PLANNING THE FUTURE OF CROSS-BORDER FAMILIES:
A PATH THROUGH COORDINATION – 'EUFAM'S'
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## REPORT ON INTERNATIONALLY SHARED GOOD PRACTICES

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EUFam's Project

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**Presentation**

Following the EUFam's national seminars, that took place between July and December 2016, (respectively in Italy, Germany, Spain and Croatia), the Max Planck Institute Luxembourg for Procedural Law hosted the International Exchange Seminar of the EUFam's Project in May 2017. The purpose of the event was the sharing of knowledge, experiences and views among judges, practitioners, academics, EU policy makers and state officers, who are confronted to the EU Family Law Regulations (Brussels IIa[1], Rome III[2], Maintenance[3], Successions[4]) in their daily practice, in order to collect internationally-shared good practices.

The Seminar gathered 82 participants (42 academics, 13 judges, 18 lawyers, 2 State officers, 4 representatives of Central Authorities, 1 representative of the European Commission, 1 representative of The Hague Conference on Private International Law, 1 representative of the Project's Academic Advisory Board) coming from twelve different countries (Belgium, Bulgaria, Croatia, Czech Republic, France, Germany, Greece, Italy, Luxembourg, The Netherlands, Spain and the United Kingdom).

The discussion was structured in four panels, composed of experts in the field. Each panel was dedicated to one of the key difficulties witnessed in the development of the EUFam's Project (this assessment has been based on results collected through the national seminar reports[5], the EUFam's database[6], the First Assessment Report[7] and the Report on the Outcomes of the Questionnaire[8]). Each panel started with a concise explanation by a researcher of the Max Planck Institute Luxembourg, followed by an intervention of a renowned expert who took up the problem and finally, the largest part

[1] 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, *OJ* L 338, p.1, (hereinafter the "Brussels IIa Regulation").
[2] Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, *OJ* L 343, p.11, (hereinafter the "Rome III Regulation").
[3] Regulation (EU) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, *OJ* L 7, p.1, (hereinafter the "Maintenance Regulation").
[4] 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 on the creation of a European Certificate of Succession, *OJ* L 201, p.107, (hereinafter the "Successions Regulation").
[5] Hereinafter, "national reports". Available at http://www.eufams.unimi.it/category/research-outputs/ (last accessed on 9 June 2017).
[6] Available at http://www.eufams.unimi.it/category/database/ (last accessed on 9 June 2017).
[7] Available at http://www.eufams.unimi.it/2017/01/09/firstassessmentreport/ (last accessed on 9 June 2017).
[8] Available at www.eufams.unimi.it/2017/06/01/report-outcomes-online-questionnaire/ (last accessed on 9 June 2017)

of the time was allocated to a discussion, chaired by experienced Professors, with participants who were invited to share their views, experiences and questions.

In accordance with the so-called *Chatham Rules*, the names of the participants are not reported.

The outcome of the fruitful debates that took place in the course of the seminar can be reported as follows:

## 1. The main aspects related to Brussels IIa Regulation and Rome III according to the findings of the EUFam's Project

### 1.1. Matrimonial matters

#### *1.1.1. Personal scope of application*

According to the results of the EUFam's national reports, the personal scope of application of Brussels IIa still remains unclear. In the Regulation, when the grounds of Articles 3, 4 and 5 do not give jurisdiction to a Member State, the national laws are applicable; but only if no other Member State can be seized in accordance to the Regulation, as was stated by the CJEU in the case *Sundelind Lopez*[9].

This left unsolved the following situation: one of the spouses has the nationality of a Member State and both spouses have the habitual residence in a third country. Apparently, then it is unclear which courts have jurisdiction. In order to solve this problem, the Commission's Proposal[10] has now merged Articles 6 and 7, providing a sort of *forum necessitatis* rule (one interpretation of the doctrine, notably from one of the members of the EUFam's Academic Advisory Board). However, according to the national reports, its wording is still confusing.

The invited expert (German academic) stressed how unfortunate it was that the Commission's Proposal did not address matrimonial matters, as there is clearly a need for reform in this regard.

[9] CJEU, Judgment of 29 November 2007, *Sundelind Lopez*, C- 68/07, ECLI:EU:C:2007:740.

[10] 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), 30/06/2016. Please take into account that at the time the International Exchange Seminar was hosted (12 May 2017), the European Parliament Draft Report on the 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), (2016/0190(CNS)) was not yet published. This is the reason why the participants only referred to the Commission's Proposal during the seminar.

Concerning the issue of the personal scope of application, in the opinion of the expert, the Commission's Proposal did not address the problem. The Commission's Proposal only merged Articles 6 and 7 of the Regulation in one single provision. However, residual jurisdiction is not that important regarding matrimonial matters because Article 3 of the Regulation grants a rather wide jurisdiction to the Member States. It is quite difficult to identify cases not covered by Article 3 which is why it is not that important as compared, for example, to the Succession Regulation where we have only one connecting factor for jurisdiction. The expert continued suggesting that the best solution would be a two-fold approach: on the one side, the need for harmonization of the residual jurisdiction (Article 7 of the 2006 Commission's Proposal would be a good starting point[11], which provided for residual jurisdiction in two cases -if one of the spouses has the nationality of a Member State and if one of the spouses had his/her residence during the last 3 years within a Member State-). One related idea here is the possibility to take up the 5 years period contained in the Succession Regulation in order to have consistency. On the other side, a harmonized *forum necessitatis* would be advisable, following the examples of Article 7 of the Maintenance Regulation, Article 11 of the Succession Regulation or Article 11 of both new Regulations on matrimonial property regimes[12] and property consequences of registered partnerships[13].

During the debate, a German academic pointed out the incoherence of having the rule of *forum necessitatis* in some instruments and not in others. Jurisdiction of necessity has a sound basis in human rights. The lack of this rule creates a general dissatisfaction with the instruments.

The representative of the European Commission informed about the need to base the new legislative proposals on data, and explained that when the draft of the Proposal was being discussed

[11] Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters (COM(2006) 399 final), 17/07/2006. According to this instrument, article 7 was replaced by the following: "Article 7. Residual jurisdiction. Where none of the spouses is habitually resident in the territory of a Member State and do not have a common nationality of a Member State, or, in the case of the United Kingdom and Ireland do not have their "domicile" within the territory of one of the latter Member States, the courts of a Member State are competent by virtue of the fact that: 5. the spouses had their common previous habitual residence in the territory of that Member State for at least three years; or 6. one of the spouses has the nationality of that Member State, or, in the case of United Kingdom and Ireland, has his or her "domicile" in the territory of one of the latter Member States."

[12] Council Regulation (EU) 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 (*OJ* L 183, 08/07/2016).

[13] Council Regulation (EU) 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* L 183, 08/07/2016).

there was no data available for matrimonial matters. However, the Central Authorities provided some statistics regarding parental responsibility from the data they had collected. Therefore, those statistics helped justifying the need of changes in the field of parental responsibility and child abduction.

Regarding Articles 6 and 7 of Brussels IIa, the representative of the European Commission indicated that the problem in practice is that the relationship between these two provisions is not clear. One Article establishes a very clear protective rule that also exists in Brussels Ia Regulation[14]: the nationals or habitually residents in a Member State may only be sued before the courts of other Member States under the rules set out in the Regulation. The other Article provides the possibility to use the national rules on residual jurisdiction, but only in those situations when they are needed, because they do not fall under the connections foreseen in the Articles of the Regulation. The aim of the Commission is to present a clearer text of these two Articles.

### *1.1.2. Material scope of application*

Regarding the material scope of application, there might be a need for clarifying the term "marriage". The EUFam's national reports focused on two concepts that might create doubts: registered partnerships and same-sex marriages.

In this vein, it is also worth analyzing the need to regulate the recognition of private divorces at the European level, especially in light of the last reform of the French law on divorce (*Loi no. 2016-1547*), allowing for a sort of private divorce that recently triggered a formal complaint before the European Commission against France[15].

The invited expert (German academic) pointed out that political reasons due to the sensitive nature of these matters, and the unanimity requirement (under Article 81.3 TFEU[16]), might be behind the lack of reforms. The expert reflected on the impact of this provision in the field and suggested its abolition in the future as well as to, at least, open the door to the mechanism of enhanced

[14] 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 (recast) (*OJ* L 351, 20/12/2012).
[15] More information on this issue can be found here: http://conflictoflaws.net/2017/complaint-against-france-for-a-violation-of-several-obligations-arising-from-the-rome-iii-and-brussels-iibis-regulations/ (last visited on 9 June 2017).
[16] Treaty on the Functioning of the European Union (*OJ* C 326, 26/10/2012).

cooperation if a majority of Member States are willing to go forward in broadening the material scope of application of Brussels IIa.

The ideal situation, according to the invited expert, would be that same-sex marriages and registered partnerships would be included within the new Brussels IIa Regulation. If so, the question would be whether different jurisdictional provisions are necessary for these kinds of relationships. In that case, a careful assessment of Article 3 of Brussels IIa Regulation would be advisable. It would also be useful to add an additional basis for jurisdiction in the Member State where the registered partnership was registered, following the example of the Regulation on property consequences of registered partnerships. And the same would apply to same-sex marriages, in order to allow those couples to have at least one forum for dissolving their marriage if they concluded their same-sex marriage in the European Union. However, the rule of the so-called alternative jurisdiction introduced in the Regulations on matrimonial property regimes and property consequences of registered partnerships should be avoided.

As to private divorces (like the new French, Spanish, Italian and possibly in the future Dutch approach to divorce), maybe the European Commission has planned here a kind of hidden reform because the notion of the term "court" is replaced by "authority". It seems that at least private divorces, where an authority is involved in the registration of the divorce (for example, a civil status officer), could be covered by the new Regulation. The pending decision of the CJEU in the case *Sahyouni* (C-372/16) will hopefully shed some light on how to deal with those private divorces.

The comments from the audience varied.

As for the topic of same-sex marriages, a Spanish academic divulged information about a relevant request for a preliminary ruling before the CJEU, now pending (case *Coman and Others*, C-673/16). This case is connected to the free movement of rights of EU citizens that are married to a third State national. If this third State national is a same-sex partner and the marriage was validly contracted in a country different from the State of recognition, and taking into account that the referring court invokes the Charter[17], it will be difficult for the CJEU to avoid answering against the recognition of the marriage for Private International Law purposes.

[17] Articles 7, 9, 21 and 45 of the Charter of Fundamental Rights of the European Union (*OJ* C 346, 18/12/2000).

Regarding the issue of private divorces, an Italian academic shared the view that a clarification on this point would be really useful and not necessarily politically engaging if it is made in the form of, for example, a recital clarifying this in the preamble of Brussels IIa, leaving things as they are as far as the grounds of jurisdiction are concerned. He continued to point out that the distinction here is not simply whether an authority is involved or not, because an authority is almost inevitably and systematically involved. The issue is for what exactly the authority is there. On the one hand, there are situations where the involved authority limits herself to receiving declaration statements from the spouses. If the authority does nothing more than that, this would be a purely private divorce scenario where no issue of jurisdiction arises because in the end it is as if it was a contract made before a notary, for example. On the other hand, if the authority involved carries out some assessment or some actual evaluation which results in a decision, then the issue of jurisdiction arises and we need rules, the rules of Brussels IIa Regulation to regulate the circulation of such decision. But in the first scenario (purely private one), jurisdiction is simply not an issue. If there is a clarification to this effect in the preamble, domestic legislators would be enabled to decide whether their reforms in this field fit in a purely private scenario or in a somehow public scenario.

Another Italian academic stated that in private divorces there might be an interest to register the divorce in another Member State (for example, in the Member State where one of the spouses is a national). Therefore, it is necessary to provide a forum for that such as for instance a choice-of-forum, but without the requirement of residence, because there is already the joint request, which is sort of a choice-of-forum to a certain extent.

