UtrechtLawReview

Party Autonomy Under the New Brussels IIa (Recast) Regulation: Stalemates and Innovation

ARTICLE

JACQUELINE GRAY

ABSTRACT

The Brussels IIa (Recast) Regulation – the long-anticipated revision of the 2003 Brussels II bis Regulation – has brought about significant changes to the EU's jurisdictional rules that apply to cross-border matrimonial matters (divorce and legal separation) and matters of parental responsibility. However, the role of party autonomy – in this context, the opportunity for parties to the proceedings to designate a closely-connected jurisdiction – continues to be a divisive matter under this renewed instrument. Whilst the pre-existing possibility for parties to participate in the determination of jurisdiction for matters of parental responsibility has been fine-tuned by this recast, the new instrument negates to include a much-needed choice of court provision for cross-border divorce and legal separation. This omission has wide-ranging consequences, both for the use of the instrument itself, as well as for the possibility of coordination with jurisdictions that govern related proceedings.

CORRESPONDING AUTHOR:

Jacqueline Gray

jtg.gray@gmail.com

KEYWORDS:

EU private international law; party autonomy; choice of court; Brussels IIa (Recast) Regulation; Brussels II bis Regulation; international family law; matrimonial matters; divorce and legal separation; parental responsibility

TO CITE THIS ARTICLE:

Jacqueline Gray, 'Party Autonomy Under the New Brussels IIa (Recast) Regulation: Stalemates and Innovation' (2022) 18(1) Utrecht Law Review 45–56. DOI: *https://doi.org/10.36633/ulr.763*

1. INTRODUCTION

During the course of the past twenty years, the European Union (EU) has taken on the ambitious task of unifying its Member States' private international law rules, including those that relate to cross-border aspects of family matters (matrimonial matters,[1] parental responsibility,[2] property relations[3] and maintenance[4]) and succession.[5] One of the hallmarks of this process has been the widespread inclusion of a limited form of *party autonomy* – the option for parties to select a closely connected court and/or applicable law to govern decision-making on a particular relationship or process – on a supranational level in these fields.

Whilst party autonomy is well established in the private international law rules relating to contractual obligations,[6] its usage in cross-border family matters and succession has until now been sporadic between states and subject areas. Following the recent flurry of legislative activity in this realm, the EU has introduced an opportunity for parties to make both a choice of court and choice of law in cross-border situations involving maintenance, the property relations between spouses and registered partners and succession. On the other hand, development has been markedly more limited in the context of matrimonial matters (divorce and legal separation) and parental responsibility. Whilst in the case of the former a choice of law is solely provided,[7] with regard to the latter, there is only a very narrow opportunity to participate in designating the competent jurisdiction.

Given the recent legislative trend, the process of revising the 2003 Brussels II bis Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility gave rise to particular anticipation that a choice of court might finally be introduced for matrimonial matters. However, such hopes were ultimately dashed when the final draft adopted by the Council contained no innovation in this regard. On the other hand, parental responsibility, a field that by its nature[8] necessitates a high degree of restraint with regard to party choice, experienced a considerable fine-tuning of the provisions that allow for party participation in the designation of jurisdiction.

This article will begin by outlining the conceptualisation of party autonomy in the context of the EU's unified private international law rules on family matters and succession, with a particular view to the EU's goal of removing obstacles to free movement within the Union. It will then proceed to explore the changes in terms of party autonomy (or, in certain instances, the lack thereof) brought forth by the new Brussels IIa (Recast) Regulation in the context of both matrimonial matters and parental responsibility. The consequences that stem from the format of this new instrument will be analysed, taking into account its impact upon the wider EU private international law framework.

---

1 Council Regulation (EC) 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility [2003] OJ L338/1 (Brussels II bis Regulation); Council Regulation (EU) 2019/1111 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction [2019] OJ L178/1 (Brussels IIa (Recast) Regulation) [in force from 1 August 2022]; Council Regulation (EU) 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L343/10 (Rome III Regulation).

2 Brussels II bis Regulation; Brussels IIa (Recast) Regulation.

3 Council Regulation (EU) 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [2016] OJ L183/1 (Matrimonial Property Regulation); Council Regulation (EU) 2016/1104 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships [2016] OJ L183/30 (Partnership Property Regulation).

4 Council Regulation (EC) 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L7/1 (Maintenance Regulation); Hague Protocol on the Law Applicable to Maintenance Obligations (Hague Maintenance Protocol).

5 Regulation (EU) 650/2012 of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] L201/107 (Succession Regulation).

6 Jacqueline Gray, *Party autonomy in EU private international law: choice of court and choice of law in family matters and succession* (Intersentia 2020) 5–9.

7 Rome III Regulation, art 5.

8 Above all, the need for the best interests of the child to be of paramount consideration in any decision-making regarding their interests.

