

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



Jurisdiction in matrimonial matters - Reflections for the review of the Brussels IIa Regulation

STUDY FOR THE JURI COMMITTEE



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

**Jurisdiction in matrimonial matters -
Reflections for the review of the
Brussels IIa Regulation**

STUDY

Abstract

At the request of the European Parliament Committee on Legal Affairs (JURI), this research paper was commissioned by the Policy Department for Citizen's Rights and Constitutional Affairs to examine difficulties experienced in relation to jurisdiction in matrimonial matters, and assess the need for amendment of current legislation concerning party autonomy, transfers of jurisdiction and harmonisation of rules on residual jurisdiction. It concludes that there is a pressing need for reform insofar as transfers of jurisdiction are concerned, and a compelling case for the introduction of more party autonomy. The case for harmonisation of residual rules, however, is less clear. In the light of national case law and academic literature, the study also considers whether same-sex relationships could be governed by the Regulation and argues that there is a strong legal argument for their inclusion.

ABOUT THE PUBLICATION

This research paper was requested by the European Parliament's Committee on Legal Affairs and commissioned, supervised and published by the Policy Department for Citizens' Rights and Constitutional Affairs.

Policy departments provide independent expertise, both in-house and externally, to support European Parliament committees and other parliamentary bodies in shaping legislation and exercising democratic scrutiny over EU external and internal policies.

To contact the Policy Department for Citizens' Rights and Constitutional Affairs or to subscribe to its newsletter please write to: poldep-citizens@europarl.europa.eu

Research Administrator Responsible

Céline Chateau
Policy Department C: Citizens' Rights and Constitutional Affairs
European Parliament
B-1047 Brussels
E-mail: poldep-citizens@europarl.europa.eu

AUTHOR

Dr Justin Borg-Barthet, Lecturer in EU and private international law, University of Aberdeen, United Kingdom

LINGUISTIC VERSIONS

Original: EN

Manuscript completed in June 2016
© European Union, 2016

This document is available on the internet at:
<http://www.europarl.europa.eu/supporting-analyses>

DISCLAIMER

The opinions expressed in this document are the sole responsibility of the author and do not necessarily represent the official position of the European Parliament. Reproduction and translation for non-commercial purposes are authorized, provided the source is acknowledged and the publisher is given prior notice and sent a copy.

CONTENTS

EXECUTIVE SUMMARY	4
1. INTRODUCTION	7
1.1. Background Information	7
1.1.1. Aims of the Study	7
1.1.2. Current Jurisdictional Rules under the Brussels IIa Regulation	8
1.1.3. Case law of the Court of Justice of the European Union (CJEU)	8
2. GENERAL PRINCIPLES AND ISSUES ARISING FROM THE RULES	11
2.1. <i>Lis Pendens</i> and Forum shopping	11
2.2. Party Autonomy	12
2.2.1. Emerging consensus around party autonomy	13
2.2.2. Applicable principles in the Treaties	15
2.2.3. Autonomy and Free Movement of Persons	16
2.3. Residual Jurisdiction	17
2.4. Consolidation of Proceedings	18
2.5. Protection of the weaker party	18
2.6. Divergence in national law and policy	20
3. EVIDENCE FROM NATIONAL CASE LAW	22
3.1. Methodology	22
3.1.1. Research and analysis of case law	22
3.2. England and Wales	22
3.2.1. Overview	22
3.2.2. <i>Lis Pendens</i> , Forum Shopping	23
3.2.3. Transfers of Jurisdiction	25
3.2.4. Party Autonomy	26
3.2.5. Residual Jurisdiction – BIIa and Third States	27
3.3. Germany	28
3.4. Italy	29
3.5. Poland	30
3.6. Belgium	31
4. KEY FINDINGS AND RECOMMENDATIONS	32
4.1. Party Autonomy	32
4.2. Transfers of Jurisdiction and <i>Forum Conveniens</i>	34
4.3. Residual Jurisdiction	35
4.4. Same-sex relationships	36

EXECUTIVE SUMMARY

Background

Council Regulation (EC) No 2201/2003,¹ also known as the Brussels IIa Regulation, governs jurisdiction in matrimonial and parental matters. The Regulation was adopted in 2003 and came into force in 2005. It replaces an earlier Regulation, namely Regulation 1347/2000 which was also known as the Brussels II Regulation.

Article 65 of the Brussels IIa Regulation provides that the Regulation was to be reviewed by 01 January 2012. In 2014, the European Commission published a report on the application of the Regulation.² This was followed by a public consultation.³ The Commission has since established a group of experts to assist in the formulation of proposals for review of the Regulation.

It is envisaged that the review of the Regulation will be adopted under the special legislative procedure. As such, Parliament will have a consultative role, rather than acting as co-legislator as in the ordinary legislative procedure. This study was requested by the European Parliament committee on Legal Affairs and commissioned by the Policy Department on citizens' rights and constitutional affairs to inform the committee's position on the Commission's forthcoming proposals to revise the Regulation. It supplements a number of recent studies focused on the parental responsibility aspects regulated by Brussels IIa⁴.

As for matrimonial matters, the Regulation includes rules concerning which courts of the Member States are able to hear a case concerning divorce, separation and annulment of marriages. At the request of the committee on Legal Affairs, this study will focus on these aspects of the Regulation.

The Regulation provides that spouses are not able to conclude an amicable binding agreement to choose the court in which to bring proceedings. Instead, the Regulation contains a list of seven possible rules which connect the spouses to particular Member States. The spouse instituting the court proceedings may choose any of these courts. This means that whichever party is first to begin proceedings is able to choose the court that suits their interests best. This may be to the detriment of the other spouse.

The Regulation contains separate rules concerning which courts can hear cases concerning parental responsibility, while maintenance obligations and property are dealt with in other regulations. The separate rules may mean that the spouses are involved in court proceedings in several Member States.

¹ Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2003] OJ L 338/1.

² European Commission (EC), 'Report from the commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000', COM(2014)225, 15 April 2014.

³ The results of the consultation are available at <https://ec.europa.eu/eusurvey/publication/BXLIIA>

⁴ L. Carpaneto, [Cross-border placement of children in the EU](#), European Parliament, 20116, PE 556.945, 2016; J. H. A van Loon, [The Brussels IIa Regulation: towards a review?](#), in [Cross-border activities in the EU - making life easier to citizens](#), European Parliament, PE 510.003, 2015, (pp. 177-207); Swiss Institute of Comparative Law, [Cross-border Parental Child Abduction in the European Union](#), European Parliament, PE 510.012, 2015 and [The parental responsibility, child custody and visitation rights in cross-border separations](#), PE 425.615, 2010; C. Fenton-Glynn, [Adoption without consent - Update 2016](#), European Parliament, PE 556.940.

There have been attempts to change the rules in the past. In particular, in 2006, the Commission proposed the Brussels II^{ter} Regulation.⁵ However, this was not adopted as the required unanimity in Council was not achieved since the Member States disagreed about the content of legislation.⁶ These disagreements were a result of different legal traditions concerning divorce and separation. Some Member States limit access to divorce, while others are more liberal. Since legislation concerning family law requires unanimity among the Member States in Council, the legislation was not adopted.

Aim

The aim of this study is to consider whether, from the observation of the way Member States apply EU law and consideration of relevant literature, there need to be changes to the rules in the Brussels IIa Regulation. To this end, the study analyses academic literature, as well as the judgments of the courts of selected Member States and the Court of Justice of the European Union (CJEU).

The study considers whether there is room for reform to improve the efficiency of the operation of the Regulation, as well as whether rules may operate in a manner that could be abusive to a spouse who may be more vulnerable, particularly due to financial dependence on the other spouse. This is addressed with reference to developments in family law which are designed to allow the spouses to achieve amicable outcomes. The study also considers the effects of the rules on the free movement of persons.

Following analysis of national case law and academic literature, it was also considered necessary to address the position of same-sex relationships with a view to determining whether they should be included within the scope of the Regulation.

Key findings

The study finds that the Regulation lacks internal consistency. A piecemeal approach to legislation concerning jurisdiction in matrimonial matters and related matters such as maintenance may result in multiple courts simultaneously hearing cases concerning the same parties and essentially the same issues.

The absence of a provision allowing courts to transfer a case to a better suited court in another Member State may result in incompatible judgments and hardship to the parties. This is particularly evident in case law from England and Wales, but also in other jurisdictions considered in this study. Matrimonial disputes in which the parties contest jurisdiction are costly to the parties and the courts of the Member States.

The Regulation allows, and even encourages, forum shopping for courts whereby parties seek jurisdictional advantage by rushing to a court that they expect will deliver a favourable ruling. This, in turn, discourages amicable resolution of disputes in family matters and is therefore inconsistent with conciliatory family law policies. These problems are exacerbated as a consequence of a lack of mechanism for the parties to agree to seise a particular court. It is further found that the limitation of grounds of jurisdiction in matrimonial matters and

⁵ Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters (COM (2006) 399 final).

⁶ For a succinct discussion of the failed reform process and its aftermath, see A Fiorini, "Harmonizing the Law Applicable to Divorce and Legal Separation — Enhanced Cooperation as the Way Forward?" (2010) 59 *International and Comparative Law Quarterly* 1143, 1143-1158.

the exclusion of party autonomy may have the effect of limiting the enjoyment of the right to free movement.

The case law of the Member States further suggests that the jurisdictional rules can be used in a vexatious manner. The lack of discretion for the courts to refuse to exercise jurisdiction may result in abuse of a vulnerable party. It is also evident in the case law that matrimonial disputes in which the parties contest the jurisdiction of courts are costly to both the parties themselves and to the courts of the Member States.

Finally, the study finds that the apparent exclusion of same-sex relationships from the scope of the Regulation creates a lacuna in EU family law and may fall foul of the fundamental right to be free from discrimination on grounds of sexual orientation.

In sum, therefore, the study finds that a review of the rules on jurisdiction in matrimonial matters is timely and proposals are therefore submitted in order to address these matters.

1. INTRODUCTION

1.1. Background Information

1.1.1. Aims of the Study

This study considers whether, on the basis of the way EU rules are applied, reform is required in respect of the rules concerning jurisdiction in matrimonial matters in the Brussels IIa Regulation.⁷ Notwithstanding longstanding criticisms of the existing rules,⁸ the basic mechanism has remained unchanged since the adoption of original Brussels II Regulation.⁹ Proposed changes were included in the ill-fated Brussels II^{ter} Regulation¹⁰ in 2006. However, this did not command the required unanimity in Council in order to be adopted and the proposal was consequently withdrawn.¹¹

This report, which has been produced at the request of the European Parliament Committee on Legal Affairs (JURI), reviews the law and its application with a view to recommending whether reform is required. In particular, the report considers party autonomy, transfers of jurisdiction and rules on residual jurisdiction. The study considers whether, and the extent to which, there is a need for reform insofar as transfers of jurisdiction are concerned, as well as whether there is a compelling case for the introduction of party autonomy. Furthermore, the case for reform of residual rules of jurisdiction is also considered. In view of the case law of the Member States, the study also considers whether same-sex relationships should be included within the scope of the Regulation.

In this introductory section the report provides a brief overview of the operation of the rules and the interpretative guidance provided by the Court of Justice of the European Union. This is followed by an appraisal of the general principles which could inform legislative reform.

The third section then provides an overview of case law from selected jurisdictions, namely England and Wales, Germany, Italy, Poland and Belgium. The selected jurisdictions were chosen both due to the availability of data through the EUPILLAR database,¹² and in view of the fact that they provide evidence from: (i) northern, southern, eastern and western Europe, (ii) newer and older Member States, (iii) larger states and states with relatively smaller populations,¹³ (iv) a range of socio-economic and religious-cultural realities and (v) diverse legal cultures (common law, French civil law and German civil law).

⁷ Regulation 2201/2003 (n 1).

⁸ See generally T.M.C. ASSER Institut, 'Evaluation on practical problems resulting from the non-harmonisation of choice of Law rules in Divorce Matters' (2002) available at: http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm.

⁹ Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses [2000] L 160/21, Article 2.

¹⁰ Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters (COM (2006) 399 final).

¹¹ See Fiorini (n 6) 1143-1158.

¹² The EUPILLAR project involves six research partners from the Universities of Freiburg, Antwerp, Wrocław, Leeds, Milan and Complutense of Madrid, examining the case law and legal practice on the main EU private international law instruments in the Court of Justice of the European Union and in Germany, Belgium, Poland, Great Britain, Italy and Spain. The key objectives of the project are to consider whether the selected Member States' courts and the Court of Justice of the EU can appropriately deal with the relevant cross-border issues arising in the European Union context and to propose ways to improve the effectiveness of the European PIL framework. <http://www.abdn.ac.uk/law/research/eupillar.php> accessed 28 February 2016.

¹³ Searches for case law from Malta, the only microstate considered, yielded no relevant results.

In the fourth section, the study proposes changes that could be made to better align the legislation with identified principles and practical considerations.

