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THE EU REGULATION ON FAMILY LAW: THE ITALIAN PERSPECTIVE

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1. Cross-border family law represents a peculiar legal sector within the broader EU competence in the area of civil judicial cooperation, due to its impinging upon sensitive interests closely connected to the Member States' domestic legal systems. Indeed, more stringent conditions are provided in Art. 81(3) TFEU in order to adopt legislative measures in this policy field (namely, a special legislative procedure[1]), and national Parliaments are entitled to oppose the adoption of the Council's decision aimed at subjecting the measure to the ordinary legislative procedure[2]. In this case, however, the EU act may still be implemented through an enhanced cooperation, requiring the agreement between at least nine Member States.

Notwithstanding these procedural limitations, a quite extensive body of EU legislation has been enacted for the purposes of harmonising the private international law (PIL) regimes in relation to a number of aspects related to family law. In particular, the matters of divorce and legal separation[3], parental responsibil-

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[1] As is well known, Art. 81(3) requires the Council to act unanimously after consulting the European Parliament.

[2] More precisely, national Parliaments may essentially veto the decision to make use of the *passerelle* clause provided in Art. 81(3), second paragraph, which again requires unanimity in the Council, the consultation of the European Parliament and a proposal from the Commission.

[3] Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, in *OJ* L 338 of 23 December 2003, p. 1 et seq. (hereinafter also "Brussels IIa Regulation"), which will be repealed by Council Regulation (EU) 2019/1111, in *OJ* L 178 of 2 July 2019, p. 1 et seq., from 1 August 2022; Council Regulation (EU) No. 1259/2010 of 20

ity[4], maintenance obligations[5], property relations[6] were regulated over the years, albeit to a different extent both in terms of PIL rules (jurisdiction, applicable law, recognition and enforcement) and number of Member States bound by these measures (besides the special position enjoyed by Denmark, Ireland and the United Kingdom[7], some of these EU acts implemented an enhanced cooperation[8]). The achievement of the harmonisation objective pursued by the Regulations adopted in these fields is, however, largely dependent on Member States' courts, which are called upon to interpret and apply the EU instruments in the actual cases brought before them. In this regard, the guidance provided by the Court of Justice of the EU (CJEU), especially through the direct "dialogue" with national courts made possible by the reference for a preliminary ruling, is essential in order to clarify the interpretation of the relevant Regulations' provisions and to guarantee their uniform and consistent application. It is therefore particularly useful to measure the effectiveness of these Regulations from a practical perspective, by taking the national case law as a privileged source of reference.

With these considerations in mind, this paper aims at offering a country-specific empirical evaluation[9] of the practical application of the EU Regulations on family law and their interplay with international Conventions. More precisely, through the assessment of selected Italian case law[10], it delves into the main issues related,

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December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, in *OJ* L 343 of 29 December 2010, p. 10 et seq. (hereinafter also "Rome III Regulation").

[4] Brussels IIa Regulation.

[5] Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, in *OJ* L 7 of 10 January 2009, p. 1 et seq. (hereinafter also "Maintenance Regulation").

[6] Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, and Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, both in *OJ* L 183 of 8 July 2016, p. 1 et seq. and p. 30 et seq., respectively.

[7] The conditions of this special position are framed in Protocols (No. 21) and (No. 22), annexed to the EU Treaties, respectively concerning the UK/Ireland, and Denmark.

[8] The above-cited Rome III Regulation, and the twin Regulations No. 2016/1103 and No. 2016/1104.

[9] As this paper carries out a practice-oriented analysis, the references to legal literature are limited to an essential selection of contributions provided here: GRATION, CURRY-SUMNER, WILLIAMS, SETRIGHT, RIGHT, *International Issues in Family Law: The 1996 Convention on the Protection of Children and Brussels IIa*, Jordan Publishing, Bristol 2015; QUEIROLO, *EU Law and Family Relationships*, Aracne, Roma 2015; *European Family Law*, vol. III, *Family Law in a European Perspective*, edited by Scherpe, Edward Elgar Publishing, Cheltenham 2016; *European Commentaries of Private International Law. Brussels IIbis Regulation*, edited by MAGNUS, MANKOWSKI, Verlag Dr. Otto Schmidt, Köln 2017.

[10] The national case law herein cited and commented on has been collected as part of the activities of the "EUFam's"/"EUFams II" projects and filed in a public database available at: http://www2.ipr.uni-heidelberg.de/eufams/index.php?site=entscheidungsdatenbank. In this database, the full text of the

firstly, to the scope of application of the EU instruments, and then to each PIL aspect according to the relevant regulatory framework, namely Brussels IIa, Rome III and Maintenance Regulations[11], as well as the 1980 and the 1996 Hague Conventions[12]. The paper concludes with an overall appraisal of the issues emerged through this analysis.

2. The first general consideration that can be inferred from the analysis of the Italian case law regards a still insufficient assessment of the PIL issues related to each claim that is brought before the court. Even though the majority of the collected decisions do follow a proper approach in this regard, it is nevertheless common practice to determine jurisdiction with regard to the main claims (mostly matrimonial and/or parental responsibility matters). Then, the courts rule on the merits of the remainder of the application without further reference to the relevant EU Regulations or international Conventions to determine the applicable law, but generally recalling the Italian substantive law[13]. This may point to persisting difficulties not only in the understanding of the actual scope of these legal instruments (and of the underlying claims), which is the necessary condition for their correct application, but more broadly in implementing a proper methodology to deal with cross-border cases.

A further aspect to consider from a general perspective is the peculiar relationship that exists between the Brussels IIa Regulation and the Member States' PIL statutes. The EU jurisdictional regime always takes precedence over national rules whenever an international element (even linked to a non-EU State) exists in the actual case, and the CJEU has indeed recalled that the Regulation does not make "reference to any limitation of [its] territorial scope"[14]. This results from the absence of any per-

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decisions is not published, but for each of them a data set is provided that includes the main factual and legal elements, as well as a descriptive summary and a short critique. The alphanumeric code following the decisions cited in the footnotes represents the uniform classification tool adopted in order to populate the database. The references not displaying such code are made to decisions that were not classified in this database.

[11] Although they constitute an integral part of the research conducted within the "EUFam's"/"EUFams II" projects, the twin Regulations No. 2016/1103 and No. 2016/1104 are not addressed in this paper, as no Italian decision concerning their application has been classified, at the time of writing, in the database that was used as the main case law source (see *supra*, footnote 10).

[12] Respectively, Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, and 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. Their full text (both in English and French) and regularly updated status table are available at: www.hcch.net.

[13] E.g., Trib. minorenni Milano, decree, 5 February 2010, ITF20100205; Trib. Torino (settima sezione civile), order, 13 May 2016, ITF20160513; Trib. Roma (prima sezione civile), 21 February 2017, ITF20170221; Trib. Padova (prima sezione civile), 8 September 2017, ITF20170908; Trib. Cosenza (seconda sezione civile), 18 September 2017, ITF20170918.

[14] CJEU, Case C-393/18 PPU, *UD* v *XB* [2018], EU:C:2018:835, para. 31.

sonal prerequisite for the "international" application of the Brussels IIa Regulation and is laid down in the residual grounds of jurisdiction provided in Arts. 7 and 14 thereof with regard to matrimonial matters and parental responsibility, respectively. As far as the analysed Italian case law is concerned, occasional inconsistencies have emerged in this respect. The application of the Brussels IIa Regulation in cases of legal separation or divorce disputes between third-country nationals is indeed well established (as confirmed by the CJEU)[15] and results in a proper reference to the grounds of jurisdiction set forth in its Art. 3[16]. On the contrary, the location of the habitual residence of a child in a non-Member State at times excludes any reference to the Brussels IIa Regulation[17]. However, this appears incorrect from a methodological perspective, because it is the residual ground of jurisdiction provided in Art. 14 thereof[18] that allows the court to refer to its domestic rules, provided that there is no other court within the EU having jurisdiction pursuant to Arts. 8-13 of the Regulation. In this regard, the CJEU has reiterated a distinction that needs to be made within the jurisdictional regime in parental responsibility matters. There are in fact certain provisions such as Arts. 9, 10 and 15 of the Regulation implying that "their application is dependent on a potential conflict of jurisdiction between courts in a number of Member States", while the wording of Art. 8(1) precludes it from being limited "to disputes relating to such conflicts"[19].

