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EUFAMS II

FACILITATING CROSS-BORDER FAMILY LIFE: TOWARDS A COMMON EUROPEAN UNDERSTANDING

COMPARATIVE REPORT ON NATIONAL CASE LAW

EUFAMS II CONSORTIUM

11 FEBRUARY 2020

A joint project of the Institute for Comparative Law, Conflict of Laws and International Business Law at Universität Heidelberg, Universitat de València, Università di Verona, Università degli studi di Milano, Lund University, the University of Osijek, the Max Planck Institute Luxembourg for Procedural Law und the Asociacion Española de Abogados de Familia

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TABLE OF CONTENTS

ABBREVIATIONS

1980 Hague Child Abduction Convention *Convention on the Civil Aspects of International Child Abduction, drafted by the Hague Conference on Private International Law and concluded at The Hague on 25 October 1980*

1996 Hague Child Protection Convention *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, drafted by the Hague Conference on Private International Law and concluded at The Hague on 19 October 1996*

2007 Hague Maintenance Protocol *Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, drafted by the Hague Conference on Private International Law (HCCH)*

Brussels II bis Recast Regulation *Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)*

Brussels II bis Regulation *Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000*

CJEU *Court of Justice of the European Union*

ECS *European Certificate of Succession*

ECtHR *European Court of Human Rights*

EU *European Union*

Evidence Regulation *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*

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*

PIL *Private International Law*

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*

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*

Quincy C. Lobach/Tobias Rapp

A. INTRODUCTION

I. SETTING-UP THE DATABASE

A case law database containing cases from the courts of various EU Member States dealing with PIL in family and succession matters was set up over the course of the predecessor project EUFams I. The EUFams II project endeavored to optimize the technical features of the Database, both relating to the submission of cases as well as to the retrieval of cases by means of a search mechanism. The cases previously gathered were reviewed and transferred to the new Database.

Along with standardized data for each judgement in ten European languages, the Database also comprises a summary of the facts and of the decision given by the court as well as a short critique in English prepared by the national partners. The technical foundation of the Database allows for convenient searching for basic data, such as the date of the decision, the Member State, the level of the court, the States involved and the subject dealt with. Moreover, operators can search for the decisions' contents, such as the applicable norms, the affirmation of international jurisdiction, the choice of court or law and the granting of recognition and enforcement or the taking of evidence. In addition, cross-references between previous and subsequent court decisions in the same matter, including preliminary references to the CJEU, have been established. Ultimately, the optimization enables practitioners and academics alike to obtain easy access to case law.

The Database in fully functional form can be found on the EUFams II Project Website: http://www.ipr.uni-heidelberg.de/forschung/eufams.html

II. POPULATION OF THE DATABASE

As of 12.12.2019, the Database is populated as follows:

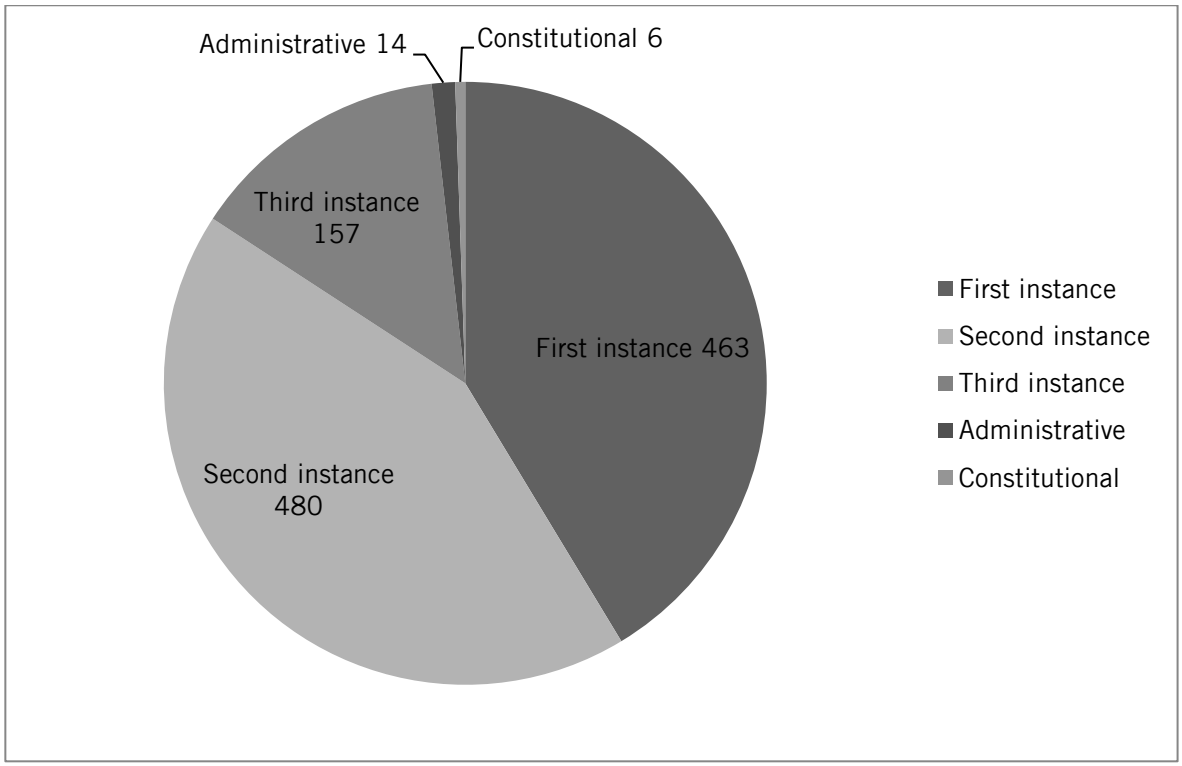

Figure 1: Cases by level of court (n=1120)

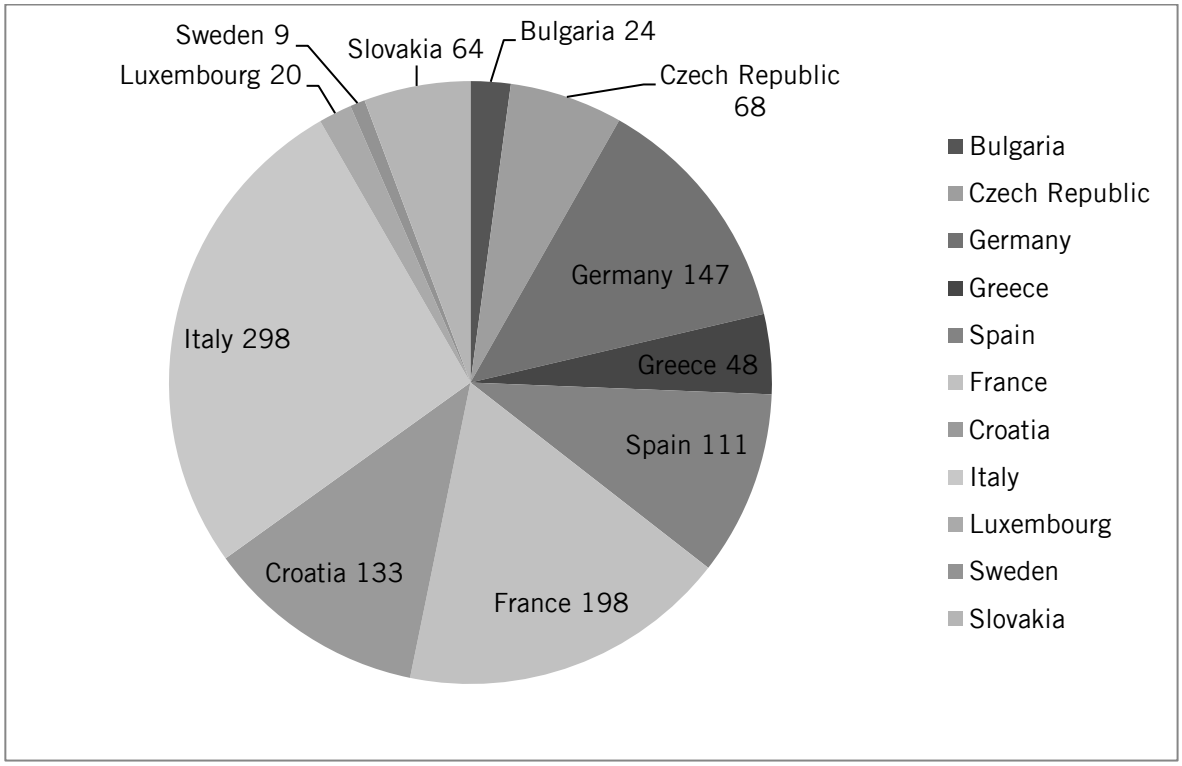

Figure 2: Cases by Member State (n=1120)

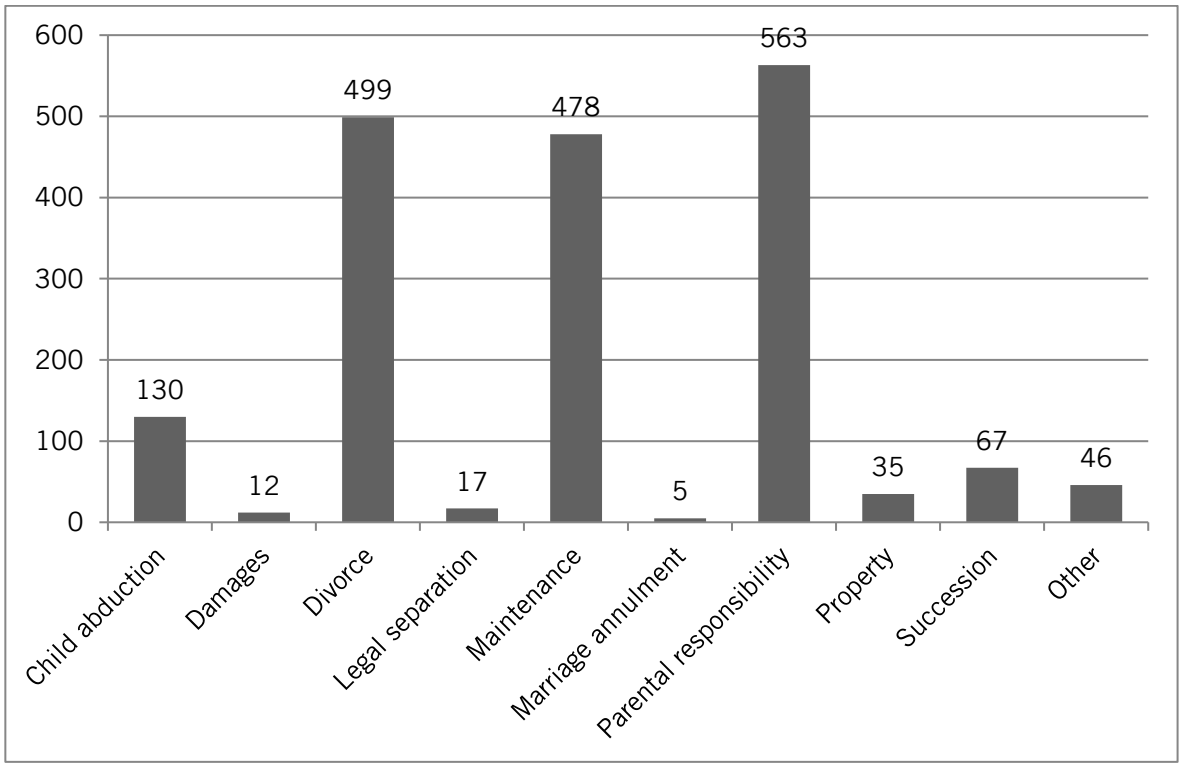

Figure 3: Cases by subject matter (multiple subjects per case possible)

III. THIS REPORT

This Report aims at making the collected cases more accessible in view of their large number (1120). The research team was interested in unveiling the actual application of the instruments of European family and succession law as practiced by the national courts. In particular, the research endeavored to identify good and bad practices alike. Moreover, it attempted to gain insights into the coverage of European family and succession law and the remaining fields in which courts resort to domestic PIL.

To that aim, the coordinator prepared a template which was formulated in a very open manner in order to extract expertise from the national partners, all of which had appointed a single or a very limited number of persons responsible for the submission of cases. These persons were particularly acquainted with cases of their jurisdiction and were thus best equipped to provide a selection of issues of general interest.

The coordinator received national reports on Croatia, France, Germany, Greece, Italy, Luxembourg, Spain and Sweden (Sections B. to I.). Subsequently, the coordinator prepared a comparative analysis of the selected cases which is accordingly part of this Report (Section J.).

B. CROATIA

I. PRE-SELECTION

The methodology of collecting relevant Croatian case law was twofold. The main sources of information were judgments published by the courts in "e-Board", a publicly available database, hosted by the Ministry of Justice.[1] However, the obligation of the courts to publish its judgements in anonymised form is not implemented systematically. Hence, upon request and by courtesy of the courts, the research team was given access to additional judgments.

II. SAMPLE DESCRIPTION

A number of 58 Croatian judgements were submitted to the Database, 36 of which were rendered by first instance courts and an additional 21 by appellation courts. 1 decision was handed down by the Supreme Court of the Republic of Croatia.

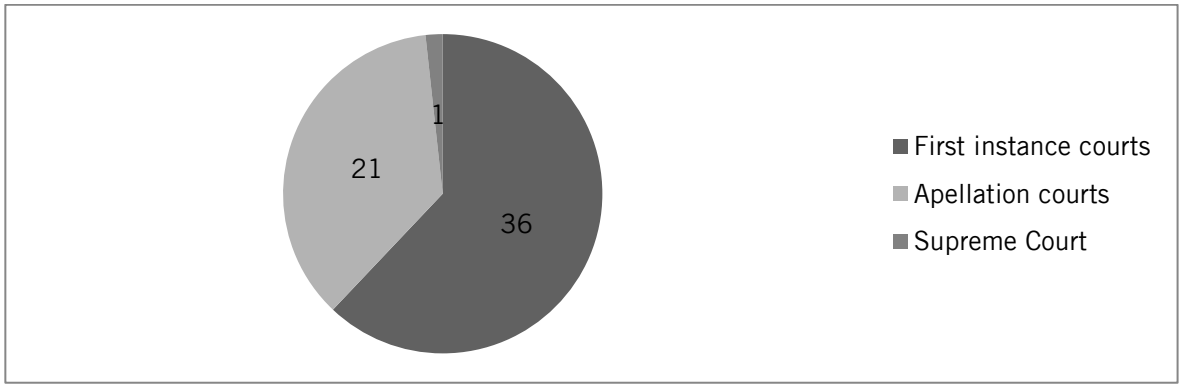

Figure 4: Croatian cases in the EUFams II Database

Divorce	10
Divorce with children	12
Parental responsibility (including abduction) and attributed claims	25
Maintenance	7
Successions	4
Total number	58

Figure 5: Croatian cases by subject matter of a dispute

In respect of the subject matter of the claim, the EUFams II Case Law Database reveals that the majority of collected cases relate to parental responsibility with attributed claim for maintenance. The number of individual claims in respect of maintenance is rather low.

[1] The Ministry of Justice of the Republic of Croatia, e-Board, available at https://e-oglasna.pravosudje.hr.

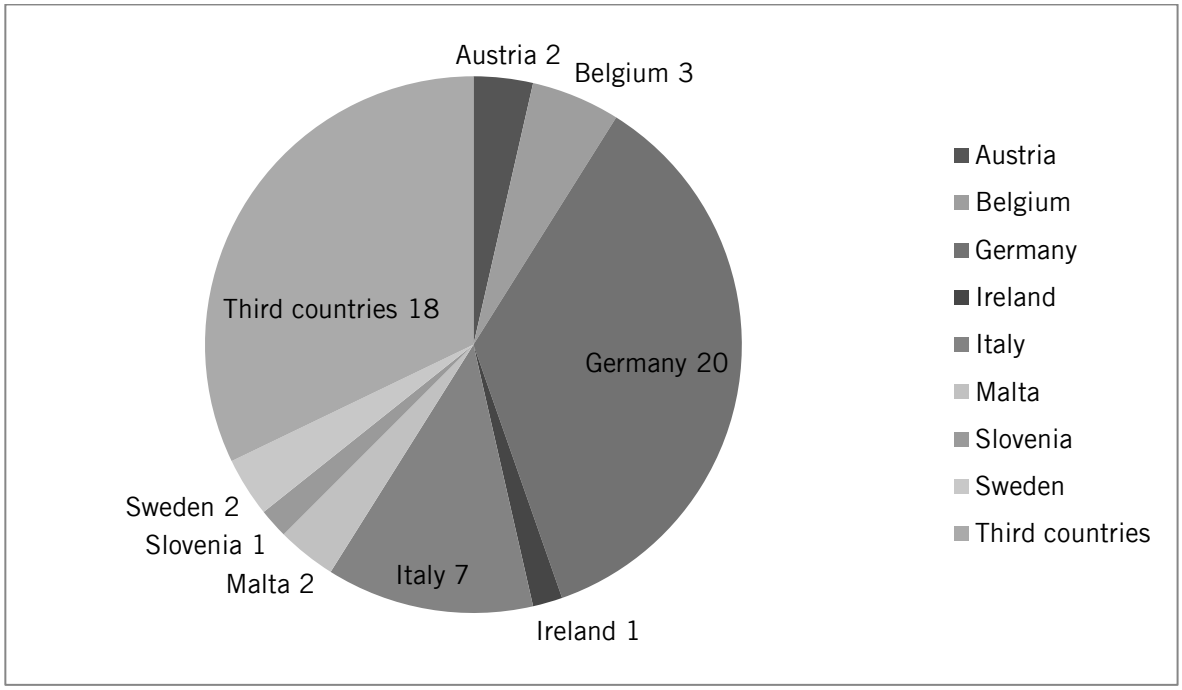

Figure 6: Croatian cases by State involved

When it comes to Member States involved, it can be observed that the majority of collected cross-border cases relate to Germany. This circumstance may be attributed to the fact that a great number of Croatian citizens migrated to Germany in the last few years. Additionally, a large amount of cases relate to neighbouring third countries (Serbia as well as Bosnia and Hercegovina). The vast majority of the parties involved are Croatian nationals, mainly residing abroad.

Courts rarely refer to CJEU and ECtHR case law as a source of interpretation. Most judgments (93%) are grounded on national law and relevant regulations, while only 5% and 2% respectively refer to CJEU and ECtHR case law.

