EUFAMS II

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

REPORT ON THE SPANISH EXCHANGE SEMINAR

PROF. ROSARIO ESPINOSA CALABUIG AND
PROF. PABLO QUINZÁ REDONDO

28 AUGUST 2019

A joint project of the Institute for Comparative Law, Conflict of Laws and International Business Law at Universität Heidelberg, Universitat de València, Università di Verona, Università degli studi di Milano, Lund University, the University of Osijek, the Max Planck Institute Luxembourg for Procedural Law und the Asociacion Española de Abogados de Familia

cooperating partners:

This project was funded by the European Union's Justice Programme (2014-2020).

The content of this project represents the views of the author only and is his/her sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.

SUMMARY

The Spanish Exchange Seminar focused on the following aspects:

- Matrimonial matters: Brussels II bis Regulation
- Parental responsibility: guardianship of minors undertaken by public entities, court authorizations, minor's habitual residence
- Child abduction: Art. 11 Brussels II bis Regulation, provisional measures, habitual residence of the child, Brussels II bis Recast Regulation
- Maintenance obligations: compensatory pension in Spain, habitual residence of the creditor, accumulation of claims
- Rome III Regulation: concept of marriage
- Matrimonial property regimes and property consequences of registered partnerships: concept of marriage and Art. 9, doubts regarding Art. 26, problems with interregional issues
- Successions: applicable law, autonomy of the parties, oral mortis causa dispositions
- Public documents

SUMMARY IN SPANISH

El Seminario español del EUFams II se centró en varios aspectos de relevancia:

- Materia matrimonial: Reglamento Bruselas II bis
- Materia de responsabilidad parental: tutela del menor por organismos públicos, autorizaciones judiciales, residencia habitual del menor
- Traslado o retención ilícita de menores: art. 11 Bruselas II bis, medidas provisionales, residencia habitual del menor, Propuesta de reforma de Bruselas II bis
- Obligaciones de alimentos: la pensión compensatoria en España, la residencia habitual del acreedor de alimentos, acumulación de acciones
- Reglamento Roma III: Concepto de matrimonio
- Régimen económico matrimonial y efectos de parejas registradas: Concepto de matrimonio y art. 9, dudas del art. 26, problemas con el derecho interregional
- Sucesiones: ley aplicable, autonomía de la voluntad, disposiciones orales mortis causa
- Documentos públicos

TABLE OF CONTENTS

A. INTRODUCTION

The Spanish Exchange Seminar was one of the National Exchange Seminars organized within the EUFams II project. It was organized by the University of Valencia, one of the partners involved in the project.

The event endeavored to evaluate the state of implementation of European private international law in family and succession matters in Spain, its interplay with the relevant international conventions and the relevant aspects of application by legal operators. European family and succession law shall be understood in this report as containing the following matters:

- matrimonial matters, parental responsibility and child abduction in Brussels II bis Regulation[1]
- matrimonial matters in Rome III Regulation[2]
- Maintenance Regulation[3]
- Matrimonial Property Regimes Regulation[4] and Regulation on Property Consequences of Registered Partnerships[5]
- Succession Regulation[6]
- Public Documents Regulations[7]

In particular, the objective of the seminar was to identify practical problems with the implementation process and to elaborate proposals in order to improve the effectiveness of the European instruments in Spain.

After the presentation of the project and the outline of the seminar by the academics of the University of Valencia (members of the Spanish EUFams II team), as well as the Asociación Española de Abogados de Familia (AEAFA), five expert speakers and the participants were invited to discuss the regulations. All of them addressed crucial issues, problems and possible solutions which were discussed amongst all

---

[1] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

[2] 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.

[3] Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

[4] Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.

[5] Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.

[6] 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.

[7] Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012.

participants, namely, 16 academics from Spain, 1 academic from Portugal, 5 judges, 2 land registrars, 3 notaries and 25 lawyers.

The meeting was meant as an event of free and open discussion between the participants favoring exchange of opinions and their professional and academic experiences in the application of the European regulations and the international conventions.

During the seminar, the mostly referred to European instruments were the Brussels II bis Regulation and the Rome III Regulation, in particular when it comes to international jurisdiction and applicable law (more than that of recognition and enforcement of decisions). Reference was also made to the Property Regimes Regulations as well as to the Succession Regulation which was subject to a controversial discussion.

The following report outlines the critical issues and opinions that arose during the Seminar. The names of the participants are not reported, but their professional status is provided, so that their remarks can be put into context (Chatham House Rule).

B. BRUSSELS II BIS REGULATION

As in the Spanish Exchange Seminar within the EUFams I project in 2016, the plurality of European and international instruments was highlighted once again as the main problem in cross-border family cases in the Spanish Exchange Seminar in May 2019. However, in comparison with the first Exchange Seminar, the EUFams II seminar has shown an increasing familiarity of the Spanish legal operators with the regulations in family matters, in particular with the Brussels II bis Regulation, Rome III Regulation and Maintenance Regulation. Moreover, notaries and land registrars attending the Seminar highlighted an increasing use of Successions Regulation, in particular in those places in Spain with a fair number of foreign residents. The case law regarding these matters has clearly increased in Spain in the last years. In this vein, several examples of court decisions were cited in relation to the Brussels II bis Regulation.

