

The application of the Brussels IIa Regulation in the Italian legal order having regard to specific cases concerning Italy and the UK

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1. Introduction.

It has been more than ten years since Regulation (EC) No 2201/2003 (hereinafter Brussels IIa)¹ became applicable on 1 March 2005 in the EU Member States (except Denmark)² and a significant amount of case law regarding its interpretation and application has developed at both EU and domestic level. At times, however, the implementation of this legal instrument in Member States' legal orders has given rise to difficulties and diverging interpretations of its provisions.

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¹ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338 of 23 December 2003, pp. 1-29.

² As specified by Recital 31 to the Regulation. Instead, the UK and Ireland gave notice of their wish to take part in the adoption and application of said legal instrument in accordance with Art. 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, and are thus bound by it (see Recital 30 to the Regulation).

The topic of the application of Brussels IIa is particularly relevant because of the prospective impact of the withdrawal of the UK from the EU on 29 March 2019 (provided that no extension of this two-year term has been decided). The UK Government, as will be further discussed in more detail, has indeed announced that it intends to convert directly applicable EU law (such as Regulations) into UK laws. As a result, the national case law applying the current Brussels IIa regime, which has become over the years a consolidated source of reference for practitioners and scholars, will continue to provide a valuable guidance for the future relationships between the UK and the EU Member States within the judicial cooperation system. In particular, the perspective adopted in this paper takes into account some critical issues in the application of Brussels IIa emerging from the Italian practice by analysing selected decisions rendered in cases concerning Italy and the UK.³ In addition, where relevant, the analysis also considers the interrelationship between Brussels IIa and other international conventions, such as the 1980 Hague Convention on child abduction⁴ and the 1996 Hague Convention on child protection,⁵ as well as other EU legal instruments, such as the Maintenance Regulation.⁶

The paper is structured as follows: firstly, a general overview of some of the possible Brexit implications for cross-border family disputes is provided, then, the inquiry turns to the Italian case law applying Brussels IIa. In this regard, specific issues concerning matrimonial matters, parental responsibility and child abduction are dealt with. The paper concludes with a more general critical appraisal of the application of said Regulation in the Italian legal order. In addition, as the Brussels IIa regime is currently subject to a revision process that started last year with the publication of the European Commission's proposal,⁷ some further

³ In the literature, for a comprehensive evaluation of the Italian case law applying the EU Regulation in civil, commercial and family matters see S. Bariatti, I. Viarengo, F.C. Villata (a cura di), *La giurisprudenza italiana sui regolamenti europei in materia civile e commerciale*, Milano, 2016.

⁴ Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. The full text of the Convention and the updated status table are available at www.hcch.net.

⁵ Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. The full text of the Convention and the updated status table are available at www.hcch.net.

⁶ Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7 of 10 January 2009, pp. 1-79. With regard to the UK, see Commission decision 2009/451/EC of 8 June 2009 on the intention of the United Kingdom to accept Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 149 of 12 June 2009, p. 73. However, the UK (as Denmark) is not bound by the Hague Protocol of 23 November 2007 on the Law applicable to Maintenance Obligations, to which Art. 15 of Maintenance Regulation refers. Consequently, the law applied to maintenance obligations in the UK courts is the law of the forum.

⁷ 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 of 30 June 2016, available at <http://eur-lex.europa.eu>.

considerations of the practical application of the Regulation in light of its future recast are set forth.

2. Possible implications of Brexit on cross-border family disputes within the EU: an overview.

As the relations between the UK and the other EU Member States will be subject to unprecedented changes following the Brexit referendum of last June, the paper opens with some preliminary considerations on the possible implications for the respective PIL regimes.

Before assessing the more substantial aspects, it is useful to recall that on 29 March 2017 the European Council received from the British Prime Minister the notification of the UK's intention to leave the EU.⁸ The process of withdrawal under Art. 50 TEU has formally started and the EU Treaties will cease to apply in the UK when the agreement between the EU and the withdrawing State enters into force, or, failing that, after two years from the notification. The first step on the EU side was the definition of the guidelines setting out the framework for negotiations, which the European Council adopted on 29 April 2017.⁹ Subsequently, on 5 April the European Parliament adopted its resolution on the negotiations,¹⁰ and on 22 May the EU27 Council adopted the decision authorising the opening of the process,¹¹ accompanied by negotiation directives to be implemented during the first phase. As most recent steps, the first two round of negotiations took place in Brussels on 19 June and from 17 to 20 July, respectively.¹²

The impact of Brexit on the existing cross-border judicial system has been dealt with in two reports published by the House of Lords¹³ and the House of Commons,¹⁴ respectively. These sources, however, do not seem to provide sufficient clarity into a topic that remains essential in pursuing the objective of an “orderly withdrawal” that is a recurring motto from both sides of the negotiations. Indeed, it appears contradictory to recommend the Government to maintain the closest possible cooperation with the EU on family justice matters, stressing

⁸ Available at www.consilium.europa.eu.

⁹ European Council, *Guidelines following the United Kingdom notification under Article 50 TEU*, EUCO XT 20004/17, 29 April 2017, available at www.consilium.europa.eu.

¹⁰ Resolution of the European Parliament on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union, 5 April 2017, (2017/2593(RSP)), available at www.europarl.europa.eu.

¹¹ Council decision authorising the opening of the negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union, XT 21016/17, 15 May 2017, available at www.consilium.europa.eu.

¹² See http://ec.europa.eu/commission/brexit-negotiations_en.

¹³ House of Lords, European Union Committee, *Brexit: justice for families, individuals, and businesses?*, 17th Report of Session 2016-17, published on 20 March 2017.

¹⁴ House of Commons, Justice Committee, *Implications of Brexit for the justice system*, Ninth Report of Session 2016-17, published on 22 March 2017.

the practical value of principles such as the mutual recognition and enforcement of judgments, and, at the same time, to invoke the end of the substantive jurisdiction of the CJEU in the UK without proposing any feasible alternative to the uniform and binding interpretation of the EU judiciary.¹⁵

More recently, the UK Government has delivered its future partnership paper on cross-border civil judicial cooperation with the EU after Brexit.¹⁶ The final objective is to conclude «an agreement with the EU that allows for close and comprehensive cross-border civil judicial cooperation on a reciprocal basis, which reflects closely the substantive principles of cooperation under the current EU framework».¹⁷ In particular, the UK intends to incorporate into domestic law the Rome I and II Regulations on the law applicable to contractual and non-contractual matters, respectively, and also to ensure legal certainty to businesses, consumers and families by facilitating a smooth transition to the new framework in civil judicial cooperation.

The future regulation of transnational justice, moreover, involves the more general issue of the relationship between EU law and UK courts. In this regard, the most recent reference comes from the European Union (Withdrawal) Bill 2017-19¹⁸ (also known as “Great Repeal Bill”), which is under discussion in the UK Parliament. The text of the Bill, as introduced on 13 July 2017, first provides that «[t]he European Communities Act 1972 is repealed from exit day», and then sets forth the conditions to retain existing EU law. In particular, the Bill intends to convert directly applicable EU law (such as Regulations) into UK laws,¹⁹ and to preserve UK laws implementing EU obligations (*e.g.* giving effect to Directives).²⁰ It is however clear that this solution, lacking a more comprehensive cooperation agreement between the UK and the EU, would impose stricter obligations on the UK than those under which it is currently bound. The UK would in fact be required to apply the current judicial cooperation regime (converted into domestic law) in its relations with the other EU Member

¹⁵ See especially House of Commons, Justice Committee, *Implications of Brexit for the justice system*, cited above, pp. 12-14 and pp.16-18.

¹⁶ Department for Exiting the European Union, *Providing a cross-border civil judicial cooperation framework: a future partnership paper*, 22 August 2017, available at <https://www.gov.uk/government/publications/providing-a-cross-border-civil-judicial-cooperation-framework-a-future-partnership-paper>.

¹⁷ *Ibid.*, para. 19.

¹⁸ European Union (Withdrawal) Bill 2017-19, available at <http://services.parliament.uk/bills/2017-19/europeanunionwithdrawal.html>. The Bill was introduced to the House of Commons and given its First Reading on 13 July 2017. It was also preceded by a White Paper published by the Department for Exiting the European Union, which already provided a similar framework for the incorporation of EU law into UK domestic legislation (see *Legislating for the United Kingdom's Withdrawal from the European Union*, 30 March 2017, available at www.gov.uk/government/publications/the-great-repeal-bill-white-paper).

¹⁹ *Ibid.*, Section 3 “Incorporation of EU direct legislation”.

²⁰ *Ibid.*, Section 2 “Saving for EU-derived domestic legislation”.

States (most notably, the principle of mutual recognition and the enforcement rules), while the latter would not be under the same obligations since they are not bound to UK laws.

