ABSTRACT

This research focuses on the issue of lis pendens through Brussels II-bis Regulation (2201/2003) for divorce disputes, personal separation of spouses and marriage annulment. The aim is based on the elimination of parallel proceedings and conflicting decisions circulating in the European judicial area. It is an application that recognizes spouses a wide choice of different jurisdictional criteria that avoids the rush to court in order to assure the spouse who acts first of all the advantages deriving from the material law that is applicable according to the conflict-of-law rules of the court seised. The jurisprudence of the CJEU is quite clear on the application of the rule on lis pendens based on Brussels II-ter Regulation (n. 2019/1111) in order to produce innovations that can be considered useful by mitigating the distorting effects deriving from the operation of the principle of lis pendens expected in matters of matrimonial disputes.

RESUMEN

Esta investigación se centra en el tema de lis pendens a través del Reglamento Bruselas II-bis (2201/2003) para disputas de divorcio, separación personal de cónyuges y anulación de matrimonio. El objetivo se basa en la eliminación de procedimientos paralelos y decisiones contradictorias que circulan en el espacio judicial europeo. Es
una aplicación que reconoce a los cónyuges una amplia variedad de criterios jurisdiccionales diferentes que evitan la prisa a la corte para asegurar al cónyuge que actúa ante todo las ventajas derivadas de la ley material que es aplicable de acuerdo con las reglas de conflicto de leyes. de la corte embargada. La jurisprudencia del TJUE es bastante clara sobre la aplicación de la norma sobre lis pendens basada en el Reglamento Bruselas II-ter (n. 2019/1111) para producir innovaciones que puedan considerarse útiles al mitigar los efectos distorsionadores derivados de la operación del principio de lis pendens esperado en asuntos de disputas matrimoniales.

**KEY WORDS:** litispendency, Bruxelles II-bis, Bruxelles II-ter, international private European law, matrimonial disputes.

**PALABRAS CLAVE:** litispendencia, Bruxelles II-bis, Bruxelles II-ter, derecho internacional privado europeo, disputas matrimoniales.

**SUMMARY:** I. LIS PENDENS AND BRUSSELS II-BIS REGULATION; - II. THE DIFFERENCE BETWEEN TRUE AND FALSE LIS PENDENS; - III. ANALYSIS OF THE VIOLATION OF THE COORDINATION MECHANISM BETWEEN PARALLEL ACTIONS; - IV. REGULATION BRUSSELS II-TER AND MATRIMONIAL DISPUTES; - V. CONCLUDING REMARKS

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I. LIS PENDENS AND BRUSSELS II-BIS REGULATION

The Brussels II-bis Regulation recognizes spouses in marriages of matrimonial disputes with a wide choice between different criteria of jurisdiction. In particular, the

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parties have the possibility of simultaneously instituting judgments with the same object and title or even related to the judicial authorities of several member states. Reasons of convenience can push each of the spouses to turn to the judge before whom they believe they can have greater advantages and a greater probability of accepting their claims.

Regarding the forum shopping that has been standardized by Rome III Regulation, despite the fact that some EU member states have not joined the cooperation in question, they maintain autonomous conflict-of-law rules on the matter and consequently may represent welcome destinations for the establishment of a marriage dispute into the extent that they identify as applicable law a regulation considered particularly favorable for the pursuit of the objectives that not even the uniformity of the conflict rules for the member states participating in the enhanced cooperation is an element suitable to root out the phenomenon of forum shopping. In reality, spouses manage to prescind from the applicable law may be influenced in the choice of the member state in which to establish the dispute also by other considerations such as those relating to the greater proximity of the forum to the greater knowability of the legal system of the court seised or from the awareness to be able to enjoy greater procedural advantages.

According art. 19 of the Brussels II-bis Regulation, intends to pursue in the interest of a good administration of justice within the Union, the aim of preventing parallel proceedings from being instituted before courts of different member states with the consequent risk of obtaining inconsistent decisions on the same issues. The objective has been reaffirmed in the jurisprudence of the Court of Justice of the European Union (CJEU) on the few occasions in which it has been able to deal with the interpretation of the rule on lis pendens contained in Brussels II or in subsequent Brussels II-bis Regulation.


CJEU, C-296/10, Purrucker of 9 November 2010, ECLI:EU:C:2010:665, I-11163, par. 64, C-489/14, A v. B of 6 October 2015, ECLI:EU:C:2015:654, par. 20. C-386/17, Liberato of 16 January 2019,
The same rule on lis pendens being essentially based on the criterion of prevention inevitably produces the effect of encouraging the phenomenon known as rush to court\textsuperscript{6}. Therefore, each spouse can speed up the time and be the first to resort to the judicial authority since precisely by virtue of the operation of the law on lis pendens he/she will be able to preclude the other spouse the possibility of obtaining from the judicial authority of a different member state a decision on the same dispute.

