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REPORT ON THE ITALIAN GOOD PRACTICES

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[1] "Presentation" and "Final considerations" were drafted by Maria Caterina Baruffi; paragraphs 1-7 by Caterina Fratea and paragraphs 8-17 by Cinzia Peraro.

Presentation

The Italian Exchange Seminar was the first National Exchange Seminar organized within the *Eufam's Project*. Amongst the various Italian partners, the University of Verona was the one in charge for its organization. The event, like the other national exchange seminars that will take place in the near future within the project, was intended to evaluate the state of implementation in Italy of EU Regulations on family law (Brussels IIa, Rome III, 4/2009, 650/2012) and their interplay with the relevant international conventions. Thanks to the practical experience of the experts invited the purpose of the Seminar was to identify good practices and elaborate proposals aimed at improving the effectiveness of the European instruments.

The event was carried out in the form of a round table in which academics, legal practitioners and State officers participated (precisely: 11 judges; 10 academics; 16 lawyers/lawyers trainees; 2 State officers; 1 representative of the Project's Academic Advisory Board and 1 foreign expert from Portugal; see the Italian Seminar's *Internal Evaluation Report*). The meeting was meant to be a moment of free and open discussion between the participants in order to favour the exchange of views and compare their professional and academic experiences underlining what they reckon to be the main critical issues on the application of the EU Regulations and the related international Hague Conventions that mainly arise from the national case-law. In order to facilitate the debate all the relevant legal materials were distributed.

During the debate the legal tool that was mostly referred to was the Brussels IIa Regulation, which was predictable given that this is also the most applied Regulation according to the case-law collected for the database of the project, as it was underlined by the experts during the Seminar. The proposal for the Brussels IIa Recast[2], published two weeks before the Seminar and mentioned in relation to some of the main issues that have arisen, will be further analysed during the following steps of the Project.

In accordance with the so-called *Chatham Rules*, the names of the invitees are not reported, stressing only the professional category of the expert who intervened.

The critical issues on the application of the regulations that arose during the Seminar can be reported as follows.

[2] Proposal for a Council regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), COM(2016) 411 final of 30 June 2016.

1. SCOPE OF APPLICATION OF THE BRUSSELS IIA REGULATION.

Lawyers expressed some doubts regarding the **personal scope** of application of the Brussels IIa Regulation, especially as far as matrimonial matters are concerned. In fact, unlike the Brussels Ia[3] Regulation which specifies that it can be applied only to persons domiciled in a Member State, the Brussels IIa Regulation does not contain such provision. Even though a similar requirement could be inferred from its Art. 6 (exclusive nature of jurisdiction under Articles 3, 4 and 5), Art. 7 (residual jurisdiction) makes it clear that the residual jurisdiction itself is not connected to the lack of a personal prerequisite for the application (as it happens in the Brussels Ia system), but to the lack of jurisdiction of any judge of a Member State. Therefore, the invited lawyers called for a clarification whether the Regulation has a personal prerequisite for the application or is an *erga omnes* legal tool.

Academics underlined that Art. 6 (and a proper indication of the personal scope of application) is *de facto* removed by the *Sundelind/Lopez* decision of the ECJ[4] that recognized the application of the Brussels IIa Regulation also to non-EU nationals that are not habitually resident in a Member State. It follows that in the Brussels IIa system the personal scope of application corresponds to the grounds of jurisdiction: it applies to couples that are in one of the situations laid down in Art. 3 of the Regulation and to children habitually resident in a Member State. When a ground of jurisdiction is met, the Regulation will apply, without assessing the residence of the respondent. The proposal for the Brussels IIa Recast is not very clear on this respect: present Arts. 6-7 are put together in a single provision with an opaque formulation. Academics agreed that the present Art. 6 should be removed.

As for the **subject matter** of the Brussels IIa Regulation, the judges stressed the importance of clarifying what the term "marriage" refers to, given the lack of a definition in the Regulation (not even included in the proposal of the Brussels IIa Recast) and the absence of any preliminary ruling to the European Court of Justice on this respect.

