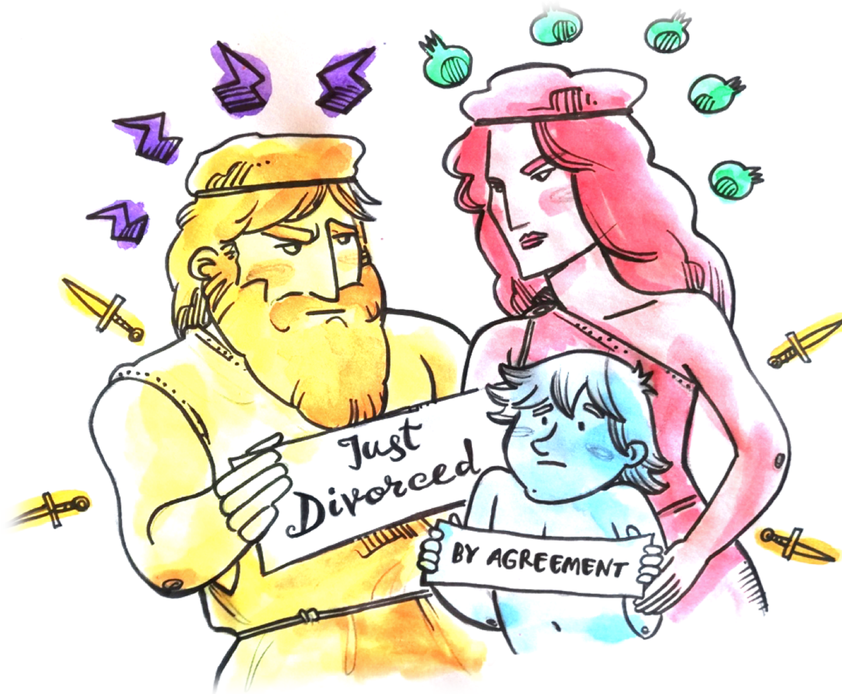
THEMIS COMPETITION 2019

Semi-Final B

EU and European Family law

(TH/2019/02)

AGREEMENTS concluded by **spouses** in the matter of **divorce or legal separation**: the "***dogma***" of recognition and enforcement within the European area



drawings realized by Team Italy

Martina Bianchi

Noemi Genovese

Giovanni Verardi

Tutor: Giuseppe Buffone

Team Italy

Chapter I. *Agreement as the best solution for family disputes*

[1.1.] Agreements concluded in the matter of legal separation and divorce
[1.2]. The situation in Europe: Member States that provide for separation/divorce agreements
[1.3]. The situation in Italy

Chapter II. *Recognition and enforcement of agreements concluded in the matter of legal separation or divorce: how does it work today?*

[2.1]. Recognition and enforcement of decisions under the current system
[2.2]. Circulation of agreements
[2.3]. ECJ, case 372/16, Sahyouni v. Mamisch, 20th December 2017
[2.4]. Which national authority releases the certificate (art. 39)?

Chapter III. *Recognition and enforcement of agreements concluded in the matter of legal separation or divorce: how will it work tomorrow?*

[3.1]. The new Brussels IIa Regulation as resulting from the general approach of 7th December 2018
[3.2]. Critical aspects and problems that remain open
3.2.a The quest for the golden agreement, or agreement shopping
3.2.b The risk of prevarication
3.2.c Hearing of the child

Chapter IV. *Conclusion*

[4.1.] *In general* - European policies should encourage ADR in family law
[4.2.] *Today* - Evolutionary interpretation of art. 46 of Brussels IIa Regulation
[4.3.] *Tomorrow* - Agreements and child protection

Chapter

I - Agreement as the best solution for family disputes

Family disputes, especially cross-border ones, generally present many problems, also because the legal aspects are complicated by the emotional involvement of parties, by the personal stories of the family, by the involvement of children. The level of conflict is indeed particularly high and situation is more complicated in case of cross-border disputes. This is why the European Union promotes mediation in the context of family disputes and suggests the use of alternative dispute resolution tools. The legal systems of the Member States have taken these suggestions and introduced, in the field of family disputes, instruments of alternative dispute resolution.

Taking into account different instruments of alternative dispute resolutions, most of the Member States' law provide for items that quicken the arrangement of the agreements and, at the same time, reduce the use of contentious instruments. As a consequence, the judicial system can result relieved.