The importance that the norm on lis pendens assumes in the context of a judicial area which aims to be truly integrated is particularly significant in family matters. The lack of an efficient coordination mechanism between parallel proceedings, established in different member states, would risk leading to conflicting rulings that could lead to the creation of divergent statutes for spouses. That is, the same individual would risk being considered as still married to a member state and at the same time with a free state following the dissolution or annulment of the marriage in another member state or under the regime of marital separation. Among other things, a similar situation would be likely to produce a concrete obstacle to the freedom of movement between member states.

II. THE DIFFERENCE BETWEEN TRUE AND FALSE LIS PENDENS

For the operation of the law on lis pendens provided for in the matter of matrimonial disputes by the Brussels II-bis Regulation is that "before the courts of different member states and between the same parties have been filed for divorce,\textsuperscript{6}\textsuperscript{CJEU, C-168/08, Hadadi of 16 July 2009, ECLI:EU:C:2009:474, I-06871, par. 57 which states that although it is true that the Regulation by Regulation Brussels II-bis of a plurality of fora with jurisdiction can induce spouses to appeal rapidly to the judicial authority of the member state in which it is possible to hope to take advantage of the advantages deriving by the substantive law on divorce, applicable according to the international rules of the forum, this circumstance cannot in itself comprise that the choice made by the spouse of such a spouse must be considered abusive. See also in argument: P. STONE, Stone on private international law in the European Union, Edward Elgar Publishers, Cheltenham, 2018. P. LAGARDE, “L’application du règlement Bruxelles II bis en cas de double nationalité”, in Revue Trimestrielle de Droit Européenne, 46, 2010, pp. 770ss. P. MAESTRE CASAS, “Doble nacionalidad y forum patriae en divorcios internacionales (notas a la STJUE de 16 de Julio 2009, Hadadi, AS. C-169/08)”, in Cuadernos de derecho Transnacional, n. 2, 2010, pp. 292ss.}

\textsuperscript{6} CJEU, C-168/08, Hadadi of 16 July 2009, ECLI:EU:C:2009:474, I-06871, par. 57 which states that although it is true that the Regulation by Regulation Brussels II-bis of a plurality of fora with jurisdiction can induce spouses to appeal rapidly to the judicial authority of the member state in which it is possible to hope to take advantage of the advantages deriving by the substantive law on divorce, applicable according to the international rules of the forum, this circumstance cannot in itself comprise that the choice made by the spouse of such a spouse must be considered abusive. See also in argument: P. STONE, Stone on private international law in the European Union, Edward Elgar Publishers, Cheltenham, 2018. P. LAGARDE, “L’application du règlement Bruxelles II bis en cas de double nationalité”, in Revue Trimestrielle de Droit Européenne, 46, 2010, pp. 770ss. P. MAESTRE CASAS, “Doble nacionalidad y forum patriae en divorcios internacionales (notas a la STJUE de 16 de Julio 2009, Hadadi, AS. C-169/08)”, in Cuadernos de derecho Transnacional, n. 2, 2010, pp. 292ss.
personal separation of the spouses and annulment of the marriage\textsuperscript{7}.

If the identity of a party is requested, the two disputes brought before courts of different member states need not have the same purpose and the same title. It is possible to reach this conclusion by comparing the provisions contained in par. 1 and in par. 2 of art. 19 of Brussels II-bis Regulation. Only the par. 2 dedicated to parental responsibility disputes explicitly limits the coordination mechanism to the hypothesis in which the judgments pending in the two different member states have the same object and the same title. The par. 1 in question, as anticipated, governs the mechanism for coordinating judgments concerning matrimonial disputes, requires the proceedings between the same parties and relating to divorce applications, personal separation of spouses and marriage annulment\textsuperscript{8}. The mechanism that requires the judge to suspend his proceedings could well work when, for example, before a judge from a first member state, a spouse introduces a case aimed at obtaining legal separation while before a judge from a second member state other spouse establishes a judgment aimed at obtaining a divorce or annulment decision\textsuperscript{9}.

Since the coordination mechanism does not operate only in the case of a real lis pendens (which occurs when the two proceedings have the same object and the same title), it has been stressed by many that the rule in question is also capable of applying to cases of false lis pendens. In this regard, the Borràs report with reference to the


\textsuperscript{8} On the other hand, the rule of lis pendens for disputes relating to civil and commercial matters requires the assumption that applications having the same subject matter and the same title have been proposed before the judges of different member states and between the same parties. It must be taken into account that already in this context the CJEU has long endorsed a broad interpretation capable of including in the notion of the same object and same title all the controversies that are characterized by the identity of the relationship to the bases of the questions. See in particular the next cases: C-144/86, Gubish of 8 December 1987, ECLI:EU:C:1987:528, I-04861, par. 5, 6ss. C-406/92, Tatry of 6 December 1994, ECLI:EU:C:1994:400, I-05439, par. 37. C-116/02, Gasser of 9 December 2003, ECLI:EU:C:2003:652, I-14693, par. 41. C-523/14, Aanneningsbedriif Aertssen NV of 22 October 2015, ECLI:EU:C:2015:722, published in the electronic reports of the cases, par. 45. also in this area such a solution had been motivated on the basis of the impossibility of taking into account the characteristics and the different configuration of the national procedural Regulations. For further details see also: J. HILL, A. CHONG, International commercial disputes commercial conflict of laws in english, Bloomsbury Publishing, New York, 2014, pp. 285ss. M. AHMED, The nature and enforcement of choice of court agreements. A comparative study, Bloomsbury Publishing, New York, 2017. G. VAN CALSTER, European private international law, Bloomsbury Publishing, New York, 2016.