Lastly, a brief mention of the application *ratione temporis* should be made in relation to two EU family law instruments among those considered for the purposes of this case law assessment. In particular, albeit rarely, the Maintenance Regulation and the Rome III Regulation were not referred to by the Italian courts in the collected judgments even though they were both already applicable at the date of the commencement of the proceedings at hand[20]. This has usually resulted in the incorrect

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[15] CJEU, Case C-68/07, *Kerstin Sundelind Lopez* v *Miguel Enrique Lopez Lizazo* [2007], EU:C:2007:740.

[16] Among the many examples: Trib. Roma (prima sezione civile), 27 August 2014, ITF20140827b (Tunisian spouses); Trib. Roma (prima sezione civile), 27 January 2015 No. 1821, ITF20150127 (Peruvian spouses); Trib. Roma (prima sezione civile), 1 June 2016, ITF20160601a (Filipino spouses); Trib. Belluno, 9 November 2017, ITF20171109 (Albanian spouses).

[17] E.g., Trib. Roma (sezione prima civile), 17 February 2016, ITF20160217b, regarding a child habitually resident in Australia; Cass. (sezioni unite civili), 28 May 2014 No. 11915, ITT20140528, regarding a child habitually resident in Cuba; Cass. (sezioni unite civili), 5 June 2017 No. 13912, ITT20170605, regarding a child habitually resident in the State of Washington, USA.

[18] In few cases, however, Art. 14 of the Brussels IIa Regulation has been correctly referred to and applied: see Trib. Milano, 1 June 2012, ITF20120601; Trib. Padova (sezione prima civile), 1 August 2016, ITF20160801.

[19] CJEU, *UD* v *XB*, cited above, para. 33.

[20] With regard to the Maintenance Regulation, see Trib. Vercelli, decree, 26 May 2016, ITF20160526 (the temporal issue actually regarded the 2007 Maintenance Protocol as recalled by Art. 15 of the Maintenance Regulation); Trib. Modena (seconda sezione civile), 7 February 2017, ITF20170207; Trib. Parma (prima sezione civile), 31 May 2017, ITF20170531. With regard to the Rome III Regulation, see Trib.

application of the Italian PIL Act (Law No. 218 of 31 May 1995)[21] in lieu of the EU instruments. Nevertheless, in most cases the decision on the substance of the case remained unaffected by the reference to the wrong legal basis[22].

2.1. A recurring issue in the selected Italian case law is the assessment of a fault-based separation petition pursuant to Art. 151(2) of the Italian Civil Code (*domanda di separazione con addebito*). A fault-based separation petition is the request made by one or both spouses to the court in order to determine which of them (if any) can be held accountable for the breakdown of the marriage (and also be ordered to provide for spousal maintenance). In this regard, Recital 8 of the Brussels IIa Regulation clarifies that it should not deal with issues such as "grounds for divorce" (and, by extension, those for legal separation), but applies only to the dissolution of matrimonial ties. In the Italian legal order, however, despite the fault-based claim being independent from the separation petition (and only upon the party's request), it cannot be brought before a court in proceedings other than that on separation[23]. As a result, national courts have usually applied the same PIL regime to the separation petition and the fault-based claim, whenever submitted, even though a specific assessment regarding the latter was carried out only in a handful of decisions that mainly followed a similar approach[24]. More precisely, the legal sources that have been referred to are the Brussels IIa Regulation (Art. 3) and the Rome III Regulation (Art. 5 or 8) in order to establish jurisdiction and the applicable law, respectively. A different reasoning, in which jurisdiction was grounded on Art. 5(3) of the Brussels I Regulation[25] given that

Roma (prima sezione civile), 25 July 2014, ITF20140725; Trib. Pavia, 20 August 2015, ITF20150820a; Trib. Pavia, 20 August 2015, ITF20150820B; Trib. Pavia, 8 January 2016, ITF20160108; Trib. Cuneo, 22 September 2016, ITF20160922; Trib. Roma (prima sezione civile), 4 November 2016, ITF20161104 (this case was particularly odd given that Art. 31(1) of the Italian PIL Act was referred to when determining the law applicable to the legal separation claim, while Art. 8(d) of the Rome III Regulation was applied to determine the law applicable to the fault-based aspect of the same petition); Trib. Roma (prima sezione civile), 19 May 2017, ITF20170519c.

[21] Law No. 218 of 31 May 1995, *Riforma del sistema italiano di diritto internazionale privato*.

[22] In one instance, however, it seems that the merits of the case could have changed: see Trib. Milano (nona sezione civile), order, 16 November 2012, ITF20121116, where the court directly ruled on the substance of the spousal maintenance claim applying the Italian law, even though by virtue of Art. 15 of the Maintenance Regulation and Art. 3 of the 2007 Hague Protocol the applicable law should have been the English law (the habitual residence of the maintenance creditor was located in London).

[23] This is indeed the settled approach taken by Italian courts when ruling on fault-based separation petitions according to Art. 151(2) of the Italian Civil Code. For instance, see Cass. (prima sezione civile), 7 December 2007 No. 25618; Cass. (prima sezione civile), 20 March 2008 No. 7450; Cass. (prima sezione civile), 30 March 2012 No. 5173.

[24] Trib. Roma (prima sezione civile), 4 November 2016, ITF20161104; Trib. Parma (prima sezione civile), 31 May 2017, ITF20170531; Trib. Belluno, 9 November 2017, ITF20171109; Trib. Velletri (sezione prima civile), 21 May 2019, ITF20190521.

[25] Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in *OJ* L 12 of 16 January 2001, p. 1 et

Italy was the place where the harmful event (i.e., the fault) had occurred, was proposed only in one judgment among those collected, and therefore does not seem settled[26].

2.2. Generally speaking, the wide-ranging scope of parental responsibility matters under the Brussels IIa Regulation is properly interpreted in the reported Italian case law, also in light of the relevant CJEU decisions. No particular doubt has arisen with regard to all legal situations that are inherently related to parental responsibility rights – namely from their very existence ("attribution"), throughout their forms of exercise ("exercise, delegation, restriction"), to their cessation ("termination")[27] – as well as to measures that possess the purposive nature of protecting the child and his/her best interests, such as those in relation to child's property. In this latter respect, for instance, an Italian judge supervising guardianships (*giudice tutelare*) has ordered the appointment of a special guardian (unrelated to the family) authorised to represent the children (habitually residing in Spain) in the purchase of an immovable property located in Italy by reasonably considering this measure according to Art. 1(2)(c) of the Brussels IIa Regulation[28].

