



PLANNING THE FUTURE OF CROSS-BORDER FAMILIES:
A PATH THROUGH COORDINATION - 'EUFAM'S'

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ASOCIACION ESPAÑOLA DE ABOGADOS DE FAMILIA



SCUOLA SUPERIORE DELLA MAGISTRATURA



First Assessment Report on the case-law collected by the Research Consortium

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Workstream 1

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List of abbreviations

Brussels I Regulation - Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (in Official Journal of the European Union No L 12 of 16 January 2001)

Brussels IIa Regulation - Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (in Official Journal of the European Union No L 338, 23 December 2003)

CCCat - Civil Code of Cataluña

CJEU - Court of Justice of the European Union (and previous denominations)

Croatian PIL Act - Law on resolution of Conflict of Laws with regulations of other countries (Službeni list SFRJ No 43 of 23 July 1982 with corrigenda in No 72/82, in Croatian Official Gazette - Narodne novine - No 51/91)

Czech PIL Act 1963 - Act No 97/1963 Coll., on International Private and Procedural Law

EGBGB - Introductory Act to the German Civil Code (Bundesgesetzblatt 1994 I, Nr. 63 of 28 September 1994)

ECC - Civil Code of Ecuador

ECtHR - European Court of Human Rights

EU - European Union

FamFG - German Act on Proceedings in Family Matters and in Matters and Non-contentious Jurisdiction of 17 December 2008 (Bundesgesetzblatt 2008 I, p. 2586, 2587)

FCC - Civil Code of France (available at legifrance.gouv.fr)

Hague Convention of 1961 - Hague Convention of 5 October 1961 concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Minors

Hague Convention of 1980 - Convention of 25 October 1980 on the Civil Aspects of International Child Abduction



Hague Convention of 1996 - 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

Hague Convention of 2007 - Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance

Hague Maintenance Protocol - Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations

ICC - Civil Code of Italy (in Gazzetta Ufficiale No 79 e 79-bis of 4 April 1942)

IrCC - Civil Code of Iran

Italian Law No 218/1995 - Law No 218 of 31 May 1995 Reform of the Italian private international law system (in Gazzetta Ufficiale No 68 -128 of 3 June 1995)

Lugano Convention of 2007 - Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters signed on 15 October 2007

Maintenance Regulation - Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (in Official Journal of the European Union No L 7 of 10 January 2009)

PCC - Civil Code of Peru

Rome III Regulation - Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (in Official Journal of the European Union No L 343 of 29 December 2010)

SCC - Civil Code of Spain

SPSL - Syrian Personal Status Law

Succession Regulation - Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (in Official Journal of the European Union No L 201 of 27 July 2012)



PLEASE NOTE

The EUFam's code: the citation of case-law in the footnotes is made using the "EUFam's code", a code created to ensure an efficient research within the EUFam's public database, available at www.eufams.unimi.it. The code is composed as follows:

- Two letters indicating the country
(<http://publications.europa.eu/code/pdf/370000en.htm>);
- One letter indicating the Level of the court (F = first, S = second, T = third, C = constitutional, or A = administrative);
- The date of the judgment in reverse order (YYYYMMDD).

For instance, a judgment of first instance issued in Italy on the 24 June 2014 will have the following code: ITF20140624



Introduction

Filippo Marchetti

1. Purpose of the Report

As foreshadowed in the “Planning the future of cross-border families: a path through coordination - "EUFam's" project, this report is based on the case-law collected by 10 June 2016. This report is meant to provide an empirical assessment of the data provided by the case law. It is preliminary to a Final Study to be issued at the end of the project, once the gathering of the case-law is completed, and the best practices of judges and lawyers of the addressed Member States are collected and analysed. Using this report as starting point, the Final Study will address and examine the issues arisen in the case law as well as the problematic aspects highlighted by the legal doctrine, but not encountered in the case law yet.

The EUFam’s project aims at assessing the effectiveness of the *in concreto* functioning, also with reference to the free movement of persons, of Regulations (EU) No 2201/2003 and No 1259/2010, of Regulation No 4/2009 and the 2007 Hague Protocol and the 2007 Hague Recovery Convention as well as of Regulation No 650/2012, in order to identify the paths that lead to further improvement of such effectiveness.

The objective of all these Regulations and international instruments is to increase legal certainty, predictability and party autonomy with the ultimate goal of removing the existing obstacles to the free movement of persons. The legislation on these matters is composed by multiple instruments that regulate in a fragmentary, and yet interconnected manner, relationships of a different nature. Therefore, uncertainties may arise from their combined application.

Since the project aims to collect and analyse the practice and best solutions adopted by national courts facing interpretative issues under the current system, the research consortium agreed on the compilation of national case-law in an online archive and database, in order to allow for a faster and more efficient data mining through electronic means. A database containing raw data in English regarding the collected



judgments was deemed to be useful also in order to overcome linguistic barriers that may exist when dealing with legal orders of several Member States.

This First assessment report aims to provide the consortium itself with useful, consistent and readable data in order to identify the most appropriate focus for the following project-related initiatives and increase the effectiveness of the activities set forth under all workstreams of the project. Therefore, it does not aim to provide the public with a statistically solid picture of the European practice. Indeed, data will be added to the EUFam's database until December 2017, date of the end of the project, and the Final Study (Workstream 3) will include a more statistically elaborated section in which the totality of national case-law is taken into account, providing for highly comparable data concerning Member States' practice.

2. Scope and methodology

This report aims at giving an overview of all the information provided by the partners during the classification and uploading process of the collected case-law. It analyses the data regarding the main private international law matters (jurisdiction, applicable law, recognition and enforcement of judgments) on the basis of the list of topics required in the database.

This report also addresses the interplay among European and international instruments, as well as the cross-cultural issues regarding Islamic Law and Latin American legal systems, as foreseen under Annex 1 of the project. Finally, this report also investigates the impact of EU private international law instruments in family matters on the free movement of persons within the European Union.

Methodologically, collection of the case-law has been conducted with each partner collecting, classifying and analysing judgments issued by their national courts. Bulgaria, Greece and France have been gathered by the Max Planck Institute Luxembourg, while Slovak and Czech cases have been collected and analysed by the University of Milan. Judgments have been uploaded in full text in a cloud archive hosted on the servers of the University of Milan. Said servers also host a database in which information on each judgment has been uploaded as raw data by partners in order to ensure readability,



comparability, and data consistency. The substance of the raw data included by the partners in the database is taken as correct by the coordination team without any further cross-control.

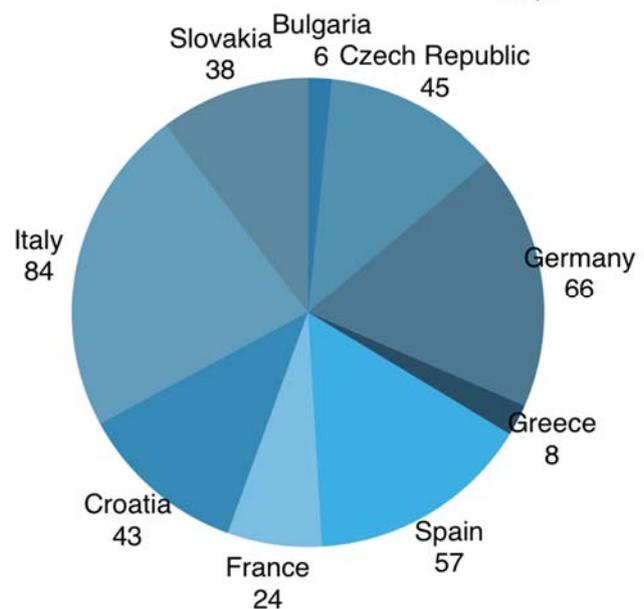
Some partners of the project reported several difficulties in gathering case-law for research purposes in their own jurisdiction. While some systems do not present issues regarding the collection of cases (Germany), some others do not provide for a centralized, systematic collection and classification of judgments, which renders such a task challenging, especially with regard to judgments issued in minor districts (Italy).

Furthermore, in one system (Croatia) the distribution and uploading of the full-texts of judgments is not allowed.

Moreover, it has been noted that, in lack of a general source of judgments, gathering information by directly contacting the competent courts was not always possible. Finally, the database demonstrates that the case-law in the recognition of judgments, due to the general structure of the rules on recognition and enforcement in the relevant Regulations, is scarce.

In some cases, the consortium does not have any relevant information regarding the date of the commencement of the proceeding. For instance, issues such as the temporal scope of application of one instrument over another prove difficult to assess lacking such data.

Graph 1



3. Quantitative data

Totally, at the date of 10 June 2016 the consortium collected 371 judgments, divided as shown in Graph 1.

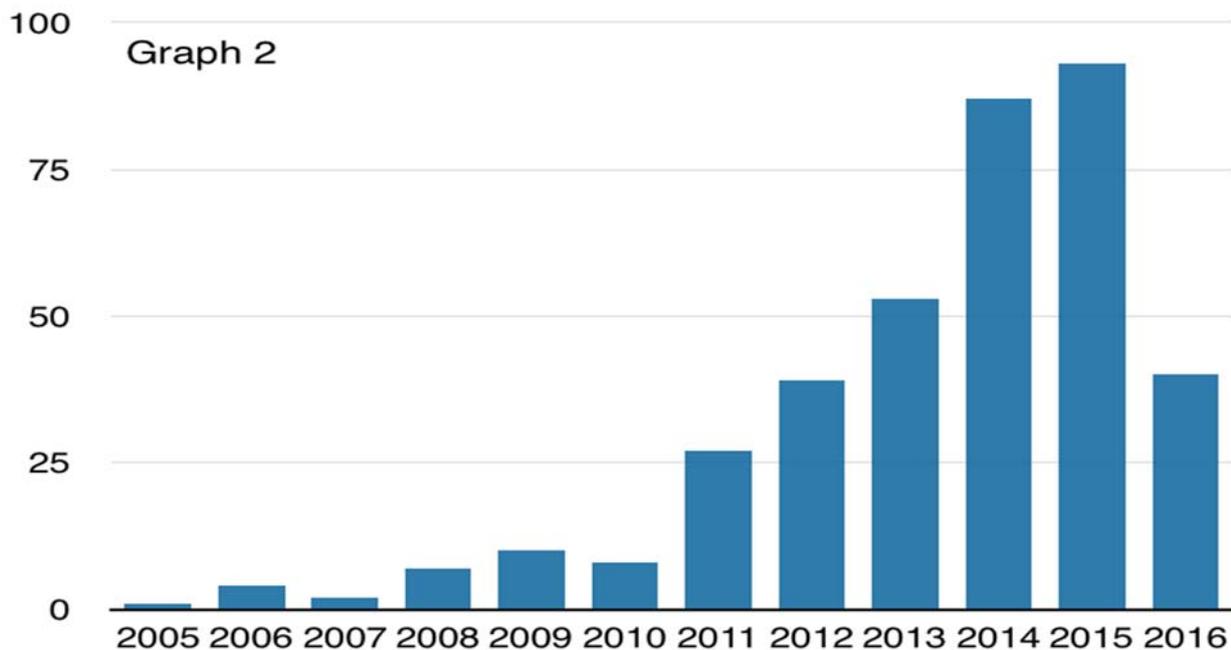
At this stage, partners uploaded the most relevant case-law of the jurisdictions they are in charge of, while they committed to provide the consortium with the totality of their national case-law concerning the legal



instruments object of the EUFam's project research before the end of the project in December 2017.

Out of 371 judgments, 143 are issued by courts of first instance, 188 by courts of second instance, and 34 by courts of third instance broadly defined (e.g. last instance, extraordinary instance, supervisory instance, "highest" - "supreme" - "Cassation" courts). 3 judgments were issued by administrative courts and the 3 judgments on the EUFam's topics were issued by the Czech Constitutional Court.

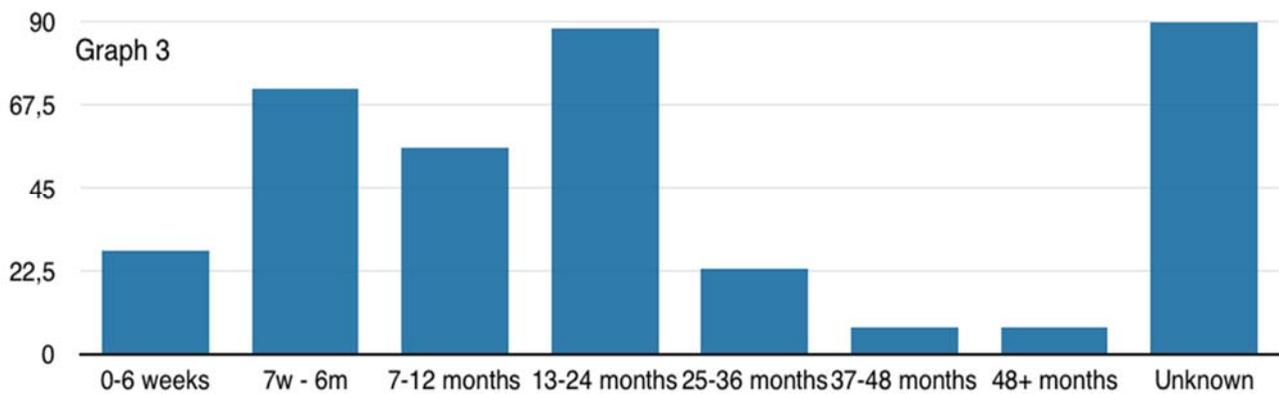
With regard to the distribution of judgments over time, Graph 2 shows how at this stage



the great majority of the collected case-law regards the last five years. This data may be explained as depending on the inconsistent availability of data concerning older cases. Indeed, the most recent case-law is likely to be easily collectable through database and online journals, while collecting older cases may represent a challenge, especially in some jurisdictions.



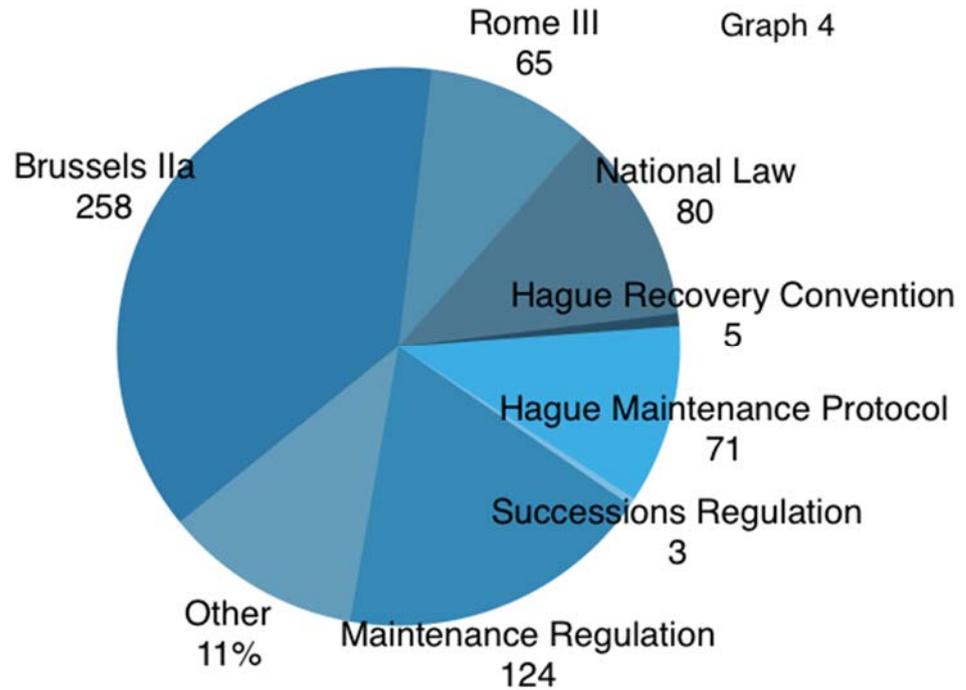
Dealing with the statistical length of the proceedings related to the collected judgments, data shown in Graph 3 highlights how the great majority of judgments are



rendered within two years from the commencement of the proceeding, while only few of them are rendered following longer proceedings. In about 25% of the cases the consortium has not been able to determine the length of the proceeding, mostly because such information is sometimes not available in the judgment. With regard to the cases which lasted over 25 months (37 judgments), the data so far collected show that Italy is by far the country with the highest number of lengthy proceedings (20 judgments), followed at distance by France with 4 lengthy proceedings. However, it has to be pointed out that so far the University of Verona provided the coordination team with four times the number of judgments provided for by the French counterpart, and therefore it is highly recommended to rely on the final project study for such policy-related considerations.

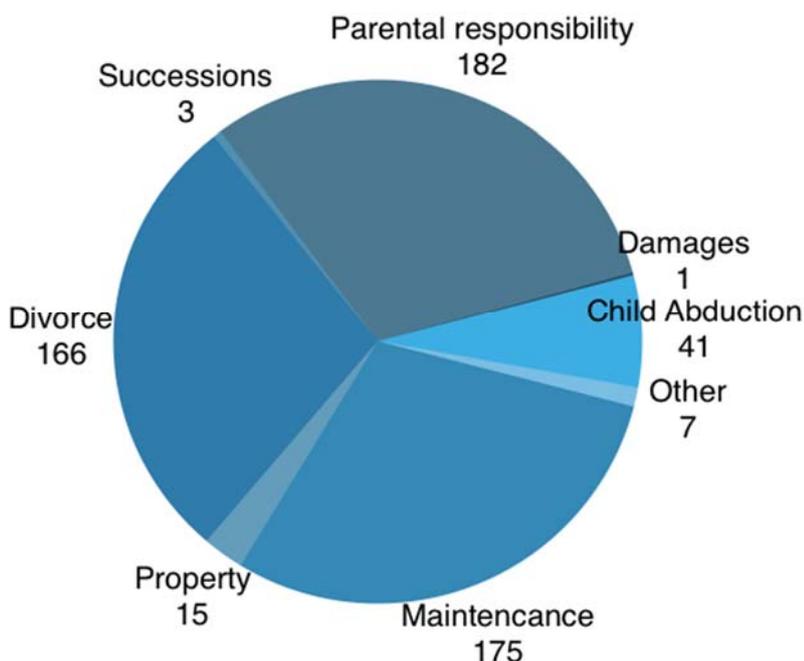


Moving to substantial aspects of the project's scope of research, data show how the great majority of judgments concern the Brussels IIa Regulation: Graph 4 shows that the application of such Regulation doubles in numbers the



application or interpretation of the Maintenance Regulation and that it is four times greater than the one of the Rome III Regulation. Worth of closer attention is the application of national Private International Law statutes in family matters: the

Graph 5



consortium highlighted the application or interpretation of such statutes in 80 cases, which amounts to 21% of the collected judgments. It has to be pointed out that over 50% of the judgments relate to more than one legal instrument: In 176 cases only the courts applied a single legal tool.

In 299 cases out of 371, the judgment was of declaratory



nature; in 50 cases only an injunction was issued, and interim measures have been observed in only 24 cases.

As shown in Graph 5, about a half of the collected and classified judgments regard divorce, and about the same percentage concerns parental responsibility matters and maintenance. Said graph highlights how divorce, parental responsibility and/or maintenance are often treated jointly by national courts.

Requests for interpretative preliminary rulings to the CJEU are a tool of last resort for national courts. Indeed, out of 271 collected cases, in 10 cases only a referral to the Court in Luxembourg was considered by the court. In 7 cases only the request for a preliminary ruling was actually made.

In matters relating to jurisdiction, in 318 judgments the court had to decide whether to exercise or decline its competence, while in 53 judgments only the issue was not dealt with. In 272 cases the court decided to exercise jurisdiction, while in 46 proceedings only the court concluded not to be entitled to hear the case. In 225 cases out of 272, jurisdiction has been determined through the Brussels IIa Regulation; in 90 cases out of 272 it has been determined through the Maintenance Regulation; in 39 cases national law has been applied to determine jurisdiction. Again, the sum of the said data is over 272 due to the joint treatment of said matters. Situations of *lis pendens* have been registered by partners in 39 cases, especially involving other EU Member States.

With regard to applicable law matters, the issue was dealt with in 189 cases out of 371 (51%). The law of the forum has been applied in 154 cases, while in only 35 cases a foreign law has been applied (in 12 cases the law of another EU Member State, in 23 cases the law of a non-EU-Member-State). The Rome III Regulation has been applied in 61 of said cases, while the Hague Maintenance Protocol in 63 cases; national Private International Law statutes have been deemed applicable in 91 judgments, while other unspecified legal instruments have been applied to the determination of the applicable law in 36 cases.

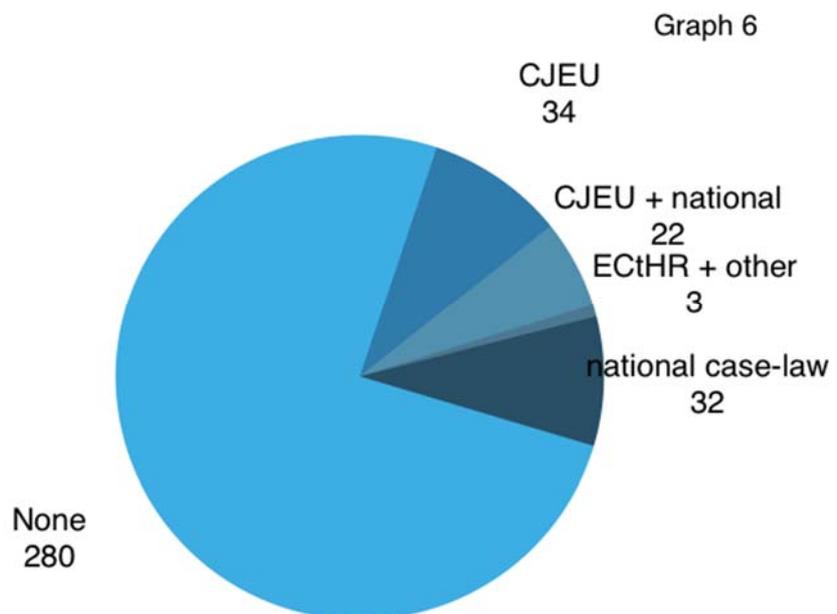
The issue of the recognition and enforcement of judgments has been dealt with in 45 proceedings: in 8 cases the foreign judgment has not been recognised, while in 37 cases recognition was granted (in 10 cases through the Brussels IIa Regulation, in 16 cases



through the Maintenance Regulation, while in 12 cases national Private International Law statutes have been applied to this matter).

Cooperation among courts has been triggered in 25 cases only out of 371, while only 6 of the collected judgments stem out of proceedings in which the taking of evidence abroad was necessary. In 5 cases Sharia-related issues arose and have been dealt with, while in 5 cases Latin American legal systems were somehow involved.

The practice of making reference to ECtHR, CJEU and national case-law is not sufficiently widespread. Graph 6 shows that only 25% of the collected case-law includes a reference to previous national or supranational judgments. National and CJEU case-law is predominant, while in only 3 cases the case-law of the ECtHR has been mentioned.





1. Matters related to the scope of application

Ilaria Viarengo

1.1. Matrimonial matters

No particular problems have emerged from the case-law.

One issue has arisen in the Italian case-law. According to Recital No 8, the Brussels IIa Regulation should apply only to the dissolution of matrimonial ties and should not deal with issues such as the grounds for divorce. However, the Italian courts apply Brussels IIa Regulation when they are required to adjudicate a separation on fault grounds, thus declaring to which of the spouses the separation is chargeable, in consideration of his/her behaviour contrary to the duties deriving from the marriage. Under Italian law such a request (“*richiesta di addebito*” pursuant to Article 151(2) ICC) is considered so much related to the application for separation that it cannot be decided apart. Therefore, it could not be subjected to jurisdiction rules different from those provided for separation.¹ In order to extend the Italian jurisdiction to the “*richiesta di addebito*” a court of first instance has even applied Article 5(3) of the Brussels I Regulation, as the court for the place where the harmful event occurred.²

1.2. Parental responsibility

As regards the material scope of application, so far the courts have proved very familiar with all the definitions set forth by Article 2 of the Brussels IIa Regulation in matters concerning parental responsibility.

As recalled by the CJEU, the notion of “parental responsibility”, is to be interpreted broadly and “includes all rights and duties relating to the person or the property of a

¹ Tribunale di Belluno, 30 December 2011, ITF20111230; Tribunale di Milano, 23 July 2012, IT20120723; Tribunale di Roma, 20 February 2013, ITF20130220; Tribunale di Milano, 12 April 2013, ITF20130412.

² Tribunale di Tivoli, 6 April 2011, ITF20110406.



child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect”.³ Accordingly, the term “civil matters” is to be interpreted autonomously and it can include measures which, under the domestic law of a Member State, are regarded as falling within public law.⁴

Therefore, it seems questionable a decision of the *Verwaltungsgericht Augsburg*,⁵ which held that Brussels IIa Regulation is not applicable in administrative proceedings between the parents or the official guardian and the office for youth welfare. On the contrary, the Regulation has been deemed as applicable in disputes involving the *German Youth Welfare* by the *Oberverwaltungsgericht Lüneburg*.⁶

As concerns the territorial scope of application of the Brussels IIa Regulation, in some cases the courts declined jurisdiction, in matters of parental responsibility over children habitually resident in a non-Member State. This raises the question whether the Regulation does not apply at all lacking the habitual residence of the child in a EU Member State or (more probably) the Regulation applies, provided that an international element exists in the case at issue. Therefore, the court should determine its jurisdiction under Article 14, which provides for residual jurisdiction instead of declining it by virtue of Article 8.⁷

1.3. Maintenance

The temporal scope of application of the Maintenance Regulation has caused some confusion. The courts do not always apply the Maintenance Regulation, but sometimes revert immediately to the national conflict-of-laws rules and do not examine their international jurisdiction at all.⁸ It occurs in particular when a maintenance issue arises in divorce proceedings involving claims over different issues (the spouses' *status*,

³ CJEU, 26 April 2012, case C-92/12 PPU, *Health Service Executive v. S.C., A.C.*, ECLI:EU:C:2012:255, para. 59.

⁴ CJEU, 27 November 2007, case C-435/06, *C.*, ECLI:EU:C:2007:714; CJEU, 21 October 2015, C-215/15, *Vasilka Ivanova Gogova v. Ilia Dimitrov Iliev*, ECLI:EU:C:2015:710.

⁵ Verwaltungsgericht Augsburg, 13 April 2015, Au 3 E 15.251, DEA20150413.

⁶ Oberverwaltungsgericht Lüneburg, 20 January 2016, 4 LB 14/13, DEA20160120.

⁷ Tribunale di Milano, 10 July 2012, IT20120710; Tribunale di Milano, 16 April 2014, ITF20140416.

⁸ Audiencia Provincial Islas Baleares, 2 March 2015, 77/2015, EES20150302.



parental responsibility over the couple's child/children, maintenance, matrimonial property regimes).

Some difficulties in relation to the delineation of the material scope with the Maintenance Regulation and the Hague Maintenance Protocol arose in the Italian case-law. In Italy, the concept of maintenance obligation is narrower than the autonomous notion used in application of the Maintenance Regulation. Actually, the latter includes two legal institutions ruled by the ICC (alimony - *alimenti* - and maintenance - *mantenimento*), as well as the institution of divorce contribution (*assegno divorzile*). Most Italian courts have well understood the necessity of refraining from referring to national concepts, however similar the Italian term “maintenance” sounds as compared to the one used in the Maintenance Regulation.⁹

The Maintenance Regulation, in line with the EU legislation on family matters, excludes family *status* from its scope, and does not provide what conflict rule should be adopted to determine the law applicable to preliminary questions. Consequently, it leaves open the alternative between the *lex fori* and the *lex causae* approach (independent/dependant solution). Following the second approach a German court of second instance addressed the preliminary question of paternity. Therefore, the court applied the same law applicable to the main question i.e. maintenance.¹⁰

Finally, some doubts raise in relation to the issue of the assigning the matrimonial home, which seems to be included in the broad notion of “maintenance” elaborated by the CJEU, despite the contrary statement of an Italian court of first instance which applied national conflict-of-laws rules (notably Article 32 of Italian Law No 218/1995).¹¹

⁹ Tribunale di Milano, 1 June 2012, ITF20120601; Tribunale di Belluno, 30 December 2011, ITF20111230, which, however, does not apply the Maintenance Regulation to the issue of the assigning the matrimonial home.

¹⁰ Oberlandesgericht Frankfurt a. M., 12 April 2012, 5 UF 66/11, DES20120412.

¹¹ Tribunale di Belluno, 30 December 2011, ITF20111230.



1.4. Interplay among EU family law instruments

The major issue regards the application of the ancillary jurisdiction provided in Article 3(c) and (d) of the Maintenance Regulation. The courts do not always apply Article 3(c) and decline their jurisdiction with regard to maintenance.¹²

As stated by the CJEU, Article 3(c) and (d) of the Maintenance Regulation must be understood as meaning that, where two courts are seized of proceedings, one involving proceedings concerning the separation or dissolution of the marriage of the parents of minor children, and the other involving proceedings involving parental responsibility for those children, an application for maintenance in respect of those children cannot be regarded as ancillary both to the proceedings concerning parental responsibility, within the meaning of Article 3(d) of that Regulation, and to the proceedings concerning the *status* of a person, within the meaning of Article 3(c) of that Regulation. They were regarded as ancillary only to the proceedings in matters of parental responsibility. Stated otherwise, Article 3(d) took precedence over Article 3(c) of the Maintenance Regulation.

In its judgment, the CJEU considered that, in the light of the best interest of the child, the court with jurisdiction to entertain proceedings concerning parental responsibility, as defined in Article 2(7) of the Brussels IIa Regulation, was in the best position to evaluate *in concreto* the issues involved in the application relating to maintenance of the children.¹³

The case from which the referral originated concerned the legal separation of two Italians and the custody and maintenance of their children, all of them habitually resident in London. According to Article 8 of the Brussels IIa Regulation, together with Article 3(d) of the Maintenance Regulation, the English court had jurisdiction over either parental responsibility or maintenance regarding the children. However, regarding the divorce between their parents, the Italian court had jurisdiction because the applicant, the father, was an Italian national and resided in Italy. Therefore, according to Article 3(1)(a) of the Brussels IIa Regulation, together with Article 3(c) of the Maintenance

¹² Juzgado de Primera Instancia de Pamplona, 6 June 2014, 298/2014, ESF20140606.

¹³ CJEU, 16 July 2015, case C-184/14, *A v. B.*, ECLI:EU:C:2015:479.



Regulation, the Italian court was also competent to decide on the related maintenance issues.

The *Tribunale di Milano*, seized by the husband, held that, according to Article 3(c) and (d) of the Maintenance Regulation, it had jurisdiction to decide on the issue of maintenance for the benefit of the wife, but not to decide on maintenance for the benefit of the children (since the latter request was not ancillary to proceedings over personal *status*, but to proceedings concerning parental responsibility).¹⁴ The referring court, the *Corte di Cassazione*, as appealed by the husband in view of the court of Milan's refusal to assume jurisdiction, asked the CJEU whether Article 3(c) and (d) of the Maintenance Regulation must be interpreted as meaning that the court which had jurisdiction to entertain proceedings concerning maintenance obligations towards minor children, raised in the context of legal separation proceedings, was both the court with jurisdiction to entertain proceedings concerning personal *status* and the court with jurisdiction to entertain proceedings concerning parental responsibility.¹⁵ In other words, the issue was whether the heads of jurisdiction set out in Article 3(c) and (d) of the Maintenance Regulation must be understood to be mutually exclusive, or whether the conjunction "or" in the provision implies that the courts that have jurisdiction over legal separation and parental responsibility may be both validly seized with applications relating to maintenance in respect of children.

Sometimes the courts do not examine their international jurisdiction at all and revert immediately to the national conflict-of-laws rules.¹⁶ More often, they examine their international jurisdiction, but do not apply all the relevant Regulations. Divorce, maintenance obligations, assigning the matrimonial home and parental responsibility issues are often addressed in the same proceedings for divorce. The courts not always examine their international jurisdiction with regard to all aspects of the case. They apply correctly Brussels IIa Regulation with regard to divorce and then they (wrongly)

¹⁴ Tribunale di Milano, 16 November 2012, ITF20121116. The judgment was in line with the reasoning subsequently confirmed by the CJEU. Subsequently, the CJEU ruling was followed by the Corte di Cassazione, s.u., 5 February 2016 No 2276, ITT20160205.

¹⁵ Corte di Cassazione, 7 April 2014 No 8049, ITT20140407.

¹⁶ Krajský soud v Českých Budějovicích, 7 April 2008, 5 Co 732/2008, CZS20080407; Audiencia Provincial Barcelona, 4 February 2015, 53/2015, ESS20150204; Audiencia Provincial Islas Baleares, 2 March 2015, 77/2015, EES20150302; Audiencia Provincial Barcelona, 20 October 2015, 661/2015, ESS20151020.



extends their jurisdiction to the related maintenance and parental responsibility issues, without even examining the possibility of applying the Maintenance Regulation or Article 8 of the Brussels IIa Regulation.¹⁷

With regard to applicable law, it often occurs that maintenance, as well as parental responsibility issues, are regulated as if they were “*de-facto* issues”, without any reference to the relevant Regulations. The courts, after having established their jurisdiction on the basis of the Brussels IIa Regulation and the Maintenance Regulation, rule on the merit, applying their own law.¹⁸ Fortunately, there are some examples of good practice as well.¹⁹

¹⁷ Audiencia Provincial Barcelona, 18 July 2013, 551/2013, ESS20130718; Audiencia Provincial Barcelona, 17 November 2015, 828/2015, ESS20151117.

¹⁸ Tribunale di Milano, 11 June 2012, IT20120611; Tribunale di Milano, 23 July 2012, IT20120723; Tribunale di Milano, 14 February 2013, IT20130214; Audiencia Provincial Barcelona, 19 July 2013, 57172013, ESS20130719; Audiencia Provincial Barcelona, 4 February 2015, 53/2015, ESS20150204; Audiencia Provincial Barcelona, 20 October 2015, 661/2015, ESS20151020.

