Rule on Choice-of-Court Agreements in the light of the proposals to review the Brussels II*a* Regulation

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Art. 12 of the Brussels II*a* Regulation provides for a rule on the prorogation of jurisdiction concerning parental responsibility. The aim of the provision is not only to ensure legal certainty and predictability, but also to allow consolidation of proceedings and to reduce the costs, which may be caused by simultaneous proceedings in different Member States.[1] The prorogation of jurisdiction does not represent an exclusive ground of jurisdiction, which would produce the negative effect of depriving the jurisdiction of all other Member States court under the Brussels II*a* Regulation.[2] The discretionary power of the Member State court when evaluating the best interest of the child suggests non-exclusivity,[3] flexibility, and non-binding effect[4] on the prorogued Member State court.

Rule on choice-of-court agreements in parental responsibility matters was for the first time introduced in Art. 3(2) of the Brussels II Convention[5], inspired by Art. 10(1) of the 1996 Hague Convention on parental responsibility and protection of children.[6] In contrast to the Brussels II Convention and the Brussels II Regulation,[7] Art. 12(3) of the Brussels II*a* Regulation guarantees the non-discriminatory treatment of both marital children and children born out of the marriage.[8] In 2016 the Commission presented the Proposal, which suggested

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[1] E. PATAUT, E. GALLANT, *Article 12*, in U. MAGNUS, P. MANKOWSKI,(eds), Brussels IIbis Regulation: 2017, European Commentaries on Private International Law, Otto Schmidt, Sellier European Law Publishers, 2017, p. 151; C. GONZÁLES BEILFUSS, *Prorogation of Jurisdiction*, in C. HONORATI (ed), Jurisdiction in Matrimonial Matters, Parental Responsibility and International Abduction: A Handbook on the Application of Brussels II-*a* Regulation in National Courts, Giappichelli, 2017, p. 186.

[2] C. GONZÁLES BEILFUSS, *Prorogation of Jurisdiction*, *op. cit.*, p. 187, 195. See also General Approach, where once the parties have accepted the jurisdiction expressly in the course of the proceedings, such jurisdiction shall be exclusive.

[3] E. PATAUT, E. GALLANT, *Article 12*, in Brussels IIbis Regulation: 2017, *op. cit.*, p. 153.

[4] C. GONZÁLES BEILFUSS, *Prorogation of Jurisdiction*, *op. cit.*, p. 194.

[5] Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters - Declaration, annexed to the minutes of the Council, adopted during the Justice and Home Affairs Council on 28 and 29 May 1998 when drawing up the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters, OJ C 221, 16 July 1998, ("Brussels II Convention").

[6] Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children of 19 October 1996.

[7] Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ L 160, 30 June 2000.

[8] ECJ, Case C-656/13, *L v. M*, 12 November 2014, ECLI:EU:C:2014:2364, par. 50.

minor modifications regarding the text of Art. 12 of the Brussels II*a* Regulation,[9] taking into the consideration interpretation provided by the ECJ.[10] However, in December 2018, the Council of the EU has reached General Approach concerning the Commission Proposal, where the rule on choice-of-court seems to be significantly changed.[11]

In the first place, it is necessary to pay attention to a new wording of Art. 10a of General Approach, which modifies the structure of Art. 12 of the Brussels II*a* Regulation and abolishes the distinction between "two types" of choice-of-court. Art. 12(1) of the Brussels II*a* Regulation allows concentration of parental responsibility proceedings with divorce, separation, or marriage annulment proceedings and Art. 12(3) lays down the rule on the prorogation of jurisdiction in proceedings other than those referred to in paragraph 1. It was discussed whether the latter paragraph should enable concentration of the proceedings other than the proceedings concerning divorce, separation, or marriage annulment,[12] or, if this provision permits seizing a Member State court in the autonomous proceedings.[13] According to ECJ in case C-656/13, only the interpretation, allowing the application of Art. 12(3) of the Brussels II*a* Regulation even where no other proceedings are pending before the court chosen, guarantees that the objectives pursued by the Brussels II*a* Regulation are respected.[14] Art. 10(3) of the Commission's Proposal eliminates any doubts in this regards by removing the wording in the text "*proceedings other than those referred to in paragraph 1*". Even more, as indicated above, the text of new Art. 10a of the General Approach unifies two rules on choice-of-court by providing that the courts of a Member State shall have jurisdiction where (i) the child has a substantial connection with that Member State, (ii) the parties and any other holder of parental responsibility have agreed (accepted) upon the jurisdiction; and (iii) exercise of jurisdiction is in the best interests of the child. According to General Approach, the possibility of concentration of jurisdiction in divorce, separation, or marriage annulment

