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FACILITATING CROSS-BORDER FAMILY LIFE: TOWARDS A COMMON EUROPEAN UNDERSTANDING REPORT ON THE ITALIAN EXCHANGE SEMINAR

PROF. DR. MARIA CATERINA BARUFFI,
DR. DILETTA DANIELI, DR. CATERINA FRATEA AND
DR. CINZIA PERARO
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SUMMARY

The Italian Exchange Seminar's main findings are related to the following aspects:

- **matrimonial matters:** recognition and enforcement of decision and certificate under Art. 39 Brussels II bis Regulation
- **parental responsibility:** interplay between Brussels II bis Regulation and 1996 Hague Child Protection Convention (also in the light of the Recast Regulation), residual jurisdiction, protection of children in non-judicial separations/divorces
- **child abduction:** interplay between Brussels II bis Regulation and 1980 Hague Child Abduction Convention, Art. 11 Brussels II bis Regulation (also in the light of the Brussels II bis Recast Regulation), enforcement of return orders, cooperation between Central Authorities;
- **maintenance obligations:** circulation and review of maintenance decisions
- **matrimonial property regimes and property consequences of registered partnerships:** provisions on applicable law
- **successions:** interplay with matrimonial property regimes, European Certificate of Succession
- **public documents:** recognition of legal effects relating to the content of the public documents

SUMMARY IN ITALIAN

Durante l'Italian Exchange Seminar, la discussione si è concentrata sui seguenti aspetti:

- **Materia matrimoniale:** riconoscimento ed esecuzione delle decisioni e certificato ex art. 39 del regolamento Bruxelles II bis
- **responsabilità genitoriale:** coordinamento tra il regolamento Bruxelles II bis e la convenzione dell'Aja del 1996 (anche alla luce della rifusione del regolamento), competenza residuale, protezione dei minori in divorzi/separazioni non giudiziali
- **sottrazione internazionale:** coordinamento tra il regolamento Bruxelles II bis e la convenzione dell'Aja del 1980, Art. 11 del regolamento Bruxelles II bis (anche alla luce della rifusione del regolamento), esecuzione degli ordini di ritorno, cooperazione tra le autorità centrali
- **obbligazioni alimentari:** circolazione e modifica delle decisioni
- **regimi patrimoniali tra coniugi e effetti patrimoniali delle unioni registrate:** disposizioni sulla legge applicabile
- **successioni:** coordinamento con il regolamento sui regimi patrimoniali tra coniugi, certificato successorio europeo
- **documenti pubblici:** riconoscimento degli effetti giuridici relativi al contenuto dei documenti pubblici

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A. INTRODUCTION

The Italian Exchange Seminar organized within the EUFams II project was held at the Law Department of the University of Verona. The conference language was Italian.

The project partner in charge of its organization was the University of Verona, which chose to structure the event into two sessions (morning and afternoon), further subdivided into thematic panels (of 45 minutes each). This division into panels allowed a focused discussion on the relevant EU regulations and their interplay with various Hague conventions. Namely, the panels of the morning session dealt with parental responsibility (Brussels II bis Regulation and 1996 Hague Child Protection Convention), child abduction (Brussels II bis Regulation and 1980 Hague Child Abduction Convention) and public documents (Public Documents Regulation); in the afternoon session, the topics of successions (Succession Regulation), matrimonial matters (Brussels II bis Regulation and Rome III Regulation), matrimonial property regimes and patrimonial consequences of registered partnerships (Matrimonial Property Regimes Regulation and Regulation on Property Consequences of Registered Partnerships), maintenance (Maintenance Regulation and 2007 Hague Maintenance Protocol) were addressed.

Each panel was opened by selected speakers called to present some of the most significant issues related to the given topic. The eight speakers were chosen from the categories of legal practitioners, members of the judiciary and civil registrars with a view to favoring a more practice-oriented approach for the subsequent discussion.

The attendees were 51 in total: 28 legal practitioners (lawyers and trainee lawyers), 6 member of the judiciary, 13 academics, 3 civil registrars and one foreign expert. In addition, 9 EUFams II staff members took part in the seminar (besides 4 members from the organizing partner, also 4 members from the University of Milan and one member from the Max Planck Institute Luxembourg). The organizational policy with regard to attendees was by invitation, which the University of Verona, upon coordination with the University of Milan, disseminated through a list of pre-existing contacts from lawyers' associations, members of the judiciary, academia, civil registrars and public officers. The foreign expert (French academic) was selected according to the geographical scope of the EUFams II project, and thus the national perspectives already covered in the other Exchange Seminars, and, as a plus, the ability to speak fluently in Italian.

In the following sections, the main findings are reported and grouped according to the specific EU legal instrument. Comments and opinions expressed by the attendees are referred to under the Chatham House Rules. At the end of the seminar, satisfaction surveys were distributed to the attendees in order to receive their feedback on the event. The outcomes of the satisfaction surveys will also be taken into account, where relevant, in relation to each section.

B. BRUSSELS II BIS REGULATION

During the Italian Exchange Seminar, three different panels were devoted to the Brussels II bis Regulation¹: one panel on matrimonial matters, a second on parental responsibility and a third on child abduction. All panels opened with an introduction delivered respectively by two civil registrars, a public prosecutor and a lawyer, each raising a few practical issues deriving from the peculiar perspective of their own professional background.

In relation to the topics dealt with in these panels, 50 attendees (89,29%) declared in the satisfaction survey to have at least occasionally engaged with divorce, legal separation or marriage annulment in their professional activities, whereas 45 attendees (80,36%) with parental responsibility or child abduction.

The main findings of these panels are summarized in the following subsection.

