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DIPARTIMENTO DI STUDI INTERNAZIONALI,
GIURIDICI E STORICO-POLITICI



PLANNING THE FUTURE OF CROSS-BORDER FAMILIES:
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PLANNING THE FUTURE OF CROSS BORDER FAMILIES: A PATH THROUGH COORDINATION FINAL STUDY

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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)



CASE CITATION

The EUFam's code: the case-law cited in footnotes is mentioned by referring to its "EUFam's code", which is a unique code generated for an efficient research within the EUFam's public database, available at www.eufams.unimi.it. The code is composed as follows:

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

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



INTRODUCTION

Filippo Marchetti

A. PURPOSE OF THE FINAL STUDY

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

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

Being a target of the project to collect and analyse the practice and best solutions adopted by national courts facing interpretative issues under the current system, the research consortium agreed on the collection of national case-law in an online archive and database, to allow for a faster and more efficient data mining through electronic means. A database containing raw data in English regarding the collected judgments was deemed to be useful also to overcome linguistic barriers that may exist when dealing with legal orders of several Member States.



B. SCOPE AND METHODOLOGY

This study aims at expanding the work carried out by the research consortium in 2016 with the publication of the First assessment report on the collected case law,¹ and is mainly based on the case law entries of the EUFam's case-law database.²

The case-law research has been conducted by each partner by collecting, classifying and analysing judgments issued by their national courts. Bulgaria, Greece and France have been gathered by the Max Planck Institute Luxembourg, while Slovak and Czech cases have been collected and analysed by the University of Milan. Judgments have been uploaded in full text in a cloud archive hosted on the servers of the University of Milan. Said servers also host a database in which information on each judgment has been uploaded as raw data by partners to ensure readability, comparability, and data consistency. The substance of the raw data inserted by the partners in the database is taken as correct by the coordination team without any further cross-control.

The partners of the project gave notice of a few difficulties in gathering case-law for research purposes in their own jurisdiction. While some systems do not present issues regarding the collection of cases, a few others do not provide for a centralized, systematic collection and classification of judgments, which renders such a task challenging, especially regarding judgments issued in minor districts. Moreover, in one country, full-texts of judgments were received from judges and some have been found on the courts' e-boards: nonetheless, for none of the collected texts the authorization was given to distribute them.

Moreover, it has been noted that, in lack of a general source of judgments, gathering information by directly contacting the competent courts was not always possible. Finally, the fact that judgments in matrimonial matters are not formally (recognised and) enforced contributed to the reduced amount of case-law. In some cases, the consortium does not have any relevant information regarding the date of the commencement of the proceeding.

¹ Available at www.eufams.unimi.it

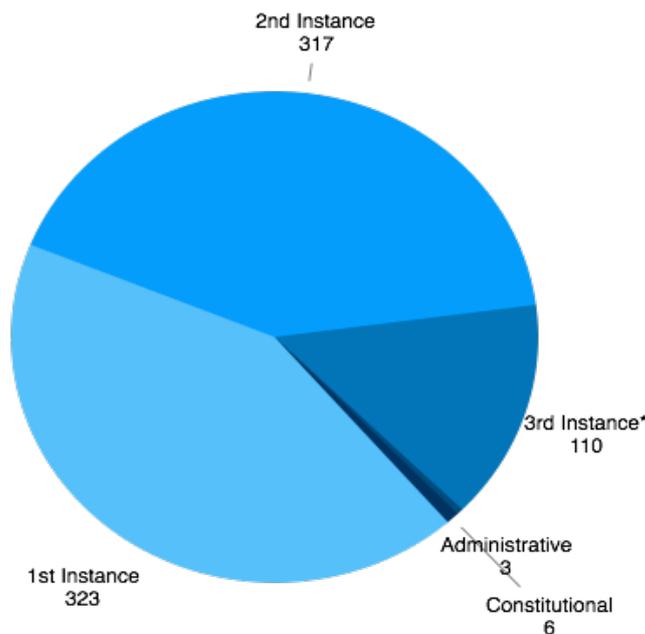
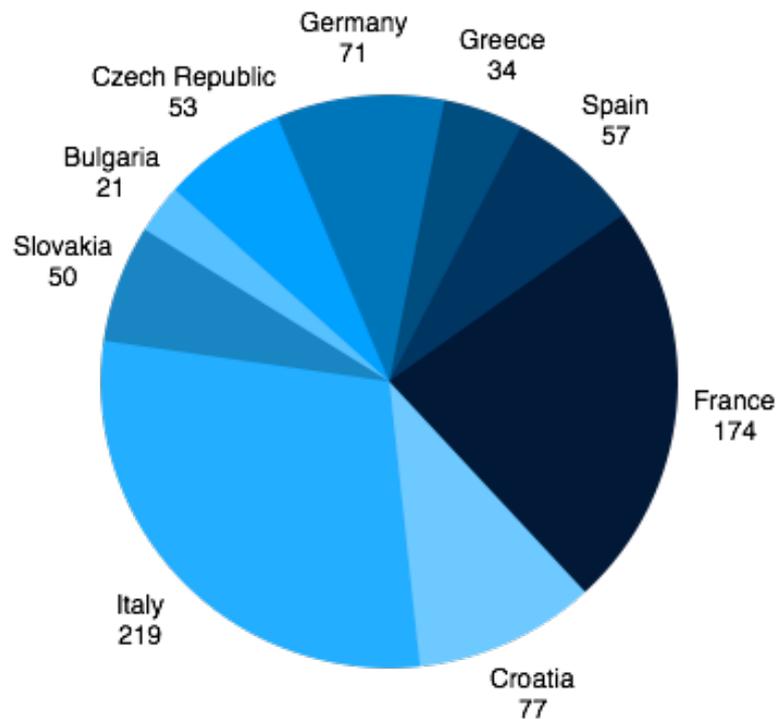
² Available at www.eufams.unimi.it



C. QUANTITATIVE DATA

Totally, at the date of 1 December 2017 the consortium collected 756 judgments, divided as shown in Graph 1.

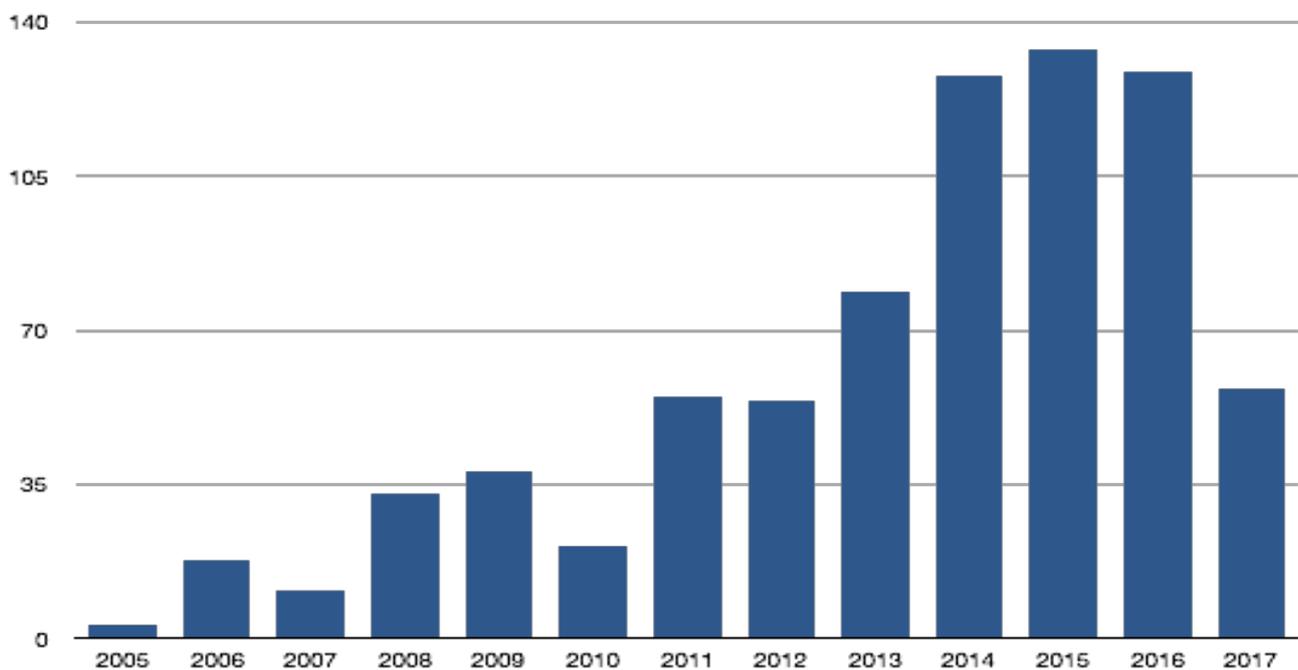
Out of 756 judgments, 323 are issued by courts of first instance, 317 by courts of second instance, and 110 by courts of third instance broadly defined (e.g. last instance, extraordinary instance, supervisory instance, “highest”,



“supreme”, “Cassation” courts). 3 judgments were issued by administrative courts and the 6 judgments on the EUFam’s topics were issued by the constitutional courts.



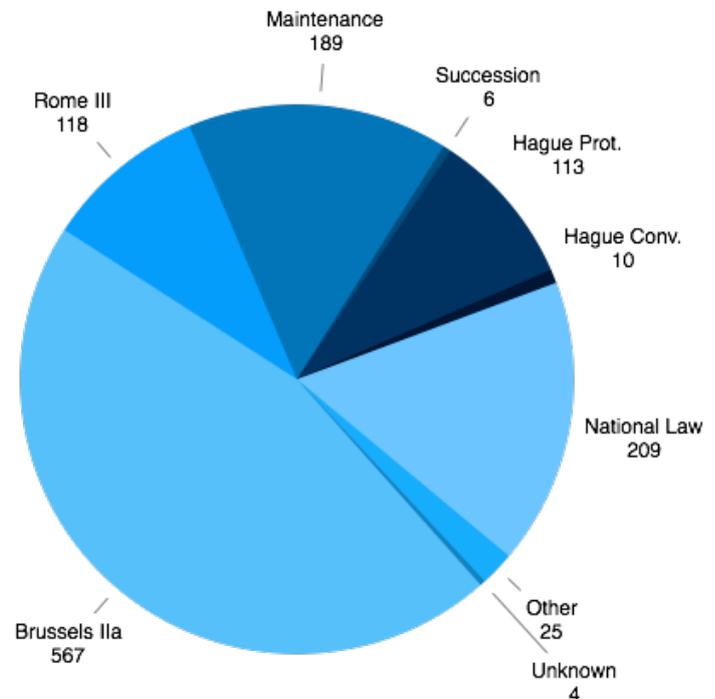
Regarding the distribution of judgments over time, Graph 2 shows how the great majority of the collected case-law regards the last five years. This data may be explained as depending on the inconsistent availability of data concerning older cases. Indeed, the most recent case-law is easily collectable through database and online journals, while collecting older cases represents a challenge, especially in some jurisdictions.



Dealing with the statistical length of the proceedings related to the collected judgments, data highlights how the great majority of judgments are rendered within two years from the commencement of the proceeding, while only few of them are rendered following longer proceedings. In about 25% of the cases the consortium has not been able to determine the length of the proceeding, mostly because such information is sometimes not available in the judgment.



Moving to substantial aspects of the project's scope of research, data show how the great majority of judgments concern the Brussels IIa Regulation: Graph 4 shows that the application of such Regulation more than doubles in numbers the application or interpretation of the Maintenance Regulation and that it is five times greater than the one of the Rome III Regulation. Worth of closer attention is the application of national



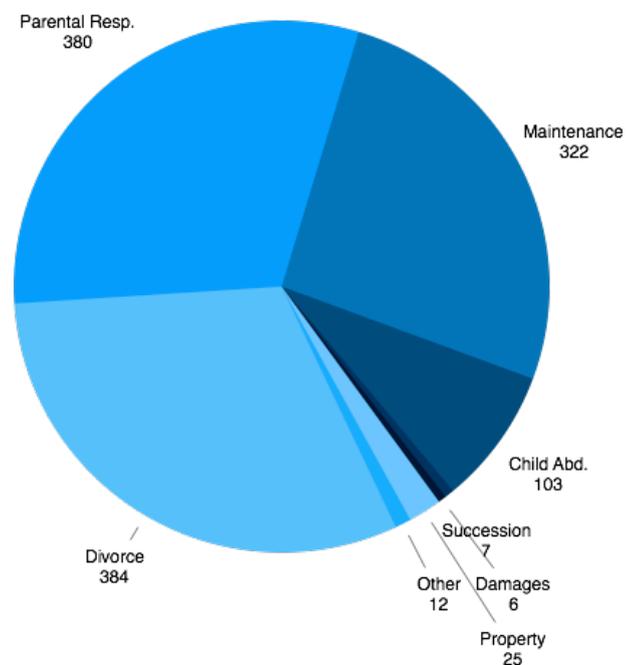
Private International Law statutes in family matters: the consortium highlighted the application or interpretation of such statutes in 209 cases, which amounts to 28% of the collected judgments. It must be pointed out that over 50% of the judgments relate to more than one legal instrument: In 336 cases only the courts applied a single legal tool. In 520 cases, the judgment was of declaratory nature; in 160 cases only an injunction was issued, and interim measures have been observed in only 54 cases.

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

Requests for interpretative preliminary rulings to the CJEU are a tool of last resort for national courts. Indeed, out of 756 collected cases, in 18 cases only a referral to the Court in Luxembourg was considered by the court. In 11 cases only the request for a preliminary ruling was made.



In matters relating to jurisdiction, in 679 judgments the court had to decide whether to exercise or decline its competence, while in 100 judgments only the issue was not dealt with. In 587 cases the court decided to exercise jurisdiction, while in 91 proceedings only the court concluded not to be entitled to hear the case. In 426 cases, jurisdiction has been determined through the Brussels Ila Regulation; in 144 cases, it has been determined through the Maintenance Regulation; in 117 cases, national law has been applied to determine jurisdiction. Situations of *lis pendens* have been registered by partners in 91 cases, especially involving other EU Member States. Regarding applicable law matters, the issue was dealt with in 391 cases. The law of the forum has been applied in 329 cases, while in only 62 cases a foreign law has been applied (in 17 cases the law of another EU Member State, in 45 cases the law of a non-EU-Member-State). The Rome III Regulation has been applied in 121 of said cases, while the Hague Maintenance Protocol in 114 cases; national Private International Law statutes have been deemed applicable in 200 judgments, while other unspecified legal instruments have been applied to the determination of the applicable law in 38 cases. The issue of the recognition and enforcement of judgments has been dealt with in 94 proceedings: in 23 cases the foreign judgment has not been recognised, while in 71 cases recognition was granted.





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Cooperation among courts has been triggered in 61 cases only out of 756, while only 15 of the collected judgments stem out of proceedings in which the taking of evidence abroad was necessary. In 14 cases Sharia-related issues arose and have been dealt with, while in 7 cases Latin American legal systems were somehow involved.



CHAPTER 1. SCOPE OF THE EU FAMILY LAW REGULATIONS

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A. MATRIMONIAL MATTERS³

I. INTRODUCTION

According to the European Commission there are currently around 16 million international couples in the European Union (hereinafter: “EU”). That means that cross-border family issues are likely to happen frequently.⁴ In fact, the statistics show that the number of international divorces and separations has increased in the EU in the last few years. For example, Denmark, Latvia, Lithuania and Portugal are the countries with the most divorces per year in the EU.⁵

At the same time, legal alternatives to marriage, like registered partnerships and others, have become more widespread and national legislations have changed to confer more rights on unmarried and same sex couples.⁶ In 2017, 13 of the 28 Member States (hereinafter: “MS”) regulate same sex marriages.⁷ This supposes a potential increase of

³ This paragraph shall be attributed to: Rosario Espinosa Calabuig.

⁴ See http://ec.europa.eu/justice/civil/family-matters/index_en.htm

⁵ See http://ec.europa.eu/eurostat/statistics-explained/index.php/Marriage_and_divorce_statistics

⁶ For detail http://europa.eu/youreurope/citizens/family/couple/registered-partners/index_en.htm. See Dethloff, ‘New models of partnership: the financial consequences of separation’ (2011), 12 *Journal of the academy of European Law*, 89-102.

⁷ In particular, Finland (2017), Slovenia (2015), Luxembourg (2015), Ireland (2015), United Kingdom (2014, except for Northern Ireland), France (2013), Denmark (2012), Portugal (2010), Sweden (2009), Norway (2009), Spain (2005), Belgium (2003), Netherland (2001). Outside EU countries like Canada, South Africa, Norway, Argentina, Brazil, Uruguay, New Zealand and some States of USA and Mexico also recognise same-sex marriages.



marriages in the EU and a greater likelihood -correlative to this increase- of legal separations and divorces in the States where they are possible.⁸

Considering the above, the interest of the EU legislator is justified in providing a uniform response throughout this field with instruments such as the Brussels IIa Regulation.

The Brussels IIa Regulation is undoubtedly “the cornerstone of judicial cooperation in family matters in the Union”, as evidenced by the Opinion of the European Economic and Social Committee on the Proposal for a Council Regulation on the competence, recognition and enforcement of decisions on matrimonial matters and parental responsibility, published on February 26, 2017 (speaker C. Bäumlner). The opinion itself reflects the current European policy more focused on the regulation of “matrimonial matters”, with all the limitations that will now be explained, than on other types of unions. According to the Opinion “judicial cooperation between the Member States of the Union must gradually improve and adapt to the reality of an increasing number of citizens throughout the Union who move, *get married* and have children”.⁹

Both the aforementioned Opinion and the Proposal to recast the Brussels IIa Regulation launched in June 2016,¹⁰ focus on the rules on child abduction, leaving unresolved many of the limitations and shortcomings of the Brussels IIa Regulation as regards the specific “matrimonial matters”.

There are many doubts, questions and issues which arise from this Regulation (as well as the other instruments) regarding their practical implementation by the practitioners and legal professionals in the MS. It has been -and continues to be- a long process full of difficulties, most of them arising from the legal and socio-cultural differences among the different European MS. But there is still a long way to go.

Many of these doubts and problems of interpretation derive, in the case of the Brussels IIa Regulation, from the limited scope of application and the specification, between other aspects, of the meaning of “matrimonial matters”. The possible extension of this

⁸ More broadly Espinosa Calabuig, *Diversity awareness and cross-border family issues*, in Ruiz Abu-Gnim (ed), *Private International Law: Embracing Diversity*, Edinburgh University Press, 2017.

⁹ [COM(2016) 411 final -2016/0190 (CNS)].

¹⁰ Proposal for a Council regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast). Brussels 30 June 2016. COM (2016) 411 final. 2016/0190 (CNS)



scope should be reconsidered in relation to the Proposal to recast the Brussels IIa Regulation.

II. ISSUES INCLUDED AND EXCLUDED FROM THE BRUSSELS IIa REGULATION

By now the Brussels IIa Regulation itself asserts strictly that regarding judgments on *divorce, legal separation or marriage annulment* (Article 1.1. a),¹¹ it “*should apply*” only to the dissolution of matrimonial ties and *should not deal* with issues such as the grounds for divorce, property consequences of the marriage or any other ancillary measures,¹² according to recital 8.¹³ These limitations can raise problems in countries where the judge is competent to dissolve the marriage and also to rule on the liquidation of the matrimonial property regimes and to fix the new framework of parent-child relationships.¹⁴

It is a limitation which also occurs within the scope of the Rome III Regulation,¹⁵ which only deals with “*the dissolution or loosening of marriage ties*”.¹⁶ Consequently, other issues that in some European MS are resolved in the same procedure are not contemplated by these Regulations, so they must be resolved by another rule.

On the other hand, a procedure of matrimonial nullity initiated by a third party after the death of one of the spouses does fall within the scope of application of the Brussels IIa Regulation, as declared by the CJEU in its judgment of 10-13-2016, in case C-294/15,

¹¹ It is understood only in cases with foreign elements, according to the Judgment of the Provincial Court of Madrid of 13-2-2017, in relation to the divorce of two Spanish nationals, one of whom was a resident of Colombia.

¹² See Ní Shúilleabráin, *Cross-border divorce law Brussels II bis*, New York, Oxford, 2010, 119; Magnus and Mankowski, *Brussels IIbis Regulation*, Munich, Sellier European Law Publishers, 2012, 27; Cornelup, *Droit Européen du Divorce - European Divorce Law*, LexisNexis, 2013, 195.

¹³ Nor are maintenance obligations and post-divorce pensions regulated (example in the Spanish case-law judgments of the Provincial Court of Valencia 14 January 2003, of Barcelona 31 March 2003, of Cádiz 15 September 2005). See Calvo Caravaca, Carrascosa González (eds), *Derecho Internacional Privado, Volumen II*, 17 ed., Granada, Comares, 2017, 275.

¹⁴ This is the case, for example, of Spain. See Iglesias Buhigues, Esplugues Mota, Palao Moreno, *Derecho Internacional Privado*, Valencia, Tirant Lo Blanch, 2017, 11 ed., 460; Añoveros Terradas, ‘The Impact and Application of the Brussels II bis Regulation in Spain’ in Boele-Woelki, González Beilfuss (eds), *Brussels II bis: Its Impact and Application in the Member States*, Intersentia, Commission on European Family Law, 2007, 279-295.

¹⁵ OJ L 343, de 29 December 2010, came into effect on 21 June 2012.

¹⁶ Recital 10 Rome III Regulation.



Mikolajczyk.¹⁷ This is so because the regulation governs any process of marriage annulment in any instance and even though the marriage has already been dissolved as a result of the death of one of the spouses. Article 3 of the Brussels IIa Regulation does not limit its application to living spouses, but is formulated in a general way, so that a third party or the Public Ministry could request the nullity of the marriage in accordance with said precept. Given that the Regulation clearly affects marriage annulment, it should be understood, in short, that it does not exclude matrimonial annulment actions after the death of one or both spouses, so it can be applied to determine the competent court that decides the merits of the case. Other matters that are understood not to be regulated by the Brussels IIa Regulation would be procedures for matrimonial nullity, divorce or separation that are religious in nature, unless a MS considers that a religious authority is vested with civil or state power.¹⁸

III. NOTION OF MARRIAGE

The definition of “marriage” is not among the definitions of Article 1 of Brussels IIa Regulation despite it being a fundamental term for the entire Regulation.¹⁹ The specification of what is meant by marriage is essential, since it is a “preliminary question” to divorce, separation or matrimonial annulment.²⁰ The question of whether or not there is a marriage arises in relation to cases such as polygamous marriages, marriages between persons of the same sex, revocable marriages, temporary marriages, marriages between minors, civil unions, registered or unregistered ...

¹⁷ See Iglesias Buhigues, Esplugues Mota, Palao Moreno, *Derecho Internacional Privado*, Valencia, Tirant Lo Blanch, 2017, 11 Ed., 460; Ní Shúilleabráin, *op.cit.*, 122; Cornelup, *op.cit.*, 197

¹⁸ See Calvo Caravaca, Carrascosa González (eds), *op. cit.*, 275, according to which what Regulation BIIa does not regulate is the legitimacy to exercise the actions of divorce, separation or matrimonial annulment. It is a matter of substance that is governed by the law applicable to the merits of the case, which will be determined in accordance with the conflict rules of the forum. But it does allow a third party, for example the daughter of one of the deceased spouses, who requests the nullity of the marriage to be able to resolve the succession of the same, according to the aforementioned ruling of the CJEU of 13-10-2016.

¹⁹ See Ní Shúilleabráin, *op.cit.*, 105; Cornelup, *op. cit.*, 200; Boele-Woelki, González Beilfuss (eds), *op. cit.*, 28.

²⁰ Calvo Caravaca, Carrascosa González (eds), *op. cit.*, 275.



Of all of them, the ones that have provoked the most comments are undoubtedly marriages between people of the same sex and registered partnerships.²¹

a) Same-sex marriages

Practitioners and academics have stressed the problems related to some kind of divorces as that of same sex couples.²² The absence of any reference to that was deliberated due to the different opinions in the European MS on the acceptance of this type of marriage. However, it would be nowadays wise to tackle this issue as there can be cases where this type of couples would not find a MS jurisdiction to hear their judicial separation or divorce, and thus they were discriminated in relation to other couples.²³

The Proposal to reform the Regulation, does not introduce a similar rule to Article 13 of Rome III or to Article 9 of the Regulation on economic-matrimonial regimes, in relation to marriages between persons of the same sex, which should be reconsidered as a matter of consistency between international instruments. In the Impact study, it is indicated that it is a very sensitive question, it being better not to deal with it so that the States that recognize this type of marriage can apply Brussels II, and those that do not recognize it are not obliged to apply it.²⁴ A similar rule in the new Regulation would prevent any interpretive risk in favour of a possible recognition of marriages which, although valid in certain MS, are not in many others.²⁵

²¹ Between others see Magnus, Mankowski, *op.cit.*, 29; Cornelup, *op. cit.*, 201-204; Boele-Woelki, González Beilfuss (eds), *op.cit.*, 29; Ní Shuilleabráin, *op.cit.*, 114-116.

²² According to the opinions done in the *Spanish Exchange Seminar* celebrated in Valencia in October 2016. See *Report on Spanish Good practices*, in www.eufams.unimi.it (pp. 4-5).

²³ *Report on Spanish Good practices*, 4-5, in www.eufams.unimi.it

²⁴ See more broadly Campuzano Díaz, 'La Propuesta de reforma del Reglamento 2201/2003: ¿Se introducen mejoras en la regulación de la competencia judicial internacional', in Guzmán Zapatero, Esplugues Mota, *Persona y familia en el nuevo modelo español de Derecho internacional privado*, Valencia, tiran lo Blanch, 2017, 91-102.

²⁵ This would explain the "reassuring tone" of recital 26.2 of the Rome III Regulation, which states that "Where this Regulation refers to the fact that the law of the participating Member State whose court is seized does not deem the marriage in question valid for the purposes of divorce proceedings, this should be interpreted to mean, *inter alia*, that such a marriage does not exist in the law of that Member State. In such a case, the court should not be obliged to pronounce a divorce or a legal separation by virtue of this Regulation". See the critical analysis of Article 13 done by Orejudo Prieto De Los Mozos, "La nueva regulación de la ley aplicable a la separación judicial y al divorcio: aplicación del reglamento Roma III en España", *Diario La Ley*, nº 7913, 2012, 5-6. See also Guzmán Zapatero, 'Divorcio, matrimonio y ciertas diferencias nacionales: a propósito de su tratamiento en el Article 13 del Reglamento Roma III', in



It is striking, in addition, that the *forum necessitatis* has not been incorporated. This rule could have been envisaged in cases where the competent courts are located in the EU but whose laws do not provide for divorce or do not recognise the validity of the marriage in order to obtain a divorce decision. It would have been sufficient to require some link with the *forum*, for example the nationality of one of the spouses.²⁶ It is worth recalling that, as regards the Rome III Regulation and keeping in mind Article 13 of same, the Council of the EU issued a Declaration requesting a reform of Brussels IIa Regulation to include a *forum necessitatis* for cases in which the competent courts were in countries that do not recognise same-sex marriages.²⁷ The European Parliament also joined this request in its legislative resolution of 15 December 2010, requesting that the reform be carried out urgently.²⁸

It is interesting to highlight how practice is demonstrating that the courts of some MS in which same-sex marriage is not recognized, as in the case of Italy,²⁹ are recognizing the registration of such marriages that have been celebrated in a State where they are

Esplugues Mota, Palao Moreno (eds), *Nuevas fronteras del Derecho de la Unión europea. Liber amicorum José Luis Iglesias Buhigues*, Valencia, Tirant lo Blanch, 2012, 52.

²⁶ In these regards see Orejudo Prieto De Los Mozos, *op. cit.*, 6; Baruffi, 'Il regolamento sulla legge applicabile ai 'divorzi europei'', *Diritto dell'Unione europea*, (4/201 1), 861; Clerici, 'Il ruolo dell'autonomia privata tra espansione e limiti di operatività nel regolamento (CE) N. 1259/2010 sulla legge applicabile al Divorzio e alla separazione legale', *Diritto del Commercio internazionale* (2012), 357. See also Franzina, 'The law applicable to divorce and legal separation under regulation (EU) No. 1259/2010 of 20 December 2010' (2011) 3 *Cuadernos de Derecho Transnacional*, 101-102, in favour of a broad notion of marriage in Rome III Regulation that could favour the inclusion of same-sex couples and, in general, any union with a formal and stable character created through a procedure regulated by law and susceptible to being dissolved according to that procedure. See also Franzina, 'Sul forum necessitatis nello spazio giudiziario europeo', (2009) *Rivista di diritto internazionale*, 1121-1129.

²⁷ 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.

²⁸ See Campuzano Díaz, *op. cit.*, 95-97. In this sense see, *Report on the Spanish Good Practices*, October 2016, in www.eufams.unimi.it.

²⁹ Regarding this topic see the interesting debate maintained during the *Italian Exchange Seminar* celebrated in Verona in July 2016 reflected in the *Report of Italian Good Practices*, in www.eufams.unimi.it 4.



recognized.³⁰ For this they have argued the respect of the *status familiae* and Article 12 of the European Convention on Human Rights on 4 November 1950.³¹

Regarding the future Regulation, it has been also proposed that the use of gender-neutral terminology in it (“spouses” instead of “husband or wife”) would facilitate coverage of same-sex marriages.³²

Consequently, the silence of the Proposal launched in 2016 related to some important points such as a rule comparable to Article 13 of the Rome III Regulation and a *forum necessitatis* for cases in which the competent authorities are in countries that do not admit same sex marriages should be reconsidered in the interests of consistency between all the instruments.

b) Registered partnerships

Also excluded from the scope of Brussels IIa are registered partnerships, which would demonstrate the lack of sensitivity towards the current pluralism of family models.³³ However, in some Member States such as Great Britain or Germany certain “de facto couples” have the same legal effect as marriages. This could lead to consider that the dissolution of these relationships with the equivalent effects of marriage would be regulated by Brussels IIa.³⁴ Therefore, a more flexible view of “matrimonial matters”

³⁰ See for details Marinai, ‘Recognition in Italy of Same-Sex Marriages Celebrated Abroad: The Importance of a Bottom-up Approach’ (2016) 9 *European Journal Legal Studies* 10.

³¹ The judgment of the Italian Supreme Court of 31 January 2017 confirmed the decision of the Court of Appeal of Naples that had ordered the registration of a French marriage consisting of two women. On the other hand, the Italian Government introduced in the Private International Law Act of 31 May 1995, n. 218, Article 32 bis (and thanks to a legislative decree of action of the Italian Same-Sex Civil Partnership Act of 20 May 2016, n. 76), according to which ‘the civil union or other similar institution, constituted abroad between Italian citizens of the same sex habitually resident in Italy produces the effects of civil unions regulated by Italian law’.

³² See Swennen, ‘Atypical Families in EU (Private International) Family Law’, in Meeusen et al., *International family law for the European Union*, Antwerpen, 2007, 396.

³³ See Ancel, Muir-Watt, *La désunion européenne: le Règlement dit Bruxelles II*, *Revue Critique de Droit International Privé*, 2001, 403-457.

³⁴ Calvo Caravaca, Carrascosa González (eds), *op. cit.*, 275; Ní Shúilleabráin, *op. cit.*, 105



would encompass registered couples and, in the same way, same-sex marriages, against a stricter interpretation by which Brussels IIa only contemplates “classic” marriage.³⁵ It is assumed that the Regulation can only be applied to formalized relationships. But some MS automatically confer rights and obligations on those who cohabit for a defined period. However, these regimes do not require any formal act of status acquisition and therefore there is no need for any formal act of dissolution. BIIa Regulation is concerned with this formal process of dissolution which is absent in such “de facto” relationships.³⁶ Finally, Practitioners and academics have also stressed the problems related to private divorces that are not included in the Brussels IIa Regulation’s scope of application as already indicated by the CJEU in the Case C-281/15.³⁷

B. PARENTAL RESPONSIBILITY³⁸

I. INTRODUCTION TO THE RELEVANT LEGISLATION

Parental responsibility matters are directly regulated by EU secondary legislation, in particular by the Brussels IIa Regulation that provides for rules concerning jurisdiction, recognition and enforcement of decisions, and co-operation between central authorities. Only the applicable law is not covered by the PIL scope of this legal instrument, and is therefore governed by international sources, where these are applicable, or by national laws on a residual basis.³⁹ Further, on a general note, Brussels IIa Regulation applies since 1 March 2005 to all EU Member States, except Denmark. Two significant developments need however to be considered in this regard: on the one hand, the recasting process of the Regulation that is currently ongoing,⁴⁰ and on the other hand,

³⁵ Gaudemet-Tallon, *Le Règlement n° 1347/2000 du conseil du 29 mai 2000: Compétence, reconnaissance et execution des decisions en matière matrimoniale et en matière de responsabilité parentale des enfants communs*, *Journal du droit international*, 2001, 381-387.

³⁶ See Ní Shúilleabráin, *op.cit.*, 105; Swennen, *op. cit.*, 413.

³⁷ According to the opinions exposed in the *Spanish Exchange Seminar* celebrated in Valencia in October 2016. See *Report on Spanish Good practices*, in www.eufams.unimi.it (pp. 4-5).

³⁸ This paragraph shall be attributed to: Diletta Danieli.

³⁹ See Ch 5 of this Final Study (Applicable Law).

⁴⁰ European Commission, ‘Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on



the impact of the withdrawal of the UK from the EU that will be effective on 29 March 2019 (provided that no extension of the two-year term from the notification of the UK's intention to withdraw has been agreed upon).

First, the paper provides an overview of the material and personal scope of Brussels IIa Regulation concerning parental responsibility, followed by some preliminary issues regarding the use of this notion in other international instruments. Then, the matters included in and excluded from the scope of parental responsibility within the meaning of the Regulation are assessed in more detail, considering the relevant CJEU and national⁴¹ case law. To conclude, some remarks on the practical implications of a far-reaching understanding of the concept of parental responsibility within the EU legal system are proposed.

Brussels IIa Regulation expressly defines its material scope of application in Article 1(1) thereof, specifying that it applies “in civil matters relating to (b) the attribution, exercise, delegation, restriction or termination of parental responsibility”. Paragraphs 2-3 of the same provision complement the notion by adding two lists of matters that are, respectively, included in and excluded from the broad wording of Paragraph 1. Article 2 furthermore lays down a number of definitions of the recurring legal terms used in the Regulation, which are equally relevant to determine the contents of parental responsibility rights for the purposes of their interpretation and application (in particular, insofar as is here relevant, No 7-10 of the mentioned Article).

Another aspect that is worth considering on a preliminary basis regards the absence of personal prerequisites of application in the Brussels IIa regime,⁴² 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

international child abduction (recast)’ COM(2016) 411 final. In the literature e.g. ‘The revision of the Brussels IIbis Regulation (special issue)’ (2015) *Nederlands Internationaal Privaatrecht*; Baruffi, ‘La riforma del regolamento Bruxelles II bis e la tutela dell’interesse superiore del minore’ in Triggiani, Cherubini, Ingravallo, Nalin and Virzo (eds), *Dialoghi con Ugo Villani*, 2 (Bari, Cacucci editore, 2017) 1087-1092; Honorati, ‘The Commission’s proposal for a recast of Brussels IIa Regulation’ (2017) *International Family Law Journal*, 97-114.

⁴¹ The national case law herein cited and commented has been collected by the partners of the EUFam’s project and filed in a public database available at: www.eufams.unimi.it/category/database/.

⁴² See also Report on the Italian Good Practices, section 1, 3, for similar considerations made with particular regard to matrimonial matters.



differs significantly from that adopted in other EU PIL instruments⁴³ 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 “original hierarchy”⁴⁴ 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.⁴⁵ 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.⁴⁶

Before analysing the actual contents of parental responsibility matters governed by Brussels IIa Regulation, it should be pointed out that this concept has a widespread use in various international instruments concerning the rights of children and their protection, where it is generally preferred to the stricter notion of “parental authority”.⁴⁷ The most comprehensive source in this regard is the Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures of protection of children (hereinafter also “Hague Convention of 1996”),⁴⁸ which the EU Regulation parallels in

⁴³ 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 a EU Member State in order to be applied.

⁴⁴ Pataut, ‘Article 14. Residual jurisdiction’ in Magnus and Mankowski, *Brussels IIbis Regulation* (n 1) 162. See also Viarengo, Villata (eds), *First Assessment Report on the case-law collected by the research consortium (hereinafter: “First assessment report”)*, section 1, 17, available at www.eufams.unimi.it.

⁴⁵ See Ch 4 of this Final Study (Jurisdiction).

⁴⁶ e.g. Cass (sezioni unite), 28 May 2014 No 11915, ITT20140528, regarding a child who was habitually resident in Cuba.

⁴⁷ It is worth mentioning that the paradigm shift occurred at the international level between the term “parental responsibility” instead of the more traditional “parental authority” was also among the grounds underlying the recent Italian legislative reform on the regulation of filiation and parent-child relationships (legge 10 December 2012, n. 219, Disposizioni in materia di riconoscimento dei figli naturali; decreto legislativo 28 December 2013, n. 154, Revisione delle disposizioni vigenti in materia di filiazione, a norma dell’articolo 2 della legge 10 December 2012, n. 219).

⁴⁸ The full text of the Convention (both in English and French) and the regularly updated status table are available at: www.hcch.net. See generally Lowe and Nicholls, *The 1996 Hague Convention on the*



many respects. Among them, there are indeed the definition of parental responsibility provided for in Article 1(2) of the Convention, and the included and excluded matters listed in its Articles 3 and 4, respectively.

A further example comes from the European Convention of 25 January 1996 on the exercise of children's rights established within the framework of the Council of Europe,⁴⁹ whose objective is to set forth a number of procedural rights and facilitate their exercise in proceedings affecting children, especially those “involving the exercise of parental responsibilities” (Article 1(3)). The use of the plural form, besides, is meant to particularly emphasise the scope of the notion as encompassing a wide set of powers, rights and duties.⁵⁰ Neither the international nor the European legal instruments actually define their contents, which are therefore left to the laws of the State where responsibility is under consideration.⁵¹ As regards specifically Brussels Ila Regulation, an autonomous interpretation of parental rights and duties is however required in order to ensure consistency with the harmonising purposes of EU law.

To conclude these introductory considerations, it must be specified that Brussels Ila Regulation does not set a range of age of children to be covered by the scope of application of its rules on parental responsibility, as opposed to other international instruments such as the Hague Convention of 1996 (children up to the age of 18) or the Hague Convention of 1980 on child abduction⁵² (children up to the age of 16). As a

Protection of Children (Bristol, Jordan Publishing, 2012); Gration, Curry-Sumner, Williams, Setright and Right, *International Issues in Family Law: The 1996 Convention on the Protection of Children and Brussels Ila* (Bristol, Jordan Publishing, 2015); Baruffi, 'La Convenzione dell'Aja del 1996 sulla tutela dei minori nell'ordinamento italiano' (2016) *Rivista di diritto internazionale privato e processuale*, 977-1019.

⁴⁹ The full text of the Convention (both in English and French) and the regularly updated status table are available at: www.coe.int.

⁵⁰ See generally the work of the Commission on European Family Law (CEFL), which has led to the publication of the 'Principles of European Family Law regarding Parental Responsibilities' in 2007 with the aim of promoting a degree of harmonisation of family law throughout Europe (available at: <http://ceflonline.net/principles/>). In the literature, e.g. Boele-Woelki, 'The CEFL Principles regarding Parental Responsibilities: Predominance of the Common Core' in Boele-Woelki and Sverdrup (eds), *European Challenges in Contemporary Family Law* (Antwerp-Oxford-Portland, Intersentia, 2008) 63-91.

⁵¹ Explanatory Report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (approved by the Council on 28 May 1998), prepared by Dr Alegría Borrás (Borrás Report) [1998] OJ C221/27, para 24.

⁵² Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. Its full text (both in English and French) and the regularly updated status table are available at: www.hcch.net.



result, also this aspect shall be defined by Member States' legal systems.⁵³ It should be noted, however, that the Recast Proposal intends to fill the legislative gap by inserting two specific rules in this regard. On the one hand, the new Recital 12 expressly provides for the application of the Regulation “to all children up to the age of 18 years”, with the exception of the provisions on child abduction that “should continue to apply to children up to the age of 16 years” in order to be consistent with the Hague Convention of 1980. On the other hand, a new definition (No 7) is introduced in Article 2 of the Regulation, pursuant to which the term “child” shall mean “any person below the age of 18 years”. Moreover, Brussels Ila Regulation does not require any link with matrimonial proceedings for its application in parental responsibility matters, with the consequence that its scope covers all children regardless of their biological origin (Recital 5 of the Regulation).⁵⁴

II. CONTENTS OF PARENTAL RESPONSIBILITY RIGHTS UNDER BRUSSELS IIA REGULATION

As mentioned above, Article 1(1) of Brussels Ila Regulation sets forth the general provision concerning its scope in relation to parental responsibility, which includes civil matters covering any legal situation from the very existence of such right (“attribution”), throughout its forms of exercise (“exercise, delegation, restriction”), to its cessation (“termination”). The concept of parental responsibility is further clarified by the definition provided in Article 2(7) of the Regulation, which refers to “all rights and duties relating to the person or the property of a child [that] are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect”. It follows that under the EU legal framework, the holder of parental responsibility may either be a natural or a legal person (Article 2(8)), and the rights and

⁵³ European Commission, ‘Practice Guide for the application of the Brussels Ila Regulation’ [2014], para 3.1.1.1.

⁵⁴ This enlargement of the scope of Brussels Ila was indeed a significant departure from its predecessor Brussels II, which applied only to children of both spouses (Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses [2000] OJ L160/19). On occasion, also national case law (especially less recently) has underlined this legislative improvement when assessing petitions regarding parental responsibility independently from any connection to matrimonial issues: e.g. AG Leverkusen 10 August 2006, 33 F 222/05, DEF20060810.



duties conferred to the holder may indifferently derive from a judicial decision, a legislative provision or a private agreement having legal effect.

The scope of the Regulation resulting from the broad wording of these rules has been specified by the CJEU case law in various instances. The term “civil matters”, for example, is an autonomous concept of EU law that is common to other PIL instruments.⁵⁵ In particular, measures that would pertain to the public law sphere according to Member States’ laws are nonetheless encompassed in the notion of civil matters for the purposes of Brussels IIa Regulation provided that the object of the application requesting that measure falls within its material scope.⁵⁶ In this regard, the CJEU has most recently held that the object of an action where the court is called upon to rule on the child’s need to obtain a passport and the parent’s right to apply for that passport without the agreement of the other parent is the “exercise of parental responsibility for that child”⁵⁷ within the meaning of Article 1(1)(b) in conjunction with Article 2(7) of Brussels IIa. No relevance should indeed be given to the fact that this court’s decision would subsequently be considered in the administrative procedure for issuing the child’s passport, which remains exclusively regulated by national law. Also, national case law appears to properly follow this autonomous interpretation: for instance, German courts apply the Regulation even in administrative proceedings involving the *Jugendamt* (youth welfare office).⁵⁸

This general notion of parental responsibility is then complemented by the lists of included and excluded matters provided in Paragraphs 2-3 of Article 1, respectively. Each of them is separately analysed in the following subparagraphs.

⁵⁵ Brussels IIa Regulation: in this context, e.g. CJEU, case C-645/11 *Land Berlin v Ellen Mirjam Sapir et al* [2013] ECLI:EU:C:2013:228; CJEU, case C-49/12 *The Commissioners for Her Majesty’s Revenue & Customs v Sunico ApS et al* [2013] ECLI:EU:C:2013:545.

⁵⁶ CJEU, case C-435/06 *C* [2007] ECR I-10169, ECLI:EU:C:2007:714; CJEU, case C-523/07 *A* [2009] ECR I-2805, ECLI:EU:C:2009:225. Both decisions are further analysed in section II.A of this paper.

⁵⁷ CJEU, case C-215/15 *Vasilka Ivanova Gogova v Ilia Dimitrov Iliev* [2015] ECLI:EU:C:2015:710, para 29.

⁵⁸ OVG Lüneburg 20 January 2016, 4 LB 14/13, DEA20160120. Against VG Augsburg 13 April 2015, 3 E 15.251, DEA20150413, even though the ruling of this court does not seem convincing. See also First Assessment Report, section 1, 17.



a) Article 1(2) of the Brussels IIa Regulation: included matters

The matters listed in this provision are merely illustrative, and thus do not cover all issues that could potentially fall within the material scope of Brussels IIa Regulation.

Point (a) first refers to “rights of custody and rights of access”, which are aspects typically related to the attribution and the exercise of parental responsibility. The former is specifically defined in Article 2(9) of the Regulation as including “rights and duties relating to the care of the person of a child, and in particular the right to determine the child’s place of residence”, while the latter is a less comprehensive right that allows its holder “to take a child to a place other than his or her habitual residence for a limited period of time” pursuant to Article 2(10).⁵⁹

In particular, the notion of rights of custody needs to be interpreted independently of any domestic legislation in order to be consistent with a uniform application of EU law,⁶⁰ and is further relevant to determine whether a child’s relocation may amount to a “wrongful removal or retention” within the meaning of Article 2(11).⁶¹ In this specific regard, account must be given to custody rights that were both (a) conferred under Member States’ laws applicable in each case, i.e. those of the place of habitual residence of the child immediately before the removal or retention, and (b) effectively exercised by their holder (either jointly or alone). As established by the CJEU,⁶² it follows that the wrongful character depends on the actual place of a child’s habitual residence immediately before the relocation, and the court of the place where the child was removed or retained can order the return only provided that is able to determine - on the basis of the factual circumstances of each case - whether his/her habitual residence was located in the Member State of origin.

⁵⁹ Both definitions are clearly inspired by those provided in the Hague Convention of 1980 on international child abduction (Art 5).

⁶⁰ CJEU, case C-400/10 PPU *J. McB. v L. E.* [2010] ECR I-8965, ECLI:EU:C:2010:582, para 41.

⁶¹ The Regulation’s provisions on child abduction (Arts 10-11) fall outside the scope of this paper and are dealt with in Ch 4 of this Final Study (Jurisdiction). On the interpretation given by national courts to the notion of custody rights in the context of child abduction proceedings, see e.g. Najvyšší súd Slovenskej republiky, 2 M Cdo 23/2008, 30 June 2009, SKT20090630; Najvyšší súd Slovenskej republiky, 6 Cdo 1/2013, 30 April 2013, SKT20130430; Trib minorenni Catania, 1 July 2015, ITF20150701.

⁶² CJEU, case C-376/14 PPU *C v M* [2014] ECLI:EU:C:2014:2268, para 57.



As far as rights of access are concerned, the scope of application also includes the enforcement of a penalty payment imposed in order to ensure the effectiveness of such rights, in accordance with the CJEU ruling in *Bohez*.⁶³ Indeed, it has been deemed as an ancillary measure that serves to protect a right falling within the scope of Brussels IIa Regulation, rather than that of Brussels I Regulation (and the current Brussels Ia) that generally applies to civil and commercial matters. The practical impact of this decision appears to have been overlooked in a case regarding compensation for damages sought for a breach of rights of access pursuant to Article 709-ter of the Italian Civil Procedural Code, where the national court did not carry out any specific assessment of the relevant PIL aspects.⁶⁴

Article 1(2) of Brussels IIa further provides that “guardianship, curatorship and similar institutions” are among the matters covered by the notion of parental responsibility (Point (b)). Also, “the designation and functions of any person or body having charge of the child’s person or property, representing or assisting the child” (Point (c)) and “the administration, conservation or disposal of the child’s property” that qualify as measures of protection are similarly governed by the Regulation (Point (e)). The peculiar nature of these latter two cases is well underlined by Recital 9 thereof, which specifies that whenever the measures relating to the child’s property do not concern his/her protection (i.e. do not involve disputes between the parents), they rather fall within the scope of application of Brussels I (currently Ia) Regulation.⁶⁵ As an example following this purposive approach, it is worth mentioning an Italian case where the judge supervising guardianships (*giudice tutelare*) applied Brussels IIa Regulation to a joint application lodged by the parents on behalf of their children for the appointment of a special guardian authorised to represent them in the purchase of an immovable property (in particular, it held that such action fell within the scope of Article 1(2)(c)).⁶⁶

Lastly, Point (d) of Article 1(2) considers “the placement of the child in a foster family or in institutional care”. These particular situations could be inherently regulated by

⁶³ CJEU, case C-4/14 *Christophe Bohez v Ingrid Wiertz* [2015] ECLI:EU:C:2015:563.

⁶⁴ Trib Benevento, 12 March 2015 No 587, ITF20150312.

⁶⁵ See also Practice Guide (n 16), para 3.1.1.4.

⁶⁶ Trib Padova (Giudice tutelare), 14 September 2017, ITF20170914.



public law within Member States' legal systems, but the CJEU has regarded them as measures affecting the rights of custody over a child, and thus as matters relating to parental responsibility under Brussels Ila Regulation.⁶⁷ This holding is also consistent with the autonomous interpretation given to the term “civil matters”, which has been analysed above. Moreover, the Regulation's material scope includes a judgment rendered by a court of a Member State that orders the placement of a child in an institutional care in another Member State even where such decision entails “a period of deprivation of liberty [of that child] for therapeutic and educational purposes”.⁶⁸ This further aspect is in fact qualified as a measure for protection of the child, and not as a “punishment for the commission of a criminal offence”⁶⁹ that would be excluded from the scope of the Regulation (Article 1(3)(g)).

b) Article 1(3) of the Brussels Ila Regulation: excluded matters

As opposed to the matters addressed above, the list of those excluded from the material scope of Brussels Ila Regulation is exhaustive. Generally speaking, the grounds underlying the choice of excluding a particular matter can be grouped into two categories: some of them are typically governed by national laws (and thus Member States enjoy a wide margin of discretion), while others are indeed regulated at the EU level, but in specific acts other than Brussels Ila Regulation.

The former category comprises the matters listed in Points (a)-(d) and (g) of Article 1(3), which refer, respectively, to “the establishment or contesting of a parent-child relationship”, “decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption”, “the name and forenames of the child”, “emancipation”⁷⁰ and “measures taken as a result of criminal offences committed by children”. In addition, Recital 10 clarifies the reasons for excluding the establishment of

⁶⁷ C (n 19) paras 32-53; A (n 19) paras 21-29.

⁶⁸ CJEU, case C-92/12 *Health Service Executive v S.C. and A.C.* [2012] ECLI:EU:C:2012:255, para 63.

⁶⁹ *ibid*, para 65.

⁷⁰ In particular, given that emancipated children can exercise a number of rights before reaching the age of majority without the assistance of parents or guardians, the Regulation becomes inapplicable to them according to the age limit provided for in each national legal system (in Italy, for example, the possibility of emancipation is given at 16 years): see Baruffi, ‘Articoli 1-2’ (n 1) 2548.



parenthood and, more generally, questions relating to the status of a person, stressing that these aspects differ from the attribution of parental responsibility. Member States courts appear fairly attuned to the interpretation of these exclusions, and no issues appear to have arisen from the case law. For instance, an Italian court has properly held that the assessment of the state of neglect of a child, being a preparatory measure in order to possibly declare his adoption, falls outside the scope of Brussels IIa Regulation pursuant to Article 1(3)(b).⁷¹

As for the matters listed in Points (e) and (f) that are governed by different EU legal instruments, i.e. maintenance obligations and successions, the relevant Regulations are the Maintenance Regulation and the Succession Regulation respectively. Unlike Brussels IIa, both of them provide for rules covering all PIL aspects (jurisdiction, applicable law and recognition and enforcement of decisions), thus offering a complete legislation that should facilitate the courts to rule on these specific matters. Nonetheless, the fragmentation of proceedings between various regulatory regimes still poses occasional difficulties upon national courts,⁷² which sometimes fail to assess each claim according to the correct EU and/or international instrument that should be applied.⁷³

Furthermore, with specific regard to the exclusion provided in Article 1(3)(f), the CJEU has recently established that Brussels IIa applies to an inheritance settlement agreement concluded between the surviving spouse and a guardian *ad litem* on behalf of minor children, even though the approval of the agreement has been requested in the context of succession proceedings.⁷⁴ This view is again supported by the purpose of protection of the children underlying such measure, which is required to supply for their limited legal capacity and thus aimed at fulfilling their best interests. The provisions of the Succession Regulation also confirm this holding by expressly excluding the status and

⁷¹ Trib minorenni Roma, 25 January 2008, ITF20080125.

⁷² This issue was also highlighted in the Report on the outcomes of the online questionnaire (see especially section 5, 55-56).

⁷³ For some examples regarding the interplay between Brussels IIa and Maintenance Regulations, see e.g. Županijski sud u Puli Gž-1532/14, 16 September 2014, CRS20140914; Trib Modena (sezione seconda civile) 7 February 2017 no 769, ITF20170207.

⁷⁴ CJEU, case C-404/14 *Marie Matoušková* [2015] ECLI:EU:C:2015:653.



legal capacity of natural persons from its scope of application (Article 1(2)(a)-(b) thereof).

III. FINAL REMARKS

It appears safe to conclude that the contents of parental responsibility under Brussels IIa Regulation are indeed far-reaching, and it is also no coincidence that the CJEU has consistently supported a wide interpretation of the rules governing its scope of application (Article 1) and the related definitions (Article 2). More precisely, the key element that needs to be considered in order to establish whether a specific action or legal institution actually falls within the scope of the Regulation is the purposive nature, in the sense that it should ultimately aim at protecting the child and his/her best interests. In accordance with the international legal framework, it follows that parental responsibility is a harmonised and child-centred notion also from a EU perspective.⁷⁵

Partially different considerations, however, may be drawn with regard to the separate concepts of the holding and exercise of parental responsibility. As mentioned above, the actual contents of these rights continue to be governed by domestic laws of each Member State, under which also public authorities and parties other than the parents can play a significant role. As a result, the practical application of Brussels IIa Regulation may face occasional inconsistencies, which are however counterbalanced by the unifying purpose of the EU-autonomous notion of parental responsibility.

These points are also confirmed by the general trends emerging from the national case law that has been assessed. Indeed, Member States' courts are well accustomed to applying the Regulation to all claims concerning attribution, exercise and termination of parental responsibility over a child, in accordance with the broad definition provided in Article 1(1)(b) thereof. Albeit infrequently, there are still some difficulties in addressing the relevant PIL issues regarding claims that are ancillary to proceedings on parental responsibility rights (e.g. measures of enforcement related to a breach of rights of

⁷⁵ For a more comprehensive assessment see Ferrer-Riba, 'Parental responsibility in a European perspective' in Scherpe (ed), *European Family Law. Family Law in a European Perspective*, III (Cheltenham-Northampton, Edward Elgar Publishing, 2016, 284-310.



access). At times, these aspects may not be assessed at all, or otherwise by referring to the wrong EU and/or international legal source. In these cases, the qualified guidance provided by the CJEU and the overarching objectives of Brussels IIa Regulation should be always borne in mind.

C. MAINTENANCE⁷⁶

I. INTRODUCTION

Maintenance obligations within the European Union (EU) are governed by the 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 obligations⁷⁷ (Regulation) and the Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance⁷⁸ (Convention), accompanied by the Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations⁷⁹ (Protocol). Once the competent judicial or administrative authority receives a request for the international recovery of maintenance it should first address the issue of scope of each of those instruments. Assessment relates to substantive, temporal and geographical scope. It naturally relates also to the disconnection clauses, i.e. rules governing relation among these instruments, and relations to other legal instruments.

Both Regulation and Convention have many similarities but they are separate and autonomous legislative regimes. They will be applied separately to relevant cases according to their respective scope provisions.⁸⁰ As a default, the Regulation will apply

⁷⁶ This paragraph shall be attributed to: Mirela Župan, Martina Drventić.

⁷⁷ 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 [2009] OJ L 7/1.

⁷⁸ Convention on the International Recovery of Child Support and Other Forms of Family Maintenance [2011] OJ L 192/51.

⁷⁹ Protocol on the Law Applicable to Maintenance Obligations [2009] L 331/19.

⁸⁰ Lortie, Groff, *Practical Handbook for Competent Authorities: the 2007 Hague Child Support Convention, the 2007 Hague Protocol on Applicable Law (Maintenance) and the 2009 European Union Maintenance Regulation* (Onești, Magic Print, 2013), para 146.



to cross-border maintenance cases among Member States of the European Union. As a default, Convention will apply to international cases involving a Member State of the European Union and a State outside of the European Union which is a Contracting State to the Convention. Outside of the European Union, the Convention will apply between Contracting States to the Convention. In the end, Protocol would prescribe choice of law rules applicable in Member States obliged by it, regardless if the case relates to EU or any international maintenance obligation.

II. BACKGROUND

Convention and Regulation were negotiated simultaneously. They represent a significant shift from the international maintenance obligations regime build beforehand for decades. Following conventions addressing the cross-border recovery of maintenance have previously been concluded at international level:

1. The United Nations Convention on the Recovery Abroad of Maintenance, New York, 20 June 1956⁸¹ (1956 New York Maintenance Convention);
2. Convention of 24 October 1956 on the law applicable to maintenance obligations towards children⁸² (1956 Maintenance Convention);
3. Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children⁸³ (1958 Maintenance Convention);
4. Convention of 2 October 1973 on the Law Applicable to Maintenance Obligation⁸⁴ (1973 Applicable Law Convention);

⁸¹ United Nations, Convention on the Recovery Abroad of Maintenance, New York, 20 June 1956, Treaty Series, vol. 268, 3, and vol. 649, 330, <https://treaties.un.org/doc/Publication/UNTS/Volume%20268/v268.pdf>.

⁸² Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations, assets.hcch.net/docs/86a87ff7-e700-4e05-a40c-61090beecb9c.pdf.

⁸³ Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children, <https://assets.hcch.net/docs/d7d884ee-954e-49b1-bbb4-b6380a1bb1bd.pdf>.

⁸⁴ Convention of 2 October 1973 on the Law Applicable to Maintenance Obligation, <https://assets.hcch.net/docs/86a87ff7-e700-4e05-a40c-61090beecb9c.pdf>.



5. Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations⁸⁵ (1973 Enforcement Regulation).

The reform of the existing law on international maintenance obligations began in May 2003 at the Hague Conference on Private International Law (HCCH). The work within the HCCH resulted with the new convention with the sophisticated system of administrative cooperation and with the simple and fast system of recognition and enforcement of maintenance decisions based on indirect grounds of jurisdiction.⁸⁶ The Protocol was enacted on 23 November 2007, when it became clear that many Member States of HCCH were not interested in harmonizing the applicable law rules.⁸⁷

At regional European level EU legislative activity in private international law was primarily focused on commercial matters. However, such rules encompassed the maintenance obligation as well. Following instruments were applicable:

1. Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters⁸⁸ (hereinafter: “Brussels Convention”),
2. Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters⁸⁹ (1988 Lugano Convention),
3. Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters⁹⁰ (Brussels I Regulation),
4. Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters⁹¹ (2007 Lugano Convention).⁹²

⁸⁵ Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, <https://assets.hcch.net/docs/d7d884ee-954e-49b1-bbb4-b6380a1bb1bd.pdf> .

⁸⁶ Beaumont, ‘International Family Law in Europe - the Maintenance Project, the Hague Conference and the EC: A Triumph of Reverse Subsidiarity’ (2009) 73 *The Rabel Journal of Comparative and International Private Law* 509, 513.

⁸⁷ Ibid, 514.

⁸⁸ Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, [1972] OJ L 299.

⁸⁹ Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters [1988] OJ L 319.

⁹⁰ Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 012.



During the negotiation within the HCCH the EU had commenced its own reform process. Regulation was finalized after the Hague negotiations have been concluded in November 2007. Regulation was adopted in December 2008.

The parallel negotiations on those two instruments resulted with the harmony between the two instruments. Some of the provisions of the Convention are being used in the Regulation. Regulation benefited significantly from the Hague negotiations in the following areas: the provision of free legal aid in all child support cases, extensive duties for Central Authorities and the adoption of a separate Protocol on applicable law.⁹³ The wording of the Regulation emphasizes that the Community and its Member States have taken part in HCCH negotiations which had led to the adoption of Convention and Protocol, which both should be taken into account in the application of the Regulation.⁹⁴ Protocol entered into force as part of EU law before it entered into force at international level. The Convention was ratified by the European Union on 9 April 2014 and entered into force on 1 August 2014.⁹⁵ At the present time, except in EU, the Convention is in force in Albania, Bosnia and Herzegovina, Brazil, Honduras, Kazakhstan, Montenegro, Norway, Turkey, Ukraine and USA.⁹⁶ The Protocol is applicable in Member States since 18 June 2011 (not including Denmark and United Kingdom).⁹⁷ The extensive use of EU external competences however led to a complex milleaue, several connected

⁹¹ Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L 339/3.

⁹² For particular emphasis to Switzerland see J K Kostkiewicz, M Eichenberger, 'International maintenance law in legal relations between Switzerland and the EU' (2005) 20 *Comparative Law Review* 13-31.

⁹³ Walker, *Maintenance and child support in private international law* (Oxford, Hart Publishing, 2015) 2.

⁹⁴ Rec 8 of the Maintenance Regulation. See also Borràs, 'The Necessary Flexibility in the Application of the New Instruments on Maintenance' in Boele-Woelki, Einhorn, Girsberger & Symeonides (eds), *Convergence and Divergence in Private International Law. Liber Amicorum Kurt Siehr* (Zurich/The Hague, 2010)

⁹⁵ Council Decision of 9 June 2011 on the approval, on behalf of the European Union, of the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance [2011] OJ L 192/39.

⁹⁶ Status table, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=131>, accessed 25 October 2017.

⁹⁷ Rec 20 and Article 76 of the Maintenance Regulation.



legal instruments whose coordination becomes essential to properly serve justice in cross border maintenance obligation cases.⁹⁸

III. CONCEPT OF MAINTENANCE

Around the world maintenance comes in many forms and it is hard to determine its clear concept.⁹⁹ Concept of maintenance on national level is strongly under the effect of the legal culture of origin, customs and habits.¹⁰⁰ Most commonly the function of maintenance is to provide the claimant with means of support, with whatever is necessary to sustain life. Support in kind is generally not covered by international maintenance obligation proceedings which mostly concern only financial support.¹⁰¹

Comparative law context reveals definitions of various extent which can be found in different jurisdictions. The peculiarity of some legal system has been confronted with application of the Regulation and the Protocol. For example, in Italian system there are several forms of maintenance, with the different names, conditions and amounts, depending on the relationship between the parties. Italian law distinguishes between *obbligazione alimentare* and *assegno di mantenimento*. *Obbligazione alimentare* is the provision of material assistance to a person who is unable to support themselves. It is payable by certain persons identified by law, as part of their duty of family solidarity.¹⁰² *Assegno di mantenimento* is the provision of financial assistance by one spouse to another in the event of separation or divorce, and it is designed to ensure that whoever receives it is able to maintain the living standard enjoyed during the marriage. *Assegno di mantenimento* is not conditional upon the beneficiary being in need and it may be claimed even if the beneficiary is working. It may be waived and it may be

⁹⁸ Pataut, 'The external dimension of Private International Family Law', in Cremona, Micklitz (eds) *Private Law in the External Relations of the EU* (Oxford, Oxford University Press, 2016).

⁹⁹ Walker (n 17) 8.

¹⁰⁰ Jayme, 'Cultural Dimensions of Maintenance Law from a Private International Law Perspective' in Beaumont et al (eds) *The Recovery of Maintenance in the EU and Worldwide* (Oxford, Hart Publishing, 2014) 3.

¹⁰¹ Martiny, 'Maintenance obligations in the conflict of laws' (1994) 247 *Collected Courses of the Hague Academy of International Law* 142, 144.

¹⁰² Sections 433 ff of the Codice civile (approved by Royal Decree No. 262 of March 16, 1942, and amended up to Decree No. 291 of December 7, 2016).



replaced by a single payment.¹⁰³ Collected case law showed that there are difficulties in relation to the delineation of the material scope with the Regulation and Protocol arose in the Italian case law due to this distinguishing. Still, Most Italian courts have well understood the necessity of refraining from referring to national concepts.¹⁰⁴

a) Child maintenance

Traditionally, the maintenance obligation arises as a moral obligation for parent to support their biological children.¹⁰⁵ It has been transformed to legal principle by the Article 27(4) of the United Nations Convention on the Right of the Child (UNCRC) saying that States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad.

Parents should also support adopted children, and in some cases parents will also be obliged to support their step children. Comparative family law distinguishes various modalities and indicates to severe differences throughout EU.

In more recent times new questions relating to maintenance duty appear with the variety of medical methods of conceiving children. One of the open issues relates to maintenance of a child conceived with assisted reproductive technology and surrogacy.¹⁰⁶ Domestic legal solutions to surrogacy matter differ widely among jurisdictions.¹⁰⁷ Question who is the parent obliged to pay the maintenance for the child therefore gets more complicated. No reference to these issues can be tracked neither with the preparatory or final acts in relation to the Convention or Regulation. However, three theoretical situations which can result in a claim for maintenance involving

¹⁰³ See European E-justice Portal, Maintenance Claims - Italy, https://e-justice.europa.eu/content_maintenance_claims-47-it-en.do?init=true&member=1, accessed on 26 October 2017.

¹⁰⁴ *First Assessment Report*, 18.

¹⁰⁵ Walker (n 17) 9.

¹⁰⁶ See Trimmings, Beaumont, 'General Report on Surrogacy' in Trimmings, Beaumont (eds) *International Surrogacy Arrangements: Legal Regulation at the International Level* (Oxford, Hart Publishing, 2013) 439-549.

¹⁰⁷ See Župan, Puljko, Sukačić, 'Međunarodni ugovori o zamjenskom majčinstvu - nestaje li paradigma mater semper certa est?' (2013) 29 *Pravni vjesnik: časopis za pravne i društvene znanosti Pravnog fakulteta Sveučilišta J.J. Strossmayera u Osijeku* 7, 7-19.



surrogacy may be identified. First, situation where the surrogate mother decides to keep the child and seeks child maintenance from the intended father and/or intended mother; second, situation where the intended father and/or the intended mother make a claim for child maintenance against the surrogate mother; and third, situation where, following the breakdown of the relationship of the intended parents, one of the intended parents seeks child maintenance from other intended parent or from the surrogate mother.¹⁰⁸

b) Spousal maintenance

Unlike to the child maintenance there is no international treaty obligation for adults to support or maintain each other in view of spousal maintenance. Such obligation is thus shaped by the national policy and standards, that have created diverging legal solutions. Variety of different forms of (spousal) maintenance has direct consequences to cross-border disputes as well. It has been raised with early Brussels case law dating to 80-ies. In the case *De Cavel II*¹⁰⁹ the reference to the CJEU was made by the German court. It asked whether the Brussels Convention is applicable to the payments of interim compensation (*prestation compensatoire*), granted to one of the parties in a French judgment dissolving a marriage pursuant to Article 270 of the French Civil Code. In terms of Article 270 the payment in question is intended to compensate, as far as possible, for the disparity which the breakdown of the marriage creates in the parties' respective living standards.¹¹⁰ It represents any financial obligation between former spouses after divorce which are fixed on the basis of their respective needs and resources and are equally in the nature of maintenance. The court decided that it represents a civil matter within the meaning of the first paragraph of Article 1 of the Brussels Convention and accordingly come within the scope of the Convention.¹¹¹

¹⁰⁸ See Trimmings, 'The Interface between Maintenance and Cross-Border Surrogacy' in Beaumont et al (eds) *The Recovery of Maintenance in the EU and Worldwide* (Oxford, Hart Publishing, 2014) 266.

¹⁰⁹ CJEU, case 120/79 *Louise de Cavel v Jacques de Cavel* [1980] ECLI:EU:C:1980:70.

¹¹⁰ French law distinguished between *pension alimentaire* and *prestation compensatoire*.

¹¹¹ CJEU, case 120/79 (n 35) para 5.



Post-marital maintenance is unknown or only ordered for a short period in certain jurisdictions with the objective to improve the economic situation of the divorced spouse. One of the examples may be tracked with Czech solution. According to Czech Civil Code the spouse who has not caused the breakdown of the marriage or who disagreed with the divorce, and who incurred serious harm as a result of the divorce, may apply to a court to determine that the former spouse has the duty to maintain and support him. The right of a divorced spouse to maintenance and support may in this case be considered justified only for a period appropriate to the circumstances, but not longer than for three years after the divorce¹¹² Opposing principles can be found in German policy. German law used to recognize a guarantee of standard of living. This was replaced in 2008 with the compensation for disadvantages resulting from the marriage¹¹³ German Civil Code distinguished between maintenance obligation of spouses living apart and a maintenance of the divorced spouse. Later is based on the principle of personal responsibility - if one of the spouses is not in position to provide his own maintenance, he/she has the possibility to submit the claim for maintenance against the other spouse.¹¹⁴ This right can be based on some of the provisions governing the wide spectrum of maintenance forms such as maintenance to care for a child, maintenance by reason of old age, maintenance for illness or infirmity, maintenance for unemployment and topping-up maintenance, maintenance for reasons of equity.

c) Maintenance arising from the same-sex marriage or partnership

Regulation and Convention remain silent on the question whether maintenance obligations deriving out of same sex relationships fall to its scope. Approach to this issue depends on the national policy of each Member State. In States which introduced the same-sex marriage the prevailing solution is to apply *mutatis mutandis* the rules drafted

¹¹² Civil Code, 89/2012 Sb, Article 762, <http://obcanskyzakonik.justice.cz/images/pdf/Civil-Code.pdf>.

¹¹³ Jayme (n 25) 11.

¹¹⁴ Civil Code in the version promulgated on 2 January 2002 (Federal Law Gazette [Bundesgesetzblatt] I 42, 2909; 2003 I 738), last amended by Article 4 para 5 of the Act of 1 October 2013 (Federal Law Gazette I 3719), Section 1569.



for the opposite sex marriage on the same-sex marriage.¹¹⁵ Following that there seems to be no reason to not apply the conflict of law rule to such marriage.¹¹⁶ Recently the registered partnership emerges as only form of registered union for same-sex person. This civil union occurs as one step on the way to equalization with the marital union.¹¹⁷ Question raised is whether the partnership can be treated on the basis of conflict of law rules adopted for marriage. There is no uniform answer applicable to all jurisdictions. The practice is different throughout EU. Denmark took the stand that existing international instruments should not be applicable to partnerships, unless all Contracting States agreed to. Right the opposite, the Netherland took the stand that the selected international instruments, such as the Convention, which applies to maintenance obligations “arising from a family relationship, parentage, marriage or affinity”, can be applied to the same-sex partnership.¹¹⁸

Nevertheless, the attitude of the Member States national courts to (non)application of the Regulation and the Protocol to maintenance obligations having as its legal basis a same sex marriage should be directed by the CJEU and ECHR case law on equal treatment of homosexuals. Landmark decision of the CJEU in *Tadao Maruko v Vddb*¹¹⁹ stands as a confirmation of vertical interpretation of prohibition of discrimination at any other legal matter.