[9] Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), COM/2016/0411 final, 30 June 2016 ("Commission's Proposal").

[10] See for example, ECJ, Case C-436/13, *E. v. B.*, 1 October 2014, ECLI:EU:C:2014:2246 as to the limitation of time concerning the effects of the agreement according to Article 12(3) of the Brussels IIa Regulation; Case C-656/13, *L v. M* as to autonomous proceedings according to Article 12(3) of the Brussels IIa Regulation.

[11] The Presidency of the Council of the European Union, 14784/18, 2016/0190(CNS), 30 November 2018 ("General Approach").

[12] On this strict interpretation see B. ANCEL, H. MUIR WATT, *L'intérêt supérieur de l'enfant dans le concert des jurisdictions: Le Règlement de Bruxelles II Bis*, Revue critique de droit international privé, (2005), p. 588, where this provision should serve as an extension of other proceedings which based jurisdiction on Article 7 of the Brussels II*a* Regulation (residual basis). Other interpretations would lead to the threat of operation of Article 15 of the Brussels II*a* Regulation.

[13] On the interpretation supporting extensive interpretation see E. GALLANT, *Responsabilité parentale et protection des enfants en droit international*, Defrenois, 2004, p. 132.

[14] ECJ, Case C-656/13, *L v. M*, par. 45, 47, 50.

upon fulfilment of specific requirements, as provided in Art. 12(1) of the Brussels IIa Regulation, remains still possible in virtue of new Recital.[15] In other words, pending divorce, separation, or marriage annulment proceedings would not represent a special type of jurisdiction agreement, but each of the jurisdictional grounds listed in Art. 3 of the Brussels II*a* Regulation may be perceived as a substitution for the condition of the substantial connection.[16] However, due to a sharp critique of Art. 3 of the Brussels II*a* Regulation, which opens the door for abusive procedural tactics,[17] such substantial connection may still leave an inevitable question. Moreover, although new Art. 10a(1)(a) of General Approach maintains *status quo* as to the non-exhaustive list of substantial connections, it encompasses expressly another factor which could be newly taken into consideration: former habitual residence of the child.

In the second place, attention must be drawn to subjects to the agreement. Art. 12(1) of the Brussels II*a* Regulation requires an agreement between the spouses (where at least one of the spouses must have parental responsibility in relation to the child), which are parties to

[15] See new Recital in the General Approach, which should be added: "*Under specific conditions laid down by this Regulation, jurisdiction in matters of parental responsibility might also be established in a Member State where proceedings for divorce, legal separation or marriage annulment are pending between the parents, or in another Member State with which the child has a substantial connection and which the parties have either agreed upon in advance, at the latest at the time the court is seised, or accepted expressly in the course of those proceedings, where the law of that Member State so provides, even if the child is not habitually resident in that Member State, provided that the exercise of such jurisdiction is in the best interests of the child*." The concentration of jurisdiction is convenient mainly in the Member States, where it is common that the court deciding over divorce, legal separation, or marriage annulment of the spouses has jurisdiction to decide over the parental responsibility too, for example, in Slovakia. According to the Slovak law, matters relating to divorce, maintenance, and parental responsibility must be decided in unique proceedings (Article 24, par. 1 of the Act No 36/2005 Coll. on Family law and Article 100 of Act No 161/2015 on Civil Procedure). By virtue of EU legal instruments in family matters prevailing over the national law rules, the Slovak courts are often obliged to exclude certain matters (parental responsibility, maintenance etc.) from a single hearing although separation of proceedings from unique family proceedings is in not known to Slovak law. The case law demonstrates that the national courts still face with the problems regarding the "division" of the proceedings in divorce and parental responsibility. See for example *Krajský súd Bratislava*, 30 September 2011, 5 Co 414/2011.