I. MATRIMONIAL MATTERS

1. Recognition and enforcement of decisions – Certificate concerning judgments in matrimonial matters by virtue of Art. 39 Brussels II bis Regulation

According to Art. 37 Brussels II bis Regulation, a party seeking or contesting recognition or applying for a declaration of enforceability shall produce a copy of the judgment which satisfies the conditions necessary to establish its authenticity and the certificate referred to in Art. 39 Brussels II bis Regulation.

In this regard, civil status registrars underlined the peculiarity of the Italian system. In fact, circular n. 24 of 23 June 2006 issued by the Ministry of Home Affairs established that only the certificate is required in order to update the civil registers, without the need for a copy of the decision². Civil registrars are entitled to request a copy of the decision (and other documentation deemed necessary) only if the certificate contains data inferring the existence of possible grounds of non-recognition pursuant to Art. 22 Brussels II bis Regulation.

Besides the different application of Art. 37 Brussels II bis Regulation in Italy compared to other Member States, the Italian practice makes it *de facto* impossible for civil registrars to adequately verify the actual existence of grounds of non-recognition, as it is extremely difficult to deduce such grounds from the sole certificate without recourse to the content of the decision.

Even though the office to which the civil registrars participating in the seminar pertain had on several occasions expressed these concerns to the Ministry of Home Affairs, the Italian situation remains unchanged. In practice, the control of the existence of grounds of non-recognition is carried out by the Italian consulates, which keep a copy of the decision. In this regard, however, cases have been reported where the Italian

¹ 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, OJ L 338, 23.12.2003, p. 1 et seq.

² The document (in Italian) is available at https://dait.interno.gov.it/documenti/circ-024-servdemo-23-06-2006_0.pdf.

consulates also corrected mistakes contained in the certificate, thereby going beyond their competences.

2. Recognition and enforcement of decisions – Certificate by virtue of Art. 39 concerning separation/divorce decisions issued by civil registrars or concerning separation/divorce agreements

In Italy, Law n. 162 of 10 November 2014 introduced two new types of separation and divorce:

- an administrative separation/divorce that the spouses can file before civil registrars in the absence of minors or, more in general, dependent children. In such cases, the certificate required by Art. 39 Brussels II bis Regulation is issued by the civil registrars themselves according to the circular n. 13 of 20 July 2018 of the Ministry of Home Affairs³
- a separation/divorce by means of an agreement concluded by the spouses through their lawyers (so called *negoziazione assistita*). In such cases, according to the circular n. 19 of 22 May 2018 of the Ministry of Justice⁴, the certificate required by Art. 39 is issued by the public prosecutor who has to approve the agreement

With regard to the second form of divorce, a lawyer commented on the issuing of a verbatim copy of the final decision approving the agreement, which is necessary for its recognition in another Member State according to Art. 37 Brussels II bis Regulation. In particular, problems may arise in those districts where the original decision is not kept by the court to which the public prosecutor who has to approve the agreement pertains, but by one of the two lawyers who has counselled the spouse. In this case, the spouse seeking recognition has to refer first to the lawyer in question and not directly to the Court in order to obtain a copy of the decision.

II. PARENTAL RESPONSIBILITY

1. Costs of the proceedings concerning parental responsibility

Lawyers argued that these costs can be very high in cross-border proceedings. Some Italian courts, like the Tribunal of Milan, allow the benefit of legal aid also for translation costs, but this good practice does not seem to be applied by all jurisdictional authorities throughout the country.

2. Interplay between Brussels II bis Regulation and 1996 Hague Child Protection Convention

According to a lawyer, one of the most critical issues is the interplay between the Regulation and the 1996 Hague Child Protection Convention⁵, which is a scarcely

³ The document (in Italian) is available at <https://dait.interno.gov.it/documenti/circ-013-servdemo-20-07-2018.pdf>.

⁴ The document (in Italian) is available at https://www.giustizia.it/giustizia/it/mg_1_8_1.page?contentId=SDC116080&previousPage=mg_1_8.

⁵ 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.

known legal tool in Italy, being applicable only since 2016. This calls for the formal recognition of specialized lawyers and judges trained in cross-border family matters, which in Italy is still lacking.

Moreover, an academic underlined that in several decisions the court having jurisdiction in parental responsibility matters directly applies its own national law, without referring to the 1996 Hague Child Protection Convention in order to determine the applicable law.

In relation to the interplay of the two abovementioned legal instruments, the most critical issues which arose during the seminar can be summarized as follows.

a) Protection measures in the form of authorization for a child to conclude a specific act

A notary pointed out the unclear coordination and application in practice of the 1996 Hague Child Protection Convention and the Brussels II bis Regulation, because not always is the Convention to be applied in conjunction with the Regulation in every Member State. For instance, even though Art. 20 Brussels II bis Regulation establishes that provisional, including protective measures have to be taken by the courts of the Member State where the child or its assets are present, there can be cases where the intervention of the judge is not necessary. This happens if the law applicable by means of the 1996 Hague Child Protection Convention does not require a judicial authorization in order to conclude a specific act (the notary gave the example of the acceptance of a donation by a minor habitually residing in France where a judicial authorization is not required in such cases).

b) Protection of migrant children

The discussion turned to the absence in the Brussels II bis Regulation of a provision aimed at clearly determining its scope of application (similar to the one contained in Brussels I bis Regulation⁶). In particular, some academics highlighted how the lack of such a provision is still quite problematic when migrant children (or, more in general, children of which the habitual residence cannot be determined) are involved. In fact, Art. 13 Brussels II bis Regulation, which refers to ground of jurisdiction based on the child's presence, does not appear to apply to migrant children entering the EU from a Third State, with the consequence that the 1996 Hague Child Protection Convention should govern such situations.