In general terms, judges, land registrars, notaries, academics and lawyers agreed that the application of international instruments on family matters has clearly improved in Spain despite some setbacks. In any event, account was given to the difficulties arising out of the increasing and overlapping number of international instruments dealing with private international law issues making their application challenging. The variety of instruments is in clear contrast with the Spanish substantive and procedural approach to family law, where all these claims are handled together.

I. MATRIMONIAL MATTERS

Unlike the EUFams I seminar where participants focused on the Brussels II bis Regulation and its jurisdiction rules on matrimonial matters, the EUFams II seminar put more emphasis on the provisions on parental responsibility. However, some comments were also made as to the matrimonial crisis. In this regard, the reduced scope of application of the Brussels II bis Regulation – applicable only to the dissolution of matrimonial ties – was emphasized by several academics as a problem. The Regulation does not deal with issues such as the grounds for divorce, the property consequences of the marriage or any other ancillary measures (cf. Recital 8 Brussels II bis Regulation). This is not coherent with legal systems such as the Spanish, where one sole judge is competent not only to dissolve the marriage, but also to rule on the liquidation of the matrimonial property regime as well as on the adjustment of the parent-child relationship to the new framework.

The attendees also spoke about private divorces following the doubts arising from the *Sahyouni* case[8]. Although divorce is a private matter, according to Spanish law it is only possible to get a divorce if a public authority, either judicial or non-judicial (notary), is involved. Therefore, divorce in Spain cannot be labelled as private in view of the involved competent authorities. Accordingly, it is not possible to get access to the Civil Register without first having obtained a judicial resolution or a notarial deed

[8] CJEU 20.12.2017, C-372/16 (Sahyouni).

(in the latter case only in those situations where Spanish law allows divorce before a notary, i.e. when no minors or incapacitated persons are involved).[9]

II. PARENTAL RESPONSIBILITY

The seminar served as a forum for an extensive discussion of parental responsibility with an emphasis on international child abduction as referred to in the Brussels II bis Regulation.

1. Guardianship of minors taken by public entities

One of those issues was guardianship by public entities, placement of a child and other measures taken by public entities included in the Brussels II bis Regulation. Reference was made to an CJEU judgment[10] according to which Art. 1 (1) Brussels II bis Regulation is to be interpreted to the effect that a single decision ordering a child to be taken into care and placed outside his original home in a foster family is covered by the term 'civil matters' for the purposes of that provision, while that decision was adopted in the context of public law rules relating to child protection.

2. Judicial authorizations

Attention was raised to the fact that judicial authorizations are included within the Brussels II bis Regulation, in particular the authorization of an estate division undertaken with the intervention of a minor's tutor[11], the authorization to repudiate a minor's succession[12] and authorization instead of a parent's consent to travel to get a passport in the country of the minor's nationality that is different from the one who the child resides[13].

3. Habitual residence of the minor

The general rule of international jurisdiction based on the habitual residence of a minor in a Member State was also debated in the seminar (cf. Art. 8 Brussels II bis Regulation). By ways of exception to Art. 8, the courts remain competent to modify access rights in case of a legal change of residence during three months (Art. 9 Brussels II bis Regulation) and, in the event of international abduction, up to one year from the moment that the child is residing in another Member State, is integrated in that country and the person or entity holding his/her custody is aware of his/her whereabouts and does not claim his/her return (Art. 10 Brussels II bis Regulation).

The CJEU has paid attention to the criterion of physical and not temporary presence along with that of proximity and integration in a social and family environment.[14] In the case of a mother that moved to a State other than that of the habitual residence with the consent of the other parent to give birth, the Court of Justice has concluded that

---

9 Cf. Art. 82 (1), 83, 87 and 89 of the Spanish Civil Code; Art. 54 (1) of the Spanish Law of the Notaries; Art. 1 of Spanish Regulation on the organisation and legal regime of the notaries and Art. 61 of Spanish Law of the Civil Registry, inscription of separation, nullity and divorce.

10 CJEU 27.11.2007, C-435/06 (C).

11 CJEU 06.10.2015, C-404/14 (Matousková).

12 CJEU 19.04.2018, C-565/16 (Saponaro).

13 CJEU 21.10.2015, C-215/15 (Gogova).

14 CJEU 15.02.2017, C-499/15.

> *"the infant can, however, be habitually resident in a Member State, notwithstanding the fact that it has never been physically present there, only in so far as its mother has her de facto centre of interests there, this being a matter which it is for the referring court to ascertain. In this regard, particular importance attaches to any indicia demonstrating that the mother has family, social and cultural connections in that Member State, as well as to any tangible manifestations of the mother's intention to live there with the child following its birth"*

Against this backdrop, it has to be highlighted that Art. 15 Brussels II bis Regulation entitles the competent court to stay the case in favor of another Member State's courts provided that a party consents to the request, it is in the best interest of the child and the second court is better placed than the former to decide the case, e.g. if the child had changed residence to that country or it is the State of residence of the parental responsibility's holder, that of the child's nationality or where the concerned assets are located.