Today it is common ground that friendly agreements are the best solution for family disputes: first, the agreement generally guarantees the spontaneous execution of the agreements; secondly, the agreement guarantees greater stability over time; finally, the **judge's decision defines the dispute but does not resolve the conflict.** On the contrary, the agreement makes up the couple conflict and allows the partners to reach a new balance.

A common *datum* to the Member States is the introduction of judicial instruments of settlement of the dispute in an amicable manner. In these cases, the court makes it possible for spouses to use tools to reach an agreement (for ex. mediation, the use of experts, etc.), the agreement eventually reached is approved by the court with a decision.

Many Member States, however, over time, have also introduced new tools that we could call "*new generation tools*" for agreements: in these cases, spouses are allowed to enter into agreements for the amicable settlement of the dispute without even having to go to court. The rationale behind these tools is as follows: a) to encourage a friendly solution by simplifying the possibility of reaching agreements, guaranteeing greater autonomy and a system that costs less; b) to prevent spouses who have already reached an agreement from having to go to court anyway, with an economic and time burden; c)

to guarantee spouses who have reached an agreement, greater confidentiality, as they can avoid having to go to court. In recent years, this possibility has also been envisaged for concluding a separation or divorce agreement, thus reaching new types of agreements that some interpreters have called "*private divorce*".

Anyway, in these cases, special protection measures are generally provided in case the spouses have children. This is a common principle that has been borrowed by the *UN Convention on the rights of the Child* and it is now taken into account by most of the Member States in the regulation of the agreements between spouses.

In this regard, any agreement or private and voluntary regulation has to be checked in the light of the best interest of the children, which has always to be fulfilled.

As a consequence, it can be noted that a higher level of liberalization is recognized in cases of divorce in absence of children or minors.

[1.1.] Agreements concluded in the matter of legal separation and divorce

Traditionally, European legal systems have provided for the possibility for parents to enter into amicable agreements concerning parental responsibility: in general, with the intervention of a judge. Only in recent years, some Member States have also introduced the possibility for spouses to conclude agreements on legal separation and divorce.

This possibility has brought down a *taboo*: that the matter of status, particularly marriage, was not at the parties' disposal. These agreements are different from those concluded before judicial authorities. Agreements concluded before the judge are subject to judicial authority control and are included in a decision.

The extrajudicial agreements, on the contrary, substantially maintain "*contractual*" character and are not contained in a judge's decision. In out-of-court agreements, an authority is generally required to intervene according to the applicable national law, but it is not a judicial authority.

In relation to these measures, an issue arises in regard to their enforceability.

The judges' decisions are indeed enforceable, also if reproducing agreements reached by the spouses during the trial. On the contrary, the enforceability regime of private agreements differs from country to country in regard of the civil law national

system. The differences, hence, are also due to the different nature of the tools that are provided.

More specifically, another element that could determine a difference with regard to the enforceability could be the legal nature of the agreement. Many Member States, indeed, provide for the intervention of a public authority or a notary. In the latter case, the enforceability could be ensured under certain terms and conditions. Instead, if the instrument used results in a mere private agreement, such as a contract, the enforceability could not always be ensured.

To clearly understand this phenomenon in Europe, it is worth checking which Member States have introduced such mechanisms and what exactly the applicable law provides.

[1.2.] The situation in Europe: Member States that provide for separation and divorce agreements.

Therefore, on the basis of the previous analysis, some key-points arise. The aforementioned issues have to be highlighted in order to assess the "state of the art" in the Member States and to hold a comparative analysis of the legislations.

In particular, it has been found that there are different kinds of agreements and that the spouses can sign them before different authorities too.

Therefore, it has to be clarified the enforceability system of the above-mentioned agreements. In particular: how the agreements are enforced under national laws in the different Member States, and if the involvement of an authority is required for enforceability.

Eventually, it could be noted that there are some Member States who enforce these agreements as a contract and some others that treat them as decisions.