On the other hand, other academics pointed out that this problem is rather theoretical, since the habitual residence of unaccompanied minors, despite not being immediately identifiable, will eventually be settled after a period of residence in the host EU Member State. Therefore, a provision on the personal scope of application of the Brussels II bis Regulation is not deemed necessary. The Regulation indeed applies in all those circumstances where its rules on jurisdiction lead to a court of a Member State. In addition, the Brussels II bis Regulation is not the only instrument on family

⁶ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1 et seq.

matters which does not contain a provision on the personal scope of application (neither do the Maintenance and Succession Regulation).

As another academic underlined, the interpretation according to which Art. 13 Brussels II bis Regulation (jurisdiction based on the child's presence) does not apply to children habitually resident in a Third State before the displacement is rather unsatisfactory. Besides, it has not been confirmed by the CJEU. In fact, in the decision *UD v XB* of 2018⁷, the Court established that Arts. 9, 10 and 15 Brussels II bis Regulation necessarily imply that their application is dependent on a potential conflict of jurisdiction between courts of different Member States, without making the same consideration in relation to Art. 13 Brussels II bis Regulation.

c) Residual jurisdiction

The debate during the seminar showed that there are still major doubts amongst lawyers on the functioning of Art. 14 Brussels II bis Regulation on residual jurisdiction. In fact, in situations of children habitually resident in a State which is neither a Member State nor a contracting party to the 1996 Hague Child Protection Convention, it is often overlooked that Art. 14 Brussels II bis Regulation refers Member States' courts to domestic private international law.

d) Non-judicial forms of separation and divorce and protection of children

The foreign expert underlined that alternative forms to the judicial separation/divorce have been introduced also in France. In particular, a couple can opt for the divorce before a notary, which however does not entail any control by the judicial authority even when children are involved (unless the child asks to be heard, which represents a very rare case). In addition, the notary does not carry out any control on the applicable law, even though this is required by virtue of Art. 16 (2) 1996 Hague Child Protection Convention (provided that the other State involved is a party thereto), under which the attribution or extinction of parental responsibility by an agreement or an unilateral act, without the intervention of a judicial or administrative authority, is governed by the law of the State of the child's habitual residence at the time when the agreement or unilateral act takes effect. Therefore, there can be divorces providing for an arrangement on parental responsibility without any judicial authority verifying that the agreement between the former spouses is compliant with the child's best interests.

III. CHILD ABDUCTION

1. Determination of the habitual residence of the child

One of the judges underlined that in many child abduction proceedings the applicant's request is dismissed because the court holds that the child was not habitually resident in the country from which the child was allegedly abducted. This issue is especially critical with couples that tend to move frequently from a country to

⁷ CJEU 17.10.2018, C-393/18 PPU (*UD v XB*).

another, thus highlighting the difficulties in the determination of the child's habitual residence.

2. Interplay between Brussels II bis Regulation and 1980 Hague Child Abduction Convention

What normally happens in cases of child abduction is that both legal tools are referred to, resulting in concurrent proceedings, one for the return of the child, the other for the exclusive custody (both can then be instituted by each of the parents in the respective country of habitual residence).

In addition to the existence of concurring proceedings before different judicial authorities⁸, problems of coordination may arise between the return proceedings and the parental responsibility proceedings. Usually, the proceedings for the return of the child are instituted later than those on parental responsibility due to the time required to start the cooperation between Central Authorities and to locate the child in the State of refuge. For instance, it often occurs that, when the court competent for the parental responsibility matters orders the return of the child, the court of the State of refuge competent for the abduction proceedings has in the meantime adopted the provisional measure of travel prohibition for the child by virtue of Art. 20 Brussels II bis Regulation, thus preventing the return order to be enforced.

In addition, in a case when parental responsibility proceedings were instituted in both countries involved, a judge reported that the court (of the State of refuge) applied Art. 15 Brussels II bis Regulation in order to transfer the case to the other court considered as better placed to hear the case.

3. Measures adopted by virtue of Art. 11 (4) Brussels II bis Regulation

Academics agreed that the measures referred to in Art. 11 (4) Brussels II bis Regulation envisage also financial and economic measures (e.g. granting the child an adequate place to live and subsistence upon the return).

4. Functioning of Art. 11 (8) Brussels II bis Regulation

According to a judge, in relation to the Italian legal order, it has to be clarified which court is competent to issue the so-called trumping order (return order issued by Member State of habitual residence after the Member State of refuge denied the return). It emerged that it is the civil court competent for the parental responsibility if the left-behind parent applied for the custody in the State of habitual residence. In the absence of parental responsibility proceedings, the competence pertains to the juvenile court.

5. Enforcement of return orders

In the Italian legal order, public prosecutors within the juvenile courts are entrusted with the enforcement of return orders issued by the Italian juvenile courts. According to a judge, considering how delicate these situations can be, in intra-EU cases the public prosecutor should make reference to Art. 11 (4) Brussels II bis Regulation in

⁸ In Italy, for instance, parental responsibility proceedings fall within the competence of the civil courts, whereas child abduction proceedings fall within the competence of the juvenile courts.

order to request the authorities of the country of the child's habitual residence sufficient guarantees that the child will maintain regular relations with the abducting parent, being adequate arrangements to secure the protection of the child after his or her return.

Moreover, in some instances, return orders are difficult to enforce, especially when the child, in view of the return to the country of habitual residence, shows severe psychological suffering. Since in the Italian legal order the return order can only be appealed before the Supreme Court, a judge wondered whether the juvenile court can, in such circumstances, suspend the enforceability of a return order. In this regard, according to the participating judges, the judicial experiences are varied: in some cases, the requests for suspension made by the public prosecutors have been granted, in others they have been rejected.

6. Cooperation between Central Authorities

Various Italian practitioners, who also worked within the German and Spanish Central Authorities, highlighted the critical aspects of the cooperation, i.e. the lack of financial resources and personnel and the increasingly longer time needed to obtain a response from the Central Authority of another country which implies that the cooperation can end up unsuccessfully.