4. Prorogation of jurisdiction

Brussels II bis Regulation enshrines the joinder of a parental responsibility claim to another claim, either on marriage annulment, legal separation and divorce, or on a different matter from the latter (Art. 12 (1) and 12 (3) Brussels II bis Regulation). For example, Art. 12 (3) Brussels II bis Regulation allows for such a prorogation to the jurisdiction dealing with a filiation or alimony claim provided that the child has a close connection to that Member State and jurisdiction has been accepted or otherwise in an unequivocal manner by all the parties to all the parties to the proceedings at that time and is in the best interest of the child.

The question is how the CJEU interprets these circumstances. Prorogation of jurisdiction as laid down in Art. 12 Brussels II bis Regulation has been modified in its terms since the CJEU accepts that the appearance in court of all the parties to the proceedings is enough to sustain jurisdiction on parental responsibility provided that it is in the best interest of the child and there is no other on-going proceeding.[15] The question in that case was whether the act of the mother who lodged the motion at the Czech court, and subsequently questioned its jurisdiction, represented acceptance of the jurisdiction in accordance with Art. 12 (3) Brussels II bis Regulation. At the appellate level, the mother argued that the Czech court was not competent in the given case.

Moreover, express or otherwise unequivocal acceptance is a requirement in either case for prorogation of jurisdiction. In the seminar, a lawyer posed the question whether a judge can interpret that such acceptance occurs when the other party appears in the proceedings without questioning the jurisdiction. A judge answered by referring to the abovementioned judgment which states that „the mother's act did not represent unequivocal acceptance of the jurisdiction". Likewise the *Saponaro* judgment, in a case where the parents claimed for judicial authorization to repudiate the succession to which their child is a party before the jurisdiction of the asset´s

[15] CJEU 12.11.2014, C-656/13.

situation – almost the only asset in the succession – and not that of their habitual residence, states that this is a parental responsibility matter and, for our purposes, that

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

According to the abovementioned participating judge, the interpretation made by the CJEU on Art. 12 (3) Brussels II bis Regulation amounts to a recognition of tacit submission in parental responsibility matters, i.e. appearance of all parties without challenging the jurisdiction imply the granting of jurisdiction on parental responsibility as well.

Against this background, one of the judges of the seminar stated that in the event of the most common type of prorogation, divorce along with alimony and parental responsibility, examination ex officio of the three circumstances laid down in Art. 12 Brussels II bis Regulation is required if a party to the proceeding does not appear, in similar terms as if the proceeding only deals with one of these claims. Besides, if all parties appear before court, the seized court initially examines its jurisdiction on the matrimonial crisis and subsequently will assume that on alimony and parental responsibility unless jurisdiction is challenged (it is to note the mandatory intervention of the Public Ministry) or it is not in the best interest of the child.

5. Child abduction and Art. 11 Brussels II bis Regulation

One of the most heated debates during the seminar concerned Art. 11 (4) Brussels II bis Regulation. The issue was raised by several lawyers, and one judge agreed that this provision has not been properly applied in Spain to the extent that the factual circumstances in the rule are particularly difficult to prove. However, the participants also agreed that the burden of proof should not be reverted as this would compromise the return of the child. Both the 2016 amendment proposal to Brussels II bis Regulation and the proposal on June 2018 (see below) were mentioned. However, the current changes of this provision come with the expectation that it gains in efficiency and effectiveness.

A judge mentioned a CJEU judgment[16] because it clarified some issues related to Chapter 3 Brussels II bis Regulation. In particular, the CJEU stated that

> *„where it is alleged that children have been wrongfully removed, the decision of a court of the Member State in which those children were habitually resident, directing that those children be returned and which is entailed by a decision dealing with parental responsibility, may be declared enforceable in the host Member State in accordance with those general provisions"*

In addition, the Regulation must be interpreted as not precluding a court of one Member State

[16] CJEU 17.09.2018, C-3215/18 PPU and C-357/18 PPU.

"from adopting protective measures in the form of an injunction directed at a public body of another Member State, preventing that body from commencing or continuing, before the courts of that other Member State, proceedings for the adoption of children who are residing there"

6. Provisional measures

On the issue of jurisdiction allocated to the court that it is not competent to decide on the merits – including the jurisdiction of the place where the child has been taken – but to adopt provisional measures in accordance with Art. 20 Brussels II bis Regulation, the same judge reminded that the CJEU has addressed it on four occasions, to indicate that:

- Urgency is a requirement that refers to both the situation of the child and the practical impossibility of claiming on parental responsibility before the competent jurisdiction to decide on the merits (Recital 42 Brussels II bis Regulation).[17]
- It has to concern people located in the Member State of adoption, be provisional, and with effects only in that State, thereby they cannot be recognized and enforced in another Member State.[18]
- Custody provisionally assigned to the abducting mother cannot oppose to the enforcement of the judgment requesting the return of the child.[19]
- The application for provisional measures according to Art. 20 Brussels II bis Regulation does not trigger *lis pendens* effects in relation to similar or final measures claimed before the competent judges to decide on the merits.[20]

After paying attention to all these explanations, lawyers in the room asked for more judges specialized in private international law and family matters with a view to interpret this kind of provisions. One lawyer introduced as an example one of his cases dealing with child abduction in Australia in which the Australian judge had requested information on how the child's situation would be if it were returned for which reason factors such as the father's salary and his properties in Spain are under consideration.

Several academics highlighted the role of recitals, i.e. to clarify or justify the proper law. In addition, they highlighted the significance of the English and French versions to interpret European law.

