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

REPORT ON THE INTERNATIONAL EXCHANGE SEMINAR

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EXECUTIVE SUMMARY

The International Exchange Seminar was held at the Max Planck Institute Luxembourg on 25th October 2019 to debate the functioning and the effectiveness of the instruments that regulate family and succession law in the European Union, and propose possible improvements. It gathered 82 participants, including renowned academics from various institutions, judges, notaries, lawyers, and representatives of international organizations and family law associations from thirteen different Member States.

The morning session of the International Exchange Seminar focused on the EU procedural regime for matrimonial matters and matters of parental responsibility. Particular regard was given to the Brussels II-*bis* Regulation Recast (Brussels II-*ter* Regulation)[1] that will apply from August 1st, 2022. This Recast mainly affects the rules on parental responsibility but also comprises new provisions regarding matrimonial matters, notably regarding the recognition of out-of-court divorces. In this regard, the International Exchange Seminar provided an overview and a first critical assessment of the Recast. Among others, the issues addressed concerned the characterization of same-sex marriages under the Brussels II-bis/-ter Regulation and possible consistent solutions (e.g., a harmonized European definition of 'marriage' vs. the characterization via the *lex fori*). Concerning 'private divorces', the discussion showed that the recognition of divorce agreements is, in principle, to be welcomed, but the Recast does not regulate sufficiently certain aspects. For instance, the review of jurisdiction or the law applicable to private divorce agreements raises several questions. Other conclusions concern the consequences of a violation of the *lis pendens*-rule, which should be regulated by additional EU legislation.

With regard to matters of parental responsibility, one of the most debated issues was Article 21 Brussels II-*ter* Regulation on the hearing of the child. Among other questions, it remains unclear to what extent national practices of the Member States will be affected by this new provision. Some participants argued that Article 21 only reiterates the importance of taking into account the child's views following the case-law of the CJEU and the ECtHR. Other participants held that the provision mainly extends the principle of mutual trust to the different methods applied in the Member States for the hearing of the child. Concerning child abduction proceedings, participants concluded that the Brussels II-*ter* Regulation might fail to solve the primary deficiencies of the current Regulation. Instead, the new enforcement provisions of the Recast risk to create additional venues for litigation and to further extend the timeframe of the return proceedings.

The afternoon session focused on the enhanced cooperation recently established with the adoption and entry into force of the Regulations on Matrimonial Property Regimes[2]

[1] 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, OJ L 178, 2.7.2019, p. 1 et seq.

[2] 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, 8.7.2016, p. 1–29.

and on Property Regimes for Registered Partnerships,[3] on the one hand, and the Succession Regulation[4] and the Regulation on Public Documents,[5] on the other hand. The Regulations on the property regimes of international couples entered into force in 2016 and, as of January 2019, they became applicable in 18 Member States. Their adoption is to be welcome in that it marks a significant – albeit partial, due to the limited territorial scope of their application – step forth in the architecture of EU private international and procedural law in family matters, and it contributes to the European Union's endeavour and commitment to ensure consistency in the treatment of cross-border family law matters within the Area of Freedom, Security and Justice.

However, as it transpired from the discussions held at the International Exchange Seminar, these Regulations are characterised by a high degree of complexity. Among the pending questions that were identified are those of scope and characterisation, which stem, *inter alia*, from the lack of an autonomous definition of the term 'marriage' under the Regulation on Matrimonial Property Regimes. Issues of coordination in the jurisdiction over property claims, on the one hand, and succession or divorce (or dissolution of the registered partnership), on the other hand, were also identified as problematic, notably with reference to the lack of clarity on whether the principle of *perpetuatio fori* applies in these cases. Numerous questions pertaining to applicable law were also raised, in particular vis-à-vis two core features of the Regulations and namely the determination of 'habitual residence' under the Regulations and the consequences of the conversion, in accordance with the laws of some Member States, of a marriage into a registerd partnerchip and *vice-versa*. Against this backdrop, the discussions shed the light on the paramount importance of education and training in this area of the law, to foster predictability and legal certainty.

The second panel of the afternoon session covered the Succession Regulation and the Regulation on Public Documents. Overall, the discussions highlighted that the absence of certain autonomous notions and the interplay of diverging (if not mutually exclusive) national concepts are two core of the problems that have arisen and/or have been identified with respect to the interpretation and actual application of the Succession Regulation, to the detriment of consistency and predictability. In addition, courts and practitioners are faced with issues pertaining to party autonomy – which embodies the fundamental instrument to pursue estate planning and certainty, and should therefore be cherished. Finally, the coordination of the Regulation with other existing instruments – be it treaties or national laws – have also proven challenging. In spite of the hermeneutics of the Court of Justice of the European Union on some

[3] 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, 8.7.2016, p. 30–56.

[4] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201, 27.7.2012, p. 107–134.

[5] 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, 26.7.2016, p. 1–136.

questions, these issues remain partly unsettled and are at the core of the debate both in academia and in practice.

Finally, as concerns the Regulation on Public Document, it was highlighted that, while the Regulation does not regulate family law matters *per se*, it pursues the objective of curtailing excessive bureaucratic procedures and costs for citizens when they need to present in a Member State a public document issued in another Member State. Some of the formalities dealt with in the Regulation are, indeed, of paramount importance for the area of family and succession law: as such, its adoption and recent entry into force are to be welcomed.

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A. INTRODUCTION

Following the National Exchange Seminars organized by the partner universities of the EUFams II Project (Universities of Heidelberg (coord.), Lund, Milan, Osijek, Valencia, and Verona), the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law hosted the *International Exchange Seminar* on 25th October 2019.

The purpose of the International Exchange Seminar was to address the difficulties met at the national level, to identify common patterns, and to share good practices with regard to the application of the EU instruments in family law. Notably, the Seminar discussed and explored possible solutions to controversial and problematic issues identified in the course of the National Exchange Seminars.

The Seminar was held in English and it gathered renowned academics from various institutions, judges, notaries, lawyers, and representatives of international organizations and family law associations. Notably, the event was comprised of 82 participants (57 academics, seven national judges and one judge from the Court of Justice of the European Union, eight lawyers, four State officers, two representatives of the Hague Conference on Private International Law, two representatives of the Project's Academic Advisory Board as well as the External Evaluator) coming from thirteen different Member States (namely, Austria, Belgium, Croatia, France, Germany, Greece, Italy, Luxembourg, The Netherlands, Portugal, Spain, Sweden, and the United Kingdom). The participants were selected as attendees in light of their renowned expertise in cross-border family matters.

The Seminar was structured in four panels addressing several subject matters of the EU Regulations on family and succession law. It also included an additional discussion session on the potential impacts of 'Brexit' on European family law. This selection of topics for the Seminar was based on the results and findings of the EUFams II Project hitherto achieved, notably the outcomes of the five National Exchange Seminars as well as the empirical survey conducted within the Project.

A total number of eight speakers and four chairs were involved in the panels. Each panel comprised two short interventions: a first presentation carried out by a member of the Project, followed by an assessment performed by an invited expert. These interventions focused, respectively, on a descriptive overview and a concise assessment of problematic issues related to the different EU Regulations and international instruments on cross-border family and succession matters. While the first panel included two German scholars, the other panels featured presentations of research fellows from the Max Planck Institute Luxembourg as well as of two academics and one practitioner from different Member States (Belgium, Spain, and the UK). Similarly, the four panels and the additional discussion session were chaired by renowned scholars from different Member States (Austria, Germany, Greece, and Spain). Both the chairs and the speakers were selected upon invitation in light of their renowned expertise in international family and succession law.

After each panel, the floor was immediately given to the international audience of experts for an open discussion chaired by the same academics as during the

presentations. The participants were invited to share their views and experiences and to discuss the issues addressed in the panels.

The present Report summarizes the outcome of these fruitful debates under the so-called Chatham House Rules (i.e., the names of the speakers are not mentioned).[6]

[6] The authors of this Report wish to acknowledge Mr. Arthur Bianco for his valuable editorial assistance.

B. FROM BRUSSELS II-*BIS* TO BRUSSELS II-*TER*: A CRITICAL ASSESSMENT OF THE STATUS QUO AND FUTURE DEVELOPMENTS[7]

I. MATRIMONIAL MATTERS

1. The fragmentation of EU family law

The first panel of the morning session focused on the procedural rules on matrimonial matters in the Brussels II-*bis* Regulation. Particular regard was given to the Brussels II-*bis* Regulation Recast, i.e., the future Brussels II-*ter* Regulation that will apply from August 1st, 2022. This Recast mainly affects the rules on parental responsibility but also comprises new provisions regarding matrimonial matters, notably regarding the recognition of out-of-court divorces. In this regard, the International Exchange Seminar provided an overview and a first critical assessment of the Recast.

Matrimonial matters were chosen as a crucial topic to be discussed in the International Exchange Seminar in light of its practical significance. While most cross-border family cases involve issues of parental responsibility and property regimes, their starting point is usually a divorce proceeding. As the other EU Regulations on family law often refer or directly link their jurisdiction rules to the Brussels II-*bis* Regulation, this instrument should be subject to particular scrutiny.

European Procedural law as a whole is the broader perspective from which the current situation of European family law needs to be analyzed. Looking at the various procedural cross-border instruments, especially the Brussels I Regulation and its follow-ups, it is evident that there is a certain coherence among all of them. Notably, the Brussels I Regulation and its Recast (Brussels I-*bis* Regulation) function as a so-called 'Mother Regulation' and constitute a reference point for all other EU Regulations in civil and commercial matters.

In contrast, family matters do not follow this pattern. Even if the Brussels II-*bis* Regulation (soon Brussels II-*ter* Regulation) may serve as a reference source for a few terms, the situation is much more complicated and fragmented than in civil and commercial matters. In addition, the unanimity principle applicable in the special legislative procedure for family law matters (Art. 81(3) TFEU) as well as the principle of enhanced cooperation (Art. 326 et seq. TFEU) fragment the implementation of the Regulations on family law even further.

As a starting point, the first panel of the International Exchange Seminar addressed the scope of application of the Brussels II-*bis* Regulation and its Recast. As will be reported further below, this analysis leads to a fundamental discussion on the definition of marriage as such. This discussion on the status quo of European family law mirrors the situation in the EU of today: On the one hand, most stakeholders can agree on core principles, but on the other hand, significant divergences exist that hinder the harmonious application of the Regulation.

[7] This Chapter was written by Dr. Marlene Brosch, Max Planck Institute for Procedural Law Luxembourg.

2. Problematic issues in the EU regime on matrimonial matters

a) Applicability to out-of-court divorces

The first presentation started with a descriptive overview of problematic aspects related to cross-border matrimonial matters that have been discussed in the National Exchange Seminars. Notably, two issues were identified as being unsettled: 'private divorces' and same-sex marriages. The discussion particularly involved the relevant changes made by the Council of the European Union at the final stage of the Brussels II-*bis* Recast.

In its Recast Proposal of 2016[8], the European Commission announced that 'for matrimonial matters, the preferred policy option is retaining the status quo'. This policy option was probably adopted in light of the political sensitivity of cross-border matrimonial matters and cross-border recognition of personal status in general. However, the final version approved by the Council at the end of June 20199 entails significant changes for matrimonial matters and the recognition of so-called 'private divorces' in particular.

First of all, the presentation addressed the broad term of 'private divorces' that is often used for a multitude of divorce types. Concerning the legal nature of such divorces, a first differentiation must be drawn between unilateral and consensual divorces. Another distinction relates to the function of the authority involved in the divorce and to the constitutive or declaratory nature of its involvement. Furthermore, 'private divorces' may be classified according to the participation of a public or private third party and to the degree of its involvement. For instance, the authority involved may scrutinize or control the substance of divorce agreements.

More specifically, the presentation highlighted the existence of several degrees of 'privateness' of divorces. On the one end of the scale, 'private divorces' are performed mostly before or through religious institutions. In contrast, the types of 'private divorces' known in EU jurisdictions are less 'private' and thus located on the other end of the scale. However, their classification is difficult since these divorces may involve different professions (notaries, lawyers, public prosecutors, or civil registrars) that carry out various functions. Hence, depending on the characteristics of these 'European' divorces, they may no longer be considered as private and would instead appear to be 'public' divorces *without the involvement of courts* (i.e., 'out-of-court divorces').

The presentation briefly reminded that the CJEU has recently sparked the discourse on the recognition of (purely) 'private' divorces in the *Sahyouni* case[10]. In Germany, such divorces were formerly considered to be covered by the Rome III Regulation.

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[8]Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), COM(2016) 411 final, p. 10, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0411&from=EN.

[9] See the official press release of 25th June 2019 of the European Council, 'More effective rules to deal with cross border matrimonial matters and parental responsibility issues', available at: https://www.consilium.europa.eu/en/press/press-releases/2019/06/25/more-effective-rules-to-deal-with-cross-border-matrimonial-matters-and-parental-responsibility-issues/.

[10] CJEU, Judgment of 20.12.2017, *Sahyouni v Mamisch,* C-372/16, ECLI:EU:C:2017:988.

The main argument for this interpretation was Recital 9, which claimed that the Rome III Regulation 'should create a clear, comprehensive legal framework in the area of the law applicable to divorce'. However, in the *Sahyouni* decision, the CJEU held that the Rome III Regulation does not apply to private divorces, and especially not to the case at hand where a representative of one spouse proclaimed the dissolution of the marriage in front of a religious court in Syria ('talaq'). To reach this conclusion, the CJEU primarily relied on a *textual* interpretation of the Rome III Regulation, which repeatedly refers to terms such as 'courts' and 'proceedings'. According to the CJEU, these terms are indicative of the exclusion of private divorces in the EU regime for cross-border divorces. As a result, the Court held that unilateral divorces performed via religious authorities do not fall under the substantive scope of the Rome III Regulation.

Looking beyond the *Sayhouni* decision, the legal landscape is still unclear. Concerning the Brussels II-*bis* Regulation, its application to private divorces pronounced in a Member State[11] is moot. Admittedly, the ruling in the *Sahyouni* case is relatively ambiguous: Even if the judgment only concerns the scope of application of the Rome III Regulation, the CJEU deducted additional arguments from the Brussels II-*bis* Regulation to deny the applicability of the Rome III Regulation.[12] The decisive criterion used by the CJEU is that the divorce in question has to be declared either by a national court or 'under the scrutiny' of a public authority to be covered by the EU regime.

According to the invited speaker, it is debatable whether the types of out-of-court divorces regulated by several Member States fulfill the criteria set forth by the CJEU. Assuming that the EU regime on matrimonial matters does not encompass such divorces, Member States may only apply their domestic private international law to recognize an out-of-court divorce pronounced in another Member State. This approach could create a problematic relationship between domestic law and EU norms.

However, this unsatisfying situation might change in the future, as the Brussels II-*ter* Regulation provides for specific rules on the recognition of out-of-court divorces.

