The New International Procedure in Matrimonial Matters in Europe

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I. Introduction

The free movement of persons is one of the fundamental freedoms guaranteed by the European Community Treaty (Articles 61 et seq. EC Treaty). It cannot be surprising, therefore, that the 'freedom to marry one's partner of choice', contained in Article 6(1) of the German Basic Law in the interpretation given to that provision by the Federal Constitutional Court in its famous 'Spaniard' Decision,[1] is increasingly being used across borders by people of different nationalities. As a result, the number of bi- and multinational marriages and families is increasing steadily.[2] Occasionally, a third person causes an impediment to a marriage because

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References to the following literature appear in abbreviated form:

Jayme/Hausmann, Internationales Privat- und Verfahrensrecht, 10th ed., 2000; *Kropholler*, Europäisches Zivilprozeßrecht, 7th ed., 2002; *Schack*, Internationales Zivilverfahrensrecht, 3rd ed., 2002; *Hau*, Das System der internatinoalen Entscheidungszuständigkeit im europäischen Eheverfahrensrecht, FamRZ 2000, 1333; *Helms*, Die Anerkennung ausländischer Entscheidungen im Europäischen Eheverfahrensrecht, FamRZ 2001, 257; *Kohler*, Internationales Verfahrensrecht für Ehesachen in der EU: Die Verordnung Brüssel II, NJW 2001, 10; *Pirrung*, Europäische justitielle Zusammenarbeit in Zivilsachen – insbes. das neue Scheidungsübereinkommen, ZEuP 1999, 834; *Pirrung*, Unification de droit en matière familiale: la Convention de l'Union européenne sur la reconnaissance des divorces et la question de nouveaux travaux d'Unidroit, Rev. dr. unif. 1998, 629; *Vogel*, Internationales Familienrecht: Änderungen und Auswirkungen durch die neue EU-Verordnung, MDR 2000, 1045; *Wagner*, Die Anerkennung und Vollstreckung von Entscheidungen nach der Brüssel II-Verordnung, IPRax 2001, 73.

[1] BVerfGE 31, pp. 58 et seq., at p. 67; see also the comments in *RabelsZ* 1972, vol. 36, pp. 2–140.

[2] The number of marriages entered into in Germany, where at least one of the partners did not have German nationality, increased from 5.86% in 1985 to 9.06% in 1995 and further to 9.48% in 1999; see Statistisches Jahrbuch für die Bundesrepublik Deutschland, 2001, p. 69.

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he or she is still unhappily married to the bride or groom. Getting this third person out of the way in a lawful manner can be a problem under international procedural rules for divorces. Quite often, there will be a race between the spouses for the most convenient forum and the end result, in quite a number of cases, is a limping marriage, respectively a limping divorce, namely when the divorce is not recognized by some countries. Although it is probably exaggerated to call the differences in substantive law and the occasional problems with procedural law regarding marriage and divorce in the EU a serious impediment to integration,[3] they certainly are disturbing, in particular for countries seeking an orderly international administration of justice.

The harmonization of substantive divorce law in the EU is certainly illusory for the time being – and in my opinion not even desirable, given the manifold religious and cultural specificities connected to marriage,[4] which should not be reduced to the lowest common denominator. The only promising approach can be found, therefore, in the harmonization of the rules of procedure, as demonstrated by the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters. This is precisely the approach taken by EC Regulation 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, which entered into force on 1 March 2001.[5] While this Regulation generally emulates the proven principles of the Brussels Convention – and therefore has been called 'Brussels II' by some – there is an important difference, which must not be forgotten: The Convention facilitates the free movement of judgments relating (almost exclusively) to pecuniary claims; status-related claims are explicitly excluded by Article 1(2)(1) of the Convention. The Regulation, by contrast, seeks to facilitate the mutual recognition of decisions affecting status,[6] in particular decisions dissolving marriage. In that respect, the criticism by *Jayme* is justified, namely that family status is being treated like merchandise and that the Regulation promotes circulation rather than continuity.[7] While marriage is actually made more difficult by the accumulation of connecting factors in Article 13(1) of the Introductory Code to the Civil Code (EGBGB), divorce is made considerably easier by the generous rules on jurisdiction and recognition, which can be found in the Regulation. From the point of view of conflicts of laws, as Christian Kohler has noted,[8] marriage seems to be an undesirable status. The Regulation is based on the assumption that the status of marriage is an impediment to personal freedom. While this assumption may be criticised, it obviously did not lead to a wider discussion prior to the enactment of the Regulation.

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3 So *Kohler*, NJW 2001, p. 10.
4 But see *Pirrung*, Rev.dr.unif. 1998, p. 638.
5 OJ 2000 L 160, p. 19. The rules for the application of the Regulation in Germany can be found in §§ 50–54 AVAG, as amended on 19 February 2001, BGBl. I 288.
6 And only those! See below at VI, note 70 and corresponding text.
7 *Jayme*, IPRax 2000, pp. 165 et seq., at p. 168.
8 *Kohler*, NJW 2001, p. 15.

II. Legal Basis

The legal basis of the Brussels Convention of 1968 ('Brussels I') was Article 293 (ex Art. 220) EC Treaty, according to which the Member States, 'shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals [...] the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards'. By contrast, the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (Matrimonial Convention) of 25 May 1998[9] was based on Article K.3(2) c) TEU, a provision created as part of the 'Third Pillar' on Cooperation in Justice and Home Affairs by the Maastricht Treaty of 7 February 1992. This Convention had been preceded by German initiatives as early as 1992[10] and by a draft from Heidelberg, dated 2 October 1993,[11] which also followed the model of the Brussels Convention of 1968 and covered the entire area of family and succession law. However, it turned out that the time was and still is not ripe for such an ambitious agreement. Therefore, the Matrimonial Convention was limited to questions of status.[12]

On 1 May 1999, shortly after the Council recommended to the Member States the adoption of the Matrimonial Convention,[13] the Amsterdam Treaty of 2 October 1997 entered into force. It removed judicial cooperation in civil matters from the Third Pillar of the TEU to the First Pillar creating a new Article 65 EC Treaty, which became part of Title IV on Visas, Asylum, Immigration and Other Policies Related to Free Movement of Persons. Pursuant to this Article 65, the Council is authorized to directly adopt 'measures [...] improving and simplifying [...] the recognition and enforcement of decisions in civil and commercial cases [...]' (Art. 65 a)). Consequently, it is no longer necessary to negotiate a convention, which must then be ratified by all Member States (*compare* Article 47 of the Matrimonial Convention). Instead, the Council can now directly adopt the necessary legislative

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[9] OJ 1998 C 221/1, with a Protocol on the Interpretation by the Court of Justice of the European Communities of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (OJ p. 19), and an Explanatory Report by *Alegría Borrás* (OJ pp. 27–68). The German text can also be found in FamRZ 1998, pp. 1416–1422. On the Matrimonial Convention see also *Finger* in FuR 1998, pp. 346–350; *Hau*, Internationales Eheverfahrensrecht in der EU, FamRZ 1999, pp. 484–488; and *Jayme/Kohler* in IPRax 1998, pp. 417 et seq., at p. 419–420.