7. Habitual residence of the child

Some of the lawyers indicated that in many cases of child abduction the applicant's request is dismissed because the court determines that the child does not have its habitual residence in the state from which it was allegedly abducted. This point is particularly conflicting in cases in which the parents move frequently, with or without their children, making the determination of their habitual residence even more difficult.

---

[17] CJEU 23.02.2009, C-403/09 PPU (Detiček).

[18] CJEU 15.02.2010, C-256/09 (Purrucker I).

[19] CJEU 01.07.2010, C-211/10 PPU (Povse).

[20] CJEU 09.11.2010, C-296/10 (Purrucker II).

C. BRUSSELS II BIS RECAST PROPOSAL

The attendees of the seminar focused on the rules on child abduction of the Brussels II bis Recast Proposal presented on 30 November 2018 The new Brussels II bis Regulation was finally published on 2 July 2019.[21] In particular, as it was stated by some of the academics attending the seminar, the Council, when drafting the Brussels II bis Recast Proposal, had some objectives, namely:

- Complete abolition of exequatur for the decisions in matters of parental responsibility.
- Harmonize certain rules for the enforcement procedure.
- Clarify rules on the opportunity of the child to express his or her views.
- Clarify rules on the placement of a child in another Member State.
- Clarify rules on the circulation of authentic instruments and agreements.
- Provide clearer rules on intra-EU child abduction cases.

All these objectives have been reflected in the new Brussels II bis Regulation.

From a formal point of view, the rules on international child abduction cases seem to have been clarified with a new chapter devoted to them (Art. 21 to 26a Brussels II bis Recast Proposal).

Art. 21 Brussels II bis Recast Proposal has for instance clarified the relationship between the 1980 Hague Child Protection Convention and the Brussels II bis Regulation. In this sense, Art. 74 Brussels II bis Recast Proposal states that the provisions of the 1980 Hague Child Protection Convention shall continue to apply as complemented by the provisions of the Regulation. Some academics stated that this rule is a step backwards because the rules of the Brussels II bis Regulation had preference over the Convention instead of having a mere complementary role.

Art. 25 Brussels II bis Recast Proposal seems also to be an improvement when it comes to the return of the child procedure. The new rules include the possibility for the court to ensure contact between the child and the person seeking the return, taking into account the best interest of the child. Art. 11 (4) Brussels II bis Recast Proposal is completed with interim measures and a closer communication between authorities is stablished.

Additionally, the rules of cooperation between Central Authorities have been reinforced (Art. 21a Brussels II bis Recast Proposal refers to a receipt and processing of applications by Central Authorities).

Another novelty is the explicit possibility to use Alternative Dispute Resolution in order to solve conflicts relating to international child abduction, although not all professionals are convinced of the effectiveness of Alternative Dispute Resolution in this context.[22]

---

[21] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction.

[22] Cf. *Lobach/Rapp*, An Empirical Study on European Family and Succession Law, p. 22 et seq. (http://www2.ipr.uni-heidelberg.de/eufams/index-dateien/microsites/download.php?art=projektbericht&id=2).

Another step forward in the protection of the child should be the reference to provisional measures in return proceedings (Art. 25 (4) Brussels II bis Recast Proposal) as it was indicated by one of the judges attending the seminar.

The maintenance of the return procedure has had some improvements as well. In this sense, the new rules state that the overriding mechanism has been limited to Art. 13 (1) (b) or Art. 13 (2) 1980 Hague Child Protection Convention. However, it has not been introduced the motivation of the refusal orders.

Another novelty has been the introduction of the needed link between the return order and the decision on the substance of custody rights (aspect that had caused many problems in the past, at least in Spain). Furthermore, the right of the child to be heard seems to have been reinforced although the contents of this right will go on depending on the national law and procedure. This rule was criticised by one of the academics due to the differences already existing in the procedural rules of the Member States.

Finally, as it was raised in the seminar, the new rules proposed in 2018 have extended the suppression of exequatur to all decision regarding parental responsibility and not only to those regarding access rights and return orders. Besides, some grounds of refusal of recognition and enforcement have been introduced for all these matters (Art. 38 Brussels II bis Recast Proposal) but with rules for "certain privileged decisions": those containing rights of access and return of the child following the overriding mechanism.

The European legislator seems to have chosen a new system of rules thinking on the exceptional cases in which the non-return of the child is preferred taking into account his/her best interest in the line of the European Court of Human rights.

D. ROME III REGULATION

In general, participants are familiar with Rome III Regulation which is applied by courts more and more frequently in a proper manner. Doubts as to which is the applicable conflict of law rule in these matters, either the regulation or Art. 107 of the Spanish Civil Code, are fading away. However, the participants criticized that the Rome III Regulation had excluded some matters, for instance marriage annulment, and been approved only via the enhanced cooperation mechanism.

One academic raised attention for the disagreement on the concept of marriage in view of the increase of the number regulations. Nevertheless, this issue is not new. For example, the concept of consumption and consumer in the Rome I Regulation has been interpreted in many CJEU judgments, depending on the background of the case (e.g. franchise, real estate, etc.). Accordingly, the disappointment on lack of a common concept is not justified as the issue is not new. This is a decision taken by all: it has been decided that that concept be defined by Member States.