The starting point of these new rules is the distinction between 'judgments' on the one hand, and 'authentic instruments' and 'agreements' on the other hand. The Brussels II-*bis* Regulation already adopts this distinction for recognition and enforcement (Art. 21, Art. 46). According to Art. 2(4) of the Brussels II-*bis* Regulation, 'judgments' are, essentially, decisions of state courts. In addition, the Recast defines 'authentic instruments' as official documents drawn up or registered by a competent authority of a Member State (e.g., a notary), whereas 'agreements' have to be concluded by the parties and then recorded by a public body of a Member State (Art. 2(2) no. 2, 3

[11] The Brussels II-*bis* Regulation does not apply to private divorces from Third States, as they fall out of the Regulation's scope of application that only covers divorce decisions from EU Member States.

[12] The CJEU referred to the fact that the Brussels II-*bis* Regulation relates to 'judgments', i.e., decisions pronounced by a court of a Member State. The Court considered this reference in light of the principle of harmonious application of the Brussels II-bis Regulation and the Rome III Regulation. See Recital 10 of the Rome III Regulation: 'The substantive scope and enacting terms of this Regulation should be consistent with [the Brussels II-bis Regulation]'.

Brussels II-*ter* Regulation). As the Recast clearly states that a public authority has to be involved concerning 'agreements', purely 'private' divorces fall outside the scope of the Recast.[13]

To recognize a private divorce agreement in another Member State, the Recast sets forth four conditions (Art. 65 et seq.): (1) The divorce agreement must comply with the respective definition of the Regulation; (2) The agreement has to be registered (3) by the authority of a Member State having jurisdiction under the ordinary jurisdiction rules of the Regulation (Art. 3 et seq.); (4) The agreement must have a binding legal effect in the Member State of origin. Upon fulfillment of these criteria, the 'private' divorce agreement will be automatically recognized in all other Member States to the same extent as a court decision. To effectuate the recognition, however, the party seeking the recognition has to request a certificate before the competent authority in the state of origin. This certificate may only be issued if the Member State of origin had jurisdiction under the Regulation and if the divorce agreement is legally binding in that Member State (Art. 66 Brussels II-*ter* Regulation).

In practice, lawyers involved in the drafting of private divorce agreements will have to examine whether the Member State of the issuing authority has jurisdiction according to the Regulation. Otherwise, parties may end up with an agreement that is valid in the Member State of origin but cannot be recognized in the other Member States.

Furthermore, even if the parties obtain a certificate, the recognition of a divorce agreement may be refused on the following grounds laid down in Article 68 Brussels II-*ter* Regulation: 1) if the agreement violates public policy; 2) if the agreement is irreconcilable with a divorce agreement in the Member State of recognition; 3) if the agreement conflicts with an earlier agreement or decision rendered in another Member State or Third State.

The presentation also referred to legislative developments in some Member States that include matters of parental responsibility in out-of-court divorce agreements. Unlike agreements exclusively dealing with divorce matters, agreements on parental responsibility have enforceable contents that are subject to additional rules under the Recast (Art. 68(2),(3) Brussels II-*ter* Regulation).

b) Applicability to same-sex marriages

The second topical issue addressed in the first panel relates to both the Brussels II-*bis* Regime and the Rome III Regulation, namely, whether these instruments apply to same-sex marriages.[14] This issue is particularly controversial because, at present, there is no definition of 'marriage' in EU Private International Law.

In its traditional concept, marriage is the union between a man and a woman. According to the prevailing, yet restrictive opinion, the Brussels II-*bis* regulation does not apply to same-sex marriages as they were not legally recognized in the EU at the time the Regulation was promulgated. Therefore, same-sex marriages may not fall under the substantive scope of the Recast, as Recital 90 refers to the principle of

[13] This is explicitely laid down in Recital 14 Brussels II-*ter* Regulation.

[14] This category includes marriages involving at least one person of neutral gender.

continuity of the interpretation between the Brussels II-Regulation, the Brussels II-bis Regulation, and the Recast.

According to a different, more dynamic definition, the strict heterosexual concept within the Brussels II-*bis* Regulation cannot be maintained in light of the increasing number of Member States recognizing same-sex marriages in their domestic legal systems. This second solution is also endorsed by the principle of non-discrimination and the Charter of Fundamental Rights.

In light of this controversial situation, participants criticized that the Recast does not provide for an autonomous definition of 'marriage', which could ensure a uniform application of the Regulation. However, the annexes of the Recast might indicate that the legislator has, indeed, addressed this issue: The new standard forms replace the current terminology of 'husband' and 'wife' with the more gender-neutral term 'spouse'.

Concerning the Rome III Regulation, an argument in favor of including same-sex marriages in its scope of application may be derived from Article 13. This provision states that the Member States are not obliged to recognize a marriage if the marriage in question is 'not valid' under the *lex fori*. Therefore, if a Member State can refuse the recognition of a particular form of marriage, such as same-sex marriages, this means that they are, in principle, covered by the Regulation. Otherwise, the mentioned rule would not have a proper meaning.

On the other hand, two arguments speak against the applicability of the Rome III Regulation to same-sex marriages: First, Article 1(2) states that the Regulation does not apply to the existence, validity, or recognition of a marriage. Second, Recital 10 indicates that the scope of application of the Brussels II-*bis* Regulation and the Rome III Regulation shall be aligned. Consequently, if the Brussels II-*bis* Regulation does not apply to the dissolution of same-sex marriages, then the Rome III Regulation cannot be applicable either.

c) Further open questions

To conclude, the presentation briefly referred to additional open questions on matrimonial matters that have been raised in the National Exchange Seminars, such as the lack of party autonomy and the incentive to forum shop, or the lack of harmonized rules on residual jurisdiction and subsidiary jurisdiction. These deficiencies remain unsolved in the Brussels II-*ter* Regulation. Furthermore, it remains unclear whether the special public policy-clause in Article 10 Rome III Regulation refers to a situation in which the applicable divorce law discriminates against a spouse *in abstracto* or *in concreto.*[15] Another issue addressed in the National Exchange Seminars concerns the *Liberato* case[16] of the CJEU and the lack of effective sanctions against the violation of *lis pendens*.

3. Future developments in the Brussels II-*ter* Regulation

The second presentation was conceived as a critical response to the previous intervention. The speaker focused on the changes that the Brussels II-*ter* Regulation

[15] The CJEU did not answer this question in the *Sahyouni* case (C-372/16, ECLI:EU:C:2017:988).

[16] CJEU, Judgment of 16.1.2019, *Liberato v Grigorescu*, C-386/17, ECLI:EU:C:2019:24.

will bring concerning matrimonial matters and welcomed the general orientation of this Recast.

a) The new regime for the recognition of out-of-court divorces

The speaker delved deeper into the new provisions on 'private divorces' and notably into the mechanism and prerequisites of their recognition. In principle, granting more autonomy to spouses should be welcomed, especially if there are no children and no disputes on the consequences of the divorce involved. Nevertheless, the procedural autonomy provided for by the Recast is subject to certain limits: The agreement concluded by the parties must comply with the autonomous definition of the Regulation, it must be legally binding and registered by a competent authority of a Member State having jurisdiction.

After having explored the prerequisites for obtaining the recognition of an out-of-court divorce, the question arises whether the Recast defines the authority and the stage of proceedings to review these requirements. According to Article 103 of the Recast, the Member States shall communicate to the European Commission the courts or authorities competent to issue certificates for divorce agreements. As the Member States can elect whatever institution they want to assume this role, there is no safeguard against the registration of agreements without any scrutiny of the requirements.

Other unclear aspects concern the power and jurisdiction of courts. In Germany, 'private divorces' are not allowed at the moment. This fact may incite spouses residing in Germany to seize a notary in France to register their divorce agreement and to have it recognized in Germany with a certificate issued under Recast. German courts cannot declare such an approach as contrary to public policy because this particular refusal ground does not apply to a lack of jurisdiction.

According to the Recast, this situation might be treated differently: Under EU procedural law, a lack of jurisdiction does, in general, not constitute a refusal ground. In the same vein, the refusal grounds for divorce agreements in Article 68 Brussels II-*ter* Regulation do not include the prerequisites laid down in Article 66, such as the requirement of having a competent authority registering the agreement. However, the general rule in Article 69 on the prohibition of review of the jurisdiction of the court of origin does not explicitly include Article 68. Therefore, a lack of competence could exceptionally constitute a refusal ground with regard to divorce agreements.

Furthermore, it remains unclear how to determine the law applicable to divorce agreements outside the scope of the Rome III Regulation. Taking into account the criteria laid down in the *Sahyouni* decision of the CJEU, the French model of out-of-court divorces may not fall under the Rome III Regulation, whereas the 'private divorce' under Spanish law might be covered. This diverging interpretation is problematic and leads to the same open question that has been raised concerning the lack of jurisdiction. If French divorce law applies, can a German court refuse the recognition of the French 'private divorce'? Normally, the non-applicability of the Rome III Regulation cannot constitute a refusal ground. This situation of uncertainty should be solved.

b) The characterization of same-sex marriages in EU Procedural law

The presentation also shed light on the long-standing discussion about same-sex marriages and the extent to which the Brussels II-*bis*/-*ter* Regulation applies, if at all.

The starting point is Recital 90 Brussels II-*ter* Regulation, which lays down the principle of continuous interpretation. One the one hand, same-sex marriages were not (yet) a significant issue when the Brussels II Convention was drafted in the late 1990s. On the other hand, some areas of the Recast seem to expressively address these types of unions, e.g., concerning the use of gender-neutral terms in the annexes. Some participants argued that these new terms express a deliberate choice of the legislator. Also, the 'evolutive' or 'dynamic' interpretation applied by the European Court of Human Rights was presented as an approach to reading the Recast.

c) Further controversial issues

The National Exchange Seminars raised numerous other problematic questions concerning matrimonial matters which have not been taken into consideration in the Recast. Among others, the lack of hierarchy in Article 3 Brussels II-*bis* Regulation and the discriminatory jurisdiction rules[17] will remain unchanged.

The recent judgment of the CJEU[18] concerning the provision on the transfer of jurisdiction (Art. 15 Brussels II-*bis* Regulation) was also briefly addressed in the context of forum shopping. This decision concerned a case where forum shopping led to parallel proceedings in the UK and Romania, and both seized courts had jurisdiction under the Brussels II-*bis* Regulation. The CJEU held that the transfer rule is not applicable if both courts are competent as to the substance of the matter under Article 12 and Article 8 Brussels II-*bis* Regulation. This situation has to be solved via the *lis pendens*-rule (Art. 19), so that the court first seized will have the priority to rule on the matter and the court second seized must stay the proceedings. However, the solution via *lis pendens* may not be the ideal one in some instances, in which granting the transfer of jurisdiction to a court of another Member State would be more favorable instead. By way of example, the speaker referred to a situation in which proceedings on marital property start first, and divorce proceedings start subsequently. There is currently no possibility for a transfer of jurisdiction to the later court, or *vice-versa*.

The speaker commenting on the Brussels II-*ter* Regulation also addressed the controversial *Liberato* decision of the CJEU and argued that the Recast is even stricter than the ruling of the CJEU. Furthermore, the lack of *lis-pendens* rules concerning parallel proceedings in a Third State is still an unresolved problem.

To conclude, the presentation addressed further reform proposals *de lege ferenda*. Notably, the Brussels II-*bis/-ter* Regulation could serve as a 'reference Regulation' similar to the Brussels I-*bis* Regulation. However, to achieve this status, the Brussels II-*bis/-ter* Regulation should contain a comprehensive, yet shorter set of rules on

[17] According to Art. 3(a)(v) Brussels II-*bis*/-*ter* Regulation, a person may file for divorce in the Member State where he/she has been residing for at least a year, whereas this waiting period is shortened to six months if that person is a national of the Member State in question (Art. 3(a)(vi)).

[18] CJEU, Judgment of 4.10.2018, *IQ v JP*, C-478/17, ECLI:EU:C:2018:812.

jurisdiction, recognition, and enforcement of decisions. As to the possible inclusion of applicable law rules, the speaker welcomed the development of so-called 'mixed regulations' (such as the Succession Regulation or the Regulation on Property Regimes) but pointed out the difficulties arising out of an enhanced cooperation.

4. Critical analysis of selected issues in the open discussion

a) The definition of 'marriage' and the inclusion of same-sex couples

Following the two presentations concerning the EU regime on matrimonial matters, the floor was given to the audience for an open discussion.

One of the most controversial issues tackled in the debate concerned the definition of 'marriage'. From a general point of view, the lack of an explicit definition of 'marriage' in the Recast of the Brussels II-*bis* Regulation was criticized as a significant deficiency. Different solutions were taken into consideration and heavily debated. One of these solutions concerns Recital 17 of the Regulation on Matrimonial Property Regimes, which states that the notion of 'marriage' is not defined by the Regulation but by national law. The participants discussed whether this approach could be applied by analogy to the Brussels II-*ter* Regulation and other EU instruments on Private International Law. In this case, Member States could individually decide whether or not to apply their domestic rules.

In response to this argument, other participants were in favor of having an autonomous interpretation of the concept of 'marriage' within the Brussels II-*bis* Regulation. They argued that the Property Regimes Regulations were adopted via the Enhanced Cooperation Procedure (Art. 326 et seq. TFEU), which expresses the intentions of a *limited* number of Member States. Therefore, these Regulations have to be strictly differentiated from the situation in the Brussels II-*bis* Regulation. Besides, the value of Recitals should not be overestimated. They are not equal to an operative provision, and the CJEU has deviated from Recitals in some instances, especially in the context of the Brussels I Regulation. However, the CJEU might outline an autonomous interpretation in its case-law, notably by considering the Charter of Fundamental Rights as a steppingstone. The widely accepted *Coman* judgment[19] is already a small step in this direction. The CJEU held that the Member States should recognize same-sex marriages concluded in another State in the context of residence rights, yet migration matters and family law are closer than one might think.

Other participants argued that the Recast does not leave the definition of 'marriage' wholly untouched. First, according to experts involved in the preparation of the Brussels II Convention, no reference was made to marriage as being exclusively a union between a man and a woman. The lack of an explicit legal definition in the text of the Convention and, later on, of the Regulation was a deliberate move. Second, the use of the gender-neutral term 'spouse' in the annexes of the Recast is a persuasive argument. In light of the negotiations on the Recast, this linguistic change is a deliberate choice, and it addresses the difficulties that arise from the practical use of the current standard forms. For instance, judges and civil servants in Belgium generally apply the Brussels II-*bis* Regulation and the Rome III Regulation to same-

[19] CJEU, Judgment of 5.6.2018, *Coman et al.*, C-673/16, ECLI:EU:C:2018:385.

sex marriages in light of their 'matrimonial' essence, but the terms 'husband' and 'wife' in the standard forms are hampering the issuing of certificates.