The plaintiff, Mr Tadao Maruko, is a homosexual that entered into a registered partnership with another man. He had contributed to the compulsory pension scheme of the *Versorgungsanstalt der deutschen Bühnen (Vddb)* for more than 40 years. When his life partner died in 2005, Mr Maruko demanded the payment of a widower’s pension, as part of the survivor’s benefits. The Vddb scheme provided for the grant of a widower’s pension only in the case of married couples, not in the case of a registered partnership

¹¹⁵ Wautelet, ‘Cross-Border Same Sex Relationships - Private International Law Aspects’ in Fuchs, Boel-Woelki (eds), *Legal Recognition of Same-Sex Relationships in Europe* (Intersentia, 2012) 144.

¹¹⁶ *Ibid*, 146.

¹¹⁷ Župan, ‘Registered Partnership in Cross-border Situations’ in Bodiřoga-Vukobrat *et al.* (eds), *Invisible Minorities* (Hambourg, Verlag Dr. Kovač, 2013) 98.

¹¹⁸ Wautelet, ‘Cross-Border Same Sex Relationships - Private International Law Aspects’ in Fuchs, Boel-Woelki (eds), *Legal Recognition of Same-Sex Relationships in Europe* (Intersentia, 2012) 21.

¹¹⁹ CJEU, case C-267/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* [2008] ECLI:EU:C:2008:179.



between persons of the same sex. According to Mr Maruko, the VddB's refusal to grant him survivor's benefits on the same conditions as a surviving spouse was discrimination on grounds of his sexual orientation. He filed an action with the Bavarian Administrative Court, Munich, which referred the case to the CJEU for a preliminary ruling, asking whether Directive 2000/78/EC obliges Member States to ensure that in cases such as the one at hand the surviving same-sex partner receives a survivor's benefit equivalent to that granted to a surviving spouse. The CJEU ruled in Mr Maruko's favour, stating that the payment of a widower's pension under an occupational pension scheme was to be considered a part of the employed person's salary, and hence fell within the scope of the Directive which forbids discrimination on grounds of sexual orientation with regard to employment and employment-related benefits.

In case *Pajić v Croatia*¹²⁰ the ECtHR ruled on the recognition of a homosexual couple in an immigration context.

The applicant, a national of Bosnia and Herzegovina, was in a stable same-sex relationship with a woman living in Croatia. After two years, she lodged a request before the Croatian authorities for a residence permit with a view to family reunification. She submitted proves of her Croatian education and 17 years long term residence in Zagreb. She also explained her intention to establish a household and start a business with her partner. The immigration authorities refused her request because the Aliens Act expressly restricted the right to a temporary residence permit to heterosexual couples and made no mention of same-sex couples. The ECtHR noted that the Croatian legal system recognised both extramarital relationships of different-sex couples and same-sex couples. ECtHR considered that a partner in a same-sex relationship, as Ms Pajić, who applied for a residence permit for family reunification so he or she could pursue the intended family life in Croatia was in a comparable situation to a partner in a different-sex extramarital relationship as regards the same intended manner of making his or her family life possible. The Croatian Aliens Act reserved the possibility of applying for a residence permit for family reunification to different-sex couples, married or living in an extramarital relationship. By tacitly excluding same-sex couples from its scope, the

¹²⁰ ECtHR, *Pajić v. Croatia*, no. 68453/13, 23 February 2016.



Aliens Act introduced a difference in treatment based on the sexual orientation of the persons concerned. The ECtHR found a violation of Article 14 read in conjunction with Article 8 of the European Convention of Human Rights.

Recently in December of 2017 the ECtHR ruled on the matter exclusively in the context of Italian law refusing recognition or registration of the same sex marriage the six applicant couples entered abroad. Ruling in *Orlandi and Others v. Italy*¹²¹ confirms that such a national attitude amounts to a violation of the right to respect for private and family life.

Prohibition of discrimination in the context of maintenance obligations requires further elaboration, having in mind distinction amongst two different situations. The first possible scenario would relate to exercising a jurisdiction while the other one would relate to choice of law process: determination and application of respective substantive law. The above-mentioned landmark Luxembourg and Strasbourg courts case law should by analogy be applied to cross border maintenance obligations as well. Autonomous interpretation of the Regulation requires that qualification is broad, as confirmed also by CJEU. Adjudication should take into account basic legal principles which create part of primary law, as well as human rights obligations which are integral part of Lisbon Treaty and accompanied Charter of Fundamental rights. These aspects applied simultaneously may lead to a conclusion that instant rejecting to take jurisdiction over a maintenance claim because it derives out of same sex marriage, would amount to discrimination. Court of each Member State would have to accept adjudicating over that matter, naturally if its jurisdiction is founded on the Regulation, despite the fact that such legal obligation in relation to exact maintenance creditor and debtor eventually does not exist by its substantive law. Court would have to find the applicable law to discover if such an obligation pursuant to the applicable legal regime exists. If it would exist in relation to registered partners of same sex, and spouses of opposite sex, rejecting to grant such maintenance by invoking public policy would amount to discrimination. If pursuant to applicable law such obligation exists only in relation to spouses, but not in relation to registered partners, let alone same sex in any variant, the

¹²¹ ECtHR, *Orlandi and Others v. Italy*, no. 26431/12, 14 December 2017.



obligation to same sex spousal maintenance would not exist. If in a third scenario the applicable law would not have any rules on registered partnership of same sexes, and marriage is through Constitutional provision considered to be a legal relation solely reserved for opposite sexes, maintenance obligation claim of a same sex spouse may be rejected by invoking a public policy excuse.

IV. SUBSTANTIVE SCOPE

The Regulation applies to all maintenance obligations arising from a family relationship, parentage, marriage and affinity.¹²² This provision appears to be a very broad at the first, but the full range of its scope may not be applicable in all cases. Definition of the term “maintenance” is not included in the Regulation. Recital 11 reminds it should be interpreted autonomously. The relevant applicable law will be used to determine whether a maintenance obligation exists under the Regulation.¹²³

According to the Regulation the rules on the conflict of laws determine only the law applicable to maintenance obligations and do not determine the law applicable to the establishment of the family relationships which forms a legal basis of the maintenance obligation.¹²⁴ The existence and nature of relationship which may give rise to maintenance obligation is covered by the national law of the Member States. Application of the Regulation confines only to maintenance matters. *Vice versa*, application of the Regulation does not entail any legal effect to the underlying family relation. To put additional emphasis on this concept Article 22 confirms that a recognition and enforcement of a decision on maintenance shall not in any way imply the recognition of the family relationship, parentage, marriage or affinity underlying the maintenance obligation which gave rise to the decision.¹²⁵

Stance of the Protocol is alike. Protocol shall determine the law applicable to maintenance obligations arising from a family relationship, parentage, marriage or affinity, including a maintenance obligation in respect of a child regardless of the

¹²² Article 1 of the Maintenance Regulation.

¹²³ Walker (n 17) 37.

¹²⁴ Recital 21 of the Maintenance Regulation.

¹²⁵ *Ibid*, Article 22.



marital status of the parents.¹²⁶ Regarding the question of existence of such relationship, the decisions rendered in application of this Protocol shall be without prejudice to the existence of any of the relationships referred to in the first paragraph.¹²⁷ Explanatory Report clarifies that the autonomous connection of the maintenance obligation implies that the law applicable to the family relationships to which Article 1(1) refers needs to be determined, in each Contracting State, on the basis of the rules of conflicts of laws in force and generally applicable in that State.¹²⁸ This raises no difficulty when the existence or non-existence of the family relationship is the principal issue of the proceedings concerned (e.g., when the claim relates to the proof of parentage). The problem arises when the issue of existence of the family relationship arises on a preliminary basis in the course of proceedings with the maintenance as the principal claim (e.g., if the debtor disputes the existence of the parentage). Explanatory Report on the Protocol advocates employment of dependency method with such preliminary issues. It leans on the attitude embraced by its 1956 and 1973 predecessors. Consequently, the law designated to govern the maintenance obligation should also apply to the preliminary issue of the existence of a family relationship within the meaning of Article 1(1).¹²⁹ This solution was embraced by the German appeal court in Frankfurt am Main.¹³⁰

The German applicant was living with his mother in Germany. He claimed maintenance from the defendant with the residence in Germany. The mother was originally married in Belarus, but at the same time she had lived together with the defendant in Germany. In 2006, it was discovered that the applicant was not the child of the mother's husband. The defendant had recognized paternity. The court of first instance therefore granted the claimed with maintenance. In the meantime, the applicant moved with his mother to Belarus. The defendant appealed first instance decision, arguing that under

¹²⁶ Article 1(1) of the Maintenance Protocol.

¹²⁷ *Ibid*, Article 1(2)

¹²⁸ Bonomi, *Explanatory Report on the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations* (The Hague, HCCH Publications, 2013) para 24.

¹²⁹ *Ibid*, para 24.

¹³⁰ Oberlandesgericht Frankfurt a. M., Beschluss vom 12 April 2012 - 5 UF 66/11, DES20120412.



Belarusian Law the child is considered to be the child of the mother's present husband and that the applicant entitled to maintenance from the mother's husband.

The German Court applied the German law to the maintenance claim pursuant to the Article 3(1) and Article 4(3) of the Maintenance Protocol. The preliminary issue of paternity was resolved by reference to the same law that governs the maintenance, so the court found also German law applicable. The defendant's objection referring to the Belarus law was therefore dismissed.

Although the solution offered in the Explanatory Report is not binding on the Contracting States,¹³¹ it is considered to be a preferable theoretical approach to preliminary questions in international conventions in general. While it offers space for controversies, it also contributes to the procedural efficiency and consistency of decision-making under the Maintenance Protocol.

V. GEOGRAPHICAL SCOPE

The Regulation is directly applicable in all Member States of the European Union. Exceptionally Denmark is participating in the Maintenance Regulation only as far as its provisions amend Brussels I Regulation. Pursuant to an Agreement, provisions of the Maintenance Regulation are applied to relations between other Member States and Denmark with the exception of the provisions in Chapters III (Applicable Law) and VII (Co-operation between Central Authorities).¹³² However, the Polish court misinterpreted this provision of the Agreement. It leaves away the Denmark of the applicable law regime of the Protocol. The other Member States are obliged to apply the Hague Protocol *erga omnes*, hence it should have been applied to this case as well.

The First instance court in Poland dealt with the application for the increase of the amount of the maintenance obligation. The court stated that at the time the court was seized the defendant had his habitual residence in Denmark. The Court was obliged to define which court shall have jurisdiction and which law shall be applicable. The

¹³¹ Bonomi (n 56) para 24.

¹³² Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2013] OJ L 251/1.



jurisdiction was established under Article 3 of the Maintenance Regulation. The court emphasized that Denmark is not bound by the provisions concerning the determination of the applicable law. Considering this the court found that the applicable law should be established according to the 1973 Applicable Law Convention. Article 4 of this Convention determines that the internal law of the habitual residence of the maintenance creditor shall govern the maintenance obligations referred. Consequently, the Polish law was applied in the case.¹³³

With respect to the applicable law regime under the Regulation, the United Kingdom, alongside Denmark, are not bound by the Protocol.¹³⁴ As a consequence, decisions given in these two countries would be treated differently for the purposes of recognition and enforcement.¹³⁵

Rules on Jurisdiction, contained in Chapter II of Regulation and the applicable law rules of the Protocol in Chapter III have an *erga omnes* character. Hence, the application is not confined to cases connected to or from other Member States of the European Union. Rather would the competent authorities apply these rules universally to all international cases which fall within the scope of the Regulation.¹³⁶ A symptomatic example of national practice may be found with a Court in Milano case file.¹³⁷

The applicant (wife) claimed the request for the divorce, parental responsibility, child maintenance and spousal maintenance before the Italian court. The defendant was Italian-Moroccan national. Whole family had the habitual residence in Switzerland. The Court decided to have jurisdiction over divorce under the Article 3(1)(b) of the Brussels Ila Regulation. The Court disclaimed the jurisdiction over the claim on parental responsibility pursuant the Article 8 of the same Regulation. The Court accepted its jurisdiction over the maintenance action filed by the wife, as such claim is ancillary to the action concerning status pursuant to Article 3(c) of the Maintenance Regulation.

¹³³ III RC 589/12 (SR dla Wrocławia Śródmieścia we Wrocławiu).

¹³⁴ Protocol (no 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice [2013] OJ C 202/295.

¹³⁵ Chapter IV, Section 2 of the Maintenance Regulation will be applicable.

¹³⁶ Lortie (n 4) para 505.

¹³⁷ Tribunale di Milano, order 16 April 2014, ITF20140416.



Also, the court disclaimed its jurisdiction over the claim for child maintenance explaining that claim was inherently connected to the one on parental responsibility and thus requires to be decided together. Under Article 3 of the Maintenance Protocol the Italian court applied the Swiss law as the law of the State of the creditor's habitual residence on the spousal maintenance claim.

VI. TEMPORAL SCOPE

The Regulation is applicable in 27 Member States from 18 June 2011,¹³⁸ whereas in relation to Croatia the Regulation is in force since 1 July 2013.¹³⁹

The Regulation specifies that it will apply only to proceedings instituted, to court settlements approved or concluded, and to authentic instruments established after the date of application of the Regulation.¹⁴⁰ An interesting example of temporal scope of application may be found with the Second Instance Court of Czech Republic.

The child, Czech citizen with habitual residence in Germany, claimed maintenance against his father on 21 September 2012. The defendant is Czech citizen with habitual residence in the Czech Republic. The First Instance Court in Czech Republic declared the lack of jurisdiction in accordance with Article 5(2) of the Brussels I Regulation. The applicant appealed against this decision. The Court of Appeal annulled the decision of First Instance Court and remitted the case back for further consideration to the First Instance Court. The Court of Appeal decided that the First Instance Court must apply Maintenance Regulation instead of the Brussels I Regulation. Moreover, the Czech court have jurisdiction on the basis of Article 3(1) a) due to the fact that the father is habitually resident in the Czech Republic.¹⁴¹

¹³⁸ Article 76(2) of the Maintenance Regulation.

¹³⁹ Council Regulation (EU) No 517/2013 of 13 May 2013 adapting certain regulations and decisions in the fields of free movement of goods, freedom of movement for persons, company law, competition policy, agriculture, food safety, veterinary and phyto-sanitary policy, transport policy, energy, taxation, statistics, trans-European networks, judiciary and fundamental rights, justice, freedom and security, environment, customs union, external relations, foreign, security and defence policy and institutions, by reason of the accession of the Republic of Croatia [2013] OJ L 158/1.

¹⁴⁰ Article 75(1) of the Maintenance Regulation

¹⁴¹ Krajský soud v Brně, 21 Co 327/2014, 3 September 2014, CZS20140903.



Peculiar consideration of the term “maintenance proceeding instituted” may be traced by the Belgian Court of First instance case.

The divorce proceedings were brought before the Bruges Court of First Instance by the applicant on 29 April 2011. The defendant lodged a counterclaim for maintenance after divorce on 21 March 2012. The Court needed to examine when the proceedings were “instituted” within the meaning of the Article 75(1) of the Regulation. The Court considered that the concept of “instituted” must receive an autonomous interpretation. The Court compared Article 75(1) of the Regulation and Article 18 of the Rome III Regulation and had deduced that the meaning of both terms cannot be the same. It concluded that the wording from the Maintenance Regulation refers to the moment when the maintenance claim is put before the court. For the case exposed this was at the time the defendant submitted its written conclusions on 21 March 2012. Therefore, the Maintenance Regulation was applicable.¹⁴²

The Regulation figures an exception from the above-mentioned default rule on its temporal application. Section 2 and 3 of the Chapter IV - rules on recognition, enforceability and enforcement of decisions given in Member State not bound by the Maintenance Protocol, will apply to (i) decisions given in the Member States before the date of application of the Regulation where recognition and declaration of enforceability are requested as from the date of application of the Regulation, and to (ii) decisions given as from the date of application of the Regulation following proceedings begun before that date. Still, such decisions must fall with the scope of Brussels I Regulation for the purposes of recognition and enforcement.¹⁴³

The applicant, acting on behalf of her two children, petitioned the court in Rhodos (Greece) to declare a maintenance judgment enforceable in Greece. The judgment was issued by a court of Amsterdam in 2005. The debtor resides in Rhodos. The court accepted the application and declared the Dutch judgment as enforceable in Greece. The court noted that the Regulation was applicable from 18 June 2011 and pointed out that the provisions regarding the enforcement of judgments originating in countries not

¹⁴² H.L. v. N.B. - Rb. Brugge, 11 July 2012.

¹⁴³ Article 75(2) Maintenance Regulation.



bound by the 2007 Hague Protocol are also applicable with respect to judgments of Member States, if these judgments were issued before the Regulation's date of application.¹⁴⁴

Regarding decisions given in other Member States where the Brussels I Regulation is applicable, the date of entry into force of the Brussels I Regulation is decisive. For Austria, Belgium, Germany, Greece, Ireland, Finland, France, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden and the United Kingdom the Regulation entered into force on 1 March 2002. For a number of other States, the Brussels I Regulation would have been applicable as of 1 May 2004 (Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovakia and Slovenia) and as of 1 January 2007 (for Romania and Bulgaria). In the Republic of Croatia, it entered into force on the same date as Maintenance Regulation -1 July 2013.

The Regulation provides that the Brussels I Regulation will continue to apply to procedures for recognition and enforcement underway on the date of application of the Maintenance Regulation. Brussels court was faced with such a request.

Facts of the case speak of both parties of German nationality. They established their residence in Brussels, where husband had worked for the European Commission. The husband filed an application for divorce before the German court on 17 January 2011. On 4 April 2012, wife filed a claim for maintenance after divorce. On 27 January 2012, wife also brings summary proceedings before the President of the Court of First Instance of Brussels in order to obtain a provisional maintenance. Husband contested the jurisdiction of the Belgian courts, claiming the parties had reached an agreement on the jurisdiction of the German courts. The first judge agreed and dismissed the case. Upon wife's appeal the Brussels Court of Appeal refers to the application of the Maintenance Regulation to the case. The parties themselves had argued that the Brussels I Regulation was still applicable, since husband had initiated the divorce proceedings on 17 January 2011, before the date of application of the Maintenance Regulation on 18 March 2011. The Court of Appeal stated that since wife had brought a writ of summons for the maintenance claim on 27 January 2012, after the date of application of the Maintenance

¹⁴⁴ No. 98/2014, Rhodes Single-Member Court of First Instance (Monomeles Protodikeio Rodou), ELF20140311.



Regulation the proceedings were “instituted” within the meaning of Article 75(1) Maintenance Regulation. The application of the Maintenance Regulation is mandatory. At final Court of Appeal of Brussels decides that there was a valid choice of court agreement between the parties conferring jurisdiction to the courts of Berlin.¹⁴⁵

VII. DEMARCATION BETWEEN SPOUSAL MAINTENANCE AND MATRIMONIAL PROPERTY

Challenges of characterization in maintenance matters, particularly in relation to the matrimonial property matters, date far back to early application of the Brussels Convention. In case *de Cavel v de Cavel I*.¹⁴⁶

Mr Cavel applied for the divorce in France together with the application for the protective measure, a freezing order covering the wife’s assets in Germany. By order from 1977 the French court authorized the putting under seal of the furniture, effects and other objects in the couple’s flat at Frankfurt and on the safe hired in the wife’s name in a bank in the same city. The judge also authorized the freezing of the wife’s bank account. The husband had then applied to the Court in Frankfurt for an order for the enforcement of the French decision in reliance with the Article 31 of the Brussels Convention. After the case was brought before the German Federal Court of Justice, it decided to ask for a preliminary ruling from the CJEU. The German court asked whether the matter of the case fell within the substantive scope of Brussels Convention, or whether the French freezing order had related to the “rights in property arising out of a matrimonial property” - which have been excluded from the scope of the Brussels Convention by the Article 1(1). The Court answered that the judicial decision authorizing provisional protective measure such as the placing under seal or the freezing of the assets of the spouse in the course of proceedings for divorce do not fall within the scope of the Convention as defined in Article (1) if those measures are closely connected with either question of the status of the persons involved in the divorce proceedings or proprietary legal relations resulting directly from the matrimonial relationship or the dissolution thereof.

¹⁴⁵ S.-R. v. R. - Bruxelles, 18 February 2013, Belgium, Second Instance.

¹⁴⁶ CJEU, case 143/78 de Cavel v de Cavel I, 1979, ECR 1055.



The scope of application of the Brussels Convention explicitly excluded, among others, the rights in property arising out of a matrimonial relationship.¹⁴⁷ This distinction was retrieved in the subsequent Community legislation, particularly the Brussels I¹⁴⁸ and Maintenance Regulation. Recently the Regulations on matrimonial property regimes and property consequences of registered partnerships were adopted. Both would come into force on 29 January 2019, for Member States which participate in enhanced cooperation.¹⁴⁹ As for the scope of application, these Regulations follow the line of previous reasoning and exclude the maintenance obligation from their respective material scope of application.¹⁵⁰ Due to the specificities of the substantive laws of the Member States, distinction between matrimonial property and maintenance issues is not so easy to draw, despite such a clear demarcation within the scope provisions.

CJEU has not been given the opportunity to interpret on demarcation of the terms maintenance obligation and matrimonial property in accurate times.

The concept of “spousal maintenance” is by the MPR conceived as a set of rules concerning the property relationships between the spouses and in their relations with third parties, as a result of marriage or its dissolution.¹⁵¹ At the earlier stage of a Proposal of this Regulation the Explanatory Memorandum contained the reference to the autonomous nature of the term “matrimonial property regime”. It suggested that the notion of “matrimonial property regime” must be given an autonomous interpretation. Moreover, it should embrace considerations of both the spouses' daily management of their property and the liquidation of their property regime as a result of the couple's separation or the death of one of the spouses.¹⁵² The academics would unilaterally

¹⁴⁷ 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, Official Journal [1972] OJ L 299.

¹⁴⁸ Article 1(2) of the Brussels I Regulation.

¹⁴⁹ 18 Member States (Sweden, Belgium, Greece, Croatia, Slovenia, Spain, France, Portugal, Italy, Malta, Luxembourg, Germany, the Czech Republic, the Netherlands, Austria, Bulgaria, Finland and Cyprus).

¹⁵⁰ Rec 22, Article 1(2)c) of the Regulations on matrimonial property regimes and property consequences of registered partnerships.

¹⁵¹ Article 3(1)a) Regulation (EU) 2016/1103

¹⁵² Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, Brussels, 2 March 2016 COM(2016) 106 final 2016/0059 (CNS), 7.



advocate for an autonomous concept,¹⁵³ but interpretation at hand still remains to be a trill.

Domestic substantive law of continental Europe distinguishes between the matrimonial property and maintenance issues in a much clearer manner in comparison to the England and Ireland.¹⁵⁴ In a landmark *Van den Boogaard vs Laumen*¹⁵⁵ case the CJEU had to give general guidelines on how to decide whether an English financial order should be characterized as the order of maintenance or as the order of division of property.

Mr Van den Boogaard and Ms Laumen were married in the Netherlands in 1957. In 1982, they moved to London. By the judgment of 1990 the High Court dissolved the marriage and also dealt with an application made by the Ms Laumen for full ancillary relief. The English court awarded her a capital sum so that periodic payment of maintenance would be unnecessary. The money awarded also included money from the sale of moveable property and the transfer of a painting and immovable property. In 1992 Ms Laumen lodged the application before the Dutch court for the enforcement of the English judgment, relying on the 1973 Hague Maintenance Convention. The Amsterdam court tried to find bases to enforce the decision under the Brussels Convention and therefore it referred to the CJEU. The reference was made to the question whether the English judgment was to be classified as a “judgment given in matters relation to maintenance” in which case leave to enforce would be properly granted, or whether it was to be classified as a “judgement given in a matter relating to rights in property arising out of a matrimonial relationship”, in which case the 1973 Maintenance Convention could provide no basis for the enforcement. The CJEU held that an order for a lump sum and transfer of ownership comes under the scope of maintenance as long as the purpose of the award is to ensure the former spouse’s maintenance. It makes no difference in this regard that payment of maintenance is provided for the form of lump sums.

The CJEU seems to suggest that the nature of the claim should be decisive in characterizing claims as relating to maintenance as opposed to the matrimonial

¹⁵³ Torga, ‘Spousal Maintenance Obligations and Matrimonial Property under New EU Law’ in Beaumont et al (eds) *The Recovery of Maintenance in the EU and Worldwide* (Oxford, Hart Publishing, 2014) 427.

¹⁵⁴ *Ibid*, 429.

¹⁵⁵ CJEU, case C-220/95 *Van den Boogaard v Laumen* (1997) ECR I-1147.



property.¹⁵⁶ Divided determining and deciding on claims resulting from the marriage dissolution can be seen from the decision of the Belgian court of First instance.¹⁵⁷ Case file speaks of the spouses of Dutch nationality which were married under the system of separation of property. The plaintiff initiated divorce proceedings. The defendant filed a counterclaim for maintenance after the divorce. The last marital residence of the parties was in Belgium, also the place where the plaintiff was still resident at the time of the introduction of the divorce proceedings. The Belgian court based its jurisdiction over the divorce proceedings according to Article 3(1)(a) of the Brussels IIa Regulation. Belgian law was applicable to divorce pursuant to Article 55(1) of the Belgian Code of Private International Law. The claim for liquidation and division of the marital property regime was settled according to Belgian national PIL rules. The courts of Hasselt had jurisdiction and had applied the Dutch law. Finally, the Court has jurisdiction to hear the counterclaim for maintenance on the basis of Article 3 of the Maintenance Regulation. Belgian law was applicable according to the Maintenance Protocol.

VIII. MAINTENANCE REGULATION IN RELATION TO OTHER COMMUNITY INSTRUMENTS

Maintenance Regulation modifies Brussels I Regulation by replacing the provision of that regulation applicable to matters relating to maintenance obligation. There is the exception from the Article 75(2) of the Maintenance Regulation (see ch VI.A.).¹⁵⁸ Maintenance Regulation replaces, in matters relating to maintenance obligation, Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims,¹⁵⁹ except with regard to European Enforcement Orders on maintenance obligations issues in a Member State not bound by the Maintenance Protocol.¹⁶⁰ In enforcement matters the Maintenance

¹⁵⁶ Torga (n 83) 40.

¹⁵⁷ X v. Y - AR 10/754/A - Rb. Hasselt, 27 December 2011.

¹⁵⁸ Article 68(1) of the Maintenance Regulation.

¹⁵⁹ Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims [2004] OJ L 143.

¹⁶⁰ Article 68(2) of the Maintenance Regulation.



Regulation went further than the EEO. In contrast with the European Enforcement Order Regulation,¹⁶¹ it does not require that the authorities of the State of origin issue a certificate that attests that specific procedural requirements have been respected. Still, the Member States not bound by the Maintenance Protocol are still left to use this instrument. The European Enforcement Order allows judgments, court settlements and authentic instruments in respect to uncontested claims to be automatically recognized and enforced in another member State. There are no immediate grounds for refusal of enforcement. A national case law proves the application.

The parties to the proceedings had been married and they separated. They entered into a notarized agreement which was signed in Frankfurt am Main on 26 July 2007. It provided for the payment of a lump sum and a monthly maintenance payment. The husband, Mr Vogel, decided not to pay the maintenance. A European Enforcement Order was issued by the German notary in order to enforce the agreement in UK. Although the Maintenance Regulation was considered not to be applicable, the judge made Registration orders, dated 14 December 2009 and 21 November 2011. In October 2012, the German notary withdrew the European Enforcement Order Certificate. Mr Vogel made an application for the registration orders to be set aside. Also, he asked all of the costs orders which had been made against him to be undone and all of the relevant orders to be discharged. The judge deciding on the case explained that once a document which complies in form with the certificate for which the Regulation provides in relation to a European Enforcement Order has been delivered by somebody apparently entitled to deliver it to the court of enforcement, this court has no option but to permit enforcement of the European Enforcement Order. There is no mechanism for a challenge in this court to the validity of the European Enforcement Order Certificate. Article 21 in paragraph 2 provides in terms that the Member State of enforcement cannot in any circumstances review as to its substance the European Enforcement Order or its certification.¹⁶²

¹⁶¹ See Article 6 of the European Enforcement Order Regulation.

¹⁶² England and Wales, First Instance *Lothschutz v Vogel* [2014] EWHC 473 QB.



Another imminent Regulation interplaying with the Maintenance Regulation is the Regulation (EU) No 655/2014 Of The European Parliament And Of The Council Of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters¹⁶³ (EAPO). Since its scope of application clearly excludes only the maintenance obligations arising by occasion of death, the conclusion may be withdrawn that all other maintenance obligations fall to its scope. The method of unification confined to EAPO significantly differs to the Maintenance Regulation, and no overlapping of its scope is evident. EAPO is merely a 28th regime of preservation order, effectuated besides national protective and preservation rules. The EAPO Regulation can be used in a cross-border cases in which the bank account or accounts to be preserved by the EAPO are maintained in a Member State other than the creditor or the court seize of application of EAPO.¹⁶⁴ The EAPO is available before substantive proceedings on maintenance are initiated, during those proceedings or after a judgement is obtained; therefore, a creditor may obtain an EAPO in the pre-judgement and post-judgement stage. The applicant must satisfy the court that there is an urgent need because there is a real risk that without EAPO enforcement will be impeded or made substantially more difficult. Also, creditor has to satisfy the court the he is likely to success on the substance in cases where judgment was not yet given.¹⁶⁵ The preservation order application procedure is in principle an *ex parte* written procedure based on information and evidence provided by the creditor. Despite the at first glance weak position of a debtor, he is provided sufficient legal remedies to challenge the EAPO.¹⁶⁶

One may wonder why would a maintenance creditor choose to use the EAPO instead of Maintenance Regulation. The first sight advantage of the Maintenance Regulation is the Central Authority administrative cooperation mechanism, which is not a logistics for

¹⁶³ Regulation (Eu) No 655/2014 of the European Parliament And Of The Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters [2014] OJ L 189/59.

¹⁶⁴ Ibid, Article 3.

¹⁶⁵ Ibid, Article 7.

¹⁶⁶ See Župan, 'Cross-border recovery of maintenance taking account of the new European Account Preservation Order (EAPO)' (2015) 16 ERA Forum 163.



applications under the EAPO. However, the Central Authority and free legal aid are beneficial merely to child maintenance. In a spousal maintenance case, with substantial amount of maintenance debt, a creditor may have an interest to seize the account and preserve the funds for future debt collection.

Regulations contributing to the more effective proceedings under the Maintenance Regulation are Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (Taking of Evidence Regulation)¹⁶⁷ and Regulation that can be of assistance is the Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000 (Service Regulation).¹⁶⁸ Their scope of application is of a procedural nature and serve to take evidence and serve documents in relation to any other regulation in civil justice area.

IX. CONCLUSION

Unlike the Convention which limits its substantive scope to child and spousal maintenance and only exceptionally for the other forms of maintenance, the Regulation has a relatively broad scope of application. It applies to all maintenance obligations arising from a family relationship, parentage, marriage and affinity. The term relative is used because existence and nature of relationships which may give rise to maintenance obligations is covered by the national law of the Member States. While all national laws predict the obligation on child maintenance and most of them the obligation of spousal maintenance, the collected case study has not showed any difficulties in the application of Regulation toward those forms of maintenance. On the other side, due to the variety of methods by which children can be conceived such as assisted reproductive technology

¹⁶⁷ Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [2001] OJ L 174.

¹⁶⁸ Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000 [2007] OJ L 324/79.



and surrogacy, it is a matter of time when these matters will be raised before the national courts. Consequently, additional research of this matter is needed. Equal arguments stand in relation to the maintenance arising from the registered partnership of the same-sex couples. No case dealing with the issue of maintenance obligation arising from the registered partnership was identified in available national case law. The issues were never addressed by the CJEU either. However, courts should adhere to the combined application of the Regulation with the CJEU and ECtHR rulings in respect of a violation of private life and discrimination, as presented in this study. In terms of temporal and geographical scope of application the collected national case law suggests no difficulty in the application of the Regulation.

D. SUCCESSION¹⁶⁹

The scope of Regulation (EU) No 650/2012 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 has been rarely tackled in the discussions at the national meetings (this possibly due to its limited period of application compared with other European instruments) but some remarks about its scope can at least be underlined on the basis of the (little) existing practice to date before the CJEU and national instances of some Member States.

The issues raised in this framework can be classified in three different categories related with 1) the material scope of application, 2) the personal scope of application and 3) the temporal scope of application.

1) The material scope of application is regulated in Article 1. Under this provision, this Regulation shall apply to “*succession to the estates of deceased persons*”, a rule which must be completed with the definition of “succession” included in Article 3(1)(a), which states that “1. *For the purposes of this Regulation: (a) ‘succession’ means succession to the estate of a deceased person and covers all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession; (...)*”.

¹⁶⁹ This paragraph shall be attributed to: Carmen Ázcarraga Monzonis.



The scope of application of Regulation on Successions is very broad as reflected in Recital 9: “The scope of this Regulation should include all civil-law aspects of succession to the estate of a deceased person, namely all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession”. The Regulation covers most of the issues usually qualified as successions in domestic laws of EU Member States except for some aspects such as the exclusion of the formal validity of dispositions of property upon death made orally (Article 1(2)(f)).¹⁷⁰

By contrast, this Regulation shall not be applied to revenue, customs or administrative matters (i.e. the classical exclusion of public matters included in other Regulations) nor to other matters listed in its paragraph 2,¹⁷¹ some of which have been tackled by the CJEU as pointed out by two of the national reports drafted by the teams of the Project. We refer to the *Kubicka* case (C-218/16, already ruled) and the *Mahnkopf* case (C-558/16, still pending).

a) The first case about the Regulation on Successions heard by the CJEU was ruled recently, on 12 October 2017. It deals with rights *in rem* and the facts and the reasoning of the Court are the following: Ms Kubicka, a Polish national resident in *Frankfurt an der Oder* (Germany), is married to a German national. Two children, who are still minors, were born from that marriage. The spouses are joint owners, each with a 50% share, of land in Frankfurt an der Oder on which their family home is built. In order to make her will, Aleksandra Kubicka approached a notary practising in Słubice (Poland). Ms Kubicka wishes to include in her will a legacy “by vindication”, which is allowed by Polish law, in favour of her husband, concerning her share of ownership of the jointly-owned immovable property in Frankfurt an der Oder. She wishes to leave the remainder of the assets that comprise her estate in accordance with the statutory order of inheritance, whereby her husband and children would inherit it in equal shares. She expressly ruled out recourse to an ordinary legacy (legacy “by damnation”), as provided for by

¹⁷⁰ Bonomi, Wautelet: *El Derecho europeo de sucesiones. Comentario al Reglamento (UE) N° 650/2012, de 4 de julio de 2012*, Thomson Reuters Aranzadi, Cizur Menor (Navarra), 2015, 59.

¹⁷¹ This list has been conceived as exhaustive given that it does not include the expression “in particular” as decided in Article 23(2). Bonomi, Wautelet: *op. cit.*, 61.



Article 968 of the Civil Code, since such a legacy would entail difficulties in relation to the representation of her minor children, who will inherit, as well as additional costs.

On 4 November 2015, the notary's assistant refused to draw up a will containing the legacy "by vindication" stipulated by Aleksandra Kubicka on the ground that creation of a will containing such a legacy is contrary to German legislation and case-law relating to rights *in rem* and land registration, which must be taken into consideration under Article 1(2)(k) and (l) and Article 31 of the Succession Regulation and that, as a result, such an act is unlawful. The notary's assistant stated that, in Germany, a legatee may be entered in the land register only by means of a notarial instrument containing an agreement between the heirs and the legatee to transfer ownership of the immovable property. Foreign legacies "by vindication" will, by means of "adaptation", be considered to be legacies "by damnation" in Germany, under Article 31 of the Succession Regulation. This interpretation is clear from the explanatory memorandum of the German law which amended national law in accordance with the provisions of the Succession Regulation (*Internationales Erbrechtsverfahrensgesetz* (Law on international succession proceedings), of 29 June 2015, BGBl. I p. 1042).

On 16 November 2015, Aleksandra Kubicka submitted to the notary an appeal pursuant to Article 83 of the Law on notaries against the decision refusing to draw up a will containing such a legacy "by vindication". She claimed that the provisions of the Succession Regulation should be interpreted independently and, in essence, that none of those provisions justify restricting the provisions of succession law by depriving a legacy "by vindication" of material effects. Since her appeal to the notary was not upheld, Aleksandra Kubicka brought an appeal before the *Sąd Okręgowy w Gorzowie Wielkopolskim* (Regional Court, Gorzów Wielkopolski, Poland). The referring court considers that, pursuant to Article 23(2)(b) and (e) and Article 68(m) of the Succession Regulation, legacies "by vindication" fall within the scope of succession law. However, it is uncertain to what extent the law in force in the place where the asset to which the legacy relates is located can limit the material effects of a legacy "by vindication" as provided for in the succession law that was chosen.

Given that, under Article 1(2)(k) of the Succession Regulation, the "nature of rights *in rem*" is excluded from the scope of the regulation, legacies "by vindication", as



provided for by succession law, cannot create for an asset rights which are not recognised by the *lex rei sitae* of the asset to which the legacy relates. However, it is necessary to determine whether that same provision also excludes from the scope of the regulation possible grounds for acquiring rights *in rem*. In that regard, the referring court considers that the acquisition of rights *in rem* by means of a legacy “by vindication” is governed exclusively by succession law. Polish legal literature on the matter takes the same position, while the explanatory memorandum of the German draft law on international succession law and amending the provisions governing the certificate of succession and other provisions (*Gesetzesentwurf der Bundesregierung*, BT-Drs. 17/5451 of 4 March 2015) provides that it is not obligatory, in the context of the Succession Regulation, for German law to recognise a legacy “by vindication” on the basis of a will drawn up according to the law of another Member State.

Regarding Article 1(2)(l) of the Succession Regulation, the referring court also wonders whether the law governing registers of rights in immovable or moveable property may have an impact on the effect of a legacy under succession law. In that regard, it states that if the legacy is recognised as producing material effects in matters relating to succession, the law of the Member State in which such a register is kept would govern only the means by which the acquisition of an asset under succession law is proven and could not affect the acquisition itself.

As a result, the referring court considers that the interpretation of Article 31 of the Succession Regulation also depends on whether or not the Member State in which the asset to which the legacy relates is located has the authority to question the material effect of that legacy, which arises under the succession law that has been chosen. In those circumstances the *Sąd Okręgowy w Gorzowie Wielkopolskim* (Regional Court, Gorzów Wielkopolski, Poland) decided to stay the proceedings and to refer the following question to the CJEU for a preliminary ruling: “Must Article 1(2)(k), Article 1(2)(1) and Article 31 of the Succession Regulation be interpreted as permitting refusal to recognise the material effects of a legacy by vindication (*legatum per vindicationem*), as provided for by [Polish] succession law, if that legacy concerns the right of ownership of immovable property located in a Member State the law of which does not provide for legacies having direct material effect?”



In sum, as explained in the Report on Internationally Shared Good Practices drafted by the Max Planck Institute of Luxembourg (May 2017, p. 49), the question asked is if Articles 1(2)(k) and (l), or 31 of the Succession Regulation should be interpreted as rejecting the effects of the *legatum per vindicationem* foreseen by the law governing the succession, when this figure relates to an immovable situated in a Member State in whose legal system the *legatum per vindicationem* does not have real direct effect.

The Report on the German Good Practices (September 2016, p. 12) clarifies that in Germany a legacy solely leads to a claim for transfer of the property (“*Damnationslegat*”), whereas in other countries (such as France, Italy and Poland) a legacy causes a direct change of ownership (“*Vindikationslegat*”). The problem raised in this field was whether such a direct transfer of property is subject to the rules of successions law or the national property law. The dominant opinion in Germany stipulated that the “*lex rei sitae*” (the property law) should prevail. Therefore, if the property is situated in Germany, the “*Vindikationslegat*” was converted into a “*Damnationslegat*”. However, it has been pointed out that the Regulation on Successions could bring a change to this opinion.

Article 23(2)(e) of the Regulation stipulates that the applicable law shall govern the transfer of the rights to the legatees,¹⁷² so the successions law might prevail under the Regulation. On the other hand, Article 1(2)(l) states that “*any recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register*” are excluded from the scope of the Regulation; and moreover Article 31 could lead to a “*Vindikationslegat*” being converted into a “*Damnationslegat*” as it calls for an adaption of *rights in rem* under certain circumstances.¹⁷³ However, the German report states that its application has to be rejected “pursuant to its wording and to ensure an international

¹⁷² Article 23(2)(e): “2. That law shall govern in particular: (...) e) the transfer to the heirs and, as the case may be, to the legatees of the assets, rights and obligations forming part of the estate, including the conditions and effects of the acceptance or waiver of the succession or of a legacy”.

¹⁷³ Article 31: “Where a person invokes a right in rem to which he is entitled under the law applicable to the succession and the law of the Member State in which the right is invoked does not know the right in rem in question, that right shall, if necessary and to the extent possible, be adapted to the closest equivalent right in rem under the law of that State, taking into account the aims and the interests pursued by the specific right in rem and the effects attached to it”.



harmony of court decisions”. Therefore, in conclusion, it has been argued that successions law should be applicable and that the content of the property right should not be confused with the mode of its transfer (German report, p. 13).

In fact, the *Kubicka* case reminds under Recital 15 of the Regulation that this legal instrument does not affect the limited number (“*numerus clausus*”) of rights *in rem* known in the national law of some Member States and that a Member State should not be required to recognise a right *in rem* relating to property located in that member State if the right in question is not known in its law. In this case, both legacies constitute methods of transfer of ownership of an asset recognised in both legal systems concerned. As stated by the Advocate General, the choice of a legacy “by vindication” rather than a legacy “by damnation” does not alter the content of the right to be exercised regarding the asset. It simply allows a right *in rem* to be transferred directly to the legatee, rather than being passed on indirectly by establishing a right *in personam* for the legatee.

The direct transfer of a property right by means of a legacy “by vindication” concerns only the arrangement by which that right *in rem* is transferred at the time of the testator’s death, which, according to Recital 15, is precisely what the Succession Regulation seeks to allow, in accordance with the law governing succession. Therefore Articles 1(2)(k) and (l) and 31 of the Regulation “must be interpreted as precluding refusal of recognition in a Member State whose legal system does not provide for legacies “by vindication” of the material effects produced by such a legacy when succession takes place in accordance with the chosen succession law”.

b) In second place, the exclusion from the scope of application of the Regulation related with matrimonial property regimes has also raised concerns. Academics have stressed the close link between the two matters and the need to coordinate the solutions provided,¹⁷⁴ as reflected in Recital 12: “(...) this Regulation should not apply to questions relating to matrimonial property regimes, including marriage settlements as known in some legal systems to the extent that such settlements do not deal with succession matters, and property regimes of relationships deemed to have comparable effects to

¹⁷⁴ Palao Moreno, ‘Artículo 1. Ámbito de aplicación’ in Iglesias Buhigues, Palao Moreno, *Sucesiones internacionales. Comentarios al Reglamento (UE) 650/2012*, Tirant lo Blanch, Valencia, 2015, 37.



marriage. The authorities dealing with a given succession under this Regulation should nevertheless, depending on the situation, consider the winding-up of the matrimonial property regime or similar property regime of the deceased when determining the estate of the deceased and the respective shares of the beneficiaries”.

Regarding the practical problems pointed out in the research, the Report drafted by the University of Heidelberg explains that “it is a typical German problem that the inheritance of a spouse can be increased by the surviving spouse if he/she opts for the resolution of the matrimonial property regime according to the rules of succession” (p. 12) and therefore the possibility of this supplementary quarter to be a part of the inheritance has been object of debate. According to such report, before the application of the Regulation the prevailing opinion in Germany did not classify it as part of successions law but of matrimonial property law.

However, the conclusion adopted in the discussion of the Seminar hosted by the University of Heidelberg was that this is an unsolved issue and that it is nonetheless necessary to include this supplementary quarter in the European Certificate of Succession. The German team considers desirable that the CJEU would settle this dispute and this will happen in the near future under the *Mahnkopf* case (C-558/16) as highlighted in the Report drafted by the Max Planck Institute of Luxembourg (p. 49). The questions asked by the referring court in this case are the following:

“Is Article 1(1) of the EU Succession Regulation to be interpreted as meaning that the scope of the regulation (“succession”) also covers provisions of national law which, like Paragraph 1371(1) of the German *Bürgerliches Gesetzbuch* (BGB, Civil Code), govern questions relating to matrimonial property regimes after the death of one spouse by increasing the share of the estate on intestacy of the other spouse?

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

If this question is to be answered in the negative in principle, can it nevertheless be answered in the affirmative exceptionally for situations where (a) the purpose of the



Certificate of Succession is limited to asserting rights of the heirs in a certain other Member States to property of the deceased located there, and (b) the ruling on succession (Articles 4 and 21 of the EU Succession Regulation) and – irrespective of which conflict-of-law rules are applied – the questions relating to matrimonial property regimes are to be assessed on the basis of the same national legal system.

If the first and second questions are answered in the negative in their entirety, is Article 68(l) of the EU Succession Regulation to be interpreted as meaning that the share of the surviving spouse increased pursuant to a rule governing matrimonial property regimes may be recorded in full in the European Certificate of Succession, but for information purposes only on account of the increase?”

2) Besides the two mentioned cases related with the material scope of application, the Report drafted by the Max Planck Institute of Luxembourg also mentions several national decisions where some issues related with the personal scope of application of this Regulation have been raised. For instance, the Spanish *Resolución de la Dirección General de Registros y del Notariado* (DGRN) of 15 June 2016¹⁷⁵ deals with the possible application of the Regulation to the will of a UK national whose habitual residence was in Spain. The Spanish administrative authority concludes correctly that the Regulation is of application in this case despite the fact that UK is not bound by this legal instrument. It recalls upon its universal application as a common feature of European Regulations in the field of applicable law. Article 20 of the Regulation on Successions states that “Any law specified by this Regulation shall be applied whether or not it is the law of a Member State”. Therefore, the inheritance open in Spain before Spanish notary shall be governed by the Regulation and the rules of Chapter III in particular, which deal with the determination of the relevant law governing the case. Furthermore, it is also worth noting in this case that the British *de cuius* granted a will before the Regulation entered into application (2003) and this fact led to discuss the possibility of applying the transitional provisions laid down in Article 83 of the Regulation. The Spanish authority supported that the testamentary disposition included a *professio iuris* under which the testator had chosen his national law (British law) to govern his future succession so that

¹⁷⁵ BOE n. 175, 21 July 2016.



the forced shares Spanish law grants to descendants (*legítimas sucesorias*) had not to be respected.

A second example concerning the personal scope of application of this Regulation concerns the decision of the First Instance Court of Yambol (Bulgaria) also referred to in the Report drafted by the Max Planck Institute. This decision tackled the issue of whether a British citizen has a right to a European Certificate of Succession. The Regional Court held that the fact that UK was not part of the Regulation precluded the possibility for a British citizen to obtain such Certificate. The District Court of Yambol quashed the first instance decision and sent the case back to the Regional Court, which explained that Recital 72 of the Regulation clearly states that the court should issue the Certificate upon request, so it is understood that this rule is mandatory.

3) Finally, regarding the temporal scope and transitional provisions (Article 83), the same Report on Shared Good Practices drafted by the Max Planck Institute mentions two decisions of the Spanish DGRN, the above mentioned *Resolución* of 15 June 2016 and a second one of 10 April 2017.¹⁷⁶ In the first case, as already said, the deceased was a British citizen, while in the second it is a German national. Both had their habitual residence in Spain at the time of death. The British citizen had granted his will in 2003 before a Spanish Notary and died after 17 August 2015. The German national had made it in 2014 (the Regulation was already in force although it did not apply), passing away as well after 17 August 2015. Both had appointed as sole heir their respective wives, although they had at least one child -who according to Spanish law is a forced heir-. In both cases, there was a discussion about the applicable law: whether it was Spanish law, as a default rule, or English/German law. In the first case, the DGRN got to the conclusion that there had been a *professio iuris* in favour of English law; but not in the latter case.

Concerning the temporal issues, as previously said the first decision of 2016 concerned a will granted in 2003 (before the application of the Regulation), a fact which led to discuss the possible application of Article 83 regarding transitional provisions and which was solve in the positive thus accepting the choice of national law (British law) done in

¹⁷⁶ BOE n. 99, 26 April 2017.



such disposition upon death made prior to 17 August 2015. Regarding the decision of 2017, the importance of adopting rules favouring predictability and legal certainty (Recital 80) is recalled in order for citizens to avoid problems due to legal changes after having arranged their inheritance in a certain way before the entry into application of the Regulation. The will covered by this decision was granted before a Spanish notary in 2014, when the Regulation was in force but not in application. There was no explicit choice of law but the Registrar considered there actually was and consequently that the testator had chosen his national law (German law). However, the DGRN supported the inexistence of such a choice (given that there is not an “explicit *profession iuris* or undoubted in its terms”) and ruled the application of the law of the habitual residence (Spanish law) according to the joint interpretation of Article 26(1)(d) and 83(3) of the Regulation.



CHAPTER 2. FINDING A HABITUAL RESIDENCE

Thalia Kruger

I. INTRODUCTION

Home is where the heart is. But where is the heart? This is not an easy matter at times of family crisis. Many of the EU Regulations in the field of family law use “habitual residence” as a basis of jurisdiction or as a connecting factor to find the applicable law. In many cases, probably the most, it is easy for the judge to establish someone’s habitual residence: the situation is clear and it can easily be deduced where people live. In these cases, the judges need not elaborate on how they go about finding the habitual residence.

However, in a number of cases, the habitual residence is put in question, or sometimes heavily disputed between spouses, former spouses or other family members. For these cases, it is necessary to find the habitual residence. This chapter deals with the question of how judges can and should do the finding. For purposes of the research I have relied heavily on the case law collected by the EUFam’s partners. The original judgments are often not accessible to me (due to their language), but the information in the database provided usable material.

II. A POPULAR CONCEPT

Many EU Regulations use the concept of “habitual residence” as a basis of jurisdiction and as a connecting factor for finding the applicable law.

a) As basis of jurisdiction

Brussels IIa uses “habitual residence” frequently: in recitals 12, 17 and 18 and in Article 2 in the definitions of “rights of access” and “wrongful removal or retention”, Articles 3,



6 and 7 on jurisdiction in divorce and marriage annulment, Articles 8-13 on jurisdiction in matters of parental responsibility, Article 15 on transfer of jurisdiction, Article 18 on the examination of admissibility, Article 23 on grounds for non-recognition of judgments in parental responsibility matters, Article 29 on the jurisdiction of local courts, Article 33 on the appeal against a decision of enforceability, Article 42 on the enforcement of return decisions, Article 51 on security, bonds and deposits, Article 57 on the working method of central authorities, Article 61 on the relation with the Hague Child Protection Convention of 1996, and Article 66 on Member States with more than one legal system.

The Maintenance Regulation uses the term in recitals 15, 17 and 32, Article 3 containing the general rule on jurisdiction, Article 4 on choice of court, Article 8 on limits to proceedings in respect of States party to the Hague Maintenance Convention of 2007, Article 11 on the examination of admissibility, Article 27 on the jurisdiction of local courts, Article 32 on the appeal against a declaration of enforceability, and Article 45(d) on legal aid and costs.

The Succession Regulation's jurisdiction rules are in most cases based on habitual residence (Articles, 4, 6, 10, 13 and 16).

The recent Matrimonial Property and Registered Partnerships Regulations also make use of habitual residence as basis for jurisdiction (Articles 5, 6 and 16 of the Matrimonial Property Regulation; Articles 6 and 16 of the Registered Partnerships Regulation).

b) As connecting factor for applicable law

The Hague Maintenance Protocol, incorporated in the Maintenance Regulation,¹⁷⁷ refers to the habitual residence as general rule for finding the applicable law (Article 3). Also for special categories of maintenance creditors and spouses' habitual residence is relevant (Articles 4 and 5), as well as for special defences (Article 6). Habitual residence is one of the bases for the limited choice that parties are permitted to make (Article 8).

¹⁷⁷ By Article 15.



Rome III¹⁷⁸ employs habitual residence as its main connecting factor in Article 8 for the law applicable to divorce if the parties have not chosen the applicable law. Article 5, granting a limited choice to the spouses, refers in two of its four subparagraphs to the habitual residence of the spouses or one of them.

The applicable law rules of the Succession Regulation also use habitual residence (Articles 21, 27 and 28).

Lastly, the recent Matrimonial Property and Registered Partnerships Regulations also rely heavily on habitual residence, both for the limited choice allowed to the parties (Articles 22, 23, 24 and 25 of both Regulations) and for the rule on applicable law in the absence of choice (Article 26 and 28 of both Regulations).

The use of the concept is not limited to the field of family law,¹⁷⁹ but given the scope of the EUFam's project, this paper is restricted to the family law instruments. As a result, the paper will only focus on the habitual residence of natural persons, both adults and children. It will not discuss the habitual residence of companies or other legal persons.

III. AN AUTONOMOUS CONCEPT

The concepts used in the EU regulations should get an autonomous interpretation. Therefore, Member State courts may not rely solely on national understandings of the concept.

¹⁷⁸ Regulation 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, *OJ L* 343, 29 December 2010, 10.

¹⁷⁹ Brussels Ia uses "habitual residence" in Article 15 on insurance, Article 19 on consumers, and Article 72 on the continued use of older conventions on the enforcement of judgments from third States. Rome I makes use of "habitual residence" as its main connecting factor: see recitals 19, 21, 25, 28, 39, Article 4 on the applicable law in the absence of choice, Article 5 on carriage contracts, Article 6 on consumers contracts, Article 7 on insurance contracts, Article 10 on material validity, Article 11 on formal validity, and Article 19 containing a definition of habitual residence. In Rome II "habitual residence" is not the main connecting factor as in Rome I, but has an important subsidiary place. It is employed in recitals 18, 20, 33, Article 4 containing the general rule, Article 5 on product liability, Article 10 on unjust enrichment, Article 11 on negotiorum gestio, Article 12 on culpa in contrahendo, and Article 23 containing a definition of habitual residence.



Moreover, in the spirit of mutual trust, national courts in the EU cannot second-guess the finding of a habitual residence made by a national court in another EU Member State.¹⁸⁰

a) Case law of the CJEU on the habitual residence of children

The CJEU has already issued four judgments on the habitual residence of children in the field of international family law.¹⁸¹ In these cases the Court set out factors that national courts should consider when determining the habitual residence of a child. In the first case, *A*, the Court set out a number of factors that courts should use to establish the habitual residence of a child. These are “the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family’s move to that State, the child’s nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State.”

The Court has kept these factors in the next cases, but gave further explanations.

The Court reiterated that the fact that a habitual residence is in accordance with the law is only one of the factors that a national court should consider.¹⁸² In this case the mother removed the child from France to Ireland in accordance with a judgment by a French court. However, at the time she moved, she was aware that the judgment was being appealed and that her permission was therefore precarious. The appeal court revoked the permission to move to Ireland and the presence of the child there thus became against the law. This fact in itself is relevant, but had to be considered in combination with the other factors. It is interesting to note that the Irish Supreme Court, after receiving this response from the CJEU, found that the child was habitually resident in Ireland.¹⁸³ The Court took into account the fact that the appeal was pending

¹⁸⁰ Czech Constitutional Court, 8 September 2015, #214, CZT20150908.

¹⁸¹ CJEU, case C-523/07, *A*, ECLI:EU:C:2009:225; C-497/10, *Mercredi v Chaffe*, ECLI:EU:C:2010:829; C-376/14, *C v M*, ECLI:EU:C:2014:2268; C-111/17, *OL v PQ*, ECLI:EU:C:2017:436.

¹⁸² CJEU, case C-376/14, *C v M*, ECLI:EU:C:2014:2268. For criticism of this case, see Beaumont, Holiday (2015) ‘Recent developments on the meaning of ‘habitual residence’ in alleged child abduction cases’, Centre of Private International Law, University of Aberdeen Working Paper No 2015/3, available at http://www.abdn.ac.uk/law/documents/Recent_Developments_on_the_Meaning_of_Habitual_Residence_in_Alleged_Child_Abduction_Cases_.pdf

¹⁸³ *G v G* [2015] IESC 12.



in France at the time of the move, but also other factors, such as the child's ties with her parents, her relatives in Ireland and her language capabilities.

For infants the factors remain relevant, the CJEU said in *Mercredi*.¹⁸⁴ However, the family origins and the family and social connections of the person of whom the infant is dependent have to be considered.¹⁸⁵

A mere intention is not sufficient if the infant has never been present in the particular country. The Court had the opportunity to give this explanation in a recent case¹⁸⁶ in which the mother gave birth in Greece, with the agreement of the father. The family home was in Italy, and the intention was that the mother and child would return there. However, the mother never returned. This child could not be habitually resident in Italy on the basis of the mere intention of the parents if she has never been to Italy.

b) The habitual residence of adults

There is no case law of the CJEU yet on the autonomous interpretation of “habitual residence” for adults in the sphere of international family law. This solicits the question of which inspiration is the most appropriate: the case law on the habitual residence of children since these cases are squarely in the ambit of family law, or the case law on habitual residence in social security and staff cases since these cases focus on adults and the best way to determine the centre of their lives.

In my opinion, national courts could draw inspiration from both these sources. First, because the case law all aim to seek the centre of an individual's interests. This is in line with the meaning of habitual residence in Brussels IIa.¹⁸⁷ Second, because it would make sense to simplify and converge approaches across legal fields rather than to needlessly complicate them. Individuals do not compartmentalise their lives into sections such as tax, social security and family and then have several centres of their interests. Third, because the case law with respect to children is certainly relevant insofar as it deals with families, but in itself insufficient. The important difference

¹⁸⁴ CJEU, case C-497/10, *Mercredi v Chaffe*, ECLI:EU:C:2010:829.

¹⁸⁵ at para 56 and in the operative part of the judgment (para 72).

¹⁸⁶ CJEU, case C-111/17, *OL v PQ*, ECLI:EU:C:2017:436.

¹⁸⁷ See Report on the Brussels II Convention by A Borrás.



between moving children and moving adults is that adults can and do decide for themselves, while children are dependent on an adult's (usually a parent's) intentions. Advocate General Kokott wrote in her Opinion for case A that it is not appropriate to transpose case law from other fields of law when assessing the habitual residence of a child.¹⁸⁸ In her view the family law context is different. While this is true for children, the position of adults is different. Her statement should not be extended beyond the context in which it was made.

IV. A FACTUAL CONCEPT

Even from before the EU had competence in private international law matters, the Hague Conference on Private International law has often used “habitual residence” as a connecting factor in its conventions. The Conference deliberately chose for a concept that is not burdened by legal technicalities but dependent upon fact.¹⁸⁹ The European Union (EU) legislator has followed this approach in its Regulations in the field of Private International Law.¹⁹⁰

In a certain sense, it is ironic to write a paper for a legal volume on the concept of habitual residence: the point of the concept is that it should not become legalistic. The Hague Conventions and the EU Regulations have deliberately refrained from defining the term “habitual residence”. It should indeed be left to national judges to apply the facts and find where the people in front of them habitually reside.

The Conventions and Regulations generally do not even contain guidelines or clues for the finding of a habitual residence. The Succession Regulation poses an exception: its recitals 23 and 24 do give such clues. Recital 23 states that: “the authority dealing with the succession should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking

¹⁸⁸ CJEU, case C-523/07, A, ECLI:EU:C:2009:39 stated at paras 34-36.

¹⁸⁹ Collins (2006) *Dicey, Morris and Collins on The Conflict of Laws* (London, Sweet & Maxwell) at 168; Winter (2010) 'Home is where the Heart is: Determining 'Habitual Residence' under the Hague Convention on the Civil Aspects of International Child Abduction' 33 *Washington University Journal of Law and Policy* 351 at 355.

¹⁹⁰ Collins (2006) *Dicey, Morris and Collins on The Conflict of Laws* (London, Sweet & Maxwell) at 168; Briggs (2014) *Private International Law in English Courts* (Oxford, Oxford University Press) at 76.



account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence. The habitual residence thus determined should reveal a close and stable connection with the State concerned taking into account the specific aims of this Regulation.”

The legislator then goes further to justify its meddlesomeness by stating in recital 24 that: “determining the deceased's habitual residence may prove complex. Such a case may arise, in particular, where the deceased for professional or economic reasons had gone to live abroad to work there, sometimes for a long time, but had maintained a close and stable connection with his State of origin. In such a case, the deceased could, depending on the circumstances of the case, be considered still to have his habitual residence in his State of origin in which the centre of interests of his family and his social life was located. Other complex cases may arise where the deceased lived in several States alternately or travelled from one State to another without settling permanently in any of them. If the deceased was a national of one of those States or had all his main assets in one of those States, his nationality or the location of those assets could be a special factor in the overall assessment of all the factual circumstances.”

Therefore, when discussing habitual residence, lawyers and academics should take care not to impose a definition, but only to enlist the factors that are or are not considered relevant by the CJEU and by national courts and to discuss factors that should or should not be relevant.

V. A CONCEPT FILLED IN BY FACTORS

National courts considered a variety of factual circumstances in order to determine the habitual residence. The ones that feature most prominently in the cases collected in the EU Fam's database, are those that the CJEU enlisted.¹⁹¹

¹⁹¹ *OLG Stuttgart*, 12 April 2012, DES20120412; Czech Supreme Court, 27 September 2011, CZT20110927 (according to the commentary in the EU Fam's database this is an important case, often referred to by other Czech cases); Czech case, 11 October 2013, CZS20131011; Brno court, 2 April 2015, CZS20150402; Slovakian case, Dunaj, 4 March 2014, SKF20140304; *OLG Koblenz*, 18 March 2015, DES20150318; *OLG Stuttgart*, 26 August 2015, DES20150826.



For adults, courts have also considered employment,¹⁹² loans,¹⁹³ owning immovable property,¹⁹⁴ their driving licence,¹⁹⁵ where their children attend school,¹⁹⁶ the receipt of important mail such as bank statements,¹⁹⁷ personal and administrative relations,¹⁹⁸ where they paid social assistance contributions,¹⁹⁹ and even the place of the spouses' wedding.²⁰⁰

The fact that an adult maintains a close relationship with family members in his or her country of origin is not in itself considered sufficient to establish a habitual residence.²⁰¹ Similarly, visiting children in a particular country is not sufficient to be considered habitually resident there.²⁰² Paying taxes in a particular country does not necessarily mean that the adult has established the permanent centre of his or her interests there.²⁰³ A registered residence does not necessarily amount to a habitual residence in that State.²⁰⁴ A Spanish court even considered working in a particular country as insufficient where the person travelled a lot.²⁰⁵

For children, besides the factors of the CJEU, courts have also considered other factual circumstances such as where the child was hospitalised,²⁰⁶ the location of the child's doctor,²⁰⁷ the place where a parent works,²⁰⁸ the child's sports,²⁰⁹ the child's own relationship with his or her peers.²¹⁰ The *Bundesgerichtshof* emphasised that the factors

¹⁹² French *Cour de Cassation*, 24 February 2016, FRT20160224.

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid* and *Tribunale Milano*, 16 April 2014, ITF20140416.

¹⁹⁵ *Tribunale Milano*, 16 April 2014, ITF20140416.

¹⁹⁶ French *Cour de Cassation*, 24 February 2016, FRT20160224 and *Tribunale Milano*, 16 April 2014, ITF20140416.

¹⁹⁷ *Corte d'appello di Catania*, 2 October 2015, ITS20151002.

¹⁹⁸ Spanish case, 12 March 2013, ESS20130312.

¹⁹⁹ *Tribunale Milano*, 16 April 2014, ITF20140416.

²⁰⁰ *Tribunale di Roma*, 25 October 2013, ITF20131025.

²⁰¹ Greek case, 8 June 2015, ELS20150608; Greek case 1 April 2013, EL20130401.

²⁰² Split court, 20 July 2015, CRS20150720.

²⁰³ *Cour d'appel de Colmar*, 1 April 2014, FRS20140401.

²⁰⁴ Split court, 20 July 2015, CRS20150720.

²⁰⁵ Spanish case, 17 March 2015, ESS20150317.

²⁰⁶ *Corte d'appello di Catania*, 2 October 2015, ITS20151002.

²⁰⁷ Czech Supreme Court, 27 September 2011, CZT20110927.

²⁰⁸ Czech case, 24 April 2013, CZT20130424.

²⁰⁹ *Tribunale Milano*, 16 April 2014, ITF20140416.

²¹⁰ *Tribunale di Genova*, 22 December 2014, ITF20141222.



to be taken into account for children must be considered independent from their parents.²¹¹ However, the Court added that the habitual residence of a child generally corresponds with that of the caretaking parent.²¹²

Courts have also pointed out the factors that are insufficient in themselves to establish the habitual residence of a child: the registration of the child in a particular country (i.e. formal residence),²¹³ the child attending pre-school,²¹⁴ the place where child benefits are paid.²¹⁵

The factors should remain within their factual context. They should remain in equilibrium. Thus, no single factor should be seen as decisive. Judges should resist the temptation to devise set criteria when considering the factors. An example of such set criteria is attaching a specific time limit to the criteria of “duration”. It emerges from the case law collected in the EUFam’s project that German courts consider that a person attains a habitual residence if he or she has been in the country for six month or more. Some courts regard a six-month period as sufficient and fail to take into account the other factors.²¹⁶ Other courts regard this period almost akin to a presumption, but consider other factors as well.²¹⁷ It seems that the German courts follow an old judgment from 1982 in which the *Bundesgerichtshof* found that after six months it could reasonably be concluded that a person has a new habitual residence.²¹⁸ Some courts have not found the correct balance between this old *Bundesgerichtshof* case law and the more recent case law by the CJEU. When applying the EU Regulations, they should pay more attention to the guidance given by the CJEU. When considering “habitual residence” in the application of domestic law, German courts can (and should) of course follow the case law of the *Bundesgerichtshof*.

²¹¹ *BGH*, 17 February 2010, DET20100217.

²¹² *Ibid.*

²¹³ Supreme Court of Slovakia, 13 March 2009, SKT20090312; Zagreb court, 16 July 2014, CRF20140716; Zagreb court, 2 December 2014, CRS20141202; *OLG Hamm*, 2 February 2011, DES20110202.

²¹⁴ *OLG Hamm*, 2 February 2011, DES20110202.

²¹⁵ *OLG Koblenz*, 18 March 2015, DES20150318.

²¹⁶ *OLG Karlsruhe*, 26 August 2015, DES20150826.

²¹⁷ *Kammergericht Berlin*, 2 March 2015, DES20150302; *OLG Karlsruhe*, 5 June 2015, DES20150605.

²¹⁸ *BGH* 29 October 1982.



There is case law that gets the balance right. The *Oberlandesgericht Stuttgart*²¹⁹ considered the fact that the mother and child moved to Spain more than six months before. However, it did not see this fact as decisive, but also took into account the child's school and the social integration. The Court found that the six-month period is relevant, but that finding a habitual residence requires a case-by-case analysis.

VI. A TIMELY CONCEPT

Regarding children, the Brussels IIa Regulation contains an explicit mention of the relevant point in time: when the court is seised.²²⁰ Strangely, the Regulation does not mention the relevant time to consider the habitual residence for cases in matrimonial matters (divorce, legal separation and marriage annulment). The Borrás Report refers to the “time of application”.²²¹ This is in line with the time element for children. It is also aligned with the Rome III Regulation,²²² the Matrimonial Property Regulation,²²³ and the Regulation on the Property Consequences of Registered Partnerships.²²⁴ The Maintenance Regulation, like Brussels IIa for Adults, is silent on the relevant moment of habitual residence. The Succession Regulation also contains a reference to the relevant point in time, but here it is the time of the death and not the time of the application.²²⁵

The Hague Child Protection Convention (1996) and Hague Maintenance Protocol operate differently: they provide that jurisdiction shifts when the habitual residence changes.²²⁶

The EUFam's database reveals that courts have approached divergently the question of when the habitual residence must be in their State.

²¹⁹ *OLG Stuttgart* 30 March 2012, DES20120330.

²²⁰ Article 8 Brussels IIa.

²²¹ See § 31 Borrás Report. This Report was written for the Convention on which Regulation 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, *OJ L 160*, 30 June 2000, 19 (Brussels II, the predecessor of Brussels IIa) was based. The Report is published at *OJ C 221*, 16 July 1998, 27.

²²² Article 8 Rome III refers to the “time the court is seised”.

²²³ Article 6a) Maintenance Property Regulation for jurisdiction. For applicable law, the Regulation refers to the first common habitual residence of the spouses: Article 26(1)a).

²²⁴ Article 6a) Regulation Property Consequences of Registered Partnerships for jurisdiction.

²²⁵ Article 4 Succession Regulation for jurisdiction; Article 21 for applicable law.

²²⁶ Article 5(2) Hague Child Protection Convention (1996); Article 3(2) Maintenance Protocol.



In a maintenance claim the *Oberlandesgericht Frankfurt am Main* found the time of seising the court the relevant moment even if the habitual residence shifted during the course of the proceedings.²²⁷

Regarding children, the courts have not always kept the focus on the moment of seising. A Slovak court found that the habitual residence of the child shifted from Slovakia to the Czech Republic after the institution of the proceedings, which resulted in neither the Slovak nor the Czech court having jurisdiction.²²⁸ An Italian court considered the habitual residence of the child at the moment of the decision instead of the moment of the institution of the proceedings.²²⁹ However, the child had been living in Ecuador for some time, so the outcome would probably have been the same. The *Bundesgerichtshof* found that for purposes of jurisdiction it was sufficient that the child became habitually resident in Germany at some point during the procedure, as long as he or she was so habitually resident by the end of the court proceedings.²³⁰ It seems that the problem in this case was that it was hard to determine the child's habitual residence at the timing of the institution of the proceedings.