1.1.2. Current Jurisdictional Rules under the Brussels IIa Regulation

Article 3 of the Brussels IIa Regulation provides seven grounds of jurisdiction, as follows:

In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State

(a) in whose territory:

- the spouses are habitually resident, or
- the spouses were last habitually resident, insofar as one of them still resides there, or
- the respondent is habitually resident, or
- in the event of a joint application, either of the spouses is habitually resident, or
- the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or
- the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her "domicile" there;

(b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the "domicile" of both spouses.

In addition, Article 5 provides that 'without prejudice to article 3, a court of a Member State that has given a judgment on a legal separation shall also have jurisdiction for converting that judgment into a divorce, if the law of that Member State so provides'.

Article 4 provides that the 'court in which proceedings are pending on the basis of Article 3 shall also have jurisdiction to examine a counterclaim, insofar as the latter comes within the scope of this Regulation'. There is not, however, a general power to consolidate proceedings *ex officio*.

The grounds of jurisdiction in Article 3 have equal status and exclusive effect in order to prevent the application of competing jurisdictional rules.¹⁴ A court that is seised of a claim over which it has jurisdiction under any of the grounds provided in Article 3 may not refuse to exercise that jurisdiction. In other words, a court has no discretion to decide that it is not the best suited forum to hear a claim. If the Regulation provides that a court is one of a number of appropriate jurisdictions, the possibility that another court is better suited is not contemplated and therefore not a relevant consideration. Instead, potential conflicts of jurisdiction are resolved through the application of the *lis alibi pendens* rule, which requires that the court first seised hear a case, while all other courts refrain from exercising their jurisdiction in the same matter between the same parties.

1.1.3. Case law of the Court of Justice of the European Union (CJEU)

The jurisdictional rules are elaborated somewhat by a number of cases in which the Court of Justice provided interpretative guidance concerning aspects of the operation of the

¹⁴ Regulation 2201/2003 (n 1), Article 6; Case C-168/09 *Laszlo Hadadi (Hadady) v Csilla Marta Mesko, wife of Hadadi (Hadady)* [2009] ECR I-6871; P Beaumont and P McEleavy, *Anton's Private International Law* (3rd edn W Green, 2011), 16.04.

Regulation. These are, of course, supplemented by a wealth of case law concerning other instruments, particularly the Brussels I Regulation, which may be applicable by analogy to Brussels IIa.¹⁵

Few difficulties arise from some of the cases concerning the Brussels IIa Regulation. In Case C-489/14 *A v B*, for example, a case concerning judicial separation and divorce proceedings brought between the same parties in different courts, the CJEU merely clarified the limits of the *lis pendens* rule. The request for a preliminary ruling from the High Court of Justice of England and Wales sought greater clarity concerning the application of the *lis pendens* rule in a situation in which proceedings in the court first seised had expired when proceedings were initiated in the court of another Member State. The CJEU explained that the criteria for *lis pendens* are no longer fulfilled in such a situation as the risk of irreconcilable judgments no longer exists.¹⁶

Nor do significant questions arise from the judgment in *Sundelind Lopez*.¹⁷ This case concerned proceedings in which a third country national was the respondent in the court of a Member State where he was not habitually resident. Indeed, the respondent was neither a national of a member state, and nor did he reside in the Union. The petitioner, a Swedish national, sought to institute proceedings in Sweden on the basis of that Member State's residual rules of jurisdiction. The action was brought in Sweden notwithstanding the fact that the spouses were last habitually resident in France and the petitioner still lived there. The CJEU held that the national court could not apply its domestic private international law rules if the courts of another Member State had jurisdiction under the Regulation.¹⁸

In contrast, Case C-184/14 *A v B*,¹⁹ highlights the problematic interaction of the provisions of the Brussels IIa Regulation concerning matrimonial matters and those concerning parental responsibility, as well as the relationship of Brussels IIa to the Brussels I Regulation²⁰ and the Maintenance Regulation.²¹ The case concerned separation proceedings brought in Italy in which a counterclaim for child maintenance was raised. The Italian court asked whether this could be considered to be ancillary to the separation proceedings.

The CJEU noted that the legislation distinguishes proceedings concerning the status of persons from proceedings concerning parental responsibility.²² A distinction was to be drawn between proceedings concerning the rights and obligations of the parties qua spouses, and the rights and obligations of those same parties qua parents.²³ It was found in a particularly noteworthy passage of the judgment that the jurisdictional rules concerning status were defined on the basis of the parties' residence, whereas in matters concerning parental responsibility jurisdiction was determined on the basis of proximity having regard to the best interests of the child.²⁴

The Court noted that 'it should be observed that an application involving maintenance in respect of minor children is not necessarily linked to divorce or separation proceedings.

¹⁵ See e.g. Advocate General Cruz Villalón in Case C-489/14 *A v B* [2015] ECR-0000, para 116.

¹⁶ Case C-489/14 *A v B* [2015] ECR-0000, para 37.

¹⁷ Case C-68/07 *Kerstin Sundelind Lopez v Miguel Enriquen Lopez Lizazo* [2007] ECR I-10403.

¹⁸ *Ibid*, para 28.

¹⁹ Case 184/14 *A v B* [2015] ECR-0000.

²⁰ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1, Art 5(2).

²¹ Council Regulation (EC) 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L 7/1.

²² Case C-184/14 (n 19), paras 32-33.

²³ *Ibid*, paras 38-39.

²⁴ *Ibid*, para 37.

Moreover, such proceedings do not necessarily lead to obligations to pay maintenance towards a minor child being imposed.²⁵ In the CJEU's view the court seised of matters concerning parental responsibility was best suited to determine the question of child maintenance.²⁶ The Court therefore found that the Italian court did not have jurisdiction to entertain a counterclaim concerning child maintenance.²⁷

The Court's reading of the legislation is certainly defensible, particularly insofar as it usefully unravels the complicated interaction of a number of related instruments. The Brussels IIa Regulation excludes maintenance obligations from its scope,²⁸ and it is not tenable therefore to argue that they could fall within the meaning of a counterclaim under Article 4, which is limited to matters falling within the scope of the Regulation.

In practical terms, however, the fact that maintenance obligations are 'not *necessarily* [emphasis added] linked to divorce proceedings'²⁹ does not of itself mean that they might not be linked in individual cases. The judgment of the Court required the bifurcation of proceedings concerning the same parties and the consequent expenditure of further funds emanating from the same source required ultimately to serve the best interests of the children of the marriage. It is regrettable, therefore that a piecemeal approach to the adoption of legislation results in outcomes that are unlikely to serve the interests of the parties or those of their children.

The potential for multiplication of potential fora is further emphasised with reference to the judgment in *Hadadi*, a reference for a preliminary ruling from a French court.³⁰ This case concerned a dispute in which both spouses had dual nationality of two Member States, namely France and Hungary. It was found that in such cases it is not open to a national court to consider further connections such as 'effective nationality' to determine which nationality was to be preferred.³¹ The court first seised could therefore be that of either nationality.

The CJEU was cognisant that the Regulation 'in so far as it regulates only jurisdiction but does not lay down conflict rules determining the substantive law to be applied, might indeed, as Ms Mesko claims, induce spouses to rush into seising one of the courts having jurisdiction in order to secure the advantages of the substantive divorce law applicable'.³² Nevertheless, the court noted that it does not follow that 'the seising of a court having jurisdiction under Article 3(1)(b) of that regulation may be regarded as an abuse.'³³

The judgments in Case C-184/14 *A v B* and *Hadadi* illustrate how the mechanistic operation of the Regulation appears, therefore, to preclude the exercise by national courts of judicial discretion to prevent opportunistic forum shopping. The extent of the problem is highlighted in the Part 3 hereunder in which the judgments of national courts are considered.

²⁵ Ibid, para 42.

²⁶ Ibid, para 43.

²⁷ Ibid, paras 43-48.

²⁸ Regulation 2201/2003 (n 1), Art 1(3)(e).

²⁹ Case C-489/14 (n 16), para 42.

³⁰ Case C-168/09 *Laszlo Hadadi (Hadady) v Csilla Marta Mesko, wife of Hadadi (Hadady)* [2009] ECR I-6871.

³¹ Ibid, para 51.

³² Ibid, para 57.

³³ Ibid.

2. GENERAL PRINCIPLES AND ISSUES ARISING FROM THE RULES

2.1. *Lis Pendens* and Forum shopping

The purpose of the *lis pendens* rule is 'to avert the bringing of contending matrimonial proceedings and as a consequence the possibility of irreconcilable judgments on the same issue rendered by courts in different Member States.'³⁴ The *lis pendens* rule uses the principle of *prior temporis* whereby proceedings before the court first seised take precedence over any competing suits.³⁵ The rule is absolute and the courts are not afforded any discretion. In theory this should provide legal certainty to the parties in that the court first seised will oversee the matrimonial proceedings and is not open to challenge.

In reality, however, the *lis pendens* rule provides the parties with the opportunity to forum shop within the limits of the jurisdiction rules of the Regulation.³⁶ Indeed, practitioner websites in the United Kingdom actively encourage prospective clients to forum shop.³⁷ Forum shopping allows the individual to choose tactically the forum which will be to their advantage, whether for financial reasons (such as reputation for granting divorce settlements that are more generous, or less so), or for reasons of convenience.

Prior to the adoption of the Regulation – and, indeed, still in disputes falling outside the scope of the Regulation - national laws of both civilian and common law traditions had systems in place to deter forum shopping in matrimonial disputes. The purpose of the rules was to limit opportunistic behaviour by the parties which would grant an unfair advantage to the pursuer to the detriment of the defendant.

The means whereby the major legal families sought to mitigate forum shopping differed. Common law courts applied the *lex fori* to the substance of a dispute and were therefore potentially amenable to forum shopping. To mitigate this, they employed the procedural device of *forum non conveniens*, whereby a court had the discretionary power to refuse to hear a case in the event that justice would be better served if the matter were heard elsewhere. In contrast, civilian courts adhered strictly to the *lis pendens* rule whereby the court first seised of a matter would hear the case. If the matter fell within an accepted ground of jurisdiction, the court would have no discretion to refuse to exercise said jurisdiction. Forum shopping was limited, however, by way of choice of law rules which ensured that the applicable law was not necessarily the *lex fori*.³⁸

³⁴ P Mankowski, 'Common Provisions' in U Magnus and P Mankowski (eds) *European Commentaries on Private International Law Brussels IIbis Regulation* (2012, Sellier European Law Publishers, Munich) 222.

³⁵ Mankowski (n 34) 222.

³⁶ Mankowski (n 34) 179 and 222-223; Justice Moylan speaking at a seminar organised by REUNITE held in Portcullis House, London, 3rd February 2016, 'Council Regulation (EC) No 2201/2003 (Brussels IIa) Proposals for Change and Potential Impact' noted that overall Brussels IIa had been a notable success in that it has reduced the scope for families to be caught in cross-border issues through greater narrative and legal certainty but that there was still scope for improvement highlighting the issues of forum shopping, trifurcation, lack of ability to transfer matrimonial matters to a jurisdiction better placed to deal with it.

³⁷ See e.g. D Hodson and A Thomas, 'Divorce and Forum Shopping' (International Family Law Group, 2012), 1: http://www.iflg.uk.com/userFiles/cupids_arrowdivorce_and_forum_shopping.pdf; C Fusco, 'Forum Shopping in Divorce: Update after the *Mittal v Mittal* Decision (Anthony Gold, 2013): <http://anthonygold.co.uk/latest/legal-insight/forum-shopping-in-divorce-update-after-mittal-v-mittal-decision>; A Woelke, 'The Expat Divorce in England' (Alternative Family Law, 2013): <http://www.alternativefamilylaw.co.uk/en/international/expat-divorce-forum-shopping.html>.

³⁸ M No Shuillebhain, 'Ten years of European family law: retrospective reflections from a common law perspective' (2010) *International and Comparative Law Quarterly* 1021, 1029.

The Regulation replaces national rules with a laundry list of jurisdictional rules which, it was suggested at the time of their adoption, would invite forum shopping motivated by financial advantage to one party.³⁹ The survey of case law below suggests that this prognostication was well-founded, as does a survey of practitioner websites which encourage parties to act expeditiously in securing an advantageous forum.⁴⁰ Indeed, in *CC v NC*,⁴¹ Mr Justice Mostyn lamented the fact that it is arguable that the Regulation “encourages forum shopping, inasmuch as it does not contain in relation to a suit for divorce a provision to transfer the suit to a court better placed to hear the case”.⁴²

The potential for tactical forum shopping is compounded by the lack of cohesion between instruments that could govern different aspects of the same set of facts. In particular, the court first seised of a dispute concerning the divorce itself will not necessarily be the court that has jurisdiction over the parental or maintenance aspects of the dispute. This is a consequence of the multiple grounds for jurisdiction in both the Brussels IIa Regulation and the Maintenance Regulation.⁴³ It follows, that parties may seek different courts and that those courts could deliver judgments based on divergent appreciation of the same set of facts. The absence of a mechanism to consolidate proceedings means that the courts are unable to resolve both the potential substantive conflict and the hardship arising from the multiplication of proceedings.