Moreover, as regards the binding force of the CJEU decisions, the Repeal Bill provides (using a rather convoluted wording) that UK courts are not bound by any EU law or decisions made after exit day, but will continue to be bound by those made before Brexit, except for the Supreme Court.²¹ A more sensitive question is the status given by UK courts to future CJEU decisions on provisions of EU law that are still identical after Brexit in UK law. Clearly such decisions should not be binding but the UK judges should be free to take account of them in the same way that they take account of judgments of courts from other countries that are applying the same law (*e.g.* when the UK and those States are party to the same international treaty). Indeed when such judgments of the CJEU depart from pre-Brexit decisions of the CJEU the UK courts should also be free, though not required, to depart from the earlier decisions and not wait for the UK Supreme Court to do so. This is in fact the underlying reason of the further clarifications laid down in the Repeal Bill, according to which UK courts are allowed to «have regard to anything done on or after exit day by the European Court, another EU entity or the EU (...) if [they] consider it appropriate to do so».²²

Also concerning the issue of direct CJEU jurisdiction in the UK, which will formally end on exit day, the UK Government has published a further partnership paper on enforcement and dispute resolution for the upcoming UK-EU agreements²³ (*i.e.* the Withdrawal Agreement and the future partnership agreement). The document discusses several options of existing models of partnership between the EU and third countries that do not impose direct jurisdiction of the CJEU over the third State, but do actually entail a reference to CJEU decisions, or even a voluntary reference to the EU Court for a binding interpretation. The ultimate decision on which option should be implemented for the future UK-EU agreements, however, is left open to negotiation.

As for the EU's side, the task force set up by the European Commission to conduct the Brexit negotiations has recently issued a position paper containing the main principles concerning judicial cooperation in civil and commercial matters.²⁴ The short text, however, seems to have a more limited scope, as it actually deals with the provisional application of the

²¹ *Ibid.*, Section 6 “Interpretation of retained EU law”.

²² *Ibid.*, Section 6(2).

²³ Department for Exiting the European Union, *Enforcement and dispute resolution: a future partnership paper*, 23 August 2017, available at <https://www.gov.uk/government/publications/enforcement-and-dispute-resolution-a-future-partnership-paper>.

²⁴ European Commission, Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU, Position paper transmitted to EU27 on Judicial Cooperation in Civil and Commercial Matters, 28 June 2017, available at <http://ec.europa.eu>.

EU legal instruments to choice-of-forum and choice-of-law agreements made prior to the withdrawal date of the UK, and to judicial proceedings that are ongoing on the withdrawal date. The UK has set out its response to this document in the above-mentioned partnership paper on the civil judicial cooperation framework,²⁵ substantially concurring in the EU's opinion on the general principles that should govern the provisional relationship in the event that no agreement on a future cooperation system can be reached.

Against this background, a possible term of reference among the existing models of partnership that link the EU with third States could be the system of cooperation struck with the Swiss Confederation. On the one hand, Switzerland is member of the European Free Trade Agreement (EFTA),²⁶ but not of the European Economic Area (EEA),²⁷ and, on the other hand, has concluded a number of bilateral agreements with the EU. This allows the parties involved to negotiate a progressive cooperation in selected European policies (such as customs, free movement of persons, agriculture, scientific research, transport, Europol and Eurojust), thus forming an international legal framework within which the respective interests are effectively balanced. Along this path, a further step for the future EU-UK relationship could be the negotiation of agreements regarding specifically the area of judicial cooperation, which remains a crucial issue to protect the rights of both EU citizens living in the UK and UK citizens living in the EU.

While no indications are yet available regarding the exact features of the withdrawal agreement, it is moreover possible to set forth some specific remarks on the future of cross-border family disputes from the perspective of international law.²⁸ Currently, the UK is bound by both the 1980 and the 1996 Hague Conventions, having ratified them in its capacity as member of the Hague Conference on Private International Law. As a result, it is reasonable to imagine that the UK will remain a Contracting State of both Conventions given that the future withdrawal from the EU will not have any direct relevance on their binding force.

²⁵ Department for Exiting the European Union, *Providing a cross-border civil judicial cooperation framework: a future partnership paper*, cited above, Annex A.

²⁶ The EFTA is an intergovernmental organisation established in 1960 and aimed at promoting free trade and economic integration among its Member States (Iceland, Liechtenstein, Norway and the Swiss Confederation). See also www.efta.int.

²⁷ The EEA was concluded between the EU Member States and three out of four EFTA Member States (namely, Iceland, Liechtenstein, Norway) with the objective of bringing these countries together in a single market based on the four fundamental economic freedoms. It entered into force on 1 January 1994. See again www.efta.int.

²⁸ See P. Beaumont, *Private international law concerning children in the UK after Brexit: comparing Hague Treaty law with EU Regulations*, University of Aberdeen Centre for Private International Law Working Paper 2017, No. 2, available at www.abdn.ac.uk/law/research/working-papers-455.php.

As far as the 1980 Convention is concerned, its provisions will continue to apply to abduction cases involving the UK and both EU and third States, without the complementary rules provided in Brussels IIa in the absence of any specific agreement. Most notably, UK courts will no longer be able to resort to the procedure for overriding non-return orders issued by another Member State (Art. 11(6-8) of Brussels IIa Regulation).

As to the 1996 Convention, its comprehensive regulation of child protection measures will become the main source of law to address cross-border parental responsibility disputes in the UK. Indeed, it has been underlined that after Brexit the UK case law regarding the Convention will increase considerably,²⁹ thus contributing to the international success and visibility of said legal instrument.

A partially different set of considerations is necessary with regard to another PIL instrument to which the UK is currently bound, namely the 2007 Hague Maintenance Convention.³⁰ The UK is in fact a party to that Convention as a member of a REIO (regional economic integration organisation, *i.e.* the EU), and it will need to sign and ratify it directly as a contracting State.

These Conventions will certainly continue to provide reliable regimes within which legal practitioners can operate also after Brexit. However, as already mentioned, the possibility of maintaining a closer judicial cooperation between the UK and the other Member States by means of specific agreements will furthermore ensure a smoother transition aimed at protecting the rights of citizens and families on the move.

3. The application of Brussels IIa with regard to matrimonial matters: the concept of habitual residence.

As already mentioned, the analysis now focuses on national case law applying Brussels IIa, which in the future will provide a qualified source of reference for the future PIL regimes between the UK and the EU Member States. Selected cases involving the UK and Italy are considered.

Regarding matrimonial matters, as is well known, the material scope of application of Brussels IIa only covers the various instances of dissolution of a marriage, namely divorce, legal separation and marriage annulment. In Italy, as opposed to many other Member States

²⁹ See *M & L (Children), Re* [2016] EWHC 2535 (Fam), 14 October 2016, in which the High Court stressed that after the Brussels IIa Regulation will cease to apply to the UK, «the provisions of the 1996 Hague Convention will undoubtedly acquire a greater prominence» (para. 1).

³⁰ Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance. The full text of the Convention and the updated status table are available at www.hcch.net.

such as the UK, a court may declare a divorce only provided that there has been a previous period of legal separation between the spouses.³¹ As a result, the alternative heads of jurisdiction provided for in Art. 3(1) of the Regulation, which are deemed to favour – to some extent – practices of “forum shopping” or “forum running”, may occasionally lend themselves to misuses of the regulatory framework. An instructive example to this end comes from the notorious case *Rapisarda v Colladon* of 2014.³² The proceedings concerned 180 divorce petitions that were lodged before UK county courts by several Italian couples on the ground that the habitual residence of either the applicant or the respondent was in England. However, these statements later proved to be false, as the address given was identical in all 180 petitions. The Queen’s Proctor brought the case before the UK High Court of Justice (Family Division), which eventually set aside the divorce decrees nisi and absolute as being void on the ground of fraud, and, for the same reason, dismissed the petitions in those proceedings still pending before county courts.

The application of Art. 3 of Brussels IIa has not raised much concern in the Italian case law.³³ Domestic courts have interpreted the key connecting factor of habitual residence as «the place where a person has established, on a fixed basis, his/her permanent centre of interests and where he/she carries out most of his/her personal and professional life».³⁴ While the CJEU has yet to identify a well-established concept of habitual residence with regard to matrimonial matters, such a notion seems in any case consistent with the guidance provided by supranational case law, which stresses the importance of a comprehensive factual evaluation of a person’s personal and professional ties. At times, however, Italian courts tend to overestimate the documents exhibited by the parties, such as certificates of residence or

³¹ In this regard, the relevant domestic legislation has been recently amended by the Law of 6 May 2015, No 55, which modified the Italian law on divorce (Law of 1 December 1970, No. 898). More precisely, the new law reduced the period of previous consensual separation (*separazione consensuale*) to six months from the time the couple appeared before the court and the act of divorce was registered by the president of the court, as well as the period of previous judicial separation (*separazione giudiziale*) to twelve months.