A particular problem arises when the child moves from an EU Member State to a State outside the EU that is party to the Hague Child Protection Convention (1996). While Brussels IIa provides that jurisdiction stays with the court of the habitual residence at the time of the institution of the proceedings, the 1996 Hague Convention provides that jurisdiction shifts with the habitual residence, as explained above. The *Kammergericht Berlin* was faced with such a situation. After the institution of the proceedings the child's habitual residence moved from Germany to Russia.²³¹ Russia is party to the 1996 Hague Convention.²³² The court referred to the disconnection rule for these two legal instruments.²³³ It found that if the child is not habitually resident in the EU, the

²²⁷ *OLG Frankfurt am Main*, 12 April 2012, DES20120412.

²²⁸ Slovak court, 21 November 2014, SKF20141121.

²²⁹ *Tribunale di Genova*, 22 December 2014, ITF20141222.

²³⁰ *BGH*, 17 February 2010, DET20100217.

²³¹ *Kammergericht Berlin*, 2 March 2015, DES20150302.

²³² See the status table for this Convention at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=70>.

²³³ Article 61a) Brussels IIa.



Convention takes precedence. Therefore, the jurisdiction in this case lay with the Russian and not the German courts.

The *Kammergericht* did a good job of respecting its international obligations. Brussels Ila's current wording on the interaction between Brussels Ila and the 1996 Hague Convention does not provide for a correct solution. Article 61 simply states if the child is habitually residence in the EU, Brussels Ila prevails over the Convention. The Proposal for the Recast of Brussels Ila solves this problem by bringing the Regulation in line with the Convention's rule.²³⁴ The Regulation will, if the Proposal is accepted, also attribute jurisdiction to the place of the new habitual residence from the moment of the move.²³⁵

VII. A CONCEPT LINKED TO BUT NOT LIMITED TO INTENTION

The CJEU made clear in the above-mentioned case of *OL v PQ* that a child (an infant in this case) cannot acquire a habitual residence at a place where he or she has never been physically present. The mere intention of the parents is insufficient to establish a habitual residence. In my view the logic of this conclusion can also be extended to adults: they cannot acquire a habitual residence in a country without actually being there.

The French Court of Cassation had come to an opposite conclusion in a case that was decided prior to the *OL v PQ* judgment. The French Court of Cassation placed more emphasis on the common intention of the parents about where the child would be living.²³⁶ The facts were similar to that of *OL v PQ*. The parents had agreed that the mother would travel from Michigan, where the family home was, to see her father in France. She took the couple's daughter with her. She was pregnant and gave birth to the second child in France. When she refused to return to the US, the father instituted return proceedings. At issue was whether the younger child was habitually resident in the US. The child had never been to the US. However, the French Court of Cassation

²³⁴ See 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) of 30 June 2016, COM(2016) 411 (Recast Proposal).

²³⁵ Recast Proposal Article 7.

²³⁶ French Cass., 26 October 2011 (première chambre civile). See also Fiorini (2012) 'The Habitual Residence and the Newborn - A French Perspective' 61 *International & Comparative Law Quarterly*, 530.



considered the parents' intention and found that the child was habitually resident in Michigan.

The United Kingdom Supreme Court was also faced with this question.²³⁷ It was reluctant to find that an infant could have his habitual residence in a country where he has never been.²³⁸ However, making such finding was not necessary, as the English courts would also have had jurisdiction if the child were not habitually resident in England.²³⁹

For the assessment of the habitual residence of older children (i.e. not infants) the intention of the parents also plays a role. This is in line with the case law of the CJEU. An Italian court for example found the fact that a parent who moves to a country for a short period or for holidays could not have expected that the child's stay in this country was definitive.²⁴⁰

For an unaccompanied minor refugee the *Oberlandesgericht of Karlsruhe* relied more heavily on intention than might be done in other cases.²⁴¹ The Court looked at the centre of the child's life, social integration, the time spent in Germany with a foster family, and also the fact that a change of habitual residence was not foreseeable, thus looking at where the child will stay in the immediate future.

VIII. A CONCEPT TOLERATING AN ILLEGAL SITUATION

As habitual residence is a factual concept and as such the fact whether the stay is legal or illegal is not decisive. This emerges from the case law of the CJEU, where the "regularity" or the stay is only one of the factors to be considered.²⁴² As set out above, even the fact that the child stays in a country in violation of a court order is only one relevant fact when assessing the habitual residence.

²³⁷ Fiorini (2012) 'The Habitual Residence and the Newborn - A French Perspective' 61 *ICLQ* 530, 533-534.

²³⁸ *In the matter of A (Children)* [2013] UKSC 60.

²³⁹ On the basis of the residual jurisdiction, for which Article 14 Brussels IIa refers to national law, the English courts would have jurisdiction. See *In the matter of A (Children)* [2013] UKSC 60 at para 59-76. See also Schuz (2014) 'Case Commentary. Habitual residence of the child revisited: a trilogy of cases in the UK Supreme Court' 26 *Child & Family Law Quarterly*, 342 at 350-353.

²⁴⁰ Corte d'appello di Catania, 3 June 2015, ITS20150603; Corte d'appello di Catania, 2 October 2015, ITS20151002.

²⁴¹ OLG Karlsruhe, 5 March 2012, DES20120305.

²⁴² CJEU C-523/07, A, ECLI:EU:C:2009:225; C-497/10, *Mercredi v Chaffe*, ECLI:EU:C:2010:829.



Here it is important to draw a clear distinction between the factual concept of habitual residence and the law that surrounds it. Article 10 of Brussels IIa can cause confusion: this Article provides for the retention of the jurisdiction of the court of the former habitual residence of the child in case of a wrongful removal or retention in another country. The provision does not aim to define or in any way determine the habitual residence of an abducted child. It merely creates an exception to the general rule (in Article 8) that the habitual residence creates jurisdiction.

Article 10 is sometimes read to mean that a wrongful removal or retention cannot alter a child's habitual residence. Such interpretation amounts to cutting a legal corner. Courts should not, it is submitted, succumb to this short-cut, which causes them to lose accuracy in their legal reasoning. The result is elevating Article 10 to a rule on habitual residence rather than a rule distributing jurisdiction. The EUFam's database contains a number of cases where courts did use the short-cut.²⁴³ Similarly, the *Oberlandesgericht Stuttgart* found that a child's habitual residence could change immediately upon a move if it is planned for a long period and if the holders of custody agreed.²⁴⁴ The fact that the court adds here the agreement of the holders of custody as a requirement for acquiring a new habitual residence impinges on the factual nature that the habitual residence must take.

Other courts got it right, finding a habitual residence due to the fact that the child is settled and had been residing in the new country for more than a year.²⁴⁵

IX. A CONCEPT REFERRING TO ONLY ONE PLACE

Some debate has arisen about the possibility of having a dual habitual residence. Some national courts have found that a child can simultaneously have more than one habitual residence. These were situations where the children had significant contacts with more than one country. For instance, a Czech court found that the children were

²⁴³ Zagreb Court, 2 December 2014, CRS20141202.

²⁴⁴ *OLG Stuttgart*, 26 August 2015, DES20150826.

²⁴⁵ Italian court, 28 January 2016, ITF20160128.



simultaneously habitually resident in the Czech Republic and in Switzerland.²⁴⁶ The court made a careful assessment of the relevant factors such as proximity, social and family integration, duration of the stay and the languages that the children spoke. Similarly, the Slovakian Supreme Court found children to have a degree of integration in two States.²⁴⁷ The children went to school in both States – half the time in the one State, half the time in the other (hopefully this is exceptional). The children moreover were integrated socially and family-wise in both States (probably a less exceptional feature of this case). This is not the only case in the database in which the Slovakian court found that children had a dual habitual residence.²⁴⁸

In two other cases (after the Supreme Court decision), Slovakian courts refrained from finding that an adult simultaneously had two habitual residences.²⁴⁹ It seems that the court came to this conclusion based on the facts of the particular case and one cannot deduct a principled stance against dual habitual residence. Whether courts are more reluctant to find a dual habitual residence for adults than for children is unclear to me. Refraining from finding a dual habitual residence does seem in line with the recitals of the Succession Regulation.²⁵⁰ These recitals seem to provide guidelines in finding only one habitual residence, even for people who were very mobile during their lifetime.²⁵¹ To my mind, the autonomous concept, and the factors that the CJEU has laid down are meant to find one habitual residence. Ruling that an adult or a child has several habitual residences would impede the functioning of the Regulations. This could increase the courts that have jurisdiction. It could make it impossible to determine whether there has been a child abduction.

²⁴⁶ Czech case, 11 October 2013, CZS20131011.

²⁴⁷ Supreme Court of Slovakia, 30 April 2013, SKT20130430.

²⁴⁸ Bratislava court, 28 January 2014, SKS20130128.

²⁴⁹ Slovakian case, 30 May 2014, SKS20140530; Slovakian case, 31 January 2014, SKS20140131.

²⁵⁰ Recitals 23 and 24.

²⁵¹ Especially Recital 24.



X. CONCLUSION

The heart can only be where it is physically present. Its place will be interpreted in the same manner throughout the EU. There are various factors that can help judges to locate it, but there is no general rule. The heart ticks at its own pace. It has its own will, travels where it wishes, even illegally. The heart can only be one place at a time.



CHAPTER 3. JURISDICTION

MPI Luxembourg main researchers: Marta Requejo Isidro (Succession Regulation), Arantxa Gandía Sellens (Brussels IIa Regulation, Consolidation of claims), Amandine Faucon Alonso (Maintenance Regulation, Consolidation of claims), Philippos Siaplaouras (General principles and objectives).

A. GENERAL PRINCIPLES AND OBJECTIVES

By providing for the Area of Freedom, Security and Justice (AFSJ), the Treaty on the Functioning of the European Union (TFEU) has awarded the European Union with genuine competence in matters of civil procedure.²⁵² A brief look at the recitals of the relevant instruments, i.e. the Brussels IIa, Maintenance and Succession Regulations, seems to confirm the very prominent position of the AFSJ for the European legislator: the very first recital in all three Regulations focuses on the AFSJ, emphasizing how the Union is committed to maintaining and developing it. This textual emphasis may be indicative of the EU legislator considering the AFSJ as a key objective which permeates these instruments.

The emphatic presence of the AFSJ in the opening recitals is not limited to instruments of family law or succession: the third recital of the central instrument in EU civil procedure, Brussels Ia, also repeats the objective. The CJEU has also noted that the objective of an AFSJ had given the Community “a new dimension”.²⁵³ These occurrences may be indicative of how the AFSJ is perceived as the basic constitutional framework which encompasses the various legislative initiatives as regards European civil procedure.²⁵⁴

Article 67 paragraph 1 TFEU contains the programmatic declaration that the EU “shall constitute an area of freedom, security and justice with respect for fundamental rights

²⁵² Hess, ‘The State of the Civil Justice Union’ in Hess/ Bergström/ Storskrubb (eds), *EU Civil Justice: Current Issues and Future Outlook* (Oxford, Hart Publishing, 2016) 1.

²⁵³ CJEU, case C-443/03 *Götz Leffler v Berlin Chemie AG* EU:C:2005:665, [2005] ECR I-9611, para 45.

²⁵⁴ cf Kotzur, in Geiger/ Khan/ Kotzur (eds), *EUV-AEUV*, 6th ed. (Munich, CH Beck, 2017) article 67 AEUV para 2, who uses the term “Verfassungsraum”.



and the different legal systems and traditions of the Member States”. With regard to civil procedure, paragraph 4 further declares that the EU “shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters”. These provisions set the overall characteristics of the EU’s legislative involvement in civil procedure: the keywords are access to justice and mutual recognition, along with respect of fundamental rights and respect of the traditions of Member States. Furthermore, Article 81 paragraph 1 TFEU stipulates that the EU “shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases”, followed by a list of specific areas of competence. A special paragraph is devoted to family law (para 3).

The ASFJ, as provided for in the TFEU, signifies an emancipation of the concept from the needs of the internal market.²⁵⁵ The ASFJ is currently perceived as an independent area of policy, which aims to facilitate the movement of people within the EU - legislative initiatives no longer need to be taken “in so far as necessary for the proper functioning of the internal market” as Article 65 of the Treaty establishing the European Community (TEC) stipulated. Judicial cooperation to facilitate the free movement of Union citizens is, therefore, an independent and separate objective under the ASFJ within the current framework of the EU treaties.

Mutual recognition (Article 81 paragraph 1 TFEU) and access to justice (Article 67 paragraph 4 TFEU) constitute the two main underlying principles of the EU’s competences in matters of judicial cooperation in civil matters.²⁵⁶ Both concepts are implemented by the common rules on jurisdiction. On the one hand, access to justice is guaranteed by providing clear jurisdictional bases for the parties.²⁵⁷ On the other hand, having common jurisdictional rules and trusting that the Member States will apply them

²⁵⁵ Recitals 4, 12 and article 3 para 2 TEU; Müller-Graff in Pechstein/ Nowak/ Häde (eds), *Frankfurter Kommentar zu EUV, GRC und AEUV* (Tübingen, Mohr Siebeck, 2017) Article 67 AEUV para 3.

²⁵⁶ Hess in Grabitz/ Hilf/ Nettesheim (eds), *Das Recht der Europäischen Union* (Munich, CH Beck, 2010) Article 81 AEUV para 31.

²⁵⁷ Pfeiffer, *Internationale Zuständigkeit und Prozessuale Gerechtigkeit* (Frankfurt, Vittorio Klostermann, 1995) 362-364.



are essential for facilitating free circulation of judgments.²⁵⁸ However, while these conclusions may be correct and the constitutional importance of the ASFJ correctly assessed, no concrete and direct overarching principles seem to be deducible which would bind the legislator in shaping the grounds for jurisdiction. This, of course, does not preclude an assessment of whether the current instruments do or do not satisfy the requirements of the ASFJ.

From a purely procedural point of view, the *overall* regulation of jurisdiction in the EU instruments follows the old continental rule²⁵⁹ of *actor sequitur forum rei*, as shown by Article 4 Brussels Ia, Article 3(a) third indent Brussels IIa and Article 3(b) Maintenance Regulation, complemented of course with numerous exceptions and additions. *Actor sequitur forum rei* is an expression of a more general principle of procedural fairness, i.e., of the fundamental basic protection for the defendant (“*favor defensoris*”) who is exposed to an attack by the plaintiff.²⁶⁰ In the words of the Court, this principle “serves as a counterpoise to the facilities provided by the Convention with regard to the recognition and enforcement of foreign judgments”.²⁶¹ Moreover, *forum rei* constitutes a rejection of *forum actoris*; only insofar as there is a concrete jurisdictional base provided for another forum may the plaintiff deviate from the rule.²⁶² The other jurisdictional bases provided for are understood as *exceptions* to the general rule. It is evident that *actor sequitur forum rei* primarily addresses access to justice for the defendant, since it establishes a familiar and close forum for the defendant.²⁶³

²⁵⁸ Jenard Report [1979] OJ C59/7, Recital 6 Brussels I bis Regulation.

²⁵⁹ See Chainais/ Ferrand/ Guinchard, *Procédure Civile*, 33rd ed. (Paris, Dalloz, 2016) para 1523: ‘Cette règle est traditionnelle. Elle existait dans le droit romain, dans le droit canonique, dans le droit coutumier’.

²⁶⁰ Jenard Report (n 11), 18; Dickinson in Dickinson/ Lein (eds), *The Brussels I Regulation Recast* (Oxford, Oxford University Press, 2015) para 1.60; Pontier/ Burg, *EU Principles on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters* (The Hague, T.M.C. Asser Press, 2004) 55-57, 118-124; with regard to internal jurisdiction, see e.g. Vollkommer in Zöller, *Zivilprozessordnung*, 31st ed. (Cologne, Otto Schmidt, 2016) § 12 No. 2.

²⁶¹ CJEU, case 220/84 *AS-Autoteile Service GmbH v Pierre Malhé* EU:C:1985:302, [1985] ECR 2267 para 15.

²⁶² CJEU, case C-412/98 *Group Josi Reinsurance Company SA and Universal General Insurance Company (UGIC)* EU:C:2000:399, [2000] ECR I-5925, para 36.

²⁶³ Hess, ‘Die allgemeinen Gerichtsstände der Brüssel I-Verordnung’ in W Hau/H Schmidt (eds), *Facetten des Verfahrensrechts: Liber Amicorum Walter F. Lindacher zum 70. Geburtstag* (Cologne, Carl Heymanns, 2007) 54-55.



In the subsystem of jurisdiction in family matters and matters of succession, however, *actor sequitur forum rei* does not prevail.²⁶⁴ Instead, various principles lie behind the jurisdictional rules of the Regulations in question here, such as the interest of the child,²⁶⁵ protection of the weaker party²⁶⁶ and securing harmony of *forum* and *ius*.²⁶⁷ The Succession Regulation does not know *forum rei* at all. Whereas these principles have in common that they do not emanate from procedural law, no *single* general principle governs the jurisdictional rules of all three Regulations. The departure from the *forum rei* is not unexpected either, since protection of the defendant is neither the only nor the ultimate principle behind the jurisdictional order.²⁶⁸ Even when jurisdiction according to the rule is provided (e.g. Article 3(a) third indent Brussels IIa or Article 3(b) Maintenance Regulation), there is an essential difference compared to Brussels Ia: it is not meant to exclude *forum actoris*, but rather constitutes one of many other possible fora available for the plaintiff. Proximity to the case, protection of the weaker party and the child's best interests are more appropriate where sensitive personal relationships have to be ascertained.²⁶⁹ In the case of the Regulations in question here, substantive concerns prevail over procedural ones, even if jurisdiction is of procedural nature. In that sense, access to justice, as an objective of the ASFJ, is shifted towards the child or the weaker party, or even the plaintiff in general rather than the defendant, a shift which is legitimized by substantive reasoning.²⁷⁰ Therefore, while the general objective of creating the ASFJ does not seem to impose a specific overarching principle upon which the jurisdictional system has to be built, the concrete choices of the instruments in question do seem appropriate, at least on an abstract level, to satisfy

²⁶⁴ Borrás Report [1998] OJ C221/27 para 28.

²⁶⁵ Recital 12 Brussels II bis.

²⁶⁶ Recital 9 Maintenance Regulation.

²⁶⁷ Recital 27 Succession Regulation, B Hess/C Mariottini/C Camara, 'Note on Regulation (EC) n. 650/2012 of July 2012 on jurisdiction, applicable law, recognition and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession' (European Parliament - PE 462.493 2012) 10.

²⁶⁸ Pontier/ Burg (n 14) 57.

²⁶⁹ cf Magnus/ Mankowski in Magnus/ Mankowski (eds), *Brussels IIbis Regulation* (Munich, Sellier European Law, 2012) introduction para 4.

²⁷⁰ See e.g. Borrás Report (n 18) 38 para 32, Recital 9 Maintenance Regulation.



the purpose of access to justice enshrined in the ASFJ given the subject matter of the three Regulations.

B. SECTOR-SPECIFIC PRINCIPLES AND OBJECTIVES

I. MATRIMONIAL MATTERS AND PARENTAL RESPONSIBILITY

The Brussels IIa Regulation has evolved from other previous European instruments. According to recital 28 in its Preamble, Brussels IIa replaces the previous Regulation 1347/2000²⁷¹ on the same matters, and in recital 3 recalls that the content of the latter was substantially taken over from the Convention of 28 May 1998,²⁷² hereinafter: “Brussels II Convention”. That Convention, being the origin of the procedural regulation of family matters at the European level, followed the principles on which the 1968 Brussels Convention²⁷³ was based.²⁷⁴

The different nature of the instruments preceding Brussels IIa, especially as regards their subject-matter, makes it necessary to distinguish two different categories of jurisdictional principles governing it: matrimonial matters and parental responsibility.

As for matrimonial matters, recital 33 of the Brussels IIa establishes that the Regulation observes the principles of the Charter of Fundamental Rights of the European Union.²⁷⁵

The relevant provisions of this text for matrimonial matters are Article 7 (respect for private and family life), Article 9 (right to marry and right to found a family), Article 23 (equality between men and women), Article 33.1 (the family shall enjoy legal, economic and social protection) and Article 45 (freedom of movement and of residence).

²⁷¹ Council Regulation (EC) 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses [2000] OJ L160/19

²⁷² Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters [1998] OJ C221/2

²⁷³ 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1972] OJ L299/32.

²⁷⁴ As stated in the Preamble of Brussels II Convention and in the Explanatory Report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters prepared by Dr. Borrás [1998] OJ C221/27, hereinafter, “Borrás Report”, para. 5.

²⁷⁵ [2000] OJ C364/1



Regarding parental responsibility, the Brussels Ila Regulation highlights the principle of equality for all children (recital 5), the protection of the best interests of the child (recital 12), the principle of proximity to the child, meaning that jurisdiction should lie in the first place with the child's habitual residence (recital 12), except if another court is better placed to hear the case (recital 13). The importance of the hearing of the child is also stated (recital 19). Finally, recital 33 emphasizes respect for the rights of the child as set out in Article 24 of the Charter of Fundamental Rights of the European Union.

The establishment of rules of jurisdiction for matrimonial matters and parental responsibility arises from the preservation of the free movement of persons.²⁷⁶ To this end, it was necessary to simplify the formalities for establishing rapid and automatic recognition of judgments,²⁷⁷ based on the principle of mutual trust.²⁷⁸ To achieve that simplification in the recognition stage, the unification of the rules of international jurisdiction²⁷⁹ was an unavoidable complementary step.

Additionally, the proper functioning of the rules of jurisdiction is another of the objectives on which the Brussels Ila Regulation was founded. Along these lines, the mandate to review the precedent Regulation 1347/2000 was established in its Article 43. Although according to its text the revision was only due by 2006, as a result of an initiative presented by the French government the Commission presented a Proposal for amending Regulation 1347/2000²⁸⁰ considerably earlier. In order to introduce improvements and to guarantee the future fulfilment of the same objective of proper functioning of the rules of jurisdiction, Brussels Ila also contains its mandatory revision

²⁷⁶ Recital 1 Brussels Ila Regulation; recital 4 Regulation 1347/2000.

²⁷⁷ Borrás Report, paras 5 and 12.

²⁷⁸ Recital 2 Brussels Ila Regulation.

²⁷⁹ Borrás Report, paras 5 and 12.

²⁸⁰ Commission (EC), 'Proposal for a Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility repealing Regulation (EC) No 1347/2000 and amending Regulation (EC) no. 44/2001 in matters relating to maintenance' COM (02) 222 final, 27 August 2002.



in Article 65. As a result, the Commission presented several proposals for its amendment.²⁸¹

II. MAINTENANCE CLAIMS

Although maintenance matters were covered by the Brussels Convention and the Brussels I Regulation,²⁸² ever since the Tempere Council meeting in 1999 the EU had been eager to further simplify and accelerate the settlement of cross-border maintenance disputes. The main objective was to eliminate obstacles to the recovery of maintenance claims and thereby guarantee the free movement of related decisions within the EU.²⁸³²⁸⁴ To achieve that, the legislator was willing to establish minimum guarantees through common procedural rules and to abolish *exequatur* so that maintenance claims would be quickly, efficiently and inexpensively enforced in requested states.

The European Commission came up with a suitable proposal in 2005. It stressed the need for provisional enforcement of maintenance decisions as well as the abolition of intermediary measures that prevented an effective and continuous recovery of maintenance claims by the creditor. The necessity to access information regarding the debtor situation was also pointed out while recalling that debtor's rights also ought to be protected in the recovery process.

In parallel, the Hague Conference of Private International law adopted a Protocol on the Law Applicable to Maintenance Obligations in 2007. The EU²⁸⁵ took part in its preparation and therefore sought for synergy, coherence and complementarity between both instruments while considering their different level of integration.²⁸⁶

²⁸¹ Commission (EC), 'Proposal for a Council Regulation amending Regulation (EC) no. 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, COM/2006/0399 final; and Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)' COM (16) 411 final, 30 June 2016.

²⁸² Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ [2001] L12/1.

²⁸³ Recitals 22, 25, 26, 31, 45.

²⁸⁴ 52,38% of the online questionnaire respondents believe that the Regulation has effectively eased the recovery of cross-border maintenance claims (Report on the outcome of the online questionnaire, 26).

²⁸⁵ The UK and Denmark are not part to the Protocol while some non-EU states are.

²⁸⁶ Recitals 17, 20, 24.



The deliberations above resulted in the Maintenance Regulation. It contains harmonised rules on jurisdiction, refers to the Hague 2007 Protocol for applicable law and provides for two recognition and enforcement regimes depending on whether the state of origin is a party to the 2007 Protocol (abolition of *exequatur*) or not (declaration of enforceability required).

III. SUCCESSIONS

Unity and universality of the estate and party autonomy as means to facilitate free movement

The heading “sector-specific principles” stands for two sets of questions which are formally separate but closely intertwined in practice. Horizontally, it refers to the principles on which the rules in force for the particular subject matter - divorce, parental responsibility, etc. - are based; vertically, to those governing the specific cross-border issue at stake - jurisdiction, applicable law, recognition. This part focuses exclusively on the rules on jurisdiction of the Succession Regulation.

Like all EU jurisdictional rules, those of the Succession Regulation, in its Chapter II, serve primarily procedural aims, namely the proper administration of justice and due process.²⁸⁷ In addition, they must align and be consonant with the (successions) context. In this regard, generally speaking the European Succession Regulation endorses the principles of unity and universality, on the one hand, and the principle of autonomy, on the other, as instrumental to an overarching end: the proper functioning of the internal market, which should be facilitated by removing the obstacles to the free movement of persons who currently face difficulties in asserting their rights in the context of a succession having cross-border implications.

As a consequence of the *unity and universality principles* the distinction between movable and real estate succession no longer exists in cross-border settings in determining the competent court. Besides, as the jurisdictional rules and the conflict of laws rules are equally permeated by the above-mentioned principles, any given

²⁸⁷ Other procedural objectives, such as the harmonious functioning of justice, account for the rules on *lis pendens* and related actions, also under Chapter II.



succession is ensured of being treated coherently by one single court applying one single law. In addition, the EU lawmaker has strengthened the links between the two sets of rules by resorting, in as much as possible, to the same connecting point, which is primarily the last habitual residence of the deceased; by doing so it provides for another form of unity, that of the *forum* and the *ius*, allowing the competent court to apply its own law most of the time. Conversely, where the conflict-of-laws rule's connection and the jurisdictional ground diverge, the *forum-ius* parallelism is dropped unless reunion is made possible again, which requires certain conditions. The most relevant case of split is created by the deceased's exercise of party autonomy - the choice of the applicable law.²⁸⁸

The principle of *autonomy* means that citizens are allowed to organize their succession by deciding whether the law applicable to their succession should be that of their last habitual residence or that of their nationality. Should nationality be chosen, a change of residence between the time of the choice and the time of death will not call into question the dispositions of property upon death. However, as a result of the choice the relation *forum/ius* is no longer automatic. An exception, which illustrates once more the lawmaker's concern here, allows for reunification where the law chosen by the deceased is the law of a Member State, provided the parties concerned agree that a court or the courts of that Member State are to have exclusive jurisdiction to rule on any succession matter. The exercise of the rights of heirs and legatees, of other persons close to the deceased, and of creditors of the succession, is facilitated in this way.

Further examples of the wish to *facilitate* the life of EU citizens in succession matters exist in Chapter II, as shown by the following rule: to simplify the lives of heirs and legatees habitually resident in a Member State other than that in which the succession is being or will be dealt with, any person entitled under the law applicable to the succession to make declarations concerning the acceptance or waiver of the succession,

²⁸⁸ Further situations may result from the application of Article 10 (subsidiary jurisdiction) and Article 11 (*forum necessitatis*), or of other factors. To name some: a choice of law may be partial (affecting only a disposition upon death -see Article 24-, or agreements as to succession, Article 25); special rules imposing restrictions concerning or affecting the succession in respect of certain assets located in a State different than the one of the court seized, which shall apply to the succession in so far as, under the law of that State, they are applicable irrespective of the law applicable to the succession; *renvoi* may impose the application of a foreign law.



of a legacy or of a reserved share, or concerning the limitation of his liability for the debts under the succession, is allowed to make such declarations before the courts of the Member State of his habitual residence.

C. CORE FAMILY MATTERS: CRISIS OF THE COUPLE AND PARENTAL RESPONSIBILITY

I. INTRODUCTION

Chapter II of the Brussels IIa Regulation contains the rules of jurisdiction applicable to cases that present certain links to the European Union in the field of matrimonial crisis and parental responsibility. Chapter II is divided into three sections. Section 1 refers to the rules of jurisdiction on divorce, legal separation and marriage annulment; section 2 alludes to those rules in the field of parental responsibility; and section 3 contains provisions common to both areas.

Before analysing the rules of jurisdiction in detail, it is convenient for the sake of clarity to briefly refer to the matters excluded from Brussels IIa, in order to establish the impact that those have on the matters covered by this instrument.

Article 1(3) Brussels IIa lists the matters to which this instrument shall not apply: the establishment or contesting of a parent-child relationship; decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption; the name and forenames of the child; emancipation; maintenance obligations; trusts or succession; measures taken as a result of criminal offences committed by children.

These exclusions have as a result that the jurisdiction rules set out in Brussels IIa cannot be used to rule on these matters. Some of these matters, however, are so closely linked to the matters covered by Brussels IIa, that they could be the objects of preliminary questions accessory to the main claim.

For example, the establishment or contesting of a parent-child relationship has a close connection to a parental responsibility claim. Here, the first matter (preliminary question) is excluded from the material scope of Brussels IIa, while parental responsibility is covered by this instrument. The same scenario applies to annulment or



revocation of adoption. If an adoption is revoked, no parental responsibility claims can succeed. In the same line, questions related to emancipation also have important consequences for parental responsibility.

The CJEU, in the context of the Brussels I system, has clearly stated that only the subject-matter of the action should be taken into account to determine whether an action falls within the scope of an instrument. It went on to state that it would be contrary to the legal certainty principle to vary the application of an instrument according to the existence of a preliminary issue.²⁸⁹ This idea was also invoked in the context of exclusive jurisdiction grounds, especially when a matter reserved to the exclusive jurisdiction of a Member State is put in issue by a plea in objection, establishing the applicability of the exclusive jurisdiction only when the action is raised in the proceedings as the principal subject-matter.²⁹⁰ However, the completely opposite view was applied in another case where a matter of exclusive competence was raised as a preliminary issue.²⁹¹ Therefore, no clear conclusions can be drawn here from the CJEU case law.

In family law, no CJEU case law sheds light on the application of the grounds of international jurisdiction when a subject is raised as a preliminary question to the main dispute. The only reference to this problem is to be found in the Explanatory Report on the 1996 Hague Child Protection Convention by Paul Lagarde.²⁹² The solution there described is that the question preliminary to a principal question shall be decided upon under the rules of private international law of the State of the authority which has taken

²⁸⁹ CJEU, case C-190/89 *Marc Rich & Co. AG v Società Italiana Impianti PA* [1991] ECR I-03855, paras 26-27. CJEU, case C-129/92 *Owens Bank Ltd v Fulvio Bracco and Bracco Industria Chimica SpA* [1994] ECR I-00117, para 34. CJEU, case C-266/01 *Préservatrice foncière TIARD SA v Staat der Nederlanden* [2003] ECR I-04867, para 42.

²⁹⁰ CJEU, case C-144/10 *Berliner Verkehrsbetriebe (BVG) v JPMorgan Chase Bank NA, Frankfurt Branch* [2011] ECR I-03961, para 34.

²⁹¹ CJEU, case C-4/03 *Gesellschaft für Antriebstechnik mbH & Co. KG v Lamellen und Kupplungsbau Beteiligungs KG* [2006] ECR I-06509, paras 27-30.

²⁹² Lagarde, Explanatory Report on the 1996 Hague Child Protection Convention (1998) <<https://www.hcch.net/en/publications-and-studies/details4/?pid=2943>> accessed 06 December 2017.



jurisdiction.²⁹³ Special attention should be given to that Convention, as it was adopted taking into account the Brussels II Convention (being prepared at that moment).²⁹⁴

Many of these excluded matters are not yet regulated at the European level but by national laws. National laws usually give jurisdiction to the courts of its State when one of the elements of the dispute relates to that State. However, in international disputes, with several elements related to different countries, the courts competent to hear the question related to the preliminary defence might differ from the competent courts to decide the object of the main dispute (regulated in a European instrument). And even if the preliminary question is included in a European instrument, it is not certain that the same court will be competent to decide both the preliminary question and the main one.

The consequence of these exclusions is the risk of having different courts deciding on closely related matters. This lack of procedural coordination has a direct and clear impact on the length and economic costs of the proceedings. If the court deciding on the preliminary question is not the same as the one hearing the main claim, the court seized with the main claim will have to stay the proceedings and refer the parties to the court competent for ruling on the prior ancillary question.

This problem could be solved by adding a provision in the Regulation giving jurisdiction over preliminary questions to the competent court for hearing the main claim, related to matrimonial matters or parental responsibility, given that the jurisdiction of the latter is assumed on the basis of the Brussels IIa Regulation.

II. AN ACTION FOR DIVORCE, SEPARATION OR NULLITY

In the field of matrimonial crisis, the functioning of the jurisdiction rules presents a certain degree of hierarchy. Although hierarchy in jurisdiction is normally identified with Brussels Ia, as opposed to the alternative grounds of jurisdiction of Brussels IIa, it is

²⁹³ *ibid.*, para 30. Also in this line, although not as clear as the Lagarde Report, see Borrás Report, para 27.

²⁹⁴ See in this regard Borrás, 'Article 8' in Magnus/Mankowski (n 23) 111.



worth noting that Brussels Ila presents several provisions regulating matrimonial matters, beyond the *classical* and well-known Article 3.

Article 6 Brussels Ila asks from the legal practitioner to first give priority to the alternative grounds of jurisdiction established in Article 3 (alongside with Article s 4 and 5), and if it is not possible to determine jurisdiction according to this provision, then the residual jurisdiction rules come into play. This is the reason why it is necessary to distinguish between general and residual jurisdiction.

a) General grounds of jurisdiction: a pro-claimant solution

Article 3 Brussels Ila lists a total of seven options (listed in indents) to grant jurisdiction to a Member State court.²⁹⁵ These different options work *alternatively*, meaning that the claimant can choose whichever court appointed by those indents. The *modus operandi* of this provision, which presents alternative grounds of jurisdiction as opposed to hierarchical ones, has been criticized. Some arguments against the alternative grounds of jurisdiction focus on the so-called “race to the court”,²⁹⁶ the *forum shopping* practice²⁹⁷ and their difficult application.²⁹⁸ The majority of practitioners also expressed their preference for a hierarchical application of these grounds.²⁹⁹

²⁹⁵ These seven options were listed giving rise to a clear *favor divortii*, Borrás, ‘Article 3’ in Magnus/Mankowski (n 23) 90.

²⁹⁶ Escher, Wittmann, ‘Report on the German Good Practices’ (2016) <<http://www.eufams.unimi.it/wp-content/uploads/2017/01/EUFAMS-German-report-on-good-practices.pdf>> accessed 6 December 2017 11.

²⁹⁷ *ibid* 3.

²⁹⁸ As regards the latter, it has been pointed out that in some Member States judges are used to applying hierarchical lists of jurisdictional grounds. See Wiwinius, ‘L’impact et l’application du Règlement Bruxelles II bis en Grand-Duché de Luxembourg’, in Boele-Woelki, González Beilfuss (eds), *Brussels II bis: Its Impact and Application in the Member States* (Antwerp/Oxford, Intersentia, 2007) 199-200. On the judicial practice of not referring to the specific letter or indent of Brussels Ila, see Baruffi, Fratea, Peraro, ‘Report on the Italian Good Practices’ (2016) <http://www.eufams.unimi.it/wp-content/uploads/2017/01/EUFams_Italian-Exchange-Seminar_Report_Italian_Good_practices_eng_final3.pdf> accessed 6 December 2017 6.; M Župan and M Drventić, ‘Report on the Croatian Good Practices’ (2016) <<http://www.eufams.unimi.it/wp-content/uploads/2017/01/EUFAMS-Croatian-report-on-good-practices.pdf>> accessed 6 December 2017 7.

²⁹⁹ Escher, Wittmann (n 51) 3. Espinosa Calabuig, Carballo Piñeiro, ‘Report on Spanish Good Practices’ (2016) <<http://www.eufams.unimi.it/wp-content/uploads/2017/01/EUFAMS-Spanish-report-on-good-practices.pdf>> accessed 6 December 2017 5. EUFam’s team of the University of Verona, ‘Report on the outcomes of the online questionnaire’ (2017) <<http://www.eufams.unimi.it/wp-content/uploads/2017/06/EUFAMS-Report-Outcomes-Online-Questionnaire.pdf>> accessed 6 December 2017 11.



The opposite option, i.e., the hierarchical list, has also been criticized on the grounds that having only one option would be too narrow an approach.³⁰⁰ Along the same lines, flexibility has been stressed as a positive factor.³⁰¹

In our opinion, a hierarchical order among the jurisdictional grounds listed in Article 3 of Brussels Ia would be advisable so as to avoid the problems of race to the court and forum shopping. This hierarchical list would have to be accompanied by allowing agreements on choice of court as this would balance the rigidity of a hierarchical order for applying the grounds of jurisdiction.

The different criteria stated in Article 3 are based either on habitual residence,³⁰² nationality³⁰³ or on both jointly. The list of available options is certainly wide:³⁰⁴ the spouses' habitual residence; the last habitual residence of the spouses, insofar as one of them still resides there; the respondent's habitual residence; in the event of a joint application, the habitual residence of either; the applicant's habitual residence if he/she resided there for at least a year immediately before the application was made; the applicant's habitual residence if he/she resided there for at least six months immediately before the application was made and is a national of that State; the common nationality of the spouses.

The connecting factors established in Brussels Ia were not modified in the Commission's Proposal. It is regrettable that the last common habitual residence of the spouses is not enough for assuming jurisdiction.³⁰⁵ For now, and also in the Proposal, one of the spouses still has to reside in that last common habitual residence.

³⁰⁰ Gandia Sellens, Camara, Faucon Alonso and Siaplaouras, 'Report on Internationally Shared Good Practices' (2017) <<http://www.eufams.unimi.it/wp-content/uploads/2017/06/Report-on-Internationally-Shared-Good-Practices-v2.pdf>> accessed 6 December 2017, 11.

³⁰¹ Espinosa Calabuig, Carballo Piñeiro, 'Report on Spanish Good Practices', 5.

³⁰² On the notion of habitual residence, see above at Chapter 2.

³⁰³ The problem of multiple nationalities in this field was solved by the CJEU, in the case C-168/08 *Laszlo Hadadi (Hadady) v Csilla Marta Mesko, épouse Hadadi (Hadady)* [2009] ECR I-06871. No relevant problem linked to the criterion of nationality has been noted in the case law, see EUFam's database *First Assessment Report*, 30.

³⁰⁴ The majority of academics are against the vast catalogue of grounds of jurisdiction established in the Brussels Ia system. See Gandia Sellens, Camara, Faucon Alonso and Siaplaouras, 'Report on Internationally Shared Good Practices', 11.

³⁰⁵ Similarly, although in the field of party autonomy, see Borg-Barthet, *Jurisdiction in matrimonial matters - Reflections for the review of the Brussels Ia Regulation* (PE 571.361).



As an extension of Article 3, Articles 4 and 5 should be mentioned. Article 4 states that the court determined according to Article 3 will also examine any counterclaim that falls within the scope of the Regulation.³⁰⁶ Moreover, if the court appointed used Article 3 rules on legal separation, Article 5 provides that it will also have jurisdiction for converting that judgment into a divorce, if the law of that Member State so provides Article. No remarkable changes have been made regarding these provisions in the Commission's latest Proposal.

b) Residual jurisdiction

A priori, residual jurisdiction is regulated only in Article 7, which is entitled “residual jurisdiction”. However, its application in practice requires a joint interpretation with Article 6. A proof of this is that the Commission's Proposal has merged the text of these two provisions into one article.

Article 6 Brussels Ia establishes that a spouse who is habitually resident in or a national of a Member State may be sued in another Member State only in accordance with Articles 3, 4 and 5. Article 7 complements Article 6 providing that if no court of a Member State has jurisdiction pursuant to Articles 3, 4 and 5, jurisdiction shall be determined according to the national laws. This provision introduces also another possibility: against a respondent who is neither habitually resident nor a national of a Member State, any national of a Member State who is habitually resident within the territory of another Member State may avail himself of the jurisdiction rules applicable in that State.

The CJEU case in *Sundelind* shed some light on the interpretation of these provisions. According to this judgment, when no court of a Member State has jurisdiction pursuant to Articles 3 to 5 Brussels Ia, jurisdiction is to be governed by the national laws.³⁰⁷ It also provided that the respondents who are habitually resident in or nationals of a Member State can only be sued under Articles 3 to 5 (Article 7(2)), but that rule does not

³⁰⁶ On the distinction between the situations giving rise to a counterclaim and to *lis pendens*, see Borrás, ‘Article 4’ in Magnus/Mankowski (n 23) 95.

³⁰⁷ CJEU, case C-86/07 *Kerstin Sundelind Lopez v Miguel Enrique Lopez Lizazo* [2007] ECR I-10403, para 18.



impact the exclusive nature of the jurisdiction rules contained in the Regulation. If jurisdiction can be assumed by a court pursuant to Articles 3 to 5, that jurisdiction prevails over any other jurisdiction grounded on national law.³⁰⁸

Against a respondent who is not habitually resident in or a national of a Member State, if the suit is presented in a Member State, the jurisdiction of the court seized should be grounded in Articles 3 to 5 Brussels Ia. Should this not be possible, if the petitioner is a national of a Member State but is habitually resident within the territory of another Member State, he may avail himself of the national rules of jurisdiction applicable in that State.³⁰⁹

These two provisions have been heavily criticized because of their convoluted wording.³¹⁰ Moreover, another observation highlighted the lack of effectiveness of national rules (which might lead to situations where no jurisdiction is provided).³¹¹

The Commission's Proposal merges these two articles into one, the new Article 6. Nevertheless, this fusion did not bring any new change to the previous understanding of the current Articles 6 and 7 Brussels Ia. Subsequently, some academics have suggested that, for the sake of clarity, this new Article 6 should be deleted.³¹² Others have advocated for replacing it by a *forum necessitatis* rule.³¹³ However, some positive reactions have also been expressed, in the sense that the proposed text better clarifies the previous Articles 6 and 7.³¹⁴

The case law gathered during the EUFam's Project shows that, in general, judges are well aware of the exclusive nature of the jurisdiction grounds contained in Articles 3-5 Brussels Ia.³¹⁵ Additionally, it also follows from practice that the application of the national rules on jurisdiction, through Article 7 Brussels Ia, is scarcely used.³¹⁶

³⁰⁸ *ibid* para 22.

³⁰⁹ *ibid* paras 23-24.

³¹⁰ Espinosa Calabuig, Carballo Piñeiro, 'Report on Spanish Good Practices', 7.

³¹¹ Escher, Wittmann, 'Report on the German Good Practices', 3.

³¹² Baruffi, Fratea, Peraro, 'Report on the Italian Good Practices', 3.

³¹³ Escher, Wittmann, 'Report on the German Good Practices', 3.

³¹⁴ Espinosa Calabuig, Carballo Piñeiro, 'Report on Spanish Good Practices', 7.

³¹⁵ Tribunale di Belluno, 30 December 2011, ITF20111230; Općinski sud Osijek, 23 December 2013, P2-614/2013, CRF20131223; Tribunale di Cagliari, 20 June 2013, ITF20130620; Corte di Cassazione, 2 May 2016 No 8619, ITT20160502.

³¹⁶ *First Assessment Report*, 36-37.



Regarding the need for a *forum necessitatis* rule, only one case in EUFam's case law gave rise to such a situation. Nevertheless, the case was not directly connected to a matrimonial matter, the couple being already divorced. The issue arose in relation to the splitting of pension rights acquired during marriage. In that case, the court argued that the international jurisdiction over this issue follows the jurisdiction over divorce. As the splitting of pension rights is not covered by Brussels IIa, it seems that the reasoning applied in that case followed from national practice or national rules.³¹⁷ Taking into account that this specific institution is not regulated at the European level,³¹⁸ in order to avoid situations of lack of jurisdiction, the national rules dealing with it should not only provide substantive safeguards but also procedural ones.

However, to guarantee access to justice as much as possible a *forum necessitatis* rule would be advisable,³¹⁹ 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 regimes³²⁰ and property consequences of registered partnerships.³²¹ This rule could be accompanied by an improved, clearer wording of the new Article 6.

c) The missing rules: party autonomy/forum necessitatis

As wide as the different connecting factors of Article 3 seem, it is regrettable that no provision allowing for choice of court in matrimonial matters is listed.³²² The

³¹⁷ Oberlandesgericht Karlsruhe, 17 August 2009, 16 UF 99/09, DES20090817.

³¹⁸ Even unknown at the national level in some Member States, see Gandia Sellens, Camara, Faucon Alonso, Siaplaouras, 'Report on Internationally Shared Good Practices', 18.

³¹⁹ Gandia Sellens, Camara, Faucon Alonso, Siaplaouras, 'Report on Internationally Shared Good Practices' 6.

³²⁰ 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 [2016] OJ L183/1.

³²¹ 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 [2016] OJ L183/30.

³²² It could be argued that a certain choice-of-court is possible if the spouses introduce a joint application, as according to Article 1.a, indent 4, in that case the spouses can choose the court of the State where either of the spouses is habitually resident. The option would only be there if the spouses reside in different countries. Criticism in this regard is also found in Espinosa Calabuig, Carballo Piñeiro, 'Report on



Commission's Proposal left this article and its grounds of jurisdiction untouched. A major and much needed change that could have been introduced relates to the possibility of choosing the court for matrimonial matters.³²³ In Brussels IIa as it is, and in the Proposal, the spouses cannot choose the court for deciding upon their separation or divorce. This position contrasts with the idea of respecting the will of the parties. For example, the Rome III Regulation permits to choose the law applicable to divorce and legal separation. Similarly, the Maintenance Regulation allows the parties to agree on the competent court. And also, the new Regulation on matrimonial property regimes contains provisions on choice of court and choice of applicable law.

Regarding the convenience of a *forum necessitatis* rule, the present debate points to the need of establishing one.³²⁴ There is indeed an incoherence in having the rule of *forum necessitatis* in some instruments and not in others, taking into account, moreover, that jurisdiction of necessity has a sound basis in human rights.³²⁵ It is therefore recommended that to avoid situations of denial of justice, a *forum necessitatis* rule is provided for those cases where 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).

III. PARENTAL RESPONSIBILITY DISPUTES

The *modus operandi* of the rules for determining jurisdiction in cases of parental responsibility is different to the one just explained for matrimonial matters. There are several general rules for identifying the competent courts, two exceptions to those rules and two provisions dealing with residual jurisdiction. However, as in matrimonial

Spanish Good Practices', 6. Although this last Report also collects the views of some practitioners who indicated that the number of couples interested in the choice-of-court clauses is limited.

³²³ Escher, Wittmann, 'Report on the German Good Practices', 7. Espinosa Calabuig, Carballo Piñeiro, 'Report on Spanish Good Practices', 6.

³²⁴ See above, this chapter at 3.2.2.

³²⁵ Gandia Sellens, Camara, Faucon Alonso, Siaplaouras, 'Report on Internationally Shared Good Practices', 6.



matters, this set of rules also presents a level of hierarchy in its application: if the two exceptions to the general rules concur, these exceptions will have to be applied first; in the absence of these exceptions, the general rules will be followed; and if jurisdiction still cannot be determined, then the residual jurisdiction rules will come into play.³²⁶

Here there is the need to differentiate disputes at the subject-matter level. There are two different types of disputes: those relating to parental responsibility over a child who keeps her habitual residence or moves lawfully, and those relating to parental responsibility over an abducted child. The general rules for determining jurisdiction depend on the kind of conflict involved.

a) Disputes relating to parental responsibility over a child who keeps her habitual residence or moves lawfully

Following Article 8(1) Brussels IIa, the general jurisdiction rule points to the courts of the Member State in which territory the child is habitually resident. However, by way of exception and according to Article 9, if the child moves lawfully from one Member State to another and acquires a new habitual residence there, the courts of the Member State of the child's former habitual residence will retain jurisdiction for three months following the move.

Nevertheless, this rule only applies for the purpose of modifying a judgment on access rights issued in the Member State from which the child moved, where the holder of access rights pursuant to the judgment on access rights continues to have his or her habitual residence. However, the holder of access rights can accept the jurisdiction of the courts of the Member State of the child's new habitual residence by participating in proceedings before those courts without contesting their jurisdiction.

Now, the Commission's Proposal added a clarification to the text of the current Article 8, which corresponds to Article 7 in the Proposal. The new clarification responds to the unanswered question of determining jurisdiction for cases where a minor moves lawfully

³²⁶ Borrás explains the functioning of the Brussels IIa Regulation in a different way: the general rule is the one stated in Article 8, while the rest of articles (9 to 15) are exceptions to that general rule. See Borrás, 'Article 8' in Magnus/Mankowski (n 23) 115.



and there is no previous judgment on parental responsibility. In these situations, the authorities of the Member State of the new habitual residence would have jurisdiction over parental responsibility. Unfortunately, this clarification has been removed in the text of the European Parliament.³²⁷

Apart from the problems in determining the habitual residence of the child,³²⁸ a relevant issue has been identified in the case law. It referred to the temporal change of residence of a child when the proceedings were initiated. The child, having habitual residence in Germany, was staying in Austria when the judicial proceedings over parental responsibility were initiated in Germany. The child went back to Germany with his mother afterwards, once the proceedings were ongoing. The German Supreme Court ruled establishing the international jurisdiction in favour of the German courts, basing its reasoning on the principle of procedural economy, given that otherwise the court would have to deny its international jurisdiction in the first place, just to start a new proceeding a few months later.³²⁹

However, some practitioners have showed some concerns³³⁰ over the relationship of Article 9 Brussels Ila and Article 5(2) of the 1996 Hague Convention.³³¹ The problem arises because the 1996 Hague Convention does not contain a rule providing for the continuance of the jurisdiction of the child's former habitual residence. Instead, it contains the general principle of giving jurisdiction to the authorities of the new habitual residence, without adding further information. As discussed above, the prorogation of jurisdiction during three months is only foreseen for modifying an already issued judgment (Article 9(1) Brussels Ila). If there are no proceedings ongoing and no judgment has been delivered, both instruments (Brussels Ila and the 1996 Hague Convention) provide the same solution: the jurisdiction pertains to the State of habitual residence at the time the court is seized. This idea has been strengthened in the text of

³²⁷ See the amendment no. 10 of the European Parliament Draft Report on the proposal for a Council regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), 2016/0190(CNS).

³²⁸ See above at Chapter 3.

³²⁹ See *First Assessment Report*, 28 and Bundesgerichtshof, 17 February 2010, XII ZB 68/09, DET20100217.

³³⁰ See Espinosa Calabuig, Carballo Piñeiro, 'Report on Spanish Good Practices', 12.

³³¹ The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.



the Commission's latest Proposal. Despite this same result, it is worth noting that Brussels IIa has priority over the 1996 Hague Convention among Member States, in accordance with Article 61 Brussels IIa.

A more problematic situation would arise in the case where, while the proceedings are ongoing, the child lawfully moves to another Member State. Here, the issue would be that, as no judgment has been issued yet, there is nothing to modify and in theory Article 9 does not apply given its wording ("jurisdiction [...] for the purpose of modifying a judgment" in the current text of Brussels IIa or "decision" in the Proposal). The court checks its jurisdiction when it is seized. Thus, if the proceedings are still pending in a Member State, without a judgment being issued yet, that Member State should retain jurisdiction even if the child lawfully moves, following the general principle of *perpetuatio fori*. Although this principle is not applicable in the framework of the 1996 Hague Convention,³³² in this regard the Brussels IIa Regulation and the 1996 Hague Convention differ.³³³ Nevertheless, the Commission's Proposal has brought Brussels IIa in line with the 1996 Hague Convention. According to recital 15 and Article 8(1) of the Proposal, when a child moves lawfully to another Member State, jurisdiction should follow the child even if proceedings are ongoing. However, parties may agree that the courts of the Member State where proceedings are ongoing retain jurisdiction until a final decision has been given. This possibility of agreement on the already seized court is not contained in any article, but only sketched in recital 15 and this might lead to problems in practice (e.g., how and when the agreement should be made).

Concerning the current situation, i.e., the application of the *perpetuatio fori* principle in the scope of Brussels IIa, it is worth mentioning that if the child lawfully moves to another Member State in an early stage of the proceedings the court which assumed jurisdiction as to the merits could use the mechanism of transfer of jurisdiction (Article 15).

³³² Lagarde, *Explanatory Report*, para 42.

³³³ Borrás, 117. See also OLG Karlsruhe, *Beschl.* v. 12 November 2013 - 5 UF 140/11.



b) The case of the abducted child

In cases of child abduction, it is necessary to draw a clear distinction between the claim for ordering the return of the child and the claim for establishing custody rights. Article 11 Brussels IIa establishes the jurisdiction for deciding over the return of the child, while Article 10 Brussels IIa relates to the question of custody over an abducted child.

When a child has been wrongfully removed, generally by one of the co-holders of the custody rights, the most urgent measure to apply for (by the left-behind parent) is the return of the child. In this scenario, Article 11 Brussels IIa refers to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. According to this instrument, jurisdiction for ordering the return of the child lies with the courts of the State where the child is (Article 12). Those courts will order the return of the child unless: more than one year has elapsed from the date of the wrongful removal and the child is settled in her new environment (Article 12); the left-behind custody holder did not actually exercise her custody rights or acquiesced in the removal; or there is a grave risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation (Article 13).

Article 11 Brussels IIa complements the aforementioned provisions of The Hague Convention of 1980. The Regulation stresses that it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity. The person who requested the return shall also be heard. Moreover, the court shall act expeditiously and cannot refuse return of the child on the basis of grave risk for the child if adequate arrangements have been made. Additionally, certain measures are listed for assuring smooth coordination between the court issuing a non-return judgment and the authorities of the State where the minor had her previous residence. Finally, the provision closes with a reminder on the enforceability of any subsequent judgment on the custody of the child requiring her return.

This last paragraph of Article 11 Brussels IIa refers to the claim for establishing custody rights, if the competent courts under The Hague Convention of 1980 refused the return of the child. In this scenario, the left-behind parent can claim her custody rights over



the non-returned child. Here, Article 10 Brussels IIa follows the principle of assigning the jurisdiction to the court of the State where the child had her habitual residence before the removal. Once the child has acquired a habitual residence in the State to which she was abducted, the jurisdiction will pertain to this last State. This holds true only if the holder of the custody rights has acquiesced in the removal or retention; or if the child has resided in that other Member State for at least one year after the holder of the custody rights has had or should have had knowledge of the whereabouts of the child.

In this last scenario, however, at least one of these requirements needs to be met: 1) within one year after the holder of custody rights has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed; 2) a request for return lodged by the holder of custody rights has been withdrawn and no new request has been lodged within one year since the notice of the whereabouts; 3) a case before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed given the absence of submissions by the parties; 4) a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention.

The Commission's Proposal has introduced a new chapter on child abduction in the text of the proposed Regulation. Among the new measures suggested in this field, the most remarkable one is that the court examining the question of custody of the child should take into account the reasons for and evidence underlying the decision refusing to return the child (Article 26(4)).

The rest of the measures introduced relate to the concentration of local jurisdiction (Article 22), the use of mediation (Article 23(2)), the provisional enforceability of the decision ordering the return of the child (Article 25(3)) and the limit of the possible appeals (Article 25(4)).

The modifications introduced by the Commission do not really change the previous "overriding regime" or "two-track system", meaning that once an order for non-return is issued, if the court of the previous habitual residence still has jurisdiction to rule on custody, it could then give custody to the left-behind parent and order the return of the



child. Practitioners did not welcome this lack of substantial changes in this field, claiming that the current mechanism is infrequently used³³⁴ and inefficient, taking into account that return orders are rarely enforced. The solution suggested by practitioners is to concentrate the jurisdiction in favour of the State where the child was abducted to.³³⁵ In theory, and taking into account the principle of mutual trust, this would be a positive solution. However, one of the problems identified in practice is the bias that, to a certain extent, exists from the judiciary, benefitting sometimes the abductor with the citizenship of the State to which the court pertains.³³⁶ A good measure in order to guarantee some “neutrality” would be to allow for concentrating the jurisdiction to rule on the question of the return of the child and the custody rights in the courts of the State where the child has been abducted to, only if both custody-holders agree.³³⁷

³³⁴ The case law collected in the EUFam’s Database shows the lack of reference to Brussels IIa in decisions refusing the return of a child. See Court of first instance of Athens, 12 May 2011 No 1767/2011, ELT20110512; Court of first instance of Athens, 9 January 2015 No 1503/2015, ELF20150109; Općinski građanski sud Zagreb, 24 March 2016, R1 Ob-198/16-13, CRF20160324; Županijski sud u Zagrebu, 12 June 2015, Gž Ob-103-15-2, CRS20150612; Najvyšší súd Slovenskej republiky, 30 September 2009, 2 M Cdo 23/2008, SKT20090630; Tribunale per i minorenni di Lecce, 4 March 2005, ITF20050304; Tribunale per i minorenni di Lecce, 25 July 2007, ITF20070725; Tribunale per i minorenni di Lecce, 30 May 2012, ITF20120530. Also, *First Assessment Report*, 44-45 and Gandia Sellens, Camara, Faucon Alonso and Siaplaouras, ‘Report on Internationally Shared Good Practices’ 27.

³³⁵ Escher, Wittmann, ‘Report on the German Good Practices’ 4-5.

³³⁶ Lagarde, *Explanatory Report*, para 41. Lowe, Stephens, ‘Global Trends in the Operation of the 1980 Hague Abduction Convention’ (2012) 46 *Family Law Quarterly*, 41, 63; Kruger (2011) *International Child Abduction. The Inadequacies of the Law* (Oxford-Portland, Hart) 75-76; Trimmings (2013) *Child Abduction within the European Union* (Oxford-Portland, Hart) 79; Beaumont, Walker, Holliday, ‘Conflicts of EU Courts on Child Abduction: The reality of Article 11(6)-(8) Brussels IIa proceedings across the EU’ (2016) CPIL Working Paper 1 <https://www.abdn.ac.uk/law/documents/CPIL_Working_Paper_No_2016_1.pdf> accessed 6 December 2017 215.

³³⁷ In this line, although limited to cases where the return of the child is not possible or the parties have agreed upon the non-return, Bundesrechtsanwaltskammer, ‘Öffentliche Konsultation zur Funktionsweise der Verordnung (EG) Nr. 2201/2003 des Rates über die Zuständigkeit und die Anerkennung und Vollstreckung von Entscheidungen in Ehesachen und in Verfahren betreffend die elterliche Verantwortung und zur Aufhebung der Verordnung (EG) Nr. 1347/2000 (“Brüssel-IIa-Verordnung”)', *Stellungnahme Nr. 37/2014*, para 9 <<http://www.brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-europa/2014/august/stellungnahme-der-brak-2014-1.pdf>> accessed 6 December 2017.

For Pataut, if the parents agree on the removal, this would allow to apply the general rule of jurisdiction of article 8, based on the habitual residence of the child. See Pataut, ‘Article 10’ (2012) in Magnus/Mankowski (n 23) 122-123. However, it might be that sufficient time has not passed and the child did not yet acquire a legal habitual residence in the country where she was abducted to. Therefore, that would create problems in order to apply article 8.



c) Special and residual jurisdiction

As explained above, if the case presents the specific requirements for applying Articles 12 or 15, these provisions should be preferably applied over other grounds of jurisdiction of the Regulation.

i. Prorogation of jurisdiction

Article 12 Brussels IIa contains a rule for establishing jurisdiction over parental responsibility questions in favour of Member States courts different from the rules established in the general rules of Articles 8 and 9. There is no distinction based upon the situation of the child: this provision is also applicable for ruling on the parental responsibility over an abducted child.³³⁸

This prorogation of jurisdiction is only foreseen in two cases (regulated in Articles 12(1) and 12(3): 1) when the jurisdiction over matrimonial matters was assumed by virtue of Article 3 of the Regulation or 2) when the child has a substantial connection with a specific Member State. In the first case, the jurisdiction will be established in favour of the courts already exercising jurisdiction on the application for divorce, legal separation or marriage annulment of at least one of the holders of parental responsibility. In the second case, jurisdiction over parental responsibility will be allocated to the courts of the Member State to which the child is substantially connected (in particular by virtue of the fact that 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).

Moreover, additional requirements should be met: for the first option, that at least one of the spouses has parental responsibility in relation to the child (Article 12(1)(a)); and for both options, that the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings, at the time the court is seized, and is in the best interests of the child (Articles 12(1)(b) and 12(3)(b)). The temporal element is, thus, essential. The expression “at the time the court is seized” should be read in connection with Article 16. Following the interpretation given to both articles, the prorogation can only work in cases where the

³³⁸ Pataut, ‘Article 12’ in Magnus/Mankowski (n 23) 149.



parties have agreed to the prorogation before submitting their claim or in the event of a joint application.

In case of issuance of a final judgment on matrimonial matters or parental responsibility, issued before the assumption of jurisdiction by the court competent by virtue of Article 3, the jurisdiction so conferred will cease.

Finally, the provision establishes that where the child has his or her habitual residence in the territory of a third State which is not a contracting party to the 1996 Hague Convention, jurisdiction under this article shall be deemed to be in the child's interest, in particular if it is found impossible to hold proceedings in the third State in question.

The main problem in practice regarding this provision is the judicial assessment of the acceptance of the jurisdiction by the parties to the proceedings.³³⁹ Generally, judges tend to assume jurisdiction when the defendant does not contest it, treating this ground of jurisdiction as the *classical* jurisdiction by appearance³⁴⁰ of Article 26 Brussels Ia. However, the text of Article 12 Brussels IIa does not describe the provision in the same terms as Article 25 Brussels Ia. Whereas Article 25 only required that the “defendant enters an appearance” before a court, without contesting its jurisdiction, in Article 12 Brussels IIa, jurisdiction has to be accepted “expressly or otherwise in an unequivocal manner”. The expression “unequivocal manner” cannot be assessed at the same level as a mere “appearance”. Thus, it would help if judges expressly ask the parties for their acceptance in cases where the defendant simply appears in front of the court.

The Commission's Proposal did not introduce major changes in this provision (corresponding to Article 10 of the Proposal). The determination of the time-limit for accepting the jurisdiction of the court on parental responsibility is the only remarkable issue. That acceptance should be expressly declared or unequivocally deduced at the latest at the time the court is seized, or where the law of that Member State so provides, during the proceedings. This solution will contribute to improve the current problem of acknowledging the unequivocal acceptance in those States whose law

³³⁹ Krajský súd Bratislava, 13 January 2014, 11CoP/362/2013, SKS20140113; Amtsgericht Steinfurt, 8 January 2008. 10 F 9/07, DEF20080108. See *First Assessment Report*, 30-31.

³⁴⁰ See Baruffi, Fratea, Peraro, ‘Report on the Italian Good Practices’ 6-7; Espinosa Calabuig, Carballo Piñeiro, ‘Report on Spanish Good Practices’ 11-12.



provides for a longer time-limit. However, if this is not the case, it is difficult to predict the circumstances where an unequivocal acceptance can be deduced from the time the court is seized (thus, from the very beginning).

In order to solve confusion at the judicial level of assessing the unequivocal circumstances of acceptance, it would be advisable that a clarification of such an acceptance “in an unequivocal manner” is introduced in a Recital.

ii. Transfer to a court better placed to hear the case

Brussels IIa also contains a sort of *forum non conveniens* rule in Article 15. According to this provision, the courts of a Member State having jurisdiction as to the substance of the matter may transfer the case to another Member State court better placed to hear it.

This transfer can be done by staying the case or the part thereof in question and inviting the parties to introduce a request before the court of that other Member State; or by directly requesting a court of another Member State to assume jurisdiction.

The initiative as to the transfer might come from a party, or from the court first seized or from a court of another Member State with which the child has a particular connection. In the two last cases, the transfer must be accepted by at least one of the parties.

The Article includes certain guidelines to assess the position of the potentially better placed court to hear the case. The case should be transferred only if it is in the best interest of the child and if the child has a particular connection to the other Member State. This particular connection is found if the better placed Member State has become the habitual residence of the child after the seizure of the first court; or if that State is the former habitual residence of the child; or is the place of the child's nationality; or is the habitual residence of a holder of parental responsibility; or is the place where property of the child is located and the case concerns measures for the protection of the child relating to the administration, conservation or disposal of this property.

Paragraphs 4 and 5 of the provision continue adding a *prorogatio fori* rule in favour of the court first seized. This court will exercise its jurisdiction if the better placed court is



not seized within the established time-limit and, in any case, if that court does not accept its jurisdiction within six weeks of the seizure.

Finally, a duty of cooperation among courts, either directly or through the central authorities, is established.

The Commission's Proposal barely modified this provision (Article 14 of the Proposal). It has only clarified that the cooperation among courts can also be done through the European Judicial Network in civil and commercial matters.

In general, no relevant difficulties have been identified within the case law when applying this article. Even the lack of use of this mechanism seems to be vanishing, as gradually more and more cases of transfer of jurisdiction come to light.³⁴¹ The main problems posed by this provision when applied in practice relate to cooperation among courts (language misunderstandings, lack of standard forms...)³⁴² However, these problems of cooperation among authorities are not only related to the provision at hand, but general issues regarding cooperation among judges in matters related to the material scope of Brussels Ia.

It is worth noting that Article 15 is mainly used to transfer jurisdiction to another court by the court already possessing it, but it is not used to request jurisdiction when it is not originally given.³⁴³ In this line, it would be useful to state this last possibility more clearly and visibly in the text of the Regulation, alongside with the creation of tools (mainly suitable forms) for judges in order to simplify their task when using the mechanism of transfer of jurisdiction.

³⁴¹ Bundesgerichtshof, 2 April 2008, XII ZB 134/06, DET20080402; Okresný súd Bratislava II, 27 January 2014, 28P/277/2011, SKF20140127; Tribunale di Milano, 11 February 2014, ITF20140211; Oberlandesgericht Stuttgart, 6 May 2014, 17 UF 60/14, DES20140506; Općinski sud u Sisku, 2 December 2016, R1-eu-2/16, CRF20160219; Okresný súd Michalovce, 23 October 2015, 23Pcud/6/2015, SKF20151021; Tribunale di Novara, 19 April 2012, ITF20120419; Tribunale per i minorenni di Roma, 25 January 2008, ITF20080125; Tribunale di Siracusa, 3 May 2016, ITF20160503; Tribunale di Novara, 31 October 2012, ITF20121031. See also *First Assessment Report*, 49-53. The results of the EUFams Questionnaire still point, though, to an infrequent application of Article 15.

³⁴² See Župan and Drventić, 'Report on the Croatian Good Practices' (2016) 13.

³⁴³ See Gandia Sellens, Camara, Faucon Alonso, Siaplaouras, 'Report on Internationally Shared Good Practices' 28.



iii. Residual jurisdiction

In Brussels IIa there are two grounds of residual jurisdiction, contained in Articles 13 and 14. The first of these two provisions sets out that when it is not possible to establish a child's habitual residence or jurisdiction cannot be assumed making use of the rule of prorogation of jurisdiction (Article 12), then the courts of the Member State where the child is present shall have jurisdiction. However, it is worth noting that if the child has her habitual residence in a third State, this provision does not give jurisdiction to the court of the Member State where the child is present.³⁴⁴

This Article 13 will also apply (but not only) to refugee children or children internationally displaced because of disturbances occurring in their country.

The second of the aforementioned provisions, Article 14, refers to the “classical” residual jurisdiction rule. Accordingly, if no court can establish its jurisdiction under the rules of the Regulation, jurisdiction shall be determined, in each Member State, by the laws of that State.

These two provisions have not been modified in the text of the Commission's Proposal. These two articles are rarely used in practice.³⁴⁵ This lack of use might be due to the assumption of jurisdiction directly under national law grounds, without mentioning the reference to these laws by Article 14.

Regarding the possibility of establishing jurisdiction on the basis of Article 13 (child's presence), not a single case has been found.³⁴⁶

³⁴⁴ Pataut, 'Article 13' (2012) in Magnus, Mankowski (eds), *Brussels IIbis Regulation* (Munich, Sellier European Law Publishers), 160-161.

³⁴⁵ Nejvyšší soud, 29 May 2013, 23 Nd 64/2013, CZT20130529; Općinski sud u Osijeku, 28 May 2015, P ob 345/15, CRF20150528. See *First Assessment Report*, 37.

³⁴⁶ Gandia Sellens, Camara, Faucon Alonso, Siaplaouras, 'Report on Internationally Shared Good Practices' 39.



D. MAINTENANCE

I. INTRODUCTION

The Maintenance Regulation is the second Regulation related to family matters that has been adopted by the EU. It harmonizes the rules on jurisdiction, applicable law (through the Hague 2007 protocol)³⁴⁷ as well as recognition and enforcement, related to “maintenance obligations arising from a family relationship, parentage, marriage or affinity”.³⁴⁸ It entered into force on 18 June 2011. Consequently, the maintenance claims now fall outside the scope of the Brussels Ibis³⁴⁹ and EEO Regulation.³⁵⁰

One of the peculiarities of the Maintenance Regulation is the dual regime it offers. As the text was adopted in parallel with The Hague 2007 Protocol on the Law Applicable to Maintenance Obligations it contains a different regime depending on whether the state of origin is party to the Protocol or not. If the state is a party, the Protocol applies to designate the applicable law and exequatur is abolished. If the state is not a party,³⁵¹ applicable law is designated domestically and a declaration of enforceability is necessary for enforcement. As regard to jurisdiction, provisions are the same in both scenarios.

³⁴⁷ Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, available at <https://www.hcch.net/en/instruments> (accessed 10 January 2017).

³⁴⁸ Article 1(1).

³⁴⁹ 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 [2012] OJ L351/1.

³⁵⁰ Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims [2004] OJ L143/15. Except for European enforcement orders concerning maintenance obligations issued by EU countries that are not bound by the 2007 Hague Protocol.

³⁵¹ So far, this concerns the United Kingdom and Denmark which did not join The Hague 2007 Protocol.