2. FORM AND FUNCTION OF PARTY AUTONOMY IN THE EU'S PRIVATE INTERNATIONAL LAW RELATING TO FAMILY MATTERS AND SUCCESSION

As a starting point, it is clear that the essence of party autonomy is rooted in a regard for the free will of the individual. In this present setting, it revolves around the ability of the parties to determine, in most instances through agreement,[9] the legal conditions (competent court and applicable law) to which their relationship will be subject. This exercise of self-determination centres on a reflection of self and necessitates that a choice ought to be both authentic[10] (freely expressed, free from force[11] and manipulation[12]) and sufficiently informed.[13]

Despite the unquestionably pivotal role that free will plays in party autonomy, it is at the same time apparent that its exercise is only permitted in as far as the legal framework will allow.[14] The limits in this regard are particularly well-demarcated in the EU regulations that concern cross-border family matters and succession. In this realm, choice is significantly constrained, with parties generally only being permitted to select a law or Member State court that has a 'close connection'[15] to themselves or their relationship. This sits in sharp contrast to the EU regulations that provide for a choice of law or choice of court in (non-)contractual obligations, under which parties may generally select an unconnected applicable law or Member State court to govern their proceedings.[16]

A number of reasons can be proposed for the comparatively restricted nature of choice in cross-border family matters and succession. Firstly, in view of the fact that parties are not dealing with one another 'at arm's length' in the close personal relationships addressed by these rules, unfettered private ordering might appear to be inappropriate or risky.[17] There is also a more specific need to protect the interests of certain parties – those that might be generally considered to be in a weaker bargaining position, such as children, maintenance creditors and beneficiaries of an estate.[18] Furthermore, this is also an area which the state demonstrates a particular interest in regulating; family and succession law represents a unique juxtaposition between law and society, entailing rules that reflect the religious and cultural trends predominant in a particular state.

9 With the exception of the *professio juris* under the Succession Regulation, whereby a designation has been made singularly by the deceased.

10 Symeon Symeonides, 'The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments' (2013) 61 The American Journal of Comparative Law 873, 878.

11 Ernst Kramer and Thomas Probst, 'Defects in the contracting process' in AT von Mehren (ed), *International Encyclopedia of Comparative Law* (Mohr Siebeck 2008), paras 390–394 (force), 395–400 (threat of force), 205–208 (economic duress); Hugh Beale, 'Duress and undue influence' in Hugh Beale (ed), *Chitty on Contracts* (30th edn, Sweet and Maxwell 2008) at paras 7–011 (duress of person), 7–012 (duress of goods) and 7–014 (economic duress); Ewan McKendrick, *Contract Law: Text, Cases, and Materials* (5th edn, OUP 2012) 627–632 (duress of the person), 632–634 (duress of goods), and 634–649 (economic duress).

12 Kramer and Probst (ibid) 213ff.

13 The type of information required varies depending on the decision at hand. Looking to the notarial requirements in a number of EU Member States' domestic laws (e.g. Austria, Belgium, France and the Netherlands) that are imposed for making a marital contract, it can be seen that knowledge on the content and consequences of the available regimes is necessitated – see Jens M Scherpe (ed), *Marital Agreements and Party Autonomy in Comparative Perspective* (Hart Publishing 2012) 58 (Austria), 78–79 (Belgium and France), 248 (the Netherlands), 493 (comparative perspective). It is suggested that a similar level of knowledge would be required when designating a choice of court or law in this present context.

14 Gray (n 6) 20–23.

15 The format of this requirement varies by instrument, but generally includes the options of the habitual residence and nationality of one or both of the parties, as well as the place where the relationship was created and the place where assets are located in more specific instances.

16 Subject to caveats; see, for instance, the protection of specific weaker parties under the Rome I and Rome II Regulations, the limitation of choice for matters concerning rights *in rem* under Rome I, art 4(1)(c) and the restriction of choice prior to an event under Rome II unless the situation involves commercial activity (Rome II, art 14(1)(b)).

17 Nina Dethloff, 'Contracting in Family Law: A European Perspective' in Katherina Boele-Woelki and others (eds), *The Future of Family Property in Europe* (Intersentia 2011), para 3.2.1. and Patrick Wautelet, 'Party Autonomy in International Family Relationships: A Research Agenda' in Caroline Cauffman and Jan M Smits (eds), *The Citizen in European Private Law* (Intersentia 2016) para 16.

18 Gray (n 6) 32–34.

Although party autonomy is now prevalent in private international law, the justification for permitting individuals to select their own legal conditions in this manner has been relatively unscrutinised.[19] Some have in fact argued that the unquestioning promotion of this device is based on a 'foundational myth',[20] whilst others have dismissed its usage as merely a 'stop gap' used to remedy the shortcomings of other legal methods within the cross-border context.[21] Despite the seemingly deep roots that party autonomy might appear to hold within the international and human rights context as a reflection of individual will,[22] its most tangible purpose in this present context is as a tool through which the free movement of persons can be facilitated within the Union.[23] Unification of the private international law rules on family matters and succession is viewed as forming part of the development of a 'genuine European area of justice', in which individuals 'should not be prevented or discouraged from exercising their rights by the incompatibility or complexity of legal and administrative systems in the Member States'.[24]

Within this paradigm, party autonomy can be seen as a means of tackling three principal obstacles to citizens exercising their free movement rights. Firstly, crossing borders may impact upon legal certainty by increasing complexity[25] and unpredictability[26] when faced with a plethora of unfamiliar rules on jurisdiction and applicable law, as well as creating the possibility for the frustration of expectations connected to decision-making that has taken place under a previously applicable legal system (e.g. selection of a certain matrimonial property regime)[27] or expectation on the effects of one's relationships (e.g. the recognition of same-sex marriage).[28] Party autonomy may, subject to the rules in place, offer the opportunity for persons to select the legal conditions that apply to their relations or processes and to move with confidence around the Union with this knowledge in mind.

