

Brussels IIa Rome III

Article-by-Article Commentary

edited by

Christoph Althammer

**beck-shop.de**
2019
DIE FACHBUCHHANDLUNG



Published by

Verlag C. H. Beck oHG, Wilhelmstraße 9, 80801 München, Germany,
eMail: bestellung@beck.de

Co-published by

Hart Publishing, Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, United Kingdom,
online at: www.hartpub.co.uk

and

Nomos Verlagsgesellschaft mbH & Co. KG Waldseestraße 3–5, 76530 Baden-Baden, Germany,
eMail: nomos@nomos.de

Published in North America (US and Canada) by Hart Publishing,
c/o Independent Publishers Group, 814 North Franklin Street, Chicago, IL 60610, USA


beck-shop.de
DIE FACHBUCHHANDLUNG

ISBN 978 3 406 72643 9 (C.H.BECK)

ISBN 978 1 50993 088 3 (HART)

ISBN 978 3 8487 5530 1 (NOMOS)

© 2019 Verlag C. H. Beck oHG
Wilhelmstr. 9, 80801 München

Printed in Germany by
Beltz Graphische Betriebe GmbH
Am Fliegerhorst 8, 99947 Bad Langensalza

Typeset by
Reemers Publishing Services GmbH, Krefeld

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without the prior permission of Verlag C. H. Beck, or as expressly permitted by law under the terms agreed with the appropriate reprographic rights organisation.

Enquiries concerning reproduction which may not be covered by the above should be addressed to
C. H. Beck at the address above.

Foreword

The number of marriages to foreign nationals has increased significantly in recent years in Europe. This development is also linked to an increase in binational (cross-border) divorce proceedings and international lawsuits concerning parental responsibility.

The present commentary represents the English version of the German first edition published in 2014, which is heavily updated in terms of content. The commentary deals with the two most important European regulations, which help the legal practitioners in the resolution of such cases. The so-called **Brussels IIbis Regulation** (Brussels IIa Regulation) contains provisions on international jurisdiction, as well as on the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility. The Regulation is rightly considered the most important Rule of Procedure in the field of international family law. However, the Brussels IIbis Regulation might lose its validity in the future with the coming into force of Brexit in the United Kingdom. Something else would apply in the case of a “Great Repeal Bill” (“EU Withdrawal Bill”), which would stipulate that EU law should continue to apply as UK national law after Brexit takes effect.

On the other hand, the so-called **Rome III Regulation** determines the substantive law applicable to divorce and legal separation without dissolution of the marriage bond. Created for the first time in the history of the European Union in the framework of “enhanced cooperation”, this regulation can already be described as a model of success, as it is now valid in 17 Member States. This has opened a way to a “Europe moving at different speeds”. The Rome III Regulation represents a “quantum leap” for the standardization of international divorce law (strengthening of party autonomy, residence principle). However, it contains no conflict of law provisions for matters concerning parental responsibility. In order to determine the applicable substantive law, the Hague Child Protection Convention of 1996 should be consulted. For this reason, an appendix to the international private law of parental responsibility is added to this commentary, completing the relevant European conflict of law rules.

The present commentary aims to focus on the context between the Brussels IIbis Regulation and the Rome III Regulation and to provide the reader with easily accessible guidelines. For this reason, independent commentary on other family law regulations is deliberately omitted. Their influence is taken into account, however, if it is thematically relevant in an individual case.

The authors are scientists, judges, lawyers and notaries who have been intensively involved with both regulations for many years. All of them attach great importance to a presentation adapted to the requirements of the practice, but at the same time realize this concern with scientific pretense. An important goal of this work is to provide the reader with clearly formulated guidelines in disputes. The European Court of Justice decisions made so far in this area are taken into account as comprehensively as possible.

Many thanks to all contributors to this commentary!

Regensburg, 20 October 2018

Christoph Althammer

Summary of Contents

List of Authors	XI
List of Abbreviations	XIII
List of Commentaries and Monographs	XVII