II. A CLAIM FOR MAINTENANCE

a) General grounds of jurisdiction

i. Principle

The general provision on jurisdiction in maintenance cases is in Article 3 of the Regulation. It provides that the court to be seized shall correspond either to: the habitual residence of the defendant/debtor; the habitual residence of the creditor; the court seized concerning the status of a person; the court seized in relation to parental responsibility proceedings. The last two possibilities are of particular importance in practice as maintenance claims are almost always ancillary to divorce or parental responsibility proceedings.

ii. Difficulties

The main difficulty that appeared throughout the EUFam's project is the fragmentation of family matters.³⁵² Maintenance matters are particularly affected by that inconvenience as it is in most cases an ancillary question. From the database and different seminars, we can see that it results in some courts and tribunals, seized on divorce and/or parental responsibility, ruling on maintenance without correctly referring to the corresponding Regulation.³⁵³

Regarding Article 3, as the grounds for jurisdiction listed are alternative rather than hierarchical, there is a risk for a better-informed party to rush to one of the possible jurisdictions to get a more favourable outcome. Parties can however prevent that risk by making a choice of court as allowed by Article 4. In the EUFam's database, a Spanish

³⁵² See below.

³⁵³ There are numerous cases in the EUFam's database, *inter alia*: Audiencia Provincial Murcia, 10 October 2013, 598/2013, ESS20131010; Audiencia Provincial Barcelona, 23 July 2015, 549/2015, ESS20150723; Tribunale di Pavia, 20 August 2015, ITF20150820b; Tribunale di Roma, 18 December 2015, ITF20151218; Tribunale di Milano, 11 December 2012, ITF20121211; Krajský soud v Českých Budějovicích, 5 April 2011, 5 Co 781/2011, CZS20110405; Općinski sud u Šibeniku 38 POB-24/16, 19 October 2016, CRF20161019; Okresný súd Dunajská Streda, 4 March 2014, 9P/88/2013, SKF20140304; Monomeles Protodikeio Grevenon, 9 September 2013, ELF20130909; Районен съд - Казанлък, 23 July 2014; BGF20140723; Cour d'appel de Caen, 29 septembre 2016, 15/03300, FRS20130929b; Cour d'appel d'Aix-en-Provence, 1 September 2016, 15/19977, FRS20160901.



ruling illustrates another impact of the lack of hierarchy, i.e., a court that could have jurisdiction (under Article 3(c)) declined it because another court (French) could hear the case according to Article 3(a).³⁵⁴ Another first instance judgment from Croatia declined jurisdiction despite having it based on the habitual residence of the defendant (following from Article 3(a)) because the child resided elsewhere and therefore the court having jurisdiction according to Article 3(b) should hear the case. This ruling was quashed by the appeal court which considered that the grounds were alternative so that meeting any of them was sufficient.³⁵⁵ Some courts also decline jurisdiction without checking every possibility offered by Article 3.³⁵⁶ Proceedings are therefore multiplied and lengthened. Courts also seem confused when they have jurisdiction based on two grounds. They usually only refer to one.³⁵⁷

Regarding Article 3 and ancillary proceedings, a case was brought up to the CJEU.³⁵⁸ The facts were: Two Italians were divorcing in Italy although they lived with their children in London. The English court therefore had jurisdiction regarding parental responsibility. In this case, it was not clear to the court whether the maintenance questions concerning the children were to be considered ancillary to the divorce proceedings (Italy)³⁵⁹ or to the parental responsibility case (the UK). The court replied that maintenance claims concerning the children should be considered as ancillary to the parental proceedings only so that Article 3(d) applied.

An additional difficulty brought up during the EUFam's national and international seminars is the status of public authorities.³⁶⁰ They often act in place of the original creditor to recover maintenance debts and when doing so it is seemingly not clear whether those authorities can themselves rely on the habitual residence of the creditor to seize a court (Article 3(b)). It was however clarified that Article 2(10) defines the

³⁵⁴ Juzgado de Primera Instancia de Pamplona, 6 June 2014, 298/2014, ESF20140606.

³⁵⁵ Krajský soud v Brně, 11 September 2012, 20 Co 668/2012, CZS201209110.

³⁵⁶ Okresný súd Rimavská Sobota, 13 November 2013, 2P/173/2012, SKF20131113; Okresný súd Veľký Krtíš, 21 November 2014, 7P/148/2014, SKF20141121.

³⁵⁷ Audiencia Provincial de Barcelona num. 22 May 2014, 341/2014, ESS20140522.

³⁵⁸ CJEU, case C-184/14 A v B [2015] ECR EU:C:2015:479.

³⁵⁹ Corte di Cassazione, 7 April 2014, 8049, ITT20140407.

³⁶⁰ Escher, Wittmann, 'Report on the German Good Practices', 8 and Gandia Sellens, Camara, Faucon Alonso, Siaplaouras, 'Report on Internationally Shared Good Practices' 41.



term “creditor” by referring to an “individual”. Article 64 does make an exception to that definition by indicating that public bodies can be creditors but it specifies that it applies only for recognition and enforcement purposes. Recital 14, which also refers to public bodies, shall be read in conjunction with Article 64. Their joint interpretation results in excluding public bodies as creditors for the purpose of jurisdiction.³⁶¹ This approach is also confirmed by the case law of the CJEU under the Brussels Convention.³⁶²

iii. Assessment

In practice, only 36% of respondents to the online questionnaire considered that Article 3 is being correctly referred to by courts and tribunals while 11% of respondents have witnessed the Regulation being completely ignored despite maintenance questions being at stake.³⁶³

In cases where Article 3 was correctly applied, a large majority (73%) of respondents noted that jurisdiction was based either on the habitual residence of the defendant or as proceedings ancillary to parental responsibility or divorce.³⁶⁴ Regarding ancillary proceedings, more than 25% of respondents indicated that the ruling of the CJEU, regarding maintenance concerning children, has been unnoticed.

b) Party autonomy: choice of court

i. Principle

In addition to the general provision, Article 4 offers the possibility for parties to opt for the court where they are habitually resident or the court of the country of which one of them is a national. For maintenance obligations concerning spouses, or former spouses, there are two additional possibilities: the court that has jurisdiction for the matrimonial matters dispute or the court of their last habitual residence. The agreement must be in writing, at the latest at the moment the court is seized.

³⁶¹ See Gandia Sellens, Camara, Faucon Alonso, Siaplaouras, ‘Report on Internationally Shared Good Practices’ 41.

³⁶² CJEU, case C-433/01 *Freistaat Bayern and Jan Blijdenstein* EU:C:2004:21, [2004] ECR I-981.

³⁶³ See the EU Fam’s Report on the outcome of the online questionnaire, 21.

³⁶⁴ Report on the outcome of the online questionnaire, 22.



ii. Rules concerning children

Article 4(3) specifies that the choice of court possibility does not exist for disputes relating to maintenance for a child under the age of 18.³⁶⁵ This limitation is meant to protect children as weaker parties. However, it was noted during the EUFam's international seminar that the rules are the contrary under Brussels IIa; there is a possibility to prorogate jurisdiction only for cases related to children.³⁶⁶ No justification has been found to explain that discrepancy in the available preparatory documentation.

iii. Assessment

In practice, to the knowledge of respondents to the online questionnaire, 75% of parties to maintenance proceedings do not use the choice of court possibility. The main reason (59%) is the difficulty of reaching an agreement. The next reason is the lack of knowledge/awareness from the parties (47%) but also from the practitioners (40%) and from the courts themselves (21%).

As an illustration of the rare use of the provision, it should be noted that no ruling that referred to a choice of court provision was found in the database.

At the EUFam's international seminar, a lawyer noted that well-informed parties adopt different approaches depending on the beneficiary of the maintenance. Hence, there is a trend to opt for the joint nationality court regarding maintenance between spouses (due, mainly, to financial reasons) while concerning maintenance in favour of the common child, the preferred court is the court of the State of the common habitual residence. It results in duplication and lengthening of judicial proceedings.

c) Subsidiary jurisdiction and forum necessitatis

i. The principle

To avoid a denial of justice, when no Member State court would otherwise be seized, the Maintenance Regulation provides two alternatives.

³⁶⁵ In case Okresný súd Brezno, 28 August 2013, 2P/93/2013, SKF20130828, the Slovak court expressly mentioned that no choice of court could be accepted given the age of the children.

³⁶⁶ See Gandia Sellens, Camara, Faucon Alonso, Siaplaouras, 'Report on Internationally Shared Good Practices', 41.



The first is a subsidiary jurisdiction principle. It is in Article 6 and provides that when no State, being Member to the Regulation or the Lugano Convention, has jurisdiction but the parties have a common nationality, the court of that country can be seized.

The second option, in Article 7, constitutes a step further and provides that any Member State that has a sufficient connection with a case can be seized if no other Member State has jurisdiction according to the Regulation.

ii. Assessment

These rules do not seem to be regularly applied in practice. 57% of the respondents to the online questionnaire have never witnessed the provision being applied while only 2% have seen it used in more than 5 times.

No questions related to those articles were brought up during the different seminars held for the EUFam's project.³⁶⁷

E. MATTERS OF SUCCESSION

I. THE RULES ON INTERNATIONAL JURISDICTION

Following the scheme of previous EU Regulations, Chapter II of the Succession Regulation establishes both the grounds for international jurisdiction and rules related to their application in practice (time a court is deemed to be seized; examination as to jurisdiction; examination as to admissibility; *lis pendens*; related actions). The Regulation sets the international jurisdiction of the Member State bound by it for procedures in succession matters, which will arise once the succession has been opened. It does not distinguish between contentious or voluntary jurisdiction. In view of the fact that authorities other than the judicial ones may perform similar functions under national law in certain succession matters, the jurisdictional rules of the Regulation are also binding on them.

³⁶⁷ There is only one case which refers to Article 7 in the database but the Court declined jurisdiction (Bundesgerichtshof, 14 October 2015, XII ZB 150/15, DET20151014). Same regarding Article 6 with the case Oberlandesgericht Koblenz, 18 June 2014, 13 WF 564/14, DES20140618.



The system of jurisdictional grounds of Regulation 650/2102 is a closed one: there is no place left for the national criteria of the Member State - in return the Regulation provides for a residual forum (Article 10) and a forum necessitates (Article 11). The principles followed in Chapter II are common to the rest of the instrument: unity and universality of the succession, where “unity” means as well the parallelism forum / ius. Consequently, as a rule the seized court will exercise its jurisdiction to rule on the entire succession, and it will do so by applying its own law. The best expression of these principles is Article 4, which admits, however, three main exceptions.

Firstly, should a deceased leaving assets in a Member State not have had his last habitual residence in the EU: A) the courts of the Member State where the assets are located shall decide on the succession as a whole, provided that the deceased had the nationality of that Member State upon his death; or failing that, if he had the habitual residence in that State provided that at the time the court is seized, not more than five years has elapsed since that habitual residence changed. (Article 10(1), (a) and (b). B) Failing the above conditions, the courts of the Member State where assets are located may still rule on the succession, but only in relation to such assets (Article 10(2))

Secondly, if the deceased has chosen the applicable law, according to Article 22 the courts of the last habitual residence, competent according to Article 4, should apply the law of the nationality of the deceased and not their own. To avoid this result, the parties concerned are allowed to agree on the jurisdiction of the courts of the chosen nationality (Article 5, Article 7(b)); in that case, any other court must decline their jurisdiction (Article 6(b)). Additionally, in the absence of agreement between the parties concerned, the courts of the Member State of the last habitual residence of the deceased may, at the request of one of the parties to the proceedings, decline jurisdiction if they consider that the courts of the Member State of the chosen law are better placed to rule on the succession, taking into account the practical circumstances of the succession, such as the habitual residence of the parties and the location of the assets; the courts of a Member State whose law had been chosen by the deceased pursuant to Article 22 shall then have jurisdiction to rule on the succession (Article 6(a), Article 7(a)).



Thirdly, where the estate of the deceased comprises assets located in a third State, the court seized to rule on the succession may, at the request of one of the parties, decide not to rule on one or more of such assets if it may be expected that its decision in respect of those assets will not be recognized and, where applicable, declared enforceable in that third State (Article 12)

II. ASSESSMENT

a) Jurisdictional rules in practice

At the time of the drafting of the EUFam's *Planning the future of cross-border families: a path through coordination* Final Report, information about the practice on the jurisdictional rules of the Succession Regulation is almost completely lacking. Considering the materials gathered by the Consortium the only element on which it is possible to comment seems to be the notion of “habitual residence”. In the seminars that took place in Heidelberg on 16 September 2016, and in Croatia on 13, 14 October 2016, speakers expressed their concern about the concept of “habitual residence”, common to the rules on jurisdiction and applicable law of the Regulation, highlighting some factual situations that will be problematic: for example, the case of returnees to the Republic of Croatia who have mostly lived abroad for economic reasons; the cases of accommodation of old people in -the cheaper- retirement homes abroad; or the cases of individuals living one half of the year in one state and in another state for the other half. The problem of obtaining the pertinent evidence to establish the habitual residence, which will precede the succession procedure itself, was also mentioned.

It is of interest in this context to remember that the Regulation itself has foreseen the difficulties linked to the “habitual residence” construct, and offers some guidelines to help determine it in recitals 23 and 24. Two elements deriving from them are in open contrast with the evidence obtained during the EUFam’s project:

The first is the autonomy of the notion “habitual residence”, which “should reveal a close and stable connection with a Member State taking into account the specific aims of this Regulation” (recital 23 *in fine*). This probably excludes the usability of the case law



of the CJEU on the “habitual residence” related to the Brussels Ila Regulation, except to the extent it corresponds to the above-mentioned condition. While being relevant, this stance on the systematic interrelation of EU instruments does not qualify as a novelty: already in its decision in the case C-45/13, *Kainz*, the CJEU had stressed that the alignment of all Regulations is not unavoidable;³⁶⁸ in particular, it must be dropped whenever it entails an interpretation unconnected to the scheme and objectives pursued by the specific Regulation at stake. The decision of the Kammergericht Berlin, 26 April 2016, where the interpretation of habitual residence was borrowed from the CJEU case law on Brussels Ila regulation, deserves therefore a negative assessment.

Secondly, the unimportance of the subjective element (volitional or psychological) when determining the habitual residence. The deceased’s conviction on what is or should be his habitual residence is not included among the elements mentioned by the Recital; it can thus be argued that it has no bearing - or at least, that its value is only relative and must be weighed with the rest of the indicators. The answers to question 21³⁶⁹ of the EUFam’s questionnaire point, however, to a possible incorrect understanding of this aspect: of the 130 respondents, 50% agreed that “Yes, a voluntary element in establishing the habitual residence before the death should be taken into account “, whereas only 20.77% were in favour of taking into account other elements (i.e., to the exclusion of the voluntary element and the time spent in a given country).

b) Best practices?

The scarcity of the case law on the jurisdictional rules of the Regulation does not allow for the identification of best practices yet. However, we would like to stress the following case of the Općinski građanski sud u Zagrebu O-1895/16, of June 6th, 2016, as

³⁶⁸ [2014] ECR EU:C:2014:7, para 20.

³⁶⁹ See *Report on the outcomes of the online questionnaire*: ‘Based on your knowledge/experience, would the notion of habitual residence require a specific interpretation under Regulation No 650/2012? (e.g. where an elderly person was moved by potential heirs to another country at the sole purpose of establishing jurisdiction and applicable law)?’.



an example of good cooperation and awareness of the cross-border implications of a succession.³⁷⁰

A Croatian citizen (born in 1946) died in Zagreb, Croatia on 25 January 2016. His last habitual residence was in Croatia: although he lived and worked in Germany for 25 years, when he retired he moved to Croatia; during his life he had a close connection to Croatia, where he owned a house and regularly went back to visit his family during holidays; almost all of his property (both movable and immovable) was located in Croatia; there was only a bank account registered in his name in Hamburg, Germany. His heirs were a niece and two nephews.

The notary -as a body exercising judicial function- applied the Succession Regulation properly to decide on the matter; he established his jurisdiction according to Article 4 since the habitual residence of the deceased was in Croatia and applied Croatian law according to Article 21 of the Succession Regulation. As a precautionary measure, however, he contacted the Municipal court in Hamburg, Germany, to check whether proceedings had been initiated at the German court. The notary received a notification from the Municipal Court in Hamburg, Germany on 18 May 2016 which confirmed that no proceedings had been initiated in the matter.

F. CONSOLIDATION OF PROCEEDINGS

The different research conducted under the EUFam's project, demonstrates a real difficulty in bringing proceedings related to one family to a single court.

I. THE IMPEDIMENTS TO CONSOLIDATION

The difficulty in consolidating claims is not linked to a particular European instrument. Rather the contrary, it appears to be due to the lack of consistency among the different European Regulations as well as the absence of an efficient solution within the said instruments. This section will mainly focus on spouse-related disputes (*i.e.* the Brussels

³⁷⁰ See the EUFam's data base, number CRF20160606. Latest update: <http://www.eufams.unimi.it/2017/09/26/eufams-database-26-09-17/>, last visited 10 November 2017.



Ila and Maintenance Regulation). Indeed, litigation involving children requires specific rules to protect their best interest. They will be dealt with further below.

a) Non-alignment of the jurisdictional grounds

In matrimonial proceedings the question of status often involves parallel maintenance claims. Currently, it may be that one single court is competent to decide on these matters because the different instruments partially use similar connecting factors.³⁷¹ However, there is no guarantee that only one court has jurisdiction. The Brussels Ila Regulation provides for six grounds of jurisdiction based on the habitual residence, and one on the nationality,³⁷² while the Maintenance Regulation only relies on two grounds linked to habitual residence (of the debtor and of the creditor).³⁷³ The Maintenance Regulation additionally offers the possibility to seize the court having jurisdiction over matrimonial matters or parental responsibility.³⁷⁴ 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).

The lack of harmonization leads to certain confusion, by the parties but also by the courts and lawyers, when applying the different EU Family Law instruments especially when a situation is connected to different States.³⁷⁵ Different examples exist in the

³⁷¹ As shown by certain judgments from the EUFams 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.

³⁷² Article 3 of the Brussels Ila Regulation.

³⁷³ Article 3(a) and (b) of the Maintenance Regulation.

³⁷⁴ Article 3 (c) and (d).

³⁷⁵ Cf *inter alia*: Audiencia Provincial Barcelona, 17 November 2015, 828/2015, ESS20151117; Juzgado de Primera Instancia de Pamplona, 6 June 2014, 298/2014, ESF20140606; Županijski sud Pula, 7 April 2015, GŽ-269/15-2, CRS20150407; Cour d'appel de Douai, 5 March 2015, 2015/149, FRS20150305; Cour d'appel de Paris, 10 January 2008, 05/22715, FRS20150305; Okresný súd Trenčín, 12 October 2016, 34P/140/2016, SKF20161012; Tribunale di Roma, 24 March 2017, ITF20170324; Tribunale di Bergamo, 24 June 2014, ITF20140624.



EUFam's database and often concern parties of different nationalities who live in a country together but move back to their state of origin at the end of their relationship. In Italy, the court of Tivoli was seized by an Italian father for divorce and parental responsibility while his German wife moved back to Germany with the child. The wife introduced a counterclaim for maintenance for the child and herself. The Italian first instance court accepted jurisdiction for all claims even though, according to Brussels IIa, the German court had jurisdiction for parental responsibility. However, the appeal court correctly declined jurisdiction regarding that matter but then also for maintenance even though, under the Maintenance provisions, it could have retained its jurisdiction regarding the wife's claim.³⁷⁶ Another example collected relates to a child living in Ireland but the Slovakian father decided to apply for maintenance in his country of origin. The Slovakian court, relying only on Brussels IIa, declined jurisdiction for both maintenance and for parental responsibility, even though no claim was made in relation to parental responsibility. Therefore, although maintenance was the basis of the initial claim, the court did not consider the Maintenance Regulation at all.³⁷⁷

b) Alternative grounds of jurisdiction

Beside the lack of consistency, an additional difficulty arises from the fact that the different grounds of jurisdiction, mentioned above, are set alternatively in both the Brussels IIa 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 (and sometimes live in different EU Member States), those grounds

Also when dealing with only one instrument. For example, regarding Brussels IIa, see Tribunale di Ravenna, 31 March 2016, ITF20160331; Tribunale di Novara, 31 October 2012, 733, ITF20121031; Bundesgerichtshof, 10 February 2016, XII ZB 38/15, DET20160210; and concerning the Maintenance Regulation, see Tribunal Supremo, 10 June 2015, EST20150610. Audiencia Provincial Murcia, 10 October 2013, 598/2013, ESS20131010; Tribunale di Milano, 11 December 2012, ITF20121211; Krajský soud v Českých Budějovicích, 5 April 2011, 5 Co 781/2011, CZS20110405; Monomeles Protodikeio Grevenon, 9 September 2013, ELF20130909; Районен съд - Казанлък, 23 July 2014; BGF20140723; Cour d'appel de Caen, 29 septembre 2016, 15/03300, FRS20130929b.

³⁷⁶ Tribunale di Tivoli, 6 April 2011, ITF20110406, Article 5(2) of the Brussels I Regulation was still applicable regarding Maintenance at the time the proceedings were initiated.

³⁷⁷ Okresný súd Trenčín, 12 October 2016, 34P/140/2016, SKF20161012.



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 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.³⁷⁸ This risk is especially significant since the conflicts of law rules are currently uniform only across seventeen Member States.³⁷⁹ 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.³⁸⁰ 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).³⁸¹ The divorce will consequently be granted more easily than if the German court had been seized.³⁸² There are currently no possibilities for the weaker spouse to counter that.

Beside the risk of rushing to court, the absence of hierarchy also leads to difficulties for judges and legal practitioners. It indeed happens that a court is seized but does not know whether it should accept jurisdiction since other jurisdictions could be competent according to the Regulation. As an example from the case law collected: An Italian court was hesitant to accept jurisdiction for divorce. There was a ground to accept it under Brussels IIa as the wife had moved back to Italy and lived there for a year, but she had

³⁷⁸ 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)’ COM (16) 411 final, 30 June 2016, thoroughly acknowledges the rush to court issue, 14.

³⁷⁹ The Rome III Regulation contains conflict of law rules for the 17 countries 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.

³⁸⁰ 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

³⁸¹ https://e-justice.europa.eu/content_divorce-45-se-en.do?member=1 (last consulted, 27 November 2017).

³⁸² In Sweden, except in specific circumstances, there are no requirements to be granted a divorce but 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 consulted, 27 November 2017).



lived in Brussels, together with her husband, for thirty years. The Supreme Court finally decided that the grounds are alternative and therefore the court has to accept jurisdiction if it is possible under Article 3 of Brussels IIa.³⁸³ If a maintenance claim regarding children occurs concomitantly to parental responsibility proceedings, the CJEU has nevertheless stepped in to clarify that such court should have jurisdiction rather than the court seized of divorce proceedings.³⁸⁴

c) Misapplication of the instruments

The absence of coherence between both Regulations renders their understanding and application difficult for parties but also for legal practitioners and judges. The case law collected demonstrates that many courts consolidate the proceedings without verifying their competence and therefore without correctly establishing their jurisdiction. They actually check the grounds of jurisdiction as regards to one matter, however their rulings refer to other questions too, and they do not question their competence for those specific questions. As explained above, the problem is particularly strong regarding maintenance matters. Since these are often matters ancillary to divorce or parental responsibility, courts tend to rule on the maintenance claims also without referring to the Maintenance Regulation.³⁸⁵

Apart from the temporal and economic costs incurred when carrying out proceedings in different Member States related to the same parties and the same closely-connected aspects of the same dispute,³⁸⁶ there is also a significant risk of contradictory decisions which contradicts the purpose of those instruments.³⁸⁷

³⁸³ Corte di Cassazione, 17 February 2010, n. 3680, ITT20100217. See above.

³⁸⁴ CJEU, case C-184/14, *A v B* [2015] ECR EU:C:2015:479. The preliminary question was brought up by the Italian Corte di Cassazione (7 April 2014, 8049, ITT20140407).

³⁸⁵ See above.

³⁸⁶ Specialised legal advice required in different Member States, due to multiple proceedings and the risk of rush to court, multiplies 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.* 15.

³⁸⁷ See above.



II. SOLUTIONS CURRENTLY OFFERED BY THE REGULATIONS

The instruments themselves try to tackle those difficulties by offering two possibilities to consolidate proceedings and therefore avoid the seizing of numerous courts:

a) Ancillary claims

The instruments discussed provide for the possibility to join certain claims considered as ancillary to another procedure. Article 12 of Brussels Ia allows the court seized of divorce proceedings to rule on parental responsibility claims. This possibility is however limited and depends on various elements such as the best interest of the child. Along the same lines, Article 15 offers the possibility to transfer a parental responsibility case to a court better placed to hear the dispute. This opportunity must constitute an exception to the general provision and must equally serve the best interest of the child. Regarding maintenance, Article 3(c) and (d) provide that the court dealing with a divorce or parental responsibility claim can also rule on related maintenance matters. As explained above, this provision remains problematic as courts do not know whether they should accept jurisdiction even though there is another court more closely connected to the case.³⁸⁸ Furthermore, there is no possibility to link matrimonial matters as an ancillary claim to ongoing parental responsibility or maintenance proceedings.

b) Party autonomy

The Maintenance Regulation offers the possibility for spouses to choose the court having jurisdiction to hear their divorce as the competent court for maintenance claims. Additionally, Article 4 allows them to opt for the court of one of their habitual residences or nationalities but that provision does not necessarily ease consolidation of proceedings since no equivalent provisions exist for matrimonial matters in Brussels Ia. The operation of Article 4 is consequently undermined in practice as parties who decide to join the maintenance claim to the divorce proceedings end up with greater

³⁸⁸ The CJEU has so far only clarified that if the maintenance concerns children and there is a parental responsibility case pending, that court has “priority” to hear the claim (*A.v. B*, *cf* above).



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 desire certainty for maintenance, they might opt for the other grounds offered by Article 4: 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 have jurisdiction regarding divorce.

In conclusion, as it stands consolidation of proceedings is not easy to achieve and when it is feasible, courts tend to group claims on their own initiative rather than by applying the existing instruments.

III. PARENTAL RESPONSIBILITY

The rules of jurisdiction on parental responsibility do entail fewer problems of rushing-to-court or legal uncertainty since the available grounds of jurisdiction are more limited,³⁸⁹ 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, the consolidation of proceedings in the field of parental responsibility is, at the moment, fragmented. Indeed, the rules of jurisdiction contained in Brussels IIa allow the claims over parental responsibility to be concentrated before the same court exercising jurisdiction in matrimonial matters (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 (Litt. c and d of Article 3 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

³⁸⁹ Although it should be noted that judges might differently understand the notion of “best interests of the child” which might affect legal certainty.



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 it 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 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.

G. FINAL ASSESSMENT AND RECOMMENDATIONS

I. BRUSSELS IIa REGULATION

In general, the Brussels IIa Regulation has proven to be a very useful instrument, covering a notable range of cases related to matrimonial matters and parental responsibility.³⁹⁰ However, the instrument could be improved if certain aspects are modified.

a) Spouse-related matters

i. Introduction of hierarchy

It would be possible to counter and prevent the so-called “rush to court” that currently arises from the alternative grounds set in the Regulation and the lack of uniform

³⁹⁰ The amount of decisions collected in the EUFam’s Database is quite telling in this regard.



conflict-of-laws rules, if the grounds of jurisdiction set in Article 3 of Brussels Ia were 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 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 State where the couple has their common habitual residence, and 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 shares 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 none 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 in order 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.³⁹¹

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-law rules although some Member States have not agreed to them.³⁹² As an example, Sweden would have to accept that

³⁹¹ It would apply when the defendant lives in a third state while the applicant lives in the EU.

³⁹² Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)' COM (16) 411 final, 30 June 2016, 20.



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.³⁹³

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.

ii. *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 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.³⁹⁴ In the situation where consolidation is not their desire, they could 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.³⁹⁵ It is traditionally recognised that countries meeting this requirement are the countries of habitual residence or nationality of either of the spouses. Given the

³⁹³ The *lex fori* principle applies in Sweden, see above.

³⁹⁴ 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.

³⁹⁵ It should be noted that party autonomy is currently being increased in many EU Member States' family law. Cf, eg, Scherpe, *The Present and Future of European Family Law* (Edward Elgar Publishing, Cheltenham, 2016) 69.



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.³⁹⁶

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. In order 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 the rush-to-court practice as well as the reduction of the 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.³⁹⁷ It should, however, be noted that party autonomy might be politically difficult to accept for Member States averse to other forms of marriage.

iii. *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

³⁹⁶ Article 4 of the Maintenance Regulation, *vice versa*, already offers the possibility to seize the court competent for matrimonial matters (see below).

³⁹⁷ Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)' COM (16) 411 final, 30 June 2016, 22.



subject to substantive conditions (notably, the better placement depends on the best interests of the child).³⁹⁸

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 2005³⁹⁹ and also discussed in the Commission Staff Working Document Impact Assessment of 2016.⁴⁰⁰

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 the 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),⁴⁰¹ 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 in order 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 have

³⁹⁸ See in detail CJEU, case C-428/15 *Child and Family Agency v J. D* [2016] ECR EU:C:2016:819.

³⁹⁹ Green Paper on applicable law and jurisdiction in divorce matters, COM/2005/0082 final, 14 March 2005.

⁴⁰⁰ 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).

⁴⁰¹ 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 in such a stage the main proceedings are not deemed to have started yet.



to be taken into consideration. A practical example concerning a case where this rule could be applicable would be 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.

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.

b) Parental responsibility

Currently, the rules of jurisdiction over parental responsibility are designed in such a fragmentary way that they do 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.⁴⁰² 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,

⁴⁰² 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.



the best interests of the child (which needs to be highlighted in matters of parental responsibility) and the interest of justice. In both cases, close 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, in case that consolidation is advisable in the case at hand.

II. AMENDMENTS OF REGULATION No 4/2009

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 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 alleged 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, litt. 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 in order to counter the two difficulties brought up and to allow consolidation, *ex-post*, when the 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 interest of justice,⁴⁰³ 3) if it responds to the best interests of the child⁴⁰⁴ and 4) if the judges in charge of the relevant courts have reached a common decision on jurisdiction.

Finally, a solution that does not entail substantive changes, but constitutes a key element for a better application of the Regulations and a swifter consolidation of proceedings, lays in the training of legal professionals so that they can advise and inform the parties as to the most efficient solution regarding the seizing of a jurisdiction. Mediation should also be encouraged and in that framework, professionals conducting such procedure should be properly trained and informed. They are indeed well placed to help parties reach an agreement on a unique court to hear their claims.

⁴⁰³ It should be observed that consolidation is not always appropriate. The judges involved should consider if consolidation is really needed in order 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.

⁴⁰⁴ In this vein, the CJEU already stated that the best interest of the child should be assessed when jurisdiction over maintenance claims is exercised by virtue of Article 3 (d) of the Maintenance Regulation (when the maintenance claim is ancillary to the relevant proceedings concerning parental responsibility). CJEU, case C-184/14 A v B [2015] ECR EU:C:2015:479, para 46.



CHAPTER 4. PROVISIONAL MEASURES

Lidia Sandrini

All the EC/EU Regulations covered by the EUFam's Project provide the possibility to obtain a prompt and effective interim protection of the rights at issue pending the judgment on the merits. As is well known, however, they adopt different solutions in order to achieve this outcome. On the one hand, the Maintenance Regulation, as well as the Succession Regulation,⁴⁰⁵ follows the path of Brussels I Regulation, which reproduced with minor changes what the Brussels Convention of 1968⁴⁰⁶ already provided. On the other, the Brussels IIa Regulation draws on the Brussels II Regulation and, through it, on the Brussels II Convention.⁴⁰⁷

Under both regimes the judge having jurisdiction as to the substance of a case has the power to order provisional measures, and these may circulate according to the rules governing the recognition and enforcement exactly as any other decision issued by that judge.

The differences between Brussels IIa e the other two Regulations pertain, first of all, to the power to order provisional and protective measures when the courts of another Member State have jurisdiction as to the substance of the matter and, secondly, to the circulation of such measures. In fact, even if all the relevant provisions are merely permissive in nature - *i.e.* do not prevent the exercise of such power and leave it to domestic legal orders to provide a ground of jurisdiction to that respect - only Article 20 of Brussels IIa explicitly provides the conditions that must be satisfied, namely: the

⁴⁰⁵ The same solution has been adopted by both 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 and 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.

⁴⁰⁶ Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Brussels, 27 September 1968 (in Official Journal of the European Union No L 299, 31 December 1972).

⁴⁰⁷ Council Act of 28 May 1998 drawing up, based on Article K.3 of the Treaty on European Union, the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (in Official Journal of the European Union No C 221, 16 July 1998).



measures concerned must be urgent; they must be taken in respect of persons or assets in the Member State where those courts are situated; and they must be provisional.⁴⁰⁸ Instead, Article 14 of the Maintenance Regulation and Article 19 of the Succession Regulation do not specify any further requirement, and merely refer to the law of the Member State whose court has been seised by the applicant to seek provisional relief. However, in light of the aforementioned similarity between these provisions and Arts. 24 and 31 of the 1968 Brussels Convention and of the Brussels I regulation respectively, it is submitted that this gap may be filled by reference to the CJEU case-law related the latter.⁴⁰⁹ According to that jurisprudence, “provisional or protective measures” are intended to preserve a factual or legal situation in order to safeguard those rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter.⁴¹⁰ The Court also stated that the granting of such measures is conditional on the existence of a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the Contracting State of the court before which they are sought.⁴¹¹ Finally, their provisory character should be ensured by the possibility to reverse the effects of the interim decision if the plaintiff is unsuccessful in his claim, *i.e.* with regard to interim payments, often requested when maintenance rights are at issue, the repayment to the defendant of the sum awarded shall be guaranteed.

Finally, it may be recalled that only Article 20 of Brussels IIa addresses the problem of contradictory decisions arising from the possibility of seeking provisional measures both before a court which is competent to deal with the substance of the claim and before a court that is not competent to that extent, providing for a time limit as to the effect of the interim measures granted by the latter.⁴¹²

⁴⁰⁸ CJEU, 2 April 2009, CJEU, case C-523/07, A, ECLI:EU:C:2009:225. See also CJEU, 23 December 2009, case C-403/09 PPU, Detiček, ECLI:EU:C:2009:810; 15 July 2010, case C-256/09, Purrucker I, ECLI:EU:C:2010:437; 9 November 2010, case C-296/10, Purrucker II, ECLI:EU:C:2010:665.

⁴⁰⁹ CJEU, 26 March 1992, case C-261/90, Reichert, ECLI:EU:C:1992:149.

⁴¹⁰ CJEU, 17 November 1998, case C-391/95, Van Uden, ECLI:EU:C:1998:543.

⁴¹¹ *Ibidem*. See also CJEU, 27 April 1999, case C-99/96, Mietz, ECLI:EU:C:1999:202.

⁴¹² Article 20(2) states that “The measures referred to in paragraph 1 shall cease to apply when the court of the Member State having jurisdiction under this Regulation as to the substance of the matter has taken the measures it considers appropriate”.



As regards the circulation of provisional and protective measures, the CJEU has clearly stated that the provisions laid down in Article 21. Brussels IIa do not apply to provisional measures falling within the scope of Article 20 of that regulation. However, the fact that such measures do not qualify for the system of recognition and enforcement provided for under that regulation does not prevent all recognition or all enforcement of those measures in another Member State, as other international instruments or other national legislation may be used, in a way that is compatible with the regulation.⁴¹³

The opposite may be argued with respect to the Maintenance Regulation and the Succession Regulation. In fact, coherently with the CJEU case-law on the Brussels I system (as it was before the recasting of The Brussels I Regulation), one should admit that no legal basis may be found therein for drawing a distinction between provisional and definitive measures, even when recognition and enforcement is at issue.⁴¹⁴

Therefore, provisional remedies granted by a court seized under the aforementioned Article 14 of Regulation No 4/2009 and Article 19 of the Succession Regulation are entitled to the free circulation of judgments whenever they fulfil the already mentioned requirements as to their “provisional” character, in the sense in which that term has been defined by the CJEU, provided that the “real connecting link” condition is met.⁴¹⁵

In a tentative comprehensive assessment, against such a complex regulatory framework, one needs to acknowledge that the jurisprudence of Member States in this area shows more than occasional difficulties. Before going to a qualitative assessment, however, it is worth noting that few judgments, among those that have been examined, deal with provisional and protective measures. That does not mean that orders granting provisional and protective measures are seldom issued by Member States Court. The explanation for this exiguous number may be found in the fact that, as it is well known, that kind of decision is scarcely reported. Furthermore, it should be noted that most decisions dealing with provisional measures concern parental responsibility. Again, as in many Member States courts are used to order interim payments while the proceedings

⁴¹³ CJEU, 15 July 2010, case C-256/09, Purrucker I, ECLI:EU:C:2010:437, paragraph 92 and operative part of the judgment.

⁴¹⁴ CJEU, Judgment of 27 March 1979, case 143/78, De Cavel, ECLI:EU:C:1979:83. See Judgment of 21 May 1980, case 125/79, Denilauler ECLI:EU:C:1980:130.

⁴¹⁵ CJEU, 27 April 1999, case C-99/96, Mietz, ECLI:EU:C:1999:202.



on maintenance obligations is pending on the merits, it may be submitted that the lack of case-law on Regulation No 4/2009 depends on the availability of relevant jurisprudence. As far as the Succession Regulation is concerned, the reason probably lies in the fact that it has become applicable only recently.

With regard to the correctness of the decision examined, it feels appropriate to underline that among the collected judgments many decisions ordering provisional measures are good examples of proper application of the regime established by Brussels IIa Regulation with regard to the exercise of jurisdiction on provisional and protective measure, either by the judge competent on the merits, or on the ground of Article 20. The decisions issued at the enforcement stage also deal correctly with the rules governing the recognition of interim judgments issued in other Member States, taking into account the different regime applicable, depending on the ground on which the court of origin has founded its jurisdiction.

As regards the exercise of the power to issue provisional measures by the Court which is competent to deal with the substance of the case, however, it may not be omitted that the assessment of jurisdiction in the context of interim proceedings aiming to regulate the parties' respective rights and duties pending the proceedings on the merits is not always carried out paying due attention to all the relevant normative instruments. A case decided by the Tribunale di Padova on 9 May 2017,⁴¹⁶ in which different claims relating to the same family case - *i.e.* for legal separation, for child's custody, for maintenance were brought before the same Court, may be a good example of this kind of shortcomings. In that case, as provided by national procedural rules, before referring the case to the Tribunal for the final decision, the President of the Tribunal had to take all the urgent measures of protection that were required in light of the actual situation of the parties. More precisely, the President authorized the spouses to live separately, awarded the joint custody of the child, whose main placement should be with the mother, and granted access rights to the father. Furthermore, maintenance interim orders were issued against the husband. Despite the variety of issues at stake, the President founded jurisdiction by exclusive reference to Article 3 of Brussels IIa. Since

⁴¹⁶ Tribunale di Padova, 9 Maggio 2017, ITF 20170509.



the decision on the merits made clear that the Italian Tribunal was competent to deal with custody and maintenance under the relevant PIL rules, the outcome of the interim proceedings may not be considered incorrect. However, as it will be seen dealing with the recognition and enforcement abroad of provisional measures, the lack of accuracy of the reasoning is not without consequences.

As to the exercise of jurisdiction according to Article 20 of the Brussels IIa Regulation, Member States' courts also show a good attitude. More specifically, they generally refrain from issuing provisional measures in relation to children not residing nor present in the State,⁴¹⁷ in line with the interpretation of the provision resulting from the CJEU case-law.⁴¹⁸

Some Italian cases are worth mentioning as examples of the great extent to which Member State courts have embraced the distinction between the role of the courts dealing with the merits and the role of the court issuing provisional measures under Article 20, as ruled by the CJEU. In the first case, the *Corte di Appello di Catania*,⁴¹⁹ after an assessment of the relevant elements of the case conducted with the cooperation of the National Central Authorities, held that a Romanian decision, according to which a child should have lived with his or her mother, was a provisional

⁴¹⁷ See e.g.: Krajský soud v Českých Budějovicích, 14 January 2009, 5 Co 32/2009, CZS20090114; Corte di Appello di Catania, 17 March 2014, ITS20140317.

⁴¹⁸ Particularly, with reference to CJEU, 9 November 2010, case C-296/10, *B. Purrucker v. G. Vallés Pérez*, ECLI:EU:C:2010:665.

⁴¹⁹ Corte di Appello di Catania, 3 June 2015, ITS20150603; see also Tribunale di Arezzo, 15 March 2011, ITF20110315. Sometimes, the final result could be deemed to be correct, but the reasoning purporting it is not entirely persuasive: see e.g. Tribunale di Vercelli, 23 July 2014, ITF20140723, by which the father has been granted with right of access to the child, who was residing in Italy with the mother. The Court stated that it would have been pointless to evaluate whether the provisional measure aiming to regulate the right of access adopted by the Romanian Court, in the context of the Romanian divorce proceedings between the parents, could still be considered valid or overturned by the divorce decision. Since the Romanian Court was not competent neither under Article 8 nor under Article 12 of Bussels IIa Regulation, and, furthermore, the Romanian jurisdiction could not have been grounded on Article 20 of the same Regulation, since the child was not in that State, the Court founded itself bound to state on the father's rights of access without taking into account the Romanian protective measure, as child's best interest requires the measures on the rights of access to be taken by the authority where the child resides, which is the better placed to evaluate the needs of the child, to monitor his/her personality and the ongoing of the relationships with the parents. The decision is valuable for the reference to the major international/regional instruments enshrining the principle of the child's best interest, as well as for the effort in balancing such principle with the mutual trust between member States on which EU rules on judicial cooperation are based. Besides that, it must be noticed that the relevance of Romanian interim measures should have been more easily motivated taking into account Article 20(2) of the Brussels IIa Regulation, in light of the jurisprudence of the CJEU.



judgment issued by virtue of Article 20 of the Brussels IIa Regulation. Therefore, said judgment should have ceased to apply when the court of the Member State having jurisdiction as to the merits of the case had taken the appropriate measures. Since jurisdiction as to the custody application lay with Italian Judicial Authorities, the court of second instance then replaced the Romanian provisory order by granting shared custody to both parents, with the child being placed at the father's residence and the mother being granted visitation rights.

In another case, the *Corte di Appello di Cagliari* had been requested to issue provisional measures pursuant to Article 20 of the Brussels IIa Regulation in the context of a case on parental responsibility already brought before a Dutch court. The Italian court did not grant the requested provisional order as such measure would have unduly interfered with the exercise of jurisdiction by the Dutch court competent on the merits, by way of a substantial revision of the exercise of access rights already granted to the father by that court.⁴²⁰

More recently, the same approach has been endorsed by the *Tribunale di Roma*⁴²¹ in a case concerning legal separation, custody of the children (Italian/Albanian citizens) and maintenance, which had been brought by the wife, an Albanian citizen, against her Italian/Albanian husband. At the hearing of 16th May 2017 - taking place before the President of the Tribunal, who is allowed to take provisional and urgent measures according to domestic procedural law - it was acknowledged that an earlier judgment given in Albania had already declared the divorce and regulated the custody and maintenance of the children. Since that judgment fulfilled the conditions necessary for its recognition in Italy, no provisional and urgent measures were needed. Moreover, according to the President of the Tribunal, the wife's claim requesting urgent measures towards the children was actually a request for modification of the Albanian decision on the merits of the patrimonial and non-patrimonial consequences of the divorce. As a consequence, that request had to be lodged before the competent court where the judgment on the merits had been rendered. This case is noteworthy as the principle

⁴²⁰ Tribunale di Cagliari, 12 December 2015, ITF20151212, in which CJEU, 2 April 2009, case C- 523/07, A., ECLI:EU:C:2009:225, has been followed step-by step.

⁴²¹ Tribunale di Roma, 18 May 2017, ITF201702518.



prescribing that provisional measures should not be used as a device to interfere with the exercise of jurisdiction by the judge competent on the merits was applied towards a non-EU country. In the perspective of the relations with third countries, the decision might be questionable, as the interplay between the relevant EU instruments, i.e. Brussels IIa Regulation and Maintenance Regulation, with other international instruments to be considered in that specific case, i.e. the 1996 Hague Convention and the 2009 Hague Convention, was not been carefully investigated.⁴²² However, it is noteworthy that the aforementioned principle had been fully endorsed by the judiciary and, from another perspective, the judgment is also interesting as it reveals that the influence of EU legislation and of its underlying principles may go well beyond its scope.

With reference to the characterization of national measures as “provisional and protective measures” for the purposes of Article 20 of the Brussels IIa Regulation, the case-law does not give rise to significant concerns.⁴²³ Nonetheless, a peculiar measure Czech courts are entitled to issue in the contest of abduction proceedings under Article 193(c) of Law No 99/1963 Coll. Civil Procedure may be cited as an exception.

When said courts are seized for a return order as courts of the requested State (Article 11 of the Regulation), by applying the domestic provision, Czech courts sometimes make the return order conditional upon the payment by the requesting parent of a sum for the accommodation of the abducting parent in the State of origin, or upon the arrangement for such accommodation,⁴²⁴ in order to enable the abducting parent to stay with the child while the competent court decides on the merit. The characterization of such measures as “provisional and protective measures” under Article 20 of the Brussels IIa Regulation is doubtful, as well as the possibility to require the fulfilment of conditions other than those provided for by its Article 11 in order to issue the return order.

⁴²² That could however depend on the summary procedure governing interim proceedings. It should be also mentioned that because of the decision’s interim character, it is not possible to infer from it all the relevant factual element of the case.

⁴²³ In this respect it may further be noticed that the prohibition or restrictions to the expatriation of the child, that often are set in the pre-trial phase of custody disputes by Member States Courts, are properly qualified as protective measures in accordance with Article 20. See e.g. Ústavní soud, 3 March 2011, 2471/10, CZC20110303, Tribunale per i minorenni di Venezia, 30 November 2011, ITF20111130.

⁴²⁴ See e.g.: Krajský soud v Brně, 17 July 2012, 20 Co 501/2012, CZS20120717; Krajský soud v Brně, 4 June 2013, 20 Co 223/2013, CZS20130604; Krajský soud v Brně, 23 July 2013, 20 Co 203/2013, CZS20130723; Krajský soud v Brně, 19 January 2016, 20 Co 622/2015, CZS20160119.



Moving on to decisions issued at the enforcement stage, it is worth noting that one of the German reported case⁴²⁵ gave rise to the CJEU judgment in the case C-256/09,⁴²⁶ which clarified the condition under which provisional measures ordered in another Member State may be recognised and enforced. In that decision, the CJEU has drawn the above-mentioned distinction between the measures granted by the Court competent on the merits, which may circulate through the UE member States according to the rules provided for by the Regulation, and those grounded on Article 20, which may only be recognised under the rules provided either by an international Convention⁴²⁷ or by domestic law. Not surprisingly, after the CJEU had given its guidance, the German court dealing with the proceeding⁴²⁸ followed them step-by-step. More precisely, according to the German Federal Court, as the jurisdiction of the court of origin did not find a clear or apparent basis in Article 8 et seq. of the Regulation, Article 21 et seq. were inapplicable for the recognition of the Spanish provisional measure and it could not be recognised nor enforced in Germany.

Conversely, in a later case, the enforceability of the foreign provisional order has been declared by German courts, since the context of the decision clearly showed that the court of origin had founded its competence on Article 8, even if such Article had not been explicitly mentioned.⁴²⁹

It could appear, from the aforementioned cases that the court in the requested State does not usually stick to the ground of jurisdiction which has been referred to in the judgment. The court rather performs a more in-depth analysis of the case, which takes into account all relevant factors, which can be inferred from the decision rendered in another Member State. However, in light of the CJEU jurisprudence, the court issuing a provisional measure should be aware of the need to make the ground on which it found

⁴²⁵ Bundesgerichtshofs, 10 June 2009, XII ZB 182/08, DET20090610.

⁴²⁶ CJEU, 15 July 2010, case C-256/09, *B. Purrucker v. G. Vallés Pérez*, ECLI:EU:C:2010:437.

⁴²⁷ For a case of recognition and enforcement of a provisory judgment, apparently grounded on Article 20 of the Brussels IIa Regulation, under the Hague Convention of 1996, see Oberlandesgericht München, 22 January 2015, 12 UF 1821/14, DES20150122.

⁴²⁸ Bundesgerichtshofs, 9 February 2009, XII ZB 182/08, DET20110209.

⁴²⁹ See Oberlandesgericht Stuttgart Beschluß, 3 March 2014, 17 UF 262/13, DES20140305, confirmed by Bundesgerichtshofs, 8 April 2015, XII ZB 148/14, DET20150408.



its competence on the merits clear, by way of an explicit reference to the relevant rule of the Brussels IIa Regulation, in order to allow an easier circulation of the decision. Unfortunately, as it has been already noticed examining the case decided by the Tribunale di Padova on 9th May 2017,⁴³⁰ in this respect the case-law is not always satisfactory⁴³¹ and sometimes even wrong, especially when in the reasoning the exercise of jurisdiction is explained by reference to domestic rules of Private International Law, while it should have been correctly founded on the Regulation.⁴³²

⁴³⁰ Tribunale di Padova, 9 May 2017, ITF 20170509. See above, fn. 13 and corresponding text.

⁴³¹ See e.g. Krajský soud v Brně, 18 September 2012, 38 Co 356/2012, CZS20120918, which issued a provisional order without any examination or commentary regarding its jurisdiction; it is worth nothing that the first instance interim judgment failed to give reasons for the exercise of jurisdiction as well.

⁴³² See e.g. Županijski sud u Rijeci, 28 November 2013, GŽ-5432/2013-2, CRS20131128, dismissing the appeal lodged by the defendant (the father) against the judgment of the Municipal Court in Rijeka, by which the Court of first instance granted a provisional measure and awarded the custody of the child to the plaintiff (the mother), in the context of a proceedings on the merits in matter of divorce; both the Court of first instance and the Court of second instance referred exclusively to domestic rules of Private International Law. See also Županijski sud u Dubrovniku, 14 October 2015, GŽ 1336/14, CRS20141025, that set aside the first instance decision, by which a provisional measure had been granted, on the basis, *inter alia*, that the lower Court did not refer to the relevant Brussels IIa Regulation provisions in order to assess its jurisdiction, and applied the domestic rules instead.



CHAPTER 5. PARALLEL PROCEEDINGS

Mirela Župan, Martina Drventić

A. INTRODUCTION

Cornerstone of EU civil justice is the free circulation of judgements. To reach that overall aim the EU has undertaken a systematic engagement with unification of private international law rules. Member States afforded EU with internal and external competence to enact a system that assures smooth recognition and enforcement.⁴³³ Leaning on the principle of mutual trust they aim for accomplishment of a dream of the “fifth market freedom”. However, such a fairy tale may turn to an action movie or a soap opera, if rules are applied in an abusive way. One of the most prominent examples is the misuse of alternative grounds of jurisdiction available to applicants. Despite the unification in the area of international jurisdiction, the potential of conflicting decisions is not eliminated. Concern is thus raised with regard to the potential risk of contradictory decisions. Regulations employ several layers of mechanisms to combat such situations. The burden traditionally falls on the *lis pendens* and related actions rule, which prevent contradictory judgments from arising. However, rules that enable merge of different procedures, such as the transfer of jurisdiction rule and choice of court, serve that purpose as well. Additional instance of control exists with the rules on recognition, which prevent recognition of double ruling.

Parties are often keen to initiate simultaneous procedures before courts of several different Member States, seeking for legal protection in a forum which they perceive to be the most affordable for their own claim. The general private international law rule is that the second seized court stays its proceedings (or even automatically decline jurisdiction in favour of the first seized court). The rule is reflected in national private

⁴³³ Hess “The State of the Civil Justice Union”, in Hess, Bergström, Storskrubb (eds) EU Civil Justice (Hart, Oxford, 2016), 1-19.



international law legislation with variety of forms.⁴³⁴ In piecemeal EU legislation the formula of preventing parallel proceedings is used in variety of combinations, though the Brussels I regulation provides for the core of it. *Lis pendens* rule serves many functions in cross-border civil litigation of EU Member States. Protection of juridical system, protection of the parties, safeguarding the procedural economy, preserving the mutual trust, as well as protection of a right to a fair trial of Article 6 of ECHR may be pinpointed here. Hence the system should prevent at the early stage any parallel procedure. Though *lis pendens* rules is introduced to assure sensitivity in handling complex cross-border cases, strict application of the first in time rule may lead right to the opposite effect. Open issues and gaps in application of the *lis pendens* rules of the Brussels II a, Maintenance and Successions Regulation however create a narrow problematic area. Parallel procedures are challenging in several other aspects as well. Such situations that do not meet true *lis pendens* criteria, but concurrent claims are pending in different jurisdictions, have been in spectrum of legislator and practice as well.

Aim of this chapter is twofold: to provide a framework for different aspects of parallel procedures *de lege lata* in the practice of the national courts, and to offer solutions for *de lege ferenda* legislation. Main focus would be given to pendency rule. Such elaboration triggers the rules currently contained in EU legislation on international family and successions law; most prominent problems detected by the case law collected within several jurisdictions and possible improvements. Proposals for future amendments of EU legislation, in particular in relation to the ongoing legislative process of Brussels IIa recast are offered.

B. LIS PENDENS AND CONCURRENT PROCEDURES – STATE OF FACT

Rules on parallel procedures resemble the problems of sector specific unification in EU civil justice. In piecemeal EU legislation, the formula of preventing parallel proceedings

⁴³⁴ Silberman, “Chapter L.11: Lis alibi pendens”, in Basedow et al (eds) *Encyclopedia of Private International Law* (Elgaronline) 1158 ff.



is used in variety of combinations.⁴³⁵ Prototype formula used to draft relevant provisions in regulations enacted in post Amsterdam area may be found in the Brussels I regulation.⁴³⁶ This common core provision served to create a pendency rule in Brussels II and IIa as well.⁴³⁷ The concept has been interpreted by the great number of CJEU decisions, whereas the CJEU has given it a European wide meaning.⁴³⁸ Therefore, interpretation provided by CJEU on the pendency and priority issue in event of parallel procedures may be used by analogy to any regulation in civil justice area, as confirmed by the C 406/09 *Realchemie Nederland*.⁴³⁹

However, Brussels I instantly provided rules on true *lis pendens* and related actions, pattern not used with Brussels II a, but followed later by Maintenance and Successions Regulations. The relevant Articles 27-30 of the Brussels I have been significantly altered with the Recast of that Regulation,⁴⁴⁰ to address the challenges appeared in the practice.

Brussels II a, Article 19 *Lis pendens* and dependent actions

1. Where proceedings relating to divorce, legal separation or marriage annulment between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

⁴³⁵ Linton, in Hess, EU Civil Justice, op.cit., 282.

⁴³⁶ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 012, 16/01/2001 P. 0001 - 0023.

⁴³⁷ As referred to by Hess, Heildeberg Report - Report on the Application of Regulation Brussels I in the Member States Study JLS/C4/2005/03, 29.

⁴³⁸ CJEU refers to the “general concept” of *lis pendens* in a dispute concerning parallel proceedings under the Insolvency Regulation, CJEU, 05 February 2006, C-341/04, *Eurofood IFSC Ltd.*, ECR 2006 I-3813.

⁴³⁹ “As a preliminary point, it must be recalled that, in so far as The Brussels I Regulation now replaces the Brussels Convention in relations between the Member States, with the exception of the Kingdom of Denmark, an interpretation given by the Court concerning that convention also applies to the regulation, where its provisions and those of the Brussels Convention may be treated as equivalent (see, inter alia, Case C-292/08 *German Graphics Graphische Maschinen* [2009] ECR I-8421, paragraph 27 and case-law cited). Furthermore, it is clear from recital 19 in the preamble to The Brussels I Regulation that continuity in interpretation between the Brussels Convention and that regulation should be ensured.” Para 38.

⁴⁴⁰ European Parliament and the Council Regulation (EU) 1215/2012 of December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1 (Brussels Ia Regulation).



2. Where proceedings relating to parental responsibility relating to the same child and involving the same cause of action are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

3. Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court.

In that case, the party who brought the relevant action before the court second seised may bring that action before the court first seised.

Lis pendens Maintenance Regulation (Article 12), Successions Regulation Article 17 Lis pendens

1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

Related actions Maintenance Regulation (Article 13), Successions Regulation (Article 18)

1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

2. Where those actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable decisions resulting from separate proceedings.



The basic rules have been widely elaborated by many valuable academic contributions.⁴⁴¹ Deductive reasoning lead to a common core approach to the parallel proceedings employed by the international family and successions regulations.

Provisions belong to the “common provisions” section;

Only one scenario is prescribed: *lis pendens* in different Member States; no rules in relation to third States;

Differentiation is introduced among the *lis pendens* and related actions;

Autonomous determination of the moment from which the court is deemed to be seized is unified;

Perpetuatio fori principle counts for all;

Strict first in time approach is employed on the bases of chronological order in which the courts are seized;

Having in mind the above stated, as well las the fact that the prototype Brussels I regulation has been significantly altered with the 2012 recast, it remains uncertain if the regime employed currently the EU international family and successions regulations is appropriate. The EU Fam’s project deals with the three relevant regulations. One of them, the Successions Regulation was issued at the time the Brussels I recast took place. However, rules on *lis pendens* do not resemble the evolution undertaken by EU legislator. Currently the procedure to reform the Brussels Ila is ongoing. However, besides minor cosmetical changes the Brussels II ter Recast proposal⁴⁴² contains no significant change to Article 19 in general. Some improvement is offered in relation to Hague 1996 Convention contracting states, which would be discussed latter.

⁴⁴¹ Fentiman, ‘Lis pendens - related actions’ in Magnus, Mankowski (eds), *European Commentaries on Private International Law Brussels I Regulation* (2nd Revised Edition, Sellier European Law Publishers 2012) 560; Beaumont, McElevy *Anton’s Private international law* (W. Green, 2011); Walker, *Maintenance and child support in private international law* (Oxford, Hart Publishing, 2015).

⁴⁴² 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) Brussels, 30 June 2016 COM(2016) 411.



C. PARALLEL PROCEDURE IN NATIONAL PRACTICE

Elaboration of the national courts practice presented here is based on the findings of the EU Fam's project, but other available sources as well. The core information derives of the EU Fam's deliverables: reports and case law database. However, all of the other academic and practice findings rendered so far, as well as other available published national case law, served to test and confirm the (in)effectiveness of the system to combat parallel procedures at EU level.

I. EUFAM'S REPORTS

Uniform rules enacted by relevant regulations gain their shape in national court practice. The aspect of problems in application is particularly highlighted by EUFam's reports.

*First Assessment Report on the case-law collected by the Research Consortium*⁴⁴³ was made on the sample of 371 decisions and had showed that situations of *lis pendens* have been registered in 39 cases. The report showed that the Member states' case-law has proven to apply correctly the relevant rules on *lis pendens*. Still, sometimes the correct outcome has been reached through the application of national rules instead of the applicable EU Regulation. The collected cases raised issues of interrelation of the *lis pendens* rule with the rule on exclusive jurisdiction and also with the rule determining the moment of seizing of a court. Several cases pointed out on the issue of distinction between the assessment of the *lis pendens* situation and the assessment of jurisdiction per se. Report also pointed out to the *lis pendens* in the context of the third states proceedings. Collected case law revealed that there are two approaches of dealing with the situations where the proceeding is pending before a non-Member state's court. The first is to apply the rules of *lis pendens* established by the EU regulation in cases involving non-Member states and the second approach goes in the favour of application of national rules on *lis pendens*.

⁴⁴³ Viarengo, Villata (eds), *First Assessment Report on the case-law collected by the Research Consortium*, <http://www.eufams.unimi.it/2017/01/09/firstassessmentreport/>



*Report on the Italian good practices*⁴⁴⁴ includes some observation given by the judges participated on the National seminar. One of them concerns the breach of the Article 19 of the Brussels IIa Regulation. It was concluded that if a foreign court second seized does not stay the proceedings and issues its decision earlier than the court first seized, the spouses can only appellate this decision before the court of the Member State that issued it. Besides, the breach of Article 19 does not represent a ground for non-recognition of foreign judgment. As to the *lis pendens* exception with third countries, the invited judges agreed on national law which governs the international *lis pendens* to be applicable instead of the Regulation. Finally, it was concluded that, with regard to the Italian institute on extrajudicial separation/divorce, it must be clarified whether starting an extrajudicial separation/divorce can be considered as applying before a court within the meaning Article 19 of the Brussels IIa Regulation.

*Report on the German good practices*⁴⁴⁵ evidenced the solution to the proceedings delays commonly used by the parties. The participant of the National seminar proposed the amendment of the Article 19 of the Brussels IIa Regulation in term of requiring the party that first filed the claim to actively pursue the court proceeding. In case that party delays the proceeding for at least six weeks, the court first seized shall decline jurisdiction in favour of the court second seized.

*Report on the Croatian good practices*⁴⁴⁶ emphasized the need of further elaboration of the *lis pendens* rules by the academics in order to achieve the uniform interpretation in practice. Issue which lead to this conclusion arose on the matter of establishing the fact that ongoing process is taking place abroad. Question arose if a judge can rely on a document on foreign language and stop/drop its later procedure, or it is considered to be a public document that ought to be translated by official translator office, as was suggested by one appellate court decision.

⁴⁴⁴ Baruffi, Fratea, Peraro, *Report on the Italian good practices*, <http://www.eufams.unimi.it/2017/01/10/italian-report-on-good-practices/>

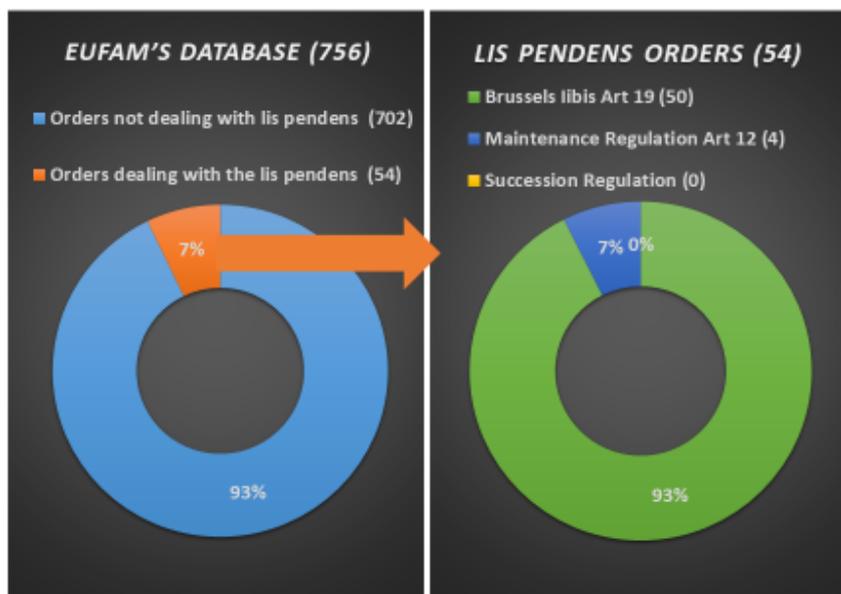
⁴⁴⁵ Escher, Wittmann, *Report on the German good practices*, <http://www.eufams.unimi.it/2017/01/10/german-report-on-good-practices/>

⁴⁴⁶ Župan, Drventić, *Report on the Croatian good practices*, <http://www.eufams.unimi.it/2017/01/10/croatian-report-on-good-practices/>

II. EUFAM'S DATA BASE ON *LIS PENDENS*

Data base created under the project contained 756 decisions in total on 1st December 2017. Out of the total number 54 were *lis pendens* orders. Most of them, 50, related to application of Brussels II a, 4 related to Maintenance Obligations Regulation and none was identified in relation to Successions Regulation.

Figure 1. Data base on *lis pendens*



III. PRACTICE OF THE NATIONAL COURT OF THE MEMBER STATES

National case in relation to *lis pendens* may be classified in several categories. Rough classification would be to cases with: a) smooth application of the rules; b) false application of the rules; c) problematic application of the rules.



a) Smooth application

Smooth application of the rules is evidenced in number of cases where rules preventing parallel procedures functioned well. Several categories were identified. Among the category of complex cases with interrelated matters on several attributed claims *lis pendens* was triggered in different scenarios. The objective scope of *lis pendens* was questioned here. Some of the issues were outside the scope of EU regulations, i.e. matrimonial property action does not develop parallel procedure effect in relation to divorce action brought before a different Member State court. In other cases issues were within the EU scope in complex actions involving divorce and other claims including parental responsibility/maintenance. National courts properly concluded that Brussels Ila applies in a case only to that specific part of the claim and leaves the rest of the claim unaffected. The conclusion of a court that isolated maintenance claim of a spouse against other spouse does not develop *lis pendens* effect with relation to a divorce action brought before different Member State court is equally well found.

National court dealt with a question if the second seized court should *dismiss* or *stay* the procedure, where the conclusion was reached that appropriate method of declining jurisdiction is to dismiss the petition.

In some national cases the parties objected *lis pendens* in later stage of parallel procedures. The court which was obviously first seized could not even apply the *lis pendens* because the court obviously second seized already rendered a decision. Hence, instead of *lis pendens* court dealt with *res iudicata*.

National courts had to deal with proper procedural matters as well, to draw a line of a distinction between the assessment of the *lis pendens* situation and the assessment of jurisdiction. In national practice courts positively determined its jurisdiction pursuant to Article 3(1)(b) (parties' common nationality) and only afterwards dealt with the question concerning the date of commencement of both proceedings for the purpose of *lis pendens*.



b) False application

False application of the rules has been detected in national case law as well. False application amounts to clear departure from the provision of relevant regulation. It also amounts to disregarding the previously set CJEU standards of interpretation. The latter is particularly relevant due to the CJEU interpretation in case C 406/09, clearly stating that Brussels I cases apply by analogy. Case law reveals false procedural distinction between the assessment of the *lis pendens* situation and the assessment of jurisdiction. Hence, the court of first instance could not decline its jurisdiction without previous examination of the facts regarding *lis pendens*. In another case the court correctly established its own jurisdiction and then established *lis pendens*, but then falsely engaged with establishing the facts that provide ground for the jurisdiction of the court first seized. Such court second seized actually undertook a review of the jurisdiction of the court first seized, which is clearly sanctioned by CJEU in C 351/89 Overseas Union Insurance Ltd, 27 June 1991.

In some situations the proceedings in the court first seized last extensively too long. However, the court second seized had to acknowledge that regardless of the passed time (even if the court first seized was inactive), the *lis pendens* rule remains untouched. Such standing was previously confirmed by CJEU in C-116/02 Gasser, 9 December 2003.

National case law evidences a clash with national procedure as well. One of the prominent examples of diversity of national procedural rules is the provision on holding a jurisdiction. Hence, many national procedural systems do not have a clear stage/moment to declare the court holds jurisdiction. Thus, the court second seized remains in doubt whether the court first seized accepts jurisdiction over the case. The provision on *lis pendens* determines that the court second seized must stay its proceedings until such a time that the jurisdiction of the court first seized is established.



In a number of national cases abduction proceedings was pending in one Member State and parental responsibility procedure in the other Member State. Such a situation does not amount to a parallel procedure, as confirmed by CJEU.⁴⁴⁷

Similar scenario is the pendency of a procedure upon provisional measure in one Member State and parental responsibility procedure in the other Member State. Equally to the previous example with abduction proceedings, this situation does not amount to a parallel procedure, as confirmed by CJEU in C 296/10, 31 May 2010, Bianca Purrucker v Guillermo Vallés Pérez.

Rare but still identified scenario is with negative declaratory judgement in maintenance matters. Here the application of Brussels I case law becomes relevant again.⁴⁴⁸ A much awaited clarification of the CJEU would come with judgement in case C 467/16. So far, the opinion of Advocate General Szpunar in this case clarifies that:

“The cause of action comprises the facts and rule of law relied on as the basis of the action and the object of the action means the end that the action has in view. It is sufficient that the actions have, in essence, the same subject matter: the claims are not required to be entirely identical. The converse situation of an action for a declaration of non-liability being followed by an action for damages has also been the subject of a ruling. In that respect, the latter action has the same object as the former, since the question of the existence or nonexistence of liability is the focus of the proceedings. The different heads of claim do not mean that the two legal actions have different objects.” Opinion of AG Szpunar in C-467/16, para 31.

c) Problematic application

Problematic application of the pendency rules amounts to situations where legal gaps exist in the regulatory scheme, and no CJEU ruling provides for acceptable interpretation. Such a scenario results with diverging interpretation in different Member

⁴⁴⁷ “Such an action, whose object is the return, to the Member State of origin, of a child who has been wrongfully removed or retained in another Member State, does not concern the substance of parental responsibility and therefore has *neither the same object* nor the *same cause* of action as an action seeking a ruling on parental responsibility.” CJEU, case C-376/14 PPU, 31 July 2014 para 40, C v M; also Purrucker, CJEU, case C-296/10, para 68.

⁴⁴⁸ CJEU, case C-406/92, 6 December 1994, Tatry; C-144/86 8 December 1987, Gubisch Maschinenfabrik.



States. The main points of departure in this third set of cases are how to establish if the other court has been seized and how to establish/interpret the procedural law of the other Member State. A glance on CJEU fresh case law on *lis pendens* reveals the problems are symptomatic for entire civil justice area.⁴⁴⁹

In these cases sometimes the evidence was lacking, but there was an objection of *lis pendens*. Subsequent question relates to the issue if court collects evidence on *lis pendens ex officio* or not? If we take the doctrinal point that it is done *ex officio* by the court, we end up with a new lacuna in a scenario where a case, i.e. upon successions, is handled by a notary instead of a court, since no cooperation mechanism is at their disposal.

Another scenario equally symptomatic for entire civil justice area is the problem of establishing the moment the court is seized in event of a preliminary or similar procedure predating the substantive procedure, which is required by law to initiate the procedure on the substance. In divorce cases Member States national family law often prescribes obligatory mediation before a divorce. In the context of our topic it becomes relevant if the *lis pendens* is activated with the launch of the “preliminary” mediation procedure, or only with the divorce petition before the court (when in terms of national procedure the case starts pending). Advocate General Szpunar employed a valuable *functional interpretation* on the matter:

“My proposed answer to the question of the referring court is, therefore, that in a situation such as that in the main proceedings, where a conciliation procedure is an obligatory step which has to be followed before a case can be brought before a court and where a conciliation procedure and an ensuing procedure before a court are considered as comprising two separate parts of the judicial procedure, a court has been seised under Articles 27 and 30 of the Lugano II Convention at the moment the conciliation authority is seised, provided that the plaintiff has undertaken all necessary steps incumbent on him to continue the procedure before a court.” Opinion of the AG Szpunar, C-467/16, para 52.