2.2. Party Autonomy

Unlike the position of disputes concerning children, there is no provision in the Regulation for the parties to agree to ground jurisdiction in the courts of a mutually agreeable Member State. Indeed, the parties are unable to select a jurisdiction even from among the limited grounds available in Article 3, save to the extent that joint applications may be possible per the fourth indent of Article 3(a).

Attempts to amend rules of jurisdiction in 2006 Brussels II^{ter} proposal failed to reach the required unanimity.⁴⁴ The Commission had proposed to introduce a new article 3(a) which would have allowed the parties to agree to choose ‘any of the grounds of jurisdiction listed in Article 3, or the courts at the place of the spouses’ last common habitual residence for a minimum period of three years or the courts of a Member State where one of the spouses is a national of that Member State or, in the case of the UK or Ireland has his or her domicile.’⁴⁵ Account was to be taken of the existence of ‘substantial links’ between the parties and a Member State.⁴⁶

The lack of a formal facility for prorogation does not of itself preclude the parties from reaching an informal agreement as to which court among those available in Article 3 is best suited to both litigants. However, such an agreement is not enforceable and a court of a

³⁹ P McEleavy, ‘The communitarization of divorce rules: what impact for English and Scottish law?’ (2004) *International and Comparative Law Quarterly* 605, 627-628.

⁴⁰ See e.g. Hodson and Thomas (n 37); Fusco (n 37); Woelke (n 37).

⁴¹ *CC v NC* [2014] EWHC 703 (Fam).

⁴² *Ibid* [14].

⁴³ Regulation 4/2009 (n 21).

⁴⁴ A Borrás, ‘Jurisdiction’ in U Magnus and P Mankowski (eds) *European Commentaries on Private International Law Brussels IIbis Regulation* (2012), Sellier European Law Publishers, Munich) 88. Council [Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L 343/10, recital 6.

⁴⁵ Borrás (n 44) 88.

⁴⁶ *Ibid*.

Member State is unable to account for this when determining whether it should exercise jurisdiction.⁴⁷

Accordingly, whereas the Brussels IIa Regulation allows a degree of autonomy in respect of matters relating to parental responsibility and child abduction,⁴⁸ this is not so in matrimonial disputes under Article 3. The position in Article 3 is also to be contrasted with the Rome III Regulation, which permits, albeit limitedly, choice of law agreements in matters relating to divorce and legal separation.⁴⁹ Similarly, the Maintenance Regulation allows the parties to agree to ground jurisdiction in a limited number of connected courts.⁵⁰

It is noteworthy, however, that the Rome III Regulation was adopted by only 14 Member States under the Enhanced Cooperation Procedure as a consequence of disagreement concerning the breadth of choice of law available to the parties,⁵¹ and is now in force in only 16 States of the EU-28.⁵² Given a lack of uniformity in choice of law rules, a choice of forum under the Brussels IIa Regulation is also a mechanism to choose the applicable law. In considering whether prorogation of jurisdiction is a desirable device in the context of matrimonial disputes, it must therefore be recalled that prorogation is to be viewed more broadly as both a choice of forum and, potentially, choice of applicable law.

It is submitted, further, that in assessing party autonomy, it is necessary to consider both (i) whether more party autonomy would make the process of grounding jurisdiction in family disputes more efficient, and (ii) whether the principle of party autonomy is compatible with pertinent family law policies and legal principles.

2.2.1. Emerging consensus around party autonomy

It is uncontroversial that party autonomy is a useful device to render more efficient disputes having an international element.⁵³ Indeed, in commercial transactions, prorogation and choice of law clauses are standard cost-saving devices. This results in fewer preliminary pleas in commercial disputes, thereby reducing both risk and actual costs to litigants.⁵⁴ There is no evidence to suggest that these efficiencies would not equally be beneficial to parties to matrimonial disputes. Indeed, whereas commercial actors often benefit from the limitation of personal liability, this is not so in family law disputes where the financial implications of litigation can be pervasive.

Still, arguments founded on efficiency in commercial matters are not necessarily as persuasive in the context of matrimonial disputes. It is arguable, for example, that the priorities of parties to commercial disputes are distinguishable from those in matrimonial litigation. In particular, the preferred outcome in commerce is usually, though not always, a financially favourable resolution to the benefit of one or both of the parties. In family law matters, the considerations of the parties may include financial matters, but are often coloured by weighty personal concerns which are not quantifiable in pecuniary terms.

⁴⁷ *Diana Hillary Jefferson v Conor Dominic O'Connor* [2013] EWCA Civ 38.

⁴⁸ Regulation 2201/2003 (n 1), Article 12.

⁴⁹ Regulation 1259/2010 (n 44), Article 5.

⁵⁰ Regulation 4/2009 (n 21), Article 4.

⁵¹ See Fiorini (n 6) 1144-45.

⁵² The participating Member States are Austria, Belgium, Bulgaria, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Portugal, Romania, Slovenia, and Spain.

⁵³ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L 351/1, Article 25; P Nygh, *Autonomy in International Contracts* (OUP 1999) 2-3.

⁵⁴ Nygh (n 53) 2-3.

In private international law generally, the principle is of longstanding in matters relating to contract law. The basic justification for autonomy is that the freedom of the parties to determine their rights and obligations in municipal contract law should logically be extended to the transnational sphere.⁵⁵ The principle has been transposed, with some modification, to other areas of law including company law,⁵⁶ tort/delict,⁵⁷ succession⁵⁸ and aspects of family law.⁵⁹ The principle is limited, however, where there is a strong state interest in the matter and it is therefore considered that contractual principle is inapplicable.⁶⁰

It is submitted that developments in family law internationally have rendered aspects of this area of law more akin to contract. In broad terms, there has been significant movement away from the sacramental construct of marriage towards a contractual view.⁶¹ Indeed, all Member States now admit the possibility of divorce. Furthermore, there has been a gradual movement in Europe towards divorce laws based on the withdrawal of consent to remain married by one of the parties, as opposed to fault-based rules in earlier divorce legislation.⁶²

Matrimonial disputes in particular have changed over recent decades and there appears to be an emerging global consensus that courts should seek amicable solutions where possible.⁶³ The role of the courts is therefore primarily to facilitate a meeting of the minds of the parties in the first instance, and only to proceed to adversarial procedures where this first phase is not successful. It follows that the parties are first expected to agree to do or not to do a number of things; they are encouraged to reach an outcome that is contractual in nature. The contractual nature of the resolution suggests that the justifications for autonomy in contract law are *mutatis mutandis* applicable to matrimonial disputes.

It is also noteworthy that, although the legislator has not consented to the inclusion of autonomy in Article 3, this is not to say that choice is excluded. Indeed, Article 3 provides the parties numerous grounds of jurisdiction from which they may choose. That choice, however, is not made jointly but severally. It follows that the autonomy of individuals is not rejected altogether by the legislator and that there is therefore an implicit acceptance that the parties are well-placed to select a suitable jurisdiction from among a prescribed list of legal systems with which they are deemed to have a connection.

The choice, however, is granted to only one party. It is agreement between the parties, rather than individual liberty, that is excluded altogether. It is not immediately apparent that there is any justification for an approach that admits autonomy but excludes consensual exercises of autonomy. Indeed, this is especially dissonant with the overall policy objectives

⁵⁵ Ibid, 7-8.

⁵⁶ Case C-212/97 *Centros Ltd v Erhvervs-og Selskabsstyrelsen* [1999] ECR I-01459.

⁵⁷ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40, Article 14.

⁵⁸ Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L 201/107, Articles 5 and 22.

⁵⁹ Regulation 2201/2003 (n 1), Article 12; Regulation 1259/2010 (n 37), Article 5.

⁶⁰ See J Borg-Barthet, *The Governing Law of Companies in EU Law* (Hart 2012), 18.

⁶¹ P de Cruz, *Family Law, Sex and Society* (Routledge 2010), 375-376; M Antokolskaia, 'Convergence and Divergence in Divorce Laws in Europe' (2006) *Child and Family Law Quarterly*, 307, 327; A Hatland and E Mayhew, 'Parental Rights and Obligations' in J Bradshaw and A Hatland (eds), *Social Policy, Employment and Family Change in Comparative Perspective* (Edvard Elgar 2006), 89.

⁶² de Cruz (n 53) 27-28; M Antokolskaia, 'Dissolution of marriage in westernised countries' in J Eekelaar and R George (eds), *Routledge Handbook on Family Law and Policy* (Routledge 2014) 76-90.

⁶³ Antokolskaia 2014 (n 62), 85; Chen Wei and Lei Shi, 'Divorce Procedure in China' in J Eekelaar and R George (n 62), 114-115; N Espejo-Yaksic and F Lathrop-Gómez, 'Relaxation and Dissolution of marriage in Latin America' in J Eekelaar and R George (n 62), 136; A Singer, 'Parenting issues after separation: a Scandinavian perspective' in J Eekelaar and R George (n 62), 239; M Maclean and J Eekelaar, 'Institutional mechanisms: courts, lawyers and others' in J Eekelaar and R George (n 62), 373.

of family law in any jurisdiction. It is generally accepted that parties should act in concert to achieve outcomes that limit disruption to the greatest extent possible.⁶⁴ This is so whether family laws are inspired by spiritual or temporal considerations. Agreements concerning jurisdiction may also have the effect of mitigating the acrimony arising from litigation since parties are more likely to engage constructively in the substance of a dispute without added adversarial proceedings concerning jurisdiction.

2.2.2. Applicable principles in the Treaties

The principle of party autonomy finds some constitutional support in the law of the European Union. It is arguable that economic liberty in the context of the fundamental freedoms is to be understood not only as an instrument for the generation of wealth, but as part of a broader political constitutional project which was intended to free individuals of the state in a post-totalitarian Europe.⁶⁵ A more modest reading, however, would suggest that party autonomy is a method to enable political integration, rather than an end in itself.⁶⁶

Nevertheless, several recitals to the Treaty on European Union and the Treaty on the Functioning of the European Union attest to the central place of individual freedom in the laws of the European Union. In particular, the second recital to the Treaty on European Union (TEU) asserts that *inter alia* Europe's humanist inheritance gave birth to the values of freedom and democracy. It is that same humanist inheritance that underpins the notion of individual autonomy to determine the means whereby disputes are resolved.⁶⁷

Family law, however, is carved out of the provisions concerning the internal market and measures are consequently adopted by a different procedure. Article 81(3) TFEU requires unanimous consent of the Member States in order that measures are adopted. This appears to be due, in part, to a perception that the regulation of family matters is closely associated with the sovereignty of the Member States.⁶⁸ What is more, it is an affirmation that harmonisation of transnational family law is ancillary to the core goals of integration, as opposed to a prerequisite for the attainment of the central aims of the Union. Furthermore, the second recital to the TFEU itself notes Europe's religious inheritance, and this is reflected in the Member States' continued ability to express that religious inheritance in diverse national family laws.

Still, this should not necessarily be understood to alter the constitutional value of broad principles, including in particular the humanist value of individual liberty. It is, arguably, merely a realignment of the means whereby agreed principles are pursued in a narrow area of law. This interpretation suggests that the institutions are under an obligation, albeit one that is unenforceable, to ensure that liberty is pursued through common action. In particular, it is arguable that the European Parliament, in its capacity as an institutional representative of the citizens of the Union, should act to safeguard individual liberty whereas it is for States to act to preserve national prerogatives.

⁶⁴ See T.M.C. ASSER Institut (n 8) 27.

⁶⁵ See MP Maduro, *We The Court: The European Court of Justice and the European Economic Constitution. A Critical Reading of Article 30 of the EC Treaty* (Hart Publishing 1998) 126-9; W Sauter and H Schepel, *State and Market in European Union Law: The Public and Private Spheres of the Internal Market before the EU Courts* (Cambridge University Press 2009) 13-15.

⁶⁶ See Borg-Barthet (n 60) 74-75.

⁶⁷ PS Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon 1979) 292-321; Nygh (n 53) 7-8.

⁶⁸ Fiorini (n 6) 1144-45; J Borg-Barthet, 'The Principled Imperative to Recognise Same-Sex Unions in the EU' (2012) *Journal of Private International Law* 358, 368-369.

2.2.3. Autonomy and Free Movement of Persons

Union action in family law is justified on the basis of an overarching goal to create 'an area of freedom, security and justice, *in which the free movement of persons is ensured*. [emphasis added]'.⁶⁹ The Brussels IIa Regulation, in its preamble, notes that it is '[t]o this end' that legislation is to be adopted concerning judicial cooperation in civil matters.⁷⁰ Accordingly, measures concerning transnational family law should not, in principle, be considered without reference to the overarching aim of the facilitation of freedom of movement.

It is therefore pertinent to consider whether the limitation of grounds of jurisdiction available to the parties in Article 3 of the Regulation is compatible with the fundamental freedoms. This is especially so since the EU Charter of Fundamental Rights, which elevates the fundamental freedoms to the status of fundamental rights,⁷¹ was accorded quasi-equality with the Treaties following the coming into force of the Treaty of Lisbon.⁷²

It is certainly arguable in particular that restricting choice among the courts of the Member States is tantamount to a restriction of free movement of persons in that it renders the exercise of free movement less attractive.⁷³ By virtue of the restricted choice of fora, citizens of the Union are less likely to exercise their right to seek and take up employment in another Member State during the pendency of proceedings, which may take many years to be concluded. Equally, citizens are less likely to exercise their right to freedom of establishment. That the fundamental freedoms can be engaged in opposition to restricted choice is, therefore, beyond doubt.