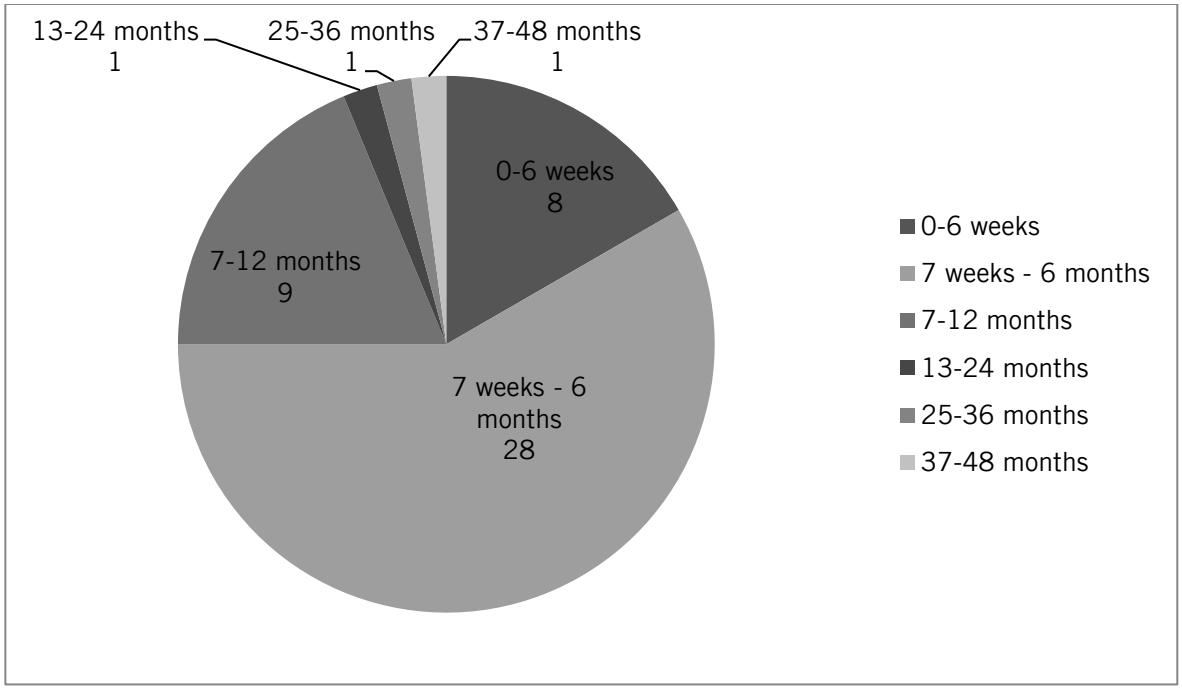

Figure 7: Process duration in Croatian cases

The data on the length of proceedings (most of the collected cases were handled in a period of less than 6 months) is encouraging and rebuts the general public opinion that proceedings last extensively long.

III. MAIN ISSUES

The number of cross-border disputes before the Croatian judiciary is increasing. Courts and public notaries have been developing skills and knowledge to apply and interpret relevant European regulations and Hague Conventions. However, application and interpretation are still facing challenges.

1. Divorces without children

In most of the collected cases relating to divorce without children, the courts have established their jurisdiction properly. Jurisdiction was mostly based on the common nationality of both spouses (Art. 3 (1) (b) Brussels II bis Regulation).[2] Nonetheless, in the issued decisions, the courts often failed to refer to the provisions on jurisdiction set out in the Regulation,[3] even though they are obliged to. Most of the cases relate to families that have been living abroad for several years but opt to instigate divorce proceedings in Croatia for economic reasons as the Croatian judiciary operates at fairly low costs.

2. Divorces with children

The majority of divorces, however, relate to couples with minors. Several issues can be highlighted in this group of cases. One of the issues detected in the case law is the fact that divorce proceedings are initiated at the moment when the family still lives in Croatia, but subsequently moves abroad.[4] The court is thus faced with a situation where it has started dealing with the merits of the case, but it has actually lost connection to the parties. When it comes to the obligatory counselling before the Social Welfare Service, it seems to be unclear at which point in time the case is pending for the purposes of PIL.

In several cases, a court dealt with third country nationals. Having in mind that Croatia borders various third countries, the number of such cases is rather significant (see above). The issue of delimitation of the Brussels II bis Regulation from the 1996 Hague Child Protection Convention was a prominent issue in these cases.[5]

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[2] Županijski sud u Zagrebu, 16.04.2019, Gž ob 410/2019, HRS20190416.

[3] Općinski sud u Osijeku, 29.11.2018, P OB 321/18, HRF20181129; Općinski sud u Splitu, Stalna služba u Trogiru, 31.10.2018, POB 500/15, HRF20181031; Općinski sud u Vukovaru, Stalna služba u Vinkovcima, 27.09.2018, P OB 69/18, HRF20180927.

[4] Općinski sudu u Osijeku, 21.12.2018, P OB 327/2015, HRF20181221; Općinski sud u Osijeku, 31.08.2017, P OB 77/2017, HRF20170831; Općinski sud u Slavonskom Brodu, 25.10.2018, P OB 126/18, HRF20181025.

[5] Općinski sud u Vukovaru, 11.04.2016, P OB 393/15, HRF20161104; Općinski sud u Puli, 27.09.2018, P Ob-288/6, HRF20180927a; Općinski sud u Splitu Stalna služba u Trogiru, 31.10.2018, POB 500/15, HRF20181031; Općinski sud u Osijeku, 29.11.2018, P Ob-321/2018-6, HRF20181129; Općinski sud Osijeku, 07.12.2018, P OB 191/2018-12, HRF20181207; Općinski sud u Dubrovniku, 14.12.2018, R1 Ob-105/2018-19, HRF20181214; Županijski sud u Zagreb, 02.07.2012, 343 Gž2-238/12-2, HRS20120702; Županijski sud u Zagrebu, 22.10.2012, 34 Gž-470/2014-2, HRS20141022; Županijski sud u Splitu, 04.04.2017, Gž ob 703/2016, HRS20170404; Županijski sud u Splitu 24.08.2018, Gž Ob-474/2017, HRS20180824; Županijski sud u Zagrebu, 05.03.2019, Gž Ob-

Furthermore, similar to divorces without children, spouses with children living abroad tend to opt for divorce proceedings, but also related proceedings to be settled in Croatia. In such cases involving children, a prorogation is merely possible under the additional requirements of Art. 12 Brussels II bis Regulation, i.e. when it is in the best interest of the child. Hence, there are several cases where Croatian courts declined jurisdiction in a combined claim, relying on the argument that a long and costly procedure of taking evidence in the Member State where the child is habitually residence could not be in its best interest.[6] Therefore, economic arguments play a role: courts cannot organize a procedure in the usual sequence of hearings due to distance of the parties, means of evidence are situated abroad, which may require the involvement of a Central Authority or a request under the Evidence Regulation.

3. Transfer of jurisdiction

Pursuant to Croatian Civil Law parties are obligated to submit an application or a claim with their personal data on nationality and domicile. Hence, in typical family cases, the cross-border implication is often recognized only in a later stage of the procedure. At that time *perpetuatio fori* prevents a court to dismiss the claim. Instead, the court has to seek for a transfer to insure timely service of justice.

Since transfer of jurisdiction is not a genuine mechanism of the Croatian legal system, the need for implementing provisions to enable its operation was already raised in the EUFams I project. No provisions were enacted in the meantime. Hence, courts are dealing with the transfer on a case-to-case basis. Open questions regarding the transfer of jurisdiction prescribed by Art. 15 Brussels II bis Regulation include:

– how should the court communicate (directly or through a judicial network);
– how to deal with the language barrier;
– will the court accept the evidences presented by another court;
– how to proceed in the event that the circumstances of the case change, especially when the child moves to another country.

Although these issues were clearly pinpointed at the national seminar, to our knowledge there is no published or unpolished Croatian judgement.

4. Habitual residence

Several cases raised the issues of determining the habitual residence of an adult and a child. A portion of the judgements were based on the interpretation of the notion of habitual residence advocated by the CJEU. Several cases raise concerns as the court does not investigate habitual residence *ex officio*, but only upon objection of the party claiming there is a lack of jurisdiction.[7]

82/2019, HRS20190305; Županijski sud u Zagrebu, 10.06.2019, Gž Ob-623/19-2, HRS20190610; Županijski sud u Splitu, 01.08.2019, Gž Ob-383/2019-2, HRS20190801.

[6] Općinski sud u Đakovu, 17.06.2019, P OB 88/2019, HRF20190617a; Općinski sud u Osijeku, 29.03.2016, P2 27/2015-54, HRF20160329.

[7] Općinski sud u Zadru, 12.10.2017, POB 65/17, HRF20171012; Županijski sud u Zagrabu, 12.02.2018, Gž Ob 1259/17, HRS20180212; for example also Županijski sud u Splitu, 26.09.2016, Gž Ob 540/16, HRS20160926.

5. Hearing of the child

The opinion of the child is to be taken into account in any proceedings relating to rights and obligations of a child. The cases collected indicate that the sole fact that the child has been heard is not particularly emphasized in some judgements.[8] However, according to the Croatian Family Law of 2015[9], in any proceedings, a special guardian has to be appointed whose obligation is to represent the "child's voice" in disputes relating to children.

6. Child abduction

A set of cases relates to child abduction. Despite the fact that the 1980 Hague Child Abduction Convention gives only an exceptional and limited number of grounds for refusal of return, there is a trend of court decisions refusing the return on the ground of existence of a grave risk of harm within the meaning of Art. 13 (1) (b) 1980 Child Abduction Convention. Therefore, the courts often transformed the return proceedings into the procedure on the merits of the dispute.[10] The collected cases suggest that most courts had conducted a thorough analysis of the child's situation in order to evaluate the child's best interests. The judges mainly based their decisions on the opinions and proposals of the Social Welfare Centres.[11] In most cases the court actually did not consider the risk in the country of origin, but the negative effects of the separation of a child from the abducting parent.[12]

7. Provisional and protective measures

The collected cases indicate that the courts are confronted with difficulties relating to the application of provisions on provisional measures. These relate to defining the jurisdiction of national courts to impose provisional, including protective measures under Art. 20 Brussels II bis Regulation. Case law sheds light on a specific question of qualification of a provisional measure: Is any provisional measure pertaining to the scope of application of the relevant regulation available, or may the Croatian court only issue a provisional measure for several types of actions, as prescribed by Art. 592 (1) National Family Act[13]? Case law also reveals the fact that national courts are questioning the legal effects to attribute provisional measures taken in another Member State.[14]

8. Succession, habitual residence, ECS

Croatian notaries have so far been successful in the application of the Succession Regulation. There are occasional challenges in terms of recognizing the cross-border

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[8] Općinski sudu u Vukovaru, 27.09.2018, P Ob 69/18, HRF20180927.

[9] Family Act, Official Gazzette No 103/15. Art. 86, 240, 360.

[10] Općinski građanski sud u Zagrebu, 21.05.2014, 143 RIO 538/12, HRF20140521; Općinski sud u Dubroviniku, 14.12.2018, R1OB 105/2018, HRF20181214; Općinski građanski sud u Zagrebu, 25.05.2017, R1OB 649/17, HRF20170712.

[11] Općinski građanski sud u Zagrebu, 15.03.2012, 148 RIO 519/11, HRF20120315.

[12] Općinski sud u Dubrovniku, 14.12.2018, R1 OB 105/2018, HRF20181214; Općinski građanski sud u Zagrebu, 21.05.2014, 143 RIO-538/12, HRF20140521.

[13] Official Gazzette No 103/15.

[14] Općinski sudu U Osijeku, 16.03.2017, R1 Ob 68/2017, HRF20170316.

element or establishing the habitual residence. However, most of the problems which heirs to the estate located in Croatia face are caused by the lack of knowledge or willingness of the notaries as competent authorities in other Member States to apply the Succession Regulation and to decide on the property as a whole (including the property situated in Croatia).[15] Although Croatian notaries report good practices in regard to the application of the ECS and commend the registry offices and their efforts to apply it in order for heirs to register their immovable assets in Croatia, a problem has been detected: Occasionally, issuing authorities from other Member States do not respect the instruction contained in the ECS form on how the information on the asset should be indicated in order for the registry office of another Member State to be able to proceed with the registration. In such cases, Croatian notaries can only advise heirs to request the issuing authority of another Member State to rectify the ECS.

IV. CONCLUDING REMARKS

In the most common scenario of divorce with children, courts are faced with the application of provisions on prorogation, defining the habitual residence of a child, and transfer of jurisdiction. In most of these cases the Brussels II bis Regulation was properly applied. The transfer provision is still problematic due to the lack of implementing legislation. In a large number of cases, children from third countries were subjects of procedure – courts were reluctant whether to apply the Brussels II bis Regulation or the 1996 Hague Child Protection Convention. In several cases, courts had difficulties in establishing *lis pendens* in another Member State.[16] In child abduction cases, the interpretation of the grave risk of harm does not correspond to international standards. Furthermore, the interpretation of "adequate measures" within the meaning of Art. 11 (4) Brussels II bis Regulation is problematic. The application of the Successions Regulation seems to function well, particularly when it comes to the interpretation of habitual residence and issuing an ECS.

The Property Regimes Regulations have not yet been dealt with by the Croatian courts.

[15] Općinski sud u Osijeku, 17.06.2019, Z-9215/2019, HRF20190617.

[16] Općinski sud u Poreču, 28.11.2014, P 381/14, HRF20141128; Županijski sud u Puli, 06.07.2015, Gž 218/2015, HRS20150706.

C. FRANCE

I. PRE-SELECTION

The research on French jurisprudence concerning cross-border family law cases was carried out via the online database "doctrine.fr" in which case law is largely available. The research was limited to the period between January 2017 and September 2019. It was decided to extend the search to an earlier date than the official start of the EUFams II Project to ensure systematic and continuous coverage of case law during the transition period from the EUFams I Project to the follow-up EUFams II Project.

As numerous judgements involving European Regulations on family law and interconnected international instruments were retrieved, it was indispensable to make a selection for the Database. The selection was made with the objective of achieving a balanced thematic diversity and to highlight cases with controversial legal issues or revealing "problematic" court practices and diverging interpretation among French courts. In addition, it should be noted that in the above-mentioned French database, decisions from first instance courts are scarcely or not at all available. Due to this lacking accessibility, only cases from appellate courts and the supreme court were retrieved.[17]

II. SAMPLE DESCRIPTION

In total, 30 cases were selected for the Database: 20 decisions were rendered on appeal by different Courts of Appeal (*Cours d'appel*), whereby the Paris Court of Appeal issued almost half of these cases; and 10 decisions were rendered by the Court of Cassation (*Cour de cassation*).

III. MAIN ISSUES

1. Awareness and judicial assessment concerning international jurisdiction and applicable law

The awareness of courts and their familiarity with the European Regulations and interconnected international instruments on cross-border family law is rather average in the cases selected for the EUFams II Database.[18] In some cases, the court did not explicitly refer to the relevant jurisdiction, grounds and rules on the applicable law. Notably, we identified this court practice in cases where the defendant did not contest the jurisdiction seized by the claimant or the law on which he based his claims. For instance, in a decision of the Versailles Court of Appeal[19] concerning the divorce of a French-Algerian couple residing in France, both the court of first instance and the appellate court only assessed the international jurisdiction and the applicable law concerning maintenance and omitted the relevant rules for divorce and parental responsibility. Even if the court had, indeed, jurisdiction according to Art. 3, 8 Brussels II bis Regulation, this practice is not in line with Art. 17 Brussels II bis

[17] Cf. C.II.

[18] Cf. Lobach/Rapp, An Empirical Study on European Family and Succession Law, *passim*.

[19] Cour d'appel de Versailles, 05.01.2017, 16/01468, FRS20170105.

Regulation. In addition, the automatic application of the *lex fori,* even if it was the correct law to be applied in the specific case, leads to a circumvention of the relevant PIL rules (Rome III Regulation, 1996 Hague Child Protection Convention).

A similar approach of a first instance court was partially corrected by the Lyon Court of Appeal.[20] In this divorce proceeding involving a Cambodian couple, the lower court had vaguely confirmed its jurisdiction and (automatically) applied the *lex fori*. The Court of Appeal overruled *ex officio* the decision with regard to the applicable law and applied Cambodian law as the law of the State of the spouses' common nationality (Art. 8 (1) (c) Rome III Regulation).

However, notwithstanding the above-mentioned incorrect practices, it should be noted that problematic or controversial case law was explicitly selected for the Database. In many other cases, the courts correctly applied the pertinent European regulations, and no unclear or controversial issue was raised or overlooked. Out of such "unproblematic" cases, only a few were uploaded to the Database.[21]

In other cases, courts assessed their jurisdiction and the applicable law *ex officio,* but wrongly applied the pertinent jurisdiction ground and applicable law rule. For instance, the Caen Court of Appeal[22] applied the *lex fori* as the applicable law for maintenance claims, but thereby wrongly interpreted Art. 8 (1) (c) of the 2007 Hague Maintenance Protocol. While this provision indeed aligns law applicable to divorce for ancillary maintenance claims, the court overlooked the fact that Art. 8 of the 2007 Hague Maintenance Protocol only applies to party autonomy, i.e. the applicable divorce law has to be chosen by the parties, which did not happen in the case at hand.

Similarly, the Court of Cassation rendered an illustrative judgement on the geographical scope of the Brussels II bis Regulation.[23] The case concerned a Belgian couple that separated in 2011, and after that, the father moved to the Democratic Republic of Congo with the children. Seven years later, the mother abducted the children to France, thus violating a Belgian custody judgement, which was recognised in the Democratic Republic of Congo. The French first instance court, which was seized by the mother to obtain a (new) custody decision, declared itself competent to hear the case and applied the *lex fori* "in light of the urgent circumstances". The appellate court upheld the father's motion to contest the court's jurisdiction and to request the return of the children to the Democratic Republic of Congo. Finally, the Court of Cassation corrected the wrong application of the Brussels II bis Regulation and the 1980 Hague Child Abduction Convention, which were both not applicable in the case at hand: The Democratic Republic of Congo is not a party to the 1980 Hague Child Abduction Convention, and the correspondent rules of the Brussels II bis Regulation can only be implemented in intra-EU cases.

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[20] Cour d'appel de Lyon, 09.05.2017, 15/07268, FRS20170509.

[21] See, for instance, Cour d'appel de Versailles, 18.05.2017, 16/03225, FRS20170518: The court referred to all pertinent EU and international instruments and correctly examined the grounds for jurisdiction and the applicable law rules.

[22] Cour d'appel de Caen, 22.06.2017, 16/02968, FRS20170622.

[23] Cour de cassation, 17.01.2019, 18-23.849, FRT20190117.