Differently, some difficulties have been encountered when addressing claims that are ancillary to parental responsibility rights, in particular penalty payments pursuant to Article 709-*ter*(2) of the Italian Civil Procedural Code. More precisely, this provision allows the judge to take enforcement measures in cases of breach of the rights of custody or any other action that may cause harm to the child or undermine the exercise of such rights, which can consist either in a warning, or a compensation for damages, or even a fine. The actual scope of the provision is however debated, given that its wording only refers to failures to comply with the custody regime. However, in the case law it has been extensively applied also to cases of failures to comply with maintenance obligations[29]. Among the collected Italian decisions, requests for compensation for damages claimed on the basis of Article 709-*ter*(2) of the Italian Civil Procedural Code have been ruled upon without carrying out any preliminary PIL assessment[30], but for a case adjudicated by the

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seq., which was applicable *ratione temporis* in the case at issue (subsequently repealed by Regulation (EU) No. 1215/2012, in *OJ* L 351 of 20 December 2012, p. 1 et seq.).

[26] Trib. Tivoli, 6 April 2011, ITF20110406.

[27] The actual extent of these legal situations, however, is specified by the applicable substantive law (either domestic law or foreign law, as determined by the connecting factor laid down in the relevant international instrument). On the law applicable to parental responsibility matters, see *infra*, Section 4.

[28] Trib. Padova (*giudice tutelare*), 14 September 2017, ITF20170914. On this case see also *infra*, Section 3.1.

[29] E.g., Trib. Bologna, 19 June 2007; Trib. Roma, 5 June 2007; Trib. Modena, 20 January 2012.

[30] Trib. Roma (prima sezione civile), 20 May 2014, ITF20140520b; Trib. Vercelli (prima sezione civile), decree, 23 July 2014, ITF20140723; Trib. Roma (prima sezione civile), 27 August 2014, ITF20140827b; Trib. Benevento, 12 March 2015 No. 587, ITF20150324; Trib. Roma (prima sezione civile), 24 March 2017, ITF20170324.

Italian Supreme Court[31]. In order to rule on the jurisdiction of the lower court, this judgment precisely addressed the ancillary relationship existing between claims concerning the exercise of parental responsibility over children habitually residing in London and a further action based on Article 709-*ter*(2), whose subject matter in this case was the alleged breach of maintenance obligations towards them and the consequent request for compensation for damages. The Supreme Court held that the cause of action of the latter claim was inherently based in tort (i.e., the breach of maintenance obligations), and thus was not ancillary to the action on parental responsibility. As a result, jurisdiction to rule on tort claims had to be established under the Brussels I Regulation (applicable *ratione temporis*), and not the Brussels IIa Regulation. This conclusion may appear inconsistent with the CJEU ruling in the *Bohez* case[32], where the enforcement of a penalty payment imposed in order to ensure the effectiveness of rights of access was considered an ancillary measure that serves to protect a right falling within the scope of the Brussels IIa Regulation. It seems difficult, however, to draw general considerations from a single decision.

Another issue that is worth mentioning with regard to the scope of application of the EU instruments in relation to parental responsibility rights is the assessment of the claim concerning the award of the family home. Also under this respect, the selected Italian case law provides only a "partial" guidance as far as the preliminary PIL aspects are concerned. Indeed, in one case an Italian court of first instance has expressly grounded their jurisdiction on such a claim pursuant to Art. 8 of the Brussels IIa Regulation and determined the applicable law on the basis of Art. 2 of the 1961 Hague Convention as recalled by Art. 42 of the Italian PIL Act, clarifying that it should be considered as a measure of protection towards children[33]. More precisely, the family home was awarded to the custodial parent (the mother) in order to allow her to keep living with the children. However, this holding seems common to many other collected judgments in which courts have been called upon to rule on the claim regarding the family home, despite the lack of any reference to the relevant EU and international legal sources before taking the decision on the merits[34]. In another instance, the award of the family home was considered ancillary to the maintenance claim, and the PIL regime was determined accordingly[35].

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[31] Cass. (sezioni unite civili), 15 November 2017 No. 27091, ITT20171115.

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

[33] Trib. Cremona (prima sezione civile), 15 September 2014, ITF20140915. In another case, a similar reasoning was followed and the claim for the award of the family home was considered as pertaining to parental responsibility matters, but the legal instrument that was referred to was – erroneously – Art. 5 of the 1996 Hague Convention, and not the Brussels IIa Regulation: see Trib. Parma (sezione prima), 4 April 2018, ITF20180404.

[34] E.g., Trib. Milano (nona sezione civile), 8 April 2011, ITF20110408; Trib. Roma (prima sezione civile), 27 August 2014, ITF20140827B; Trib. Roma (prima sezione civile), 8 March 2016 No. 4804, ITF20160308; Trib. Roma (prima sezione civile), 12 April 2016, ITF20160412; Trib. Torino (settima sezione civile), order, 13 May 2016, ITF20160513.

[35] Trib. Parma, 23 May 2018, ITF20180523.

3. The application of the general grounds of jurisdiction laid down in the EU family law instruments do not raise much concern in the reported Italian case law. National courts are indeed fairly familiar with the interpretation of the key connecting factor of habitual residence in accordance with the guidance provided by the CJEU[36], which stresses the importance of a comprehensive factual evaluation of one's personal and professional ties. A further comment regards the different approach occasionally taken in relation to matrimonial and parental responsibility claims. In the former cases, Italian courts sometimes tend to consider exclusively the documents exhibited by the parties, such as certificates of residence or income tax returns, in order to locate the habitual residence without carrying out a proper factual assessment as required by the CJEU[37]. On the contrary, in the latter cases the evaluation concerning the habitual residence of children is usually more accurate and takes into account the actual circumstances of the case[38]. For example, in a case involving a very young child (two years old at the time the proceedings were commenced) who had no personal ties other than the maternal and paternal families, the Italian Supreme Court has held that her habitual residence should be determined according to a "projective view". In other words, the determination should be made on the basis of factual elements, such as the enrolment in kindergarten for the coming year and the registration in the national healthcare system that proved the intention of the mother to keeping the child's residence in the UK[39]. With regard to the parents' intention to settle with the child in a certain Member State, however, the CJEU has specified that is it to be taken into account as an "indicator" capable of complementing other pieces of evidence, but cannot by itself be "crucial to the determination of the habitual residence of a child"[40].

3.1. Art. 12 of the Brussels IIa Regulation is rarely referred to and applied in the collected Italian decisions. This was indeed established as a consequence of

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[36] The notion of habitual residence has indeed been clarified by the CJEU in a number of decisions, which however concern only children: Case C-523/07, *A* [2009], EU:C:2009:225; Case C-497/10 PPU, *Barbara Mercredi* v *Richard Chaffe* [2010], EU:C:2010:829; Case C-376/14 PPU, *C* v *M* [2014], EU:C:2014:2268; Case C-111/17, *OL* v *PQ* [2017], EU:C:2017:436; Case C-512/17, *HR* [2018], EU:C:2018:513; *UD* v *XB*, cited above. With regard to the interpretation of the notion in another area of law (namely, expatriation allowances), see CJEU, Case C-452/93 P, *Pedro Magdalena Fernández* v *Commission of the European Communities* [1994], EU:C:1994:332.

[37] In this regard, see Trib. Belluno, 30 December 2011, ITF20101230; Trib. Roma (prima sezione civile), 20 February 2013; Trib. Parma (prima sezione civile), 2 January 2017, ITF20170102; Trib. Alessandria (sezione civile), 11 December 2017, ITF20171211.

[38] For example: Trib. minorenni Milano, decree, 5 February 2010, ITF20100205; Trib. minorenni Milano, 30 April 2010, ITF20100430.

[39] Cass. (sezioni unite civili), 30 March 2018 No. 8042, ITT20180330.