The unclear definition of the term 'marriage' is also a significant issue concerning the scope of application of the two Property Regimes Regulations. While the Regulation on the Property Consequences of Registred Partnerships entails a remarkably broad, gender-neutral definition that could also include same-sex marriages, there is no parallel definition of 'marriage' in the Regulation on Matrimonial Property Regimes.[20] Special attention was drawn to the relationship between marriage and registered partnership by way of example of legislative reforms in Italy. The recently introduced Article 32-*bis* of the Italian Private International Law Act requalifies same-sex marriages concluded abroad between Italian citizens as a civil partnership according to Italian domestic law. This provision creates significant uncertainty concerning the Property Consequences Regulations. In practice, if an Italian judge is seized according to the rules of the Regulation on Property Consequences of Registered Partnerships, the marriage in question will be requalified as a civil partnership under Italian law, i.e., the law of the state of origin. If a Belgian judge is seized with proceedings on divorce and division of property of Italian same-sex spouses living in Belgium, which is possible via a combination of Article 3 Brussels II-*bis* Regulation and Article 5 of the Matrimonial Property Consequences Regulation, the question arises whether the Belgian judge must also apply the Italian PIL provision on 'downgrading' the same-sex marriage to a civil partnership.

Looking from a broader perspective, the problematic qualification of same-sex marriages in EU family law highlights a lacking consensus among the EU Member States. Western-European liberal mainstream leads to the conclusion that if national law qualifies a union between two persons of the same sex as a 'marriage', this definition applies to all (national and European) instruments relevant for that marriage. This conclusion is not as evident in other legal systems. Only half of the EU Member States have, so far, 'accepted' same-sex marriages. In light of this diversity, an autonomous interpretation of 'marriage' that moves away from national concepts proves to be complicated. Notably, some Eastern-European States have codified the term 'marriage' as being a union between a man and a woman in their constitutions. From their perspective, an obligation to ignore their constitutional framework merely based on the EU Family Law Regulations seems hardly understandable.

A different solution worth considering is to permit the Member States to 'opt-out' from certain subject matters of the scope of the Brussels II-*bis* Regulation (e.g., the applicability to same-sex marriages). However, by granting this possibility to 'legally' deviate from the Regulation, private international law instruments would become optional and 'à la carte', leading to further fragmentation within EU Family Law.

A scholar from the UK argued that an exceeding imposition of the EU's viewpoint to the Member States was, to a certain extent, also considered by the United Kingdom in the context of the 'Brexit'-Referendum. The EU should try to strike a balance

[20] Applying the Registered Partnerships Regulation to same-sex marriages could solve the problematic situation with regard to Member States that do not recognise same-sex marriages. However, this solution could involve certain disadvantages as the Registered Partnerships Regulation is not identical with the Regulation on Matrimonial Property Regimes; see *infra*, Chapter D.

between facilitating the free movement of persons and 'international' families, on the one side, and 'imposing' mainstream-rules to national legal orders, on the other side. The European legislator should accept that, at present, Member States follow an inhomogeneous approach towards same-sex marriages in their national laws, but a consensus might be reached in the future.

b) Out-of-court divorces

The new rules in the Brussels II-*ter* Regulation on cross-border recognition of 'private' divorce agreements (Art. 64–68) raised several topics of concern in the discussion.

The decisive question is whether the agreement has been registered or not. The Recast follows the approach that, if a divorce agreement is registered and its effects clearly defined, it shall be recognized in all other Member States. In the opposite case, if there is no registration, the results of and the prerequisites for a 'private' divorce agreement may remain unclear, and such documents should not freely circulate.

Due regard was given to the requirement under the Brussels II-*ter* Regulation on the jurisdiction of the Member State in which the agreement has been registered (Art. 64 et seq.). This cross-cutting issue is not only relevant in the Brussels II-*ter* Regulation but also, for instance, in the Succession Regulation.[21] It raises the general question of the applicability of jurisdiction rules to non-judicial authorities, such as notaries, that render 'decisions' under EU instruments. Allowing to review their jurisdiction in the Member State of recognition is questionable in light of mutual trust and the free movement of judgments. However, the competence of the registering authority is particularly sensitive in cases of forum shopping, i.e., if the spouses purposely choose to have their divorce agreement registered in a particular country without having any close connection to this state. Courts in the state of recognition might show a certain degree of mistrust whether the registering authority has correctly assessed its jurisdiction.

Concerning Article 103 Brussels II-*ter* Regulation that requires the Member States to communicate their registering authorities to the Commission, the European legislator should be aware of the fact that the designated authorities may have vast territorial competences under national law, such as notaries under French law. This domestic distribution of competence may be incompatible with EU jurisdiction rules. Therefore, it could be useful to have uniform jurisdiction rules applied to notaries and other internal authorities, too.

c) The *Liberato* judgment of the CJEU (C-386/17)

Most participants disagreed with the CJEU's decision of January 16th, 2019, in the case of *Liberato v Grigorescu* (C-386/17). First, the Court qualified Article 19 Brussels II-*bis* Regulation on *lis pendens* as a jurisdictional rule. This argument was criticized

[21] For example, a party may deliberately seek to obtain an authentic instrument in a particular state even if that state is not competent under the Succession Regulation. At the stage of recognition in another Member State, the judges may oversee or disregard the jurisdiction rules of the Regulation. The question on whether jurisdiction must be established under the Succession Regulation if notaries issue a certificate as a 'decision' on succession rights, is at the core of the case C-80/19 pending before the CJEU (see http://curia.europa.eu/juris/showPdf.jsf?text=650%252F2012&docid=219786&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=2919162).

insofar as, from a technical and teleological point of view, rules on *lis pendens* and rules on jurisdiction operate differently. While the latter set limits to the court's adjudicative power from the outset, the former aim at coordinating parallel proceedings. Second, the CJEU has so far strictly applied the *lis pendens*-rules under the Brussels I-*bis* Regime. However, in the *Liberato* case, the Court follows a different approach by stating that a violation of *lis pendens* shall have no consequence.

From a practitioner's point of view, the judgment of the CJEU has significant drawbacks in Italy. Under Italian law, a spouse seeking divorce has to file for legal separation first. Due to the lengthiness of these proceedings, the other spouse might seize a court in another Member State to obtain a judgment and to have it recognized in the Member State where the first proceedings are still pending. This situation was precisely the case in *Liberato*: After the husband had initiated legal separation proceedings in Italy, the wife started divorce proceedings before a Romanian court that issued a divorce decree relatively quickly. She then applied for incidental recognition of the Romanian divorce decree before the Italian court based on the Brussels II-*bis* Regulation, even though she had started the Romanian proceedings in violation of *lis pendens*-rule. According to the *Liberato* judgment, such tactics remain sanctionless under the Brussels II-*bis* Regime.

To many participants' disappointment, the Brussels II-*ter* Regulation clearly confirms the CJEU's ruling: Recital 56 of the Recast states that the recognition of a decision should only be refused if the refusal grounds exhaustively provided for in the Regulation are fulfilled. Any refusal ground not listed in the Regulation cannot be invoked, such as the violation of *lis pendens*. However, the CJEU's decision could be overruled and corrected by additional EU legislation.[22]

Furthermore, the rules on *lis pendens* in the Brussels II-*ter* Regulation specifically address parallel proceedings involving an exclusive choice-of-court agreement under Article 10 Brussels II-*ter* Regulation. Article 20(4),(5) of the Recast adopt the provisions of Article 31 Brussels I-*bis* Regulation on the reversal of priority. Some participants criticized this synchronization, as the rationale in contract law cannot equally apply to family law and parental responsibility in particular.

d) Party autonomy in matrimonial matters

Unlike the Recast Proposal of 2006,[23] the Brussels II-*ter* Regulation does not allow for choice-of-court agreements in matrimonial matters. This gap is particularly regretful as the complementary Rome III Regulation enables spouses to choose the applicable divorce law but only from the perspective of the Member States that participated in the Enhanced Cooperation Procedure (Art. 326 et seq. TFEU). A choice-of-court agreement could secure the effectiveness of a choice-of-law agreement by determining the jurisdiction of a Member State that applies the Rome III Regulation.

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[22] By way of example, the *lis pendens*-rules of the Brussels I-*bis* Regulation was introduced to remedy the harsh interpretation of the CJEU in the case *Gasser v Misat* (C-116/02, ECLI:EU:C:2003:657), where a party disregarded an exclusive jurisdiction agreement and seized a court in another Member State.

[23] Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, COM(2006) 399 final, p. 15 et seq.

A possible reason why the European legislator was reluctant to introduce a choice-of-court option for divorce proceedings refers to the best interests of the child. If the parents could agree on the jurisdiction of a Member State for their divorce proceedings, this jurisdiction would also be relevant for ancillary proceedings on parental responsibility under Article 12(1) of the Brussels II-*bis* Regulation. Provided that the child is not habitually resident in the *forum prorogatum*, the prorogation may not be compatible with the best interests of the child. However, Article 10 of the Brussels II-*ter* Regulation now grants even further party autonomy with regard to parental responsibility. At the same time, this provision strongly emphasizes the best interests of the child as a substantive criterion. This safeguard mechanism could have been extended to choice-of-court agreements entered into for the main proceedings on divorce. By contrast, if there are no children involved in the divorce, there is no such need for special protection, and spouses should have the possibility to conclude choice-of-court agreements under the EU regime.

e) Treaties with the Holy See

During the discussion, attention was also drawn to a particular, yet often over-looked provision in the Brussels II Regime. Article 99 of the Brussels II-*ter* Regulation addresses the relationship between the Regulation and treaties entered into by several Member States with the Holy See. This provision was first introduced in the Brussels II Convention but already raised several questions at that time. Agreements with the Holy See are not compatible with the scope of application of the Brussels II Regime, namely, civil matters. However, in light of the unanimity requirement in the Council, it was necessary to include such agreements, as the respective EU instruments would not have been adopted otherwise. Twenty years later, the unanimity principle has, once again, led to the explicit reference to treaties with the Holy See.

II. PARENTAL RESPONSIBILITY (INCLUDING CHILD ABDUCTION)

1. From Brussels II-*bis* to Brussels II-*ter*

The second panel of the Seminar dealt with matters related to children as provided for by the Brussels II-*bis* Regime. At the outset of the recast procedure of the Brussels II-*bis* Regulation, parental responsibility matters were the primary motivation to reform the current system. This particular area of law seemed to have caused severe problems that needed to be addressed urgently.[24] Therefore, the second panel of the Seminar was conceived to shed light on these practical deficiencies and the solutions proposed in the new Brussels II-*ter* Regulation.

2. Practical deficiencies and legislative developments in the Brussels II-*bis* Regime

This first presentation had two purposes: First, it summarised the problematic issues concerning parental responsibility identified in the National Exchange Seminars. Second, it described the significant changes in the Brussels II-*ter* Regulation that will apply from August 1st, 2022. Specifically, the presentation focused on three

[24] See Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), COM(2016) 411 final, p. 2.

problematic areas: the child's best interests, the child abduction regime, and the cooperation between Central Authorities and courts.

a) The best interests of the child

An overarching theme of the Brussels II-*bis* Regulation and the Recast is the child's best interest. However, the Regulation does not define this notion, and the National Exchange Seminars raised the question of whether more 'European' guidance was necessary to facilitate the practical application of the Regulation. Indeed, the Brussels II-*ter* Regulation provides for further indications.

For the sake of clarity, the Recast harmonizes the term 'child' in line with the 1996 Hague Child Protection Convention and the 2000 Hague Convention on the Protection of Vulnerable Adults. According to Article 2(2) no. 6 of the Recast, any person below the age of 18 years is considered a 'child'. The Recast also refers to legal sources that are common to the Member States and could serve as guidelines for interpreting the notion of the child's best interest: Article 24 of the Charter of Fundamental Rights and the United Nations Convention on the Rights of the Child.

Furthermore, the Brussels II-*ter* Regulation emphasizes the principle of the best interests of the child in new situations compared to the current Regulation. For instance, the Recast refers to the best interests of the child as a guideline for courts to decide whether to refer the parties to mediation or other ADR mechanisms (Art. 35). However, this provision has been drafted with caution on when and how courts shall consider mediation. This cautious approach is due to the fact that Article 35 applies to child abduction proceedings where the use of mediation is very controversial.

Another problematic issue linked to the best interests of the child is the hearing of the child. Notably, the National Exchange Seminars have highlighted the diverging national procedures on when and how a child should be heard. The Recast tries to address this inhomogeneous situation by introducing a general provision on 'the right of the child to express his or her views' (Art. 21 Brussels II-*ter* Regulation). The current Regulation does not contain such a general rule on the hearing of the child. Consequently, Member States rely heavily on their national standards when deciding on whether refusing the enforcement of a decision. Against this backdrop, the introduction of a harmonized provision proved to be difficult under various perspectives. For instance, such a rule needed to be broad enough to allow for a case by case approach. Finally, the Council adopted the wording of the new Article 21 that explicitly refers to the *lex fori*.

Contrary to many national provisions, Article 21 Brussels II-*ter* Regulation does not entail a strict age limit, but judges are supposed to take into account the child's age and maturity. In addition, Article 21 states the person hearing the child does not necessarily have to be the judge, but also a social worker or psychologist could be involved instead.

Following this new definition, the refusal grounds of the Regulation have been clarified to prevent the Member States from applying their own stricter standards in the enforcement stage. According to Article 39 of the Recast, recognition and enforcement of a judgment may be refused if the child has not been heard in line with the guidelines set out in Article 21.

However, the duty to hear the child is not absolute. If the proceedings only concern the property of the child or if the case is particularly urgent, it will not be necessary to hear the child's views (Art. 39(2) Brussels II-*ter* Regulation).

b) The procedural regime on cross-border child abduction

The second area tackled in the presentation concerns the European and international system for cross-border child abduction proceedings. A significant problem highlighted in the National Exchange Seminars is the excessive use of the grounds for refusing the return of the child, such as Article 13(1) (b) of the 1980 Hague Child Abduction Convention. This provision permits to refuse the return of the child if this return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. In addition, the National Exchange Seminars have highlighted an inconsistent application of Article 11(4) Brussels II-*bis* Regulation. This provision prevents courts from refusing the return of a child if 'adequate arrangements' can guarantee the protection of the child in the State of origin. Another major problem is the excessive length and costliness of child return proceedings.

Regarding the current Article 11(4) Brussels II-*bis* Regulation, the Recast clarifies how the court of enforcement shall assess if adequate measures taken in the Member State of origin are enough to protect the child after its return. According to Article 27 Brussels II-*ter* Regulation, the court in the Member State of enforcement shall mainly rely on the parties' evidence. Also, it may directly communicate with the courts of the State of origin to inquire about such measures.