It does not necessarily follow, however, that any restriction is unjustified under the TFEU. The *Gebhard* test provides guidance on the limits of unilateral action by the Member States. Under that test, restrictions to free movement 'must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it'.⁷⁴ The possible application of a *forum conveniens* test to replace a universally applicable ban on choice of forum suggests that, at a minimum, the restriction would fall at the final hurdle.

The argument faces considerable difficulty, however, when confronted with the case law of the Court of Justice concerning review of legality of EU instruments.⁷⁵ The Court does not apply the same degree of scrutiny to harmonised legislation as it does to unilateral action of the Member States. This, of course, is due to the fact that the potential for disruption to the legal order of the Union is greater in the event that Member States adopt conflicting legislation. For a Union measure to be incompatible with the Treaty and fail the proportionality test, it must be shown that the measure impinges upon the very substance of the relevant right.⁷⁶

⁶⁹ Regulation 2201/2003 (n 1), recital 1.

⁷⁰ Ibid.

⁷¹ Charter of Fundamental Rights of the European Union [2012] OJ C 326/391, Article 45.

⁷² Treaty on European Union, Article 6(1).

⁷³ See by analogy, criticisms of equivalent rules concerning the allocation of jurisdiction as between Scotland and England and Wales: Beaumont and McElevay (n 14), 16.07.

⁷⁴ Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-04165, para 37.

⁷⁵ See generally P Craig and G de Burca, *EU Law: Text, Cases and Materials* (6th edn OUP, 2015), 551-555.

⁷⁶ Cases C-402 and 415/05 P *Kadi and Al Barakaat International Foundation* [2008] ECR I-6351 [355].

It is not clear that the very substance of the right to free movement would be impinged upon in the event that a party's enjoyment of the right was limited temporarily because the pendency of divorce proceedings rendered the enjoyment of the right less attractive. Nor is it clear that the legislation would fall foul of the proportionality test as applied to Union action. In particular, it is arguable that the legislation could be defended on the grounds that the Member States retain discretion to ensure that litigation takes place in a limited number of courts that, in the policy judgement of the legislator, are closely connected with the dispute.

The fact of the absence of a judicial route to contest the restriction of the fundamental freedoms cannot, however, be equated with the attainment of an overarching goal to adopt legislation which ensures the free movement of persons. In other words, while the present legislation could be defended from judicial scrutiny, it does not follow that it attains the political goal which is ostensibly to be furthered by Union action in family law. While the discretionary choice exercised by the legislator is not *prima facie* legally unsound, it is submitted that the exercise of legislative discretion could be better aligned with the purpose of the conferral of power in this policy area, namely the furtherance of free movement of EU citizens.

2.3. Residual Jurisdiction

The scope of Article 3 of the Regulation is limited to matters in which a jurisdictional ground which connects the parties to a Member State is present. Member States are required to apply the rules in the Regulation in the event that the courts of another Member State have been or could be seised under Article 3.⁷⁷

Outwith the scope of the Regulation, national courts are free, however, to apply their residual rules of jurisdiction.⁷⁸ The Regulation does not prescribe the application of the *lis pendens* rule in respect of third states. Nor does it appear to limit the use of procedural devices such as *forum non conveniens* whereby a national court could refrain from exercising jurisdiction if a court of a third state would be better suited to hear the cases.⁷⁹

It was proposed in the draft Brussels IIter Regulation that the existence of substantial links with a Member State could engage the Regulation. In the event that the parties previously had shared a habitual residence in a Member State for at least three years or if one of them was a national of a Member State, it was proposed that the Regulation, including the *lis pendens* rule, could be engaged.⁸⁰

As noted in Recital 9 of the preamble to the proposed revision, this would enhance 'predictability and access to courts for spouses of different nationalities living in a third state.' It is not entirely clear, however, that the justifications for EU action in the area of family law, namely the furtherance of the free movement of persons, are engaged in respect of persons residing outwith the Union.⁸¹

⁷⁷ *Sundelind Lopez* (n 17).

⁷⁸ Regulation 2201/2003 (n 1), Article 7.

⁷⁹ *Pauline Siew Chai v Tan Sri Khoo Kay Peng* [2014] EWHC 1519 (Fam)[21]; *AB v CB* (Divorce and Maintenance Discretion) [2012] EWHC 3841 (Fam) [50].

⁸⁰ Brussels IIter (n 4), Article 7.

⁸¹ For discussion of criticisms concerning 'euro-centric legal imperialism', see generally P McElevy, 'Luxembourg, Brussels and now the Hague: congestion in the promotion of free movement in parental responsibility' (2010) *International and Comparative Law Quarterly* 505-519.

2.4. Consolidation of Proceedings

While Article 4 allows a court to hear a related action insofar as it is the subject of a counter-claim, in matrimonial matters there is no general power comparable to that available under Article 15 for a court of a Member State to transfer a case to a better suited court in another jurisdiction. Article 15 confers the power of a court to order a transfer in the best interests of the child in matters concerning parental responsibility. This power can be exercised *ex officio*, following a petition by one of the parties, or following a request from another court. While the safeguarding of the best interests of the child should be understood to be a general principle of law, it does not appear that this – or indeed any other consideration – could support a transfer of jurisdiction in matrimonial disputes.

Furthermore, the Regulation does not deal directly with matters pertaining to maintenance obligations and the property consequences of marriage.⁸² The absence of a general power to consolidate disputes in matters relating to divorce and judicial separation is somewhat surprising when considered in the light of the practicalities of relevant proceedings; the parties are not, as a general rule, only interested in terminating their spousal relationship, but they intend the consequences of the termination of their relationship to be addressed at the same time.⁸³

In principle, these matters could be dealt with by the same courts as a consequence of overlap of jurisdictional rules in relevant instruments. This is not, however, necessarily the case. The parties may – and, indeed, the case law demonstrates that they often do – seize different courts of different aspects of the same dispute. It follows that, not only is there a multiplication of expenses, but there is a real danger of conflicting judgments and no systematic, uniform mechanism to ensure that this is avoided in all cases. This is somewhat dissonant with the overarching aim of the Regulation and the harmonisation of private international law generally, namely the avoidance of conflicting judgments from courts of the Member States.

2.5. Protection of the weaker party

It is a general principle of EU private international law that jurisdictional rules should be devised in a manner that does not render a respondent vulnerable to vexatious proceedings or grounding of jurisdiction in a manner that is intentionally detrimental to his or her interests. Accordingly, in civil and commercial matters, for example, there is a general rule that proceedings be brought in the courts of the respondent's domicile.⁸⁴ What is more, default rules should be deviated from in the event that those rules could favour a party in a stronger position to the detriment of the weaker party.⁸⁵ This too is evident in the Brussels I Recast,⁸⁶ in which the principle of individual freedom to transact is otherwise extensive.

Norms concerning the protection of the weaker party are articulated with reference to classes of actor as opposed to the identification of a vulnerable party on a case by case basis. Thus, a consumer or employee is favoured over a commercial seller or employer since this reflects

⁸² Regulation 2201/2003 (n 1), recital 8.

⁸³ See Part 3 below.

⁸⁴ Regulation 1215/2012 (n 53), Article 4.

⁸⁵ Nygh (n 53) 139-171; TC Hartley, *International Commercial Litigation* (2nd edn CUP, 2015), 660; CGJ Morse, 'Consumer Contracts, Employment Contracts and the Rome Convention' (2000) *International and Comparative Law Quarterly* 1, 1.

⁸⁶ Regulation 1215/2012 (n 53), Articles 17-23.

the typical profile of the relative negotiating strengths of the parties.⁸⁷ This is notwithstanding the fact that the generalisation might not be universally applicable to individual cases.

In the context of matrimonial disputes, it is typically the case that men are in a stronger financial position. The male partner is the sole financial provider in 21 per cent of families, and the main provider in 37 per cent.⁸⁸ In contrast, the female partner is the sole provider in only 5 per cent of families, and the main provider in 9 per cent, with the remaining 29 per cent being relatively equal.⁸⁹ Gender inequality in the labour market is especially accentuated in families with children. Indeed, fathers are more likely to be employed than male nonparents, whereas mothers aged between 25 and 49 are far more likely to be unemployed or in part-time employment.⁹⁰ These figures are to be qualified somewhat in view of the positive correlation between female employment and the likelihood of divorce.⁹¹ Nevertheless, this does little to alter the overall profile of male financial dominance.⁹²

It follows that the male partner is usually better placed to procure legal advice which would lead to the institution of proceedings in a jurisdiction that is favourable to the legal outcome he would prefer. Although this is not necessarily apparent in case law, the lack of direct judicial evidence does not suggest that the logical inference of the financial facts is somehow avoided in practice. Indeed, there is ample evidence in the case law of tactical manoeuvring in matrimonial disputes.⁹³ Rather, the logical conclusion is that the party in a weaker financial position may be less inclined to incur the risk of lengthy and costly contestation of jurisdiction.⁹⁴

The present legal framework makes no provision for the protection of a weaker party. It is submitted that to define the weaker party on the basis of gender would be problematic in principle and would encounter constitutional difficulty insofar as a universally applicable rule defined by gender would appear to fall foul of Treaty principles concerning discrimination on grounds of gender.⁹⁵

Nevertheless, it is open to the EU legislator to allow courts a measure of flexibility in order to protect a party from abusive recourse to jurisdictional grounds provided in Article 3 of the Regulation. In particular, the doctrine of *forum non conveniens*, while rejected in the context of commercial relationships,⁹⁶ is attractive in the context of matrimonial disputes which are best determined by the most closely connected court.⁹⁷ This is especially so given the extensive catalogue of jurisdictional grounds available to the pursuer in Article 3 of the Regulation,⁹⁸ which is unparalleled in many other EU instruments.

⁸⁷ Nygh (n 53) 143.

⁸⁸ M Mills et al, *Gender equality in the workforce: Reconciling work, private and family life in Europe* (European Union Programme for Employment and Social Solidarity, 2014) 30.

⁸⁹ Ibid. N.B. figures are reproduced as rounded up in Mills et al's report.

⁹⁰ Ibid.

⁹¹ For discussion of the ambiguous direction of causality between employment and divorce, see e.g. S Ruggles, 'The rise of divorce and separation in the United States, 1880-1990' (1997) *Demography*, 455-479; O Bargain et al, 'Female labor supply and divorce: New evidence from Ireland' (2012) *European Economic Review* 1675, 1677; RE Mueller, 'The effect of marital dissolution on the labour supply of males and females: Evidence from Canada' (2005) *The Journal of Socio-Economics* 787, 787-809.

⁹² See Mueller (n 92) 788.

⁹³ See Part 3 below.

⁹⁴ McEleavy 2004 (n 39) 626.

⁹⁵ Treaty on European Union, Article 3(3).

⁹⁶ Case C-281/02 *Owusu v Jackson* [2005] ECR I-1383.

⁹⁷ McEleavy 2004 (n 39) 626.

⁹⁸ Ibid.

The introduction of an enforceable principle based on a close connection would enable a national court to consider whether a choice of jurisdiction from among those available to the parties was selected on vexatious grounds by the petitioner to the detriment of the respondent.

It is submitted that the imperative of judicial discretion is rendered all the more stark when considered in the context of possible previous abusive behaviour. Reliable data concerning the relationship between domestic abuse and marital separation and/or divorce are not available due to under-reporting.⁹⁹ However, there is an irresistible logic to the thesis that jurisdictional rules can be used abusively against a party who had been abused in the matrimonial home. Indeed, this is well documented in the context of cases concerning international child abduction, at least insofar as England and Wales is concerned.¹⁰⁰ It follows that there is a real risk that this could be the case in the context of matrimonial disputes. However, the absence of immediate consideration for the welfare of children in the scheme of Article 3 results in a lack of provision for the protection of the vulnerable party. This is to be contrasted with Article 11 of the Brussels IIa Regulation read in conjunction with Article 13 of the Hague Convention on International Child Abduction. There remains, therefore, a significant problematic gap in the scheme of the jurisdictional rules concerning matters governed by Article 3 of Brussels IIa, albeit one which, possibly due to under-reporting, is not readily identifiable in practice.

2.6. Divergence in national law and policy

Historically, the negotiation of instruments concerning family law has faced obstacles arising from divergent family law policies in the Member States. Family laws are not viewed as purely technical instruments but as tools for the pursuit of policies concerning the organisation of the basic unit of society in a manner that is consistent with cultural understandings of how that basic unit should be ordered. Difficulties arising from divergent views concerning the manner in which this is to be achieved are compounded by the religious implications of family law. This is further complicated by the relationship between religion and ideas about the origins and boundaries of states - family law is closely associated with the residual sovereignty of the member states.¹⁰¹ There appears, consequently, to be some resistance to supranationalisation on the basis of shared values insofar as this is viewed as an erosion of national identity and an infringement of the residual rights of the Member States.