³² *Rapisarda v Colladon (Irregular Divorces)* [2014] EWFC 35, 30 September 2014, available at www.bailii.org. In this instance, the misuse of the provisions set forth in the Regulation in order to ground the divorce proceedings in the UK was so evident that the President of the Family Division, Sir J. Munby, described it «as a conspiracy to pervert the course of justice on an almost industrial scale». The case was also reported in *Rivista di diritto internazionale privato e processuale*, 2015, pp. 264-267.

³³ For an overview, see I. Viarengo, *International divorce proceedings in Italy: issues arising in the case law*, in *Rivista di diritto internazionale privato e processuale*, 2016, pp. 701-724.

³⁴ See, among others, Corte di cassazione, sezioni unite, judgment of 17 February 2010, No. 3680; Corte di cassazione, sezioni unite, judgment of 25 June 2010, No. 15328, both available in the legal database *Pluris*, <http://pluris-cedam.utetgiuridica.it>.

income tax returns, in order to locate the habitual residence without carrying out a proper factual assessment as required by the CJEU.³⁵

As to matrimonial cases involving Italy and the UK, however, it is frequent that Italian couples habitually resident in the UK avoid using this connecting factor and prefer to initiate legal separation (or divorce) proceedings before Italian courts pursuant to the ground of jurisdiction provided for in Art. 3(1)(b) of Brussels IIa (common nationality of the parties). For example, in one case married Italian nationals habitually residing in London, where their children were born, got in contact with an English mediator in order to reach an agreement regarding the regulation of family holidays. Nonetheless, the husband chose to lodge an application for fault-based legal separation and shared custody of the children with the Court of first instance of Milan, which properly held it had jurisdiction only as to the separation petition pursuant to Art. 3(1)(b) of Brussels IIa.³⁶

With regard to the UK, however, two further clarifications on these issues are necessary. First, as to the ground of jurisdiction laid down in Art. 3(1)(b), in the case of the UK (and Ireland) it is required that both spouses are domiciled in the forum State according to the domestic law (instead of having a common nationality). Domicile is a peculiar legal notion that is used in common law systems, and is understood as the place where a person has fixed his/her residence with the intention of making it permanent.³⁷ Consequently, even though a person may hold different residences, his/her domicile is unique. It is thus used to identify a connection between a given person and the country in which he/she has his home on a permanent and indefinite basis. Moreover, it has been underlined that the concept of domicile in the context of Brussels IIa needs to be understood according to the meaning it has in the UK and Ireland, as opposed to the reference to domicile provided in the Brussels I regime that grounds the criterion of general jurisdiction (now Art. 4 of Regulation 1215/2012).³⁸

Second, the UK is a State with different legal systems (namely, England and Wales; Scotland; Northern Ireland; and Gibraltar) and thus Art. 66 of Brussels IIa requires that each

³⁵ For an example of these decisions, see Tribunale di Belluno, judgment of 30 December 2011, available in the legal database *Pluris*, <http://pluris-cedam.utetgiuridica.it> (separation and parental responsibility proceedings between Moroccan nationals where the Italian jurisdiction regarding matrimonial matters was grounded on Art. 3(1)(a), fifth indent of Brussels IIa); Tribunale di Roma, judgment of 20 February 2013 (separation and parental responsibility proceedings between Peruvian nationals where the Italian jurisdiction regarding matrimonial matters was grounded on Art. 3(1)(a), fifth indent of Brussels IIa).

³⁶ Tribunale di Milano, sezione IX civile, order of 16 November 2012 (this case is further examined *infra*, para. 3.1). For a similar example, see also Tribunale di Milano, sezione IX civile, judgment of 8 April 2011, available in the legal database *Pluris*, <http://pluris-cedam.utetgiuridica.it> (Italian nationals habitually resident in Scotland).

³⁷ See *amplius* P. Stone, *EU Private International Law*, Cheltenham-Northampton, 2014, III ed., p. 426 f.

³⁸ In this regard see the *Explanatory Report on the Convention of 20 May 1998 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters*, drafted by Prof A. Borrás, para. 34.

territorial unit must be treated as a separate State for the purposes of establishing the habitual residence and/or the domicile of a person. As a result, both these notions need to be referred to the specific territory, and not to the UK as a whole, in order to ground the jurisdiction pursuant to the relevant provisions of the Regulation.³⁹

3.1. The *lis pendens* rule.

The above-mentioned legal requirement in Italian law of a fixed period of legal separation before a judgment of divorce can be issued may also justify the frequent application of the *lis pendens* rule set forth in Art. 19(1) of Brussels Ia when the dispute involves Italy and the UK. More precisely, the particular situation of concurrent separation and divorce disputes is known as “false *lis pendens*”⁴⁰ since the two proceedings do not possess, strictly speaking, the same cause of action, but only involve the same parties. In some cases, an earlier application for legal separation was even lodged in Italy with the precise purpose of effectively preventing divorce proceedings before the courts of those Member States where such legal requirement (previous separation) is not provided. As a consequence of the *prior tempore* rule pursuant to Art. 19(1), the court second seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established. It is worth stressing that such provision only applies insofar as the legal proceedings are pending before courts of different Member States, and not third States.⁴¹

A correct application of Art. 19(1) was recently given in a decision rendered by the Court of first instance of Milan on 24 February 2017.⁴² The factual background of the case referred

³⁹ The wording of Art. 66 of Brussels Ia Regulation leaves unresolved the question whether the Regulation also applies to jurisdictional disputes arising between different territorial units within the UK. Some courts have indeed been called upon to rule on the issue, and the prevailing opinion supports an “orthodox” view that the Regulation does not apply in similar cases (*Re W-B (Family Jurisdiction: Appropriate Jurisdiction within the UK* [2012] EWCA Civ 592, 18 April 2012, and *London Borough of Camden v Caratt & Others* [2013] EWHC 2336 (Fam), 31 July 2013, both available at www.bailii.org; however, in *MAS v VD & Anor* [2006] ScotSC 53, 1 June 2006, available at www.bailii.org, the application of the Regulation was accepted in a dispute between England and Scotland).

⁴⁰ The term was first adopted in the *Explanatory Report on the Convention of 20 May 1998 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters*, drafted by Prof. A. Borrás. The scope of the false *lis pendens* is actually limited to matrimonial disputes due to the different substantial legislation existing between Member States.

⁴¹ It is actually debated whether the exclusive character of the grounds of jurisdiction set forth in Brussels Ia Regulation (pursuant to its Art. 7) would furthermore prevent the application of domestic rules on international *lis pendens* when the other dispute is pending before a court of a third State (in Italy, more precisely, the relevant provision would be Art. 7 of the Law of 31 May 1995, No. 218 – Italian PIL Act). A referral on this issue is now pending before the United Divisions of the Italian Supreme Court, which have yet to render the final judgment (see Corte di cassazione, sezione VI civile, order of 2 May 2016, No. 8916).

⁴² Tribunale di Milano, sezione IX civile, order of 24 February 2017, available at www.quotidianogiuridico.it, 5 April 2017, commented by M.C. Baruffi, *La litispendenza internazionale tra i giudizi di separazione e divorzio*. Concerning Art. 19 of Brussels Ia Regulation, the Italian Supreme Court has

to a divorce proceedings initiated on 2 June 2016 by the wife in London and an application for legal separation and regulation of parental responsibility lodged on 15 June 2016 by the husband in Italy. The Italian court stayed the pending legal separation proceedings until the English court – first seized – would establish its jurisdiction to rule on the divorce petition. Conversely, as regards parental responsibility matters, it ordered that the proceedings should continue because the children were habitually resident in Italy. To support its reasoning, the court expressly recalled the CJEU judgment in *A v B*, which dealt with a case of *lis pendens* between France and the UK and interpreted the concept of «established jurisdiction» within the meaning of Arts. 16 and 19 of Brussels IIa.⁴³

4. The application of Brussels IIa with regard to parental responsibility issues: the general rule on jurisdiction and the conditions for prorogation of jurisdiction.

Moving to consider parental responsibility issues, Brussels IIa provides for only one general head of jurisdiction, with a few exceptions that will be examined later.⁴⁴ The main provision is Art. 8, which again refers to the fundamental connecting factor of habitual residence. Indeed, the courts of the Member State where the child is habitually resident at the time the court is seized shall have jurisdiction to rule on parental responsibility. Similarly to the context of matrimonial disputes, also in this regard the determination of a child's habitual residence heavily relies on factual elements, among which are the duration, the conditions and the grounds for the stay on the territory of a given Member State, as well as the child's nationality, enrolment in school, linguistic knowledge, family and social relationships.⁴⁵ It follows that courts usually take a case-by-case approach when assessing such concept, even to

recently referred another interesting matter to the Court of Justice, namely whether the failure to establish a *lis pendens* situation (in a case between Italy and Romania) may allow the requested court – first seized – to refuse the recognition of the decision rendered by the court second seized on the basis of the procedural public policy (Art. 24 of the Regulation): see Corte di cassazione, sezione I civile, order of 20 June 2017, No. 15183, available at www.italgiure.giustizia.it/sncass.