¹⁹ For a correct and precise coordination among several legal sources (EU instruments and national law) see: Tribunale di Roma, 6 November 2013, ITF20131106; Audiencia Provincial Barcelona, 30 October 2014, 665/2014, ESS20141030; Audiencia Provincial Barcelona, 11 December 2014, 773/2014, ESS20141211; Tribunale di Belluno, 23 December 2014, ITF20141223; Audiencia Provincial Barcelona, 8 January 2015, 10/2015, ESS20150108; Tribunale di Roma, 2 July 2015, 14412, ITF20150702; Tribunale di Roma, 2 October 2015, 19765, ITF20151002; Tribunale di Belluno, 24 May 2016, ITF20160524.



2. Matters related to jurisdiction

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2.1. General grounds of jurisdiction²⁰

The Brussels IIa Regulation provides for uniform rules to settle conflicts of jurisdiction between Member States and lays down a multitude of fora in Article 3 whereas does not allow the spouses to designate the competent court by common agreement. Rules of international jurisdiction that exist under the law of the Member States are in principle not applicable if one of the spouses is habitually resident in a Member State or is a national of a Member State or in the case of Ireland and the United Kingdom is domiciled therein (Article 6). By way of exception national rules on international jurisdiction however come into play if there are no courts in any Member State with jurisdiction on the matter under the residual jurisdiction rule of Article 7.²¹

With regard to parental responsibility, Article 8 provides for the general jurisdiction of the courts of the Member State where the child is habitually resident at the time the court is seized, except for certain cases of a change in the child's residence or pursuant to an agreement between the holders of parental responsibility.

The Maintenance Regulation provides for alternative *fora* which resulted (with few amendments) from the special head of jurisdiction contained in Article 5(2) of the Brussels I Regulation. In order to protect the creditor's rights, pursuant to Article 3(a) and (b) jurisdiction in matters relating to maintenance obligations lies with the court of the place where the defendant is habitually resident or for the place where the creditor is habitually resident. Furthermore, jurisdiction in matters relating to maintenance obligations in Member States can lie with the court which has jurisdiction to entertain proceedings concerning the *status* of a person or parental responsibility if the maintenance matter is ancillary to those proceedings (unless that jurisdiction is solely

²⁰ This paragraph shall be attributed to: Ilaria Viarengo.

²¹ This rule was clearly established by the CJEU, 29 November 2007, case C-68/07, *Kerstin Sundelind Lopez v. Miguel Enrique Lopez Lizazo*, ECLI:EU:C:2007:740.



based on nationality) (Article 3(c) and (d)). In addition to the general provisions, the Maintenance Regulation provides in Article 4 for the possibility of the parties to a limited choice of court.

The Succession Regulation adopts as general head of jurisdiction, over all assets, regardless their location, the last habitual residence of the *de cuius* at the time of death (Article 4). This rule can be derogated from only in a limited number of circumstances, which are mostly connected with the exercise of party autonomy (Article 5-7), and with cases in which the last habitual residence of the *de cuius* is not localised in a Member State (Articles 10 and 11).

The issue of jurisdiction shall be assessed by the court on its own motion. Such assessment must refer to the moment the claims are filed before the court. Therefore, facts and actions taken by the parties subsequent to the filing of the claims are irrelevant with a view to establishing jurisdiction.²²

A. Habitual residence

Habitual residence is a key factor. In Article 3(1)(a) of the Brussels IIa Regulation six out of seven jurisdictional grounds are based on habitual residence. With regard to parental responsibility, Article 8 of the Brussels IIa Regulation indicates the child's habitual residence. In the Maintenance Regulation the general grounds of jurisdiction are based on habitual residence. Article 3(a) and (b) provide for the defendant's or the creditor's habitual residence. The Succession Regulation provides that the general connecting factor for the purposes of determining both jurisdiction and the applicable law should be the habitual residence of the deceased at the time of death (Articles 4 and 21(1)).

Notwithstanding the large use of habitual residence in these provisions, a definition of what is meant by it cannot be found in the Brussels IIa Regulation and Maintenance Regulations. On the other hand, neither do they express reference to the law of the Member States. For the first time, the issue of the definition of habitual residence has been addressed in the Succession Regulation. Recitals No 23 and No 24 of the Succession Regulation provides some criteria for determining the habitual residence. However,

²² Tribunale di Milano, 16 April 2014, ITF20140416.



Recital No 23 points out that no inter-instrumental interpretation the habitual residence is intended. Accordingly, the CJEU has pointed out in several rulings that the interpretation of the habitual residence “must take into account the context of the provision and the purpose of the relevant Regulations”.²³

i) Matrimonial matters

The courts often establish jurisdiction on the basis of Article 3(1)(a) without taking a closer look at the facts. Where they thoroughly examine the facts of the case, they generally look for personal and professional ties to the person’s place of residence. With regard to matrimonial matters, the collected decisions tend to give a broad interpretation of the concept of habitual residence. A well-established CJEU case-law specifically with regard to divorce is still lacking. Nevertheless, from a global overview of the case-law on Article 3 of the Brussels IIa Regulation appears that so far the case-law has tried to follow the indications of the CJEU, although the latter concern a different matter. For example, the Italian Supreme Court stated that “habitual residence” means “the place where the person has established, on a fixed basis, his permanent habitual centre of interests and where he/she carries out most of his/her personal and eventually professional life”.²⁴ However, in this interpretation, the intention of the person, whether he/she intends his/her stay in Italy to be a permanent move or a temporary one, has an incidental and not essential role.

The courts of lower instance sometimes base the determination of the habitual residence on the evaluation of documents such as, for example, the certificate of residence, the stay permit and the income tax return, without any further examination of the factual circumstances.²⁵ Fortunately, there are some examples of good practice as well. A correct examination of the factual circumstances can be found, for example,

²³ CJEU, 2 April 2009, case C-523/07, A , ECLI:EU:C:2009:225, para. 34; 22 December 2010, case C-497/10, *Mercredi v. Chaffe*, ECLI:EU:C:2010:829, para. 45.

²⁴ Corte di Cassazione, s.u., 17 February 2010 No 3680, ITT20100217; Corte di Cassazione, s.u., 25 June 2010 No 15328, ITT20100625.

²⁵ Tribunale di Belluno, 30 December 2011, ITF20111230; Tribunale di Roma, 20 February 2013, ITF20130220.



in *Cour d'appel de Colmar*, 1 April 2014.²⁶ This decision regards a divorce between a British national and a New Zealand national, who, after the marriage in England, have lived in Switzerland and in France. At the time the French court was seized, both of them had already moved respectively to England and back to Switzerland. The fact that the husband had kept his domicile in France, where he paid taxes and received some invoices, was not considered a significant factor characterizing the effectivity and permanence of the habitual residence.

It is not clear from the case-law, whether the reference in Article 3(1)(a) of the Brussels IIa Regulation to an applicant having “resided” in a country for a year (or six months if he/she is a national of the Member State in question) prior to the petition is meant as “habitual residence” or simply “residence”. In the national practice some divergences can be found regarding the issue of whether the expression “resided there” implicitly refers to the immediately preceding “habitual residence” or if it has an independent meaning. One may quote the judgment of an Italian court of first instance,²⁷ regarding a divorce between an Italian wife and a United States husband. In this case the wife re-established her habitual residence in Italy for more than six months before the claim. Therefore, Italian courts had jurisdiction on the case.

Practical difficulties to identify the habitual residence have arisen in some cases where the parties spend their time in different places, or after having moved to another country, often travel to the country of origin where they have kept significant ties. At least three decisions may be quoted. Firstly, the French *Cour de cassation*, in a case regarding a couple of Azerbaijani nationals temporarily living in France where the husband has been posted by his company with a 3-year employment contract, after having lived also in Congo and Angola. The court held that their stay in France could be considered stable for the purpose of determining their habitual residence. Although the habitual residence in France was contested by the husband, because of the temporary character of his employment, and consequently of the permit stay of both spouses, the

²⁶ Cour d'appel de Colmar, 1 April 2014, 13/01316, FRS20140401.

²⁷ Tribunale di Pordenone, 14 October 2014, ITF20141014.



court deemed as relevant elements a loan contracted in France, an immovable property in France, and the children's school in France.²⁸

Secondly, in a decision of a Greek court of first instance, regarding a divorce between a Greek husband and a German citizen, both EU employees in Brussels, the Greek court, seized by the husband, declined jurisdiction. Although the plaintiff often travelled to Greece where he had kept business interests and a close relationship with his family, the habitual residence was correctly deemed to be in Brussels where they worked and lived.²⁹ Finally, it was not so easy for the *Tribunale di Milano* to identify the habitual residence in a case in which the spouses used to move through several countries during the year (Santo Domingo, Switzerland, Italy, summer holidays sailing).³⁰ The court established that the main factual elements lead to Switzerland as their main centre of interests (i.e. a house's ownership, the driving license, the children's school).

This analysis has shown that where the issue of the identification of the habitual residence has been addressed, the courts are aware that it must be determined *in concreto* by looking at objective criteria denoting a certain degree of integration of the individual in a given country.

The most problematic aspect is the number of decisions where there is no examination of the issue of the habitual residence or such an examination seems to be very superficial.³¹

ii) Child's habitual residence

In general, the case-law has followed the criteria provided by the CJEU, such as, in particular, the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social

²⁸ Cour de Cassation, 24 February 2016, 15-10288, FRT20160224.

²⁹ Court of second instance of Thessaloniki, 8 June 2015, 1689/2005, ELS20150608. Similarly, the periodic visits of a father to his children who live in another country have no impact on the habitual residence in the country where he works and habitually lives. See Županijski sud u Splitu, 20 July 2015, Gž Ob-58/2015, CRS20150720.

³⁰ Tribunale di Milano, 16 April 2014, ITF20140416.

³¹ Općinski sud Buje, 12 February 2014, P-17/2014, CRF20140212; Tribunale di Roma, 3 November 2014, 21666, ITF20141103; Županijski sud u Splitu, 20 July 2015, Gž Ob-58/2015, CRS20150720.



relationships of the child in that State.³² In the national case-law also other factors as, for example, the extra-curricular activities and the physical presence,³³ the mother language,³⁴ have been taken in consideration in a case-by-case approach, while no relevance has been given to the parents' or the child's citizenship alone.³⁵

In line with it, some supreme courts have intended the child's habitual residence as the place where, *de facto*, by virtue of a regular and stable presence, the child lives his/her daily life and has the centre of his/her relations, not only with parents.³⁶ Also lower courts have proven very familiar to such principle.³⁷

When it comes to determining *in concreto* the child's habitual residence, the courts appear to be very careful in examining the factual circumstances of the case, excluding any relevance of the subjective element, that is the intention (mostly of the parents) to settle in a certain place, i.e. to establish their habitual residence there.³⁸

The predictable future habitual residence has been taken in account in order to define the habitual residence of an unaccompanied refugee minor, who has just arrived in Germany.³⁹ In this case the residence of the foster family has been considered as the habitual residence of the minor given in custody. In an opposite way ruled a Czech court in a case of placement of the child (with habitual residence in the Czech Republic) in a foster family with habitual residence in Germany.⁴⁰

³²CJEU, 2 April 2009, case C-523/07, A., ECLI:EU:C:2009:225; 22 December 2010, case C-497/10 PPU, *Mercredi v. Chaffe*, ECLI:EU:C:2010:829; 9 October 2014, case C-376/14 PPU, *C. v. M.*, ECLI:EU:C:2014:2268.

³³ Oberlandesgericht Stuttgart, 6 May 2014, 17 UF 60/14, DES20140506.

³⁴ Oberlandesgericht Karlsruhe, 5 June 2015, 18 UF 265/14, DES20150605.

³⁵ Tribunale di Roma, 5 November 2013, 25806, ITF20131105.

³⁶ Corte di Cassazione, s.u., 17 February 2010 No 3680, ITT20100217; Nejvyšší soud České republiky, 27 September 2011, 30 Cdo 2244/2011, CZT20110927; Corte di Cassazione, s.u., 13 February 2012 No 1984 ITT20120213; Corte di Cassazione, s.u., 18 September 2014 No 19664, ITT20140918.

³⁷ Tribunale di Belluno, 30 December 2011, ITF20111230; Tribunale di Palmi, 28 January 2013, ITF20130128; Tribunale di Milano, 11 February 2014, ITF20140211; Tribunale di Milano, 24 March 2014, ITF20140324; Tribunale di Milano, 16 April 2014, ITF20140416; Tribunale di Belluno, 23 December 2014, ITF20091223; Oberlandesgericht Karlsruhe, 5 June 2015, 18 UF 265/14, DES20150605.

³⁸ Corte di Cassazione, s.u., 13 February 2012 No 1984, ITT20120213. See also Krajský soud v Brně, 31 July 2012, 38 Co 387/2011, CZS20120731. In this judgment of a Czech Court of second instance, the intention of the mother, i.e. she intended her stay in UK to be a temporary move and not a permanent move, was not taken in account.

³⁹ Oberlandesgericht Karlsruhe, 5 March 2012, 18 UF 274/11, DES20120305.

⁴⁰ Krajský soud v Českých Budějovicích, 14 January 2009, 5 Co 105/2009, CZS20090114.



Most of the gathered case-law emphasizes the actual and continuous course of the child's life in order to establish its habitual residence, at times even independent from the amount of time spent in one place or another.⁴¹ Only in the German case-law, it seems that a residence's period of six months is generally taken in consideration as relevant in order to identify the habitual residence's place.⁴²

According to Article 9, when a child moves lawfully from one Member State to another and acquires a new habitual residence there, the courts of the Member State of the child's former habitual residence, by way of exception to Article 8, shall retain jurisdiction for a period of three-months. However, in case of wrongful removal of a child, a change of the habitual residence after the court has been seized, is irrelevant when it is a consequence of provisional measures issued in urgent cases.⁴³

A notable judgment was given by the German Supreme Court dealing with a change of the child's residence from Austria to Germany during the proceedings in Germany. The German court held that the habitual residence of the child in the State of the *forum* at some time during the proceedings, as long as the child is habitually resident there by the end of the judicial proceedings is sufficient to establish jurisdiction.⁴⁴ At first glance, this appears to contradict the wording of Article 8 of the Regulation, which requires the child to be habitually resident in the State of the *forum* at the time the court is seized, i.e. at the beginning of the judicial proceedings. However, the German court argued that this requirement aims at maintaining the court's jurisdiction if the habitual residence of the child changes after the beginning of the proceedings (*perpetuatio fori* rule). In contrast, it is not meant to prevent the court's jurisdiction from being first established after the beginning of the proceedings.

A good example on how to determine the habitual residence of a child after a relocation into another Member State is given by a German court of second instance.⁴⁵ It regards

⁴¹ Corte di Cassazione, 4 December 2012 No 21750, ITT20121204.

⁴² Oberlandesgericht Stuttgart, 30 March 2012, 17 UF 338/11, DES20120330; Oberlandesgericht Zweibrücken, 22 May 2015, 2 UF 19/15, DES20150522; Oberlandesgericht Karlsruhe, 5 June 2015, 18 UF 265/14, DES20150605.

⁴³ Corte di Cassazione, s.u., 2 August 2011 No 16864, ITT20110802; See also Kammergericht Berlin, 2 March 2015, 3 UF 156/14, DES20150302.

⁴⁴ Bundesgerichtshof, 17 February 2010, XII ZB 68/09, DET20100217.

⁴⁵ Oberlandesgericht Stuttgart, 6 May 2014, 17 UF 60/14, DES20140506.



two children who have first lived in London, and then moved to Germany where they have lived for nine months with the agreement of both parents and finally were taken back to London by their father.

The need that the interpretation of habitual residence be congruent with international Conventions has been taken in account in some German cases regarding the transfer of a child from a Member State to a non-Member State, party of the Hague Convention of 1961, after the court had been seized. Under the Hague Convention of 1961, the jurisdiction changes once the child changes its place of residence. Provided that Brussels IIa Regulation has priority only in relation to EU-Member States, according to Article 60(a) of the Brussels IIa Regulation, the *perpetuatio fori* rule is not applicable. Therefore, the jurisdiction shifted from the German court to the courts of the non-Member State involved.⁴⁶

Finally, where the habitual residence is “fragmented”, according to the *Tribunale di Milano*, it is necessary to look for the main habitual residence deriving from a combination of quantitative and qualitative links with a certain country.⁴⁷

B. Nationality

A problem may arise as regards the use of nationality as a ground of jurisdiction in case of dual/multiple nationality. There is a general common understanding that, in order to assess whether an individual possesses the nationality of a country, the law of such country should apply. Cases of plurality of nationality were dealt with by the CJEU in the *Hadadi* case. According to the judgment, where spouses each hold the nationality of the same two Member States, the courts of those Member States of which the spouses hold the nationality have jurisdiction under that provision and the spouses may seize the court of the Member State of their choice. Therefore, the plaintiff may choose among

⁴⁶ Oberlandesgericht Frankfurt a. M., 12 April 2012, 5 UF 66/11, DES20120412; Kammergericht Berlin, 2 March 2015, 3 UF 156/14, DES20150302, both regarding a child, habitual resident in Germany at the time the application for custody was filed and then taken by one of the parents, respectively, to Turkey and to Russia.

⁴⁷ Tribunale di Milano, 16 April 2014, ITF20140416.



the nationalities they possess, irrespective of any effective link with the Member State at stake.⁴⁸

In the collected case-law only a handful of cases regard parties with a common double nationality.⁴⁹ In none of them, the double nationality has raised any problems, since the jurisdiction was founded on the habitual residence of both or either of them. Therefore, the issue has not been dealt.

In many cases both spouses are non-EU Member State nationals and the jurisdiction is founded on Article 3(1)(a) of the Brussels IIa Regulation, in particular on the habitual residence of the applicant (Article 3(1)(a) 5 indent)⁵⁰ or of either of them in the event of a joint application (Article 3(1)(a) 4 indent),⁵¹ or of both of them (Article 3(1)(a) 1 indent).⁵² As clarified in Recital No 8 of the Regulation No 1347/2000 (Brussels II), recalled in the CJEU Case *Sundelind Lopez*,⁵³ the Regulation “should also apply to nationals of non-Member States whose links with the territory of a Member State are sufficiently close”.

2.2. Prorogation of jurisdiction⁵⁴

On an overall evaluation, Member states’ case-law on this matter portrays some difficulties. On one hand, only in a few cases the existence of an agreement between the spouses was positively acknowledged by the proceeding court, on the other hand

⁴⁸ CJEU, 16 July 2009, case C-168/08, *Hadadi*, ECLI:EU:C:2009:474.

⁴⁹ Oberlandesgericht Hamm, 7 May 2013, 3 UF 267/12, DES20130507; Audiencia Provincial Barcelona, 5 March 2014, 158/2014, ESS20140305; Oberlandesgericht München, 2 June 2015, 34 Wx 146/14, DES20150602; Općinski sud u Požegi, 11 March 2016, P-Ob-28/15-12, CRF20160311.

⁵⁰ Tribunale di Mantova, 19 January 2016, ITF20160119b, regarding two Chinese nationals. The wife resided in Italy for more than a year before the application while the habitual residence of the husband was unknown. See also Tribunale di Roma, 27 January 2015, 1821, ITF20150127, regarding two Peruvian nationals, in which the jurisdiction of the Italian Court is founded on the habitual residence of the plaintiff and Tribunale di Belluno, 30 December 2011, ITF20111230.

⁵¹ See for example Tribunale di Belluno, 6 March 2009, 106, ITF20090306, concerning a joint application lodged by two Indian spouses who habitually reside in Italy.

⁵² See Audiencia Provincial Valencia, 6 October 2014, 720/2014, ESS20141006; Audiencia Provincial Barcelona, 4 December 2014, 756/2014, ESS20141204; Audiencia Provincial Barcelona, 8 January 2015, 10/2015, ESS20150108; Tribunal Superior de Justicia Aragón, 6 October 2015, 27/2015, EST20151006; Audiencia Provincial Vizcaya, 24 February 2016, 117/2016, ESS20160224; regarding respectively two Nigerian, Moroccan, Chinese Equatorian and Algerian nationals living in Spain.

⁵³ CJEU, 29 November 2007, case C-68/07, *Sundelind v. Lopez*, ECLI:EU:C:2007:740.

⁵⁴ This paragraph shall be attributed to: Francesca C. Villata.



prorogation of jurisdiction apparently has come into relevance only within the context of the Brussels IIa Regulation or of the ground of jurisdiction based on the appearance of the defendant, where available.⁵⁵

Under Article 12(1) of the Brussels IIa Regulation the courts of a Member State exercising jurisdiction by virtue of Article 3 on an application for divorce, legal separation or marriage annulment shall have jurisdiction in any matter relating to parental responsibility connected with that application where: (a) at least one of the spouses has parental responsibility in relation to the child; and (b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility, at the time the court is seized, and is in the superior interests of the child.

Such rule grounded the decision of a Czech court of second instance to annul the first instance decision which had not considered its possible application,⁵⁶ as well as the analogous judgment given by a Slovak court of second instance. In the latter case the mother filed an action for divorce, determination of parental responsibilities and maintenance. Both the parents and their child were Slovak nationals, though the child habitually resided in Hungary. The court of first instance declined its jurisdiction on parental responsibility matters according to Article 8 of the Brussels IIa Regulation and declined jurisdiction on divorce matters as well, although jurisdiction should have been affirmed pursuant Article 3(1)(b). The court justified its decision on the fact that Slovak legal system does not allow that these aspects were dealt with in separate proceedings. The mother appealed against this judgment. The court of second instance annulled the first instance decision and referred the case back for further consideration. The court of second instance grounded its decision on the principle of priority of EU law which should have prevented the court of first instance from declining its jurisdiction on divorce, even if it did not have jurisdiction on parental responsibility issues. For the maintenance aspects the Maintenance Regulation should have been applied. Therefore, the Slovak court had jurisdiction under Article 3(c) of the Maintenance Regulation. As to parental

⁵⁵ Oberlandesgericht Koblenz, 18 March 2015, 13 UF 825/14, DES20150318; Oberlandesgericht Stuttgart, 17 January 2014, 17 WF 229/13, DES20140117.

⁵⁶ Krajský soud v Brně, 4 December 2014, 20 Co 617/2014, CZS20141204.



responsibility, the court of first instance should have considered if the condition for application of Article 12 comma 1 of the Brussels II a Regulation were fulfilled.⁵⁷

In a peculiar case, Article 12(1) has been applied by a German court not to affirm its own jurisdiction, but to decline jurisdiction in favour of another Member state's courts (Poland), one may assume, because the parents had agreed on that Member state's jurisdiction.⁵⁸ It is unclear, however, why the applicant mother, having her habitual residence in Germany together with her daughter, had applied for custody of her child before a German court if she agreed on (or, more likely, did not contest) the jurisdiction of the Polish court before which the defendant father had filed a petition for divorce.

Article 12(3) has encountered larger favour before Member States' courts, even though in several situations where it could have played its role it has been neglected.⁵⁹ This was especially evident in a case decided by a Czech court. The court of first instance dismissed the proceedings pursuant to Article 8(1) of the Brussels IIa Regulation, since the child was habitually resident in the United Kingdom (the child used to live there, also his parents were habitually resident in the United Kingdom and the child himself attended a school in the United Kingdom). Conversely, none of the parties used to live in the Czech Republic nor intended to live there in the future. The father appealed against this judgment on the basis of Article 12(3), since the child has a strong relationship with the Czech Republic (he was a Czech citizen and spoke Czech language) and all parties explicitly accepted jurisdiction of the Czech courts. The court of second instance stated that the court of first instance had correctly applied Article 8(1) and again failed to apply Article 12 which is translated in Czech language as a "continuing in proceeding", without considering the CJEU's findings in its judgment of 12 November 2014, case C-656/13, where the Court of Justice stated that Article 12(3) must be interpreted as meaning that the jurisdiction of a court of a Member State which is not that of the

⁵⁷ Krajský súd Bratislava, 13 January 2014, 11CoP/362/2013, SKS20140113.

⁵⁸ Amtsgericht Steinfurt, 8 January 2008. 10 F 9/07, DEF20080108.

⁵⁹ Krajský súd Trnava, 13 January 2012, 10CoP/33/2011, SKS20120113; Krajský súd Žilina, 26 January 2016, 5CoP/3/2016, SKS20160126; Okresný súd Veľký Krtíš, 21 November 2014, 7P/148/2014, SKF20141121; Krajský súd Nitra, 31 March 2016, 6CoP/10/2016, SKS20160331.



child's habitual residence can be grounded on Article 12(3) even where no other proceedings are pending before the chosen court.⁶⁰

On the same note, a Slovak court had previously adopted a different approach with reference to the relation between the ground of jurisdiction provided under Article 12(3) and the other fora established under the Brussels IIa Regulation. In that case, the father had filed an action on determination of parental responsibility. The court of first instance had declined jurisdiction according to Article 8 since the child habitually resided in Hungary. The mother appealed against this decision claiming that the Slovak courts had jurisdiction since the child habitually resided in Slovakia as well and she referred to Articles 12 and 13. The court of second instance annulled the decision and referred the case back for further consideration to the court of first instance. In the Appellate court's opinion, all conditions set out in Article 12 were met and hence the court of first instance should re-exercise its jurisdiction. The court of second instance inferred that the jurisdiction of Slovak courts had been accepted expressly by the holders of parental responsibility from the fact that the father had filed an action before the Slovak court and the mother had appealed against the decision of the court of first instance that had declined its jurisdiction.⁶¹

On the flip side, Article 12(3) has been applied to ground jurisdiction of a Spanish court in a case concerning two Chinese spouses with habitual residence in Spain. They had 4 children: 3 of them were living in Spain whereas the other one lived in China with his grandfather. The Spanish court had to deal with divorce, parental responsibility, maintenance and matrimonial property issues. As for the minor living in China, the court affirmed its jurisdiction according to Article 12(3) and (4) (best interests of the minor).⁶² Article 12(3) was also applied to ground the jurisdiction of Czech courts on an action on annulment of educational care. The protected child was a Czech Republic national having his habitual residence in Austria, his mother had her habitual residence in Austria and his father was a Czech Republic national with habitual residence in Czech Republic. The educational care had been ordered by a Czech court in 2005, but in the meanwhile

⁶⁰ Krajský soud v Plzni, 29 January 2015, 15 Co 27/2015, CZS20150129.

⁶¹ Krajský súd Banská Bystrica, 25 April 2012, 17CoP/24/2012, SKS20120425.

⁶² SAP Barcelona, 8 January 2015, 10/2015, ESS20150108.



the child with his mother had moved to Austria. The court of first instance declined its jurisdiction pursuant to Article 8 of the Brussels IIa Regulation. The court of second instance established that all conditions set out in Article 12(3) were fulfilled and that the Czech court had therefore jurisdiction on the merits of the case.⁶³

Furthermore, Article 12(3) has also been applied in two Czech cases, respectively decided in 2007 and in 2011, though it led the proceeding courts to decline their jurisdiction since the defendant mother entered her appearance only to contest the jurisdiction of those courts.⁶⁴ It is worth noting that in the first case the mother entered her appearance before the court of second instance.

Moreover, one may find a plain application of Article 12(3) in a Slovak judgment given with reference to an action on parental responsibility filed by a mother. Before the commencement of the proceeding, the parents had drawn up the parental responsibility agreement. Even though both the father and the child habitually resided in Germany, the court of first instance applied Article 12(3) since, all conditions therein provided were fulfilled: the child was Slovak and the parents expressly accepted the jurisdiction of Slovak courts at the first hearing.⁶⁵

Finally, Article 12(3) was also considered in another Czech proceedings concerning children habitually resident in Austria. The court of first instance declined its jurisdiction by virtue of Article 8(1) and Article 17 of the Brussels IIa Regulation. The father appealed against this decision. He affirmed that the mother without his consent moved the children to Austria. In his opinion, Article 10 should have been applied. On 19 March 2013 a request for the return of children under the Hague Convention of 1980 was sent to the Austrian Central Authority. The court of second instance stated that the Austrian court had to take cogniscence the matter of children abduction and of the determination of their habitual residence. The same court, however, concluded that Czech courts had jurisdiction pursuant to Article 12(3) of the Brussels II a Regulation. The children had strong relations with Czech Republic (they were Czech nationals, the

⁶³ Krajský soud v Brně, 13 August 2012, 20 Co 541/2012, CZS20120813.

⁶⁴ Krajský soud v Českých Budějovicích, 12 March 2007, 5Co 526/2007, CZS20070312; Nejvyšší soud České republiky, 27 September 2011, 30 Cdo 2244/2011, CZT20110927.

⁶⁵ Okresný súd Liptovský Mikuláš, 21 September 2012, 7P/26/2011, SKF20120921.



father habitually resided in the Czech Republic), and the jurisdiction of Czech court had been accepted otherwise in an unequivocal manner by all the parties, since the father filed an action on parental responsibility on 26 October 2012 and an action in same matter between same parties before the same court was filed by the mother on 29 October 2012. This undoubtedly meant that both parents had expressed their acceptance of the jurisdiction of Czech courts. In the course of the proceedings mother argued that the Czech court did not have jurisdiction and subsequently also filed an action before an Austrian court. Nevertheless, considering that the mother had made her application to the Czech court on the advice of the Czech Office for the Protection of the Social Rights of Children, because she did not know where her children were and had also applied to the competent authorities in Austria, and, once she was aware of all the facts, on 31 October 2012, she had clearly stated that she did not accept the international jurisdiction of the Czech courts, the Supreme Court stated that Article 12(3) could not be applied in this case by virtue of the CJEU's interpretation.⁶⁶

2.3. Exclusive jurisdiction⁶⁷

Only 3 judgments, out of the 372 that have been examined, mention Article 6 of the Brussels IIa Regulation, which confers exclusive character to the grounds of jurisdiction set out in Article 3 et seq.

Two of them⁶⁸ refer to the provision in order to stress such character, in order to support court's jurisdiction under the mentioned EU Rules or the decision to decline it.

In one case only, the issue of the exclusive character of the jurisdictional grounds was raised as a key point in assessing the correct interpretation of the Regulation *vis à vis* domestic rules of Private International Law.⁶⁹ The case had been brought in first instance before the *Tribunale di Bolzano*, upon an application for legal separation

⁶⁶ Nejvyšší soud České republiky, 27 January 2015, 30 Cdo 1994/2013, CZT20150127.

⁶⁷ This paragraph shall be attributed to: Lidia Sandrini.

⁶⁸ Tribunale di Belluno, 30 December 2011, ITF20111230; Općinski sud Osijek, 23 December 2013, P2-614/2013, CRF20131223. See also Tribunale di Cagliari, 20 June 2013, ITF20130620, that refers to the exclusive character of the grounds of jurisdiction set out in Article 3 et seq. of the Brussels IIa Regulation, without explicitly mentioning Article 6.

⁶⁹ Corte di Cassazione, 2 May 2016 No 8619, ITT20160502. On the same case see also under "*Lis pendens*".



lodged by the husband, an Italian citizen. The wife, Italian citizen as well, contested the jurisdiction of the Italian court, claiming that precedence should be given to the proceedings for legal separation pending in Switzerland, as the Swiss court had been seized first. The Italian court of first instance declared the lack of jurisdiction and international *lis pendens*. Subsequently, the Italian court of second instance recognised that the Italian jurisdiction could have been grounded on Article 3(1)(b) of the Brussels Ila Regulation but also suspended the proceedings, by virtue of Article 7 of Italian Law 218/1995, which stipulates international *lis pendens*. In third instance, the Italian Supreme Court referred to the United Divisions of the same court, since it considered doubtful whether the exclusive character of the grounds of jurisdiction set out in Article 3 of the Brussels Ila Regulation prevents the application of national rules on *lis pendens*, where the other proceedings is pending in a State that is not a Member State of the EU. The United Divisions of the Italian Supreme Court have not rendered their judgment yet. Whatever that court will decide, it is worth mentioning here that the issue is still open at the EU level and that, in order to obviate to analogous doubts raised by the Brussels I Regulation, its recast provide for a new provision addressing *lis pendens* in the relations between Member States and third States.

Going back to the quantitative information, it may be observed that the very few decisions that refer to Article 6 should not be understood as a symptom of inobservance of the exclusive character of the grounds of jurisdiction set out in the Brussels Ila Regulation. To the contrary, the case-law review has shown that such exclusivity is generally assumed as obvious by judges.⁷⁰ Thus, it could be submitted that, precisely because of such attitude, the reference to Article 6 is often perceived as redundant.

Finally, it may not be omitted that in some judgments, whereas jurisdiction is correctly founded on the grounds provided for by Brussels Ila Regulation, pointless references to national Private International Law rules are added, apparently for the sake of completeness or as precaution, especially when either of the parties has contested that

⁷⁰ As to the application of Article 3 of the Brussels Ila Regulation see under “General ground of jurisdiction”.



the matter falls within the scope of the Regulation.⁷¹ Even if such practice does not usually lead to a wrong assessment as to the jurisdiction of the court seized, nevertheless it should be strongly discouraged, as it results in a possible fault in the reasoning.

2.4. Residual jurisdiction⁷²

The *residual jurisdiction* rule according to Article 7 and 14 of the Brussels II a Regulation was applied only by two Member States' courts.

The first judgment dealing with this rule was issued by the Czech Supreme Court.⁷³ In this custody case, Article 14 of the Brussels II a Regulation was applied, due to the child's habitual residence in a third State (Norway) and impossibility to establish jurisdiction of the Czech courts pursuant to Articles 8-13 of the Brussels IIa Regulation. Neither The Hague Convention of 1996 could not be applied nor the Lugano Convention of 2007 could be applied, since Norway was not a Contracting State of the former⁷⁴ and parental responsibility is excluded from the scope of the latter. As a consequence, the Czech Supreme Court concluded that Czech PIL Act 1963 was applicable.

