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Between parties' consent and judicial discretion: joinder of claims and transfer of cases in regulation (EU) 2019/1111

Keywords: *joinder of claims, prorogation of jurisdiction, transfer of cases, forum non conveniens*

1. Regulation (EU) No. 2201 of 2003 on matrimonial matters and parental responsibility (the Brussels II bis Regulation)[1] has recently been recast by Regulation (EU) 2019/1111 of June 25, 2019 (Brussels II bis recast, or the Brussels II ter Regulation)[2]. Indeed, Regulation 2201/2003, while considered to be an effective instrument, had revealed some problematic aspects on which the European legislator deemed it appropriate to intervene[3].

With reference to these problematic aspects[4], in June 2016, the Commission formulated, after intensive data collection and survey work, a proposal to recast the Brussels II bis Regulation. In the document of June 30, 2016 which accompanied the recast proposal, the Commission proposed some general objectives, which in turn were broken down into specific objectives. The Parliament commented on the Commission's proposal, with a political "compromise" intervention by the Council. At the end of the legislative process, the Brussels II ter Regulation on jurisdiction and the recognition and enforcement of

[1] Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000 (OJ L 338, p. 1, as amended).

[2] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (OJ L 178, p. 1).

[3] According to Recital 1: "The report concluded that Regulation (EC) No. 2201/2003 is a well-functioning instrument that has brought important benefits to citizens, but that the existing rules could be improved. A number of amendments are to be made to that Regulation. In the interests of clarity, that Regulation should be recast".

[4] L. Carpaneto, *La ricerca di una (nuova) sintesi tra interesse superiore del minore "in astratto" e "in concreto" nella riforma del regolamento Bruxelles II*-bis, "Rivista di diritto internazionale privato e processuale" 2018/4, p. 974.

judgments in matrimonial matters and in matters of parental responsibility, and on international child abduction, applicable as of August 1, 2022, finally saw the light[5]. Not all of the Commission's proposals made it into the final text approved by the Council, but the objectives highlighted in the original proposal were enhanced. In fact, the new Brussels II ter Regulation introduces important innovations with respect to the previous system, in a delicate game of balances between child protection, national interests, coordination with other international instruments, in the prism of strengthening mutual trust between the judicial systems of the Member States (recital 3).

In this paper, I will focus on two issues concerning jurisdiction: namely, procedural tools to avoid splitting litigation related to the same family crisis in several different Member States and mechanisms to transfer a case from one Member State to another for reasons of more appropriateness.

2. With regard to the first profile, as it is well known, the Brussels II bis Regulation proposed non-homogeneous jurisdiction grounds, respectively, for matrimonial disputes and for disputes concerning parental responsibility, with the consequence that the judge with jurisdiction over the former could lack jurisdiction over the latter. In this way, litigation concerning the same family crisis was often fragmented in two different States. Moreover, the Brussels II bis Regulation lacked a general rule on jurisdiction for related actions which would allow objectively connected claims (for which the Regulation conferred jurisdiction on the courts of different Member States) to be brought before a single forum. This situation has not been changed by the recast Regulation.

Regulation 1111, as a matter of fact, has not introduced any innovation with respect to the connecting factors for matrimonial disputes[6]. Against the Commission's "restrictive" proposal, therefore, the "diffuse jurisdiction" based on a multiplicity of alternative connecting factors remains, in order to facilitate access to the courts in this area. In matters of parental responsibility, on the other hand, the main connecting factor remains the habitual residence of the child (now enshrined in Art. 7), in implementation of the principle of proximity (recital 20). It is interesting to note that Recital 19 indicates that the rules of jurisdiction in matters of parental responsibility are informed by the best interests of the child and should be applied accordingly. The interest of the child, in other words, is elevated to a hermeneutical canon of the criteria for a jurisdictional connection in this area.

Therefore, a split between the matrimonial forum and the forum for parental responsibility disputes can frequently occur also in the new recast Regulation.

The European legislator has nevertheless tried to intervene in this respect, albeit mainly indirectly.

First of all, mention should be made of the new Art. 10 (tagged "Choice of court"), which provides for a (limited) possibility for the parties to choose the competent forum

[5] From the same date, according to art. 104, regulation no. 2201/2003 will be repealed.

[6] For an analysis of the "political choices" made in this regard, see C. Honorati, *La proposta di revisione del regolamento Bruxelles II-bis: più tutela per i minori e più efficacia nell'esecuzione delle decisioni*, "Rivista di diritto internazionale privato e processuale" 2017/2, p. 249.

in matters of parental responsibility. This choice of court makes it possible (at least in some cases) to consolidate the parental responsibility claim before the courts of the Member State where the parents are engaged in divorce or legal separation proceedings.

The Commission, in presenting its proposal, had highlighted the appropriateness of introducing this possibility of choice of court, with a view to discouraging forum shopping and making jurisdiction in such a sensitive area of law more predictable. In the text finally approved, however, this possibility has been (perhaps incongruously) excluded for matrimonial matters and, for parental responsibility, it has been surrounded by a detailed set of conditions and requirements.

Art. 10, however, is not an absolute innovation. As a matter of fact, it develops what was previously provided for by art. 12(3) of the Brussels II bis Regulation, at the same time implementing the interpretative guidelines of the Court of Justice of the European Union (CJEU).

Art. 12(3)(a) of the Brussels II bis Regulation, by way of derogation from Art. 8, conferred prorogated jurisdiction on the courts of a Member State when the child had a substantial connection with that Member State.

In this regard, the CJEU noted that the wording of Art. 12(3) alone did not make it possible to establish whether or not, in order for the prorogation of jurisdiction provided for therein to apply, it was necessary for the court in whose favor the prorogation of jurisdiction was sought to be already seised of another proceeding, unlike what was provided for by paras. 1 and 2 of the same provision[7]. In an earlier judgment, the CJEU itself, however, held that the jurisdiction in matters of parental responsibility prorogated under Art. 12(3) in favour of a court of the Member State hearing the proceedings on the agreement between the holders of parental responsibility ceased with the delivery of a final judgment in the context of those proceedings, since it could not be accepted that, in any event, such prorogated jurisdiction continued throughout the childhood of the person concerned, in the latter's best interests[8]. With this in mind, the CJEU concluded that the prorogation of jurisdiction provided for in the rule at issue here could be applied without it being necessary for the proceedings in that matter to be linked to another proceeding already pending before the court in whose favor the prorogation of jurisdiction was sought[9]. In the opinion of the Luxembourg judges, this interpretation was the only one capable of not nullifying the useful effect of Art. 12(3): limiting its scope to situations in which proceedings in matters of parental responsibility could be linked to other proceedings already pending would have considerably reduced the possibility of using the prorogation provided for therein, given that the need to institute proceedings in matters of parental responsibility might arise independently of any other proceedings[10].