⁴³ Court of Justice, judgment of 6 October 2015, case C-489/14, *A v B*, EU:C:2015:654, paras. 28-38. All judgments of the CJEU cited in this paper are available at <http://curia.europa.eu>. The case was peculiar also because it dealt with the possible impact of different time zones on the *lis pendens* rule. In this regard, the Court of Justice explained that the time difference «is not in any event capable of frustrating the application of (...) Article 19 of Regulation No 2201/2003, which, taken in conjunction with the rules in Article 16 of that regulation, [is] based on chronological precedence» (para. 44).

⁴⁴ In the literature, on this issue see for example L. Carpaneto, *Giurisdizione in materia di responsabilità genitoriale: il regolamento n. 2201/2003*, in A. Cagnazzo, F. Preite, V. Tagliaferri (a cura di), *Il nuovo diritto di famiglia. Profili sostanziali, processuali e notarili*, IV, *Tematiche di interesse notarile, Profili internazionalprivatistici*, Milano, 2015, pp. 921-962

⁴⁵ The CJEU case law has indeed singled out, by way of example, a number of recurring elements that need to be taken into account in order to establish a child's habitual residence: see judgment of 2 April 2009, case C-523/07, *A*, EU:C:2009:225, paras. 37-42; judgment of 22 December 2010, case C-497/10 PPU, *Barbara Mercredi v Richard Chaffe*, EU:C:2010:829, para. 56, in relation to the habitual residence of an infant.

a greater extent than in matrimonial disputes.⁴⁶ Moreover, it is significant that recently the Court of Justice has been called upon to interpret the concept of habitual residence of a child in a case of an infant who was born in a Member State (Greece) other than that where her parents resided together (Italy) and who has been then wrongfully retained there⁴⁷. In particular, it held that the parents' initial intention of returning the child to a different Member State could not amount to be the prevailing consideration in establishing his habitual residence. Otherwise, in the case of infants it would always be located at the place of habitual residence of the parents, resulting in a misinterpretation of such concept within the meaning of the Regulation. Similarly, in another recent case, the Court of Justice was again requested to rule on the habitual residence in parental responsibility proceedings and held that the determination of a child's habitual residence in a given Member State «requires at least that the child has been physically present in that Member State».⁴⁸

In family law practice it is quite common that separation or divorce cases also involve the regulation of parental responsibility rights such as the child's custody or rights of access. Precisely to this purpose, Brussels IIa sets forth specific requirements for a court of a Member State exercising jurisdiction under its Art. 3 on an application for divorce, legal separation or marriage annulment to extend jurisdiction in any matter relating to parental responsibility connected with that application (prorogation of jurisdiction). Under Art. 12(1) it is in fact necessary that (a) at least one of the spouses holds parental responsibility rights in relation to the child, (b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility, at the time the court is seized, and (c) the prorogation pursues in any case the best interests of the child.

⁴⁶ Occasionally, however, Italian courts do not carry out any assessment of PIL issues before ruling on the merits of the case, with the result that it is not possible to infer the juridical bases on which the decision is grounded. For a recent example, see Tribunale di Roma, sezione I civile, decree of January 2017, available at www.quotidianodiritto.ilsole24ore.com, in which the Italian jurisdiction appears to be based on Article 8 of Brussels IIa Regulation only because the decision refers to the prior assessment carried out by the Juvenile Court of Rome when dismissing the return request of the children to the UK. Moreover, it is worth mentioning this decision insofar as it ruled in the interests of the children by establishing their main placement with the father in the UK. Even though the mother had been living in Italy where the children had (apparently) their habitual residence, she was not considered a reliable parent for the purposes of allocating the rights of custody and the placement of the children.

⁴⁷ Court of Justice, judgment of 8 June 2017, case C-111/17 PPU, *OL v PQ*, EU:C:2017:436. It must be noted that the case actually refers to the notion of habitual residence within the meaning of Article 11(1) of Brussels IIa Regulation, but the considerations of the preliminary ruling also apply to other provisions of that legal instrument. The opinion of Advocate General Bot has been delivered on 16 May 2017, which supports the conclusion that the physical presence of a child in a given Member State since her birth cannot constitute a wrongful removal to the extent that the parents intended for the child to be born in another Member State (EU:C:2017:375, paras. 64-91).

⁴⁸ Court of Justice, judgment of 15 February 2017, case C-499/15, *W and V v X*, EU:C:2017:118, paras. 61-65.

Where the conditions for a prorogation of jurisdiction laid down in Art. 12 are not fulfilled, it may occur that, pursuant to the general provisions of Arts. 3 and 8 of Brussels IIa Regulation, jurisdiction on matrimonial matters and parental responsibility is actually split between courts of different Member States. Indeed, when the child is not habitually resident in the Member State where the matrimonial proceedings is lawfully pending, there is a “disconnection” between the court that is competent to hear the case on matrimonial matters and that having jurisdiction on parental responsibility issues.

This practical effect has been stressed also in the Italian case law implementing the Regulation, as the courts have interpreted narrowly the conditions set forth in Art. 12 in accordance with the best interests of the child and the principle of proximity that underlie the jurisdictional regime regarding parental responsibility (as explained in Recitals 12 and 13 to the Regulation). For instance, married Italian nationals were habitually residing in the UK with their two children in December 2010 when the husband filed for judicial separation before the Tribunal of Palermo, claiming also the joint custody of the children. The wife then lodged a parental responsibility application with the English courts and also appeared before the Tribunal of Palermo objecting to its jurisdiction, at least with regard to the parental responsibility and the child maintenance claims. In March 2011 the wife applied to the Italian Supreme Court for a ruling on the international jurisdiction of the Italian courts (*regolamento di giurisdizione*).⁴⁹ The Supreme Court acknowledged that the Italian court had jurisdiction on the judicial separation claim on the basis of Art. 3(1)(b) of Brussels IIa (common nationality of the parties). On the contrary, its jurisdiction was lacking as regards parental responsibility issues pursuant to Art. 8 of Brussels IIa, since the children were habitually resident in England and Wales and, moreover, the Italian jurisdiction had not been accepted pursuant to Art. 12 of the same Regulation. In this regard, the Supreme Court held that the acceptance of the jurisdiction of the Italian court as to parental responsibility could not be inferred from the failure of the party to contest its jurisdiction on the personal separation petition, given that the two applications have different objects. Or, to put it differently, the party’s acceptance of the jurisdiction of the Italian court on matrimonial matters could not be extended to the application regarding the children’s custody and maintenance. This view was

⁴⁹ Corte di cassazione, sezioni unite civili, judgment of 30 December 2011, No. 30646, available in the legal database *Pluris*, <http://pluris-cedam.utetgiuridica.it>. Similarly, in another case involving Italian and British parties the Supreme Court confirmed the reasoning of an appellate court that overturned the first instance decision by declaring the “disconnection” of jurisdictional competence between Italian and UK courts (Corte di cassazione, sezioni unite civili, judgment of 7 September 2016, No. 17676, available in the legal database *Pluris*, <http://pluris-cedam.utetgiuridica.it>). The former, in fact, had jurisdiction only as to the separation petition, while the latter were exclusively competent to rule on the child’s custody and maintenance given that the child was habitually resident in the UK and the conditions for prorogation of jurisdiction were not met.

supported by both the wording of Art. 12 («accepted expressly or otherwise in an unequivocal manner») and the ultimate aim of protecting the best interests of the children. Consequently, in the case at issue the English court had exclusive jurisdiction to rule on the application concerning parental responsibility that was lodged by the mother, as the children were habitually resident in London, while the Italian court (namely, the Court of first instance of Palermo) was competent to rule on the separation petition pursuant to Art. 3(1)(b) of Brussels IIa, since both spouses were Italian nationals.

4.1. The effects on jurisdiction regarding ancillary maintenance claims.

The “disconnection” between competent courts on matrimonial matters and parental responsibility, respectively, affects also their jurisdiction regarding maintenance obligations as provided in Art. 3 of the Maintenance Regulation which attributes jurisdiction to (a) the habitual residence of the defendant, or (b) the habitual residence of the maintenance creditor, or to ancillary proceedings concerning (c) the status of a person or (d) parental responsibility.