[40] CJEU, *OL* v *PQ*, cited above, paras. 46-50; in relation to this judgment, see also Cass. (sezioni unite civili), 2 October 2019 No. 24608, ITT20191002, which ruled on the very same case submitted to the CJEU through the reference for preliminary ruling from the Tribunal of Athens. Along the same line, also CJEU, *HR*, cited above, paras. 61-65.

the lack of its (narrow) requirements, mostly that regarding the spouses' acceptance of the jurisdiction of the courts seised with the matrimonial proceedings. In fact, according to the Italian practice, such a requirement implies at least the appearance of the parties before the court[41]. A further proper guidance comes from a judgment delivered by the Italian Supreme Court[42], where it has been clarified that the acceptance of the jurisdiction of the lower court as to parental responsibility could not be inferred from the failure of the party to contest jurisdiction on the personal separation petition, since the two applications had different subject matters. In other words, the party's acceptance of the jurisdiction of the Italian court on matrimonial matters could not be extended to the application regarding the child's custody and maintenance. In the case at issue, the impossibility of applying the prorogation of jurisdiction thus resulted in the "disconnection" of the jurisdiction on the separation petition and the custody and maintenance claims, which lay with the Italian and the UK courts, respectively.

Occasionally, questionable references to Art. 12 of the Brussels IIa Regulation are also found in the Italian case law. On the one hand, this provision is sometimes recalled even though the jurisdiction on parental responsibility matters was already grounded pursuant to the general rule of Art. 8, thus raising some doubts on the proper understanding of its functioning[43]. On the other hand, in one instance[44] the application of Art. 12 in order to first assess and then decline jurisdiction on parental responsibility claims does not appear convincing to the extent that the child was habitually resident in Italy at the time the Italian first instance court was seised and then moved to Germany when proceedings were pending. This supervening relocation should have been more appropriately considered under Art. 15 of the same Regulation for the purposes of transferring the case to the court better placed to hear it (i.e., the German court), being one of the factual circumstances that proves a "particular connection" to the other Member State within the meaning of Art. 15(3).

Lastly, a brief comment should be given with regard to an illustrative decision rendered by an Italian judge supervising guardianships, who retained its jurisdiction according to Art. 12(3) of the Brussels IIa Regulation in order to appoint a guardian representing two children habitually resident in Spain in the purchase of an immovable property located in Italy[45]. Indeed, it was properly held that the conditions required by that provision were met in the instant case. The children had

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[41] This practically relevant aspect was indeed pointed out in Baruffi, Fratea, Peraro, *Report on Italian Good Practices*, elaborated within the "EUFam's" project, 2016, p. 6, available at: www.eufams.unimi.it/wp-content/uploads/2017/01/EUFams_Italian-Exchange-Seminar_Report_Italian_Good_practices_eng_final3.pdf.

[42] Cass. (sezioni unite civili), 30 December 2011 No. 30646, ITT20111230.

[43] Trib. Belluno, 27 October 2016 No. 5217, ITF20161027; Trib. Belluno, 9 November 2017, ITF20171109.

[44] Trib. Benevento, 12 March 2015 No. 587, ITF20150312.

[45] Trib. Padova (*Giudice tutelare*), 14 September 2017, ITF20170914.

a substantial connection with Italy (i.e., Italian nationality), the jurisdiction of the Italian court was expressly accepted by all the parties to the proceedings (the parents had lodged a joint application), and the best interests of the children were fulfilled.

3.2. A recurring trend the reported Italian case law is the frequent exclusive reference to the 1980 Hague Convention, without mention to the Brussels IIa Regulation, in decisions concerning intra-EU child abduction cases[46]. This incorrect approach in the resolution of these often complex disputes should be reconsidered because it may overlook certain procedural requirements set forth by the Regulation, which are precisely aimed at reinforcing the swiftness and effectiveness of the proceedings (e.g., Art. 11(3) on the six-week time limit, or Art. 11(4) regarding the obligation to order the return whenever adequate arrangements are put in place in the State of origin).

Notwithstanding this general remark, examples of good practice are also found in the collected Italian decisions, which are worth mentioning here for the accurate and thorough assessment carried out in the context of the problematic "overriding" mechanism pursuant to Art. 11(6-8) of the Brussels IIa Regulation. As is well known, these provisions regulate the particular case where the court of the Member State of refuge has issued a non-return order pursuant to Art. 13 of the 1980 Hague Convention and the court of the Member State where the child was habitually resident immediately before the wrongful removal or retention is allowed to review the issue of the child's custody (and may even reverse the previous order). Two decisions issued by the Italian Supreme Court appear particularly significant in this regard.

The first one[47] can be considered a textbook case of application of the provisions at hand, in which the Supreme Court has clarified both procedural and substantial aspects of their functioning in the domestic legal order. As to the former, it held that, in the absence of any specific provision, the reference in Art. 11(7) to the relevant "national law" regulating the proceedings instituted before the court of the State of habitual residence should be Art. 7(3-4) of the Law No. 64 of 15 January 1994, which governs return proceedings initiated under the 1980 Hague Convention[48]. Para. 4 in particular establishes the direct appeal to the Supreme Court of the decree issued by the Juvenile Court in return proceedings under the 1980 Convention. Consequently, according to the Supreme Court, this provision has to be extended to the proceedings under Art. 11(7-8) of the Brussels IIa Regulation. As to

[46] E.g., Cass. (prima sezione civile), 14 July 2006 No. 16092, ITT20060714 (abduction case between Italy and Poland); Trib. minorenni Milano, 30 April 2010, ITF20100430 (abduction case between Italy and the UK); Cass. (prima sezione civile), 19 May 2010 No. 12293, ITT20100519 (abduction case between Italy and Germany: the decision contained only a brief mention to Art. 11(2) on the hearing of the child); Cass. (prima sezione civile), 8 February 2017 No. 3319, ITT20170208 (abduction case between Italy and Ireland).

[47] Cass. (prima sezione civile), 14 July 2010 No. 16549, ITT20100714.

[48] More precisely, these proceedings shall be held in chambers (*camera di consiglio*) before the Juvenile Court of the place where the child is located, which shall issue an enforceable decree.

the substantial part of the ruling, it was recalled that the court of the State of habitual residence should carry out a further and comprehensive evaluation of the factual circumstances and the legal grounds underlying the non-return order. The Juvenile Court of Palermo, having jurisdiction on the merits, reviewed the evidence already examined by the court of the State of refuge (the Tribunal of Cordoba, Spain), and confirmed that the conditions required for the exception set forth in Art. 13(1)(b) of the 1980 Convention were indeed fulfilled.

Similarly, the second judgment[49] concerned an abduction case in which an Italian court (the Juvenile Court of Florence), being the court of the place where the child habitually resided before the wrongful removal to Poland, was called upon to rule on the child's custody after the Polish court (seised by the father) had issued a non-return order. In this regard, the Italian Supreme Court underlined the temporary "split" of jurisdiction, under the Brussels IIa regime, between the authorities of the Member State where the child had moved (Poland) and those of the country of previous habitual residence (Italy), which should adjudicate, respectively, the issues of return or non-return and parental responsibility. In the case at hand, the Juvenile Court of Florence had properly retained its jurisdiction and extensively reviewed the grounds for the non-return that had been assessed by the Polish court (in particular, after considering the removal to Poland as wrongful, it took into account the settlement of the child in his new family environment and the inadequate parenting skills of the father). As a result, its final custody decision did not require the return of the child to Italy, and shifted, for the future, the jurisdiction on parental responsibility upon the courts of the new habitual residence (Poland).

3.3. The collected Italian case law that deals with provisional and urgent measures issued according to Art. 20 of the Brussels IIa Regulation is not particularly extensive. It should be preliminarily specified that the reported decisions regarded only measures taken in relation to children, which is predictable since they are often the most vulnerable subjects in cross-border family disputes. Even these few examples, however, do present some inconsistencies in the reasoning given to support the adoption of such measures. Indeed, in some judgments the jurisdiction to take provisional measures was properly grounded on the provision at issue by recognising that the substance of the matter should be adjudicated by a court of another Member State, and then verified the three cumulative conditions in accordance with the relevant CJEU case law were present[50] (i.e., the measure must be urgent, it must be taken in respect of persons in the Member State concerned, and must be provisional)[51].