[10] *Pirrung* in ZEuP 1999, p. 843; Rev.dr.unif. 1998, pp. 631 et seq. *See also Chr. Kohler*, [Art. 220 EC Treaty] et les conflits de juridictions en matière de relations familiales: premières réflexions, RDIPP 1992, pp. 221–240; *Sturlèse*, 'L'extension du système de la convention de Bruxelles au droit de la famille, Trav.com.fr.dr.int.pr. 1995–1998, pp. 49–64.

[11] A French version was published in *IPRax* 1994, pp. 67–69.

[12] Concerning the legislative history preceding the Matrimonial Convention see the Explanatory Report by *Alegría Borrás*, OJ 1998 C 221/27, in particular paras. 7–10.

[13] OJ 1998 C 221/1.

measures. And this is precisely what the Council did next, that is, on 29 May 2000, when it adopted Regulation 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. This Regulation has direct effect in the Member States pursuant to Article 249(2) EC Treaty and has made the Matrimonial Convention obsolete.

This declaration stating that the Member States are not competent[14] raises three issues: (1) the validity of Article 65 as legal basis; (2) the limited geographical scope of application of Article 61 et seq. EC Treaty; and (3) the limited competence of the European Court of Justice according to Article 68 EC Treaty to interpret the Treaty articles in Title IV and any measures adopted on their basis.

(1) Article 65 authorizes the adoption of 'measures in the field of judicial cooperation in civil matters' only 'insofar as necessary for the proper functioning of the internal market'. Naturally, recital 4 of the preamble of the Brussels II Regulation makes the claim that the measure is necessary in this sense, since it uses Articles 61 c), 65 a) and 67(1) as legal bases. However, the connection with the internal market is not exactly obvious, as long as trade in spouses is illegal. With regard to the principle of subsidiarity, the Council also claims in recital 5 of the preamble that the goals of the Regulation 'cannot be sufficiently achieved by the Member States and can, therefore [...] be better achieved by the Community'. Again, one should not simply believe this. The goals of the Regulation could have been achieved just as successfully by a convention between the Member States, along the lines of the Brussels Convention of 1968. It is true that the negotiation and ratification of a convention would take more time. However, experience also shows that legislation that is carefully drafted and adopted by the Member States themselves has the advantage of being more readily accepted than orders from Brussels, in particular as the sense and quality of the latter are not always beyond doubt. Regardless of these considerations, Commission and Council happily pressed ahead with further legislation. Also on 29 May 2000, they adopted Regulation 1348/2000 on the Service in the Member States of Judicial and Extrajudicial Documents in Civil and Commercial Matters, as well as Regulation 1346/2000 on Insolvency Proceedings.[15] Furthermore, the long-awaited reform of the Brussels Convention of 1968[16] has now arrived in the form of a regulation on the basis of Article 65 EC Treaty, namely, Regulation 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, which recently entered into force on 1 March 2002

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[14] Concerning the problems inherent in Article 65 ECT see *Schack*, Die EG-Kommission auf dem Holzweg von Amsterdam, ZEuP 1999, pp. 805–808; *Heß*, Die 'Europäisierung' des internationalen Zivilprozessrechts durch den Amsterdamer Vertrag: Chancen und Gefahren, NJW 2000, pp. 23–32.

[15] OJ 2000 L 160, at p. 37, resp. (Regulation 1346/2000) at p. 1.

[16] *See R. Wagner* IPRax (1998) p. 241.

(Brussels Regulation).[17] As the Council did not want to wait for this Regulation, the Regulation on matrimonial matters, while based on the Matrimonial Convention,[18] already anticipates certain changes now made in the Brussels Regulation 44/2001 and will be fully in step with the reformed rules.

(2) In all these efforts, Commission and Council seem to forget that the entire Title IV of the Treaty, according to its Article 69, is not applicable to the United Kingdom, Ireland, and Denmark. Therefore, all regulations adopted on the basis of Article 65 will necessarily remain patchwork. They need to be supplemented by agreements with the non-participating Member States. In the case of the Regulation on matrimonial matters the problem is limited to Denmark,[19] since the United Kingdom and Ireland have declared their intention to be bound by it.[20] But as a consequence of this situation, the Regulation on matrimonial matters and other regulations based on Article 65 violate the subsidiarity principle as laid down in Article 5(2) EC Treaty, since they *de facto* cannot achieve the goal of Union-wide legal harmonization.[21]

(3) The inappropriate legal basis of the Regulation on matrimonial matters has another unfortunate side effect. In contrast with the rules contained in the protocol on interpretation of the Brussels Convention and its counterpart of 28 May 1998 for the Matrimonial Convention,[22] according to Article 68(1) EC Treaty only the courts of final instance and no longer all appellate courts are entitled to make references for preliminary rulings to the European Court of Justice. This is another lamentable regress.[23]

It will be for the European Court of Justice to give the definitive answers to these competency problems. Very possibly, a time bomb is ticking and one day we will yearn for a return to the good old days of intergovernmental agreements.

III. Scope of Application

As we have seen, the geographic field of application is reduced by the non-

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[17] OJ 2001 L 12/1. The entry into force is regulated at Article 76 of the Regulation. Concerning the legislative proposal of 14 July 1999 (COM (1999) 348 final), see *Jayme/Kohler*, IPRax 1999, pp. 401 et seq., at pp. 404–406; the revised proposal of 26 October 2000 can be found in COM (2000) 689 final.

[18] *See* recital 6 of the preamble of the Regulation on matrimonial matters.

[19] *See* Article 1(3) of the Regulation on matrimonial matters and recital 25 of the preamble to it.

[20] Recital 24 of the preamble.

[21] *See also Schack*, ZEuP 1999, pp. 805 et seq., at p. 808.

[22] *See* supra, note 9, and Article 45 of the Matrimonial Convention. The protocol on its interpretation is reproduced in *Kropholler* Europäisches Zivilprozeßrecht (6th ed., 1998) annex XI.