2. Residual jurisdiction

In another case concerning the diverging interpretation of European Regulations, the Court of Cassation[24] rendered a judgement on the interpretation of Art. 6 Brussels II bis Regulation, which goes beyond the case law of the CJEU[25]. Notably, the Court of Cassation ruled for the first time on the applicability of national jurisdiction grounds for divorce proceedings in light of the Brussels II bis Regulation. The case involved a Belgian-French couple who moved to India in 2012, and in 2013, the wife filed an action for divorce in her country of origin (France) during a short stay there. The lower courts accepted the international jurisdiction of French courts under Art. 7 Brussels II bis Regulation and Art. 14 French Civil Code[26], as no Member State had jurisdiction under Art. 3 Brussels II bis Regulation. The Court of Cassation, however, followed a stricter interpretation: As the husband is a national of another Member State (Belgium), Art. 6 (b) Brussels II bis Regulation prevents French courts from establishing their jurisdiction according to the *lex fori* – even if no Member State has jurisdiction under Art. 3 et seq. Brussels II bis Regulation. This interpretation adopted by the Court of Cassation is debatable, as it denies access to justice within the EU to European nationals who may only seize a court in their third country of residence (India).

3. Definition of "habitual residence"

The collected cases highlight a varied court practice to assess and determine the "habitual residence" as a connecting factor for both the court's jurisdiction and the applicable law.

In particular, there seems to be no converging interpretation of Art. 8 (a) Rome III Regulation. This provision refers to the law of the State "where the spouses are habitually resident at the time the court is seized". The wording of this provision does not refer to a specific place where both spouses are habitually resident, but merely to the same country of habitual residence. For instance, the Paris Court of Appeal adopted the latter interpretation.[27] However, the Lyon Court of Appeal[28] interpreted this provision in the sense that cohabitation of the spouses is required. This restrictive interpretation omits that the designation of the applicable law is based on the principle of "close connection" between the parties and the respective state, and not a specific place of residence. Given these doubts on the correct interpretation of Art. 8 (a) Rome III Regulation, the Lyon Court of Appeal could have asked the CJEU for a preliminary reference, but it did not seize this opportunity. Therefore, it remains to be seen if the CJEU will provide for more precise guidance in the future. Art. 8 (a) Rome III Regulation is the first default rule that applies in the absence of a choice of law-agreement; thus, it is of paramount importance to have a consistent interpretation for cross-border divorce cases in all Member States.

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[24] Cour de cassation, 15.11.2017, 15-16.265, FRT20171115.

[25] CJEU, 29.11.2007, C-68/07 (Kerstin Sundelind Lopez v Miguel Enrique Lopez Lizazo).

[26] According to this exorbitant jurisdiction rule, French nationals may sue, in certain cases, a foreign national in France even if the latter is not residing on French territory.

[27] Cour d'appel de Paris, 03.05.2017, 15/07817, FRS20170503.

[28] Cour d'appel de Lyon, 28.02.2017, 15/03508, FRS20170228.

Succession law is another subject matter where the notion of "habitual residence" is heavily discussed. French courts have extensively ruled on the notion of the deceased's "last habitual residence" under Art. 4, 21 Succession Regulation. In particular, the Paris Court of Appeal has ruled on the interpretation of this concept in two recent decisions[29] concerning, respectively, a United States of America (US) national whose disinherited children started proceedings before French courts against their siblings who inherited the estate. In both cases, the claimants requested the division of immovable property allegedly located in Paris, arguing that their father's last habitual residence was in France. These cases highlight a seemingly recurrent tactic of disinherited children of US nationals to start proceedings in France, hoping to obtain a mandatory share through the application of French Succession Law. This tactic might come as a response to recent judgements of the Court of Cassation in which the lack of mandatory shares in the applicable succession law was not identified as violating the French *ordre public* as such.[30] The complexity of these cases resulted from the fact that the deceased stayed alternatively in the US and France, traveling regularly back and forth. The court analyzed all factual elements of the case (such as: working place, nationality, place of birth, place of decease, desired burial place, formal registration of residence, location of assets, participation in elections, tax registration) and gave particular regard to the recitals of Succession Regulation. Eventually, the French court concluded that the last habitual residence of the deceased was, indeed, in the US, and thus denied its jurisdiction under Art. 4 Succession Regulation. The jurisdiction based on the location of assets in the forum (Art. 10 Succession Regulation) was denied, too: It was not proven that the immovable assets in France once belonged to the deceased.

Furthermore, the Court of Cassation ruled on the habitual residence of children in the context of cross-border child abduction.[31] In two cases, the court assessed the child's habitual residence in light of the case law of the CJEU[32], thus highlighting that the child must be integrated into a social environment and that a merely occasional or temporary physical presence of the child is not sufficient. In addition to these main criteria, the court mentioned as pertinent factors the duration, the circumstance and the reasons of the child's presence in the forum, its nationality, its school enrollment, its knowledge of the national language, as well as the intention of the parent having custody to settle down in the forum. However, in both cases the Court of Cassation denied the establishment of a "new" habitual residence in the country to which the child had been abducted, even though some of the criteria mentioned above showed a particular connection and integration in this country. To some extent, this interpretation avoids privileging the abducting parent who may profit from the fact

[29] Cour d'appel de Paris, 07.03.2018, 17/13293, FRS20180307; Cour d'appel de Paris, 15.05.2018, 17/05183, FRS20180515.

[30] Cf. **Fehler! Verweisquelle konnte nicht gefunden werden.**.

[31] Cour de cassation, 28.02.2018, 17-17.624, FRT20180228; Cour de cassation, 28.03.2018, 17-31.427, FRT20180328.

[32] CJEU, 02.04.2009, C-523/07 (A); CJEU, 22.12.2010, C-497/10 (Barbara Mercredi v Richard Chaffe); CJEU, 09.10.2014, C-376/14 (C v M).

that, the more time elapses, the more likely it is that the child acquires a new habitual residence.

4. Recognition and enforcement of foreign judgements

The collected cases do not highlight any particular difficulty of French courts concerning the application of the European rules on recognition and enforcement of foreign judgements in family matters. By way of example, two Courts of Appeal[33] rendered decisions where they correctly applied the refusal grounds of the Maintenance Regulation with regard to financial orders from UK courts, and rightly pointed out the prohibition of *révision au fond* (Art. 42 Maintenance Regulation).

Another example is a decision of the Paris Court of Appeal[34] where the court correctly refrained from applying Brussels II bis Regulation to assess the recognition of an Algerian divorce judgement, as the rules on recognition and enforcement of the Brussels II bis Regulation do not apply to judgements from third countries. Notably, the Algerian divorce order was based on the husband's unilateral declaration (*talaq*), which was held contrary to the French *ordre public*. Specifically, the refusal of the recognition was based on the public policy-exception in the bilateral Convention on Exequatur and Extradition concluded between France and Algeria in 1964.

5. Compulsory portions and *ordre public*

In two illustrative and much-debated cases,[35] the Court of Cassation held that foreign law which does not stipulate mandatory shares might be applied in France under certain circumstances. In the cases at hand, the deceased was a French national living in California where he had established a "family trust" to transfer all of his assets. As he had appointed his wife as sole heir and trustee, his children were *de facto* "disinherited", as the applicable Californian law does not confer any compulsory share to them. The children started proceedings in France and claimed their mandatory shares under French law on immovable assets located in France. The Court of Cassation held that the application of Californian law does not as such infringe the French *ordre public*, but only if the application of the foreign law in question leads to an "unacceptable situation", notably if the children would be left in a precarious financial situation.

Although the Succession Regulation was not yet applicable *rationae temporis* in the cases mentioned above, the question regarding the scope of the public policy-mechanism is also controversial under Art. 35 Succession Regulation. However, it should be remembered that it is national law that primarily defines the scope of *ordre public*. At least from the French perspective, the Court of Cassation's decisions put an end to a long debate in French doctrine concerning the scope of the public policy-exception and on the relationship between public policy and compulsory shares. This

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[33] Cour d'appel de Toulouse, 10.01.2017, 15/06267, FRS20170110; Cour d'appel de Paris, 14.05.2019, 17/06490, FRS20190514.

[34] Cour d'appel de Paris, 30.05.2017, 16/24111, FRS20170530.

[35] Cour de cassation, 27.09.2017, 16-17.198, FRT20170927; Cour de cassation, 27.09.2017, 16-13.151, FRT20170927a.

jurisprudence will be equally relevant for cases falling under the Succession Regulation.

Interestingly, after the entry into force of the Succession Regulation, the respective "disinherited" children in such cases started to follow a different tactic to seize their compulsory shares, namely, to seize a court in the French *forum rei sitae* under Art. 10 Succession Regulation, and to have French law applied. However, this tactic has not proven to be successful so far. In particular, the courts did not follow the children's argument that the deceased had his habitual residence in France.[36]

[36] Cf.C.III.3.

D. GERMANY

I. PRE-SELECTION

The Database comprises all published cases of German courts with a reference to at least one of the instruments of European family and successions law. In order to generate a complete list of cases, every major database that gathers anonymized versions of all published decisions of German courts was analyzed. The search criteria included the official denomination of the respective instrument (e.g. Regulation (EC) No 2201/2003) as well as alternate denominations often found in decisions of German courts and in the legal literature (e.g. EuEheVO, Brüssel IIa, etc.). A high number of cases were found. In a next step, the cases were selected on the basis of their practical and theoretical importance. If an instrument was not applicable to the case or the case did not refer to an instrument, the decision was not added to the Database.

II. SAMPLE DESCRIPTION

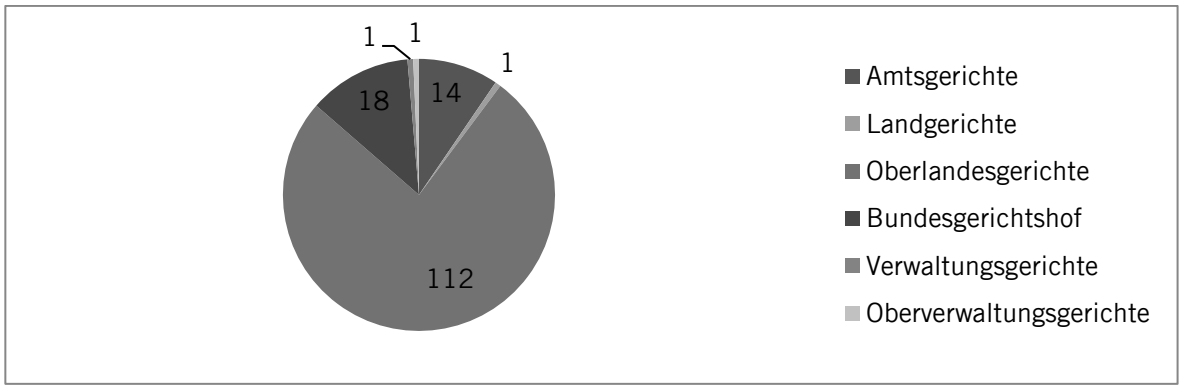

Figure 8: German cases in the EUFams II Database

Due to the fact that most first instance courts do not publish their decisions unless the case is of general importance, the majority of the decisions in the Database were rendered by higher instance courts. The cases can be subdivided as follows:

- Amtsgerichte (magistrate courts, acting as courts of first instance in family matters): 14 cases
- Landgerichte (regional courts, acting as courts of second instance for appeals against decisions of regional courts in matters for which higher regional courts have no jurisdiction): 1 case
- Oberlandesgerichte/Kammergericht (higher regional courts, acting as courts of second instance for appeals against decisions of regional courts in family matters): 112 cases
- Bundesgerichtshof (Federal Supreme Court, acting as court of last resort): 18 cases
- Verwaltungsgerichte (administrative courts, acting as courts of first instance in administrative matters): 1 case
- Oberverwaltungsgerichte (higher administrative courts, acting as court of second instance in administrative matters): 1 case

III. MAIN ISSUES

1. Habitual residence

The concept of habitual residence, being the main connecting factor for jurisdiction and applicable law alike, is mentioned in nearly every decision dealing with questions of PIL. While the general concept seems to be widely known, diverging concepts emerge in cases dealing with persons lacking some form of legal capacity or in cases with conflicting factual elements.

a) Importance of subjective elements?

In Germany, it is controversially discussed whether subjective elements play a role when assessing habitual residence. Some courts tend to regard subjective elements, mainly the intentions of the person whose habitual residence is concerned, as criteria of great importance.[37] Other courts consider the ability to autonomously form the will to stay at a certain place as a necessary requirement for the establishment of habitual residence.[38] In addition, it is still unsolved, whether the intentions of custodians or legal guardians have to be taken into account when assessing the habitual residence of minors or of other persons lacking some form legal capacity.[39]

Especially if either the stay had begun shortly before the court was seized or if conflicting factual elements otherwise lead to ambiguous results, the courts are taking subjective elements into account. In German case law, subjective elements often serve as the required connection that allows the immediate establishment of habitual residence without any need for integration into the new environment. If for example an adult moved to another State with the intention to settle there for the indefinite future, he or she would be considered to have established a new habitual residence in that State in the course of the relocation, even if there were no other connections to that State at that time.

If seen in the context of this case law, the controversy regarding the required capabilities for establishing habitual residence as well as the question of whether the intentions of legal guardians may be regarded, mostly seem to concern the first alternative for establishing a new habitual residence, while not necessarily affecting the possibility that in the course of the ongoing stay sufficient ties emerge so that a new habitual residence is established irrespective of any identifiable subjective elements. There are, however, some decisions which seem to preclude even the latter alternative if the person in question is incapable of forming an autonomous will.[40] In other decisions, the criteria for determining the habitual residence of minors are concordantly applied to adults without full legal capacity.[41]

Especially two reasons lead to a high level of uncertainty: Many decisions lack detailed comments on the criteria that apply on the assessment of the habitual residence. In

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[37] E.g.: AG Hameln, 27.02.2017, 31 F 34/17 EASO, DEF20170227.

[38] Most restrictive: OLG München, 22.03.2017, 31 AR 47/17, DES20170322; similar but without explicit conclusions: OLG Hamm, 02.01.2018, I-10 W 35/17, DES20180102.

[39] Regarding this discussion see also section b), aa).

[40] Especially: OLG München, 22.03.2017, 31 AR 47/17, DES20170322.

[41] LG Augsburg, 30.01.2018, 054 T 161/18, DES20180130.

addition, the concept of habitual residence may differ under different instruments of European family and successions law.

b) Habitual residence of children

In principle, when it comes to define the habitual residence in cases concerning minors, German courts seem to agree on the following: A child is habitually resident where the center of its life is located, based on its integration in its social and family environment. In order to identify this place, all circumstances of the individual case are to be taken into account, including the duration, the conditions and reasons for the stay, the conditions and reasons for the family's move to the respective place, the child´s nationality and language abilities, the place and conditions of the child´s attendance at school, and its social and family relations.[42] However, despite this generally accepted definition, some diverging tendencies can be identified.

aa) The right to determine the child's place of residence

When assessing both the child's family and social relations as well as other reasons for its stay at a certain place, German courts (sometimes) take into account, whether the relocation has been performed by or with the consent of the persons holding the right to determine the child´s place of residence. These are the custodians of child. Furthermore, the courts assess whether the child's stay was intended to last for a sufficient amount of time that would allow the child to become socially integrated in its new environment. If both of these conditions are met, the courts generally confirm the establishment of a new habitual residence, regardless of the child's own intentions.[43] This appears to be similar to cases in which adults relocate with the intention to stay for the indefinite future (immediate change of habitual residence). Furthermore, the child's inability to form its own autonomous will seems to be substituted by the intention of its parents and legal guardians. This line of reasoning is also applied to cases in which public authorities take charge of minors by placing them in child care facilities or foster families.

bb) Six-month period as indication for establishing habitual residence

Additionally, some German courts refer to existing case law which considers the continuous stay of six months to generally suffice for a person to reach the degree of social integration required for the establishment of habitual residence.[44] This case law was established during the 1970s and applied as a rule of thumb for both adults and minors. It was developed for cases in which a new habitual residence had not been established by the relocation itself, e.g. when an initial intention to relocate

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[42] Cases with a similar definition: OLG Koblenz, 14.02.2017, 13 UF 32/16, DES20170214; OLG Bamberg, 12.05.2016, 2 UF 58/16, DES20160512a; OLG Stuttgart, 30.01.2017, 17 UF 274/16, DES20170130; OLG Karlsruhe, 17.01.2018, 18 UF 185/17, DES20180117; KG Berlin, 09.02.2018, 3 UF 146/17, DES20180209.

[43] Cases with this approach: OLG Celle, 18.01.2016, 12 UF 2/16, DES20160118; OLG Bamberg, 24.04.2017, 2 UF 265/16, DES20170424; OLG Karlsruhe, 17.01.2018, 18 UF 185/17, DES20180117; KG Berlin, 09.02.2018, 3 UF 146/17, DES20180209; OLG Karlsruhe, 16.08.2018, 2 UF 113/18, DES20180816.

[44] Cases referring to this principle: OLG Stuttgart, 30.01.2017, 17 UF 274/16, DES20170130 ; OLG Karlsruhe, 17.01.2018, 18 UF 185/17, DES20180117; KG Berlin, 09.02.2018, 3 UF 146/17, DES20180209; OLG Karlsruhe, 16.08.2018, 2 UF 113/18, DES20180816.

permanently could not be determined. By applying this rule of thumb, the courts could, in absence of evidence to the contrary, specify an approximate point in time for the new residence to become the habitual one. The 6-month rule mostly serves as an additional factor when evaluating the duration of the stay. However, it does not absolve the court from assessing other criteria that might lead to contrary conclusions.

2. Interpretation of the term "child" in Art. 8 Brussels II bis Regulation

The interpretation of the term "child" in Art. 8 Brussels II bis Regulation has proven to be problematic in cases in which the person involved had already reached the age of 18 years but was still considered a minor by the law of their nationality. The cases brought before the German courts mostly concerned young men of Gambian or Guinean nationality. Since the Brussels II bis Regulation, in contrast to the 1996 Hague Child Protection Convention, has not explicitly defined the term "child", most German courts concluded that it had to be defined by the *lex fori*. German law defines a child to be a person who has not reached majority according to the applicable law for matters of its personal status. Since the matter of the person's majority had to be determined in the main proceedings anyway, the courts tended to refer to the German case law on "double relevant facts".[45]

As a result of the new definition in Art. 2 (2) 6th indent Brussels II bis Recast which defines the term "child" as any person under the age of 18 years, this German approach may not be continued under the Recast. It is, however, of the utmost importance for cases still governed by the current Brussels II bis Regulation. Here, the question remains whether the term contains a similar but implicit concept that bars the application of other national concepts. This question has only been partially considered by the German courts.