[3] Regulation (EU) no. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* L 351 of 20 December 2012.
[4] ECJ 29 November 2007, case C-68/07, EU:C:2007:740.

In Italy this issue is particularly significant in the light of the new law on same-sex registered partnerships[5], which, however, does not consider them as marriages. This can cause some problems in the recognition of same-sex marriages validly entered into abroad. The solution adopted in Italy is recognizing these marriages as registered partnerships[6] and, in fact, at the moment a decree implementing the Law no. 76/2016 has been proposed establishing that foreign same-sex marriages should enter the registered partnership records in Italy. It can be inferred that the foreign marriages are considered as existing, but are then downgraded to registered partnerships for the purposes of their recognition in Italy. According to the judges, sharing opinions with the German partner of the project on this aspect could turn out to be very useful, since the German legal order had to face the same issue when their law on registered partnerships was adopted.

In any case, an Italian court is not entitled to declare the separation or the divorce of a same-sex couple married abroad since that relationship is not considered to be a marriage. However, it cannot be denied that this could lead to very unsatisfactory outcomes. For instance, in the case of a couple made up of two Italian nationals validly married abroad and both habitually resident in Italy, there would not be any court having jurisdiction for their separation under the Regulation. This is also confirmed by Art. 13 of the Rome III Regulation.

Academics underlined that the Brussels IIa Regulation applies to same-sex marriages only in those Members States that recognize them and this flexible application serves the interests of the same-sex couples themselves. In a situation like the one described above it could be proposed to extend the applicability of the instruments on parental responsibility jurisdiction contained in the Brussels IIa Regulation (i.e. the *forum non conveniens*) to the matrimonial matters in order to make it possible to transfer the proceedings to the Member State where the marriage was celebrated.

In the countries that do not recognize same-sex marriages, but only registered partnerships (e.g. Italy or Germany), the Brussels IIa Regulation will not be applicable, yet all the invitees agreed that the Regulations on maintenance, succession and property consequences of registered partnerships[7] will apply since the registered partnerships are considered family relationships.

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[5] Law no. 76 of 20 May 2016, Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze, *Italian Official Journal* no.118 of 21 May 2016. All the consolidated Italian legislation can be found at *www.normattiva.it*.

[6] Art. 1, par. 28, letter *b*, Law no. 76 of 20 May 2016 cited above.

[7] Council Regulation (EU) no. 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, *OJ* 183 of 8 July 2016.

Amongst the academics, anticipating what will be said later about the public policy exception, some invitees did not exclude *a priori* that the Italian judges should apply the Brussels IIa Regulation to same-sex marriages entered into abroad between two foreign citizens because, once the matrimonial tie is lawfully created in another Member State and is only related to a foreign legal order, it should be recognized across all the other Member States. If the couple resides in Italy and the Italian judicial authority is therefore the nearest one, this authority should rule on the consequences of a marriage lawfully entered into in another Member State. In such a case, in fact, the couple does not ask the Italian authorities to be entitled to exercise the rights deriving from a same-sex marriage that the Italian legal order does not recognize, but rather to be entitled to apply before an Italian court to declare the dissolution of that marriage. Therefore, there is no contrast with the values that the Italian legal order reflects, also considering the adoption of the already mentioned Law no. 76/2016 on registered partnerships. On the contrary, stronger doubts arise if one of the spouses is an Italian national because in this case there is a connection with the Italian legal order right from the moment when the tie arose.

2. EU OR THIRD COUNTRY NATIONALS ASKING ITALIAN COURTS FOR PARENTAL RESPONSIBILITY OR MAINTENANCE DECISIONS.

The Italian judges reported to have adjudicated cases of spouses (EU or third country nationals) separated or divorced abroad, who apply before the Italian courts because the foreign decision did not state or insufficiently stated on parental responsibility and/or maintenance. This situation mostly arises with nationals from Eastern European countries or Bangladesh and Pakistan. Two possible solutions may be adopted:

- not recognizing the separation or the divorce decision because it does not state on parental responsibility. Therefore, it would become necessary to lodge another application for separation/divorce, parental responsibility and maintenance before an Italian court. In general, however, it is hard to consider a decision contrary to the public policy because it omits to rule on certain aspects (i.e. parental responsibility or maintenance); or,
- considering the application regarding the parental responsibility brought before the Italian court as a modification of the conditions of the separation or divorce (considered by the invited judges the most appropriate way). The procedural problem is that in such situations the court does

not properly modify anything about the separation or the divorce, so the problem of a correct qualification of the application before the Italian courts remains.