Negotiations concerning the adoption of the Brussels II^{ter} Regulation and the subsequent adoption of the Rome III Regulation in particular were complicated by the fact that one Member State, Malta, did not at the time allow divorce. Foreign divorces were recognised only where one of the parties was a citizen or domiciliary (in the common law sense) of another state and the divorce was granted by the courts of that state.¹⁰² In 2011, however, following a referendum, Maltese law made provision for the award of divorce decrees.¹⁰³ It follows that the most significant divergence in national laws concerning matrimonial disputes has now been removed.

⁹⁹ De Cruz (n 53) 315.

¹⁰⁰ See A Perry and N Lowe. 'International child abduction - the English experience' (1999) *International and Comparative Law Quarterly* 127, 135-136.

¹⁰¹ Borg-Barthet (n 68) 368-369.

¹⁰² See R Farrugia, 'International Marriage and Divorce Regulation and Recognition in Malta' (1995) *Family Law Quarterly* 627, 633.

¹⁰³ See Civil Code of Malta, Article 66B.

There remain, however, divergences between substantive and procedural rules. Indeed, the substantive differences between national laws have prevented the harmonisation of choice of law rules across the Union. The Rome III Regulation required the use of the enhanced cooperation procedure because Sweden refused to participate in an instrument which would have required it to apply a less liberal approach to the granting of divorces.¹⁰⁴

Scandinavian laws on the dissolution of marriage, primarily contractual in nature, do not require reasons for the granting of a divorce.¹⁰⁵ This is to be contrasted with the laws of States such as Ireland, Poland and Malta, whose historical attachment to the sacramental view of marriage is reflected in a more begrudging approach to the availability of divorce.¹⁰⁶ By way of example, in Malta, procedural obstacles include a requirement that '(a) on the date of commencement of the divorce proceedings, the spouses shall have lived apart for a period of, or periods that amount to, at least four years out of the immediately preceding five years, or at least four years have lapsed from the date of legal separation; and (b) there is no reasonable prospect of reconciliation between the spouses'.¹⁰⁷

The enduring divergence between the Member States suggests that, in order for unanimity to be achieved in Council, radical reform should be avoided. Legislative solutions, therefore, should seek to reconcile the above-mentioned principles with realistic expectations of policies that Member States might seek to protect.

¹⁰⁴ Fiorini (n 6) 1144; K Boele-Woelki, 'To be, or not to be: enhanced cooperation in international divorce law within the European Union' (2008) *Victoria University of Wellington Law Review* 779, 785.

¹⁰⁵ Fiorini (n 6) 1144.

¹⁰⁶ *Ibid.*

¹⁰⁷ Civil Code of Malta, Article 66B.

3. EVIDENCE FROM NATIONAL CASE LAW

3.1. Methodology

3.1.1. Research and analysis of case law

The case law from the Member States provides a glimpse of the manner in which the Regulation has been implemented and the difficulties encountered by courts and litigants. In order to provide a sample that is representative of the major legal traditions, a geographic and economic spread, as well as a sample which includes Member States that have been admitted to the EU at different times, the authors selected case law from England and Wales, Germany, Italy, Poland and Belgium.¹⁰⁸ The choice of these jurisdictions was also driven by pragmatic imperatives, including the availability of data within the limited time available for the compilation of this report.

Using legal databases such as Westlaw and the British and Irish Legal Information Institute a comprehensive list of relevant cases for England and Wales was gathered. For the case law from continental jurisdictions the fledgling database of the EUPILLAR project at the University of Aberdeen was accessed.¹⁰⁹

In view of the fact that the common law courts provide a more fulsome account of proceedings in their judgments, much of this section will focus on the judgments of the courts of England and Wales. The case law reveals some problems that are specific to that jurisdiction. England and Wales has had to adjust to a Regulation that is built on some legal concepts that are not indigenous to the common law,¹¹⁰ and which also was seised of a significant number of cases in which jurisdiction was contested. In contrast, it appears that other jurisdictions encounter fewer difficult cases of concurrent jurisdiction.

This appears to be a consequence of the view that England and Wales is an attractive jurisdiction for the party seeking maintenance.

3.2 England and Wales

3.2.1. Overview

The case law in England and Wales includes several examples of a 'battle for jurisdiction' in matrimonial proceedings under Brussels IIa Regulation. The 'first come first served' approach to jurisdiction under the Regulation in theory should create predictability for the parties. In particular, England and Wales is seen as an attractive jurisdiction for the party seeking maintenance. Indeed, in all but one of the cases in which jurisdiction was contested between England and Wales and another EU Member State since the Regulation came into force, it was found that the party seeking maintenance wished to ground jurisdiction in England and

¹⁰⁸ Searches were also conducted for cases of the Superior Courts of Malta but found that there had been only one case in which jurisdiction in matrimonial disputes under the Brussels II regime was cited (*Vossberg Bettina Pro Et Noe vs Equinox International Limited (C29674) Et Noe* (Court of Appeal, 09/12/2012)). The case concerned a claim for maintenance which was intertwined with a transnational business dispute that had been ongoing for over 12 years. The court found, correctly it is submitted, that the preliminary plea as to its jurisdiction under the Regulation was irrelevant to the dispute.

¹⁰⁹ See note 12.

¹¹⁰ McElevay 2004 (n 39) 623-624.

Wales.¹¹¹ In the single exception, in which the wife sought to ground jurisdiction in the Netherlands, she asked that the Dutch court apply English law to the substance of the proceedings.¹¹² Accordingly, the draw of the substantive law of England and Wales encourages forum shopping or the initiation of parallel proceedings in order to either claim the English courts to take advantage of their approach to maintenance or conversely to try to seise a court in another Member State in order to try to prevent the English courts from having jurisdiction.

When the parties take a tactical approach to jurisdiction, this can have serious financial consequences. This is particularly evident in relation to high value divorces. These disputes also directly impact on the courts that have to factor in the time to deal with these cases. In three of the twenty-two recorded cases since the Regulation came into force, the parties to each case had spent approximately one million pounds sterling between them simply disputing the issue of jurisdiction, and in one extreme case involving possible concurrent jurisdiction between England and Malaysia the parties had spent over 2.7 million pounds sterling solely on the legal costs to determine jurisdiction.¹¹³

3.2.2. *Lis Pendens*, Forum Shopping

As a consequence of the perceived differences in financial provision arising from divorce proceedings in England and Wales, there is a rich body of case law in which the courts note the pitfalls of the *lis pendens* rule and its implications for forum shopping.

This is perhaps most evident in *Agata Rapisarda v Ivan Collidon*.¹¹⁴ This case involved 180 cases of fraudulent 'forum shopping' where a party in each case had utilised the same address in the UK owned by an Italian company in order to obtain jurisdiction for divorce in England. Jurisdiction in the original cases was claimed under Article 3(1) of Brussels IIa. All the divorce decrees were declared void due to fraud. There can be little doubt, of course, that fraudulent claims do not in and of themselves constitute an argument concerning the proper operation of a regulation. However, the cases do indicate that the jurisdictional rules in the Regulation invite a degree of forum shopping that is somewhat problematic in practice.

Indeed, as noted above, in *CC v NC*,¹¹⁵ Mr Justice Mostyn observed that the Regulation "certainly permits forum shopping. It could be argued that it encourages forum shopping, inasmuch as it does not contain in relation to a suit for divorce a provision to transfer the

¹¹¹ *E v E* [2015] EWHC 3742 (Fam); *Bauge v China* [2014] EWHC 3975 (Fam); *CC v NC* [2014] EWHC 703 (Fam); *S v S (Brussels II Revised: Articles 19(1) and (3) Reference to ECJ)* [2014] EWHC 3613 (Fam); *Agata Rapisarda v Ivan Collidon* [2014] EWFC 35; *EA v AP* [2013] EWHC 2344 (Fam); *Diana Hillary Jefferson v Conor Dominic O'Connor* [2013] EWCA Civ 38; *V v V* [2011] EWHC 1190 (Fam); *T v T (Brussels II Revised Article 15)* [2010] EWHC 3928 (Fam); *O v O* [2010] EWHC 3539 (Fam); *C v C* [2010] 2676 (Fam); *W Husband v W Wife* [2010] EWHC 1843 (Fam); *Z v Z (Divorce: Jurisdiction)* [2009] EWHC 2226 (Fam); *Sheraleen Boyd Munro v Ian Munro* [2007] EWHC 3315 (Fam); *Jane Elizabeth Marinos v Nikolas Lykourgos Marinos* [2007] EWHX 2047 (Fam); *NDO v JFO* [2007] EWHC 1274 (Fam); *L-K v K (Brussels II Revised: Maintenance Pending Suit)* [2006] EWHC 153 (Fam); *Prazic v Prazic* [2006] EWCA Civ 497.

¹¹² *Brenden John Robert Divall v Yijun Divall* [2014] EWHC 95 (Fam).

¹¹³ *V v V* [2011] EWHC 1190 (Fam) [61] "The overall bill to the family, now standing at £925,000, will no doubt top £1 million if next month's hearing about the children goes ahead. It should be recalled that this level of expense has been incurred without a basis of jurisdiction having been established, or a page being filed in relation to the ultimate financial orders that will be required"; *W Husband v W Wife* [2010] EWHC 1843 (Fam) the legal costs amounted to £120,000 to determine the jurisdiction; *JKN v KCN* [2010] EWHC 843 (Fam), [7] the combined legal by both parties amounted to £900,000 at the preliminary stage and included costs for the stay of application, the freezing order application and the application for maintenance pending suit; *Pauline Siew Chai v Tan Sri Khoo Kay Peng* [2014] EWHC £2,700,000 spent on legal costs between the two parties.

¹¹⁴ *Agata Rapisarda v Ivan Collidon* [2014] EWFC 35

¹¹⁵ *CC v NC* [2014] EWHC 703 (Fam)

suit to a court better placed to hear the case, unlike proceedings in relation to children, where such a provision exists under Article 15; nor has it been amended to provide for transfer on the basis of forum conveniens".¹¹⁶

Similarly, in *Wai FoonTan v Weng Kean Choy*,¹¹⁷ a case involving a jurisdictional battle over whether proceedings should be heard in England or Malaysia, it was noted that there was "little doubt that the husband and wife each seek juridical advantage in relation to financial resolution proceedings which arise at the end of their marriage. This feature is common place in relation to matrimonial breakdown involving parties with several international property bases".¹¹⁸

Further evidence of tactical manoeuvring is to be found in the case of *W Husband v W Wife*.¹¹⁹ The parties to the divorce were both nationals of Sweden. They owned property there and retained other links. They had been habitually resident in England for 15 years. The husband worked in England, and their children were born in England and went to school there. The court found that the case was "patently one of tactical manoeuvring by each of these parties in which, as I have been told today, they have now jointly invested around £120,000 in legal fees. As such, a divorce in either England or Sweden would be just as effective and just as appropriate as a means of dissolving their marriage. But each patently shares a common belief (whether correct or not) that the wife would receive greater financial provision if the divorce is here than if it is in Sweden."

Equally, however, there exist cases in which the jurisdictional battle appears to be an end in itself. In *E v E*,¹²⁰ for example, the wife commenced divorce proceedings in England notwithstanding the fact that parallel proceedings had been commenced in France.¹²¹ She challenged the jurisdiction of the French court in the English court under Article 16 and Article 19 on the basis that, in her view, she had not been served with the necessary documents for the French court's jurisdiction to have been established. A finding in her favour would in turn have affected which court was first seised. Mr Justice Moylan dismissed this point on the basis that as "both parties have accepted, the French proceedings were instituted in 2011, when the husband issued the requête (...) that Article 16 has no relevance to the current circumstances."¹²²

He noted in particular that "this appears to be a tactical jurisdictional battle which does not address the substantive issues at all".¹²³ He observed that the terms of Article 19 are clearly established and "In my view, the court should not encourage, and should actively discourage, the tactical filing of a second set of proceedings in England when the jurisdiction of the court of another Member State has been established."

Tactical forum shopping is also evident in the case of *EA v AP*,¹²⁴ in which the husband sought to ground jurisdiction in Italy, while the wife preferred the English court. The wife was unaware of the Italian proceedings and filed for financial provision for herself and the children based on the parties' habitual residence in England. The court of England and Wales decided that as the Italian court was first seised under Article 16 of Brussels IIa and England and

¹¹⁶ Ibid [14].

¹¹⁷ *Wai FoonTan v Weng Kean Choy* [2014] EWCA Civ 251.

¹¹⁸ Ibid [8].

¹¹⁹ *W Husband v W Wife* [2010] EWHC 1843 (Fam)

¹²⁰ *E v E* [2015] EWHC 3742 (Fam), [6].

¹²¹ Ibid [10] and [11].

¹²² Ibid [23].

¹²³ Ibid [5].

¹²⁴ *EA v AP* [2013] EWHC 2344 (Fam).

