Third Country Nationals and the Procedural Role of EU Family and Succession Law

Marlene Brosch and Cristina M. Mariottini***

Abstract Analyzing the interface of private international and procedural law with situations that involve third country nationals is of the essence to promote a uniform and effective regulation of family and succession matters in pursuance of the free circulation of persons in the EU. The importance of this analysis is reaffirmed by the increasing migration flows from third States and by the refugee crisis that the EU Member States are experiencing to date.

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In particular, the variety of pertinent instruments, together with their possible different application at the national level, may prove to be a source of significant uncertainty. Against this background, this contribution examines the impact of procedural aspects in cases involving third country nationals on the objectives of predictability, effectiveness, and harmonized solutions in EU family and succession law.

Keywords jurisdiction, recognition of status, *lis alibi pendens,* third country nationals, habitual residence, Brussels II bis Regulation, Brussels II ter Regulation

I. Introduction

With regard to third country nationals and, in particular, refugees, there does not appear to be uniformity in the number or the setting of the cross-border cases analyzed within the EUFams II Project. As will be further illustrated throughout this contribution, the number of cases collected and analyzed do not seem to be proportional to the dimension of the Member States of origin or the size of their population. On the other hand, this lack of consistency may be traced back to the geographical, historical, and socio-cultural background of the Member States examined within the Project.

For instance, Luxembourg is a landlocked country traditionally attracting foreigners from the surrounding EU Member States,[1] as reflected in many cross-border family cases involving nationals from Belgium, France, and Germany. Germany, on the other hand, has many historical relations to non-Member States due to its long history of migrant labor, attracting workers in particular from Turkey and the successor States of former Yugoslavia, but also due to the international relations with the occupying powers after World War II, some of whose nationals decided to stay in Germany.[2]

Significant migration flows from numerous countries also occur in Spain, in particular stemming from Spain's longstanding historical relations with Latin-American countries and its geographical proximity to Northern

1 According to the annual census of 2020, approximately 88% of foreigners living in Luxembourg are EU citizens, cf. *Institut national de la statistique et des études économiques du Grand-Duché de Luxembourg,* Population par nationalités détaillées 2011–2020.

2 According to statistics from 2019, around 3.5 million out of 11.2 million foreigners living in Germany are third country nationals; cf. *Destatis – Statistisches Bundesamt,* Foreign population by place of birth and selected citizenships on 31 December 2019.

African countries.[3] Furthermore, the presence of other foreigners, such as UK nationals,[4] is likely a result of Spain being a renowned retirement destination. However, compared to the notable presence of third country nationals in Spain, the number of disputes involving third country nationals is far from voluminous.

Italy, on the other hand, has only in recent decades been increasingly receiving immigrants, primarily from third States.[5] The cases collected in the EUFams II database do not pinpoint specific non-Member States involved more frequently than others in cross-border family cases. However, it is of note that a high incidence of proceedings includes third country nationals from South Eastern and Eastern Europe, North Africa, as well as from China and Switzerland, the common border likely being the primary factor contributing to the number of disputes between Italy and Switzerland.

The shared border is also at the origin of the cases brought before Greek courts and connected to Albania, from which a significant portion of the immigration flows into Greece originated in the last decades.[6] Similarly, while the vast majority of the Croatian jurisprudence collected within the project is related to intra-EU cases,[7] Croatian third State-related cases are most frequently connected to neighboring countries and, in particular, Serbia and Bosnia and Herzegovina.

Furthermore, with regard to France, many cases involving nationals from third States formerly under French colonial control show that the parties either had double citizenship or had exclusively kept their third State nationality.[8] Finally, while no prevailing trends can be identified at present as concerns Sweden, it is expected that the 2015 refugee crisis may successively

3 *King/Lulle,* Research on Migration, especially p. 16–18.

4 Following the United Kingdom's departure from the EU on 31.01.2020, for the purposes of this contribution the United Kingdom is considered as a third State, regardless of the transition period currently running and expiring on 31.12.2020; cf. Art. 126 of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ C 384I, 12.11.2019, p. 1 (59).

5 As of 2019, nearly half of the over 5 million foreigners legally residing in Italy are third country nationals; cf. *Istituto Nazionale di Statistica,* Stranieri residenti al 1° gennaio – Cittadinanza.

6 According to a report of the Greek statistical authority based on the last census in 2011, of all foreign persons that settled in Greece during the last five years before the census, almost a third originated from Albania; cf. *Hellenic Statistical Authority,* Press Release on 2011 Population and Housing Census – Migration.

7 Of the 61 Croatian cases collected in the project database, only 18 relate to third States.

8 See p. 224.

lead to an increased number of cases in this Member State involving, e.g., Syrian nationals.

Despite these historical and geographical differences at the outset, prevailing trends and common difficulties in applying the European and international legal framework in cross-border family matters can be identified. Notably, based on the case law collected within the EUFams II Project, this contribution sheds light on the peculiarities of cases involving third country nationals with regard to jurisdiction, the coordination of parallel proceedings, the recognition of statuses abroad and, to some extent, the circulation of foreign judgments. In this context, particular consideration is given to procedural aspects of cross-border family cases before Member States' courts involving refugees and migrants.

II. The jurisdiction of Member States' courts vis-à-vis third country nationals

1. General tendencies

According to the analysis of the case law collected in the EUFams II database, legal separation and divorce, parental responsibility, maintenance, and child abduction are the areas in cross-border family disputes where third country nationals are most frequently involved. In contrast, few disputes involving third country nationals were reported in succession matters.

a. Assessment of jurisdictional grounds

As a general tendency, the analysis of collected case law shows that Member State courts do not always assess their jurisdiction *ex officio* or only do so implicitly, in particular if the defendant does not contest jurisdiction. This approach can be observed both in cases concerning EU nationals[9] and in cases involving third country nationals. For instance, in a case involving an Egyptian-Luxembourgish couple, the Luxembourgish wife filed a petition for divorce before a Luxembourgish court only one month after she had moved to Luxembourg from the United Arab Emirates, where she had lived with her

9 See for instance Cour d'appel de Lyon, 09.05.2017, no. 15/07268, FRS20170509; Tribunal d'arrondissement de Luxembourg, 20.12.2018, no. 506/2018, LUF20181220.

husband, an Egyptian national.[10] The court correctly held that none of the jurisdiction grounds of Art. 3 Brussels II bis Regulation were applicable, as the husband (the defendant) was domiciled in a third State, and the spouses never had their common habitual residence in an EU Member State. As the husband did not challenge the jurisdiction, the court did not assess its jurisdiction any further, even though Art. 6 Brussels II bis Regulation leads to the application of national jurisdiction rules in such a case. Arguably, the court proceeded to implicitly assess the establishment of its jurisdiction under domestic law.[11]

Similar occurrences are reported in Italy, in cases involving both nationals from Member States and third States, especially with respect to applications for maintenance both in divorce and parental responsibility cases[12], as well as to specific claims such as the award of the family home.[13] Possibly because the circumstances of the cases were rather linear and undisputed and the decision on the substance of the case remained unaffected, in these cases, the question of jurisdiction was not addressed explicitly by the court.