Secondly, parties may use choice of law agreements to ensure a law of subjective close affinity applies to their relationships or processes – for instance, the ability to choose between the rules of the state where everyday life is located, or from where one originates, or from where the

19 Alex Mills, *Party Autonomy in Private International Law* (Cambridge University Press 2018) 67;Jürgen Basedow, *The Law of Open Societies – Private Ordering and Public Regulation of International Relations* (Brill Nijhoff 2015) 115.

20 Horatia Muir-Watt, '"Party autonomy" in international contracts: from the makings of the myth to the requirements of global governance' (2010) 6 European Review of Contract Law 250, 256–257.

21 Matthias Lehmann, 'Liberating the Individual from Battles Between States: Justifying Party Autonomy in Conflicts of Laws' (2008) 41 Vanderbilt Journal of Translational Law 381, 394.

22 See declarations referring to freedom and liberty in: Articles 1 and 3 of the United Nations Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR); Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (European Convention on Human Rights, as amended) (ECHR); Preamble and Article 6 of the Charter of Fundamental Rights of the European Union [2012] OJ C326 and Article 2 of the Consolidated Version of the Treaty on European Union [2016] OJ C202 (TEU). Reference might also be made to Article 8 ECHR and Article 7 of the EU Charter of Fundamental Rights, from which a 'right to personal autonomy' has been drawn by the ECtHR – see *Pretty v UK* App no 2346/02(ECtHR 29 July 2002) para 61.

23 See discussion in Gray (n 6) ch 3.

24 Tampere European Council Conclusions 1999, paras 18 and 28.

25 Gray (n 6) 48–49. See variances in national rules with regard to which jurisdiction can be seised: Policy Evaluation Consortium, *Impact Assessment on Community Instruments concerning matrimonial property regimes and property of unmarried couples with transnational elements* (EPEC 2009) 91–92; the differences between national conflict of law rules: Basedow (n 19) 233–235; and discussion of the overall fragmented nature of the network of national private international law rules: TMC Asser Institute, *Étude sur les régimes matrimoniaux des couples mariés et sur le patrimoine des couples non mariés dans le droit international privé et le droit interne des États membres de l'Union Européenne: Analyse comparative des rapports nationaux et propositions d'harmonisation* (2003) 32, para 1.2.1.4; Thalia Kruger, 'The Quest for Legal Certainty in International Civil Cases' in: *Collected Courses of the Hague Academy of International Law, Volume 380* (Brill Nijhoff 2016) 303.

26 Gray (n 6) 49. For instance, the 'rush to court' issue: see European Policy Evaluation Consortium, *Study to inform a subsequent Impact Assessment on the Commission proposal on jurisdiction and applicable law on divorce matters* (EPEC 2006), 7, para 1.4; and the indefinite nature of private international law rules that are assessed at the time the court is seised.

27 Gray (n 6) 50–51. See also discussion (particularly regarding the application of mutable connecting factors over property relations) in Basedow (n 19) 288–289.

28 Gray (n 6) 51–54. See discussion concerning the protection of a civil status as a vested right: Jan-Jaap Kuipers, *EU Law and Private International Law: The Interrelationship in Contractual Obligations* (Nijhoff Publishers 2012) 310; and specific regard for the validity of same-sex marriages and registered partnerships across borders: Patrick Wautelet, 'Private International Law Aspects of Same-sex Marriages and Partnerships in Europe' in Katharina Boele-Woelki and Angelika Fuchs (eds), *Legal Recognition of Same-sex Relationships in Europe* (2nd edn, Intersentia 2012) 36.

parties' assets are located.[29] This can be seen as a means of avoiding a situation in which the law that is applied through objective conflict of laws rules does not reflect the life actually lived by the parties or is not in fact the most suitable set of rules for the decision-making in question.[30]

Finally, the opportunity to designate the competent court or applicable law can be used as a means of removing practical barriers to accessing justice that may be experienced by internationally active parties when they cross borders in the EU.[31] Parties might make a designation of the court and applicable law in order to ensure that proceedings are held in a familiar legal system in which they do not have to rely on costly interpreters and bilingual legal professional.[32] The costs and inconveniences associated with the application of foreign law could also be addressed through coordination of the law and court that governs a proceeding.

Addressing the aforementioned obstacles forms the basis for EU legislative action in the field of private international law relating to family matters and succession, and these considerations play a key role in the proceeding analysis of party autonomy within the new Brussels IIa (Recast) Regulation.