COMPARATIVE TABLE

Legal systems that provide for «private» agreements in the matter of legal separation/divorce

Member State	Authority before which the agreement is concluded	Enforcement under national law	Legal nature
Belgium	Notary	Treated as private contracts. If approved by a judge, agreements are enforced as decisions.	Private agreements
Estonia	Notary Vital statistics office	If confirmed by the notary, agreements are enforceable under the same conditions of the courts' decisions.	Private agreements authenticated by the notary or the vital statistics office
France	Notary Lawyers	Registration by a notary is required for the enforceability. Otherwise, in some cases, the judge approves the agreement - but the legal nature changes.	Private agreements ——— Court decision
Italy	Lawyers Registrar	For the enforceability the agreements shall be lodged: - if signed with lawyers, at the Public Prosecutor office, which authorizes; - if signed before the Public Officer are lodged at the belonging registrar office for confirmation. In both cases, there are no special procedures for the enforceability.	Lawyer agreements: private agreements with the same effects of jurisdictional decisions Before Administrative Authorities: private agreements with the same effects of jurisdictional decisions
Latvia	Confirmed by the Court	If not confirmed by the court, treated as contracts. If agreements are confirmed by the court can be enforced.	Private agreements
Netherlands	Notary	Financial agreements: enforceable with bailiff. Agreements related to children: have to be enforced with a judicial procedure.	Authenticated agreements

Slovenia	Notary	The agreements reached under notarian records are enforceable. Otherwise, the parties shall submit private agreements to the court.	Notarial records
Spain	Notary, Registry	Can be enforced by summary trial or execution of public deed.	Private agreements. For the enforceability the notarization in a public deed is needed
Portugal	Registrar Voluntary mediation	For the enforceability the involvement of an authority is required. As approved by the Civil Registrars, agreements are enforced as decision.	Private agreements enforced as decisions
Romania	Notary	Executed voluntarily, as contracts. Otherwise shall be authenticated to be enforced. The enforcement can be held by the bailiff.	Authenticated private agreements
Germany	Private agreements	Not enforceable	Effects only on a practical basis between parents
Malta	Private agreements	Same enforceability of contracts	Private agreements
Sweden	Tax Agency Social Committee	The enforceability system depends on the matter of the agreement: - division of property in case of divorce: registered at the tax Agency; - parental responsibility or maintenance of a child: approved by the social Committee	Private agreements. If agreements are approved by the Social Committee are enforced as court's decisions
Finland	Local Social Welfare Board	Private agreements confirmed by the Local Social Welfare Board are valid and enforceable. Private agreements are not enforceable.	If confirmed by SWB – private agreements enforceable ad court's decisions

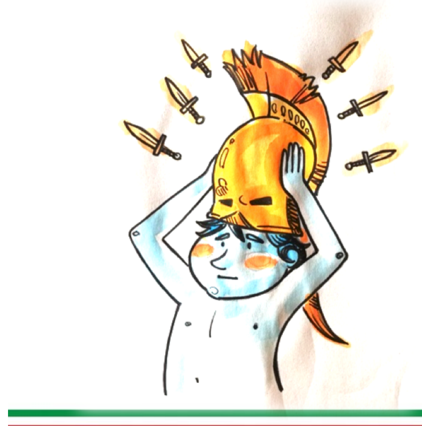
[1.3.] The situation in Italy

In the Italian legal system spouses can conclude an agreement in the matter of separation or divorce without the intervention of a judicial authority. Under Italian law (No 162 of 2014), spouses can decide to conclude an agreement by resorting to the "*negoziazione assistita*".

This legal arrangement, "**assisted negotiation**", is an alternative dispute resolution procedure, similar to mediation, aimed also at reducing the workload of our courts. It is a procedure where the parties agree to cooperate in good faith and fairness to resolve their dispute amicably, with the assistance of lawyers, within the time limit agreed by the parties.

More specifically, the assisted negotiation consists in an agreement undersigned by the spouses (the so-called "negotiation agreement" – *convenzione di negoziazione*) by means of which the couple who would like to separate, assisted by its Italian lawyers specialized in family law, can agree both upon the economic matters (for ex. the use of the family house or the provision of alimony/child support) and the matters connected to the placement of the children. As soon as the negotiation agreement is drafted and executed, the lawyers must authenticate the signatures, file the document to the competent Prosecutor Office and wait for its security clearance.

As an alternative, the spouses can decide to declare their will to separate before the Public Officer (the public registrar) of the municipality of residence of one of the two spouses or of the municipality where the deed of marriage has been registered. This second alternative can be carried out also without the assistance of a lawyer. However, there are two limitations to take into consideration: this "declaration" before the Public Officer can be chosen only by couples who do not have minors, or not self-sufficient or handicapped children and, moreover, it does not allow for the insertion of economic provisions in the declaration, as, for example, alimony or child support.