A German academic commented on this issue, pointing out that a forum for registering the divorce is quite different from a forum for judicial proceedings on divorce or separation. Therefore, the whole catalogue of grounds of jurisdiction needs to be rethought.

The representative of the European Commission suggested dealing with this new trend of private divorces applying Article 55 of the Commission's Proposal, for the time being. This aforementioned article relates to authentic instruments and agreements and not only provides for enforcement but also for recognition. She also explained that the purpose of substituting the term "court" by "authority" is to align it with the wording used in the 1996 Hague Convention[18].

[18] The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

However, some problems have been identified, for example, regarding the *lis pendens* situations, which are uncommon among administrative authorities. Therefore, this change will probably be reversed.

On this topic, the invited expert (German academic) added that a foreseeable problem in the future is that it will be very difficult to distinguish different forms of divorce. For example, there is no difference between a Spanish court issuing a divorce on demand and an Italian civil status-officer just receiving the declaration that a couple wants to be divorced. Both authorities decide nothing in substance, they take a declaration. Therefore, there is no reason why the Spanish court should be bound by Article 3 Brussels IIa whereas the Italian civil status-officer should not.

Afterwards, a Spanish notary intervened and shared his concerns about the public interest at stake in the private divorces. That public interest is the link between the spouses. He clarified that in Spain the divorce before a notary is not considered as a private divorce, because the notary exercises judicial functions. In this line, the Spanish notaries have to assess if they have jurisdiction. There is not a free choice of notary in this matter, as it is the case in any other action. Therefore, in case of a divorce with international elements, the notaries have to check if they have jurisdiction according to Brussels IIa Regulation. He suggests introducing in the Regulation an explanation of the concept of authentic instrument and authorities, which would help to shed some certainty in this area.

#### *1.1.3. Alternative/hierarchical grounds of jurisdiction and choice-of-court*

Another topic suggested for discussion related to the alternative or hierarchical functioning of the grounds of jurisdiction. Traditionally, the doctrinal debate has focused on the choice between alternative grounds of jurisdiction (meaning that the plaintiff can seize whichever court among those meeting the requisites for holding jurisdiction) and hierarchical grounds of jurisdiction (this would be to some extent the Brussels Ia approach, meaning that the jurisdiction will be assumed respecting the order of precedence). The Regulation as its current version and the Commission's Proposal follow the option of the alternative grounds of jurisdiction. Here the question would be if this is the most appropriate approach. According to the responses stated in the EUFam's Report on the Outcomes of the Questionnaire, the majority of the answers favored the option for the hierarchical grounds of jurisdiction. The possibility of introducing a rule allowing the choice-of-court in matrimonial matters is also linked to this topic.

Concerning the grounds of jurisdiction, the invited expert (German academic) agreed on establishing some degree of hierarchy within Article 3 of Brussels IIa in order to prevent a rush to the courts. However, this problem will be balanced by Article 5 of the Regulation on matrimonial property regimes, as the spouses' agreement is required if the court seized to rule on an application for divorce, legal separation or marriage annulment pursuant to the exorbitant rules of Brussels IIa and shall have jurisdiction to rule too on matters of the matrimonial property regime arising in connection with that application. In addition, Brexit will also balance the problem, as Article 3 of Brussels IIa will not be used anymore to seize a British court.

Regarding the possibility of choice of court agreements, according to the expert, it should exist. As the possibility of choosing the applicable law already exists, it should be possible to simultaneously choose the forum.

Afterwards, a German academic from the audience shared his opinion in favor of abandoning the vast catalogue of heads of jurisdiction of Article 3 of Brussels IIa. However, the option of strict hierarchy should also be discarded, as it would mean that there would be only one possible forum for divorcing and that is a too narrow an approach. As a possible solution, he suggested to keep the option of choosing the courts of the State of the nationality, as there could be the possibility that the couple still kept links to that State and they did not integrate themselves well in the State of current habitual residence.

An Italian academic said that she is very much in favor of the system of alternative grounds of jurisdiction, and that they should be enlarged, especially for the cases of couples with the nationality of a Member State but habitual residence in a third State. They should have the possibility to seize a court in the European Union. This situation will be more common with Brexit.

Another remark from a German academic highlighted the link between limiting the alternative grounds of jurisdiction and the choice of forum. The more the choice is limited, the more need there will be for a choice of forum possibility. Therefore, this is something that should be assessed together and not separately.

A German lawyer pointed out the possibility of choice of law under the Rome III Regulation and said that there should exist, accordingly, the possibility of choice of court.

### *1.1.4. Consolidation of proceedings*

In Family Law disputes many questions may arise concerning the same parties: matrimonial matters, parental responsibility, maintenance, etc... Currently, it may be that one single court is competent to decide on these matters because the different instruments partially use similar connecting factors. However, there is no guarantee that only one court is competent. The parties may seize different courts for different aspects of the same dispute. Another related point in this regard is the need for introducing party autonomy, as one of the possible solutions for allowing the parties to consolidate their proceedings.

In the opinion of the invited expert (German academic), the current system suffices, as there is the possibility of consolidation of proceedings in Article 5 of the Regulation on matrimonial property regimes and Article 3 of the Maintenance Regulation. Therefore there are some safeguards for consolidating proceedings in the areas of matrimonial property and maintenance. However, this does not guarantee the consolidation in the same court, because, at least, the Regulation on matrimonial property regimes only regulates international jurisdiction and not local jurisdiction, and at the level of the local jurisdiction the consolidation could be not foreseen (for example, in Belgium). Regarding child-related matters, the expert shared the practice carried out by the majority of legal systems of separating between child-related matters and matrimonial matters, and in his opinion there is no reason to change this situation.

### *1.1.5. Scope of provisional measures*

Further, the fourth question for analysis concerned the scope of provisional measures. Traditionally, the doctrine has been divided as regards to the possibility to adopt provisional measures in relation to matrimonial matters. Currently, the text presented by the Commission rules out this possibility, only allowing the adoption of provisional measures in relation to "the child or property belonging to the child". In the database of the EUFam's Project, five cases are listed where the courts have adopted provisional measures in matrimonial matters.

The invited expert (German academic) welcomed the change introduced by the Commission, limiting the scope of the provisional measures to child-related matters only. This finishes with the

confusion created in the past by the CJEU[19]. Additionally, there are now instruments covering the financial consequences of the divorces, and those are the instruments allowing provisional measures falling in their material scope.

A Belgian academic shared the same view as the expert and indicated that the only scenario where provisional measures for matrimonial matters could be needed is if a court establishes for some reason that the spouses are authorized to live separately because they need to have that date from which they lived separately for the later divorce proceedings.

A member of the MPI-Luxembourg clarified that apart from that situation, other cases found related to the need to update the records in the Civil Registry with the divorce proceedings or the need to allow the use of the common residence to only one of the spouses.

A French lawyer explained the perspective of the practitioners in this issue. She said that what often happens in Member States like France is that the judge may make an initial ruling on the question of jurisdiction in matrimonial matters and that decision could be appealed. In that context of lengthy proceedings, the possibility of asking for provisional measures is important.

The invited expert pointed out that the court having jurisdiction on the merits can always take provisional measures related to matrimonial disputes. The question is if there is really a need for a provision allowing a court without jurisdiction on the merits to take provisional measures in matrimonial matters.

#### *1.1.6. Coordination among judges*

In the current text of the Regulation and in the Commission's Proposal, there are not many provisions on cooperation between judicial authorities regarding matrimonial matters. It seems to be a field for parental responsibility issues. However, using some coordination rules, regarding the flow of information among courts, would be adequate for certain situations in matrimonial matters, as for example regarding *lis pendens*.

[19] CJEU, Judgment of 15 July 2010, *Purrucker*, C-256/09, ECLI:EU:C:2010:437, § 86.

The invited expert (German academic) expressed his skepticism, as in matrimonial matters the parties should inform of the proceedings conducted in other Member States, the court has no obligation *ex officio*.

A British academic pointed out the problem that will arise with Brexit and the coordination of pending proceedings, as Article 19 Brussels IIa restricts its scope to actions among Member States. She suggested some solution along the lines of Articles 33 and 34 of Brussels Ia.

The representative of the European Commission clarified that at the moment this is a matter left to the national legal systems and it also depends on reciprocity. Apparently the situation will remain as it is for some time. Concerning the coordination among Member States, she shared her opinion in favor of having an explicit provision on judicial cooperation in matrimonial matters and suggested to follow the model established in the Insolvency Regulation.

### 1.2. Relationship between jurisdiction and applicable law

#### *1.2.1. Coincidence between forum and ius*

The first issue that has been identified is the discrepancy and the lack of coordination between the rules and connecting factors respectively set by Brussels IIa and Rome III. As pointed out in the EUFam's national seminars, the coincidence between *forum* and *ius* ensures a swift application of the law and limit additional delays and costs relating to the application of foreign law. In this context, the absence of choice-of-court agreements both in the current version of Brussels IIa and in the 2016 Commission proposal has been lamented.

The invited expert (Spanish academic) started pointing out the practicalities of the synchrony between *forum* and *ius* including the fact that it is less costly and more convenient for practitioners. However, a complete synchrony between *forum* and *ius* is not possible. First, there is a difference of logic between the two issues. On the one hand jurisdiction rules lie on access to court, the right to a fair trial and therefore require alternative fora. On the other hand, choice of law rules aim at designating the law of the closest connection. This difference of logic implies, in practice, a potential discrepancy between the two. Second, it is important to recall that one of the reasons why no unanimity was reached among Member States to adopt Rome III was the fact that some Member States did not want to apply foreign law. In this context, trying to achieve a complete synchrony –

while the instrument applies to Member States who are willing to apply foreign law– appears to be contradictory.

The invited expert (Spanish academic) continued stressing the importance of taking into consideration the different types of "customers" who are addressed by International and European Family Law. Depending on their profiles, the issue of costs is more or less relevant.

There are "easy" cases in which, according to the national reports, the breakdown of the family (in which several nationalities coexist) does not imply any relocation as all the members of the family stay in the same Member State. In those cases, the application of the relevant legal instruments – regulations and conventions – will mainly result in the application of the law of the forum to every matter. This will no longer be the case once the Regulation on matrimonial property regime enters into force as it will be the law of the first habitual residence that will apply. In these instances, bearing in mind also the needs of the "customers", it would probably be relevant to allow for a choice of the national court.

Regarding the numerous alternative fora provided by Brussels IIa, the invited expert (Spanish academic) particularly insisted on the relevance of the ground of jurisdiction based on the forum of the plaintiff. For instance, in Spain, there are cases in which two third-State nationals got married in their country of origin but have lived in Spain for many years. A typical example is the following: the female spouse works in the care sector, the husband goes back to the third State of their common nationality and the female spouse wants to file for divorce. In this instance, the forum of the plaintiff is an important ground to ensure access to court to particularly vulnerable litigants.

During the debate, a German academic (Professor Pfeiffer) underlined the fact that there is a certain need for coordinating choices of law and jurisdiction rules. However, a complete synchrony is not possible for technical reasons as stated by the invited expert. While choice of law rules aim at identifying one particular law applicable to one specific question, jurisdiction rules traditionally require a good interest analysis. In other words there are different interests to be taken into account: the most significant ones are the access to court and the other one is the convenience of the parties. For instance, it may be that a court is easier to access in general however another court might be more convenient for parties. Another important aspect to be taken into account is efficiency. As an example, in cases where the main issue relates to matrimonial property, it is very likely that there is

an interest to have a decision from the forum *rei sitae* to have effective means of ceasing that property.

