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GIURIDICI E STORICO-POLITICI



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Dipartimento
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ASOCIACION ESPAÑOLA DE ABOGADOS DE FAMILIA

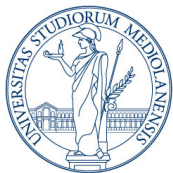


EUFAM'S POLICY GUIDELINES

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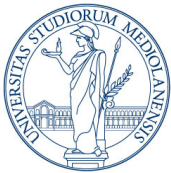


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LIST OF ABBREVIATIONS

Brussels I Regulation - Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (In Official Journal of the European Union L 012, 16 January 2001)

Brussels Ia Regulation - 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 (In Official Journal of the European Union L 351, 20 December 2012)

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

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

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

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

Matrimonial Property Regime Regulation - 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 (in Official Journal of the European Union No L 183 of 8 July 2016)

Brussels IIa Recast Proposal - Proposal of 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) of 30 June 2016, COM(2016)411final, 2016/0190 (CNS)

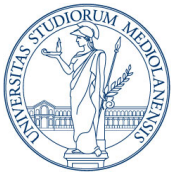
Regulation on the Property Consequences of Registered Partnerships - Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the



area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships (in Official Journal of the European Union No L 183 of 8 July 2016)

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

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



1. INTRODUCTION

One of the deliverables of the EUFam's Project is to formulate policy guidelines for amendments to the current Regulations, and to submit them to the EU legislator with a view to taking further steps in the direction of removing the current obstacles to the free movement of persons.

Currently, the European legislation on family matters is spread out in multiple Regulations that regulate in a fragmentary, yet interconnected, manner relationships of a different nature.

The situation gets more complicated with number of multilateral agreements previously acceded by Member States. Recently such agreements which fall into the external competence are adopted directly by EU.

The multitude of Regulations applicable to family matters and the number of variables they put forth in relation to both the grounds of jurisdiction and the applicable law, as well as the mechanisms for recognition and enforcement of foreign judgments, path the way to several coordination problems. When spouses file for a divorce, the court will therefore have to determine its jurisdiction based on the Brussels IIa Regulation, but the court might also have to apply other European instruments or even national private international law, in order to establish jurisdiction for any other (related) claim.

The chances of multiplication of potential fora are further emphasized with reference to the CJEU case law.¹

The piecemeal approach of the European legislation may result in multiple courts simultaneously hearing cases concerning the same parties and essentially the same issues. Beside this example, a few other issues have been encountered in the case law.²

All the issues listed below were addressed in the EUFam's First Assessment Report, in a few EUFam's national reports and discussed during the International Exchange Seminar

¹ E.g. cases CJEU, 16 July 2009, case C-168/08, *Hadadi*, ECLI:EU:C:2009:474, and CJEU, 16 July 2015, case C-184/14, *A v B.*, ECLI:EU:C:2015:479.

² See VIARENGO, VILLATA (eds.), *EUFam's First Assessment Report on the case-law collected by the Research Consortium*, (hereinafter: *EUFam's First assessment report*) as well as The EUFam's database, available at www.eufams.unimi.it



held in Luxembourg in May 2017. In addition, it must be highlighted that this document takes into consideration the Proposal for the Brussels IIa Recast Regulation.³

Referrals to the original EUFam's deliverables are available in footnote.

This document is divided into two parts:

1. Cross-cutting issues, dealing with some issues regarding aspects related to all EU family law instruments;
2. Specific issues regarding the existing legal tools, focusing on problems encountered in the EUFam's survey. Each issue is analysed by assessing the problem, formulating a policy recommendation, and, possibly, proposing an article amendment.

2. CROSS-CUTTING ISSUES

COINCIDENCE OF *FORUM* AND *IUS*⁴

Assessment

A main issue is the discrepancy and the lack of coordination between the grounds of jurisdiction and the connecting factors set by the Brussels IIa and the Rome III Regulations respectively. As pointed out in the EUFam's national seminars, the coincidence between *forum* and *ius* ensures a swift application of the law and limits additional delays and costs relating to the application of a foreign law.⁵ This occurs for several reasons. First, judges are obviously more acquainted with the application of their own national law, which means that they will be more thorough and precise when applying said law. Second, although EU integration greatly contributed to the integration of the EU national legal systems, linguistic differences still constitute an obstacle in ascertaining and applying a foreign law, especially when it comes to gather interpretative practice and lower-courts case law. Finally, applying several laws to the

³ (COM(2016) 411 final).

⁴ This paragraph shall be attributed to: Ilaria Viarengo, Filippo Marchetti.

⁵ EUFam's Report on Internationally Shared Good Practices, p. 14, as well as Spanish Report on Good Practices, p. 6.



same proceeding may have the side effect of leading to results that may not be considered entirely fair due to the potential incompatibility of the various rules applied.

Recommendation

Even if a complete coordination does not appear uncomplicated to achieve due to the intrinsic multifaceted nature of family law, two solutions may be envisaged.

First, the introduction of new rules on choice-of-court-agreements in the upcoming Brussels IIa Recast Regulation would be certainly welcome. This need will become even more urgent once the Regulation on matrimonial property regimes will be in force. Indeed, whenever a couple has changed their habitual residence during the marriage, Article 26(1) of said Regulation leads to the application of the law of the first common habitual residence. However, in such circumstances, based on the other Regulations, jurisdiction normally lies with the courts of the present or last habitual residence of the spouses, and not with the court of the State of the first common habitual residence. Therefore, courts will have to apply a foreign law, which is not to be considered intrinsically negative, but it casts shadows on procedural efficiency whenever other aspects of the proceeding are regulated by a different law. This is also true in the event of the decease of one of the spouses, provided that under the Succession Regulation the court of the last habitual residence of the deceased has jurisdiction on succession and, by virtue of Article 4 of the Matrimonial Property Regimes Regulation, also on matters relating to the connected matrimonial property regime.

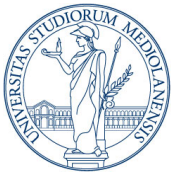
Another solution may be to follow the same approach as the Succession Regulation also in the framework of the Brussels IIa Regulation. Although this Regulation does not provide for an independent choice of court, it provides for a choice-of-court agreement in favour of the court of the State whose law the parties have chosen.

CONSOLIDATION OF PROCEEDINGS⁶

Assessment

i. Spouses-related disputes

⁶ This paragraph shall be attributed to: Arantxa Gandia Sellens, Amandine Faucon Alonso.



The Brussels Ila Regulation and the Maintenance Regulation are part of the European Regulations applicable to family matters. They provide grounds to establish jurisdiction in cross-border family cases. While both cover child-related matters, this section will mainly focus on spouse-related disputes. Indeed, litigation involving children requires specific rules to protect their best interest. They will be dealt with further below.

ii. Non-alignment of the jurisdictional grounds

Article 3 of the Brussels Ila Regulation provides for six grounds of jurisdiction based on the habitual residence, and one on the nationality,⁷ while the Maintenance Regulation only relies on two grounds linked to habitual residence (of the debtor and of the creditor).⁸ The latter additionally offers the possibility to seize the court having jurisdiction over matrimonial matters or parental responsibility.⁹ Due to this lack of consistency between jurisdictional grounds, parties cannot always seize the same court for each dispute. This is, for example, the case when the court seized for divorce is the court of nationality, as this option does not exist for maintenance. The opportunity to bring such claim as ancillary to matrimonial matters is also proscribed by the Regulation when the jurisdiction of that court is based on the nationality of one of the parties (Article 3(c) Maintenance Regulation).

iii. Alternative grounds of jurisdiction

Besides the lack of consistency, an additional difficulty arises because the above-mentioned different grounds of jurisdiction are set alternatively in both the Brussels Ila and Maintenance Regulations. It means that none of the jurisdictions designated prevail and that parties get an opportunity to opt for any of the possibilities listed. Since families covered by European instruments characteristically have cross-border features, those grounds usually point towards different countries. The outcome is a lack of certainty regarding the court to be seized and therefore undermines predictability as well as legal security. As a consequence, the so-called practice of “rushing to court” is

⁷ Art 3 of the Brussels Ila Regulation.

⁸ Art 3(a) and (b) of the Maintenance Regulation.

⁹ Art 3 (c) and (d) of the Maintenance Regulation.



encouraged since a better informed party can seize the most advantageous court and oblige other courts to decline jurisdiction due to the functioning of the *lis pendens* rules.¹⁰ This risk is especially significant since the conflict of laws rules are currently uniform only across seventeen Member States.¹¹ Some courts will therefore apply their national conflict rules, which might differ from the European solution, and offer a result which favours one of the spouses.¹² As an example, a Swedish husband living with his Swedish wife in Germany might “rush” to the Swedish court, despite the stronger links with Germany, because that jurisdiction will apply their conflict-of-laws rules and apply Swedish law (the *lex fori* principle applies in Sweden).¹³ The divorce will consequently be granted more easily than if the German court had been seized.¹⁴ There are currently no possibilities for the weaker spouse to counter that.

iv. Choice of court

Further difficulties in applying the Regulations regard the missing possibility of choosing the competent court. Such an opportunity is offered in Article 4 of the Maintenance Regulation while no equivalent provisions exist in Brussels IIa. The operation of Article 4 of the Maintenance Regulation is consequently undermined in practice as parties who decide to join the maintenance claim to the divorce proceedings end up in greater uncertainty due to the divorce court not being determined in advance. It also creates an enhanced “rush to court” when the divorce court is chosen to deal with maintenance as the court first seized for divorce will have competence for both matters. If parties

¹⁰ The Commission Staff Working Document, impact assessment, accompanying the document 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), thoroughly acknowledges the rush to court issue ({COM(2016) 411 final} {SWD(2016) 208 final}, p 14).

¹¹ The Rome III Regulation contains conflict of law rules for the 17 Member States party to the enhanced cooperation - Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, [2010] OJ L343/10.

¹² An article from the French Journal *Le monde* highlighted a similar situation regarding the rush to, or away from, British courts, well-known as a hub for getting divorced, mostly chosen by women. See: http://www.lemonde.fr/referendum-sur-le-brexit/article/2016/07/08/le-brexit-inquiete-les-hommes-fortunes-en-instance-de-divorce_4966171_4872498.html (last accessed: 27 November 2017).

¹³ https://e-justice.europa.eu/content_divorce-45-se-en.do?member=1 (last accessed: 27 November 2017).

¹⁴ In Sweden, except in specific circumstance, there are no requirements to be granted a divorce while in Germany the breakdown of the marriage must be established (Section 1565(1) of the German Civil Code, https://e-justice.europa.eu/content_divorce-45-en.do (last accessed: 27 November 2017).



desire certainty for maintenance, they might opt for the other grounds offered by Article 4 of the Maintenance Regulation: the court of nationality or habitual residence, but they will subsequently lose the guarantee of having the proceedings dealt with by the same court since the chosen court might not be the one having jurisdiction regarding divorce.

v. The problems

The impediments discussed are mostly problematic because they lead to different courts possibly having jurisdiction regarding various matters related to the same relationship. This multiplication of proceedings constitutes a risk of having contradictory judgments and entails increased judicial expenses and delays,¹⁵ which contradicts the purpose of those instruments. Additionally, the absence of coherence between both Regulations renders their understanding and application difficult not only for parties but also for legal practitioners and judges.

Recommendations

To tackle both difficulties and strengthen the functioning of European family law, various proposals are suggested.

Proposed amendments to the Brussels IIa Regulation

Relationships among spouses

Introduction of hierarchy

To prevent the so-called “rush to court” that currently arises from the alternative grounds set in the Regulation and the lack of uniform conflict-of-laws rules, the grounds of jurisdiction set in Article 3 of Brussels IIa should be reduced and placed in a hierarchical order. Such a policy would result in only one court having jurisdiction. A court seized in violation of the established order would thus have to decline jurisdiction, consequently undermining the possibility of rushing to court. The risk of parallel

¹⁵ Specialised legal advice required in different member states, due to multiple proceedings and the risk of rush to court, multiplies the costs which can consequently reach up to 15.000 EUR according to the impact assessment study ordered by the Commission on Brussels IIa, *op. cit.* p 15.



proceedings and contradictory judgments as well as the related costs are thus reduced while legal predictability and security is enhanced.

As a suggestion, based on the policy approach currently followed in European family law, the main ground would be the jurisdiction of the Member States where the couple has its common habitual residence, or failing that, the last common habitual residence. It is indeed largely accepted that such a court would have sufficient connection with the couple to be able to efficiently settle their dispute. In the situation where the couple no longer share a common habitual residence, the ground based on their last common residence could still be kept provided one spouse is still living in that country or that they lived there for a sufficient time. Should neither of them live there any longer, the habitual residence of the defendant would be applicable. In the situation where none of the grounds above points towards a Member State, then Article 7 on residual jurisdiction allows for national conflict rules to be applied to prevent a denial of justice. Article 7 could be replaced by a similar provision which would point towards the court of a Member State where the applicant has his current habitual residence.¹⁶

The main argument that has blocked the implementation of the hierarchy possibility is the lack of flexibility that a single competent court entails. Such a configuration might, indeed, not meet the necessary adaptation to the higher mobility of cross-border couples and their specific needs. Additionally, it generates a political hurdle in the sense that it results in indirectly designating the conflict-of-laws rules although some Member States have not agreed to them.¹⁷ As an example, Sweden would have to accept that when it is not the country of common habitual residence of the spouses, it will not be possible to seize the Swedish court and thereby apply Swedish law.¹⁸

Such impediments could be countered by a combination of two additional policies: flexibility can indeed occur ex-ante thanks to a choice of court possibility and ex-post through a transfer of the proceedings to a better placed court. Both policies are discussed in the following section.