Chapter

II - Recognition and enforcement of agreements concluded in the matter of legal separation or divorce: **how does it work today?**

Examination of the European legislations has led to the discovery of many national systems that provide for the possibility of «private divorce». At this point we must ask ourselves a question: **how do these agreements circulate in Europe?**

[2.1]. Recognition and enforcement of decisions under the current system

Legal separation and divorce within the European area are ruled by two main different regulations. The first one is Regulation No 2201 of 2003 (so called "*Brussels IIa*"), which deals with the jurisdiction and the recognition of decisions - we will focus mostly on this regulation.

The second one is Regulation No 1259 of 2010 (so called "*Rome III*"), which contains rules about applicable law in these issues. Particularly, this regulation applies to divorce and legal separation in situations involving a conflict of laws. The main connecting factor in these cases is the choice of law made by the parties.

Regarding patrimonial issues, these are excluded from both Brussels IIa and Rome III; they are governed by Regulations No 1103 and No 1104 of 2016, that rule jurisdiction, applicable law, recognition and enforcement of decisions in the matter of matrimonial property regimes and of property consequences of registered partnerships.

Also maintenance obligations are excluded from Brussels IIa and Rome III. Indeed, these economic matters are provided for by Regulation No 4 of 2009. This regulation applies to maintenance obligations arising from a family relationship, marriage or affinity, and it deals with the matter of jurisdiction, applicable law and recognition of judgments in that field.

As stated, Brussels IIa concerns jurisdiction, recognition and enforcement of decisions in matrimonial matters and in the matter of parental responsibility. The purpose of this regulation is to remove obstacles to the application of the fundamental principle of free circulation in the European Union. Indeed, rules on judicial cooperation in civil law matters are inspired by principle of mutual trust between Member States of the European Union, in order to let the national decisions circulate within European borders. A divorce pronounced in Italy can be recognised in Greece, and *vice versa*.

Regarding jurisdiction, Brussels IIa provides for several competent courts, leaving the choice to the parties. Rules on jurisdiction are based, firstly, on the habitual residence of one or both spouses.

Recognition of a judgment, instead, is provided for by article 21; according to this provision, a judgment relating to divorce, legal separation or marriage annulment given in a Member State can be recognised in other Member States. However, the judgment cannot be recognised if such recognition is contrary to the public policy of the Member State, if it was given in default of appearance, or if it is irreconcilable with a former judgment given in a proceeding between the same parties.

Still, there is an important difference between decision concerning matrimonial affairs (separation, divorce, annulment of marriage) and decision concerning parental responsibility (e.g. custody, access or visitation rights). Parental responsibility's decisions are submitted to enforcement; instead, decision relating to matrimonial affairs, are submitted to recognition.

This distinction is very significant for the problem of recognition of agreements concluded in the matter of legal separation or divorce.

It is therefore necessary to ask a question: do agreements in the matter of separation or divorce fall under the scope of Brussels IIa? Can we consider an agreement of separation or divorce concluded without a judge as a case of "*decision released by a judicial authority*" according to the provisions of the regulation?

[2.2]. Circulation of agreements

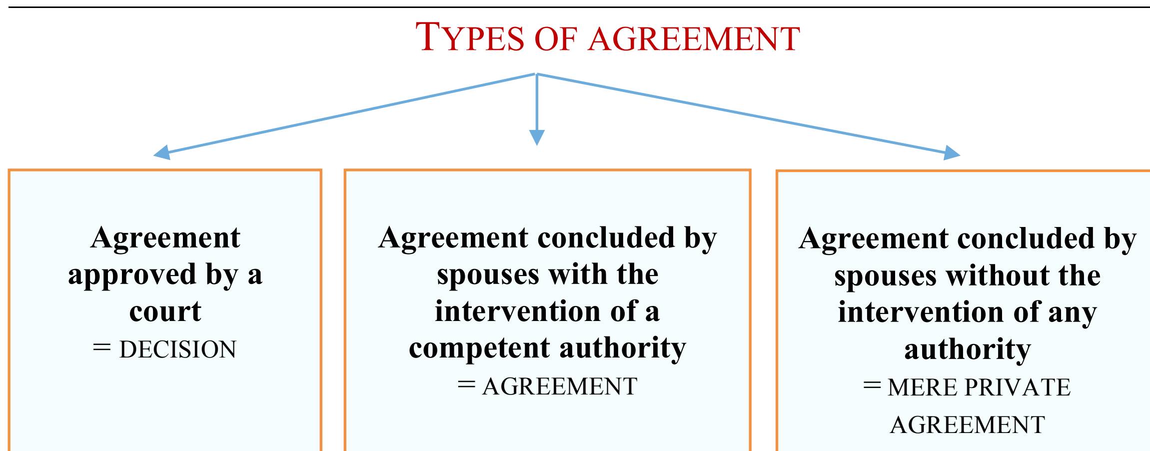
The issue of the circulation of agreements is to be faced distinguishing the possible types of agreements. A first type of agreement is the one approved by a judicial authority with a decision: for example, the "separation by mutual consent" approved by the judge. Any agreement issued by the court following an examination of its substance in accordance with national law is to be recognised or enforced as a "decision".