corresponding provision contained in the aforementioned Brussels II Convention had specified that the provision in question represented a novelty and specifically responded to the need to take into account the differences between the laws of the member states concerning separation, divorce and marriage annulment. Even today the material norms that regulate family law and specifically marriage disputes in the various member states remain characterized by a strong heterogeneity. If it is true that in the meantime all member states have introduced divorce institutes into their legislation\(^{10}\), it must be taken into account that some member states do not regulate legal separation or still do not guarantee the possibility of obtaining the annulment of marriage\(^{11}\). Putting the different types of matrimonial disputes on the same level, an attempt has clearly been made to favor the application of the coordination mechanism, extending the same to any dispute concerning the same matrimonial relationship regardless of the fact that we are faced with a case of a true lis pendens and avoiding incurring incompatible decisions that would have risked producing as a consequence that the spouses were considered separated on the territory of one member state and divorced on the territory of another member state.

Given the amplitude of the sufficient conditions to activate the coordination mechanism between parallel proceedings, it was not deemed necessary to provide for specific rules for connection cases as instead occurred under the Brussels I and then I-bis Regulations\(^{12}\).

In order to favor a single decision on the questions proposed before judges from two different member states, art. 19, par. 3 after providing that "when the jurisdiction of the court previously seised has been ascertained, the court seised subsequently declares its incompetence in favor of the court seised before" adds that "in this case the party who proposed the application before the subsequently seized court may bring

\(^{10}\)Of the member states of the EU, the last in chronologic order to regulate the institution of divorce in its legislation was Malta. Following a referendum held on May 28, 2011, this status led to the divorce through the Civil Code in its legal order. (Amendment Act, 2011 (Act n. XIV of 2011), adopted 29 July 2011 and entry in force 1st October 2011.

\(^{11}\)Among the member states that do not guarantee the possibility of obtaining the annulment of the marriage it is possible to mention Finland and Sweden.

\(^{12}\)With reference to civil and commercial matters, the simultaneous pending of two judgments instituted in different member states and concerning related questions is the subject of the specific provision contained in art. 28 of Regulation Brussels I, later taken over from art. 30 of Regulation Bruxelles I-bis. D. LIAKOPOULOS, “The impact of secondary legislation on the legal systems of Member States. Jurisprudential aspects and harmonization/integration of European procedural law”, in Revista Projeção, Direito e Sociedade, 10 (2), 2019.
proceedings before the previously seized court ". When, by means of this mechanism, the request submitted before the judge is transferred to the prevenient judge, the latter will be put in a position to pronounce on all the questions that the parties had originally proposed before two different judges. If both applications are well founded by virtue of the favor divortii which characterizes the Brussels II-bis Regulation, the previous judge will have to accept the most radical application in the sense of the dissolution of the relationship (for example that of divorce in case the other application is turned to achieve separation).

In particular, an element of criticality is represented by the fact that the law applicable in the judgment instituted before the prevenient judge may not know the institution object of the request that had been originally proposed before the prejudiced judge and then transferred to the first. This can happen in the event that the judge first seized must enact a law that does not provide for the legal separation between spouses and is required to rule on such a request after it has been transferred from the previous judgment. In such a case, the previous judge will be forced to declare the application concerning the institution not known by the applicable law inadmissible, making the possibility of transferring the action offered by art. 19, par. 3 second period of the Brussels II Regulation.

The problem just mentioned does nothing but confirm what has already been observed with reference to the entire discipline of lis pendens in matters of matrimonial disputes. While pursuing the meritorious objective of legal certainty, this can favor delaying and merely opportunistic tactics on the part of the spouse who is able to exploit the differences in the applicable laws and, for example, also the different period of time required in the member states in order to obtain the dissolution of the marriage bond. Spouses who are more prudent or with more economic means can take advantage of the rule in question, anticipating the action of the counterparty and establishing the dispute before the judicial authority of the member state in which their interests can be more easily realized.

III. ANALYSIS OF THE VIOLATION OF THE COORDINATION MECHANISM BETWEEN PARALLEL ACTIONS

The regulations dictated by the Brussels II-bis in order to coordinate parallel proceedings that can be simultaneously instituted before the courts of different member states, is based on the prevention criterion. A decisive element in determining which judge must pursue is that relating to the date on which the proceedings were initiated in the various member states. To this end art. 16 of Brussels II-bis Regulation expressly autonomously sets out the criteria for determining when the jurisdiction of a member state is considered to be a court. Taking into account the heterogeneity of the procedural rules in force in the legal systems of the various member states, it is expected that if the action is introduced by filing a judicial request or an equivalent document, that date will be taken into consideration provided that the plaintiff subsequently does not has failed to take all the measures it was required to make the notification to the other party. If the action is introduced by means of an act to be notified to the other party, the judicial authority will be deemed to have been brought to the date on which the notifying authority receives the document, provided that the plaintiff has not subsequently failed to take all the necessary measures so that the deed was filed with the court.