The special link between the State and the child existed, according to the regulatory provisions, when one of the holders of parental responsibility habitually resided in that

[7] ECJ, 12 November 2014, C-656/13, L. v. M., ECLI:EU:C:2014:2364.

[8] ECJ, 1 October 2014, C-436/13, E. v. B., ECLI:EU:C:2014:2246.

[9] ECJ, 12 November 2014, C-656/13.

[10] See also ECJ, 21 October 2015, C-215/15, Gogova v. Iliev, ECLI:EU:C:2015:710.

State or the child was a national of that State, with the clarification that this substantial link could have referred to a time prior to the establishment of the application[11].

This possibility to derogate from the general ground of the habitual residence of the child, on the other hand, recognized a limited autonomy of the parties in matters of parental responsibility[12].

Indeed, Art. 12(3)(b) provided, as a second prerequisite for the exercise of the jurisdiction of the forum with which the child had a special connection, that such jurisdiction had been accepted expressly or in any other unequivocal manner by all the parties to the proceedings at the date on which the courts were seised[13] and it was in the best interests of the child.

This was an innovative form of *forum conveniens*, in which the assertion of jurisdiction was linked to the verification of requirements on a case-by-case basis[14]. However, the margins of application of the rule were not very wide, if only because, in contentious cases, it would have been difficult to find an acceptance of the "prorogated" jurisdiction by all the parties involved.

In any case, even in the face of such unequivocal acceptance, the rule provided for an element of discretion on the part of the judge, who was called upon to assess the appropriateness of his own competence in accordance with the prevailing interest of the child[15].

New Art. 10 of Regulation 1111 (significantly titled "Choice of court"), as mentioned above, develops the prorogation of jurisdiction provided for in Art. 12(3) of the Brussels II bis Regulation, of which it therefore represents an "evolution". For this reason, the case law of the CJEU relating to the previous rule can continue to be relevant in the new context.

Like the previous rule, Art. 10 confers jurisdiction in matters of parental responsibility on the courts of a Member State under certain conditions.

First, para. 1(a) confirms that the child must have a substantial connection with the Member State of the forum. In addition to the fact that at least one of the holders of parental responsibility is habitually resident in the State of the forum (*i*) or that the child is a national of that State (*iii*), it has been added that the "prorogated" Member State is the former habitual residence of the child (*ii*).

Art. 10(1)(b) then addresses the issue of the "consent" of the persons concerned to the prorogation of jurisdiction in favor of the State with which the child has a special relationship.

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[11] S. Marino, *La portata della proroga del foro nelle controversie sulla responsabilità genitoriale*, "Rivista di diritto internazionale privato e processuale" 2015/2, p. 354.

[12] ECJ, 19 April 2018, C-565/16, Saponaro v. Xylina, ECLI:EU:C:2018:265.

[13] ECJ, 1 October 2014, C-436/13. See also Supreme Court, 1 December 2009, I (A Child), 2009 UKSC 10.

[14] See ECJ, 1 October 2014, C-436/13; Supreme Court, 1 December 2009, I (A Child); S. Marino, *La portata...*, p. 353.

[15] According to the Court of Appeal, Civ. Div., 16 December 2014, c. LR (A Child), 2014 EWCA Civ 1624, the judge, from this point of view, must ascertain "whether it is in the child's interests for the case to be determined in the courts of this country rather than elsewhere".

First of all, the rule specifies that such consent must come not only from the "parties" but also from "any other holder of parental responsibility". The principle of law enunciated by the CJEU in the Saponaro and Valcheva[16] cases, with respect to Art. 12(3) of the Brussels II bis Regulation, has thus been implemented in the new rule[17]. In that decision, it was held that the notion of "all parties to the proceedings" transcends the notion of "parents" or "holders of parental responsibility" and thus also includes the public prosecutor who, under the law of the forum, may have to participate in the proceedings[18].

3. The "form" of the parties' consent assumes different connotations.

(a) Firstly, the possibility has been made explicit that the persons concerned freely agree to the jurisdiction of the State in question, at the latest on the date on which the court is seised (sub-para. *i*). In other words, the prorogation of jurisdiction may result from an agreement prior or contemporaneous to the date on which the proceedings are commenced. Also with respect to Art. 12(3) of the Brussels II bis Regulation, on the other hand, the CJEU had held that the existence of an express or at least unambiguous agreement[19] between all the parties to the proceedings required by that provision, in the light of the rule in art. 16, had to be ascertained by the date on which the court application or any other equivalent document was filed with the chosen judge[20].

Such a choice of court agreement, pursuant to art. 10(2), must be in writing and must be dated and signed by the parties or be filed with the court in accordance with national law and procedures, with the clarification that any electronic communication that allows for a durable record of the agreement is to be considered equivalent to writing. No special wording is required, but only the clear expression of assent with respect to the choice of a certain jurisdiction for the resolution of disputes concerning a specific child.

Unlike similar agreements in civil and commercial matters, the effectiveness of an agreement on the choice of forum in this area of the law, where non-negotiable rights are at stake, is neither absolute nor automatic.

In the first place, the prorogation of jurisdiction is subject to the exercise of discretionary evaluations of the judge with respect to the interests of the child (see below).

Moreover, even if the literal wording of the rule is not very clear in this regard, it is to be considered that the judge's control of the parties' awareness of the non-acceptance of jurisdiction, provided for in point *ii*) (see below), should also be extended to the agreement prior to the institution of proceedings[21]. As a matter of fact, Recital 23 expresses this view. There is, therefore, a sort of right to reconsideration, compatible with the non-negotiable nature of the rights under consideration here.

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16 ECJ, 31 May 2018, C-335/17, Neli Valcheva v. Georgios Babanarakis, ECLI:EU:C:2018:359.

17 See also B. Musseva, *The recast of the Brussels IIa Regulation: the sweet and sour fruits of unanimity*, "ERA Forum" 2020/21, at para. 3.3.

18 ECJ, 19 April 2018, C-565/16.

19 According to the Court of Appeal, Civ. Div., c. LR (A Child), this circumstance must be rigorously ascertained.

20 ECJ, 19 April 2018, C-565/16.

21 See also B. Musseva, *The recast...*, at point 3.3.

Even the choice of the competent court is not indiscriminate. In the light of the provisions of Art. 10(1)(a), as a matter of fact, the agreement or acceptance of the parties is in any event limited to the Courts:

1) of the habitual residence of one of the holders of parental responsibility;
2) of the child's former habitual residence;
3) of the State of which the child is a national.