b. The concept of "habitual residence"

As the jurisdiction grounds in the EU regulations on family matters are predominantly based on the parties' habitual residence in the EU, the practical relevance of nationality and, in particular, of a third State nationality is limited. This result is particularly evident in Art. 3 Brussels II bis Regulation, where the parties' nationality only plays a minor role with a view to establishing jurisdiction in divorce and legal separation proceedings.[14] In addition, as the respective jurisdiction ground based on nationality (Art. 3 (b)

10 Tribunal d'arrondissement de Luxembourg, 07.01.2016, no. 3/2016, LUF20160107.

11 The court might have implicitly accepted its jurisdiction under the exorbitant jurisdiction rule of Art. 14 of the Luxembourgish Civil Code, which grants a forum to Luxembourgish citizens vis-à-vis foreigners who do not reside in Luxembourgish territory; cf. on this provision *Kinsch,* in: Encyclopedia of Private International Law, p. 2296 (2301); *Wiwinius,* Le droit international privé au Grand-Duché de Luxembourg, p. 241 et seq.

12 Tribunale di Cuneo, 19.02.2018, ITF20180219; Tribunale di Monza, 21.03.2019, ITF20190321; Tribunale di Monza, 03.07.2019, ITF20190703; Tribunale di Milano, 11.12.2018, ITF20181211; Tribunale di Rimini, 12.06.2018, ITF20180612; Tribunale di Vicenza, 30.10.2018, ITF20181030; Tribunale di Treviso, 08.01.2019, ITF20190108.

13 Tribunale di Parma, 06.05.2019, ITF20190506.

14 The longstanding debate on the adequateness of nationality or habitual residence as connecting-factors in private international law shall not be repeated here; cf. *Bogdan,* in: Meeusen et al., International family law for the European Union, p. 303 et seq.; *Nishitani,* Recueil des Cours 401 (2019), p. 135 (251 et seq.).

Brussels II bis Regulation) only refers to the spouses' common nationality of a Member State; a third State citizenship remains irrelevant.

In line with this, several court decisions omit any references to the parties' third State nationalities, as their habitual residence in the forum suffices for the purposes of establishing jurisdiction under the applicable EU instrument. For instance, in a divorce case concerning a couple that had married in Albania and filed for divorce in Greece, the parties' nationality was not mentioned in the judgment. Instead, the court only referred to the residence of the parties in Greece.[15] In a similar fashion, Croatian judgments are not descriptive as regards the method applied to establish the parties' habitual residence. In cases where the habitual residence is located in a third State, this is merely declared by the court in its judgment.[16] Similarly, the general jurisdiction rule in matters of parental responsibility (Art. 8 Brussels II bis Regulation) only refers to the child's habitual residence. It is, therefore, irrelevant whether a third country national or an EU national is involved as a parent.[17]

However, it does not appear from the collected case law that courts of the Member States examined in the project systemically differentiate based on EU citizenship or non-EU citizenship when assessing habitual residence, or that they "over-"confirm the establishment of habitual residence in their respective territory with regard to third country nationals. Notably, courts have indeed dismissed actions on the grounds that the parties' habitual residence was located in non-EU countries.[18]

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15 Cf. Kos Single-Member Court of First Instance (Monomeles Protodikeio Ko), 07. 12. 2017, no. 125/2017, ELF20171207. In another case, a couple who had married in Pakistan, divorced in Germany and then sought recognition of the divorce in Greece, whereby the Greek court did not refer to the parties' nationality; cf. Ioannina Single-Member Court of First Instance (Monomeles Protodikeio Ioanninon), 01. 01. 2008, no. 84/2008, ELF20080084.

16 Županijski sud u Zagrebu, 05. 03. 2019, Gž Ob-82/2019, HRS20190305; Županijski sud u Splitu, 24. 08. 2018, Gž Ob-474/2017-2, HRS20180824.

17 For instance, in one parental responsibility case where the Albanian applicant did not possess a residence permit in Greece, the case was adjudicated nonetheless because the court based its jurisdiction on the habitual residence of the child under the Brussels II bis Regulation; cf. Grevena Single-Member Court of First Instance (Monomeles Protodikeio Grevenon), 09. 09. 2013, no. 96/2013, ELF20130909. Similarly, a court in Spain ruled that, in accordance with Art. 3 (d) Maintenance Regulation, it did not have jurisdiction to issue provisional measures concerning a child habitually residing in Ecuador with his mother. The father had applied for such measures taking advantage of the fact that the child was spending his summer vacation in Spain; see Audiencia Provincial de Baleares, 29. 10. 2018, no. 178/2018, ESS20181029.

18 In particular, the French Court of Cassation has repeatedly ruled on the "close connection" in French-American succession cases, in which the last habitual residence of the testator was ultimately denied; see Cour de cassation, 27. 09. 2017, 16-17198, FRT20170927; Cour de cassation, 27. 09. 2017, no. 16-13151, FRT20170927a. For matters of parental responsibil-

Against this backdrop, it is noteworthy that, in a recent Luxembourgish case[19] concerning the recognition of a Chinese divorce decree, the Luxembourgish court gave particular weight to the parties' habitual residence when reviewing the issuing authority's jurisdiction under national recognition rules.[20] Notably, the court held that the habitual residence, and not the parties' (in this case, Chinese) nationality, is to be considered as the predominant connecting-factor under the general principle of "proximity". Thus, the non-EU citizenship was given less weight compared to the connection to Luxembourg as the place of the spouses' common habitual residence.[21] This case shows how the predominant role of habitual residence as the primary jurisdictional ground in the EU regulations on cross-border family cases may influence the assessment of jurisdiction also in cases that fall under national procedural law. This prevalence of the "habitual residence" as a connecting-factor to assess the courts' jurisdiction may be linked to its dynamic nature and its aptitude to prove the settlement of an individual into a specific country. Thus, the underlying EU policy[22] connected to the concept of "habitual residence" aimed at fostering the integration of both EU citizens and third country nationals in the internal market appears to potentially influence the assessment of jurisdiction vis-à-vis third country nationals outside the scope of application of the EU regulations.

c. Forum shopping, access to justice and interest-based deviations from default jurisdiction rules

From the collected case law, it appears that courts rarely deviate from general jurisdiction rules under the EU regulations. As the habitual residence is usually the decisive connecting-factor for the purposes of jurisdiction, the

ity see for instance Audiencia Provincial de Girona, 28.03.2019, no. 57/2019, ESS20190328, in which the Spanish court found that the child's habitual residence was established in Peru, and thus denied its jurisdiction under the Brussels II bis Regulation.