Once the date of the pending parallel judgments introduced before the judges of two member states has been identified on the basis of these criteria, the subsequent procedure must be suspended pending the first judge having ascertained its jurisdiction over the dispute. If this happens, the judge prevented and required to declare his incompetence in favor of the judge coming.

Even if the discretionary jurisdiction is not foreseen by the rule in question, the CJEU practice shows that it is quite possible that the aforementioned suspension obligation will be disregarded and in fact frustrate the coordination mechanism described above.

The main proceedings in the specific case concerned a matrimonial dispute

\[14\] The CJEU has clarified that the jurisdiction of the judicial authority previously seised must be considered not established if the proceedings instituted before it have expired after the second judicial authority has been brought. As the risk of incompatible situations ceases to exist, the situation of lis pendens ceases. See also in argument: C. CHALAS, “Litispendance et décalage horaire dans le contentieux du divorce en Europe”, in Revue Critique de Droit International Privé, 2016, pp. 388ss.
between Mr. Liberato and Ms Grigorescu on the request for recognition in Italy of a divorce decree (as well as on parental responsibility and maintenance obligations) pronounced in Romania. The latter decision had resulted in a judgment that had been initiated by Ms Grigorescu after her husband had previously appealed to the Italian judicial authority (the Teramo court). Despite that Mr. Liberato had objected in the Romanian proceedings to the prior pending of the Italian judgment, the Romanian judge, believing that he was not faced with a hypothesis of lis pendens, omitted to suspend his judgment and in addition to pronouncing the divorce, ordered the custody of the mother of the son of the couple, regulated the father's right of visit and established the amount of the maintenance allowance that the father had to pay to the son. The first instance Italian judgment ended with a sentence that decided that the son should be entrusted exclusively to the father, governed the modalities for exercising the mother's right of visit and imposed on the latter a contribution to the maintenance of the son. The court of Teramo rejected Ms Grigorescu's request for an incidental recognition of the Romanian divorce decree that has now become final since the proceedings that led to the latter had been started later than the separation judgment promoted in Italy. Ms Grigorescu also obtained an appeal on the reform of this first instance judgment on the basis that the violation of the law on union law by a judicial body of another member state subsequently seized does not represent an obstacle recognition of the sentence pronounced by the latter. After the sentence of the Court of Appeal of Aquila was challenged by Mr. Released, the Court of Cassation decided to suspend the trial and to propose a preliminary ruling before the CJEU on the recognition of foreign decisions. The Court of Cassation in its order of reference, specified, among other things, that the possibility of clarifying whether the violation of the rules of lis pendens dictated by the Brussels II-bis Regulation could constitute a suitable reason to ascertain the manifest opposition to the public order of the foreign decision and such as to exclude the recognition of the latter within the Italian legal system. It must be taken into account that pursuant to art. 24 of Brussels II-bis Regulation the judge called to rule on the acknowledgment of the sentence issued in another member state is precluded the review of the jurisdiction of the judge of origin and that the public order clause cannot be

15The Romanian judge had erroneously considered that the lis pendens did not exist on the basis of the consideration that the object of the (separation) application filed before the Italian judge was different from that of the (divorce) application filed before the same Romanian judge. See case: C-386/17, Liberato of 16 January 2019, op. cit., par. 34.
invoked, as a limit to the recognition of the sentence foreign in the face of violation of
the rules on jurisdiction referred to in articles 3 to 14 of the same Regulation.

The CJEU was essentially called to clarify whether the violation of the rules on
lis pendens by the Romanian judge who had not suspended his proceedings despite the
prior pending marriage dispute between the same parties, could be an appropriate reason
to prevent recognition of the decision in Italy.

In resolving the questions submitted to it, the CJEU recalled the importance of
the principle of mutual trust between member states and the consequent need to limit
the grounds for non-recognition to the bare minimum. In the specific case, it was
legitimate to doubt whether the principle of mutual trust and recognition of decisions
should prevail over the equally important objective pursued by the rules on lis pendens,
to realize the interest in a good administration of justice within the Union and to avoid
parallel proceedings that may lead to conflicting decisions in the member states. It had
to be clarified whether mutual trust should represent a sort of carte blanche\textsuperscript{16}
capable of
overcoming any violations of the rules on lis pendens.