[23] *See also Heß*, NJW, (2000) pp. 23 et seq., at pp. 28–29.

participation of Denmark. What remains to be examined is the substantive scope of the Regulation on matrimonial matters.[24] According to its Articles 1(1) a) and 2(1), the Regulation is applicable to 'civil proceedings relating to divorce, legal separation or marriage annulment'. This covers all status-related decisions that can be adopted with a view of terminating or loosening the ties of marriage, including decisions on parental responsibility rendered in connection with the dissolution of marriage (Article 1(1) b) of the Regulation). What remain outside the scope of the Regulation are all other legal consequences of divorce, in particular those related to the division of matrimonial property and those concerning maintenance obligations.[25] For the latter, Article 5(2) of the Brussels Regulation remains applicable. In German law, therefore, the proceedings covered by the Regulation are those for divorce and those for annulment of a marriage (§§ 1564, 1313 of the German Civil Code (BGB))[26].

Not explicitly regulated in the Regulation on matrimonial matters are actions for a declaratory judgment whether or not a marriage is valid (*compare* §§ 632, 606(1) of the German Code of Civil Procedure (ZPO)). However, in light of the intention of the Regulation to provide Union-wide rules for all proceedings concerning status, it should be presumed that this kind of actions is also covered.[27] Nevertheless, the Regulation is clearly not applicable to actions relating to the termination of non-marital or same-sex partnerships.[28] The proceedings of the Regulation do not contain any indication for any other interpretation of the notion of 'marriage' than the classical one.

By contrast, according to its Article 1(2), the Regulation on matrimonial matters is not limited to judicial decisions regarding status. Administrative decisions, as officially recognized for example in Denmark for consensual divorce proceedings, do come under the scope of application of the Regulation.[29]

IV. Jurisdiction to Decide

Like Article 2 of the Brussels Regulation, Articles 2 and 3 of the Regulation on

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[24] The relationship between the Regulation and any applicable international agreements and to the autonomous international civil procedure rules of the Member States will be discussed below at VII and VIII.

[25] Cf. recital 10 of the preamble of the Regulation on matrimonial matters.

[26] § 1313 BGB nowadays contains the provisions on annulment that used to be found in §§ 24 and 29 EheG.

[27] This is supported also by *Gruber*, FamRZ 2000, pp. 1129 et seq., at p. 1130; *Hau*, FamRZ 2000, p. 1333; and *Vogel*, MDR 2000, p. 1046; for an opposing view see *Helms*, FamRZ 2001, p. 259.

[28] *See Kohler*, NJW 2001, p. 15.

[29] Compare the report by *Borrás* (above, note 12), at no. 20, with a further example in Finland. The Danish example, of course, is irrelevant due to Article 1(3) of the Regulation.

matrimonial matters only deal with the international jurisdiction of the courts of the Member States. The local jurisdiction must still be determined in each case according to the national law of the respective Member State. In exceptional cases, if there are no corresponding rules about local jurisdiction in the Member State whose courts have international jurisdiction, then the gap must be filled by devising a rule on jurisdiction by necessity.[30]

According to its Article 7, the bases of jurisdiction in the Regulation on matrimonial matters are exclusive if the respondent spouse is habitually resident in or has the nationality of a Member State (that is, EU with the exception of Denmark).[31] It is worth noting that Article 7, precisely as the jurisdictional rule in Article 2(1), refers to the habitual residence, and no longer to the domicile, which can still be found in Article 2(1) and 3(1) of the Brussels Regulation. German civil procedure law knows the same distinction. While general jurisdiction over a person exists at the place of its domicile (§ 13 ZPO), matrimonial law primarily looks at the place of habitual residence (§§ 606, 606a ZPO). And while Article 52 of the Brussels Convention tries to resolve the difficult questions which can arise as to the domicile of a person by reference to the internal law of the court seized of the matter,[32] the Regulation on matrimonial matters completely dispenses with any attempt at defining habitual residence,[33] probably hoping that this question of fact will be understood in more or less the same way throughout the Member States.

The centrepiece of the Regulation on matrimonial matters are six alternative and equal bases of jurisdiction in Article 2(1) a), which all depend, to varying degrees, on the habitual residence, and a seventh basis in Article 2(1) b) with the common nationality of both spouses. All seven bases of jurisdiction are equally valid; the sequence in the Article does not create a hierarchy among them and no one is secondary to the others.[34] Consequently, it is irrelevant that nationality is mentioned last in Article 2(1) of the Regulation, while it comes first in § 606a(1)(1) ZPO.

What is instead decisive, is the fact that Article 2(1) b) of the Regulation requires that the spouses both have the same nationality, whereas it suffices for § 606a(1)(1) ZPO that one of the spouses is a German national or was a German national at the time of the marriage. This means that little is left of what was once a legitimate basis of jurisdiction for status-related issues[35] in the home country of the person(s) concerned.

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[30] *See Schack*, IZVR paras. 188 et seq., 398; and – with respect to Article 14 of the Brussels Convention – *Mankowski*, IPRax 2001, pp. 33–37.

[31] In the case of the United Kingdom and Ireland, the nationality is replaced by the 'domicile' pursuant to the law of these two Member States (Article 2(2) of the Regulation).

[32] *See Schack*, IZVR paras 244 et seq.

[33] *See Kropholler*, commentary on Article 5 of the Brussels Regulation, at para. 51.

[34] See the report by *Borrás* (above note 12), at no. 28; and *Hau*, FamRZ 2000, pp. 1334–1335. Erroneous, by contrast, *Finger*, FuR 1998, p. 347.

[35] Schack, IZVR para. 208. For a critical view of the German provisions see *Becker-Eberhard*, § 606a ZPO – ein Tatbestand mit zu minimalen Inlandsbezügen?, in FS for Rolf A. Schütze, Munich (1999), pp. 85–102, at p. 88 et seq.

What has been eliminated, in particular, is the procedural counterpart to the *privilegium germanicum* in Article 17(1)(2) EGBGB. On the other hand, Article 2(1) a) of the Regulation on matrimonial matters offers such a broad range of residence-related bases of jurisdiction, that an additional nationality-based jurisdiction seems superfluous, in particular since the latter bears a great danger of limping divorces.

The list of six residence-related bases of jurisdiction in Article 2(1) a) seems to be organized by order of increasing questionableness. It begins with the common habitual residence of the spouses (as in § 606a(1)(2) ZPO), which is followed by the last common habitual residence of the spouses, provided one of them still resides there. Probably, Article 2(2)b) of the Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations[36] has served as the model for this provision. Consequently, the applicant does not have to follow his or her spouse to another country.