The participants discuss the lack of a concept of marriage in all regulations currently applicable, taking into consideration that the Spanish private international law system follows the *lex fori* characterization. However, characterization shall be carried out autonomously in European private international law.

The absence of a concept of marriage also has a bearing on Rome III Regulation. For instance, Art. 13 Rome II Regulation states that

> *„Nothing in this Regulation shall oblige the courts of a participating Member State whose law does not provide for divorce or does not deem the marriage in question valid for the purposes of divorce proceedings to pronounce a divorce by virtue of the application of this Regulation"*

Art. 9 Matrimonial Property Regimes Regulation is similar to this provision: a court cannot dissolve a marriage not considered valid. However, Art. 13 Rome III Regulation entitles the seized court to disengage from the regulation with the risk of limping legal relations, while Art. 9 Matrimonial Property Regimes Regulation does not.

The question is on which basis a court decides whether there is a valid marriage or not. Recital 10 Rome III Regulation lays down that preliminary issues are to be decided by relying on the conflict of law rules which seems to be contradictory to Art. 13 Rome I Regulation referring apparently to the legislation of the court seized.

Divorce is not defined either. There is great divergence from one State to another, in particular as to the authority that has to intervene. For instance, the abovementioned *Sahyouni* judgement was addressed during the debate.

The absence of a definition of divorce poses three problems of control:

- what authority intervened (e.g. religious authorities)
- what type of functions the authority perform
- whether another authorities exercises some sort of control over these former authorities

In the debate, the role of the CJEU was applauded as it has been significantly helping in the development of autonomous concepts, although these concepts pose problems. Some participants have proposed to start the path of substantive harmonization as

well as to promote a limited party autonomy, to protect the weaker party. To this end, courts are essential in interpreting the will of the parties in selecting the law applicable.

E. MAINTENANCE REGULATION

The topic of alimony among relatives was not much discussed in the seminar.

I. COMPENSATORY PENSION IN SPANISH LAW

The participants mentioned the usual issue of applying the Maintenance Regulation in Spain to the extent that compensatory pension is also within its scope of application.

II. HABITUAL RESIDENCE OF THE MAINTENANCE CREDITOR

The Maintenance Regulation allocates jurisdiction in maintenance matters to the courts of habitual residence, either of the creditor or of the debtor (Art. 3 (a), (b) Maintenance Regulation) or, in default, to the court of the common nationality (Art. 6 Maintenance Regulation). According to one judge, the criterion of the maintenance creditor's habitual residence might trigger doubts because the obligation of the parent not in custody of the child might be deemed due to the other parent in Spain and in a matrimonial proceeding.

In some cases, the child is in a State different from the State of the deciding court, usually with relatives on a permanent basis. According to this judge, the regulation assumes that the child is always the creditor and his/her residence is the relevant one. This is the reason why Art. 4 (3) Maintenance Regulation does not confer party autonomy in selecting the jurisdiction in relation a child under 18 years old, because the forum-selection clause should be concluded by its legal representative with the aim of protecting the weaker party (Recital 19 Maintenance Regulation). That weaker party is the child, but not the legal representative.

III. PROROGATION OF JURISDICTION

According to the Maintenance Regulation, joinder to a proceeding on the status of a person (divorce, filiation) or on parental responsibility is accepted, unless jurisdiction is only based on the nationality of one of the parties (Art. 3 (c), (d) Maintenance Regulation). In case of parallel proceedings in different Member States, one about the matrimonial crisis and another about parental responsibility, the CJEU has concluded that the maintenance obligation is only ancillary to the claim on parental responsibility.[23]

[23] CJEU 16.07.2015, C-184/14.

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

Matrimonial Property Regimes Regulation raised most of the discussions in the seminar given its novelty and lack of knowledge amongst practitioners, in particular lawyers.[24] There were many and interesting comments of all sorts.

I. CONCEPT OF MARRIAGE

The concept of marriage triggers again questions, this time in relation to matrimonial property regimes. Art. 9 Matrimonial Property Regimes Regulation, that entitles the seized judge to inhibit, depends on this concept. In the seminar, both a professor from France and a professor from Spain stated that this concept is to be found in national law. However, Recital 21 Matrimonial Property Regimes Regulation says otherwise, namely that national private international law should be applied first. This does not only concern same-sex couples, but also convenience marriage, of involving a child, polygamic, etc.

In Spain, there is no conflict of laws rule on marriage validity, thereby Art. 107 (1) of the Spanish Civil Code on marriage annulment is taken into consideration. However, this provision is not clear because it submits the issue to the law of the place where the marriage was concluded.

Art. 9 Matrimonial Property Regimes Regulation seeks to protect the domestic concept of marriage. According to the Art. 9 (1) Matrimonial Property Regimes Regulation and by way of exception, if a court of the Member State that has jurisdiction pursuant to the Regulation (Art. 4, 6, 7 or 8 Matrimonial Property Regimes Regulation) holds that „under its private international law, the marriage in question is not recognized for the purposes of matrimonial property regime proceedings, it may decline jurisdiction".