Furthermore, the Recast clarifies certain aspects concerning the length of proceedings and the autonomous deadlines under the Regulation. Article 24 Brussels II-*ter* Regulation states that the six weeks period to render a decision applies in each instance, and Article 28 determines an additional six weeks period for the enforcement procedure. However, the final version of the Recast is less far-reaching than the proposals made by the European Commission to avoid extremely long proceedings. The Commission suggested obliging the Member States to concentrate jurisdiction in child abduction cases in a limited number of courts and to limit the number of appeals against a return order to one. The Council did not adopt these proposals but inserted references to them in the Recitals, which invite the Member States to implement such measures via domestic legislation.

Regarding the enforcement procedure, the Brussels II-*ter* Regulation abolishes exequatur for all decisions on parental responsibility (Art. 34), but still differentiates the refusal grounds than may be invoked against 'privileged decisions' and other decisions. A further significant change concerns the enforcement of 'trumping orders'. The strict overriding mechanism (currently laid down in Art. 11(8) Brussels II-*bis* Regulation) may be reversed in exceptional cases: According to Article 56 Brussels II-*ter* Regulation, the court of enforcement may suspend and, eventually, refuse the implementation of the 'trumping order' if the circumstances have changed after this order was issued in the Member State of origin and if the enforcement would now endanger the child in question. However, the court of enforcement cannot automatically refuse the enforcement but shall first consider any 'appropriate step'. Admittedly, the latter criterion is relatively vague.

c) Cooperation between Central Authorities and courts

The combined European and international system on cross-border child abduction proceedings relies heavily on the collaboration between Central Authorities. However, the National Exchange Seminars showed that this cooperation is complicated and insufficient in practice. The Brussels II-*ter* Regulation tries to tackle this issue by introducing more detailed rules on the specific tasks of the Central Authorities, designating the Authorities that have to provide for information, and specifying how this information shall circulate.

Furthermore, the National Exchange Seminars shed light on the practical relevance of other cooperation mechanisms that directly involve the judges concerned. These 'tools', which are also emphasized in the Recast and its Recitals, are the European Judicial Network, the International Hague Network of Judges, and the Evidence Regulation[25].

Another major issue worth mentioning in the cooperation between Central Authorities is the protection of personal data. The Recast addresses the need for such protection by implementing specific requirements set out by the GDPR for the transmission and processing of personal data (Art. 88 Brussels II-*ter* Regulation).

3. The rules on parental responsibility in the Brussels II-*ter* Regulation

The second presentation aimed at a more in-depth evaluation of the Brussels II-*ter* Regulation in the area of parental responsibility. This intervention did not focus on a comparison between the proposal of the European Commission and the final text published in the Official Journal, as the *outcome* of negotiations is of paramount importance for practitioners and not the negotiations as such. Therefore, the provisions of the Recast voted by the Council should be analyzed to the extent they enhance the practical application of the Regulation. Interestingly, the survey conducted within the EUFams II Project revealed that the EU instrument on family law that is best known among professionals is, indeed, the Brussels II-*bis* Regulation.[26] By changing the Regulation, this relatively high degree of familiarity will be set back. It remains to be seen how the new rules will be understood and applied by practitioners.

a) Enforcement of decisions in matters of parental responsibility

Particular regard was given to the new Chapter 4 Section 3 in the Brussels II-*ter* Regulation on 'common provisions on enforcement'. The speaker welcomed these new provisions as a step in the right direction to better regulate the enforcement procedure for decisions on parental responsibility after the abolition of exequatur (Art. 34 Brussels II-*ter* Regulation). Harmonizing the enforcement procedure means to directly interfere with the administration of justice of the Member States, which the latter cautiously accepted.

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[25] 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, OJ L 174, 27.6.2001, p. 1 et seq.

[26] Lobach/Rapp, An Empirical Study on European Family and Succession Law: Report on the Questionnaire conducted within the framework of the EUFams II project (2019), p. 16, available at: http://www2.ipr.uni-heidelberg.de/eufams/index-Dateien/microsites/download.php?art=projektbericht&id=2.

However, among these new rules on enforcement, the practical application of the grounds for refusal and suspension of enforcement (Art. 56) and in particular of Article 56(6) Brussels II-*ter* Regulation raises several questions. On the one hand, these refusal grounds are sensible insofar as a court will never proceed to enforce a decision if there is a real risk of physical or psychological harm for the child. On the other hand, the European legislator tried to limit the use of these refusal grounds to exceptional cases by demanding significant changes in the circumstances or a new temporary element, but these limits may not be a sufficient barrier.

The problematic effect of these new refusal grounds is that they confer further 'ammunition' to parents to extend the litigation to the enforcement stage of child abduction proceedings. Consequently, the enforcement procedure might become even less efficient than under the current Regulation. Return proceedings may end up being limitless without solving the actual child abduction.

b) 'Agreements' on parental responsibility

Another issue highlighted in the presentation concerns Chapter 4 of the Recast dealing with 'authentic instruments and agreements' (Art. 64 et seq.). Addressing such family law agreements involving children in the new Regulation was welcomed as a positive development. Notably, the grounds for refusing the recognition of agreements and authentic instruments address specifically the need to hear the child. At the internal level, there is often no explicit mechanism or guarantee that the child is being heard during the negotiations of the agreement. In light of the new refusal ground based on the hearing of the child (Art. 68(3) Brussels II-*ter* Regulation), the national practice of not hearing the child's views needs to be revised.

Furthermore, Chapter 4 leads to a methodological change insofar as the parties can control the substantive law applicable to the out-of-court agreement. This aspect, as well as the mechanism of reviewing the jurisdiction, raises several open questions.

c) The right of the child to be heard

Concerning the revised provision on the right of the child to be heard (Art. 21 Brussels II-*ter* Regulation), it is indeed remarkable that the Member States have accepted to negotiate a harmonized provision. However, the final wording of this rule does not entail any significant changes except for the references to the case-law of the CJEU. If a court decides to hear a child, it must offer the child an adequate opportunity to express its views and has to take into account the opinions expressed by the child.[27]

An additional clear message of Article 21 Brussels II-*ter* Regulation is that all methods used in the Member States for the hearing of the child must be considered equivalent and adequate in light of the principle of mutual trust. However, it may be questioned if this attitude of equivalence applies, indeed, to all methods.

d) Party autonomy in matters of parental responsibility

The new provision on choice-of-court agreements (Art. 10 Brussels II-*ter* Regulation) was presented as a significant development. Notably, parties may conclude a choice-of-court agreement at any time before a dispute arises, which is currently not

[27] CJEU, Judgment of 22.12.2010, *Zarraga v Pelz*, C-491/10 PPU, ECLI:EU:C:2010:828.

permitted under Article 12 Brussels II-*bis* Regulation. However, such an *ex-ante*-agreement does not confer exclusive jurisdiction but only a concurrent jurisdiction: Article 10(4) Brussels II-*ter* Regulation states that only the prorogation agreed upon in the course of proceedings shall confer exclusive jurisdiction. This differentiation is problematic as it creates a race to the courthouse. For instance, one parent might seize the court that was chosen before the proceedings started, and the other parent might apply to another court according to the default rule. In this regard, the possibility to select the competent court *beforehand* may only be useful if the parties agree and will not enter into conflict at a later stage. However, if parties agree in any event, there is likely no need to seize a court to solve their case. Therefore, it would have been more important to guarantee the validity of an *ex ante*-agreement in cases where the parties disagree and bring their case to court.

e) The role of the Recitals

The presentation also addressed a question that applies to EU Regulations in general, namely, the lack of certainty attached to Recitals and their value. This open question is particularly crucial in the Brussels II-*ter* Regulation that comprises a total of 98 Recitals. These Recitals are not only remarkably long but also increasingly complicated.

Notably, the Recitals of the Brussels II-*ter* Regulation seem to address different target groups. They reach out to judges who interpret the Regulation but also address lawyers to teach them how to use the Regulation. For instance, Recital 43 proposes lawyers to opt for a choice-of-court agreement to obtain the homologation of agreements reached via mediation in child abduction cases. The Recitals also refer to the governments of the Member States with regard to national implementation laws. Also, the Recitals address the delegates involved in the negotiations and whose proposals were not accepted. This mixture is hard to understand and leaves the exact scope and substance of the Recitals unclear.

4. Critical analysis of selected issues in the open discussion

a) The efficiency and length of enforcement proceedings

Following the two presentations concerning the EU regime on parental responsibility, the floor was given to the audience for an open discussion. The first issue addressed in the discourse concerned the overall efficiency of enforcement proceedings under the Brussels II-*bis*/-*ter* Regulation.

From a general point of view, it was criticized that the Recast does not extend the instructions on expeditious proceedings (Art. 24 Brussels II-*ter* Regulation) to the enforcement stage of child abduction cases. This shortcoming is particularly regretful as timing is critical in child abduction cases: The more time elapses, the more stable the presence of the child becomes in the state of abduction. As a result, the court may no longer consider the return to be in the best interest of the child and may deny the request in light of Article 13(1) (b) 1980 Hague Child Abduction Convention.

Regarding the differentiation between 'privileged' decisions and other decisions on parental responsibility, it was criticized that the Recast does not provide better guidance for practitioners. Even if the Recast reduces this differentiation between decisions by abolishing exequatur *in toto*, it still follows a double-track system with

regard to the refusal grounds. Practitioners may have difficulties in applying these different rules.

Special attention was drawn to the specific ground for suspending and refusing the enforcement of a return order according to Article 56 Brussels II-*ter* Regulation. Notably, participants discussed to what extent this new provision will change the system under the current Article 11 Brussels II-*bis* Regulation. The case-law of the European Court of Human Rights regarding Article 8 ECHR[28] opens the possibility for courts to exercise discretion to protect the best interests of the child. In light of the new Article 56, the courts of the Member States will have to take into account this margin of discretion which does not comply with the current mechanism. Instead, the new refusal grounds seem to lead back to the mechanism under Article 13(1)(b) of the 1980 Hague Child Abduction Regulation, which might become a strong incentive for parents to litigate even further. Among others, the Recitals of the Brussels II-*ter* Regulation explicitly encourage the involvement of social workers and child psychologists. These professionals may be involved to assess if the return would endanger the child's physical and psychological well-being. Such measures might, however, create additional avenues for litigation and further extend the return proceedings. This result contradicts the aim of the Brussels II-*bis* Regime to ensure a quick return of the child.

The lengthiness of return proceedings does not only increase the probability of refusing the return of the child but also creates high costs for the parties involved. According to Article 26 and Article 42 of the 1980 Hague Child Abduction Convention, a Member State may not assume these costs. This possibility to reserve the costs of legal assistance in return proceedings can be a significant hurdle for the parties concerned. Therefore, some participants recommended revising this provision, especially with regard to mediation, which is often particularly expensive.

The discussions with the audience also addressed the concentration of jurisdiction in cross-border parental responsibility cases, which had been proposed by the European Commission as a mechanism to avoid overly lengthy proceedings. Some participants welcomed this proposal, but others highlighted that the Member States follow different approaches to the concentration of jurisdiction in general. While some Member States traditionally follow this mechanism in their domestic law (for instance, Germany), this is not the case in other Member States that were not ready to accept significant interferences with their national procedural law.

In the final version of the Recast, the only left-overs of these additional proposals are the Recitals, which appeal to the Member States to consider such mechanisms in their domestic legislation. The Recitals also suggest providing enough funding for Central Authorities, as their proper functionality and efficiency may have a direct effect on the duration of the proceedings.

b) The new provision on the hearing of the child

Article 21 Brussels II-*ter* Regulation on the 'right of the child to be heard' raised multiple questions in the discussion. First of all, the nature of the explicit

[28] See, for instance, the case of *X v. Latvia* (27853/09), Judgment of 26.11.2013, decided by the Grand Chamber of the European Court of Human Rights.

reference to domestic law and the delimitation between the harmonized criteria and national standards remain unclear. The CJEU might apply this provision in line with the interpretation of public policy in the *Krombach* case.[29] In this judgment, the Court held that, if the public policy-clause refers to national law, this reference is subject to limits imposed by EU law, including the Charter of Fundamental Rights. The same approach could apply to Article 21 Brussels II-*ter* Regulation. Several participants highlighted the crucial role of the CJEU in shaping the obligation to hear the child and providing better guidance on its interpretation.

In the final version of Article 21, more importance was given to the principle of equivalence than to harmonization of detailed requirements for the hearing of the child. National practices vary heavily in this regard. In Spain and Italy, for instance, most authorities do not involve children under the age of 12. This practice may not be in line with Article 21 Brussels II-*ter* Regulation that deliberately avoids defining a specific minimum age to hear the child. The PETI Committee had suggested introducing a respective age limit,[30] but the European Parliament did not adopt this proposal.[31] Notably, defining a strict minimum age in the Brussels II-*ter* Regulation would have been contrary to Article 12 of the UN Convention on the Rights of the Child, which does not differentiate between children of a certain age concerning the right to be heard.

From a more general point of view, some participants argued that the hearing of the child is more important if the parents *disagree* on matters of parental responsibility, whereas in a *consensual* setting, such as in out-of-court divorces, there is no need to involve the child in the proceeding. In fact, the analysis of case law shows that children are heard only in a limited number of cases. For instance, it is a common practice in Italy to refrain from hearing the child in judicial mutual consent divorces and out-of-court divorces.

Practitioners in the audience discussed to what extent Article 21 Brussels II-*ter* Regulation will have an impact on such national practices. Some participants argued that Article 21 is a reasonable compromise that allows respecting the rights of the child in accordance with national substantive law and procedural law. Contrary to the rule proposed by the European Commission,[32] the final provision does not stipulate a strict obligation to hear every child. This ratio is also reflected in the title of Article 21, which refers to the *right* of the child to express his or her opinion, and not to an *obligation* for courts.

Consequently, refusing to hear the child in compliance with national procedures would not trigger the refusal ground of Article 39(2) Brussels II-*ter* Regulation. Italian

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[29] CJEU, judgment of 28.3.2000, *Krombach v Bamberski*, C-7/98, ECLI:EU:C:2000:164.

[30] See the Opinion of the European Economic and Social Committee on the Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), OJ C 125, 21.4.2017, p. 50.

[31] See the proposed amendments adopted by the Parliament concerning Art. 20 of the Recast Proposal: http://www.europarl.europa.eu/doceo/document/TA-8-2018-0017_EN.html?redirect.

[32] Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), COM(2016) 411 final, p. 42.

judgments on mutual consent divorces rendered under Italian law without the child being heard by the judge should, therefore, be recognized and enforced in the EU under the Brussels II-*ter* Regulation. The same question arises with regard to out-of-court divorces involving matters of parental responsibility. Article 68(3) Brussels II-*ter* Regulation permits to refuse the recognition and enforcement of such agreements if the child has not had an opportunity to express his/her views in accordance with Article 21. This refusal ground might stop the circulation of out-of-court divorces drawn up under Italian law if this refusal ground is interpreted in a strict sense. While courts may involve a psychologist or social services to hear the child, lawyers are not able to do so as they are not professionals trained for this task. However, this lack of training may also apply to judges involved in a judicial divorce. By way of example, a German practitioner referred to a case that does not represent a 'best practice': The judge heard the child for one hour and asked the latter ninety questions.