The CJEU had to dwell on a textual topic based on the aforementioned art. 24 of
Regulation which prohibits the application of the public order limit to the rules on
jurisdiction pursuant to articles 3 to 14 of the Regulation. Since the rules on lis pendens
are regulated in art. 19 and do not fall under the aforementioned articles 3 to 14, it could
be argued - contrary to - that the limit of public order could be invoked to refuse the
recognition of a sentence (such as the Romanian one) pronounced without respecting
the basic prevention criterion of the lis pendens rule. The CJEU also stressed that the
rules on lis pendens even if not included in articles 3 to 14 are still contained in Chapter
II of the Regulation dedicated to jurisdiction. Furthermore, to admit that the judge of the
state in which recognition of the sentence is requested can review the reasons (right or
wrong that they are)\textsuperscript{17} on the basis of which the judge of origin has not declined his
jurisdiction would entail a review of the rules on jurisdiction that it is forbidden from
art. 24 of Regulation.

At the conclusion of its reasoning, the CJEU considered that the violation by the

\textsuperscript{16}H. MUIR WATT, “Sanctionner ou circuler? Les conséquences sur le terrain des effets des jugements de
la méconnaissance par le juge second saisi des règles relatives à la litispendance”, in \textit{Revue Critique de
Droit International Privé}, 2019, pp. 488ss.

\textsuperscript{17}C-386/17, Liberato of 16 January 2019, op. cit., par. 57
prejudiced judge of the rules on lis pendens cannot in itself justify the non-recognition of the sentence which then became definitive pronounced by the latter. In particular, such a violation cannot justify the failure to recognize this decision for its manifest opposition to the public order of the requested member state.

Following the provisions of the CJEU ruling, the Italian Court of Cassation rejected the appeal filed by Mr.Released to reform the ruling with which the Aquila court of appeal recognized the divorce decree issued by the Romanian judge.

The solution reached in the case in question appears difficult to understand. Mr. Liberato should have tried the remedies that might exist in the state of origin of the sentence rendered in violation of the prevention criterion provided by the law on lis pendens. It could already have asked for a preliminary ruling to the CJEU there. However, once the Romanian sentence had been finalized, it could no longer be syndicated by the judges of other member states, who could deny its recognition only for the exhaustive reasons indicated in Brussels II-bis Regulation. Among these reasons, some interpretative margin seemed to provide the public order clause as a means of alleging infringement of the law on lis pendens. The CJEU correctly observed that in so doing the judge of the requested state would in fact be allowed to review the jurisdiction of the judge who pronounced the sentence to be recognized. Review that however is prohibited by Brussels II-bis Regulation. In doing so, the principle of mutual trust between member states that underlies the system of recognition of decisions in the European judicial area has been enhanced. It is true that the solution provided by the CJEU helps to incentivize each of the spouses to establish parallel proceedings in several member states in the hope of obtaining a sentence faster than those necessary for the other party. Once the sentence has been obtained, it will have to be unknown in the other member states even if it was made in violation of the rules on lis pendens.

IV. BRUSSELS II-TER REGULATION AND MATRIMONIAL DISPUTES

The reform that led to the adoption of Regulation 2019/1111 (Brussels II-ter) concerned aspects relating to parental responsibility. With reference to this area, a significant change regards the role recognized in the autonomy of the will in relation to jurisdiction's determination. Instead of the rule that in Brussels II-bis Regulation, allows
the extension of jurisdiction by agreement of the parties in favor of the competent authority to decide on divorce, personal separation or marriage annulment applications, a wider choice has been introduced of the forum that the parties, and any other holder of parental responsibility, can exercise in favor of a member state with which the minor has a substantial relationship as long as this is in the interest of the minor himself. The judicial authority seized on the basis of such a choice option acquires exclusive jurisdiction with a consequent derogation regarding parental responsibility - the prevention criterion that normally regulates cases of lis pendens. That is, any court in another Member State will be required to stay the proceedings until the court seised on the basis of the agreement or acceptance declares that it is not competent under the agreement or acceptance. If the latter has declared its exclusive jurisdiction, the court of another member state, even if first seised, must declare its lack of jurisdiction. The new Regulation then provides for the abolition of the exequatur for all decisions made in matters of parental responsibility so as to ensure their faster and more effective circulation between the member states of the union. Still on the basis of this objective, uniform minimum standards are then introduced for the enforcement procedure. Further changes are aimed at ensuring that cases of child abduction are dealt with as quickly as possible and at regulating the procedures for placing the minor in another member state, subject to obtaining the consent of the competent authority of the latter. Clearer rules are also introduced in order to make effective the possibility that the minor can express himself regarding the proceedings concerning him if he has reached a sufficient degree of maturity.

With reference to matrimonial disputes, on the other hand, the Brussels II-ter Regulation has left unchanged the rules on jurisdiction which continue to provide for a wide range of holes, alternative to each other which can be brought by the spouses. New rules have been established in relation to the circulation of public deeds and agreements on personal separation and divorce having binding legal effects in the home member state following the formal intervention of a public authority or other authority designated by individual member states. This takes account of the legislative
innovations that have been introduced in some of the member states in recent years in order to allow separation or divorce to be achieved through simplified and non-jurisdictional procedures.

In relation to profiles concerning the coordination between marriage disputes pending at the same time in several member states, only a few specific changes have been introduced.

