (*supra* note 25), FamRZ 2001, at 263.

<sup>54</sup> In Article 34 of Regulation (EC) No. 44/2001 of 22 December 2000 this ground for non-recognition has been abolished.

<sup>55</sup> Cf. hereon ECJ 28 March 2000 – C-7/98 – *Krombach v Bamberski*, EuLF 2000/01 (E), at 129 et seq. (paras. 21 et seq.); ECJ 11 May 2000 – C-38/98 – *Renault v Maxicar*, EuLF 2000/01 (E), at 133 et seq. (paras. 26 et seq.); hereon *Lopez-Tarruella*, The Public Policy Clause in the System of Recognition and Enforcement of the Brussels Convention, EuLF 2000/01 (E), at 122 et seq.

<sup>56</sup> This case was not regulated in Article 27 Brussels Convention; corre-

one Member State and one non-Member State. This means that the earlier decision prevails as long as the requirements for its recognition are fulfilled. On the other hand, under Article 15(1), lit. c MatR the absolute precedence of judgments of the State in which recognition is sought – in accordance with Article 27, No. 3 of the Brussels Convention – remains.<sup>57</sup> Consequently, these domestic judgments are privileged, even if they are only handed down after the foreign judgment. The effects of a matrimonial judgment from another Member State which could at first be recognised, therefore cease with the coming into force of a competing domestic judgment. The question thus arises, of whether this also applies to domestic *dismissal of action* judgments; e.g. whether the final dismissal of a petition for divorce by a German court prevents the recognition of a divorce judgment – handed down earlier or later – of another Member State. An argument for a positive answer to this question could be found in the liberal wording of Article 13(1) MatR (judgment “[f]or the purposes of this Regulation”). As Helms<sup>58</sup> rightly points out, the result would be, however, an “unfettered divorce tourism” because the unsuccessful applicant before a German family court would not be prevented from directly afterwards lodging the petition for divorce anew before a court of another Member State which has jurisdiction under Article 2 MatR, and the subsequent judgment granting the petition would then have to be recognised in Germany. The purpose of Article 13(1) MatR, which is to prevent the obligatory recognition by Member States with more tolerant internal divorce provisions, of foreign judgments dismissing the petition for divorce, in contrast suggests a restrictive interpretation of this provision, namely, that the definition of “judgment” applies only to such foreign judgments which have to be recognised and enforced in the Member States, but does not apply to the domestic judgments of the Member State in which recognition is sought and which are opposed to such recognition.<sup>59</sup>

The practical scope of this question of interpretation should not of course be overestimated for two reasons. Firstly, the percentage of dismissed motions in matrimonial matters, namely in divorce and legal separation proceedings, is according to experience low; secondly, a domestic judgment only bars the recognition and enforcement of a judgment from another Member State under Article 15(1), lit. c MatR when the two judgments are “irreconcilable” with another. However, it must be noted, that not every judgment in a dependent action which according to Article 11(2) MatR justifies the objection of *lis pendens*, also constitutes a ground of non-recognition according to Article 15(1), lit. c MatR.<sup>60</sup> Rather, the starting point for an autonomously determined concept of “irreconcilability” is the concept of what is the “same cause of

action” under Article 11(1) MatR.<sup>61</sup> The free movement of judgments in matrimonial matters and the consistent assessment of civil status in all Member States, at which the Regulation aims, calls in this respect for a restrictive interpretation of “irreconcilability”. Accordingly, the recognition in particular of a foreign matrimonial judgment which has *more far reaching consequences on the civil status* of the parties, should not as a result be ruled out only because a judgment in the State in which recognition is sought, has just pronounced another judgment which has lesser consequences for the marital status. Consequently, the annulment of a marriage in the domestic jurisdiction prevents the recognition of a foreign judgment which grants a divorce; in contrast to this however, the legal separation of spouses granted by a German court does not oppose recognition of a later grant of divorce in relation to the same marriage by a court of another Member State.<sup>62</sup> Moreover, a German judgment which rejected the petition of divorce as unfounded because the statutory period of separation had not yet been fulfilled, may not in any case stand in the way of a later foreign judgment granting divorce if the marriage, at the time the foreign divorce judgment was pronounced, could also have been dissolved by a German court.