The second judgment was rendered by the Croatian court of first instance.⁷⁵ The court correctly established its jurisdiction over the divorce case according to Croatian Private International Law Act (wife is Croatian national with habitual residence in Switzerland, husband is Swiss national with habitual residence in Thailand). However, the Croatian court failed to mention in the judgment that its jurisdiction was based on a residual ground permitted by Article 7 of the Brussels II a Regulation.

⁷¹ *Ibidem* and, as to the delimitation of the scope of the Brussels IIa Regulation, the section "Matrimonial matters" in the chapter "Matters related to the scope of application".

⁷² This paragraph shall be attributed to: Lenka Válková.

⁷³ Nejvyšší soud, 29 May 2013, 23 Nd 64/2013, CZT20130529.

⁷⁴ Norway has ratified Hague Convention of 1996 on 30 April 2016, i.e. after the Czech Court issued judgment.

⁷⁵ Općinski sud u Osijeku, 28 May 2015, P ob 345/15, CRF20150528.



2.5. Provisional measures⁷⁶

Approximately 20 decisions, among those that have been examined, deal with provisional and protective measures. That does not mean that orders granting provisional and protective measures are seldom issued by Member States Court. The explanation for this exiguous number may be found in the fact that, as it is well known, that kind of decision is scarcely reported. Furthermore, it should be noted that all the decisions dealing with provisional measures concern parental responsibility. Again, as in many Member States courts are used to order interim payments while the proceedings on maintenance obligations is pending on the merits, it may be submitted that the lack of case-law on Article 14 of the Maintenance Regulation is merely a matter of availability of the relevant jurisprudence. Hence, particularly with regard to such measures, the judges and the other practitioners involved in the Project may contribute significantly to the assessment of the practice under the relevant provisions of the EU Regulation in family matters.

Many of the reported judgments ordering provisory measures are good examples of proper application of the regime established by Brussels IIa Regulation with regard to the exercise of jurisdiction on provisional and protective measure, either by the judge competent on the merits, or on the ground of Article 20. Other decisions have been issued at the enforcement stage and deal correctly with the rules governing the recognition of interim judgments issued in other Member States, taking into account the different regime applicable, depending on the ground on which the court of origin has founded its jurisdiction.

Starting from that last issue, it is worth noting that one of the German reported case⁷⁷ gave rise to the CJEU judgment in the case C-256/09,⁷⁸ which clarified the condition under which provisional measures ordered in another Member State may be recognised and enforced. In that decision, the CJEU has drawn the above-mentioned distinction between the measures granted by the Court competent on the merits, which may circulate through the UE member States according to the rules provide for by the

⁷⁶ This paragraph shall be attributed to: Lidia Sandrini.

⁷⁷ Bundesgerichtshofs, 10 June 2009, XII ZB 182/08, DET20090610.

⁷⁸ CJEU, 15 July 2010, case C-256/09, *B. Purrucker v. G. Vallés Pérez*, ECLI:EU:C:2010:437.



Regulation, and those grounded on Article 20, which may only be recognised under the rules provided either by international Convention⁷⁹ or domestic law. Not surprisingly, after the CJEU had given its guidance, the German court dealing with the proceeding⁸⁰ followed them step-by-step. More precisely, according to the German Federal Court, as the jurisdiction of the court of origin did not find a clear or apparent basis in Article 8 et seq. of the Regulation, Article 21 et seq. were inapplicable for the recognition of the Spanish provisional measure and it could not be recognised nor enforced in Germany. Conversely, in a later case, the enforceability of the foreign provisional order has been declared by German courts, since the context of the decision clearly showed that the court of origin had founded its competence on Article 8, even if such Article had not been explicitly mentioned.⁸¹ It could appear, from the aforementioned cases that the court in the requested State does not usually stick to the ground of jurisdiction in the judgment. The court rather performs a more in-depth analysis of the case, which takes into account all relevant factors, which can be inferred from the decision rendered in another Member State. However, in light of the CJEU jurisprudence, the court issuing a provisional measure should be aware of the need to make the ground on which it found its competence on the merits clear, by way of an explicit reference to the relevant rule of the Brussels IIa Regulation, in order to allow an easier circulation of the decision. Unfortunately, on this respect the case-law is not always satisfactory⁸² and sometimes even wrong, especially when in the reasoning the exercise of jurisdiction is explained by reference to domestic rules of Private International Law, while it could have been correctly founded on the Regulation.⁸³

⁷⁹ For a case of recognition and enforcement of a provisory judgment, apparently grounded on Article 20 of the Brussels IIa Regulation, under the Hague Convention of 1996, see Oberlandesgericht München, 22 January 2015, 12 UF 1821/14, DES20150122.

⁸⁰ Bundesgerichtshofs, 9 February 2009, XII ZB 182/08, DET20110209.

⁸¹ See Oberlandesgericht Stuttgart Beschuß, 3 March 2014, 17 UF 262/13, DES20140305, confirmed by Bundesgerichtshofs, 8 April 2015, XII ZB 148/14, DET20150408.

⁸² See e.g. Krajský soud v Brně, 18 September 2012, 38 Co 356/2012, CZS20120918, which issued a provisional order without any examination or commentary regarding its jurisdiction; it is worth nothing that the first instance interim judgment failed to give reasons for the exercise of jurisdiction as well.

⁸³ See e.g. Županijski sud u Rijeci, 28 November 2013, GŽ-5432/2013-2, CRS20131128, dismissing the appeal lodged by the defendant (the father) against the judgment of the Municipal Court in Rijeka, by which the Court of first instance granted a provisional measure and awarded the custody of the child to the plaintiff (the mother), in the context of a proceedings on the merits in matter of divorce; both the



Member States' courts show a good attitude also as to the exercise of jurisdiction according to Article 20 of the Brussels Ila Regulation. More specifically, they generally refrain from issuing provisional measures in relation to children not residing nor present in the State,⁸⁴ in line with the interpretation of the provision resulting from the CJEU case-law.⁸⁵

Two Italian cases are worth mentioning as examples of the great extent to which Member State courts have embraced the distinction between the role of the courts dealing with the merits and the role of the court issuing provisional measures under Article 20, as ruled by the CJEU in the first judgment. The *Corte di Appello di Catania*,⁸⁶ after an assessment of the relevant elements of the case conducted with the cooperation of the National Central Authorities, held that a Romanian decision, according to which a child should have lived with his or her mother, was a provisional judgment issued by virtue of Article 20 of the Brussels Ila Regulation. Therefore, said

Court of first instance and the Court of second instance referred exclusively to domestic rules of Private International Law. See also *Županijski sud u Dubrovniku*, 14 October 2015, Gž 1336/14, CRS20141025, that set aside the first instance decision, by which a provisional measure had been granted, on the basis, *inter alia*, that the lower Court did not refer to the relevant Brussels Ila Regulation provisions in order to assess its jurisdiction, and applied the domestic rules instead.

⁸⁴ See e.g.: *Krajský soud v Českých Budějovicích*, 14 January 2009, 5 Co 32/2009, CZS20090114; *Corte di Appello di Catania*, 17 March 2014, ITS20140317.

⁸⁵ Particularly, with reference to CJEU, 9 November 2010, case C-296/10, *B. Purucker v. G. Vallés Pérez*, ECLI:EU:C:2010:665.

⁸⁶ *Corte di Appello di Catania*, 3 June 2015, ITS20150603; see also *Tribunale di Arezzo*, 15 March 2011, ITF20110315. Sometimes, the final result could be deemed to be correct, but the reasoning purporting it is not entirely persuasive: see e.g. *Tribunale di Vercelli*, 23 July 2014, ITF20140723, by which the father has been granted with right of access to the child, who was residing in Italy with the mother. The Court stated that it would have been pointless to evaluate whether the provisional measure aiming to regulate the right of access adopted by the Romanian Court, in the context of the Romanian divorce proceedings between the parents, could still be considered valid or overturned by the divorce decision. Since the Romanian Court was not competent neither under Article 8 nor under Article 12 of Bussels Ila Regulation, and, furthermore, the Romanian jurisdiction could not have been grounded on Article 20 of the same Regulation, since the child was not in that State, the Court founded itself bound to state on the father's rights of access without taking into account the Romanian protective measure, as child's best interest requires the measures on the rights of access to be taken by the authority where the child resides, which is the better placed to evaluate the needs of the child, to monitor his/her personality and the ongoing of the relationships with the parents. The decision is valuable for the reference to the major international/regional instruments enshrining the principle of the child's best interest, as well as for the effort in balancing such principle with the mutual trust between member States on which EU rules on judicial cooperation are based. Besides that, it must be noticed that the relevance of Romanian interim measures should have been more easily motivated taking into account Article 20(2) of the Brussels Ila Regulation, in light of the jurisprudence of the CJEU.



judgment should have ceased to apply when the court of the Member State having jurisdiction as to the merits of the case had taken the appropriate measures. Since jurisdiction as to the custody application lay with Italian Judicial Authorities, the court of second instance then replaced the Romanian provisory order by granting shared custody to both parents, with the child being placed at the father's residence and the mother being granted visitation rights. In the second case, the *Corte di Appello di Cagliari* had been requested to issue provisional measures pursuant to Article 20 of the Brussels IIa Regulation in the context of a case on parental responsibility already brought before a Dutch court. The Italian court did not grant the requested provisional order as such measure would have unduly interfered with the exercise of jurisdiction by the Dutch court competent on the merits, by way of a substantial revision of the exercise of access rights already granted to the father by that court.⁸⁷

Finally, as to the characterization of national measure as “provisional and protective measures” for the purposes of Article 20 of the Brussels IIa Regulation, the case-law does not give rise to significant concerns.⁸⁸ As exception can be mentioned a peculiar measure that Czech court may issue, under Article 193(c) of Law No 99/1963 Coll. Civil Procedure in the contest of abduction proceedings, when said courts are seized for a return order as courts of the requested State (Article 11 of the Regulation). By applying the domestic provision, Czech courts sometimes make the return order conditional upon the payment by the requesting parent of a sum for the accommodation of the abducting parent in the State of origin, or upon the arrangement for such accommodation,⁸⁹ in order to enable the abducting parent to stay with the child while the competent court decides on the merit. The characterization of such measures as “provisional and protective measures” under Article 20 of the Brussels IIa Regulation is doubtful, as well

⁸⁷ Tribunale di Cagliari, 12 December 2015, ITF20151212, in which CJEU, 2 April 2009, case C- 523/07, A., ECLI:EU:C:2009:225, has been followed step-by step.

⁸⁸ In this respect it may further be noticed that the prohibition or restrictions to the expatriation of the child, that often are set in the pre-trial phase of custody disputes by Member States Courts, are properly qualified as protective measures in accordance with Article 20. See e.g. Ústavní soud, 3 March 2011, 2471/10, CZC20110303, Tribunale per i minorenni di Venezia, 30 November 2011, ITF20111130.

⁸⁹ See e.g.: Krajský soud v Brně, 17 July 2012, 20 Co 501/2012, CZS20120717; Krajský soud v Brně, 4 June 2013, 20 Co 223/2013, CZS20130604; Krajský soud v Brně, 23 July 2013, 20 Co 203/2013, CZS20130723; Krajský soud v Brně, 19 January 2016, 20 Co 622/2015, CZS20160119.



as the possibility to require the fulfilment of conditions other than those provided for by its Article 11 in order to issue the return order.

2.6. Child abduction⁹⁰

Less than 50 decisions, out of the 371 that have been examined, address or are related to a situation of child wrongful removal/retention or to a request filed in order to obtain the respect of access rights. It is a substantial number of judgments, but its actual significance should be assessed in light of the statistics on return requests received by Brussels IIa Regulation States,⁹¹ looking at the overall quantity of return applications received by the Central Authorities of the Member States that are also covered by the present survey on a country-by-country basis.⁹² Assuming that the number of requests has not significantly decreased in the last few years,⁹³ which unfortunately are not covered by statistics on child return applications, it may be submitted that the cooperation between Central Authorities is in many cases successful, *i.e.* it often secures the voluntary return of the abducted child or brings about an amicable resolution of the issue.

Consequently, the judiciary is usually called to handle the more complex and sensitive cases only when other paths, as mediation, have already failed because of the ongoing conflict between the parties or the non-cooperative attitude of the removing parent. Thus, the institution of judicial proceedings in parental child abduction is often

⁹⁰ This paragraph shall be attributed to: Lidia Sandrini.

⁹¹ See Hague Conference on Private International Law, Prel. Doc. No 8 B of May 2011 - *A statistical analysis of applications had been made in 2008 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. Part II - Regional Report*, available at <https://www.hcch.net/en/publications-and-studies/details4/?pid=5421&dtid=32>; Swiss Institute of Comparative Law (SICL), *Cross-border parental child abduction in the European Union*, edited by the European Parliament, Policy Department C: Citizens' Rights and Constitutional Affairs, 2012, available at <http://www.europarl.europa.eu/studies> (hereafter "the SICL Report"). As the statistics on the return applications date back to 2008 or, for few selected Member States, to 2013, while the case-law that is here examined covers the period 2005-2016, an in-depth comparison of the data using statistical models - even considering only the Member States, which have been covered by all the studies - would be incorrect.

⁹² See the SICL Report, p. 49.

⁹³ *Ibidem*, pp. 50-51.



the “last resort”, which is coherent with the purposes both of the Hague Convention of 1980 and with Brussels Ila Regulation.

Despite the high degree of complexity of the cases involving child abduction, judges of Member States’ courts show a good attitude towards the application of the Hague Convention of 1980 rules as complemented by the Brussels Ila Regulation. Only 30% of the decisions concerning child abduction issues shows some difficulties in the application of the relevant instruments. The large majority reach correct solutions, supported by reasonings that take into account both Brussels Ila Regulation, together with the CJEU jurisprudence, and the Hague Convention of 1980.

As examples of good practice, with specific regard to the request for return orders, two cases may be mentioned. The first has been dealt by a German court of second instance, which issued a return order to France of the children wrongfully removed to Germany, upholding the first instance decision.⁹⁴ In the second one, a Croatian court of first instance applied the Hague Convention of 1980, as provided for by Article 62 of the Brussels Ila Regulation, and rejected a request for the return of the children to Serbia, stating, *inter alia*, that the requirement of the “actual exercise of custody rights” (Article 13a of the 1980 Hague Convention) was not fulfilled.⁹⁵

In both cases, the seized courts issued their judgments within the six-week time limit provided for under Article 11(3) of the Brussels Ila Regulation and Article 11 of the Hague Convention of 1980, and the respect of this timing did not prejudice the correctness of the decisions with respect both to the operative part of the judgment and to the reasoning. Unfortunately, in other cases courts have acted expeditiously as well, but with less satisfactory results.⁹⁶ In most cases, proceedings have taken far too long

⁹⁴ Oberlandesgericht Brandenburg, 22 September 2006, 15 UF 189/06, DES20060922.

⁹⁵ Općinski sud u Rijeci, 25 April 2014, R10-62/14, CRF20140425, which also stressed that the judicial authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation; it is worth nothing that, despite a lack of clear provisions in the Hague Convention of 1980 mirroring that provided for by Article 11(5) of the Brussels Ila Regulation, the Court did hear the father requesting the return of a child.

⁹⁶ See e.g.: Tribunale per i minorenni di Lecce, 25 July 2007, ITF20070725, which, in order to decide on the access rights claimed by the father, residing in Germany, with regard to the daughter habitually resident with the mother in Italy, did not make any reference to Brussels Ila Regulation in order to assess



than six weeks, confirming that such a time limit is often too short, even applied to each instance separately and not referred to the entire return procedure.⁹⁷

Leaving apart the timing issue, the analysis of the judgments shows that shortcomings occur mostly, when courts are called upon to apply the rules set out in Article 11 of the Brussels IIa Regulation, while incorrectness in the application of other rules, which come into play in abduction cases, is a rare event.

First, it must be pointed out a generalised absence, in the few decisions that refused the return of the child to the Member State of origin, of any reference to Article 11(4) of the Brussels IIa Regulation. According to this provision the court cannot refuse to return a child on the basis of Article 13(b) of the Hague Convention of 1980 if it is established that adequate arrangements have been made to secure the protection of the child after his/her return.⁹⁸ However, it is not always clear whether the lack of reference to Article

its jurisdiction and grounded the decision exclusively on Article 21 of the Hague Convention of 1980; moreover the Court did not hear the 7 years old child, stating that the hearing would have been inappropriate having regard to her age; Tribunale per i minorenni di Lecce, 2 March 2012, ITF20120302, issuing a return order to Greece of children wrongfully retained by the father in Italy without giving the children the opportunity to be heard; Tribunale di Milano, 31 March 2014, ITF20140331, which characterized the retention of the daughter by the Mother in Germany as a case “wrongful retention”, even if the father had agreed on child staying in Germany longer and on visiting the daughter there, and dismissed the request filed by the father on the custody rights stating that, in light of the joint application of Article 11 of the Brussels IIa Regulation and of the Hague Convention of 1980, he should have filed a claim for return before the Central Authority of the requested State (Germany); Županijski sud u Zagrebu Gž, 12 June 2015, Gž Ob-103-15-2, CRS20150612, which dismissed an appeal against the return order issued by the Municipal Court of Zagreb on the grounds set out in Article 13b of the Hague Convention of 1980, without making any reference to Article 11(4) of the Brussels IIa Regulation, *i.e.* without verifying if in the Netherland (requesting Member State) appropriate measures could have been arranged in order to secure the protection of the child; Općinski građanski sud Zagreb, 24 March 2016, R1 Ob-198/16-13, CRF20160324, in which Brussels IIa Regulation has not been applied, since in the case, concerning the wrongful removal of a child to Croatia from France, the relationships with a non-Member State (USA) were also involved, as the decision on custody issued in France, where the child was habitually residing before de removal (requesting State), have established that the father could take the child to live in Los Angeles with him.

⁹⁷ E.g., it took more 13 months to the Tribunale di Milano, 9 July 2015, ITF20070725, in order to reject the applicant claim for the revision of a return order, which had been issued by a Czech Court (requested Member State), for reasons relating to the allocation of internal functional competence among different Italian Courts; the same time took the Bundesgerichtshofs, 8 April 2015, XII ZB 148/14, 20150408, in order to upheld the second instance decision, which had declared the enforceability in Germany of the Hungarian decision granting the right of custody to mother of a child habitually resident in Hungary and wrongfully retained by the father in Germany.

⁹⁸ See e.g.: Court of first instance of Athens, 12 May 2011 No 1767/2011, ELT20110512, refusing the return of the child to the Netherlands; Court of first instance of Athens, 9 January 2015 No 1503/2015, ELF20150109, in which the return of the child to Poland has been refused, *inter alia*, because the removal could not be characterized as “wrongful”, given the consent of the mother to it; the Court also held that



11(4) of the Brussels IIa Regulation in the reasoning is merely a matter of drafting - *i.e.*, whether the court has indeed established that the child cannot be protected in the State of origin before refusing the return, but has omitted to mention this circumstance in the reasoning - or, on the contrary, a symptom of judges' difficulties in applying jointly two different sets of rules. Though the analysis of other few judgments, mainly Italians, granting the return order with exclusive reference to the Hague Convention of 1980, without even mentioning the Brussels IIa Regulation, might support the second hypothesis,⁹⁹ it should be considered that the lack of reference to Article 11(4) may not be deemed to be conclusive itself. However, the rule provided for under Article 11(4) of the Brussels IIa Regulation is crucial in order to reinforce the effectiveness of the principle of the immediate return of the child to the State of origin, pursued by the Brussels IIa Regulation. Therefore, the issue should be further examined, primarily by collecting judges' direct experiences about that, in order to find out what kind of action could more usefully be implemented.

there was a grave risk that the return to Poland would have exposed the child to physical or psychological harm, without mentioning Article 11(4) of the Brussels IIa Regulation. Općinski građanski sud Zagreb, 24 March 2016, R1 Ob-198/16-13, CRF20160324 mentioned above, in which the omission in referring to Article 11(4) depends on the fact that the case has been treated as involving the relationship with a non-Member State (USA); Županijski sud u Zagrebu, 12 June 2015, Gž Ob-103-15-2, CRS20150612 mentioned above, refusing the return of the child to the Netherlands. See also Najvyšší súd Slovenskej republiky, 30 September 2009, 2 M Cdo 23/2008, SKT20090630, which annulled the second instance decision and called upon the Court of first instance to further evaluate the conditions for refusal according to Article 13 of the Hague Convention of 1980, without mentioning Article 11(4) of the Brussels IIa Regulation.

⁹⁹ See e.g.: Tribunale per i minorenni di Lecce, 4 March 2005, ITF20050304; Tribunale per i minorenni di Lecce, 25 July 2007, ITF20070725, and Tribunale per i minorenni di Lecce, 30 May 2012, ITF20120530. See also Bundesgerichtshofs, 28 April 2011, XII ZB 170/11, DET20110428, confirming the enforceability of an Hungarian judgment according to Article 21 et seq. of the Brussels IIa Regulation, even though the Hungarian Court had not explicitly mentioned the Brussels IIa Regulation. In these cases, it may be argued that such omission did not prejudice the outcome of the decision, as most of the procedural rules provided for by Article 11 of the Brussels IIa refer to the refusal of the return order. However, since the application of the Hague Convention of 1980 between Member States has to comply with Articles 60 and 62(2) of the Regulation (see below, under "Interrelation with international Conventions"), the starting point of the reasoning should be Brussels IIa Regulation. Furthermore, it must be recalled that some provisions set out in Article 11 are strictly functional to the conduct of any proceedings on claims for return, *i.e.* to their quickness and fairness. On one hand, Article 11(3) reinforces the obligation upon member States to apply the most expedite procedure, establishing that the six-weeks-time limit may only be exceeded under exceptional circumstances (on the difficulties envisaged by the Courts in processing applications for return within this time limit, see above). On the other hand, the compliance with the obligation to give the child the opportunity to be heard, provided for by para. 2 (on which see below), could be decisive in order to evaluate any objections to the return and any risk to which he/she would be exposed after the return.



Finally, with regard to this specific issue, it could be reported, as a valuable exception, an already mentioned decision issued by the *Oberlandesgericht Brandenburg*, which explicitly recalled that there is no room for the application of Article 13(b) of the Hague Convention of 1980, whenever the safeguards provided for under Article 11(4) of the Regulation have been arranged.¹⁰⁰

To the same extent to which Brussels IIa Regulation pursues the prompt return of abducted children, it also aims to reinforce their right to be heard (Article 11(2)). The analysis of the relevant case-law shows that in many cases courts give due regard to the minors' fundamental right to express their view.¹⁰¹ Nevertheless, there are cases in which it is doubtful whether this right has been fully respected and, unfortunately, they are not sporadic. Sometimes courts omit completely to mention whether the child has been heard during the procedure or not and, consequently, to give any explanation. In other decisions, there is a reference to expertise given by social services about the degree of the child integration in a social environment and on the strength of his/her relationship with the parents, but it is not expressly stated that the minor had the opportunity to express his/her view. Finally, in other judgments the decision taken by the court not to hear the child is too concisely motivated by a reference to his/her age, even if the minor concerned is not an infant and, thus, an accurate exam in order to his/her degree of maturity should have been required.¹⁰²

¹⁰⁰ *Oberlandesgericht Brandenburg*, 22 September 2006, 15 UF 189/06, DES20060922.

¹⁰¹ As well-known, this right is recognised by Article 12(2) of the UN Convention on the Rights of the Child and by Article 24 of the Charter of Fundamental Rights of the European Union. As examples of judgments giving particular importance to the hearing of the minor see e.g.: *Oberlandesgericht Düsseldorf*, 4 March 2008, II-1 UF 18/08, DES20080304; *Tribunale per i minorenni di Lecce*, 30 May 2012, ITF20120530, mentioned above; *Najvyšší súd Slovenskej republiky*, 17 December 2013, 6Cdo/292/2013, SKT20131217, which annulled the second instance decision because the children have not been given the opportunity to be heard, and stated that the Court of second instance had to provide an expert assessment in order to examine whether, in light of their age and degree of maturity, the children were able to express their needs and their approach to the return to the father's home.

¹⁰² See e.g.: *Tribunale per i minorenni di Lecce*, 4 March 2005, ITF200503; *Tribunale per i minorenni di Lecce* 25 July 2007, ITF20070725, mentioned above and concerning the same abduction case, both of which motivated the refusal to proceed to the hearing of the child (who was five and seven years old, respectively, at the time of the first and of the second proceedings) referring exclusively to her juvenile age; *Court of first instance of Athens*, 12 May 2011 No 1767/2011, ELT20110512, mentioned above; *Tribunale per i minorenni di Lecce*, 2 March 2012, ITF20120302 mentioned above; *Tribunale per i minorenni di Lecce*, 11 February 2013, ITF20130211, suspending the execution of the decree issued by the same Court on the 2 March 2012 mentioned above, because the factual situation did not justify anymore the return, in light of the interest of the children; *Krajský soud v Brně*, 4 June 2013, 20 Co 223/2013,



In all these cases, the effective respect for the rights of the child raises the major concerns, from a substantial perspective. Moreover, from a procedural perspective, problems may also arise with regard to the circulation of judgments. If the judgment on return is given pursuant to Article 11(8) of the Brussels IIa Regulation, the omission in reporting about the hearing of the minor or an inadequate motivation for the decision not to hear him or her could bring about the impossibility to issue the certificate referred to in Articles 41-42 of the Regulation. With regard to the decisions relating to parental responsibility issued by the court competent pursuant to Article 10 of the Brussels IIa Regulation, the same faults could be taken into account at the recognition stage, according to Article 23(b).¹⁰³

Whenever the child is abroad, practical difficulties may obstacle his/her hearing. Nevertheless, in such circumstances courts should consider the possibility to use the arrangements laid down in the Evidence Regulation.¹⁰⁴ On the contrary, such a possibility does not appear to have been taken into account in the examined judgments.¹⁰⁵

The analysis of the case-law on child abduction issues does not show other reiterated incorrectness that could be indicative of more general difficulties in the application of the Brussels IIa system. Nevertheless, there are isolated examples of misinterpretation that is worth mentioning.

CZS20130604, issuing a return order of a child abducted from Italy together with a provisional measure enabling the mother (i.e. the abducting parent) to stay with the child until the time of the Italian decision on the merit; Krajský soud v Brně, 4 March 2014, 19 Co 113/2014, CZS20140304, issuing a provisional order preventing the return of a child to Austria; Oberlandesgericht Stuttgart, 6 May 2014, 17 UF 60/14, DES20140506, in which the competence of the Court has been grounded on Article 10 of the Brussels IIa Regulation; Krajský súd Bratislava, 18 August 2014, 11CoP/82/2014, SKS20140818; Tribunale per i minorenni di Catania, 1 July 2015, ITF20150701, which rejected the application for return on the ground - which has been assessed without hearing the child - that the requirement of the “actual exercise of custody rights” was not fulfilled.

¹⁰³ See below, under “Matters related to recognition and enforcement”.

¹⁰⁴ Regulation (EC) No 1206/2001, of 28 May 2001, on cooperation between the Courts of the Member States in the taking of evidence in civil or commercial matters.

¹⁰⁵ In the decision issued by Tribunale per minorenni di Catania, 1 July 2015, ITF20150701, the Court required the Italian Consulate in Belgium to acquire information on the material and psychological situation of the child in that State and, finally, after 40 days from the request, decided without waiting for those information, since it considered prevalent, in the interest of the child, the need to settle the situation. See also below, under “Interplay with other EU instruments”.



In a couple of cases, the characterization of the factual situation adopted by the seized court does not seem to be fully consistent with the ground of jurisdiction in light of which said court has assessed its competence. A judgment rendered by the *Tribunale di Milano*¹⁰⁶ shows as well some incoherence between the characterization of the retention of the child in another State and the set of rules called upon to regulate the situation. In the specific case, after the mother had retained the daughter in Germany longer than agreed, the father brought an action in Italy in order both to obtain exclusive custody rights on the daughter and to limit the mother's access rights. The court considered the retention of the child in Germany unlawful. Thus, it dismissed the claim stating that the father should have presented a request for the return to the German Central Authority according to the Hague Convention of 1980. In this case, in light of the few factual details reported, it is not possible to say whether an abduction had actually taken place,¹⁰⁷ but, if that had been the case, Italy would have been the Member State where the child was habitually resident immediately before the wrongful retention. Thus, the court should have assessed its competence applying Article 10 of the Brussels IIa Regulation. Conversely, if the move and permanence of the child in Germany was lawful, the court should have evaluated in the details the habitual residence of the child, in order to verify whether had been transferred to Germany or it could still be considered to be in Italy. Consequently, the assessment of the jurisdiction should have been done according to Article 8 of the Brussels IIa Regulation.

Two further judgments are not fully persuasive.¹⁰⁸ Both of them, in presence of joint custody rights, have determined that the children had their habitual residence both in the State of origin and in the requested State. In this respect, it could be submitted that

¹⁰⁶ Tribunale di Milano, 31 March 2014, ITF20140331.

¹⁰⁷ In the reasoning of the judgment is mentioned that the father had given his consent to the permanence of the daughter with the mother in Germany, and had agreed with the mother on his following visits to her there. Afterwards, the mother would have impeded the father's access to the daughter and for this reason he would have claimed the exclusive custody of the child.

¹⁰⁸ Najvyšší súd Slovenskej republiky, 30 April 2014, 6 Cdo 1/2013, SKT20130430; Krajský súd Bratislava, 28 January 2014, 11 CoP/508/2013, SKS20130128. It should be noticed, however, that in both cases the Courts assessed that an abduction had taken place because the move of the children had been decided by one of the parents without the consent of the other, notwithstanding joint custody rights had been established. On the autonomous meaning of "habitual residence" under and for the purposes of the Brussels IIa Regulation see under "General grounds of jurisdiction".



even if a child may be integrated, to a certain extent, in two different Member States, in light of the CJEU case-law,¹⁰⁹ the habitual residence should correspond to the place that reflects the highest degree of integration of the child in a social and family environment, which may be identified in only one Member State. If that assumption is correct, whenever it proves impossible to establish such a stronger degree of integration, the solution could be to rely upon Article 13.

Finally, the exam of the case-law concerning the abduction issue has shown a peculiarity of Czech domestic law. Article 193(c) of Czech Law No 99/1963 Coll. Civil Procedure allows courts to issue provisional measures in proceedings regarding child abduction. On this ground, Czech courts have sometimes ordered to the parent, who was asking for the return, to pay a periodic sum to the person who retained the child or to ensure and pay for his/her accommodation in the State of origin after the child's return and until the court of that State decides on the merits. The characterization of such measures as provisional and protective measures under Article 20 of the Brussels II a Regulation is not that obvious.¹¹⁰ Besides that, it is doubtful whether courts may make the child's return conditional upon requirements other than those provided for by the Regulation and the Hague Convention of 1980, as that could easily jeopardize the proper functioning of a system aiming to ensure the prompt return of the child.

2.7. *Forum non conveniens*¹¹¹

Under Article 15 of the Brussels IIa Regulation, the court which has jurisdiction on the merits (i.e. the "court of origin"), can transfer the case to a court of another Member State if the latter is better placed to hear the case. This can be done, by way of exception, subject to the condition that the child has a "particular connection" with the other Member State (Article 3(3)), and provided that the transfer is in the child's best interest.

¹⁰⁹ On the assessment of child's habitual residence see especially CJEU, 2 April 2009, case C-523/07, A., ECLI:EU:C:2009:225; 22 December 2010, case C-497/10, *Mercredi v. Chaffe*, ECLI:EU:C:2010:829.

¹¹⁰ See also under "Provisional and protective measures".

¹¹¹ This paragraph shall be attributed to: Lidia Sandrini.



That provision mirrors Article 8 of the Hague Convention of 1996, and supplements it with a more detailed set of procedural rules. As it also happened to the Hague Convention rule, Article 15 of the Brussels IIa Regulation had been scarcely used at the beginning, given its innovative character. The exam of the case-law shows that courts have now get used to this mechanism, which is based on the principle of mutual trust: 12 judgments, out of the 371 examined, deal with the transfer of the case, or part of it, to or by the court of another Member State.

Among these judgments, in 5 cases¹¹² courts have decided negatively on the transfer because the requirements provided for under Article 15 were not fulfilled. This is coherent with the provision set out in Article 15, according to which the transfer may be disposed (or accepted) by way of exception. Therefore, it shall be limited to those cases in which the specific and exceptional circumstances of the case lead to the conclusion that the court competent according to Articles 8 et seq. of the Regulation is not the best placed to hear the case.

In one case,¹¹³ a Slovak court accepted to hear the case after it had received a request for transfer by the UK Supreme Court. This case is an excellent example of the correct application of Article 15, as the two courts proceeded to an in-depth exam of the fulfilment of the requirements set out in para. 3 of this Article and considered carefully what it should be done in the best interest of the child. It should also be noticed that the UK Supreme Court cooperated with the Slovak Office for International Protection of the Child according to Article 15(6) of the Brussels IIa Regulation.

¹¹² See: Bundesgerichtshof, 2 April 2008, XII ZB 134/06, DET20080402, rejecting, on procedural grounds, the appeal against the second instance decision that, overturning the first instance decision, had decided negatively on the transfer of the case to a French Court in Paris; Okresný súd Bratislava II, 27 January 2014, 28P/277/2011, SKF20140127, in which the jurisdiction has been declined on the ground that the Slovak Court did not had received any request of transfer by the UK Court, which it recognised to be competent on the merits and to which it had applied according to Article 15(2)(c); Tribunale di Milano, 11 February 2014, ITF20140211, in which the request had been declared inadmissible on procedural grounds, but it is also stressed that in any case substantive reason would have led to the rejection, because there were none of the elements of connection provided for in Article 15(3); Oberlandesgericht Stuttgart, 6 May 2014, 17 UF 60/14, DES20140506, upholding, as far as the assessment of jurisdiction was concerned, the first instance judgment which, *inter alia*, had rejected the application for transfer lodged by the defendant; Općinski sud u Sisku, 2 December 2016, R1-eu-2/16, CRF20160219, rejecting a request for transfer received from a UK Court because, *inter alia*, the child was born and habitually resident in the UK, were also his/her closest family were living, while there were not relatives of the child able or willing to accept custody over him/her in Croatia.