19 Tribunal d'arrondissement de Luxembourg, 09.01.2019, no. 7/2019, LUF20190109; see p. 233.

20 On national procedures for the recognition of foreign judgments, see p. 232 et seq.

21 See also Cour d'appel de Paris, 30.05.2017, no. 16/24111, FRS20170530. In this case concerning parallel proceedings, the Court of Appeal held that the parties' Algerian nationality established only little connection to Algeria, as they had been residing in France for several years before the French courts were seized.

22 On the underlying rationale of the "habitual residence" as connecting-factor in EU private international law see for instance *Lurger,* in: von Hein/Rühl, Kohärenz im Europäischen Internationalen Privat- und Verfahrensrecht, p. 202 (215 et seq.); *Rentsch,* Der gewöhnliche Aufenthalt im System des Europäischen Kollisionsrechts, p. 68 et seq., 77 et seq.

jurisdiction of the forum is easily established. Consequently, courts do not have a particular incentive to adopt a discretionary or flexible approach to deviate from these objective results. [23] Also, for reasons of legal certainty, the hard-and-fast jurisdiction rules of the EU regulations on family law rarely allow courts to deny their jurisdiction on a discretionary basis, i.e., on the grounds that the courts of another State would be better suited to hear the case.[24]

However, parties themselves might try to circumvent the objective jurisdiction rules put forth in the EU regulations. Notably, some divorce cases before French courts involving third country nationals from countries that were formerly under French colonial control highlight a particular tendency of forum shopping. In a divorce case involving French-Algerian dual citizens,[25] the wife started divorce proceedings in France based on the spouses' habitual residence under Art. 3 (1) (a) indent 1 Brussels II bis Regulation. The husband had previously seized a civil court in Algeria, whose jurisdiction was contested by the wife. Subsequently, the French court declined the recognition of the Algerian divorce decision on the grounds of public policy,[26] as the Algerian court had granted the divorce in favor of the husband based on his unilateral action (repudiation). In this regard, the tactic to seek the divorce decree before the Algerian court and subsequently its incidental recognition before the French court circumvented the jurisdiction grounds under the Brussels II bis Regulation.[27] Other cases highlight a tendency of courts to deviate from jurisdiction rules based on considerations of the parties' interests, in particular access to justice within the EU.[28] For instance, in a Luxembourgish divorce case concerning an Egyptian-Luxembourgish couple,[29] it remains unclear on which grounds the Luxembourgish court seized by the

23 However, on the modulations of the criterion of habitual residence in EU family law instruments and its features especially with regard to child abduction cases see *Beaumont/Holliday,* in: Zupan, Private International Law in the Jurisprudence of European Courts – Family at Focus, p. 37–56, highlighting how, in the United Kingdom, the concept of habitual residence of the child has developed from one which used to put weight on parental intention to a mixed model, which takes a more child-centered and fact-based approach.

24 On Art. 15 Brussels II bis Regulation (Art. 12 and 13 Brussels II ter Regulation), which establishes a limited *forum conveniens*-rule according to the best interests of the child, see *Pataut,* in: Malatesta/Bariatti/Pocar, The External Dimension of EC Private International Law in Family and Succession Matters, p. 123 (145 et seq.).

25 Cour d'appel de Paris, 30.05.2017, no. 16/24111, FRS20170530.

26 On this refusal ground, see p. 234.

27 For the development of French jurisprudence on the evasion of law in cross-border divorce cases cf. *Ancel,* in: YPIL 7 (2005), p. 261 et seq.

28 Concerning refugees, see p. 237 et seq.

29 Tribunal d'arrondissement de Luxembourg, 07.01.2016, no. 3/2016, LUF20160107.

wife affirmed its jurisdiction.[30] The underlying motive for the court's approach could have been to grant the wife access to divorce in Luxembourg, as she might not have had equal access to divorce in the United Arab Emirates, where the couple had its last habitual residence.

An area of law in which Member State courts are granted a certain discretionary approach in intra-EU cases is the jurisdiction for parental responsibility cases under the Brussels II bis Regulation. This instrument attributes a significant role to the best interests of the child, which may also impact the determination of, inter alia, jurisdiction.[31] For instance, an Italian court initially and provisionally established its jurisdiction pursuant to Art. 12 Brussels II bis Regulation over a parental responsibility case lodged (together with an action for legal separation) by the husband against the mother, who was habitually resident in Spain with the children. However, in a subsequent judgment, the court ruled that, although its jurisdiction over the case was properly established in accordance with Art. 12 Brussels II bis Regulation, in the case at hand the establishment of its jurisdiction did not satisfy the children's best interest as a result of the highly conflictual relationship between the parents in relation to the children's living arrangements.[32] This conclusion is also reinforced by the fact that the residence of the children would make it difficult – despite the coordination mechanism provided by the Taking of Evidence Regulation – to adopt fast and efficacious decisions. Therefore, the court declined jurisdiction over the application on parental responsibility.

Interestingly, jurisdiction was declined irrespective of the parties' will – at the time of the institution of the proceeding – to let the Italian court decide on parental responsibility. Thus, the ultimately decisive court's assessment of the compatibility of the chosen forum with the child's best interests prevailed over party autonomy. To what extent similar interest-based jurisdictional assessments may be adopted in cases with connections to third States is left to domestic procedural law by the Brussels II bis Regulation and the Brussels II ter Regulation.[33]

30 See p. 221.

31 See e.g. Corte di Cassazione, 30.09.2016, no. 19599, IT:CASS:2016:19599CIV, and 15.06.2017, no. 14878, CASS:2017:14878CIV. The decisions of the Corte di Cassazione, rendered as of 2015, are available at http://www.italgiure.giustizia.it/sncass/ (last consulted 03.06.2020).

32 Tribunale di Roma, 14.06.2019, ITF20190614a.

33 See p. 227 et seq. and 235.

2. The interrelation between EU regulations, domestic procedural law, and international instruments

a. The residual scope of application of national jurisdiction grounds

The interplay of EU and national jurisdiction grounds gives rise to uncertainties in particular with regard to the Brussels II bis Regulation, which grants a residual role to national jurisdiction rules when no court of a Member State has jurisdiction under the Regulation (Art. 6 et seq. and Art. 14 Brussels II bis Regulation). For instance, in a parental responsibility case involving Greek nationals,[34] the grandmother seized a Greek court to have her access rights regulated with regard to her grandchild, who was living in California with the child's mother. The court applied national jurisdiction rules and accepted its jurisdiction on the basis of the parties' Greek nationality. It denied the applicability of the Brussels II Regulation, arguing that there was no international element for the purposes of the Regulation. However, the international element is not restricted to purely intra-EU cases in order for the Regulation to apply.[35] Thus, the court erroneously denied the territorial applicability of the Brussels II bis Regulation.[36]

In the same vein, in third country national-related cases, Croatian courts have applied standards set by the former domestic private international law rules, instead of an EU regulation, on the erroneous assumption that issues related to third country nationals fall outside the scope of application of the Brussels II bis regime.[37] However, in a case relating to Russian citizens who clearly had their habitual residence in Croatia, such a practice of the court of first instance was corrected by the appellate court.[38] In this respect, it should also be borne in mind that third country national cases in Croatia often relate to former Yugoslav countries. Notwithstanding the lack of linguistic barriers, courts still fail to apply private international law standards to such "foreign domestic cases".[39]

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34 Patras Single-Member Court of First Instance (Monomeles Protodikeio Patron), 25.07.2018, no. 526/2018, ELF20180725.