As an example, mention can be made of a choice-of-court clause inserted in a separation agreement between two parents habitually resident in Italy, enforced after one of them has been authorized to move with the minor child to another Member State.

Art. 10(2), on the other hand, foresees that also persons who become parties to the proceedings after the court has been seized may express their agreement to the prorogation of jurisdiction after the commencement of the proceedings, even tacitly: in the absence of their contestation, in fact, their agreement is considered implicit. In this case, it is not expressly provided that the court has to make sure that the intervening parties are informed of their right not to accept the jurisdiction, as it is the case under art. 10(b)(ii) (see below).

With respect to Art. 12(3) of the Brussels II bis Regulation, the CJEU noted that the condition regarding the unambiguous nature of the acceptance of the jurisdiction of the court seised by all parties to the proceedings had to be interpreted restrictively[22]. In particular, it was held that art. 12(3) of the Brussels II bis Regulation did not apply if one party had brought the application and another party (including the prosecutor) had subsequently intervened before the same court to contest its jurisdiction[23]. This ruling appears to be relevant also in the context of the new wording of art. 10.

(b) As an alternative to a prior agreement between the parties, art. 10(b)(ii) provides for the possibility that the parties or any holder of parental responsibility expressly accept jurisdiction in the course of the proceedings, provided that the court has ensured that all parties are informed of their right not to accept such jurisdiction.

The first part of the rule recalls the provisions of art. 12(3)(b) of the Brussels II bis Regulation, but it extends the express acceptance (in the absence of a prior free agreement between the parties) to the phase following the commencement of the proceedings, in order to coordinate with the hypothesis envisaged by art. 10(b)(1).

Unlike what is provided for by art. 10(2) in the case of a written agreement, here the question arises as to whether the acceptance of jurisdiction in the course of the proceedings can be tacit or it must necessarily be expressed (although the literal content of the rule suggests the second option to be the correct one).

In art. 12(3) of the Brussels II bis Regulation the problem was different: in that provision, the parties' acceptance could be expressed or in any case result "in an unequivocal manner". In this regard, the CJEU had specified that such a hypothesis could clearly not arise where the court was seised on the initiative of only one of the parties to the proceedings, the other party had referred another case to the same court at a later date,

[22] ECJ, 21 October 2015, C-215/15.
[23] ECJ, 19 April 2018, C-565/16.

and the latter party had contested the jurisdiction of the court seised from the very first act for which it was responsible in the context of the first case[24]. In other words, the acceptance of jurisdiction is to be referred and limited to each individual proceeding[25]. Such ruling appears to apply, *mutatis mutandis*, also in the new context.

Again with reference to art. 12(3) of the Brussels II bis Regulation, the CJEU had clarified that the jurisdiction acceptance presupposes, at the very least, that the party sued has knowledge of the proceedings taking place before the said court: from this point of view, also and above all in the new context, it cannot therefore be presumed that jurisdiction is accepted by a party who has remained in default of appearance[26] and to whom no notice of the action has been served and for whom a representative *ad litem* has therefore been appointed, whose procedural conduct is irrelevant in this context[27]. Moreover, the Italian Supreme Court, with reference to the Brussels II bis Regulation, excluded that the participation of the defendant spouse in the previous separation proceedings could constitute "acceptance" of the Italian jurisdiction over an application to modify the conditions of such separation[28]. The Italian *Cassazione*, moreover, denied that the lack of opposition to the jurisdiction on the separation claim could imply the acceptance of the court's jurisdiction also on the parental responsibility claims[29]. Again with reference to the Brussels II bis Regulation, the *Cassazione* ruled that raising defences and bringing counterclaims do not in itself amount to an unequivocal acceptence of the jurisdiction[30].

The CJEU, on the other hand, has held that there is an "unequivocal" acceptance when both parents of a child file a joint application before the same judge, thus manifesting the same willingness to refer the matter to the same judge[31]. In my opinion, such procedural behaviour may constitute an express acceptance of jurisdiction also in the context of new Art. 10: indeed, what could be more express than the submission of the application to a particular judge?

Para. 4 of Art. 10 specifies that the jurisdiction extended under para. 1(b)(ii) is exclusive. In fact, new art. 9, on jurisdiction in cases of child abduction, is without prejudice to art. 10.

The wording of the new art. 10, on the other hand, overcomes the doubt raised with respect to Art. 12(3) of the Brussels II bis Regulation as to whether the agreement of the parties must pre-date the bringing of the action[32] or it may intervene in the initial phase

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[24] ECJ, 12 November 2014, C-656/13; S. Marino, *La portata...*, p. 343.

[25] See also S. Marino, *La portata...*, p. 355.

[26] See, in relation to art. 12(1) of the Brussels II bis Regulation, Tribunale di Belluno, 30 December 2011 [in:] "Rivista di diritto internazionale privato e processuale" 2012, p. 452; Cass., 15 November 2017, n. 27091 [in:] "Rivista di diritto internazionale privato e processuale" 2019, p. 563.

[27] ECJ, 21 October 2015, C-215/15.

[28] Cass., 5 June 2017, no. 13912, "Foro italiano" 2018, I, c. 621.

[29] Cass., sez. un., 30 December 2011, no. 30646.

[30] Cass., sez. un., 2 ottobre 2019, n. 24608.

[31] ECJ, 19 April 2018, C-565/16.

[32] See S. Marino, *La portata...*, p. 354.

of proceedings[33]. The CJEU did not expressly rule on this matter, but it seemed to favour a broader solution: with reference to the procedural position of the prosecutor, in fact, the Court, as we have seen, on the one hand, considered that the latter's opposition to the choice of court precluded the recognition that, at the date of submission of the application, all the parties to the proceedings had accepted the prorogation of jurisdiction; on the other hand, it noted that, in the absence of such an opposition, the agreement of that party could be considered implicit, satisfying the requirement that the acceptance of the extension be "unequivocal"[34].

With respect to those who accept the jurisdiction in the course of the proceedings, as noted above, the rule requires the court to ensure that they are informed of their right to object to such jurisdiction. In other words, an "informed consent" is needed, which it is up to the national court to verify.