¹¹³ Okresný súd Michalovce, 23 October 2015, 23Pcud/6/2015, SKF20151021.



In two cases, the application from a party for the transferal has not been examined by the court seized. In the first one, a Czech court of first instance did not examine the application lodged by the defendant in order to obtain the transfer to an Italian court, on the ground that the *perpetuatio fori*-principle as provided in Article 8 made the change of the child's habitual residence irrelevant, as it had occurred after the commencement of the Czech proceedings. Afterwards, the court of second instance annulled the judgment and referred the case back to the lower court for further consideration, *inter alia*, with regard to the possibility to apply Article 15(3)(a) of the Brussels IIa Regulation. In this case, it should be highlighted how the disapplication of Article 15 of the Brussels IIa Regulation in first instance has been promptly corrected in second instance.¹¹⁴ In the second case, the President of an Italian court did not take into consideration, in the decision issued after an hearing, the application under Article 15 of the Brussels IIa Regulation, which had been sent from the German judicial authorities first seized.¹¹⁵ Such decision may be explained in light of the extremely limited aims of the presidential hearings according to the Italian rules on civil proceedings. In fact, that hearing is mainly intended to ascertain the true will of the parties towards the dissolution of marriage, and to refer them to the court for a full examination of the case. Furthermore, the President of the court can decide, in case of urgency and by way of protective measures, on duties and obligations between the parties in order to ensure the well-being of the members of the family, including children. In the case at issue, provisory arrangements as to the care of the children had already been taken by the German court and implemented by the parties. Thus, the judge considered that the transfer could not be regarded as being urgent. On the contrary, as it may lead to decline jurisdiction, the court of the merits could have better dealt with it, together with all the jurisdiction issues, at the subsequent stage of the proceedings. The decision may be deemed to be correct. In fact, it is submitted that the decision on the transfer could hardly be taken at that early stage of proceedings, even if the issue of jurisdiction

¹¹⁴ Krajský soud v Českých Budějovicích, 7 April 2008, 5 Co 732/2008, CZS20080407, in which the Court of second instance clarified that the Court of first instance had to proceed to an exhaustive assessment of all the jurisdiction issues, including the application of Article 15 of the Regulation, instead of immediately dismissing the case on the ground of the internal territorial competence rule.

¹¹⁵ Tribunale di Novara, 19 April 2012, ITF20120419.



did not require any further consideration, as it involves an in-depth exam of the best interest of the child that cannot be based on a prima face review of the case.

In three cases, out of the four in which there had been a positive assessment of the possibility to transfer the case, either by the court of origin or by the requested court, courts seem to have faced some difficulties in interpreting and applying Article 15. Those difficulties are not indicative of a more general problem of misinterpretation of the provision, nor do they raise major concerns; nevertheless, it is worth mentioning them, as they may give cause for reflection about possible improvements of the discipline and as well as to the action that may be taken to improve its application.

Two Italian judgments show, to a different extent, some uncertainty as to the application of Article 15(3). The *Tribunale per i minorenni di Roma*,¹¹⁶ in the decision on the transfer of the proceedings to a Lithuanian court upon request of a party, has omitted to set out the time-limit by which the Lithuanian court should have been seized, thus leaving uncertain whether and when the Italian proceeding might have been resumed. The *Tribunale di Siracusa*,¹¹⁷ which stayed the custody proceedings brought before it, upon an application for transfer to a Belgian court, set a time-limit of 15 days by which the Belgian judicial authorities should have been seized. In this case, one might wonder whether the time-limit was not too short.

In a third Italian case,¹¹⁸ there are some inconsistencies between the reasoning and the dispositive part of the judgment, as the Italian court recognised the German judicial authority to be competent with the merits of the case in matter of custody rights that was pending before both the courts. Then, it concluded for the application of Article 15 - *i.e.* to transfer the case to the German court - and set a time limit by which the German court shall be seized by the parties. Before that, the German court had stayed the proceedings on parental responsibility on *lis pendens* ground, being the court second seized. Afterwards, it had applied to the Italian court for the transfer. This could perhaps explain why the latter had wrongly applied Article 15, instead of decline jurisdiction.

¹¹⁶ Tribunale per i minorenni di Roma, 25 January 2008, ITF20080125.

¹¹⁷ Tribunale di Siracusa, 3 May 2016, ITF20160503.

¹¹⁸ Tribunale di Novara, 31 October 2012, ITF20121031.



As already mentioned, these cases do not induce to evaluate negatively the attitude of Member State courts toward Article 15. However, the overall exam of the reported cases shows that the provision is not applied in the part providing for the possibility for courts to inter into direct judicial communications. Hence, it is submitted that more efforts should be deployed to encourage courts to avail of that possibility, which can prove to be useful, particularly in view of a quick assessment of the best interest of the child.

2.8. *Forum necessitatis*¹¹⁹

The question of the application of *forum necessitatis* arose in one case only. The case was brought before the German Federal Court.¹²⁰ The creditor, habitually resident in the United States, claimed maintenance from the defendant, habitually resident in Germany. Maintenance order has been granted by the courts of lower instance. The German court of second instance¹²¹ established its jurisdiction on the basis of Article 3(a) of the Maintenance Regulation and determined German law as applicable law according to Article 15 of the Maintenance Regulation in conjunction with Article 4(3) of the Hague Maintenance Protocol. However, according to § 240 of the German *FamFG* a motion for separate trial is necessary regarding the defendant's objection as to the maintenance adjustment. Consequently, the *status* of parties to this separate proceedings is reversed: the defendant becomes the applicant in this separate trial for maintenance adjustment. Therefore, the German court of second instance stated that courts of the United States had jurisdiction pursuant to Article 3(a) and (b) (the creditor is also defendant) for a motion for separate trial. However, the Federal Court was not of the same opinion as court of second instance and concluded that the German courts have jurisdiction according to Article 7 of the Maintenance Regulation also regarding the separate motion, since the courts of the United States might deny their jurisdiction according to the U.S. principle of "Continuing Exclusive Jurisdiction".

¹¹⁹ This paragraph shall be attributed to: Lenka Válková.

¹²⁰ Bundesgerichtshof, 14 October 2015, XII ZB 150/15, DET20151014.

¹²¹ Oberlandesgericht Frankfurt am Main, 5 March 2015, 6 UF 225/13, DES20150305.



Articles 3-5 of the Maintenance Regulation cannot cover all potential gaps connected with the application of national procedural rules. Thus, the rule on *forum necessitatis* aims at protecting the right of full access to justice as it has been demonstrated in this case. However, § 240 FamFG providing for the “separate proceedings” for maintenance adjustment might create some problems in practice in the future. The original defendant does not have any more the *status* of defendant to this separate proceedings. As the “new” applicant, he or she shall bring the case to the court of another Member State or of a third State, in accordance with Article 3(a) and (b) of the Maintenance Regulation, assuming that Article 7 of the Maintenance Regulation cannot be applied. Moreover, separate proceedings in two different Member States might create legal uncertainty and incur additional costs for specialised legal advice.

Although the question of *forum necessitatis* did not expressly arise in the second case, the current judgment of a German court¹²² shall be mentioned in this chapter in order to demonstrate that the lack of a rule on *forum necessitatis* in the Brussels IIa Regulation might create certain problems in practice. A couple, Portuguese nationals, were habitually resident in Portugal at the time when the German court was seized. The couple was divorced in Portugal and the wife successfully petitioned a German court of first instance for a pension rights adjustment in her favour. The German court of second instance subsequently denied the international jurisdiction of the German courts over the pension rights adjustment. The court argued that the international jurisdiction over the pension rights adjustment follows the jurisdiction over the divorce itself and as a consequence, that the Brussels IIa Regulation is applicable by analogy (as already stated by the Federal Court in previous case-law). Since the requirements for the application of Article 3 of the Brussels IIa Regulation were not satisfied, the German courts declared lack of jurisdiction.

The institute of the pension rights adjustment (Article 17(3) of the German *EGBGB*), providing for the splitting of pension rights acquired during marriage, is widely unknown in most national jurisdictions and therefore is not governed by European or international Regulations. This leads to the significant risk that an adjustment of German pension

¹²² Oberlandesgericht Karlsruhe, 17 August 2009, 16 UF 99/09, DES20090817.



rights cannot be asserted before foreign courts that hold international jurisdiction over the divorce. Thus, since the Brussels IIa Regulation does not contain rule on *forum necessitatis*, similar situations might result in denial of access to justice. However, the new German provision under § 102 *FamFG* explicitly establishes international jurisdiction of German courts in order to revise legal practice of the German courts.

2.9. *Lis pendens*¹²³

On an overall evaluation, Member states' case-law in this area has proven to apply correctly the relevant Regulation, though sometimes the correct outcome has been reached through the application of national rules instead of the applicable EU Regulation.¹²⁴ Furthermore, there is a reasonable balance between decisions where the courts retained their jurisdiction and decisions where the courts stayed proceedings in favour of other Member states' jurisdiction.

Among the collected cases, only one decision shows some uncertainties in assessing the facts of the case for the purposes of the priority rule embodied in the Brussels IIa Regulation.¹²⁵ Nevertheless, it is highly likely that the proceeding court preferred not to delve into the assessment of the starting date of the parallel UK proceedings since in the meantime the UK court had also rendered its judgment on the claim at issue (parental responsibility), thereby preventing the Czech court to consider that aspect.

As to the objective scope of the *lis pendens* provision under Article 19, the analysed judgments consistently applied the mechanism therein provided to claims for separation in respect of divorce proceedings, and *vice versa*,¹²⁶ as well as to a petition for divorce filed in Poland, deemed capable of determining *lis pendens* in respect of a claim for financial support for divorce proceedings in Germany.¹²⁷

As it is well-known the *lis pendens* mechanism is based on the priority rule, pursuant to which the court "second seized" shall of its own motion stay its proceeding until such

¹²³ This paragraph shall be attributed to: Francesca C. Villata.

¹²⁴ E.g. Krajský soud v Hradci Králové, 3 January 2011, 26 Co 532/2010, CZS20110103.

¹²⁵ Krajský soud v Brně, 5 August 2014, 17 Co 76/2013, CZS20140805.

¹²⁶ Tribunale di Belluno, 23 December 2009, ITF20091223; Tribunale di Cagliari, 3 September 2011, ITF20110309; Krajský súd Trnava, 23 September 2014, 25CoP/40/2014, SKS20140923.

¹²⁷ Oberlandesgericht Zweibrücken, 10 October 2006, 6 WF 41/06, DES20060310.



time as the jurisdiction of the court “first seized” is established. Article 16 of the Brussels IIa Regulation establishes the conditions upon which a court shall be deemed to be seized for the purposes of the priority rule.

Article 16 was correctly applied, for instance, by the *Tribunale di Belluno* in a case where on 2 May 2007 a wife, German citizen, applied for divorce before the court of first instance of Munich (Germany) and on 9 August 2007 the petition was notified to the husband, an American citizen, who, on 10 August 2007 applied for separation before the Italian court,¹²⁸ as well as in further Italian,¹²⁹ German,¹³⁰ French¹³¹ cases.

On a different note, the time the court is seized also comes into relevance for the purposes of Article 8 of the Brussels IIa Regulation (general jurisdiction of the Member state where the child has his/her habitual residence at that time). Therefore, the criteria provided in Article 16 were also applied by *Oberlandesgericht Hamm* to a claim lodged by a father on 25 February 2010 for an extension of his right of contact and of access to his child, since on 1 March 2010 the official residence of both mother and child had been shifted from Germany to Hungary.

Though in some cases the dates of commencement of the parallel proceedings, as determined in accordance with Article 16, clearly reveals a rush to the courts on behalf of either spouses to activate the jurisdiction of the preferred court,¹³² in only one case - among those collected in the database as of 10 June 2016 - a proper attempt of abuse of the criteria provided in Article 16 was made, though unsuccessfully, in a proceeding before a Croatian court. The plaintiff, a Croatian national, concluded in Germany consular marriage with the defendant, also a Croatian national. Since 1994 the spouses lived in Germany where their two daughters were born. In 2014, the plaintiff filed a petition for divorce, parental responsibility and maintenance before the Croatian court. The defendant claimed that the service of documents instituting the proceedings was incorrect since she used to live in Germany and not in Croatia as stated in the petition (which she blames on the fraudulent behaviour of the plaintiff). So, the service that was

¹²⁸ Tribunale di Belluno, 23 December 2009, ITF20091223.

¹²⁹ Tribunale di Cagliari, 9 March 2011, ITF20110309; Tribunale di Milano, 16 April 2014, ITF20140416.

¹³⁰ Oberlandesgericht Zweibrücken, 22 May 2015, 2 UF 19/15, DES20150522.

¹³¹ Cour d'appel de Lyon, 11 April 2011, 10/05347, FRS20110411.

¹³² E.g. *Krajksý soud v Brně*, 3 June 2015, 20 Co 285/2015, CZS20150603.



effected at the address stated in the petition was not valid. She also pointed out that parallel proceedings had started in Germany, with the same parties and the same cause of action, which, since started earlier, should be given the priority. The Croatian court, however, upon the receipt of documents which undoubtedly showed that the defendant had been living in Germany with no interruption for the last 20 years and that German proceedings had been started earlier than the proceedings brought by the plaintiff in Croatia, taking into an account Article 19 of the Brussels IIa Regulation, decided to dismiss the case.¹³³

Turning to proper procedural matters, at least two judgments demonstrated a clear distinction between the assessment of the *lis pendens* situation and the assessment of jurisdiction per se, though contradictory approaches were adopted in dealing with such issue. In a case decided by Czech courts - which proved to be second seized in respect of a German court before which a petition for divorce had been previously filed by the defendant in the Czech proceedings - the proceeding court, first, positively determined its jurisdiction pursuant to Article 3(1)(b) (parties' common nationality) and only afterwards dealt with the question concerning the date of commencement of both proceedings for the purpose of Article 19.¹³⁴ On the other hand, in a dispute decided by a Slovak appellate court, a mother filed an action for divorce and determination of parental responsibility. The court of first instance declined its jurisdiction since the child habitually resided in Italy and a proceeding regarding separation had been filed before an Italian court. The mother appealed against this judgment affirming (i) that the *lis pendens* mechanism was inapplicable since only separation proceedings were dealt with before the Italian court, and (ii) that regarding parental responsibility, the court of first instance must evaluate the application of Article 12(1) of the Brussels IIa Regulation. The court of second instance correctly overturned the first instance decision stating that the court of first instance could not decline its jurisdiction without previous examination of the facts regarding *lis pendens*, as well as of the possibility to apply

¹³³ Općinski sud u Splitu, 8 January 2016, Pob - 74/14, CRF20160108.

¹³⁴ Nejvyšší soud České republiky, 16 July 2008, 4 Nd 55/2008, CZT20080716.



other provisions of the Brussels IIa Regulation applicable in parental responsibility matter (other than Article 8).¹³⁵

Finally, in a somehow confusing decision, the *Tribunale di Cagliari* more than once stated that it had jurisdiction under Article 19 of the Brussels IIa Regulation. The decision, however, reveals that the court only intended to make clear that, being the court first seized, it could assess its jurisdiction under Article 3. The court, however did not adopt any decision on its jurisdiction at that stage of the proceedings, whereas it reopened the discovery phase of the proceedings to determine the common habitual residence of the spouses pursuant to an autonomous factual evaluation.¹³⁶

With specific reference to parental responsibility proceedings, in a recent decision the *Tribunale di Cagliari* properly acknowledged *lis alibi pendens* in relation to a Dutch proceedings pending before the Dutch Supreme Court. Then, the Italian court examined whether it could hold its jurisdiction on the basis of Article 20 of the Brussels IIa Regulation in order to issue provisional measures. Taking into account the relevant CJEU case-law, the court held that issuing the provisional measures requested by the mother in her application would have implied a substantial revision of the exercise of access rights granted to the father. Therefore, it declined its jurisdiction in favour of the Dutch courts and dismissed the mother's application for provisional measures.¹³⁷ The same approach had already been endorsed by the *Tribunale di Milano* in a previous judgment.¹³⁸

Finally, an interesting decision was rendered by the *Tribunale di Novara* on 31 October 2012.¹³⁹ A husband (Italian national) lodged an application for fault-based legal separation, shared custody of the son, maintenance obligation, and a lump sum as damages. The wife (Italian and German national) appeared before the court and challenged the jurisdiction of the Italian court in favour of German courts. Moreover, immediately after the husband had brought the action before the Italian court, she seized a German court claiming the sole custody of the child. The German court, firstly,

¹³⁵ Krajský súd Trnava, 23 September 2014, 25CoP/40/2014, SKS20140923.

¹³⁶ Tribunale di Cagliari, 9 March 2011, ITF20110309.

¹³⁷ Tribunale di Cagliari, 12 December 2015, ITF20151212.

¹³⁸ Tribunale di Milano, 16 July 2014, ITF20140716.

¹³⁹ Tribunale di Novara, 31 October 2012, ITF20121031.



stayed the proceeding pursuant to Article 19(2) of the Brussels IIa Regulation. Later on, upon application of the mother, the German court asked the Italian authority to transfer the proceeding to Germany on the basis of Article 15 of the same Regulation. The Italian court dealt exclusively with the issue of jurisdiction. As far as the legal separation is concerned, the Italian court held its jurisdiction according to Article 3 of the Brussels IIa Regulation (the spouses were last habitually resident in Italy and the applicant was still resident in the country). Moreover, it underlined that the German court was seized only for the matters relating to the spouses' son. Therefore, the court retained the jurisdiction and ruled for the continuation of the proceedings on the subject matter of the dispute. With regard to parental responsibility matters (custody, rights of access, and maintenance obligations), the court pointed out that, for the purpose of the application of Article 8 of the Brussels IIa Regulation, the child was habitually resident in Germany. Consequently, jurisdiction laid with the German court. Moreover, it excluded the applicability of Articles 9, 10, and 12 to which Article 8 is subject (Article 8(2)). But, while stressing the fact that the decision over parental responsibility would have been taken by a court different from the one dealing with the issue of legal separation, it stated that Article 15 of the Regulation specifically addresses those situations. On such basis, the Italian court concluded for the application of Article 15 and set a time limit by which the German court should have been seized.¹⁴⁰

2.10. *Exceptio rei iudicatae*¹⁴¹

Alongside coordination mechanisms, also the *exceptio rei iudicatae* has to be mentioned, as a useful tool to prevent the reconsideration by a different court of a claim for divorce filed with the hope of a more favourable treatment for the applicant. For instance, on 21 October 2009, a petition for divorce was filed before a court of first instance in the Czech Republic. The court dismissed the proceedings on divorce due to the fact that the spouses had been already divorced in Poland. The applicant challenged

¹⁴⁰ Tribunale di Novara, 31 October 2012, ITF20121031.

¹⁴¹ This paragraph shall be attributed to: Francesca C. Villata.



the judgment affirming that the decision given by the Polish court had not been delivered to him.

The Czech court of second instance confirmed the judgment of the court of first instance. According to the court of second instance it was not possible to issue a new judgment since the marriage had been already divorced in Poland and the judgment had to be automatically recognised in the Czech Republic on the basis of the Brussels IIa Regulation. The court of appeal concluded that it was not possible to continue the proceedings since there was a *lis pendens* situation according to the Czech Code of civil procedure.¹⁴² On one hand, the court should have applied the Brussels IIa Regulation and not the national rules. On the other hand, no proceeding was actually pending in Poland anymore. Therefore, only the *res iudicata* exception could and should have been applied.

In a different case, a claim for divorce and parental responsibility was filed before a Slovak court on 23 September 2011. Later on, on 30 March 2012, the same spouses filed a petition on the same matters before an Austrian court, who gave its judgment before the Slovak court did the same. Therefore, the Slovak court dismissed its proceedings on the basis of *res iudicata*, in connection with Article 23 of the Brussels IIa Regulation. Actually, the Austrian court should have stayed its proceedings, waiting for the assessment on behalf of the Slovak court of its own jurisdiction and only if that assessment had proven to be negative, then the Austrian court should have continued its proceedings. On the other hand, once the Austrian decision had been given, the Slovak court could not but recognise that decision pursuant to the Brussels IIa Regulation rules.¹⁴³

2.11. Coordination with third States' proceedings¹⁴⁴

Brussels IIa Regulation, as well as the Maintenance and the Succession Regulations, lack any provisions on coordination with third countries' jurisdiction.

¹⁴² Krajský soud v Hradci Králové, 1 March 2011, 26 Co 532/2010, CZS20110103.

¹⁴³ Okresný súd Rímovská Sobota, 24 May 2012, 9P/8/2011, SKF20120524.

¹⁴⁴ This paragraph shall be attributed to: Francesca C. Villata.



Therefore, when a proceeding on the same (or connected) matter is pending before a non-Member state's court, in the absence of a precise guidance from the CJEU's case-law with reference to this area of law, two different paths may be followed and, as a matter of fact, are followed by Member States' courts.

On one hand, national courts may deem mandatory the application of the ground of jurisdiction provided in the EU Regulations and never decline jurisdiction in favour of a non-Member state court, whenever pursuant to the rules of jurisdiction embodied in the relevant Regulation they have jurisdiction on the matter. On the other hand, lacking any explicit provision on this matter within the context of the relevant EU Regulations, national courts are entitled to apply their own national rules on *lis alibi pendens* and related actions, as well as on choice-of-court agreements, and consequently decline jurisdiction whenever the conditions required under those rules are met.

As for Italy, the matter is going to be addressed by the Plenary Session of the Supreme court on a referral by one of its divisions. In the case at the origin of the referral, the husband, an Italian national, applied for separation before the *Tribunale di Bolzano*. The wife, Italian national as well, contested the jurisdiction because another proceeding was already pending in Switzerland. The Italian court of first instance declined jurisdiction on the basis of international *lis pendens*. The court of second instance declared that Italian jurisdiction could have been grounded on Article 3(1)(b) of the Brussels IIa Regulation but also declared the international *lis pendens* by virtue of Article 7 of Italian Law No 218/1995. The Plenary Session are expected to state their view on whether jurisdiction grounded on Article 3 of the Brussels IIa Regulation is exclusive and hence prevailing over Italian Law No 218/1995 and the rules on *lis pendens* therein contained or whether Article 7 of the same law is still applicable for parallel proceeding between Italy and a non-Member state.¹⁴⁵

Anyway, among the cases collected in the database, the first approach was endorsed by a Czech court of first instance in a case where the applicant was a Czech Republic and U.S. national and the defendant a Czech Republic national. The court of first instance held that the action on divorce between the same parties relating to the same subject

¹⁴⁵ Corte di Cassazione, 2 May 2016 No 11740, ITT20160502.



matter had been filed in the United States and hence, that the earlier action on divorce in U.S. constituted an obstacle of *lis pendens* under the Czech Code of civil procedure. The original applicant appealed against this judgment and argued that he had concluded two marriages with the defendant (one in the Czech Republic and another in the U.S.), and for this reason, there could not be a *lis pendens*. The court of second instance decided that the court of first instance failed to apply Brussels IIa Regulation regardless the habitual residence (outside EU) of the parties. The application of the Brussels IIa Regulation resulted from Article 72, under which the Regulation shall be binding in its entirety and directly applicable in the Member states. Since Article 19 of the Regulation only addresses *lis pendens* between Member states, it meant that there were not the conditions to dismiss the divorce proceedings. Nevertheless, in the reasoning of the court of second instance it is not clear whether the court of first instance was obliged to declare its jurisdiction on the basis of the Brussels II a Regulation or if the court of first instance had to suspend the proceeding.¹⁴⁶

The same path was followed by a Croatian court of first instance in a judgment rendered on 15 October 2014 regarding spouses of different nationalities (Croatian and Bosnian) living separately, respectively in Croatia and in Bosnia. One of the spouses promoted a proceeding for divorce, parental responsibility and maintenance before a Croatian court, whereas the other one before a Bosnian court. The Croatian court examined its jurisdiction only according to the relevant EU Regulations.¹⁴⁷

The second approach - favourable to the applicability of national rules on *lis alibi pendens* - was followed by the Italian Supreme Court in a case brought before Italian courts on 19 September 2014 by a mother for the adoption of restrictive measures of the father's parental responsibility. Before the first instance competent court (juvenile court) the father raised an exception regarding a previous action that had been brought before the Court of Massachusetts in 2012. By virtue of Article 7 of Italian Law No 218/1995 the Supreme Court declared the lack of jurisdiction of the *Tribunale per i minorenni di Firenze* because of international *lis pendens*. The Italian Supreme Court

¹⁴⁶ Krajský soud v Českých Budějovicích, 14 August 2018, 5 Co 1611/2008, CZS20080814.

¹⁴⁷ Općinski sud u Dubrovniku, 15 October 2014, GŽ.1366/14, CRF20141015.



recalls that Article 19 of the Brussels IIa Regulation is not to be applied because it addresses only intra EU *lis pendens*.¹⁴⁸

Also a Croatian court of second instance endorsed the same approach, even grounded on an erred application of national grounds of jurisdiction to the request of provisional measures relating to the custody of a Croatian child filed by a mother Croatian and Serbian national, both having their habitual residence in Croatia, whereas the father was Serbian.¹⁴⁹

An intermediate approach, so as to say, was adopted by the French *Cour d'appel de Lyon*. The case at hand concerned a French couple having their habitual residence in Switzerland. On 1 April 2010 the husband had filed a petition for divorce in France. In June 2010, the wife challenged the jurisdiction of French courts to decide over the divorce on the ground that Swiss courts had already been seized to take provisional measures concerning the marriage ("*Mesures de protection de l'union conjugale*"). In July 2010, the French court of first instance - after considering that Brussels IIa Regulation was not applicable because the couple had their habitual residence in a non-Member state - declined jurisdiction in favour of Swiss courts. The husband appealed against this order arguing that French courts had jurisdiction to decide over matrimonial matters and to take provisional measures given the common nationality of the spouses. On a subsidiary basis, he argued that French courts had jurisdiction over divorce matters also on the ground of Article 14 of the French Civil Code (exorbitant ground of jurisdiction based on the nationality of the claimant). The court of second instance decided that the court of first instance erred in considering that the Brussels IIa Regulation was not applicable. By referring to such Regulation, the court of second instance clarified the absence of a *ratione loci* criterion in Brussels IIa Regulation and ruled that French courts had jurisdiction pursuant to Article 3(1)(b) of the Brussels IIa Regulation (common nationality criterion). In addition, by referring to Article 16 of the Brussels IIa Regulation, the court of second instance strictly applied the *lis pendens* chronological rule and came to the conclusion that French courts were seized before

¹⁴⁸ Corte di Cassazione, 18 March 2016 No 5428, ITT20160318.

¹⁴⁹ Županijski sud u Rijeci, 28 November 2013, GŽ-5432/2013-2, CRS20131128.



Swiss courts, thereby paving the way for a sort of reflexive effect of the Regulation provisions on *lis alibi pendens*.¹⁵⁰ The same line of reasoning was also adopted by the *Tribunale di Milano* in a decision given on 16 April 2014. On 20 December 2013 a wife, Moroccan/Italian citizen, applied to the court for judicial separation, child's custody and maintenance. On 29 January 2014 the husband, Italian citizen, started a proceeding in Switzerland. The husband appeared before the *Tribunale di Milano* objecting the lack of jurisdiction of the Italian court since habitual residence of the spouses and child was in Switzerland. The President of the Italian court established that the *lis pendens* has to be solved in favour of the Italian court first seized by referring to Article 19 and Article 16 of the Brussels IIa Regulation.¹⁵¹

¹⁵⁰ Cour d'appel de Lyon, 11 April 2011, 10/05347, FRS20110411.

¹⁵¹ Tribunale di Milano, 16 April 2014, ITF20140416.



3. Matters related to applicable law

Jacopo Re, Ilaria Viarengo, Francesca C. Villata

3.1. Choice of Law¹⁵²

Party autonomy as a connecting factor is recognised with regard to divorce and legal separation, according to Article 5 of the Rome III Regulation, and to maintenance obligations, by virtue of reference to the Hague Maintenance Protocol in Article 15 of the Maintenance Regulation and in the Succession Regulation (Article 22).

However, almost all the judgments collected regard Article 5 of the Rome III Regulation. Only one judgment of the French *Cour de cassation* triggers the application of Article 15 of the Maintenance Regulation and the Hague Maintenance Protocol. It regards a prenuptial agreement concerning the economic consequences of divorce, governed by German law, chosen by the parties as national law of the husband, which excluded any compensatory allowance. The couple divorced in France and the wife requested a compensatory allowance. The first and court of second instances rejected the request pursuant to the marriage contract. The French *Cour de cassation* overruled the court of second instance decision on the ground that pursuant to Article 13 of the Hague Maintenance Protocol, the court should have checked whether the effects of German law (i.e. the exclusion of compensatory allowances) were manifestly contrary to French international public policy.¹⁵³

According to Article 5 of the Rome III Regulation, spouses may choose either the law of the State where they have their common, habitual residence, or the law of the state where they were last habitually resident (provided one of them still resides there), or the law of the state of nationality of either spouse, or the *lex fori*. Both the criteria of habitual residence or nationality refer to the time the agreement was concluded.

Most of the judgments regarding Article 5 are Italian. In Germany, there are very few judgments (3), one in France, in the other States none at all.

¹⁵² This paragraph shall be attributed to: Ilaria Viarengo.

¹⁵³ Cour de Cassation, 8 July 2015, 14-17880, FRT20150708.



In most cases the parties choose the law that allows a more rapid and inexpensive divorce. In Italy, until the recent reform, divorce was granted on the grounds of “the breakdown of the material and spiritual union between the spouses” as reflected in a continuous period of legal separation lasting at least three years. Quite often the spouses, both or either of them foreign nationals, with habitual residence in Italy, have chosen one of their national laws in order to get divorced without any previous period of separation. Most judgments on the Rome III Regulation in Italy have applied a foreign law which provides for immediate divorce upon mutual application. Given the universal character of the Rome III Regulation, in many of them the applicable law is the law of a third State.¹⁵⁴

The choice of the relevant national law sometimes seems to be grounded on cultural reasons as in the decision of the *Oberlandesgericht Hamm*.¹⁵⁵ The spouses, an Iranian-German wife and an Iranian husband, living in Germany, have chosen the Iranian law. In some disputes before Italian courts, regarding Moroccan couples or Moroccan-Italian couples, living in Italy, the chosen law was the Moroccan one.¹⁵⁶ Moreover, the application of the national law makes the recognition and enforcement of the divorce judgment in the State of origin easier.

A. Material validity of the agreement

Party autonomy is, indeed, the best way to preserve the spouses’ interests, since such autonomy is generally exercised by taking into consideration the substantive rules of the applicable law. A judgment of the *Oberlandesgericht Nürnberg*,¹⁵⁷ is worth mentioning because the reason of the choice was questioned by the court of first instance.

A German-Kasahk couple habitually resident in Germany, asked for legal aid in order to file for divorce. The court of first instance refused legal aid as German law, applicable according to Article 8 of the Rome III Regulation, requires a period of separation for

¹⁵⁴ For some examples of Italian Courts which have pronounced an “express divorce” under respectively the Mexican, the US and the Spanish law see: Tribunale di Treviso, 18 December 2012, ITF20121218; Tribunale di Firenze, 22 May 2014, ITF20140522; Tribunale di Udine, 26 August 2013, ITF20130826.

¹⁵⁵ *Oberlandesgericht Hamm*, 7 May 2013, 3 UF 267/12, DES20130507.

¹⁵⁶ Tribunale Milano, 10 February 2014, ITF20140210; Tribunale di Firenze, 22 May 2014, ITF20140522.

¹⁵⁷ *Oberlandesgericht Nürnberg*, 31 January 2013, 7 WF 1710/12, DES20130131.



divorce. The parties, who have not lived separately, argued that they intended to choose Kazakh law which provides for divorce without a period of separation. Nevertheless, the court of first instance did not grant legal aid as the parties should have agreed on the applicable law before filing for legal aid. Correctly, the court of second instance overruled the decision of the court of first instance, stating that Article 46(d) Sec. 2 EGBGB provides for a choice of law during a proceeding, according to Article 5(3) of the Rome III Regulation. However, no official translation was provided during the proceedings. Instead, a Russian speaking lawyer was able to provide a translation, which confirmed what the parties said. Even though that statement could not be fully reliable, the court stated that the probability was high enough to grant legal aid.

The decision of the court of first instance is questionable also for another reason. The parties' reason of favouring a certain law is usually based on the assessment, by the spouses, of the advantages and disadvantages of the substantive rules. The control of the court over the agreement's material validity must be limited in the boundaries of Article 6 and with regard to public policy (Article 12) and to the principle of non-discrimination (Article 10).

In the already mentioned decision of the *Oberlandesgericht* Hamm the parties had concluded a marriage contract which, according to Iranian law, allowed the wife to exercise the option of delegated repudiation (*talāq-e tawfīd*). This marriage contract was deemed as a valid choice of in favour of Iranian law pursuant to Article 5 of the Rome III Regulation because it includes numerous notions of the Iranian code. Even though the parties did not explicitly choose Iranian law, the wording of the marriage certificate has been considered a strong indication of their will to handle family issues pursuant to Iranian law. The wife uttered the *talaq* formula, according to the procedure of *talāq-e tawfīd* provided for in the marriage certificate and allowed by Iranian law, in front of the German judge and the husband's lawyer.¹⁵⁸ Firstly, it is interesting to note that in this case the law chosen regulates not only the substance of the divorce but also some procedural aspects as the wife pronounced the phrase according to the Iranian

¹⁵⁸ Para. 58.