⁴⁴⁹ CJEU, case C-29/16, *Hanse Yachts AG v Port D’Hiver Yachting SARL, Société Maritime Côte D’Azur, Compagnie Generali IARD SA*, 4 May 2017; CJEU, case C-173/16, *M. H.v.M. H.*, order of the Court, 22 June 2016; Case C 523/14, *Aannemingsbedrijf Aertssen NV et.al.*, 22 October 2015.



A great number of national cases faces the problem of parallel procedure in relation to a Third State. General approach of the regulatory scheme in international family and successions matters is that no rule is prescribed. Unfortunately, neither has the CJEU rendered a decision on this matter. National case law proves that the area remained controversial with two different approaches followed by the Member States' courts. In some Member States the ongoing Third state procedure is respected, while in the other it is ignored (due to Owusu judgement and exclusive nation of the EU jurisdictional rules). This legal lacuna creates an unwanted effect, as parallel procedures are fostered. The situation bears a qualified burden in scenario where parallel procedure exist in a Hague 1996 Contracting state. *Perpetuatio fori* principle, adhered by the Brussels II a regulation causes additional obstacles in serving justice in cases where child lawfully moves to a 1996 contacting state but the procedure is already pending somewhere in the EU.

D. EVOLUTION OF AN APPROACH TO COMBAT PARALLELISM OF PROCEDURES

Uniform rules, ones applied in national case law, present its benefits but also its shortcomings. EU is keen to undertake revision of each piece of the regulation over the time, particularly to address the problems in its application. Provisions on *lis pendens* and related actions of the Brussels IIa, Maintenance Regulation and Succession Regulation follow the model established with Brussels Convention regime. However, relevant area has been significantly upgraded by the CJEU interpretations, and accordingly altered by the Brussels Ia regulation. The Brussels II a recast procedure is ongoing for several years, hence it is in accelerated procedure currently. The Recast Proposal however does not introduce any significant change to the *lis pendens* rule. The provision remains untouched, though some change derives out of the disconnection clause of Article 75(2)(c) of the Proposal. Despite the disconnection clause rule that Regulation takes priority if a child is habitually resident in a Member States, by virtue of



Recast rules the prior proceedings in Hague Contacting 1996 State may be taken into account.⁴⁵⁰

Accordingly, the Brussels II ter Recast proposal is applaudable for some improvements in parallel procedures fight arena, leaving other problematic or unclear issues untouched. Background documents used by the Commission before it launched the Recast procedure, particularly the *Study on assessment*⁴⁵¹ directed to some problematic points in application of the *lis pendens* rule. However, the attached statistical data offered no clear indication to major problems in application of pendency rules. However, the EU Fam's National Reports, Report to the good practice, and particularly the data base, signal that action is needed in this area as well. Our study indicates that current rules are encouraging forum shopping within Europe and support unjust "tactical" litigation. Collection of 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. In respect of other identified issues the evolution accomplished in the context of the Brussels Ia should not be overseen. Attitude towards abolishing a parallelism of procedures in should be advocated, with certain amendments that go even beyond that prototype model. Consequently more clarity and certainty would be assured in the EU civil justice area. Aspects highlighted here should thus be translated into a series of new provisions. Some of the problems particularly relate to maintenance claims, hence they should be taken into account in the future recast of that Regulation.

Several aspects deserve instant attention.

Conduct of the applicant. 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

⁴⁵⁰ "Article 75 C (c) where proceedings relating to parental responsibility are pending before an authority of a State Party to the 1996 Hague Convention in which this Regulation does not apply at the time when an authority in a Member State is seised of proceedings relating to the same child and involving the same cause of action, Article 13 of that Convention shall apply."

⁴⁵¹ Study on the assessment of Regulation (EC) No 2201/2003 and the policy options for its amendment. FINAL REPORT. Evaluation. Analytical annexes. Directorate-General for Justice and Consumers, 2015. http://ec.europa.eu/justice/civil/files/bxl_ia_final_report_evaluation.pdf



party, a special provision or recital should be added, requiring the party that first filed the suit to actively pursue the court proceeding.⁴⁵² 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 the purpose of determining whether the jurisdiction of the court first seized 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 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

⁴⁵² As suggested in the Report on the German Good Practices, p.4 (1.3.), p.13 (Conclusions).



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.

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 II a 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 a EU court which is seized may not be declined. On the other hand Article 13 of the Hague 1996 Convention prevent 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.

Lis pendens with third States. 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 proceedings is subject to conditions prescribed by national law. Some Members 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.

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 Recast Regulation of Brussels IIa is modelled on respective provision of Article 29 para. 2 of the Brussels I a regime should prescribe that upon



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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.



CHAPTER 6. APPLICABLE LAW

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A. OBJECTIVE CRITERIA: THE QUEST FOR COORDINATION⁴⁵³

I. THE FRAGMENTATION OF EU PRIVATE INTERNATIONAL LAW IN FAMILY MATTERS AND SUCCESSION

The most recent legislation of the European Union on family matters is spread over multiple Regulations that regulate relations of a different nature, but that are interconnected in a fragmentary manner, and for which unitary treatment would be convenient. The EU system of Private International Law in family matters has progressively extended its scope from divorce and legal separation⁴⁵⁴ to the related aspects of family life.⁴⁵⁵ The system is approaching a further extension once the new regulations on property regimes in respect of marriage and of registered partnerships will be in force.⁴⁵⁶ Actually, this will occur at least for the Member States that will take part in the enhanced cooperation, which is the road taken by the European legislator in order to have the two regulations adopted.⁴⁵⁷ On 9 June 2016, the Council adopted Decision (EU) 2016/954 authorising such enhanced cooperation. Seventeen Member States addressed a request to the Commission indicating their wish to establish enhanced cooperation between themselves after the failure, in December 2015, to reach

⁴⁵³ This paragraph shall be attributed to: Ilaria Viarengo.

⁴⁵⁴ Brussels IIa Regulation and Rome III Regulation.

⁴⁵⁵ Maintenance Regulation; Hague Maintenance Protocol.

⁴⁵⁶ Matrimonial Property Regime Regulation; Regulation on the Property Consequences of Registered Partnerships. Both Regulations will entry into force in the EU Member States participating in enhanced cooperation on 29 January 2019.

⁴⁵⁷ Cfr. Council Decision (EU) 2016/954 of 9 June 2016 authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships, OJ 2016 L159, 16.



a political agreement among all Member States on the proposals relating to matrimonial property regimes and registered partnerships adopted on 16 March 2011.⁴⁵⁸

The objective of all these regulations is to increase legal certainty, predictability and party autonomy with the ultimate goal of removing the obstacles to the free movement of persons.

Divorce proceedings, maintenance obligations, and matrimonial property regimes have been kept conceptually separate in the framework of the European Union's law, and have been regulated with different regulations, which, in their scope, provide for express and mutual exclusions. Nonetheless, in practice these matters are often addressed in the same action for divorce. Issues such as assigning the matrimonial home, and the definition of the obligation of one spouse to support financially the other are strongly and substantially connected to the ruling on divorce, and to the conditions and reasons that ground that ruling.

Furthermore, the Succession Regulation comes in the picture.

The strong interaction in every legal system between matrimonial property and succession laws justifies the need for coordination with respect of jurisdiction and of the applicable law to both. Characterization problems regarding borderline rules between matrimonial property and succession laws, as well as consistency and adaptation problems related in particular to the protection of the surviving spouse or partner can arise with the application of different laws. In practice, provisions for liquidation under property regimes are frequently in question preceding the liquidation of the estate of a deceased. In this regard, and in almost all legal systems, the extent of the participation of the surviving partner or spouse to the succession is affected by the marriage or partnership property rules. In systems where the legal regime is the shared-property regime, this participation is generally less significant. By contrast, in those States where the properties of the spouses or partners are separate property, such participation tends to be wider. Therefore, it would be advisable to submit all of these questions to a single, national law.

⁴⁵⁸ COM(2011) 126 final and COM(2011) 127 final.



Put in other words, the matrimonial regime may considerably modify the outcome of the rights of the spouse to the estate.

The importance of these issues is in fact likely to increase because the number of couples with an international dimension is increasing: spouses of different nationalities, spouses of the same nationality but living in a state where they are not nationals, or owning assets in different states or even couples divorcing or dying in a country other than that of their origin. The mobility of persons is increasing as well as, the trend to get divorced.

Coordination between divorce and the financial aspects of family life, i.e. property and maintenance, and between succession and property is also needed for practical reasons related to the interests of the parties concerned. The Commission has declared to be aware of the interrelationship between divorce and ancillary financial matters.⁴⁵⁹ The quest for coordination plays an essential role in the jurisdiction rules of the most recent regulations in the field of matrimonial property and in the field of property effects of registered partnership.⁴⁶⁰ Therefore, the two regulations contain special rules in order to ensure the concentration of proceedings. The Regulation Brussels IIa is currently under revision. After its adoption in 2003 the Maintenance Regulation⁴⁶¹ and very recently the two Regulations regarding property have been adopted. Unfortunately, the need of coordination with respect to jurisdiction between divorce and its financial consequences has not been taken in account in recasting Brussels IIa.

Provided that the final and principal objective (goal) of the EU family law legislation is “of maintaining and developing an area of freedom, security and justice in which the free movement of persons is ensured”⁴⁶² from a practical point of view two needs seem to be overly relevant. Firstly, the need to avoid litigation proceedings in different

⁴⁵⁹ “The Commission is aware that the question of applicable law in divorce matters cannot be examined in isolation from these ancillary matters and will therefore carefully consider the interrelationship between the different issues when preparing future projects.” COMMISSION STAFF WORKING PAPER - Annex to the Green Paper on applicable law and jurisdiction in divorce matters, SEC(2005)331 of 14 March 2005

⁴⁶⁰ Recital 32 of both Regulations.

⁴⁶¹ 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, OJ 2009 L 7, 10 (hereinafter referred to as the “Maintenance Regulation”).

⁴⁶² Recital 1 Matrimonial Property Regime Regulation.



jurisdictions with the duplications of proceedings and expense. Secondly, given the ties between these fields of law, it would be advisable that divorce and all the financial aspects on the one hand and succession and property aspects, on the other one, be governed by the same law.

II. THE QUEST FOR COORDINATION: A TEST CASE

As already said, it is highly advisable to allow the same law to govern all different issues related to the dissolution of the marriage or partnership.

Although it is true that in the different EU legislative texts the same connecting factors (in particular habitual residence and nationality) have been generally used, it is nevertheless also true that the moment they are referred to is often different. As a result, the applicable laws can prove to be different.

Article 26 of the Matrimonial Property Regime Regulation refers to the common, habitual residence at the time of marriage as the first connecting factor in a cascade of connecting factors, whilst Article 8 of Rome III refers to the moment at which the court is seized for divorce proceedings. On its part, the Maintenance Protocol establishes, as general rule, the application of the law of the current habitual residence of the creditor,⁴⁶³ or, in certain circumstances, the law of the State to which the spouses are more closely connected, in particular that of their last common habitual residence.⁴⁶⁴

The Matrimonial Property Regime Regulation does not contain a specific provision to apply the same law as to divorce and legal separation, as, on the contrary, it explicitly provides for the determination of jurisdiction. Without a parties' agreement, a dissociation between the applicable laws may frequently happen.

A similar dissociation may also result with respect to the law applicable to maintenance. At this regard, the choice of the first common habitual residence as immutable connecting factor in the Matrimonial Property Regime Regulation may have undesirable consequences. In case of a change of residence by the spouses, the law of the first common habitual residence of the spouse inevitably differs from the law which is

⁴⁶³ Article 3.

⁴⁶⁴ Article 5.



applicable to other related issues under the EU regulations. Suffice it here to take the following example.

A German husband and a Czech wife, after having lived in Germany, move to Spain, where after several years apply for divorce. In this case, the proceedings can be concentrated in one single court, pursuant to Article 5(1) of the Matrimonial Property Regime Regulation and Article 3(c) of the Maintenance Regulation. On the contrary, divorce and the connected issues are not subject to a single law. German law would be applicable for matrimonial property, as the law of the first habitual residence of the spouses after marriage, according to Article 26(1)(a) of the Matrimonial Property Regime Regulation. Spanish law would apply to the divorce, as the law of their habitual residence at the time the court is seised, pursuant to Article 8(a) of Rome III as well as to maintenance, pursuant Article 3 of the maintenance protocol.

The scenario will get more complicated if the husband in this example, after the couple have lived together in Germany and then in Spain, moves to another country, such as France. After one year, he files for divorce there. Again, the concentration of the proceedings in the same jurisdiction is still possible, but not automatic. The jurisdiction of the French court is based on Article 3(1)(a) fifth indent of Brussel IIa because it is the court in which the applicant is habitually resident for at least a year immediately before the application. In order to have the related matrimonial property issues also handled by the French court, a choice-of-court agreement is needed, pursuant to Article 5(2)(a) of the Matrimonial Property Regime Regulation.

As regards applicable law, assuming that the wife is the maintenance creditor, the French law will apply to the divorce, as law of the forum, the German law to matrimonial property, as the law of their first, common, habitual residence after the marriage, and the Spanish law to maintenance, as the law of the habitual residence of the wife.



In order to overcome the difficulties of the application of different laws to intertwined issues arisen in the same situation, the parties could conclude a choice of law agreements as provided in all the instruments at stake.⁴⁶⁵

III. ASSESSMENT OF THE CASE-LAW

The case law shows the difficulties of the judges to correctly apply the relevant regulations with regard to jurisdiction as well as applicable law.

Sometimes the courts do not examine their international jurisdiction at all and immediately revert to the national conflict-of-laws rules.⁴⁶⁶ More often, they examine their international jurisdiction, but do not apply all the relevant Regulations. Divorce, maintenance obligations, assigning the matrimonial home and parental responsibility issues are often addressed in the same proceedings for divorce. The courts not always examine their international jurisdiction regarding all aspects of the case. They correctly apply Brussels IIa Regulation regarding divorce and then they (wrongly) extend their jurisdiction to the related maintenance and parental responsibility issues, without even examining the possibility of applying the Maintenance Regulation or Article 8 of the Brussels IIa Regulation.⁴⁶⁷

Regarding applicable law, first, it often occurs that maintenance, as well as parental responsibility issues, are regulated as if they were “*de-facto* issues”, without any reference to the relevant Regulations. The courts, after having established their jurisdiction on the basis of the Brussels IIa Regulation and the Maintenance Regulation, rule on the merit, applying their own law.⁴⁶⁸ Second, other judgments apply national

⁴⁶⁵ See Gonzales Beilfuss, *The role of party autonomy in pursuing coordination*, in this EU Fam's Final Study, 176.

⁴⁶⁶ Krajský soud v Českých Budějovicích, 7 April 2008, 5 Co 732/2008, CZS20080407; Audiencia Provincial Barcelona, 4 February 2015, 53/2015, ESS20150204; Audiencia Provincial Islas Baleares, 2 March 2015, 77/2015, EES20150302; Audiencia Provincial Barcelona, 20 October 2015, 661/2015, ESS20151020.

⁴⁶⁷ Audiencia Provincial Barcelona, 18 July 2013, 551/2013, ESS20130718; Audiencia Provincial Barcelona, 17 November 2015, 828/2015, ESS20151117.

⁴⁶⁸ Tribunale di Milano, 11 June 2012, IT20120611; Tribunale di Milano, 23 July 2012, IT20120723; Tribunale di Milano, 14 February 2013, IT20130214; Audiencia Provincial Barcelona, 19 July 2013, 57172013, ESS20130719; Audiencia Provincial Barcelona, 4 February 2015, 53/2015, ESS20150204; Audiencia Provincial Barcelona, 20 October 2015, 661/2015, ESS20151020. Krajský soud v Českých Budějovicích, 5 April 2011, Co 781/2011, CZS20110405; Cour d'appel de Lyon, 27 June 2011, 10/05170, FRS20110627a; Okresný súd Lučenec, 21 November 2013, 17P/171/2012, SKF20131121; Okresný súd



conflict-of-laws rules to situations falling into the temporal scope of the supranational uniform rules.⁴⁶⁹ Last, some courts rightfully apply Rome III Regulation rules (or the national PIL rules, if the situation falls outside the temporal scope of said Regulation) in order to determine the law applicable to legal separation and divorce; the law thus found regulates also other claims (mainly maintenance ones) without any further consideration of their specific conflict-of-laws issues.⁴⁷⁰ Fortunately, there are some examples of good practice as well.⁴⁷¹

B. THE ROLE OF PARTY AUTONOMY IN PURSUING COORDINATION⁴⁷²

I. INTRODUCTION

One of the most salient features of EU Family choice of law instruments is that they recognise party autonomy, i. e. that parties are permitted to conclude agreements designating the applicable law. Article 5 of the Rome III Regulation establishes that spouses may agree to designate as the law applicable to their divorce or legal separation

Dunajská Streda, 4 March 2014, 9P/88/2013, SKF20140304; Krajský soud v Brně, 3 October 2014, 14 Co 70/2014, CZS20141003; Krajský súd Žilina, 21 May 2015, 5CoP/37/2012, SKS20150521; Općinski sud u Splitu, 22 December 2015, Pob - 341/14, CRF20151222; Općinski sud u Požegi, 11 March 2016, P-Ob-28/15-12; CRF20160311; Općinski sud u Sisku, 18 March 2016, P-Ob-578/15, CRF20160318.

⁴⁶⁹ This happened in only two cases decided by the same Court on the same day: Tribunale di Pavia, 20 August 2015, ITF20150820a; Tribunale di Pavia, 20 August 2015 No 868, ITF20150820b. In both judgments, the Court applied Italian law *ex Article* 31(1) of Italian Law No 218/1995 as the law of the country in which the matrimonial life was mainly located. However, given the similar nature of that connecting factor and the spouses' habitual residence (recalled in Article 8(a) and 8(b) of Rome III Regulation) and considering that in both cases the spouses had different nationalities, Italian law would have been applied as well, even if the Courts had made due reference to the Rome III Regulation.

⁴⁷⁰ See, among many, Tribunale di Belluno, 30 December 2011, ITF20111230; Tribunale di Roma, 14 June 2013, ITF20130614; Tribunale di Roma, 25 October 2013, ITF20131025a; Tribunale di Roma, 25 October 2013, ITF20131025b; Tribunale di Roma, 27 August 2014, No 17456, ITF20140827; Audiencia Provincial Barcelona, 4 February 2015, num. 53/2015, ESS20150204; Tribunale di Pordenone, 10 June 2015, ITF20150610; Audiencia Provincial Barcelona, 23 July 2015, num. 549/2015, ESS20150723; Audiencia Provincial Vizcaya, 24 February 2016, num. 117/2016, ESS20160224.

⁴⁷¹ For a correct and precise coordination among several legal sources (EU instruments and national law) see: Tribunale di Roma, 6 November 2013, ITF20131106; Audiencia Provincial Barcelona, 30 October 2014, 665/2014, ESS20141030; Audiencia Provincial Barcelona, 11 December 2014, 773/2014, ESS20141211; Tribunale di Belluno, 23 December 2014, ITF20141223; Audiencia Provincial Barcelona, 8 January 2015, 10/2015, ESS20150108; Tribunale di Roma, 2 July 2015, 14412, ITF20150702; Tribunale di Roma, 2 October 2015, 19765, ITF20151002; Tribunale di Belluno, 24 May 2016, ITF20160524.

⁴⁷² This paragraph shall be attributed to: Cristina González Beilfuss.



the law of the State where the spouses are habitually resident at the time the agreement is concluded; or the law of the State where the spouses were last habitually resident, in so far as one of them still resides there; or the law of the State of nationality of either spouse or the law of the forum. Article 8 of the Hague Protocol on the law applicable to maintenance obligations likewise establishes that the maintenance creditor and debtor may at any time designate as applicable to a maintenance obligation the law of any State of which either party is a national at the time of the designation; the law of the State of the habitual residence of either party; the law designated by the parties as applicable, or the law in fact applied, to their property regime or the law designated by the parties as applicable, or the law in fact applied, to their divorce or legal separation. The Matrimonial Property Regulation also provides in Article 22 that the spouses or future spouses may agree to designate the law applicable to their matrimonial property regime, provided that this law is either the law of the State where the spouses or future spouses, or one of them, is habitually resident; or the law of a State of nationality of either spouse or future spouse at the time the agreement is concluded. The Registered Partnership Regulation contains a parallel provision in connection to the property effects of registered partnership.

Party autonomy is thus a characteristic and structural element of the EU choice of law system in Family matters. Even though limited to legal systems close to the legal relationship in question, spouses or partners have the power to determine the law that governs their relationship. Objective choice of law rules based on the principle of proximity only apply when the parties do not choose the applicable law, or the choice made turns out to be invalid.

The EU Private international law system has progressed step by step, through the enactment of singular pieces of legislation that do not always work well together. A deficit in coordination between the different building blocks is, in fact, one of the main criticisms that has been voiced in legal writing. Since the main rule in choice of law is the party autonomy rule it makes sense to pose the question as to whether coordination can be achieved through party autonomy. In the context of choice of law, where the function of legal rules is to establish the law that governs a given relationship,



coordination can be supposed to mean that distinct aspects of a legal dispute are subject to the same system of law.

Coordination is desirable from a PIL perspective because it prevents characterization and adaptation difficulties. If matrimonial property and maintenance claims are governed by the same substantive law, it does in practice not matter very much whether a particular financial relief claim falls under one or the other choice of law rule. Since matrimonial property and maintenance obligations between former spouses are attuned to each other in a given legal system, the fact that both matters are governed by the same substantive law avoids incoherent results that would require an adjustment by the competent authority. It is also unquestionable that dispute resolution is easier and therefore cheaper and quicker, if the competent authority does not have to combine the application of substantive rules pertaining to different legal systems to one dispute.

II. THE JUSTIFICATION OF PARTY AUTONOMY

Before examining whether the party autonomy rule contributes to coordination it is worthwhile inquiring about the theoretical justification for the party autonomy rule in EU International Family law. The rationale of a legal rule is its intellectual backbone and provides internal logic and coherence. If the pursuit of coordination were determined to be part of the rationale of the party autonomy rule, any deficits of coordination would be essential shortcomings. If, on the contrary, the party autonomy rule was justified by considerations alien to coordination and coordination were so to speak merely a side-effect of the exercise of party autonomy, deficits in the pursuit of coordination would be less grievous.

Uncovering the justification for the party autonomy rule in International Family law would require an in-depth examination that is not feasible in the context of this conference paper. It is however possible to examine the reasons given by the legislator in the Recitals of the Regulations or the Explanatory Report to The Hague Protocol to try to understand why the European legislator decided to expand the party autonomy rule and turn it into the primary choice of law rule in International Family law.



Recital 15 of the Preamble to the Rome III Regulation justifies the introduction of the party autonomy rule by referring to the concepts of flexibility and legal certainty and connecting these with an increased mobility of European couples. The explanation lacks clarity, essentially because all these concepts are buzz-words that appear again and again in Preambles and court decisions and seem to serve multiple purposes.

The rationale of the party autonomy rule is a bit further revealed in the Bonomi report to The Hague Protocol. There it is stated that the party autonomy rule secures a measure of stability and foreseeability. This suggests that the party autonomy rule is established essentially in the interest of individuals, who need a legal framework that allows them to anticipate what the applicable law is before any dispute arises and the competent authority intervenes. This interpretation is confirmed by Recital 45 of the Matrimonial Property Regulation that very clearly states that party autonomy has been introduced to facilitate to spouses the management of their property.

Allowing spouses or partners to designate the applicable law is intended to facilitate that families take the management of their affairs into their own hands. Informed decision making, which is part of the right to self-determination that is today an essential aspect of family law, is always made in the shadow of the law. In an international context it is essential to establish which is the legal system that provides the legal background to the agreements and decisions that shape family life. This is the more necessary in the context of a PIL system that has embraced habitual residence as the main objective connecting factor. Habitual residence can be easily changed and can be uncertain because it requires weighing different objective and subjective factors. Party autonomy can be used to anchor all kinds of agreements and decisions in the chosen legal system. It avoids the risks associated to the uncertainties connected to the determination of the applicable law by the competent authority and therefore increases the chances that agreements and decisions will be found in conformity to the law, because this law was probably consulted and taken into account when the agreement was made.

If the rationale of the party autonomy rule is the empowerment of families, its role in the pursuit of coordination is essential to evaluate whether the rule serves its purpose. For the reasons mentioned before, because coordination prevents the appearance of



characterization and adaptation difficulties that destabilize the legal framework; and also because the matters covered by the different instruments very often come together, precisely at the moment when families cease to be families and are at risk of not agreeing about anything.

III. COORDINATION THROUGH THE EXERCISE OF PARTY AUTONOMY: THE TEST CASE

To determine whether party autonomy can be exercised to achieve coordination it is useful to look particularly into its role in a divorce scenario. What would happen if Giacomo of Italian nationality and Carmen of Spanish nationality, a married couple residing in Belgium would after twelve years of marriage decide to divorce?

Rome III would certainly allow them to designate either Belgian (the law of their common habitual residence), Spanish (the law of the wife's nationality) or Italian law (corresponding to the husband's nationality). If they decided to select Spanish law, that is at present very divorce-friendly, they would as well be able to designate it to any maintenance-claims between them. Giacomo and Carmen would also be able to establish Spanish law as the law governing their matrimonial property regime, but their choice would in principle not have retroactive effects unless they so decided and in this case without any prejudice to third parties.

IV. LIMITATIONS TO COORDINATION

At first sight it therefore seems that the party autonomy rule can essentially contribute to the achievement of coordination. There are however certain limitations that become apparent upon further reflection.

The first important limitation appears if Giacomo and Carmen have minor children and the divorce court is required to also take a decision on parental responsibility. The law applicable to parental responsibility would be the law of the habitual residence of the child i.e. Belgian law. Giacomo and Carmen have no possibility to choose Spanish law neither to parental responsibility matters nor to maintenance obligations towards the children. The Divorce court would thus be required to apply Belgian law and Spanish law in combination.



The ability to choose the applicable law furthermore depends on whether the divorce claim is filed with a court recognizing the party autonomy rule. If the case would finally be heard by a court of a State outside the EU or even by the Court of a Member State not bound by Rome III and the Matrimonial Property Regulations the parties' choices would probably be disregarded. Unlike in Contract law, party autonomy is not a general principle of International Family law. A major shortcoming of the party autonomy principle is therefore that spouses do not have the power to designate the divorce court to make sure that their choices as to the applicable law will be respected. Much would therefore be gained if the Brussels II a Regulation were amended to provide for a rule on prorogation of jurisdiction in matrimonial matters. Its absence is furthermore unjustified in view of the rule on prorogation in parental responsibility matters contained in Article 12(3) Brussels IIa.

What is however very often overlooked in the analysis is that most divorces are mutual consent divorces. This surely has an impact on the decision where to file divorce which can be assumed to be a joint decision. If Giacomo had left Carmen and settled in for example Sweden, a Member State not bound by Rome III and the Matrimonial Property Regulations, and the couple agreed as to the decision to divorce, they could choose to file the divorce petition in Belgium (the State of former common habitual residence), provided that Carmen had stayed in Belgium. If she had moved back to Spain they would be free to agree on filing the claim either in Sweden or in Spain.

But while they can agree on designating the competent authority and therefore can be said to enjoy a certain degree of party autonomy if they also agree in substance, what Brussels II a does not foresee is a prorogation agreement concluded when divorce is a mere hypothesis. Spouses are free to choose the law applicable to their divorce and the law applying to maintenance claims and matrimonial property at any, in the prospect of future divorce that may or may not occur, but at that moment they are not able to select the competent authority. Consequently, they are at the mercy of each other, if they finally decide to divorce. In the worst scenario, if divorce is contentious Giacomo and even Carmen might be able to deactivate any agreements concluded on the applicable law by filing the law suit in Sweden.



There are many voices calling for allowing party autonomy in connection to jurisdiction in matrimonial matters. Proposals are usually quite unspecific as to what is exactly meant. As we have seen, spouses already have some room for it under the present norms, if they decide to divorce by mutual agreement. The real question therefore is if they should be allowed to select the competent authority before the dispute arises.

A prorogation rule that would allow them to select the competent authority for a future divorce might in my view not be compatible with fundamental rights, if it bound one spouse to necessarily file divorce in one jurisdiction that might be difficult to access.

Imagine that Giacomo and Carmen had decided for the Belgian courts, that Giacomo had gone to Italy and wanted a divorce that Carmen would be against. If this agreement created an exclusive forum in Belgium Giacomo might in practice perhaps not be able to divorce. Or more realistically divorcing Carmen would come with difficulty and expense. In her wonderful book on contracts in family law Martha M. Ertman explains how she inserted a so-called Ulysses clause into a family law contract with the father of her child. They included a forum selection and choice of law clause in favour of the courts and the law of Massachusetts at a time when the parties were living in Texas and Utah. “This little clause” she writes “erected a huge logistical and financial barrier to courtroom battle”. She argues that such a clause functions like a Ulysses clause tying Ulysses to the mast so that he can steer the ship past the mermaids famous for their beautiful songs that enchant sailors to dive into the sea and to their deaths. The clause in fact creates a powerful incentive to reach agreement. It is either agreement or huge lawyer’s fees.

But while this may function in some cases, particularly among law professors like Martha Ertman and the father of her child, other partners would in such a circumstance choose to merely go factual. Because divorce is difficult and expensive, why not simply forget that one is married. If the former partner lives in another country many might think that getting a divorce decision is not so important after all. Only to perhaps discover later on that it does matter. And not only to Giacomo but to the new family that he might have created.



V. EVALUATION

The party autonomy rule can thus play a key role in the pursuit of coordination. From the viewpoint of the parties however coordination might mean something different than simply applying the same law. If the party autonomy rule serves essentially party interests in providing a stable framework for individual decisions and agreements it might still be possible to subject connected issues to different legal systems, provided that they work well together. As we saw before, parents are not able to designate the law applicable to parental responsibility matters which are primarily governed by the law of the State of the child's habitual residence. But since there is a lot of common core in parental responsibility legislation in European legal systems it might actually not be very important. Likewise, if the chosen matrimonial property regime is separation of property the difficulties associated in having to apply foreign law and in subjecting maintenance obligations to a different legal system than matrimonial property might in the end not be substantial.

C. THE 1996 HAGUE CONVENTION ON THE PROTECTION OF CHILDREN⁴⁷³

I. INTRODUCTION

The Brussels IIa Regulation only provides for rules concerning jurisdiction, recognition and enforcement of decisions, and co-operation between central authorities. Consequently, there is no EU PIL instrument regulating the law applicable to parental responsibility matters, as opposed to matrimonial matters in relation to which the Rome

⁴⁷³ This paragraph shall be attributed to: Maria Caterina Baruffi.



III Regulation⁴⁷⁴ governs the law applicable to divorce and legal separation for those Member States that participate in this enhanced cooperation.⁴⁷⁵

This legislative gap is however filled by another international legal instrument, namely the Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures of protection of children,⁴⁷⁶ which has entered into force, among others, for all EU Member States.⁴⁷⁷ Prior to that, each Member State had to refer to its domestic PIL statutes, with the consequence that the legal certainty could practically be compromised.

⁴⁷⁴ 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 (Rome III Regulation) [2010] OJ L343/10. See generally Baruffi, 'Il regolamento sulla legge applicabile ai 'divorzi europei'' (2010) 16 *Il Diritto dell'Unione europea* 867-893; Viarengo, 'Il Regolamento UE sulla legge applicabile alla separazione e al divorzio e il ruolo della volontà delle parti' (2011) 47 *Rivista di diritto internazionale privato e processuale*, 601-624.

⁴⁷⁵ The Member States currently participating in the enhanced cooperation (as of 2 November 2017) are the following: Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania, Slovenia and the three that have joined at a later stage, ie Lithuania, Greece and Estonia (in the latter country the Regulation will be applicable from 11 February 2018).

⁴⁷⁶ The full text of the Convention (both in English and French) and the regularly updated status table are available at: www.hcch.net.

⁴⁷⁷ Denmark is not bound by Brussels IIa Regulation, but has been a Contracting State of the 1996 Convention since 1 October 2011 in its capacity as member of the Hague Conference on Private International Law (Commission of the European Communities, 'Proposal for a Council Decision authorising the Member States to ratify, or accede to, in the interest of the European Community the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (the 1996 Hague Convention)' COM(2003) 348 final, para 11). Italy was the last EU Member State to ratify the 1996 Convention on 30 September 2015 (legge 18 June 2015, n. 101, Ratifica ed esecuzione della Convenzione sulla competenza, la legge applicabile, il riconoscimento, l'esecuzione e la cooperazione in materia di responsabilità genitoriale e di misure di protezione dei minori, fatta all'Aja il 19 ottobre 1996), but has not yet passed any implementing legislation, as the draft law is still under discussion in the Justice Committee of the Italian Senate (atto Senato n. 1555-bis, available at: www.senato.it). See generally Cottatellucci, 'La convenzione de L'Aja del 19 ottobre 1996: contenuti ed ambiti di competenza', available at: <http://www.minoriefamiglia.it/download/cottatellucci-ratifica-convenzione-aja.pdf> accessed 31 October 2017; Ruo, 'La ratifica della Convenzione dell'Aja del 19 ottobre 1996' (2015) (4) *Minori giustizia* 43-54. With regard to the parliamentary debate on the legal institution of *kafalah* see Peraro, 'Il riconoscimento degli effetti della *kafalah*: una questione non ancora risolta' (2015) 51 *Rivista di diritto internazionale privato e processuale* 557ff; on the relevance of *kafalah* in the Italian legal order after the ratification of the Convention see Avezzù, 'Problemi relativi alla giurisdizione italiana e agli effetti della *kafalah* in Italia' (2015) (4) *Minori giustizia* 55-64. Moreover, although in relations between Contracting States the 1996 Convention replaces the previous 1961 Hague Convention by virtue of Article 51 of the former, in the Italian legal order Article 42 of the Italian PIL Act (legge 31 May 1995, n. 218, Riforma del sistema italiano di diritto internazionale privato) still contains an express reference to the 1961 Convention to determine the law applicable to measures of protection of children and no legislative amendment has yet been introduced. On the uncertainty arising out of the current wording of Article 42 of the Italian PIL Act see



Unlike the Maintenance Regulation,⁴⁷⁸ whose Article 15 recalls the 2007 Hague Protocol,⁴⁷⁹ Brussels IIa Regulation does not refer to the 1996 Convention in the context of specific provisions on the applicable law, but rather in Articles 61-62 thereof (contained in Chapter V “Relations with other instruments”).⁴⁸⁰ The former states that the Regulation supersedes the Convention whenever (a) “the child concerned has his or her habitual residence on the territory of a Member State” and (b) with regard to the recognition and enforcement of a judgment given in a court of a Member State on the territory of another Member State, “even if the child concerned has his or her habitual residence on the territory of a third State which is a contracting Party to the (...) Convention”. The latter rule provides on a residual basis that the Convention “shall continue to have effect in relation to matters not governed by [the] Regulation”.

On a more general note, the 1996 Hague Convention was drafted within the framework of the Hague Conference on Private International Law (HCCH), whose aim is the promotion of cross-border co-operation in the field of civil and commercial matters. It is precisely for this statutory purpose, which can directly impact on the civil judicial cooperation policy, that the EU could become a member of the HCCH in 2007. Negotiations for the membership had already started in 2002, and on 5 October 2006 the Council of the EU adopted the Decision 2006/719/EC,⁴⁸¹ thereby declaring to accept the Conference Statute (provided as Annex IV to the Decision) from the date of the

Baruffi, ‘La Convenzione dell’Aja del 1996 sulla tutela dei minori nell’ordinamento italiano’ (2016) 52 *Rivista di diritto internazionale privato e processuale* 980.

⁴⁷⁸ 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 (Maintenance Regulation) [2009] OJ L7/1.

⁴⁷⁹ Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations. The full text of the Protocol (both in English and French) and the regularly updated status table are available at: www.hcch.net.

⁴⁸⁰ Nash, ‘Recognition under the 1996 Hague Convention’ (2015) *International Family Law*, 264, takes the view that ‘the Convention has not really taken hold as one might have expected’. On the relations between the two international instruments e.g. McElevay, ‘The 1996 Hague Convention and the European Union: Connection and Disconnection’ in *A Commitment to Private International Law. Essays in Honour of Hans van Loon*, (Cambridge-Antwerp-Portland, Intersentia, 2013) 371-380; Gratton, I Curry-Sumner, Williams, Setright and Right, *International Issues in Family Law: The 1996 Convention on the Protection of Children and Brussels IIa* (Bristol, Jordan Publishing, 2015) and generally Ch 8 of this Final Study (Relations with other instruments).

⁴⁸¹ Decision 2006/719/EC on the accession of the Community to the Hague Conference on Private International Law [2006] OJ L297/1.



admission of the Community as a HCCH member. In June 2005 the HCCH Diplomatic Conference adopted the amendments to the Statute that allowed a regional economic integration organisation (REIO) to accede to it. In Annex II to the Decision, the matters pertaining to both exclusive and shared competences of the EU are specifically listed, also with regard to its external field of action. Indeed, according to well-established CJEU case law⁴⁸² now codified in Articles 3 Paragraph 2 and 216 Paragraph 1 TFEU, whenever the EU has enacted measures included in a competence conferred by the Treaties, it can also conclude those international agreements that are necessary to the fulfilment of their objectives.⁴⁸³ However, as to the 1996 Hague Convention, the EC could not accede to it, since only sovereign States are allowed to be parties thereto, and this notwithstanding the shared competence held by the (former) EC that was already exercised through Brussels IIa Regulation regarding jurisdiction, and recognition and enforcement of decisions in parental responsibility matters (whereby the competence had become exclusive). Instead, as far as the applicable law is concerned, Member States maintained their competence, and thus a specific authorisation to sign the 1996 Convention in the interest of the Community was required.⁴⁸⁴ Those that were both EU Member States and Contracting States of the 1996 Convention (with the exception of Denmark) had to make a further declaration in order to ensure continuity to the relevant internal Community laws on recognition and enforcement of judgments laid down in particular by Brussels IIa Regulation.⁴⁸⁵

⁴⁸² Case 22/70 *Commission v Council* [1971] ECR 263, ECLI:EU:C:1971:32 (*ERTA*).

⁴⁸³ On the external relations of the EU in the area of private international law see most recently Franzina (ed), *The External Dimension of EU Private International Law after Opinion 1/13* (Cambridge-Antwerp-Portland, Intersentia, 2017).

⁴⁸⁴ Council Decision 2003/93/EC of 19 December 2002 authorising the Member States, in the interest of the Community, to sign the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children [2003] OJ L48/1.

⁴⁸⁵ Council Decision 2008/431/EC of 5 June 2008 authorising certain Member States to ratify, or accede to, in the interest of the European Community, the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children and authorising certain Member States to make a declaration on the application of the relevant internal rules of Community law [2008] OJ L151/36. In the literature, Cremona, 'Disconnection Clauses in EU Law and Practice' in Hillion, Koutrakos (eds), *Mixed Agreements Revisited. The EU and its Member States in the World* (Oxford-Portland, Hart Publishing, 2010) 167. See generally also Lowe, 'International Developments. The 1996 Hague Convention on the protection of children—a fresh appraisal' (2002) 14 *Child and Family Law Quarterly* 192; Cremona, 'Member States as Trustees of the



This choice of not regulating the law applicable to parental responsibility has been confirmed also in the Recast Proposal of Brussels IIa Regulation,⁴⁸⁶ whose process of negotiation is currently ongoing. In particular, Article 75(3) of the Recast states that the reference to “the provisions of Chapter II” of the 1996 Convention shall be read as “the provisions of Section 2 of Chapter II of this Regulation”, thus clarifying a further level of coordination between the two international legal instruments.

II. THE LAW APPLICABLE TO PARENTAL RESPONSIBILITY UNDER THE 1996 CONVENTION REGIME

a) Article 15: general rule

According to Article 15 of the Convention, the general principle is the coincidence between *forum* and *ius*, in order to facilitate the authorities exercising their jurisdiction. This rule in fact makes it possible for the authorities of Contracting States to apply their internal law, which is the law they are most familiar with.⁴⁸⁷

Community Interest: Participating in International Agreements on Behalf of the European Community’, (2009) EUI Working Papers Law 17/2009, available at: www.eui.eu accessed 31 October 2017; De Miguel Asensio, ‘International conventions and European instruments of private international law: interrelation and codification’ in De Miguel Asensio, Bergé (eds), *The Place of International Agreements and European Law in a European Code of Private International Law*, in Fallon, Lagarde, Poillot Peruzzetto (eds), *Quelle architecture pour un code européen de droit international privé?* (Frankfurt, Peter Lang, 2011) 185-212; L Tomasi, ‘Articoli 59-63 Regolamento (CE) 27 novembre 2003, n. 2201/2003’ in Zaccaria (ed), *Commentario breve al diritto della famiglia*, 3rd ed. (Milano, Wolters Kluwer-CEDAM, 2016) 3054.

⁴⁸⁶ European Commission, ‘Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)’ COM(2016) 411 final, especially 5, para 1, where the Commission clarifies any interpretative doubt specifying that ‘both in intra-EU cases and cases in relation to third States, the *law applicable to parental responsibility matters* is determined by the 1996 Hague Convention’. In the literature see generally ‘The revision of the Brussels IIbis Regulation (special issue)’ (2015) *Nederlands Internationaal Privaatrecht*; Kruger and Samyn, ‘Brussels II bis: successess and suggested improvements’ (2016) 12 *Journal of Private International Law* 132-168; Honorati, ‘La proposta di revisione del regolamento Bruxelles II-bis: più tutela per i minori e più efficacia nell’esecuzione delle decisioni’ (2017) 53 *Rivista di diritto internazionale privato e processuale* 247-282.

⁴⁸⁷ Explanatory Report on the 1996 Hague Child Protection Convention by Paul Lagarde (Lagarde Report) [1998] 573, para 86, available at: www.hcch.net. Further advantages are underlined by N Lowe and M Nicholls, *The 1996 Hague Convention on the Protection of Children* (Bristol, Jordan Publishing, 2012) 57.



However, Article 15 provides an exception to this general rule, which should not be “utilised too easily”:⁴⁸⁸ Paragraph 2 states that, “in so far as the protection of the person or the property of the child requires”, authorities may apply or take into consideration the law of another State (even that of a non-Contracting State) with which the situation has a substantial connection. As the Convention does not clarify the meaning of the wording “substantial connection”, the State of which the child is a national or in which his/her property are located could be considered in this regard, in accordance with its Article 8(2). Moreover, when applying this provision, authorities should be sure that it is in the best interests of the child.

Article 15(3) clarifies that a change in the child’s habitual residence (to another Contracting State)⁴⁸⁹ will result in a change of the authorities having jurisdiction, as well as in a change of the law governing the conditions of application - not defined in the Convention - of the measures taken in the State of the former habitual residence.

Beside the general rule provided in Article 15, the Convention establishes a set of conflict-of-laws rules applicable to specific situations related to parental responsibility. Each of them is separately assessed in the following subparagraphs.

b) Article 16: attribution or extinction of parental responsibility by operation of law

According to Article 16, the attribution or the extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority, is governed by the law of the State of the habitual residence of the child (Paragraph 1). Furthermore, Paragraph 2 specifies that, where the attribution or the extinction of parental responsibility may occur as a result of an agreement or a unilateral act, the applicable law is that of the State of the child’s habitual residence at the time when the agreement or unilateral act takes effect, even if it is the law of a non-Contracting State

⁴⁸⁸ Lagarde Report (n 15) 575, para 89.

⁴⁸⁹ In case the habitual residence is located in a non-Contracting State, the situation would fall outside the scope of application of the Convention, and therefore national laws on recognition and enforcement would apply.



(Article 20). However, in the event that the judicial or administrative authority is involved, the general rule established in Article 15(1) shall apply.⁴⁹⁰

Parental responsibility that exists under the law of the State of the child's habitual residence subsists after a change of that habitual residence, in order to ensure continuity in the parent-child relationship (Paragraph 3). Furthermore, if the child's habitual residence changes, pursuant to Article 15(4) the attribution of parental responsibility by operation of law to a person who does not already have such responsibility is governed by the law of the State of the new habitual residence. In the light of the foregoing, two opposite principles govern the rules set out in Paragraphs 3 and 4 of Article 16, namely those of continuity and mutability. Nevertheless, they both aim at ensuring the exercise of parental responsibility over a child. The co-existence of different parental responsibility holders also cannot be excluded, as a result of the application of the laws of the former and the new habitual residence.

c) Articles 17-18: exercise, termination and modification of parental responsibility

The 1996 Hague Convention provides that the law of the State of the child's habitual residence governs the exercise of parental responsibility, even in case of a change of his/her place of habitual residence (Article 17). Therefore, the Convention makes a distinction between the attribution of parental responsibility, governed by Article 16, and its exercise, governed by Article 17. The distinction becomes relevant in the event of a change of the child's habitual residence, since the exercise of parental responsibility obeys the principle of mutability. Consequently, the holder of parental responsibility under the law of the State of former habitual residence retains such right, but he/she shall exercise it under the conditions provided by the law of the State of the child's new habitual residence.⁴⁹¹ Pursuant to Article 18,⁴⁹² the parental responsibility

⁴⁹⁰ Lowe, 'International Developments' (n 13) 197.

⁴⁹¹ Lagarde Report (n 15) 581, para 109.

⁴⁹² See Practical Handbook on the Operation of the 1996 Hague Child Protection Convention (Practical Handbook) [2014] 98, for some examples of the situations falling within the scope of application of the provision at issue.



may be terminated or the conditions of its exercise may be modified by measures taken in application of the *lex fori* of the authority whose jurisdiction is based on Articles 5-10 of the Convention. This rule aims at avoiding the difficulties that may stem from concurrent parental responsibility rights resulting from the laws of the child's various habitual residences.

d) Article 19: protection of third parties

Article 19 is deemed to protect third parties who in good faith enter into a transaction in the State of the child's new habitual residence with the person who acts as legal representative of the child. The Convention thus establishes that the validity of a transaction entered into between a third party and another person who would be entitled to act as the child's legal representative under the law of the State where the transaction was concluded cannot be contested, and the third party cannot be held liable, on the sole ground that the other person was not entitled to act as the child's legal representative under the law designated by the provisions of the Convention. This rule, however, does not apply if the third party knew or should have known that the parental responsibility was governed by the latter law and if the transaction was entered into between persons present on the territory of the same State (Paragraph 2).⁴⁹³

e) Articles 20–22: universal character, *renvoi* and public policy

In accordance with other EU legal instruments,⁴⁹⁴ the rules concerning applicable law set out in the 1996 Hague Convention are of universal application, meaning that the designated law may even be the law of a non-Contracting State (Article 20). Nevertheless, it could be inferred from Article 15 that this provision applies only when parental responsibility is attributed or extinguished without a judicial or administrative

⁴⁹³ Consequently, the rule does not apply whenever the transaction is negotiated at a distance: Lagarde Report (n 15) 583, para 113.

⁴⁹⁴ Article 4 of Rome III Regulation.



authority being involved,⁴⁹⁵ i.e. in those cases governed by Article 16, as the principle of coincidence between *forum* and *ius* would otherwise be compromised.

Article 21(1) further states as a general rule that *renvoi* is excluded. However, if the law applicable according to Article 16 to the attribution or extinction of parental responsibility is that of a non-Contracting State, which designates the law of another non-Contracting State that would apply its own law, the law of the latter State applies. According to Article 22, the application of the law designated by the Convention can be refused only if it would be manifestly contrary to public policy, “taking into account the best interests of the child” (thus following the recurring wording included in other international instruments on child protection).⁴⁹⁶

III. PRACTICAL ASPECTS: GENERAL TRENDS IN NATIONAL CASE LAW

In this section a general overview of the main trends emerging from national case law⁴⁹⁷ with regard to the application of the 1996 Hague Convention in the context of Brussels IIa proceedings is provided.

On a preliminary note, it must be mentioned that the Convention is frequently applied without ascertaining whether the other State involved in the case at issue is indeed a Contracting party thereto.⁴⁹⁸ In other words, it may occur that the national court, which is called upon to hear a cross-border parental responsibility case governed by Brussels IIa Regulation and has to determine the applicable law pursuant to the 1996 Convention, does not verify whether this international instrument has actually been ratified by and entered into force in the other State involved, but directly applies the relevant rules of

⁴⁹⁵ Mosconi, Campiglio, *Diritto internazionale privato e processuale. Statuto personale e diritti reali*, II, 4th ed. (Milano, Wolters Kluwer-UTET Giuridica, 2016) 41; see also Lagarde Report (n 15) 583, para 115.

⁴⁹⁶ The reference regards in particular Brussels IIa Regulation, whose Article 23 provides for the mentioned ground of non-recognition of foreign decisions.

⁴⁹⁷ The national case law herein cited and commented has been collected by the partners of the EUFam's project and filed in a public database available at: www.eufams.unimi.it/category/database/.

⁴⁹⁸ Mosconi, Campiglio, *Diritto internazionale privato e processuale. Parte generale e obbligazioni*, I, 8th ed. (Milano, Wolters Kluwer-UTET Giuridica, 2017) 29f.



the Convention.⁴⁹⁹ This could result in a misapplication of the Convention due to the difficulties in the understanding of its functioning and its provisions.

A further aspect regarding the practical application of the Convention provisions on the applicable law is the occasional reference only to Article 15, which sets forth the general principle of coincidence between *forum* and *ius*, instead of the specific conflict-of-laws rules envisaged in the following Articles. In addition, Article 16 is sometimes recalled in the context of judicial proceedings,⁵⁰⁰ even though it only governs the applicable law whenever a judicial or administrative authority is not (actively) involved.⁵⁰¹ As the judicial decisions that have been assessed mostly concerned disputes between parents on the exercise of parental responsibility rights (custody and/or access), however, the applicable provision should have been Article 17, which refers to the law of the State of the child's habitual residence. In other similar instances, in fact, national courts have more properly recalled both Articles 15 and 17, or even only the latter rule, in order to determine the applicable law in the case at hand.

Another debatable issue appears to be the temporal application of the 1996 Convention, which has come forward especially in the Italian case law (having the international instrument entered into force in this legal system only recently, on 1 January 2016). In this regard, Article 53(1) generally provides that the Convention shall apply to measures taken in a State "after [it] has entered into force for that State". However, there is no specific rule concerning proceedings that were pending and in which no measure had yet been taken at the date of entry into force, with the consequence that the laws of each Contracting State govern these situations.⁵⁰² More precisely, in the Italian case law two opposite approaches seem to have been followed: in most cases, it was held that the situation fell outside the temporal scope of the Convention on the ground that the

⁴⁹⁹ e.g. Audiencia Provincial Barcelona, 9 April 2014 num. 262/2014, ESS20140409 (the parties were a Spanish and an Indian national); Audiencia Provincial Barcelona, 17 April 2015 num. 256/2015, ESS20150417 (the parties were a Spanish and a Peruvian national); Cour d'appel de Caen 3 November 2016 n. 15/03741, FRS20161103 (the parties were Algerian nationals).

⁵⁰⁰ e.g. Trib Padova, 25 July 2016, ITF20160725; Trib Belluno 27 October 2016 no 5217, ITF20161027, commented by MC Baruffi, 'Famiglia, regolamenti UE e convenzioni internazionali: considerazioni sulla sentenza del Tribunale di Belluno' *Il Quotidiano giuridico* 23 February 2017, available at: www.quotidianogiuridico.it.

⁵⁰¹ Lagarde Report (n 15) 577, para 98.

⁵⁰² *ibid* 603, para 177.



proceedings were already initiated before the entry into force of the Convention,⁵⁰³ while, more rarely, the Convention provisions were applied in the final decision that was issued after that date.⁵⁰⁴ In the latter instances, the element that appears to have been properly considered in order to apply the 1996 Convention also to pending proceedings could be the lack of provisional measures taken at the time of its entry into force, but no specific reasoning on this point was given in the judgments.

Moreover, in those Member States comprising several territorial units, different sets of rules may apply in respect of the matters covered by the scope of application of the Convention. Following a recurring legislative option contained in other PIL instrument, also the 1996 Convention deals with these cases in Articles 47-48 thereof, establishing the general principle that the law of the relevant territorial unit should apply. However, in a number of analysed decisions these provisions were improperly not recalled in order to designate the law of a specific territorial unit as applicable to the case at issue.⁵⁰⁵

Lastly, a brief consideration should be made with regard to another issue stemming from the Italian case law. The recently introduced Article 36-*bis* of the Italian PIL Act qualifies as overriding mandatory rules those domestic law provisions concerning the attribution of parental responsibility to both parents, the parents' duty to provide for child maintenance and the powers conferred to the judicial authority to restrict or terminate the exercise of parental responsibility in order to protect the child.⁵⁰⁶ The application of said Article could however amount to a breach of international law (and

⁵⁰³ e.g. Trib Roma, 8 March 2016 no 4804, ITF20160308; Trib Roma, 12 April 2016, ITF20160412; Trib Roma, 28 September 2016 no 17955, ITF20160928; Trib Roma, 14 October 2016, ITF20161014. The 1996 Hague Convention was nonetheless recalled in some of these decisions as an interpretative tool ('in chiave dinamica') to define the scope of the prior 1961 Hague Convention (concerning the powers of authorities and the law applicable in respect of the protection of infants), which was applied in the instant cases by means of the reference "in any case" to this instrument contained in Article 42 of the Italian PIL Act.

⁵⁰⁴ Trib Roma, 19 May 2017, ITF20170519a; Trib Belluno, 27 October 2016 no 5217, ITF20161027.

⁵⁰⁵ e.g. Audiencia Provincial Barcelona, 27 June 2013 num. 496/2013, ESS20130627; Audiencia Provincial Barcelona, 30 October 2014 num. 665/2014, ESS20141030; Audiencia Provincial Barcelona, 11 December 2014 num. 773/2014, ESS20141211; Audiencia Provincial Barcelona, 23 December 2014 num. 817/2014, ESS20141223.

⁵⁰⁶ Clerici, 'Articolo 36-*bis* l. 31 maggio 1995, n. 218' in Zaccaria (ed), *Commentario breve al diritto della famiglia* (n 13) 2492, criticises the provision as it could compromise the international uniformity of decisions.



EU law)⁵⁰⁷ performed by the State insofar as the domestic mandatory rule overrides the Convention provisions governing the applicable law.⁵⁰⁸ Therefore, it appears safer to conclude that the Convention provisions should in any case apply,⁵⁰⁹ unless the foreign law designated by these conflict-of-laws rules results to be manifestly contrary to public policy in light of the principles underlying the (inapplicable) domestic overriding mandatory rule.⁵¹⁰

IV. FINAL REMARKS

The possibility to draw definitive conclusions on the application of the 1996 Convention in proceedings governed by Brussels IIa Regulation proves to be a rather difficult task, also considering that national case law is not particularly extensive.

First, it must be considered that the interplay between the two international instruments is regulated only on a general basis (Articles 61-62 of Brussels IIa Regulation), without any specific provision regarding the aspect of the applicable law, and this adds a degree of uncertainty upon national courts when dealing with parental responsibility disputes. As already mentioned, not even the Brussels IIa Recast Proposal appears to have provided a clearer approach in this regard, and the application of the Convention provisions remains thus regulated by general principles of the law of treaties, with occasional ambiguities that may jeopardise the uniformity of decisions and their subsequent circulation in the EU.

⁵⁰⁷ CJEU, case C-224/01 *Gerhard Köbler v Republik Österreich* [2003] ECR I-10239, ECLI:EU:C:2003:513; CJEU, case C-173/03 *Traghetti del Mediterraneo SpA v Repubblica italiana* [2006] ECR I-5177, ECLI:EU:C:2006:391.

⁵⁰⁸ Mosconi, Campiglio, *Diritto internazionale privato e processuale. Parte generale e obbligazioni* (n 26) 280f; Clerici, 'Articolo 36-bis' (n 34) 2443-2445.

⁵⁰⁹ But see Trib Belluno, 27 October 2016 no 5217, ITF20161027, which seemingly supports the view that Article 36-bis imposes the application of the Italian substantive rules over the foreign law designated by the conflict-of-laws provisions of the Convention.

⁵¹⁰ But see Mosconi, Campiglio, *Diritto internazionale privato e processuale. Statuto personale e diritti reali* (n 23) 203, who take the view that Article 36-bis of the Italian PIL Act, being an overriding mandatory rule, should apply even where the applicable law is designated by the conflict-of-laws provision of the Convention. However, they also suggest that the same outcome could have been better achieved by means of a special public policy clause in order to avoid the practical effect of preventing the application of the foreign law.



Also, the practical implementation of the system of rules on the applicable law envisaged in the 1996 Convention may result itself challenging, as the relationship between the general rule of Article 15 and the specific conflict-of-laws provisions has been misinterpreted in a number of decisions among those that have been assessed.

Therefore, it could be provisionally argued that national courts still need to get accustomed to a complex legal instrument such as the 1996 Convention, especially in its combined application with Brussels Ila Regulation. Nonetheless, the entry into force of the Convention now in all EU Member States will certainly contribute to a consistent recourse to both legal sources and thus to the building of a more established case law that is able to provide sound guidance for the resolution of cross-border cases.

D. THE IMPACT OF THE PROOF OF FOREIGN LAW⁵¹¹

I. INTRODUCTION

The application of Foreign law by national authorities - judicial and extrajudicial - is probably one of the weakest points of the process of harmonisation of Private International Law (hereinafter: "PIL") of the European Union (hereinafter: "EU").

The revolution of the PIL begun after the Treaty of Amsterdam and later consolidated by the Lisbon Treaty has not had any impact on this crucial topic.⁵¹²

A comparative review of European legislations demonstrates recurrent problems, such as unclear answers, inconsistencies between the theoretical and practical approach, procedural obstacles, etc. All this has negative consequences for the harmonization process of private law and the PIL of the EU.

In practice, detailed conflict rules coexist with unclear rules on the application and proof of a foreign law by the authorities, both judicial and extrajudicial, of a country. This supposes, at the same time, a clear promotion of the *lex fori*.

⁵¹¹ This paragraph shall be attributed to: Rosario Espinosa Calabuig.

⁵¹² See Pace, *Nuove tendenze del diritto dell'Unione europea dopo il Trattato di Lisbona*, Milan, Giuffrè, 2012.



The lack of common rules or principles in this regard can weaken the functioning of the single market, in particular by the imposition of unjustifiable burdens and costs on the parties that could come to be considered as a violation of the European Convention on Human Rights of 1950, in particular its Article 6 and the Right to a Fair Trial.⁵¹³ All this has negative repercussions on citizens and their expectations in cross-border litigation (high costs, uncertainty, *forum shopping* ...).

It is striking that few EU texts refer to this topic. For example Article 30(1)(I) of the Rome II Regulation.⁵¹⁴ But nothing is said, for example, in the Stockholm Action Plan 2010-2014 whose revision is planned for 2017.⁵¹⁵

Therefore, all efforts made by the EU and other institutions to achieve a common response are justified. In this regard the Hague Conference of private international law has been working on this topic for the last years and has indicated the need to work on future instruments in this area.⁵¹⁶ But now it should be the turn of the EU.⁵¹⁷

In the field of EU Family Law, it should be remembered that no Regulation of those drafted in the scope of the applicable law, such as the Rome III Regulation,⁵¹⁸ expressly

⁵¹³ See Esplugues, Iglesias, Palao Moreno, Espinosa Calabuig, Azcárraga: 'General report on the application of foreign law by judicial and non-judicial authorities in Europe' in Esplugues, Iglesias, Palao (eds), *Application of Foreign Laws*, Munich, Sellier, 2011, 6.

⁵¹⁴ In particular, there is a "Review clause" according to which: 1. Not later than 20 August 2011, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation. If necessary, the report shall be accompanied by proposals to adapt this Regulation. The report shall include: (i) a study on the effects of the way in which foreign law is treated in the different jurisdictions and on the extent to which courts in the Member States apply foreign law in practice pursuant to this Regulation; ...'

⁵¹⁵ As announced at <http://www.consilium.europa.eu/es/policies/strategic-guidelines-jha/>

⁵¹⁶ See Lortie, Groff, 'The evolution of work on Access to foreign law at the Hague Conference on private International Law', in Nishitani (Ed.,) *Treatment of Foreign Law -Dynamics Toward Convergence?*, Springer, 2017, 615-638.

⁵¹⁷ See the several Proposals launched by academics and EU Projects in Esplugues Mota, 'Harmonization of Private International Law in Europe and Application of Foreign Law: The Madrid Principles of 2010' and Lalani, 'A proposed model to facilitate access to foreign law'. Both in Bonomi, Romano (Eds), *Yearbook of Private International Law*, Vol. XIII, 2011, 273 and 299 respectively.

⁵¹⁸ 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 (OJ L 343, 29 December 2010, came into effect on 21 June 2012).



regulates either the imperative nature of its conflict rules, or the treatment that the proof of the foreign law must receive in the process.⁵¹⁹

However, the absence of a provision that establishes that its rules are of imperative application for the State parties (and not discretionary as happens with the conflict rules in some States) and another that provides that the designated law should be applied *ex officio* by the judge, should not be interpreted in the sense that both issues depend on the PIL of the forum.⁵²⁰

Therefore, bearing in mind the characteristics of the European Regulations, as well as the objectives they pursue, the application of the conflict rules they contain should be considered imperative, and also in the Member States whose PIL have a discretionary conflict system, whether legal or factual,⁵²¹ as is explained hereafter.

However, the existence of many disparities and particularities between MS in this field, as described below, render by now difficult to put in practice this interpretation in the framework of the EU Regulations.

II. APPLICATION BY JUDICIAL AUTHORITIES: NATURE OF FOREIGN LAW

One of the main issues in the application and proof of a foreign law is what is the nature attributed to said foreign law in the various legal systems. In this sense, a comparative review of the legislation in MS shows that most States advocate a legal nature of foreign law against a few that give it a factual nature and then others in which a hybrid nature prevails. These differences have repercussions on the role attributed to judges and the parties in determining the content of foreign law.

In particular, those who advocate the status of foreign law as “law” imply an active role for the courts in the argument and determination of the content of foreign law. This

⁵¹⁹ See Queirolo, Carpanetto, *Considerazioni critiche sull'estensione dell'autonomia privata a separazione e divorzio nel regolamento 'Roma III'*, in *Rivista di diritto internazionale privato e processuale*, 2012, 59 ff.

⁵²⁰ Following Orejudo Prieto De Los Mozos, 'Imperatividad de la norma de conflicto y prueba del Derecho extranjero en los reglamentos sobre ley aplicable a las situaciones privadas internacionales', in Abel Lluch, Picó I Junoy, Richard González (Eds), *La prueba judicial. Desafíos en las jurisdicciones civil, penal, laboral y contencioso-administrativo*, Madrid, La Ley, 2011, 477-498pp. 477-498.

⁵²¹ Virgós Soriano, Garcimartín Alférez, *Litigación internacional. Derecho procesal civil internacional*, 2ª ed., Civitas, Madrid, 2007, 523.



condition will also influence the possible revision. On the other hand, in those that advocate the factual nature of foreign law, the parties have the biggest, if not the only role.

In general, the legal status of foreign law is advocated in the majority of the EU (also in the “Declaration on Equal Treatment of the Law of the Forum and Foreign Law” by the Institute of International Law in 1989, at the *Santiago de Compostela* session). However, practice shows the presence of many inconsistencies in the various state systems that are difficult to fit into either model.⁵²²

a) Legal nature of foreign law

This approach is advocated in countries such as Germany, Austria, Belgium, Bulgaria, Denmark, Slovakia, Slovenia, Estonia, Finland, France, Greece, Hungary, Italy, Poland, Portugal, the Czech Republic and Sweden. However, there are differences in this approach as it is expressly recognized (as in the majority of cases) or not by legislation. For example, in some countries where the legal nature of foreign law is expressly recognized (such as Belgium or Italy), it has nevertheless been restricted. This is the case of Belgium by an interpretation of Article 608 Civil procedure code (CPC) made by the Supreme Court in 2004 on the review of judgements that have applied foreign Law. The High Court has considered that the revision of these cases is only possible if breach of applicable Belgian choice of law rules is also invoked.⁵²³

In Italy, for its part, the Supreme Court has declared that foreign law will have a factual nature in certain cases, which generates great uncertainty.⁵²⁴ In other countries, for example Bulgaria, the legal status of foreign law is not expressly recognised, but PIL

⁵²² See Hartley, ‘Pleading and proof of foreign law: The major European Systems compared’, *The International and Comparative Law Quarterly*, 1996, 271-274; Hausmann, ‘Pleading and proof of foreign law - A comparative analysis’, *The European Legal Forum*, 2008, 1, 2

⁵²³ For instance, Cass., 3 June 2004, *Pasicrisie belge*, 2004, 964 or Cass. 18 April 2005, *Pasicrisie belge* 2005, 895, in Esplugues, Iglesias, Palao, Espinosa, Azcárraga, *op. cit.*, 12.

⁵²⁴ More broadly see Queirolo, ‘Conoscenza del diritto straniero e contraddizioni della giurisprudenza italiana’, *Rivista di diritto internazionale privato e processuale*. 2010, 603-634; Ivaldi, ‘In tema di applicazione giudiziali del diritto straniero’, *ivi*, 2010, 585-602;



legislation establishes the obligation of judges to apply foreign law on the understanding that the parties should not need to prove it as fact.⁵²⁵

In some countries the absence of an express recognition of the legal status of foreign law is complemented by an active role of judges and the doctrine. This would be the case in Germany after the interpretation of Article 293 of the Civil procedure Code (ZPO) given by authors and courts.⁵²⁶ In others such as France or Poland, this condition is not recognized in any way, but it is accepted, since the French Supreme Court has indicated that once a foreign law is designated by a conflict law, this is the applicable “Law”. In Poland, it is supported only by doctrine.⁵²⁷

b) Factual nature of foreign law

The factual nature of foreign law is advocated in countries of the British tradition. This is the case in the UK, although there are exceptions in what is considered “a fact of a peculiar nature”. In other words, it has been interpreted that when the decision is appealed due to an inappropriate application of foreign law, it is no longer treated as factual but rather the review is carried out as if it were a legal matter.⁵²⁸ This interpretation is also advocated in Malta, Cyprus and Ireland.

c) Hybrid nature of foreign law

In countries such as Spain or Luxembourg foreign law is recognised as a factual condition, but this consideration is contradicted by the role of judges as to the ascertainment of the content of foreign law. In particular, in Luxembourg Judges are entitled, but not obliged to ascertain the content of foreign law if they have a proper knowledge of it. And the parties are not compelled to plead the foreign law, but if they

⁵²⁵ Natov and Others, ‘Bulgaria’, in Esplugues, Iglesias, Palao, *op. cit.*, 148.

⁵²⁶ See Hausmann, *op. cit.*, 2

⁵²⁷ Esplugues, Iglesias, Palao, Espinosa, Azcárraga, *op. cit.*, 13.

⁵²⁸ See Fawcett, Carruthers, *Cheshire, North and Fawcett. Private International law*, Oxford, Oxford Univ. Press, 14th ed., 2008, 111-113; Fentiman, *International Commercial Litigation*, Oxford, Oxford univ.press, 2010, pp.286-287.



do it, they must prove its content.⁵²⁹ For this reason foreign law can be considered of hybrid nature.

In fact, Spain awards the condition of fact to foreign law but with some particularities and inconsistencies. The Spanish system on treatment of foreign laws is regulated by different legal sources, principally Article 12.6 Civil Code (CC) as well as Arts. 281 and 282 of the Civil Procedure Act of 2000 (CPA) and the recent Act of 29/2015 on International Legal Cooperation,⁵³⁰ that in practice has not introduced relevant changes in this field. Despite the mandatory character awarded to the choice of law rules (Article 12.6 CC) and the lack of obligation for the parties to plead foreign law, the parties are compelled to prove its content (Article 281.2 CPA). The inconsistency between the mandatory nature of conflict of laws rules and the burden of parties of proving the foreign law makes the system unsatisfactory at least in the judicial scope because more flexible solutions can be found in the non-judicial scope,⁵³¹ Nevertheless there are also some opinions that favour the consideration of foreign law as a law, not a fact, in certain aspects.⁵³²

In other countries such as Latvia and Lithuania, a hybrid nature of foreign law has been also advocated, so that in cases where foreign law is applied by international agreements it has a legal nature, but if it is applied by an agreement between the parties it is considered factual. In the Netherlands, as a general rule it is considered as “Law” by the jurisprudence. Thus, Article 25 CPC is interpreted as the obligation of the court to apply the conflict rules of the forum and the foreign law to which they may refer, although a review by the Supreme Court does not cover the application of foreign law (“*tertium genus*”).⁵³³

⁵²⁹ Similar situation is produced in Luxemburg. See Cuniberti, Rueda, ‘Luxemburg’ in Esplugues, Iglesias, Palao, *op. cit.*, 256-257.

⁵³⁰ BOE (Spanish Official Journal) n. 182 of 31 July 2015.

⁵³¹ See Azcárraga Monzonís, ‘Spain: The application of foreign laws in Spain - Critical Analysis of the legal novelties of 2015’, in Nishitani (Ed.), *op. cit.*, 329-346.

⁵³² For example, parties are prevented to agree on the content of foreign law whereas they should have been granted that possibility should foreign law have been treated as a fact according to Article 281.3 CPA (‘*All those facts on which there is full agreement of the parties are exempt from prove except in cases where the subject matter of the process is out of power of disposition of the parties*’). See Iglesias, Esplugues, Iglesias Palao, ‘Spain’, in Esplugues, Iglesias, Palao, *op. cit.*, 357-358.

⁵³³ Esplugues, Iglesias, Palao, Espinosa, Azcárraga, *op. cit.*, 16-17.