In particular, account was taken of the growing importance of mediation and other alternative resolution methods applicable to matrimonial disputes. This entailed the need to specify also in the light of the CJEU jurisprudence that-for the purpose of identifying the moment from which a proceeding is considered pending in a member state-the date of initiation of a compulsory conciliation procedure before a national conciliation authority is to be held on the same basis as the date on which a court is considered to be a court.

The discipline of lis pendens in matters of matrimonial disputes has remained substantially unchanged except for the aforementioned clarifications which have merely clarified and consolidated the legal framework already resulting from CJEU jurisprudence. Following up on the CJEU ruling in the Liberato case, it was expressly specified that the violation of the rule laid down in the matter of lis pendens cannot

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19 The growing relevance of so called private divorces had previously been underlined also in the jurisprudence of the CJEU which, moreover, had found that both the Rome III Regulation and the Brussels II-bis Regulation only apply to divorces pronounced by a state judicial authority by a public authority or with its control and that the inclusion of divorces of a private nature within the scope of these Regulations would require choices that fall within the competence of the union legislator alone. In this sense see also the sentence: C-372/16, Sahyouni of 20 December 2017, ECLI:EU:C:2017:988, published in the electronic reports of the cases. For further details see also: A. DUTTA, “Private divorces outside Rome III and Brussels II bis? The Sahyouni gap”, in Common Market Law Review, 56, 2019, pp. 1662ss. C. HUGO, T.M.J. MÖLLERS, Legality and limitation of powers. Values principles and Regulations in civil law, criminal law and public law, Nomos Verlag, Baden-Baden, 2019, pp. 294ss. S. GORNELOUP, The Rome III Regulation. A commentary on the law applicable and legal separation, Edward Elgar Publishers, Cheltenham, 2020.

20 CJEU, C-467/16, Schlöpp of 20 December 2017, ECLI:EU:C:2017:993, published in the electronic reports of the cases, par. 58. in this specific case, the preliminary referral submitted by a German judge (the Amtsgericht Stuttgart) to the CJEU concerned the interpretation of the law on lis pendens contained in the convention on jurisdiction and the recognition and enforcement of decisions on the matter. civil and commercial, signed on 30 October 2007 (Convention of Lugano II). The referring court asked whether, in the event of a lis pendens, the date of initiation of a compulsory conciliation procedure could represent the moment from which the judicial authority should be considered to have been requested. For further details see: A. BRIGGS, Civil jurisdiction and judgments, ed. Routledge, London & New York, 2015, pp. 372ss.

21 In this sense see art. 35 of Regulation Bruxelles II-ter. Taking into account the different ways in which the national procedural systems determine the slope of the respective proceedings, the aforementioned Regulation specifies, in art. 17, the means by which the moment in which a judicial authority considers itself to be a court can be established.
constitute a reason for refusing to recognize the decisions that fall within the scope of the new Regulation\textsuperscript{22}.

The perplexities related to a system that allows and even seems to almost encourage the phenomenon of the race to the court with a clear distorting effect on the good functioning of the Regulation remain. This phenomenon, which is not positive in itself, is harmful in a matter such as marriage where it would be advisable to resort to conciliatory procedures and mechanisms aimed at urging the parties to adequate reflection before taking legal action to end the marital relationship. On the contrary, the awareness of the advantages that can be obtained according to the member state in which the marriage dispute is rooted can push the parties who are aware of the consequences of the discipline of lis pendens contained in the Regulation in question, to engage in aggressive practices, aimed at anticipate the opponent's moves, quickly establishing the dispute before the judicial authority of the state in which the interests pursued seem more easily achievable.

The issue was certainly well known to the EU institutions so much that it had already been highlighted by the commission in the Green Paper drawn up shortly after the adoption of the Brussels II-bis Regulation\textsuperscript{23}. The subsequent application practice has only confirmed the distortions caused by the Regulation in question. For example, divorce tourism has been significant in recent years in the direction of the United Kingdom where evidently the prospect of particularly substantial economic measures in favor of the spouses has in many cases pushed to fictitiously create the factual conditions necessary to be able to root the jurisdiction of the British courts\textsuperscript{24}. It was pointed out that in the face of these findings, the commission assessed the prospect of introducing some mechanisms that are notably capable of reducing the negative consequences of the law on litigation, but in the last resort it was preferred not to introduce solutions of complex application and in any case not fully satisfactory.

In any case, it may be useful here to consider some hypotheses of modification

\textsuperscript{22}See recital n. 56 of Regulation Bruxelles II-ter.
of the law on lis pendens in matters of matrimonial disputes. In our opinion, the need to reflect on the solutions that can be taken when we decide to put our hands on regulation again despite their failure to accept them during the recent reform, despite the awareness that this will hardly happen in a short time.