3. JURISDICTION UNDER THE BRUSSELS IIA REGULATION.

It emerged from the discussion (and from the case-law collected by the project consortium) that, when applications concerning separation/divorce, parental responsibility and maintenance are brought within the same proceedings, often the judges verify their jurisdiction only in relation to the matrimonial matters and, if this is correctly grounded, then they deal also with the other applications by applying the Italian law without assessing their competence on those matters. Moreover, there are also decisions that still refer to Italian private international rules to determine the jurisdiction or the applicable law[8]. However, these wrong trends are becoming less frequent.

In addition, the judges, even when grounding their jurisdiction correctly, only indicate the article of the regulation applied without referring to the specific letter or indent (i.e. Arts. 3 of Brussels IIa and Maintenance Regulations).

4. ARTICLE 12 OF THE BRUSSELS IIA REGULATION.

Different opinions emerged on how the expression "the jurisdiction of the courts exercising jurisdiction by virtue of Article 3 has been accepted" must be interpreted. In Italy, for instance, the Tribunal of Rome deems sufficient the lack of any express objection. However, when the proceedings continue in default of appearance of one of the parties the interpretation of the provision can be more complicated. The academics generally agreed that in such cases Art. 12 cannot be applied and that the acceptance of the jurisdiction must be, if not necessarily written, at least explicit, which implies the appearance of the parties before the court. The provision itself does not require a written agreement, but the jurisdiction must be accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility, even because matrimonial and parental responsibility matters, even when dealt with jointly, must be treated separately.

[8] Law no. 218 of 30 May 1995, Riforma del sistema italiano di diritto internazionale privato, *Italian Official Journal* no.128 of 3 June 1995 (supplemento ordinario no. 68), also at *www.normattiva.it*.

On this regard the invited foreign expert confirmed that also in Portugal it is not required a written agreement but the simple appearance of the spouses before the judge without any express objection on the court prorogating its jurisdiction.

According to the proposal for the Brussels IIa Recast the jurisdiction must be accepted at the latest at the time the court is seized or, where the law of that Member State so provides, during those proceedings. In this way the new provision will be in line with Art. 5 of the Rome III Regulation.

Judges found it useful to expressly ask the parties of separation/divorce proceedings if they want them to have jurisdiction also on matters related to parental responsibility pursuant to Art. 12 in order to avoid that, in the absence of a previous agreement, the proceedings on matrimonial matters and parental responsibility continue separately. The Tribunal of Rome adopted this approach in a few cases involving the Gulf Countries, where the Italian couples were residing with their children coming to Italy only to apply for legal separation.

In any case, as emerges also from the foreign case-law that has been collected, Art. 12 (especially par. 3) is rarely used, even though it is not clear whether this is due to either the difficulty of reaching an agreement or the lack of familiarity with it.

5. *LIS PENDENS* EXCEPTION (ART. 19 BRUSSELS IIA REGULATION).

On this issue from the judges some observations emerged as follows:

- if a foreign court first seized declines its jurisdiction, the Italian court second seized, that stayed the proceedings, cannot continue the proceedings automatically but has to discharge the stay by expressly resuming the proceedings;
- if a foreign court second seized does not stay the proceedings and issues its decision earlier than the court first seized, the spouses can only appellate this decision before the court of the Member State that issued it. Not being the breach of Art. 19 of the Brussels IIa Regulation a ground for non-recognition, the foreign judgment must be recognized in Italy and the judge may not adjudicate the case by declaring the action deprived of purpose. In a case like this, in order to collect information about a Romanian divorce decision, an Italian judge affirmed to have made recourse to the European Judicial Network (EJN)[9], which turned out to be useful and effective. In any case, since the effectiveness of Art. 19 depends on the parties' behaviour and it cannot be