3. Jurisdiction for the assertion of maintenance claims by public authorities

German law offers several possibilities for public authorities to become holder of another person's maintenance claims. Predominantly, these claims are assigned to public authorities providing maintenance creditors with social assistance benefits or maintenance advances. Because of the *cessio iuris,* under these circumstances, it is often the public authority and not the initial creditor tasked with bringing the maintenance claims before the court. Therefore, it needs to be determined whether these authorities may apply the same procedural provisions provided for the initial creditor, namely, whether they may invoke jurisdiction under Art. 3 (b) Maintenance Regulation. According to German case law, this jurisdiction may be invoked at the habitual residence of the initial creditor although the court was seized by public authorities or other entities the claims were assigned to.[46] On the contrary, some

[45] This approach was applied in the following cases: OLG Bremen, 23.02.2016, 4 UF 186/15, DES20160223; OLG Bremen, 07.02.2017, 5 UF 99/16, DES20170207; OLG Koblenz, 14.02.2017, 13 UF 32/17, DES20170214; OLG Hamm, 03.05.2017, II-10 UF 6/17 , DES20170503; OLG Hamm, 12.07.2017, II-12 UF 217/16, DES20170712; OLG Hamm, 17.07.2017, II-12 UF 224/16, DES20170717; OLG Karlsruhe, 07.09.2017, 18 WF 62/17, DES20170907; OLG Hamm, 11.08.2017, 12 UF 229/16, DES20170811; OLG Hamm, 21.08.2018, II-12 UF 224/16, DES20180821; BGH, 20.12.2017, XII ZB 333/17, DET20171220.

[46] Relevant cases: OLG Hamm, 06. 05.2016, 9 UF 196/14, DES20160506 (question not openly addressed); OLG Köln, 18.01.2019, 25 UF 144/18, DES20190118; BGH, EuGH-Vorlage, 05.06.2019, XII ZB 44/19, DET20190605.

scholars refer to the *Blijdenstein*-decision of the CJEU[47]. According to this decision, the determination of jurisdiction practiced by German courts under these conditions violated the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters. However, since the Maintenance Regulation shows a far less restrictive system of jurisdiction rules compared to the one stated in the Convention, German courts argue that the previous judgment could no longer apply under the Maintenance Regulation. Recently, the German Federal Supreme Court has requested a preliminary ruling of the ECJ on this matter.[48]

4. Recognition of private divorces in Germany

In the aftermath of the *Sahyouni*-decision[49], German courts needed to decide how the void resulting from the non-applicability of the Rome III Regulation to private divorces could be filled under German law. In German case law and literature, it has not yet been clarified whether and to what extent the provisions of the Rome III Regulation are applicable by means of analogy under German law. Some courts favor the applicability of the Rome III Regulation, since the German legislator had been of the opinion that the Rome III Regulation is applicable to all forms of divorce.[50] Other courts tend to apply the conflict of laws rules that were repealed when the Regulation went into force.[51] They argue that the German legislator had expressed no intention to extend the applicability of the Rome III Regulation. Eventually, the German legislator has solved this controversy with the new Art. 17 (2) of the German Introductory Act to the Civil Code (EGBGB) by explicitly declaring the provisions of the second chapter of the Rome III Regulation applicable to private divorces, be it with certain modifications, cf. Art. 17 (2) EGBGB.[52]

5. Enforcement measures and corresponding remedies in family matters

As a result of the increasing numbers of foreign decisions in family matters, German courts often had to deal with objections raised by debtors against the declaration of enforceability, the enforcement in general or against certain enforcement measures taken by German authorities.

a) Remedies against the declaration of enforceability

In several cases defendants either raised objections directly against the declaration of enforceability or the enforceable claim, or claimed a lack of solvency due to subsequently changed circumstances. German courts have quite confidently dismissed these appeals, clarifying that appeals against the declaration of enforceability were intended for objections which result in the non-recognition of the respective decision. While a review of the decision as to its substance is explicitly forbidden, material objections that emerged after the court ruling could be regarded

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[47] CJEU, 15.01.2004, C-433/01 (Blijdenstein).

[48] BGH, EuGH-Vorlage, 05.06.2019, XII ZB 44/19, DET20190605; pending as: C-540/19.

[49] CJEU 20.12.2017, C-372/16 (Sahyouni); for background see OLG München, EuGH-Vorlage, 29.06.2016, 34 Wx 146/14, DES20160629.

[50] See OLG Düsseldorf, 15.02.2018, I-13 VA 6/16, DES20180215.

[51] See OLG München, 14.03.2018, 34 Wx 146/14, DES20180314.

[52] G. v. 17.12.2018 (BGBl. I S. 2573), in force since 29.01.2019.

only in separate proceedings according to § 767 of the German Code of Civil Procedure (ZPO). Subsequent changes in the circumstances affecting the amount of maintenance can only be presented in the course of modification proceedings.[53]

b) Applications opposing the enforcement according to § 767 of the German Code of Civil Procedure (ZPO)

According to § 767 German Code of Civil Procedure the debtor may oppose the enforcement based on material objections against the enforceable claim, if these objections have emerged after the court ruling. Especially in case of installments, mentioned objections were raised to intervene. In that matter, the court of first instance has referred the question to the CJEU to decide whether the jurisdiction rules provided for the initial proceedings apply or the jurisdiction for **proceedings concerned with the enforcement of judgments** under Art. 24 (5) Brussels Ia Regulation may be invoked in this regard.[54] These proceedings are currently pending before the CJEU.[55]

c) Specific enforcement measures and corresponding remedies

As regards the specific enforcement measures taken by German courts during enforcement proceedings, one case dealt with the authorization of direct force against a child for the purpose of enforcing a decision in which its return had been ordered.[56] In another case, the court was tasked with enforcing a decision on access rights by imposing coercive sanctions on a party neglecting its obligations although it had already been threatened with such sanctions in the decision itself.[57] In both cases, German courts have accepted the international jurisdiction for these measures and the corresponding remedies based on national procedural law after confirming that the instruments of European family law contained no pertinent provisions.

6. Modification of foreign decisions or authentic instruments in maintenance matters or matters of parental responsibility

In principle, German courts agree on the fact that foreign decisions and authentic instruments may not be reviewed as to their substance during modification proceedings. There are however cases in which they unwittingly come in conflict with this general principle. One problem in that regard is posed by foreign decisions in which the court does not specify the applicable law. Under these conditions, German courts tend to interpret the foreign decision in such manner as if the law had been applied they themselves would have deemed applicable.[58] Such interpretation may very well constitute a review of the foreign decision as to its substance if there is no indication that the court had indeed applied that law. This especially holds true when

[53] Cases with this reasoning: OLG Frankfurt, 09.02.2018, 4 UF 266/17, DES20180209a; OLG Stuttgart, 09.03.2018, 17 UF 8/18, DES20180309; OLG Celle, 16.04.2018, 17 UF 41/18, DES20180416; OLG Hamm, 19.07.2018, II-11 UF 93/18, DES20180719.

[54] AG Köln, EuGH-Vorlage 16.01.2019, 322 F 210/18, DEF20190116.

[55] Pending as: C-41/19.

[56] OLG Hamm, 19.07.2018, II-11 UF 93/18, DES20180719.

[57] OLG Karlsruhe, 27.06.2019, 18 WF 105/19, DES20190627.

[58] OLG Frankfurt, 20.05.2016, 4 UF 333/15, DES20160520.

the decision contains elements not known under that law.[59] Other problems arise when a decision or an authentic instrument is to be modified after the applicable law has changed due to the relocation of the creditor. Under these conditions, German courts tend to redetermine the maintenance, without first inquiring whether the decision or the authentic instrument in question contains deviations from the provisions of the previously applicable statutory law. Crucially, these deviations need to be maintained in the course of the modification in order to refrain from changing the substance that may not be reviewed. Especially in cases where the maintenance has been agreed by the parties, the hypothetical benefits the agreement might entail for one of the parties need to be respected when adapting the agreement to the legal framework of the newly applicable law.[60]

Decisions in matters of parental responsibility regarding access rights are much easier to modify. Here, the living conditions of the child have often undergone changes of such significance that the previous access regulation is no longer viable without harming the child. Under these conditions, even substantial changes in the respective decision are allowed since the decision itself depended on the specific circumstances under which it was made.[61]

7. Content limitations for the ECS

One question which has occupied courts since the introduction of ECS is what information may be included. The main issue here is whether German authorities are required to include information about certain assets belonging to the estate when the estate is transferred to the heir by means of universal succession according to German law. Since under German succession law, the whole estate is automatically transferred to the heir, German courts tend to oppose the inclusion of information that might indicate that any form of individual transfer has taken place. They argue that Art. 68 Succession Regulation only allows for the inclusion of the information listed therein to the extent required for the purpose of the ECS. In case of "the list of rights and/or assets for any given heir" mentioned in Art. 68 (I) Succession Regulation, this would, according to the German courts, require these assets to have been transferred directly *in rem*. Since there is no such individual transfer, the inclusion of such data would only serve informatory purposes that would contradict the formal nature of the ECS.[62]

This increasingly settled case law was established without any participation of the CJEU and is based solely on the interpretation of Art. 68 Succession Regulation. This interpretation can hardly be described as being evident. Given that the Regulation itself lists in Art. 63 (2) (b) "the attribution of specific assets forming part of the estate to the heir(s)" as one of the circumstances the ECS is intended to demonstrate, the ECS seems open enough to include scenarios in which such assets are transferred to

[59] Likewise: OLG Bremen, 17.10.2016, 4 UF 99/16, DES20161017.

[60] This was overlooked in: OLG Hamm, 06.06.2017, 11 UF 206/16, DES20170606.

[61] See: OLG Stuttgart, 08.06.2017, 17 UF 45/16, DES20170608.

[62] See: AG Augsburg, 27.06.2017, 3 VI 94/17, DEF20170627; OLG Nürnberg, 05.04.2017, 15 W 299/17, DES20170405; OLG München, 12.092017, 31 Wx 275/17, DES20170912; OLG Nürnberg, 27.10.2017, 15 W 1461/17, DES20171027.

a sole heir as part of the estate. In any case, no single Member State on its own may define the scope of admissible content of the ECS since it is intended to be recognized in all Member States, allowing for easy demonstration of the facts listed therein. If each Member State would define which data were to be included, this would significantly hinder the effectiveness of the ECS. This holds true if the State in which the right needs to be invoked would require information that may not be admitted into the ECS according to the leading opinion under the applicable succession law. The present case law has similar consequences in relation to Austria as the Austrian land registry requires proof that the property indeed belongs to the estate.

In order to put an end to such differing concepts and the hindrances they entail, uniform guidelines are required.

8. Miscellaneous

a) Transitional provisions of the Succession Regulation

Other decisions concern certain aspects of the transitional provisions of the Succession Regulation. The most interesting among them is a decision of the Federal Supreme Court in which it has confirmed that the retroactive effects of Art. 83 (2) Succession Regulation do not contradict the European principle of legal certainty, even in regard to formerly invalid agreements as to successions that were concluded more than 15 years before its entry into force.[63]

b) Recognition of underage marriages

Another topic of specific importance for Germany is the recognition of foreign underage marriages. In reaction to a decision in which a Syrian marriage concluded with a 14 year-old girl was recognized[64], the German legislator has introduced Art. 13 (3) of the German Introductory Act to the Civil Code (EGBGB) which declares void all marriages concluded with minors under the age of 16 years. Considering the provision, a potential conflict with European law becomes apparent. Specifically, this may be the case when a married couple with one spouse who had not been 16 years old at the time of the marriage moves to Germany from a Member State where the marriage is considered valid. The provision is currently under review by the German Federal Constitutional Court as the Federal Supreme Court deemed it to be in violation of the German Constitution.[65]

c) Preliminary question of paternity in maintenance matters

Another ongoing controversy concerns the question of how to determine the applicable law regarding the preliminary question of the defendant's paternity in maintenance matters. While there has been settled case law of the German Federal Supreme Court, according to which the paternity was to be determined according to the law that governs the maintenance claim, there are ongoing discussions amongst German scholars and practitioners whether this case law may be continued under the 2007 Hague Maintenance Protocol. Unfortunately, the Federal Supreme Court has left

[63] BGH, 10.07.2019, IV ZB 22/18, DET20190710.

[64] OLG Bamberg, 12.05.2016, 2 UF 58/16, DES20160512a.

[65] For more information see: BGH, 14.11.2018, XII ZB 292/16, DET20181114.

this matter undecided.[66] This debate is complicated by the fact that some courts seem to favor yet a third option according to which neither the law governing the maintenance claims nor the law determined by the conflict rules of the forum State governs the question of paternity, but the law determined by the conflict of laws rules of the State whose law governs the maintenance claims.[67]

d) Application of the 2007 Hague Maintenance Protocol in relation to non-contracting States

Finally, there have been two decisions of a court of second instance in regard to the applicability of the 2007 Hague Maintenance Protocol in relation to non-contracting States which seemingly contradict each other. While the Protocol was applied in relation to Paraguay which neither ratified the Protocol nor the 1973 Hague Convention, the Protocol was not applied in relation to Turkey who had ratified the 1973 Hague Convention but not the Protocol. According to Art. 18 of the 2007 Hague Maintenance Protocol, the Protocol, though being universally applicable in relation to non-contracting States, could only take precedence over the provisions of the 1973 Hague Convention in relation to States also bound by the Protocol. Therefore, the 1973 Hague Convention was to be applied if the other State had only ratified it but not the Protocol.[68]

[66] See: BGH, 05.07.2017, XII ZB 277/16, DET20170705.

[67] OLG Hamm, 06.05.2016, 9 UF 196/14, DES20160506.

[68] OLG Karlsruhe, 07. 02.2017, 16 UF 307/13, DES20170207a; OLG Karlsruhe, 14.07.2017, 18 WF 3/17, DES20170714.

E. GREECE

I. PRE-SELECTION

The cases selected to be uploaded to the case-law Database were identified on the grounds of their variety and peculiarities, which made them attractive for the purposes of the project. For instance, some distinctively portray a situation where courts do not have a proper and thorough training in the diverse instruments that may be applicable in the area of cross-border family law: this is true with respect to cases where the cross-border element points to a third country (which may be construed as featuring a higher degree of complexity), but it is also true with respect to cases between EU Member States. On the other hand, other cases emphasize a lack of technicality in the understanding of how these instruments operate which is often at the origin of dubious or problematic judicial outcomes. With a view to offering a thorough overview, some cases featuring a certain degree of complexity were also included to reflect the good and proper understanding of courts of the application *in concreto* of the instruments that fall in the scope of interest of the EUFams II Project.

A general remark with regard to the identification of Greek cases has to be made: the date of a judgment is not always available. In the text available in the Database, cases are usually cited in a sequential numerical form (XXX/YYYY), which means that the part of the decision mentioning the date is sometimes omitted.[69] In those cases, the date indicated for the purpose of generating the EUFams Code was the first of January of the year the judgment was rendered.

II. SAMPLE DESCRIPTION

Overall, 14 decisions were collected based on the data available in the major Greek national case law database (NOMOS database). Of these decisions, 11 were rendered by courts of first instance and 3 were rendered on appeal.

III. MAIN ISSUES

1. Jurisdiction and applicable law in family matters: Some struggles in coordinating the sources and identifying the boundaries

A significant portion of the Greek judgments collected addressing questions of jurisdiction and applicable law, particularly in matrimonial matters and parental responsibility, portray the struggle that courts – both in first instance and on appeal – often face either in giving proper application to an instrument or in coordinating the several instruments that regulate cross-border family matters. In these aspects lie what may be identified as the real problematic issues for Greek courts.

a) Properly identifying the territorial scope of the Brussels II bis Regulation

A remarkably evident example of the struggle faced by both a court of first instance and on appeal with respect to properly identifying the territorial scope of the Brussels II bis Regulation is offered by a case on access rights brought by the Greek

[69] Concretely, four cases did not have a date: ELF20170101, ELF20170101a, ELF20180101 and ELF20180101a.

grandmother of a Greek child habitually residing in California with his mother (also a Greek national). The Court of Appeal upheld the judgment of first instance confirming the non-applicability of the Brussels II bis Regulation on the grounds that the cross-border element did not exist with respect to a EU Member State.[70] Both courts based their jurisdiction on Greek domestic law and overlooked the fact that, for the purposes of the application of Brussels II bis Regulation, and more precisely with respect to the Regulation's territorial scope, it is not required that the cross-border element point to an EU Member State. It is true that, ultimately, the outcome would have not changed *in casu*: given that the child had its habitual residence in the US, had the courts given proper application to the Regulation, they would eventually have applied national law via Art. 14 of the Brussels II bis Regulation. However, the fact remains that the courts gave an inaccurate reading of the Regulation's territorial scope. Furthermore, while the lower court based its jurisdiction on nationality, the Court of Appeal added that Greek courts have jurisdiction due to a *de facto* inability of the plaintiff to access the US judge. Therefore, the court introduced a type of *forum necessitatis* premised on the plaintiff's factual inability to access the competent courts: had the court applied the Brussels II bis Regulation, as it should have, in accordance with Art. 13 Brussels II bis Regulation recourse to such a residual solution would have been possible only provided the child's habitual residence could not be established. However, this was not the case here.

b) Drawing the boundaries between the scope of the instruments *ratione materiae*

A certain degree of confusion has also arisen with respect to drawing the boundaries between the scope of the instruments *ratione materiae*. This has occurred with a court of first instance which ruled on divorce, parental responsibility, access rights and maintenance of the child of a couple married in Albania but habitually residing in Greece:[71] while the court correctly applied the Brussels II bis Regulation and the Rome III Regulation as regards divorce, it omitted to determine separately jurisdiction and applicable law with respect to parental responsibility, access rights and maintenance.

c) Lesser degree of familiarity with questions of and sources regulating applicable law (as opposed to jurisdiction)

The courts' struggle is at times also epitomized in a lesser degree of familiarity with questions of and sources regulating applicable law (as opposed to jurisdiction). E.g., a court of first instance correctly accepted jurisdiction (at least as a result, cf. below) on the ground that in Greece was the last common habitual residence of the spouses and the plaintiff retained it (Art. 3 (1) (a) 2nd indent Brussels II bis Regulation) over the divorce proceedings of an Albanian couple, married in Albania, but living in Greece since 2005.[72] However, the court applied both – domestic PIL rules and the Rome III

[70] Patras Single-Member Court of Appeal (Monomeles Efeteio Patron), 12.03.2019, No. 137/2019, ELS20190312 (on appeal from Patras Single-Member Court of First Instance (Monomeles Protodikeio Patron), 25.07.2018, No. 526/2018, ELF20180725).

[71] Kos Single-Member Court of First Instance, 07.12.2017, No. 125/2017, ELF20171207.