#### b) Custody Law Matters

In Article 15(2) MatR the grounds of non-recognition for judgments on the parental responsibility<sup>63</sup> of children of both spouses given on the occasion of matrimonial proceedings are especially regulated. In this way, not only the safeguarding of the rights of the opposing parent, but also first and foremost, the *welfare of the child* is taken into account in the recognition of custody law judgments.<sup>64</sup> The welfare of the child must therefore be especially considered in the context of the public policy proviso in Article 15(2), lit. a MatR.<sup>65</sup> In addition, the recognition of a custody law judgment under Article 15(2), lit. b MatR is also refused if the child were not given sufficient opportunity to be heard.<sup>66</sup> Article 15(2), lit. d MatR ensures that the person claiming infringement of his or her parental responsibility through the judgment, is also given the opportunity to be heard. Lastly, special provisions also apply to cases where the judgment for which recognition is sought, is irreconcilable with a competing judgment in the State in which recognition is sought, or alternatively, is irreconcilable with a judgment in a non-Member State fulfilling the criteria for recognition in this State and the child has his or her habitual residence in the non-Member State. The provisions for recognition of judgments in matrimonial matters state that any judgment in the State in which recognition is sought but only

responding to the already prevailing view on the Brussels Convention (cf. Kropholler (supra note 5), para. 49 on Article 27; Geimer/Schütze (supra note 5), para. 137 on Article 27, the MatR also extends the application of the principle of priority to this matter.

<sup>57</sup> Rightly critical thereof Helms (supra note 25), FamRZ 2001, at 265 with further references, on the criticism of the generally privileged status of judgments from non-Member States under Article 27 No. 3 Brussels Convention.

<sup>58</sup> Helms (supra note 25), FamRZ 2001, at 265.

<sup>59</sup> Also to this effect Helms (supra note 58); for a different view Kobler (supra note 30), NJW 2001, at 13 et seq. (nn. 8 and 38).

<sup>60</sup> On the varying scope of the *res judicata* and the *lis pendens* effects see above under Section I. 4. (at the end of the text).

<sup>61</sup> On the parallel set of issues in the Brussels Convention cf. Geimer/Schütze (supra note 5), paras. 138 et seq. on Article 27.

<sup>62</sup> Helms (supra note 25), FamRZ 2001, at 265; already to this effect the Borrás-Report (supra note 4), para. 71.

<sup>63</sup> On the concept of “parental responsibility” cf. Part I of this article under Section II. 1. b), EuLF 2000/01 (E), at 274.

<sup>64</sup> Cf. Wagner (supra note 23), IPRax 2001, at 78.

<sup>65</sup> Cf. the parallel regulation contained in Article 23(2), lit. d of the Hague Convention of 19 October 1996 on the Protection of Children (CPC).

<sup>66</sup> Cf. the parallel regulation contained in Article 23(2), lit. b CPC. Regarding the hearing of the child, the child must be heard in accordance with the rules applicable in the Member States concerned, which must include the rules in the UN Convention of 20 November 1989 on the Rights of the Child, which is in effect in all Member States of the MatR, and in particular Article 12 thereof, cf. the Borrás-Report (supra note 4), para. 73.

an *earlier* judgment from a foreign court can prevent recognition (Articles 15(1), lit. c and d MatR respectively); in contrast, in custody law matters under Articles 15(2), lit. e and f MatR only a *later* judgment in the State in which recognition is sought or of a non-Member State in which the child has his or her habitual residence and which fulfils the conditions necessary for its recognition in the State in which recognition is sought, impedes recognition.<sup>67</sup> In this way, it can be ensured that – following the example set by Article 23(2), lit. e Hague Convention on the Protection of Children (CPC) – only those judgments which best take into account the child’s actual situation, are enforced.