This mechanism appears to be similar to that provided for in Art. 26(2) of Regulation 1215/2012 (Brussels I bis)[35], which, with respect to matters subject to quasi-exclusive jurisdiction (insurance contracts, consumer contracts, employment contracts), requires the court to verify that any acceptance of jurisdiction by the "weaker" party to the substantive relationship takes place in the knowledge that he or she waives the right to contest the lack of jurisdiction of the court seised.

Here, too, therefore, a rule of uniform procedural law has been introduced which imposes on the judge an "informative" duty with respect to the prerogatives of the parties, of particular importance when the *lex fori* allows the party to participate in the trial without the assistance of a lawyer[36]. As recital 23 makes clear, the task of the court is to examine whether the agreement or acceptance of jurisdiction is based on a free and informed choice of the parties concerned and is not due to one party taking advantage of the other party's difficult situation or weak position.

It has been argued that a party who has accepted the jurisdiction cannot later withdraw its consent[37].

4. In any case, the prorogation or the acceptance of jurisdiction by the parties are never binding for the judge, who must in any case assess that the exercise of jurisdiction is in the best interest of the child. In other words, a discretionary power of the judge is provided for, in the light of all the circumstances of the concrete case: also here, the EU legislator appears to have implemented the common law doctrine of *forum (non)*

[33] See Lady Hale in the Supreme Court, c. I (A Child); Sir Munby in the Court of Appeal, Civ. Div., c. LR (A Child), at point 17, states: "I do not see how this correspondence begins to demonstrate an «unequivocal» (…) acceptance of the jurisdiction by the mother (…), particularly at a time when no proceedings had been begun".

[34] ECJ, 19 April 2018, C-565/16.

[35] 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 (OJ L 351, p. 1, as amended).

[36] According to B. Musseva, *The recast...*, at point 3.3: "If the court breaches its obligation this should be a ground for appeal allowing reconsideration of the validity of the express acceptance".

[37] Lady Hale in Supreme Court, c. I (A Child).

conveniens, traditionally applied also for the purposes of the effectiveness of choice of court clauses.

Such an assessment, as we have seen, was also provided for in Art. 12(3) of the Brussels II bis Regulation: with respect to this rule, the CJUE had stated that the exercise of the prorogated jurisdiction should not risk to negatively affect the situation of the child[38].

With reference to the Brussels II bis Regulation rule, the CJEU, in a case in which the referring court had been asked to authorise the waiver of the succession of a minor habitually resident in a different State, held that there was such an interest on the basis of the circumstance that the residence of the testator at the date of his death, his assets, which were the subject-matter of the estate, and the liabilities of the estate were located in the Member State of the referring court, in the absence of any indication that the prorogation of jurisdiction might adversely affect the situation of the child[39].

For some, this interest would also be satisfied in the event of an actual willingness of parents to cooperate[40].

As a corollary of this requirement, prorogated jurisdiction under Art. 10 shall only apply to proceedings in which such jurisdiction has been determined to be in the best interests of the child. Neither the acceptance of the parties nor the judge's assessment as to the appropriateness of the exercise of such prorogated jurisdiction in the particular case has any binding effect in subsequent proceedings concerning the same child.

With respect to Art. 12(3) of the Brussels II bis Regulation, although there was no specific indication in the relevant provision, the CJEU had ruled that a prorogation of jurisdiction under this provision would, in any event, be applicable only to the specific proceedings for which the court whose jurisdiction had been prorogated was seised[41].

In the new context, Art. 10(3), in order to respect the principle of proximity in future new proceedings (Recital 24), expressly provides that, unless the parties agree otherwise, the jurisdiction exercised in accordance with para. 1 of the rule ceases:

a) as soon as the decision rendered in the relevant proceedings is no longer subject to ordinary appeal; the regulation does not offer a common notion of an ordinary means of appeal. The principle of law established by the CJEU in the context of the Brussels I bis Regulation in civil and commercial matters is therefore also relevant here. In that context, in the case Industrial Diamond v. Riva, the CJUE[42], taking note of the profound differences existing in the Member States with regard to the classification of appeals, established an autonomous concept of ordinary appeal, to be deduced exclusively from the system of the Regulation and not from the law of the State of origin or that of recognition and enforcement. The Court further specified that this is to be understood as any appeal which forms part of the normal procedure

[38] ECJ, 19 April 2018, C-565/16.
[39] ECJ, 19 April 2018, C-565/16.
[40] S. Marino, *La portata...*, p. 358.
[41] ECJ, 12 November 2014, C-656/13.
[42] ECJ, 22 November 1977, C-43/77, Industrial Diamond v. Riva, Racc. 77, c. 2175.

of a trial, which in itself constitutes a procedural development capable of leading to the annulment or reform of the decision whose recognition or enforcement is sought, which is reasonably foreseeable by the parties and which may be brought in the State of origin within a specific time-limit fixed by the law and which starts to run after the decision;

b) the proceedings are terminated for another reason.

It is clear, in fact, that the acceptance of jurisdiction expressed in the course of the proceedings is limited to the duration of those proceedings.

With respect to a choice of court clause, on the other hand, the rule does not imply the loss of its effectiveness: the clause, in fact, will remain in force but, in any subsequent proceedings, any party may exercise its "right to reconsider" (see above) and, in any case, the requirement of art. 10(1)(c), i.e. that the exercise of jurisdiction is in the best interests of the child, will have to be reconsidered *ex novo*.

5. The prorogation of jurisdiction governed by art. 10, as it has been said, can achieve, at least indirectly, the result of concentrating matrimonial proceedings and those relating to parental responsibility in the same forum.

In Regulation no. 1111, on the other hand, as mentioned above, the discipline on jurisdiction for reasons of connection between cases has been drastically modified.

In Regulation no. 2201, the matter was governed by art. 12(1), which provided for (limited) cases of "attraction" of claims for parental responsibility before the forum where a matrimonial dispute was pending. In fact, as we have seen, in the Brussels II bis Regulation, the court seised of a matrimonial dispute on the basis of one of the connecting factors provided therein could not necessarily examine and decide other claims, also connected to the matrimonial matter, such as, in particular, those relating to parental responsibility, with respect to which specific connecting factors were provided.

In the absence of a general rule conferring jurisdiction on grounds of connection between claims, as mentioned above, the judge with jurisdiction over the matrimonial application could not decide on related claims unless there was a specific connecting factor for such claim.

In this context, Art. 12(1) of the Brussels II bis Regulation (under the heading "Prorogation of jurisdiction") played the role of a special rule which, under certain conditions, allowed the dispute on parental responsibility to be brought before the court which exercised jurisdiction over the matrimonial application.