In these cases, the agreement reached by the spouses is approved by the judge and included in a formal act that constitutes a decision: these agreements certainly fall within the scope of application of the Brussels IIa.

However, we also have other types of agreements in which no judicial authority intervene: agreements concluded by spouses without the intervention of any authority, agreements that are merely private. In these cases, there is no decision, no court: it is clear that we fall outside the scope of the regulation.

However, there are also agreements which are neither a decision nor merely private, that have been registered by a public authority competent to do so. Such public authorities can include – for example - notaries or civil registrars. These agreements acquire binding legal effect in the Member State of origin following a formal intervention of a public authority, without the intervention of a judicial authority.

These agreements are not mere private agreements and, at the same time, they are not a decision: that's why they are also called "*private divorces*". Can they circulate under Brussels IIa?



A useful provision can be found in article 46 of Brussels IIa, where it is argued that "*documents which have been formally drawn up or registered as authentic instruments and are enforceable in one Member State and also agreements between the parties that are enforceable in the Member State in which they were concluded shall be recognised and declared enforceable under the same conditions as judgments*".

There is, however, a problem: at first glance, this provision seems to refer only to "*enforceable*" agreements and that is not the case of agreements or decisions of divorce, which are, as seen before, only "*recognisable*". In this regard, solely agreements in the matter of parental responsibility should be enforceable. Following this reasoning, article

46 would not include in its field of application merely recognisable agreements, such as those on separation and divorce.

In any case, even overcoming this issue, a problem would remain: art. 46 can work only within the "field of application" of Brussels IIa.

Still, it is possible to interpret article 46 in an evolutionary way. Indeed, at the time of the introduction of art. 46 there were no instruments in the Member States allowing to stipulate agreements of "private divorce". The question was not at stake: the provision was thought only for agreements regarding parental responsibility.

Since it is also necessary to give to provisions a useful sense, in accordance with the social evolution, we could propose a modern interpretation of art. 46 of Brussels IIa, that would include also agreements of "private divorce" within the "*agreements recognised and declared enforceable under the same conditions as judgments*". This interpretation would be also in line with the aim of Brussels IIa, that is to recognize divorce agreements concluded within the European Union, in order to increase judicial cooperation in family law, to encourage the use of mediation, to avoid disputes, to create mutual trust between Member States, and then to remove obstacles to free circulation in the European Union.

[2.3]. ECJ, Case 372/16, Sahyouni v. Mamisch, 20th December 2017

At the moment, the Court of Justice has not explicitly addressed the issue concerning the scope of Brussels IIa and, in particular, if it also covers agreements that have not been concluded before a jurisdictional authority. Nevertheless, some important observations could be found in the decision made by the ECJ in the case C-372/16 (judgement of the Court of the 20th of December 2017).

In this decision, the Court of Justice dealt with the request for recognition in Germany of a divorce concluded in Syria, based on Sharia and pronounced on the sole basis of the unilateral declaration of a spouse before a religious court. The Court of Justice's decision concerns the application of Regulation No 1259 of 2010 (Rome III) and not Brussels IIa, but is useful also for the purpose of our analysis because, according to recital n. 10 of Rome III, "*the substantive scope and enacting terms of that*

regulation should be consistent with Regulation No 2201/2003". Therefore, the meaning of the word "divorce" is the same in both Brussels IIa and Rome III.