Wales was second seised, a mandatory stay of the wife's petition and of the financial remedy application had to be granted under Article 19 of Brussels IIa Regulation.

The jurisdiction in the Italian courts had not been established, however. The outcome is that the wife is left without a remedy for maintenance. The English court recognised the decision to stay proceedings "may cause hardship and injustice to the wife" as she was entirely dependent on her husband's voluntary contributions. The courts recognised that the husband's litigation strategy may be tactical. However, the mechanistic operation of the Regulation allowed no remedy to mitigate the hardship, which appeared to be deliberately inflicted.¹²⁵

3.2.3. Transfers of Jurisdiction

The question of transfers of jurisdiction has arisen in a number of cases in which courts lamented the concurrence of related proceedings. In *T v T*,¹²⁶ for example, it appears that the Court was compelled to refuse a transfer of jurisdiction notwithstanding the impression that it was better placed to hear the case. The Court held, correctly, that Article 15 only permitted transfers of cases concerning parental responsibility.

Most noteworthy, however, are the observations of the Court in *S v S*:¹²⁷

"It is a remarkable and regrettable fact that Brussels II Revised contains within Article 15 a procedure which allows a court which has jurisdiction to transfer the case in question to another court within the European Union if it is better placed to hear it, but that power is available only in relation to children's cases. There is no comparable provision within Brussels II Revised which allows a court to transfer a divorce to the courts of another member state on the basis that the courts of that latter member state would be best placed to hear the case. Nor to my knowledge are there any proposals to alter Brussels II Revised to incorporate such a power, notwithstanding that the new Judgments Regulation No.1215/2012, which will take effect on 10th January 2015, contains, by virtue of Recitals 23 and 24 and Articles 33 and 34, a comparable provision to Article 15 of Brussels II Revised enabling the court to stay proceedings on the basis that another jurisdiction was better placed to hear the case. So one can see that in relation to divorce cases the anomalous situation arises that there are no powers, in contrast to civil claims and children claims, to achieve a transfer to a court which is better placed to hear the case or otherwise is a more convenient forum. It is in the face of this iron inflexibility that the parties in divorce cases engage in such extensive, expensive and futile manoeuvres as have been demonstrated in this case."

This case involved an application by the husband to strike out his wife's divorce petition on the basis that at the time it was filed the jurisdiction of France had been "unambiguously and incontrovertibly established within the terms of Article 19."¹²⁸ The parties are French nationals. They were married in 1997 having signed a conventional French marriage contract

¹²⁵ Evidence of the potential for abusive tactical behaviour is also to be found in *Sheraleen Boyd Munro v Ian Munro* [2007] EWHC 3315 (Fam), albeit ultimately unsuccessful. In this case, the judge observed that the husband "may be driven by tactical considerations, namely to wear down the wife and/or in an expectation that a Spanish judge would award the wife significantly less financial provision than an English judge would."

¹²⁶ *T v T* (Brussels II Revised Article 15) [2010] EWHC 3928 (Fam).

¹²⁷ *S v S* (Brussels II Revised: Articles 19(1) and (3): Reference to ECJ) [2014] EWHC 3613 (Fam).

¹²⁸ *Ibid* [1].

adopting the regime of *séparation de biens*. They had three children. Two were born just before their move to London in 2000 and the third was born in 2001. In 2010 the husband moved out of the matrimonial home and into a rented flat. Nine months after the separation the husband applied for judicial separation in France on 30 March 2011.¹²⁹

The wife responded by applying for child support in England on 19th May 2011 and by filing for divorce there on 24th May. She also sought a separate application for child maintenance which included capital. Therefore at this point there were 4 sets of litigation in two separate countries.¹³⁰

On 15 December 2011 the French court stated that it had jurisdiction to pass judgment and grant interim measures but that the issues relating to the children including the child maintenance were to be dealt with in England.¹³¹ The parties appealed the decision. The appeal was heard 10 months later and the first instance decision was upheld.

In England the proceedings under the Children's Act for maintenance were going ahead. It was held that the wife's divorce petition should be dismissed as a consequence of Article 19.

The judge noted that "I am of the clear view that the state of affairs with which I am presented cannot have been in contemplation of the architects of BII in its original form or Brussels II Revised. The object of the exercise is to ensure that jurisdiction is swiftly established, that the cases are swiftly heard and that irreconcilable judgements are avoided. The history of this case demonstrates that none of these goals will be achieved, and that lengthy litigation in two jurisdictions potentially awaits these unfortunate parties."¹³²

3.2.4 Party Autonomy

The case of *Diana Hillary Jefferson v Conor Dominic O'Connor*¹³³ is a curious one in which the husband attempted to invoke an agreement to abandon proceedings in the UK and to submit the divorce to the Spanish jurisdiction.¹³⁴ The husband appealed to the Spanish court that the wife had failed to ratify the agreement and requested that consensual proceedings in Spain be converted into contentious proceedings.¹³⁵ He requested a stay of the English proceedings due to the agreement.¹³⁶ At first instance, it was decided to not only stay the proceedings before the English court but to dismiss them.¹³⁷ The wife then filed an appellants notice. This appeal was allowed.¹³⁸

The court held that "the effect of the Agreement was to estop the wife from arguing that the English divorce proceedings remained extant had precisely the same effect as if he had expressly enforced an agreement as to jurisdiction. Article 19 inhibits any such process. In my judgment, therefore, the judge (...) ought to have held that the provisions under Article 19 of the Regulation were applicable and could not be overridden by the Agreement."

¹²⁹ Ibid [3]

¹³⁰ Ibid [4].

¹³¹ Ibid [6].

¹³² Ibid [10].

¹³³ *Diana Hillary Jefferson v Conor Dominic O'Connor* [2013] EWCA Civ 38.

¹³⁴ Ibid [10].

¹³⁵ Ibid [14].

¹³⁶ Ibid [15].

¹³⁷ Ibid [17].

¹³⁸ Ibid [19].

3.2.5 Residual Jurisdiction – BIIa and Third States

In cases from England and Wales concerning residual jurisdiction, the recurrent theme is the issue of *forum conveniens*. Whereas it is clear that the court cannot apply the doctrine of *forum non conveniens* in cases falling within the territorial scope of the Regulation, it is not clear whether English courts retain the power to do so in matters falling within their residual jurisdiction.

In *Pauline Siew Chai v Tan Sri Khoo Kay Peng*,¹³⁹ a case concerning concurrent proceedings in England and Malaysia, the question arose as to whether an English court should stay proceedings in favour of the courts in Malaysia.¹⁴⁰ The test that was applied by the English court was whether the “balance of fairness (including convenience) as between the parties to the marriage is such that it is appropriate for the proceedings in the other jurisdiction to be disposed of before further steps are taken in the proceedings”.¹⁴¹

The test for *forum conveniens* applied by the Malaysian courts differed from the English approach in that the Malaysian court looked for the appropriate jurisdiction.¹⁴² Mr Justice Bodey highlighted the difficulty in this outcome as it meant that if the husband continued with the proceedings in Malaysia “and establishes both parties domicile there, then both jurisdictions would be exercising a concurrent jurisdiction over the same divorce and over the same finances which is in a word a nightmare.”

The two different approaches to determine *forum conveniens* between England and Wales and a third state suggest a need for greater clarity concerning the interaction of the courts of the Member States and those of third states.

In *JKN v JCN*¹⁴³ the English court considered whether the judgment in *Owusu*¹⁴⁴ limited its power to employ the device of *forum non conveniens*. In *Owusu* the ECJ found that the Brussels Convention did not allow courts to decline jurisdiction in favour of a third state in the event that the courts of that Member State could exercise jurisdiction under the Convention. The *JKN v JCN* case concerned concurrent proceedings in England and New York. It was argued by the wife that the English court should not stay proceedings since the principle in *Owusu* applied also in the context of Brussels IIa. The argument was not upheld and, following a jurisdictional battle in which legal costs amounted to £900,000, it was determined that New York was the appropriate forum.

Owusu was also cited in the case of *AB v CB (Divorce and Maintenance Discretion)*.¹⁴⁵ The court found that *Owusu* did not apply to cases concerning matrimonial proceedings. The Court further noted that the Brussels I Recast recognises a discretionary power to stay proceedings. The Court also considered a Cour de Cassation judgment in which it was held that divorce proceedings in France should be stayed in favour of prior divorce proceedings in Iceland on the ground of *lis alibi pendens*.¹⁴⁶ It was found, therefore, that to order a stay on the ground of *forum conveniens* was not an infringement of Brussels IIa.¹⁴⁷

¹³⁹ *Pauline Siew Chai v Tan Sri Khoo Kay Peng* [2014] EWHC 1519 (Fam)[21]

¹⁴⁰ *Ibid* [54].

¹⁴¹ *Ibid*.

¹⁴² *ibid* 78.

¹⁴³ *JKN v JCN* [2010] EWHC 843 (Fam)

¹⁴⁴ Case C-281/02 *Owusu v Jackson* [2005] ECR I-1383.

¹⁴⁵ *AB v CB (Divorce and Maintenance Discretion)* [2012] EWHC 3841 (Fam) para 50.

¹⁴⁶ Cour de Cassation 17 June 2009 (Appeal no 08 – 12456).

¹⁴⁷ *AB v CB (Divorce and Maintenance Discretion)* [2012] EWHC 3841 (Fam) para 50.

3.3 Germany

Whereas the case law from England and Wales suggests the existence of a problem of concurrent jurisdiction and forum shopping, there is little evidence of these issues arising in German cases. Indeed, most of the German case law identified in the EUPILLAR database appears to concern straightforward application of Article 3 of the Brussels IIa Regulation.¹⁴⁸

There are, however, a number of noteworthy cases in which the German courts were required to consider the more challenging aspects of the operation of the Regulation.

One such case concerned a divorce application brought in Germany by a German wife against a Maltese husband.¹⁴⁹ Both parties were habitually resident in Malta. At the time of the initiation of proceedings, Maltese law did not make provision for divorce. However, Maltese law had changed and allowed divorce by the time the appeal was heard. It was therefore found that there was no need to establish *forum necessitatis* in Germany in order to safeguard the rights of the parties. The German court therefore declined jurisdiction since the Maltese courts were competent in accordance with Article 3 of the Regulation.

While the fundamental substantive differences in respect of divorce have been eliminated following changes in Maltese law, there do remain differences in the treatment of the legal recognition and termination of same-sex relationships. In such cases, it is submitted that the exercise of *forum necessitatis* jurisdiction may be necessary and that greater clarity is required.¹⁵⁰ This is apparent in the Belgian cases discussed in Part 3.5 below.

The German cases also highlight a difficulty in interpreting the material scope of the Regulation. In particular, in a case concerning the adjustment of pension rights,¹⁵¹ the Higher Regional Court of Karlsruhe found that the Regulation precluded it from exercising jurisdiction notwithstanding the fact that Recital 8 of the Regulation excludes ancillary measures from the scope of the provisions of divorce. Since pension rights are ancillary measures, it appears that the Court incorrectly applied the Regulation by analogy to a matter that was explicitly excluded from its scope. It is arguable that this resulted in a denial of justice to the parties since the matter concerned German pensions and would better have been decided by the competent German court.¹⁵²

¹⁴⁸ OLG Jena, 28.4.2015 – 1 UF 668/14; AG Pankow-Weißensee, 28.3.2012 – 28 F 9276/10; AG Neustrelitz, 12.1.2011 – 6 F 106/09; OLG Zweibrücken, 22.5.2015 – 2 UF 19/15; AG Frankfurt a.M., 27.10.2010 – 456 F 5196/09; AG Nürtingen, 26.4.2010 – 17 F 873/05; AG Ansbach, 9.10.2008 – 3 F 883/08; AG Landau, 13.1.2015 – 2 F 232/14; OLG Hamm, 7.5.2013 – II-3 UF 267/12; OLG Hamm, 17.1.2013 – II-4 UF 172/12; OLG Hamm, 14.6.2012 – II-4 UF 136/10; AG Stadtroda, 3.4.2012 – 2 F 151/11; OLG Stuttgart, 3.4.2012 – 17 UF 352/11; OLG Koblenz, 29.5.2008 – 7 UF 812/07; OLG Koblenz, 26.11.2008 – 9 UF 653/06; OLG Oldenburg, 26.7.2012 – 4 WF 82/12; OLG Stuttgart, 22.1.2007 – 17 UF 65/07; OLG Zweibrücken, 10.3.2006 – 6 WF 41/06; AG Leverkusen, 20.4.2005 – 33 F 141/04; KG 13.5.2009 – 3 UF 93/08; AG Seligenstadt, 17.1.2008 – 32 F 695/05..

¹⁴⁹ fBGH, 20.02.2013 – XII ZR 8/11.

¹⁵⁰ For discussion of the possible application of the Brussels IIa Regulation to same-sex relationships, see T Kruger and L Samyn, 'Brussels IIbis: successes and suggested improvements' (2016) *Journal of Private International Law* 132, 135-138.

¹⁵¹ OLG Karlsruhe, 17.8.2009 – 16 UF 99/09.