[9] See *http://ec.europa.eu/justice/civil/judicial-cooperation/european-network/index_en.htm*.

excluded that two parallel proceedings lead to conflicting decisions (especially in the cases when one of the parties does not appear), according to the judges a mechanism of binding communication between judicial authorities on a European scale should be introduced when proceedings under Brussels IIa Regulation are instituted;

- the *lis pendens* exception has been raised only in a very limited number of cases and, when it happened, the parties often reached an agreement on the court to whom transfer the proceedings;
- as to the *lis pendens* exception with third countries, the invited judges agreed on Art. 7 (on international *lis pendens*) of the above mentioned Law no. 218/1995 to be applicable in place of the Regulation.

6. DETERMINATION OF THE LAW APPLICABLE TO SEPARATION OR DIVORCE.

Both lawyers and judges underlined the difficulties in the retrieval of the applicable law when it is a foreign (especially African) one and it is common practice that, despite the *iura novit curia* principle, the judges often ask the lawyers to find the relevant legal texts. In Italy this problem also regards civil-status registry officers before whom, under certain conditions, a couple can apply for separation or divorce, in accordance with the recently adopted Law no. 162/2014[10].

7. INTERPLAY BETWEEN THE BRUSSELS IIA REGULATION AND THE ITALIAN LEGAL TOOL CALLED "NEGOZIAZIONE ASSISTITA".

The above mentioned Law no. 162/2014 also introduced another kind of **extrajudicial separation/divorce**, the so-called "negoziazione assistita", which is a procedure that may lead to an agreement on the separation/divorce between the parties thanks to the lawyers' assistance. In relation to this specific legal tool several problems may arise:

- applicable law: when it comes to separation or divorce the Italian law that introduced this legal tool refers to the Italian law on divorce without taking into consideration the possibility that this form of "assisted" separation or divorce might have a cross-border element and, therefore, be ruled by a foreign law. When the parties opt for an extrajudicial separation or divorce, the Rome III Regulation applies in order to determine which law is applicable.

[10] Art 12, Law no. 162 of 10 November 2014, which converted the Decree no. 132 of 12 September 2014, Misure urgenti di degiurisdizionalizzazione ed altri interventi per la definizione dell'arretrato in materia di processo civile, *Italian Official Journal* no. 212 of 12 September 2014, also at *www.normattiva.it*.

- extrajudicial separation/divorce and *lis pendens* rule: it must be clarified whether starting an extrajudicial separation/divorce can be considered as applying before a court within the meaning Art. 19 of the Brussels IIa Regulation.
- another possible critical to issue related to the extrajudicial separation/divorce is the hearing of the child since Art. 56 of the Italian Lawyers' Code of Professional Conduct prevents lawyers from hearing the children. This provision could lead to some difficulties when these agreements are to be recognized in another Member State. As a possible solution one of the lawyers participating in the Seminar suggested that lawyers could be authorized to delegate the hearing of the child to a psychologist chosen by the parties by mutual consent.
- it is also unclear who is entitled issue the certificate of art. 39 of the Brussels IIa Regulation. The registry officer confirmed that they usually issue the certificate in cases of separation/divorce.

8. HEARING OF THE CHILD.

According to the judges the issues related to the hearing of the child not only concern the extrajudicial separations/divorces, but also the cases where the parties apply before the court for **separation/divorce by mutual consent** (the vast majority of cases). In this kind of **judicial proceedings**, in fact, the trend is not to hear the child given that there is no conflict between the parents. Moreover, Art. 336 *bis* of the Italian Civil Code[11] allows the judge not to hear the child if the hearing is contrary to the child's best interest or considered manifestly unnecessary. After all, according to the invited judges, the parents do not lose the right to take decisions for their children after their separation. If there is an element of conflict between the spouses it is sensible for the judge to intervene by hearing the child. Otherwise the separated parents will continue to take the decisions for their child as before.