Code. Secondly, the *Oberlandsgericht* compared the conditions of the Iranian divorce to those provided in the German divorce and therefore excluded the incompatibility with the public policy.

B. Moment of the agreement

One issue, much debated in particular in the Italian case-law, is whether the spouses can choose the applicable law even during the course of the proceedings.

Under Article 5(2), “an agreement designating the applicable law may be concluded and modified at any time, but at the latest at the time the court is seized”. But Article 5(3) allows parties to reach such an agreement also during the proceedings, if the law of the forum so provides and under the conditions set out in that law.

In Germany the parties are allowed to conclude an agreement during the proceedings as specified in Article 46d(2), EGBGB,¹⁵⁹ and recalled in the above mentioned decision of the *Oberlandesgericht Nürnberg*.¹⁶⁰

The Italian case-law unanimously recognised the possibility to reach an agreement during the proceedings, even if this is not expressly provided in the law.¹⁶¹ According to a line of jurisprudence followed, in particular, by the *Tribunale di Milano*, the parties, in the first hearing, before the presiding judge, were required to be duly informed in the light of Recital No 18 of the Rome III Regulation on the possibility to choose the applicable law by common agreement. Then, the order issued pursuant to Article 709 of the Italian Civil Procedural Code, which assigned the hearing for the appearance before the presiding judge, should have contained the warning to the parties that such an agreement can be included in the supplementary pleadings or with the entry of appearance.¹⁶²

¹⁵⁹ Pursuant to Article 46d, paragraph 2, an agreement can be concluded “zum Schluss der muendlichen verhandlung in der ersten Instanz”. This provision was introduced by the “Gesetz zur Anpassung der Vorschriften des Internationalen Privatrechts an die Verordnung (EU) Nr. 1259/2010 und zur Änderung anderer Vorschriften des Internationalen Privatrechts” of 23 January 2013, in *Bundesgesetzblatt*, 2013, I, p. 101.

¹⁶⁰ *Oberlandesgericht Nürnberg*, 31 January 2013, 7 WF 1710/12, DES20130131.

¹⁶¹ *Tribunale di Milano*, 11 December 2012, ITF20121211; *Tribunale di Milano*, 10 February 2014, ITF20140210.

¹⁶² It must be noted that the case-law collected regard the separation/divorce proceedings before the reform introduced by the Act 6 May 2015 No 55 (GU No 107 of 11 May 2015). In order to understand the



An example was the judgment of the *Tribunale di Milano*, 11 December 2012. The court held that the parties, both Ecuadorian nationals, did not make any choice of law. This holding was the result of finding that they deemed still applicable Article 31 of the Italian Private International Law Act, which does not allow a choice and provides for the application of the common national law. Provided that the same result, presumably envisaged by the parties, i.e. the application of their common national law, could have been reached through the *optio juris*, the court recalled that Rome III Regulation grants the possibility to make the choice also during the proceedings and invited the parties to conclude such a choice. As explained in another judgment of the *Tribunale di Milano*,¹⁶³ following the same line of reasoning, the agreement must be considered as a procedural legal transaction (“*negozio di diritto processuale*”), able to regulate aspects of the proceedings. Moreover, in case of modification of the request for a judicial divorce into a joint application for a “consensual” divorce, following the agreement on the applicable law, the agreement is technically prior to the request for divorce. Therefore, this request must be deemed as a new one.

As already mentioned, in Italy, legal separation and divorce are two separate proceedings. Therefore, the possibility of conversion, as provided in Article 5 of the Brussels IIa Regulation, is not allowed.

However, Italian courts have accepted that the original request to obtain the separation could be modified into an application for divorce after a choice, during the proceedings, for a foreign law providing for the divorce without any period of separation. For example, in one case before a court of first instance the Italian husband filed for legal separation and the Brazilian wife failed to appear before the court. However, she sent a

Italian case-law on the crucial issue of the moment of the choice of law, it is worth briefly describe the types of proceedings used in Italy. According to the ICC (Article 150 et seq.) legal separation, prerequisite for spouses seeking a divorce sentence, may be i) consensual (*separazione consensuale*), but becomes effective only with the approval of the Court, which is responsible for checking that the agreements reached by the spouses respect the interest of the children and of the weaker party (Articles 150-158 ICC; Article 711 Italian Civil Procedural Code (Codice di procedura Civile) ii) judicial (*separazione giudiziale*) (Article 151 ICC). The new Act has modified Article 3 of the Law No 898 of 1 December 1970 (Divorce law) and therefore reduced the *separazione consensuale* to a period of six months from the time the couple appears in Court and the act of divorce is registered by the president of the Court and the *separazione giudiziale* to a period of 12 months.

¹⁶³ Tribunale di Milano, 10 February 2014, ITF20140210.



notary certification to her Italian attorney asking for divorce and opting for the Brazilian law. The husband agreed to the wife's request and his original application was modified into an application for divorce.¹⁶⁴

Notwithstanding the open approach towards the use of party autonomy, the existence of an agreement shall be assessed by the court. In another decision,¹⁶⁵ the wife (Albanian citizen as her husband) applied for divorce, without a previous period of separation, claiming the application of Albanian law by virtue of an agreement concluded before the proceedings. As a subsidiary plea, she requested the judicial separation. The court held that, since the respondent did not appear and could neither express during the proceedings the will to apply Albanian law nor produce the agreement concluded with the wife before the proceedings, Article 5 of the Rome III Regulation could not be applied. Therefore, the court applied Italian law, pursuant to Article 8, and declared a judicial separation instead of the divorce.

C. Formal requirements

When the spouses agree on the choice of the applicable law, they must be aware of the implications of their choice. The requirement to respect strict formalities ensures that the importance of the agreement, as well as the meaning of its terms, is fully understood. This is also meant to protect the weaker and less well-informed (and often less wealthy) party. The agreement on the choice of law should at least be expressed in writing, dated, and signed by both parties. Furthermore, parties must comply with the additional requirements, if any, in the law of the participating Member State in which the spouses have their habitual residence at the time the act is concluded. Or, if the spouses are habitually resident in different participating Member States, spouse must comply with the laws of either Member State. If only one of the spouses is habitually resident in a participating Member State at the time the agreement is concluded, and that State lays down additional formal requirements for this type of agreement, those requirements apply (Article 7).

¹⁶⁴ Tribunale di Pordenone, 30 June 2015, ITF20150630.

¹⁶⁵ Tribunale di Pordenone, 10 June 2015, ITF20150610.



The written form must, therefore, be accompanied by guarantees of authenticity, such as the notarial act, only if this is imposed by one of the legal systems indicated. As long as the agreement has been validly entered into under the Regulation, the authority requested to apply the law designated by the parties must consider the agreement as formally valid in spite of the possibly more stringent requirements imposed by the *lex fori*.

With regard to Germany, for example, the notarial act is required by the law, according to Article 46d(1) EGBGB. In Italy the case-law demonstrated that the written form is sufficient¹⁶⁶

A notable judgment was given by the *Tribunale di Pordenone*¹⁶⁷ regarding a divorce between an Italian wife and a US husband. In this proceeding, the court accepted that the choice of law, in favour of the US law,¹⁶⁸ was expressed by the husband per email. This approach was in compliance with Article 7(1), which established that: “Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing”.

3.2. Objective connecting factors¹⁶⁹

A. Overview

The common objective connecting factor of the analysed instruments is habitual residence. Indeed, habitual residence is the key corner stone of European private international law rules in family matters. As to the determination of the applicable law, it is foreseen in Article 8 of Rome III Regulation, in Article 3 of the Hague Maintenance Protocol (recalled by Article 15 of the Maintenance Regulation) and in Article 21 of the Succession regulation. Moreover, the law of the child’s habitual residence is applicable

¹⁶⁶ Tribunale di Milano, 11 December 2012, ITF20121211; Tribunale di Milano, 10 February 2014, ITF20140210; Tribunale di Parma, 9 June 2014, ITF20140609.

¹⁶⁷ Tribunale di Pordenone, 14 October 2014, ITF20141014.

¹⁶⁸ This decision is worth mentioning also for the issue of the application of a law of a non-unified system. Pursuant to Article 14(c) of the Rome III Regulation, where a State comprises several territorial units, each of which has its own system of law any reference to nationality shall refer to the territorial unit with which the spouse or spouses has or have the closest connection (in this case, the State of Pennsylvania).

¹⁶⁹ This paragraph shall be attributed to: Jacopo Re.



for issues related to parental responsibility and protective measures (pursuant to Article 15 of the Hague Convention of 1996) and the child's habitual residence identifies the competent authority under Article 4 of the Hague Convention of 1980.

Besides the habitual residence, some of the above-mentioned instruments foresee further objective connecting factors, such as common nationality of the spouses and *lex fori* (as per Article 8(c) and 8(d) of Rome III Regulation), or an exception clause (e.g. Article 21(2) of the Succession Regulation and 15(2) of the Hague Convention of 1996).

Before analysing each objective connecting factor, it seems important to pay attention to the following three situations emerged from the gathered case-law.

First, some judgments do not even refer to conflict-of-laws rules in order to determine the applicable law. In this few judgments, indeed, the courts of some Member States have directly applied their substantive law.¹⁷⁰

Second, other judgments make due reference to national conflict-of-laws rules in order to determine the applicable law, complying with the temporal scope of the supranational uniform rules.¹⁷¹

Conversely, few judgments apply national conflict-of-laws rules to situations falling into the temporal scope of the supranational uniform rules.¹⁷²

¹⁷⁰ Krajský soud v Českých Budějovicích, 5 April 2011, Co 781/2011, CZS20110405; Cour d'appel de Lyon, 27 June 2011, 10/05170, FRS20110627a; Okresný súd Lučenec, 21 November 2013, 17P/171/2012, SKF20131121; Okresný súd Dunajská Streda, 4 March 2014, 9P/88/2013, SKF20140304; Krajský soud v Brně, 3 October 2014, 14 Co 70/2014, CZS20141003; Krajský súd Žilina, 21 May 2015, 5CoP/37/2012, SKS20150521; Općinski sud u Splitu, 22 December 2015, Pob - 341/14, CRF20151222; Općinski sud u Požegi, 11 March 2016, P-Ob-28/15-12; CRF20160311; Općinski sud u Sisku, 18 March 2016, P-Ob-578/15, CRF20160318.

¹⁷¹ With regard to Rome III Regulation see Tribunale di Belluno, 30 December 2011, ITF20111230; Juzgado de Violencia, 24 May 2012, num. 42/2012, ESF20120524; Audiencia Provincial Barcelona, 13 March 2013, num. 163/2013, ESS20130313; Tribunale di Roma, 14 June 2013, ITF20130614; Audiencia Provincial Barcelona, 19 July 2013, ESS20130719; Tribunale di Roma, 25 October 2013, ITF20131025a; Tribunale di Roma, 25 October 2013, ITF20131025b; Tribunale di Roma, 3 November 2014 No 21666, ITF20141103. As per the Maintenance Regulation, see Oberlandesgericht Frankfurt a. M., 12 April 2012, 5 UF 66/11, DES20120412; Tribunale di Cagliari, 20 June 2013, ITF20130620.

¹⁷² This happened in only two cases decided by the same Court on the same day: Tribunale di Pavia, 20 August 2015, ITF20150820a; Tribunale di Pavia, 20 August 2015 No 868, ITF20150820b. In both judgments, the Court applied Italian law *ex Article* 31(1) of Italian Law No 218/1995 as the law of the country in which the matrimonial life was mainly located. However, given the similar nature of that connecting factor and the spouses' habitual residence (recalled in Article 8(a) and 8(b) of Rome III Regulation) and considering that in both cases the spouses had different nationalities, Italian law would have been applied as well, even if the Courts had made due reference to the Rome III Regulation.



Last, some Spanish and Italian courts rightfully apply Rome III Regulation rules (or the national PIL rules, if the situation falls outside the temporal scope of said Regulation) in order to determine the law applicable to legal separation and divorce; the law thus found regulates also other claims (mainly maintenance ones) without any further consideration of their specific conflict-of-laws issues.¹⁷³

B. Habitual residence

Habitual residence is a personal, territorial and factual connecting factor. Its localisation, therefore, does not rely on a legal definition, but on the basis of an overall assessment of the circumstances of the life of the person involved, taking into account all the relevant factual elements, with the aim of revealing a close and stable connection with a particular state. Furthermore, being an autonomous concept, it allows a functional and teleological interpretation according to the aims of each Regulation or international convention. In this view, before analysing how habitual residence works in the above-mentioned acts, it seems worthy to enquire how it is determined by the courts of the Member States involved in the project.

B.1. Determining habitual residence

As already mentioned, habitual residence is an autonomous concept. This implies that, according to the need for uniform application of European Union law and to the principle of equality, the terms of a provision of a Regulation which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, having regard to the context of the provision and the objective pursued by the legislation in question.¹⁷⁴ In this regards, the courts of the Member States

¹⁷³ See, among many, Tribunale di Belluno, 30 December 2011, ITF20111230; Tribunale di Roma, 14 June 2013, ITF20130614; Tribunale di Roma, 25 October 2013, ITF20131025a; Tribunale di Roma, 25 October 2013, ITF20131025b; Tribunale di Roma, 27 August 2014, No 17456, ITF20140827; Audiencia Provincial Barcelona, 4 February 2015, num. 53/2015, ESS20150204; Tribunale di Pordenone, 10 June 2015, ITF20150610; Audiencia Provincial Barcelona, 23 July 2015, num. 549/2015, ESS20150723; Audiencia Provincial Vizcaya, 24 February 2016, num. 117/2016, ESS20160224.

¹⁷⁴ CJEU, 2 April 2009, case C-523/07, A, ECLI:EU:C:2009:225



cannot rely on domestic legal definition in order to determine one's habitual residence.¹⁷⁵

In general, habitual residence is composed of two elements: an objective one - the physical presence of a person in a specific place - and a subjective one - the so-called *animus manendi*. This is true, for sure, for the determination of an adult's habitual residence.¹⁷⁶ National case-law, however, have shown that, in enquiring the factual circumstances of the situation at stake in order to determine the child's habitual residence, no relevance has to be paid to the intention of the child's parents to settle in a given place.

It seems important to underline that the nature of the connecting factor itself escapes from a dogmatic and legal definition; its ascertainment depends, after all, on the factual elements of the case at stake and on their balance. Moreover, as already noticed, the choice and the weight of each factual element may change, depending on whether habitual residence has to be determined with regard to an adult (e.g. a deceased person), a couple (e.g. spouses) or a child and on the material scope of the considered instrument.

In general, it is quite easy to localise a person's habitual residence when the case at stake has a low cross-border element degree. In such situations, indeed, almost all the relevant factual elements will point to one State. This is the case, for example, when the only cross-border element is a foreign nationality of one of the parties of a given relationship, while the family life is spent only in one (and other) country,¹⁷⁷ or when

¹⁷⁵ Even if this principle is well acquired in Member States case-law, in few judgments some Courts made express reference to domestic law in this regards. See, *inter alia*, Krajský súd Bratislava, 12 September 2012, 11 CoP/96/2012, SKS20120912, where the Court of Appeal of Bratislava applied Article 39 of the Slovak PIL Act in order to localise the child's habitual residence for the purposes of Article 8 of Brussels IIa Regulation.

¹⁷⁶ See, among many, Tribunale di Milano, order, 16 April 2014, ITF20140416; No 1689/2005, ELS20150608; Cour de cassation, 24 February 2016, 15-10288, FRT20160224.

¹⁷⁷ See, for example, Nejvyšší soud, 31 October 2012, 30 Cdo 2374/2012, CZT20121031. In that case - a parental responsibility one - the Czech Supreme Court undoubtedly found that the Czech children of a Czech-Greek couple had their habitual residence in Greece where they lived from 1998 to 2010 (when the mother, a Czech citizen, filed a custody action before a Czech Tribunal on the base of Article 34 of the Czech PIL Act 1963, that grounds jurisdiction on nationality in that matter); those children had all their relevant social connection (e.g. their daily life, their studies) in Greece, except from their nationality and their mother's one. In another Czech decision, Krajský soud v Českých Budějovicích, 5 April 2011, Co 781/2011, CZS20110405, the only foreign element was to be found in the nationality of the child's father,



the situation is cross-border only for the fact that a party works in another State.¹⁷⁸ In other words, although nationality is an important connection in private international law - and itself a connecting factor in some regulations and national PIL Acts - itself alone cannot play a major role in determining a person's habitual residence.

The more the cross-border element degree rises in a given situation, the more it becomes harder to ascertain one's habitual residence. Therefore, an in-depth analysis of each factual element and an overall assessment of these contacts is required.

The CJEU case-law offers some guidance for the determination of a child's habitual residence,¹⁷⁹ but, at present, there are no judgments on adult's habitual residence.

i) Child's habitual residence

As to a child's habitual residence, the CJEU stated that "in addition to the physical presence of the child in a Member State other factors must be chosen which are capable of showing that that presence is not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in a social and family environment"; "in particular, the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and

while all other connecting elements pointed to the Czech Republic; accordingly, the Czech Court of Appeal localised the child's habitual residence in the Czech Republic. Again, it is quite easy to state that a couple, who lived for years Greece, where they have their economic and social life, is habitually resident in that country, even if both spouses are Polish citizens as in the case decided by a Greek Court ELF20060615; the same applies, *mutatis mutandis*, for a Croatian couple living for long time in Austria (Salzburg) as in the case judged by Županijski sud Pula, 7 April 2015, Gž-269/15-2, CRS20150407. See also, for similar situations, Audiencia Provincial Barcelona, 9 April 2014, 262/2014, ESS20140409; Audiencia Provincial Barcelona, 22 May 2014, 341/2014, ESS20140522; Cour d'appel de Lyon, 27 June 2011, 10/05170, FRS20110627a.

¹⁷⁸ Accordingly, in a case where the family life was in Spain, all the family's members (spouses and two children) were Spanish and they lived in Mallorca before the breaking up of the spouses/parents relationship, while the husband/father travelled a lot to United Kingdom due to working reasons - where he settled after the end of the marriage - the couple habitual residence was found in Spain. See, Audiencia Provincial Islas Baleares, 17 March 2015, 98/2015, ESS20150317.

¹⁷⁹ It does not surprise, therefore, that national case-law make due reference to the CJEU's jurisprudence. See, among may, Oberlandesgericht Karlsruhe, 5 March 2012, 18 UF 274/11, DES20120305; Oberlandesgericht Stuttgart, 30 March 2012, 17 UF 338/11, DES20120330; Audiencia Provincial Barcelona, 12 November 2013, 777/2013, ESS20131112; Tribunale di Milano, 11 February 2014, ITF20140211; Okresný súd Dunajská Streda, 4 March 2014, 9P/88/2013, SKF20140304; Audiencia Provincial Barcelona, 20 February 2015, 58/2015, ESS20150220.



the family and social relationships of the child in that State must be taken into consideration”; “the parents’ intention to settle permanently with the child in another Member State, manifested by certain tangible steps such as the purchase or lease of a residence in the host Member State, may constitute an indicator of the transfer of the habitual residence [and] another indicator may be constituted by lodging an application for social housing with the relevant services of that State”; “by contrast, the fact that the children are staying in a Member State where, for a short period, they carry on a peripatetic life, is liable to constitute an indicator that they do not habitually reside in that State”.¹⁸⁰

Moreover, with regard to a new-born living with its mother only since “few days in a Member State - other than that of her habitual residence - to which she has been removed, the factors which must be taken into consideration include, first, the duration, regularity, conditions and reasons for the stay in the territory of that Member State and for the mother’s move to that State and, second, with particular reference to the child’s age, the mother’s geographic and family origins and the family and social connections which the mother and child have with that Member State”.¹⁸¹

The reported CJEU case-law suggests that a number of factual elements have to be taken into account in determining a child’s habitual residence. These include, but are not limited to, the duration, regularity, conditions and reasons for the stay on the territory of a given State, the reason for the family moving, the child’s nationality, the place and conditions of attendance at school, its linguistic knowledge and its family and social relationships in that State. In this regards, States case-law have proven to follow the CJEU rulings and its designed case-by-case method.¹⁸²

Other child’s relevant connections, in addition to those suggested by the CJEU, have been evaluated by the courts of the Member States, such as: i) its extra-curricular

¹⁸⁰ CJEU, 2 April 2009, case C-523/07, A, ECLI:EU:C:2009:225, para. 38-41.

¹⁸¹ CJEU, 22 December 2010, case C-497/10 PPU, ECLI:EU:C:2010:829, para. 56.

¹⁸² See, among many, Oberlandesgericht Stuttgart, 30 March 2012, 17 UF 338/11, DES20120330; Polymeles Protodikeio Athinon, 1 April 2013 No 1689/2005, EL20130401; Krajský soud v Českých Budějovicích, 11 October 2013, 5 Co 2019/2013, CZS20131011; Županijski sud u Puli, 7 April 2015, Gž-269/15-2, CRS20150407; Corte di Appello di Catania, 3 June 2015, ITS20150603.



activities;¹⁸³ *ii*) its registered residence (whether combined with the receiving of child's benefit by State authorities¹⁸⁴ or not);¹⁸⁵ *iii*) its sports activities;¹⁸⁶ *iv*) its stay in foster families;¹⁸⁷ *v*) its language skills.¹⁸⁸

As per the duration of the stay, it seems that German case-law foresees a sort of six month test in order to evaluate whether a child's habitual residence can change or not. For example, a German court has stated that a child has become habitually resident in Spain since he lived there for more than six months.¹⁸⁹ In the court's view, for the determination of a child's habitual residence, its intention to settle down is not crucial. Indeed, habitual residence depends on the centre of the child's life. In this regard, after a residence of six months a habitual residence is usually assumed. The court states that (especially) young children settled down faster in a new environment and therefore a certain social integration exists after six months. At the time the claim was filed, the child lived in Spain with its mother. Even though it hadn't been living in Spain for a long time, the period of six months is meanwhile exceeded. As it has been going to school

¹⁸³ Oberlandesgericht Stuttgart, 30 March 2012, 17 UF 338/11, DES20120330; Oberlandesgericht Stuttgart, 6 May 2014, 17 UF 60/14, DES20140506.

¹⁸⁴ Oberlandesgericht Koblenz, 18 March 2015, 13 UF 825/14, DES20150318. In this case, however, the above-mentioned connections, localized in Luxembourg, were not deemed sufficient to determine that the child was habitually resident in Luxembourg. Indeed, the Court found that the child's habitual residence was in Germany, where it goes to and where it was brought after each contact with the other parent in Bulgaria. Moreover, the existence of another registration in Luxembourg and the receiving of Luxembourgian child benefits are not to be deemed sufficient to suggest a habitual residence in Luxembourg because neither of them require a main residence in Luxembourg.

¹⁸⁵ In a decision of Corte di Appello di Catania, 2 October 2015 No 1476, ITS20151002, it was clearly stated that a registered residence (in that case, in Belgium) has only a presumptive meaning and can only be one of the many elements that must be taken into account in order to establish the habitual residence of the child. In this case, the child's habitual residence has been found in Italy, where, among other circumstances, the child was hospitalized (in Siracusa) and was assisted in other occasions by the Italian National Health System. Moreover, the child only speaks Italian.

¹⁸⁶ Tribunale di Milano, order, 16 April 2014, ITF20140416. In this case, an highly fragmented one, where the family life was connected with several countries (Santo Domingo, Switzerland and Italy), the child's habitual residence was found in Switzerland (Lugano) where it was enrolled in a Swiss school and where it attended its sports activities and its major social events.

¹⁸⁷ Oberlandesgericht Karlsruhe, 5 March 2012, 18 UF 274/11, DES20120305; Krajský soud v Českých Budějovicích, 14 January 2009, 5 Co 105/2009, CZS20090114.

¹⁸⁸ Nejvyšší soud České republiky, 27 September 2011, 30 Cdo 2244/2011, CZT20110927; Corte di Appello di Catania, 2 October 2015, No 1476, ITS20151002; Nejvyšší soud, 24 April 2013, 30 Cdo 715/2013, CZT20130424.

¹⁸⁹ Oberlandesgericht Stuttgart, 30 March 2012, 17 UF 338/11, DES20120330. In this case, a parental responsibility one, the applicant (father) and the defendant (mother) had lived in Germany with their underage child until they separated and the defendant moved to Spain with the child in 2010. The child was six years old at that time.



there and its mother, as most important attachment figure is there, it is further integrated socially. Therefore, its place of habitual residence is Spain and the Spanish courts have jurisdiction.

In another judgment, a German court has stated that a child has become habitually resident in Denmark since he has been living there for more than six months.¹⁹⁰ The court, by making due reference to the above-mentioned CJEU case-law, pointed out that after living in a country for more than six months, the residence usually changes to that country. Indeed, a place of habitual residence must be the expression of a certain social and family integration and that the presence is not temporary or incidental. Important factors are the centre of the child's daily life, the residence of the family, its mother tongue, the reasons for the change in residence and its social connections. Moreover, even if the child's residence is limited to a certain study period, the intensity of a study visit and the shifting of the centre of the daily life lead to a new habitual residence. In the case at hand, all criteria led to Denmark as the place of residence. The multiple short visits in Germany cannot change this or establish a second place of residence.

Besides the six months period, that is peculiar to German case-law¹⁹¹ and is not paralleled in other States case-law,¹⁹² the above-mentioned German judgments show the right path for the determination of a child's habitual residence. In the end, and following a case-by-case approach, the determination of a child's habitual residence

¹⁹⁰ Oberlandesgericht Karlsruhe, 5 June 2015, 18 UF 265/14, DES20150605. In this case, again a parental responsibility one, the applicant, father of a 2 1/2 year old child, files for custody. Originally, the child lived in Germany with both parents, but the parents separated and the mother moved to Denmark and took the child with her. At first, she only planned a study year abroad and the father approved her taking the child. However, later on, the mother decided that she would prolong her stay for estimated three years.

¹⁹¹ German case-law, however, does not follow a strict six months rule. As the case decided by the Oberlandesgericht Karlsruhe, 5 March 2012, 18 UF 274/11, DES20120305, shows, a minor's habitual residence may be settled in a very short period of time. In that case, an unusual one, the minor was a refugee, present in Germany without its parents. The Court stated that enquiring its social connections before its arrival to Germany would not be suitable for a refugee. Indeed, it would have been better to investigate its present and future connections, giving a special weight to the place it will be likely to stay in the immediate future. (*i.e.* Germany).

¹⁹² This does not mean that other national case-law ignore the length of the child's stay in ascertaining its habitual residence. See, for example, Tribunale di Genova, 22 December 2014, ITF20141222, in which the Italian Court makes reference to a period of two years in Ecuador, among other social connections and its daily life, in order to determine the minor's habitual residence in that State. For Czech case-law see Krajský soud v Brně, 8 September 2015, 20 Co 258/2015, CZS20150908, in which the length of the child's stays in England and in Czech Republic is duly analysed.



depends on the overall assessment of all relevant connections, aiming at identifying the place where it has a regular and stable presence, it lives its daily life and where it has the centre of its relations.¹⁹³

In some cases, the pattern of the relevant connections might be either highly fragmented, or perfectly divided into two States. Besides the difficulty of ascertaining the child's habitual residence in this rare situations, a child might be deemed either to have two habitual residences or to be judged as habitually resident in State B, by a court seized in State A, and as habitually resident in State A, by a court seized in State B.

This odd situations have been found in Czech and Slovak case-law. As to a possible dual habitual residence, a Czech court stated that a child might have two different habitual residences,¹⁹⁴ while the Slovak Supreme court has stated the a child have two different habitual residences if that child attends school in both States, spends there the same amount of time and has social and family connections of the same kind and quality in both States.¹⁹⁵

As to the other situation (*i.e.* when a court in State A deems that a child is habitually resident in State B and *vice versa*), this may pose serious problems of negative conflicts of jurisdictions and of laws; therefore, extreme cautiousness is required in such circumstances. This happened in a case judged by a Slovak court, that has been seized after the applicant received a negative declaration on jurisdiction by a Czech court (due

¹⁹³ See, among many, Nejvyšší soud České republiky, 27 September 2011, 30 Cdo 2244/2011, CZT20110927; Tribunale di Belluno, 30 December 2011, ITF20111230; Polymeles Protodikeio Athinon, 1 April 2013 No 1689/2005, EL20130401; Tribunale di Milano, order, 16 April 2014, ITF20140416; Tribunale di Genova, 22 December 2014, ITF20141222; Županijski sud u Puli, 7 April 2015, Gž-269/15-2, CRS20150407

¹⁹⁴ Krajský soud v Českých Budějovicích, 11 October 2013, 5 Co 2019/2013, CZS20131011. The fact pattern is quite complex. In this case, the all family is composed by Czech citizens (parents/spouses and their child) and the parents/spouses work in Switzerland. The Court of First Instance (Okresní soud v Českých Budějovicích) declared a lack of jurisdiction due to the child's habitual residence in Switzerland. The mother appealed arguing that her child is habitually resident in the Czech Republic because her daughter is citizen of the Czech Republic, they often stay in the Czech republic in order to visit family in the apartment in her property, her daughter has a strong relationship with the Czech Republic (she speaks Czech language and her pediatrician is in the Czech Republic as well) and stay of the mother and child in Switzerland is temporary. Meanwhile, the father of the child moved to the Czech Republic and agrees with jurisdiction of Czech court. The Court of Appeal The Court of Appeal annulled the decision and remitted the case back to the First Instance Court for further consideration. On the matter, it stated that the child's habitual residence has to enquired in a much broader context and that the daughter might be habitually resident in Switzerland and Czech Republic as well; accordingly two habitual residences are possible.

¹⁹⁵ Najvyšší súd Slovenskej republiky, 30 April 2013, 6 Cdo 1/2013, SKT20130430.



to the fact that the latter one found that the child was habitually resident in the Slovak Republic). The Slovak court, in return, stated that the child was habitually resident in the Czech Republic, excluding its jurisdiction as well.¹⁹⁶

Lastly, when the family life is highly divided in many States, it might be hard to balance the relevant connections. In these cases, courts have paid high considerations at (and gave preference to) the place where the child is studying (or where it is enrolled) and where it has its social and extracurricular activities.¹⁹⁷

ii) Adult's habitual residence

Coming to consider an adult's habitual residence, it is quite normal to witness a change in the kind of the relevant connections enquired. Moreover, given the nature of the connecting factor, a case-by-case method is followed as well,¹⁹⁸ aiming at localising its habitual residence in the place where the person has established, on a fixed basis, its permanent habitual centre of interests¹⁹⁹ and where it carries out most of its personal and eventually professional life.²⁰⁰

Regretfully, a number of decisions: *i)* lack of any reasoning about the adult's habitual residence (that is taken for granted in State of the court seized),²⁰¹ or *ii)* show that the court was satisfied by the party's allegation without any further consideration,²⁰² or *iii)*

¹⁹⁶ Okresný súd Veľký Krtíš, 21 November 2014, 7P/148/2014, SKF20141121. It is important to underline that, from the data collected by the database, neither of the two Courts seem to have analysed in full details the factual connections of the situation at stake.

¹⁹⁷ Tribunale di Milano, order, 16 April 2014, ITF20140416; Oberlandesgericht Stuttgart, 6 May 2014, 17 UF 60/14, DES20140506.

¹⁹⁸ See, among many, Cour d'appel de Colmar, 1 April 2014, 13/01316, FRS20140401; Tribunale di Milano, order, 16 April 2014, ITF20140416; No 1689/2005, ELS20150608; CRS20150720; Cour de Cassation, 24 February 2016, 15-10288, FRT20160224;

¹⁹⁹ Cour d'appel de Colmar, 1 April 2014, 13/01316, FRS20140401; Tribunale di Milano, order, 16 April 2014, ITF20140416.

²⁰⁰ Općinski sud Osijek, 23 December 2013, P2-614/2013, CRF20131223.

²⁰¹ Općinski sud Buje, 12 February 2014, P-17/2014, CRF20140212; the Croatian Court omitted to elaborate the facts and circumstances that were established, as well as the findings that led to a conclusion that there is a habitual residence in Croatia. Tribunale di Roma, 3 November 2014 No 21666, ITF20141103; in this case, it seems that the Court did not give any specific index according to which the applicant can be considered habitually resident in Italy.

²⁰² Županijski sud u Splitu, 20 July 2015, Gž Ob-58/2015, CRS20150720. The Court missed the opportunity to address the issue of habitual residence the way it should have been addressed. The Court was satisfied to establish the fact that the plaintiff had his residence and worked in in Croatia for several years prior to



prove that the court has localised the person's habitual residence on the ground of mere administrative documents.²⁰³

Although what it has just been reported refers to a minority of cases, nevertheless it shows that sometimes courts pay no (or very superficial) attention to the issue of ascertaining a person's habitual residence.

The right way to determine an adult's habitual residence is to assess the overall factual elements of the given case. Paradigmatic, in this regard, may be a decision of the French Supreme Court.²⁰⁴ In this case, a couple of Azerbaijani nationals married in Azerbaijan and moved to France in 2004 where their two children were born later on. The female spouse filed a petition for divorce in France in 2013. Her husband contested the competence of French courts on the ground that the centre of main interests of the family is not in France but in Azerbaijan. The French Supreme Court upheld the court of Appeal decision on the ground that it rightfully considered all the relevant elements of the case - in order to consider that the habitual residence of the family was in France - such as: the husband's employment contract, a loan contracted in France, immovable property in France, children going to school in France where they were born.

As the reported decision shows, States case-law - absent a consolidated CJEU case-law on the relevant connections to be taken into account - has identified some key connections.

For an adult, the country where it settles with its family (if applicable), especially if it is the same where it works, may be decisive to state that in that place it has its habitual residence.²⁰⁵ However, when the working place is located in a country other than the

his application and that his periodical leaves for Germany are only for the purposes of seeing his children. In the eyes of the Court, this was enough to establish that the plaintiff's habitual residence is in Croatia.