¹⁵² See V Gärtner: "Internationale Zuständigkeit deutscher Gerichte bei isoliertem Versorgungsausgleichsverfahren" (2010) *Praxis des Internationalen Privat- und Verfahrensrechts*, 520, 520-522.

3.4 Italy

Out of the nineteen Italian cases in the EUPILLAR database that concerned jurisdiction in matrimonial matters, four cases involved issues relating to *lis pendens*,¹⁵³ three cases highlight the issue of multiple proceedings in differing countries,¹⁵⁴ nine cases concerned straightforward confirmation to establish jurisdiction based on the habitual residence of the party¹⁵⁵ and two cases relating to the third state.¹⁵⁶ The profile of the Italian case law also suggests that different issues appear to be problematic when compared to those identified in the courts of England and Wales. In particular, there is less evidence of forum shopping.

This is not to say, however, that forum shopping is not a concern. By way of example, the Tribunal of Palmi found in one judgment that the father was forum shopping when he lodged an application for a 'divorce with minors' in the courts of Romania.¹⁵⁷ The wife subsequently applied for custody in the Italian courts. The father had refused to be served with the claim lodged by the Italian court. The Italian court held that it had jurisdiction to hear the claim for custody of a child lodged at the same time as the action for legal separation of the parents when, in the three years prior to the claim, the daughter was habitually resident in Italy.

In contrast to limited cases of forum shopping, there is significant evidence of problems concerning different elements of a breakdown of a single family unit being heard in different jurisdictions. The case law clearly demonstrates that the courts, albeit correctly applying the Regulation, leave the parties with the separation and divorce actions being heard in one jurisdiction and parental responsibility and ancillary matters being heard in another.

In a case heard by the Tribunal of Milan,¹⁵⁸ an action for legal separation, jurisdiction over status, parental responsibility and maintenance of the wife and children was brought before the Italian court. The action for legal separation could be brought before the Italian court on the basis of nationality of the parties as the Tribunal of Milan held that the Italian court had been first seised in line with Article 19(3), but the Swiss court had jurisdiction to hear the claim for parental responsibility on the basis of the habitual residence of the children.

The Italian courts also had jurisdiction to hear the claim for maintenance by the wife as it was ancillary to the action for legal separation but that the Swiss courts had jurisdiction to hear the claim for maintenance for the children as that was ancillary to parental responsibility.

¹⁵³ Examples of cases concerning issues relating to *lis pendens* - Supreme Court of Cassation, 10 September 2014 n. 19004, in RDIPP, 2015; Tribunal of Palmi, 28 January 2013, in RDIPP, 2014, p. 371; Court of Appeal of Perugia, 10 March 2011, in RDIPP, 2012, p. 153; Tribunal of Varese, decree 4 October 2010, in RDIPP, 2011, p. 743; Tribunal of Belluno, 23 December 2009, in RDIPP, 2011, p. 727.

¹⁵⁴ Examples of cases concerning issues relating to transfer of jurisdiction - Tribunal of Milano, order 16 April 2014, in RDIPP, 2015, p. 162; Supreme Court of Cassation (Plenary), order 30 December 2011 n. 30646, in RDIPP, 2013, p. 126; Tribunal of Firenze, decree 20 May 2003, in RDIPP, 2005, p. 737.

¹⁵⁵ Examples of cases concerning issues relating to habitual residence - Tribunal of Pordenone, 14 October 2014, in RDIPP, 2014, p. 1012; Tribunal of Milano, 24 June 2013 (Unknown); Tribunal of Milano, 11 December 2012, in RDIPP, 2013, p. 768; Tribunal of Milano, 1 June 2012, in RDIPP, 2013, p. 753; Tribunal of Belluno, 30 December 2011, in RDIPP, 2012, p. 452; Tribunal of Milano, 8 April 2011, in RDIPP, 2011, p. 1112; Tribunal of Tivoli, 6 April 2011, in RDIPP, 2011, p. 1097; Supreme Court of Cassation (Plenary), 25 June 2010 n. 15328, in RDIPP, 2011, p. 435; Supreme Court of Cassation (Plenary), order 17 February 2010 n. 3680, in RDIPP, 2010, p. 750.

¹⁵⁶ Recognition of decision from third state, Tribunal of Belluno, 5 November 2010, in RDIPP, 2011, p. 756; Tribunal of Monza, 11 April 2011, in RDIPP, 2012, p. 786.

¹⁵⁷ Tribunal of Palmi, 28 January 2013, in RDIPP, 2014, p. 371

¹⁵⁸ Tribunal of Milano, order 16 April 2014, in RDIPP, 2015, p. 162

A case heard by the Tribunal of Tivoli¹⁵⁹ also illustrates the problem of concurrent proceedings. In this case, Italian courts had jurisdiction over an action for legal separation brought by an Italian citizen against a German citizen residing in Germany. The Italian courts also had jurisdiction over the ancillary claim for maintenance. They did not, however, have jurisdiction over a claim for the maintenance of the child, nor parental responsibility. Since the child was resident in Germany, the German courts had jurisdiction for these matters.

3.5 Poland

Six Polish cases were identified relating to jurisdiction in matrimonial matters, dating from 2012 onwards.¹⁶⁰ From the case law it was evident that two issues prevailed, namely *lis pendens* in three cases,¹⁶¹ and multiple proceedings and transfer of jurisdiction issues in two cases.¹⁶² The final case concerned the non-recognition of a judgment given by a Dutch court in the Polish courts due to procedural errors and therefore will not be included for analysis.¹⁶³

In I ACz 248/14, a Polish court of first instance rejected the application for divorce as it was held that there was sufficient evidence that the German court had been seised on 22 August whereas the Polish court was seised on 29 August. On appeal the court of second instance disagreed and held that the court of first instance ought to have stayed proceedings until jurisdiction in the German court had been established. Declining jurisdiction under Article 19 can only take place if the court first seised has been established.

III C 2898/13 is a relatively unremarkable case in which the Polish court stayed an application for divorce on the basis of Article 19(1) of Brussels IIa that the defendant had brought proceedings relating to separation before the Italian court.

Case I ACz 2057/12, on the other hand, reveals multiple failures to apply the Regulation correctly. The court of first instance stayed proceedings according to its national law as a Belgian court was also seised. The court of first instance also refused a petition for protective measures relating to parental responsibility on the basis that it could not act while it was stayed. The court of second instance disagreed with both of these approaches and stated that the court of first instance should have applied Brussels IIa to the question of jurisdiction and that in urgent cases the Polish courts could have taken protective measures under Article 20(1) of Brussels IIa.

The cases concerning multiple proceedings and transfers of jurisdiction also involve the overturning of decisions of courts of first instance due to misapplication of the Regulation. In V Aca 13/13, the Polish court of first instance issued a judgment on divorce and in the same proceedings ruled on matters relating to parental responsibility. At the same time the French court, where the children were habitually resident, had issued a decision relating to contact. The Polish court of second instance disagreed with the court of first instance that it had jurisdiction under Article 15 as the French court which had jurisdiction on the matter had not indicated that it wished to transfer the case.

¹⁵⁹ Tribunal of Tivoli, 6 April 2011, in RDIPP, 2011, p. 1097

¹⁶⁰ EUPILLAR Project, University of Aberdeen.

¹⁶¹ I ACz 248/14; I ACz 2057/12; III C 2898/13.

¹⁶² V Aca 13/13; I ACz 542/15.

¹⁶³ I ACz 1669/14.

In I ACz 542/15, a case concerning divorce and parental responsibility, the court of first instance stayed proceedings and invited the parties to apply to the courts of England and Wales to deal with the issue of parental responsibility. The child was habitually resident in the UK. This decision was appealed. The court of second instance held that a transfer of jurisdiction made of a court's own motion must be accepted by at least one of the parties and the appeal was upheld.

The issues arising in the cases are consistent with those in other jurisdictions in that they demonstrate that problems may arise due to the concurrence of jurisdiction in a number of Member States. However, there also appears to be an element of difficulty associated with the correct application of the Regulation. It is submitted that the decisions of superior courts reveal that this is not a matter that is directly related to the drafting of the Regulation itself, but one that suggests a need for ongoing judicial training of courts of first instance in order to ensure that the need for appeals is avoided and greater expediency thereby ensured.

3.6 Belgium

Approximately thirty six cases were identified relating to jurisdiction and matrimonial matters.¹⁶⁴ Twenty one of those cases were not contentious and the Belgian courts are thought to have applied Brussels IIa correctly. There are cases that involve the Belgian courts incorrectly applying Brussels IIa in whole or in part.¹⁶⁵ Five cases concerning *lis pendens* do appear but are not problematic.¹⁶⁶

In spite of the relatively large number of cases that were identified, only two cases clearly appear to refer to Article 15 and transfer of jurisdiction in which the parties were simultaneously litigating the dissolution of their marriage and matters related to parental responsibility.¹⁶⁷

Belgium appears to have four cases where the courts found jurisdiction under *forum necessitatis*. *Forum necessitatis* is not a ground for jurisdiction within the Brussels IIa Regulation. The Belgian courts are aware that this is not a ground for jurisdiction under Brussels IIa and instead refer to the Belgian Code of Private International Law 2004.¹⁶⁸

Of particular note here is the judgment in *N.R. v B.C.* in which the court applied residual rules to a case concerning a same-sex relationship.¹⁶⁹ The Court did not consider the possibility that the Regulation might apply to same-sex relationships, relying instead on the commonly held view that EU family law is primarily concerned with the traditional family unit. It is submitted, however, that a request for a preliminary ruling from the Court of Justice is timely in view of recent developments in EU law and the law of the European Convention on Human Rights.¹⁷⁰

¹⁶⁴ EUPILLAR Project, University of Aberdeen.

¹⁶⁵ *W v H Civ Bruxelles*, 19 June 2013; *B. v A.* - Bruxelles, 2 February 2011; *T. v X.* - Civ. (réf.) Bruxelles, 30 May 2007.

¹⁶⁶ *Lis Pendens - B. v A.* - Bruxelles, 17 November 2011; *P. v B.* - Civ. Bruxelles, 8 November 2006; *T. v X.* - Civ. (réf.) Bruxelles, 30 May 2007; Joined cases 2011/1033/C and 2011/1422/C - *M. v. D.* - Bruxelles, 21 June 2012.

¹⁶⁷ Transfer of Jurisdiction - *M. v H.* - Bruxelles, 27 June 2011; *T.S. v D.* - Civ. Bruxelles, 25 April 2006;

¹⁶⁸ *Forum Necessitatis - W v H Civ Bruxelles*, 19 June 2013; *L. v Z.* - Trib. Bruxelles, 9 December 2011; *E. v H.* - Trib. Bruxelles, 2 December 2011; *N.R. v B.C.* - Civ. Arlon, 20 November 2009.

¹⁶⁹ *N.R. v B.C.* - Civ. Arlon, 20 November 2009.

¹⁷⁰ Case C-147/08 *Römer v Hamburg* [2011] ECR I-3591; Case C-267/12 *Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux Sèvres* [2013] ECR-0000; *Schalk and Kopf v Austria* (2011) 53 EHRR 20; *Vallianatos v Greece* (2014) 59 EHRR 12; *Oliari v Italy* (Application Nos 18766/11 and 36030/11).

4. KEY FINDINGS AND RECOMMENDATIONS

4.1. Party Autonomy

The pervasiveness of the principle of autonomy in private law and its possible constitutional status in European Union law suggests that one should assume that autonomy is to be permitted unless it can be shown that there are strong reasons to provide otherwise. In other words, it appears that the argument against autonomy bears the logical burden of proof.

The case for autonomy, however, is less clear when seen in the light of practical considerations. In particular, the fluidity of family relations that are coming to an end, as well as the potential unforeseen vulnerability of one party, suggest that autonomy is to be treated with caution.¹⁷¹ For as long as courts are not empowered to decline jurisdiction in order to protect a vulnerable party, there is a compelling argument that the exercise of autonomy may bind an individual to a path the pursuit of which they might wish to reconsider.¹⁷²

Indeed, the very nature of relationships in which the Brussels IIa Regulation is engaged is such that parties are often likely to exercise their right to move from one Member State to another when a relationship breaks down. By way of example, a spouse who took up residence in a Member State solely due to the circumstances of the other spouse might have no reason to remain in that State if the relationship broke down. It follows that informed consent to an agreement concerning the resolution of matters arising from the breakdown of that relationship might only be possible once the end of the relationship was foreseen.

This is not, however, fatal to an argument that the parties should be encouraged to agree to a choice of forum. Rather, it emphasises the need for judicial oversight of choices of forum, whether these are exercised jointly or severally. Indeed, there is nothing in the present scheme of the Regulation to protect a vulnerable party from abusive choices of forum by the plaintiff. The potential for forum shopping by the better resourced party ensures that a vulnerable party is unable to avail him or herself of remedial procedural devices. It is submitted, therefore, that the matter of autonomy should be given due consideration, but that this should be subject to a requirement of judicial oversight to ensure that vulnerable parties be afforded adequate protection from abuse.