Many participants reiterated that it is particularly difficult to obtain the cooperation of the Central Authorities of certain countries (Eastern Europe, Russia, South America), all the more so because many of them interpret the one-year term contained in Art. 12 1980 Hague Child Abduction Convention⁹ and in Art. 10 Brussels II bis Regulation very narrowly.

7. Excessive use of Art. 13 (b) 1980 Hague Child Abduction Convention

Even though the system established by both the Convention and the Regulation should be aimed at granting the return of the child, the provision contained in Art. 13 (b) 1980 Hague Child Abduction Convention (on the grounds for non-return) is applied in a relatively high number of cases by the courts seized for the return (at least in some States), turning into the rule despite being conceived as exceptional.

An academic suggested that a solution to overcome the divergences between judicial authorities of different countries in the interpretation and application of Art. 13 (b) 1980 Hague Child Abduction Convention (as well as divergences in the determination of the habitual residence of the child) could be the creation of supranational family courts, however this could be difficult on a political level.

⁹ 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.

C. BRUSSELS II BIS RECAST PROPOSAL

Even though at the time the seminar was held, the Brussels II bis Recast had not yet been adopted, in this report reference is made to the final draft subsequently published in the EU Official Journal¹⁰. The main issues raised by the participants are linked to some of the corresponding critical aspects related to the Brussels II bis Regulation.

I. PROTECTION OF MIGRANT CHILDREN

In relation to the application of the Brussels II bis Recast Regulation to migrant children, Recital 25 of the new instrument clearly specifies what had already been inferred from the Brussels II bis Regulation: the jurisdiction rule based on the presence of the child (new Art. 11) should only apply to children habitually resident in a Member State before their displacement. Where the habitual residence of the child before the displacement was in a Third State, the jurisdiction rule of the 1996 Hague Child Protection Convention on refugee children and internationally displaced children should apply.

However, an academic underlined that it cannot be taken for granted that the 1996 Hague Child Protection Convention applies in situations regarding children displaced from a Third State. In fact, during the last meeting of the “Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention” some States have adopted a restrictive position in this regard¹¹.

Moreover, the same academic pointed out how the exclusion of environmental migrants from the scope of application of the new Regulation is rather unsatisfactory.

II. CHILD ABDUCTION AND ART. 11 (8) BRUSSELS II BIS REGULATION

Art. 29 (6) Brussels II bis Recast Regulation contains a slightly different wording compared to the current Art. 11 (8)¹². The novelties brought about by the new Regulation run the risk of limiting the scope of the trumping order, which in many situations can represent a deterrent and a useful tool to avoid abductions and facilitate agreements and mediations.

¹⁰ 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, in OJ L 178, 02.07.2019, p. 1 et seq.

¹¹ See the Conclusions & Recommendations of the Special Commission, October 2017, available at <https://assets.hcch.net/docs/edce6628-3a76-4be8-a092-437837a49bef.pdf>, par. 33 et seq.

¹² The new provision no longer refers to “a subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation”, but to “any decision on the substance of rights of custody”.

D. ROME III REGULATION

The Italian Exchange Seminar did not devote a specific panel to this Regulation¹³, as it was comprised in the panel dedicated to matrimonial matters, which in general did not appear to be particularly problematic for the attendees. In fact, the Rome III Regulation was mentioned only in relation to one aspect, which deals with the extension of the *Sahyouni* case law¹⁴ to divorces pronounced without the intervention of the judge¹⁵.

The foreign expert raised the issue of how in France the *Sahyouni* case law, according to which a divorce resulting from a unilateral declaration made by one of the spouses before a religious court does not fall within the substantive scope of the Rome III Regulation, opened a debate on whether private divorces concluded before the notary without any control of the judicial authority fall within the scope of application of the Brussels II bis Regulation. It is true that this case law does not refer to Brussels II bis Regulation but merely to the law applicable to divorce. However, it can be inferred that Brussels II bis Regulation shall not be applied in the same situations where Rome III Regulation is not applicable. In this context, if the *Sahyouni* case law applied to divorces before the notary, these divorces would also fall outside the scope of application of the Brussels II bis Regulation and could not circulate according to the rules of the Brussels II bis system (in such cases, however, these notary acts could circulate by means of Public Documents Regulation and, outside the EU, the 1961 Apostille Convention¹⁶).

Nonetheless, the case law in question applies to unilateral divorces pronounced before a religious authority and does not seem possible to extend it to divorces which are the result of an agreement between the spouses registered by a notary. A similar conclusion could be drawn in relation to the Italian separation and divorces concluded before the civil registrars, since both fall within the definition of “divorce pronounced by a national court or by, or under the supervision of, another public authority” contained in para. 45 of the CJEU decision. Therefore, both kinds of acts should circulate according to Art. 46 Brussels II bis Regulation.

¹³ Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L 343, 29.12.2010, p. 10 et seq.

¹⁴ CJEU 20.12.2017, C-372/16 (*Sahyouni*).

¹⁵ For the familiarity with matrimonial matters emerging from the satisfaction surveys cf. section B.

¹⁶ Convention abolishing the requirement of legalisation for foreign public documents, drafted by the Hague Conference on Private International Law and concluded in The Hague on 5 October 1961.

E. MAINTENANCE REGULATION AND 2007 HAGUE MAINTENANCE PROTOCOL

The panel on the Maintenance Regulation¹⁷ and the 2007 Hague Maintenance Protocol¹⁸ was opened by a lawyer.

In relation to the topics dealt with in the panel, 38 attendees (67,86%) declared in the satisfaction survey to have at least occasionally engaged with maintenance obligations in their professional activities.

The main findings of this panel are summarized in the following subsections.