¹⁶ It would apply when the defendant lives in a third state while the applicant lives in the EU.

¹⁷ COM(2016) 411 final} {SWD(2016) 208 final, *op. cit.*, p 20.

¹⁸ The *lex fori* principle applies in Sweden, see *supra*.



Ex ante. Introduction of party autonomy

A necessary counterpart to the rigidity of hierarchy, among the grounds of jurisdiction, is the introduction of a choice of court possibility. It would allow spouses who either (i) wish to be certain of the competent court despite their potential moves across countries, or (ii) wish to seize another court than the one designated by the general provision to thus agree on a court to hear their matrimonial dispute. As this opportunity currently exists under the Maintenance Regulation, amending Brussels IIa in this sense would also further enhance consistency among instruments while allowing spouses to ensure a consolidation of the proceedings that concern their family by opting for the same court.¹⁹ In the situation where consolidation is not their desire, they could use also refer to the choice-of-court provisions to designate different courts for matrimonial and maintenance matters. This would maximise flexibility for spouses without affecting predictability. These features are essential for cross-border families who tend to be connected to different States. Legal security is also maintained since such a court would have to be designated by a common agreement between both spouses.

Due to the specificity of family matters, party autonomy ought to be limited to an option between grounds that ensure a substantial connection between the court and the spouses.²⁰ It is traditionally recognised that countries meeting this requirement are the countries of habitual residence or nationality of either of the spouses. Given the connection of couples with their common habitual residence, a possibility to choose that court should exist even though none of the spouses resides in that country any longer. Such options would align with Article 4 of the Maintenance Regulation, thus ensuring the possibility to consolidate proceedings through a choice of court. To completely align both instruments, an additional ground should be the court having jurisdiction for maintenance claims.²¹

¹⁹ Party autonomy regarding the competent court is also consistent with the policy approach followed by Article 5 of the Rome III Regulation, which offers the possibility to choose the law applicable to divorce and legal separation.

²⁰ It should be noted that party autonomy is currently being increased in many EU Member States' family law. Cf., e.g., J M Scherpe, *The Present and Future of European Family Law* (Edward Elgar Publishing, 2016) 69.

²¹ Article 4 of the Maintenance Regulation, *vice versa*, already offers the possibility to seize the court competent for matrimonial matters (see *infra*).



Regarding the validity of the choice-of-court, the approach contained in the Maintenance Regulation could be followed as well. It entails a written agreement concluded by both parties at the latest when the court is seized. To strengthen the operation of the agreement and avoid contradictory judgments, this competence should be considered as exclusive.

Besides the arguments above, a choice of court provision would entail the same advantages offered by hierarchy, i.e., to prevent rush-to-court practice as well as ensuring reduction of costs incurred by multiple proceedings and specialised legal advice sought in different Member States. The impact assessment study ordered by the Commission has highlighted that 85% of stakeholders are in favour of a limited choice of court available to spouses to settle their matrimonial dispute.²² It should, however, be noted that party autonomy might be politically difficult to accept for Member States averse to other forms of marriage.

Ex post. Transfer of jurisdiction

The solutions based on the reduction of heads of jurisdiction, hierarchy and agreed jurisdiction should be complemented by introducing the possibility to transfer a case to a better placed court.

The idea of transfer to a court better placed to hear the case is already present in Article 15 of the Brussels IIa Regulation. However, this Article is only applicable to disputes related to parental responsibility and is limited to very specific situations and subject to substantive conditions (notably, the better placement depends on the best interests of the child).²³

Here, our proposal points to a rule which combines the philosophy behind the idea of transfer of jurisdiction and the connection among ancillary claims. Moreover, this proposal is aligned in an analogous manner to the one contained in the Green Paper on applicable law and jurisdiction in divorce matters presented by the Commission in 2005²⁴

²² COM(2016) 411 final} {SWD(2016) 208 final, *op. cit.*, p 22.

²³ See in detail Case C-428/15 *Child and Family Agency v J. D.* [2016] ECR EU:C:2016:819.

²⁴ Green Paper on applicable law and jurisdiction in divorce matters {SEC(2005) 331} COM/2005/0082 final.



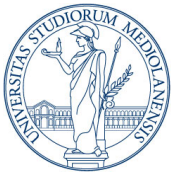
and also discussed in the Commission Staff Working Document Impact Assessment of 2016.²⁵

The scope of this rule would cover matrimonial matters, parental responsibility and maintenance claims. Therefore, a disposition in this regard would have to be included in both Brussels IIa and Maintenance Regulations. Concerning matrimonial matters, the suggested rule would contain a transfer of jurisdiction in favour of the court of another Member State, where proceedings on parental responsibility and/or maintenance are already ongoing (at an early stage),²⁶ if such a consolidation is advisable on a case-by-case basis.

Regarding the functioning of the rule, it would allow a consolidation of proceedings ex post. This means that when proceedings concerning a specific claim are at an early stage in the court of one Member State while other related claims are taking place in the courts of another State, the judge could decide to transfer the latter to concentrate proceedings. This mechanism would have to be applied only if certain conditions are met: its application would require the request of one of the parties and an assessment of the interests of justice at stake. Moreover, if among the involved claims there is one related to parental responsibility, the best interests of the child must be taken into consideration. A practical example concerning a case where this rule could be applicable would be a situation where a claim related to the divorce of a couple is filed in a Member State different from the Member State where that very same couple is involved in ongoing proceedings on parental responsibility and/or maintenance. This case might arise when a couple had already obtained a decision on legal separation, the questions on parental responsibility over the common children and maintenance still being unsolved, but in the meanwhile, one spouse files for divorce.

²⁵ Commission Staff Working Document Impact Assessment accompanying the document 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) SWD/2016/0207 final - 2016/0190 (CNS). The idea of transfer was rejected because “it may be expected to be difficult to reach unanimity on the appropriate criteria defining in which circumstances a transfer should be permitted” (paras. 1.6.3 and 1.7).

²⁶ Transfer will operate under the procedural rules of the Member States. It should also be noted that the ongoing proceedings for establishing provisional measures do not justify, in principle, such a transfer, since at such a stage the main proceedings are not deemed to have started yet.



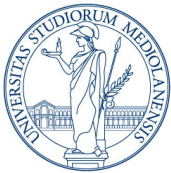
Finally, the whole transfer mechanism presupposes a close communication among judges in close collaboration with the parties involved in the proceedings. The ideal scenario would be to reach a common decision concerning jurisdiction by the judges seized with different claims regulated by different family law instruments but, at the same time, related to the same parties.

Parental responsibility

The rules of jurisdiction on parental responsibility entail fewer problems of rushing-to-court or legal uncertainty since the available grounds of jurisdiction are more limited,²⁷ in general, than those currently listed for matrimonial matters. Therefore, the connections used to establish jurisdiction in this field are considered to be suitable. However, consolidation of proceedings in the field of parental responsibility is, at the moment, fragmented. Indeed, the rules of jurisdiction contained in Brussels IIa allow claims over parental responsibility before the same court exercising jurisdiction in matrimonial matters to be concentrated (Article 12(1) of the Brussels IIa Regulation). In parallel, the rules of jurisdiction of the Maintenance Regulation allow a maintenance claim ancillary to the proceedings concerning the status of a person, on the one hand and, on the other hand, to the proceedings concerning parental responsibility to be consolidated (Article 3(c) and (d) of the Maintenance Regulation).

It is also worth mentioning here the possibility of transfer to a court better placed to hear the case, offered by Article 15 of the Brussels IIa Regulation. It could be argued that a judge could use this Article for transferring her jurisdiction to the court seized with ongoing proceedings on matrimonial matters and maintenance, if this is done in the best interest of the child. However, this possibility of consolidation is only open if the claims have been filed in such a way that permits jurisdiction to be seized in a particular order: first, using Article 3(c) of the Maintenance Regulation to consolidate the maintenance claim to the ongoing dispute on matrimonial matters and secondly, using Article 15 of the Brussels IIa Regulation to consolidate the claim over parental responsibility, filed shortly afterwards, to the ongoing proceedings on matrimonial

²⁷ Although it should be noted that judges might differently understand the notion of “best interests of the child”, which might affect legal certainty.



matters and maintenance. The same consolidation is possible in another situation: when the parental responsibility claim is being heard by the court seized with a question of matrimonial matters (by virtue of Article 12 of the Brussels IIa Regulation) and the claim on maintenance is then added to those ongoing proceedings using the ground established in Article 3(d) of the Maintenance Regulation. In both cases, however, the consolidation is only possible when the first dispute brought to court is the one related to matrimonial matters.

This fragmentary way of designing the rules does not allow for a consolidation of the claims related to matrimonial matters, parental responsibility and maintenance at the same time. It could be that one single court is competent to decide on these matters because the different instruments partially use similar connecting factors.²⁸ However, there is no guarantee that only one court has jurisdiction. The parties may seize different courts for different aspects of the same dispute.

Therefore, in the field of parental responsibility it would be necessary to either explicitly allow Article 15 of the Brussels IIa Regulation to be used for transferring jurisdiction to the court already seized with claims related to matrimonial matters and maintenance, in the interest of the child; or establish a new rule on transfer of jurisdiction in favour of the court already seized with those claims on matrimonial matters and maintenance, respecting the conditions of the request of one of the parties, the best interests of the child (which needs to be highlighted in matters of parental responsibility) and the interest of justice. In both cases, judicial communication among the judges involved should be fostered in order to reach a common decision as to the best placed court to hear the consolidated claims, if consolidation is advisable in the case at hand.

Proposed amendments to the Maintenance Regulation

The current operation of the Maintenance Regulation only permits limited avenues of rushing to the court. Although Article 3 of the Regulation provides for several alternative

²⁸ As shown by certain judgments from the EUFam's case law database: Audiencia Provincial Barcelona, 8 January 2015, 10/2015, ESS20150108; Tribunale di Belluno, 23 December 2014, ITF20141223; Tribunale di Padova, 15 February 2016, ITF20160215.



grounds of jurisdiction, they are more limited than in matrimonial matters: According to Article 4 of the Maintenance Regulation, jurisdiction lies either with (a) the court of the creditor or (b) at the defendant's habitual residence. The Article also offers a possibility to bring the maintenance claim to the court seized regarding divorce or parental responsibility thus allowing for consolidation of those claims. Moreover, Article 4 provides for a choice of court, and if the parties use this option, the incentive of filing first vanishes. It should also be noted that the claimant in maintenance cases is normally considered the "weaker" party, due to the supposed imbalance in economic terms of the claimant in comparison to the defendant. Therefore, the establishment of alternative grounds of jurisdiction in this area is not as problematic as concerning matrimonial matters.

In this vein, the current design of the grounds of jurisdiction in the Maintenance Regulation should be kept. However, difficulties regarding the operation of Articles 3 and 4 of the Maintenance Regulation occur in two situations. First, when the divorce court has been seized based on the nationality of the parties: Article 3(c) does not allow the spouses to bring their maintenance claim to that forum. Secondly, the possibilities of consolidation offered are set in two separate options, i.e. Article 3(c) and (d): an *a priori* combination of both sets of rules is not possible in order to give jurisdiction to one court to deal with all the claims.

A rule permitting the transfer of jurisdiction should be added to counter the two difficulties brought up and to allow consolidation, *ex-post*, when options offered by Article 3 have not been followed. This rule would operate on a case-by-case basis and when certain conditions are met: 1) if the consolidation is requested by one of the parties, 2) if the consolidation observes the interests of justice,²⁹ 3) if it responds to the best interests of the child³⁰ and 4) if the judges in charge of the relevant courts have reached a common decision on jurisdiction.

²⁹ It should be observed that consolidation is not always appropriate. The judges involved should consider if consolidation is really needed to solve the claims in terms of substance, taking into account that the parties involved in the different ongoing proceedings are the same and the subject matters of their disputes fall within family law and, therefore, might be connected to a certain extent.

³⁰ In this vein, the CJEU already stated that the best interest of the child should be assessed when the jurisdiction over maintenance claims is exercised by virtue of art. 3(d) of the Maintenance Regulation



PROOF OF FOREIGN LAW³¹

In general, the burden of proof of foreign law and the related costs constitute practical difficulties.³² At the EU level, the European Judicial Network is not working satisfactorily. 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. It may happen that also in the jurisdictions which provide for the *ex officio* application and ascertainment of foreign law by judges the parties must plead and prove foreign law. 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 the spouses. This law also tends to be chosen for cultural reasons and/or to secure recognition and enforcement.