Under that provision, in particular, the courts of the Member State in which jurisdiction was exercised, pursuant to Art. 3, on applications for divorce, legal separation or marriage annulment, also had jurisdiction over applications relating to parental responsibility that were connected with such applications if:

a) at least one of the spouses exercised parental responsibility over the child;

and

b) the jurisdiction of those courts had been accepted expressly or in any other unequivocal manner by the spouses or holders of parental responsibility on the date on which the courts were seised and was in the best interests of the child.

The nationality or habitual residence of the child is irrelevant[43].

A prerequisite for the application of such "prorogated" jurisdiction was that the court seised with the matrimonial application was not also that of the child's habitual residence. In addition, the exercise of such "related" jurisdiction had to be in the best interests of the child.

Such jurisdiction by connection was, moreover, "time-limited": under para. 2 of art. 12, in fact, the jurisdiction exercised in accordance with para. 1 ceased as soon as:

a) the judgment granting or rejecting the application for divorce, legal separation or marriage annulment had become final;

or

b) in cases where proceedings in respect of parental responsibility were still pending on the date referred to in subparagraph (a), the judgment in those proceedings had become final;

or

c) the proceedings referred to in sub-paras. (a) and (b) had terminated for another reason.

In judicial practice, Art. 12(1) of the Brussels II bis Regulation has proven to be difficult to apply[44]. The rigid applicative requirements of jurisdiction by "attraction" provided for therein, in fact, often implied that the matrimonial claim was severed from the claims on parental responsibility or maintenance[45], leading to a multiplication of proceedings and possibly to conflicting decisions[46].

Regulation no. 1111 not only continues not to provide for a general jurisdiction ground for related claims but it has also eliminated the special rule contained in Art. 12(1) of the Brussels II bis Regulation. There is thus no provision in the recast regulation which directly provides that the judge of the matrimonial proceedings may also decide on parental responsibility. As we have seen, this may be achieved indirectly through the application of the provisions of Art. 10 (see above).

The "consolidation" of claims relating to minors and matrimonial disputes, on the other hand, can be achieved, once again indirectly, also as a result of the application of two particular hypotheses of "discretionary" derogation from the forum of the habitual residence of the child provided for in Regulation 1111.

In the recast regulation, in fact, the scope of application of Art. 15 of the Brussels II bis Regulation has been rewritten and extended. That provision, which closed the section on jurisdiction in matters of parental responsibility, as it is well known, provided for a rule of jurisdiction derogating from the general jurisdiction of the court of the habitual residence

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[43] Th.M. de Boer, *What we should not expect from a recast of the Brusssels IIbis Regulation*, "Nederlands internationaal privaatrecht" 2015/1, p. 13.

[44] Cass., sez. un., 27 November 2018, no. 30657 [in:] "Rivista di diritto internazionale privato e processuale" 2019, p. 575, for examples, denies the application of this provision in the relevant case.

[45] See e.g. Cass., sez. un., 27 November 2018, no. 30657.

[46] See Tribunale di Belluno 27 October 2016, www.questionididirittodifamiglia.it (access 29.10.2021). Critical remarks about this decision of the European lawmaker from S. Bernasconi, *Domanda di separazione e domande riguardanti i figli: la giurisdizione sulla domanda principale non si estende necessariamente alle domande accessorie*, "Famiglia e diretto" 2016, p. 1135.

of the child[47], allowing, under certain conditions and in exceptional cases[48], the transfer of a case from one Member State to another[49].

This provision was applicable whenever a court of a Member State exercised its jurisdiction in the matter and also in the case of an appeal in matters of child protection lodged on the basis of public law by the competent authority of a Member State and concerning the adoption of measures relating to parental responsibility[50].

Being an exception to the general rule of the habitual residence of the child[51], according to the CJEU, this provision should be interpreted restrictively[52].

In particular, Art. 15 of the Brussels II bis Regulation provided that, exceptionally, the courts of a Member State having jurisdiction as to the substance of the matter – if they considered that the courts of another Member State, with which the child had a particular connection, would be better placed to hear the case or a specific part thereof and where this was in the best interests of the child – may 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 or request a court of another Member State to assume the jurisdiction in accordance with para. 5.

The jurisdiction of the court seized could be derived from Arts. 8, 9 and 12 of the Brussels II bis Regulation[53]. On the other hand, the CJEU held that the judicial authority to which the case could be transferred could not be the judge normally competent to hear the merits of the dispute on the basis of Arts. 8 and 9[54].

This was the first form of discretionary transfer of jurisdiction accepted by a European regulation, in the wake of the common law doctrine of *forum non conveniens*[55]. It, in fact, required an assessment of the existence of an alternative forum "more appropriate" to rule, due to the close link with the child, in application of the principle of proximity, which is based on the overriding protection of the child's interests[56].

This could be done at the request of one of the parties or even *ex officio*, and even on the initiative of the court of another Member State with which the child had a special connection[57]. In the case of an initiative *ex officio*, however, the transfer of the case could be carried out only if it had been accepted by at least one of the parties[58].

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47 ECJ, 4 October 2018, C-478/17, IQ v. JP, ECLI:EU:C:2018:812.

48 ECJ, 10 July 2019, C-530/18, EP v. FO, ECLI:EU:C:2019:583; ECJ, 4 October 2018, C-478/17.

49 ECJ, 27 October 2016, C-428/15, Child and Family Agency v. J. D, ECLI:EU:C:2016:819.

50 ECJ, 27 October 2016, C-428/15.

51 ECJ, 10 July 2019, C-530/18.

52 ECJ, 27 October 2016, C-428/15; Supreme Court, 13 April 2016, in the matter of N (Children), 2016 UKSC 15.

53 S. Marino, *La portata...*, p. 363.

54 ECJ, 4 October 2018, C-478/17.

55 See also Tribunale di Milano 11 February 2014 [in:] "Rivista di diritto internazionale privato e processuale" 2015, p. 379.

56 See App. Caltanissetta, 4 May 2009 [in:] "Fam. min." 2009/6, p. 54.

57 See for example the facts of the case in ECJ, 4 October 2018, C-478/17.

58 In order to comply with this requirement, in the case decided by Tribunale di Vercelli, 18 December 2014, www.ilcaso.it (access 29.10.2021), the judge, before rendering the decision, had to summon

The judge of the Member State that normally has jurisdiction, in order to be able to request the transfer of the case, must be able to overcome the strong presumption in favor of maintaining its jurisdiction[59].

The alternative jurisdiction must, in effect, be in another Member State with which the child concerned had a "special connection"[60].