[72] Lamia Single-Member Court of First Instance (Monomeles Protodikeio Lamias), 06.05.2019, No. 79/2019, ELF20190506.

Regulation – to conclude that the law of the spouses' common nationality (Albanian law) is applicable. In doing so, the court overlooked the fact that the Rome III Regulation replaces national law insofar as it is applicable. Moreover, the court directly proceeded to apply Art. 8 (c) Rome III Regulation without mentioning whether the spouses had concluded an agreement on the applicable law and without examining whether Greek law, as the law of the last common habitual residence of the spouses, was applicable in the case at hand. This result is also in contrast with the court basing its jurisdiction on the spouses' last common habitual residence. Applying Greek substantive law might have been the correct result: while the court does not confirm it explicitly, it seems that both spouses continue to habitually reside in Greece.

On the other hand, in a divorce case between spouses of American/Japanese and German nationality, the court of first instance correctly established its jurisdiction and applied substantive Greek law:[73] the plaintiff has had her habitual residence in Greece for over a year before the court was seized (Art. 3 (1) (a) 5th indent Brussels II bis Regulation) and Greek law was deemed applicable after the court checked each step provided by the Rome III Regulation.

d) International instruments in family law

Along these lines, a struggle may also be identified with regard to international instruments in family law. For example, in a case on parental responsibility of Greek nationals who married in Greece, where they had a child, and who agreed that the mother (who moved to the UK shortly after the proceedings were commenced) should have custody of the child, in determining the law governing parental responsibility a court of first instance (which rendered a judgment that is otherwise meticulous in its review of the different instruments and is correct in most aspects) nevertheless applied domestic PIL rules despite Greece having ratified the 1996 Hague Child Protection Convention.[74]

e) Good command of the relevant instruments

On the other hand, Greek courts have also displayed a good command of the relevant instruments. For instance, correct application of the provisions on *lis alibi pendens* was given in a divorce case of a couple which used to live in the UK until the wife left for Poland and the husband moved to Greece: the wife then seized a Polish court (January 2016) and the husband seized a court of first instance in Greece (March 2016). It is noteworthy that the Greek court correctly applied the relevant provisions of the Brussels II bis Regulation on pendency and thus ordered on its own motion a stay of proceedings until the Polish court rules on its own jurisdiction: in doing so, the court also accurately distinguished the difference between the rules concerning *lis alibi pendens* in matters of divorce and the Brussels I bis Regulation (i.e. the lack of relevance of the identity of the cause of actions).[75]

Good coordination was also displayed in a case on the application lodged by the parents for judicial authorisation to renounce an inheritance on behalf of their children

[73] Larissa Single-Member Court of First Instance, No. 229/2018, ELF20180101.

[74] Larissa Single-Member Court of First Instance, No. 564/2017, ELF20170101a.

[75] Gytheio Single-Member Court of First Instance, No. 7/2017, ELF20170101.

(Greek nationals living in Germany) who stood to inherit a significant amount of debts from a relative who died intestate in Greece: in line with the CJEU's judgment in the Saponaro-case[76], a Judge of the Peace ruled that the matter did not fall within the scope of the Succession Regulation, but in within the scope of the Brussels II bis Regulation instead.[77] It established jurisdiction on the grounds of Art. 12 (3) Brussels II bis Regulation since the children were Greek nationals and the parents accepted the court's jurisdiction by applying it without any reservations.

Finally, giving an overall proper application to the provisions of the Maintenance Regulation and displaying good coordination, a court of first instance reiterated that recognition of a Polish decision in Greece on maintenance obligations against a defendant (the father) domiciled in Greece was unnecessary since, under the Maintenance Regulation, recognition of decisions rendered in a Member State is automatic (Art. 23 Maintenance Regulation).[78] With respect to enforcement, the court observed that the Maintenance Regulation was applicable from 18.06.2011 and pointed out that the provisions on the enforcement of judgments originating in countries not bound by the 2007 Hague Maintenance Protocol are also applicable with respect to judgments of Member States, provided these judgments were issued before the Regulation's date of application. On these grounds, the court proceeded to declare the Polish judgment enforceable.

2. Child's best interests

According to the decisions collected, Greek courts display an overall proper understanding and pursuance of the child's best interests. For instance, a Court of Appeal's extensive inquiry into the conditions of the child's current life and the taking into account of the child's view on the matter are noteworthy: upholding the judgment rendered on first instance, the Court of Appeal rejected the request for return of a child to the Czech Republic on the ground that the child did not have her habitual residence in that Member State and, upon examining the child and the people surrounding her, it reached the conclusion that the child had settled in well in Greece. Furthermore, the court gave consideration to the fact that, as the child herself confirmed to the court, she did not wish to return to the Czech Republic.[79]

As was the case in the previous judgment, another judgment rendered on appeal by the same court stands out for the court's thorough evaluation of the child's current conditions and the fact that the court also explicitly took into account the child's opinion.[80] In the instant case, the Court of Appeal rejected the mother's request for a return order of the child to Greece on the grounds that, although the father was unlawfully retaining the child in Belgium, the court found that the child had an

[76] CJEU, 19.04.2018, C-565/16 (Saponaro).

[77] Xanthi Justice of Peace, No. 139/2018, ELF20180101a.

[78] Drama Single-Member Court of First Instance, 20.02.2018, No. 44/2018, ELF20180220.

[79] Dodecanese Single-Member Court of Appeal (Monomeles Efeteio Dodekanisou), 12.02.2018, No. 46/2018, ELS20180212 (on appeal from Rhodes Single-Member Court of First Instance (Monomeles Protodikeio Rodou), 31.07.2015, No. 374/2015, ELF20150731. The decision of the first instance was collected during the EUFams I Project).

[80] Dodecanese Single-Member Court of Appeal (Monomeles Efeteio Dodekanisou), 12.03.2018, No. 60/2018, ELS20180312.

excellent relationship with his father and his other relatives in Belgium. Also, the child was well integrated in Belgium and, while being fluent in Flemish, lacked any real connections to Greece and was not fluent in Greek. The Court of Appeal therefore concluded that, by ordering the return of the child to Greece, there was a grave risk of exposing the child to psychological harm. Hence, it reversed the judgment of the court of first instance,[81] which had ordered the return of the child to Greece upon having refused to hear the child on the basis of the child's age and degree of maturity (but failing to provide any reasoning and explanation on this point), having summarily dismissed the claims of the child stating that his mother neglected him, and having rejected the argument that a return order would expose the child to psychological harm.

A truly minor exception to the Greek courts' overall proper understanding and pursuance of the child's best interests may be identified, with respect to jurisdiction over parental responsibility, in a decision where a court of first instance mentioned the requirement under Art. 12 (1) Brussels II bis Regulation that, beyond the agreement of the parties, jurisdiction of the seized court shall serve the superior interests of the child. However, while the court did mention the requirement, it omitted to specifically explain how these interests are served.[82]

3. Successions

An overall good grasp of the Succession Regulation emerges from a decision of a (perhaps slightly overzealous) Court of first instance that ruled on the application for the issuance of a ECS lodged by the widow of the deceased who was habitually resident in Crete at the time of death, died *ab intestato*, and whose majority of assets was located in Germany.[83] In her application, the widow (who, with the couple's three children, was one of the four heirs and who – per the court's request – submitted a detailed list of the assets belonging to the estate and their location) also requested the court to indicate in the ECS the exact right of each heir with respect to each asset of the estate. The court assumed jurisdiction over the case, noting that the fact that the ECS was meant to be used in another Member State (namely, Germany) satisfied the requirement that the case be cross-border. Having identified Greek law as the applicable law, the court proceeded to issue the requested ECS. However, on the grounds of the absence of a testament in accordance to which it would have been possible to identify the rights of each heir with respect to each specific asset of the estate, the court rejected the applicant's request that the court determine the participation of each heir *vis-à-vis* each specific asset. The case was based on straightforward facts and the judgment is overall correct. Nevertheless, the judgment tackles some interesting issues connected with the ECS. On the one hand, the court adopts the view that – to prove the cross-border element – the applicant not only has to allege that the ECS will be used in another Member State but also has to submit a list of the assets located in another Member State (Germany). Whether information this detailed is required just to ascertain the cross-border element is questionable. On

[81] Rhodes Single-Member Court of First Instance, 11.08.2014, No. 443/2014, ELF20140811.

[82] Larissa Single-Member Court of First Instance, No. 564/2017, ELF20170101a.

[83] Chania Justice of Peace, No. 170/2019, 15.03.2019, ELF20190315.

the other hand, the court offers an answer to the interesting issue of how specific the content of the ECS has to be, and – on the grounds that it suffices that the ECS indicate each heir's share of the whole estate – it takes a negative stance on the issue of whether the ECS has to include the list of assets belonging to the estate and identify each heir's share on each asset in case of intestate succession. This is a reasonable conclusion given that, in intestate succession, heirs are usually not assigned specific assets but, rather, a share of the whole estate.

Ilaria Viarengo/Francesca Villata/Nicolò Nisi/Lenka Válková

F. ITALY

I. PRE-SELECTION

EUFams II cases have been mainly collected through research on websites dedicated to the publication of case law (e.g. ilcaso.it) and in the most updated databases available (notably Dejure and Pluris). While Supreme Court decisions are all publicly available, more difficulties to collect first instance and appeal decisions have been encountered, because they are generally unreported. Full texts of judgments were also received directly from judges operating in family law courts, confirming that there is a significant amount of first instance decisions (especially in the context of *more uxorio* relationships) yet unreported.

II. SAMPLE DESCRIPTION

Within the EUFams II Project, 53 cases were collected, 19 of which were rendered by the Court of Cassation while 34 were handed down by lower courts. These cases were divided per matters addressed as follows:

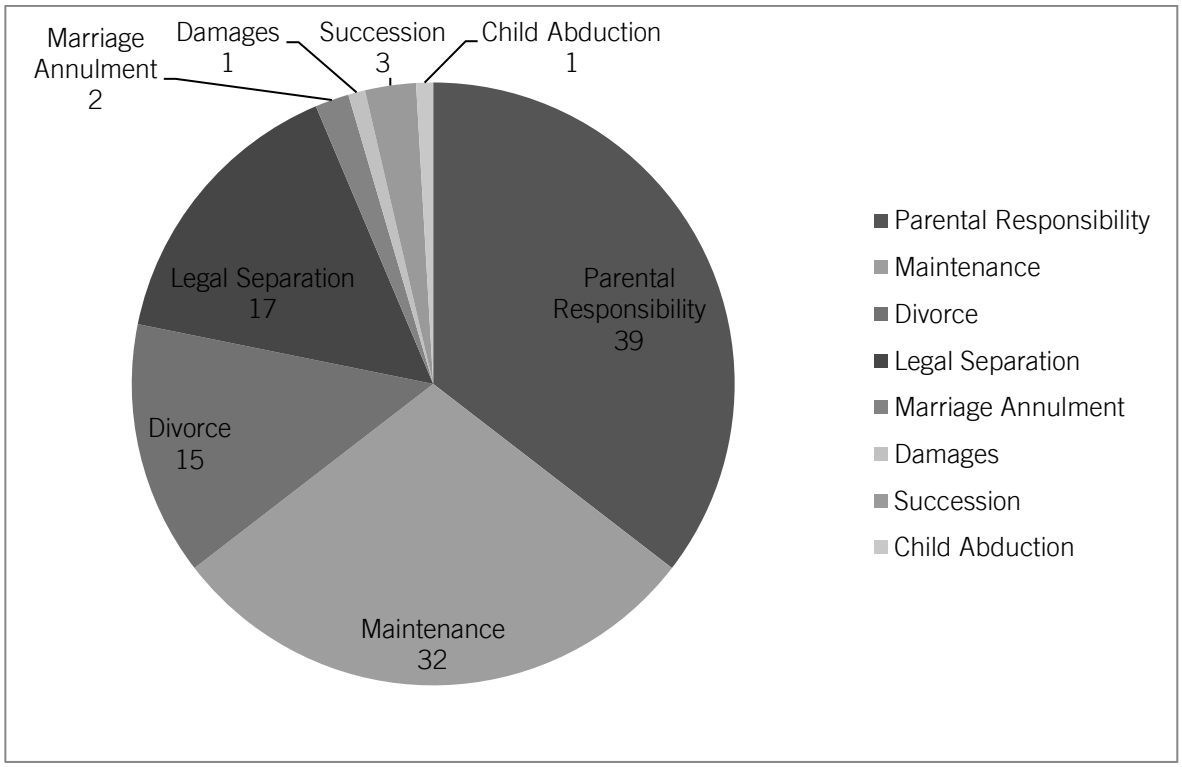

Figure 9: Number of Italian cases by subject matter

III. MAIN ISSUES

1. Personal scope of application of Brussels II bis Regulation

Several decisions have been rendered in cases where at least one of the parties or even both were nationals of a third country. In such cases, one decision of the CJEU[84] is generally mentioned and leads either to the establishment of jurisdiction under the

[84] CJEU, 29.11.2007, C-68/07 (Kerstin Sundelind Lopez v Miguel Enrique Lopez Lizazo).

Brussels II bis Regulation irrespective of the nationality of the parties[85] or to the application of national jurisdictional rules.[86]

In one case, however, the tribunal wrongly – if one considers the interpretation of Art. 8 Brussels II bis Regulation provided by CJEU[87] – applied the 1996 Hague Child Protection Convention instead of the Brussels II bis Regulation to a child of Serbian nationality, even though it was undisputedly habitually resident in Italy.[88]

Interestingly, in a case closely connected to the US, the tribunal considered both the 1996 Hague Child Protection Convention and the Brussels II bis Regulation (respectively, Art. 5 and 8 for parental responsibility and Art. 11 and 20 for provisional measures) for the assessment of jurisdiction, without expressly delimiting the respective scope of application of the two instruments based upon the existing coordination mechanism.[89]

2. Declaration of fault-based legal separation

A recurring issue is the assessment of a fault-based separation petition pursuant to Art. 151 (2) Italian Civil Code (*domanda di separazione con addebito*) in order to determine which of the spouses (if any) can be held accountable for the breakdown of the marriage (and also be ordered to provide for spousal maintenance). In the Italian legal order, the fault-based claim is an autonomous and independent petition which, however, must be brought before the court of the separation proceeding. It follows that, although Recital 8 Brussels II bis Regulation excludes matters relating to the grounds of divorce, national courts usually apply the PIL regime of the separation petition also to the inextricably linked fault-based claims.[90] In one case, the application was dismissed with no PIL analysis.[91]

3. Award of the family home: Which applicable regime?

Another sensitive issue is the assessment of the claim concerning the award of the family home. From the cases collected in the EUFams I Case Law Database, it seemed that such claims had to be considered – albeit only in one case expressly[92] – as a measure of protection for children, thus subject to Art. 8 Brussels II bis Regulation.

This solution is confirmed in one case[93], but, very interestingly, also different interpretations have been provided in the context of cases where the children had already reached the age of majority. In particular, the petition concerning the award of

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[85] Trib Parma, 02.08.2018, ITF20180802; Trib Parma, 15.11.2018, ITF20181115a; Trib Milano, 11.12.2018, ITF20181211; Trib Parma, 14.02.2019, ITF20190214; Trib Torino, 15.02.2019, ITF20190215; Trib Novara, 16.05.2019, ITF20190516a; Trib Belluno, 19.07.2017, ITF20170719.

[86] E.g. Trib Roma, 02.02.2018, ITF20180202, where, however, only Art. 7 Brussels II bis Regulation and not the CJEU case (Footnote 84) is mentioned.

[87] CJEU, 17.10.2018, C-393/18 PPU (UD v XB).

[88] Trib Parma, 04.04.2018, ITF20180404.

[89] Trib Milano, 02.07.2018, ITF20180702.

[90] Trib Belluno, 19.07.2017, ITF20170719; Trib Parma, 06.05.2019, ITF20190506; Trib Velletri, 21.05.2019, ITF20190521.

[91] Trib Cuneo, 19.02.2018, ITF20180219.

[92] Trib Cremona, 15.09.2014, ITF20140915.

[93] Trib Parma, 04.04.2018, ITF20180404.

the family home was considered either as an issue ancillary to maintenance and, thus falling under the scope of the Maintenance Regulation[94] or as an issue where no European uniform jurisdictional rules exist and consequently national rules shall apply[95]. In one case, instead, the application was dismissed with no PIL analysis.[96]

4. *Forum necessitatis*

Only in one case collected in the EUFams II Case Law Database[97], Italian jurisdiction was established by resorting to the *forum necessitatis* provided by Art. 7 Maintenance Regulation. The application to obtain the review of the conditions of maintenance was filed by the father, an Italian national, against the wife and the child, who both transferred their residence to the Dominican Republic and the latter having also reached the age of majority. The national court established its jurisdiction based on the fact that it had a sufficient connection with the case due to the following elements: the father was an Italian national and requested the review of a decision issued by an Italian court on the maintenance of his son, an Italian national. Under these circumstances, the court considered it to be unreasonable to force the father to start such proceeding in the Dominican Republic where the son habitually resided. The court applied Italian law based on Art. 6 of the 2007 Hague Protocol (instead of its Art. 3, 4), although it expressly excludes from its scope parent-child and spouses' relationship.

5. Jurisdictional criteria of Art. 3 Maintenance Regulation

As the CJEU made it already clear[98], the Maintenance Regulation provides for alternative and non-hierarchized criteria for jurisdiction which give priority to the applicant's choice. Consequently, the fact that a court has declared that it has no jurisdiction to rule on an action in relation to the exercise of parental responsibility for a minor child is without prejudice to its jurisdiction to rule on applications relating to maintenance obligations with regard to the child if that jurisdiction may be based on Art. 3 (a) Maintenance Regulation.[99] However, as it was also visible from the EUFams I Case Law Database, national courts occasionally interpret this provision too extensively, consider the jurisdiction based on Art. 3 (c)-(d) Maintenance Regulation as mandatory and limit the alternative nature of the relationship with Art. 3 (a)-(b) Maintenance Regulation. This trend is confirmed in one case[100], where the national court dismissed jurisdiction for maintenance towards the wife under Art. 3 (c) Maintenance Regulation because this application could have been decided by the

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[94] Trib Parma, 23.05.2018, ITF20180523.

[95] Trib Parma, 05.08.2018, ITF20180802.

[96] Trib Parma, 06.05.2019, ITF20190506.

[97] Trib Novara, 15.11.2018, ITF20181115.

[98] CJEU, 05.09.2019, C-468/18 (R v P).