The coordinator of the project – Italian academic highlighted that according to the outcome of the project, the main problem for judges is the fragmentation of applicable law regarding the same situation *i.e* divorce and related aspects. In this regard, the possibility to choose the law applicable could be a useful tool to have a single law applicable to the entirety of the situation. This can only be prospective because we have to wait for all the EU regulations to be applicable. So far, most of the case law relates to Article 5 Rome III and most of the cases are from Italy.

In addition, a German academic highlighted the practical consequences of combining *electio fori* and *electio iuris*. Allowing *electio fori* would be a step forward however such an agreement might be considered void in other Member States. This would undermine the objective of certainty.

Concerning choice-of-court clauses, a Croatian academic underlined the relevance of choice-of-court agreements after the marriage breakdown. For instance, it would particularly ensure that same-sex couples willing to divorce can have access to court.

A Belgian academic pointed out that the impossibility to make *ex ante* choice of court agreements is problematic given the objective of legal certainty sought by EU jurisdiction rules. In this regard, the mechanisms set in the Succession Regulation could be of relevance. Although this Regulation does not provide for independent choice of courts, it sets out some sophisticated contractual mechanisms whereby in a will or in a succession agreement parties may agree on the exclusive jurisdiction of a Member State's courts, provided that the deceased chose this Member State's law to govern his succession. Those State courts would be the ones of the forum which law was chosen by the deceased to govern his or her succession. One may wonder whether such mechanisms could apply in the framework of Brussels IIa, e.g. by not exactly designating the courts of a Member State but rather coercing parties to refrain from picking the "least favoured forum" through a penalty that would ensue.

### *1.2.2 The validity of choice-of-law clauses*

Regarding the framed party autonomy set in Rome III, a very limited number of decisions have been found. Nevertheless, several questions as to the validity of choice-of-law clauses have been raised during the EUFam's national seminars. Requirements as to the formal validity of the choice

of law are set in Article 7. Those requirements vary greatly from one participating Member State to another. Some legal systems require a notarial act (for instance Germany) whilst in others the written form is sufficient. Recital 18 furthermore sets an informed choice principle in order to guarantee the fairness of the agreement and an equal protection of the spouses. However once again, there are no common standards among participating Member States as to what constitutes an informed choice. Another issue regarding the validity of clauses is the fact that an *electio juris* valid in a participating Member State could however be considered void before the competent authorities of a non-participating Member State.

As stressed in the national reports, the invited expert (Spanish academic) addressed the issue of the moment for concluding the choice of law agreement. It is important to distinguish two situations: a choice of law made when divorce is a hypothesis and an agreement made when divorce is already on the table. In the former situation, spouses are under a certain emotional state and they do not consider all the relevant elements. For instance, in the *Granatino* case[20], a broker from the City signed a prenuptial agreement –that he could not understand because it was in German– as a token to prove his father-in-law he was not getting married for money. When such choice-of-law agreements are signed and spouses are bound by it more than decades later, this might appear unfair. It is necessary therefore to raise awareness in this regard.

Concerning the informed choice principle, the invited expert pointed out the difficulties to achieve an informed consent. In her opinion, it is for the notaries and lawyers to guarantee that the parties are informed. That being said, one may wonder whether professionals are relevantly prepared to take up this challenge. Indeed, not only knowledge of foreign law is required but it also implies to master comparative family law in order to be able to advise people as to what choice would be better for them.

During the discussion, a German lawyer explained the mindset in which young clients are when they make a prenuptial agreement and tackle the question of applicable law. Most of the time, they do not project themselves into the future but rather want to know generally what law would apply if they were to divorce in their current country of residence.

[20] *Radmacher* (formerly Granatino) v *Granatino* [2010] UKSC 42.

A Belgian academic took up the issue of informed *ex ante* choice of law in prenuptial agreements. The issue of ensuring that informed consent is ensured while such clause might have effects decades after it was concluded is crucial. The question is whether additional safeguards should be set at the European level or whether such ability is left to the discretion of Member States.

The invited expert (Spanish academic) underlined the existing safeguards to ensure an informed consent when a choice-of-court agreement is concluded. Under Catalan law for instance, *ex ante* choice-of-law agreements require an independent legal advice, a duty to disclose certain things and very often there is a hardship clause. The main problem appears to be the evolution between the circumstances at the time the agreement is concluded and at the time it is enforced. Indeed, factual circumstances might change (mobility of the family) but also the designated law might change.

A German academic highlighted the relevance of the mobility of families pursuant to the conclusion of *an electio fori*. For instance, pursuant to German national law, the choice of law for divorce is automatically connected to the choice of law relating to the split of pension (*Versorgungsausgleich*). Therefore, in case a couple gets divorced in another State where the *lex fori* is applied in order to obtain a speedier divorce, this could result in ousting the pension splitting according to German law. This outcome could be very disadvantageous especially for spouses – such as stay-at-home parents– who have not worked.

As a follow up, the invited expert (Spanish academic) pointed out that from a Spanish perspective, the *Versorgungsauslgeich* is an unknown institution and there is no choice-of-law provision in Spain. This is one of the reasons why the German community living in Barcelona never divorce in Spain but file for divorce in Germany. The current fragmentation of sources is problematic in order to ensure an informed choice. From a practical point of view, this requires *inter alia* extended calculation.

In this vein, a German academic underlined the fact that there are situations in which it should be carefully considered whether or not to enforce prenuptial agreements. In his opinion, this should not be a choice-of-law question but rather it should be for substantive law to provide appropriate rules to deal with such situations. In addition, there is a difference between the different matters that these prenuptial agreements address. On the one hand, there is the question regarding the assets existing prior to the marriage and other hand, the issues relating to the income of the couple during their marriage. For instance, if the professional life of the couple has taken a direction different

from the one they had in mind when signing the prenuptial agreement, it might be fair that a court, when addressing spousal support or alimony claims takes that into consideration. With regard to the former aspect, it would be certainly unfair if the law does not open an avenue that gives certainty with what happens to one's asset. There is an undeniable and legitimate need that choice of court and choice of law can be made. Once again, this could –for instance– be tackled by substantive law.

A German academic lamented the absence of a harmonized approach as to the moment when choice-of-law agreements may be made. Pursuant to Article 5 of Rome III, it is currently left to the Member States to allow choice-of-court agreements during the proceedings. The possibility to choose the law applicable during the proceedings would be welcome. It should be possible to make a choice of law agreement during the proceedings like in the 2007 Hague Protocol[21] or there should at least be the possibility to make an '*accord procédural*' in favour of the forum law.

In addition, a British academic made some observations regarding party autonomy and the timing of the choice. Parties do not tend to anticipate matrimonial breakdown, in the same way as parties do not anticipate torts and delicts. In this regard, an interesting parallel can be drawn with Article 14 of Rome II Regulation[22]. Pursuant to this provision, choice-of-law agreements are restricted to choice after the event given rise to damage has occurred. Such restriction –justified by the protection of weaker parties– could be extended to matrimonial context.

A Belgian academic distinguished three types of choice-of-law agreements in accordance with the time when they are concluded. The two first ones are *ex ante*: at the prenuptial stage and at the marriage breakdown but before going to court. The third one arises during the proceedings. As for the latter – which is covered by Rome III – it is to be welcome that many national legal systems allow such late choice. The EUFam's database shows for instance that Italian courts sometimes ask the parties whether they want to make a choice-of-law agreement given that the *lex fori* might be less interesting in their given case. However, the distinction between the first two categories of choice-of-law agreements is more complex. Unlike tort, marriages are more fluid, there is no exact date to consider when the marriage breakdown starts or when to change the choice-of-law agreement because the family moves to another country for instance.

[21] The Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations (hereinafter the 2007 Hague Protocol).
[22] Regulation (EC) no 864/2007 of the European Parliament and of the council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), (*OJ* L 199/40, 31.7.2007), Article 14.

An Italian academic made some comments regarding the Italian practice on the law applicable to divorce. Italian courts have used the possibility to make a choice-of-law agreement as a way to offer a swift divorce –under their common national law– to couples who are resident in Italy and who could not divorce directly in Italy because of the Italian three-year of separation requirement. This is a distortion of the use of Article 5 of the Rome III Regulation because it is triggered very late in the proceedings. Most of the time in these cases neither the parties nor their counsels are aware of the application of Rome III and they make wrong assumptions when preparing their application for divorce by only relying on Italian law (that does not allow *electio iuris*). Whereas this will soon stop being a problem since that period of separation will no longer apply, it still shows the importance of education and training of judges and lawyers. In this context, projects such as the EUFam's Project are crucial in order to exchange experiences and ideas.

On another note, in some instances it might make more sense for foreign nationals to go to their country of origin to have a swift and inexpensive divorce rather than retaining them in Italy where they are subject to the three-year period of separation. This is the responsibility of the counsels to seek the best interests of the clients.

### *1.2.3 The application of choice-of-law rules*

In the absence of choice of law, Article 8 sets 4 hierarchical connecting factors. In the light of the case law and the information disseminated during the EUFam's seminars, it appears that there is a lack of familiarity with Rome III. Judges tend either to apply domestic conflict-of-law rules or to straightforwardly apply national substantive law. The answer as to whether the courts should apply conflict-of-law rules *ex officio* varies among the Member States.

So far, there is no CJEU case law related to the autonomous interpretation of the concept of habitual residence in matrimonial matters. The reviewed case law shows that – when applying the relevant conflict-of-law rule - judges tend to rely on the parties' allegations and do not give any reasoning to determine the habitual residence of spouses. During the seminars, Article 8.b) and its 'more than one-year of residence' condition has been criticized as being too rigid. Some advocate for a more flexible approach relying on a closest connection test.

The invited expert (Spanish academic) expressed some concerns about the absence of examination of the habitual residence unless it is contentious. As an example, reference was made to *Rapisarda*

v. *Colladon*[23]. In this case, the court annulled 180 petitions for divorce in which Italian spouses pretended that they were habitually resident in the UK in order to get a speedy divorce. When it is not contentious, the national courts tend to rely on the parties and on basic administrative documents, which is problematic.

During the discussion, an Italian academic insisted that there should be a clear stand at the EU level as to the mandatory character of conflict of law rules. This is crucial in order to ensure the effectiveness of EU private international law. On this premise, there must be adequate evidence of the factual elements that are used as the connecting factor.

As a follow up, a German academic pointed out the fact that a lot of mandatory and substantive rules coming from the European Union are not applied *ex officio* but left off to the parties in contentious proceedings. In the case of conflict-of-law rules, he suggested that Courts should have more discretion in divorce proceedings and that they should not be strictly bound by parties' submission. This would go in the direction of a procedural solution to ensure the effectiveness of the rules.

In this vein, a German academic underlined the need to define what is understood by *ex officio*. Indeed, it is applied in numerous areas of law in the different Member States. For instance, the *ex officio* application of EU consumer protection law has been developed by the Court of Justice. The EU Procedural study recently conducted by the MPI Luxembourg dealt substantially with this issue[24]. In this field, the *ex officio* application entails that the court gives a helping hand to the party who is in a less favourable position than the other. This approach should be favoured in the field of conflict-of-laws matters and it should be endorsed by the European Union. This would be a balanced way to achieve effectiveness while currently there are some Member States where Private International Law is simply left out if no party refers to it.

An English practitioner pointed out the importance of conflict of laws and private international law when it comes to property law. In practice, the question of recognition when the immoveable is located abroad is very complicated to deal with for the clients. From a more general perspective, the

[23] [2014] EWFC 35.
[24] An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law (JUST/2014/RCON/PR/CIVI/0082).

main problem appears to be a political one. One of the reasons why the United Kingdom voted to leave the EU is a general feeling that Brussels interferes too much. Overall, there has been a failure to persuade citizens that Member States are at the initiative and that all these harmonized rules aim at helping EU citizens. In other words, it appears that there are stakeholders with diverging interests on the table: the lawyers, the parties, the Member States. The *Rapisarda v. Colladon* case is a great example of this difficulty to convince citizens that what is achieved by the EU legislator is in their interests.