35 *Pataut/Gallant,* in: Magnus/Mankowski, Art. 14 Brussels II bis Regulation note 3; *Pataut,* in: Malatesta/Bariatti/Pocar, The External Dimension of EC Private International Law in Family and Succession Matters, p. 123 (129 et seq.).

36 However, as the child had its habitual residence in the US, Art. 14 Brussels II bis Regulation would have allowed the Greek court in any event to apply national jurisdiction rules.

37 Županijski sud u Splitu, 01.08.2019, Gž Ob-383/2019-2, HRS20190801; Županijski sud u Splitu, 24.08.2018, Gž Ob-474/2017-2, HRS20180824.

38 Županijski sud u Zagrebu, 10.06.2019, Gž Ob-623/19-2, HRS20190610.

39 Općinski sud u Osijeku, 29.11.2018, P Ob-321/2018-6, HRF20181129.

Similarly, the determination of residual jurisdiction in cross-border divorce cases with a connection to third States has given rise to debatable views. In a remarkable judgment, the French Court of Cassation[40] adopted a strict, literal application of the exclusive nature of Art. 6 et seq. Brussels II bis Regulation. The underlying case involved a Belgian-French couple who moved to India in 2012. It was uncontested that the spouses had their first habitual residence in Belgium and afterwards established a new habitual residence in India. In 2013, the wife filed an action for divorce in France during a short stay there, based on the exorbitant jurisdiction rule of the claimant's French nationality.[41] The Court of Cassation denied access to divorce before the French courts based on this exorbitant jurisdiction rule, arguing that the husband's Belgian nationality would "block" this jurisdiction under Art. 6 (b) Brussels II bis Regulation. However, as the jurisdiction grounds of Art. 3 et seq. Brussels II bis Regulation did not establish the competence of the courts of *any* Member State, Art. 7 Brussels II bis Regulation should have been applied to determine the French courts' jurisdiction on the basis of domestic jurisdiction grounds. In fact, the CJEU itself has only ruled that domestic jurisdiction grounds cannot apply if the courts of another Member State have jurisdiction under Art. 3 et seq. Brussels II bis Regulation.[42] With the strict exclusivity as interpreted by the Court of Cassation, the latter oversees the impact of its ruling *in concreto:* It denies access to justice within the EU to nationals of EU Member States who otherwise may only seize a court in their third State of residence (in this case, India).

In order to overcome this denial of justice, scholars have discussed the introduction of a *forum necessitatis,*[43] which, contrary to the Brussels II bis Regulation, has been regulated uniformly in cross-border succession matters (Art. 11 Succession Regulation). Unfortunately, the recast of the Brussels II bis Regulation (Brussels II ter Regulation) will not bring any significant changes

40 Cour de Cassation, 15. 11. 2017, no. 15-16.265, FRT20171115.

41 According to Art. 14 of the French Civil Code (Code Civil), French courts have jurisdiction for actions lodged by a French national against a foreigner, even if the defendant is residing abroad, concerning obligations that the foreign defendant has concluded in France with the French applicant; cf. *Cachard,* Droit international privé, note 59 et seq.

42 CJEU, 29. 11. 2007, C-68/07 (*Sundelind Lopez/Lopez Lizazo*). Similarly, the England and Wales Court of Appeal (Civil Division) had requested a preliminary ruling on whether Art. 4 (1) Brussels I bis Regulation confers a "right to be sued" only at the place of domicile in a Member State and thus permits an anti-suit injunction against a claimant conducting a proceeding in a third State, see CJEU, C-946/19 (*MG*) (the request has meanwhile been withdrawn); *Mandy Gray v. Hamish Hurley* [2019] EWCA Civ 2222.

43 See among others *Antomo,* in: Pfeiffer/Lobach/Rapp, Europäisches Familien- und Erbrecht, p. 13 (24 et seq.); *Kruger/Samyn,* JPIL 12 (2016), 132 (139 et seq.).

to this shortcoming. According to Art. 6 Brussels II ter Regulation, which formally merges Art. 6 and Art. 7 Brussels II bis Regulation, the residual jurisdiction in matters of divorce is still governed by national procedural law to the same extent as under the current legal framework.[44]

Furthermore, the application of national *lis pendens* rules in cases connected to third States may lead to contradictory results, as a court could decline its jurisdiction, even though such jurisdiction was adequately established in accordance with an EU regulation. In a parental responsibility case connected with the United States, an Italian court first concluded that it would be competent under both the Brussels II bis and Maintenance Regulation as the daughter was habitually resident in Italy at the time of the application.[45] However, the court declined jurisdiction by referring to Art. 7 of the Italian PIL Act.[46] As it is known, the EU regulations do not contain rules on *lis pendens* with third States, and the question is still open as to what extent such decline of jurisdiction is permitted in accordance with these instruments.[47] In this framework, it should also be noted that, while commonly sound from an objective and logical standpoint, the criterion of priority that is the foundation of the jurisdictional rule on *lis pendens* may not always be appropriate with respect to cases concerning family matters. This is especially the case with disputes involving minors, where the child's best interest may reasonably justify overriding the criterion of priority in properly establishing jurisdiction over the case.[48]

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44 Cf. *Antomo,* in: Pfeiffer/Lobach/Rapp, Europäisches Familien- und Erbrecht, p. 13 (24 et seq.); *Brosch,* GPR 2020, 179 (181).

45 Tribunale di Milano, 02. 07. 2018, ITF20180702.

46 Legge 31 maggio 1995, n. 218, Riforma del sistema italiano di diritto internazionale privato, Gazzetta Ufficiale della Repubblica italiana n. 128 del 3 giugno 1995, suppl. ord. (Law 31 May 1995 No 218 reforming the Italian System of Private International Law, Italian OJ (suppl.) No 128 of 03. 06. 1995); translation in English available in [1996] 35 ILM 760.

47 The question of ruling on whether jurisdiction grounded on Art. 3 of the Brussels II bis Regulation was exclusive, and thus prevailed over the domestic rule on international *lis pendens* (Art. 7 of the Italian PIL Act) was requested to the Supreme Court, which actually decided the case without directly tackling the merit of the question. See Corte di Cassazione, 22. 12. 2017, no. 30877, ITT20171222. See also p. 240.