²⁰³ See, for example, Tribunale di Belluno, 30 December 2011, ITF20111230, in which the habitual residence is assumed on the base of a registered residence (para. 2.1. of the judgment). *Contra*, the retention of a Croatian domicile (civil law concept) according to Croatian law did not lead to establish a Croatian habitual residence for a husband who lived with his family and worked in Salzburg (Austria) for years. In the case judged by Županijski sud Pula, 7 April 2007, Gž-269/15-2, CRS20150407, the Court has found that the husband's habitual residence was in Austria.

²⁰⁴ Cour de Cassation, 24 February 2016, 15-10288, FRT20160224.

²⁰⁵ See Thessaloniki Court of Appeal, 8 June 2015 No 1689/2005, ELS20150608. In this case it has been questioned whether the spouses' habitual residence was in Belgium or in Greece. More precisely, a divorce action was filed before a Greek Court by a Greek citizen against its German spouse. Both spouses were EU employees in Brussels, where, they had bought a house. They were both working and living in Brussels.



one where its family lives and where it is used to come back, its habitual residence has been found in the latter.²⁰⁶

Besides the family and the working places, the courts of the Member States have enquired other connections, such as: *i*) the person's intention;²⁰⁷ *ii*) frequent and regular visits to family members or relatives;²⁰⁸ *iii*) properties and economic interests;²⁰⁹ *iv*) the person's domicile (civil law concept),²¹⁰ especially if he or she pays taxes in the same place;²¹¹ *v*) the length of the stay;²¹² *vi*) the person's driving license.²¹³

Lastly, it seems important to underline that, when the person's life (or its family life) is spent between different countries, courts tends to use a centre of gravity approach. In this regard, the enquiry made by the court of first instance of Milan can be taken as an

The Greek claimant was travelling often to Greece (visit of other family members living in Greece, leisure or business purposes). The Thessaloniki Court of Appeal confirmed the decision of the Thessaloniki Court of First Instance, which found that the spouses had their habitual residence in Brussels. The fact that the claimant, an EU employee, had a close relationship with its family members in Greece and was visiting Greece regularly was not deemed enough to state that it had its habitual residence in Greece. See also, Tribunale di Belluno, 6 March 2009, ITF20090306; Nejvyšší soud, 31 October 2012, 30 Cdo 2374/2012, CZT20121031; Polymeles Protodikeio Athinon, 1 April 2013 No 1689/2005, EL20130401; Županijski sud Pula, 7 April 2007, Gž-269/15-2, CRS20150407.

²⁰⁶ See, Audiencia Provincial Islas Baleares, 17 March 2015, 98/2015, ESS20150317. In a case where the family life was in Spain, all the family's members (spouses and two children) were Spanish and they lived in Mallorca before the breaking up of the spouses/parents relationship, while the husband//father travelled a lot to the United Kingdom due to working reasons - and where he settled after the end of the marriage - the couple's habitual residence was found in Spain.

²⁰⁷ Tribunale di Milano, order, 16 April 2014, ITF20140416.

²⁰⁸ See, again, Thessaloniki Court of Appeal, 8 June 2015 No 1689/2005, ELS20150608; Polymeles Protodikeio Athinon, 1 April 2013 No 1689/2005, EL20130401; Županijski sud Pula, 7 April 2007, Gž-269/15-2, CRS20150407. Although Courts of different Member States have paid attention to this factual situation, it has no or few impact in determining a person's habitual residence, particularly when the person lives and work in the same country and the regular and frequent visits are in another one.

²⁰⁹ Some Courts have evaluated the fact that a person bought or rented a house/apartment. See Thessaloniki Court of Appeal, 8 June 2015 No 1689/2005, ELS20150608; Nejvyšší soud, 24 April 2013, 30 Cdo 715/2013, CZT20130424; Amtsgericht Berlin-Schöneberg, 20 August 2013, 22 F 171/12, DEF20130820; Općinski sud u Splitu, 8 January 2016, Pob - 74/14, CRF20160108. Other Courts have also taken into account the place where the person has its bank account. See, for example, Corte di Appello di Catania, 2 October 2015, No 1476, ITS20151002.

²¹⁰ Županijski sud Pula, 7 April 2007, Gž-269/15-2, CRS20150407.

²¹¹ Cour d'appel de Colmar, 1 April 2014, 13/01316, FRS20140401. In this case, however, the Court of Appeal stated that the fact that the claimant retained its domicile in France and was paying taxes in France was not enough to qualify France as the permanent centre of his interests. The situation at stake involved a couple (British national/New Zealand national) who married in England. They then moved to Switzerland with their children where they established their habitual residence.

²¹² Tribunale di Milano, order, 16 April 2014, ITF20140416. In this case, the couple was used to move through several countries during the year; the length of each stay was taken into account. See also, Krajský soud v Brně, 11 November 2014, 20 Co 637/2014, CZS20141111.

²¹³ Tribunale di Milano, order, 16 April 2014, ITF20140416.



excellent example. In determining the law applicable to a divorce claim, the court has engaged itself in a thorough analysis of all the relevant connection of the couple.²¹⁴ After a careful balance of all the relevant connections - in which a combination of qualitative and quantitative elements has been deemed necessary - the court found that many factual elements (such as: buying a house there, taking the driving license there, enrolling the child to a school in Lugano, paying there social assistance contributions also for the wife) pointed to the couple's intention to settle their centre of interest in Switzerland, therefore declaring that they were habitually resident in that country.

B.2. Habitual residence in practice

The main issue of habitual residence, as a connecting factor, is its localisation. Besides that, its functioning is quite smooth.

Being the common and general connecting factor of supranational PIL rules related to family matter, habitual residence would lead to the application of one and the same law if all the people involved in a given situation are habitually resident in the same country. Accordingly, the legal provisions of the same applicable law will regulate all the issues at stake (being that separation/divorce or maintenance or minor protection).²¹⁵ This fact, of course, will ensure not only coherent solutions, but also easy ones.

Conversely, when family components have their habitual residence in different States, more than one law will be applicable for different issues of the same relationship.

²¹⁴ Tribunale di Milano, order, 16 April 2014, ITF20140416 (p. 3 ff. of the judgment). The elements taken into account are: each spouses' citizenship and registered residence; the places (and the length of each stay) where they spent their year (*i.e.* from November to April in Santo Domingo, July and August on board of a ship across the Mediterranean sea, the rest of the year between Lugano - Switzerland - and Milan - Italy); the place of their child's school; the number of days spent in Lugano and Milan; the place where they bought the "family house"; the change of their child's school; the request of a Swiss "permit of domicile" for each family member; the spouse/mother's driving license; paying social assistance contribution; the child's medical examinations, birthday party, sports and social activities.

²¹⁵ Tribunale di Roma, 6 November 2013, No 22099, ITF20131106; Audiencia Provincial Barcelona, 4 December 2014, num. 756/2014, ESS20141204; Audiencia Provincial Barcelona, 11 December 2014, num. 773/2014, ESS20141211; Audiencia Provincial Islas Baleares, 17 March 2015, num. 98/2015, ESS20150317; Tribunale di Roma, 6 November 2013, No 22099, ITF20131106; Tribunale di Roma, 2 October 2015, No19765, ITF20151002; Tribunal Superior de Justicia Aragón, 6 October 2015, num. 27/2015, EST20151006.



Needless to say, all instruments have a universal application; this implies that any law determined by the supranational PIL rules will be applied whether or not it is the law of a Member State.²¹⁶

i) Legal separation and divorce

Absent a choice of the applicable law, pursuant to Article 5 of the Rome III Regulation, Article 8 of said Regulation foresees that legal separation and divorce are to be subject to the law of the state (a) where the spouses are habitually resident at the time the court is seized; or, failing that (b) where the spouses were last habitually resident, provided that the period of residence did not end more than one year before the court was seized, insofar as one of the spouses still resides in that State at the time the court is seized. Therefore, either the law of the country where both spouses have their habitual residence is applicable,²¹⁷ or the law of the country where both spouses were last habitually resident, provided that the time conditions set forth under let. b are met.²¹⁸

The case-law gathered on Article 8(a) and 8(b) does not raise any issue on the application of habitual residence as a connecting factor. Indeed, the above-mentioned judgments does not report anything more than what it is there prescribed.

ii) Maintenance

Habitual residence is the general connecting factor for maintenance issues too. It is foreseen in Article 3 of the Hague Maintenance Protocol, which is referred to by Article 15 of the Maintenance Regulation.

²¹⁶ See, for example, Amtsgericht Berlin-Schöneberg, 20 March 2013, 22 F 171/12, DEF20130820, that applies Thai law (as per Article 8(a) Rome III Regulation) to the divorce of a couple habitually resident in Thailand.

²¹⁷ See, among many, Amtsgericht Berlin-Schöneberg, 20 March 2013, 22 F 171/12, DEF20130820; Juzgado de Primera Instancia de Pamplona, 3 June 2014, num. 254/2014, ESF20140603; Audiencia Provincial Barcelona, 4 December 2014, num. 756/2014, ESS20141204; Tribunale di Padova, 6 February 2015, No 408, ITF20150206; Oberlandesgericht Thüringer, 28 April 2015, 1 UF 668/14, DES20150428; Tribunal Superior de Justicia Aragón, 6 October 2015, num. 27/2015, EST20151006; Audiencia Provincial Barcelona, 17 November 2015, num. 828/2015, ESS20151117.

²¹⁸ See Tribunale di Roma, 27 January 2015, No 1821, ITF20150127; Audiencia Provincial Islas Baleares, 17 March 2015, num. 98/2015, ESS20150317; Tribunale di Mantova, 19 January 2016, ITF20160119b.



As already seen,²¹⁹ courts of some Member States sometimes do not look for the law applicable to maintenance issues, if these are requested jointly in a legal separation/divorce procedure. In these cases, the law applicable to legal separation/divorce also regulates maintenance claims. On the other hand, when the main issue at stake is maintenance, courts apply the relevant PIL rules.²²⁰

Once more, the gathered case-law does not raise any issue on the application of habitual residence as a connecting factor.

C. Nationality

As an objective connecting factor, nationality is of personal and legal nature. It attaches a person not to the territory of a State, but rather to its national community. Being a legal connecting factor, its ascertainment depends on the substantive rules of the State that conferred its citizenship to the person at stake. In other words, in order to assess whether an individual possesses the nationality of a State, the law of such State should apply.

Although this criterion had played a major role in private international law in the past, especially for matters related to a person's status, in the current supranational PIL rules it has little room.²²¹

²¹⁹ *Supra* note 174.

²²⁰ See, among many, Krajský súd Trenčín, 21 March 2012, 17CoP/19/2012, SKS20120321; Tribunale di Belluno, 12 November 2013, ITF20131112; Krajský soud v Brně, 26 November 2013, 20 Co 235/2013, CZS20131126; Audiencia Provincial Barcelona, 30 January 2014, num. 68/2014, ESS20140130; Audiencia Provincial Barcelona, 11 November 2014, num. 746/2014, ESS20141111; Bundesgerichtshof, 10 December 2014, XII ZB 662/13, DET20141210; Audiencia Provincial Valencia, 4 March 2015, num. 139/2015, ESS20150304; Oberlandesgericht Frankfurt am Main, 05 March 2015, 6 UF 225/13, DES20150305; Krajský soud v Brně, 8 September 2015, 20 Co 258/2015, CZS20150908.

²²¹ This may explain why, in two occasions, Spanish Courts have applied the law of the common nationality instead of the law of the spouses' common habitual residence. In Article 8 of Rome III Regulation an inversion of the connecting factors *vis-à-vis* previous national PIL rules occurred. In other words, the spouses' common habitual residence is now the first objective connecting factor, while nationality plays a subsidiary role. This is true for Spain, where Article 107.2 of the Spanish civil code prescribed the application of the law of the common nationality for legal separation and divorce. In this regard, the judgments gave by Audiencia Provincial Valencia, 6 October 2014, num. 720/2014, ESS20141006 and by Audiencia Provincial Castellón, 27 April 2015, num. 43/2015, ESS20150427, applied to the couples' divorces the law of their common nationality (respectively, Nigerian and Romanian law), instead of the Spanish law, which would have been applicable as the law of their common habitual residence as per Article 8(a) Rome III Regulation.



Indeed, in the uniform instruments, nationality is foreseen only in Article 8(c) of the Rome III Regulation. Absent a choice of the applicable law, pursuant to Article 5, and when litt. (a) and litt. (b) of Article 8 are not applicable, the law applicable to legal separation and divorce is the one of which both spouses are nationals at the time the court is seized.

In the judgments gathered so-far, only one has applied Article 8(c) of Rome III Regulation.²²² Therefore, there is no case-law that applied (and solved) the possible problems that may rise from nationality as a connecting factor, such as the determination of the law applicable in case of dual/multiple nationalities.

D. Lex fori

Lex fori is the last objective connecting factor foreseen in PIL family rules. More precisely, its application is prescribed only in legal separation/divorce procedures and in so far as, neither habitual residence of the spouses, nor common nationality can lead to an applicable law. It follows that the recourse to the substantive law of the court seized becomes necessary in order to avoid any denial of justice in any given situation. In practice, this connecting factor does not raise any problem at all.

Article 8(d) of Rome III Regulation has been applied three times: *i*) a Spanish court applied its own substantive law to settle a divorce between a Spanish husband, habitually resident in Spain, and his wife (of unknown nationality) habitually resident in France;²²³ *ii*) an Italian court applied Italian law to regulate a divorce between an Italian wife, habitually resident in Italy, and her Ivorian husband, whose habitual residence was unknown to the wife since 2006;²²⁴ *iii*) German law has been applied by a German court for a divorce between a German spouse, habitually resident in Germany, and a French spouse, habitually resident in France for more than one year.²²⁵

²²² Audiencia Provincial Barcelona, 16 July 2015, num. 556/2015, ESS20150716. In this case, the spouses - both Spanish citizens - had their habitual residence in two different countries, and it was not clear when the common habitual residence came to end. Therefore, the Court applied Spanish law to their divorce.

²²³ Juzgado de Primera Instancia de Pamplona, 6 June 2014, num. 298/2014, ESF20140606.

²²⁴ Tribunale di Roma, 27 August 2014, No 17456, ITF20140827.

²²⁵ Oberlandesgericht Zweibrücken, 22 May 2015, 2 UF 19/15, DES20150522.



3.3. Non-unified legal systems²²⁶

The objective connecting factors, as well as the choice of the applicable law may lead to designate the law of a State with two or more legal systems, thus raising questions of territorial or inter-personal conflict-of-laws.

On the one hand, both Rome III Regulation and the Hague Maintenance Protocol foresee special rules to address this issue, while, on the other hand, they state that those rules are not mandatory for internal conflict-of-laws.

Besides the Spanish case-law, which is - not surprisingly - rich in the matter, only Italian case-law report a judgment in which a territorial conflict-of-laws issues has occurred.²²⁷

In a divorce procedure, the parties agreed to choose the law of the State of Pennsylvania as the applicable one. Pursuant to Article 5 of the Rome III Regulation the choice was valid, since the husband was a United States citizen. Moreover, Article 14(c) of the same Regulation prescribes that “any reference to nationality shall refer to the territorial unit designated by the law of that State, or, in the absence of relevant rules, to the territorial unit chosen by the parties or, in absence of choice, to the territorial unit with which the spouse or spouses has or have the closest connection”. The Italian court of first instance upheld the choice of Pennsylvania law. Curiously, however, it did not do so on the basis of the parties’ choice, but after having assessed that Pennsylvania was the territorial unit with which either one spouse or both of them have the closest connection. More precisely, the court found that the parties got married in Pennsylvania, and there the matrimonial life was constantly localized until the spouses’ separation.²²⁸

Spain is State with several territorial legal systems, especially in matters related to a person’s status. The case-law gathered so-far contains does not contain purely internal conflicts of laws. Spanish courts have adopted (mainly) three solutions for the determination of the territorial unit law applicable.²²⁹

²²⁶ This paragraph shall be attributed to: Jacopo Re.

²²⁷ Tribunale di Pordenone, 14 October 2014, ITF20141014.

²²⁸ Tribunale di Pordenone, 14 October 2014, ITF20141014 (p. 3 of the judgment).

²²⁹ A fourth solution, the one relying on Spanish internal conflict-of-laws rules (in the case Article 13(2) of the Spanish Civil Code) has been followed only by Audiencia Provincial Barcelona, 23 July 2015, num. 549/2015, ESS20150723.



In a first group of judgments, courts have applied the special rules set forth in Rome III Regulation and in the Hague Maintenance Protocol, therefore determining the law applicable pursuant to Articles 14 and 15 of Rome III Regulation and Article 16 of the Hague Maintenance Protocol.²³⁰

In a second group of judgments, Catalan courts have applied Catalan law on the ground of Article 14(1) of the Statute of Autonomy of Catalonia (“Estatut d’Autonomia”) and the principle of territoriality of Catalan law.²³¹

Lastly, other Catalan courts have applied Catalan law without giving any explanation on the matter.²³²

3.4. Proof of foreign law²³³

This subject matter has been addressed by the commentator(s) of four Spanish decisions where, respectively, Moroccan (in three cases) and Bolivian law were deemed applicable. Nevertheless, in all cases the “short critique” part in the data-base emphasized that the court, though applying those foreign laws, had not dealt with the question of how the relevant foreign law had been proven.²³⁴

The question has come into relevance also in two German cases. In the first one, Thai law was deemed applicable pursuant to Article 8 of the Rome III Regulation to a divorce proceeding between two spouses who were habitually resident in Thailand when the husband filed for divorce. Without deeming it necessary to consult an expert on Thai

²³⁰ Audiencia Provincial Barcelona, 7 November 2013, num. 768/2013, ESS20131107; Audiencia Provincial Barcelona, 12 November 2013, num. 777/2013, ESS20131112; Audiencia Provincial Barcelona, 11 November 2014, num. 746/2014, ESS20141111; Audiencia Provincial Barcelona, 16 July 2015, num. 556/2015, ESS20150716; Tribunal Superior de Justicia Aragón, 6 October 2015, num. 27/2015, EST20151006.

²³¹ Audiencia Provincial Barcelona, 3 June 2013, num. 421/2013, ESS20130603; Audiencia Provincial Barcelona, 30 January 2014, num. 68/2014, ESS20140130; Audiencia Provincial Barcelona, 15 July 2014, num. 476/2014, ESS20140715; Audiencia Provincial Barcelona, 4 December 2014, num. 756/2014, ESS20141204; Audiencia Provincial Barcelona, 30 December 2014, num. 833/2014ESS20141230.

²³² See, among many, Audiencia Provincial Barcelona, 27 June 2013, num. 496/2013, ESS20130627; Audiencia Provincial Barcelona, 15 July 2014, num. 476/2014, ESS20140715; Audiencia Provincial Barcelona, 30 October 2014, num. 665/2014, ESS20141030; Audiencia Provincial Barcelona, 20 October 2015, num. 661/2015, ESS20151020.

²³³ This paragraph shall be attributed to: Francesca C. Villata

²³⁴ Audiencia Provincial Barcelona, 19 July 2013, 57172013, ESS20130719; SAP Barcelona, 30 October 2014, 665/2014, ESS20141030; Audiencia Provincial Barcelona, 8 April 2014, 260/2014, ESS20140408; Audiencia Provincial Barcelona, 15 May 2013, 366/2013, ESS20130515.



law, the court established the meaning and interpretation of Thai law itself. Although Thai law provides reasons for divorce, none of them were considered relevant in the present case, as the wife solely left the marital bedroom and didn't leave the house. According to the court's interpretation of Thai law, psychological pressure cannot be seen as violence or maltreatment, which would have been a reason for divorce according to Thai law. As a result, the court dismissed the claim. The commentator argued that though it is hard to believe that a German local court could adequately apply Thai law, which is fundamentally different from German law, in the instant case the German court interpreted Thai divorce law in such a comprehensible and detailed manner that it left no room for uncertainty. Therefore, the discretionary decision not to consult an expert on Thai law in this matter has appeared reasonable.²³⁵

In the second one, the spouses, who were habitually resident in Germany, asked for legal aid in order to file for divorce. However, the court of first instance stated that pursuant to Rome III Regulation, German law would have been applicable on a potential petition for divorce. As German law only allows divorce after a time of separation and as the parties had not lived separately, no legal aid could be granted. Subsequently, the parties had argued that they would exercise a choice of law in favour of Kazakh law which doesn't request any time of separation. Nevertheless, the court of first instance, referring to a German conflict-of-laws rule then in force, did not grant legal aid since the parties should have agreed on the applicable law before filing for legal aid. On appeal the court stated that the claim for legal aid was to be granted. Since the Rome III Regulation allows a choice of law even when proceedings have already commenced, therefore, the parties were entitled to choose Kazakh law, which doesn't require time of separation, even if the parties wanted to choose the respective law only to be granted legal aid. However, no official translation of Kazakh law was provided during the proceedings. Instead, a Russian speaking lawyer was able to provide a translation, which confirmed what the parties said. Even though this statement was not fully reliable, the court stated that the probability was high enough to grant legal aid.²³⁶

²³⁵ Amtsgericht Berlin-Schöneberg, 20 August 2013, 22 F 171/12, DEF20130820.

²³⁶ Oberlandesgericht Nürnberg, 31 January 2013, 7 WF 1710/12, DES20130131.



3.5. Overriding mandatory rules²³⁷

An overriding mandatory rule is a rule which a legal system wants to be applied regardless of what the applicable law is under its PIL rules. The issue is highly debated and one may expect - in matter related to a person's status, especially child's status - a high number of judgments applying some mandatory rules of the forum law.

This has not been the case so far, as the case-law gathered reports only two judgments that explicitly refer to some overriding mandatory rules. Both of them are found in Italian case-law, and both of them deal with Article 36-*bis* of Italian Law No 218/1995.

This Article prescribes that “notwithstanding the referral to a foreign law, are applicable in every case Italian law rules that: a) gives parental responsibility to both parents; b) establishes the duty of both parents to provide for child support; c) gives the court the power to adopt measures limiting of parental responsibility in the presence of prejudicial acts against the child”.

Accordingly, the parental responsibility claim, raised in a divorce procedure between two Tunisian citizens²³⁸ and two Senegalese citizens²³⁹ - both couples habitually resident in Italy - is governed by Italian law, as overriding mandatory rules of the forum.

3.6. Public policy²⁴⁰

Under public policy exception, a foreign rule, which would normally be applicable, will not be given effect if to do so would be contrary to the forum public policy. In this regard, Article 12 of Rome III Regulation prescribes that “Application of a provision of the law designated by virtue of this Regulation may be refused only if such application is manifestly incompatible with the public policy of the forum”.

In matrimonial matters, a public policy issue may arise when the applicable law is based on religious law. With regards to Islamic law,²⁴¹ it might be questioned if the institute of

²³⁷ This paragraph shall be attributed to: Jacopo Re.

²³⁸ Tribunale di Belluno, 23 December 2014, ITF20141223.

²³⁹ Tribunale di Firenze, 9 March 2015, ITF20150309.

²⁴⁰ This paragraph shall be attributed to: Jacopo Re.

²⁴¹ See, for more details, *infra*, para. 6.2.



“talaq” (repudiation - usually a divorce effected by the husband’s enunciation of the word “talaq” this constituting a formal repudiation of his wife) would be contrary to Member States’ public policy. The case has been raised before a German court.²⁴² Two Iranian citizens married in Iran in 2009. Later on, the wife acquired German nationality. They had a daughter, got separated in 2011, and now reside in Germany. The marriage certificate included several conditions (six months of no maintenance payments, bad behavior towards the wife) under which the wife was allowed to file for divorce. The wife did so in 2012. The German court stated that the marriage certificate could be interpreted as a choice of law agreement in favor of Iranian law pursuant to Article 5 of the Rome III Regulation. Indeed, the conditions agreed upon are the same conditions stipulated by Article 1133, 1134, 1138 IrCC. Even though the parties did not consider explicitly choosing Iranian law, the wording was considered to be a strong indication for their will to handle the matter pursuant to Iranian law. Consequently, as the wife pronounced the set divorce phrase “talaq” in the presence of two men during the proceedings of the court of first instance in Germany pursuant to Article 1133, 1134 IrCC and as several of the conditions (six month of no maintenance payments, bad behavior of the husband rendering the marriage not acceptable, no sincere wish to uphold the marriage) for divorce inserted in the marriage certificate were fulfilled the divorce became effective under Iranian law. In doing so, the court recognized that the effects of the provisions of the IrCC (given the particular circumstances of the case - mainly that it was the wife to seek a divorce through talaq) were not contrary to German public policy. As the public policy exception is based on a case-by-case analysis of the effects of the foreign law at stake, it might be incautious to say that “talaq” is never contrary to public policy.

Another public policy issue might be found with regard to a marriage contract that excludes any form of compensatory allowance in case of divorce. The French Supreme court, indeed, overruled the judgment of a court of Appeal on the ground that pursuant to Article 13 of the Hague Maintenance Protocol, the judge should have checked

²⁴² Oberlandesgericht Hamm, 07 May 2013, 3 UF 267/12, DES20130507.



whether the effects of German law (precisely the exclusion of any compensatory allowances) were manifestly contrary to French international public policy.²⁴³

A third and last issue, which occurred several time in Italian case-law, deals with the question whether a foreign law, that does not foresee any period of legal separation before granting divorce, is contrary to Italian public policy or not. The Italian jurisprudence on the issue is unanimous in stating that it is not contrary to Italian international public policy.²⁴⁴

²⁴³ Cour de cassation, 8 July 2015, 14-17880, FRT20150708.

²⁴⁴ Tribunale di Belluno, 6 March 2009, ITF20090306; Tribunale di Roma, 25 July 2014, ITF20140725; Tribunale di Firenze, 9 March 2015, ITF20150309.



4. Matters related to recognition and enforcement

Elena D'Alessandro

4.1. General remarks

A. Scope of Application of Chapter III of the Brussels IIa Regulation

The rules on recognition and enforcement laid down in the Brussels IIa Regulation apply only to decisions on the merit, provisional and protective measures, authentic instruments and agreements from other EU States.²⁴⁵ Consequently, as correctly clarified by national case-law, neither a decision concerning matrimonial matters delivered in Moldavia²⁴⁶ nor a US decree²⁴⁷ shall be recognised according to the Brussels IIa Regulation.

Arguably, the *Oberlandesgericht München*,²⁴⁸ disapplying Article 61 of the Brussels IIa Regulation, which gives precedence to the Brussels IIa Regulation, has recognised and enforced a Polish return order according to the Hague Convention of 1996. In the concrete case, a child was abducted, by his mother, from Germany to Poland and then, after only one year re-abducted, by his father, to Germany. The mother asked the Polish court for a return order, affirming that the habitual residence of the child was in Poland. Subsequently she asked German courts to recognise and enforce such order. The *Oberlandesgericht München* recognised and enforced the order pursuant to the Hague Convention of 1996 instead of according to Article 42 of the Brussels IIa Regulation because there was no hearing of the father in Poland.

²⁴⁵ Except Denmark.

²⁴⁶ Audiencia Provincial of Cantabria, 13 January 2014, 11/2014, ESS20140113.

²⁴⁷ Tribunale di Roma, 29 May 2015, 12459, ITF20150529b.

²⁴⁸ Oberlandesgericht of Munich, 22 January 2015, 12 UF 1821/14, DES20150122.



B. Temporal scope of Application of Chapter IV of the Maintenance Regulation

The *Bundesgerichtshof*,²⁴⁹ held that an English judgment seeking maintenance rendered before 18 June 2011, whose enforcement was requested after that date, is recognisable and enforceable in accordance with Article 23 and seq. of the Maintenance Regulation, because of Article 75(2)(a) of the Maintenance Regulation, according to which “Sections 2 and 3 of Chapter IV shall apply to decisions given in the Member States before the date of application of this Regulation for which recognition and the declaration of enforceability are requested after that date”.

C. Recognition and Enforcement of Protective measures on the basis of the Brussels Ila Regulation

According to the limits imposed by the rulings of the CJEU in the cases “*Purrucker I* and *II*”,²⁵⁰ provisional and protective measures rendered in a EU Member State can be currently recognised and enforced within the European judicial area if the court granting the order has jurisdiction over the substance.²⁵¹ Therefore, in cases in which the court of origin has declared its competence on the basis of Article 8 et seq. of the Brussels Ila Regulation, a provisional and protective measure shall be recognised and enforced according to the Brussels Ila Regulation.

As noted by the *Bundesgerichtshof*,²⁵² this is because the courts of the Member State of recognition/enforcement are not permitted to *ex post* decide on the jurisdiction of the court of origin (Article 24 of the Brussels Ila Regulation). The courts of the Member State of recognition/enforcement can only check whether the court of origin has based its jurisdiction on the Brussels Ila Regulation by reading the context of the decision.

²⁴⁹ Bundesgerichtshof, 10 December 2014, XII ZB 662/13, DET20141210.

²⁵⁰ The preliminary rulings were originated by a national proceedings pending in a Member State covered by this Research.

²⁵¹ CJEU, 9 November 2010, case C-296/10, *Purrucker v. Vallés Pérez*, ECLI:EU:C:2010:665, para. 73: no distinction can be drawn on the basis of the nature of the proceedings brought before those Courts, that is, according to whether they are proceedings for interim relief or substantive proceedings. Neither the concept of “judgment”, defined in Article 2(4) Brussels Ila Regulation, nor Articles 16 and 19 of the Regulation relating, respectively, to the seising of a Court and *lis pendens*, indicate that the Regulation makes such a distinction. The same is true of the provisions of the Brussels Ila Regulation relating to recognition and enforcement of judgments, such as Articles 21 and 23 thereof.

²⁵² Bundesgerichtshof, 9 February 2011, XII ZB 182/08, DET20110209.



On the contrary, due to the fact that Article 20 of the Brussels IIa Regulation can cover only measures adopted by courts which do not base their jurisdiction, in relation to parental responsibility, on one of the articles in Section 2 of Chapter II of the Regulation, Article 21 et seq. of the Brussels IIa Regulation (concerning recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility), currently do not apply to provisional measures falling within the scope of Article 20.²⁵³

The *Purrucker* cases have been carefully analysed by the *Bundesgerichtshof*.

In particular, the *Bundesgerichtshof* has explained in greater detail, that, in circumstances in which the court of the Member State of origin has omitted to declare on which rule its competence is based, if such data do not arise obviously from the wording of the decision, the court of the Member State of recognition/enforcement shall evaluate - by reading the context of the foreign decision - whether the case falls into the scope of Article 20 of the Brussels IIa Regulation.²⁵⁴

This approach has been confirmed by a subsequent decision of the same court (*Bundesgerichtshof*).²⁵⁵ In the case brought to the attention of the German Federal court, a Hungarian court (the court of origin) had not expressly mentioned the Brussels IIa Regulation in the provisional measure. However, the *Bundesgerichtshof* held that the reasoning of the Hungarian measure showed that the latter had, in fact, applied Article 10 of the Brussels IIa Regulation. As a result, the concrete case was considered as falling within the scope of Article 21 et seq. of the Brussels IIa Regulation.

D. The partial abolition of *exequatur* for maintenance decisions

The Maintenance Regulation has abolished the need for an *exequatur* of decisions, authentic instruments and agreements rendered in a Member State bound by the Hague Maintenance Protocol (Article 17 and seq.). By contrast, an *exequatur* is still needed for decisions, authentic instruments and agreements rendered in a Member State not bound by the Hague Maintenance Protocol (Article 23 and seq.).

²⁵³ CJEU, 15 July 2010, case C-256/09, *Purrucker v. Vallés Pérez*, ECLI:EU:C:2010:437. In national case-law see Tribunale di Arezzo, 15 March 2011, ITF20110315. On this aspect see also *supra*, para. 2.5.

²⁵⁴ Bundesgerichtshof, 9 February 2011, XII ZB 182/08, DET20110209.

²⁵⁵ Bundesgerichtshof, 28 April 2011, XII ZB 170/11, DET20110428.



Consequently, the courts of the Member State of enforcement have to ascertain if, and starting from what date, the Member State of origin was bound by the Hague Maintenance Protocol.

The analysis of national case-law shows that a twin-track approach has not generated particular problems.

The *Oberlandesgericht München*²⁵⁶ and the *Oberlandesgericht Karlsruhe*²⁵⁷ both have dealt with the connection between the Hague Maintenance Protocol and the Maintenance Regulation in relation to judgments rendered, respectively, in Austria and in Hungary.

The *Oberlandesgericht München* has clarified that, as Germany and Austria are both bound by the Hague Maintenance Protocol, a decision rendered in Austria shall be declared enforceable in Germany according to Article 17 and seq., starting from 18 June 2011.

Conversely, decisions granting claims before 18 June 2011 shall be declared enforceable pursuant to Article 23 and seq. of the Maintenance Regulation.

The *Oberlandesgericht Karlsruhe* has come to the same conclusion, referring to a Hungarian judgment.

4.2. Grounds for refusal of recognition/enforcement

Maintenance Regulation

The national case-law takes into account that, as clarified by the CJEU case-law, the grounds for refusal of recognition are to be interpreted in an exhaustive way.

Consequently, it has been said that the fact the enforceable foreign decision had been appealed in the Member State of origin cannot be considered a ground for refusal of recognition pursuant to Article 24 of the Maintenance Regulation.²⁵⁸

If the appeal is successful, and the recognised and automatically enforceable decision was given in a Member State bound by the Hague Maintenance Protocol (Chapter III,

²⁵⁶ Oberlandesgericht München, 12 January 2012, 12 UF 48/12, DES20120112.

²⁵⁷ Oberlandesgericht Karlsruhe, 6 December 2011, 8 W 34/11, DES20111206.

²⁵⁸ Oberlandesgericht Düsseldorf, 28 April 2015, 1 UF 261/14, DES20150428.



Section I Maintenance Regulation), it will cease to produce its effects - including enforceability - in the Member State of origin, as well as in the Member State of recognition.