[16] On the similar conclusion already as to Article 12(1) of the Brussels IIa Regulation see E. PATAUT, E. GALLANT, *Article 12*, in Brussels IIbis Regulation: 2017, *op. cit.*, p. 155.

[17] See *Agata Rapisarda v Ivan Colladon* [2014] EWFC 35. This English case concerned 180 cases of fraudulent forum shopping. A party in each case utilised the same address in the UK owned by an Italian company in order to obtain jurisdiction for divorce in England. All the divorces were declared void. See also *CC v NC* [2014] EWHC 703 (Fam); *Wai FoonTan v Weng Kean Choy* [2014] EWCA Civ 251; *W Husband v W Wife* [2010] EWHC 1843 (Fam); *E v E* [2015] EWHC 3742 (Fam); *EA v AP* [2013] EWHC 2344 (Fam). On the forum shopping in family matters see: ECJ, Case C-168/08, *Laszlo Hadadi (Hadady) v Csilla Marta Mesko, épouse Hadadi (Hadady)*, 16 July 2009, ECLI:EU:C:2009:474, par. 57; M. NÍ SHÚILLEABHÁIN, *Cross-border divorce law. Brussels II bis*, Oxford University Press, 2010, pp. 149; J. MEEUSEN, *System shopping in European private international law in family matters*, in J. MEEUSEN, M. PERTEGAS, G. STRAETMANS, F. SWENNEN (eds), International Family Law for the European Union, Intersentia, 2007, pp. 239; N. DENTHLOFF, *Arguments for the Unification and Harmonisation of Family Law in Europe*, in K. BOELE-WOELKI, Perspectives for the Unification and Harmonisation of Family Law in Europe, Intersentia, 2003, p. 51. On the possibility of *forum shopping* which should be resolved by the new regulation see: See A. BORRÁS, *From Brussels II to Brussels II bis and Further*, in K. BOELE-WOELKI, C. GONZÁLEZ BEILFUSS (eds), Brussels II bis: Its Impact and Application in the Member States European Family Law Series No 14, Intersentia, 2007, p 8.

divorce, separation, or marriage annulment proceedings according to Art. 3 of the Brussels II*a* Regulation. Where one of the holders of the parental responsibility is not subject to the proceedings according to Art. 3, the provision requires an additional agreement also with a holder of the parental responsibility.[18] Contrarily, Art. 12(3) of the Brussels II*a* Regulation provides that the jurisdiction of the Member State courts must be accepted expressly or otherwise by all the parties to the proceedings. Who is party to the proceedings should be determined by the national law.[19] General Approach introduces a mix of these two paragraphs regarding subjects to such agreement: the parties, as well as any other holder of parental responsibility, must agree (or accept) upon the jurisdiction. In consequence, such parties may be spouses of the proceedings according to Art. 3 of the Brussels II*a* Regulation, or parties different to spouses in other proceedings, who would be determined by the national law.

The most significant doubts in the context of Art. 12 of the Brussels II*a* Regulation concern the question regarding (i) time of seising a Member State court, *i.e.*, whether the parties are able to agree on a Member State court prior to the institution of proceedings or after the commencement of the proceedings;[20] and (ii) acceptance made "otherwise in an unequivocal manner", *i.e.,* if it covers tacit acceptance and submission by appearance.[21] Art. 10 of the

[18] However, certain linguistic versions suggest that is necessary either the agreement between the spouses or the agreement between the holders of parental responsibility (Spanish and German versions). On the other hand, other linguistic versions provide for the wording "and", where both agreements are required (English, French, and Italian versions). The Proposal for a Recast of the Brussels II*a* Regulation, as well as other subsequent proposals of the European Parliament, do not offer any answer - the linguistic versions are still different (compare English, French, and Italian version with German and Spanish versions).