In more general terms, there should be a clear stand at the EU level as to the mandatory character of conflict-of-laws rules. This is crucial to ensure the effectiveness of EU private international law. There are currently some Member States where private international law is simply left out if no party refers to it.

The analysis of the gathered case-law shows that regarding applicable law, it often occurs that maintenance, as well as parental responsibility issues, are regulated as if they were “de-facto issues”, without any reference to the relevant Regulations. The courts, after having established their jurisdiction based on the Brussels IIa Regulation and the Maintenance Regulation, rule on the merit, applying their own law. It is regrettable that some national courts only apply foreign law when it is requested by the parties. That is not compatible with the nature of EU Regulations. However, it always gets back to the question of costs.³³

In the field of EU Family Law, no Regulation expressly regulates either the imperative nature of its conflict rules, or provides that the applicable law should be applied ex

(when the maintenance claim is ancillary to the relevant proceedings concerning parental responsibility).
See Case C-184/14, *A v B* [2015] ECR EU:C:2015:479, para 46.

³¹ This paragraph shall be attributed to: Rosario Espinosa Calabuig.

³² See *EUFam's First Assessment Report*, p. 88-89.

³³ *EUFam's First Assessment Report*. p. 22.



officio by the judge. However, the absence of these rules should not be interpreted in the sense that both issues depend on the PIL of the forum.

Certainly, the existence of many divergencies among MS in this field make it difficult to regulate these issues at European level. However, it would be convenient in order to strengthen the functioning of the single market.

JUDICIAL TRAINING, AND JUDICIAL AND ADMINISTRATIVE COOPERATION³⁴

The cooperation mechanism, be it judicial, administrative or mixed, maximises the benefits of private international law rules. Efficient dispute resolution often gets at stake as families move around EU. Courts are faced with fact finding in foreign countries, with evidence in foreign language, hearing parties from abroad. In family disputes, social reports may be drafted or protective measures issued, in another Member States. Jurisdictional criteria in transfer proceedings, as well as in child abduction cases rely on cooperation.³⁵ Establishing *lis pendens* and other parallel procedure, like a rendered provisional measure, requires effective mechanism of cooperation.

Lack of formal and informal communication is evidenced by collected case law. Scarcely any record on usage of the European Judicial Network may be found. Benefits of IJHN are not employed, moreover, some of the Member States do not have a judge nominated to this network. Coherence amongst these parallel systems exists, as well as communication amongst nominated judges. This good practice should be pushed forward to every single Member State. External EU competence should be used to promote achieving cooperation in Third State cases relating to Hague Conference on Private International Law (HCCH) Contracting States.

³⁴ This paragraph shall be attributed to: Mirela Župan.

³⁵ On the cooperation among Central Authorities in cases of child abduction, see also *EUFam's First Assessment Report*, p. 42 et seq.



Proposal for a recital

Member States should foster employment of any available cooperation mechanism, EU or international. Synergy with IHJN should be promoted in international cases relating to relevant HCCH Conventions Contracting states.

Additional consideration in relation to cooperation relates to authorities which are not afforded by one. Case law particularly addressed the Civil Status Records Office and Public notary. In regards the first one, lack of mechanism of cooperation for Civil status records office hampers the effectiveness of legal protection in event of giving effects to parental responsibility decision rendered in another Member State, as far as public notary is concerned, its actions mainly relate to successions proceedings. At national seminar, the judges highlighted a difficulty in determining the cross-border element in the succession, also due to the limited information received from the parties. This seems particularly problematic in Member States which still adhere to initiations of proceedings in succession matters *ex officio*, like Croatia does for any Croatian deceased national. Without participation of the parties, the notary can only establish the domicile (from the documents received from the police) but not the habitual residence of the deceased. The latter is decisive for proper determination of a jurisdiction (Article 4) and applicable law (Article 21) under the Successions Regulation. The notary lacks information on the property located outside Croatia as well. The benefits of cooperation in relation to *lis pendens* have been addressed previously.

The mechanism of Central Authority system is envisioned as a logistical support to actors of cross-border parental responsibility procedures. Enormous workload, combined with limited funding and scarce human resources hinder achieving these goals. System of Central Authorities in Brussels IIa cases has been criticized for its time-consuming proceedings, lack of transparency, inconsistency and diverging practice throughout the EU. Internal rules on the organisation and structure of the Central Authority lead to different treatment of citizens in various EU countries. Problematic implementing legislation was lately highlighted by CJEU ruling in C-283/16 - S regarding the Maintenance Regulation as well.



Provisions relating to the functioning of the Central Authority have been extensively altered by the Brussels IIa Recast Proposal. Such course of development is laudable. However, some room for improvement still remains. The overall objective of EU civil justice in family matters may not set aside international obligations that Member States individually, or EU collectively, have towards Hague Conference on Private International Law. Such synergy is justified as EU has exclusive external competence to this area. Moreover, the Central Authority system of the regulations draws inspiration from such international instruments. Member States should be encouraged to synchronize the designation of a body to perform as Central Authority under the interconnected international instruments. Having in mind the overlapping scope of application of the Hague 1996, Hague 1980 with the Brussels IIa, and Maintenance Convention and the Regulation, overlapping of designated bodies should take place. Currently a number of Member States have designated different bodies, seated internally within different departments. Such a scheme impedes the functioning of the system as a whole. Hence, the EU should make sure that the abovementioned model of a Central Authority designation policy is abandoned.

Another aspect of cooperation, completely overlooked by the Brussels IIa Recast Proposal, deserves further consideration. It is the internal (national) cooperation system, which is a prerequisite of international cooperation system. Lack of an obligation placed upon Member States to improve internal cooperation of Central Authority with its intermediaries, amounts to ineffective international cooperation. Any concern that such a provision goes beyond the internal competence conferred to EU is ungrounded. If Member States conferred EU to enact rules on Central Authority, they are obliged to make the system function. If they may not provide its functioning individually, principle of subsidiarity obliges EU to engage with uniform rules.

At the moment, no time frame for actions taken by Central Authority is set. The Brussels IIa Recast should bring uniformity to this area, with general 8 weeks' time limit, and 6+6+6 weeks in child abductions. However, more clarity is needed with regards the moment the period starts pending. Namely, by vast majority the applications are incomplete at first they are submitted to the receiving Central Authority. Is the set time



frame counted from the moment of submission of the application or a complete application?

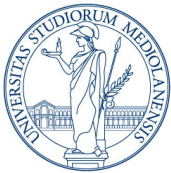
The Brussels IIa Recast should also provide for a timeframe for urgent cases, though it may be problematic to define such urgent applications since all of the child related matters are in its essence of such kind.

Regulations addressed previously provide many valuable lessons. Long *vacatio legis* is an opportunity to address the government to review any national legislation that may be affected and provide smooth application of the new Regulations. Any authority that would be affected with its application should be addressed and prepared.

ENHANCED COOPERATION³⁶

EU should find appropriate ways of addressing Members States that are still not bind with this Regulation, but have joined the system of other enhanced cooperation Regulation, such as Matrimonial Property. Multiplicity of legal sources jeopardizes smooth and proper administration of justice in cross-border cases.

³⁶ This paragraph shall be attributed to: Mirela Župan.



3. SPECIFIC ISSUES

A. BRUSSELS IIA REGULATION

MATRIMONIAL MATTERS

Same-sex marriage, registered partnerships³⁷

Assessment and recommendation

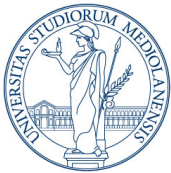
Regarding the material scope of application, there is a need for greater clarity as to whether the Regulation will address marriage in a broader sense including same-sex marriage. In the EU Fam's national reports and in the "Report on internationally shared good practices" it was suggested that same-sex marriages should be included within the Brussels Ila Recast Regulation. In that case, a careful assessment of Article 3 of Brussels Ila Regulation would be advisable.³⁸ Same sex couples ought to have access to a jurisdiction to hear about their judicial separation or divorce, not being guaranteed in the current state of affairs. This is particularly true for those cases where a couple made up of two citizens having the nationality of a EU country which does not recognize same-sex marriages and both habitually resident in that same country, validly married in another EU Member State. In fact, there would not be any court having jurisdiction for their separation under the Regulation.

Therefore, Article 3 should be modified in order to allow the couples who concluded a same-sex marriage in the European Union to have at least one forum for dissolving their marriage.³⁹

³⁷ This paragraph shall be attributed to: Mirjam Escher, Josef Wittmann.

³⁸ To clarify the inclusion of same-sex marriage a new Recital might be added to the Regulation, e.g.: "This regulation shall be applicable to all marriages and partnerships, regardless of the spouses' sex. Hereby it shall be guaranteed that marriages and partnerships concluded in the European Union have at least one forum for dissolution."

³⁹ Cf. the pending CJEU proceedings, *Coman and Others*, C- 673/16, regarding the recognition of the status of spouse acquired in a third State and the enjoyment of freedom of movement under the Directive 2004/38/EC



Moreover, it was argued that also registered partnerships ought to be included within the Brussels IIa Recast Regulation. If so, it would be useful to add an additional ground of jurisdiction in the Member State where the registered partnership was registered, following the example of the Regulation on property consequences of registered partnerships.⁴⁰ Therefore, the last step of the scale of jurisdiction factors should point to the Member State under whose law the mandatory registration of the partnership was made in order to establish it.

The silence of the proposal related to some important points such as a rule comparable to Article 10 of the Rome III Regulation or Article 9 of the Regulation on matrimonial property regimes should be reconsidered in the interests of consistency between all the European and international instruments.⁴¹

Private divorces⁴²

Assessment

The so-called “private divorces” fall under the broad category of foreign divorces declared (or constituted) without the intervention of a judicial authority. This broad heading groups: a) divorces constituted by non-judicial public authorities; b) divorces declared by public authorities; and c) purely private divorces agreed by the parties without the intervention of an authority (or when the intervening authority does not have official functions).⁴³

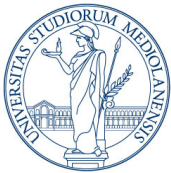
Nowadays within the EU in some Member States it is possible that non-judicial public authorities, like notaries, constitute/declare the divorce (these divorces correspond to categories a and b, just listed). In some cases, those notaries just give the necessary

⁴⁰ Such an additional ground of jurisdiction might be added as Article 3(1)(c), e.g.: “under whose law the registered partnership was created.”

⁴¹ It might be advisable to introduce a new article to produce consistency, e.g.: “If no court of a Member State having jurisdiction pursuant to Articles 3, 4 and 5 provides for divorce or legal separation on grounds of the spouses’ sex, jurisdiction shall lie with the courts of the Member State under whose law the marriage was concluded.”

⁴² This paragraph shall be attributed to: Arantxa Gandia Sellens.

⁴³ Calvo Caravaca/Carrascosa González, *Derecho internacional privado*, vol. II, 2016, pp 343-344.



formal requirement to the common will of the parties, only declaring the divorce (for example, in France)⁴⁴ or exercise judicial powers, constituting the divorce (for example, in Spain).⁴⁵

In both cases, the intervention of an authority can be seen as falling under the current concept of court in Brussels IIa or the concept of authority in the text proposed by the Commission in its Brussels IIa Recast Proposal. There is an ongoing discussion focused on the function developed by the authority that intervenes (either declaratory or constitutive) and the impact that this might have on the scope of application of the regulation. However, the majority of the authors agree that such a differentiation is not always easy to make and that the best way to avoid confusion is to cover under Brussels IIa all cases where an official authority is involved in the divorce.⁴⁶ There are also scholars who point to the use of Article 46 Brussels IIa if a marriage is terminated by a document formally drawn up by a notary or registered as authentic instrument,⁴⁷ however it is disputed if Article 46 is applicable only to titles with enforceable content or if, when there is no content to enforce, it is enough that the contents are capable of being recognized.⁴⁸

Regarding the intervention of religious authorities (without recognized *imperium*)⁴⁹ in the divorce or purely private divorces agreed by the parties in a common document (these divorces correspond to category c, following the list above), it is worth noting that purely private divorces do not exist in the EU -or at least not in the Member States participating in the Rome III Regulation- as the Advocate General stated in the recent

⁴⁴ MPI-Lux report, p. 7. Available at <http://www.eufams.unimi.it/wp-content/uploads/2017/06/Report-on-Internationally-Shared-Good-Practices-v2.pdf> (last visited on 6 December 2017).

⁴⁵ MPI-Lux report, p 10. See also DGRN no. 114/16 N.

⁴⁶ Pintens, W., p 54 in Magnus/Mankowski, Brussels IIa Regulation.

⁴⁷ Siehr, p 264 in Magnus/Mankowski, Brussels IIa Regulation.

⁴⁸ Magnus (who defends the latter view), p 383, Magnus/Mankowski, Brussels IIa Regulation.