The CJEU had expressed itself with respect to the details of the procedural mechanism under consideration here. This case law is relevant also in the new context: I will therefore deal with it below.

In order to avoid gaps in the protection of the child, Art. 15 of the Brussels II bis Regulation regulated what can be defined as a form of international *translatio iudicii*. In particular, the court originally seised had to set a time limit within which the courts of the other Member State had to be called upon. If, however, this time limit expired with no positive reaction, jurisdiction continued to be exercised by the court first seised.

The CJEU pointed out that the mechanism of Art. 15 was compatible with the procedural rules of the State *ad quem* requiring the institution of proceedings separated from those initiated in the first Member State, in which the court could take account of factual circumstances other than those which could have been taken into consideration by the court initially having jurisdiction[61].

The courts of the other Member State, within six weeks, could accept jurisdiction over the case, where, due to the specific circumstances of the case, this was in the best interests of the child[62]. Following such acceptance, the authority first seised would decline jurisdiction. Otherwise, the authority first seised would continue to exercise jurisdiction.

Under Art. 15(6) of the Brussels II bis Regulation, the authorities were required to cooperate in this context either directly or through the central authorities appointed under Art. 53.

6. The mechanism for the transfer of jurisdiction introduced by Art. 15 of the Brussels II bis Regulation was an innovative but cumbersome one.

The objective of identifying, in the concrete case, the most appropriate judge for the decision, appears, however, to be particularly relevant with respect to decisions regulating such delicate relations as those related to parental responsibility. In fact, in the recast regulation such objective appears to be pursued in a more organized way and with more precise (even if not necessarily more effective) provisions.

In the Brussels II ter Regulation, in particular, its old Art. 15 has been replaced by two new rules (Art. 12 and 13), which respectively deal with two hypotheses previously regulated in a single place.

Art. 12, in particular, with the heading "Transfer of jurisdiction to the court of another Member State" represents the direct evolution of Art. 15 of the Brussels II bis Regulation.

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the mother (the only party to the proceedings) before it, in order to acquire her consent to the transfer of the case to the Romanian judicial authorities.

[59] ECJ, 27 October 2016, C-428/15.

[60] ECJ, 27 October 2016, C-428/15.

[61] ECJ, 27 October 2016, C-428/15.

[62] Tribunale per i Minorenni di Genova, 11 December 2009 [in:] "Fam. min." 2010/9, p. 61.

Here, too, it is envisaged that, in exceptional circumstances, the court of a Member State having jurisdiction as to the substance of the matter may, in essence, "transfer" the dispute to the court of another Member State, on the basis of discretionary considerations regarding the greater suitability of that other authority to rule on the matter.

In its "old" Art. 15, the foreign forum had to be "better placed to hear the case or a specific part thereof" and the transfer had to respond to "the best interests of the child". In para. 1 of its new Art. 12, it is instead required, in a more general way, that the foreign authority is "best placed to assess the best interests of the child in the particular case". In any case, what is required is a greater "appropriateness" of the alternative forum for the decision of the relevant dispute.

Under Art. 12, the procedure for the transfer of jurisdiction can be initiated either upon request of the parties or *ex officio*. In this second case, however, it is no longer required that the transfer be accepted by at least one of the parties.

The prerequisite for the transfer remains the same, i.e. the existence of a particular connection between the "alternative" jurisdiction and the child. The "parameters" on the basis of which the existence of such a special relationship can be assessed are listed exhaustively (recital 26) in para. 4 and have remained unchanged with respect to Art. 15 of the Brussels II bis Regulation (see below).

Also in this context, therefore, the case law of the CJEU dealing with the nature and the contents of the judge's analysis remain relevant.

Such analysis has a summary nature[63] and it develops in three steps, with reference to three different requirements[64].

a) In the first place, the judge must establish that there is another State having a "particular connection" with the child.

Art. 12(4), in order to direct the discretion of the court, provides for an exaustive list[65] of relevant factors[66] from which such "particular connection" may be deemed to exist: a reference is made, in particular, to the fact that a Member State has become the habitual residence of the child after the start of the original proceedings[67], or that it is the former habitual residence of the child, or it is the State of the nationality of the child[68],

[63] Fam. Court, 23 October 2014, Re A and B, 2014 EWFC 40.

[64] ECJ, 10 July 2019, C-530/18. If one of this steps is not satisfied, the provision will be inapplicabile: the Court of Appeal, 21 February 2014, Nottingham City Council v. LM, 2014 EWCA Civ 152.

[65] ECJ, 27 October 2016, C-428/15; ECJ, 10 July 2019, C-530/18.

[66] ECJ, 10 July 2019, C-530/18.

[67] See Tribunale di Vercelli, 18 December 2014, www.ilcaso.it (access 29.10.2021), ruling that the minor children of the applicant, located in Romania for more than a year and who went to school there, were habitually resident in Romania. Cour d'appel de Bruxelles, 11 March 2013, www.dipr.be (access 29.10.2021), 2013/2, p. 40, in a case where a minor had been transferred to another State in compliance with a judicial decision which had been appealed by the other parent, opposing such tranfer, denied that "l'enfant a acquis, après 8 mois, se résidence habituelle" in the other State.

[68] Such circumstance may be implied from the fact that a minor is born in a Member State of which one of his parents is a national: ECJ, 10 July 2019, C-530/18.

or it is the habitual residence of a holder of parental responsibility or, lastly, it is the place where property of the child is located and the case concerns measures for the protection of the child relating to the administration, conservation or disposal of that property[69].

All these are factual factors[70], to be ascertained on a case by case basis.

Cases where none of these factors is present are *ab origine* excluded from the transfer procedure[71]. The application of the rule was thus denied in a case in which the judge to whom the transfer of the case should have been made was the one where the minors resided at the time the request was made and who would therefore have had jurisdiction on the basis of Art. 8 of the regulation[72].

It is up to the court hearing the case to compare the extent and degree of the child's general proximity to the forum of his or her habitual residence with that resulting from the verification of the conditions of the current Art. 12(4)[73]. If, as a result of this analysis, the court is convinced that the links between the child and the State of his or her habitual residence are stronger than those with another Member State, the application of Art. 12 should be excluded, without further consideration[74].

b) As a second step, it must be assessed whether there is a court in the other Member State with which the child has a special connection that is better placed to deal with the case.

To this end, it must be determined whether the transfer would bring real and concrete added value as regards the taking of a decision concerning the child, as compared to keeping the child before the first court[75]. In this analysis, consideration may be given, *inter alia*[76], to the rules of procedure of the other State and in particular those applicable to the collection of evidence, with reference to the specific impact of the alternative court's ability to better manage the case, in particular by facilitating the collection of evidence and testimony[77]. The CJEU, in this regard, excluded the relevance of the fact that, in a Member State, the case may be decided in chambers by specialized judges[78].