Following the principle *actor sequitur forum rei*, jurisdiction is also established at the place of habitual residence of the respondent.[37] In fact, the third alternative makes the first one superfluous, since the common habitual residence of both spouses – if they still live together – does not provide an additional jurisdiction beyond the habitual residence of the respondent.[38] By contrast with the rules in § 606a(1) points 3 and 4 ZPO, the habitual residence of the applicant alone only provides jurisdiction if the application is made by both spouses jointly (4th alternative in Article 2(1) a)) or if the applicant has been habitually resident at that place for at least a year before the application was made (5th alternative).[39] As an important difference to § 606a(1)(4) ZPO, the Regulation never asks whether a decision would be recognized in the home countries of the spouses.

Highly problematic is the 6th alternative, where the required time of residence prior to the application is reduced to six months, provided the applicant is a national of the respective State.[40] The creation of this alternative jurisdiction supposedly facilitates things for a spouse who returns to his or her home country.[41] However, the differences in the required periods have a distorting impact on the race for the most suitable forum. An applicant who remains at the last common habitual place of residence can start proceedings there immediately (2nd alternative);[42] an applicant who returns to the home country has to wait for six months before being able to start proceedings there (6th alternative); and an applicant who moves to another Member State must wait for a full year (5th alternative).

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[36] German text in *Jayme Hausmann*, no. 183. English text at http://hcch.net/e/conventions. This convention is binding on many Member States, not however on Germany.
[37] This is the same in Article 2 no. 1 of the 1970 Hague Convention.
[38] *Hau*, FamRZ 2000, p. 1334.
[39] This, again, is the same as provided for in Article 2 no. 2a) of the 1970 Hague Convention.
[40] *See also* Article 2 no. 4 of the 1970 Hague Convention.
[41] See the report by *Borrás* (above, note 12), at no. 32.
[42] *See Kohler*, NJW 2001, p. 11.

It may safely be predicted that the latter two alternative bases of jurisdiction will be very important in practice and that the preferential treatment under the 6th alternative for nationals of the forum State is a violation of the non-discrimination principle in Article 12(1) EC Treaty.[43] 'Within the scope of application' of the EC Treaty, Article 12(1) prohibits 'any discrimination on grounds of nationality'. If the Regulation on matrimonial matters is not an outright violation of EU constitutional law (see above, at II.), it certainly falls within the scope of application of the Treaty. However, as a direct consequence of the 6th alternative in Article 2(1) a) of the Regulation, a spouse must wait only half as long until he or she can initiate proceedings in his or her own forum, if he or she returns to his or her home Member State, rather than moving to another Member State.[44] In a different context,[45] Article 36(2) b) of the Regulation provides that '[the] principle of non-discrimination on the grounds of nationality between citizens of the Union shall be respected'. In the context of Article 2, the Council apparently did not even notice the discriminatory effect of its legislation.[46] Therefore, it can only be a question of time until the European Court of Justice will declare the 6th alternative of Article 2(1) a) to be null and void.

By providing a multitude of alternative bases of jurisdiction, the Regulation obviously seeks to facilitate divorces.[47] This makes the provisions of Article 11 of the Regulation concerning the coordination of parallel proceedings all the more important (see V below).

The problem of the increasing number of spouses with dual nationality was not considered worthy of consideration. In contrast with German private international law (Article 5(1) EGBGB), neither § 606a(1)(1) ZPO, nor the Regulation on matrimonial matters are taking into consideration whether one of several is the most effective or the forum state's nationality.[48] Such a distinction would be too uncertain and would be at odds with the intended jurisdictional privileges. For questions of jurisdiction, consequently, any one nationality is as good as any other. This, however, can cause disadvantages to a person who lost his or her previous nationality and acquired that of his or her spouse upon marriage.

By contrast with §§ 623(1), 621(2) 1 ZPO,[49] the Regulation on matrimonial

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[43] *See also Hau* FamRZ 2000, p. 1336. As far as the common nationality of both spouses according to Article 2(1)b) is concerned, the author does not see a problem with the non-discrimination principle. The aim of having a sensible parallelism between applicable law and forum would seem to suffice as justification for a distinction between couples with the same nationality and couples with differing nationalities, in particular since it does not depend on who is the applicant and who is the respondent. *Hau*, in FamRZ, disagrees with this, however.

[44] This is also criticized by *Pirrung* ZEuP 1999, p. 844; see also *Hau* FamRZ 2000, p. 1334.

[45] Concerns Finland and Sweden, see below VII.

[46] Similarly, any awareness of the problem is missing in the report by *Borrás* (above, note 12), para. 32.

[47] *See* above I., note 7 and accompanying text.

[48] *Hau*, FamRZ 2000, p. 1337, with further references.

[49] On these provisions see *Schack*, IZVR, paras. 376 et seq.; *Georg Graf*, Die internationale Verbundszuständigkeit, Munich (1984).

matters does not provide for a supplemental jurisdiction for ancillary matters; however, nor does it exclude it if contained in autonomous law. Article 3(1) of the Regulation grants jurisdiction over matters relating to parental responsibility to the same courts that deal with the divorce or separation according to Article 2, provided that the child is habitually resident in that Member State.[50] If the child is not habitually resident in the same Member State, the jurisdiction of the court dealing with the divorce or separation according to Article 2 is extended by Article 3(2) only under strict conditions. For matters relating to parental responsibility, Article 3(3) even subjects the rule of *perpetuatio fori* to certain conditions. The applicability of the rule of *perpetuatio fori* as such can be derived not so much from Article 3(3),[51] but rather from general principles of international civil procedure, on which, for example, the Brussels Convention is also based.[52]

For cases of child abduction, Article 4 of the Regulation on matrimonial matters refers to the rules on jurisdiction provided by the Hague Convention of 25 October 1980 on Civil Aspects of International Child Abduction. Article 5 of the Regulation provides an identical rule for counterclaims as can be found in Article 6(3) of the Brussels Regulation. Article 6 provides a special rule for divorce proceedings, if there already was a judgment on legal separation.

As it is generally the case with exclusive jurisdiction (see Article 7), Article 9 provides that the court seized must examine of its own motion whether it has jurisdiction. If the respondent is habitually resident abroad and does not 'enter an appearance' in the court where the action was brought and which has jurisdiction, that court must stay the proceedings until it is shown 'that the respondent has been able to receive the document instituting the proceedings [...] in sufficient time to enable him or her to arrange for his or her defence, or that all necessary steps have been taken to this end' (Article 10(1) of the Regulation).[53] To resolve the complicated questions of service abroad, paragraphs (2) and (3) of Article 10 refer to Regulation 1348/2000 and the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, which must be taken into account in these cases.