⁴⁹ It is worth noting that according to art. 2(1) of Brussels IIa, “the term ‘court’ shall cover all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to Article 1” and art. 2(2) of the same Regulation states “the term ‘judge’ shall mean the judge or an official having powers equivalent to those of a judge in the matters falling within the scope of the Regulation”. Also in this line goes art. 2(1) of the Commission’s Proposal: “‘authority’ means any judicial or administrative authority in the Member States with jurisdiction in matters falling within the scope of this Regulation”.



opinion given in the *Sahyouni* case.⁵⁰ Therefore, no change is needed at the moment in this regard in Brussels IIa, since it only covers decisions issued in the EU. Only a clarification in a Recital would be advisable.

Concerning substantive recognition (as opposed to formal recognition) of purely private divorces declared in third States, some Member States apply Rome III, this issue being the main question of the *Sahyouni* case⁵¹ now pending before the CJEU. Once the CJEU gives its ruling, a guideline containing its result could be added in the Rome III Regulation in order to clarify its scope of application.

Recommendation

Since purely private divorces are non-existent at the moment within the EU, no change is necessary in this regard in the Brussels IIa Regulation. Only a clarification in a Recital is advisable, in the sense that whenever an officially recognized authority intervenes in the divorce, it falls under the scope of application of Brussels IIa.

Universal scope of application⁵²

Assessment

Another problem within matrimonial matters relates to the personal scope of jurisdiction. The confusion created by Articles 6 and 7 of Brussels IIa has not been changed by the proposed merging of both provisions contained in the Commission's Proposal. The proposed Article 6⁵³ does not improve the wording of the current Articles

⁵⁰ Note 49, based on the allegations of the German Government. Conclusions of the AG Henrik Saugmandsgaard Øe in Case C-372/16 Soha Sahyouni v. Raja Mamisch ECLI:EU:C:2017:686. Regarding the French notarial divorce, the intervention of the notary and the need of mandatory legal advice for the parties make this kind of divorce fall under category b (list above). However, the European Commission has been notified about the broad scope of the French law regulating this kind of divorce, since it gives powers to notaries to declare divorces without checking the grounds of jurisdiction of Brussels IIa, but at the same time the law foresees their recognition under Brussels IIa (by authorizing the notary to deliver the certificate on the dissolution of the marriage). See more information on <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 6 December 2017).

⁵¹ Case C-372/16 Soha Sahyouni v. Raja Mamisch ECLI:EU:C:2017:686, pending.

⁵² This paragraph shall be attributed to: Arantxa Gandia Sellens.

⁵³ Article 6 of the Commission's Proposal reads: "1. Where no authority of a Member State has jurisdiction pursuant to Articles 3, 4 and 5, jurisdiction shall be determined, in each Member State, by the laws of that Member State.



6 and 7 and it is still too difficult to apply in practice. It remains unclear whether an EU national with habitual residence in a third State can file in the EU applying the domestic rules of jurisdiction.⁵⁴

A better solution would be to establish a universal scope of application; meaning that if no ground of jurisdiction is given by the Regulation to any EU Member State, then there should be no residual jurisdiction in favour of national rules.⁵⁵

This universal scope rule should be accompanied by a *forum necessitatis* rule in the sense that if proceedings cannot reasonably be brought or conducted or would be impossible in a third state with which the case is closely connected (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 and property consequences of registered partnerships).⁵⁶

Recommendation

The introduction of an explicit rule clarifying the personal scope of application of Brussels IIa would be advisable. This rule could consist of a universal scope of application, as far as it is accompanied by a *forum necessitatis* rule in line with other EU Family Law instruments.

2. Paragraph 1 shall not apply to a respondent who:

(a) is habitually resident in the territory of a Member State; or

(b) is a national of a Member State, or, in the case of the United Kingdom and Ireland, has his or her 'domicile' in the territory of one of the latter Member States.

3. As against a respondent who is not habitually resident in a Member State and is not either a national of a Member State or, in the case of the United Kingdom and Ireland, does not have his 'domicile' within the territory of one of the latter Member States, any national of a Member State who is habitually resident within the territory of another Member State may, like the nationals of that Member State, avail himself of the rules of jurisdiction applicable in that Member State".

⁵⁴ MPI-Lux report, p 5.

⁵⁵ In a similar vein, Kruger/Samyn, "Brussels II bis: successes and suggested improvements", *Journal of Private International Law*, vol. 12, 2016, p. 140.

⁵⁶ In this line, MPI-Lux report, p 6.



Party autonomy⁵⁷

Assessment and recommendation

There is no provision in the Brussels IIa Regulation that makes it possible for the parties to agree on the jurisdiction over a claim for divorce, legal separation or marriage annulment.⁵⁸ Indeed, the parties are unable to select a jurisdiction even from among the limited grounds available in Article 3, save to the extent that joint applications may be possible per the fourth indent of Article 3(a).

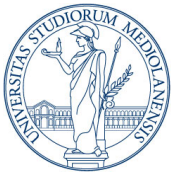
In order to achieve a coincidence between forum and ius, a limited forum choice should be provided, which should mirror the possibilities enshrined in the Rome III Regulation.⁵⁹ Alternatively, following the solutions provided in the Succession and Property Regimes Regulations, the parties may be allowed to agree that the courts of the Member State, whose law is applicable, or the law in fact applied to their divorce or legal separation or marriage annulment, shall have jurisdiction. Moreover, the proposed jurisdictional grounds on choice-of-court relating to divorce or separation or annulment should improve the consolidation among proceedings on maintenance, matrimonial property regime and parental responsibility. The jurisdiction of the designated court could be for example based on the habitual residence of either of the spouses, on the spouses' last common habitual residence or on the nationality of one of them. They could be also entitled to designate a court which has jurisdiction to entertain proceedings concerning parental responsibility over spouses or future spouses' child, ensuring that such jurisdiction gives a primary consideration to the child's best interests.

As regards to the moment when the conditions must be met, the proposed rule on choice-of-court should opt for one of the models adopted in the other instruments e.g. only at the time the choice of court agreement is concluded (Article 5 of the Rome III Regulation) or both at the time the choice of court agreement is concluded and at the time the court is seized (Article 4 of the Maintenance Regulation):

⁵⁷ This paragraph shall be attributed to: Ilaria Viarengo and Lenka Válková. Please consider the Model Choice-of-Court and Choice-of-Law Clauses, available at www.eufams.unimi.it.

⁵⁸ On this matter, see *EUFam's First Assessment Report*, p. 30 et seq.

⁵⁹ Cf. the Report on the German Good Practices, p. 7 (2.2.), p. 13 (Conclusions). See also the considerations made *supra* concerning the coincidence of *forum* and *ius*.



Moreover, the formal requirements on choice-of-court should be aligned with the formal requirements on choice-of-court or on choice-of-law contained in other Regulations in family matters.⁶⁰ It is questionable whether the rule on the substantive validity on choice-of-court should be introduced.⁶¹

The last problematic issue concerns the question of (non)exclusivity of choice-of-court agreement. The non-exclusivity of the choice-of-court agreement might be allowed in order to enlarge the existing available jurisdictional grounds or to strengthen already available jurisdictional grounds (as also regulated in Article 4(1) of the Maintenance Regulation).

Proposed amendments to the Brussels IIa Regulation

In the light of the foregoing, it may be suggested:

1. to introduce a choice of court rule allowing the spouses to choose (a) a court of a Member State in which one of the parties is habitually resident,⁶² or (b) a court of a Member State of the spouses' last common habitual residence,⁶³ or (c) a court of a Member State of which one of the spouses has the nationality,⁶⁴ or (d) a court of a Member State whose law is applicable or the law in fact applied, to their divorce or legal separation, or (e) a court of a Member State which has jurisdiction to entertain proceedings concerning parental responsibility over spouses or future spouses' child.

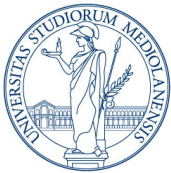
⁶⁰ See Article 4(2) of the Maintenance Regulation, Article 7(2) of the Matrimonial Property Regime Regulation and Article 7(1) of the Rome III Regulation.

⁶¹ Neither the Maintenance Regulation, nor Matrimonial Property Regime Regulation provides for the rule on substantive validity of choice-of-court agreement. However, it may be suggested to follow the example of Brussels Ia Regulation (Article 25, para 1).

⁶² Although Article 5(1)(a) of the Rome III Regulation provides for the possibility to designate the law of common spouses' habitual residence, the jurisdictional ground referring to habitual residence of only one of the spouses is aligned with Article 4(1)(a) of the Maintenance Regulation and indirectly also with Article 3(1)(a) of the Brussels IIa Regulation which is in fact based on the habitual residence of one of the spouses. In the 2006 Brussels IIa Recast Proposal, which has never been adopted, was proposed to introduce rule on choice-of-court relating to divorce or legal separation allowing to the spouses to agree on a court which would have otherwise jurisdiction on the grounds of jurisdiction listed in Article 3. However, according to the authors, the proposed Article on choice-of-court in this document seems to be *prima facie* more comprehensive.

⁶³ The spouses' last common habitual residence is in line with Article 4(1)(c)(ii) of the Maintenance Regulation (the Maintenance Regulation only requires two years duration of the spouses' habitual residence), this jurisdictional ground was also proposed in the 2006 Brussels IIa Recast Proposal (requiring three years duration of the spouses' habitual residence).

⁶⁴ See Article 5(1)(c) of the Rome III Regulation and Article 4(1)(b) of the Maintenance Regulation.



2. to determine that the above mentioned conditions have to be met at the time the choice of court agreement is concluded or at the time the court is seized as well.
3. to align the proposed rule on choice-of-court agreement regarding exclusivity with Article 4(1) of the Maintenance Regulation by stating that the jurisdiction conferred by agreement shall be exclusive unless the spouses or future spouses have agreed otherwise.
4. to unify the possible different approaches which may be taken by the Member States courts on the substantive validity of the choice-of-court agreement, by following the current model introduced into the Brussels Ia Regulation, by specifying that a Member State court designated by the agreement shall have jurisdiction unless the agreement is null and void as to its substantive validity under its law (i.e. law of designated Member State court).

Lis pendens⁶⁵

Provisions on *lis pendens* and related actions of the Brussels IIa, Maintenance Regulation and Succession Regulation follow the model established with Brussels Convention regime.⁶⁶ However, relevant area has been significantly upgraded by the CJEU interpretations, and latter, accordingly altered by the Brussels Ia regulation.

The Brussels IIa Recast Proposal jet reflects almost none of those changes. The provision remains untouched. Some change however derives out of the disconnection clauses of Article 75(2)(c) of the Proposal. Accordingly, the *lis pendens* and related procedure in relation to Hague 1996 Contracting States is settled. The EU Fam's valuable national case law speaks of huge number of parallel procedures, in different scenarios. Invoking *lis pendens* resulted with various open questions and diverging national practices. Most of them still amount to clash of a national procedural law rules with the provisions of a Regulation, which could hardly be eliminated without procedural law unification. Nevertheless, evolution accomplished in the context of the Brussels Ia should not be

⁶⁵ This paragraph shall be attributed to: Mirela Župan.

⁶⁶ On the case law in *lis pendens* matters, see Villata in the *EU Fam's First Assessment Report*, available at www.eufams.unimi.it, p. 55 et seq.



neglected. Attitude towards parallelism of procedures in general should be advocated, with certain amendments that go even beyond that prototype model.

i) Conduct of the applicant

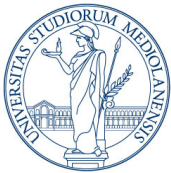
Assessment and recommendation

As the current rule on *lis pendens* in the Brussels IIa Regulation (Article 19) does not sufficiently prevent a wilful delay of proceedings by one party, a special provision or recital should be added, requiring the party that first filed the suit to actively pursue the court proceeding.⁶⁷ A rule to prevent such bad faith seems necessary because the CJEU did not yet issue any express interpretation on this issue. Indeed, in the case C-489/14, *A v B*, 6 October 2015, it dealt with the issue of the conduct of the applicant in the first proceedings, notably his lack of diligence. Nevertheless, the Court actually focused on other aspects of the situation to establish that the criteria for *lis pendens* were no longer fulfilled. Therefore, it stated that the conduct of the applicant in the first proceedings was not relevant for determining whether the jurisdiction of the court first seised was established.

In divorce proceedings, a party may “rush to a court” to gain the advantage of a more favourable forum, but then engage with alternative resolution of a case. That party misused the *lis pendens* rule to freeze the jurisdiction, thus minimizing the possibility for mediation or other ADR to succeed. Some national laws would give the parties the option to activate *lis pendens* at an early stage, regardless of the ongoing ADR or regardless if the litigation would in the end take place. On the contrary, other national laws preclude this possibility.

Another aspect of this problem lies with the time-limits for the service of the documents instituting the proceedings, in correlation with the *lis pendens*. Pursuant to the general rule a court is deemed to be seized for the purposes of the *lis pendens* rule when the document instituting the proceedings is lodged with the court, provided that the claimant has not subsequently failed to take the steps he was required to take to have service effected on the defendant. This rule applies whenever, according to the

⁶⁷ As suggested in the Report on the German Good Practices, p. 4 (1.3.), p. 13 (Conclusions).



applicable rules of national procedural law, the document does not have to be served before being lodged with the court. Some national procedural laws afford the claimant with a period of time for service, after having lodged the document with the court. Hence the claimant can lodge the document instituting a proceeding, triggering the *lis pendens* mechanism and then wait for a long time.