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[69] See App. Caltanissetta, 4 May 2009 [in:] "Fam. min." 2009/6, p. 54: here, a particular connection between the minor and the State of the alternative forum was found to exist in the light of the fact that the State in question was the mother's habitual residence and that the minor had been transferred there after the start of the proceedings in Italy.

[70] The Court of Appeal, Nottingham City Council v. LM.

[71] ECJ, 27 October 2016, C-428/15; ECJ, 10 July 2019, C-530/18; ECJ, 4 October 2018, C-478/17.

[72] ECJ, 4 October 2018, C-478/17.

[73] ECJ, 10 July 2019, C-530/18.

[74] ECJ, 10 July 2019, C-530/18.

[75] See Fam. Court, Re A and B, giving great relevance to the familiarity with the family history of the Czech authorities: "It is fair to assume there is a depth of knowledge and experience of the family dynamics in the Czech Republic, hinted at within the documents from the authorities there, which is very largely unavailable to the authorities here".

[76] According to the Court of Appeal, Nottingham City Council v. LM, this is an "evaluation to be performed on all the circumstances of the case".

[77] ECJ, 10 July 2019, C-530/18. See also the Court of Appeal, Nottingham City Council v. LM, point 20.

[78] ECJ, 10 July 2019, C-530/18.

The substantive law of that other State should not be taken into account, so as not to violate the principle of mutual trust[79].

c) Thirdly, it must be established whether the transfer corresponds to the best interests of the child, assessing whether the transfer itself is not likely to adversely affect the situation of the child concerned and evaluating the possible negative impact that such a transfer could have on the child's emotional, family and social relationships or on his or her material situation[80]. What is at issue here, then, is whether the transfer is in the best interests of the child and not the final result of the proceedings in the other State[81]. From this point of view, in the UK case law, it has been affirmed that in the analysis of the best interests of the child, the importance of identity, nationality and citizenship should be emphasized[82].

On the other hand, any impact of the transfer on other persons should, in principle, not be taken into account, unless this in turn is relevant to assessing the risk for the child[83].

It is also possible, in this context, to provide that only a specific part of the case is transferred from one State to another[84].

The transfer of jurisdiction remains, in any case, a discretionary decision[85].

Such transfer of jurisdiction, moreover, whether requested by a court wishing to transfer its jurisdiction or by a court wishing to obtain jurisdiction (see Art. 13), produces effects only for the specific case for which it is made. Once the proceedings for which

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[79] ECJ, 10 July 2019, C-530/18. Fam. Court, Re A and B, states, at point 40: "it is irrelevant to the Article 15 question that the other court may not have the full list of options available to the English court – for example the ability to order non consensual adoptio".

[80] ECJ, 27 October 2016, C-428/15; see the Supreme Court, In the matter of N (Children), where Lady Hale, at point 43, specifies that the notion of "better placed" is linked to that of "best interests": "but it is clear that they are separate questions and must be addressed separately, The second one does not inexorably follow from the first". See K. Trimmings, *Transfer of jurisdiction and the best interests of the child*, "Cambridge Law Journal" 2016/75 (3), p. 471.

[81] The Supreme Court, in the matter of N (Children), point 44. See also Fam. Court, Re A and B; according to Tribunale Vercelli, 18 December 2014, www.ilcaso.it (access 2.11.2021), it is in the interest of minors who have moved to Romania that the proceedings concerning them be dealt with by the Romanian judge, since he/she is better able to acquire the elements to understand the needs of the minors and to better elaborate the content of the measure to be issued. The analysis of the judge of Vercelli, however, seems to overlap the interest of the child with the adequacy of the "alternative" foreign judge. See also the High Court of Justice, 13 March 2013, The Child v. The Central Authority of the Republic of Slovakia, 2013 EWHC 521 (Fam), where Mr. J. Mostyn, at point 37, states: "The analysis of best interests only goes to inform the question of forum and should not descend to some kind of a divisive value judgment about the laws and procedures of our European neighbours".

[82] Fam. Court, Re A and B, in relation to minors belonging to the Roma ethnic group from the Czech Republic.

[83] ECJ, 27 October 2016, C-428/15.

[84] ECJ, 27 October 2016, C-428/15.

[85] ECJ, 10 July 2019, C-530/18. See also the Court of Appeal, Nottingham City Council v. LM, reversing the first instance decision allowing the transfer of jurisdiction to the courts of the Czech Republic.

such a transfer was requested and granted have been completed, the transfer has no effect for future proceedings (recital 28).

7. What has changed with respect to Art. 15 of the Brussels II bis Regulation is the procedural mechanism of the transfer, which, in the new wording of Art. 12, is regulated more precisely, particularly as concerns its dynamics and timing.

If, therefore, the seised court considers that there is another judicial authority better placed to assess the best interests of the child in the specific case, he/she shall order the stay of the proceedings (or part of them), and may then, alternatively:

a) set a time limit for one or more of the parties to inform the alternative court of the pending proceedings and of the possibility to transfer jurisdiction and to introduce an application before that court;
b) request a court of the other Member State to assume jurisdiction in accordance with para. 2.

Recital 26 adds that the competent court should make the request to the court of another Member State only if its earlier decision to stay the proceedings and request a transfer of jurisdiction has become *res judicata*, where such a decision can be challenged under national law. In other words, a two-phase mechanism is configured, which presupposes first a dialectical confrontation, possibly also with an appeal, regarding the decision of the court to stay the proceedings for the purpose of transferring jurisdiction, with the possibility of formulating the request to the other court only after its own relevant decision has become final. The timing of this mechanism may, however, discourage recourse to the institution should the advisability of the transfer be opposed by the parties.

The "alternative" court may then accept jurisdiction, where this is in the best interests of the child due to the particular circumstances of the case, within six weeks:

a) from the time it is seized by at least one of the parties involved (sub-para. (a)) or
b) from the time of receipt of the request from the court initially seised (sub-para. (b)).

If the "alternative" court accepts the transfer of jurisdiction in its favour, the court first seised may decline jurisdiction. On the other hand, the latter will continue to exercise jurisdiction if it has not received an acceptance of jurisdiction from the court of the other Member State within seven weeks from when:

a) the time limit set for the parties to introduce an application before a court of another Member State in accordance with point (a) of para. 1 has expired; or
b) that court has received the request in accordance with point (b) of para. 1.