V. Lis Pendens

In divorce cases it is quite common that parallel proceedings are initiated in different countries, as each spouse wants to secure procedural and/or substantive advantages

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[50] *See also* §§ 1671, 1687 BGB.
[51] *See Hau*, FamRZ 2000, p. 1340.
[52] *See Kropholler*, before Article 2 of the Brussels Regulation, para. 14; *Schack*, IZVR, paras. 392 et seq.
[53] Identical provisions can be found in Article 20(2) of the Brussels Convention and in Article 26(2) of Regulation 44/2001.

of a specific forum. The various jurisdictions provided for in Article 2 of the Regulation on matrimonial matters offer interesting opportunities for tactically minded spouses with qualified legal counsel.[54]

Until recently, everyday proceedings such as the divorce of a French-German couple could very well be conducted in parallel in both countries, for example because each State's courts considered that they were first seized or because the French court completely disregarded the German proceedings and judgment on the basis of the privilege in Article 14 of the French civil code granted to French nationals.[55] Article 11 of the Regulation has brought this anachronistic situation to an end. This provision, which is comparable to Article 21(1) of the Brussels Convention and to Article 27(1) of Regulation 44/2001, obliges the court second seized to respect litispendence at the court first seized. As a consequence, the court second seized must suspend its proceedings of its own motion until the jurisdiction of the court first seized has been established; once that has been done, the court second seized must decline its jurisdiction of its own motion (Article 11(3) 1 of the Regulation on matrimonial matters). In this way, negative conflicts of jurisdiction can be prevented. In the same way as under the Brussels Regulation, and different from the autonomous rules of German international civil procedure law, the foreign litispendence must be respected without any prognosis for the possibility of recognition.[56] Furthermore, just as in Article 27 of the Brussels Regulation,[57] the expression 'involving the same cause of action' must be interpreted broadly.

Article 11(2) of the Regulation on matrimonial matters goes even further. In order to achieve the greatest possible extent of procedural concentration, it obliges the court second seized to stay its proceedings even if the proceedings in the court first seized do 'not involv[e] the same cause of action', as long as they are between the same parties and concern a related issue, for example, when the one proceeding is for divorce and the other for annulment of the marriage.[58] For such a case, Article 11(3)

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[54] Consequently, there is abundant literature on the issue. For recent contributions see *Safferling*, Rechtshängigkeit in deutsch-französischen Scheidungsverfahren, Diss. Erlangen 1996; *Burckhardt*, Internationale Rechtshängigkeit und Verfahrensstruktur bei Eheauflösungen, Diss. Heidelberg 1997; *Heiderhoff*, Die Berücksichtigung ausländischer Rechtshängigkeit in Ehescheidungsverfahren, Bielefeld (1998) (reviewed by *Philippi* in FamRZ 2000, pp. 525–527); *Finger*, Ausländische Rechtshängigkeit und inländisches Scheidungsverfahren, FuR 1999, pp. 310–317; *Gruber*, Die 'ausländische Rechtshängigkeit'' bei Scheidungsverfahren, FamRZ 1999, pp. 1563–1568; *Gruber*, Die neue 'europäische Rechtshängigkeit' bei Scheidungsverfahren, FamRZ 2000, pp. 1129–1135.

[55] A classical example can be found in the judgments of the Cour d'appel Colmar of 11 June 1990 and of the OLG Karlsruhe of 21 December 1990, IPRax 1992, pp. 173 and 171, with comments by *Sonnenberger*, Deutsch-französische Ehescheidungsprobleme, at pp. 154–159.

[56] *Hau*, FamRZ 2000, p. 1339, with further references; see also *Schack*, IZVR paras. 754 et seq., 761.

[57] *See Schack*, IZVR para. 762.

[58] However, Article 11(2) is less broad than para. (1) since it does not apply in cases where the other proceedings are for parental responsibility (Article 3 of the Regulation); cf. the report by *Borrás* (above, note 12), at no. 54.

2 provides that proceedings that have been declared inadmissible in the court second seized can be brought to the court first seized. Apparently, the intention is to create a jurisdiction for related matters that goes beyond the provisions of Article 5 for counterclaims;[59] it also differs substantially from the provisions contained in Article 28(2) of the Brussels Regulation. This rule is not without problems, as becomes evident from the example contained in the explanatory report with respect to Article 11:[60] If proceedings are first brought in Sweden for divorce and then in Austria for annulment of the marriage, the Austrian court must decline jurisdiction in spite of the fact that the Swedish court, according to Swedish law, can only decide about the divorce but cannot annul a marriage *ex tunc*. In practice, the only solution for the interested spouse would be to await the Swedish divorce and then start new proceedings in Austria for *ex tunc* annulment in order to achieve a retroactive effect of the recognized divorce judgment.

The fact that Article 11(4) of the Regulation on matrimonial matters provides for the first time a definition of litispendence is an important progress over Article 21 of the Brussels Convention.[61] Even if the new rule, in its two alternatives, has become rather complicated, it achieves the purpose, namely, to make the time when a court is seized – and the objection of *lis alibi pendens* can be brought – independent of the highly problematic time of service of the relevant document on the respondent.[62] For that purpose, Article 11(4) a) of the Regulation on matrimonial matters refers to the time when the necessary documents are lodged with the court, that is, what is referred to as 'Anhängigkeit' in Germany.[63] The goal of determining jurisdiction as early as possible is demonstrated also by the second alternative contained in Article11(4) b), which regulates litispendence in such countries as France,[64] where a court will only deal with a case after the respondent has been served.

VI. Recognition and Enforcement

From the perspective of many Member States, including Germany, Article 14(1) of the Regulation on matrimonial matters brings another important innovation by dispensing with any kind of procedure for recognition. Foreign judgments relating to divorce, legal separation or marriage annulment must be recognized automatically,

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[59] See the report by *Borrás* (above, note 12), at no. 55.
[60] See the report by *Borrás* (above, note 12), at no. 57; see also *Gruber*, FamRZ 2000, pp. 1134–1135.
[61] This definition anticipated Article 30 of Regulation 44/2001; it was not yet contained in Article 11 of the Matrimonial Convention.
[62] *See Hau*, FamRZ 2000, p. 1339.
[63] This was already promoted by *Schack* in IPRax 1991, pp. 270 et seq. and in IZVR para. 760.
[64] *See Sonnenberger*, IPRax 1992, p. 157.

like under Article 33(1) of the Brussels Regulation, without an recognition procedure as it used to be required by Article 7 § 1 FamRÄndG.