### 3. Recognition Proceedings

Just like the Brussels Convention,<sup>68</sup> the MatR follows the principle of *automatic* recognition. Decisions handed down in one of the Member States in matrimonial and custody law cases are consequently recognised in all other Member States without requiring any special procedure (Article 14(1) MatR). Compared with the previous legal situation in most Member States, on the other hand, considerable progress, has been brought about by the rules of Article 14(2) MatR.<sup>69</sup> According to this, no special procedure for updating the civil-status records of one Member State based on court judgments from another Member State in a matrimonial matter, may be prescribed; a judgment against which no further legal recourse may be had under the law of the State of origin, is in itself sufficient.

For *German* law, this has the practically important consequence that the previous monopoly of the “Landesjustizverwaltung” (a special authority under the control of the Ministers of Justice of the “Bundesländer”) for recognition of foreign decisions in matrimonial matters under Article 7 § 1 of the Family Law Amendment Act<sup>70</sup> has since the entry into force of the MatR been significantly restricted. In as far as the decision of a German court or a German public authority depends on the incidental question of whether or not a decision handed down in a matrimonial law case in another Member State is to be recognised, the court or public authority seised of the matter may now independently consider this preliminary question (cf. Article 14(4) MatR). This applies particularly to registry offices which e.g. must decide on the remarriage of spouses divorced abroad, or similarly to fiscal and welfare authorities whose decisions are dependent upon the preliminary question of whether the marriage has been validly dissolved. In this way, the recognition procedure in matrimonial matters is correlated to the procedure for recognition of property law judgments (Article 26 Brussels Convention, § 328 German Civil Procedure Code) as well as to judgments on non-contentious matters (see § 16 a German Act on Mat-

ters of Non-Contentious Jurisdiction). By doing so, the risk has been enhanced that in future also in matrimonial matters contradictory judgments might be handed down by German courts and authorities on the recognition of judgments given in another Member State.<sup>71</sup> The special recognition proceedings conducted before the “Landesjustizverwaltung” will in future be restricted to judgments in matrimonial matters from States which are not Member States of the MatR.<sup>72</sup> Admittedly, under Article 14(3) of the MatR, any interested party<sup>73</sup> may apply for a decision that a judgment relating to divorce, legal separation or annulment of marriage given in another Member State is either to be recognised or not recognised. However, in Germany this decision will in future no longer be made by the “Landesjustizverwaltung”, but rather, based on Sections 2 and 3 of Chapter III MatR, by the family court having jurisdiction in the proceedings for enforcement of judgments from other Member States under Articles 21 et seq. MatR,<sup>74</sup> and such decision is only binding inter partes. Any action for interim declaratory judgement on whether a judgment from another Member State in a matrimonial matter can be recognised is admittedly not barred by this.<sup>75</sup>

### 4. Declaration of Enforceability

The provisions of the MatR on enforcement apply on the one hand to court orders as to costs in matrimonial cases (Article 13(2) MatR), and on the other hand to judgments regarding parental responsibility in respect of a child of both spouses (Article 21(1) MatR). Just like the Brussels Convention, the Regulation only deals with the procedure for a *declaration* of enforceability of a judgment handed down in another Member State.<sup>76</sup> By contrast, enforcement of a judgment is governed by the *lex fori* of the respective State in which the judgment is executed. Substantively, the procedure for a declaration of enforceability under the MatR follows closely the procedure under the Brussels Convention (Articles 31 et seq.) or alternatively, under the future Council Regulation (EC) No. 44/2001 (Articles 38 et seq.). Consequently, a more detailed treatment of this matter can be dispensed with here.<sup>77</sup>

<sup>67</sup> Cf. *Wagner* (supra note 23), IPRax 2001, at 78; *Helms* (supra note 25), FamRZ 2001, at 265 et seq.; further the *Borrás*-Report (supra note 4), para. 73 (at the end of the text).

<sup>68</sup> Cf. Article 26 Brussels Convention.

<sup>69</sup> The *Borrás*-Report (supra note 4), para. 63, refers correctly to this point, as this regulation shall lead to a noticeable saving of time and money for the party affected.

<sup>70</sup> Cf. on this regulation in more detail *Staudinger/Spellenberg* (supra note 7), Article 7 § 1 of the German Family Law Amendment Act (FamRändG), at 654 et seq.; *Henrich* (supra note 8), paras. 28 et seq., each with further references.