### *1.2.4 The application of the law of third States*

Another important issue that was highlighted is the application of foreign law. In general, the burden of proof of foreign law and the related costs constitute substantial practical difficulties. At the EU level, the European Judicial Network aims at providing information about Member States laws through national contact points. The reach of this mechanism appears to be limited as it is mainly relevant in cases where parties agree about the content of foreign law. Overall, the assessment of foreign law relies on experts which entail high costs. In an interesting German case nonetheless, the court had to apply Thai law pursuant to Article 8 and the court self-established the meaning of the law without consulting experts. This discretionary decision was deemed reasonable as there was no room for uncertainty.

The application of the law of third States is even more problematic given its limited access. The creation of a database – especially for African and Asian law has been suggested. In the framework of the project, the reviewed case law shows that third-States law is often applied as the law of the common nationality of spouses. This law also tends to be chosen for cultural reasons and/or to secure recognition and enforcement. Furthermore, the case law shows that parties also often tend to choose the law that provides for a swift and inexpensive divorce. For instance, there was a case where Kazakh spouses – who were habitually resident in Germany – argued that they chose Kazakh law as the latter could provide them with a swifter divorce, while German law required a period of separation.

The invited expert (Spanish academic) stressed the fact that the main obstacle when it comes to the application of foreign law is the issue of costs. In practice, it is to be regrettable that some national courts only apply foreign law when it is requested by the parties. It is not compatible with the nature of EU regulations however as it always gets back to the question of costs. For instance in

Spain, judges have the obligation to apply foreign law but in practice they cannot afford spending any money in order to find the content of the foreign law. At the EU level, the European Judicial Network is not working satisfactorily because of the lack of financial means. The contact points are often overloaded with work. The creation of a European Institute of Comparative law similar to the Swiss Institute of Comparative Law would be very welcome. Once again, the question as to who would be financing such project is problematic.

#### *1.2.5 Internal conflict-of-law rules*

Concerning non-unified legal systems, some difficulties have been raised as to the application of internal conflict-of-law rules. Articles 14 and 15 set some rules in this regard. The collected case law shows for instance that sometimes there is no specification as to the law of the territorial unit. Some cases also illustrate a proper reference to Rome III. For instance, a choice-of-law agreement – valid pursuant to Article 5 – designated Pennsylvanian law as one of the spouses was a US citizen. When applying Article 14.c), the Italian court surprisingly relied on the closest connection criterion instead of the choice of the parties.

#### *1.2.6 Referral to the 1996 Hague Convention*

As for parental responsibilities, the 1996 Hague Convention applies in order to determine the law applicable, since Brussels IIa only covers jurisdiction matters. The 1996 Hague Convention is based on the principle of synchrony between *forum* and *ius*. In practice, the two instruments are well-coordinated and in most cases the *lex fori* –i.e the law of the child's habitual residence– applies. Nonetheless, the absence of an explicit referral to the provisions of the 1996 Hague Convention in Brussels IIa has been criticized. Indeed, an express reference could help practitioners and judges who are already having a hard time with the fragmentation of rules.

### 1.3. Parental responsibility

#### *1.3.1. The interplay between the judgments on custody and the non-return judgments*

Under the current text of the Brussels IIa Regulation, when a minor is abducted to another Member State, the decision on the return of the child is up to the courts of the State where the child has been abducted to. That decision is "autonomous" from the decision on the parental responsibility of the

child, which will be decided by the courts of the Member State where the child was habitually resident, as a general rule (reaffirmed by the CJEU in the *Rinau* case[25]).

This autonomy among decisions could give rise to non-harmonic solutions. However, the interplay among the decision on custody and non-return has now been revised in the text of the Commission's Proposal. There, the suggestion is that the court shall examine the question of custody of the child taking into account the child's best interests and the evidence and reasons for refusing the return of the child.

The invited expert (representative of the European Commission) began the assessment by pointing out how the current position of Article 11 within the text of Brussels IIa is confusing due to the fact that it is situated within the chapter about jurisdiction. Therefore, the Commission's Proposal has relocated the provision in a new chapter. Apart from some procedural changes, the expert remarked that no major changes were introduced regarding Article 11. A description was then given by the expert concerning the current overriding mechanism and explained that, in general, the Proposal does not introduce many changes to it, because the Commission's programme was the abolition of exequatur, a goal which has already been achieved as to the overriding mechanism[26]. The invited expert explained that the Proposal contains a better redraft of the relevant provisions, but the policy concept has not changed.

Moreover, the expert noted that there is an ongoing search for rules that would make the whole process run smoother. For instance, difficulties arise when the court which refuses the return of the child has to transmit the judgment to the court where custody proceedings are already pending due to the lack of a translation regime. Under the proposed provisions, the documents are to be translated in the framework of the Hague return proceedings, meaning that the losing party, i.e. the applicant, will have to bear the translation costs, a solution which was not considered unfair by the invited expert, since the overriding mechanism benefits the applicant. The expert further explained that a new suggestion is to have a form with a list of documents attached and to have only the titles of the documents and a single text field translated. In that way, the court of the custody proceedings can subsequently make an informed choice as to which documents it needs translated, while the relevant costs will burden the custody proceedings. In case there are no custody proceedings

[25] CJEU, Judgment of 11 July 2008, *Rinau*, C-195/08 PPU, ECLI:EU:C:2008:406.
[26] Articles 11 para. 8, 40 para. 1 b) and 42 of the Brussels IIa Regulation.

pending, the expert pointed out that a thought exists to abolish the transmission of documents altogether and to introduce a system consisting of having the Hague court, which is planning to refuse return of the child, inform the parties about the existence of the overriding mechanism and invite them to bring any challenges against the non-return order in the State of the child's former habitual residence within custody proceedings.

As to what kind of judgments should be capable to trigger the override mechanism, the expert noted that the Commission did not agree with the opinion held by the CJEU in the *Povse v. Alpago* case[27], where the CJEU ruled that a simple return order given under summary proceedings can override the non-return order by triggering the override mechanism. The invited expert underlined that the overriding mechanism is justified only if there are proper proceedings by the proper court on the basis of full examination of the facts of the case and the best interests of the child, not on the basis of summary proceedings, a position which is now adopted in the Commission's Proposal.

There were various comments from the audience.

An Italian academic pointed out that, according to the EUFam's first assessment report on case law, there is no widespread habit of the national courts to refer to CJEU or ECtHR case law, which, according to this academic, means that national courts underestimate the human rights dimension of family law. Therefore, it has to be reminded that in cases of parental responsibility and child abduction, any decision is capable to adversely affect the right to family life which is enshrined in Article 7 of the EU Human Rights Charter and Article 8 of the ECHR[28]. The academic stressed, as a general remark, that it should not be forgotten that both CJEU and ECtHR case law has to be taken into account in order to avoid the risk of condemnation by the ECtHR.

A German practitioner commented that it is regrettable that the Proposal did not introduce more changes. She then asked whether it is correctly understood that there are changes introduced by the new Proposal regarding the enforcement of a return order within the custody procedure, since the Proposal contains provisions allowing objections during the stage of enforcement, which was not allowed under the current Regulation. The invited expert replied that there is no change and the grounds for refusal of enforcement that are presently excluded still remain excluded. The invited

[27] CJEU, Judgment of 1 July 2010, *Povse v. Alpago*, C-211/10 PPU, ECLI:EU:C:2008:406.
[28] Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe, concluded 4/11/1950 (United Nations, Treaty Series, vol. 213).

expert described that only partial harmonization as to the rules which govern enforcement is introduced in the Proposal, a domain which up to this point was dealt with by national law. The expert noted that this has sometimes led to judgments not being enforced due to national law objections, despite being granted the exequatur (for those judgments which are subject to exequatur). The expert underlined that the provision does not establish a *révision au fond* of the judgment. The expert also remarked that the override mechanism judgments will continue to be enforceable without any control by the requested State.

A Belgian academic asked whether the differentiation of the transmission of documents procedure on the basis of whether there are custody proceedings already pending will solicit more proceedings, prompting lawyers to advise their clients to make sure that they have a custody proceeding pending and increasing the rush to the court. The invited expert answered by admitting that this might indeed happen but it should not be considered as a negative aspect, since an abduction has taken place and it needs to be resolved, preferably before the courts of former habitual residence of the child and at the earliest possible time.

A French lawyer pointed out that there are Member States (Austria, Germany) who circumvent the overriding mechanism by not enforcing final judgments ordering the return of a child, himself having a relevant case pending against Austria pending in the ECtHR. He described that despite having won The Hague cases in Germany and Austria up to the Supreme Courts, six months later the other party triggered non-execution proceedings and the central authorities refused to enforce the return order. The lawyer is wondering what the position of the Commission is as regards this issue and whether this could be considered as bad faith on the part of the aforementioned member states. The invited expert replied by noting that the Commission is aware of such instances and that it is not a case of circumvention of the overriding mechanism, but rather of poor national implementation of the Hague Convention. The Proposal does not include a specific provision for such a case but it does for another issue, namely that where the child is further moved to another country. The Proposal explicitly provides for the recognition and enforcement of a return order in the Member State where the child was further moved. Moreover, the expert has pointed out that the Proposal contains a new provision whereby the state of the child's previous habitual residence is informed if the return order has not been enforced within six weeks after the enforcement procedure had been instituted. The invited expert did not exclude infringement procedures, if there is a systematic and continuous violation by a Member State.

Two British academics remarked that the use of Article 11 is not widespread. Few cases were found involving this provision and for half of them a certificate was issued, while only 20-25% of them were actually enforced.

### *1.3.2. Interaction between the Brussels IIa Regulation and the 1996 Hague Convention*

The text of the current version of the Regulation gives priority to the Regulation upon the Convention if the child's habitual residence is in a Member State or if the recognition and enforcement of a judgment given in a Member State is sought in another Member State. Now, the Commission's Proposal states some clarifications to that priority rule, giving way to the application of the Convention 1) where there is a choice of court agreement in favor of a non-Member State but Party to the Convention; 2) in cases of transfer of jurisdiction to another State Party of the Convention; 3) where proceedings are pending before a State Party of the Convention when a Member State is seized.

The invited expert started by noticing that the primacy of the Regulation over the 1996 Convention is confirmed. The invited expert expressed the view that the three aforementioned issues do not constitute exceptions because the courts of the Member States have already reasonably applied the 1996 Convention in cases where *lis pendens* issues involving third-States connections arose. The expert gave an example of such an application by describing a situation where a child has its habitual residence in Germany and proceedings begin there, followed by the initiation of divorce proceedings in Switzerland, which is a party to the 1996 Convention. In this example, the Swiss court would have ancillary jurisdiction over the child on the basis of the 1996 Convention while German courts would have already been seized on the basis of the habitual residence of the child. Therefore, the expert continued, it was considered favorable to explicitly regulate these issues in the Proposal.

As to the issue of the applicable law, the invited expert underlined that the Proposal provides for the applicability of the rules on the applicable law of the 1996 Convention when the jurisdictional rules of the Regulation are applied. Such a provision was deemed necessary because Article 15 of the 1996 Convention, which opens the chapter on applicable law, assumes the application of the jurisdictional rules of the 1996 Convention. A bolder reference to the rules on applicable law of the 1996 Convention, like the one found in Article 15 of the Maintenance Regulation with respect to the 2007 Hague Protocol, has been avoided mainly due to policy constraints, since such a provision

would create an external competence of the Union and it is questionable how many Member States would favor it.