Malpractice of rush to the court and passivism contributes to ineffective service of justice, burdens the courts and thwart other possible alternative dispute resolution mechanisms. It would thus be advisable to question whether a common standard may be established, in order to set a minimum or maximum timeframe for party engagement. Inserting a rule with strict time frame could potentially foil the ratio of such a rule. Namely, time limits may fall too short for some, but unnecessarily long for other Member States. Having in mind the significantly diverging length of civil proceedings throughout EU, it is recommended to reconsider whether a provision or a recital would be more appropriate. Such an amendment should prescribe that a party that has launched the proceedings is obliged to pursue with the action and participate actively within reasonable timeframe, as well as sanction for any opposite behaviour.

ii) Perpetuatio fori in conjunction to parallel procedures

Brussels IIa adheres to the continental law principle of *perpetuatio fori*. Once the jurisdiction is grounded at the moment the court is seized, it remains firm despite the fact that circumstances may change. Hague 1996 Convention abandoned this principle. Since the jurisdiction is set to the court of the habitual residence of a child, any movement of a child amounts to a change of jurisdiction. Lack of coordination among the Brussels IIa and the 1996 Hague Convention in this respect is most unwelcome. In event of a movement of a child from EU to a 1996 Hague Convention Contracting State the jurisdiction of an EU court which is seized may not be declined. On the other hand Article 13 of the Hague 1996 Convention prevents any new procedure in the new habitual residence of a child. Still, once the recognition of a judgement rendered in a Member State is sought in Hague 1996 Contracting State, such may be denied. This scenario should be avoided by abandoning the *perpetuatio fori* in the Brussels IIa Regulation Recast as well.



iii) Lis pendens with third States.

Assessment and recommendation

First generation of EU civil justice regulations provided no rules with regards the attitude towards parallel procedure in a Third State. A flexible approach is here welcome, to allow the courts of the Member States to take into account proceedings pending before the courts of Third States. So far, no CJEU ruling indicates whether the ongoing identical or related procedure should be taken into account or tolerated by a second seized EU Member State court. The national practice is diverse. Some Member States adhere to the old comity principle and under the domestic private international law rules give way to such a foreign procedure. Stay or dismissal of a proceeding is subject to conditions prescribed by national law. Some Member States follow the CJEU reasoning in *Owusu*, and find no legal ground in EU law to stop or decline jurisdiction. Hence, such Member State court ignores a prior foreign Third State procedure and refuses to stop or drop a pending case before it. Such a diverse national practice is not welcome. Lack of clarification leads to parallelism in procedures. Judgement rendered in a Member State would in most occasions produce no effect abroad. Such scenario hampers international cooperation, pressures procedural economy and effects with legal uncertainty. In child related matters, it is contrary to the best interest of a child.

Following the Brexit outcomes, the problems related to this particular issue will increase as Article 19 Brussels IIa Regulation restricts its scope to proceedings among Member States. Solutions along the lines of Articles 33 and 34 of the Brussels Ia Regulation should serve as a model to this matter.

iv) Cooperation in relation to lis pendens

National case law identified side inconveniences that authorities have faced with application of the *lis pendens* rule. Often they were lacking any information either on the facts or the foreign procedural law required to establish the moment the court of another Member State is seized. Similar conclusion may be drawn from the CJEU recent



case law in C-29/16, where the interpretation of the foreign procedural law remains decisive for *lis pendens* rule application. These problems have been effectuated by relevant national case law in relation to Successions Regulation as well. Namely, succession proceedings are in some Member States initiated *ex officio* upon establishment of the fact of death of the deceased, for example in Croatia. In many cases the authority could not determine if proceedings were also initiated in another Member State. This occurs in cases where the notary informs the parties (successors) that proceedings have been initiated, but parties remain passive. Obstacles in succession proceedings which could be removed through enhanced judicial cooperation concern the *lis pendens*.

Hence the changes should adhere to the evolution of the *lis pendens* rule of Brussels I regime, and provide for a rule that obliges a court to reveal the date it is deemed to be seized. Such a rule would contribute to smooth and efficient service of the justice within EU.

Proposal for the rule of the Brussels IIa Recast Regulation is modelled on respective provision of Article 29 para. 2 of the Brussels I a regime should prescribe that upon request by a court seised of the dispute, any other court seised shall without delay inform the former court of the date when it was seised.

*Forum necessitatis*⁶⁸

Assessment and recommendation

The EUFam's survey reveals that necessity is very seldom relied upon for jurisdictional purposes in cross-border disputes concerning family relationships.⁶⁹ However, to ensure access to the court, 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 Regulations on property regimes.

⁶⁸ This paragraph shall be attributed to: Ilaria Viarengo, Rosario Espinosa Calabuig.

⁶⁹ See *EUFam's First Assessment Report* p. 53 et seq.



A similar *forum necessitatis* rule in Brussels IIa should be reconsidered as a matter of coherence among the EU family law instruments, in particular for cases in which the competent authorities are in countries that do not admit same sex marriages. It is well known, for example, that Article 13 of Rome III together with the grounds of jurisdiction provided by the Brussels IIa Regulation, can potentially lead to a denial of justice.⁷⁰

Proposed amendment to the Brussels IIa Regulation:

Following the example of the above-mentioned provisions, it should be provided that:

“Where no court of a Member State has jurisdiction pursuant to other provisions of this Regulation, the courts of a Member State may, on an exceptional basis, hear the case if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely connected.

The case must have a sufficient connection with the Member State of the court seised”.

PARENTAL RESPONSIBILITY

The changes brought about by the Brussels IIa Recast Proposal are to be welcomed. However, the EUFam’s Report on the outcomes of the online questionnaire proposes some clarifications and amendments.

Scope of application⁷¹

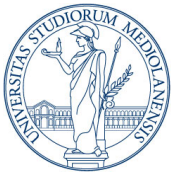
Assessment and recommendation

As confirmed by the national case law, the substantive scope of application of the Brussels IIa Regulation regarding parental responsibility issues does not raise particular problems. Domestic courts have in fact proved to be familiar with the list of matters addressed by Article 1 and the definitions set forth by Article 2.⁷²

⁷⁰ The Council in the adoption of the Rome III Regulation, urged that, to remedy such situations, it is necessary to provide - in the recast of the Brussels IIa Regulation - for a *forum necessitatis*, whereby a court different from the one that is prevented from granting a divorce can be seized (Council Document of 26 November 2010, 17046/10, JUSTCIV 214, JAI 100). In this vein see also the European Parliament Resolution of 15 November 2010.

⁷¹ This paragraph shall be attributed to: Diletta Danieli, Caterina Fratea, Mirela Župan.

⁷² See *EUFam’s First assessment report*, p. 16.



However, various issues can be touched upon:

1. as to the material scope of application
 - a) some doubts still exist in relation to protection of the property of a child. According to Article 1(2)(e), it amounts to administration, conservation, or disposal of his property. Closer inspection of Recital No 9 of the Regulation reveals that the intention of the legislator was to provide rules with the sole scope of protecting the child. Thus, the Regulation is limited to protective measures and it applies to the designation and functions of a person or body having charge of the child's property, representing, or assisting him. Other measures, which relate to the child's property but do not concern his protection, are not covered by this Regulation but by the Brussels Ia Regulation;⁷³
 - b) with regard to measures that can be taken to ensure the effectiveness of parental responsibility rights (namely, rights of custody and rights of access), such as penalty payments or similar actions, the CJEU has already provided a qualified guidance in its *Bohez v Wiertz*⁷⁴ ruling, by holding that such measures serve to protect a right falling within the scope of Brussels Ia Regulation, and are thus subject to its regime. However, occasional uncertainties may arise in relation to different measures that can be ordered in case of breach of other parental responsibility obligations, or that may generally have a compensatory nature, as their inclusion in the scope of said Regulation could be arguable.
2. as to the personal scope of application, it is worth considering the absence of personal prerequisites of application in the Brussels Ia regime,⁷⁵ with the consequence that the EU instrument always supersedes national rules whenever an international element (even linked to a non-EU State) exists in the given case. This legislative solution differs significantly from that adopted in other EU PIL

⁷³ Krajský soud v Brně, 19 November 2015, No 13 Co 83/2015.

⁷⁴ CJEU, judgment of 9 September 2015, case C-4/14, *Christophe Bohez v Ingrid Wiertz*, ECLI:EU:C:2015:563.

⁷⁵ See Pataut, p. 162 in Magnus/Mankowski, *Brussels IIbis Regulation, 2012; EUFam's Final Study*, Chapter 2, *Scope of the EU Family Regulations. Parental Responsibility*; see also *Report on the Italian Good Practices*, para. 1, for similar considerations made with particular regard to matrimonial matters.



instruments⁷⁶ and contributes to a substantial extension of the factual situations potentially falling within the scope of application of EU rules. As far as parental responsibility matters are concerned, this hierarchy between EU and national legal sources results from the residual ground of jurisdiction laid down in Article 14 of Brussels IIa Regulation, which allows the court of a Member State to refer to domestic laws only provided that there is no other court within the EU having jurisdiction pursuant to Articles 8-13 thereof. Notwithstanding this express provision, at times national courts have failed to preliminarily refer to Article 14 of the Regulation and directly applied their domestic PIL statutes in some cases where the habitual residence of the child was located outside the EU.⁷⁷

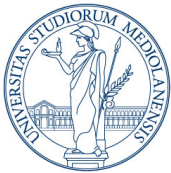
Proposed amendments to the Brussels IIa Regulation

In light of the foregoing and considering the Proposal for a Brussels IIa Recast Regulation:

1. as to the material scope of application, there is no need of amendment of Articles 1 and 2 of the Regulation. However, it could be suggested:
 - a. an integration of present Recital No 9 to better clarify the extent and the practical application of the provision enshrined in Article 1(2)(e); and
 - b. an additional Recital to specify the extent of the Regulation's scope with regard to ancillary measures that may be taken to ensure the effectiveness of parental responsibility rights;
2. as to the personal scope of application, the introduction of a Recital that clarifies the hierarchy between the EU national legal sources even when the international element is linked to a non-EU State could be useful.

⁷⁶ E.g. 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 (Brussels Ia Regulation) [2012] OJ L351/1, which in principle requires that the defendant is domiciled in an EU Member State in order to be applied.

⁷⁷ See *EUFam's First assessment report*, p. 17.



Hearing of the child⁷⁸

Assessment and recommendation

The analysis of the case-law gathered in the EUFam's database shows that only in a limited number of cases the child has been heard.⁷⁹ However, it is not clear whether the child has not actually been heard or the decision does not make any reference to the hearing. It also reveals a trend of not hearing the child in divorces lodged by mutual consent or agreements on parental responsibility. Moreover, there are notable divergences regarding the minimum age requested.⁸⁰

In addition, difficulties arise because Member States have diverging rules governing the hearing of the child. In particular, Member States with stricter standards regarding the hearing of the child than the Member State of origin of the decision are encouraged by the current rules to refuse recognition and enforcement if the hearing of the child does not meet their own standards.⁸¹

The Brussels IIa Recast Proposal seeks to give more weight to the children's right to be heard and have their opinion taken in account. Article 20 sets up an obligation for a court to hear a child capable of forming his or her own views in all proceedings on custody and access, and on the return of children abducted by one of their parents, and the court must give weight to those views. It means, in line with Article 12 of the UN Children's Rights Convention, as well as with Article 24(1) of the EU Charter, that the judge must always hear the child and only when considering the weight that must be given to the child's views can the judge consider the child's age and degree of maturity. Therefore, Member States will be obliged to mutually recognise the different national systems for hearing children.

In the light of the foregoing:

⁷⁸ This paragraph shall be attributed to: Ilaria Viarengo.

⁷⁹ See EUFam's Database, available online at www.eufams.unimi.it. See also *EUFam's First Assessment Report* p. 105 et seq.

⁸⁰ See EUFam's German Report on Good Practices, p. 6

⁸¹ *Ibidem*.



1. It is much welcomed that the Brussels IIa Recast Proposal places more emphasis on the children's right to be heard. However, a strict obligation to hear every child, regardless of how old the child is, is difficult to establish in practice. Although a general obligation of the courts to provide the child is with a genuine and effective opportunity to express his or her views should be highlighted, a case by case assessment is still necessary.
2. National procedural rules on how, and by whom the child is heard must not be changed (cf. Recital No 23 Brussels IIa Recast Proposal).
3. Not hearing the child is not a ground for refusal anymore to recognise or to enforce a decision. However, Member States with high standards as to the hearing of the child might use the ground of non-recognition of Article 38(1)(a) (public policy, considering the child's best interest). A recital should be inserted clarifying that Article 38 provides relief in cases where the authorities of the Member State of origin did not *at all* respect these principles.⁸²
4. It would be necessary to bring evidence of the impossibility of hearing the child. The current annex IV is built in such a way that does not make it possible to indicate the reasons why the child has not been heard. In the new Annex II of the Brussels IIa Recast Proposal the impossibility to hear the child is not taken in account. It may be advisable to reformulate the Annex in order to take these elements into account and avoid difficulties in the recognition of decisions.