3. PARTY AUTONOMY (OR THE LACK THEREOF) IN DIVORCE AND LEGAL SEPARATION

Given the legislative trend in recent years, an opportunity to make a choice of court in matrimonial matters was an anticipated development for the Brussels IIa (Recast) Regulation. However, as will be discussed below, its inclusion ultimately did not materialise. The continuing absence of party autonomy in the determination of jurisdiction in matrimonial matters has numerous consequences, both with regard to the singular usage of the instrument itself and coordination with other related instruments within the framework.

3.1. LEGISLATIVE STALEMATE

The Brussels II Regulation[33] (later the Brussels II bis Regulation) on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility represented one of the earliest steps by the EU to unify the private international law on family matters and succession. Although an opportunity to participate in the prorogation of court in matters of parental responsibility has always been included under this instrument,[34] its jurisdictional rules on matrimonial matters have never permitted any form of party autonomy.

In the years that followed, other instruments concerning maintenance, property relations and succession introduced the possibility for adults to select the law and court that govern their relationships or processes. Furthermore, the Rome III Regulation brought forth the option of spouses to choose the law that applies to their divorce or legal separation. By the time that Brussels II bis was due for revision in the mid-2010s, there was a great deal of anticipation that a choice of court provision would be inserted into the renewed regulation, bringing it into line with the other instruments that addressed relationships between adults within this framework.

As stated in the introduction, the addition of a choice of court did not ultimately transpire for matrimonial matters in the Brussels IIa (Recast) Regulation. In exploring the rationale for this, it is useful to first point out that in contrast to other EU legislative areas, instruments introduced in the realm of family matters require Council unanimity to be passed.[35] Due to a

29 See discussion of the components of close connection in Gray (n 6) 55–58.

30 ibid 58–59.

31 See full elaboration of practical barriers in ibid 60–65.

32 See description of temporal and financial costs in: Swiss Institute of Comparative Law, *The Application of Foreign Law in Civil Matters and its Application for the Future* (JLS/2009/JCIV/PR/0005/E4) 35, 54–55.

33 Council Regulation (EC) No 1347/2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses [2000] L160/19.

34 Brussels II bis Regulation, art 12.

35 Article 81(3) of the Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202 (TFEU) requires Council unanimity for legislative acts concerning family matters (maintenance, matrimonial matters, parental responsibility and property relations). According to Article 81(2) TFEU, other measures (including those that pertain to succession) can be adopted using the Qualified Majority Voting (QMV) procedure.

failure to reach unanimous agreement amongst the Member States on the inclusion of party autonomy in the Rome III Regulation and Property Regulations, such instruments needed to be adopted by a limited number of Member States through enhanced cooperation. Although the reasons for opposing party choice in cross-border family matters are not well developed, there appeared to be general sense amongst certain Member States that party autonomy is inappropriate in this sensitive realm that represents an intersection between law and society,[36] with specific concerns relating to the protection of weaker parties in agreements and the (non-) recognition of same-sex marriage.[37]

Whilst there are strong counterarguments[38] which could have been proposed to the above objections, due to the pivotal role already played by Brussels II bis in cross-border international proceedings across the Union, the risk of once again necessitating the use of enhanced cooperation to adopt a recast containing party autonomy in matrimonial matters was deemed unacceptable. Participatory fragmentation of this kind brings with it significant disadvantages[39] and would have unacceptably undermined the crucial functioning of this well-established instrument. Although one could propose alternative solutions, such as an optional choice of court clause allowing an opt-out for reluctant Member States,[40] given that the recast will only be implemented in August of 2022, any revision is a remote notion.

3.2. CONSEQUENCES THAT ARISE FROM THE ABSENCE OF PARTY AUTONOMY

Having established that party autonomy will not be a feature in EU jurisdictional rules concerning matrimonial matters for the foreseeable future, the question arises as to the consequences of this status quo. The outcomes in this regard can be divided into two categories: (i) singular and (ii) those that arise in coordination with other instruments.

Looking at the first category of consequences, those pertaining to the usage of Brussels IIa in isolation, it is primarily clear that couples do not have an optimised opportunity to direct proceedings towards a subjectively convenient and suitable forum. Although the alternative grounds listed in Article 3 of the Brussels IIa (Recast) Regulation are based on a standardised consideration of objective close connection to the parties, in theory such parties could agree between one another to select the most suitable forum. However, this instrument concerns divorce and legal separation, and due to the often-antagonistic nature of these proceedings there is a significant likelihood that the parties may compete with one another to seise a forum that best suits their individual needs (so-called 'rush to court'[41]) or at least not cooperate in a collective manner. The opportunity to formally select a court in advance would have allowed the parties to balance their respective interests through consensus in a much more neutral time and setting.

In addition to this, parties may find that none of the fora available through the grounds listed in Article 3 of Brussels IIa are suitable to make decisions concerning their relationship. This is of particular concern with regard to same-sex marriage, which is not universally recognised throughout the Union.[42] At the time the court is due to be seised, it may be the case that there is not an available ground under Article 3 that directs proceedings towards a forum that

36 Sagi Peari, 'Choice-of-law in family law: Kant, Savigny and the parties' autonomy principle' (2012) 4 Nederlands Internationaal Privaatrecht 597–604.

37 See further commentary on reasons for non-participation in Rome III in: Katharina Boele-Woelki, 'For Better or for Worse: The Europeanization of International Divorce Law' (2010) 12 Yearbook of Private International Law 1, 25–28.