[19] C. GONZÁLES BEILFUSS, *Prorogation of Jurisdiction*, *op. cit.*, p. 191. See also ECJ, Case C-565/16, *Alessandro Saponaro and Kalliopi-Chloi Xylina*, 19 April 2018, ECLI:EU:C:2018:265, par. 26. The ECJ, referring to the Opinion of Advocate General Tanchev, decided that a prosecutor who, according to the national law, has the capacity of a party to the proceedings commenced by the parents, is a party to the proceedings within the meaning of Article 12(3)(b) of the Brussels IIa Regulation, since the "*EU legislature thus took care to use a term that encompassed all the parties to the proceedings, within the meaning of national law*".

[20] Article 12 of the Brussels IIa Regulation provides that the parties need to agree on a Member State court at the time the court is seized. According to Article 16 of the Brussels IIa Regulation, a Member State court shall be deemed to be seized at the time when the document instituting the proceedings is lodged with the court. The English case, *I (A Child),* [2009] UKSC 10, [35], has demonstrated the difficulties with the interpretation of the English version (as well as with the Italian, Spanish and French versions) of the wording "at the time is seized", in particular if it can be interpreted as that the jurisdiction of the courts has been accepted at any time after the proceedings had begun. It was concluded that: *"…the diversity of views expressed by this court indicates that the interpretation is not acte clair and may have to be the subject of a reference to the European Court of Justice in another case. But I would favour an interpretation which catered both for a binding acceptance before the proceedings began and for an unequivocal acceptance once they had begun*."

[21] The ECJ has tackled the issue in several judgments. It can be deduced from the ECJ case-law that: a) The acceptance cannot be limited to the "time when the document instituting the proceedings is lodged with the court" by virtue of Article 16 of Brussels II*a* Regulation, but it covers party's conduct that took place later, see ECJ, Case C-656/13, *L v. M*, par. 19, 21, 28; Case C-565/16, *Alessandro Saponaro*, Opinion of Advocate General Tanchev, par. 60; b) By analogy it is possible to make a reference to Article 24 of the Brussels I Regulation (Article 26 of the Brussels I*bis* Regulation) determining the tacit prorogation see case C-215/15, *Vasilka Ivanova Gogova v Ilia Dimitrov Iliev*, 21 October 2015, ECLI:EU:C:2015:710, par. 42; c) The agreement of the party may be regarded as implicit in the absence of opposition after the date on which the court

Commission Proposal reacts to this doubt by providing that the jurisdiction of Member State court must be accepted "*at the latest the court is seized, or, where the law of that Member State so provides, during those proceedings*". In a case, where the jurisdiction is accepted during the proceedings, the agreement must be recorded in court in accordance with its national law.[22] The question is whether the wording "to be recorded" implies tacit prorogation where entering into proceedings without contesting jurisdiction may be merely recorded in any form in accordance with the law of the seized Member State court, or if a specific agreement by the parties registered in front of the Member State court would be necessary. General Approach even more, clarifies this problem by specifying that (i) the agreement should be made at the latest at the time the court is seised; or (ii) *express* acceptance of the jurisdiction is required in the course of those proceedings, which must be expressed in writing, dated and signed or included in the court record in accordance with national law and procedure, whereby all the parties must be informed of their right not to accept the jurisdiction. It appears that the General Approach rejects any possibility of assuming jurisdiction on the basis of submission by entering an appearance. Conversely, paragraph 1a enjoys a legal presumption of implicit agreement in case of absence of the opposition of a person who became a party to the proceedings after the court was seized as already interpreted by the ECJ in case C-565/16, *Alessandro Saponaro.*[23]