There is only one case in Art. 9 (3) Matrimonial Property Regimes Regulation that exempts the judge of that possibility and it is the partners providing a divorce judgment issued in another jurisdiction (*res iudicata*): "This Article shall not apply when the parties have obtained a divorce, legal separation or marriage annulment which is capable of being recognized in the Member State of the forum". In this case, the seized judge cannot inhibit, but accept that there are both a valid marriage, and a divorce in another jurisdiction. This gives rise to another issue, that of how to apply recognition and jurisdiction rules.

One academic suggested to address the issue from the recognition perspective, but not resorting to the recognition and enforcement rules on the regulation, but from the marriage perspective (by request of a marriage certification).

As to the concept of marriage, the participants raised several doubts. Some considered it a preliminary question because it is excluded from the Matrimonial

[24] Cf. *Lobach/Rapp*, An Empirical Study on European Family and Succession Law, p. 28 et seq. (http://www2.ipr.uni-heidelberg.de/eufams/index-dateien/microsites/download.php?art=projektbericht&id=2).

Property Regimes Regulation. In other countries such as Portugal, as indicated by the foreign speaker, there is a conflict rule on marriage validity submitting the issue to the domestic law, although there might be an issue of public policy. In the case of same-sex marriages, it has been also suggested to change their categorization and apply the Matrimonial Property Regimes Regulation.

1. Education of legal practitioners

Several lawyers called for more training of civil servants and other legal practitioners that have to apply European law to the extent that it is the only way to provide for foreseeability and to secure legal certainty. Indeed, the Property Regimes Regulations are of no use if the advising civil servant is not familiar with them. Legislative change does not increase foreseeability and so we stand where we were before. In addition to an increase in education and training, the new provisions should be accompanied by information campaigns addressing the general public. Only a few people go to a lawyer before marrying, and when they get divorced, it is already too late. This is not a legal issue but an essential one, and therefore, the European Commission should be informed accordingly.

2. Acceptance of legal facts and their consequences

As to the acceptance of legal facts, some lawyers questioned how to give effects to a legal fact which occurred in another member State. They provided the following example: an owner of real estate in Spain marries in the Netherlands opting for community of property. Accordingly, the real estate in Spain is automatically included in the marriage property. The issue is how to register it. Notaries and registrars did not reach a final conclusion. It would be adequate to have something similar to the certificate of inheritance.

Furthermore, the notaries attending the seminar highlighted the growing complexity of stating the boundaries of the matrimonial property regime in marriages between nationals of different States. They argued that a good solution would be to have instruments that clarify and fix the matrimonial property regime. Some initiatives should be taken in order to inform these couples about the convenience of choosing the applicable law, ordering their economic relations and their affected assets in public documents, much in the same way that the Succession Regulation allows for successions. Therefore, although the instruments for such a fixation exist, the truth is that their use is not as frequent as it would be advisable in practice.

The notaries also argued that in Spain there is a known and special situation in relation to territorial organization based on Autonomous Communities with their own special rights, among which we find those that regulate their own matrimonial property regimes. Therefore, the conclusion reached by the previous section is extended to this situation.

3. Issues with Art. 26 Matrimonial Property Regimes Regulation

Matrimonial Property Regimes Regulation continued to raise comments and issues at the seminar. More specifically, a reference was made to the applicable law in default of a choice of law clause. A question of foreseeability was raised. Art. 26 Matrimonial Property Regimes Regulation lays down hierarchical connecting factors which are

different from those of Art. 9 (2) of the Spanish Civil Code (common nationality instead of common habitual residence).

The participants had issues as to whether this provision provides more legal certainty than Art. 9 (2) of the Spanish Civil Code. In practice, it is more of the same problem because citizens are not instructed by legal practitioners, who are not well-informed.

The new Civil Register has delayed its entry into force four times (now 30.06.2020). Art. 60 Matrimonial Property Regimes Regulation lays down that the matrimonial property regime, either legal or chosen, has to be registered along with the marriage. The problem, however, is that the one in charge of the marriage proceeding has to do it all.

II. INTERNAL CONFLICT RULES

Internal conflicts of laws were also controversially discussed to the extent that the main connecting factor, civil neighborhood, is not registered and the mere statement by the spouses is not sufficient. There are cases in which, for instance, there is a marriage between a person from Aragon and another from Catalonia and they cannot prove their civil neighborhood in Aragon. Sometimes there are several contradictory authentic instruments (separation v. universal community).

One of the most controversial issues in the Spanish doctrine deals with the interpretation of the wording “rules provided in the Chapter IV of the preliminary title of the Spanish Civil Code” (Art. 16 (1) Spanish Civil Code), since the Regulation on matrimonial property regimes refers to the “internal conflict of law rules” (Art. 33 (1) to designate the specific law (the common one or a regional one) that has to be applicable. Which are these rules when the Regulation designates Spanish Law? Those contained in Art. 9 of the Spanish Civil Code or the Regulation itself? This issue is really important not only for Spanish lawyers or practitioners, but also for those of other Member States bound by the Regulation, since they will deal with this matter when Spanish law is applicable according to the conflict of law rules of the Regulation.

One of the academics emphasized that two possible answers can be given to these questions. The first one is a static position: Spanish conflict of law rules dealing with matrimonial property regimes contained in the Civil code would be applicable to determine whether common civil law or regional law is applicable to a particular situation. This position is called as “static” because it interprets Art. 16 (1) of the Spanish Civil Code literally. This position was defended in the seminar by the notaries.