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[49] Cass. (prima sezione civile), 12 May 2015 No. 9632, ITT20150512.

[50] CJEU, Case C-523/07, *A* [2009], EU:C:2009:225, paras. 45-65; see also CJEU, Case C-403/09 PPU, *Jasna Detiček v Maurizio Sgueglia* [2009], EU:C:2009:810.

[51] E.g., Trib. minorenni Milano, decree, 5 February 2010, ITF20100205; Trib. Cagliari (prima sezione civile) 12 December 2015, ITF20151212.

Conversely, in other instances the reference to Art. 20 of the Brussels IIa Regulation seems mistaken insofar as the court already had jurisdiction to rule on the merits of the case[52], usually by virtue of Art. 8 thereof because the child or children are habitually resident in Italy[53]. Even though the outcomes of these decisions were not affected by the incorrect legal basis, they nonetheless could have been challenged for misapplication of the relevant provision.

The reason of this occasional misunderstanding may be found in a specific feature of the domestic procedural system in family matters, which leads to an overlap between the provisional measures governed by the domestic law and the Brussels IIa Regulation. Indeed, in the Italian legal order 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 Italian Civil Procedural Code. Such provisional measures, however, possess a broader scope of application than those based on Art. 20 of the Brussels IIa Regulation. The latter instrument is in fact limited to the case where the judicial authority issuing these orders does not have substantive jurisdiction under the Regulation. This aspect, however, seems to have been overlooked in the judgments mentioned above.

3.4. With regard to the *lis pendens* exception, two issues emerged in the collected Italian decisions appear particularly relevant to discuss in this context.

The former issue revolves around the problematic case where, pending proceedings before an Italian court first seised, a court of a different Member State second seised has issued its decision without having stayed the proceedings pursuant to Art. 19 of the Brussels IIa Regulation. A breach of this provision does not amount to a ground of non-recognition of the foreign decision[54], with the consequence that it must be recognised in the Italian legal order if the interested party so requests. Such a situation is precisely at the heart of a reference for preliminary ruling made by the Italian Supreme Court by order of 20 June 2017[55]. The factual background of the case refers to parallel proceedings initiated before the Tribunal of Teramo (Italy) and the Tribunal of Bucharest (Romania), respectively first and second seised with matrimonial claims (separation in Italy and divorce in Romania), as well as child

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[52] This aspect has been recently reiterated also by the CJEU, which stated that courts are enabled to grant provisional, including protective, measures under Art. 20 of the Brussels IIa Regulation "provided that those courts do not base their jurisdiction, in relation to parental responsibility, on one of the articles in Section 2 of Chapter II of [that] regulation": CJEU, Joined Cases C-325/18 PPU and C-375/18 PPU, *Hampshire County Council v C.E., N.E.* [2018], EU:C:2018:739.

[53] Trib. Varese (prima sezione civile), decree, 4 October 2010, ITF20101004; Trib. Bologna (prima sezione civile), 17 February 2016, ITF20160217a; Trib. Torino (settima sezione civile), 13 May 2016, ITF20160513.

[54] As underlined also in BARUFFI, FRATEA, PERARO, *Report on the Italian Good Practices*, cited above, pp. 7-8.

[55] Cass. (prima sezione civile), order, 20 June 2017, ITT20170620.

custody and maintenance. While the Italian proceedings were pending, by decision of 31 May 2010 the Tribunal of Bucharest, after dismissing the *lis pendens* exception raised by the husband, declared the divorce between the parties, awarded the custody of the child to the mother and granted the father the rights of access. Moreover, it issued a maintenance order against the father. This decision became final after being confirmed by the Court of Appeal of Bucharest on 12 June 2013.

Meanwhile, the proceedings in Italy came to an end. In the final decision of 8 July 2012, the Tribunal of Teramo awarded the sole custody of the child to the father, ordering his return to Italy, granted the rights of access to the mother, and issued a maintenance order against the mother. The Italian court furthermore dismissed the mother's application for recognition of the decision issued by the Tribunal of Bucharest in 2010, noting that the proceedings in Italy had been initiated prior to those in Romania and the Romanian court had thus infringed Art. 19 of the Brussels IIa Regulation by failing to stay the proceedings. The mother appealed this final judgment before the Court of Appeal of L'Aquila (Italy), again requesting the recognition of the Romanian decision. The Court reversed the lower instance judgment by allowing the *res iudicata* exception and held that there were no grounds for non-recognition of the Romanian decision.

The case was then brought before the Italian Supreme Court, which referred to the CJEU a question of interpretation of the notion of *lis pendens* according to EU law and, more broadly, the effectiveness of the EU system of judicial cooperation and its basic principles of circulation and automatic recognition of judgments between Member States. Indeed, the Supreme Court maintained that the Romanian courts committed a manifest error of law in dismissing the objection of *lis pendens* raised by the father at each stage of the proceedings. This was the result of a misinterpretation of this rule due to the Romanian procedural law, which required the identity of the cause of action, the object, and the parties in the concurrent proceedings. Notwithstanding the express wording of Art. 19(1) of the Brussels IIa Regulation, the Romanian court considered the proceedings for legal separation and divorce to be inherently different, and thus did not apply the "first-in-time" rule. Consequently, the final decision in Romania was issued by a court that had no jurisdiction on the case at hand, being second seised. According to the Italian Supreme Court, this was not only an infringement of a jurisdictional rule, but also of a principle pertaining to procedural public policy, namely the circulation of judgments within the EU. Moving from these considerations, the crucial issue became establishing whether Art. 19 was only meant to be complementary to the jurisdictional rules of the Regulation (Arts. 3-14), or its violation could furthermore amount to a ground of non-recognition, within the broader notion of procedural public policy, of a decision issued by a court of a Member State that was second seised. In this regard, Art. 24 of the Brussels IIa Regulation expressly excludes only Arts. 3-14 thereof from the notion of public policy, but not the *lis pendens* rule. This is an issue that may indeed jeopardise the principle of mutual trust between Member States.

Advocate General Bot has delivered his Opinion on 9 September 2018 [56], in which he did not share the view proposed by the Italian Supreme Court regarding the consequences of the infringement of the *lis pendens* rule. Indeed, this rule could not be considered as important as those referred to in the context of the non-recognition of a decision on the basis of procedural public policy. In addition, a similar view would run counter the exhaustive list of the grounds of non-recognition laid down in Art. 23 of the Brussels IIa Regulation, as well as the exceptional character of the public policy clause[57]. More generally, the court of the Member State in which recognition is sought, is prevented from refusing the recognition on the sole ground of an alleged misapplication of EU law. The Advocate General, however, acknowledged the possible exploitation of the *lis pendens* rule, especially when combined with the wide range of alternative grounds of jurisdiction provided by the Regulation in matrimonial matters, but also expressed confidence that Member States courts would properly apply Art. 19(1) in light of the CJEU's interpretation. According to the Opinion, only a violation of procedural rights having "higher rank" (such as those granting the non-custodial parent the possibility to express his views, or the compliance with reasonable time-limits) may allow the non-recognition of a decision on the ground that it would be contrary to the public policy of the requested State (containing the fundamental rights guaranteed by EU law).