### *1.3.3. Transfer of jurisdiction*

The functioning of the transfer of jurisdiction was also a discussed topic. At the seminar, the starting point for discussion was the positive assessment of the application of the current Article 15 of the Regulation, in light of the evaluation carried out in the EUFam's First Assessment Report on Case-Law.

However, it was deemed necessary that a smoother application of this Article would be attained if coordination amongst the judges was more encouraged (the case *Child and Family Agency v J. D* [29], being an example of the good coordination amongst authorities). However, this is not the common practice and some courts do not apply Article 15 for various reasons. For example, either because the time-limit given for seizing the more competent court was too short or because the courts confuse this Article with a *lis pendens* situation. The results of the EUFam's Questionnaire also highlighted this seldom application of Article 15.

The invited expert (representative of the European Commission) remarked that when Article 15 was enacted, only the UK and Ireland were content with it, since it constituted a sort of codification of the *forum non conveniens* concept. However, the expert continued by stating that this attitude has changed and currently many Member States consider that this provision should be applied more often, despite its exceptional character which stems from the fact that the jurisdictional rules of the Regulation in child matters are based on the principle of proximity with the child. The invited expert noted that there are some practitioners who understand Article 15 as only allowing a court already possessing jurisdiction to further transfer it, not to request it when it is not originally given. Consequently, the expert noted that the Commission's Proposal splits the current Article 15 into two separate Articles, like the corresponding provisions in the 1996 Hague Convention, in order to make it more evident that it is applicable in both directions.

[29] CJEU, Judgment of 27 October 2016, *Child and Family Agency v J. D.*, C-428/15, ECLI:EU:C:2017:62.

### *1.3.4. The abolition of the declaration of exequatur*

The next point discussed related to the new "fast-track" system for enforcement. The current version of the Regulation contains the requirement of applying for a declaration of enforceability as a general rule for enforcing a decision. But exceptions are made for rights of access and the return of a child. However, courts do not always take into consideration these exceptions.

The system has now been changed in the Commission's Proposal, where the previous exception has now become the rule. In other words, the declaration of enforceability disappears for enforcing the decisions on parental responsibility in general. This measure could also help celerity in the process of enforcement, avoiding situations as the one described in the ECtHR case *Strumia v. Italy*, no. 53377/13, where Italy was condemned due to the failure to put in place the necessary measures to maintain the ties of a father with his daughter.

The invited expert (representative of the European Commission) started by describing the current status. Exequatur has already been abolished for judgments relating to access rights under Article 41 of the Regulation by using the certificate issued in the state of the origin of the judgment, while the choice to optionally follow the exequatur procedure is still left open for the applicant, as well as for the overriding mechanism. The expert noted that, in general, the abolition of exequatur will affect custody and some protection orders. The expert noted that in some countries, like Germany, where custody judgments cannot be enforced because they are considered like status judgments, the view among colleagues is that nothing is left to be further abolished. However, in the legal systems of the other Member States, the applicant is entitled to request the handover of the child as a result of a custody judgement. The expert reflected that recognition in EU law means to give a judgment the same effect it has in the state of origin, meaning that such a judgment needs to be able to be enforced in Germany too. Germany had implemented relevant provisions as regards the 1980 Custody Convention[30] in order to allow the enforcement of such judgments, providing for a declaratory order by the exequatur judge, a solution which is now followed with respect to the Regulation too.

[30] European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children of the Council of Europe, concluded 20/05/1980 (United Nations, Treaty Series, vol. 1496).

As an example of an affected case, the invited expert mentioned the CJEU's judgment in the case C-92/12 PPU[31], where the placement of a child from Ireland into an institution in England had been ordered. Enforcement requires a debtor who is not conforming to his/her obligations, whereas in that case the only person who could oppose this judgment, i.e. the holder of parental responsibility, was in agreement with it. Therefore the question arose whether this could be considered enforcement. The invited expert remarked that the placement order functions in this case as the legal basis to transfer a child who has run away from the institution, since the child is a holder of fundamental rights like freedom of movement and, therefore, there was a need to declare its enforceability.

The expert then described that the Proposal's system consisted of a merger of the former Articles 41 and 42 of the Brussels IIa Regulation, where everything is concentrated in the state of origin of the judgment and no control whatsoever takes place in the state of enforcement, and the new Brussels Ia regime. However this proposal caused frictions and therefore a new solution, one being closer to the regime of the Brussels Ia Regulation, is being sought. This means that exequatur is abolished in the State of origin, but safeguards are put in the state of enforcement, giving it more powers of reviewing. This became evident for the invited expert after the CJEU judgment in the *Aguirre Zarraga v. Simone Pelz*[32]case, where the Court ruled that, under the overriding mechanism, the State where the enforcement is sought has no power whatsoever over the enforcement and even a provisional stay of enforcement has to be requested in the State of origin of the judgment. This conclusion is, in the view of the expert, not appropriate when children are involved, because urgent matters cannot be assessed in another country, it will be too late. Therefore, the Brussels Ia system is to be adapted to procedures where children are the object of enforcement.

A Spanish academic referred to the tension between the case-law of the ECtHR and the CJEU regarding the assessment of best interests of the child in the framework of the enforcement of a child's return. Especially because it seems that the ECtHR carries out an analysis of the best interest of the child taking into account the particular circumstances of the case (as it was seen in the ECtHR *Neulinger* case, no. 41615/07) and the CJEU focuses rather on the best interests of children in the abstract.

[31] CJEU, Judgment of 26 April 2012, *Health Service Executive v. S.C. and A.C.*, C-92/12 PPU, ECLI:EU:C:2010:828.
[32] CJEU, Judgment of 22 December 2010, *Zarraga v. Simone Pelz*, C-491/10 PPU, ECLI:EU:C:2012:255.

In relation to this issue, the invited expert (representative of the European Commission) said that what preoccupied the whole community of supporters of the 1996 Hague Convention in the ECtHR *Neulinger* case was that it required a full assessment of the entire family situation of the child, along with an in-depth analysis of the child's best interest in order to decide upon the Hague-Convention-return application. Consequently, there is a presumption that the ECtHR wanted the national courts to really examine the substance of the best interests of the child. But in the ECtHR *X v. Latvia* decision (no. 27853/09), which was decided by the Grand Chamber, a very long part on general principles was inserted into the decision, which is rather detached from the individual case, clarifying the relationship between the 1980 Hague Child Abduction Convention[33] and decisions about return-applications under that Convention and custody proceedings. The Commission's Proposal has been drafted taking into account this last decision. The Spanish academic replied later recalling that some later ECHR's cases have taken up again *Neulinger*, in spite of the *X v. Latvia* decision.

### *1.3.5. The hearing of the child*

An important and recurrent issue in all the EUFam's Seminars and reports is the importance of the hearing of the child. One major problem that has arisen in practice is the lack of hearing of the child. With the current text of the Regulation, it is in the discretion of the court to give the child the opportunity to be heard. If the court holds that because of the age or maturity of the child a hearing would be inappropriate, there is no chance to speak. This mechanism is often abused by the courts and even 15-year-old children are not heard. Even the European Court of Human Rights condemned Spain because a judge refused to give audience to two children aged 11 and 12 (ECtHR, *Iglesias Casarrubios and Cantalapiedra Iglesias v. Spain*, 23298/12).

Now the Commission's Proposal introduces the audience of the child if he/she is capable of forming his/her own views. The judge will have to give due weight to the child's views. The discretion for assessing it might be used, however, in a non-harmonic way, as seen with the present text. In this regard, the results of the EUFam's Questionnaire point out the need for a higher degree of harmonization at the EU level.

[33] Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (United Nations, Treaty Series, vol. 1343).

The invited expert stressed the fact that the Commission's Proposal introduces a new Article 20[34], which constitutes a change in the system. Currently the obligation to hear the child in Hague return proceedings exists in Article 11, a provision which could build on Article 13 para. 2 of the 1980 Hague Convention. However, the Convention itself does not include an obligation to hear the child, whereas the Regulation's obligation applies only to Hague proceedings. By virtue of the new provision an obligation of substantive law to hear the child in all matters of parental responsibility is introduced, which will be enabled every time the Regulation is applied. The expert pointed out that there are some who believe that a cross border element is required for the Regulation to be applicable, but others consider the Regulation to be applicable each time a national court seized, regardless of the cross border element. Therefore, this obligation would apply in all cases of parental responsibility, which is not a novelty, since it is already included in Article 12 UN Convention on the Rights of the Child[35] to which all member states are parties. However, since the UK and Ireland have not implemented this Convention in their domestic law, citizens cannot rely on these provisions. Article 20 would therefore make this obligation a directly applicable rule of EU law.

An Italian academic pointed out that the results of the EUFam's Questionnaire show that there is a general concern with the lack of minimum standards, and wonders if a good solution would be to establish a common minimum age for hearing the child.

An Italian judge shared the Italian practice of hearing the child even in proceeding of divorce or separation by mutual consent and had highlighted its importance and advantages.

The discussion was continued by a German judge, who described the German practice. In Germany, children are heard from the age of three. He agrees that there is a need to establish minimum standards.

An Italian academic stated his concerns on how it could be politically-controversial could to establish minimum standards, setting a minimum age above which the judge should hear the child,

[34] The proposed Article reads as follows: "Article 20. Right of the child to express his or her views. When exercising their jurisdiction under Section 2 of this Chapter, the authorities of the Member States shall ensure that a child who is capable of forming his or her own views is given the genuine and effective opportunity to express those views freely during the proceedings. The authority shall give due weight to the child's views in accordance with his or her age and maturity and document its considerations in the decision."
[35] Convention on the Rights of the Child, concluded 20/11/1989, United Nations, Treaty Series, vol. 1577 (United Nations, Treaty Series, vol. 1577).

taking into account the very different ways of dealing with this issue in the different Member States.

The invited expert (representative of the European Commission) commented that the possibility of introducing minimum standards was explored but rejected as the recommendations of the Committee on the UN Convention on the Rights of the Child explicitly say that no minimum age should be established. Article 12 of the UN Convention on the Rights of the Child indicates that every child capable of forming his or her own views, regardless of how old the child is, should be heard. This requires a case-by-case assessment. Other minimum standards refer to how the child has to be heard. In some Member States it is the judge who directly hears the child, in others this is done by a social worker who afterwards reports to the judge. Both systems are considered sufficient.

She also expressed her agreement in the importance to hearing the child also in proceedings of consensual divorce or separation but that it is difficult to establish an obligation in practice.

### *1.3.6. Personal scope of application of the provisional measures*

Concerning the personal scope of application, according to the Brussels IIa Regulation, and taking into account the interpretation provided by the CJEU in the case *Detiček*[36], provisional measures can be taken regarding the child and his/her parents. However, in the text of the Proposal, this approach has been limited to the child.

The invited expert (representative of the European Commission) described the reasoning behind this limitation. At the time of the negotiation of Article 20 of the Regulation, the recognition and enforcement of provisional measures was rejected at the European level. The reason behind this was the existence of jurisdiction in two States, dealing with the same child. Therefore the adopted solution was to restrict the provisional measures to the territory of the court issuing them and to allow that in case of urgency, the court of the State where the child is present can also adopt protective measures. However, because of various drafting techniques, Article 20 was worded in such a way that the CJEU was then asked about its interpretation. The CJEU interpreted it as covering persons present in that State, extending it to the parents. This was unfortunate, because the protection of the child is independent of the fact whether one or two of the parents are also present

[36] CJEU, Judgment of 23 December 2009, *Detiček*, C-403/09 PPU, ECLI:EU:C:2009:810.

in that State. As a consequence, it was proposed to copy Article 11 of the 1996 Hague Convention into the text of the Regulation, which is what Article 12 now does.