<sup>71</sup> Cf. *Vogel* (supra note 19), MDR 2000, at 1049; *Wagner* (supra note 23), IPRax 2001, at 79; *Helms* (supra note 25), FamRZ 2001, at 261.

<sup>72</sup> These are not just the third countries, but also the EC Member State *Denmark*, cf. in Part I of this article under Section II. 2, EuLF 2000/01 (E), at 274.

<sup>73</sup> These are not just the parties involved in the foreign matrimonial proceedings, but also third parties (e.g. children, heirs) as well as authorities (e.g. register offices), cf. *Helms* (supra note 25), FamRZ 2001, at 201, but also public prosecutor’s office, in so far as a corresponding function is permitted under the national law of the state in which the judgment is to be recognised, cf. the *Borrás*-Report (supra note 4), para. 65.

<sup>74</sup> The local jurisdiction shall be determined in accordance with Article 22(3) MatR by the internal law of the Member State in which proceedings for recognition or non-recognition are brought. In Germany, according to Annex I of the MatR local jurisdiction shall lie with the Family Court (Familiengericht) Pankow/Weissensee in the district of the Kammergericht (KG Berlin); in the districts of the remaining Oberlandesgerichte with the Familiengericht located at the seat of the respective Oberlandesgericht and otherwise as determined by Article 22(2) MatR.

<sup>75</sup> Cf. § 256(2) ZPO.

<sup>76</sup> In the United Kingdom, the registration replaces the writ of execution in accordance with Article 21(2) MatR.

<sup>77</sup> Cf. on the details *Wagner* (supra note 23 ), IPRax 2001, at 79; *Vogel* (supra note 19), MDR 2000, at 1050.



### III. Concluding Evaluation

The entry into force of the MatR on 1 March 2001 undoubtedly signifies a milestone on the way to the desirable uniform determination of the matrimonial status of individuals in the European Union. By harmonising the rules on jurisdiction in Chapter II, the exorbitant fora favouring the State's own nationals<sup>78</sup> in matters of marriage and custody law have been restricted in terms of their ramifications on non-Member States judgments. In addition, the stringent obligation to respect earlier litispendency of matrimonial proceedings in other Member States has significantly reduced the danger of positive conflicts of jurisdiction and subsequently resulting contradictory judgments. Finally, the provisions of Chapter III have not only made the recognition and enforcement of judgments in matrimonial and custody matters significantly easier, but have also eliminated the procedural impediments which previously stood in the way of registering foreign judgments relating to divorce, legal separation or annulment of marriage.

Two aspects are particularly worthy of critical attention, i.e. firstly, the continuing strong importance of the nationality link in the law of jurisdiction and secondly, the lack of harmonisation of conflict of laws regulations on the dissolution of marriage in the Member States.

#### 1. Does the Nationality Link in Article 2 of the MatR Infringe Article 12 of the Treaty of Rome?

Nationality, as shown previously,<sup>79</sup> is incorporated into the rules of jurisdiction under the MatR, on the one hand as a qualifying feature for jurisdiction over actions initiated under Article 2(1), lit. a, bracket 6 MatR, and on the other hand as the forum patriae under Article 2(1), lit. b MatR. This then raises the question of, to what extent these provisions are compatible with the *prohibition on discrimination* in Article 12 of the Treaty of Rome, because there is to a large extent unanimity that not only the legislators of Member States but also the organs of the European Community themselves are bound by this prohibition on discrimination.<sup>80</sup> Although the ECJ until very recently could justify the nationality link in the private international laws of the Member States on the basis that Article 12 of the Treaty of Rome could only be applicable to the range of issues validly dealt with under the Treaty and thus could not encompass matters of conflict of family laws,<sup>81</sup> this is now, since the entry into force of the Treaty of Amsterdam, out of the question because this Treaty created a legal basis for secondary Community law in the field of international matrimonial procedure law in Articles 61, lit. c, 65 and 67(1) of the Treaty of Rome.<sup>82</sup>

However, if one assumes that the European Council were bound by Article 12 of the Treaty of Rome at the time it en-

acted the MatR, then jurisdictions linked to nationality raise some doubts because their discriminatory effects can absolutely not be denied. Thus according to Article 2(1), lit. a, bracket 6 MatR, that spouse who after the failure of a marriage moves his or her habitual residence to his or her home State is in a more advantageous position because there he or she can petition for divorce after only six months. On the other hand, after the failure of a marriage, that spouse who – e.g. for professional reasons – is forced to make his or her habitual residence in a Member State other than the State of his or her nationality, is discriminated against. Thus a German wife suffers a disadvantage after the failure of her marriage in Italy if she moves her habitual residence to Austria instead of to Germany because there she must wait an additional half-year in order to file for divorce against her Italian husband.