However, a problem regarding *ex ante* agreement for parental responsibility may still arise, where the parties may agree on the jurisdiction of a court, which will have jurisdiction for divorce, separation, or marriage annulment according to Art. 3 of the Brussels II*a* Regulation. Although this agreement may benefit the parties who wish to concentrate the proceedings relating to divorce, separation, or marriage annulment with the proceedings relating parental responsibility, due to the absence of a rule on choice-of-court relative to divorce, separation, or marriage annulment,[24] it creates impossibility to predict which court will assume jurisdiction. It may, even more, encourage a "rush to court".[25]

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was seized, whereby opposition precludes the acceptance of the prorogation of jurisdiction, see case C-565/16, *Alessandro Saponaro*, par. 32.

[22] See C. HONORATI, *La proposta di revisione del regolamento Bruxelles IIbis: più tutela per i minori e più efficacia nell'esecuzione delle decisioni*, Rivista di diritto internazionale privato e processuale, (2017), p. 255, where according to the author the procedural conduct of the party, which neither explicitly accepts the jurisdiction or contests the jurisdiction, but requests parental responsibility in the petition filed upon the court in the divorce proceedings, cannot be in virtue of this new wording in the Commission's Proposal understood as implicit acceptation.

[23] ECJ, Case C-565/16, *Alessandro Saponaro*, par. 32

[24] There was a large number of discussions concerning the introduction of the rule on the choice-of-court agreement in divorce, legal separation, and marriage annulment into the Brussels II*a* Regulation; a number of

Lastly, particularly one amendment in the General Approach must be highlighted as to protection of the weaker parties. Article 12 of the Brussels II*a* Regulation does not contain any rule on the substantive validity of the choice-of-court agreement. However, it must be borne in mind that Article 12 of the Brussels II*a* Regulation does not produce the negative effect of depriving the jurisdiction of other Member States courts.[26] This has two consequences. First, the previous agreement which would be concluded in mistake, fraud, or duress does not preclude the weaker party from seizing a Member State of the place of habitual residence of the child. Second, such a seized Member State court does not examine the substantive validity of the jurisdiction agreement, since the agreement is not effective for any other Member State court other than the designated one. Therefore, the substantive validity may be assessed only by the seized designated Member State court (i) only in the light of the considerations connected with the requirements laid down in Article 12 of the

studies, reports, impact assessments and projects concerned this issue. See for example: Study to inform a subsequent Impact Assessment on the Commission proposal on jurisdiction and applicable law in divorce matters, Draft Final Report to the European Commission DG Justice, Freedom and Security, European Policy Evaluation Consortium, 2006; Commission Staff Working Document. Annex to the proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters. Impact Assessment, SEC(2006) 949, 17 July 2006; EU Commission, Study on the assessment of Regulation (EC) No 2201/2003 and the policy options for its amendment, Final report: evaluation – Study. Study conducted by Deloitte, 2015, available at: https://publications.europa.eu/en/publication-detail/-/publication/463a5c10-9149-11e8-8bc1-01aa75ed71a1/language-en/format-PDF/source-73782761; Commission Staff Working Document. Impact Assessment. Accompanying the document Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), SWD/2016/0207 final, 30 June 2016; Project 'Planning the future of cross-border families: a path through coordination' (EUFam's), co-funded by the Directorate-General for Justice and Consumers of the European Commission (JUST/2014/JCOO/AG/CIVI/7729) available at: http://www.eufams.unimi.it/project/; Project 'Cross-Border Proceedings in Family Law Matters before National Courts and CJEU', funded by the European Commission's Justice Programme (GA - JUST/2014/JCOO/AG/CIVI/7722) available at: http://www.asser.nl/projects-legal-*a*dvice/cross-border-proceedings-in-family-law-matters-before-national-courts-*a*nd-cjeu/. Article 3a of the Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, COM(2006)0399 final, 17 July 2006 contained a new rule on the choice-of-court agreement in divorce or legal separation. The never-accepted, proposed rule on the choice-of-court agreements in divorce or legal separation did not meet with unconditional approval. T. M. DE BOER, *What we should not expect from a recast of the Brussels IIbis Regulation*, in Nederlands Internationaal Privaatrecht (2015), p. 11. In 2016, the Commission processed the various options in order to improve the current rules laid down in the Brussels II*a* Regulation. Commission compared the options and found out that "*the existing rules have proven to work to a large extent satisfactorily, and the drawbacks of the other options make them currently not feasible or desirable*." See Commission Staff Working Document. Impact Assessment. Accompanying the document Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), SWD/2016/0207 final, 30 June 2016, p. 23.