Proposed amendments to the Brussels IIa Regulation

Considering the Proposal for a Brussels IIa Recast Regulation, it may be suggested:

1. An additional recital in order that Article 38(1)(a) (violation of public policy, taking into account the child's best interests) could provide relief in cases where the authorities of the Member State of origin did not at all respect these principles

⁸² Cf. the Resolution of the GEDIP (Groupe européen de droit international privé/European Group for Private International Law) on the Commission Proposal for a Recast of the Brussels IIa Regulation proposed by the Commission/ Résolution sur la réforme proposée par la Commission du règlement Bruxelles 2bis —, accessible at <http://www.gedip-egpil.eu/> >documents du Groupe.



2. As to Article 20, that it clarifies that the authority shall provide the child with a genuine and effective opportunity to express those views freely during the proceedings, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law. Therefore, the authority shall give due weight to the child's views in accordance with his or her age and maturity and documents its considerations in the decision.

3. As to the Certificate Annex II, that it specifies:

- The child was heard: Yes/no.

If no, reason:

Prorogation of jurisdiction⁸³

Assessment and recommendation

In relation to Article 12, different issues may arise.⁸⁴

On the one hand, some uncertainties regard how the expression “the jurisdiction of the courts exercising jurisdiction by virtue of Article 3 has been accepted” must be interpreted. In particular, it should be clarified whether it is sufficient the lack of any express objection by the respondent. The interpretation of the provision becomes more complicated when the proceedings continue in default of appearance of one of the parties.

It must be argued that the acceptance of the jurisdiction shall be, if not necessarily written, at least explicit, which implies the appearance of the parties before the court. The provision itself does not require a written agreement, but the jurisdiction has to be accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility, even because matrimonial and parental responsibility matters, even when dealt with jointly, must be treated separately.

⁸³ This paragraph shall be attributed to: Maria Caterina Baruffi, Caterina Fratea.

⁸⁴ On this matter, see *EUFam's First Assessment Report*, p. 30 et seq.



On another hand, it must be welcomed the amendment to the heading of the provision brought about by the Proposal for the Brussels IIa Recast. The title, in fact, will no longer be “Prorogation of jurisdiction”, but “Choice of court for ancillary and autonomous proceedings” (new Article 10).

However, as the new heading shows, in the same Article two separate grounds of jurisdiction coexist, which refer to two different situations. This could lead to confusion and misunderstanding, as confirmed by the number of preliminary ruling with which the CJEU has been called to interpret the interplay between present Article 12(1) and 12(3). It must be also welcomed that according to the Proposal the jurisdiction must be accepted at the latest at the time the court is seized or, where the law of that Member State so provides, during those proceedings. In this way, the new provision will be in line with Article 5 of the Rome III Regulation.

Finally, a better coordination between present Articles 12 and 15 should be sought to favour the concentration of proceedings. In particular, it could be useful to specify that the transfer of proceedings established in the latter provision could:

- be extended to matrimonial matters; and
- also take place upon request of the court of the State where the child has its habitual residence in favour of the court of the State seised of an application for divorce or legal separation of the child’s parents, or for annulment of their marriage (see below para. “Other grounds of jurisdiction”).

Proposed amendments to the Brussels IIa Regulation

Considering the foregoing, it may be suggested:

- as to the first issue, that the Recast Regulation specifies more clearly that the acceptance of jurisdiction under Article 12 cannot be inferred from a general lack of objection, but requires a positive behaviour, however not written, and above



all that the provision cannot be applied in default of appearance of the respondent.⁸⁵

- as to the second issue, that the two grounds of jurisdiction established in Article 12 be separated by proving two different articles: one for the ancillary proceedings, the other for the autonomous ones;
- as to the third issue (and in addition to the amendments to Article 15 proposed in the para “Other grounds of jurisdiction”), that a Recital should be introduced specifying that Article 15 could be used by the court of the State of the child’s habitual residence in order to facilitate reaching an agreement between the parties in favour of moving the proceedings before the court of the State where the separation/divorce/annulment proceedings are pending, provided that it corresponds to the best interests of the child.

Other grounds of jurisdiction⁸⁶

Assessment and recommendation

Besides Article 12, Articles 9 and 15 contain the two other grounds of jurisdiction of the Brussels IIa Regulation that represent exceptions to general provision laid down in Article 8.

To neither of them the Proposal for the Brussels IIa Recast introduces major changes.

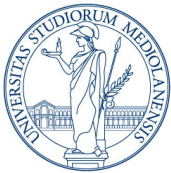
From the national case law analysed within the EUFam’s project and gathered in the EUFam’s database it can be inferred that:

- Article 9 seems to have never been used.⁸⁷ This can be due to the strict temporal conditions enshrined in the provision, which make the recourse to it extremely hard;

⁸⁵ See also *Report on the Italian Good Practices*, para. 4.

⁸⁶ This paragraph shall be attributed to: Maria Caterina Baruffi, Caterina Fratea.

⁸⁷ The only decision in the EUFam’s database that seems to apply Article 9 is the Italian judgment of Corte di Cassazione, sezioni unite, 21 October 2009, no 22238. This decision, however, simultaneously refers to Article 9 and 10, which have two opposite scopes of application. Moreover, from the circumstances of case it was possible to infer that the relocation was wrongful and therefore only Article 10 should have the relevant provision to assess the jurisdiction.



- Article 15 proves to be very difficult to apply. This might be due to the circumstance that the kind and the extent of the assessment that the court of the second Member State must carry out to verify if it is better placed to hear the case in the best interests of the child are not sufficiently clear. As a result, this provision is rarely used in practice, as the decisions gathered in the EUFam's database confirm.

Even though this provision is meant to be applied in exceptional cases, a wider recourse to it could be useful to reduce the fragmentation of proceedings and to call for the judge that is better placed to hear the case;

Proposed amendments to the Regulation

Considering the foregoing:

- as to Article 9, rethinking the temporal conditions for its application may represent a possible solution in order to make it possible for the provision to play an actual and effective role;
- as to Article 15, it could be advisable:
 - to further specify that the transfer can take place only if it corresponds to the best interests of the child, which shall be assessed in practice on case-by-case basis;
 - to clarify whether the assumptions laid down in Article 15(3), that justify the transfer of proceedings, are either provided as examples or are meant to be exhaustive;
 - following the path of the 1996 Hague Convention, to add to these assumptions the possibility to transfer of proceedings towards a State whose authorities are seised of an application for divorce or legal separation of the child's parents, or for annulment of their marriage, provided that an agreement between the spouses is reached (see above para "Prorogation of jurisdiction) and, above all, this corresponds to the best interest of the child to be ascertained in practice;
 - following once again the example of the 1996 Hague Convention, in particular of its Articles 8 and 9, to provide for two separate provisions also in the



Brussels IIa Recast: one for the cases where the transfer of proceedings is sought - directly or through the invitation to the parties - by the court of State where the child has its habitual residence (thus having jurisdiction by virtue of present Article 8); the other for the cases where the transfer of proceedings follows the request of the court of the State with which the child has a substantial connection.

In the first of the two provisions, it should also be clarified that the court should make the request to transfer the proceedings only if the decision to stay has become final in order to avoid situations of possible parallel proceedings;

- besides considering extending its scope also to matrimonial matters to make it possible:
 - for same-sex married couples, residing in and made of nationals of EU Member States where their marriage is not recognized, to be granted access to a court having jurisdiction according to the Regulation;
 - for the judge seized of an application of separation/divorce/annulment of marriage to transfer the proceedings towards the authorities of the State where the child has its habitual residence and that would have jurisdiction according to one of the grounds of Article 3(a) of the Regulation, provided that there is the consent of the parties.

For instance, this could be useful in those cases where a couple habitually residing in an EU Member State with their child decides to apply for separation/divorce/annulment before the authorities of the State of their nationality.

The one appeal-limit for the cases of child abduction⁸⁸

Assessment and recommendation

As regards return proceedings, two improvements brought about by the Proposal for the Brussels IIa Recast must be underlined, in particular:

⁸⁸ This paragraph shall be attributed to: Caterina Fratea.



- limiting to one the possibilities to appeal a return decision (Article 25(4) of the Proposal);
- setting an 18-week time frame for the whole process (six-week time limit for the completion of the case file by the Central Authority in view of the return proceedings, six weeks for the first instance proceedings, six weeks for the appeal - Articles 63(1)(g) and 23(1) of the Proposal).

These restrictions are particularly delicate because touch on the procedural autonomy of EU Member States. However, their introduction responds to a view of a timely restoration of the *status quo ante*. This is particularly true for the second one, since appeals can often lead to delays, especially in those legal orders that provide a three-instance system and/or the possibility to appeal the decision granting enforcement.

It must be pointed out that the one appeal limit contained in the Proposal does not undermine the possibility of a cross-appeal within the same appeal proceedings.

Proposed amendments to the Brussels IIa Regulation

When referring to the one appeal limit, it appears that Member States are free to establish whether the appeal shall take place before a second instance court or a supreme court, as long as this not affect the six-week time limit within which the proceedings shall be concluded.

However, it could be argued the need for the Brussels IIa Recast Regulation to clarify the nature of the only judicial review allowed (whether on the merits or limited to the correct application of the law, as happens before the supreme courts of many Member States).

As a result of this one appeal limit and taking into account that the number of instances hearing the case becomes much more limited, another question is whether it would be appropriate to introduce an obligation for first instance courts to refer to the CJEU with a preliminary ruling, if necessary.



Mediation⁸⁹

Assessment and recommendation

The introduction of mediation in the Regulation Brussels IIa is considered a very positive policy which goes in line with the promotion of the use of ADR mechanisms in the framework of the right of access to justice. It is not a new proposal in the EU in the field of child abduction (recourse to the European Parliament Mediator for International Parental Child Abduction has been viable as of 1987 and the Directive 2008/52/EC on mediation in civil and commercial matters has boosted its implementation in the EU) but encouraging and extending its use in this particular scope through more channels will help to improve communication between the parents and even if the whole dispute is not solved, to create the necessary basis for further cooperation between them in the future would mean a huge success in cases concerning cross-border parental responsibility issues. The families will also benefit from other advantages of mediation such as confidentiality, the reduction of costs and the fact that agreements are more likely to be complied with voluntarily. However, the mere reference is not enough; other measures must be implemented to further develop the change of culture that is still needed in order to encourage citizens to use it in practice instead of going to court, either as an out of court system or as court-annexed mediations.

The Proposal to amend Regulation Brussels IIa states that “Several substantial modifications are proposed with the aim of improving the efficiency of the return of an abducted child and the problems relating to the complexity of the “overriding mechanism” under the Regulation”. Among them, “the proposal would oblige Central Authorities to (...) promote mediation while making sure that this does not delay the proceedings”, an idea which is reflected in Article 63(1)(f). Furthermore, mediation (and in general the possibility of achieving amicable solutions by other means) is also explicitly referred to in Recital No 28 and Article 23(2) of the Proposal.

⁸⁹ This paragraph shall be attributed to: Carmen Azcárraga Monzonis.



The invited expert to the meeting held at the Max Planck Institute in May 2017 (representative of the European Commission) explained that Article 23 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.⁹⁰ In fact, Recital No 28 of the Proposal makes reference to the assistance, where appropriate, by “existing networks and support structures for mediation in cross-border parental responsibility disputes”. In this field it is important to remind the work of the Hague Conference on Private International Law, which includes two relevant achievements: in first place, the creation of a network of Central Contact Points for International Family Mediation (the EU should encourage Member States to join this network); in second place, the publication in 2012 of the “Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction”.

On the other hand, the EUFam’s survey reveals that the private international law practitioners, although in favour of mediation as a soft remedy to reach a solution (parental responsibility cases involve not only legal but also emotional issues which may be tackled more conveniently in such procedures), highlight some disadvantages, such as the tense situation between the parents or the use of mediation to stall the proceedings (as it was shown in the ECtHR case, *Raw and others vs. France*, 7 March 2013, 10131/11). This is particularly true for child abductions, with a 6 week period for child return order. The Commission Proposal states repeatedly that mediation should not unduly delay the proceedings as seen in the above Articles and Recital. In this scope it might be problematic to distinguish between a *mala fide* behaviour and the genuine need for more time for reaching a common solution. Therefore it is extremely important to train mediators and judges properly in order for them to conclude, first, whether mediation is feasible and recommendable in the particular case because a case-by-case assessment is necessary (it can be even forbidden in cases of domestic or gender violence, or not convenient where the relationship between the parents is deteriorated

⁹⁰ See *Report on Internationally Shared Good Practices*, p. 35.

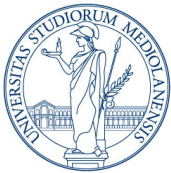


substantially) and, second, once mediation is deemed feasible and advisable, in order to establish the adequate number of sessions.