The second answer is called „dynamic“ position. According to this, Spanish conflict of law rules dealing with matrimonial property regimes contained in the Civil Code would be replaced by the Regulation. This position is called as “dynamic” because it considers that the reference to the “rules provided in the Chapter IV of the preliminary title of the Spanish Civil Code” is to those rules that are in force at a particular moment in time. This position was defended by some of the academics of the seminar.

One of the questions in the debate was if the Spanish legislator should modify Art. 9 (2) and 9 (3) of the Spanish Civil Code, making a reference to the Regulation on matrimonial property regimes. This would not be a new situation, since Art. 9 (4) and

9 (6), modified during the summer of 2015, mentions explicitly the 1996 Hague Child Protection Convention[25].

According to the academics, the provision that should be modified or clarified should be Art. 16 (1) of the Spanish Civil Code, in order to determine to which rule it refers: explicitly to those contained in the Spanish Civil Code or to those which are in force in every moment. In other words, it seems to us that the debate should be the content of Art. 16 (1) and not that of Art. 9 (2) and 9 (3) of the Spanish Civil Code.

It was also discussed whether it is possible to apply the Regulation to conflicts arising between territorial units from the same Member State. According to the title of Art. 35 Matrimonial Property Regimes Regulation, the Regulation is not applicable to internal cases. But the title of this disposition is contradictory with its content, since by the wording "shall not be required to apply the Regulation" it can be understood the opposite: that it is possible to apply the regulation to internal cases.

Taking into account this interpretation, a question arises: Is an express statement by the Spanish legislator necessary in order to allow legal operators to apply the regulation to internal cases or is it up to them to apply it unilaterally to those situations? Given the fact that the content of Art. 16 (1) of the Spanish Civil Code is not supposed to be amended in short term and also considering that a new Spanish interregional law would be the most suitable but unlikely solution, the academics stated that Spanish legal operators could apply the Matrimonial Property Regimes Regulation to determine if the common law or a regional law is applicable to an international situation once the regulation itself has determined the application of Spanish law, but also to cases which are purely connected to the Spanish legal system.

[25] Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, drafted by the Hague Conference on Private International Law and concluded at The Hague on 19 October 1996.

G. SUCCESSION REGULATION

This regulation was considered to be properly applied according to notaries and land registrars.

In general, the assessment of the Succession Regulation during its first years of application has been positive, at least from the notary perspective.

The application of European private international law rules poses some preliminary questions according to the notaries: autonomous concepts are used and the mistake is made of incorporating concepts of national law. An additional issue is the lack of familiarity with comparative law (e-justice seems not to be sufficient).

Some issues of applicable law were discussed, for example, the significance of Art. 23 Succession Regulation and its scope of application (e.g. liability for inheritance debts). There is a lack of awareness as to the interrelationship among the three sectors of private international law when it comes to the application of the regulation (the choosing of the national law of the deceased might activate the jurisdiction of a Member State).

A further point was made as to the determination *ex ante* of the applicable law. Benefits include the freezing of the applicable law, exclusion of *renvoi* and establishment of a further jurisdiction criterion. The regulation seeks to promote party autonomy of the deceased. Nevertheless, the drafting of a will is not that common in some Member States such as France. It is important to select the applicable law even without an international element in view of a possible change of circumstances that might hamper foreseeability.

Conflict rules in the Succession Regulation are not coordinated with those in the Matrimonial Property Regulation.

A further issue is that of the existence of States with more than one legal system such as Spain were internal conflict rules are not in coordination with those of the regulation given rise to adaptation problems.

As to the determination *ex post* of the applicable law, the opening of the succession might give rise to problems: notaries are directly applying the Notary Law without establishing first their international jurisdiction according to the Regulation.

The proof of nationality, habitual residence and civil neighborhood was discussed, i.e. whether to ask for passport, a certificate of employment, etc. There are a number of practical issues that make it difficult to solve a case.

Some participants criticized the difficulties in applying the *renvoi* laid down in the Succession Regulation that might cause a *depeçage*. Against this backdrop, party autonomy would be the best option to solve the problem.

I. PARTY AUTONOMY

The introduction of the principle of party autonomy in private international law in family and succession matters was praised by the participants as the most important way of dealing with the main issues that affect family life and succession. However, it is necessary to have repercussions in practice and to achieve the relevance envisaged by the European legislator in the different regulations, that citizens – the ultimate

beneficiaries – become familiar with the existing options and be able to make the available choice. Both notaries and judges have to inform citizens of the available options and whether they conform to their interests.

A lawyer also illustrated the task of lawyers for reinforcing party autonomy in practice by making reference to several cases involving Dutch citizens. Proof of foreign law was also discussed and a notary reminded that a report issued by a notary can be sufficient proof as indicated by Art. 36 of the *Reglamento Hipotecario*.

II. ORAL MORTIS CAUSA DISPOSITIONS

The issue of oral *mortis causa* dispositions and whether they are accepted in Spain or not was also raised. Is the regulation applicable or not? According to a notary, the oral will is only for exceptional cases and its (in)formal nature can cause problems. Its validity would be a preliminary question, but for some issues as that of international jurisdiction, the regulation would be applicable. At the time of legislating, the lawmaker does not take into account the legal practitioner that has to apply the regulation. For example, it is very difficult to understand jurisdiction rules in the Matrimonial Property Regimes Regulation. The notary criticized the enhanced cooperation and the way of legislating in the EU. He also referred to the case of spouses that go to the notary but do not agree. The notary has to make a very quick assessment of their personal circumstances. It is necessary to have a system that establishes the matrimonial property regime.