It was precisely from a dispute where the jurisdiction on legal separation, child custody and maintenance was split between Italian and UK courts that originated the referral for a preliminary ruling to the CJEU regarding Art. 3(c) and 3(d) of the Maintenance Regulation at issue (case *A v B* of 16 July 2015).⁵⁰ As already mentioned above,⁵¹ the facts referred to a couple of Italian nationals habitually resident in England and Wales where their two children were born. In February 2012, the husband lodged an application before the Court of first instance of Milan asking for the fault-based legal separation, the shared custody of the children, and offering to contribute to the children’s maintenance. The wife objected to the jurisdiction of the Italian court as to the claims regarding parental responsibility and child maintenance, arguing that jurisdiction lay with the English court already seized in this regard. The President of the Court of Milan, before whom the first hearing must take place according to domestic procedural law, issued an order ruling only on the legal separation petition and the spousal maintenance claim, while declaring it lacked jurisdiction as to the children’s custody and maintenance.⁵² The husband appealed the first instance decision before the Supreme Court, asking for a ruling on the international jurisdiction of the Italian courts (*regolamento di giurisdizione*). He maintained that the Tribunal of Milan wrongly referred to Art. 3(d) of the Maintenance Regulation to limit the scope of the alternative head of

⁵⁰ Court of Justice, judgment of 16 July 2015, case C-184/14, *A v B*, EU:C:2015:479.

⁵¹ See *supra*, para. 2.

⁵² Tribunale di Milano, sezione IX civile, order of 16 November 2012.

jurisdiction provided for in its Art. 3(c). The Supreme Court acknowledged that no specific precedent had been rendered on this issue and referred the question for a preliminary ruling to the CJEU seeking to establish whether the alternative heads of jurisdiction set forth in Art. 3(c) and Art. 3(d) of Maintenance Regulation were to be interpreted as mutually exclusive.⁵³ The Court of Justice held in its judgment that when a court of a Member State is seized of proceedings involving the separation between the parents of a minor child and a court of another Member State is seized of proceedings in matters of parental responsibility involving that same child, an application for maintenance obligations towards that child is ancillary only to the proceedings concerning parental responsibility, within the meaning of Art. 3(d) of the Maintenance Regulation. Consequently, the Supreme Court ruled in light of the CJEU interpretation and ultimately held that the English courts shall have exclusive jurisdiction over child maintenance, on the ground that said application is ancillary to the dispute on parental responsibility initiated in the UK and not to that on legal separation between the spouses pending in Italy.⁵⁴

4.2. Child abduction proceedings.

Moving on to consider international child abduction proceedings, the Brussels IIa Regulation contains a set of provisions (Arts. 10 and 11) that aim at complementing the legal framework already established by the 1980 Child Abduction Convention.⁵⁵

The Regulation envisages a twofold jurisdictional regime in this regard. On the one hand, according to its Art. 10 the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention retain their jurisdiction (upon certain conditions) until the child has acquired a habitual residence in another Member State. On the other hand, the jurisdiction to issue a return order pursuant to the 1980 Hague Convention and Art. 11 of the Regulation lies with the courts of the Member State where the child has been removed or is being retained. Moreover, Art. 11 of the Regulation also complements the 1980

⁵³ Corte di cassazione, sezioni unite civili, order of 7 April 2014, No. 8049, available in the legal database *Pluris*, <http://pluris-cedam.utetgiuridica.it>.

⁵⁴ Corte di cassazione, sezioni unite civili, order of 5 February 2016, No. 2276, available in the legal database *Pluris*, <http://pluris-cedam.utetgiuridica.it>.

⁵⁵ In the literature, for a comprehensive assessment of child abduction proceedings in the EU see M.C. Baruffi, *Uno spazio di libertà, sicurezza e giustizia a misura di minori: la sfida (in)compiuta dell'Unione europea nei casi di sottrazione internazionale*, in *Freedom, Security and Justice: European Legal Studies*, 2017, pp. 2-25. At the international level, also the 1996 Hague Convention contains specific provisions on child abduction, which do not supersede the framework set out by the previous 1980 Convention, but are rather aimed at strengthening and improving its functioning (for further references and comments on the 1996 Convention, see M.C. Baruffi, *La convenzione dell'Aja del 1996 sulla tutela dei minori nell'ordinamento italiano*, in *Rivista di diritto internazionale privato e processuale*, 2016, pp. 977-1019).

Hague Convention with provisions ensuring the prompt return of the child in abduction proceedings (paras. 1-5), and regulating the exceptional cases where a court has issued an order on non-return pursuant to Art. 13 of the Convention (paras. 6-8).⁵⁶

According to the latest annual statistics provided by the Italian Ministry of Justice, child abduction cases involving Italy and the UK in the year 2015 amount to 18 (11 “active” and 7 “passive” cases).⁵⁷ Even though the UK is among those foreign countries with the highest number of cases when comparing the data available in these statistics, the reported case law on this subject matter is rather limited. This may be the result of the cooperation between Central Authorities or other means of dispute resolution, such as mediation, which often prove to be successful in child abduction cases, and thus the institution of judicial proceedings is only a measure of last resort.

Among the few available decisions regarding Italy and the UK is a decree issued by the Juvenile Court of Milan in 2010.⁵⁸ Preliminarily, it must be underlined that the proceedings were instituted according to the 1980 Child Abduction Convention as implemented in the Italian legal order by the Law of 15 January 1994, No. 64.⁵⁹ Pursuant to Art. 7 of said Law, the father lodged a request with the Italian Central Authority asking for the return of his daughter to the UK. He claimed that the mother had wrongfully retained the child in Italy, as she did not return to her habitual residence in the UK after having spent a planned holiday with the child in her country of origin. The Italian Central Authority forwarded the request to the competent judicial authority, *i.e.* the prosecutor by the Juvenile Court of Milan, who filed an application for the return of the child. The Juvenile Court was called upon to establish whether the non-return of the child to the UK was indeed wrongful after evaluating the location of her habitual residence. The case was peculiar in that it regarded a very young child, who had been living for three months in Italy after her birth and then moved to her

⁵⁶ In the literature, with particular regard to the overriding mechanism see C. Honorati, *La prassi italiana sul ritorno del minore sottratto ai sensi dell'art. 11 par. 8 del regolamento Bruxelles II bis*, in *Rivista di diritto internazionale privato e processuale*, 2015, pp. 275-314; P. Beaumont, L. Walker, J. Holliday, “Conflicts of EU courts on child abduction: the reality of Article 11(6)-(8) Brussels IIa proceedings across the EU” (2016) 12 *Journal of Private International Law* 211-260; C. Honorati, *L'oggetto del giudizio “di riesame” ai sensi dell'art. 11 del regolamento Bruxelles II bis*, in E. Triggiani, F. Cherubini, I. Ingravallo, E. Nalin, R. Virzo (a cura di), *Dialoghi con Ugo Villani*, vol. 2, Bari, 2017, pp. 1121-1139 (also for further bibliographical references).

⁵⁷ More precisely, the Juvenile Justice Department of the Italian Ministry of Justice publishes annual statistics on international child abduction, which are available at www.giustizia.it. The data are broken down into two categories (“active” and “passive” cases) regarding each foreign country.

⁵⁸ Tribunale per i minorenni di Milano, decree of 30 April 2010.

⁵⁹ For the corresponding legislation in the UK see the Child Abduction and Custody Act 1985, which ratified and implemented in the domestic legal system both the 1980 Child Abduction Convention and the 1980 European Convention on Recognition and Enforcement on Decisions Concerning Custody of Children (the full-text of the Act is available at www.legislation.gov.uk).

father's residence in the UK, where she had been staying for almost nine months before the mother took her to Italy. The factual circumstances and the documents exhibited by the parties led the Juvenile Court of Milan to conclude that the child was habitually resident in the UK before her move to Italy, and no account could be given to the mother's intention to actually establish her residence there with her daughter. Then, as regards the exceptional circumstances for issuing a non-return order pursuant to Art. 13 of the 1980 Hague Convention, the court held that they had to be interpreted narrowly in relation to very young children (as in the present case), so as to comprise only objective risks of physical or psychological harm. Otherwise, a court would always be bound to refuse the return of very young children who have been removed or retained by their mother, in light of the close relationship existing between a mother and a child of that age. On these grounds, the Juvenile Court upheld the request made by the father and ordered the return of the child to the UK. Even though the conclusion reached appears convincing as to the merits of the case, no reference to the relevant provisions of Brussels IIa was made in the court's legal reasoning.

With regard to intra-EU child abduction cases, in the Italian case law the references to only the relevant provisions of the 1980 Convention seem indeed quite common.⁶⁰ On the contrary, the combined application of international and EU rules is generally lacking and it could even result in a challenge of the decision for infringement and misapplication of law.