Finally, it is worth noting that the Proposal does not only refer to mediation but also to “other appropriate means”. This clarification provides flexibility and allows the inclusion in this scope of other systems, more or less formal, provided that they do not unduly delay the achievement of solutions. In fact, no delays or even disputes would exist if mediation (or those other means) were used to prevent family problems to aggravate. Mediation can be useful before the controversy has arisen, during and after, even at the enforcement stage.

Proposed amendments to the Brussels IIa Regulation

- The Proposal should include a rule to coordinate the procedural consequences of the initiation of mediation during proceedings for the return of a child including issues such as the impact on deadlines or the possible influence on *lis pendens* rules.
- Article 23(2) states that the court shall examine whether the parties are willing to engage in mediation “As early as possible during the proceedings” but this assessment should be done “from the very beginning”, possibly with the support of a mediator who would help to establish its convenience in the particular case. Furthermore, the inclusion of “other appropriate means” in this provision (which only refers to mediation) like in Article 63 and Recital No 28 could be assessed in order to promote the achievement of amicable solutions in a more flexible manner even during judicial proceedings.
- The Proposal may envisage the possibility of including mandatory elements in mediation as a stronger and more successful way to inform citizens about its existence and advantages and consequently foster the use of this ADR system in the EU. This is permitted by EU law in civil and commercial matters under Article 5(2) Directive 2008/52/EC. Among all the proposals based on the possible introduction of mandatory



elements, the so-called “opt-out system” is particularly interesting, i.e. the obligation to mediate in appropriate cases with the ability to opt out in the first session with no consequences (and preferably with no costs).

- In case the mandatory element is introduced, Article 38 of the Proposal should include a new ground of non-recognition based on the infringement of this rule.
- The Proposal may consider the possibility to encourage or even impose Member States to provide these services free of charge or at least with minimum costs. The most preferable option would be the creation of public bodies but a more realistic scenario includes the participation of private entities, whose services should be subsidized. The interests involved (above all the best interest of children) justify the financial effort this policy would require.
- It may useful to add an explicit reference to electronic means as a way to encourage mediation in cross-border cases, where the parties are usually located in different countries. The Directive 2008/52/EC does not regulate the use of new technologies but Recital No 9 enables Member States to develop this possibility in domestic legislations.

Reference to the 1996 Hague Convention⁹¹

Assessment and recommendation

The combined application of Brussels IIa Regulation and the 1996 Hague Convention in cross-border disputes regarding parental responsibility has been raising less critical issues since all EU Member States have become contracting parties to the latter.

Nonetheless, the interplay between the Regulation as regards the issues on jurisdiction and the Convention as regards the issues on applicable law remains a problematic aspect for national courts.

⁹¹ This paragraph shall be attributed to: Maria Caterina Baruffi, Diletta Danieli.

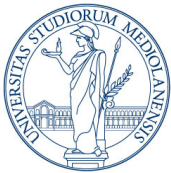


The 1996 Hague Convention is based on the principle of coincidence between *forum* and *ius*, pursuant to the general rule set forth by Article 15 thereof. The Convention further provides for conflict-of-laws rules in relation to specific situations concerning parental responsibility rights. In practice, in most cases the *lex fori* - i.e. the law of the child's habitual residence - applies, with the consequence that the authorities of Contracting States actually refer to the law they are most familiar with.

The coordination between the 1996 Convention and Brussels IIa Regulation, however, is regulated only on a general basis (Articles 61-62 of the latter instrument) and the same regulatory approach has been taken also in the Recast Proposal. Indeed, according to new Article 75, where the child concerned has his or her habitual residence in the territory of a Member State the Regulation shall apply. Article 75(2) establishes a few exceptions:

- where the parties have agreed upon the jurisdiction of an authority in a State Party to the 1996 Hague Convention in which the Regulation does not apply, Article 10 of that Convention shall apply (prorogation of jurisdiction);
- with respect to the transfer of jurisdiction between an authority in a Member State and an authority in a State Party to the 1996 Hague Convention in which the Regulation does not apply, Articles 8 and 9 of that Convention shall apply (transfer of jurisdiction);
- regarding proceedings pending before an authority of a State Party to the 1996 Hague Convention in which the Regulation does not apply at the time when an authority of a Member State is seised of concurrent proceedings, Article 13 of the Convention shall apply.

Moreover, Article 75(3) thereof provides that the reference contained in Article 15(1) of the Convention to “the provisions of [its] Chapter II” (Jurisdiction) shall be read as “the provisions of Section 2 of Chapter II” of the Regulation (rules on jurisdiction in matters of parental responsibility), thus clarifying a further level of coordination between the two international instruments. This kind of specification is considered necessary to overcome the wording of Article 15 of the Convention according to which the authorities



of contracting States shall apply their own law when exercising their jurisdiction under the Convention.⁹²

Article 75(3) of the Proposal reiterates the primacy of the Regulation over the Convention as to the system of jurisdiction in relation to parental responsibility matters, in addition to the specific provisions laid down in Article 75(1) of the Recast (and with only exceptions of Article 75(2)).

Proposed amendments to the Brussels IIa Regulation:

With a view to offering a sounder guidance for the combined application of Brussels IIa Regulation and the 1996 Hague Convention in cross-border disputes, it could be proposed to introduce a Recital in the Recast Proposal that contains an express reference to the latter instrument with regard to the determination of the law applicable to parental responsibility matters, even though this PIL aspect is not governed by the Regulation. This interpretative tool may in fact prove useful to practitioners and judges when facing this further level of fragmentation of proceedings, and could be welcomed to supplement the general rules on the relations between the two instruments provided in Article 75 of the Recast.

B. ROME III REGULATION

Same-sex marriage, registered partnerships⁹³

As for Brussels IIa Regulation, there is a need for greater clarity as to whether the Regulation will address marriage in the broadest sense, including same-sex marriages and registered partnerships. According to the Recital No 10 of Rome III the substantive scope and enacting terms of this Regulation should be consistent with the Brussels IIa

⁹² See Report on internationally shared good practices, p. 27.

⁹³ This paragraph shall be attributed to: Mirjam Escher, Josef Wittmann.



Regulation. Therefore, with regard to the scope of application of the regulation it would be advisable to pursue the same solution envisaged for the BXII.⁹⁴

Party autonomy and informed choice⁹⁵

Assessment and recommendation

According to Recital No 18 of the Rome III Regulation a choice -of law-agreement by the spouses should be an informed choice. However, the EUFam's survey shows that the necessary counselling of the parties is not ensured in all Member States.⁹⁶ Therefore, further efforts should be made to raise awareness in this regard in the Member States. The issue of ensuring an informed consent is even more relevant in prenuptial agreements, because the choice of law might have effects decades after it was concluded. The question is whether additional safeguards should be set at the European level or whether such task has to be left to the discretion of Member States. In any case, judicial training should cover also this aspect.

Objective criteria: flexibility⁹⁷

Assessment and recommendation

During the EUFam's national 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. In cases where the spouses were habitually resident in a State for more than 20 or 30 years, it seems not adequate to deny the application of the law of that State just because one spouse left that State for

⁹⁴ This might encompass a new Recital clarifying the inclusion of same-sex marriage and registered partnerships in the Regulation (e.g. "This regulation is applicable to all marriages and partnerships, regardless of the spouses' sex.") and the addition of a new ground of jurisdiction in Article 8 (e.g. Article 8(e)): "under whose law the registered partnership was created.").

⁹⁵ This paragraph shall be attributed to: Ilaria Viarengo, Rosario Espinosa Calabuig.

⁹⁶ So do the findings in the Report on the German Good Practices, p. 7 (2.1.); a possible addition to Article 8 (b) might be: "where the spouses were last habitually resident, provided that the period of residence did not end more than 1 year before the court was seized or lasted longer than five years with the spouses still retaining a close connection to the State, in so far as one of the spouses still resides in that State at the time the court is seized".

⁹⁷ This paragraph shall be attributed to: Mirjam Escher, Josef Wittmann.



slightly more than one year. Therefore, a more flexible rule, which allows the courts to alternatively apply the law of the country with which the matter is most closely connected, should be adopted.⁹⁸

C. MAINTENANCE REGULATION

Party autonomy⁹⁹

Assessment and recommendation

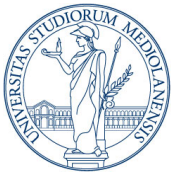
The Maintenance Regulation allows parties to agree on the competent court (Article 4). However, the choice of court is totally excluded for disputes relating to a maintenance obligation towards a child under the age of 18 (Article 4(3)). This restriction is aimed to the protection of the minor as the weaker party. However, its rigid application may, in practice, lead to the opposite result. Actually, the chosen forum may prove to be more favourable to the child's interests. Providing for some flexibility, the need to protect the child could be more ensured. The court should be allowed to weigh in whether its decision will be in the "best interest" of the child and if substantial connection between the designated court and the child exists. The judicial discretion as provided in Article 12 of the Brussels IIa Regulation on the evaluation of the fulfilment of the conditions should be allowed.

Proposed amendment to the Maintenance Regulation

It may be recommended to allow the application of Article 4 also to a dispute relating to a maintenance obligation towards a child under the age of 18, where the child has a substantial connection with that Member State, in particular by virtue of the fact that

⁹⁸ In this regard see the findings in the Report on the German Good Practices, p. 7 (2.3.); a possible addition to Article 8 (b) might be: "where the spouses were last habitually resident, provided that the period of residence did not end more than 1 year before the court was seized or lasted longer than five years with the spouses still retaining a close connection to the State, in so far as one of the spouses still resides in that State at the time the court is seized".

⁹⁹ This paragraph shall be attributed to: Ilaria Viarengo, Lenka Válková. Please consider that a dedicated EUFam's deliverable is dedicated to party autonomy. See Model Choice-of-Court and Choice-of-Law Clauses, available at www.eufams.unimi.it.



one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State; and the jurisdiction of the court is in the best interests of the child.

Role of public authorities¹⁰⁰

Assessment and recommendation

In the German Exchange Seminar the scenario was discussed that in practice maintenance claims are regularly enforced by state authorities.¹⁰¹ The authorities receive the claims through *cessio legis* from the original creditor and proceed against the maintenance debtor in an action for recourse. Hereby the question arises whether public authorities can rely on the jurisdiction of the court at the creditor's habitual residence as provided in Article 38(b) of the Maintenance Regulation or whether Article 3(b) of the Regulation is a special protective provision only the creditor himself can rely on. If the latter is the case, problematic situations could occur in which different courts have jurisdiction for the maintenance claims between two parties depending on whether these claims have already been assigned to a third party or not (split jurisdiction).

While there is broad consent that it would be adequate to allow a public authority the reference to Article 3(b) of the Maintenance Regulation, many hold the view that the Regulation - *de lege lata* - does not permit an interpretation in this sense. It is referred to Recital 14 and Article 64(1), according to which the term "creditor" explicitly includes public authorities, but only for the purpose of an application for the recognition or enforcement of a decision, not regarding Article 38(b) of the Regulation. Therefore, a revision of the Maintenance Regulation is proposed to ensure that also public authorities can rely on the jurisdiction of the court at the creditor's habitual residence as provided in Article 3(b).¹⁰²

¹⁰⁰ This paragraph shall be attributed to: Mirjam Escher, Josef Wittmann.

¹⁰¹ Report on the German Good Practices, p. 8 (3.1.).

¹⁰² It might be advisable to include a new Recital, e.g.: "Public bodies can rely on Article 3(b) for the purpose of enforcing maintenance claims having been assigned from the original creditor."



D. SUCCESSION REGULATION¹⁰³

INTRODUCTION

Not surprisingly, mostly due to the (relatively) short time that the Regulation has been applicable, the identification of bad or best practices—or even of common patterns—in the application of the Succession Regulation supporting the need for policy recommendations has proven complex. Still, some cases from the jurisdictions falling under the scope of the EU Fam's project—most of them publicly available in its database¹⁰⁴—highlight difficulties met in practice, which are apparently linked to the lack of awareness or proper understanding of the new rules. Remarkably, this phenomenon occurs even in situations where difficulties had been foreseen by the lawmaker and a solution provided for, either as a suggestion in the preamble or as a rule in the operative text. A combined effort of the Commission and of the Member States to bring the Regulation closer to the authorities dealing with succession may help avoid the uncertainties and their likely outcome—the heterogeneous application of the rules.¹⁰⁵ To this aim, we would recommend the development of a practice guide drafted by the Commission and addressed to the relevant stakeholders¹⁰⁶ in the Member States, which is specifically designed to acquaint them to the Regulation and highlight unique difficulties, some of which will be detailed hereinafter.

¹⁰³ This paragraph shall be attributed to: Marta Requejo Isidro, Philippos Siaplaouras.

¹⁰⁴ <http://www.eufams.unimi.it/2017/09/26/eufams-database-26-09-17/>, last visited 11 October 2017.