[99] This provision has been correctly applied in the following cases, where Art. 3 (a)-(b) Maintenance Regulation was applied also in divorce and/or parental responsibility cases: Trib Belluno, 19.07.2017, ITF20170719; Trib Padova, 25.10.2017, ITF20171025; Trib Parma, 04.04.2018, ITF20180404; Trib Genova, 16.04.2018, ITF20180426; Trib Parma, 02.08.2018, ITF20180802; Cass, 27.11.2018, No 30657, ITT20181127; Trib Torino, 15.02.2019, ITF20190215; Trib Novara, 16.05.2019, ITF20190516a; Trib Velletri, 21.05.2019, ITF20190521.

[100] Trib Vercelli, 24.07.2019, ITF20190724; cf. also Trib Milano, 10.01.2019, ITF20190110 for an explanation of the same (misleading) reasoning.

court competent for the divorce proceeding (i.e. Romania), although the wife was habitually resident in Italy and, thus jurisdiction could have been established under Art. 3 (a)-(b) Maintenance Regulation, irrespective of the divorce proceeding already decided in Romania.

In another case, the national court ascertained its jurisdiction under Art. 3 (d) Maintenance Regulation even though it had previously declined jurisdiction for parental responsibility in favor of a German court, whose decision incidentally had already been recognized in Italy under Art. 21 (4) Brussels II bis Regulation. This solution was questionably justified by the fact that, notwithstanding the German decision on parental responsibility, the national court would equally have had jurisdiction – although the court does not further explain the reasoning – under the prorogation of jurisdiction provided by Art. 12 Brussels II bis Regulation, thus it was also provided with jurisdiction for maintenance application.[101]

6. Applicable law for parental responsibility matters: 1996 Hague Child Protection Convention

The law applicable to parental responsibility, in lack of European instruments, is determined in accordance with the 1996 Hague Child Protection Convention, which has entered into force for all EU Member States. This Convention – also when applied directly and not as referred to by Art. 42 Italian PIL Act[102] – is in most cases applied without ascertaining whether the other State involved in the case at issue is indeed a contracting party thereto, thus showing a general unfamiliarity by national courts with the functioning of that Convention.

From the cases collected in the EUFams II Case Law Database, it follows that there is no consistency in the reference to this conflict-of-laws regime. In one case only, Art. 15 of the 1996 Hague Child Protection is mentioned[103], in one case Art. 15 et seq.[104], in two cases Art. 16-17[105], and in two other cases only Art. 17[106]. Reference to Art. 16 of the 1996 Hague Child Protection is generally surprising because the latter provision only governs the applicable law to the attribution or extinction of parental responsibility whenever a judicial or administrative authority is not involved. However, the actual outcome of the decisions remained unaffected by the different legal bases, given that national courts have in any case applied the Italian law.

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[101] Trib Novara, 16 January 2019, ITF20190116; in the case at stake, Art. 3 (a)-(b) Maintenance Regulation was not applicable because the maintenance creditor was habitually resident in Germany and the proceeding was started by a joint application of the spouses.

[102] Art. 42 (1) Italian PIL Act reads as follows: "The Hague Convention of October 5, 1961 on the powers of authorities and the law applicable in respect of the protection of infants rendered effective in Italy by the law of October 24, 1980, No 742 shall, in every case, govern the protection of minors". In three cases that started before the entry into force in Italy of the 1996 Hague Convention (01.01.2016), the courts applied the 1961 Hague Convention as referred to by Art. 42 Italian PIL Act: Trib Parma, 2.08.2018, ITF20180802; Trib Parma, 15.11.2018, ITF20181115a; Trib Velletri, 21.05.2019, ITF20190521.

[103] Trib Parma, 13.10.2017, ITF20171013.

[104] Trib Padova, 25.10.2017, ITF20171025.

[105] Trib Novara, 16.05.2019, ITF20190516a; Trib Belluno, 19.07.2017, ITF20170719.

[106] Trib Torino, 15.02.2019, ITF20190215; Trib Parma, 04.04.2018, ITF20180404.

7. Choice of law agreements under the Rome III Regulation

Choice of law agreements are generally used as a tool to obtain a more rapid and inexpensive divorce. Quite often the spouses, both or either of them foreign nationals, with habitual residence in Italy, not being allowed to directly divorce under Italian law, choose their national laws to get divorced without any previous period of separation.[107]

Most decisions, however, lack any express analysis of the formal and substantial validity requirements of the choice of law agreements concluded under Art. 5 Rome III Regulation. To this extent, in one case, the tribunal affirmed that the determination on the timeliness and validity of choice of law under Art. 5-7 Rome III Regulation may be a difficult issue to solve, thus it is preferable not to leave it to an out-of-court settlement (such as the Italian *convenzione di negoziazione assistita*) or to a mere administrative authorization.[108]

8. Use of European instruments as source of interpretation of national legislation or international conventions

In several cases, the national courts have used uniform European definitions and CJEU-oriented interpretations in order to fill the gap in national legislation or international convention dealing with the same matter.

In a twin judgment[109], the Supreme Court referred to a supranational shared definition of the right of access in relation to grandparents (as interpreted by the CJEU[110]) in order to confirm that Art. 317 bis Italian Civil Code provides the ascending line with an autonomous right of access to their grandchildren, but it is not as unconditional as it is always subject to the best interests of the child.

In another case connected with the Principality of Monaco, the Supreme Court transposed the interpretation given by the CJEU of the notion of habitual residence and the interplay between Art. 8, 10 and 11 thereof (namely provided in Case C v M[111]) to the 1996 Hague Child Protection Convention and the relationship between Art. 5 and 7 thereof.[112]

Similarly, in a case related to the validity of a jurisdictional clause contained in the deed of trusts in favor of Swiss arbitration, the Succession Regulation – albeit inapplicable since the deceased died before the application date thereof – was, however, mentioned by the court to reinforce the conclusion that the dispute fell outside the scope of succession matters also under national law.[113]

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[107] Trib Cuneo, 19.02.2018, ITF20180219 (Albanian law); Trib Firenze, 16.05.2019, ITF20190516 (Moroccan law).
[108] Trib Torino, 01.06.2018, ITF20180601.
[109] Cass, 25.07.2018, No 19779, ITT20180725; Cass, 25.07.2018, No 19780, ITT20180725a.
[110] CJEU, 31.05.2018, C-335/17 (Neli Valcheva v Georgios Babanarakis).
[111] CJEU 09.10.2014, C-376/14 PPU (C v M).
[112] Cass, 13.12.2018, No 32359, ITT20181213.
[113] Cass 12.07.2019, No 18831, ITT20190712.

9. Lack of PIL analysis for each individual claim

A small number of first instance decisions – which indeed represent only an exception[114] – still reveal an insufficient assessment of the PIL issues related to each individual claim that is brought before the court, meaning that jurisdiction and applicable law are determined only with regard to the main claims (generally, matrimonial and/or parental responsibility matters). Nevertheless, it is worth stressing that in most cases factual circumstances were rather linear and undisputed and the decision on the substance of the case remained unaffected by the reference to the wrong legal basis.

There are cases where no PIL analysis is made with regard to custody and maintenance, but the national court extended the conclusions on jurisdiction and/or applicable law reached for legal separation and/or divorce.[115] Similarly, there are cases with no PIL analysis concerning maintenance, both jurisdiction and applicable law, with an extension of the assessment made with regard to parental responsibility.[116] Only in one case, there was no PIL analysis at all.[117]

It is also worth mentioning that in three cases relating to maintenance petitions[118], the national court wrongly applied Art. 5 (2) of Regulation No 44/2001 instead of Maintenance Regulation, already applicable *ratione temporis*.

10. Erroneous application of Italian PIL Act (Law No 218/1995)

The location of the habitual residence of a child in a non-Member State triggers the residual ground of jurisdiction provided in Art. 14 Brussels II bis Regulation that allows the court to refer to its domestic rules, provided that there is no other court within the EU having jurisdiction pursuant to Art. 8-13 Brussels II bis Regulation. In this framework, jurisdiction could be established under Art. 42 Italian PIL Act, which refers to 1961 Hague Convention, or directly under 1996 Hague Child Protection Convention, but not under Art. 37 Italian PIL Act and the exorbitant fora (e.g. nationality) provided therein.[119] In a similar case connected to Switzerland, the Supreme Court correctly assessed this point by making reference to 1996 Hague Child Protection Convention and dismissing jurisdiction for parental responsibility.[120]

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[114] Indeed, the following decisions have assessed – though with some uncertainties – all the PIL issues relevant for the (multi-matter) case: Trib Belluno, 19.07.2017, ITF20170719; Trib Parma, 13.10.2017, ITF20171013; Trib Padova, 25.10.2017, ITF20171025; Trib Parma, 04.04.2018, ITF20180404; Trib Genova, 26.04.2018, ITF20180426; Trib Parma, 23.05.2018, ITF20180523; Trib. Milano, 02.07.2018, ITF20180702; Trib. Novara, 08.11.2018, ITF20181108; Trib Parma, 15.11.2018, ITF20181115a; Trib Milano, 10.01.2019, ITF20190110; Trib Novara, 16.01.2019, ITF20190116; Trib Parma, 06.05.2019, ITF20190506; Trib Novara, 16.05.2019, ITF20190516a; Trib Velletri, 21.05.2019, ITF20190521; Trib Vercelli, 24.07.2019, ITF20190724.

[115] Trib Cuneo, 19 February 2018, ITF20180219; Trib Monza, 21 March 2019, ITF20190321; Trib Monza, 3 July 2019, ITF20190703.

[116] Trib Milano, 11.12.2018, ITF20181211; Trib Rimini, 12.06.2018, ITF20180612; Trib Vicenza, 30.10.2018, ITF20181030; Trib Treviso, 08.01.2019, ITF20190108; Trib Torino, 15.02.2019, ITF20190215 (only concerning applicable law).

[117] Trib Vicenza, 07.03.2018, ITF20180307.

[118] Trib Roma, 02.02.2018, ITF20180202; Trib Parma, 23.05.2018, ITF20180523; Trib Parma, 13.10.2017, ITF20171013.

[119] Trib Novara, 08.11.2018, ITF20181108 (which wrongly applied Art. 37 Italian PIL Act).

[120] Cass, 17.09.2019, No 23100, ITT20190917.

Another issue concerns the determination of applicable law pursuant to Art. 36 bis Italian PIL Act (applicable as of 07.02.2014), which requires the application of Italian law as overriding mandatory rules to some matters (e.g. shared parental responsibility to both parents, maintenance duty of both parents, etc.). This provision, however, is not sufficient to apply Italian law directly and it should never prevent the application of foreign law.[121] It is in fact highly debated in legal scholarship whether Art. 36 bis Italian PIL Act may be applied in cases where the application of Italian law would be in conflict with Hague instruments governing the applicable law for parental responsibility and maintenance (notably 1996 Hague Child Protection Convention and 2007 Hague Maintenance Protocol). In such cases, some authors propose that Italian law may only be relevant under Art. 36 bis Italian PIL Act when the foreign law designated by the Hague instruments is manifestly contrary to public policy.

11. National certificates and the European Certificate of Succession

In a very interesting case (on the interpretation of Art. 32 of Law No 161/2014 and the Royal Decree of 28 March 1929 No 499), a national court was asked to decide on whether the ECS has different characteristics and serves different purposes than national certificates. The court correctly concluded that under Art. 62 (3) Succession Regulation – in line with the CJEU[122] – in the context of cross-border succession the ECS must be granted the same legal effect of national certificate granted by the competent authorities.[123] It follows that a ECS granted by a national notary public in respect of a national deceased may very well justify the registration in Italy of the transfer of inheritance rights in the land register and the possibility of claiming inheritance rights.

12. Hearing of the child

The necessary requirement of the hearing of the child is provided under Art. 12 UN Convention on the Rights of the Child, Art. 6 Strasbourg Convention on the Exercise of Children's Rights and Art. 24 Charter of Fundamental Rights of the EU. The Brussels II bis Recast Regulation expressly endorses the relevance of this requirement in Recitals 39, 53 and 57.

Very interestingly, the Supreme Court annulled a decision because the daughter was not heard on the ground that she had already made declarations on the family situation and on the father's suitability before the judge of the Principality of Monaco. This was not considered sufficient due to the biased environment in which the declarations were made by the Supreme Court, which upheld the plea and referred the case back to the Court of Appeal for the adoption of necessary measures to hear the child.[124]

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[121] Trib Novara, 08.11.2018, ITF20181108 (where however the court applied directly Italian law).
[122] CJEU, 21.06.2018, C-20/17 (Vincent Pierre Oberle).
[123] Trib Trieste, 08.05.2019, ITF20190508.
[124] Cass, 11.06.2019, No 15728, ITT20190611.

G. LUXEMBOURG

I. PRE-SELECTION

Luxembourg is an international hub where, as of January 2018, foreign nationals represented almost half (48%) of the total population.[125] Unsurprisingly, a high number of family law cases before Luxembourgish courts entail a cross-border element. By way of example, we found approx. 600 decisions between January 2017 and June 2019 that concerned Brussels II bis Regulation.

Similarly, many cases that involved other European Regulations on family law and interconnected international instruments were retrieved. It was, therefore, indispensable to select a smaller number of cases for the Database. This selection was based on two main criteria, namely balanced thematic diversity and topicality of the legal issues concerned (e.g. child abduction, religious marriages). In the majority of cases collected, the courts correctly applied the pertinent EU provisions, and no unclear or controversial issue was raised or overlooked. Out of such "unproblematic" cases, it was decided to upload only a few, while emphasizing cases with problematic aspects.

II. SAMPLE DESCRIPTION

In total, 20 cases were selected for the Database: 1 decision of the Magistrate's Court of Luxembourg (*Tribunal de paix de Luxembourg*), 15 decisions of District Courts (*Tribunaux d'arrondissement*), 1 decision of the Court of Appeal (*Cour d'appel*), and 3 decisions of the Court of Cassation (*Cour de cassation*).

III. MAIN ISSUES

1. Assessment of international jurisdiction and applicable law

As a general remark, the overall awareness and familiarity with regard to European instruments and interconnected international instruments on cross-border family law seem to be relatively high among Luxembourgish judges. However, Luxembourgish courts do not always assess, *ex officio*, their international jurisdiction and the applicable law in cross-border family matters. Court practice varies heavily in this regard. By way of example, in a recent decision[126], the District Court of Luxembourg did not explicitly assess its international jurisdiction under the Brussels II bis Regulation. However, the defendant did not contest the jurisdiction, and both spouses were habitually resident in Luxembourg and showed no intent to seize the courts of another Member State. Even if the court's jurisdiction was established in any event, according to Art. 3 (1) (a) 1st indent Brussels II bis Regulation (common habitual residence in the forum), this practice is not in line with Art. 17 Brussels II bis Regulation.

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[125] In the capital city of Luxembourg, the percentage of foreign nationals is even higher (69%); cf. http://luxembourg.public.lu/de/le-grand-duche-se-presente/population/index.html.

[126] Tribunal d'arrondissement de Luxembourg, 20.12.2018, 506/2018, LUF201801220.

In other cases, the court assessed its jurisdiction *ex officio* but wrongly applied specific rules of the Brussels II bis Regulation. The District Court of Luxembourg[127] was seized with a petition for divorce by a Luxembourgish national who moved back to Luxembourg with her child, while her husband (Egyptian national) stayed in Dubai. The wife seized the Luxembourgish court only one month after moving back to Luxembourg so that none of the jurisdiction grounds of Art. 3 Brussels II bis Regulation was applicable. The court correctly held that the international jurisdiction could not be derived from Art. 3 Brussels II bis Regulation. However, the court overlooked the fact that in such a case, the Brussels II bis Regulation allows the application of national jurisdiction rules (Art. 14 Brussels II bis Regulation). Instead, it held that, as the defendant did not appear before court "to object the lack of jurisdiction", the court could not deny its jurisdiction *ex officio*. This assumption is certainly wrong if another Member State would have had jurisdiction (cf. Art. 17 Brussels II bis Regulation), which was, however, not the case. Instead, the court would have been competent to hear the divorce case according to the domestic exorbitant jurisdiction rule in Art. 14 Luxembourgish Civil Code, which grants a forum for Luxembourgish nationals vis-à-vis foreigners who do not reside in Luxembourgish territory.

Again, other judgements highlight the courts' awareness of the *ex officio*-assessment. Recently, the District Court of Luxembourg[128] rendered a very didactical judgement where it approved a divorce agreement based on the spouses' consent. Here, the court explicitly referred to Art. 17 Brussels II bis Regulation and its obligation to assess the international jurisdiction *ex officio*. Consequently, the court affirmed its jurisdiction based on the parties' habitual residence in the forum State (Art. 3 (1) (a) 1st indent Brussels II bis Regulation) and acknowledged the parties' choice of Luxembourgish law as the applicable law under Art. 5 (1) (a) Rome III Regulation. The drafting of the divorce agreement, and notably its choice of law-clause, gives the impression that the spouses sought specific legal advice on the legal implications of the cross-border element of their divorce. This is undoubtedly a didactical practice where parties make informed choices with the assistance of their lawyers.

2. Interplay between EU instruments, international instruments, and domestic law

Several cases highlight the complex interaction between the different legal sources on jurisdiction, applicable law, and recognition and enforcement of foreign judgements in cross-border family matters. A recent District Court decision[129] is a very illustrative example of this interplay and, at the same time, highlights the Luxembourgish courts' awareness and familiarity with this fragmented legal framework. The case concerned divorce proceedings between Romanian nationals residing, respectively, in Luxembourg (husband) and Germany (wife). This case is also a typical example of how divorce proceedings and issues of parental responsibility, matrimonial property regime, and child maintenance are connected in practice.

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[127] Tribunal d'arrondissement de Luxembourg, 07.01.2016, 3/2016, LUF20160107.

[128] Tribunal d'arrondissement de Luxembourg, 14.12.2018, 64/2018, LUF20181214.

[129] Tribunal d'arrondissement de Luxembourg, 22.01.2015, 40/2015, LUF20150122a.

The court correctly applied the relevant European regulations and international instruments, except for the Maintenance Regulation, which was not mentioned at all.[130] It should be noted that the Grand Duchy of Luxembourg is one of three states that are parties to the 1978 Hague Matrimonial Property Convention, which was applied in the case at hand.

At the same time, the mentioned case highlights the deficiency of the European framework on applicable law in family matters when it comes to the different connecting factors. The connecting factors applicable in the case at hand were not aligned, thus leading to *dépeçage*: The court had to apply three different national laws (German, Romanian, and Luxembourgish law). Unfortunately, the Matrimonial Property Regime Regulation, which was not applicable *rationae temporis* in the case at hand, will not change this situation. Like the 1978 Hague Matrimonial Property Convention, the primary connecting factor is the law of the State of the spouses' first common habitual residence (Art. 26 (1) (a) Matrimonial Property Regulation), which is not in line with the connecting factors of other European PIL rules in family matters.