The Court, in its decision, *inter alia,* states at point n. 47: "*while it is true that a number of Member States have, since the adoption of Regulation No 1259/2010, introduced into their legal systems the possibility for divorces to be pronounced without the involvement of a State authority, it is nevertheless the case (…) that the inclusion of private divorces within the scope of that regulation would require arrangements coming under the competence of the EU legislature alone*".

More precisely, the Court argued that "*in the light of the definition of the concept of 'divorce' in Regulation No 2201/2003, it is clear from the objectives pursued by Regulation No 1259/2010 that the regulation covers exclusively divorces pronounced either by a national court or by, or under the supervision of, a public authority".*

DIVORCES COVERED BY REGULATION NO 2201/2003

Divorces pronounced by a national court

Divorces pronounced by a public authority

Divorces pronounced under the supervision of a public authority

According to the Court reasoning, it doesn't seem that "private divorces" could fall under the scope of Brussels IIa. Nevertheless, if we analyze deeper the central object of the ruling, we can outline some differentiations. Surely, according to the ECJ, unilateral declarations of divorce are not ruled by European regulations; the same could be said for agreements concluded without any intervention of public authorities. However, it seems possible to argue that ECJ didn't refer also to "mixed" agreements, in which divorce is pronounced on the basis of a private agreement, but also with the "constitutive (final) intervention of a court or public authority" (point n. 22).

Indeed, several proceedings recently introduced by Member States result in "mixed" agreements. In these cases, the divorce is pronounced under the control of a public authority. Therefore, this scenario should be comprehended in European regulations, like the scenario of divorces pronounced directly by a judicial or a public authority.

[2.4]. Which national authority releases the certificate (art. 39)?

Brussels IIa leaves open also another important question, related to the certificate necessary for the recognition and enforcement of decisions in matrimonial matters and in the matter of parental responsibility in a different state.

In this regard, art. 39 of Brussels IIa states that "*The competent court or authority of a Member State of origin shall, at the request of any interested party, issue a certificate using the standard form set out in Annex I (…) or II*". The question is: which national authority is competent to release the certificate in case of agreements?

On this point, Brusells IIa seems to leave a margin of discretion to each Member States. Some Member States have defined the issue of competence with a legislative intervention; Romania, for instance, established that the certificate is released by the judge that would be abstractly competent for the case. In Germany, instead, the only way to get a divorce is to turn to a judge, therefore the certificate shall be issued by the court where the marriage was dissolved.

Italy has not ruled on the issue through a specific legislative intervention, but with administrative recommendations – issued in 2018 by the Ministry of Interior and the Ministry of Justice. If the agreement was concluded with the assistance of lawyers - as in the case of assisted negotiation -, the competent authority for the release of the certificate is the Prosecutor Office who gave the security clearance. While, if the agreement was concluded before a Public Officer, the competent authority for the certificate should be that very same Public Officer.

III - Recognition and enforcement of agreements concluded in the matter of legal separation or divorce: **how will it work tomorrow?**

On the 7th of December 2018, the JHA Council has reached a general approach on 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 (Brussels IIa *recast*). In this new regulation, the scope of application is expressly extended to the agreements on legal separation and divorce, and specific provisions are inserted.

[3.1]. The new Brussels IIa Regulation as resulting from the general approach of 7th December 2018.

Taking into account the "new" provisions we are interested in, we'll start by noticing the addition of "*agreements*" inside article 2, entitled "*Definitions*". This new article provides a definition of "agreement", namely «*a document which is not an authentic instrument, has been concluded by the parties in the matters falling within the scope of this Regulation and has been registered by a public authority as communicated to the Commission by a Member State (...)*». Pursuant to this new provision, agreements in the matter of separation or divorce now fall clearly under the scope of the regulation.

The choice made by the new regulation is not to extend the scope to all types of agreements: indeed, a recital clarifies that the regulation does not allow free circulation of *mere private agreements*. However, agreements that are neither a decision nor an authentic instrument but have been registered by a public authority competent to do so can circulate. Such public authorities include notaries registering agreements, even where they are exercising a liberal profession.

An agreement can benefit of free circulation only if it has "binding legal effect" in the Member State where it was concluded: if it does so, it can be treated as equivalent to 'decisions' for the purpose of the application of the rules on recognition.

Therefore, we can affirm that the new regulation includes agreements that acquire binding legal effect in the Member State of origin following a formal intervention of a

public authority or of another authority as communicated to the Commission by the Member State for that purpose.