A first hypothesis of reform already considered by the commission\textsuperscript{25} concerned the provision also in matters of matrimonial disputes of the possibility of transferring jurisdiction in favor of the judicial authority of another member state that is considered more suitable to deal with the case. This mechanism would have the model already governed by art. 15 of Brussels II-bis Regulation\textsuperscript{26} on parental responsibility in turn inspired by the forum non conveniens typical form of common law systems\textsuperscript{27}. As well as with regard to parental responsibility, the instrument in question should be applied only if specific and exceptional conditions are met. For example, to ensure legal certainty, the transfer could be provided in exhaustive cases and in any case only to member states where the center of gravity of married life is located. This center of gravity could be identified by virtue of connection criteria listed exhaustively and which could include the spouses' last common habitual residence-if one of them still lives there-or their common citizenship. In order to prevent such a mechanism from being exploited for mere dilatory purposes, special precautions should also be taken to clearly specify the modalities of its operation.

To avoid delaying tactics that could be induced by the lis pendens rule, it was

\textsuperscript{25}This reform hypothesis was indicated by the European Commission, COM Green Paper (2005)82 650, def., p. 10ss.

\textsuperscript{26}The art. 15, par. 1 of Regulation Bruxelles II-bis provides that the courts of one Member State competent to hear a parental responsibility claim on the substance can transfer this case or a specific part of it to a court of another Member State with which the minor has a particular connection where it believes that the latter is more suitable to treat it and where this corresponds to the best interests of the minor. In this sense see: E. PATAUT, “Article 15”, in U. MAGNUS, P. MANKOWSKI (eds.), Brussels II bis Regulation, ed. Sellier, Munich, 2012, pp. 174ss. K. TRIMMINGS, “Transfer of jurisdiction and the best interests of the child”, in Cambridge Law Journal, 75 (3), 2016, pp. 472ss. In the same spirit see also from the CJEU: C-428/15, Child and Family agency of 27 October 2016, ECLI:EU:C:2016:816, C-478/17, IQ v. JP of 4 October 2018, ECLI:EU:C:2018:812, above the cases published in the electronic reports of the cases. See in argument: B. CAMPUZANO DÍAZ, “El artículo 15 del reglamento 2201/2003 y la remisión a un órgano jurisdiccional mejor situado para conocer del asunto. Nota a la sentencia del TJUE de 4 de octubre de 2018, IQ v. JO, As. 478/17”, in Cuadernos de Derecho Transnacional, 11, 2019, pp. 452ss.

then proposed to impose on the party who first instituted the dispute before the judge of a member state the obligation to continue the judgment carefully, providing in case of inactivity for a period of at least six weeks that the court seised must decline its jurisdiction. However, such a remedy does not seem to take into account the fact that the long times are often not due to the inactivity of one of the parties but to structural problems of the judicial proceedings in some member states which are chosen by the party having an interest in pursuing obstructionist conduct. If it were found that the problems of justice in the country where the action was first proposed were so serious as to inevitably consider the violation of the right to a fair trial, then, due to the unreasonable length of the proceedings, it could then possibly be taken into consideration. the hypothesis of allowing the prejudiced court to refuse to take into account the prior pending judgment of a similar state.

We can then ask whether it is justified in a system that continues to provide for a plurality of holes placed between them on an equal basis and not on a hierarchical scale that the prevention mechanism on which the lis pendens is based operates - in an indiscriminate way - even in the face of cases of false lis pendens. In this regard, it has been stressed that this mechanism appears justified when the first court was seized with an application for divorce while the second judge was seized with an application for separation but not also in the opposite case or when the divorce application was proposal before the biased judge. In the latter case, any separation pronounced in the first state does not preclude a subsequent divorce. By eliminating the rule of prevention in this specific hypothesis and therefore allowing the judge in charge to continue his judgment, he would help to counteract the delaying tactics of the party who, in order to prevent the dissolution of the bond, hastens to establish a separation judgment in a different member state. On the other hand, it would be possible to establish two parallel matrimonial disputes in different member states with the same marital relationship at the same time.

In fact, practice has shown that the risk of parallel proceedings is not averted even by the current rule on lis pendens. It is still possible that the bailed judge violates the obligation under the lis pendens rule to suspend his judgment. Since no penalty is envisaged for this eventuality, it cannot be excluded that cases similar to the one taken into consideration by the CJEU in the Liberato judgment examined above cannot be repeated.
Taking into account that the phenomenon of rush to court and the delaying tactics that can derive from it are essentially a consequence of the plurality of holes in matters of matrimonial disputes that both the Brussels II-bis Regulation and its recast provide for the preferable solution seems to reduce the number of holes in question or in any case to introduce a hierarchy between them so that they cannot be left to the discretion of the parties.

This solution, however, although it was desired by many parties, does not seem to have been seriously taken into consideration when the Regulation was revised. Resistances are evident that on the political level would first of all be met by the Nordic countries who are not willing to give up the forum of common citizenship of the spouses, considered by them as a hierarchy of freedom for their citizens residing abroad.

V. CONCLUDING REMARKS

In this research, the characteristics and peculiarities of the regulation on lis pendens that the Brussels II-bis Regulation provides for matrimonial disputes have been examined. It is a coordination mechanism, without any other reason, aimed at preventing parallel proceedings from being carried out within the European judicial area and at avoiding having irreconcilable decisions on several issues in several member states. This risk is all the more felt in a matter such as marriage where claudic situations due to the creation of diverging personal and family statutes in the member states could represent a concrete obstacle to the movement of people in the EU territory.