### *1.3.7. Territorial scope of application of the provisional measures*

The Brussels IIa Regulation and the CJEU interpretation in the case *Purrucker I* [37], demonstrate that the territorial scope of these measures, when adopted by a court not having jurisdiction for the merits, is limited to the national territory of the court issuing the measures. However this territorial scope has now been enlarged however, as the Commission's Proposal includes the provisional measures within the provisions for recognition and enforcement in other MS.

The invited expert (representative of the European Commission) explained that the court having jurisdiction under the Regulation for the merits of the case can issue any provisional measures at once and they will also circulate under the Regulation. That decision can be recognized and enforced in other Member States under the current system. However, where a court does not have jurisdiction under the merits, the current Article 20 follows the example of Brussels I.

She also pointed out that the system established by the CJEU in the *Purrucker I* decision about Article 20, provided for three different categories of provisional measures, which is not easy for practitioners to understand.

The first category relates to the court having jurisdiction on the merits, on which judgements can circulate. Secondly, where there are courts not having jurisdiction on the merits, you have to check whether the provisions of Article 20 have been complied with and if so, the judgement has effect in the state where it was given but no cross-border effect. However, the CJEU stated, against the previously prevailing opinion, that the judgment issued by the court not having jurisdiction on the merits could circulate under national law or under other international instruments. That was a new addition triggered by the Advocate General and followed by the CJEU. Besides, there is a third category: a decision adopting a provisional measure without having jurisdiction on the merits and without meeting the requirements of Article 20. Therefore, there is a provisional measure, but it should have never been given. There is no remedy to block this kind of measures under the Regulation.

[37] CJEU, Judgment of 15 July 2010, *Purrucker I*, C-256/09, ECLI:EU:C:2010:437.

### *1.3.8. Mediation*

The recourse to mediation for the child abduction cases was very much commented in the EUFam's national seminars. Recourse to mediation for child abduction cases is by no means a new development within the EU. As of 1987, recourse to the *European Parliament Mediator for International Parental Child Abduction*[38] has been viable.

However, it has now been explicitly introduced in the Proposal for recasting a Regulation (notably, the Brussels IIa Regulation). Among the PIL practitioners, it's worth noting that the views are divided, expressing the advantages of mediation for these cases on the one hand (as a soft remedy to reach a solution by the parties), but also highlighting some disadvantages, such as the tense situation between the parents or the use of mediation to stall the proceedings (as was shown in the ECtHR *Raw and others vs. France*, 10131/11). Although the Proposal states that the mediation shouldn't unduly delay the proceedings, it might be problematic to distinguish between a *mala fide* behavior and the genuine need for more time for reaching a common solution.

In regard to mediation, the invited expert (representative of the European Commission) highlighted that the proposed rule is in the Chapter on child abduction. This provision has been proposed because many Central Authorities under the Child Abduction Convention already provide a mediation framework and help the parents (the abductor parent and the left behind) to get together on speaking terms. Taking into account this experience, Article 23 of the Proposal establishes that a court to which a return application under The Hague Convention has been made, shall examine as early as possible whether the parents are willing to engage in mediation. As for the European Parliament Mediator, the expert informed that the main problem of this figure is the lack of funding and legal basis for performing its functions.

### *1.3.9. The one appeal-limit for the cases of child abduction*

The one appeal-limit for the cases of child abduction was also addressed in some EUFam's national reports and therefore it was a topic of discussion during the International Exchange seminar. The length in the proceedings for cases of child abduction has always been a general complaint. The Regulation does not contain rules on the appeal instances allowed in each jurisdiction, but the

[38] More information is available at: http://www.europarl.europa.eu/atyourservice/en/20150201PVL00040/Child-abduction-mediator (last accessed on 9 June 2017).

Commission proposes to limit them to one. Here, some questions arise regarding the kind and the nature of appeal allowed (second instance or only cassation). Another question relates to whether as a result of this one appeal-limit, it would be appropriate to oblige the first instance court to introduce preliminary questions to the CJEU, if necessary and taking into account that the number of instances hearing the case is much more limited.

The invited expert (representative of the European Commission) explained that some Member States (like Germany or Italy) already have limited the appeals to only one. Some countries even allow the provisional enforcement of the judgment given in first instance, as the appeal can take too long to be decided. Therefore, the Commission has proposed a one appeal-limit. And, in order to respect the autonomy of the Member States, the wording has been deliberately left open. Like that, each Member State is free to choose the kind of appeal covered by the limit. Additionally, it was problematic to explicitly state if the appeal covered had to be ordinary or extraordinary, as those categories differ from country to country. There are also constitutional concerns to be considered, as the recourse to constitutional courts cannot be excluded.

#### *1.3.10. Concentration of courts for child abduction cases*

Another issue discussed during some EUFam's national seminars was the concentration of courts for child abduction cases. The current version of the Regulation does not encompass provisions regarding the concentration of courts for child abduction cases. Nevertheless, this is a practice that has been already carried out by some Member States and has now been included in the Commission's Proposal. It should be noted here that the size of the different countries in the EU varies a lot, subsequently posing the question of whether the smaller countries really need such a concentration. Moreover, the Memorandum of the Commission's Proposal highlights the value of the experience. However, another key feature for reaching specialization and celerity in the proceedings is formation.

Concerning the topic of concentration of jurisdiction, invited expert (representative of the European Commission) shared the concerns of the Member States who have already such concentration because they fear that the CJEU will interpret this provision in a different way as they are already carrying it out. However, the practitioners from Member States where this practice doesn't exist yet have welcome this change, which was difficult for them to introduce in their own jurisdictions.

Regarding the small countries in the EU, the expert pointed out that a similar provision is already working well under the Community Design Regulation[39], which establishes to limit the number of courts to the maximum possible. The expert recognized that more information in the recitals might be helpful in this regard.

As for the training of judges, the expert agreed that the training is a necessary part of specialization and has to come before gaining experience.

A British academic informed on some statistics, indicating that 80% of all the appeals introduced at the European Union level upheld the first instance decisions.

A Greek academic followed up, sharing his view that the system in general is complicated enough to limit the number of appeals –with the overriding mechanism and alike provisions–. In his opinion, no limits to the appeals should be set up.

Regarding the issue of the kind of appeal allowed, a Spanish judge informed about the last reform of Spanish law, in which only one appeal is possible, and this appeal in an ordinary one. However, whereas recourse to the Supreme Court is not possible anymore, it is still admitted to file a claim before the Constitutional Court.

Concerning the number of courts per country, the same Spanish judge argued that it is very complex to fulfill a strict limitation in complex countries like Spain, with many regions.

He also shared the Spanish experience regarding the provisional enforcement of the first-instance decisions. In the past, this was possible in Spain. However, the second-appeal courts had the power to immediately suspend the provisional enforcement, on the ground of the best interest of the child, which frequently occurred. As a result, the system was not efficient and reversed. In his view, in order to avoid these problems, the best solution would be to have a rapid ruling at the second-instance level on which enforcement can be done without being suspended.

[39] Article 80.1 of the Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs amended by Council Regulation No 1891/2006 of 18 December 2006 amending Regulations (EC) No 6/2002 and (EC) No 40/94 to give effect to the accession of the European Community to the Geneva Act of the Hague Agreement concerning the international registration of industrial designs (*OJ* L 386 of 29/12/2006): "The Member States shall designate in their territories as limited a number as possible of national courts and tribunals of first and second instance (Community design courts) which shall perform the functions assigned to them by this Regulation".

An Italian academic shared her opinion on the need of concentration jurisdiction not only for child abduction cases, but also for parental responsibility cases.

The representative of the European Commission disagreed in this point. In her view, the two issues have to be kept separately. She explained that the proceedings under the 1980 Hague Child Abduction Convention take place in a State which does not have jurisdiction over the substance of parental responsibility. She continued stating that the only common area for these two kind of cases is the overriding mechanism, where the court has issued an order on non-return pursuant to Article 13 of the 1980 Hague Convention and then a family court which has jurisdiction over the substance of the parental responsibility has to decide whether the child shall be retuned nonetheless. She pointed out that in Belgium the concentration of jurisdiction is established for both overriding mechanism proceedings and parental responsibility cases, and this creates problems because it delays the proceedings. While a case of child abduction is heard by a local court, if the other country decides against the return of the child to Belgium, then the jurisdiction for assessing the application of the overriding mechanism and the question of custody is given to another court. This change of courts creates delays.

#### *1.3.11. Coordination among Central Authorities*

The improvement of the coordination among Central Authorities is also a key feature for analysis. The coordination among Central Authorities, although in general has been described as positive (for example, looking at the answers provided to the EUFam's Questionnaire), it has received some critique, when comparing how certain Central Authorities from some countries deal with their issues better than others. The Commission in its Proposal focuses on the strengthening of resources of these Central Authorities.

A representative from the Croatian Central Authority emphasized the importance of strengthening the resources of the Central Authority, especially in view of some additional functions and additional responsibilities. She welcomed the new provision in the Commission's Proposal in this regard.

A British academic agreed that the resources are very important. However, some governments argue that this is an interference with national independence.

The invited expert (representative of the European Commission) explained that the new rule on the resources for Central Authorities seeks to help these bodies by creating an international obligation to fulfill that serves as justification for getting support at the national budgetary negotiations.

#### *1.3.12. Protection of unaccompanied minors*

The phenomenon of the large amounts of refugees coming to Europe as a result of the Syrian war emphasized the problem of establishing some kind of protection upon unaccompanied minors. Here, the question for the debate was if the rules contained in Brussels IIa are of assistance. Only two interventions from the audience followed.

A Spanish academic informed that to her knowledge there is no case as such in the case-law of the different Member States. But she recalled the CJEU case C-648/11[40]. In this case, the CJEU decided that where an unaccompanied minor with no member of his family legally present in the territory of a Member State has lodged asylum applications in more than one Member State, the Member State in which that minor is present after having lodged an asylum application there is to be designated the 'Member State responsible'.

A Belgian academic shared the information she gathered after contacting Central Authorities on this issue, but they did not have cases on unaccompanied minors. However, she described two cases where two families of refugees were split up, being the children with one of the parents. And the Central Authorities used Brussels IIa and the 1980 Hague Convention for establishing contact between the children and the absent parent, although neither of the cases were child abduction cases.

## 2. The application of the Maintenance Regulation in practice (Regulation and Hague Protocol)

### 2.1. Fragmentation of family matters between different regulations

From the observations collected through the national seminars and the EUFam's database, the main issue regarding the Maintenance Regulation seems to be the fragmentation of family matters between various instruments. The different texts in force notably have different scope, different

[40] CJEU, Judgment of 6 June 2013, *MA, BT, DA v Secretary of State for the Home Department*, C 648/11, ECLI:EU:C:2013:367.

grounds of jurisdiction and different procedures for recognition and enforcement.

The case law collected demonstrates that this confusion results in many courts correctly establishing jurisdiction as regard to divorce or parental responsibility but then rule on maintenance without applying the corresponding Regulation.

Courts also have difficulties while applying the provisions to concentrate proceedings. The *A v. B* case[41] is an illustration of that. The Court of Justice of the European Union had to decide whether a maintenance claim was ancillary to divorce (Article 3(c)) or to parental responsibility (Article 3(d)). It was finally decided that parental responsibility proceedings have "priority" when the maintenance claim concerns children.

The invited expert (British academic) firstly explained that the problem of not, or incorrectly, applying the maintenance instrument is not new. Before 18 June 2011, the Brussels I Regulation[42] was applicable to maintenance matters and judges, as well as lawyers, already tended to misapply the text. The difficulties should therefore be solved by improving awareness of the Regulation, notably through training, to ensure that both judges and lawyers understand the rules and apply them correctly so that the system can work as best as possible.