On 16 January 2019 the CJEU issued the final judgment in this case[58], supporting the findings already made in the Advocate General's Opinion. More precisely, it was reiterated that the court first seised should not refuse the recognition of a judgment rendered by the court second seised in breach of the *lis pendens* rule, as it would perform a review of the jurisdiction of the latter court, and this notwithstanding the exclusion of Art. 19 of the Brussels IIa Regulation from the test of public policy as clarified in Art. 24 thereof. Moreover, the CJEU recalled the narrow interpretation to be given to the grounds of non-recognition of a decision if it is manifestly contrary to public policy, pursuant to Arts. 22(a) and 23(a) of the Regulation, being these grounds "an obstacle" to the principle of mutual trust[59].

The Italian Supreme Court delivered its final decision in this case on 17 May 2019[60] and correctly followed the guidance provided by the CJEU in its preliminary

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[56] Opinion of AG Bot in Case C-386/17, *Stefano Liberato* v *Luminita Luisa Grigorescu* [2018], EU:C:2018:670. It is worth mentioning that the questions raised by the Italian Supreme Court involved not only matrimonial and parental responsibility matters, but also maintenance obligations, and therefore they were reformulated by including the reference to Regulation No 44/2001, which was applicable to the latter issues at the time of the dispute.

[57] *Ibidem*, para. 87.

[58] CJEU, Case C-386/17, *Stefano Liberato* v *Luminita Luisa Grigorescu* [2019], EU:C:2019:24. Also in the final decision, the questions raised by the referring court were reformulated and answered in light of Brussels IIa and Brussels I Regulations.

[59] *Ibidem*, para. 55.

[60] Cass. (sezione prima civile), 17 May 2019 No. 13412, ITT20190517. This decision, however, appears to be less clear in the further assessment of the other pleas in law involving the alleged irrec-

ruling, thus excluding the possibility of refusing the recognition of the Romanian divorce judgment on the ground of the breach of the *lis pendens* rule.

The second matter regards the *lis pendens* exception in the context of third States' proceedings, for which the EU family law Regulations lack any specific provision. In particular, the United Chambers of the Italian Supreme Court were called upon to rule on whether jurisdiction grounded on Art. 3 of the Brussels IIa Regulation was exclusive, and thus prevailed over the domestic rule on international *lis pendens* (Art. 7 of the Italian PIL Act), or whether the latter provision was applicable in cases of parallel proceedings between Italian and third States' courts[61]. The final ruling was issued on 22 December 2017[62]. Before analysing the contents of this judgment, it should be specified that it does not "directly" tackle the substance of the question mentioned above, but actually assesses the preliminary issue of the nature of international *lis pendens* and its consequences on the legal remedies available in order to challenge the decision of the court second seised ordering the stay of the proceedings in such a situation. In this regard, the Supreme Court clarified a long-standing divergence in its case law by holding that the order to stay the proceedings issued by the court second seised did not entail any decision on its jurisdiction, which was exclusively up to the court first seised. Indeed, the powers conferred to the court second seised were limited to determine whether the *lis pendens* situation actually exists on the basis of the "first-in-time" rule[63], thus amounting to a mere procedural finding and not to a ruling on jurisdiction. As a result, the only available remedy in the Italian legal system to challenge the decision ordering the stay of the proceedings due to *lis pendens* was the request for mandatory ruling on the question of competence (*regolamento necessario di competenza*) pursuant to Art. 42 of the Italian Civil Procedural Code, and not the request for a ruling on the question of jurisdiction by virtue of Art. 41 thereof (*regolamento di giurisdizione*). As already observed, this conclusion essentially prevents the Supreme Court from further evaluating the relationship between EU and national rules on jurisdiction and *lis pendens*, having ruled that the latter issue does not involve any assessment on jurisdiction.

3.5. Regarding ancillary maintenance claims, a question deserving specific mention is whether Italian courts have been following the guidance provided by the CJEU as to the mutually exclusive relationship existing between the alternative heads of jurisdiction set forth in Art. 3(c) and Art. 3(d) of the Maintenance Regulation[64],

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oncilability between the Romanian and the Italian judgments pursuant to Arts. 22(c) and 23(e) of the Brussels IIa Regulation, which were ultimately dismissed.

[61] Cass. (sesta sezione civile), order, 2 May 2016 No. 11740, ITT20160502.

[62] Cass. (sezioni unite civili), 22 December 2017 No. 30877, ITT20171222.

[63] More precisely, by ascertaining whether the requirement of the identity between the causes of action is indeed met, as well as the pending judgment before the court first seised.

[64] CJEU, Case C-184/14, *A* v *B* [2015], EU:C:2015:479.

which was clarified in a preliminary ruling requested by the Italian Supreme Court[65]. From the reported national case law, it stems that the mentioned CJEU decision has occasionally been interpreted too extensively, and namely considering the jurisdiction based on Art. 3(c)-(d) as mandatory and limiting the alternative nature of the relationship with the other grounds of jurisdiction in Art. 3(a)-(b)[66]. Nonetheless, there are also examples of proper application of these provisions in light of the CJEU ruling, even though sometimes this was not expressly recalled in the reasoning[67].

In relation to maintenance claims, another recurring trend in the reported Italian decisions concerns jurisdiction grounded on Art. 5 of the Maintenance Regulation, which is based on the appearance of the defendant before the court. Frequently, the further reference to such ground of jurisdiction appears unnecessary, to the extent that the court has already retained jurisdiction on the general grounds laid down in Art. 3 thereof[68]. Albeit this additional legal basis does not lead to different outcomes in the final decision, it should nevertheless be avoided in order to comply fully with the jurisdictional regime set forth in the Maintenance Regulation.

4. A peculiar issue emerging from the collected Italian case law concerns the designation of the law applicable to legal separation/divorce also before the court during the proceedings, which is a possibility expressly laid down in Art. 5(3) of the Rome III Regulation upon condition that "the law of the *forum* so provides" and in accordance with that law. Despite the lack of any domestic provision that may be relevant for this purpose, Italian courts have nonetheless recognised this possibility[69] and maintained that it was sufficient to infer it from the principles governing the legal system of the *forum*[70]. Furthermore, a choice-of-law agreement should be considered as pertaining to the category of procedural contracts (*negozi*

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[65] Cass. (sezioni unite civili), order, 7 April 2014 No. 8049, ITT20140704. The final decision rendered after the preliminary ruling is Cass. (sezioni unite civili), order, 5 February 2016 No. 2276, ITT20160205.

[66] Trib. Roma (prima sezione civile), 4 November 2016, ITF20161104; Cass. (sezioni unite civili), 15 November 2017 No. 27091, ITT20171115; Trib. Milano (sezione nona civile), 10 January 2019, ITF20190110; Trib. Vercelli, 24 July 2019, ITF20190724. The absence of any hierarchy between the heads of jurisdiction laid down in Art. 3 of the Maintenance Regulation has indeed been reiterated by the CJEU also in Case C-468/18, *R* v *P* [2019], EU:C:2019:666.

[67] E.g., Trib. Belluno, 19 July 2019, ITF20190719; Trib. Roma (prima sezione civile), 4 August 2017, ITF20170804; Trib. Novara (sezione civile), 16 May 2019, ITF20190516A.

[68] E.g., Trib. Belluno, 27 October 2016 No. 5217, ITF20161027; Trib. Roma (prima sezione civile), 21 April 2017, ITF20170421A; Trib. Roma (prima sezione civile), 5 May 2017, ITF20170505. In one case, the reference to Art. 5 of the Maintenance Regulation was actually mistaken given the default of appearance of the defendant: Trib. Padova (prima sezione civile), 3 March 2017, ITF20170303.

[69] Trib. Milano (sezione nona civile), order, 11 December 2012, ITF20121211; Trib. Milano (sezione nona civile), order, 10 February 2014, ITF20140210.