Decisions which must be recognized are not only those by courts but also equivalent ones by administrative authorities,[65] not however those of canonical courts.[66] Article 13(3) extends the duty of recognition to formal and enforceable documents and court approved settlements. The intention was to cover agreements on parental responsibility that can be approved by Finnish authorities;[67] under no circumstances, however, can this Article be applied to notarized agreements between the spouses on the legal consequences of a divorce,[68] for which the entire Regulation on matrimonial matters does not apply.[69]

For the proper understanding of the Regulation on matrimonial matters it is important to remember that the term 'judgment' is limited to positive decisions that actually led to a divorce, legal separation or annulment of the marriage.[70] Dismissing decisions that do not affect the status of the spouses thus do not have to be recognized pursuant to the Regulation.[71]

Article 15(1) and (2) of the Regulation on matrimonial matters provide exhaustive lists of grounds for non-recognition separately for judgments relating to a divorce, legal separation or marriage annulment, and for judgments relating to the parental responsibility of the spouses. Article 15(1) is closely modelled on Article 27 of the Brussels Convention, however, with two exceptions. First, the provision of Article 27(4) was not adopted. This provision allows the State, where recognition of a judgment is sought, to apply its own private international law in status-related matters. Such recourse to rules of *ordre public* on conflict of laws is explicitly prohibited by Article 18 of the Regulation on matrimonial matters. Consequently, the Member States must recognize a judgment even if the marriage could not have been dissolved according to their own law.[72] The prohibition of any *révision au fond* is restated in Article 19 of the Regulation.

Secondly, there is a difference with respect to the right to be heard. By contrast with Article 27(2) of the Brussels Convention (and the preceding Article 15(1) of the Matrimonial Convention), it is no longer an issue whether the respondent was duly served with the relevant documents, as long as they were served in sufficient time. In this way, unnecessary formalities concerning the rules on service can be avoided.

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[65] See Article 1(2) of the Regulation on matrimonial matters and recitals 9 and 15 of its preamble.

[66] But see Article 40(2) and (3) of the Regulation on matrimonial matters; and *Helms* FamRZ 2001, p. 259.

[67] See the report by *Borrás* (above, note 12), at no. 61.

[68] For an opposing view see *Geimer*, IPRax 2000, pp. 366 et seq., at p. 368.

[69] *See* above III; and *R. Wagner*, IPRax 2001, p. 76.

[70] See the report by *Borrás* (above, note 12), at no. 60; see also recital 15 of the preamble to the Regulation; and *Kohler*, NJW 2001, p. 13.

[71] *R. Wagner*, IPRax 2001, p. 76; *Helms*, FamRZ 2001, p. 258; see also above I., note 6 and corresponding text.

[72] This is criticized by *Kohler*, NJW 2001, p. 14.

The grounds for non-recognition of judgments relating to the parental responsibility of the spouses in Article 15(2) of the Regulation are modelled on Article 23(2) of the 1996 Child Protection Convention, which is not yet in force.[73] As Article 17 of the Regulation explicitly states, the jurisdiction of the court of origin may not be reviewed. Article 15(2) b) of the Regulation is of specific interest here. According to this provision it is a 'violation [of a] fundamental principle [...] of procedure', if a judgment was rendered – except in cases of urgency – 'without the child having been given an opportunity to be heard'. Such a judgment shall not be recognized. Consequently, the parents should insist on a hearing to deal with issues regarding children, even if such a hearing is not foreseen under the law of the forum, in order to make the judgment recognizable abroad. It is to be expected that this provision will lead to a convergence of the procedural laws of the Member States in the longer term.[74]

According to the general rule, the burden of proof regarding the factual preconditions for any grounds for refusing to recognize a foreign judgment is placed on the one who seeks recognition as a favourable decision.[75] This is independent of the formulation used for the grounds for or against recognition. While Article 23(2) of the 1996 Child Protection Convention uses the phrase '[r]ecognition may however be refused', Article 27 of the Brussels and Lugano Conventions, as well as Article 15(1) and (2) of the Regulation on Matrimonial Matters, stipulate that a 'judgment shall not be recognised'. Neither of these provisions is intended to create their own rules for the distribution of the burden of proof.[76]

The different formulations show something else, however: While Article 23(2) of the 1996 Child Protection Convention leaves room for the application of the general principle that a judgment should be recognised whenever possible,[77] Article 15 of the Regulation provides legal certainty for status decisions by categorically excluding recognition in these kind of cases.[78]

On the other hand, legal certainty for status decisions is put in doubt by the rule, contained both in the Brussels and Lugano Conventions and in the Regulation on Matrimonial Matters, that judgments shall be recognized even if they are not yet *res judicata*. Article 20 of the Regulation merely provides a possibility to stay the proceedings if an appeal against the judgment has been lodged in the State of origin.

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[73] Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children of 19 October 1996; for the German text see *Jayme/Hausmann*, No. 55.

[74] *See also* § 50b FGG and the judgment by the German Constitutional Court of 29 October 1998, BVerfGE 99, 146, at p. 157.

[75] *See Schack*, IZVR para. 884; *Stein/Jonas/H. Roth*, ZPO, 21st ed. 1998, § 328 ZPO para. 30; this is not uncontested, however.

[76] For a different view see *Kropholler*, before Art. 33 of the Brussels Regulation, para. 7.

[77] *See Schack*, IZVR para. 807.

[78] See the report by *Borrás* (above, note 12), at no. 67. Concerning the Brussels Regulation, see *Schack*, IZVR para. 808.