In essence, in the current formulation, the dynamics for ordering or denying the transfer of jurisdiction are exhausted in the space of a few weeks, making the relevant timeframe certain.

Para. 5 of Art. 12 clarifies that, where the exclusive jurisdiction of the court has been established pursuant to Art. 10 (on the prorogation of jurisdiction), it may not transfer jurisdiction to the court of another member state. This is, in fact, an obvious corollary of the exclusive nature of the jurisdiction conferred under its new Art. 10.

8. Art. 13 of the Brussels II ter Regulation completes the scenario, regulating the "Request for transfer of jurisdiction by a court of a Member State not having jurisdiction".

This provision develops, in other words, the hypothesis provided for by Art. 15(2)(c) of the Brussels II bis Regulation, with the specification that such a request cannot be made by the judge of the State where a child who has been wrongfully removed from his or her habitual residence is located (para. 1 is, in fact, without prejudice to Art. 9).

Again, the request for transfer can only be made "in exceptional circumstances".

The prerequisite is that the court of a Member State, which does not have jurisdiction under the Regulation, nevertheless considers, in the light of the special relationship with the child (in the sense already seen in the context of Art. 12), that it is better placed to assess the best interests of the child in the specific case.

In such a case, it may request a transfer of jurisdiction from the courts of the Member State of the child's habitual residence (irrespective of whether proceedings concerning parental responsibility over that child are already pending in that State).

Within six weeks of receiving such a request, the court receiving the request may agree to transfer its jurisdiction. This shall be done if, due to the specific circumstances of the case, the latter considers such transfer to be in the best interests of the child. In this case, the court to which the request is addressed must inform the requesting court of its acceptance without delay. In the absence of such acceptance within the six-week period, the requesting court may not exercise jurisdiction.

Also in this context, the requirement of the acceptance of the transfer by at least one of the parties has disappeared. Although the rule does not make it explicit, it seems to me that the judicial authority to which the request is addressed cannot do so without first stimulating the discussion with the parties exercising parental responsibility over the child. This may pose problems with respect to the short term provided for the acceptance of the transfer.

If necessary, the procedural provisions of the *lex fori* will have to be adapted to allow the requested court to summon the parties before it to discuss the request from the other court.

9. At the end of this paper, it can be confirmed that the consolidation of matrimonial and parental responsibility cases before the same court is not an objective pursued as such by the European legislator.

Although a large number of matrimonial cases raise issues related to parental responsibility, which in domestic law are normally decided by the same court, in the European area of justice the objectives pursued with respect to the jurisdiction on matrimonial cases are different from those underlying the jurisdiction on parental responsibility and this has, as an obvious consequence, that, in the case of "mobile" families within the territory of the European Union, it is often necessary to institute proceedings in different Member States.

As a matter of fact, the policy underlying matrimonial jurisdiction, aimed at facilitating access to justice to the spouse who wants to obtain the freedom of status, can hardly be reconciled with that of the best interests of the child, which serves as a guiding star with respect to cases on parental responsibility, in which the principle of proximity between the judge and child is of fundamental importance.

On the other hand, separating the matrimonial case from the case on parental responsibility can be functional to "purifying" the case on the conjugal bond from the complexities of the issues relating to children, facilitating the solution of the dispute on their personal status.

In this context, on the other hand, a strict control by national judges over the actual location of the habitual residence of a child becomes essential, in order to avoid abuses and distortions of the dynamics of the process by one parent to the detriment of the other.

The new rules of the Brussels II ter Regulation try to balance the interests of the parties and the needs of justice, with provisions that are not necessarily consistent with each other.

On the one hand, for example, with regard to the prorogation of jurisdiction, the informed consent of the parties is enhanced, on the other hand, with regard to the transfer of the case from one Member State to another, the consent of the parties can be disregarded, increasing the role and discretion of the judge.

The new rules on the "choice of court clause", on the other hand, are interesting from a theoretical point of view but, all in all, introduce a merely optional forum, since each party can always "reconsider" its prior consent to jurisdiction.

The provisions on the transfer of cases from one State to another continue to be somewhat cumbersome, but the clarifications made with respect to the operational mechanisms of this transfer should be appreciated.

The effort of the European legislator to ensure that the case is decided by the most appropriate judge to assess the best interests of the child's life is to be welcomed, even though it may lead to an increase in litigation and the risk of lengthening the time taken to reach a decision.

The new rules in this area are particularly interesting in that they introduce uniform procedural mechanisms that Member States will have to implement, adapting existing rules or, better, introducing specific provisions to coordinate the regulation and the *lex fori*, in order to guarantee certainty and predictability and, above all, rapidity in resolving these preliminary questions.

Above all, with regard to the transfer of cases from one State to another, the centrality of cooperation between the courts of the Member States is confirmed. The Courts, as a matter of fact, must dialogue with each other, without prejudice or preconceptions, in order to try to reach decisions that actually meet the best interests of the child.

The recast regulation tries to strengthen this cooperation, with Art. 86 ff. However, the operational experience of the Brussels II bis Regulation shows that rules, in themselves, are not enough. It will therefore be necessary to guarantee in practice the effective and efficient implementation of the new European procedural instruments.

Abstrakt

Pomiędzy zgodą stron a uznaniem sędziowskim: łączenie roszczeń i przekazywanie spraw sądowi innego państwa członkowskiego w rozporządzeniu Rady (UE) 2019/1111

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Rozporządzenie Rady (UE) 2019/1111 wprowadziło nowe reguły i mechanizmy mające na celu zapewnienie, że sprawy dotyczące odpowiedzialności rodzicielskiej będą rozstrzygane przez sądy korzystniej zlokalizowane dla ochrony najlepiej pojętego interesu dziecka. W związku z tym, mimo braku ogólnego przepisu dotyczącego łączenia powiązanych roszczeń, przekształcone rozporządzenie daje zainteresowanym stronom ograniczoną możliwość wyboru właściwego forum. Co ważniejsze, sędziowie uzyskali dyskrecjonalne uprawnienie do decydowania o wykonywaniu swojej jurysdykcji z możliwością przekazania sprawy do bardziej odpowiedniego forum. Te nowe uprawnienia i mechanizmy proceduralne wzmacniają europejską przestrzeń sprawiedliwości oraz wdrażają pogłębioną współpracę i współdziałanie pomiędzy sądami różnych państw członkowskich.

Słowa kluczowe: *łączenie roszczeń, prorogacja jurysdykcji, przekazywanie spraw, forum non conveniens*

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