Therefore, if the appealed decision was already enforced, the debtor may invoke the loss of the enforceability (i.e. the lack of a European Enforcement Order) in the Member State of enforcement, if permitted by the local legal system.

However, it is debated whether the enforcement of a decision rendered in a Member State not bound by the Hague Maintenance Protocol and in that country appealed, may be refused even if “the appeal”, in itself, is not a ground for refusal of recognition listed in Article 24 of the Maintenance Regulation.

The *Bundesgerichtshof* answered this question in the affirmative,²⁵⁹ stating that the dispositive part of the CJEU’s case *Prism Investments BV v. Jaap Anne van der Meer*²⁶⁰ must be interpreted in accordance to para. 38 of its reasoning (“the fact that the judgment is unenforceable in the Member State of origin prevents enforcement in the Member State in which enforcement is sought”). This implies that, in order to obtain the declaration of enforceability, the interested party, in the course of the *exequatur* proceedings, has to demonstrate that the foreign decision is still valid and enforceable in its Member State of origin notwithstanding the appeal.

Furthermore, since the grounds for refusal of recognition must be interpreted restrictively, the Greek court of first instance of Alexandroupolis held that, the mere fact that the applicant had attached the certificate prescribed by Article 54 of the Brussels I Regulation instead of the form set out in Annex II of the Maintenance Regulation, cannot constitute a ground for denying recognition in Greek of a German decision imposing maintenance obligation on the Greek father.²⁶¹

²⁵⁹ Bundesgerichtshof, 23 September 2015, XII ZB 234/15, DET20150923.

²⁶⁰ CJEU, 13 October 2011, case C-139/10, *Prism*, ECLI:EU:C:2011:653: “Article 45 Brussels I on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as precluding the Court with which an appeal is lodged under Article 43 or Article 44 of that Regulation from refusing or revoking a declaration of enforceability of a judgment on a ground other than those set out in Articles 34 and 35 thereof, such as compliance with that judgment in the Member State of origin”.

²⁶¹ Court of first instance of Alexandroupolis, 2 May 2015 No 97/2015, ELF20150205.



4.3. Public policy

Mutual recognition implies that the recourse to the public policy can be envisaged only where recognition or enforcement of a decision delivered in another Member State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle: substantive or procedural in nature.

The national case-law shows that the factors relied on as being contrary to public policy are most often factors related to the so called procedural public policy (A).

Seldom, they are factors related to the substantial public policy (B).

In the context of the Brussels IIa Regulation, a contributory factor to the scarce application of the ground for refusal of substantial public policy is probably the fact that the recognition of decisions on matrimonial matters rendered in third countries and, in particular, in Islamic countries using Sharia Law fall outside the field of application of the Regulation.²⁶²

A. Procedural public policy

Maintenance Regulation

The notion of “breach of procedural policy” seems to be applied narrowly, consistently with the CJEU case-law on this subject.

Quoting the CJEU case *Trade Agency Ltd*,²⁶³ the *Oberlandesgericht Karlsruhe* has confirmed a declaration of enforceability of a Dutch judgment granting maintenance to a divorced wife and her children, rendered by the court of first instance of Karlsruhe.

The plaintiff argued that the decision of the Dutch court infringed the German public order since he was not granted an interpreter during the foreign proceedings.

The *Oberlandesgericht Karlsruhe*,²⁶⁴ in line with the CJEU case-law, held that an infringement of the public policy cannot be detected, as the reasons of the ruling of the

²⁶² CJEU, 12 May 2016, case C-281/15, *Soha Sahyouni v. Raja Mamish*, ECLI:EU:C:2016:343. The request for a preliminary ruling was referred by the *Oberlandesgericht München*, 2 July 2015, 34 Wx 146/14, DES20150602.

²⁶³ CJEU, 6 September 2012, case C-619/10, *Trade Agency*, ECLI:EU:C:2012:531.

²⁶⁴ *Oberlandesgericht Karlsruhe*, 27 January 2014, 8 W 61/13, DES20140127.



Dutch judgment clarify that the plaintiff deliberately renounced to defend himself during the Dutch proceedings.

Accordingly, the *Oberlandesgericht Hamm*²⁶⁵ has affirmed that a Polish judgment granting maintenance in favour of the child does not constitute a breach of the German public order (Article 24(a) of the Maintenance Regulation) merely because the paternity was ascertained solely on the basis of the mothers testimony according to which the defendant was the father. In the view of the German court, such modus operandi does not contradict the public policy, because the father did have the chance to request a DNA test in the course of the Polish proceedings. In addition, the father had the possibility to appeal the decision in Poland before claiming a public order violation in the Member State of enforcement (i.e. in Germany).

A similar case was decided, in the same manner, by the *Oberlandesgericht Stuttgart*.²⁶⁶ Moreover, the *Corte di Appello di Catania*²⁶⁷ held that a default judgment on maintenance become final without notification to the person who was in default of appearance, cannot be considered, in itself, manifestly contrary to public policy ex Article 24(a) of the Maintenance Regulation. This is because the right of defence can be limited in the interest of legal certainty. Accordingly, Italian non-notified decisions become final after 6 months from the issuance.

Lastly, the French *Cour de cassation*²⁶⁸ has dealt with the wording of Article 24(a) of the Maintenance Regulation, pursuant to which “the test of public policy may not be applied to the rules relating to jurisdiction”.

In the concrete case, a French woman, after having transferred her domicile in the United Kingdom, obtained a divorce decree according to English Law. In the course of the French enforcement proceedings (ex Article 23 and seq. of the Maintenance Regulation) the husband argued that a fraud had been perpetrated by the woman in declaring that her habitual residence was in England and, therefore, the judgment

²⁶⁵ *Oberlandesgericht Hamm*, 28 June 2014, II-11 UF 279/11, DES20120628.

²⁶⁶ *Oberlandesgericht Stuttgart*, 13 February 2012, 17 UF 331/11, DES20120213, concerning a Czech judgment granting maintenance, merely based upon the statement of the applicant, according to which the defendant was the father of the child.

²⁶⁷ *Corte d'appello di Catania*, 27 May 2014, ITS20140527.

²⁶⁸ *Cour de cassation*, 25 May 2016, 15-21407, FRT20162505.



should have been considered in contrast with the French public policy. Nonetheless, the French *Cour d'appel de Toulouse*,²⁶⁹ properly applying Article 24(a) of the Maintenance Regulation, declared the English judgment enforceable in France. The decision was confirmed by the *Cour de cassation*.

B. Substantive public policy

As said, in practice, substantial public policy is often invoked, but seldom successful.

Brussels II a

On various occasions, Italian courts held that, pursuant to Article 22(a) of the Brussels IIa Regulation, a judgment of divorce rendered abroad in the absence of a previous decision on legal separation cannot be considered in contrast with the substantive public policy even if, under Italian law, legal separation is a necessary step to obtain divorce.²⁷⁰

Maintenance Regulation

The *Oberlandesgericht Karlsruhe*²⁷¹ held that the requirement of Article 24(a) of the Maintenance Regulation was not met in a case in which the father argued that he was not able to pay maintenance support in accordance to an Austrian decision, which the children tried to have declared enforceable in Germany. As stated by the *Oberlandesgericht*, the decision cannot be considered contrary to public policy, insofar as German courts, in determining the maintenance sum, usually take into account the fictitious income of the debtor and not his/her actual financial means.

Accordingly, the *Oberlandesgericht Frankfurt am Main*²⁷² held that the requirement of Article 24(a) of the Maintenance Regulation was not fulfilled in a case in which the

²⁶⁹ Cour d'appel de Toulouse, 8 April 2015, quoted by Cour de cassation, 25 May 2016 No 15-21407, FRT20162505.

²⁷⁰ Corte d'appello di Bologna, 18 November 2014, ITS20141118; Tribunale di Firenze, 9 March 2015, ITF20150309; Tribunale di Belluno, 5 November 2010, ITF20101105.

²⁷¹ Oberlandesgericht Karlsruhe, 27 January 2014, 8 W 61/13, DES20140127.

²⁷² Oberlandesgericht Frankfurt am Main, 30 December 2015, 4 UF 268/15, DES20151230.



father argued that the maintenance sum listed in the British judgment was too high (GBP 4.000 per month).

Furthermore, in a case which falls outside the scope of the Brussels IIa Regulation (despite this, interesting for the purposes of this report) the court of first instance of Belluno²⁷³ examined whether Italian public policy would be violated by the recognition of a Ukrainian divorce decree not taking a stand on children's custody and maintenance. In the court's view, the judgment does not constitute a breach of Italian substantive public policy, due to the fact that it does not preclude the possibility, for the interested parent, to act before the court having jurisdiction in order to claim children's custody and maintenance.

4.4. Service of documents

National case-law on notification to the defendant of the document instituting proceedings as a ground for refusal of recognition of a default judgment in the context of both, Brussels IIa Regulation and Maintenance Regulation, seems to be consistent and uniform.

Brussels IIa

(I) Absence of notification or errors deliberately committed in serving the defendant with the claim form are considered grounds for refusal of recognition.

In particular, according to Article 23(c) of the Brussels IIa Regulation, the *Amtsgericht Berlin*²⁷⁴ decided not to recognise in Germany a French provisional measure rendered in default because the defendant (mother) had not been properly served with the document instituting the proceedings before the French court. The document instituting the proceedings had only been sent to the former French address of the mother and not to her current German address, as a result of the counterparty's deliberate misinformation. Because of this, the mother was also not granted the opportunity to be heard by the court (Article 23(c) and (d) of the Brussels IIa Regulation).

²⁷³ Tribunale di Belluno, 24 June 2010, ITF20100624.

²⁷⁴ Amtsgericht Berlin-Pankow/Weißensee, 20 March 2009, 28 F 935/09, DEF20090320.



The *Amtsgericht Berlin* also had to address the question whether it was possible, for the mother, to request the non-recognition of the French decision and, at the same time, to appeal the French default judgment in the Member State of origin. The German court held that the appeal of the French decision and the petition not to recognise the judgment in a different country are independent of and not hampered by each other.

(II) Even the lack of an adequate period allowing the defendant to prepare his reaction has been deemed as a ground for refusal of recognition.

In this respect, the court of Barcelona has applied the ruling of the CJEU in the case *Trade agency*²⁷⁵ in a situation concerning Article 23(c) of the Brussels Ila Regulation. Particular attention was paid to paras 32 and 33 of the reasoning, which made clear that such ground for refusal of recognition “aims to ensure that the rights of defence of a defendant in default of appearance delivered in the Member State of origin are observed by a double review... Under that system, the court of the Member State in which enforcement is sought must refuse or revoke the enforcement of a foreign judgment given in default of appearance if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence”. Consequently, it has been said that the court of the Member State in which recognition or enforcement is sought, even if the person in default was served with the claim form, has to ascertain whether that defendant has the time necessary in order to prepare his defence or to take the steps necessary to prevent a decision delivered in default of appearance. In the case at hand, the person in default (the wife) was served with the document which instituted the proceedings but, as the defendant was abroad, she did not have sufficient time to prepare her defence. Due to this reason, the recognition of the Italian judgment was denied.²⁷⁶

Maintenance Regulation

²⁷⁵ CJEU, 6 September 2012, case C-619/10, *Trade Agency*, ECLI:EU:C:2012:531, para. 32 and 33.

²⁷⁶ Audiencia Provincial of Barcelona, 20 February 2015, 58/2015, ESS20150220.



National case-law stresses that the notion of “incorrect or missing service” has to be interpreted restrictively. Accordingly, the creditor’s failure to notify a final judgment has not been considered a valid reason for refusing recognition and enforcement.²⁷⁷

More precisely, the requirements listed in Article 24(b) of the Maintenance Regulation have been considered not met in a case in which the defendant (the father, living in Paraguay), obliged by virtue of a Polish judgment to pay maintenance to his son, argued that he had not known of his maintenance obligation until he received the Polish decision of first instance, due to the fact that, in the course of the German enforcement proceedings, such affirmation turned out to be untrue.²⁷⁸

4.5. Irreconcilability among decisions

National case-law confirms that such ground of non-recognition/enforcement shall be interpreted strictly, in so far as exception to the basic principle of mutual recognition.

Brussels Ila

Properly, the mere fact that a judgment was rendered in breach of Article 19 of the Brussels Ila Regulation has not be considered a sufficient reason for the purpose of refusing recognition on the basis of Article 23(f) of the Brussels Ila Regulation.²⁷⁹

Maintenance Regulation

It has been noted that, according to the ruling of the CJEU in the case of *Prism Investments BV v. Jaap Anne van der Meer*,²⁸⁰ a court of the member State of enforcement is precluded from refusing a declaration of enforceability of a judgment on a ground other than those set out in Article 24 of the Maintenance Regulation, such as the lack of legitimate interest in the proceedings.²⁸¹

²⁷⁷ Oberlandesgericht Nürnberg, 7 October 2014, 7 UF 694/14, DES20140710.

²⁷⁸ Oberlandesgericht Nürnberg, 7 October 2014, 7 UF 694/14, DES20140710.

²⁷⁹ Okresný súd Rimavská Sobota, 24 May 2012, 9P/8/2011, SKF20120524. Consequently, the judgment rendered by the Court of Rohrbach in Upper Austria has been recognised in Slovakia.

²⁸⁰ CJEU, 13 October 2011, case C-139/10, *Prism*, ECLI:EU:C:2011:653.

²⁸¹ Oberlandesgericht Stuttgart, 25 October 2013, 17 UF 189/13, DES20131025.



4.6. Review on the merits

There is very little case-law on the applicability of the prohibition of reviews on the merits, which consequently gives little positive guidance.

Brussels II a

The Czech Constitutional Court²⁸² found in breach of Article 24 of the Brussels IIa Regulation, which expressly prohibits the review of jurisdiction of the court of origin, the refusal of recognition and enforcement of a British decision ordering the return of the child in the United Kingdom. More precisely, the Czech Constitutional Court has annulled the decision of the municipal court in Brno and the subsequent decision of the regional court in Brno, both refusing recognition and enforcement, due to fact that both courts, to deny recognition and enforcement, autonomously evaluated the habitual residence of the child.

With regard to Article 26 of the Brussels IIa Regulation, the German Federal Court²⁸³ held that the prohibition of review on the merits means that a court of the Member State of enforcement cannot verify if the judge of the Member State of origin, in the course of the proceedings, has ascertained and evaluated all the relevant facts in a correct way.

Maintenance Regulation

The *Oberlandesgericht Karlsruhe*²⁸⁴ held that, pursuant to Article 42 (“interdiction of a *révision au fond*”), a decision granting maintenance cannot be modified in a Member State other than the Member State of origin.

²⁸² Ústavní soud, 8 September 2015, II.ÚS 3742/14, CZC20150908.

²⁸³ Bundesgerichtshof, 8 April, 2015, XII ZB 148/14, DET20150408.

²⁸⁴ Oberlandesgericht Karlsruhe, 27 January 2014, 8 W 61/13, DES20140127. Accordingly: Oberlandesgericht Stuttgart, 1 December 2014, 17 UF 150/14, DES20141201.



4.7. Lack of hearing of the child

According to our research, in the context of the Brussels IIa Regulation, the lack of hearing of the child as a ground for refusal of recognition and enforcement, has been taken into account only by the German courts and only in relation to Article 23(b).

Germany has adopted strict standards regarding the hearing of the child²⁸⁵ except, of course, in case of urgency.

Indeed, the *Bundesgerichtshof*²⁸⁶ held that a Hungarian interim measure rendered by a court which has affirmed its competence pursuant to Article 8 of the Brussels IIa Regulation, shall be declared enforceable in Germany according to Article 28 of the Brussels IIa Regulation, even if the child had not been heard prior to the decision, for at least two reasons.

First of all, because in the Member State of origin the child's hearing cannot take place if considered inappropriate having regard to the age of the child and his or her degree of maturity. In the case at hand, the child was three years old.

Secondly, because in case of urgency the child's hearing cannot take place. In the concrete case, the decision was an interim measure and, in addition, the father did not disclose the whereabouts of the child.

As said, in cases in which there was no urgency, the ground for refusal of recognition listed in Article 23(b) of the Brussels II a has been interpreted more widely.

For instance, the *Oberlandesgericht Schleswig Holstein*²⁸⁷ refused to recognise an Italian judgment relating to parental responsibility because the children (respectively: 10 and almost 6 years old at the time of the proceedings) had not been heard in the course of the Italian proceedings before the *Tribunale per i minorenni di Milano*. It held that, pursuant to Article 23(b) of the Brussels IIa Regulation, a judgment shall not be recognised if the child in question was not heard in violation of fundamental principles of procedure of the Member State in which recognition is sought (aside from urgent cases). In the case at hand, the children had only been summoned to appear before the

²⁸⁵ Under German Constitutional Law, the child must be heard by the deciding Court: Siehr, in Magnus-Mankowsky, *Brussels II-bis Regulation*, Munich, 2012, 282.

²⁸⁶ Bundesgerichtshof, 8 April, 2015, XII ZB 148/14, DET20150408.

²⁸⁷ Oberlandesgericht Schleswig, 19 May 2008, 12 UF 203/07, DES20080519.



Italian court, which was not deemed sufficient by the *Oberlandesgericht Schleswig Holstein*. The *Oberlandesgericht* pointed out that, even if Article 23(b) of the Brussels IIa Regulation only refers to an opportunity to be heard as a requirement for the recognition of a judgment relating to parental responsibility, this does not mean that the child's hearing is optional for the court. This wording is only supposed to clarify that the child cannot be forced to make a statement.

The German court argued that the merely summoning of the underage children was not enough to fulfil the requirement listed in Article 23(b), especially since their mother and caretaker refused to allow them to attend the Italian proceedings.

Moreover, in the opinion of the *Oberlandesgericht*, the children's hearing could not be considered inappropriate regarding the age of the children and their degree of maturity. In addition, the *Oberlandesgericht Schleswig Holstein* noted that the Italian court should have used alternative methods such as requesting the German courts legal assistance or cooperation in order to hear the children according to the Evidence Regulation.

In a similar manner, the *Oberlandesgericht Hamm*²⁸⁸ denied the enforcement of a French decision granting to the father the custody of his three-year-old child. The court found the decision of the French court unenforceable according to Article 23(b) of the Brussels IIa Regulation, as the French court had not heard the child before rendering its decision. The *Oberlandesgericht Hamm* noted that in principle, according to German law, a child, at the age of three, has to be heard in proceedings regarding parental responsibility.

²⁸⁸ *Oberlandesgericht Hamm*, 26 August 2014, 11 UF 85/14, DES20140826.



5. The relationship with other legal instruments

Alessandra Lang, Lidia Sandrini

5.1. Issues related to the free movement of persons in the European Union²⁸⁹

All the judgments entered into the database involve international families and the application (or the non-application) of EU Private International Law Regulations, but not all of them raise issues that can affect the freedom of movement within the European Union.

The right to free movement is granted only to EU nationals and their family members, and within the Member States of the Union. It implies that they can move to any Member State other than their State of origin, and they can come back to their State of origin after exercising the right to move. Any national provision of whichever nature, that hinders the freedom of movement cannot be applied, unless it is grounded on considerations of general interest. Even decisions adopted by a court can hinder the enjoyment of those rights, and must be evaluated under a free movement of persons' perspective.

The fact that only EU nationals and their family members enjoy the right to free movement within the Union guided the selection of the judgments to assess.²⁹⁰ First of all, since third country nationals are outside the personal scope of application of the

²⁸⁹ This paragraph shall be attributed to: Alessandra Lang.

²⁹⁰ It goes without saying that, for the present assessment, information about the nationality of the persons involved and the place of residence are essential. A number of judgments in the database do not provide such information (48 judgments, distributed as follows: CR 7, CZ 3, DE 19, ES 2, FR 4, IT 8, SK 5). For this reason, these judgments should not be considered, unless some useful elements can be extracted from them.



freedom of movement, cases that involve only third country nationals are not relevant for the present assessment.²⁹¹

Second, since the freedom of movement can be exercised only within the Union, cases that involve EU nationals who move to third countries should not be considered, because in general do not impinge on freedom of movement.

The types of families going to courts are very diverse, as well as the problems to be solved. In the present assessment, I will focus on four issues: a) restrictions imposed by the court (or claimed by a party even when not granted by the court) on the right to free movement of a family member; b) divorce and its effects on the right to reside; c) maintenance allowance and its effects on the right to reside of both child and former spouse; d) further miscellaneous issues that are nonetheless interesting to focus on.

A. Restrictions imposed by the Court on the right to free movement of a family member

This issue has a direct impact on the exercise of the right of free movement. The relevant cases mainly regard parental responsibility and the parents' respective rights of custody and of access to the child. The freedom of movement of either parent can be restricted, in order for the other to exercise their rights. Restrictions can be introduced in advance, that is the court may issue an order restricting the right of the parent to travel or to move to another Member States,²⁹² or *ex post*, when the court orders the return of the child in case of parental child abduction. This kind of restrictions can be easily reconciled to directive 2004/38/EC,²⁹³ the general legislation on free movement, which states that both the right to exit and the right to enter another State can be

²⁹¹ 70 judgments, distributed as follows: DE 6, ES 24, FR 11, IT 29. For the purposes of free movement, the citizens of all 28 Member States are EU nationals, even though their State of origin may not be bound by one or more private international law Regulations.

²⁹² Among the many, see Cour d'appel de Paris, 7 October 2014, 14/04093, FRS20141007: the Court issued a decision prohibiting the father to leave the country, in order to limit the risk of child abduction; Cour d'appel de Lyon, 27 June 2011, 10/03527, FRS20110627: the Court decided that neither parents can leave the country without the other one's consent.

²⁹³ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 229, 29-6-2004, page 35 and ff.



limited for reasons of public order. No doubt that respect for the rights that others draw from the law as established by a court comes within the public order exception.

Sometimes the party asks the court to limit the right to move of the former spouse: for instance, an Italian husband applied for separation and for the right to assent to the renewal of his wife's passport. The court dismissed this second plea, since it would have been an indirect limitation of the right of free movement, hardly reconcilable with the EU law, because it pursues a private, rather than a public interest.²⁹⁴

The judgments entered in the database offer a wide range of examples of orders restricting the right to move, limits to the right to come back to one's own State of origin comprised.²⁹⁵

B. Divorce and its effects on the right to reside

Divorce can affect the rights connected to free movement. Divorce entails a change of *status* and divorcees are no more part of the same family. When a person resides in a member State as spouse of a EU citizen, according to Directive 2004/38/EC, and divorce is declared before acquiring the right of permanent residence (that is, before 5 years have elapsed from the registration of residence),²⁹⁶ the former spouse must meet the other requirements laid down by the directive in order to maintain his or her residence. In other words, the title for residence changes: it is not grounded any more on the *status* of spouse of an EU national, but needs to be founded on other legal grounds.

It must be pointed out that this kind of problems do not occur when the former spouses are nationals of the State where they both live. In fact, nationals enjoy the right to live in their State of origin as a matter of national law, not of EU law. In the same vein, the cases regarding spouses having different nationalities, one being a third country

²⁹⁴ See Tribunale di Pavia 20 August 2015, ITF20150820a. The case at hand in a strict sense should not be considered, because the spouses are an Italian husband and an Albanian wife, living in Italy. The Albanian wife is not entitled to freedom of movement. Nonetheless, the case is mentioned, because it raises an issue that could potentially affect rights of EU origin.

²⁹⁵ Among the many, see Krajský soud v Brně, 4 June 2013, 20 Co 223/2013, CZS20130604: the Court ordered the mother (Czech national) to return the child to Italy, therefore limiting her right to move back to her State of origin with the child.

²⁹⁶ Under Directive 2004/38, after 5 years of legal and continuing residence the member of the family acquires a right of permanent residence, which is disconnected from the right to reside of the EU national.



national, the other being an EU national, residing in the Member State of origin of the EU national, remain outside the scope of application of EU law, and the *status* of the former spouse (third country national) is not governed by EU law.

The relevant typology is as follows:

- i) two spouses having the same EU nationality and residing in another Member State;
- ii) two spouses having different EU nationality, residing in a Member State which is not the State of origin of any of them;
- iii) two spouses having different EU nationalities, residing in the State of origin of one of them: the couple fall outside the scope of application of Directive 2004/38/EC, but the former spouse, as EU national, falls within such scope.
- iv) spouses having different nationalities - a third country national and a EU national - residing in another Member State.

Applicable rules depend on whether the former spouse is an EU national or not.

Former spouses having EU nationality can retain the right to reside, if they personally satisfy the conditions laid down by Directive 2004/38/EC. Therefore, their right of residence is conditional on their being workers or having “sufficient resources for themselves not to become a burden on the social assistance system of the host Member State during their period of residence” (Article 7 of Directive 2004/38/EC).

If the former spouse is a third country national, stricter conditions to retain the right of residence will apply: not only the conditions applicable to the divorcee who has the nationality of a Member State, shall have to be met but also one of the four hypotheses listed in Article 13(2) of the Directive shall have to be met.²⁹⁷ Article 13(2)(a) is particularly problematic, as the Court of Justice states it only applies when the EU

²⁹⁷ “(a) prior to initiation of the divorce or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted at least three years, including one year in the host Member State; or
(b) by agreement between the spouses or the partners referred to in point 2(b) of Article 2 or by Court order, the spouse or partner who is not a national of a Member State has custody of the Union citizen’s children; or
(c) this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting; or
(d) by agreement between the spouses or partners referred to in point 2(b) of Article 2 or by Court order, the spouse or partner who is not a national of a Member State has the right of access to a minor child, provided that the Court has ruled that such access must be in the host Member State, and for as long as is required.”



citizen resides in the host State when the request for divorce is submitted to the Court.²⁹⁸ If the spouse, who is an EU citizen, leaves the State where s/he used to live with his/her spouse, and after going back to his/her State of origin, s/he files an application for divorce there, the position of the non EU spouse who remains in the other State is no more regulated by Article 13, but by (the less favourable) Article 12 instead, which grants a residence right only if the spouse has the custody of the children and provided they are enrolled at school.

Cases in the database shows that it is not uncommon that one spouse goes back to his/her state of origin, leaving the other spouse alone in the Member State of their previous common residence. Nonetheless, no “Singh style” case is reported. On the contrary, courts often state that they have no jurisdiction. Even if courts do not seem to have taken into account the residence rights of the third country spouse, their decisions are nonetheless a positive outcome for the third country spouse.

C. Maintenance allowance and its effects on the right to reside of child and former spouse

EU nationals are entitled to reside in a member State of which they are not nationals if they are workers or have sufficient economic resources in order not to become a burden on State finances. Such resources may also be provided to the person by a third party, for instance a family member. In cases of divorce or of parental responsibility the host State may consider the maintenance allowance that a court may ask a party to pay to the other party as relevant grounds for the purpose of giving the right to reside.

It would be interesting to evaluate whether the courts take it into account when establishing the amount of maintenance to be paid to the family member who lives in another Member State.²⁹⁹

²⁹⁸ CJEU, 16 July 2015, case C-218/14, *Singh et al.*, ECLI:EU:C:2015:476.

²⁹⁹ Krajský soud v Brně, 3 September 2014, 21 Co 327/2014, CZS20140903: the child (over 18 years old, Czech citizen with habitual residence in Germany) filed an action on maintenance matters against her father (Czech citizen with habitual residence in the Czech Republic), and the Court decided that Czech Courts have jurisdiction to decide the case.



In case of revision of the allowance paid to the former spouse or to the child, the judicial decision may affect the right of residence of the other party, should it reduce the amount of resources made available to them.³⁰⁰

With this respect the judgment of the German court of second instance³⁰¹ is worthy of mention. The applicant is the underage child of the defendant. The child moved from Bulgaria to Germany, where s/he lived with his/her father. Both father and child are German and their residence in Germany does not depend on EU law. The applicant asked for an alteration of the Bulgarian maintenance allowance according to German law, since the minimum value of the maintenance obligation had been determined by Bulgarian courts according to Bulgarian law. The court said it has jurisdiction. Even though the applicant did not draw his/her right of residence from EU law, the case is interesting for the present purpose, since it reveals an issue that potentially comes within the scope of application of EU law.

Another interesting case is the judgment of the Croatian court of first instance:³⁰² the family used to live in the State of the forum (Croatia) and after divorce the mother moved to Sweden in search of a job. The court gave the children's custody to the mother, since it deemed this decision to be in keeping with their best interest. One wonders whether the court took account of the rights that the parent enjoyed in Sweden. In fact, as a jobseeker, a EU citizen enjoys a limited right of residence (only for six months) and no right to social assistance, unless national law provides otherwise.

D. Miscellaneous issues

Some Bulgarian cases also deserve to be mentioned and namely: the judgment of the court of first instance, regional court Kazanlak³⁰³ and the judgment of the court of third instance.³⁰⁴ Albeit different, in both cases the mother, a Bulgarian national living abroad with her child, asked the court to be entitled to give the required consent in the place

³⁰⁰ For instance, Krajský súd Trenčín, 21 March 2012, 17CoP/19/2012, SKS20120321, the mother filed an application for the increase of maintenance allowance.

³⁰¹ Oberlandesgericht Koblenz, 18 March 2015, 13 UF 825/14, DES20150318.

³⁰² Općinski sud u Sisku, 18 March 2016, P-Ob-578/15, CRF20160318.

³⁰³ Районен съд - Казанлък, 11 June 2014, 1018/2014, BGF20140611.

³⁰⁴ Върховен касационен съд, 9 January 2014, 6366/2013, BGT20140109.



of the child's father for the renewal of the child's passport. In the case decided by the court of first instance, the father did not live with the family, but in Bulgaria, and did not contribute to the child's maintenance. From the description of the second case, it can be assumed that both parents lived abroad. The courts declared that they had no jurisdiction to adjudicate the cases. A different outcome was reached some years before by the court of third instance,³⁰⁵ which on the contrary stated that Bulgarian courts are competent because the claim regards the issuing of Bulgarian documents.

The matters relating to the issuance of documents are not regulated by EU law as such. However, since identity documents (and passports among them) are the principal means to prove one's nationality, they have a clear connection with freedom of movement. Uncertainty under national law on the renewal of passport might hinder the free movement of the holder.

5.2. Interrelation with international Conventions³⁰⁶

As in other fields of private international law, in family matters the room left to the application of international Conventions by member State courts depends primarily on the scope of the EU law (*i.e.*, Member States continue to apply international Agreements in matters non covered by Regulations).³⁰⁷ Thus, a proper characterization by the judge of any issue that has been brought before the court in the context of proceedings in family matters is crucial in order to properly determine whether a EU Regulation or a Convention apply to each of them.

Secondly, the applicability of international Conventions also depends on the specific rules provided for by each Regulation in order to allow member States to comply with the obligations assumed with third countries before the adoption of the relevant EU instrument.³⁰⁸

³⁰⁵ Върховен касационен съд, 12 January 2011, BGT20110112.

³⁰⁶ This paragraph shall be attributed to: Lidia Sandrini.

³⁰⁷ See above, under "Matters related to the scope of application".

³⁰⁸ See, e.g., Article 69 of the Maintenance Regulation, dealing with "Relation with existing international Conventions and agreements", and Article 63(1) of the Brussels IIa Regulation, regarding its "Scope and effects".



Furthermore, with regard to certain family issues EU law establishes an interaction with certain international Conventions. That is the case of the Hague Convention of 1996. As well known, the Convention applies in relations between Member States in matters of applicable law, since Brussels Ila Regulation does not cover this subject. Conversely, the Regulation prevails in the relations between Member States in matters of jurisdiction, recognition and enforcement. Besides, as far as jurisdiction is concerned, the Hague Convention of 1996 is not irrelevant to the Regulation, as the circumstance that the child has his/her habitual residence in a third State that is not a contracting party to that Convention makes the presumption introduced by Article 12(4) of the Brussels Ila Regulation come in to play in the assessment of the child's best interest. On the same path, the Maintenance Regulation gives relevance to the Hague Maintenance Protocol at the enforcement stage, providing for a simplified procedure that applies only to decision issued in Member States bound by that instrument. Besides, as far as matters of applicable law are concerned, the Regulation refrains from providing for a conflict-of-laws discipline and refers to the aforementioned Hague Maintenance Protocol with regard to the Member States that are also contracting party to it (Article 15). In addition, one may recall that the Maintenance Regulation provides for coordination with the Lugano Convention of 2007 (Article 4(4)), with regard to exclusive choice of court agreements, and with the Hague Convention of 2007 (Article 8), as to proceedings brought by the debtor in order to modify a previous decision or to have a new one.

Finally, it should be mentioned the peculiar interrelation between the Brussels Ila Regulation and the Hague Convention of 1980. Whereas the Convention continues to apply in relation to cases of child abduction both between a Member State and third States and between Member States. With regard to such latter cases, Brussels Ila Regulation supplements the international rules with specific provisions aiming to better ensure the prompt return of the child.³⁰⁹ Hence, in relations between Member States the prevailing character of the Regulation over the Hague Convention of 1980, as set out by Article 60 of the Brussels Ila Regulation, results in a joint application of the two instruments.

³⁰⁹ See above, under "Child Abduction".