38 For instance, a choice of court is already permitted under Article 4 of the Maintenance Regulation (n 4), in which all Member States (apart from Denmark and the Republic of Ireland) participate. Arguably, the creditor in a maintenance proceeding is in a generally weaker position than the parties in divorce proceedings. Likewise, it is hard to see the risk in allowing those in same-sex marriages the opportunity to decide the legal conditions to which their relationship is subject: why would they select a law or court which does not recognise their relationship?

39 Gray (n 6) 279–282.

40 See an analogous example provided in Maintenance Regulation, art 15 ('Determination of applicable law'), which pertains only to those Member States that are bound by the Hague Maintenance Protocol (n 4).

41 European Policy Evaluation Consortium, *Study to inform a subsequent Impact Assessment on the Commission proposal on jurisdiction and applicable law on divorce matters* (EPEC 2006), 7.

42 As of 2021, 13 of the 27 EU Member States recognise and perform same-sex marriages (Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Luxembourg, Malta, Netherlands, Portugal, Spain and Sweden).

recognises the relationship. This might result in a 'limping' relationship that is unable to be dissolved, therefore meaning that the parties cannot proceed with related processes such as the division of property.[43]

This denial of access to justice could, in many instances, be avoided through making a designation of jurisdiction at the start of the relationship (e.g. in a marriage contract), since it is likely that the parties have a close connection to a Member State in which their relationship was celebrated. In the circumstances in which this is not possible (for instance, the parties have been married in a third country), an (albeit more convoluted) solution could be to select a close connection that becomes available through applicable choice of court rules at some point during the marriage.[44]

The Brussels IIa (Recast) Regulation forms part of a larger framework of related instruments that touch upon the realm of matrimonial matters. As such, the consequences of the lack of party autonomy in this present regulation also impact upon the functioning of this framework as a whole. Parties are unable to fully coordinate through choice the fora that are competent to decide upon matters related to the dissolution of a marriage (most commonly divorce in conjunction with the dissolution of the property regime,[45] maintenance[46] and possibly matters of parental responsibility[47]). In the face of such circumstances, they may opt to concentrate the other proceedings in a jurisdiction of their preference and tolerate the practical inconvenience of travelling to another state to attend divorce proceedings. Alternatively, they might agree to hold all proceedings in the Member State that is determined according to Brussels IIa,[48] therefore being forced to prioritise convenience at the expense of other considerations.

The continued absence of a choice of court in Brussels IIa also has a consequential impact upon the effectiveness of a choice of law made under the Rome III Regulation. Where a prior choice of law has been made, the parties may ultimately find that the coordinating Member State court is not available under Article 3 of Brussels IIa. Similar to the dilemma presented in the previous paragraph, the parties might have to choose between the application of a law with which they have an affinity or the practical benefits of changing their agreement to apply the *lex fori*.

In all of the scenarios in this section, the lack of a choice of court under the Brussels IIa (Recast) Regulation introduces an obstacle that forces the parties to balance competing priorities in organising their legal proceedings. This additional complication runs counter to the original goal of the EU legislator to optimise the organisation of legal processes for those that exercise their right to free movement.

4. PARTY AUTONOMY IN MATTERS OF PARENTAL RESPONSIBILITY

In contrast to matrimonial matters, party autonomy in the realm of parental responsibility has experienced a significant overhaul in the new Brussels IIa (Recast) Regulation. It should first be emphasised that party autonomy is manifestly different here to that which exists in the rules that concern adult relationships. Indeed, party autonomy in this present context sits at the outer reaches of what might be deemed to fall within this definition, whereby the agreement of the parties is just one of a number of factors in the determination of jurisdiction.[49]

43 This is exasperated by the fact that there is no *forum necessitatis* or other safety net provision that caters towards such circumstances in Brussels IIa. This can be contrasted with Article 9 of the Property Regulations, which provides a framework of rules that allow a relationship to be re-directed towards a suitable forum – see discussion in Gray (n 6) 279.

44 Since most choice of court rules contained in other related EU instruments permit the parties to select a particular forum at the time an agreement is concluded.

45 Matrimonial Property Regulation, arts 5 and 7.

46 Maintenance Regulation, art 4.

47 Brussels II bis, art 12, and Brussels IIa, art 10.

48 In accordance with Matrimonial Property Regulation, art 5, and Maintenance Regulation, art 4(1)(c)(i).

49 Gray (n 6) 4.

Brussels II bis contained two provisions that allowed for a limited form of party autonomy: Article 12, which established rules on prorogation of court, and Article 15, which permitted the participation of the parties in a *forum non-conveniens* mechanism. The changes that have been brought forth to these respective provisions by the revised Brussels IIa (Recast) Regulation will be discussed below.