I. THE DISTINCTION BETWEEN MAINTENANCE OBLIGATIONS AND MATRIMONIAL PROPERTY REGIMES

A lawyer recalled that the only CJEU case law regarding this distinction dates back to 1997¹⁹, when it was held that the fundamental purpose of maintenance obligations is to enable one spouse to provide for him/herself and that the needs and resources of each spouse shall be taken into consideration to determine the amount. The application of the Matrimonial Property Regimes Regulation²⁰ as of 29 January 2019 has entailed some difficulties in the Italian legal order from a procedural and a substantive point of view. With regard to the former aspect, maintenance and matrimonial property claims used to be completely independent, and the claims on matrimonial property could be filed only in separate proceedings (otherwise they would be held inadmissible). By virtue of Art. 5 Matrimonial Property Regimes Regulation, it is now possible to confer jurisdiction on matrimonial property claims to the court already seized to rule on an application for divorce, legal separation or marriage annulment. As to the substantive aspect, the unclear distinction between a maintenance allowance from other claims regarding for example the division of the couple's property or a company set up between spouses still arise.

In relation to this point, another lawyer questioned whether a distinction can also be drawn between a primary and a secondary matrimonial property regime, where the former is subject to the rules applicable to personal relationships set forth in the Italian PIL Act (Law n. 218 of 31 May 1995). In his opinion, under the Matrimonial Property Regimes Regulation this would not be possible anymore, as its scope of application is wider than that of the domestic provisions. This view was shared by an academic, as well as by the foreign expert who underlined that this issue has been much debated also in the French literature.

¹⁷ Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7, 10.01.2009, p. 1 et seq.

¹⁸ Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, drafted by the Hague Conference on Private International Law (HCCH).

¹⁹ CJEU 27.02.1997, C-220/95 (van den Boogaard).

²⁰ Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ L 183, 08.07.2016, p. 1 et seq.

II. THE ITALIAN CASE LAW ON THE REVIEW OF THE CONDITIONS OF THE LEGAL SEPARATION/DIVORCE AND ITS CONSEQUENCES

A lawyer commented on the Italian case law that accepted the possibility to apply, in Italy, for the review of the conditions of the divorce for the purposes of obtaining a maintenance allowance, where the divorce was declared by the courts of another Member State having jurisdiction pursuant to Art. 3 (1) (b) Brussels II bis Regulation and no decision on maintenance obligations was taken in those proceedings²¹. The lawyer expressed some doubts towards this approach, since a petition for reviewing the conditions of the divorce would require reasonable grounds (i.e. new factual circumstances) in order to be heard by the court, but in this kind of cases they would not be deemed to exist.

Furthermore, the lawyer gave the example of a married couple of Romanian nationality, habitually residing in Italy, who separated in Italy. The wife was granted a maintenance allowance against the husband. Assuming that the husband moved back to Romania and obtained a divorce decision there, it is disputed whether the wife would still be entitled to the maintenance allowance, given that the divorce would replace the previous separation. Following the aforementioned case law, the wife could initiate further proceedings before the Italian courts in order to convert the maintenance allowance in a divorce allowance. In this regard, a judge concurred with this view, but distinguished the possible case in which it may be inferred from the divorce decision that the claim for a divorce allowance is already regulated.

III. THE DEFINITION OF MAINTENANCE CLAIMS BETWEEN THE SPOUSES AND POSSIBLE NEW FACTUAL CIRCUMSTANCES

A lawyer addressed the problematic situation arising where an Italian divorce decision by mutual consent regulates any pre-existing financial claims between the spouses by means of a lump-sum allowance (known in Italy as *una tantum*), and subsequently, maybe after several years since the divorce, one of the spouses applies in another Member State for the review of the conditions of the divorce on the basis of new factual circumstances. The lawyer indeed questioned whether this possibility may be given, considering that a similar decision on the financial claims is intended to avoid any further reassessment of these aspects. The attending judges agreed that the decision has the effect of *res iudicata*, and therefore should be recognized as such in another Member State without any further review. In addition, a judge suggested that a possible practical solution may be the clarification, included in the divorce decision, that in the Italian legal order the ruling on the financial claims can no longer be modified when a *una tantum* allowance has been awarded.

²¹ See Corte di Cassazione, sez. I, 01.02.2016, n. 1863; Tribunale di Belluno, 21.4.2016.

F. MATRIMONIAL PROPERTY REGIMES REGULATION AND REGULATION ON PROPERTY CONSEQUENCES OF REGISTERED PARTNERSHIPS

The panel on the Matrimonial Property Regimes Regulation and the Regulation on Property Consequences of Registered Partnerships²² started with an introduction delivered by a notary, who is also an academic, commenting on some critical issues relating to the policy choices made in the Regulations, as well as practical aspects emerged in these first months since becoming applicable.

In relation to the topics dealt with in the panel, 27 attendees (48,21%) declared in the satisfaction survey to have at least occasionally engaged with property regimes in marriage and registered partnerships in their professional activities.

The main findings of this panel are summarized in the following subsection.

I. THE TEMPORAL SCOPE OF THE PROVISIONS ON APPLICABLE LAW

A preliminary issue raised by a notary concerned the transitional provision (Art. 69 of both Regulations) specifying that the provisions on the applicable law only apply to spouses marrying or partners registering their partnership on or after 29 January 2019, with the consequence that for couples already married or having already registered the partnership, the existing PIL regime continues to apply. This could be overcome by a choice of law agreement entered into on or after 29 January 2019. According to the notary, this narrow temporal scope of application presents a partially unsatisfactory policy choice, as it may undermine the objective of harmonization pursued with the Regulations.