Even though the reported case law involving Italy and the UK did not give rise to much concern on the child's right to express his/her view,⁶¹ this issue is nonetheless a fundamental aspect in legal proceedings involving children,⁶² especially abduction cases. Art. 11(2) of Brussels IIa states that the child shall be «given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity», and Art. 23(b) lists the violation of the right to be heard among the grounds of non-recognition for judgments relating to parental responsibility. These provisions are furthermore

⁶⁰ See for example Tribunale per i minorenni di Lecce, judgment of 25 July 2007; Tribunale per i minorenni di Lecce, judgment of 30 May 2012.

⁶¹ For a recent example see the above-mentioned Tribunale di Roma, sezione I civile, decree of January 2017. In that case, the children were ten and five years old, respectively, and were considered too young for being heard during the judicial proceedings. Nonetheless, the evidence collected by the consultant appointed by the judge, who had met and talked with the children, was deemed sufficient for the ruling on the merits of the case.

⁶² On the issue, among the most recent contributions, see B. Ubertazzi, *The Child's Right to Be Heard in the Brussels System*, in *European Papers*, 2017, vol. 2, no. 1, pp. 43-74, available at www.europeanpapers.eu/en.

consistent with the international regulatory framework on child protection, particularly Art. 12 of the 1989 UN Convention on the Rights of the Child.⁶³

As far as the Italian legal order is concerned, only a recent legislative reform⁶⁴ expressly provided for the right of the child to be heard in any decision that regards him/her. More precisely, Art. 315-*bis* of the Civil Code now establishes said right for children aged 12 and up (or younger only if he/she is capable of forming his/her own views), whereas Arts. 336-*bis* and 337-*octies* specify the procedural aspects, together with Art. 38-*bis* of the Final Provisions of the Civil Code. Should the hearing appear to conflict with the child's best interests, the judicial authority may decide not to comply with this obligation, provided that the decision is duly motivated. Regarding child abduction proceedings, however, the obligation to hear the child was prescribed even before the introduction of these new provisions, pursuant to Art. 7 of the Law No. 64/1994. These legislative amendments were properly reflected in the Italian case law, which has increasingly taken a wider approach in this regard.⁶⁵ Indeed, the Supreme Court has held that the state of mind of a child who has been heard according to the Civil Code provisions should «always and necessarily» be taken into account even in child abduction cases⁶⁶ and the subsequent case law has generally maintained this view, also in purely internal situations.⁶⁷

4.3. The exceptional rule of transfer of proceedings (or *forum conveniens*).

In the context of parental responsibility, Brussels IIa has introduced a provision concerning the possibility for a court having jurisdiction on the merits to transfer the case to a court of another Member State that is deemed better placed to adjudicate the dispute (Art. 15).⁶⁸ The rule is actually inspired by the common law doctrine of *forum (non) conveniens*, while it represents a quite innovative provision for civil law legal orders. In the Brussels IIa regime,

⁶³ Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entered into force on 2 September 1990. The full text of the Convention and the updated status table are available at www.ohchr.org.

⁶⁴ Law of 10 December 2012, No. 219 and Legislative Decree of 28 December 2013, No. 154.

⁶⁵ This approach revised the traditional view that acknowledged only a cognitive relevance to the view expressed by the child in directing the judge to appraise the factual circumstances of the case. For an example of this narrower interpretation, see Corte di cassazione, sezione I civile, judgment of 11 August 2011, No. 17201, available in the legal database *Pluris*, <http://pluris-cedam.utetgiuridica.it>.

⁶⁶ Corte di cassazione, sezione I civile, judgment of 5 March 2014, No. 5237, available at www.italgiure.giustizia.it/sncass. Even though the case concerned a child abduction dispute between Italy and a third State (the US), it is worth mentioning it in this context for the relevance of the Court's holding.

⁶⁷ Among others, Corte di cassazione, sezione I civile, judgment of 31 March 2014, No. 7479, available at www.italgiure.giustizia.it/sncass (child abduction case involving Italy and Hungary); Corte di cassazione, sezione I civile, judgment of 10 September 2014, No. 19007, available at www.italgiure.giustizia.it/sncass (purely internal situation).

⁶⁸ Also the 1996 Hague Child Protection Convention provides for a similar legal tool, which is regulated in two separate provisions, Art. 8 and Art. 9.

the transfer of jurisdiction, by way of exception, may take place upon application of a party, or of the court's own motion, provided in both cases that the other Member State has a «particular connection» with the child and that the transfer pursues the child's best interests. In a recent preliminary ruling, the Court of Justice has explained at length the functioning of said transfer, holding that, first, the court of a Member State has to establish the particular connection existing between the child and another Member State in light of the factors provided in Art. 15(3) of the Regulation. Second, the court having jurisdiction must determine whether there is, in that other Member State, a court that is better placed to hear the case. To this end, account must be given to a «genuine and specific added value» that the court in the other Member State may provide with respect to the decision to be taken in relation to the child. Thirdly and last, the overall requirement of the compliance with the best interests of the child implies that the envisaged transfer shall not be «detrimental to the situation of the child concerned», having regard to possible «negative effects that such a transfer might have on the familial, social and emotional attachments of the child (...)or on that child's material situation». ⁶⁹

The Italian practice shows that Art. 15 has not been widely applied in cross-border parental disputes, but the available decisions prove nonetheless that Italian courts are fairly attuned to the conditions and the procedural mechanisms required for its application.

For example, the Court of first instance of Milan rendered a paradigmatic judgment on 11 February 2014 with regard to a case involving Italy and the UK. ⁷⁰ The facts concerned a couple that got married, had two daughters and then divorced in the UK. In September 2013 the father brought an action before a court in Cambridge claiming the sole custody of the underage daughter. The mother appeared before the court and asked that the proceedings be transferred to Italy pursuant to Art. 15 of Brussels IIa. The Court set the time limit for the father's reply on 17 January 2014 and the time limit for the mother's rejoinder on 31 January 2014. While these time limits were pending, the mother initiated a proceeding before the Court of first instance of Milan asking it to retain its jurisdiction according to Art. 15. The Italian court, however, dismissed the application holding that the transfer was inadmissible for two different sets of reasons, both procedural and substantive. From a procedural point of view, even when the request was not of the court's own motion but upon application from the party, it was up to the court of the Member State having jurisdiction as to the substance of the

⁶⁹ Court of Justice, judgment of 27 October 2016, case C-428/15, *Child and Family Agency v J. D.*, EU:C:2016:819, see especially paras. 50-61.

⁷⁰ Tribunale di Milano, sezione IX civile, judgment of 11 February 2014, available in *Rivista di diritto internazionale privato e processuale*, 2014, pp. 379-384.

matter to set a time limit by which the courts of the other Member State shall be seized, according to Art. 15(4) of the Regulation. By contrast, in the present case the English court had not yet ruled on the transfer request proposed by the respondent. Furthermore, with regard to the substantive point of view, the Court of Milan deemed Art. 15 inapplicable since there was none of the elements proving a particular connection with the child as provided for in Art. 15(3).⁷¹

In another case involving Italy and the UK, the Court of Appeal of Florence on 15 January 2014 ruled on the applicability of the transfer of proceedings under Art. 15 of Brussels Ia.⁷² In that instance, a couple of British nationals were habitually resident in Florence with their three children and in 2012 the mother moved back to the UK with the two younger children, where she also applied for divorce. In Italy, the father initiated parental responsibility proceedings concerning the school education of the oldest child, who still habitually resided in Florence. The mother claimed the application of Art. 15 of Brussels Ia in order to transfer the case to the English courts, deemed as better placed to hear the case and before which the divorce proceedings were pending. The Court of first instance of Florence held its jurisdiction on Art. 8 of Brussels Ia Regulation and then, after hearing the child and taking into account his determination to continue the studies in Italy, established that he could stay in Italy with the father. On appeal filed by the mother, the Court of Appeal of Florence upheld the decision of the lower court. Particularly, as regards the request to transfer the proceedings to the UK, the appellate court held that none of the exceptional circumstances justifying such possibility was met in the present case. Once again, the Italian case law appears to be familiar with the strict conditions to which Art. 15 of the Regulation is subject, and has indeed resorted in very few cases to the exceptional transfer of the case to a better placed court.⁷³

⁷¹ For the sake of completeness, Art. 15(3) of Brussels Ia Regulation provides that a particular connection between a child and a given Member State exists where said Member State «(a) has become the habitual residence of the child after the court having jurisdiction as to the substance of the matter was seized, or (b) is the former habitual residence of the child, or (c) is the place of the child's nationality, or (d) is the habitual residence of a holder of parental responsibility, or (e) is the place where property of the child is located and the case concerns measures for the protection of the child relating to the administration, conservation or disposal of this property».

⁷² Corte di appello di Firenze, judgment of 15 January 2014, available in *Rivista di diritto internazionale privato e processuale*, 2014, pp. 170-172.