It is proposed, in the above-mentioned “recast”, that, basically, agreements and authentic instruments should be considered equivalent to “decisions” (see Recital n. 59) as for their recognition and enforcement.

Precisely, agreements on divorce should be recognised without any further proceedings, and, similarly, settlements regarding parental responsibility should be considered decisions and thus recognised and enforced (article 55 co. 1, 2) without any special procedure being required (for example: an *exequatur*).

More specifically, agreements that **have binding legal effect** in one Member State should be deemed equivalent to “decisions” for the purpose of the application of the rules on recognition.

As for decisions, there are some cases which give way to the refusal of the recognition or the enforcement of the agreement or authentic instrument, for example contrast with public policy, presence of irreconcilable decisions, authentic instruments or agreements (see article 56b).

In order to be granted recognition or/and enforcement, parties are required to present a specific certificate, which has to be issued by the Member State in which the agreement or the authentic instrument have been formed; the certificate will differ from the one laid down for decisions, as several models are expected (annexes III and IV).

At a first analysis, it would seem that couples opting for a less formal way of exiting their marriage would have the same benefits in terms of circulation of the settlement than the ones seising a court, or at least that may have been the intention of the drafters. Nonetheless, we will proceed pointing out some critical aspects.

[3.2]. Critical aspects and problems that remain open

3.2.a The quest for the “*golden”* agreement, or *agreement shopping*

The new regulation clarifies that agreements can be concluded only before authorities that are competent according to the rules of jurisdiction. However, since these are “just” agreements, it cannot be excluded that spouses - by mutual agreement –

may try to overcome the jurisdiction's rules, if necessary also taking advantage of the system used.

For example, spouses can resolve to turn to a notary, which, in some Member States, is both a public officer and a private professional, thus being "at disposal" of the parties, even if the Member State lacks jurisdiction.

In such a case parties have indeed agreed on their divorce, but in the wrong "setting": does this flawed agreement have any value? Can it circulate throughout Europe nonetheless?

Given that the "flaw" derives from the violation of rules regarding jurisdiction, we should consider the Court of Justice's ruling in similar cases; for example, in the case of violation of the rule sets out by article 19 of the regulation, in the matter of *lis pendens*. There the reasoning of the Court was the following: "*The rules of lis pendens (...) must be interpreted as meaning that where, in a dispute in matrimonial matters, parental responsibility or maintenance obligations, the court second seised, in breach of those rules, delivers a judgment which becomes final, those articles preclude the courts of the Member State in which the court first seised is situated from refusing to recognise that judgment solely for that reason. In particular, that breach cannot, in itself, justify non-recognition of a judgment on the ground that it is manifestly contrary to public policy in that Member State*" (case C-386/17).

Indeed, article 24 of the regulation "*Prohibition of review of jurisdiction of the court of origin*" states that, not only jurisdiction may not be reviewed by the Member State asked for recognition, but also that violation of rules relating to jurisdiction does not serve as a reason for refusal of recognition. According to the article above-mentioned, and to the Court reasoning, we could assume that also agreements concluded in violation of the rules relating to jurisdiction do have value, and therefore can be recognised too.

Still, the rationale behind the prohibition of later review of jurisdiction of the court of origin, and behind the reasoning of the Court, is to enhance and protect mutual trust between judicial authorities in the European Union: should we grant the same trust to private's work?

Eventually, granting circulation to agreements concluded in Member States lacking jurisdiction would mean allowing spouses to conclude agreements all over Europe, in accordance with their own desires; in other words, European citizens would be granted a blank check as for their divorce: they could look for the most convenient Member State where to dissolve their union, and there buy their tailored exit deal.

3.2.b The risk of prevarication

Another critical point regards the risk of prevarication between spouses; contrarily to judicial proceedings, agreements in themselves do not provide for a safe space and there might be no measures in order to prevent the weaker party to accept an unjust deal. We should not underestimate the power here granted to spouses, who can dissolve their marriage just by themselves, with no need for a court to be seised.

Such a freedom bears a great risk of abuse at the expenses of the weaker spouse, who could be talked into signing a bad agreement by their counterparty, with more financial means.

Whereas, in all judicial decisions, even the ones that incorporate an agreement between parties, there is a prior screening with regards to the balance of the mutual obligations, agreements work perfectly only in case of equal powers between parties, while in case of unbalance they might allow for abuses.

The regulation does not require for agreements to be valid and to circulate to be just; there is no provision setting out precautions regarding this issue.