On the lack of coordination amongst instruments, it was explained that separate proceedings in two different Member States might create legal uncertainty and incur additional costs for specialised legal advice. It was stressed that those issues are inherent in the rules of the instruments. While the various possibilities offered in Brussels IIa for divorce do create inconsistency, in practice jurisdictions often does coincide. Indeed, if parties rely on the habitual residence, the difficulties can be avoided as across all matters it is the key connecting factor. It was added that referring to the current habitual residence also eases the enforcement process.

Another solution would be to change the texts but it seems very unlikely in practice. As the Regulations are there and stand as they are, the solution seems to be, again, to raise awareness and improve training so that the texts are used properly. Especially, as provisions to help ensuring consistency and coherence exist.

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[41] CJEU, Judgment of 16 July 2015, *A v B*, C-184/14, ECLI:EU:C:2015:479

[42] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *O.J. L 12, p. 1* (hereinafter the Brussels I Regulation).

Concerning party autonomy, it was explained that there does not seem to be any policy explanation regarding the inconsistencies. It was stressed that under Brussels IIa Regulation there is the possibility of prorogation of jurisdiction for cases involving children but not for adults whereas for maintenance it is the opposite. The explanation does not lie with an idea of protecting the weaker party.

Coming to recognition and enforcement, it was stressed that again the rules are incoherent, not only amongst the instruments but also within the Maintenance Regulation as such. There seems to be no real policy justification on that. However, because these issues are inherent in the rules of the instrument there is no quick fix. The only solution lies again with training.

### 2.2. Jurisdictional grounds and public authorities

A question that was discussed during the national seminars concerned public authorities. They often act in place of the original creditor to recover maintenance debts and in that situation, it is seemingly unclear whether they themselves can rely on the habitual residence of the creditor to seize a court (Article 3(b), Maintenance Regulation). Recital 14 has been interpreted by some as meaning the Authority could indeed act on that ground, whereas others believed the recital only concerned recognition and enforcement.

The invited expert (British academic) argued that public bodies cannot rely on the habitual residence of the original creditor. She referred to the definition of creditor found in Article 2(10) which refers to an "individual". Article 64 makes an exception to this definition by indicating that public bodies can be creditors but for recognition and enforcement purposes only. Reading those two Articles in conjunction with Recital 14, intentionally excludes public bodies as creditors for the purpose of jurisdiction. This approach is also confirmed by the case law of the CJEU under the Brussels Convention.

The expert specified that although public bodies have to act at the place of the debtor (Article 3(a), Maintenance Regulation), regarding applicable law, the law of the habitual residence of the creditor normally applies (Article 3, 2007 Hague Protocol). In case public bodies are not able to collect maintenance debts based on that law, they are likely to fall within Article 4(1)(b) of the 2007 Hague Protocol which provides that the law of the forum should apply. If however the public body creditor is not entitled to maintenance under that law, then the law of the creditor applies instead. As a

result, the public body should always be able to obtain a maintenance order in the State of the debtor's habitual residence if they are entitled to make the claim under the law of the State of their habitual residence. Regarding a claim for reimbursement, Article 10 of the 2007 Hague Protocol specifies that the law of the public body will apply in any event.

A representative of the German Central Authority explained that there is a problem with Article 3(b) not only as regard to applicable law but also concerning legal aid that public bodies can receive. She also explained that they usually reassign a reimbursement claim to the creditor.

A French lawyer explained that couples that opt for the court of the joint nationality, often do so not only to get an easy divorce but also for financial reasons. However, the "loosing" spouse will then not agree for the child support to be dealt at the same place and will prefer to go to the place of habitual residence of the children for what concerns them. There are two difficulties for practitioners in that case: the long gap between the two decisions and also the notion of child support that varies across Member States (e.g. including the accommodation fees or not). Some kind of harmonisation would therefore be very helpful for practitioners.

### 2.3. The Hague Convention and Protocol

A third issue regards The Hague 2007 Convention[43] and 2007 Protocol that determine the applicable law. The main aspect that has been discussed at national level concerns the application of both instruments and their relation as regards to third States. Especially when a State is party to the Convention but not the Protocol (Albania, Japan, Switzerland and Turkey). For some participants, only the Convention can apply whereas for others, the intention to include third States within the Protocol was expressed in the drafting materials.

The invited expert (British academic) stated that the explanatory report[44] seems to suggest that priority should be given to the 2007 Protocol in states that are signatory to both. But the 1973 Convention can still apply in states that have not moved onto The Hague 2007 Protocol. She additionally stressed that given the universal application of the Hague 2007 Protocol, it does not matter that the law designated corresponds to a non-contracting State (universal application).

[43] The Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance (hereinafter the 2007 Hague Convention).
[44] Explanatory Report on The Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.

Another difficulty raised regarding The Hague 2007 Protocol is the interpretation of the term "closer connection" in Article 5, applying in case of annulment of the marriage. The invited expert (British academic) suggested that the provision is meant for use in cases where the closer connection is obvious and only when a party objects to the other law. In examining that possibility, the explanatory report indicates that the court should consider all connections to the marriage, and assess whether they are more or less significant than the current habitual residence of the creditor. The parties spent most of their married life in one State (*e.g.* Austria) and that is a different State to the State of the applicable law under Article 3 (*e.g.* Italy). In that case Austrian law has a closer connection to the marriage. She added that the closer connection has to be to the marriage itself not the spouses generally.

An academic from Belgium explained that Article 5 is not an easy provision. It is discretionary and is sometimes used too broadly in the sense that some courts use the provision to apply their own law. It is also unclear which period should be the reference to assess the closer connection, is it at the time the court is seized? The invited expert replied that from the explanatory report of the Hague 2007 Protocol, it is necessary to look at all the connections to the marriage since it occurred. The academic additionally wondered whether the fact that the closer connection favours the creditor should play a role.

A lawyer from France asked what the link with maintenance is when referring to the closer connection with the marriage. The place of the habitual residence seems like a more logical factor to assess the need of the creditor. The invited expert replied that if it is a new habitual residence there is not much link with the marriage itself. She added that this provision can be seen a bit as party autonomy since the parties object to one law in order to have another one applied. The same applies in case of submission to a court; the parties might have no actual connection to that court.

### 2.4. The nature of some benefits

At national seminars, the issue of the qualification of child benefits (*e.g. Kindergeld*), as State benefit or child income was brought up as it impacts the calculation of the maintenance payment.

The invited expert explained that this problem relates to national laws and how national systems are set up regarding the calculation of child support. In countries where child maintenance is decided purely on need, then State benefits may have more importance as a deduction from the calculation if

the child's needs are met. However, in countries where it is predominantly about making the responsible parent pay a percentage of their income towards the child, then anyway the amount of benefit available is not important; this is a different payment and should be considered as a different payment. This question of interpretation and calculation is therefore a matter of applicable law.

The invited expert further specified that State benefits will usually, if not always, be paid by the Government in the State of the creditor's habitual residence. The benefits are only going to be paid in line with national law, so it could be the case that even if an attempt to make a deduction from the money due by the paying parent is made, the deduction could be very low if State benefits are low. If the policy in the creditor's State is for the creditor to keep all money available in order to prevent child poverty then it could be against their public policy to deduct benefits from the maintenance calculation. It is a very complex topic. The problem will seemingly mainly appear in case of prorogation under Article 12 of Brussels IIa and Article 3(d) of the Maintenance Regulation. This is linked to the inconsistencies in the jurisdictional provisions across the instruments.

A representative of the German Central Authority explained that in Germany, irrelevant of the applicable law, there is a possibility to receive the difference if the amount of child benefit received is lower than in Germany. She specified that the Central Authority informs the mothers of that possibility. A German academic asked whether there is an explicative statement explaining that this would be excluded from the calculation of the maintenance of the child and the representative of the Central Authority confirmed.

A German academic referred to Article 11 of the Protocol which specifies that questions related to the calculation of the maintenance should be dealt with according to the applicable law. The problem is only when the jurisdiction, the applicable law and the country of habitual residence do not match. In that case, it is difficult to know how to integrate the different benefits in the calculation, as the different States have different approaches.

A representative of the Croatian Central Authority stated that in Croatia, they do not deal with the questions of children's allowance, under the EU and The Hague instruments but with the EU regulations which relate to coordination of social security issues.

### 2.5. Right to apply for a review

In relation to Article 19 of the Maintenance Regulation and the right to apply for a review, in case

of default of appearance, it is seemingly not clear which legal remedies are available, at which stage it is possible to apply (State of judgment or State of enforcement) and therefore to which court.

The invited expert stated that the problem of the competent court seems to relate only to an incorrect translation in the Croatian text. The review under Article 19 should take place in the State of origin – the State that issues the judgment. Regarding the remedy, she referred to Article 19(3) and explained that either the review should be rejected or the decision should be declared null and void. In the latter case, a new application for establishment of a decision must commence.

The expert further cited Article 21(3), explaining that a decision might be enforced even though it is later declared null and void based on Article 19.

A German academic inquired about the implementation process, at national level, to complement Article 19. The invited expert replied that the procedure to be followed for the review can be enacted by national law but regarding the remedy there is not much room left by Article 19(3).

It was noted that no practitioners attending the seminar ever applied the provision.

**2.6. Third States**

Beside the question of The Hague conventions, a problem raised relates to incomplete or unclear judgments from third states and parties subsequently applying in a Member State. It appears unclear whether the parties should start new proceedings to have a decision, or, that the claims on maintenance should be considered as a modification on the condition of the divorce.

The invited expert noted that this question is to be dealt with by national law as it is not covered by the Maintenance Regulation. She added that in England and Wales Part III of the 1984 Act allows the English courts to issue a decision on maintenance following an overseas divorce, either because no decision on maintenance was given or the maintenance awarded was too low.

**2.7. Central Authorities**

The main struggle appears to be that collaboration with, and amongst them is sometimes difficult. Additional to their difference in nature (judicial or administrative), their action and powers also differ across Member States.

The Court of Justice of the European Union was seized of a question on Central Authorities and maintenance in the case *M.S. v. P.S.*[45]. On 9 February 2017, it stated that the obligation for parties to go through Central Authorities to get enforcement, without having the possibility to directly seize the competent court, is contrary to the Maintenance Regulation.

The invited expert confirmed the difficulties evoked and additionally pointed out a difference in the resources available for Central Authorities. All those divergences reflect in the case law. She advocated for more clarity and structure and pointed out that the Proposal for the Brussels IIa recast does try to tackle the issue, notably trough allocating minimum resources. She stressed the importance of their function.

A representative of the German Central Authority said that in general, cooperation works. It can be really efficient. Concerning competences, she believed it would be helpful to concentrate. In some States, Authorities for outgoing and incoming cases are different and it complicates the communication.

A French practitioner who collaborated with Central Authorities from seven countries stressed that there are many problems of cooperation, of competency and of legal training but also of transparency. There are currently tensions between France and Austria regarding cooperation among their Authorities. He suggested that Central Authorities should be seen as public Authorities engaging the international responsibility of the States before the European Court of Human rights. He mentioned the case for which France was condemned for breach of Article 8 because the actions of the French Authorities were insufficient to execute a judgment ordering the return of a child[46]. Regarding, the Proposal for recasting Brussels IIa, the practitioner believes the European Commission did not go far enough. It should have provided clear transparency obligations to the Central Authorities.

A representative of the Croatian Central Authority explained than in Croatia the Central Authority depends on the Ministry for demography, youth and social policy and is also in charge of The Hague and New York Conventions. She stated that the cooperation is swift and efficient. They work mainly with Germany, Austria, Ireland and the United Kingdom. She also mentioned the

[45] CJEU, Judgment of 9 February 2017, *M.S. v. P.S.*, C-283/16, ECLI:EU:C:2017:104.
[46] ECtHR, *Raw and others v. France*, no 10131/11, 7 March 2013.

efficiency of the European Judicial Network, where they can have bilateral meetings when needed.