COMMENTARY REGULATION (EC) 2201/2003 BRUSSELS IIA

Commentary Regulation (EC) 2201/2003 Brussels Iia	1
Introduction	5
Chapter I. Scope and Definitions	13
Article 1. Scope	13
Article 2. Definitions	25
Chapter II. Jurisdiction	31
Section 1. Divorce, legal separation and marriage annulment	31
Article 3. General jurisdiction	31
Article 4. Counterclaim	59
Article 5. Conversion of legal separation into divorce	61
Article 6. Exclusive nature of jurisdiction under Articles 3, 4 and 5	64
Article 7. Residual jurisdiction	71
Section 2. Parental responsibility	74
Preliminary note	74
Article 8. General jurisdiction	77
Article 9. Continuing jurisdiction of the child's former habitual residence	88
Article 10. Jurisdiction in cases of child abduction	90
Article 11. Return of the child	95
Article 12. Prorogation of jurisdiction	101
Article 13. Jurisdiction based on the child's presence	112
Article 14. Residual jurisdiction	113
Article 15. Transfer to a court better placed to hear the case	114
Section 3. Common provisions	122
Preliminary note to Articles 16–20	122
Article 16. Seising of a Court	122
Article 17. Examination as to jurisdiction	125
Article 18. Examination as to admissibility	127
Article 19. Lis pendens and dependent actions	129
Article 20. Provisional, including protective, measures	144
Chapter III. Recognition and Enforcement	159
Section 1. Recognition	159
Article 21. Recognition of a judgment	159
Article 22. Grounds of non-recognition for judgments relating to divorce, legal separation or marriage annulment	168
Article 23. Grounds of non-recognition for judgments relating to parental responsibility	173
Article 24. Prohibition of review of jurisdiction of the court of origin	180
Article 25. Differences in applicable law	181
Article 26. Non-review as to substance	183
Article 27. Stay of proceedings	184
Section 2. Application for a declaration of enforceability	186
Article 28. Enforceable judgments	186
Article 29. Jurisdiction of local courts	191
Article 30. Procedure	192
Article 31. Decision of the court	194
Article 32. Notice of the decision	196
Article 33. Appeal against the decision	196
Article 34. Courts of appeal and means of contest	199
Article 35. Stay of proceedings	200
Article 36. Partial enforcement	202

Summary of Contents

Section 3. Provisions common to Sections 1 and 2	203
Article 37. Documents	203
Article 38. Absence of documents	205
Article 39. Certificate concerning judgments in matrimonial matters and certificate concerning judgments on parental responsibility	207
Section 4. Enforceability of certain judgments concerning rights of access and of certain judgments which require the return of the child	208
Article 40. Scope	208
Article 41. Rights of access	214
Article 42. Judgments ordering the return of a child	220
Article 43. Rectification of the certificate	226
Article 44. Effects of the certificate	229
Article 45. Documents	230
Section 5. Authentic instruments and agreements	232
Article 46.	232
Section 6. Other provisions	236
Article 47. Enforcement procedure	236
Article 48. Practical arrangements for the exercise of rights of access	238
Article 49. Costs	240
Article 50. Legal aid	242
Article 51. Security, bond or deposit	244
Article 52. Legalisation or other similar formality	245
Chapter IV. Cooperation between central authorities in matters of parental responsibility	247
Article 53. Designation	247
Article 54. General functions	249
Article 55. Cooperation in cases specific to parental responsibility	250
Article 56. Placement of a child in another Member State	254
Article 57. Working method	256
Article 58. Meetings	257
Chapter V. Relations with other instruments	259
Article 59. Relation with other instruments	259
Article 60. Relations with certain multilateral conventions	264
Article 61. Relation with the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children	267
Article 62. Scope of effects	270
Article 63. Treaties with the Holy See	271
Chapter VI. Transitional provisions	275
Article 64.	275
Chapter VII. Final provisions	285
Article 65. Review	285
Article 66. Member States with two or more legal systems	286
Article 67. Information on central authorities and languages accepted	288
Article 68. Information relating to courts and redress procedures	289
Article 69. Amendments to the Annexes	290
Article 70. Committee	291
Article 71. Repeal of Regulation (EC) No 1347/2000	292
Article 72. Entry into force	294
COMMENTARY REGULATION (EC) 1259/2010 ROME III	
Commentary Regulation (EC) 1259/2010 Rome III	297
Introduction	303
Chapter I. Scope, Relation with Regulation (EC) No 2201/2003, Definitions and Universal Application	313
Article 1. Scope	313
Article 2. Relation with Regulation (EC) No 2201/2003	320
Article 3. Definitions	321
Article 4. Universal application	322

Summary of Contents

Chapter II. Uniform Rules on the Law Applicable To Divorce and Legal Separation	325
Article 5. Choice of applicable law by the parties	325
Article 6. Consent and material validity	342
Article 7. Formal validity	345
Article 8. Applicable law in the absence of a choice by the parties	348
Article 9. Conversion of legal separation into divorce	356
Article 10. Application of the law of the forum	359
Article 11. Exclusion of renvoi	363
Article 12. Public policy	366
Article 13. Differences in national law	374
Article 14. States with two or more legal systems – territorial conflicts of laws	378
Article 15. States with two or more legal systems – inter-personal conflicts of laws	380
Article 16. Non-application of this Regulation to internal conflicts of laws	382
Chapter III. Other provisions	383
Article 17. Information to be provided by participating Member States	383
Article 18. Transitional provisions	384
Article 19. Relationship with existing international conventions	386
Article 20. Review clause	388
Chapter IV. Final Provisions	389
Appendix: Convention of 19 October 1996 – protection of children	391
Index	407

**beck-shop.de**
DIE FACHBUCHHANDLUNG