In cross-border cases the solution that could avoid problems in the recognition of the decision is a detailed motivation. In these cases some courts (e.g. Tribunals of Rome and Turin) try to give a stricter motivation specifying in the judgment that the child has not been heard because the hearing was not deemed necessary by the parents.

[11] Introduced with Legislative Decree no. 154 of 28 December 2013, Revisione delle disposizioni vigenti in materia di filiazione, a norma dell'articolo 2 della legge 10 dicembre 2012, n. 219, in *Italian Official Journal* no. 5 of 8 January 2014, also at *www.normattiva.it*.

From the case-law collected until today it is possible to infer that only in a limited number of cases the child is heard. However, it is not clear whether the child has not actually been heard or the decision does not make any reference to a hearing that has been made.

The denial of recognition of a decision that does not make any reference (or just a very brief one) to the hearing of the child has to be founded on Art. 23 of the Brussels IIa Regulation, which, amongst the grounds of non-recognition for judgments relating to parental responsibility, lists the lack of hearing of the child in violation of fundamental principles of procedure of the Member State in which recognition is sought. Since the parameters are those of the requested State, and not those of the State that issued the decision, a problem of possible non-recognition can arise in both extrajudicial and judicial separation/divorce proceedings if the child has not been heard or the way in which the hearing has been carried out is considered inadequate.

As the representative of the Italian Central Authority pointed out, the Central Authorities of the Member States expect the child to be heard especially in cases of abduction (and particularly those involving Northern European countries) because many objections tend to arise when the hearing does not take place, even when the child could not be heard because he/she was in another country. In situations like this it would be necessary to bring evidence of the impossibility of hearing the child, however the annex IV is built in such a way that does not make it possible to indicate the reasons why the child has not been heard. It may be advisable to reformulate the annex in order to take into account these elements and avoid difficulties in the recognition of decisions. As for the Italian scenario, some courts are used to carrying out the hearing, while others simply give general reasons for not hearing the child mostly based on their young age. For instance, the Tribunal of Bolzano, being at the border with Germany (country that always requires the child to be heard), hears even very little children. It must be considered though that abduction cases that end up in court are the big minority.

Academics generally agreed on the necessity for the Italian courts to adapt their standards to the European ones in order to favour the circulation of judgments and, more in general, to consider that, even if the decision is adopted in relation to all the different applications, matrimonial and parental responsibility matters must be kept separate. Moreover, the judge is the only one entitled to decide whether and how a child has to be heard, not the parents.

9. HABITUAL RESIDENCE OF THE CHILD.

Except for the cases involving very young children, the invited judges and the Italian Central Authority do not point out particular difficulties in determining the habitual residence of a child. At the same time none of the invitees incurred in a case of possible double habitual residence (as for example happened in other countries of Eastern Europe whose case-law is being collected).

In relation to foreign decisions, the Italian Central Authority underlined a few decisions coming from Baltic countries characterised by an incomplete motivation regarding the determination of the habitual residence of the child.

Under this respect, the Portuguese foreign expert, besides confirming that Portugal faces many of the same critical issues encountered by the Italian legal practitioners, stressed nonetheless a problem that the Italian courts did not apparently come across. In fact, the most serious issue for the Portuguese practitioners is the low level of familiarity with the EU Regulations on family law which mostly reflects on the flexible way in which the Art. 8 of the Brussels IIa Regulation is applied.

10. EU LEGAL SOURCES ON FAMILY LAW AND CIVIL STATUS REGISTERS.

Lawyers pointed out that certain Italian courts seized for the modification of the separation/divorce conditions established in a foreign decision do not adjudicate the case as long as the foreign decision itself has not entered the Italian civil status registry. The Brussels IIa Regulation, however, does not require such intervention allowing the judge to proceed with the application for the modification of the separation/divorce conditions also in the absence of it. The registry officer confirmed that, according to Art. 19 d.P.R. no. 396/2000 (Regulation on the civil-status records)[12], foreign acts regarding two foreign citizens who reside in Italy enter the civil status records without any control on either the form and content of the act or the respect of the public policy (unlike the acts regarding at least one Italian citizen). The act in question could also deal with a polygamous or same-sex marriage or a unilateral repudiation. Given the lack of any form of control, the act is merely reproduced with the only aim to make it easier for a foreign citizen residing in Italy to obtain a copy of it without necessarily referring to their Consulate (interpretation