48 *Corneloup et al.,* Children on the Move: A Private International Law Perspective, Study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee, PE 583.158, especially para. 1.3.1. On the interface between private international law rules and best interests of the child see especially *Fiorini,* in: Biagioni et al., Migrant Children: Challenges for Public and Private International Law, p. 379 et seq.

b. Delimitating the scope of application of, respectively, EU and international instruments

The framework applicable in the EU for cross-border family and succession cases is marked by a high degree of fragmentation and complexity. Notably, the application of the Brussels II bis Regulation is supplemented by the 1996 Hague Child Abduction Convention and the 1980 Hague Child Abduction Convention. The procedural provisions regulating the order of application and coordination of these instruments are laid down in Art. 60 et seq. Brussels II bis Regulation. National case-law collected within the EUFams II project highlights that the Member States' courts sometimes struggle to correctly identify the scope of application of these instruments.

For instance, in a case concerning the abduction of siblings from a third State to France, the lower courts misinterpreted the geographical scope of the 1980 Hague Child Abduction Convention in combination with the Brussels II bis Regulation. The mother had taken the children from the Democratic Republic of Congo (RDC) to France. She seized the French courts to establish the children's residence at her home in France, claiming that the children had suffered mistreatment in the RDC by their father. The French court of first instance declared itself competent to hear the case and applied French substantive law "given the urgent circumstances". Similarly, the court of appeal applied Art. 3 et seq. 1980 Hague Convention and Art. 11 Brussels II bis Regulation to affirm the violation of the father's custody right. Both courts applied the 1980 Hague Convention, although the State of the child's habitual residence (RDC) is not a party to the Convention. Finally, in its illustrative judgment, the French Court of Cassation[49] held that the lower courts had wrongly applied the Convention and the Brussels II bis Regulation, as the latter can be implemented only in intra-EU child abduction cases. Consequently, neither were French courts competent to hear the case, nor was French law applicable.

In particular, the Court of Cassation addressed the underlying motives of the lower courts to manifestly ignore the geographical scope of the Regulation and the Convention, namely, the urgency of the child abduction case at hand. The lower courts arguably wanted to abide by the "need for speed" in child-abduction cases and to render a judgment as quickly as possible, which is, in principle, in line with the best interests of the child. In addition, as there were no other international rules to exercise jurisdiction, the "urgent" solution adopted by the lower courts may have aimed to close a legal gap by

49 See Cour de cassation, 17.01.2019, no. 18-23.849, FRT20190117.

reverting to a *forum necessitatis*. However, the Court of Cassation clarified that even urgent circumstances do not justify circumventing the correct application of the mentioned instruments.

In a similar vein, the Italian case law collected in the EUFams II database shows that international instruments on private international law are frequently applied without ascertaining whether the other State involved in the case at issue is a contracting party thereto.[50] This may sometimes result in a misapplication of those instruments and suggests a persistent lack of familiarity with the instruments' respective functioning. Furthermore, the current lack of implementation laws after the entry into force (as of 1 January 2016) in Italy of the 1996 Hague Child Protection Convention still gives rise to uncertainties stemming from the reference made in Art. 42 of the Italian PIL Act to the previous 1961 Hague Minors Protection Convention.[51] In particular, the application of Art. 42 of the Italian PIL Act (and, consequently, of the 1961 Hague Convention) does not seem correct in those cases where the other State involved is a contracting State of the 1996 Hague Convention, whose application would have been possible on a direct basis, i.e., without relying on the domestic provision.[52]

The interface between EU and international instruments has also proven wavering for Croatian courts. However, cases of erroneous applications of the Brussels II bis Regulation in relation to parental responsibility for a child residing in Bosnia and Herzegovina, originally reported in the framework of the EUFams I Project,[53] were not reported in the context of the EUFams II Project. Furthermore, evidence shows that Croatian courts have correctly applied the regime of the 2007 Lugano Convention to maintenance issues in a case related to Switzerland, declining their jurisdiction since both spouses and their child, all Croatian nationals, were domiciled in Switzerland.[54]

50 For example, with regard to the application of the 1996 Hague Child Protection Convention in order to determine the law applicable to parental responsibility claims, see e.g. Tribunale di Roma (I civ. div.), 19.05.2017, ITF20170519a; Tribunale di Roma, 07.07.2017, ITF20170707; Tribunale di Aosta, 10.07.2017, ITF20170710; Tribunale di Roma, ITF20170721a; Tribunale di Padova, 14.09.2017, ITF20170914.

51 On this issue, see further *Baruffi,* RDIPP 2016, 977 (980 footnote 10).

52 For an example of this approach see Tribunale di Alessandria, 11.12.2017, ITF20171211.

53 Općinski sud u Dubrovniku, 15.10.2014, Gž 1366/14, CRF20141015.

54 Županijski sud u Splitu, 04.04.2017, Gž ob 703/2016, HRS20170404 (on appeal from Općinski sud u Vukovaru, 04.11.2016, P Ob 393/15, HRF20161104).

III. Recognition of status of third country nationals established abroad

1. General remarks

Problems in accessing information on the personal status of third country nationals are often experienced by courts seized with a cross-border family dispute, as well as by civil status registrars and lawyers dealing with non-judicial applications for separation/divorce in accordance with the national law of some Member States.[55] This issue is all the more crucial since the relevance of statuses validly acquired abroad touches upon core values of legal systems in general, as illustrated by the rich jurisprudence of the ECtHR in this area of the law, in particular with respect to the right to protection of family life.[56] While it is to some degree difficult to elaborate on the actual issues faced by legal practitioners, as these rarely emerge in the reported cases,[57] both formal and informal exchanges with practitioners throughout the Project, and notably by means of the Nationals and the International Exchange Seminars, have proven a valuable source in this regard.

The EU regulations on family matters do not regulate the ascertainment and proving of facts necessary for the establishment of jurisdiction. Thus, it is left to the *lex fori* to decide how and by whom these facts have to be proven, or if courts have to investigate these facts *ex officio.*[58]

In this vein, Luxembourgish courts only take into account the evidence submitted by parties for alleged facts, such as the existence of a habitual residence or the conferral of a particular nationality.[59]

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55 See for instance the Italian Decree Law No. 132 of 12.09.2014, converted into law and amended by Law No. 162 of 10.11.2014.

56 Cf., among others, ECtHR, 06.05.2004, no. 70807/01 (*Hussin/Belgium*); ECtHR, 28.06.2007, no. 76240/01 (*Wagner and J.M.W.L/Luxembourg*); ECtHR, 29.04.2008, no. 18648/04 (*McDonald/France*). See *Kinsch,* in: Liber Amicorum Siehr, p. 259 et seq. See also *Lagarde,* in: Mélanges Mayer, p. 441 et seq.

57 It is of note that courts sometimes also rely on the parties' counsel in order to retrieve information with respect to a person's civil status and the relevant provisions governing these aspects, for instance in Italy; cf. *Baruffi/Fratea/Peraro,* Report on the Italian good practices – EUFam's Project, p. 8.

58 *Mankowski,* in: Magnus/Mankowski, Art. 17 Brussels II bis Regulation note 24, with references.