The need to take into account the existence of heterogeneous material legislation in the legal systems of the individual member states of the Union in relation to the separation, divorce and annulment of marriage28 has led to the acceptance-within the framework of Brussels II-bis Regulation-a broad notion of lis pendens capable of working well in the face of cases of "false" lis pendens. In order for the mechanism in question to work, the identity of object and title between the two cases instituted in different member states is not necessary but it is sufficient that they concern the same marriage relationship. In this way it was intended to prevent the possibility that by

28Art. 12 of Regulation Bruxelles II-bis
virtue of two different judgments the spouses are considered at the same time separated on the territory of one member state and divorced on the territory of another member state.

The lis pendens rule based on the prevention criterion aims to pursue meritorious objectives of legal certainty. In hindsight, however, the same criterion-combined with the operation of a plurality of jurisdiction criteria that the Brussels II-bis Regulation\(^{29}\) places on a level of perfect equality-can favor delaying and merely opportunistic tactics on the part of the spouse who is able to exploit the differences between the applicable laws (in particular, for issues not covered by Rome III Regulation or other uniform rules of private international law of the union but in any case connected to matrimonial disputes), as well as the different procedures and timelines necessary in the member states to obtain the dissolution of the marital bond.

The CJEU jurisprudence in the Liberato case highlighted further problems of application of the lis pendens rule. In particular, it emerged that any violation by the prejudiced judge of the coordination mechanism between parallel actions can have repercussions within the legal system of the judicial authority before which the marriage dispute was first established. If such a violation has not been remedied by means of legal remedies available in the member state of the judicial authority which has been prevented, any sentence pronounced by the latter is likely to be recognized in the member state in which the action was initially proposed. The principle of mutual trust between member states that underlies the system of recognition of decisions in the European judicial area prevents us from reviewing the jurisdiction of the judge who pronounced the sentence to be recognized and in the same way to use the public order clause as means of claiming infringement of the lis pendens rule.

In the face of a system that allows and even seems to almost encourage the phenomenon of the race to the court with a clear distorting effect on the proper functioning of a regulation that operates in a matter, such as marriage, in which it would instead be preferable to favor the use of conciliatory procedures and to urge the parties to an adequate reflection before taking legal action, a much more courageous reform intervention was desirable on the occasion of the adoption of the Brussels II-ter

\(^{29}\)See recital n. 8 of Regulation Bruxelles II-bis “it should not apply to issues such as divorce cases” or to cases related to the separation judgment such as those aimed at ascertaining also as a result of claims for damages to which of the spouses it is possible to charge the fault of the marriage failure.
Regulation, which will be applicable from 1 August 2022.

On closer inspection, the efforts of the reform were essentially aimed at improving the discipline dedicated to the issue of parental responsibility. On the other hand, the changes introduced in relation to the sector of marriage disputes were less significant. Specifically, then, the discipline of lis pendens in matters of matrimonial disputes has remained substantially unchanged except for a few clarifications taken essentially to clarify and consolidate the legal framework already resulting from the CJEU jurisprudence.

According to our opinion, a good opportunity was lost to intervene in relation to the reduction of the distortions caused by the law on lis pendens in matters of matrimonial disputes. Of course, it is necessary to recognize the undoubted difficulty in finding solutions that are not of complex application and are therefore fully satisfactory. We have analyzed some of the proposals to review the lis pendens mechanism which have been discussed in various forums. However, we have found that if and when it is decided to go back to the Regulation - it will be difficult to expect to solve the problems highlighted without a more complex rethinking of the functioning of the jurisdiction criteria envisaged in the matter of matrimonial disputes. The distortions, in fact more than being caused by the mechanism of lis pendens (considered in itself) seem to be due to the fact that the latter operates in a context characterized by a large number of jurisdictional forums placed between them in a relationship of absolute equality. Reducing the number of the latter or providing for the introduction of a hierarchical criterion in their functioning would decrease the possibility for the parties to make excessive use of forum shopping and also the distorting consequences described above. On the other hand, doing so would introduce elements of rigidity into the system which, if not properly weighted, would risk producing negative repercussions with respect to the objective of the free movement of people within the territory of the union.

The fundamental problem ultimately lies in the consideration that the European judicial area aims to reproduce an area that has characteristics similar to those of an integrated legal system. It is illusory to pretend that such an area can be compared to that inside a single state. In an internal judicial area, the parties to a matrimonial dispute are subject to the same law, regardless of the judicial authority that is brought before it. In the European judicial area, despite the uniform harmonization of conflicts of laws
through the Rome III Regulation, the material regulations governing the sector in question continue to be heterogeneous. This implies that a certain degree of forum shopping is physiological and that it is influenced by considerations of opportunities for the pursuit of the interests that the parties involved aim to achieve from time to time.
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