[12] Decree of the President of the Italian Republic Regolamento per la revisione e la semplificazione dell'ordinamento dello stato civile, a norma dell'articolo 2, comma 12, della legge 15 maggio 1997, n. 127, *Italian Official Journal* of 30 December 2000 (supplemento ordinario no. 223), also at *www.normattiva.it*.

confirmed by the Italian Supreme Administrative Court[13]). Therefore, being the act exhibited by the parties identical to the one that entered the Italian civil status records, any judge should proceed in the adjudication of the case. This was unanimously confirmed by the judges invited to the Seminar (who however stressed as well that many Italian courts do not follow this approach).

Both the participating academics and the invited registry officer raised strong criticism on Art. 19 of the d.P.R. no. 396/2000 and the lack of control that it provides. Besides a problem of coordination with Art. 18 (according to which foreign acts cannot enter the Italian registries if contrary to the public policy), it is critical that these acts do not undergo any form of administrative or judicial control even though their registration does not entail any modification of the civil status in the Italian legal order.

11. Effectiveness of the protection of rights granted by the EU legal system.

According to the academics a very critical issue is the lack of a regime on the circulation of public documents in the Brussels IIa Regulation. Even though underestimated, this aspect is of pivotal importance for the effectiveness of the protection of rights granted by the EU legal system. Recurring to the court should in fact be the last resort for the parties. This issue is related to the cross-border administrative cooperation, which, together with the activity of the social services, is fundamental for the good administration of justice (e.g. also for the hearing of the child).

Under this regard, the new Regulation on the simplification of the requirements for presenting certain public document must be welcomed[14].

It must also be welcomed that the proposal for Brussels IIa Recast substitutes the term "court" with "authority" (see new Art. 2) referring also to the administrative authorities. At the same time, however, it must be borne in mind that the Regulation will apply to administrative authorities which have jurisdictional functions (which already happens with the present Brussels IIa Regulation). Therefore, it is likely that the Brussels IIa Recast will not mark a significant change under this point of view. This is confirmed by the regulations on matrimonial property regimes and on property

[13] Consiglio di Stato, decision no. 1732/2011. The judgment can be found at *www.giustizia-amministrativa.it*.
[14] Regulation (EU) no. 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) no. 1024/2012, *OJ* L 200 of 26 July 2016.

consequences of registered partnerships[15], whose recitals 29 establish that the term "court" should be given a broad meaning so as to cover not only courts in the strict sense of the word (exercising judicial functions), but also notaries who, in some Member States and in certain matters of property consequences, exercise judicial functions, and notaries and legal professionals who exercise judicial functions by delegation of power by a court.

12. DEFINITION OF PUBLIC POLICY.

From the academics it comes the idea of reviewing and disempowering the notion of public policy if the recognition of a status legally acquired in another Member State is necessary for the protection of individual rights. The public policy exception should not take into account the formal definition of a foreign legal tool referred to in an act or a decision but exclusively its effects in the light of the respect of the cultural identity of the people involved. An aprioristic application of the public policy exception may be dangerous in the light of the protection of individuals.

This should also be considered in relation to the polygamous marriage, for instance in cases where the second wife applies before an Italian court to ask for maintenance. In such a case, the judge is not called to apply a foreign (Islamic) law incompatible with its own legal system (e.g. declaring a repudiation), but to protect the rights of the former wife against the man that in their own legal system was lawfully considered her husband. Again, repudiation cannot always be considered contrary to the public policy of the requested State if this in some way protects the repudiated wife from her husband.