This then leaves the question of whether prorogation should be unlimited, or whether it should be restricted to the jurisdictional grounds presently open to the pursuer. The principle of autonomy in its undiluted form would lead to the conclusion that the parties should be free to choose any jurisdiction. Nevertheless, legislative history suggests that unanimity concerning party autonomy will not be readily achieved in Council. It follows that application of the principle without restriction as to eligible fora is still less likely to be accepted.

Further, it is necessary to consider whether autonomy should be extended also to the annulment of marriages. The Brussels II *ter* proposal excluded annulment on the basis that it is 'closely connected to the conditions for the validity of marriage, and for which parties' autonomy is inappropriate.¹⁷³ The ability to jointly seek jurisdictional arbitration concerning

¹⁷¹ McElevay 2004 (n 39) 620-621.

¹⁷² *Ibid.*

¹⁷³ Brussels II *ter* (n 4) Recital 6.

the very existence of a marriage would not serve the identified principles regarding autonomy and should therefore be excluded.

It is submitted, therefore, that the following provision should be added to the Regulation:

Choice of court

1. The parties may, at a time when proceedings in matters relating to divorce or legal separation are contemplated by both parties and not more than one year prior to the commencement of proceedings, agree that the following court or courts of a Member State shall have jurisdiction to settle any disputes in matters relating to divorce or legal separation:

- (a) a court or the courts of a Member State in which one of the parties is habitually resident;
- (b) a court or the courts of a Member State of which one of the parties has the nationality or, in the case of the United Kingdom and Ireland, of which one of the parties has "domicile";
- (c) a court or the courts of the Member State which was the Member State of the spouses' last common habitual residence for a period of at least one year.
- (d) the court which has jurisdiction to settle their dispute concerning maintenance obligations between spouses:

The conditions referred to in points (a), (b), (c) or (d) have to be met at the time the choice of court agreement is concluded or at the time the court is seised.

The jurisdiction conferred by agreement shall be exclusive unless the parties have agreed otherwise.

2. A choice of court agreement shall be in writing. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'.

This above proposed draft article follows closely the drafting of Article 4 of the Maintenance Regulation.¹⁷⁴ This would afford greater coherence between the two instruments, thereby limiting potential concurrent jurisdiction and furthering the principles underpinning the principle of party autonomy.

Minor changes are proposed, however, to ensure that any agreement concerning jurisdiction in matrimonial matters would be binding on the parties only in the event that it was concluded when the parties could reasonably foresee the consequences of their agreement. Accordingly, it is recommended that a prorogation agreement should only be binding on the parties if divorce proceedings were contemplated at the time of the conclusion of the agreement. Further, this should be within a reasonably short time prior to the initiation of proceedings in order to ensure that consent to the agreement is not interrupted by a period of conciliation between the parties.

The proposed paragraph (b) has also been altered to reflect the fact that domicile may be a relevant connecting factor in the United Kingdom and Ireland in keeping with Article 3(1)(b) of the Brussels IIa Regulation. This ensures that all of the jurisdictional grounds available in

¹⁷⁴ Regulation 4/2009 (n 21).

Article 3 are reflected in the proposed Choice of Court provision. Finally, paragraph (d) mirrors paragraph (c) (i) of the Maintenance Regulation.

The draft article might appear to increase the parties' choice in that there is no minimum period of habitual residence as in the fifth and sixth indent of Article 3(a) of Brussels IIa. This is in keeping with the fourth indent of that article concerning joint applications. This, it is submitted, would facilitate the free movement of the parties and enable them to reorder their lives without undue interruption. The fact that both parties would be in agreement concerning the appropriate court, unlike the situations in Article 3(a) where the time-bars are defined with reference to the applicant, suggests that this proposed new article would not substantially favour either party.

4.2. Transfers of Jurisdiction and *Forum Conveniens*

While the benefits of the exclusion of transfers of jurisdiction in matrimonial disputes are not immediately apparent, the case law discussed in the Part 3 above indicates that the risks which were noted by commentators at the time of the adoption of the Regulation have now become real costs to litigants and courts.

It is submitted, therefore, that the legislator should empower courts to transfer jurisdiction to a better suited court of a Member State. This would enable courts to limit bifurcation of proceedings and thereby to limit costs, delays, and emotional distress. It would also enable courts to protect parties from tactical manoeuvring currently available to petitioners under Article 3 of Brussels IIa.

It is proposed that the following provision, which follows closely the wording of Article 15 of the present Regulation, should be added to the revised Regulation:

Transfer to a court better placed to hear the case

1. By way of exception, the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State, with which the case has a manifestly closer connection, would be better placed to hear the case, or a specific part thereof, and where this is in the interests of justice, the interests of the parties or the best interests of the children of either spouse:

(a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with paragraph 4; or

(b) request a court of another Member State to assume jurisdiction in accordance with paragraph 5.

2. Paragraph 1 shall apply:

(a) upon application from a party; or

(b) of the court's own motion; or

(c) upon application from a court of another Member State with which the case has a particular connection, in accordance with paragraph 3.

A transfer made of the court's own motion or by application of a court of another Member State must be accepted by at least one of the parties.

3. The case may be considered to have a manifestly closer connection to a Member State as mentioned in paragraph 1, if that Member State:

- (a) is the place of the spouses' last joint habitual residence, insofar as one of them still resides there, or
- (b) is the place of the respondent's habitual residence; or
- (c) is the place of the court seised of proceedings between the parties concerning rights and obligations arising from marriage, the divorce, legal separation or marriage annulment or parental responsibility.

4. A transfer to a court better placed to hear a case may be considered to be in the interests of justice, the interests of the parties or the best interests of the children of either spouse if the institution of proceedings in the court first seised is manifestly oppressive or vexatious to either party.

5. The court of the Member State having jurisdiction as to the substance of the matter shall set a time limit by which the courts of that other Member State shall be seised in accordance with paragraph 1.

If the courts are not seised by that time, the court which has been seised shall continue to exercise jurisdiction in accordance with Articles 3 to 7.

6. The courts of that other Member State may, where due to the specific circumstances of the case, this is in the best interests of justice, accept jurisdiction within six weeks of their seisure in accordance with paragraph 1(a) or 1(b). In this case, the court first seised shall decline jurisdiction. Otherwise, the court first seised shall continue to exercise jurisdiction in accordance with Articles 3 to 7.

7. The courts shall cooperate directly for the purposes of this Article.

This recommendation combines the approach in Article 15 of the Regulation with a limited application of the *forum conveniens* doctrine.¹⁷⁵ Accordingly, the benefits of a predictable system are not done away with, but a measure of flexibility is afforded to ensure that the excesses of multiple forum shopping are less likely. In order to safeguard vulnerable parties from the potential of consent being given to a choice of court, it is further submitted that this proposed new article should not be limited to jurisdictional transfer in the absence of choice by the parties.

4.3. Residual Jurisdiction

While the case law suggests that greater clarity is needed concerning the interaction of the Regulation and the residual jurisdiction of the Member States, it is not immediately apparent that legislative intervention is necessary or desirable to achieve the overarching aim of facilitating the free movement of persons within the Union.

As noted in Section 2.3 above, the adoption of rules devised for the Brussels II^{ter} proposal would indeed afford greater predictability. It is submitted, however, that a rule of extraterritorial concern should be treated with caution and adopted only if it can be shown that (i) it does not result in the externalisation of problems associated with rigid *lis pendens* rules, and (ii) it does not deprive parties of mechanisms such as *forum non conveniens*.

¹⁷⁵ *St Pierre and others v South American Stores (Gath & Chaves) Ltd* [1936] 1 KB 383 [398].

4.4 Same-sex relationships

While it appears that the legislator did not contemplate the inclusion of same-sex relationships within the scope of the Regulation, the term 'spouses' has now come to mean more than a wife and a husband in several Member States.¹⁷⁶ This was not so when the Convention was adopted, or indeed when the Brussels IIa Regulation was adopted in 2003.

Marriage has now been opened to couples of the same gender in ten Member States,¹⁷⁷ while the laws of a further nine contemplate civil partnerships.¹⁷⁸ Of the ten states that have non-discriminatory marriage laws, five also provide civil partnerships.¹⁷⁹ In total, therefore, nineteen of the EU's twenty-eight Member States have legislation that equates same-sex and opposite-sex relationships. There is no explicit provision in EU law for the cross-border recognition of these relationships, or indeed for their dissolution.

Furthermore, the judgment of the European Court of Human Rights in *Oliari* suggests that States may have a 'positive obligation to ensure...a specific legal framework providing for the recognition and protection of...same-sex unions.'¹⁸⁰ This, however, need not be marriage itself,¹⁸¹ and indeed there exist constitutional bars to marriage between persons of the same gender in nine Member States.¹⁸²

The Belgian judgment in *N.R. v B.C.*¹⁸³ suggests that the courts of the Member States might not take the view that the Regulation ought to be interpreted more widely so as to include marriage between spouses of the same gender. It is arguable, however, that the legislator's choice to be silent on the matter of same-sex relationships could be read both to include and to exclude marriage between spouses of the same gender.¹⁸⁴ On the one hand, silence on the matter could be viewed in the historical context in which marriage between persons of the same gender was not contemplated in any legal system in the Union. On the other hand, it is commonplace for private international law to encounter situations in which terms in common use are susceptible to different meanings in different jurisdictions. In those situations, a uniform meaning may develop and this may evolve over time, in particular through the judgments of the CJEU.¹⁸⁵ In any event, there is a need for greater clarity as to whether the Regulation will address marriage in the broadest sense.

Kruger and Samyn identify three possible solutions, namely (i) the application of the Regulation by Member States which recognise marriages between spouses of the same gender; (ii) explicit provision that the definition of marriage is a matter for national law; (iii) the explicit inclusion of marriage between persons of the same gender.¹⁸⁶ It is submitted that a further option exists, namely the inclusion of both marriage broadly defined, and marriage-like relationships within the scope of the Regulation.

¹⁷⁶ Kruger and Samyn (n 150) 135-136.

¹⁷⁷ Belgium, Denmark, France, Ireland, Luxembourg, Netherlands, Portugal, Spain, Sweden, United Kingdom.

¹⁷⁸ Austria, Croatia, Cyprus, Finland, Germany, Greece, Hungary, Italy, Malta.

¹⁷⁹ Ireland, Luxembourg, Netherlands, Spain, United Kingdom.

¹⁸⁰ *Oliari v Italy* (Application Nos 18766/11 and 36030/11), para 185.

¹⁸¹ *Ibid*, para 192.

¹⁸² Bulgaria, Croatia, Hungary, Italy, Latvia, Lithuania, Poland, Romania, Slovakia (ILGA Europe (n 174)).

¹⁸³ *N.R. v B.C.* - Civ. Arlon, 20 November 2009.

¹⁸⁴ Kruger and Samyn (n 150) 136.

¹⁸⁵ In the context of jurisdiction in contractual matters, see for example Case 26/91 *Jacob Handte and Co. GmbH v Traitements Mecano-chemiques* [1992] ECR I-3967.

¹⁸⁶ *Goodwin* (2002) 35 EHRR 447, para 100; A Fiorini, "New Belgium Law on Same Sex Marriage and its PIL Implications" (2003) 52 *International and Comparative Law Quarterly* 1039, 1049.

The Charter of Fundamental Rights explicitly proscribes discrimination on grounds of sexual orientation, and differs from the European Convention on Fundamental Rights in that it does not define marriage with reference to a man and a woman. This has been interpreted by some authors – and, indeed, by the European Court of Human Rights – to be a deliberate departure from the traditional definition of marriage.¹⁸⁷ It is arguable, therefore, that legislation that discriminates between same-sex and opposite-sex relationships falls foul of the Union’s constitutional law and as such is open to challenge before the CJEU.¹⁸⁸

Nevertheless, the CJEU has not yet interpreted the Charter in a manner that would require the recognition of same-sex relationships in family law instruments that were intended to regulate opposite-sex relationships. Furthermore, in the current political context it is highly unlikely that the required unanimity in Council could be achieved for an instrument that required the recognition of marriages between persons of the same gender, even if only with a view to terminating those legal relationships.

It is submitted, therefore, that while there does appear to be a legal obligation to provide legislation that *mutatis mutandis* replicates the provisions for opposite-sex relationships, it is not clear that a route to do so exists in the present state of the Union’s distribution of power.

¹⁸⁷ Kruger and Samyn (n 150) 137-138.

¹⁸⁸ See generally Borg-Barthet (n 68).

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS **C**

Role

Policy departments are research units that provide specialised advice to committees, inter-parliamentary delegations and other parliamentary bodies.

Policy Areas

- Constitutional Affairs
- Justice, Freedom and Security
- Gender Equality
- Legal and Parliamentary Affairs
- Petitions

Documents

Visit the European Parliament website:
<http://www.europarl.europa.eu/supporting-analyses>

PHOTO CREDIT: iStock International Inc.



ISBN 978-92-823-9471-7 (paper)
ISBN 978-92-823-9472-4 (pdf)

doi:10.2861/030700 (paper)
doi:10.2861/513199 (pdf)