4.1. ARTICLE 10 OF THE BRUSSELS IIA (RECAST) REGULATION (ARTICLE 12 OF BRUSSELS II BIS)

Article 12 of Brussels II bis set out the opportunity for prorogation of court in two distinct circumstances. The first of these, Article 12(1), provided for jurisdictional linkage with the courts of the Member State with competence to decide a related divorce, legal separation or marriage annulment (matrimonial matters) under Article 3 of this same instrument in cases where the matter of parental responsibility is auxiliary to such proceedings.[50]

Although the prorogation mechanism contained in Article 12(1) came into play in conjunction with divorce, legal separation or marriage annulment proceedings that have been instigated by the parties, its emphasis on 'acceptance' as opposed to 'agreement' assigned a passive role to the will of the spouses in linking the jurisdictions. In addition to the acceptance of all holders of parental responsibility,[51] as with any formal decision making concerning a minor, the assumption of jurisdiction was to be adjudged by the court with a view to the child's best interests.[52]

The second mechanism, Article 12(3), provided a separate, distinct opportunity for prorogation of a Member State court in the context of autonomous parental responsibility proceedings, whereby the courts of a Member State with which the child has a 'substantial connection' may assume jurisdiction. Whilst the passive tone of agreement ('acceptance') and the use of judicial discretion in the consideration of the child's best interests were the same as Article 12(1), the focus of this second mechanism was much broader. It applied to all proceedings concerning parental responsibility and required the participation of 'all parties to the proceedings'[53] (as opposed to simply the holders of parental responsibility).

The judicial consideration of 'substantial connection' was to occur in tandem with the child's best interests. This could foreseeably equate to a far more complex assessment than in Article 12(1), which focused on proximity of the child to the jurisdiction in question, taking into consideration elements such as the nationality, past habitual residence and/or other circumstances that make the jurisdictional a proximate one (e.g. historical contact with the national authorities).[54]

There was also an additional rule in Article 12(4) that applied to instances falling within the scope of Article 12(3), providing that if a child is habitually resident in a third state that is not a contracting party of the 1996 Hague Convention on Child Protection, there would be a presumption that holding proceedings in the requested EU Member State jurisdiction was deemed to be in the 'interest' (or, to use the standardised term, 'best interests') of the child, 'in particular if it is found impossible to hold proceedings in the third State in question'. This presumption is rather unclear regarding its scope and application (particularly where holding

50 According to Article 12(2), this competence is strictly limited to the two linked proceedings, coming to an end once a final decision has been made either regarding the divorce, legal separation or marriage annulment in question, or the related matter of parental responsibility (whichever is last). Under Article 12(2)(c), competence will also end if either of the aforementioned proceedings comes to an end for another reason.

51 This is a necessary inclusion, given that the spouses are not necessarily both holders of parental responsibility, nor are they always the sole holders of parental responsibility. Additional holders of parental responsibility could include ex-partners of one of the spouses, grandparents or local authorities. See Brussels II bis, art 2(7) : a holder of parental responsibility can be a natural or legal person; European Commission, *Practice Guide for the application of the Brussels IIa Regulation* (2014), 19.

52 United Nations Convention on the Rights of the Child (adopted 20 November 1989 UNGA Res 44/25)(UN-CRC), art 3(1); EU Charter of Fundamental Rights, art 24(2).

53 The breadth of the definition of this category is to be delegated to national law – see Case C-565/16 *Alessandro Saponaro and Kalliopi-Chloi Xylina. Request for a preliminary ruling from the Eirinodikeio Lerou (Greece)* [2018] ECLI:EU:C:2018:265, para 28.

54 See also the specific facts in Case C-565/16 *Saponaro* (ibid) whereby in light of the connection of this case to a succession, the location of the deceased's assets and their place of residence at the time of death was also considered relevant in an assessment under Brussels II bis, art 12(3) (see para 36 of this judgment).

proceedings in such a state would not be strictly 'impossible'), but it appeared to be based on the stance that judicial cooperation with non-Hague Convention countries creates a (rebuttable) presumption that holding proceedings in the requested EU Member State would be in the child's best interests.[55]

The rules contained in Article 12 of Brussels II bis have been significantly overhauled by the Brussels IIa (Recast) Regulation. The two mechanisms are now merged into a single, comprehensive provision in Article 10 of the new instrument that applies equally to matters of parental responsibility occurring inside and outside of the dissolution of a marriage.

Although the basic functioning of Article 10 remains the same as its predecessor, the tone of the new provision has shifted considerably, being rebranded as a positive 'choice of court' (rather than prorogation). Building upon the CJEU's ruling in *Saponaro*,[56] it is clarified in Article 10(1)(b)(ii) that jurisdiction can be accepted during the course of proceedings. This more pragmatic, flexible approach embraces the practice that was already documented for Member States under the previous instrument[57] and reflects the fact that parties oftentimes do not immediately come together to seise the court in such situations.

With regard to the opportunity for forward planning, although the wording of the new instrument opens the way for pre-emptive choice ('agreed…at the latest at the time the court is seised'[58]), due to the nature of matters concerning parental responsibility (particularly the need to consider the child's best interests), such advanced agreement would be inherently tentative. Furthermore, given the lack of a parallel choice of court for matrimonial matters, the opportunity to coordinate related jurisdictional choices in advance is still not possible in any case.