Similarly, in a complex case involving a Russian national (wife) and a US national (husband) who had their first common habitual residence in Luxembourg, the Luxembourgish court[131] had to assess various cross-border elements and PIL issues. The court was seized by the husband with a petition for divorce and thoroughly analysed all pertinent grounds of jurisdiction, especially Art. 3, 8-14 Brussels II bis Regulation. The complexity of the case resulted not only from the combination of domestic law (national PIL), international instruments (1996 Hague Child Protection Convention), and European legal sources but also from the existence of parallel proceedings in Russia.[132]

3. Best interests of the child

A typical pattern that arises in cases concerning children moving from one country to another with one of their parents is the judicial assessment of the 'best interests of the child'. In one case,[133] the Luxembourgish authorities were seized with a return order from Portugal concerning two children who had been abducted to Luxembourg by their mother. The Luxembourgish court of first instance issued a return order but decided not to hear the children in light of Art. 11 (2) Brussels II bis Regulation, as they did not have the necessary level of maturity and independent discernment to create an own view about their return to Portugal. The mother's challenge to this assessment was unsuccessful: The Court of Cassation confirmed that the lower court stayed within its margin of appreciation and sufficiently motivated its decision on whether to hear the children.

Similarly, the Court of Cassation referred to the discretionary power of the court in a case where the mother took the child with her from Luxembourg to France.[134] The

[130] However, the court had, in any event, jurisdiction pursuant to Art. 3 (b) of the Maintenance Regulation (country of residence of the creditor).

[131] Tribunal d'arrondissement de Luxembourg, 29.01.2013, 47/2013, LUF20130129.

[132] Cf. G.III.4.

[133] Cour de cassation, 09.02.2017, 12/2017, LUT20170209.

[134] Cour de cassation, 02.06.2016, 56/16, LUT20160602.

father seized the Luxembourgish authorities without a request for returning the child, but with an application on the substance, i.e. on custody and access rights, which entailed the determination of the children's domicile. The decision thereupon rendered by the Luxembourgish court fixed the child's residence at the mother's place. The father challenged this decision, arguing, inter alia, a violation of the right to a fair trial (Art. 6 ECHR), as the court had not requested a social worker's report on the well-being of the child in both Luxembourg and France. Again, the Court of Cassation held that the lower courts had sufficiently justified their decision on not requesting an additional expert opinion so that the court had adequately taken into account the child's best interests.

These decisions of the Court of Cassation are particularly noteworthy, as their remarkably brief reasoning mainly refers to the lower court's discretion. By strengthening the margin of appreciation of the courts seized in such cases, one could argue, on the one hand, that the "abandoned" parent has little to no chance to challenge the assessment of the "best interests of the child". On the other hand, this approach meets the aim of child return applications, namely, to order the quick return of the child. In addition, it avoids lengthy proceedings from which the abducting parent could benefit.

This case law will not be majorly affected by Brussels II bis Recast Regulation, notably concerning the hearing of the child. Art. 21 Brussels II bis Recast Regulation only provides for general guidelines on the hearing of the child: It does not refer to a strict age limit and mainly underlines the child's maturity and capability of discernment, as has already been done by the Luxembourgish case law. Furthermore, the Recast does not provide for stricter guidelines on the notion of the "best interests of the child", which, therefore, remains an issue of substantive assessment of the facts in each specific case.

4. Particularities and difficulties arising from cases involving third country nationals

The collected case law highlights specific factual and legal issues that arise from the involvement of third country nationals. One of these issues concerns the public policy exception. The District Court of Luxembourg has applied this mechanism in two similar judgements relating to religious divorce law. In a very particular decision,[135] the husband based his petition for divorce on Moroccan law, which, according to the applicable domestic (the Rome III Regulation was not yet in force) PIL, was the law of the State of the spouses' common nationality. However, following a motion of the husband (!) during the proceedings, the court set aside the applicable Moroccan law in light of public policy reasons (constitutional principle of the equality of sexes), thus pronouncing the divorce under Luxembourgish law. The decision was given by default, as the wife did not appear before court.

In a similar decision rendered under the Rome III Regulation,[136] the applicable divorce law by default was, again, the law of the State of the spouses' common nationality, namely Iranian law. Upon the wife's request, the court applied the public policy

[135] Tribunal d'arrondissement de Luxembourg, 06.12.2007, 359/2007, LUF20071206.

[136] Tribunal d'arrondissement de Luxembourg, 09.11.2017, 414/2017, LUF20171109.

exception and set aside the Iranian divorce provisions that discriminated against the wife. The husband did not contest this intervention.

Both cases highlight an interesting approach to the practical use of the public policy exception. The claimants clearly envisaged this mechanism to have the *lex fori* applied for reasons of procedural efficiency, i.e. to obtain a quick divorce, whereas the application of foreign law could have led to more lengthy proceedings. This approach might seem unusual, as the defendant usually invokes the public policy-exception for *substantive* reasons, or the court itself applies this mechanism *ex officio*[137]. However, in the second case mentioned above, the court did not refer to the particular public policy exception under Art. 10 Rome III Regulation to set aside the discriminatory divorce law (the famous Sahyouni-decision of CJEU[138] was rendered a month later).

Other cases involving non-European nationals are far more sensitive than the cases mentioned above, notably when they concern refugees and the assessment of their habitual residence. In one case of 2016,[139] an Iraqi couple fled to Luxembourg, where they applied for international protection. Three months after their arrival, the wife filed a petition for divorce before the District Court of Luxembourg. The husband challenged its jurisdiction, claiming that the spouses were not habitually resident in Luxembourg. Eventually, the court determined (rather superficially) that the wife's habitual residence was in Luxembourg. It argued that the application for international protection expressed the spouses' intent to stay in Luxembourg on a regular and permanent basis, even though the asylum proceedings were still pending. Therefore, the court primarily referred to the *animus manendi*.

The question of whether and to what extent subjective circumstances shall be taken into account for the assessment of the habitual residence is moot. However, the approach to grant the wife access to justice in Luxembourg in the case mentioned above might have served to protect her: Her husband had allegedly mistreated her, and if none of the jurisdictional grounds of Art. 3 Brussels II bis Regulation was applicable, no national jurisdiction rule (via Art. 7 Brussels II bis Regulation) could have seemingly established the Luxembourgish courts' jurisdiction.

A problematic procedural issue involving third State nationals concerns the situation of parallel proceedings with third states and the 'rush to the courts'. The Brussels II bis Regulation does not address this situation, and the Brussels II bis Recast Regulation will neither bring any changes. The following decisions highlight divergent approaches to such cases.

In a divorce case involving a French wife and a Serbian-French husband,[140] the husband seized a Serbian court only one month after the wife had started divorce proceedings in Luxembourg. While the Luxembourgish proceeding was still pending,

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[137] See, for instance, Tribunal d'arrondissement de Luxembourg, 07.01.2016, 3/2016, LUF20160107: The wife based her claims for divorce on the *lex fori*. The court, however, determined that Arabian divorce was applicable by default, but its application had to be set aside in favour of the *lex fori* for reasons of public policy.

[138] CJEU, 20.12.2017, C-372/16 (Sahyouni).

[139] Tribunal d'arrondissement de Luxembourg, 13.10.2016, 397/2016, LUF20161013.

[140] Tribunal d'arrondissement de Luxembourg, 22.01.2015, 49/2015, LUF20150122.

the Serbian court rendered a judgement, which was registered in France in the civil status records upon the husband's request. This registration was considered to be binding by the Luxembourgish court, which dismissed the wife's action for divorce in light of *res iudicata*. However, the Luxembourgish court did not explicitly refer to the legal basis for granting recognition of the French "recognition", i.e. the registration of the Serbian divorce judgement in France. It is, therefore, unclear whether the court applied the *lex fori* for this matter, or if it overlooked the fact that the rules on automatic recognition of Art. 21 et seq. Brussels II bis Regulation do not apply to judgements from non-EU Member States.

Lis pendens in relation to a third State was also a central issue in a case before the District Court of Luxembourg,[141] where the court correctly refrained from applying the Brussels II bis Regulation to a judgement from a third State (Russia) and solved the issue via domestic law and international rules. In this case, the husband (US national) and wife (Russian national) had their first habitual residence in Luxembourg. When the husband seized the Luxembourgish court with a petition for divorce under Art. 3 (1) (a) 2nd indent Brussels II bis Regulation, the wife and children had already moved back to Russia. She claimed that she had seized a court in Moscow one day after the husband and that this court had already rendered a judgement on the divorce and custody while the Luxembourgish proceedings were still pending. With regard to divorce, the Luxembourgish court applied the *lex fori* and, ultimately, denied the recognition of the Russian decision, as it did not comply with the domestic jurisdiction rules ("mirror-principle"). Concerning parental responsibility, the court correctly held that, according to the Hague Child Protection Convention (Russia applies the Convention since 2012), no refusal ground was pertinent *in casu*. Consequently, the Russian judgement had to be recognized in Luxembourg.

This case is also a typical example of *perpetuatio fori*: During the proceedings before the Luxembourgish court, which lasted over seven years, the husband moved back to the US, so that none of the parties was habitually resident in the forum when the Luxembourgish court rendered its judgement. The only connecting factor was the former place of the family's habitual residence. The question remains whether and to what extent the Luxembourgish judgment on divorce may be recognized in the parties' countries of residence (USA, Russia), to avoid "limping" legal situations.

[141] Tribunal d'arrondissement de Luxembourg, 29.01.2013, 47/2013, LUF20130129.

Carmen Azcárraga Monzonís/José Juan Castelló Pastor/Pablo Quinzá Redondo

H. SPAIN

I. PRE-SELECTION

The cases on the Succession Regulation, Maintenance Regulation, and Brussels II bis Regulation provided by the Spanish team in the Database were selected in two phases. In the first phase, two main criteria were applied in the preliminary search:

1. the period of time covered by EUFams II (2016 to 2019) and

2. the use of key words in the two databases which were used for this task (Aranzadi Westlaw and Tirant online). 71 decisions, both administrative and judicial, were found. In a second phase, all cases were carefully read and a number of them were finally selected (54) for a subsequent analysis taking into account their contribution to practice and the objectives of the project. Some of the listed cases are not governed by the Succession Regulation (either because they refer to domestic cases or due to the prior death of the deceased) but they have been kept in the analysis since they include arguments based on it which have been considered relevant. The same holds true for the Property Regime Regulation, since in all cases found, this instrument was not yet applicable.

II. SAMPLE DESCRIPTION

The cases (54 in total) collected relate to the following matters:

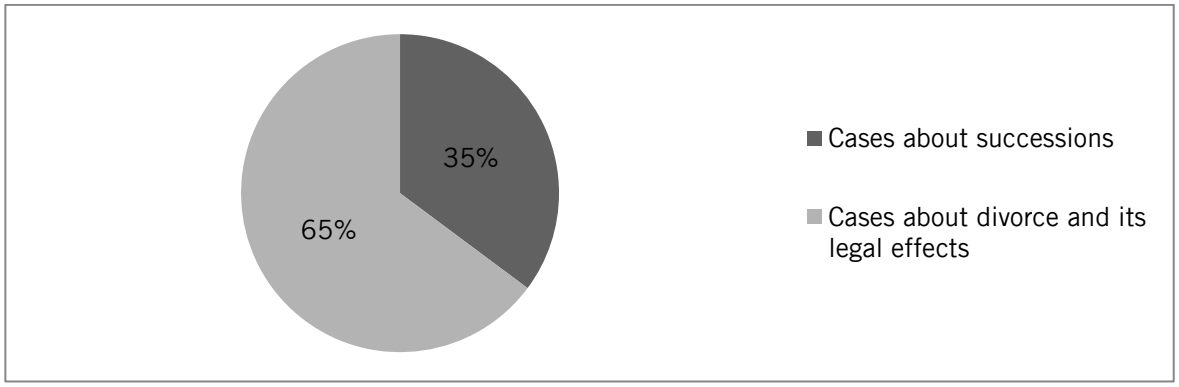

Figure 10: Spanish cases in the EUFams II Database (n=54)

– Cases about successions: 19. Number of cases before each instance: 11 before *Dirección General de los Registros y del Notariado* (General Direction for Registers and Notaries); 5 before different *Audiencias Provinciales* (appeal courts of regional scope); 1 before *Tribunal Superior de Justicia del País Vasco* (third instance; High court of Basque Country); 2 before *Tribunal Supremo* (Supreme Court).
– Cases about divorce and its legal effects (child abduction, maintenance obligation and/or matrimonial property regimes): 35. Number of cases before each instance: 33 before different *Audiencias Provinciales* (appeal courts of regional scope); 2 before *Tribunal Superior de Justicia de Cataluña* (third instance; High court of Catalonia).

III. MAIN ISSUES

1. Temporal scope of the Succession Regulation

The fact that the Succession Regulation entered into force recently (as of 17.08.2015, cf. Art. 84) entails that one of the relevant aspects dealt with by Spanish authorities refers to its temporal scope of application – including its transitional rules (Art. 83). While at the beginning some doubts may have arisen in practice, within the period of time covered by this research, Spanish authorities have properly applied this aspect of the new instrument. In some cases, the rules on the temporal scope are referred to in order to discard its application; in others they are alleged with the aim of confirming it (death prior or on/after 17.08.2015, respectively)[142].

2. European Certificate of Succession

Spanish authorities refer to the ECS in many decisions, both administrative and judicial. The competence for issuing this certificate as well as its nature and effects seem to be clear[143]. The Succession Regulation is also sometimes mentioned – regardless of its actual applicability to the particular case – when confirming the succession titles admitted by Spanish law (Art. 14 Ley Hipotecaria); among them, the ECS[144].

3. Relationship of the Succession Regulation with bilateral conventions

The Succession Regulation prevails over existing international conventions concluded exclusively between two or more Member States. Spanish courts have correctly applied this rule regarding the Convention on successions between Greece and Spain of 1919, which was actually applicable in the decision raised[145] at the time of the death of the deceased (2008) but cannot be applied anymore since the application of the Succession Regulation (Art. 72 (2)).

4. Divorce and its legal effects – application or non-application of Islamic Law

Once the Rome III Regulation leads to the application of the law of an Islamic country, its application would depend on whether the particular provisions governing the case violate public policy. For example, in a case where Jordanian law was applicable to the matrimonial property regime, the separation regime provided in this State does not violate per se the Spanish public policy (i.e. it does not discriminate against women) and consequently, this foreign law will be applied in Spain. By contrast, in a case where the recognition and enforcement of a decision ruled by a Moroccan judge was dealt with, the request was rejected because some of the economic rights of the wife

142 Audiencia Provincial Barcelona, 29.11.2018, 364/2018, ESS20181129; DGRN, 02.03.2018, ESA20180302DGRN, 04.07.2016, ESA20160704; DGRN, 10.04.2017, ESA20170410; DGRN, 11.01.2017, ESA20170111; DGRN, 14.02.2019, ESA20190214; DGRN, 15.06.2016, ESA20160615; Tribunal Supremo, 05.12.2018, 685/2018, EST20181205.

143 DGRN, 04.01.2019, ESA20190104; DGRN, 28.07.2016, ESA20160728.

144 DGRN, 21.03.2016, ESA20160321; Audiencia Provincial Barcelona, 07.02.2018, 59/2018, ESS20180207; Audiencia Provincial Valencia, 18.10.2016, 323/2016, ESS20161018.

145 Audiencia Provincial Baleares, 04.05.2016, 131/2016, ESS20160504.

who filed the divorce were denied on gender grounds and this was considered to violate Spanish public policy[146].

5. Divorce and its legal effects – Catalan law applicable

One of the main aspects that can be highlighted regarding the analyzed decisions on maintenance (and also parental responsibility) relates to the determination of the applicable law, especially when Catalan law is applicable. In this sense, once the jurisdiction of Spanish courts has been established, the legal operator applies the choice-of-aw rule and, depending on the connecting factor, it can lead to Catalan law which is usually applied when the parties have their habitual residence in Catalonia (since this regional Law covers certain substantive matters, such as aspects of maintenance rights, minors, guardianship, family home, compensatory benefit, etc.) [147].

[146] Audiencia Provincial Barcelona, 26.02.2019, 135/2019, ESS20190226.

[147] Audiencia Provincial Barcelona, 18.05.2017, 473/2017, ESS20170518; Audiencia Provincial Barcelona, 29.01.2018, 51/2018, ESS20180129; Audiencia Provincial Barcelona, 04.04.2018, 283/2018, ESS20180404; Audiencia Provincial Barcelona, 12.09.2018, 580/2018, ESS20180912; Audiencia Provincial Barcelona, 25.09.2018, 618/2018, ESS20180925.

Lina Rönndahl/Michael Bogdan/Ulf Maunsbach

I. SWEDEN

I. PRE-SELECTION

Only published precedents from the second instance (Court of Appeals) and the highest instance, both the Supreme Court and the Supreme Administrative Court, were selected.

II. SAMPLE DESCRIPTION

In total, there are only 9 relevant published cases, of which 3 are from the second instance (Svea Court of Appeals, *Svea hovrätt*) and 6 are from the highest instance, either the Supreme Court (*Högsta domstolen*) or the Supreme Administrative Court (*Högsta förvaltningsdomstolen*).

Given the limited amount of Swedish case law, it was decided to present all cases in this report.

III. MAIN ISSUES

1. Marriage

In one case,[148] the Supreme Court found that there was no Swedish jurisdiction to deal with a divorce application filed by a Swedish citizen living in France against a Cuban citizen living in Cuba. This decision was based on a preliminary ruling of the CJEU[149], which had made it clear that Art. 6-7 Brussels II bis Regulation were to be interpreted as meaning that even though the defendant is neither domiciled nor is a national of a Member State, the national court's (*in casu* Sweden's) national jurisdictional grounds for divorce must not be used, if the court of another Member State (*in casu* France) has jurisdiction under Art. 3 Brussels II bis Regulation. In the present case, French jurisdiction under Art. 3 (1) (a) Brussels II bis Regulation could be based on the applicant's French residence for at least one year or, alternatively, on the couple's last joint residence with the applicant's continued residence in France. Presumably this case ought to be defined as good practice, as it is in compliance with European law and CJEU-practice.

In another case,[150] a Swedish court of appeal held that pursuant to autonomous Swedish jurisdictional rules there was Swedish jurisdiction to deal with a divorce petition filed by a Philippines national with habitual residence in Sweden against her husband living in the Philippines. This case was criticized. It is submitted that relying on autonomous Swedish jurisdictional rules was incorrect, as Swedish jurisdiction followed rather from Art. 3 (1) Brussels II bis Regulation (cf. Art. 7 (1) Brussels II bis Regulation). As regards the outcome in this case, the practical result, i.e. the fact that a Swedish court had jurisdiction, would have been the same. However, the fact that it can be argued that the legal basis for jurisdiction should have been the Brussels II bis Regulation is somewhat worrying. This may support the presumption that some

[148] Högsta domstolen, 28.01.2008, NJA 2008 p. 71, SET20080128

[149] CJEU, 29.11.2007, C-68/07 (Sundelind Lopez v Lopez Lizazo).