Because of that composite framework of rules, a number of judgments rendered in Member States apply international Conventions along with EU Regulations. Generally, the courts of the Member States show a good attitude in managing the difficulties arising from the need to search out from the EU legal system in order to find the proper rule for matters not covered by the Regulations. In most of the cases, they also refer correctly either to the relevant Regulation or to international Conventions, depending on the connection of the factual situation or of the subjects involved with a Member/non-Member State. It is worth mentioning a judgment issued by a Spanish court of second instance. As to divorce, the court has correctly assessed jurisdiction under Article 3(1) of the Brussels Ila Regulation and has determined the applicable law according to Article 8 of the Rome III Regulation; as to parental responsibility, it has founded its jurisdiction on Article 8 of the Brussels Ila Regulation, in respect of the two children habitually resident in Spain, and on Article 12(3) and (4) as for the minor living in China (taking into account the best interests of the minor, being China not a contracting State of the Hague Convention of 1996), and has determined the applicable law according to Article 15 of the Hague Convention of 1996; as to maintenance obligations, it has declared its jurisdiction under Article 3 of the Maintenance Regulation, and has determined the applicable law according to the Hague Maintenance Protocol, by reference to Article 15 of the Maintenance Regulation.³¹⁰

³¹⁰ Audiencia Provincial Barcelona, 8 January 2015, 10/2015, ESS20150108; among the number of judgments that have correctly addressed the interrelation between EU Regulations and international Conventions, see also: Cour d'Appel Lyon, 30 May 2011, 10/02739, FRS20110530, where, in a case in matter of parental responsibility involving parents and children Nigerian nationals, habitually residents in France, Brussels Ila Regulation, as to jurisdiction, and the 1996 Hague Convention, as to the applicable law, have been correctly applied; Audiencia Provincial Valencia, 6 October 2014, 720/2014, ESS20141006, where, in a case involving Nigerian citizens residing in Spain, the Court have had to apply Brussels Ila Regulation, Rome III Regulation, Maintenance Regulation, Hague Maintenance Protocol and the 1996 Hague Convention and did that correctly; Oberlandesgericht Frankfurt am Main, 5 March 2015, 6 UF 225/13, DES20150305, dealing with a case involving a German citizen (the creditor) and a USA citizen (the maintenance debtor) and showing how the Maintenance Regulation and the Hague Maintenance Protocol complete each other; Oberlandesgericht Karlsruhe, 5 June 2015, 18 UF 265/14, DES20150605, in which, with regard to a child residing in Denmark, the jurisdiction has been assessed under the 1996 Hague Convention in light of Article 61 and Recital No 48 of the Brussels Ila Regulation; Tribunal Superior de Justicia Aragón, 6 October 2015, 27/2015, EST20151006, where, in a case involving Ecuadorian citizens residing in Spain, the Court applied correctly all the relevant EU and international instruments;



Conversely, from a statistical perspective, it is worth noting that only few judgments (approximately the 15% of the 371 examined), show difficulties as to the interaction between EU Regulations and the international Convention.

Most of the judgments that result not completely persuasive - either as to the solution reached or, where that is correct, as to the reasoning - have been issued in abduction cases. Thus, the joint application of the Hague Convention of 1980 and Brussels IIa Regulation has proved to be uneasy and, probably because of a well-established habit to refer to the Hague Convention of 1980 only, in some cases where its application had to comply with the precedence-rule provided for under Article 60 of the Regulation, the latter is not mentioned at all. Consequently, courts did not always take into account the procedural rules set out in Article 11 of the Regulation.³¹¹

Out of the field of child abduction, only in few cases the choice by the court of the relevant international Convention is not correct. This problem pertains specifically to the Conventions on the applicable law, in matters both of parental responsibility and of maintenance obligations. Especially the Italian and French case-law shows a tendency to still refer to the old Hague Conventions, now replaced by the Hague Convention of 1996 and by the Hague Maintenance Protocol.³¹²

Only occasionally, international Conventions are applied in place of the relevant EU Regulation.³¹³ More often (but still very rarely) it may be found an undistinguished and

³¹¹ For a more detailed analysis of the matter, with references to the relevant case-law, see above, under "Child Abduction".

³¹² As to France, see e.g.: Cour d'Appel Nancy, 22 November 2014, 13/02292, FRS20131122, and Cour d'appel de Douai, 5 March 2015, 14/347, FRS20140417, both applying the Hague Convention of 1961 instead of the Hague Convention of 1996; Cour d'Appel Metz, 19 December 2014, 14/00884, FRS20141219, applying the Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations instead of the Hague Maintenance Protocol. As to Italy, the problem has raised only with regard to maintenance obligation, since the Hague Convention of 1996 has entered into force in 2016. See, e. g., Tribunale di Roma, 27 January 2014, ITF20150127, where the mentioned 1973 Hague Convention has been applied instead of the Hague Maintenance Protocol, while the reference to the mentioned Hague Convention of 1961 is correct, as Italy had not ratified the Hague Convention of 1996 at the time of the proceedings.

³¹³ See e.g., Tribunale di Cagliari, 20 June 2013, ITF20130620, applying the Hague Convention of 1961 instead of the Brussels IIa Regulation. To this respect it is also worth mentioning a decision issued by a Czech Court of second instance in matters of maintenance obligations (Krajský soud v Brně, 31 March 2015, 20 Co 674/2014, CZS20150331): the Court exercised its jurisdiction on the basis of the Hague Convention of 1996, since the maintenance debtor was resident in the USA, which is not a member State of EU, and therefore (*sic*) Brussels IIa Regulation couldn't be applied. In this last case it seems that the Court occurred in a double mistake, as it has excluded the application of the Brussels IIa Regulation rules



mixed reference to all the EU rules and international agreements dealing with the issues raised before the court, sometimes complemented with a reference to domestic Private International Law rules.³¹⁴ That is probably the more specific symptom of the difficulties in applying such a complex normative framework. However, those difficulties do not always harm the judgment outcome, due to the large degree of convergence among the solutions provided by the different instruments.

Finally, among the cases that raised problems related to the interaction between international Conventions and EU Regulations, there is only one judgment³¹⁵ in which an issue that could be deemed still open has arisen and its decision by the German court seized has been decisive for the outcome of the case. The controversy, in matters of parental responsibility, involved a Turkish and German national (the father) and an Austrian national (the mother), who moved together to Germany in 2006 with their one-year-old daughter (German national). After the parents separated, custody was given to the father. In 2012, the mother claimed access rights to the daughter before a German court. Shortly after the first instance proceedings had been pending, the father moved with the daughter to Turkey. The court of first instance continued with proceedings, finding that it had jurisdiction over the matter pursuant to Article 8 of the Brussels IIa Regulation and decided in favour of the mother. The father appealed the decision, claiming, *inter alia*, that German courts could not decide over the matter as jurisdiction had shifted to the Turkish courts. The court of second instance held that that Article 8 of the Brussels IIa Regulation, which provides that jurisdiction should be assessed taking into account the habitual residence of the child at the time when the court is seized, and by that affirms the *perpetuatio fori* rule (*i.e.*, once a case is pending, the court

because of the residence in a third country of the defendant, on one hand, and, on the other, as it had identified the wrong piece of EU legislation as applicable in maintenance matters. To the last regard, it should be pointed out that it is doubtful whether the Maintenance Regulation, which is not mentioned, should have been applied not, as the date of the commencement of the proceedings is not reported.

³¹⁴ See e.g., Tribunale di Firenze, 9 March 2015, ITF20150309, in a case involving Senegalese nationals habitually residents in Italy, concerning divorce, custody rights and maintenance obligations; Audiencia Provincial Barcelona, 20 October 2015, 661/2015, ESS20151020, where, as regard maintenance obligations, reference is made to the Maintenance Regulation in order to assess jurisdiction, without any specification of the dispositions applied, whether the jurisdiction issues are dealt by reference to national private international rules, as far as divorce is concerned, and without mentioning the instrument applied as to custody rights

³¹⁵ Oberlandesgericht Frankfurt a. M., 12 April 2012, 17 UF 22/12, DES20120412.



seized shall have jurisdiction even if the residence of the child changes afterwards), is not applicable in relation to Turkey. The court has based its interpretation on Article 60(a) of the Regulation, according to which the Brussels Ila Regulation takes priority on the Hague Convention of 1961 (to which both Germany and Turkey are Contracting Party) between EU Member States only. Thus, in relations between Germany and Turkey, the Hague Convention of 1961 prevails over the Brussels Ila Regulation. That led the court to decline jurisdiction, since the Convention does not provide for the *perpetuatio fori* rule.

The decision is a good example for the interaction between the different Regulation and Conventions. It is clear that the Brussels Ila Regulation has to step back in relation to non-member states. However, in the aforementioned case, the application of Article 60(a) of the Brussels Ila Regulation has turned out in the unlikely effect that the court of second instance had to decline jurisdiction on a matter already dealt in first instance by another German court. One may wonder if such strict interpretation of Article 60(a) of the Brussels Ila Regulation is required in order to ensure the respect of the Hague Convention of 1961. It should also be noticed that if both Germany and Turkey had been party to the Hague Convention of 1996,³¹⁶ Article 61 had come into play. Even so, in light of the rule provided for by Article 61(a), it would be uncertain if the *perpetuatio fori* rule could have been applied. In fact, the provision does not specify the time in relation to which the requirement of the child's habitual residence in a Member State has to be fulfilled in order to apply the Regulation in place of the Convention. Thus, it remains uncertain whether the exercise of the jurisdiction by the court seized in the first instance, when grounded on the habitual residence of the child in the Member State, is sufficient to perpetuate the jurisdiction of this Member State as long as the possibility to go through different instances of proceedings requires.

³¹⁶ Germany ratified the Hague Convention of 1996 in 2010, while Turkey has not ratified it yet. Hence, the Hague Convention 1961 is still applicable in the relations between the two states.



6. Cross-cultural issues

Elisa Giunchi, Marzia Rosti

6.1. Latin America³¹⁷

As to Latin America, the following judgments have been identified.

Two judgments by the *Tribunale di Roma*, concerning the separation of a Peruvian couple who had married in Peru and are domiciled in Rome,³¹⁸ and one judgment regarding the dissolution of marriage of a Peruvian couple who had married in Peru, is domiciled in Rome and whose consensual separation has been validated by the court of first instance of Viterbo in 2009.³¹⁹ In all these cases the court affirmed that:

1. jurisdiction lies with Italian courts as per Article 3(1)(a) of the Brussels IIa Regulation, which prescribes the requirement of habitual residence of both spouses; Articles 3 and 32 of Italian Law No 218/1995 and the CJEU case *Sundelind v. Lopez* were also referred to by the court.

2. As to the applicable law, the judge takes into consideration the Peruvian Civil Code (PCC, chapter on the family) on the basis of the principle of nationality, as the spouses are Peruvian nationals, in application of Articles 28 and 31(1) of Italian Law No 218/1995. In particular, the court took into consideration Articles 333 (causes of separation), 340 (custody of children), 342 (child support), and 348 (causes of divorce, with reference to the causes of separation mentioned in Article 333) PCC.

In the judgment of 8 February 2013,³²⁰ the *Tribunale di Roma* ruled that, as no act of violence or injury against the wife has been proven, which under Article 333 PCC could be a cause for divorce, the “*separación convencional*” is functional, being it a residual option prescribed under Article 333(13) PCC. This option can be chosen if the separation is asked by the spouses by mutual agreement, provided that 2 years have gone by since

³¹⁷ This paragraph shall be attributed to: Marzia Rosti.

³¹⁸ Tribunale di Roma, 8 February 2013, ITF20130208; Tribunale di Roma, 14 June 2013, ITF20130614.

³¹⁹ Tribunale di Roma, 25 October 2013, ITF20131025a.

³²⁰ Tribunale di Roma, 8 February 2013, ITF20130208.



the celebration of the marriage (4 in case of the existence of under age children). In this case, the wife left the conjugal house in 2007 and since 2008 the couple has been living apart. As to their minor daughters, joint custody is awarded to the parents, though they will stay mostly with the mother. The judge stresses that such an institution is not part of the Peruvian legislation, which prescribes that in cases of separation due to a specific cause the children's custody is awarded to the spouse who was not at fault (Article 340 PCC); if both are responsible, in case the children are over 7 years old custody will be awarded to the father; if they are younger, it will be awarded to the mother. As this is a "*separación convencional*", the judge applied Article 345 PCC, which prescribes that it is up to the court to rule on the custody, by taking into account the parents' requests and the best interests of the child.

As to child support, the judge decided that the father will have to maintain the daughters (EUR 500/month) and pay over 50% of the extraordinary expenses that have been agreed upon by the parents (he presumably refers to Article 342 PCC on "*pensión alimenticia*", but this is not mentioned in the decision).

In the judgment of 14 June 2013,³²¹ separation due to violence by the husband against his wife is granted by the judge, as prescribed by Article 333(1) PCC; the minor son's custody is awarded to the mother; she is also given exclusive guardianship according to Article 340 PCC; however, her request for spousal support is rejected, though she is given the conjugal house; the father will have to pay the "*pensión alimenticia*" for the minor son (EUR 300/month) as per Article 342 PCC.

In the judgment of 25 October 2013,³²² the marriage of a Peruvian couple who had married in Peru, and had their residence in Rome is dissolved. Their consensual separation had been recorded by the *Tribunale di Viterbo* in 2009. Article 348 PCC provides for divorce with reference to the causes of separation prescribed by Article 333 PCC, among such causes is a long period of separation, which in the present case started in 2009, when the separation was recorded by the court of Viterbo. The parents are to

³²¹ Tribunale di Roma, 14 June 2013, ITF20130614.

³²² Tribunale di Roma, 25 October 2013, ITF20131025a.



pay a monthly contribution for one of their children; the other one will live with his father who will economically support him (no specific rules are mentioned by the court). The *Tribunale di Milano* also ruled on the dissolution of marriage of an Ecuadorian couple, who had married in Ecuador and was domiciled in Milano, in conformity with the Civil Code of Ecuador (ECC).³²³ The judge established that as to jurisdiction, it lies with Italian courts, according to Article 3 of the Brussels Ila Regulation on the requirement of habitual residence of both spouses, and Articles 3 and 32 of Italian Law No 218/1995.

In that case, the wife asked the judge to dissolve their marriage, to grant her custody of their minor daughters, and for the husband to support them and herself until she would find regular employment. These requests were based on the ECC, Book I, Title III (“on marriage”), Articles 104-129 (now Articles 105-130). The husband agreed to end the marriage, but held that she was responsible for it having clearly committed adultery (Article 109(1) ECC, now Article 110(1)) , adding that she had left the conjugal house for over a year for no justifiable reason (Article 109(11) ECC, now Article 110(11)). In May 2006 she had in fact gone back to Ecuador with her daughters, and made it clear that she had no intention of going back to Italy. When she returned to Italy in 2001, she lived in her conjugal house but led an autonomous life; in 2012 she let it known that she was 6 months’ pregnant following her relationship with a new partner. The husband therefore holds that the custody of their daughters cannot be awarded to her, and that she cannot be granted economic support either (Article 107(4) ECC, now Article 108(4) with reference to Article 109, now Article 110) [the articles mentioned in the 2012 judgment do not coincide with those of the now-in-force ECC, which was amended in 2015. Legal age for marriage is now 18 for both spouses; the abandonment of the conjugal house as a cause of divorce is now fixed to 1 year rather than 3].

In its judgment, the court authorises the spouses to live apart; grants the daughters’ custody to the father; asks the local social services to monitor the emotional development of the daughters and the capacity of both parents to look after their needs, and establishes that the mother has to pay EUR 150/month for their maintenance. The legislation applied in these matters has not been mentioned.

³²³ Tribunale di Milano, 11 December 2012, ITF20121211.



The court decides that at a subsequent hearing (fixed for 5 March 2013) the litigants must indicate their choice to apply either the law of Ecuador or Italian law, as such choice has not been made yet, contrary to Article 5 of the Rome III Regulation. The Regulation provides that a couple can agree on the law applicable to divorce and consensual separation as long as it is the law of the country of habitual residence of both or of one of them, the law of the state of which one of them is a national or the law of the forum. The judge reminds that on 20 February 1931 Ecuador implemented the code of Private International Law, providing for the right to get separated and divorce on the basis of the law of the conjugal domicile (Article 52), which would have led in this specific case to Italian law.

Two judgments are also classified³²⁴ in which the dissolution of marriage was declared by applying respectively Mexican (Article 267(XVII) of the Mexican Civil Code, for a marriage celebrated between a Mexican citizen and an Italian citizen) and Brazilian legislation as requested by the parties. Neither of the applied laws provides for separation as a prerequisite for divorce. The decision to apply foreign law is made pursuant to Article 5 of the Rome III Regulation, which gives spouses the right to designate by common consent the law applicable to divorce and consensual separation according to the criteria specified therein.

6.2. Islamic law³²⁵

In the period under consideration two appeal cases heard in Spanish courts of second instance dealt with Moroccan nationals who are habitual resident in Spain.

In the Spanish case No 366/13 of 15 May 2013,³²⁶ the litigants, of Moroccan nationality, have a minor son, who is presumed by the court to be of Moroccan nationality; they married in Morocco and their habitual residence is Cataluña. The court of first instance attributed post-divorce custody to the mother, established visitation rights for the father and determined the amount of maintenance owed by the father to the son. The

³²⁴ Tribunale di Treviso, 18 December 2012, ITF20121218; Tribunale di Pordenone, 30 June 2015, ITF20150630.

³²⁵ This paragraph shall be attributed to: Elisa Giunchi.

³²⁶ Audiencia Provincial Barcelona num. 366/2013, 15 May 2013, ESS20130515.



father subsequently appealed it concerning visitation rights and the amount of maintenance.

As to the competence of the court, the appeal court observes that according to the Brussels IIa and Brussels I Regulations (Maintenance Regulation was not applicable *ratione temporis*) the jurisdiction lies with Spanish courts. With regards to applicable law, the judge holds that both claims are governed by Moroccan Law: in light of the fact that the request was submitted before the entry in force of the 1996 Hague Convention, according to Article 9(4) of the Spanish code Moroccan law must be applied to parental responsibility (*ṣadāna*) and maintenance (*nafaqa*) under the domestic choice-of-law rules in force at that time. Explicit mention is made by the court of Article 182 of the *Mudawana* on the determination of visitation times and places, which should be aimed at preventing “any attempt intended to thwart such visits” and take into consideration “the conditions of each party and the specific circumstances pertaining to each case”; Article 186 which in issues of custody mentions that courts must take into consideration the best interest of the child. With regards to child maintenance, as at the moment of the request the Hague Maintenance Protocol was not in force, according to Article 9(7) of the Civil Code of the forum the *Mudawana* clauses must also be applied under the relevant domestic choice-of-law rules. Reference is therefore made to Article 189 of the *Mudawana* which specifies what constitutes maintenance and what elements should be taken into account when determining its amount.

No issues related to *sharī'a* are mentioned in this case, either by the parties involved or by the judges, as far as can be gauged by the transcription, which is very succinct. The Articles of the *Moudawana* cited by the judge are mostly of a procedural nature; in any case, neither are they *sharī'a*-based nor do they represent any challenge to public policy; on the contrary, the *Mudawana* norms evoked by the judge include the principle of the best interests of the child that is current in European jurisprudence and legislation but less frequently resorted to in the Middle East. This principle is not only incorporated in Moroccan legislation, including the Child Protection Code, but is generally implemented by judicial and administrative authorities in decisions affecting children, particularly in cases of divorce.



In the Spanish judgment of 53/15 of 4 February 2015,³²⁷ the spouses married in Morocco in 1995, are of Moroccan nationality, and reside in Cataluña. Unlike case 366/13 mentioned above, in this case they acquired Spanish nationality; they have two children born in Spain who are also Spanish nationals. In the court of first instance the judge gave custody to the mother, granted her the matrimonial house, fixed the amount of allowance owed by the father to the children, determined his visitation rights, rejected her request for a “*compensación económica por trabajo para la casa por desequilibrio entre le patrimonies de les cónyuges*” (payment for household services during the marriage.) and for a “*pensión compensatoria*”. The wife then appealed to increase the amount of maintenance owed to the children, to introduce retroactivity on the terms of payment, and obtain a “*compensación económica*”, while the husband appealed to reduce the amount of maintenance.

As to the competence of the court on issues of separation and its effects, the judge states that there is no doubt that it lies with Spanish courts, as both spouses reside in Spain and have acquired Spanish nationality, their children were born in Spain and are Spanish nationals. As to applicable law, Spanish legislation is applicable on the basis of the Rome III Regulation; as the Spanish Civil Code (SCC) establishes that the law of habitual residence must be applied also to extra-communitarian citizens, the norms of the Cataluña Civil Code (CCCat) must be applied. However, with regard to some economic aspects, such as the “*compensación económica*”, the fact that they have Spanish nationality and have lived in Cataluña for 10 years does not automatically imply that the regime of separation of the CCCat must be applied. On the basis of 9(2) of the SCC (the national conflict-of-laws rule), the personal law of both spouses at the time of marriage must be applied; in this case it was Moroccan law, as indicated by the marriage act in which the dower regime is expressly mentioned. As it is not certain that between the spouses the separation regime of the CCCat applies, the judge declares that he cannot assess the request for an economic compensation.

The judge increases the amount of the maintenance owed to the children, and the wife is recognised a pension (“*Pension compensatoria*”) in monthly instalments on the basis

³²⁷ Audiencia Provincial Barcelona num. 53/2015, 4 February 2015, ESS20150204.



of her poor physical conditions and the economic disparity between spouses, while the rejection of the request of a “*compensación económica por trabajo*” is confirmed.

No reference is made to the Brussels IIa Regulation, neither of divorce issues nor of parental responsibility. The judgment states that, according to the facts, there is no doubt with regards to the competence of Spanish courts but does not justify their competence.

2) In regards to the law applicable to divorce, no reference is made to Article 8 of the Rome III Regulation. The judge directly applies “the law of the habitual residence of the spouses”, without referring to it.

3) No justification is given for the application of Spanish law (precisely, the law of Cataluña) with regards to parental responsibility and maintenance.

4) As to the matrimonial property regime of the couple, the judge applies, correctly, Article 9(2) SCC, but it is not clear if the judge finally applies the law of Morocco or not. Concerning *sharī'a*, as in the previous case, the transcription is quite vague. We are for example left in the dark as to the reasoning on *compensación económica*/dower regime made by the judge. This compensation may not be recognised in Morocco, unless the Spanish judge justifies his decision in ways that are acceptable by Moroccan judges and equivalent in outcome to norms and principles of the *Mudawana* on the deferred dower, the maintenance owed for the “*iddah*”, or the “consolation gift”, all provided for by the *Mudawana* (Article 84).

Two cases heard in Germany by appeal courts raise, unlike the Spanish cases, important issues related to the enforcement and interpretation of *sharī'a* norms and institutions.

In the German case,³²⁸ the Iranian applicant married in Iran in 2009 an Iranian woman, who later acquired German nationality. They had a daughter, got separated in 2011, and now reside in Germany. The marriage certificate included, as is standard practice in Iran, several conditions under which the wife was allowed to file for divorce. After the spouses moved back to Germany (where the wife had lived before the marriage), the husband appeared to be violent and offensive. The wife filed for divorce in 2012 and the

³²⁸ Oberlandesgericht Hamm, 07 May 2013, 3 UF 267/12, DES20130507.



court of first instance ruled in her favour in application of Iranian law and of the marriage certificate which allowed her to exercise the option of delegated repudiation (*ḥalāq-e tawfīd*). Further, the requirements of the marriage certificate and Iranian law were violated: the husband did not pay maintenance for six months and ill-treated her. The applicant, on his part, claims that the court violated his right of a fair hearing and misinterpreted Iranian law. He claims in particular that there was no interpreter present even though he wasn't able to understand the proceedings fully. Furthermore, he claims that the requirements for a divorce pursuant to Article 1133 of the Iranian Civil Code (IrCC) were not met as he paid maintenance in the form of gold coins and was not able to pay more than that; finally, he denies insulting his wife, which would be another possible reason for divorce according to Iranian law.

The appeal was dismissed, but the reasoning of the court of first instance is amended. First, the court of first instance did not apply the Rome III Regulation although it had come into force one day before the proceedings opened. Second, the marriage certificate can be interpreted as a choice-of-law in favour of Iranian law pursuant to Article 5 of the Rome III Regulation because it includes numerous notions of the latter. The conditions agreed upon in particular are the same conditions stipulated by Articles 1133, 1134, 1138 IrCC. Even though the parties did not explicitly choose Iranian law, the wording of the marriage certificate is a strong indication of their will to handle family issues pursuant to Iranian law. As the wife pronounced a set divorce phrase according to the procedure of *ḥalāq-e tawfīd* provided for in the marriage certificate and allowed by Iranian law, in the presence of two men during the first instance proceedings in Germany pursuant to Articles 1133, 1134 IrCC and as several of the conditions for divorce inserted in the marriage certificate (six month of no maintenance payments, ill-treatment by the husband rendering the marriage not acceptable, no sincere wish on his part to uphold the marriage) were fulfilled, the ruling of the court of first instance is upheld. It is observed that one of the crucial questions in the instant case is whether a marriage certificate can be interpreted as a choice-of-law clause. It would be impractical to apply German law to a marriage certificate, in which the parties used several rules implemented in another legal system, thus indicating their will to divorce



pursuant to the respective law. Therefore, the only feasible solution is to consider the marriage certificate as a choice-of-law. The judge further holds that this divorce is not against public policy, though no motivation is given.

Concerning *sharī'a*, it has to be recalled that since the Muslim marriage is a contract, the spouses can negotiate and insert conditions to the marriage as long as they do not contradict the meaning and essence of *niqāh* (the Islamic marriage). In particular, a man may grant his right of unilateral *ḥalāq* to the wife in the marriage contract or through a subsequent contract. This right can be either absolute (the wife can use it whenever she wishes), or conditional (its exercise is tied to the presence of a specified condition). In either case, this practice frees the wife from the need to establish a ground for divorce and closes the gap between the husband's unlimited power to divorce and the much more restrictive requirements that a wife must meet in order to escape an unhappy marriage. Under classical Sunni and Shia law, delegated repudiation was to be exercised without the intervention of the court, while in the legislation of the contemporary world it usually requires the intervention of relevant authorities, mostly courts.

In *ithna 'ashari* law (the main branch of Shi'ism), which inspires the Iranian Code and is therefore relevant to the present case, a man cannot technically delegate the power of divorce, which remains exclusively his; but he can grant agency to his wife or a third person to act on his behalf. Article 1119 of the 1982 IrCC in fact establishes that "The parties to the marriage can stipulate any condition to the marriage which is not incompatible with the nature of the contract of marriage, either as part of the marriage contract or in another binding contract: for example, it can be stipulated that if the husband marries another wife or absents himself during a certain period, or discontinues the payment of cost of maintenance, or attempts the life of his wife or treats her so harshly that their life together becomes unbearable, the wife has the power, which she can also transfer to a third party by power of attorney to obtain a divorce herself after establishing in the court the fact that one of the foregoing alternatives has occurred and after the issue of a final judgment to that effect".

For a repudiation and its delegated version to be valid, two adult Male Muslims of good character (meaning honest, with no penal precedents) must be present when the



pronouncement is made: Article 1134 IrCC states that “The divorce must be performed in the actual form of utterance and in the presence of at least two just men who must hear the actual form of divorce”. Presumably she will also need the same kind of evidence, though I was unable to find any relevant rule on this either in Iranian legislation or in classical Islam. The case mentions that she divorced herself on his behalf before two witnesses, but does not state whether they were male and Muslim. This is relevant because should the witnesses in this specific case not have the characteristics called for by Iranian law, the divorce could be presumably invalidated.

The majority of jurists tie the right to delegated repudiation to a specific condition, as reflected in current Iranian legislation. According to Iran’s Personal Status Law, there is in fact a standard marriage contract according to which a woman may divorce herself through recourse to the court under a number of conditions, including: the husband has not paid the *nafaqa* for six months without reason; the husband does not treat her well, which are mentioned in the case to justify her request of divorce. A woman is entitled to initiate a divorce also under the terms of Iran’s Civil Code as amended in 1982: according to Article 1130 IrCC, if she can prove to the court that her marriage entails hardship and harm for her, she can obtain divorce. In such cases, even if the husband did not give his consent or cooperate, the court could divorce his wife on his behalf, though case studies indicate that in a patriarchal society like the Iranian one and in a judicial system where judges are only men the allegation of harm is very difficult to prove. In 2002, a note was added to the same article, according to which more grounds and details were added to the cases of *allegation of harm* in which the wife could request a judicial divorce.

As the marriage contract under Iranian law does not recognise the wife an unconditional right of repudiation, but ties it to certain conditions, the judge’s decision on the conformity of this practice to public policy seems debatable. She has in fact to prove ground (lack of maintenance and ill treatment, in the present case), or waive her *mahr* (in case of mutual consent) or both *mahr* and additional financial rights (in case of *khul’*), while the husband may have recourse to unilateral and unlimited *ḥalāq*.



In the German case,³²⁹ the parties married in May 1999 in Syria. Until 2003 they were resident in Germany, where they acquired German nationality. They then travelled to various Middle Eastern countries before returning to Germany where they live now. In May 2013 the husband obtained a divorce in a *sharī'a* court in Latakia (Syria) through a representative (presumably by *ḥalāq*, though this is not specified). In September 2013 the wife gave a signed statement that she had received all the payments arising out of the marriage agreement and the *ḥalāq*, amounting to USD 20.000, owed to her “according to religious provisions”. Hence she considered him released from all payments and the obligations deriving from the divorce resolution of the Latakia court. Soon after he asked the recognition of the divorce in Germany. The court of first instance accepted his request and the registered act was transmitted to the lawyer of the wife. The latter opposed the decision in February 2014, claiming that the requirements for the recognition of the divorce had not been met, that the divorce was against German law, that she had never received all the USD 20.000, contrary to her written statement, and that the declaration to give up one’s dower and maintenance is void according to Syrian law.

In the opinion of the judge, from an abstract perspective the recognition of the divorce by the court of first instance is against public policy, as no equal access to divorce is guaranteed to the spouses by Syrian law: the latter recognises, he states, consensual separation and judicial separation on initiative of the wife for the disease of the husband, while he can divorce by the unilateral and unlimited right of *ḥalāq*. Reference is made here to Article 85 (repudiation) and 105 (women’s requests to divorce) of Syrian Personal Status Law (SPSL). In the concrete case under review the opposite conclusion is however reached, though no explanation is given.

The *Oberlandesgericht München* made a request for a preliminary ruling to the court of Justice submitting the following questions:³³⁰

1. Is Article 1 of the Rome III Regulation applicable to a divorce executed by a religious court on the basis of the *sharī'a*?

³²⁹ Oberlandesgericht München, 02 June 2015, 34 Wx 146/14, DES20150602.

³³⁰ CJEU, 12 May 2016, case C-281/15, *Soha Sahyouni v. Raja Mamish*, ECLI:EU:C:2016:343. The Court declared its lack of jurisdiction to answer the questions referred by the Oberlandesgericht München.



2. If yes,

a. is Article 10 of the Rome III Regulation applicable in case of the assessment of the domestic recognisability of a divorce?

b. In case this question is answered in an affirmative way,

(1) is an abstract comparison to be undertaken, under which the law of the appealed state grants the access to divorce to the other spouse as well but ties different substantial and procedural requirements to it than to the access of the first spouse

or

(2) is the validity of a legal norm dependent on the question whether the application of the norm of foreign law that is discriminatory in the abstract is also discriminatory in the specific case?

c. If question (b) is affirmed, is the agreement of the discriminated spouse to accept the divorce a reason not to apply the legal norm?

He concludes by stating that reference to the CJEU is necessary for courts of the member states to interpret the European Regulations consistently. Especially concerning questions regarding the *shari'a*, German courts often do not have the expertise to rule on such issues. And even if they did, it is not clear what the European Regulations to recognise in regard to *sharī'a* law and which rules are outside of the scope of recognition.

Two issues of Islamic law as received by SPSL of 1953 (No 59/1953, as amended by Law No 34/1975) emerge in this case: the conditions under which women and men can divorce and norms on maintenance and dower (*mahr*). As to the first aspect, the Syrian code recognises three types of divorce: unilateral repudiation by the husband; *mukhāla* divorce, which in turn can be by mutual consent (*mubara'a*) or wife-initiated, with him agreeing in exchange for her renunciation of some or all of her economic rights; judicial divorce asked by the wife under some circumstances (such as disease or defect of the husband, non-maintenance, absence), and discord, which is open to both spouses) .

His unilateral no-fault divorce therefore complies with Syrian law, which on matrimonial and filiation issues draws very closely from classical *sharī'a*. It may be interesting to note that against this complex picture, the judge refers to two articles only of the SPSL,



presumably to highlight the dichotomy between the unlimited right of the husband to divorce through *ṁalāq*, and the very restrictive conditions under which the wife can petition for divorce. There is no doubt that the spouses have unequal rights under SPSL to terminate marriage, and more generally in the legislation pertaining to the domestic sphere, though if they had in the concrete case divorced by mutual consent or by discord (*shiqāq*), public policy may have been respected.

The stipulation of a dower in the marriage contract is in Syrian Law, as in *sharī'a*, a condition for a valid marriage and an obligation for the husband, whether it is specified or not. An unpaid dower is a debt to the wife. It is divided into prompt dower, due to her upon the conclusion of the contract and deferred dower, due to her when the marriage is terminated due to an irrevocable divorce or death of the husband. If no agreement between spouses exist on the amount of dower fixed in the contract and the contract is not available, “proper” dower as determined by the courts will be payable. Most disputes revolve around the question of the dower amount stipulated and actually paid, and whether the wife is entitled to part or all of it. Another obligation for him is maintenance of the wife, in return to obedience. In *ṁalāq* cases, the husband owes his wife post-divorce maintenance for the duration of the waiting period (*‘iddah*), up to maximum 9 months if she is pregnant; when repudiation becomes irrevocable, at the end of the *‘iddah*, he owes her the unpaid or deferred dower. The wife may be awarded also additional compensation of up to three years if the repudiation is considered by the judge arbitrary. In the case reviewed here the wife is therefore correct in claiming that dower and maintenance cannot be forfeited (unless, I will add here, the marriage has not been consummated or she asks for a divorce under the *mukhala* procedure, but these points are not relevant here), though we cannot know whether the USD 20.000 allegedly paid by him in golden coins were meant as a settlement replacing or subsuming the maintenance owed to her for the waiting period and the deferred dower, or one of them, and whether by releasing him of further obligations she meant to give up the additional compensation she may demanded according to Syrian law.