Certain confusing terminology that was problematic in Article 12 of Brussels II bis has also been removed in the recast. There is no longer any reference to 'unequivocal acceptance',[59] and the formal manner in which agreement can be established is considerably elaborated upon. A further improvement is also seen in the removal of the confusing presumption contained in Article 12(4) of Brussels II bis. The considerations set out in Article 12(4) would in any case weigh heavily in a best interests assessment, and the removal of this superfluous rule goes some way in simplifying the usage of the new mechanism.

Although clarity has for the most part been improved by the Brussels IIa recast, it is somewhat confusing that the new provision makes no reference to linkage with the court of matrimonial matters. Although it is clear from the wording of Recital 23 of Brussels IIa that linkage with the jurisdiction competent to decide on a divorce or legal separation remains a principal purpose for Article 10, there is actually no express mention of this in the provision itself alongside the exemplification of the requisite 'substantial connection' in Article 10(1)(a). Whilst this list is not exhaustive, the failure to mention the provision's links to matrimonial matters is nonetheless puzzling.

Overall, the new format for Article 10 of the Brussels IIa (Recast) regulation demonstrates that the drafters have sought to take into account the difficulties that have arisen in interpreting

55 See the opinion of Lady Hale in the UK Supreme Court judgment: *I (A child)* [2009] UKSC 10 [37]. See also the discussion of this provision in TMC Asser Institute and others, *Regulation Brussels II bis Guide for Application: Chapter 3* (2018), 90–91, para 7.

56 *Saponaro* (n 58) para 32, in which a subsequent refusal by a party that occurred after the court was seised by the main applicants under Article 12(3) of Brussels II bis was upheld. See also the critique of the inflexibility of a strict deadline for prorogation under Article 12(3) in the UK Supreme Court case of *I (A child) [2009] UKSC 10 [28]*.

57 See Dutch cases of Rb. Arnhem, 17-11-2008, nr. 157203 / FA RK 07-11485; Rb. Den Haag, 14-02-2013, nr. C/09/422710 FA RK 12-5002, in which a father, upon giving his verbal submission, was requested to provide his assent to competence; Rb. Den Haag, 11-07-2013, nr. C/09/443928 FA RK 13-4125, in which the court also acknowledged that this was an analogous approach to that strictly prescribed in Article 12(3). See also information in TMC Asser Institute et al. (n 60) 101, para 7.4.3: The Czech courts hold the view that since the non-applicant party should be given the opportunity to react to the request at hand, parties do not always have to consent at the very start of proceedings.

58 Brussels IIa (Recast) Regulation, art 10(1)(b)(i).

59 For a discussion of differences in national interpretation of this term see: T.M.C. Asser Institute et al. (n 60) 94–97, para 7.4 and Gray (n 6) 226.

Article 12 of Brussels II bis[60] and have largely produced a much more usable, clear and streamlined provision that optimises practicality and legal certainty. The more prominent status attributed to the will of the parties under Article 10 sits in contrast with the revision of the *forum non-conveniens* mechanism now contained in Article 12 and 13 of Brussels IIa.

4.2. ARTICLES 12 AND 13 OF THE BRUSSELS IIA (RECAST) REGULATION (ARTICLE 15 OF BRUSSELS II BIS)

The *forum non-conveniens* mechanism contained in Article 15 of the Brussels II bis Regulation is used in certain circumstances to transfer a case from one Member State to another where the latter is better placed to hear it. It sets out a detailed framework through which the court competent for matters of parental responsibility according to the general jurisdictional rules of Brussels II bis may, in exceptional circumstances, transfer jurisdiction to the court of another Member State with which the child has a 'particular connection',[61] namely a Member State that (a) has become the habitual residence of the child after the court has been seised, (b) was formerly the habitual residence of the child, (c) is the place of nationality of the child, (d) is the habitual residence of a holder of parental responsibility or (e) is the place in which property of the child is located.[62] In contrast to the open-ended character of Article 12(3) of Brussels II bis, the list set out in Article 15 is exhaustive.[63] As with the other provisions discussed above, the transfer and acceptance of jurisdiction must of course be considered as being in the best interests of the child.[64]

Although Article 15 was designed around the aim of transferring a case to a more suitable forum, it arguably entails a small degree of party autonomy. In this regard, at least one party must participate by either instigating the process of transfer or accepting the transfer that was started by either the competent Member State court or the court with which the child has a 'particular connection'.[65] Unlike Article 12 of Brussels II bis, only one of the parties to the proceedings must agree to the transference of jurisdiction. It is thus clear that the role of party participation here merely serves as an additional check and balance to the overall exercise of judicial discretion.[66]

The Brussels IIa (Recast) Regulation has seen a significant scaling back of party autonomy in the renewed *forum non-conveniens* mechanism. Under Article 12 and 13 of this new instrument, acceptance by at least one party to the proceedings is no longer required in instances where the court has instigated this mechanism of its own motion or another Member State court has requested that a case be transferred to its jurisdiction. There are still limited circumstances in which parties to the proceedings may play a role; namely, the possibility for a party themselves to instigate the *forum non conveniens* mechanism or for one or more parties to be invited by the Member State with jurisdiction to introduce an application before another Member State court.[67] However, it is clear that the recast has brought forth a fundamental shift in the nature of this provision, and party assent no longer serves as a standard requirement alongside consideration of the child's best interests.