Other participants argued that the above-mentioned practice in Italy is not at all in line with the requirements of Article 21 Brussels II-*ter* Regulation. This provision does not differentiate between contentious and mutual consent divorces, and the child has to be involved in either situation. Italian courts and practitioners should, therefore, find a workable solution to include children in mutual consent divorces, as the conclusion of an agreement does not necessarily imply that the best interests of the child have been taken into account.

However, other participants held that Article 21 Brussels II-*ter* Regulation does not constitute a significant change, as Article 24 of the Charter of Fundamental Rights Charter and the UN Convention on the Rights of the Child have already been applied under the current Regulation to protect the rights of the child in proceedings. Therefore, Article 21 is merely a 'reminder' addressed to all stakeholders to mainstream the idea of hearing the child in the proceedings. At the same time, Article 21 respects the fact the Member States attach different values to the hearing of the child. Notably, this provision does not require that a judge hears the child, but that *somebody* has to. For instance, if the judge asks the parents whether they have involved the child in their decision or listened to it and if the judge considers this circumstance in the judgment, then the child has been 'heard'.

Furthermore, the relevance of a declaration of the child made before a court in another Member State was discussed. For instance, in a recent decision of the Italian Court of Cassation,[33] the Italian Court of First Instance decided not to hear a child that had already been heard by courts in Monaco. The Court of Cassation overruled this decision, arguing that the environment in which the child had been heard in Monaco was too biased against the father. In such cases, it remains unclear whether declarations made before courts in another Member State will be sufficient to comply with the requirements of Article 21 Brussels II-*ter* Regulation, and to what extent the environment in which the child was heard in that other Member State plays a decisive role. Notably, a declaration of the child made a long time ago might not correspond to the child's present conditions, as circumstances concerning children usually evolve

[33] Corte di Cassazione, 11.06.2019, 15728, The judgment is available in the EUFams II database as ITT20190611.

very quickly. Therefore, a court should not rely exclusively on such an 'outdated' statement made in another Member State.

To conclude, the discussion highlighted that, notwithstanding the difficulties of dealing with different national approaches, the hearing of the child is a fundamental right. It is subject to the Charter of Fundamental Rights, which should be interpreted uniformly. This framework also applies to Article 21 Brussels II-*ter* Regulation that should regulate more than just referring to national systems.

c) Mediation

The Brussels II-*ter* Regulation addresses mediation and other ADR mechanisms specifically in the context of child abduction proceedings (Art. 35) and, more generally, invites parents and other parties to try mediation. In light of this mediation-friendly yet cautious approach of the Recast, the discussion during the International Exchange Seminar evolved around practical problems in the use of ADR in cross-border proceedings concerning children. First of all, practitioners in the audience were aware of the delicate situation at stake: On the one hand, judges try to invite parties, often via their lawyers, to attempt mediation. Lawyers, however, have to deal with their clients who are fighting over the child and who started judicial proceedings precisely because it was difficult to reach an agreement out of court.

Furthermore, a fundamental problem is the availability of specialized mediators, in particular concerning child abduction cases. The skills of the mediator are crucial, as mediation is only as effective as the mediator is qualified. In this regard, the website 'crossbordermediator.eu' was presented, which provides a list of mediators specifically trained to deal with cross-border family conflicts, including international child abduction.

d) Jurisdiction for incidental questions and the case-law of the CJEU

Special attention was drawn to Article 16 Brussels II-*ter* Regulation on the jurisdiction for incidental questions. This new provision states that, if the outcome of proceedings in a matter falling outside of the scope of the Regulation depends on the determination of an incidental question relating to parental responsibility, the court where these main proceedings are pending is competent to rule on that incidental question for the purposes of those proceedings, even if it does not have jurisdiction under the Regulation.

The audience discussed to what extent this new jurisdiction rule affects the case-law of the CJEU.[34] The CJEU has, so far, argued that questions concerning parental responsibility arising in other (primary) proceedings could *not* be qualified as preliminary, but as main questions. The CJEU thus tried to establish the seized court's competence for these questions under the general jurisdiction heads of the Brussels II-*bis* Regulation, notably by affirming the validity of a choice-of-court agreement.[35] Some participants argued that Article 16 Brussels II-*ter* Regulation will reverse this approach by treating such questions as 'incidental'. This interpretation is supported

[34] For instance, see CJEU, judgment of 19.4.2018, *Saponaro et al.*, C-565/15, ECLI:EU:C:2018:265; CJEU, judgment of 6.10.2015, *Matoušková*, C-404/14, ECLI:EU:C:2015:653.

[35] CJEU, judgment of 19.4.2018, *Saponaro et al.,* C-565/15, ECLI:EU:C:2018:265.

by the recitals 32 and 33 of the Regulation that reflect situations the CJEU dealt with in its case-law, but which now fall under Article 16, such as the judicial approval of acts concerning the assets of minors or the rejection of inheritance.

e) Additional open questions and reform proposals

After many years of applying the return mechanism under the Brussels II-*bis* Regime, it has become evident that this mechanism has its limits. At the outset, the return mechanism was designed to speed up the proceedings and to have children returned as quickly as possible. However, the practical application of the Brussels II-*bis* Regulation shows that this aim has only been met to a limited extent. In this regard, the Brussels II-*ter* Regulation will presumably be of little help, as it provides parents with too much 'ammunition' to continue litigating.

In particular, the discussion with the audience addressed the differences in national legislation concerning relocation orders. In some Member States, the caregiver is not entitled to obtain such an order even for legitimate reasons. Consequently, if the caregiver decides unilaterally to move away with the child, this parent would commit child abduction, whereas the other parent has multiple legal 'weapons' to counteract the relocation under the Brussels II-*bis*/-*ter* Regulation.

Also, the current regime does not sufficiently take into account the rise of joint parental custody, which enables parents to 'share' the child by rotating the care every other week. Joint custody hinders each parent from moving away with the child, as this act would amount to child abduction.

The discussion terminated with the conclusion that the current child abduction regime needs a recommitment to return the child immediately and to shift other substantive purposes to a later step. The European legislator should rethink these issues for future reforms.

C. 'BREXIT' AHEAD: IMPACTS ON EUROPEAN FAMILY LAW[36]

Shortly after the International Exchange Seminar, the European Council adopted a decision to delay Brexit until 31 January 2020 to allow more time for the withdrawal agreement to be ratified.[37] Participants from the UK felt reassured about this extension and reiterated the need for legal certainty to protect international families and their rights after Brexit.

Other participants were not as confident whether a withdrawal agreement will be reached or not. However, they concluded that both scenarios would entail advantages and disadvantages concerning cross-border family matters. With or without a 'deal' between the EU and the UK, international family law will remain a complex legal framework.

A benefit of the withdrawal agreement would be to set up a transitional period during which the existing European instruments continue to apply. Thus, the legal landscape that remains *after* the transitional period seems more unclear.

This uncertainty concerning the applicable legal regime is particularly problematic for child abduction cases. On the one hand, the system set up by the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention is not affected by Brexit and will continue to apply in the UK. On the other hand, these instruments do not establish an equally comprehensive framework as the Brussels II-*bis* Regulation does. At present, it is unlikely that the UK will enact an equivalent to the Brussels II-*bis/-ter* Regulation unilaterally, also in a 'no deal'-scenario. However, even if there is no direct continuity with the EU instruments on family law, the Brussels II-*bis* Regime will continue to influence courts in the UK. They have applied the Brussels II-bis Regulation for many years, and the respective case-law will likely be taken into consideration further on.

Apart from the child abduction regime, further crucial post-Brexit questions on cross-border family matters are currently debated in the UK. Notably, particular attention is given to the rules on the transfer of jurisdiction (Art. 15 Brussels II-*bis* Regulation and, respectively, Art. 12 and Art. 13 Brussels II-*ter* Regulation) and *lis pendens* (Art. 19 Brussels II-*bis* Regulation and, respectively, Art. 20 Brussels II-*ter* Regulation).

According to a practitioner from the UK, it would be necessary to ensure effective national procedural rules on cross-border family matters for post-Brexit times. Notably, professionals and scholars in the UK have recently been debating the virtues of a discretionary mechanism, such as *forum non conveniens*, in contrast to the 'European' *lis pendens*-rule of the Brussels II-*bis* Regulation. Even if the doctrine of *forum non conveniens* was applied historically before UK courts, practitioners are now used to applying the *lis pendens*-principle instead.

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[36] This Chapter was written by Dr. Marlene Brosch, Max Planck Institute for Procedural Law Luxembourg.

[37] See the official press release of 29th October 2019 of the European Council, 'Brexit: European Council adopts decision to extend the period under Article 50', available at: https://www.consilium.europa.eu/en/press/press-releases/2019/10/29/brexit-european-council-adopts-decision-to-extend-the-period-under-article-50/#.

In this regard, it is interesting to note how the point of view of British scholars and practitioners changed on *lis pendens* and the possibility to transfer the jurisdiction. Unlike the negotiations of the Brussels II-*bis* Regulation, they are now well aware of the disadvantages of the discretionary approach of *forum non conveniens*, such as high costs and the duration of proceedings. UK professionals are, therefore, urging the legislators to consider the negative implications of a more discretionary rule compared to the European regime that is currently (still) in place.

The Brexit-panel of the International Exchange Seminar Seminar was closed with a word of hope by a scholar from the other side of the Channel. If the UK reaches a withdrawal agreement, it might be willing and able to join the system set up by the Brussels II-*bis*/-*ter* Regulation at a later stage.

D. THE RECENTLY ESTABLISHED ENHANCED COOPERATION IN MATRIMONIAL PROPERTY REGIMES AND PROPERTY REGIMES FOR REGISTRED PARTNERSHIPS: INNOVATIONS AND PITFALLS[38]

I. A FOREWORD

The first panel of the afternoon focused on the recently established enhanced cooperation in matrimonial property regimes and property regimes for registered partnerships. After numerous years of reflections and negotiations, Regulation (EU) 2016/1103[39] and Regulation (EU) 2016/1104[40] were adopted on 24 June 2016 on the basis of Article 81(3) TFEU: They entered into force on 28 July 2016, and became applicable as of 29 January 2019. In accordance with Article 20 TEU and Title III TFEU, these Regulations implement enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of, respectively, matrimonial property regimes and the property consequences of registered partnerships.[41]

The purpose of these Regulations is threefold: notably, these Regulations (i) clarify which national court has jurisdiction to assist couples manage their property or distribute it between them in case of divorce, separation or death; (ii) shed the light on which national law governs the matters that fall within their scope of application; and (iii) simplify the recognition and enforcement in one Member State of a judgment given in another Member State on questions of property regimes of international couples.

At present, 18 Member States participate in the enhanced cooperation established with these Regulations. They are Belgium, Bulgaria, Cyprus, Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Luxembourg, Malta, The Netherlands, Austria, Portugal, Slovenia, Finland, and Sweden. Estonia has also expressed its interest in taking part in the cooperation.[42]

The adoption of Regulations 1103 and 1104 of 2016 marks a significant – albeit partial, due to the limited territorial scope of their application – step forth in the architecture of EU private international and procedural law in family matters, and it contributes to the European Union's endeavour and commitment to ensure consistency in the treatment of cross-border family law matters within the Area of Freedom, Security and Justice.

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[38] This Chapter was written by Dr. Cristina M. Mariottini, Max Planck Institute for Procedural Law Luxembourg.

[39] 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, 8.7.2016, p. 1–29.

[40] 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, 8.7.2016, p. 30–56.

[41] See Council Decision (EU) 2016/954 of 9 June 2016 authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships, OJ L 159, 16.6.2016, p. 16–18.

[42] See, in particular, Art. 331 TFEU.

However, the Regulations on property regimes of international couples are characterised by a high degree of complexity and, as transpired from the discussions held within the panel, pending questions arise, in particular, from the coordination of these Regulations as between themselves, from their coordination with the Brussels II-*bis* (and, soon, Brussels II-*ter*) Regulation, and from their coordination with the Succession Regulation.

II. THE PROPERTY REGIME OF INTERNATIONAL COUPLES: A FIRST ASSESSMENT. INCREASED CERTAINTY, BUT ADDITIONAL LACK OF COORDINATION IN THE AREA OF EU FAMILY LAW

The first presentation delivered within the panel shed the light on the pending and problematic issues discernible in the context of the EU Regulations on the property regime of international couples.

As shown in the course of the National Exchange Seminars hosted locally by the Project Partners, there is general consensus that the Regulations provide an improvement vis-à-vis legal certainty compared to the previous situation, which was characterised by a tangle of different national rules. However, a number of sources of uncertainty were also identified.

As the first critical assessment offered in the panel portrayed, among the problematic issues are: matters of scope and characterisation (*infra*, para. 1); questions of coordination between rules on jurisdiction over property claims and succession or divorce (or dissolution of the registered partnership) (*infra*, para. 2); questions related to the law that governs the property regime of the international couples (*infra*, para. 3); and the paramount importance of education and training to foster predictability and legal certainty (*infra*, para. 4).

1. Scope and characterisation

a) Lack of definition of the term 'marriage' in the Regulation on Matrimonial Property Regimes

The presentation started by highlighting the lack of an autonomous definition of the term 'marriage' in the Regulation on Matrimonial Property Regimes. In fact, while Article 3(1)(a) of the Regulation on Property Consequences of Registered Partnerships provides an autonomous definition of 'registered partnership' for the purposes of the Regulation, the Regulation on Matrimonial Property Regimes does not contain any binding definition of the term 'marriage'.

As already pointed out with respect to the Brussels II-*bis* Regulation, due to the lack of such definition the Regulation on Matrimonial Property Regimes does not apply in a consistent manner: Concerns in this respect arise, of course, vis-à-vis the characterisation of same-sex marriages, to the detriment of uniform interpretation and application of the Regulation.[43] However, a similar concern was raised also with regards to the characterisation of the French 'avantages matrimoniaux'.

During the debate, it was remarked that the definition of the term 'marriage' actually amounts to a preliminary question on the validity of a marriage: As such, it is a private

[43] See *supra* at Chapter B.

international law question, which needs to be looked at from the perspective of the forum. The question of the validity of a marriage and of the legal consequences of a marriage are in given State, whether same-sex or not, is therefore to be solved by giving application to the private international law of the Member State.

In this framework, it is of note that the Regulation adopts gender-neutral forms and, in particular, it employs the term 'party'. It follows that the gender-neutral forms accommodate the instance where – as is the case under the laws of Belgium, The Netherlands and Sweden – same-sex marriage is construed as falling within the scope of the Matrimonial Property Regulation (as well as within the scope of the Brussels II-*bis* Regulation). However, while this feature indicates flexibility as to the inclusion of same-sex marriage in the scope of the Regulation, it does not offer a permanent and uniform solution to the ambiguity of the Regulation in this respect.