In this void of precautions, it is up to the Member States' own legislations to provide for eventual procedural precautions or later controls in order to make sure that no unfairness takes place in those agreements.

An agreement solely drafted by spouses might to prove unjust, but Member States can draw up a legal frame in which parties are free to stipulate an agreement and, at the same time, be assisted in doing so – one example could be the already mentioned Italian "assisted negotiation".

3.2.c Hearing of the child

The new regulation introduces a general obligation for the child to have an opportunity to be heard (see art. 20). This general provision doesn't apply to agreements. In fact, a Recital clarifies that "*the obligation to provide the child with the opportunity to express his or her views under this Regulation does not apply to authentic instruments and agreements*". However, another Recital affirms: "*although the obligation to provide the child with the opportunity to express his or her views under this Regulation does not apply to authentic instruments and agreements, the right of the child to express his or her views continues to apply pursuant to Article 24 of the Charter of Fundamental Rights of the European Union and in light of Article 12 of the UN Convention on the Rights of the Child as implemented by national law and procedure. The fact that the child was not given the opportunity to express his or her views should not automatically be a ground of refusal of recognition and enforcement of authentic instruments and agreements in matters of parental responsibility*".

On this matter the regulation "recast" stipulates that "*The recognition or enforcement of an authentic instrument or agreement in matters of parental responsibility* ***may*** *be refused if the authentic instrument was formally drawn up or registered, or the agreement was registered, without the child who is capable of forming his or her own views having been given an opportunity to express his or her views*".

This provision raises some doubts. In agreements concluded without the intervention of a judicial authority there is no space for the hearing of a minor conducted by a judge. So, who should listen to the child?

IV - Conclusion

[4.1.] In general - *European policies should encourage ADR in family law*

Family disputes, especially cross-border ones, generally present many problems, and EU Family law should encourage the implementation of agreements and negotiations tools that avoid judicial proceedings. In this regard, EU Law should take into account the evolution of the national laws in the different Member States, and, consequently, improve itself. Indeed, it is the experience derived from judicial proceedings that lead to the introduction of new tools of resolution in spouses' disputes.

[4.2.] Today - *Evolutionary interpretation of art. 46 of Brussels IIa Regulation*

The core of the European legal framework in the matter of recognition and circulation of decisions and agreements is Regulation No. 2201 of 2003. The purpose of the regulation is to remove obstacles to free circulation within the European Union.

Art. 46 of the regulation seems to refer only to "enforceable" agreements in the matter of parental responsibility; however, it would be necessary to adopt an evolutionary interpretation and include in the scope of application of the provision also "recognisable" agreements in matrimonial matters, and, therefore, also agreements of "private divorce".

Still, in the Sahyouni case, the European Court of Justice stated that unilateral declarations of divorce are not ruled by European regulations and, in an obiter dictum, added that the same applies to "not unilateral" agreements concluded without the intervention of public authorities.

However, this seems to be a very strict interpretation, as it excludes also agreements from the scope of application of European regulations.

[4.3.] Tomorrow – *Agreements and child protection*

Brussels IIa *recast* represents, surely, a progress, as it would expressly allow for spouses to opt for an agreement as a way of exiting their marriage; still, we must be

wary of the issues that agreements could raise, most of all the fact that agreements do not provide for a moment in which children could be heard.

The protection of weaker parties, be them one of the spouse or the children, is, at the moment, left to the initiative of the Member States. Member States should provide families with a legal frame that allows a certain degree of flexibility and freedom in order for parties to reach a suitable agreement and, at the same time, set protective measures. As for children, in particular, Member States should opt, preferably, for private proceedings that involve a third party who could, if needed, hear the child.

Nonetheless, we should not forget that when there is less conflict between parents and they are able to reach an agreement, children benefit too, therefore we could assume that an agreement is, in itself, in the child's best interest.

****

The problems we have examined are related both to the current text of the regulation and to the future one. The task of the interpreter, on the other hand, is precisely to deal with legal problems and not to stop in front of them.

When it comes to problems to be solved to help families involved in legal proceedings, effort and commitment must be offered to the fullest extent.

A reasonable solution can generally be found.

You could say we are optimistic….

But, do you know what?

"I'D RATHER BE AN OPTIMIST AND WRONG, THAN A PESSIMIST AND RIGHT."
Albert Einstein