Given the residual, immediate nature of party acceptance that already existed under Brussels II bis, the further reduction in its role appears to be a favourable development that aims to facilitate efficiency and cater towards the child's best interests by cultivating a more focused, streamlined procedure. Notions such as forward planning and coordination with other areas are not considerations in this context and are therefore not negatively impacted by the change. Just as party choice may be increased or underlined where beneficial, it can also conversely be scaled back where it is inappropriate given the circumstances in question.

60 E.g. by clarifying the beginning and end points of proceedings under Article 10(2) and (3). See case law that considered such questions: Case C-565/16 *Alessandro Saponaro and Kalliopi-Chloi Xylina. Request for a preliminary ruling from the Eirinodikeio Lerou Leros (Greece)* [2018] ECLI:EU:C:2017:942, Opinion of AG Tanchev, para 59; *I (A child)* (n 51) [28]; Case C-436/13 *E. v. B. Request for a preliminary ruling from the Court of Appeal (England and Wales)* [2014] ECLI:EU:C:2014:2246, paras 44-50. See outlining of such deliberations in Gray (n 6) 215–217.

61 Brussels II bis, art 15(2).

62 Where the case concerns measures for the protection of the child relating to the administration, conservation or disposal of this property, see Brussels II bis, art 1(2)(e).

63 Étienne Pataut, 'Chapter II – Jurisdiction, Section 2 – Parental Responsibility' in U Magnus and P Mankowski (eds), *Brussels II bis Regulation* (Sellier 2012), 170.

64 Brussels II bis, arts 15(1) and (5).

65 Brussels II bis, art 15(2).

66 Gray (n 6) 196.

67 See Brussels IIa (Recast) Regulation, art 12(1) and (1)(a).

5. CONCLUSION

The new Brussels IIa (Recast) Regulation clearly presents a mixed bag with regard to the development of party autonomy within the EU private international law in the realm of family matters and succession. On the one hand, there is the disappointing negation to introduce the opportunity to make a choice of court for divorce and legal separation. This absence is entirely out of step with the other EU instruments that provide unified private international law rules on adult relationships. The underlying reasons for this absence are primarily based on general notions of sovereignty or protectionism over this sensitive realm, which are hard to overcome given the special legislative process required in this area.

The lack of a choice of court option for international couples in matrimonial matters only serves as a barrier to the full enjoyment of their free movement rights within the Union: the negative impact affects usage of the instrument itself, as well as coordination with other related areas. Although the likelihood of any change to this status quo is very low given that this instrument is newly introduced, it is suggested here that an imperfect compromise, such as an optional choice of court clause, might be inserted into a future revision.

The other side of this coin is represented in the realm of parental responsibility. There have been significant changes to this area under the Brussels IIa (Recast) Regulation. The tone and structure of Article 12 of Brussels II bis (now Article 10 of Brussels IIa) has been significantly fine-tuned and clarified. This builds on a body of judgments concerning Brussels II bis and takes into account a number of interpretational difficulties that arose under this instrument. The new instrument has been streamlined and simplified by removing the distinction between proceedings that occur in conjunction with matrimonial matters and those that arise independently of such matters. The new Article 10 has also been re-branded from 'prorogation' to a 'choice of court', making it clear that parties can now play an active role in the determination of a suitable jurisdiction in matters of parental responsibility.

In a contrasting move, party autonomy in Article 15 of Brussels II bis (now Articles 12 and 13 of Brussels IIa) has been considerably scaled back. Whilst empowering the will of the parties to the proceeding was never the focus under this *forum non-conveniens* provision, their role is now limited to instances where the parties themselves instigate proceedings or they are called upon to do so. The reduction in party participation in instances covered by Articles 12 and 13 of the Brussels IIa (Regulation) is to be seen as a beneficial development; just as party autonomy is a means of facilitating the free movement of persons in many instances, its presence is not appropriate in all circumstances.

The revision of Brussels II bis has brought with it many opportunities to learn from the usage of this prior instrument and bring about a new set of rules that further the goals of the EU legislator in taking action in this realm. For our purposes, the role of party autonomy in the rules concerning parental responsibility has been markedly clarified and delineated, optimising legal certainty and practicality within this instrument. Notwithstanding this, however, the continued absence of party autonomy for matrimonial matters prevents those in cross-border relationships from organising the conditions to which their legal relations will be subject and manifests as a significant obstacle to the enjoyment of their free movement rights.

COMPETING INTERESTS

The author has no competing interests to declare.

AUTHOR INFORMATION

Dr. Jacqueline Gray undertook her PhD at the Utrecht Centre for European Research into Family Law (UCERF) at Utrecht University.

DOI: 10.36633/ulr.763

TO CITE THIS ARTICLE:
Jacqueline Gray, 'Party Autonomy Under the New Brussels IIa (Recast) Regulation: Stalemates and Innovation' (2022) 18(1) Utrecht Law Review 45–56. DOI: *https://doi.org/10.36633/ulr.763*

Published: 05 May 2022

Utrecht Law Review is a peer-reviewed open access journal published by Utrecht University School of Law.