III. IMPERATIVE APPLICATION OF THE CONFLICT RULE AND APPLICATION OF THE FOREIGN LAW

There are good reasons, such as legal security and equality in the treatment of equal situations, to advocate the imperative nature of the conflict rule. In general, this type of rule is as mandatory as any other, so that in most systems the imperative aspect is not even expressly mentioned. Spanish law has an exception, an explicit provision: Article 12.6 of the CC establishes that “the Courts and authorities shall apply *ex officio* the rules of conflict of Spanish law”. In accordance with this provision and following the interpretation of the Spanish Supreme Court,⁵³⁴ parties do not need to invoke the applicability of a specific conflict of laws rule when a foreign element is involved in the private international situation, and they cannot agree to avoid its application either.⁵³⁵

Although it is not expressly regulated, in the majority of the EU the conflict rule is considered of imperative application, except for some countries like Luxembourg, Cyprus and UK. In others it is uncertain, as is the case with Ireland and Malta. In countries with a legal nature of foreign law and imperative conflict rules, the parties are not obliged in principle to plead or prove its content. On the other hand, a discretionary nature of the conflict rule implies the obligation to prove it in order to activate the PIL machinery. In countries like France the conflict of law rule is considered mandatory depending on the “availability of laws” of the case: if the parties remain silent, the judge “shall” invoke the foreign law only if the laws referred to in the case “are not available” to the parties. A similar position exists in Denmark, Finland and Sweden.⁵³⁶

In other countries like Luxembourg the courts can apply foreign law *ex officio* on certain occasions (if they know it). In Spain, notwithstanding the mandatory character of the conflict of law, in practice there is an inconsistency when applying the rule, as already pointed. In this sense the *iura novit curia* principle does not bind judges as regards foreign law and the burden of proof rests on the parties. According to Article 281 CPA: Object and need of proof: 1....2. *Custom and foreign law shall also be object of proof.*

⁵³⁴ Judgments 436/2005 of 10 June 2005 (RJ \2005\6491).

⁵³⁵ See Azcárraga Monzonís, ‘Spain: The application of foreign laws in Spain - Critical Analysis of the legal novelties of 2015’, in Nishitani (Ed.), *op. cit.*, 329-346.

⁵³⁶ Esplugues, Iglesias, Palao, Espinosa, Azcárraga, *op. cit.*, 19.



The evidence of custom shall not be needed when the parties agree on its existence and content and its rules do not violate public policy. Foreign law shall be proved as regards its content and validity; the court may make use of all means of ascertainment deemed necessary for its implementation.

The Spanish situation shows that although there is an express provision stating that the conflict rule must be applied imperatively, it is only possible to respect this mandate if there are adequate procedural instruments. In particular, the authorities must be in a position to apply *ex officio* any law, not only that of the forum, but also a foreign law. If such application is subject to the practice of proof of law, when the applicable law is foreign, the evidence must be able to be demonstrated at the request of the authority. On the contrary, that is, if the proof of foreign law remains in the hands of the parties, as is the case in the common-law systems, the conflict rule becomes discretionary, since the inactivity of such parties will be equivalent to the application of the law of the forum, unless the provision for such a case is to deny the claim,⁵³⁷ as has happened on occasion.⁵³⁸

In general, the application of conflict rules and the proof of foreign law is an extremely controversial issue in Spain as it was evidenced in the *EUFam's Spanish Exchange Seminar*, in Valencia in October 2016. The interpretation given to this issue has led in practice to legal uncertainty given that some judges apply *ex officio* foreign law while others apply Spanish law if the parties fail to prove foreign law.⁵³⁹ Unfortunately, a significant number of courts ignore the international element and directly apply Spanish law, not even indicating the applicable conflict rule. As highlighted by some lawyers in the mentioned Seminar, this leads to great frustration on the side of the affected party

⁵³⁷ See Orejudo Prieto De Los Mozos, 'Imperatividad de la norma de conflicto y prueba del Derecho extranjero en los reglamentos sobre ley aplicable a las situaciones privadas internacionales', in Abel Lluch, Picó I Junoy, Richard González (Eds), *La prueba judicial. Desafíos en las jurisdicciones civil, penal, laboral y contencioso-administrativo*, Madrid, La Ley, 2011, 477-498.

⁵³⁸ This possibility has serious drawbacks. Not only can it lead to a denial of justice if the lack of evidence can not be attributed to the parties, as in the Spanish TC in its Sent. 10/2000, of January 17, 2000 (in <http://www.tribunalconstitucional.es>) but, in addition, it would prevent the parties from returning to make the same claim, in accordance with the provisions of Article 400 CPA. See Orejudo Prieto De Los Mozos, 'Imperatividad de la norma de conflicto...' *op.cit.*, 479; Virgós Soriano/Garcimartín Alférez, *op.cit.*, 521.

⁵³⁹ See *Report on Spanish Good Practices*, in www.eufams.unimi.it, 9.



to the proceeding. Practitioners agree that the Spanish practice has to improve in these matters, but they also highlighted that it is necessary to enhance access to foreign law by ameliorating cooperation in the European area of justice and simplifying proof of foreign law.⁵⁴⁰

IV. PLEADING OF FOREIGN LAW BEFORE STATE COURTS

Once again, the nature of foreign law affects the role of the parties and the judge in the argument and application thereof. In countries where the legal status of foreign law is advocated, an active role of the judge is appreciated. This produces an *ex officio* application of foreign law. The parties are not obliged to plead it in these countries (Austria, Belgium, Bulgaria or Czech Republic ...) although in some cases there are qualifications to be made.

For example, in Germany, Article 293 ZPO is not explicit, but has been interpreted in the sense of an *ex officio* application of foreign law by the German judge without any pleading by the parties.⁵⁴¹

In Italy there is a “mixed” attitude towards foreign law. On the one hand, Article 14 of the PIL Act establishes the legal nature of foreign law and therefore the judge's obligation to apply it *ex officio*. On the other hand, however, it is observed that jurisprudence has not always treated it as a law. Thus, sometimes the Italian Supreme Court has treated it as fact in some cases, it is the duty of the parties to plead its application and provide the judge with its content.⁵⁴²

In France (and similarly in the Scandinavian countries) the pleading of foreign law depends on two factors: the willingness of the parties to plead it, in which case the

⁵⁴⁰ Some of these problems have been diminished by the fact that the connections chosen by European PIL point to the *lex fori* in a very significant number of cases. In this regard, the predominance of the habitual residence over that of nationality in e.g. Rome III Regulation is positively assessed by the practitioners. However, some opinions pointed out that it would be advisable to include a reference to the law of the nationality of the spouses as *obiter dicta* for recognition purposes in their country of origin. Morocco's law was specifically mentioned in view of the number of cases dealt with by the Spanish judges. See *Report on Spanish Good Practices*, in www.eufams.unimi.it (p. 9).

⁵⁴¹ See Sangiovani, ‘La conoscenza, l'interpretazione e l'applicazione della legge straniera da parte del giudice civile Tedesco’, *Rivista di diritto internazionale privato e processuale*, 1999, 915-916.

⁵⁴² See Queirollo, *op.cit.*, 624-634.



judge must apply it, and the nature of the litigation, “available or not”, so that if the parties do not say anything and the rights in litigation are available to the parties, the judge will not be obliged to apply it.⁵⁴³

In countries where the factual condition of foreign law is advocated, there is an active attitude of the parties and a passive role of the judges, who will wait for the parties to claim foreign law.

The UK is the most radical example.⁵⁴⁴ Judges have a completely passive role in the application of foreign law. Everything depends on the parties, because if they want it to be applied “they must plead” and provide the judge with its content. But the case will be treated as domestic. Something similar exists in Ireland.

In Spain the mandatory character of the conflict of law rule (ex Article 12.6 CC) makes it unnecessary for the parties to plead foreign law but this entails some problems in practice, as explained before.

Finally, in countries where the hybrid condition of foreign law is advocated, such as the Netherlands, Article 25 CPA is interpreted by the jurisprudence in the sense that the judge must apply its conflict rules and the law to which they refer *ex officio* without the parties having to plead it.⁵⁴⁵

In conclusion, there are clear inconsistencies between theory and practice.

V. THE *IURA NOVIT CURIA* PRINCIPLE

Once again, the aforementioned inconsistencies between theory and practice can be seen in the manifestation of the *iura novit curia* principle in relation to foreign law. There seem to be three factors that affect it:

⁵⁴³ See Fulli-Lemaire and Rojas-Tamayo, ‘France’, in Esplugues, Iglesias, Palao, *op. cit.*, 187-189; Pitaluga, ‘La prova del diritto straniero: evoluzione giurisprudenziali in Francia e in Italia’, *Rivista di diritto internazionale privato e processuale*, 2002, 675-694 .

⁵⁴⁴ See Fentiman, *op.cit.*, 281; Fawcett, Carruthers, *op.cit.*, 111-113.

⁵⁴⁵ See Geeroms, *Foreign law in civil litigation. A comparative and functional analysis*, Oxford, OUP, 2004, 49 ff.



a.- The Foreign law that is applied in the framework of a state judicial proceeding. Litigation rules have a necessary and sometimes unpredictable influence on how the court will treat foreign law in each case.

b.- Whatever the options in favour of the *ex officio* application of foreign law it should be taken into account that the judge is a person whose knowledge of foreign law - and time available - is limited, besides that generally he/she will not feel very comfortable with it.

c.- The role that is currently given to the parties in the EU regarding these types of proceedings.

In countries where foreign law has in theory a legal nature, the *iura novit curia* principle extends to foreign law and results in its application *ex officio* by judges e.g. Slovenia, Portugal, Belgium. However, in other countries, practice shows that this is not the case. In Austria the principle is mitigated in practice, and the judge can apply the foreign law “when he knows it”, while not being forced to know it. The same happens in Bulgaria, the Czech Republic, France and Italy, whose legislation recognises the application of this principle to foreign law, but then the courts do not apply it because of the practical difficulties involved.⁵⁴⁶

In countries where foreign law has a factual nature, we see a passive attitude of the court regarding the argument and proof of foreign law. Therefore the principle of *iura novit curia* does not play a part with respect to foreign law. This is the case in the UK, Cyprus, Ireland and Malta.

In Spain judges do not have the duty to know the content of foreign laws.⁵⁴⁷ Thus the *iura novit curiae* principle is exclusively confined to the knowledge of Spanish law and furthermore this rule is applied in a rigid way because even if the judge knows the content of a foreign law, he shall not apply it if it has not been properly proved by the parties.⁵⁴⁸

⁵⁴⁶ For all these aspects see Esplugues, Iglesias, Palao, Espinosa, Azcárraga, *op. cit.*, 30-37..

⁵⁴⁷ As stated by Judgment of Spanish Supreme Court 797/2007 of 4 July 2007 (RJ\2007\4937) and others listed in it. According to Forner Delaygua, *Proof of the facts in the process: aspects of applicable law*, Bosch, Barcelona, 2006, 95, the *ex officio* application of foreign laws is unreasonable.

⁵⁴⁸ In general Azcárraga Monzonis, *op. cit.*, 331.



In countries where the foreign law has a hybrid nature such as the Netherlands, the parties must neither argue nor prove the foreign law. In accordance with Article 25 CPA the judges must apply the conflict of law rules and the foreign law *ex officio*.⁵⁴⁹ Therefore, the *iura novit curia* principle is fully applied. However, sometimes the right of the courts to request the parties provide information on the applicable foreign law is recognized.

VI. ASCERTAINMENT OF THE CONTENT OF THE FOREIGN LAW

In general, most of the European systems have opted to pronounce themselves in favour of the *ex officio* application of the foreign law, but there are many particularities.⁵⁵⁰ In countries that advocate the legal nature of foreign law, in theory the judges apply it *ex officio*, and must determine its content. However, once again some points of detail must be made. For example, in Germany, according to Article 293 ZPO, judges and doctrine advocate the legal nature of foreign law and its application *ex officio*. But, as in Austria, this interpretation is partially weakened and the *iura novit curia* principle does not actually cover foreign law. The courts will sometimes request assistance from the parties to investigate the content of the applicable foreign law. According to Article 139 ZPO the court must inform the parties about the applicable foreign law and they (the parties) can plead and prove the content voluntarily if they decide to. In practice, the German judge - like the Austrian judge - may have little time to determine the content of foreign law and will end up applying German - or Austrian - law. It has been argued that in cases where the parties are of the same nationality as the applicable foreign law they could agree the content of this applicable law, which would then be accepted by the judge. However, the majority opinion considers that the choice of the

⁵⁴⁹ See Geeroms, *op.cit.*, 49.

⁵⁵⁰ For instance, in Germany, Article 293 ZPO (Kropholler, *Internationales Privatrecht*, 5^a ed., Mohr Siebeck, Tubinga, 2004, 45-46). In Italy, Article 14 LIDIPr (Picone, 'La prova del diritto straniero nella legge italiana di riforma del diritto internazionale privato', in Mansel et al., (eds), *Festschrift für Erik Jayme*, Sellier, Munich 2004, 690-700). See Orejudo Prieto De Los Mozos, 'Imperatividad de la norma de conflicto...', *op. cit.*, 477-498.



applicable law would only be possible if the relevant choice of law rule allows such a choice of law.⁵⁵¹

In countries with a factual nature, the determination and proof of the content of the foreign law corresponds with the parties. However, in countries such as the UK we can see that according to the *Civil Evidence Act 1972*, in England and Wales, preliminary proceedings undertaken by the *High Court* or the *Crown Court* or during an appeal regarding foreign law, can be considered as *evidence of the foreign law*. Finally, in countries with a hybrid nature such as the Netherlands, notwithstanding the obligation of the court to apply the foreign law *ex officio* and the absence of an obligation for the parties to prove its content, it is expected that they (the parties) will assist the court in the task of specifying it. Moreover, they can even be asked for help.⁵⁵²

VII. THE MEANS OF PROOF OF THE CONTENT OF THE FOREIGN LAW

In countries of a legal nature they regulate this point in different ways, independently of the obligation of the court to apply the foreign law *ex officio* and the application to it of the *iura novit curia* principle.

Sometimes the State's legislation includes a general reference to the means available to find out the content of foreign law. For example, the courts of Estonia may use their “knowledge” of foreign law. According to Article 234 CPC if this is not sufficient, they can use the original sources of information and other acts with which to specify that law. Article 4 of the PIL Act, in addition to compelling the judge to determine the content of foreign law *ex officio*, also guarantees the right to request assistance from the Ministry of Justice or Foreign Affairs, use experts and make a request for assistance from the parties.⁵⁵³

In Germany, Article 293 ZPO allows the court to collect information through formal means of proof - Ministry of Justice - and any auxiliary source of information, including experts (e.g. Professors of the *Max Planck Institut* for comparative and International

⁵⁵¹ See Haussmann, *op. cit.*, 2; Hartley, *op. cit.*, 275; Bach, Gruber, ‘Austria and Germany’ in Esplugues, Iglesias, Palao (eds), *op. cit.*, 104-105.

⁵⁵² See Fentiman, *op. cit.*, 295 ff; Fawcett, Carruthers, *op. cit.*, 113-114; Geeroms, *op. cit.*, 101-102.

⁵⁵³ Nekrosius, Vèbraité, ‘Baltic countries’ in Esplugues, Iglesias, Palao (eds), *op. cit.*, 122.



Private law in Hamburg although it has no obligation to give an expert opinion and can decline such an offer by the courts). The expert might also be required to appear before the court. Many times, they use their own knowledge, for example in cases of “day to day” Family Law (divorce, matrimonial economic arrangements ...), and they go to the court libraries, where they can even find journals on foreign law (for example on Turkish law).⁵⁵⁴

In Italy, Article 15 of the PIL Act refers to international agreements, information from the ministry of justice or experts, as well as specialized institutions.⁵⁵⁵

In countries of a factual nature such as the UK, the parties must provide the court with all the content of foreign law through all kinds of means, mainly expert opinions given orally (England and Wales). The judge will not intervene in the evidence, except in cases of conflict between the opinions of the experts. Finally, in countries of a hybrid nature such as Lithuania, when foreign law is applied *ex officio* by the court, experts may be called upon as may the Ministries of Justice or Foreign Affairs. If the parties are involved in the giving of evidence they may use the means provided by Article 1(12)(4) CC. In the Netherlands courts can ask the parties to help them, in which case the parties usually turn to experts. But the court is not obliged to take this information into account.⁵⁵⁶

In the framework of EU Regulations like Rome III, the application of foreign law demanded by the conflict rules should be carried out *ex officio* by the authorities of the States parties. In this regard, recital 14 warns of the existence of mechanisms that will provide authorities with the necessary information on the content of the foreign law. However, these mechanisms not only contribute to the mere knowledge of the State laws but also raise doubts about the effective usefulness of the European Judicial Network to which the Regulation refers, since it is not sufficient updated, nor does it contain all the aspects which may require the correct and sufficient application of a foreign law.⁵⁵⁷

⁵⁵⁴ Bach, Gruber, ‘Austria and Germany’ in Esplugues, Iglesias, Palao (eds), *op. cit.*, 106-107.

⁵⁵⁵ Di Muro, ‘La ricerca e l’interpretazione del diritto straniero. La Cassazione di fronte agli artt. 14 e 15 della legge n° 218/1995’, *Giurisprudenza Italiana*, 2003, 480.

⁵⁵⁶ Esplugues, Iglesias, Palao, Espinosa, Azcárraga, *op. cit.*, 52-53.

⁵⁵⁷ See Orejudo Prieto De Los Mozos, ‘Imperatividad de la norma de conflicto...’, *op. cit.*, 480. According to the author, the correct application of the Rome III Regulation requires that the courts apply *ex officio* any foreign law (of States Parties, Member States and third States) claimed by it. Unfortunately, they will not have adequate means to do so. As can be seen from the concern shown by the Commission in this regard:



Besides, implementation of Article 14 of Rome III Regulation has been questioned in the States Parties with more than one legal system, as Spain.⁵⁵⁸

VIII. APPLICATION OF INTERNATIONAL CONVENTIONS

All the EU Member States except Ireland are members of the London Convention 1968 and also of the Protocol of 1978, except Slovenia and Ireland. In addition, Spain is part of the Inter-American Convention of Montevideo 1979.

The majority of the EU Member State also have bilateral Conventions to obtain information on the content of foreign law.

All agree, however, on their limited functionality given the procedural complexity and limitations of foreign law obtained in this way.

The use of the *European Judicial Network* or the *European E-Justice* website should encourage them to become a good alternative to the London Convention in certain cases. However, the use of this *network* is demonstrating failures in its implementation, as already mentioned.

'... the proper functioning of the European judicial area sometimes requires a national court to apply the law of another Member State. The Union must consider how to avoid the disparity of current practices in this area'. See point 3.3 of the Communication from the Commission to the European Parliament and the Council, An area of freedom, security and justice serving the citizen, Brussels, 10 June 2009, COM(2009) 262 final, on 14 (available on <http://eur-lex.europa.eu>). It is very possible that the (Spanish) authorities will continue to consider that the foreign law - even if its application is required by an EU Regulation - must be alleged and proved in trial by the parties, so that, in the event of any omission of this "duty" they will continue to apply the *lex fori*, as it is deduced from judgments like the one of the Provincial Court of Valencia (Section 10^a) no. 85/2009, of February 10 (Westlaw Aranzadi JUR 2010/73433).

⁵⁵⁸ During the *Spanish Exchange Seminar* celebrated in Valencia in October 2016, Article 14 of Rome III Regulation was questioned given that Catalan law was being applied not by reference to this provision, but by mandate of the Catalan Autonomous Statute. Political reasons and the territoriality principle would explain this departure from the Regulation as one judge explained in the Seminar. However, it was acknowledged that Article 14 has to be mentioned as well while establishing the applicable law to internal conflicts of laws. In this vein, there was a mention to the specific problem of cross-border successions from foreigners who reside in a Spanish region with its own law, being the issue which law is applicable, either that of the Spanish civil code or the special law of that territory. See *Report on Spanish Good Practices*, in www.eufams.unimi.it, 9.



IX. PROOF OF THE CONTENT OF FOREIGN LAW AND LEGAL ASSISTANCE

In practice, the high costs resulting from the determination of a foreign law, whether from the investigation thereof, its translation, etc., discourage its application by the national courts and the parties often decide not to plead it, which adversely affects the functioning of the PIL system.⁵⁵⁹

In countries of a legal nature such as Portugal, there has been no response to this issue. In Germany, when the court asks the parties for help and experts are called in, costs seem to be covered, but on other occasions it does not seem possible. In Italy they are in favour of covering these costs, but it is not expected they will from a legal point of view. In countries of a factual or hybrid nature there are also interpretive disparities. For example, no assistance is provided to the parties in the UK, Malta, Cyprus or Ireland. In the Netherlands the costs are assumed to be covered by the court when it asks the parties for help in the investigation of foreign law.⁵⁶⁰

X. PRACTICAL APPLICATION OF THE FOREIGN LAW

The practical application of foreign law by state courts raises several issues of great importance on which there is no clear and uniform answer. In particular: a) how that foreign law is applied by the judge; b) what happens in cases where the judge considers that the content of the foreign law has not been sufficiently determined and c) what happens if the judge refuses to apply the foreign law invoked by the conflict of law rule.⁵⁶¹

There is a general objective in this field, that the application in the forum of a foreign law should be the same as in its country of origin. From there, two trends emerge. On the one hand, it is interpreted that foreign law can be applied as if it were a true state law, taking into account the way in which it is interpreted in its country of origin. For example, in Austria, although there is no clear information about it, in Belgium, Bulgaria, in Germany (possible gaps in foreign law can be covered by the judge), in Italy

⁵⁵⁹ Hartley, *op. cit.*, 275.

⁵⁶⁰ Esplugues, Iglesias, Palao, Espinosa, Azcárraga, *op. cit.*, 58-59.

⁵⁶¹ For all these issues see broadly Esplugues, Iglesias, Palao, Espinosa, Azcárraga *op. cit.*, 63-74.



(taking into account jurisprudence and doctrine). On the other hand, it has been interpreted that foreign law must be applied as such, that is, as a *foreign law*, although taking into account how it is interpreted in its country of origin.

Equally problematic is the question of what happens in cases where the judge considers that the content of the foreign law has not been sufficiently determined. Sometimes the possible existence of a limitation period for the determination of the content of foreign law by the court may incline it to stop the search for a foreign law and instead apply the *lex fori*. The search for the meaning of foreign law and the way in which it is applied in its country of origin is usually what both - judges and parties - wish to determine. And this is not much easier.

Finally, another aspect to consider is what happens when the forum judge refuses to apply the foreign law? In general, it seems to be accepted that this will happen when there is a breach of the public order of the forum. In some countries (for example, Hungary) other motives are mentioned such as legal fraud in the conflict rules, the lack of determination of its content or the lack of reciprocity.

XI. POSSIBLE REVIEW BY THE COURTS OF THE APPLICATION OF THE FOREIGN LAW?

The possible revision by the courts of the foreign law that, in principle, has been designated as applicable is another question on which there have traditionally been interpretative doubts. In general, it is admitted in all the EU Member States, although there are differences in the reasons for revision (in principle, for breach of conflict of law rules, or for lack of or incorrect application of foreign law) and the competent authorities for this purpose.

In general, different situations may be distinguished. Firstly, where the courts have not applied the conflict of laws rule or it has been wrongly applied. Secondly, the courts have correctly applied the conflict of laws rule but the foreign law has not been validly proved by the parties and *lex fori* is finally applied. Thirdly, the courts have correctly applied the conflict of laws rule, the parties have proved the content and validity of the foreign law but *lex fori* is finally applied to the merits. Lastly, the courts have properly applied the conflict of laws rule, the foreign law has been validly proved by the parties



and the courts have applied the foreign law, but the parties consider that it has been wrongly applied.⁵⁶²

For example, in Spain all these situations have received different interpretations. On the one hand, Articles 207(1) and 455 CPA admit the possibility of a general appeal (*recurso de apelación*) of first instance decisions before the Provincial Court (*Audiencia Provincial*). This possibility is said to be applicable to all the situations previously described. On the other hand, Article 477(1) CPA states the possibility to challenge a previous decision rendered by a Provincial Court, if some conditions are met, through cassation before the Supreme Court (*Tribunal Supremo*). This is deemed to be clearly applicable to the first three abovementioned situations. However the fourth one is more controversial.⁵⁶³

In general, the provision of a system of appeals in this area is necessary to ensure the proper functioning of the state and EU PIL systems, as well as to guarantee full access to justice. All this also translates into greater legal certainty within the EU.

XII. APPLICATION OF THE FOREIGN LAW BY NON-JUDICIAL AUTHORITIES

Few MS expressly refer to non-judicial authorities (for instance, Estonia, with its 2002 PIL Act, and Spain, with Article 12(6) CC), although de facto notaries and registrars, among others, apply foreign law in the EU with many nuances.

For instance, authorities in charge of the Civil Registry may apply foreign law when determining the capacity of foreigners to get married. Notaries may also apply foreign law when establishing the capacity of a foreigner to enter into a contract or to establish a last will and testament. International successions governed by foreign laws may also have consequences in the registration of Real Estate in Land Registries. And the same

⁵⁶² Cf. Azcárraga Monzonis, *op. cit.*, 335-336.

⁵⁶³ Some authors believe that this challenge should also be granted in cases where the foreign law has not been properly applied, but others do not think the violation of a foreign law can be object of cassation. See in particular Calvo Caravaca, Carrascosa González, 'Application of foreign law in Spain and the new Law on Civil Procedure', *Anales de Derecho. Universidad de Murcia*, n. 17, 1999, 302-303). For the negative view (also supported by the Spanish Supreme Court in Judgment of 15 July 1983 in RJ 1983\4228) see Miralles Sangro, *Application of foreign law in the process and judicial protection*, Dykinson, Madrid, 2007, 213; Azcárraga Monzonis, *op. cit.*, 335-336.



occurs with Commercial Registrars who deal with transactions that have foreign elements.

As a general principle, the same rules as regards application of foreign law by judicial authorities are deemed applicable. But in practice a much more flexible position exists as regards the role played by these authorities as to the proof of the content and validity of foreign law.

The mandatory character of conflict of law rules certainly persists, but the *lura novit curia* principle and the requirement of proof of foreign law by the parties are approached in a more flexible manner. In particular, the non-judicial authorities can use their own knowledge of foreign law to apply it and they can also replace the parties in case they know foreign law. In these cases, no proof by the parties is then required. However, no rules exist in the case that foreign law is not proved either by the authority or the parties. But it is considered that the prospective registration will be denied (registers) or the requested legal act will not be performed (notaries).⁵⁶⁴

E. PUBLIC POLICY AND OVERRIDING MANDATORY PROVISIONS⁵⁶⁵

The public policy exception is a fundamental and utmost delicate issue in private international law. While national and European conflict-of-laws rules aim at designating a law which is considered most appropriate to regulate a specific matter, a public policy exception is raised - in applicable law matters⁵⁶⁶ - whenever the application of the designated rule may lead to consequences that are unacceptable for the legal order of the forum.⁵⁶⁷ In view of safeguarding the legal orders from unacceptable applicable rules, all main EU private international law of family instruments contain a public policy rule. The Rome III Regulations contains a standard *ordre public* clause at its Article 12, prescribing that judges may waive the application of a foreign law only if its application

⁵⁶⁴ More broadly Esplugues, Iglesias, Palao, Espinosa, Azcárraga, *op. cit.*, 79-89.

⁵⁶⁵ This paragraph shall be attributed to: Filippo Marchetti.

⁵⁶⁶ With regard to public policy exception with regard to recognition and enforcement of judgments, see the contribution of Pfeiffer, Escher and Wittmann in this Final Study, at 220 ff.

⁵⁶⁷ Cf Wurmnest, *Ordre Public (Public Policy)*, in Leible, *General Principles of European Private International Law*, 2016, 305 ff.



is manifestly incompatible with the public policy of the forum.⁵⁶⁸ Analogously, the Hague Maintenance Protocol is equipped with an equivalent public policy rule at its Article 13.⁵⁶⁹ Substantially aligned is Article 35 of the Succession Regulation. While this instrument is considered of key important, its use must be limited in order not to jeopardise the functioning of the private international law system. To this end, current public policy clauses can only be triggered when the effect of the application of the foreign law is manifestly contrary to the public policy of the forum.⁵⁷⁰

In our practise, a public policy exception at the applicable law level has been raised in a few occasions.

First, a public policy issue may arise when the applicable law is based on a religious law, such as in the case of the OLG Hamm 7 May 2013.⁵⁷¹ This case regarded two Iranian citizens who got married in Iran in 2009. Later, the wife acquired German nationality. They had a daughter, got separated in 2011, and now reside in Germany. The Iranian marriage certificate included a few conditions under which the wife could file for divorce (such as six months of no maintenance payments, bad behaviour of the husband towards the wife). The wife filed for divorce in 2012. The German court stated that the marriage certificate could be interpreted as a choice-of-law agreement in favour of Iranian law pursuant to Article 5 of the Rome III Regulation. Indeed, the conditions agreed upon are the same conditions stipulated by Article 1133, 1134, 1138 IrCC. Even though the parties did not explicitly chose Iranian law, the wording of the marriage certificate was a strong indication of their will for it to be regulated by Iranian law. Iranian law contains an institute called “talaq”, under which a spouse may repudiate the other by pronouncing said word three times. The wife pronounced the set divorce phrase in the presence of two male witnesses during the proceedings pursuant to Article 1133, 1134 IrCC and the divorce became effective under Iranian law. In allowing such an

⁵⁶⁸ On this Article, see Joubert, Article 12 - Ordre Public, in Corneloup, *Droit européen du divorce*, 2013, 615.

⁵⁶⁹ On Article 13 of the Protocol, see the explanatory report issued by Bonomi and freely available for consultation at www.hcch.net.

⁵⁷⁰ Cf Mosconi, Campiglio, *Diritto internazionale privato e processuale*, 2015, 260.

⁵⁷¹ Oberlandesgericht Hamm, 07 May 2013, 3 UF 267/12, DES20130507.



outcome, the court implicitly recognised that the effects of the IrCC rules were not contrary to German public policy.

Second, in case of a foreign law lacking the institute of legal separation, the courts' assessment may vary as to whether direct divorce is contrary to public policy. Italy is a country in which separation is a mandatory step before divorce may be granted. Nonetheless, Italian courts tend not to use the public policy exception in these cases,⁵⁷² though case-law is not unanimous and, despite a clear direction pointed at by the Supreme Court of Cassation,⁵⁷³ rogue lower-court judgments are still to be encountered.⁵⁷⁴ However, Italy is not the only country interested by this issue, and the Audiencia Provincial de Barcelona also ruled on this matter, stating that a law that does not allow for separation is contrary to public policy.⁵⁷⁵

Another public policy issue may arise when a marriage contract excludes any form of compensatory allowance in case of divorce. The French Supreme Court overruled a judgment issued by a Court of Appeal because the judge did not assess whether the effects of the application of the foreign law (namely German law, which excludes compensatory allowances) are manifestly contrary to French public policy pursuant to Article 13 of the Hague Maintenance Protocol.⁵⁷⁶

Regarding overriding mandatory provisions, i.e. rules that must be applied regardless of the applicable law that is pointed at by the conflict-of-laws rules of the forum, no further case is to be reported on top of the ones already mentioned in the First Assessment Report.⁵⁷⁷

⁵⁷² Tribunale di Belluno, 6 March 2009, ITF20090306; Tribunale di Roma, 25 July 2014, ITF20140725; Tribunale di Firenze, 9 March 2015, ITF20150309

⁵⁷³ Corte di Cassazione, No 16978/2006 and No 10378/2004.

⁵⁷⁴ Tribunale di Milano, 24 March 2014, ITF20140524.

⁵⁷⁵ Audiencia Provincial Barcelona n. 777/2013, ESS20131112.

⁵⁷⁶ Cour de cassation, 8 July 2015, 14-17880, FRT20150708.

⁵⁷⁷ See First Assessment Report, 90 ff.



Indeed, despite the issue be frequently analysed by scholars,⁵⁷⁸ only two judgments explicitly refer to overriding mandatory provisions. Both are found in Italian case-law, and both deal with Article 36-*bis* of Italian Law No 218/1995.

According to Article 36-*bis*, “notwithstanding the referral to a foreign law, Italian law provisions apply in all cases where said law: a) gives parental responsibility to both parents; b) establishes the duty of both parents to provide for child support; c) gives the court the power to adopt measures limiting of parental responsibility in the presence of prejudicial acts against the child”.

Accordingly, Italian law was applied to regulate parental responsibility claim within divorce proceedings between two Tunisian citizens⁵⁷⁹ and two Senegalese citizens⁵⁸⁰ respectively, where both couples were habitually resident in Italy.

⁵⁷⁸ See for instance Honorati, *Norme di applicazione necessaria e responsabilità parentale del padre non sposato*, in *Rivista di diritto internazionale privato e processuale*, 2015, 793 ff.

⁵⁷⁹ Tribunale di Belluno, 23 December 2014, ITF20141223.

⁵⁸⁰ Tribunale di Firenze, 9 March 2015, ITF20150309.



CHAPTER 7. THE FRAGMENTATION OF RECOGNITION AND ENFORCEMENT REGIMES

Thomas Pfeiffer, Mirjam Escher, Josef Wittmann

A. INTRODUCTION

It is apparent that EU citizens and families cannot hope for legal certainty and security without a reliable recognition and enforcement regime. If families are to be able to move freely, it must be assured that their marital status is recognised in all Member States and that judgements relating to parental responsibility or maintenance claims are generally enforced.⁵⁸¹ In this regard, one major hurdle to the free movement of families is posed by the heterogeneous requirement of *exequatur*. While the Maintenance Regulation has abolished the *exequatur* procedure for decisions given in a Member State bound by the Hague Maintenance Protocol, decisions given in states not bound by the Hague Maintenance Protocol still must be granted *exequatur* before being enforced. Further, the enforcement of judgements falling under the scope of the Brussels IIa Regulation in general requires *exequatur*, except for judgements relating to rights of access and return orders. The fragmentation of the European recognition and enforcements regimes in family matters continues to be deepened by the Member States' different interpretation of refusal grounds set by the Maintenance and the Brussels IIa Regulation, such as the *ordre public* or the requirement to hear the child in matters of parental responsibility. Finally, the enforcement process itself varies from one Member State to another, applying a different degree of awareness to the sensitive process of enforcing judgments relating to parental responsibility.

This contribution will - in line with the *EUFam's Project* - restructure these matters and examine the rationale behind the described state of fragmentation. In this context, the

⁵⁸¹ Scott, *A question of trust? Recognition and enforcement of judgements*, *Nederlands Internationaal Privaatrecht (NiPR)* 2015/1, 27.



report will also assess the recent Commission's proposal to fully abolish the exequatur procedure as foreseen under the Brussels IIa Regulation. The analysis ends by addressing the special problem of enforcing preliminary rulings in matters of child abduction and family matters in general.

B. THE REQUIREMENT FOR EXEQUATUR UNDER THE MAINTENANCE AND BRUSSELS IIA REGULATION

I. THE PARTIAL ABOLITION OF EXEQUATUR FOR MAINTENANCE DECISIONS

The Maintenance Regulation has abolished the need for an exequatur of decisions and agreements rendered in a Member State bound by the Hague Maintenance Protocol (Article 17 et seq.). By contrast, an exequatur is still needed for decisions and agreements rendered in a Member State not bound by the Hague Maintenance Protocol (Article 23 et seq.), which is only relevant in relation to Denmark and the United Kingdom. The exequatur requirement for decisions rendered in Denmark and the United Kingdom is based on the ground that, as these states are not bound by the conflict-of-law rules of the Hague Maintenance Protocol, forum shopping could be encouraged. Therefore, these decisions shall not be enforced before being reviewed through an exequatur procedure.⁵⁸²

Further, an exequatur procedure is necessary for decisions rendered in Member States of the Hague Maintenance Protocol, if the decision was not yet given under the application of the 2007 Hague Maintenance Protocol. According to a decision by the Council (EU) from November 30, 2009 the Hague Maintenance Protocol is only applicable for maintenance proceedings instituted after June 18, 2011 - irrespective of the time period for which maintenance is claimed (unlike to the provision in Article 22 Hague Maintenance Protocol!).⁵⁸³ Consequently, besides decisions rendered in Denmark and the

⁵⁸² See Nademleinsky, *Die neue EU-Unterhaltsverordnung*, EF-Z 2011/04, S. 130, 133.

⁵⁸³ Oberlandesgericht Nürnberg, July 10, 2014 - 7 UF 694/14, DES20140710.



United Kingdom, only maintenance decisions resulting from proceedings instituted before June 18, 2011 require exequatur under the Maintenance Regulation.

II. THE EXEQUATUR REQUIREMENT IN THE BRUSSELS IIA REGULATION

While the partial exequatur requirement in the Maintenance Regulation for maintenance decisions rendered in Denmark and the United Kingdom as well as for maintenance decisions resulting from proceedings instituted before June 18, 2011 is widely approved, the exequatur requirement in the Brussels Iia Regulation is strongly disputed. As laid out above, the enforcement of judgements falling under the scope of the Brussels Iia Regulation in general requires exequatur, with the exception of judgements relating to rights of access and return orders.

On June 30, 2016 the European Commission proposed a recast of the Brussels Iia Regulation, abolishing the exequatur for all decisions falling under the scope of the Regulation.⁵⁸⁴ The abolition of exequatur for decisions in family law matters constitutes one of the objectives laid down in 1999 at the European Council in Tampere.⁵⁸⁵ In addition, the Stockholm Programme⁵⁸⁶ and the Stockholm Action Plan,⁵⁸⁷ acknowledging the importance of mutual trust between Member States, establish that the process of abolishing all intermediate measures, such as exequatur, should be continued - including with regards to judgments in cases of parental responsibility.

Against this backdrop, the recent Commission's proposal to abolish the exequatur under the Brussels Iia Regulation seems like an inevitable step in the process of integrating the Member States' judicial systems and as a further indicator of increasing mutual trust between Member States in each other's legal systems. In the proposal, the Commission

⁵⁸⁴ European Commission, 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), June 30, 2016, 10 f.

⁵⁸⁵ Tampere European Council, October 15-16, 1999, Presidency Conclusions, no. 34.

⁵⁸⁶ The Stockholm Programme - An open and secure Europe serving and protecting citizens, Council document No. 17024/09 JAI 896, paras. 3.1.2 and 3.3.2.

⁵⁸⁷ Communication from the Commission to European Parliament, the Council and the Economic and Social Committee, Delivering an Area of Freedom, Security and Justice for Europe's Citizens - Action Plan Implementing the Stockholm Programme of 20 April 2010, COM(2010) 171 final, 8 and 23; see also Scott, *A question of trust? Recognition and enforcement of judgements*, *Nederlands Internationaal Privaatrecht (NiPR)* 2015/1, 27.



states that exequatur remains an obstacle to the free circulation of decisions.⁵⁸⁸ As an example, the Commission cites that the time for obtaining exequatur varies between the Member States from a couple of days to several months, while it takes additional time to collect the documents necessary for the application and translations. Further, as the exequatur procedure is already abolished for matters of access, the anomaly might arise that rights of access may be enforced before a judgement determining the child's residence is enforced.⁵⁸⁹ This phenomenon is particularly serious as matters of residence and contact are often decided in the same judgement.

However, critics of the Commission's proposal warn that abolishing the exequatur procedure should not be pursued at the expense of abandoning safeguards including those relating to public policy, nor should it reduce protection for children.⁵⁹⁰ The difficulty of totally abandoning the safeguards of the exequatur process is particularly demonstrated by the different interpretation of refusal grounds, such as the *ordre public* or the requirement to hear the child in matters of parental responsibility. The following chapter is going to examine the varying understanding of refusal grounds through the Member States' judiciaries. Based on these findings, an assessment will be given on whether removing the requirement for exequatur will indeed mean the abandonment of certain safeguards, and whether certain safeguards could be upheld, even if exequatur is abolished.

C. GROUNDS OF NON-RECOGNITION AND REFUSAL OF ENFORCEMENT

The grounds of non-recognition or non-enforcement stipulated in Article 23 Brussels IIa Regulation as well as in Article 24 Maintenance Regulation are to be interpreted in an exhaustive way.⁵⁹¹ Thereby the European legislator aims to guarantee the establishment

⁵⁸⁸ Cf. European Commission's Proposal, 4.

⁵⁸⁹ See also Scott, *A question of trust ? Recognition and enforcement of judgements*, *Nederlands Internationaal Privaatrecht (NiPR)* 2015/1, 27, 28; Kruger/Samyn, *Brussels II bis: successes and suggested improvements*, *Journal of Private International Law* 2016, Vol. 12, No. 1, 132, 160.

⁵⁹⁰ Kruger/Samyn, *Brussels II bis: successes and suggested improvements*, *Journal of Private International Law* 2016, Vol. 12, No. 1, 132, 160; see also *Escher/Wittmann*, Report on the German Good Practices, 5 f.

⁵⁹¹ Court of Second Instance Stuttgart, 17 UF 189/13, DES20131025 stating that Article 24 cannot be extended beyond its wording; cf. Article 34(1) Maintenance Regulation.



of a uniform area of justice in Europe. However, there are some exceptions to this rule as the grounds of non-recognition and refusal of enforcement concern certain subjects still deviating between the Member States.

I. HEARING OF THE CHILD

This ground of non-recognition is regulated by Article 23(b) Brussels IIa Regulation. It stipulates the non-recognition of a judgement *“if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought”*.

The hearing of the child - explicitly referring to fundamental principles of the Member States - is unsurprisingly an area, in which the Member States still provide a clearly deviating level of protection. Germany's case law for example sets strict standards in relation to Article 23(b) Brussels IIa Regulation. This stems from the fact that the hearing of the child is a fundamental procedural principle in Germany deriving from Article 103 II, 1 I, 2 II of the German Constitution and constitutes part of German *ordre public*. Exceptions can only be assumed to protect the child's mental health. The German Federal Court elaborates that the child must always be heard, if (1) it is appropriate regarding the age and maturity of the child and (2) the matter is no case of urgency.⁵⁹² Correspondingly, Article 23(b) Brussels IIa Regulation must be interpreted widely in Germany. Therefore, it is not enough to summon children to appear before court to fulfil the requirement. The wording *“having been given the opportunity to be heard”* means merely that the children cannot be forced to speak, but they should explicitly be given the opportunity to be heard.⁵⁹³

However, other countries do not seem to impose such strict standards. In Italy, there is a trend not to hear the child in cases, in which the parties apply for separation or divorce by mutual consent, as no conflict between the parents exists. To this effect

⁵⁹² BGH, 08 April 2015, XII ZB 148/14, DET20150408.

⁵⁹³ Oberlandesgericht Schleswig, 12 UF 203/07; Court of Second Instance Hamm, 11 UF 85/14, DES20140826.



Article 336 bis of the Italian Civil Code stipulates that no hearing of the child shall take place, if it is contrary to the child's best interest or it is manifestly unnecessary. Namely, the option to refrain from hearing the child for reasons of lacking necessity exemplifies the difference to the German approach, deeming the hearing of the child's opinion necessary under all circumstances. In Italy, courts have different practices depending on their geographical location as well. The Tribunal of Bolzano for example hears even small children as it is located on the border to Germany. The Italian Central Authority deems cases of abduction involving Northern Europe most problematic. If the courts refrain from hearing a child in such a case, it seems necessary to deliver evidence as to the impossibility of such a hearing. However, Annex IV of the Brussels IIa Regulation⁵⁹⁴ does not provide for this, so a rewording of the Annex might be necessary. In Spain, the lack of hearing a child even led to the European Court of Human Rights criticizing Spain and ordering a court to hear the thirteen-year-old girl.⁵⁹⁵

As the current text of the Brussels IIa Regulation leaves a certain degree of discretion to the Member States' courts, the situation described above underlines that there certainly is a need to act. Especially the German practice calls for a European standard that strengthens the child's position by possibly setting a strict age limit. Italy's experts propose to request a detailed explanation as to why a child wasn't heard from the respective courts, thereby wanting to avoid cross-border misunderstandings. In a questionnaire carried out by the *EUFam's* Project-Partners under the supervision of University of Milan multiple experts from all participating countries had the opportunity to assess the necessity to set a strict European standard. 64 % of the experts answered the question whether they thought "*a higher degree of harmonization at the EU level would prove useful in order to minimize the recourse of the ground of non-recognition provided in Article 23 (b)*" with "yes".⁵⁹⁶ This supports the German call for a European standard.

⁵⁹⁴ Certificate referred to in Article 42(1) concerning the return of the child.

⁵⁹⁵ ECtHR, *Iglesias Casarrubios and Cantalapiedra Iglesias v. Spain*, 23298/12, 11 October, 2016.

⁵⁹⁶ 114 experts gave an answer to this question, 73 answered with yes (64,04 %), 26 had no opinion or did not know (22,81 %) and 15 answered no (13,16 %).



This situation is also captured in the current European Commission's proposal for a recast of the Brussels IIa Regulation.⁵⁹⁷ The explanatory memorandum states that there are discrepancies in the interpretation of the ground for non-recognition, in particular in relation to the hearing of the child. These difficulties derive from the diverging rules in the Member States. The memorandum concludes that Member States with stricter standards than the Member State of origin of the decision are indeed encouraged by the current rules to refuse recognition and exequatur if the hearing of the child does not satisfy their own standards. The proposal underlines the importance to take the child's best interest into account and to underline this principle in the rules more firmly.⁵⁹⁸ Following these observations, the proposal recommends a new Article 20 stipulating a *"right of the child to express his or her views"*. *"When exercising their jurisdiction under Section 2 of this Chapter, the authorities of the Member States shall ensure that a child who is capable of forming his or her own views is given the genuine and effective opportunity to express those views freely during the proceedings. The authority shall give due weight to the child's views in accordance with his or her age and maturity and document its considerations in the decision."*⁵⁹⁹ This article would constitute a change in the system as it introduces an obligation of substantive law to hear the child in all matters of parental responsibility. Such an obligation is indeed already included in the UN Convention on the Rights of the Child, but would then be a directly applicable rule of European Union law, leaving none of the Member States a possibility to disregard it. Further, the lack of a hearing of the child would no longer be an explicit ground of refusal to recognise a decision, but it would still be part of the public policy of countries greatly valuing it such as Germany.

Even though this proposal aims to underline the importance of the children's views for the proceedings, it does not satisfy the universal call for a stricter standard. It still leaves room for interpretation on the part of the Member States. But a common minimum age for the hearing of a child is a highly debated and criticized possibility as

⁵⁹⁷ COM(2016) 411 final, Brussels, 30 June 2016, 2016/0190 (CNS), available at: <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-411-EN-F1-1.PDF>.

⁵⁹⁸ Cf. European Commission Proposal, 4.

⁵⁹⁹ Cf. European Commission Proposal, 42.



well. The difficulties of the topic, especially in light of the UN Convention on the Rights of the Child, seem to call for a case-by-case assessment. Every child's maturity is a compilation of multiple factors and the child's history has to be taken into account as well as its sensitivity.

Further it is discussed whether minimum standards for the process should be set, in particular by whom the child should be heard (by judge or social worker). But there is no case law flagging this issue and there was no concern raised in connection with this.

As a result, the current regulation of Article 23(b) Brussels IIa Regulation seems not satisfactory in different regards. For one it is only strictly applied by Member States that include the child's right to be heard in their concept of public policy anyways. Therefore, the provision seems to be purely declaratory. Further, it does not adequately underline the importance of the inclusion of the child's views in light of the UN Convention on the Right of the Child and in order to rule in the child's best interest. But most importantly, it supports the discrepancies in the interpretation of Article 23(b) Brussels IIa Regulation in the different Member States and even drives the stricter Member States to refuse recognition or enforcement. Therefore, the proposal's substantive approach is a better concept, but its wording is still fairly open.

II. PUBLIC POLICY

The status quo is one of mutual recognition, assuming an infringement of public policy only, if the decision to be recognised and enforced is at variance with the Member State's legal order to an unacceptable degree. As set out in the CJEU-case *Krombach v. Bamberski*,⁶⁰⁰ the ordre public exception only applies when there is a manifest contradiction to the fundamental values of the state where recognition or enforcement is sought. This definition also upholds in matters of European family law. E.g. Article 24(a) Maintenance Regulation stipulates that a decision shall not be recognised "*if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought.*"

⁶⁰⁰ CJEU, case C-7/98 - Dieter Krombach v André Bamberski.



Further, it can be stated that - like under the scope of any other European instrument of Private International and Procedural Law - “*public policy exception is often invoked, but seldom applied*”.⁶⁰¹ Hereby most ordre public objections relate to procedural principles, rather than to substantial public policy. This may be explained by the limited scope of the Regulations only applying between Member States and therefore rarely touching on issues, such as the recognition of marriages from Islamic countries.⁶⁰²

a) Procedural public policy

The Member State Courts follow a narrow application of this provision consistent with the wording “*manifestly contrary*” and the CJEU case-law.⁶⁰³ The judgements collected in the EUFam’s case law database and recapitulated in the EUFam’s First Assessment Report⁶⁰⁴ stand as an example:

Quoting the CJEU case *Trade Agency Ltd*, the Oberlandesgericht Karlsruhe has confirmed a declaration of enforceability of a Dutch judgment granting maintenance to a divorced wife and her children, rendered by the Amtsgericht Karlsruhe. The plaintiff argued that the decision of the Dutch court infringed the German public order since he was not granted an interpreter during the foreign proceedings. The Oberlandesgericht Karlsruhe, in line with the CJEU case-law, held that an infringement of the public policy cannot be detected, as the reasons of the ruling of the Dutch judgment clarify that the plaintiff deliberately renounced to defend himself during the Dutch proceedings.⁶⁰⁵

Further, the Oberlandesgericht Hamm⁶⁰⁶ has affirmed that a Polish judgment granting maintenance in favour of the child does not constitute a breach of the German public order (Article 24(a) of the Maintenance Regulation) merely because the paternity was

⁶⁰¹ Hess/Pfeiffer, ‘*Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law*’, IPOL-JURI_ET(2011)453189_EN, 2011.

⁶⁰² Cf. CJEU, case C-281/15, 12 May 2016.

⁶⁰³ Oberlandesgericht Hamm, II-11 UF 279/11, DES20120628 (it is not an infringement of public policy, if the court based the defendant’s paternity solely on the mother’s testimony, but the defendant had the chance to request a DNA test); Oberlandesgericht Stuttgart, 17 UF 331/11, DES20120213; Corte d’appello di Catania, ITS20140527 (default judgements can become final without notice to the person in default).

⁶⁰⁴ *First assessment report*, 93 ff.

⁶⁰⁵ Oberlandesgericht Karlsruhe, 27 January 2014, 8 W 61/13, DES20140127.

⁶⁰⁶ Oberlandesgericht Hamm, 28 June 2014, II-11 UF 279/11, DES20120628.



ascertained solely on the basis of the mother's testimony, according to which the defendant was the father. In the view of the German court, such *modus operandi* does not contradict the public policy, because the father did have the chance to request a DNA test in the course of the Polish proceedings. In addition, the father had the possibility to appeal the decision in Poland before claiming a public order violation in the Member State of enforcement (i.e. in Germany). A similar case was decided - in the same manner - by the Oberlandesgericht Stuttgart.⁶⁰⁷

Moreover, the Corte di Appello di Catania⁶⁰⁸ held that a default judgment on maintenance becoming final without notification to the person who was in default of appearance cannot be considered, in itself, manifestly contrary to public policy ex Article 24(a) of the Maintenance Regulation. This is because the right of defence can be limited in the interest of legal certainty. Accordingly, Italian non-notified decisions become final after 6 months from the issuance.

Finally, the French Cour de cassation⁶⁰⁹ has dealt with the wording of Article 24(a) of the Maintenance Regulation, pursuant to which "*the test of public policy may not be applied to the rules relating to jurisdiction*". A French woman, after having transferred her domicile to the United Kingdom, obtained a divorce decree according to English Law. In the course of the French enforcement proceedings (ex Article 23 et seq. of the Maintenance Regulation) the husband argued that a fraud had been perpetrated by the woman in declaring that her habitual residence was in England and, therefore, the judgment should have been considered in violation of the French public policy. Nonetheless, the French Cour d'appel de Toulouse⁶¹⁰ properly applying Article 24(a) of the Maintenance Regulation, declared the English judgment enforceable in France. The decision was confirmed by the Cour de cassation.

⁶⁰⁷ Oberlandesgericht Stuttgart, 13 February 2012, 17 UF 331/11, DES20120213, concerning a Czech judgment granting maintenance, merely based upon the statement of the applicant, according to which the defendant was the father of the child.

⁶⁰⁸ Corte d'appello di Catania, 27 May 2014, ITS20140527.

⁶⁰⁹ Cour de cassation, 25 May 2016, 15-21407, FRT20162505.

⁶¹⁰ Cour d'appel de Toulouse, 8 April 2015, quoted by Cour de cassation, 25 May 2016 No 15-21407, FRT20162505.



b) Substantive public policy

Within the scope of the Brussels IIa Regulation, Italian courts repeatedly held that pursuant to Article 22(a) of the Brussels IIa Regulation, a judgment of divorce rendered abroad in the absence of a previous decision on legal separation cannot be considered in contrast with the substantive public policy even if, under Italian law, legal separation is a necessary step to obtain divorce.⁶¹¹

Regarding the Maintenance Regulation more crucial subjects surface. The Oberlandesgericht Stuttgart determined whether the maintenance sum can be based on fictitious or actual income, coming to the conclusion that this constitutes no infringement of public policy.⁶¹² The Oberlandesgericht Frankfurt found that a maintenance sum being set too high is no breach of substantive public policy.⁶¹³ Finally, the Tribunale di Belluno discussed whether a divorce decree not taking stand on custody and maintenance infringes public policy, if the possibility to raise such claims before a court is given. This was negated as well.⁶¹⁴

c) Interim findings and results of the EUFam's Project's Questionnaire

In line with these findings, 54 % of the experts asked about the application of public policy in the EUFam's Project's Questionnaire answered that the public policy exception has not been applied too extensively in practical cases. Thus, the mutual trust among Member States is not jeopardized. Only 11 % gave the opposite answer and 35 % had no opinion or did not know what to reply.⁶¹⁵ This ratio shows that the public policy exception is not regarded as one of the crucial topics.

This observation leaves the question whether there are indeed problems that have to be discussed aside from the universal uncertainty that derives from the “*unruly horse*”

⁶¹¹ Corte d'appello di Bologna, 18 November 2014, ITS20141118; Tribunale di Firenze, 9 March 2015, ITF20150309; Tribunale di Belluno, 5 November 2010, ITF20101105.

⁶¹² Oberlandesgericht Stuttgart, 17 UF 150/14, DES2014120.

⁶¹³ Oberlandesgericht Frankfurt, 4 UF 268/15, DES20151230 (elaborating that the maintenance sum is dependent on the need determined on a case-by-case basis in Germany as well).

⁶¹⁴ Tribunale di Belluno, 5 November 2010, ITF20101105.

⁶¹⁵ 114 experts answered this question, 62 (54,39 %) said no, 40 had no opinion or did not know (35,09 %), 12 said yes (10,53 %).



public policy. An issue that was indeed raised during the discussion accompanying the Italian Exchange Seminar targets the question whether the recognition of a decision protecting the weaker party may be interpreted in conflict with public policy. In this context, it was underlined that public policy does not observe formal aspects, but the effect in light of the parties' cultural identity must be taken into account. Therefore, a polygamous marriage and the repudiation of a wife can be in line with public policy, if it protects the repudiated wife. This issue is currently relevant as more and more culturally diverging matters emerge. Regarding public policy, the courts have to evaluate the effect on a case-by-case basis, not the formal remedy itself. In light of the disputed case-law, discussing public policy this flexible and practical approach is already widely adapted, leaving the hope that the new challenges will be met likewise.

III. SERVICE OF DOCUMENTS

Both the Brussels IIa Regulation and the Maintenance Regulation have a provision stipulating the lack of notification to the defendant of the documents instituting proceedings as ground for refusal of recognition or enforcement. Thereby not only the lack of the notification itself, but as well an error in the process shall hinder recognition and enforcement.

Article 23(c) Brussels IIa stipulates that a judgment shall not be recognised “*where it was given in default of appearance if the person in default was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence unless it is determined that such person has accepted the judgement unequivocally*”. The question arises what the wording “*to enable defence*” is exactly referring to. Especially in cross border cases it is necessary to provide enough time and information to prepare a substantial defence. The Amtsgericht Berlin-Pankow/Weißensee elaborated to this effect that it is not enough to serve the papers at an old address because of the deliberate misinformation of the other party.⁶¹⁶

⁶¹⁶ Amtsgericht Berlin-Pankow/Weißensee, 28 F 935/09, DEF20090320 (the documents had only been sent to the former French address of the plaintiff and not her current German address as a result of the



Otherwise, the applicant could influence the possibility for the defendant to prepare his/her defence. Similarly, an English judge refused recognition and enforcement of a Romanian judgement in a matter of parental responsibility.⁶¹⁷ The mother was not served with the initiating documents. Instead they were sent to the child's maternal grandmother, although the mother claimed that the documents had not been received. However, according to the Romanian judge the service met the requirements of Romanian law.

Article 24(b) Maintenance Regulation stipulates that a decision shall not be recognised *“where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the decision when it was possible for him to do so”*. The notion of *“incorrect or missing service”* must hereby be examined thoroughly for each case, as in some cases defendants invoke the refusal ground by assertion of incorrect facts: In a case of the Oberlandesgericht Nürnberg⁶¹⁸ the defendant had claimed that he only learned of the divorce proceedings and the maintenance claim in January 2013. However, this claim had been proven wrong, as the defendant had in fact received a copy of the document instituting the Polish proceeding in December 2011 and even gave a statement in reaction to this copy.

IV. IRRECONCILABILITY

The notion of irreconcilability simply states that a decision cannot be irreconcilable *“with a later judgement relating to parental responsibility given in the Member State in which recognition is sought”* (Brussels IIa), respectively *“with a decision given in the dispute between the same parties in the Member State in which recognition is sought”* (Maintenance Regulation).

respondent's deliberate misinformation); in Audiencia Provincial of Barcelona, 58/2015, ESS20150220 the person in default was served with the documents, but did not have sufficient time to prepare a defence as the defendant was abroad; cf. CJEU, C-619/10, Trade Agency, para. 32.

⁶¹⁷ MD v. AA, [2014] EWHC 2756 Fam. as discussed by J.M. Scott, A question of trust ? Recognition and enforcement of judgements, *Nederlands Internationaal Privaatrecht (NiPR)* 2015/1, 27, 32.

⁶¹⁸ Oberlandesgericht Nürnberg, 7 UF 694/14 (DES20140710).



The refusal ground of irreconcilability as stated in Article 23(f) Brussels Ila Regulation gives preference to the later judgement and therefore acknowledges the changing circumstances relating to parental responsibility.⁶¹⁹ However, instances occur where courts exercise jurisdiction in violation of the *lis pendens* rule of Article 19 Brussels Ila Regulation requiring the court second seised to decline jurisdiction. In these cases, the judgement of the court wrongfully exercising jurisdiction can of course not be granted preference, but rather must be declined recognition and/or enforcement. The CJEU was faced with that matter in the *Mercredi* case, stating that Article 23(e) and (f) Brussels Ila Regulation only allow denying recognition of decisions if they are irreconcilable with a later decision of a Member State court.⁶²⁰ Therefore, the court created an unwritten ground of non-recognition, allowing the court first seised not only to question jurisdiction, but also to decline enforcement of an order by the court second seised. For reasons of legal certainty and to ensure the consistent application of this (unwritten) refusal ground throughout the Member States,⁶²¹ this matter should be picked up in a potential recast of the Brussels Ila Regulation.⁶²²

With regard to the Maintenance Regulation, the Oberlandesgericht Düsseldorf did not consider the fact that a Dutch decision had been appealed and thereby modified a ground for refusal pursuant to Article 24(1)(d) Maintenance Regulation.⁶²³ This interpretation leads to the phenomena that a decision is enforced that would not be recognised in the rendering state itself, promoting an imbalance inherent in the international enforceability of decisions. The German Federal Court clarifies this in its decision regarding the instant case. It stipulates that it is a general principle that a decision can only be enforced if it would also be recognised in the rendering state itself. Therefore, apart from a possible irreconcilability in the state of enforcement, the

⁶¹⁹ Scott, *A question of trust ? Recognition and enforcement of judgements*, *Nederlands Internationaal Privaatrecht (NiPR)* 2015/1, 27, 33.

⁶²⁰ CJEU, case C-497/10 PPU - *Mercredi*.

⁶²¹ E. g. the court of Okresný súd Rimavská Sobota demands a restrictive interpretation of the concept regarding Article 23(f) Brussels Ila Regulation. It stipulates that the mere fact of a breach of Article 19 is not a sufficient reason to call two decisions irreconcilable, *Okresný súd Rimavská Sobota*, 9P/8/2011, SKF20120524.

⁶²² See also Schulz/Dutta, *First Cornerstones of the EU Rules on Cross-border Child Cases*, *Journal of Private International Law* 2014, Vol. 10, No. 1, 1, 14.

⁶²³ Oberlandesgericht Düsseldorf, 28 April 2015, 1 UF 261/14, DES20150428.



enforcement court has to take the legal effects of the decision in the rendering state into account as well.⁶²⁴

D. ABOLITION OF EXEQUATUR

The abolishment of the exequatur under the Brussels IIa Regulation is a worthwhile goal in the process of integrating the Member States' judicial systems. However, certain safeguards must remain.

While the exequatur is considered pure formality in most cases and can sometimes be costly and time-consuming, the undertaken assessment of refusal grounds has shown that situations occur, in which control and assessment on part of the state of enforcement is necessary:

The Member State courts assign uneven relevance to the hearing of the child in matters of parental responsibility. Outright abolishment of the exequatur would require hard-to-reach concessions by countries currently setting very strict standards in relation to Article 23(b) Brussels IIa Regulation. This is especially true with regard to Germany, where the hearing of the child is a fundamental procedural principle, deriving from Article 103 II, 1 I, 2 II of the German Constitution and constitutes part of German *ordre public*.

The public policy exception only applies in cases of manifest contradiction to the fundamental values in the state of recognition or enforcement and is therefore denied in the vast majority of cases. However, due to upcoming fundamental changes to European Family Law, the *ordre public* exception might still be necessary as a safeguard to national autonomy. In particular, there is no common sense on same sex-marriages. Further, in the wake of the current refugee crisis courts will have to address challenges arising from Islamic law institutions, such as polygamous marriage. In this context, many Member States will consider the level of protection granted to women a part of their public policy; consensus between Member States in this regard will be difficult to achieve.

⁶²⁴ BGH, 23 September 2015, XII ZB 234/15, DET20150923 in connection with CJEU C-139/10 ('Prism').



Still situations occur, in which the service of documents is not sufficient to enable proper defence. It must always be assured that procedural rights of the parties have been respected.

Further, it has been shown that a decision can only be enforced pursuant to Article 23 et seq. Maintenance Regulation if the decision would also be recognised in the rendering state itself. Therefore, the enforcement court has to take every modification into account.⁶²⁵ A decision cannot be awarded legal effects, which it does not have in the Member State of Origin or which a decision of the same kind rendered directly in the Member State of Enforcement could not produce.⁶²⁶

The Commission's proposal to abolish the exequatur under the Brussels IIa Regulation adequately takes into account the above-mentioned concerns. While the exequatur as an obligatory intermediary procedure required for enforcement will be given up, a party against whom enforcement is sought may - upon application - still invoke the same grounds to oppose enforcement: public policy, failure to serve the documents instituting the proceeding, reconciliation with another decision. Only the lack of hearing the child would no longer be an explicit ground of refusal to recognise a decision. Instead, an obligation of substantive law to hear the child in all matters of parental responsibility shall be introduced. This obligation of course leaves room for interpretation on the part of the Member States. However, cases in which a Member State's court reaches an objectively unacceptable interpretation of the law, disregarding the child's right of self-determination, the public policy exception would continue to apply.

E. VARYING METHODS OF ENFORCEMENT

Article 47(1) Brussels IIa Regulation stipulates that “[t]he enforcement procedure is governed by the law of the Member State of enforcement”, thus leaving the selection of enforcement measures to the Member States. This decision of the European legislator opens the door for a wide variety of enforcement measures documented by a

⁶²⁵ BGH, 23 September 2015, XII ZB 234/15, DET20150923 in connection with CJEU, case C-139/10 ('Prism').

⁶²⁶ CJEU, case C-139/10 ('Prism'), para. 38.



comparative study conducted by the T.M.C. Asser Instituut in The Hague in December 2007.⁶²⁷

Whereas Member States as Belgium and Austria commence the enforcement process by indirect measures such as mediation through courts, Common Law jurisdictions often resort to more sturdy methods such as fines or even imprisonment of the parents.⁶²⁸ Concerning these more drastic measures the Member State of enforcement must bear in mind the possible effect on the child. In *M v. S* the Scottish Second Division of the Inner House of the Court of Session was confronted with such a case and stipulated that even though parental imprisonment separates the child from the primary carer, courts are nonetheless entitled to impose such a sentence if deemed necessary.⁶²⁹ Consequently, such measures can be taken as last resort after careful consideration of the possible effects on the child.

Most problematic is certainly the option to apply force directly to the child. Coercion directly forced on the child can leave the child traumatized and the family deeply harmed instead of solving the dispute.⁶³⁰ These measures can therefore directly contradict the foremost goal of the Brussels IIa Regulation to protect the child's best interest. Only in situations endangering the child direct force can therefore be appropriate. If such coercion is indeed necessary and the situation can be resolved by applying force to a parent instead of the child, this approach should always be an option previously taken. Then again not offering the possibility of force being applied can lead to an impasse as well. In the case *Re ML and AL (Children)* a Deputy Judge of the High Court called it a "sorry state of affairs" for the Brussels IIa Regulation that his judgement could not be enforced properly in Austria.⁶³¹ He criticised the Austrian measures of enforcement as well as a lack of judicial cooperation, stating that the only measure available in this case in Austria was a fine, which was not even imposed. In his

⁶²⁷ Comparative study on enforcement procedures of family rights, T.M.C. Asser Instituut, JLS/C4/2005/06, The Hague, 19 December 2007.

⁶²⁸ Comparative study, JLS/C4/2005/06, 11 ff., 91.

⁶²⁹ *M v. S*, 2011 S.L.T. 918, 922 (2009).

⁶³⁰ Scott, *A question of trust? Recognition and enforcement of judgements*, Nederlands Internationaal Privaatrecht (NiPR) 2015/1, 27, 33 ff.

⁶³¹ *Re ML and AL (Children)* (Contact Order: Brussels II Regulation) (No 2), [2006] EWHC 3631 (Fam), para. 8.



view, the mother was abusing the children by not allowing contact with their father. Under these special circumstances he deemed force necessary and appropriate.⁶³² This case underlines that whereas in most cases a fine will be sufficient,⁶³³ each case much be analysed according to its special circumstances.

The question remains how an effective enforcement of the decisions under the Brussels IIa Regulation can be ensured, not leaving a “*sorry state of affairs*”. It is certainly desirable to find a common solution, namely a European approach to enforcement. But such an attempt of unification could undercut the national systems of enforcement. The countries not only have differing enforcement regimes, but different classifications of the matters to be enforced.⁶³⁴ Unification would disturb the coherent logic of these national systems.⁶³⁵

Therefore, the preferable approach is to regulate minimum standards and basic rules in a directive.⁶³⁶ The Court of Origin must be directed to give greater detail as to how the decision should be enforced and the Member State of enforcement must provide for certain coercive measures, ensuring the compliance with the decision.⁶³⁷ In all these considerations, the best interest of the child must always be the paramount principle guiding the selection of an appropriate enforcement measure. Further, an instrument of cooperation of judges is paramount in these cases. As noted by the Deputy Judge of the High Court in *Re ML and AL (Children)*, the judges must be able to communicate to best enforce a complicated decision in the sensitive area of family law.⁶³⁸ The Model Protocol for communication of judges designed by the EUFam’s project is an instrument allowing for exactly such communications.

⁶³² *Re ML and AL (Children)* (Contact Order: Brussels II Regulation) (No 2), [2006] EWHC 3631 (Fam), para. 7 ff.

⁶³³ Cf. Tribunale di Roma, sezione prima civile, ITF20170324 ordering an enforcement measure of a payment of 500 € for each month of delay in complying with the order.

⁶³⁴ Comparative study, JLS/C4/2005/06, 55.

⁶³⁵ *Thalia Kruger/ Liselot Samyn*, Brussels II bis: success and suggested improvements, *Journal of Private International Law*, Vol. 12, 161 refer to the “coherent logic” of the national procedural systems that mustn’t be disturbed.

⁶³⁶ *Kruger/Samyn*, *Journal of Private International Law*, Vol. 12, 161.

⁶³⁷ Cf. *Scott QC*, *Nederlands Internationaal Privaatrecht* 2015, 33.

⁶³⁸ Cf. *Re ML and AL (Children)* (Contact Order: Brussels II Regulation) (No 2), [2006] EWHC 3631 (Fam), para. 7.



Additional problems could certainly arise if *exequatur* is abolished under the Brussels IIa-recast. Then the Member States might fail to communicate to ensure a suitable measure of enforcement as the courts often play a decisive role in the enforcement process. The concern was raised that the Member States might directly resort to the most obvious measure of enforcement, being coercion directed on the child.⁶³⁹

F. PRELIMINARY JUDGEMENTS AND CHILD ABDUCTION

I. RETURN OF THE CHILD

In cases of parental child abduction the overarching goal must be the rapid execution of the child return procedure. However, under the current enforcement regime the immediate return of the child is not always ensured.⁶⁴⁰

As an example, the Hague Child Abduction Convention continues to apply between EU Member States. However, in certain specific cases the Brussels II a Regulation provides for an additional procedure of obtaining the return of an abducted child: If a court of the EU Member State to which the child has been abducted refuses the return of the child on the grounds set out in Article 13 of the Hague Child Abduction Convention, the Brussels IIa Regulation allows parallel proceedings concerning custody rights in the state of the (former) habitual residence of the child. If such custody proceedings result in a return order in favour of the parent left behind - which is accompanied by a certificate pursuant to Article 42 of the Regulation - this decision shall be immediately enforceable in other EU Member States without any further procedure regarding registration for enforcement or declaration of enforceability (Article 11 Sec. 6-8 Brussels II a Regulation). In practice, this two-track-system is only infrequently used and largely ineffective. The certificate pursuant to Article 42 of the Brussels IIa Regulation is rarely issued, most likely because the hearing of the child (necessary according to Articles 11 Sec. 2 and 42 Sec. 2(a) of the Brussels IIa Regulation) causes considerable difficulties. It

⁶³⁹ Scott, *A question of trust ? Recognition and enforcement of judgements*, *Nederlands Internationaal Privaatrecht (NiPR)* 2015/1, 27, 33.