⁷³ For two examples of decisions that granted the transfer of the proceedings to a court of another Member State, see Tribunale per i minorenni di Roma, judgment of 25 January 2008 (case involving Italy and Lithuania, in which the Juvenile Court provisionally suspended the mother's parental responsibility rights over her child and requested the Lithuanian judicial authority to exercise its jurisdiction over the proceedings according to Art. 15 of Brussels Ia) and Tribunale di Siracusa, judgment of 3 May 2016 (case involving Italy and Belgium, in which the Italian Court stayed the custody proceedings pending before it and acknowledged that the conditions for the transfer to the Belgian court were met, however setting a short time limit of only 15 days by which the better placed court should have been seised).

This decision of the Court of Appeal of Florence also offers a proper example in another respect, namely that concerning the determination of the law applicable to the parental responsibility claim. In this regard, the appellate court found that the decision was aimed at issuing child protection measures, and thus the correct legal basis was Art. 42 of the Italian PIL Act (Law No. 218/1995), instead of its Art. 36 on the law applicable to parent-child relations as argued by the lower court.⁷⁴ In any case, it is worth recalling that the reference to the domestic PIL rules no longer applies to cases decided after the entry into force of the 1996 Child Protection Convention in Italy, which occurred on 1 January 2016⁷⁵. The determination of the law applicable to child protection measures now follows the rules set forth in this international instrument, particularly in its Arts. 15 to 22.

4.4. The jurisdictional regime regarding provisional and urgent measures.

Although Art. 20 of Brussels IIa is included among the jurisdictional provisions that are common to both matrimonial and parental responsibility matters, the reported Italian case law on provisional measures only regards the latter issues, and it will be thus analysed in this section of the paper. This circumstance may be reasonably explained bearing in mind that it is much more frequent for a court to take such protective measures with regard to children, since they are often the most vulnerable subjects in cross-border family disputes. As to the conditions required for ordering provisional measures under Art. 20 of Brussels IIa, the Italian courts seem to be particularly acquainted with the relevant CJEU case law, which is often referred to in this context. As is well known, in this regard the CJEU has specified the following three cumulative requirements: the measure must be urgent, it must be taken in respect of persons in the Member State concerned, and must be provisional.⁷⁶

An example of proper application of the provision at issue comes from a decree issued by the Juvenile Court of Milan on 5 February 2010 in a case regarding Italy and the UK.⁷⁷ Indeed, the Italian court was seized by the mother, who claimed the sole custody of her new born daughter and the regulation of the father's rights of access. The father preliminarily objected the lack of jurisdiction of the Italian authority, given that the child was habitually

⁷⁴ The possible overlapping of the respective scopes of application of Arts. 36 and 42 of the Italian PIL Act is a recurring issue in the Italian case law. However, the prevailing opinion has been consistently referring to Art. 42 to determine the law applicable when the decision to be taken, albeit affecting the parental responsibility regime, is aimed at the protection of a child (see, among others, Corte di cassazione, sezioni unite, judgment of 9 January 2001, No. 1, available in the legal database *Pluris*, <http://pluris-cedam.utetgiuridica.it>).

⁷⁵ In the UK it entered into force on 1 November 2012.

⁷⁶ Court of Justice, judgment of 2 April 2009, case C-523/07, *A*, cited above, paras. 45-65; also judgment of 23 December 2009, case C-403/09 PPU, *Jasna Detiček v Maurizio Sgueglia*, EU:C:2009:810.

⁷⁷ Tribunale per i minorenni di Milano, decree of 5 February 2010.

resident in England and Wales. Moreover, as the mother went to Italy with the daughter to visit her parents but never came back to her habitual residence in England, he requested the Italian court to issue urgent measures pursuant to Art. 20 of Brussels IIa granting him rights of access to the child. The Juvenile Court held as founded the preliminary exception raised by the father, declaring its lack of jurisdiction as regards the merits of the parental responsibility dispute. Both the documents exhibited by the parties and the factual circumstances of the case supported the conclusion that the child had in fact her habitual residence in the UK at the time she entered Italy together with her mother. Nonetheless, the Italian court further examined its competence to issue provisional and urgent measures according to Art. 20 of Brussels IIa and Arts. 330 and 336(3) of the Italian Civil Code, by recalling the above mentioned CJEU case law. In this regard, it considered that the judicial authority having jurisdiction on the substance of the matter (*i.e.* the English court) had not yet issued any decision, and also the actual harm caused to the child had she been deprived of her right to maintain a relationship with both parents. The Juvenile Court consequently granted the father the rights of access to his daughter to be exercised until such time as the court having jurisdiction pursuant to Art. 8 of the Regulation issued a further decision.⁷⁸

With regard to provisional and urgent measures, a specific feature of the domestic procedural system must also be pointed out. More precisely, the first hearing in separation proceedings takes place before the president of the court, who is allowed to issue provisional orders in the interests of the spouses and the children according to Art. 708 of the Civil Procedural Code. Such provisional measures, however, possess a broader scope of application than those provided in Art. 20 of Brussels IIa. The latter instrument is in fact limited to the circumstance where the judicial authority issuing these orders is not that having substantive jurisdiction under the Regulation. This partially common reference to provisional measures has led to occasional confusion in the reported case law, as some Italian courts have wrongly recalled Art. 20 to issue provisional and urgent measures in the context of first hearings before the presidential judge when they actually had jurisdiction over the merits of the dispute.⁷⁹ Even though the outcomes of these decisions were not affected by the incorrect

⁷⁸ This decision of the Juvenile Court of Milan is worth mentioning also in another respect, namely in that it refers to the role of the tutelary judge (*giudice tutelare*, *i.e.* the judge supervising guardianships) acting as enforcement authority to make practical arrangements for organising the exercise of rights of access pursuant to Art. 48 of Brussels IIa. This holding indeed acknowledges a further power to the tutelary judge, who is generally competent to modify only a final judgment rendered by first instance or juvenile courts, and not provisional judgments as that issued on the basis of Art. 20 of Brussels IIa.

⁷⁹ An example in this regard is a decision of the Court of first instance of Bologna applying Art. 20 of Brussels IIa to take provisional measures concerning a child who had been residing in Italy with his mother for more than a year. In that instance, the court could have reasonably deemed that the child had acquired his

legal basis, they nonetheless could have been challenged for misapplication of the relevant provision.

5. Final remarks: current trends in the Italian case law implementing Brussels IIa and a look into the Recast proposal.

After having examined some of the most significant decisions illustrating the approach taken by Italian case law when applying the relevant provisions of Brussels IIa, it is safe to say that the courts have a generalised familiarity with it. Indeed, the basic structure of the Regulation (*e.g.* its scope of application, its principles and key notions such as habitual residence) seems to have been properly accommodated in the judicial decisions dealing with cross-border cases. For instance, one can reasonably share the narrow interpretation given with regard to the conditions for prorogation of jurisdiction under Art. 12 of the Regulation, and, on a similar note, the interpretation given to the transfer of jurisdiction to the better placed court pursuant to Art. 15. Both indeed comply with the principles underlying the Regulation and show a correct reading of the CJEU case law regarding these provisions.

Currently, however, the main difficulties appear to stem from the fragmentation of the relevant rules among different legal tools at the international and EU level, which actually implies an extensive knowledge of their functioning and coordination mechanisms. For example, the interrelations between the Brussels IIa and the 1980 and 1996 Hague Conventions, as well as the Maintenance Regulation, are often misunderstood in the case law, resulting in a separate application of these instruments, or the application of one instrument over another. Furthermore, courts occasionally struggle to apply Brussels IIa and its underlying principles in an autonomous manner, with the result that the EU provisions are sometimes superimposed on domestic legal notions and misapplied (as in the case of provisional and urgent measures under Art. 20 of the Regulation).

It is thus still valuable to further support and promote the creation of a true “culture” of EU private international law among legal practitioners through specialised courses, lectures, research projects, which can help to offer practical guidance towards a smooth resolution of cross-border disputes. This is of utmost importance especially in this field of law, as it directly involves the sensitive interests of families, children and vulnerable persons.

habitual residence there, and thus the reference to the mentioned provision appears incorrect. The proceedings were initiated upon application by the father claiming the return of the child to the UK, which was ultimately dismissed by the court (Tribunale di Bologna, sezione I civile, decree of 17 February 2016, available at www.ilcaso.it).