13. CERTIFICATE OF ART. 39 OF THE BRUSSELS IIA REGULATION.

Unlike what happened under the Regulation no. 1347/2000, the instructions of the Italian Ministry of Home Affairs deem sufficient the exhibition of the certificate for a foreign decision to be enforced[16]. At the same time, the registry officer is required to control that the decision is not manifestly contrary to the public policy and, if in doubt, can ask for a copy of the original judgment. What happens is that normally registry officers ask for the copy of the decision and its translation because otherwise a proper control would be impossible and, in addition to this, the certificates

[15] Council Regulation (EU) no. 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, and above mentioned Regulation no. 2016/1104, both in *OJ* 183 of 8 July 2016.
[16] "Circolare" no. 24 of 23 June 2006, at *http://servizidemografici.interno.it/it/content/circolare-n-242006*.

submitted by the parties are very often incomplete or wrongly filled in, especially in relation to the questions on the default of appearance. For instance, the invited registry officer underlined that in Croatia it is established that, when a party decides not to appear in a procedure falling within the scope of application of the Brussels IIa Regulation, a lawyer is nonetheless appointed in order to object the requests of the applicant. In a case like this, normally the certificate does not declare the default of appearance even though the respondent did not personally take part to the proceedings. It would be interesting to exchange views with the Croatian partner of the project on this regard.

The Italian Central Authority confirmed that in many cases the certificates (as well as the extracts of the Regulation 4/2009) are wrongly filled in, with formal and substantial mistakes, thus resulting inaccurate.

Overall, the Italian decisions do not mention the certificates because they are hardly ever submitted. At the same time the Italian authorities are rarely asked to issue the certificates. This implies that these decisions may not circulate easily. Judges from the Tribunal of Rome reported that, despite the high numbers of cross-border cases lodged before it, every year only a couple of certificates on parental responsibility matters are issued. On the contrary, a higher number of extracts are issued in relation to the Maintenance Regulation.

14. ENFORCEMENT.

Being the enforcement of decisions a competence of the Court of Appeal within the Italian legal order, not many elements on this topic were stressed during the Seminar where first instance judges were invited. Nonetheless, they confirmed that their colleagues reported a very low number of enforcement applications of decisions on parental responsibility issued in other Member States (also in major Courts of Appeal, like Rome, where the number of cases is supposed to be rather conspicuous). This stands for a low level of circulation of the decisions across the EU, possibly due to the non-familiarity or lack of information about the EU regulations.

15. COOPERATION BETWEEN CENTRAL AUTHORITIES AND INTERPLAY BETWEEN EU REGULATION ON FAMILY LAW AND REGULATION 1206/2001.

The Italian Central Authority underlined that Germany established tight limits on this matter requiring the judges who want to collect and exchange information from other Member States to

activate the tools of the Regulation no. 1206/2001[17] instead of the cooperation tools laid down in the EU regulations on family law. However, it should be up to the judge to decide what legal instrument suits better between the EU regulations on family law and the Evidence Regulation. Moreover, the requests for information under the Brussels IIa Regulation are traceable and quantified (and in fact statistics are produced), whereas the requests under the Evidence Regulation are not. It would be interesting to exchange views with the German partner of the project on this regard.

In general the exchange of information regarding children between Central Authorities is rarely used. As the representative of the Italian Central Authority reported during the Seminar, in 2015 the number of active requests about the situation of children submitted under Brussels IIa Regulation amounted to approximately 20 and the number of active requests under the Maintenance Regulation from its entry into force is around 35 in total.

16. ITALIAN CIVIL PROCEDURE ON FAMILY MATTERS.

The Italian procedural rules on family matters establish that the first hearing of separation/divorce takes place before the President of the Court who has the duty to take provisional and urgent measures on the custody of the children, the maintenance obligations and the family home[18], but does not adjudicate the merits of the case.

In relation to the Brussels IIa Regulation, some academics doubted that the Presidential hearing represents the appropriate moment:

- to stay the proceedings in case the court of another Member State is first seized according to Art. 19 of the Brussels IIa Regulation; and,
- to raise the application of Art. 15 of the Regulation.

These two provisions, in fact, require a complete assessment of the case, that is not carried out within the first Presidential hearing.