As to the temporal scope of application in relation to the applicable law provisions, an academic additionally pointed out that even after 29 January 2019, the Matrimonial Property Regimes Regulation would not apply in relation to choice of law agreements entered into by Italian (or by an Italian national and a foreign citizen) same-sex spouses married abroad, given that their marriage would be 'downgraded' as a registered partnership under Art. 32 bis Italian PIL Act, and therefore the Regulation on Property Consequences of Registered Partnerships would govern their agreement. In this regard, a civil registrar reported the actual case of a same-sex couple of Italian nationals habitually resident in France, who married abroad and had their marriage recorded in the Italian civil status registers. They had chosen French law as applicable to their marriage pursuant to the Matrimonial Property Regimes Regulation and requested this choice to be indicated in the record on the celebration of marriage. The attendees extensively discussed this issue and presented different views. An academic argued that the Regulation on Property Consequences of Registered Partnerships should apply in a similar case, as a consequence of the downgrade imposed by Art. 32 bis Italian PIL Act. Conversely, another academic held that the choice of law was made under the Matrimonial Property Regimes Regulation in a Member State where the same-sex marriage is recognized (France), and only

²² Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ L 183, 08.07.2016, p. 30 et seq.

afterwards the couple moved to Italy requesting to record the agreement containing the valid choice of law. Thus, also in Italy the Matrimonial Property Regimes Regulation should apply.

II. THE FORMAL VALIDITY OF CHOICE OF LAW AGREEMENTS UNDER THE MATRIMONIAL PROPERTY REGIMES REGULATION

A notary reiterated that in case the spouses enter into a choice of law agreement, the rules provided in Chapter III of the Matrimonial Property Regimes Regulation shall apply even though the marriage was celebrated before 29 January 2019. As a result, with regard to the formal validity pursuant to Art. 23 (2) Matrimonial Property Regimes Regulation, agreements concluded by spouses habitually resident in Italy shall be subject to the additional formal requirements for matrimonial property agreements laid down by domestic law, i.e. an agreement concluded by means of an authentic instrument in the presence of two witnesses (cf. Art. 162 Italian Civil Code). This view was also shared by other academics, even though the notary reported that many notaries do not agree on this point, and there are examples from practice confirming their opinion. For instance, in the regions in Northern Italy applying a land-based registration system (*sistema tavolare*), it is common practice to include the choice of Italian law in the purchase deed of an immovable property concluded by the spouses, thereby avoiding the formal requirements of matrimonial property agreements.

III. THE CONNECTING FACTOR OF HABITUAL RESIDENCE IN THE MATRIMONIAL PROPERTY REGIMES REGULATION

An academic argued that this connecting factor appears “weakened” in the default applicable law provision of the Matrimonial Property Regimes Regulation (Art. 26), since it is intended as the spouses’ first common habitual residence after the conclusion of the marriage. In addition, as opposed to the Succession Regulation²³, in which the habitual residence is meant to be the cornerstone of the applicable law regime, it seems that the Matrimonial Property Regimes Regulation much rather favors the recourse to the following successive connecting factors, particularly that of the State with which the spouses have the closest connection (and this may also be the State of habitual residence, which could not be ascertained as the first common habitual residence).

In relation to the determination of the first common habitual residence of the spouses, a notary further underlined how difficult this may be for legal professionals other than judicial authorities who have competences in matters of matrimonial property regimes (e.g. notaries). Indeed, as opposed to the impartial assessment of a judge, these categories of practitioners may be called upon to carry out a sort of questioning into the spouses’ lives, while remaining bound to their duty of diligence towards the client.

²³ 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, OJ L 201, 27.07.2012, p. 107 et seq.

G. SUCCESSION REGULATION

The panel on the Succession Regulation²⁴ opened with an introduction delivered by a notary, who raised a few practical issues concerning the application of this instrument in the light of the recent CJEU case law on the one hand and his professional experience on the other.

In relation to the topic dealt with in the panel, 28 attendees (50%) declared in the satisfaction survey to have at least occasionally engaged with succession matters in their professional activities.

The main findings of this panel are summarized in the following subsection.

I. THE CJEU RULING IN *MAHNKOPF* AND THE ISSUES LEFT UNRESOLVED

A notary briefly recalled the factual background of the *Mahnkopf* case brought before the CJEU²⁵, concerning the German provision²⁶ under which, in the event of termination of the property regime of community of accrued gains (*Zugewinnngemeinschaft*), when the accrued gains are allocated the surviving spouse's share on intestacy is increased by an additional quarter of the estate. This provision is aimed at determining the size of the share of the estate to be allocated to the surviving spouse, and therefore falls within the scope of application of the Succession Regulation. As a result, the qualification of this measure as succession-related additionally allows information concerning that share to be included in the European Certificate of Succession (ECS), and to be subject to the relevant regime under Art. 69 Succession Regulation.

While the conclusion reached by the CJEU in that case did not raise much concern, as both jurisdiction and applicable law led to the German legal order, the same would not be true whenever the law governing the succession is different from that according to which the ECS is issued (e.g. by virtue of a choice of law clause). For instance, if the ECS containing information on the increase in the surviving spouse's share according to the German property regime of a community of accrued gains is invoked in another Member State (Italy), where the default matrimonial property regime is the community of property, it remains unclear how to give effect (if any) to the increased share.

The notary also highlighted that the CJEU did not address a relevant aspect in *Mahnkopf*, which nevertheless was touched upon in the request for a preliminary ruling by the referring court. Namely, the possibility to record in full in the ECS that the share of the surviving spouse was increased pursuant to a rule of the matrimonial property regime, which could be given for information purposes only on account of the increase. However, the interpretation of these "information purposes" is not uniform in

²⁴ 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, OJ L 201, 27.07.2012, p. 107 et seq.

²⁵ CJEU 01.03.2018, C-558/16 (*Mahnkopf*).