59 The nationality is, however, primarily relevant for the assessment of the applicable law; cf. Tribunal d'arrondissement de Diekirch, 30.05.2018, no. 131/2018, LUF20180530: Lack of evidence for the husband's Congolese citizenship for the purposes of applying Congolese divorce law under Art. 8 (c) Rome III Regulation, on which the wife's claims were based; Tribunal d'arrondissement de Luxembourg, 09.11.2017, no. 414/2017, LUF20171109: The

Similarly, mindful of the difficulties that may surround proving one's status, some Member States adopt a rather flexible approach when it comes to recognizing status acquired abroad. For instance, Swedish procedural law is based on the principle of free admission and free evaluation of evidence, so that family status can be proved, inter alia, by means of documents that, while per se unreliable, are nevertheless corroborated by witness testimonies. Likewise, in cases in which a previous status change had occurred in a third State, Greek courts have referred to the relevant administrative documents or legal instruments (such as court judgments) without indicating any difficulties of proof, in particular with regard to the incidental question of the validity of marriage in divorce cases.[60] Also manifesting a certain degree of flexibility, amendments were introduced to the Croatian Family Act, providing that a statement given under civil and criminal liability before a notary public or before the registrar is considered an appropriate substitute for the original birth certificate, such a document being a necessary requirement to validly contract marriage in Croatia.[61]

Therefore, it appears that, with regard to proving certain legal status changes formed abroad at the stage of incidental recognition, some courts do not apply the established formal procedures, i.e., the assessment of a substantive fact via the applicable conflict of laws rules or the recognition of judgments. On the other hand, the latter procedure shows noteworthy particularities with respect to third State judgments, as will be discussed in the following section.

2. Examples of domestic recognition procedures and national refusal grounds

The recognition and enforcement of judgments from third States do not fall within the scope of the EU regulations on family and succession matters; thus, they remain a matter of domestic procedural law or bilateral and

applicant (the wife) could not bring evidence for the husband's Iranian nationality, so that the *lex fori* was applied pursuant to Art. 8 (d) Rome III Regulation.

60 See for instance Athens Single-Member Court of First Instance (Monomeles Protodikeio Athinon), 01.01.2017, No. 2362/2017, ELF20172362 (marriage concluded in Egypt); Larissa Single-Member Court of First Instance (Monomeles Protodikeio Larissis), 01.01.2018, No. 229/2018, ELF20180101 (marriage concluded in California); Lamia Single-Member Court of First Instance (Monomeles Protodikeio Lamias), 06.05.2019, No. 79/2019, ELF20190506, and Grevena Single-Member Court of First Instance (Monomeles Protodikeio Grevenon), 09.09.2013, No. 96/2013, ELF20130909 (marriage concluded in Albania).

61 See the Croatian Family Act (Official Gazette, 103/15).

multilateral treaties. Even though the uniform rules on recognition and enforcement of the EU regulations explicitly, yet limitedly, take into consideration third State judgments insofar as the irreconcilability with an earlier third State judgment represents a common ground for non-recognition of a later judgment issued by a Member State court,[62] the application of these refusal grounds does not emerge in the collected case-law.

As will be shown below, national recognition rules often imply a review of the court of origin's jurisdiction or the application of the substantive public policy exception. The application of these provisions is a distinctive feature compared to the recognition of intra-EU judgments. These latter judgments are subject to the restrictive use of refusal grounds under the EU regulations,[63] which exclude the review of the court of origin's jurisdiction in light of mutual trust and the principle of the free circulation of judgments within the EU. The consequence of these diverse recognition systems is that the validity of a non-EU judgment is not uniformly secured in the Member States. Consequently, status changes established in a third State might lead to "limping" situations, thus creating avenues of legal uncertainty.[64]

In a case concerning a Chinese-Luxembourgish couple living in Luxembourg, one of the spouses sought the recognition of a divorce declaration issued by a Chinese notary.[65] The Luxembourgish court implicitly considered the divorce declaration to be a judgment, as it applied the standard test foreseen by the French-inspired Luxembourgish jurisprudence for the recognition of judgments from third States; notably, it examined the Chinese notary's competence in light of the principle of "proximity". [66] The court refused to grant recognition to the Chinese divorce declaration, stating that the connection (*lien de rattachement*) to Luxembourg was more substantial compared to the connection to the forum in China following the husband's Chinese nationality. The latter was the only connecting-factor that could have

62 See Art. 22 (d), 23 (f) Brussels II bis Regulation, Art. 24 (d) Maintenance Regulation, Art. 37 (d) Matrimonial Property Regimes Regulation, Art. 37 (d) Registered Partnerships Regulation, Art. 40 (d) Succession Regulation.

63 For instance, several cases highlight the strict application of refusal grounds under the Maintenance Regulation in Luxembourg and France; cf. Tribunal de paix de Luxembourg, 19.10.2017, no. 3427/2017, LUF20171019; Cour d'appel de Toulouse, 10.01.2017, no. 15/06267, FRS20170110; Cour d'appel de Paris, 14.05.2019, no. 17/06490, FRS20190514.

64 Cf. *Antomo,* in: Pfeiffer/Lobach/Rapp, Europäisches Familien- und Erbrecht, p. 13 (56).

65 Tribunal d'arrondissement de Luxembourg, 09.01.2019, no. 7/2019, LUF20190109.

66 Next to this review of the court of origin's jurisdiction, Luxembourgish courts review the third country judgment's compliance with both substantive and procedural public policy, the absence of a fraudulent evasion of law, and the absence of irreconcilability with a Luxembourgish judgement; cf. Tribunal d'arrondissement de Luxembourg, 27.03.2019, no. 177266, Journal des tribunaux Luxembourg, 2019/64, 84 et seq.

testified a close link to China and, therefore, could have established the notary's competence.

Given the historical link between France and Northern African countries, the recognition of judgments between these jurisdictions is a regular pattern in cross-border divorce cases before French courts. In particular, the recognition of third State divorce orders is often discussed in light of the public policy exception.[67] This refusal ground is usually laid down in bilateral conventions, for instance, in Art. 1 (d) of the French-Algerian Convention on Exequatur and Extradition of 1964,[68] which regulates the continuity of personal status between the two countries. French courts have refused the recognition of Algerian divorce orders based on the unilateral repudiation by the husband, arguing that it discriminates against the wife and thus violates public policy.[69]

In keeping with the above, a Spanish court refused recognition of a Moroccan divorce decree on the grounds that it conflicted with the Spanish substantive *ordre public,* to the extent that it denied particular economic rights to the wife merely because she was the applicant in the divorce proceedings. The recognition was denied in accordance with the Convention between Spain and Morocco on judicial assistance in civil, commercial and administrative matters of 1997, whose Art. 23 (4) includes a public policy exception to the mutual recognition of judgments.[70] In addition, the Moroccan court had based its jurisdiction on the presumption that both spouses were still living in Morocco, although they had been living in Spain with their children for more than 15 years. Conversely, the Spanish court exercised its jurisdiction, in accordance with the relevant EU regulations, based on the parties' habitual residence in Spain.[71]

The recognition of divorce judgments issued in third States is usually sought incidentally before the court of a Member State where divorce

67 Cf. on the respective case law of the French Court of Cassation *Ancel*, in: YPIL 7 (2005), p. 261 et seq.

68 Convention entre la France et l'Algérie relative à l'exequatur et à l'extradition et de l'échange de lettres complétant le protocole judiciaire signés le 27 août 1964, French OJ, 17.08.1965, p. 7269.