Nevertheless, the jurisdictional link to the common nationality of spouses under Article 2(1), lit. b MatR also leads to discrimination because the application for divorce can be filed at any time in the State of common nationality, whereas, partners in a nationally-mixed marriage are forced to meet the criteria in Article 2(1), lit. a MatR. If a German wife accordingly wishes to divorce her German husband with whom she has been living in marriage in Italy, then she can at any time seise a German court. But if, on the other hand, the woman had been married to an Austrian then she only has the opportunity to do this if she moves her habitual residence back to Germany and has lived there for at least six months. Whether any grounds for justification which would stand up to a review of the MatR by the ECJ, can be found for such discrimination on the basis of nationality and the concomitant restriction on the free movement of persons, seems to be at least a matter of some doubt.<sup>83</sup>

#### 2. Requirement for Standardisation of Conflict of Marriage Law Provisions

Judicial practice in relation to the Brussels Convention has already shown that standardisation of jurisdiction law simultaneously with harmonisation of conflict of laws provisions has undesirable consequences, since the complainant will use his or her right to choose between the general and the special forum to seise the courts of that State whose private international law entails application of substantive law most favourable to the action sought. In order to counter the danger of such forum shopping, the Member States concluded in 1980 the Rome Convention on the Law Applicable to Contractual Obligations<sup>84</sup> to supplement the Brussels Convention. For the same reason, work on harmonising private international law of non-contractual obligations ("Rome II") has in the meantime begun.<sup>85</sup>

Parallel harmonisation of private international law in the field of marriage law is also inevitable because the dangers of forum shopping have only increased in view of the extensive

<sup>78</sup> Cf. § 606(1), No. 1 ZPO; Articles 14, 15 of the French Code Civil.

<sup>79</sup> Cf. Part I of this article under Section III. 2, EuLF 2000/01 (E), at 276.

<sup>80</sup> Cf. Geiger, EUV/EGV, 3<sup>rd</sup> ed., Munich (D), 2000, para. 3 on Article 12; Hau (*supra* note 3), FamRZ 2000, at 1335 with further references.

<sup>81</sup> Cf. also ECJ 10 June 1999 – C-430/97 – *Johannes v Johannes*, IPRax 2000, at 305, 306 et seq. with commentary from Rigaux, at 287 (on the adjustment of pension rights).

<sup>82</sup> Cf. Part I of this article under Section I. 2, EuLF 2000/01 (E), at 272 et seq.

<sup>83</sup> Cf. hereon in more detail Han (*supra* note 3), FamRZ 2000, at 1355-1357.

<sup>84</sup> Text reprinted in OJ 1980 L 266, at 1 et seq.

<sup>85</sup> Cf. the Council and Commission action plan on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice of 3 December 1998, OJ 1999 C 19, at 1 et seq., under item 40 b.

differences in both international and substantive divorce law in the Member States. Therefore, by unification of international conflict of divorce laws, the situation must be achieved that marriage is always dissolved according to the same substantive law by courts in different Member States which have jurisdiction under Article 2 MatR. Present-day legal differences will on the contrary only result in exacerbating the race of the spouses to get to the jurisdiction most favourable to their position on divorce and its consequences (or to ward off the same) because the priority principle is so strictly implemented under Article 11 MatR.