¹⁰⁵ Already and within the same Member State jurisdiction: on how to identify the habitual residence compare Kammergericht Berlin, 26 April 2016, 1 AR 8/16, OLG HH, 16 November 2016, 2 W 85/16 (Hanseatisches Oberlandesgericht Hamburg). On the identification of a choice of the applicable law, see the Spanish decisions issued by the Spanish Directorate-General of Registers and Notaries: Dirección General de los Registros y el Notariado, Resolución no. 7026/2016, 15 June 2016, source: Aranzadi Insignis, RJ\2016\4990; Dirección General de los Registros y el Notariado, Resolución no. 7817/2016, 4 July 2016, source: Aranzadi Insignis, RJ\2016\4032; Dirección General de los Registros y el Notariado, Resolución no. 4556/2017, 10 April 2017, source: Aranzadi Insignis, RJ\2017\1590.

¹⁰⁶ By which we mean sophisticated actors such as the authorities dealing with successions, notaries or registrars. In October 2017 the Commission published a guide entitled '*Cross-border successions. A citizen's guide*' intended to explain the basics of the Regulation to the general public, thus unsuitable for the purposes alluded to in the text.



SCOPE OF APPLICATION

Personal scope

Assessment. Citizens of Member States not bound by the Regulation

The Succession Regulation combines provisions on jurisdiction, on applicable law, on recognition or, as the case may be, acceptance, enforceability and enforcement of decisions, authentic instruments and court settlements, as well as those on the creation of a European Certificate of Succession. According to Recitals No 81 and 82, neither the United Kingdom, Ireland nor Denmark are committed to adopt the Regulation, leaving these states not bound by it or subject to its application. What this entails for the scope of application needs to be correctly understood: the UK nationality of the deceased does not prevent the application of the Regulation by the authority of his/her last habitual residence, located in one of the bound Member States, in order to determine the applicable law.¹⁰⁷ Along the same lines, the UK nationality of an applicant for a European Certificate has no impact on the scope of the Succession Regulation, provided the court dealing with the application has jurisdiction under Articles 4, 7, 10 or 11 of the Regulation.¹⁰⁸

Recommendation

A clarification in this regard may help dispel the doubts which could arise in practice. A comparison can be made to other EU Regulations of 'asymmetric' application, such as the Maintenance Regulation or regulations concluded by way of the enhanced cooperation procedure. This may enable the national authorities to more easily identify the situation and resort to the experience they may have already consolidated.

¹⁰⁷ The question arose before the Dirección General de los Registros y el Notariado, Resolución no. 7026/2016, 15 June 2016, source: Aranzadi Insignis, RJ\2016\4990.

¹⁰⁸ Regional Court Yambol decision 177, 30 March 2016; District Court Yambol, 4 May 2016, BGS20160504.



Temporal scope and transitional provisions

Assessment

Understanding Article 83(2) and 83(3)

The Succession Regulation applies to the succession of persons who die on or after 17 August 2015. Some transitional provisions ease the transition from the former Member States' private international law rules and the, sometimes extremely different, European ones, helping to ensure the validity of succession-related legal acts granted before that date.

According to Article 83(2), if the deceased had chosen the law applicable to his succession prior to 17 August 2015, that choice shall be valid if it meets the conditions laid down in Chapter III, or if it is valid in accordance with the rules of private international law that were in force at the time the choice was made, in the State in which the deceased had his habitual residence or in any of the States whose nationality he possessed. Article 83(3) provides for a similar rule in cases where a disposition of property upon death was made prior to 17 August 2015. In other words, it should be admissible and valid in substantive terms and as regards form if it meets the conditions laid down in Chapter III, or if it is admissible and valid in accordance with the rules of private international law which were in force at the time the disposition was made, in the State in which the deceased had his habitual residence, in any of the States whose nationality he possessed or in the Member State of the authority dealing with the succession.

Paragraphs 2 and 3 of Article 83 confirm the Regulation's preference for succession planning, an axis of the system which here gets stretched to its limit. Indeed, the effects of Article 83 paragraphs 2 and 3 go far beyond what would be required to respect the intentions of a deceased person who granted a will or chose the applicable law before 17 August 2015. Not only will a choice of law or a disposition *mortis causa* effective at the time of granting according to the rules of private international law in force, remain valid, but they can also be confirmed if they were void, even when such



nullity was or could have been known by the deceased. This is because the Regulation does not discriminate according to the reasonable or unreasonable, legitimate or illegitimate nature of his/her expectations. In other words, choices of law and dispositions of property upon death become independent from the legal system operative at the time and place where they were granted; thus, they may be declared lawful under private international law rules alien thereto. Their validity, in short, is possible 'by accident', unrelated to the regime the authorities of each Member State were bound to respect at the time of granting. This is striking, particularly in relation to the choice of law, because before the Regulation choice of law was only acknowledged in a few Member States. As a result of Article 83(2), the Member States' authorities dealing with a will or a disposition *mortis causa* established before 17 August 2015 must in any case inquire about a possible choice of law even though such choice would have been unthinkable under the law applicable at the time of granting. Should such choice really exist, in practice it would presumably have been made implicitly and thus will be difficult to spot, not least due to the lack of experience of the competent authorities in many Member States. Besides, the authorities must check the validity of the choice—and, as the case may be, of a disposition of property upon death—in light of private international law rules which (with the exception of Article 83(3), last sentence) they are most likely not acquainted with. One may conclude that, all in all, the application of Articles 83(2) and 83(3) place a heavy burden on the national authorities dealing with a given succession.

Understanding Article 83(4)

According to Article 83(4), if a disposition of property upon death was made at any time prior to 17 August 2015 in accordance with the law that the deceased could have chosen in relation to the Regulation, that law shall be deemed to have been chosen as the law applicable to the succession. The provision is meant both to ease the process of identifying the applicable law and to protect the trust of the individuals. The text envisages the case of a will granted under a private international law system, governed by the connecting factor "nationality", and not allowing for the choice of law. The grantor of a will, according to his/her national law coinciding with his/her habitual



residence, would have been unaware of the fact that, should he/she die on or after 17 August 2015, a change of the habitual residence between the granting of the will and the time of death could, as a result of Article 21 of the Regulation, affect the validity of the disposition. To avoid such an outcome, Article 83(4) creates the fiction that in such situations national law has been chosen and extends it to the whole succession, hence providing a pragmatic solution.

Recommendation

It is easy to predict that frequent resort to Article 83 will be made presently and in the immediate future.¹⁰⁹ Raising awareness of its existence as well as of its precise consequences and internal logic is of the essence. In particular, it is important to draw attention to paragraph 4 of the provision: Member States' authorities dealing with a disposition of property upon death granted prior to 17 August 2015, in a country where the connecting factor used to be (or still is, in the case of a third State or a Member State not bound by the Regulation) the nationality do not need to look further for the applicable law if such disposition is valid under the deceased's national law.

JURISDICTION

Habitual residence

Assessment

In general, the courts of the Member States in which the deceased had his habitual residence at the time of death shall have jurisdiction to rule on the succession as a whole. To help determine the deceased's habitual residence, some hints are given in Recital No 23. Here, distinctive features related to the subject matter of the Regulation are incorporated, and it is recommended that 'The habitual residence thus determined

¹⁰⁹ Dirección General de los Registros y el Notariado, Resolución no. 7026/2016, 15 June 2016, source: Aranzadi Insignis, RJ\2016\4990; Dirección General de los Registros y el Notariado, Resolución no. 7817/2016, 4 July 2016, source: Aranzadi Insignis, RJ\2016\4032; Dirección General de los Registros y el Notariado, Resolución no. 4556/2017, 10 April 2017, source: Aranzadi Insignis, RJ\2017\1590.



[should] reveal a close and stable connection with the State concerned taking into account the specific aims of this Regulation'. In certain cases—such as border commuters or where the deceased had gone to live abroad to work, sometimes for a long time, but had maintained a close and stable connection with his State of origin—determining the deceased's habitual residence may prove complex.¹¹⁰ Support is given here by Recital No 24.

Recommendation

The notion of habitual residence is certainly an elusive one. The guidelines in Recitals Nos 23 and 24 are not binding, but they certainly assist the authorities engaged in reaching an outcome that matches the intention of the Regulation. Hence, any recommendation on this matter should stress that, as a matter of principle, resorting to the interpretation of the CJEU as developed for other Regulations, in particular for the Brussels IIa Regulation, is neither needed nor advisable.

Issuance of a national certificate of Succession

Assessment

Article 62(3) of the Regulation stipulates that the European certificate of succession does not replace national certificates of succession. An interesting question which arose in a German case related to whether jurisdiction of the courts to issue national certificates of succession is now regulated by the Regulation, thereby replacing national rules on the matter. The question has been referred to the CJEU.¹¹¹

¹¹⁰ Kammergericht Berlin, 26 April 2016, 1 AR 8/16.

¹¹¹ Case C-20/17 *Oberle* [2017] OJ C112/27 (pending).



APPLICABLE LAW

Identification of a choice of law

Assessment

The Succession Regulation enables citizens to organize their succession in advance by choosing the law applicable to their succession—with only the choice of the law of his/her nationality being permitted—expressly in a declaration in the form of a disposition of property upon death. Alternatively, the choice shall be demonstrated by the terms of such a disposition. Identifying such a choice may prove difficult in particular for the authorities in Member States where no choice was admitted prior to the Regulation, but also for those systems more lenient as to what hints may be relied upon to conclude which law the deceased intended to choose. Recital No 39 provides for narrow support in this regard, stating, ‘A choice of law could be regarded as demonstrated by a disposition of property upon death where, for instance, the deceased had referred in his disposition to specific provisions of the law of the State of his nationality or where he had otherwise mentioned that law’.

Recommendation

In view of the scant assistance given by the Regulation on this point, guidance on what indications can be regarded as a proof of the choice of law (and which ones should conversely be discarded) would be most welcome. More specifically, practices in force in Member States where the choice of law was allowed prior to the Regulation should be analysed to determine whether they ought to be rejected or upheld under the new regime. The drafting of the disposition of property upon death following the legal structure mandated by a specific legal order, or the use of a Member State language, may be accepted as they constitute elements of the written text, whereas factors external to the text are more controversial. This would include the place where the disposition was granted, the nationality of the notary, or oral declarations made by the deceased. In addition, new emerging trends call for further assessment, for instance,



whether the appointment of the spouse as sole heir by a British citizen amounts to choosing English law because it is a common feature of English wills.¹¹²

Scope of applicable law

Assessment

Delimitation: property/family law v. succession law

The cases brought before the CJEU, either pending or already decided upon, show that one area where legal practice faces challenges with respect to the Succession Regulation is the delimitation of the scope of the law governing succession. The problems which arose here deal with the delimitation of national property and family law, i.e. whether a Member State can refuse to recognize the effects on immovable property on its own soil that are a result of a legal institution provided by the law governing succession and whether said law also regulates claims which under national law are considered to be part of family law.

In the first case,¹¹³ the referring court asked the CJEU whether Germany was able not to recognize the material effects of a *legatum per vindicationem* upon property rights on immovable property on its soil, a legal institution provided for by Polish law, which was also the law chosen to govern succession under the Regulation. German law recognizes only legacy by damnation, not legacy by vindication. The Court negated the possibility of such refusal.

The EUFam's database shows that practical issues related to immovable property also arise in national case law. In a Croatian judgment, the notary did not apply the Regulation to establish jurisdiction nor to ascertain the law governing succession, but

¹¹² Dirección General de los Registros y el Notariado, Resolución no. 7026/2016, 15 June 2016, source: Aranzadi Insignis, RJ\2016\4990; Dirección General de los Registros y el Notariado, Resolución no. 7817/2016, 4 July 2016, source: Aranzadi Insignis, RJ\2016\4032; Dirección General de los Registros y el Notariado, Resolución no. 4556/2017, 10 April 2017, source: Aranzadi Insignis, RJ\2017\1590.

¹¹³ Case C-218/16 *Kubicka* [2017] ECR EU:C:2017:755.



directly applied national law to register the new owner in the land registry, despite the fact that the deceased person had his habitual residence in Germany.¹¹⁴

As to the second case submitted to the CJEU,¹¹⁵ the referring court has asked the CJEU whether the Regulation's scope includes matters of increasing the share of the estate of one spouse after the death of the other spouse in cases of intestacy. The referring court also asks, in case the CJEU rules that the scope of Regulation does not include said issues, whether these amendments to the spouse's share should be indicated in the European certificate of succession or not. The CJEU has not issued a judgment yet.

Recommendations

The issues presented before the CJEU reflect highly practical questions of cross-border successions. Practitioners, lawyers and judges should be aware both of the fact that these issues have been raised and that the CJEU has either already ruled on them or is expected to rule on them. Moreover, as both the judgments on the *Kubicka* case and the Croatian judgment show, the handling of immovable property may present a source of frictions. The effects of the law governing succession as a whole, and in particular those aspects dealing with immovable property, must also be clarified. It is therefore advisable, if a practice guide is published, to highlight these issues.

¹¹⁴ Case Općinski sud u Vukovaru O-2543/15, 17 February 2016, CRF20160217.

¹¹⁵ Case C-558/16 *Mahnkopf* [2017] OJ C30/25 (pending).