69 See for instance Cour d'appel de Paris, 30.05.2017, no. 16/24111, FRS20170530. However, the court did not clearly state whether this assessment has to be done *in concreto* or *in abstracto,* a distinction that is also highly debated within the Rome III Regulation; cf. on Art. 10 Rome III Regulation *Sonnentag,* in: Pfeiffer/Lobach/Rapp, Europäisches Familien- und Erbrecht, p. 61 (64 et seq.).

70 Convenio de cooperación judicial en materia civil, mercantil y administrativa entre España y Marruecos, Boletín Oficial del Estado 151, 25.06.1999.

71 See Audiencia Provincial de Barcelona, 26.02.2019, no. 135/2019, ESS20190226.

proceedings are pending. This situation is often the result of formerly having parallel proceedings in the Member State and the third State in question.[72] The coordination of such parallel proceedings is a significant point of concern in the current EU framework. Unlike Art. 33 Brussels I bis Regulation, the Brussels II bis Regulation does not put forth any particular provision for this situation. If both proceedings are being conducted, the typical approach of the party who seized the third State court is to obtain a judgment quickly and to seek its incidental recognition in the Member State. If the recognition is denied, conflicting decisions may follow, thus creating limping legal situations. In this regard, even if Art. 22 (d) Brussels II bis Regulation puts forth a ground for "blocking" the recognition of a judgment from a Member State if it is irreconcilable with an earlier judgment from a third State, incompatible judgments resulting from *lis alibi pendens* with regard to third States cannot be consistently avoided, as this refusal ground only applies in particular circumstances. It is therefore regrettable that the European legislator has not taken the recast of the Brussels II bis Regulation as an occasion to provide uniform guidance for coordinating *lis alibi pendens* with regard to third States in the Brussels II ter Regulation.[73]

IV. Procedural aspects of cross-border family cases involving refugees

1. General remarks

The application of the EU regulations in family matters, and in particular of the Brussels II bis Regulation, is not limited to relations that find their origin and development within the family. On the contrary, it encompasses any measures taken to protect minors, including with respect to minors that

72 See Cour d'appel de Paris, 30.05.2017, no. 16/24111, FRS20170530: The husband obtained a divorce order before the Algerian court, which was seized second, and requested its incidental recognition before the French court; Tribunal d'arrondissement de Luxembourg, 22.01.2015, no. 49/2015, LUF20150122: The Serbian court, which was seized second, was first to render a judgment. The husband then sought the incidental recognition of the divorce judgment in Luxembourg.

73 Cf. on this criticism *Antomo,* in: Pfeiffer/Lobach/Rapp, Europäisches Familien- und Erbrecht, p. 13 (55); with regard to the Brussels II bis Regulation, see *Borrás,* in: Malatesta/Bariatti/Pocar, The External Dimension of EC Private International Law in Family and Succession Matters, p. 99 (106, 109); *Vitellino,* in: Malatesta/Bariatti/Pocar, The External Dimension of EC Private International Law in Family and Succession Matters, p. 221 (246 et seq).

were forced to leave their country of origin, such as asylum-seekers and refugees.[74]

The refugee crisis of 2015 and the interconnected migration flows do not appear to have majorly affected the application of the EU regulations in family matters with regard to procedural aspects in the selected jurisdictions. However, from the case law research conducted within the EUFams II Project, some conclusions can be drawn. For instance, it appears that family and succession law cases involving parties from third States such as Syria and Afghanistan have slightly increased in France and Germany since the beginning of the refugee crisis in the last decade. This increase mainly concerns divorce cases and matters of parental responsibility involving nationals from the abovementioned third States.[75]

The legal environment surrounding the refugee crisis is at times characterized by a degree of flexibility, stemming from the fact that especially for an individual who is seeking or was granted refugee status, proving one's status abroad can be particularly cumbersome. Being aware of this, some Member States have adopted a more flexible regime in this area of the law. For instance, the Swedish Supreme Administrative Court has further increased the ductility of Swedish laws in this area by ruling that, with regard to applications for refugee status, authorities are not expected to carry out a close examination of the information to be entered into the civil register.[76] Rather, they should begin their inquiry from the facts that are easily established and, only when the information is deficient or unclear, registration of the fact should not take place. In this context, however, it must be pointed out that the registration or refusal of registration in the population register is not binding on the general courts dealing with civil disputes, such as those concerning inheritance or maintenance. However, such administrative documents may be submitted as evidence in family proceedings before civil courts.[77]

74 *Honorati,* RDIPP 2019, 691 (698).

75 See for instance Tribunal de grande instance de Paris, 24.02.2017, no. 16/40145, FRF20170224; Tribunal de grande instance de Paris, 03.03.2017, no. 16/43580, FRF20170303; Amtsgericht Hameln, 27.02.2017, 31 F 34/17 EASO, DEF20170227.

76 Supreme Administrative Court, 03.07.2000, RÅ 2000 N 122, SES20000703.

77 See p. 231 et seq.

2. Assessment of the habitual residence of refugees

In general, no systemic difficulties concerning the establishment of jurisdiction in a Member State in proceedings involving refugees have been identified in the collected case law. Arguably, migrants or refugees bring their legal disputes to court after they have factually stayed in a particular Member State for a certain period. As a result, their habitual residence will likely be established in the forum at the time the court is seized. Once the habitual residence of refugees and migrants is established in a certain Member State, their third State nationality or their statelessness is only of secondary relevance for the purposes of international jurisdiction under the EU regulations in family matters, as the primary connecting-factor therein is the parties' habitual residence in the EU.[78]

However, pending or closed asylum proceedings may be relevant for the assessment of the habitual residence of migrants and refugees. For instance, in a case concerning Iraqi spouses who first lived in Iraq after their marriage and then filed a request for international protection in Luxembourg in 2016, the wife filed a petition for divorce only three months after their arrival in Luxembourg.[79] The husband challenged the jurisdiction of the Luxembourgish court, arguing that the couple was not habitually resident in Luxembourg. The court held that the spouses' request for international protection expressed their intention to stay in Luxembourg on a regular or permanent basis. In this regard, the court primarily applied a subjective element, i.e., the *animus manendi.*[80] It did not give further attention to the (objective) elements that the asylum proceedings were still ongoing at the time the wife seized the court, or to the short amount of time spent in the forum. Also, it did not consider to what extent the parties were already integrated or would become integrated in Luxembourg in the future. Given that the notion of "habitual residence" implies a certain stability or regular presence in a specific place, it is doubtful whether such a rash evaluation of the claimant's habitual residence can suffice.[81] The reason for such a brief, arguably result-oriented assessment

78 See p. 221 et seq.

79 Tribunal d'arrondissement de Luxembourg, 13. 10. 2016, no. 397/2016, LUF20161013.

80 The court referred to *Borrás,* Explanatory Report on the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters, p. 38, which explicitly refers to the "intention" of a person to establish "the permanent or habitual centre of his interests". On the consideration of the *animus manendi,* see further *Weller,* in: Leible/Unberath, Brauchen wir eine Rom 0-Verordnung?, p. 293 (314 et seq.).