⁶⁴⁰ Cf. European Commission Proposal, 3.



requires the court to either take action under the Evidence Regulation or to informally cooperate with the child welfare officers in the state to which the child has been abducted. However, even if the hearing of the child has been properly conducted and an Article 42-certificate has been issued, court orders to return the child are rarely enforced, despite the fact that under the Brussels IIa Regulation they are automatically enforceable without the need for exequatur. To put it briefly, the mechanism laid down in Article 11 Sec. 6-8 of the Brussels II a Regulation is considered an ineffective procedure that involves additional costs and even causes further instability for the child by lengthening the ongoing proceedings.⁶⁴¹

Against this backdrop, the recent Commission's proposal to streamline this so-called "overriding mechanism" (newly proposed Article 26) is considered a step into the right direction. E.g. the judgement of the court refusing the return of the child as well as other relevant documents, which have to be transmitted to the court having jurisdiction, shall be translated into the official language of that court. Further, the court where custody proceedings are pending is then required to review the issue of child custody taking into account the best interests of the child, as well as the reasons and evidence for the decision of non-return of the child. However obstacles remain, as any child who is capable of forming his or her own views has to be heard in these proceedings,⁶⁴² which in most cases requires⁶⁴² the cooperation of the abducting parent (even if alternative means such as videoconferencing are used).

In general, the Commission's focus on expediting the return procedure foreseen in the Hague Child Abduction Convention is strongly welcomed.⁶⁴³ This includes the possibility of taking provisional measures and declaring the decision ordering the return of the child provisionally enforceable notwithstanding any appeal. In general, the one-appeal-limit for return decisions adequately confronts delaying national provisions, such as in Spain, where the second-instance appellate courts are granted power to suspend the enforcement of a decision in the best interest of the child.

⁶⁴¹ Escher/Wittmann, *Report on the German Good Practices*, 4 f.

⁶⁴² Cf. European Commission Proposal, 13.

⁶⁴³ Cf. European Commission Proposal, 3, 12 f.



II. SCOPE OF THE APPLICATION OF THE BRUSSELS IIA REGULATION IN LIGHT OF ARTICLE 20

According to the CJEU interpretation in *Purrucker I*,⁶⁴⁴ Article 20 of the Brussels IIA Regulation constitutes an opening clause stipulating that in urgent cases a Member State can take provisional measures in respect of persons or assets available under the law of that State, even if, under the Brussels IIA Regulation, the court of another Member State has jurisdiction to the substance of the matter. Consequently, a court not competent on the merits under the Brussels IIA Regulation can resort to other instruments of Private International Law by way of Article 20. As an example, the Oberlandesgericht Munich referred to the Hague Convention of 1996 on the Protection of Children in a case concerning the enforcement of a judgement on parental responsibility, thereby disregarding Article 61 Brussels IIA Regulation.⁶⁴⁵

Particularly in cases of child abduction, Article 20 of the Brussels IIA Regulation is essential to accelerate the return procedure. However, it is also to mention that on behalf of the clarity and foreseeability of the recognition and enforcement regime the opening clause of Article 20 Brussels IIA Regulation has to be applied in a harmonious manner complying with a precise scope of application. In this regard, the CJEU in *Purrucker I* provided for a system of enforcement, distinguishing between different categories of provisional measures:

If the court of origin of a provisional measure has jurisdiction over the main proceedings pursuant to the Article 8 et seq. of the Brussels IIA Regulation, the recognition and enforcement of the provisional measure is subject to the Article 21 et seq. of the regulation.

In contrast, if the court of origin does not have jurisdiction pursuant to the Article 8 et seq. of the Brussels IIA Regulation, the Article 21 et seq. are inapplicable. In this case the provisional measure can only be recognised and enforced based on separate international agreements or the respective national law. However, this recognition outside the Brussels IIA Regulation is only possible if the requirements of Article 20 of the Regulation are met (*“opening clause”*).

⁶⁴⁴ CJEU, case C-256/09 - Bianca Purrucker v Guillermo Vallés Pérez.

⁶⁴⁵ Court of Second Instance Munich, 22 January 2015, 12 UF 1821/14, DES20150122.



This interpretation was exemplarily applied by the Oberlandesgericht Stuttgart⁶⁴⁶ The case concerned a provisional measure rendered in Hungary. The Hungarian Court had not explicitly based its international jurisdiction on the Brussels Ila Regulation, but had referred to the child's habitual residence. This approach implies that the Hungarian Court had indeed resorted to Article 8 Brussels Ila Regulation without explicitly pointing it out. Therefore, the court of enforcement was right to apply Article 21 et seq. Brussels Ila Regulation. However, the delimitation of Article 21 et seq. and Article 20 Brussels Ila Regulation still causes misunderstanding among practitioners with some courts still issuing provisional measures without any examination or explanation concerning their jurisdiction⁶⁴⁷ or they resort to domestic rules of Private International Law, while their international jurisdiction properly results from the Brussels Ila Regulation.⁶⁴⁸ This forces the court of enforcement to examine the requirements of Article 20 Brussel Ila Regulation, as recognition and enforcement of provisional measures is only subject to the Article 21 et seq. of the regulation, if the court of origin has jurisdiction over the main proceedings pursuant to the Article 8 et seq. of the Brussels Ila Regulation. Examining whether the provisions of Article 20 Brussels Ila Regulation have been complied with, the court in the state of enforcement has then to determine the enforceability based on other international agreements (e.g. the Hague Convention on the protection of minors, the European Convention concerning Custody and the Restoration of Custody of Children (1980)) or the respective national law. These rules hold stricter requirements for the recognition and enforcement of foreign court decisions. For example, the court in the state of recognition/enforcement is permitted to ex post decide on whether the court of origin had jurisdiction, which contradicts the Regulation's goal to simplify cross-border litigation procedures. Therefore, it is

⁶⁴⁶ Oberlandesgericht Stuttgart, 3 March 2014, 17 UF 262/13, DES20140305, confirmed by the German Federal Court, 8 April 2015, XII ZB 148/14, DES20140408.

⁶⁴⁷ Cf. Krajský soud v Brně, 18 September 2012, 38 Co 356/2012, CZS20120918.

⁶⁴⁸ Cf. Zupanijski sud u Rijeci, 28 November 2013, GZ-5432/2013-2, CRS20131128 (both the Court of first instance and the Court of second instance referred exclusively to domestic rules of Private International Law); Zupanijski sud u Dubrovniku, 14 October 2015, Gž 1336/14, CRS201410258 (set aside the first instance decision, by which a provisional measure had been granted, on the basis, *inter alia*, that the lower Court did not refer to the relevant Brussels Ila Regulation provisions in order to assess its jurisdiction, and applied the domestic rules instead).



welcomed that the Commission proposes the simplification of the recognition and enforcement regime regarding provisional measures, including provisional measures within the provisions for recognition and enforcement and thereby facilitating the circulation of decisions between Member States.⁶⁴⁹

⁶⁴⁹ See also: EUFam's Report on the internationally shared good practices, 34.



CHAPTER 8. COORDINATION WITH THIRD STATES, RELATION WITH OTHER INSTRUMENTS

Laura Carballo Piñeiro, Pietro Franzina, Alessandra Lang

A. FORUM NECESSITATIS⁶⁵⁰

I. THE NOTION

The creation of a *forum necessitatis*, or forum of necessity, reflects a concern for the effective protection of an individual's right to access to justice. The idea, put shortly, is that a court, though lacking jurisdiction pursuant to the ordinary rules that determine the cases which that court is entitled to adjudicate, should be entitled to assert its jurisdiction whenever the plaintiff would otherwise be barred from enforcing his claim, or would meet with practical difficulties which would be unreasonable to bear. In this connection, using necessity as a ground of jurisdiction is a way to correct, or supplement, the functioning of the jurisdictional rules that would normally apply to the case, insofar as required to avoid the risk of a denial of justice.

II. THE RELEVANT PROVISIONS IN EU PRIVATE INTERNATIONAL LAW

The idea of necessity made its appearance in EU private international law with the Maintenance Regulation.⁶⁵¹ According to Article 7, where no court of a Member State has jurisdiction pursuant to the other provisions of the 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

⁶⁵⁰ This paragraph shall be attributed to: Pietro Franzina.

⁶⁵¹ 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, OJ L 7 of 10 January 2009.



closely connected”, provided, in any case, that the dispute has “a sufficient connection with the Member State of the court seised”.

An almost identical provision can be found in Article 11 of the Succession Regulation,⁶⁵² and, under a more elaborate wording, in Article 11 of the Property Regimes Regulations.⁶⁵³

In the four texts, necessity provides a *residual* ground on which jurisdiction can be asserted on an *exceptional basis*. It is a residual ground in the sense that it only applies where it is established that no court in a Member State would normally be entitled to hear the case. Its operation is exceptional, according to the preferred view, in the sense that the seised court, departing from the usual approach based on abstract and rigidly predetermined connecting factors, must assess, under a strict test, whether, in the circumstances, the exercise of jurisdiction would be the appropriate response to a serious demand for justice, which would otherwise remain frustrated.⁶⁵⁴

The remaining EU legislative measure which set forth rules on jurisdiction fail to contemplate, at least explicitly, a similar opportunity. The Brussels IIa Regulation does not provide, as such, for a *forum necessitatis*. As a matter of principle, however, necessity may serve as a ground of jurisdiction in matrimonial matters and in matters relating to parental responsibility whenever the domestic rules of the Member State whose courts are seised so provide, as long as the conditions set forth in Article 7 and in Article 14, respectively, have been complied with.

⁶⁵² Regulation (EU) No 650/2012 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, OJ L 201 of 27 July 2012.

⁶⁵³ 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, and Regulation 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ L 183 of 8 July 2016.

⁶⁵⁴ Cf., among others, Franzina, ‘Sul *forum necessitatis* nello spazio giudiziario europeo’, 92 *Rivista di diritto internazionale* (2009), 1121, at 1122 f., and Rossolillo, ‘*Forum necessitatis* e flessibilità dei criteri di giurisdizione nel diritto internazionale privato nazionale e dell’Unione Europea’, 2 *Cuadernos de Derecho Transnacional* (2010), 403, at 405. See, however, for a different reading, Parker J in *Baldwin v Baldwin* [2014] EWHC 4857 (Fam) (14 March 2014), available at <<http://www.bailii.org>>, suggesting that the word “exceptional” in Article 7 of the Maintenance Regulation means “by way of exception”, not “extraordinary”.



III. DOMESTIC CASE-LAW RELATING TO FORUM OF NECESSITY

The information collected in the framework of the EUFam's Project suggest that necessity is very seldom relied upon for jurisdictional purposes in cross-border disputes concerning family relationships. Arguably, this reflects the fact that ordinary rules of jurisdiction already provide claimants with a rather broad opportunity to have their case heard in a Member State, and, at the same time, that potentially interested claimants presumably believe that Member States courts would apply the “necessity test” in a stringent manner, and would in fact be ready to entertain a case on grounds of necessity only in exceptional cases, as required by the pertinent provisions.

Two judgments are reported where the rule on *forum necessitatis*, as laid down in the Maintenance Regulation, is specifically considered.

a) The 2014 ruling of the High Court of England and Wales

On 14 March 2014, the Family Division of the High Court of England and Wales gave its decision in the case of *Baldwin v Baldwin*.⁶⁵⁵ The case concerned an English husband and an Ethiopian wife who had married in Dubai, where they had been living until their marriage broke down. The husband then started divorce proceedings in England and moved to Indonesia. The wife did not challenge the jurisdiction of English courts regarding divorce, and rather claimed maintenance from the husband for herself and the couple's child.

For his part, the husband challenged the jurisdiction of English courts with respect to the claim for maintenance on the ground of Article 3 of the Maintenance Regulation.

The High Court held, to the contrary, that English courts were entitled to hear the case. For this, it relied, *inter alia*, on Article 7. It rejected the argument, advanced by the husband, that the wife's claim could and should be litigated in Dubai, or in Indonesia, or in Ethiopia. The Court found that: (a) the wife could not litigate in Dubai, since she was no longer resident there and was not entitled to entry that country without a visa (which had been cancelled in the meanwhile, and could only be obtained with financial

⁶⁵⁵ *Baldwin v Baldwin* [2014] EWHC 4857 (Fam), supra n 4.



resources that the wife was lacking); (b) Indonesia did not have a close connection with the parties and the case; (c) Ethiopia had no closer connection with the parties than England.

The High Court concluded, based on the way in which the husband had conducted himself, that the husband's "main concern about maintenance is to inhibit the ability of the wife to litigate", while "trying to starve the wife out of her capacity to run legal proceedings in this jurisdiction". The Court finally held that "the difficulties for the wife litigating effectively in any other jurisdiction now, in the circumstances in which she finds herself, would be immense and insurmountable", so much so that it would be "wholly unreasonable to expect her to do so".

b) The 2015 ruling of the Federal Supreme Court of Germany

The *Bundesgerichtshof* dealt with Article 7 of the Maintenance Regulation in a judgment of 14 October 2015.⁶⁵⁶ The case concerned family support claimed by a US resident from a debtor who habitually resided in Germany.

The German courts seised of the matter had asserted their jurisdiction over the claim based on Article 3(a) of the Maintenance Regulation (jurisdiction at the place "where the defendant is habitually resident"). The claim was successful as to its substance, and the defendant was ordered to provide support in the form of periodical payments.

The debtor had subsequently sought to have the amount of the allowance amended. For this, as required by the relevant German rules of civil procedure, namely § 240 of the German law on procedure in family matters and in matters of non-contentious jurisdiction,⁶⁵⁷ the debtor initiated separate proceedings against the maintenance creditor aimed at the modification of the allowance. However, the German court seised of the latter proceedings found that it lacked jurisdiction pursuant to Article 3 of the Maintenance Regulation, and that no other provision in the Regulation allowed the matter to be decided in Germany.

⁶⁵⁶ XII ZB 150/15, available at <<http://www.bundesgerichtshof.de>>.

⁶⁵⁷ Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit.



The Federal Supreme Court overturned this finding and held that jurisdiction could be asserted in Germany, in the circumstances, on the ground that the claimant would have likely been unable to obtain the amendment of an allowance granted in Germany from a court in the US, given that US courts regard this kind of claims as belonging to the continuing exclusive jurisdiction of the courts which ruled on the allowance in the first place.

In the view of the *Bundesgerichtshof*, this was enough to call Article 7 of the Maintenance Regulation into question. The Court then relied on the latter provision to conclude that the request for amendment could be dealt with in Germany, noting that the proceedings for the modification of the allowance featured “a sufficient connection” with Germany for the purposes of the Regulation.

IV. OTHER SITUATIONS WHERE JURISDICTION MAY BE ASSERTED ON GROUNDS OF NECESSITY

The situations considered in the above rulings, albeit peculiar in some respects, largely fit in the typical scenarios in which, according to scholars, necessity may come into play as a jurisdictional basis.

Bringing proceedings in the third country with which the case is closely connected could in fact prove impossible, or unreasonable, in basically three circumstances: (a) where, as in the case decided by the Federal Supreme Court of Germany, the courts of the third country in question would presumably decline jurisdiction, or have already ruled that they will not entertain the claim; (b) where the claim, though falling within the jurisdiction of the courts of the relevant third country, would be regarded by those courts as inadmissible on a point of law; (c) where, due to special circumstances in the third country in question, the claimant would be prevented, as a matter of fact, from instituting or conducting judicial proceedings before the courts of that country, or it would be unreasonable for the claimant to do so (e.g., because evidence exists that local courts are not impartial, and would in fact be hostile to the claimant, or because -



as in the case considered by the English High Court - the claimant would experience insurmountable practical difficulties if litigation were to occur elsewhere).⁶⁵⁸

B. IMPACT OF THE REGULATIONS ON THE FREE MOVEMENT OF PERSONS IN THE EU⁶⁵⁹

I. INTRODUCTION

The European Union's private international law regulations pursue the objective of removing obstacles to the free movement of persons. This report aims to investigate the relationship between free movement of persons and private international family law,⁶⁶⁰ in order to understand whether the objective of removing obstacles to free movement of persons is achieved through the Union's family law regulations. The decisions contained in the database offer a broad and varied panorama of the cases and we will consider these.

To understand the relationship between the two regulatory systems, we need to ascertain the degree to which the solutions devised in the area of private international family law are prompted by free movement of persons requirements and by the relevance of free movement of persons requirements in the interpretation of private international law rules. In addition, we need to consider the obstacles to free movement of persons which can or could arise from the absence of private international law instruments and to establish whether the family law regulations help to overcome those obstacles.

First of all, we need to define the concept of "free movement of persons". Far from being simply synonymous with mobility, free movement of persons expresses a specific legal concept in the European Union's legal system.

⁶⁵⁸ See generally, and for further references, Marongiu Buonaiuti, *Article 11*, in Calvo Caravaca, Davì, Mansel (eds), *The EU Succession Regulation* (Cambridge 2016), 199, at 203 ff.

⁶⁵⁹ This paragraph shall be attributed to: Alessandra Lang.

⁶⁶⁰ Brussels IIa Regulation, Maintenance Regulation, Rome III Regulation, Succession Regulation, Matrimonial property regimes Regulation, Property consequences of registered partnerships Regulation.



II. THE NOTION OF FREE MOVEMENT OF PERSONS IN THE TREATY

The expression “free movement of person” is used in the founding Treaties in two different contexts, which we can describe here as being free movement of persons in the context of the “Schengen system” and free movement of persons as a fundamental tenet of citizenship of the Union.

a) In the context of the “Schengen system”, free movement of persons is associated with the abolition of controls at internal borders and is understood to mean mobility of individuals between Member States irrespective of nationality.⁶⁶¹ In this context, free movement of persons is ensured when there are no controls at internal borders to check the nationality of individuals and their right to move from one State to another.⁶⁶² This right of free movement is enjoyed by all lawful residents within the European Union, including Union citizens and third-country nationals who have a right to be present in a European Union State.⁶⁶³

b) In contrast, as far as rights associated with citizenship of the Union are concerned, free movement of persons is a much broader concept in terms of content but more

⁶⁶¹ It is well known that the seeds from which the present Article 77 TFEU sprouted were planted outside the European Economic Community framework by the five Member States that signed the 1985 Schengen Agreement and the 1990 Implementing Convention, hence the name of “Schengen system” to designate the rules on the abolition of checks at the internal borders.

⁶⁶² According to Article 2 no 11, Regulation 2016/399 of the European Parliament and of the Council, on a Union Code on the rules governing the movement of persons across borders and repealing reg. 562/2006 [2016] OJ L77/1 (hereinafter: “Schengen Borders Code”), border checks are “checks carried out at border crossing points, to ensure that persons, including their means of transport and the objects in their possession, may be authorised to enter the territory of the Member States or authorised to leave it”. The same regulation abolishes border checks at internal borders and strengthens them at external borders. The very abolition of the internal borders rests on the controls carried out at the external borders by the Member States, with the assistance of the Union, as the case may be.

⁶⁶³ Schengen Borders Code, Article 22: “Internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out”. The preamble of the Schengen Agreements is very telling in that it stated that the freedom to cross internal borders was recognized by the EEC Treaty to all nationals of the Member States. The Court of Justice itself recognized that “as long as Community provisions on controls at the external borders of the Community, which also imply common or harmonised rules on, in particular, conditions of access, visas and asylum, have not been adopted, the exercise of [the right to move and reside freely in the territory of the Member States conferred by the Treaty on citizens of the Union] presupposes that the person concerned is able to establish that he or she has the nationality of a Member State.” (CJEU, case C-378/97 *Wijsenbeek* [1999] ECR I-6207, para 42).

Third country nationals who are entitled to benefit from the abolition of the internal borders are those who are legally in the Union, ie: the family members of the citizens of the Union, persons legally residing in a Member State, persons legally present in a Member States, with an entry visa for a short stay or exempted from visa requirements.



restricted in terms of beneficiaries compared with the “Schengen system”, because it includes not only mobility but also the right of residence and the right to equal treatment, which are guaranteed only for Union citizens (and their family members, irrespective of nationality) and only under the conditions set out in the Treaties and in secondary legislation. In concise terms, Union citizens have the right of residence in a Member State other than their own if they are workers or self-employed persons (and in this case, we are in the context of the internal market),⁶⁶⁴ they are students and have sufficient resources to support themselves financially or if they are neither workers nor students but have sufficient resources to support themselves financially without claiming benefits from the host State.⁶⁶⁵ Third-country nationals enjoy free movement of persons according to the meaning described above if they are family members of a Union citizen who has the right of residence. The term “family members” includes the spouse, the partner in a registered partnership, if the host State treats registered partnerships as equivalent to marriage, descendants who are under the age of 21 or are dependants and dependent relatives in the ascending line.⁶⁶⁶ After five years of residence, the Union citizen and their family members no longer need to meet particular conditions and acquire a right of permanent residence, which they lose only in cases of prolonged absences or on serious grounds of public policy or public security.⁶⁶⁷ This means that the

⁶⁶⁴ It is well known that free movement of persons was originally limited to workers and self-employed persons and was one of the four fundamental freedoms of the common market. It was later extended to other categories of persons (students, pensioners, persons with an income) thanks to the Court of Justice and to the Council and was subsequently recognised as a tenet of Union citizenship in the 1992 Maastricht Treaty. In general, on the personal scope of free movement, see Tomkin, ‘Citizenship in Motion: the Development of the Freedom of Movement for Citizens in the Case-Law of the Court of Justice of the European Union’ in Guild and Minderhoud (eds), *The first decade of EU migration and asylum law* (Leiden, Nijhoff, 2012) 25 ff.

⁶⁶⁵ Directive 2004/38: Articles 6 (Right of residence for up to three months) and 7 (Right of residence for more than three months). On the directive, see Iliopoulou, ‘Le nouveau droit de séjour des citoyens de l’Union et des membres de leur famille: la directive 2004/38/CE’ (2004) *Revue du Droit de l’Union européenne* 523; De Bruycker, ‘La libre circulation des citoyens européens entre codification et réforme. Présentation générale de la directive 2004/38’, in Carlier, Guild (ed), *L’avenir de la libre circulation des personnes dans l’U.E.* (Bruxelles, Bruylant, 2006) 21; Guild, Peers, Tomkin, *The EU Citizenship Directive. A Commentary* (Oxford, Oxford University Press, 2014); Morviducci, *I diritti dei cittadini europei*, 2nd ed. (Torino, Giappichelli, 2014); Barnard, *The Substantive Law of the EU. The Four Freedoms*, 5th ed. (Oxford, Oxford University Press, 2016) 331.

⁶⁶⁶ Directive 2004/38: Articles 2 (Definitions) and 3 (Beneficiaries).

⁶⁶⁷ Directive 2004/38, Chapter IV, Article 16-21.



loss of family member status or the loss of a source of income no longer affects the right of residence.

The residence conditions for third-country nationals who are not family members of the Union citizen can be established by Union law or by national law, but are not included within free movement of persons. The Union's competence to define the residence conditions for third-country nationals is known as immigration policy⁶⁶⁸ or common asylum policy,⁶⁶⁹ depending on the reasons for such residence. Immigration and asylum policies are part of the area of freedom, security and justice, which includes the "Schengen system" but not citizenship of the Union or the internal market.⁶⁷⁰

Free movement of persons therefore brings with it a series of rights for beneficiaries. Free movement within the "Schengen system" entails the right not to be subjected to controls when crossing an internal border.⁶⁷¹ If controls at internal borders were reintroduced temporarily or even permanently, free movement of persons, as a right associated with citizenship of the Union (right of residence and equal treatment), would

⁶⁶⁸ Article 79 TFEU is the legal basis that allows the Union to develop a common immigration policy. Giving the Union the power to develop a policy in a certain field is not necessarily tantamount to having a policy in that field. And even though a number of pieces of secondary legislation have actually been adopted, this does not mean that a complete regime has indeed been set out. Some Treaty provisions even hinder the adoption of an ideal complete common policy in these field, because they reserve some matters, which are part and parcel of a common policy, to the States. As a matter of fact, the Union has not the right to determine volumes of admission of third-country nationals coming from third countries in order to seek work, nor can it harmonize national legislations on the integration of third country nationals residing legally (Article 79, paras. 4 and 5). On the development of EU law on these subjects, see generally El-Enany, 'EU Asylum and Immigration Law under the Area of Freedom, Security and Justice', in Arnall and Chalmers (eds), *Oxford Handbook of EU law* (Oxford, Oxford University Press, 2015) 880, and for more details, Hailbronner and Thym (eds), *EU Immigration and Asylum Law. A Commentary*, 2nd ed. (München, C.H. Beck, 2016).

⁶⁶⁹ The common policy on asylum and subsidiary protection is grounded on Article 78 TFEU and is developed in accordance to the 1951 Geneva Convention relating to the status of refugees. The conditions under which asylum seekers and refugees can reside in a Member States are laid down by Directives 2013/33 and 2011/95 respectively. See generally El-Enany, 'EU Asylum and Immigration Law' 880, and for more details, Hailbronner, Thym, *EU Immigration and Asylum Law. A Commentary*.

⁶⁷⁰ The legal bases of Directive 2004/38 are Articles 12 TEC (now Article 18 TFEU: non-discrimination on ground of nationality), 18, para 2 (now Article 21, para 2: citizenship of the Union), 40 (now Article 45: workers), 44 (now Article 50: freedom of establishment) and 52 (now Article 59: freedom to provide services).

⁶⁷¹ Article 22 of the Schengen Borders Code.



be unaffected.⁶⁷² This is because Union citizens and their family members enjoy rights of entry and residence which do not involve the checking of documents.⁶⁷³

From a geographical point of view, there is a difference between the two meanings of free movement of persons illustrated above. The abolition of internal borders corresponds to the Schengen area, which is both more restricted and more extensive compared with the area in which free movement of persons in its broader sense applies. It is more restricted because the Schengen area does not include the United Kingdom and Ireland, under Protocol 21, or other States with which controls have not been abolished (Cyprus, Bulgaria, Romania, Croatia).⁶⁷⁴ These six States are required to recognise free movement of persons, according to its citizenship meaning, because they are Member States of the European Union. The Schengen area also includes countries that are not Member States of the European Union: Iceland, Norway⁶⁷⁵ and Liechtenstein,⁶⁷⁶ on the one hand, and Switzerland⁶⁷⁷ on the other. All four are associated to Schengen, the first three being connected to the Union by the European

⁶⁷² Articles 25-35 of the Schengen Borders Code laid down the relevant provisions for the temporary reintroduction of border control at internal borders. Piçarra, 'Le régime juridique du franchissement des frontières intérieures de l'Union européenne face aux défis de la migration', in Iliopoulos-Strangas, Potacs, Tanasescu, Ziller (eds), *Migration - Migration - Migrations* (Baden-Baden, Nomos Verlagsgesellschaft, 2017) 119.

⁶⁷³ The citizens of the Union draw the right to free movement from Article 21 TFEU. The conditions under which the said right can be exercised are laid down by Directive 2004/38.

⁶⁷⁴ Accession to the Union does not bring about the automatic abolition of checks at the internal borders: the Council has to decide whether the State is ready for it (2003 Accession Act, Article 3, para 1-2; 2005 Accession Act, Article 4; 2011 Accession Act, Article 4). Cyprus asked for the extension of the temporary regime, due to the well-known division of the island, while the Council has not yet decided the full application of the provisions of the Schengen acquis, and therefore the abolition of checks at the internal borders, in Bulgaria, Romania and Croatia.

⁶⁷⁵ Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen acquis (Brussels, 18-5-1999 [1999] OJ L176/36). Tizzano, 'A proposito dell'inserzione dell'acquis di Schengen nei trattati comunitari: l'accordo 'del Consiglio' con Islanda e Norvegia', (1999) *Diritto dell'Unione europea* 521; Wichmann, 'The Participation of the Schengen Associates: Inside or Outside?', (2006) *European Foreign Affairs Review* 87.

⁶⁷⁶ Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis (Brussels, 28-2-2008 [2011] OJ L160/3).

⁶⁷⁷ Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis (Luxembourg, 26-10-2004 [2008] OJ L53/50).



Economic Area Agreement, which provides for free movement of persons according to the internal market version.⁶⁷⁸ In contrast, Switzerland is not bound by free movement of persons but has entered into an agreement with the Union which provides for a system that is not dissimilar to the Union's own system.⁶⁷⁹

III. RIGHTS ASSOCIATED WITH FREE MOVEMENT OF PERSONS

From a legal point of view, free movement of persons grants beneficiaries a number of rights. The most significant rights are those associated with Union citizenship.

The rights associated with Union citizenship may concern residence conditions *stricto sensu* or equal treatment during residence. As regards residence conditions *stricto sensu*, these are set out in Directive 2004/38. As far as equal treatment is concerned, the fundamental principle is that of no discrimination on grounds of nationality within the scope of application of the Treaty.⁶⁸⁰ This prohibits direct discrimination, in the sense that the Union citizen has the right to receive the same treatment as the citizen of the host State, and indirect discrimination, which occurs when the effect of applying the rule, which by itself is neutral on the basis of nationality, is to cause harm to the Union citizen, creating an obstacle to free movement of persons. It is vitally important that the national legislation whose discriminatory content or effect is being discussed falls within the scope of the Treaty. This notion is not perfectly defined and continues to raise interpretative questions. However, it is clear that the principle of no

⁶⁷⁸ Agreement on the European Economic Area (Porto, 2-5-1992 [1994] OJ L1/3): Articles 28 and 31, corresponding to Articles 45 and 49 TFEU. By Decision 158/2007 ([2008] OJ L124/20), the EEA Joint Committee decided that Directive 2004/38 is applicable in the EEA States, but the words "Union citizen(s)" must be replaced by the words "national(s) of EC Member States and EFTA States". On the EFTA Court case-law, see Burke, Ísberg Hannesson, 'Citizenship by the back door? Gunnarsson' (2015) *Common Market Law Review* 1111.

⁶⁷⁹ Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons (Luxembourg, 26-6-1999 [2002] OJ L114/6). Contrary to Directive 2004/38, the Agreement provides for neither the right of permanent residence, nor the enhanced protection against expulsion; it prescribes the issuance of a residence permit and grants a narrower right to non-discrimination on grounds of nationality than EU law. Ippolito, 'Non discriminazione sulla base della nazionalità nell'accordo sulla libera circolazione delle persone Unione europea - Svizzera', in Condinanzi (a cura di), *Unione europea e Svizzera tra cooperazione e integrazione* (Milano, Giuffrè, 2012) 163.

⁶⁸⁰ Bell, 'The principle of equal treatment: widening and deepening', in Craig, de Búrca (eds), *The Evolution of EU Law* (Oxford, Oxford University Press, 2011) 611.



discrimination on grounds of nationality must lie at the heart of the creation and application of any national legislation, including in areas where the Union does not have competence but where competence is reserved for the States, if denying equal treatment might create an obstacle to free movement of persons.⁶⁸¹

Obstacles to free movement of persons need to be removed by States, unless they are justified by imperative requirements in the general interest and necessary to attain the object they pursued. Obstacles can originate from State laws, from administrative practices and from individual decisions, including court judgments.⁶⁸² The Union's legislative intervention helps States but is not exhaustive.⁶⁸³ The principle of no discrimination on grounds of nationality is a tool that is helpful in removing obstacles but it is not perfect, since it relies on the individuals' resolution to go to court to vindicate their right not to be discriminated against.

Free movement as described up to this point concerns relations between a Union citizen and a host State different from the State of origin.⁶⁸⁴ However, free movement of persons in certain cases also confers rights on the Union citizen with respect to their own State. These are rights that are nonetheless associated with past or future mobility. Firstly, the State of origin must treat its own citizen (who is returning after exercising their right of free movement by having settled in another Member State) exactly the same as it treats Union citizens who settle in its territory.⁶⁸⁵ Secondly, the State must not put in place obstacles that discourage its citizens from exercising their free movement rights in other Member States.⁶⁸⁶ Thirdly, the State must not harm its citizens

⁶⁸¹ Income tax rules (CJEU, case C-283/15 X [2017] ECLI:EU:C:2017:102) and language rules applicable to civil proceedings (CJEU, case C-322/13 *Rüffer* [2014] ECLI:EU:C:2014:189) are but a few examples of matters which rest within the remit of national competence and are nonetheless subject to the principle of non-discrimination on grounds of nationality.

⁶⁸² For a judicial decision that amount to an obstacle to free movement of persons, CJEU, case C-430/10 *Gaydarov* [2011] ECR I-11637.

⁶⁸³ The case decided by Oberlandesgericht Karlsruhe, 17 August 2009, 16 UF 99/09, DES20090817, about pension rights adjustment, provides us with a good example of the limits of individual action and on the necessity of modifying the law to eliminate an obstacle to free movement.

⁶⁸⁴ Directive 2004/38 only applies to Union citizens who move to another Member States: CJEU, case C-434/09 *McCarthy* [2011] ECR I-3375, para 43.

⁶⁸⁵ This principle is particularly important as to family reunification.

⁶⁸⁶ CJEU, case C-56/09 *Zanotti* [2010] ECR I-4517.



by failing to take account of the fact that their family members have exercised their free movement rights.⁶⁸⁷

Frontier workers who live in one Member State (often, but not always, in the State of nationality) and work in another Member State find themselves in an unusual position. More often than others, they will need to contend with two legal systems.

IV. FREE MOVEMENT OF PERSONS AND SITUATIONS FALLING UNDER PRIVATE INTERNATIONAL FAMILY LAW

However broad it may be, free movement of persons does not include all situations that present a foreign element in relation to private international family law. The foreign element is certainly associated with mobility but not necessarily with free movement of persons. This is clearly borne out in practice: a substantial number of decisions contained in the database are unconnected to free movement of persons. These essentially include the following cases:

- i) cases in which the parties are third-country nationals, have the same nationality or different nationality: free movement does not apply because the third-country nationals, even where they acquire rights from Union law, do not enjoy free movement of persons as a right associated with citizenship of the Union.
- ii) cases in which the parties are a citizen of the forum State and the other citizen from a third country who lives and has always lived in the forum State or in a third country: here too the element of mobility between Member States, which is a necessary requirement for applying free movement of persons, is absent. The residence conditions for family members of citizens of the forum State do not fall under free movement of persons and are not currently governed by Union law.⁶⁸⁸

⁶⁸⁷ CJEU, case C-403/03 *Schempp* [2005] ECR I-6421.

⁶⁸⁸ The decisions contained in the database show a large number of disputes involving third-country nationals. This is not surprising when one considers that there are many more foreign nationals than Union citizens who are living in a country other than their own. According to Eurostat data, foreign-born people living in the EU-28 accounted for 10.2% of the total population on 1-1-2014. People born outside the EU are almost twice than people born in one Member State and living in another.



iii) cases in which the parties are citizens of the forum State and are connected to a third country (where they have lived, continue to live, or where at least one of them lives): free movement does not apply because the right of a person to live in their State does not depend on Union law. So mobility concerns a third country not bound by free movement.

Certain problems relating to free movement can occur when the parties are a citizen of the forum State and the other citizens of another Member State, each resident in their own State of origin. Although the residence conditions of a person in their own State of origin are governed by national law and not by free movement of persons, it is true that potential mobility could be obstructed, for example by measures or orders relating to parental responsibility towards children.⁶⁸⁹

Cases that present a foreign element in relation to private international law and abstractly fall within the scope of free movement of persons are as follows:

i) cases in which at least one of the parties who are Union citizens remains in a State where he or she does not have citizenship: firstly, the Union citizen, if he or she has not acquired the right of permanent residence, must meet the conditions on which residence is conditional and family circumstances could affect their ability to meet those conditions, and secondly, the Union citizen could suffer discrimination compared with citizens of the host State.

ii) cases in which a party, a third-country national, resided as a family member of a Union citizen in a State where the Union citizen does not have citizenship: loss of family member status, arising essentially from a divorce ruling, impacts on rights of residence. As already stated, the third-country national only falls under free movement of persons if he or she is a family member of a Union citizen. If he or she does not enjoy that status or loses that status, he or she may therefore also lose the right of residence in the host State. However, this is not the case when the third-country national, a family member of the Union citizen, moves on their own to another Member State. Here, the person does not have a right of residence falling within the scope of free movement of persons

⁶⁸⁹ These are recurring cases for both the Court of Justice and national courts.



because the family member's right arises only in the State in which their Union citizen relative is situated.⁶⁹⁰

The cases brought to the CJEU confirm that not all case who present a foreign element also fall within the scope of application of free movement of persons.

V. FREE MOVEMENT OF PERSONS AND JUDICIAL COOPERATION IN CIVIL MATTERS

Private international law forms part of judicial cooperation in civil matters, which, in turn, is included within the area of freedom, security and justice.⁶⁹¹ The reasons for the connection between free movement of persons and Union competence in this area can be understood by looking at how Union integration has evolved.

The Treaty of Rome established that the activities of the European Economic Community would achieve “the abolition, as between Member States, of obstacles to the free movement of persons, services and capital” (Article 3(a)). Detailed provisions were contained in Title III (Free movement of persons, services and capital). The Single European Act adds to the objectives the establishment of the internal market as an “area without internal frontiers in which the free movement of goods, persons, services and capital is ensured” (Article 8 A).⁶⁹² The abolition of controls at internal borders is accompanied by the strengthening of controls at external borders and by other forms of collaboration to ensure that criminals or persons not otherwise entitled do not take advantage of free movement. It is well known that States initially preferred to develop these forms of cooperation outside of the European Economic Community. Since the Maastricht Treaty, however, States have agreed to cooperate in sensitive areas within the framework of the so-called third pillar, which include judicial cooperation in civil matters, areas intended to “[achieve] the objectives of the Union, in particular the free

⁶⁹⁰ CJEU, case C-40/11 *Iida* [2012] ECLI:EU:C:2012:691.

⁶⁹¹ Article 81 TFEU is the legal bases of private international law regulations.

⁶⁹² De Ruyt, *L'acte unique européen: commentaire*, 2nd ed. (Bruxelles, Editions de l'Université de Bruxelles, 1989) 149 ff. Civil matters were not mentioned among the areas where cooperation among Member States were useful. The obstacles to free movement of persons were to be addressed by harmonising national legislations, under Article 100 TEEC, since the new simplified procedure connected to the establishment of the internal market was not applicable according to Article 100 A, para 2, TEEC. The impossibility to gain the required unanimity within the Council brought some of the Member States to engage in cooperation outside the EEC framework (see above, footnote 1).



movement of persons” (Article K.1).⁶⁹³ The Amsterdam Treaty states that the objectives of the Union include the objective “to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime” (Article B TEU) and dedicates a title of the TEC to “Visas, asylum, immigration and other policies related to free movement of persons”, which contains Article 65, the legal basis for the Union’s private international law acts.⁶⁹⁴ Finally, the Lisbon Treaty provides that “The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.” (Article 3(2) TEU).⁶⁹⁵ The title of the Treaty that contains detailed provisions on the free movement of persons retains the reference in its name, whereas the title that contains the legal basis for the Union’s private international law acts loses this (and becomes “Area of freedom, security and justice”).

The extension of the Union’s competences was therefore prompted by the need to deal with the collateral effects of the free movement of persons as a component of the internal market and of the abolition of controls at internal borders. The pursuit of the objective of free movement of persons becomes the reason behind every exercise of the

⁶⁹³ The link between justice and home affairs on the one hand and facilitating free movement of persons on the other was clearly stated in the preamble of the Treaty. Curti Gialdino, *Il Trattato di Maastricht sull’Unione europea: genesi, struttura, contenuto, processo di ratifica* (Roma, Istituto poligrafico e Zecca dello Stato, 1993) 295 ff; Cloos, Reinesch, Vignes, Weyland (sous la direction de), *Le traité de Maastricht: genèse, analyse, commentaires*, 2nd ed. (Bruxelles, Bruylant, 1994) 491 ff.

⁶⁹⁴ Twomey, ‘Constructiong a Secure Space: the Area of Freedom, Security and Justice’, in O’Keeff, Twomey (eds), *Legal Issues of the Amsterdam Treaty* (Oxford, Hart, 1999) 351 ff. Legal scholars regarded the ‘communitarization’ with different degrees of appraisal. For instance, while Adam, ‘La cooperazione in materia di giustizia e affari interni tra comunitarizzazione e metodo intergovernativo’ (1998) *Diritto dell’Unione europea* 504, underlines that the ‘communitarization’ of the judicial cooperation in civil matters brought with it a shrinkage of its potential scope of application; Bariatti, ‘La cooperazione giudiziaria in materia civile dal terzo pilastro dell’Unione europea al Titolo IV del Trattato CE’ (2001) *Diritto dell’Unione europea* 288, points out that the subsequent practice of the institutions has widened the scope of Article 65, since the matters it lists are only illustrative.

⁶⁹⁵ Barrière Brousse, ‘Le Traité de Lisbonne et le droit international privé’ (2010) *Journal du droit international*; E Storskrubb, ‘Civil Justice - A newcomer and an unstoppable wave?’, in Craig, De Búrca, *The evolution of EU law*, 299; Peers, ‘Justice and Home Affairs Law since the Treaty of Lisbon: A Fairy-Tale Ending?’, Acosta Arcarazo, Murphy (eds), *EU Security and Justice Law. After Lisbon and Stockholm* (Oxford, Portland, 2014) 17.



Union's competence in the areas indicated. The reference to the need to achieve the objective and the suitability of the act for achieving that objective is sufficient to justify the act, without having to demonstrate that that specific act is necessary, on account of its content, to ensure the free movement of persons. A harmonised set of private international law rules, applicable in all the Member States, is in itself a valuable achievement, in a Union where mobility has become more and more common. A different question is whether these harmonised rules lead to a law that is in line with the mobile persons' prediction.

VI. Free movement of persons and private international family law regulations

The recitals to all private international family law regulations begin with the following statement: “The Union has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is assured. For the gradual establishment of such an area, the Union must adopt measures relating to judicial cooperation in civil matters having cross-border implications, particularly when necessary for the proper functioning of the internal market”.⁶⁹⁶ With the exception of the Brussels IIa Regulation, the other regulations in force also mention free movement of persons in the recital concerning the principle of subsidiarity, along the following lines: “Since the objectives of this Regulation, namely [specific objectives of the act] and thus to facilitate the free movement of persons within the European Union, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Regulation, be better achieved at Community [Union] level, the Community [Union] may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality

⁶⁹⁶ Council Regulation 1259/2010, Recital no 1. The same statement is also contained in the other private international family law regulations, with minimal variants. A similar recital can also be found in almost all private international law regulations (Regulations 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, 805/2004 creating a European Enforcement Order for uncontested claims, 1896/2006, creating a European order for payment procedure, 861/2007 establishing a European Small Claims Procedure, 606/2013 on mutual recognition of protection measures in civil matters), but does not appear in Regulations 1346/2000 on insolvency proceedings, 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 864/2007 on the law applicable to non-contractual obligations (Rome II), and 593/2008 on the law applicable to contractual obligations (Rome I).



as set out in that Article this Regulation does not go beyond what is necessary to achieve those objectives.”⁶⁹⁷

Less stereotyped references are contained in some of the regulations, in which free movement of persons is mentioned in relation to the choices made in terms of connecting factors. Strangely, the Brussels Ila Regulation is silent on the matter but the 1998 Brussels Convention,⁶⁹⁸ which never entered into force but which was the predecessor to Brussels Ila, proposed solutions on forums of jurisdiction which “deal with mobility” in order to “meet individuals” needs”.⁶⁹⁹

The Rome III Regulation states “Increasing the mobility of citizens calls for more flexibility and greater legal certainty. In order to achieve that objective, this Regulation should enhance the parties’ autonomy in the areas of divorce and legal separation by giving them a limited possibility to choose the law applicable to their divorce or legal separation.” (recital 15). Here there is a cause-and-effect relationship between granting the spouses a certain autonomy in the choice of the applicable law and increasing the mobility of persons.

The Succession Regulation wishes to remove “the obstacles to the free movement of persons who currently face difficulties in asserting their rights in the context of a succession having cross-border implications”, both for persons who wish to organise their succession in advance and for heirs, legatees and other persons close to the deceased and creditors of the succession. Recital 23 identifies a link between the increasing mobility of persons and the choice of habitual residence of the deceased at the time of death as a general connecting factor for identifying both jurisdiction and the applicable law, without neglecting to ensure the proper administration of justice and to ensure a genuine connecting factor.

Regulations 2016/1103 and 2016/1104 refer to increasing mobility of citizens as a means of justifying choices in relation to jurisdiction. If there is a connection between property matters and successions between spouses and/or dissolution of the marriage or registered partnership, mobility justifies the choice of concentrating jurisdiction on the

⁶⁹⁷ The Brussels Ila Regulation uses an even more generic wording to justify the principle of subsidiarity.

⁶⁹⁸ [1998] OJ C221/1.

⁶⁹⁹ Borrás report ([1998] OJ C221/27) para 27.



authorities already competent on the basis of the Successions Regulation and, respectively, on the Brussels IIa Regulation or on the judge having jurisdiction to hear the termination of the registered partnership.⁷⁰⁰ If no such connection exists, mobility justifies the choice of identifying a scale of connecting factors for the purposes of determining jurisdiction. According to recital 35 of both regulations, “these connecting factors are set in view of the increasing mobility of citizens and in order to ensure that a genuine connecting factor exists between the spouses and the Member State in which jurisdiction is exercised.”

Finally, recital 16 of Regulation 2016/1104 identifies, as obstacles to the free movement of persons (which the regulation intends to remove) the difficulties that couples who have entered into a registered partnership find “in the administration and division of their property”.

This panorama allows us to make a number of observations. Firstly, free movement of persons is the generic objective of the private international family law regulations and the reference to free movement in the recitals performs the function of identifying the foundation for the Union’s competence. Secondly, mobility is mentioned as a means of justifying choices in relation to connecting factors. These choices range from allowing the parties limited autonomy in determining the applicable law (Rome III Regulation), to enabling the testator to organise their succession in advance, to identifying a main connecting factor (Succession Regulation), a scale of connecting factors (Regulations 2016/1103 and 2016/1104) or alternative connecting factors (for divorce: Brussels IIa Regulation). Different solutions are therefore justified by the same goal. Thirdly, the specific need to abolish obstacles to free movement is expressly mentioned, in the case of Regulation 2016/1104, to justify the choice of an instrument that concerns “provisions on jurisdiction, applicable law, recognition or, as the case may be, acceptance, enforceability and enforcement of decisions, authentic instruments and court settlements”⁷⁰¹ and, in the Successions Regulation, to safeguard the rights of all parties involved.

⁷⁰⁰ Recital 32 to both regulations.

⁷⁰¹ The Maintenance Regulation is silent on the point.



Free movement of persons seems to be mentioned here according to its simple non-technical meaning of mobility. Free movement of persons does not seem to impose the choice of connecting factors that is actually made, to the exclusion of any other.⁷⁰² If we take the Successions Regulation, for example, we can see that a change of habitual residence brings about a change in the applicable law and in jurisdiction, a change that can be neutralised by choosing the citizenship law. It seems that the wish is to take account of the case where the person changes habitual residence but keeps citizenship (which does not change) as the connecting factor. It does not take into consideration the situation (which is certainly not infrequent in the area of free movement) where a migrant worker who has spent their entire active life in one State moves on retirement to another State, for example to the State of origin or to a third Member State, but wishes to retain as applicable the law of State where he or she has been resident their whole life and where their assets and family members have perhaps remained. In other words, the reference to free movement could equally have justified different choices regarding connecting factors.

The provisions relating to parental responsibility contained in the Brussels IIa Regulation seem, in any case, to be aimed at preventing a parent from taking advantage of free movement (in other words the right to move around) in order to move the child's habitual residence and cause a change in the court having jurisdiction. From that perspective, the Brussels IIa Regulation is not aimed at abolishing obstacles to free movement of persons but rather at ensuring that the interests of the child prevail in a context of easier mobility.⁷⁰³ The opportunities offered by free movement of persons and, in particular, the absence of controls at internal borders, could be exploited by a parent with custody to take advantage of the separate nature of legal systems in order to undermine the other parent's rights or harm the child's interests. The arrangements established in the regulation bring together the legal systems, as if the courts of the States involved were part of a single system aimed at protecting the best interests of

⁷⁰² Alternative connecting factors can be envisaged that can as well or even better serve free movement. It is difficult to say in abstract terms that mobility prompts to prefer one factor to another. Bogdan, *Concise introduction to EU private international law* 2nd ed. (Groningen, Europa law publishing, 2013) 28.

⁷⁰³ The best interests of the child take precedence over the right to free movement: see CJEU, case C-428/15 *Child and Family Agency* [2016] below.



the child. From a different perspective, when the holder of rights of custody exercises free movement rights and moves to a different State from the State of origin and lawfully transfers the child's residence, he or she could undermine the other parent's rights of access. But shared custody can restrict the enjoyment of free movement of persons because neither parent can change their residence or the child's residence without the other parent's consent.

VII. FREE MOVEMENT OF PERSONS AND PRIVATE INTERNATIONAL FAMILY LAW IN THE CASE-LAW OF THE COURT OF JUSTICE

The CJEU has rendered about thirty ruling on private international family law regulations. Interestingly, it has not focussed on free movement of persons in its interpretation of private international family law regulations. The Court mentioned free movement in a few judgments.

The *Sundelind Lopez*⁷⁰⁴ case involves interpretation of Articles 6 and 7 of the Brussels IIa Regulation, in a case where the wife submitted an application for divorce to a judge in her State of nationality, but resided in another member State where her matrimonial life was situated before her third country national husband came back to his State of origin. The Court refers to the aim of the Brussels IIa Regulation to ensure free movement of persons as to encompass also third country nationals having a sufficiently close link with the territory of a Member States. As a consequence, the residual competence of Article 7 cannot be applied when the judge of another Member State is competent to hear the case. Here the Court's reasoning is not entirely clear, but in any case, it seems to take free movement as equivalent to mobility.

The *Hadadi*⁷⁰⁵ case concerns the effect of same dual nationality on the ground of jurisdiction referred to in Article 3(1)(b) of the Brussels IIa Regulation and, in particular, examines whether only one of the nationalities in common should or can be taken into account in determining the jurisdiction of the court seised or whether both nationalities can be used to that end, at the applicant's choice. The Court states that "there is

⁷⁰⁴ CJEU, case C-68/07 [2007] ECR I-10403.

⁷⁰⁵ CJEU, case C-168/08 *Hadadi* [2009] ECR I-6871.



nothing in the wording of Article 3(1)(b) to suggest that only the ‘effective’ nationality can be taken into account in applying that provision” (para 51). To support that interpretation, the Court states that the contrary interpretation would be in conflict with the objective of the provision and the context of which it forms part. In para 53, the Court states that “such an interpretation would restrict individuals’ choice of the court having jurisdiction, particularly in cases where the right to freedom of movement for persons had been exercised”. The statement is only apparently clear and proves to be unsatisfactory on closer examination. The Court compares the situations where we have, on the one hand, a couple with the same, single, nationality and, on the other hand, a couple with the same dual nationality. If the first couple has habitual residence in a State in which they are not nationals, the grounds of jurisdiction of the regulation based on habitual residence and those based on same nationality are, for that couple, placed on an equal footing, even if they have not retained any link with the State of nationality. If the second couple could choose only the court of effective nationality as being the court of same nationality, and if effective nationality corresponded to that of habitual residence, they would not then have the same freedom of choice as the couple with the same, single, nationality. But this reasoning only makes sense if the couple, as the applicants in the main proceedings, have habitual residence in a State of which they are nationals. If, in contrast, habitual residence is in a State of which the spouses are not nationals, habitual residence plays no part in determining the most effective nationality. In truth, the reference to free movement is not particularly useful. Two apparently marginal statements are more significant when it comes to looking into the reasons behind the interpretation. Firstly, the judgment considers the fact that, from the perspective of each of the States involved, the person is its own national (consideration developed from para 41 onwards of the judgment). In other words, equality between Member States means that one or another nationality cannot be considered the most effective depending on the observation point. Secondly, the need to determine which is the most effective nationality “would make verification of jurisdiction more onerous and thus be at odds with the objective of facilitating the application of the Brussels IIa Regulation by the use of a simple and unambiguous



connecting factor” (para 55). Equality between States and legal certainty requirements appear to be more robust reasons for justifying the Court’s interpretation.

The *Child and Family Agency*⁷⁰⁶ case concerns an application, brought by the Irish court, for transfer of the case to the United Kingdom court pursuant to Article 15 Brussels IIa Regulation. The child in question is the second child of a United Kingdom national, who moved to Ireland after the United Kingdom authorities had decided that the baby, at the time unborn, should be placed in the care of a foster family. Of interest here is the final question that the Court answers concerning whether, in the context of Article 15, account should be taken of “the effect that a possible transfer of that case to a court of another Member State may have on the right of freedom of movement of the persons concerned or the reasons why the mother of the child concerned exercised that right, prior to that court being seised” (para 62). However, it should not be overlooked that the Court had just said that the court seised, having jurisdiction as the court of the habitual residence of the child, must be capable of rebutting the “strong presumption in favour of maintaining its own jurisdiction” (para 49). It is no surprise, therefore, that in response to the specific question about free movement, the Court states that the best interests of the child must be taken into account when deciding on a transfer pursuant to Article 15 of the regulation. Therefore, “if a possible transfer of the case was liable to be detrimental to the right of freedom of movement of the child concerned, that would be one of the factors to be taken into consideration when applying Article 15(1) of the Brussels IIa Regulation” (para 64), whereas the effect on the freedom of movement of others, such as the mother, should not be taken into account, unless there are adverse repercussions on the situation of the child. Equally irrelevant are the reasons why the mother chose to exercise her right of freedom of movement (para 66). In contrast, in *McB*, the Court stated that the mother with custody who comes back to her State of origin with the child is exercising her right to free movement and is not abducting the child, because the move is not detrimental to the father who does not

⁷⁰⁶ CJEU, case C-428/15 [2016] ECLI:EU:C:2016:819.



enjoy parental responsibility nor to the child.⁷⁰⁷ Here, free movement is a mere synonym with mobility, since it is not EU law that grants the right for nationals to reside in their State of origin.

The *Child and Family Agency* ruling can be adopted in support of the argument that the best interests of the child prevail over free movement of persons requirements. It can also be used to dispute the importance of protection of free movement as an interpretative factor of the Brussels IIa Regulation, at least for the part relating to the rights of children.

VIII. FREE MOVEMENT OF PERSONS AND CHOICE OF CONNECTING FACTORS

In very general terms, there is no denying that the choice of “habitual residence” as opposed to nationality as a factor in determining the court having jurisdiction and the applicable law seems to be in line with free movement. This is because “habitual residence” is a factor that can incorporate the exercise of free movement and which changes with the exercise of free movement, whereas nationality is a more permanent factor, which is not affected by the exercise of free movement. If the connecting factor is “habitual residence”, the exercising of free movement can bring about a change in “habitual residence” and, therefore, a change in the court having jurisdiction and/or in the applicable law. If the connecting factor is nationality, the exercising of free movement does not bring about a change in the court having jurisdiction and/or in the applicable law.

Although central to the system of private international family law, the concept of “habitual residence” is not defined. It is clear that this is an autonomous concept of Union law, which must be applied having regard to the particular characteristics of the case in question and taking into account a number of factors. For free movement of persons, the key notion is that of residence, which has both a factual and legal connotation. Factual because it concerns the presence of a person in a given State and

⁷⁰⁷ CJEU, case C-400/10 PPU *McB* [2010] ECR I-8965. A similar reasoning can be read in a Greek ruling on first instance (*Monomeles Protodikeio Kavalas*, 11 January 2009, no 24/2009, ELF20090111), which is almost the only decision in the database mentioning free movement of persons.



legal because it entails the fulfilment of particular requirements. Right of residence is proven by registration with the competent authorities, if this is provided for under national law.⁷⁰⁸ However, residence for the purposes of free movement of persons does not appear to have any particular relevance in determining “habitual residence”. Residence has to do with the legality of the foreign national’s presence in the State, a requirement that appears to be unnecessary when it comes to determining “habitual residence”. Courts very often dwell on the grounds for residence in cases pertaining to free movement, since the legality of residence is key here, whereas they rarely address the issue when applying private international law rules.⁷⁰⁹

Since the registered place of residence alone is not sufficient to determine “habitual residence”, neither will registration of residence, which is equivalent to the registered place of residence.

Habitual residence can be moved relatively easily, at least in theory. From legislation and legal literature, there emerges a certain fear that free movement of persons is being exercised as a means of artificially manufacturing the connecting factors that lead to the application of legislation that is more favourable to the parties’ interests, thus circumventing the interests of the State whose law would otherwise be applicable.⁷¹⁰

The wide opportunity for choice of the court having jurisdiction over divorce, introduced by the Brussels IIa Regulation (but already present in the 1998 Convention), together with automatic recognition of decisions, have raised the fear of the use of forum shopping to obtain a divorce more easily.⁷¹¹ Furthermore, the 1998 Convention was designed to expand the forums of jurisdiction to take account of mobility (“involve[d] flexible rules to deal with mobility”).⁷¹² The discussion on the means of combating forum

⁷⁰⁸ Directive 2004/38, Article 8 (Administrative formalities for Union citizens): “for periods of residence longer than three months, the host Member State may require Union citizens to register with the relevant authorities.” Article 9 (Administrative formalities for family members who are not nationals of a Member State) establishes that Member States deliver a residence card to non-EU family members.

⁷⁰⁹ Both CJEU and national courts judgments attest that.

⁷¹⁰ Meeusen, ‘System shopping in European private international law in family matters’ in Meeusen, Pertegás, Straetmans, Swennen (eds), *International family law for the European Union* (Antwerpen, Intersentia, 2007) 239; Lopes Pegna, ‘Collegamenti fittizi o fraudolenti di competenza giurisdizionale nello spazio giudiziario europeo’ (2015) *Rivista di diritto internazionale* 397.

⁷¹¹ Siehr, ‘Article 22’ in Magnus, Mankowski (eds), *Brussels IIbis Regulation* (Munich, Selp, 2012) 270.

⁷¹² Borrás Report, para 27.



shopping has been lively but of little concrete importance. This conclusion is confirmed by the decisions contained in the database where the problem does not emerge, even though some of the States involved have more restrictive legislation that could be circumvented through opportunistic behaviour.

The risk of forum shopping is mentioned in the Rome III Regulation. The recitals consider this risk, albeit with regard to one particular aspect only, in which the opportunistic behaviour is exhibited by just one of the parties. Recital 9 provides that the rules laid down in the Regulation should “prevent a situation from arising where one of the spouses applies for divorce before the other one does in order to ensure that the proceeding is governed by a given law which he or she considers more favourable to their or her own interests”. Here the aim is to protect the other party as opposed to preserving the State’s interests.

The Successions Regulation is more explicit, as can be seen in recital 26: “Nothing in this Regulation should prevent a court from applying mechanisms designed to tackle the evasion of the law, such as fraude à la loi in the context of private international law”. The fear is precisely that the individual concerned takes advantage of free movement and changes their residence in order to change the court having jurisdiction and/or the applicable law as a means of evading the application of rules that protect interests that the State issuing those rules considers inalienable, but with which the individual concerned does not agree.

Similar considerations are discussed by legal scholars in relation to other provisions.⁷¹³ In short, there is a feeling that some of the connecting factors may offer an incentive for the parties to evade the application of rules that are disagreeable to them.⁷¹⁴

A similar fear is also raised by the rules on free movement of persons.⁷¹⁵ There are two aspects that are of interest here: firstly, the exercise of mobility to enjoy free

⁷¹³ Villata, ‘Regolamento 4/2009’, in Baruffi, Pocar (a cura di), *Commentario breve ai Trattati dell’Unione europea*, 2nd ed. (Padova, Cedam, 2014) at 636, suggests that Article 3 para 2 of the Hague Maintenance Protocol could provide the maintenance creditor with an incentive to relocate in another State where to enjoy better conditions.

⁷¹⁴ Not all legal scholars share this feeling. See for instance, Rossi, ‘L’incidenza dei principi del diritto comunitario sul diritto internazionale privato: dalla «comunitarizzazione» alla «costituzionalizzazione»’ (2004) *Rivista di diritto internazionale privato e processuale*, 79.



movement of persons and to evade the application of unwelcome rules and, secondly, the manufacture of fictitious conditions in order to fall within the scope of free movement.

The first aspect, which is more analogous to the fears associated with mobility in the context of private international family law, comes in various forms. One case that has received a lot of attention in the courts concerns the conduct of a Union citizen residing in their State of origin and who, having been unable under national law to reunify with their family members, moves their residence or their centre of activity to another Member State in order to invoke against the State of origin the application of the free movement of persons provisions and thus reunify with their family members.⁷¹⁶ The CJEU has stated that the exercising of free movement means that a national of a Member State who returns to their State must enjoy the same treatment as Union law attributes to a Union citizen who moves to a different State from that of their nationality. The exercising of free movement, however, requires the national concerned to have resided in another Member State under the conditions laid down by Union law, i.e. as a worker, student or otherwise with sufficient resources to support himself financially, and to have resided together with the family member, in order to generate a family life to be protected. To use the words of the CJEU, “where the residence of the Union citizen in the host Member State has been sufficiently genuine so as to enable that citizen to create or strengthen family life in that Member State”,⁷¹⁷ then when he or she returns to their State of origin, he or she has the right to reunify with their family members, as if

⁷¹⁵ Bergamini, ‘Il difficile equilibrio fra riconoscimento del diritto alla libera circolazione, rispetto della vita familiare e abuso del diritto’ (2006) *Diritto dell’Unione europea*, 347; Adinolfi, ‘La nozione di «abuso di diritto» nell’ordinamento dell’Unione europea’ (2012) *Rivista di diritto internazionale*, 329; Iliopoulou-Penot, ‘Libertés de circulation et abus de droit’, in Duboit, Maitrot de la Motte (ed), *L’unité des libertés de circulation. In varietate concordia* (Bruxelles, Bruylant, 2013) 185.

⁷¹⁶ EU law lays down rules on family reunification of Union citizens (Directive 2004/38) and of third country nationals (Directive 2003/86). Family reunification of nationals is regulated by national legislations, which are often less protective than EU law. Hence in an attempt to bring family reunification within the scope of application of EU law, UK nationals go down the ‘Irish road’, Danes the ‘Swedish road’ and nationals of the Netherlands the ‘Belgian road’. For more comments, see respectively Costello, ‘Metock: free movement and ‘normal family live’ in the Union’ (2009) *Common Market Law Review* 610; Elsmore, Starup, ‘Comment on Jia’ (2007) *Common Market Law Review* 789, and Bierbach, ‘The return of the Member State national and the destiny of the European Citizen’ (2008) *European Constitutional Law Review*, 358.

⁷¹⁷ CJEU, case C-456/12 *O. and B.* [2014] ECLI:EU:C:2014:135, para 51.



he or she were a Union citizen moving to a different State from the State of origin. It is different when the Union citizen remains resident in the State of origin but works as an employee or on a self-employed basis in another Member State. In this case, the situation falls within the scope of free movement of persons, and the individual concerned can invoke the application of the Union's rules on family reunification, if the refusal of reunification may interfere with the exercise of freedom to provide services or with the freedom of movement for workers.⁷¹⁸

A further situation that could be conceived, one that has not yet been raised before the CJEU, is that of the marriage of same-sex persons who, being unable to get married in the State of origin, could decide to move to another Member State and marry there in order to obtain recognition of the marriage in the State of origin, this time invoking a principle established in case-law on recognition of personal status.⁷¹⁹

From the cases briefly mentioned above, a difference seems to emerge between mobility according to its standard meaning of moving from one State to another and free movement. Mobility is not sufficient to bring the situation within the framework of free movement of persons.

A second aspect in which the conduct of the parties can appear fraudulent or at least opportunistic and which is connected to private international law is that of marriages of convenience, meaning marriages that are lawful but not genuine because they are "entered into in order to circumvent the provisions relating to entry and residence of nationals of non-Member States."⁷²⁰ In the cases that have reached the CJEU, the question of marriages of convenience has been highlighted in relation to family reunification of spouses joined together in marriage.⁷²¹ However, the problem may be relevant to the Union's private international law in the event that the marriage of

⁷¹⁸ CJEU, case C-457/12 *S. and G.* [2014] ECLI:EU:C:2014:136.

⁷¹⁹ We will come back to this subject below.

⁷²⁰ CJEU, case C-109/01 *Akrich* [2003] ECR I-9607, para 57. The Commission drew up an Handbook to provide the Member States with common definitions and uniform methods to assess a real or bogus marriage: *Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens*, SWD/2014/284.

⁷²¹ CJEU, cases C-370/90 *Surinder Singh* [1992] ECR I-4265; C-60/00 *Carpenter* [2002] ECR I-6279; *Akrich* cit.; C-127/08 *Metock* [2008] ECR I-6241; *O. and B.* cit. In these cases, the question whether the marriage was one of convenience was raised hypothetically, because the genuine nature of the marriage was never in discussion.



convenience is dissolved or ended by divorce, in order to enable the party who took advantage of that situation to obtain the further advantage of a residence or work permit. On the basis of Directive 2004/38, the divorced spouse retains the right of residence in certain cases. If the spouse has already obtained the right of permanent residence (although it is unlikely that a marriage of convenience will last for five years), the termination of the marriage will not entail loss of the right of residence. The ease of finding a court having jurisdiction over divorce might encourage marriages of convenience but practice, or at least the practice gathered in the database, does not appear to substantiate this abstract fear.⁷²²

IX. OBSTACLES TO FREE MOVEMENT OF PERSONS AND PRIVATE INTERNATIONAL FAMILY LAW

From a free movement perspective, the harmonisation of private international family law can facilitate the exercise of free movement in various ways, effectively eliminating the obstacles that could impair the enjoyment of that right.

a) The right of residence is granted to Union citizens if they are workers or self-employed persons or have sufficient resources not to become a burden on State finances (Article 7 of Directive 2004/38).⁷²³ The source of the resources can be very diverse. Resources must be available to the person concerned but do not necessarily need to be “personal”. This means that resources can be provided to the person concerned by a third party. According to case-law, the third party in question may be the parent, even if a third-country national,⁷²⁴ the unmarried partner⁷²⁵ or the spouse, even if a third-

⁷²² Only one case can be cited where the court was concerned with a marriage of convenience, where it was proven that one of the spouses intended to take avail of the residence permit (Grenoble Court of Appeal, 30 August 2016, no 15/01463, FRS20160830). However, this was not a matter relevant to free movement of persons law because one of the spouses was a Union citizen residing in his State of origin.

⁷²³ In this regard, a Croatian decision is interesting: the family used to live in the State of the forum (Croatia) and after divorce the mother moved to Sweden in search of a job. The court gave the children's custody to the mother, since it deemed this decision to be in keeping with their best interest. (Općinski sud u Sisku, 18 March 2016, P-Ob-578/15, CRF20160318) One wonders whether the court took account of the rights that the parent enjoyed in Sweden. In fact, as a jobseeker, a EU citizen enjoys a limited right of residence (only for six months) and no right to social assistance, unless national law provides otherwise.

⁷²⁴ CJEU, case C-413/99 *Baumbast and R.* [2002] ECR I-7091, C-200/02 *Chen* [2004] ECR I-9925.

⁷²⁵ CJEU, case C-408/03 *Commission v Belgium* [2006] ECR I-2647.



country national.⁷²⁶ The third party does not need to have a legal (statutory or contractual) obligation to provide the resources. In contrast, however, if the Union citizen obtains their resources from a maintenance claim, the fact that such an obligation, if determined by a court judgment, is automatically recognised means that it is possible to meet the requirement for residence. From this perspective, therefore, the Maintenance Regulation eliminates a possible obstacle to free movement of persons. Compared to the Brussels Ia Regulation, the Maintenance Regulation helps the creditor who relies on the payments by the debtor, because it makes the declaration of enforceability of the decision unnecessary. In addition, decisions which establish a maintenance claim are enforceable even though the relationship underlying the maintenance obligation cannot be recognized.

b) Besides the Union citizen, their family members (spouse, partner, descendants, relatives in the ascending line) have the right of residence. Therefore, although the assessment of the validity of marriage, registered partnership, adoption, paternity are key, they are not regulated by EU law and are “systematic gaps” in the private international family law of the Union.⁷²⁷ However, it has to be recalled that neither the Regulations in force do not define “marriage” or “spouse”,⁷²⁸ and even if Regulation 2016/1104 gives a definition of registered partnership, it points out that the definition is only instrumental to the application of the regulation itself.⁷²⁹ Recognition of family status obtained in other Member States would therefore be extremely important for the persons concerned.⁷³⁰ It is well known, however, that this objective cannot be achieved at present, due to the unanimity requirement. Nor, for the same reasons, could it be any easier for the Union to adopt private international family law acts, which could provide a harmonised solution to the problem and make the recognition of family status smoother. Therefore, uncertainty may continue to exist about the recognition of

⁷²⁶ CJEU, case C-218/14 *Singh and others* [2015] ECLI:EU:C:2015:476.

⁷²⁷ Kramer *et al.*, ‘A European framework for private international law: current gaps and future perspective’ (2012) at 67.

⁷²⁸ Recital 17 of Regulation 2016/1103.

⁷²⁹ Article 3(a) and recital 17.

⁷³⁰ The Court of Justice will have shortly to decide whether a same-sex marriage celebrated in a third country gives spousal status for the purpose of family reunification under Directive 2004/38: pending CJEU, case C-673/16, *Coman and others* [2017] OJ C104/29.



statuses which, having been obtained in one State, are asserted in another State where they are unknown or are not possible. Although legal scholars have looked at this subject in depth and proposed various solutions about how to achieve recognition through the use of different techniques,⁷³¹ including drawing inspiration from the case-law of the CJEU on the recognition of names,⁷³² no particular problems seem to be raised in practice. Instead, a different aspect - evidence of status - is subject to a regulation that will undoubtedly facilitate free movement of persons,⁷³³ albeit without following a private international law approach.

c) In contrast, judgments on divorce or dissolution of marriage which are issued in another Member State are automatically recognised. Often the principle of *favor divortii* expressed in the Brussels IIa Regulation is justified by reference to free movement of persons and by taking account of the position of the spouse who is applying for divorce or for dissolution of marriage. The CJEU explained that the jurisdiction rules laid down in Article 3 of the Brussels IIa Regulation are designed “to protect the rights of a spouse who has left the country of common habitual residence”.⁷³⁴ Indeed, it is very common that the spouse, who moved to the State of the other spouse because of the marriage, comes back to their State of origin in case of matrimonial breakdown⁷³⁵ and the regulation does not want to leave them without a competent court. Legal scholars have pointed out that the weaker party in divorce proceeding is the less resourced one, who cannot receive legal advice on which court to go to in order to get better divorce

⁷³¹ Baratta, ‘Il regolamento comunitario sul diritto internazionale privato della famiglia’ in Picone (a cura di), *Diritto internazionale privato e diritto comunitario* (Padova, Cedam, 2004) 197 ff.; Tomasi, *La tutela degli status familiari nel diritto dell’Unione europea* (Padova, Cedam, 2007); Melcher, ‘(Mutual) recognition of registered relationship via EU private international law’ (2013) *Journal of Private International Law*, 149; Kohler, ‘Towards the recognition of civil status in the European Union’ 15 (2013/2014) *Yearbook of Private International Law*, 13; Lagarde, ‘La méthode de la reconnaissance est-elle l’avenir du droit international privé?’ 371 (2015) *Recueil de Cours* 18; Marino, ‘Il diritto all’identità personale e la libera circolazione delle persone nell’Unione europea’ (2016) *Rivista di diritto internazionale* 287.