As concerns the definition of 'marriage', the Regulation on Matrimonial Property Regimes does provide an indication to the interpreter in the part where it leaves, at Recital 17, 'marriage' to be 'defined by the national laws of the Member States'. However, the question arises as to which national law is to decide what is to be construed as 'marriage'.

This question forms the object of a wide and active academic debate. While some scholars refer, for this purpose, to the law according to which the supposed marriage was concluded, a majority opinion favours the application of the *lex fori*. In this respect, however, the invited expert objected to both positions and observed that this is a matter left to national law to be identified on the basis of the private international law rules of the forum.

In favour of the possibility of subjecting this issue to the *lex fori*, it is commonly also maintained that applying the *lex fori* to matters as sensitive as those falling within the scope of the Regulation prevents recourse to the public policy exception to refuse application to a foreign law, to the benefit of a smooth and less conflictual administration of justice. However, as the speaker observed, recourse to public policy should necessarily not be identified as a problem *per se*. To the contrary, in an area that is progressively undergoing major substantive changes such as the one addressing the definition of marriage, allowing courts to be confronted with the possibility of applying foreign laws that provide in a manner that is visibly different than the *lex fori* may actually contribute – thanks to the courts' process of hermeneutical revision – towards a narrower understanding of the public policy exception in this area of the law and towards the approximation of the substantive laws of the Member States.

Finally, it is of note that the CJEU has influenced private international law through the notion of free movement and of EU citizenship. The Court could rule on whether the Member States are required to recognise a foreign same-sex marriage based on the free movement principle. This would amount to the extension of the *Polbud* judgment[44] where the Court mandated the obligation to recognise the free movement principle for residence purposes. While this step has not been taken yet, free movement and EU citizenship seem to be the common grounds for the recognition of

[44] CJEU, Judgment of 25.10.2017, *Polbud*, C-106/16, ECLI:EU:C:2017:804.

same-sex marriage. In this regard, however, a warning was made to underscore that the CJEU may adopt different approaches under the different Regulations. For instance, when in the *OL v PQ* judgment[45] the CJEU required physical presence for the establishment of the habitual residence, it only required it for children: Habitual residence for matter of property regimes of international couples might be considered differently, as is also the case with respect to the Succession Regulation.

b) Conversion of a same-sex registered partnership into marriage: ambiguities and risks

An additional question pertaining to characterisation arises in the context of the possibility to convert a same-sex registered partnership into a marriage. This is possible, for instance, in Belgium, in accordance with the Law of 17 May 2013,[46] which opened marriage to same-sex couples. Unlike the case of Article 32-*bis* of the Italian Private International Law Act (which mandates that same-sex marriages concluded abroad by Italian nationals produce the effects in Italy of a registered partnership),[47] the Belgian Civil Code upgrades into a marriage a registered partnership concluded in another Member State. In doing so, the authorities will look at the content of the civil partnership, rather than at its name: Provided such content meets that of a marriage, the ensuing relationship will be characterised as 'marriage'.

During the debate, it was objected that the possibility of a default upgrade of a registered partnership into marriage which might result in forcing somebody in a marriage when they only wanted to be part of a registered partnership. In its reply, the invited expert explained that the rationale of the Belgian rule lies in the fact that the Belgian law on marriage is more advantageous for the parties compared to the law on registered partnerships: In the intentions of the Belgian legislator, if the content of the arrangement is the same as the marriage, then the relationship will be characterised as marriage to allow the parties to benefit from the more advantageous regulation offered by the law on marriage.

Similarly, since 2004 in Scotland same-sex couple can register for civil partnership and, since 2014, a couple can enter a same-sex marriage. The legislation allows a couple to upgrade that civil partnership into a marriage. However, by quirk of domestic law, there is a backdating mechanism that has the effect of date the marriage as far back as the time the partnership was concluded. One can wonder how the Regulations can accommodate this. The first common habitual residence is no longer from the moment the marriage is upgraded, from the time the partnership started. This is a clear source of uncertainty.

Overall, the 'upgrade' of the relationship is not without risk for the parties. On the one hand, the question remains pending as to whether, as a result of such conversion, the relationship transitions from being regulated by the Regulation on Property Consequences of Registered Partnerships to the one on Matrimonial Property Regimes. On the other hand, a change in the applicable regime may shift the

[45] CJEU, Judgment of 8.06.2017, *OL v PQ*, C- 111/17 PPU, ECLI:EU:C:2017:436.

[46] Loi n° 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe, JORF n°0114 du 18 mai 2013 p. 8253.

[47] Law No 218 of 31 May 1995 and subsequent amendments.

applicable law to the law of a State which does not recognize same-sex marriages and, consequently, might not provide for claims concerning the property of the partners. As the speaker emphasized, in this respect it is of paramount importance that the parties be aware of this possibility and be placed in a position where they can make an informed decision, especially if the law applied to their newly converted same-sex marriage does not allow for same-sex marriage and for claims based on that marriage.

c) Between property and succession matters: Characterisation in the aftermath of the *Mahnkopf* decision

A significant open question concerning characterisation was also identified with respect to the decision of the Court of Justice of the European Union in the *Mahnkopf* case[48] where the CJEU ruled that, in the event of the death of one of the spouses, the allocation of the accrued gains (in accordance with § 1371 BGB (German Civil Code)) is to be characterised as a succession matter and thus falls under the Succession Regulation.[49]

The Court based its decision on the grounds that the provision is not meant to regulate the allocation of assets, but rather the determination of the share of the estate to be allocated to the surviving spouse. Moreover, Article 1(2)(d) of Regulation 2016/1103 expressly excludes from its scope the 'succession to the estate of a deceased spouse.

As the presentation noted, the Court's ruling sets itself apart from the prevailing opinion in Germany, which was in favour of the issue being regulated under the statute that governs the matrimonial property regime. However, the wording of the judgment – especially in the parts where it states 'that provision does not appear to have as its *main purpose* the allocation of assets or liquidation of the matrimonial property regime'[50] and 'Such a provision therefore *principally concerns succession* to the estate'[51] – suggests that the Court of Justice was aware that these claims could serve more than one purpose, thus leaving the question partly open and generating still a certain degree of uncertainty.[52]

2. Coordination between rules on jurisdiction over property claims and succession or divorce (or dissolution of the registered partnership): *Perpertuatio fori vel non*?

As the presentation highlighted, while joint jurisdiction for property claims brought in connection with proceedings on succession or divorce (or dissolution of the registered partnership) (see Art. 4 and 5 of both Regulations) is to be read with favour, a shortcoming may be identified in the lack in the Regulations of any provision on the relationship between the rules on jurisdiction.

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[48] CJEU, Judgment of 1.03.2018, *Mahnkopf*, C-558/16, ECLI:EU:C:2018:138.

[49] 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, 27.7.2012, p. 107–134.

[50] CJEU, Judgment of 1.03.2018, *Mahnkopf*, C-558/16, ECLI:EU:C:2018:138, para. 40 (emphasis added).

[51] *Ibidem* (emphasis added).

[52] The judgment is further discussed *infra*, in Chapter E, para. I.2.

For instance, it was observed that, if one of the spouses dies pending the divorce proceedings in which the property claims also were brought, it would have to be decided whether the seized court remains competent to decide on the property claims although the divorce proceedings have terminated with the death of the spouse.

A similar coordination problem arises if property claims were brought before a court whose jurisdiction is based on Article 6 of the Matrimonial Property Regimes Regulation ('Jurisdiction in other cases') and the other party subsequently filed for divorce before a different court. In particular, assuming a court is seized under this provision, which allows for parties to seize a court regardless of concurring situation of divorce or succession, if a divorce is filed concurrently, does the court initially seized retain jurisdiction over the property claims?

In each case, one would have to decide whether the court initially seised should retain its jurisdiction or, to the contrary, lose it to the other court that is tasked with the corresponding succession or divorce proceedings. The presentation remarked that, while the *perpetuatio fori* principle can assist in these cases, many scholars are not in favour of this approach. Either way, it was noted, this question does not benefit from a clear-cut response and requires clarification.

Against this background, the invited speaker recalled that the question of *perpetuatio fori* was a subject of discussions during the negotiations for the recast of the Brussels II-*bis* Regulation. *Perpetuatio fori* is the principle underlying Article 8 Brussels II-*bis* Regulation in the part where the provision expressly states that the situation 'at the time the court is seised' is crucial for the purposes of establishing jurisdiction of the courts of a Member State over a case of parental responsibility. As a result of this provision and of its underlying principle, if the child relocates to another State, jurisdiction does not shift to the authorities of the State of the child's new habitual residence: To the contrary, jurisdiction lies with the authorities of the child's State of former residence. The provision therefore pins jurisdiction to the circumstances as they are at the time the court is seized and ignore the changes in the circumstances. As the invited speaker remarked, the Commission tried to repeal the provision in its proposal, maintaining that under the Regulation jurisdiction should change as soon as a child relocates.[53] However, the proposal was not accepted in the final version of the text and the *perpetuatio fori* provision was retained.[54]

3. Applicable law

A significant number of open issues are pending also with respect to the question of applicable law: While some are inherent to the Regulations and may to some extent be overcome with the proper information being made available to the interested parties, others shed the light on ambiguities that characterise the Regulations and that may be

[53] Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), COM(2016) 411 final, p. 10, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0411&from=EN.

[54] Cf. Arts 7 and 8 of 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, *OJ* L 178, 2.7.2019, p. 1–115.

solved only by means of the uniform and binding interpretation of the Regulations by the CJEU or with the intervention of the EU legislator.

a) Temporal scope of the provisions on applicable law

The presentation remarked that, pursuant to the two Regulations on property regimes of international couples, the provisions on applicable law only apply to spouses marrying or partners registering their partnership on or after 29 January 2019 entails: This entails that, for couples married or having registered their partnership before that date, the existing private international law regime continues to apply, to the detriment of harmonization.

Indeed, this lack of uniformity can be overcome by means of a choice of law agreement entered into on or after 29 January 2019. However, at this solution appears inadequate to solve the problem, since it relies on information that the parties might not have. Once again, the importance of a proper dissemination of information among the interested stakeholders proves to be of major importance in this area of the law.

b) Determination of the first common habitual residence after the conclusion of the marriage

The presentation then proceeded to detect another source of uncertainty in Article 26(1)(a) of the Matrimonial Property Regimes Regulation in the part where – for the purposes of identifying the applicable law, absent a choice of law agreement – the provision refers to 'the spouses' first common habitual residence after the conclusion of the marriage' without actually defining the relevant point in time. The Regulation only states, in Recital 49, that the first habitual residence should be the one established during the time 'shortly after marriage'.

In this framework, one should be mindful that the law identified on the basis of this connecting factor applies retroactively: this entails that – to foster legal certainty – the time that elapses between the conclusion of the marriage and the establishment of the spouses' first habitual residence needs to be reasonably short and contained.

In this respect, the invited expert observed that, since the Court of Justice of the European Union held (in matters of parental responsibility) that there cannot be a habitual residence without a physical presence,[55] one cannot rely on the couple's intention (e.g., to start family or to have a home) for the purposes of identifying the place of first habitual residence.

On a related note, in an attempt to lessen the impact of the uncertainties that surround the determination of the spouses' first habitual residence, it was stated that the need to identify such connecting factor usually arises the moment the couple purchase a house, or when they own property and start litigation. Therefore, the question of where the spouses' first habitual residence is located will likely arise not shortly after the marriage but, rather, at a later time, when the notion should be no longer problematic because the couple's first habitual residence will have most likely been established and it will be easily identifiable. However, in this respect it was

[55] CJEU, Judgment of 15.02.2017, *W and V v X,* C-499/15, ECLI:EU:C:2017:118, para. 61; Judgment of 17.10.2018, *UD*, C-393/18 PPU, ECLI:EU:C:2018:835, para. 53.

objected that, in a society where mobility increases exponentially and where an individual may relocate multiple times in a relatively short time, identifying and especially proving the place of first habitual residence may prove significantly more complex than expected, especially if this entails going back several years in time, after multiple relocations.

c) Choice of law and 'downgrading' of same-sex marriages into registered partnerships

Some legal systems, such as Italy (see Art. 32-*bis* of the Italian Private International Law Act), provide that same-sex marriages concluded abroad by nationals produce the effects of a registered partnership, instead. As relayed *supra*, the 'downgrading' as well as the 'upgrading' of a relationship raises the question as to which Property Regimes Regulation governs the newly established relationships.[56]

The uncertainty that stems from this lack of clarity brings about a threat to the individual rights of the couple and might catalyse a significant degree of uncertainty also for the third parties that entertain legal relationships with the couple. In this respect, Article 22(1)(a) of the Regulation on Registered Partnerships is of limited assistance. This provision states that 'The partners or future partners may agree to designate or to change the law applicable to the property consequences of their registered partnership, provided that that law attaches property consequences to the institution of the registered partnership and that that law is one of the following: (a) the law of the State where the partners or future partners, or one of them, is habitually resident at the time the agreement is concluded'. As the speaker underscored, the following may occur: In accordance with the Regulation on Matrimonial Property Regime, an Italian couple living in France marries in France, designating French law as the law applicable to their marriage and requesting that their choice be recorded in the civil registry. The couple subsequently applies to have the marriage recorded in the Italian civil registry.

Similarly to the case of an 'upgrade' of the relationship, the question arises as to which Property Regimes Regulation applies: Is it the one on Registered Partnerships, as a result of the 'downgrading' of the relationship according to Article 32-*bis* Italian Private International Law Act, or is the choice of law made under the Regulation on Matrimonial Property Regimes in a Member State (such as France) which allows for same sex-marriage to be governed by this latter Regulation?

The complexity of the situation, however, further increases in the event that the couple relocates, *e.g.*, to Luxembourg before applying for registration in Italy: Against this background, in fact, they would lose any possibility to invoke – in accordance with Article 22 – French law as the law that regulates their property regime. The uncertainty that ensues is to the detriment of legal certainty in the treatment of the couple's rights but also in the opposability of such rights toward third parties. It is, therefore, deemed desirable that a clear-cut solution be provided to foster clarity and predictability in this regard.

[56] See para. 1.b in this Chapter.

d) The formal validity of choice of law agreements under the Matrimonial Property Regimes Regulation

Some lack of clarity was also underscored with regard to the formal validity of agreements (Art. 23(2) Matrimonial Property Regimes Regulation) concluded by spouses habitually resident, in particular, in Italy: It was questioned whether the formal validity of such agreements is 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).

While this is the solution favoured by the majority opinion, it was noted that some regions in apply a land-based registration system ('sistema tavolare'), whereby 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.

e) Is there any room for implied choice of law agreements?

The question whether implied choice of law is permitted under the Regulation on Matrimonial Property Regimes also remains open. The presentation recalled that – unlike the Rome I,[57] Rome II[58] and Succession[59] Regulations – the Regulation on Matrimonial Property Regimes does not contain a provision on implied choice of law. While some argue that it should be inferred from the lack of such provision that implied choice of law is not allowed under the Regulation, others refer to the legislative history of the Regulation to suggest the opposite (the exclusion of implied choice of law was, in fact, initially included, however it subsequently removed from the draft).