²⁶ Section 1371 (1) German Civil Code (*Bürgerliches Gesetzbuch*).

the literature: many commentators adopt a narrow view, arguing that the aspects relating to matrimonial property regimes contained in an ECS would be governed by rules which differ from one Member State to another. The attending notary, on the contrary, supported the opposite view, maintaining that the information contained in the ECS should be observed also when it may be different from (or even contrary to) the applicable regime in the Member State where the ECS is invoked.

II. THE CJEU RULING IN *OBERLE*

A notary commented on the CJEU's *Oberle* decision²⁷, in which it was held that the rules in the Succession Regulation (in particular Art. 4) determine the international jurisdiction of Member States' courts with regard to the issuing of national certificates of succession (in that case, an *Erbschein* under German law). This was inferred from the wording of the Art. 4, which refers to "the succession as a whole", and therefore to all succession proceedings taking place before the courts of a Member State, as well as from the objective of the Succession Regulation to ensure consistency between rules on jurisdiction and applicable law. Furthermore, in the case of *Oberle*, the procedure for issuing the national certificate of succession was non-contentious, and the CJEU stressed that the Succession Regulation is to be applied irrespectively of whether decisions concerning a succession with cross-border implications are given in contentious or non-contentious proceedings.

The notary, however, pointed out that in this decision less attention was paid to two provisions of the Regulation (Art. 2 and Art. 62 (3)) which may leave open the possibility of a sort of 'dual track' approach, i.e. to regulate the succession under national laws on the one hand and under the Succession Regulation on the other hand.

III. ISSUES STEMMING FROM PRACTICE

A notary reported two specific issues with which he was confronted in daily practice. First of all, it is not clear in the Succession Regulation whether the competent authority shall issue the ECS solely in the language accepted by its Member State or also in the language accepted in the Member State where the ECS will produce its effects (and, in cases involving more than one Member State, in various languages). Secondly, the lack of mechanisms of co-operation between authorities of the Member States has been criticized. In this regard, difficulties were reported, for example, in arranging the actual liquidation of estates in another Member State (e.g. custody, valuation of assets), for which it would be useful that the competent authorities of the Member States where the assets are located were authorized to carry out these operations directly.

IV. THE CONSISTENCY BETWEEN THE LAW APPLICABLE TO SUCCESSION AND THE LAW APPLICABLE TO MATRIMONIAL PROPERTY REGIMES

An academic raised the much-debated issue of the 'planned' exercise of party autonomy by combining choice of law agreements under the Succession Regulation

²⁷ CJEU 21.06.2018, C-20/17 (*Oberle*).

and the Matrimonial Property Regimes Regulation. As opposed to the jurisdictional regime, which prorogates the jurisdiction of the court seized of succession proceedings relating to a spouse to matters of matrimonial property arising in connection with the succession case (Art. 4 Matrimonial Property Regimes Regulation), the consistency in the law applicable to both succession and matrimonial property regimes can be ensured only upon condition of a mutual agreement. Indeed, the default applicable law pursuant to Art. 26 Matrimonial Property Regimes Regulation is, firstly, the law of the State of the spouses' first common habitual residence after the conclusion of the marriage, which may often not coincide with the default applicable law according to Art. 21 Succession Regulation, i.e. the law of the State where the deceased spouse has his/her habitual residence at the time of death.

A notary underlined the importance of ensuring consistency by means of a choice of law agreement, also stressing that it would be welcomed, from a practical perspective, to increase awareness amongst EU citizens, particularly prior to a possible relocation to another Member State. In this regard, it was also pointed out that, even where such an agreement is reached, an actual informed choice from both spouses is difficult to identify, with the consequence that it is often the choice of the more 'influential' spouse (also financially) which ultimately prevails.

V. THE LIMITED CHOICE OF LAW

In order to elaborate on the difficulties arising from the limited choice of law possibilities under the Succession Regulation, a legal practitioner gave the example of an Italian woman wishing to disinherit her daughter who has completely neglected her. In Italy, she would be prevented from doing so because of the domestic provisions regarding reserved shares in the estate. This possibility could be granted, for example, by applying the law of Catalonia, which however cannot be chosen by the Italian woman as it is not the law of the State of her nationality. The practitioner thus concluded that the inclusion of the law of habitual residence for the purposes of a choice of law in succession matters would have been welcomed from a practical point of view.

A notary expressed a similar view, but further explained that during the negotiation of the Succession Regulation the possibility to choose the law of habitual residence of the deceased was expressly ruled out with a view to preserving the domestic rules concerning compulsory portions in the estate, even though the connecting factor of habitual residence would have guaranteed at least a certain degree of substantial connection between the given State and the deceased.

H. PUBLIC DOCUMENTS REGULATION

The panel on the Public Documents Regulation²⁸ was opened by a civil registrar, who raised the main features of this newly applicable piece of EU legislation (indeed, it became applicable on 16 February of this year). This was deemed useful in order to provide the attendees with a general overview that led to more specific comments during the discussion.

In relation to the topic dealt with in the panel, only 9 attendees (16,07%) declared in the satisfaction survey to have at least occasionally engaged with public documents in their professional activities.

The main findings of this panel are summarized in the following subsection.

I. THE OBJECTIVE OF THE PUBLIC DOCUMENTS REGULATION

A civil registrar underlined that the Public Documents Regulation aims at fulfilling the ambitious objective of free circulation of certain public documents within the EU and of simplification of the requirements for presenting them. This distinguishes the Public Documents Regulation from other existing international conventions governing these aspects (e.g. the 1961 Apostille Convention, the 1976 Convention on the issue of multilingual extracts from civil status records²⁹, and the 1980 Convention on the issue of a certificate of legal capacity to marry³⁰). This simplification mainly concerns the requirement of legalisation (and similar formalities), from which the wide range of public documents falling within the scope of the Public Documents Regulation are exempted as well as the requirement to provide certified copies and translations of these public documents, which is facilitated through the multilingual standard forms established by the Regulation. With regard to the latter aspect, it was pointed out that these multilingual standard forms do not replace the original public document issued in the language of the Member State of origin and therefore should not circulate on an autonomous basis, but should only be attached to the public document of which they constitute the translation.