The judges agreed that the Presidential hearing should only be aimed at taking the urgent measures, but, besides the legal framework, reasons of advisability and expediency call for the President of the Court, before whom a *lis pendens* exception has been raised or a transfer of

[17] Council 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, *OJ* L 174, 27.6.2001.
[18] Arts. 707-708 Italian Civil Procedural Code.

proceedings requested, to suggest the parties to find an agreement on the court having jurisdiction and, as a consequence, to withdraw the application before the other court. If the parties do not find an agreement, Arts. 15 and 19 should not be applied by the President of the Court but only by the judge who adjudicates the merits of the case.

17. FRAGMENTATION OF PROCEEDINGS.

Lawyers underlined the fragmentation of proceedings deriving from the combined application of the Regulations, whereas according to the academics this fragmentation is inevitably related to cross-border cases various instruments apply depending on the different applications lodged by the parties. The Regulations contain some tools to reduce the risk of fragmentation and call for the judge who is better placed to adjudicate the case, in particular pursuant to Arts. 12 and 15 of Brussels IIa Regulation, although they are scarcely used (even because these mechanisms are difficult to activate when there is a strong conflict between the parents).

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Final considerations

In the light of the foregoing, in relation to some of the paragraphs outlined above, a list of both possible good practices and other proposals to improve the effectiveness of the EU regulations on family law may be summarized as follows.

GOOD PRACTICES

- in relation to paragraph 2: in the case of spouses separated or divorced abroad, who apply before the Italian courts because the foreign decision did not state or insufficiently stated on parental responsibility and/or maintenance, **consider** the application regarding the parental responsibility brought before the Italian court a modification of the conditions of the separation or divorce established in a foreign decision;
- in relation to paragraph 4: **avoid** the application of Art. 12 of Brussels IIa Regulation if one of the parties fails to appear before the court because a lack of objection to the prorogation of jurisdiction is not considered an unequivocal acceptance of the competence of the court seized;
- in relation to paragraph 5: **introduce** a mechanism of stricter communication within the EJN between the courts seized for family proceedings in order to avoid conflicting decisions. In

particular, in the presence of a *lis pendens* exception, **refer** to the EJN to collect information about the proceedings pending in another Member State or about a decision issued there;

- in relation to paragraphs 7-8: as for extrajudicial separation/divorce agreements or judicial family proceedings lodged by mutual consent, **hear** the child or strictly **motivate** why the hearing was not carried out in order to exclude the possibility of a denial of recognition of the final decision in another Member State;
- in relation to paragraphs 11-12: on the one hand, **strengthen** the administrative cooperation between Member States in order to make the protection of the individuals involved in family proceedings more effective; on the other, when it comes to the recognition of foreign decisions, **avoid** a narrow interpretation of the public policy clause especially when this could lead to a limitation of the rights of the weak spouse. Moreover, paying attention to the circulation of public documents in the light of the adoption of the above mentioned Regulation no. 2016/1191;
- in relation to paragraph 13: even if not specifically requested, **submit** a copy of the certificate of Art. 39 of Brussels IIa Regulation to the civil-status registry officers when seeking the recognition of the decision issued in another Member State in order to undergo a proper control on the respect of the public policy;
- in relation to paragraph 16: when a *lis pendens* exception has been raised or a transfer of proceedings requested, **find** an agreement between the parties before the Presidents of the Italian courts on which court has jurisdiction, and, as a consequence, **withdraw** the application before the other court.

PROPOSAL OF POSSIBLE AMENDMENTS TO BRUSSELS IIA REGULATION

- in relation to paragraph 1: being at the moment the *forum non conveniens* under Art. 15 of Brussels IIa Regulation only applicable in relation to parental responsibility proceedings, it may be proposed to extend this instrument also to the matrimonial matters. In this way it would be possible to determine a competent judge to same-sex spouses married abroad but citizens of and habitually resident in a Member State whose legal order does not recognize same sex marriages;
- in relation to paragraph 8: it may be suggested to reformulate the certificate included in the present annex IV in order to include a specific section on the reasons why, in cases of abduction, the child has not been heard thus avoiding difficulties in the recognition of decisions.

OTHER POSSIBLE SUGGESTIONS

- in relation to paragraph 6: the creation of a database of foreign laws on family matters (especially those coming from Asian or African legal order) is advisable.