As the invited expert remarked, the problem arises in particular when the parties drew up an agreement that clearly shows that the agreement is based on one specific legal system, although such choice is not explicitly written in the document. In the opinion of the invited expert, it would be overly legalistic to maintain that the choice was not expressed and that the matrimonial property regime is governed by the law of the spouses' first habitual residence, as opposed to the law impliedly designated by the parties.

During the debate, the question was also raised whether the question of implied partnership amounts to a question of evidence? If this were the case, implied choices of law would be decided in accordance with the law of the forum.

The question remains open and, once again, the importance of education and training towards, in this case, a conscious and proper use of party autonomy, is patent.

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[57] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6–16.

[58] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, p. 40–49.

[59] 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, 27.7.2012, p. 107–134.

4. Education and training

As underlined during the presentation, the structure of the Regulations on the property regime of international couples is fairly convoluted and raises several questions: This is a problem in and of itself.

In addition, the survey that was conducted within the EUFams II Project has shown that practitioners and judges are for the most part unfamiliar or little familiar with the Regulations: in fact, 57% of the respondents to the survey admitted to not having any familiarity with the instruments, as did 77% of the responding judges.[60] Against this background, education and training are a core tool and should be pursued as a primary means to achieve the objective of effectiveness of the Regulations and harmonization in this area of the law.

To foster legal certainty and predictability, education and training should not be limited to practitioners and to the judiciary: to the contrary, they should also be extended to citizens, who should be in the position of making informed decisions, in a timely manner, with respect to their property regimes.

[60] Lobach/Rapp, An Empirical Study on European Family and Succession Law: Report on the Questionnaire conducted within the framework of the EUFams II project (2019), p. 26, available at: http://www2.ipr.uni-heidelberg.de/eufams/index-Dateien/microsites/download.php?art=projektbericht&id=2.

E. THE SUCCESSION REGULATION AND THE REGULATION ON PUBLIC DOCUMENTS: PRACTICAL ISSUES AND RECENT DEVELOPMENTS[61]

The second panel of the afternoon session covered two Regulations, namely the Succession Regulation[62] and the Regulation on Public Documents:[63] The first presentation began by offering a detailed overview of the core problems in the area of succession matters; it proceeded to review the relevant case law of the CJEU, also referring to national case law; it then offered a first compelling analysis as regards the case law made available via the Project case law database; finally, it provided a synopsis of the Regulation on Public Documents, which recently became applicable in all the Member States, emphasizing the interplay of this Regulation with the Regulations on family and succession law.

The presentation was followed by the intervention of an invited expert which pursued two major objectives: On the one hand, it identified practical issues related to the Succession Regulation, extending its analysis also to the impact that the Regulation has in Third States and, on the other hand, it encouraged the further analysis of, in particular, the Succession Regulation by scholars.

A lively debate ensued.

Overall, the discussions held within the panel highlighted that the absence of certain autonomous notions and the interplay of diverging (if not mutually exclusive) national concepts are two core of the problems that have arisen and/or have been identified with respect to the interpretation and actual application of the Succession Regulation, to the detriment of consistency and predictability. In addition, courts and practitioners are faced with issues pertaining to party autonomy – which embodies the fundamental instrument to pursue estate planning and certainty, and should therefore be cherished. Finally, the coordination of the Regulation with other existing instruments – be it treaties or national laws – have also proven challenging. In spite of the hermeneutical intervention of the Court of Justice of the European Union on some questions, these issues remain partly unsettled and are at the core of the debate both in academia and in practice.

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[61] This chapter was written by Dr. Cristina M. Mariottini, Max Planck Institute for Procedural Law Luxembourg. The author wishes to acknowledge Mr. Philippos Siaplaouras, Max Planck Institute for Procedural Law Luxembourg, for his helpful comments on previous drafts of this chapter.

[62] 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, 27.7.2012, p. 107–134.

[63] 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, 26.7.2016, p. 1–136.

I. THE SUCCESSION REGULATION: STATE OF THE ART

1. The core problems

a) The notion of habitual residence

The presentation commenced with the observation that the notion of habitual residence is the default rule at the very core of the Succession Regulation and it remarked that, in spite of such a central position in the Regulation, the Regulation does not provide a definition of this term, giving rise to a certain degree of uncertainty, including the case of negative conflicts of jurisdiction.

A crucial role in the determination of the notion of habitual residence in accordance with the Succession Regulation is played by Recitals 23-24 pursuant to which, for the purposes of the Regulation, the determination of habitual residence is subject to a particularly close scrutiny and takes the form of 'an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence' (Recital 23). However, this general statement is counterbalanced by the nuances put forth at Recital 24 which add flexibility to the notion for those cases where determining the habitual residence of the deceased proves particularly complex.

In this regard, it was noted in the debate following the presentation that the notion of habitual residence is not the same in accordance with every the EU Regulation in private international and procedural law. For example, the notion of the habitual residence under the Succession Regulation is not the same as the one adopted in the context of cases of child abduction, due to the fact that the Regulations pursue different objectives. For instance, the Brussels II-*bis* Regulation does not permit a change in the habitual residence of the child based on relocation: The underlying rationale of this rule is to be found in the goal of sanctioning any unlawful transfer of the child. On the contrary, pursuant to the Maintenance Regulation it is for the maintenance creditor to confirm the change in residence, to ensure an easier access to a maintenance claim.

Ultimately, it was observed that, against this backdrop and absent a ruling by the Court of Justice of the European Union on this matter, the EUFams II case law database, as well as the analysis of the cases collected therein, will prove useful to properly carve out the relevant notion of habitual residence pursuant to the Succession Regulation and close – to the extent possible – the gap left by the absence of such autonomous notion.[64]

b) Party autonomy and jurisdiction based on appearance

While the Succession Regulation foresees party autonomy, such possibility is nevertheless not unlimited. Especially concerning choice of court agreements, the provisions laid down in the Regulation are complex, and sometimes hard to understand and to apply. For instance, as the presentation observed, Article 5 of the Succession Regulation puts forth an interesting paradox by calling upon the parties to

[64] In this regard, cf also *infra*, para. 3 of this Chapter.

form an agreement in order to initiate the proceedings, when the proceedings will then tell who the parties really are: such parties are, in fact, not known in advance, except in specific cases.

Regarding jurisdiction based on appearance, the presentation then remarked that this provision should be approached with a certain degree of caution and, in particular, bearing in mind that the same notions may be construed differently across the several instruments of EU procedural law.

c) Cooperation between courts

Cooperation between courts is a cornerstone in EU family law. However, the Succession Regulation – unlike the Brussels II-*bis* Regulation, which in Article 15 provides for the possibility to transfer jurisdiction – does not provide for such a possibility. According to Article 6 of the Succession Regulation, in the event of a choice of law made pursuant to Article 22, a court seised in accordance with Article 4 or 10 may decline jurisdiction if it considers that the courts of the Member State of the chosen law are better placed to rule on the succession (para. (a)) or shall decline jurisdiction if the parties to the proceedings have agreed, in accordance with Article 5, to confer jurisdiction on a court or the courts of the Member State of the chosen law (para. (b)).[65] However, the mechanism put forth under Article 6 is not streamlined and it will require restarting the procedure before the courts of the other Member State, thus possibly hampering cooperation in family matters.

2. Recent jurisprudence of the CJEU

The presentation then proceeded to address the case law of the CJEU, noting that such case law can be divided in two categories. The first one tackles the issue of scope and the coordination of the Succession Regulation with instruments on other subject matters: These cases have already been dealt with in the other segments of this Chapter for different purposes. The second one addresses the Succession Regulation *per se*.

a) Rulings on scope and on the coordination of the Succession Regulation with other instruments

With regard to scope, the presentation underscored that in the *Kubicka* case[66] the Court ruled that Article 1(2)(k) and (l) and Article 31 of the Succession Regulation must be interpreted as precluding refusal, by an authority of a Member State (in the instant case, Germany), to recognise the material effects of a legacy 'by vindication', which is recognised by the law governing succession chosen by the testator in accordance with Article 22(1) of that Regulation (in the instant case, Polish law), when that refusal is based on the ground that the legacy concerns the right of ownership of immovable property located in that Member State whose law does not provide for legacies with direct material effect when succession takes place. In particular, the Court held that Article 31 of the Succession Regulation does not concern the method of the transfer of rights *in rem*, including, *inter alia*, legacies 'by

[65] See also Art. 7(a) of the Succession Regulation, which mirrors and supports the mechanism put forth at Art. 6 by establishing that such courts shall have jurisdiction to rule on the succession if a court previously seised has declined jurisdiction in accordance with Article 6.

[66] CJEU, Judgment of 12.10.2017, *Kubicka*, C-218/16, ECLI:EU:C:2017:755, esp. para. 65.

vindication' or 'by damnation', but only the respect of the content of rights *in rem*, determined by the law governing the succession (*lex causae*), and their reception in the legal order of the Member State in which they are invoked (*lex rei sitae*).[67] Therefore, in so far as the right *in rem* transferred by the legacy 'by vindication' is the right of ownership, which is recognised in German law, there is no need for the adaptation provided for in Article 31 of the Succession Regulation. Accordingly, Article 31 of the Succession Regulation must be interpreted as precluding refusal of recognition, in a Member State whose legal system does not provide for legacies 'by vindication', of the material effects produced by such a legacy when succession takes place in accordance with the chosen succession law.[68]

The presentation then proceeded to address the *Mahnkopf* judgment,[69] reference to which was already made with regard to matrimonial property regimes.[70] In the *Mahnkopf* judgment, the Court ruled that Article 1(1) of the Succession Regulation must be interpreted as meaning that a national provision which prescribes, on the death of one of the spouses, a fixed allocation of the accrued gains by increasing the surviving spouse's share of the estate falls within the scope of that Regulation.

As the presentation further emphasized, the coordination of succession matters with questions of parental responsibility also raises some interesting points: for instance, in the *Matoušková* judgment,[71] the Court held that the Brussels II-*bis* Regulation must be interpreted as meaning that the approval of an agreement for the sharing-out of an estate concluded by a guardian *ad litem* on behalf of minor children constitutes a measure relating to the exercise of parental responsibility, within the meaning of Article 1(1)(b) of that Regulation and thus falls within the scope of the latter, and not a measure relating to succession.

The presentation then proceeded to recall the decision rendered by the CJEU on the interplay between the Brussels II-*bis* Regulation and national civil procedure. In the *Saponaro* case,[72] the parents of a minor lodged, in the name of the minor, an application for permission to renounce an inheritance before the courts of Member State other than the one in which both the parents and the minor are habitually resident. In this respect, the Court held that Article 12(3)(b) of the Brussels II-*bis* Regulation must be interpreted as meaning that the joint lodging of proceedings by the parents of the child before the courts of their choice amounts to an unequivocal acceptance by them of that court. The Court then stated that a prosecutor who, according to the national law, has the capacity of a party to the proceedings commenced by the parents, is a party to the proceedings within the meaning of Article 12(3)(b) of the Brussels II-*bis* Regulation. Opposition by that party to the choice of jurisdiction made by the parents of the child in question, after the date on which the court was seised, precludes the acceptance of prorogation of jurisdiction by all the

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[67] *Ibid.*, para. 64.

[68] *Ibid.*, para. 65.

[69] CJEU, Judgment of 1.03.2018, *Mahnkopf*, C-558/16, ECLI:EU:C:2018:138.

[70] See *supra*, in Chapter D, para. II.1.c.

[71] CJEU, Judgment of 6.10.2015, *Matoušková*, C-404/14, ECLI:EU:C:2015:653.

[72] CJEU, Judgment of 19.04.2018, *Saponaro and Xylina*, C–565/16, ECLI:EU:C:2018:265.

parties to the proceedings at that date from being established. In the absence of such opposition, the agreement of that party may be regarded as implicit and the condition of the unequivocal acceptance of prorogation of jurisdiction by all the parties to the proceedings at the date on which that court was seised may be held to be satisfied.

b) Rulings on the Succession Regulation *per se*

The presentation then proceeded to address the three judgments that the CJEU rendered on the Succession Regulation as such. Two of these judgments address issues related to national certificates of succession and tackle, on the one hand, the question of jurisdiction to issue such certificate and, on the other hand, the characterization of such certificates. A third judgment sheds the light on the optional nature of the form for the European Certificate of Succession.

In the *Oberle* judgment[73] the Court ruled that Article 4 of the Succession Regulation must be interpreted as precluding legislation of a Member State (in the instant case, Germany) which provides that, although the deceased did not, at the time of death, have his or her habitual residence in that Member State, the courts of that Member State are to retain jurisdiction to issue national certificates of succession, in the context of a succession with cross-border implications, where the assets of the estate are located in that Member State or the deceased was a national of that Member State. As the Court observed at paragraph 44, Article 4 determines the international jurisdiction of the courts of the Member States in relation to proceedings involving measures concerning the succession as a whole, such as, in particular, the issuing of national certificates of succession, irrespective of whether those proceedings are contentious or non-contentious. Article 4 refers, in particular, to the criterion of the habitual residence of the deceased at the time of death (in the instant case, located in France): it follows that applying national law (i.e., German law) 'to determine the general jurisdiction of the courts of the Member States to issue national certificates of succession would be contrary to the objective thus set out in recital 27 of Regulation No 650/2012, which is intended to ensure consistency between the rules relating to jurisdiction and those relating to the applicable law in that area'. [74]

In *WB*[75] the Court addressed the issue of the characterization that is to be given to a notarial certificate of succession and it ruled that such certificate, issued on the application of all parties, does not qualify as a 'decision' but as an 'authentic instrument', instead. Notably, the Court held that the first subparagraph of Article 3(2) of the Succession Regulation must be interpreted as meaning that a notary who draws up a deed of certificate of succession at the unanimous request of all the parties to the procedure conducted by the notary does not constitute a 'court' within the meaning of that provision. It follows that the notary does not need to verify its jurisdiction, because rules on jurisdiction apply to 'courts'. In this respect, the speaker noted that this decision implements a trend that is visibly different that the one in *Oberle*, where the Court concentrated all kinds of certificates in the Member State that has jurisdiction. The Court stated that such a deed does not constitute a 'decision'

[73] CJEU, Judgment of 21 June 2018, *Oberle*, C-20/17, ECLI:EU:C:2018:485.

[74] *Ibid.*, para. 52.

[75] CJEU, Judgment of 19.07.2019, *WB*, C-658/17, ECLI:EU:C:2019:444.

within the meaning of Article 3(1)(g) of the Succession Regulation and, rather, it constitutes an 'authentic instrument' within the meaning of Article 3(1)(i).