Only the important updating of civil-status records is reserved by Article 14(2) of the Regulation for judgments 'against which no further appeal lies'.[79] Upon application by a party, a special decision regarding the recognition or non-recognition of a judgment must be adopted pursuant to Article 14(3) of the Regulation (in combination with § 51 AVAG); such a decision is only effective *inter partes*, however.[80]

Since status-changing judgments, by their very nature, cannot be enforced (except with regard to the costs), the rules on enforcement in Articles 21 et seq. of the Regulation concern only the questions of parental responsibility. The question of enforcement of the decision on costs, which must be recognized according to Article 13(2) and is not covered by Articles 21 et seq., remains unanswered, in particular, if the judgment results in the denial of a divorce or annulment of the marriage.[81]

The procedure for a declaration of enforceability is modelled on Articles 32 et seq. of the Brussels and Lugano Conventions. In Germany, jurisdiction is vested in the 'Familiengericht' at the seat of the corresponding 'Oberlandesgericht'.[82]

VII. Relations with Other Conventions

Article 36 of the Regulation on Matrimonial Matters – similar to Articles 69 and 70 of the Brussels Regulation – provides for supremacy of the Regulation over prior conventions between the Member States and Article 37 does the same for five specifically listed multilateral Conventions in the relations between the Member States. These are the 1961 Hague Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors, the 1967 Luxembourg Convention on the Recognition of Decisions Relating to the Validity of Marriages,[83] the 1970 Hague Convention on the Recognition of Divorces and Legal Separations,[84] the 1980 European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children,[85] and the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility

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[79] See the report by *Borrás* (above, note 12), at no. 63; and *Helms*, FamRZ 2001, p. 260. Article 33(3) of the Convention on Matrimonial Matters, which relates to Article 14(2), was not adopted in Article 32 of the Regulation, however.

[80] *See Helms*, FamRZ 2001, at pp. 261 et seq.

[81] See, for example, Articles 18 et seq. of the Hague Convention Relating to Civil Procedure of 1 March 1954.

[82] For details see *R. Wagner*, IPRrax 2001, pp. 79 et seq.

[83] German text in *Jayme/Hausmann*, no. 182.

[84] German text in *Jayme/Hausmann*, no. 183.

[85] German text in BGBl. 1990 II 206, 220 and in *Jayme/Hausmann*, no. 184.

and Measures for the Protection of Children;[86] the latter is limited to cases in which the child concerned is habitually resident in a Member State. Since jurisdiction under Article 3 of the Regulation is harmonized with the jurisdictional rules in Articles 5 and 10 of the Child Protection Convention, Article 3 of the Regulation should not lead to any significant conflicts.[87] All conventions covered by Articles 36 and 37 of the Regulation remain applicable for judgments adopted before 1 March 2001 (Article 38(2) of the Regulation).

A convention mentioned not in Article 37 but more prominently in Article 4 of the Regulation on Matrimonial Matters is the 1980 Hague Convention on the Civil Aspects of International Child Abduction.[88] After a child has been abducted, the courts at the new place of residence can only become active within the framework established by Article 16 of the 1980 Hague Convention.[89] As long as the criteria of that article are not fulfilled, jurisdiction remains with the courts at the previous and legitimate habitual place of residence of the child.[90]

For disputes related to maintenance obligations in these cases, the Regulation on Matrimonial Matters is not applicable. They are still subject to Article 5(2) of the Brussels Regulation. The second alternative in Article 5(2), where the maintenance matter is ancillary to proceedings concerning the status of the person, should normally lead to the same result as regards jurisdiction as is provided in Article 2 of the Regulation.[91]

Finland and Sweden have been granted the option, in Article 36(2) of the Regulation, to continue applying, in relations between themselves and the other Scandinavian countries, the Convention of 6 February 1931 between Denmark, Finland, Iceland, Norway and Sweden Comprising International Private Law Provisions on Marriage, Adoption and Guardianship. However, from now on, neither Finland nor Sweden have declared that they will make use of this option. Article 40 of the Regulation grants priority to the Concordats concluded between the Holy See on one side, and Italy, Portugal, and Spain on the other.

While taking account of prior international agreements of the Member States, the Regulation limits their power to conclude new agreements and conventions. Between each other, the Member States are allowed to agree on supplementary rules as long as

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[86] *See* above, note 73. The Child Protection Convention was intended to replace the 1961 Convention on the Protection of Minors. For the German text of the Child Protection Convention see RabelsZ 62 (1998), pp. 502–518, with commentary by *Siehr* at pp. 464–501; and see *Pirrung*, in FS Rolland, (1999), pp. 277–290.

[87] In particular since jurisdiction based on Article 3 is ancillary to the jurisdictions provided in Article 2 of the Regulation; see the report by *Borrás* (above, note 12) at no. 63; for a different view see *Jayme/Kohler*, IPRax 2000, pp. 454, 457, who want to apply Article 3 also in the context of a jurisdiction based on Article 8.

[88] German text in BGBl. 1990 II 207; and in *Jayme/Hausmann*, no. 222.

[89] *See Hau*, FamRZ 2000, at p. 1338.

[90] See recital 13 of the preamble of the Regulation on Matrimonial Matters.

[91] *See Hau*, FamRZ 2000, at p. 1338.

these do not conflict with the Regulation, in accordance with Article 39 of the latter. For agreements with third States, Article 16 of the Regulation provides that they may only lead to the non-recognition of a judgment adopted in a Member State if jurisdiction had been based on criteria other than those listed in Articles 2 to 7 of the Regulation. However, Article 16 does not specifically deal with the competence to negotiate and conclude such agreements with third States. Pursuant to the ERTA decision (*Commission of the European Communities v Council of the European Communities. European Agreement on Road Transport)* of the European Court of Justice,[92] this competence could nowadays belong to the Community. This is probably what the Commission wants to emphasise by its declaration on Article 16.[93] The Council, on the other hand, has declared that the Regulation 'shall not prevent a Member State from concluding agreements with non-Member States, which cover the same matter as this Regulation, where the agreement in question does not affect this Regulation'.[94] This is a clear example of the trend towards universal EC rules on conflict of laws.[95]

VIII. Remaining Areas of Application for Autonomous German Law

The Regulation leaves only very small areas for the application of autonomous German law. As soon as the defendant spouse resides habitually in one of the Member States (EU minus Denmark), § 606a ZPO is replaced by Articles 2 to 7 of the Regulation. As stipulated by Article 14 of the Regulation, judgments from other Member States which terminate a status of marriage can no longer be subjected to the special recognition procedure provided in Article 7 § 1 FamRÄndG.

The autonomous law of the Member States[96] remains applicable only in the following cases: (1) older cases,[97] (2) the recognition of judgments which sustain the status,[98] (3) provisional measures in urgent cases pursuant to Article 12 of the

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[92] The original ERTA case was the Court's judgment of 31 March 1971 in Case 22/70, 1971 ECR 263; see *Schack*, Europäisches Urheberrecht im Werden, ZEuP 2000, pp. 799 et seq., at 813.

[93] Reproduced in IPRax 2001, at p. 62.

[94] OJ 2000 C 183, at p. 1 (with a wrong reference to the number of the Regulation, see *Kohler*, NJW 2001, p. 14, note 32); the full text can also be found in IPRax 2001, at p. 62.