Before concluding, some final thoughts on the Brussels IIa Recast proposal are worth setting forth.⁸⁰ As usual, the Commission's initiative was preceded by extensive preparatory works, which comprised a public consultation,⁸¹ an external study on the operation of the Regulation,⁸² and the proposals made by a group of experts appointed by the EU institution.⁸³ The collected evidence showed only limited problems with regard to the provisions on matrimonial matters, while the more pressing issues concerned the regulation of parental responsibility. Six main shortcomings were in fact singled out, namely the child return procedure, the placement of the child in another State (regulated in Chapter II, Section 2 on jurisdiction in parental responsibility matters and the newly inserted Chapter III on child abduction), the requirement of *exequatur*, the hearing of the child, the actual enforcement of decisions (regulated in the new Chapter IV on recognition and enforcement) and the cooperation between Central Authorities (regulated in the new Chapter V). From an institutional point of view, the proposed Regulation is subject to the special legislative procedure, within which the opinion of the European Parliament should be issued before the end of 2017. Moreover, the Working Party on Civil Law Matters (Brussels IIa), *i.e.* a preparatory body set up within the Council of the EU, has regularly met since the transmission of the Commission's proposal to examine the draft text of the Recast.⁸⁴

A critical appraisal of those amendments that appear relevant in relation to the above-mentioned Italian case law will be provided below.

First, as already mentioned, child abduction proceedings are regulated in a specific Chapter of the Regulation (III) with the aim of reducing the inefficiencies of the return procedure. The new Art. 22 is aimed at ensuring the concentration of local jurisdiction for the applications for the return of a child on a limited number of courts, which shall be communicated by each Member State to the Commission. While this amendment is to be welcomed as it promotes the specialisation of the courts dealing with abduction cases, such provision does not find a

⁸⁰ In the literature, among the first available contributions on the Recast see T. Kruger, L. Samyn, "Brussels II bis: success and suggested improvements" (2016) 12 *Journal of Private International Law* 132-168; M.C. Baruffi, *La riforma del regolamento Bruxelles II bis e la tutela dell'interesse superiore del minore*, in *Dialoghi con Ugo Villani*, cited above at fn. 49, vol. 2, pp. 1087-1092; C. Honorati, *La proposta di revisione del Regolamento Bruxelles II bis: più tutela per i minori e più efficacia nell'esecuzione delle decisioni*, forthcoming in *Rivista di diritto internazionale privato e processuale*, 2017, no. 2.

⁸¹ The results are available at <http://ec.europa.eu/justice>.

⁸² *Study on the assessment of Regulation (EC) No 2201/2003 and policy options for its amendment. Final report*, published in May 2015. It is available at <http://ec.europa.eu/justice/civil>. The Author was appointed as legal expert for the Italian report with regard to the Regulation provisions on parental responsibility.

⁸³ Further information on the mission and the members of the Expert Group are available at <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3294>.

⁸⁴ In particular, the discussions within the Working Party have led to a revised text of Chapters I-III and Art. 20 of the proposed Brussels IIa Recast, which has not yet been made publicly available.

corresponding rule with regard to the decisions refusing the return pursuant to the new Art. 26. As far as the Italian legal order is concerned, 29 specialised Juvenile Courts are tasked with comprehensive competences on civil, administrative and criminal matters. However, a recent legislative reform has proposed to rearrange the current juvenile justice system, by replacing the existing Juvenile Courts with specialised divisions within the civil and criminal courts.⁸⁵ This new organisation actually raises several doubts among legal practitioners, since it would no longer ensure a proper assessment of sensitive issues concerning children, nor a swift resolution of legal proceedings where they are involved. Should the reform be passed by the Italian Parliament, it appears difficult to reconcile with the recast Brussels IIa regime.

Moreover, the new rules envisage a stricter time limit for issuing an enforceable return order, which amounts to a maximum of 18 weeks for all possible stages of the proceedings.⁸⁶ Also in this regard, the swifter procedure surely aims at ensuring a prompt return of the child who was wrongfully removed or retained, but it remains to be seen whether national courts will actually be able to comply with these time limits. From this point of view, unfortunately, Italian case law does not offer encouraging perspectives.

Concerning the procedure for the return of the child, the Draft report on the Commission's proposal recently published by the European Parliament's Committee on Legal Affairs⁸⁷ has proposed an amendment concerning the notification of the return order (and the date upon which it takes effect) to be made from the judicial authority to the Central Authority of the Member State of former habitual residence of the child.

Second, the right of the child to express his/her view is expressly provided in a specific common provision, namely the new Art. 20, which obliges the authorities having jurisdiction under the Regulation to give the child the «genuine and effective opportunity» to exercise this fundamental right.⁸⁸ In this regard, the Draft report on the Commission's proposal of the

⁸⁵ Draft Law on the efficiency of the civil justice system, which was passed by the Chamber of Deputies on 10 March 2016 and is currently being examined by the Senate (see Atto Senato n. 2284, Delega al Governo recante disposizioni per l'efficacia del processo civile, available at www.senato.it).

⁸⁶ More precisely, the Central Authorities are required to receive and process the return application within a six-week time limit, as do also the first instance court and the appellate court, respectively.

⁸⁷ European Parliament, Committee on Legal Affairs, Draft report on the proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), 2016/0190(CNS), 9 May 2017, available at www.europarl.europa.eu.

⁸⁸ The hearing of the child is indeed a key issue in the context of the Brussels IIa Recast, to the extent that the Presidency of the Council has invited the Justice and Home Affairs Council «to hold a policy debate with a view to endorsing the policy approaches» on this matter (see Presidency of the Council of the European Union, 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) – Policy debate, 9317/17, 19 May 2017, paragraph 8, available at www.consilium.europa.eu). The debate was held during the

European Parliament's Committee on Legal Affairs has specified that the competent authorities «shall document their considerations in the decision», in order to express the contents of their legal reasoning. Moreover, among the grounds of non-recognition the reference to a decision rendered without the child having been given such an opportunity has been removed (new Art. 38), with the consequence that only when the lack of hearing has not been duly motivated, the recognition of the decision may be refused.

A possible critical feature of the new regime can however be found in the new template of the certificate concerning judgments on parental responsibility (Annex II). The judicial authority may in fact encounter some difficulties when filling out the certificate, as the questions regarding the opportunity of the child to be heard and the due weight given to his/her views now provide only for a positive answer. Also, one may question the choice not to introduce any kind of common standards or harmonisation regarding the procedures or the conditions for hearing the child during the legal proceedings, which has been stressed as a relevant improvement in ensuring the mutual recognition of decisions among the EU Member States.⁸⁹

Third, the jurisdictional competence to issue provisional measures is limited to the courts of the Member State where the child or property belonging to the child is present (new Art. 12). Consequently, the Recast has codified the relevant case law in this regard, given that domestic courts had indeed interpreted the former Art. 20 as referring to measures to protect children in urgent cases. Moreover, as opposed to the existing regime, these measures shall not have local effect, but are able to “travel with the child”, *i.e.* «ceas[ing] to apply as soon as the authority of the Member State having jurisdiction (...) as to the substance of the matter has taken the measures it considers appropriate».⁹⁰ Particularly important is also the new wording in Art. 12(1), which expressly obliges the authority having taken the protective measures to inform the authority having jurisdiction as to the substance of the matter, in order to reinforce the means of cooperation between them. The new provision thus provides for a proper clarification of its scope of application and introduces procedural obligations for domestic courts called upon to issue this kind of measures.

Council meeting on 8 and 9 June 2017 (see Council of the European Union, Outcome of the Council meeting Justice and Home Affairs, 10136/17, 8 and 9 June 2017, available at www.consilium.europa.eu).

⁸⁹ See 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 of 21 April 2017, pp. 46-50, para. 2.20.

⁹⁰ As provided in the new Art. 12(1) of the Recast. This substantial innovation mirrors the provisions of the 1996 Hague Children’s Convention, namely its Art. 11.

It is also worth mentioning that according to the Draft report on the Commission's proposal of the European Parliament's Committee on Legal Affairs, the provisional measures shall cease to apply not only as soon as the competent authority has taken the appropriate measures, but further «from the moment when said authority notifies those measures to the authority of the Member State in which the provisional measures were taken», thus adding a procedural obligation upon the authority having jurisdiction under the Regulation.

One final consideration addresses to the choice not to amend Art. 3 on general jurisdiction regarding matrimonial matters. Indeed, as the above-mentioned case law has shown (especially in the *Rapisarda v Colladon* case), it is actually possible to misuse the alternative grounds of jurisdiction in order to initiate the legal proceedings before a more favourable court. Moreover, the application of the connecting factor of nationality (or domicile in the UK and Ireland) envisaged in Art. 3(1)(b) may occasionally result in establishing a lawful jurisdiction that, however, does not possess a sufficient factual link with the parties. While this may be acceptable for adjudicating matters on personal status, this would appear problematic for the purposes of the prorogation of jurisdiction over parental responsibility proceedings pursuant to Art. 12 of the Regulation. Therefore, an amendment introducing a hierarchy between those grounds of jurisdiction (similar to Art. 8 of Rome III Regulation), or removing some of them, may have been welcomed from a practical point of view.