[150] Svea hovrätt, 14.06.2013, RH 2013:46, SES20130614

Swedish lawyers are still not familiar with European law in this field. This assumption is supported by the findings of the Empirical Study.[151]

2. Parental responsibility

In a Swedish appeal case,[152] the court agreed, without providing any justification of its own, with the court of first instance that a child abducted from Finland to Sweden had to be returned in accordance with Swedish legislation implementing the 1980 Hague Child Abduction Convention. In addition to that legislation, the court of first instance referred also to Art. 11 (4) Brussels II bis Regulation, stipulating that the return of abducted children must not be refused if it is proved that appropriate measures have been taken to ensure the child's protection after the return. This case upholds the perception that child abductions cases should be handled within the jurisdiction of courts where the child was domiciled before the abduction. The case is fully in-line with the intentions of the applicable rules.

The Supreme Administrative Court's ruling[153] did not deal with PIL in a narrow sense, but rather with social (public welfare) law. The issue in the case was whether there was Swedish jurisdiction to decide on the taking into public care, pursuant to Swedish welfare legislation, of children in a problematic situation when the child in question resided abroad. Some criticism was put forward. The Court answered the question on the basis of autonomous Swedish law, which was wrong in view of the subsequent CJEU judgment in the case of C[154], where the CJEU, through an autonomous Community interpretation of the concept of "civil matters" in Art. 1 (1) Brussels II bis Regulation, concluded that the Regulation applied to the taking of children into public care by Swedish authorities, despite the fact that such measures are in Sweden perceived as being of a public-law nature. Considering the criticism, this ruling may be defined as bad practice. We would suggest, however, that the case reveals that there still exists uncertainty as regards issues of qualification in the intersection between public and private law. Clarifications from the CJEU in this regard, in the case of C and in subsequent practice, will likely improve the situation.

In another case,[155] a Swedish court of appeal dealt with a child that had been abducted to Sweden, but did not discuss that child's return because no application for such return had been made by the deprived parent in Greece. The question raised concerned rather whether Art. 10 Brussels II bis Regulation did not hinder Swedish courts to rule, against the objections of the deprived parent, on the abducting parent's petition for custody. The court of appeal affirmed the decision of the court of first instance, which noted that the child had been residing in Sweden for more than a year after the deprived parent had become aware of the child's whereabouts (Art. 10 (b) Brussels II bis Regulation). Therefore, the Swedish court assumed jurisdiction.

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[151] Cf. Lobach/Rapp, An Empirical Study on European Family and Succession Law, *passim*.

[152] Svea hovrätt, 21.09.2006, RH 2006:60, SES20060921

[153] Regeringsrätten (the earlier designation of Högsta Förvaltningsrätten), 20.06.2006, RÅ 2006 ref. 36, SET20060620

[154] CJEU, 27.11.2007, C-435/06 (C).

[155] Svea hovrätt, 15.06.2010, RH 2010:85, SES20100615

This ruling – in favor of jurisdiction in the country to which the child was abducted – illustrated how problematic child abduction cases are.

In a Supreme Court decision,[156] the habitual residence of a child under Art. 8 Brussels II bis Regulation, which makes such residence the main basis of jurisdiction in matters of parental responsibility, had to be determined. The case concerned Swedish jurisdiction to decide on a custody dispute regarding a child that had moved to Indonesia together with its mother who was its sole custodian at the time. The Court noted that Art. 8 Brussels II bis Regulation was applicable even though the case had no connection with any Member State other than Sweden. It referred to the reasoning of the CJEU in cases A[157] and Mercredi[158] and concluded that despite the short time elapsed since the move, the child could no longer be considered to have its habitual residence in Sweden. The court relied on the fact that the mother was entitled to decide where the child would live and that circumstances such as the enrolling of the child in an Indonesian school showed that she intended to establish herself and for the foreseeable future have the center of her interests there. Since no other Member State had jurisdiction under the Brussels II bis Regulation, Swedish jurisdiction had pursuant to Art. 14 Brussels II bis Regulation to be determined in accordance with Swedish jurisdictional rules, but these were based on the child's habitual residence as well. The Court confirmed that the Swedish concept of habitual residence corresponds in principle to that of European law. The father's petition for custody was thus dismissed in lack of Swedish jurisdiction. In that regard, it is good practice in line with prior case law both from Swedish court and the CJEU.

A Supreme Court decision[159] dealt with the same parties. As described above, the mother, who was the sole custodian, had lawfully moved to Indonesia together with the child. The father, living in Sweden, was granted certain rights of access by a Swedish court and petitioned the court for the enforcement of these rights by an injunction under the threat of a fine. The mother objected and claimed that there was no Swedish enforcement jurisdiction. While the subordinate courts dismissed the father's petition, the Supreme Court came to an opposite decision. It pointed out that Swedish enforcement jurisdiction does not quite coincide with Swedish adjudication jurisdiction and that international law does not prohibit ordering a parent who has moved abroad to respect the other parent's access rights. In view of the child's need for contact with both parents, the main principle must be that there is Swedish competence when it comes to enforcing access rights granted by a Swedish decision. An injunction can constitute an effective means of pressure even if the custodian lives abroad, provided he or she has retained connections with Sweden. Since the mother in the present case did not completely lack connection with Sweden, the court held that there was Swedish jurisdiction to rule on the father's enforcement application. It is worth noting that the Court spoke merely of enforcement of Swedish decisions, but it is submitted that the same applies to decisions rendered in the other EU Member

[156] Högsta domstolen, 05.07.2011, NJA 2011 p. 499, SET20110705

[157] CJEU, 02.04.2009, C-523/07 (A).

[158] CJEU, 22.12.2010, C-497/10 (Mercredi).

[159] Högsta domstolen, 05.07.2011, NJA 2011 p. 507, SET20110705a

States, because Art. 47 (2) Brussels II bis Regulation stipulates that such decisions are to be enforced under the same conditions as if they had been issued in the executing Member State. This case is interesting as it emphasizes that enforcement jurisdiction is different from jurisdiction to adjudicate. This might be obvious for a private international law scholar – two different competences that are supposed to fulfill different legal purposes – but it is still promising to note that this awareness is supported by the Supreme Court. In this regard, this case is insightful.

In another Supreme Court case,[160] a father residing in the Czech Republic demanded that his children, which their mother had brought from the Czech Republic to Sweden and detained there, must be returned to the Czech Republic in accordance with the 1980 Hague Child Abduction Convention and the Brussels II bis Regulation. A return order presupposed that the children were resident in the Czech Republic at the time of abduction and that the abduction was contrary to the father's rights under Czech law. The court of appeal stated that the children were habitually resident in the Czech Republic and that according to Czech law, the parents had joint decision rights, making the one-sided move of the children to Sweden by their mother illegal. The Supreme Court agreed in principle with these conclusions but rejected, nevertheless, the father's demands. During the proceedings in the Swedish Supreme Court, the mother procured a Czech court's decision whereby she was granted an interim right to stay with the children in Sweden. Despite the fact that the Czech ruling was merely provisional and not final, the Supreme Court regarded it as equal to such ex-post approval of the abduction which can be taken into account in accordance with Art. 13 (a) of 1980 Hague Child Abduction Convention. Once again, we have a case in favor of jurisdiction in the country to which the child was abducted that confirms the problematic nature of child abduction cases. Typically, in abduction cases, courts have to find reasonable solutions in a factual situation that is highly contrarious. What may be detected is that there are needs to support national court system and international collaboration it this field so that child abductions cases can be handled with even more meticulousness.

3. Maintenance

In a final case,[161] the application for a declaration of enforceability of a Polish judgment was rejected, since the defendant in the Polish proceedings was not properly served and consequently did not have a real chance to defend himself. It was not enough for the conditions for notifying the judiciary after repeated service attempts according to Polish law. The Polish judgment was also covered by Brussels I Regulation, but enforceability was refused for the same reasons under Art. 34 (2) of that Regulation. This case confirms that questions regarding enforcement has its own characteristics and that the right to a fair trial is a prevailing interest in PIL.

IV. CONCLUDING COMMENTS

As is indicated above, there is a limited number of Swedish cases. Still it is possible to draw some cautious conclusions. Swedish courts are being more and more aware of

[160] Högsta domstolen, 27.04.2012, NJA 2012 p. 269, SET20120427

[161] Högsta domstolen, 11.07.2012, NJA 2012 N20, SET20120711

the implications of European law and tend to comply with CJEU-practice. It is also promising to note that the few cases that are actually decided are usually thoroughly argued, with an insightful knowledge of PIL.

The important implications of the cases presented would be that Swedish courts and the Swedish legal system move forward – in a rather slow pace – with promising awareness of the growing complexity of PIL.

J. COMPARATIVE ANALYSIS

I. GENERAL REMARKS

At the outset, it should be noted that some of the partners predominantly focused on problematic and pathological cases while refraining from a submission of straight forward cases. Therefore, the findings of this Report cannot support the proposition that courts, in the majority of cases, struggle with or more often than not wrongly apply the instruments of European family and succession law. Rather, the Report provides insights into particularly problematic cases and solutions adopted by the courts, may they be considered a good or a bad practice.

This Comparative Analysis will address some of the most prominent issues of the current legal framework as they have surfaced in the national reports on case law as well as over the course of the EUFams II-project.

II. SCOPE OF APPLICATION

1. Unitary application to main and annexing matters

One of the most general issues which can be observed in the case law of virtually all Member States covered is the tendency of courts to consider jurisdiction and applicable law in a unitary manner. As a typical example, courts dealing with divorce proceedings, often decide on annex matters such as parental responsibility and/or maintenance in the same procedure. In fact, in 57 % of all divorce cases, annex matters are accordingly dealt with.[162] After establishing their jurisdiction and the applicable law some courts tend to refrain from separately assessing jurisdiction and applicable for these annexing subject matters (cf. E.III.1.b), F.III.9.). This practice may be indicative of a lack of familiarity with the methodology of PIL. While such a course of action may not necessarily affect material outcomes, particularly when the instruments applicable to the annex matters employ the same connecting factors for jurisdiction and applicable law as the instruments applicable to the main matter, it may be a potential source for incorrect decisions. These observations are in line with the Empirical Study conducted at an earlier stage of the project.[163]

2. Difficulties of demarcation

Courts repeatedly experienced difficulties regarding the demarcation between EU regulations, Hague conventions and national PIL. A particularly notable example is the interplay between the Brussels II bis Regulation and the 1996 Hague Child Protection Convention in matters relating to parental responsible and/or protection measures which inter alia was observed in Croatia, Italy and Greece (B.III.2., F.III.1., E.III.1.b)). In the defense of the courts, it has to be noted that the interplay amongst these instruments and with national PIL is of a particular complexity.

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[162] Of the 468 cases dealing with divorce as main matter, 269 cases involved annex matters while only 199 cases dealt with divorce exclusively.

[163] Cf. Lobach/Rapp, An Empirical Study on European Family and Succession Law, 25.

Another problematic issue regarding demarcation concerns persons over 18 which are still considered minors under the law of their nationality (D.III.2.). This issue pertains to third country nationals. For these cases, it is unclear whether the Brussels II bis Regulation applies as it does not contain a definition of the term "child". On the contrary, the 1996 Hague Child Protection Convention applies to any person under 18 (Art. 2) while the 2000 Hague Adult Protection Convention applies to persons over 18 years (Art. 2 (1)) and therefore draws a clear line of demarcation. The Brussels II bis Recast Regulation will accordingly incorporate an autonomous definition of "child" in line with the Hague framework (Art. 2 (2) no. 6).

III. HABITUAL RESIDENCE

1. Ex officio

Courts are required to *ex officio* determine their jurisdiction pursuant to inter alia Art. 17 Brussels II bis Regulation, Art. 10 Maintenance Regulation, Art. 15 Succession Regulation. However, one of the most prominent issues identified over the course of the project has been the tendency of courts to refrain from a determination of grounds for jurisdiction *ex officio*. This issue has been highlighted by the Empirical Study[164] and Exchange Seminars and in this Report has been observed in Croatia, France and Luxembourg (B.III.4., C.III.1., G.III.1.). Courts only engage in an assessment if jurisdiction is contested by one of the parties. In the majority of cases, the connecting factor for jurisdiction is habitual residence, determination of which is largely dependent on the facts provided by the parties. Assuming neither party contests jurisdiction, the court practice of assessing habitual residence *ex officio* allows for indirect party autonomy where direct party autonomy may not be available. For instance, parties can simply claim to be habitually resident within the State of the court, thereby prorogating a court of their choice for divorce proceedings. However, neither the Brussels II bis Regulation nor the Brussels II bis Recast Regulation contain the possibility of choices of court in divorce matters.

2. Notion of habitual residence in practice

The national courts seem to be well acquainted with the CJEU's case law on the notion of habitual residence as is observed for France, Germany and Sweden (C.III.3., D.III.1.b), I.III.2.). This is particularly true when it comes to the assessment of the habitual residence of children. In a string of cases[165], the CJEU has provided various criteria for the determination of habitual residence of very young children. One, if not the most important criteria is essentially the habitual residence of the young child's sole custodian. Consequently, when the sole custodian moves abroad he or she can establish habitual residence for himself/herself and the child almost immediately provided that an intention to stay abroad can be established (*animus manendi*). Similar considerations can come into play when refugees are concerned (cf. G.III.4.).

The issue of *animus manendi* and the relevance or even necessity of subjective elements for the purpose of the establishment of habitual residence is of particular

[164] Lobach/Rapp, An Empirical Study on European Family and Succession Law, 35 et seq.

[165] Cf. in particular CJEU, 22.12.2010, C-497/10 PPU (Mercredi) and CJEU, 28.06.2018, C-512/17 (HR/KO).

importance within the framework of the Succession Regulation. Particularly in Germany (D.III.1.a)), it is discussed whether persons suffering from dementia moving to a nursing home abroad shortly before their death are able to establish habitual residence. Such persons may lack the ability to independently form a legally acknowledgeable will. In these cases, it is feared that custodians, i.e. in most cases their children and potentials heirs, may relocate the person in question to a State with a more favorable succession law. On the other hand, this opinion precludes persons suffering from dementia from ever establishing habitual residence again.

IV. EUROPEAN CERTIFICATE OF SUCCESSION

The content of the ECS is controversial as is evidenced by the Empirical Study[166] and the Exchange Seminars. In this Report, difficulties were observed in Germany and Greece (D.III.7., E.III.3.). In particular, problems arise when the issuing authority merely confirms the status of the heir as to its share to the estate (as a result of universal succession) while another authority abroad, e.g. the land register, requires the ECS to contain information on the heir's legal relationship to a particular asset, e.g. immovable property. For instance, land registrars may refuse the alteration of the land register if the ECS mentions that the heir has a one fourth entitlement to the estate but does not explicitly appoint the heir as the (partial) owner of the immovable property in question.

V. MISCELLANEOUS

Additional issues have only surfaced in single or only few country reports but are believed to be of general interest. Some of these issues will briefly be addressed in this section:

For maintenance obligations, some Member States provide for a system of public maintenance funds which pays maintenance creditors under certain requirements and, usually by way of *cession legis*, collects advances paid to creditors from maintenance debtors (e.g. D.III.3.). Such a recollection may often require litigation between the maintenance fund and the debtor. In such a situation, the question arises whether the maintenance fund, usually located in the State of the creditor, can bring a claim against the debtor living abroad in the forum of the initial maintenance creditor, i.e. conveniently before its own courts. This question is currently pending before the CJEU.[167]

Furthermore, it was observed that some temporary measures between factual separation and actual divorce are not (explicitly) covered by the current framework. While some of the temporary measures, such as interim maintenance payments and provisional measures on parental responsibility, are covered by the Maintenance Regulation (Art. 14) and the Brussels II bis Regulation (Art. 20) respectively, others may fall through the coverage of the regulations and conventions. This particularly concerns the award of the family home during divorce proceedings. One Italian court assumed jurisdiction pursuant to Art. 8 Brussels II bis Regulation when a child was involved, while another applied the Maintenance Regulation as the child had already

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[166] Lobach/Rapp, An Empirical Study on European Family and Succession Law, 30 et seq.

[167] C-540/19, *WV/Landkreis Harburg*.

reached the age of majority, and a third court in a similar case relied on national law (F.III.3). It is questionable whether the issue of the award of the family home falls within the substantive scope of the Brussels II bis Regulation, the Maintenance Regulation or even the Property Regimes Regulations. This matter of great practical importance is currently characterized by legal uncertainty.

The Croatian report addressed the transfer of jurisdiction to a court better suited to deal with the matter pursuant to Art. 15 Brussels II bis Regulation (B.III.3.). The transfer of jurisdiction is a concept rather unknown in most civil law jurisdiction. As a result, courts may be inexperienced in this regard and may require further guidance regarding the practical implementation of the regime of *forum conveniens*, e.g. by implementing legislation but also by guidelines for direct judicial cooperation.

Case law shows that great discrepancies regarding the hearing of the child continue to exist both when it comes to the necessity of the hearing in general and as well as the modality of the hearing and the persons conducting it. For instance, in Croatia, courts often rely heavily on the assessment of social welfare centers (B.III.5.), while in Luxembourg (G.III.3.), courts have a broad discretion in these matters.

Finally, on a more general note, the search for cases showed that the ratio between cross-border and purely domestic cases is particularly low. Only a minor share of family and succession law cases have cross-border elements. Consequently, learning and economy of scale effects only occur to a limited extent. An exception to this general observation is Luxembourg where the majority of the inhabitants are either themselves foreign nationals or maintain relations with foreign nationals (G.I.). As a result, the percentage of cases with cross-borders elements compared to other countries appears to be significantly higher. Unsurprisingly, Luxembourg courts appear to be well versed in international family and succession law.

VI. CONCLUDING REMARKS

The Case Law Database has proven to be an extremely helpful tool to enable legal operators and academics alike to obtain access to otherwise inaccessible foreign case law. Simultaneously, it provides a solid foundation for the discussion on the actual implementation of the instrument of European and international family and succession law throughout the EU. The cases collected enable the verification and falsification of assumptions and theoretical reasoning in academia and practice alike. Moreover, these cases have unveiled practices and challenges which hitherto remained unnoticed and can therefore be taken into consideration during the remainder of the EUFams II project and beyond.