81 While it may be possible that a person acquires a new habitual residence in a short period of time, all other circumstances of the case should be assessed as well, cf. *Limante,* JPIL 14 (2018), 160 (171 et seq.).

might have been to protect the wife by granting her straightforward access to justice in Luxembourg.[82]

Similarly, in a case adjudicated in 1995 the Swedish Supreme Court already exhibited remarkable flexibility in a case involving a Croatian asylum seeker's application for divorce in Sweden. Notably, the Supreme Court found that the applicant had her habitual residence in Sweden due, inter alia, to her "strong legal interest" to have her action adjudicated in Sweden. This allowed Swedish courts to have jurisdiction over her action for divorce, in accordance with the Swedish private international law rules at that time.[83]

Contrary to the jurisprudence mentioned above, case law from other jurisdictions supports the argument that the "habitual" nature of the residence of an asylum seeker cannot usually be established until asylum is granted. Such a more "objective" approach has been observed with regard to German courts and, in particular, to the weight given to asylum proceedings for the assessment of the habitual residence of refugees. For instance, in a parental responsibility case concerning Syrian nationals,[84] the German court argued rather broadly that refugee status does not imply that the parties actually intended to stay in Germany indefinitely, since refugees usually aim to return to their home country, once the reasons that led them to flee their country of origin were resolved. The court also referred to the temporal limitation of the residence permit to indicate that their stay would only be temporary.[85] This assessment appears to be too abstract for conclusively proving or denying the parties' habitual residence in this specific case.

These examples show that Member States' courts do not appear to follow a consistent approach of granting access to a court to refugees and migrants under the EU regulations in family matters. This finding is in line with the longstanding debate on the exact content and interpretation of the concept of "habitual residence", notably with regard to the role to be attached (if any) to the intent of the parties to establish their habitual residence in a particular

82 If the habitual residence in Luxembourg were denied, none of the Regulation's jurisdictional grounds would have applied, thus leaving the establishment of the courts' jurisdiction to national jurisdiction rules via Art. 7 Brussels II bis Regulation.

83 Swedish Supreme Court (Högsta domstolen), 11.04.1995, SET19950411. While this judgment is quite dated, it is nevertheless understood to reflect the law to date, as inferred from the Comparative Report on Third Country Nationals prepared by the Swedish partners (unpublished), especially p. 3.

84 Amtsgericht Hameln, 27.02.2017, 31 F 34/17 EASO, DEF20170227.

85 Similarly, in a case concerning a Gambian national, the court denied the need for appointing a legal guardian, arguing that the person concerned would not have any apparent reason to be granted asylum in Germany and would thus not be permitted to stay long-term in Germany, see Oberlandesgericht Koblenz, 14.02.2017, 13 UF 32/17, DES20170214.

Member State. In order to achieve a more uniform and consistent assessment of the habitual residence of such individuals across the EU, the comparative review of national case-law of Member State courts provides a valuable starting point for identifying common trends and best practices, and should thus be conducted further.[86]

V. Conclusions

Analyzing the interface of private international and procedural law with situations that involve connections with third States is of the essence to promote a uniform and effective regulation of family and succession matters in pursuance of the free movement of persons in the EU. The importance of this analysis is reaffirmed by the increasing migration flows from third countries and by the refugee crisis that the EU Member States are experiencing to date.

In examining the impact of procedural aspects in cases involving third country nationals on the objectives of predictability, effectiveness and harmonized solutions in EU family and succession law, this contribution has identified areas that may prove to be a source of inconsistency and uncertainty. These shortcomings may be traced back to the high degree of fragmentation and complexity that arises from the variety of the existing instruments and the inherent nuances in the legislation that these instruments put forth. However, this contribution has concurrently identified aspects that are worthy of appreciation.

Against this background, common trends and specific issues in the treatment of disputes having connections with third States were identified, in particular with regard to jurisdiction, including the coordination of parallel proceedings, as well as the recognition of statuses abroad.

In the context of jurisdiction, the concept of habitual residence appears to efficiently symbolize the integration of individuals in the social and legal fabric of the Member States, in pursuance of legal predictability and flexibility. This seems to operate successfully, and without any particular discriminations, also with regard to the assessment of jurisdiction vis-à-vis third country nationals.[87] However, a degree of uncertainty arises pertaining to the correct understanding of the scope of application of the EU and interna-

86 See for instance on the establishment of the habitual residence of adults under the Brussels II bis Regulation *Limante,* JPIL 14 (2018), 160 (168 et seq.) and in particular on the habitual residence of refugees *Budzikiewicz*, in: Budzikiewicz et al., Migration und IPR, p. 95 (110 et seq.).

87 See p. 222.

tional instruments in family law matters, namely the proper interpretation of what constitutes an international element to establish the territorial and personal scope of application of such instruments. Especially with regard to cases connected with third States, the delicate nature of the matters adjudicated in family law disputes suggests the need to reconsider some legislative choices on jurisdiction (as is the case of a *forum necessitatis* in matters of legal separation and divorce) to ensure proper access to justice.[88]

The lack of clarity and harmonization with regard to cases of *lis pendens* with third States is also a potential source of unpredictability that is worthy of attention. On the one hand, it leaves open the question to what extent Member State courts may decline jurisdiction. On the other hand, it creates the premises for inconsistent treatments of the same matter in different States, to the detriment of legal certainty. Finally, it bears an impact on the circulation of judgments in the Member States. As this contribution suggests, this issue is all the more crucial and should be specifically addressed, in light of how inconsistent judgments, especially in family matters, can concretely and negatively affect an individual's life.

Yet, the flexible approach that Member States seem to have adopted with regard to the recognition of statuses formed abroad, especially in a context as difficult and challenging as that faced by refugees, appears to be indicative of adaptation skills and awareness. As such, it should be welcomed as a means to pursue legal fairness and to enhance access to justice.

Overall, the existing lacunae and open questions that were identified with respect to cases connected with third States, and especially the questions arising from the dubious understanding and interpretation of courts of the scope of application of the relevant instruments in family law matters, highlights the core importance of legal education and judicial training. In this area, efforts should be ensured and increased to foster predictability and legal certainty, and education and training should be made available to legal practitioners and the judiciary alike.[89]

88 See p. 227 et seq.

89 In this regard, see also *Župan et al.,* in this volume. With respect to the recently established enhanced cooperation in matrimonial property regimes and property regimes for registered partnerships, see *Mariottini,* in: Brosch/Mariottini, EUFams II – Report on the International Exchange Seminar, especially D.II.4.

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