Regarding case C-283/16 (aforementioned) of the Court of Justice, the representative of the Croatian Central Authority asked how it articulates with Article 55 and recalled that under the 2007 Hague Convention, parties can apply directly to a Court. The invited expert explained that the two routes are possible and that it is not possible to force going through Central Authorities. However, if there is a request for legal aid, it is necessary to go through Central Authorities.

**2.8. The exequatur, language and translation**

On the exequatur, despite its abolition, it was stressed that recognition and enforcement remain difficult due to language and translation problems. Even though there are standardized forms available, the language versions are not always accurate. The forms are also perceived as being too numerous, complex and difficult to complete.

The invited expert first clarified that regarding enforcement as such, since the Regulation is in force for a few years, there are fewer and fewer *exequatur* as the newer procedure is now applicable to most cases. As regard to the public policy exception, the expert noted there hasn't been any real problem with the concept in the cases mentioned in the handout. Concerning the translation, she explained that it is a procedural issue and there is not much that can be done. Additionally, the expert mentioned Article 47 (Maintenance Regulation) and the need to provide legal aid for recognition and enforcement if it has been provided for establishment. Some States are not happy with this because they have different rules on legal aid internally even though for child support issues there is legal aid under the Regulation.

A representative of the German Central Authority noted that the forms are still new and therefore formation is important for everyone and the Authority works on that.

A representative of the Croatian Central Authority mentioned that all the forms were not available in Croatian on the E-portal website and it delayed the process but it has now been solved. She then explained it was not clear whether the forms should be filled in the language of the country issuing the decision or the language of the one receiving it. And depending on the answer, who should bear the translation costs when the translation tools on the portal are not sufficient? The invited expert replied that according to Article 59, there is an obligation to translate only when necessary.

An Academic from Croatia inquired about adjustment – automatic or not – of the amount of the maintenance obligation and the impact it can have on enforcement. There does not seem to be cases concerned in the database constituted so far. A German practitioner explained that this automatic adjustment exists in Germany and does not seem to create problems. The academic from Croatia continued stating that the problem is when German judgments are to be enforced in states where this adjustment does not exist. A German practitioner replied that the answer lays in a judgment being concrete enough and also referred to the 2007 Hague Convention system.

### 2.9. Maintenance and Brexit

On maintenance and Brexit, the invited expert explained that the United Kingdom will hopefully join the 2007 Hague Convention as an independent State. It should be enough as regard to child support as it is similar to the current system (Central Authorities, legal aid). The only difference is its indirect rules of jurisdiction but they are kind of equivalent to the rules in the EU Regulation so if there is jurisdiction under the EU Regulation then it should be recognized in the UK under the indirect rules in the 2007 Convention. The only problem would be the missing *lis pendens*, if there are families that are trying to seize courts in a Member State and the United Kingdom, then the case could end up with two sets of on-going proceedings but hopefully for child support that will not be too much of a problem.

A German academic underlined that the question of the interplay between the EU and The Hague instruments will become of central importance.

## 3. Succession Regulation: selected questions

The expert who briefly assessed the Succession Regulation is a researcher of the MPI-Luxembourg. Here follows a summary on the presentation on this topic.

The Succession Regulation was not much touched upon in the national meetings, possibly because the practice on the Regulation is necessarily limited. Still, there are three preliminary references to the CJEU which are pending and several national decisions which already show the variety of constellations practitioners will meet in the future.

### 3.1. Three requests to the CJEU have been lodged

The first one relates to the *Kubicka* case[47]. The question asked is if Articles 1.2.k and l, or 31 of the Succession Regulation should be interpreted as rejecting the effects of the *legatum per vindicationem* foreseen by the law governing the succession, when this figure relates to an immoveable situated in a Member State in whose legal system the *legatum per vindicationem* does not have real direct effect.

Another pending case is the *Mahnkopf* case[48]. The questions asked by the referring court are the following ones: "1. Is Article 1(1) of the EU Succession Regulation (1) to be interpreted as meaning that the scope of the regulation ('succession') also covers provisions of national law which, like Paragraph 1371(1) of the German *Bürgerliches Gesetzbuch* (BGB, Civil Code), govern questions relating to matrimonial property regimes after the death of one spouse by increasing the share of the estate on intestacy of the other spouse?

2. If the first question is answered in the negative, are Articles 68(l) and 67(1) of the EU Succession Regulation in any case to be interpreted as meaning that the share of the surviving spouse may be recorded in full in the European Certificate of Succession, even if a portion of it stems from an increase pursuant to a rule governing matrimonial property regimes like Paragraph 1371(1) of the Civil Code?

3. If this question is to be answered in the negative in principle, can it nevertheless be answered in the affirmative exceptionally for situations (…)".

The last one is the *Oberle* case[49]. Here the issue relates to the scope of the jurisdiction for producing certificates of succession: "Is Article 4 of 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 (1) (Regulation No 650/2012) to be interpreted as meaning that it also determines exclusive international jurisdiction in respect of the granting, in the Member States, of national certificates of succession which have not

[47] CJEU, *Kubicka*, C-218/16, Advocate General Conclusions, ECLI:EU:C:2017:387.
[48] CJEU, *Mahnkopf*, C-558/16.
[49] CJEU, *Oberle*, C-20/17.

been replaced by the European certificate of succession (see Article 62(3) of Regulation No 650/2012), with the result that divergent provisions adopted by national legislatures with regard to international jurisdiction in respect of the granting of national certificates of succession — such as Paragraph 105 of the *Familiengesetzbuch* (the Family Code) in Germany — are ineffective on the ground that they infringe higher-ranking European law?"

### 3.2. Several national decisions which already show the variety of constellations practitioners will have to address in the future

#### *3.2.1. Doubts on the scope of application of the Regulation*

*3.2.1.1. Personal scope and doubts related to UK citizens*

- Whether the Regulation applies to the will of a UK national whose habitual residence was in Spain was a question for dispute in Spain, correctly decided by the *Resolución de la DGRN* (Spain) of June 15, 2016.

- Does a British citizen have a right to a European certificate of succession? The issue was tackled with by the First Instance Court of Yambol (Bulgaria). The Regional Court held that as the UK was not part of the Regulation, an issue of a Certificate for a British citizen would run contrary to the purposes of the Succession Regulation. The District Court of Yambol quashed the first instance decision and sent the case back to the Regional Court. It explained that Recital 72 of the Regulation clearly states that the court should issue the Certificate upon request. It is true that the Certificate shall not take the place of internal documents used for similar purposes in the Member States (Article 62 para. 3). However, the issue of the Certificate upon request is mandatory.

*3.2.1.2. Temporal scope and transitional provisions:*

Two contradictory (at least, apparently) *Resoluciones de la DGRN* (Spain), one of June 15, 2016 and the other of April 10, 2017 must be recalled here. With the exception of the nationality of the deceased (one was a Britt, the other one a German national), the underlying facts are very similar: both deceased had their habitual residence in Spain at the time of death. The British citizen had granted his will in 2003 before a Spanish Notary. He died after August 17, 2015. The German national had made it in 2014 (the Regulation was already in force although it did not apply), passing away as well after August 17, 2015.

Both had appointed as sole heir their respective wives, although they had at least one child –who according to Spanish law is a forced heir–.

In both cases there was a discussion about the applicable law: whether it was Spanish law, as a default rule, or English/German law. In the first case, the DGRN got to the conclusion that there had been a *professio iuris* in favor of English law; but not in the latter case.

The first decision sought support on art. 83.4 Succession Regulation: "If a disposition of property upon death was made prior to 17 August 2015 in accordance with the law which the deceased could have chosen in accordance with this Regulation, that law shall be deemed to have been chosen as the law applicable to the succession."

The disposition *in favor of the sole wife* would provide the base for the application of this provision, the consequence of which is that the law that could have been chosen applies not only to the particular disposition of property upon death, but to the whole will. In the expert's opinion, the reasoning may be correct, and could explain the difference with the second case (besides the date of the drafting of the will: 2003-2014, although it is not sure to what extent this is relevant, for the person that could still die before the entering into force of the Regulation): if German law does not allow for a disposition in the sole favor of the wife, Article 83.4 Succession Regulation would not have played any role here. However, the DGRN also refers to Article 22, as if the legal institution foreseen there and in Article 83.4 were the same. Actually it is not: whereas Article 22 allows for a choice of law and in particular for an implicit one, Article 83.4 establishes the fiction that a law has been chosen. The difference is clear: the actual will of the testator is only relevant under Article 22; for the purposes of Article 83.4 what matters is that the law that could have been chosen renders valid the disposition of property.

### *3.2.2. Jurisdiction: Habitual residence and the systemic relations or relations between EU instruments*

1) The *Kammergerich Berlin* in a decision of 26 April 2016 interpreted the concept of "habitual residence" in the lines on the CJEU case-law as elaborated for the Brussels IIa Regulation. This point had been raised at the EUFam's German National Seminar, where the prevailing opinion was expressed in the sense that the "habitual residence" in the context of the Succession Regulation

shall be interpreted for this Regulation, following its Recital 23. The *Kammergerich Berlin* decided otherwise.

2) Conversely, the *OLG Hamburg*, several months later, in November 16, 2016, preferred an interpretation according to Recital 23. This case raises as well the question of the link between the choice of law by the deceased and the choice of forum by the heirs (Article 7). At the end it was nevertheless excluded since several parties to the proceedings had contested the jurisdiction of the court.

### *3.2.3. Applicable law*

*3.2.3.1. The Regulation and the national doctrine of renvoi*:

It is worth mentioning here the *Resolución de la DGRN* (Spain), July 4, 2016. In this decision, once it was decided that British law should apply the issue of *renvoi* popped up. The reason is "Spanish-specific": the Supreme Court has clarified the rol and scope of renvoi in the last decade in cases where the succession of British citizens was at stake. According to the Spanish Supreme Court *renvoi* is only admissible provided that it does not jeopardize the principles of unity and universality; and only to the first degree (*renvoi* to Spanish law).

The Succession Regulation includes a rule on *renvoi* (Article 34) imposing compulsory *renvoi* under the conditions and with the limits therein reflected. In the light of it, the DGRN correctly concluded that the Spanish principles on *renvoi* have no room under the Regulation.

*3.2.3.2. States with more than one legal system – territorial conflicts of laws (Article 36 Succession Regulation):*

The *Resolución de la DGRN* (Spain) of April 10, 2017 had to decide which Spanish law is applicable to the succession of a German citizen residing in Valencia. It did so according to article 36 Succession Regulation, which replaces the national solution.

### *3.2.4. Good practice – trying to avoid the duplication of proceedings*

A Croatian case, involving a German court, deals with this issue. The case dates from June, 6, 2016. A Croatian citizen (born in 1946) died in Zagreb (Croatia) on January, 25, 2016. His last habitual residence was in Croatia. Although he lived and worked in Germany for 25 years, when he retired

he moved to Croatia. During his life he had a close connection to Croatia; he owned a house and regularly went to visit his family during holidays. Almost all of his property (both movable and immovable) was situated in Croatia. There was only a bank account registered in his name in Hamburg, Germany. His heirs were a niece and two nephews.

The Croatian notary, as a body which exercises judicial function, applied the Succession Regulation properly and decided in the matter. The notary established his jurisdiction according to Article 4 since the habitual residence of the deceased was in Croatia and applied Croatian law according to Article 21, both of the Succession Regulation. As a measure of precaution the notary contacted the local court in Hamburg (Germany) in order to check whether proceedings have been initiated at the German court. The notary received a notification from the Municipal court in Hamburg, Germany on May, 18th 2016 which confirmed that no proceedings have been initiated in the matter.