[95] *Jayme/Kohler*, IPRax 2000, p. 454. This trend is welcomed by *Basedow*, The Communitarization of the Conflicts of Laws Under the Treaty of Amsterdam, CMLRev 2000, vol. 37, pp. 687 et seq., at pp. 702 and 705.

[96] Including the international agreements concluded by them.

[97] See Articles 38(2), 42(1) and (2) of the Regulation.

[98] *See* above, at VI (note 71 and corresponding text). In these cases the *privilegium germanicum* of Article 17(1)(2) EGBGB can still be invoked; this was apparently overlooked by *G. Wagner*, Scheidung von EU-Auslandsdeutschen nach Inlandsrecht – europarechtswidrig?, IPRax 2000, pp. 512 et seq., at p. 519.

Regulation, and (4) the highly problematic cases of residual jurisdiction mentioned in Article 8(1) of the Regulation.

Article 8 of the Regulation follows the model of Article 4 of the Brussels and Lugano Conventions. In cases where Articles 2 to 6 of the Regulation do not provide for the jurisdiction of any Member State, the forum State is entitled to determine jurisdiction on the basis of its autonomous law (Article 8(1)). Any decisions adopted on the basis of this residual jurisdiction[99] have to be recognised by the other Member States pursuant to Article 14(1) of the Regulation, except where Article 16 applies.[100] Practical examples where a residual jurisdiction would become relevant are not easily constructed: a couple with habitual residence in the United States, of which one spouse has German and the other American citizenship, wants to get divorced in Germany. For such a case, Article 8(1) of the Regulation allows recourse to § 606a(1)(1) ZPO.

What is highly questionable, by contrast, is the availability of national residual jurisdiction in cases where the applicant[101] has his or her habitual residence in a Member State but the time limits in the 5th and 6th alternative of Article 2(1) a) are not yet fulfilled. The answer should be in the negative,[102] in order to prevent national jurisdictions intervening and contradicting with a Community-wide jurisdiction which becomes effective in the course of the proceedings.

Pursuant to Article 8(2) of the Regulation, jurisdictional privileges provided for in national law, such as Article 14 of the French civil code, must be granted also to those nationals of other Member States, who are habitually resident in the respective State. The dual requirement of nationality of a Member State and habitual residence in the State in question is more restrictive than the rule provided in Article 4(2) of the Brussels Regulation, which only refers to the habitual residence of the applicant. Consequently, Article 8(2) has been criticised as an expression of a fortress-Europe mentality,[103] which unnecessarily discriminates against nationals of third States. Article 4(2) of the Brussels and Lugano Conventions may have been partly the result of tactical considerations in treaty negotiations as regards third countries,[104] these considerations, however, should play no role in a Community regulation on matrimonial matters. Hence, Article 8(2) of the Regulation is out of place and the room that Article 7 leaves for national residual jurisdiction under Article 8(1) is very narrow in practice.

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[99] Examples for residual jurisdiction in different Member States can be found in the report by *Borrás* (above, note 12) at para. 47.

[100] *See Hau*, FamRZ 2000, at p. 1340.

[101] For cases where the defendant spouse is habitually resident in a Member State or is a national of a Member State, Article 7 of the Regulation blocks access to the residual national jurisdiction foreseen in Article 8.

[102] For a different view see *Hau*, FamRZ 2000, at p. 1341.

[103] *See Hau*, FamRZ 2000, at p. 1341.

[104] *See Schack*, IZVR paras. 103 and 333.

IX. Overall Assessment

Disregarding the fact that it generally facilitates the dissolution of marriages, the Regulation on Matrimonial Matters should be welcomed as a positive development. The broad rules on jurisdiction in Article 2 are compensated by the compulsory and early recognition of prior litispendence pursuant to Article 11 of the Regulation. However, the obligation to recognize judgments of other Member States is limited to judgments which change the matrimonial status. Thus, the recognition of decisions in ancillary matters regarding the matrimonial property regime, pension rights adjustments, or parental visitation rights, are left open.[105] With regard to the latter, the Council has already presented a draft regulation on the mutual enforcement of judgments on rights of access to children.[106] As far as the immediate return of children is concerned, that draft regulation would be the third regulatory instrument besides the 1980 European Convention Concerning Custody and the 1980 Hague Convention on Child Abduction.[107] This is overdoing it. Such a parallel structure of complicated regulatory instruments can only confuse courts and practitioners.[108] As could be expected,[109] the Commission uses its new weapon contained in Article 65 of the Treaty far too quickly and aims at anything coming to mind. Rather, it should take time to reflect and consider with national experts and academics.[110] In that respect, the slow pace of progress characteristic of international conventions can be a virtue,[111] and the Commission's drive for rapid results a vice.

However, we will not be able to stop the flood coming from Brussels. The transformation of the Brussels Convention into an EC Regulation will necessitate amendments in the Regulation on Matrimonial Matters. Then there will be a need to elaborate a special agreement in order to bring Denmark back into the system. The same is true – possibly also for the United Kingdom and Ireland – for all other regulations to come out of Article 65 EC Treaty. And when as many bases of jurisdiction are offered as is the case in Article 2 of the Regulation, literally inviting the applicant to forum shop, there will soon be a need for a Community-

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[105] Article 3 of the Regulation on Matrimonial Matters covers only decisions on parental responsibility. For decisions on maintenance, the Brussels Convention and, as from 1 March 2002, Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters are applicable.

[106] OJ 2000 C 234, p. 7; the German text can also be found in IPRax 2000, at pp. 444–447. *See also Heß*, IPRax 2000, pp. 361–363.

[107] *See* above, at VII (notes 85 and 88 and corresponding text).

[108] This complaint is also made by *Pirrung*, ZeuP 1999, at p. 837; and by *Heß*, IPRax 2000, at p. 363.

[109] *See Schack*, ZEuP 1999, pp. 805 et seq., at p. 808.

[110] *See also Heß*, IPRax 2000, at p. 363.

[111] One of those who are impatient with this system is *Basedow*, in CMLRev 2000, vol. 37, at p. 688.

wide harmonization of conflict of laws rules in family law.[112] With its urge towards perfection, the Community will create more and more uniform law – all on a questionable legal basis – in areas that have been well maintained by the individual states for more than 200 years in a federation such as the USA. Vive l'Europe.

[112] *See Hau*, FamRZ 1999, at p. 488; and *Kohler*, NJW 2001, at pp. 14 et seq.