II. THE POSSIBLE COUNTERFEIT OF THE PUBLIC DOCUMENT

A civil registrar intervened to illustrate the solution that the Public Documents Regulation provides in cases of possible counterfeit of the public document or its certified copy. Indeed, whenever the authority of the Member State in which the document is presented has a reasonable doubt as to its authenticity, there is the

²⁸ Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012, OJ L 200, 26.07.2016, p. 1 et seq.

²⁹ Convention on the issue of multilingual extracts from civil status records, drafted by the International Commission on Civil Status and concluded in Vienna on 8 September 1976.

³⁰ Convention on the issue of a certificate of legal capacity to marry, drafted by the International Commission on Civil Status and concluded in Munich on 5 September 1980.

possibility to refer to the repository of the Internal Market Information System (IMI)³¹. In case the doubt remains, a further request for information may be submitted through IMI to the authorities of the Member State where the document was issued. This check through IMI can only be requested by specific authorities within the Member States: in Italy, the registration of these authorities in IMI is arranged under the supervision of the Department for European Policies established within the Presidency of the Council of Ministers (Italian coordinator of IMI).

It was underlined that the possibility of counterfeit of the standard forms is likely from a practical point of view and thus particular attention should be paid in this regard.

III. THE RECOGNITION OF LEGAL EFFECTS RELATING TO THE CONTENT OF THE PUBLIC DOCUMENTS

It was emphasized by civil registrars that the Public Document Regulation does not affect the recognition in a Member State of legal effects relating to the public document issued in another Member State. The standard forms do not amount to extracts from or verbatim copies of the civil status record formed in a Member State. However, it was also reported that this view, on which the civil registrars attending the seminar concurred, is not shared among all representatives of their profession.

In this regard, an academic pointed out that issues may arise in relation to other practitioners acting as public officials, for instance in case of mutual divorce agreements concluded before a notary. This kind of agreements, to which according to the Public Documents Regulation the required standard form is attached, could indeed pose some challenges for the receiving authorities insofar as uncertainties regarding their contents and the underlying personal status may arise. Nevertheless, the possible situation of uncertainty should not bear consequences on the recognition of legal effects of that personal status in another Member State, which the standard forms of the Public Documents Regulation are not able to affect.

IV. THE GENERAL UNFAMILIARITY WITH THE PUBLIC DOCUMENTS REGULATION

An issue raised during the discussion concerned the relatively low level of familiarity and, consequently, practical problems relating to the application of the Public Documents Regulation (at least thus far). An academic underlined that this may also be linked to the fact that the Regulation does not address the substantive law of the Member States in relation to personal and familiar status. Therefore, the most pressing issues concerning the recognition of a personal status that is unknown under the law of the requested Member State would fall outside the scope of application of the Public Documents Regulation.

Furthermore, a notary reported a case in which some difficulties with the standard forms provided for by the Public Documents Regulation were encountered with regard to the entry in the national land registry. This proves that a wide range of public officers, including land registrars, should acquire familiarity with the practical

³¹ Established by Regulation (EU) No 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC (IMI Regulation), OJ L 316, 14.11.2012, p. 1 et seq.

operation of the Public Documents Regulation. In this regard, a civil registrar welcomed the example of the circular n. 2 issued by the Italian Ministry of Home Affairs on 14 February 2019³², informing prefects (who are the Italian authorities competent in this matter) of the upcoming application of the Public Documents Regulation and providing guidelines as to its functioning (in particular, the use of multilingual standard forms and the website on which these are available).

³² The document (in Italian) is available at https://dait.interno.gov.it/documenti/circ-002-servdemo-14-02-2019_0.pdf.

I. CONCLUSION AND OUTLOOK

In the light of the above, the following conclusions can be drawn.

From the discussion during the seminar, it emerged a general familiarity with the Regulations first adopted and in application for several years, i.e. the Brussels II bis Regulation (especially as far as matrimonial matters are concerned) and the Rome III Regulation. In fact, in relation to these topics, the most challenging aspects from a practical perspective regard the application of said instruments to the non-judicial forms of separation and divorce recently introduced in Italy as well as and some technical aspects regarding the enforcement of matrimonial decisions.

In a similar manner, the practical application of the Maintenance Regulation appears to be established. The discussion mainly focused on the circulation of maintenance decisions and their possible review, which not only involves substantive aspects but also procedural issues.

The application of the Brussels II bis Regulation in parental responsibility and child abduction proceedings still raises some problematic issues, especially in its interplay with the 1996 Hague Child Protection Convention. These aspects, also in the light of the adoption of the Brussels II bis Recast Regulation, would deserve further assessment within the upcoming project activities.

Different consideration should be made with regard to the Succession Regulation, with which notaries proved to be very familiar. However, it is still only limitedly applied by the other groups of practitioners.

The least familiarity was observed with the more recent regulations on property regimes as well as with the Public Documents Regulation, for which very few cases have hitherto been reported due to the fact that these only became applicable several months before the seminar. Nonetheless, a few critical aspects related to specific provisions on applicable law contained in these legal instruments have been raised. The following activities of the project could investigate whether the application of these provisions is also problematic in legal practice.

From a general standpoint, it can be inferred that the most pressing issues concern the interplay (e.g. between the Succession and Matrimonial Property Regimes Regulation) or the possible overlap (e.g. between the Maintenance and Successions Regulation) between various instruments. These connections, and in general the overall coordination of these instruments, could represent an interesting topic for further discussion during the International Exchange Seminar, also in the light of the outcomes of the other National Exchange Seminars.