In addition to that, the entry into force of the MatR has entailed a notable discrepancy in conflict of law situations between the assessment of marriage on the one hand, and that of divorce on the other hand. While the *entering* into of a marriage in most Member States has been made dependent on the meeting of cumulative substantive marriage prerequisites in the State of nationality or alternatively, the State of domicile of both spouses, and also on the observance of the form requirements of the venue where the marriage is contracted (including some mandatory form requirements), the spouse wishing to get out of the marriage now has the opportunity of choosing from the catalogue of jurisdictions under Article 2 MatR the forum in a State where divorce is most strongly favoured substantively and in terms of conflict of laws ramifications, and he or she can then count on the recognition of the divorce in all Member States of the MatR. In this way, marriage seems, as *Kobler*<sup>86</sup> has correctly stressed, "in any case like an undesirable condition in conflict of laws situations whose coming about is to be made more difficult and whose elimination is to be made easier."

The lack of harmonisation of provisions on conflicts-of-law also leads ultimately to problems for judgments on parental responsibility occasioned by a matrimonial law proceeding because in particular, the interplay between the MatR and the Hague Conventions on the protection of adolescents and infants is still largely not clarified. The Hague Conventions are based on the principle of consonance of jurisdiction and applicable law: the court having jurisdiction under Articles 1 or 4 of the Convention on the Protection of Minors of 1961 or under Article 5 et seq. of the Convention on the Protection of Children of 1996, always decides on measures for the protec-

tion of the child's person or property under its own law (Articles 2, 4(1) of the Convention on the Protection of Minors of 1961; Article 15 of the Convention on the Protection of Children of 1996). This consonance has been disturbed since the MatR went into force because the two Hague Conventions according to Article 37 MatR have been superseded by Article 3 of the MatR with regard to jurisdiction for custody matters which are to be decided on the occasion of matrimonial proceedings.<sup>87</sup> This then raises the question, under which law, for instance, an Italian court on the occasion of the divorce of two German parents living there must decide upon the custody of a child which at the time of the divorce already has his or her habitual residence in Germany. The proper solution, in my opinion, would be to limit the consonance principle of the Hague Conventions to such cases in which the court would also have jurisdiction under the Hague Convention which is applicable in the forum State. If that is lacking, then the court having jurisdiction under Article 3 MatR must instead decide the matter of parental responsibility according to its own conflict of law provisions.<sup>88</sup>

Only when the work on creating European conflicts of laws rules in the area of matrimonial and child law, which is now still in its infancy,<sup>89</sup> is successfully completed will one be able to proceed to extend the substantive scope of the MatR, on the one hand, extending it to the further consequences of divorce, especially in the field of property law, with the aim of creating an all-encompassing European jurisdiction rule for divorce proceedings and on the other hand, to the dissolution of non-marital (heterosexual or homosexual) partnerships, the number of which has further risen in recent years in the Member States and which have increasingly been recognised as legal unions.<sup>90</sup>

<sup>86</sup> *Kobler* (*supra* note 80), NJW 2001, at 15.

<sup>87</sup> Cf. hereon in more detail *Kobler* (*supra* note 30), NJW 2001, at 13 et seq.; *Wagner* (*supra* note 23), IPRax 2001, at 74 et seq.

<sup>88</sup> Also to this effect likely *Jayme/Kobler* *Europäisches Kollisionsrecht 2000: Interlokales Privatrecht oder universelles Gemeinschaftsrecht?*, IPRax 2000, at 454 et seq. (457).

<sup>89</sup> Cf. hereon Council and Commission action plan (*supra* note 85), under item 41 f.

<sup>90</sup> Cf. hereon *Hausmann*, *Überlegungen zum Kollisionsrecht registrierter Partnerschaften*, in: *Festschrift für Henrich*, Bielefeld (D), 2000, at 241 et seq. (242 et seq.), with references.

## The Proper Forum for Illicit Acts in Cases of Cross-Border Infringement of Proprietary Commercial Rights

Proposed Interpretations of Article 5, No. 3 of the Brussels Convention

Rüdiger Pansch\*

### I. Introduction

In cases of violations of international scope, holders of intellectual property rights are frequently confronted with sig-

nificant difficulties in enforcing their claims. Non-standard national court practice and a labyrinth of international conventions and regulations of the European Community will not infrequently deter them from selecting the most advantageous international forum of jurisdiction. If an intellectual property right holder wants to avert a violation immediately

\* Doctoral student, University of Constance (D).