Finally, in *Brisch*[76] the Court clarified the optional (as opposed to mandatory) nature of the form for the European Certificate of Succession laid down in the Commission Implementing Regulation (EU) No 1329/2014 establishing the Forms referred to in the Succession Regulation.[77] In particular, the Court held that Article 65(2) of the Succession Regulation and Article 1(4) of Commission Implementing Regulation (EU) No 1329/2014 must be interpreted as meaning that, for the purposes of an application for a European Certificate of Succession, the use of Form IV in Annex 4 to Implementing Regulation No 1329/2014 is optional.

3. National case law collected in the Project database: First considerations

A first analysis of the national case law collected within the Project shows that succession matters are involved in approximately 20% of all the cases collected and uploaded onto the Project database, and 90% of those cases give application to the Succession Regulation. This proves that the EUFams II case law database is to be construed as a very helpful tool for the purposes of identifying open questions and paving the way towards a uniform understanding of the Succession Regulation.

According to the statistical data that may be extracted from the database, among the problems that courts are currently facing are traditional questions related to the Succession Regulation and namely questions of jurisdiction and applicable law in connection with habitual residence, and the European Certificate of Succession. The fact that Article 4 and Article 21 of the Succession Regulation are often used indicates that habitual residence plays a role in many cases. Article 62 represents another focal point in the current case law as people apply for the deliverance of European Certificates of Succession.

[76] CJEU, Judgment of 17.01.2019, *Brisch*, C-102/18, ECLI:EU:C:2019:34.

[77] Commission Implementing Regulation (EU) No 1329/2014 of 9 December 2014 establishing the Forms referred to in Regulation (EU) No 650/2012 of the European Parliament and of the Council 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 359, 16.12.2014, p. 30–84.

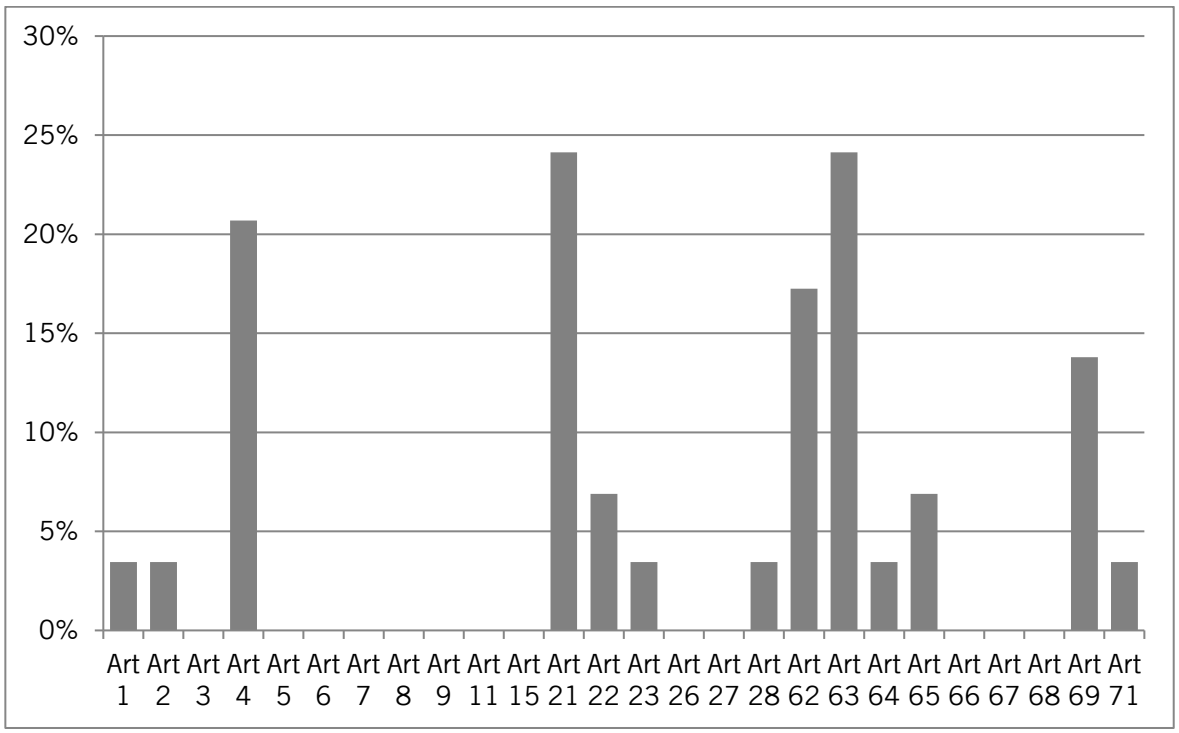

Figure 1: Recurring succession matters as identified through the EUFams II case law database (chart courtesy of Mr. Philippos Siaplaouras, MPI Luxembourg)

On the other hand, it is regrettable that questions of party autonomy and jurisdiction, namely under Articles 5(2) and 9, do not appear to be very recurrent. This is unfortunate in particular because these provisions have raised several issues and it would be interesting to see how they are used in practice.

Concerning the question of habitual residence, some recurring patterns emerge from the case law of the national courts. The courts have, in fact, put forward a quasi-objective criterion to identify habitual residence which takes into account the duration and frequency of the stays as well as the socio-economic and family relations (including work activity, language and where the family of the deceased resides).[78] On the other hand, the presence of assets and nationality only play a subsidiary role and are seldom used, and the presence of a portfolio in one State is not enough to determine the habitual residence.

Finally, the presentation tackled the question, which transpires from the national case law, whether there is a subjective element in the notion of habitual residence. From the Recitals of the Regulation, one can infer that the notion is to be understood objectively, however this is not a unanimous opinion. German courts, for example, tend to think that a subjective element is needed. A court from Hamm, for instance, ruled that the intention to remain for an indefinite time is required to satisfy the notion of habitual residence.[79] This question is open and remains up for discussion.

[78] See, for instance, Cour de cassation, Chambre civile 1, 29 May 2019, 18-13.383, FRT20190529 upholding Cour d'appel de Paris, 7 March 2018, n° 17/13293. The judgment is available in the EUFams II database as FRS20180307.

[79] OLG Hamm, Beschluss vom 02. Januar 2018 – I-10 W 35/17. The judgment is available in the EUFams II database as DES20180102.

II. AN ASSESSMENT AND FURTHER REFLECTIONS

1. Parallelism between different instruments

The invited expert recalled the importance of, among other instruments, the Convention of 13 January 2000 on the International Protection of Adults, which – in its interplay or comparison with other Hague conventions[80] – mostly raises issues similar to those that arise as between the EU Regulations in family law matters. The presentation highlighted, for instance, that the 2000 Hague Convention is based on the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children and that the 2000 Hague Convention raises issues such as whether an adult has been heard in another jurisdiction and how to know if that adult has been heard. A clear parallel may be identified between this question and those concerning the hearing of children under the 1996 Hague Convention.

2. *Renvoi*, no *renvoi* and limitations of scope

The invited expert observed that, while the Succession Regulation does not directly bind the United Kingdom, the United Kingdom is still affected by the Regulation because of its own Private International Law rules. A British court will, in fact, apply the Regulation when the local Private International law rules point to the laws of another Member State. Therefore, the presentation proceeded to offer several inputs and insight with respect to the problems that arise, in particular, with regard to the interplay of the provisions on choice of law and *renvoi*.

Article 34(2) of the Succession Regulation excludes *renvoi* if a valid choice of law was made in accordance with Article 22. The question, then, arises whether the choice of law is valid or not. For instance, the deceased may have drawn up several wills (for example, one for England and another for the rest of the world): the concern then arises as to whether the deceased can make a valid choice of the law applicable to his or her succession if he or she has more than one will, when Article 22 clearly says that the choice of law can be made in relation to the succession as a whole.

The invited expert highlighted an open question also with regard to the possibility of making an implicit choice of law. Recital 39 of the Succession Regulation states that 'A choice of law should be made expressly in a declaration in the form of a disposition of property upon death or be demonstrated by the terms of such a disposition. A choice of law could be regarded as demonstrated by a disposition of property upon death where, for instance, the deceased had referred in his disposition to specific provisions of the law of the State of his nationality or where he had otherwise mentioned that law'. Recital 39 seems to open to the possibility that a choice of law be made implicitly: if this is correct, such implicit choice, too, affects *renvoi* by excluding it.

According to Article 83(2) of the Regulation, if the deceased chose the law applicable to his or her succession prior to the date the Regulation became applicable (17

[80] All the instruments adopted in the framework of the Hague Conference on Private International Law cited in this Report may be found at https://www.hcch.net/, under 'Instruments'.

August 2015), that choice shall be valid provided it meets the conditions laid down in Chapter III or if it is valid in application of the rules of private international law which were in force, at the time the choice was made, in the State in which the deceased had his habitual residence or in any of the States whose nationality he or she possessed. However, the provision at Article 83(4) gives the possibility of a 'deemed' choice by stating that, if a disposition of property upon death was made prior to 17 August 2015 in accordance with the law which the deceased could have chosen in accordance with this Regulation, that law 'shall be deemed to have been chosen as the law applicable to the succession'. Therefore, a choice can be based on Article 83(4), instead of Article 22, and such choice does not have to be a choice of law for the whole succession: The deceased may have several wills that follow different choices based on one of the two provisions. However, in an instance such as the one at hand, it is difficult to know if *renvoi* applies: in fact, the Regulation does not state explicitly whether *renvoi* is excluded also vis-à-vis a choice made in accordance with Article 83(4).

The invited expert also raised the question of what constitutes *renvoi* and what does not. The current English Inheritance Act of 1975 makes provision for a court to vary (and extend, when appropriate) the distribution of the estate of a deceased person to any spouse, former spouse, child, child of the family or dependant of that person in cases where the deceased person's will or the standard rules of intestacy fail to make reasonable financial provision, but only provided the deceased was domiciled in England. The question arises as to whether this provision constitutes a limitation or a *renvoi* issue. In particular – the expert wondered – in the event that an English client, living in France, does not want French Law to apply, but English Law instead and he or she choose the Inheritance Act to govern his or her their estate, must the French court apply the Inheritance Act even though the deceased was not domiciled in England?

3. The Succession Regulation and treaties with Third States

The invited Expert brought to the attention of the participants the fact that a certain degree of lack of harmonization may be observed also with respect to treaties that Member States have entered into with Third States and that, to any extent, govern succession matters. For instance, he observed that – with regards to the Establishment and Consular Agreement concluded between Italy and Switzerland in Bern on 22 July 1868,[81] and notably Article 17 thereof – a different interpretation of the scope of application of the Agreement may be detected: While according to the jurisprudence of the Swiss courts such Treaty applies for questions of jurisdiction but it also provides implied rules in regard to applicable law, in the understanding of Italian courts the Treaty only applies for jurisdiction and not for applicable law. The question of which interpretation should prevail is open and debated.

While this issue does not really affect the application of the Succession Regulation, it is nevertheless of note that how treaties with Third States interact with the Regulation is a particularly complicated question, which also leaves some issues pending. For

[81] The text of the Treaty is available, in French, German and Italian, at https://www.admin.ch/opc/it/classified-compilation/18680003/index.html.

instance, if a Swiss citizen dies in Italy, it is clear from Article 17 of the Treaty that Switzerland has jurisdiction. However, the Treaty does not regulate how the deceased's property located in Germany should be regulated. The question then arises as to whether the Succession Regulation applies in this case or whether the Treaty applies to the property located in Germany as a result of the fact that jurisdiction lies with the courts in Switzerland.

III. THE REGULATION ON PUBLIC DOCUMENTS

The presentation then moved on to introduce the Regulation 2016/1191 on Public Documents.[82] The Regulation simplifies the circulation of certain public documents in the European Union: It was adopted on 6 July 2016 and applies in all EU Member States as from 16 February 2019.

As the presentation emphasized, while the Regulation does not regulate family law matters *per se*, some of the formalities dealt with in the Regulation are of paramount importance for that area of the law: this justifies the inclusion of this Regulation in the scope of the EUFams II Project, in general, and of the presentation, in particular. In fact, the Regulation covers public documents issued in the areas that are sensitive and often arise – more often than not in the form of preliminary questions – in the context of succession matters, and notably: birth; a person being alive; death; name; marriage, including capacity to marry and marital status; divorce, legal separation or marriage annulment; registered partnership, including capacity to enter into a registered partnership and registered partnership status; dissolution of a registered partnership, legal separation or annulment of a registered partnership; parenthood; adoption; domicile and/or residence; nationality; absence of a criminal record, provided that public documents concerning this fact are issued for a citizen of the Union by the authorities of that citizen's Member State of nationality.

As underlined in the presentation, the Regulation on Public Documents pursues the objective of curtailing excessive bureaucratic procedures and costs for citizens when they need to present in a Member State a public document issued in another Member State. For instance, as a result of the adoption of the Regulation public documents and their certified copies issued by the authorities of a Member State must be accepted as authentic by the authorities of another a Member State without the need of an authenticity stamp (*i.e.*, the *apostille*). If the public document is not in one of the official languages of the Member State requesting the document, citizens can ask for a multilingual standard form, available in all EU languages, from the authorities of the a Member State which issued the public document.

The presentation then underscored that the Regulation deals with the authenticity of public documents but not with the recognition of their legal effects in another Member State. The recognition of the legal effects of a public document is still governed by the national provisions on recognition in force in the Member State where the citizen presents the document. However, in applying their national law, Member State must

[82] 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, 26.7.2016, p. 1–136.

respect European Union law, including the case law of the Court of Justice of the European Union, on the free movement of citizens within the European Union.

F. CONCLUDING REMARKS

The International Exchange Seminar culminated in the final conclusions that were drawn from the day's discussions. It transpired from the exchanges that took place between the experts that, in comparing the area of European family and succession law with other areas of European private international and procedural law, the practice in European family and succession law sets itself apart. As the convenor of the conclusions observed, several instruments in this field are relatively new and this area of the law is characterised by uncertainties: scholars and practitioners need to find the path that assists them to overcome the obstacles that surround, in particular, the application in practice of these instruments. The uncertainty that surrounds these instruments is further increased as a result of a feature that is unique to succession and family law, and notably the fact that these areas of the law encompass personal and financial matters, combining economic aspects with tradition and culture.

The convenor of the conclusions remarked that it is obviously impossible to summarise the discussions on so many instruments. However, he observed that several of the issues identified through the discussions related to characterisation were discussed throughout the International Exchange Seminar: notably, with respect to private divorces, marriages, vindication, and the delineation between succession law and matrimonial property. Another typical problem that arose from the discussions is the tension between binding concepts, on the one hand, and the choices individuals can make, on the other. One characteristic of all private international law instruments in the area of family and succession law is that they have pathed a way towards party autonomy in the applicable law. This development is to be welcomed: in fact, currently there is more diversity as to the personal lives of European citizens and, thus, there is a stronger need for party autonomy. On the other hand, the pressure on some matters may become stronger, as it became apparent during the discussions on public policy.