⁷³² Cases C-148/02 *Garcia Avello* [2003] ECR I-11613, C-353/06 *Grunkin and Paul* [2008] ECR I-7639.

⁷³³ Regulation 2016/1191 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union, which is founded on Article 21, para 2 TFEU and not on Article 81. Bonifay, ‘La circulation des citoyens européens entre États membres au lendemain de l’adoption du règlement «documents publics»’ (2017) *Journal du droit international*.

⁷³⁴ CJEU, case C-294/15 *Mikołajczyk* [2016] ECLI:EU:C:2016:772, para 50.

⁷³⁵ The case-law of both the CJEU and national courts whose decisions are gathered in the database confirm this trend.



conditions. Therefore, the spouse left behind can be in a weaker position than the spouse who left the State of their common habitual residence. This is all the more so when the loss of spousal status brought about by divorce or dissolution can affect the other spouse's right of residence. As already pointed out, the family member's right of residence derives from that of the Union citizen. Since that right exists for as long as the Union citizen retains the right of residence, it would be lost in the event of dissolution of the family ties. Article 13 of Directive 2004/38 governs the effects of dissolution of matrimonial ties⁷³⁶ (or termination of the registered partnership)⁷³⁷ on the right of residence. Former spouses retain the right of residence if certain conditions are met. That provision is particularly important because former spouses could otherwise find themselves in a situation of weakness and the risk of losing the right of residence could prompt them to continue the marriage even if they wished to end it. Within free movement of persons, the weaker party is the one whose migratory status depends from their spouse.

As regards the conditions under which spouses retain the right of residence in the event of divorce, the rules differ according to their nationality: if they are Union citizens, they retain the right of residence on condition that they are workers or self-employed persons. If they are non-Union citizens, they must fall into one of the four categories set out in Article 13(2) and must be workers or self-employed persons. As far as resources are concerned, the maintenance that a former spouse is required to pay to the other could be regarded as adequate.⁷³⁸

The four scenarios in which the family member can retain the right of residence concern: 1) the duration of the marriage (three years, including one in the host Member

⁷³⁶ The dissolution of matrimonial ties can be the result of annulment or divorce. Nothing is stipulated in the event of separation, which, as a legal institution, is not recognised by all Member States, particularly because matrimonial ties are not dissolved and spousal status is not lost. The principle has been upheld by the Court, in a case in which the spouses, although remaining married, had commenced a relationship with other individuals, subsequently sealed by a new marriage (CJEU, case C-244/13 *Ogieriakhi* [2014] ECLI:EU:2014:2068). The decision is very favourable to the spouse, a third-country national, because it allows for the retention of Union rules as opposed to national rules on immigration but, in the absence of children, it is hard to understand what interest it protects, certainly not family life which, in this case, had clearly ended.

⁷³⁷ The Court has ruled out the possibility of Article 13 being applied in the case of a non-formalised cohabitation relationship: CJEU, case C-45/12 *Hadj Ahmed* [2013] ECLI:EU:C:2013:390, para 37.

⁷³⁸ Guild, Peers and Tomkin, *The EU Citizenship Directive*, 167.



State, on the date of initiation of the proceedings for the dissolution of the marriage), 2) the custody of children, based on a consensual decision or a court order, 3) the grant of rights of access to a minor child, provided that it has been established that access must be in the host Member State and for as long as is required, 4) difficult circumstances, such as having been a victim of domestic violence while the marriage was subsisting, which justify retention of the right of residence.

The protective scope of the provision is however weakened by its restrictive interpretation: the Court has stated that Article 13 only applies if the Union citizen resides in the host State at the time of initiating divorce proceedings.⁷³⁹ The reason for this is that the provision protects an existing right of residence, which would be extinguished as a result of divorce. If, however, the Union citizen moves to another State, leaving their spouse behind, and subsequently divorces, the spouse has already lost the right of residence (unless the conditions set out in Article 12 of the Directive apply) and Article 13 does not apply. The interpretation is understandable if a certain period of time elapses between departure and divorce.⁷⁴⁰ But if it were followed in circumstances where the divorce proceedings were initiated immediately after departure, the Union citizen would have the power to decide the fate of their spouse which Article 13 instead seemed to neutralise.

Article 12 of the Directive governs the retention of the right of residence by the family member in the event of departure (or death) of the Union citizen. For the purposes concerning us here, where there are children enrolled at a school to pursue their studies there, the departure of the Union citizen does not affect the children's right of residence or the right of residence of the parent who has custody of them, irrespective

⁷³⁹ CJEU, case C-218/14 *Singh and others* [2015] ECLI:EU:C:2015:476, para 61, confirmed by C-115/15 *NA* [2016] ECLI:EU:C:2016:487. The *NA* case was different from the *Singh and others* case because the applicant in the main proceedings had been mistreated during the marriage. The Court's response does not change. The Court does not believe that the literal content of Article 13 allows for a different interpretation, unlike the Advocate General Wathelet, who states that the need to protect the weak party can justify extending its interpretation. Furthermore, in the case in question, the Court states that the applicant in the main proceedings has the right of residence in the host State as the parent having custody of a child (attending school) of a migrant worker.

⁷⁴⁰ Mrs *NA*'s husband disowned her less than six months after leaving the United Kingdom and the decision should not be recognised in the UK. The spouses of the three applicants in *Singh and others* initiated divorce proceedings six to twelve months after they had left the country.



of nationality. That right of residence is not subject to any further condition. Moreover, family members who are Union citizens (but not family members who are third-country nationals) retain the right of residence, in the event of departure of the Union citizen, provided that they meet the conditions for residence on a personal basis. It follows that, within the context of the Directive, the protection of the family member's right of residence is more limited in the case of departure compared with divorce, because the family should remain united and follow the beneficiary of free movement.

The interpretation that the CJEU gave in *Singh and others*, combined with the divorce-friendly regime laid down by the Brussels IIa Regulation, which enables the spouse to seise the court of their State of nationality both where the spouses have the same nationality (Article 3, 1 (b)) and where he or she transfers their habitual residence provided that six months have elapsed (Article 3, 1(a), sixth indent), and grant recognition to all divorce decisions without control as to the international jurisdiction of the court that issued the judgment, could jeopardise the protective balance that Directive 2004/38 seeks to achieve.

A different interpretation of Articles 12 and 13 of Directive 2004/38 would, however, be possible. The premise is that the two provisions concern different situations: under the former the family ties still exist, whereas under the latter they are cut.

Article 12 governs the consequences of the Union citizen's departure but does not define when the person is considered to have departed. On the one hand, the emphasis could be placed on intentions and the Union citizen could be considered as having departed if he or she leaves the State with the intention of not returning and of moving elsewhere. However, the CJEU has shown on various occasions that it does not attach importance to the reasons why a person chooses to exercise free movement.⁷⁴¹ We propose instead a systematic interpretation of Article 12 in conjunction with Article 16(3) of the Directive, which provides that for the purposes of acquiring the right of permanent residence, continuity of residence is not affected by temporary absences of the Union citizen from

⁷⁴¹ According to the Court of Justice, the reasons pursued by the citizens of the Union when they decide to move to another State are irrelevant and cannot be taken into account to rule out the application of EU law: CJEU, cases 53/81 *Levin* [1982] ECR 1035, para 21, C-413/01 *Ninni-Orasche* [2003] ECR I-13187, para 42-44, C-46/12 *L.N.* [2013] ECLI:EU:C:2013:97, para 47. In contrast CJEU, case C-333/13 *Dano* [2014] ECLI:EU:C:2014:2358, para 78.



the State of residence not exceeding a total of six months. If an absence of that duration is irrelevant for the purposes of considering the person as being continually present in the host State, it could equally be considered relevant for the purposes of assessing when the person ought to be considered as having departed. Thus, it could be conceived that as soon as he or she leaves the host State and for a period of six months, the person has not departed but is still present in the country.

As to Article 13, the interpretation according to which the citizen of the Union must reside in the host State at the time of initiating divorce proceedings does not harmonise with the regime provided for by the Brussels IIa Regulation. Instead, the place of the divorce proceedings should be immaterial. The only relevant factors are the conditions laid down by Article 13: if the other spouse satisfies them, the protective regime should apply.

Ease of divorce and retention of the right of residence for the spouse (especially if not a citizen of the Union) could encourage parties to enter into marriages of convenience, which, as pointed out above, are lawful but concluded in order to manufacture the conditions for obtaining a right of residence.

d) The descendants of the Union citizen or of their spouse or partner also enjoy the right of free movement of persons. Directive 2004/38 simply provides that the descendant is a family member of the Union citizen and can reunite with the parent who exercises free movement on a personal basis. The Union citizen does not need to hold the right of custody (in the sense of the right to establish the child's habitual residence), not even where the other parent is alive and does not accompany the Union citizen. In contrast, Directive 2003/86 on family reunification of third-country nationals provides that reunification is enjoyed by "the minor children including adopted children of the sponsor where the sponsor has custody and the children are dependent on him or her. Member States may authorise the reunification of children of whom custody is shared, provided the other party sharing custody has given his or her agreement" (Article 4 (1) (c)). The right to family reunification connected with the exercise of the right of free movement could be abused by the Union citizen to move the child's habitual residence and remove them from the parent with custody or in breach of the rights of the other parent with custody. To avoid the abuse of free movement and to guarantee the rights of parents



and children to have a normal relationship, the rules on child abduction seem particularly appropriate. The parent's right to exercise free movement with the child or to be reunited with the child is limited by the existence of the right of the parent with custody to decide on the child's habitual residence. Free movement must not affect the exercise of the rights of the parent who has the right of custody or, if custody is shared, the manner in which it is exercised. The Brussels IIa Regulation guarantees this coordination because custody decisions are also effective in the other Member States. Free movement cannot be used to circumvent national provisions that have granted the other parent the right to live with the child. In this way, the best interests of the child are safeguarded. Directive 2004/38 mentions the interests of the child in Article 28 titled "Protection against expulsion", stipulating that the child cannot be expelled "except if the expulsion is necessary for the best interests of the child", which is not relevant here. However, recital 31 states generally that "this Directive respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union", allowing for an interpretation of the Directive consistent with the Charter, to provide the protection that the Charter prescribes. Therefore, it can be maintained that the Directive, in the part where it establishes that the child has the right of residence with the parent who has exercised free movement, must be construed in the sense that the parent must have the right to decide on the child's residence and, if he or she has that right, he or she must exercise it in accordance with the provisions of the applicable legislation. This interpretation serves to achieve the best interests of the child which is the objective of the part of the Brussels IIa Regulation on parental responsibility. The very existence of the regulation, establishing a harmonised system applicable in all Member States, reduces the obstacles to free movement that could be created if States were unilaterally responsible for the protection of the child.

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



might hinder the free movement of the holder. Therefore, the CJEU *Ivanova Gogova* case⁷⁴² shed some lights about a potential obstacle to free movement pertaining to the renewal of the passport of a minor. Bulgarian law required the consent of both parents. However, the parents lived apart and the father did not give his consent. The mother was resident in Italy but submitted an action to remedy the lack of agreement of the other parent to a court in Bulgaria.⁷⁴³ The CJEU explained that such an action deals with parental responsibility and comes within the scope of application of the Brussels IIa Regulation. Therefore, the court of the “habitual residence” of the minor (Italy in the present case) has jurisdiction and its decision is to be taken into account by the State of origin of the minor.

X. CONCLUDING REMARKS

Private international family law and free movement of persons law are two different and distinct regulatory systems. The interferences between the two seem rather fortuitous and unintended. In some cases they reinforce one another, whereas in others they pursue different aims. A better coordination would be a valuable asset for both systems.

C. RELATION BETWEEN THE HAGUE MAINTENANCE PROTOCOL AND THE PRIOR HAGUE MAINTENANCE CONVENTIONS⁷⁴⁴

I. INTRODUCTION

The Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations,⁷⁴⁵ along with the *Hague Convention on the International Recovery of Child Support and*

⁷⁴² CJEU, case C-215/15 [2015] ECLI:EU:C:2015:710.

⁷⁴³ The case stands not alone: the EUFAM's database gathers three similar decisions (Районен съд - Казанлък, 11 June 2014, 1018/2014, BGF20140611; Върховен касационен съд, 9 January 2014, 6366/2013, BGT20140109; Върховен касационен съд, 12 January 2011, BGT20110112).

⁷⁴⁴ This paragraph shall be attributed to: Laura Carballo Piñeiro.

⁷⁴⁵ Protocol on the Law Applicable to Maintenance Obligations concluded in The Hague on 23 November 2007, *UNTS Reg. No. A-51361*.



Other Forms of Family Maintenance,⁷⁴⁶ has been approved with the aim to modernize an otherwise rich field in international provisions. Just focusing on the instruments produced by the Hague Conference on Private International Law and only on those dealing with conflicts of laws, the Hague Maintenance Protocol has been preceded by the Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children⁷⁴⁷ and the Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations.⁷⁴⁸ However, the aim “to ensure the effective international recovery of child support and other forms of family maintenance”⁷⁴⁹ taking advantage of the latest developments in inter-country cooperation and the modern means of communication, has been taken as an opportunity to revisit the conflict-of-laws system in these matters by some countries.⁷⁵⁰

Against this backdrop, the risk of treaty collision is high and affects an important number of EU Member States. As known, the Hague Maintenance Protocol applies in all Member States by submission of Article 15 of the Maintenance Regulation, save the case of the United Kingdom.⁷⁵¹ Moreover, both prior the Hague Maintenance Conventions are in force in nine EU Member States being the 1956 Convention also applicable in Austria and that of 1973 in Poland.⁷⁵² None of these countries have denounced the prior conventions to the extent that the Protocol does not require denunciation while establishing that it is the international instrument to apply as regards to other EU

⁷⁴⁶ International Convention on the International Recovery of Child Support and Other Forms of Family Maintenance concluded in The Hague on 23 November 2007, UNTS Reg. No. I-51361.

⁷⁴⁷ International Convention on the law applicable to maintenance obligations towards children concluded in The Hague on 24 October 1956, 510 UNTS 161.

⁷⁴⁸ International Convention on the Law Applicable to Maintenance Obligations concluded in The Hague on 2 October 1973, 1056 UNTS 199.

⁷⁴⁹ See Article 1 of the Hague 2007 Maintenance Convention.

⁷⁵⁰ According to Beaumont, ‘Reflections on the relevance of Public international law to Private international law treaty making’ (2010) 340 *Recueil des Cours* 1, 43, the Protocol was negotiated by the European Union, Switzerland, China and Japan while other countries, in particular the United States and Canada, showed no interest in its ratification and thus in the final outcome.

⁷⁵¹ Denmark has accepted the application of the Maintenance Regulation by Council Decision 2006/325/EC of 27 April 2006 concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O J [2006] L 120/22.

⁷⁵² The 1956 Convention is still in force in Austria, Belgium, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal and Spain, while that of 1973 is in Belgium, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Poland, Portugal and Spain.



Member States.⁷⁵³ However and absent denunciation of the prior Hague Maintenance Conventions, a conflict of treaties arises as to those third States which have not ratified the Protocol yet, but are party to either the 1956 or 1973 Hague Maintenance Convention, or both.

In order to address this issue, the paper will first tackle the solutions provided by the Hague Maintenance Protocol and its compatibility clauses, and second try to fill the gaps by looking at other instruments beyond the Protocol, in particular the Vienna Convention on the Law of Treaties.⁷⁵⁴ Article 30(2) thereof gives priority to compatibility clauses,⁷⁵⁵ but it also establishes that the problems not solved by the latter need to find a solution in other principles of this convention. However, not all issues can be solved according to these principles for which reason the paper will move to separately tackle the relation between the Protocol and each of the Hague Maintenance Conventions as they do not have the same territorial scope of application.

It is, however, to acknowledge from the beginning that the relevance of this issue in practice is very limited as courts rightly opt for applying the Hague Maintenance Protocol and dismiss the prior conventions. The question to be answered is whether this is really the best practice in the field for which reason a brief examination of the technical solutions provided by these conventions in comparison to the Protocol since reasonable. This examination may lead us to the conclusion that the conflict of treaties is just apparent.⁷⁵⁶ The paper will close with a brief summary of conclusions.

⁷⁵³ See *Explanatory Report to the Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations* written by Bonomi, Text adopted by the Twenty-First Session, Hague Conference on Private International Law (hereafter, Bonomi Report), para. 197-199.

⁷⁵⁴ International Convention on the Law of Treaties concluded in Vienna on 23 May 1969, 1155 UNTS 331.

⁷⁵⁵ See more about this terminology and an enumeration of different variants of compatibility clauses in Noodt Taquela, 'Applying the most favourable treaty or domestic rules to facilitate private international law co-operation' (2016) 377 *Recueil des Cours* 208 ff. See also Álvarez González, 'Cláusulas de compatibilidad en los Convenios de la Conferencia de La Haya de Derecho Internacional Privado' (1993) 45 *Revista Española de Derecho Internacional* 39 ff.

⁷⁵⁶ See taking the distinction between real and apparent conflicts from the studies on the conflict of laws, Bureau, 'Les conflits de conventions', in *Travaux du Comité Français de Droit International Privé 1998-2000* (Paris, Pedone, 2001) 201, 205.



II. COMPATIBILITY CLAUSES IN THE HAGUE MAINTENANCE PROTOCOL

The Maintenance Regulation does not provide for specific compatibility clauses as regards to conflict-of-laws conventions. The issue is, nevertheless, indirectly addressed by the referral to the Hague Maintenance Protocol made in its Article 15. Hence, conflicts between instruments on maintenance matters are to be tackled in the framework of this latter instrument. In fact, Article 18 thereof specifically deals with this instrument's coordination with the abovementioned prior Hague Maintenance Conventions. This provision resembles Article 18 of the Hague 1973 Maintenance Convention and reads as follows:

As between the Contracting States, this Protocol replaces the Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations and the Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children.

A first reading of this compatibility clause points to the replacement of the prior Hague Maintenance Conventions by the Protocol once the latter is ratified by the concerned Contracting State. However, a second reading reveals its weaknesses to the extent that it is construed on the basis of reciprocity - "as between the Contracting States" - while this is not the basis of the Hague Maintenance Protocol's operation. The latter's provisions apply "even if the applicable law is that of a non-Contracting State",⁷⁵⁷ i.e. the Protocol has universal application and it is not only applicable "as between the Contracting States". Moreover, the 1973 Hague Convention lays down a similar rule to this one,⁷⁵⁸ being that of 1956 less problematic because it only applies when the governing law is that of a Contracting State.⁷⁵⁹ Hence, the compatibility clause only solves the conflict of treaties when both States are party to the Protocol, but does not

⁷⁵⁷ See Article 2 of the Hague Maintenance Protocol.

⁷⁵⁸ See Article 3 of the 1973 Hague Maintenance Convention.

⁷⁵⁹ See Article 6 of the 1956 Hague Maintenance Convention.



address the problem of the applicable instrument as regards to a non-Contracting State in which the former Conventions remain in force.

Within the European Union, the problem is limited to those EU Member States which are also Contracting States to either the 1956 or 1973 Hague Maintenance Convention, and as regards to third States which are not a party to the Protocol, but are bound by one of the prior conventions. For the time being, that is the case of Albania,⁷⁶⁰ Japan,⁷⁶¹ Switzerland,⁷⁶² and Turkey.⁷⁶³ Should one of these countries ratify the Protocol, the problem would be then solved by the here discussed Article 18. Meanwhile, there is an unaddressed conflict of treaties.⁷⁶⁴ For the sake of completeness, it is to mention that the problem does not affect, of course, those countries which are neither party to the Protocol nor the abovementioned conventions; EU Member States will apply the Protocol as regards to the latter on grounds of the instrument's universal scope of application.

The compatibility clause enshrined in Article 18 of the Hague Maintenance Protocol is essential in providing legal certainty as to its application while sending the clear message that States should join the most modern treaty. However, it does not solve all the issues that the application of the concurrent maintenance instruments causes. Taking this into account, other compatibility clauses of the Protocol could come into operation, in particular its Article 19. The latter focuses, though, on the “co-ordination with other instruments”, i.e. referring to instruments other than the Hague Maintenance Conventions expressly dealt with in Article 18.⁷⁶⁵

⁷⁶⁰ Albania is a party to the 1973 Hague Maintenance Convention since December 1, 2011.

⁷⁶¹ Japan is a party to both conventions since September 19, 1977 in that of 1956, and since September 1, 1986 in the following one.

⁷⁶² Switzerland is a party to both conventions since January 17, 1965 in that of 1956, and since October 1, 1977 in the following one.

⁷⁶³ Turkey is a party to both conventions since April 24, 1972 in that of 1956, and since November 1, 1983 in the following one.

⁷⁶⁴ Already advancing that the time of the conflict of laws has been followed by the conflict of treaties, see Majoros, *Les conventions internationales en matière de droit privé: abrégé théorique et traité pratique* (Paris, Pedone, 1976).

⁷⁶⁵ Article 19 of the Hague Maintenance Protocol reads as follows:

“(1) This Protocol does not affect any other international instrument to which Contracting States are or become Parties and which contains provisions on matters governed by the Protocol, unless a contrary declaration is made by the States Parties to such instrument.

(2) Paragraph 1 also applies to uniform laws based on special ties of a regional or other nature between the States concerned”.



Moreover, Article 19 could be labelled as a neutral compatibility clause because it only seeks to establish mere compatibility between instruments⁷⁶⁶ and fails to provide for the principle of maximum effectiveness.⁷⁶⁷ This lack of material orientation is relevant to our research because it cannot be used as a canon of interpretation for those cases not directly tackled by Article 18; while there have been some interpretations indicating that the principle of most favourable instrument should apply in these cases, the terms of this clause do not support such an application, but it would depend on the terms of the other instrument.⁷⁶⁸

Both compatibility clauses were introduced following the advice contained in a preliminary study on the co-ordination between the Maintenance Project and other international instruments.⁷⁶⁹ The point to be made now is that this study analyses not only the conventions on applicable law to maintenance obligations, but the whole project, i.e. first and foremost taking into account the finally approved Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance. While this convention is based on the principle of cooperation and compatibility clauses such as those under analysis seem appropriate for this type of provisions, the same does not apply to conflict-of-laws conventions, in particular when they have a universal scope of application.⁷⁷⁰ The latter was not taken into account in drafting these clauses, but achieving co-ordination between conventions.⁷⁷¹

In view of these developments, an intermediate conclusion can be reached. The provisions contained in the Hague Maintenance Protocol do not provide an expedient

⁷⁶⁶ See Bonomi report, para. 200.

⁷⁶⁷ This principle has been developed by Feren Majoros, n 21, I 253. See also Noodt Taquela, n 12, 218-227.

⁷⁶⁸ If the other instrument does not contain a more assertive compatibility clause, the conflict between conventions is not solved and this is when a principle like that of applying the most favourable treaty could be useful as defended by Noodt Taquela, n 12, 223-227. However, her argument is restricted to international judicial co-operation treaties and it does not seem suitable for conflict-of-laws treaties on account of the underlying principles.

⁷⁶⁹ See Lortie, *Co-ordination between the Maintenance Project and other international instruments*, Hague Conference on Private International Law, Prel.Doc. No 18, June 2006.

⁷⁷⁰ Already highlighting this difficulty see Droz, 'Regards sur le droit international privé comparé. Cours general de droit international privé' (1991) 229 *Recueil des Cours* 9, 390-94: 'Unification universelle sur unification universelle ne vaut'.

⁷⁷¹ See Lortie, n 26, 13-14.



answer to the issue of which conflict-of-laws convention apply when the other State involved in the case has not ratified the Protocol and both States are bound by a prior Hague Maintenance Convention.

Article 18 of the Hague Maintenance Protocol provides for those cases in which States are parties to more than one Hague Maintenance instrument giving preference to the Protocol. While the principle behind this rule is that of *lex posterior derogat priori*, the same applies to the relations between a State bound by more than one Hague Maintenance instrument and a State which is not a party to any of them.⁷⁷² Following these considerations, if both States are bound by the same Hague Maintenance Convention and one of them has not ratified the Protocol, the *pacta sunt servanda* principle points to the application of the treaty to which both States are members. However, the universal scope of the Protocol is in contradiction with this conclusion, thereby it is advisable to seek for further guidance.

III. SOLUTIONS TO THE CONFLICT OF CONVENTIONS BEYOND THE COMPATIBILITY CLAUSE

If the answer to the conflict of treaties under discussion here has to be sought beyond this instrument, the resorting to Articles 30 to 32 of the Vienna Convention on the Law of Treaties of 1969 dealing with successive treaties on the same subject matter is the following step,⁷⁷³ as the Vienna Convention's provisions operate on a subsidiary basis.⁷⁷⁴ In this vein, it has already been asserted that this convention not only applies to Public international law treaties, but also to those of Private international law.⁷⁷⁵ It is also worth noting that the value of the Vienna Convention's provisions in applying the Hague Conventions is compromised by the fact that some States party to the Hague Conference

⁷⁷² Ibid. 16. The same outcome would be reached by applying international customary law as pointed out by *ibid.*

⁷⁷³ The issue of whether conventions have the same subject matter has been discussed at length, but it is going to be left of this paper as there is no doubt that the three instruments at stake do have the same subject matter, maintenance obligations, although their personal scope may vary. See on this interpretation issue, *ibid.* 15.

⁷⁷⁴ See for all *ibid.* 15; Noodt Taquela, n 12, 251-252.

⁷⁷⁵ Mann, 'Uniform Statutes in English Law' (1983) 99 *The Law Quarterly Review* 376 ff.



of Private international law have not ratified it,⁷⁷⁶ as it is remarkably for our purposes the case of France and Turkey. A further problem arises out of the lack of focus of the Vienna Convention on Private international law conventions at the time of its discussion, i.e. it may not pay attention to their private dimension.

Be that as it may, Article 30(3) of the Vienna Convention leads to the same result as Article 18 of the Hague Maintenance Protocol. That provision lays down that the later treaty is to be applied if both States are party to it; thereby the prior treaty is the one to be applied if both States have ratified it.⁷⁷⁷ This conclusion seems to be confirmed by Article 30(4)(b) of the Vienna Convention,⁷⁷⁸ which reads as follows:

“4. When the parties to the later treaty do not include all the parties to the earlier one: (...) (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations”.

The German *Bundesgerichtshof* decided a case in 1986 involving the Hague 1956 Convention on the Law Applicable to Maintenance and a bilateral treaty between Germany and Iran signed in 1929 on the grounds of this rule.⁷⁷⁹ Accordingly, the bilateral treaty was applied in that case because it was in force between both States, but not the Hague Convention which had not been ratified by Iran.⁷⁸⁰

⁷⁷⁶ Nevertheless, there is also the opinion that the Vienna Convention codifies what is international customary law. See on this debate the references provided by Lortie, n 26, 15. The same author specifies that it may not be a codification of the practice of international organisations regarding the development of conventions since Article 5 of the Vienna Convention provides that “[it] applies to any treaty which is the constituent instrument of an international organisation and to any treaty adopted within an international organisation without prejudice to any relevant rules of the organisation”.

⁷⁷⁷ See on this application of the speciality principle *ratione loci*, Bureau, n 13, 213.

⁷⁷⁸ See on these provisions, Wright, ‘Conflicts between international law and treaties’ (1917) *The American Journal of International Law* 566, 576-9. On their history, see Koskeniemi, ‘Fragmentation of International Law’ (2006) *International Law Commission*.

⁷⁷⁹ *Bundesgerichtshof*, 15 January 1986, *Die deutsche Rechtsprechung auf dem Gebiet des internationalen Privatrechts*, no. 85, 198.

⁷⁸⁰ The reasoning of the German Supreme Court does not lack controversy to the extent that the Hague Convention has a territorial scope of application, thereby it was not applicable in this case and there was not conflict between treaties as pointed by Noodt Taquela, n 12, 251.



However and as it happens with the already commented Article 18 of the Hague Maintenance Protocol, it is highly debatable whether this rule works beyond treaties without a territorial connection as it is our study case,⁷⁸¹ in particular in the light of their origins.⁷⁸² In contrast, the Protocol's scope of application is universal, i.e. regardless of the applicable law being that of a Contracting State. Against this background, it might be advisable to resort to Article 31 of the Vienna Convention in order to fill up the gap in Article 18 of the Protocol by taking into consideration "the terms of the treaty in their context and in the light of its object and purpose".⁷⁸³ Accordingly, it is convenient to take a closer look at the relationship between these international instruments.

IV. THE 1956 HAGUE MAINTENANCE CONVENTION

The 1956 Hague Maintenance Convention does not have a universal scope of application as it is only applicable if the chosen law is that of a Contracting State.⁷⁸⁴ The problem will thus arise when the selected law is that of Japan, Switzerland or Turkey,⁷⁸⁵ since these countries have ratified this convention, but not the Hague Maintenance Protocol. The conflict arises for those countries that are also a party to the latter since the Protocol's scope is universal, i.e. it is applicable even if the chosen law is that of Japan, Switzerland and Turkey.

However, it is interesting to note that these three countries are also part of the 1973 Hague Maintenance Convention. While this convention lays down a very similar compatibility clause to that enshrined in Article 18 of the Protocol, the application of the 1956 Hague Maintenance Convention in these countries should be ruled out by the principle of *lex posterior derogat priori*. Hence, the conflict between treaties could be

⁷⁸¹ See for all Bureau, n 13, 213-214; Noodt Taquela, n 12, 256-257.

⁷⁸² See Wright, n 35, 576.

⁷⁸³ On the principle of systemic interpretation, i.e. taking into account the environment of the treaty, see Koskenniemi, n 35, 208-209.

⁷⁸⁴ See Article 6 of the 1956 Hague Maintenance Convention.

⁷⁸⁵ See the Introduction to this paper.



restricted to one between the 1973 Convention and the Protocol as the former would supersede the 1956 Convention in those countries that have joined both.

Austria is, nevertheless, a case in point to the extent that this country is an EU Member State and thus applies the Protocol by way of Article 15 of the Maintenance Regulation, but it is also a Contracting State to the 1956 Convention. Should the Japanese, Swiss or Turkish law be applicable to a maintenance obligation, Austrian courts would be faced with the choice between the 1956 Convention and the Protocol. In dealing with these residual cases, the Explanatory Report to the Hague Maintenance Protocol suggests the application of this instrument in the light of the objective of Article 18, i.e. that of making the Protocol supersede the former conventions.⁷⁸⁶ While this general aim may serve as a guideline in solving the conflict of treaties, a literal interpretation of Article 18 does not support this conclusion; thereby it would be convenient to find further arguments in this direction. To this end, the principle of maximum effectiveness may be of help.⁷⁸⁷

The general objectives of the Maintenance Project are to modernize this field of law by providing more effective and efficient tools to maintenance creditors.⁷⁸⁸ In this vein, it is not a secret that it aims at reviewing the prior Maintenance Conventions, including those on conflict of laws. However, the Protocol does not depart from the general connecting factor, the one established for the first time by the 1956 Hague Convention, i.e. the law of the habitual residence.⁷⁸⁹ Other innovations are, nevertheless, provided that may support the conclusion that the Protocol matches the general objectives of both instruments in better ways than the said convention, confirming that the Protocol should be applied instead of the 1956 Hague Convention.⁷⁹⁰

⁷⁸⁶ See Bonomi report, para. 198. See insisting on this point, Bonomi, 'The Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligation' (2008) 10 *Yearbook of Private International Law* 333, 334-36.

⁷⁸⁷ See developing this way to solve conflicts between private international law treaties, Bureau, n 13, 215-218.

⁷⁸⁸ See Lortie, 'The development of medium and technology neutral international treaties in support of post-convention information technology systems. The example of the 2007 Hague Convention and Protocol' (2008) 10 *Yearbook of Private International Law* 359 ff.

⁷⁸⁹ See on the benefits of this criterion in this field, Bonomi, n 43, 341-342.

⁷⁹⁰ These innovations are examined in the following section.



V. THE 1973 HAGUE MAINTENANCE CONVENTION

The conflict between the 1973 Hague Maintenance Convention and the Protocol is more difficult to solve because both instruments claim their universal scope of application.⁷⁹¹ As said before, if Article 30 of the Vienna Convention is resorted to deal with this issue, the 1973 Convention would take priority over the Protocol on account of both States being a party to it. That would be the case of the ten abovementioned EU Member States and Albania, Japan, Switzerland and Turkey. The question to be discussed now is whether the principle of maximum effectiveness advises to apply the Protocol instead of the 1973 Convention.

The reading of the discussions at the (pre-)Diplomatic Conference leading to the approval of the Protocol shows that the 1973 Hague Maintenance Convention was considered a well-performing convention in terms of the provided solutions, but in need of modernization, in particular as regards to the law applicable to maintenance obligations between spouses and ex-spouses. The need to replace it motivated the drafting of the Protocol which encompasses all family relationships as the 1973 Convention does, the main difference being the lack of reservations in the Protocol.⁷⁹²

The structure of the Protocol is similar to that of the 1973 Hague Maintenance Convention. Both establish as a general connecting factor the maintenance creditor's habitual residence,⁷⁹³ design a number of subsidiary factors in a "cascade" with the aim of favouring maintenance creditors,⁷⁹⁴ lay down a special rule for facilitating public bodies' recovery of maintenance,⁷⁹⁵ the exception of public policy,⁷⁹⁶ and the issues included in the law applicable to maintenance obligations.⁷⁹⁷ However, the Protocol substantially differs from the 1973 Hague Maintenance Convention in a number of approaches developed to favour maintenance creditors.

⁷⁹¹ See Article 3 of the 1973 Convention and Article 2 of the Protocol.

⁷⁹² The phrasing of Article 1 of the Protocol resembles that of Article 1 of the 1973 Convention showing the close relationship between both instruments, i.e. the latter was used as a model to draft the later. However and unlike the convention, the Protocol does not allow for reservations.

⁷⁹³ See Article 3 of the Hague Maintenance Protocol and 4 of the 1973 Convention.

⁷⁹⁴ See Article 4 of the Hague Maintenance Protocol and Articles 4 to 6 of the 1973 Convention.

⁷⁹⁵ See Article 10 of the Hague Maintenance Protocol and Article 9 of the 1973 Convention.

⁷⁹⁶ See Article 13 of the Hague Maintenance Protocol and Article 11 of the 1973 Convention.

⁷⁹⁷ See Article 11 of the Hague Maintenance Protocol and Article 10 of the 1973 Convention.



The role of the law of the forum in the Hague Maintenance Protocol is the first approach to be highlighted. While the law of the maintenance creditor's habitual residence is the general connecting factor, the law of the seized court is the first residual factor after that one in the case of a specific type of maintenance creditors,⁷⁹⁸ and in priority over the parties' common nationality.⁷⁹⁹ Moreover, it becomes the first connecting factor if the claim is brought by the creditor before the courts of the maintenance debtor's habitual residence.⁸⁰⁰ This innovative rule seeks to promote the coincidence between the law and the forum avoiding by this means the time and costs associated to the proof of foreign law.⁸⁰¹ Such savings favour maintenance creditors, but also provide them with a choice of laws whereby their chances of getting their obligation approved and maybe enhanced augment.⁸⁰²

The 1973 Hague Maintenance Convention also refers to the *lex fori*, but as a very last resort, namely after the law of the habitual residence and that of common nationality.⁸⁰³ This is not the only difference between the two instruments as their scope of application also differs; the conflict rule in “cascade” provided by the 1973 Convention has a general scope and it is thus applied to all creditors while that of the Protocol does to a very specific category of them. This last restriction could be considered a weakness of the Protocol in the protection of maintenance creditors. However and as has been contended,⁸⁰⁴ the premise of the “cascade” being applicable

⁷⁹⁸ According to Article 4(1) of the Hague Maintenance Protocol, beneficiaries of this materially-oriented rule are children towards their parents and vice-versa regardless of their age, and persons under the age of 21 years old save the case of maintenance obligations between spouses and ex-spouses. The latter is submitted to the general rule and the escape clause laid down in Article 5. Remarkably, Article 4 does not exclude the resorting to the defence endorsed by Article 6 according to which debtor may prove that they are not obliged under the law of their common nationality and the law of the debtors' habitual residence. See critical, Bonomi, n 43, 343.

⁷⁹⁹ See Article 4.2 of the Hague Maintenance Protocol.

⁸⁰⁰ See Article 4(3) of the Hague Maintenance Protocol. This provision is a compromise between those countries that favour the automatic application of the law of the forum, and those that prefer the law of the creditor's habitual residence. See WGAL report of June 2006, Prel.Doc. No. 22, para. 24 and 25; Bonomi, n 43, 345.

⁸⁰¹ In addition to this, it has been mentioned that the common nationality criterion is discriminatory, thereby its role should be reduced. See for all, Bonomi, n 43, 343-344.

⁸⁰² The benefits of this indirect choice are restricted to only specific creditors because the Diplomatic Conference understood that they were the only ones that deserve it. See Bonomi, n 43, 346.

⁸⁰³ See Article 6 of the Hague 1973 Convention.

⁸⁰⁴ See Bonomi, n 43, 344.



to all creditors is not entirely true as spouses and ex-spouses were excluded from it.⁸⁰⁵ This means that some categories of adult creditors are left out of the protection provided by the cascading connecting factors in the Protocol. Nevertheless, the right to maintenance of these creditors is debatable from a comparative law approach to the extent that many countries do not acknowledge obligations based on collateral parentage or affinity relationships. Seen in this light, the difference between both instruments loses its relevance.

As abovementioned, the Hague Maintenance Protocol was largely triggered on grounds of revising the law applicable to obligations between spouses and ex-spouses. The 1973 Convention establishes a rigid conflict rule that submits the obligation to the law applicable to divorce, legal separation or nullity of marriage.⁸⁰⁶ In contrast, the Protocol relies on the general rule, that allocating the governing law to the country of the creditor's habitual residence, but devises an escape clause for these specific cases.⁸⁰⁷ Moreover, it reminds that the closest law to maintenance obligations between spouses and ex-spouses may be that of the last common habitual residence.⁸⁰⁸

The third innovative approach of the Hague Maintenance Protocol consists of securing some room for party autonomy in selecting the applicable law. On the one hand, creditor and debtor are allowed to conclude a procedural agreement whereby the law of the forum is to govern any maintenance obligation claimed in a specific proceeding.⁸⁰⁹ On the other hand, the parties to the maintenance obligation are entitled to conclude at

⁸⁰⁵ See Article 8 of the Hague 1973 Maintenance Convention submitting these obligations to the law applicable to separation, nullity or divorce.

⁸⁰⁶ The main criticism comes from the fact that this conflict rule favours forum shopping to the extent that there is no unification as to the law applicable to these relationships. Moreover, the claim may arise after the dissolution of marriage proceedings, at a time when the law applied to divorce, legal separation or nullity has become estranged to the couple. See on these issues and others Bonomi, n 43, 347-348.

⁸⁰⁷ The grounds for this escape clause are that the general rule is not always suitable for this type of obligations in view of the differences among legal systems. See Bonomi, n 43, 346.

⁸⁰⁸ See Article 5 of the Hague Maintenance Protocol. Particularly remarkable is that this clause only comes into operation upon request of one of the parties to the obligation, restricting by this means its legal uncertainty. The seized court will nevertheless have to assess whether there is a closer law to the case than that of the maintenance creditor's habitual residence, weighting factors such as the one mentioned in text, but also others such as the common nationality or respective nationalities, the place of marriage's celebration or dissolution, etcetera.

⁸⁰⁹ See Article 7 of the Hague Maintenance Protocol. The validity of this procedural agreement is submitted to the law of the forum and its effects restricted to the relevant proceedings.



any time an agreement on the applicable law provided that they are capable of defending their interests and subject to certain limitations and conditions.⁸¹⁰

In light of these innovations, it is clear that it is not indifferent how to solve the conflict between instruments dealt with in this paper to the extent that applying one or the other may provide a different outcome. The question is thus whether countries party to both of them may choose one or the other depending on which one better secures the interests at stake and in particular those of the maintenance creditor.⁸¹¹

However, this “choice of treaties” does not seem to be favoured by international law in absence of a compatibility clause in these terms. While the lack of such clause in the Hague Maintenance Protocol has already been highlighted,⁸¹² Article 19 of the 1973 Convention reads as follows:

“[t]his Convention shall not affect any other international instrument containing provisions on matters governed by this Convention to which a Contracting State is, or becomes, a Party”.

This compatibility clause seeks for co-ordination, but not for applying the instrument that best favours a given objective, thereby not being a clause enshrining the principle of maximum effectiveness. However, it seems to point the preference of the Protocol over the 1973 Convention, being this outcome reinforced by the basis of Article 18 of the Protocol, i.e. that of replacing the prior Hague Maintenance Conventions.⁸¹³

⁸¹⁰ See Article 8 of the Hague Maintenance Protocol. Choosing the law applicable to these obligations has the advantage of increasing legal certainty and avoiding forum shopping, in particular in relations between (future) spouses and ex-spouses. Once this was accepted, the Diplomatic Conference found reasonable to extend this benefit to other adults save the case of those considered “vulnerable”. Their definition is taken from the Hague Convention of 13 January 2000 on the International Protection of Adults. See Bonomi, n 43, 353-354. Further protections come from the fact that only a number of laws can be actually chosen to govern the maintenance obligation, and only the law of the creditor’s habitual residence can determine whether he or she can renounce to the maintenance obligation.

⁸¹¹ This question is different from that of whether a *depeçage* of conventions is admissible, what has already been concluded that it is not. See for all Bureau, n 13, 216

⁸¹² See Section 2 of this paper.

⁸¹³ See Bonomi report, para. 199.



VI. SUMMARY

The Hague Maintenance Protocol has been born in the framework of the Maintenance Project with the aim of modernising these matters and thus the prior 1956 and 1973 Hague Maintenance Conventions, i.e. the underlying objective is then to replace both of them. However, Article 18 of the Protocol only requires this replacement as between Contracting States to this instrument, and does not take into account the case in which a State is already a party to one of the said conventions and has not ratified the Protocol yet.

In view of the Protocol's universal scope of application, Articles 30 et seq. of the Vienna Convention do not provide for a satisfactory solution to this conflict of treaties. It may come by way of the general objectives underlying all these instruments, i.e. by the operation of the principle of maximum effectiveness. While the analysed conflict of treaties is not entirely apparent to the extent that the instruments may point to different outcomes in a few cases, the collision should still be solved in favour of the treaty that better responds to the underlying interests in maintenance matters. The application of this guiding principle is not entirely clear, but it can play a role, at least as regards to the 1956 Hague Convention. As to the 1973 Hague Convention, the prevalence of the Hague Maintenance Protocol can be asserted on the basis of the compatibility clause included in the convention seeking for co-ordination with future instruments.



CHAPTER 9. CROSS-CULTURAL ISSUES

Elisa Giunchi

A. ISSUES OF ISLAMIC LAW

Leaving aside issues of jurisdiction and applicable law, which are analysed by the previous chapters, in the following pages we will clarify some key *sharī'a* concepts that have time and again surfaced in the cases. We will also highlight problematic aspects pertaining to the enforcement of *sharī'a*-based norms by the European courts of law. Most cases that have been analysed deal with Moroccan nationals and with the recognition of legal acts originating in Morocco, and apply the 2004 Moroccan Family Code (Moudawana).⁸¹⁴ This law, enacted by the Parliament under the commotion caused by the 2003 Casablanca bombings, greatly ameliorated women's status in the country and is today one of the most progressive laws in the Middle East, second only to that of Tunisia and Turkey. Unlike Turkish legislation, the only one that gives equal rights to men and women within the family, Moroccan and Tunisian legislation remains anchored to an Islamic discourse, though its interpretation of *sharī'a* is markedly progressive and can be considered innovative in its extended use of *takhayyur* and *ijtihād*. Major components of the 2004 Moudawana include raising the minimum legal age of marriage to 18 for men and women, establishing joint responsibility for the family, further limiting polygamy, and granting women more rights in the negotiation of marriage contracts and in the field of divorce. As the analysed cases applying the Moudawana deal with divorce, let us look in more detail at the norms regulating divorce. The divorce procedures foreseen by the 2004 law include repudiation (*talāq*) (Article 82); while recognising this procedure, that is no doubt penalising to women, the Moroccan

⁸¹⁴ Cour d'appel, 10 July 2014, 12/17948, FRS20140710; Cour d'appel de Douai, 29 January 2009, FRS20090129; Audiencia Provincial Barcelona num. 777/2013, 12 November 2013, ESS20131112; Audiencia Provincial Barcelona num. 57172013, 19 July 2013, ESS20130719; Cour de cassation, 1ère chambre, 17 December 2008, N° 07-15.393, FRT20081217, is the only case of child abduction, applying Article 2-11 of regulation (EC) 2201/2003 of 27 November 2003 /Bruxelles II bis); Tribunale di Reggio Emilia, sez. I, 22 March 2014, ITF20140322.



legislator attempted to discourage it and to support repudiated women by establishing that the husband who pronounces *talāq* owes his ex-wife the delayed dower if appropriate, maintenance for the *'idda* (the legal “waiting period” following divorce) and the consolation gift, which is assessed on the basis of the duration of the marriage, the financial means of the husband, the reasons for the repudiation, and the degree to which the husband has abused this right (Article 84). Several articles set the conditions for the validity of *talāq* to further discourage it: the repudiation is not accepted from an inebriated person, a person who has been forced to do so, or an irate person (Article 90); vows and pledges do not result in repudiation (Article 91); multiple expressions of repudiation pronounced verbally, with a symbolic gesture or in writing result in only one repudiation (Article 92); repudiation made conditional on doing something or abstaining from something has no effect (Article 93).

A variety of options - all taken from *fiqh* - are also open to women who want to divorce: first, they can petition the court for a *talāq* if this right has been explicitly delegated to them; second, divorce can be asked by women on several grounds, such as non-respect by the husband of one of the conditions in the marriage contract; harm; non-maintenance; absence, latent defect; abstinence and abandonment (Article 98). An avenue that is increasingly used to escape an unhappy marriage is that of harm: the Moudawana establishes that failure to respect any condition in the marriage contract constitutes a harm justifying a divorce request. Any ignominious behaviour by the husband or act that causes the wife material or moral harm such that the continuance of the conjugal relationship is rendered unendurable shall be considered a harm justifying a divorce request, and compensation will be paid by the culprit (Article 99). Research on the actual functioning of Moroccan courts indicate that proving these grounds is actually quite difficult and can result in lengthy battles.⁸¹⁵ It may be easier for a woman to obtain divorce by mutual consent (Article 114) - though this procedure is rarely used - and by *khul'* (Article 115), a *sharī'a* procedure whereby the wife pays a compensation to

⁸¹⁵ Sadiqi, 'The potential within. Adjudication on shiqaq (discord) divorce by Moroccan judges', in Giunchi, *Adjudicating Family Law in Muslim Courts* (Abingdon, Routledge, 2014), 124. See also Zeidguy, 'Analyse de la jurisprudence', in Benradi, M'chichi et al (eds) *Le code de la famille. Perceptions et pratique judiciaire* (FriedrichEbert Stiftung, Fez, 2007), 217-71.



the husband; while according to classical Islamic law *khul'*, like *talāq*, is an extrajudicial act, Moroccan legislation, like most other Muslim-majority countries, has turned it into a judicial act. Although the payment of a compensation tends to restrict this practice to well-off women, the Moroccan legislator prescribed that woman who divorce by *khul'* may recover the sum paid to obtain the divorce if they prove that they acted under duress or as the result of harm caused by their husband. Finally, the 2004 Moudawana gives both spouses the possibility to divorce for irreconcilable differences or discord (*shiqāq*) (Article 94), a practice that has some grounding in Maliki law; in cases of discord the judge must take into account each spouse's responsibility so as to fix compensation. It may be interesting here to note that *shiqāq* has been interpreted by Moroccan courts in an extensive manner, so as to include any situation that makes the survival of marriage difficult, and that affection and mutual respect are mentioned as part of the "spirit" of *sharī'a* and signs of a solid marriage. Their absence can therefore be considered as justifying a request of divorce.⁸¹⁶

Given the multiple options that women must petition for divorce, the limits posed to unilateral *talāq*, and especially the inclusion of *shiqāq*, that gives men and women equal rights to divorce, it does not come as a surprise that in all cases that have been analysed the Moudawana has not been considered as contrary to public policy nor has it proved contentious. In one case in particular, Cour d'appel de douai 29 January 2009 n. 07/00200, where the parties, two Moroccans, had married at the Moroccan consulate in Lille (France), the Cour d'appel explicitly stated that the clauses on divorce for discord "ne presentment aucune contradiction avec la conception française de l'ordre public international, notamment en ce que chacun des époux peut demander le divorce sur ce fondement". The court thus attempted to reconcile the spouses, as provided for by the Moudawana, and evaluated the responsibility of each spouse in order to fix a compensation, again as foreseen by the Moudawana.

The Moudawana prescribes that the court should appoint two mediators, one from each of the two families. Unfortunately, no details are given in the case under review on the procedure of reconciliation followed by the Cour d'appel de Douai, and we are therefore

⁸¹⁶ Sadiqi, 126-8.



left in the dark as to whether the members of each family were involved, as is usually the case in Morocco. Research indicates that involving them may be more penalising for the women involved, but that it also makes it more likely that the parties will stick to the agreement.

In another case (Trib. Reggio Emilia, sez. I, 22 March 2014) the Moudawana was considered “pienamente conforme ai principi fondamentali dell’ordine pubblico” (that is, “fully in conformity with the fundamental principles of public policy”). Much more contentious appears to be the enforcement of Syrian law (SPSL of 1953 (No 59/1953, as amended by Law No 34/1975 and on inheritance issues by Legislative Decree 76/2010), due to the presence within it of a greater degree of inequality between the spouses and due to the involvement in that country of religious courts. A few explanations on these two points may be useful here: unlike the Moroccan system, where the judiciary has long been secular, the Syrian legal system provides for a dual judicial system, with separate secular and religious courts. The former hears both civil and criminal matters, while the second hears cases involving personal status, family and inheritance disputes. *sharī’a* courts, whose judges are appointed by the Ministry of Justice, hear disputes among Syrian Muslims and non-Syrian Muslims who adhere to Islamic personal status laws.

As to the Syrian legislation pertaining to divorce, the SPSL, which draws from the Ottoman Law on Family Rights (1917), and the Egyptian Laws on Personal Status and Succession enacted between 1920-1946, was amended by the Personal Status (Amendment) law No.34 of 1975 - which modified existing norms and added new provisions to increase the legal rights of women; the law applies to all Syrians, though exceptions are made for Druze, Christians and Jews, who are granted legislative and judicial autonomy in the field of family law. Accordingly, Christian women will not be allowed to divorce, while Muslim women will be allowed to do so, albeit at certain conditions. However, despite legal differences, experts note that all religious communities share a cultural understanding of gender, family relations and correct



behaviour.⁸¹⁷ More than religion, it is culture that seems to be a key determinant of women's status and rights.

The SPSL recognises various types of divorce, in a manner similar to that of the Moudawana: the husband may divorce by *talāq*, which forces him to pay the unpaid dower and maintenance; if uttered while he is intoxicated, disoriented/enraged, under coercion, during grave illness, or in order to coerce it is to be considered as ineffective; a second option is that of *mukhāla* divorce, which can be by mutual consent (*mubara'a*) or wife-initiated (*khul'*), with the husband agreeing in exchange for her renunciation of some or all of her economic rights;⁸¹⁸ judicial divorce can also be asked by the wife under some circumstances (such as non-maintenance, defect in the husband preventing consummation, husband's insanity or absence without justification; husband's sentencing to three years' imprisonment); finally, either spouse may seek judicial divorce on grounds of discord causing such harm as to make cohabitation impossible. The court will try, as it does in *talāq* and *mukhala*, to reconcile the parties and only in case of failure it will decide for divorce. The SPSL, which as we have seen is not much different from the Moudawana when it comes to divorce, is discussed in the case *Oberlandesgericht München*, 2 June 2015, 34 Wx 146/14. The facts are briefly summarised here: the parties married in Syria in 1999 and later acquired German nationality. They then travelled to various Middle Eastern countries before returning to Germany. In May 2013, the husband obtained through a representative a divorce by *talāq* in a *sharī'a* court in Latakia (Syria). Subsequently, his wife signed a declaration acknowledging that she had received all the payments which, according to Islamic law, were due to her under the marriage contract and based on the unilateral divorce and she thereby released her husband from all obligations to her. He then applied to have the divorce recognised in Germany. His request was granted in 2013 by the court of second instance in Munich, which held that the Rome III Regulation on the law applicable to divorce covered that type of application and that, under that regulation, the divorce

⁸¹⁷ Van Eijk, *Family Law in Syria: Patriarchy, Pluralism and Personal Status Codes* (I.B. Tauris, London-NY, 2016), 100.

⁸¹⁸ In *mubara'a* she will renounce her outstanding rights, while in *khul'* she will also return the rights already received, such as the prompt dower.



at issue was governed by Syrian law. In 2014, the ex-wife however contested the recognition of the divorce, claiming that the requirements for its recognition had not been met as the divorce was against German law; she further claimed that she had never received all the USD 20.000, contrary to her written statement, and that the declaration to give up one's dower and maintenance is in any case void according to Syrian law.

Some explanation of dower (*mahr*) may be useful. The stipulation of dower in the marriage contract is in Syrian Law, as in *sharī'a*, a condition for a valid marriage and an obligation for the husband, whether it is specified or not. An unpaid dower is a debt to the wife. It is divided into prompt dower, due to her upon the conclusion of the contract, and deferred dower, due to her at the end of the *'idda* following an irrevocable divorce or the death of the husband. If no agreement between spouses exist on the amount of dower fixed in the contract and the contract is not available, "proper" dower as determined by the courts will be payable. A great number of disputes, in Syria as elsewhere in the Middle East, revolve around the question of the dower amount stipulated and actually paid, and on whether the wife is entitled to part or all of it. In *talāq* cases, the husband according to Syrian law owes his wife post-divorce maintenance for the duration of the *'idda*. The divorced wife may be awarded compensation of up to three years' maintenance (in addition to the maintenance owed to her during the *'idda*) if the husband's exercise of *talāq* is considered by the judge to have been arbitrary.

In the case reviewed here the wife is therefore correct in claiming that dower and maintenance cannot be forfeited (unless, it may be added, the marriage has not been consummated or she asks for a divorce under the *mukhala* procedure, but these points are not relevant here), though we are not told whether the USD 20.000 allegedly paid by him in golden coins were meant as a settlement replacing or subsuming the maintenance owed to her for the waiting period and the deferred dower, or one of them, and whether by releasing him of further obligations she meant to give up the additional compensation she may have demanded according to Syrian law. In this case, as in others that have been reviewed, more details would have been useful.



The *Oberlandesgericht München* (OM) rejected her request to annul the decision. The judge held that the divorce in this specific case was not against public policy as she consented to it *a posteriori* by accepting financial compensation. The wife appealed, and in 2015 the OM suspended the proceedings and submitted to the CJEU some questions concerning the interpretation of the Rome III Regulation: first of all, it asked whether or not the scope of the Rome III Regulation include “private divorce”, in this instance one pronounced before a religious court on the basis of shari’a; if the answer to this question was in the affirmative, should the validity of a rule depend on whether the application of the foreign law is discriminatory *in abstracto*, or in the particular case in question? And, if the answer to this question is in the affirmative, does the fact that the spouse discriminated against consents to the divorce – for instance by accepting compensation – constitute a ground for not applying that rule?

In *Sahyouni C-281/15* the CJEU declared itself on 12/5/2016 incompetent to decide, claiming that it did not have sufficient information to do so. On 29 June, the OM court re-submitted to the court those very questions. Advocate General (AG) Henrik Saugmandsgaard Øe held that the divorce in the case under review case “was ‘private’ in so far as it is based not on a constitutive decision of a court or other public authority, but on a declaration of intent of the spouses, in this case unilateral and followed by a merely declarative act of a foreign authority”. He further noted, by referring to the preparatory works of Rome III Regulation, that the latter does not cover such kind of divorces.⁸¹⁹

It may be added here that while some countries (such as Tunisia, Algeria, Lybia) prescribe that all forms of divorce must be effected before the courts and by order of the judge, in other countries some types of divorce, primarily *talāq* and *khul’*, which according to *sharī’a* are extra-judicial procedures, become effective when pronounced or when recorded, even if they have not been heard by a judge.⁸²⁰ We do not have

⁸¹⁹ *Soha Sahyuni vs. Raja mamisch (C-372/16)*, Opinion by Advocate General, <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-09/cp170098en.pdf>. Full text in <http://curia.europa.eu/juris/documents.jsf?num=C-372/16>.

⁸²⁰ Nasir, *The Status of Women Under Islamic Law and Modern Islamic Legislation* (Leiden, Brill, 2009), 134-135. Even within countries that prescribe judicial procedures, there are situations in which out-of-



enough information to assess whether the case under review falls into this category. No details are in fact given in either OM or *Sahoyuni C-281/15* on the reasons why the pronouncement is considered declarative.

The AG further noted that whether access to divorce provided for by the foreign law is discriminatory or not must be assessed *in abstracto*, and not in the light of the specific circumstances of each case: if the applicable foreign law is discriminatory by virtue of its content, it must not be applied irrespective of its actual consequences. As to the fact that the spouse discriminated against consented to the divorce, he believed that the rule set out in Article 10 of the Rome III Regulation, which is based on compliance with values considered to be fundamental, is mandatory in nature and therefore, in the intention of the EU legislators, does not fall within the sphere in which individuals could renounce the protection of their rights.

Another country where *sharī'a* courts decide on issues of personal status is that of Lebanon. The Lebanese legal system is quite a complex one, with laws for Sunni and Shia Muslims, Druze, Jewish people, and for various Christian confessions. There is no unified code or judicial system. Unlike Christian courts, the *sharī'a* courts used by Sunnis and Shias are part of the State: their functionaries, including the *shaykhs* who act as judges, are State employees. Here, as in Syria, despite differences between the laws applied to members of different religions, inequality between spouses is glaring when it comes to divorce for all of them: while there are many ways for men to get a divorce, few ways are available to women. Such gap comes up in *Cour de cassation, 23 February 2011, 10-14101*, involving two Lebanese nationals who got married in 1994 in Lebanon and had four kids. At some point the wife and the children joined the husband in France. The latter in 2009 filed for divorce before a Shia court in Lebanon through the *talāq* procedure and two months later, while the request was still pending, the wife filed for divorce in France. The husband raised the *lis pendens* exception, which the French judge refused arguing that the proceedings in Lebanon were not respecting fundamental French principles such as the equality between spouses and the right to defence. The *Cour de cassation* confirmed the decision, holding that the *lis pendens exception* could

court *talāqs* may be considered as valid. Only Tunisia is unequivocal in denying the reception and validity of all out-of-court divorces.



not be granted since it would result in having to recognize a decision that *in concreto* went against “l’ordre public international”. Interestingly, no mention was made of the fact that Lebanese courts deciding on family issues based on the Jafari school are not restricted to codified law but can follow the majority positions of their school, which gives them wide discretion.⁸²¹ This obviously limits any assessment by European courts of whether the applicable legislation is *in abstracto* discriminatory and as such is against the public policy. Whether this is the reason why reference was made to discrimination *in concreto* rather than *in abstracto* is not possible to know based on the information given in the transcript.

Iranian courts, which also apply Shia law to issues pertaining to personal status, display much less discretion. In the aftermath of the 1979 revolution, Khomeini suspended the existing family law, though the ensuing discretion of courts in interpreting and applying uncodified Jafari law was limited in subsequent decades through a series of laws and amendments. As Ziba Mir Hosseini notes, in Iran, “[r]eturn to sharia” has not been a return to the classical *feqh* [*fiqh*] notion of plural and uncodified laws; the judiciary has retained not only many of the legal concepts and laws of the Pahlavi era, but also the notion of a centralised and unified legal system.”⁸²²

While the conservative interpretation of shari’a which prevailed after 1979 worsened women’s status in society and within the family, a series of laws in subsequent decades reinstated some of the rights that they had enjoyed under the Pahlavi regime and in some cases even widening them further: today Iranian judges are empowered, e.g., to issue a divorce when women establish that the continuation of the marriage would cause intolerable suffering or hardship. According to Article 1130, “[w]hen it is proved to the Court that the continuation of the marriage causes difficult and undesirable conditions, the judge can for the sake of avoiding harm and difficulty compel the husband to, divorce his wife. If this cannot be done, then the divorce will be made on the permission of the Islamic judge”. Marriage can also be severed through *khul’* and annulled on many

⁸²¹ Clarke, ‘Shari’a courts and Muslim Family Law in Lebanon’, in Giunchi, *Adjudicating Family Law in Muslim Courts* (Abingdon, Routledge, 2004), 32-47.

⁸²² Mir Hosseini, ‘Sharia and National Laws in Iran’, in Otto (ed) *Sharia Incorporated: A Comparative Overview of Legal Systems in Twelve Muslim Countries in Past and Present* (Leiden University Press, Leiden, 2010), 338.



grounds, including ill-treatment of the wife by the husband, defects in the husband, if they were not known before marriage, and his inability or unwillingness to provide for the maintenance of the wife.

A case that applies Iranian law and raises important issues related to the enforcement and interpretation of *sharī'a*-inspired legislation is Oberlandesgericht Hamm, 07 May 2013, 3 UF 267/12. The Iranian applicant married in Iran in 2009 an Iranian woman, who later acquired German nationality. The marriage certificate included, as is standard practice in Iran, several conditions under which the wife could file for divorce. After the spouses moved back to Germany, where the wife had lived before the marriage, the husband appeared to be violent and offensive. The wife filed for divorce in 2012 and the court of first instance ruled in her favour in application of Iranian law and of the marriage certificate which allowed her to exercise the option of delegated repudiation (*talāq-e tawfīd*). She in fact held that both the requirements of the marriage certificate and Iranian law had been violated, as the husband had not paid maintenance for six months and had ill-treated her, thus violating the requirements of the marriage certificate.

His position was that the court had violated his right of a fair hearing, as there was no interpreter present even though he wasn't able to fully understand the proceedings, and misinterpreted Iranian law. Furthermore, he claimed that the requirements for a divorce pursuant to the Iranian Civil Code (IrCC) were not met as he had paid maintenance in the form of gold coins and was not able to pay more than that; finally, he denied insulting his wife, which is a cause for divorce according to Iranian law. His appeal was dismissed, though the reasoning differed from that of the court of first instance. Among other things, the second instance judge held that the marriage certificate should be interpreted as a choice-of-law in favour of Iranian law according to Article 5 of the Rome III Regulation because it included numerous notions of the latter. Even though the parties did not explicitly choose Iranian law, the wording of the marriage certificate was a strong indication, according to the judge, of their wish to handle family issues pursuant to Iranian law. The judge also held that the ruling on divorce should be upheld as the wife had pronounced a set divorce phrase according to the procedure of *talāq-e tawfīd* provided for in the marriage certificate and allowed by Iranian law, in the



presence of two men during the first instance proceedings in Germany pursuant to Articles 1133, 1134 IrCC and as several of the conditions for divorce inserted in the marriage certificate (six month of no maintenance payments, ill-treatment by the husband rendering the marriage not acceptable, no sincere wish on his part to uphold the marriage) were fulfilled.

It may be useful here to spend a few words on what is delegated repudiation according to *sharī'a* and to Iranian law. Since the Muslim marriage is a contract, the spouses can negotiate and insert conditions to the marriage as long as they do not contradict the meaning and essence of *nikāh* (the Islamic marriage). In particular, a man may grant his right of unilateral *talaq* to the wife in the marriage contract or through a subsequent contract. This right can be either absolute (the wife can use it whenever she wishes), or conditional (its exercise is tied to the presence of a specified condition). Under classical Sunni and Shia law, delegated repudiation is to be exercised without the intervention of the court, while in the legislation of the contemporary world it usually requires the intervention of relevant authorities, mostly courts. While the insertion of stipulations is *de facto* controversial and considered as a source of shame in many Arab communities, there is less resistance to it in Iran. ⁸²³ Article 1119 of the 1982 IrCC establishes that “[t]he parties to the marriage can stipulate any condition to the marriage which is not incompatible with the nature of the contract of marriage, either as part of the marriage contract or in another binding contract: for example, it can be stipulated that if the husband marries another wife or absents himself during a certain period, or discontinues the payment of cost of maintenance, or attempts the life of his wife or treats her so harshly that their life together becomes unbearable, the wife has the power, which she can also transfer to a third party by power of attorney to obtain a divorce herself after establishing in the court the fact that one of the foregoing alternatives has occurred and after the issue of a final judgment to that effect”. In theory these stipulations, which are printed in every marriage contracts, are not valid unless they bear the signature of the husband under each clause. In practice, as Zia Mir Hosseini notes, irrespective of his

⁸²³ To be more precise, in Jafari law, which inspires the Iranian Code, a man cannot technically delegate the power of divorce, which remains exclusively his, but he can grant agency to his wife or a third person to act on his behalf.



signature, the judge can compel the husband to pronounce *talāq* or effect it on the husband's behalf if the continuation of marriage is thought to entail hardship for the wife.⁸²⁴ As elsewhere in the Middle East, the judiciary often extends women's rights that are provided by the national legislation.

The reasoning by the German court seems problematic, considering the limited information we are given in the transcription, for two reasons. First, for a repudiation and its delegated version to be valid, according to Iranian law two adult Male Muslims of good character (meaning honest, with no criminal precedents) must be present when the pronouncement is made: Article 1134 IrCC states that "The divorce must be performed in the actual form of utterance and in the presence of at least two just men who must hear the actual form of divorce". Presumably she will also need the same kind of evidence, though I was unable to find any relevant rule on this either in Iranian legislation or in classical Islam. The case mentions that she divorced herself on his behalf before two witnesses, but does not state whether they were male, honest, with no criminal precedents and Muslim. This is relevant because should the witnesses in this specific case not have the characteristics called for by Iranian law, the divorce could be presumably invalidated.

Second, as the marriage contract under Iranian law does not recognise the wife an unconditional right of repudiation, the judge's decision on the conformity of this practice to public policy seems debatable. We have mentioned that the judge may consider the absence of his signature below the stipulations as irrelevant. Yet, the wife has in any case to prove the non-fulfilment of the conditions stipulated in her marriage contract; the other avenues open to a wife who wants to divorce are equally difficult: she has to prove harm or other grounds (physical problems hindering intercourse, lack of maintenance, ill treatment, madness, etc.); or she can offer him some inducements, by means of either *khul'* or *mubara'a*, which is not an option for many women. The ease with which the man can divorce is much greater: "A man can divorce his wife whenever

⁸²⁴ Mir Hosseini, 'The Delegated Right to Divorce in Iran and Morocco', in Carroll and Kapoor, *Talaq-i-Tafwid: The Muslim Woman's Contractual Access to Divorce: An Information kit*, Women Living Under Muslim Laws, 1996, 130



he wishes to do so” (Article 1133), as long as it takes place in the presence of “two just men”, and the utterance of repudiation can be even performed by his attorney.

In Iran *khul'*, as prescribed by the majority positions of *fiqh*, need to have the consent of the husband. In the legislation of some countries, however, such as that of Pakistan and Egypt, divorce through *khul'* can be obtained without his consent, provided that the wife agrees to forfeit all her financial rights. There is no doubt that this practice is penalising to women: besides being costly for women, jurisprudence shows that men wanting to divorce often pressure their wives to demand a *khul'* instead of pronouncing a *talāq* as this is more beneficial to them in economic terms. Men may also ask for very high compensation, effectively blocking the procedure in those cases in which the wife does not have private means of sustaining herself or a supportive family. In some cases, the compensation can be granted in the form of family settlements, typically including the loss of custody rights of children. The procedure of *khul'* has come up only once in the cases analysed: in the rather succinct transcription of *Tribunale di Torino*, 23 January 2017, we are told that two Algerian nationals were declared divorced in 2015 through the procedure of *khul'* by the Tribunal of Orano (Algeria); the latter also awarded the mother the custody of their three children, two of whom were minors. A few years later the mother applied to the Tribunal of Torino (Italy) for the modification of the divorce conditions and in particular asked to be awarded the family home. The Court of Turin dismissed her application as she had not produced any evidence that the divorce decision pronounced in Algeria had become final. In Algeria, *khul'* divorces cannot be appealed before the Court of Appeal (Article 57 of Algerian family code), but they can be appealed before the Algerian Supreme Court by virtue of Article 349 Algerian Civil Procedural Code. It may be noted here that expecting that the applicant would provide evidence that divorce by *khul'* has become final does not take into account the hurdles faced by Algerian women who use this procedure, and seems not to take into account that Algerian law prescribes in no ambiguous terms that divorced women and their children have the right to stay in their former conjugal homes, at least until the former husband has provided a suitable accommodation.

The Algerian jurisprudence is not, however, as unambiguous. This may not come as a surprise: women's rights are rather controversial in a society as polarised as that of



Algeria, with the consequence that the judiciary is quite cautious in its approach to this issue. Unlike what has happened in Morocco, where reforms improving women's rights within the family met little resistance, partly due to the fact that they originated from a monarchy that is religiously legitimated and within a society that is quite homogeneous, in Algeria, where as a consequence of its history the legitimacy of the government and the very identity of the State are more controversial, there is much less consensus on women's status, and reforms have been as a consequence piece-meal and contested. The emphasis on Islam as the hallmark of national identity coupled with rising Islamism and Saudi influence in the '70s and '80s in the context of unrest due to welfare cuts, resulted in a family code (law n. 84 of 9 June 1984) that reflected the gender asymmetries of Islamic classical law to a greater extent than the legislation of neighbouring countries. In 2005 (ordinance n.05-02 of 27 February 2005), the government reformed family law, prescribing among other things that, as already mentioned, divorced women with children must be provided decent accommodation and the right to stay in their former conjugal homes until that moment; the ordinance also outlawed forced marriages, further constrained polygamy, and did away with the requirement that women must obey their husbands. However, the concept of *wali*, the male guardian, was re-affirmed, even for adult women, even though they could choose him, and overall family law remains skewed in favour of the husband.