[70] In particular, reference is made to the principle of fair trial enshrined in Art. 111 of the Italian Constitution: see Trib. Milano (sezione nona civile), order, 10 February 2014, ITF20140210.

di diritto processuale) that are usually admissible under the general clause of party autonomy. Given that the law applicable to divorce and legal separation has been included by the Rome III Regulation among those procedural aspects that may be subject to party autonomy, no further domestic provision should be required in this regard[71].

An interesting case involving the determination of the law applicable to a divorce concerned the legal tool of the out-of-court settlement concluded by the spouses through the assistance of counsel (*convenzione di negoziazione assistita da uno o più avvocati*), recently introduced in the Italian legal order[72]. More precisely, by means of such an agreement, a couple of Argentinian spouses intended to obtain a divorce without a prior legal separation in accordance with the law of common nationality designated under Art. 31 of the Italian PIL Act. The agreement was subject to the approval of the competent public prosecutor (namely, the prosecutor at the Tribunal of Turin), who refused it and forwarded the case to the President of the Tribunal. In its decree[73], the court confirmed the public prosecutor's decision because the possibility to conclude such an out-of-court settlement in order to obtain a divorce is conditional upon the legal separation being previously ordered by a court and lasting for the fixed period established by the law[74]. Consequently, the agreement between the spouses could not be authorised, and the Tribunal of Turin stressed that this outcome would not raise any question of constitutionality given that the couple could still obtain a divorce without a prior legal separation by asking for the application of their national law in the context of a proceedings by mutual consent. In addition, the court grounded its decision on the inappropriateness of this out-of-court settlement to take into account complex issues such as the timeliness and the validity of the choice of law as required under Art. 5 of the Rome III Regulation.

Moving to the law applicable to parental responsibility matters, the relevant legal instrument, as is well known, is the 1996 Hague Convention on the protection of children. Considering the entry into force in Italy of said Convention on 1 January 2016 and the continued lack of any implementing legislation, various issues have arisen when Italian courts were seised with parental responsibility proceedings under the Brussels IIa Regulation and had to determine the applicable law pursuant to the

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[71] Again, Trib. Milano (sezione nona civile), order, 10 February 2014, ITF20140210.

[72] Art. 6 of the Decree Law No. 132 of 12 September 2014, *Misure urgenti di degiurisdizionalizzazione ed altri interventi per la definizione dell'arretrato in materia di processo civile*, converted into law and amended by Law No. 162 of 10 November 2014.

[73] Trib. Torino, decree, 1 June 2018, ITF20180601. In the decision, the designation of the law applicable to divorce under the Italian PIL Act was corrected and the reference was properly made to the Rome III Regulation.

[74] Twelve months from the time the couple appeared before the President of the court in case of judicial proceedings, or six months in case of separation by mutual consent, as provided by Law No. 55 of 6 May 2015, *Disposizioni in materia di scioglimento o di cessazione degli effetti civili del matrimonio nonché di comunione tra i coniugi*.

1996 Convention. The collected Italian case law proves particularly useful to show a number of these practical difficulties.

Firstly, it must be mentioned that the 1996 Hague Convention is often applied without ascertaining whether the other State involved in the case at issue is a Contracting Party thereto. In those decisions where the international instrument indeed applies (i.e., after its entry into force), Italian courts do not preliminarily verify whether it has actually been ratified by and entered into force in the other State(s) involved, but directly apply its relevant rules regarding the applicable law[75]. This trend (common also to other Member States' case law) may suggest a persisting unfamiliarity with the functioning of the Convention from an international law perspective, which differs from that of the EU Regulations.

The relatively recent entry into force of the 1996 Convention in Italy has also given rise to uncertainties as to its temporal scope of application. As will be recalled, the general rule laid down in Art. 53(1) of the Convention provides that it shall apply to measures taken in a State "after [it] has entered into force for that State". However, there is no specific rule concerning proceedings that were pending and in which no measure had yet been taken at the date of entry into force, with the consequence that the laws of each Contracting State shall govern these situations. In this regard, two opposite approaches seem to have been followed in the reported Italian case law. In most cases, it was held that the situation fell outside the temporal scope of the Convention on the ground that the proceedings were already initiated before its entry into force[76]. More rarely, the Convention provisions were applied in the final decision that was issued after that date[77]. In the latter instances, the factual circumstance that appears to have justified the application of the 1996 Convention to pending proceedings could be the lack of provisional measures taken at the time of its entry into force. However, it is not possible to infer any further guidance from these judgments since no specific reasoning on this point was given. In addition, the reference to the previous 1961 Hague Convention still provided in Art. 42 of the

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[75] E.g., Trib. Roma (prima sezione civile), 19 May 2017, ITF20170519a; Trib. Roma (prima sezione civile), decree, 7 July 2017, ITF20170707; Trib. Aosta, 10 July 2017, ITF20170710; Trib. Roma (prima sezione civile), decree, ITF20170721a; Trib. Padova (Giudice tutelare), 14 September 2017, ITF20170914.

[76] E.g., Trib. Roma, 8 March 2016 No. 4804, ITF20160308; Trib. Roma, 12 April 2016, ITF20160412; Trib. Roma, 28 September 2016 No. 17955, ITF20160928; Trib. Roma, 14 October 2016, ITF20161014; Trib. Parma (prima sezione civile), 2 January 2017, ITF20170102, which expressly states that the 1996 Convention is applicable only to disputes initiated after its entry into force by virtue of the principle of non-retroactivity; Trib. Parma (sezione prima civile), 2 August 2018, ITF20180802; Trib. Velletri (sezione prima civile), 21 May 2019, ITF20190521. In some of these decisions the 1996 Hague Convention was nonetheless recalled as an interpretative tool ("in chiave dinamica") to define the scope of the prior 1961 Hague Convention (concerning the powers of authorities and the law applicable in respect of the protection of infants), which was applied in the instant cases by means of the reference "in any case" to this instrument contained in Art. 42 of the Italian PIL Act.

[77] Trib. Roma, 19 May 2017, ITF20170519a; Trib. Belluno, 27 October 2016 No. 5217, ITF20161027.

Italian PIL Act causes an ambiguity that may undermine the proper application of the 1996 Convention in the Italian legal order, even though this provision is supposed to apply only on a residual basis[78].

A further aspect emerging from the Italian case law regards the practical application of the Convention provisions on the applicable law (Arts. 15-18). Namely, in the reported judgments, which typically involve judicial proceedings regarding separation or divorce and ancillary parental responsibility claims (rights of custody and/or access), there is no consistency in the reference to this conflict-of-laws regime. In most cases, Art. 15 and/or Art. 17 are recalled in order to determine the law applicable to the claims on the exercise of parental responsibility rights[79]. In rarer cases, Art. 16 is also referred to in the context of judicial proceedings[80], even though it governs the applicable law to the attribution or extinction of parental responsibility whenever a judicial or administrative authority is not (actively) involved. However, it should be specified that the actual outcomes of the decisions remained unaffected by the different legal bases, given that national courts have in any case applied the Italian law – being both the *lex fori* and the law of the habitual residence of the child – and accordingly ruled on the merits of the parental responsibility issues at hand.

A last remark to be made with regard to the collected Italian decisions concerns Art. 36-*bis* of the Italian PIL Act[81], which qualifies as overriding mandatory rules those domestic law provisions concerning the attribution of parental responsibility to both parents, the parents' duty to provide for child maintenance, and the powers conferred to the judicial authority to restrict or terminate the exercise of parental responsibility in order to protect the child. In particular, given that its condition of application is expressly "the reference to a foreign law", it does not seem convincing to recall such provision in those situations where the Italian law in any

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[78] In particular, the reference to Art. 42 of the Italian PIL Act does not seem correct in those cases where the other State involved is a Contracting State of the 1996 Hague Convention, and thus its application would have been possible on a direct basis, i.e., without recalling the domestic provision. For an example of this questionable approach see Trib. Alessandria (sezione civile), 11 December 2017, ITF20171211.