[25] On the same considerations see F. C. Villata, L. Válková, EUFam's Model Choice-of-Court and Choice-of-Law Clauses, available at: http://www.eufams.unimi.it/2017/12/27/model-clauses/, p. 42-45.

[26] C. GONZÁLES BEILFUSS, *Prorogation of Jurisdiction*, in Jurisdiction in Matrimonial Matters, Parental Responsibility and International Abduction, *op. cit.*, p. 187, 194, 195.

Brussels II*a* Regulation[27] - such a conclusion would lead to the impossibility of examining substantive validity which seems even more essential element in family matters with a weaker party; (ii) conflict-of-laws rules (of the designated Member State court) in virtue of the new rule on substantive validity introduced into Article 25 of the Brussels I-*bis* Regulation;[28] or (iii) by the *lex fori*, which always means the law of the designated Member State court. Although the General Approach newly suggests exclusivity of the agreement in the situation where all parties have already accepted the jurisdiction expressly in the course of the proceedings, it practically does not introduce an amendment. It is possible to imagine that the Member State court A is first seized and the second seized Member State court B establishes its jurisdiction on the basis of the (exclusive) agreement of the parties under Article 10a(1)(b)(ii) of the General Approach in the course of its proceedings (for example, where the *lis pendens* would not be known to the Member State court B). In such a case, the decision as to the jurisdiction of the Member State B would be binding on the Member State court A and the Member State court A would not be entitled to examine substantive validity of the acceptance of the parties in the course of the proceedings in front of the Member State court B.[29] Although none of the proposals have contained any rule on substantive validity, one significant modification in the General Approach strengthen the position of the weaker party: a court must newly ascertain, that the previous agreement or acceptance in the course of the proceedings was based on an informed and free choice of the parties and was not a result of one party taking advantage of the predicament or weak position of the other party in the light of Art. 10a(1)(b) and new Recital of the General Approach.[30]

The General Approach as to Art. 10a determining choice-of-court must be in generally evaluated positively - it makes an effort to clarify most of the problems which may arise during the application of this provision and which still seem to be unclear. However, it is regrettable that it was not proposed to tackle the issue on the rule on choice-of-court agreements relative to divorce, separation, or marriage annulment in the proposals, which may

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[27] As stated by the ECJ in the context of the Brussels Convention. See ECJ, Case C-159/97, *Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA*, 16 March 1999, ECLI:EU:C:1999:142, par. 49.

[28] 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, 20 December 2012 ("Brussels I*bis* Regulation).

[29] ECJ, Case C-456/11, *Gothaer Allgemeine Versicherung AG et al v Sampskip*, 15 November 2012, EU:C:2012:719.

[30] A new Recital should be added: "*Before exercising its jurisdiction based on a choice of court agreement or acceptance the court should examine whether this agreement or acceptance was based on an informed and free choice of the parties concerned and not a result of one party taking advantage of the predicament or weak position of the other party. The acceptance of the jurisdiction in the course of the proceedings should be recorded by the court in accordance with national law and procedure*.".

still create a problem also in the context of the *ex ante* choice-of-court agreements relative to parental responsibility.