A registrar reported on the difficulties of solving private international law cases in short time and reminded of many cases in Spanish regions where many foreign persons are residing. As a matter of fact, the international element is to be found even in the tiniest villages. Above all, he highlighted the significance of agreeing on matrimonial property issues.

H. PUBLIC DOCUMENTS REGULATION

In general, it was highlighted that legal practitioners are still not familiar with the Public Documents Regulation.[26] For this reason, some explanations were given by some of the attendees. The notaries emphasized the significance of this regulation and its utility in practice. The land registrars pointed out that the Regulation does not affect the recognition in a Member State of legal effects of the public documents issued in another Member State.

[26] Cf. *Lobach/Rapp*, An Empirical Study on European Family and Succession Law, p. 31 et seq. (http://www2.ipr.uni-heidelberg.de/eufams/index-dateien/microsites/download.php?art=projektbericht&id=2).

I. CONCLUSION AND OUTLOOK

- The plurality of European and international texts that can be applied to the same case was highlighted as the main problem connected with the application of the family law regulations. However, in comparison with the first Spanish Exchange Seminar in 2016, the Spanish Exchange Seminar of 2019 has shown a bigger familiarity of Spanish legal operators with the regulations in family matters, in particular with the Brussels II bis Regulation and Rome III Regulation, as well as with the Maintenance Regulation. Moreover, notaries and land registrars pointed out the increasing use of the Succession Regulation in particular in places in Spain with many foreign residents, also in small towns. The case law on these matters has clearly increased in Spain in the last years. Several examples were discussed regarding the most recent cases in relation to the Brussels II bis Regulation.
- In general terms, judges, land registrars, notaries, academics and lawyers agreed that the application of international instruments on family matters has clearly improved in Spain despite some difficulties. Anyway, account was given to the difficulties arising out of the increasing and overlapping number of international instruments dealing with private international law issues that makes their application challenging.
- As to private divorces, it is not possible in Spain to get divorced before a government department nor to access the Civil Registry without having previously obtained a judgment or a notary deed (in the latter case only in those situations where Spanish law allows to do it before a notary). It is important to explain this point due to some mistakes made in relation to it in other countries.
- Many questions regarding parental responsibility and child abduction were specially debated, in particular the proceedings provided by Art. 11 (4) Brussels II bis Regulation as well as the interplay with the rules of international conventions. In this regard many hopes in the reform of the rules on child abduction were exposed.
- In particular, several objectives were emphasized as desired by the new regulation:
  - Complete abolition of exequatur for the decisions in matters of parental responsibility.
  - Harmonize certain rules for the enforcement procedure.
  - Clarify rules on the opportunity of the child to express his or her views (right to be heard).
  - Clarify rules on the placement of a child in another Member State.
  - Clarify rules on the circulation of authentic instruments and agreements.
  - Provide clearer rules on intra-EU child abduction cases.
- The accomplishment of a short deadline for the return of the child will only be possible with an inter-state cooperation framework. This will require direct communication, without intermediaries, among authorities and courts of different countries. In particular, it will require the assistance of the Central Authorities involved, the existing networks of judicial cooperation, the members of the International Hague Network of Judges and the liaison judges. This could be enhanced, presumably, by the concentration and specialization of jurisdiction as provided for in the Brussels II bis Recast Proposal for reform.

- The concept of marriage still raises questions in relation to divorce and the Brussels II bis Regulation as well as the Property Regimes Regulations.
- As to the Matrimonial Property Regimes Regulation and Succession Regulation, the issue of the Spanish internal conflict rules and their lack of adaptation to the rules in the regulations was highlighted. In this respect, two possible answers were debated in the seminar: the static position defended in the seminar by the notaries and the dynamic position defended by some of the academics attending the seminar. According to the notaries, legal operators could apply in Spain the Matrimonial Property Regimes Regulation to determine if the common law or a regional law is applicable to an international situation once the Regulation itself has determined the application of Spanish law, but also to cases which are solely connected to the Spanish legal system.
- The introduction of the principle of party autonomy in private international law in family and succession matters was praised by the participants as the most important way of dealing with the main issues that affect family life and succession.
- However, it is necessary to have repercussions in practice and to achieve the relevance envisaged by the European legislator in the different regulations, that citizens become familiar with the existing options and be able to make the available choice.
- When it comes to the application of the Succession Regulation, choice of the applicable law is advisable even when there is no international element yet, just in advance of a change of legislation with as subsequent planning often becomes difficult. However, it is regrettable that there is no coordination between the Succession Regulation and Matrimonial Property Regimes Regulation in terms of conflict rules. Again, the fact that there are States with more than one legal system and internal conflict rules that are not in line with the regulations is a matter of concern.
- Finally, it was highlighted that Spanish legal operators are still not familiar with the Public Documents Regulation. The notaries emphasized the significance of this Regulation and its utility in practice. Land registrars pointed out that the Regulation does not affect the recognition in a Member State of public documents' legal effects issued in another Member State.