[79] E.g., Trib. Roma (prima sezione civile), decree, 21 October 2016, ITF20161021a; Trib. Roma (prima sezione civile), decree, 19 May 2017, ITF20170519a; Trib. Roma (sezione prima civile), decree, 7 July 2017, ITF20170707; Trib. Aosta, 10 July 2017, ITF20170710; Trib. Roma (prima sezione civile), decree, ITF20170721a; Trib. Padova (Giudice tutelare), 14 September 2017, ITF20170914; Trib. Parma (sezione prima civile), 13 October 2017, ITF20171013; Trib. Parma (sezione prima), 4 April 2018, ITF20180404; Trib. Torino (settima sezione civile), 15 February 2019 No. 696, ITF20190215.

[80] E.g., Trib. Padova, 25 July 2016, ITF20160725; Trib. Belluno, 27 October 2016 No. 5217, ITF20161027; Trib. Belluno, 9 November 2017, ITF20171109; Trib. Novara (sezione civile), 16 May 2019, ITF20190516a.

[81] This provision was introduced by Legislative Decree No. 154 of 28 December 2013, *Revisione delle disposizioni vigenti in materia di filiazione, a norma dell'articolo 2 della legge 10 dicembre 2012, n. 219*.

case applies as determined through the relevant provisions of the 1996 Convention[82]. Furthermore, this practice of mistakenly applying a domestic rule could amount to a breach of international law (and EU law) performed by the State (more precisely, its judicial authorities)[83] insofar as the domestic mandatory rule overrides the Convention provisions governing the applicable law.

5. A specific assessment of the main trends in the application of the rules on recognition and enforcement of judgments laid down in the EU family law instruments seems challenging with regard to the reported Italian case law, because very few decisions have dealt with these issues. Nonetheless, the practical application of the respective regimes (especially the Brussels IIa and the Maintenance Regulations) does not raise much concern[84], and proper references to the Italian PIL Act (Arts. 64-67) are made whenever the EU provisions do not come into play (i.e., judgments rendered in third States)[85].

Specific mention, however, should be made to some cases in which Italian courts have been seised with proceedings concerning, on the one hand, the recognition of a foreign decision and, on the other hand, parental responsibility and/or maintenance claims that had not (or only to a partial extent) been adjudicated by the court of the State of origin. Under the domestic procedural law, these applications lodged with Italian courts have been considered as requests for review of the conditions laid down in the separation or divorce judgment[86], and decided accordingly[87]. More precisely, the approach taken can be clarified as follows. First, the seised court has recognised the foreign decision on separation or divorce pursuant to the Brussels IIa Regulation or the Italian PIL Act (depending on whether it had been issued by a Member State or a third State court). Then, after having assessed its jurisdiction

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[82] Trib. Belluno, 27 October 2016 No. 5217, ITF20161027; Trib. Belluno, 9 November 2017, ITF20171109; Trib. Lecco, 28 November 2017, ITF20171128.

[83] CJEU, Case C-224/01, *Gerhard Köbler* v *Republik* Österreich [2003], EU:C:2003:513; Case C-173/03, *Traghetti del Mediterraneo SpA* v *Repubblica italiana* [2006], EU:C:2006:391.

[84] E.g., Trib. Bari, 27 April 2009, ITF20090427; Trib. Roma (prima sezione civile), 18 December 2015, ITF20151218; Trib. Roma (prima sezione civile), 19 January 2016, ITF20160119a; Trib. Roma (prima sezione civile), 19 January 2016, ITF20160119c; C. App. Catania, 9 June 2014, ITS20140609; C. App. Milano, 19 September 2014, ITF20140919.

[85] E.g., Trib. Belluno, 5 November 2010, ITF20101105; Trib. Reggio Emilia (prima sezione civile), 22 March 2014, ITF20140322; Trib. Torino, 23 January 2017, ITF20170123; Trib. Roma (prima sezione civile), 18 May 2017, ITF20170518; Trib. Parma (sezione prima civile), 14 February 2019, ITF20190214.

[86] In particular, under Art. 710 of the Italian Civil Procedural Code as to the modification of the conditions of legal separation, and under Art. 9 of the Italian law on divorce (Law No. 898 of 1 December 1970) as to the modification of the conditions of divorce.

[87] Trib. Roma (prima sezione civile), decree, 17 February 2015, ITF20150217; Trib. Roma (prima sezione civile), 21 October 2016, ITF20161021B; Trib. Modena (seconda sezione civile), 7 February 2017, ITF20170207; Trib. Roma (prima sezione civile), 18 May 2017. See also Cass. (sezione prima civile), 1 February 2016 No. 1863; Trib. Belluno, 21 April 2016.

on parental responsibility and/or maintenance claims and determined the respective applicable law, it ruled on the merits, thus modifying or supplementing the foreign ruling.

Even though this approach does seem to achieve positive outcomes on a factual basis, it nonetheless casts some doubts from a procedural point of view. Indeed, these petitions for review would require reasonable grounds deriving from the existence of new factual circumstances, which in these cases would not seem to occur[88].The final decision does not actually modify any finding made in the previous separation or divorce conditions, but should rather be formally considered as a new application on parental responsibility and maintenance.

6. The overall assessment of the main trends that arose in the collected Italian case law shows a generalised familiarity with the application of the EU Regulations on family law and the relevant international Conventions. This is particularly evident with regard to the basic rules laid down in these legal instruments, such as their general scope of application, or the key connecting factors for establishing jurisdiction and applicable law (especially the habitual residence).

On the contrary, the main difficulties appear to stem from the fragmentation of the relevant rules among different legal instruments at the international and EU level, which actually implies an extensive knowledge of their functioning and coordination mechanisms. For instance, the interrelations between the Brussels IIa Regulation 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 instead of another.

In addition, some inconsistencies in the reported decisions seem to relate to legal institutions that may not be *prima facie* ascribed to the relevant provisions of the EU family law Regulations, but nonetheless can fall within their scope of application by way of interpretation and following the guidance provided by the CJEU. This is the case, for example, of the PIL assessment of the petition concerning the award of the family home, or penalty payments established in the event of a breach of rights of custody or failures to comply with maintenance orders.

It is therefore particularly valuable to adopt such a "law in action" viewpoint through a monitoring exercise of the practical application of these EU instruments in the national case law, which can provide a reliable picture of the state of the art and point to the most current developments, either positive or negative.

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[88] Practical consequences of this approach were pointed out in Baruffi, Danieli, Fratea, Peraro, *Report on the Italian Exchange Seminar*, elaborated within the "EUFams II" project, 2019, p. 11, available at: http://www2.ipr.uni-heidelberg.de/eufams/index-Dateien/microsites/download.php? art=projektbe richt&id=9.

The EU regulations on family law: the Italian perspective

Abstract: *The paper provides a practice-oriented assessment of the application of the EU Regulations on family law in the Italian legal order. Through the analysis of selected national case law, it addresses the main issues related to the scope of application of the EU instruments, as well as to each private international law aspect covered under the relevant regulatory framework, namely Regulations No. 2201/2003, No. 4/2009 and No. 1259/2010 and their interplay with the 1980 and the 1996 Hague Conventions.*

Keywords: *EU family law regulations; Italian case law; Scope of application; Jurisdiction; Applicable law; Recognition and enforcement.*